IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

SHEET METAL WORKERS LOCAL NO. 20 WELFARE AND BENEFIT FUND, and INDIANA CARPENTERS WELFARE FUND, on behalf of themselves and all others similarly situated, Plaintiffs, v. CVS PHARMACY INC. and CAREMARK, L.L.C., Defendants.	Case No. 1:16-cv-00046-S
PLUMBERS WELFARE FUND, LOCAL 130, U.A., on behalf of itself and all others similarly, Plaintiffs, v. CVS PHARMACY INC. and CAREMARK, L.L.C., Defendants.	Case No. 1:16-cv-00447-S

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

[REDACTED VERSION]

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I. INTRODUCTION

Prior to 2008, CVS charged uninsured customers or "cash payors" a uniform price nationwide for each generic drug. CVS (like all retail pharmacy chains) reported this cash price as its Usual & Customary (U&C) price to pharmacy benefit managers (PBMs). PBMs used the U&C price to adjudicate the amount that health plans (like Plaintiffs) paid for their members' drug purchases. This standard process in the retail pharmacy industry guaranteed that a health plan and its members would never pay more than an uninsured customer for the same drug.

In 2008, however, CVS decided to significantly discount its generic drug prices to compete for uninsured customers—but sought to avoid the concomitant reduction to the U&C price that health plans would then pay for their members' purchases. Thus, CVS conspired with Caremark to create the Health Savings Pass (HSP) program (the "HSP Enterprise"), through which discounted cash purchases would be run. Rather than report the HSP price as its U&C price, CVS purposefully reported a U&C price that was higher than its HSP price to PBMs, including Caremark, Express Scripts, Medco, MedImpact, and OptumRx, knowing the PBMs would use this inflated U&C price to adjudicate all applicable claims for which Plaintiffs and the Class members paid.

Class certification is warranted because the salient legal and factual questions will be resolved with proof common to Plaintiffs and the Class. The HSP Enterprise's uniform scheme to defraud the Class does not differ by geographic location, individual store, generic drug on the HSP list, PBM, or health plan—and should be tried once in a single courthouse on behalf of all injured Class members. As set forth below, Plaintiffs satisfy Federal Rule of Civil Procedure 23(a) and (b)(3). The Class consists of hundreds of health plans, satisfying numerosity under Rule 23(a)(1). Plaintiffs also satisfy Rule 23(a)(2) because they seek to hold CVS and Caremark responsible for their scheme to defraud and have identical causes of action as the Class. Plaintiffs

are typical of the Class under Rule 23(a)(3), because all paid for generic drugs based on inflated U&C prices. Finally, Plaintiffs have no interests antagonistic to the Class under Rule 23(a)(4).

Plaintiffs also satisfy Rule 23(b)(3). Common questions of fact or law predominate since the HSP Enterprise operated in the same manner with respect to the U&C prices for HSP drugs, and liability will be established by class-wide common proof. Moreover, a class action is superior to hundreds—if not thousands—of trials in which the same evidence will be introduced to prove Defendants' design, implementation, and operation of the scheme to defraud. Accordingly, Plaintiffs' motion should be granted.

II. THE PROPOSED CLASSES

Plaintiffs seek to certify the following classes under Federal Rule of Civil Procedure 23(a) and (b)(3):[1]

> ***Nationwide Class.*** All health plans that, at any time between November 2008 and February 1, 2016, (1) had Caremark, L.L.C., Express Scripts, Medco, OptumRx, or MedImpact (or any of their predecessors) as their pharmacy benefit managers, (2) paid for generic prescription drugs purchased from CVS that were included in CVS's Health Savings Pass program, and (3) paid for those drugs based on a formula containing Usual and Customary price.
>
> ***Unfair and Deceptive Conduct Consumer Protection Class.*** All health plans that, at any time between November 2008 and February 1, 2016, (1) had Caremark, L.L.C., Express Scripts, Medco, OptumRx, or MedImpact (or any of their predecessors) as their pharmacy benefit managers, (2) paid for generic prescription drugs purchased from CVS that were included in CVS's Health Savings Pass program in California, Florida, Illinois, Iowa, Massachusetts, New Jersey, New York, Ohio, and Washington, and (3) paid for those drugs based on a formula containing Usual and Customary price.

[1] The following payors are excluded from the Classes: (1) any governmental payors, including Medicare and Medicaid; (2) any health plans that served on Caremark's Client Advisory Committee since January 1, 2008; and (3) any health plans that have had parent, subsidiary, or affiliate relationships with any pharmacy benefit manager at any time since January 1, 2008. Also excluded: (1) CVS and its management, employees, subsidiaries, and affiliates; and (2) CVS Caremark and its officers and directors.

> ***Omissions Consumer Protection Class.*** All health plans that, at any time between November 2008 and February 1, 2016, (1) had Caremark, L.L.C., Express Scripts, Medco, OptumRx, or MedImpact (or any of their predecessors) as their pharmacy benefit managers, (2) paid for generic prescription drugs purchased from CVS that were included in CVS's Health Savings Pass program in Illinois, Michigan, Nevada, and New Jersey, and (3) paid for those drugs based on a formula containing Usual and Customary price.
>
> ***Unjust Enrichment Class.*** All health plans that, at any time between November 2008 and February 1, 2016, (1) had Caremark, L.L.C., Express Scripts, Medco, OptumRx, or MedImpact (or any of their predecessors) as their pharmacy benefit managers, (2) paid for generic prescription drugs purchased from CVS that were included in CVS's Health Savings Pass program in Arkansas, Colorado, Connecticut, District of Columbia, Hawaii, Illinois, Indiana, Iowa, Missouri, New Mexico, New York, Oklahoma, and West Virginia, and (3) paid for those drugs based on a formula containing Usual and Customary price.[2]

III. SUMMARY OF FACTS COMMON TO THE ENTIRE CLASS

Plaintiffs submit this fact summary to demonstrate that common evidence will be used to prove the claims of the named Plaintiffs and the Class. This common evidence predominates over any individual issues, and thus liability can be established on a class-wide basis at trial.

A. The purpose of Usual and Customary prices is to ensure that health plans and their members do not pay more for generic drugs than uninsured persons.

1. The Class is comprised of health plans that provide prescription drug benefits to their members.

Persons who purchase prescription drugs at retail pharmacies, such as CVS,[3] fall into two general categories: those who have funded prescription-drug benefits through a health plan (the

[2] The Nationwide Class, Unfair and Deceptive Conduct Consumer Protection Class, Omissions Consumer Protection Class, and Unjust Enrichment Class may collectively be referred to as the Class.

[3] Defendant CVS Pharmacy, Inc. ("CVS") is a nationwide retail pharmacy chain with over 9,900 locations nationwide and fills approximately 1.3 billion prescriptions a year. Headquartered in Rhode Island, CVS is a subsidiary of CVS Health Corporation, a holding company. Ex. 1 (CVS Health at a Glance); Ex. 2 at 13, 17 (CVS Health 2018 Annual Report); Ex. 3 at Exhibit 21.1 (CVS Health Corp. 2018 Form 10-K). All "Ex." references are to the exhibits attached to the Declaration of Steve W. Berman in Support of Plaintiffs' Motion for Class Certification, filed concurrently herewith.

insured) and those who lack such benefits (the uninsured).[4] An insured person generally pays the pharmacy a part of the cost of the drug in the form of a copay.[5] The remainder is paid by the insured's health plan, which is operated by an entity known as a third-party payor (TPP).[6] Examples of TPPs include insurance companies, union health and welfare benefit funds such as the named Plaintiffs, and federal and state governments.

Pharmaceutical benefit managers (PBMs) are companies that serve as middlemen between pharmacies and TPPs, setting up pharmacy networks, creating formularies or lists of preferred drugs, negotiating the formulas at which TPPs will pay and pharmacies will be reimbursed for prescriptions, and facilitating billing and payments.[7]

2. U&C is defined as the lowest price available to a cash payor for the purchase of a drug at the pharmacy.

Contracts between TPPs and PBMs—and between PBMs and pharmacies—typically contain a "lower of" pricing provision for generic drugs.[8] Under lower-of pricing, the reimbursement to the pharmacy for an insured's purchase is the lowest of enumerated prices.[9] An example of a lower-of pricing formula for payment of generic-drug claims from a contract between a PBM [redacted] and CVS follows:[10]

[redacted]

[4] *See* Ex. 4, Expert Report of Rena Conti in Support of Plaintiffs' Motion for Class Certification (referred to herein as "Conti Rep."), ¶ 24.

[5] *Id.*

[6] *Id.*, ¶ 25. This case concerns only private, non-governmental TPPs.

[7] *Id.*, ¶¶ 26–28.

[8] *Id.*, ¶ 35.

[9] *Id.*, ¶¶ 35, 36, 40.

[10] Ex. 5 [redacted]).

Similarly, an example of a lower-of pricing formula, setting the amount Plaintiff [redacted] (a TPP) was to pay its PBM [redacted] for generic-drug claims follows:[11]

[redacted]

As reflected in the above examples, the prices typically used in the lower-of formula are:

a. the Average Wholesale Price (AWP), which is a public benchmark price over which neither the pharmacies nor the PBMs have control;[12]

b. the Maximum Allowable Cost (MAC), which is a proprietary price set by the PBM;[13] and

c. the Usual and Customary (U&C) price, which "is the amount that a customer without insurance pays for a drug"[14] and is set by the pharmacy.[15]

U&C price is a common industry term.[16] [redacted] .[17] The NCPDP defines U&C price as "the amount charged cash customers for the prescription exclusive of sales tax or other amounts charged."[18] [redacted]

[11] Ex. 6 at CAREMARKSM_0054058.

[12] Conti Rep., ¶ 40; Ex. 7 at 72:3–10 (MedImpact 30(b)(6) Dep.).

[13] Conti Rep., ¶ 40; Ex. 7 at 72:11–20 (MedImpact 30(b)(6) Dep.).

[14] Ex. 8 at CAREMARKSM_ 0018222 n.2. *See also* Conti Rep., ¶ 40; § IV(C).

[15] Conti Rep., ¶ 40, §IV(C); Ex. 7 at 215:6–8 (MedImpact 30(b)(6) Dep.).

[16] Conti Rep., ¶ 42, §IV(C).

[17] Ex. 9 at 58:7–11 (Thomas Gibbons Dep. in The State of Texas ex rel. Myron D. Winkelman and Stephani Martinsen v. CVS Health Corp. and CVS Pharmacy, Inc., No. D-1-GV-14-000388 (Travis Co., Tex. Dist. Ct.) ("Texas Medicaid")).

[18] Ex. 10 at 38.

[redacted]

[redacted]”[19]

U&C price is typically the highest retail price for a prescription drug because it is the price paid by uninsured persons, who lack the bargaining power of TPPs or PBMs.[20] The purpose of U&C price is to ensure that a pharmacy doesn't charge an insured person and their health plan more than the pharmacy charges an *un*insured customer.[21] Indeed, ensuring that a pharmacy's reimbursement is no more than the U&C price is consistent with the purpose of insurance.[22] Otherwise, an insured patient could pay more for a prescription than he or she would in the absence of insurance, thus defeating the purpose of prescription drug coverage.[23]

3. CVS reported a uniform U&C price for a drug to all PBMs nationwide.

[redacted]

[redacted]”[24] [redacted].[25] Thus, the U&C price is not necessarily the most common price available to an uninsured consumer, but rather the cheapest price available.

CVS reported the same U&C price for a generic drug to every PBM in any given period.

[redacted],[26] [redacted]

[redacted]

[19] Ex. 11 at 46:18–21 (John Zevzavadjian Dep. in *Corcoran et al. v. CVS Pharmacy, Inc.*, No. 3:15-cv-03504 (N.D. Cal.) (“*Corcoran*”)).

[20] Conti Rep., ¶ 45.

[21] *Id.*, ¶ 46.

[22] *Id.*

[23] *Id.*

[24] Ex. 12 at 62:7–63:2 (Thomas Gibbons Dep. in *Corcoran*).

[25] *See id.* at 64:10–19.

[26] *Id.* at 62:7–63:2.

[redacted],[27] [redacted]

[redacted] [28]

B. The Health Savings Pass Enterprise was created to shield the discount prices offered to uninsured consumers from CVS's U&C prices on which TPP payments were based.

In September 2006, Walmart announced a new price of $4 for a 30-day supply of certain generic drugs.[29] Walmart submitted $4 as its U&C price to PBMs (and thus TPPs) for the drugs in its discount program.[30] [redacted],[31] [redacted].[32] In 2007, Walgreens also introduced a generic-drug discount program, advertising a three-month supply of select generic drugs for $12.99 for a $20 enrollment fee.[33]

[redacted] [34] [redacted].[35]

1. The HSP Enterprise charged a nominal HSP enrollment fee to justify excluding HSP prices from the calculation of U&C prices.

[redacted]

[redacted]

[redacted]",[36] [redacted]

[27] *See, e.g.*, Ex. 13 at 60:22–61:15 (William John Barre Dep. in *Corcoran*); Ex. 14 at 36:21–38:16 (Amber D. Compton Dep. in *Corcoran*); Ex. 15 at 42:15–44:3 (Franceen Spadaccino Dep. in *Corcoran*).

[28] *See, e.g.*, Ex. 16 at 117:9–24 (Express Scripts 30(b)(6) Dep.); Ex. 7 at 214:7–217:11 (MedImpact 30(b)(6) Dep.); Ex. 17 at 201:15–202:13 (OptumRx 30(b)(6) Dep.).

[29] Ex. 18 at CAREMARKSM_0014737–38.

[30] Ex. 16 at 132:19–22 (Express Scripts 30(b)(6) Dep.).

[31] Ex. 19 at 36:2–3 (Bari Harlam Dep. in *Texas Medicaid*).

[32] *Id.* at 36:4–8 [redacted].

[33] *See* Ex. 20; Ex. 21.

[34] Ex. 22 at 72:6–73:7 (Thomas Morrison Dep. in *Texas Medicaid*).

[35] *Id.* at 72:6–73:3; *see also id.* at 66:6–67:1.

