**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

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| ROBERT MAYBERRY, individually, and on behalf of those similarly situated,<br><br>v<br><br>WALGREENS, CO., an Illinois corporation, ALBERTSONS COMPANIES, INC., an Idaho corporation, SUPERVALU, INC., a Minnesota corporation, and CVS PHARMACY, INC., a Rhode Island Corporation, | Case No.: 17-cv-1748<br><br>Hon.<br><br>***Plaintiff Demands Trial by Jury*** |

## CLASS ACTION COMPLAINT

Plaintiff Robert Mayberry ("Plaintiff"), through his undersigned attorneys, brings this lawsuit against Walgreen Co. (hereinafter "Walgreens"); Albertsons Companies, Inc., individually and d/b/a as "Osco Drug"; Supervalu, Inc., individually and d/b/a as "Osco Drug" (hereinafter "Osco"); and CVS PHARMACY, INC., individually and d/b/a CVS/Caremark (hereinafter "CVS"), and each of them, collectively referred to hereafter as "Defendants", as to Plaintiff's own acts upon personal knowledge, and as to all other matters upon information and belief. In order to remedy the harm arising from Defendant's illegal conduct, which has resulted in unjust profits, Plaintiff brings this action on behalf consumers specifically defined herein, who purchased insulin pump supplies from Defendants.

## NATURE OF THE CASE

1. This case arises from the Defendants' repeated and systematic violation of basic rules of payment and/or reimbursement for claims processed by Defendants on behalf diabetic

patients prescribed insulin pump supplies, by representing to the diabetic patients that they were responsible for a significantly larger portion of the equipment and supply costs than was actually true pursuant to their Medicare benefits and coverage.

2. The Defendants misapplied, or did not apply, benefits to which Medicare Plan participants were entitled and instead repeatedly and systematically overcharged diabetic patients with excessive out-of-pockets fees for insulin pump supplies that would have otherwise been considered covered services by Medicare and subject to the Medicare reimbursement rates.

3. More specifically, Defendants submitted to CMS reimbursement claims for insulin pump supplies pursuant to Medicare Part D, as opposed to Medicare Part B. When CMS denies payment of claims submitted pursuant to Medicare Part D, Defendants then charge the patient who must pay out-of-pocket. Not only is the patient confronted with out-of-pocket expenses for the insulin pump supplies, but the patient is also at risk for reaching Medicare Part D limits. Once reaching the limits, the patient incurs out-of-pocket expenses for all prescriptions filled beyond those limits, until reaching the catastrophic coverage threshold. This is known as the donut hole.

4. On behalf of himself and all others similarly situated, Plaintiff seeks relief from the Defendants for injuries caused by their common practice, including: (a) an order certifying the action to be maintained as a Class action and ordering Plaintiffs and their counsel to represent the Class; (b) restitution; (c) compensatory damages; (d) punitive, statutory, and/or treble damages; (e) attorneys' fees; (f) costs of this suit; (g) pre- and post-judgment interest; and (h) such other and further relief as this Court may deem necessary or proper.

## JURISDICTION AND VENUE

5. This Court has subject matter jurisdiction over this class action pursuant to 28 U.S.C. § 1332 as amended by the Class Action Fairness Act of 2005 because the matter in controversy exceeds $5,000,000, exclusive of interest and costs, because the proposed Class consists of 100 or more members, and minimal diversity exists.

6. This Court has personal jurisdiction over the Defendants because they are authorized to do business and in fact do business in this district and have sufficient minimum contacts with this district, and/or each Defendant otherwise intentionally avails itself of the markets in this state through the promotion, marketing and sale of insulin pump supplies in this district, to render the exercise of jurisdiction by this Court permissible under traditional notions of fair play and substantial justice.

7. Pursuant to 28 U.S.C. § 1391, venue is proper in the Northern District of Illinois because Defendant, Walgreens, is located in this District; Defendants Supervalu and Albertsons operate Osco Drug stores in this District; Defendant Supervalu has a centralized pharmacy support facility located in this District; Defendant CVS operates pharmacies in this District; and a substantial part of the events underlying Plaintiffs' claims occurred in this District.

## THE PARTIES

8. Plaintiff Robert Mayberry is an individual residing in Geneva, Illinois. Plaintiff purchased insulin pump supplies from the Defendants during the Class Period. Plaintiff incurred losses and/or damages as a result of the activities alleged herein. Plaintiff and/or their property and/or estate were injured as a result of the conduct alleged herein. Plaintiff has suffered injury-in-fact for which he is entitled to seek monetary damages.

9. Defendant Walgreen Co. is an Illinois corporation with its principal place of

business in Deerfield, Illinois. Walgreens owns and operates approximately 8,300 stores throughout the United States. Defendant Walgreens sells insulin pumps and insulin pump supplies.

10. Defendant Albertsons is an Idaho corporation with its principal place of business in Boise, Idaho. Albertsons owns and operates in-store pharmacies commonly known as Osco Drug throughout the United States. Defendant Albertsons sells insulin pump supplies.

