

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

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**LINDEN CARE, LLC,**

*Plaintiff,*

*-against-*

**COMPLAINT**

Civil Action No. 1:15-CV-1335  
(BKS/CFH)

**EXPRESS SCRIPTS, INC.**

*Defendant.*

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Plaintiff Linden Care, LLC (“Linden Care”), by its attorneys, Damon Barclay, LLP, as and for its Complaint against Defendant Express Scripts, Inc. (“Express Scripts” or “ESI”), alleges as follows:

**INTRODUCTION**

1. This is an action arising from Defendants’ breach of contract, New York consumer protection laws and tortious interference with contract.

2. Linden Care, a New York pharmacy specializing in dispensing oncology pain medications, seeks injunctive relief to prevent irreparable harm to itself and hundreds of its patients throughout New York and the United States who need uninterrupted access to the rare pain medications dispensed by Linden Care.

3. Defendant is one of the nation’s largest pharmacy benefit managers, which not only administers the managed care plans and audits pharmacies such as Linden Care, but also operates its own pharmacy in direct competition with Linden Care and other retail pharmacies.

4. Wearing those multiple hats as auditor, enforcer and direct competitor, ESI has today – **with no advance notice** – forced Linden Care out of ESI’s pharmacy network based on a trumped-up charge that Linden Care is mailing drugs out of state purportedly in violation of contract.

5. Linden Care, however, is and has been operating in full compliance with its contract with ESI.

6. Linden Care requests that this Court order ESI not to terminate Linden Care from its pharmacy network and to allow Linden Care to continue to dispense drugs to its patients located in New York and other states.

**JURISDICTION AND VENUE**

7. This Court has original jurisdiction based upon complete diversity between the parties. This is a civil action between citizens of different states wherein the amount in controversy exceeds \$75,000.00, and, as such, this Court possesses subject matter jurisdiction of this controversy pursuant to 28 U.S.C. §§ 1332(a)(1).

8. This Court further has supplemental subject matter jurisdiction under 28 U.S.C. §1367 over Linden Care’s pendent claims under New York State law.

9. This Court has personal jurisdiction over Defendant ESI because, among other things, it regularly does business in the state of New York and in this judicial district, and because ESI has established minimum contacts with the forum, and the exercise of jurisdiction over ESI will not offend traditional notions of fair play and substantial justice.

10. Upon information and belief, ESI has voluntarily conducted business and solicited customers in the state of New York, including in this judicial district.

11. Upon information and belief, ESI has committed and continues to commit acts in violation of the claims asserted herein in the state of New York and in this judicial district.

12. Venue is proper in the United States District Court for the Northern District of New York under 18 U.S.C. §1965. ESI resides in, can be found in, has one or more agents in, and/or transacts or has transacted its affairs in this district and division.

**THE PARTIES**

**The Plaintiff**

13. Plaintiff Linden Care, LLC is located at 130 Crossways Park Drive, Woodbury, New York, is a pharmacy duly licensed by the state of and New York.

14. Linden Care is a retail pharmacy with a focus on pain management to meet the unique needs and challenges facing patients, their caregivers and practitioners.

15. Linden Care is licensed in 49 states and the District of Columbia and services the needs of patients and physicians in the highly regulated area of pain management.

16. Linden Care works closely with leading pain pharmaceutical manufacturers and pain management physicians to formulate patient management programs to facilitate prior authorization and best-in-class compliance to optimize treatment outcomes for patients.

17. Specialty services provided by Linden Care include pharmacy benefit coordination, obtaining prior authorization for pain medications, access to manufacturer co-pay or eVoucher programs, dispensing of brand drugs and honoring “do not substitute” with generics.

18. Linden Care’s specialized patient intake and care coordinators work with both physicians and insurance companies to reduce stress on patients and keep paperwork to a minimum. Linden Care’s experienced team always advocates for the patient and helps guide patients through the morass of red tape incumbent in today’s complex managed-care environment.

19. Linden Care engages with patients to provide initial counseling, review potential medication side effects and stress the importance of safety for not just the patient but their loved ones as well. Education by Linden Care help mitigate the risk of patient non-adherence and misuse and ensures that the provider’s treatment goals are achieved.

20. Linden Care understands the nuances of specialty medications, especially scheduled products, REMS products and the special handling needs they have. Linden Care provides refills and checkup reminders to ensure smooth and effective treatment maintenance.