[36] Ex. 23.

[redacted].[37]

[redacted]

[redacted]."[38] [redacted]

[redacted][39] [redacted]

[redacted]."[40]

[redacted]

[redacted]."[41] [redacted]

[redacted]

[redacted][42]

[redacted]

[redacted]"[43] [redacted]"[44] [redacted]

[redacted]

[redacted][45] [redacted]

[redacted][46]

[37] Id.

[38] Ex. 24 at 166:7–18 (Elizabeth Scott Wingate Dep. in *Corcoran*).

[39] Ex. 23.

[40] Id.

[41] Ex. 25 at 83:4–6 (Paul Ferschke Dep. in *Texas Medicaid*).

[42] Ex. 26; *see* Ex. 27 at 1–2; Ex. 25 at 82:17–87:25 (Paul Ferschke Dep. in *Texas Medicaid*); Ex. 28 [redacted].

[43] Ex. 29; *see* Ex. 25 at 81:1–9, 96:19–97:12 (Paul Ferschke Dep. in *Texas Medicaid*); Ex. 30 at CVSC-0178356 [redacted].

[44] Ex. 31 at CVSC-0020461.

[45] Ex. 32.

[46] Ex. 33 at CVSC-0222900; Ex. 34.

[redacted][47] [redacted][48] [redacted]

[redacted]"[49]

2. Caremark's role in the HSP Enterprise was to shield CVS's high U&C prices from the effects of the discount HSP prices.

Launched on November 9, 2008,[50] the HSP program advertised a $10 annual fee to access over 400 generic drugs at $9.99 for a 90-day supply.[51] [redacted]

[redacted][52] [redacted]

[redacted][53]

[redacted]

[47] Ex. 35.

[48] Ex. 36.

[49] Ex. 37.

[50] Ex. 38 at CVS's Resp. to Pls.' Interrog. No. 1.

[51] Ex. 39 [redacted]). The prices did increase once during the lifetime of the program. *See* Ex. 38 at CVS's Resp. to Interrogatory No. 1; Ex. 40. The drugs included in the HSP program changed over time, [redacted] Ex. 41 at CAREMARKSM_0033096; *see* Ex. 42.

[52] Ex. 43 at CVSC-0222397 [redacted]; Ex. 44, ¶ 19 (Decl. of John Lavin in *Corcoran*); Ex. 45; Ex. 46 [redacted]

[53] Ex. 47 at CAREMARKSM_0032553; *see* Ex. 48 ([redacted].

During the lifetime of the HSP program, CVS never factored the HSP price into its U&C price submissions to PBMs. [redacted],[54] [redacted].[55] [redacted] [redacted] ,,56 [redacted] [redacted] [redacted] ,,57

3. ScriptSave joined the HSP Enterprise to further insulate U&C from HSP prices.

[redacted] [58] [redacted] [59] [redacted].[60]

[redacted]

[redacted] [61] [redacted],

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[54] Conti Rep., §§ IV(B),(C).

[55] Ex. 12 at 62:2–64:2, 71:8–15 (Thomas Gibbons Dep. in *Corcoran*).

[56] *Id.* at 63:4–9.

[57] *Id.* at 62:7–63:2.

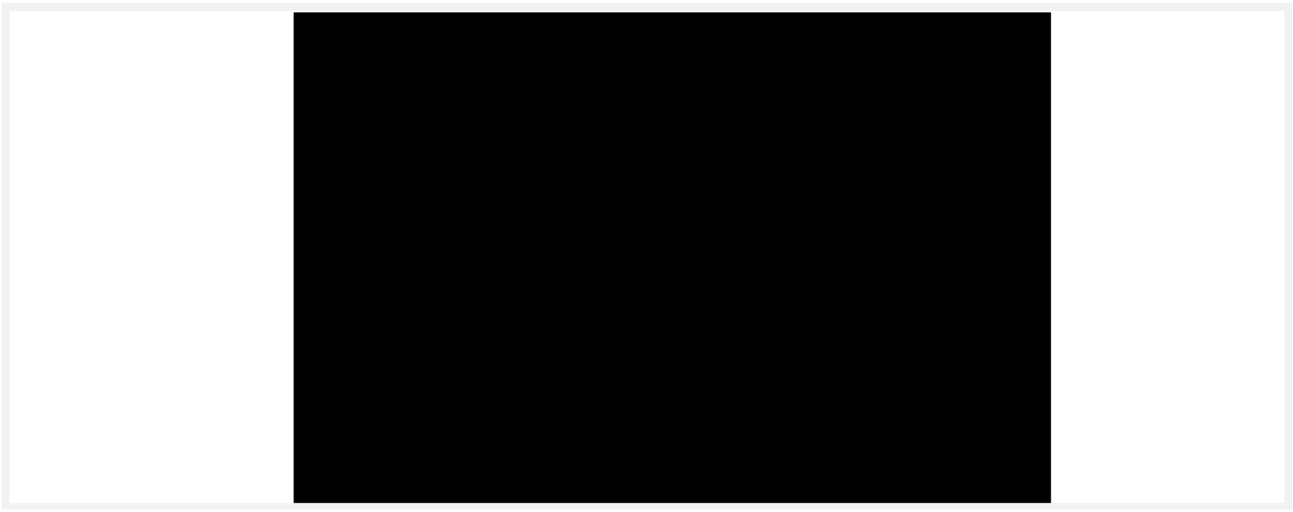
[58] *See, e.g.*, Ex. 49 ([redacted]; Ex. 50 at CVSSM-0005384–86.

[59] *See, e.g.*, Ex. 50 at CVSSM-0005386; Ex. 51; Ex. 52; Ex. 25 at 119:10–121:17 (Paul Ferschke Dep. in *Texas Medicaid*); Ex. 53 at 177:1–18 (Scott Tierney Dep. in *Corcoran*).

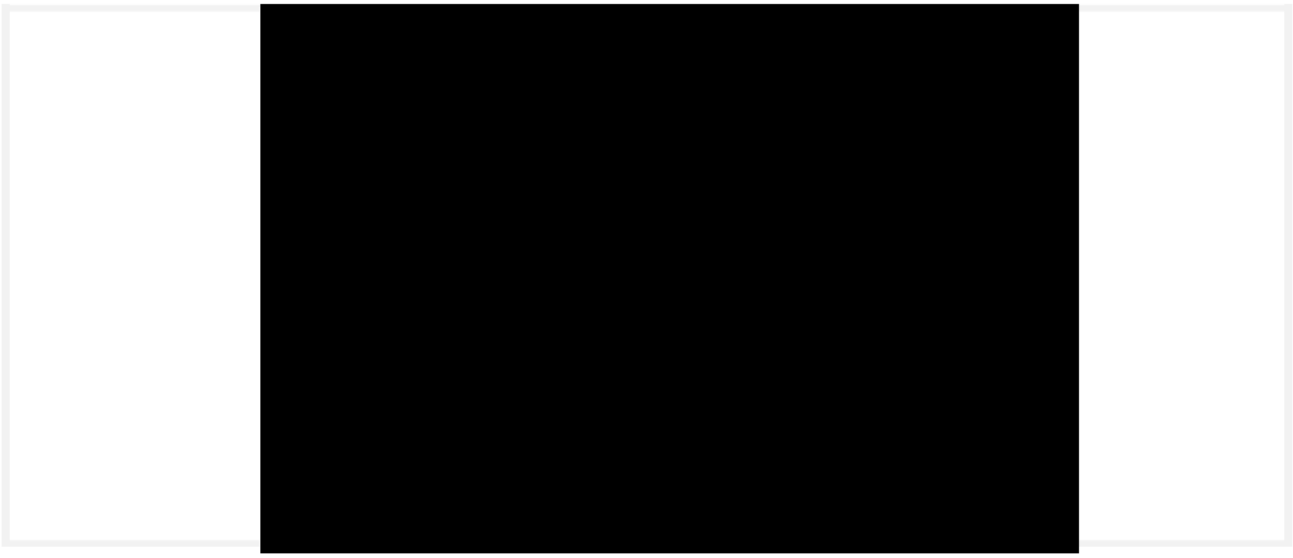
[60] Ex. 50 at CVSSM-0005386; *see* Ex. 53 at 177:1–18 (Scott Tierney Dep. in *Corcoran*).

[redacted].[62]

[redacted].[63]



[redacted].[64]



[61] Ex. 52; Ex. 25 at 119:10–121:17 (Paul Ferschke Dep. in *Texas Medicaid*).

[62] Ex. 54; *see* Ex. 55.

[63] Ex. 56 at ScriptSave000083.

[64] *Id.* at ScriptSave000100.

[redacted][65]

[redacted]

[redacted][66]

[redacted][67]

[redacted][68]

[redacted][69]

[redacted]

[65] Ex. 57 at CVSC-0229354.

[66] Ex. 58 at CVSC-0320427.

[67] Ex. 59; Ex. 60.

[68] Ex. 61 at ScriptSave001160.

[69] *Id.* at ScriptSave001158.

[redacted] 70

[redacted]

[redacted] 71

[redacted]

ScriptSave administered the HSP program from July 9, 2013, until CVS discontinued the program on February 1, 2016.[72] [redacted] .[73]

C. The PBM Participants in the HSP Enterprise knowingly used CVS's inflated U&C prices to adjudicate TPP claims without disclosing the fraud.

1. PBM Caremark LLC

The agreement between Caremark (as a PBM) and CVS defined U&C as including [redacted] 74

[70] Ex. 62 at ScriptSave001167.

[71] *Id.* at ScriptSave001168.

[72] Ex. 63, ¶¶ 10–11 (Decl. of Thomas Gibbons in *Corcoran*); Ex. 64 at ScriptSave001593; Ex. 38 at CVS's Resp. to Pls.' Interrog. No. 1.

[73] Ex. 65 at CVSC-0317670; *see* Ex. 12 at 216:21–217:12, 218:9–23 (Thomas Gibbons Dep. in *Corcoran*).

[74] Ex. 66 at CVSSM-0011015 [redacted] ; *see* Ex. 44, ¶¶ 7–8 (Decl. of John M. Lavin in *Corcoran*).

[redacted]

[redacted].[75] [redacted]

[redacted].[76]

Caremark never proactively disclosed to all of its TPP clients that CVS's HSP discounts were not included in U&C. [redacted]

[redacted].[77] [redacted]

[redacted][78] [redacted]

[redacted]

[redacted][79]

Defendant Caremark, L.L.C. is a subsidiary of the holding company CVS Health Corporation. Caremark adjudicates approximately 1.9 billion prescriptions a year, with 92 million persons receiving prescription-drug benefits through the company. Headquartered in Northbrook, Illinois, Caremark realized $134.1 billion in revenues in 2018. Ex. 1 (CVS Health at a Glance); Ex. 2 at 12, 17 (CVS Health 2018 Annual Report); Ex. 3 at Exhibit 21.1 (CVS Health Corp. 2018 Form 10-K); Ex. 67 (company overview of Caremark LLC).

[75] Ex. 44, ¶ 22 (Decl. of John M. Lavin in *Corcoran*).

[76] Ex. 68 at 20:8–16 (Caremark 30(b)(6) Dep. in *Corcoran*).

[77] Ex. 69; *see* Ex. 70 at 61:20–25, 62:23–63:5 (Brian Correia Dep.).

[78] Ex. 69.

[79] Ex. 70 at 70:25–71:6, 72:24–73:3, 75:2–6 (Brian Correia Dep.); *see, e.g.*, Ex. 71 at CAREMARKSM_0085442 [redacted]; Ex. 72 ([redacted]

[redacted].

2. PBM Medco Health Solutions, Inc.

During the lifetime of the HSP program, Medco adjudicated claims for its TPP clients [redacted].[80] [redacted]

[redacted]."[81] [redacted]

[redacted]

[redacted]".[82]

[redacted]

[redacted],[83] [redacted]

[redacted].[84] [redacted]

[redacted].[85]

[redacted]

[80] Ex. 73 at 62:13–21, 82:4–8 (Medco 30(b)(6) Dep.). Medco Health Solutions, Inc. was a large public PBM that merged with Express Scripts in April 2012. Ex. 74 at 6 (Express Scripts Holding Company's 2017 Form 10-K). Before the merger, Medco provided prescription-drug benefits to approximately 65 million people. In 2011, the company adjudicated close to a billion prescriptions and recorded net revenues of $70 billion. Ex. 75 at 7 (Medco's 2011 Form 10-K).

[81] Ex. 73 at 25:4–19 (Medco 30(b)(6) Dep.); Ex. 76 at CVSSM-0009969–70 ([redacted].

[82] Ex. 77 at CVSC-0067997 ([redacted]; *see* Ex. 73 at 25:30–26:5, 62:23–63:21 (Medco 30(b)(6) Dep.); Ex. 76 at CVSSM-0009943 ([redacted].

[83] Ex. 78.

[84] *See* Ex. 79; Ex. 80 ([redacted].

[85] Ex. 81 at CVSSM-0011761 [redacted].

[redacted][86] [redacted][87] [redacted][88] [redacted][89] [redacted][90] [redacted][91]

3. PBM Express Scripts, Inc.

During the Class Period, Express Scripts[92] adjudicated claims for its TPP clients using the U&C prices reported by CVS. The applicable contract between Express Scripts and CVS defines "Usual and Customary Retail Price" as [redacted]"[93] [redacted]

[86] Ex. 73 at 82:4–13 (Medco 30(b)(6) Dep.).

[87] *Id.* at 82:4–8.

[88] *Id.* at 62:13–21, 82:4–8.

[89] *Id.* at 82:4–13.

[90] *Id.* at 82:21–86:5.

[91] *Id.* at 82:21–84:7.

[92] Express Scripts, Inc. is a PBM that provides prescription drug benefits to approximately 100 million people, adjudicates approximately 1.4 billion prescriptions a year, and has 3,000 TPP clients. Ex. 82 (Express Scripts Corporate Overview). Express Scripts merged with Cigna in December 2018. Ex. 83.

