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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

v.

ELI LILLY AND COMPANY, *et al.*,

Defendants.

CASE NO. 23STCV00719

PBM DEFENDANTS' NOTICE OF DEMURRER AND DEMURRER TO COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

Hearing Date: May 1, 2024
Hearing Time: 10:00 a.m.
Judge: David S. Cunningham III
Department: SS11

TO THE COURT, ALL PARTIES, AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that PBM Defendants CaremarkPCS Health, L.L.C., CVS Health Corp., Express Scripts, Inc., and OptumRx, Inc. demur to all causes of action in the Complaint of the State of California pursuant to Code of Civil Procedure Section 430.10(e) on the following grounds:

Demurrer to All Causes of Action

1. PBM Defendants demur to all causes of action on the ground that the claim is untimely because the statute of limitations has expired.

Demurrer to First Cause of Action

(Business and Professions Code Section 17200)

2. PBM Defendants demur to the first cause of action for violation of the unlawful, fraudulent, and unfair prongs of the Unfair Competition Law ("UCL") on the grounds that the State's claim is barred by the UCL safe harbor; the State cannot establish a predicate violation of the Consumer Legal Remedies Act; the State fails to allege any unfair conduct under any applicable test; and the State fails to allege any actionable false or misleading statements of fact.

Demurrer to Second Cause of Action

(Unjust Enrichment)

3. PBM Defendants demur to the second cause of action for unjust enrichment on the grounds that the State has not alleged any unjust conduct independent of its UCL claim; unjust enrichment is not a cause of action; the unjust-enrichment claim is duplicative of the State's UCL claim; the claim is barred by express contract; and the claim is inconsistent with the State's *parens patriae* authority.

Demurrer to All Causes of Action

4. The claims against CVS Health Corporation should be dismissed because its only involvement is as a parent company of CaremarkPCS Health, L.L.C., and there are no allegations justifying disregarding the corporate form.

The demurrer is based upon this notice, the accompanying demurrer, the accompanying memorandum of points and authorities, all matters of which this Court may take judicial notice, the

arguments presented to the Court at the hearing, and such other matters as the Court may properly consider. The parties have met and conferred and participated in the Court's pre-motion conference.

Dated: February 26, 2023

Respectfully submitted,

UMHOFER, MITCHELL & KING LLP

/s/ Elizabeth A. Mitchell
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INTRODUCTION AND SUMMARY OF ARGUMENT

The State of California claims that rebate negotiations between pharmacy benefit managers ("PBMs")[1] and insulin manufacturers are an unlawful "scheme" to inflate drug prices. But pharmaceutical rebates have been standard business practice to obtain discounts for decades. *See In re EpiPen (Epinephrine Injection, USP) Mktg., Sales Pracs. & Antitrust Litig.*, 44 F.4th 959, 964-68 (10th Cir. 2022), *cert. denied*, 143 S. Ct. 1748 (2023). And for good reason. They reflect hard-fought, competitive negotiations that benefit the PBMs' health-plan clients, including clients in California, by lowering the net cost of prescription drugs like insulin.

The State's claim that those longstanding negotiations are really an unlawful conspiracy fails for four reasons. *First*, the State's causes of action are time-barred because they challenge conduct that California was aware of—and that it investigated—long before the limitations period expired.

Second, the State fails to plead a violation of the Unfair Competition Law ("UCL"). The UCL prohibits "unlawful," "unfair" and "fraudulent" acts or practices. The State has failed to state a claim under any prong. The State has not pleaded a claim under the "unlawful" prong because the California Legislature (and Congress) enacted legislation specifically authorizing the rebating practices the State challenges. In addition, the State has not alleged a violation of the Consumer Legal Remedies Act ("CLRA")—the sole predicate law the State alleges the PBMs violated—because the State fails to allege that the PBMs made unlawful misrepresentations relating to the reasons for, existence of, or amounts of any price reduction in insulin. The State's allegations at most identify non-actionable statements of opinion (puffery), and the State fails to identify any specific misrepresentations that relate to price reductions or insulin at all.

The State also fails to plead a claim under the "unfair" prong. This Court should follow many California courts in requiring UCL plaintiffs to tether an unfairness claim to another constitutional

[1] The moving Defendants are Express Scripts, Inc. ("Express Scripts"); CVS Health Corporation and CaremarkPCS Health, L.L.C. ("CVS Caremark"); and OptumRx Inc. ("OptumRx") (collectively, the "PBM Defendants"). CVS Health Corp. ("CVS Health") is not a PBM and joins this demurrer without waiving and expressly preserving its objections to personal jurisdiction. *See* Cal. Civ. Proc. Code § 418.10(e). The other Defendants include Eli Lilly and Company ("Eli Lilly"), Novo Nordisk Inc. ("Novo Nordisk"), and Sanofi-Aventis U.S. L.L.C. ("Sanofi") (collectively, the "Manufacturer Defendants").

provision, statute, or other well-established law. The State has not even attempted to satisfy this test. Insofar as the Court analyzes the State's claims under tests that balance the costs and consumer benefits of certain conduct, the State's claims still fail because "*[n]o one* can seriously dispute that exclusive rebate agreements stimulate price competition in the prescription drug market." *In re EpiPen*, 44 F.4th at 987 (emphasis added).

The State has also failed to plead facts to support a "deceptive" claim under the UCL, for many of the reasons the State's unlawfulness claim fails; the State does not even allege that the PBMs made any false statements, and it comes nowhere close to establishing that PBMs have a duty to disclose details of rebate agreements with third-party consumers with whom they have no relationship. And the State's allegations that list prices are misleading are inconsistent with federal law that dictates how manufacturers publish list prices.

Third, the State's unjust enrichment claim fails because unjust enrichment is not an independent cause of action, and this claim merely duplicates the State's (meritless) UCL claim.

Finally, the Court should dismiss CVS Health, a corporate parent that does not provide any PBM services and is not alleged to have committed fraud or abused the corporate form.

BACKGROUND

Eli Lilly, Novo Nordisk, and Sanofi are pharmaceutical companies that research, develop, manufacture, and sell prescription drugs, including insulin and other diabetes medications. Compl. ¶ 4. They set the list prices for their products. *Id.* ¶¶ 6, 103, 137.

CVS Caremark, Express Scripts, and OptumRx are PBMs that contract with health plan sponsors to administer prescription drug benefits. *Id.* ¶¶ 5, 113. Among other things, PBMs develop lists of drugs called "formularies" that their health-plan clients can adopt to determine whether and to what extent those clients cover the cost of certain medications for their members. *Id.* ¶¶ 5, 111(e)-(g), 119. Although PBMs develop formularies that they offer to clients, their clients decide whether to accept, reject, or customize an offered formulary and set the coverage that applies to their members. *Id.* ¶ 120 (recognizing clients adopt "custom or partially custom formularies").

PBMs negotiate with pharmaceutical manufacturers to obtain discounts on prescription drugs that they can then offer their clients. *E.g.*, *id.* ¶¶ 113, 123. Through those negotiations, PBMs obtain

rebates from manufacturers that can offset the cost of pharmaceutical drugs. Those rebates flow back to the PBMs' clients in accordance with the terms of their client contracts, lowering the clients' net drug costs. *Id.* ¶¶ 5, 198. The PBMs' clients, in turn, determine how those rebates are applied to their health plans. *See id.* ¶ 161. In their capacities as PBMs, CVS Caremark, Express Scripts, and OptumRx do not transact business directly with their clients' beneficiaries and do not have business relationships with individual end-use consumers.

