STATE OF MICHIGAN
IN THE SUPREME COURT

DANA NESSEL, Attorney General of the State of Michigan, *ex rel.* the People of the State of Michigan,

Plaintiff/Appellant,

v

ELI LILLY AND COMPANY,

Defendant/Appellee.

SC: 165961
COA: 362272
Ingham County CC: 2022-000058-CZ

APPENDIX TO DEFENDANT-APPELLEE'S SUPPLEMENTAL BRIEF

(Exhibits 1 - 19; Appx. 1b-311b)

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APPENDIX TO DEFENDANT-APPELLEE'S SUPPLEMENTAL BRIEF

(Exhibits 1 – 19; Appx 1b – 311b)

Ex. No.	Date	Description	Appx Nos.
16	01/29/2019	*Hinderer v Snyder,* unpublished per curiam opinion of the Court of Appeals issued Jan. 29, 2019 (Docket No.339759); 2019 WL 360732	**283b-293b**
17	06/29/2021	*FOMCO v Hearthside Grove*, opinion of the United States District Court for the Western District of Michigan, issued June 29, 2021 (Case No.1:20-cv-1069); 2021 WL 2659632	**294b-298b**
18	11/01/2018	*Comer v Roosen Varchetti & Olivier, PLLC*, opinion of the United States District Court for the Eastern District of Michigan, issued Nov. 1, 2018 (Case No. 17-13218); 2018 WL 5719793	**299b-306b**
19	03/15/2012	*Ming Chu Wun v North American Company for Life and Health Insurance,* opinion of the United States District Court for the District of Nevada, issued March 15, 2012 (Case No. 2:11-CV-00760); 2012 WL 893750	**307b-311b**

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Case Summary

Case Title:	ATTY GEN MI vs ELI LILLY AND COMPANY
Case Number:	22-000058-CZ
Judge:	WANDA STOKES
PLAINTIFF:	ATTY GEN MI
DEFENDANT:	ELI LILLY AND COMPANY
Case Status:	CLOSED
Disposition:	3CC-UNCONTESTED/DEFAULT/SETTLED - 07/20/2022
File Date:	01/25/2022

Case Events

63 08/07/2023	APPLICATION FOR LEAVE TO APPEAL
62 08/07/2023	NOTICE OF FILING APPLICATION FOR LEAVE TO APPEAL
61 06/22/2023	DECISION FROM COURT OF APPEALS - AFFIRMED
60 01/11/2023	DECISION FROM COURT OF APPEALS - DENIED
59 12/13/2022	RECORD SENT TO COURT OF APPEALS
58 09/06/2022	BYPASS APPLICATION FOR LEAVE TO APPEAL W/ APPELLANT'S APPENDIX
57 09/02/2022	RECORDER/REPORTER'S NOTICE OF FILING OF TRANSCRIPT/AFFIDAVIT OF MAILING
56 09/02/2022	TRANSCRIPT OF PROCEEDINGS- MOTION FOR SUMMARY DISPOSITION- JULY 7, 2022
55 07/26/2022	APPEALS TO HIGHER COURT RECEIPT: 496725 DATE: 07/26/2022
54 07/25/2022	RECORDER/REPORTER'S NOTICE OF FILING OF TRANSCRIPT
53 07/21/2022	CASE CLOSED C30
52 07/20/2022	ORDER ON CROSS MOTIONS FOR SUMMARY DISPOSITION W/POS
51 07/11/2022	HEARING HELD ON THE RECORD THE FOLLOWING EVENT: MOTION FOR SUMMARY DISPOSITION SCHEDULED FOR 07/07/2022 AT 10:30 AM HAS BEEN RESULTED AS FOLLOWS: RESULT: HEARING HELD ON THE RECORD JUDGE: STOKES, WANDA M. LOCATION: MASON COURTHOUSE RESULT ST0001
50 07/11/2022	HEARING HELD ON THE RECORD THE FOLLOWING EVENT: MOTION FOR SUMMARY DISPOSITION SCHEDULED FOR 07/07/2022 AT 10:30 AM HAS BEEN RESULTED AS FOLLOWS: RESULT: HEARING HELD ON THE RECORD JUDGE: STOKES, WANDA M. LOCATION: MASON COURTHOUSE RESULT ST0001
49 07/06/2022	HEARING ADJOURNED THE FOLLOWING EVENT: MOTION FOR SUMMARY DISPOSITION SCHEDULED FOR 07/07/2022 AT 11:00 AM HAS BEEN RESULTED AS FOLLOWS: RESULT: C30 ADJOURNED

	JUDGE: STOKES, WANDA M. LOCATION: MASON COURTHOUSE RESULT STAFF: STAFF: COUR0001
48 07/06/2022	HEARING ADJOURNED THE FOLLOWING EVENT: MOTION FOR SUMMARY DISPOSITION SCHEDULED FOR 07/07/2022 AT 11:00 AM HAS BEEN RESULTED AS FOLLOWS: RESULT: C30 ADJOURNED JUDGE: STOKES, WANDA M. LOCATION: MASON COURTHOUSE RESULT STAFF: STAFF: COUR0001
47 07/06/2022	HEARING SET: THE FOLLOWING EVENT: MOTION FOR SUMMARY DISPOSITION SCHEDULED FOR 07/07/2022 AT 11:00 AM HAS BEEN RESCHEDULED AS FOLLOWS: EVENT: MOTION FOR SUMMARY DISPOSITION DATE: 07/07/2022 TIME: 10:30 AM JUDGE: STOKES, WANDA M. LOCATI0001
46 07/01/2022	ATTORNEY GENERAL'S REPLY IN SUPPORT OF CONSOLIDATED CROSS-MOTION FOR SUMMARY DISPOSITION AND BRIEF IN SUPPORT
45 06/21/2022	NOTICE RE: MOTIONS FOR SUMMARY DISPOSITION
44 06/17/2022	DEF. ELI LILLY AND COMPANY'S OPPOSITION TO ATTORNEY GENERAL'S CONSOLIDATED CROSS- MOTION FOR SUMMARY DISPOSITION
43 05/30/2022	ORDER RE: MOTION TO EXCEED PAGE LIMITATION - GRANTED W/ PS
42 05/27/2022	ORDER GRANTING UNOPPOSED MOTION FOR TEMPORARY ADMISSION FOR JAMES F HURST, PC W/ PS
41 05/27/2022	HEARING SET: THE FOLLOWING EVENT: MOTION FOR SUMMARY DISPOSITION SCHEDULED FOR 09/14/2022 AT 1:00 PM HAS BEEN RESCHEDULED AS FOLLOWS: EVENT: MOTION FOR SUMMARY DISPOSITION DATE: 07/07/2022 TIME: 11:00 AM JUDGE: STOKES, WANDA M. LOCATIO0001
40 05/27/2022	HEARING SET: THE FOLLOWING EVENT: MOTION FOR SUMMARY DISPOSITION SCHEDULED FOR 09/14/2022 AT 1:00 PM HAS BEEN RESCHEDULED AS FOLLOWS: EVENT: MOTION FOR SUMMARY DISPOSITION DATE: 07/07/2022 TIME: 11:00 AM JUDGE: STOKES, WANDA M. LOCATIO0001
39 05/27/2022	HEARING HELD ON THE RECORD THE FOLLOWING EVENT: MOTION (MISC) SCHEDULED FOR 05/27/2022 AT 10:00 AM HAS BEEN RESULTED AS FOLLOWS: RESULT: HEARING HELD ON THE RECORD JUDGE: STOKES, WANDA M. LOCATION: MASON COURTHOUSE RESULT STAFF: STAFF: 0001
38 05/27/2022	HEARING ADJOURNED THE FOLLOWING EVENT: MOTION FOR SUMMARY DISPOSITION SCHEDULED FOR 09/14/2022 AT 1:00 PM HAS BEEN RESULTED AS FOLLOWS: RESULT: C30 ADJOURNED JUDGE: STOKES, WANDA M. LOCATION: MASON COURTHOUSE RESULT STAFF: STAFF: COURT0001
37 05/27/2022	HEARING ADJOURNED THE FOLLOWING EVENT: MOTION FOR SUMMARY DISPOSITION SCHEDULED FOR 09/14/2022 AT 1:00 PM HAS BEEN RESULTED AS FOLLOWS: RESULT: C30 ADJOURNED JUDGE: STOKES, WANDA M. LOCATION: MASON COURTHOUSE RESULT STAFF: STAFF: COURT0001
36 05/27/2022	NOTICE RE: MOTIONS FOR SUMMARY DISPOSITION ON 07/07/22 W/ PS
35 05/26/2022	ORDER GRANTING UNOPPOSED MOTION FOR TEMPORARY ADMISSION FOR ANDREW A KASSOF, PC W/ PS
34 05/26/2022	ORDER GRANTING UNOPPOSED MOTION FOR TEMPORARY ADMISSION FOR TAJ J. CLAYTON, PC W/ PS

33	05/26/2022	ORDER GRANTING UNOPPOSED MOTION FOR TEMPORARY ADMISSION FOR DIANA M WATRAL, PC W/ PS
32	05/25/2022	MOTION FOR TEMPORARY ADMISSION TO PRACTICE FOR JAMES F. HURST, PC W/ NOH, AND PS
31	05/25/2022	MOTION FEE RECEIPT: 494433 DATE: 05/25/2022
30	05/20/2022	MOTION FEE RECEIPT: 494263 DATE: 05/20/2022
29	05/20/2022	DEF ELI LILLY AND CO'S OPPOSITION TO MOTION FOR EXPEDITED CONSIDERATION OF CROSS MOTIONS FOR SUMMARY DISPOSITION W/ PS
28	05/20/2022	MOTION FOR TEMPORARY ADMISSION TO PRACTICE FOR DIANA M WATRAL, PC
27	05/20/2022	MOTION FOR TEMPORARY ADMISSION TO PRACTICE FOR ANDREW A KASSOF, PC
26	05/20/2022	MOTION FOR TEMPORARY ADMISSION TO PRACTICE FOR TAJ J. CLAYTON, PC
25	05/20/2022	NOTICE OF HEARING W/ PS RE: MOTION'S FOR PRO HAC VICE
24	05/17/2022	HEARING SET: EVENT: MOTION (MISC) DATE: 05/27/2022 TIME: 10:00 AM JUDGE: STOKES, WANDA M. LOCATION: MASON COURTHOUSE RESULT: HEARING HELD ON THE RECORD
23	05/17/2022	NOTICE RE: MOTION FOR EXPEDITED CONSIDERATION ON 05/27/22 W/ PS
22	05/16/2022	MOTION FEE RECEIPT: 494040 DATE: 05/16/2022
21	05/16/2022	ATTORNEY GENERAL'S MOTION FOR EXPEDITED CONSIDERATION OF CROSS MOTIONS FOR SUMMARY DISPOSITION W/ BRIEF IN SUPPORT, AND PS
20	04/29/2022	ATTORNEY GENERAL'S MOTION TO EXCEED PAGE LIMITATION
19	04/29/2022	ATTORNEY GENERAL'S CONSOLIDATED CROSS-MOTION FOR SUMMARY DISPOSITION AND BRIEF IN SUPPORT (AND IN RESPONSE TO DEF'S SUMMARY DISPOSITION MOTION) W/ APPENDIX
18	04/29/2022	MOTION FEE RECEIPT: 493269 DATE: 04/29/2022
17	04/29/2022	PROOF OF SERVICE RE: ATTORNEY GENERAL'S MOTION FOR CROSS-SUMMARY DISPOSITION W/ APPENDIX, MOTION TO EXCEED PAGE LIMIT, AND APPEARANCE
16	04/29/2022	APPEARANCE OF COUNSEL ON BEHALF OF PLTF ATTORNEY: HAMMAKER III, CARL J (81203)
15	04/27/2022	HEARING ADJOURNED THE FOLLOWING EVENT: SCHEDULING CONFERENCE SCHEDULED FOR 05/03/2022 AT 8:00 AM HAS BEEN RESULTED AS FOLLOWS: RESULT: C30 ADJOURNED JUDGE: STOKES, WANDA M. LOCATION: MASON COURTHOUSE RESULT STAFF: STAFF: COURT REPORTER0001
14	04/22/2022	DOCKET ENTRY ERROR
13	04/05/2022	NOTICE OF HEARING W/ PS
12	03/31/2022	HEARING SET: EVENT: MOTION FOR SUMMARY DISPOSITION DATE: 09/14/2022 TIME: 1:00 PM JUDGE: STOKES, WANDA M. LOCATION: MASON COURTHOUSE RESULT: C30 ADJOURNED
11	03/31/2022	HEARING SET: EVENT: MOTION FOR SUMMARY DISPOSITION DATE: 09/14/2022 TIME: 1:00 PM JUDGE: STOKES, WANDA M. LOCATION: MASON COURTHOUSE RESULT: C30 ADJOURNED
10	03/28/2022	MOTION FEE RECEIPT: 491852 DATE: 03/28/2022
9	03/28/2022	DEF ELI LILLY AND CO'S MOTION FOR SUMMARY DISPOSITION W/

		BRIEF IN SUPPORT, AND PS
8	03/28/2022	APPENDIX OF UNPUBLISHED AUTHORITY
7	03/21/2022	HEARING SET: EVENT: SCHEDULING CONFERENCE DATE: 05/03/2022 TIME: 8:00 AM JUDGE: STOKES, WANDA M. LOCATION: MASON COURTHOUSE RESULT: C30 ADJOURNED
6	03/21/2022	ORDER AND NOTICE OF SCHEDULING CONFERENCE W/ PS
5	03/09/2022	STIPULATED ORDER EXTENDING DEF'S ELI LILLY AND COMPANY'S DATE TO RESPOND TO PLT'S COMPLAINT
4	03/08/2022	ENTERED IN ERROR RECEIPT 490928 REVERSED BY 490975 ON 03/08/2022.
3	03/07/2022	APPEARANCE ON BEHALF OF ELI LILLY AND COMPANY W/ PS ATTORNEY: SCHNEIDER, MATTHEW (62190) ATTORNEY: BROOKS, KENNETH T. (33834) ATTORNEY: UNDERKOFFLER, KEITH DAVID (84854)
2	01/25/2022	COMPLAINT FILED RECEIPT: 488973 DATE: 01/25/2022
1	01/25/2022	SUMMONS ISSUED

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STATE OF MICHIGAN

COURT OF APPEALS

ATTORNEY GENERAL,

Plaintiff-Appellant,

v

ELI LILLY AND COMPANY,

Defendant-Appellee.

UNPUBLISHED
June 22, 2023

No. 362272
Ingham Circuit Court
LC No. 22-000058-CZ

Before: RIORDAN, P.J., and BORRELLO and BOONSTRA, JJ.

PER CURIAM.

In this case involving the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq*., plaintiff, the Attorney General of Michigan, appeals as of right an order granting summary disposition under MCR 2.116(C)(8) to defendant Eli Lilly and Company. We affirm.

On January 25, 2022, plaintiff filed a petition for civil investigative subpoenas, seeking to "commence an investigation under the MCPA into [defendant's] practices in pricing analog insulin." The MCPA makes unlawful any "[u]nfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce[.]" MCL 445.903(1). Plaintiff also filed a complaint for a declaratory judgment, seeking a declaration that the MCPA "applies to the conduct she seeks to explore in the Petition."

The dispute over whether the MCPA applies involves two Supreme Court opinions, *Smith v Globe Life Ins Co*, 460 Mich 446; 597 NW2d 28 (1999), superseded in part by statute as stated in *Dell v Citizens Ins Co of America*, 312 Mich App 734; 880 NW2d 280 (2015), and *Liss v Lewiston-Richards, Inc*, 478 Mich 203; 732 NW2d 514 (2007). Those opinions interpreted MCL 445.904(1)(a), a provision of the MCPA that exempts from the act "[a] transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States." Simply put, the Court in *Smith* and *Liss* concluded that if a general category of conduct or a general transaction is specifically authorized by law, the § 4(1)(a) exemption applies, even if the granular transaction or conduct might otherwise be improper. See *Smith*, 460 Mich at 465 (explaining that the proper inquiry "is whether

the general transaction is specifically authorized by law, regardless of whether the specific misconduct alleged is prohibited"); *Liss*, 478 Mich at 212 (quoting same).

The trial court concluded that, on the basis of *Smith* and *Liss*, plaintiff's complaint for declaratory relief was not viable as a matter of law because the actions plaintiff sought to investigate were specifically authorized by law. In other words, defendant was authorized by law to manufacture and sell insulin. Thus, the trial court granted defendant's motion for summary disposition and dismissed the case.

Plaintiff filed a claim of appeal in this Court, as well as a bypass application for leave to appeal in our Supreme Court. Our Supreme Court denied the bypass application but directed this Court to "expedite its consideration of this case." *Attorney Gen v Eli Lilly & Co*, ___ Mich ___; 982 NW2d 395 (2022).

This Court reviews de novo a trial court's grant of summary disposition under MCR 2.116(C)(8). *Dalley v Dykema Gossett*, 287 Mich App 296, 304; 788 NW2d 679 (2010). "Questions of statutory interpretation, construction, and application are reviewed de novo." *Johnson v Johnson*, 329 Mich App 110, 118; 940 NW2d 807 (2019).

In the present case, it is not in dispute that defendant manufactures and sells drugs, including insulin, pursuant to licenses issued under Part 177 of the Public Health Code, MCL 333.17701 *et seq*. Clearly, then, under *Smith* and *Liss*, the § 4(1)(a) exemption applies. The trial court correctly reached that conclusion in its order dismissing the case. Indeed, plaintiff concedes in her brief on appeal that "affirmance is currently required in light of *Smith* and *Liss*."

However, plaintiff asserts that, in light of our Supreme Court's denial of her bypass application, our Supreme Court implicitly indicated to this Court that it should consider her arguments that *Smith* and *Liss* were wrongly decided. Plaintiff argues that this Court should issue an opinion urging our Supreme Court to overturn the pertinent holdings in *Smith* and *Liss*. We decline the invitation to do so.

Our Supreme Court is responsible for overturning its own precedent and can do so if it chooses. "It is the duty of the Supreme Court to overrule or modify [its] caselaw . . . , and the Court of Appeals and the lower courts are bound by the precedent established by the Supreme Court until it takes such action." *People v Metamora Water Serv, Inc*, 276 Mich App 376, 387-388; 741 NW2d 61 (2007). We note that our Supreme Court, in other cases, has expressly directed this Court to address one or more specific issues. See, e.g., *People v Samuels*, 507 Mich 928 (2021); *Schutt v Suburban Mobility Auth for Regional Trans*, 507 Mich 897 (2021); *Woodring v Phoenix Ins Co*, 501 Mich 883 (2017). It did not do so here. Thus, the denial of plaintiff's bypass application may signal nothing more than the fact that our Supreme Court concluded that none of the discretionary grounds for granting such an application were satisfied. See MCR 7.305(B)(4).

Affirmed.

/s/ Michael J. Riordan
/s/ Stephen L. Borrello
/s/ Mark T. Boonstra

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DEPARTMENT OF ATTORNEY GENERAL

Michigan Department of Attorney General

Fiscal Year 2024

Budget Presentation

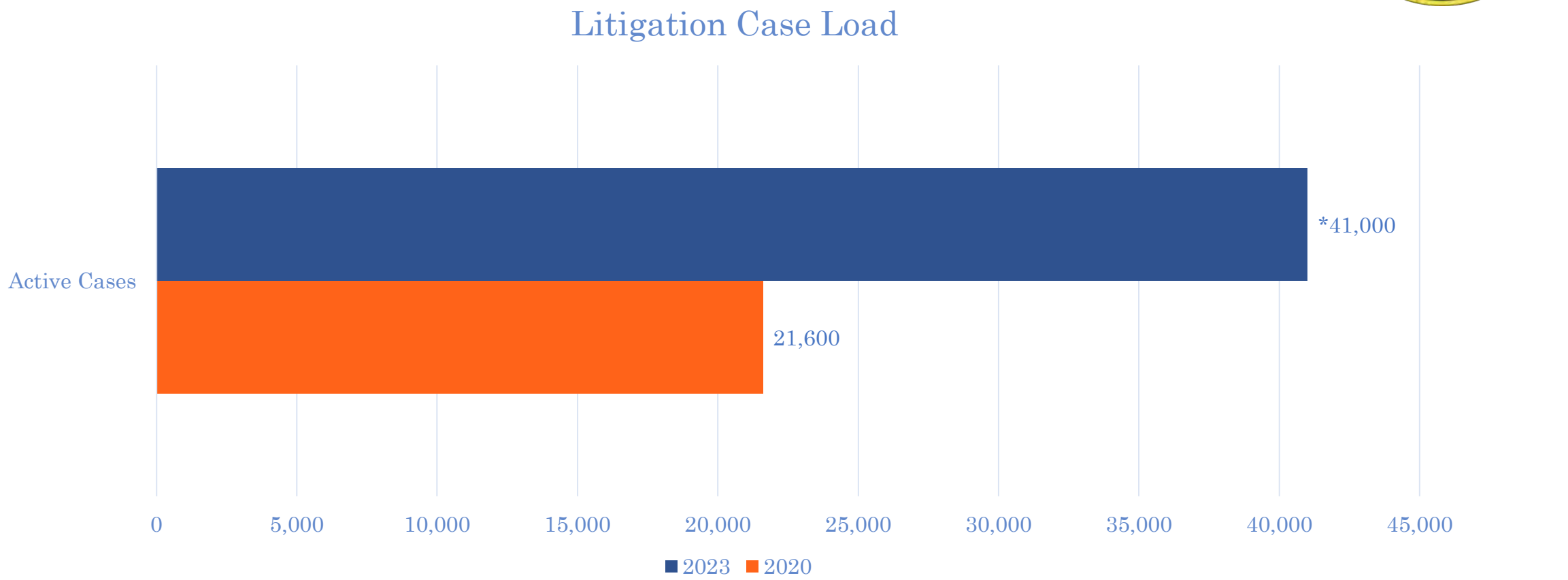
Michigan State House

March 7, 2023

Departmental Overview

- The Attorney General is a constitutional officer, the chief law enforcement officer of the state, and head of the Department of Attorney General, a department within the executive branch of state government. The Attorney General's duties are derived from common law, prescribed by statute, court decisions, and tradition.
- The Attorney General is the lawyer for the State of Michigan, the Governor, and the People. When public legal matters arise, she renders opinions on matters of law and provides legal counsel for each officer, department, board, and commission of state government. She provides legal representation in court actions and assists in the conduct of official hearings held by state agencies.
- The Attorney General may intervene in any lawsuit, criminal or civil, in the interest of the People of the State of Michigan. She advises and supervises prosecuting attorneys throughout the state. The Attorney General also possesses certain investigative powers, including the power to investigate allegations of election fraud and complaints for the removal of public officials. She may also request grand jury investigations of crime in the state. By virtue of her office, the Attorney General is a member of various state boards and commissions.
- The Department is organized into three bureaus that oversee twenty-three divisions. Each division represents certain state agencies, boards, or commissions or practices in specialized legal areas.

Departmental Overview



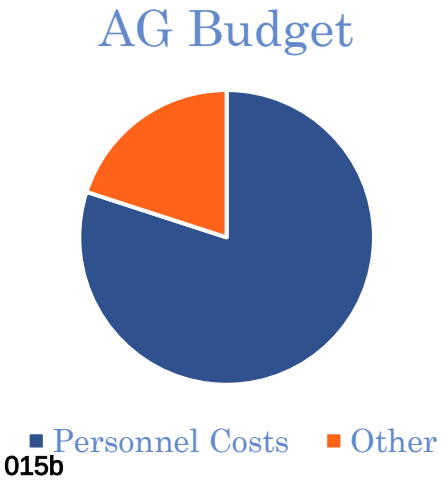
** Anticipated annualized active case load exceeding 41,000 cases for the coming year. This does not include active investigations, expungement application processing, client level advice, and training across the state.*

Departmental Overview

The Attorney General employs a staff of:

- Assistant attorneys general
- Legal assistants
- Investigators
- Victim advocates
- Clerical personnel
- Paralegals

80% of the Department's budget are personnel costs



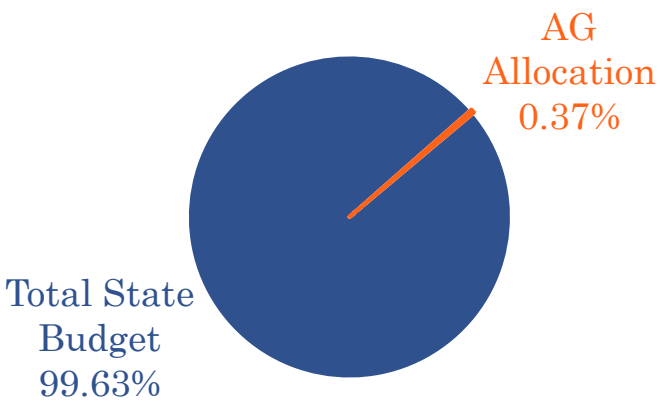
Private sector attorneys charge between 4 and 5 times the rate of an Assistant Attorney General

$600 Million in savings

Budgetary Impact

The Department operates on approximately 1/3 of 1% of the total State General Fund budget

State General Fund Expenditures



The Department's operational appropriations for FY 2022 was $105,216,100

$430 Million The Department won over $430 million in awards payable to the State and Citizens in FY2022.

$400 Million The Department has averaged over $400 million per year in awards payable to the State and Citizens during the past four fiscal years.

> $4 per $1 spent The Department has brought into the State an average of more than $4 for each dollar appropriated to it every year during the past four fiscal years.

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Line Item Appropriations

Governor's Recommendation FY 2024

Line Item	Amount	Funding Source	Use
1) Attorney General Operations			
Attorney General	$112,500	GF/GP	Funding for the Attorney General's salary
Unclassified Positions	$918,300	GF/GP	Funding for five Executive positions.
Operations	$104,937,500	$41,244,500 - GF/GP $36,114,300 - IDG $20,318,000 - Restricted $7,139,500 - Federal	All staff salaries, benefits, contractual services, supplies, materials, expert witnesses, travel, rent, worker's compensation, equipment, and other operation costs.
Child Support Enforcement	$3,733,400	$930,300 - GF/GP $2,803,100 - Federal	Provides funding for the Attorney General's Child Support Division, which includes salaries, benefits, contractual services, supplies, materials, travel, rent, equipment, and other operation costs.
Information Technology Services and Projects	$1,642,400	GF/GP	Provides funding for Department of Technology , Management and Budget related services.
Public Safety Initiative	$888,300	GF/GP	Provides funding for special assistant attorneys general and one support staff to prosecute crimes within distressed cities.
Sexual Assault Law Enforcement	$1,463,600	GF/GP	Provides funding for the Attorney General's sexual assault enforcement activities, which includes salaries and benefits for 5 FTEs, contractual services, supplies, materials, travel, equipment, and other operation costs.

Line Item Appropriations

Governor's Recommendation FY 2024

Line Item	Amount	Funding Source	Use
2) Prosecuting Attorney Coordinating Council (PACC)*	$2,702,400	$2,126,100 - GF/GP $455,100 - Restricted $121,200 - Federal	Provides funding for the Prosecuting Attorneys Coordinating Council, which includes salaries, benefits, contractual services, supplies, materials, travel, rent, equipment, and other operation costs. Provides funding for scholarships for tuition, travel, and state prosecutors training.
3) One-time Appropriations	$ 0		

*Appropriated separately – Type I Agency.

FY 2023 Cost Projections

FY 2023* Projected Costs by Category

Category	Projected Costs	Percentage of Budget
Personnel-Related Costs	$91,700,000	78%
Contractual Services, Expert Witness Fees, Supplies, and Maintenance	$19,200,000	16%
Rent	$ 3,625,000	3%
Information Technology	$2,150,000	2%
Travel	$1,200,000	1%
Equipment	$400,000	Less than 1%

TOTAL: $ 118,273,000

**FY2023 has $8.5 million in one-time appropriations for Job Court & Organized Retail Crime.*

FY 2024 Initiatives Comparison

2018 Initiatives

1. Human Trafficking
2. OK2SAY

FY 2024 Initiatives

1. Clergy Abuse Investigation
2. Boy Scouts of America Investigation
3. Sexual Assault Prosecution
4. Consumer Protection
5. Human Trafficking
6. Child Support Enforcement
7. Reducing Utility Rate Increases
8. Cold Case Homicides
9. Michigan Identity Theft Support
10. Job Court
11. Elder Abuse Task Force
12. PFAS Accountability
13. Auto Insurance Fraud Unit
14. Conviction Integrity Unit
15. Opioid Litigation
16. Public Integrity Unit
17. Robocall Enforcement
18. Organized Retail Crime
19. Hate Crimes & Domestic Terrorism Unit
20. Expungement Unit

Conviction Integrity Unit

- The Executive Recommendation includes **$1.01 million** in new funding for the Unit.
- The Conviction Integrity Unit (the "CIU") investigates claims of innocence to determine whether there is clear and convincing new evidence that the convicted defendant was not the person who committed the offense.
- The Department website includes information for claimants to submit applications to have their cases reviewed by email or by U.S. mail.
- This unit currently has over 850 open files, with cases that are in various stages. The unit also receives numerous new applications from claimants on a weekly basis.

Conviction Integrity Unit

Cases where relief has been granted

2021 **Gilbert Poole**
32 years in prison. Full exoneration

2022 **George DeJesus and Melvin DeJesus**
25 years in prison. Full exoneration for both.

2021 **Corey McCall**
16 years in prison. Full exoneration

2023 **Jeff Titus**
21 years in prison. Stipulated to a new trial.

In addition to the above 5 cases, the CIU work has **reviewed and closed over 900 cases**. This unit currently has **over 850 open files**, with cases that are in various stages. The unit also receives numerous new applications from claimants on a weekly basis.

Address Confidentiality Program

- In December 2020, Governor Whitmer signed the Address Confidentiality Program Act, 301 of 2020. The Address Confidentiality Program (ACP) was created to provide certain protections for victims of domestic violence, sexual assault, stalking, human trafficking, or those who fear that disclosure of their physical address will increase the risk of harm.
- ACP is a statewide confidentiality program administered by the Michigan Department of Attorney General. ACP operates to shield a program participant's actual physical address by providing an official designated/substitute address and free mail forwarding service.
- This program is statutorily required to take effect in October of 2023.

Organized Retail Crime Unit

- The ORC Unit will work statewide to investigate & prosecute cases of organized retail fraud
- This unit will work in conjunction with retailers, federal, state, and local law enforcement, and county prosecutors.
- The Coalition of Law Enforcement & Retail Association estimates that ORC accounts for around $45 billion in annual losses, with nearly $1 billion in Michigan alone.
- ORC is also a safety threat to retail workers, with a quarter of retailers saying they have seen an increase in aggression by criminals. It is also responsible for driving up costs for retailers, which in turn are passed along to consumers or can lead to the closing of storefronts.
- The uniqueness of these cases requires a specialized team that can operate statewide and can focus on these cases.

Job Court

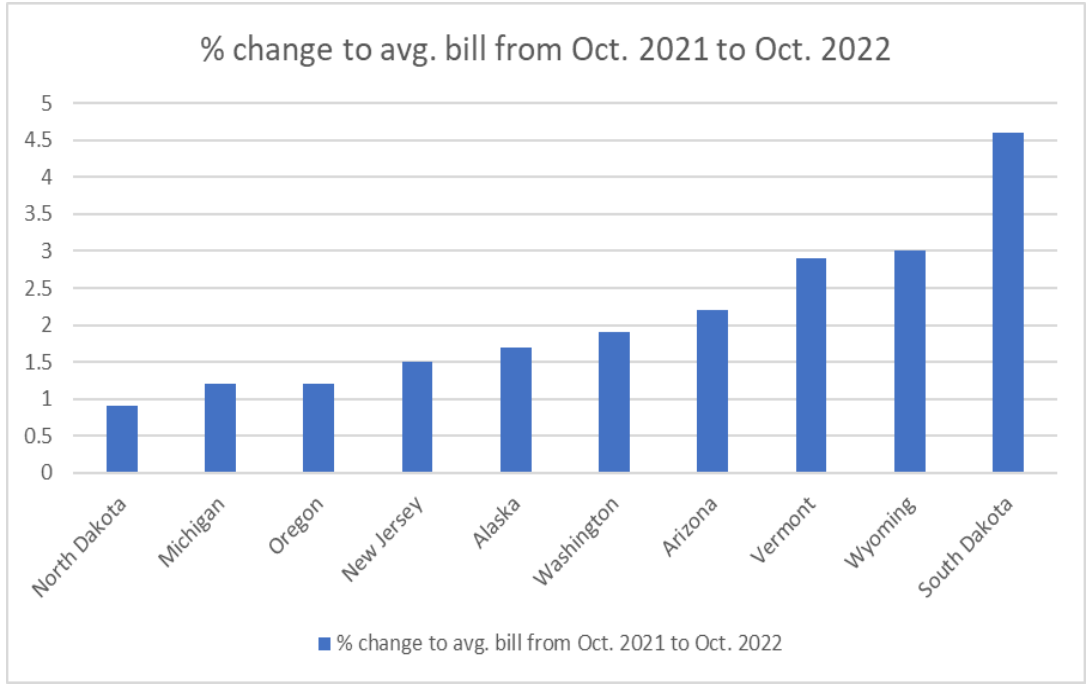
Job Court is a pilot program and will serve as a diversion program for certain offenders by connecting them with gainful employment.

- Participants would be monitored for one year and be required to maintain frequent and open lines of communication with the employer. Participants will receive wraparound services from the state of Michigan to ensure accountability and compliance with the requirements of the program. Prosecutors would have the option to dismiss charges against Job Court participants who successfully complete the program, which will be dependent on legislative action to launch.
- This will also allow courts to reduce their criminal backlog.

Reducing Utility Rate Increases

- In 2022, the AG helped save customers over **$350 million** by reducing DTE's electric rate increase by over **90%** thus reducing a proposed 9% increase to monthly bills to less than 1%.
- Similarly, the AG helped reduce Consumers Energy electric rate increase by nearly 50% along with $10 million donation to low-income assistance.
- In Consumers Energy Integrated Resource Plan, the AG helped save hundreds of millions rejecting several natural gas power plants, increase 8,000 MW of solar generation by 2040, and obtain a $33 million donation over 15 years for low-income assistance.
- In 2022, the AG helped save customers $1,055,372,128.
- Since taking office, the AG has helped save over $2.4 billion for customers
  - For every $1 invested the AG has returned roughly $2,400 in savings to customers using less than half the staff of the average utility consumer advocate office around the country.
- Since taking office, the AG has doubled the number of active cases, opening 28 cases and 8 multistate filings in 2022.

- The AG works closely with other advocates across the state and country to help reduce emissions and increase renewables while maintaining a focus on affordability.
- Michigan was second among the ten states with the smallest increase in electricity bills.



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Source: Save on Energy.com, Electricity Bill Report: Who paid the most, least? 1/05/2023

Robocall Enforcement

- Robocall Enforcement initiative was launched in November 2019 to focus on Federal, state, and industry cooperation, consumer education, increased enforcement, and statutory updates and we have become a national leader in this area.

- The Department website includes a page dedicated to robocalls, including background on how robocalls work, consumer education relating to robocall scams, and ways for consumers to protect themselves and report robocalls.

- Attorney General Nessel – in partnership with Ohio Attorney General Yost – hosted the national Robocall Summit in Detroit in July 2022. The Summit – attended by law enforcement from around the country – provided concrete information for use in bringing and litigating robocall cases.

- The Department joined the Executive Committee of the newly formed 50-State Anti-Robocalling Litigation Task Force in June 2022. The purpose of the Task Force is to identify, investigate, and take legal action against gateway VoIP providers responsible for bringing a majority of illegal foreign robocalls into the U.S.

- The Department has joined seven other states in bringing a lawsuit in the Southern District of Texas (Houston) against Rising Eagle Capital Group, LLC, et al., for various violations of the Telephone Consumer Protection Act by, among other things, making robocall solicitations to consumers on the Do Not Call Registry in each of the Plaintiff States; (Arkansas, Indiana, Michigan, Missouri, North Carolina, North Dakota, Ohio, and Texas). The case will likely be tried in late April/early May 2023.

- The Department provided several educational presentations on illegal robocalls to constituent groups. This included presentations by Attorney General Nessel to senior groups about phone calls pitching grandparent, IRS, and sweepstakes scams.

- The Department received 1,272 robocall complaints in 2022. Since the launce of the 2019 launch of the initiative, our Department has received more than 11,894 robocall complaints since the 2019 launch.

Human Trafficking

- Department's Human Trafficking Initiative was established in 2011

- Since 2019, in over 30 presentations to over 3,000 people, the Human Trafficking Initiative provided training to approximately 200 Law Enforcement professionals, 350 legal professionals, 800 medical professionals, 800 various other professionals, as many as 1,000 various other professionals and about 400 members of the general public.

- We've have arrested 34 individuals on human trafficking charges, secured 25 convictions, with cases against other defendants currently pending.

- The Legislature created the standing Michigan Human Trafficking Commission within the Department of Attorney General, whose members are appointed by the Governor to represent various groups and public officials.
  - In 2019, the commission recommended a new package of roughly 30 human trafficking bills aimed at expanding training requirements for certain professionals, strengthening tools to hold traffickers accountable, expanding protections for victims of trafficking, and revising the criminal justice system's approach to commercial sexual activity, otherwise known as prostitution. This proposal was reintroduced in 2021 and the Department continues to work with the legislature to ensure passage.

Opioid Enforcement

- In 2021 and 2022, Attorney General Nessel participated in opioid settlements with McKinsey & Co., McKesson Corporation, AmerisourceBergen Corporation, Cardinal Health, Inc., and Janssen Pharmaceutical. These settlements will result in nearly $800 million for Michigan governments, over the next 18 years, to abate the opioid crisis. To date, the State of Michigan has received nearly $100 million, and Michigan local governments have received nearly $82 million.

- In 2022 and 2023, Attorney General Nessel announced additional opioid settlements in principle with Teva Pharmaceuticals, Allergan Pharmaceuticals, CVS Pharmacy, and Walmart Pharmacy. These settlements could result in an **additional $446 million for Michigan governments**.

- Attorney General Nessel continues to work on additional opioid settlements that will benefit Michigan. This includes the Purdue Pharmaceutical bankruptcy, where the Attorney General participates in a committee representing government claimants. This committee continues to seek solutions that will ensure Purdue Pharmaceutical and the Sackler family are held accountable for their actions that created and nurtured the opioid crisis.

Consumer Protection

- The Department's Corporate Oversight Division houses the Consumer Protection Unit and enforce more than 35 state statutes that protect consumers and charities
- Direct consumer and state recoveries totaled over **$116.3 million** in 2022
- Alert consumers to scams, deceptive business practices, privacy threats, and emerging identity theft schemes. Over 138 consumer alerts on the AG website that staff monitor and update.
- Registers or licenses over 10,587 charities on a yearly basis and professional fundraisers that solicit from the public on a yearly basis. Investigates and enforces charitable trust laws against charities, professional fundraisers, and charitable trustees.
- Handles statewide consumer protection and antitrust enforcement efforts and investigations
- Leads and participates in multistate cases and investigations nationwide.
- The Michigan Identity Theft Support Unit (MITS) helps provide Michigan identity theft victims with resources and guidance in determining ways to minimize damage caused by identity theft. MITS handled 992 requests in 2022.

Sexual Assault Kit Initiative

- The Michigan Legislature appropriated $1.46 million dollars in 2022 for the investigation and prosecution of cases arising from previously untested sexual assault kits.

- These funds allowed cases to be revisited to determine if they could be prosecuted after having been tested in a lab for forensic evidence, in some cases many years after a sexual assault.

- The AG's office manages the funding of Special Assistant Attorney Generals in each of the Projects but leaves direct supervision of the Projects to the local, elected prosecutor of the county.

- The Project oversees investigation, victim services, and prosecution for cases that arise from the previously untested Sexual Assault Kits. The Department has MOUs with Calhoun, Washtenaw, Wayne, Kalamazoo, Ingham, and Jackson Counties:

• Kalamazoo County	226 cases with 32 active investigations, 12 cases pending in court and 12 convictions
• Calhoun County	210 cases with 40 closed, 4 case pending in court and 8 convictions
• Ingham County	127 investigations, 2 cases pending in court and 3 convictions
• Jackson County	67 investigations underway, and 2 convictions
• Washtenaw County	159 cases with open 20 open investigations, 3 pending in court
• Wayne County	Funds approved, awaiting hiring to add to task force with 222 convictions and over 800 serial offenders identified

Clergy Abuse Investigation

- Investigation launched in August of 2018 in partnership with the Michigan State Police
  - 1.5 million paper documents and 3.5 million digital documents recovered

- A hotline for victims, family members of victims, and members of the general public is staffed by a full-time victim advocate to provide immediate referrals for those in need. To date, the Department has received over 1000 calls, letters and emails.

- The investigation has yielded the following results:
  - 112 police investigations
  - Identified **454** abusive clergy members
  - Identified **811** victims of abuse
  - 242 cases reviewed for criminal prosecution
  - 11 charged defendants with 7 criminal convictions
  - 32 volunteers have worked many hours of unpaid time

- All documents have been reviewed.

Boy Scouts of America Investigation

- The Department is examining a total of 5,000 claims sent from BSA national for review.

- Currently, a completed review of 550 claims resulted in roughly 60 inquiries sent to MSP for further investigation.

- In October of last year, the investigation yielded its first guilty plea on first and second degree criminal sexual assault counts.

Elder Abuse Task Force

- The Elder Abuse Task Force has been jointly launched with the Attorney General, Michigan Supreme Court, and more than 55 agencies that provide services that affect vulnerable adults and senior citizens.
  - Sen. Paul Wojno, Senator Roger Victory, and Rep. Graham Filler represent the Republican and Democratic Caucuses in the Senate and House of Representatives.
  - Created to implement systemic changes that were recommended by the 1998 Supreme Court Task Force and the 2007 Governor's Task Force, to assess current shortfalls and problems in the system and address them.

- An Elder Abuse Unit has been created in the Financial Crimes Division to investigate and prosecute financial exploitation cases. Four prosecutors and three investigators have been allocated to this unit.

- Statewide Elder Abuse investigation form has been rolled out in conjunction with law enforcement agencies in order to streamline reporting and increase accountability and transparency.

- Online trainings have been developed and are currently in use statewide for stakeholders and the public to educate themselves on the issues surrounding elder abuse and how they can take an active role in pushing back.

- The Financial Exploitation Prevention Act requires financial institutions to report vulnerable adult financial exploitation to law enforcement or adult protective services.

- This new law has resulted in numerous cases being brought by my department and led to restitution being paid to multiple victims.

PFAS Accountability

- The Attorney General has filed multiple lawsuits since January 2020 against PFAS manufacturers, distributors, and users. For the manufacturer lawsuits, the Attorney General is working with Special Assistant Attorneys General (SAAGs) retained because of their expertise in bringing claims against manufacturers of harmful products.
- The first suit against PFAS manufacturers seeks damages, past costs, and remediation for Michigan resources impacted by PFAS other than firefighting foam. That case survived multiple motions to dismiss and is currently pending in the Multi-District Litigation on PFAS, on a track with other state and local governments. The State has a pending motion to bring the PFAS manufacturers case back to Michigan.
- The Attorney General, with the SAAG team, filed two more lawsuits against manufacturers of PFAS-containing firefighting foam known as AFFF (aqueous film-forming foam). One case seeks damages and costs for impacts from commercial AFFF, and the other for impacts from Mil-Spec foam. These 2 cases are pending in the Multi-District Litigation.
- In January 2023, the State reached a settlement in its case against Asahi Kasei Plastics North America for PFAS contamination from its former facility near Brighton, Michigan. The settlement requires Asahi to investigate PFAS in soil, groundwater, and surface water discharged from their former facility, and to undertake response actions to address levels that exceed state criteria. In addition to the required investigation and response actions to address exceedances of PFAS criteria, the settlement requires Asahi to pay the State's past and future oversight costs and costs of litigation, including the attorney fees of the SAAGs for this matter, which means that these costs will not be shifted to taxpayers.
- In the past year, the AG filed two new PFAS lawsuits against companies that have released PFAS into the environment in Michigan. The first, filed in Kent County, is against FKI Hardware and its predecessors for PFAS and other contamination related to its plating operations going back over one hundred years. The second case is against Domtar Industries, a paper manufacturer whose PFAS-contaminated sludges impacted the environment in St. Clair County.
- The Attorney General continues to oversee implementation of the 2020 Consent Decree with Wolverine Worldwide Inc. that resolved the AG's lawsuit against Wolverine for contaminating drinking water and the environment in North Kent County. The settlement requires Wolverine to pay $69.5 million to extend municipal water to over 1,000 properties; over 650 homes are already connected, with construction for remaining lines ongoing. The settlement also requires Wolverine to maintain and replace water filters; to continue sampling residential wells and monitoring groundwater in the area; to investigate impacts to surface waters; and to undertake response activities at source areas.

Child Support Enforcement

- Child Support Division was created in 2003 to combat the problem of unpaid child support
- The mission of the Child Support Division is to enforce child support orders by prosecuting those individuals who have a history of non-payment and have significant arrearages of at least $5,000
- Investigators in the Attorney General's Child Support Division identify parents who can pay support to their children but refuse to do so.
- In Fiscal Year 2022 over **$22 million dollars** were collected for child support.
- Complaints can be filed online by visiting www.michigan.gov/ag or by calling the Financial Crimes Division at 517-335-7560. ***Please refer your constituents in need of help to our office.***

Hate Crimes and Domestic Terrorism

Hate Crimes & Domestic Terrorism unit investigates and prosecutes hate crimes and acts of domestic terrorism by following up on tips and providing departmental resources to local and federal law enforcement partners, and resources to community partners.

- Notable cases include:
  - Wolverine Watchman: Three members of the Wolverine Watchmen were sentenced to years behind bars. Joseph Morrison, Paul Bellar and Pete Musico appeared before Judge Thomas Wilson of the 4th Circuit Court in Jackson County, and each were sentenced up to 20 years in prison.
  - "The Base" (Justen Watkins, Tristan Webb, Alfred Gorman): The Base is a white supremacy gang that openly advocates for violence and criminal acts against the U.S. All 3 defendants plead guilty to various felonies.

The unit takes threats of violence seriously and have at least 9 convictions for cases involving threats against elected officials.

Other Specialized Units

- Public Integrity Unit was formed in the Criminal Division in 2011 and prosecutes those that breach the public trust or steal taxpayer dollars. The Public Integrity Unit has been expanded to include in-custody deaths and police-involved shootings referred to us by local prosecutors, local law enforcement agencies or the Michigan State Police.

- Payroll Fraud Enforcement Unit was established to go after shady actors committing payroll fraud, strengthen whistleblower protections to shield employees who report wrongdoing, and toughen penalties against payroll fraud to make Michigan a leader in protecting workers.

Funding Issues

- The Department of Attorney General is funded by both General Fund and Restricted Fund sources, with the majority coming from IDGS from other state departments.
- There is a significant need in this department to increase general revenue dollars to handle an influx of cases we're seeing come to us through other county prosecutors' offices, as well as address complex cold case homicide and sexual assault cases that only the department can handle.
- To address this issue, we are requesting an additional **$4.5 million** in General Fund resources above the Executive Recommendation.

Questions?

4

Legislative Analysis

Mary Ann Cleary, Director
Phone: (517) 373-8080
http://www.house.mi.gov/hfa

MCPA INSURANCE EXEMPTIONS

House Bill 5558 as enacted
Public Act 251 of 2014
Sponsor: Rep. Tom Leonard

House Committee: Judiciary
Senate Committee: Insurance

Complete to 7-2-14

A SUMMARY OF HOUSE BILL 5558 AS ENACTED

The Michigan Consumer Protection Act contains provisions that prevent consumers from using the act to bring a private cause of action (a lawsuit) against an insurance company for committing unfair, unconscionable, or deceptive methods, acts, or practices in violation of Chapter 20 of the Insurance Code.

House Bill 5558 amends the Michigan Consumer Protection Act to specify that this prohibition applies to methods, acts, and practices occurring before, on, or after March 28, 2001. The bill states that its provisions are retroactive to and effective as of March 28, 2001, and that it is curative and intended to prevent any misinterpretation that that may result from the decision of the Michigan Supreme Court in *Converse* v *Auto Club Group Ins Co*, No. 142917, October 26, 2012.

(The bill specifically says it is intended to prevent any misinterpretation that the MCPA applies to or creates a cause of action for an unfair, unconscionable, or deceptive method, act, or practice occurring before March 28, 2001, that is made unlawful by Chapter 20 of the Insurance Code.)

However, the bill ***would not*** apply to or limit a cause of action filed with a court concerning a method, act, or practice that occurred before March 28, 2001, ***if*** the cause of action had been filed in a court of competent jurisdiction on or before June 5, 2014. (June 5, 2014, is the date that House Bill 5558 was amended on the House floor to allow cases currently in the pipeline, so to speak, to go forward to completion.)

Lastly, the bill makes technical corrections to citations to the Michigan Public Service Commission Act and the Credit Union Act.

MCL 445.904

BACKGROUND INFORMATION:

The issue the bill addresses is whether a consumer may sue an insurance company under the Michigan Consumer Protection Act (MCPA) for damages resulting from unfair,

unconscionable, or deceptive methods, acts, or practices in violation of Chapter 20 of the Insurance Code that occurred on or before March 28, 2001; or if legal actions based on such a claim can only be made under pertinent provisions of the Insurance Code.

The March 28, 2001, date cited in the statute is the effective date of legislation (Public Act 432 of 2000) that put the current prohibition against such lawsuits into the MCPA. So, the question that has arisen is: did PA 432 intend to apply only prospectively or was it intended to apply as well to cases prior to its effective date (as an amendment aimed at just clarifying and restating the proper relationship between the Insurance Code and the MCPA)?

Recent court decisions have addressed this (as described later), including a 2012 order by the Michigan Supreme Court that appeared to say that a plaintiff can seek to recover damages resulting from methods, acts, or practices violative of the MCPA based on conduct by a [insurance company] defendant occurring [before] March 28, 2001, as long as the action was timely filed.

The current bill has been introduced in response to (and to counteract) those decisions.

Briefly put, when the MCPA was enacted in 1976, it put in place a provision that says that the act does not apply to "a transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States." [Section 4(1)(a)]

It also contained provisions, in Section 4(2)(a), stating that *except for the purposes of an action filed by a person under Section 11*, the act did not apply to unfair, unconscionable, or deceptive methods, acts, or practices made unlawful by any of a number of regulatory statutes. One of the cited statutes is Chapter 20 of the Insurance Code. Chapter 20 deals with unfair and prohibited trade practices and frauds and contains within it the Uniform Trade Practices Act.

Section 11 of the MCPA allows private individuals to bring a private cause of action, including obtaining a declaratory judgment that a method, act, or practice is unlawful under the MCPA; obtaining injunctive relief; seeking actual damages or $250, whichever is greater, and reasonable attorney fees; and bringing a class action for damages caused by unlawful methods, acts, or practices.

In 1999, the Michigan Supreme Court upheld a person's right under Section 4(2)(a) to bring a cause of action under Section 11 of the MCPA against an insurance company for deceptive practices made unlawful by Chapter 20 of the Insurance Code. [*Smith* v *Globe*, 460 Mich 446 (1999)] In response to the *Smith* decision, the Legislature enacted Public Act 432 of 2000, which eliminated the reference to Chapter 20 of the Insurance Code from Section 4(2)(a) and, instead, specifically stated that the MCPA does not apply to or create a cause of action for an unfair, unconscionable, or deceptive method, act, or practice made unlawful by Chapter 20 of the Insurance Code.

Public Act 432 took effect March 28, 2001. Subsequently, in *Converse* v *Auto Club Group Insurance Company*, the Michigan Court of Appeals stated that with "regard to claims accruing before March 28, 2001, private actions against an insurer were permitted pursuant to MCL 445.911 of the MCPA" (that is, Section 11) "arising out of misconduct made unlawful by chapter 20 of the insurance code." [Docket No. 293303 (2011)]

The ability to pursue claims arising from an insurance company's actions that occurred before March 28, 2001, when PA 432 took effect, was echoed in an order issued by the state Supreme Court on October 26, 2012, as noted earlier. In the order, generally speaking, the state Supreme Court determined that a plaintiff can seek to recover damages resulting from methods, acts, or practices violative of the MCPA based on conduct by a insurance company defendant occurring before March 28, 2001, as long as it was timely filed. [*Converse* v *Auto Club Group Ins Co*, Docket No. 142917 (October 26, 2012)]

House Bill 5558, as enrolled, has the effect of counteracting the holdings of the Michigan Court of Appeals and Supreme Court, and the bill specifically says it is curative in nature. Thus, since the bill is retroactive, it is clear that consumers may not bring an action against an insurer under Section 11 of the MCPA for practices branded unfair by Chapter 20 if the conduct of the insurer happened before, on, or after March 28, 2001 when PA 432 became law. However, a narrow exception is provided for lawsuits currently being litigated (specifically, those actions filed on or before June 5, 2014, which was the date the exception language was added by a House floor amendment).

Brief arguments in support of the bill

Simply stated, supporters say that the bill definitively and with absolute clarity amends the MCPA to do what it was meant to do when it was created in 1976. Supporters maintain that the original intent of the act was to make the Insurance Code the proper statute for the regulation of the trade practices of insurance companies and other participants in the insurance industry. They say there is no need for duplicative remedies in the MCPA. Those aggrieved by actions on the part of insurance companies have ample protections under Chapter 20 of the Insurance Code. State insurance regulators are up to the task of responding to and resolving consumer complaints, as well as taking administrative actions against insurers who violate the Code.

Supporters say that when Public Act 432 of 2000 put the current prohibition against lawsuits for claims against insurance companies into the MCPA, it was not intended to apply only prospectively but was intended to apply in all instances regardless of their date of occurrence; it was intended to restore the appropriate relationship between the MCPA and the Insurance Code.

Brief arguments in opposition to the bill

Opponents of the bill say that an analysis of the beginnings of the MCPA support the view that the act was intended only to exempt actions by insurers that are "permitted"

under laws administered by state and federal government officials or boards. This was to protect professional conduct permitted under those other laws and regulatory structures from interference by lawsuits brought under the MCPA. However, say critics of this bill, unfair, misleading, dishonest, and deceptive conduct on the part of an insurance company or insurance professional does not constitute permissible conduct, and was therefore never intended to be exempt from direct consumer lawsuits – which is why Section 11 of the MCPA originally allowed such lawsuits.

Opponents say that it is not true that consumers aggrieved in the past, present, or future have other effective avenues for remedies. They say the remedies under Chapter 20 are largely administrative, meaning that in response to consumer complaints, the Department of Insurance and Financial Services will investigate and levy minimal fines or license sanctions, or issue cease and desist orders, and so on. Reportedly, courts have consistently held that there is no private cause of action under Chapter 20 of the Insurance Code (Uniform Trade Practice Act), meaning that an aggrieved consumer cannot initiate a lawsuit directly against the insurance company or insurance professional.

Opponents also point to the harmful impact of this proposed legislation on injured individuals. Public Act 432 of 2000 has already stopped lawsuits initiated under the MCPA against insurance companies for deceptive trade practices occurring after March 28, 2001. The court cases that gave rise to House Bill 5558 involved persons who had suffered catastrophic injuries and who have been denied needed long-term medical and/or assistive services. The floor amendment allowing claims filed by June 5, 2014, to go forward greatly aids some of these individuals, but closes the door to others suffering similar wrongs at the hands of insurance customers who had been eligible to file claims under Section 11 of the MCPA but who had not yet done so; these would have been a finite number of claimants.

FISCAL IMPACT:

The bill would have no significant fiscal impact on the state or local units of government.

Legislative Analyst: Susan Stutzky
Fiscal Analyst: Marilyn Peterson

■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.

5

MICHIGAN DEPARTMENT OF ATTORNEY GENERAL

FISCAL YEAR 2025

House Appropriations
Subcommittee on General Government
Feb. 27, 2024

DEPARTMENTAL OVERVIEW

The Attorney General is a constitutional officer, the chief law enforcement officer of the state, and head of the Department of Attorney General, a department within the executive branch of state government.

The Attorney General's duties are derived from common law, prescribed by statute, court decisions, and tradition.

The Attorney General is the lawyer for the State of Michigan, the Governor, and the People.

When public legal matters arise, she renders opinions on matters of law and provides legal counsel for each officer, department, board, and commission of state government.

She provides legal representation in court actions and assists in the conduct of official hearings held by state agencies.

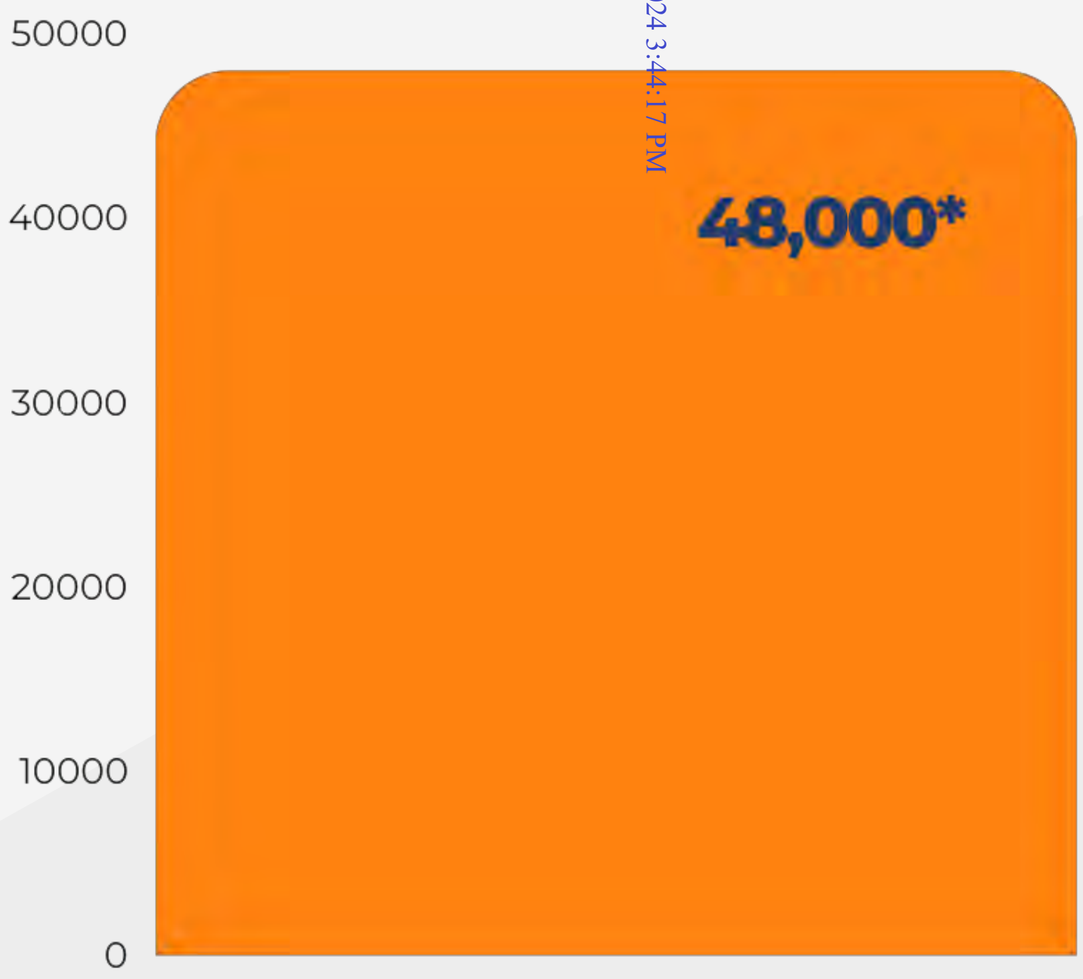
The Attorney General may intervene in any lawsuit, criminal or civil, in the interest of the People of the State of Michigan.

She advises and supervises prosecuting attorneys throughout the state. The Attorney General also possesses certain investigative powers, including the power to investigate allegations of election fraud and complaints for the removal of public officials. She may also request grand jury investigations of crime in the state. By virtue of her office, the Attorney General is a member of various state boards and commissions.

The Department is organized into three bureaus that oversee twenty-three divisions.

Each division represents certain state agencies, boards, or commissions or practices in specialized legal areas.

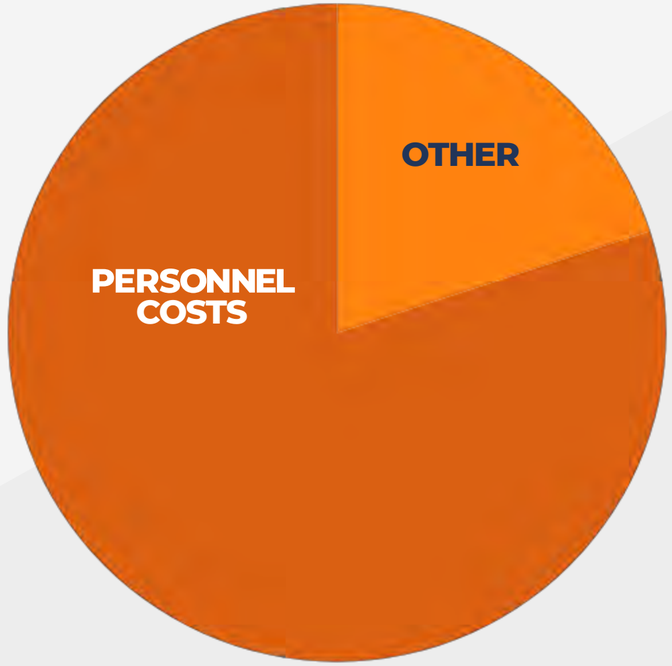
LITIGATION CASE LOAD



** Anticipated annualized active case load exceeding 48,000 cases for the coming year. This does not include active investigations, expungement application processing, client level advice, and training across the state.*

THE ATTORNEY GENERAL EMPLOYS A STAFF OF:

- Assistant attorneys general
- Legal assistants
- Investigators
- Victim advocates
- Clerical personnel
- Paralegals



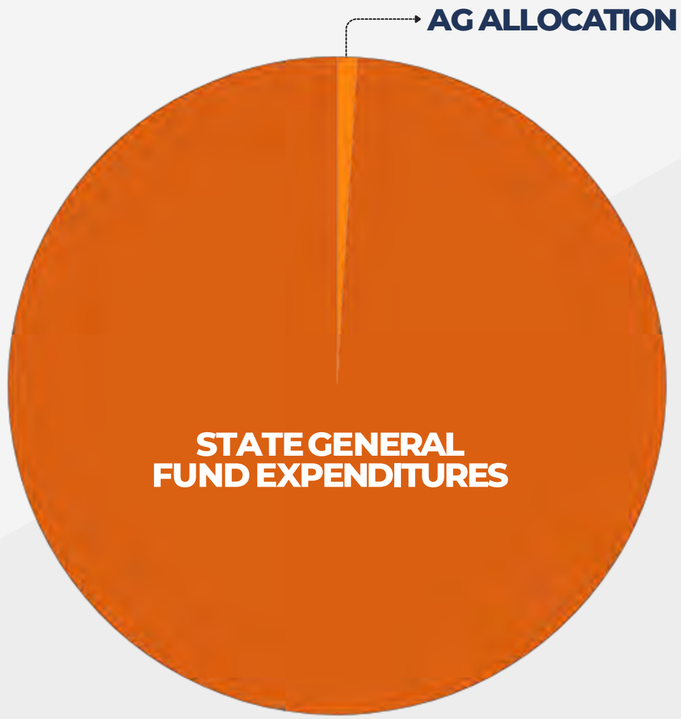
Private sector attorneys charge between 4 and 5 times the rate of an Assistant attorney general

$600M IN SAVINGS

BUDGETARY IMPACT

*The Department operates on approximately **1/3 of 1%** of the State General Fund Budget*

- **The Department's operational appropriations for FY 2023 was $108,121,000**
- The Department won over **$425 million in awards** payable to the State and Residents in FY 2023.
- The Department has **averaged over $400M per year in awards** payable to the State and Residents during the past four fiscal years.
- The Department has brought into the State an average of **more than $4 for each dollar appropriated** to it every year during the past four fiscal years.



$425M IN AWARDS

FY 2024 INITIATIVES

- Clergy Abuse Investigation
- Sexual Assault Prosecution
- Consumer Protection
- Human Trafficking
- Child Support Enforcement
- Reducing Utility Rate Increases
- Cold Case Homicides
- Michigan Identity Theft Support
- Job Court
- Elder Abuse Task Force
- MSU Nassar Records Review
- CID Accreditation
- PFAS Accountability
- Conviction Integrity Unit
- Opioid Litigation
- Public Integrity Unit
- Robocall Enforcement
- Organized Retail Crime
- Hate Crimes & Domestic Terrorism Unit
- Expungement Unit
- Small Business Identity Theft
- Address Confidentiality Program

CONVICTION INTEGRITY UNIT

The Conviction Integrity Unit (the "CIU") investigates claims of innocence.

6 Exonerations

Over 154 years served

Reviewed and closed over
900 CASES.

This unit currently has over
850 OPEN FILES
with cases that are in various stages.

This unit receives numerous ***new applications*** from claimants ***on a weekly basis.***

ADDRESS CONFIDENTIALITY PROGRAM

MICHIGAN
ADDRESS
CONFIDENTIALITY
PROGRAM

The Address Confidentiality Program (the "ACP") will help victims of violent crimes, and individuals at risk of being threatened or physically harmed, keep their address confidential.

121 individuals enrolled since Sept. 2023

The ACP has trained
256 people in 38 counties.

ACP has been presented to nearly *900 stakeholders.*

ORGANIZED RETAIL CRIME

Since April 2023

31 investigations
41 defendants charged
30 prosecutions
Almost $2M cash seized

Red Bull

7 people charged

8,000 EBT's compromised

Kitchen Aid

Losses in excess of $20K

3-10 year prison sentence

M-Perks

Nearly $500K in cash seized

Sam's Club

Loss of $20K

Home Invasion Crew

Over $1M in theft/losses to 8 homes

LuluLemon/Ulta

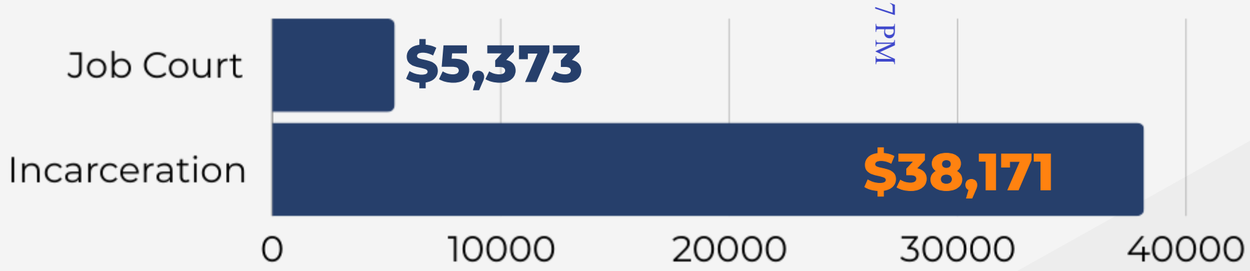
4 people charged
34 stores

FORCE

Special Agents
MSP
FBI
USPS

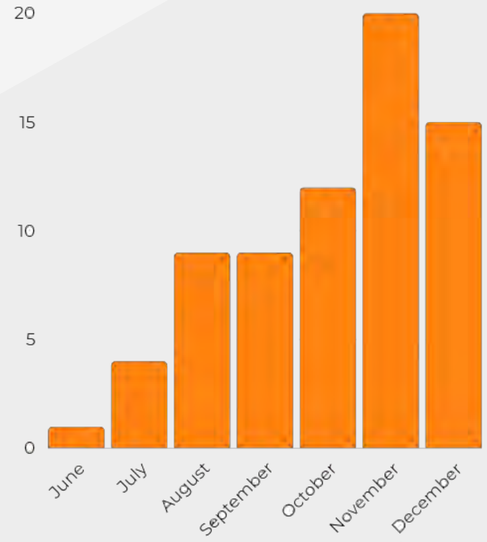
JOB COURT

Job Court is a pilot program in Genesee, Marquette, and Wayne counties.



The Job Court ***more than doubled its participant count*** in the last quarter.

JOB COURT WILL SAVE THE STATE REVENUE BY REDUCING THE NUMBER OF INCARCERATIONS



New Participant Intakes

The cost of incarceration for an inmate per year is approximately $38,171 versus the cost per participant for a year in the program is approximately $5,373.

MISSING, MURDERED INDIGENOUS PEOPLE

Improving Criminal Justice Response to Sexual Assault, Domestic Violence, Dating Violence, and Stalking Grant

Meetings

Quarterly meetings started in February 2024

Task Force

In development with stakeholders

LAW ENFORCEMENT ACCREDITATION PROGRAM

- Complied with the MLEAC's 108 accreditation standards.
- Developed and implemented more than 54 written directives, policies, and procedures.
- Developed and implemented more than 19 training programs and certifications.
- Invested in infrastructure enhancements
- Introduced law enforcement tools and equipment
- Focused on community engagement activities to foster positive relationships.

MICHIGAN IDENTITY THEFT SUPPORT

Michigan Identity Theft Support

Michigan Identity Theft Support (“MITS”) provides identity theft victims with resources and guidance.

Six steps for victims of identity theft.

Twelve educational presentations in 2023.

Handled 1,270 requests in 2023.

SMALL BUSINESS IDENTITY THEFT

Helping Michigan's small businesses

Assistance

Education, mediation, litigation, and legislation.