[93] Ex. 84 at CVSC-0325309 [redacted]; Ex. 16 at 50:21–52:6 (Express Scripts 30(b)(6) Dep.).

[redacted] ”[94] [redacted]

[redacted] [95] [redacted]

[redacted] [96]

4. PBM MedImpact Healthcare Systems, Inc.

During the Class Period, MedImpact[97] adjudicated claims for its TPP clients using the U&C prices reported by CVS. MedImpact's contract with CVS [redacted]

[redacted] .[98]

[redacted]

[redacted]

[redacted] [99]

[redacted]

[redacted] .”[100] [redacted]

[redacted]

[94] Ex. 16 at 124:2–11 (Express Scripts 30(b)(6) Dep.).

[95] *Id.* at 52:7–53:23.

[96] *Id.* at 125:3–8.

[97] MedImpact Healthcare Systems, Inc. is [redacted], Ex. 7 at 24:6–13 (MedImpact 30(b)(6) Dep.), providing pharmaceutical benefits to more than 50 million people. Ex. 85 (MedImpact History).

[98] Ex. 86 at CVSSM-0002936 [redacted].

[99] Ex. 7 at 66:6–25 (MedImpact 30(b)(6) Dep.).

[100] *Id.* at 46:7–12, 225:18–24.

[redacted][101]

[redacted].[102]

[redacted]

[redacted]"[103]

[redacted]

[redacted]

[redacted].[104]

[redacted]

[redacted]

[redacted].[105]

5. PBM OptumRx Inc.

During the lifetime of the HSP program, OptumRx[106] adjudicated claims for its TPP clients using the U&C prices reported by CVS. [redacted]

[redacted]

[redacted]

[101] *Id.* at 204:5–207:6, 209:4–21, 210:4–213:21.

[102] *Id.* at 245:22–246:3.

[103] Ex. 87 at MI-SM_00001211; *see* Ex. 7 at 264:20–266:5 (MedImpact 30(b)(6) Dep.).

[104] Ex. 88 at MI-SM_00003933 ([redacted]).

[105] Ex. 7 at 270:19–271:1 (MedImpact 30(b)(6) Dep.).

[106] Incorporated in California, OptumRx, Inc. is a PBM that provided prescription-drug coverage to 65 million people in 2018, realizing revenues of $69.5 billion. Ex. 89 at 9, 36 (UnitedHealth Group's 2018 Form 10-K). [redacted] Ex. 17 at 136:13–17, 179:7–12 (OptumRx 30(b)(6) Dep.).

[redacted]

[redacted]”[107]

[redacted][108][redacted]

[redacted]

[redacted]”[109][redacted]

[redacted][110][redacted]

[redacted][111]

[redacted]

[redacted][112]

[redacted]

[redacted]

[redacted][113]

IV. APPLICABLE LEGAL STANDARDS

Class actions are an essential tool for adjudicating cases involving multiple claims that involve similar factual and/or legal inquiries. Rule 23 “creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action.”[114] The party

[107] Ex. 90 at CVSSM-0024187 [redacted]; Ex. 17 at 68:14–69:14 (OptumRx 30(b)(6) Dep.).

[108] Ex. 17 at 69:24–71:24 (OptumRx 30(b)(6) Dep.).

[109] *Id.* at 143:24–144:11.

[110] *Id.* at 96:20–97:1, 97:19–98:5, 148:17–149:4.

[111] *Id.* at 103:3–104:1, 148:17–149:4.

[112] Ex. 91 at CVSSM-0001770 [redacted]); *see* Ex. 17 at 74:22–75:14 (OptumRx 30(b)(6) Dep.).

[113] Ex. 17 at 79:16–23 (OptumRx 30(b)(6) Dep.).

[114] *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010).

seeking certification "bears the burden of 'affirmatively demonstrat[ing] his compliance' with the Rule 23 requirements."[115] The Court conducts a "rigorous analysis" and may consider merits questions, but only to the extent that those questions are relevant in determining whether all of the requirements of Rule 23 are satisfied.[116] "[T]he office of a Rule 23(b)(3) certification ruling is not to adjudicate the case; rather, it is to select the metho[d] best suited to adjudication of the controversy fairly and efficiently."[117]

V. THE PROPOSED CLASSES SATISFY THE REQUIREMENTS OF RULE 23(a)

A. Numerosity is met since joining hundreds of Class members would be impracticable.

Rule 23(a)(1) directs that the class be "so numerous that joinder of all members is impracticable." As this Court has explained, "numerosity is not a difficult burden to satisfy and courts routinely find that classes with more than forty members meet the requirement."[118] The PBMs maintain electronic business records of each Class member that paid for HSP drugs during the Class Period. The Class is comprised of hundreds, if not thousands, of Class members.[119] This figure easily meets any numerosity requirement.

B. Numerous common issues exist because the focus is on CVS's common course of conduct within the HSP Enterprise.

Next, Rule 23(a)(2) directs that "there are questions of law or fact common to the class." "Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury,'" and that the claims arising from that injury depend on a "common contention" that

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[115] *In re Nexium Antitrust Litig.*, 777 F.3d 9, 18 (1st Cir. 2015) (quoting *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013)).

[116] *Id.* at 18–19.

[117] *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 460 (2013).

[118] *Walsh v. Gilbert Enters.*, 2019 U.S. Dist. LEXIS 41225, at *8 (D.R.I. Mar. 14, 2019) (Smith, J.) (citations and internal quotation marks omitted).

[119] *See generally* Conti Rep.

is "of such a nature that it is capable of classwide resolution."[120] Rule 23 does not require each and every question be common, rather "for purposes of Rule 23(a)(2) [e]ven a single [common] question will do."[121]

Plaintiffs readily satisfy the commonality requirement given that they base their claims on CVS's uniform practice of setting and publishing U&C prices that exceed HSP prices. This conduct did not change by region, store, or PBM to which CVS communicated the information. Rather, CVS set one U&C price for each generic drug and communicated it to all PBMs. The PBMs then used this price to adjudicate the claims for each Class member. This is exactly the type of common allegation that courts find sufficient to establish commonality.[122]

Additional common issues include, among others: (1) whether CVS, Caremark, and ScriptSave formed an enterprise; (2) whether the PBMs were part of the enterprise, their roles in the operation of the enterprise, and their knowledge and participation in the scheme to defraud; (3) whether CVS's and the PBMs' misrepresentations and omissions were material; (4) whether CVS violated consumer protection statutes and was unjustly enriched; (5) whether Defendants' violations harmed Plaintiffs and the members of the Classes; and (6) the relief, if any, to which Plaintiffs and the Classes are entitled.

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[120] *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349–50 (2011); *see also Walsh*, 2019 U.S. Dist. LEXIS 41225, at *9 (same).

[121] *Dukes*, 564 U.S. at 359 (alteration in original, internal quotation marks omitted).

[122] *Marrero-Rolon v. P.R. Elec. Power Auth.*, 2018 U.S. Dist. LEXIS 170679, at *13 (D.P.R. Sept. 30, 2018) (concluding that Rule 23(a)(2) was satisfied because, "[s]ince all class members assert the same RICO claims, the case presents common questions of law including, but not limited to, the existence of a RICO enterprise, the existence of a pattern of racketeering activity, and the existence of a conspiracy"); *Robinson v. Fountainhead Title Grp. Corp.*, 257 F.R.D. 92, 94 (D. Md. 2009) ("The alleged scheme to defraud, if proven, operated in the same manner with regard to all customers and thus, liability for operating the scheme will flow from class-wide common proof."); *Heastie v. Cmty. Bank of Greater Peoria*, 125 F.R.D. 669, 675 (N.D. Ill. 1989) ("In short, the question of whether there has been a violation of RICO will turn on common questions of law and fact, and thus the requirement of Rule 23(a)(2) is satisfied."); *McMahon Books, Inc. v. Willow Grove Assocs.*, 108 F.R.D. 32, 38 (E.D. Pa. 1985) (finding commonality satisfied because "many of the elements of RICO civil actions focus on the conduct of the defendants").

C. Plaintiffs' claims are also typical of the Class.

"In actions under RICO, 'the typicality requirement is satisfied if the claims of the class representative and the class arise from the same scheme by the defendant to defraud the class members.'"[123] Granting class certification of a RICO claim, one district court in the First Circuit explained that typicality was satisfied because "[a]s the class allegations show, class members assert the same defendants' conduct, the same underlying events, the same injury, and will use the same legal arguments to prove liability."[124] Here, Plaintiffs assert the same RICO claims as the Class members, all arising from the same fraudulent scheme and underlying events. Like the Class, Plaintiffs were defrauded into paying inflated U&C prices for HSP drugs.

Plaintiff Sheet Metal Workers Local No. 20 Welfare and Benefit Fund. Located in Indianapolis, Indiana, the Sheet Metal Workers Local No. 20 Welfare and Benefit Fund ("SMW Fund") is a TPP which provides medical and prescription-drug benefits to its members.[125] During the life of the HSP program, Caremark was the SMW Fund's PBM. For most of that period, the Fund's contracts with Caremark included a lower-of pricing provision:[126]

[redacted]

[123] *Torres-Ronda v. Jt. Underwriting Ass'n*, 2012 U.S. Dist. LEXIS 143264, at *15–16 (D.P.R. Oct. 2, 2012) (quoting MOORE'S FEDERAL PRACTICE, § 23.24[8][d]).

[124] *Id.* at *17 ("Moreover, there are no issues related to 'differences between people based on levels of [physical] injury,' or allegations of 'prospectively injured people.' There are only injuries that are subject to mathematical calculation or, like the equitable relief requested, claims which have class-wide applicability. The typicality requirement is also met.") (quoting *Ruiz v. American Tobacco Co.*, 180 F.R.D. 194, 197 (D.P.R. 1998)).

[125] Ex. 92 at P_016793 [redacted]. The Fund administers an "employee welfare benefit plan," or "employee benefit plan," as defined in the Employee Retirement Income Security Act (ERISA). Ex. 93 at 46:9–22 (SMW Fund 30(b)(6) Dep.); Ex. 94, §§ 1.08, 1.12, 3.18 (SMW Fund's Restated Agreement and Declaration of Trust); 29 U.S.C. § 1002(1), (3) (defining "employee welfare benefit plan" and "employee benefit plan" for purposes of ERISA).

[126] Ex. 6 at CAREMARKSM_0054058; *see also* Ex. 95 at CAREMARKSM_0054105.

The Fund paid for generic prescription drugs purchased at CVS stores by the Fund's members and beneficiaries,[127] including drugs on the HSP list.[128] Thus, the Fund was damaged by CVS's failing to report HSP prices as U&C prices, and suffered $189,515 in out of pocket losses.[129] The Fund is thus typical of Class members.

Plaintiff Indiana Carpenters Welfare Fund. Located in Indianapolis, the Indiana Carpenters Welfare Fund ("Carpenters Fund") is a TPP that provides medical and prescription-drug benefits to its members.[130] During the life of the HSP program, the Carpenters Fund received PBM services from Medco, now owned by Express Scripts, through the Fund's affiliation with the United Brotherhood of Carpenters. Under the terms of its contracts with Medco, Indiana Carpenters paid Medco for generic prescription drugs based on a lower-of pricing formula, for example:[131]

[redacted]

[127] Ex. 96 at 44:9–20 (Hazel Compton Dep.); Ex. 93 at 212:5–7 (SMW Fund 30(b)(6) Dep.).

[128] Conti Rep., ¶ 77.

[129] *Id.*

[130] Ex. 97 at 22:3–7 (Carpenters Fund 30(b)(6) Dep.); Ex. 98, § 3.2(b) [redacted]. Like Sheet Metal, Carpenters is also an employee benefit plan under ERISA. Ex. 97 at 21:13–18; Ex. 98, §§ 2.7, 3.1; Ex. 99 at P_001762–64 (Carpenters Fund Combination Plan Document and Summary Plan Description); 29 U.S.C. § 1002(1), (3) (defining "employee welfare benefit plan" and "employee benefit plan" for purposes of ERISA).

[131] Ex. 100 at P_013361 [redacted]; *see* Ex. 101 at P_000021 ([redacted]); *see also* Ex. 102 at P_000075 ([redacted]; Ex. 103 at P_001901 [redacted].

During the same period, the Fund paid for generic prescription drugs purchased at CVS stores by the Fund's members and beneficiaries, including drugs on the HSP list.[132] Thus, the Carpenters Fund was damaged by CVS's failing to report HSP prices as U&C prices, and suffered $136,834 in out of pocket losses.[133] The Fund is thus typical of Class members.

Plaintiff Plumbers' Welfare Fund, Local 130, U.A. Located in Chicago, Plaintiff Plumbers' Welfare Fund, Local 130, U.A. ("Plumbers' Fund") is a TPP,[134] which provides medical and prescription-drug benefits to its members.[135] During the life of the HSP program, the Plumbers' Fund received PBM services from Express Scripts. Under the terms of its contracts with Express Scripts, the Plumbers' Fund paid for generic prescription drugs based on a lower-of pricing formula, for example:[136]

[redacted]

During the same period, the Fund paid for generic prescription drugs purchased at CVS stores by the Fund's members, including generic drugs on the HSP list.[137] Thus, the Plumbers' Fund was damaged by CVS's failing to report HSP prices as U&C prices, and suffered at least $45,391 in out of pocket losses.[138] The Fund is therefore typical of Class members.

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[132] Conti Rep., ¶ 77.

[133] *Id.*

[134] Plumbers administers an employee benefit plan as defined in ERISA. Ex. 104 at 33:7–9, 48:9–25 (Plumbers Fund 30(b)(6) Dep.); Ex. 105, §§ 3.1–3.4 [redacted].

[135] Ex. 104 at 48:13–17 (Plumbers Fund 30(b)(6) Dep.).

[136] *See id.* at 142:13–149:2; Ex. 106 [redacted]; Ex. 107 ([redacted]); Ex. 108, [redacted]; Ex. 109 ([redacted].

[137] Conti Rep., ¶ 77.

