

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

KEVIN McCABE,

Plaintiff,

-against-

CVS HEALTH CORPORATION,

Defendant.

1:22-cv-3116

COMPLAINT

PARTIES

1. Plaintiff, Kevin McCabe (“McCabe”), resides in the Eastern District of New York and is a citizen of the State of New York.

2. Defendant, CVS Health Corporation (“CVS”), is a corporation organized and existing under the laws of Delaware, and maintains its principal place of business at One CVS Drive, Woonsocket, Rhode Island 02895.

JURISDICTION AND VENUE

3. This Court has jurisdiction under 28 U.S.C. Section 1332(d)(2)(A).

4. The matter in controversy would exceed an aggregated sum or value of \$5,000,000, exclusive of interest and costs, if the putative class (described below) were certified.

5. Venue is proper in this District pursuant to 28 U.S.C. Section 1391(b)(2).

6. At least two thirds of the members of the putative class are not citizens of the State of New York.

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FACTS

7. From November 2, 2021, through November 27, 2021, CVS conducted a campaign (the “Campaign”) in which, prior to the completion of transactions at its nearly ten thousand stores in the 50 States and the District of Columbia, customers were asked on the checkout screen if they wished, as part of the checkout process, to make a donation, above and beyond the price of their purchase, to the American Diabetes Association (“ADA”).

8. The only term of the Campaign that CVS provided to customers was a representation on the checkout screen that the customer could make a donation to the ADA (a “Campaign Donation”) by tapping one of several boxes on the checkout screen, each of which contained a pre-selected amount, or that the customer could tap a box stating “no” with respect to making a Campaign Donation (the “Checkout Message”).

9. The Checkout Message represented that CVS was merely collecting Campaign Donations and forwarding them to the ADA.

10. The Checkout Message was a material element of the Campaign.

11. CVS intended that customers would rely upon the Checkout Message in deciding whether to make a Campaign Donation.

12. Customers had no reason to believe that the Checkout Message was anything but true and accurate.

13. CVS did not merely collect customers’ Campaign Donations and forward them to the ADA, but, instead, counted Campaign Donations toward the satisfaction of a legally binding obligation, which CVS had made to the ADA, to donate \$10 million to the ADA during the three-year period of 2021 through 2023 (the “CVS Obligation”).

14. CVS necessarily used Campaign Donations to reimburse itself, or pay down its debt, with respect to the CVS Obligation.

15. CVS's treatment of, and benefit from, Campaign Donations were materially different than the false, deceptive, and misleading representation that CVS had given to its customers, which was that CVS was merely collecting Campaign Donations and forwarding them to the ADA.

16. On or about November 15, 2021, McCabe made a Campaign Donation at the CVS store located at 1933 Victory Boulevard, Staten Island, New York 10314.

INTENTION TO REPRESENT A CLASS

17. McCabe intends to seek the certification of a class (the "Putative Class") pursuant to Rules 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure.

18. The Putative Class comprises McCabe and all other persons who made a Campaign Donation.

19. There are thousands of other members of the Putative Class whose claims would be similar to McCabe's claims; and, furthermore, McCabe's claims are typical of those claims.

20. The members of the Putative Class are so numerous that joinder of all of them is impracticable.

21. McCabe would fairly and adequately protect the interests of the other members of the Putative Class. McCabe's interests would be, for purposes of this litigation, coincident with the interests of the other members of the Putative Class, and McCabe would have no interests that would be antagonistic to, or in conflict with, the other members of the Putative Class.

22. A class action would be superior to all other available methods for the fair and efficient adjudication of this controversy. Because the Putative Class is so numerous that joinder of all of its members would be impracticable, and because the damages sustained by most of the individual members would be too small to render prosecution of the claims asserted herein economically feasible on an individual basis, the expense and burden of individual litigation would make it impractical for all of the members to adequately address the wrongs complained of herein. McCabe knows of no

impediments to the effective management of this action as a class action.

23. Common questions of law and fact predominate over questions that affect only individual Class Members. Among these questions are:

- (i) whether CVS conducted the Campaign;
- (ii) whether, when a customer checked out of a CVS store during Campaign, he was asked on the checkout screen if he wished, as part of the checkout process, to make a Campaign Donation;
- (iii) whether the only term of the Campaign that was provided was the Checkout Message;
- (iv) whether the Checkout Message represented that CVS was merely collecting Campaign Donation and forwarding them to the ADA;
- (v) whether the Checkout Message was material to the Campaign;
- (vi) whether CVS intended that customers would rely upon the Checkout Message in deciding whether to make a Campaign Donation;
- (vii) whether customers had any reason to believe that the Checkout Message was anything other than true and accurate;
- (viii) whether, prior to the Campaign, CVS had made a legally binding commitment to donate \$10 million to the ADA during the three-year period of 2021 through 2023;
- (ix) whether CVS counted Campaign Donations toward CVS's satisfaction of the CVS Obligation;
- (x) whether CVS used Campaign Donations to reimburse itself, or pay down its debt, with respect to the CVS Obligation;
- (xi) whether CVS's treatment of, and benefit from, Campaign Donations was materially different than that which CVS had represented to its customers, which was that CVS was merely collecting Campaign Donations and forwarding them to the ADA.

(xii) whether CVS engaged in common-law fraud; and

(xiii) whether CVS violated the consumer-protection statutes that compose the Second Claim for Relief.

CLAIMS FOR RELIEF

24. McCabe incorporates, into each Claim for Relief, each and every allegation contained in paragraphs “1” through “16.”

FIRST CLAIM

[Common-Law Fraud]

25. CVS engaged in fraud under the common law of the 50 States and the District of Columbia.

26. As a result of CVS’s fraud, McCabe and the other members of the Putative Class are entitled to actual damages.

SECOND CLAIM

[Violations of Consumer-Protection Laws]

ALABAMA

ALABAMA DECEPTIVE TRADE PRACTICES ACT

(Ala. Code §§ 8-19-1 - 8-19-15)

27. CVS violated the Alabama Deceptive Trade Practices Act, Ala. Code §§ 8-19-1 - 8-19-15, with respect to persons who made Campaign Donations in Alabama (the “Putative Alabama Class Members”); specifically, CVS violated Ala. Code § 8-19-5(27).

28. The Putative Alabama Class Members are entitled to statutory damages of \$100 pursuant to Ala. Code § 8-19-10(a)(1).

29. The Putative Alabama Class Members are entitled to reasonable legal fees pursuant to Ala. Code § 8-19-10(a)(3).

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