The California Legislature is well aware of rebates. The Legislature held public hearings in 2016 and 2017 regarding rebates and pharmaceutical pricing.[2] After those hearings, the Legislature decided to regulate pharmaceutical rebates through a regimen of disclosure—not by prohibiting rebates altogether. In 2017, the Legislature made clear its intent to "*permit* . . . pharmacy benefit managers[] to negotiate discounts and rebates." Cal. Health & Safety Code § 127676(b)(2) (emphasis added). In 2018, the Legislature enacted further legislation requiring PBMs to publicly disclose information about the precise conduct the State challenges—negotiated rebates, administrative fees, and formulary exclusions. *See* Cal. Bus. & Prof. Code § 4441(e). The statutory definition of rebates squarely encompasses the payments the State now claims are unlawful: "any utilization discounts the pharmacy benefit manager receives from a pharmaceutical manufacturer or labeler." *Id.* § 4441(e)(2).

In addition to this specific approval by the California Legislature, myriad provisions throughout the U.S. Code similarly recognize the widespread use of pharmaceutical rebates as an effective method of controlling drug costs, and specifically authorize PBMs' rebating practices when performing PBM services related to drugs for federal programs such as Medicare. *See* 42 U.S.C. § 1396r-8; Ex. F, Medicare & State Health Care Programs: Fraud & Abuse; Clarification of the Initial OIG Safe Harbor Provisions and Establishment of Additional Safe Harbor Provisions Under the Anti-Kickback Statute,

[2] *See* Ex. B, *Understanding the Pharmaceutical Supply Chain: What is Driving Up the Cost of Drugs*, Cal. State Assembly Comm. on Health Informational Hearing (Oct. 31, 2016), http://tinyurl.com/yb7b8s45; Ex. C, *Impact of Rising Drug Costs on Public and Private Payers*, Cal. State Assembly Comm. on Health Informational Hearing (Feb. 14, 2017), http://tinyurl.com/3nnnwezm; Ex. D, *Pharmacy Benefit Manager 101*, Cal. State Sen. Bus., Prof. & Econ. Dev. Comm. Oversight Hearing (Mar. 20, 2017), http://tinyurl.com/4v3we2uk; Ex. E, *Pharmacy Benefit Manager 101*, Cal. State Sen. Comm. on Bus., Prof. & Econ. Dev. Comm. Background Paper, at 3 (2017), http://tinyurl.com/yp5j79xr.

64 Fed. Reg. 63518, 63518 (Nov. 19, 1999); Ex. G, OIG Compliance Program Guidance for Pharmaceutical Manufacturers, 68 Fed. Reg. 23731, 23734, 23736 (May 5, 2003).

In this action, the State seeks to upend that legislative and regulatory judgment and alleges that the PBMs' negotiations with manufacturers are not hard-fought, arm's length negotiations, but a conspiracy to raise the price of insulin. Based on that allegation, the State asserts two causes of action: (1) violation of the UCL and (2) unjust enrichment. *See* Compl. ¶¶ 225-37. The State purports to bring each claim in its *parens patriae* capacity on behalf of California residents with diabetes. *See id.* ¶¶ 206-24.

LEGAL STANDARD

A demurrer should be sustained where a "pleading does not state facts sufficient to constitute a cause of action." Cal. Civ. Proc. Code § 430.10(e). In evaluating the sufficiency of a complaint, courts "treat as true all material facts properly pleaded," but need not credit "contentions, deductions or conclusions of facts or law." *Freeman v. San Diego Ass'n of Realtors*, 77 Cal. App. 4th 171, 178 n.3 (1999). A plaintiff must state with "reasonable particularity" the facts supporting the statutory elements of the violation. *See Amiodarone Cases*, 84 Cal. App. 5th 1091, 1115 (2022) (citation omitted).

ARGUMENT

I. ALL OF THE STATE'S CLAIMS ARE TIME-BARRED.

The State's own allegations show that its claims are time-barred. UCL claims are subject to a four-year statute of limitations. Cal. Bus. & Prof. Code § 17208; *Cansino v. Bank of Am.*, 224 Cal. App. 4th 1462, 1475 (2014). The UCL's limitations period applies to "[a]ny action to enforce any cause of action" under the UCL, including an action brought by the State. Cal. Bus. & Prof. Code § 17208; *see People v. Overstock.com, Inc.*, 12 Cal. App. 5th 1064, 1075 (2017), *as modified* (June 23, 2017). To the extent the State can bring an unjust enrichment claim, *see infra* pp.22-24, the claim sounds in fraud (Compl. ¶ 234) and therefore is subject to the same limitations period as a claim by its residents—three years. *See* Cal. Civ. Proc. Code § 338; *Federal Deposit Ins. Corp. v. Dintino*, 167 Cal. App. 4th 333, 347 (2008).

"[T]he UCL is governed by common law accrual rules to the same extent as any other statute." *Aryeh v. Canon Bus. Sols., Inc.*, 55 Cal. 4th 1185, 1196 (2013). A cause of action accrues "at the

moment when the party alleging injury is entitled to 'begin and prosecute an action thereon.'" *Pollock v. Tri-Modal Distrib. Servs., Inc.*, 11 Cal. 5th 918, 931 (2021) (citation omitted). That moment occurs when the cause of action "is complete with all of its elements." *Aryeh*, 55 Cal. 4th at 1191. Applying these principles and the relevant limitations period, the State's UCL claim is untimely if it accrued before January 12, 2019, and the State's unjust enrichment claim is untimely if it accrued before January 12, 2020.

The State's Complaint shows its claims accrued well before 2019. It alleges that (1) drugs were allegedly excluded from standard formularies "in and around 2014," Compl. ¶ 121; (2) insulin rebates allegedly "have grown from 13% of the list price in 2007 to 70% in 2018," *id.* ¶ 147; (3) manufacturers allegedly offered rebates that grew between 2013 and 2018, *id.* ¶ 148; (4) PBMs allegedly facilitated "horizontal rebate information exchanges" in 2016, *id.* ¶ 166; (5) PBMs allegedly made misrepresentations in their reports and statements in 2017, *id.* ¶¶ 198-200; and (6) diabetics allegedly experienced price increases up to 2016 and 2018, *id.* ¶¶ 208-14. The Senate Insulin Report referenced in the Complaint almost exclusively alleges conduct prior to 2019. *See* Ex. A, *Insulin: Examining the Factors Driving the Rising Cost of a Century Old Drug* (Senate Insulin Report), at 59-80, U.S. Sen. Comm. on Fin., S. Rep. No. 116-51 (2021), http://tinyurl.com/57d7crzp. To boot, the California Attorney General *in 2017* investigated the *same conduct* that it now challenges in its Complaint. *See id.* at 27 n.142 (citing CVS's 2017 Annual Report, noting that "CVS reported receiving a civil investigative demand in 2017 from the Attorney General for Washington. The state informed the company that information provided in response to the demand would be shared with California[.]").

And as discussed above, the State Legislature conducted hearings and enacted comprehensive regulations subjecting the PBMs to specific reporting obligations regarding rebates *starting in 2016*. *See supra* p.3; *see also* Manufacturers' Br. 5-6. The State does not seriously dispute that it challenges conduct predating the limitations period. Instead, it hopes that the continuing violation doctrine and theory of continuous accrual may salvage its claims. *See* Joint Statement at 6-7. Neither

does.[3] Under the "continuing violations" doctrine, "[a]llegations of a pattern of reasonably frequent and similar acts may, in a given case, justify treating the acts as an indivisible course of conduct" that is "actionable in its entirety" even if some of the alleged conduct occurred outside of the limitations period. *Aryeh*, 55 Cal. 4th at 1198. The doctrine therefore applies when "a wrongful course of conduct bec[omes] apparent only through the accumulation of a series of harms." *See id.* In that scenario, the limitations period begins once the plaintiff is "aware of" and "recognize[s] as wrongful" the defendant's "allegedly fraudulent and unfair acts." *Id.*

The continuing-violations doctrine does not apply here. According to the State's own allegations, the relevant rebating and formulary practices go back to 2014, and the State's behavior—including investigating the challenged rebating practices and enacting legislation specifically authorizing pharmaceutical rebating practices—demonstrates that it "was aware of" and recognized the allegedly "wrongful" nature of the defendants' conduct far longer than four years ago. *See id.*; Compl. ¶¶ 121, 148-50; *supra* p.3. If the State believed PBMs' longstanding business practices were unlawful, it had ample opportunity and knowledge to sue within the limitations period.

