

IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

OHIO HIGHWAY PATROL
RETIREMENT SYSTEM
1900 Polaris Parkway, Suite 201
Columbus, Ohio 43240-4037,

Plaintiff,

v.

EXPRESS SCRIPTS, INC.
c/o Statutory Agent
Corporation Service Company
50 West Broad Street, Suite 1330
Columbus, Ohio 43215,

Defendant.

CASE NO.

JUDGE

COMPLAINT

(JURY DEMAND ENDORSED HEREON)

Now comes Plaintiff, Ohio Highway Patrol Retirement System (“HPRS”), by and through its counsel, and as its Complaint against Defendant Express Scripts, Inc. (“ESI”), alleges as follows:

1. Plaintiff HPRS is a public pension fund for the Ohio Highway Patrol’s sworn officers, cadets in training at the academy and members of the radio division. In addition to pension benefits and services for its members and their families, HPRS provides health care coverage. HPRS’ benefits are funded by the State of Ohio and annual member contributions of 14% of salary. In 2019, HPRS spent \$3.8 million dollars on its pharmacy benefits for its members.

2. Defendant ESI, a Delaware corporation, with its principal place of business in St. Louis, Missouri was acquired by Cigna Corporation (NYSE: CI) on December 20, 2018. As an

operating subsidiary, Defendant ESI is part of Cigna's Health Services segment which reported \$70.8 billion in adjusted revenues for the nine-month period ending September 30, 2019.

3. This Court has jurisdiction over Plaintiff HPRS's claims pursuant to R.C. 2305.01, which gives the Court of Common Pleas general jurisdiction over civil actions. This Court has personal jurisdiction over Defendant ESI because Defendant ESI does business in Ohio and has the requisite minimum contacts with Ohio necessary to permit the Court to exercise jurisdiction. Defendant ESI also is registered to do business in the State of Ohio.

4. Venue is proper in Franklin County, Ohio, pursuant to Civ. R. 3(B)(3).

5. Plaintiff HPRS brings this lawsuit to recover damages from Defendant ESI, which had been the pharmacy benefit manager ("PBM") for Plaintiff HPRS' health plans.

6. On or about January 1, 2013, Plaintiff HPRS and Defendant ESI entered into the Pharmacy Benefit Administration and Management Services Agreement (the "Agreement"). A true and correct copy of the Agreement will be marked as Exhibit ("Ex.") A and filed with the Clerk of Courts under seal.

7. Jurisdiction and venue are also proper because the terms of the parties' Agreement provides that any court action shall be brought in a court in Franklin County, Ohio. Ex. A, § 7.2.

8. The Agreement was amended on four separate occasions between 2016 and 2018. True and correct copies of the amendments will be marked as Exs. B-E and filed with the Clerk of Courts under seal.

9. Defendant ESI represents that through its "solutions" it can "deliver better value" to its pension system clients like Plaintiff HPRS. But Defendant ESI's "solutions" only served

Defendant ESI as it repeatedly breached the Agreement to drive up Plaintiff HPRS's costs by overcharging Plaintiff HPRS.

10. Defendant ESI's breaches of the Agreement include, but are not limited to:
 - a. Failing to meet the pricing discount and dispensing fee guarantees;
 - b. Misclassifying generic drugs as brand drugs to charge higher prices;
 - c. Overcharging for generic drugs by failing to timely adjust generic pricing lists to accurately reflect the lowest available pricing;
 - d. Failing to disclose Defendant ESI's sources of remuneration received in connection with its performance of services for Plaintiff HPRS; and
 - e. Failing to perform services for Plaintiff HPRS as required by Section 5.1 of the Agreement.

11. Defendant ESI's breaches have caused Plaintiff HPRS to overpay Defendant ESI throughout the term of the Agreement while Defendant ESI silently pocketed millions of dollars in overcharges.

12. Defendant ESI had a fiduciary duty to Plaintiff HPRS.

13. Plaintiff HPRS is entitled to an accounting of all remuneration Defendant ESI received related to providing services to Plaintiff HPRS.