11. Defendant SuperValu is a Minnesota corporation with its principal place of business in Eden Prairie, Minnesota. SuperValu owns and operates in-store pharmacies commonly known as Osco Drug and Sav On throughout the United States. Defendant SuperValu sells insulin pump supplies.

12. Defendant CVS is a Rhode Island corporation with its principal place of business in Woonsocket, Rhode Island. CVS owns and operates in-store pharmacies throughout the United States. CVS sells insulin pump supplies.

## FACTUAL ALLEGATIONS

### Diabetes and Insulin

13. 29.1 million people in the United States have diabetes.[1] For those aged 65–74 years, the rates of diabetes diagnoses increased by 113% (from 10.1 to 21.5 per 100 persons) from 1993 to 2014. Similarly, for those aged 75 years or older, the rates of diabetes diagnosis increased by 140% (from 8.0 to 19.2 per 100 persons) from 1990 to 2014.[2] Diabetes can create vulnerabilities. A 2011 study by the CDC found that 64.4% of adult diabetics reported at least 1

[1] http://www.cdc.gov/diabetes/data/statistics/2014statisticsreport.html
[2] http://www.cdc.gov/diabetes/statistics/prev/national/figbyage.htm

day per month of either poor mental or physical health.[3]

14. Diabetes is a disease in which your blood glucose, or blood sugar, levels are too high. Glucose comes from the foods you eat. Insulin is a hormone that helps the glucose get into your cells to give them energy. With type 1 diabetes, the body's pancreas does not make insulin. With type 2 diabetes, your body does not make or use insulin well. Without enough insulin, the glucose stays in your blood.[4]

15. Over time, having too much glucose in your blood can cause serious problems. It can damage your eyes, kidneys, and nerves. Diabetes can also cause heart disease, stroke and even the need to remove a limb.

16. Insulin is a hormone that helps glucose get into your cells to give them energy. Without insulin, too much glucose stays in your blood. In instances of elevated blood glucose, the administration of insulin is necessary. Insulin can be administered by injection, by inhalation and by pump.

**Insulin Pumps**

17. An insulin pump is a medical device designed to facilitate appropriate, timely and continuous doses of insulin to a diabetic in an effort to maintain a normal blood glucose. The pump is intended to eliminate the need for manual shots of insulin self-administered by the patient.

18. Insulin pumps are small computerized devices that deliver insulin in two ways: (1) in a steady measured and continuous dose ("basal" insulin); and (2) as a surge ("bolus")

[3] http://www.cdc.gov/diabetes/statistics/mental/figmentphyus2008.htm
[4] https://medlineplus.gov/diabetes.html

dose, at your direction, around mealtime.[5]

19. Insulin pumps provide constant, continuous infusion of short-acting insulin by mechanical force and delivered via a soft cannula under the skin.[6] Ideal pump candidates are those diagnosed with Type 1 Diabetes or insulin-deficient Type 2 Diabetics who take insulin multiple times per day, assess blood glucose levels several times per day, are motivated to obtain tighter blood glucose control, are capable of managing the rigors of pump therapy initiation and maintenance, capable of carbohydrate counting, insulin correction, and prepared to troubleshoot problems related to pump operates and plasma glucose levels.

20. As of 2014, there were an estimated 500,000 insulin pumps in use throughout the United States.[7] Market analysis suggest that insulin pump use will increase through 2021.[8]

**CMS's Role in Payment for Insulin Pumps**

21. The Centers for Medicare and Medicaid Services (CMS) administers health insurance coverage for eligible beneficiaries in the form of Medicare and/or Medicaid. Medicare is administered in several parts for coverage of specific categories of services.

22. Medicare Part A is designated for hospital insurance, and covers medically necessary hospital, skilled nursing home, home health and hospice care. It is free if you have worked and paid social security taxes for at least 40 quarters or approximately 10 years. Part A coverage is administered by the government, namely, CMS.

23. Medicare Part B is designated for medical insurance and covers medically necessary doctors' services, preventative care, durable medical equipment, hospital outpatient

[5] http://www.diabetes.org/living-with-diabetes/treatment-and-care/medication/insulin/insulin-pumps.html
[6] See AACE/ACE Diabetes Guidelines, Endocr. Pract. 2015; 21 (Suppl 1) pp. 54-55.
[7] http://professional.diabetes.org/podcast/use-technology-management-diabetes
[8] http://www.strategyr.com/MarketResearch/infographTemplate.asp?code=MCP-6134.

services, laboratory tests, x-rays, mental health care, and some home health and ambulance services. Part B participants pay a monthly premium for this coverage, and it is administered by a private health insurance company that has a contract with the government.

24. Medicare Part D is designated for prescription drug coverage and is only available fro a monthly premium paid by the participant to a private health insurance company that has a contract with the government, that is, CMS.

25. Medicare Part C is not a separate coverage component. Instead, Medicare Part C is a component of the overall Medicare plan that allows private health insurers to provide Medicare benefits. These HMO and PPO plans administered by private health insurance companies are known as Medicare Advantage Plans. Part C allows for plan participants to have their benefits administered by a private health insurer rather than by CMS. Advantage Plans must offer the same benefits as original Medicare, however, they can do so with different rules, costs and coverage restrictions. Part D plans are often included in a Medicare Advantage Plan, and a participant will pay a monthly premium for an Advantage Plan, in addition to your Part B premium.