Presentations

The Attorney General's office is available for presentations in your community

Consumer Protection

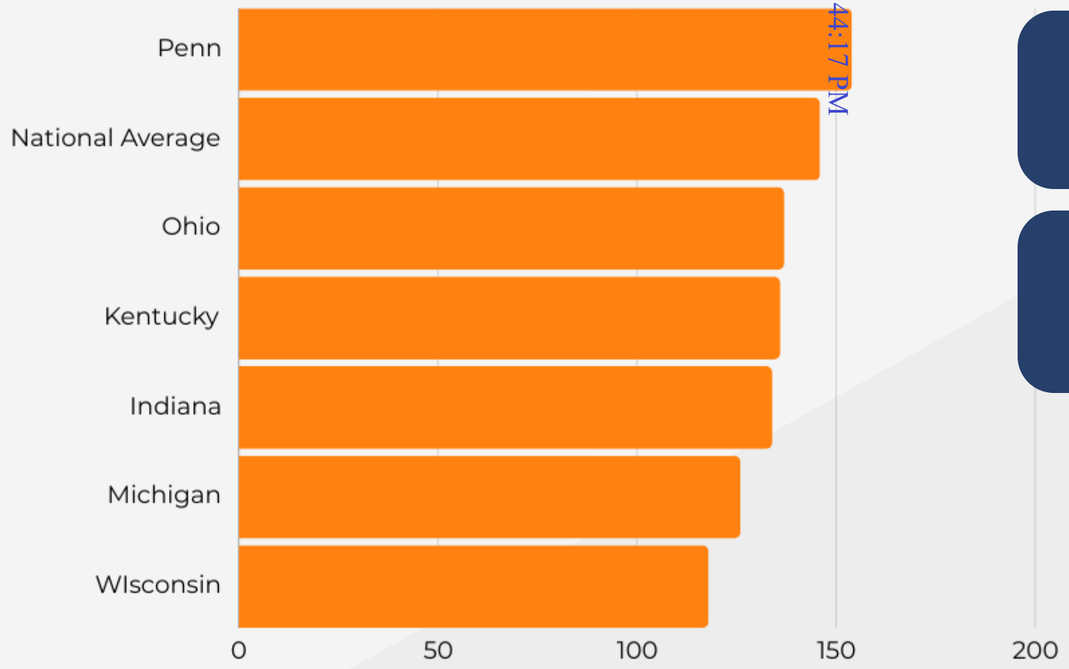
CP website provides resources for businesses to identify and protect against business identity theft.

MITS

Directly assisting businesses regarding identity theft

SAVING UTILITY RATEPAYERS MONEY

Average Residential Monthly Electric Bill for September 2023



Saved customers $117M reducing ***Consumers Energy*** electric rate increase.

Saved customers $254M reducing ***DTE's*** electric rate increase.

Doubled the number of active cases, opened 36 cases in 2023.

Saved over $250M

- **Closing DTE's remaining coal plants**
- **Increasing distributed generation and renewables**
- **Obtaining a $38 million donation for low-income assistance and energy efficiency,**
- **Obtaining a first-of-its-kind transparency for DTE's political donations**

SINCE TAKING OFFICE, AG HELPED SAVED NEARLY $3B FOR CUSTOMERS

IN 2023, AG HELPED SAVE CUSTOMERS $668,606,806

ROBOCALL ENFORCEMENT

- Launched in 2019.
- Website updated in 2023.
- Anti-Robocalling Litigation Task Force - Executive Committee
  - Civil investigative demands to 20 VoIP providers
  - May 2023 - Avid Telecom lawsuit
  - November 2023 - Public warning letters to eight providers

- March 2023 - Shut down massive robocall operation based in Texas.
- Numerous educational presentations on illegal robocalls to various groups.
- 1,235 robocall complaints in 2023.
- Since the 2019 launch of the initiative, our Department has received more than 13,129 robocall complaints.

HUMAN TRAFFICKING

MICHIGAN
HUMAN TRAFFICKING
COMMISSION

- Housed within the Department of Attorney General
- Nine members appointed by the Governor to represent various groups representing law enforcement, policy makers and survivors.
- Recommended a new package of roughly 30 human trafficking bills in 2019.
- Reintroduced in 2023 and the Department continues to work with the legislature to ensure passage.

Recentering the Commission to focus on policy

Supporting HT Legislation

HUMAN TRAFFICKING

- New Human trafficking specialist on staff
- Nine (9) new open investigations since December 2023
- Rebuilding relationships with stakeholders including law enforcement partners and advocacy organizations

Focus on labor trafficking

Developing Task Force committed to labor trafficking

OPIOID ENFORCEMENT

- Settlements with marketers, distributers, and manufacturers - ***nearly $1.6 billion for Michigan*** governments, over the next 18 years.
- To date, the ***State of Michigan has received over $120 million***, and Michigan local governments have received over $82 million.
- In 2023, settlements with additional manufacturers and pharmacies - additional ***$730 million for Michigan governments.***
- Purdue Pharmaceutical bankruptcy - committee representing government claimants.

CONSUMER PROTECTION

LAUNCHED A NEW STANDALONE WEBSITE IN 2023

(mi.gov/agcp)

Enforces more than 35 state statutes that protect consumers and charities.

Direct consumer and state recoveries totaled over $8.1M in 2023.

Over 138 consumer alerts.

Registers or licenses over 12,088 charities and professional fundraisers on a yearly basis.

Investigates and enforces charitable trust laws against charities, professional fundraisers, and charitable trustees.

Handles statewide consumer protection and antitrust enforcement efforts and investigations.

Leads and participates in multistate cases and investigations nationwide.

SEXUAL ASSAULT KIT INITIATIVE

- Appropriated $1.46M in 2022
- Oversees investigation, victim services, and prosecution for cases arising from the previously untested Sexual Assault Kits
- MOUs with Calhoun, Washtenaw, Wayne, Kalamazoo, Ingham, and Jackson Counties

Calhoun County

210 cases with 40 closed, 4 cases pending in court and 8 convictions

Kalamazoo County

226 Cases with 32 active investigations, 12 cases pending in court and 12 convictions

Ingham County

127 investigations, 2 cases pending in court and 3 convictions

Jackson County

67 investigations underway, and 2 convictions

Washtenaw County

159 cases with 20 open investigations, 3 pending in court

Wayne County

Funds approved, awaiting hiring to add to task force with 222 convictions and over 800 serial offenders identified

CLERGY ABUSE INVESTIGATION

Launched in August 2018 - partnership with MSP

REPORTS PRODUCED FOR THE FOLLOWING DIOCESES:

- ***Marquette*** Oct. 2022
- ***Gaylord*** Jan. 2024
- ***Kalamazoo*** Spring 2024
- ***Lansing*** Summer 2024
- ***Grand Rapids*** Fall 2024
- ***Saginaw*** Winter 2024
- ***Detroit*** Winter 2025

ELDER ABUSE TASK FORCE

ELDER ABUSE TASK FORCE

THE ELDER ABUSE TASK FORCE LAUNCHED IN 2019

AG, MICHIGAN SUPREME COURT, AND MORE THAN 55 DIFFERENT ORGANIZATIONS

FIVE BILL GUARDIANSHIP REFORM PACKAGE PENDING

Elder Abuse Unit
investigates and prosecutes financial exploitation cases

Statewide Elder Abuse investigation form

Online trainings

The Financial Exploitation Prevention Act (FEPA)

PFAS ACCOUNTABILITY

- Multiple lawsuits since January 2020 against PFAS manufacturers, distributors, and users.
- PFAS manufacturers lawsuit - damages, past costs, and remediation for Michigan resources impacted by PFAS other than firefighting foam.
- Two more lawsuits against manufacturers of PFAS-containing firefighting foam - damages and costs
- January 2023 - Asahi Kasei Plastics North America settlement.
- Two new PFAS lawsuits against companies that have released PFAS into the environment in Michigan.
- Oversees implementation of the 2020 Consent Decree with Wolverine Worldwide Inc.
  - $69.5M to extend municipal water to over 1,000 properties.
  - over 650 homes are already connected, with construction for remaining lines ongoing.
  - Maintain and replace water filters / continue sampling residential wells and monitoring groundwater in the area / investigate impacts to surface waters / undertake response activities at source areas.

CHILD SUPPORT ENFORCEMENT

Enforces child support orders by prosecuting those individuals who have a history of non-payment and have significant arrearages of at least $5,000

IN FISCAL YEAR 2023 OVER $24M WAS COLLECTED FOR CHILD SUPPORT

OVER 45K CASES GENERATED

Investigators identify parents who can pay support to their children but refuse to do so.

Complaints can be filed online (mi.gov/agcomplaints) ***or by calling*** the Financial Crimes Division (517-335-7560).

Please refer your constituents in need of help to our office.

HATE CRIMES & DOMESTIC TERRORISM

Investigates and prosecutes hate crimes and acts of domestic terrorism.

Notable Cases

Wolverine Watchmen

“The Base”

Convictions

At least 28 convictions for cases involving threats against elected officials.

OTHER SPECIALIZED UNITS

Public Integrity Unit

- 104 pending cases
- Prosecutes those that breach the public trust or steal taxpayer dollars.
- Expanded to include in-custody deaths and police-involved shootings.

Payroll Fraud Enforcement Unit

- Strengthening whistleblower protections to shield employees who report wrongdoing and provide incentives when they do.
- Toughening penalties against payroll fraud to make Michigan a leader in protecting workers.

QUESTIONS?

525 W. Ottawa St. Lansing, MI
3030 W. Grand Blvd, Ste 10-200
Detroit, MI

517-335-7622
517-313-456-0240

mi.gov/ag
mi.gov/agcp
mi.gov/mhtc

6

DEPARTMENT OF ATTORNEY GENERAL

Michigan Department of Attorney General

Fiscal Year 2021

Budget Presentation

Michigan House of Representatives

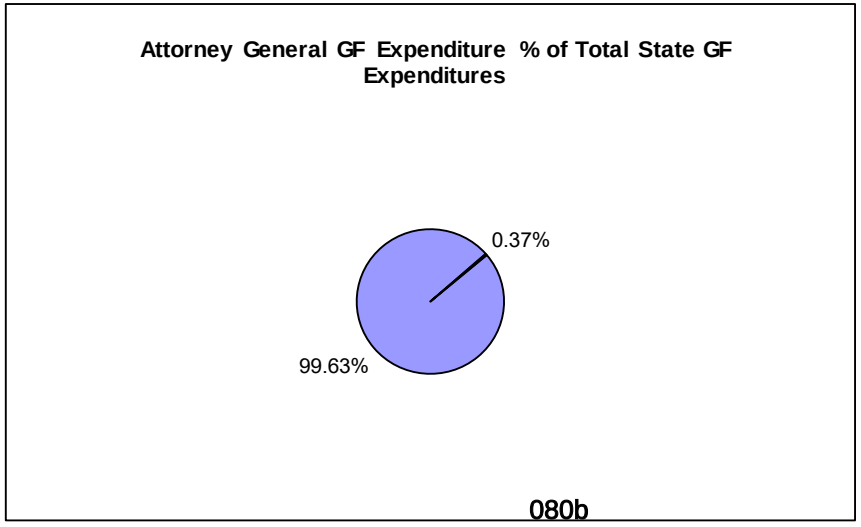
March 3, 2020

Departmental Overview

- The Attorney General is a constitutional officer, the chief law enforcement officer of the state, and head of the Department of Attorney General, a department within the executive branch of state government. The Attorney General's duties are derived from common law, prescribed by statute, court decisions, and tradition.
- The Attorney General is the lawyer for the State of Michigan, the Governor, and the People. When public legal matters arise, she renders opinions on matters of law and provides legal counsel for each officer, department, board, and commission of state government. She provides legal representation in court actions and assists in the conduct of official hearings held by state agencies.
- The Attorney General may intervene in any lawsuit, criminal or civil, in the interest of the People of the State of Michigan. She advises and supervises prosecuting attorneys throughout the state. The Attorney General also possesses certain investigative powers, including the power to investigate allegations of election fraud and complaints for the removal of public officials. She may also request grand jury investigations of crime in the state. By virtue of her office, the Attorney General is a member of various state boards and commissions.
- The Department is organized into four bureaus that oversee twenty-three divisions. Each division represents certain state agencies, boards, or commissions or practices in specialized legal areas. As of January 1, 2020 the divisions maintain a litigation case load of approximately 21,600 cases and we anticipate an annualized active case load exceeding 41,000 cases for the coming year.
- To assist in the myriad functions of the Department, the Attorney General employs a staff of assistant attorneys general who must be members of the State Bar of Michigan and who are appointed under Michigan Civil Service Rules. In addition, the Attorney General employs secretaries, investigators, clerical personnel, and paralegals to assist in carrying out the mandate of the office. All the legal work performed by the assistant attorneys general, including drafting of opinions and legal documents and representation of client agencies, is done in the name of the Attorney General and with her approval, or the approval of her designee.

Budgetary Impact

- The Department of Attorney General operates on approximately 1/3 of 1% of the total State General Fund budget
- 86% of the department budget are personnel costs
- Private sector attorneys charge between 4 and 5 times the rate of an Assistant Attorney General



Positive Budgetary Impact

- The Department's operational appropriations for FY 2019 was $98,670,700
  - The Department won $400,135,869 in awards payable to the State and Citizens

- The Department has averaged over $380,000,000 per year in awards payable to the State and Citizens during the past four fiscal years.

- The Department has averaged more than $4 per year for every dollar appropriated during the past four fiscal years.

Top Initiatives

- MSU Investigation
- Clergy Abuse Investigation
- Flint Water Investigation
- Sexual Assault Prosecution
- Consumer Protection
- Human Trafficking
- Child Support Enforcement
- Reducing Utility Rate Increases
- Elder Abuse Task Force
- PFAS Accountability
- Auto Insurance Fraud Unit
- Conviction Integrity Unit
- Opioid Enforcement
- Public Integrity Unit
- Robocall Enforcement

MSU Investigation

- The department brought charges against Larry Nassar who pleaded guilty to 10 total counts of Criminal Sexual Conduct. Nassar was sentenced to 40-175 years in Ingham County and 40-125 years in Eaton County.

- In January 2018, the department opened an investigation into systemic issues of sexual misconduct at Michigan State University at the request of the University's Board of Trustees.
  - Partnered with the Michigan State Police to build an investigatory team of more than 30 people
  - Contacted almost 550 people, interviewing over 280 survivors and 105 current and former employees of the University
  - Reviewed approximately 105,000 documents produced by MSU consisting of almost 500,000 pages

- Criminal charges we filed by the department against three individuals from the University:
  - Former gymnastics coach Kathie Klages
  - Former Dean of the College of Osteopathic Medicine William Strampel
  - Former President Lou Anna K. Simon

- William Strampel was convicted of one count of felony misconduct in office and two misdemeanor charges of willful neglect of duty and was sentenced to one year in jail. Kathie Klages was convicted of felony and misdemeanor charges of lying to police and will be sentenced in April. Lou Anna K. Simon's case is currently pending in Eaton County Circuit Court.

Clergy Abuse Investigation

- Investigation launched in August of 2018
  - 1.5 million documents and 3.5 million digital documents recovered

- A hotline for victims, family members of victims, and members of the general public is staffed by a full-time victim advocate to provide immediate referrals for those in need
  - To date, the Department has received over 650 calls, letters and emails. The Attorney General's investigation is being conducted in partnership with the Michigan State Police.

- The investigation has yielded the following results:
  - 75 police investigations
  - Identified 270 abusive clergy members
  - Identified 552 victims of abuse
  - 131 cases reviewed for criminal prosecution
  - 9 charged criminal prosecutions with 2 convictions
  - 32 volunteers have worked over 1,000 hours of unpaid time

- Over 1 million paper documents and 3.4 million digital documents remain to be reviewed

Flint Water Investigation

- The Attorney General has dual responsibilities to represent the people of Michigan and defend the State of Michigan
  - 112 active lawsuits filed against the State of Michigan are being defended by the Department of Attorney General
  - State defense funding of $3,000,000 has been designated as a work project
- Almost all private attorneys and investigators have been replaced by Attorney General staff employees and supervised SAAGs to control costs and improve efficiency
- Subsequent investigation discovered that numerous deaths had not been investigated and almost 19 million documents remain unreviewed and not turned over to defense counsel
- Investigation is in its final stages and continues to be exhaustive and thorough
- Cumulative cost is approximately $14,500,000 through Fiscal Year 2020

Sexual Assault Prosecution

- Sexual Assault, Domestic Violence, and Stalking Unit was created within the Criminal Division in March 2012

- The driving philosophy is to operate in a victim-centered, offender-focused, trauma-informed manner, focusing on how best we can serve our victims to promote healing and bring justice, even if they come years or decades later.

- The unit provides technical assistance to prosecutor offices and law enforcement agencies including assistance on sexual assault and domestic violence cases including intimate partner homicides both during the investigation phase and while the case is in the court system.

- Oversees testing, investigation, victim services, and prosecution for previously untested Sexual Assault Kits. The Department has MOUs with Calhoun, Washtenaw, Wayne, Kalamazoo, Ingham, and Jackson Counties.
  - Kalamazoo County — 212 investigations, 16 warrants charged and 6 convictions
  - Calhoun County — 210 investigations, 8 warrants charged and 6 convictions
  - Ingham County — 126 investigations, 2 warrants charged and 1 conviction
  - Jackson County — 67 investigations underway
  - Washtenaw County — Funds approved, position posted
  - Wayne County — Funds approved, waiting for commission approval

Consumer Protection

- Consumer Protection Division enforces more than 35 state statutes that protect consumers and charities
- Once finalized, Michigan Identity Theft Support (MITS) unit will educate consumers on technology-based matters
- Direct consumer and state recoveries totaled over $19,000,000 in 2019
- Received and replied to almost 10,000 written consumer complaints and inquiries in 2019
- Alert consumers to scams, deceptive business practices, privacy threats, and emerging identity theft schemes. Over 100 consumer alerts on the AG website that staff monitor and update.
- Registers or licenses over 8,300 charities on a yearly basis and professional fundraisers that solicit from the public on a yearly basis. Investigates and enforces charitable trust laws against charities, professional fundraisers, and charitable trustees.
- Handles statewide consumer protection and antitrust enforcement efforts and investigations
- Leads and participates in multistate cases and investigations nationwide

Human Trafficking

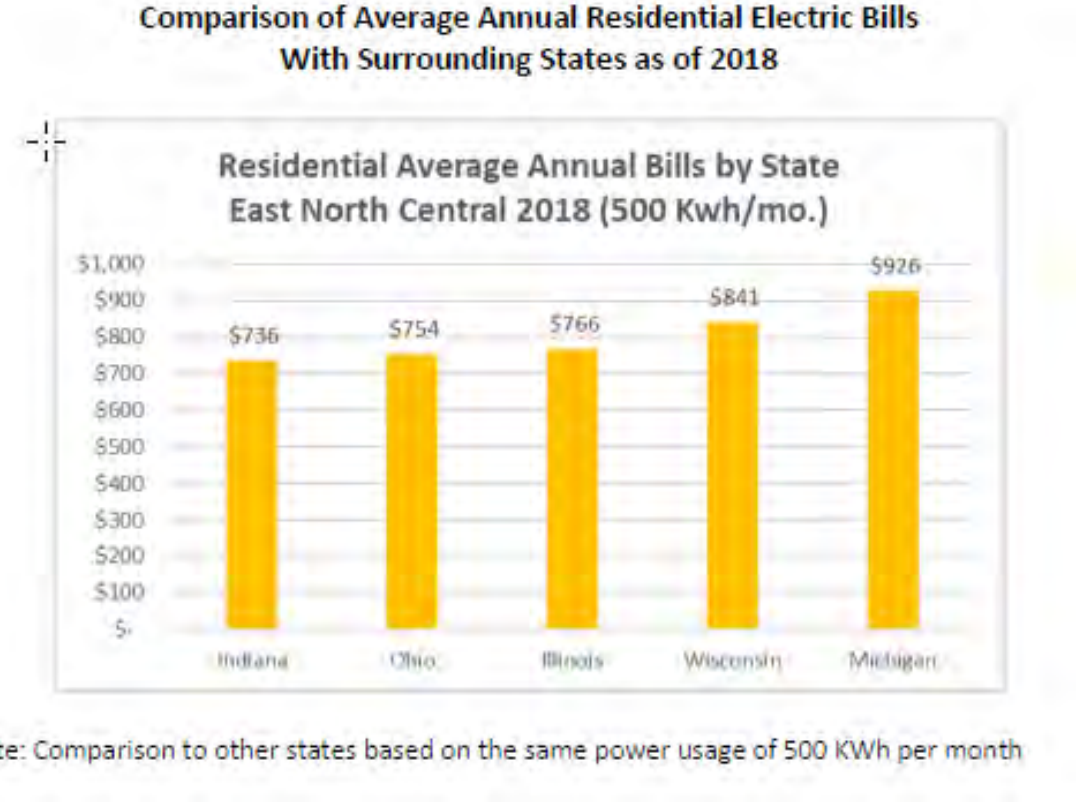
- Human Trafficking Unit was established in 2011
- Just in 2019, in a total of 19 presentations to over 2000 people, the Human Trafficking Unit provided training to approximately 150 Law Enforcement professionals, 200 legal professionals, 700 medical professionals, 800 various other professionals, and about 200 members of the general public.
- To date, has arrested 28 individuals on human trafficking charges, secured 26 convictions, with cases against other defendants currently pending.
- Legislature created the standing Michigan Human Trafficking Commission within the Department of Attorney General, whose members are appointed by the Governor to represent various groups and public officials.
    - In 2019, the commission recommended a new package of roughly 30 human trafficking bills aimed at expanding training requirements for certain professionals, strengthening tools to hold traffickers accountable, expanding protections for victims of trafficking, and revising the criminal justice system's approach to commercial sexual activity, otherwise known as prostitution.

Child Support Enforcement

- Child Support Division was created in 2003 to combat the problem of unpaid child support
- The mission of the Child Support Division is to enforce child support orders by prosecuting those individuals who have a history of non-payment and have significant arrearages of at least $5,000
- Investigators in the Attorney General's Child Support Division identify parents who can pay support to their children but refuse to do so
- Complaints can be filed online by visiting www.michigan.gov/ag or by calling the Financial Crimes Division at 517-335-7560

Reducing Utility Rate Increases

- In 2019, the utility ratepayer advocate division saved customers $473,602,342
  - For every $1 invested, the department has returned roughly $500 in ratepayer savings using less than half the staff of the average consumer advocate office around the country
- Comparatively, the office has handled more files in 2019 versus 2018
- Using a snapshot in time comparison from January 2018 to the present, an average Michigan residential customer has saved 4% on their annual electric bill
- Department works closely with other advocates across the state and the country to help reduce carbon emissions and increase renewables while maintaining a focus on affordability



Elder Abuse Task Force

- The Elder Abuse Task Force has been jointly launched with the Attorney General, Michigan Supreme Court, and over 50 agencies that provide services that affect vulnerable adults and senior citizens.
  - Sen. Pete Lucido, Sen. Paul Wojno, Rep. Graham Filler, and Rep. Brian Elder represent the Republican and Democratic Caucuses in the Senate and House of Representatives.
  - Created to implement systemic changes that were recommended by the 1998 Supreme Court Task Force and the 2007 Governor's Task Force, to assess current shortfalls and problems in the system and address them.
- An Elder Abuse Unit has been created in the Financial Crimes Division to investigate and prosecute financial exploitation cases
- Statewide Elder Abuse investigation form has been rolled out in conjunction with law enforcement agencies in order to streamline reporting and increase accountability and transparency
- Online trainings have been developed by the office and are currently in use statewide for all stakeholders to educate themselves on the issues surrounding elder abuse and how they can take an active role in pushing back
- Four prosecutors have been allocated to support this unit

PFAS Accountability

- Governor Whitmer issued an Executive Order to make the Michigan PFAS Action and Response Team (MPART) a permanent body. The Attorney General provides legal support to MPART and its member agencies on PFAS matters, including litigation referrals.
- The Attorney General filed a lawsuit in January 2020 against 17 PFAS manufacturers, distributors, and users, and is working with Special Assistant Attorneys General retained because of their expertise in bringing claims against manufacturers of harmful products. The Attorney General and the SAAGs are pressing that lawsuit forward on behalf of the many state agencies impacted by PFAS and are exploring additional litigation to recover State damages and injuries related to PFAS.
- The Attorney General recently reached a settlement with Wolverine Worldwide Inc. in the lawsuit brought on behalf of EGLE. That settlement includes $69.5 million to extend municipal water to over 1,000 properties, along with enforceable obligations to maintain and replace water filters; to continue sampling residential wells and monitoring groundwater in the area; to investigate impacts to surface waters; and to undertake response activities at source areas.

Auto Insurance Fraud Unit

- The Auto Insurance Fraud Unit (AIFU) investigates and prosecutes criminal acts relating to the submission of fraudulent motor vehicle insurance claims

- The initial focus will be abuse of the no-fault system, such as organized conspiracies, including doctors, lawyers, healthcare providers, runners, lay owners of medical facilities, repair shops, and participants in staged accidents

- Currently investigating 18 matters; 3 cases have been prosecuted
  - One was resolved with a plea and an agreement to pay over $40,000 in restitution; two are currently being litigated

Conviction Integrity Unit

- The Conviction Integrity Unit reviews eligible claims of actual innocence submitted by claimants arising from state-law convictions in all of Michigan's counties other than Wayne County, which has its own Conviction Integrity Unit.

- Review will be conducting using existing court records and any newly discovered evidence submitted by the claimant and determine whether the claim of actual innocence merits further review and investigation.

- The unit has received over 700 requests for investigation. In response, each claimant has been provided with a formal application for review. Those applications are being screened for further investigation.

- In cases where further review is merited, the Attorney General's Conviction Integrity Unit will conduct an independent investigation including interviews of victims, witnesses, and new testing of physical evidence to determine whether the claimant is innocent of the crime(s) for which he/she was convicted and sentenced.

- The unit works with county prosecutors, law enforcement, defense attorneys, and innocence clinics, as necessary.

Opioid Enforcement

- The Department has increased its efforts to hold liable parties accountable and seek remediation for the effects of the opioid crisis.

- In December 2019, Michigan became the first state in the country to sue major opioid distributors as drug dealers when Attorney General Nessel filed a lawsuit against Cardinal Health Inc., McKesson Corporation, AmerisourceBergen Drug Corporation, and Walgreens in Wayne County Circuit Court.

- In September 2019, Attorney General Nessel joined the Committee representing governmental claimants in the Purdue Pharma bankruptcy and settlement discussions, seeking a solution that will make sure Purdue Pharma and the Sackler family are held accountable for their actions that created and nurtured our nation's opioid crisis

- The Department of Attorney General is engaged in collaborative, multistate investigations into the marketing and sales of opioids. Settlement discussion are sensitive and ongoing.

Public Integrity Unit

- The Public Integrity Unit was formed in the Criminal Division in 2011 and prosecutes those that breach the public trust or steal taxpayer dollars

- To date, the unit has prosecuted over 110 defendants for public corruption crimes and secured over 190 convictions, including for:
    - Embezzling over $100,000 against an MSP Trooper
    - Official Misconduct in Office against a County Prosecutor and a District Judge
    - Embezzlement by a Public Official against a sworn Court Officer and City Deputy Treasurer
    - Forgery for dismissing cases against a court clerk
    - Bribery against building inspectors and police officers

- The AG is a member of the FBI Public Corruption Task Force, with ongoing joint state-federal investigations

Robocall Enforcement

- Robocall Enforcement initiative was launched in November 2019 to focus on Federal, state, and industry cooperation, consumer education, increased enforcement, and statutory updates

- Department has received more than 1,800 robocall complaints in three months. More than 1,700 people have signed up to join the AG's Robocall Crackdown Team.
  - These complaints have resulted in the opening of three large scale investigations focusing on specific scams

- The Department website includes a page dedicated to robocalls, including background on how robocalls work, consumer education relating to robocall scams, and ways for consumers to protect themselves

- Currently working with other AG offices and the industry to develop investigative protocols and identify issues

- Working with stakeholders and the Legislature to update Michigan's laws regarding robocalls and telephone solicitations

Line Item Appropriations

Governor's Recommendation FY 2021

Line Item	Amount	Funding Source	Use
1) Attorney General Operations			
Attorney General	$112,500	GF/GP	Funding for the Attorney General's salary
Unclassified Positions	$828,500	GF/GP	Funding for five Executive positions.
Operations	$96,309,800	$34,283,100 - GF/GP $35,285,800 - IDG $19,716,500 - Restricted $7,024,400 - Federal	All staff salaries, benefits, contractual services, supplies, materials, expert witnesses, travel, rent, worker's compensation, equipment, and other operation costs.
Child Support Enforcement	$3,709,300	$948,800 - GF/GP $2,760,500 - Federal	Provides funding for the Attorney General's Child Support Division, which includes salaries, benefits, contractual services, supplies, materials, travel, rent, equipment, and other operation costs.
Information Technology Services and Projects	$1,629,400	GF/GP	Provides funding for Department of Technology , Management and Budget related services.
Public Safety Initiative	$388,600	GF/GP	Provides funding for special assistant attorneys general and one support staff to prosecute crimes within distressed cities.
Sexual Assault Law Enforcement	$1,729,300	GF/GP	Provides funding for the Attorney General's sexual assault enforcement activities, which includes salaries and benefits for 5 FTEs, contractual services, supplies, materials, travel, equipment, and other operation costs.

Line Item Appropriations

Governor's Recommendation FY 2021

Line Item	Amount	Funding Source	Use
2) Prosecuting Attorney Coordinating Council (PACC)*	$2,269,200	$1,728,200 - GF/GP $419,800 - Restricted $121,200 - Federal	Provides funding for the Prosecuting Attorneys Coordinating Council, which includes salaries, benefits, contractual services, supplies, materials, travel, rent, equipment, and other operation costs. Provides funding for scholarships for tuition, travel, and state prosecutors training.

*Appropriated separately – Type I Agency.

FY 2020 Cost Projections

FY 2020 Projected Costs by Category

Category	Projected Costs	Percentage of Budget
Personnel-Related Costs	$85,100,000	86%
Contractual Services, Expert Witness Fees, Supplies, and Maintenance	$7,400,000	7%
Rent	$ 3,600,000	4%
Information Technology	$1,700,000	2%
Travel	$800,000	1%
Equipment	$400,000	Less than 1%

FY 2021 Cost Projections

FY 2021 Projected Costs by Category

Category	Projected Costs	Percentage of Budget
Personnel-Related Costs	$87,700,000	87%
Contractual Services, Expert Witness Fees, Supplies, and Maintenance	$6,500,000	6%
Rent	$ 3,700,000	4%
Information Technology	$1,800,000	2%
Travel	$800,000	1%
Equipment	$400,000	Less than 1%

Questions?

7

BIENNIAL REPORT

of the

ATTORNEY GENERAL

of the

STATE OF MICHIGAN

for the

BIENNIAL PERIOD ENDING DECEMBER 31, 1990

FRANK J. KELLEY
ATTORNEY GENERAL

AUTHORITY

PRINTED BY SPEAKER HINES AND THOMAS, INC., LANSING, MICHIGAN—1991

LETTER OF TRANSMITTAL

To the Honorable Legislature of the State of Michigan:

In accordance with the provisions of MCLA 14.30; MSA 3.183, I herewith submit the Report of the Attorney General for the biennial period of January 1, 1989 through December 31, 1990.

FRANK J. KELLEY,
Attorney General.

insurance companies and to the Commissioner of the Financial Institutions Bureau in obtaining orders of liquidation of banks, savings and loans and credit unions.

Division Caseload:

	Pending 12/31/88	Opened 1989	Closed 1989	Pending 12/31/89	Opened 1990	Closed 1990	Pending 12/31/90
Mich. Courts							
Ct. of Claims	22	6	25	3	1	1	3
Circuit Court	58	14	42	30	26	20	36
Ct. of Appeals	13	3	12	4	10	5	9
Supreme Court	1	4	1	4	0	4	0
Total:	94	27	80	41	37	30	48
US Courts							
District Court	2	1	1	2	3	1	4
Cir. Ct. of App.	4	0	4	0	2	0	2
Total:	6	1	5	2	5	1	6
Admin. Actions	69	28	35	62	30	50	42

Other Significant Division Activities:	**1989**	**1990**
Attorney General Opinions	4	3
Examination & Approval of Amendments to Articles of Incorporation of Insurance Companies	28	27

Consumer Protection and Charitable Trusts Division

Frederick H. Hoffecker, Assistant in Charge

The Consumer Protection and Charitable Trusts Division represents the public interest in the areas of general consumer protection, franchises, business opportunities, and antitrust matters. The Division also represents the Secretary of State in Bureau of Automotive Regulation matters. In addition, the Division is responsible for licensing charitable solicitations, registering charitable trusts and protecting the interests of charitable beneficiaries.

Division Caseload:

	Pending 12/31/88	Opened 1989	Closed 1989	Pending 12/31/89	Opened 1990	Closed 1990	Pending 12/31/90
Mich. Courts							
Probate Court	291	80	64	307	98	78	327
District Court	1	1	2	0	0	0	0
Circuit Court	36	6	16	20	7	10	23
Ct. of Appeals	8	1	5	4	2	4	2
Supreme Court	0	1	0	1	2	2	1
Total:	336	89	87	332	109	94	353
US Courts							
District Court	3	1	2	2	1	2	1
Cir. Ct. of App.	1	0	1	0	0	0	0
Total:	4	1	3	2	1	2	1
Admin. Actions							
Bureau of Automotive Regulation	36	15	20	31	23	18	36

Other Significant Division Activities:	**1989**	**1990**
Notices of Intended Action	76	63
Assurances of Discontinuance	43	29

Consumer Protection Section		
Consumer complaints	8,431	8,185
Monies recovered for consumers	$1,182,472	$1,452,807
Franchise Section		
Franchise registrations	784	841
Business opportunity registrations	30	44
Enforcement Actions		
Franchise law violations	67	46
Business opportunity violations	27	28
Illegal chain promotions and pyramids	1	12
Antitrust	5	14
Corporation	2	5
Fees and Recoveries		
Franchise fees	196,000.00	210,250.00
Civil penalties and investigative costs	60,251.27	12,750.00
Antitrust	7,877,896.00	4,870,639.00
Charitable Trust Section		
Amount transferred to charities from probated estates	$49,253,765.71	$14,866,306.14
Amount transferred to charities from unregistered trusts	1,978,538.91	2,106,913.02
Files opened for determination of applicability of charitable trust and solicitation requirements	625	539
Charitable trust files opened	207	160
closed	218	67
Charitable trust files maintained at end of biennial period		1,668
Estate accountings received	487	501
Nonprofit corporate dissolutions	99	137
Charitable organizations licensed	1,799	2,286
Professional fund raisers licensed	122	168

Corrections Division

Wallace T. Hart, Assistant in Charge

The Corrections Division acts as general counsel to the Corrections Commission and the Department of Corrections and represents the Commission, the Department and its officials and employees in the federal and state court systems. The Division also provides legal advice and consultation regarding interpretation of state and federal constitutions, statutes and rules and their effect on Department decisions, policies and procedures.

At the end of 1988 a number of cases that were being handled by the Corrections Division were transferred to the newly created Appellate Division, Federal Habeas Unit and the Executive Division's FOIA Unit.

Division Caseload:

	Pending 12/31/88	Opened 1989	Closed 1989	Pending 12/31/89	Opened 1990	Closed 1990	Pending 12/31/90
Mich. Courts							
Probate Court	6	42	33	16	70	78	8
District Court	10	9	20	13	25	10	28
Ct. of Claims	99	26	90	59	48	24	83
Circuit Court	976	500	817	583	698	399	882

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of the

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BIENNIAL PERIOD ENDING DECEMBER 31, 1992

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ATTORNEY GENERAL

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Consumer Protection and Charitable Trusts

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The Consumer Protection and Charitable Trusts Division represents the public interest in the areas of general consumer protection, franchises, business opportunities, and antitrust matters. The Division also represents the Secretary of State in Bureau of Automotive Regulation matters. In addition, the Division is responsible for licensing charitable organizations, registering charitable trusts and protecting the interests of charitable beneficiaries.

Division Caseload:

	Pending 12/31/90	Opened 1991	Closed 1991	Pending 12/31/91	Opened 1992	Closed 1992	Pending 12/31/92
Michigan Courts							
Probate Court	327	131	123	335	93	78	352
District Court	0	1	0	1	0	0	1
Circuit Court	23	2	21	3	1	0	4
Court of Appeals	2	0	2	0	0	0	0
Supreme Court	1	0	1	0	0	0	0
Total:	353	134	147	339	94	78	357
US Courts							
District Court	1	2	2	2	0	0	2
Total:	1	2	2	2	0	0	2
Admin. Actions							
Bureau of Automotive Reg.	36	19	4	51	34	21	64

Other Significant Division Activities:	**1991**	**1992**
Consumer Protection Section		
Consumer complaints	7,787	7,965
Monies recovered for consumers	$1,590,371	$2,767,124
Franchise Section		
Franchise registrations	815	825
Business opportunity registrations	39	79
Franchise Enforcement Actions		
Franchise law violations	29	36
Business opportunity violations	30	68
Illegal chain promotions and pyramids	27	13
Antitrust	14	15
Corporation	8	2
Franchise Fees and Recoveries		
Franchise fees	$ 203,500	$ 204,250
Civil penalties and investigative costs	20,750	68,125
Antitrust	5,191,857	9,230,299

Charitable Trust Section		
Amount transferred to charities from probated estates	21,267,198	48,463,234
Amounts transferred to charities from unregistered trusts	629,259	5,538,813
Files opened for determination of applicability of charitable trusts and solicitation requirements	830	673
Charitable trust files opened	246	205
Charitable trust files closed	74	76
Charitable trust files maintained at end of biennial period	4,721	4,926
Estate accountings received	480	593
Nonprofit corporate dissolutions	100	169
Charitable organizations licensed	2,667	2,333
Professional fund raisers licensed	184	164

Corrections Division

Wallace T. Hart, Assistant in Charge

The Corrections Division provides advice and representation to the Department of Corrections and the Office of Community Corrections.

The Division was reorganized in 1992 when three new sections (Federal Litigation Section, State Litigation Section, Federal Intake Section) were created. The State Litigation Section handles the defense of all state litigation as well as mental health commitment and guardianship proceedings. The Federal Intake Section handles all incoming *pro se* federal civil rights cases and the Federal Litigation Section handles the remaining federal civil rights cases and trial preparation and presentation of *pro se* cases.

Division Caseload:

	Pending 12/31/90	Opened 1991	Closed 1991	Pending 12/31/91	Opened 1992	Closed 1992	Pending 12/31/92
Mich. Courts							
Probate Court	8	80	82	6	62	63	5
District Court	27	18	24	21	9	16	14
Ct. of Claims	85	72	66	91	52	59	84
Circuit Court	874	721	720	875	934	867	942
Ct. of Appeals	127	192	135	184	257	198	243
Supreme Court	31	26	37	20	55	33	42
Total:	1,152	1,109	1,064	1,197	1,369	1,236	1,330
US Courts							
District Court	1,103	570	765	908	563	733	738
Cir. Ct. of App.	220	241	256	205	263	318	150
Supreme Court	0	14	12	2	19	15	6
Total:	1,323	825	1,033	1,115	845	1,066	894
Admin. Actions	1	3	1	3	0	2	1

BIENNIAL REPORT

of the

ATTORNEY GENERAL

of the

STATE OF MICHIGAN

for the

BIENNIAL PERIOD ENDING DECEMBER 31, 1994

FRANK J. KELLEY
ATTORNEY GENERAL

AUTHORITY

PRINTED BY SPEAKER HINES AND THOMAS, INC., LANSING, MICHIGAN—1995

LETTER OF TRANSMITTAL

To the Honorable Legislature of the State of Michigan:

In accordance with the provisions of MCLA 14.30; MSA 3.183, I herewith submit the Report of the Attorney General for the biennial period of January 1, 1993 through December 31, 1994.

FRANK J. KELLEY
Attorney General

Consumer Protection and Charitable Trusts

Frederick H. Hoffecker, Assistant in Charge

The Consumer Protection and Charitable Trusts Division represents the public interest in the areas of general consumer protection, franchises, business opportunities, and antitrust matters. The Division also represents the Secretary of State in Bureau of Automotive Regulation matters. In addition, the Division is responsible for licensing charitable organizations, registering charitable trusts and protecting the interests of charitable beneficiaries.

Division Caseload:

	Pending 12/31/92	Opened 1993	Closed 1993	Pending 12/31/93	Opened 1994	Closed 1994	Pending 12/31/94
Michigan Courts							
Probate Court	352	80	99	333	113	88	358
District Court	1	0	0	1	0	0	1
Circuit Court	4	4	2	6	4	1	9
Court of Appeals	0	1	0	0	0	0	0
Total:	357	85	101	340	117	89	368
US Courts							
District Court	2	2	0	2	2	0	4
Admin. Actions							
Bureau of Automotive Reg.	64	23	13	74	30	37	61

Other Significant Division Activities:	**1993**	**1994**
Consumer Protection Section		
Consumer complaints	7,425	8,163
Monies recovered for consumers	$728,157	$1,216,444
Franchise Section		
Franchise registrations	826	866
Business opportunity registrations	117	66
Franchise Enforcement Actions		
Franchise law violations	31	27
Business opportunity violations	82	53
Illegal chain promotions and pyramids	27	16
Antitrust	11	12
Corporation	5	1
Franchise Fees and Recoveries		
Franchise fees	$209,250	$220,000
Civil penalties and investigative costs	$ 46,700	$ 21,350
Antitrust	$ 62,961	$ 3,293

Charitable Trust Section		
Amount transferred to charities from probated estates	$130,557,845	$23,709,068
Amounts transferred to charities from unregistered trusts	$ 5,555,980	$ 2,814,264
Files opened for determination of applicability of charitable trusts and solicitation requirements	986	867
Charitable trust files opened	289	376
closed		
Charitable trust files maintained at end of biennial period	N/A	5,387
Nonprofit corporate dissolutions	164	149
Charitable organizations licensed	2,370	2,680
Professional fund raisers licensed	181	201
Solicitor registrations	3,162	3,038

Corrections Division

Wallace T. Hart, Assistant in Charge

The Corrections Division provides legal advice and representation to the Department of Corrections and the Office of Community Corrections. While the majority of the workload consists of the representation of the Department of Corrections and its employees in the federal and state court systems, the Division also provides legal advice and consultation regarding employment issues, contracts, interpretation of state and federal constitutions, statutes and rules and their effects on agency decisions, policies and procedures.

Division Caseload:

	Pending 12/31/92	Opened 1993	Closed 1993	Pending 12/31/93	Opened 1994	Closed 1994	Pending 12/31/94
Mich. Courts							
Probate Court	5	46	47	4	0	4	0
District Court	14	14	14	14	18	21	11
Circuit Court	942	955	933	964	999	1127	836
Ct. of Claims	84	29	55	58	52	48	62
Ct. of Appeals	243	262	232	273	269	276	266
Supreme Court	42	53	60	35	61	62	34
Total:	1,330	1,359	1,341	1,348	1,399	1,538	1,209
US Courts							
District Court	738	534	553	719	563	518	764
Cir. Ct. of App.	150	267	266	151	233	195	189
Supreme Court	6	24	23	7	23	15	15
Total:	894	825	842	877	819	728	968
Admin. Actions	1	20	4	17	18	29	6

BIENNIAL REPORT

of the

ATTORNEY GENERAL

of the

STATE OF MICHIGAN

for the

BIENNIAL PERIOD ENDING DECEMBER 31, 1996

FRANK J. KELLEY
ATTORNEY GENERAL

AUTHORITY

PRINTED BY CPI, INC., LANSING, MICHIGAN—1997

LETTER OF TRANSMITTAL

To the Honorable Legislature of the State of Michigan:

In accordance with the provisions of MCLA 14.30; MSA 3.183, I herewith submit the Report of the Attorney General for the biennial period of January 1, 1995 through December 31, 1996.

FRANK J. KELLEY
Attorney General

Consumer Protection and Charitable Trusts

Frederick H. Hoffecker, Assistant in Charge

The Consumer Protection and Charitable Trusts Division represents the public in the areas of general consumer protection, franchises, business opportunities and antitrust matters. The Division also represents the Secretary of State in Bureau of Automotive Regulation matters. In addition, the Division is responsible for licensing charitable organizations, registering charitable trusts and protecting the interests of charitable beneficiaries.

Division Caseload:

	Pending 12/31/94	Opened 1995	Closed 1995	Pending 12/31/95	Opened 1996	Closed 1996	Pending 12/31/96
Michigan Courts							
Probate Court	455	98	56	497	69	54	512
Circuit Court	6	2	1	7	3	1	9
Ct. of Appeals	0	1	1	0	0	0	0
Supreme Court	0	1	0	1	0	1	0
Total	**461**	**102**	**58**	**505**	**72**	**56**	**521**
US Courts							
District Court	1	0	1	0	0	0	0
Total	**1**	**0**	**1**	**0**	**0**	**0**	**0**

Other Significant Division Activity:	**1995**	**1996**
Consumer Protection Section		
Consumer complaints	10,480	9,568
Monies recovered for consumers	$1,559,983	$1,393,298
Franchise Section		
Franchise registrations	888	839
Business opportunity registrations	78	57
Franchise Enforcement Actions		
Franchise law violations	47	54
Business opportunity violations	104	78
Illegal chain promotions and pyramids	21	18
Antitrust	16	21
Corporation	8	7
Franchise Fees and Recoveries		
Franchise fees	$237,500	$258,000
Civil penalties and investigative costs	$ 57,700	$ 59,900
Antitrust	$ 37,650	$ 41,870

Charitable Trust Section

Amount transferred to charities from probated estates	$17,083,789	$16,511,333
Amounts transferred to charities from unregistered trusts	$ 2,401,063	$ 1,690,545
Files opened for determination of applicability of charitable trusts and solicitation requirements	1,003	988
Nonprofit corporate dissolutions	173	204
Charitable organizations licensed	2,456	2,684
Professional fund raisers licensed	196	204
Solicitor registrations	3,104	2,654
Charitable trust files maintained		
Charitable trusts files maintained at end of biennial period	N/A	5,686

Corrections Division

Wallace T. Hart, Assistant in Charge

The Corrections Division provides legal advice and representation to the Department of Corrections, the Michigan Parole Board, and the Office of Community Corrections. While the majority of the workload consists of the representation of the Department of Corrections and the Michigan Parole Board and their employees in the federal and state court systems, the Division also provides legal advice and consultation regarding employment issues, contracts, etc., as well as interpretation of state and federal constitutions, statutes and rules, agency decisions, policies and procedures.

Division Caseload:

	Pending 12/31/94	Opened 1995	Closed 1995	Pending 12/31/95	Opened 1996	Closed 1996	Pending 12/31/96
Michigan Courts							
District Court	11	8	10	9	8	7	10
Circuit Court	838	1334	792	1380	1724	1694	1410
Ct. of Claims	63	38	32	69	50	52	67
Ct. of Appeals	264	207	247	224	272	291	206
Supreme Court	34	55	41	49	67	69	46
Total	**1210**	**1642**	**1122**	**1731**	**2121**	**2113**	**1739**
US Courts							
District Court	753	510	576	687	341	546	481
6th Cir. Ct. of App.	191	195	214	172	201	210	163
Supreme Court	15	24	18	21	15	14	22
Total	**959**	**729**	**808**	**880**	**557**	**770**	**666**

BIENNIAL REPORT

of the

ATTORNEY GENERAL

of the

STATE OF MICHIGAN

for the

BIENNIAL PERIOD ENDING DECEMBER 31, 1998

FRANK J. KELLEY
ATTORNEY GENERAL

AUTHORITY

PRINTED BY CPI, INC., LANSING, MICHIGAN—1999

LETTER OF TRANSMITTAL

To the Honorable Legislature of the State of Michigan:

In accordance with the provisions of MCLA 14.30; MSA 3.183, I herewith submit the Report of the Attorney General for the biennial period of January 1, 1997 through December 31, 1998.

FRANK J. KELLEY
Attorney General

Consumer Protection Division

Stanley F. Pruss, Assistant in Charge

The principal function of the Consumer Protection Division (CPD) is investigating and mediating consumer complaints and encouraging compliance with consumer protection and antitrust laws. The CPD administers directly or indirectly more than 35 state statutes. Under many of these statutes the CPD has exclusive or primary compliance and enforcement jurisdiction. By statutory prescription, the CPD registers charitable trusts, public safety organizations, and professional fundraisers acting on behalf of public safety organizations; licenses charitable organizations and professional fundraisers acting on behalf of charities; and is a necessary party in any probate estate having a residuary devise to a charitable entity. The CPD also licenses franchises operating in this state, regulates offerings of "business opportunities," and enforces consumer laws against offerors of pyramid investment scams. The CPD represents two clients: the Corporations Division within the Department of Consumer and Industry Services, and the Bureau of Automotive Regulation within the Department of State. An important part of the CPD's mission is to engage in consumer education initiatives commensurate with available resources.

Division Caseload:

	Pending 12/31/96	Opened 1997	Closed 1997	Pending 12/31/97	Opened 1998	Closed 1998	Pending 12/31/98
Michigan Courts							
Probate Court	512	79	52	539	94	51	582
Circuit Court	9	2	7	4	3	5	2
Ct. of Appeals	0	0	0	0	1	1	0
Total	**521**	**81**	**59**	**543**	**98**	**57**	**584**
US Courts							
District Court	0	0	0	0	1	1	0
6th Circ Ct of Appls.	0	0	0	0	1	1	0
Total	**0**	**0**	**0**	**0**	**1**	**1**	**0**
Admin. Actions	**416**	**149**	**87**	**578**	**112**	**62**	**628**

Monies Paid To/By the State:	**1997**	**1998**
All Judgments/Settlements paid TO State:	$952,183	$672,498

Other Significant Division Activity:

Consumer Protection Section		
Consumer complaints	10,490	11,835
Monies recovered for consumers	$1,634,089	$1,137,328
Franchise Section		
Franchise registrations	865	831
Business opportunity registrations	68	59
Franchise Enforcement Actions		
Franchise law violations	25	21
Business opportunity violations	56	438
Illegal chain promotions and pyramids	37	19
Antitrust	1	4
Franchise Fees and Recoveries		
Franchise fees	$216,250	$207,750
Civil penalties and investigative costs	$ 28,650	$ 21,875
Antitrust	$144,840	0

Charitable Trust Section

Amounts transferred to charities from unregistered trusts	$7,397,688	$31,895,039
Files opened for determination of applicability of charitable trusts and solicitation requirements	1,403	799
Nonprofit corporate dissolutions	134	174
Charitable trusts licensed	437	719
Professional fund raisers licensed	220	234
Solicitor registrations	3,145	4,128
Charitable trust files maintained	899	572

Corrections Division

Leo H. Friedman, Assistant in Charge

The Corrections Division provides legal advice and representation to the Michigan Department of Corrections, the Michigan Parole Board, and the Office of Community Corrections. While the majority of the workload consists of the representation of the Department of Corrections and the Michigan Parole Board and their employees in the federal and state court systems, the Division also provides legal advice and consultation regarding employment issues, contracts, etc., as well as interpretation of state and federal constitutions, statutes and rules, agency decisions, policies and procedures.

Division Caseload:

	Pending 12/31/96	Opened 1997	Closed 1997	Pending 12/31/97	Opened 1998	Closed 1998	Pending 12/31/98
Michigan Courts							
District Court	10	6	3	13	4	7	10
Circuit Court	1,410	1,762	1,357	1,815	1,640	1,971	1,484
Ct. of Claims	67	49	59	57	32	32	57
Ct. of Appeals	206	228	169	265	230	283	212
Supreme Court	46	41	33	54	52	52	54
Total	**1,739**	**2,086**	**1,621**	**2,204**	**1,958**	**2,345**	**1,817**
US Courts							
District Court	481	185	332	334	137	226	245
6th Circ Ct of Appls	163	156	136	163	129	117	175
USSC	22	20	11	31	11	35	7
Total	**666**	**341**	**479**	**528**	**277**	**378**	**427**
Admin. Actions	**6**	**0**	**0**	**6**	**0**	**0**	**6**

Monies Paid To/By the State:	**1997**	**1998**
All Judgments/Settlements paid TO State	$ 7,810.03	$ 8,191.66
All Judgments/Settlements paid BY State	$869,016.59	$1,667,001.80

BIENNIAL REPORT

of the

ATTORNEY GENERAL

of the

STATE OF MICHIGAN

for the

BIENNIAL PERIOD ENDING DECEMBER 31, 2000

JENNIFER M. GRANHOLM
ATTORNEY GENERAL

AUTHORITY

PRINTED BY CPI, INC., LANSING, MICHIGAN—2001

LETTER OF TRANSMITTAL

To the Honorable Legislature of the State of Michigan:

In accordance with the provisions of MCLA 14.30; MSA 3.183, I herewith submit the Report of the Attorney General for the biennial period of January 1, 1999 through December 31, 2000.

JENNIFER M. GRANHOLM
Attorney General

Consumer Protection Division

Stanley F. Pruss, Assistant in Charge

The Consumer Protection Division (CPD) investigates and mediates thousands of consumer complaints and encourages compliance with consumer protection and antitrust laws. The CPD administers or enforces more than 35 state statutes. By statutory mandate, the CPD registers charitable trusts and public safety organizations, and licenses professional fundraisers acting on behalf of charities. The Attorney General, through CPD, is a necessary party to any probate estate having a residuary devise to a charitable trust entity. The CPD also licenses franchises operating in this State, regulates offerings of "business opportunities," and enforces consumer laws against offers of pyramid investment scams. The CPD represents two clients: the Corporations Division within the Department of Consumer and Industry Services, and the Bureau of Automotive Regulation within the Department of State. The division educates consumers through speeches to community groups, seminars, workshops, coalitions, and task forces.

Division Caseload:

	Pending 12/31/98	Opened 1999	Closed 1999	Pending 12/31/99	Opened 2000	Closed 2000	Pending 12/31/00
Michigan Courts							
Probate Court	582	105	42	613	77	65	654
Circuit Court	2	4	2	2	4	3	3
Court of Appeals	0	0	0	0	1	1	0
Total	**584**	**109**	**44**	**615**	**82**	**69**	**657**
U.S. Courts							
District Court	0	0	0	0	2	0	2
Total	**0**	**0**	**0**	**0**	**2**	**0**	**2**
Admin. Actions	**628**	**125**	**156**	**597**	**129**	**102**	**624**

Other Significant Division Activity:	1999	2000
Consumer Protection Section		
Formal written complaints by consumers	14,214	16,901
Monies recovered for consumers	$1,815,230	$1,816,485
Franchise Section and Antitrust Section		
Franchise registration	870	924
Business opportunity registrations	29	28
Franchise law violations	14	6
Business opportunity violations	25	3
Illegal chain promotion and pyramids	15	11
Franchise fees	$217,250	$231,000
Civil penalties and investigative costs	32,013	20,492
Antitrust Actions	7	8
Antitrust civil penalties, state recoveries and *cy pres* distributions	$2,250,447	$1,680,079
Recoveries for consumers	400,000	575,000
Charitable Trust Section		
Files opened for determination of applicability of charitable trust and solicitation requirements	929	820
Nonprofit corporate dissolutions closed	168	120
Charitable solicitation licenses issued	3617	3849
Charitable solicitation professional fundraiser licenses issued	281	276
Public safety registrations issued	67	75
Public safety professional fundraiser registrations issued	23	14
Registered charitable trusts	7248	7597
Charitable trust assets	$47,973,201,179	$54,999,822,943

Corrections Division

Leo H. Friedman, Assistant in Charge

The Corrections Division advises and represents the Michigan Department of Corrections and the Michigan Parole Board. The division represents and defends the Department of Corrections and the Michigan Parole Board and their employees against lawsuits in the federal and state courts, and provides legal advice and consultation regarding employment issues, contracts, and the interpretation of state and federal constitutions, statutes and rules, and agency decisions, policies, and procedures.

Division Caseload:

	Pending 12/31/98	Opened 1999	Closed 1999	Pending 12/31/99	Opened 2000	Closed 2000	Pending 12/31/00
Michigan Courts							
District Court	10	5	4	11	7	13	5
Circuit Court	1,484	1,567	1,602	1,449	969	1,734	684
Court of Claims	57	27	24	60	24	46	38
Court of Appeals	212	220	170	262	198	304	156
Municipal	0	1	0	1	0	1	0
Probate	0	1	0	1	1	2	0
Supreme Court	54	39	35	58	60	84	34
Total	**1,817**	**1,860**	**1,835**	**1,842**	**1,259**	**2,184**	**917**
U.S. Courts							
District Court	245	176	156	265	178	194	249
6th Circ Ct of Appls	175	90	126	139	85	150	74
U.S. Supreme Court	7	12	13	6	13	12	7
Total	**427**	**278**	**295**	**410**	**276**	**356**	**330**
Out-of-State Courts	**0**	**1**	**1**	**0**	**0**	**0**	**0**
Admin. Actions	**6**	**0**	**4**	**2**	**0**	**2**	**0**

Monies Paid To/By the State:	**1999**	**2000**
All Judgments/Settlements Paid BY State:	$914,274.48	$4,920,167.25

Criminal Division

Robert Ianni, Assistant in Charge

The Criminal Division investigates and prosecutes criminal cases based on the Attorney General's common law and statutory duties as Michigan's chief law enforcement officer, and her statutory responsibility to supervise Michigan's 83 prosecuting attorneys.

A major function of the Criminal Division is to investigate alleged criminal activity, including inquiry into allegations of public official misconduct and crimes against the State of Michigan. Major criminal investigations are conducted independently or in cooperation with local, state, and federal law enforcement agencies.

The Criminal Division oversees the Money Laundering/Financial Crimes and Conspiracy Crimes Section, a federally funded, multi-agency task force that assists local law enforcement in complex financial investigations. The team is specially trained in asset tracing and computerized evidence retrieval techniques and facilitates asset forfeitures and prosecutes, or assists in prosecuting, cases under Michigan's money laundering and racketeering statutes.

The Attorney General formed her High Tech Crime Unit (HTCU) within the Criminal Division in May 1999 to respond to complaints involving crimes using computers and the Internet. The HTCU mission is to: (1) prosecute cases involving crimes committed through the use of computers and the Internet; (2) serve as a state-wide resource center and clearinghouse for information, training, and assistance; (3) provide advice on the development of state legislation dealing with high tech crimes issues; (4) cultivate relationships with the high tech private sector in order to develop strategies for self-regulation; and (5) respond and adapt to the ever-changing

BIENNIAL REPORT

of the

ATTORNEY GENERAL

of the

STATE OF MICHIGAN

for the

BIENNIAL PERIOD ENDING DECEMBER 31, 2002

JENNIFER M. GRANHOLM
ATTORNEY GENERAL

AUTHORITY

PRINTED BY J.B. PRINTING CO. INC., KALAMAZOO, MICHIGAN—2003

LETTER OF TRANSMITTAL

To the Honorable Legislature of the State of Michigan:

In accordance with the provisions of MCLA 14.30, I submit the Report of the Attorney General for the biennial period of January 1, 2001 through December 31, 2002.

JENNIFER M. GRANHOLM
Attorney General

Medicare reimbursement issues, and provides legal services with regard to the collection and preservation of vital statistics and health records and the administration of medical services for crippled children. The division represents the Department of Community Health, its officers and employees in litigation arising out of the public provision of health services, which involves claims of deprivation of constitutional and civil rights, contract actions, and dismissal of employees. Finally, the division may also represent the Department of Community Health in administrative matters before the Department of Civil Service and in administrative hearings to determine the financial liability of recipients of services, as well as in appeals to the courts from these and other administrative decisions.

Division Caseload:

	Pending 12/31/00	Opened 2001	Closed 2001	Pending 12/31/01	Opened 2002	Closed 2002	Pending 12/31/02
Michigan Courts							
District Court	0	1	0	1	0	0	1
Probate Court	5	19	16	8	6	2	12
Circuit Court	11	28	24	15	23	8	30
Court of Appeals	2	2	2	2	2	1	3
Supreme Court	1	0	0	1	0	0	1
Total	**19**	**50**	**42**	**27**	**31**	**11**	**47**
U.S. Courts							
District Court	6	4	1	9	6	2	13
Out-of-State Court	0	1	0	1	0	1	0
Total	**6**	**5**	**1**	**10**	**6**	**3**	**13**
Admin. Actions	45	74	49	70	50	36	84

Monies Paid To/By the State:	**2001**	**2002**
All Judgments/Settlements paid TO State	$120,955.00	$101,000.00
All Judgments/Settlements paid BY State	$43,500.00	$2,766,996.28

Other Significant Division Activity:
The division provides legal expertise to state agencies on the Health Insurance Portability and Accountability Act (HIPAA) through the Attorney General's HIPAA Workgroup. It also interacts with the Federal Food and Drug Administration with regard to health care frauds, especially the AIDS Fraud Task Force. The division is also defending the state in four multi-million dollar products liability cases involving the anthrax vaccine and former U.S. military personnel.

* Effective November 1, 2002, the Community Health Division was merged with the Public Administration Division. The two divisions form the Community Health and Public Administration Division with Ronald J. Styka as the Assistant in Charge.

Consumer Protection Division

Stanley F. Pruss, Assistant in Charge

The principal function of the Consumer Protection Division is investigating and mediating consumer complaints and encouraging compliance with consumer protection and antitrust laws. The division administers directly or indirectly more than 35 state statutes. Under many of these statutes, the Consumer Protection Division has exclusive or primary compliance and enforcement jurisdiction. By statutory prescription, the division issues licenses to charities and professional fund raisers acting on their behalf; registers charitable trusts, public safety organizations and their fund

raisers; and is a necessary party to any probate estate having a residuary devise to a charitable entity. Franchisees must provide the division with notice of their intent to offer or sell franchises. The division also regulates the offer and sale of franchises, offerings of "business opportunities," and enforces consumer laws against offerors of pyramid investment scams. The division represents the Bureau of Regulatory Services within the Department of State. An important part of the division's mission is to engage in consumer education initiatives commensurate with available resources.

Division Caseload:

	Pending 12/31/00	Opened 2001	Closed 2001	Pending 12/31/01	Opened 2002	Closed 2002	Pending 12/31/02
Michigan Courts							
District Court	654	105	129	630	87	430	287
Circuit Court	3	9	2	10	6	10	6
Court of Appeals	0	0	0	0	1	1	0
Total	**657**	**114**	**131**	**640**	**94**	**441**	**293**
U.S. Courts							
District Court	2	0	0	0	2	0	4
Total	**2**	**0**	**0**	**0**	**2**	**0**	**4**
Admin. Actions	624	68	422	270	42	39	273

Other Significant Division Activity:	**2001**	**2002**
Consumer Protection Section:		
Consumer complaints	23,167	25,127
Monies recovered for consumers	$1,761,743	$2,175,091
Franchise and Antitrust Section:		
Franchise registrations	916	1,049
Business opportunity registrations	30	23
Franchise Enforcement Actions:		
Franchise law violations	10	5
Business opportunity violations	2	4
Franchise fees	$229,000	$240,000
Civil penalties and investigative costs	$95,415	$20,492
Recoveries for consumers		$731,738
Antitrust Actions:	7	8
Antitrust civil penalties, state recoveries and *cy pres* distributions	$2,011,615	$1,628,078
Recoveries for consumers		$882,326
Charitable Trust Section:		
Files opened for determination of applicability of charitable trust and solicitation requirements	859	915
Nonprofit corporate dissolutions closed	148	215
Charitable solicitation licenses issued	3815	4578
Charitable solicitation professional fund raiser licenses issued	286	260
Public safety registrations issued	81	74
Public safety professional fund raiser registrations issued	19	18
Registered charitable trusts	8039	8349
Charitable trust assets	$52,223,524,504	$59,985,094,232

BIENNIAL REPORT

of the

ATTORNEY GENERAL

of the

STATE OF MICHIGAN

for the

BIENNIAL PERIOD ENDING DECEMBER 31, 2004

MICHAEL A. COX
ATTORNEY GENERAL

AUTHORITY

PRINTED BY J.B. PRINTING CO. INC., KALAMAZOO, MICHIGAN—2005

LETTER OF TRANSMITTAL

To the Honorable Legislature of the State of Michigan:

In accordance with the provisions of MCL 14.30, I submit the Report of the Attorney General for the biennial period of January 1, 2003 through December 31, 2004.

MICHAEL A. COX
Attorney General

Administrator also provides legal services for the Department of Treasury's Abandoned and Unclaimed Property Division.

In November 2003, the division took over tax enforcement functions for the Department of Treasury from the Criminal Division. The tax enforcement cases deal with civil forfeiture actions under the Tobacco Products Tax Act, jeopardy tax assessments, and criminal prosecutions.

Division Caseload:

	Pending 12/31/02	Opened 2003	Closed 2003	Pending 12/31/03	Opened 2004	Closed 2004	Pending 12/31/04
Michigan Courts							
District Court	136	198	169	165	269	233	201
Probate Court	0	468	58	410	181	233	358
Circuit Court	74	175	153	96	144	151	89
Court of Claims	0	2	0	2	1	1	2
Court of Appeals	7	11	9	9	7	6	10
Tribunal	0	2	0	2	0	0	2
Supreme Court	1	2	1	2	3	3	2
Total	**218**	**858**	**390**	**686**	**605**	**625**	**664**
US Courts							
District Court	4	0	2	2	3	2	3
6th Circ Ct of Appeals	4	1	0	5	2	1	6
USSC	0	0	0	0	2	1	1
U.S. Bankruptcy Ct.	5	4	3	6	0	0	6
Total	**13**	**5**	**5**	**13**	**7**	**4**	**16**
Admin. Actions	402	2,516	2,400	518	2,372	2,411	479

Monies Paid To/By the State:	**2003**	**2004**
Amounts paid TO State:		
Judgments	9,560.76	0
Fees/Fines from liquor violations	1,033,990.00	1,006.971.00
Fees/Fines from gambling violations/convictions	277,036.25	574,222.50
Restitution/Forfeitures	118,213.53	152,189.00
Alcohol Assurances of Discontinuance penalties	10,869.34	0*
Public Administration-Moneys Escheated	1,149,495.78	361,824.79
Amounts paid BY State:	0	0

Other Significant Division Activity*:		
Notices of Intended Action filed by Alcohol	7	0
Alcohol Assurances of Discontinuance filed:	14	0

*Notices of Intended Action and Assurances of Discontinuance were temporarily suspended pending the resolution of the U.S. Supreme Court case of *Granholm, et al v Heald, et al*, Case No. 03-1116.

Consumer Protection Division

Katharyn Barron, Assistant in Charge (beginning November 2004)
Stewart H. Freeman (May 2003 – November 2004)

The principal function of the Consumer Protection Division is investigating and mediating consumer complaints and encouraging compliance with consumer protection and antitrust laws. The division administers or enforces more than 35 state statutes. Under many of these statutes, the Consumer Protection Division has exclusive or primary compliance and enforcement jurisdiction.

By statutory prescription, the division issues licenses to charities and professional fund raisers acting on their behalf; registers charitable trusts, public safety organizations and their fund raisers; and is a necessary party to many probate estates having a residuary devise to a charitable entity. Franchisors must provide the division with notice of their intent to offer or sell franchises. Those offering for sale a "business opportunity" must also provide the division with notice. The division also enforces consumer laws against offerors of product-based pyramid scams. The division educates consumers through speeches, seminars, workshops, coalitions, and task forces.

The former Special Projects Division and the Special Litigation Division are now part of the Consumer Protection Division. The Consumer Protection Division, therefore, now also is lead counsel in disputes involving the national tobacco settlement. The division additionally provides representation to the public at large, and the State of Michigan as a consumer, in utility rate proceedings before the Michigan Public Service Commission and the courts. During 2003-2004, the division appeared in all significant administrative and judicial proceedings involving the rates and services of the State's largest utilities and in proceedings involving several smaller utilities. In addition, the division has the responsibility of representing the consumer interest in utility energy cost recovery proceedings conducted by the Public Service Commission pursuant to 1982 PA 304. Finally, the division also handles miscellaneous matters at the direction of the Attorney General.

Division Caseload:

	Pending 12/31/02	Opened 2003	Closed 2003	Pending 12/31/03	Opened 2004	Closed 2004	Pending 12/31/04
Michigan Courts							
District Court	1	1	1	0	0	0	0
Circuit Court	67	6	59	14	15	4	11
Court of Claims	0	0	0	0	0	0	0
Court of Appeals	11	7	4	14	7	8	13
Supreme Court	5	0	5	0	3	0	3
Probate Court	188	32	49	171	39	102	108
Total	**272**	**46**	**122**	**199**	**64**	**114**	**135**
US Courts							
District Court	11	0	9	2	0	2	0
6th Circ Ct of Appeals	10	0	8	2	2	2	2
USSC	5	1	5	1	1	2	3
U.S. Bankruptcy Ct.	3	12	10	5	7	9	3
Total	**29**	**13**	**27**	**10**	**10**	**15**	**8**
Admin. Actions	163	549	624	88	52	52	88

*Pending 12/31/02 figures include the merger of cases from the former Special Projects and Special Litigation Divisions.

Other Significant Division Activity:	**2003**	**2004**
Consumer complaints	18,987	18,444
Money recovered for consumers	$2,561,548.92	3,044,535.67
Civil penalties, investigative, and other costs/income	$734,652.01	$819,928.67
Franchise registrations	1,063	1,180
Business opportunity registrations	24	20
Franchise fees	$270,000.00	$300,000.00

Antitrust civil penalties, state recoveries and *cy pres* distributions	$11,351,911.59	$3,792,712.04
Antitrust recoveries for consumers		$2,139,226.19
Tobacco		
Monies paid to the State	$326,021,477.90	273,595,641.25

Charitable Trust		
Files opened for determination of applicability of charitable trust and solicitation requirements	959	854
Nonprofit corporate dissolutions closed	212	202
Charitable solicitation licenses issued	4684	4592
Charitable solicitation professional fundraiser licenses issued	271	167
Public safety registrations issued	69	82
Public safety professional fundraiser registrations issued	13	14
Registered charitable trusts	9051	9335

**Effective May 11, 2003, the Special Projects Division was merged into the Consumer Protection Division, and January 1, 2005, the Special Litigation Division was merged into the Consumer Protection Division. The figures for the three divisions are being reported as the Consumer Protection Division for the 2003-2004 report.