Terms of the Agreement

14. The Agreement was "implemented" on January 1, 2013 with a three-year term that was subsequently renewed on separate occasions such that the Agreement remains in effect until December 31, 2022. *See* Exs. B-C.

15. The Agreement obligates Defendant ESI to provide Plaintiff HPRS with pharmacy benefits management services that include pharmacy network contracting and

management, claims processing, mail service benefit and specialty product pharmacy, management and distribution of services, formulary and rebate and administration services, and data management, reporting, eligibility and benefit administration services related to claims.

16. In performing these services, the Agreement expressly obligates Defendant ESI to act as a fiduciary in the performance of its claims adjudication functions. *See* Ex. A, § 3.7, “Claims Adjudication”.

17. Further, the Agreement requires Defendant ESI to act in the “best interests” of Plaintiff HPRS and to “employ its expertise, knowledge and experience with integrity and fidelity . . . to derive the lowest net cost” for the drugs covered and available under Plaintiff’s plan for its members. *See* Ex. A, § 5.1, “Sponsor’s Trust in and Reliance on Defendant ESI.”

18. The Agreement also confirms the very close relationship of the parties and Plaintiff HPRS’s special confidence and trust in Defendant ESI’s integrity and fidelity which reflects Defendant ESI’s fiduciary duty to Plaintiff HPRS. Ex. A, §5.1.

19. The Agreement states that:

ARTICLE 3 – OPERATIONAL AND ADMINISTRATIVE MATTERS

Section 3.7 Claims Adjudication

(a) **Claims Processing.**

ESI shall process and adjudicate all Claims in a manner consistent with the standards described in Section 5.1 and in accordance with the agreed upon standards in the Service Performance Guarantees of Appendix A.

For purposes of this Agreement, ESI agrees to perform the following Claims administration responsibilities as a fiduciary. Under the terms of this Agreement, such fiduciary duties shall consist solely of:

- (i) setting up Sponsor’s benefit design within ESI’s system consistent with Sponsor’s Plan according to the EBD in effect at the time of the adjudication of the Claim;

- (ii) testing adjudication to assure compliance with the Sponsor’s Plan according to the EBD;
- (iii) adjudicating the Claims for Sponsor’s Enrollees in accordance with Sponsor’s current EBD; and
- (iv) correcting or reimbursing Sponsor for any errors caused solely by ESI.

* * *

Sponsor stipulates that the Plan is not subject to the Employment Retirement Income Security Act of 1974 as amended. Nothing set forth in any provision of this Section 3.8 shall alter any aspect of ESI’s obligations under or the standards applicable to ESI under Section 5.1 of this Agreement or the application of the provisions of that section to the entirety of this Agreement.

ARTICLE 5 – STANDARDS OF CONDUCT BY ESI

Section 5.1 Sponsor’s Trust In and Reliance On ESI

(a) Reliance on ESI’s Knowledge and Experience.

ESI acknowledges and agrees that Sponsor has selected ESI as its pharmacy benefit management vendor to provide expertise, knowledge, and experience. ESI accepts and understands that Sponsor is placing confidence and trust in the integrity and fidelity of ESI to deal truthfully, accurately and honestly with and in the best interests of Sponsor in all aspects of this Agreement and that as a result ESI occupies a position of influence with respect to employing its expertise, knowledge and experience on behalf of Sponsor. For purposes of this Agreement, acting in the “best interests” of Sponsor means ESI will employ its expertise, knowledge and experience with integrity and fidelity in all aspects of this Agreement * * *

(b) ESI Client Pledge and Best in Class Relationship.

ESI acknowledges that Sponsor trusts and expects ESI to perform the Services and ESI represents and warrants that it shall perform the Services according to its “Client Pledge”, attached as Schedule 5.1(b).

* * *

ESI acknowledges Sponsor’s desire to operate its pharmacy benefits program on a “best in class” basis.

* * *

(c) Clinical Activities and Formulary Services

* * *

ESI will work in good faith to provide complete, accurate and unbiased information and recommendations regarding Clinical Activities and Formulary Services to allow Sponsor to:

* * *

(d) Representations and Warranties.