21. These patients are typically quite sick and find it extraordinarily inconvenient, if not

impossible, to travel for such mundane activities as visiting their local pharmacy. They prefer, and in many instances their condition requires, that their medications come to them rather than they go to their medications.

22. Many of these medications are not stocked by pharmacies, as most cannot afford to keep these medications on hand. Additionally, since these drugs are narcotics, many pharmacies choose not to handle them because of the inherent risk of burglaries or robberies. In other words, it is too dangerous for many to handle. Market and safety considerations combine to make these medications relatively scarce to find on the general market. Linden Care has been willing and able to invest in sufficient inventory to cover its dispensing needs, incur the additional expense of providing for adequate security to its premises and provides immediate delivery to those in desperate need for pain relief. As such, Linden Care, which is registered as a pharmacy in 49 of the 50 states and the District of Columbia, has become well-known as a reliable and efficient provider of these medications in the medical community. The doctors refer their patients to Linden Care because they know that their patients will receive the medications they so desperately require without delay.

23. Linden Care employees have been specially trained to comply with the TIRF-REMS program. The Transmucosal Immediate Release Fentanyl (TIRF) Risk Evaluation and Mitigation Strategy (REMS) program is an FDA-required program designed to ensure informed risk-benefit decisions before initiating treatment, and while patients are treated to ensure appropriate use of TIRF medicines.

24. The purpose of the TIRF REMS Access program is to mitigate the risk of misuse, abuse, addiction, overdose and serious complications due to medication errors with the use of TIRF medicines, and Linden Care is one of a few pharmacies that provide drugs under the TIRF-REMS program.

25. The TIRF-REMS program requires trained staff members and immediate action to ensure prescriptions are processed the same day they are received; and generally requires Linden Care to respond to

more than 5,000 patient calls per week.

26. Linden Care also provides medication to elderly patients in a unit dose format in an effort to assist patients with the cumbersome task of remembering medications on a daily basis at particular times.

27. Without this service, many patients would be unable to conform with medication requirements and may ultimately find themselves in need of further medical attention.

### **The Defendant**

28. Upon information and belief, and at all times hereinafter mentioned, Defendant Express Scripts, Inc. was and is a Delaware corporation with its principal place of business located at One Express Way, St. Louis, Missouri.

### **FACTUAL ALLEGATIONS**

#### **A. Relationship Of The Parties.**

29. ESI is a pharmacy benefit manager (“PBM”) that administers health insurance plans in New York and throughout the United States, known as a pharmacy network.

30. Upon information and belief, ESI is one of the two largest PBMs in the United States.

31. As a PBM, ESI is an agent of the plans for which it is working.

32. On or about May 11, 2009, Linden Care entered into a Pharmacy Provider Agreement (“2009 Agreement”) with ESI.

33. Thus, by executing the 2009 Agreement, Linden Care became a member of ESI’s retail pharmacy network.

34. As a PBM, ESI regularly and extensively reviews and regulates the pharmacies in its network, including the imposition of extensive administrative, financial and operational requirements and intrusive

audits, both on-site and document-only “desk audits.”

35. Moreover, ESI administers different types of pharmacy networks. One is the retail pharmacy network that Linden Care joined through the 2009 Agreement. Another is a Mail Order network in which ESI authorizes its network pharmacies to dispense drugs throughout the United States.

36. ESI also wears another hat. Not only is it a PBM that regulates and reviews Linden Care, it also operates its own mail-order pharmacy, and thus is a direct competitor of Linden Care’s.

37. This dual role infuses ESI with an inherent conflict of interest, as it stands as both a pharmacy’s overseer and competitor. *See, e.g.*, PBM Compensation and Fee Disclosure, ERISA Advisory Council, available at <http://www.dol.gov/ebsa/publications/2014ACreport1.html> (“PBM are on both sides of a business transaction when they manage a formulary and serve as owners of a network of retail pharmacies, a mail order dispensing operation or a high-cost specialty drug pharmacy.”)

38. Upon information and belief, ESI has an incentive to squeeze the most lucrative prescriptions away from network pharmacies such as Linden Care and steer them to ESI’s own mail order pharmacy, regardless of patient well-being or fairness to its network retail pharmacies.

**B. ESI Failed to Provide Linden Care with Sufficient Notice Required by Contract and New York Statute.**

39. Under applicable New York State statutes, pharmacies are entitled to thirty (30) days notice of termination and a right to appeal. ESI violated those requirements here.