Criminal Appellate Division

Brenda E. Turner, Assistant in Charge

The Criminal Appellate Division was formed in July 2003 by a merger of the former Habeas Corpus Division and the Prosecuting Attorneys Appellate Service.

The Criminal Appellate Division represents the various state prison wardens in federal court actions for writs of habeas corpus filed by state prisoners claiming their federal constitutional rights were violated in their state criminal proceedings.

The Criminal Appellate Division also represents the People of the State of Michigan in the Michigan Court of Appeals and the Michigan Supreme Court in appeals from felony convictions obtained in the 56 counties which have a population of 75,000 or less. Additionally, the division appears as special appellate counsel where appointed by the court and provides assistance at the appellate level to other counties and divisions within the Department.

Division Caseload:

	Pending 12/31/02	Opened 2003	Closed 2003	Pending 12/31/03	Opened 2004	Closed 2004	Pending 12/31/04
Michigan Courts							
Court of Appeals	150	85	114	121	128	110	139
Supreme Court	32	48	61	19	46	41	24
Total	**182**	**133**	**175**	**140**	**174**	**151**	**163**
US Courts							
District Court	621	347	470	498	560	434	624
6th Circ Ct of Appeals	269	358	341	286	305	316	275
USSC	1	4	1	4	4	7	1
Total	**891**	**709**	**812**	**788**	**869**	**757**	**900**

BIENNIAL REPORT

of the

ATTORNEY GENERAL

of the

STATE OF MICHIGAN

for the

BIENNIAL PERIOD ENDING DECEMBER 31, 2006

MICHAEL A. COX
ATTORNEY GENERAL

AUTHORITY

PRINTED BY J.B. PRINTING CO. INC., KALAMAZOO, MICHIGAN—2007

LETTER OF TRANSMITTAL

To the Honorable Legislature of the State of Michigan:

In accordance with the provisions of MCL 14.30, I submit the Report of the Attorney General for the biennial period of January 1, 2005 through December 31, 2006.

MICHAEL A. COX
Attorney General

Consumer Protection Division

Katharyn A. Barron, Division Chief

The principal function of the Consumer Protection Division is investigating and mediating consumer complaints and encouraging compliance with consumer protection and antitrust laws. The division administers or enforces more than 35 state statutes. Under many of these statutes, the Consumer Protection Division has exclusive or primary compliance and enforcement jurisdiction.

By statutory prescription, the division issues licenses to charities and professional fundraisers acting on their behalf, registers charitable trusts, public safety organizations and their fundraisers, and is a necessary party to many probate estates having a residuary devise to a charitable entity. Franchisors must provide the division with notice of their intent to offer or sell franchises. Those offering for sale a "business opportunity" must also provide the division with notice. The division also enforces consumer laws against offerors of product-based pyramid scams. The division educates consumers through speeches, seminars, workshops, coalitions, and task forces.

As of January 1, 2006, the tobacco and special litigation work is no longer handled in the Consumer Protection Division. There is now a separate division entitled *Tobacco & Special Litigation.*

The division also represents the Michigan Retirement Systems in security fraud matters. The Systems invest on behalf of Michigan Public School Employees, State Employees, State Police, and Michigan Judges. In March 2006, the Michigan Retirement Systems was appointed co-lead plaintiff along with Central States and New Mexico in the securities class action lawsuit against HealthSouth Corporation, its former directors and executives, as well as HealthSouth's investment bankers (UBS) and former outside auditors (Ernst and Young), *In re HealthSouth Corporation*, USDC No. CV-03-BE-1502-S, United States District Court for the Northern District of Alabama.

Finally, the division also handles miscellaneous matters at the direction of the Attorney General.

Division Caseload:

	Pending 12/31/04	Opened 2005	Closed 2005	Pending 12/31/05	Opened 2006	Closed 2006	Pending 12/31/06
Michigan Courts							
District Ct	0	0	0	0	1	0	1
Probate Ct	107	76	24	159	92	75	176
Circuit Ct + 1 Out-of-State	16	4	8	12	5	5	12
Ct of Appeals	3	1	1	3	4	1	6
Supreme Ct	0	0	0	0	1	0	1
Total	***126**	**81**	**33**	***174**	**103**	**81**	**196**
US Courts							
District Ct	8	3	3	8	1	3	7
6th Circ Ct of App	2	0	1	1	1	0	2
Supreme Ct	1	1	1	1	0	1	0
Bankruptcy Ct	2	0	1	1	0	0	1
Total	**13**	**4**	**6**	**11**	**2**	**4**	**10**
Administrative Actions	10	7	17	0	0	0	0

*The pending 2004 totals will not match the 2003-2004 biennial report, and the 2005 pending totals will not be accurate because the tobacco and other special litigation files were moved from Consumer Protection Division to a new Special Litigation and Tobacco Division.

Monies Paid To the State and Other Significant Activities:	**2005**	**2006**
Consumer complaints	18,680	19,456
Money recovered for consumers	$3,609,736.17	$6,307,714.99
Civil penalties, investigative, and other costs/income	$1,280,838.79	$1,760,199.74
Franchise registrations (new & renewal)	1,302	1,372
Business opportunity registrations	21	22
Franchise fees	$325,750.00	$343,750.00
Antitrust civil penalties, state recoveries and *cy pres* distributions	$4,594,696.06	$587,788.60
Antitrust recoveries for consumers	$901,603.65	$0
Charitable Trust		
Files opened for determination of applicability of charitable trust and solicitation requirements	942	1,006
Nonprofit corporate dissolutions closed	217	256
Charitable solicitation licenses issued	4,481	5,324
Charitable solicitation professional fundraiser licenses issued	409	222
Public safety registrations issued	72	73
Public safety professional fundraiser registrations issued	21	24
Registered charitable trusts	9,767	10,069

Criminal Division

Thomas C. Cameron, Division Chief

The Criminal Division investigates and prosecutes criminal cases based on the Attorney General's common law and statutory duties as Michigan's chief law enforcement officer and his statutory responsibility to supervise Michigan's 83 prosecuting attorneys. In order to carry out its mission, the Criminal Division employs 14 full-time prosecutors, 7 full-time Special Agent Investigators, and 6 full-time support staff, along with law student support when available.

The Criminal Division is comprised of several units including the Office of Special Investigations (OSI), the Child and Public Protection Unit (CPPU), and the Joshua Project. Investigations and prosecutions for the division involve the full spectrum of criminal offenses, but the OSI's primary focus remains in the area of complex cases, including cold case homicides and prosecuting public corruption of elected officials. The CPPU investigates and prosecutes the exploitation of children over the Internet, including solicitation of children for sexual purposes, using the Internet to disseminate obscene matter to a minor, and crimes involving child pornography. The Joshua Project is a community prosecution initiative created by the Attorney General in response to a 30 percent increase of non-fatal and fatal shootings that occurred in the City of Detroit during the first half of 2004 compared to the previous year. Fully implemented on January 1, 2005, this unit prosecutes gun-related assaults in the City of Detroit's Southwest Police District.

For over 20 years, the Criminal Division has also been active in environmental and welfare fraud prosecutions. The division prosecutes all welfare recipient fraud cases in Wayne County. Most recipient fraud is discovered through wage match programs and is investigated and referred for prosecution by the Michigan Family Independence Agency, Office of Inspector General. For over 15 years, the division has also specialized in the prosecution of environmental crimes across the State of Michigan.

BIENNIAL REPORT

of the

ATTORNEY GENERAL

of the

STATE OF MICHIGAN

for the

BIENNIAL PERIOD ENDING DECEMBER 31, 2008

MICHAEL A. COX
ATTORNEY GENERAL

AUTHORITY

PRINTED BY EDWARDS BROTHERS, INC., ANN ARBOR, MICHIGAN — 2009.

LETTER OF TRANSMITTAL

To the Honorable Legislature of the State of Michigan:

In accordance with the provisions of MCL 14.30, I submit the Report of the Attorney General for the biennial period of January 1, 2007, through December 31, 2008.

MICHAEL A. COX
Attorney General

US Courts							
District Ct	4	2	1	5	2	3	4
Circ Ct of App	6	1	2	5	3	1	7
Supreme Ct	0	0	0	0	2	1	1
Total	**10**	**3**	**3**	**10**	**7**	**5**	**12**
Administrative Actions	162	183	229	116	158	126	148

Monies Paid To/By the State:	**2007**	**2008**
All Judgments/Settlements paid TO State	$5,000.00	$117,201.86
All Judgments/Settlements paid BY State	0	0

CONSUMER AND ENVIRONMENTAL PROTECTION BUREAU

A. Michael Leffler
Bureau Chief

This Bureau began the biennial period as the Consumer Protection and Criminal Prosecutions Bureau with the following five divisions: Alcohol and Gambling Enforcement Division; Consumer Protection Division; Criminal Prosecutions Division; Environment, Natural Resources and Agriculture Division; and the Tobacco and Special Litigation Division. During the biennial period, the Department was reorganized, renaming this Bureau as the Consumer and Environmental Protection Bureau. The Alcohol and Gambling Enforcement Division and Criminal Prosecutions Division were moved to the newly-named Criminal Justice Bureau, and the Licensing and Regulation Division was moved to this Bureau.

The Bureau's primary civil responsibilities include the protection of consumers and businesses from unscrupulous commercial practice; enforcement and oversight of tobacco and utility law; the regulation of certain professions, occupations, and services; and the protection of Michigan's natural resources. Attorneys in the Bureau practice in virtually all state and federal courts as well as state administrative tribunals. The Bureau also serves as house-counsel for the Departments of Agriculture, Environmental Quality, and Natural Resources as well as various licensing boards and commissions.

Consumer Protection Division

Katharyn Barron, Division Chief

The principal function of the Consumer Protection Division is investigating and mediating consumer complaints and encouraging compliance with consumer protection and antitrust laws. The Division administers or enforces more than 35 state statutes. Under many of these statutes, the Consumer Protection Division has exclusive or primary compliance and enforcement jurisdiction.

By statutory prescription, the Division issues licenses to charities and professional fundraisers acting on their behalf; registers charitable trusts, public safety organizations and their fundraisers, and is a necessary party to many probate estates having a residuary devise to a charitable entity. Franchisors must provide the

Division with notice of their intent to offer or sell franchises. Those offering for sale a "business opportunity" must also provide the Division with notice. The Division also enforces consumer laws against offerors of product-based pyramid scams. The Division educates consumers through speeches, seminars, workshops, coalitions, and task forces.

The Michigan Cyber Safety Initiative (Michigan CSI) is an Internet safety education program with presentations for kindergarten through eighth-grade students and a community seminar. Michigan CSI was piloted in the spring of 2007 and fully launched during the 2007-2008 school year. During calendar year 2007, 89,790 students and adults participated in the programming, while in calendar year 2008, the program reached an additional 219,317 people.

The Division also represents the Michigan Retirement Systems in security fraud matters. The Systems invest on behalf of Michigan Public School Employees, State Employees, State Police, and Michigan Judges.

Finally, the Division also handles miscellaneous matters at the direction of the Attorney General.

Division Caseload:

	Pending 12/31/06	Opened 2007	Closed 2007	Pending 12/31/07	Opened 2008	Closed 2008	Pending 12/31/08
Michigan Courts							
District Ct	1	4	1	4	3	3	4
Probate Ct	176	52	55	173	69	41	201
Circuit Ct	10	8	8	10	6	2	14
Ct of Appeals	6	3	3	6	1	3	4
Supreme Ct	0	1	0	1	0	0	1
Total	**193**	**68**	**67**	**194**	**79**	**49**	**224**
Out-of-State State Courts	2	0	0	2	0	0	2
US Courts							
District Ct	7	1	1	7	4	2	9
Circ Ct of App	2	0	1	1	0	0	1
Bankruptcy Ct	1	0	0	1	1	0	2
Total	**10**	**1**	**2**	**9**	**5**	**2**	**12**

Monies Paid To the State and Other Significant Activities:	**2007**	**2008**
Consumer complaints	20,035	19,323
Money recovered for consumers	$2,947,602.02	$2,626,769.16
Civil penalties, investigative, and other costs/income	$1,167,548.30	$6,866,162.90
Franchise registrations (new & renewal)	1,404	1,401
Business opportunity registrations	6	13
Franchise fees	$351,000.00	$350,250.00
Antitrust civil penalties, state recoveries and *cy pres* distributions	$597,043.59	$1,944,452.66
Antitrust recoveries for consumers	$282,869.34	$21,066.05

Files opened for determination of applicability of charitable trust and solicitation requirements	1355	1451
Dissolution, public safety, professional fundraiser files opened	263	369
Nonprofit corporate dissolutions closed	272	201
Charitable solicitation licenses issued	5311	5730
Charitable solicitation professional fundraiser licenses issued	382	219
Public safety registrations issued	67	70
Public safety professional fundraiser registrations issued	7	6
Registered charitable trusts at year end	10,559	10,982

Environment, Natural Resources, and Agriculture Division

S. Peter Manning, Division Chief

The Environment, Natural Resources, and Agriculture Division advises and represents the Department of Environmental Quality, Department of Natural Resources, and Department of Agriculture in matters involving environmental regulation, natural resources management, and agricultural programs. The Division also advises and represents other state agencies in matters involving Native American treaty issues, and the Department of Energy, Labor, and Economic Growth in Land Division Act matters. The Division also serves as legal counsel to or as the Attorney General's representative on the following Commissions or other bodies:

- Agriculture Commission
- Natural Resources Commission
- Great Lakes Commission
- Mackinac Island State Park Commission
- Great Lakes Fishery Trust
- Michigan State Waterways Commission
- Natural Resources Damage Assessment Trustee Councils
- Water Resources Conservation Advisory Council

Division Caseload:

	Pending 12/31/06	Opened 2007	Closed 2007	Pending 12/31/07	Opened 2008	Closed 2008	Pending 12/31/08
Michigan Courts							
District Ct	2	0	1	1	0	0	1
Probate Ct	3	0	2	1	1	2	0
Circuit Ct	219	133	152	200	112	120	192
Ct of Claims	1	3	1	3	3	2	4
Ct of Appeals	32	25	26	31	15	27	19
Supreme Ct	5	10	5	10	11	9	12
Total	**262**	**171**	**187**	**246**	**142**	**160**	**228**
US Courts							
District Ct	20	8	10	18	11	11	18
Circ Ct of App	9	6	5	10	7	6	11
Supreme Ct	2	2	2	2	1	2	1
Bankruptcy Ct	17	4	2	19	2	6	15
Total	**48**	**20**	**19**	**49**	**21**	**25**	**45**
Administrative Actions	127	32	35	124	35	31	128

BIENNIAL REPORT

of the

ATTORNEY GENERAL

of the

STATE OF MICHIGAN

for the

BIENNIAL PERIOD ENDING DECEMBER 31, 2010

MICHAEL A. COX
ATTORNEY GENERAL

AUTHORITY

PRINTED BY EDWARDS BROTHERS, INC., ANN ARBOR, MICHIGAN — 2011

LETTER OF TRANSMITTAL

To the Honorable Legislature of the State of Michigan:

In accordance with the provisions of MCL 14.30, I submit the Report of the Attorney General for the biennial period of January 1, 2009, through December 31, 2010.

MICHAEL A. COX
Attorney General

CONSUMER & ENVIRONMENTAL PROTECTION BUREAU

Robert Ianni
Bureau Chief

This Bureau began the biennial period as the Consumer and Environmental Protection Bureau with the following four divisions: Consumer Protection Division; Environment, Natural Resources, and Agriculture Division; Licensing and Regulation Division; and the Tobacco and Special Litigation Division. As a result of a Department reorganization during the biennial period, the following divisions were added to the bureau: Corporate Oversight Division; Health, Education & Family Services Division; Labor Division; and the Public Administration Division. Also, the Tobacco and Special Litigation Division was incorporated into the Environment, Natural Resources, and Agriculture Division.

The Bureau's primary civil responsibilities include the protection of consumers and businesses from unscrupulous commercial practice; enforcement and oversight of tobacco and utility law; the regulation of certain professions, occupations, and services; and the protection of Michigan's natural resources. Attorneys in the Bureau practice in virtually all state and federal courts as well as state administrative tribunals. The Bureau serves as house-counsel for the Departments of Agriculture, Environmental Quality, and Natural Resources as well as various licensing boards and commissions. The Bureau provides legal representation in matters affecting such diverse areas as education, social services, health law, labor/workforce issues, and provides legal advice and representation to state agencies and officials to secure compliance with Michigan law in corporate, insurance, and securities matters.

The Bureau Chief and two Division Chiefs within the Bureau serve as the Department's emergency management coordinators and regularly train and provide legal advice at the State Police Emergency Operations Center on issues arising during state declared disasters and emergencies. The emergency management coordinators also provide legal training to first responders, state and local emergency management directors, judges, and attorneys responsible for advising local agencies during an emergency. A CD entitled "Public Health Law Bench Book for Michigan Courts," which provides an extensive compilation of emergency public health law was developed within the Bureau and is widely distributed to all courts and legal practioners.

Consumer Protection Division

Katharyn Barron, Division Chief

The principal function of the Consumer Protection Division is investigating and mediating consumer complaints and encouraging compliance with consumer protection laws. The division administers or enforces more than 35 state statutes. Under many of these statutes, the Consumer Protection Division has exclusive or primary compliance and enforcement jurisdiction.

By statutory prescription, the division issues licenses to charities and professional fundraisers acting on their behalf; registers charitable trusts, public safety organizations and their fundraisers, and is a necessary party to many probate estates having a residuary devise to a charitable entity. Franchisors must provide the division with notice of their intent to offer or sell franchises. Those offering for sale a "business opportunity," must also provide the division with notice. The division also enforces consumer laws against offerors of product based pyramid scams. The division educates consumers through speeches, seminars, workshops, coalitions, and task forces.

The Michigan Cyber Safety Initiative (Michigan CSI) is an Internet safety education program with presentations for kindergarten through eighth-grade students and a community seminar. Michigan CSI was piloted in the spring of 2007, and fully launched during the 2007-2008 school year. During calendar year 2009, 183,997 students and adults participated in the programming, while in calendar year 2010, the program reached an additional 178,854 people.

The Senior Brigade program consists of 30 minute presentations tailored to seniors and their caregivers. The seminars were launched in September 2009 and 85 presentations were provided in the remainder of calendar year 2009. In calendar year 2010, 566 seminars were conducted.

Finally, the division also handles miscellaneous matters at the direction of the Attorney General.

Division Caseload:

	Pending 12/31/08	Opened 2009	Closed 2009	Pending 12/31/09	Opened 2010	Closed 2010	Pending 12/31/10
Michigan Courts							
Municipal Ct	0	0	0	0	0	0	0
District Ct	3	0	3	0	0	0	0
Probate Ct	201	33	105	129	49	61	117
Circuit Ct	14	8	12	10	5	8	7
Ct of Claims	0	0	0	0	0	0	0
Ct of Appeals	4	3	2	5	1	3	3
Supreme Ct	1	1	2	0	2	1	1
Total	**223**	**45**	**124**	**144**	**57**	**73**	**128**
Out-of-State State Courts	2	0	1	1	0	1	0
US Courts							
District Ct	1	0	1	0	0	0	0
Circ Ct of App	1	0	1	0	0	0	0
Supreme Ct	0	0	0	0	0	0	0
Bankruptcy Ct	2	0	2	0	0	0	0
Total	**4**	**0**	**4**	**0**	**0**	**0**	**0**

Monies Paid To the State and Other Significant Activities:	**2009**	**2010**
Consumer complaints	17,445	14,503
Money recovered for consumers	$1,720,737.48	$1,859,957.04
Civil penalties, investigative, and other costs/income	$2,227,428.52	$76,395.31
Franchise registrations (new & renewal)	1,271	1,271
Business opportunity registrations	5	9
Franchise fees	$317,750.00	$317,750.00

	2009	**2010**
New Files Opened: Charitable organizations, professional fundraisers, public safety organizations, dissolution requests, trusts	2001	1912
Nonprofit corporate dissolutions closed	416	337

Charitable solicitation licenses issued	6950	7473
Charitable solicitation professional fundraiser licenses issued	299	350
Public safety registrations issued	78	82
Public safety professional fundraiser registrations issued	7	15
Registered charitable trusts as of year end	12,133	13,003

Corporate Oversight Division

Suzan M. Sanford, Division Chief

The Corporate Oversight Division provides general representation and counsel to the Office of Financial and Insurance Regulation (OFIR) within the Department of Energy, Labor & Economic Growth (renamed the Department of Licensing and Regulatory Affairs effective April 25, 2011). Corporate Oversight represents OFIR in matters involving banking, insurance, and securities, including the Michigan Insurance Code, Patient's Right to Independent Review Act, Blue Cross Act (Nonprofit Health Care Corporation Reform Act), Banking Code of 1999, Mortgage Brokers, Lenders & Servicers Licensing Act, Consumer Financial Services Act, Uniform Securities Act, and numerous other consumer finance related laws. In addition, the Division acts as counsel to the OFIR Commissioner in receivership, rehabilitation, and liquidation proceedings involving insurance companies, health maintenance organizations, banks, and other regulated entities.

The Division also provides representation to the Corporation Division of the Bureau of Commercial Services within the Department of Energy, Labor & Economic Growth. In this capacity, the Division provides general legal advice, selective document review, and representation in all litigation pertaining to the organizational documents for business corporations, nonprofit corporations, limited partnerships, limited liability companies, and limited liability partnerships to be formed, and for foreign entities to obtain a certificate of authority to transact business in the State, as required by Michigan law.

The Division further protects consumers through the enforcement of state and federal antitrust laws, Michigan's price gouging statute, and predatory lending laws. The Division also investigates and criminally prosecutes financial, charitable, and consumer fraud.

Finally, the Division represents the Michigan Retirement Systems, which invest on behalf of the Michigan Public School Employee, State Employees, State Police, and Michigan Judges, in security fraud matters involving violations of state and federal security laws.

Division Caseload:

	Pending 12/31/08	Opened 2009	Closed 2009	Pending 12/31/09	Opened 2010	Closed 2010	Pending 12/31/10
Michigan Courts							
Municipal Ct	0	0	0	0	0	0	0
District Ct	0	8	0	8	34	31	11
Probate Ct	0	0	0	0	0	0	0
Circuit Ct	19	20	9	30	35	11	54
Ct of Claims	0	0	0	0	0	0	0
Ct of Appeals	5	5	1	9	6	6	9
Supreme Ct	4	4	2	6	4	4	6
Total	**28**	**37**	**12**	**53**	**79**	**52**	**80**

BIENNIAL REPORT

of the

ATTORNEY GENERAL

of the

STATE OF MICHIGAN

for the

BIENNIAL PERIOD ENDING DECEMBER 31, 2012

BILL SCHUETTE
ATTORNEY GENERAL

AUTHORITY

PRINTED BY EDWARDS BROTHERS, INC., ANN ARBOR, MICHIGAN – 2013

LETTER OF TRANSMITTAL

To the Honorable Legislature of the state of Michigan:

In accordance with the provisions of MCL 14.30, I submit the Report of the Attorney General for the biennial period of January 1, 2011, through December 31, 2012.

BILL SCHUETTE
Attorney General

CONSUMER & ENVIRONMENTAL PROTECTION BUREAU

Robert Ianni
Bureau Chief

This bureau consists of the following twelve divisions: Consumer Protection, Corporate Oversight, Environment, Natural Resources and Agriculture, Finance, Health, Education, and Family Services, Labor, Licensing and Regulation, Public Employment, Elections, and Tort, Public Service, Revenue and Collections, State Operations, and Transportation. During this biennial period, six of these divisions (Finance, Public Employment, Elections, and Tort, Public Service, Revenue and Collections, State Operations, and Transportation) were transferred from the Governmental Affairs Bureau to the Consumer and Environmental Protection bureau due to a departmental reorganization.

The bureau's primary civil responsibilities include the protection of consumers and businesses from unscrupulous commercial practice; enforcement and oversight of tobacco and utility law; the regulation of certain professions, occupations, and services; and the protection of Michigan's natural resources. Attorneys in the bureau practice in virtually all state and federal courts as well as state administrative tribunals. The bureau serves as house-counsel for 16 state departments as well as various licensing boards and commissions. The bureau provides legal representation in matters affecting such diverse areas as education, social services, health law, labor/workforce issues, and provides legal advice and representation to state agencies and officials to secure compliance with Michigan law in corporate, insurance, and securities matters.

Consumer Protection Division

Katharyn A. Barron, Division Chief

The principal function of the Consumer Protection Division is investigating and mediating consumer complaints and encouraging compliance with consumer protection laws. The division administers or enforces more than 35 state statutes. Under many of these statutes, the Consumer Protection Division has exclusive or primary compliance and enforcement jurisdiction.

By statutory prescription, the division registers charities and licenses professional fundraisers acting on their behalf, registers charitable trusts, public safety organizations and their fundraisers, and is a necessary party to many probate estates having a residuary devise to a charitable entity. Franchisors must provide the division with notice of their intent to offer or sell franchises. Those offering for sale a “business opportunity,” must also provide the division with notice. The division also enforces consumer laws against offerors of product based pyramid scams. The division educates consumers through speeches, seminars, workshops, coalitions, and task forces.

The Michigan Cyber Safety Initiative (Michigan CSI) is an Internet safety education program with presentations for kindergarten through eighth-grade students and a community seminar. Michigan CSI was piloted in the spring of 2007, and fully launched during the 2007-2008 school year. During calendar year 2011, 98,086 students and adults participated in the programming, while in calendar year 2012, the program reached an additional 153,060 people.

The Senior Brigade program consists of 30 minute presentations tailored to seniors and their caregivers. The seminars were launched in September 2009. In calen-

dar year 2011, 320 seminars were conducted. During calendar year 2012, 370 seminars were conducted.

Finally, the division also handles miscellaneous matters at the direction of the Attorney General.

Division Caseload:

	Pending 12/31/10	Opened 2011	Closed 2011	Pending 12/31/11	Opened 2012	Closed 2012	Pending 12/31/12
Michigan Courts							
Probate Ct	117	28	55	90	35	33	92
Circuit Ct	7	3	7	3	10	12	1
Ct of Claims	0	1	0	1	0	0	1
Ct of Appeals	3	3	2	4	0	3	1
Supreme Ct	1	1	2	0	0	0	0
Total	**128**	**36**	**66**	**98**	**45**	**48**	**95**
US Courts							
Bankruptcy Ct	0	1	0	1	0	1	0
Total	**0**	**1**	**0**	**1**	**0**	**1**	**0**

Monies Paid To the State and Other Significant Activities:	**2011**	**2012**
Consumer complaints	12,844	10,908
Money recovered for consumers	$1,876,013.45	$1,314,751.38
Civil penalties, investigative, and other costs/income	$3,877,799.00	$11,121,870.04
Franchise registrations (new & renewal)	1,297	1,300
Business opportunity registrations	4	8
Franchise fees	$324,250.00	$325,000.00

	2011	**2012**
New Files Opened: Charitable organizations, professional fundraisers, public safety organizations, dissolution requests, trusts	1,754	1,900
Nonprofit corporate dissolutions closed	415	794
Charitable solicitation licenses and registrations issued	6,694	8,192
Charitable solicitation professional fundraiser licenses issued	368	344
Public safety registrations issued	68	78
Public safety professional fundraiser registrations issued	15	15
Registered charitable trusts as of year-end	13,861	14,314

Corporate Oversight Division

Suzan M. Sanford, Division Chief

The Corporate Oversight Division provides representation and counsel to state departments in matters involving banking, insurance, and securities. The division acts as general counsel to the Office of Financial and Insurance Regulation (OFIR) of the

Department of Energy, Labor and Economic Growth and works to enforce the Michigan Insurance Code, Patient's Right to Independent Review Act, Blue Cross Act (Nonprofit Health Care Corporation Reform Act), Banking Code of 1999, Mortgage Brokers, Lenders and Servicers Licensing Act, Consumer Financial Services Act, Uniform Securities Act, and numerous other consumer finance related laws. This includes the regulation of Blue Cross Blue Shield of Michigan, HMOs, state-chartered banks, domestic insurance companies, foreign insurance companies, state-chartered credit unions, consumer finance lenders, insurance agents, securities agents, and broker-dealers.

The division acts as counsel to the Commissioner of OFIR in receivership, rehabilitation, and liquidation proceedings involving insurance companies, health maintenance organizations, banks, and other regulated entities. During the biennial period, responsibility for enforcement of the Uniform Securities Act moved from OFIR to the Securities Division of the Bureau of Commercial Services within Department of Licensing and Regulatory Affairs (LARA). The division also provides representation to the Corporation Division of the Bureau of Commercial Services within the LARA. For the Corporation Division, the division provides services that enable business corporations and nonprofits, limited partnerships, limited liability companies, and limited liability partnerships to be formed, and for foreign entities to obtain a certificate of authority to transact business in the state, as required by Michigan law.

The division protects consumers through enforcement of state and federal antitrust laws, Michigan's price gouging statute, and predatory lending laws. The division also investigates and prosecutes financial, charitable, and consumer fraud.

The division also represents the Michigan Retirement Systems, which invest on behalf of the Michigan Public School Employee, State Employees, State Police, and Michigan Judges in security fraud matters involving violations of state and federal security laws.

Division Caseload:

	Pending 12/31/10	Opened 2011	Closed 2011	Pending 12/31/11	Opened 2012	Closed 2012	Pending 12/31/12
Michigan Courts							
District Ct	11	15	17	9	23	25	7
Circuit Ct	54	27	45	36	35	37	34
Ct of Appeals	9	7	12	4	8	6	6
Supreme Ct	6	3	7	2	1	1	2
Total	**80**	**52**	**81**	**51**	**67**	**69**	**49**
Out-of-State State Courts	**0**	**0**	**0**	**0**	**1**	**1**	**0**
US Courts							
District Ct	11	9	2	18	14	10	22
Circ Ct of App	3	1	1	3	3	3	3
Bankruptcy Ct	5	1	0	6	3	5	4
Total	**19**	**11**	**3**	**27**	**20**	**18**	**29**
Administrative Actions							
State	1	1	2	0	0	0	0
Federal	0	1	1	0	0	0	0
Total	**1**	**2**	**3**	**0**	**0**	**0**	**0**

Monies Paid To/By the State:	**2011**	**2012**
All Judgments/Settlements paid TO State	$2,139,779.12	$111,781,351.71

Other Significant Division Activity:

In February 2012, Attorney General Schuette and 48 other states entered into a historic $25 billion State-Federal Mortgage Settlement with the five leading bank mortgage servicers to address allegations of faulty foreclosure processes and poor servicing of mortgages that harmed Michigan homeowners. Michigan residents are expected to receive approximately $780 million in benefits, including a $97.2 million payment directly to the state of Michigan that created the Homeowner Protection Fund, to ensure families affected by the foreclosure crisis received the most benefit.

Environment, Natural Resources, and Agriculture Division

S. Peter Manning, Division Chief

The Environment, Natural Resources, and Agriculture Division's primary client agencies are the Departments of Environmental Quality, Natural Resources, and Agriculture and Rural Development. The division advises and represents these agencies in matters involving environmental protection, natural resource management, and agricultural development and oversight. The division also represents various state agencies in matters involving Indian law, including treaty issues and gaming, and represents the Department of Licensing and Regulatory Affairs regarding Land Division Act matters.

The division also advocates for ratepayers in utility rate proceedings before the Public Service Commission. The division appeared in all significant rate cases involving the largest utilities, and in cost recovery proceedings under 1982 PA 304. The division also handled other matters at the direction of the Attorney General, including such matters as Blue Cross Blue Shield of Michigan and the tobacco Master Settlement Agreement.[1] Beginning in 2011, the State Public Administrator was housed in the division. (See Other Significant Division Activity below.)

The division also serves as legal counsel to or as the Attorney General's representative on the following Commissions:

- Commission of Agriculture and Rural Development
- Natural Resources Commission
- Great Lakes Commission
- Mackinac Island State Park Commission
- State Waterways Commission
- State 911 Commission
- Great Lakes Fishery Trust
- Utility Consumer Participation Board

Division attorneys appear in state administrative proceedings and in virtually all state and federal trial and appellate courts.

[1] In July of 2011, the Tobacco Unit was transferred to the Revenue and Collections Division involving 21 litigation cases: 13 Michigan Circuit Court cases, 1 Michigan Court of Appeals case, 1 Michigan Supreme Court case, 2 U.S. District Court cases, 1 U.S. Court of Appeals case, and 3 U.S. Bankruptcy Court cases; as well as 1 federal administrative case and 28 general assignments.

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AUTHORITY

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BILL SCHUETTE
Attorney General

CONSUMER & ENVIRONMENTAL PROTECTION BUREAU

Robert Ianni
Bureau Chief

This bureau consists of the following twelve divisions: Consumer Protection; Corporate Oversight; Environment, Natural Resources and Agriculture; Finance; Health, Education, and Family Services; Labor; Licensing and Regulation; Public Employment, Elections, and Tort; Public Service; Revenue and Collections; State Operations; and Transportation.

The bureau's primary civil responsibilities include the protection of consumers and businesses from unscrupulous commercial practice; enforcement and oversight of tobacco and utility law; the regulation of certain professions, occupations, and services; and the protection of Michigan's natural resources. Attorneys in the bureau practice in virtually all state and federal courts as well as state administrative tribunals. The bureau serves as house-counsel for 16 state departments as well as various licensing boards and commissions. The bureau provides legal representation in matters affecting such diverse areas as education, social services, health law, labor/workforce issues, and provides legal advice and representation to state agencies and officials to secure compliance with Michigan law in corporate, insurance, and securities matters.

The bureau chief and two division chiefs within the bureau serve as the department's emergency management coordinators and regularly train and provide legal advice at the State Police Emergency Operations Center on issues arising during state declared disasters and emergencies. The emergency management coordinators also provide legal training to first responders, state and local emergency management directors, judges, and attorneys responsible for advising local agencies during an emergency. A CD entitled "Public Health Law Bench Book for Michigan Courts," which provides an extensive compilation of emergency public health law was developed within the bureau and is widely distributed to all courts and legal practitioners.

Consumer Protection Division

Katharyn Barron, Division Chief

The principal function of the Consumer Protection Division is investigating and mediating consumer complaints and encouraging compliance with consumer protection laws. The division administers or enforces more than 35 state statutes. Under many of these statutes, the Consumer Protection Division has exclusive or primary compliance and enforcement jurisdiction.

By statutory prescription, the division registers charities and licenses professional fundraisers acting on their behalf, registers charitable trusts, public safety organizations and their fundraisers, and is a necessary party to many probate estates having a residuary devise to a charitable entity. Franchisors must provide the division with notice of their intent to offer or sell franchises. Those offering for sale a "business opportunity," must also provide the division with notice. The division also enforces consumer laws against offerors of product based pyramid scams. The division educates consumers through speeches, seminars, workshops, coalitions, and task forces.

OK2SAY is a student safety program that encourages students to confidentially report tips on potential harm or criminal activities directed at students, school employees, and schools. The Attorney General offers free presentations for students

in grades 6-12, a program overview, and a community seminar for parents, guardians, and interested leaders. OK2SAY was operational at the beginning of the 2014-2015 school year. During calendar year 2014, 48,284 students and adults participated in the programming.

The Michigan Cyber Safety Initiative (Michigan) is an Internet safety education program with presentations for kindergarten through eighth-grade students and a community seminar. Michigan was piloted in the spring of 2007, and fully launched during the 2007-2008 school year. During calendar year 2013, 178,650 students and adults participated in the programming, while in calendar year 2014, the program reached an additional 131,169 people.

The Senior Brigade program consists of 45-minute presentations tailored to seniors and their caregivers. The seminars were launched in September 2009. In calendar year 2013, 701 seminars were conducted. During calendar year 2014, 649 seminars were conducted.

Finally, the division also handles miscellaneous matters at the direction of the Attorney General.

Division Caseload:

	Pending 12/31/12	Opened 2013	Closed 2013	Pending 12/31/13	Opened 2014	Closed 2014	Pending 12/31/14
Michigan Courts							
Probate Ct	92	3	95	0	1	0	1
Circuit Ct	1	9	10	0	9	7	2
Ct of Claims	1	0	1	0	0	0	0
Ct of Appeals	1	1	2	0	0	0	0
Total	**95**	**13**	**108**	**0**	**10**	**7**	**3**

Monies Paid To the State and Other Significant Activities:	**2013**	**2014**
Consumer Complaints	10,896	10,504
Money Recovered For Consumers	$2,194,714.79	$1,314,857.42
Civil Penalties, Investigative, and Other Costs/Income	$3,455,137.58	$647,930.80
Franchise Registrations (New and Renewal)	1,348	1,418
Business Opportunity Registrations	2	1
Franchise Fees	$337,000.00	$354,500.00

	2013	**2014**
New Files Opened: Charitable Organizations, Professional Fundraisers, Public Safety Organizations, Dissolution Requests, Trusts	1,753	1,761
Nonprofit Corporate Dissolutions Closed	371	456
Charitable Solicitation Registrations Issued	7,560	8,284
Charitable Solicitation Professional Fundraiser Licenses Issued	340	370
Public Safety Registrations Issued	77	78
Public Safety Professional Fundraiser Registrations Issued	15	9
Registered Charitable Trusts as of Year-End	15,052	14,986

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BILL SCHUETTE
ATTORNEY GENERAL

AUTHORITY

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Attorney General

Administrative Actions							
State	4	0	1	3	0	1	2
Federal	0	0	0	0	0	0	0
Total	**4**	**0**	**1**	**3**	**0**	**1**	**2**

Monies Paid To/By the State:	**2015**	**2016**
All Judgments/Settlements Paid TO State	$7,705.00	$17,906.08
All Judgments/Settlements Paid BY State	0	0

Other Significant Division Activity:	**2015**	**2016**
Citizen Inquiries Processed	253	230

The CRCL Division provided significant legal advice and representation to the CMEAA during this period, relative to the establishment of operational rules, procedures and guidelines.

CONSUMER PROTECTION PRACTICE GROUP

Wanda Stokes (2015)
Vacant (2016)
Practice Group Manager

Two divisions comprise the Consumer Protection Practice Group: Consumer Protection and Licensing and Regulation. The practice group's primary responsibilities include protecting consumers from unscrupulous commercial practices and enforcing the regulation of certain professions, occupations, and services.

Consumer Protection Division

Katharyn Barron, Division Chief

The Consumer Protection Division fields citizen questions, mediates consumer complaints, encourages compliance with consumer protection laws, and proactively educates Michigan citizens. The division mediates complaints related to more than 35 state statutes. Under many of these statutes, the Attorney General has exclusive or primary compliance and enforcement jurisdiction.

By statutory prescription, the division: registers charities and licenses professional fundraisers acting on their behalf; registers charitable trusts, public safety organizations and their fundraisers; and is a necessary party to many probate estates having a residuary devise to a charitable entity. In October of 2016, all charity regulatory functions were transferred to the Licensing and Regulation Division. Charitable fraud matters are handled by the Corporate Oversight Division.

Franchisors and those offering for sale a "business opportunity" must provide the Consumer Protection Division with notice of their intent to offer or sell franchises or opportunities. The division also enforces consumer laws against those offering product-based pyramid scams.

The division educates the public through consumer alerts and speaking engagements. The Consumer Education program (formally known as Senior Brigade) consists of six different 45-minute presentations tailored to educate Michigan consumers.

Topics include: Home Repair and Improvement; Identity Theft; In-Home Care and Senior Residences; Investment Fraud; Online Safety; and Phone, Mail and e-Scams. The seminars were launched in September 2009. A total of 4,142 seminars have been presented. In calendar year 2015, 734 seminars were conducted, and during calendar year 2016, 723 seminars were conducted.

Educational opportunities offered to students include the Michigan Cyber Safety Initiative (Michigan CSI) and OK2SAY. Michigan CSI is an internet safety education program with presentations for kindergarten through fifth grade students. Piloted in the spring of 2007, and fully launched during the 2007-2008 school year, Michigan CSI has cumulatively reached 1,469,465 students and adults. During calendar year 2015, 129,093 students participated in the programming, while in calendar year 2016, the program reached an additional 116,125 students.

OK2SAY is a student safety program that encourages students to confidentially report tips on potential harm or criminal activities directed at students, school employees, or schools. The Attorney General offers free presentations for students in grades 6-12, a program overview, and a community seminar for parents, guardians, and interested leaders. OK2SAY was operational at the beginning of the 2014-2015 school year and has cumulatively reached 322,308 students and adults. During calendar year 2015, 142,348 students and adults participated in the programming and 2,169 tips were filed. During calendar year 2016, 131,676 students and adults participated in the programming and 3,359 tips were filed.

Division Caseload:

	Pending 12/31/14	Opened 2015	Closed 2015	Pending 12/31/15	Opened 2016	Closed 2016	Pending 12/31/16
Michigan Courts							
Probate Ct	1	0	0	1	0	1	0
Circuit Ct	2	12	14	0	6	6	0
Ct of Claims	0	0	0	0	0	0	0
Ct of Appeals	0	0	0	0	0	0	0
Total	**3**	**12**	**14**	**1**	**6**	**7**	**0**

Monies Paid To the State and Other Significant Activities:	**2015**	**2016**
Consumer Complaints	8,943	8,405
Consumer Refunds/Forgiven Debts and State Recoveries	$6,167,428.85	$3,160,661.57
Franchise Registrations (New and Renewal)	1,468	1,487
Franchise Fees	$367,000.00	$371,750.00

Licensing and Regulation Division

Michelle M. Brya, Division Chief

The Licensing and Regulation Division provides legal services to three bureaus within the Department of Licensing and Regulatory Affairs (LARA). The division represents the Bureau of Professional Licensing and the 27 health regulatory boards, commissions, and task forces created under the Public Health Code; the Corporations, Securities, and Commercial Licensing Bureau and 31 occupational regulatory boards created under the Occupational Code and the Cemetery Commissioner; and the

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BILL SCHUETTE
ATTORNEY GENERAL

AUTHORITY

PRINTED BY SHERIDAN BOOKS, CHELSEA, MICHIGAN–2020

LETTER OF TRANSMITTAL

To the Honorable Legislature of the state of Michigan:

In accordance with the provisions of MCL 14.30, I submit the Report of the Attorney General for the biennial period of January 1, 2017, through December 31, 2018.

BILL SCHUETTE
Attorney General

Consumer Protection Division

Katharyn Barron, Division Chief

The Consumer Protection Division fields citizen questions, mediates consumer complaints, encourages compliance with consumer protection laws, and proactively educates Michigan citizens. The division mediates complaints related to more than 35 state statutes. Under many of these statutes, the Attorney General has exclusive or primary compliance and enforcement jurisdiction.

Franchisors and those offering for sale a "business opportunity" must provide the Consumer Protection Division with notice of their intent to offer or sell.

The division educates the public through consumer alerts and speaking engagements. The Consumer Education program consists of six different 45-minute presentations tailored to educate Michigan consumers. Topics include: Home Repair and Improvement; Identity Theft; In-Home Care and Senior Residences; Investment Fraud; Online Safety; and Phone, Mail and e-Scams. The seminars were launched in September 2009. A total of 5,563 seminars have been presented to 119,613 Michigan consumers. In calendar year 2017, 723 seminars were conducted, and during calendar year 2018, 698 seminars were conducted.

Educational opportunities offered to students include the Michigan Cyber Safety Initiative (Michigan CSI) and OK2SAY. Michigan CSI is an internet safety education program with presentations for kindergarten through fifth grade students. Piloted in the spring of 2007, and fully launched during the 2007-2008 school year, Michigan CSI has cumulatively reached 1,694,128 students and adults. During calendar year 2017, 110,147 students participated in the program, while in calendar year 2018, the program reached an additional 114,516 students.

OK2SAY is a student safety program that encourages students to confidentially report tips on potential harm or criminal activities directed at students, school employees, or schools. The Attorney General offers free presentations for students in grades 6-12, a program overview, and a community seminar for parents, guardians, and interested leaders. OK2SAY was operational at the beginning of the 2014-2015 school year and has cumulatively reached 614,988 students and adults. OK2SAY has received 17,207 tips since the program became operational. During calendar year 2017, 136,475 students and adults participated in the program and 4,605 tips were filed. During calendar year 2018, 156,205 students and adults participated in the program and 6,473 tips were filed.

Division Caseload:

	Pending 12/31/16	Opened 2017	Closed 2017	Pending 12/31/17	Opened 2018	Closed 2018	Pending 12/31/18
Michigan Courts							
Probate Ct	0	0	0	0	0	0	0
Circuit Ct	0	1	0	1	0	1	0
Ct of Claims	0	0	0	0	0	0	0
Ct of Appeals	0	0	0	0	0	0	0
Total	**0**	**0**	**0**	**1**	**0**	**1**	**0**

Monies Paid To the State and Other Significant Activities:	**2017**	**2018**
Consumer Complaints	10,116	8,884
Consumer Refunds/Forgiven Debts and State Recoveries	708,852.55	$674,099.60
Franchise Registrations (New and Renewal)	1,556	1,641
Franchise Fees	$389,000.00	$410,250.00

Corporate Oversight Division

Joseph Potchen, Division Chief

The Corporate Oversight Division takes a primary enforcement role in a number of matters, including antitrust, consumer protection, charitable trusts and white-collar crime.

- **Antitrust:** The division investigates and litigates price fixing, market allocation, monopolization and similar types of antitrust matters, including merger and acquisition reviews.
- **Consumer Protection:** The division actively enforces state consumer protection laws, including the Michigan Consumer Protection Act. These efforts seek to address such issues as deceptive business practices, mortgage fraud, price gouging, and other consumer-related matters.
- **Charitable Trusts:** The division provides legal advice to the Attorney General's charitable trust unit and represents them in court when necessary. In addition, the division represents the Attorney General in supervising and enforcing charitable gifts on behalf of the public.
- **White-Collar Crime:** The division conducts criminal investigations and prosecutes white collar crime cases arising in several contexts, including those involving scams against homeowners seeking help obtaining loan modifications. It also investigates and prosecutes financial, charitable, and consumer fraud, including criminal securities fraud. The division also handles tax related investigations and prosecutions, prosecutions of unlicensed real estate brokers, unlicensed accountants, unlicensed securities agents and agents selling unlicensed investments. In October, 2018 the criminal work of this division was moved to the newly created Child, Elder and Family Financial Crimes Division.

The Corporate Oversight Division also provides representation and counsel to the Department of Insurance and Financial Services (DIFS), the Department of Health and Human Services (DHHS), the Department of Licensing and Regulatory Affairs-Bureau of Corporations, Securities and Commercial Licensing (LARA-BCSCL) and the Department of Treasury's Bureau of Investments (Treasury-BOI).

- **DIFS:** The division represents DIFS in matters relating to receivership, rehabilitation, and liquidation proceedings involving banks, insurance companies, and other regulated financial entities. The division reviews insurance company's articles of incorporation and amendments. The division represents DIFS in any lawsuits filed in state or federal court and in any

8

2015 WL 5026176
Only the Westlaw citation is currently available.
United States District Court, E.D.
Michigan, Southern Division.

Davida WOODGER, Plaintiff,
v.
TAYLOR CHEVROLET, INC., Defendants.

Civil Action No. 14–cv–11810
|
Signed August 25, 2015

Attorneys and Law Firms

Jonathan R. Marko, Sarah Marie Thomas, James B. Rasor, The Rasor Law Firm, PLLC, Royal Oak, MI, for Plaintiff.

Michael J. Weikert, Kemp Klein Law Firm, Troy, MI, for Defendants.

OPINION AND ORDER (i) DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (Dkt. 19) AND (ii) DISMISSING PLAINTIFF'S CLAIM UNDER THE MICHIGAN CONSUMER PROTECTION ACT (COUNT III) WITHOUT PREJUDICE

MARK A. GOLDSMITH, United States District Judge

I. INTRODUCTION

***1** This is a case regarding an inaccurate odometer disclosure statement, with claims brought pursuant to the Motor Vehicle Information and Cost Savings Act, 49 U.S.C. § 32701, *et seq.* ("Federal Odometer Act") (Count I), as well as Michigan's odometer disclosure statute, Mich. Comp. Laws § 257.233a (Count II), and the Michigan Consumer Protection Act ("MCPA"), Mich. Comp. Laws § 445.901, et *seq.* (Count III). The parties agree that Defendant Taylor Chevrolet, Inc. ("Taylor") sold Plaintiff Davida Woodger a used vehicle, and that Taylor provided an inaccurate odometer disclosure statement during the sale; the statement reflected approximately 10,000 less miles than were actually attributable to the vehicle. However, the parties disagree whether Taylor can be held liable for this error.

The discovery period has ended. Taylor filed a motion for summary judgment (Dkt.19), Woodger filed a response (Dkt.28), and Taylor filed a reply (Dkt.31). The Court heard oral argument on May 21, 2015, and took the matter under advisement. Pursuant to a subsequent Order, the parties then submitted supplemental briefing (Dkts.37, 38). Because the Court concludes that a genuine issue of material fact exists regarding the "intent to defraud" requirement for Woodger's odometer act claims, the Court denies Taylor's motion for summary judgment. However, because Woodger's claim under the MCPA raises a novel and complex issue of Michigan law, the Court dismisses this claim without prejudice, pursuant to 28 U.S.C. § 1367(c).

II. BACKGROUND

The facts of this case are largely undisputed, although the inferences to be drawn therefrom are contested. On October 11, 2013, Taylor acquired a 2011 Nissan Murano from a customer as part of a trade. Def. Br. at 1; Pl. Resp. at 4. The vehicle had 56,160 miles on it, which was reflected on an odometer disclosure statement. Def. Br. at 1; Pl. Resp. at 4; *see also* 10/11/2013 Odometer Disclosure Statement (Dkt.19–2).

At the time of the trade, the vehicle's information—including the mileage—was entered into Taylor's data management system. Def. Br. at 1; Pl. Resp. at 4. It is the job of the title clerk—in this case, Erica Anderson—to take the mileage off the vehicle and put it into the data management system. Def. Br. at 1; Pl. Resp. at 4.

Taylor subsequently submitted an application for title and registration for the vehicle to the State of Michigan. *See* Application (Dkt.19–6). On the application, Taylor listed the odometer mileage as "46,160"—10,000 miles less than when the vehicle was obtained by Taylor. *Id.* The box in which this mileage was listed warns, "The odometer mileage reading must match the mileage reading disclosed to the purchaser on the title and/or mileage statement." *Id.* The State of Michigan subsequently issued a certificate of title reflecting a mileage of 46,260. *See* Certificate of Title (Dkt.19–7).

Woodger purchased the vehicle from Taylor on November 8, 2013. *Id.* The odometer disclosure statement that Woodger was provided reflected an odometer mileage of 46,260. *See* 11/8/2013 Odometer Disclosure Statement (Dkt.19–8). This same mileage was placed on the assignment of the title. *See* Certificate of Title (Dkt.19–7). Both parties agree that this mileage was incorrect, and that the correct mileage was

approximately 56,160 miles. *See* Def. Br. at 1–2; Pl. Resp. at 4–6; Def. Reply at 1–2.

***2** At some point during the sale negotiations with Woodger, Taylor's sales agent obtained a copy of a CARFAX report, which discloses reported information about a car's history. Pl. Resp. at 6–7; Def. Reply at 2; *see also* T. Schiftar Dep. at 10:10–15 (Dkt.28–6). The agent showed the report to Woodger, who signed a document acknowledging having been offered the opportunity to see and review the report. Pl. Resp. at 6–7; Def. Reply at 2; *see also* D. Woodger Dep. at 31:10–33:6 (Dkt.28–2). Woodger claims that the report the sales agent obtained revealed the mileage discrepancy, but that she was not permitted to review the report in detail or keep it after the sale. Pl. Resp. at 7; *see also* D. Woodger Dep. at 31:10–33:6.

Woodger brought the vehicle back to Taylor a few days later for the replacement of tires. Def. Br. at 2; Pl. Resp. at 5. At that time, the mileage discrepancy came to the parties' attention. Def. Br. at 2; Pl. Resp. at 5. The parties were unable to resolve the matter informally, Def. Br. at 2; Pl. Resp. at 5, and this lawsuit followed.

III. SUMMARY JUDGMENT STANDARD

A court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). When a defendant seeks summary judgment, the defendant "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986) (quotation marks omitted). "[T]he plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 257 (1986). A mere scintilla of evidence is insufficient; rather, "there must be evidence on which the jury could reasonably find for the [nonmovant]." *Id.* at 252.

When evaluating the evidence on a motion for summary judgment,

> credibility judgments and weighing of the evidence are prohibited. Rather, the evidence should be viewed in the light most favorable to the non-moving party. Thus, the facts and any inferences that can be drawn from those facts must be viewed in the light most favorable to the non-moving party.

Biegas v. Quickway Carriers, Inc., 573 F.3d 365, 373 (6th Cir.2009) (brackets and citations omitted).

IV. ANALYSIS

Taylor raises two arguments in support of its motion for summary judgment. First, Taylor argues that both the federal and state odometer statutes require "intent to defraud" to hold a seller liable, and there is no evidence of such an intent with respect to the odometer statement here. Instead, Taylor suggests that this simply was a clerical error when the mileage was entered into the data management system. *See* Def. Br. at 4–7. Second, Taylor argues that its sale of the vehicle is exempt from the MCPA, because the sale is "specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state"—in this case, the Michigan Motor Vehicle Code, the Secretary of State, and the Bureau of Regulatory Services. *Id.* at 8–10.

The Court first addresses Taylor's argument regarding an "intent to defraud." The Court concludes that a genuine issue of material fact exists regarding this element, and thus denies Taylor summary judgment on the odometer act claims. However, although the Court denies summary judgment on Counts I and II, the Court dismisses Woodger's MCPA claim (Count III) as raising a novel and complex issue of Michigan law, pursuant to 28 U.S.C. § 1367(c)(1).

A. Whether Woodger Has Sufficiently Shown Intent to Defraud

***3** Woodger raises claims under both the federal and Michigan odometer statutes. Congress enacted the Federal Odometer Act, 49 U.S.C. § 32701, *et seq.,* because consumers "rely heavily on the odometer reading as an index of the

condition and value of a vehicle," and "are entitled to rely on the odometer reading as an accurate indication of the mileage of the vehicle." *Id.* § 32701(a). That statute provides, in relevant part, as follows:

> (a)(1) Under regulations prescribed by the Secretary of Transportation that include the way in which information is disclosed and retained under this section, a person transferring ownership of a motor vehicle shall give the transferee the following written disclosure:
>
> (A) Disclosure of the cumulative mileage registered on the odometer.
>
> (B) Disclosure that the actual mileage is unknown, if the transferor knows that the odometer reading is different from the number of miles the vehicle has actually traveled.
>
> (2) A person transferring ownership of a motor vehicle may not violate a regulation prescribed under this section or give a false statement to the transferee in making the disclosure required by such a regulation.

Id. § 32705(a). The National Highway Traffic Safety Administration has, in turn, promulgated regulations requiring the disclosure of odometer mileage and its accuracy. *See* 49 C.F.R. §§ 580.1, 580.2, 580.5(a), (c), (e).

The statute also permits enforcement by private parties through civil litigation, and sets forth the permissible relief: "A person that violates this chapter or a regulation prescribed or order issued under this chapter, with intent to defraud, is liable for 3 times the actual damages or $10,000, whichever is greater." 49 U.S.C. § 32710(a). The statute further allows for recovery of costs and reasonable attorney fees. *Id.* § 32710(b).

Michigan similarly regulates the provision of odometer mileage information upon selling a vehicle. Michigan Compiled Laws § 257.233a provides, in relevant part, as follows:

> (1) When the owner of a registered motor vehicle transfers his or her title or interest in that vehicle, the transferor shall present to the transferee before delivery of the vehicle, written disclosure of odometer mileage by means of the certificate of title or a written statement signed by the transferor including the transferor's printed name, containing all of the following:
>
> (a) The odometer reading at the time of transfer not to include the tenths of a mile or kilometer.
>
> * * *
>
> (g) One of the following:
>
> (i) A statement by the transferor certifying that to the best of his or her knowledge the odometer reading reflects the actual mileage of the vehicle.
>
> (ii) If the transferor knows that the odometer reading reflects the amount of mileage in excess of the designed mechanical odometer limit, a statement to that effect.
>
> (iii) If the transfer [sic] knows that the odometer reading differs from the mileage and the difference is greater than that caused by odometer calibration error, a statement that the odometer reading does not reflect the actual mileage and should not be relied upon. This notice shall include a warning notice to alert the transferee that a discrepancy exists between the odometer and the actual mileage.

Mich. Comp. Laws § 257.233a(1). Like its federal counterpart, the state statute also sets forth the penalties for non-compliance: "A person who, with intent to defraud, violates any requirement under subsection (1) ... is liable in an amount equal to 3 times the amount of actual damages sustained or $1,500.00 whichever is greater, and in the case of a successful recovery of damages, the costs of the action together with reasonable attorney's fees." *Id.* § 257.233a(15).

***4** Both the federal and state statutes require an "intent to defraud." *See* 49 U.S.C. § 32710(a); Mich. Comp. Laws § 257.233a(15). Taylor argues that "there is absolutely no evidence of any intent to defraud on behalf of the Defendant and the facts clearly show a mistake on behalf of the dealership." Def. Br. at 5. Taylor suggests that, "it appears that the title clerk for the dealership made a mistake and accidentally entered the mileage for the Vehicle into the data management system as 46,160 instead of 56,160." *Id.* Taylor also asserts that "[i]t is not plausible that a class 'A' auto dealer in the state of Michigan would put its dealer license at risk to attempt to defraud the Plaintiff with respect to a 10,000 mileage discrepancy when the difference in value is negligible and only in the range of $575.00 to $776.00." *Id.* at 6–7.

Woodger responds that a question of fact exists as to Taylor's intent to defraud. Pl. Resp. at 9–16. Woodger first argues that, pursuant to Michigan Compiled Laws § 257.233a(14), Taylor's provision of a false odometer disclosure statement is

prima facie evidence of a fraudulent act. *Id.* at 10. Woodger also argues that the "intent to defraud" requirement can be satisfied based on Taylor's failure to take steps to verify the accuracy of the disclosure statement. *Id.* at 11. In support of this argument, Woodger asserts that: (i) the CARFAX report at the time of the sale reflected a mileage discrepancy, but Taylor failed to investigate this issue; and (ii) Taylor's sales agent rushed Woodger through the sales transaction and did not print the CARFAX report or permit Woodger to examine it in detail, instead having her sign a waiver—as part of numerous other documents during the process—acknowledging that she had seen the report. *Id.* at 13–15.

A threshold issue exists regarding the proper interpretation of the phrase "intent to defraud" in the odometer statutes. Woodger suggests that the term goes beyond willful conduct, also encompassing a reckless standard, *i.e.,* where the seller closes its eyes to a glaring deficiency. Indeed, Woodger claims that the "dealership's assertion that a clerical error occurred on the paperwork is not a legal excuse," because "the standard of review ... is whether the transferor may have had reason to know of the mileage discrepancy." Pl. Resp. at 14 (emphasis removed).

The Sixth Circuit might well disagree with Woodger's interpretation for purposes of the federal statute. In *Paul's Auto World v. Boyd,* 881 F.2d 1077 (Table), 1989 WL 88484, at *2 (6th Cir. Aug. 7, 1989), the Sixth Circuit set forth the requirements for establishing liability under the predecessor to the current federal statute. The court concluded that the phrase "intent to defraud" requires a showing of a " 'willful' act done with specific intent to deceive a purchaser of the mileage on a car." *Id.* This suggests that recklessness is not sufficient. *See also Moss v. Farr Motor Co., Inc.,* 82 F.3d 418 (Table), 1996 WL 166734, *2 (6th Cir. Apr. 9, 1996) (uncertainty as to the accuracy of the odometer is insufficient; liability requires that the defendant knew the mileage on the odometer was false).

Even the authority Woodger cites in support of her reckless standard recognizes the Sixth Circuit's stricter "willful" requirement. In *Haynes v. Manning,* 917 F.2d 450, 453 (10th Cir.1990), the Tenth Circuit joined the majority of courts in holding that "reckless disregard is sufficient to prove intent to defraud" for the federal odometer statute. In so holding, however, the *Haynes* court expressly rejected the position taken by the Eastern District of Tennessee—and affirmed by the Sixth Circuit—that " 'intent to defraud' means 'to act willfully and with the specific intent to deceive any purchaser or potential purchaser of a motor vehicle who inspects the odometer of a motor vehicle as an index of the condition and value of such vehicle." *Id.* (citing Shipe v. Mason, 500 F.Supp. 243, 245 (E.D.Tenn.1978), aff'd, 633 F.2d 218 (Table) (6th Cir. Sept. 29, 1980)). At least one other district court in this circuit has similarly looked to Sixth Circuit law in concluding that a plaintiff's reliance on a gross negligence or reckless standard was not persuasive. *See Scherber v. Online Auctions, LLC,* No. 13–530, 2014 WL 3908114, at *3 (N.D.Ohio July 3, 2014). *But see Nabors v. Auto Sports Unlimited, Inc.,* 475 F.Supp.2d 646, 652 (E.D.Mich.2007) (holding, without explanation, that "to show an intent to defraud under the Act, [the plaintiff] must show an intentional violation or that Auto Sports exhibited a reckless disregard for the truth as to the Jeep's mileage"). [1]

1 The *Nabors* court cited *Jones v. Hanley Dawson Cadillac Co.,* 848 F.2d 803 (7th Cir.1988) in support of its statement that a plaintiff under the federal odometer statute must show either an intentional or reckless violation; however, *Jones* held only that mere negligence was insufficient to establish an intent to defraud.

***5** Nevertheless, the Court need not resolve this issue, as Woodger has raised a genuine issue of material fact even at the higher "wilfull" level. Woodger's argument focuses almost exclusively on her allegations regarding the CARFAX report. In particular, Woodger claims that the report shown to her at the time of the sale revealed a mileage discrepancy, but that Taylor's agent rushed her through the sale and did not permit her to carefully review the report, which would have revealed the problem. Woodger asserts that the evidence can support a finding that the sales agent "noticed the mileage inconsistency, pushed through the sale despite the inconsistency, and intentionally withheld the CARFAX report from Plaintiff, knowing that there was a [mileage inconsistency] warning." *See* Pl. Supp. Br. at 3 (Dkt.38); Pl. Resp. at 13–14.

In support of her claim, Woodger has provided a CARFAX report that was generated on or around December 4, 2013—nearly a month after the sale. *See* CARFAX Report (Dkt.28–5); *see also* Compl. ¶ 20 (Dkt.1). This report contains an entry dated October 12, 2013, which reveals both a mileage of 46,160 and the following statement: "MILEAGE INCONSISTENCY[.] The mileage reported here conflicts with this vehicle's odometer history. Ask a mechanic or the seller to confirm the actual mileage—this entry may just

be a clerical error." CARFAX Report (Dkt.28–5); *see also id.* ("Odometer Check[.] Inconsistent mileage indicated."). Woodger claims the notifications in this report suffice for purposes of showing an intent to defraud, because they suggest that Taylor's agent knew or recklessly disregarded the mileage issue.

Although the CARFAX report that Woodger has provided was generated a month after the sale, the Court concludes that there is a genuine issue of material fact whether the report at the time of sale, *i.e.,* November 2013, contained the same information. After the hearing on Taylor's motion, the Court ordered the parties to submit supplemental briefing setting forth any and all evidence regarding "[w]hether the [December 2013] CARFAX report ... contained the same information—and, in particular, the 'Mileage Inconsistency' warnings on pages 2 and 4 of 5 of the report—at the time of the November 2013 sale." 7/28/2015 Order (Dkt.36). Although Taylor filed a supplemental brief disputing whether the November 2013 report contained the actual "Mileage Inconsistency" warnings, Taylor appears to have conceded that the November 2013 report did state that there were approximately 46,000 miles on the vehicle. *See* Def. Supp. Br. at 2 (Dkt.37) ("Plaintiff's pleading supports the fact that the CARFAX presented to Plaintiff showed 46,000 miles on the Vehicle and did not show any sort of mileage inconsistency."). Woodger similarly testified in her deposition that the CARFAX report she was shown at the time of the sale disclosed a mileage of 46,000. *See* D. Woodger Dep. at 30:16–31:1 (Dkt.28–2).

The 46,160 mileage reading appears in the October 12, 2013 line entry on the report—the same line entry containing one of the "Mileage Inconsistency" warnings. While Taylor's counsel argued at the motion hearing that this entry was not added to the report until *after* the sale of the vehicle to Woodger (a point he admitted was not in the record), *see* Rough Tr. at 15–18, this is belied by Taylor's most recent briefing, in which Taylor sets forth that Woodger's complaint supports "the *fact* that the CARFAX presented to Plaintiff showed 46,000 miles on the Vehicle." (Emphasis added). Therefore, given that Taylor now appears to concede that the October 12, 2013 entry showing 46,160 miles appeared on both the November 2013 and December 2013 reports, the Court concludes that, taking all inferences in Woodger's favor, the evidence supports a finding that the "Mileage Inconsistency" warning that is included in that same line entry was on both reports as well. This is a logical conclusion, given that the "Mileage Inconsistency" warning likely resulted from the discrepancy between the October 12, 2013 entry (46,160 miles), and the September 21, 2013 entry immediately preceding it (55,319 miles).

***6** The Court also finds that a genuine issue of material fact exists regarding Taylor's knowledge about the mileage issue. Taylor's sales agent testified that he gave Woodger a "clean CARFAX, no accidents, no damage." T. Schiftar Dep. at 10:14–15 (Dkt.28–6). This suggests that the sales agent at least reviewed the report prior to giving it to Woodger; otherwise, he could not have known that the CARFAX report revealed "no accidents, no damage." *Id.* And given that Taylor concedes that the November 2013 report revealed a mileage of 46,160, and the report showed a mileage of 55,319 directly above that, a reasonable factfinder could infer that the sales agent was aware of the mileage problem but did not correct the odometer disclosure statement, thereby potentially satisfying the "intent to defraud" requirement under either a "wilfull" or "reckless" standard.

Taylor's arguments in favor of summary judgment are not well taken. Taylor claims that this was nothing more than a clerical error committed by the title clerk. *See* Def. Br. 5–6. In support of this argument, Taylor highlights testimony that the title clerk ultimately was terminated due to making mistakes. *Id.* Taylor also claims that it is "not plausible that a class 'A' auto dealer in the state of Michigan would put its dealer license at risk to attempt to defraud the Plaintiff with respect to a 10,000 mileage discrepancy when the difference in value is negligible and only in the range of $575.00 to $776.00." *Id.* at 6–7.

While these arguments are appropriate for Taylor to make before the ultimate factfinder, they are premised on credibility determinations and disputed facts, which are inappropriate on summary judgment. In light of the inferences that can be drawn from the evidence discussed earlier, as well as the fact that those inferences must be viewed in the light most favorable to Woodger at this time, the Court concludes that a genuine issue of material fact exists regarding Taylor's intent to defraud. Summary judgment is, therefore, inappropriate. [2]

[2] In its supplemental brief, Taylor raises a new argument—that it cannot be liable for fraud based on the CARFAX report, because Woodger reviewed the report and, thus, "would have been on notice that representations regarding the mileage of the vehicle may have been inaccurate." Def. Supp. Br. at 3–4. This is an issue raised for the first time in Taylor's supplemental brief, and it goes beyond

the bounds of the limited issue the Court asked the parties to address in supplemental briefing: whether the November 2013 report contained the same information as the December 2013 report. *See* 7/28/2015 Order. The Court, thus, refuses to consider this argument at this time. *See Trustees of the Painters, Union Deposit Fund v. G & T Comm. Coatings, Inc.,* No. 13–13261, 2014 WL 2743340, at *2–3 (E.D. Mich. June 17, 2014) (rejecting interpretation of a fringe benefit clause that was raised for the first time in a supplemental brief, because this was "far beyond the appropriate time to assert a new argument"); *United Am. Healthcare Corp. v. Backs,* 997 F.Supp.2d 741, 747 (E.D.Mich.2014); *see also Howard v. Pierce,* 738 F.2d 722, 723 n.2 (6th Cir.1984) (refusing to consider argument raised for the first time in a reply brief).

Moreover, Taylor cites *The Mable Cleary Trust v. The Edward–Marlah Muzyl Trust,* 686 N.W.2d 770, 783 (Mich.Ct.App.2004), in support of its claim that it cannot be liable if Woodger was "either presented with the information and chose to ignore it or had some other indication that further inquiry was needed." Def. Supp. Br. at 3. However, in *Titan Insurance Co. v. Hyten,* 817 N.W.2d 562 (Mich.2012), the Michigan Supreme Court held that to the extent *Mable Cleary Trust* "can be read to support the proposition that a party has an independent duty to investigate and corroborate representations, we overrule *Mable Cleary Trust." Id.* at 555, n.4.

In addition, Woodger alleges that although she was shown the report, she was not permitted to examine it or keep a copy of it. *See* D. Woodger Dep. at 31:2–4. Viewing all inferences in Woodger's favor, a reasonable factfinder could conclude that this was because the sales agent knew of the mileage issue in the report and did not want Woodger to see it, as described above. This would undermine Taylor's suggestion that Woodger was adequately presented with information that she chose to ignore.

