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17 *Interim Class Counsel*

18 **IN THE UNITED STATES DISTRICT COURT**
19 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
20 **OAKLAND DIVISION**

21 Christopher Corcoran, et al.,
22 Plaintiffs,
23 v.
24 CVS Pharmacy, Inc.
25 Defendant.

Case No. 4:15-cv-03504-YGR

CLASS ACTION

**PLAINTIFFS' NOTICE OF MOTION
AND MOTION FOR CLASS
CERTIFICATION; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

Date: January 31, 2017

Time: 2:00pm

Courtroom: 1

Judge: Honorable Yvonne Gonzalez Rogers

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1 **NOTICE OF MOTION AND MOTION**

2 **TO: THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:**

3 PLEASE TAKE NOTICE that on January 31, 2017, at 2:00 p.m., in Courtroom 1, 4th Floor, of
4 this Court, located at 1301 Clay Street, Oakland, California, Plaintiffs Christopher Corcoran, Elizabeth
5 Gardner, Tyler Clark, Michael Norkus, Zulema Avis, Robert Garber, Toni Odorisio, Onnolee
6 Samuelson, Robert Jenks, Debbie Barrett, Carl Washington, Vincent Gargiulo, Zachary Hager, Carolyn
7 Caine, Walter Wulff, Amanda Gilbert, and Gilbert Brown (“Plaintiffs”) will and hereby do move the
8 Court for an order (i) certifying this action as a class action based on the description of the classes herein,
9 (ii) appointing Plaintiffs as representatives of the class, and (iii) appointing Plaintiffs’ attorneys of record
10 as class counsel.

11 Plaintiffs seek to certify the following classes:

12 All CVS customers in [California] [Arizona] [Massachusetts] [New York] [Ohio]
13 [Texas] [Florida] [Illinois] [New Jersey] [Pennsylvania] [Georgia]¹ who, between
14 November 2008 and the present (the “Class Period”), (1) purchased one or more generic
15 prescription drugs that were offered through CVS’s Health Savings Pass (“HSP”) program
16 at the time of the purchase; (2) were insured for the purchase(s) through a third-party payor
17 plan (except those that did not use usual and customary pricing or expressly excluded
18 discount programs from usual and customary pricing);² and (3) paid CVS an out-of-pocket
19 payment for the purchase greater than the HSP price for a 90-day supply of the prescription
20 (or, greater than a price proportionate to the HSP price but for a prescription less than or
21 greater than a 90-day supply).

19 For each of the state classes, Plaintiffs seek certification of a statutory unfair and deceptive acts
20 and practices (“UDAP”) claim (except in Ohio and Georgia), and common law fraud, negligent
21 misrepresentation, and unjust enrichment claims, arising under the laws of each of the respective states.

22 This Motion is made pursuant to Federal Rule of Civil Procedure 23, on the grounds that:

- 23 (a) The class, consisting of numerous patients of Defendant CVS Pharmacy, Inc. (“CVS”) who
24 were unlawfully overcharged for their purchases of generic prescription drugs made using
25 insurance, comprises millions of similarly situated individuals such that joinder of all
26 members is impracticable;

27
28 ¹ Each of the state classes has the same definition.

² A list of qualifying contracts is set forth in Exhibit 12 to this Motion.

- 1 (b) CVS’s uniform overcharging scheme and resultant identical type of damages to Plaintiffs
2 and the class presents several core questions of law and fact common to the class;
- 3 (c) The named Plaintiffs’ claims are typical of the claims of the class;
- 4 (d) The named Plaintiffs and their attorneys – already appointed as interim class counsel – have
5 fairly and adequately protected the interests of the class and will continue to do so;
- 6 (e) By falsely reporting inflated “usual and customary” (“U&C”) prices and thereby collecting
7 inflated copayments, CVS has acted, and refused to act, in a wrongful manner that applies
8 generally to Plaintiffs and class members as a whole, such that final injunctive relief or a
9 declaration, requiring CVS to report truthful U&C prices that account for cash prices it offers
10 to the general public through discount card programs, would be appropriate;
- 11 (f) The questions of law and fact that are common to the class – notably CVS’s uniform
12 overcharging scheme and uniform manner of resultant damages to Plaintiffs and the class –
13 overwhelmingly predominate over any individualized issues that might exist; and
- 14 (g) Certifying this case to proceed as a class action is superior to any other method of
15 adjudicating Plaintiffs’ and class members’ claims against CVS.

16 Plaintiffs’ Motion is based upon this Notice, the accompanying Memorandum of Points and
17 Authorities, the supporting declarations and exhibits of evidence, Plaintiffs’ Trial Plan, any reply
18 memorandum Plaintiffs file, the orders, pleadings, and files in this action, and such other matters as may
19 be presented at or before the hearing.

20
21 Dated: October 3, 2016

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STATEMENT OF ISSUES TO BE DECIDED

- I. Should the Court certify the 11 state classes Plaintiffs assert, given:
 - (i) CVS’s uniform unlawful pricing scheme, and its resultant harm to Plaintiffs and the classes, presents multiple common questions of law and fact;
 - (ii) millions of CVS patients are similarly situated to Plaintiffs;
 - (iii) Plaintiffs’ claims are typical of the classes;
 - (iv) Plaintiffs and their counsel have represented, and will continue to represent, those classes ably;
 - (iv) CVS wrongfully has acted or refused to act in a manner that applies generally to Plaintiffs and the classes, such that a final injunction or declaration would be appropriate;
 - (v) the common questions of law and fact overwhelmingly predominate over individualized issues, given the uniform nature of CVS’s conduct, the uniform manner in which Plaintiffs and the classes were harmed, the uniform method for calculating Plaintiffs’ and classes members’ damages, and the similarities in the state laws on which Plaintiffs and the class sue; and
 - (vi) class treatment is superior to any other means of adjudicating this action, given the numerous essentially uniform claims of the class members, and the classwide factual and legal issues that can best be adjudicated in a single proceeding?
- II. Should the Court appoint the named Plaintiffs as representatives of the classes?
- III. Should the Court appoint Plaintiffs’ attorneys of record as class counsel?

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INTRODUCTION

1
2 Since November 2008, CVS Pharmacy, Inc. (“CVS”) has engaged in a uniform, unlawful pricing
3 scheme: CVS has knowingly charged millions of insured patients (including Plaintiffs and class
4 members) falsely inflated copayments on purchases of a number of generic prescription drugs. CVS did
5 so by knowingly submitting to health insurance plans falsely inflated “usual & customary” (“U&C”) prices,
6 instead of CVS’s true U&C prices – ones based on the Health Savings Pass (“HSP”) program
7 prices CVS offered to the general public. To remedy CVS’s misconduct, Plaintiffs move this Court to
8 certify 11 single-state classes of similarly situated members – insured patients whom CVS charged
9 copayments in excess of CVS’s true U&C prices.

10 CVS’s conduct is uniform and classwide. In every pharmacy transaction involving a customer
11 with health insurance, CVS reports to the customer’s insurer (also described as the third party payor, or
12 “TPP”) or its claims administrator (also described as the pharmacy benefits manager, or “PBM”) CVS’s
13 U&C price for the drug being purchased under its contractual arrangements with the insurer. In the
14 pharmaceutical industry, the U&C price is defined as the “cash” price charged to the general public (*i.e.*,
15 the amount charged for transactions in which insurance is not used). Informed by CVS’s reported U&C,
16 the insurer and the patients pay CVS their respective portions of what is owed for the drug. The amounts
17 that CVS collects from insurers and patients cannot exceed CVS’s reported U&C price.

18 But CVS, in determining its U&C price – a confidential process which CVS itself has described
19 as “proprietary” and to which only CVS has access – artificially and fraudulently inflates the purported
20 U&C prices it submits to TPPs and PBMs, in order to collect higher amounts from insurers and patients.
21 CVS does so by purposefully excluding from consideration the most common and customary cash prices
22 it actually charges to the general public: the price CVS offers under its HSP program. In other words,
23 CVS has reported as its purported U&C prices ones that *were neither “usual” nor “customary.”* Just
24 this year, in *United States ex rel. Garbe v. Kmart Corp.*, the Seventh Circuit found this type of conduct
25 wrongful, holding that the prices another pharmacy offered in its own discount program (functionally
26 identical to CVS’s HSP program) “represented the ‘usual and customary’ charges for the drugs,”
27 because “*the ‘usual and customary’ price requirement should not be frustrated by so flimsy a device*
28

1 *as [the pharmacy’s] ‘discount programs.’*” 824 F.3d 632 (7th Cir. 2016).³ As a result of CVS
 2 fraudulently inflating U&C prices submitting to TPPs and PBMs, CVS has collected from its insured
 3 customers (including Plaintiffs and class members) copayments far higher than CVS’s true U&C price.