26. Generally, Medicare Part B covers the medical services required for diabetic Medicare beneficiaries. Part B also covers some preventative services for beneficiaries at risk for diabetes. More specifically, Part B covers external insulin pumps and the insulin used by the device for people who meet certain conditions in relation to, amongst other criteria, the history and nature of their diabetes and their blood glucose levels.

27. Medicare Part D typically covers anti-diabetic drugs, like insulin, and supplies needed for inhaling or injecting insulin.

28. Medicare Part D plans often have a coverage gap known as a "donut hole" which limits what the drug plan will cover after a certain dollar amount is reached. In 2016, once a plan and plan participant reach $3,310 on costs for covered drugs, the participant is in the coverage gap or "donut hole." The gap extends until a participant reaches $4,850 in out-of-pocket cost, and the participant is then eligible for catastrophic coverage.

29. As part of the service offered by Providers who fill prescriptions, including orders for durable medical equipment like insulin pumps, for the benefit of Medicare participants, such Providers process and submit claims for payment to Medicare on behalf of the plan participant. When the Provider submits a claim to Medicare, Medicare submits payment to the Provider. Under original Medicare, a plan participant will typically pay 20% of the Medicare-approved amount after meeting the Part B deductible. Medicare will pay 80% of the Medicare-approved amount of the cost of the insulin pump.

30. Under most health insurance plans, including Medicare and Medicaid, an insulin pump is considered durable medical equipment. CMS regulations specify that an insulin pump and the pump supplies, including insulin used in the pump, constitute durable medical equipment. Durable medical equipment that is deemed covered by Medicare, is covered by Medicare Part B, not Part D.

31. Medicare and Medicaid guidelines set forth which medical services are considered "covered services" and at what rated such covered services are reimbursed. Generally Medicare and Medicaid directly reimburse a provider or supplier for covered services.

32. Typically, Medicare and Medicaid reimbursement rates paid to a provider or

supplier are less than the charged rate, though this was not always the case.

33. In the 1990s, CMS was reimbursing suppliers of insulin pumps and related supplies at the rates sought by suppliers. Then, in the 2000s, discussions of reform were underway. By 2008, CMS elected to implement a plan for reform that would significantly reduce the reimbursement rate allowed for Providers, including Defendants.

**Defendants' conduct**

34. Walgreens fills prescriptions for insulin pump supplies, including supplying insulin used in the pump.

35. Osco Drug fills prescriptions for insulin pump supplies, including supplying insulin used in the pump.

36. CVS fills prescriptions for insulin pump supplies, including supplying insulin used in the pump.

37. The Defendants, and each of them, know that reimbursement for insulin pumps and insulin pump supplies are covered by Medicare Part B. In fact, Defendants publicly acknowledge the applicability of Part B, and hold themselves out as having an excellent knowledge and understanding of CMS guidelines concerning coverage for insulin pumps and supplies.

38. Nevertheless, Defendants systematically submit claims for reimbursement on insulin used in pumps through Part D, the prescription plan. CMS and private insurers administering Part D reject such claims, because insulin used in insulin pumps is considered part of the durable medical equipment. Durable medical equipment, if covered, is covered by Part B.

39. The rejection of claims erroneously submitted pursuant to Part D, causes the patient to pay out-of-pocket for the insulin used in the pump. Alternatively, if the claim for the insulin is covered by Part D, and the Defendant is paid by Part D coverage, that payment is attributed to the patient's Part D maximum benefit limit, when it should in fact be attributed to the patient's Part B benefits.

40. Once the patient reaches the Part D coverage limit, that patient then has a coverage gap, known as the donut hole. During this gap, the patient must pay out-of-pocket for all prescription medications. The patient continues to pay out-of-pocket until reaching the catastrophic limit, at which time benefits resume at 95%. Of course, the patient would not have been caused to prematurely enter the donut hole if the Defendants would have correctly submitted claims for insulin used in pumps pursuant to Part B.

41. Defendants are motivated by profit. Because CMS has reduced the rate of reimbursement for insulin pump supplies, Defendants profits are increased when the Defendants cause patients to pay the reimbursement out-of-pocket, rather than accepting the reduced reimbursement rate offered by Medicare or Medicare Plans. Defendants are not motivated to verify that the reimbursement claims for insulin used in pumps are correctly submitted.

42. Plaintiff is a Medicare Plan Participant, and has been a Medicare beneficiary since 1996. Plaintiff is also Type 2 diabetic who has used insulin to control his blood glucose for approximately 35 years. Since 2002, Plaintiff has been prescribed an insulin pump.

43. Plaintiff received a prescription from a health care provider for insulin pump. Plaintiff also received a prescription for insulin pump supplies, including insulin for use with the

pump.