40. Earlier today, November 10, 2015, Linden Care received via overnight courier a letter from ESI dated November 9, 2015 stating that ESI was terminating Linden Care from its pharmacy network effective immediately (“Termination Letter”). A copy of the Termination Letter is annexed here as **Exhibit**

**A.**

41. Section 4803(b)(1) of the New York State Insurance Law provides that “An insurer shall not

terminate a contract with a health care professional for participation in the in-network benefits portion of the insurer's network for a managed care product unless the insurer provides to the health care professional a written explanation of the reasons for the proposed contract termination and an opportunity for a review or hearing as hereinafter provided.”

42. Section 4803(b)(2) of that statute further provides that the notice of the proposed contract termination must include: (i) the reasons for the proposed action; (ii) notice that the health care professional has the right to request a hearing or review, at the professional's discretion, before a panel appointed by the insurer; (iii) a time limit of not less than thirty days within which a health care professional may request a hearing or review; and (iv) a time limit for a hearing date which must be held within not less than thirty days after the date of receipt of a request for a hearing.

43. Section 4406-d(2) of the New York State Public Health Law has near-identical provisions for managed care plan terminations of Medicaid providers.

44. Here, ESI did not provide the required thirty (30) days notice, nor did it provide an opportunity for a hearing or review.

45. The 2009 Agreement provides also provides a notice period that was also violated by ESI.

46. Section 4.1 of the 2009 Agreement provides for a 90-day written notice period prior to a termination. ESI did not provide that notice prior to termination. An excerpt of the 2009 Agreement is annexed here as **Exhibit B**.

47. Instead, ESI purports to rely upon immediate termination provisions under Section 4.2(c) of the 2009 Agreement. However, as set forth below, that provision is inapplicable here.

48. Although ESI has not provided Linden Care with sufficient time to fully investigate the various issues addressed in the Termination Letter, even a cursory review reveals that the factual assertions

purporting to be the basis of the termination are unfounded.

49. For example, the Termination Letter states that Linden Care's license in Maryland expired on May 31, 2014. That is not correct. Annexed as **Exhibit C** is a copy of Linden Care's license in Maryland that clearly shows it is valid through May 2016.

50. In addition, ESI asserts that Linden Care has also mailed drugs to California without a license. Linden Care's initial review indicates that any shipments to California were *de minimis* and were sent to residents of other states where Linden Care is licensed and who were vacationing or otherwise in California on a temporary basis and needed uninterrupted access to their medications.

51. Linden Care is continuing to look into the other allegations made in the Termination Letter

**C. ESI's Awareness Of Linden Care's Dispensing Drugs Out Of State.**

52. Since Linden Care and ESI entered into the 2009 Agreement, ESI knew that Linden Care was dispensing drugs out of state via FedEx due to the fact it audited Linden Care's prescription dispensing as its PBM. ESI did not object to that practice, nor did it inform Linden Care that it considered "mail" to mean anything other than delivery service by or through the USPS.

53. In fact, Linden Care is not aware of any definition of "mail order" in the 2009 Agreement or the ESI Provider Manual.

54. Notably, upon information and belief, ESI's mail-order pharmacy dispenses drugs throughout the United States by overnight courier such as FedEx – the same practice it objects to when performed by Linden Care.

55. Thus, up until today, ESI did not raise any objection to Linden Care's practice of using FedEx to dispense drugs out of state.

**E. Linden Care and its Patients Will Suffer Irreparable Harm from ESI's Termination of Linden Care from the Pharmacy Network.**



56. If Linden care is terminated from the ESI pharmacy network, it will suffer irreparable harm, as will its patients.

*1. Linden Care's Patients Will Suffer Irreparable Harm In the Form of Acute Pain and Harm to Their Health*

57. A significant portion of the drugs dispensed by Linden Care consists of narcotic drugs that are not readily available at a local pharmacy.

58. Many of the drugs contain fentanyl and are used to manage breakthrough pain in adults with cancer who are opioid tolerant. As with all opioids, these drugs have addictive qualities, and patients who suddenly withdraw can become sick with withdrawal symptoms in addition to being overwhelmed with untreated pain.

59. These patients are typically quite sick and find it extraordinarily inconvenient, if not impossible, to travel for such mundane activities as visiting their local pharmacy. They prefer, and in many instances their condition requires, that their medications come to them rather than they go to their medications.

