

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

HARRIS COUNTY, TEXAS,

Plaintiff,

v.

ELI LILLY & COMPANY, et al.,

Defendants.

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CIVIL ACTION H- 19-4994

MEMORANDUM OPINION AND ORDER

Pending before the court is a motion for partial dismissal of plaintiff Harris County’s second amended complaint. Dkt. 76. Defendants Eli Lilly and Company, Novo Nordisk Inc., and Sanofi-Aventis U.S. LLC (collectively, the “Manufacturer Defendants”); and defendants Express Scripts Holding Company, Express Scripts, Inc., ESI Mail Pharmacy Services, Inc., Express Scripts Pharmacy, Inc., CVS Health Corporation, Caremark RX, L.L.C., Caremark, L.L.C., CaremarkPCS Health, L.L.C., Caremark Texas Mail Pharmacy, LLC, Aetna RX Home Delivery, LLC, Aetna Pharmacy Management Services, LLC, Optum, Inc., and OptumRX, Inc., (collectively, the “PBM Defendants”), request that the court dismiss Harris County’s claims asserted under the Texas Deceptive Trade Practices Act (“DTPA”) with prejudice. *Id.* After considering the motion, response, reply, second amended complaint, and the applicable law, the court is of the opinion that the motion to dismiss Harris County’s DTPA claim (Dkt. 76) should be **DENIED**.

I. BACKGROUND

This order only addresses Harris County's DTPA claim. Harris County provides health benefits to its employees through a self-funded health plan. Dkt. 68 (second amended complaint). It subsidizes its beneficiaries' prescription drug purchases, including purchases of drugs used to treat diabetes. *Id.* It also purchases diabetes medications for prisoners in Harris County jails. *Id.*

Harris County alleges that the Manufacturer Defendants manufacture most diabetes medications in the United States, and the PBM Defendants manage the pharmacy benefits for most people in the United States. *Id.* It asserts that the Manufacturer Defendants "have in lockstep raised the reported prices of their respective diabetes drugs in an astounding manner," including an insulin price increase of up to 1000%. *Id.* Harris County contends the reason for the price increase is a conspiracy between the PBM and Manufacturer Defendants to create a secret spread between the reported price for diabetic medications and the true net price for the same drugs. *Id.* Harris County calls this conspiracy the "Insulin Pricing Scheme." *Id.*

Under this alleged scheme, the PBM Defendants represent to their clients that they use their market power to drive down prices by causing manufacturers to compete on price for placement on their formularies. *Id.* Harris County alleges that instead, the PBM Defendants "exploit their market power to cause substantial increases in the prices of diabetes medications in order to create massive profits for themselves and the Manufacturer Defendants," which increases costs for employers who provide employee health benefits, like Harris County. *Id.* Harris County asserts that the Manufacturer Defendants artificially raised their reported prices and then secretly refunded a significant portion of the increase to the PBM Defendants, calling the secret refunds "rebates, discounts, concession fees, etc." *Id.* Harris County asserts that in reality the refunds are a *quid pro quo* for formulary inclusion and that the PBM Defendants grant formulary status based

on the highest inflated price and largest refund amount. *Id.* Harris County asserts that it spends millions of dollars on diabetes medications and that a substantial part of the amount it spends can be attributed to the inflated prices due to the Insulin Pricing Scheme. *Id.*

The fifth cause of action in Harris County's complaint is a DTPA claim based on the Insulin Pricing Scheme. *Id.* Harris County alleges that the defendants' scheme resulted in violations of the following subsections of the DTPA: 17.46(B)(5), 17.46(B)(11), 17.46(B)(24), and 17.50(A)(3). *Id.* Harris County alleges that it is a "consumer" under the DTPA because it is "a subdivision . . . of this state who seeks or acquires by purchase or lease, any goods or services," including diabetes medication and pharmacy benefit management services." *Id.* (quoting the definition of "consumer" in the DTPA). It asserts that the defendants misrepresented that the prices for diabetes medications, the PBM Defendants misrepresented the price reductions to payors like Harris County by indicating that the money they received from the Manufacturer Defendants lowered the overall prices of the medications, the Manufacturer Defendants failed to disclose that the reported prices were not the result of competitive market forces and were artificially inflated in coordination with the PBM Defendants, the PBM Defendants failed to disclose that their formulary construction did not lower the overall price for diabetes medications, and the defendants took advantage of Harris County's lack of knowledge of the scheme to a "grossly unfair degree." *Id.* Harris County alleges that each purchase it made based on the falsely inflated prices represents an independent harm to the County. *Id.* It asserts that it paid excessive and inflated prices every time it paid for an at-issue drug, noting that there are sixty different National Drug Codes associated with the at-issue drugs and the purchases took place at varying times and were dispensed at countless different pharmacies. *Id.* It contends that each purchase benefitted Harris County because "the health and well-being of its employees is essential to Harris County's ability to fulfill