4 CVS has admitted, or cannot reasonably dispute, that its conduct applies in a uniform manner
 5 for each relevant transaction of every class member. CVS admitted in its Answer that it “does not today,
 6 and never has, reported the HSP price as its U&C price on drugs included on the HSP formulary.”⁴ [REDACTED]

7 [REDACTED]
 8 [REDACTED]
 9 [REDACTED]⁵ In short, that ruling “will resolve an issue that is central to the validity of each one of the
 10 claims in one stroke.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011). Therefore, this case
 11 is the quintessential one for which class certification is warranted.

12 CVS’s fraudulent and deceptive reporting of U&C prices has caused millions of class members,
 13 who have purchased many of the most commonly-prescribed health-critical generic drugs, to pay much
 14 higher copayments than they should have. [REDACTED]

15 [REDACTED]
 16 [REDACTED]
 17 [REDACTED]
 18 Plaintiffs demonstrate below that they satisfy all elements for certification. But three salient
 19 points bear emphasis. **First, the evidence of CVS’s uniform scheme to charge inflated copayment**
 20 **prices is the same for all claims and all class members.** Each transaction where CVS charged a patient
 21 an inflated copayment, by falsely inflating CVS’s submitted U&C price, constitutes both a written
 22 misrepresentation – stating a false U&C price and a false charge to the patient – and an omission –
 23 concealing that the patient was not getting the benefit of her insurance. The claims adjudication process
 24 and CVS’s transaction data evidences that CVS conducted this overcharge scheme in a common and
 25 uniform manner across the class, and that CVS has charged each class member at least one inflated
 26

27 ³ Emphasis added throughout unless otherwise indicated.

28 ⁴ Aug. 12, 2016 CVS Pharmacy, Inc. Answer [ECF 144] ¶ 71.

⁵ Declaration of Robert B. Gilmore (“Gilmore Decl.”), Ex. 1, Tierney 226:18-25. All exhibit references are to those attached to the Gilmore Declaration unless otherwise indicated.

1 copayment in this manner. This sort of common, classwide evidence of deception is why the Supreme
2 Court observed that certification so often is warranted in consumer fraud cases. *Amchem Prods., Inc. v.*
3 *Windsor*, 521 U.S. 591, 623 (1997).

4 **Second, CVS uniformly deceived each class member by reporting and charging inflated**
5 **prices.** This case is all about false prices – CVS charging Plaintiffs and class members falsely inflated
6 copayments calculated from falsely inflated U&C prices. The case law recognizes that price is a material
7 term of any consumer transaction, and thus reliance and materiality can be established on a classwide
8 basis. *See Bias v. Wells Fargo & Company*, 312 F.R.D. 528, 541 (N.D. Cal. 2015). Indeed, the uniform
9 nature of CVS’s overcharging scheme is quite similar to other cases where courts, including this Court,
10 have found that a defendant’s uniform classwide *financial* misrepresentations warranted certification.
11 *See, e.g., Bias*, 312 F.R.D. at 537 (certifying class based on uniform failure to inform customers that
12 broker’s price opinion fees included a mark-up); *In re Checking Account Overdraft Litigation*, 307
13 F.R.D. 630, 648 (S.D. Fla. 2015) (certifying classes where Wells Fargo’s uniform overdraft fee
14 overcharging scheme “constitute the very heart of the claims for which Plaintiffs seek class
15 certification.”); *Spann v. J.C. Penny Corp.*, 307 F.R.D. 508, 522 (C.D. Cal. 2015), *amended* 314 F.R.D.
16 312 (C.D. Cal. 2016) (evidence of a “systematic and pervasive unlawful price comparison policy”
17 supported certification).

18 **Third, the case is ideally suited for classwide resolution and vindicates the underlying policy**
19 **of Rule 23.** Plaintiffs seek certification of 11 single-state classes, thus avoiding any inter-state conflicts
20 of laws. Plaintiffs show through their accompanying Trial Plan that their causes of action are amenable
21 to classwide proof, and that trying 11 single-state classes is readily manageable. What is more, this is
22 the paradigmatic case “[w]here it is not economically feasible to obtain relief within the traditional
23 framework of a multiplicity of small individual suits for damages” and therefore “aggrieved persons
24 may be without any effective redress unless they may employ the class action device.” *Deposit Guar.*
25 *Nat’l Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 339 (1980); *see also Bias*, 312 F.R.D. at 543. CVS
26 has been able to get away with its uniform scheme by overcharging patients in modest amounts
27 individually, but reaping enormous sums for itself in the aggregate. The class action was created to
28 combat exactly this type of conduct. Plaintiffs therefore respectfully request that this Court certify the

1 11 single-state classes set forth in the Notice of Motion, appoint the Plaintiffs identified above as class
 2 representatives, and appoint the law firms of Hausfeld LLP, Stein, Mitchell, Cipollone, Beato, &
 3 Missner, LLP, and Pritzker Levine LLP as class counsel.

4 **STATEMENT OF RELEVANT FACTS**

5 At trial, Plaintiffs will rely upon common, classwide evidence of CVS's uniform pricing conduct
 6 to demonstrate classwide liability, injury, and damages for all class members under each state law cause
 7 of action. This common evidence of liability and harm comes from CVS itself: CVS's internal emails
 8 and memoranda, CVS's prescription drug transaction data, CVS's witness testimony, even CVS's
 9 judicial admissions, as described extensively below. In addition, Plaintiffs will rely on the expert
 10 testimony of Dr. Robert P. Navarro, a professor of pharmacy at the University of Florida, and Dr. Joel
 11 Hay, a professor of pharmaceutical economics at the University of Southern California, as described in
 12 their declarations submitted with Plaintiffs' Motion, cited below.

13 **A. In Prescription Drug Purchases Using Insurance, CVS Is Not Permitted To** 14 **Charge Patients Copayments That Exceed CVS's "Usual and Customary" Price.**

15 Approximately 90% of Americans – including all Plaintiffs and class members – are enrolled in
 16 a private or public health care plan that splits prescription drug costs between the insurer and insured.
 17 Declaration of Dr. Robert P. Navarro ("Navarro Decl.") ¶¶ 10, 12, Ex. 2. When filling prescriptions
 18 using insurance, insured patients frequently pay a portion of the cost (a copayment), and the plan (TPP,
 19 or the PBM on behalf of the TPP) pays the remainder of the cost. *Id.* ¶ 12; Answer ¶¶ 10-11, 44. The
 20 PBMs and TPPs have agreements with pharmacies, including CVS, which govern, among other things,
 21 the prices that CVS may charge for prescription drugs purchased by the insured patients. Ex. 2, Navarro
 22 Decl. ¶¶ 13-14; Answer ¶¶ 10, 44, 67. When an insured patient fills a prescription at CVS, the
 23 pharmacist generates a claim by transmitting patient, prescription, and insurance information
 24 electronically to the TPP or PBM. Answer ¶¶ 12, 48-49. Using that information, the TPP or PBM then
 25 immediately transmits back to CVS the amounts that CVS will receive from the insurer and from the
 26 patient. *Id.* ¶ 49. This almost-instantaneous, automated process is known in the pharmacy industry as
 27 "claims adjudication." *Id.* Since at least November 2008, CVS's electronic claims adjudication process
 28 has utilized standardized data fields developed by the NCPDP, a pharmacy standard-setting

1 organization. Answer ¶¶ 49-50. CVS follows this format for all transactions with all TPPs and PBMs.
2 Ex. 3, 30(b)(6) 68:8-23; Answer ¶ 50.

3 For every insured transaction, CVS transmits its U&C price to the TPP or PBM. Ex. 3, 30(b)(6)
4 80:5-83:23; Ex. 1, Tierney 42:12-43:7. The NCPDP’s Telecommunication Standard includes Field No.
5 426-DQ, “Usual and Customary Charge,” which NCPDP’s data dictionary defines as “Amount charged
6 cash customers for the prescription exclusive of sales tax and other amounts claimed.” Answer ¶ 53.
7 As CVS has conceded, “[t]he U&C price is an industry term meaning the cash price paid by the general
8 public” and a “‘cash’ customer typically means a customer who purchases a drug without using
9 insurance.” Dec. 4, 2015 CVS Pharmacy Mot. to Dismiss [ECF 56] at 15. CVS’s internal documents
10 and witnesses offer similar definitions. *See, e.g.*, Ex. 4, Health Savings Pass Reconciliation Process
11 [CVSC-0313152, at 152] [REDACTED]
12 [REDACTED] Ex. 5, Third Party Finance Glossary of Terms [CVSC-0068438, at
13 458] [REDACTED]); Ex. 6, Greenwood 40:11-25.

