18-346

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

JOHN DOE 1, on behalf of themselves and all other similarly situated, JOHN DOE 2, on behalf of themselves and all other similarly situated, BRIAN CORRIGAN, STAMFORD HEALTH, INC., and BROTHERS TRADING CO., INC.,
Plaintiffs-Appellants,

KAREN BURNETT, individually and on behalf of themselves and all other similarly situated, BRENDAN FARRELL, individually and on behalf of themselves and all other similarly situated, ROBERT SHULLICH, individually and on behalf of themselves and all other similarly situated,
Consolidated Plaintiffs-Appellants,

v.

EXPRESS SCRIPTS INC., ANTHEM, INC.,
Defendants-Appellees,

1-10 INCLUSIVE DOES,
Defendants.

On Appeal from the United States District Court
Southern District of New York - 1:16-CV-03399-ER

BRIEF AMICI CURIAE OF AARP AND THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF APPELLANTS

MATTHEW C. KOSKI
National Employment
Lawyers Association
2201 Broadway, Suite 310
Oakland, CA 94612
Tel: (415) 296-7629

MARY ELLEN SIGNORILLE
AARP Foundation
Litigation
601 E Street, NW
Washington, D.C. 20049
Tel: (202) 434-2060

KAREN L. HANDORF
Cohen Milstein Sellers
& Toll, PLLC
1100 New York Avenue, N.W.
Suite 500, West Tower
Washington, D.C. 20005
Tel: (202) 408-4600
Fax: (202) 408-4699

Counsel for Amici Curiae

CORPORATE DISCLOSURE STATEMENT

AARP

The Internal Revenue Service has determined that AARP is organized and operated exclusively for the promotion of social welfare pursuant to Section 501(c)(4) of the Internal Revenue Code and is exempt from income tax. The Internal Revenue Service has determined that AARP Foundation is organized and operated exclusively for charitable purposes pursuant to Section 501(c)(3) of the Internal Revenue Code and is exempt from income tax. AARP and AARP Foundation are also organized and operated as nonprofit corporations under the District of Columbia Nonprofit Corporation Act.

Other legal entities related to AARP and AARP Foundation include AARP Services, Inc., and Legal Counsel for the Elderly. Neither AARP nor AARP Foundation has a parent corporation, nor has either issued shares or securities.

NELA

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the National Employment Lawyers Association (NELA) makes the following disclosure: (1) NELA is a private, non-profit organization under

Internal Revenue Code § 501(c)(6); (2) NELA has no parent corporation; and (3) no publicly held corporation or other publicly-held entity owns ten percent (10%) or more of NELA.

Dated: May 3, 2018

/s/ Karen L. Handorf
Karen L. Handorf
COHEN MILSTEIN SELLERS
& TOLL, PLLC
khandorf@cohenmilstein.com
1100 New York Avenue, N.W.
Suite 500, West Tower
Washington, D.C. 20005
Tel: (202) 408-4600
Fax: (202) 408-4699
Counsel for Amici Curiae

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INTERESTS OF AMICI CURIAE[1]

AARP is the nation's largest nonprofit, nonpartisan organization dedicated to empowering Americans 50 and older to choose how they live as they age. With nearly 38 million members and offices in every state, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, AARP works to strengthen communities and advocate for what matters most to families, with a focus on health security, financial stability, and personal fulfillment. AARP's charitable affiliate, AARP Foundation, works to end senior poverty by helping vulnerable older adults build economic opportunity and social connectedness.

AARP and AARP Foundation, through participation as amici curiae in state and federal courts,[2] seek to protect older Americans' pension, health, and other benefit rights guaranteed under the Employee

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[1] Amici certify that 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, and further certifies that no person, other than amici, contributed money intended to prepare or submit this brief. FED. R. APP. P. 29(c)(5). Counsel for both parties have consented to the filing of this brief.

[2] *E.g.*, *CIGNA Corp. v. Amara*, 563 U.S. 421 (2011); *LaRue v. DeWolff, Boberg & Assocs.*, 552 U.S. 248 (2008); *Osberg v. Foot Locker, Inc.*, 862 F.3d 198 (2d Cir. 2017); *Fletcher v. Convergex Grp., L.L.C.*, 679 F. App'x. 19 (2d Cir. 2017).

Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001, *et seq*. One of those objectives is to ensure that participants receive affordable and accessible health benefits that they have been promised in accordance with the protections of the Employee Retirement Income Security Act of 1974 ("ERISA"). 29 U.S.C. §§ 1001, *et seq*. The quality of the lives of these workers in retirement depends substantially on their ability to obtain those health benefits that they have been promised and to ensure that fiduciaries prudently and loyally manage and administer participants' health plans.

NELA is the largest professional membership organization in the country, comprising lawyers who represent workers in labor, employment, and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 69 circuit, state, and local affiliates have membership of over 4,000 attorneys committed to working on behalf of those who have been treated unlawfully in the workplace. NELA's members litigate daily in every circuit, affording NELA a unique perspective on how the principles announced by the courts in employment cases actually play out on the ground. NELA strives to

protect the rights of its members' clients and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace.

This case presents the issue of whether a third-party administrator that has discretionary authority over management of the Plans' prescription drug program and the plan assets used to pay for prescription-drug benefits, is a fiduciary. The case also presents the issue of whether a pharmacy benefit manager that has been delegated broad discretion to set prescription drug prices, was a fiduciary because, among other things, it set its own compensation. Amici submit this brief because the decision below failed to ensure that fiduciaries prudently and loyally manage participants' benefit programs, including the price plans and participants pay for prescription drug benefits. Resolution of the issues in this case will have a significant impact on the price plan participants and beneficiaries pay for their health care benefits.

SUMMARY OF ARGUMENT

Under ERISA's broad, functional definition of fiduciary, *Lopresti v. Terwilliger*, 126 F.3d 34, 40 (2d Cir. 1997), persons are fiduciaries to the extent they, among other things, exercise discretion in managing the plan

or exercise authority or control with respect to plan assets. 29 U.S.C. § 1002(21)(A). In order to determine whether and to what extent a person is a fiduciary, a court must engage in a fact-intensive inquiry that generally cannot be determined at the pleading stage. *See, e.g. Bernhard v. Cent. Parking Sys. of New York, Inc.*, 282 F.R.D. 284, 288 (E.D.N.Y. 2012).

The Plaintiffs adequately alleged that Anthem was a fiduciary because the contract between the Plaintiff Plans and Anthem gave Anthem broad discretion to determine prescription drug prices, including complete discretion to select a pharmacy benefit manager ("PBM") and to negotiate the terms of an agreement under which the PBM would provide prescription drug benefits to Plan participants and beneficiaries. These functions were a critical part of plan administration. The district court erred by treating the selection of a PBM as a business decision. In the case of self-insured plans, the money Anthem paid out for pharmacy benefits was paid directly by the Plans, not out of Anthem's own assets.[3]

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[3] This brief focuses on the self-insured plans, but nothing in it should be construed as suggesting that the claims of insured participants do not have merit. An insurance contract is itself a plan asset. *See Faber v. Metropolitan Life Ins. Co.*, 648 F. 3d 98, 102 (2d Cir. 2011) (deferring to Department of Labor's views that plan assets will include any property

The district court further erred by comparing Anthem's activities to those of a plan sponsor determining which benefits to offer to its employees. Anthem was not the plan sponsor but was instead retained by the Plans to provide pharmacy benefit services for a fee. Holding that Anthem is not liable for its alleged imprudent and disloyal selection of ESI as a pharmacy benefit manager deprives plan sponsors of their ability to control costs, a critical factor in deciding what benefits to offer and whether to offer them at all.

The Plaintiffs also adequately alleged that ESI was a fiduciary because it controlled the factors that determine the amount of its compensation. *See F.H. Krear & Co. v. Nineteen Named Trustees*, 810 F.2d 1250, 1259 (2d Cir. 1987). Here, the PBM contract granted ESI discretion over how much the Plans and their participants paid for prescription medication, including an unidentified "competitive benchmark" standard for prices. Because the factual allegations, taken as true, establish that ESI had discretion over the prices it charged

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in which the plan has a beneficial ownership interest including contracts). Under certain circumstances, the insurance contract may give the insurer sufficient discretion with respect to its terms that the insurer becomes a fiduciary.

through management of the Plan's pharmacy benefits, the allegations against ESI should not have been dismissed.