***7** Accordingly, the Court denies Taylor's motion as to Counts I and II, the federal and Michigan odometer act claims, respectively. [3]

[3] Woodger relies on Michigan Compiled Laws § 257.233a(14) to support her argument that a false odometer statement is *prima facie* evidence of a fraudulent act, but this is a red herring. Pl. Resp. at 10. That provision establishes that a false statement can constitute *prima facie* evidence of a fraudulent act for purposes of section 249, which deals with the Secretary of State's authority to deny, suspend, or revoke a dealer's license if the Secretary finds that the "[t]he applicant or licensee has been guilty of a fraudulent act in connection with selling ... vehicles of a type required to be registered under this act." *See* Mich. Comp. Laws § 257.249(d). Michigan Compiled Laws § 257.233a(14) says nothing about establishing *prima facie* evidence of fraud for purposes of section 257.233a(15)—the provision establishing civil liability for a violation that was committed with "intent to defraud." Nevertheless, given the actual evidence discussed above, the Court finds that summary judgment is not appropriate.

B. The MCPA Claim

Although the Court denies Taylor's motion for summary judgment on Woodger's claims under the federal and Michigan odometer acts, the Court dismisses Woodger's claim under the MCPA (Count III) without prejudice. The parties dispute whether this sales transaction, and thus Taylor, is exempt from MCPA liability in this case. Taylor cites broad language from a Michigan Supreme Court decision, as well as language from Justice Cavanagh's separate opinion in that case, in support of its position that the MCPA cannot apply. Def. Br. at 8–10 (citing *Smith v. Globe Life Ins. Co.,* 597 N.W.2d 28 (Mich.1999)). Woodger responds by citing an older Michigan Court of Appeals decision. *See* Pl. Resp. at 16–19 (citing *McRaild v. Shepard Lincoln Mercury,* 367 N.W.2d 404 (Mich.Ct.App.1985)).

Taking Taylor's theory to its logical conclusion, any transaction that is in any way regulated by a governmental board or officer acting under statutory authority, even minimally, would be wholly exempt from the MCPA. Such a far reaching interpretation could, potentially, eviscerate the protections the statute was designed to provide. This complex and novel issue requires interpreting the scope of an important state statute and a Michigan Supreme Court decision's discussion of that statute, which the Court believes would best be addressed by Michigan's courts, particularly given the parties' cursory briefing on this issue before this Court. Therefore, the Court declines to exercise

supplemental jurisdiction over this claim, and dismisses it without prejudice. *See* 28 U.S.C. § 1367(c)(1).

V. CONCLUSION

For the foregoing reasons, the Court denies Defendant Taylor's motion for summary judgment (Dkt.19) regarding Counts I and II, but dismisses Count III without prejudice.

The Court will issue an amended scheduling order setting new dates for the settlement conference, final pretrial conference, and trial, as well as due dates for the final pretrial order and non-dispositive motions. All other aspects of the Court's Case Management and Scheduling Order remain in effect (Dkt.8).

***8** SO ORDERED.

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United States District Court, D. New Jersey.

IN RE INSULIN PRICING LITIGATION

Case No. 2:17-cv-00699 (BRM) (RLS)
|
Signed February 5, 2024

OPINION

Martinotti, District Judge

***1** Before the Court is Plaintiffs' Motion for Class Certification pursuant to Federal Rule of Civil Procedure 23. (ECF Nos. 574, 575.) Defendants Novo Nordisk, Inc. ("Novo Nordisk"), Sanofi-Aventis U.S. LLC ("Sanofi"), and Eli Lilly and Company ("Eli Lilly")[1] (collectively, "Defendants") filed an opposition (ECF No. 576), Plaintiffs filed a reply (ECF No. 577), Defendants filed a sur-reply (ECF No. 587), and Plaintiffs filed a response to Defendants' sur-reply as part of an omnibus filing (ECF No. 597). Plaintiffs later filed a supplemental brief in further support of then Motion for Class Certification. (ECF No. 707.) Plaintiffs also filed a letter with a notice of supplemental authority—*In re Vahartan, Losortan, & Irbesarton Prods. Liab. Litig.*, Civ. A. No. 19-2875, 2023 WL 1818922 (D.N.J. Feb. 8, 2023) (ECF No. 606), to which Defendants filed a letter in response (ECF No. 607), and Plaintiffs filed a letter in reply to Defendant's response (ECF No. 609). Defendants also separately filed a letter with an additional notice of supplemental authority—*In re Niaspan Antitrust Litig.*, 67 F.4th 118 (3d Cir. 2023). (ECF No. 635.)

1 On May 26, 2023, Plaintiffs filed a Motion for Preliminary Approval of Class Action Settlement between Plaintiffs and Defendant Eli Lilly. (ECF No. 639.) This motion is *sub judice*, pending adjudication of various subsequently filed motions to intervene and object to this motion, which were referred to The Honorable Joseph A. Dickson, U.S.M.J. (ret.), appointed as mediator in this action. (*See* ECF No. 644; *see also* No. 23-md-03080, ECF No. 19 (Case Management Order #2 in related insulin pricing multi-district litigation) at 2.)

Also before the Court is Defendants' Motion to Exclude the Expert Testimony of Plaintiffs' expert Meredith Rosenthal, Ph.D. (the "*Daubert* Motion"). (ECF Nos. 593, 594.) Plaintiffs filed an opposition (ECF No. 595), Defendants filed a reply (ECF No. 596), and Plaintiffs filed a sur-reply as part of an omnibus filing (ECF No. 597). Having reviewed the parties' voluminous submissions filed in connection with the two motions, and having held oral argument on November 28, 2023, for the reasons set forth below and for good cause having been shown, Plaintiffs' Motion for Class Certification is **DENIED**, and Defendants' *Daubert* Motion is **GRANTED IN PART and DENIED IN PART**.

TABLE OF CONTENTS

I. BACKGROUND [2]

[2] The factual and procedural backgrounds of this matter are well known to the parties and were previously recounted by the Court in its Opinion granting in part and denying in part Defendants' Motion to Dismiss the First Amended Complaint (ECF No. 252); the Court's Opinion granting in part and denying in part Defendants' Motion to Dismiss the Second Amended Complaint (ECF No. 304); and the Court's Opinion granting in part and denying in part Defendants' Motion to Dismiss the Third Amended Complaint (ECF No. 505). Therefore, the Court includes only the facts and procedural background relevant to the present motions.

A. Factual Background

This action arises out of Plaintiffs' challenge to Defendants' allegedly unfair and unconscionable pricing scheme for their analog insulin products. (*See generally* ECF No. 411 (Third Amended Class Action Complaint).) Plaintiffs are analog insulin consumers who filed the Third Amended Class Action Complaint ("TAC") on behalf of themselves and all others similarly situated, *i.e.:*

> All individual persons in the United States and its territories who paid any portion of the purchase price for a prescription of Apidra, Basaglar, Fiasp, Humalog, Lantus, Levemir, Novolog, Tresiba, and/or Toujeo at a price calculated by reference to a list price, AWP (Average Wholesale Price), or WAC (Wholesale Acquisition Price) for purposes other than resale.

(ECF No. 411 ¶ 322; *see also id.* ¶¶ 25–185.) Defendants are manufacturers who manufacture and sell prescription medications, including analog insulin products. [3] (*Id.* ¶¶ 186–88.) Defendants set the Wholesale Acquisition Cost ("WAC" [4]), also known as the list price, for their prescription drugs, including analog insulin products. (*See id.* ¶ 205; ECF No. 576-2, Ex. 1 (Expert Report of Laurence C. Baker, Ph.D. ("Baker Rpt.")) ¶ 27.) WAC is defined as "the manufacturer's list price for the drug or biological to wholesalers or direct purchasers in the United States, not including prompt pay or other discounts, rebates or reductions in price[.]" 42 U.S.C. § 1395w-3a(c)(6)(B) (2021). The WAC, or list price, serves as the reference point from which pharmacy benefit managers ("PBMs" [5]) and drug manufacturers negotiate rebates. (*Id.* ¶ 207.) WAC is related to, but not the same as, Average Wholesale Price ("AWP"). [6] (*See id.* ¶¶ 202, 206.)

[3] Defendant Eli Lilly is incorporated in Indiana with its principal place of business in Indiana. (ECF No. 411 ¶ 186.) Defendants Novo Nordisk and Sanofi are both incorporated in Delaware with their principal places of business in New Jersey. (*Id.* ¶¶ 187–88.) Defendant Eli Lilly manufactures the analog insulin products Humalog and Basaglar; Defendant Novo Nordisk manufactures the analog insulin products Fiasp, Novolog, Levemir, and Tresiba; and Defendant Sanofi manufactures the analog insulin products Apidra, Lantus, and Toujeo. (*Id.* ¶¶ 186–88.)

[4] "WAC" is defined as "Wholesale Acquisition *Price*" in Plaintiffs' filings (*e.g.*, ECF No. 411 ¶¶ 202, 322; ECF No. 575 at 58) and as "Wholesale Acquisition *Cost*" in Defendants' filings (*e.g.*, ECF No. 576 at 16). The Court understands Wholesale Acquisition Price and Wholesale Acquisition Cost to be referring to the same thing—the list price Defendants set for their analog insulin products.

[5] As stated in Plaintiffs' TAC: "PBMs effectuate the drug transactions between health insurers, pharmacies, and drug manufacturers" and "[t]hey negotiate directly with drug manufacturers on

behalf of health insurers to determine the prices those insurers pay for the manufacturers' drugs." (ECF No. 411 ¶ 4.) "Drug manufacturers and PBMs negotiate these price discounts in the form of 'rebates': drug manufacturers refund PBMs a portion of their drugs' prices (the rebate)" and "PBMs then pass on a portion of those rebates to their health insurer clients." (*Id.*) Three PBMs —CVS Health, Express Scripts, and OptumRx —"together cover over 80% of the insured market[.]" (*Id.*) "When two or more branded medicines fall into the same therapeutic category and have similar effectiveness and safety profiles (as is the case with the analog insulins), a PBM is in the position to sometimes exclude, or place in a non-preferred position, one of the medications in favor of another." (*Id.* ¶ 5.) Thus, "the large PBMs can push significant portions of the market toward or away from the [D]efendants' products." (*Id.*)

6 *See In re Pharm. Indus. Average Wholesale Price Litig.*, 252 F.R.D. 83, 87 (D. Mass. 2008) (noting "AWP" or Average Wholesale Price refers to the average price that wholesalers charge to providers like doctors and pharmacies, which may not reflect the "true" average price charged by wholesalers); ECF No. 575 at 19 ("AWP is WAC plus 20% due to a court order settling two nationwide class-actions." (citing Rosenthal Rpt. ¶ 29) (other citations omitted)); ECF No. 576 at 16 n.3 ("Some —but not all—PBMs, insurers, and pharmacies also use a figure called the Average Wholesale Price ('AWP'). AWP is generally calculated by increasing WAC by a fixed percentage—often, but not always, 20%." (citing Baker Rpt. ¶¶ 30–32)); Baker Rpt. ¶¶ 30–31 ("Defendant insulin manufacturers do not determine AWP and do not publish AWP; instead, AWP is calculated and published by commercial pricing compendia, like IBM Micromedex Red Book and Medi-span, using manufacturers' WAC. As applicable to this case, AWP for the analog insulin has generally, but not always, been calculated as 1.2 × WAC. AWP has been used as a benchmark by insurance payers to determine how much to reimburse and pay for a given drug. As commonly used today, AWP is not a measurement of actual average wholesale prices. In fact, some pricing compendia have discontinued publishing AWP." (footnotes omitted)).

***3** Branded prescription drugs in the United States move through a complex distribution chain where drug manufacturers typically sell their products to wholesalers at a negotiated price, who in turn sell the products to various providers including hospitals, clinics, and retail pharmacies, who then in turn distribute the products to patients who are prescribed those products. (*Id.* ¶¶ 193–97, 200.) Downstream charges generally flow from the manufacturer to the wholesaler, from the wholesaler to the retailer (or mail order), and from the "retailer (or mail order) to the health benefit providers (in the form of ingredient cost reimbursement and dispensing fees) and [to] consumers (in the form of coinsurance, copayment, deductible payment, and/or cash)." (*Id.* ¶ 198.) Upstream charges, however, flow from PBMs and/or health benefit providers back to the manufacturers. (*Id.* ¶ 199.) "[U]pstream charges are price discounts the defendant drug manufacturers offer PBMs and their health insurer clients in the form of 'rebates' " and "typically occur well after the point-of-sale transactions." (*Id.*)

This industry is unique because the way patients pay for prescription drugs vastly differs from the way wholesalers, PBMs, and health insurers pay for those same products. (*Id.* ¶ 203.) The prices for the products distributed in this chain differ for each participating entity—"different actors pay different prices for the same drugs." (*Id.* ¶ 202.) Manufacturers do not sell medications directly to the consumers, and as such, they do not set the price the consumer pays for any particular medication, but they do set the list price (the WAC) for their products, and consumers usually pay for prescription drugs based on those list prices. (*See id.* ¶¶ 200–08.) Patients typically pay in one of a few ways based on the manufacturer's list price. (*Id.* ¶ 203.) First, for insured patients who have coinsurance, they pay a pre-set percentage of the point-of-sale purchase price. (*Id.*) Second, for insured patients who have deductibles, they pay a portion of the point-of-sale purchase price. (*Id.*) Insured patients may also pay a fixed or tiered co-pay for prescription medications. (*Id.*) Third, for uninsured patients, also known as cash-paying patients, they typically pay a usual and customary ("U&C") price.[7] (*Id.*)

7 *See* ECF No. 575 at 20 ("Specifically, an insured patient with coinsurance or deductible requirements pays for analog insulin based on the lesser of her pharmacy's usual and customary price (U&C) or the reimbursement rate her pharmacy negotiated with her insurer (or, more commonly,

> the insurer's PBM). Both the U&C price and the negotiated reimbursement rate are tied to AWP. U&C is either pegged directly to AWP or otherwise set based on AWP. And the negotiated reimbursement rate for the analog insulins is AWP minus a fixed percentage.... Cash purchasers pay U&C, which, again, is tied to WAC or AWP." (citations omitted)); ECF No. 576 at 19–20 ("One type of pharmacy cash price is the Usual & Customary ('U&C') price. Medicare defines a pharmacy's U&C price as the lowest price at which a pharmacy has made a drug 'widely and consistently available' to the public. Like cash prices generally, U&C prices often do not correlate with WACs. That is because U&C prices are affected by factors other than list prices, such as competition between local pharmacies. Thus, U&C prices can vary substantially even within a single pharmacy chain. Regardless, 'very few customers actually pay the full usual and customary price,' because of discounts and affordability programs." (citations omitted)); Baker Rpt. ¶¶ 36–39 (discussing U&C prices).

Health insurers cover all or a portion of their insured customers' medication costs, submitting payments to pharmacies on behalf of their members, and their reimbursement amounts depend on whether and where the medication falls on their PBMs' formularies—*i.e.*, the ranked list of drugs an insurance plan will cover. (*Id.* ¶¶ 195, 207.) Formularies have different tiers that affect the prices insured consumers pay. (*See id.*) "When a drug is excluded from formulary or placed in a non-preferred position, health insurers using that formulary will make their plan beneficiaries shoulder a greater percentage or all of the disadvantaged product's cost." (*Id.* ¶ 5.) Insurance plans include different cost-sharing and coverage terms. (*See id.* ¶¶ 201, 214–21, 223–29.) The deductible is the amount a consumer must spend before the insurer begins sharing in those costs. (*Id.* ¶¶ 214, 225.) Insured consumers pay their insurer monthly premiums that are often based in part on the deductible level. (*See id.* ¶¶ 213–14.) In addition to their deductibles, insured consumers may also make co-payments or coinsurance payments for their healthcare costs. (*Id.* ¶ 223.) After reaching the deductible, an insured consumer may have to pay a co-payment at a fixed dollar amount or coinsurance at a fixed percentage amount for healthcare costs including medications being purchased. (*Id.* ¶ 223–25.) Also, "[p]lans that cover prescription drugs right away, not requiring patients to reach deductibles first, usually require copayments or coinsurance contributions for every drug purchase." (*Id.* ¶ 225.)

***4** "A copayment is a fixed or tiered fee that an individual must pay for a healthcare service at the time of care; for example, when she picks up a prescription." (*Id.*) "Copayment rates vary depending on the drug; usually drugs in preferred formulary positions have lower copays, and drugs in disfavored formulary positions require larger copays." (*Id.*) Coinsurance is "a fixed percentage of the cost of the healthcare service provided." (*Id.* ¶ 224.) Coinsurance percentages can similarly vary, "with lower coinsurance rates for preferred drugs and higher coinsurance rates for disfavored drugs." (*Id.*) When insured patients purchase a prescription medication from a pharmacy, their insurer pays a portion of the purchase price "based on the price its PBM negotiated for that medication (the net price)" and the patient also usually pays a portion of the purchase price out-of-pocket for that medication. (*Id.* ¶¶ 195, 201.)

Drug manufacturers may offer rebates to an insurer's PBM to gain formulary access for their prescription drugs. (*Id.* ¶¶ 8, 207.) PBMs then independently decide whether to pass along rebates to the health insurer. (*Id.* at ¶¶ 4, 234; Baker Rpt. ¶ 59; *id.*, Ex. 2 (Expert Report of Sean Nicholson, Ph.D. ("Nicholson Rpt.")) ¶ 28.) PBMs may retain a portion of the rebate before passing the remainder of the cost on to the health insurer. (ECF No. 411 ¶¶ 2, 4, 364; Baker Rpt. ¶ 59.) Some health insurers who receive those rebate savings can then choose to pass along some or all of those savings to their customers. (ECF No. 411 ¶¶ 214–21, 223–29; Baker Rpt. ¶ 60.) Depending on the insurer, these savings may come in the form of lower plan premiums or reduced cost-sharing obligations on consumers for prescription drugs. [8] (*See id.*) For example, an insurer may take rebates into account in determining a consumer's coinsurance obligations. (*Id.* ¶ 86.) Other insurers who receive manufacturer rebates may choose not to pass on the rebate savings to their consumers. (*Id.*)

8 In 2020, one insurer disclosed to its plan members that for any rebate-eligible drug they purchase, the plan members will receive most of the estimated value of the rebates which will reduce their contribution to the cost of the drug. (Baker Rpt. ¶ 60.) Another insurer requires all rebates to be passed on to consumers enrolled in its fully insured plans. (*Id.*)

Here, Plaintiffs allege Defendants engaged in an unfair and unconscionable pricing scheme by artificially inflating the list prices for their analog insulin products so they could offer "secret rebates" to certain PBMs in exchange for preferred formulary placement, which Plaintiffs contend caused them and the putative class members to overpay for Defendants' analog insulin products. (ECF No. 411 ¶¶ 1–3, 8; ECF No. 575 at 1, 4, 54–55.) Plaintiffs contend Defendants artificially inflated the list prices for their analog insulin products to compete for preferred positions on the PBMs' drug formularies[9] by offering increased rebates to PBMs. (*Id.*) Plaintiffs claim they and the putative class members suffered harm because they had to overpay for Defendants' analog insulin products, paying "based on a fraudulently inflated list price." (ECF No. 411 ¶¶ 3, 8, 13; ECF No. 575 at 3, 18–24.) Plaintiffs assert Defendants published their list prices "while concealing their net prices, [which] has deceived the plaintiffs into believing that the list prices on which their out-of-pocket payments are based are reasonable and fair approximations of the actual cost of their analog insulins." (ECF No. 411 ¶ 14.) Plaintiffs premise this pricing scheme on Defendants' alleged unfair and unconscionable practice of publicly reporting one price for their analog insulins while offering a far lower price —the net price—to certain PBMs, by virtue of offering them significant rebates.[10] (*Id.* ¶¶ 2, 234–41.)

9 Health insurers rely on PBMs to set and manage their drug formularies—the list of prescription drugs for which an insurance plan offers insurance benefits. (Rosenthal Rpt. ¶ 26.) Because analog insulins are interchangeable within their therapeutic classes, PBMs can restrict formularies to cover only one analog insulin for each class, thereby forcing manufacturers to compete for formulary placement. (*Id.* ¶¶ 46–47.)

10 However, Plaintiffs and Defendants both generally agree that paying rebates to PBMs in the pharmaceutical industry is legal. (*See* ECF No. 576 at 2; ECF No. 577 at 1, 39–40; *see also* ECF No. 411 ¶ 6 ("When used correctly, rebates can significantly lower consumers' costs. In theory, drug manufacturers might offer PBMs discounts or rebates that lower the manufacturers' *net* selling prices while their list prices remain constant. Such rebates would serve as a legitimate basis to confer formulary status to the least costly medication. The legitimate use of discounts and rebates that actually reduce consumer costs is not at issue in this case.").)

***5** According to Plaintiffs, Defendants' allegedly unfair and unconscionable scheme of competing for formulary access of the largest PBMs by unjustifiably raising the list prices for their analog insulin products so they could offer these middlemen bloated rebates—so-called "spreads" between list prices and net prices—began (for most analog insulins) sometime between 2014 and 2015, when Defendants' list prices began trending in a different direction from the net prices they were offering to the PBMs and insurers. (ECF No. 575 at 2, 8, 16–17.) "Net prices" refers to the prices PBMs negotiate and pay for Defendants' products after subtracting from the list prices the rebate amounts Defendants issued to them in order to gain formulary placement. (ECF No. 411 ¶¶ 2, 4, 7–8.) Net prices may fluctuate as they necessarily depend on a particular PBM's negotiations with Defendants. (*See id.*) Plaintiffs contend their proposed classes are based on the monetary losses they suffered in overpaying for their analog insulin products as a result of Defendants' allegedly unfair and unconscionable pricing scheme. (*Id.* ¶¶ 3, 12–14, 19–20.) Plaintiffs further allege whatever negotiations or transactions may or may not have taken place between manufacturers and wholesalers or between wholesalers and pharmacies did not impact the prices consumers paid. (*Id.* ¶ 439.)

Plaintiffs state PBM rebates are part of an industry scheme to inflate the price of analog insulin products, whereby the largest PBMs use their leverage to set formularies. (ECF No. 411 ¶¶ 2, 364, 392.) If a drug is excluded from the formularies, consumers may be required to pay a larger share of the cost, or even the full cost; accordingly, using formularies gives PBMs wide latitude to extract rebates from manufacturers. (*Id.* ¶¶ 2, 207, 239, 277.) Plaintiffs argue Defendants offer PBMs higher spreads in exchange for preferred positions on their drug formularies, rather than lower their list prices for their prescription drugs. (*Id.*) Plaintiffs contend Defendants' allegedly "fraudulent conduct in artificially inflating the list prices of the analog insulins" has "directly and proximately caused the plaintiffs and members of the class to be injured[,]" and Plaintiffs assert they "have overpaid many hundreds of millions of dollars" based on these artificial list prices. (*Id.* ¶¶ 306, 377.)

B. Procedural History

On April 20, 2021, Plaintiffs filed their Third Amended Class Action Complaint ("TAC"). (ECF No. 411.) On June 11, 2021, Defendants filed a Partial Motion to Dismiss the TAC.

(ECF No. 422.) Plaintiffs filed an opposition (ECF No. 455), and Defendants filed a reply (ECF No. 468). On December 17, 2021, the Court granted in part and denied in part Defendants' Motion to Dismiss the TAC. (ECF No. 505.) The Court also directed the parties to provide a joint submission to the Court "with an agreed upon list as to which claims fail as to certain Defendants where no Plaintiff from the respective state purchased that Defendant's products" (ECF No. 505 at 34–35), which the parties did on February 1, 2022 (ECF Nos. 508, 508-1 [11]).

11 Relevant to Plaintiffs' Motion for Class Certification, Plaintiffs represented in this filing to the Court that they are not asserting claims against Sanofi under the Kansas Consumer Protection Act because no plaintiff is alleged to have purchased Sanofi's product in Kansas. (*See* ECF No. 508 (Feb. 1, 2022 Letter from the Parties to the Court submitted in response to the Court's Dec. 17, 2021 Order (ECF No. 506)) (attaching a chart (ECF No. 508-1) "showing which claims have been dismissed, withdrawn, or are not asserted against a particular defendant because no plaintiff is alleged to have purchased the defendant's product in a given state"); ECF No. 508-1 at 7 (indicating there are no plaintiff claims against Sanofi under the Kansas Consumer Protection Act); *see also* ECF No. 411 ¶¶ 724–31 (noting the count (Count Twenty-Seven) alleging a violation of the Kansas Consumer Protection Act is against *Novo Nordisk*).) Based on this filing, the Court understands Plaintiffs are not currently asserting any claims against Sanofi under the Kansas Consumer Protection Act.

On September 20, 2022, Plaintiffs filed a Motion for Class Certification. (ECF Nos. 574, 575.) Defendants filed an opposition (ECF No. 576), Plaintiffs filed a reply (ECF No. 577), Defendants filed a sur-reply [12] (ECF No. 587), and Plaintiffs filed a response to Defendants' sur-reply as part of an omnibus response (ECF No. 597). On February 9, 2023, Plaintiffs filed a letter with a notice of supplemental authority—*In re Valsartan, Losartan, & Irbesartan Prods. Liab. Litig.*, Civ. A. No. 19-2875, 2023 WL 1818922 (D.N.J. Feb. 8, 2023)—in further support of their Motion for Class Certification (ECF No. 606), to which Defendants filed a letter in response (ECF No. 607), and Plaintiffs filed a letter in reply to Defendant's response (ECF No. 609). On May 9, 2023, Defendants separately filed a letter with an additional notice of supplemental authority—*In re Niaspan Antitrust Litig.*, 67 F.4th 118 (3d Cir. 2023)—in further support of its opposition to Plaintiffs' Motion for Class Certification. (ECF No. 635.)

12 On October 28, 2022, Defendants filed a letter attaching a sur-reply in support of their opposition to Plaintiffs' Motion for Class Certification and requesting that the Court consider their sur-reply "to respond to new arguments that Plaintiffs advanced for the first time in their reply brief in support of their motion for class certification." (ECF No. 587 at 1.) On November 3, 2022, Plaintiffs filed a letter in response stating if the Court permitted Defendants to file their sur-reply, then it should also permit Plaintiffs to submit an omnibus sur-reply in response to both Defendants' sur-reply and Defendants' *Daubert* Motion. (ECF No. 588.) Plaintiffs stated they did not oppose Defendants' request to file a sur-reply so long as they could file a sur-reply in response to Defendants' sur-reply, and they represented that after meeting and conferring, Defendants consented to Plaintiffs' request. (ECF No. 588 at 1.) On November 4, 2022, the Court granted Defendants' request to file a sur-reply and Plaintiffs' request to file an omnibus sur-reply in response. (ECF No. 589.)

***6** On November 30, 2022, Defendants filed a Motion to Exclude the Expert Testimony of Plaintiffs' expert Meredith Rosenthal, Ph.D. ("Dr. Rosenthal") (the "*Daubert* Motion"). (ECF No. 593.) Plaintiffs filed an opposition (ECF No. 595), Defendants filed a reply (ECF No. 596), and Plaintiffs filed a sur-reply as part of an omnibus response (ECF No. 597).

On November 28, 2023, the Court held oral argument [13] on both Plaintiffs' Motion for Class Certification and Defendants' *Daubert* Motion. (ECF No. 713 (Sealed Tr. of Nov. 28, 2023 Oral Arg.).) The Court addresses both Motions in turn.

13 Oral argument was originally scheduled for February 9, 2023, and was rescheduled twice before being canceled on March 29, 2023, after the parties informed the Court about Plaintiffs' settlement with Eli Lilly. (*See* ECF Nos. 603, 605, 617, 619, 626.) Following the formation of the Insulin Pricing MDL (MDL No. 3080), oral

argument was re-scheduled to November 28, 2023. (*See* ECF No. 705.)

II. DEFENDANTS' *DAUBERT* MOTION

Defendants move to exclude the testimony of Plaintiffs' expert Meredith Rosenthal, Ph.D., a Professor of Health Economics and Policy at Harvard University's School of Public Health ("Dr. Rosenthal"). (ECF Nos. 593, 594.) Plaintiffs retained Dr. Rosenthal to opine on the following:

> (1) describe in economic terms the [alleged] list-price increase scheme orchestrated by the defendants, (2) assess how this scheme benefited the defendants and other major actors in the pharmaceutical supply chain while imposing costs on consumers, (3) evaluate the economic impact of this scheme on class members, (4) apply statistical methods to determine the date or dates when the injury to class members began, and (5) calculate damages.

(ECF No. 575-2 (Decl. of Meredith Rosenthal, Ph.D. in Supp. of Class Cert. ("Rosenthal Rpt.")) ¶ 1.) Among other things, Dr. Rosenthal opines that Defendants' alleged "list-price increase scheme" consisted of Defendants choosing to increase rather than decrease list prices for their analog insulin products to gain market share, and in doing so, undermined price competition and instead competed on rebates unobserved by, and unavailable to, consumers. (*Id.* ¶ 2.) Dr. Rosenthal asserts "[t]his led to a growing spread between the list prices, most of which increased faster than they had before the class period, and net prices (prices net of rebates), which increased much less, or even decreased." (*Id.* ¶¶ 2, 45–58.) Dr. Rosenthal proffers that all, or virtually all, the proposed class members overpaid for Defendants' analog insulin products based on the "extremely high" list prices Defendants set for those products. (*Id.* ¶¶ 2, 79–97.) Dr. Rosenthal states Defendants' allegedly illegal price increases directly led to proposed class members having to overpay for Defendants' analog insulin products. (*Id.* ¶ 2.) Dr. Rosenthal concludes the estimated damages for the Proposed Nationwide Classes total $512.9 million for Novo Nordisk and $518 million for Sanofi, and the estimated damages for the Proposed Multi-State Classes and the other proposed state-specific classes total $160.7 million for Eli Lilly, $237.5 million for Novo Nordisk, and $206.9 million for Sanofi. (*Id.*)

In forming her opinions and reaching her conclusions, Dr. Rosenthal relied on a statistical "trend break" test to determine "when the trend in the ratio of net and list prices is statistically significantly different over two separate time periods." (*Id.* ¶ 114.) She asserts that for each of Defendants' analog insulin products, "this test finds a trend break representing the point when the ratio between net and list price increases faster than it had in the past." (*Id.*) Dr. Rosenthal determined "this trend break is the point when the challenged conduct affects prices." (*Id.*) Dr. Rosenthal labels the period before the trend break as the "pre-period," or the period before the challenged conduct affects prices, and she labels the period after the trend break as the "post-period," or the period after the challenged conduct affects prices. (*Id.*) Dr. Rosenthal relies on the trend break test and uses the trend break to determine when the alleged injury to the putative class members began (*i.e.*, the class periods). (*Id.* ¶¶ 1, 77, 114–17.) In other words, Dr. Rosenthal opines the trend breaks for each of Defendants' analog insulin products indicate the respective start dates for the proposed class period for each of those products within each of Plaintiffs' twelve proposed classes. (*Id.*)

***7** Dr. Rosenthal also contends "[l]ist prices are the basis of the price for virtually all retail pharmaceutical transactions" and accordingly the prices the putative class members pay for Defendants' analog insulin prices are based on Defendants' list prices for those products. (*Id.* ¶¶ 84–97.) To determine damages, Dr. Rosenthal created a but-for world where the trend breaks never occurred for any of Defendants' analog insulin products; she did this "by taking the average ratio of the AWP to the net price in the four quarters prior to the post-period" and then applying that ratio "to the net price in the post-period" to determine "an alternative AWP price that would have prevailed in the post-period, but for the challenged conduct." (*Id.* ¶ 118.) In Dr. Rosenthal's but-for world, the but-for AWP "constructs a scenario in which the gains from competition are shared with patients" and patients' "out-of-pocket payments rise and fall together with the net price." (*Id.*) Dr. Rosenthal uses this but-for AWP to calculate but-for out-of-pocket costs. (*Id.* ¶ 119.) According to Dr. Rosenthal, the damages are the difference between actual out-of-pocket costs and the but-for out-of-pocket costs "summed up across the universe of class transactions." (*Id.*; *see also id.* ¶¶ 120–39.)

Dr. Rosenthal argues she can calculate damages on a class-wide basis using common evidence for the following putative class members: (1) uninsured, "cash-paying consumers who paid based on list price"; (2) "insured consumers (either by commercial insurance or Medicare Part D plans) who paid coinsurance (*i.e.*, a specified percentage of the pharmacy reimbursement)"; and (3) "insured consumers (again, either by commercial insurance or Medicare Part D plans) who paid all or part of the price of the drug with a deductible payment." (*Id.* ¶¶ 83, 110–39; *see also id.* ¶¶ 98–109 (describing how putative class members were allegedly injured).) Dr. Rosenthal excludes the following from Plaintiffs' proposed classes: (1) "purchases in which the consumer paid a co-pay (*i.e.*, a flat dollar amount that is the same regardless of the price of the drug)" because that consumer's payment "would have been the same even if the total retail price had been lower" and therefore was "not calculated by reference to a list price" (*id.* ¶ 80); (2) "transactions in which the consumer used a co-pay coupon" (*id.* ¶ 81); (3) "transactions reimbursed by Medicaid" (*id.* ¶ 82); and (4) transactions "where the consumer paid nothing" (*id.*).

Defendants argue Dr. Rosenthal's opinions are inadmissible under FRE 702 and *Daubert* and should be excluded because her apparent novel [14] methodology is not reliable —it cannot reliably identify whether Defendants' pricing for analog insulin is "unfair" or "unconscionable" and likewise cannot reliably measure injury or damages for putative class members. (ECF No. 594 at 1–4; *see also id.* at 13–31.) Defendants further contend Dr. Rosenthal's methodology: (1) "lacks any 'objective and verifiable indicia of reliability[,]" (2) does not reliably measure any "unfair or unconscionable" conduct, (3) does not reliably measure either injury or damages for proposed class members, (4) "does not correspond in any meaningful way to the prices that consumers actually pay[,]" (5) does not attempt to measure whether Defendants caused any injury, and (6) "does not, and cannot, reliably measure damages for any putative class member." (*Id.* at 1–4.) Defendants maintain Plaintiffs cannot point to any evidence showing Defendants' behavior, decision, or conduct through which their prices for their analog insulin products allegedly changed from lawful to unlawful and instead rely on Dr. Rosenthal "to draw that line for them." (*Id.* at 1.) Defendants assert Dr. Rosenthal, like Plaintiffs, does not use any specific price, price increase, rebate increase, or rebate percentage to determine what is "fair" versus "unfair" pricing; rather, she "employs an improvised methodology of comparing ratios 'to decide [ ] the specific start date' on which the alleged 'unfair' and 'unconscionable' conduct 'began' as to each Defendant's insulin products and then estimate class-wide damages." (*Id.*)

14 Defendants state Dr. Rosenthal's methodology in this case "by her own admission has never been used before and no court has ever approved[.]" (ECF No. 594 at 1–2.) Defendants claim Dr. Rosenthal "is not using any recognized economic approach to detecting supposedly 'unfair' or 'unconscionable' pricing, or any settled principle for measuring damages from allegedly illegal pricing under state consumer protection laws[,]" and that she "invented" this methodology for this case, which methodology "rests solely on her say-so that prices after a certain statistical inflection point are 'unlawful.' " (*Id.* at 2; *see also id.* at 8 ("Here, 'there is simply too great an analytical gap between the data' that Prof. Rosenthal analyzed to find purported statistical 'trend breaks,' and 'the opinion proffered' that these changes in trends equate to unfair or unconscionable pricing—a methodology no court has ever accepted before." (citing *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997)); *id.* at 8–13; ECF No. 596 at 2 ("Without disputing Defendants' showing that a trend break test is not a 'recognized economic approach to detecting supposedly "unfair" or 'unconscionable' pricing', Plaintiffs mischaracterize this argument as a claim that trend break tests cannot be used for any purpose. But the relevant question under Daubert is whether the expert's method is 'reliably applied' to this case. Plaintiffs never answer this question. No established liability theory or economic doctrine holds that a trend break establishes if price-setting conduct is 'fair' or 'unfair.' The only link between those concepts is Prof. Rosenthal's say-so." (citations omitted)).)

***8** In opposition, Plaintiffs argue the structural break test Dr. Rosenthal uses in her opinion is a "widely accepted method" to detect the point at which some trend over time changes in a significant way. (ECF No. 595 at 9–20.) Plaintiffs contend courts have allowed experts in class actions in antitrust cases to rely on structural break analyses "as evidence of the class period, damages, or causation[,]" which Plaintiffs state is the same purpose Dr. Rosenthal offers here, (even though this is not an antitrust case)—she uses the structural break test to determine when the effects of the alleged conduct

occurred; she does not opine on the legal question of whether Defendants' conduct was fair. (*Id.* at 9–17.) In other words, Dr. Rosenthal's methodology "analyzes *the effects of conduct*, not the conduct itself." (*Id.* at 15; *see also* ECF No. 577 at 38–39 ("The structural break (or trend break) analysis does not attempt to determine the unfairness or lawfulness of defendants' actions. The jury will decide that. What the structural break test does is determine the class period. Several courts have upheld the test for this purpose.... Plainly, *something* changed about the way in which defendants price insulin.... The structural break test simply measures with scientific precision when that change occurred. The jury may then investigate what the defendants did to cause that trend break and can decide the lawfulness of that conduct from there.").) Further, Plaintiffs assert Defendants misrepresent the results of Dr. Rosenthal's trend break analysis, but even assuming their interpretation is true, this goes to the weight, not the admissibility, of Dr. Rosenthal's testimony. (ECF No. 595 at 17–21.)

Plaintiffs also submit Defendants do not challenge Dr. Rosenthal's methods employed in her damages model but instead claim they can prove her model as unreliable by identifying "flaws" or "mistakes" in her results and/or by showing her model yields "nonsensical," "arbitrary," or "inconsistent" results. (*Id.* at 21–25.) But Plaintiffs state, even assuming this is true, their claim is based on "unfair *practices*, not unfair prices" and therefore, "class membership does not depend on the patient having paid some threshold *amount;* it depends on whether the patient paid *a price inflated by defendants' conduct." (Id.* at 22.) In other words, Plaintiffs concede it is possible two people paid nearly identical sums for the same insulin but one of them falls into one of Plaintiffs' proposed classes and the other does not, because their membership in a class is based on Defendants' conduct with respect to those members, not the member's actual payment. (*See id.*) According to Plaintiffs, this is "an expected consequence where injury flows from the unlawful conduct, and not the other way around." (*Id.* at 23.) Lastly, Plaintiffs submit Defendants had sole control over the list prices of their analog insulin products, which Plaintiffs claim "confirms that only they could cause the injuries relevant here[,]" and therefore Dr. Rosenthal's damages model does not need to account for alternative causes related to putative class members' overpayment of those products. (*Id.* at 3, 26–28.) Plaintiffs also contend Dr. Rosenthal's model can accurately measure damages—the alleged overpayments putative class members paid for Defendants' analog insulin products—because Defendants' list price has a direct effect on pharmacy prices. (*Id.* at 26 (citing Rosenthal Rpt. ¶ 123).)

In reply, Defendants contend: (1) trend breaks cannot reliably measure "unfair" or "unconscionable" pricing; (2) Dr. Rosenthal's trend break analysis cannot reliably determine when Defendants' conduct allegedly became unfair or unconscionable; (3) Plaintiffs cannot defend Dr. Rosenthal's "arbitrary methodological choices or the nonsensical results her method generates"; and (4) Dr. Rosenthal fails to reliably measure causation and injury. (ECF No. 596 at 2–15.) Defendants argue Dr. Rosenthal's trend break analysis is Plaintiffs' "sole evidence to delineate lawful and unlawful pricing: a break, they claim, "demarcates the 'pre-period'—***when the defendants' behavior was not unlawful***—from the 'post-period'—***when defendants' behavior was unlawful.***" (*Id.* at 1 (quoting ECF No. 575 at 74).) Defendants contend "no court or objective independent source has *ever* endorsed using a trend break for such a purpose[,]" and that "[n]o established liability theory or economic doctrine holds that a trend break establishes if price-setting conduct is 'fair' or 'unfair' "—Dr. Rosenthal's opinion is the only link between those concepts. (*Id.* at 1–2.)

Defendants also assert (1) Plaintiffs do not respond to their argument "that there was 'no empirical foundation' for the claim that 'faster' increases in spreads between prices cause prices to become 'unfair' or 'unconscionable' under any objective standard or case law"; (2) Plaintiffs "cannot identify any expert who has used a trend break analysis for that purpose"; (3) Dr. Rosenthal herself "admits she has never used this method in her nearly two dozen expert engagements"; and (4) one of Defendants' experts, Professor Laurentius Marais, stated he "has never seen 'a structural break model like Dr. Rosenthal's model here used to detect and measure the effect of allegedly unfair and unconscionable pricing.' " (*Id.* at 4 (citing Rosenthal Dep. at 269:11-269:18; Marais Rpt. ¶¶ 1, 12).) Defendants also state Plaintiffs do not address Defendants' contention that Dr. Rosenthal's method "lacks any relationship to the amounts consumers pay, Plaintiffs' allegations, or the evidence" and that Plaintiffs do not dispute the nonsensical results her method generates (*e.g.*, "under her model, the *same* cost to a consumer can be fair one month but unfair the next"; "a *higher* consumer cost can be fair while a *lower* cost can be unfair"; "*identical* alleged conduct corresponds to 'trend breaks' *years* apart"; and "a product whose price '*follows*' another product's price has an 'unfair' cost a year *before* the product it follows"). (*Id.* at 1.)

***9** Defendants also argue Dr. Rosenthal's failed attempts to accurately estimate even one proposed class member's injury shows the unreliability of her method for proving class-wide impact. (*Id.* at 2, 14–15.) Defendants further contend Dr. Rosenthal fails to account for alternative causes of injury despite admitting "the prices consumers pay for Defendants' products 'depend greatly' on alternative causes like 'consumer's plan terms'—never mind the countless decisions by insurers and PBMs 'that affect how much patients pay.' " (*Id.* at 13–14 (citations omitted).)

In their sur-reply, Plaintiffs contend Defendants "still fail[ ] to grapple with Dr. Rosenthal's damages model" and reiterate Defendants' *Daubert* motion should be denied. (ECF No. 597 at 24–25.) Plaintiffs claim Defendants attempt to frame Dr. Rosenthal's damages model as unreliable based on "a single data entry error" but argue this does not undermine "the wealth of data inputs Dr. Rosenthal would rely on to calculate damages for a certified class." (*Id.* at 24 (citing ECF No. 596 at 14–15).) Plaintiffs do not substantively address Defendants' other arguments in support of their *Daubert* motion.

A. Legal Standard

The Third Circuit has held that Federal Rule of Evidence 702 ("FRE 702") and *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993) apply at the class certification stage. *In re Blood Reagents Antitrust Litig.*, 783 F.3d 183, 187 (3d Cir. 2015) (holding "a plaintiff cannot rely on challenged expert testimony, when critical to class certification, to demonstrate conformity with Rule 23 unless the plaintiff also demonstrates, and the trial court finds, that the expert testimony satisfies the standard set out in *Daubert*"). FRE 702 governs the admissibility of expert testimony. *Daubert*, 509 U.S. at 588. FRE 702 provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the proponent demonstrates to the court that it is more likely than not that:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert's opinion reflects a reliable application of the principles and methods to the facts of the case.

Fed. R. Evid. 702. FRE 702 "embodies three distinct substantive restrictions on the admission of expert testimony: qualifications, reliability, and fit."[15] *Karlo v. Pittsburgh Glass Works, LLC*, 849 F.3d 61, 80 (3d Cir. 2017) (quoting *Elcock v. Kmart Corp.*, 233 F.3d 734, 741 (3d Cir. 2000)). Pursuant to *Daubert*, "district courts perform a gatekeeping function to ensure that expert testimony meets the requirements of [FRE] 702." *Karlo*, 849 F.3d at 80. District courts, in exercising their gatekeeping function, "must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *In re Paulsboro Derailment Cases*, 746 F. App'x 94, 98 (3d Cir. 2018) (quoting *Daubert*, 509 U.S. at 589). This gatekeeping function "extends beyond scientific testimony to 'testimony based on "technical" and "other specialized" knowledge.' " *In re Processed Egg Prods. Antitrust Litig.*, 81 F. Supp. 3d 412, 415 (E.D. Pa. 2015) (quoting *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999)). "The test of admissibility is not whether a particular scientific opinion has the best foundation, or even whether the opinion is supported by the best methodology or unassailable research." *De La Cruz v. Virgin Islands Water & Power Auth.*, 597 F. App'x 83, 91 (3d Cir. 2014) (quoting *In re TMI Litig.*, 193 F.3d 613, 665 (3d Cir. 1999), *as amended*, 199 F.3d 158 (3d Cir. 2000)). "Rather, the test is whether the particular opinion is based on valid reasoning and reliable methodology." *Id.* In other words, courts look to "whether the expert's testimony is supported by 'good grounds.' " *Karlo*, 849 F.3d at 81 (citations omitted). The party offering the expert's testimony bears the burden of establishing admissibility by a preponderance of the evidence. *Padillas v. Stork-Gamco, Inc.*, 186 F.3d 412, 418 (3d Cir. 1999).

15 Of these three elements required for the admissibility of expert testimony, Defendants appear to only be contesting the reliability element with respect to Dr. Rosenthal's expert testimony, so the Court only addresses this element here.

***10** The standard for reliability is "not that high." *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 745 (3d Cir. 1994). For an expert's testimony to be reliable under FRE 702, "the expert's opinion must be based on the methods and procedures of science rather than on subjective belief or unsupported speculation; the expert must have good grounds for his or her belief." *Calhoun v. Yamaha Motor Corp., U.S.A.*, 350 F.3d

316, 321 (3d Cir. 2003) (quotations and citations omitted). In determining whether a proposed expert's testimony is reliable, courts must consider the following factors:

> (1) whether a method consists of a testable hypothesis; (2) whether the method has been subjected to peer review; (3) the known or potential rate of error; (4) the existence and maintenance of standards controlling the technique's operation; (5) whether the method is generally accepted; (6) the relationship of the technique to methods which have been established to be reliable; (7) the qualifications of the expert witness testifying based on the methodology; and (8) the non-judicial uses to which the method has been put.

Oddi v. Ford Motor Co., 234 F.3d 136, 145 (3d Cir. 2000) (quoting *In re Paoli R.R.*, 35 F.3d at 742 & n.8). "[T]he reliability analysis applies to all aspects of an expert's testimony: the methodology, the facts underlying the expert's opinion, the link between the facts and the conclusion, *et alia*." *Heller v. Shaw Indus., Inc.*, 167 F.3d 146, 155 (3d Cir. 1999).

"[A] model purporting to serve as evidence of damages in [a] class action must measure only those damages attributable to that theory." *Comcast Corp. v. Behrend*, 569 U.S. 27, 35 (2013). At the class certification stage, while damages calculations need not be exact, "any model supporting a 'plaintiff's damages case must be consistent with its liability case[.]' " *Id.* (citations omitted). "The first step in a damages study is the translation of the *legal theory of the harmful event* into an analysis of the economic impact *of that event*." *Id.* at 38 (citation omitted).

B. Decision

The trend break test, also known as the structural break test, is a statistical test used to detect a point in time when a particular variable increases or decreases at a rate significantly different than it had in the past. *See, e.g.*, *In re Broiler Chicken Antitrust Litig.*, Civ. A. No. 16-8637, 2022 WL 1720468, at *9 (N.D. Ill. May 27, 2022). As such, the use of a trend break test to determine a point in time when some trend changed in a significant way is not unreliable. For example, in *In re Broiler Chicken Antitrust Litigation*, the court noted plaintiffs' expert did not state anywhere "that his structural break test is intended to identify a *cause* of the decrease in the rate of production." *In re Broiler Chicken Antitrust Litig.*, 2022 WL 1720468, at *9. Rather, the court said the structural break test "is simply intended to confirm whether the readily apparent decrease is truly statistically significant, such that it makes sense to investigate its cause in the first place[;]" it "is not intended to identify causes, collusive or otherwise." *Id.* The court also noted the expert thoroughly considered alternative causes in his regression analysis, which made up the second part of his analysis, "[s]o, the fact that [the expert] did not consider non-collusive causes at that point in his analysis is not a reason to find his method unreliable." *Id.*

Similarly, in *In re Namenda Direct Purchaser Antitrust Litigation*, the defendants complained that the expert's "structural break test fail[ed] because it [did] not isolate the cause of the February 2014 break." 331 F. Supp. 3d 152, 178 (S.D.N.Y. 2018). However, the expert testified the structural break test was not designed to do so and "that '[the test] is not able to tease out where the source of the structural break comes from by itself[;]' " rather, "[o]ne has to implement it because one believes that there is some event which leads to a structural break." *Id.* In other words, the expert's "test demonstrate[d] that there was a 'structural break' in February 2014, which happened to be the date when the hard switch was announced." *Id.* The *Namenda* court stated "[c]orrelation does not prove causation, but the coincidence in timing between the announcement and the structural break shown by the data is some evidence of causation in support of Plaintiffs' theory." *Id.* The court noted that "[p]erhaps other things were happening in the market in February 2014, and [defendants] may go into them to undercut [the expert's] data" but "[f]or the purposes of *Daubert*, [the expert's] analysis passes muster." *Id.* at 178–79. At most, the court concluded the defendants' arguments concerning the expert's assumptions in his analysis "go to its weight, not [the] admissibility of that testimony." *Id.* at 179 (citation omitted).

***11** Here, Dr. Rosenthal relies on the statistical trend break test, or structural break test, to (1) define the class periods for each of Defendants' analog insulin products within each of Plaintiffs' twelve proposed classes (*i.e.*, indicating when the alleged injury to the putative class members began) and (2) calculate aggregate damages based on Plaintiffs' and the putative class members' alleged overpayments for

Defendants' analog insulin products. In other words, Dr. Rosenthal uses the trend break test to identify when the effects of the alleged conduct occurred in order to support Plaintiffs' theory that that trend break is when Defendants' conduct allegedly began causing injury to the putative class members. But Dr. Rosenthal does not use the trend break test to measure any specific conduct or event or whether Defendants' conduct was unfair or unconscionable and when that conduct became unfair or unconscionable. Indeed, Dr. Rosenthal does not identify any strategy or decision by Defendants that began the allegedly unlawful conduct and likewise does not opine on *when* specifically Defendants allegedly began the unlawful conduct. Rather, as in *In re Broiler Chicken Antitrust Litigation*, her methodology simply shows something happened at a particular point of time for each of Defendants' analog insulin products at issue—a so-called trend break where the ratio between the list prices and the net prices for those products increased faster than it had previously.

Dr. Rosenthal's opinion based on her trend break analysis does not establish (1) whether Defendants' conduct caused the trend break, (2) whether Defendants' conduct constitutes "unfair practices" or was unconscionable, (3) when Defendants' conduct allegedly became unfair or unconscionable, or (4) whether Defendants' conduct caused injury to the putative class members; rather, these are legal questions for the fact finder and on which Plaintiffs bear the burden of proof. Dr. Rosenthal's method simply helps identify for the fact finder when the supposed trend breaks occurred with a reasonable degree of scientific precision. *See* Comcast, 569 U.S. at 35; *see also* *In re Broiler Chicken Antitrust Litig.*, 2022 WL 1720468, at *9 ("[T]he structural break test is not intended to identify causes, collusive or otherwise."); *Int'l Union of Operating Engineers Loc. No. 68 Welfare Fund v. Merck & Co.*, 929 A.2d 1076, 1088 (N.J. 2007) (stating "[t]o the extent that plaintiff intends to rely on a single expert to establish a price effect in place of a demonstration of an ascertainable loss or in place of proof of a causal nexus between defendant's acts and the claimed damages, however, plaintiff's proofs would fail" as "[t]hat proof theory would indeed be the equivalent of fraud on the market, a theory we have not extended to [NJ]CFA claims"). Plaintiffs themselves admit Dr. Rosenthal uses the trend break test to determine when the *effects* of the alleged conduct occurred (*i.e.*, the trend break), *not the* conduct itself, and that Dr. Rosenthal does not opine on the legal question of whether Defendants' conduct was unfair or unconscionable under the applicable state law (the jury will decide this). [16] (*See* ECF No. 595 at 13–17; ECF No. 577 at 38–39.)

16 Defendants argue Plaintiffs solely rely on Dr. Rosenthal's opinion regarding when the effects of the alleged conduct occurred (*i.e.*, the trend breaks) for each of Defendants' analog insulin products to argue these trend breaks are when Defendants' conduct allegedly became unlawful, *i.e.*, unfair or unconscionable, with respect to each of their insulin products, and that this alleged conduct caused Plaintiffs and the putative class members harm. These are legal arguments Plaintiffs will have to prove but, in their words, are *not* Dr. Rosenthal's testimony; therefore, the Court need not address this for purposes of deciding Defendants' *Daubert* Motion.

It is possible that other variables, or a combination of variables, caused the significant divergence between the list prices and net prices for Defendants' analog insulin products or that Defendants' conduct did not in fact cause harm to Plaintiffs. However, this fact does not render as unreliable. Dr. Rosenthal's methodology of relying on a trend break test to determine when the trend in the ratio of net prices and list prices became "statistically significantly different." Additionally, Dr. Rosenthal's model appears consistent with Plaintiffs' liability case. *See* Comcast, 569 U.S. at 35 (citations omitted).

***12** At the class certification stage, the Court need not determine whether Dr. Rosenthal's opinion is correct and/or what facts and assumptions are or were appropriate for her to include in her model. *See* *Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1318 (9th Cir. 1995) ("[T]he test under *Daubert* is not the correctness of the expert's conclusions but the soundness of his methodology."). Rather, the Court must simply determine whether her testimony is reliable. *See* *In re Paoli R.R.*, 35 F.3d at 744 ("The evidentiary requirement of reliability is lower than the merits standard of correctness. *Daubert* states that a judge should find an expert opinion reliable under Rule 702 if it is based on 'good grounds,' *i.e.*, if it is based on the methods and procedures of science. A judge will often think that an expert has good grounds to hold the opinion that he or she does even though the judge thinks that the opinion is incorrect. As *Daubert* indicates, '[t]he focus ... must be solely on principles and methodology, not on the conclusions that they generate.' The grounds for

the expert's opinion merely have to be good, they do not have to be perfect." (alterations and citations omitted)).

Mindful that the standard for reliability is "not that high," *In re Paoli R.R.*, 35 F.3d at 745, the Court finds Dr. Rosenthal's methodology to be sufficiently reliable to survive Defendants' *Daubert* challenge at the class certification stage because it is based on the scientific trend break method. *See Calhoun*, 350 F.3d at 321; *cf. Sheet Metal Workers Loc. 441 Health & Welfare Plan v. GlaxoSmithKline, PLC*, Civ. A. No. 04-5898, 2010 WL 3855552, at *30 (E.D. Pa. Sept. 30, 2010) ("The plaintiffs contend, and [defendant] disputes, that Dr. Rosenthal's yardsticks provide a common method capable of showing damages across the class. The court does not need to resolve this issue, having already decided certification is inappropriate[.] ... That being said, I believe the plaintiffs' methodology is insufficient because the calculations were made using *average* prices. This evidence says nothing about the actual price paid by each purported class member. Average prices falter as a method for proving class-wide injury, because 'averaging "by definition glides over what may be important differences.' " " (citation omitted)).

Therefore, Defendants' Motion to Exclude the Expert Testimony of Dr. Meredith Rosenthal (ECF No. 593) is **GRANTED IN PART and DENIED IN PART**. To the extent Plaintiffs intend to rely on Dr. Rosenthal's testimony to establish whether Defendants' conduct in setting list prices for their analog insulin products was unfair or unconscionable under the applicable state law, Defendants' *Daubert* Motion is **GRANTED** because Dr. Rosenthal's methodology is not reliable in determining this question of law. The parties have not cited, and the Court has not otherwise found, any case where the trend break test was used to establish whether price-setting conduct is unfair or unconscionable. Defendants' *Daubert* Motion is otherwise **DENIED**.

III. PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Plaintiffs seek to certify a total of fifteen classes under Federal Rule of Civil Procedure 23 ("Rule 23")—specifically under Rule 23(a), Rule 23(b)(2), and Rule 23(b)(3). (ECF Nos. 574, 575.) Plaintiffs first seek to certify two nationwide classes—one against Novo Nordisk and the second against Sanofi—for alleged unconscionable acts under the New Jersey Consumer Fraud Act ("NJCFA") (the "Proposed Novo Nordisk Nationwide Class" and the "Proposed Sanofi Nationwide Class"; collectively, the "Proposed Nationwide Classes"). (ECF No. 574 at 2–3; ECF No. 575 at 41–79.) Separately, Plaintiffs also seek to certify thirteen state-specific classes for alleged "unfair" acts under various state consumer protection laws prohibiting unfair or unconscionable conduct, as follows: (1) three multi-state classes—each comprised of sixteen state consumer protection statutes [17] (all of which Plaintiffs assert apply the Federal Trade Commission ("FTC") three-part "substantial injury" test for unfairness to determine whether an act is "unfair")—one against each of the three Defendants for alleged "unfair" acts (the "Proposed Novo Nordisk Multi-State Class," the "Proposed Sanofi Multi-State Class," and the "Proposed Eli Lilly Multi-State Class"; collectively, the "Proposed Multi-State Classes"); (2) three New Jersey-specific classes—one against each of the three Defendants—for alleged "unconscionable" acts under the New Jersey Consumer Fraud Act, N.J. Stat. Ann. § 56:8-1 *et seq.* (the "Proposed Novo Nordisk New Jersey Class," the "Proposed Sanofi New Jersey Class," and the "Proposed Eli Lilly New Jersey Class"; collectively, the "Proposed New Jersey Classes" [18]); (3) three Texas-specific classes —one against each of the three Defendants—for alleged "unconscionable" acts under the Texas Deceptive Trade Practices Consumer Protection Act, Tex. Bus. & Com. Code § 17.41 *et seq.* (the "Proposed Novo Nordisk Texas Class," the "Proposed Sanofi Texas Class," and the "Proposed Eli Lilly Texas Class"; collectively, the "Proposed Texas Classes"); (4) two Kansas-specific classes—one against Novo Nordisk and one against Sanofi—for alleged "unconscionable" acts under the Kansas Consumer Protection Act, Kan. Stat. § 50-623 *et seq.* (the "Proposed Novo Nordisk Kansas Class" and the "Proposed Sanofi Kansas Class"; collectively, the "Proposed Kansas Classes"); and (5) two Utah-specific classes—one against Novo Nordisk and one against Sanofi—for alleged "unconscionable" acts under the Utah Consumer Sale Practices Act, Utah Admin. Code § 13-11-1 *et seq.* (the "Proposed Novo Nordisk Utah Class" and the "Proposed Sanofi Utah Class"; collectively, the "Proposed Utah Classes"). (ECF No. 574 at 3–14; ECF No. 575 at 79–99.)

17 Plaintiffs assert the claims for these classes are brought under the following sixteen state statutes: (1) Colorado Consumer Protection Act, Colo. Rev. Stat. § 6-1-101 *et seq.*; (2) Connecticut Unfair Trade Practices Act, Conn. Gen. Stat. § 42–110a *et seq.*; (3) Delaware Consumer Fraud Act, Del. Code Tit. 6, § 2511 *et seq.*; (4) Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. § 501.201 *et seq.*; (5) Illinois Consumer Fraud and Deceptive

Business Practices Act, 815 Ill. Comp. Stat. 505/1 *et seq.*; (6) Indiana Deceptive Consumer Sales Act, Ind. Code § 24-5-0.5-1 *et seq.*; (7) Iowa Private Right of Action for Consumer Frauds Act, Iowa Code §§ 714H.1 *et seq.*; (8) Louisiana Unfair Trade Practices and Consumer Protection Law, La. Rev. Stat. § 51:1401 *et seq.*; (9) Maine Unfair Trade Practices Act, Me. Rev. Stat. Ann. Tit. 5, § 205-A *et seq.*; (10) Maryland Consumer Protection Act, Md. Code Ann., Com. Law § 13-301 *et seq.*; (11) Massachusetts Consumer Protection Act, Mass. Gen. Laws Ch. 93A, § 1 *et seq.*; (12) North Carolina Unfair and Deceptive Trade Practices Act, N.C. Gen. Stat. § 75-1.1 *et seq.*; (13) North Dakota Consumer Fraud Act, N.D. Cent. Code § 51-15-01 *et seq.*; (14) Oklahoma Consumer Protection Act, Okla. Stat. Tit. 15, § 751 *et seq.*; (15) South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10 *et seq.*; and (16) Tennessee Consumer Protection Act, Tenn. Code Ann. § 47-18-104, 47-18-101 *et seq.* (ECF No. 574 at 3–4 n.1; *see also ECF No.* 411 ¶¶ 645–80, 696–723, 732–63, 822–37, 847–57, 874–90 (Counts 18 (Colorado), 19 (Connecticut), 20 (Delaware), 21 (Florida), 24 (Illinois), 25 (Indiana), 26 (Iowa), 28 (Louisiana), 29 (Maine), 30 (Maryland), 31 (Massachusetts), 40 (North Carolina), 41 (North Dakota), 43 (Oklahoma), 46 (South Carolina), and 47 (Tennessee).)

18 To avoid potential duplication, the Court assumes for purposes of this Opinion that Plaintiffs intend for the Proposed Novo Nordisk New Jersey Class and the Proposed Sanofi New Jersey Class to be sub-classes of the Proposed Nationwide Classes since both of these proposed sets of classes are based on claims asserted under the NJCFA.

***13** Plaintiffs assert their proposed classes "include only those cash, coinsurance, deductible, or Medicare Part D patients who paid *based on WAC or AWP*." (ECF No. 575 at 19.) Plaintiffs exclude the following from all of their proposed classes: (1) "purchases where a manufacturer coupon was applied" (ECF No. 574 at 14); (2) "purchases (or receipt of) insulin through a Medicaid program" (*id.*); (3) "each [D]efendant and any entity in which it has a controlling interest, and their legal representatives, officers, directors, assignees, and successors" (*id.* at 14–15); and (4) "any co-conspirators and their officers, directors, management, employees, subsidiaries, and affiliates." (*id.* at 15; *see also* ECF No. 575 at 19–20, 64 ("The method for ascertaining class members will exclude those who did not pay for their prescribed analog insulins based on the defendants' list prices.... The plaintiffs will obtain [ ] information, which will allow Dr. Rosenthal and claims administrators to identify every single analog insulin purchase made with a coupon so that it can be excluded from the class." (footnotes omitted)).)

At oral argument, Plaintiffs represented that Eli Lilly is not part of their Motion for Class Certification (ECF No. 713 at 11), presumably because of the pending Motion for Preliminary Approval of a Class Action Settlement with Eli Lilly (*see* ECF No. 639). Therefore, the Court assumes for purposes of this Opinion that Plaintiffs are *not* seeking to certify their three proposed classes against Eli Lilly—the Proposed Eli Lilly Multi-State Class, the Proposed Eli Lilly New Jersey Class, and the Proposed Eli Lilly Texas Class—and accordingly **DENIES WITHOUT PREJUDICE** Plaintiffs' motion to certify these three classes. The Court addresses Plaintiffs' request to certify the remaining twelve proposed classes not involving Eli Lilly.

A. Legal Standard

A class action under Federal Rule of Civil Procedure 23 ("Rule 23") is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart Stores v. Dukes*, 564 U.S. 338, 348 (2011) (citing *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979)). "To invoke this exception, every putative class action must satisfy the requirements of Rule 23(a) and the requirements of either Rule 23(b)(1), (2), or (3)." *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 590 (3d Cir. 2012). A party seeking class certification must first demonstrate the proposed class satisfies the four requirements of Rule 23(a):

> (1) the class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions of law or fact common to the class;
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). These four requirements are customarily referred to as: (1) numerosity, (2) commonality, (3) typicality, and (4) adequate representation, respectively. *Dukes*, 564 U.S. at 349. In addition to satisfying these four Rule 23(a)

requirements, a party seeking class certification must also show that the requirements of Rule 23(b)(1), 23(b)(2), or 23(b)(3) are met. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997).

Under Rule 23(b)(2), a class action may be maintained if "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). The Third Circuit has regularly held certification pursuant to Rule 23(b)(2) requires cohesiveness of class claims among the class members. *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 142 (3d Cir. 1998). The Third Circuit articulated the following two reasons for the cohesiveness requirement. *Id.* at 143. "First, unnamed members with valid individual claims are bound by the action without the opportunity to withdraw and may be prejudiced by a negative judgment in the class action." *Id.* Second, "the suit could become unmanageable and little value would be gained in proceeding as a class action ... if significant individual issues were to arise consistently." *Id.* In other words, "the court must ensure that significant individual issues do not pervade the entire action because it would be unjust to bind absent class members to a negative decision where the class representative['s] claims present different individual issues than the claims of the absent members present." *Id.* Therefore, Rule 23(b)(2) is not appropriate where "significant individual liability or defense issues ... would require separate hearings for each class member in order to establish defendants' liability." *Santiago v. City of Philadelphia*, 72 F.R.D. 619, 627 (E.D. Pa. 1976).

***14** Under Rule 23(b)(3), a class action may be maintained if "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). These requirements are known as "predominance" and "superiority," respectively. *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 310 (3d Cir. 2008), *as amended* (Jan. 16, 2009). The issues pertinent to these findings include:

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
>
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
>
> (D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3). Superiority "asks the court 'to balance, in terms of fairness and efficiency, the merits of a class action against those of "alternative available methods" of adjudication.' " *In re Prudential Ins. Co. Am. Sales Prac. Litig. Agent Actions*, 148 F.3d 283, 316 (3d Cir. 1998) (quoting *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 632 (3d Cir. 1996)). "Predominance 'tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation,' a standard 'far more demanding' than the commonality requirement of Rule 23(a)[.]" *In re Prudential*, 148 F.3d at 310–11 (quoting *Amchem*, 521 U.S. at 623–24). The Third Circuit has held that for proposed classes under Rule 23(b)(3), there is an "implicit requirement that class members be ascertainable," meaning a plaintiff's proposed class must be "currently and readily ascertainable based on objective criteria." *In re Niaspan*, 67 F.4th at 129–30, 133 (quoting *Hargrove v. Sleepy's LLC*, 974 F.3d 467, 477 (3d Cir. 2020)).

"Class 'certification is proper only if the trial court is satisfied, after a rigorous analysis' that all of the necessary Rule 23 requirements have been fulfilled." *Ferreras v. Am. Airlines, Inc.*, 946 F.3d 178, 183 (3d Cir. 2019) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350-51 (2011)). "The party seeking certification bears the burden of establishing each element of Rule 23 by a preponderance of the evidence." *Marcus*, 687 F.3d at 591 (citing *In re Hydrogen Peroxide*, 552 F.3d at 307). The Third Circuit has set forth "three key aspects of class certification procedure." *In re Hydrogen Peroxide*, 552 F.3d at 307. First, the court's decision to certify a class requires factual determinations in support of each Rule 23 requirement by a preponderance of the evidence, "not merely a 'threshold showing' by a party." *Id.* "Second, the court must resolve all factual or legal disputes relevant to class certification, even if they overlap with the merits—including disputes touching on elements of the cause of action." *Id.* Lastly, "the court's obligation to consider all relevant evidence and arguments extends to expert testimony, whether offered by a party seeking class certification or by a party opposing it." *Id.* "An overlap between a class certification requirement and the merits of a claim is no reason to decline to resolve relevant disputes when necessary to determine whether a class certification requirement is met." *Id.* at 316. To determine whether the Rule 23 class certification requirements are

satisfied, the Third Circuit has stated that district courts may "delve beyond the pleadings" where appropriate, and their certification analysis may include a "preliminary inquiry into the merits." *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 306 (3d Cir. 2011) (quoting *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 167 (3d Cir. 2001), *as amended* (Oct. 16, 2001)). However, "plaintiffs need not actually establish the validity of claims at the [class] certification stage." *Sullivan*, 667 F.3d at 306. "[T]rial courts 'must engage in a rigorous analysis and find each of Rule 23[ ]'s requirements met by a preponderance of the evidence before granting certification[,]" even if this "involves judging credibility, weighing evidence, or deciding issues that overlap with the merits of a plaintiff's claims." *In re Niaspan*, 67 F.4th at 130 (quoting *Harnish v. Widener Univ. Sch. of Law*, 304 (3d Cir. 2016)).

B. Decision [19]

[19] The Court has jurisdiction over Plaintiffs' Motion for Class Certification under the Class Action Fairness Act of 2005 ("CAFA"). *See* 28 U.S.C. § 1332(d). CAFA confers jurisdiction on federal district courts over certain class actions where the following requirements are met: (1) the amount in controversy exceeds $5,000,000, as aggregated across all individual claims; (2) the citizenship of at least one plaintiff differs from that of any defendant, *i.e.*, there is minimal diversity; and (3) the class consists of at least 100 members. *See* 28 U.S.C. § 1332(d).

***15** The Court first addresses below whether Plaintiffs' twelve proposed classes [20] satisfy the ascertainability requirement for class actions and then analyzes whether each of Plaintiffs' twelve proposed classes meets the requirements under Rule 23(a), Rule 23(b)(2), and Rule 23(b)(3). For purposes of this class certification analysis, the Court assumes Plaintiffs' allegations as true.

