UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 15-cv-62685-CMA – Altonaga/McAliley

JOHN DOE, on behalf of himself and all others similarly situated,

Plaintiffs,

v.

COVENTRY HEALTH CARE, INC., COVENTRY HEALTH AND LIFE INSURANCE COMPANY; COVENTRY HEALTH PLAN OF FLORIDA, INC.; COVENTRY HEALTH CARE OF FLORIDA, INC.; and DOES 1-10, inclusive,

Defendants.

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT PURSUANT TO FED. R. CIV. P. 12(B)(1) AND 12(B)(6)

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Plaintiff John Doe ("Plaintiff") submits this Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss Plaintiff's Complaint Pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) and supporting memorandum (D.E. No. 13) ("Motion" or "Mot.") filed by Coventry Health Care, Inc., Coventry Health and Life Insurance Company, Coventry Health Plan of Florida, Inc., and Coventry Health Care of Florida, Inc. (collectively, "Coventry").

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Coventry's Motion should be denied in its entirety.[1] At issue here is an insidious form of discrimination that puts at risk the privacy and health of vulnerable HIV/AIDS patients, a group long discriminated against by the health insurance industry and for whom the Patient Protection and Affordable Care Act ("ACA") offered the promise of equality in health coverage. A central premise of the ACA—embodied in the "guaranteed issue" and anti-discrimination provisions at issue in the Motion—was to bar health insurers from imposing discriminatory coverage for patients with HIV/AIDS. *See, e.g.,* 42 U.S.C. §§ 300gg—gg-4, 18116; 43 U.S.C. § 18022(b)(4)(B); Compl., ¶¶ 82-86, 90-94. The need for this prohibition is clear. Requiring health insurers to offer coverage for patients with pre-existing conditions means little if the insurer can deter consumers from utilizing the benefits of their coverage by charging exorbitant co-pays or only covering prescription drug care through inferior mail-order programs that put the patients' privacy and health at risk. Compl., ¶¶ 3-5, 83-85, 93-94.

In response to this action, Coventry, like its parent company Aetna, Inc.,[2] claims it suspended the Program. Yet Coventry had supposedly agreed to do so as of June 1, 2015, but apparently ignored that agreement, and it is disputed whether the Program has in fact stopped or is still in place. Compl., ¶ 2; Doe Decl., ¶¶ 9-10. In addition, Coventry still has not provided any notice of the status of the Program to affected Class members.

[1] As set forth in the Objections to Defendants' Amended Request for Judicial Notice (filed March 24, 2016) and the Declaration of John Doe ("Doe Decl.") filed concurrently herewith, Coventry's Motion is based on disputed facts. On its face, the Motion must be denied on this ground alone.

[2] In *John Doe One et al. v. Aetna, Inc. et al.* ("*Aetna*"), U.S. Dist. Ct. S. Dist. of Cal., Case No. 14-cv-02986-LAB (DHB), Aetna filed a Motion to Dismiss under Rule 12(b)(1) claiming—apparently on behalf of itself and its subsidiaries—that the company had voluntarily decided to end its mandatory mail-order program for HIV/AIDS medications as of January 1, 2015 and July 1, 2015. (D.E. No. 21). On March 15, 2016, the Court denied Aetna's motion. *Doe v. Aetna, Inc.*, 2016 WL 1028363 (S.D. Cal. Mar. 15, 2016).

The impact of Coventry's Program on HIV/AIDS patients is real, imminent and severe (Compl., ¶ 21), not a mere "temporary unhappiness," as Coventry so cavalierly claims (Mot. at 1). This includes:

- Higher co-insurance costs due in part to loss of co-pay assistance programs not recognized under the Program, potentially making life-sustaining medications unaffordable for vulnerable patients (Compl., ¶¶ 59, 83);

- Loss of face-to-face interactions with a specialty pharmacist who can detect potentially harmful adverse drug interactions common with HIV/AIDS medications, manage adherence and resistance issues, side effects, or dosing complications (*id*., ¶¶ 4, 13-27, 62);

- Requiring members to interact with a bureaucratic process manned by poorly trained customer representatives on a toll-free line who do not know the patient or their medical history, sometimes requiring hours on the phone to fill a prescription navigating phone menus and long hold times (*id*., ¶¶ 20, 27);

- Interruptions in HIV/AIDS medications for which strict adherence is necessary to prevent serious health consequences due to shipment delays created by that bureaucratic process (*id*. ¶¶ 7, 26, 62);

- Serious privacy concerns for HIV/AIDS patients who are forced to receive deliveries at their workplace and in their neighborhoods, for HIV/AIDS patients who have not disclosed their medical status to their work colleagues, friends, families or even roommates who do not know that the recipient has HIV/AIDS (*id*., ¶¶ 8, 84);

- Financial risk of lost or stolen shipments left at their door or in their mailbox or, if the recipient must be present when the package is delivered, forcing the patient to obtain needed medications on the schedule of the delivery person (*id*. ¶¶ 9, 26); and

- Based on the processes created by Coventry and its designated mail-order pharmacy Express Scripts, Inc., being required to coordinate with multiple pharmacies and pharmacists for specialty and non-specialty medications, increasing stress and potentially undermining their immune system, which is detrimental to people with chronic illness (*id*. ¶¶ 27, 58, 84).

While Coventry challenges Plaintiff's standing, the relevant question on standing is whether Plaintiff had standing *when he filed this claim.* The allegations and evidence clearly show he did, and that the Complaint could be amended to resolve such questions and allege on-going wrongful conduct. *See* Compl., ¶¶ 57-63; Doe Decl., ¶¶ 5-7, 10. To the extent Defendants argue that Plaintiff's claims have been rendered moot by Coventry's alleged change of heart after this lawsuit was filed, that too is wrong because Coventry has not met its "formidable burden of showing that it is *absolutely clear* the allegedly wrongful behavior could not reasonably be

expected to recur." *Friends of the Earth v. Laidlaw Environmental Svcs. (TOC), Inc*., 528 U.S. 167, 190 (2000) (emphasis added). In fact, as detailed in the Doe Decl. at ¶¶ 5-10, this issue is on-going and has not been resolved, as Plaintiff has incurred unreimbursed out-of-pocket losses.

II. FACTUAL BACKGROUND

Plaintiff has been enrolled in a Coventry PPO health plan through his employer since August 2015. Compl., ¶ 56. From 2012 through November 2015, Plaintiff obtained his HIV medications, Prezcobix and Tivicay, from a local community pharmacy that specializes in serving HIV/AIDS patients. *See id*., ¶ 57. The pharmacists at his local pharmacy are very knowledgeable and understand the subtle nuances of HIV medications. *Id*., ¶ 63.

However, in November 2015 Plaintiff was told by a Coventry representative that he had to use Express Scripts in order to receive his HIV medications, despite being in the middle of a course of treatment. Compl., ¶ 57; Doe Decl. ¶ 5. Under the Program, if HIV/AIDS patients like Plaintiff do not obtain their specialty medications from Express Scripts, they must pay full price with no benefits—thousands of dollars or more each month—to purchase their HIV/AIDS medications from a community or specialty retail pharmacy where they can receive counseling from a pharmacist and other critical services. Compl., ¶ 3; Doe Decl., ¶ 6.