ARGUMENT

I. CONGRESS INTENDED PERSONS TO BE LIABLE AS FIDUCIARIES BASED ON THEIR ACTIONS, NOT THEIR TITLES.

Congress enacted ERISA over 40 years ago to "protect . . . participants in employee benefit plans and their beneficiaries, . . . by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans." 29 U.S.C. § 1001(b); *see Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 15 (1987) ("ERISA's fiduciary standards 'will prevent abuses of the special responsibilities borne by those dealing with plans.'"). To that end, Congress imposed a federal fiduciary regime applicable to the management of both pension and welfare benefit plans to eliminate abuses and mismanagement of plans. 29 U.S.C. §§ 1104 & 1106; *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140 n.8 (1985) ("[T]he crucible of congressional concern was misuse and mismanagement of plan assets by plan administrators and that ERISA was designed to prevent these abuses in the future").

ERISA imposes stringent fiduciary standards not only on those who are named as fiduciaries in plan documents, but also on a broad range of

persons that have the authority to manage plans or to manage or control plan assets, as well as those who have discretionary authority or responsibility in the management of a plan. Indeed, the number of entities that may have such authority can be "wide-ranging as ERISA also permits the dispersion of fiduciary functions among multiple fiduciary service providers." *See* JOHN H. LANGBEIN, ET AL., PENSION AND EMPLOYEE BENEFIT LAW 548 (Robert C. Clark, et al. eds., 5th ed.). Thus, to reach these service providers and ensure further protections for plan participants, ERISA utilizes a broad and functional definition of fiduciary. *See LoPresti v. Terwilliger,* 126 F.3d 34, 40 (2d Cir. 1997) ("As this Court has recognized, Congress intended ERISA's definition of fiduciary 'to be broadly construed.'"); *Blatt v. Marshall & Lassman,* 812 F.2d 810, 812 (2d Cir. 1987) (same); *Mason Tenders Dist. Council Pension Fund v. Messera*, 958 F.Supp. 869, 881 (S.D.N.Y. 1997) (stating that "[u]nlike the common law definition under which fiduciary status is determined by virtue of the position a person holds, ERISA's definition is functional").

A person can acquire fiduciary status in three ways: (1) exercising discretionary authority or control over management of the plan or

exercising control over disposition or management of plan assets; (2) rendering investment advice for a fee; or (3) exercising discretionary authority in plan administration. 29 U.S.C. § 1002(21)(A).[4] As the Supreme Court recognized: "ERISA [] defines 'fiduciary' not in terms of formal trusteeship, but in *functional* terms of control and authority over the plan, *see* 29 U.S.C. § 1002(21)(A), thus expanding the universe of persons subject to fiduciary duties." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262 (1993) (emphasis in original); *see* LANGBEIN et al., PENSION AND EMPLOYEE BENEFIT LAW, *supra* p. 9, at 543 ("The multifaceted definition of 'fiduciary' . . . reflects the expectation that a large cast of characters may be at work in administering a pension or welfare benefit plan. The

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[4] The statutory language is as follows:

> Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) 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, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan . . . .

definition directs attention away from labels and toward the function of each actor.”).

“Fiduciary status under ERISA is to be construed liberally, consistent with ERISA’s policies and objectives.” *In re Beacon Assocs. Litig.*, 818 F.Supp.2d 697, 706 (S.D.N.Y. 2011) (internal quotations omitted); *Frommert v. Conkright*, 433 F.3d 254, 271 (2d Cir. 2006) (recognizing “Congress’s intention that ERISA’s definition of fiduciary be broadly construed”). The legislative history unambiguously indicates that Congress anticipated fiduciary status to encompass consultants and advisors, whose special expertise leads them to formulate and act on discretionary judgments while performing administrative functions not otherwise contemplated as fiduciary. H. R. CONF. REP. NO. 93-1280, 93d Cong., 1974 U.S.C.C.A.N. 4639, 5038, 5103 (“[T]he definition includes persons who have authority and responsibility with respect to the matter in question, regardless of their formal title.”). As a result, “whether or not an individual or an entity is an ERISA fiduciary must be determined by focusing on the function performed, rather than on the title held.” *Blatt*, 812 F.2d at 812 (“Congress intended the term [fiduciary] to be broadly construed. ‘[T]he definition includes persons who have authority and