14 The U&C price serves a vital purpose. A common, standardized aspect of the claims
15 adjudication process is that, on insurance transactions, a pharmacy cannot charge an amount higher than
16 its U&C price, and thus TPPs and PBMs use the U&C price that a pharmacy submits to calculate the
17 amounts that the pharmacy will be paid for the purchase. Ex. 2, Navarro Decl. ¶¶ 7-8. [REDACTED]
18 [REDACTED]
19 [REDACTED] Ex. 7, Gibbons (TX) 61:23-62:8 [CVSC-0223177, at 192-93].
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]

23 [REDACTED]⁶ [REDACTED]
24 [REDACTED]. Ex. 3, 30(b)(6) 188:8-189:23.
25

26 ⁶ Ex. 7, Gibbons (TX) 60:20-61:1 [REDACTED] [REDACTED]”); *see*
27 *also* Ex. 8, Colbert (TX) 184:8-185:9 [REDACTED]
28 [REDACTED]; Ex. 9, Ferschke (TX) 26:10-25 ([REDACTED])

1 All of Plaintiffs’ and class members’ TPP or PBM’s agreements with CVS prohibit CVS from
2 charging patients prices that exceed the pharmacy’s U&C prices. Ex 12, Chart of Relevant Contracts;
3 Ex. 6, Greenwood 43:15-44:10, 76:22-78:3 [REDACTED]
4 [REDACTED] Ex. 2, Navarro Decl. ¶¶ 21, 25.⁷ Exhibit
5 12 to the Gilmore Declaration sets forth the insurance plan contracts and documents that have been
6 identified to date as containing “Lower of U&C” pricing terms. Importantly, for purposes of this motion,
7 all of the contracts pertaining to class members have the same or substantially similar “Lower of U&C”
8 provisions, so that no individual contractual analysis is necessary. CVS patients in the 11 state classes
9 insured under these plans, and who paid copayments described in the class definitions (*i.e.*, higher than
10 CVS’s HSP prices), are class members.⁸

11 Beyond this uniformity in the contracts, [REDACTED]
12 [REDACTED]
13 [REDACTED].

14 Ex. 15, Declaration of Dr. Joel Hay (“Hay Decl.”) ¶ 33. [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED] Ex. 1, Tierney 43:8-45:12; Ex. 3,
18 [REDACTED]

19 [REDACTED]
20 Ex. 10, Morrison 116:1-14 [REDACTED]
21 [REDACTED]
22 Ex. 6, Greenwood 48:18-49:1 [REDACTED] *id.* 70:10-17 [REDACTED] s that I
23 work on typically include lower of logic between the rate schedule and usual and customary.”).

⁷ *E.g.*, Ex. 13, [REDACTED]
24 [REDACTED] [CVSC-0014111], Ex. C ¶ 5 [REDACTED]
25 [REDACTED] *see also id.*, § [REDACTED]
26 [REDACTED] Ex. 14, [REDACTED]
27 [REDACTED]
28 [REDACTED]

⁸ Plaintiffs reserve the right to add as class members patients who made purchases pursuant to additional plans based on further information adduced during discovery.

1 30(b)(6) 89:12-91:18. *Third*, [REDACTED]
 2 [REDACTED] Ex. 7, Gibbons (TX) 120:21-121:5, 124:6-125:7;
 3 Ex. 9, Ferschke (TX) 30:15-31:25.

4 Thus, CVS's contracts, its own witnesses, its transaction data, and its internal tracking of claims
 5 adjudication, all demonstrate that the Lower of U&C pricing mechanism applies uniformly to Plaintiffs
 6 and class members' transactions with CVS.

7 **B. CVS Develops The HSP Program – A Uniform Generic Drug Pricing Program –**
 8 **To Inflate Its Reported U&C Prices.**

9 [REDACTED]
 10 [REDACTED]
 11 [REDACTED]
 12 [REDACTED] Ex. 10, Morrison 142:23-143:12. CVS therefore created the so-
 13 called Health Savings Pass program, which provided a pretext for CVS to continue to report falsely high
 14 "U&C" prices to the TPPs, while still obtaining the competitive benefits of charging lower prices to
 15 cash-paying customers.

16 CVS launched the HSP program in November 2008. Answer ¶ 60. Under the HSP program,
 17 CVS sold generic drugs at set "discount" prices to cash-paying customers who paid a nominal
 18 membership fee. The HSP program was available throughout the country at any CVS store. Ex. 3,
 19 30(b)(6) 229:14-230:3. A standard 90-day supply for nearly all HSP-eligible generic prescription drugs
 20 was \$9.99 (November 2008-2010) and \$11.99 (starting in 2011). Answer ¶ 62.⁹ The HSP generic drug
 21 program included over 400 generic prescription drugs, including some of the most commonly prescribed
 22 generic drugs for cardiovascular, allergy, and diabetes conditions, among others. Answer. ¶ 62; Ex. 16,
 23 HSP program formularies. In [REDACTED]
 24 [REDACTED] Ex. 3, 30(b)(6) 194:17-20.
 25 CVS stopped the HSP program after Plaintiffs filed this suit, and while regulators such as the Texas
 26 Attorney General still are investigating CVS's U&C reporting and the HSP program.

27
 28 ⁹ A small subset of HSP drugs had different price-points, such as antibiotics and women's health drugs.
 Answer ¶ 62; Ex. 16, HSP program formularies.

1 In essence, CVS used the HSP program as a ruse to evade reporting the pharmacy's true cash
2 prices as its U&C price, thereby increasing the amounts CVS could charge insurers and patients.
3 Plaintiffs will rely on classwide evidence – CVS documents, CVS witness testimony, CVS transaction
4 data, and expert testimony and analysis – to prove that CVS's HSP prices were CVS's true U&C prices:
5 the cash prices charged to the general public for the eligible generic drugs.

6 **First**, HSP indisputably involved cash prices. [REDACTED]

7 [REDACTED]”¹⁰

8 **Second**, the HSP program was open to the general public. [REDACTED]

9 [REDACTED]
10 [REDACTED] Ex. 22, CVSC-0222895, at -98; *see also* Ex. 23, Morrison
11 (TX) 227:2-22 [REDACTED]

12 [REDACTED] The only criteria for a patient to enroll in the program was to fill out a form and pay a small
13 membership fee. Ex. 10, Morrison 117:1-25; Ex. 3, 30(b)(6) 234:21-235:4. From November 9, 2008
14 through 2010, cash paying customers could join the HSP program for a \$10 annual fee, which was raised
15 to \$15 in 2011. Answer ¶ 62. [REDACTED]

16 [REDACTED]
17 [REDACTED]
18 [REDACTED] Ex. 15, Hay Decl. ¶ 41.
19 [REDACTED]

20 [REDACTED] *Id.* [REDACTED]

21 [REDACTED] *Id.* ¶ 41, Table 4. [REDACTED]
22 [REDACTED]

23 [REDACTED] Ex. 2, Navarro
24 [REDACTED]

25 ¹⁰ *See, e.g.,* [REDACTED]

26 [REDACTED] Ex. 18, [REDACTED]

26 [REDACTED]” Ex.

27 [REDACTED] 19,

27 [REDACTED] Ex. 20,

27 [REDACTED] Ex. 21, [REDACTED]

28 ¹¹ Ex. 19, Aug. 3, 2008 D. Ghertner Email to multiple CVS personnel [CVSC-0222766]; Ex. 7, Gibbons (TX) 214:8-215:20; *see also* Ex. 2, Navarro Decl. ¶ 52.