[138] *Id.*

D. Plaintiffs and their counsel satisfy the adequacy prerequisite.

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class."[139] "[T]he adequacy-of-representation requirement . . . raises concerns about the competency of class counsel and conflicts of interest between the representative plaintiff and the putative class members."[140] "But perfect symmetry of interest is not required and not every discrepancy among the interests of class members renders a putative class action untenable. 'Only conflicts that are fundamental to the suit and that go to the heart of the litigation prevent a plaintiff from meeting the Rule 23(a)(4) adequacy requirement.'"[141]

Here, the SMW Fund, the Carpenters Fund, and the Plumbers' Fund will fairly and adequately protect the Class's interests. Plaintiffs bring the same RICO claims, for the same type of damages measured by their out-of-pocket losses, under the same legal theories as a Class member would. None has conflicts with Class members. Moreover, each has demonstrated their willingness to vigorously prosecute this case to protect the interests of the Class. Plaintiffs' efforts are reflected by their vigorous participation in the prosecution of this case.

Each Plaintiff responded to seven sets of requests for production, with each Fund producing thousands of pages. The Carpenters' Fund also collected 3,294 documents from five trustees' personal and non-party business email accounts, the SMW Fund collected 180,216 documents from six trustees' personal and non-party business email accounts, and the Plumbers' Fund collected 247,263 documents from five trustees personal and non-party business email accounts. Each Plaintiff responded to eight sets of interrogatories and three sets of requests for

[139] FED. R. CIV. P. 23(a)(4).

[140] *Walsh*, 2019 U.S. Dist. LEXIS 41225, at *11 (internal quotations omitted).

[141] *Matamoros v. Starbucks Corp.*, 699 F.3d 129, 138 (1st Cir. 2012) (quoting 1 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 3:58 (5th ed. 2012)).

admissions (numbering in the hundreds). And Plaintiffs produced nine witnesses for deposition, in addition to attending multiple third-party and party depositions.

Plaintiffs' understanding of their roles as class representatives is exemplified by Plaintiff SMW Fund,[142] on whose behalf Trustee Scott Parks spent approximately 50 hours preparing to testify as the 30(b)(6) representative.[143] To prepare, Mr. Parks met four times with counsel, spoke to 17 current or former trustees, read the depositions of other trustees, and reviewed dozens of lengthy documents.[144] During the deposition, Mr. Parks demonstrated the Fund's understanding of this case: "My understanding is CVS Caremark inflated their pricing by not incorporating their drug program, and it was not factored into the usual and customary pricing."[145]

Furthermore, Plaintiffs' counsel will continue to vigorously represent the interests of the Class, and requests appointment as class counsel under Rule 23(g).[146] As a result, Rule 23(a)(4) is satisfied here.

E. Class membership is ascertainable using electronic transactional data and customer records maintained by Defendants and pharmacy benefit managers.

Some courts have identified an additional feature to the class-certification determination: "an implied requirement" that "a putative class . . . be ascertainable with reference to objective criteria"[147] In the First Circuit, so long as an "administratively feasible" mechanism exists for determining class members, Plaintiffs will meet this requirement.[148] In other cases, having the

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[142] Ex. 93 at 23:13–16, 24:12–15, 282:4–8 (SMW Fund 30(b)(6) Dep.).

[143] *Id.* at 292:14–8.

[144] *Id.* at 25:22–26:3, 30:2–6, 30:19–31:15, 293:23–294:1.

[145] *Id.* at 40:16–19. *Cf.* Ex. 111 at 141:8–11 (Carpenters Welfare Fund 30(b)(6) Dep.); Ex. 104 at 14:18–25 (Plumbers Fund 30(b)(6) Dep.).

[146] *See infra* at § VI.E.

[147] *Romulus v. CVS Pharm., Inc.*, 321 F.R.D. 464, 467 (D. Mass. 2017) (citations and internal quotation marks omitted).

[148] *In re Nexium Antitrust Litig.*, 777 F.3d at 19 (internal quotation marks omitted).

injured parties submit affidavits or declarations has sufficed.[149] But this case presents a far easier method because electronic records of each Class member and its payments exist.[150] And so an objective means to determine Class members readily exists.[151]

VI. THE COURT SHOULD CERTIFY THE CLASSES UNDER RULE 23(b)(3)

Rule 23(b)(3) instructs that "[a] class action may be maintained if Rule 23(a) is satisfied" and where "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members." A common question "is one where 'the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized class-wide proof.'"[152] In contrast, an individual question "is one where 'members of a proposed class will need to present evidence that varies from member to member.'"[153]

Common issues will predominate during the trial of Plaintiffs' claims. The key evidence necessary to establish those claims is common to Plaintiffs and all members of the Classes: They all seek to prove, among other things, that CVS and Caremark created HSP for the purpose of permitting CVS to provide low-cost generic drugs to cash payors without passing the benefit of the lower prices to third-party payors as the U&C prices—and that this uniform conduct was wrongful. The evidence changes little if there are hundreds of Class members or millions. Either way, Plaintiffs would, for instance, present the same evidence that U&C price is the price charged to uninsured consumers, that CVS charged HSP prices to uninsured consumers, that

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[149] *Id.* at 20.

[150] Conti Rep., ¶ 77.

[151] *See, e.g.*, *Torres-Ronda*, 2012 U.S. Dist. LEXIS 143264, at *17 (concluding that "the identity of class members is either known or readily ascertainable because each class member has or had a contract with the JUA or the insurer defendants").

[152] *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) (quoting 2 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 4:50, at 196–97 (5th ed. 2012)).

[153] *Id.*

CVS did not report the HSP price as its U&C price, that Caremark (and later ScriptSave) shielded the HSP prices to protect CVS's U&C price, that the PBM Participants used the inflated U&C price as reported to adjudicate claims without regard to contract definitions, and the scheme caused economic loss to Plaintiffs and the members of the Classes. Common issues "are more prevalent or important than the non-common, aggregation-defeating, individual issues."[154]

A. Rule 23(b)(3)'s requirements are satisfied for Plaintiffs' RICO claims because common questions of law and fact predominate.

"Common issues frequently predominate in RICO actions that allege injury as a result of a single fraudulent scheme."[155] Courts thus regularly certify classes bringing RICO claims.[156] An "[a]nalysis of predominance under Rule 23(b)(3) 'begins, of course, with the elements of the underlying cause of action.'"[157] Here, common evidence will be used at trial to prove that the HSP Enterprise engaged in a pattern of racketeering activity, or conspired to do so.

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[154] *Tyson Foods*, 136 S. Ct. at 1045.

[155] *Friedman v. 24 Hour Fitness USA, Inc.*, 2009 U.S. Dist. LEXIS 81975, at *22 (C.D. Cal. Aug. 25, 2009).

[156] *See, e.g.*, *Just Film, Inc. v. Buono*, 847 F.3d 1108, 1121 n.3 (9th Cir. 2017) (finding common questions of fact predominate because the elements of a RICO claim "focus" on the defendants' conduct); *Sykes v. Mel S. Harris & Assocs. LLC*, 780 F.3d 70, 89 (2d Cir. 2015) (affirming district court's certification of class based on finding that "individual considerations did not outweigh other issues which were common to prove elements of RICO claim); *Cohen v. Trump*, 303 F.R.D. 376, 382 (S.D. Cal. 2014) ("Here, Plaintiff argues his RICO claim raises common questions as to 'Trump's scheme and common course of conduct, which ensnared Plaintiff[] and the other Class Members alike.' The Court agrees."); *Spalding v. City of Oakland*, 2012 WL 994644, at *3 (N.D. Cal. Mar. 23, 2012) (commonality found where plaintiffs "allege[] a common course of conduct that is amenable to classwide resolution"); *Torres-Ronda*, 2012 U.S. Dist. LEXIS 143264, at *20 (finding Rule 23(b)(3) satisfied and stating that "[t]his action does not involve individual questions of fact or law since defendants' conduct operated in the same manner with regard to all vehicle owners and liability would be established by class-wide common proof."); *Negrete v. Allianz Life Ins. Co. of N. Am.*, 238 F.R.D. 482, 488 (C.D. Cal. 2006) ("The Court finds that the class members' claims derive from a common core of salient facts, and share many common legal issues [e.g.,] whether Allianz entered into the alleged conspiracy and whether its actions violated the RICO statute."); *McMahon Books*, 108 F.R.D. at 38–39 ("In a case such as this, where a number of plaintiffs claim injury from a single fraudulent scheme allegedly constituting racketeering activity on the part of the defendants, each of the plaintiffs' claims will focus on defendants' conduct to establish a violation of section 1962.").

[157] *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 815 (7th Cir. 2012) (quoting *Erica P John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809 (2011)).

1. Each element of Plaintiffs' RICO claims will be proved by evidence common to the Class.

As this Court noted in its March 31, 2018 order, "[a] viable RICO claim under § 1962(c) requires four elements: '1) conduct; 2) of an enterprise; 3) through a pattern; 4) of racketeering activity.'"[158] For § 1962(d), plaintiffs must establish defendants conspired to violate § 1962(c).

Every Class member across the country will prove each of these liability elements for §§ 1962(c) and (d) with the same evidence, and the answer to each of the questions posed by each element will be the same. For example, under the first element of § 1962(c), a finder of fact will decide for the entire class whether each Defendant did or did not conduct the affairs of the HSP Enterprise. "In order to 'participate, directly or indirectly, in the conduct of such enterprise's affairs,' one must have some part in directing those affairs."[159] Plaintiffs will prove this "conduct" element through common proof of each participant's respective role in directing the affairs of the enterprise, whether it be CVS setting it into motion and reporting U&C prices without regard to its HSP prices, Caremark developing a separate program through which to run HSP prices in order to shield CVS's U&C prices, ScriptSave taking the HSP program over from Caremark to further insulate U&C prices from HSP prices, or the PBM Participants knowingly (and secretly) adjudicating the Class's charges for HSP drugs using the inflated U&C price as reported by CVS. The same is true for the remaining three elements of § 1962(c) because the existence or non-existence of the HSP Enterprise,[160] and the fact and extent of Defendants'

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[158] *Sheet Metal Workers Local No. 20 Welfare & Benefit Fund v. CVS Pharm., Inc.*, 305 F. Supp. 3d 337, 345–46 (D.R.I. 2018) (quoting *Libertad v. Welch*, 53 F.3d 428, 441 (1st Cir. 1995)).

[159] *Reves v. Ernst & Young*, 507 U.S. 170, 179 (1993).

[160] The question whether CVS and Caremark are sufficiently distinct to form a RICO enterprise is also a common question. *See Bessette v. Avco Fin. Servs.*, 230 F.3d 439, 449 (1st Cir. 2000) ("This circuit has consistently refrained from adopting a bright line rule that a subsidiary can never be distinct from its parent corporation . . . . Rather, we will continue to look to the allegations in the complaint to determine whether the parent's activities are sufficiently distinct from those of the subsidiary at the time that the alleged RICO violations occurred."); *Fabrica De Muebles J. J. Alvarez, Inc. v. Westernbank De P.R.*,

racketeering activity will all be proven with the same evidence as to each Class Member. Similarly, with respect to the § 1962(d) claim, either a given defendant conspired to violate § 1962(c) or it did not. It is as simple as that. Both the proof and the answer as to each liability element of the RICO claims will be the same for each Class member.

Class certification is thus appropriate because "[w]hether plaintiffs' theory fails or prevails, it does so for the entire proposed class."[161] Either CVS committed a fraud by purposefully failing to report HSP prices for generic medications as the U&C price, or CVS was not required to report the HSP price as the U&C price. Either the PBMs concealed and perpetuated the fraud by using the inflated U&Cs to adjudicate TPP claims, or correctly used CVS's U&C as reported. Regardless of the outcome, the existence of the scheme will be proved or defeated by the same evidence. Indeed, because every Class Member was entitled to the benefit of the actual U&C price for purchases of generic medications at CVS, the scheme could not possibly injure one Class member and not another.

2. Evidence that the predicate acts of mail or wire fraud establish a pattern of racketeering is classwide.

This Court explained that: "'One scheme that extends over a substantial period of time, or that shows signs of extending indefinitely into the future, can establish a pattern.'"[162] Finding that Plaintiffs' "alleged scheme consisted of various well-pleaded instances of the RICO

2009 U.S. Dist. LEXIS 112843, at *18-19 (D.P.R. Dec. 4, 2009) ("Under First Circuit precedent, if a parent's activities are sufficiently distinct from those of the subsidiary at the time that the alleged RICO violations occurred they may be considered separate entities for purposes of RICO liability.") (citations omitted).

[161] *Hale v. State Farm Mut. Auto. Ins. Co.*, 2016 U.S. Dist. LEXIS 126390, at *34 (S.D. Ill. Sept. 16, 2016) (granting class certification).

[162] *Sheet Metal Workers Local*, 305 F. Supp. 3d 337, 350 (quoting *Efron*, 223 F.3d at 16).

predicates mail and wire fraud,"[163] this Court stated "'that the alleged false statement to the Indiana Funds was the reported U & C price, which Plaintiffs claim was inflated.'"[164]

At trial, Plaintiffs will prove: (1) defendants knowingly devised or participated in a scheme to defraud, (2) to obtain money or property by means of false or fraudulent pretenses, representations and promises, and (3) that the mails or interstate wire facilities were used in carrying out the scheme.[165] "The use of the mails (or the wires) need not be essential to the scheme to defraud, or even done by a defendant, so long as the mailing is a closely related and reasonably foreseeable incident of the scheme."[166]

It is manifestly clear from the nature of these elements that the proof of the predicate acts will concern the scheme itself and its objective effects, and thus is susceptible to common proof. Plaintiffs will prove that each Defendant was a knowing participant in a scheme to cause the Class to pay for generic drugs at inflated U&C prices, that they acted with intent (including reckless disregard) to defraud, and that at least one "co-schemer" used (or caused the use of) the mails or wires in furtherance of the fraudulent scheme. If Plaintiffs prove the scheme with respect to their individual claims, the claims of all Class members will be proven.[167]

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[163] *Id.*

[164] *See also id.* (quoting *Sheet Metal Workers*, 221 F. Supp. 3d at 231).