responsibility with respect to the matter in question, regardless of their formal title.'") (*citing* H.R.Rep. No. 1280, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 4639, 5038, 5103);[5] *see also Amato v. Western Union Int'l, Inc.*, 773 F.2d 1402, 1416-17 (2d Cir.1985); *LoPresti*, 126 F.3d at 40 (reversing the district court's finding that a defendant was not a fiduciary, noting that "the district court overlooked the fact that an individual also may be an ERISA fiduciary by, as just stated, 'exercis[ing] any authority or control respecting management or disposition of [plan] assets.'"); *Am. Med. Ass'n v. United HealthCare Corp.*, No. 00 CIV. 2800 (LMM), 2007 WL 1771498, at *24 (S.D.N.Y. June 18, 2007); *Chao v. Docster*, No. 3:01-CV-827(NAM/DEP), 2006 WL 1593521, at *6 (N.D.N.Y. Mar. 31, 2006)); *United States v. King,* No. 10 CR. 122 JGK, 2011 WL 1630676, at *2 (S.D.N.Y. Apr. 27, 2011) ("These facts could support a jury finding, at the very least, that the defendant exercised 'authority or control respecting management or disposition' of the Local 147 Funds' assets, and that she was thus a fiduciary of the funds under ERISA.").

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[5] In finding that a defendant was acting as a fiduciary, one circuit court remarked: "if it talks like a duck . . . and walks like a duck . . . , it is a duck." *Donovan v. Mercer,* 747 F.2d 304, 308, 309 (5th Cir. 1984).

In cases concerning a fiduciary's obligations under ERISA, the threshold question is whether some person "was acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to complaint." *Pegram v. Herdrich*, 530 U.S. 211, 225-26 (2000). Whether a person is a fiduciary–and to what extent–is a highly fact-intensive inquiry and generally cannot be determined at the pleading stage. *See, e.g. Bernhard v. Cent. Parking Sys. of New York, Inc.*, 282 F.R.D. 284, 288 (E.D.N.Y. 2012) ("[t]he determination of whether a person is a fiduciary is fact-based, and cannot be determined in a motion to dismiss."); *Rispler v. Sol Spitz Co.*, No. 04 Civ. 1323, 2007 WL 1926531, at *4-5 (E.D.N.Y. June 06, 2007) ("The determination as to when a service provider assumes de facto control is fact-intensive: persons or entities who are not identified as fiduciaries can be de facto fiduciaries if they have discretionary authority over assets in an ERISA plan."); *Smith v. Local 819 I.B.T. Pension Plan*, 291 F.3d 236, 241 (2d Cir. 2002) (finding that a complaint could survive a motion to dismiss based on the bare allegation that a defendant was a fiduciary).

II. THE CONTRACT BETWEEN ANTHEM AND THE PLANS ALLOWS ANTHEM TO CHOOSE A SERVICE PROVIDER AND CONTRACT FOR SERVICES TO BE PAID FOR BY

THE PLANS AND THEIR PARTICIPANTS, MAKING ANTHEM A FIDUCIARY.

Many of the Plaintiff plans are not even insured by Anthem, but have instead simply contracted with Anthem to provide administrative services, including pharmacy benefit management. Cost containment is a critical factor in determining the level of benefits offered or whether benefits will be offered at all. Whether a plan is insured or self-insured, pharmacy costs are the most complex and fastest growing component of medical benefits expenditures. They currently represent 20-25% of overall U.S.medical spending, a percentage predicted to grow in the near future.[6] Plans seek to control their growing drug costs by entering into contracts with PBMs who, in turn, negotiate high-volume contracts with drug manufacturers. *See, e.g.*, *In re Express Scripts, Inc.*, 2008 WL 1766777, at *2 ("It is generally understood and expected that entities that provide health benefits to their members or employees do so in an effort to reduce health care costs."); *Glanton ex rel. ALCOA Prescription Drug Plan v. AdvancePCS Inc.*, 465 F.3d 1123, 1124 (9th Cir. 2006) ("PBMs manage prescription drug benefit programs and seek to reduce their

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[6] *See* http://www.csrxp.org/wp-content/uploads/2016/04/CSRxP_Facts-of-Rising-Rx-Prices.pdf

clients' drug costs by pooling claims and negotiating volume discounts with pharmaceutical companies."). According to the Pharmaceutical Care Management Association ("PCMA"), the mission of the PBM industry is to "reduce prescription drug costs and improve convenience and safety for consumers, employers, unions, and government programs."[7]