## CLASS ACTION ALLEGATIONS

44. Plaintiff bring this action as a class action pursuant to Federal Rule of Civil Procedure 23(b)(2) and 23(b)(3) on behalf of the following classes:

> For the years 2006 through present, all persons who were Medicare or Medicaid Plan Participants and utilized an insulin pump, with insulin supplied by Defendants, and for whom Defendants sought payment directly from the Plan Participant rather than submit claims pursuant to CMS regulations and guidelines.

45. The following persons are expressly excluded from the Class: (1) Defendant and its subsidiaries and affiliates; (2) all persons who make a timely election to be excluded from the proposed Class; (3) governmental entities; and (4) the Court to which this case is assigned and its staff.

46. This action can be maintained as a class action because there is a well-defined community of interest in the litigation and the proposed Class is easily ascertainable.

47. Numerosity: Based upon Defendants' marketing materials, combined with CMS data publicly available sales data with respect to the products at issue, it is estimated that the Class numbers in the thousands and that joinder of all Class members is impracticable.

48. Common Questions Predominate: This action involves common questions of law and fact applicable to each Class member that predominate over questions that affect only individual Class members. Thus, proof of a common set of facts will establish the right of each Class member to recover. Questions of law and fact common to each Class member include, for example:

a. Whether Defendants engaged in unlawful, unfair or deceptive business practices by failing to properly process claims for reimbursement and instead seeking payment from Plan Participants;

b. Whether Plaintiff and the Class are entitled to equitable and/or injunctive relief;

c. Whether Defendant's unlawful, unfair and/or deceptive practices harmed Plaintiff and the Class; and

d. Whether Defendant was unjustly enriched by its deceptive practices.

49. Typicality: Plaintiff's claims are typical of the claims of the Class because Plaintiff engaged Defendants to fill prescriptions for insulin intended for use in an insulin pump, and Defendants filled those prescriptions but failed to submit proper claims for reimbursement pursuant to CMS guidelines during the Class Period. Defendant's unlawful, unfair, and/or fraudulent actions concern the same business practices described herein irrespective of where they occurred or were experienced. Plaintiff and the Class sustained similar injuries arising out of Defendant's conduct. The injuries of each member of the Class were caused directly by Defendant's wrongful conduct. In addition, the factual underpinning of Defendant's misconduct is common to all Class members and represents a common thread of misconduct resulting in injury to all members of the Class. Plaintiff's claims arise from the same practices and course of conduct that give rise to the claims of the Class members and are based on the same legal theories.

50. Adequacy: Plaintiff will fairly and adequately protect the interests of the Class. Neither Plaintiff nor Plaintiff's counsel have any interests that conflict with or are antagonistic to the interests of the Class members. Plaintiff has retained highly competent and experienced class action attorneys to represent their interests and those of the members of the Class. Plaintiff and Plaintiff's counsel have the necessary financial resources to adequately and

vigorously litigate this class action, and Plaintiff and counsel are aware of their fiduciary responsibilities to the Class members and will diligently discharge those duties by vigorously seeking the maximum possible recovery for the Class.

51. Superiority: There is no plain, speedy, or adequate remedy other than by maintenance of this class action. The prosecution of individual remedies by members of the Class will tend to establish inconsistent standards of conduct for Defendants and result in the impairment of Class members' rights and the disposition of their interests through actions to which they were not parties. Class action treatment will permit a large number of similarly situated persons to prosecute their common claims in a single forum simultaneously, efficiently, and without the unnecessary duplication of effort and expense that numerous individual actions would engender. Further, as the damages suffered by individual members of the Class may be relatively small, the expense and burden of individual litigation would make it difficult or impossible for individual members of the Class to redress the wrongs done to them, while an important public interest will be served by addressing the matter as a class action. Class treatment of common questions of law and fact would also be superior to multiple individual actions or piecemeal litigation in that class treatment will conserve the resources of the Court and the litigants, and will promote consistency and efficiency of adjudication.

52. The prerequisites to maintaining a class action for injunctive or equitable relief pursuant to FED. R. CIV. P. 23(b)(2) are met as Defendant has acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final injunctive or equitable relief with respect to the Class as a whole.

53. The prerequisites to maintaining a class action pursuant to FED. R. CIV. P. 23(b)(3) are met as questions of law or fact common to class members predominate over any questions affecting only individual members, and a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

54. Plaintiff and Plaintiff's counsel are unaware of any difficulties that are likely to be encountered in the management of this action that would preclude its maintenance as a class action.

**NAMED PLAINTIFFS' ALLEGATIONS**

55. Plaintiff is a life-long type 2 diabetic, and a Medicare Plan Participant since December 1, 2006. Plaintiff has Medicare Part A, B and D plans. Part D is for prescription coverage. Durable medical equipment, such as the Plaintiff's insulin pump, is claimed under Part B.

56. Plaintiff first began using the insulin pump in June 2002. Plaintiff's current pump was replaced, for the second time, in September 2013. Since 2002, Plaintiff exclusively used the insulin pump to control his blood glucose and the insulin was administered by the pump, as opposed to self-injection. Claims for reimbursement on the pump were submitted pursuant to Medicare Part B. At all relevant times, claims for reimbursement on the insulin were submitted by Defendants pursuant to Medicare Part D. The claims should have been submitted pursuant to Part B.