The State also cannot avail itself of the "continuous accrual rule," under which "recurring invasions of the same right can each trigger their own statute of limitations." *Aryeh*, 55 Cal. 4th at 1198, 1201. Courts have largely confined the continuing accrual theory to "a limited category of cases, including installment contracts, leases with periodic rental payments, and other types of periodic contracts that involve no fixed or total payment amount." *Factory Direct Wholesale, LLC v. iTouchless Housewares & Prods., Inc.*, 411 F. Supp. 3d 905, 917-18 (N.D. Cal. 2019) (citation omitted) (collecting cases). None of those categories applies here.

[3] The State has not attempted to revive its claims under the "discovery rule," nor could it. For the discovery rule to apply, the State must have had no reason to suspect the "factual basis for [the] elements" of its claim until after the limitations period began. *Norgart v. Upjohn Co.*, 21 Cal. 4th 383, 389 (1999). The Complaint's allegations and other facts subject to judicial notice establish that California suspected—or, at the very least, had reason to suspect—the factual basis for its claims long before January 2019. Indeed, the State's active investigation into and regulation of rebates *starting in 2016* precludes any reliance on the discovery rule. *See supra* p.3.

II. THE STATE FAILS TO PLEAD A CLAIM UNDER THE UCL.

The State alleges a violation of all three prongs of the UCL, claiming that the PBMs have engaged in business practices that are "unlawful," "unfair," and "fraudulent." As a threshold matter, the UCL claims fail because the rebate negotiations about which the State complains were expressly approved by state and federal law, and therefore fall within the UCL's safe harbor. In addition, the State has failed to properly allege a violation of any of the three UCL prongs for several reasons.

A. The Complained of Conduct Falls Under the UCL's Safe Harbor.

The State's UCL claim is barred by the UCL's safe harbor, which immunizes from UCL liability practices approved by the state or federal government. "If the Legislature has permitted certain conduct or considered a situation and concluded no action should lie, courts may not override that determination." *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 182 (1999). Therefore, "[a] business practice that might otherwise be considered unfair or deceptive cannot be the basis of a [UCL] action if the conduct has been deemed lawful" by another source of law. *Byars v. SCME Mortg. Bankers, Inc.*, 109 Cal. App. 4th 1134, 1136-37 (2003). The safe harbor bars the State's UCL claim entirely. *See Cel-Tech*, 20 Cal. 4th at 182; *Lopez v. Nissan N. Am., Inc.*, 201 Cal. App. 4th 572, 591 (2011).[4]

The California Legislature specifically considered and allowed the PBMs' rebating practices that are the subject of the State's Complaint. Beginning in 2016, the Legislature held a series of public hearings to evaluate rebates as a part of drug pricing. *See supra* p.3. Following those hearings, the Legislature expressly condoned the ongoing negotiating practices and elected to regulate them through disclosure requirements. To that end, the Legislature enacted chapter nine of the California Health & Safety Code, which imposes on both manufacturers and PBMs various notice, reporting, and justification obligations related to prescription drugs sold to certain purchasers (which includes the health plans PBMs contract with). *See* Cal. Health & Safety Code § 127677(e); *see also Amgen Inc. v. Health Care Servs.*, 47 Cal. App. 5th 716, 721-25 (2020). The Legislature's intent in enacting these

[4] The Supreme Court has assumed without deciding that the safe-harbor defense applies to claims under the unlawful prong. *See De La Torre v. CashCall, Inc.*, 5 Cal. 5th 966, 986-87 (2018). Here, the predicate statute for the State's unlawful prong is the CLRA, which has its own safe harbor. *See Lopez*, 201 Cal. App. 4th at 594. The defense applies to fraudulent claims as well. *See id.* at 591.

new obligations was "to *permit* purchasers, both public and private, as well as pharmacy benefit managers, to *negotiate discounts and rebates* consistent with existing state and federal law." Cal. Health & Safety Code § 127676(b)(2) (emphases added).

In 2018, the California Legislature enacted further legislation codifying its judgment that the PBMs' rebating practices should continue, subject to disclosure requirements. Section 4441(e) of the California Business & Professions Code requires PBMs to disclose upon the request of the purchaser various information, including "[t]he aggregate amount of rebates received by the pharmacy benefit manager by therapeutic category of drugs," "administrative fees," and formulary exclusions. *Id.* § 4441(e)(2)-(3). The statute defines rebates broadly to include "any utilization discounts the pharmacy benefit manager receives from a pharmaceutical manufacturer or labeler." *Id.* § 4441(e)(2).

The California Legislature thus codified express language protecting manufacturers' ability to "voluntarily make pricing decisions" and PBMs' right "to negotiate discounts and rebates." Cal. Health & Safety Code § 127676(b)(2); Cal. Bus. & Prof. Code § 4441. The Legislature's decision to "unequivocally permit[]" the conduct challenged here—*i.e.*, rebate negotiations with manufacturers—"afford[s a] safe harbor from UCL liability." *Alvarez v. Chevron Corp.*, 656 F.3d 925, 933 (9th Cir. 2011). Similarly, by enacting legislation imposing rigorous reporting and disclosure obligations on PBMs about their negotiating practices and the rebates for which they negotiate, the Legislature made clear what PBMs need to (and need not) disclose. The State contends that the PBMs' compliance with those regulations—disclosing the information they are required to disclose and not further pricing information—constitutes fraudulent or deceptive conduct. Because the PBMs complied with the applicable disclosure requirements, they had "no obligation to disclose" more. *See Lopez*, 201 Cal. App. 4th at 592; *Parent v. MillerCoors LLC*, 2015 WL 6455752, at *6 (S.D. Cal. Oct. 26, 2015).

Federal law similarly recognizes and protects PBMs' negotiating practices. Federal law expressly contemplates the use of rebates in its definition of relevant terms including, for example, defining the Wholesale Acquisition Cost ("WAC") of drugs—*i.e.*, the list price the State is challenging in this case—as "the manufacturer's list price . . . not including prompt pay or other discounts, rebates or reductions in price." 42 U.S.C. § 1395w-3a(c)(6)(B); *see id.* § 1396r-8(k)(1)(B)(i)(IV) (excluding "rebates or discounts" from definition of "average manufacturer price"); *see also In re Insulin Pricing*

Litig., 2024 WL 416500, at *28 (D.N.J. Jan. 24, 2024) ("[T]he Court does not see—and Plaintiffs do not explain—how it would be able to enjoin Defendants as Plaintiffs request without causing Defendants to violate [42 U.S.C. § 1395w-3a(c)(6)(B)]."). Congress similarly envisions that PBMs will negotiate rebates with manufacturers for Medicare Advantage and Medicare Part D plans. That is why Congress requires PBMs to report to the U.S. Department of Health and Human Services ("HHS") "[t]he aggregate amount, and the type of rebates, discounts, or price concessions . . . that the PBM negotiates" with manufacturers, and "the aggregate amount of the rebates, discounts, or price concessions that are passed through to the plan sponsor." 42 U.S.C. § 1320b-23(b)(2). And, most importantly, HHS has long recognized that PBM-negotiated rebates from drug manufacturers fall within a "safe harbor" under the Anti-Kickback Statute. Ex. F, Medicare & State Health Care Programs: Fraud & Abuse; Clarification of the Initial OIG Safe Harbor Provisions and Establishment of Additional Safe Harbor Provisions Under the Anti-Kickback Statute, 64 Fed. Reg. 63518, 63518 (Nov. 19, 1999).