Plaintiff spent significant personal resources, time and energy trying to opt-out of the Program. Compl., ¶¶ 6, 37-38, 57-59, 61. Throughout December 2015, Plaintiff had numerous calls with Coventry representatives, some of which lasted over an hour, where he expressly requested to opt-out of the Program. *Id*., ¶¶ 37-38, 57, 59; Doe Decl., ¶ 6. Plaintiff was told by Coventry representatives as late as December 30, 2015 that the Program was mandatory and his only alternative was to purchase the medications at his own cost. *Id*., ¶¶ 37, 38; Doe Decl., ¶ 8. Plaintiff's pharmacist also told Plaintiff that he either had to use the mail-order pharmacy or pay full price for his HIV medications if he continued to obtain them from his pharmacy. *Id*., ¶¶ 39, 59; Doe Decl., ¶ 6.

Plaintiff was also "forced to go out-of-pocket to purchase medications at increased personal cost as a result of the … Program." *Id*., ¶ 75; Doe Decl., ¶7. Since he needed his HIV medications, on or about December 16, 2015 Plaintiff ordered them through Express Scripts. Doe Decl., ¶ 7. Plaintiff paid a co-pay of $200 (due to an error made by Coventry, Plaintiff was erroneously charged a *second* $200 co-pay, which required Plaintiff to spend even more time to get reversed). *Id*. Making matters worse, Plaintiff then experienced a delay in shipment when

Coventry miscalculated the date upon which his medications were due to be refilled. *Id.*, ¶ 7. Additionally, Express Scripts refused to honor credits Plaintiff received from his community pharmacy for manufacturer rebates, resulting in even more out-of-pocket losses. Compl., ¶ 59. Plaintiff's employer sent a written request in late December 2015 appealing Coventry's decision to deny his opt-out request, which was refused. Doe Decl., ¶ 9.

On December 22, 2015, Plaintiff filed the Complaint on behalf of himself and all others similarly situated, asserting violations of: (1) anti-discrimination provisions of the Patient Protection and Affordable Care Act ("ACA") under ACA Section 2705 (42 U.S.C. § 300gg-4), and (2) ACA Section 1557 (42 U.S.C. § 18116); (3) unlawful reduction of benefits under ERISA (29 U.S.C. § 1132(a)(1)(B)), (4) breach of fiduciary duties under ERISA (29 U.S.C. § 1109(a)); (5) failure to provide full and fair review required by ERISA (29 U.S.C. § 1132(a)(3)); (6) failure to provide accurate evidence of coverage ("EOC") and summary plan description ("SPD") under ERISA (29 U.S.C. §§ 1132(a)(3) and (c)); and (7) violation of Americans with Disabilities Act ("ADA") (42 USCA § 12101, *et seq.*).

When Plaintiff filed the Complaint, there was no indication that "Coventry formularies were already in the process of being modified." *See* Mot. at 3, citing Engelhardt Decl., ¶ 4. While Coventry claims that since January 1, 2016, Coventry placed all HIV/AIDS medications on non-specialty tiers and all plan members can obtain HIV/AIDS medications (except for the drug Fuzeon) through local in-network retail pharmacies (Mot. at 3; Engelhardt Decl., ¶¶ 6-8), such a claim is directly contrary to the well-pleaded facts in the Complaint at ¶¶ 37-40, 59. *See also* Doe Decl., ¶¶ 5-6, 8-10, where he explains both he and his company's plan benefits administrator were told the exact opposite, and confirmed he was obligated to use the Program just *two days* before it was supposedly to end. Plaintiff never received any written communications from Coventry confirming that the mandatory mail-order requirement ended as of January 1, 2016.

What's worse, even as of mid-March 2016, he is *still* receiving calls from Express Scripts to use mail-order for his drugs. And on March 22, 2016, his partner, who is on the same policy, received a written demand from Express Scripts stating he had to fill another HIV/AIDS specialty medication (Truvada) *by mail-order* or be charged full price for his medication. Doe Decl., ¶¶ 5, 10, Ex. 1. These disputed factual issues cannot be resolved through this Motion. If anything, they demonstrate why the Court is in a position to provide redress since (just as with its parent company Aetna) Coventry's claims cannot be squared with Plaintiff's current experience.

Further supporting that these issues are ripe, after the Complaint was filed, on December 24, 2015 Coventry's counsel emailed Plaintiff's Counsel claiming that the mail-order requirement would not apply to HIV/AIDS medications as of January 1, 2016 (just as Aetna claimed the previous year, *see* n. 3). Declaration of Alan Mansfield ("Mansfield Decl."), ¶ 2. After several emails, on December 31, 2015, Plaintiff's counsel requested Coventry provide a declaration from its CEO supporting the claim that the Program was ending on January 1, 2016. Mansfield Decl., ¶ 3, Ex. 1. On January 4, 2016, Coventry's counsel said they would consider doing so. *Id.*, ¶ 3. Despite repeated subsequent requests, Coventry's counsel never sent the declaration. *Id.*, ¶ 4. In fact, it was not until just a few hours before Coventry filed its Motion almost two months later that Coventry's counsel sent Plaintiff's counsel a copy of a declaration. However, it was not from Coventry's CEO, but rather from Elizabeth Engelhardt, a mid-level employee with Aetna, not Coventry, filed in support of this Motion and claiming Coventry had changed its formularies as of January 1, 2016. Mansfield Decl., ¶ 5. Plaintiff objects to the consideration of her Declaration as she does not appear to be the person most qualified to make such claims for Aetna, let alone for Coventry. *See* Mansfield Decl., ¶¶ 5-6, Ex. 2. And since Ms. Engelhardt previously claimed under penalty of perjury in the *Doe v. Aetna* action that the mandatory mail-order program had been suspended by Aetna (including, presumably, for all its subsidiaries) as of either January 1, 2015 or July 1, 2015 (see n. 2), there is a significant question whether her current Declaration is contradicted by her prior Declaration. *See id.*, ¶ 5.

