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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF RHODE ISLAND

_____	)	
SHEET METAL WORKERS LOCAL NO. 20	)	
WELFARE AND BENEFIT FUND, and	)	
INDIANA CARPENTERS WELFARE FUND,	)	
on behalf of themselves and all	)	C.A. No. 16-046 WES
others similarly situated,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
CVS PHARMACY, INC., et al.,	)	
	)	
Defendants.	)	
_____	)	
PLUMBERS WELFARE FUND, LOCAL 130,	)	
U.A., on behalf of itself and all	)	
others similarly situated,	)	
	)	C.A. No. 16-447 WES
Plaintiffs,	)	
	)	
v.	)	
	)	
CVS PHARMACY, INC., et al.	)	
	)	
Defendants.	)	
_____	)	

**MEMORANDUM AND ORDER**

WILLIAM E. SMITH, District Judge.

Plaintiffs Sheet Metal Workers Local No. 20 Welfare and Benefit Fund ("Sheet Metal Workers"), Indiana Carpenters Welfare Fund ("Indiana Carpenters"), and Plumbers Welfare Fund Local 130 ("Plumbers") (collectively, "Plaintiffs" or "named Plaintiffs") move to certify four classes of third-party payors ("TPPs") or

health plans in two consolidated cases. Pls.' Mem. in Supp. of Pls.' Mot. for Class Certification ("Pls.' Mot.") 1-3, ECF No. 123;<sup>1</sup> see also Reply in Supp. of Pls.' Mot. for Class Certification ("Pls.' Reply") 3-4, ECF No. 145-1 (amending the class definition for the "Omissions Consumer Protection Class").<sup>2</sup> They allege that Defendant CVS Pharmacy, Inc. ("CVS") and five pharmacy benefit managers ("PBMs") - Defendant Caremark, L.L.C. ("Caremark", together with CVS, "Defendants"), Express Scripts, Inc., OptumRx, Inc., Medco Health Solutions, Inc.,<sup>3</sup> and MedImpact Healthcare Systems, Inc. - engaged in a nationwide scheme and conspiracy to overcharge TPPs, in violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961, et seq., and various state laws. First Am. Compl. ("FAC") 5-9, 52-84, ECF No. 171. Specifically, Plaintiffs allege that CVS defrauded and overcharged the health plans in failing to treat its Health Savings Pass ("HSP") membership prices as its "Usual and Customary" ("U&C") prices when reporting U&C prices to the PBMs. Moreover, Plaintiffs

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<sup>1</sup> All docket entries refer to the docket in C.A. No. 16-046.

<sup>2</sup> Defendants make much of the term "health plans" as overly vague, but Plaintiffs clarify that it is used as a synonym for "third-party payor" - "namely, any entity (other than the patient or health care provider) that reimburses the patient's health care expenses (e.g., pharmaceutical purchases)." Pls.' Reply 18. In this opinion, "TPPs" and "health plans" are used interchangeably.

<sup>3</sup> Express Scripts purchased MedCo in 2012. FAC ¶¶ 12, 111. During the life of the HSP Program, Indiana Carpenters' PBM was MedCo. Id. ¶ 12.

claim that CVS and the PBMs conspired to conceal from the TPPs that the HSP prices were not included in its U&C prices.

In addition, Caremark moves to dismiss Sheet Metal Workers' claims against Caremark, on the basis that the parties have agreed to arbitrate any disputes between them. See generally Mem. in Supp. of Caremark LLC's Mot. under the FAA to Dismiss the Claims of Sheet Metal Workers ("Caremark Mot. to Dismiss") 1, ECF No. 163-1.

For the reasons that follow, Plaintiffs' Motion for Class Certification, ECF No. 120, is GRANTED, and Caremark's Motion to Dismiss, ECF No. 163, is also GRANTED. The Court DENIES WITHOUT PREJUDICE Plaintiffs' Motions to Exclude the Expert Testimony of Catherine Graeff, Michael P. Salve, Ph.D., and Brett E. Barlag, ECF Nos. 140-42.

#### **I. Background<sup>4</sup>**

Retail pharmacy chains generally sell their prescription drugs to two groups of consumers: those with prescription insurance, and those without insurance, also referred to as cash payors. FAC ¶ 29. Customers with insurance make up well over 90 percent of CVS's prescription drug business, and their prescription purchases are processed and paid for (in part or in

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<sup>4</sup> The Court gleans the background from Plaintiffs' First Amended Complaint. See generally First Am. Compl. ("FAC"), ECF No. 81-1.

full) by health plans, including health insurance companies, third-party administrators, health maintenance organizations, self-funding health and welfare benefit plans, health plans, and other health benefit providers (collectively referred to herein as "health plans" or "TPPs"). Id.

Pharmacies, including CVS, report the prices they charge cash customers, known as the "Usual and Customary" or "U&C" price, to PBMs and TPPs to comply with the National Council for Prescription Drug Program's ("NCPDP") requirements. Id. ¶¶ 1, 33-35. This arrangement (and the contracts between CVS and the PBMs), in part, guarantees that TPPs and insured consumers do not pay more for a prescription drug than an uninsured consumer would pay for the same drug. Id. ¶ 1.

Pharmacy benefit managers, or PBMs, facilitate transactions between TPPs and pharmacies. Id. ¶ 28. TPPs contract with PBMs to perform services "including the negotiation of drug prices with drug companies, creation of formularies, management of prescription billing, construction of retail pharmacy networks for insurers, and provision of mail-order services." Id. PBMs set up how pharmacy claims are adjudicated consistent with instructions from their TPP clients. Id. ¶ 36. Pursuant to PBM/TPP contracts, TPPs pay their PBMs for generic drugs purchased by their members based on the "lower of" three benchmark prices: average wholesale price ("AWP") less a defined percentage (i.e.,  $AWP - \%$ ); U&C; or

Maximum Allowable Cost ("MAC"). Id. ¶¶ 39-41. A drug's AWP is set and published by third parties. Id. ¶ 40. PBMs set the MAC for each generic drug on their proprietary MAC lists. Id. ¶ 41. The U&C is set by the pharmacy and is typically the highest of the three prices. Id. ¶ 42.

PBMs also contract with pharmacies to dispense drugs to their TPP clients. Id. ¶ 43. In those contracts, PBMs also typically agree to pay pharmacies based on benchmark prices, such as AWP, U&C, and MAC. Id. As the middlemen, PBMs make their profit from charging their TPP clients more for drugs than they pay the pharmacy for the transactions. Id. Thus, PBMs do not disclose the prices they charge their TPP clients, nor what they pay pharmacies. Id.

It was against this backdrop that, in September 2006, "Walmart turned the world of generic prescription drugs upside-down" by announcing that it would charge \$4 for a 30-day supply, and \$10 for a 90-day supply, of hundreds of generic prescription drugs. Id. ¶¶ 2, 52. Target, Walgreens, Rite Aid, and other retailers with pharmacies followed suit. Id. ¶ 52. Walmart and Target (until CVS acquired Target pharmacies in 2015) reported \$4 as their U&C prices. Id. Tweaking the model a bit, Walgreens and Rite Aid required customers to "join" their generic prescription drug programs to reap the benefits. Id. ¶ 57.

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