1 Decl. ¶¶ 45-46, belying CVS’s position that its HSP program could be excluded from determining its
2 U&C cash price.

3 *Third,* [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]

7 [REDACTED] . 15, Hay Decl. ¶¶ 10, 40.¹²

8 *Fourth,* [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]

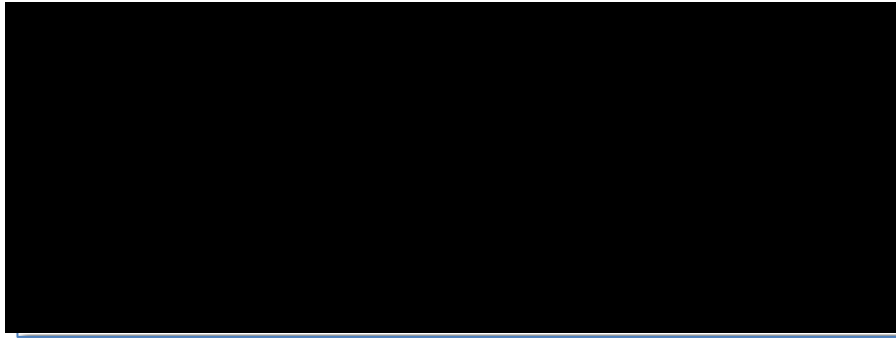
13 [REDACTED] Ex. 24, [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]

18 [REDACTED]” Ex. 25, [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]

22
23
24 ¹² Although CVS claims that it did not offer prices of less than the “standard” program price for
25 prescriptions less than 90 days, [REDACTED]

26 [REDACTED] Ex. 15, Hay Decl. ¶ 42, Table 4.

27 [REDACTED]
28 ¹³ Ex. 1, Tierney 203:17-204:20; Ex. 3, 30(b)(6) 63:12-64:2.
Ex. 26, June 2010 Landscape Strategy Presentation, at CVSC-0341635; Ex. 7, Gibbons (TX) 246:12-
247:13; Ex. 9, Ferschke (TX) 120:18-121:17.



C. CVS Has Deceived And Harmed Plaintiffs And Class Members In A Uniform Manner – Collecting Inflated Copayments That Exceed CVS’s True U&C Prices.

In a prior opinion, this Court described the core of Plaintiffs’ and class members’ case:

Plaintiffs contend that not only was the false U&C price directly communicated to them every time they paid inflated copayments, but it was also indirectly communicated to them through their insurers (third-party payors) every time their claims were adjudicated and copayments were calculated.

Corcoran v. CVS Health Corp., -- F. Supp. 3d --, No. 15-CV-3504-YGR, 2016 WL 948880, at *11 (N.D. Cal. Mar. 14, 2016). For each of Plaintiffs and class members’ overcharge transactions, CVS’s deception constitutes both a *misrepresentation* – communicating the false U&C price to Plaintiffs and class members with each inflated copayment – as well as an *omission* – “concealing from [Plaintiffs] the true U&C prices ...” and thus concealing that Plaintiffs were being denied the prices to which they were entitled under their insurance. *Id.* at * 11, *13.

Plaintiffs will show through classwide evidence that CVS committed these misrepresentations and omissions. CVS uniformly has reported inflated U&C prices, rather than its HSP prices. CVS admits that it “does not today, and never has, reported the HSP price as its U&C price on drugs included on the HSP formulary.” Answer ¶¶ 71; *see also id.* ¶¶ 13, 65. [REDACTED]

[REDACTED]

[REDACTED]. Ex. 11, Melkonian 64:9-65:7; 103:2-104:4.

Based on the foregoing evidence and their own expertise, Dr. Navarro and Dr. Hay have concluded that CVS should have included its HSP prices when setting and reporting its U&C prices. *See* Ex. 2, Navarro Decl. ¶¶ 7, 28, 36, 40, 41-52; Ex. 15, Hay Decl. ¶¶ 35-43. The Seventh Circuit

1 agrees. CVS's HSP program is functionally identical to Kmart's discount program challenged in *United*
 2 *States ex rel. Garbe v. Kmart Corp.*, which the Southern District of Illinois and the Seventh Circuit both
 3 held "represented the 'usual and customary' charges for the drugs." 824 F.3d at 632. *See also id.* at 636
 4 (describing Kmart as offering 90-day prescriptions at \$15 to patients who signed up for program); *id.* at
 5 643 ("Cash customers walking into Kmart do not cease to be members of the general public the minute
 6 they are offered – or pushed into – 'membership' in Kmart's discount program" even if they paid a
 7 nominal \$10 membership fee).

8 [REDACTED]
 9 [REDACTED]
 10 [REDACTED]
 11 [REDACTED]
 12 [REDACTED] Ex. 15, Hay Decl. ¶ 43. Thus the evidence of CVS's conduct in reporting inflated
 13 U&C prices and charging inflated copays is common to each class member, and will be applied
 14 uniformly to prove liability and damages as to each class member.

15 CVS's transaction data, and contract and plan documents with PBMs and TPPs, provide
 16 evidence of the composition of the 11 state classes for which Plaintiffs seek certification. Plaintiffs and
 17 class members participate in third-party health care plans and purchased HSP-eligible generic
 18 prescription drugs from CVS retail pharmacies between November 2008 and the present. Exhibit 27 to
 19 the Gilmore Declaration illustrates that Plaintiffs are typical of the class as a whole. Each Plaintiff and
 20 each class member purchased one or more drugs listed on the HSP program, using insurance that
 21 required that CVS not charge more than its U&C price. Ex. 27, Chart of Plaintiff Contract and Plaintiff
 22 Testimony; Ex. 15, Hay Decl. ¶¶ 9, 11, 45-50; Ex. 2, Navarro Decl. ¶¶ 20, 25. Each Plaintiff and class
 23 member paid CVS one or more copayments that exceeded CVS's true U&C price. Ex. 15, Hay Decl. ¶
 24 50. This overcharge is calculated in a uniform method using a simple arithmetic formula that is common
 25 across the classes: by measuring the difference between what CVS should have reported as its U&C
 26 price – based on the HSP prices – and the actual copayment that CVS charged to each class member.
 27 *Id.* ¶¶ 58-63. [REDACTED]

28 [REDACTED] *Id.* ¶ 56. The damages across all 11 classes are ***more than \$1.23 billion.*** *Id.*

LEGAL STANDARDS

“Federal Rule of Civil Procedure 23, which governs class certification, has two distinct sets of requirements that plaintiffs must meet before the Court may certify a class.” *Kumar v. Salov N. Am. Corp.*, No. 14-cv-2411-YGR, 2016 WL 3844334, *2 (N.D. Cal. July 15, 2016). “Plaintiffs must meet all of the requirements of Rule 23(a) and must satisfy at least one of the prongs of Rule 23(b), depending on the nature of the class they seek.” *Id.* (citing *Shady Grove Orthopedic Assocs, P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 394 (2010)).

Rule 23(a) requires a party seeking to certify a class to demonstrate (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013). In addition, the members of the class must be ascertainable. *Bias*, 312 F.R.D. at 534. Plaintiffs here seek certification under both Rule 23(b)(3) and Rule 23(b)(2). Certifying a class under Rule 23(b)(3) involves two inquiries: (1) whether the questions of law or fact common to the members of the class predominate over any questions affecting only individual members; and (2) whether a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Fed. R. Civ. P. 23(b)(3). Rule 23(b)(2) requires that “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.” Fed. R. Civ. P. 23(b)(2).

ARGUMENT

I. PLAINTIFFS SATISFY THE REQUIREMENTS OF FED. R. CIV. P. 23(A).

A. The Classes Satisfy The Numerosity Requirement.

There can be no dispute that each of the classes as defined is so numerous that joinder of all members even in one state would be “impracticable.” Fed. R. Civ. P. 23(a)(1). *Tait v. BSH Home Appliances Corp.*, 289 F.R.D. 466, 473 (C.D. Cal. 2012) (“A proposed class of at least forty members presumptively satisfies the numerosity requirement.”); *Bias*, 312 F.R.D. at 536. Here, each of the proposed classes includes hundreds of thousands or millions of members, easily satisfying Rule 23(a)(1)’s numerosity requirement. Ex. 15, Hay Decl. ¶ 56.

1 **B. CVS Acted In A Uniform Manner To Overcharge Millions Of Similarly Situated**
 2 **Persons, Yielding Several Core Common Questions.**

3 Rule 23(a) also requires one or more questions of law or fact common to the class. Fed. R. Civ.
 4 P. 23(a)(2). Rule 23 does not require that all questions of law and fact be common to every class
 5 member; rather, “[t]he existence of shared legal issues with divergent factual predicates is sufficient, as
 6 is a common core of salient facts coupled with disparate legal remedies within the class.” *Hanlon v.*
 7 *Chrysler Corp.*, 150 F.3d 1011(9th Cir. 1998). Commonality is met where plaintiffs’ claims “depend
 8 upon a common contention ... of such a nature that it is capable of classwide resolution – which means
 9 that determination of its truth or falsity will resolve an issue that is central to the validity of each one of
 10 the claims in one stroke.” *Dukes*, 564 U.S. at 351 .