57. The pump required insulin, for which Plaintiff had prescriptions filled primarily at Walgreens but occasionally at Osco Drug, and CVS. For the period of time between December 1, 2006 (the time at which Plaintiff became a Medicare beneficiary) and the present, Plaintiff

utilized the Defendant pharmacies to obtain insulin pump supplies, including insulin for the pump.

58. In each instance of Plaintiff obtaining insulin pump supplies during the relevant period of time, the Defendant pharmacies had the prescriptions at issue, and the Defendant pharmacies were informed of Plaintiff's Medicare Plan and diagnoses, which are necessary for Defendants' submission of claims for reimbursement.

59. Defendants possess superior knowledge as to the benefits associated with each Part of a Medicare Plan, and every year Defendants service tens of thousands of Medicare Part B and D prescriptions.

60. Each year, Medicare Part D participants can select a new prescription coverage plan based on their prescription needs and maximum savings. As of 2016, Plaintiff's Part D coverage was with WellCare. On or about February 23, 2016, Plaintiff received a denial of benefits relating to Plaintiff's insulin. Plaintiff was informed that Plaintiff's Part D coverage did not apply to the insulin used in Plaintiff's pump. At that time, Plaintiff learned that Plaintiff's insulin, because it was associated with pump use, should have been submitted for Part B coverage.

61. As a result of Defendants' having submitted for reimbursement of the insulin pursuant to Part D, Plaintiff had for several years paid out of pocket costs for the insulin. The out of pocket cost was paid by Plaintiff at a higher rate than if Defendants would have correctly submitted pursuant to Part B and accepted the Medicare reimbursement rate. Moreover, where any amount of Part D benefits were applied, that amount unnecessarily consumed Plaintiff's Part D plan benefits, and used benefits that had they not been misapplied, would have prevented

Plaintiff from the loss of benefits in the coverage gap or "donut hole." The coverage gap caused Plaintiff to pay additional out of pocket expenses on prescription medications that would have otherwise been paid by Part D.

## FRAUDULENT CONCEALMENT

62. Throughout the Class period, Defendants affirmatively concealed from Plaintiff and Class the defective CMS claims reimbursement process described herein.

63. Defendants had a duty to inform Plaintiff and Class of the defective claims process described herein, which it knew of or of which it should have known. Notwithstanding their duty, Defendants never disclosed the process or its effects to Plaintiff or the Class.

64. Despite exercising reasonable diligence, Plaintiff and Class could not have discovered the defective process or Defendants' scheme. Thus, running of the statute of limitations has been tolled with respect to any claims that Plaintiff or the Class have brought or could have brought as a result of the unlawful and fraudulent course of conduct described herein.

65. Defendants are further estopped from asserting any statute of limitations defense, contractual or otherwise, to the claims alleged herein by virtue of its acts of fraudulent concealment.

## CAUSES OF ACTION

## COUNT I

### (Violation of Illinois Consumer Fraud and Deceptive Business Practices Act and Substantially Similar Laws of Certain Other States)

66. Plaintiff repeats and realleges the allegations of the prior paragraphs as if fully stated herein.

67. At all times relevant hereto, there was in full force and effect the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1 et seq. and substantially similar state consumer protection statutes (the "Act"). Similar statutes, identical in their material respects, are in effect in many jurisdictions within the United States.[9]