[165] *Neder v. United States*, 527 U.S. 1, 20 (1999).

[166] *In re Lupron Mktg. & Sales Practices Litig.*, 295 F. Supp. 2d 148, 165 (D. Mass. 2003) (emphasis added). *See also Schmuck v. United States*, 489 U.S. 705, 710–11 (1989) (declaring that the mails had to be used in connection with the fraud but their use "need not be an essential element of the scheme" and could be merely "incident[al] to an essential part of the scheme" or "a step in [the] plot.").

[167] *See McKenzie v. Fed. Express Corp.*, 275 F.R.D. 290, 299–300 (C.D. Cal. 2011).

3. Proximate causation presents a common question for classwide proof.

To establish proximate causation, Plaintiffs need only show "some direct relation between the injury asserted and the injurious conduct alleged."[168] The question is simply whether Plaintiffs' damages were a "foreseeable and natural" consequence of the alleged fraudulent scheme.[169] Here, the link between Defendants' scheme to insulate CVS's U&C prices from the HSP price and Plaintiffs' alleged injury could hardly be more direct, because the consequences of the inflated U&C prices (i.e. overcharges to the Class) were not only "foreseeable and natural," but *intended* by Defendants.

CVS will argue that the existence of contracts between CVS and PBMs, and separately between PBMs and TPPs, breaks the chain of causation between CVS's reporting of U&C prices and TPPs' payments for generic drugs. First, CVS's reporting of CVS was uniform nationwide, and neither CVS nor the PBMs adjusted the U&C price to comply with contract definitions. Moreover, the First Circuit has expressly rejected this type of "break in causation" logic by denying a drug manufacturer protection from an unlawful marketing scheme—where TPPs were the intended target to pay for the drugs—just because doctors prescribed the drug.[170]

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[168] *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 654 (2008) (quoting *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992)).

[169] *Id.* at 658.

[170] *Kaiser Found. Health Plan, Inc. v. Pfizer, Inc.*, 712 F.3d 21, 42–44 (1st Cir. 2013). On April 3, 2013, the First Circuit issued opinions concerning three appeals that arose from multidistrict litigation ("MDL") known as *In re: Neurontin Mktg. & Sales Practices Litig.*, concerning the off-label marketing of Neurontin, an anticonvulsant drug manufactured by Pfizer, Inc. *Kaiser*, 712 F.3d 21 (1st Cir. 2013) (affirming jury verdict against Defendant in favor of third-party payor Kaiser); *Aetna, Inc. v. Pfizer, Inc.* ("*Aetna*"), 712 F.3d 51 (1st Cir. 2013) (reversing decision to grant summary judgment in favor of Pfizer against third-party payor Aetna); *Harden Mfg. Corp. v. Pfizer, Inc.* ("*Harden*"), 712 F.3d 60 (1st Cir. 2013) (reversing denial of the third-party payor's motion for class certification and reversing grant of summary judgment in favor of Pfizer). "The core of the plaintiffs' claims, as in Kaiser and Aetna, is the allegation that Pfizer engaged in a fraudulent off-label marketing campaign that caused the TPPs to pay for Neurontin prescriptions that were ineffective for the off-label conditions at issue, and that the plaintiffs suffered injury when they paid for those prescriptions." *Harden*, 712 F.3d at 61.

In *Kaiser,* the First Circuit affirmed a judgment against Pfizer on behalf of third-party payor Kaiser for its economic injuries arising from payments for off-label prescriptions of the drug Neurontin. Pfizer's "core defense" was "that there are too many steps in the causal chain between its misrepresentations [regarding the drug] and Kaiser's alleged injury [i.e., payment for the drug] to meet the proximate cause 'direct relation' requirement as a matter of law" under the plaintiff's RICO claim.[171] Rejecting this core defense, the First Circuit explained that "the causal chain in this case is anything but attenuated." The First Circuit explained that, "because of the structure of the American health care system," the defendant knew that TPPs, and not physicians, would "be the ones paying for the drugs [ ] prescribed." The court found that the TPP's economic injury occurred when it paid for the drug.[172]

The First Circuit further found that "the effect of [defendant's] wrongful conduct was clear in foresight, not hindsight."[173] The First Circuit thus affirmed the district court's conclusion that the plaintiff had proven proximate cause—despite the existence of a middleman between the drug manufacturer and TPP.[174] The First Circuit's analysis is directly applicable here.

The only difference between this case and *Kaiser* is that the PBMs serve as the intermediary between CVS and the health plans. However, from the outset of CVS's scheme, CVS had the ***foresight*** to plan how it would ensure that the TPP Class would pay for the HSP drugs at higher non-HSP prices. CVS knew that it had to omit the HSP prices from its U&C price calculations and submit the higher U&C prices to the PBMs so that the TPPs' claims would be

[171] *Kaiser*, 712 F.3d at 38.

[172] *Id.* at 38–40 (citations omitted).

[173] *Id.* at 39.

[174] *Id.* at 38–40 (citations omitted); *see also Aetna*, 712 F.3d at 59 ("A reasonable jury could have concluded, based on the evidence, that defendants' scheme relied upon the expectation that fraudulent off-label marketing to doctors would induce them to act in a foreseeable fashion – i.e., to write off-label prescriptions for Neurontin that would be paid for by Aetna.").

adjudicated based on the inflated U&Cs (which were passed through without change to the Class). Common questions of fact or law thus predominate on Plaintiffs' RICO claims.

B. Common issues of fact and law predominate Plaintiffs' state law claims because legal and factual questions will be resolved with proof common to all Plaintiffs and Class members.

Common issues will predominate during the trial of Plaintiffs' state claims. The key evidence necessary to establish those claims is common to Plaintiffs and all members of the Classes. They all seek to prove, among other things, that the HSP price should have been reported as the U&C price for the relevant generics and that CVS uniformly failed to do so—purposefully and by design in coordination with Caremark and others.

1. Applying multi-state law does not preclude predominance.

In exercising the wide discretion granted it by Rule 23, the Court has several options in certifying classes in this case. As one method for simplifying the trial of this case, Plaintiffs propose that the Court certify several groups of multi-state classes segregated by claim. Courts certify multi-state classes when "applicable state laws can be sorted into a small number of groups, each containing materially identical legal standards."[175] The Court need not find

[175] *Klay v. Humana, Inc.*, 382 F.3d 1241, 1262 (11th Cir. 2004); *see also Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 512–18 (6th Cir. 2015) (upholding certification of class under consumer protection laws of five states); *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 296 (1st Cir. 2000) (variations in state law do not automatically preclude class certification); *Steigerwald v. BHH, LLC*, 2016 U.S. Dist. LEXIS 21116, at *24–29 (N.D. Ohio Feb. 22, 2016) (certifying express warranty and fraud claims under laws of 10 states); *In re Checking Account Overdraft Litig.*, 307 F.R.D. 656, 674 (S.D. Fla. 2015) (certifying claims under the laws of many states and citing other authorities); *In re Checking Account Overdraft Litig.*, 275 F.R.D. 666, 679–80 (S.D. Fla. 2011) (multi-state class certification proper even if "different claims or issues are subject to different bodies of law that are not the same in functional content but nonetheless present a limited number of patterns that the court . . . can manage by means of" sub-classing); *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283, 315 (3d Cir. 1998) ("Courts have expressed a willingness to certify nationwide classes on the ground that relatively minor differences in state law could be overcome at trial by grouping similar state laws together and applying them as a unit.").

complete uniformity of state law, only that there are no material conflicts among the laws such that they can be divided into a manageable number of sub-groups.[176]

Common issues of law and fact will remain the predominant focus of this litigation notwithstanding the potential application of multiple states' laws. In Appendices A through F, Plaintiffs submit an extensive analysis of state law for violation of certain state unfair and deceptive trade practice acts and the common law of unjust enrichment. As the surveys and special verdict forms demonstrate, variations in law are minimal, and applying the laws of several states to Plaintiffs' claims does not vitiate manageability. In those few instances where variations are material, Plaintiffs show how the Court can group state laws to certify discrete classes or subclasses with adequate representatives.[177]

As to the state law classes, Plaintiff Plumbers' Fund seeks to represent the consumer protection classes, and all three Plaintiffs seek to represent the unjust enrichment class. As recently explained by the Second Circuit, Plaintiffs may "bring a class action on behalf of unnamed, yet-to-be-identified class members from other states under those states' consumer protection laws" when common questions predominate under Rule 23.[178] The First Circuit is in accord: "Importantly, the claims of the named plaintiffs parallel those of the putative class members in the sense that, assuming a proper class is certified, success on the claim under one

[176] *See Simon v. Phillip Morris*, 124 F. Supp. 2d 46, 77 (E.D.N.Y. 2000); AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW: AGGREGATE LITIGATION § 2.05(b) (2010) ("court may authorize aggregate treatment of multiple claims . . . if the court determines that . . . different claims or issues are subject to different bodies of law that are the same in functional content [or] different claims or issues are subject to different bodies of law that are not the same in functional content but nonetheless present a limited number of patterns that the court . . . can manage by means of identified adjudicatory procedures").

[177] *See* FED. R. CIV. P. 23(c)(5) ("When appropriate, a class may be divided into subclasses that are each treated as a class under this rule."); MANUAL FOR COMPLEX LITIGATION §§ 21.23, 22.754 (4th ed. 2004) (subclasses can be used to account for differences in state law).

[178] *Langan v. Johnson & Johnson Consumer Cos.*, 897 F.3d 88, 92 (2d Cir. 2018).

state's law will more or less dictate success under another state's law."[179] Thus, the First Circuit "require[s] only that a plaintiff make a single purchase in order to satisfy standing for a claim brought under multiple state laws."[180]

2. Common questions of law predominate for the Class's consumer protection act claims in 11 jurisdictions.

Consumer protection statutes, which generally prohibit unfair or deceptive trade practices, are based on the Federal Trade Commission Act.[181] All 50 states and the District of Columbia have enacted so-called "little FTC Acts."[182] Given their common source, groups of jurisdictions have similar legal requirements. As stated by a district court in the First Circuit which certified a class of TPPs under 37 states' laws, including deceptive trade practices acts: "Indeed, courts in this Circuit and elsewhere have certified classes in [ ] actions like this one despite the need to apply numerous states' laws."[183]

Plaintiff Plumbers' Fund seeks to certify Consumer Protection Classes on behalf of third-party payors in 11 jurisdictions. For ease of manageability, these 11 jurisdictions are grouped into two classes, each employing substantially similar—if not identical—consumer fraud standards: (i) the Unfair and Deceptive Conduct Consumer Protection Class to pursue claims under state statutes that generally prohibit unfair and deceptive conduct (California, Florida, Illinois, Iowa, Massachusetts, New Jersey, New York, Ohio, Washington); and (ii) the Omissions Consumer

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[179] *In re Asacol Antitrust Litig.*, 907 F.3d 42, 49 (1st Cir. 2018).

[180] *Id.* at 51 (citing *Nexium*, 777 F.3d at 31–32).

[181] *See* 15 U.S.C. § 41, *et seq*.

[182] Jack E. Karns, State Regulation of Deceptive Trade Practices Under "Little FTC Acts": Should Federal Standards Control?, 94 DICK. L. REV. 373 (1990).

[183] *In re Solodyn (Minocycline Hydrochloride) Antitrust Litig.*, 2017 U.S. Dist. LEXIS 170676, at *68 (D. Mass. Oct. 16, 2017) (certifying class of TPPs under 37 states' laws) (citing *Nexium I*, 297 F.R.D. at 176) (certifying class where 26 state laws were at issue); *In re Relafen Antitrust Litig.*, 221 F.R.D. 260, 278–84 (D. Mass. 2004) (certifying endpayor class where 12 states' antitrust laws were at issue); *In re Lidoderm Antitrust Litig.*, 2017 U.S. Dist. LEXIS 24097, at *111–12 (17 states)).

Protection Class to prosecute claims under consumer statutes that prohibit omissions of material fact (Illinois, Michigan, Nevada, New Jersey).[184] Common issues of fact and law will predominate for each of the elements, including proximate cause and damage.[185] Plaintiff's grouping ensures that each of the 11 jurisdictions in the Consumer Protection Classes utilizes objective (not subjective) standards for deception and does not require individual reliance.[186]

Plaintiff has excluded those states with elements that may be uncommon or might serve as an impediment to certification. For example, Plaintiff excluded those consumer protection statutes requiring reliance (*e.g.,* Arizona, Indiana, North Carolina, Pennsylvania, and Wyoming) or affirmative misrepresentations (*e.g.,* Colorado, Oregon, and Wisconsin); limiting standing to standing to natural persons (*e.g.,* District of Columbia, Hawaii, Maryland, Missouri, Oklahoma, Pennsylvania, Rhode Island, and West Virginia); or applying subjective standards for deception.

Plaintiff's and the Class's consumer protection claims arise from CVS's unfair and deceptive conduct in reporting U&C prices that were inflated over the HSP prices. To prove their claims, Plaintiff will present evidence as to the following common elements: (i) CVS engaged in an act or practice prohibited by state statute; (ii) Plaintiff and the Class suffered damage; and (iii) the challenged act or practice caused that damage. Because all states in the proposed Consumer Protection Classes contain these common elements of proof, and because the focus of the inquiry will be on CVS's conduct, common questions of law predominate for the Consumer Protection Classes. Under similar circumstances, courts commonly certify multi-state classes applying unfair and deceptive trade practices act claims. [187]

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[184] *See* Appendix A.

[185] *See* Appendix B.

[186] *See* Appendix C.

[187] *See, e.g.*, *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288 at 296 (affirming district court's certification of warranty grouping of eight states and rejecting defendant's arguments that "idiosyncratic"

As further evidence demonstrating the manageability of applying multi-state consumer protection law, Plaintiff provides proposed Special Verdict Forms that capture the salient elements of each claim.[188] Jury instructions will elucidate commonly defined terms and otherwise guide the fact-finder through the required elements. As the forms demonstrate, any differences that exist among state laws can easily be taken into account, thus ensuring careful adherence to legal requirements and eliminating any manageability issues.