its mission.” *Id.* Harris County also alleges that the defendants engaged in a conspiracy to violate the DTPA, citing *Four Brothers Boat Works, Inc. v. Tesoro Petroleum Cos., Inc.*, 217 S.W.3d 653, 667 (Tex. App.—Houston [14th Dist.] 2006, pet. denied). *Id.*

The defendants move for dismissal of the DTPA claims. Dkt. 76. First, they assert that the DTPA has a statutory limit of \$500,000 because it is designed to protect small consumers, and Harris County by no means qualifies as a small consumer and does not, in fact, meet the statutory definition of “consumer.” *Id.* They contend that all of Harris County’s purchases relate to two “projects” and must be aggregated accordingly. *Id.* The defendants’ proposed project categories are (1) providing insurance coverage to subsidize prescription drugs purchased by Harris County’s health plan beneficiaries; and (2) purchasing drugs for Harris County inmates. *Id.* The defendants assert that since Harris County alleges it “spent tens of millions of dollars on at-issue diabetes products,” there is no way the purchases in these two categories fall below the \$500,000 statutory limit. *Id.* Second, they argue that the claims relating to the diabetes medicines for employees should be dismissed because Harris County is not a consumer under the DTPA with regard to the drugs purchased for health plan beneficiaries because the drugs were not purchased for Harris County’s benefit and any benefit Harris County received was an incidental benefit. *Id.* Third, the defendants argue that the claim that the defendants conspired to violate the DTPA must be dismissed because the County fails to state an underlying DTPA claim. *Id.*

Harris County responds that it provides insurance coverage that subsidizes prescription drugs for its 38,000 employees, retirees, and their dependents, and it purchases diabetes medications for inmates in the county’s jails, and each insulin transaction involving the at-issue drugs is a separate DTPA violation. Dkt. 78. Harris County contends that it never purchased insulin in an aggregated amount or for a contracted price exceeding \$100,000. *Id.* Also, the

County asserts that the transactional limit is an affirmative defense that the defendants have to plead and prove. *Id.* (citing *Eckman v. Centennial Savs. Bank*, 784 S.W.2d 672, 675 (Tex. 1990) (holding that the defendant has the burden of proving the applicability of a \$25 million exception to “business consumer status” under the DTPA). At the bare minimum, Harris County contends there are genuine issues of material fact relating to whether the entire series of purchases was a set of transactions relating to the same project. As to the incidental beneficiary argument, Harris County argues that it pled that it benefitted from the transactions because it prioritizes the health and well-being of its employees, and it thus is a “consumer” under the DTPA for all of the transactions at issue. It notes that Texas law does not require that DTPA “consumers” are direct purchasers; instead, standing is established based on the individual’s relationship to the transaction. *Id.* (citing *Kennedy v. Sale*, 689 S.W.2d 892 (Tex. 1985), and *Birchfield v. Texarkana Mem’l Hosp.*, 747 S.W.2d 361 (Tex. 1987) (“A plaintiff establishes her standing as a consumer in terms of her relationship to a transaction, not by a contractual relationship with the defendant.”)). As to the alleged conspiracy, Harris County asserts that it has properly pled that each defendant’s conduct violated the DTPA and thus the defendants’ argument that the conspiracy claims fails for lack of an underlying DTPA claim has no merit. *Id.*

The motion to dismiss is now ripe for consideration. The court will first set forth the legal standard and then consider the parties’ arguments.

II. LEGAL STANDARD

Neither party asserts in their briefing on this motion that a heightened pleading standard applies. *See* Dkts. 76, 78 (both noting the Rule 8(a)(2) pleading standard). “Federal Rule of Civil Procedure 8(a)(2) requires only ‘a short and plain statement of the claim showing that the pleader is entitled to relief.’” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1964–65 (2007).

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