ESI represents and warrants that:

- (i) it will perform Clinical Activities and Formulary Services with the skill, care, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with like matters would use in the conduct of an enterprise of like character with like aims;
- (ii) it will perform all of its duties under this Agreement with integrity and fidelity to Sponsor and will be truthful, accurate and honest in all aspects of its duties and responsibilities set forth in this Agreement;

* * *

- (iv) it will advise Sponsor whether any specific Utilization Management Program, benefit design change or Formulary change being considered by Sponsor will have a positive or negative change in ESI's revenue and disclose any conflicts of interest of which it is aware as to the matter under consideration * * *;

* * *

Section 5.3 Conflicts of Interest.

* * *

ESI shall, promptly upon becoming aware of the same, disclose to Sponsor any potential conflicts of interests that could reasonably be expected to affect the objectivity of ESI or its employees in fulfilling their duties to Sponsor.

See Ex. A.

20. Plaintiff HPRS expressly relied upon Defendant ESI's promises and representations.

21. The Agreement is a “pass-through” PBM contract meaning that ESI warrants that it will receive only per-transaction administrative fees as compensation and will “pass-through” to Plaintiff HPRS the costs of the drugs dispensed by pharmacies with no markup or “spread.” *See* Ex. A, § 3.14 (“pass-through of pharma revenue”), § 3.4(e) (“there shall be no spread for Defendant ESI on Covered Drugs”); *see also id.* at Schedule 2.5.

22. The Agreement includes a Pricing Schedule which specifies and lists the prices, fees, guaranteed savings, generic drug fill rate or methods for determining the prices or fees for certain drug management and utilization programs managed by Defendant ESI, and other fees for services provided by Defendant ESI to Plaintiff HPRS. *See* Ex. A, Schedule 2.5: Pricing Schedule.

23. The Pricing Schedule was amended in January 2017 and January 2018. *See* Exs. B-D. Throughout the term of the Agreement, however, Defendant ESI did not satisfy its contractual pricing guarantees or the contractual methodology for pricing multi-source generic drugs set forth in the Pricing Schedule.

24. The Agreement terms also require two separate disclosures from Defendant ESI to Plaintiff HPRS.

25. The Agreement requires a disclosure of Defendant ESI’s types of income from pharmaceutical manufacturers not related to Defendant ESI’s services to Plaintiff HPRS and also a disclosure of any remuneration received by Defendant ESI related in any manner with Defendant ESI’s performance of services for Plaintiff HPRS Agreement, Sections 5.1(d)(vii) and 5.4.

26. The Agreement provides that:

ARTICLE 5 – STANDARDS OF CONDUCT BY ESI

Section 5.1 Sponsor’s Trust In and Reliance On ESI.

* * *

(d) Representations and Warranties.

ESI represents and warrants that:

* * *

- (vii) it earns revenue from pharmaceutical manufacturers for services that are not related to any Clinical Activities, Formulary Services, or other services performed for Sponsor according to the terms of this Agreement, and that such revenue is disclosed in the Financial Disclosure to ESI PBM Clients as attached to this Agreement as Appendix D (“Disclosure Statement”), as may be updated from time to time, provided, however, that no update or change to the Disclosure Statement will alter any obligation of ESI under this Agreement and in any case of contradiction or inconsistency between this Agreement and the Disclosure Statement the provisions of this Agreement shall in all cases control and supersede the terms of the Disclosure Statement. ESI shall provide Sponsor with any updated version of the Disclosure Statement within a commercially reasonable period of time after being adopted by ESI; and

See Ex. A.

27. The Disclosure Statement described in Section 5.1(d)(vii) expressly requires disclosure of revenue from pharmaceutical manufacturers not related to any services Defendant ESI performed for Plaintiff HPRS.

28. To ensure the integrity of the “pass through” contract model, in Section 5.4, Defendant ESI was required to disclose remuneration it received which was in any manner in connection with its performance of services for Plaintiff HPRS.

29. Section 5.4 of the Agreement expressly states:

ARTICLE 5 – STANDARDS OF CONDUCT BY ESI

* * *

Section 5.4 Disclosure of Remuneration

ESI agrees that any and all remuneration received by ESI from any source and in any manner in connection with its performance of the Services will be stated and fully disclosed at least annually in writing to Sponsor. ESI shall not receive any remuneration, revenue or other benefit on account of business with Sponsor that is not so disclosed.