Congress has recently taken action to preserve the safe harbor. During the lame duck period of the Trump administration, HHS recognized the existing safe harbor by trying to modify it in a Final Rule. *See* Ex. H, Fraud & Abuse; Removal of Safe Harbor Protection for Rebates Involving Prescription Pharmaceuticals, 85 Fed. Reg. 76666, 76667 (Nov. 30, 2020) (claiming purpose of rule was "to remove safe harbor protection for reductions in price in connection with the sale or purchase of prescription pharmaceutical products from manufacturers to plan sponsors under Part D"). The Final Rule purported to modify the safe harbor for Medicare Part D plans so it would apply only to discounts or rebates passed on to consumers at the point of sale. *See id.* But this Final Rule never took effect because Congress, on three separate occasions, postponed the rule's effective date. *See* Ex. I, Action to Delay Effective Date Consistent With Congressionally Enacted Moratorium, 88 Fed. Reg. 90125-01 (Dec. 29, 2023). Thus, Congress specifically considered the existing rebate system and "concluded no action should lie." *Cel-Tech*, 20 Cal. 4th at 182. The State cannot override that judgment through a UCL claim.

B. The State Fails To State a Claim Under the Unlawful Prong of the UCL.

The UCL's unlawful prong "'borrows violations of other laws and treats them as unlawful practices' that the unfair competition law makes independently actionable." *Cel-Tech*, 20 Cal. 4th at 180 (citation omitted). The State alleges only that the PBMs violated section 1770(a)(13) of the CLRA, which prohibits "[m]aking false or misleading statements of fact concerning reasons for, existence of, or amounts of, price reductions." Cal. Civ. Code § 1770(a)(13); *see* Compl. ¶ 229. The State's allegations fail for three reasons. First, the CLRA has its own safe harbor doctrine that independently bars the State's "unlawful" claims. Second, PBMs engage in financial transactions with sophisticated health-plan clients; they do not transact with consumers or provide "goods" or "services" at all. Third, the Complaint fails to allege any false or misleading statements about price decreases.

1. The CLRA's Safe Harbor Bars the State's Claim.

The State's cause of action under the CLRA is barred by the Legislature's explicit endorsement of the PBMs' negotiating practices. "Like UCL claims, claims under the CLRA may be barred under the 'safe harbor' doctrine." *Lopez*, 201 Cal. App. 4th at 594 (citation omitted). For the reasons previously discussed, *see supra* pp.7-9, the safe harbor applies to the alleged conduct, and thus any claim predicated upon the CLRA is barred.

2. The PBMs Are Not Covered by the CLRA.

Even setting the safe harbor aside, the alleged PBM conduct does not fall under the scope of the CLRA. The CLRA applies only to a "limited set of transactions." *Ting v. AT&T*, 319 F.3d 1126, 1148 (9th Cir. 2003). To fall within the scope of the CLRA, a challenged action must have been "undertaken . . . in a transaction intended to result or that results in the sale or lease of goods or services to any consumer." Cal. Civ. Code § 1770(a). The Complaint does not (and cannot) allege that the PBMs' negotiating pharmaceutical rebates and creating formularies for their health-plan clients fall within the CLRA's narrow scope.

First, the Complaint fails to allege any statements regarding a "[t]ransaction" within the CLRA's scope. To fall under the CLRA, a transaction must be "an agreement between *a consumer* and another person." *Id.* § 1761(e) (emphasis added). A "[c]onsumer" is an "an individual who seeks or acquires, by purchase or lease, any goods or services for personal, family, or household purposes."

Id. § 1761(d). Put together, the CLRA's liability is limited to "*consumer* transactions between a consumer and a retail seller." *Green v. Canidae Corp.*, 2009 WL 9421226, at *4 (C.D. Cal. June 9, 2009); *see also Dipto LLC v. Manheim Inv., Inc.*, 2021 WL 5908994, at *15 (S.D. Cal. Dec. 14, 2021) (dismissing CLRA claim when "there was no transaction between [the alleged consumer] and the Defendants").[5]

The State does not and cannot allege that the PBMs enter into any agreements with individual consumers. On the contrary, the State alleges that PBMs contract with pharmaceutical manufacturers, health-plan payors, and retail pharmacies. *E.g.*, Compl. ¶¶ 113, 123. Those commercial contracts with other businesses are outside the scope of the CLRA. *See, e.g.*, *Ting*, 319 F.3d at 1148 ("[T]he CLRA does not apply to commercial . . . contracts."); *Landen v. Electrolux Home Prods., Inc.*, 2013 WL 12145506, at *3 (C.D. Cal. Apr. 29, 2013). Courts across the country routinely hold that health plans are not "consumers" under substantially similar consumer-protection statutes. *See, e.g.*, *Sergeants Benevolent Ass'n Health & Welfare Fund v. Actavis, plc*, 2018 WL 7197233, at *39, *45 (S.D.N.Y. Dec. 26, 2018); *MSP Recovery Claims, Series, LLC v. Sanofi-Aventis U.S. LLC*, 2020 WL 831578, at *11 (D.N.J. Feb. 20, 2022); *In re Restasis (Cyclosporine Ophthalmic Emulsion) Antitrust Litig.*, 355 F. Supp. 3d 145, 157 (E.D.N.Y. 2018); *In re Express Scripts, Inc., Pharmacy Benefits Mgmt. Litig.*, 2006 WL 2632328, at *9 (E.D. Mo. Sept. 13, 2006).

The State cannot avoid that fatal flaw by pointing to downstream transactions in which consumers buy insulin from third parties. Under the CLRA, a "consumer" must actually purchase the goods herself, so a "person who did not seek, purchase, or lease any product or service from a defendant" cannot assert a CLRA claim. *See Balsam v. Trancos, Inc.*, 203 Cal. App. 4th 1083, 1107 (2012); *Schauer v. Mandarin Gems of Cal., Inc.*, 125 Cal. App. 4th 949, 960 (2005). PBMs are many

[5] The State tries to overcome this by pointing in its pre-pleading conference statement to one unpublished district court decision that, with minimal analysis, purported to "liberally construe[]" the CLRA to impose liability on a defendant who did not directly enter into an agreement with a consumer. *See Decarlo v. Costco Wholesale Corp.*, 2020 WL 1332539, at *9 (S.D. Cal. Mar. 23, 2020). This decision cannot be squared with the plain definition of "transaction" under the CLRA, and this court is "bound by the statute's plain text." *See, e.g.*, *Lucent Techs., Inc. v. Bd. of Equalization*, 241 Cal. App. 4th 19, 38 (2015); *Balsam v. Trancos, Inc.*, 203 Cal. App. 4th 1083, 1106 (2012). Even if *Decarlo* was correctly decided, it is inapposite because the plaintiff there alleged that the defendant controlled the ultimate transactions between consumers and the optometrists in its stores. 2020 WL 1332539, at *9. The same is not true here.

steps removed from any consumer purchase—they transact business with the health plans that ultimately provide health benefit coverage to some end-users of insulin. But PBMs have no relationship with their clients' beneficiaries, let alone those with no benefit coverage who do no business with health plans at all. The pharmacy benefit management services offered by the PBM Defendants—and which are challenged in this case—do not include the sale of drugs to pharmacies, consumers, or anyone else, because PBMs do not sell drugs. PBMs' health-plan clients are not covered by the CLRA, *see infra* pp.12-13, and the PBMs are even further removed because they engage in upstream financial transactions with health plans. *See, e.g.*, *MSP Recovery Claims, Series, LLC v. Sanofi Aventis U.S. LLC*, 2019 WL 1418129, at *18 (D.N.J. Mar. 29, 2019); *MSP Recovery*, 2020 WL 831578, at *12.