III. LEGAL STANDARD

Dismissal under Federal Rule of Civil Procedure 12(b)(1) is "extremely difficult" to obtain. *Garcia v. Copenhaver, Bell & Assocs., M.D.'s, P.A.*, 104 F.3d 1256, 1260 (11th Cir. 1997) (citation omitted). Coventry brings a "factual attack," going far beyond the allegations of the Complaint. *Id.* at 1261. This Court should deny Coventry's Rule 12(b)(1) Motion because, when considering the facts in the Complaint, the disputed Engelhardt Decl. filed with the Motion, and the Doe Decl. and Mansfield Decl. filed concurrently herewith, Plaintiff has standing to pursue such claims. Particularly when Coventry's parent company made the same claims over a year ago, and the facts turned out not to be as represented (see Mansfield Decl., Ex 2), that Coventry supposedly was obligated to suspend the Program back in June 2015 and failed to do so (Compl., at ¶ 2) and that Plaintiff has significant evidence such conduct is in fact on-going (Doe Decl., ¶¶ 5, 10, Ex. 1), this Court cannot accept such claims at face value. Since

Plaintiff's allegations and supplemental Declarations present facts to the contrary, the Court cannot grant this Motion without the benefit of any discovery to test their veracity.[3]

Courts also view Rule 12(b)(6) motions with disfavor. *Brooks v. Blue Cross & Blue Shield of Fla., Inc.*, 116 F.3d 1364, 1369 (11th Cir. 1997). A complaint should be upheld if it is "supported by [a] showing [of] any set of facts consistent with the allegations in the complaint." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 563 (2007). Since the Complaint contains enough facts to sufficiently state a claim for relief under the ACA, ERISA, and the ADA, this Court should deny Coventry's Rule 12(b)(6) Motion.

IV. PLAINTIFF HAS STANDING TO SEEK INJUNCTIVE RELIEF

Coventry challenges Plaintiff's standing, claiming it ended the Program on January 1, 2016. Mot. at 5-6. However, standing is examined as of the time a claim is filed, not based on subsequent developments. Plaintiff's standing is unquestionable given the financial harm Plaintiff already suffered, as well as the immediate threat of future harm under the Program at the time he filed the Complaint. Compl, ¶¶ 37-39, 57-59: Doe Decl., ¶¶ 5-7. It also appears Express Scripts, the mandatory mail-order provider, still believes the Program is in effect; at a minimum, it still needs to be fixed. And no notice of Coventry's change has been sent out to affected persons. *See* Compl., ¶ 67; Doe Decl. at ¶¶ 5, 10.

As interpreted by the U.S. Supreme Court, Article III of the U.S. Constitution requires that (1) a plaintiff has suffered an actual or threatened injury as a result of the defendant's alleged illegal conduct; (2) the injury is "fairly traceable" to the defendant's action; and (3) the injury is likely to be redressed by a favorable decision. U.S. Const. Art. III, § 2; *Valley Forge Christian Coll. v. Americans United for Separation of Church and State*, 454 U.S. 464, 472, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982). "Article III standing must be determined as of the time at which the plaintiff's complaint is filed." *Focus on the Family v. Pinellas Suncoast Transit Auth.*, 344 F.3d 1263, 1275 (11th Cir. 2003) (emphasis added) (citations omitted); *see also Charles H.*

[3] *See, e.g., Lawrence v. Dunbar*, 919 F.2d 1525, 1530 (11th Cir. 1990) (when the jurisdictional basis of a claim is intertwined with the merits, the district court should apply a Rule 56 summary judgment standard when ruling on a motion to dismiss which asserts a factual attack on subject matter jurisdiction); Federal Rule of Civil Procedure 56(c)(4) ("An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated").

Wesley Educ. Found., Inc. v. Cox, 408 F.3d 1349, 1352, n. 3 (11th Cir. 2005) ("Standing ... is not altered by events unfolding during litigation.").

When Plaintiff filed his Complaint, Plaintiff had spent a significant amount of time and effort trying to opt-out of the Program in order to avoid threats to his health and privacy, and was repeatedly told by Coventry employees that he could not opt-out of the Program even two days before the Program supposedly was no longer going to be in effect. Compl., ¶¶ 37, 57-58; Doe Decl., ¶¶ 6-9; *see, e.g.*, *Walker v. City of Lakewood*, 272 F.3d 1114, 1124–25 (9th Cir. 2001) (a plaintiff who "lost ... time spent responding to the" defendant's wrongful conduct and the lost time is "at least ... indirectly attributable to the [defendant's] actions" suffered sufficient injury for Article III "standing"). And as set forth in Doe. Decl. ¶ 10, such issues are on-going. Plaintiff also was forced to order his prescriptions through the mail-order pharmacy on or about December 16, 2015 and he paid a $200 co-pay that he would not have had to pay but for the Program. Doe Decl., ¶ 7. Plaintiff's injury also threatened his privacy as he had to seek intervention from his employer and reveal his medical situation to try and ameliorate the situation, which they were unable to do. *See* Compl., ¶¶ 13-27; Doe Decl., ¶ 9. Thus, Plaintiff has "suffered an actual or threatened injury as a result of the defendant's alleged illegal conduct." U.S. Const. Art. III, § 2. Such actual injury was not just "fairly traceable," it was directly traceable "to the defendant's action;" (*id.*) and such injury was "likely to be redressed by a favorable decision" (*id.*) – *i.e.*, in addition to monetary relief, the injunctive relief Plaintiff seeks would allow him and others to continue to obtain their life-saving medications in the manner most conducive to their health and privacy, receive written confirmation of the resolution of this issue, ensure the Program is in fact not going forward for all persons, and make sure medical records are corrected to ensure all affected persons receive no further communications from Express Scripts about the need to participate in the Program as to any HIV/AIDS specialty medications.

Plaintiff had no knowledge at the time he filed his Complaint that Coventry was allegedly planning on changing its formulary as of January 1, 2016. In fact, he was repeatedly told by Coventry employees that he had to obtain his medications by mail and that Coventry would not be abandoning the Program. Therefore, the threat that Plaintiff would be subject to the Program in the future was "real and immediate" and not "conjectural or hypothetical". *See* Compl., ¶¶ 6, 37-40, 57-59; Doe Decl., ¶¶ 5-7. Moreover, since filing the Complaint, Plaintiff was told he

could not opt-out of the Program, he has never received notice from Coventry of the alleged change, as recently as March 11, 2016, he received a telephone call from Express Scripts claiming it was time to refill his medications through the mail-order program, and on March 22, 2016 his partner on the same plan received a written notice he was required to fill an HIV/AIDS specialty medication through mail-order. Doe Decl., ¶ 10, Ex. 1. Plaintiff has clearly shown, or if necessary can amend the Complaint to allege "a sufficient likelihood that he will be affected by the allegedly unlawful conduct in the future." *Houston v. Marod Supermarkets, Inc*., 733 F.3d 1323, 1328-29 (11th Cir. 2013).