60. Many of these medications are not stocked by pharmacies, as most cannot afford to keep these medications on hand. Additionally, since these drugs are narcotics, many pharmacies choose not to handle them because of the inherent risk of burglaries or robberies. Market and safety considerations thus combine to make these medications scarce on the general market.

61. Linden Care, on the other hand, has been willing and able to invest in sufficient inventory to cover its dispensing needs, incur the additional expense of providing for adequate security to its premises and provides immediate delivery to those in desperate need for pain relief.

62. If Linden Care is required to cease and desist immediately, many patients are at risk for

withdrawal symptoms and overwhelming untreated pain.

2. *Linden Care Will Suffer Irreparable Harm to Its Business Relationship With Its Prescribing Physicians*

63. Linden Care, which is registered as a pharmacy in 49 of the 50 states and the District of Columbia, has become well-known as a reliable and efficient provider of these medications in the medical community.

64. Doctors refer their patients to Linden Care because they know that their patients will receive the medications they so desperately require without delay.

65. Prescribing physicians in the field of pain management also refer their patients to Linden Care because they know that Linden Care can provide “one stop shopping,” regardless of which health care plan a patient is a member of.

66. If Linden Care is terminated from ESI’s pharmacy network, prescribing physicians will face increased administrative burdens by having to split their referrals among Linden Care and other pharmacies, depending on which health plan a given patient is a member of.

67. Upon information and belief, some prescribing physicians will stop referring patients to Linden Care altogether.

3. *Linden Care Will Suffer Irreparable Harm to Its Business Relationship With Drug Manufacturers*

68. Linden Care not only has strong ongoing relationships with prescribing physicians, it also has become a trusted partner with drug manufacturers. Those relationships are in jeopardy if Linden Care is terminated from ESI’s pharmacy network.

69. Upon information and belief, if ESI terminates Linden Care, these drug manufacturers may stop using Linden Care as a dispensing pharmacy for their drugs.

4. *Termination by ESI Would Force Linden to Layoff Employees*

70. Linden Care currently employs more than 130 employees in positions ranging from pharmacists, insurance verification, intake, shipping, purchasing, processing, finance and compliance.

71. Linden Care currently dispenses millions of dollars in drugs under the ESI pharmacy network. If that revenue stream were suddenly stopped, ESI would have no choice but to eliminate jobs throughout its departments.

**FIRST CAUSE OF ACTION**  
**(Violation of New York State Insurance Law Section 4803(b))**

72. Linden Care repeats and re-alleges each of the foregoing allegations with the same force and effect as if set forth fully herein.

73. Section 4803(b)(1) of the New York State Insurance Law provides that “An insurer shall not terminate a contract with a health care professional for participation in the in-network benefits portion of the insurer’s network for a managed care product unless the insurer provides to the health care professional a written explanation of the reasons for the proposed contract termination and an opportunity for a review or hearing as hereinafter provided.”

74. Section 4803(b)(2) of that statute provides that the notice of the proposed contract termination must include: (i) the reasons for the proposed action; (ii) notice that the health care professional has the right to request a hearing or review, at the professional’s discretion, before a panel appointed by the insurer; (iii) a time limit of not less than thirty days within which a health care professional may request a hearing or review; and (iv) a time limit for a hearing date which must be held within not less than thirty days after the date of receipt of a request for a hearing.

75. As a pharmacy licensed by New York State, Linden Care is a health care professional for purposes of Section 4803 of the Insurance Law.

76. Here, ESI did not provide the required thirty (30) days notice, nor did it provide an opportunity for a hearing or review.

77. Accordingly, ESI is in violation of this section of the New York State Insurance Law, and the termination therefore is null and void.

**SECOND CAUSE OF ACTION**  
**(Violation of New York State Public Health Law Section 4406-d)**

78. Linden Care repeats and re-alleges each of the foregoing allegations with the same force and effect as if set forth fully herein.

79. ESI's immediate termination violates the provider rights embodied in the New York State Public Health Law Section 4406-d(2).

80. Specifically, the Public Health Law requires that prior to termination a provider receive a notice containing “. . . (ii) notice that the health care professional has the right to request a hearing or review, at the professional's discretion, before a panel appointed by the health care plan; (iii) a time limit of not less than thirty days within which a health care professional may request a hearing; and (iv) a time limit for a hearing date which must be held within thirty days after the date of receipt of a request for a hearing.” Pub. Health Law. § 4406-d(2)(b).