Second, for many of the same reasons, PBMs do not provide "goods" or "services" as defined in the CLRA. The State does not allege (nor credibly could it) that PBMs sell insulin to anyone—PBMs provide benefit management services to health plans, not drugs to consumers. And the California Supreme Court made clear the CLRA "does not apply to intangible property or goods," and "contains a restrictive definition of 'services.'" *Fairbanks v. Super. Ct.*, 46 Cal. 4th 56, 64 (2009). Thus, "[r]ather than applying to all businesses, or to business transactions in general, the [CLRA] applies only to transactions for the sale or lease of consumer 'goods' or 'services' as those terms are defined in the act." *Id.* at 65.

The CLRA defines "[g]oods" as "tangible chattels bought or leased for use primarily for personal, family, or household purposes." Cal. Civ. Code § 1761(a). The statute categorically excludes *intangible* goods such as life insurance, credit cards, and mortgages. *See, e.g.*, *Fairbanks*, 46 Cal. 4th at 65; *Berry v. Am. Express Publ'g, Inc.*, 147 Cal. App. 4th 224, 229 (2007); *Alborzian v. JPMorgan Chase Bank, N.A.*, 235 Cal. App. 4th 29, 40 (2015). Health insurance similarly is an intangible good excluded from the CLRA's scope. *See Ketayi v. Health Enrollment Grp.*, 516 F. Supp. 3d 1092, 1131 (S.D. Cal. 2021); *Barkan v. Health Net of Cal., Inc.*, 2019 WL 1771653, at *6 (C.D. Cal. Feb. 7, 2019). The pharmaceutical rebates for which PBMs negotiate are, at most, intangible goods, and are therefore outside the scope of the CLRA.

Nor do PBMs provide "services" covered by the CLRA. "Services" are "work, labor, and services for *other than a commercial or business use*, including services furnished in connection with the sale or repair of goods." Cal. Civ. Code § 1761(b) (emphasis added). This "restrictive definition," by its terms, excludes services for commercial or business uses. *See Fairbanks*, 46 Cal. 4th at 64; *Cal. Grocers Ass'n v. Bank of Am.*, 22 Cal. App. 4th 205, 217 (1994). The PBMs design formulary offerings and negotiate rebates for strictly business and commercial purposes.

3. The Complaint Fails To Identify False or Misleading Statements of Fact Concerning Price Reductions.

The State only identifies one supposed unlawful practice under the CLRA, making "false or misleading statements of fact concerning reasons for, existence of, or amounts of, price reductions." Cal. Civ. Code § 1770(a)(13). The State fails to plead such a violation because: (i) the pleaded representations do not actually concern the reasons for, existence of, or amounts of price reductions, and (ii) the State fails to identify any misleading statements of fact.

a. The alleged misrepresentations do not relate to the reasons for, existence of, or amounts of, price reductions.

The State characterizes the PBMs' supposed misrepresentations as "reinforc[ing] insulin's excessive price by claiming to be interested in lowering costs for consumers." *See* Compl. ¶ 197. But even accepting the truth of this characterization, this is a complaint about the PBMs' statements regarding their *subjective intent* to lower prices; it does not relate to the "reasons for, existence of, or amounts of" any price reduction for "the product or service at issue in this case." *See Turnier v. Bed Bath & Beyond Inc.*, 517 F. Supp. 3d 1132, 1137 (S.D. Cal. 2021).

Looking at the specific alleged statements highlights how inapt subsection 13 is to what the PBMs actually said. The State alleges one and only one statement from OptumRx: "Moreover, OptumRx's website has a company video stating that PBMs like OptumRx 'negotiate with drug companies for the best medication prices[.]'" Compl. ¶ 202. That alleged statement, pulled from a video, is not a statement of fact "concerning reasons for, existence of, or amounts of, price reductions."

It says *nothing* "concerning" price *reductions*[6] or insulin, never mind concerning the "reasons for, existence of, or amounts of" price reductions (about insulin or any other medication). "Best" does not mean "reduced," and "medication" is not "insulin." Because the State failed to "allege [that OptumRx] reduced or discounted" the price of "the product or service at issue in this case," the CLRA claim fails. *See, e.g.*, *Turnier*, 517 F. Supp. 3d at 1137; *Jacobo v. Ross Stores, Inc.*, 2016 WL 3483206, at *4 (C.D. Cal. June 17, 2016) ("Compare At" prices were not misstatements concerning "reasons for, existence of, or amounts of price reductions" (citation omitted)).

The same is true of CVS Caremark. The State alleges that CVS stated its formulary practices "helped reduce cost for antidiabetic drugs *for clients*." Compl. ¶ 198 (emphasis added). But the State challenges insulin prices supposedly paid by *consumers*, not the PBMs' health-plan clients. Similarly, CVS Caremark's alleged statement that "[a]ny suggestion that PBMs are causing prices to *rise* is simply erroneous," *id.* ¶ 199 (emphasis added), is not a statement about a price reduction; it is about price *increases*. *See Ehret v. Uber Techs., Inc.*, 68 F. Supp. 3d 1121, 1139 (N.D. Cal. 2014).

The State's reliance on Express Scripts' alleged statement that PBMs "negotiate with drug companies to get the prices down" and that Express Scripts "focuse[s]" its "efforts" on "mak[ing] the use of prescription drugs safer and more affordable" cannot support a CLRA claim for a similar reason: these are statement about PBMs' efforts, not price reductions. Compl. ¶¶ 200-01.

b. The State does not identify any misleading statements of fact.

The State also fails to allege any statements of fact that are misleading.[7] The Court can decide at the demurrer stage whether the particular statements are misleading and actionable. *See, e.g.*, *Rubenstein v. The Gap, Inc.*, 14 Cal. App. 5th 870, 877 (2017) (collecting cases); *cf. Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc.*, 911 F.2d 242, 245 (9th Cir. 1990). A "misleading" statement must be misleading to a "reasonable consumer." *Lavie v. Procter & Gamble Co.*, 105 Cal. App. 4th 496, 507 (2003). Under this standard, it must be "probable that a significant portion of the general

[6] The thrust of the Complaint is that the PBMs, together with the Manufacturers, have unlawfully *increased—not reduced*—insulin prices. Compl. ¶¶ 2, 6, 62, 129, 151, 168.

[7] The State does not allege that the PBMs made any "false" statements under the CLRA.

consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled." *Id.* at 508. In contrast, the "mere possibility" that a statement "might conceivably be misunderstood by some few consumers viewing it in an unreasonable manner" is insufficient. *Id.*

A "statement of fact" is distinct from a statement of opinion. Representations of opinion are generally not actionable. *See, e.g.*, *Neu-Visions Sports, Inc. v. Soren/McAdam/Bartells*, 86 Cal. App. 4th 303, 308 (2000). A representation is one of opinion "if it expresses only (a) the belief of the maker, without certainty, as to the existence of a fact; or (b) his judgment as to quality, value, authenticity, or other matters of judgment." 5 Witkin, Summary of California Law Torts § 892 (11th ed. 2023) (citation omitted); *accord Graham v. Bank of Am., N.A.*, 226 Cal. App. 4th 594, 606-07 (2014).

The few particular representations summarized above are neither misleading nor statements of fact. The statements alleged in the Complaint to be made by the PBMs are "merely opinions . . . about future events, they are not factual representations." *Graham*, 226 Cal. App. 4th at 607.