[20] This refers to Plaintiffs' twelve proposed classes not involving Eli Lilly—*i.e.*, the Proposed Nationwide Classes, the Proposed Novo Nordisk Multi-State Class, the Proposed Sanofi Multi-State Class, the Proposed Novo Nordisk New Jersey Class, the Proposed Sanofi New Jersey Class, the Proposed Novo Nordisk Texas Class, the Proposed Sanofi Texas Class, the Proposed Kansas Classes, and the Proposed Utah Classes. (ECF No. 575 at 41, 79–80; *see also* ECF No. 574 at 2–14.)

i. Ascertainability

The Third Circuit has held that for proposed classes under Rule 23(b)(3), there is an "implicit requirement that class members be ascertainable," meaning a plaintiff's proposed class must be "currently and readily ascertainable based on objective criteria." *In re Niaspan*, 67 F.4th at 129–30, 133 (quoting *Hargrove v. Sleepy's LLC*, 974 F.3d 467, 477 (3d Cir. 2020)). "Ascertainability functions as a necessary prerequisite (or implicit requirement) because it allows a trial court effectively to evaluate the explicit requirements of Rule 23." *Byrd v. Aaron's Inc.*, 784 F.3d 154, 162 (3d Cir. 2015), *as amended* (Apr. 28, 2015). "In other words, the independent ascertainability inquiry ensures that a proposed class will actually function as a class." *Id.* To satisfy this ascertainability requirement, "[p]laintiffs must show that '(1) the class is defined with reference to objective criteria; and (2) there is a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition.' " *In re Niaspan*, 67 F.4th at 130 (alteration in original) (*quoting Hargrove*, 974 F.3d at 469–70). "A plaintiff must propose a classification method with evidentiary support to meet the ascertainability requirement." *In re Niaspan*, 67 F.4th at 130. In demonstrating ascertainability, plaintiffs do not have to be able to identify all potential class members at the class certification stage; rather, they "need only show that 'class members can be identified.' " *Id.* (quoting *Byrd*, 784 F.3d at 163). "If class members are impossible to identify without extensive and individualized fact-finding or 'mini-trials,' then a class action is inappropriate." *Marcus*, 687 F.3d at 593. The burden is on the plaintiff to show "by a preponderance of the evidence that there is a reliable and administratively feasible method for ascertaining the class." *Hayes*, 725 F.3d at 356.

Here, Plaintiffs claim all their proposed classes meet both prongs of the ascertainability test because: (1) they are defined with reference to objective criteria—namely, data that can show whether the individual paid any portion of the purchase price for one or more of Defendants' analog insulin products at issue in this case "at a price calculated by reference to a list price, AWP (Average Wholesale Price), and/or WAC (Wholesale Acquisition Price) for purposes other than resale"; and (2) there is a reliable and administratively feasible mechanism for determining whether class members fall within the definitions of each

of their proposed classes—namely, by using a combination of electronically stored records of certain PBMs, retail pharmacies, insurers, and drug coupon administrators to identify putative class members during the various applicable proposed class periods. (ECF No. 575 at 5–6, 57–68, 87.) Plaintiffs argue these electronically stored records can identify the putative class members who "purchased the relevant insulins in the class period[s] at a price calculated by reference to a list price." (*Id.* at 60–61.) Plaintiffs also submit there is no requirement stating they must use a single, centralized source of data to identify putative class members (ECF No. 577 at 47), and the wealth of detailed PBM and pharmacy transactional data can be used to exclude any transactions that fall outside the definitions of their twelve proposed classes (*id.* at 44–48). Plaintiffs contend they can use transactional data to remove consumers who received manufacturer coupons (which they exclude from their proposed classes), but state consumers who used pharmacy coupons need not be removed because pharmacy programs do not shield consumers from the inflated list prices. (*Id.* at 49–50.) Plaintiffs also assert their proposed classes are ascertainable, regardless of whether factors other than the list price affected the purchase price, because the proposed classes include transactions where any portion of the purchase price is set by reference to the list prices. (*Id.* at 52–53.)

***16** However, Defendants contend none of Plaintiffs' proposed classes are ascertainable because they are "complex" and "reflect arbitrary exclusions," and Plaintiffs fail to present an administratively feasible method for identifying those who belong in their various putative classes. (ECF No. 576 at 73–75.) Defendants further assert there is no single dataset identifying all insulin purchases fitting the definitions of Plaintiffs' proposed classes, and speculation of uncollected data to potentially identify class members is insufficient to demonstrate ascertainability. (*Id.* at 75–76.) More specifically, Defendants argue Plaintiffs have failed to show they have an administratively feasible or reliable method for identifying insured and uninsured consumers who fit Plaintiffs' class definitions, no administratively feasible means for establishing that each insured and uninsured consumer paid a price set "by reference to the list price," and no reliable method for excluding insured consumers who fall outside Plaintiffs' class definitions. (*Id.* at 76–86.) Rather, Defendants state Plaintiffs "instead try to cobble together 'samples' of PBM and pharmacy data that reflect *some* insulin purchases during the class period[s]" but which "records lack essential information needed to identify putative class members[.]" (*Id.* at 75.)

Defendants note Plaintiffs' proposed method of identifying proposed uninsured class members is based on a combination of electronic records from (1) certain PBMs, (2) certain insurers, (3) certain retail pharmacies, and (4) drug coupon administrators. (*Id.* at 76 (citing ECF No. 575 at 5).) But Defendants argue three of these four sets of records cannot identify uninsured consumers; Defendants state the data from PBMs and insurers can only identify *insured* consumers, not *uninsured* consumers, and drug coupon administrator records can only be used to exclude certain transactions, not identify potential class members, whether insured or uninsured. (ECF No. 576 at 76–77 (citing Baker Rpt. ¶ 130: Rosenthal Rpt. ¶¶ 105, 109).) Defendants contend Plaintiffs are thus left with relying solely on pharmacy records to identify uninsured consumers, but assert the sample of pharmacy records data Plaintiffs have collected only covers a subset of the relevant period[21] (not the entirety of Plaintiffs' proposed class periods) and cannot reliably identify uninsured purchasers; Defendants further argue "Plaintiffs have no workable plan to obtain records from the tens of thousands of pharmacies in the country to identify '*all* uninsured consumers' dining the class period[s], as then class definition[s] require[ ]." (ECF No. 576 at 77–79.[22]) Additionally, Defendants state the evidence on which Plaintiffs rely—*i.e.*, "(1) statements from pharmacy representatives; (2) the claim that uninsured consumers always 'pay pharmacies' U&C price[s]'; and (3) Prof. Rosenthal's analysis that cash prices are '*nearly perfectly correlated* to the defendants' WACs' "—all undermine Plaintiffs' position. (*Id.* at 78–79 (alterations in original) (citing ECF No. 575 at 20–23; Rosenthal Rpt. ¶ 99).) Indeed, Defendants state evidence including testimony from pharmacy representatives shows that "cash prices are *not* uniformly calculated 'by reference to a list price[,]' " not all uninsured consumers pay a pharmacy's U&C price (which Plaintiffs contend is calculated by reference to Defendants' list price), and Dr. "Rosenthal's own data refutes Plaintiffs' assertions that cash prices are 'pegged directly' or 'tied to' list prices." (ECF No. 576 at 79–80.[23]) Defendants also contend Plaintiffs' overbroad class definitions fail to exclude consumers who received one or more forms of financial assistance and therefore suffered no injury. (*Id.* at 86–89.[24]) Defendants submit "[c]onsumer affordability initiatives, such as manufacturer co-pay coupons, typically cap the consumer's out-of-pocket cost" (meaning the consumer's costs do not vary when the list price changes), and "[c]onsequently, consumers who participated in such programs cannot have

paid a price 'by reference to' the list price." (*Id.* at 86 (citing Baker Rpt. ¶ 166).)

21 *See* ECF No. 575 at 62 ("Most [but not all] of these PBMs have produced data starting in January 2014—which is the start date of the earliest class period—and there is no dispute they have such data stretching from 2014 to the present." (citing Rosenthal Rpt. ¶ 132 n.155 [Redacted]

22 *See also* ECF No. 713 at 70–72 (Defense counsel asserting at oral argument that while Plaintiffs' counsel stated they can identify uninsured customers based on pharmacy records from [Redacted], three of these four have a field for cash payers but "for [Redacted], sure they have a field for it but they don't have any data. The field isn't populated in the data that the [P]laintiffs have been able to obtain from those pharmacies. [Redacted] doesn't even have a filed for cash transactions. And the fourth [Redacted] ... There are 66,00 pharmacies .... It's going to be [J harder to get data for the smaller ones, but even for the big ones they rely on they don't have the data that they need.").

23 *See* ECF No. 576 at 79–80 ("For example. [Redacted] Thompson Decl. ¶ 10 (emphasis added). [Redacted] Dudley Dep. 146:6-15. In fact, Plaintiffs' own expert *agreed that* pharmacies use different definitions and 'multiple factors' to calculate cash prices. Wine Dep. 165:9–20, 244:4–17 (Ex. 29)....[Redacted] Burke Decl. ¶ 9. [Redacted] Shinton Decl. ¶ 19 (Pls.' Ex. 14). [Redacted]. Baker Rpt. ¶ 136.... The below figure from Prof. Rosenthal's report, for example, shows that average prices paid by uninsured consumers in North Dakota during the putative class period for Lantus (which, according to Professional Rosenthal's theory, began in Q2 2014) fluctuated wildly, even when WAC was flat[.]").

24 *See* ECF No. 576 at 88 ("Even if Plaintiffs *could* reliably identify coupon purchases, there are many other forms of financial assistance (apart from Defendants' affordability offerings) that cap or eliminate consumers' out-of-pocket costs:

- Medicare patients are eligible to receive 'predictable copays for select insulins (no more than $35 per prescription for the month's supply) in the deductible, initial coverage, and coverage gap phases.' CMS, *Part D Senior Savings Model*, available at https://tinyurl.com/PartDcopays (Ex. 60).
- Some states (including New Jersey, New York, Wisconsin, and Massachusetts) offer drug discount programs. Baker Rpt. ¶¶ 118-20.
- Some pharmacies (including [Redacted] offer drug discount coupons. *Id.* ¶ 122.
- Non-profit organizations like the Patient Assistance Network Foundation offer billions of dollars in financial assistance. *Id.* ¶ 121.

An insured or uninsured consumer who receives any of these forms of assistance does not pay a cost 'calculated by reference to list price,' and so would need to be excluded. But because consumers under some of these programs are reimbursed *after* they pay a pharmacy (*id.* ¶ 194), they cannot be identified in PBM or pharmacy data. The same problem exists with insured consumers who benefited from rebates, including through lower plan costs. As Plaintiffs pled, the 'use of discounts and rebates that actually reduce consumer costs is not at issue in this case.' TAC ¶ 6. But Plaintiffs have no way to account for programs that provide such benefits[.]").

***17** Additionally, Defendants point to other gaps in the data on which Plaintiffs intend to rely to identify putative class members. For example, they assert "[t]he data from [Redacted] (ECF No. 576 at 84 (citing Baker Rpt. ¶¶ 173, 198, 269).) Defendants also assert that Dr. Rosenthal proposes a workaround—"treating all 'claims where the member payment is not a whole number payment amount' (*e.g.*, $25.50) as co-insurance payments (keeping them in the class), while treating all 'whole number' amounts (*e.g.*, $25.00) as co-pays (excluding them from the class)[,]" but Defendants say this proposal does not work because "co-pays can be *non-whole* dollar amounts" and Dr. "Rosenthal would be *including* consumers Plaintiffs meant to *exclude* from the class." (ECF No. 576 at 84 (citing Rosenthal Rpt. ¶¶ 120, 126 & n.150; Baker Rpt. ¶ 196 (identifying co-pays of, *e.g.*, $18.15, $37.27, and $39.93)).) Defendants submit the only way to accurately distinguish co-insurance from co-pays for purposes of determining who would be included in Plaintiffs' proposed classes "is by reviewing each person's insurance plan." (ECF No. 576 at 84.)

Though this is a close call, the Court concludes Plaintiffs' proposed classes are sufficiently ascertainable. Plaintiffs'

proposed classes include "coinsurance, deductible, Medicare Part D and cash [*i.e.*, uninsured] patients" who "paid any portion of the purchase price for a prescription of Defendants' analog insulin products "at a price calculated by reference to a list price, AWP (Average Wholesale Price), and/or WAC (Wholesale Acquisition [Cost]) for purposes other than resale" during certain specified time periods that vary depending on the analog insulin product being referenced. (ECF No. 575 at 3–4, 19, 57–58; *see also* ECF No. 574.) To show their proposed classes are ascertainable, Plaintiffs must show their proposed classes are defined with reference to objective criteria and that they have a reliable and administratively feasible mechanism for determining whether putative class members fall within their various class definitions.

Here, Plaintiffs have proposed using a combination of records from certain PBMs, retail pharmacies, insurers, and drug coupon administrators to identify putative class members —*i.e.*, cash, coinsurance, deductible, and Medicare Part D patients who paid any portion of the purchase price of one or more of Defendants' analog insulin products at a price calculated by reference to list price (or AWP or WAC). Plaintiffs claim Dr. Rosenthal can, using the PBM data, "identify which insured individuals purchased the analog insulins at a price calculated by reference to list price and were therefore injured." (ECF No. 575 at 62 (citing Rosenthal Rpt. ¶ 132).) Plaintiffs assert they can also use the retail pharmacy data to ascertain uninsured consumers and "the exact amount" consumers paid for their analog insulin, as well as to determine which consumers paid coinsurance or co-pays and "which consumer[s] paid with reference to list price." (*Id.* at 63 (citing Rosenthal Rpt. ¶¶ 132 & n.155, Part VII.D; Ex. 6 ¶¶ 6, 10–11, 14, 21.).) Plaintiffs obtained declarations from several PBMs confirming the data they maintain can be used to separate ineligible members who paid fixed co-pays from eligible members who paid coinsurance—the former being excluded from Plaintiffs' proposed classes and the latter falling within Plaintiffs' proposed classes. (*Id.* at 62–63 (citing Ex. 7 ¶ 9 [Redacted]); Ex. 8 ¶¶ 6-7 [Redacted]); Ex. 9 ¶ 6 [Redacted]); Ex. 10 ¶ 5 ([Redacted])).) Plaintiffs also submit a declaration from an insurer claims data firm representing that claims data can be used to identify analog insulin purchases made during the deductible period of a consumer's benefits plan, as well as analog insulin purchases made with coinsurance. (*Id.* at 64–65 (citing Ex. 5 ¶¶ 7, 10–13).) Moreover, Plaintiffs indicate they are in the process of obtaining records from two third-party vendors that administer all of Defendants' coupon programs and that this data will permit Dr. Rosenthal and claims administrators "to identify every single analog insulin purchase made with a coupon so that it can be excluded from the class." (*Id.* at 64 (citing Rosenthal Rpt. ¶¶ 109, 135; Ex. 6 ¶ 14; Ex. 5 ¶ 14).)

***18** To the extent Defendants claim Plaintiffs have yet to identify all putative class members, Plaintiffs are not required to identify every class member at the class certification stage. *See Hargrove*, 974 F.3d at 480 (explaining plaintiffs "do not have to prove at this stage that each proposed class member was indeed [a member of the proposed class], but only that the members can be identified"). Additionally, to the extent Defendants contend Plaintiffs' proposed classes are not ascertainable because there is no single dataset of all insulin purchases (ECF No. 576 at 75), Defendants do not cite any authority supporting the proposition that only a single, centralized source of data can be relied upon to identify class members. Rather, Plaintiffs are required to show their "purported method for ascertaining class members is reliable and administratively feasible, and permits a defendant to challenge the evidence used to prove class membership." *Carrera*, 727 F.3d at 308. Plaintiffs have done so by utilizing a combination of data sources to identify eligible consumers and exclude ineligible consumers in accordance with the definitions of their proposed classes. *See Afzal v. BMW of N. Am., LLC*, Civ. A. No. 15-8009, 2020 WL 2786926, at *8 (D.N.J. May 29, 2020) (finding plaintiffs "can use a combination of records, such as those from the defendant as well as public records" to satisfy ascertainability). Plaintiffs propose an administratively feasible method to identify class members using evidentiary support including data sets produced by PBMs, insurers, retail pharmacies, and coupon administrators as well as declarations from claims administrators with experience in distributing damages based on the produced data sets, and industry experts culling and interpreting this data. *See City Select Auto Sales, Inc. v. BMW Bank of N. Am., Inc.*, 867 F.3d 434, 441 (3d Cir. 2017) ("Affidavits, in combination with records or other reliable and administratively feasible means, can meet the ascertainability standard."). As such, Plaintiffs' proposed method permits Defendants to challenge the evidence used to prove class membership. *See Carrera*, 727 F.3d at 307 ("Ascertainability provides due process by requiring that a defendant be able to test the reliability of the evidence submitted to prove class membership.").

Therefore, the Court finds Plaintiffs' proposed classes satisfy the ascertainability requirement.

ii. Rule 23(a) Inquiry

Plaintiffs argue the Court should certify all twelve of their proposed classes because they all satisfy each of the four Rule 23(a) requirements—numerosity, commonality, typicality, and adequate representation. (ECF No. 575 at 2.) Specifically, Plaintiffs assert each of their twelve proposed classes: (1) meet Rule 23(a)'s numerosity requirement because "around seven million Americans take the analog insulins at issue in this lawsuit"; (2) meet Rule 23(a)'s commonality requirement "because common issues of law and fact regarding defendants' liability abound"; (3) meet Rule 23(a)'s typicality requirement because the class representatives' claims "mirror those of all class members" in that they are based on Defendants' alleged "unconscionable and unfair conduct and the [purported] resulting financial losses"; and (4) meet Rule 23(a)'s adequate representation requirement because the proposed "class representatives have shown dogged commitment to their representation of the classes over the past five years" in that "they have sat for depositions, gathered extensive medical documentation, and demonstrated no conflicts with the classes." (*Id.*)

Defendants contend Plaintiffs have failed to adequately meet their burden to satisfy the four Rule 23(a) requirements for their proposed classes because: (1) "Plaintiffs cannot identify common questions whose answers would drive resolution of this litigation" in that Plaintiffs' proposed questions would not generate common answers; (2) "even if any classes could be certified (they cannot), insured proposed class representatives are not typical of uninsured consumers—whose costs are not based on formularies and rebates—meaning that classes with only *insured* class representatives cannot represent *uninsured* consumers" because "there is a fundamental difference in the 'individual factual circumstances' underlying putative class members' claims, depending on whether each individual is insured or uninsured"; and (3) "under this Court's prior rulings, no proposed class representative can adequately represent individuals who purchased *different* analog insulin products, further circumscribing any classes." (ECF No. 576 at 92–98.)

The Court addresses each of Rule 23(a)'s four requirements —numerosity, commonality, typicality, and adequate representation—in turn.

a. Numerosity

Plaintiffs argue they satisfy Rule 23(a)'s numerosity requirement for each of their twelve proposed classes. (ECF No. 575 at 2, 50–51, 87–88 (citations omitted).) To satisfy Rule 23(a)'s numerosity requirement, "a plaintiff must show by a preponderance of the evidence that 'the class is so numerous that joinder of all members is impracticable.' " *Zangara v. Zager Fuchs, P.C.*, Civ. A. No. 17-06755, 2019 WL 6310056, at *2 (D.N.J. Nov. 25, 2019) (quoting Fed. R. Civ. P. 23(a)(1)). "No minimum number of plaintiffs is required to maintain a suit as a class action, but generally if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40, the [numerosity requirement] of Rule 23(a) has been met." *Stewart v. Abraham*, 275 F.3d 220, 226–27 (3d Cir. 2001) (citation omitted). However, a plaintiff must present evidence for the court to make a factual determination on whether the numerosity requirement is met. *See Marcus*, 687 F.3d at 595. When plaintiffs attempt to certify both nationwide classes and state-specific subclasses, as Plaintiffs seek here, "evidence that is sufficient to establish numerosity with respect to the nationwide class[es] is not necessarily sufficient to establish numerosity with respect to the state-specific subclass[es]." *Id.* Plaintiffs cannot "simply rely on the nationwide presence of [a defendant] to satisfy the numerosity requirement without [state]-specific evidence." *Id.*

***19** Here, Plaintiffs assert Rule 23(a)'s numerosity requirement for all of their proposed classes is met because there are thirty-nine named class representatives and around seven million Americans who take analog insulin every day. (ECF No. 575 at 50–51 (citing William Cefalu et al., *Insulin Access and Affordability Working Group: Conclusions and Recommendations*, 41 Diabetes Care 1299 (2018); Flory Rpt. ¶¶ 57, 59).) Plaintiffs do not specify how numerosity is met for each of their twelve proposed classes individually, but presumably this requirement is met for each of Plaintiffs' proposed classes, and joinder of this number of plaintiffs would be impracticable. Defendants do not appear to contest numerosity for Plaintiffs' proposed classes (*see* ECF Nos. 576, 587), and at oral argument, conceded numerosity is not an issue (*see* ECF No. 713 at 35).

Therefore, the Court finds Plaintiffs have satisfied Rule 23(a)'s numerosity requirement for their twelve proposed classes.

b. Commonality

Plaintiffs likewise contend they satisfy Rule 23(a)'s commonality requirement for each of their twelve proposed classes. (ECF No. 575 at 2, 51–54, 87–88.) Commonality under Rule 23(a) requires there to be "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). "The threshold for establishing commonality is straightforward: 'The commonality requirement will be satisfied if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class.' " *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 596–97 (3d Cir. 2009) (quoting *Baby Neal v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994)). Indeed, as the Third Circuit recognized, "[i]t is well established that only one question of law or fact in common is necessary to satisfy the commonality requirement, despite the use of the plural 'questions' in the language of Rule 23(a)(2)." *In re Schering Plough*, 589 F.3d at 597 n.10 (citations omitted). There is a low threshold for satisfying Rule 23(a)'s commonality requirement. *Newton*, 259 F.3d at 183. "The bar for establishing commonality is 'not high' and is 'easily met.' " *In re Pharmacy Benefit Managers Antitrust Litig.*, Civ. A. No. 03-04730, 2017 WL 275398, at *23 (E.D. Pa. Jan. 18, 2017) (first quoting *In re Cmty. Bank of N. Va. Mortg. Lending Pracs. Litig.*, 795 F.3d 380, 397 (3d Cir. 2015), and then quoting *Reyes*, 802 F.3d at 486); *see also In re Sch. Asbestos Litig.*, 789 F.2d 996, 1010 (3d Cir. 1986) (citations omitted) (noting the "threshold of commonality is not high"). However, a bald assertion that all putative class members suffered a violation of the same law is generally insufficient to satisfy the commonality requirement. *See, e.g.*, *Dukes*, 564 U.S. at 349–50 ("Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury' ... [but t]his does not mean merely that they have all suffered a violation of the same provision of law. Title VII, for example, can be violated in many ways—by intentional discrimination, or by hiring and promotion criteria that result in disparate impact, and by the use of these practices on the part of many different superiors in a single company. Quite obviously, the mere claim by employees of the same company that they have suffered a Title VII injury, or even a disparate-impact Title VII injury, gives no cause to believe that all their claims can productively be litigated at once. Their claims must depend upon a common contention—for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." (citations omitted)). *Cf. Griffin v. Zager*, Civ. A. No. 16-1234, 2017 WL 3872401, at *4–5 (D.N.J. Sept. 1, 2017) (finding commonality where the court determined that "[f]actually, [the plaintiff] and all class members would have to prove that [defendant] sent out [a] letter" and "the common legal question underlying [the plaintiff's] and class members' claims is whether [defendant] violated the [Fair Debt Collection Practices Act] by, among other things, falsely representing or implying its letter was a communication from an attorney" and that the defendant's conduct in sending out this letter containing false representations "was common as to all of the class members"); *A & L Indus., Inc. v. P. Cipollini, Inc.*, Civ. A. No. 12-07598, 2013 WL 5503303, at *2 (D.N.J. Oct. 2, 2013) (finding Rule 23(a)'s commonality prong met where "[e]ach of the class members' claims hinge[d] on the common contention that Defendant engaged B2B to send the exact same illegal facsimile to each potential class member, in violation of the [Telephone Consumer Protection Act,]" finding "that a determination as to the legality of that single fax will resolve in one stroke *the* issue 'central to the validity of each one of the claims' ").

***20** Rule 23(a)'s commonality requirement also does not require all putative class members to have identical claims, *see Hassine v. Jeffes*, 846 F.2d 169, 176–77 (3d Cir. 1988), and "factual differences among the claims of the putative class members do not defeat certification[,]" *Baby Neal*, 43 F.3d at 56. Rather, to satisfy commonality, what matters "is not the raising of common 'questions'—even in droves—but rather, the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Ferreras v. Am. Airlines, Inc.*, 946 F.3d 178, 185 (3d Cir. 2019) (emphasis added) (quoting *Wal-Mart*, 564 U.S. at 350). "Even where individual facts and circumstances do become important to the resolution, class treatment is not precluded." *Baby Neal*, 43 F.3d at 57. But dissimilarities within the proposed class "have the potential to impede the generation of common answers." *Ferreras*, 946 F.3d at 185 (quoting *Wal-Mart*, 564 U.S. at 350). The Rule 23(a) commonality and Rule 23(b) predominance requirements are "closely linked[,]" but the "predominance requirement is 'far more demanding than the commonality requirement[.]' " *Ferreras*, 946 F.3d at 185 (quoting *In re Hydrogen Peroxide*, 552 F.3d at 311).

Here, Plaintiffs argue Rule 23(a)'s commonality requirement is satisfied for each of their twelve proposed classes because they share common questions of law and fact that will yield common answers across the proposed classes. (ECF No. 575

at 2, 51–54, 87–88.) Plaintiffs contend the common questions of law and fact that would generate common answers for their Proposed Nationwide Classes include but are not limited to the following:

> (i) Whether the [D]efendants engaged in unfair and/or unconscionable conduct;
>
> (ii) Whether the [D]efendants controlled and inflated the list price (WAC) of their analog insulins;
>
> (iii) Whether the [D]efendants knew that the class members paid based on the list price (WAC) Novo [Nordisk] and Sanofi set;
>
> (iv) Whether the [D]efendants knew that the increased cost of analog insulin harmed the class members;
>
> (v) Whether the class members could reasonably avoid purchase of the analog insulins they were prescribed;
>
> (vi) Whether the [D]efendants took advantage of the class members' lack of capacity to forgo purchases of their analog insulins;
>
> (vii) Whether the [D]efendants competed with one another through rebates to PBMs and insurers rather than reductions to list prices;
>
> (viii) Whether the [D]efendants copied their competitors' price increases such that all rapid and long-acting insulins were infected by the scheme;
>
> (ix) Whether the [D]efendants have lacked honesty regarding the justifications and driving forces behind their list price increases;
>
> (x) Whether the [D]efendants are liable to plaintiffs and the class members for damages flowing from their alleged misconduct.

(ECF No. 575 at 52–53. [25])

25 As Defendants note (ECF No. 576 at 92–93), Plaintiffs' list of common questions of law and fact here differ from the "[q]uestions of law and fact common to the class" they listed in the TAC (*see* ECF No. 411 ¶ 332).

In opposition, Defendants assert Plaintiffs fail to meet Rule 23(a)'s commonality requirement because their proposed common questions of law and fact will not generate common answers, and even if they did, those answers would not drive the resolution of the litigation. (ECF No. 576 at 92–94.) Defendants argue some of Plaintiffs' proposed questions —*e.g.*, "Whether the [D]efendants engaged in unfair and/or unconscionable conduct"—"parrot generic legal allegations, which is 'not sufficient to establish commonality.' " (ECF No. 576 at 93 (citing *Greco v. Grewal*, Civ. A. No. 19-19145, 2020 WL 5793709, at *5 (D.N.J. Sept. 29, 2020)).) Defendants state other of Plaintiffs' common questions will not advance the litigation because, for example, "[t]here is no dispute that Defendants set list prices for their insulins and 'competed with one another through rebates,' among other factors." (ECF No. 576 at 94 (quoting ECF No. 575 at 52–53).)

***21** In reply, Plaintiffs contend "[t]he central question in this case asks not whether some threshold monetary amount to buy insulin is unfair, but whether the [D]efendants' conduct in setting benchmark insulin list prices was unfair[,]" and this question "necessarily drives common answers." (ECF No. 577 at 57–58.) In other words, Plaintiffs suggest common questions to all potential members of each of their proposed classes include whether Defendants' alleged conduct in setting artificially inflated prices for their analog insulin products was unfair or unconscionable, depending on what Defendants did and knew and when, [26] and whether Defendants are liable to Plaintiffs and the putative class members for damages flowing from this alleged conduct. (*See id.*) Plaintiffs further claim the alleged harm every proposed class member suffered—overpaying for Defendants' analog insulin products—follows directly from Defendants' alleged conduct because the retail prices are based on Defendants' list prices for those products. (*Id.* at 58.)

26 Defendants state Plaintiffs rely on Dr. Rosenthal to determine when Defendants' alleged unfair pricing schemes began. (ECF No. 576 at 23 (citing ECF No. 575 at 1, 4; Rosenthal Dep. at 190:8–190:20).) But Dr. Rosenthal admits her analysis is (1) "not based on 'when' Defendants 'were making decisions about rebates' " (ECF No. 576 at 23 (citing Rosenthal Dep. at 198:2–198:21)) and (2) "not about an amount per [insulin] pen paid at a particular transaction," and "[t]he individual transaction cost is not what's being deemed unconscionable" (*id.* at 24 (alteration in original) (citing Rosenthal Dep. 248:25–249:8, 252:15–252:22)).

By setting the list prices for their analog insulin products, Defendants effectively set the initial input from which all downstream prices flow. All proposed class members purchased an analog insulin product and allegedly paid a price based on Defendants' purportedly artificially inflated list price for that product. Accordingly, all proposed class members allegedly suffered the same injury because they all allegedly overpaid for their prescribed insulin based on Defendants' purported scheme to artificially inflate the list prices for those products. *See Dukes*, 564 U.S. at 349–50 (citation omitted) ("Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury."). This is not to say all putative class members actually suffered an injury. As the Third Circuit has stated, meeting Rule 23(a)'s commonality requirement is "easy enough." *In re Nat'l Football League Players Concussion Inj. Litig.*, 821 F.3d 410, 427 (3d Cir. 2016), *as amended (May* 2, 2016). For example, courts in this Circuit have "acknowledged commonality to be present even when not all members of the plaintiff class suffered an actual injury, when class members did not have identical claims, and, most dramatically, when some members' claims were arguably not even viable." *Id.* (quoting *In re Cmty. Bank of N. Va. Mortg. Lending Pracs. Litig.*, 795 F.3d 380, 397 (3d Cir. 2015)). In reaching those conclusions, courts have explained "the focus of the commonality inquiry is not on the strength of each class member's claims but instead 'on whether the defendant's conduct was common as to all of the class members.' " *In re Cmty. Bank of N. Va.*, 795 F.3d at 397 (quoting *Sullivan*, 667 F.3d at 305–07).

Here, Plaintiffs and the proposed class members for each of Plaintiffs' twelve proposed classes all allegedly suffered the same injury—overpaying for Defendants' analog insulin products—and all share at least one common question of law or fact, including whether Defendants' alleged conduct in setting the list prices for their analog insulin products was unconscionable and what Defendants did and knew in relation to setting these list prices, which would generate answers common to the class.[27] *See In re Pharm. Indus. Average Wholesale Price Litig.*, 252 F.R.D. 83, 103 (D. Mass. 2008) (finding commonality and listing common factual issues as including "whether the AWPs and wholesale list prices for the subject drugs are false"; "whether such misrepresentations were knowing and intentional; whether the reporting of the prices was 'unfair'; and whether these misrepresentations caused plaintiffs harm during the class period").

27 To the extent Defendants rely on *Greco v. Grewal*, the Court finds Defendants' reliance is misplaced. In *Greco*, the court found the plaintiffs failed to sufficiently raise a common question "because the [d]efendants' conduct would be materially different as to each plaintiff." Civ. A. No. 19-19145, 2020 WL 5793709, at *7 (D.N.J. Sept. 29, 2020). Unlike in *Greco*, Defendants' allegedly unfair conduct of inflating list prices of analog insulin products would be materially the same as to each putative class member, even though individualized issues related to causation and damages may remain. *Cf. Eastman v. First Data Corp.*, 292 F.R.D. 181, 189–90 (D.N.J. 2013) (finding a lack of commonality and denying motion for class certification in a case where plaintiffs argued defendant's lease program was unconscionable because "it hid[ ] the true market value of the equipment being financed[,]" stating "the unconscionability inquiry will require determining the value to each individual merchant—an inquiry which cannot be determined with common evidence" and that plaintiffs did not propose "a method by which unconscionability could be determined with common evidence" (alterations in original) (citations and footnote omitted)).

***22** Therefore, the Court finds Plaintiffs have satisfied Rule 23(a)'s commonality requirement for their twelve proposed classes because each proposed class shares at least one common question of law or fact.

c. Typicality

Plaintiffs also argue they satisfy Rule 23(a)'s typicality requirement for each of their twelve proposed classes. (ECF No. 575 at 2, 54–55, 87–88.) Typicality requires the class representative's claims be typical of the claims of the class. Fed. R. Civ. P. 23(a)(3). "The concepts of commonality and typicality are broadly defined and tend to merge, because they focus on similar aspects of the alleged claims." *Newton*, 259 F.3d at 182 (citation omitted). "Both criteria seek to assure that the action can be practically and efficiently maintained and that the interests of the absentees will be fairly and adequately represented." *Baby Neal*, 43 F.3d at 56. Like commonality, typicality is a "low threshold" to satisfy. *Newton*, 259 F.3d at 183. But unlike commonality, "[t]he

typicality inquiry is intended to assess whether the action can be efficiently maintained as a class and whether the named plaintiffs have incentives that align with those of absent class members so as to assure that the absentees' interests will be fairly represented." *Baby Neal*, 43 F.3d at 57 (citations omitted). The typicality requirement can be satisfied where " 'there is a strong similarity of legal theories' or where the claim arises from the same practice or course of conduct." *Newton*, 259 F.3d at 184 (citations omitted). "If the claims of the named plaintiffs and putative class members involve the same conduct by the defendant, typicality is established regardless of factual differences." *Id.* at 183–84 (citations and footnote omitted).

The Third Circuit articulated a three-prong analysis in assessing Rule 23(a)'s typicality requirement, consisting of three distinct, yet related, concerns:

> (1) the claims of the class representative must be generally the same as those of the class in terms of both (a) the legal theory advanced and (b) the factual circumstances underlying that theory;
>
> (2) the class representative must not be subject to a defense that is both inapplicable to many members of the class and likely to become a major focus of the litigation; and
>
> (3) the interests and incentives of the representative must be sufficiently aligned with those of the class.

Marcus, 687 F.3d at 598 (quoting *In re Schering Plough Corp.*, 589 F.3d at 599). In other words, the named plaintiffs must be sufficiently similar to the rest of the proposed class "in terms of their legal claims, factual circumstances, and stake in the litigation." *In re Schering Plough Corp.*, 589 F.3d at 597. Typicality acts as a bar to class certification when "the legal theories of the named plaintiffs potentially conflict with those of the absentees." *Georgine*, 83 F.3d at 631; *Newton*, 259 F.3d at 183. Moreover, "[i]t is well established that a proposed class representative is not 'typical' under Rule 23(a)(3) if 'the representative is subject to a unique defense that is likely to become a major focus of the litigation.' " *In re Schering Plough*, 589 F.3d at 598 (quoting *Beck v. Maximus, Inc.*, 457 F.3d 291, 301 (3d Cir. 2006)). If a class representative has a unique defense, "the representative's interests might not be aligned with those of the class, and the representative might devote time and effort to the defense at the expense of issues that are common and controlling for the class." *Beck*, 457 F.3d at 297. However, plaintiffs can satisfy the typicality requirement if their claims "arise from the same event or practice or course of conduct that gives rise to the claims of the class members, and are based on the same legal theory." *Brosious v. Child.'s Place Retail Stores*, 189 F.R.D. 138, 146 (D.N.J. 1999) (alterations and citations omitted).

***23** Here, Plaintiffs contend the class representatives' claims are typical of the claims of the putative class members of each of their twelve proposed classes because they arise from the same allegedly wrongful conduct of Defendants and are based on the same legal theory, *i.e.*, the Defendants' allegedly unlawful pricing scheme to artificially inflate the list prices of their analog insulin products "to compete for formulary access through rebates[,]" which Plaintiffs assert "was unfair and unconscionable and caused the [proposed] class[es] and representatives to overpay for insulin." (ECF No. 575 at 54–55.)

In opposition, Defendants contend Plaintiffs fail to establish the typicality requirement because "there is a fundamental difference in the 'individual factual circumstances' underlying putative class members' claims, depending on whether each individual is insured or uninsured" in that "formularies and rebates apply only to purchases by *insured* consumers[,]" but "[u]ninsured consumers' transactions do not involve rebates, formularies, or PBMs." (ECF No. 576 at 94–95.) For example, Defendants assert Plaintiffs' "liability theory plays out entirely differently for uninsured individuals" in that "[i]f a manufacturer increases both its list *and net* prices for insured transactions by 20% (such that the ratio remains unchanged), the uninsured would be unharmed according to Prof. Rosenthal—even if they paid *more* out of pocket[,]" but "[c]onversely, if the list price remains flat while the average rebate for *insured* consumers increases, then the *uninsured* would experience *no change* in out-of-pocket-costs—but would still be injured under Plaintiffs' theory." (*Id.* at 96 (citations omitted).) Defendants state therefore that the insured proposed class representatives are not typical of the uninsured proposed class members and "classes with no uninsured proposed representatives certainly cannot include uninsured members." (ECF No. 576 at 96. [28])

28 Defendants note Plaintiffs lack uninsured class representatives "in, at least, Illinois, Iowa, Maine, Massachusetts, New Jersey, and North Dakota" for Novo Nordisk and similarly lack uninsured class representatives "in, at least, Colorado, Connecticut, Delaware, Florida, Iowa, Massachusetts, New

> Jersey, North Carolina, and Texas" for Sanofi. (ECF No. 576 at 96 n.26.)

In reply, Plaintiffs submit the class representatives satisfy the typicality requirement for both insured and uninsured proposed class members because all of them can trace their injuries to the same unlawful practices—Defendants' alleged unlawful conduct. (ECF No. 577 at 60.) Plaintiffs further assert "[e]ach class representative here seeks to represent only class members who purchased insulin products in the same state from the same [D]efendant as that representative's purchases" and that "neither Dr. Rosenthal's methodology for determining damages nor the plaintiffs' theory of unfairness and unconscionability differs as to the analog insulin products at issue." (*Id.* at 61.)

Plaintiffs allege Defendants engaged in unfair and unconscionable conduct by raising the list prices of their analog insulin products in order to provide PBMs with larger "secret" rebates to gain formulary access at the expense of the putative class members who allegedly paid based on those inflated list prices. Defendants maintain the insured class representatives are not typical of the uninsured class members because there is a fundamental difference in the individual factual circumstances underlying the putative class members' claims depending on whether the individual is insured or uninsured. However, the difference in insurance status among class members does not defeat typicality because the legal theory and claims asserted by Plaintiffs—*i.e.*, Defendants' alleged artificial inflation of list prices for their analog insulin products was purportedly unfair and unconscionable, purportedly causing the proposed class members to overpay for these products—are the same among the putative class members, regardless of whether they are insured or uninsured. *See Newton*, 259 F.3d at 183–84 ("If the claims of the named plaintiffs and putative class members involve the same conduct by the defendant, typicality is established regardless of factual differences." (citations and footnote omitted)); *Marcus*, 687 F.3d at 598 ("If a plaintiff's claim arises from the same event, practice or course of conduct that gives rises to the claims of the class members, factual differences will not render that claim atypical if it is based on the same legal theory as the claims of the class."). Regardless of whether an individual class member is insured or uninsured, Plaintiffs' and the putative class members' claims arise from the same alleged conduct by Defendants. Therefore, the Court concludes factual differences between insured versus uninsured putative class members do not render Plaintiffs' claims atypical.

***24** Moreover, to the extent putative class members suffered harm by overpaying for Defendants' analog insulin products, whether they were insured or uninsured, they can trace their injuries to the same alleged unlawful practice engaged in by Defendants. *See Boley v. Universal Health Servs.*, 36 F.4th 124, 134 (3d Cir. 2022) (finding typicality satisfied where each class member could "trace his or her injury to the same [alleged unlawful] practice"); *Baby Neal*, 43 F.3d at 58 ("Where an action challenges a policy or practice, the named plaintiffs suffering one specific injury from the practice can represent a class suffering other injuries, so long as all the injuries are shown to result from the practice."). Indeed, Plaintiffs' alleged cause of injury for each putative class member for each of their proposed classes all stem from Defendants' purported conduct of artificially inflating the list prices for their analog insulin products. To the extent Defendants contend the alleged harm differs between insured and uninsured proposed class members, these differences do not preclude a finding of typicality. *See Boley*, 36 F.4th at 134 (finding factual "differences relate[d] to degree of injury and level of recovery" will generally not preclude a finding of typicality "[s]o long as the alleged cause of the injury remains the same" (citation omitted)); *In re Prudential*, 148 F.3d at 311 (" '[E]ven relatively pronounced factual differences will generally not preclude a finding of typicality where there is a strong similarity of legal theories' or where the claim arises from the same practice or course of conduct." (alteration in original) (citation omitted)).

Therefore, the Court finds Plaintiffs satisfy Rule 23(a)'s typicality requirement for their twelve proposed classes.

d. Adequate Representation

Plaintiffs also argue they satisfy Rule 23(a)'s adequate representation requirement. (ECF No. 575 at 2, 55–57, 87–88.) Adequate representation requires the representatives of a class to "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "Rule 23(a)'s adequacy of representation requirement 'serves to uncover conflicts of interest between named parties and the class they seek to represent.' " *In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 343 (3d Cir. 2010) (quoting *Amchem*, 521 U.S. at 625). The class representatives "must be part of the class and possess the same interest and suffer the same injury as the class members." *Id.* (quoting *Amchem*, 521 U.S. at 625–26). "A conflict must be 'fundamental' to violate Rule 23(a)(4)." *Dewey v. Volkswagen Aktiengesellschaft*,

681 F.3d 170, 184 (3d Cir. 2012) (citations omitted). "A conflict is fundamental where it touches 'the specific issues in controversy.' " *Id.* (citation omitted). "A conflict that is unduly speculative, however, is generally not fundamental." *Id.* "Adequate representation depends on two factors: (a) the plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation, and (b) the plaintiff must not have interests antagonistic to those of the class." *Laurens v. Volvo Car USA, LLC*, Civ. A. No. 18-08798, 2020 WL 10223641, at *10 (D.N.J. Dec. 8, 2020) (quoting *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 247 (3d Cir. 1975)). "[T]he linchpin of the adequacy requirement is the alignment of interests and incentives between the representative plaintiffs and the rest of the class." *Dewey*, 681 F.3d at183. Class representatives are "adequate" if their interests do not conflict with those of the putative class members. *See In re Prudential*, 148 F.3d at 312. "[T]he adequacy requirement assures that counsel possesses adequate experience, will vigorously prosecute the action, and will act at arm's length from the defendant." *In re Cmty. Bank of N. Va. Mortg. Lending Pracs. Litig.*, 795 F.3d 380, 389 (3d Cir. 2015) (citation omitted). "Adequacy functions as a 'catch-all requirement' that 'tend[s] to merge with the commonality and typicality criteria of Rule 23(a).' " *Laurens*, 2020 WL 10223641, at *10 (quoting *Newton*, 259 F.3d at 185).

Here, Plaintiffs contend they satisfy Rule 23(a)'s adequate representation requirement for their Proposed Nationwide Classes because the proposed class representatives "will fairly and adequately protect and represent the interests of the [proposed] classes[,]" and share coincident, not antagonistic, interests with the proposed class members. (ECF No. 575 at 56–57, 88.) Plaintiffs also assert proposed "[c]lass counsel are experienced in the prosecution of class action litigation and have extensive experience with class action litigation involving pharmaceutical products and drug pricing." (*Id.* at 56.)

***25** In opposition, Defendants argue Plaintiffs fail to satisfy the adequate representation requirement because no proposed class representative can adequately represent individuals who purchased a different analog insulin product(s) in a different state(s) than those the class representatives purchased, noting the Court has already ruled Plaintiffs lack standing to pursue state law claims for insulin products they did not purchase in a particular state. (ECF No. 576 at 96–97 (citing *In re Insulin Pricing Litig.*, Civ. A. No. 17-00699, 2019 WL 643709, at *17 (D.N.J. Feb. 15, 2019).) Defendants contend "Plaintiffs expressly assert that Defendants' conduct was *not* uniform across products, and became unlawful for different products on different dates depending on the specific relationship between each product's list and net prices, the named plaintiffs cannot be adequate representatives as to products that they did not purchase[,]" and therefore, "[a]ny certified class would thus need to exclude products that the relevant state's class representative did not purchase." (ECF No. 576 at 97–98 (citing App., Table 1, which lists the products not purchased by any class representative in each relevant state).)

In reply, Plaintiffs maintain Rule 23(a)'s adequacy requirement is satisfied because "[e]ach class representative here seeks to represent only class members who purchased insulin products in the same state from the same defendant as that representative's purchases." (ECF No. 577 at 61.) Indeed, Plaintiffs admit they are *not* seeking to represent class members who purchased insulin products from different Defendants or in different states than the representative. Plaintiffs further argue "neither Dr. Rosenthal's methodology for determining damages nor the plaintiffs' theory of unfairness and unconscionability differs as to the analog insulin products at issue[,]" and that "the class periods for the various drugs differ only because the methodology and legal theories of unfairness and unconscionability remain *consistent* across them." (*Id.*)

Although Defendants contend "the named [P]laintiffs cannot be adequate representatives as to products that they did not purchase" (ECF No. 576 at 97), Plaintiffs allege the same unlawful conduct across all analog insulin products purchased, and therefore, no fundamental conflict exists between members who purchased different analog insulin products. *See Georgine*, 83 F.3d at 630 (stating the adequacy of representation inquiry considers whether "the interests of the named plaintiffs [are] sufficiently aligned with those of the absentees"); *Hassine*, 846 F.2d at 179 ("The inquiry that a court should make regarding the adequacy of representation requisite of Rule 23(a)(4) is to determine that the putative named plaintiff has the ability and the incentive to represent the claims of the class vigorously[.]"). Because Defendants allegedly engaged in the same unlawful conduct with respect to all analog insulin products, the proposed class representatives' interests do not conflict with those of the putative class members for each of Plaintiffs' twelve proposed classes.

Therefore, the Court finds Plaintiffs satisfy Rule 23(a)'s adequate representation requirement for their twelve proposed classes.

iii. Rule 23(b) Inquiry

Because the Court concludes Plaintiffs satisfy the four threshold requirements of Rule 23(a), the Court now turns to analyzing whether Plaintiffs also satisfy the requirements for class certification under Rule 23(b)(2) and Rule 23(b)(3) for each of their twelve proposed classes. The Court addresses the requirements under each of these Rule 23(b) sections in turn. [29]

29 Because Plaintiffs only seek to certify classes under Rule 23(b)(2) and Rule 23(b)(3) and do not seek to certify any classes under Rule 23(b)(1) (*see* ECF Nos. 574, 575), the Court does not analyze the requirements under Rule 23(b)(1).

a. Rule 23(b)(2) Inquiry

Under Rule 23(b)(2), the Court must find "the party opposing the class has acted or refused to act on the grounds that generally apply 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). The Supreme Court has held the "key to the (b)(2) class is 'the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.' " *Dukes*, 564 U.S. at 360 (citation omitted). In other words, certifying a Rule 23(b)(2) class "applies only when a single injunction or declaratory judgment would provide relief to each member of the class." *Id.* Therefore, "[c]laims for individualized relief may not be certified under 23(b)(2), nor may claims for monetary relief that are 'not incidental to the injunctive or declaratory relief.' " *Lipstein v. UnitedHealth Grp.*, 296 F.R.D. 279, 291 (D.N.J. 2013) (quoting *Dukes*, 564 U.S. at 360). "Plaintiffs' sought injunction must be more specific than merely requiring that Defendants follow the law." *In re Processed Egg Prods. Antitrust Litig.*, 312 F.R.D. 124, 170 (E.D. Pa. 2015) (citations omitted).

***26** In addition, under Rule 23(b)(2), a plaintiff must show the class claims are cohesive among the putative class members. *See Gates v. Rohm & Haas Co.*, 655 F.3d 255, 263–64 (3d Cir. 2011). Cohesiveness is a primary requirement because, in a Rule 23(b)(2) action, "unnamed members are bound by the action without the opportunity to opt out." *Barnes*, 161 F.3d at 142–43. "For a court to find a class cohesive, it must find that the 'class's claims are common ones and that adjudication of the case will not devolve into consideration of myriad individual issues.' " *In re Processed Egg Prods.*, 312 F.R.D. at 169 (quoting Newberg on Class Actions § 4:34). " '[D]isparate factual circumstances of class members' may prevent a class from being cohesive and, therefore, make the class unable to be certified under Rule 23(b)(2)." *Gates*, 655 F.3d at 264 (quoting *Carter v. Butz*, 479 F.2d 1084, 1089 (3d Cir. 1973)). Accordingly, the Third Circuit "has held that district courts have the discretion to deny certification under [Rule 23](b)(2) when a given case presents 'disparate factual circumstances,' or a prevalence of individualized issues." *In re Ford Motor Co. E-350 Van Prods. Liab. Litig.*, Civ. A. No. 03-04558, 2012 WL 379944, at *38 (D.N.J. Feb. 6, 2012) (quoting *Barnes*, 161 F.3d at 143). "Indeed, a [Rule 23](b)(2) class may require more cohesiveness than a [Rule 23](b)(3) class." *Gates*, 655 F.3d at 264 (footnote omitted) (quoting *Barnes*, 161 F.3d at 142).

Here, Plaintiffs argue certifying their twelve proposed classes under Rule 23(b)(2) is appropriate because without certification, Defendants can continue to subject consumers to alleged unconscionable pricing. (ECF No. 575 at 77–79, 98.) However, Defendants contend Plaintiffs' cursory [30] request to certify injunctive classes under Rule 23(b)(2) fails because Plaintiffs do not specify the injunctive relief they seek, Plaintiffs' proposed classes are not sufficiently cohesive, and the majority of the proposed class members do not face future harm. (ECF No. 576 at 98–100.) Defendants further assert "*any* injunctive relief would require the Court to become the nation's insulin price regulator, tasked with determining what prices are 'fair'—apparently in perpetuity." (*Id.* at 98.) Defendants also state "Plaintiffs make no attempt to account for developments in Defendants' pricing practices in recent years." (*Id.* at 99 (emphasis omitted).) Defendants claim they "have broadened their affordability offerings to provide relief for patients struggling to afford insulin, with the vast majority of insulins now available for less than $50 and many consumers paying nothing[,]" and Defendants argue "[t]hese changes moot any request for injunctive relief." (*Id.* at 99–100 (emphasis and citations omitted).)

30 Defendants note Plaintiffs "spare only about two pages of their 100-page brief for this request, and never actually try to explain how they satisfy Rule

23(b)(2).” (ECF No. 576 at 98 (citing ECF No. 575 at 77–79, 98).)

In reply, Plaintiffs clarify: (1) they are seeking to enjoin Defendants “from continuing to report artificially inflated list prices that do not approximate their true net prices to [PBMs] CVS, Express Scripts, and OptumRx” (ECF No. 577 at 61 (citing ECF No. 411 ¶ 269)) and this would not “require the Court to become the nation's insulin price regulator” because “the Court isn't asked to specify the prices at which insulin must be sold, but instead is asked to require the [D]efendants to price their insulin within the boundaries of state consumer protection laws” (*id.* at 61–62 (citations omitted)); (2) their proposed classes are sufficiently cohesive because Defendants set the list prices which affect the prices all of them paid for Defendants’ analog insulin products (*id.* at 62–63); and (3) future harm exists because Defendants do not claim they stopped the allegedly unlawful conduct at issue and Defendants’ affordability programs “only apply to a sliver of the [proposed] class[es].” (*Id.* at 63.)

***27** In their sur-reply, Defendants argue Plaintiffs “belatedly try to flesh out” their Rule 23(b)(2) request in their reply after treating it in a cursory manner in their opening brief. (ECF No. 587-1 at 2; *see also id.* at 19–23.) Defendants contend Plaintiffs’ injunctive relief proposal violates Federal Rule of Civil Procedure 65(d)’s requirements [31] and “would compel Defendants to violate federal law governing the reporting of list prices.” (*Id.*) Defendants also assert Plaintiffs “confirm they can neither show the required cohesiveness among the millions of differently situated putative class members, nor account for the substantial changes in Defendants’ pricing practices and affordability offerings over time and in recent years.” (*Id.*) Specifically, Defendants: (1) reiterate that Plaintiffs have not specified the injunctive relief they seek (*id.* at 20); (2) Plaintiffs have not shown how their proposed injunctive relief would satisfy the requirements of Rule 65(d) and “[p]utting aside that the concept of ‘true net prices’ has no nexus to Plaintiffs’ ‘trend break’ method or any other aspect of Plaintiffs’ reformulated unfairness or unconscionability claim,” Plaintiffs’ “vague formulation does nothing to enable the Court to ‘at least conceive of an injunction that would satisfy [the] requirements’ of Federal Rule of Civil Procedure 65(d)” (*id.* (citations omitted)); and (3) Plaintiffs do not state how the Court “*could* enjoin Defendants from reporting ‘list prices that do not approximate their true net prices’ without violating federal law—twice over” (*id.*). Defendants state federal law prohibits pharmaceutical manufacturers from reporting list prices that approximate net prices, and therefore, Plaintiffs are asking the Court to issue an injunction that would require Defendants to violate federal law. (*Id.* at 20–21 (citing 42 U.S.C. § 1395w-3a(c)(6)(B)).) Further, Defendants submit Plaintiffs’ request for injunctive relief under Rule 23(b)(2) would also violate the Dormant Commerce Clause because “enforcing the boundaries of *some* consumer-protection laws would necessarily mean determining the WAC prices that Defendants can set for their insulins in *all* states (since Defendants necessarily set a single list price for each drug, consistent with federal law).” (*Id.* at 21 (citation omitted).)

31 Federal Rule of Civil Procedure 65(d) provides “[e]very order granting an injunction and every restraining order must: (A) state the reasons why it issued; (B) state its terms specifically; and (C) describe in reasonable detail--and not by referring to the complaint or other document--the act or acts restrained or required.” Fed. R. Civ. P. 65(d)(1).

Additionally, Defendants argue Plaintiffs’ contention that their proposed classes are sufficiently cohesive because Defendants’ list prices affect the prices all proposed class members paid “ignores the myriad factors that determine *how* point-of-sale prices are determined for any particular individual”—*e.g.*, “whether an individual had insurance (and the terms of any such coverage), the degree to which PBM rebates benefited the consumer, how the individual's pharmacy calculated the price he paid, whether the individual was eligible for one of Defendants’ affordability offerings, [etc.]” (*Id.* at 22.) Defendants contend these consumer-specific considerations prevent finding the cohesiveness needed for Rule 23(b)(2). (*Id.*) Defendants further note Plaintiffs do not dispute that Defendants’ analog insulin products are generally available for under $50 or free for many consumers, and despite Plaintiffs’ claim that this only applies to a “sliver” of their proposed classes, Defendants assert the analysis of their expert, Dr. Baker, shows this is not true. (*Id.* (citing Baker Rpt. ¶ 107 & Ex. 4).) For example, Defendants state that, in 2018, “coupon redemptions through Defendants’ financial-assistance initiatives accounted for more than one-third of the analog insulin claims for uninsured and commercially insured patients recorded in the data used by [Dr.] Rosenthal.” (*Id.* at 22–23 (citing Baker Rpt. ¶ 107).)

In response, Plaintiffs argue: (1) “courts routinely hold that plaintiffs need not satisfy [Rule 65’s] requirements at the class certification stage” and whether the Court can enter an injunction as they request “is a merits question”; (2) whether their requested relief would violate the Dormant Commerce Clause “is a merits issue” and, in any event, they

are not requesting the Court to regulate the prices of insulin; rather they are requesting the Court enjoin Defendants from "inflating list prices as a means of providing inflated rebates"; (3) their proposed Rule 23(b)(2) classes are sufficiently cohesive and Defendants do not respond to Plaintiffs' assertion that their list prices affect the prices all consumer paid; and (4) Defendants' financial assistance programs do not render their Rule 23(b)(2) classes moot. (ECF No. 590 at 21–24 (citations omitted).) Tellingly, Plaintiffs do not address Defendants' argument that their requested injunctive relief would require Defendants to violate federal law.

***28** Here, the Court finds none of Plaintiffs' proposed classes are sufficiently cohesive to be certified under Rule 23(b)(2) and are therefore not suitable for Rule 23(b)(2) relief. Plaintiffs' unconscionability and unfairness claims raise a host of individualized issues subject to various standards of review that could yield different results concerning the legality of Defendants' pricing practices related to their analog insulin products. *See Santiago*, 72 F.R.D. at 627 (finding Rule 23(b)(2) is not appropriate where "significant individual liability or defense issues ... would require separate hearings for each class member in order to establish defendants' liability"). This includes whether each putative class member shared in the rebate savings, the variations among state consumer protection laws, the variations among health plans, and the different insurers and affiliated PBMs of each class member. *See In re Domestic Drywall Antitrust Litig.*, Civ. A. No. 13-md-02437, 2017 WL 3700999, at *16 (E.D. Pa. Aug. 24, 2017) ("[T]he same issues that prevented certification [of damages classes], in particular the differences in factual circumstances between class members, also prevent a finding of cohesiveness. The factual circumstances among indirect purchasers vary widely.... It would be unfair to saddle some indirect purchasers who may have an easier time proving causation than others with a binding negative judgment, without the opportunity to 'opt out.' "). Many of these individualized issues create disparate factual circumstances among class members, and therefore fail to satisfy Rule 23(b)(2)'s cohesiveness requirement. *See, e.g.*, *In re Managerial, Pro. & Tech. Emps.*, Civ. A. No. 02-02924, 2006 WL 38937, at *6 (D.N.J. Jan. 5, 2006) (declining to certify class under Rule 23(b)(2) where the court found plaintiffs' proposed class was not cohesive and "raise[d] a number of individualized issues"). Additionally, the 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 federal law. (*See* ECF No. 577 at 61–63; ECF No. 587-1 at 20–21; ECF No. 590 at 21–24; 42 U.S.C. § 1395w-3a(c)(6)(B) ("The term 'wholesale acquisition cost' means, with respect to a drug or biological, the manufacturer's list price for the drug or biological to wholesalers or direct purchasers in the United States, *not including prompt pay or other discounts, rebates or reductions in price*, for the most recent month for which the information is available, as reported in wholesale price guides or other publications of drug or biological pricing data.").)

Therefore, Plaintiffs' motion to certify each of their twelve proposed classes under Rule 23(b)(2) is **DENIED**.

b. Rule 23(b)(3) Inquiry

Rule 23(b)(3) provides a class action may be maintained if "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). These requirements are known as "predominance" and "superiority," respectively. *In re Hydrogen Peroxide*, 552 F.3d at 310. "Predominance 'tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation,' a standard 'far more demanding' than the commonality requirement of Rule 23(a)[.]" *Id.* at 310–11 (quoting *Amchem*, 521 U.S. at 623–24). Superiority "asks the court 'to balance, in terms of fairness and efficiency, the merits of a class action against those of "alternative available methods" of adjudication.' " *In re Prudential*, 148 F.3d at 316 (quoting *Georgine*, 83 F.3d at 632).

"The predominance inquiry 'asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues.' " *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016) (citation omitted). "An individual question is one where 'members of a proposed class will need to present evidence that varies from member to member,' while a common question is one where 'the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof." *Tyson Foods*, 577 U.S. at 453 (alteration in original) (citation omitted). "When 'one or more of the central issues in the action are common to the class and can be said to predominate," a class can be certified under Rule 23(b)(3) "even though other important matters will have to be tried

separately, such as damages or some affirmative defenses peculiar to some individual class members." *Id.*

"To establish predominance, Plaintiffs must show that a group trial of [the] action will not devolve into a series of mini trials concerning causation or injury." *Neale v. Volvo Cars of N. Am., LLC*, Civ. A. No. 10-04407, 2021 WL 3013009, at *9 (D.N.J. July 15, 2021). If, on the other hand, "proof of the essential elements of the cause of action requires individual treatment," then predominance is defeated, and a class should not be certified. *See Newton*, 259 F.3d at 172. Therefore, the predominance inquiry depends upon the merits of a plaintiff's claims, because the "nature of the evidence that will suffice to resolve a question determines whether the question is common or individual." *In re Hydrogen Peroxide*, 552 F.3d at 311 (citations omitted).

***29** "[A] district court must formulate some prediction as to how specific issues will play out in order to determine whether common or individual issues predominate in a given case." *Id.* (citation omitted). For example, in *Lewis v. Ford Motor Company*, the court noted that to prove a violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law, "a plaintiff must [ ] show that as a result of the defendant's fraudulent or deceptive conduct, he or she suffered an 'ascertainable loss of money or property.' " 263 F.R.D. 252, 263 (W.D. Pa. 2009). The *Lewis* court ultimately denied plaintiffs' motion for class certification (for a count alleging a violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law) where the court found plaintiffs "failed to establish by a preponderance of the evidence commonality and predominance of common over individual issues" because "each class member would have to show not only justifiable reliance but also loss as a result of that reliance, aspects subject to individual, rather than common questions of law or fact" and "such lack of commonality" rendered the case "unsuitable for class treatment." *Id.* at 264, 268.

In determining whether common questions predominate, courts have focused on defendants' alleged liability. *See Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 456 (3d Cir. 1977); *Smith v. Suprema Specialties, Inc.*, Civ. A. No. 02-168, 2007 WL 1217980, at *9 (D.N.J. Apr. 23, 2007) (citations omitted) ("The focus of the predominance inquiry is on liability, not damages."). Practically, this means "a district court must look first to the elements of the plaintiffs' underlying claims and then, 'through the prism' of Rule 23, undertake a 'rigorous assessment of the available evidence and the method or methods by which [the] plaintiffs propose to use the evidence to prove' those elements." *Reinig v. RBS Citizens, N.A.*, 912 F.3d 115, 128 (3d Cir. 2018) (quoting *Marcus*, 687 F.3d at 600). "[T]he predominance requirement is met only if the district court is convinced that 'the essential elements of the claims brought by a putative class are 'capable of proof at trial through evidence that is common to the class rather than individual to its members.' " *Id.* at 127–28 (quoting *Gonzalez v. Corning*, 885 F.3d 186, 195 (3d Cir. 2018)).

Here, Plaintiffs seek to certify twelve classes under Rule 23(b)(3), excluding the classes involving Eli Lilly—the two Proposed Nationwide Classes, the two Proposed Multi-State Classes, the two Proposed New Jersey Classes, the two Proposed Texas Classes, the two Proposed Kansas Classes, and the two Proposed Utah Classes. (*See* ECF No. 574; ECF No. 575 at 68–77, 88–98.) Plaintiffs assert if the Court certifies all twelve proposed classes, a jury need only consider three legal standards: (1) "unconscionability" under New Jersey law; (2) a three-part FTC test for "unfair" acts that Plaintiffs contend applies to the laws of sixteen states; and (3) "unconscionability" under Texas law. (ECF No. 575 at 6.) Plaintiffs state the claims for the two Proposed Kansas Classes and the two Proposed Utah Classes are explicitly reserved for the Court to decide so those classes would not need to be presented to a jury. (*Id.* at 80.)

Plaintiffs argue each of their twelve proposed classes should be certified under Rule 23(b)(3) because "[c]ommon questions of law and fact predominate" and "a class action is superior to other available methods." (ECF No. 575 at 41–50, 69–77, 88–98.) Plaintiffs also contend that "[c]ommon evidence will establish that [Defendants] engaged in unconscionable conduct as to all class members under the NJCFA[,]" and "[c]lass-wide evidence will demonstrate impact and injury for all nationwide class members." (*Id.* at 69–76.) Plaintiffs assert they will be able to prove impact and calculate aggregate damages through common evidence showing Plaintiffs and the proposed class members overpaid for analog insulin products due to Defendants' alleged unfair and unconscionable conduct. (*Id.* at 73–76.) Specifically, Plaintiffs state they will litigate every nationwide class member's claim using the same documents, data, and witnesses and, using Defendants' documents, will prove that Defendants understood that the coinsurance, deductible, and cash payments for their analog insulin products were tied to list price. (*Id.* at 71.) To do this, Plaintiffs submit they will rely on Dr. Rosenthal's analysis comparing Defendants' list prices to certain pharmaceutical industry data on retail

pharmacy prices of Defendants' analog insulins and applying "the Pearson correlation coefficient—a statistical test—to measure the linear correlation between the two prices[,]" which Plaintiffs claim shows that the prices the proposed class members paid "are *nearly perfectly correlated*" to Defendants' list prices. (*Id.* at 72 (citations omitted).) Plaintiffs state they will also rely on data produced by non-party insurer [Redacted] which Dr. Rosenthal analyzed and determined that "[Redacted]" (*Id.* at 72–73 (citing Rosenthal Rpt. ¶ 96, Figs. 32–36).)

***30** Regarding superiority, Plaintiffs argue a class action is superior because (1) the proposed class members cannot afford to prosecute separate actions, and without class certification, litigating this case would be cost-prohibitive; (2) this is the only case challenging Defendants' alleged conduct; and (3) they will litigate the proposed class members' claims with common evidence. (*Id.* at 76–77 (citations omitted).)

Moreover, Plaintiffs submit the claims of their Proposed Nationwide Classes "do not require proof of deception, turning on individual circumstances[,]" but rather "the unlawful conduct at issue is two centralized pricing schemes (one for Novo and one for Sanofi) that harmed all class members in the exact same way—by increasing their payments for analog insulin (only the amount of damages vary)" and that "[p]roof of liability will focus entirely on the [D]efendants' actions." (ECF No. 575 at 70–71 (citations omitted). [32]) Plaintiffs also assert they will establish damages through common evidence, stating Dr. Rosenthal "will use Xponent data and [D]efendants' data to calculate what the price of the at-issue insulins would have been absent the [D]efendants' unfair conduct" and will use this to "calculate aggregate damages." (*Id.* at 53 (footnotes omitted).) Plaintiffs also claim common issues predominate for their proposed multi-state classes. (*Id.* at 90–93.) Plaintiffs state they "will prove, with common damages evidence, that each member of [their proposed] multi-state classes suffered 'substantial injury[,]' " "that those substantial injuries were not reasonably avoidable[,]" and that the "injuries are not outweighed by any benefit to consumers or competition." (*Id.* at 91–93.) Plaintiffs likewise argue common issues predominate for their proposed single-state classes and that "individualized evidence will not be required to establish liability and aggregate damages." (*Id.* at 94–95.)

32 *See also* ECF No. 575 at 71 ("For example, whether Novo [Nordisk] and Sanofi knew that the class members paid based on list price will not turn on Novo [Nordisk's] and Sanofi's knowledge as to a particular individual purchaser; instead, the plaintiffs will prove—through the [D]efendants' documents—that Novo [Nordisk] and Sanofi understood that coinsurance, deductible, and cash payments for analog insulin are tied to list price. Every nationwide class member's claim will be litigated with the exact same documents, witnesses, and data.").

In opposition, Defendants argue Plaintiffs do not satisfy Rule 23(b)(3)'s requirements because Plaintiffs fail to show predominance of common questions, and even if Plaintiffs could show this action involves a single common question, "individualized issues overwhelm any conceivable common ones." (ECF No. 576 at 27–29; *see also id.* at 29–73.) Defendants further contend: (1) the unconscionability and unfairness standards of the states in Plaintiffs' proposed classes "require highly fact-intensive inquiries that routinely result in courts denying class certification for lack of predominance"; (2) Plaintiffs' Proposed Nationwide Classes fail under Rule 23(b)(3) because "the NJCFA cannot apply to all consumers who bought [Defendants'] products nationwide"; (3) Plaintiffs' Proposed Multi-State Classes likewise fail under Rule 23(b)(3) because of "the many material differences among the sixteen states' consumer-protection laws"; (4) "Plaintiffs' abandonment of their fraud theory means they can no longer establish 'ascertainable loss' as required by New Jersey's and other states' laws"; and (5) "Plaintiffs' novel, untested damages model fails the predominance requirement under *Comcast* because it does not reliably measure any unlawful conduct or classwide injury." (*Id.* at 27–29.)

***31** Defendants assert proof of the essential elements of Plaintiffs' cause of action requires individual treatment, regardless of whether their claim is for "unconscionability" under the laws of New Jersey, Texas, Kansas, and Utah or for "unfairness" under sixteen other states' consumer protection statutes. (*Id.* at 29 (citing cases).) Defendants submit the relevant question in this action "is not whether any consumer must *take* analog insulin, but what the consumer *paid* for analog insulin and why[,]" and that "[a]ssessing the factors that impact consumers' costs entails individualized inquiries across millions of consumers, in different states, who used different products at different times." (*Id.* at 30 (citing *In re Domestic Drywall*, 2017 WL 3700999, at *15).) For example, Defendants state some of the individualized inquiries include: (1) whether each proposed class member's alleged injury was "reasonably avoidable"; (2) whether each

proposed class member could limit their out-of-pocket costs using Defendants' affordability offerings and/or other forms of financial assistance; (3) whether proposed class members could have chosen a different insurance plan (*e.g.*, one with a co-pay rather than coinsurance), which "requires different assessments at different times"; (4) whether rebates were passed to proposed class members at the point of sale; (5) whether proposed class members suffered sufficient injury under the applicable state laws; and (6) whether proposed class members can prove that Defendants' conduct and not the conduct of insurers, PBMs, pharmacies, or other non-parties caused their alleged injuries. (ECF No. 576 at 27–37.)

The Court addresses each of Plaintiffs' proposed classes under Rule 23(b)(3) in turn.