11 This case presents a number of common questions of law and fact that satisfy Rule 23’s
 12 commonality requirement because they will “generate common *answers* apt to drive the resolution of
 13 the litigation.” *Dukes*, 564 U.S. at 350 (emphasis in original). Further, each of these common questions
 14 satisfies Rule 23(a)’s commonality requirement because each “focuses on the actions of Defendant[]
 15 and does not vary by class member.” *Bias*, 312 F.R.D. at 538. The common questions include:

- 16 • Whether, in setting and reporting its U&C prices, CVS was required to include its HSP prices
 17 for drugs on the HSP formulary (which CVS admits it did not do);
- 18 • Whether by reporting to TPPs and PBMs inflated U&C prices, charging Plaintiffs and class
 19 members inflated copayments, and failing to tell Plaintiffs that they were being denied the
 20 benefit of their insurance, CVS engaged in false and deceptive conduct;
- 21 • Whether such false and deceptive conduct injured Plaintiffs and class members by causing
 22 them to pay CVS inflated copayments; and
- 23 • Whether CVS was unjustly enriched through obtaining payments from Plaintiffs inflated
 24 above CVS’s true U&C prices.

25 All of these common questions flow from CVS’s uniform practice of overcharging insured patients for
 26 HSP-eligible drugs by reporting inflated U&Cs to the TPPs. *See supra* Statement of Facts at 3-9. All
 27 of these factual and legal issues are derivative of the central issue: CVS should have reported its HSP
 28 prices as its U&C prices. That question, when decided, will “resolve an issue that is central to the
 validity of each one of the claims in one stroke.” *Dukes*, 564 U.S. at 351.

1 **C. Plaintiffs' Claims Are Typical Of Those Of The Classes.**

2 Rule 23's third requirement for typicality, which is liberally construed, is met if the "claims or
3 defenses of the representative parties are typical of the claim or defenses of the class." *Hanlon v.*
4 *Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998). "This requirement is usually satisfied if the named
5 plaintiffs have suffered the same or similar injuries as the unnamed class members, the action is based
6 on conduct which is not unique to the named plaintiffs, and other class members were injured by the
7 same course of conduct." *In re NCAA Student Athlete Name & Likeness Licensing Litig.*, No. C 09-
8 1967 CW, 2013 WL 5979327, *4 (N.D. Cal. Nov. 8, 2013) (citation omitted).

9 The named plaintiffs are typical of the class as a whole. As discussed in the Statement of Facts,
10 each Plaintiff (1) is enrolled in a third-party health insurance plan that limited the price CVS could
11 charge to its usual and customary price; (2) purchased one or more drugs included on the HSP generic
12 drug formulary, and (3) was charged a copayment that is higher than the usual and customary price for
13 that drug (CVS's true U&C prices, based on CVS's HSP prices). Ex. 27; Ex. 15, Hay Decl. ¶ 50.
14 Furthermore, CVS has admitted it has no knowledge or evidence that it told any of the named Plaintiffs
15 the truth – that it was charging Plaintiffs copayments higher than CVS's true U&C prices. Ex. 3,
16 30(b)(6) 135:4-16. And Plaintiffs themselves testified they were deceived by CVS's conduct. Ex. 27.
17 Plaintiffs satisfy the typicality requirement.

18 **D. Plaintiffs And Their Counsel Will Fairly And Adequately Protect The Interests Of
19 The Class.**

20 To be an adequate class representative, Plaintiffs and their attorneys must show that "the
21 representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P.
22 23(a)(4). "[T]he Court must consider '(i) [whether] the representative plaintiffs and their counsel have
23 any conflicts of interest with other class members, and (2) will the representative plaintiffs and their
24 counsel prosecute the action vigorously on behalf of the class?'" *Kumar*, 2016 WL 3844334 at *2
25 (quoting *Staton v. Boeing Co.*, 327 F. 3d 938, 957 (9th Cir. 2003)). Here, Plaintiffs and their attorneys
26 easily meet these requirements. *First*, no conflicts exist between the named Plaintiffs and their counsel,
27 and the class as a whole: their interests are aligned with all class members in challenging CVS's
28 fraudulent and deceptive pricing scheme. The relief that Plaintiffs and their attorneys seek is the same
for the named individuals and the class: recovery of the inflated copayment amounts they paid to CVS.

1 **Second**, the named Plaintiffs and counsel have litigated this action vigorously. As an initial
 2 matter, plaintiffs' counsel has already been deemed qualified based on the Court's approval of plaintiffs'
 3 counsel as interim class counsel. Each of the named plaintiffs deposed to date¹⁴ demonstrated their
 4 adequacy by explaining their reasons for joining the lawsuit and the efforts expended so far in connection
 5 with litigation the case on behalf of the absent class members. Plaintiffs articulated their understanding
 6 of the lawsuit.¹⁵ And Plaintiffs explained why they joined the lawsuit: they trusted CVS to give them
 7 the benefit of their insurance and charge them the price they were owed.¹⁶ They believe that CVS's
 8 failure to do so was unfair, misleading, and fraudulent.¹⁷ Plaintiffs understand their role as class
 9 representatives, have actively participated in the suit to date through review of case filings, collection of
 10 documents, answering interrogatories, and sitting for depositions. They are prepared to fulfill the class
 11 representative role and perform whatever actions are asked of them.¹⁸ In sum, Plaintiffs will more than
 12 adequately represent the class.

13
 14
 15
 16
 17 ¹⁴ The four named plaintiffs seeking to represent California (Ms. Gardner and Messrs. Corcoran, Clark,
 18 and Norkus) have yet to be deposed. Plaintiffs will supplement this submission with relevant testimony
 19 from these individuals after their depositions are completed.

20 ¹⁵ See, e.g., Ex. 28, Avis 52:24-54:6; Ex. 29, Caine 19:9-17, 61:13-25, 82:8-11; Ex. 30, Garber 13:2-6;
 21 Ex. 31, Gargiulo 83:11-84:7, 93:8-16; Ex. 32, Gilbert 38:9-13; Ex. 33, Hagert 98:17-99:10, 101:13-25,
 22 103:10-15, 106:3-18; Ex. 34, Jenks 50:17-51:13, 71:11-19, 145:17-20; Ex. 35, Samuelson 187:11-15;
 23 Ex. 36, Wulff 96:14-23..

24 ¹⁶ See, e.g., Ex. 28, Avis 87:20-88:21, 91:4-20; Ex. 37, Barrett 197:18-198:2, 216:1-19, 225:16-226:1;
 25 Ex. 29, Caine 122:13-16, 20-24, 134:17-22; Ex. 30, Garber 49:2-5; Ex. 31, Gargiulo 122:4-123:17;
 26 181:13-14, 184:8-12; Ex. 32, Gilbert 56: 18-22; 69:21-70:2; 149:23-150:1; Ex. 33, Hagert 168:3-21,
 27 178:22-179:1; Ex. 34, Jenks 148:21-149:5, 201:22-203:8; Ex. 35, Samuelson 159:18-160:11, 241:11-
 28 15; Ex. 38, Washington, 247:4-17; 294:3-8; Ex. 36, Wulff 96:5-23.

¹⁷ See, e.g., Ex. 28, Avis 183:5-16, 185:20-22; Ex. 37, Barrett 39:8-12; Ex. 30, Garber 57:14-58:10; Ex.
 31, Gargiulo 171:9-172:2; Ex. 32, Gilbert 227:8-14; Ex. 33, Hagert 205:7-206:11, 207:5-208:8; Ex. 34,
 32 Jenks 145:17-146:6; Ex. 39, Odorisio 121:2-16; Ex. 35, Samuelson 174:3-11, 242:6-20; Ex. 38,
 33 Washington 292:12-293:6.

¹⁸ See, e.g., Ex. 28, Avis 183:5-184:5, 188:3-22; Ex. 37, Barrett 265:9-18, 267:3-25, 275:12-276:9; Ex.
 29, Caine 204:1-205:1, 210:18-23; Ex. 30, Garber 21:22-22:24; Ex. 31, Gargiulo 196:25-197:6, 204:16-
 25, 205:21-206:6; Ex. 32, Gilbert 51:18-52:21, 59:14-23; Ex. 33, Hagert 48:7-23, 77:19-78:1; Ex. 34,
 34 Jenks 219:9-220:22; Ex. 39, Odorisio 64:24-65:4, 121:2-16, 258:21-259:4; Ex. 35, Samuelson 274:3-8,
 35 274:12-17, 281:4-282:20; Ex. 38 Washington 314:22-315:8, 319:24-320:9, 332:3-333:15; Ex. 36, Wulff
 36 50:7-13, 62:14-18.