The Plans did not contract with Anthem for predetermined prescription drug prices, but instead the contracts gave Anthem broad discretion to determine the prices, including complete discretion to select a PBM and to negotiate the terms of an agreement pursuant to which the chosen PBM would provide the benefits to the Plans' participants and beneficiaries. JA105, JA109-10, ¶¶ 207(a)-(b), 208, 221. These functions were a critical part of plan administration because they were necessary to carry out the purposes of the Plans. *See Varity Corp. v. Howe*, 516 U.S. 489, 502, 504 (1996) (holding that "administration" means the exercise of "such powers as are necessary or appropriate for the carrying out of the purposes" of the plan).

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[7] *See* (https://www.pcmanet.org/our-industry/; accessed April 18, 2018).

If the Plans had not contracted out these functions, the Plans and their fiduciaries would have been required to perform them. Anthem, therefore, acquired by contract "discretionary authority or discretionary responsibility in the administration" of the Plans, making it a fiduciary for those purposes. 29 U.S.C. § 1002(21)(A)(iii); *see also Negron v. CIGNA Health and Life Ins.*, No. 3:16CV11702, 2018 WL 1258837, at *5 (D. Conn. Mar. 12, 2018) (holding that entity delegated discretion to determine the amount pharmacies charged participants for prescription drugs had discretionary authority over management of the plan); *Everson v. Blue Cross & Blue Shield of Ohio*, 898 F.Supp. 532, 539 (N.D. Ohio 1994) (holding that negotiating with providers regarding the charges the plan would pay is the exercise of discretionary authority and control); *In re Express Scripts, Inc.*, 2008 WL 1766777, at *9 (holding that PBM exercised discretionary authority and control when it negotiated for discounts, kickbacks and rebates).

The district court erred in dismissing Plaintiffs' claims that Anthem is a fiduciary by holding that Anthem's selection of a PBM and negotiation of terms with the PBM was a business function, rather than a fiduciary function. Anthem was not merely providing a business

function in relation to the Plans, however; it was providing precisely what it had bargained away to ESI for $4.5 billion dollars: PBM services. The money that Anthem paid out for pharmacy benefits was paid out of Plan funds, not out of its own assets. *See Sixty-Five Sec. Plan v. Blue Cross & Blue Shield of Greater New York*, 583 F.Supp. 380, 385 (S.D.N.Y. 1984) (distinguishing insurer that pays claims out of its own assets from insurer that acts as third-party administrator). The Plans bore the risk of excessive PBM costs, not Anthem.

Similarly, in holding that Anthem was acting in its business capacity, the district court mistakenly relied on decisions involving plan sponsor business decisions. ERISA does not mandate that employers provide any particular benefits, and plan sponsors are entitled at any time to adopt, modify or terminate welfare plan benefits. *Lockheed Corp. v. Spink*, 517 U.S. 882, 887, 890 (1996). This is, in part, because Congress did not want to discourage employers from establishing plans by making regulation of such plans too expensive and onerous. *Varity*, 516 U.S. at 497. But Anthem is not the employer sponsor of the Plans, and it is not bearing the cost of providing the benefits. Rather, Anthem contracted with the Plans to provide these discretionary administrative services,

including pharmacy benefit services, for a fee. The Plans are merely holding Anthem to the benefit of its bargain – requiring it to manage and administer the Plans and the Plans' assets prudently and loyally to contain costs.

The exact opposite allegedly happened here: the Plans and Plan participants were charged much more for prescription medications than they would have been charged in the marketplace; and Anthem not only knew this, but allegedly caused it. When Anthem negotiated the service contract with ESI, it also negotiated to sell its own PBM businesses to ESI, and the contracts were contingent on each other. *See* Special Appendix ("SA") at 3. ESI told Anthem it would pay either $500 million for its PBM businesses and would give Anthem favorable terms in a PBM agreement, which would provide prescription medications to Anthem subscribers at a lower price throughout the ten-year PBM agreement, or it would pay $4.675 billion, but would charge higher rates for prescription medication over the life of the agreement. *Id.* Anthem chose the latter, thereby not only breaching the duty of prudence owed to the plans and their participants under ERISA, but also the duty of loyalty, by acting in its own self-interest and lining its pockets with an extra four billion

dollars, to the detriment of the Plans and their participants. Ultimately, in exchange for a higher price for their own PBM business, Anthem knowingly agreed to a PBM Agreement that gave ESI the discretion to charge higher prices for prescription medications.