The cases Coventry relies on are distinguishable, as in those cases the plaintiffs failed to plausibly allege facts demonstrating the likelihood of the defendants' future wrongful conduct *at the time they filed their complaints*. *See* Mot. at 5-6, *citing City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983) (plaintiff put in chokehold by police did not have standing to seek injunctive relief since the likelihood of being stopped, arrested, and placed in chokehold again was not imminent); *Dapeer v. Neutrogena Corp.*, 95 F. Supp. 3d 1366, 1374 (S.D. Fla. 2015) (plaintiff challenging sunscreen label failed to allege threat of future harm where he did not allege an intention to buy the sunscreen in the future, and, *at the time he filed his complaint*, defendant had corrected the label, which plaintiff acknowledged in his complaint); *Am. Humanist Ass'n, Inc. v. City of Ocala*, No. 5:14-CV-651-OC-32PRL, 2015 WL 5123274, at *9-10 (M.D. Fla. Aug. 31, 2015) (plaintiffs challenging a past prayer vigil did not show a real and immediate threat of a future harm where the complaint was "devoid of any allegation that another prayer vigil is scheduled or even that one is likely to be organized"). Where standing exists at the time of filing, but the defendant claims that standing has been negated by subsequent developments, such a claim must be denied.[4]

V. PLAINTIFF HAS ADEQUATELY STATED CLAIMS FOR RELIEF FOR VIOLATIONS OF THE ACA, ERISA, AND THE ADA

A. An Implied Private Right of Action Exists Under the Anti-Discrimination Provisions of the ACA That Coventry's Mail-Order Requirement Violates (Sections 1557 and 2705)

[4] Coventry's alternate argument that Plaintiff's claims have been rendered moot due to Coventry's change of heart is also misplaced. Given the lack of any notice to Plaintiff and plan members that the Program was supposedly ended, Coventry's counsel's failure to provide any Declaration from Coventry, Ms. Engelhardt's declaration failing to state whether notice was sent, and Express Scripts' communications to both Plaintiff and his partner in recent days indicating the Program is still going forward, Coventry has failed to meet its "*formidable burden* of showing that it is *absolutely clear* the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, supra*, 528 U.S. at 190 (emphasis added).

Coventry does not and cannot cite any controlling case law supporting its position that no private right of action exists under Plaintiff's two ACA anti-discrimination causes of action under Section 1557 (42 U.S.C § 18116) and Section 2705 (42 U.S.C. § 300gg-4). Several federal courts have recognized a private right of action under Section 1557. *See Rumble v. Fairview Health Servs.*, 2015 WL 1197415 at *7, n. 3 ("*Rumble*") (D. Minn. Mar. 16, 2015) ("Section 1557 provides Plaintiff with a private right of action to sue Defendants"); *Se. Pennsylvania Transp. Auth. v. Gilead Scis, Inc.*, 102 F. Supp. 3d 688, 698 (E.D. Pa. 2015) ("*Penn.*") ("Congress intended to create a private right of action for alleged violations of Section 1557"); *Callum v. CVS Heath Corporation*, 2015 WL 5782077 at *16-19, n. 3 (D.S.C. Sept. 29, 2015) ("*Callum*") (same). These courts reasoned that Congress intended to create a private right of action for violations of Section 1557 by incorporating four federal civil rights statutes (prohibiting race, sex, age, and disability discrimination) that have private rights of action, and holding that the "enforcement mechanisms provided for and available under" those four civil rights statutes apply to violations of Section 1557.[5]

The same U.S. Supreme Court test applied by the courts in *Rumble*, *Penn.*, and *Callum* to determine that Congress created a private right of action under Section 1557 requires a similar finding for Section 2705.[6] First, the Court must look to the plain language of the statute. *Rubin v. United States*, 449 U.S. 424, 430 (1981). Congress may create, either through express language or by implication, a private right of action to enforce federal law. *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). Section 2705 is titled "Prohibiting *discrimination* against individual participants and beneficiaries based on health status[.]" (emphasis added). Section 2705 also contains language evincing a "congressional intent to create new rights" (*Sandoval*, 532 U.S. at 289, 121 S.Ct. 1511): insurers "may not establish rules for eligibility (including continued eligibility) of any individual to enroll under the terms of the plan or coverage based on any of"

[5] Courts have recognized private rights of action under several statutes whose anti-discrimination provisions are expressly incorporated into the ACA (42 U.S.C § 18116), including title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d, *et seq.*), title IX of the Education Amendments of 1972 (20 U.S.C. § 1681, *et seq.*), the Age Discrimination Act of 1975 (42 U.S.C. § 6101, *et seq.*), and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794). *See, e.g., Gonzaga Univ. v. Doe*, 536 U.S. 273, 283–84 (2002); *Barnes v. Gorman*, 536 U.S. 181, 185 (2002); *Cannon v. University of Chicago*, 441 U.S. 677, 703 (1979).

[6] The mandates of Section 2705 apply to "a group health plan and a health insurance issuer offering group or *individual* health insurance coverage[.]" 42 U.S.C.A. § 300gg-4(a) (emphasis added). Coventry seems to argue that Section 2705 can only be enforced by group plan members through ERISA. This is incorrect as one federal statute cannot "preempt" another federal statute. *See Bacelli v. MFP, Inc.*, 729 F. Supp. 2d 1328, 1336 (M.D. Fla. 2010). ERISA thus does not provide the exclusive medium for recovery for any possible claim under federal law.

the enumerated "health status-related factors," including disabilities.[7] Like Section 1557, Section 2705 incorporates civil rights principles. It would be incongruous for Congress to create a private right of action under Section 1557 and not one under Section 2705 and Coventry cites no case law or legislative history that would support a contrary conclusion.

Second, courts look to a statute's legislative history to ascertain Congress' intent. "Section 2705 implicates a central goal of the ACA: to end discrimination against those with pre-existing conditions." Compl., ¶ 82. Statements by Congress, as well as the President's HIV/AIDS plan,[8] evidence a legislative intent to address abuses in the health insurance industry and discrimination, including specifically against HIV patients. The ACA "is one of the most important pieces of legislation in the fight against HIV/AIDS in our history." Dep't Health & Human Serv., *The Affordable Care Act Helps People Living with HIV/AIDS*, https://www.aids.gov/pdf/how-does-the-aca-help-plwh.pdf (last visited March 10, 2016) ("HHS"). In order for these protections to work, private litigants must have the right to enforce Section 2705. Nothing in 42 U.S.C. § 300gg-22 regarding administrative enforcement precludes the Court from finding a private right of action.

Moreover, private enforcement is necessary to ensure anti-discrimination laws are enforced, since federal agencies charged with enforcing civil rights laws are "consistently underfunded and understaffed" (Mark Bolin, *The Affordable Care Act and People Living with HIV/AIDS: A Roadmap to Better Health Outcomes*, 23 Annals Health L. 28, 29 (2014)):

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[7] *See Schwier v. Cox*, 340 F.3d 1284, 1291–92 (11th Cir. 2003) (holding that the Privacy Act, which stated that "[i]t shall be unlawful for any Federal, State or local government agency to deny to any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number," clearly conferred "a legal right on individuals: the right to refuse to disclose his or her [social security number] without suffering the loss 'of any right, benefit, or privilege provided by law'"); *Shotz v. City of Plantation, Fla.*, 344 F.3d 1161, 1167–68 (11th Cir. 2003) (finding "rights-creating language" in a statute that provided that "[n]o person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter," because the statute "specifically identifie[d] a protected class and expressly confe[rred] on that class a right not to be retaliated against").