1 **E. The Class Members Are Ascertainable Through CVS’s Transaction Data And**
 2 **Insurance Plan Documents.**

3 In addition to the Rule 23(a) requirements, Plaintiffs must also establish that the class members
 4 are identifiable. Plaintiffs satisfy the ascertainability requirement because “members of the proposed
 5 class are readily identifiable by objective criteria, and it is administratively feasible to determine whether
 6 a particular person is a member of the class.” *Bias*, 312 F.R.D. at 538; *Chavez v. Blue Sky Natural*
 7 *Beverage Co.*, 268 F.R.D. 365, 376 (N.D. Cal. 2010). Indeed, the members of the class are readily
 8 identifiable through CVS’s own transaction data. With this data, matched with CVS’s contracts (*see*
 9 Ex. 12), Dr. Hay can determine which CVS customers (1) purchased an HSP-eligible prescription drug
 10 during the class period, (2) for which the reported U&C price was greater than the HSP price (or prorated
 11 HSP price), (3) were insured through a TPP or PBM that required CVS not to charge amounts higher
 12 than its U&C prices, and (4) paid a copay that was higher than it would have been if it had been based
 13 on the actual U&C price. Ex. 15, Hay Decl. ¶¶ 45-56.¹⁹ The use of defendant’s own databases to
 14 identify class members based on objective criteria is the prototypical model of ascertainability.
 15 *Whiteway v. FedEx Kinko’s Office & Print Servs., Inc.*, No. C 05-2320 SBA, 2006 WL 2642528, at *3
 16 (N.D. Cal. Sept. 14, 2006) (analyzing records maintained by defendant is a “reasonable, objective
 17 method of ascertaining those individuals”); *Wolph v. Acer Am. Corp.*, No. 09-cv-1314, 2012 WL
 18 993531, at *2 (N.D. Cal. Mar. 23, 2012) (same); *Bias*, 312 F.R.D. at 538-39 (same).

19 **II. PLAINTIFFS SATISFY THE REQUIREMENTS OF RULE 23(B)(3).**

20 **A. Given The Uniform Nature Of CVS’s Overpricing Scheme And Its Impact On**
 21 **Plaintiffs And Class Members, Common Questions Of Law And Fact Predominate**
 22 **Over Individualized Inquiries.**

23 Rule 23(b)(3) “tests whether proposed classes are sufficiently cohesive to warrant adjudication
 24 by representation.” *Amchem*, 521 U.S. at 623. “Predominance is a test readily met in certain cases
 25 alleging consumer ... fraud ...” *Id.* Plaintiffs satisfy this standard when they “establish that the ‘issues
 26 in the class action that are subject to generalized proof, and thus applicable to the class as a whole ...
 27 predominate over those issues that are subject only to individualized proof.’” *Nitsch v. Dreamworks*
 28 *Animation SKG Inc.*, No. 14-CV-04062-LHK, 2016 WL 4424965, at *3 (N.D. Cal. July 6, 2016)

¹⁹ The class definition in the Notice of Motion has been revised from the version set forth in Plaintiffs’ Third Amended Complaint [ECF 101], to be even more precise with respect to the eligible class members.

1 (quoting *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 136 (2d Cir. 2001)) (ellipses in
 2 original). “[P]roving predominance does not require plaintiffs to prove every element of a claim is
 3 subject to classwide proof: they need only show that common questions predominate over questions
 4 affecting only individual class members.” *In re: Cathode Ray Tube (CRT) Antitrust Litig.*, 308 F.R.D.
 5 606, 612 (N.D. Cal. 2015) (citation omitted).

6 The Rule 23(b)(3) analysis starts “with the elements of the underlying cause[s] of action.” *Erica*
 7 *P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809 (2011). As explained below and further
 8 demonstrated in Plaintiffs’ proposed Trial Plan, common, generalized evidence will be used to establish
 9 elements in multiple causes of action brought by each class (*e.g.*, fraud, negligent misrepresentation,
 10 and statutory claims within each class share multiple elements that will be established by common
 11 evidence). In other words, the classes “will prevail or fail in unison,” and thus class treatment is proper.
 12 *Spann*, 307 F.R.D. at 523 (citation omitted).

13 **1. Common issues of misrepresentations and omissions predominate.**

14 Every UDAP, fraud, and negligent misrepresentation claim will require proof of a
 15 misrepresentation or omission. In this case, as the Court recognized, Plaintiffs have alleged that “CVS
 16 made a false misrepresentation every time it charged plaintiffs copays that were inflated based on
 17 inflated U & C prices,” and made omissions by “concealing from [Plaintiffs] the true U&C prices,” thus
 18 concealing that Plaintiffs were being denied the benefits of their insurance. *Corcoran*, 2016 WL 948880,
 19 at *11, *13. Plaintiffs will prove, through classwide evidence, that (1) CVS was required to charge
 20 Plaintiffs and class members copayments based on truthfully calculated and submitted U&C prices; (2)
 21 CVS submitted to TPPs and PBMs falsely inflated U&C prices rather than CVS’s HSP prices – CVS’s
 22 true U&C prices for drugs on the HSP formulary; and (3) CVS charged Plaintiffs inflated copayments
 23 based on CVS’s inflated U&C prices. These common issues predominate over individualized inquiries.

24 **First**, the common issue that CVS could not charge Plaintiffs and class members more than its
 25 U&C prices will be established using classwide evidence. As described in detail above, CVS’s contracts
 26 with PBMs and TPPs, CVS’s witnesses’ testimony, and CVS’s transactional data all evidence this
 27 common issue and show a simple key fact, [REDACTED]

28 [REDACTED] Ex. 7,

1 Gibbons (TX) 61:23-62:3. *See supra* Statement of Facts at 4-7. While the particular phrasing may
2 differ, there are no material variations among the contracts – the common requirement that CVS cannot
3 charge more than its U&C prices applies classwide. Just two weeks ago, in certifying a class of insureds
4 proceeding against a health insurer under a number of different plans, the Court found that commonality
5 and predominance were met where “Plaintiffs here have demonstrated, as a factual matter, that the
6 insurance plans for the putative class members are substantially the same in a key respect....” *Wit v.*
7 *United Behavioral Health*, No. 14-CV-02346 JCS, 2016 WL 4990514, at *17 (N.D. Cal. Sept. 19, 2016);
8 *see also Bias*, 312 F.R.D. at 536 (rejecting variation among mortgage terms as a ground for denying
9 certification, where defendant “fail[ed] to explain how variations in contract language would negate the
10 liability determination”). In this key respect, Plaintiffs’ case is readily distinguishable from *Stitt v.*
11 *Citibank*, where this Court held that “class members’ agreements had ‘distinct terms’ such that common
12 proof could not be used to determine the validity of property inspection fees.” *Stitt v. Citibank*, No. 12-
13 CV-03892- YGR, 2015 WL 9177662, at *5 (N.D. Cal. Dec. 17, 2015). That simply is not the case here.
14 CVS’s contracts, data, and witness testimony (*see supra* Statement of Facts) confirm that the “Lower of
15 U&C” pricing requirements apply classwide, and thus common proof *will* determine the “validity” of
16 CVS’s inflated U&C prices and copayment charges.

17 **Second**, whether CVS was required to include its HSP prices when reporting its U&C prices to
18 TPPs and PBMs is a question that will be uniform for all Plaintiffs. Plaintiffs will rely on decisions like
19 *Kmart*, along with industry standards set by NCPDP and the evidence concerning the nature of CVS’s
20 HSP program, to establish that CVS was required to include its HSP prices in reporting its U&C prices.
21 *See supra* Statement of Facts at 7-10. Because these questions of law apply equally to each class
22 member, class relief is “particularly appropriate.” *Gen. Tel. Co. of S.W. v. Falcon*, 457 U.S. 147, 155
23 (1982). Furthermore, Plaintiffs will rely upon CVS’s own data to demonstrate that prices offered under
24 the HSP program were the most common cash prices that CVS charged for drugs on the HSP formulary.
25 This will not vary among Plaintiffs or across the classes. The same objective evidence (CVS’s data)
26 will apply to determine whether CVS should have submitted U&C prices based on the prices it offered
27 through the HSP program. Ex. 15, Hay Decl. ¶¶ 31-34, 45-50.