3. Common questions of law predominate for Plaintiffs' unjust enrichment claims in 13 jurisdictions.

Courts have recognized that "the various states' common law defining the elements of unjust enrichment overlap" and have "typical elements."[189] This is confirmed by Plaintiffs'

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differences among state law precluded certification because "[a]s long as a sufficient constellation of common issues binds class members together," state law variations "will not automatically foreclose class certification under Rule 23(b)(3)"); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022–23 (9th Cir. 1998) (holding that "the idiosyncratic differences between state consumer protection laws [were] not sufficiently substantive to predominate over the shared claims"); *Suchanek v. Sturm Foods*, 2018 U.S. Dist. LEXIS 213658, at *32–35 (S.D. Ill. July 3, 2018) (certifying class under consumer protection statutes of five states); *In re Polyurethane Foam Antitrust Litig.*, 2015 U.S. Dist. LEXIS 94785 (N.D. Ohio July 21, 2015) (certifying consumer protection and unfair competition claims under laws of 15 states); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 267 F.R.D. 583, 593 (N.D. Cal. 2010), *amended*, 2011 WL 3268649 (N.D. Cal. July 28, 2011) (certifying class under antitrust, consumer protection, and unfair competition laws of 24 states); *In re Pharm Indus. Average Wholesale Price Litig.*, 252 F.R.D. 83, 94, 108–09 (D. Mass. 2008) (certifying class of TPPs under consumer protection laws of 27 jurisdictions); *S. States Police Benevolent Ass'n v. First Choice Armor & Equip., Inc.*, 241 F.R.D. 85, 90 (D. Mass. 2007) (certifying 23 state breach of warranty group over defendant's objections that variations of state warranty law did not predominate "after reviewing the extensive analysis and comparative charts created by the plaintiffs"); *In re Warfarin Sodium Antitrust Litig.*, 212 F.R.D. 231, 250 (D. Del. 2002) (certifying settlement class over objections that variations of state consumer fraud and antitrust laws defeat predominance where "these issues can be minimized by grouping state statutes and common law that share common elements of liability or common defenses, particularly where the lawsuits do not involve personal injuries"), *aff'd*, 391 F.3d 516 (3d Cir. 2004); *In re Copley Pharm., Inc.*, 161 F.R.D. 456, 469 (D. Wyo. 1995) (denying defendant's motion to decertify class in multidistrict litigation involving warranty claims, explaining that "[i]f the law of a particular state appears to be idiosyncratic, the residents from that state can be excised from the class" and "[e]ven if such idiosyncrasies remove half the jurisdictions in the United States, which the Court believes is highly unlikely, the application of common issues concerning the other twenty-five states should conserve judicial and litigation resources for all involved").

[188] *See* Appendix D.

[189] *In re FCA US LLC Monostable Elec. Gearshift Litig.*, 280 F. Supp. 3d 975, 1007 (E.D. Mich. 2017) (quoting *In re Cardizem CD Antitrust Litig.*, 105 F. Supp. 2d 618, 671 (E.D. Mich. 2000)).

survey of unjust enrichment law in Appendix E, which supports the certification of a 13-state Unjust Enrichment Class.[190] The Unjust Enrichment Class state laws follow the RESTATEMENT (FIRST) OF RESTITUTION § 1 and require the presence of the following basic, overlapping elements: (i) the plaintiff conferred a benefit; and (ii) the defendant accepted or retained that benefit; (iii) under circumstances that would be unjust for the defendant to retain the benefit.

Plaintiff has excluded those states from the Unjust Enrichment Class with elements that may be uncommon, including those which add an additional "appreciation" requirement[191] or require privity. With this type of analysis, courts commonly certify multi-state classes for unjust enrichment claims, including in pharmaceutical cases brought by health plans.[192] Manageability is further demonstrated by Plaintiffs' proposed Special Verdict Forms that encapsulate the salient elements of the claim and account for the minor state law variations.[193]

C. Plaintiffs' expert demonstrated that damages can be calculated on a class-wide basis using common proof and a standard methodology.

Plaintiffs retained Rena Conti, Ph.D., an Associate Research Director of Biopharma & Public Policy for the Boston University Institute for Health System Innovation & Policy, to opine on whether third-party payors (TPPs) have been injured by Defendants' conduct, ascertain whether or not damages can be calculated on a class-wide basis using common evidence, and

[190] These states include: Arkansas, Colorado, Connecticut, District of Columbia, Hawaii, Illinois, Indiana, Iowa, Missouri, New Mexico, New York, Oklahoma and West Virginia.

[191] *E.g.*, Alaska, California, Kansas, Kentucky, Maine, Maryland, Massachusetts, Nevada, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Washington, and Wisconsin.

[192] *See In re Flonase Antitrust Litig.*, 284 F.R.D. 207 (E.D. Pa. June 18, 2012) (certifying Rule 23(b)(3) class action involving unjust enrichment claims in action brought by third-party payors against defendant drug manufacturer); *In re Terazosin Hydrochloride Antitrust Litig.*, 220 F.R.D. 672, 697 n.40 (S.D. Fla. 2004) (certifying a 17-state unjust enrichment subclass, finding that unjust enrichment law is "virtually identical" from state to state).

[193] *See* Appendix F.

implement a methodology for calculating class-wide damages.[194] Dr. Conti's expertise is well-suited to the issues in this case, given her Ph.D. in Health Policy (Economics Track) from Harvard University; numerous publications in peer-reviewed journals and book chapters, including on insurer-related reimbursement and coverage issues, and trends in pricing of prescription drugs; testimony before the U.S. Senate Finance Committee regarding economic issues in the pharmaceutical industry; and retention as a consultant and testifying expert on health policy and health economics in litigation.[195]

Dr. Conti opines that, as a result of the alleged scheme, the Nationwide Class members suffered out-of-pocket losses, calculated by a generally accepted measure.[196] In other words, class members' out-of-pocket losses are calculated as the difference between what the TPP actually paid for the HSP drugs and the HSP price.[197]

Using well-accepted economic methods and data provided by defendants and third-party pharmacy benefit managers,[198] Dr. Conti calculated aggregate damages for Class Members across 13 states and the District of Columbia (hereafter the 14 states[199]) as $696,976,377 million.[200] After adjusting damages for offsets, Dr. Conti calculated aggregate damages for Class Members across the 14 states as $540,152,773.[201] She then calculated extrapolated damages for

[194] Conti Rep., ¶ 8.

[195] *Id.*, § I.

[196] *Id.*, ¶¶ 19, 62, 81. *See also id.,* § V(B).

[197] *Id.*

[198] *Id.*, § V(C)(1). *See also id.* ¶ 77, n.79.

[199] *Id.*, § V(C)(2). The 14 states are based on the states for which Defendant produced data. In the event the Nationwide Class is certified, Plaintiffs will have access to nationwide data.

[200] *Id.*, ¶ 74.

[201] *Id.*, ¶ 76.

the Nationwide Class across all states as $962,034,257.[202] Plaintiffs have thus satisfied *Comcast* because damages are both "capable of measurement on a classwide basis"[203] and tied to their theory of liability.[204]

Finally, as the Supreme Court explained, a class damages model "need not be exact."[205] Where difficulty in ascertaining damages with precision is the result of Defendants' wrongful conduct, they cannot complain that damages cannot be measured with exactness.[206] So a "reasonable estimate" of damages is sufficient for "[a]ny other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim."[207]

D. A class action is superior to adjudicating hundreds or thousands of separate individual cases involving the same issues.

Rule 23(b)(3) lists the factors courts must look to in determining "that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."[208] Here, each of the "superiority" factors weigh heavily in favor of class certification.

First, the Class members do not have interests in individually controlling the prosecution of separate actions. They have little incentive to individually litigate their claims because the

[202] Conti Rep., ¶ 80. Dr. Conti opined that the method may accommodate adjustments for factual or legal findings the jury or the Court makes for changes in the HSP Drug list, varying time periods, a subset of TPP purchasers, purchases in a particular state, and offsets.

[203] *Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013).

[204] *In re Nexium Antitrust Litig.*, 777 F.3d at 19; *see also Comcast*, 569 U.S. at 38 ("The first step in a damages study is the translation of the legal theory of the harmful event into an analysis of the economic impact of that event.").

[205] *Comcast*, 569 U.S. at 35.

[206] *Castro v. Sanofi Pasteur Inc.*, 134 F. Supp. 3d 820, 849 (D.N.J. 2015) (citing *Eastman Kodak Co. v. S. Photo Materials Co.*, 273 U.S. 359, 379 (1927)).

[207] *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 124 (1969) (quoting *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264–65 (1946)); *Castro*, 134 F. Supp. 3d at 849 (quoting *Rossi v. Standard Roofing, Inc.*, 156 F.3d 452, 484 (3d Cir. 1998)).

[208] FED. R. CIV. P. 23(b)(3)(A)–(D).

expenses and personal commitment necessary to litigate each individual claim would outweigh the potential recovery. Class-wide treatment is the only realistic option available to proceed.

Second, regarding the extent and nature of any litigation concerning the controversy already begun by or against Class members, Plaintiffs are not aware of any other class action against CVS concerning similar facts as here. This factor favors certification.

Third, it is expedient to concentrate the litigation before this Court in the District of Rhode Island. "Courts have found that class actions in a particular forum are particularly appropriate" in a variety of instances, including "when that court has already made several preliminary rulings, when a particular forum is more geographically convenient for the parties . . . or, for example when the defendant is located in the forum state."[209] Here, this Court has already ruled on multiple rounds of Rule 12 motions, as well as managed class discovery. And CVS is located in Rhode Island.

Further, there are no manageability concerns as reflected in the surveys of state law and Special Verdict Forms. Accordingly, Rule 23(b)(3)'s superiority requirement is satisfied.

E. Hagens Berman Sobol Shapiro LLP should be appointed lead counsel per Rule 23(g).

Finally, Plaintiffs respectfully request that the Court appoint Hagens Berman Sobol Shapiro LLP as Class Counsel. Hagens Berman has and will continue to "fairly and adequately represent the interests of the class."[210] Counsel has invested thousands of hours prosecuting claims on behalf of the Class members, defeating motions to dismiss, engaging in substantial deposition practice. And it has aggressively pursued class discovery to supplement its wide independent investigation. Additionally, Plaintiffs' counsel possesses extensive experience

[209] NEWBERG ON CLASS ACTIONS, § 4:71 (5th ed. 2013).

[210] FED. R. CIV. P. 23(g)(4).

prosecuting complex class actions such as this.[211] Finally, counsel will continue to devote the resources necessary to representing the Class.

II. CONCLUSION

For the reasons provided above, Plaintiffs respectfully request that this Court certify the Classes, appoint Hagens Berman Sobol Shapiro LLP as Class Counsel, appoint Plaintiffs as Class Representatives, direct that notice be sent to the Class, and grant such other relief as the Court deems necessary and appropriate.

Dated: April 29, 2019

Respectfully submitted,

By: */s/ Steve W. Berman*

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CERTIFICATE OF SERVICE

I hereby certify that on April 29, 2019, a copy of the foregoing was filed electronically. Notice of this filing will be sent to the attorneys of record by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Steve W. Berman
STEVE W. BERMAN

Appendix A: Consumer Protection Classes

UNFAIR AND DECEPTIVE CONDUCT CONSUMER PROTECTION CLASS	
States	California, Florida, Illinois, Iowa, Massachusetts, New Jersey, New York, Ohio, Washington
Authority	
California	California's Unfair Competition Law prohibits "unlawful, unfair or fraudulent" business acts or practices. Cal. Bus. & Prof. Code § 17200. "A business practice is unfair within the meaning of the UCL if it violates established public policy or if it is immoral, unethical, oppressive or unscrupulous and causes injury to consumers which outweighs its benefits." *Diehl v. Starbucks Corp.*, No. 12CV2432 AJB (BGS), 2014 WL 295468, at *10 (S.D. Cal. Jan. 27, 2014) (citation omitted). A business act or practice is "fraudulent" if members of the public are likely to be deceived. *Blakemore v. Superior Court*, 129 Cal. App. 4th 36, 49 (2d Dist. 2005). "[A] fraudulent business practice under § 17200 is one which is likely to deceive the public, and may be based on representations to the public which are untrue, and also those which may be accurate on some level, but will nonetheless tend to mislead or deceive." *Almont Ambulatory Surgery Ctr., LLC v. UnitedHealth Grp., Inc.*, 121 F. Supp. 3d 950, 978 (C.D. Cal. 2015) (quotations omitted).
Florida	"Unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." Fla. Stat. § 501.204(1). An "unfair" practice is one that "offends established public policy" or is "immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." *Samuels v. King Motor Co.*, 782 So. 2d 489, 499 (Fla. Dist. Ct. App. 2001) (quoting *Spiegel, Inc. v. FTC*, 540 F.2d 287, 293 (7th Cir. 1976)). "[A] deceptive practice is one that is likely to mislead consumers." *In re: Takata Airbag Prods. Liab. Litig.*, No. 14-24009-CV-MORENO, 2016 WL 6072406, at *11 (S.D. Fla. Oct. 14, 2016) (internal citation omitted).

Illinois	"Unfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact, or the use or employment of any practice described in Section 2 of the 'Uniform Deceptive Trade Practices Act' . . . in the conduct of any trade or commerce are hereby declared unlawful whether any person has in fact been misled, deceived or damaged thereby." 815 Ill. Comp. Stat. 505/2. In considering whether a practice is "unfair," courts review three factors: "(1) whether the practice offends public policy; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers." *Robinson v. Toyota Motor Credit Corp.*, 201 Ill. 2d 403, 418 (Ill. 2002). "Under the CFA, a statement is deceptive if it creates a likelihood of deception or has the capacity to deceive." *Bober v. Glaxo Wellcome PLC*, 246 F.3d 934, 938 (7th Cir. 2001) (citing *People ex rel. Hartigan v. Knecht Servs., Inc*., 216 Ill. App. 3d 843, 857 (Ill. App. Ct. 1991)).
Iowa	"The act, use or employment by a person of an unfair practice, deception, fraud, false pretense, false promise, or misrepresentation, or the concealment, suppression, or omission of a material fact with intent that others rely upon the concealment, suppression, or omission, in connection with the lease, sale, or advertisement of any merchandise or the solicitation of contributions for charitable purposes, whether or not a person has in fact been misled, deceived, or damaged, is an unlawful practice." Iowa Code § 714.16(2)(a). "'Unfair practice' means an act or practice which causes substantial, unavoidable injury to consumers that is not outweighed by any consumer or competitive benefits which the practice produces." Iowa Code § 714.16(n). "'Deception' means an act or practice which has the tendency or capacity to mislead a substantial number of consumers as to a material fact or facts." Iowa Code § 714.16(f).