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[2] The consumer fraud claims of Plaintiff and resident absent class members is brought under the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1 *et seq.* The consumer fraud claims of nonresident absent class members are brought under the consumer protection statute(s) of their respective states of residence. *See e.g.*, The Alabama Deceptive Trade Practices Act, Ala. Code § 8-19-5(5), (7) and (27), *et seq.*; The Arizona Consumer Fraud Act, A.R.S. § 44-1522; Cal. Bus. & Prof. Code § 17200 *et seq.*, and Cal. Bus. & Prof. Code § 17500 *et seq.* , The California Consumer Legal Remedies Act, Cal. Civ. Code § 1750, *et seq.*, and The California Unfair Competition Law, Cal. Bus. and Prof. Code, § 17200, *et seq.* The Colorado Consumer Protection Act, Col. Rev. Stat. Ann. §§ 6-1-105(1)(b), (c), (e) and (g), *et seq.*; The Connecticut Unfair Trade Practices Act, Conn. Gen. Stat. § 42-110(b), *et seq.*; The Delaware Deceptive Trade Practices Act, Del. Code Ann. Title 6, § 2532(5) and (7), *et seq.*, and the Delaware Consumer Fraud Act, Del. Code Ann. Title 6 § 2513, *et seq.*; The District of Columbia Consumer Protection Act, D.C. Code §§ 28-3904(a), (d), (e), (f) and (r), *et seq.*; Fla. Stat. Ann. § 501.201, *et seq.* (; The Georgia Fair Business Practices Act, Ga. Code Ann. §§ 10-1-393(a) and (b)(2), (5) and (7), *et seq.*; The Hawaii Deceptive Trade Practices Act, Haw. Rev. Stat. Ann. §§ 481A-3(a)(5), (7) and (12), *et seq.*; and the Hawaii Consumer Protection Act, Haw. Rev. Stat. Ann. § 480-2(a), *et seq.*; The Idaho Consumer Protection Act, Idaho Code §§ 48-603(5), (7), (17) and (18), *et seq.*, and Idaho Code § 48-603C, *et seq.*; The Indiana Deceptive Consumer Sales Act, Ind. Code §§ 24-5-0.5-3(a) and (b)(1) and (2), *et seq.*; The Iowa Consumer Fraud Act, I.C.A. §§ 714H.3 and 714H.5, *et seq.*, Consumer Plaintiffs have obtained the approval of the Iowa Attorney General for filing this class action lawsuit as provided under I.C.A § 714H.7; The Kansas Consumer Protection Act, Kan. Stat. §§ 50-626(a) and (b)(1)(A)(D) and (b)(3), *et seq.*; The Kentucky Consumer Protection Act, K.R.S. § 367.170(1) and (2), *et seq.*; The Massachusetts Consumer Protection Act, Ma. Gen. Laws Ann. Ch. 93A § 2(a), *et seq.*; The Maine Uniform Deceptive Trade Practices Act, 10 M.R.S.A. § §1212(1)(E) and (G), *et seq.*, and the Maine Unfair Trade Practices Act, 5 M.R.S.A. § 207, *et seq.*; The Maryland Consumer Protection Act, Md. Code Commercial Law, § 13-301(1) and (2)(i), and (iv) and (9)(i), *et seq*; Mich. Stat. Ann. § 19.418(1) *et seq.*; The Minnesota Uniform Deceptive Trade Practices Act, Minn. Stat. § 325D.44, subd. 1(5), (7) and (13), *et seq.*, the Minnesota Consumer Fraud Act, Minn. Stat. § 325F.69, subd. 1, and Minn. Stat.§ 8.31, subd. 3(a); The Mississippi Consumer Protection Act, Miss. Code Ann. §§ 75-24-5(1), (2)(e) and (g), *et seq.*; The Missouri Merchandising Practices Act, Mo. Ann. Stat. § 407.020(1), *et seq.*; The Montana Unfair Trade Practices and Consumer Protection Act, MCA §§ 30-14-103, *et seq.*; The Nebraska Consumer Protection Act, Neb. Rev. Stat. § 59-1602, and the Nebraska Uniform Deceptive

68. Section 2 of the Act provides in relevant part as follows:

> Unfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use of or employment of any deceptive, 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 of employment of any practice described in Section 2 of the "Uniform Deceptive Trade Practices Act," approved August 5, 1965, in the conduct of any trade or commerce are hereby declared unlawful whether any person has in fact been misled, deceived or damaged thereby, In construing this section consideration shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to Section 5(a) of the Federal Trade Commission Act. 815 ILCS 505/2 (footnotes omitted).

69. Plaintiff and other Class members are consumers within the meaning of Consumer Fraud Acts given that Defendants' business activities involve trade or commerce, are addressed to the market generally and otherwise implicate consumer protection concerns.

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Trade Practices Act, Neb. Rev. Stat. § 87-302(a)(5) and (7), *et seq.*; The New Hampshire Consumer Protection Act, N.H. Rev. Stat. Ann. § 358-A:2(v) and (vii), *et seq.*; N.J. Rev. Stat. § 56:8-1 *et seq.*; N.J. Rev. Stat. § 56:12-1 *et seq.* (New Jersey); The New Mexico Unfair Practices Act, N.M. Stat. Ann. §§ 57-12-2(D)(5)(7) and (14) and 57-12-3, *et seq.*; The Nevada Deceptive Trade Practices Act, Nev. Rev. Stat. Ann. § 598.0915(5) and (7), *et seq.*; N.Y. Gen. Bus. Law. § 349 *et seq.* ; The North Carolina Unfair Trade Practices Act N.C.G.S.A. § 75-1.1(a), *et seq.*; The North Dakota Unlawful Sales or Advertising Practices Act, N.D. Cent. Code § 51-15-02, *et seq.*; The Ohio Consumer Sales Practices Act, Ohio Rev. Code Ann. § 1345.02(A) and (B)(1) and (2), *et seq.* Pursuant to Ohio Rev. Code Ann. § 1345.09(B), Defendant's alleged acts must have been previously declared to be deceptive or unconscionable under Ohio Rev. Code Ann. §§ 1345.02; The Oklahoma Consumer Protection Act, 15 Okl. Stat. Ann. § 753(5), (7) and (20), *et seq.*; and the Oklahoma Deceptive Trade Practices Act, 78 Okl. Stat. Ann. § 53(A)(5) and (7), *et seq.*; The Oregon Unfair Trade Practices Act, Or. Rev. Stat. § 646.608(1)(e)(g) and (u), *et seq.*; The Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 P.S. §§ 201-2(4)(v)(vii) and (xxi), and 201-3, *et seq.*; The Rhode Island Deceptive Trade Practices Act, R.I. Gen. Laws § 6-13.1-1(6)(v), (vii), (xii), (xiii) and (xiv), *et seq*; The South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-20(a), *et seq.*; The South Dakota Deceptive Trade Practices Act and Consumer Protection Act, S.D. Codified Laws § 37-24-6(1), *et seq.*; The Tennessee Consumer Protection Act, Tenn. Code Ann. §§ 47-18-104(a) and (b)(5) and (7); The Texas Deceptive Trade Practices-Consumer Protection Act, V.T.C.A., Bus. & C. § 17.46(a), (b)(5) and (7), *et seq.*; The Utah Consumer Sales Practices Act, Utah Code Ann. §§ 13-11-4(1) and (2)(a) and (b); The Vermont Consumer Fraud Act, 9 V.S.A. § 2453(a), *et seq.*; The Virginia Consumer Protection Act, Va. Code Ann. § 59.1-200(A)(5)(6) and (14), *et seq.*; The Washington Consumer Protection Act, Wash. Rev. Code § 19.86.020, *et seq.*; The West Virginia Consumer Credit and Protection Act, W.V.A. Code § 46A-6-104, *et seq.*; The Wisconsin Deceptive Trade Practices Act, W.S.A. § 100.20(1), *et seq.*; and The Wyoming Consumer Protection Act, Wyo. Stat. Ann. § 40-12-105(a), (i), (iii) and (xv), *et seq.*