[8] *See, e.g.*, 156 Cong. Rec. H1854-02 (2010) (statement of Rep. Steny Hoyer, House Majority Leader) ("It is more control ... [f]or consumers, and less for insurance companies. It is the end of discrimination against Americans with preexisting conditions, and the end of medical bankruptcy and caps on benefits."); 155 Cong. Rec. S12153-02 (daily ed. Dec. 2, 2009) (statement of Sen. Cardin) (the ACA "will help achieve the goals outlined by the theme of this year's World AIDS Day campaign of 'universal access and human rights.' First and foremost, the bill eliminates discrimination based on pre-existing conditions. Individuals with HIV will no longer be rejected from insurance coverage because of their disease"). *See also* Implementing the National HIV/AIDS Strategy for the United States for 2015-2020, Exec. Order No. 13703, 80 FR 46181 at *46182 (July 30, 2015) ("In light of recent progress and continuing challenges, we must continue to improve our national effort to reduce new HIV infections, increase access to care for people living with HIV, reduce HIV-related disparities and health inequities").

> In bringing a civil rights suit and obtaining an injunction, the plaintiff was seen to act "not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority."[] The suit would address behavior that no doubt infringed upon others' civil rights as well.[] Such litigation was necessary to achieve adequate civil rights enforcement, particularly for statutes where Congress intended this blend of public and private action.[]

Sarah G. Steege, *Finding A Cure in the Courts: A Private Right of Action for Disparate Impact in Health Care*, 16 Mich. J. Race & L. 439, 445-46 (2011) (footnotes and citations omitted).[9]

Allowing private litigants to enforce the ACA's anti-discrimination provisions is consistent with the intent of the ACA to ensure access to coverage for all. "Historically, people living with [HIV/AIDS] have had a difficult time obtaining private health insurance and have been particularly vulnerable to insurance industry abuses." HHS, *supra*. Recognizing that HIV/AIDS patients "have suffered disproportionately from lack of health care access, Congress included a number of consumer protections [in the ACA] prohibiting health insurance providers from denying [HIV/AIDS patients] coverage." Bolin, *supra*, at 29 (citation omitted). Coventry cites one opinion for its claim that Plaintiff cannot bring a claim under Section 2705, but it is a reversed in part decision that does not address Section 2705 or issues relating to discrimination. *See* Mot. at 6-7, quoting *N.Y. State Psychiatric Ass'n, Inc. v. UnitedHealth Grp.*, 980 F. Supp. 2d 527, 544 (S.D.N.Y. 2013), *aff'd in part, vacated in part, remanded*, 798 F.3d 125 (2d Cir. 2015) (finding that insurers were not pled as defendants and thus could not be held liable for violating ACA and ERISA regulations governing minimum procedural rights during an appeal of a denial).

B. Plaintiff Has Stated a Claim Under Section 1557 of the ACA (42 U.S.C. § 18116)

As Plaintiff has adequately pled a violation of Section 1557 (s*ee* Compl., ¶¶ 92-94), Coventry's challenge to this claim is inappropriate at this stage. Section 1557 provides three separate bases to establish a violation: "[A]n individual shall not, on the ground prohibited under … the Rehabilitation Act of 1973 [], be *excluded from participation* in, be *denied the benefits* of,

[9] *See also* Juliet Stumpf & Bruce Friedman, *Advancing Civil Rights Through Immigration Law: One Step Forward, Two Steps Back?*, 6 N.Y.U. J. Legis. & Pub. Pol'y 131, 135 (2003) (finding that private actions are particularly important when the government is "less likely to exercise its power on behalf of those who, lacking a majority in a democratic society, have less influence on the political process"); Kathleen Kim, *The Trafficked Worker as Private Attorney General: A Model for Enforcing the Civil Rights of Undocumented Workers*, 1 U. Chi. Legal F. 247, 254 (2009) (finding that when the government enforces civil rights laws without private assistance, many violations go unpunished).

or be *subjected to discrimination* under, any health *program or activity*, any part of which is receiving Federal financial assistance...." 42 U.S.C. § 18116(a) (emphasis added). The Rehabilitation Act prohibits discrimination "solely by reason of [a person's] disability[.]" 29 U.S.C. § 794(a).[10] Coventry does not challenge it is a "health program or activity"[11] that "receives Federal financial assistance"[12] subject to Section 1557 (*see* Mot. at 13-14).

In *Callum*, *supra*, 2015 WL 1197415, at *23, the district court found that the plaintiff, an African-American male who suffered from Post-Traumatic Stress Disorder who was denied his request to shop at CVS after-hours when no other customers were present, adequately pled a claim against CVS under Section 1557 by alleging that CVS denied plaintiff his right to have his prescriptions filled at pharmacy due to his race, gender, and disability. Similarly, in *Rumble*, *supra*, 2015 WL 1197415, at *15, the court found that plaintiff, a transgender man, alleged facts sufficiently demonstrating that an emergency room doctor and hospital excluded Rumble from benefits under his plan in addition to other violations of Section 1557 where the plaintiff alleged that the emergency room doctor treated him with hostility, conducted an aggressive exam, and the emergency room made him wait for seven hours to be treated because he was transgender. Here, Plaintiff's Complaint alleges in detail how Coventry, by virtue of the Program:

- ***Excludes* HIV/AIDS patients from coverage.** The Program excludes patients from appropriate prescription coverage based on their medical condition, including such "activities" as obtaining their medications at retail pharmacies and consultations by knowledgeable pharmacists (Compl. ¶¶ 4, 7, 13-27);

- ***Denies* these patients the benefit of their health care plans' drug benefit.** As noted above and in the Complaint, the Program denies Class Members access to essential in-network drug benefits, including the direct face to face interaction with pharmacists of their choice (*id*., ¶¶ 3, 66, 94); and

- ***Discriminates* against these patients.** Patients must either pay full price for their medications at a retail pharmacy or risk their privacy and health by obtaining medications by mail. This is functionally no different than a rule that discriminates based on those patients' medical condition. The Program disproportionally impacts patients with

[10] As alleged in the Complaint (¶ 142), the U.S. Supreme Court has determined that HIV/AIDS is a "disability." *Bragdon v. Abbott*, 524 U.S. 624, 655 (1998).

[11] A "health program or activity" includes any entity providing "health-related insurance coverage." *See* Nondiscrimination in Health Programs and Activities, 80 FR 54172-01 (to be codified at 45 C.F.R. § 92.4).

[12] Coventry plans receive a wide range of federal funding: through Medicaid programs, state health exchanges, and tax credits/deductions for self insured plans or any employer-sponsored plans. *See Rumble*, 2015 WL 1197415, at *12 (concluding "as long as part of an organization or entity receives federal funding or subsidies of some sort, the entire organization is subject to the anti-discrimination requirements of Section 1557").

HIV/AIDS due to serious privacy concerns specifically related to the mail delivery of HIV/AIDS specialty medications (*id.*, ¶¶ 28-31).