Massachusetts	Massachusetts prohibits "unfair or deceptive acts or practices in the conduct of any trade or commerce." Mass. Gen. Laws Ann. ch. 93A, § 2. "Under Chapter 93A, an act or practice is unfair if it falls 'within at least the penumbra of some common-law, statutory, or other established concept of unfairness'; 'is immoral, unethical, oppressive, or unscrupulous'; and 'causes substantial injury to consumers.'" *Moreira v. Citimortgage, Inc.*, No. 15-13720-LTS, 2016 WL 4707981, at *3 (D. Mass. Sept. 8, 2016) (internal citation omitted). "[T]o determine whether conduct is deceptive, the finder of fact must assess whether the conduct possesses a tendency to deceive and could reasonably be found to have caused a person to act differently from the way he [or she] otherwise would have acted." *Full Spectrum Software, Inc. v. Forte Automation Sys., Inc.*, 858 F.3d 666, 671–72 (1st Cir. 2017) (citation and quotations omitted, second emphasis in original).
New Jersey	The New Jersey Consumer Fraud Act prohibits "deception." N.J. Stat. Ann. § 56:8–2. It is not necessary to show that any person was in fact misled or deceived; all that is required is that the conduct has the capacity to mislead. *Cox v. Sears Roebuck & Co.*, 647 A.2d 454, 462 (N.J. 1994). The New Jersey Standard Civil Jury Instructions, § 4.43 Model Charge under Consumer Fraud Act adds: "'Deception' is conduct or advertisement which is misleading to an average consumer to the extent that it is capable of, and likely to, mislead an average consumer. It does not matter that at a later time it could have been explained to a more knowledgeable and inquisitive consumer. It does not matter whether the conduct or advertisement actually have misled the plaintiff(s). The fact that defendant(s) may have acted in good faith is irrelevant. It is the capacity to mislead that is important."
New York	New York prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce[.]" N.Y. Gen. Bus. Law § 349(a). "The New York Court of Appeals has adopted an objective definition of 'deceptive acts and practices,' which requires that the representations or omissions at issue are 'likely to mislead a reasonable consumer acting reasonably under the circumstances.'" *Carias v. Monsanto Co.,* No. 15-CV-3677 (JMA) (GRB) , 2016 WL 6803780, at *9 (E.D.N.Y. Sept. 30, 2016) (internal citations omitted).
Ohio	The Ohio Consumer Sales Practices Act ("CSPA") declares that "[n]o supplier shall commit an unfair or deceptive act or practice in connection with a consumer transaction. Such an unfair or deceptive act or practice by a supplier violates [the CSPA] whether it occurs before, during, or after the transaction." Ohio Rev. Code § 1345.02(A). Such an unfair or deceptive act or practice by a supplier violates [the CSPA] whether it occurs before, during, or after the transaction." Ohio Rev. Code § 1345.02(A).

Washington	The Washington Consumer Protection Act prohibits "unfair or deceptive acts or practices in the conduct of any trade or commerce." Wash Rev. Code § 19.86.020. A practice is "unfair" if it (1) offends public policy as it has been established by statutes, the common-law, or otherwise—whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) is immoral, unethical, oppressive, or unscrupulous; or (3) causes substantial injury to consumers. *Blake v. Federal Way Cycle Ctr.*, 698 P.2d 578, 583 (Wash. Ct. App. 1985); *Rush v. Blackburn*, 361 P.3d 217, 224–25 (Wash. Ct. App. 2015). "In applying the requirement that the allegedly deceptive act has the capacity to deceive 'a substantial portion of the public,' the concern of Washington courts has been to rule out those deceptive acts and practices that are unique to the relationship between plaintiff and defendant." *Behnke v. Ahrens*, 294 P.3d 729, 735–36 (Wash. Ct. App. 2012) (citation omitted).

OMISSIONS CONSUMER PROTECTION CLASS	
States	Illinois, Michigan, Nevada, New Jersey
Authority	
Illinois	The Illinois Consumer Fraud and Deceptive Business Practices Act ("ICFA") prohibits "unfair or deceptive acts or practices, including but not limited to the use or employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact . . . in the conduct of trade or commerce . . . whether any person has in fact been misled, deceived or damaged thereby." 815 Ill. Comp. Stat. 505/2.
Michigan	The Michigan Consumer Protection Act prohibits "(s) Failing to reveal a material fact, the omission of which tends to mislead or deceive the consumer, and which fact could not reasonably be known by the consumer . . . [;] (bb) Making a representation of fact or statement of fact material to the transaction such that a person reasonably believes the represented or suggested state of affairs to be other than it actually is . . . [;] (cc) Failing to reveal facts that are material to the transaction in light of representations of fact made in a positive manner. Mich. Comp. Laws § 445.903(1).
Nevada	The Nevada Deceptive Trade Practices Act makes it unlawful to "[k]nowingly fail[] to disclose a material fact in connection with the sale or lease of goods or services," Nev. Rev. Stat. § 598.0923(2)(1), and "[k]nowingly make[ ] any other false representation in a transaction. Nev. Rev. Stat. § 598.0915(15).
New Jersey	The New Jersey Consumer Fraud Act prohibits the "act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate . . . whether or not any person has in fact been misled, deceived or damaged thereby[.]" N.J. Stat. § 56:8-2.

Appendix B: Survey of Consumer Protection Act Damage and Proximate Cause Requirements by Jurisdiction

State	Statute	Requirements
1. California	Cal. Bus. & Prof. Code § 17204	Actions for relief pursuant to this chapter shall be prosecuted exclusively in a court of competent jurisdiction . . . by a person who has suffered injury in fact and has lost money or property as a result of the unfair competition.
2. Florida	Fla. Stat. § 501.211	(1) Without regard to any other remedy or relief to which a person is entitled, anyone aggrieved by a violation of this part may bring an action to obtain a declaratory judgment that an act or practice violates this part and to enjoin a person who has violated, is violating, or is otherwise likely to violate this part. (2) In any action brought by a person who has suffered a loss as a result of a violation of this part, such person may recover actual damages, plus attorney's fees and court costs as provided in Section 501.2105.
3. Illinois	815 Ill. Comp. Stat. 505/10a(a)	Any person who suffers actual damage as a result of a violation of this Act committed by any other person may bring an action against such person. The court, in its discretion may award actual economic damages or any other relief which the court deems proper . . . (c) Except as provided in subsections (f), (g), and (h) of this Section, in any action brought by a person under this Section, the Court may grant injunctive relief where appropriate and may award, in addition to the relief provided in this Section, reasonable attorney's fees and costs to the prevailing party.
4. Iowa	Iowa Code § 714H.5	1. A consumer who suffers an ascertainable loss of money or property as the result of a prohibited practice or act in violation of this chapter may bring an action at law to recover actual damages. The court may order such equitable relief as it deems necessary to protect the public from further violations, including temporary and permanent injunctive relief.

State	Statute	Requirements
5. Massachusetts	Mass. Gen. Laws Ann. ch. 93A § 9(1)	Any person, other than a person entitled to bring action under section eleven of this chapter, who has been injured by another person's use or employment of any method, act or practice declared to be unlawful by section two or any rule or regulation issued thereunder or any person whose rights are affected by another person violating the provisions of clause (9) of section three of chapter 176 D may bring an action in the superior court, or in the housing court as provided in section three of chapter 185 C whether by way of original complaint, counterclaim, cross-claim or third party action, for damages and such equitable relief, including an injunction, as the court deems to be necessary and proper. (2) Any persons entitled to bring such action may, if the use or employment of the unfair or deceptive act or practice has caused similar injury to numerous other persons similarly situated and if the court finds in a preliminary hearing that he adequately and fairly represents such other persons, bring the action on behalf of himself and such other similarly injured and situated persons . . . .
6. Michigan	Mich. Comp. Laws § 445.911(3)	A person who suffers loss as a result of a violation of this act may bring a class action on behalf of persons residing or injured in this state for the actual damages caused by any of the following: (a) A method, act, or practice in trade or commerce defined as unlawful under section 3.
7. Nevada	Nev. Rev. Stat. § 41.600(3)(a)	If the claimant is the prevailing party, the court shall award the claimant . . . [a]ny damages that the claimant has sustained.
8. New Jersey	N.J. Stat. § 56:8–19	Any person who suffers any ascertainable loss of moneys or property, real or personal, as a result of the use or employment by another person of any method, act, or practice declared unlawful under this act or the act hereby amended and supplemented may bring an action or assert a counterclaim therefore in any court of competent jurisdiction. In any action under this section the court shall, in addition to any other appropriate legal or equitable relief, award threefold the damages sustained by any person in

State	Statute	Requirements
		interest. In all actions under this section, including those brought by the Attorney General, the court shall also award reasonable attorneys' fees, filing fees and reasonable costs of suit.
9. New York	N.Y. Gen. Bus. Law § 349(h)	In addition to the right of action granted to the attorney general pursuant to this section, any person who has been injured by reason of any violation of this section may bring an action in his own name to enjoin such unlawful act or practice, an action to recover his actual damages or fifty dollars, whichever is greater, or both such actions. The court may, in its discretion, increase the award of damages to an amount not to exceed three times the actual damages up to one thousand dollars, if the court finds the defendant willfully or knowingly violated this section. The court may award reasonable attorney's fees to a prevailing plaintiff.
10. Ohio	Ohio Rev. Code § 1345.09(B)	Where the violation was an act or practice declared to be deceptive or unconscionable by rule adopted under division (B)(2) of section 1345.05 of the Revised Code before the consumer transaction on which the action is based, or an act or practice determined by a court of this state to violate section 1345.02, 1345.03, or 1345.031 of the Revised Code and committed after the decision containing the determination has been made available for public inspection under division (A)(3) of section 1345.05 of the Revised Code, the consumer may rescind the transaction or recover, but not in a class action, three times the amount of the consumer's actual economic damages or two hundred dollars, whichever is greater, plus an amount not exceeding five thousand dollars in noneconomic damages or recover damages or other appropriate relief in a class action under Civil Rule 23, as amended.
11. Washington	Wash. Rev. Code § 19.86.090	Any person who is injured in his or her business or property by a violation of RCW 19.86.020, 19.86.030, 19.86.040, 19.86.050, or 19.86.060, or any person so injured because he or she refuses to accede to a proposal for an arrangement which, if consummated, would be in violation of RCW 19.86. 030, 19.86.040, 19.86.050, or 19.86.060, may bring a civil action in superior court to enjoin further violations, to recover the actual damages

State	Statute	Requirements
		sustained by him or her, or both, together with the costs of the suit, including a reasonable attorney's fee. In addition, the court may, in its discretion, increase the award of damages up to an amount not to exceed three times the actual damages sustained: PROVIDED, That such increased damage award for violation of RCW 19.86.020 may not exceed twenty-five thousand dollars: PROVIDED FURTHER, That such person may bring a civil action in the district court to recover his or her actual damages, except for damages which exceed the amount specified in RCW 3.66.020, and the costs of the suit, including reasonable attorney's fees. The district court may, in its discretion, increase the award of damages to an amount not more than three times the actual damages sustained, but such increased damage award shall not exceed twenty-five thousand dollars. For the purpose of this section, "person" includes the counties, municipalities, and all political subdivisions of this state.

Appendix C: Survey of Consumer Protection Act Reasonable Consumer Standards

State	Statute	Standard
1. California	Cal. Bus. & Prof. § 17200	"[C]laims under the California consumer protection statutes are governed by the 'reasonable consumer' test. Under this standard, Plaintiff must 'show that members of the public are likely to be deceived.' This requires more than a mere possibility that [the product] 'might conceivably be misunderstood by some few consumers viewing it in an unreasonable manner.' Rather, **the reasonable consumer standard requires a probability 'that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled**.'" *Ebner v. Fresh, Inc.*, 838 F.3d 958, 965 (9th Cir. 2016).
2. Florida	Fla. Stat. § 501.204	"Under Florida law, an objective test is employed in determining **whether the practice was likely to deceive a consumer acting reasonably,**" *Carriuolo v. Gen. Motors Co.*, 823 F.3d 977, 984 (11th Cir. 2016), or "**mislead the [objective] consumer acting reasonably in the circumstances**." *Democratic Republic of the Congo v. Air Capital Grp., LLC*, 614 F. App'x 460, 470 (11th Cir. 2015).
3. Illinois	815 Ill. Comp. Stat. 505/2	"Under the CFA, a statement is deceptive if it creates a **likelihood of deception or has the capacity to deceive**." *Bober v. Glaxo Wellcome PLC*, 246 F.3d 934, 938 (7th Cir. 2001).
4. Iowa	Iowa Code § 714.16	"'Deception' means an act or practice which has the **tendency or capacity to mislead a substantial number of consumers as to a material fact or facts**." Iowa Code § 714.16. "To ascertain whether a practice is likely to mislead in the consumer protection context, courts typically evaluate the overall or 'net impression' created by the representation." *State ex rel. Miller v. Vertrue, Inc.*, 834 N.W.2d 12, 34 (Iowa 2013).
5. Massachusetts	Mass. Gen. Laws Ann. ch. 93A § 2	"[C]onduct is deceptive if it possesses 'a **tendency to deceive**.'" *Aspinall v. Philip Morris Companies, Inc.*, 813 N.E.2d 476, 487 (Mass. 2004).