70. Section 2 of the Illinois Consumer Fraud Act, 815 ILCS 505/2, renders unlawful the "use or employment of any deception [including 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 any trade or commerce…" Illinois case law holds that reliance on the deception is not an element of a consumer fraud claim.

71. Except as noted below, the consumer fraud statutes and/or interpretative case law of Illinois' sister states have also either: (a) expressly prohibited omissions of material fact, without regard for reliance on the deception, or (b) have not addressed those issues.

72. Once the defective claims process became prevalent, consumers (such as Plaintiff) were entitled to disclosure of that fact because the process was a material fact in a consumer's decision-making process, and without Defendants' disclosure, consumers would not know that there was a risk of improper application of benefits and additional out of pocket expense.

73. Moreover, because Defendants' claims procedures and the period of time for which one may seek reimbursement was limited in duration, and the fact of nearly annual changes to Part D plans caused for an additional time constraint, consumers were further entitled to know of the misapplication of benefits. All of these facts were material to consumers' purchase decisions**.**

74. Specifically, at all times relevant, Defendants continuously and consistently failed to disclose to consumers (such as Plaintiff) the defective claims process concerning insulin prescribed for use via pump. Defendants failed to make these disclosures despite opportunities through its employees, sales literature, advertising and its website.

75. Defendants instead intended that Plaintiff and the Class would rely on the deception by purchasing its prescription insulin for the pump, unaware of the material facts described above. This conduct constitutes consumer fraud within the meaning of the various consumer protection statutes.

76. Plaintiff and the Class have been damaged by Defendant's deception because they purchased insulin that they otherwise would not have had to pay for had the Defendants followed CMS guidelines.

77. If Defendants had disclosed the above facts to Plaintiff and the Class, they could have (and would have) prevented economic injury by either insisting on the correct application of Part B benefits or simply avoiding the risk altogether by obtaining insulin from a different pharmacy.

78. Defendants have committed deceptive acts or practices within the meaning of the Act by engaging in the acts and practices alleged herein, including, but not limited to, its failure to disclose the material defect in its claims submissions to CMS.

79. Defendants' conduct alleged herein is furthermore unfair insofar as it offends public policy; is so oppressive that the consumer has little alternative but to submit; and causes consumers substantial injury.

80. As a direct and proximate result of the unfair acts or practices of Defendants alleged herein, Plaintiff and other members of the Class were damaged.

WHEREFORE, Plaintiffs, individually and on behalf of the Class of persons described herein, pray for an Order as follows:

A. Finding that this action satisfies the prerequisites for maintenance

as a class action set forth in Fed. R. Civ. P. 23(a), (b)(2) and/or (b)(3), and certifying the Class defined herein;

B. Designating Plaintiff as representatives of the Class and their counsel as Class counsel;

C. Entering judgment in favor or Plaintiff and the Class and against Defendants;

D. Awarding Plaintiff and Class members their individual damages and attorneys' fees and allowing costs, including interest therein.

E. Compelling Defendants to establish a program to reimburse its customers for CMS claims for insulin via pump that were previously denied or paid in part; and

F. Granting such further relief as the Court deems just

**COUNT II**
**(Common Law Fraud by Omission)**

81. Plaintiff repeats and realleges the allegations of the prior paragraphs, as if fully stated herein.

82. Defendants, through their experience, were in a position of superiority over Plaintiff and class members with respect to knowledge that insulin prescribed for use in a pump constituted durable medical equipment and was reimbursable pursuant to Part B, and that seeking reimbursement pursuant to Part D would allow Defendants a greater amount of payment, albeit out-of-pocket from the customer.

83. Once the defective claims process became prevalent, consumers (such as Plaintiff) were entitled to disclosure of that fact because the process was a material fact in a

consumer's decision-making process, and without Defendants' disclosure, consumers would not know that there was a risk of improper application of benefits and additional out of pocket expense.