Coventry claims that Section 1557 cannot provide Plaintiff a remedy since he is enrolled in a Coventry plan and can still get prescription coverage, "albeit not through the provider of his choice[.]" Mot. at 14. As set forth above, that is the point–Plaintiff has adequately stated a claim that the Program excludes patients from coverage and effectively denies them access to a key component of their benefits. Coventry cites to *Alexander v. Choate*, 469 U.S. 287, 301 (1985), for the proposition that the "Rehabilitation Act requires only that disabled individuals 'be provided with meaningful access to the benefit' offered." Mot. at 14. However, Coventry omits the opinion's crucial next sentence: "*The benefit itself, of course, cannot be defined in a way that effectively denies otherwise qualified [disabled] individuals the meaningful access to which they are entitled; to assure meaningful access, reasonable accommodations in the grantee's program or benefit may have to be made.*" *Alexander*, *supra*, 469 U.S. at 301 (emphasis added). Plaintiff includes such allegations in the Complaint. Compl., ¶¶ 92-94.

Coventry cites no rulings that support its argument that the "classification of HIV medications on the specialty tier of Coventry's formulary alone cannot give rise to a claim for discrimination" under Section 1557. Mot. at 14. In *Penn.*, insureds whose insurance companies denied coverage of a Hepatitis C drug failed to state a viable claim under Section 1557 where there were no allegations that manufacturer changed the price of its drugs depending on whether a potential consumer had Hepatitis C. Here, Plaintiff has alleged that the Program was designed and implemented in part to target HIV/AIDS patients. Compl., ¶¶ 28-31. Similarly, *Quinones v. UnitedHealth Grp. Inc.*, 2015 WL 6159116 (D. Haw. Oct. 19, 2015), cited by Coventry, is distinguishable. In *Quinones*, the court found that the plaintiff did not allege discrimination under the Rehabilitation Act where the complaint stated that the defendant's refusal to authorize coverage of plaintiff's Personal Mobility Device was discrimination that "*occurred not as a part of plan design* ... but as a result of discriminatory choices in how the benefits were administered[.]" *Id.* at *1-3 (emphasis added). Here, Plaintiff alleges the discrimination occurred as a part of Coventry's plan design. Compl., ¶¶ 93-94.

C. Plaintiff Has Stated a Claim Under ERISA

1. Plaintiff's Section 1132(a)(1)(B) Claim Is Proper

Coventry argues that Plaintiff's claim under Section 1132(a)(1)(B) should be dismissed because Plaintiff has not exhausted administrative remedies and because Plaintiff has received all of the relief to which he is entitled. Neither argument provides a basis for dismissal. As detailed in the Complaint, Plaintiff diligently attempted to resolve this matter with Coventry prior to initiating this action, spending hours on the phone with Coventry representatives, to no avail. Compl., ¶¶ 6, 37, 57. Coventry representatives told Plaintiff he could not opt-out and his only alternatives were to participate in the Program or pay for the drugs himself. Compl. ¶¶ 38, 59. Furthermore, if necessary Plaintiff could amend his Complaint to further allege his employer sent a written request to appeal this decision, which was also denied, and as a result he has exhausted his options. Doe Decl., ¶ ¶6, 9.

Even if the Court finds Plaintiff has not alleged he exhausted all administrative remedies, the Court has "discretion to excuse the exhaustion requirement" because "resort to administrative remedies would be futile or the remedy inadequate." *Counts v. Am. Gen. Life and Acc. Ins. Co.*, 111 F.3d 105, 108 (11th Cir. 1997). Exhaustion of administrative remedies would have been futile here, because, as alleged in the Complaint and documented in the Doe Decl., Coventry had a stated policy and practice that would have preordained the outcome of any administrative appeal. Plaintiff and enrollees were uniformly told that the only alternatives were to participate in the Program or to pay for these medications and refused all opt-out requests. Compl., ¶¶ 6, 8, 31, 59. Courts have frequently recognized the futility of appealing an across-the-board policy or fixed interpretation of the Plan. *See Rosario v. King & Prince Seafood Corp*., 2006 WL 2367130, at *13 (S.D. Ga. Mar. 7, 2006) (finding administrative review would have been futile where the claims arose out of a payment policy that had been consistently applied); *Berger v. Edgewater Steel Co.*, 911 F.2d 911, 917 (3d Cir. 1990) (finding that blank denial weighed "in favor of applying the futility exception"); *Corsini v. United Healthcare Corp.*, 965 F. Supp. 265, 269-70 (D.R.I. 1997) (finding it "inconceivable that resort to the administrative review process would result in anything other than a denial of the plaintiffs' claims" where "the challenged practice represented a long-standing policy that had been applied consistently").

The futility of appeal is most forcefully demonstrated by Coventry's continued stance that Plaintiff received all the benefits to which he is entitled because the underlying plan permits the Program and does not require an opt-out option. Coventry would obviously have taken the same position on appeal. Under such circumstances, exhaustion should be excused:

> The PBGC is now administering and unequivocally states in its amicus brief that the plaintiffs are not entitled to an annuity under the terms of the Plan. Thus, we are fully apprised of the administrator's expertise and its decision as to the merits of the plaintiffs' claim. Therefore, we will waive the exhaustion requirement and address the merits of the plaintiffs' benefits claim.

Horan v. Kaiser Steel Ret. Plan, 947 F.2d 1412, 1416 (9th Cir. 1991). *See also Unger v. US W., Inc.*, 889 F. Supp. 419, 424 (D. Colo. 1995) ("Although, there may be some benefit derived from permitting trustees or fiduciaries to initially interpret a plan, where as here, the fiduciaries have already determined the meaning of the Plan, there is minimal or no benefit to be gained from administrative exhaustion"). In this situation, requiring Plaintiff to "exhaust an administrative scheme would [have been] an empty exercise in legal formalism." *Perrino v. S. Bell Tel. & Tel. Co.*, 209 F.3d 1309, 1318 (11th Cir. 2000).

Likewise, Coventry errs in arguing that Plaintiff's claim fails because he has not alleged a denial of benefits. According to Coventry, Plaintiff's claim fails because "[t]here is no allegation that Plaintiff sought and obtained benefits from a local pharmacy, filed a claim with Coventry, and was denied payment for that claim." Mot. at 8. Such allegations are not required especially where, as here, Plaintiff was told he would be responsible for the full cost of thousands per month if he obtained his medications at a retail pharmacy. He also can allege he already has suffered a financial loss. Compl., ¶¶ 39, 59; Doe Decl. at ¶¶ 6-7. Pursuant to 29 U.S.C. § 1132(a)(1)(B), a participant or beneficiary "can bring suit seeking provision of [denied] benefits …, bring suit generically to 'enforce his rights' under the plan, or to clarify any of his rights to future benefits." *Aetna Health Inc. v. Davila*, 542 U.S. 200, 210 (2004). Plaintiff has alleged that he has been denied the benefit and right to use community pharmacies on an in-network basis, has been told by Coventry he cannot do so, and that Express Scripts is still acting as if he and his partner are subject to the Program. Compl., ¶¶ 37-40, 57, 59; Doe Decl. at ¶¶ 6-10. Coventry has effectively denied Plaintiff the prescription medication benefit to which he is entitled under the Plan. Plaintiff seeks to enforce his rights under the Plan and to clarify his right to future benefits. Plaintiff therefore has stated a claim under 29 U.S.C. § 1132(a)(1)(B).