See Ex. A.

30. The Agreement also requires Defendant ESI to “pass-through” to Plaintiff HPRS all administrative fees and rebates that pharmaceutical manufacturers pay to ESI that are directly attributable to the utilization of certain drugs by Plaintiff HPRS’s members. See Ex. A., § 3.14.

31. The Agreement also provides that:

Section 5.1 Sponsor’s Trust In and Reliance On ESI.

* * *

- (v) it does not accept revenue, directly or indirectly, from pharmaceutical manufacturers in relation to Clinical Activities and Formulary Services other than Rebates and Pharma Admin Fees, and that an amount equal to one hundred percent (100%) of Rebates and Pharma Admin Fees attributable to Sponsor’s Utilization and the amount Sponsor pays for Drugs for its Enrollees pursuant to this Agreement will be paid to Sponsor in accordance with the terms of this Agreement.

See Ex. A.

32. Throughout the term of the Agreement, however, ESI never satisfied its obligation under Section 5.4: “... any and all remuneration received by Defendant ESI *from any source and in any manner in connection with its performance of the Services* will be stated and fully disclosed at least annually in writing to [Plaintiff].” See Ex. A, § 5.4, “Disclosure of Remuneration” (emphasis added).

33. Throughout the term of the Agreement, Defendant ESI billed Plaintiff HPRS weekly and at no time did Defendant ESI complain or assert that Plaintiff HPRS failed to perform its obligations under the Agreement.

Defendant ESI's Failure to Meet Discount Guarantees and Properly Classify Drugs

34. As with “pass-through” PBM contracts, the parties’ Pricing Schedule includes pricing clauses with “lesser of” logic, meaning that Plaintiff HPRS will pay the lesser of one of the several defined prices for a drug which vary depending upon whether the drug is brand or generic.

35. For brand drugs, the Pricing Schedule provides that Plaintiff HPRS will be charged the “*lesser of*”:

- (a) Discounted Average Wholesale Price (“AWP”) of the drug plus Dispensing Fee *or*
- (b) Usual and Customary (“U&C”) of the drug charged by pharmacies

This methodology includes pricing guarantees to ensure Defendant ESI provides Plaintiff HPRS with competitive pricing such that Defendant ESI provides a “discount” to the AWP that varies per contract year. For example, in 2013, for brand drugs the “Minimum Guaranteed AWP Discount” was AWP minus 15.75%, and in 2016, it was AWP minus 16.25%. *See* Ex. B, Schedule 2.5, p. 138.

36. For generic drugs, the Pricing Schedule provides that Plaintiff HPRS will be charged the “*lesser of*”:

- (a) Maximum Allowance Cost (“MAC”) plus Dispensing Fee;
- (b) AWP minus brand discount plus Dispensing Fee; *or*
- (c) U&C.

This methodology includes pricing guarantees to ensure Defendant ESI provides Plaintiff HPRS with competitive pricing such that Defendant ESI includes a “discount” to the AWP that varies per contract year. For example, in 2013, for generic drugs the “Minimum Guaranteed AWP Discount” was AWP minus 76.50%, and in 2016, it was AWP minus 77.25%. *See* Ex. B, Schedule 2.5, p. 139.