1. Proposed Nationwide Classes and Proposed Novo Nordisk and Sanofi New Jersey Classes

Plaintiffs argue the Proposed Nationwide Classes, the Proposed Novo Nordisk New Jersey Class, and the Proposed Sanofi New Jersey Class should all be certified under Rule 23(b)(3) for claims brought under the NJCFA because Defendants' conduct in allegedly artificially inflating the list prices for their analog insulin products was "unconscionable" as that term is used in the NJCFA, common issues predominate, and a class action is superior to other methods. (ECF No. 575 at 41–50.)

Plaintiffs state New Jersey adopted the Restatement (Second) Conflict of Laws' "most-significant-relationship test in sections 146, 145, and 6 for deciding the choice of substantive law in tort cases involving more than one state." (ECF No. 575 at 43 (quoting *McCarrell v. Hoffmann-La Roche, Inc.*, 153 A.3d 207, 219 (N.J. 2017)).) Plaintiffs assert New Jersey applies the "most significant relationship" test to determine which state's substantive law applies, and even assuming a conflict exists between the consumer fraud laws of New Jersey and other states, the NJCFA should govern nationwide as to Plaintiffs' "unconscionable" acts claim because three of the four factors relevant to the choice-of-law analysis favor applying New Jersey law. (ECF No. 575 at 42–50; *see also id.* at 44 (" 'Viewed through the [Second Restatement's] section 6 prism, the state with the strongest section 145 contacts will have the most significant relationship to the parties or issues, and thus its law will be applied.' Section 145(2) states that contacts to be considered include: (a) the place where the injury occurred; (b) the place where the conduct causing the injury occurred; (c) the domicil, residence, nationality, place of incorporation and place of business of the parties; and (d) the place where the relationship, if any, between the parties is centered.").) Plaintiffs claim New Jersey's substantive *law—i.e.*, the NJCFA—should apply nationwide because under the analysis of the applicable factors in the § 145 choice-of-law analysis, New Jersey is (1) the place where the conduct allegedly causing injury occurred; (2) Defendants Novo Nordisk and Sanofi are companies who have their headquarters in New Jersey; and (3) " 'the place where the relationship, if any, between the parties is centered' is New Jersey" because Defendants' "allegedly unconscionable conduct occurred solely within New Jersey"; only the proposed class members' monetary losses occurred in other states. (*Id.* at 44–48 [33]; *see also* ECF No. 713 at 46 (Plaintiffs' counsel stating "Section 145 [of the] Restatement (Second) [of Conflict of Laws] applies to general tort claims, our unconscionability claim here, guided by the principles of Section 6.").)

33 Plaintiffs claim the Restatement (Second) Conflict of Laws § 146 "does not apply, because this is not 'an action for a personal injury' " (ECF No. 575 at 44 (quoting Restatement (Second) of Conflict of Laws § 146 (1971))), nor does Restatement (Second) Conflict of Laws § 148 apply, "because Plaintiffs do not claim that they and the Class members 'suffered pecuniary harm on account of [their] reliance on the defendant[s'] false representations' " (*id.* (alterations in original) (quoting Restatement (Second) of Conflict of Laws § 148 (1971))).

***32** In opposition, Defendants assert Plaintiffs' Proposed Nationwide Classes and Proposed Novo Nordisk and Sanofi New Jersey Classes fail under Rule 23(b)(3) because (1) individualized questions predominate over any common questions; (2) "the NJCFA cannot apply to all consumers who bought [Defendants'] products nationwide"; and (3) "Plaintiffs' abandonment of their fraud theory [34] means they can no longer establish 'ascertainable loss' as required by New Jersey's and other states' laws." (ECF No. 576 at 27–29, 59–62.) Defendants argue "New Jersey courts stress that unconscionability is 'fact-specific and applied on a case-by-case basis' " and courts have rejected attempts to challenge broad pricing practices under the NJCFA's unconscionability provision. (*Id.* at 38–39 (quoting *Judge v. Blackfin Yacht Corp.*, 815 A.2d 537, 541 (N.J. Super. Ct. App. Div. 2003)).) Defendants further contend the NJCFA cannot

apply nationwide to Plaintiffs' proposed classes under the applicable conflict-of-laws analysis, and Plaintiffs' Proposed Nationwide Classes cannot be certified because this would require applying the differing consumer protection laws of every state. (*Id.* at 41–42.) Instead, Defendants submit the applicable factors for the conflict-of-laws analysis favor applying the home state laws of each plaintiff and proposed class members over applying the NJCFA nationwide. (*Id.* at 42–46.) Defendants appear to agree that the Restatement (Second) of Conflict of Laws § 145 applies but argue the Court must also analyze the principles in § 6,[35] which Plaintiffs do not address. (*Id.* at 41–42.)

34 *Compare* ECF No. 411 ¶¶ 567–68, 570 ("Novo Nordisk and Sanofi engaged in deceptive business practices prohibited by the NJCFA, including artificially inflating the publicly reported list prices of their analog insulins; misrepresenting, affirmatively and/or through omission, that their list prices were reasonable approximations of the true prices of these medicines; concealing and/or misrepresenting the net prices of their analog insulins; concealing and/or misrepresenting the existence and amount of the list-to-net price spreads for their analog insulins; and engaging in other unconscionable, false, misleading or deceptive acts or practices in the conduct of trade or commerce. In violation of the NJCFA, these acts and omissions constitute 'unconscionable commercial practice[s], deception, fraud, false pretense, false promise, misrepresentation, or the knowing concealment, suppression or omission of any material fact with the intent that others rely upon such concealment, suppression or omission in connection with the sale' and pricing of their analog insulins.... By failing to disclose the net prices they offered to PBMs and by actively concealing this pricing deceit, Novo Nordisk, and Sanofi engaged in unfair and deceptive business practices in violation of the NJCFA. In the course of Novo Nordisk's and Sanofi's business, they willfully failed to disclose and actively concealed their misrepresentations regarding list prices." (citing N.J. Stat. Ann. § 56:8-2)), *with* ECF No. 575 at 44 n.174 ("Plaintiffs do not claim that they and the Class members 'suffered pecuniary harm on account of [their] reliance on the defendant[s'] false representations.' " (alterations in original) (citations omitted)); *see also* ECF No. 577 at 37–38 ("[T]he plaintiffs' 'ascertainable loss' theory here is based on the defendants' unfair and unconscionable conduct, not fraud on the market caused by misrepresentations.... [T]he plaintiffs do not contend that the defendants defrauded the market but instead that the defendants set unfairly inflated list prices, knowing that certain consumers—the class here—would pay those inflated prices."); ECF No. 713 at 50 (Plaintiffs' counsel asserting at oral argument: "Fraud on the market.... We have nothing remotely of the sort here. We haven't argued an efficient market. We haven't argued fraud on the market. Our damage theory, our ascertainable loss is derived from what they did here to set the list price which directly impacted each and every one of our plaintiffs."); ECF No. 576 at 72 ("[Dr. Rosenthal] concedes that she has not attempted to 'measure injury caused by alleged misrepresentations.' Nor has she estimated damages by measuring the value of any insulin 'promised' and 'received'; any consumer 'expectations about insulin pricing'; or the 'true' 'pro-rata share of the net prices of' insulin in the absence of any supposed misrepresentation." (quoting Rosenthal Dep. 273:17-274:25, and then quoting *In re Insulin Pricing*, 2019 WL 643709, at *15–16)); ECF No. 577 at 43–44 (Plaintiffs not disputing Defendants' argument that Dr. Rosenthal did not measure injury caused by alleged misrepresentations but rather contending this argument is irrelevant because "[Dr. Rosenthal's] analysis validly rests on unfair and unconscionable conduct" as in *D'Agostino v. Maldonado*, 216 N.J. 168 (2013)); ECF No. 713 at 43 (Defendants' counsel stating Plaintiffs "abandoned their fraud theory and it's doomed the class certification decision because ... they're not alleging any misrepresentation and they're not alleging a loss as a result of an alleged misrepresentation." (to which Plaintiffs did not dispute or even address)); *but see* ECF No. 590 at 17 ("But the plaintiffs raise fraudulent concealment in response to the defendants' limitations defense, not as a theory of liability.... The plaintiffs do not seek class certification for misrepresentations. But that does not constitute waiver of responding to a statute of limitations defense.").

35 This Court has stated the Restatement (Second) of Conflict of Laws § 6 principles are: "(1) the

> interests of interstate comity; (2) the interests of the parties; (3) the interests underlying the field of tort law; (4) the interests of judicial administration; and (5) the competing interests of the states." *Bond v. Johnson & Johnson*, Civ. A. No. 21-05333, 2021 WL 6050178, at *4 (D.N.J. Dec. 21, 2021).

***33** In reply, Plaintiffs reiterate the applicable factors under the choice-of-law analysis favor applying the NJCFA nationwide here, reasoning "[a]pplication of a single law provides the best (and most efficient) opportunity for consumers to recover nationwide" and would "further[ ] New Jersey's goal of deterring corporate misconduct in its state." (ECF No. 577 at 14–19 (citations omitted).) Plaintiffs also contend the main cases Defendants rely on with respect to the conflict-of-laws analysis predate *In re Accutane Litigation*, 194 A.3d 503 (N.J. 2018), "where the New Jersey Supreme Court held that the judicial interests of certainty, predictability and ease in applying the law are paramount in a complex case such as this." (ECF No. 577 at 16; ECF No. 713 at 31; *id.* at 29–30 (Plaintiffs' counsel asserting "*Accutane* is the guiding case by the Supreme Court in New Jersey on choice of law" and "in *Accutane*, the New Jersey Supreme Court applied New Jersey law even though every one of those plaintiffs bought the drug somewhere else, a pharmacy [ ] prescribed the drug somewhere else, and allegedly sustained an injury somewhere else").)

Plaintiffs also argue they and the putative class members suffered an ascertainable loss under the NJCFA based on a benefit-of-the-bargain theory. (ECF No. 577 at 36, 42–44.) Plaintiffs do not appear to contest Defendants' claim that they abandoned their fraud theory—indeed, Plaintiffs state they are not asserting misrepresentation or a fraud-on-the-market theory (*see supra* n.34)—but Plaintiffs contend their benefit-of-the-bargain theory does not require that they suffer an ascertainable loss as a result of deception, and instead it is sufficient if they have suffered an ascertainable loss as a result of an "unconscionable" act, which they state they have. (ECF No. 577 at 36, 42–44; ECF No. 590 at 21 ("fraud is not required to demonstrate ascertainable losses").) Specifically, Plaintiffs allege Defendants set artificially inflated list prices for their analog insulin products knowing the proposed class members would pay based on those inflated prices, and therefore Plaintiffs assert "they were '*unfairly* deprived of the benefit of the bargain' as they paid more than their pro-rata share of the net prices of the subject insulin." (ECF No. 577 at 37–38, 42 (citations omitted).) In support of their argument on this point, Plaintiffs cite to *Pollard v. AEG Live, LLC*, where the court found the plaintiffs sufficiently alleged an ascertainable loss under the NJCFA where the plaintiff alleged she overpaid for concert tickets because the defendant "wrongfully manipulated the market for tickets to the concerts by withholding an amount of tickets in excess of the amount permitted by [N.J. Stat. Ann. § 56:8-35:1 (since repealed)] and thus drove up the ticket price by reducing the supply available to the general public." (ECF No. 577 at 37–38; ECF No. 590 at 20–21; *Pollard v. AEG Live, LLC*, Civ. A. No. 14-1155, 2014 WL 4637017, at *6 (D.N.J. Sept. 16, 2014).)

In their sur-reply, Defendants reiterate that, as this Court previously stated, a "benefit-of-the-bargain theory requires that the consumer be misled into buying a product that is ultimately worth less than the product that was promised[.]" (ECF No. 587-1 at 18–19 (citing *In re Insulin Pricing*, 2019 WL 643709, at *15–16).) Defendants state Plaintiffs "cannot cite a *single* case—from any of the twenty states for which they seek certification—where a court certified a class based on a theory of alleged unfair or unconscionable pricing or price-setting conduct." (*Id.* at 1.) Defendants also assert *Pollard* is distinguishable because the plaintiff's claims in that case "were not for 'unconscionable commercial practices'; [rather,] they concerned a separate statutory provision on ticket sales[,]" which statutory provision is not at issue here. (*Id.* at 19 (citing *Pollard*, 2014 WL 4637017, at *6).)

Regarding the choice-of-law inquiry, "[a] federal court sitting in diversity applies the choice-of-law rules of the forum state—here, New Jersey—to determine the controlling law." *Maniscalco v. Brother Int'l (USA) Corp.*, 709 F.3d 202, 206 (3d Cir. 2013) (citations omitted). "New Jersey has adopted the 'most significant relationship' test set forth in the Restatement (Second) of Conflict of Laws[,]" which is a two-part test. *Id.* First, a court must determine whether "an actual conflict exists between the laws of the potential forums." *Id.* The New Jersey Supreme Court specified this step is "done by examining the substance of the potentially applicable laws to determine whether 'there is distinction' between them." *P.V. ex rel. T.V. v. Camp Jaycee*, 962 A.2d 453, 460 (N.J. 2008) (citation omitted). If no conflict exists, "there is no choice-of-law issue to be resolved." *Id.* However, if a conflict exists, the court then proceeds to the second part of the test and "determine[s] which jurisdiction has the 'most significant relationship' to the claim." *Maniscalco*, 709 F.3d at 207 (quoting *Camp Jaycee*, 962 A.2d at 460). In other words, "the Court determines 'which state has the most meaningful connections with and interests in the transaction and the parties.' " *Spence-Parker v. Del. River & Bay Auth.*,

616 F. Supp. 2d 509, 523 (D.N.J. 2009) (quoting *NL Indus., Inc. v. Comm. Ins. Co.*, 65 F.3d 314, 319 (3d Cir. 1995)); *see also In re Accutane Litig.*, 194 A.3d at 519 ("In *Camp Jaycee*, we adopted the *Restatement's* most-significant-relationship test set forth in sections 146, 145, and 6 as the paradigm for deciding 'which state's substantive law applies in personal injury cases involving more than one state." (citing *Camp Jaycee*, 962 A.2d at 459–65)); Restatement (Second) Conflict of Laws §§ 6, 145, 146 (2023).

***34** Here, the Court does not reach the more detailed conflict-of-laws analysis because even assuming there is no conflict or that the factors in that analysis favor applying the NJCFA nationwide, the Court finds Plaintiffs do not satisfy Rule 23(b)(3)'s predominance requirement for either their Proposed Nationwide Classes or Proposed Novo Nordisk and Sanofi New Jersey Classes, as further explained below. [36]

36 However, the Court notes it is not aware of any federal court in this Circuit who has certified a nationwide class applying the NJCFA nationwide under the "most significant relationship" test.

The NJCFA prohibits unlawful practices, which it defines as:

> The act, use or employment by any person of any commercial practice that is unconscionable or abusive, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby[.]

N.J. Stat. Ann. § 56:8-2. The NJCFA defines "person" as including "any natural person or his legal representative, partnership, corporation, company, trust, business entity or association, and any agent, employee, salesman, partner, officer, director, member, stockholder, associate, trustee or cestuis que trustent thereof[.]" N.J. Stat. Ann. § 56:8-1(d).

A plaintiff asserting an NJCFA claim must show proof of the following: "(1) unlawful conduct; (2) an ascertainable loss; and (3) a causal relationship between the defendants' unlawful conduct and the plaintiff's ascertainable loss." *Neale v. Volvo Cars of N. Am., LLC*, Civ. A. No. 10-4407, 2021 WL 3013009, at *9 (D.N.J. July 15, 2021) (quoting *Int'l Union*, 929 A.2d at 1086). Therefore, "[t]o state a claim under the NJCFA, a plaintiff must allege that the defendant engaged in an unlawful practice that caused an ascertainable loss to the plaintiff." *Frederico v. Home Depot*, 507 F.3d 188, 202 (3d Cir. 2007) (citing *Cox v. Sears Roebuck & Co.*, 647 A.2d 454, 462–65 (N.J. 1994)).

Regarding the first prong (proving unlawful conduct), the NJCFA proscribes three general categories of unlawful practices: "(1) affirmative acts, (2) knowing omissions, and (3) regulation violations." *Bianchi v. Lazy Days R.V. Ctr., Inc.*, Civ. A. No. 06-1979, 2007 WL 1959268, at *4 (D.N.J. July 5, 2007) (citations omitted). Unconscionable commercial practices are categorized as "affirmative acts" under the NJCFA, and therefore "do not require a showing of 'intent to deceive' or 'knowledge of the falsity of the representation.' " *Katz v. Live Nation, Inc.*, Civ. A. No. 09-3740, 2010 WL 2539686, at *5 (D.N.J. June 17, 2010) (quoting *Busse v. Homebank LLC*, Civ. A. No. 07–3495, 2009 WL 424278, at *9 (D.N.J. Feb.18, 2009)); *Cottrell v. Alcon Labs.*, 874 F.3d 154, 166 (3d Cir. 2017) (finding the NJCFA "prohibit[s] business practices that are unfair and unconscionable"). The NJCFA "does not define 'unconscionable commercial practice.' " *Ciser v. Nestle Waters N. Am., Inc.*, 596 F. App'x 157, 160 (3d Cir. 2015). Also, "[t]here is no precise formulation for an 'unconscionable' act [under the NJCFA] that satisfies the statutory standard for an unlawful practice." *D'Agostino v. Maldonado*, 78 A.3d 527, 537 (N.J. 2013). Rather, "[t]he New Jersey Supreme Court has instructed courts to 'pour content' into the term on a case-by-case basis." *Ciser*, 596 F. App'x at 160–61 (quoting *Kugler v. Romain*, 279 A.2d 640, 651 (N.J. 1971)). "The word 'unconscionable' must be interpreted liberally so as to effectuate the public purpose of the [NJ]CFA." *Assocs. Home Equity Servs., Inc. v. Troup*, 778 A.2d 529, 543 (N.J. Super. Ct. App. Div. 2001) (citing *Kugler*, 279 A.2d at 651). However, "[t]hough an unconscionable commercial practice 'is an amorphous concept obviously designed to establish a broad business ethic,' the term is not without limits" and "[t]he standard of conduct that the term 'unconscionable' implies is lack of

'good faith, honesty in fact and observance of fair dealing.' " *Id.* at 161 (quoting *Cox v. Sears Roebuck & Co.*, 647 A.2d 454, 462 (N.J. 1994)). "Most importantly, the New Jersey Supreme Court has instructed that '[t]he capacity to mislead is the prime ingredient of all types of consumer fraud.' " *Id.* (quoting *Fenwick v. Kay Am. Jeep, Inc.*, 371 A.2d 13 (N.J. 1977)). Whether conduct is unfair for purposes of the NJCFA is a question for the jury. *Slack v. Suburban Propane Partners, L.P.*, Civ. A. No. 10-02548, 2010 WL 3810870, at *5 (D.N.J. Sept. 21, 2010) (alteration in original) (citing *Hassler v. Sovereign Bank*, 374 F. App'x 341, 344 (3d Cir. 2010)).

***35** Regarding the second prong (proving an ascertainable loss), an "ascertainable loss" can be "either [an] out-of-pocket loss or a demonstration of loss in value ... that is quantifiable or measurable." *Thiedemann v. Mercedes-Benz USA, LLC*, 872 A.2d 783, 792–93 (N.J. 2005); *see also Hemy v. Perdue Farms, Inc.*, Civ. A. No. 11-00888, 2011 WL 6002463, at *18 (D.N.J. Nov. 30, 2011) ("To plead ascertainable loss under the NJCFA, a plaintiff must allege loss that is 'quantifiable or otherwise measurable.' " (quoting *Thiedemann*, 872 A.2d at 792)). "Put differently, a plaintiff is not required to show monetary loss, but only that he purchased something and received 'less than what was promised.' " *Marcus*, 687 F.3d at 606 (quoting *Union Ink Co., Inc. v. AT&T Corp.*, 801 A.2d 361, 379 (N.J. Super. Ct. App. Div. 2002)). "[W]hat New Jersey Courts require for [a] loss to be 'ascertainable' is for the consumer to quantify the difference in value between the promised product and the actual product received." *Smajlaj v. Campbell Soup Co.*, 782 F. Supp. 2d 84, 99 (D.N.J. 2011). Therefore, "[a] plaintiff arguing that he suffered an ascertainable loss must provide 'evidence from which a factfinder could find or infer that the plaintiff suffered an actual loss' " and "[s]uch a loss must be 'quantifiable or measurable' under New Jersey law." *DiCuio v. Brother Int'l Corp.*, 653 F. App'x 109, 112 (3d Cir. 2016) (quoting *Thiedemann*, 872 A.2d at 792–93). "When an unconscionable commercial practice has caused the plaintiff to lose money or other property, that loss can satisfy [ ] the 'ascertainable loss' element of the [NJCFA] claim[.]" *D'Agostino*, 78 A.3d at 542.

"[T]o have standing under the [NJCFA] a private party must plead a claim of ascertainable loss that is capable of surviving a motion for summary judgment." *Dabush v. Mercedes-Benz USA, LLC*, 874 A.2d 1110, 1116 (N.J. Super. Ct. App. Div. 2005) (quoting *Weinberg v. Sprint Corp.*, 801 A.2d 281, 283 (N.J. 2002)). "In that connection, [p]laintiffs' allegations must provide 'enough specificity as to give the defendant notice of possible damages.' " *Hemy*, 2011 WL 6002463, at *18 (citation omitted). For example, "when a merchant violates the [NJCFA] by delivering defective goods and then refusing to provide conforming goods, a customer's ascertainable loss is the replacement value of those goods." *Furst v. Einstein Moomjy, Inc.*, 860 A.2d 435, 440 (2004). *Cf. Int'l Union*, 929 A.2d at 1088 (concluding "to the extent that plaintiff seeks to prove only that the price charged for [defendant's product] was higher than it should have been as a result of defendant's fraudulent marketing campaign, and seeks thereby to be relieved of the usual requirements that plaintiff prove an ascertainable loss, the theory must fail"); *see also Dugan v. TGI Fridays, Inc.*, 171 A.3d 620, 641–42 (N.J. 2017) ("[The plaintiffs'] proposed price-inflation theory does not establish ascertainable loss and causation in this [NJ]CFA class action case. Individual plaintiffs may be able to establish ascertainable loss and causation by showing that they would not have purchased the [products] or would have spent less money on them had they been informed of their cost. The [ ] plaintiffs cannot establish ascertainable loss and causation, however, by demonstrating that [the products'] prices were higher than they would have been had [defendants] listed [their] prices .... A 'fair' or 'reasonable' price ... is no substitute for proof of the actual claimants' ascertainable loss and causation. Plaintiffs' price-inflation theory does not globally establish those elements of the [NJ]CFA for the vast and varied class of [individuals] for which the [ ] plaintiffs seek certification.").

"The New Jersey Supreme Court has repeatedly and explicitly endorsed a benefit-of-the-bargain theory under the [NJCFA] that requires nothing more than that the consumer was *misled* into buying a product that was ultimately worth less to the consumer than the product he was promised." *Smajlaj v. Campbell Soup Co.*, 782 F. Supp. 2d 84, 99 (D.N.J. 2011) (emphasis added) (citations omitted). A plaintiff alleging a benefit-of-the-bargain theory under the NJCFA "states a claim if he or she alleges (1) a reasonable belief about the product *induced by a misrepresentation*; and (2) that the difference in value between the product promised and the one received can be reasonably quantified." *See id.* (emphasis added); *see also Arcand v. Brother Int'l Corp.*, 673 F. Supp. 2d 282, 300 (D.N.J. 2009) ("When pleading a benefit-of-the-bargain loss, the plaintiff must allege 'the difference between the [product] she received and the [product] as represented at purchase.' " (alterations in original) (quoting *Romano v. Galaxy Toyota*, 945 A.2d 49, 57 (N.J. Super. Ct. App. Div. 2008)). Simply "[a]lleging a 'failure to receive the benefit of the bargain' does not satisfy the 'ascertainable loss'

requirement[.]" *Parker v. Howmedica Osteonics Corp.*, Civ. A. No. 07-02400, 2008 WL 141628, at *3 (D.N.J. Jan. 14, 2008) (alteration and citation omitted)). Rather, a "plaintiff must suffer a definite, certain and measurable loss, rather than one that is merely theoretical." *Bosland v. Warnock Dodge, Inc.*, 964 A.2d 741, 749 (N.J. 2009).

***36** Regarding the third and final prong (proving a causal relationship between the defendants' unlawful conduct and the plaintiffs' ascertainable loss), the NJCFA requires that, "in order to recover *any* damages, a plaintiff must show that she has suffered an ascertainable loss *as a result of* the defendant's unlawful commercial practice." *Cannon v. Cherry Hill Toyota, Inc.*, 161 F. Supp. 2d 362, 373 (D.N.J. 2001) (citing N.J. Stat. Ann. § 56:8-19). In other words, the NJCFA "requires a consumer to prove that [his or her] loss is attributable to the conduct that the [NJ]CFA seeks to punish by including a limitation expressed as a causal link." *Bosland*, 964 A.2d at 748; *see also Meshinsky v. Nichols Yacht Sales, Inc.*, 541 A.2d 1063, 1067 (N.J. 1988) ("[A] plaintiff must establish 'the extent of any ascertainable loss, particularly proximate to a misrepresentation or unlawful act of the defendant condemned by the [NJCFA].' " (quoting *Ramanadham v. N.J. Mfrs. Co.*, 455 A.2d 1134, 1136 (N.J. Super. Ct. App. Div. 1982))). "[U]nlike common law fraud, the NJCFA does not require proof of reliance." *Marcus*, 687 F.3d at 606 (citing *Gennari v. Weichert Co. Realtors*, 691 A.2d 350, 366 (1997)). But "the alleged unlawful practice must be a proximate cause of the plaintiff's ascertainable loss." *Marcus*, 687 F.3d at 606. Plaintiffs must show "an ascertainable loss of moneys or property, real or personal," proximately caused by the defendant's allegedly unlawful conduct. *Dabush*, 874 A.2d at 1116.

"[T]he [NJCFA] does not provide for recovery of statutory damages where a plaintiff cannot show actual harm." *Id.* (citation omitted). "While the Attorney General does not have to prove that the victim was damaged by the unlawful conduct in order to recover any damages, a private plaintiff must demonstrate 'an ascertainable loss of moneys or property, real or personal," as a result of the defendant's unlawful conduct." *Id.* (citation omitted). Simply showing a violation of the NJCFA "is insufficient to entitle a private citizen to damages under the [NJCFA]." *Dabush*, 874 A.2d at 1116. "While obstacles to calculating damages may not preclude class certification, the putative class must first demonstrate economic loss on a common basis." *Newton*, 259 F.3d at 189.

Here, with Plaintiffs' apparent abandonment of their fraud theory for liability, Plaintiffs have not sufficiently alleged a benefit-of-the-bargain theory and likewise have not shown they and the putative class members have suffered an ascertainable loss under the NJCFA. At the motion-to-dismiss stage, in considering whether Plaintiffs adequately pled an ascertainable loss under the NJCFA, the Court found Plaintiffs' Complaint failed to plead an "out-of-pocket-loss" theory because it never alleged Defendants' analog insulin products were "essentially worthless." *In re Insulin Pricing*, 2019 WL 643709, at *15 (citation omitted). However, the Court found Plaintiffs adequately pled ascertainable loss under a "benefit-of-the-bargain" theory because Plaintiffs "alleged that they were misled as to the difference between the benchmark prices and the 'true prices' of the medications" and "that Defendants intentionally and knowingly misrepresented material facts and thereby 'inflated' the price of analog insulin to the detriment of the consumers, who 'pay for analog insulin based on the medicines' *benchmark* price.' " *Id.* at *16. Based on these allegations, the Court found Plaintiffs sufficiently alleged they "were 'unfairly deprived of the benefit of the bargain' as they paid more than their pro-rata share of the net prices of the subject insulin." *Id.* [37]

37 In its opinion for Defendants' Motion to Dismiss the First Amended Complaint ("FAC"), the Court also found, based on Third Circuit precedent, that the heightened pleading standard and specificity requirement set forth in Federal Rule of Civil Procedure 9(b) applies to Plaintiffs' NJCFA claim. *In re Insulin Pricing*, Civ. A. No. 17-00699, 2019 WL 643709, at *14 (D.N.J. Feb. 15, 2019). *See also Argabright v. Rheem Mfg. Co.*, 201 F. Supp. 3d 578, 606 (D.N.J. 2016) ("The claims under the NJCFA and the ACFA are subject to the heightened pleading standard of Fed. R. Civ. P. 9(b), which requires particularized pleading for the conduct underlying fraud claims." (citing cases)). The Rule 9(b) standard requires the pleading to "state what the misrepresentation was, what was purchased, when the conduct complained of occurred, by whom the misrepresentation was made, and how the conduct led plaintiff to sustain an ascertainable loss." *In re Insulin Pricing*, 2019 WL 643709, at *14. The Court found Plaintiffs sufficiently alleged "the necessary, specific allegations to withstand Defendants' Motion to Dismiss" because they alleged "misrepresentation in that Defendants

> warranted that the artificially inflated publicly reported benchmark prices of Novolog, Levemir, Apidra, Lantus, and Toujeo were the reasonable approximations of the true cost." *Id.* Additionally, the Court concluded Plaintiffs alleged that they "purchased the subject drugs, provide[d] allegations concerning when the conduct occurred, and assert[ed] that the conduct led Plaintiffs to suffer a loss." *Id.*

***37** But at the class certification stage, Plaintiffs seemingly clarify their theory is not one based on fraud or misrepresentation but rather is based on alleged unfair and unconscionable conduct, which they submit is sufficient to show an ascertainable loss under the NJCFA because they claim they do not need to show any deception or fraud to bring this claim. (ECF No. 575 at 70 ("The claims of the nationwide classes do not require proof of deception, turning on individual circumstances."); ECF No. 577 at 42 ("Benefit-of-the-bargain damages do not require the plaintiffs to suffer an ascertainable loss as a result of deception; it suffices that plaintiffs suffered an ascertainable loss as a result of an unconscionable act.").) Essentially Plaintiffs' theory now is that Defendants' alleged conduct in setting artificially inflated list prices for their analog insulin products was an unconscionable commercial practice constituting unfair conduct under the NJCFA, which purportedly caused injuries to the putative class members by causing them to overpay for those products. Plaintiffs understandably may not want to focus on fraud or misrepresentation because courts generally seem hesitant to certify classes involving allegations of fraud, misrepresentation, or deception, as those often turn on individual circumstances. *E.g.*, *Kelley v. Microsoft Corp.*, 251 F.R.D. 544, 557 (W.D. Wash. 2008) ("Many courts have denied class certification where plaintiffs alleged a deception-based theory of consumer fraud." (citing cases)); *Webster v. LLR, Inc.*, Civ. A. No. 17-00225, 2018 WL 10230741, at *9 (W.D. Pa. Aug. 20, 2018) ("[W]hen district courts have faced the problem of nationwide classes which seek to apply state consumer protection laws, those courts have refused to certify a class." (citing cases)). But abandoning their fraud theory at the class certification stage does not allow them to adequately show an ascertainable loss for purposes of certifying a class action based on an alleged violation of the NJCFA.

While New Jersey courts have stated the NJCFA does not require proof of reliance, *Marcus*, 687 F.3d at 606 (citation omitted), and that unconscionable commercial practices as "affirmative acts" under the NJCFA "do not require a showing of 'intent to deceive' or 'knowledge of the falsity of the representation[,]' " *Katz*, 2010 WL 2539686, at *5 (citation omitted), New Jersey courts have also held that a plaintiff alleging a benefit-of-the-bargain theory under the NJCFA must allege "(1) a reasonable belief about the product *induced by a misrepresentation*; and (2) that the difference in value between the product promised and the one received can be reasonably quantified." *Smajlaj*, 782 F. Supp. 2d at 99. With Plaintiffs' apparent abandonment of their fraud theory with respect to Defendants' liability, they do not sufficiently allege a benefit-of-the-bargain theory under the NJCFA and therefore do not sufficiently allege an ascertainable loss under the NJCFA. Simply alleging a benefit-of-the-bargain loss or an unconscionable commercial practice is insufficient to show Plaintiffs have suffered a "a definite, certain and measurable loss, rather than one that is merely theoretical." *See Bosland*, 964 A.2d at 749; *Int'l Union*, 929 A.2d at 1088 (concluding "to the extent that plaintiff seeks to prove only that the price charged for [defendant's product] was higher than it should have been as a result of defendant's fraudulent marketing campaign, and seeks thereby to be relieved of the usual requirements that plaintiff prove an ascertainable loss, the theory must fail"); *see also Dugan*, 171 A.3d at 641–42 ("[The plaintiffs'] proposed price-inflation theory does not establish ascertainable loss and causation in this [NJ]CFA class action case."). Plaintiffs have not sufficiently shown they failed to receive the benefit of the bargain as they have not alleged that they had "a reasonable belief about the product *induced by a misrepresentation*"—and in fact they have asserted the opposite, that their ascertainable loss theory is *not* based on misrepresentation (*see supra* n.34))—or that they were misled into buying insulin that was worth less than was promised. Therefore, Plaintiffs have "failed to propose a cognizable theory of damages that is sufficiently supported by class-wide evidence." *See Harnish*, 833 F.3d at 313; *cf. Dugan*, 171 A.3d at 641–42 (concluding the plaintiffs' price-inflation theory did not establish ascertainable loss and causation under the NJCFA).

In *Harnish v. Widener University School of Law*, the plaintiffs' theory of damages was a price inflation theory where plaintiffs alleged that the defendant's "alleged misrepresentations inflated its tuition prices above what they should have been, and all [putative class members] suffered damages when they paid the extra, 'inflated' tuition amount." Civ. A. No. 12-00608, 2015 WL 4064647, at *6 (D.N.J. July 1, 2015). The *Harnish* court noted the plaintiffs "intend[ed] to prove damages on a classwide basis by using an expert statistical analysis to quantify the alleged tuition inflation" but found this "unacceptable" because the plaintiff's "method of

proving classwide damages relies on a 'fraud on the market' theory which New Jersey courts have rejected outside the federal securities fraud context." *Id.* at *6–7. *The Harnish* court concluded the plaintiff failed to show that the damages elements of his NJCFA claims could be established by common proof, and hence, his proposed class could not be certified under Rule 23(b)(3). *Id.* at *8. The court found the plaintiff did not satisfy Rule 23's predominance requirement because "individual questions predominate over common questions regarding the loss each proposed class member sustained." *Id.* at *6–7.

***38** The Third Circuit affirmed the *Harnish* court's decision, stating "[t]he state courts, like the District Court in this case, have emphasized that recognizing 'price inflation' as a 'cause' of 'ascertainable loss' is essentially the same as extending the fraud-on-the-market presumption to all consumer-fraud cases"; "[t]he practical effect of both [fraud-on-the-market and 'price inflation'] theories is indeed the same, and ... the state courts have refused to recognize either [a fraud-on-the-market or a 'price inflation'] theory outside the federal securities fraud context." *Harnish*, 833 F.3d at 312–13. The Third Circuit concluded the plaintiffs "therefore failed to propose a cognizable theory of damages that is sufficiently supported by class-wide evidence." *Id.* at 313. *See also Dugan*, 171 A.3d at 626 (stating "[NJ]CFA class action jurisprudence rejects 'price-inflation' theories ... as incompatible with the [NJ]CFA's terms" and concluding based on this jurisprudence, plaintiffs alleging a price inflation theory "have not established predominance with respect to their [NJ]CFA claims").

Similarly, here Plaintiffs do not have a cognizable theory of damages that is sufficiently supported by class-wide evidence. *See Harnish*, 833 F.3d at 313. Plaintiffs allege a price inflation theory—that Defendants' engaged in unlawful conduct, a purportedly unconscionable pricing scheme, by artificially inflating the list prices for their analog insulin products so they could offer rebates to certain PBMs in exchange for preferred formulary placement, which allegedly caused Plaintiffs to suffer an ascertainable loss in that they overpaid for Defendants' analog insulin products and accordingly were unfairly deprived of the benefit-of-the-bargain because they paid more than their pro-rata share of the net prices of those products. However, merely "[a]lleging a 'failure to receive the benefit of the bargain' does not satisfy the 'ascertainable loss' requirement." *Parker*, 2008 WL 141628, at *3. Rather, a "plaintiff must suffer a definite, certain and measurable loss, rather than one that is merely theoretical." *Bosland*, 964 A.2d at 749.

Even assuming, *arguendo*, Plaintiffs sufficiently alleged an ascertainable loss under the NJCFA, the Court finds Plaintiffs fail to satisfy Rule 23(b)(3)'s predominance requirement because individual questions predominate over any common ones that may exist and the Court is not convinced the essential elements of the putative class members' NJCFA claims are capable of proof at trial through evidence that is common to the class rather than individual to its members. In particular, proof of the essential elements of Plaintiffs' NJCFA claim (including whether each putative class member suffered an ascertainable loss and whether Defendants' alleged conduct caused that loss) would require multiple fact-specific individualized inquiries and evidence individual to its members, which would likely "devolve into a series of mini trials concerning causation or injury[,]" which defeats predominance. *See Neale*, 2021 WL 3013009, at *9. Determining Defendants' liability under the NJCFA would require delving into evidence individual to each putative class member and their respective factual circumstances—whether they were insured; the terms and policies of their insurance coverage, if any; whether they benefited from any of the rebates passed down through the PBMs and/or insurers; etc. *Cf. Sheet Metal Workers Local 441 Health & Welfare Plan v. GlaxoSmithKline, PLC*, Civ. A. No. 04-5898, 2010 WL 3855552, at *31 (E.D. Pa. Sept. 30, 2010) (denying class certification in an antitrust case, finding "that proof of antitrust impact and damages resulting from [the defendant's] allegedly anti-competitive conduct will require evidence individual to class members" and concluding that "plaintiffs failed to meet their burden of showing that common questions of law of fact predominated over any questions affecting individual members").

Plaintiffs are premising their alleged injury on being unfairly deprived of the benefit-of-the-bargain because they and the putative class members purportedly paid more for Defendants' analog insulin products than their pro-rata share of the net prices of those products because of Defendants' alleged unlawful pricing scheme. (ECF No. 577 at 42.) But multiple individualized inquiries will be required to determine injury, causation, and damages for Plaintiffs' alleged claims under the NJCFA, overwhelming any common issues. Like in *Dugan v. TGI Fridays*, "Plaintiffs' price-inflation theory does not globally establish those elements of the [NJ]CFA for the vast and varied class of [individuals] for which the [ ] plaintiffs seek certification." *See Dugan*, 171 A.3d

at 641–42. Plaintiffs have not sufficiently shown economic loss, *i.e.*, the fact of damage—here, ascertainable loss and a causal relationship, "core elements of liability under the NJCFA"—on a common basis or that this can be proven with common evidence. *See Harnish*, 833 F.3d at 306 (citation and quotations omitted) ("While obstacles to calculating damages may not preclude class certification, the putative class must first demonstrate economic loss—that is, the fact of damage—on a common basis.").

***39** In particular, causation will not be uniform across putative class members because whether each consumer paid more than their pro-rata share of the net prices for Defendants' analog insulin products and what caused this alleged overpayment will vary depending upon each putative class member's individual circumstances, *e.g.*, (1) whether the class member was insured or had the opportunity to be insured at any point during Plaintiffs' proposed class periods; (2) if the class member was insured, the terms of their insurance coverage and what was their reason(s) for choosing that insurance coverage; (3) whether the class member had options for alternative insurance coverage at any point during Plaintiffs' proposed class periods; and (4) what amount(s), if any, the class member paid for which of Defendants' analog insulin products and how the class member's pharmacy calculated the transaction price. To make these fact-specific determinations, various individualized inquiries, essentially "a series of mini trials" on liability, would be required to determine whether each putative class member in fact suffered an ascertainable loss under the NJCFA, and if so, whether Defendants' alleged conduct caused that class member's loss. Therefore, this cannot be determined with common evidence and instead will require evidence individual to each putative class member.

Individualized inquiries will also be required to determine whether and how putative class members benefited from the rebates. Some PBMs pass along rebates to insurers, and insurers who receive those rebate savings can choose to pass along some or all (or none) of those savings to their customers. Some insurers choose to pass along rebate savings to consumers, while others do not. Some consumers may therefore benefit from those rebate savings through lower premiums and/or lower deductibles and/or by having set copays rather than coinsurance. Other consumers may benefit from those rebates through point-of-sale rebate programs aimed at helping to offset out-of-pocket spending. Still other consumers may not benefit from those rebates at all. Therefore, determining Defendants' liability under the NJCFA will not be the same among putative class members because some insured class members may have benefitted from all or some of the rebate savings from the PBMs and insurers. Whether they benefitted depends on the specific policy (or policies) of each putative class member's particular insurer at any given time during the Plaintiffs' proposed class periods, which would require individualized fact-specific inquiries and evidence. In other words, whether an insured putative class member benefits from these rebates that make up the difference between the list price and the net price, and if so by how much, will vary depending on individualized issues concerning that putative class member's insurer(s), insurance plan(s), and affiliated PBM(s), which can all change over time.

Additional individualized inquiries would be needed to determine (1) whether the price each putative class member paid for each of Defendants' analog insulin product at issue was based on list price at all relevant times within Plaintiffs' proposed class periods; (2) whether the pharmacies charged the U&C price for every one of Defendants' analog insulin product at issue, for each putative class member, every time, and if not, how else they calculated the transaction price; (3) whether each putative class member used or could have used manufacturer coupons or other forms of financial assistance in purchasing Defendants' analog insulin product; (4) whether an uninsured putative class member could have been insured and chose not to for whatever reason; and (5) whether insured putative class members could have changed insurance plans with different coverage terms and options at any time during the proposed class periods.

Considering the breadth of Plaintiffs' twelve proposed classes and the numerous individualized inquiries that will be required to decide the factual and legal questions in this action (*e.g.*, whether Defendants' conduct was unfair or unconscionable, and if so, when their conduct supposedly became unfair and unconscionable, whether each putative class member suffered an ascertainable loss, and if so, whether Defendants' conduct proximately caused the class members' losses), the Court finds common legal and factual questions do not predominate over individualized issues. *See Sanders v. Johnson & Johnson, Inc.*, Civ. A. No. 03-02663, 2006 WL 1541033, at *5–6 (D.N.J. June 2, 2006). Therefore, the Court concludes Plaintiffs fail to satisfy Rule 23(b)(3)'s predominance requirement because of the various fact-specific, individualized inquiries that would be required for Plaintiffs to prove the essential elements of their NJCFA claim, which cannot be determined with common

evidence or without "mini trials" but rather would require individualized treatment, and which overwhelm any common issues, making class certification unsuitable for Plaintiffs' proposed classes. *See Tyson*, 577 U.S. at 453 (finding "[a]n individual question is one where 'members of a proposed class will need to present evidence that varies from member to member,' while a common question is one where 'the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof" (alteration in original) (citation omitted)).

***40** Because the Court is not convinced that the essential elements of the putative class members' NJCFA claims are "capable of proof at trial through evidence that is common to the class rather than individual to its members," the Court concludes the predominance requirement is not met, and therefore certification under Rule 23(b)(3) is inappropriate as to Plaintiffs' Nationwide Classes and Plaintiffs' Novo Nordisk and Sanofi Classes. *See Reinig*, 912 F.3d at 127–28 (quoting *Gonzalez v. Corning*, 885 F.3d 186, 195 (3d Cir. 2018)).

Additionally, to the extent Plaintiffs argue the Court should certify the Proposed Nationwide Classes and the Proposed Novo Nordisk and Sanofi New Jersey Classes for the same reasons as the courts who granted class certification in the *Valsartan* and *James v. Global Tel*Link Corporation* cases, the Court finds those cases are distinguishable from this action. *See Valsartan*, 2023 WL 1818922; *James v. Global Tel*Link Corp.*, Civ. A. No. 13-4989, 2018 WL 3727371 (D.N.J. Aug. 6, 2018).

Valsartan was a products liability case where it was uncontested that the defendants' products were contaminated and for which products the plaintiffs were attempting to recover the full purchase price paid. Based on the parties' factual and legal arguments, the *Valsartan* court found it was "incontrovertible ... that the contamination resulted from defendants' non-compliance of cGMPs at some level[,]" and concluded "[s]ince defendants' conduct in making contaminated VCDs and in putting these into the U.S. drug supply chain, which plaintiffs paid for, is incontrovertible, that singular fact grounds all of plaintiffs' claims." *Valsartan*, 2023 WL 1818922, at *14. Based on this incontrovertible fact, the *Valsartan* court stated the plaintiffs had "common facts upon which to base their economic loss claims and which are 'capable of proof at trial through evidence that is common to the class rather than individual to its members, and which dominate each putative class member's claims." *Id.*

In contrast, this is not a products liability case involving contaminated products; Plaintiffs here allege an unfair pricing scheme purportedly resulting in overpayment, which Plaintiffs contend is unconscionable conduct and which Plaintiffs are seeking to recover *any portion* of the purchase price allegedly overpaid, not necessarily the full price. The *Valsartan* plaintiffs asserted defendants' products "were worthless because, had the contamination [of defendants' products] been publicly known, [they] would not have been sold, *i.e.*, were not merchantable" and therefore they sought "as their economic loss the full cost of their payments for their insured's [products] over the relevant period." *Valsartan*, 2023 WL 1818922, at *20. Here, however, Plaintiffs are not alleging any such contamination or that Defendants' insulin products were "worthless." Rather, Plaintiffs allege they and the putative class members paid more than their pro-rata share for Defendants' insulin products.

The *James* case is likewise distinguishable. *James* involved alleged overcharges for calls made by inmates at New Jersey prisons and jails at fees "many times greater" than the costs of providing the inmate calling services. *James*, 2018 WL 3727371, at *2. The *James* plaintiffs alleged a violation of the NJCFA for "charging unconscionable rates and fees" and a violation of the Takings Clause of the Fifth Amendment and sought to certify a class action based on those two alleged violations—a class consisting of all persons who were incarcerated in New Jersey and made calls using the inmate calling services during the class period (or persons who funded those calls for the inmates). *Id.* at *3–4, *10. The court noted plaintiffs' expert "assume[d] a reasonable calling rate of 5-cents-per-minute, based on his extensive experience in the telecommunications industry" and on Global Tel*Link charging "roughly 5 cents per-minute for all calls[,]" but defendants "allegedly charged between 40 cents and $1.00 per minute during the class period." *Id.* at *7–8. Therefore, the court found there was "no concrete evidence that such costs varied so substantially as to make some fees unconscionable and others not." *Id.* at *7. In other words, whether the alleged overcharge was 35 cents per minute or 95 cents per minute or anywhere in between, that did not matter because any of those would be unconscionable. *See id.* Also, *James* was not a nationwide class action case.

***41** In *James*, the court certified a class based on claims brought under one state statute (the NJCFA) and the Takings Clause of the Fifth Amendment, and the class was limited to New Jersey inmates who made calls or individuals

who funded those calls. In contrast, Plaintiffs here propose certifying two separate *nationwide* classes in addition to multiple *multi-state* and state-specific classes involving a number of different state consumer protection statutes, with numerous putative class members across multiple states, some insured and some uninsured, who made purchases of different insulin products with different prices at different places and at various different times. In *James*, the parties put forth evidence showing concrete numbers (*i.e.*, the cost of the calls was 5 cents per minute, yet defendants were charging between 40 cents and $1.00 per minute, which overcharges were allegedly unconscionable) and based on this, the court found plaintiffs' expert could calculate damages owed to the class "even if he ha[d] not yet perfected that calculation." *James v. Glob. Tel*Link Corp.*, Civ. A. No. 13-4989, 2018 WL 3727371, at *2, *8 (D.N.J. Aug. 6, 2018).

In contrast, here, Plaintiffs are not alleging that charging a specific dollar amount or percentage (*e.g.*, $50 or 30%) for Defendants' insulin products is unconscionable; rather, Plaintiffs are alleging that Defendants' conduct in setting artificially inflated list prices for their analog insulin products and paying rebates to PBMs and other middlemen at the expense of the consumers is what is unconscionable. Put another way, Plaintiffs are not alleging, for example, that anything over $50 for one of Defendants' analog insulin products is unconscionable; instead, Plaintiffs' theory is based on putative class members who paid *any portion of the purchase price* for Defendants' analog insulin products based on reference to Defendants' list price. [38]

38 *See also* ECF No. 713 at 77 (counsel for Defendants stating at oral argument: "[Plaintiffs] are clinging to the idea that if they can establish that a list price is unconscionable on some abstract theory but then everybody that pays even the tiniest fraction of that list price, if you paid one percent of list, plaintiffs would say, well, that's unconscionable even though the actual amounts might be very small. At the same time if you're paying a lot but you're not paying a percentage of list price, plaintiffs aren't here to help. They're defining them out of a class, so you still have the same problem with some people that have suffered that are going to have a very hard time getting relief.").

Therefore, Plaintiffs' motion to certify the Proposed Nationwide Classes, [39] the Proposed Novo Nordisk New Jersey Class, and the Proposed Sanofi New Jersey Class under Rule 23(b)(3) is **DENIED**. [40]

39 Additionally, as Defendants note in their opposition, the Court previously ruled Plaintiffs lack standing to pursue state law claims for Defendants' insulin products that they did not purchase in a particular state. (ECF No. 576 at 96–97 (citing *In re Insulin Pricing*, 2019 WL 643709, at *17).) Therefore, because Plaintiffs do not claim their proposed class representatives reside and/or purchased one or more of Defendants' analog insulin products in every US state, the Court denies Plaintiffs' motion to certify their Proposed Nationwide Classes on this additional basis. *See In re Insulin Pricing*, 2019 WL 643709, at *17 ("Consistent with *Neale [v. Volvo Cars of N. Am., LLC*, 794 F.3d 353 (3d Cir. 2015)], district courts within the Third Circuit and throughout the nation have held that named plaintiffs in a class action 'lack standing to bring claims on behalf of putative classes under the laws of states where no named plaintiff is located and where no named plaintiff purchased the product at issue.' Indeed, the Complaint includes seventeen counts in which no named plaintiff resides in such state, nor is there any allegation of injury in such state. This runs afoul of the Supreme Court's holding in *DaimlerChrysler*, as well as the rules promulgated by courts of this Circuit." (quoting *In re: Niaspan Antitrust Litig.*, Civ. A. No. 13-md-02460, 2015 WL 8150588, at *3 (E.D. Pa. Dec. 8, 2015))).

40 Because the Court denies Plaintiffs' motion to certify their proposed classes under Rule 23(b)(3), it does not address the separate issue of whether Plaintiffs' class periods for each of their proposed classes—which extend "through the date on which the class is certified" (*see* ECF No. 574)—is appropriate. *See In re Domestic Drywall*, 2017 WL 3700999, at *10 ("[Indirect Purchaser Plaintiffs ('IPPs')] include in their definition of a class member anyone who is an 'end user' of drywall 'to the present time.' This open-ended timeframe is not warranted here, and further complicates ascertainability. This is not a case of an alleged 'continuing violation' which may allow damages to be awarded for a time period after the complaint was filed. Indeed, very few cases have facts which

> qualify for damages 'up to the present time.' ... It was the responsibility of counsel for IPP to limit the class in an ascertainable way, and by including the open-ended timeframe in the definition, IPPs have provided an additional reason to find that the class is not ascertainable. The Court concludes that IPPs have not met their burden to show that their proposed class is ascertainable."). The Court also notes Plaintiffs have not analyzed any potential effects any or all of the following may have on their putative classes as currently proposed: (1) President Biden's Inflation Reduction Act; (2) Novo Nordisk's MyInsulinRx program for its analog insulin products, which became effective on September 13, 2023; and (3) Sanofi's price changes and cap for certain of its analog insulin products, which became effective on January 1, 2024.

2. Proposed Novo Nordisk and Sanofi Multi-State Classes

***42** Plaintiffs argue both the Proposed Novo Nordisk Multi-State Class and the Proposed Sanofi Multi-State Class should be certified under Rule 23(b)(3) for claims brought under the consumer protection statutes of sixteen states (*see supra* n.17) because: (1) all sixteen states prohibit unfair or unconscionable practices and variations in these states' laws do not defeat commonality or predominance; (2) common issues predominate because all sixteen states apply the same three-part FTC test for determining whether an act or practice is "unfair"; and (3) they will prove impact and damages using class-wide, common evidence. (ECF No. 575 at 80–86, 88–98.) Plaintiffs argue the three-part FTC test for determining whether an act or practice is unfair requires showing that the challenged conduct: (1) caused a substantial injury, (2) that is not reasonably avoidable by consumers, and (3) is not outweighed by the benefits to consumers or competition. (*Id.* at 7, 80 (citation omitted).) Plaintiffs contend certifying their Proposed Multi-State Classes under Rule 23(b)(3) is appropriate because they will use common evidence to establish Defendants' conduct in setting the list prices for their analog insulin products was "unfair" under this three-part test, which Plaintiffs allege caused all putative class members to suffer monetary losses. (*Id.* at 88–97.) Plaintiffs maintain this showing will not require any individualized evidence because they can calculate the alleged overcharges using common evidence and "[i]ndividual reliance is not required for claims of unconscionable and unfair acts under the laws of the [ ] states at issue." (*Id.* at 95–98.)

In opposition, Defendants contend certification of Plaintiffs' Proposed Novo Nordisk and Sanofi Multi-State Classes is not appropriate because variations among the unfairness and unconscionability standards of the sixteen states' consumer protection statutes require highly individualized and fact-intensive inquiries that overwhelm any common issues and defeat predominance.[41] (ECF No. 576 at 29–37, 48–58.) First, Defendants argue even assuming putative class members were injured, the Court would have to engage in individualized inquiries to determine whether the injury was "reasonably avoidable," which "requires analyzing each person's decision-making and options for avoiding the cost she paid" for Defendants' analog insulin product at any given time during Plaintiffs' proposed class periods—*e.g.*, whether the consumers used, or could have used one of Defendants' affordability offerings or manufacturer coupons, or whether the consumers otherwise limited, or could have limited, their out-of-pocket costs by using other forms of assistance programs offered by *other* entities, such as insurers, pharmacies, and state government agencies." (*Id.* at 31–32 (citations omitted).) In support, Defendants cite evidence showing some named Plaintiffs used Defendants' affordability offerings and others chose not to. (*Id.* at 31 (citations omitted).) Additionally, Defendants argue each putative class member has a distinctive set of insurance options, which "are not set in stone; they can change any time a consumer (or family member) changes jobs, insurance plans, or insurers[,]" and "[t]hus, a consumer's ability to avoid higher costs requires different assessments at different times." (*Id.* at 32 (citing Baker Rpt. ¶ 102).) Defendants assert since some putative class members " 'could—and did—purchase' alternative products, depending on their particular circumstances," this undermines their claim that all class members "had no meaningful opportunity to avoid paying the higher retail price, and thus, whether or not a class member could have avoided the defendants' conduct is an individualized question of fact." (ECF No. 576 at 33–34 (quoting *Siegel v. Shell Oil Co.*, 612 F.3d932, 936 (7th Cir. 2010)).).

41 Defendants also note: (1) certain states (including Louisiana, North Carolina, Iowa, and Maryland) "have developed their own jurisprudence on what makes conduct unfair"; (2) other states (including Massachusetts) "impose more specific requirements on what qualifies as 'unfair' conduct"; and (3) the law is not settled in all sixteen states—"Plaintiffs recognize that *no court*

> has decided what standard applies in Colorado and Indiana, which lack codified definitions of unfairness. Likewise, no North Dakota court has applied that state's unfairness provision since its adoption." (ECF No. 576 at 52–53 (citing ECF No. 575 at 85–86 & n.329).)

Second, Defendants also submit Plaintiffs cannot show through common proof that each putative class member suffered a substantial injury, stating the individual amount consumers paid for Defendants' analog insulin products —their alleged injury—is person-specific. (*Id.* at 34.) Additionally, Defendants contend "rebates may have lowered a consumer's costs in ways not reflected in the transaction price" because "the insulin may have been on a more favorable formulary tier (meaning the consumer paid a lower price) because rebates were paid"; (2) "the insurer may have used the rebate to lower premiums or deductibles" for the consumer; or (3) "the insurer may have passed along the rebate to the consumer at the point of sale." (*Id.* (citing Baker Rpt. ¶¶ 57–60, 224; Anthem Cert. at 69).) Defendants state these individualized issues cannot be proven using common evidence. (*Id.* (citation omitted).)

***43** Third, Defendants assert Plaintiffs also cannot establish causation on a class-wide basis by simply alleging they suffered a loss because of Defendants' conduct. (*Id.* at 34.) Rather, Defendants argue Plaintiffs "must prove that *Defendants' conduct—not* the conduct of PBMs, insurers, pharmacies, or any other third party—caused each putative class member's allegedly 'excessive' costs" and this "requires a case-by-case inquiry." (*Id.* at 34–35 (citing ECF No. 575 at 47).)

Fourth, Defendants contend that analyzing whether Defendants' conduct was "outweighed by the benefits to consumers or competition" is likewise overrun by individual questions that Plaintiffs do not explain how they would address with common proof. (ECF No. 576 at 36.) Defendants submit Plaintiffs do not have any class-wide means to assess the benefits of rebates and their expert Dr. Rosenthal conceded 'consumers differentially benefit from rebates or the lack of them.' " (*Id.* at 36–37 (citing Rosenthal Dep. at 223:11–223:16).) Defendants also state that, because they "offered different rebates for different products, different PBMs, and different formularies, the benefits to consumers from this rebate competition will necessarily vary." (*Id.* at 36 (citing Baker Rpt. ¶¶ 234–35).) In contrast to the AWP wholesale price litigation involving misrepresentation-based claims that manufacturers reported fictitious and artificial AWPs, Plaintiffs seem to no longer be alleging fraud or misrepresentation (*see supra* n.34) and "do not dispute that Defendants' list prices are what they claim to be: the prices Defendants charge wholesalers, exclusive of rebates and discounts, as defined by federal law." (*Id.* (citations omitted).)

Fifth, and finally, Defendants argue the sixteen states in Plaintiffs' Proposed Novo Nordisk and Sanofi Multi-State Classes do not apply the "exact same" unfairness standard. Even assuming they did, Plaintiffs do not address the variations in the other elements (*e.g.*, scienter, causation, and statutes of limitations) of the consumer protection statutes of those states. (ECF No. 576 at 53–54.)

In reply, Plaintiffs (1) maintain common issues predominate as to whether Plaintiffs and the putative class members could reasonably avoid the harm because "where the basis for all retail prices (WAC) is the same everywhere, the consumer couldn't have avoided it as a matter of fact"; (2) contend Defendants' arguments "present common issues on the merits under an objective, reasonable person standard" because "[a] jury may decide using common proof whether it's reasonable to expect the average consumer to avoid an [alleged] overcharge by altering their physician's prescribed treatment, buying different insurance, or scouring the market for discounts only available to the select few"; (3) reiterate the three-part "substantial injury" test for unfairness applies under the laws of the sixteen states at issue; (4) state Defendants misread the case law in asserting "many states have developed their own jurisprudence on what makes conduct unfair"; (5) assert the Defendants err in asserting the Court cannot decide whether the three-part FTC test applies in Colorado, Indiana, and North Dakota, arguing that, "[w]hile no higher court in these states has explicitly outlined a test for unfair conduct, that fact does not bar certification because: ([a]) it's a common issue of law as to what test should apply; and ([b]) there are reasons to suggest each state would apply the three-part FTC test"; and (6) argue the other state law elements and state-specific issues Defendants identified do not preclude certification under Rule 23(3)(b). (ECF No. 577 at 3–11, 21–32 (citations omitted).)

***44** In their sur-reply, Defendants contend, among other things, Plaintiffs' reply introduces a "new argument that all sixteen state laws in the putative multi-state classes turn on a singular assessment of what is 'reasonably avoidable' under an 'objective reasonable person standard' " but submit this is not the test and Plaintiffs do not cite any cases from any of the

sixteen states supporting that proposition. (ECF No. 587-1 at 8 (citations omitted).)

In their response to Defendants' sur-reply, Plaintiffs assert class-wide evidence shows Defendants "proffered means of avoiding overpayment were unreasonable for all class members" and maintain they can prove substantial injury and causation with class-wide evidence and that this evidence will show the substantial injuries suffered are not outweighed by any countervailing benefits. (ECF No. 590 at 4–19.) Plaintiffs also assert Defendants' purported benefits of rebates are "speculative" and "indirect" and constitute payments by collateral sources. (*Id.* at 8–13.) Further, Plaintiffs claim even assuming these rebates are relevant, "whether their collateral benefits to class members factually mitigate the grossly inflated prices that class members pay ... is an affirmative defense." (*Id.* at 9.)

For many of the same reasons the Court denies certification of Plaintiffs' Proposed Nationwide Classes and Proposed New Jersey Classes, the Court likewise concludes certification of Plaintiffs' Proposed Multi-State Classes is inappropriate because individual questions predominate over any common ones that may exist and the Court is not convinced the essential elements of the putative class members' claims brought under the consumer protection laws of sixteen states are capable of proof at trial through evidence that is common to the class rather than individual to its members, as discussed more fully below.

The FTC Act defines the term "unfair or deceptive acts or practices" as including such acts "that (i) cause or are likely to cause reasonably foreseeable injury within the United States; or (ii) involve material conduct occurring within the United States." 15 U.S.C. § 45(a)(4)(A). However, the FTC Act also states the FTC "shall have no authority ... to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." *Id.* § 45(n). In other words, "the FTC Act defines 'unfair acts or practices' as those that 'cause[ ] or [are] likely to cause substantial injury to consumers which [are] not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.' " *F.T.C. v. Wyndham Worldwide Corp.*, 10 F. Supp. 3d 602, 613 (D.N.J. 2014), *aff'd*, 799 F.3d 236 (3d Cir. 2015) (quoting 15 U.S.C. § 45(n)).

Here, Plaintiffs maintain they can prove Defendants are liable for alleged "unfair" acts under the sixteen states' consumer fraud laws by using common evidence to show that each putative class members suffered (1) a substantial injury, (2) that was not reasonably avoidable, and (3) was not outweighed by benefits to consumers or competition. However, setting aside potential issues with the differences in the sixteen different states' consumer fraud laws themselves, and assuming for purposes of this Opinion that each of these sixteen states would apply the FTC's three-part test, the Court finds that, as with Plaintiffs' NJCFA claims, determining Defendants' liability under this test would similarly require multiple fact-specific, individualized inquiries and evidence individual to each putative class member. The Court is not convinced that common evidence can be used to prove whether each putative class member suffered a substantial injury that was not reasonably avoidable and that was not outweighed by countervailing benefits, as well as whether Defendants' alleged conduct caused or was likely to cause this alleged substantial injury.

***45** For example, individualized inquiries would be required to determine (1) whether each putative class member benefitted from any rebates that may have been passed down from PBMs and/or insurers, and (2) whether putative class members used (or chose not to use for whatever reason) prescription assistance plans, manufacturer coupons, pharmacy coupons, and/or other form(s) of financial assistance, both of which are relevant to whether each putative class member suffered a substantial injury that was not reasonably avoidable. *See, e.g.*, *Siegel*, 612 F.3d at 936 ("[W]hether or not a class member could have avoided the defendants' conduct is an individualized question of fact."); *Porsche Cars N. Am., Inc. v. Diamond*, 140 So.3d 1090, 1099 (Fla. Dist. Ct. App. 2014) (explaining "[c]onsumers may act to avoid injury before it occurs if they have reason to anticipate the impending harm and the means to avoid it, or they may seek to mitigate the damage afterward if they are aware of potential avenues toward that end" (quoting *In re Orkin Exterminating Co.*, 108 F.T.C. 263 (1986), *aff'd*, 849 F.2d 1354 (11th Cir. 1988))). When Defendants issue rebates to PBMs for formulary placement for their analog insulin products, the PBMs independently decide whether to pass along those rebate savings along to the insurers. In turn, the insurers then likewise independently decide whether to pass along all or a portion of those rebate savings to their insured consumers, *e.g.*, in the form of lower plan premiums or reduced cost-sharing obligations for prescription drugs.

Some putative class members may have benefitted from these downstream rebate savings making up the so-called spread between the list price and the net price that Plaintiffs assert constitutes evidence of an unfair and unconscionable pricing scheme. Some insurers pass along these rebate savings and others do not.

Further, the cost an insured consumer pays for an analog insulin product will vary depending on whether his or her PBM placed the product in a more favorable formulary tier because of the rebates issued by Defendants. Not all insured consumers within each of Plaintiffs' proposed classes have the same insurance plan (*e.g.*, insurance plans and terms vary in their coverages, deductible amounts, coinsurance percentages, etc.) or the same PBM, and not all PBMs maintain the same formularies. A consumer who purchased a Defendant's analog insulin product where his or her insurer's PBM places that product in a higher formulary tier would pay less than another consumer with a different insurer with a different PBM that places the same analog insulin product in a lower formulary tier. Accordingly, if a PBM placed an analog insulin product on a more favorable formulary tier because of the rebates they received from Defendants, the consumer would pay a lower fixed percentage for the product than another consumer whose PBM placed the product on a less favorable formulary tier and accordingly would benefit from that rebate. Both consumers could fall within the definitions of Plaintiffs' proposed classes while raising fact-intensive, individualized questions concerning their alleged injury and the alleged unfairness of Defendants' conduct. For these reasons, Plaintiffs' argument that PBMs and insurers are not relevant in assessing Defendants' liability is unpersuasive. Defendants' conduct cannot be determined to be unfair or unlawful unless their conduct "causes or is likely to cause *substantial injury ... which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits*." *See* 15 U.S.C. § 45(n) (emphasis added). And determining Defendants' liability under this test—*i.e.*, whether Defendants' conduct caused or was likely to cause substantial injury to the putative class members that was not reasonably avoidable and was not outweighed by countervailing benefits—cannot be determined without delving into multiple individualized inquiries and evidence individual to each putative class member. These individualized inquiries overwhelm any common ones and defeat predominance.

While Plaintiffs contend all class members belong to a captive market because they can only choose between Defendants' products, which are all subject to the same scheme, and therefore, common issues predominate (ECF No. 577 at 3–6), this misconstrues the specific inquiry required by Rule 23(b)(3). "[T]he [Rule 23(b)(3)] predominance requirement is met only if the district court is convinced that 'the essential elements of the claims brought by a putative class are 'capable of proof at trial through evidence that is common to the class rather than individual to its members.' " *Reinig*, 912 F.3d at 127–28 (citation omitted). *See also id.* at 128 ("[A] district court must look first to the elements of the plaintiffs' underlying claims and then, 'through the prism' of Rule 23, undertake a 'rigorous assessment of the available evidence and the method or methods by which [the] plaintiffs propose to use the evidence to prove' those elements."); *Neale*, 2021 WL 3013009, at *9 ("To establish predominance, Plaintiffs must show that a group trial of [the] action will not devolve into a series of mini trials concerning causation or injury."); *Smith*, 2007 WL 1217980, at *9 ("The focus of the predominance inquiry is on liability, not damages."). Plaintiffs have not satisfied the predominance requirement as to their Proposed Novo Nordisk and Sanofi Multi-State Classes because whether each putative class member suffered a substantial injury caused by Defendants' conduct, which was not reasonably avoidable and not outweighed by any countervailing benefits, raises multiple fact-intensive individualized questions that overwhelm any common ones and cannot be proven with common evidence.

***46** Even assuming putative class members suffered a substantial injury that was reasonably avoidable and not outweighed by countervailing benefits, other fact-specific individualized inquiries would be required to determining whether Defendants' conduct *caused or was likely to cause* that injury. Plaintiffs' proposed classes include insured consumers with deductible and coinsurance obligations but exclude consumers with flat co-payment plans. Consumers have options when choosing an insurance plan and might, and in some cases did, elect trade-offs such as selecting a higher premium plan for lower deductible or a plan with co-payment obligations rather than coinsurance obligations. (*See* ECF No. 576 at 32–33 (citing evidence showing some proposed class members "declined insurance coverage knowing they would bear higher out-of-pocket costs" or "consciously chose to trade lower premiums for higher out-of-pocket costs on prescription drugs").) For each putative class member, the reasons for selecting a particular insurance plan and the ability to elect or switch to a different insurance plan at any time during the proposed class periods raises fact-intensive, individualized questions relevant to determining whether they

suffered a substantial injury that was reasonably avoidable. Additionally, some members may not have known they would be exposed to the inflated list prices while others may have known but accepted the trade-offs in exchange for paying lower premiums and/or lower deductibles or coinsurance, among other reasons specific to them. *See Porsche Cars*, 140 So.3d at 1099 ("When the individual knowledge and experience of the consumer is an important element of the cause of action and its defense, there can be no class-wide proof that injury was not reasonably avoidable.")

Where the class members are insured through different insurers offering various benefits plans, an individualized inquiry is necessary to determine whether the cost each class member paid was reasonably avoidable. *Adelson v. U.S. Legal Support, Inc.*, 715 F. Supp. 2d 1265, 1278 (S.D. Fla. 2010) (finding "individualized inquiry is necessary to determine whether the [ ] charges were reasonably known and avoidable"). Plaintiffs' argument that a jury can decide whether it is reasonable to expect consumers to change their benefits plan further highlights this point—common questions do not predominate because individualized inquiries are required to determine whether or not a class member had the ability to reasonably avoid a substantial injury. Even assuming Plaintiffs could show this, additional individualized inquiries would also be required to determine whether Defendants' alleged conduct caused those injuries and that those injuries were not outweighed by any benefit to consumers or competition.

The availability of cost-saving options each putative class member may or may not have had further complicates class treatment. For uninsured class members, some may have been eligible for financial assistance programs while others may not have been. Some pharmacies offer coupons or discount cards to reduce the cost to consumers, while other pharmacies do not. A determination into whether each putative class member could have availed himself or herself of these and other cost-saving programs to avoid or mitigate their costs stemming from the allegedly inflated list prices would likewise require an individualized inquiry into the circumstances of each putative class member.