81. As a pharmacy licensed by New York State, Linden Care is a health care professional for purposes of Section 4406-d of the Public Health Law.

82. Here, ESI did not provide the required thirty (30) days notice, nor did it provide an opportunity for a hearing or review.

83. Accordingly, ESI is in violation of this section of the New York State Public Health Law, and the termination therefore is null and void.

**THIRD CAUSE OF ACTION**  
**(Breach of Contract)**

84. Linden Care repeats and re-alleges each of the foregoing allegations with the same force and effect as if set forth fully herein.

85. As set forth above, in or around the year 2009, Linden Care entered into a contract with ESI – the 2009 Agreement – to provide pharmacy services, including the dispensing of drugs, to members provided coverage for pharmacy benefits under health insurance plans.

86. Linden Care did in fact perform its obligations under the 2009 Agreement by dispensing drugs to members.

87. ESI has breached the terms of the 2011 Agreement by improperly terminating Linden Care’s membership without the required notice pursuant to Sections 4.1 and 4.2 of the 2009 Agreement and in violation of the thirty (30) day notice requirement under Section 4803(b) of the New York State Insurance Law and Section 4406-d(2) of the New York State Public Health Law;

88. Moreover, by entering into the 2009 Agreement with Linden Care, ESI made an express and/or implied promise that it would deal with Linden Care fairly and in good faith.

89. ESI breached its duty of good faith and fair dealing to Linden Care by demanding, for anticompetitive reasons, that Linden Care cease dispensing drugs out of state after making no objection to Linden Care dispensing out of state for nearly four years.

90. As the result of the foregoing breaches set forth herein, Linden Care’s patients are at risk, and Linden Care has been damaged due to lost revenues and goodwill as a result of being terminated from ESI’s retail pharmacy network.

**FOURTH CAUSE OF ACTION**  
**(Tortious Interference with Business Relations/Prospective Economic Advantage)**

91. Linden Care repeats and re-alleges each of the foregoing allegations with the same force and

effect as if set forth fully herein.

92. As previously set forth, Linden Care had existing and prospective business relations with third-parties such as patients, physicians and drug manufacturers as a result of its being a member of ESI's pharmacy network.

93. Upon information and belief, ESI was aware of Linden Care's relationships with these third-parties.

94. Upon information and belief, by terminating Linden Care's membership, ESI has intentionally interfered with these third-party relationships in an effort to steer them to ESI's own mail-order pharmacy.

95. Upon information and belief, ESI has acted in improper and dishonest means as termination of Linden Care's membership is in breach of the 2009 Agreement, without adequate foundation, and solely motivated by ESI's desire to control the mail-order dispensing in its network.

96. Upon information and belief, by terminating Linden Care's membership in ESI's pharmacy network by improper means, Linden Care's relationships with patients, physicians and drug manufacturers has been injured.

97. As a result of the termination of Linden Care's membership, Linden Care is no longer able to fill prescriptions for the thousands of patients it served under the 2009 Agreement.

98. Upon information and belief, prescribing physicians will face increased administrative burdens by having to split their referrals among Linden Care and other pharmacies, depending on which health plan a given patient is a member of. Moreover, some prescribing physicians will stop referring patients to Linden Care altogether.

99. Upon information and belief, drug manufacturers will stop using Linden Care as a dispensing

pharmacy for their drugs.

100. As the result of ESI's tortious interference with business relations and prospective economic advantage set forth herein, Linden Care has been damaged in an amount greater than \$75,000 due to lost revenues and goodwill as a result of being terminated from ESI's pharmacy network.

**JURY DEMAND**

101. Plaintiff demands a trial by jury on all issues so triable.

**WHEREFORE**, Plaintiff requests that this Court enter judgment against Defendant Express Scripts, Inc.:

1. Ordering ESI to revoke its termination of Linden Care from the ESI pharmacy network;
2. Awarding Linden Care the costs of this action and reasonable attorneys' fees; and
3. Awarding Linden Care such other and further relief as this Court may deem proper.

**DATED:** November 10, 2015

**BARCLAY DAMON, LLP**

By:                   /s Joseph A. Murphy                    
Joseph A. Murphy  
Bar Roll No. 517139

Linda J. Clark  
Bar Roll No. 301522

*Attorneys for Plaintiff*  
Office and Post Office Address  
80 State Street  
Albany, New York 12207-2830  
Telephone: (518) 429-4200

BARCLAY DAMON, LLP