The Plans, and other plans like them, depend on third party administrators for their expertise in bargaining for lower drug prices to reduce the overall cost of providing health care benefits. If third party administrators, like Anthem, are immune from suit challenging their disloyal and imprudent management, plans are likely to reduce or eliminate pharmacy benefits and/or require higher coinsurance percentages or co-payments.

III. ESI IS A FIDUCIARY BECAUSE IT HAD DISCRETION TO DETERMINE THE AMOUNT TO CHARGE PLANS.

The district court erred in dismissing Plaintiffs' claims that ESI was a fiduciary. When an entity enters into an agreement with an ERISA-covered plan, if the agreement gives the entity control over factors that determine the actual amount of its compensation, the entity becomes an ERISA fiduciary with respect to that compensation. *See F.H. Krear & Co. v. Nineteen Named Trustees*, 810 F.2d 1250, 1259 (2d Cir. 1987) ("after a person has entered into an agreement with an ERISA-

covered plan, the agreement may give it such control over factors that determine the actual amount of its compensation that the person thereby becomes an ERISA fiduciary with respect to that compensation"); *Sixty-Five Security Plan v. Blue Cross & Blue Shield*, 583 F.Supp. 380, 387–88 (S.D.N.Y. 1984) (Blue Cross was a fiduciary with respect to its own compensation where its fees were based on a percentage of claims paid, and Blue Cross had complete discretion and control over what claims would be paid); *United Teamster Fund v. MagnaCare Admin. Servs., LLC*, 39 F.Supp.3d 461, 470 (S.D.N.Y. 2014) (concluding that "the Complaint pleads that [defendant] exercised discretion in setting the management fees"); *Charters v. John Hancock Life Ins. Co.*, 583 F.Supp.2d 189, 197 (D. Mass. 2008) ("[Defendant] is a fiduciary because the Contract gave it discretionary authority to determine the amount of its compensation."); *Ed Miniat, Inc. v. Globe Life Ins. Grp., Inc.*, 805 F.2d 732, 737 (7th Cir. 1986) ("[w]hen a contract, however, grants an insurer discretionary authority, even though the contract itself is the product of an arm's length bargain, the insurer may be a fiduciary"). By contrast, an agent with a contractually-established commission rate is generally not a fiduciary. *United States v. Glick*, 142 F.3d 520, 528 (2d Cir. 1998).

ESI is a fiduciary in the present case, because the PBM Agreement grants ESI considerable discretion over several factors that determine how much the Plans pay for prescription medications. Rather than agreeing to industry-standard metrics for setting drug prices, Anthem allows ESI to exercise significant discretion over drug pricing, including an undefined "competitive benchmark" standard for prices. JA47, ¶ 18. As a result, and despite Anthem's considerable bargaining power, the prices charged by ESI to the Plans are higher than those typically charged by PBMs, including ESI, to other plans. JA84-85, JA89-90, ¶¶ 139-42, 160. Anthem and ESI disagree over the meaning of "competitive benchmark pricing," but it either grants complete discretion to ESI or partial discretion subject to the limitations in Section 5.4 and Exhibit A—either way, ESI possessed and exercised discretionary authority over the prices the Plans pay for prescription medications, as well as its own compensation.

The district court wrongly decided this issue, holding that paragraph 5.4 and Exhibit A of the PBM Agreement worked together to remove ESI's discretion over setting prescription drug prices. SA 29-30. While paragraph 5.4 and Exhibit A may constrain ESI's discretion over

setting prescription drug prices, limitations do not defeat fiduciary status. *See Blatt*, 812 F.2d at 812. The district court also failed to consider the fact that ESI has the discretion to decide whether to classify medications as "brand" or "generic"—a classification that directly affects how much the Plans and their participants must pay, as brand medications are significantly more expensive than generic ones. JA77, ¶ 117. ESI makes this classification using "a proprietary algorithm" which may "change based on the availability of the specific fields" that the algorithm uses in its classification. *Id.* These provisions grant ESI significant discretion in setting drug pricing.