84. Moreover, because Defendants' claims procedures and the period of time for which one may seek reimbursement was limited in duration, and the fact of nearly annual changes to Part D plans caused for an additional time constraint, consumers were further entitled to know of the misapplication of benefits. All of these facts were material to consumers' purchase decisions.

85. Specifically, at all times relevant, Defendants continuously and consistently failed to disclose to consumers (such as Plaintiff) the defective claims process concerning insulin prescribed for use via pump. Defendants failed to make these disclosures despite opportunities through its employees, sales literature, advertising and its website.

86. Defendants instead intended that Plaintiff and the Class would rely on the deception by purchasing its prescription insulin for the pump, unaware of the material facts described above.

87. Plaintiff and the Class have been damaged by Defendant's deception because they purchased insulin that they otherwise would not have had to pay for had the Defendants followed CMS guidelines.

88. If Defendants had disclosed the above facts to Plaintiff and the Class, they could have (and would have) prevented economic injury by either insisting on the correct application of Part B benefits or simply avoiding the risk altogether by obtaining insulin from a different pharmacy.

89. Defendants have committed deceptive acts or practices within the meaning of the Act by engaging in the acts and practices alleged herein, including, but not limited to, its failure to disclose the material defect in its claims submissions to CMS.

90. Defendants' conduct alleged herein is furthermore unfair insofar as it offends public policy; is so oppressive that the consumer has little alternative but to submit; and causes consumers substantial injury.

91. As a direct and proximate result of the unfair acts or practices of Defendants alleged herein, Plaintiff and other members of the Class were damaged.

WHEREFORE, Plaintiffs, individually and on behalf of the Class of persons described herein, pray for an Order as follows:

A. Finding that this action satisfies the prerequisites for maintenance as a class action set forth in Fed. R. Civ. P. 23(a), (b)(2) and/or (b)(3), and certifying the Class defined herein;

B. Designating Plaintiff as representatives of the Class and their counsel as Class counsel;

C. Entering judgment in favor or Plaintiff and the Class and against Defendants;

D. Awarding Plaintiff and Class members their individual damages and attorneys' fees and allowing costs, including interest therein.

E. Compelling Defendants to establish a program to reimburse its customers for CMS claims for insulin via pump that were previously denied or paid in part; and

F. Granting such further relief as the Court deems just

**COUNT III**
**(Unjust Enrichment)**

92. Plaintiff repeats and realleges the allegations of the prior paragraphs, as if fully stated herein.

93. The defective claims process described herein was a result of the Defendants' superior knowledge and control.

94. Plaintiff and the Class have conferred benefits on Defendants by purchasing insulin prescribed for use in a pump.

95. Defendants have knowingly and willingly accepted these benefits from Plaintiff and the Class.

96. Under the circumstances, it is inequitable for Defendants to retain these benefits at the expense of Plaintiff and the Class.

97. Defendants have been unjustly enriched at the expense of and detriment of Plaintiff and the Class by wrongfully collecting money to which Defendants, in equity, are not entitled.

98. Plaintiff and the Class are entitled to recover from Defendants all amounts wrongfully collected and improperly retained by Defendants, plus interest thereon.

99. As a direct and proximate result of Defendants' unjust enrichment, Plaintiff and the Class have suffered injury and are entitled to reimbursement, restitution and disgorgement from Defendants of the benefits conferred by Plaintiff and the Class.

100. Plaintiff and the Class have no adequate remedy at law.

101. Plaintiff seeks to obtain a pecuniary benefit for the Class in the form of all

reimbursement, restitution and disgorgement from Defendants. Plaintiff's counsel are entitled to recover their reasonable attorneys' fees and expenses as a result of the conference of a pecuniary benefit on behalf of the Class, and will seek an award of such fees and expenses at the appropriate time.

WHEREFORE, Plaintiff, individually and on behalf of the Class of persons described herein, pray for an Order as follows:

A. Finding that this action satisfies the prerequisites for maintenance as a class action set forth in Fed. R. Civ. P. 23(a), (b)(2) and/or (b)(3), and certifying the Class defined herein;

B. Designating Plaintiff as representatives of the Class and their counsel as Class counsel;

C. Entering judgment in favor or Plaintiff and the Class and against Defendants;

D. Awarding Plaintiff and Class members their individual damages and attorneys' fees and allowing costs, including interest thereon;

E. Imposing a constructive trust on amounts wrongfully collected from Plaintiff and the Class members pending resolution of their claims herein;

F. Compelling Defendants to establish a program to reimburse its customers for CMS claims for insulin via pump that were previously denied or paid in part; and

G. Granting such further relief as the Court deems just.

**JURY DEMAND**

Plaintiffs demand a trial by jury on all issues so triable.

DATED: March 3, 2017

Respectfully submitted,

/s/ Shannon M. McNulty
Shannon M. McNulty
smm@cliffordlaw.com
CLIFFORD LAW OFFICES
120 N. LaSalle Street, Suite 3100
Chicago, IL 60602
T: 312.899.9090