If the alleged statements can be read as anything more than each PBMs' subjective intent, they are "[n]on-specific, non-measurable assertions," or "puffery" under California law. *Brown v. Madison Reed, Inc.*, 622 F. Supp. 3d 786, 801 (N.D. Cal. 2022) (citation omitted), *aff'd*, 2023 WL 8613496 (9th Cir. Dec. 13, 2023). Statements from PBMs that they try to keep prices down are "vague, generalized, and subjective statements" that are neither "specific nor measurable." *Id.* at 802. They are "boasts" and "meaningless superlatives" that "no reasonable consumer would take as anything more weighty than an advertising slogan." *Consumer Advocs. v. Echostar Satellite Corp.*, 113 Cal. App. 4th 1351, 1361 (2003). Courts routinely hold that similar statements—or even more specific assertions—are "too general" to support a fraud claim. *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1481 (9th Cir. 1997) (statements that defendant could "control costs" and save money), *aff'd in part, rev'd in part*, 525 U.S. 299 (1999), *and overruled on other grounds by Lacey v. Maricopa County*, 693 F.3d 896 (9th Cir. 2012); *see also Echostar*, 113 Cal. App. 4th at 1361 ("crystal clear digital video" and "CD quality audio" were puffery); *Sommer v. Snapple Bev. Corp.*, 2021 WL6754525, at *1-2 (N.D. Cal. Sept. 20, 2021); *Knowles v. Arris Int'l plc*, 2019 WL 3934781, at *11-12 (N.D. Cal. Aug. 20, 2019) (dismissing UCL and CLRA claims because "statements that a product is best in class, 'unsurpassed,' or 'state of

the art,' are puffery"), *aff'd*, 847 F. App'x 512 (9th Cir. 2021); *Finney v. Ford Motor Co*., 2018 WL 2552266, at *8 (N.D. Cal. June 4, 2018) (collecting cases).

The statements the State identifies also are not likely to mislead a "significant portion of the general consuming public." *See Lavie*, 105 Cal. App. 4th at 508; *Echostar*, 113 Cal. App. 4th at 1361. As the State itself alleges, PBMs do not transact business with the individual California citizens allegedly harmed by insulin prices. The State does not (and cannot) allege why a reasonable consumer of insulin would likely be misled by statements by PBMs about cost savings they obtain for third parties, nor what they would be misled about. *See Lavie*, 105 Cal. App. 4th at 512. Moreover, each of these alleged statements is consistent with the facts alleged in the Complaint that health plans receive rebates or other discounts negotiated by PBMs and that the net price of insulin has decreased in recent years through this process. *See* Compl. ¶¶ 145, 171, 187. That the State believes prices should be lower does not render any statements alleged in the Complaint false or misleading.

C. The State Fails To State a Claim Under the Unfair Prong of the UCL.

The State identifies four supposed acts it claims are "unfair" under the UCL. *See* Compl. ¶ 230. Two relate to "artificially inflating the list prices of analog insulin," *id.* at ¶ 230 a-b, even though the State admits that Manufacturers alone set the list price, *see, e.g. id.* ¶¶ 103-04. That theory of liability does not apply to the PBMs and in any event fails for the reasons provided by the Manufacturers in their brief. Manufacturers' Br. 16-18. The State's remaining claims that the PBMs "us[e] secret rebates for analog insulin in a way that harms consumers and does not benefit competition," (*id.* ¶ 230c), and "facilitate[d] explicit or tacit collusion through facilitating practices, including the exchange or disclosure of competitively sensitive information" (*id.* ¶ 230d) also fail to state a claim as a matter of law.

1. Negotiated Insulin Rebates Are Not Unfair.

a. The State fails to satisfy the tethering test.

The California Supreme Court has rejected a broad or sweeping interpretation of the term "unfair conduct" and warned that "courts may not apply purely subjective notions of fairness" when applying the UCL. *Cel-Tech*, 20 Cal. 4th at 182-84. The Supreme Court has thus rejected tests as "too amorphous" that turned on (i) balancing the utility of the conduct against the harm or (ii) determining

whether a practice offends an undefined "public policy," or (iii) finding a practice is "immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." *Id.* at 184-85. These tests, the court explained, do not inform California businesses "to a reasonable certainty, what conduct California law prohibits and what it permits." *Id.* at 185. "An undefined standard of what is 'unfair' fails to give businesses adequate guidelines as to what conduct may be challenged and thus enjoined and may sanction arbitrary or unpredictable decisions about what is fair or unfair. *Id.* In order to confine the concept of "unfairness" to a judicially administrable test, the *Cel-Tech* court established the so-called "tethering test," requiring "any finding of unfairness to competitors under section 17200 be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition." *Id.* at 186-87.

To be sure, the *Cel-Tech* court reserved judgment about whether its rule applies beyond cases in which a "competitor alleg[es] anticompetitive practices," and some courts have continued to apply broader tests in so-called "consumer cases." *See id.* at 187 n.12. But "*Cel-Tech's* rationale for tethering competitor unfairness claims to statutory or regulatory provisions also applies to consumer unfairness claims," because the need for clarity is the same "regardless of whether the unfairness claim is asserted by a competitor or a consumer." *Boris v. Wal-Mart Stores, Inc.*, 35 F. Supp. 3d 1163, 1171 (C.D. Cal. 2014). Courts therefore routinely recognize that the *Cel-Tech* court's concerns about the need to provide adequate guidelines to businesses and to avoid arbitrary and unpredictable decisions are not limited to the competitor context and have applied the so-called tethering test to "any claims of unfairness under the UCL," including "actions brought by consumers." *See Bardin v. DaimlerChrysler Corp.*, 136 Cal. App. 4th 1255, 1271 (2006) (citation omitted); *see also, e.g.*, *Gregory v. Albertson's, Inc.*, 104 Cal. App. 4th 845, 854 (2002) ("where a claim of an unfair act or practice is predicated on public policy, we read *Cel–Tech* to require that the public policy which is a predicate to the action must be "tethered" to specific constitutional, statutory or regulatory provisions); *Scripps Clinic v. Super. Ct.*, 108 Cal. App. 4th 917, 940 (2003) (same). Courts therefore sustain demurrers where plaintiffs assert

vague unfairness claims founded on allegations that conduct is "immoral, unethical, oppressive, and scrupulous." *Durell v. Sharp Healthcare*, 183 Cal. App. 4th 1350, 1366 (2010).[8]

The courts requiring that unfairness claims be tethered to specific constitutional, statutory, or regulatory provisions have it right. The sweeping and vague nature of the State's claims—which attempt to override the specific legislative findings on prescription drug pricing—highlight the *Cel-Tech*'s court's concerns about arbitrary liability. Limiting consumer unfairness claims to only those tethered to other laws also prevents the judiciary from creating "economic policy" when such policy making is the providence of the political branches. *See Cal. Grocers Ass'n*, 22 Cal. App. 4th at 218; *see also, e.g.*, *Lazzareschi Inv. Co. v. San Francisco Fed Sav. & Loan Ass'n*, 22 Cal. App. 3d 303, 311 (1971). Indeed, adjudicating the State's unfairness claim "would require the trial court to assume general regulatory powers over the health care industry through the guise of enforcing the UCL, a task for which the courts are not well-equipped." *Alvarado v. Selma Convalescent Hosp.*, 153 Cal. App. 4th 1292, 1298, 1303-04 (2007).

Applying the tethering test, the State's claims plainly fail. The State does not even attempt to tether its unfairness claims to any constitutional, statutory, or regulatory provision. *See* Compl. ¶ 230. Nor could it. The Legislature has *blessed* the rebating practices the State challenges. *See supra* pp.7-9. The State tries to salvage the claim by claiming that it alleges that "Defendants' conduct harms competition." Joint Statement at 9. But the State's conclusory allegations about competitive harm cannot support a claim alleging a violation of the antitrust laws or even the spirit animating them. The State fails to include any of the essential elements of any antitrust claim, such as the relevant market, relevant market power, or even the precise nature of antitrust violation.

b. The State does not satisfy any other "unfairness" test.