2. Plaintiff Has Stated a Claim For Violation of 42 U.S.C. § 300gg-4

Coventry argues that Plaintiff's claim under 42 U.S.C. § 300gg-4 (Section 2705 of the Affordable Care Act) should be dismissed "because Section 300-gg applies only to exclusions from enrollment and Plaintiff is enrolled in a Coventry plan." Mot. at 8-10. However, Section

2705 provides, a health plan "may not establish rules for [1] *eligibility* (including *continued eligibility*) of any individual to enroll under the terms of the plan [2] *or coverage* based on … health-status factors…." 42 U.S.C. § 300gg-4(a) (emphasis added). Coventry claims its position is based on the plain language of the statute. But Coventry fails to address the applicable federal regulations that make clear that rules for "eligibility" include, *inter alia*, "rules relating to '[b]enefits (including rules related to covered benefits, *benefit restrictions*, and *cost sharing mechanisms* such as coinsurance, copayments and deductibles'"). 29 C.F.R. 2590.702(b)(1)(ii)(F). Discriminatory benefit restrictions like those at issue in this action violate 42 U.S.C. § 300gg-4(a), and do so here because the Program puts into question Plaintiff's continued eligibility to receive the same package of benefits.

Moreover, Section 2705's non-discrimination requirement is not limited to eligibility, but also independently prohibits discriminatory "coverage" rules based on health status-related factors in determining *terms of coverage*. Benefit changes providing qualitatively different coverage for patients with HIV/AIDS and other chronic illness (*see* Compl., ¶ 83) are doubly prohibited under Section 2705, and thus improper.

3. Plaintiff Has Stated a Claim for Breach of Fiduciary Duty

Coventry contends that Plaintiff cannot state a claim for breach of fiduciary duty because plan design decisions are not "fiduciary" decisions. First, Coventry's argument misconstrues Plaintiff's allegations. Plaintiff has alleged that Coventry serves as a fiduciary and is given exclusive discretion to interpret benefits, terms, conditions, limitations, and make factual determinations related to the health plan's benefits (for example, whether opting out of the Program is an option). Plaintiff has sufficiently alleged the fiduciary status of Coventry. Compl. ¶ 106. *See Hamilton v. Allen-Bradley Co., Inc.*, 244 F.3d 819, 826 (11th Cir. 2001). Plaintiff has also alleged that Coventry repeatedly denied him the right to opt out of the Program. Compl. ¶¶ 6, 32, 37, 38, 40, 59. Whether Coventry was acting as a fiduciary in making this determination presents a disputed factual question.

Second, even if Plaintiff's only contention related to plan design, Coventry's argument would still fail because Coventry overlooks the key language in the cases it cites that hold that employers and *plan sponsors* do not act as fiduciaries when they adopt, modify, or terminate welfare plans. Mot. at 10. Plaintiff has not sued the sponsor of the plan. As the Court in *Alexander v. United Behavioral Health*, 2015 WL 1843830, at *7 (N.D. Cal. Apr. 7, 2015)

recently noted, "[w]hile a plan can act as a settlor, setting the terms of coverage and determining the scope of the plan, it is less clear that a third party administrator can play that role." In *Snow v. Boston Mut. Life Ins. Co.*, 590 Fed. Appx. 832, 836 (11th Cir. 2014), the Court rejected the plaintiff's argument that the insurer was a "Plan Administrator" simply because the insurer drafted all plan documents. The court noted that "the design and adoption of an ERISA plan is a settlor function," citing *Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996), where the court "explain[ed] that when *plan sponsors* adopt, modify, or terminate ERISA plans 'they do not act as fiduciaries but are analogous to settlors of a trust.'" *Id*. (emphasis added).

Coventry also argues that Plaintiff cannot state a claim for breach of fiduciary duty because the relevant fiduciary duty is to the plan as a whole, not to individual participants, and any recovery must be for the plan as a whole. Mot. at 11. In support of its argument, Coventry cites 29 U.S.C. § 1109, but incorrectly cites 29 U.S.C. § 1132(a)(2). *Id.* As the court in *Castro v. Hartford Life and Acc. Ins. Co.*, 2011 WL 4889174, at *8 (M.D. Fla. Oct. 14, 2011), explains, the "two provisions of ERISA that provide a claim relief for breach of fiduciary duty [are] 29 U.S.C. § 1109 and 29 U.S.C. § 1132(a)(3)." As the court noted, Plaintiff "cannot bring a claim under section 1109 because the provision 'provides no relief to an individual plan beneficiary.'" *Id.* (quoting *Kennedy v. Met. Life Ins. Co.*, 357 F. Supp. 2d 1346, 1348 (M.D. Fla. 2005)). However, "The Supreme Court held in *Varity Corp. v. Howe*, 516 U.S. 489, 511-12 … that the 'catch-all' provision under section 1132(a)(3) could provide for an individual remedy for breach of fiduciary duty…." *Id.* In *Varity*, the Court affirmatively found that individual relief for breach of fiduciary duty is available under 29 U.S.C. § 1132(a)(3), as alleged in the Complaint at ¶ 142. *Varity*, 516 U.S. at 492, 507-515. ERISA thus provides individuals the ability to seek relief for breach of fiduciary duty.[13]

4. Plaintiff Has Stated a Claim for Full and Fair Review (Count 5)

For the reasons set forth in § B.1., Plaintiff's claim is not properly dismissed for failure to exhaust administrative remedies. Coventry's across-the-board refusal to permit members to opt out of the Program denied its plan members a "full and fair review" of their claims, as ERISA requires. 29 U.S.C. § 1133(2). A review is anything but "full and fair" when it consists of simply applying a blanket policy to deny any request for relief.

[13] As Coventry concedes, "Coventry is not moving for dismissal of the portion of Count 6 dealing with summary plan documents (SPDs) at this time." Mot. at 2, n. 1. However, Coventry provides no argument or authority for dismissal of Count 6 as it relates to EOCs either.