37. The Pricing Schedule was amended in 2016, 2017 and 2018. *See* Exs. B-D, respectively.

38. In 2018, the Pricing Schedule was amended as follows:

Table 1: Participating Pharmacy Pricing

Pharmaceutical Product Dispensed	ESI National Network
Brand Ingredient Cost Discount	Pass through the pharmacies' contracted rate with aggregate guarantees of: The lower of: <ul style="list-style-type: none"> • Discounted AWP + Dispensing Fee or • U&C Minimum Guaranteed AWP Discount: 2018: AWP-17.00% 2019: AWP-17.25% 2020: AWP-17.50% 2021: AWP-17.65% 2022: AWP-17.75%
Generic Ingredient Cost Discount	Pass through the pharmacies' contracted rate with aggregate guarantees of: The lowest of: <ul style="list-style-type: none"> • MAC+Dispensing Fee; • AWP-brand discount+Dispensing Fee or • U&C Minimum Guaranteed Overall Generic Effective Discount of AWP: 2018: AWP-82.00% 2019: AWP-82.25% 2020: AWP-82.50% 2021: AWP-82.75% 2022: AWP-83.00%
Compound Prescription Cost	Lesser of U&C or combined AWP plus service fee
Dispensing Fee/Rx	Pass through the pharmacies' contract rate with aggregate guarantees of: 2018: \$0.40 2019: \$0.39 2020: \$0.38 2021: \$0.37 2022: \$0.36

Ex. D, Term 6 “Pricing Schedule – Commercial.”

39. In each year of the Agreement except 2011-2012, Defendant ESI failed to satisfy the pricing guarantees in the then applicable Pricing Schedule thereby overcharging Plaintiff HPRS on thousands of claims.

40. Defendant ESI also repeatedly misclassified and/or continued to classify generic drugs as brand drugs. Based upon the classification, Defendant ESI charged higher prices on each of them because the brand drug pricing methodology was applied which carried with it a lower pricing guarantee, *i.e.*, smaller percent discount on AWP.

41. Defendant ESI has never corrected these costly overcharges despite its express duty to act in the “best interests” of Plaintiff HPRS to accurately adjudicate claims and apply the “lesser of” pricing provisions contained in the Agreement.

42. Plaintiff HPRS only recently discovered these breaches by having an independent analysis performed on the claims data.

Defendant ESI's Overcharging for Generic Drugs by Failing to Timely Adjust for Multi-Source Price Deflation

43. As a PBM, one of Defendant ESI's primary roles is to provide efficiencies and savings to Plaintiff HPRS. The Agreement, accordingly, required Defendant ESI to make timely additions and adjustments to its MAC List to account for changes in the status (*e.g.*, brand, generic, single-source generic or multi-source generic) of drugs and other market factors which drive down the cost of the drugs. *See* Ex. A., Schedule 2.5(b) “MAC List Description.” For example, when a brand drug becomes a single-source generic drug, the price deflation is approximately 25% of the original brand cost and when it becomes a multi-source generic drug the price deflation is approximately 85% of the original brand cost. It is, therefore, essential that Defendant ESI timely update its MAC lists so that Plaintiff HPRS is being charged the lowest

price. However, Defendant ESI failed to timely update generic pricing on MAC lists, and frequently by as much as four to five months or even longer.

44. Analysis of historical MAC prices charged to Plaintiff HPRS show that Defendant ESI failed to update its MAC List to include new generic drugs and failed to make timely adjustments to the prices of drugs already included on its MAC List that moved from single-source to multi-source generic status. Consequently, Plaintiff HPRS was regularly charged commercially unreasonable prices for generic drugs throughout the term of the Agreement.

45. Defendant ESI's failure to properly and timely update its MAC List and MAC pricing resulted in damages to Plaintiff which are in addition to, and in excess of, the damages caused by Defendant ESI's failure to adhere to the Agreement's pricing guarantees.

COUNT I
BREACH OF CONTRACT

46. Plaintiff HPRS incorporates by reference the allegations in the preceding paragraphs.

47. The Agreement is a valid and enforceable contract.

48. Plaintiff HPRS has fully performed its obligations under the Agreement.

49. Defendant ESI breached the Agreement as well as the duty of good faith and fair dealing that exists in all contracts under Ohio law.

50. Defendant ESI's breaches were committed knowingly in bad faith and with the intent to deprive Plaintiff HPRS of the benefit of its bargain and to frustrate its reasonable expectations under the Agreement.

51. As a direct result of Defendant ESI's breach of the Agreement as well as the duty of good faith and fair dealing, Plaintiff HPRS has been damaged and suffered direct economic

harm, including wrongful overcharges for prescription drugs dispensed to members of Plaintiff HPRS's health plan.