Notwithstanding *Cel-Tech*, some courts have applied an unfairness test that mirrors the test federal courts apply in cases under Section 5 of the Federal Trade Commission Act. *See Camacho v. Auto. Club of S. Cal.*, 142 Cal. App. 4th 1394, 1403 (2006) (citing 15 U.S.C. § 45(n)). "[T]he factors

[8] The Supreme Court has recognized the split of authority on the issue but has yet to resolve it. *Nationwide Biweekly Admin., Inc. v. Super. Ct.*, 9 Cal. 5th 279, 303-04 (2020).

that define unfairness under section 5 are: (1) the consumer injury must be substantial; (2) the injury must not be outweighed by any countervailing benefits to consumers or competition; and (3) it must be an injury that consumers themselves could not reasonably have avoided." *Id.* (citation omitted) Other courts use a different balancing test to determine unfairness, "weigh[ing] the utility of the defendants' conduct against the gravity of the harm to the victim." *Id.* at 1400; *see Price v. Apple, Inc.*, 2022 WL 1032472, at *5 (N.D. Cal. Apr. 6, 2022).

The Court can perform this weighing of costs and benefits balancing at the pleading stage. *See, e.g.*, *Camacho*, 142 Cal. App. 4th at 1398-99, 1406 (holding at the pleading stage that injury from allegedly wrongful debt-collection practices was outweighed by the benefits of collecting debts); *In re Ins. Installment Fee Cases*, 211 Cal. App. 4th 1395, 1419 (2012) (sustaining demurrer on UCL claim because any harm in paying installment fee was outweighed by benefits of being able to pay in installments, not as a lump sum). Such resolution as a matter of law is especially appropriate when, as the Tenth Circuit concluded, "*[n]o one* can seriously dispute that exclusive rebate agreements stimulate price competition in the prescription drug market." *In re EpiPen*, 44 F.4th at 987 (emphasis added).

Here, the Complaint does not plead a claim under either balancing test. The State affirmatively pleads concessions that show the benefits rebates provide to consumers and competition. For instance, the State concedes that rebates paid by manufacturers to PBMs flow through to payors. Compl. ¶ 101. And the State recognizes that the "net price" for insulin has been *decreasing*. *Id.* ¶¶ 186-88. Even though weighing the other benefits is an essential element of the claim under either test, the State ignores these benefits and focuses exclusively on alleged harms. But any alleged harms are untethered from the procompetitive benefits; the State alleges harm to third parties (insulin purchasers) due to price increases made by other third parties (drug manufacturers). In so doing, the State completely ignores the competitive benefits that the PBMs obtain *for their clients* and seeks to end those practices with no corresponding benefit to those clients. This fails to state a viable claim under the UCL.

2. The Complaint's Conclusory Allegations about Information Exchange Are Inadequate.

After attacking Defendants for engaging in "secretive" rebate negotiations, the State alleges, without a hint of irony, that the PBMs facilitated "collusion" through "the exchange or disclosure of

competitively sensitive information." Compl. ¶ 230. The Complaint identifies a single instance in which Express Scripts allegedly communicated with Sanofi that Eli Lilly was offering rebates on one product "in the mid-60 percent range." *Id.* ¶ 166; *see id.* ¶¶ 163-67. Such communication is entirely consistent with the PBMs Defendants' explanation "that they pit drug manufacturers . . . against each other for formulary access" by trying to acquire the highest rebate. *Id.* ¶ 164. That is exactly what PBMs are hired and expected to do for their clients. *See* Cal. Health & Safety Code § 127676.

Regardless, the State does not plead, and cannot plead, any facts to explain why encouraging competition among manufacturers is somehow "unfair." The State claims that encouraging rebate negotiations "entrench[es]" the Manufacturer Defendants in a "vicious cycle of ever-increasing list prices" to gain formulary access. Compl. ¶ 165. In other words, the PBMs allegedly incentivize Manufacturers to raise prices too much. But the argument that "prices are too high" cannot support a UCL claim against the party—here the Manufacturers—that actually raises the prices, much less against the PBMs. *See, e.g.*, *Mcgee v. Diamond Foods, Inc.*, 2016 WL 816003, at *8 (S.D. Cal. Mar. 1, 2016) ("increasing profit margins does not constitute an unfair business practice"); *Winkelmann v. Novartis A.G.*, 2018 WL 3122329, at *5 (D.N.J. June 25, 2018) (paying a higher price for a prescription drug "has not been found to violate the 'balancing test' under California law"); *see also* Manufacturers' Br. 16-18.

D. The State Fails To State a Claim Under the UCL's Fraudulent Prong.

The State's claim that the PBMs made actionable misstatements under the UCL fails for the same reasons that State cannot establish fraud under the CLRA as a UCL predicate: none of the statements the State identifies are false or misleading and are at worst non-actionable opinion or puffery. *Supra* pp.13-16.

The State advances two other theories under the UCL's "fraudulent" prong. Neither is viable. *First*, the State claims that manufacturers' list prices for insulin are, themselves, fraudulent. But those prices are set unilaterally and exclusively by the manufacturers; they could not be the basis for a claim against PBMs. *See* Compl. ¶¶ 129-43. Even setting that dispositive flaw aside, there is nothing "fraudulent" about a price the manufacturers listed and charged. The list prices are calculated according to federal statutes, 42 U.S.C. § 1395w-3a(c)(6)(B), and there is no allegation that the

manufacturers somehow misreported them. Indeed, the very relief the State seeks in this action would cause the Manufacturer Defendants to "violate federal law." *See In re Insulin Pricing Litig.*, 2024 WL 416500, at *28. The State instead alleges that the "inflated and artificial list prices have, and are, likely to deceive the People into paying more for insulin than they otherwise would have paid." Compl. ¶ 207. But the State alleges no facts supporting this conclusory statement. On the contrary, the State alleges the manufacturers' list prices correlate directly to the prices some consumers are charged. Compl. ¶¶ 208-09.

Second, the State asserts that the PBMs are liable under the UCL because they did not disclose their rebating practices to the public. That fraud-by-omission theory is a non-starter. "[T]o be actionable the omission must be contrary to a representation actually made by the defendant, or *an omission of a fact the defendant was obliged to disclose*." *Daugherty v. Am. Honda Motor Co.*, 144 Cal. App. 4th 824, 835 (2006) (emphasis added), *as modified* (Nov. 8, 2006). A duty to disclose arises in a UCL omission claim when "the plaintiff alleges that the omission was material; second, the plaintiff must plead that the defect was central to the product's function; and third, the plaintiff must allege one of the four *LiMandri* factors."[9] *Hodsdon v. Mars, Inc.*, 891 F.3d 857, 863 (9th Cir. 2018).

The Complaint here does not plausibly allege the existence of a duty for the PBMs to disclose their rebating practices to consumers. To start, the State pleads no facts suggesting that PBMs' efforts to negotiate for lower costs are material to a California resident's decision to purchase insulin. *See supra* p.16. Nor does the State allege that the negotiation of rebates is central to insulin's function. *See Hodsdon*, 891 F.3d at 864 (type of labor is not central to chocolate's function). And the State does not allege any of the four *LiMandri* factors. There are no allegations of any sort of special relationship—indeed, any relationship at all—between PBMs and consumers. Similarly, the State has not attempted to show that the bargaining at issue is in PBMs' exclusive knowledge. Nor is such a showing possible: the negotiation process has been endorsed by both state and federal governments.