D. Plaintiff Has Stated a Claim Under the ADA

Contrary to Coventry's arguments (Mot. at 14-15), Plaintiff alleges discrimination on the basis of a disability in the full and equal enjoyment of a "place of public accommodation" under Title III of the ADA, which provides:

> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

42 U.S.C. § 12182(a). Plaintiff alleges he is HIV positive, which is a "disability" under the ADA (*Bragdon v. Abbott, supra,* 524 U.S. 624; 28 C.F.R. § 36.104), and that the Program discriminates against HIV/AIDS patients on the basis of their disability. Compl., ¶¶ 138-142; *see* § V.C., *supra.*

As a result of Coventry's discriminatory conduct, Plaintiff alleges the Program denies HIV/AIDS patients access to pharmacies, which are "places of public accommodation" under the ADA. 42 U.S.C. § 12181(7)(F); *Chabner v. United of Omaha Life Ins. Co.*, 225 F.3d 1042, 1047 (9th Cir. 2007); Compl., ¶¶ 143-149. Plaintiff alleges Coventry effectively "operates"[14] these places of public accommodation through its "direct and ongoing . . . contractual control over local community pharmacies" including the "out-of-network" status of those pharmacies for HIV/AIDS medications, which results in Class Members paying full-price for their medications and effectively bars them from using such places of public accommodation as monthly HIV drug costs are easily thousands of dollars. Compl., ¶¶ 3-4, 147. Thus, Coventry "ha[s] created a nexus . . . between a public accommodation and the disparity in benefits, services, facilities, privileges, advantages, and accommodations that [it] makes available to Class Members compared to other enrollees who are not currently prescribed specialty medications." *Id.* Such allegations properly state an ADA claim. *See Rendon v. Valleycrest Productions, Ltd.*, 294 F.3d 1279, 1283-84 (11th Cir. 1002) (barrier to access to place of public accommodation need not be physical).

[14] "The term 'operates' for the purpose of the ADA means a right to control the allegedly discriminatory conditions. The relevant inquiry is whether [the defendant] had control over the actions alleged to have resulted in the discrimination charged." *Zamora v. HealthTexas Medical Group et. al.* 34 F. Supp. 2d 433, 444 (5th Cir. 1998) (complaint alleged sufficient "control" by HMO over medical provider that contracted to provide services for HMO to state claim under ADA based on alleged discrimination in level of services provided disabled enrollee).

Coventry relies on an inapposite line of cases where plaintiffs alleging discrimination in insurance policy coverage provided through employers failed to show the requisite connection to an actual or physical place. *See* Mot. at 15, citing *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114-15 (9th Cir. 2000) (employer disability plan providing greater benefits for physical disabilities than for mental ones did not violate ADA since plaintiff did not show a "connection between the good or service complained of and an actual physical place").[15] Plaintiff is not alleging that an insurance company or its offices are the relevant "place of public accommodation." Coventry's reliance on *Rendon v. Valleycrest Prods., Ltd.*, 294 F.3d 1279 (11th Cir. 2002) (contestant hotline for people applying to be on television quiz show was a place of "public accommodation" within meaning of ADA) and *Access Now, Inc. v. Sw. Airlines, Co.*, 227 F. Supp. 2d 1312 (S.D. Fla. 2002) (blind plaintiffs failed to establish nexus between airline's website and physical place of public accommodation), is similarly misplaced. Plaintiff's allegations show a "connection" between Coventry's discriminatory action (implementing the Program) and an actual, physical "place of public accommodation" (denying access to local community pharmacies). Similarly, the cases to which Coventry cites to support its claim that Plaintiff has not alleged "any actionable discrimination" involve situations where differences in benefits were not alleged as disability-based distinctions.[16]

Coventry's assertion that this ADA claim fails under the "bona fide benefit plan" exception is also baseless. Under the exception, the "terms of a bona fide benefit plan … based on underwriting risks [or] classifying risks" are exempt from the ADA. 42 U.S.C. § 12201(c)(1). However, as Coventry acknowledges, the exception does not apply if "there are allegations or evidence that the plan is relying on this exemption as a 'subterfuge' to evade the ADA's goal of preventing discrimination on the basis of disability." Mot. at 16 (citing 42 U.S.C. § 12201(c), (c)(1) & (c)(2)). The allegations in the Complaint fall precisely under this caveat to the

[15] *Chabner*, *supra*, at 1047 (court found no connection between the good/service challenged and an actual physical place where plaintiff challenged insurer's "nonstandard premium" for insurance policy); *Ford v. Schering-Plough Corp.*, *supra* (disability benefits offered as part of employer's insurance plan does not qualify as public accommodation); *Van Hulle v. Pac. Telesis Corp.*, 124 F. Supp. 2d 642 (N.D. Cal. 2000) (insurance company in its capacity as administrator of employer-provided insurance plan was not "place of public accommodation").

[16] *See Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 677 (8th Cir. 1996) (emphasis added) (finding health plan's exclusion for infertility treatment not disability-based, noting "*[a] term or provision is 'disability-based' if it singles out a particular disability (*e.g., *deafness, AIDS, schizophrenia) [or] a discrete group of disabilities (*e.g., *cancers, muscular dystrophies, kidney diseases)…")*; *Chaudhry v. Neighborhood Health P'ship*, 2005 WL 6103746 at *5 (S.D. Fla. May 4, 2005) (change in plan benefits limiting number of physical therapy visits per year did not violate ADA as to persons with chronic lung disease since the change "does not target any specific person or disability").

exception, as Plaintiff alleges that Coventry's discriminatory acts are at odds with the ADA's goal of preventing such discrimination. *See, e.g.*, Compl., ¶¶ 1, 62, 66, 138, 145–51. How a Plaintiff might allege intentional discrimination based on disability, while simultaneously failing to "allege[] any facts suggesting a 'specific intent to circumvent or evade the statutory purpose' of the ADA" (Mot. at 16) is a puzzling question. *See Public Employees Ret. Sys. of Ohio v. Betts*, 492 U.S. 158, 166, 177 (1989) (placing the burden in an age discrimination case on the plaintiff to prove discriminatory intent, while also noting that "it is difficult to see how a plan provision that expressly mandates disparate treatment of older workers in a manner inconsistent with the purposes of the [Age Discrimination Employment Act] could be said not to be a subterfuge to evade those purposes"). The purpose of this "safe harbor" exception reinforces this idea, and confirms that Coventry is mistaken: "[t]he purpose of the safe harbor provision is to permit the development and administration of benefit plans *in accordance with accepted principles of risk assessment*." *Seff v. Broward County*, 778 F. Supp. 2d 1370, 1374 (S.D. Fl. 2011) (emphasis added). What Plaintiff is alleging is anathema to "accepted principles of risk assessment." *See* Compl., ¶¶ 139, 147.[17]

VI. CONCLUSION

Coventry's Motion should be denied. If this Court is inclined to grant any portion of the Motion, Plaintiff respectfully requests leave to file a First Amended Complaint.

Respectfully submitted,

DATED: March 28, 2016

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[17] The additional cases cited by Coventry are similarly unhelpful or irrelevant. *See EEOC v. Aramark Corp.*, 208 F.3d 266, 268–69 (D.C. Cir. 2000) (holding that a disability plan enacted "long before the ADA's 1990 enactment" could not fall within the subterfuge exception to the safe harbor exemption); *United Air Lines, Inc. v. McMann*, 434 U.S. 192 (1977) (holding that there could be no specific intent to circumvent or evade the statutory purpose of the Age Discrimination Employment Act when the plan in question was adopted before the Act's enactment, and rejecting a distinction between the Act itself and the purposes of the Act).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed with the Clerk of the Court via CM/ECF and served upon all counsel or parties of record via Electronic Notice of Filing on March 28, 2016.

/s/ John Gravante
John Gravante, III