The financial cost a putative class member experiences based on those rebates is relevant in assessing whether that class member suffered a substantial injury that was not reasonably avoidable and whether Defendants' conduct in setting the list prices for their analog insulin products was unfair or unconscionable. Further, pharmacies also play a role in the purchase price for Defendants' analog insulin products, "[Redacted] (ECF No. 576 at 35 (quoting Thompson Decl. ¶ 13 (Ex. 55)).) Therefore, whether each putative class member benefitted from these rebates requires various individualized inquires, and, additionally, a consumer who benefited from Defendants' rebates raises individualized questions different from those of consumers who did not benefit from Defendants' rebates.

Plaintiffs' argument that Defendants fail to prove that passed-through rebates offset any class member's losses (*see* ECF No. 577 at 7–8) misses the point. Plaintiffs' unfair practices theory is based on Defendants allegedly artificially inflating the list prices for their analog insulin products to offer PBMs rebates at the expense of consumers. But if all or some of those rebates are passed along to consumers, this raises individualized questions concerning whether they suffered a "substantial injury," whether those injuries were reasonably avoidable, and whether those injuries were outweighed by any benefit to them. This also raises individualized questions regarding whether Defendants' conduct caused those injuries and accordingly whether Defendants' conduct constitutes an unfair act under the FTC's three-part test. Because these essential elements of the putative class members' claims under the sixteen states' consumer fraud statutes cannot be proved at trial through evidence that is common to the class rather than individual to its members, predominance is defeated with respect to Plaintiffs' Proposed Novo Nordisk and Sanofi Multi-State Classes.

***47** The individualized issues among putative class members are further compounded by variations among the sixteen state consumer protection statutes encompassed in Plaintiffs' Proposed Multi-State Classes. The differences among the sixteen state consumer protection laws present individualized issues that overwhelm common questions of law and fact and defeat predominance. *See Grandalski v. Quest Diagnostics Inc.*, 767 F.3d 175, 180 (3d Cir. 2014) (noting "[i]n a multi-state class action, variations in state law may swamp any common issues and defeat predominance" in a case where the plaintiffs, like Plaintiffs here, proposed nationwide classes for purposes of trial, not settlement, and stating settlement classes "do not pose the types of management problems that can arise in a nationwide class action trial" because courts "are not as concerned with formulating some prediction as to how [variances in state law] would play out at trial" and accordingly "need not inquire whether the varying state treatments of indirect purchaser damage claims at issue would present the type of 'insuperable

obstacles' or 'intractable management problems' pertinent to certification of a litigation class" (quoting *Sullivan*, 667 F.3d at 303–04)).

Indeed, the consumer protection statutes of different states require the consideration of different factors in assessing unfair conduct. For example: (1) Louisiana's consumer protection statute extends only to "egregious actions," *see Cheramie Servs. v. Shell Deepwater Prod.*, 35 So. 3d 1053, 1060 (La. 2010) (noting "the range of prohibited practices under LUTPA is extremely narrow" and concluding "only egregious actions involving elements of fraud, misrepresentation, deception, or other unethical conduct will be sanctioned based on LUTPA")[42]; (2) Iowa's consumer protection statute considers whether an ordinary consumer would anticipate a factor that contributes to assessing an unavoidable injury, *see State ex rel. Miller v. Vertrue, Inc.*, 834 N.W.2d 12, 37 (Iowa 2013) ("A course of conduct contrary to what an ordinary consumer would anticipate contributes to a finding of an unfair practice.")[43]; (3) Maryland's consumer protection statute "still applies a stricter 'unsophisticated consumer' standard" as opposed to the reasonable consumer standard under the three-part FTC test, *see Luskin's, Inc. v. Consumer Prot. Div.*, 726 A.2d 702, 708 (Md. 1999); (4) Massachusetts's consumer protection statute recognizes adherence to industry standards or customs as one factor supporting a finding of no unfairness, *see James L. Miniter Ins. Agency, Inc. v. Ohio Indem. Co.*, 112 F.3d 1240, 1251 (1st Cir. 1997); and (5) Maine's consumer protection statute "expressly does not apply to conduct in compliance with the orders or rules of, or a statute administered by, a federal, state or local governmental agency," *see Laing v. Clair Car Connection*, Civ. A. No. 01-516, 2003 WL 1669624, at *3 (Me. Super. Ct. Jan. 29, 2003) (citation omitted). To the extent Plaintiffs argue these are merits issues irrelevant at the class certification stage, a "court must resolve all factual or legal disputes relevant to class certification, even if they overlap with the merits—including disputes touching on elements of the cause of action." *In re Hydrogen Peroxide*, 552 F.3d at 307; *see also In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 529 (3d Cir. 2004) ("[T]he district court must determine whether variations in state laws present the types of insuperable obstacles which render class action litigation unmanageable.").

42 To the extent Plaintiffs contend the Louisiana statute still prohibits substantially injurious conduct and therefore Louisiana's bar on egregious actions does not create disparities among the state consumer protection laws (*see* ECF No. 577 at 22), that argument is unpersuasive because a jury could find Defendants engaged in unfair conduct that substantially injured class members but was not egregious.

43 Plaintiffs contend there is no disparity among the state consumer protection statutes because Iowa's statute applies the same three-part test for unfair acts. (ECF No. 577 at 23.) While true that Iowa's statute applies the same three-part test for unfair acts, Iowa law considers a unique contributing factor to a finding of an unfair practice. *See State ex rel. Miller v. Cutty's Des Moines Camping Club, Inc.*, 694 N.W.2d 518, 530 (Iowa 2005) (considering conduct an ordinary consumer would not anticipate as a factor contributing to the unavoidable injury).

***48** The consumer protection statutes of the sixteen states encompassed in Plaintiffs' Proposed Novo Nordisk and Sanofi Multi-State Classes contain are not uniform in determining whether conduct constitutes "unfair" acts or practices. Several courts considering putative multi-state classes that implicated various consumer protection statutes have similarly concluded the laws vary in significant ways. *See, e.g.*, *Vista Healthplan, Inc. v. Cephalon, Inc.*, Civ. A. No. 06-01833, 2015 WL 3623005, at *36 (E.D. Pa. June 10, 2015) ("[C]ourts in this circuit confronted with proposed multi-state consumer protection classes have concluded that the laws vary in significant ways."); *Karnuth v. Rodale, Inc.*, Civ. A. No. 03-742, 2005 WL 1683605, at *4 (E.D. Pa. July 18, 2005) ("The consumer fraud statutes of the various states are not uniform."); *Lyon v. Caterpillar, Inc.*, 194 F.R.D. 206, 219 (E.D. Pa. 2000) ("State consumer protection acts vary on a range of fundamental issues."). The disparities among the states in defining "unfair" acts presents individualized questions that overwhelm common issues and defeat predominance. Therefore, class certification of Plaintiffs' Proposed Novo Nordisk and Sanofi Multi-State Classes is inappropriate because variations among state consumer protection laws do not satisfy the predominance requirement. *In re EpiPen Mktg., Sales Pracs. & Antitrust Litig.*, Civ. A. No. 17-md-02785, 2020 WL 1873989, at *57 (D. Kan. Feb. 27, 2020) (holding "the variations among state consumer protection laws preclude predominance and thus make it inappropriate to certify the state consumer protection claims as a class action under Rule 23(b)(3)").

Therefore, Plaintiffs' motion to certify the Proposed Novo Nordisk Multi-State Class and the Proposed Sanofi Multi-State Class under Rule 23(b)(3) is **DENIED.**

3. Proposed Novo Nordisk and Sanofi Texas Classes, Proposed Kansas Classes, and Proposed Utah Classes

Plaintiffs argue the Proposed Novo Nordisk Texas Class, Proposed Sanofi Texas Class, the Proposed Kansas Classes, and the Proposed Utah Classes should all be certified under Rule 23(b)(3) for alleged unconscionable acts under the respective statutes of those states. (ECF No. 575 at 88, 94–95.) Plaintiffs contend common issues predominate under the laws of Kansas and Utah because the unconscionability standards under those laws "will not require any individualized evidence (other than the class members' individual damages)" and "[D]efendants' conduct is identical as to all class members." (*Id.* at 94 (citations omitted).) Plaintiffs likewise assert individualized evidence will not be required to prove liability and aggregate damages under the Texas Deceptive Trade Practices Act, which they state can be shown with common evidence. (*Id.* at 94–95 (citations omitted).) Plaintiffs submit the cases Defendants cite to in opposition are wrong and do not defeat predominance. (ECF No. 577 at 13–14, 33–35; ECF No. 597 at 14–17.) Plaintiffs further claim class certification is appropriate for these state-specific classes because all proposed class members belong to a captive market and Defendants' pricing scheme was uniform for all proposed class members. (ECF No. 577 at 13–14.)

***49** Defendants argue the Proposed Novo Nordisk and Sanofi Texas Classes, the Proposed Kansas Classes, and the Proposed Utah Classes should not be certified under Rule 23(b)(3) because they all fail to satisfy the predominance requirement as "proof of the essential elements of the cause of action requires individual treatment." (ECF No. 576 at 29 (citing cases).) Defendants contend Plaintiffs' unconscionability claims require highly individualized inquiries into the specific facts underlying each proposed class member's claim, including the consumer's individual circumstances, the context of their purchases of Defendants' analog insulin products, "whether the consumer was in fact injured, whether a particular Defendant's conduct caused any such injury (as opposed to third parties or other factors), whether the consumer had options to avoid that injury, and whether the consumer realized countervailing benefits from rebates." (*Id.* at 29, 38–41, 56–59.) Defendants assert Plaintiffs' unconscionability theory under the laws of Texas, Kansas, and Utah cannot be adjudicated on a class-wide basis. (*Id.* at 29, 38–41.)

Defendants further claim other state-specific issues prevent these classes from being certified. For example, Defendants state Utah does not authorize monetary relief in class actions. (*Id.* at 57 (citing *Miller v. Corinthian Colls., Inc.*, 769 F. Supp. 2d 1336, 1342 (D. Utah 2011)).) Defendants also note a Texas district court, in an insulin pricing case similar to the one here, recently dismissed a claim under the Texas Deceptive Trade Practices Act ("TDTPA") because it found the plaintiffs' allegations " 'masquerade[d]' as 'consumer protection' claims despite mirroring 'prohibited antitrust' claims under federal law" in an apparent attempt to avoid the indirect purchaser bar. *Harris Cnty. v. Eli Lilly & Co.*, Civ. A. No. 19-4994, 2022 WL 479943, at *13 (S.D. Tex. Feb. 16, 2022).

The TDTPA prohibits "[f]alse, misleading, or deceptive acts or practices in the conduct of any trade or commerce" and provides "[a] consumer may maintain an action where any of the following constitute a producing cause of economic damages or damages for mental anguish ... (3) any unconscionable action or course of action by any person[.]" Tex. Bus. & Com. Code Ann. § 17.46(a) (2019); *id.* § 17.50 (2005). The TDTPA defines an "[u]nconscionable action or course of action" as "an act or practice which, to a consumer's detriment, takes advantage of the lack of knowledge, ability, experience, or capacity of the consumer to a grossly unfair degree." *Id.* § 17.45(5). "The term 'gross' should be given its ordinary meaning, and therefore, the resulting unfairness must be 'glaringly noticeable, flagrant, complete and unmitigated.' " *Lon Smith & Assocs. v. Key*, 527 S.W.3d 604, 623 (Tex. App. 2017) (quoting *Dwight's Disc. Vacuum Cleaner City, Inc. v. Scott Fetzer Co.*, 860 F.2d 646, 650 (5th Cir. 1988)). "For an action to be unconscionable under the [T]DTPA definition as a matter of law in a class-action lawsuit, the action would have to be detrimental to every class member no matter the circumstances presented." *Peter G. Milne, P.C. v. Ryan*, 477 S.W.3d 888, 914 (Tex. App. 2015). Unconscionability "requires proof of each consumer's knowledge, ability, experience, or capacity." *Lon Smith & Assocs.*, 527 S.W.3d at 624.

The Kansas Consumer Protection Act ("KCPA") proscribes "supplier[s]" from engaging "in any unconscionable act or practice in connection with a consumer transaction." Kan. Stat. Ann. § 50-627(a) (1998). The KCPA provides the

question of whether an act or practice is unconscionable is a question for the court. *Id.* § 50-627(b). While the KCPA does not define unconscionability, it lists examples of certain circumstances a court should consider in determining whether an act or practice is unconscionable. [44] *State ex rel. Stovall v. DVM Enters., Inc.*, 62 P.3d 653, 657 (Kan. 2003). The Kansas Supreme Court also identified ten relevant factors courts could consider in determining whether conduct is unconscionable. [45] *Tomlinson v. Ocwen Loan Servicing, LLC*, Civ. A. No. 15-1105, 2015 WL 7853957, at *4 (D. Kan. Dec. 3, 2015) (citing *DVM Enters.*, 62 P.3d at 658). "When evaluating whether conduct is unconscionable under [the KCPA], courts consider whether the sale price of the product at issue grossly exceeded the price at which similar products were readily obtainable and whether the consumer was able to receive a material benefit from the subject of the transaction." *Nieberding v. Barrette Outdoor Living, Inc.*, 302 F.R.D. 600, 609 (D. Kan. 2014). Determining unconscionability under the KCPA "ultimately depends upon the facts in a given case." *DVM Enters.*, 62 P.3d at 657.

44 In determining whether an act or practice is unconscionable, courts shall consider circumstances including but not limited to the following:

> (1) The supplier took advantage of the inability of the consumer reasonably to protect the consumer's interests because of the consumer's physical infirmity, ignorance, illiteracy, inability to understand the language of an agreement or similar factor; (2) when the consumer transaction was entered into, the price grossly exceeded the price at which similar property or services were readily obtainable in similar transactions by similar consumers; (3) the consumer was unable to receive a material benefit from the subject of the transaction; (4) when the consumer transaction was entered into, there was no reasonable probability of payment of the obligation in full by the consumer; (5) the transaction the supplier induced the consumer to enter into was excessively onesided in favor of the supplier; (6) the supplier made a misleading statement of opinion on which the consumer was likely to rely to the consumer's detriment; and (7) except as provided by K.S.A. 50-639, and amendments thereto, the supplier excluded, modified or otherwise attempted to limit either the implied warranties of merchantability and fitness for a particular purpose or any remedy provided by law for a breach of those warranties.

Kan. Stat. Ann. § 50-627(b) (1998).

45 These ten factors include:

> (1) The use of printed form or boilerplate contracts drawn skillfully by the party in the strongest economic position, which establish industry wide standards offered on a take it or leave it basis to the party in a weaker economic position [citations omitted]; (2) a significant cost-price disparity or excessive price; (3) a denial of basic rights and remedies to a buyer of consumer goods [citation omitted]; (4) the inclusion of penalty clauses; (5) the circumstances surrounding the execution of the contract, including its commercial setting, its purpose and actual effect [citation omitted]; (6) the hiding of clauses which are disadvantageous to one party in a mass of fine print trivia or in places which are inconspicuous to the party signing the contract [citation omitted]; (7) phrasing clauses in language that is incomprehensible to a layman or that divert his attention from the problems raised by them or the rights given up through them; (8) an overall imbalance in the obligations and rights imposed by the bargain; (9) exploitation of the underprivileged, unsophisticated, uneducated and the illiterate [citation omitted]; and (10) inequality of bargaining or economic power.

DVM Enters., 62 P.3d at 658 (alterations in original).

***50** The Utah Consumer Sales Practices Act ("UCSPA") prohibits unconscionable acts or practices "by a supplier in connection with a consumer transaction ... whether it occurs before, during, or after the transaction. Utah Code Ann. § 13-11-5(1) (1973). Whether an act or practice is unconscionable is a question for the court, and, in determining this, "the court shall consider circumstances which the supplier knew or had reason to know." *Id.* §§ 13-11-5(2), -5(3); *see also Gallegos v. LVNV Funding LLC*, 169 F. Supp. 3d 1235, 1245 (D. Utah 2016) (noting "[t]he standard for proving unconscionability [under the UCSPA] is high"). "The UCSPA aims to 'protect consumers from suppliers who commit deceptive and unconscionable sales practices' and 'to encourage the development of fair consumer sales practices.' " *Cotte v. CVI SGP Acquisition Tr.*, Civ. A.

No. 21-00299, 2022 WL 464307, at *2 (D. Utah Feb. 15, 2022) (quoting Utah Code Ann. § 13-11-2(2)-(3)). The doctrine of unconscionability under contract law is applicable in assessing unconscionability under the UCSPA. *See Wade v. Jobe*, 818 P.2d 1006, 1017 (Utah 1991); *see also In re Zetia Ezetimibe Antitrust Litig.*, Civ. A. No. 18-2836, 2019 WL 1397228, at *32 (E.D. Va. Feb. 6, 2019) (noting that Utah courts interpret "unconscionable" conduct under the UCSPA using contract law definitions). "Procedural unconscionability focuses on the manner in which the contract was negotiated and the circumstances of the parties, ... and can be characterized as the 'absence of meaningful choice' and a 'gross inequality of bargaining power.' " *Wade*, 818 P.2d at 1017 (citing *Res. Mgmt. Co. v. Weston Ranch & Livestock Co.*, 706 P.2d 1028, 1041–42 (Utah 1985)). "Substantive unconscionability examines the relative fairness of the obligations assumed; it requires terms 'so one-sided as to oppress or unfairly surprise an innocent party,' ... or 'an overall imbalance in the obligations and rights imposed by the bargain.' " *Id.* (quoting *Res. Mgmt.*, 706 P.2d at 1041; *Bekins Bar V Ranch v. Huth*, 664 P.2d 455, 462 (Utah 1983)).

For many of the same reasons Rule 23(b)(3)'s predominance requirement is not satisfied for Plaintiffs' Proposed Nationwide Classes and Proposed Novo Nordisk and Sanofi Multi-State Classes, Plaintiffs likewise do not satisfy predominance for their Proposed Novo Nordisk and Sanofi Texas Classes, Proposed Kansas Classes, and Proposed Utah Classes because individual questions predominate over any common ones that may exist and the Court is not convinced the essential elements of the putative class members' claims brought under these states' individual consumer protection laws are capable of proof at trial through evidence that is common to the class rather than individual to its members. Determining whether Defendants engaged in unconscionable acts or practices requires an individualized inquiry into the specific facts of each putative class member's particular circumstances. *See, e.g.*, *DVM Enters.*, 62 P.3d at 657 ("Generally, whether an action is unconscionable under the KCPA is a question of law subject to unlimited review. However, the determination of unconscionability ultimately depends upon the facts in a given case. Thus, to a great extent, the determination is left to the sound discretion of the trial court to be determined on the peculiar circumstances of each case."); *Ryan*, 477 S.W.3d at 913–14 (reversing class certification of TDTPA unconscionability claim because "determining whether [defendant's] actions were unconscionable requires evaluation of each member's individual circumstances"); *see also Res. Mgmt.*, 706 P.2d at 1041 (finding for unconscionability, "a court must assess the circumstances of each particular case"); *Frederick v. S. Star Cent. Gas Pipeline, Inc.*, Civ. A. No. 10-1063, 2011 WL 3880902, at *3 (D. Kan. Sept. 2, 2011) ("There are significant distinctions among class members that render the question of unconscionability one that is individual to each purported class member rather than common to the group.... 'A question is not common ... if its resolution turns on a consideration of the individual circumstances of each class member.' " (quoting *Hershey v. ExxonMobil Oil Corp.*, No. 07-1300, 2011 WL 1234883, at *5 (D. Kan. Mar. 31, 2011))); *Haskins v. First Am. Title Ins. Co.*, Civ. A. No. 10-05044, 2014 WL 294654, at *15 (D.N.J. Jan. 27, 2014) (denying motion for class certification after finding the putative class was "not readily ascertainable and that individualized fact-finding [would] overwhelm issues common to the proposed class"); *In re Copley Pharm., Inc.*, 161 F.R.D. 456, 458 (D. Wyo. 1995) (noting "individual issues of causation and damages were present and that those issues were not proper for class adjudication"); *In re Katrina Canal Breaches Consol. Litig.*, 258 F.R.D. 128, 132, 134 (E.D. La. 2009) (finding individual issues predominated over those common to the proposed class where the court found "that individual issues exist[ed] with regards to damages, affirmative defenses, and causation" and noting "[t]he weight of the Fifth Circuit's case law holds that where damages cannot be calculated using a mechanical formula, but instead require individualized assessment, predominance generally does not exist"); *Adams v. Fed. Materials Co.*, Civ. A. No. 05-90-R, 2006 WL 3772065, at *6 (W.D. Ky. Dec. 19, 2006) ("Courts have found that individual issues of damages need not defeat predominance. However, significant individual issues of causation and affirmative defenses, combined with individual issues of damages, may defeat any claims of predominance of common issues. Where the individualized issues will destroy the utility of a class adjudication and necessitate "mini trials" to determine issues relevant to each class member, common issues do not predominate. Combined individual issues of proof regarding liability, causation, defenses, and damages may also defeat predominance. In particular, serious individual issues of causation make a case unsuitable for class adjudication." (citations omitted)).

***51** Assessing each putative class member's claim and determining Defendants' liability under these state statutes would require delving into various individualized factual issues including but not limited to (1) the role that a particular member's insurer and affiliated PBM played in allocating

rebate savings; (2) the decisions a particular member made when selecting an insurance plan(s), or choosing not to be insured, at any time during the applicable class period; (3) the list price at the time of a consumer's purchase, the corresponding net price, and the ultimate purchase price the consumer paid, minus any rebates, coupons, discounts, or other financial assistance; and (4) whether the consumer could have reasonably avoided allegedly overpaying for Defendants' analog insulin products. Setting aside the issue of individual damages (which would likewise require multiple fact-specific individualized inquiries to determine), the Court cannot conceive how Plaintiffs can prove Defendants' liability under the applicable state consumer protection statutes with common evidence and without delving into evidence individual to each putative class member's claims. Accordingly, the Court finds predominance is defeated as to Plaintiffs' Proposed Novo Nordisk and Sanofi Texas Classes, Proposed Kansas Classes, and Proposed Utah Classes, making class certification for these classes under Rule 23(b)(3) unsuitable. [46]

46 Having determined Plaintiffs fail to satisfy Rule 23(b)(3)'s predominance requirement for all of their proposed classes, the Court need not address Rule 23(b)(3)'s superiority requirement.

Therefore, Plaintiffs' motion to certify the Proposed Novo Nordisk Texas Class, the Proposed Sanofi Texas Class, the Proposed Kansas Classes, [47] and the Proposed Utah Classes under Rule 23(b)(3) is **DENIED**.

47 Notwithstanding the present analysis, although Plaintiffs seek certification of single-state classes under the Kansas statute, as Defendants note (ECF No. 576 at 39–40 n.8), the TAC asserts no unconscionability claim under Kansas law, and the Court cannot certify a class regarding claims not pled. (ECF No. 411 ¶¶ 724–31 (alleging "deceptive conduct" and "deceptive practices" in violation of the Kansas CPA).) *See also Anderson v. U.S. Dep't of Hous. & Urban Dev.*, 554 F.3d 525, 529 (5th Cir. 2008) ("The district court's authority to certify a class under Rule 23 does not permit it to structure a class around claims not pled."); *Simington v. Lease Fin. Grp., LLC*, 2012 WL 6681735, at *8 (S.D.N.Y. Dec. 14, 2012) ("This Court cannot certify a class to litigate a claim not pled."). Additionally, based on the parties' joint filing at ECF Nos. 508 and 508-1, the Court understands Plaintiffs are not currently asserting any claims against Sanofi under the Kansas Consumer Protection Act; therefore, the Court has no basis upon which to grant class certification as to Plaintiffs' Proposed Sanofi Kansas Class. Accordingly, Plaintiffs motion to certify the Proposed Kansas Classes is also denied for these additional reasons.

IV. CONCLUSION

For the reasons set forth above, Defendants' Motion to Exclude the Expert Testimony of Dr. Meredith Rosenthal (ECF No. 593) is **GRANTED IN PART and DENIED IN PART,** and Plaintiffs' Motion for Class Certification pursuant to Federal Rule of Civil Procedure 23 (ECF No. 574) is **DENIED**. An appropriate Order follows.

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

PEOPLE of the State of Michigan, Plaintiff-Appellee,
v.
Joshua Edward RUTTY, Defendant-Appellant.

No. 348465
|
September 10, 2020

Macomb Circuit Court, LC No. 2017-000709-FC

Before: Jansen, P.J., and K. F. Kelly and Cameron, JJ.

Opinion

Per Curiam.

***1** Defendant appeals as of right his jury trial convictions of two counts of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(2)(b) (victim under 13 years of age, defendant 17 years of age or older), and two counts of second-degree criminal sexual conduct (CSC-II), MLC 750.520(c)(2)(b) (victim under 13 years of age, defendant 17 years of age or older). Defendant was sentenced to 30 to 50 years' imprisonment for each of the CSC-I convictions, 30 to 50 years' imprisonment for the first count of CSC-II, and 85 to 180 months' imprisonment for the second count of CSC-II. We affirm.

I. FACTUAL BACKGROUND

This action arises from the sexual abuse of two victims, KS and JE. When the abuse occurred, defendant was dating JE's mother. Defendant and JE's mother lived together with defendant's parents and two of JE's half-siblings. JE lived with her father, but spent the weekends with her mother and defendant. Defendant sexually abused JE repeatedly when she was less than 12 years old via digital-vaginal penetration, penile-vaginal penetration, and nonpenetrative oral-vaginal contact.

When JE turned 12 years old, her mother and defendant hosted a birthday party for her at JE's aunt and uncle's house. Also attending the party was JE's cousin, KS, and various other relatives. KS was approximately five years old at the time. During the party, defendant found KS in the basement of the house. While they were in the basement, defendant picked KS up and touched her vagina. Defendant told KS he would kill himself if she told anyone he touched her. Unbeknownst to defendant, JE had walked downstairs and saw him touching KS. Defendant left the basement and KS verified to JE that defendant touched her vagina.

After the birthday party, KS told her mother what defendant had done to her and JE. KS's mother contacted JE's father and told him defendant had sexually abused KS and JE. JE's father reported the sexual abuse to the police, and defendant was arrested and taken into police custody.

II. SEVERANCE OF CHARGES

Defendant first argues he was denied a fair trial when the trial court denied his motion for severance of the charges against him. We disagree.

"Whether joinder is appropriate is a mixed question of fact and law." *People v. Gaines*, 306 Mich. App. 289, 304; 856 N.W.2d 222 (2014). Questions of fact are reviewed for clear error, and questions of law are reviewed de novo. *Id.* "Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake was made." *People v. McDade*, 301 Mich. App. 343, 356; 836 N.W.2d 266 (2013). A trial court's decision on a motion for severance is reviewed for an abuse of discretion. *People v. Girard*, 269 Mich. App. 15, 17; 709 N.W.2d 229 (2005). An abuse of the trial court's discretion "occurs when the trial court chooses an outcome that 'falls outside the range of principled outcomes.' " *People v. March*, 499 Mich. 389, 397; 886 N.W.2d 396 (2016) (citation omitted). The improper joinder of charges may be considered a constitutional violation if it results in the deprivation of a defendant's right to a fair trial. *People v. Williams*, 483 Mich. 226, 231; 769 N.W.2d 605 (2009).

***2** Defendant was charged with two counts of CSC-I and one count of CSC-II in relation to the sexual abuse of JE, as well as one count of CSC-II in relation to the sexual abuse of KS. The charges against defendant were compiled on one felony information from the start of the case. Defendant filed a motion for severance in the trial court, which was denied after

the trial court concluded there was no legal basis for severance of the charges.

MCR 6.120(B), which provides the criteria for joinder of charges, states:

> (B) Postcharging Permissive Joinder or Severance. On its own initiative, the motion of a party, or the stipulation of all parties, except as provided in [MCR 6.120(C)], the court may join offenses charged in two or more informations or indictments against a single defendant, or sever offenses charged in a single information or indictment against a single defendant, when appropriate to promote fairness to the parties and a fair determination of the defendant's guilt or innocence of each offense.
>
> (1) Joinder is appropriate if the offenses are related. For purposes of this rule, offenses are related if they are based on
>
> (a) the same conduct or transaction, or
>
> (b) a series of connected acts, or
>
> (c) a series of acts constituting parts of a single scheme or plan.
>
> (2) Other relevant factors include the timeliness of the motion, the drain on the parties' resources, the potential for confusion or prejudice stemming from either the number of charges or the complexity or nature of the evidence, the potential for harassment, the convenience of witnesses, and the parties' readiness for trial.

Defendant contends the charges should not have been joined because they were not sufficiently related, observing the crimes he allegedly committed took place in different jurisdictions and involved two separate victims. "To determine whether joinder is permissible, a trial court must first find the relevant facts and then must decide whether those facts constitute 'related' offenses for which joinder is appropriate." *Williams*, 483 Mich. at 231. With regard to the matter of jurisdiction, defendant is correct that the incidents occurred in different cities. The incidents involving JE primarily occurred in Warren, Michigan, and the incident involving KS occurred in Roseville, Michigan. However, such a distinction is of minor concern, since both cities are located in Macomb County, where the trial took place. Thus, there is no cross-county jurisdictional issue to contend with herein, and defendant did not argue in the trial court that the Macomb Circuit Court lacked jurisdiction.

Of more pressing concern is whether severance should have been granted where defendant was charged on one felony information for separate incidents of sexual abuse involving KS and JE. Given the lack of chronological or sequential commonality between the crimes against KS and JE, there is little evidence to support a finding that joinder was appropriate under MCR 6.120(B)(1)(a) or (b), but there is evidence to support a finding that joinder was appropriate under MCR 6.120(B)(1)(c) because defendant displayed a common scheme or plan by sexually abusing multiple young girls. Under MCR 6.120(B)(1)(a), joinder is appropriate if the crimes involved the same conduct or transaction. The crimes herein involved similar conduct, but did not take place in the same transaction; rather, they were isolated incidents, suggesting joinder was inappropriate under MCR 6.120(B)(1)(a). Under MCR 6.120(B)(1)(b), joinder is appropriate if the crimes involved a series of connected acts. Again, the crimes against JE and KS were not connected, and the individual incidents of sexual abuse were too isolated to justify joinder under MCR 6.120(B)(1)(b).

***3** However, joinder was nevertheless appropriate under MCR 6.120(B)(1)(c), which allows for the joinder of charges where a series of acts constituted parts of a single plan. Defendant's sexual abuse of KS and JE, although separate incidents, may be considered two parts of a larger scheme or plan to commit sexual abuse. Further, our Supreme Court has stated, "[w]hen the joined counts are logically related, and there is a large area of overlapping proof, joinder is appropriate." *Williams*, 483 Mich. at 237 (quotation marks and citation omitted). There is a logical relationship between defendant's sexual abuse of JE and KS, and further, much of the evidence overlapped in this case, including witness testimony. For example, JE testified about defendant's sexual abuse of KS, and KS testified about defendant's sexual abuse of JE; furthermore, JE's father testified he learned of the sexual abuse of KS and JE from KS's mother, who was in turn told by KS. It would be difficult to separate the timelines and witness testimony such that there would be no overlap between descriptions of the relevant events.

Moreover, even if the two cases had been severed, the prosecution could have sought to introduce evidence from each separate case under MRE 404(b), which governs the admissibility of evidence of other acts. Generally, joinder is permitted if the act of joining charges does not "prejudice the defendant [any] more than he would have been by the admissibility of the other evidence in a separate trial."

Williams, 483 Mich. at 237 (quotation marks and citation omitted). Accordingly, joinder was appropriate under MCR 6.120(B)(1)(c).

Defendant also argues he was denied a fair trial because the joinder of charges was unfairly prejudicial. MCR 6.120(B)(2) gives the trial court permission to deny the joinder of charges on the basis of "the potential for confusion or prejudice." MCR 6.120(B)(2). However, the trial court ultimately has "discretion to [join or] sever related charges on grounds of unfair prejudice." *Girard*, 269 Mich. App. at 18. The joinder of the charges may have had the potential to prejudice defendant, to the extent that evidence from the separate incidents involving JE and KS might suggest defendant had a propensity for sexually abusing young girls. However, "all evidence is somewhat prejudicial to a defendant—it must be so to be relevant." *People v. Magyar*, 250 Mich. App. 408, 416; 648 N.W.2d 215 (2002). There is no evidence the joinder of charges was outcome-determinative, and even if the trial court abused its discretion by failing to sever the charges, "misjoinder may be deemed harmless ... if all or substantially all of the evidence of one offense would be admissible in a separate trial of the other." *Williams*, 483 Mich. at 243 (quotation marks and citation omitted). As previously discussed, even if the charges had been severed, the prosecution could have sought the admission of evidence of the other sexual abuse in each separate trial under MRE 404(b). Overall, defendant has failed to show the joinder of charges prejudiced him such that he was denied a fair trial.

III. EXCLUSION OF EVIDENCE

Defendant argues he was denied the right to a fair trial when the trial court granted the prosecution's motion in limine to exclude evidence JE had made allegations of sexual abuse against defendant's brother. Alternatively, defendant argues defense counsel was ineffective for failing to oppose the prosecution's motion in limine. We disagree.

With regard to the evidentiary issue presented herein, "[t]he decision whether to admit evidence falls within a trial court's discretion and will be reversed only when there is an abuse of that discretion." *People v. Duncan*, 494 Mich. 713, 722; 835 N.W.2d 399 (2013). An abuse of discretion occurs when the trial court "makes an error of law in the interpretation of a rule of evidence," *People v. Jackson*, 498 Mich. 246, 257; 869 N.W.2d 253 (2015), or where the trial court's decision "falls outside the range of reasonable and principled outcomes[.]" *People v. Swain*, 288 Mich. App. 609, 628-629; 794 N.W.2d 92 (2010). Underlying questions of law are reviewed de novo. *People v. Pattison*, 276 Mich. App. 613, 615; 741 N.W.2d 558 (2007).

***4** With regard to the issue of ineffective assistance of counsel, in general, "[w]hether the defendant received the effective assistance of counsel guaranteed him under the United States and Michigan Constitutions is a mixed question of fact and law." *People v. Ackley*, 497 Mich. 381, 388; 870 N.W.2d 858 (2015). When examining a defendant's claim of ineffective assistance of counsel, "this Court reviews for clear error the trial court's findings of fact and reviews de novo questions of constitutional law." *People v. Dixon-Bey*, 321 Mich. App. 490, 515; 909 N.W.2d 458 (2017). However, defendant failed to properly preserve this portion of the issue by filing a motion for a new trial or a *Ginther*[1] hearing in the trial court. *People v. Payne*, 285 Mich. App. 181, 188; 774 N.W.2d 714 (2009). Since this portion of the issue is unpreserved, this Court's review is "limited to mistakes apparent on the record." *Id.*

1 *People v. Ginther*, 390 Mich. 436; 212 N.W.2d 922 (1973).

The evidence at issue herein pertains to allegations of sexual abuse made by JE against defendant's brother. At the time of trial, defendant's brother had been charged with crimes related to JE's allegations, but his case had not been adjudicated. The prosecution asked the trial court to exclude evidence regarding the charges against defendant's brother under the rape-shield statute, MCL 750.520j. MCL 750.520j " 'bars, with two narrow exceptions, evidence of all sexual activity by the complainant not incident to the alleged rape.' " *People v. Adair*, 452 Mich. 473, 478; 550 N.W.2d 505 (1996) (quotation marks and citation omitted). Generally, "evidence of a rape victim's prior sexual conduct with others, and sexual reputation, when offered to prove that the conduct at issue was consensual or for general impeachment is inadmissible." *People v. Hackett*, 421 Mich. 338, 347–348; 365 N.W.2d 120 (1984). The two narrow exceptions in the statute that permit the admission of evidence of the complainant's sexual activity are: "(a) Evidence of the victim's past sexual conduct with the actor[, and] (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease." MCL 750.520j(1).

The evidence that defendant's brother was accused of sexual abuse by JE does not fit into one of the narrow exceptions

to the rape-shield statute. It does not pertain to evidence of JE's past sexual conduct with defendant, nor does it pertain to evidence of sexual activity that would show "the source or origin of semen, pregnancy, or disease." MCL 750.520j(1). Thus, the trial court properly excluded the evidence in accordance with the rape-shield statute.

In some situations, evidence a complainant made sexual abuse allegations against another person in the past may be relevant and admissible if said allegations were false. *Hackett*, 421 Mich. at 348. As this Court has explained:

> [F]alse accusations are relevant in subsequent prosecutions based upon the victim's accusations because the fact that the victim has made prior false accusations of rape directly bears on the victim's credibility and the credibility of the victim's accusations in the subsequent case, and preclusion of such evidence would unconstitutionally abridge the defendant's right to confrontation. [*People v. Williams,* 191 Mich. App. 269, 272; 477 N.W.2d 877 (1991).]

Other scenarios in which such evidence may be admissible include situations where a defendant proffers evidence to show the source of a victim's age-inappropriate sexual knowledge. *People v. Morse*, 231 Mich. App. 424, 436; 586 N.W.2d 555 (1998).

However, evidence defendant's brother was accused of sexual abuse by JE does not fit into these categories. First, defendant presents no evidence the allegations JE made against his brother were false, nor could he have done so at the time of trial, since his brother had not yet been convicted of a crime. Second, no evidence was produced to show JE possessed inappropriate sexual knowledge, or knowledge beyond that of an ordinary a 14-year-old girl. Instead, defendant argues the evidence was relevant to show JE knew how to report sexual abuse, since she had done so in the past, thus calling into question her reasons for failing to immediately report defendant's sexually abusive behavior. However, admitting evidence for such purposes would not be permitted under the rape-shield statute, and does not tend to show JE's accusations against defendant or his brother were false. Thus, defendant cannot show the trial court erred by granting the prosecution's motion in limine to exclude the evidence.

***5** Defendant next argues, in the alternative, defense counsel was ineffective for failing to oppose the prosecution's motion in limine. To establish a claim of ineffective assistance of counsel, a defendant is required to demonstrate "that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *People v. Trakhtenberg*, 493 Mich. 38, 51; 826 N.W.2d 136 (2012). Defense counsel is presumed to be effective, *People v. Frazier*, 478 Mich. 231, 243; 733 N.W.2d 713 (2007), and defendant must be able to "overcome a strong presumption that counsel's performance constituted sound trial strategy," *People v. Riley*, 468 Mich. 135, 140; 659 N.W.2d 611 (2003).

The decision to object or to move for the exclusion of evidence is considered a matter of trial strategy. *People v. Unger*, 278 Mich. App. 210, 253; 749 N.W.2d 272 (2008). Contrary to defendant's assertion that defense counsel failed to object to the motion in limine, the record indicates defense counsel did attempt to object to the motion and the trial court's decision to exclude evidence of the allegations JE made against defendant's brother. Defense counsel asserted the evidence should be admitted because its substance was "not about [JE's] sexual activity," but was instead "about allegations that she's made against third parties." Thus, defendant's argument that defense counsel failed to object to the exclusion of the evidence is incorrect. The fact that defense counsel's objection was unsuccessful does not mean defendant was denied the effective assistance of counsel, and there is no evidence defense counsel's performance fell below an objective standard of reasonableness. *People v. Petri*, 279 Mich. App. 407, 412-413; 760 N.W.2d 882 (2008).

Defendant argues that the trial court afforded defendant the opportunity to make a more specific objection, but defense counsel failed to do so. During the trial court's discussion of the prosecutor's motion in limine, the trial court told defendant, "if you can tell me a specific reason ... why [the evidence] is relevant and why it gets around Rape Shield, then I'll listen to that argument, but at this time I am not going to allow it." The trial court did not give defense counsel a further opportunity to discuss the motion in limine before denying it. However, since the trial court did not err by introducing the evidence, an objection to the introduction of the evidence would have been futile. Defense counsel is not obligated to

make futile objections. *People v. Putman*, 309 Mich. App. 240, 245; 870 N.W.2d 593 (2015), lv. den. 498 Mich. 873 (2015). Thus, defendant was not obligated to further object to the exclusion of the evidence. Additionally, defense counsel's decision not to object may have been a strategic move designed to avoid drawing attention to damaging evidence. See *Unger*, 278 Mich. App. at 242 (stating that declining to raise objections can be consistent with sound trial strategy). Furthermore, even if defense counsel erred by failing to further object to the trial court's exclusion of the evidence at issue, defendant has not presented any evidence to establish that a reasonable likelihood exists that the outcome of the case would have been different if the evidence had been admitted. *People v. Vaughn*, 491 Mich. 642, 671; 821 N.W.2d 288 (2012). Thus, defendant cannot show he was denied the effective assistance of counsel.

IV. PROSECUTORIAL MISCONDUCT

Defendant argues the prosecutor committed prosecutorial misconduct by eliciting testimony regarding KS's credibility and by vouching for the credibility of KS and JE during closing argument. Alternatively, defendant argues defense counsel was ineffective for failing to object to the prosecutor's statements during closing argument. We disagree.

***6** Generally, "[i]ssues of prosecutorial misconduct are reviewed de novo to determine whether the defendant was denied a fair and impartial trial." *People v. Bennett*, 290 Mich. App. 465, 475; 802 N.W.2d 627 (2010). However, to preserve a claim of prosecutorial misconduct, a defendant is required to make a contemporaneous objection that raises the issue of prosecutorial misconduct, and must also request a curative instruction. Defendant did not object to the prosecutor's closing argument on the basis of prosecutorial misconduct. Thus, the issue is unpreserved, and this Court's review is for plain error affecting defendant's substantial rights. *People v. Carines*, 460 Mich. 750, 752-753; 597 N.W.2d 130 (1999). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Id.* at 763. The third aspect "generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Id.* Reversal will only be warranted where the plain error leads to "the conviction of an actually innocent defendant," or where an error affects the "fairness, integrity, or public reputation" of the judicial proceeding. *Id.* at 763-764. Defendant's ineffective assistance of counsel issue is also unpreserved, and thus, this Court's review is "limited to mistakes apparent on the record." *Payne*, 285 Mich. App. at 188.

Defendant argues the prosecutor committed misconduct by eliciting testimony regarding KS's credibility and by vouching for the credibility of KS and JE during closing argument. Alternatively, defendant argues defense counsel was ineffective for failing to object to the prosecutor's statements during closing argument. We disagree.

"[T]he test of prosecutorial misconduct is whether a defendant was denied a fair and impartial trial." *People v. Dobek*, 274 Mich. App. 58, 63; 732 N.W.2d 546 (2007). A defendant's right to a fair trial "can be jeopardized when the prosecutor interjects issues broader than the defendant's guilt or innocence." *Id.* at 63-64. "To determine if a prosecutor's comments were improper, we evaluate the prosecutor's remarks in context, in light of defense counsel's arguments and the relationship of these comments to the admitted evidence." *People v. Seals*, 285 Mich. App. 1, 22; 776 N.W.2d 314 (2009).

Defendant first contends the prosecutor erred by eliciting testimony regarding KS's credibility and character for truthfulness. As an initial matter, this Court notes defendant failed to present this issue in his statement of the issues presented on appeal. Accordingly, this argument is not properly presented for this Court's review. MCR 7.212(C)(5); *Unger*, 278 Mich. App. at 262. Since the issue is not properly before this Court, this Court need not address it. Regardless, defendant's argument lacks merit. Even if this Court were to conclude the testimony was the result of prosecutorial misconduct, "[n]o error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *People v. Watson*, 245 Mich. App. 572, 586; 629 N.W.2d 411 (2001). The trial court instructed the jury that "[t]he lawyers' questions to the witnesses ... are [ ] not ... evidence." Any prejudicial effect of the prosecutor's statements or questions was cured by the inclusion of this instruction.

Defendant next argues the prosecutor committed prosecutorial misconduct by vouching for the credibility of KS and JE during closing argument. Defendant challenges the following portions of the prosecutor's closing argument:

> Those two little girls had absolutely nothing to gain from this testimony. They have absolutely no motivation to lie here.
>
> * * *
>
> [O]ne of your jobs as the jury is ... to weigh and assess the credibility of the witnesses that have taken the stand. So let's talk a little bit about [JE]. [JE] doesn't have any reason to lie in this case, and you can't really argue that she did this for attention because she didn't tell anyone.
>
> * * *
>
> The other thing that [defense counsel] has not addressed is ... their motivation to lie. Why would these girls go the lengths that they have gone to to testify ... to come before you 12 strangers and reiterate this story consistently over the course of—of the past? Why would they do that? [Defense counsel] hasn't given you a reason.

***7** A prosecutor may not "vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness." *People v. Bahoda*, 448 Mich. 261, 276; 531 N.W.2d 659 (1995). However, it is not considered prosecutorial misconduct for a prosecutor to comment "on his own witnesses' credibility during closing argument especially when there is conflicting evidence and the question of the defendant's guilt depends on which witnesses the jury believes." *People v. Thomas*, 260 Mich. App. 450, 455; 678 N.W.2d 631 (2004).

When viewed in context, there is no evidence the prosecutor implied she had any special knowledge about KS's and JE's truthfulness. Instead, the prosecutor was merely commenting on the general credibility and truthfulness of her witnesses, which was not improper under the circumstances, where the prosecutor's case primarily relied on witness testimony. Moreover, any prejudice caused by the prosecutor's remarks was alleviated by a curative instruction. See *People v. Watson*, 245 Mich. App. 572, 586; 629 N.W.2d 411 (2001) (stating that "[n]o error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction."). The trial court instructed the jury, "[t]he lawyers' questions to the witnesses ... are [ ] not ... evidence." Accordingly, any prejudicial effect of the prosecutor's closing statement was cured by the inclusion of the instruction, and defendant has failed to show the prosecutor committed prosecutorial misconduct such that he was deprived of a fair trial.

Defendant also briefly argues defense counsel was ineffective for failing to object to the prosecutor's questions regarding KS's inability to lie and closing statements regarding JE's and KS's credibility. Defendant first argues defense counsel erred by failing to object to the prosecutor's elicitation of testimony from KS's mother regarding KS's inability to lie, and contends such testimony was inadmissible under MRE 608 because KS's credibility had not been previously attacked. As previously discussed, defendant did not raise any questions regarding witness testimony in his statement of the issues on appeal, nor did he raise the question whether defense counsel was ineffective for failing to object. Since the issue has not been properly presented for review, this Court need not address it at length. *Unger*, 278 Mich. App. at 262.

Additionally, as with defendant's earlier argument regarding whether the prosecutor erred by eliciting the challenged testimony, the present argument cannot succeed, regardless of whether it was properly presented for review. The prosecutor never directly asked KS's mother whether KS was a truthful person, or whether KS had the ability to lie. Instead, KS's mother raised the issue of her own volition while explaining how she discovered KS had been sexually abused by defendant. There is little evidence an objection was warranted, and further, little evidence an objection would have been successful. "Defense counsel is "not ineffective for failing to raise meritless or futile objections." *Putman*, 309 Mich. App. at 245. Accordingly, defense counsel was not ineffective for failing to object to this testimony. Additionally, defense counsel's decision not to object may have been a strategic move designed to draw attention away from damaging testimony. See *Unger*, 278 Mich. App. at 242 (stating that failing to raise an objection can be consistent with sound trial strategy). Moreover, defendant has presented no evidence he was prejudiced by defense counsel's failure to object to the testimony of KS's mother, or evidence showing the outcome of the case would have been different if defense counsel had objected. Consequently, defendant has not shown he was deprived of the effective assistance of counsel in this matter.

***8** Defendant also argues he was denied the effective assistance of counsel when defense counsel failed to object to the prosecutor's comments regarding KS's and JE's credibility during closing argument. However, as previously discussed, the prosecution did not commit prosecutorial misconduct by commenting on the credibility of her witnesses during closing argument, particularly where the prosecutor's case

rested almost entirely on the jury's perception of witness testimony. Since the prosecutor did not commit misconduct, defense counsel was not required to object. *Dobek*, 274 Mich. App. at 64; see also *Putman*, 309 Mich. App. at 245 (stating that "[d]efense counsel is "not ineffective for failing to raise meritless or futile objections."). Further, defendant has not shown he was prejudiced by defense counsel's failure to object to the prosecutor's closing argument. Accordingly, defendant was not deprived of the effective assistance of counsel.

Affirmed.

All Citations

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Ronald BROWNLOW and Susan Travis, Plaintiff–Appellant,
v.
McCALL ENTERPRISE INC, d/b/a Paul Davis Restoration of Washtenaw County, Defendant–Appellee.
and
State Farm Fire & Casualty Co, Defendant.

Docket Nos. 306190, 307883.
|
Feb. 12, 2013.

Washtenaw Circuit Court; LC No. 10–000049–NZ.

Before: SHAPIRO, P.J., and GLEICHER and RONAYNE KRAUSE, JJ.

Opinion

PER CURIAM.

***1** In this consolidated appeal, plaintiffs appeal two orders. In docket no. 306190, plaintiffs appeal the order granting summary disposition in favor of defendant McCall Enterprise Inc. (McCall). In docket no. 307883, plaintiffs appeal the order granting attorney fees and costs as case evaluation sanctions. We reverse the order granting summary disposition because the Michigan Consumer Protection Act (MCPA) does apply and plaintiffs have presented sufficient evidence to create a question of fact for a jury regarding whether defendant's actions resulted in damage to plaintiffs' home. We therefore also reverse the trial court's award of attorney fees and costs as case evaluation sanctions.

I. FACTS AND PROCEDURAL HISTORY

A small fire occurred in plaintiffs' microwave on March 12, 2007. The fire filled plaintiffs' house with smoke. Plaintiffs reported the claim to their insurer, State Farm Fire & Casualty Co. who a few days later, retained defendant McCall to remove the lingering smoke odor from plaintiffs' home. Defendant placed an ozone generator [1] in plaintiff's kitchen, turned it on and let it run for more than HOW LONG?24 hours. Plaintiffs stayed elsewhere during this time, and when they returned, the ozone generator was removed and their house was aired out. According to plaintiffs, the smoke odor was gone, but there was significant damage to the inside of the house, particularly to tile and rubber surfaces. They also alleged health problems resulting from the level of ozone and the products of ozone reactions.

[1] The "use of ozone for the removal of indoor contaminants, including odors, evidentially was conceived originally more than 100 years ago. The presumption made to promote ozone for this purpose is that it will oxidize organic compounds to the extent that only carbon dioxide and water vapor remain." Boeniger, *Use of Ozone Generating Devices to Improve Indoor Air Quality,* 56 Am Ind Hyg Assoc J 590–8 (1995).

Plaintiffs filed a complaint against State Farm and McCall, alleging personal injuries and property damage from excessive ozone exposure. Plaintiffs asserted claims of negligence against State Farm and McCall. Additionally, plaintiffs asserted a claim against McCall under the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq.* Plaintiffs' negligence claims against State Farm and McCall were dismissed and plaintiffs do not appeal that dismissal.

Subsequently, McCall filed a motion for summary disposition on plaintiffs' MCPA claim, arguing that plaintiffs could not prove causation and that McCall was exempt from the act under MCL 445.904(1)(a), which provides that the MCPA does not apply to "[a] transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States." The trial court agreed, concluding that the transaction was specifically authorized by McCall's contractor license. McCall then filed a motion for case evaluation sanctions, which was granted. Plaintiffs were ordered to pay costs and fees in the amount of $52,543. Plaintiffs now appeal the summary disposition of their MCPA claim against McCall as well as the case evaluation sanctions.

II. MICHIGAN CONSUMER PROTECTION ACT

In docket no. 306190, plaintiffs argue that that the trial court erred when it granted summary disposition on their claim under the MCPA. A trial court's decision on a motion for summary disposition is reviewed de novo. *Latham v. Barton Malow Co,* 480 Mich. 105, 111; 746 NW2d 868 (2008). When reviewing a motion under MCR 2.116(C)(10), we "consider[ ] the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v. Taylor,* 263 Mich.App 618, 621; 689 NW2d 506 (2004). We "also review[ ] de novo as a question of law the interpretation and application of a statute." *Attorney General v. Merck Sharp & Dohme Corp,* 292 Mich.App 1, 8–9; 807 NW2d 343 (2011).

***2** Under the MCPA, "[u]nfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce are unlawful." MCL 445.903(1). However, MCL 445.904(1)(a) provides that the MCPA does not apply to "[a] transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States." In *Smith v. Globe Life Ins Co,* 460 Mich. 446, 465; 597 NW2d 28 (1999), our Supreme Court explained that

> when the Legislature said that transactions or conduct "specifically authorized" by law are exempt from the MCPA, it intended to include conduct the legality of which is in dispute.... [W]e conclude that the relevant inquiry is not whether the specific misconduct alleged by the plaintiffs is "specifically authorized." Rather, it is whether the general transaction is specifically authorized by law, regardless of whether the specific misconduct alleged is prohibited.

Smith was reaffirmed by the Supreme Court in *Liss v. Lewiston–Richards, Inc,* 478 Mich. 203; 732 NW2d 514 (2007), where the Court stated: "Applying the *Smith* test, the relevant inquiry 'is whether the general transaction is specifically authorized by law, regardless of whether the specific misconduct alleged is prohibited.' " *Id.* at 212, quoting *Smith,* 496 Mich. at 465.

In this case, McCall was hired to clean the air in plaintiffs' home of the odor of smoke. The inquiry is thus whether the general transaction of cleaning a home is specifically authorized by the statute governing McCall's licensure as a residential builder.

> "Residential builder" means a person engaged in the construction of a residential structure or a combination residential and commercial structure who, for a fixed sum, price, fee, percentage, valuable consideration, or other compensation, other than wages for personal labor only, undertakes with another or offers to undertake or purports to have the capacity to undertake with another for the erection, construction, replacement, repair, alteration, or an addition to, subtraction from, improvement, wrecking of, or demolition of, a residential structure or combination residential and commercial structure; a person who manufactures, assembles, constructs, deals in, or distributes a residential or combination residential and commercial structure which is prefabricated, preassembled, precut, packaged, or shell housing; or a person who erects a residential structure or combination residential and commercial structure except for the person's own use and occupancy on the person's property. [MCL 339.2401(a).]

The language of the statute makes no reference to cleaning a home. McCall argues that the when it undertook the remediation of smoke odor, it was engaged in repair and alteration of plaintiffs' home. We disagree. "Repair" and "alteration" are specifically authorized activities under MCL 339.2401(a), but neither term is statutorily defined. Therefore, these terms must be accorded their plain

and ordinary meanings, informed by the context of the surrounding statute. *Grifith v. State Farm Mut Automobile Ins Co,* 472 Mich. 521, 533; 697 NW2d 895 (2005). The statute as a whole defines a residential builder as someone engaged in "construction," and the terms "repair" and "alteration" fall within a list of types of construction—erection, demolition, addition to, etc—that all involve changes to the physical structure of a building.

***3** Therefore, in the context of MCL 339.2401(a), "repair" means to restore the physical structure of a residential structure after decay or damage. And "alteration" means to "modify" the physical structure of a residential building. Here, the ozone generator was not meant to modify or restore the physical structure of plaintiffs' home. Rather, it was supposed to remove the smell of smoke from the house. Defendant conceded that operation of the ozone generator required no special knowledge or skill. The fact that removing the odor was done with an ozone generator rather than a can of room deodorizer does not bring the transaction within the ambit of the licensing requirements for residential builders. McCall argues that the machine removed smoke from the structure of the house, but if that were sufficient to bring this activity within the scope of the statute, so would use of a broom or mop as they remove dirt from the structure of a building. Michigan does not require a license for cleaning or janitorial services, but McCall's argument would practically require providers of such services to be licensed as builders. We decline to distort the law in this manner. Therefore, the trial court erred when it determined that the transaction at issue in this case was exempt from the MCPA.

III. CAUSATION UNDER THE MCPA

McCall also argues that summary disposition was appropriate because plaintiffs could not establish causation under the MCPA. Plaintiffs have not appealed the dismissal of their negligence claims and so the only causation issue relevant on appeal concerns the claim for property damage under the MCPA. However, at the trial level the question of causation as to bodily injury was part and parcel of the causation issue and much of the proofs were addressed to those injuries.

McCall [2] requested that the court bar plaintiffs from "relying upon proofs of claimed ozone exposure" and dismiss the complaint or set the matter for a *Daubert* [3] hearing "at which point the court shall makes [sic] its determination as to the admissibility of expert opinions supporting plaintiffs' contentions regarding alleged injuries and damages caused by exposure to ozone."

2 State Farm was dismissed earlier in the case.

3 *Daubert v. Merrell Dow Pharmaceuticals, Inc,* 509 U.S. 579; 113 S. Ct 2786; 125 L. Ed 2d 469 (1993).

At the conclusion of the hearing, the trial court dismissed the negligence claims, but not the claims under the MCPA, which included only damages to plaintiffs' home and not for personal injury. Subsequently, defendant sought summary disposition on the MCPA claim, the trial court granted the motion and plaintiff appealed.

We "consider[ ] the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh,* 263 Mich.App at 621.

A review of the record reveals that plaintiffs submitted a substantial amount of scientific literature regarding ozone exposure to the trial court. One article references the reactivity of household products to ozone exposure and states: "these heterogeneous reactions have been noted to cause material aging, damage to pigments and damage to cultural artifacts." Poppendieck, et al, *Ozone Reactions with Indoor Materials during Building Disinfection,* 41 Atmospheric Environment 3166–3176 (2007). Another article states, "Heterogeneous reactions involving ozone have a number of undesirable consequences, including cracking of stressed rubber, fading of dyes, damage to photographic materials and deterioration of books. Weschler, *Ozone in Indoor Environments: Concentration and Chemistry,* 10 Indoor Air 269–288 (2000) The articles explain that the damage is a result of reactions that also release chemicals into the air. Other articles noted that ozone interacted with household materials, causing them to release chemicals including formeldahyde into the air, but did not specifically reference any degradation in the function or appearance of the household materials. Moriske, et al, *Concentrations and Decay Rates of Ozone in Indoor Air in Dependence on Building and Surface Materials,* 96, 97 Toxicology Letters 319–323 (1998); Nicolas, et al, *Reactions Between Ozone and Building Products: Impact on Primary and Secondary Emissions,* 41 Atmospheric Environment 3129–3138 (2007). While these latter articles do not directly support plaintiff's position, they tend to confirm that ozone interacts with

household materials in a manner that can change the basic chemical structure of the materials.

***4** Plaintiffs also submitted reports from lay and expert witnesses. Daniel Smith wrote that he installed tile and trim work in plaintiffs' home in 2005, and during a walkthrough on May 29, 2007, after the ozone exposure, noted extensive damage to many surfaces and materials that would require repair or replacement. He did not opine regarding the cause of the damages, but estimated repair costs at $150,000–280,000. Verne Brown stated that, if McCall had done its work properly, the ozone levels in the house would not have been high enough to cause structural damage. In a later affidavit he explained how he concluded that the ozone levels in the house were in fact high enough to cause such damage. Roger Wabeke, while focusing mainly on the health risks of ozone, did opine that McCall should have warned plaintiffs of possible damage to materials from ozone exposure. In addition, plaintiffs provided deposition testimony from defendant's employee that the ozone generator placed in their home by McCall had been set at level "8" on a scale of 0 to 10. Defendant's owner testified that he was aware of the possibility of harm from ozone to humans and building materials, but did not know what levels could cause such harm. Finally, Norbert Schiller testified during the *Daubert* hearing that a study done in the home some time after the incident did find levels of formaldehyde that were "fairly high, above what one would expect in a normal residence."

In response to McCall's final motion for summary disposition, the trial court held that because plaintiffs could not establish the amount of ozone that had been in their home, they could not prove there had been enough ozone to cause the alleged damages. Under these circumstances, however, plaintiffs do not need to establish the precise amount of ozone that McCall released into their home in order to establish that the ozone caused the damage. The trial court found that there was sufficiently reliable information to allow testimony that ozone can cause damage to building materials, stating "it was clear that ozone might have a deleterious effect if it reaches a certain level. And, there was certainly identification of literature that would identify that." The literature and expert reports provided by plaintiffs certainly support the conclusion that ozone can damage household materials. McCall does not dispute that ozone can cause damage to building materials. It is also undisputed that McCall placed an ozone generator in plaintiffs' home, turned it on at a high setting, and left it running for a weekend. Plaintiffs further allege that when they left at the beginning of the weekend in question their home was in good condition, but after it had been exposed to ozone over the weekend a variety of exposed surfaces—including carpet, upholstery, wood, brick, and plastic—had been damaged. Among other things, finish had come off of wood, furniture changed color, bricks were crumbling, plastic had aged, and carpets were sticky. Verne Brown's affidavit states that these deteriorations of materials are consistent with ozone exposure, and one of the articles submitted by plaintiff[4] states that ozone reactions "have been noted to cause material aging, damage to pigments, and damage to cultural artifacts," which is entirely consistent with the damages alleged by plaintiffs. In his affidavit, Verne Brown also calculated the ozone concentrations produced in plaintiffs' home, and concluded that the concentration was extremely high. The record does not contain any evidence contrary to plaintiffs' testimony, and defendants do not directly challenge the existence of these physical changes on appeal, though they do not concede that any damages occurred over the weekend.[5]

4 Poppendieck, et al, *Ozone Reactions with Indoor Material During Building Disinfection,* 41 Atmospheric Environment, 3166–3176 (2007).

5 Defendant McCall suggests that the trial court's ruling on the motion in limine, which was not appealed by plaintiff, precludes any finding that plaintiffs have established causation. However, the trial court only barred testimony regarding the level of ozone in the house *after plaintiffs returned* to their home, which was after the ozone generation had ended and the home had been aired out. The court correctly concluded, "There's been no evidence on this record to support a claim that any hazardous or dangerous levels of ozone remained in the home after the ozone generator was in fact turned off." However, the court did not bar testimony that ozone can cause the type of property damages alleged in this case or that there was a sufficient concentration of ozone during the period the generator was operating to cause such damages.

***5** Thus, plaintiffs have provided scientific evidence that high levels of ozone damage building materials, that there was a high level of ozone in their house, and that their house suffered damages consistent with exposure to high levels of ozone during the time the exposure occurred. Further, no witness, lay or expert, has advanced any possible cause of the alleged property damages other than the ozone exposure.

Therefore, there is sufficient evidence for a jury to conclude that the ozone generator caused the damage to plaintiffs' house without resort to speculation.

IV. CONCLUSION

In Docket No. 306190, we conclude that the trial court erred when it granted summary disposition in favor of McCall on plaintiffs' MCPA claim for damages to their house. We therefore also reverse the award of case evaluation sanctions in Docket No. 307883.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

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United States District Court, E.D. Michigan, Southern Division.

Matthew RAU, et al., Plaintiffs,

v.

CALVERT INVESTMENTS, LLC, Defendant.

Case No. 19-10822
|
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OPINION & ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS (Dkt. 11)

MARK A. GOLDSMITH, United States District Judge

***1** This matter is before the Court on Defendant Calvert Investments, LLC's ("Calvert") motion to dismiss Plaintiffs' First Amended Complaint (Dkt. 11). The motion has been fully briefed. Because oral argument will not assist in the decisional process, the motions will be decided based on the parties' briefing. See E.D. Mich. LR 7.1(f)(2); Fed. R. Civ. P. 78(b). This action arises from Calvert's initiation of foreclosure proceedings following Plaintiffs' alleged default on two separate mortgages. Plaintiffs assert a variety of claims alleging various defects, irregularities, and fraudulent representations underlying the mortgage transactions and foreclosure proceedings. For the reasons stated below, the Court grants in part and denies in part Calvert's motion to dismiss.

I. BACKGROUND

Since 2014, Plaintiff Matthew Rau has executed several mortgage loan transactions with Calvert as the lender. Am. Compl. ¶ 11 (Dkt. 9). Plaintiffs allege that in 2015, Calvert advised Rau to create a limited liability company to execute a mortgage agreement unrelated to the present action, explaining that doing so would enable Calvert to avoid certain state and federal regulations of consumer loans. Id. ¶ 14. Acting in accordance with Calvert's request, Rau created Plaintiff Mchrenzie Investments, LLC ("Mchrenzie"). Id. ¶ 15.

The present action stems from two mortgage loan transactions between the parties. With respect to the first mortgage loan, Calvert agreed to provide financing for the purchase of real property located at 427 Windmill Point Drive, Flushing, Michigan (the "Windmill Property"), which Plaintiffs allege Rau intended to use as his primary residence. Id. ¶ 22. Although Calvert allegedly knew that the Windmill Property was to be used as Rau's residence, Calvert required that the transaction be executed by Mchrenzie. Id. ¶ 23. On June 30, 2017, Mchrenzie and Calvert executed loan agreement under which Calvert loaned Mchrenzie $80,000, secured by a commercial real estate mortgage (the "Windmill Mortgage") on the Windmill Property. Windmill Promissory Note, Ex. 1 to Am. Compl. [1]

[1] Although the mortgage and loan agreement documents attached as exhibits to Plaintiffs' Amended Complaint are not signed, Calvert attached signed versions of all documents as Exhibits A.1 through A.7 to its motion (Dkt. 11-2).

Under the terms of the Windmill Mortgage, Mchrenzie was required to pay any taxes assessed against the Windmill Property. Windmill Mortgage ¶ 5, Ex. 2 to Am. Compl. In the event of Mchrenzie's default on any of its obligations under the Windmill Mortgage, Calvert was authorized, "without demand or notice, [to] pay any taxes," and to add the amount paid to Mchrenzie's total indebtedness. Id. ¶ 13. Additionally, in the event of default, Calvert was authorized, "without notice, and at its option," to accelerate the entire indebtedness due and payable and, as permitted by law, to foreclose upon the Windmill Property. Id. ¶ 14. Mchrenzie separately executed an acknowledgement confirming that Mchrenzie would be responsible for paying taxes and that the property would not be owner-occupied as a primary residence. See Windmill Buyers Acceptance and Acknowledgement, Ex. A.3 to Def. Mot. (Dkt. 11-2). However, Plaintiffs allege that Rau lived at the Windmill Property for a period of time until November 2017. Am. Compl. ¶ 31.

***2** In connection with the second mortgage loan, Calvert agreed to finance Rau's purchase of real property located at 604 Warren Avenue, Flushing, Michigan (the "Warren Property"). Id. ¶¶ 32-33. On November 16, 2019, Rau and Calvert executed a loan agreement under which Calvert loaned Rau $115,000, secured by a mortgage (the "Warren Mortgage") on the Warren Property. See Warren Promissory Note, Ex. 4 to Am. Compl. The Warren Mortgage also required Rau to make an additional one-time payment of $12,500 to Calvert. Id. Although the terms of the Warren Mortgage provided that Rau was required to pay Calvert a sum to be held in escrow for the payment of taxes assessed against the Warren Property, Warren Mortgage ¶ 2, Ex. 5 to Am. Compl., the parties executed a disclaimer of this provision, under which Calvert waived the escrow requirement, Limited Waiver, Ex. A.6 to Def. Mot. (Dkt. 11-2). Accordingly, the operative portion of the Warren Mortgage provided that Rau was to pay taxes "on time directly to the person owed payment." Warren Mortgage ¶ 4.

In the event that the Warren Property became subject to a lien arising from the nonpayment of taxes, Calvert was authorized to provide Rau notice of the lien and ten days in which to cure. Id. If Rau defaulted on any obligations under the Warren Mortgage, Calvert was authorized to take any action necessary to protect its interest, including paying any sums secured by a lien and to add the amount paid to Rau's indebtedness. Id. ¶ 7. In the event of default, Calvert was required to provide notice of the default to Rau and to permit him thirty days from the date of the notice in which to cure the default. Id. ¶ 21. If Rau failed to cure the default, Calvert was authorized to accelerate the entire indebtedness due and payable and to foreclose upon the Warren Property. Id.

Calvert alleges that Plaintiffs defaulted on their respective loans by failing timely to pay the 2018 summer property taxes on the Windmill and Warren Properties. Def. Mot. at 4. Calvert also asserts that Rau was delinquent in remitting the one-time payment of $12,500 owed under the Warren Mortgage. Id. On October 11, 2018, Calvert mailed to Rau a notice that Calvert had paid overdue property taxes on both the Windmill and Warren Properties and that the amounts paid would be added to the principal balances on the respective properties. 10/11/18 Letter, Ex. 6 to Am. Compl. Plaintiffs allege that they received this letter on October 15, 2018, after Rau attempted to pay the property taxes on both properties and discovered that they had already been paid. Am. Compl. ¶¶ 50-51. As conceded in the Amended Complaint, Calvert paid the 2018 summer property taxes on both properties within two weeks of the original due date; however, Plaintiffs allege that this payment was made before the taxes became "delinquent." Id. ¶¶ 107-108. Plaintiffs also allege that despite their offers to pay Calvert the full amount of property taxes owed, Calvert refused to accept payment. Id. ¶ 60.

On October 31, 2018, Calvert mailed to Plaintiffs a notice of mortgage sale stating that a foreclosure sale on the Windmill Property was to occur on December 5, 2018. Windmill Notice of Mortgage Sale, Ex. 7 to Am. Compl. After receiving the notice, Plaintiffs again offered to pay the property taxes; however, Calvert allegedly continued to refuse the payments. Am. Compl. ¶¶ 57-58. A sheriff's sale of the Windmill Property took place on January 9, 2019, see Sheriff's Deed on Mortgage Sale, Ex. B to Def. Mot. (Dkt. 11-3), but Mchrenzie redeemed the property on June 19, 2019, Redemption Receipt, Ex. C to Def. Mot. (Dkt. 11-4).