[9] "There are 'four circumstances in which nondisclosure or concealment may constitute actionable fraud: (1) when the defendant is in a fiduciary relationship with the plaintiff; (2) when the defendant had exclusive knowledge of material facts not known to the plaintiff; (3) when the defendant actively conceals a material fact from the plaintiff; and (4) when the defendant makes partial representations but also suppresses some material facts.'" *LiMandri v. Judkins*, 52 Cal. App. 4th 326, 336 (1997).

Finally, the State does not allege that any defendant either actively concealed anything from the State or consumers, or made any misleading partial representations. There is, quite simply, no duty for PBMs to disclose the details of their pricing arrangements. *Levine v. Blue Shield of Cal.*, 189 Cal. App. 4th 1117, 1132 (2010). No fraud-by-omission claim could lie.

III. THE STATE FAILS TO STATE A CLAIM FOR UNJUST ENRICHMENT.

The State also brings a second count for unjust enrichment. That claim fails for five reasons. *First*, the State does not identify any basis, other than the alleged UCL violations, that would render any benefit unjust. The State's unjust enrichment claim therefore "is merely a restatement" of its other claims alleging that Defendants received "financial benefits resulting from their unlawful, unfair, and deceptive conduct." *A.J. Fistes Corp. v. GDL Best Contractors*, 38 Cal. App. 5th 677, 697 (2019); Compl. ¶ 236. Because the State's other cause of action does not state a claim, any unjust enrichment claim also fails. *See Avakian v. Wells Fargo Bank, N.A.*, 827 F. App'x 765, 766 (9th Cir. 2020) (per curiam).

Second, "California does not recognize a cause of action for unjust enrichment." *Hooked Media Grp., Inc. v. Apple Inc.*, 55 Cal. App. 5th 323, 336 (2020). That is because "[t]he phrase 'Unjust Enrichment' does not describe a theory of recovery, but an effect: the result of a failure to make restitution under circumstances where it is equitable to do so." *Melchior v. New Line Prods., Inc.*, 106 Cal. App. 4th 779, 793 (2003) (citation omitted).

Third, even if there could be a freestanding unjust-enrichment claim under some circumstances, the State's unjust-enrichment claim improperly duplicates its UCL claim and the remedies sought thereunder. *AIG Ret. Servs., Inc. v. Altus Fin. S.A.*, 365 F. App'x 756, 760 (9th Cir. 2010). The two claims rest on the same allegations and use parallel language to characterize the PBMs' practices. *Compare* Compl. ¶¶ 225-31, *with id.* ¶¶ 232-37. The UCL claim alleges that the PBMs engaged in "unlawful, unfair, or fraudulent" conduct, and the would-be restitution claim alleges that the PBMs engaged in "unlawful, unfair, and deceptive conduct." *Compare id.* ¶ 228, *with* ¶ 236. The tacked-on unjust-enrichment claim should be dismissed because it merely restates the State's statutory claim and remedy. *LeBrun v. CBS TV Studios, Inc.*, 68 Cal. App. 5th 199, 211-12 (2021).

Fourth, the purported unjust enrichment claim is barred by express contract. "[U]njust enrichment is not available . . . if an enforceable express contract determines the parties' rights and obligations." *Chapman v. Skype Inc.*, 220 Cal. App. 4th 217, 234 (2013). For example, in *California Medical Association, Inc. v. Aetna United States Healthcare of California, Inc.*, the Fourth District dismissed an unjust enrichment claim "because the subject matter of such claim . . . was governed by express contracts" between the defendant and various third parties. 94 Cal. App. 4th 151, 172-73 (2001). The court held that those contracts defeated the plaintiff's unjust enrichment claim, even though the plaintiff was not a party to the agreements. *Id.* The same is true here. The State's unjust enrichment claim concerns insulin and rebates, which are governed by express contracts between the PBM defendants and manufacturers (Compl. ¶¶ 45, 55, 59, 123), payors (*id.* ¶ 113), and pharmacies (*id.* ¶¶ 113, 176). The State's unjust enrichment claim fails in light of those contracts.

Fifth, the State's claim fails because the remedy is inconsistent with the State's *parens patriae* capacity. Actions brought by the State as *parens patriae* must seek to vindicate "an interest apart from the interests of particular private parties." *In re Packaged Seafood Prods. Antitrust Litig.*, 338 F. Supp. 3d 1079, 1089 (S.D. Cal. 2018) (citing *Missouri ex rel. Koster v. Harris*, 847 F.3d 646, 651 (9th Cir. 2017)). The "State must articulate an interest apart from the interests of particular private parties" and must not simply "step[] in to represent the interests of particular citizens who, for whatever reason, cannot represent themselves." *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 600, 607 (1982).

By seeking to recover monetary damages for alleged unjust enrichment, the State seeks a remedy inherently inconsistent with the State's *parens patriae* capacity. Unjust enrichment is by its nature a remedy that seeks monetary damages to relieve individual-specific harm. It applies only if the "circumstances are such that, as between the two *individuals*, it is unjust for the person to retain [a benefit]." *Durell v. Sharp Healthcare*, 183 Cal. App. 4th 1350, 1370 (2010) (citation omitted, emphasis altered). Because such a particularized claim is incompatible with the *parens patriae* doctrine, this Court must follow the lead of other courts that have rejected "*parens patriae* claim[s] for unjust enrichment under California law." *E.g.*, *In re Packaged Seafood Prods. Antitrust Litig.*, 338 F. Supp. 3d 1079, 1100 (S.D. Cal. 2018).

IV. THE COURT SHOULD DISMISS CVS HEALTH CORP.

CVS Health—the CVS Caremark corporate parent—should be dismissed. "It is a general principle of corporate law deeply 'ingrained in our economic and legal systems' that a parent corporation . . . is not liable for the acts of its subsidiaries." *United States v. Bestfoods*, 524 U.S. 51, 61 (1998) (citation omitted). To overcome this presumption, a plaintiff must show that (1) there is "such unity of interest and ownership that the separate personalities of the [subsidiary] corporation and [its parent corporation or individual owner] no longer exist" and (2) "if the acts are treated as those of the [subsidiary] alone, an inequitable result will follow." *Santa Clarita Org. for Plan. & Env't v. Castaic Lake Water Agency*, 1 Cal. App. 5th 1084, 1105 (2016) (alteration in original) (citation omitted). An inequitable result obtains only when "the corporate form is used to perpetuate a fraud, circumvent a statute, or accomplish some other wrongful or inequitable purpose." *Id.* (cleaned up).

The Complaint's allegations about CVS Health come nowhere close to meeting this rigorous test. The Complaint at most alleges that CVS Health's branding includes the term "Caremark," and that CVS corporate filings (made on behalf of the entire corporate family, not the corporate parent) refer to PBM services. *See* Compl. ¶ 48. There are no allegations that CVS Health controls CVS Caremark's PBM services, or that CVS Health's references to "its PBM services," *id.* ¶ 48b, reference services *it* provides as opposed to *its subsidiary*. And the Complaint does not even attempt to allege that CVS Health has used its corporate form to perpetuate a fraud, circumvent a statute, or perform any other inequitable purpose. Like other courts faced with these facts, this Court should dismiss the claims against the corporate parent. *See, e.g.*, *Mississippi ex rel. Fitch v. Eli Lilly & Co.*, 2022 WL 18401603, at *4-5 (S.D. Miss. Aug. 29, 2022); *Mississippi ex rel. Fitch v. Eli Lilly & Co.*, No. 21-cv-00674 (S.D. Miss. Aug. 15, 2022), slip op. at 14-16; *Moeckel v. Caremark Rx Inc.*, 385 F. Supp. 2d 668, 674 (M.D. Tenn. 2005).

CONCLUSION

For these reasons, the Court should sustain the demurrer and dismiss the State's claims with prejudice.

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Respectfully submitted,

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