Appendix C: Survey of Consumer Protection Act Reasonable Consumer Standards

State	Statute	Standard
6. Michigan	Mich. Comp. Laws § 445.903	Unfair, unconscionable, or deceptive acts include the "[r]epresent[ation] that goods . . . have . . . quantities that they do not have." Mich. Comp. Laws § 445.903. "[M]embers of a class proceeding under the [MCPA] need not individually prove reliance on the alleged misrepresentations. **It is sufficient if the class can establish that a reasonable person would have relied on the representations**." *Dix v. Am. Bankers Life Assur. Co. of Florida*, 415 N.W.2d 206, 209 (Mich. 1987).
7. Nevada	Nev. Rev. Stat. § 598.0923(1)	A fact is "material if it may affect the outcome of the sales transaction . . . . The essential question is whether a **reasonable buyer's decision** to buy or not to buy would change if the fact at issue were disclosed." *De Zamora v. Auto Gallery, Inc*., 2014 WL 1685925 (D. Nev. Apr. 28, 2014).
8. New Jersey	N.J. Stat. § 56:8–2	"For an alleged deceptive act to be actionable, courts consider whether the act has the **capacity to mislead the average consumer**." *Sauro v. L.A. Fitness Int'l, LLC*, Civ. No. 12-3682 (JBS/AMD), 2013 WL 978807, at *5 (D.N.J. Feb. 13, 2013).
9. New York	N.Y. Gen. Bus. § 349	"[T]his Court has applied an objective standard which asks whether the "representation or omission [was] **likely to mislead a reasonable consumer acting reasonably under the circumstances**,' taking into account not only the impact on the 'average customer' but also on 'the vast multitude which the statutes were enacted to safeguard--including the ignorant, the unthinking and the credulous who, in making purchases, do not stop to analyze but are governed by **appearances and general impressions**.'" *Matter of Food Parade, Inc. v. Office of Consumer Affairs of Cty. of Nassau*, 859 N.E.2d 473 (N.Y. 2006).

Appendix C: Survey of Consumer Protection Act Reasonable Consumer Standards

State	Statute	Standard
10. Ohio	Ohio Rev. Code § 1345.02(A)	A violation of the Act occurs if the practice has **a tendency or capacity to deceive**. "An act has the tendency or capacity to deceive if it is (1) at variance with the truth and (2) material or likely to be material to a consumer's decision to purchase the product or service involved." *Cranford v. Joseph Airport Toyota*, C.A. Case No. 15408, 1996 WL 282997, *8 (Ohio. Ct. App. May 17, 1996).
11. Washington	Wash. Rev. Code § 19.86.020	"To show that a party has engaged in an unfair or deceptive act or practice that violates the CPA, a plaintiff need not prove that the act in question was 'intended to deceive, but that the alleged act had the **capacity to deceive a substantial portion of the public**.'" *Peterson v. Kitsap Cmty. Fed. Credit Union*, 287 P.3d 27, 37–38 (Wash. Ct. App. 2012).

Appendix D: Plaintiffs' Proposed Special Verdict Forms for the Consumer Protection Classes

Set forth below are suggested interrogatories that would be presented on Special Verdict Forms at Trial. This form is meant to be illustrative only, and not comprehensive. Plaintiffs may suggest changes to the special interrogatories herein. Moreover, the absence of any claim or state from the suggested classes is not intended to constitute a waiver of any claims currently, or in the future, brought in this action. Note also that, under some statutes, the Court and not a jury make the required findings.

UNFAIR AND DECEPTIVE CONDUCT CONSUMER PROTECTION CLASS

Some states prohibit unfair and deceptive trade practices. These states are: California, Florida, Illinois, Iowa, Massachusetts, New Jersey, New York, Ohio, and Washington.

Do you find by a preponderance of the evidence the following:

(i) Did CVS engage in an unfair act or practice in the conduct of trade or commerce?

Yes ☐ No ☐

(ii) Did CVS engage in a deceptive act or practice in the conduct of trade or commerce?

Yes ☐ No ☐

(iii) Did CVS's conduct cause Plaintiffs and the Class to lose money?

Yes ☐ No ☐

(iv) Have Plaintiffs proved by a preponderance of the evidence the amount of money lost as a result of CVS's conduct?

Yes ☐ No ☐

If "yes," complete the following blank: The Court awards damages to Plaintiffs and the Unfair and Deceptive Conduct Consumer Protection Class in the amount of $_____. (If you answered "no," do not complete the blank.)

OMISSIONS CONSUMER PROTECTION CLASS

Some states prohibit a defendant from omitting or concealing material facts from consumers. These states are: Illinois, Michigan, Nevada, and New Jersey.

Do you find by a preponderance of the evidence the following:

(i) Did CVS conceal or omit material facts in the conduct of trade or commerce?

Yes ☐ No ☐

(ii) Did CVS's conduct cause Plaintiffs and the Class to lose money?

Yes ☐ No ☐

(iii) Have Plaintiffs proved by a preponderance of the evidence the amount of money lost as a result of CVS's conduct?

Yes ☐ No ☐

If "yes," complete the following blank: The Court awards damages to Plaintiffs and the Omissions Consumer Protection Class in the amount of $_____. (If you answered "no," do not complete the blank.)

Appendix E

Unjust Enrichment (Restatement) Multi-State Class: Survey of State Law

Below is a survey supporting the proposed unjust enrichment class, setting forth the relevant states that use the *Restatement's* definition of unjust enrichment. *See Restatement (1st) Restitution* §1 (1937) ("*Restatement (1st) Restitution*").

State	Elements of Cause of Action
Arkansas	"The *Restatement of Restitution* § 1 states simply, 'A person who has been unjustly enriched at the expense of another is required to make restitution to the other.' An action based on unjust enrichment is maintainable in all cases where one person has received money under such circumstances that, in equity and good conscience, he ought not to retain it." *Friends of Children, Inc. v. Marcus*, 876 S.W.2d 603, 606 (Ark. Ct. App. 1994) (*citing Frigillana v. Frigillana*, 584 S.W.2d 30 (Ark. 1979)).
Colorado	"The Restatement of Restitution § 1 states '[a] person who has been unjustly enriched at the expense of another is required to make restitution to the other." Restatement of Restitution § 1 (1937). The comment to this section explains that "[a] person is enriched if he has received a benefit. A person is unjustly enriched if the retention of the benefit would be unjust.' Restatement of Restitution § 1 cmt. a (1937)." *DCB Constr. Co. v. Cent. City Dev. Co.,* 965 P.2d 115, 118–19 (Colo. 1998).
Connecticut	"Plaintiffs seeking recovery for unjust enrichment must prove (1) that the defendants were benefited, (2) that the defendants unjustly did not pay the plaintiffs for the benefits, and (3) that the failure of payment was to the plaintiffs' detriment." *Town of New Hartford v. Conn. Res. Recovery Auth*., 970 A.2d 592, 609–10 (Conn. 2009).
District of Columbia	"The elements of an unjust enrichment claim are '(1) the plaintiff conferred a benefit on the defendant; (2) the defendant retains the benefit; and (3) under the circumstances, the defendant's retention of the benefit is unjust." *Falconi-Sachs v. LPF Senate Square, LLC*, 142 A.3d 550, 556 (D.C. 2016).
Hawaii	The state courts of Hawaii abide by the general theory of the Restatement of Restitution that "[o]ne who receives a benefit is of course enriched, and he would be unjustly enriched if its retention would be unjust." *Small v. Badenhop*, 701 P.2d 647, 654 (Haw. 1985).

Appendix E

Unjust Enrichment (Restatement) Multi-State Class: Survey of State Law

Below is a survey supporting the proposed unjust enrichment class, setting forth the relevant states that use the *Restatement's* definition of unjust enrichment. *See Restatement (1st) Restitution* §1 (1937) ("*Restatement (1st) Restitution*").

State	Elements of Cause of Action
Illinois	"To state a cause of action based on a theory of unjust enrichment, a plaintiff must allege that the defendant has unjustly retained a benefit to the plaintiffs detriment, and that defendant's retention of the benefit violates the fundamental principles of justice, equity, and good conscience." *Apollo Real Estate Inv. Fund, IV, L.P. v. Gelber*, 398 Ill. App. 3d 773, 787 (Ill. App. Ct. 2009).
Indiana	"A person who has been unjustly enriched at the expense of another is required to make restitution to the other." Restatement of Restitution § 1 (1937). "To prevail on a claim of unjust enrichment, a claimant must establish that a measurable benefit has been conferred on the defendant under such circumstances that the defendant's retention of the benefit without payment would be unjust." *Zoeller v. E. Chi. Second Century, Inc*., 904 N.E.2d 213, 220 (Ind. 2009).
Iowa	"Iowa generally follows the common law of restitution as summarized in the Restatement." *Nat'l Bank v. FCC Equip. Fin., Inc.*, 801 N.W.2d 17 (Iowa Ct. App. 2011) (citing Restatement of Restitution § 1 *et seq*.). "There are three elements to unjust enrichment: '(1) defendant was enriched by the receipt of a benefit; (2) the enrichment was at the expense of the plaintiff; and (3) it is unjust to allow the defendant to retain the benefit under the circumstances.'" *Pro Commer., LLC v. K & L Custom Farms, Inc.*, 870 N.W.2d 273 (Iowa Ct. App. 2015) (quoting *State ex rel. Palmer v. Unisys Corp.*, 637 N.W.2d 142, 154-55 (Iowa 2001)).
Missouri	"To establish the elements of an unjust enrichment claim, a plaintiff must show, (1) it conferred a benefit on the defendant; (2) the defendant appreciated the benefit; and (3) the defendant accepted and retained the benefit under circumstances that are inequitable or unjust." *AIG Agency, Inc. v. Mo. Gen. Ins. Agency, Inc*., 474 S.W.3d 222, 228 (Mo. Ct. App. 2015).
New Mexico	"One who has been unjustly enriched at the expense of another may be required by law to make restitution." *Tom Growney Equip., Inc. v. Ansley,* 888 P.2d 992, 994 (N.M. App. 1994) (citing *Restatement of Restitution* § 1 comments a, b, c (1937)). "To prevail on a claim for unjust enrichment, one must show that: (1) another has been knowingly benefitted at one's expense (2) in a manner such that allowance of the other to retain the benefit would be unjust." *City of Rio Rancho v. Amrep Southwest. Inc*., 260 P.3d 414, 428–29 (N.M. 2011) (internal quotation marks omitted).

Appendix E

Unjust Enrichment (Restatement) Multi-State Class: Survey of State Law

Below is a survey supporting the proposed unjust enrichment class, setting forth the relevant states that use the *Restatement's* definition of unjust enrichment. *See Restatement (1st) Restitution* §1 (1937) ("*Restatement (1st) Restitution*").

State	Elements of Cause of Action
New York	"The elements of a cause of action to recover for unjust enrichment are '(1) the defendant was enriched, (2) at the plaintiff's expense, and (3) that it is against equity and good conscience to permit the defendant to retain what is sought to be recovered." *Gym Door Repairs, Inc. v. Astoria Gen. Contr. Corp*., 43 N.Y.S.3d 381 (N.Y. App. Div. 2016).
Oklahoma	"Unjust enrichment arises from the failure of a party to make restitution in circumstances where it is inequitable, or one party holds property that, in equity and good conscience, it should not be allowed to retain." *Am. Biomedical Grp., Inc. v. Techtrol, Inc*., 374 P.3d 820, 828 (Okla. 2016) (internal quotation marks omitted). "The Restatement of Restitution . . . starts with the general principle that restitution will be available whenever one has received a benefit to which another is justly entitled. The inequity of retaining a benefit can spring from a variety of sources, such as fraud or other unconscionable conduct in which the recipient has received a benefit for which he has not responded with a quid pro quo." *Warren v. Century Bankcorporation, Inc*., 741 P.2d 846, 852 (Okla. 1987).
West Virginia	"The Court has also indicated that if benefits have been received and retained under such circumstances that it would be inequitable and unconscionable to permit the party receiving them to avoid payment therefore, the law requires the party receiving the benefits to pay their reasonable value." *Realmark Devs. v. Ranson*, 542 S.E.2d 880, 884–85 (W. Va. 2000).

Appendix F: Plaintiffs' Proposed Special Verdict Form for Unjust Enrichment

Set forth below are suggested interrogatories that would be presented on Special Verdict Forms at Trial. This form is meant to be illustrative only, and not comprehensive. Plaintiffs may suggest changes to the special interrogatories herein. Moreover, the absence of any claim or state from the suggested classes is not intended to constitute a waiver of any claims currently, or in the future, brought in this action.

THE RESTATEMENT'S BASIC TEST

A party is enriched if she receives a benefit. A party is unjustly enriched if the retention of the benefit would be unfair. A party obtains restitution when she is restored to the position she formerly occupied either by the return of something which she formerly had or by the receipt of its equivalent in money. Ordinarily, the measure of restitution is the amount of enrichment received by the defendant. If the loss suffered differs from the amount of benefit received, the measure of restitution may be more or less than the loss suffered or more or less than the enrichment.[1]

A. LIABILITY

Plaintiffs claim that CVS was unjustly enriched.

Do you find by a preponderance of the evidence the following:[2]

(i) Did the plaintiffs confer a benefit on CVS?

Yes ☐ No ☐

(ii) Did CVS accept a benefit from the plaintiffs?

Yes ☐ No ☐

(iii) Under the circumstances, would it be unfair for CVS to retain the benefit?

Yes ☐ No ☐

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1 *Restatement (First) of Restitution* § 1 (1937) ("*Restatement*").

2 *See* 21B Am. Jur. *Pleading & Practice Forms Restitution & Implied Contracts* §12.1.

B. RESTITUTION

Have plaintiffs proved by a preponderance of the evidence the amount that should be restituted to plaintiffs and the class?

Yes ☐ No ☐

If "yes," complete the following blank: The [Court/Jury] finds that the appropriate amount of restitution for Plaintiffs and the Unjust Enrichment Class is $_____. (If you answered "no," do not complete the blank.)