1 **Third**, Plaintiffs will rely on CVS’s own admissions and documents to show that CVS did not,
2 in fact, report the HSP pricing as its U&C prices. *See, e.g.*, Answer ¶ 70 (“Defendant admits that CVS
3 does not today, and never has, reported the HSP price as its U&C price on drugs included on the HSP
4 formulary.”); Ex. 1, Tierney 228:6-14. CVS’s “systematic and pervasive unlawful price ... policy” is
5 “common to all putative class members and predominates over any individual factual questions.” *Spann*,
6 307 F.R.D. at 523. This warrants class certification.

7 **2. Common issues of materiality and reliance – where required elements –**
8 **predominate.**

9 As detailed in the Trial Plan, only certain of Plaintiffs’ causes of action require proof of
10 materiality and reliance. Plaintiffs will establish these elements, where required, through the same
11 classwide evidence. *See supra* Statement of Facts. Many of Plaintiffs’ causes of action follow a
12 “reasonable consumer” standard, allow a presumption of reliance, or circumstantial evidence of reliance.
13 *See* Trial Plan § I.D. As the Ninth Circuit has described, this standard inquires “if a reasonable man
14 would attach importance to its existence or nonexistence in determining his choice of action in the
15 transaction in question.” *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1022 (9th Cir. 2011). For such
16 claims, class treatment is appropriate because the individual circumstances of specific class members
17 themselves do not control, and thus generalized proofs through classwide evidence will establish
18 Plaintiffs’ claims. *See, e.g., In re ConAgra Foods, Inc.*, 90 F. Supp. 3d 919, 1034 (C.D. Cal. 2015)
19 (analyzing numerous UDAP statutes and concluding that they follow a reasonable consumer standard
20 conducive to certification); *Miller v. Fuhu Inc.*, No. 2:14-CV-06119-CAS-AS, 2015 WL 7776794, at
21 *16 (C.D. Cal. Dec. 1, 2015) (common law fraud, UCL and CLRA claims amenable to class wide proof
22 in consumer product class action; “liability issues under these statutes will focus on the nature of [the
23 defendant’s] representations and other promotional materials, not whether each and every class member
24 would be deceived given their individual preferences or needs.”); *Brazil v. Dell Inc.*, No. C-07-01700
25 RMW, 2010 WL 5387831, at *5 (N.D. Cal. Dec. 21, 2010) (certifying common law fraud and negligent
26 misrepresentation claims, and CLRA claim; “plaintiffs need not establish that each and every class
27 member based his or her decision on the represented discounts.”).

28 But even with respect to those causes of action that do not allow for a presumption of reliance
based on a reasonable person type standard, “a fraud claim may be common and not individualized for

1 (b)(3) purposes if both the misrepresentation or omission requirement and the reliance requirement *can*
 2 *be met with common proof across the class.*” NEWBURG ON CLASS ACTIONS § 4:59 (5th ed. 2013). And
 3 courts often certify classes, particularly in the consumer deception context, that involve a common
 4 classwide representation/omission and pattern of conduct. Predominance is “a test readily met in certain
 5 cases alleging consumer ... fraud,” *Amchem Prods.*, 521 U.S. at 625, particularly where, as here, uniform
 6 practices and misrepresentations give rise to the controversy. *See, e.g., In re U.S. Foodserv. Pricing*
 7 *Litig.*, 729 F.3d 108, 120 (2d Cir. 2013) (holding that class actions may be reasonably litigated through
 8 use of “legitimate inferences based on the nature of the alleged misrepresentations at issue”); *Powers v.*
 9 *Hamilton County Public Defender Comm’n*, 501 F.3d 592, 619 (6th Cir. 2007) (“Cases alleging a single
 10 course of wrongful conduct are particularly well-suited to class certification.”). The Sixth Circuit’s
 11 decision last year in *Rikos v. Procter & Gamble Co.*, 799 F.3d 497 (6th Cir. 2015) illustrates this in the
 12 consumer fraud context. Surveying multiple states’ laws (including California, Illinois, and Florida),
 13 the court of appeals held that

14 Plaintiffs can prove causation and/or reliance on a classwide basis provided that (1) the
 15 alleged misrepresentation ... is material or likely to deceive a reasonable consumer, and
 16 (2) [defendant] made that misrepresentation in a generally uniform way to the entire class.
 As previously discussed, both factors are met here.

17 *Id.* at 518. The court then went on to find that even for a state (North Carolina) that did not permit
 18 presumptions of reliance, but required actual reliance, “although individualized showings may be
 19 required for actions for fraud, this does not in and of itself preclude a finding of the existence of a class”
 20 so long as common issues predominate. *Id.* And “while each plaintiff must prove his own reliance” the
 21 Court found that based on the nature of the misrepresentation at issue, the circumstantial evidence that
 22 can be used to show reliance is common to the whole class” *Id.* For this reason, the court held that
 23 “this classwide proof—that the alleged misrepresentation is material and was made in a generally
 24 uniform manner to all class members—would also suffice ... to show actual reliance such that individual
 25 issues would not predominate.” *Id.*

26 Here, Plaintiffs’ case stems from CVS’s uniform scheme to inflate its U&C prices. Each
 27 transaction results from CVS reporting through the standard claims adjudication process an inflated
 28 U&C price, Ex. 15, Hay Decl. ¶¶ 35-39, and payment of the resulting inflated copayment would not

1 have occurred “absent reliance upon the invoice’s implicit representation that the invoiced amount was
2 honestly owed,” *Bias*, 312 F.R.D. at 541. In such a case, there is a “presumption of reliance without
3 individualized inquiry” based on evidence of payment of an inflated price: “[i]n cases involving
4 fraudulent overbilling, payment may cause circumstantial proof of reliance based on a reasonable
5 inference that customers who pay the amount specified in an inflated invoice would not have done so
6 absent reliance upon the invoice’s implicit representation that the invoiced amount was honestly owed.”
7 *Id.* (citing *In re Foodservice*, 729 F.3d at 119-120).

8 This Court’s holding in *Bias* applies with equal force here. The Plaintiffs themselves testified
9 that being charged the right price was important to them and the basis for their suit, *see supra* Statement
10 of Facts, and what is more, [REDACTED]
11 [REDACTED]. Ex. 40, Hughes 74:7-15; Ex. 10,
12 Morrison 77:6-13; Ex. 1, Tierney 225:6-24. And “[t]here is no dispute that the alleged
13 misrepresentations were communicated to all class members, because the representations were made at
14 the point of sale as part of a standardized ... purchasing process.” *Brazil*, 2010 WL 5387831, at *4.
15 Every time CVS reported an inflated U&C price to TPPs and PBMs, and charged and collected an
16 inflated copayment from Plaintiffs and class members – evidenced by CVS’s transaction data for each
17 drug purchase – the pharmacy made the same type of misrepresentation and omission in a uniform
18 manner. [REDACTED]
19 [REDACTED] Ex. 1,
20 Tierney 226:18-25. This evidence further establishes reliance across the class. *Brazil*, 2010 WL
21 5387831, at *5 (certifying UDAP, fraud, and negligent misrepresentation claims).

22 Finally, to the extent any Plaintiffs continued filling HSP-eligible prescriptions at CVS after
23 joining this litigation, that would not change the classwide evidence of reliance and materiality.
24 Rejecting the defendant bank’s argument that “some class members would have engaged in the same
25 conduct irrespective of the alleged misrepresentation,” the Ninth Circuit concluded in *Gutierrez v. Wells*
26 *Fargo Bank, NA*, 704 F.3d 712 (9th Cir. 2012) that “we are hard pressed to agree that any class member
27 would prefer to incur multiple overdraft fees.” *Id.* at 729 (common issues predominated; “the pervasive
28 nature of Wells Fargo’s misleading marketing materials amply demonstrates that class members, like

1 the named plaintiffs, were exposed to the materials and likely relied on them.”). That is because “[t]o
 2 prove reliance, a plaintiff need not show that the misrepresentation was the ‘sole or even the predominant
 3 or decisive factor’ in his or her decision making. Instead, the representation need only have been a
 4 ‘substantial factor’ in influencing this decision.” *Vaccarino v. Midland Nat. Life Ins. Co.*, No. CV 11-
 5 5858 CAS MANX, 2013 WL 3200500, at *10 (C.D. Cal. June 17, 2013) (quoting *Engalla v. Permanente*
 6 *Med. Grp., Inc.*, 938 P.2d 903 (Cal. 1997)).