COUNT II
BREACH OF FIDUCIARY DUTY

52. Plaintiff HPRS incorporates by reference the allegations in the preceding paragraphs.

53. Plaintiff HPRS placed a special confidence and trust in the integrity and fidelity of Defendant ESI and expected it to deal truthfully, accurately, and honestly with, and in the best interests of, Plaintiff HPRS.

54. Defendant ESI was expressly required under the Agreement to perform certain claims adjudication functions on behalf of Plaintiff HPRS as a fiduciary.

55. Defendant ESI occupied a position of influence with respect to employing its expertise, knowledge and experience on behalf of Plaintiff HPRS.

56. Defendant ESI owed Plaintiff HPRS a fiduciary duty to deal truthfully, accurately and honestly with Plaintiff HPRS and in Plaintiff HPRS's best interests.

57. Defendant ESI intentionally failed to observe its fiduciary duties to Plaintiff HPRS by improperly adjudicating claims based upon the terms of the Agreement.

58. Defendant ESI intentionally failed to observe its fiduciary duties to Plaintiff HPRS by not dealing truthfully, accurately and honestly with it or acting in Plaintiff HPRS's best interests.

59. Defendant ESI's breach of its fiduciary duty has caused financial injury to Plaintiff HPRS including additional employee time and costs as well as harm to good will as well as other non-economic damages.

60. Defendant ESI's breach of its fiduciary duty has been undertaken with actual malice and/or reckless disregard for the rights and interests of Plaintiff HPRS, and Plaintiff HPRS and is entitled to punitive damages.

COUNT III
ACCOUNTING

61. Plaintiff HPRS incorporates by reference the allegations in the preceding paragraphs.

62. Defendant ESI contractually agreed to make annual financial disclosures pursuant to Section 5.4 of the Agreement.

63. Section 5.4 of the Agreement expressly provides "that any and all remuneration received by Defendant ESI from any source and in any manner in connection with its performance of the Services will be stated and fully disclosed at least annually in writing to [Plaintiff]." *See* Ex. A, § 5.4, "Disclosure of Remuneration" (emphasis added).

64. Defendant ESI further agreed that it "shall not receive any remuneration, revenue or other benefit on account of business with [Plaintiff HPRS] that is not so disclosed." *Id.*

65. Disclosures made by Defendant ESI pursuant to Section 5.1 do not satisfy Defendant ESI's disclosure obligations pursuant to Section 5.4 of the Agreement, as the disclosure obligations of each section vary both in scope and frequency.

66. Defendant ESI never satisfied its disclosure obligations under Section 5.4.

67. Plaintiff HPRS is contractually entitled to the annual financial disclosures being withheld by Defendant ESI.

68. Defendant ESI, not Plaintiff HPRS, has sole possession of the business records at issue which are of such a complicated nature that only this Court in equity can successfully unravel them.

69. Plaintiff HPRS will suffer irreparable harm without this information including, but not limited to, money damages from undisclosed sources of remuneration.

70. There is no adequate remedy at law, and therefore, Plaintiff HPRS seeks this accounting.

71. For the reasons set forth herein, Plaintiff HPRS seeks an accounting of including, but not limited to, any and all remuneration received by Defendant ESI from any source and in any manner in connection with its performance of the services to Plaintiff HPRS, for years 2010-2019, as required in Section 5.4 of the Agreement.

WHEREFORE, Plaintiff, Ohio Highway Patrol Retirement System, respectfully prays for judgment against Defendant, Express Scripts, Inc., as follows:

1. Compensatory damages in excess of Twenty-Five Thousand Dollars (\$25,000.00);
2. For an accounting;
3. Punitive damages in excess of Twenty-Five Thousand Dollars (\$25,000.00);
4. An award of prejudgment and post judgment interest;
5. An award of the costs of this litigation, including reasonable attorneys' fees; and
6. Such other relief as the Court deems appropriate and just.

Respectfully submitted,

OHIO HIGHWAY PATROL
RETIREMENT SYSTEM,
Plaintiff

/s/ Donald W. Davis, Jr.

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JURY DEMAND

Plaintiff hereby demands a trial by jury of all issues herein.

/s/ Donald W. Davis, Jr.

Attorney for Plaintiff