The district court also failed to consider ESI's discretionary authority to determine which drugs are included on its "maximum allowable cost" (MAC) list, and what that price is. JA78, ¶ 118. These decisions directly affect how much the Plans and their participants pay for prescription medications, because the MAC list sets a ceiling on how much they must pay. *See id.* The PBM Agreement establishes criteria for inclusion on the MAC list, but the criteria allows for great latitude in implementation. *Id.* The PBM Agreement establishes similarly broad criteria for determining MAC prices, which are "subject to change." *Id.*

These provisions grant ESI significant pricing discretion. The fiduciary activities by ESI affected drug pricing and impacted ESI's compensation.

The district court, therefore, erred in holding that the Plaintiffs have not alleged sufficient facts to support a finding that ESI acted as a fiduciary. Under a similar fact pattern, the *Negron* court recently found the opposite, holding that the complaint implicated plausible breaches of fiduciary duty. Among other reasons, the *Negron* court found the service provider's taking of clawbacks to be dispositive. *See Negron*, 2018 WL 1258837, at *10 (citing *Edmonson v. Lincoln Nat. Life Ins. Co.*, 725 F.3d 406, 415 (3d Cir. 2013) (duty of loyalty bars fiduciary from profiting)). The same allegations are made in the present case, and as such the motion to dismiss this claim should have been denied.

CONCLUSION

For the foregoing reasons, the decision of the district court should be reversed.

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/s/ Karen L. Handorf
Karen L. Handorf
COHEN MILSTEIN SELLERS
& TOLL, PLLC
khandorf@cohenmilstein.com
1100 New York Avenue, N.W.
Suite 500
Washington, D.C. 20005

Tel: (202) 408-4600
Fax: (202) 408-4699

Mary Ellen Signorille
William Alvarado Rivera
AARP AND AARP FOUNDATION LITIGATION
601 E Street, N.W.
Washington, D.C. 20049
Tel: (202) 434-2060

Matthew C. Koski
NATIONAL EMPLOYMENT LAWYERS ASSOCIATION
2201 Broadway, Suite 310
Oakland, CA 94612
Tel: (415) 296-7629

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 5684 words, excluding the parts of the brief exempted by Rule 32(f). I relied on the word count of Microsoft Word 2016 in preparing this certificate.

2. This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because the brief–in both its text and its footnotes–has been prepared in 14-point Century Schoolbook font.

I declare under penalty of perjury that the foregoing is true and correct.

May 3, 2018

/s/ Karen L. Handorf
Karen L. Handorf
COHEN MILSTEIN SELLERS & TOLL, PLLC
khandorf@cohenmilstein.com
1100 New York Avenue, N.W.
Suite 500, West Tower
Washington, D.C. 20005
Tel.: 202-408-4600
Fax: 202-408-4699
Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on May 3, 2018, I caused to be filed a true and correct copy of the foregoing Brief of Amici Curiae AARP and AARP Foundation and the National Employment Lawyers Association with the United States Court of Appeals for the Second Circuit by placing copies to be delivered by using the appellate CM/ECF system. I certify that all participants in the cases are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Derek W. Loeser
Gretchen S. Obrist
David J. Ko
KELLER ROHRBACK L.L.P.
1201 Third Ave., Suite 3200
Seattle, WA 98101-3052
Tel.: 206-623-1900

Jeffrey Lewis
KELLER ROHRBACK L.L.P.
300 Lakeside Drive
Suite 1000
Oakland, CA 94612
Tel.: 510-463-3900

Joe R. Whatley, Jr.
WHATLEY KALLAS, LLP
1180 Avenue of the
Americas, 20th Floor
New York, NY 10036
Tel.: 212-447-7060

Attorneys for Plaintiffs

Andrew S. Corkhill
Jacob Waldman
Derek Shaffer
QUINN EMMANUEL URQUHART
& SULLIVAN LLP
51 Madison Avenue, 22nd Floor
New York, NY 10010-1601
andrewcorkhill@quinnemanuel.com
jwaldman@quinnemanuel.com
dshaffer@quinnemanuel.com

Eric G. Serron
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, NW
Washington, DC 20036
eserron@steptoe.com

Attorneys for Defendant Express Scripts, Inc.

Glenn M. Kurtz
WHITE & CASE LLP
1221 Avenue of the Americas New York, NY 10020
gkurtz@whitecase.com

Attorney for Defendant Anthem, Inc.