7 **3. Common issues of CVS’s knowledge and intent predominate.**

8 The class claims for Fraud and certain UDAP claims will require Plaintiffs to establish CVS’s
 9 knowledge of its true U&C and CVS’s intent to induce reliance. *See* Trial Plan § I.B. These elements
 10 will be established based on the same evidence of CVS’s actions that were uniform among the Plaintiffs.
 11 It cannot be disputed that CVS knew every detail about its pricing and how it calculated its U&C prices;
 12 in fact, CVS had exclusive knowledge of this information and argued to this Court that it was
 13 “proprietary.” CVS Pharmacy MTD Reply Br. 15 [ECF 74]. And as the Court has stated (based on
 14 CVS’s submissions in discovery disputes), “it is undisputed that CVS did not report its HSP price as its
 15 U&C price anywhere in the country, *and knew it did not so report.*” Aug. 18, 2016 Order on Nationwide
 16 Data [ECF 152] at 2; Answer ¶ 71. This case-critical fact is the same for every class member.

17 **4. Common issues regarding CVS’s improper gains predominate.**

18 Common questions also predominate as to Plaintiffs’ unjust enrichment claims. “In looking at
 19 claims for unjust enrichment, we must keep in mind that the very nature of such claims requires a focus
 20 on the gains of the defendants, not the losses of the plaintiffs. That is a universal thread throughout all
 21 common law causes of action for unjust enrichment.” *In re Abbott Labs. Norvir Anti-Trust Litig.*, No.
 22 C 04-1511 CW, 2007 WL 1689899, at *9 (N.D. Cal. June 11, 2007) (quoting *Schumacher v. Tyson*
 23 *Fresh Meats, Inc.*, 221 F.R.D. 605, 612 (D.S.D. 2004). Plaintiffs will show that CVS received and
 24 retained wrongful benefits from Plaintiffs in the form of overpayments “common to all Class members.”
 25 *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175 (9th Cir. 2010); *see also Keilholtz v.*
 26 *Lennox Hearth Products Inc.*, 268 F.R.D. 330, 341 (N.D. Cal. 2010) (“Common to all class members
 27 and provable on a class-wide basis is whether Defendants unjustly profited from the sale of their
 28 fireplaces.”). [REDACTED]

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[REDACTED]

[REDACTED].²⁰**5. Common issues regarding economic damages predominate.**

Plaintiffs will prove that all class members were harmed economically by CVS's misrepresentations: if CVS had reported its actual U&C price for drugs on the HSP formulary, then the class members would have paid lower copays for their prescriptions than those CVS charged. Plaintiffs' method of proving damages must be tied to their theory of liability. *See Comcast Corp.*, 133 S. Ct. at 1433; *Bias*, 312 FRD at 542 (“[The] post *Comcast* [question] is whether damages could be feasibly and efficiently calculated once the common liability questions are adjudicated.”) (citations omitted). Plaintiffs easily meet this requirement. Dr. Hay has set forth a “workable method for calculating monetary recovery” that is tied to Plaintiffs' liability theory. *Pulaski & Middleman, LLC v. Google, Inc.*, 802 F.3d 979, 984 (9th Cir. 2015). CVS overcharged each class member as a result of CVS's reporting inflated U&C prices. Using CVS's data, Dr. Hay calculates these overcharges in a uniform method across the classes: by measuring the difference between the HSP price (including prorated prices), and the actual copayment that CVS charged to each class member. Ex. 15, Hay Decl. ¶¶ 58-60. “Common issues predominate where individual factual determinations can be accomplished using computer records, clerical assistance, and objective criteria—thus rendering unnecessary an evidentiary hearing on each claim.” *Smilow v. Sw. Bell Mobile Sys., Inc.*, 323 F.3d 32, 40 (1st Cir. 2003).

B. Certification Is The Superior Method Of Resolving The Class Members' Claims.**1. Individual litigation would be unfair and impracticable.**

This case is particularly suited to class resolution because individual “litigation costs would dwarf potential recovery.” *Hanlon*, 150 F.3d at 1023. Superiority is “easily satisfied” where, if “plaintiffs cannot proceed as a class, some—perhaps most—will be unable to proceed as individuals because of the disparity between their litigation costs and what they hope to recover.” *Local Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1163 (9th Cir. 2001).

²⁰ Ex. 26, June 2010 Landscape Strategy Presentation, at CVSC-0341635.

1 **2. Trial of the 11 single-state classes, with numerous legal similarities and all**
2 **targeting common CVS conduct, is eminently manageable.**

3 Although the state laws at issue in this case share many of the same legal tests, Plaintiffs seek
4 certification of single state classes representing the class members in each state. This is a common
5 approach courts in this circuit use to certify class actions involving multiple states. For example, in *In*
6 *re ConAgra Foods, Inc.*, the court certified 11 single-state classes – the same number here. 90 F. Supp.
7 3d at 1033–34. Rejecting the defendant’s argument that such a case could not be tried manageably, the
8 Court agreed with plaintiffs’ arguments: “they propose that the court certify eleven separate classes,
9 alleviating choice of law concerns ... [and] while they require proof of different elements, the various
10 state consumer protection laws all ‘fall into consistent pattern’” *Id.* Similarly, in *Petersen v. Costco*
11 *Wholesale Co.*, 312 F.R.D. 565, 582 (C.D. Cal. 2016), the court found manageable nine single-state
12 subclasses. While noting that “[d]efendants have pointed to different state law formulations concerning
13 whether a product has to be both defective and unreasonably dangerous, or just defective,” the Court
14 found that it “need not resolve whether these variations are material because Plaintiffs have alternatively
15 proposed formulating nine single-state subclasses. This proposal ‘would avoid almost completely the
16 tangled’ variations in state law present in other multi-state class action cases.” *Id.* (citing *In re Welding*
17 *Fume Prod. Liab. Litig.*, 245 F.R.D. 279, 294 (N.D. Ohio 2007). And “‘by holding separate trials for
18 each state-wide class, or perhaps a combined trial for a few statewide subclasses, where the law in those
19 states is similar enough to allow creation of jury instructions and a verdict form that is not too complex,”
20 the court found that defendants’ supposed manageability concerns would be obviated. *Id.* (citing *In re*
21 *Welding*, 245 F.R.D. at 294). In their Trial Plan, Plaintiffs show that classwide evidence of CVS’s
22 uniform conduct and similarities in states’ laws will allow the Court to manage the trial of this case.
23 Plaintiffs satisfy the superiority requirement.

24 **III. PLAINTIFFS SATISFY THE REQUIREMENTS OF RULE 23(B)(2).**

25 Plaintiffs also are entitled to certification of the 11 state classes for purposes of injunctive relief.
26 Class certification on this ground is appropriate “when a single injunction or declaratory judgment would
27 provide relief to each member of the class.” *Dukes*, 564 U.S. at 360. “When a class seeks an indivisible
28 injunction benefitting all its members at once, there is no reason to undertake a case-specific inquiry
into whether class issues predominate or whether class action is a superior method of adjudicating the

1 dispute. Predominance and superiority are self-evident.” *Id.* at 362-63. As the Ninth Circuit held in
 2 *Parsons v. Ryan*, 754 F.3d 657, 689 (9th Cir. 2014), where “every [member] in the proposed class is
 3 allegedly suffering the same (or at least a similar) injury and that injury can be alleviated for every class
 4 member by uniform changes in [defendant’s conduct],” Rule 23(b)(2) certification is warranted.

5 An “indivisible injunction benefitting all [class] members at once” is what Plaintiffs seek.
 6 Plaintiffs are taking one or more medications and are likely to do so on an ongoing basis. They have
 7 purchased these drugs from CVS in the past, and would do so in the future, but seek for CVS to stop
 8 charging inflated copayments. In *Wit*, the court certified a Rule 23(b)(2) injunctive relief class seeking
 9 that the defendant insurer institute new guidelines under which it would process insurance claims. 2016
 10 WL 4990514, at *23. Plaintiffs here seek a similar sort of relief: CVS should implement a new, lawful,
 11 approach to setting and reporting its U&C prices that takes into account either the HSP program or the
 12 successor program that CVS now is offering (since it continues to exclude these prices from its U&C
 13 prices as well), Ex. 3, 30(b)(6) 188:8-189:23, so that, on a going forward basis, Plaintiffs and class
 14 members will not be overcharged inflated copayments on generic drugs they purchase from CVS.²¹

15 CONCLUSION

16 For all of the foregoing reasons, Plaintiffs respectfully request that the Court grant Plaintiffs’
 17 motion to certify the 11 classes described in the Notice of Motion.

18
 19 Dated: October 3, 2016

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27
 28 ²¹ “[P]laintiffs are not ‘required to come forward with an injunction that satisfies Rule 65(d) with
 exacting precision at the class certification stage.” *Wit*, 2016 WL 4990514, at *27 (citation omitted).