On January 4, 2019, Calvert mailed to Rau a notice of default with respect to the Warren Property. Warren Default Letter, Ex. 8 to Am. Compl. The notice specified that Rau had defaulted by failing to remit payment for $12,500 and by failing to pay the property taxes. Id. Therefore, Calvert provided Rau thirty days, until February 11, 2019, to cure the default by submitting these payments. Id. Rau's counsel responded by letter dated January 24, 2019, noting an error in the amount Calvert stated was owed in property taxes and requesting the payment receipts. 1/24/19 Letter, Ex. 9 to Am. Compl. In a letter dated January 29, 2019, Calvert acknowledged that the amount of taxes owed was misstated in the notice of default and enclosed copies of the paid tax receipts. 1/29/19 Letter, Ex. 10 to Am. Compl. (Dkt. 10). However, Calvert concluded that the mistake did not invalidate the notice or extend the thirty-day cure period. Id. Though Plaintiffs allege that a sheriff's sale on the Warren Property was scheduled to take place on March 20, 2019, there is no indication in the record regarding whether this sale actually occurred. See Am. Compl. ¶ 66.

***3** In the present action, Plaintiffs assert claims alleging: (1) various violations of the Real Estate Settlement Procedures Act ("RESPA"), 12 C.F.R. § 1024.1 et seq., and the Truth in Lending Act ("TILA"), 12 C.F.R. § 1026.1, et seq. (Counts I, II, and III); (2) breach of contract (Count IV); (3) breach of the covenant of good faith and fair dealing (Count VI); (3) fraud (Count VII); (4) violations of the Michigan Consumer Protection Act ("MCPA"), Mich. Comp. Laws § 339.601 et seq. (Count VIII); (5) promissory estoppel (Count IX); and (6) wrongful foreclosure (Count X).[2] Relevant to many of

Plaintiffs' claims is the allegation that although Calvert knew Rau intended to reside at the Windmill Property, it wrongfully disguised the Windmill Mortgage as a commercial mortgage in order to circumvent certain state and federal regulations of consumer mortgages. See, e.g., Am. Compl. ¶¶ 117-120.

2 Plaintiffs do not assert a Count V in their Amended Complaint.

Defendant has filed a motion to dismiss, which will be granted in part and denied in part.

II. STANDARD OF REVIEW

On a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), "[t]he defendant has the burden of showing that the plaintiff has failed to state a claim for relief." Directv, Inc. v. Treesh, 487 F.3d 471, 476 (6th Cir. 2007) (citing Carver v. Bunch, 946 F.2d 451, 454-455 (6th Cir. 1991)), cert. denied, 552 U.S. 1311 (2008). To survive a Rule 12(b)(6) motion, the plaintiff must allege sufficient facts to state a claim to relief above the speculative level, such that it is "plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). The plausibility standard requires courts to accept the alleged facts as true, even when their truth is doubtful, and to make all reasonable inferences in favor of the plaintiff. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009); Twombly, 550 U.S. at 555-556.

Evaluating a complaint's plausibility is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Iqbal, 556 U.S. at 679. Although a complaint that offers no more than "labels and conclusions," a "formulaic recitation of the elements of a cause of action," or "naked assertion[s]" devoid of "further factual enhancement" will not suffice, id. at 678, it need not contain "detailed factual allegations," Twombly, 550 U.S. at 555; see also Erickson v. Pardus, 551 U.S. 89, 93 (2007) ("[S]pecific facts are not necessary...."). Rather, a complaint needs only enough facts to suggest that discovery may reveal evidence of illegality, even if the likelihood of finding such evidence is remote. Twombly, 550 U.S. at 556. Thus, a motion to dismiss "should not be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Directv, 487 F.3d at 476.

"In determining whether to grant a Rule 12(b)(6) motion, the court primarily considers the allegations in the complaint, although matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint, also may be taken into account." Amini v. Oberlin College, 259 F.3d 493, 502 (6th Cir. 2001) (quoting Nieman v. NLO, Inc., 108 F.3d 1546, 1554 (6th Cir. 1997)) (emphasis omitted). Further, "[D]ocuments that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to her claim." Weiner v. Klais and Co., Inc., 108 F.3d 86, 89 (6th Cir. 19997) (quoting Venture Assocs. Corp. v. Zenith Data Sys. Corp., 987 F.2d 429, 431 (7th Cir. 1993)). "Supplemental documents attached to the motion to dismiss do not convert the pleading into one for summary judgment where the documents do not 'rebut, challenge, or contradict anything in the plaintiff's complaint.' " Erve v. Henry Ford Cmty. College, No. 13-4705309, 2014 WL 4705309, at *2 (E.D. Mich. Sept. 22, 2014) (quoting Song v. City of Elyria, 985 F.2d 840, 842 (6th Cir. 1993)).

III. DISCUSSION

A. Count I – Violation of 12 C.F.R. § 1024.35(e) (RESPA)

***4** In Count I, Plaintiffs allege that Calvert, in violation 12 C.F.R. § 1024.35(e), failed to respond properly to the notice of error sent by Rau's counsel on January 24, 2019, regarding the erroneous amount of unpaid property taxes identified in the default letter with respect to the Warren Property. Calvert contends that this claim must be dismissed because Plaintiffs have not pleaded any facts that would demonstrate that the loan was a federally related mortgage loan.

Under 12 C.F.R. § 1024.35(e), a servicer of a loan is required to respond to a notice of error from a borrower by either (1) correcting the error identified by the borrower or (2) after conducting a reasonable investigation, notifying the borrower why no error has occurred. The term "error" encompasses a number of specific actions and oversights set forth in § 1024.35(b), and is more generally defined in the catchall provision as "[a]ny other error relating to the servicing of a borrower's mortgage loan," 12 C.F.R. § 1024.35(b)(11) (emphasis added). "Servicing," in turn, is defined as "receiving any scheduled periodic payments from a borrower pursuant to the terms of any federally related mortgage loan ... and making the payments to the owner of the loan

or other third parties of principal and interest....” 12 C.F.R. § 1024.2(b).

Calvert contends that Plaintiffs have not alleged facts demonstrating that the Warren Mortgage is a federally related mortgage loan. A “federally related mortgage loan” is a loan secured by residential real property that meets one of the criterion listed at 12 C.F.R. § 1024.2(b). Relevant to the present case is the requirement that a federally related mortgage loan “[i]s made in whole or in part by a ‘creditor,’ as defined in section 103(g) of the Consumer Credit Protection Act (15 U.S.C. 1602(g)), that makes or invests in residential real estate loans aggregating more than $1,000,000 per year.” Id. A “creditor” is defined under 15 U.S.C. § 1602(g) as “a person who both (1) regularly extends, whether in connection with loans, sales of property or services, or otherwise, consumer credit which is payable by agreement in more than four installments or for which the payment of a finance charge is or may be required, and (2) is the person to whom the debt arising from the consumer credit transaction is initially payable on the face of the evidence of indebtedness....”

Cases considering whether a RESPA claim was sufficiently pleaded have held that alleging that a loan was a federally related mortgage loan, without further factual elaboration, was sufficient. Gardner v. First Am. Title Ins. Co., 294 F.3d 991, 994 (8th Cir. 2002); Teeuwissen v. JP Morgan Chase Bank, NA, 902 F. Supp. 2d 826, 836 (S.D. Miss. 2011) (dismissing a RESPA claim where a plaintiff failed to allege in his complaint that his mortgage loan was a federally related mortgage loan).

Here, Plaintiffs’ pleadings founder, because they do not allege that the Warren Mortgage is a federally related mortgage loan. Nor do Plaintiffs allege facts from which this Court could infer the Warren Mortgage is a federal related mortgage loan. Plaintiffs allege in their Amended Complaint that Calvert has issued between one and thirteen mortgages per year from 2011 through 2019, summarily concluding that “Calvert is clearly a ‘creditor’ within the meaning of TILA and RESPA.” Id. ¶¶ 67-68. However, Plaintiffs do not allege that Calvert is a creditor under 15 U.S.C. § 1602(g) or that Calvert's real estate loans aggregate more than $1,000,000 per year.

***5** Plaintiffs, therefore, have not sufficiently alleged either that the Warren Mortgage was a federally related mortgage loan or facts that would permit this Court to conclude that the Warren Mortgage was a federally related mortgage loan. Accordingly, dismissal of Count I is proper.

B. Counts II and III

1. Consumer Versus Commercial Loans

Calvert contends that because the regulations set forth in RESPA and TILA apply only to consumer loans, Counts II and III of Plaintiffs’ Amended Complaint are subject to dismissal to the extent they are premised on the Windmill Mortgage, a commercial mortgage.

Calvert is correct that RESPA and TILA do not apply to commercial loans. See 12 C.F.R. §§ 1024.5(b)(2) (exempting from RESPA regulations loans for business, commercial, or agricultural purposes); § 1026.1(c)(1)(i) (limiting coverage of TILA to extensions of credit to consumers), and § 1026.3(a) (exempting from TILA regulations extensions of credit primarily for business or commercial purposes). Under TILA, a consumer is defined as “a natural person,” 12 C.F.R. § 1026(a)(11), and a consumer loan is defined as one extended “primarily for personal, family, or household purposes,” 12 C.F.R. § 1026.2(a)(12).

There is no dispute in the present action that the Windmill Mortgage was executed by Mchrenzie, a limited liability company, and not a natural person. Nor is there any dispute that the Windmill Mortgage, on its face, is identified as a commercial real estate mortgage. However, Plaintiffs contend that RESPA and TILA regulations nonetheless apply to the Windmill Mortgage, because it is a consumer loan disguised by Calvert as a commercial loan in order to circumvent state and federal regulations of consumer loans.

In support of this theory, Plaintiffs cite Sloan v. Urban Title Servs., Inc., 689 F. Supp. 2d 123 (D.D.C. 2010). In Sloan, the loan documents at issue characterized the loan as a commercial loan between the lender and a limited liability company—of which the plaintiff was the sole shareholder. Id. at 127-128. The plaintiff maintained that the loan should be construed as a personal residential loan as opposed to a commercial loan under two alternate theories. First, she alleged that she signed documents related to a consumer loan and not a commercial loan and that the documents describing the loan as commercial were fraudulently obtained by forgery. Id. at 128. Second, the plaintiff alleged that even assuming she did sign the commercial loan documents, the loan was “an illegal consumer residential loan impermissibly disguised as a commercial loan in order to avoid fair lending

laws and disclosure requirements." Id. Because the parties presented differing accounts regarding the formation of the limited liability company and the execution of the loan, the court determined that whether the loan was commercial or consumer in nature presented a question of fact. Id.

Calvert attempts to distinguish Sloan by arguing that the case was premised on the allegation that the plaintiff's signature on the commercial loan documents was forged. Def. Reply at 2 (Dkt. 13). As described above, the plaintiff's allegation in Sloan that her signature was forged was distinct from her allegation that, even if she did sign the commercial loan, it was a disguised consumer loan. 689 F. Supp. 2d at 128. The court declined to grant summary judgment on either theory. Id. Sloan, therefore, supports Plaintiffs' theory that RESPA and TILA apply to the Windmill Mortgage, even though it is identified as a commercial mortgage on its face.

***6** Ultimately, in determining whether a transaction was primarily consumer or commercial in nature, courts "must examine the transaction as a whole and the purpose for which the credit was extended." Riviere v. Banner Chevrolet, Inc., 184 F.3d 457, 462 (5th Cir. 1999). Plaintiffs have alleged that Calvert advised Rau in 2015 to form a limited liability company. Am. Compl. ¶ 14. Plaintiffs have also alleged that Calvert was aware at the time the Windmill Mortgage was executed that Rau intended to use the Windmill Property as his primary residence—and that Rau did, in fact, reside at the property for a period of time. Id. ¶¶ 22-23, 31. However, Plaintiffs allege that Calvert required Mchrenzie to execute the mortgage in order to circumvent the regulations applicable to consumer mortgages. Id. ¶ 24. Taken as true, these facts are sufficient to raise a plausible claim that the Windmill Mortgage was a consumer mortgage disguised as a commercial transaction and that, consequently, RESPA and TILA apply. Although Calvert maintains that the Windmill Mortgage was executed by Rau, a licensed realtor, on behalf of his business, see Def. Reply at 5, the Court must accept as true the facts pleaded by Plaintiffs, Iqbal, 556 U.S. at 678.

Therefore, dismissal of Plaintiffs' RESPA and TILA claims set forth in Counts II and III is not warranted on the ground that the Windmill Mortgage is commercial in nature.

2. Count II – Violation of 12 C.F.R. § 1026.41 (TILA)

Count II alleges that from the inception of the Windmill and Warren Mortgages, Calvert has failed to provide periodic mortgage statements regarding either mortgage, in violation of 12 C.F.R. § 1026.41.

Calvert first contends that this claim is time-barred to the extent that it relates to any alleged violation prior to March 20, 2018. Under TILA, an action seeking damages for an alleged violation must be brought "within one year from the date of the occurrence of the violation." 15 U.S.C. § 1640(e); see also Coyers v. HSBC Mortg. Servs., Inc., 701 F.3d 1104, 1109 (6th Cir. 2012). Plaintiffs initiated the present action on March 20, 2019. Accordingly, Calvert contends that the claim for damages is time-barred as to any alleged violations of the regulation occurring before March 20, 2018. Plaintiffs concede with respect to Count II that "[t]he one-year limitations period for the damages claim would cover damages resulting from the failure to send monthly statements from March 20, 2018, to March 20, 2019." Pls. Resp. at 10 (Dkt. 12). Any claim for damages arising from Calvert's alleged violation of 12 C.F.R. § 1026.41 are, therefore, limited to violations occurring after March 20, 2018.

Calvert next argues that Count II must be dismissed in its entirety because Calvert is a "small servicer" that is exempt from the requirements of this regulation. Indeed, 12 C.F.R. § 1026.41(e)(4) provides that small servicers are exempted from the requirement of providing consumers with periodic mortgage statements. A "small servicer" is defined, in relevant part, as a servicer that "[s]ervices, together with any affiliates, 5,000 or fewer mortgage loans, for all of which the servicer (or an affiliate) is the creditor or assignee." 12 C.F.R. § 1026.41(e)(4)(ii)(A). Calvert relies on the affidavit of its founder and sole member Mark Calvert, in which he avers that Calvert has never serviced more than twenty-one loans at any given time and currently services eleven loans. Calvert Aff. ¶ 16, Ex. A to Def. Mot. (Dkt. 11-2).

In deciding Rule 12(b)(6) motions, courts are constrained to consider only the allegations in the complaint, matters of public record, and exhibits attached to the complaint. Amini, 259 F.3d at 502. "[D]ocuments that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to her claim." Weiner, 108 F.3d at 89 (citation and internal quotation marks omitted). Because Mark Calvert's affidavit is neither referenced in Plaintiffs' complaint nor central to their claims, it may not be considered by the Court at this stage of the litigation. Calvert's argument is, therefore, unavailing. Although dismissal of Count II in its entirety is not warranted,

the claim is limited to the recovery of damages stemming from violations occurring after March 20, 2018.

3. Count III – Violation of 12 C.F.R. §§ 1026.19(e) and 1026.37 (TILA)

***7** Count III alleges that Calvert failed to provide certain disclosures regarding the Windmill and Warren Mortgages at the time those transactions took place, as required under 12 C.F.R. §§ 1026.19(e) and 1026.37.

Calvert first contends that this claim is time-barred under the one-year limitations period applicable to actions asserting violations of TILA. See 15 U.S.C. § 1640(e). The loan transaction for the Windmill Mortgage was completed on June 30, 2017, Windmill Mortgage ¶ 5, Ex. 2 to Am. Compl., and the loan transaction for the Warren Mortgage was completed on November 16, 2017, Warren Mortgage ¶ 2, Ex. 5 to Am. Compl. Therefore, Calvert maintains that the limitations periods with respect to the Windmill and Warren Mortgages expired on June 30, 2018, and November 16, 2018, respectively. The present action, however, was not filed until March 20, 2019. Plaintiffs respond that Count III sets forth a claim seeking rescission of the Windmill and Warren Mortgages—a claim governed by a three-year statute of limitations. Pls. Resp. at 10-11. [3]

[3] Plaintiffs, therefore, indirectly concede that any claim for damages would be time-barred under the one-year statute of limitations.

A debtor's right under TILA to rescind a transaction involving a security interest on his residence is governed by 15 U.S.C. § 1635. Under 15 U.S.C. § 1635(f), "[a]n obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first." However, the right of rescission set forth under § 1635 does not extend to a "residential mortgage transaction," 15 U.S.C. § 1635(e)(1), defined as "a transaction in which a mortgage ... is created or retained against the consumer's dwelling to finance the acquisition or initial construction of such dwelling," 15 U.S.C. § 1602(x) (emphasis added).

As discussed above, the Court must assume that the Windmill Mortgage is a consumer mortgage in order for TILA to apply. Accepting the Plaintiffs' pleadings as true, both the Windmill and Warren Mortgages are residential mortgage transactions, because they involve mortgages against Rau's residences created to finance the acquisition of the properties. Am. Compl. ¶¶ 22, 25, 31-33. Plaintiffs thus cannot state a claim seeking to rescind either the Windmill or Warren Mortgages. Moreover, Plaintiffs concede that any claim for damages is time-barred under the statute of limitations. Therefore, Count III must be dismissed because a claim for damages is time-barred and because Plaintiffs fail to state a viable claim seeking rescission.

C. Count IV – Breach of Contract

Count IV asserts that Calvert breached the Windmill and Warren Mortgages by (1) paying the property taxes before those taxes became delinquent; (2) failing to provide notice of its intent to pay the property taxes; (3) foreclosing on the properties when Plaintiffs had not defaulted; and (4) foreclosing on the properties without affording Plaintiffs an opportunity to cure and in spite of Plaintiffs' offers to pay the taxes. Am. Compl. ¶¶ 107-108. Calvert seeks dismissal of Plaintiffs' breach of contract claim on the ground that Plaintiffs have failed to identify any specific terms of the contracts allegedly breached.

***8** Although Calvert is correct that Plaintiffs have not identified the exact provisions they claim were breached, they have sufficiently alleged the substance of the breaches such that the provisions are readily identified in the Warren Mortgage. Specifically, the Warren Mortgage provides as follows:

> If Lender determines that any part of the Property is subject to a lien which may attain priority over this Security Instrument, Lender may give Borrower a notice identifying the lien. Borrower shall satisfy the lien or take one or more of the actions set forth above within 10 days of the giving of notice.

Warren Mortgage ¶ 4, Ex. 5 to Am. Compl. Additionally, the Warren Mortgage authorized Calvert to protect its rights in the property as follows:

> If Borrower fails to perform the covenants and agreements contained in this Security Instrument ... then Lender may do and pay for whatever is necessary to protect the value of the Property and Lender's rights in the Property. Lender's actions may include paying any sums secured by a lien which has priority over this Security Instrument.

Id. ¶ 7. Finally, in the event of Rau's default, the Warren Mortgage required Calvert to give notice to Rau before either accelerating payment of the debt or invoking the power of sale. Id. ¶ 21. This notice was required to specify the following:

> (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument and sale of the Property.

Id.

Under the Warren Mortgage, Rau was obligated to pay all taxes and assessments "on time directly to the person owed payment." Id. ¶ 4 (emphasis added). The meaning of the term "on time" is ambiguous, as it is reasonably susceptible to differing interpretations. See Cole v. Ladbroke Racing Mich., Inc., 614 N.W.2d 169, 176 (Mich. Ct. App. 2000). Plaintiffs allege there is a distinction between the date taxes are designated as "due" and the date they achieve "delinquent" status. See Am. Compl. ¶¶ 107-108. Thus, the requirement that taxes be paid "on time" could be interpreted as either (1) requiring payment of taxes by the date they become due or (2) requiring payment of taxes before they achieve delinquent status. Rau alleges that Calvert paid the taxes on the Warren Property within two weeks of their original due date and before they became delinquent. Id. Thus, Rau plausibly alleges that he was not in default of his obligation to pay taxes under the Warren Mortgage.

As set forth above, Calvert's authority to pay any sums secured by a tax lien did not become operative unless Rau failed to perform his obligations under the Warren Mortgage, thereby giving rise to a lien. Here, Rau has alleged that he did not fail to discharge his obligation to pay the taxes on the Warren Property "on time," as the unpaid taxes had not achieved delinquent status, let alone given rise to a lien. Further, in the event Calvert determined that the Warren Property was subject to a tax lien, the Warren Mortgage provided that Calvert "may give" Rau notice of the lien and ten days in which to cure. See Warren Mortgage ¶ 4. Whether Calvert was obligated to afford Rau a notice of a lien and ten days in which to cure is ambiguous—although the provision is stated in permissive terms, it is also reasonable to construe it as mandatory, especially in light of the provision requiring notice of a default. Accordingly, Rau has plausibly alleged that Calvert breached the Warren Mortgage by paying the property taxes before they became delinquent and by failing to provide Rau notice of its intent to pay.

***9** Finally, the Warren Mortgage provides that Calvert's authority to accelerate payments and to invoke the power of sale were contingent on Rau's default and Calvert's provision of both a notice of default and an opportunity to cure. While not pleaded clearly, the Amended Complaint suggests that Calvert breached the Warren Mortgage by initiating foreclosure proceedings when Rau did not, in fact, default because the property taxes were not delinquent. See Am. Compl. ¶¶ 107-108. Similarly, Rau alleges that Calvert denied him an opportunity to cure because it refused to accept his offers to pay the taxes. Id.

However, Rau does not contest the separate default underlying the foreclosure proceedings—that he failed timely to make the one-time payment of $12,500. Warren Default Letter, Ex. 8 to Am. Compl. Nor does he allege that he offered to cure this default by making the payment of $12,500. Therefore, Rau has not plausibly alleged that Calvert breached the Warren Mortgage by foreclosing on the Warren Property in the absence of a default. And because it is uncontested that Rau did not offer to cure his failure to pay $12,500, Rau has not plausibly alleged that Calvert denied him an opportunity to cure when it refused to accept his offers to pay the property taxes but not the $12,500. See Warren Mortgage ¶ 21.

The Windmill Mortgage, in contrast, does not incorporate any of the provisions from the Warren Mortgage quoted above. To the contrary, the Windmill Mortgage expressly provided that in the event of Mchrenzie's default, Calvert was authorized, "without demand or notice, [to] pay any taxes, assessments, premiums or liens required to be paid by the Mortgagor," or "without notice, and at its option, [to] declare the entire Indebtedness due and payable ... and, if permitted by state law, is authorized and empowered to sell or to cause the Property to be sold at public auction." Windmill Mortgage ¶¶ 13-14, Ex. 2 to Am. Compl. Mchrenzie likewise waived its right to "notice of every kind" in the Promissory Note. Windmill Promissory Note, Ex. 1 to Am. Compl. It is clear from the contractual language of the Windmill Mortgage that Calvert was under no obligation to provide either notice of its intent to pay property taxes or notice of default and an opportunity to cure. Plaintiffs, therefore, have failed to state a claim that Calvert breached the Windmill Mortgage on those grounds.

Similar to their earlier argument with respect to the application of RESPA and TILA to the Windmill Mortgage, Plaintiffs contend that notice and an opportunity to cure would have been required had the Windmill Mortgage been properly classified as a residential mortgage. Pls. Resp. at 16 n.1. In Sloan, discussed above, the plaintiff asserted that "a contract was formed when Plaintiff accepted the [defendants'] offer to extend a residential loan, and that the [defendants] breached that contract by delivering, not a residential loan under terms that are legal under fair lending laws, but rather a commercial loan that would be illegal if it were a loan to a person." Juergens v. Urban Title Servs., Inc., 246 F.R.D. 4, 14 (D.D.C. 2007) (internal quotation marks omitted). The court permitted the plaintiff to amend her complaint to modify her breach of contract claim to add this theory, id. at 17, and repeatedly found thereafter that factual disputes regarding the issuance of the loan precluded summary judgment, see Sloan, 689 F. Supp. 2d at 128; 652 F. Supp. 2d 51, 57-58 (D.D.C. 2009).

Here, in contrast, Plaintiffs do not allege that the parties ever formed an agreement to enter into a residential loan in connection with the Windmill Mortgage, or that Calvert breached this agreement. Rather, Plaintiffs allege that "Calvert required that the mortgage transaction occur within [sic] Mchrenzie" and that Calvert "required that Rau place the [property] into a separate entity in order to circumvent the requirements of Dodd-Frank, TILA, RESPA, and various other federal and state laws...." Am. Compl. ¶¶ 23-24. Though Plaintiffs contend that they would have been entitled to notice and an opportunity to cure if the Windmill Mortgage would have been properly classified as a residential mortgage as opposed to a commercial mortgage, such a claim would sound in statutory regulation and not the contract presently before the Court. Accordingly, Plaintiffs have not stated a plausible breach of contract claim premised on a lack of notice with respect to the Windmill Mortgage.

***10** Plaintiffs also contend that Calvert breached the Windmill Mortgage by paying the property taxes and initiating foreclosure proceedings when Mchrenzie was not in default. Indeed, Calvert's authority under the Windmill Mortgage to pay property taxes, to accelerate the indebtedness, and to invoke the power of sale was contingent on Mchrenzie's default. Calvert's authority to pay tax assessments became operative "[i]f Borrower fail[ed] to perform the covenants and agreements contained in this Security Instrument," while the authority to accelerate the indebtedness and invoke the power of sale became operative "[i]n the event of default...." Windmill Mortgage ¶¶ 13-14.

Under the Windmill Mortgage, Mchrenzie was obligated to pay taxes and assessments "at any time levied or assessed against the Mortgagor or the Property...." Id. ¶ 5. Similar to the phrase "on time," discussed above in connection with the Warren Mortgage, the phrase "at any time levied" is ambiguous. It is unclear whether this phrase required payment of property taxes at the time a tax notice is received by a property owner, at the time payment is due as specified in a notice, or at any time before the taxes become delinquent. Mchrenzie alleges that Calvert paid the taxes on the Windmill Property within only two weeks of their original due date and before they became delinquent. Am. Compl. ¶¶ 107-108. Thus, Mchrenzie plausibly alleges that it was not in default of its obligation to pay taxes under the Windmill Mortgage. Consequently, Mchrenzie has adequately stated a claim that Calvert breached the Windmill Mortgage by paying the taxes and by initiating foreclosure proceedings when Mchrenzie was not in default.

Therefore, Count IV must be dismissed insofar as it asserts that Calvert breached the Warren Mortgage by foreclosing on the Warren Property in the absence of a default and by failing to provide an opportunity to cure. Additionally, Count IV must be dismissed insofar as it asserts that Calvert breached the Windmill Mortgage by failing to provide notice of its intent to pay taxes and notice of default. Plaintiffs, however, have sufficiently pleaded that Calvert breached the Warren Mortgage by paying the property taxes and by

failing to provide notice of its intent to pay. They have also adequately pleaded that Calvert breached the Windmill Mortgage by paying the property taxes and by initiating foreclosure proceedings in the absence of a default.

D. Count VI – Breach of the Covenant of Good Faith and Fair Dealing

Count VI asserts a claim for breach of the covenant of good faith and fair dealing. Calvert contends that this count must be dismissed on the ground that Michigan does not recognize a cause of action for breach of the covenant of good faith and fair dealing.

"[T]he covenant of good faith and fair dealing is an implied promise contained in every contract that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." Hammond v. United of Oakland, Inc., 483 N.W.2d 652, 655 (Mich. Ct. App. 1992) (citation and internal quotation marks omitted). Calvert is correct that many courts have held that "Michigan does not recognize a claim for breach of an implied covenant of good faith and fair dealing." See Belle Isle Grill Corp. v. City of Detroit, 666 N.W.2d 271, 279 (Mich. Ct. App. 2003). Nevertheless, courts have also held that a claim for breach of the covenant of good faith and fair dealing may be sustained under Michigan law where the claim does not seek to override, contradict, or add a new term to the express terms of a contract. See Warren Prescriptions, Inc. v. Walgreen Co., No. 17-10520, 2018 WL 287951, at *1 (E.D. Mich. Jan. 4, 2018). The covenant of good faith and fair dealing has been applied accordingly in cases where a party is afforded discretion in the manner of its performance under a contract and the party exercises that discretion in bad faith. See id. (citing Burkhardt v. City Nat'l Bank of Detroit, 226 N.W.2d 678, 680 (Mich. Ct. App. 1975)); see also Burniac v. Wells Fargo Bank, N.A., No. 13-CV-12741, 2015 WL 401018, at *20 (E.D. Mich. Jan. 28, 2015).

***11** Given the authority holding that a claim asserting breach of the covenant of good faith and fair dealing is cognizable when it is premised on a party's alleged exercise of discretion in bad faith, the Court declines to dismiss Count VI of Plaintiff's Amended Complaint out of hand. Plaintiffs allege that Calvert acted in bad faith when it paid the taxes assessed on the Windmill and Warren Properties before they became delinquent and subsequently foreclosed on the properties while refusing to accept Plaintiffs' offers of payment. Am. Compl. ¶ 113. At heart, Plaintiffs' claim centers on Calvert's alleged refusal to accept payment of the property taxes in favor of foreclosing on the properties. Assuming that Plaintiffs' allegations are true, it is plausible that Calvert breached the covenant of good faith and fair dealing by exercising its discretion to refuse Plaintiffs' offers to pay the unpaid taxes.

E. Count VII – Fraud

In Count VII, Plaintiffs assert a claim for fraud premised on Calvert's alleged disguise of the Windmill Mortgage as a commercial mortgage for the purpose of circumventing state and federal regulations of consumer mortgages.

When pleading a claim for fraud or mistake, "a party must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). Under Michigan law, plaintiffs must plead the following facts: "(1) [t]hat defendant made a material representation; (2) that it was false; (3) that when he made it he knew that it was false, or made it recklessly, without any knowledge of its truth, and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury." Llewellyn-Jones v. Metro Prop. Group, LLC, 22 F. Supp. 3d 760, 784 (E.D. Mich. 2014) (internal quotation marks omitted) (citing Hi-Way Motor Co. v. Int'l Harvester Co., 247 N.W.2d 813, 815-816 (1976)).

Here, the Amended Complaint alleges that Calvert falsely represented to Plaintiffs at the time the Windmill Mortgage was executed that the mortgage was commercial in nature as opposed to a consumer mortgage. Am. Compl. ¶¶ 121-122. Although Calvert allegedly was aware of Rau's intent to reside at the Windmill Property, it required Mchrenzie to execute a commercial mortgage in order to circumvent state and federal regulations of consumer mortgages. Id. ¶ 119. Plaintiffs allege they acted in reliance on Calvert's representation by executing the Windmill Mortgage as a commercial mortgage and were damaged as a result of Calvert's foreclosure without providing notice or the opportunity to cure. Id. ¶¶ 125-126.

A claim for fraud requires reasonable reliance on a false representation. Cummins v. Robinson Twp., 770 N.W.2d 421, 437 (Mich. Ct. App. 2009) (citing Nieves v. Bell Indus., Inc., 517 N.W.2d 235, 238 (Mich. Ct. App. 1994)). Reliance is not reasonable where the alleged misrepresentation concerns matters "at least equally within plaintiffs' knowledge or their ability to determine." Id. Likewise, "fraud is not perpetrated upon one who has full knowledge to the contrary of a representation." Montgomery Ward & Co. v. Williams,

47 N.W.2d 607, 611 (Mich. 1951) (explaining that where the plaintiff's agent was informed of facts concerning the defendant's injury disqualifying him from receiving health and accident insurance benefits, the plaintiff's subsequent payment of insurance benefits did not give rise to a claim for fraud); Phillips v. Smeekens, 213 N.W.2d 862, 862 (Mich. Ct. App. 1973) ("[O]ne cannot rely on a representation where he knows other representations in the same transaction are false."). Moreover, where a transaction is executed with full knowledge of the facts, a party's misapprehension of the legal ramifications of that transaction cannot serve as the basis for a claim for fraud. Williams, 47 N.W.2d at 612.

Plaintiffs' claim for fraud is premised on their allegation that Calvert "disguised" the Windmill Mortgage as a commercial mortgage rather than designating it a consumer mortgage. Rau states that he intended to use the Windmill Property as his residence and, consequently, that he intended to execute a consumer mortgage. Am. Compl. ¶¶ 22, 117. On its face, the Windmill Mortgage was clearly designated as a commercial real estate mortgage. Nevertheless, Mchrenzie executed the Windmill Mortgage, as well as an acknowledgement that the property would not be owner-occupied as a primary residence. See Windmill Buyers Acceptance and Acknowledgement, Ex. A.3 to Def. Mot. (Dkt. 11-2). In view of these facts, Plaintiffs were fully aware that the Windmill Mortgage was designated as a commercial mortgage and not a consumer mortgage. Under Michigan law, plaintiffs are presumed to know the law. Cummins, 770 N.W.2d at 437. As such, Plaintiffs' claim for fraud cannot be sustained based on a misapprehension of their legal rights and obligations as a result of executing a commercial mortgage rather than a consumer mortgage. Plaintiffs' claim for fraud, therefore, must be dismissed.

F. Count VIII – Violation of the MCPA

***12** Count VIII alleges the following three violations of the MCPA: (1) causing a probability of confusion or of misunderstanding as to the legal rights, obligations, or remedies of a party to a transaction, in violation of Mich. Comp. Laws § 445.903(1)(n); (2) causing a probability of confusion or of misunderstanding as to the terms or conditions of credit if credit is extended in a transaction, in violation of Mich. Comp. Laws § 445.903(1)(o); and (3) making a representation of fact or statement of fact material to the transaction such that a person reasonably believes the represented or suggested state of affairs to be other than it actually is, and otherwise using unfair, unconscionable, or deceptive acts or practices in connection with a business, in violation of Mich. Comp. Laws § 445.903(1)(bb). Plaintiffs again argue that Calvert violated these provisions by disguising the Windmill Mortgage as a commercial mortgage. Pls. Resp. at 22.

First, Calvert seeks dismissal of this count because the MCPA applies to consumer but not commercial transactions. Def. Reply at 5. Plaintiffs' MCPA claim is premised on alleged violations of Mich. Comp. Laws § 445.903(1), which prohibits "[u]nfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce...." (Emphasis added). The MCPA defines "trade or commerce" as "the conduct of a business providing goods, property, or service primarily for personal, family, or household purposes." Mich. Comp. Laws § 445.902(1)(g) (emphasis added). The MCPA is thus inapplicable to transactions made for business or commercial purposes. See Jackson Cty. Hog Producers v. Consumers Power Co., 592 N.W.2d 112, 117 (Mich. Ct. App. 1999). As determined above with respect to the application of RESPA and TILA, Plaintiffs have alleged a plausible claim that the Windmill Mortgage is a consumer loan. However, to the extent that it is later determined that the Windmill Mortgage is a commercial loan, the MCPA would not apply.

Second, Calvert argues that the MCPA does not apply to mortgage transactions. The MCPA exempts from its purview "[a] transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States." Mich. Comp. Laws § 445.904(1)(a). In determining whether the exemption applies, "the relevant inquiry 'is whether the general transaction is specifically authorized by law, regardless of whether the specific misconduct alleged is prohibited.' " Liss v. Lewiston-Richards, Inc., 732 N.W.2d 514, 518 (Mich. 2007) (quoting Smith v. Globe Life Ins. Co., 597 N.W.2d 28, 38 (Mich. 1999)). Lenders transacting residential mortgage loans have been found to be exempt from the MCPA under Mich. Comp. Laws § 445.904(1)(a) because they are regulated under a variety of state and federal laws. See Newton v. West, 686 N.W.2d 491, 493 (Mich. Ct. App. 2004); see also Ursery v. Option One Mortg. Corp., No. 271560, 2007 WL 2192657, at *15-16 (Mich. Ct. App. July 31, 2007).

Even assuming that the Windmill Mortgage is a consumer mortgage, Calvert has not identified a single regulation or licensing requirement governing the transaction at issue here. Calvert disputes, for example, that the transaction

is governed under RESPA because it is not a federally related mortgage loan. Simply put, Calvert cannot have its cake and eat it too. Until Calvert identifies at least one regulatory board or regulatory scheme governing the Windmill Mortgage, the Court is unable to determine that the mortgage was "specifically authorized under laws administered by a regulatory board" and exempt from the MCPA.

Finally, Calvert contends that Plaintiffs failed to identify the specific conduct underlying their claims that Calvert made a misrepresentation of material fact and caused a likelihood of confusion or misunderstanding regarding Plaintiffs' legal rights, remedies, or the terms or conditions of credit. To the contrary, Plaintiffs allege that Calvert misrepresented that the Windmill Mortgage was a commercial real estate mortgage instead of a consumer mortgage. Am. Compl. ¶¶ 130, 132. Such an alleged misrepresentation, on its face, could plausibly result in the confusion of a reasonable consumer as to his legal rights, remedies, and terms and conditions of credit, as regulated by Michigan Compiled Laws § 445.903(1)(n), (o), and (bb). Plaintiffs have, therefore, adequately stated a claim alleging violations of the MCPA. Dismissal of this claim is not warranted.

G. Count IX – Promissory Estoppel

***13** In Count IX, Plaintiffs assert a claim for promissory estoppel, alleging that "it would be inequitable and unjust to treat the Windmill Promissory Note and Mortgage as a commercial transaction" and to permit Calvert to circumvent the state and federal regulations of consumer loans. Am. Compl. ¶ 146.

The elements of a promissory estoppel claim include the following: "(1) a promise, (2) that the promisor reasonably should have expected to induce action of a definite and substantial character on the part of the promisee, (3) which in fact produced reliance or injustice is to be avoided." Parkhurst Homes, Inc. v. McLaughlin, 466 N.W.2d 404, 406 (Mich. Ct. App. 1991). "A promise giving rise to an actionable claim must be 'clear and definite,' while statements that are 'indefinite, equivocal, or not specifically demonstrative of an intention respecting future conduct, cannot serve as the foundation for an actionable reliance.' " Bodnar v. St. John Providence, Inc., 933 N.W.2d 363, 377 (Mich. Ct. App. 2019) (quoting State Bank of Standish v. Curry, 500 N.W.2d 104, 108 (Mich. 1993)). Though far from clear, the Amended Complaint appears to premise this claim on the allegation that Calvert disguised the Windmill Mortgage as a commercial mortgage. See Am. Compl. ¶¶ 142-143. However, Plaintiffs do not allege that Calvert made any promise in connection with the Windmill Mortgage. Plaintiffs do not allege that Calvert made any representations regarding its future conduct —for example, by representing that any particular protection governing consumer mortgages would apply. Dismissal of this claim is, therefore, appropriate.

H. Count X – Wrongful Foreclosure

In Count X, Plaintiffs allege that Calvert wrongfully foreclosed on the Windmill and Warren Properties in violation of Michigan Compiled Laws §§ 600.3180 et seq.[4] First, Plaintiffs contend that they were not in default with respect to either the Windmill or the Warren Mortgage. Second, Plaintiffs contend they were deprived of adequate notice and an opportunity to cure.

4 Although Plaintiffs allege that Calvert scheduled a foreclosure sale of the Warren Property for March 20, 2019, Am. Compl. ¶ 163, no information on whether this sale actually took place has been provided.

Under Michigan Compiled Laws § 600.3204, a party may foreclose a mortgage by advertisement if, among other conditions, "[a] default in a condition of the mortgage has occurred, by which the power to sell became operative." The mortgage holder must provide a notice of foreclosure by advertisement that includes the following information:

> (a) The names of the mortgagor, the original mortgagee, and the foreclosing assignee, if any.
>
> (b) The date of the mortgage and the date the mortgage was recorded.
>
> (c) The amount claimed to be due on the mortgage on the date of the notice.
>
> (d) A description of the mortgaged premises that substantially conforms with the description contained in the mortgage.
>
> (e) For a mortgage executed on or after January 1, 1965, the length of the redemption period as determined under section 3240.
>
> (f) A statement that if the property is sold at a foreclosure sale under this chapter, under section 3278 the borrower will be held responsible to the person who buys the

property at the mortgage foreclosure sale or to the mortgage holder for damaging the property during the redemption period.

***14** Id. § 600.3212. This notice is to be published for four successive weeks in a newspaper published in the county where the premises are situated and is also to be posted in a conspicuous place on the premises. Id. § 600.3208. In order to set aside a foreclosure sale on the basis of an irregularity in the foreclosure proceedings, parties opposing the sale "must show that they were prejudiced by" the alleged failure to comply with any of the statutory requirements. Kim v. JP Morgan Chase Bank, N.A., 825 N.W.2d 329, 337 (Mich. 2012). Further, the alleged irregularity must relate to the "legal measures" of the foreclosure procedure itself. Williams v. Pledged Property II, LLC, 508 F. App'x 465, 468 (6th Cir. 2012).

With respect to the Windmill Mortgage, Plaintiffs contend in their brief that Calvert initiated foreclosure proceedings in violation of Michigan Compiled Laws § 600.3204 because Mchrenzie was not in default, thereby rendering the power to sell inoperative. Pls. Resp. at 23. As discussed above in connection with Plaintiffs' breach of contract claim, Mchrenzie has asserted a plausible claim that it was not in default of its obligation to pay taxes "at any time levied" under the Windmill Mortgage. As stated above, Michigan Compiled Laws § 600.3204 provides that a party may foreclose a mortgage by advertisement only if a "default in a condition of the mortgage has occurred." A lender's foreclosure on property in the absence of mortgage holder's default constitutes an "irregularity" in the foreclosure procedures sufficient to establish prejudice. See Powers v. Bank of Am., N.A., 63 F. Supp. 3d 747, 753 (E.D. Mich. 2014). Accordingly, Mchrenzie has alleged a plausible claim of wrongful foreclosure on the ground that it was not in default of the Windmill Mortgage.

Mchrenzie also contends with respect to the Windmill Mortgage that it received no notice of default and was not afforded the opportunity to cure. However, the notice provided by Calvert to Mchrenzie regarding the foreclosure of the Windmill Property was consistent with the requirements of Michigan Compiled Laws § 600.3212. On October 31, 2018, Calvert sent to Mchrenzie a notice of mortgage sale indicating its intent to foreclose on the Windmill Property. See Windmill Notice of Mortgage Sale, Ex. 7 to Am. Compl. This notice included the names of the mortgagor and mortgagee, the dates the Windmill Mortgage was executed and recorded, the amount due under the mortgage, a description of the mortgaged premises, the length of the redemption period, and a statement regarding responsibility for damages. Id. This notice was published in the Flint-Genesee County Legal News on November 2, November 9, November 16, and November 23 of 2018, and indicated a sheriff's sale date of December 5, 2018. Aff. of Publication, Ex. B to Def. Mot. (Dkt. 11-3). The notice was again published on December 14, December 21, and December 28 of 2018, and indicated a sheriff's sale date of January 9, 2019. Id. Calvert, therefore, provided Mchrenzie valid notice of foreclosure of the Windmill Mortgage as required under Michigan's foreclosure-by-advertisement statute.

Mchrenzie contends that before initiating foreclosure proceedings, Calvert was required to provide a notice of default informing it of its right to bring a court action, as well as an opportunity to cure the default within thirty days. Although Michigan law previously required lenders to provide a notice of default containing certain information and to delay foreclosure proceedings for thirty days to enable borrowers to pursue loan modification, Mich. Comp. Laws § 600.3205a(1), these provisions were repealed by 2012 Michigan Public Acts No. 521, effective June 30, 2013. Michigan's current foreclosure-by-advertisement statute regulates only notices of foreclosure but does not require notices of default. See Mich. Comp. Laws § 600.3212. Mchrenzie cites no other statutory authority requiring lenders to provide consumers a notice of default and an opportunity to cure within thirty days.

***15** Mchrenzie also asserts it was prejudiced by Calvert's wrongful refusal to accept its tender of the full amount of property taxes owed; however, that refusal does not amount to an irregularity relating to the statutory foreclosure procedures themselves. See Jundy v. Wells Fargo Bank, N.A., No. 14-12524, 2015 WL 5697658, at *5 (E.D. Mich. Sept. 29, 2015) (lender's refusal to accept the borrower's tender of the amount due to reinstate his loan did not relate to the foreclosure proceedings). Mchrenzie's wrongful foreclosure claim, therefore, is dismissed to the extent that it is premised on the allegation that Mchrenzie was deprived of notice and an opportunity to cure with respect to the Windmill Mortgage.

As with the Windmill Property, Plaintiffs contend that Calvert wrongfully foreclosed on the Warren Property in violation of Michigan Compiled Laws § 600.3204 because Rau was not in default. Pls. Resp. at 23. Specifically, Rau alleges that he was not in default of his obligation under the Warren Mortgage to pay property taxes "on time" because the taxes, though two

weeks late, were not yet delinquent. However, Rau was in default of the Warren Mortgage based not only on his alleged failure to pay the property taxes but also on his failure to make a one-time payment of $12,500. See Warren Default Letter, Ex. 8 to Am. Compl. Plaintiffs do not dispute that Rau defaulted by failing to make the payment of $12,500, nor do they allege that Rau offered to cure this default by tendering the $12,500 owed. Rau, therefore, has not alleged facts supporting his position that he was not in default of the Warren Mortgage and, consequently, that Calvert wrongfully foreclosed.

Plaintiffs also contend with respect to the Warren Mortgage that the notice of default was defective and that Rau was not afforded an opportunity to cure. Specifically, Plaintiffs allege that Calvert's January 24, 2019 notice of default in connection with the Warren Mortgage was defective because it contained inaccurate information regarding the amount of property taxes owed. See 1/24/19 Letter, Ex. 9 to Am. Compl. As discussed above in reference to the Windmill Mortgage, however, those portions of Michigan's foreclosure-by-advertisement statute requiring lenders to provide notice of default and to delay foreclosure proceedings by thirty days have been repealed. See 2012 Mich. Pub. Acts No. 521, effective June 30, 2013. Michigan's current statute regulates only notices of foreclosure and not notices of default. See Mich. Comp. Laws § 600.3212. Plaintiffs cite no statutory authority requiring lenders to provide consumers notice of default or an opportunity to cure. Likewise, as determined above, Rau's contention that Calvert wrongfully rejected his offers to pay the full amount of the property taxes owed lacks merit, as such rejection does not relate to the foreclosure procedures. See Jundy, 2015 WL 5697658 at *5. Plaintiffs' claim asserting wrongful foreclosure of the Warren Property on the basis of a defective notice of default and the deprivation of an opportunity to cure must be dismissed.

Finally, Calvert contends that Mchrenzie's redemption of the Windmill Property extinguishes its right to challenge the foreclosure proceedings because the redemption ratified the foreclosure sale. Calvert's argument is flawed. A mortgage holder may dispute foreclosure proceedings yet redeem the property in an effort to protect his interest in the property. Nothing about such a course of action implies that the mortgage holder ratified the foreclosure proceedings. Moreover, the authority Calvert relies upon in support of its premise is inapposite. Specifically, Calvert cites cases estopping mortgage holders from challenging foreclosure sales when they unreasonably delayed in seeking relief. See Fox v. Jacobs, 286 N.W.2d 854, 857 (Mich. 1939) (mortgage holder did not challenge alleged defects in the foreclosure notice for twenty months following the foreclosure sale); Walker v. Schultz, 141 N.W. 543, 545 (Mich. 1913) (mortgage holder did not challenge an irregularity in a foreclosure proceeding for years). However, there is no assertion here that Plaintiffs unreasonably delayed in challenging the foreclosure proceedings, and Calvert cites no authority specifically holding that exercising the right of redemption results in a waiver of the right to challenge the foreclosure proceedings.

IV. CONCLUSION

***16** For the reasons set forth above, the Court grants in part and denies in part Calvert's motion to dismiss. Specifically, the following claims are dismissed in their entirety: (1) violation of 12 C.F.R. § 1024.35(e) (Count I); (2) violation of 12 C.F.R. §§ 1026.19(e) and 1026.37 (Count III); (3) fraud (Count VII); and (4) promissory estoppel (Count IX).

The following claims are permitted to proceed in a limited context: (1) violation of 12 C.F.R. § 1026.41 (Count II) except to the extent that it seeks recovery of damages for violations occurring before March 20, 2018; (2) breach of contract (Count IV), to the extent that it asserts Calvert breached the Warren Mortgage by paying the property taxes and by failing to provide notice of its intent to pay, and to the extent that it asserts Calvert breached the Windmill Mortgage by paying the property taxes and by initiating foreclosure proceedings in the absence of a default; (3) breach of the covenant of good faith and fair dealing (Count VI), to the extent that it is premised on Calvert's alleged refusal to accept Plaintiffs' offers to pay the full amount of property taxes owed; (4) violation of the MCPA (Count VIII); and (5) wrongful foreclosure (Count X) to the extent that that it is premised on a lack of default on the Windmill Mortgage.

SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2019 WL 6339817

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Only the Westlaw citation is currently available.
United States District Court,
C.D. California,
Southern Division.

Joseph YACOUBIAN and Patricia Donnelly, on Behalf of Themselves Individually and All Others Similarly Situated, Plaintiffs,
v.
ORTHO-McNEIL PHARMACEUTICAL, INC., a Delaware Corporation, Ortho McNeil Neurologics, Inc., New Jersey Corporation, and Does 1 through 100, inclusive, Defendants.

No. SACV 07-00127-CJC(MLGx).
|
Feb. 6, 2009.

West KeySummary

1 **Labor and Employment** Outside Salespersons

Pharmaceutical sales representatives fell within the Fair Labor Standards Act (FLSA) outside salesman exemption since such sales representatives made sales by convincing physicians to prescribe their employer's drug. Thus, the pharmaceutical company was not required to pay its sales representatives overtime pay. Although pharmaceutical sales representatives did not sell to the patient and did not even sell to the physician, the representatives encouraged physicians to prescribe more of the drug, and physicians controlled which and how much of any medication is purchased by patients. Furthermore, like sales representatives in other industries, pharmaceutical sales representatives received more compensation as their "sales" increased. Fair Labor Standards Act of 1938, §§ 7(a)(1), 13(a)(1), 29 U.S.C.A. §§ 207(a)(1), 213(a)(1); 29 C.F.R. 541.500.

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ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFFS' MOTION FOR SUMMARY ADJUDICATION

CORMAC J. CARNEY, District Judge.

I. INTRODUCTION

***1** Plaintiffs Joseph Yacoubian and Patricia Donnelly (collectively "Plaintiffs") claim their former employers, Defendants Ortho McNeil Pharmaceutical and Ortho McNeil Neurologics (collectively "Ortho"), violated the Federal Fair Labor Standards Act ("FLSA") and similar California wage-and-hour laws by not paying overtime for their work as pharmaceutical sales representatives. Ortho moves for summary judgment on the basis that Plaintiffs are exempt from overtime because they fall under either the outside salesman exemption or the administrative exemption to wage-and-hour laws. Plaintiffs also make a cross-motion for summary adjudication on the question of whether they fall under the outside salesman exemption and contend there is an issue of fact as to the administrative exemption. After carefully considering the undisputed evidence presented by the parties and the arguments of their counsel, the Court concludes that Plaintiffs fall under the outside salesman exemptions of both the FLSA and California state law. Accordingly, Ortho's motion for summary judgment is GRANTED and Plaintiffs' motion for summary adjudication is DENIED.

II. FACTUAL BACKGROUND

Mr. Yacoubian and Ms. Donnelly were employed as pharmaceutical sales representatives with Ortho from the late 1990s to the mid 2000s. Both employees referred to themselves as sales representatives. (Defendants' Statement of Uncontroverted Facts for Mr. Yacoubian ("DUFY") ¶

11; Defendants' Statement of Uncontroverted Facts for Ms. Donnelly ("DUFD") ¶ 37.) Both worked largely outside the office, meeting with physicians with the overriding purpose of increasing the amount of Ortho drugs those physicians prescribed.

Mr. Yacoubian performed a number of duties for Ortho. Mr. Yacoubian's duties included: (1) asking physicians to write prescriptions for Ortho drugs; (2) "closing" physicians by gaining commitments from them to prescribe Ortho drugs; (3) making a territory business plan to develop strategies to increase the amounts of drugs prescribed by targeted physicians; (4) delivering a "sales message" and incorporating knowledge of drugs into "selling situations;" (5) leaving samples with physicians; and (6) managing a budget for "lunch and learn" meetings to discuss the Ortho drugs with physicians in his territory. (DUFY ¶¶ 27, 31, 63, 73, 105, 108.) Ortho tracked the number of prescriptions issued by physicians in Mr. Yacoubian's territory. Ortho used these sales numbers to evaluate Mr. Yacoubian's employment performance and to determine his "incentive compensation." (DUFY ¶¶ 42, 44.)

Ms. Donnelly had similar duties and conditions of employment. The goal of her employment was to sell Ortho drugs by persuading physicians to prescribe Ortho drugs to their patients. (DUFD ¶ 26 .) The company defines a physician's prescription of a drug as a sale. (DUFD ¶ 25.) Ms. Donnelly's duties included: (1) "selling" Ortho drugs; (2) establishing relationships with physicians; (3) discussing the "scientific basis" for prescribing Ortho drugs; (4) planning sales calls; (5) highlighting to physicians the superiority of Ortho's drugs over competitive brands; and (6) gaining specific commitments from physicians to prescribe Ortho drugs. (DUFD ¶¶ 37, 39, 40, 45.) Ms. Donnelly's performance evaluation and incentive compensation was also partially based upon the sales of Ortho drugs in her territory. (DUFD ¶¶ 56, 62.)

III. ANALYSIS

***2** Summary judgment is proper if the evidence before the Court "show[s] that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c); *see also Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). A factual issue is "genuine" when there is sufficient evidence such that a reasonable trier of fact could resolve the issue in the non-movant's favor, and an issue is "material" when its resolution might affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The moving party bears the initial burden of demonstrating that there are no genuine material issues, and that it is entitled to judgment as a matter of law. *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n,* 809 F.2d 626, 630-31 (9th Cir.1987). Once this burden has been met, the party resisting the motion "must set forth specific facts showing that there is a genuine issue for trial." *Anderson,* 477 U.S. at 256. In considering a motion for summary judgment, the court must examine all the evidence in the light most favorable to the non-moving party. *United States v. Diebold, Inc.,* 369 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962). The court does not make credibility determinations, nor does it weigh conflicting evidence. *Eastman Kodak Co. v. Image Tech. Servs., Inc.,* 504 U.S. 451, 456, 112 S.Ct. 2072, 119 L.Ed.2d 265 (1992).

Congress enacted the FLSA to promote the "general well being" of workers by eliminating detrimental labor conditions. 29 U.S.C. § 202(a). To that end, the FSLA requires:

> Except as otherwise provided in this section, no employer shall employ any of his employees ... for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. § 207(a)(1). However, businesses are exempt from providing overtime compensation to "white collar" positions, including outside salesmen and administrative employees. 29 U.S.C. 213(a)(1). These exemptions were justified because these kinds of workers "typically earned salaries well above fringe benefits and [received] better opportunities for advancement, setting them apart from the nonexempt workers entitled to overtime pay." Department of Labor, Wage and Hour Division, Defining and Delimiting the Exemptions for Executive, Professional, Outside Sales and Computer Employees; Final Rule ("Final Rule") 69 Fed.Reg. 22122, 22123-24 (April 23, 2004). "Further, the type of work performed [by white collar workers] was difficult to standardize to any time frame and could not be easily spread

to other workers after 40 hours in a week, making compliance with the overtime provisions difficult....” *Id.*

The United States Supreme Court held that exemptions to the FLSA overtime requirement “are to be narrowly construed against the employers seeking to assert them and their application limited to those establishments plainly and unmistakably within their terms and spirit.” *Arnold v. Ben Kanowsky, Inc.* 361 U.S. 388, 392, 80 S.Ct. 453, 4 L.Ed.2d 393 (1960). The employer bears the burden of showing that the plaintiff falls within the exemption. *Id.* at 393. The Ninth Circuit adheres to the United States Supreme Court's approach. *Alvarez v. IBP Inc.,* 339 F.3d 894, 905 (“[f]ollowing the Supreme Court's lead, we also read FLSA exemptions ... tightly”).

A. The Outside Salesman Exemption in the FLSA

***3** The FLSA provides that “any employee employed ... in the capacity of an outside salesman” is exempted from the requirement of overtime. 29 U.S.C. § 213(a)(1). Federal Department of Labor regulations further defining the exemption provide that:

> (a) The term “employee employed in the capacity of outside salesman” in section 13(a)(1) of the Act shall mean any employee:
>
> (1) [w]hose primary duty is:
>
> (i) making sales within the meaning of section 3(k) of the Act....

29 C.F.R. 541.500. The regulations further define sales as including:

> the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property. Section 3(k) of the Act states that “sale” or “sell” includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

29 C.F.R. § 504.501(b).

An employee's primary duty must be analyzed when determining if he or she fits into the outside salesman exemption. Federal regulations define the primary duty as “the principal, main, major or most important duty that the employee performs.” 29 C.F.R. § 541.700(a). An employee's primary duty is “based on all the facts in a particular case, with the major emphasis on the character of an employee's job as a whole.” *Id.* For these purposes, all work “performed incidental to and in conjunction with the employee's own outside sale or solicitations” must also be considered exempt. If it is determined that an employee makes sales, any work that contributes to those sales or is incidental to them must be taken into account to determine whether making sales is the employee's primary duty.

Federal regulations differentiate outside sales work from promotional work: “[p]romotional work that is incidental to sales made, or to be made, by someone else is not exempt outside sales work.” 29 C.F.R. ¶ 541.503(a). For example, a manufacturer's representative who visits shops to put up displays and posters, rearrange merchandise, or remove spoiled stock, is performing promotional work, not sales work. 29 C.F.R. 541.503(b). A Department of Labor Opinion Letter determined that college recruiters who found qualified students and induced their application to college, but did not admit the students to the college, were engaged in promotions, not sales. Opinion Letter No. 2138 [1999-02 Wages-Hours] Lab. L. Rep. (CCH) ¶ 33030 (April 20, 1999).

In this case, the Court must determine whether Plaintiffs fall under the outside salesman exemption to the FLSA because they “make sales.” The Court concludes that Plaintiffs do fall within this exemption. Pharmaceutical sales representatives do make sales: they convince physicians to prescribe Ortho drugs. These physicians' prescriptions are precisely the “other disposition” envisioned in the FLSA. The more prescriptions Plaintiffs' efforts generate, the more Plaintiffs themselves profit. These “pharmaceutical sales representatives” applied for their positions and were trained with the expectations that they would be compensated based upon their abilities to sell Ortho's drugs. They received compensation as a result of their sales activities. If they hustled more, the physicians prescribed more, and Plaintiffs made more. The object of their harder work wasn't to garner overtime, it was to generate sales.

***4** Although the FLSA's exemptions must be construed narrowly, they also must be interpreted in a manner that promotes the spirit and purpose of the exemptions.

Concluding that Plaintiffs are covered by the outside salesman exemption promotes the spirit and purpose of that exemption. The Tenth Circuit provided an early and cogent description of the outside salesman exemption's rationale in *Jewel Tea Co. v. Williams:*

> The reasons for excluding an outside salesman are fairly apparent. Such [a] salesman, to a great extent, works individually. There are no restrictions respecting the time he shall work and he can earn as much or as little, within the range of his ability, as his ambition dictates. In lieu of overtime, he ordinarily receives commissions as extra compensation. He works away from his employer's place of business, is not subject to the personal supervision of his employer, and his employer has no way of knowing the number of hours he works per day. To apply hourly standards primarily devised for an employee on a fixed hourly wage is incompatible with the individual character of the work of an outside salesman.

118 F.2d 202, 207-08 (10th Cir.1941). The Tenth Circuit's holding in *Jewel Tea* is obviously driven by the common-sense notion that it is impractical to make outside salespeople hourly employees due to the lack of supervision and structure in their jobs, and because they generate additional incentive income, usually through commission, instead of overtime. This reasoning is also reflected by federal regulations, which cite the high salaries earned by white-collar workers as well as the difficulty of standardizing these workers' jobs as two justifications for the existence of exemptions to overtime requirements. 69 Fed.Reg. at 22124.

The FLSA requires employees to "make sales" in order to qualify for the outside salesman exemption. While no appellate court has addressed whether pharmaceutical sales representatives make sales for the purpose of falling under the outside salesman exemption, the Eight Circuit has affirmed a district court's answer to a similar question in the medical device industry, the question of who are the customers for medical devices, such as pacemakers, that are to be placed inside patients' bodies. The district court determined that physicians were the customers, although they were not actually purchasing the devices. *Medtronic v. Gibbons,* 527 F.Supp. 1085 (D.Minn.1981), *aff'd* 684 F.2d 565 (8th Cir.1982). The district court explained:

> The ultimate consumer[s] of pacemakers are cardiac patients, not hospitals or doctors. But the pacemakers are sold by the manufacturers to the hospital where the patient is being treated. The hospital purchases pacemakers on a recommendation from a physician .... Medtronic's sales effort focuses on the physicians and medical personnel. Thus, the term "customers" must include not only the hospital, which actually pays for the product, but also the physicians and surgeons who recommend which product to purchase.

***5** *Id.* at 1094 n. 3.

The holding in *Medtronic* is notable because the medical device industry is heavily regulated like the pharmaceutical industry. The Food and Drug Administration regulates almost every aspect of the pharmaceutical industry, from research to sales to labeling to advertising. Pharmaceutical sales representatives are forbidden from selling drugs to physicians. Additionally, physicians are ethically bound by their professional duty to prescribe only the most appropriate medication for their patients' treatment. Regulations and ethics preclude physicians from ever making a binding commitment to a pharmaceutical sales representative to prescribe a certain drug. However, physicians here, like the physicians in *Medtronic,* directly control which, and how much, of any medication is purchased by patients. Physicians, not the end-users, select the appropriate medication. In the chain of pharmaceutical sales, the physicians are the decision makers.

In *IMS Health Inc. v. Ayotte,* the First Circuit recognized that pharmaceutical sales representatives with duties similar to Plaintiffs are very effective at selling their drugs. *IMS Health,* 550 F.3d 42 (1st Cir.2008). The First Circuit

described "detailing"-the process of representatives meeting with physicians to market the drugs, as selling. "The objective of these visits is to make sales." *Id.* at 69. "Detailing works: that it succeeds in inducing physicians to prescribe larger quantities of band-name drugs seems clear." *Id.* at 55. Furthermore, the First Circuit found "the fact that the pharmaceutical industry spends over $4 billion annually on detailing bears loud witness to its efficiency." *Id.* Although the First Circuit's decision does not take a position on the outside salesman exemption under the FLSA, it does offer a convincing description of pharmaceutical sales representatives' work as making sales.

A district court in *In Re Novartis Wage and Hour Litigation,* found that the FLSA's outside salesman exemption had to be construed to include pharmaceutical sales representatives in order to be consistent with the spirit and objectives of the exemption. *Novartis,* No. 06-MD-1794, 2009 WL 63433 (S.D.N.Y. Jan. 12, 2009) at *9. "[R]ecognizing the realities of the pharmaceutical industry is not incompatible with engaging in a narrow reading. To the contrary, it produces results that reflect the exemption's terms and spirit." *Id.* at *13. The district court reached its finding because the pharmaceutical representatives' job was to persuade physicians to prescribe Novartis drugs, and they were compensated based on their success in that endeavor. *Id.* at *12-*13. The district court found that the representatives were also largely autonomous. *Id.*

Plaintiffs argue that, because they deal only with physicians and are not directly involved in the supply or distribution chain, the outside salesman exemption does not apply to them. The Court disagrees. Without physicians, no drugs would ever be sold to patients. While physicians are not a formal link in the drug-company-to-patient supply or distribution chain, they are, in fact, the lynchpins. Physicians, not pharmacies or distributors, prescribe the drugs to be purchased and administered.

***6** Furthermore, the work of pharmaceutical sales representatives is not merely promotional within the meaning of the Department of Labor's regulations. The distinction drawn by the regulations is not one between selling and promotion. Rather, the regulations distinguish between promotional work that is done to promote others' sales, and promotional work that is done to promote sales for which the employee is credited and compensated. Plaintiffs' work promoting Ortho's drugs to physicians is directed toward increasing the amount of Ortho drugs prescribed in their territories, ultimately leading back to increased compensation for themselves. Indeed, both the evaluation of Plaintiffs' performance and their compensation depended, in large part, on the amount of Ortho drugs physicians in their territory prescribed.

Plaintiffs cannot escape the fact that they perform their duties in the way traditionally associated with outside salespeople. They spend the great majority of their time out of the office. They are not generally subject to direct supervision while they go about their business. They do not report to work first thing in the morning and clock in. They have a large degree of autonomy, which would make it more difficult to make them accountable for every minute of their day. [1] If they work harder, and excel, pharmaceutical sales representatives can convince more physicians to write prescriptions for the drugs they sell. Then drug companies rewarded them with better performance evaluations and greater incentive compensation. They are almost wholly unlike those workers who are traditionally nonexempt. Plaintiffs and other pharmaceutical sales representatives are precisely the type of employees envisioned when Congress established the outside salesman exemption from the FLSA. Plaintiffs fall under the outside salesman exemption.

1 This feasibility of hours-based compensation is a factor that Department of Labor regulations take into account. Final Rule at 22124.

B. The Outside Salesman Exemption under California Law

California's wage-and-hour laws largely mirror the FLSA. California law defines an outside salesman as "any person, 18 years of age or over, who customarily and regularly works more than half the working time away from the employer's place of business selling tangible or intangible items or obtaining orders or contracts for products, services, or use of facilities." Cal.Code Regs. Tit. 8 § 11070(2)(J). The exemption is "purely quantitative" and "focuses entirely" on whether the employee spends more than half his or her time engaged in selling. *Ramirez v. Yosemite Water Co.,* 20 Cal.4th 785, 797, 85 Cal.Rptr.2d 844, 978 P.2d 2 (Cal.1999). [2]

2 Several courts in this district have recently ruled that pharmaceutical representatives fall under California's outside salesman exemption. *See e.g. Barnick v. Wyeth,* 522 F.Supp.2d 1257 (C.D.Cal.2007). In *Barnick,* the district court

> disregarded the fact that patients, not physicians are the end-users of pharmaceuticals, calling it "a distinction without a difference." *Id.* at 1264. The district court held:
>
> > Nothing in the language of the outside salesperson exemption requires an exempted employee to engage in direct as opposed to indirect sales. Though it is true physicians never actually buy Wyeth's prescription products, it is clearly they who control the product's ultimate purchase. Because physicians determine whether or not a patient will buy a prescription product, it is they who are appropriately the target for sales efforts.
>
> *Id.* The district court in *Barnick* and other courts in the Central District used an "indicia of sales" analysis taken from federal law to make their decisions. *Barnick,* 522 F.Supp.2d at 1262. Because the employees were called salesmen, received training in sales, and were compensated, in part, based upon the amount of drugs the physicians in their territories prescribed, they fit under the outside salesman exemption.

It was clear to the district court in *Novartis* that pharmaceutical sales representatives fell under California's outside salesman exemption because they spent their time outside the office, visiting physicians to convince them to prescribe certain drugs, so the sales representatives would receive credit for making the sales. *Novartis,* 2009 WL at *12. Similarly, Plaintiffs here have one duty-to speak to physicians on behalf of Ortho in order to persuade the physicians to prescribe Ortho drugs to their patients. As discussed above, this duty is best described as selling. Ortho has submitted no evidence to show that Plaintiffs' efforts were directed toward anything else. They were not researchers or accountants or distributors or delivery drivers who sold some of their employers' product while they performed their other duties. Plaintiffs were sales people, whose job was to plan routes, practice pitches, and arrange dinners and meetings where they would try to persuade physicians to prescribe more Ortho drugs. The vast majority of Plaintiffs' work goes toward fulfilling that duty, including undergoing sales training, arranging luncheons and dinners with physicians to discuss Ortho drugs with them, and driving to and from meetings with physicians. Simply put, Plaintiffs fall under the outside salesman exemption to California law.

IV. CONCLUSION

***7** For the foregoing reasons, Ortho's motion for summary judgment is GRANTED and Plaintiffs' motion for summary adjudication is DENIED. [3]

[3] Because Plaintiffs fall under the federal and state outside salesman exemptions from wage-and-hour laws, it is not necessary to resolve the question of whether the Plaintiffs also fall under the administrative exemption to wage-and-hour laws.

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Dawn PEDINELLI, Gary Pedinelli, Lillian Mazza, John Mazza, Nancy White, and Patrick White, Plaintiffs–Appellees,
v.
TURNBERRY PARK ESTATES INC., Lawrence Sant, a/k/a Larry Sant, and Terri Sant, Defendants–Appellants.

Docket No. 324331.
|
Jan. 28, 2016.

Washtenaw Circuit Court; LC No. 11–001340–CZ.

Before: SHAPIRO, P.J., and O'CONNELL and BORRELLO, JJ.

Opinion

PER CURIAM.

***1** The dispute in this case revolves around the payment of dues and assessments to the Turnberry Park Homeowners' Association (the Association). Plaintiffs assert that the cost of the assessments should be divided proportionally between all lot owners in the Turnberry Park Estates residential development, including defendants. Defendants, however, argue that both the original declaration of restrictions and a June 2006 amendment to the original declaration exempted them from having to pay any portion of the assessments. The trial court concluded that the amended declaration was *void ab initio* and entered a judgment in plaintiffs' favor. Defendants now appeal as of right. [1] For the reasons stated in this opinion, we affirm in part, reverse in part, and remand for further proceedings.

[1] The matter came before the trial court on cross-motions for summary disposition. The trial court concluded that there were disputed issues of material fact and held a four-day evidentiary hearing. Following the hearing, the trial court adopted and incorporated plaintiffs' proposed findings of facts and conclusions of law.

I. FACTUAL AND PROCEDURAL BACKGROUND

Lawrence and Terri Sant are the sole officers of defendant Turnberry Park Estates, Incorporated (the developer). [2] Defendants developed Turnberry Park Estates, a 20–lot residential development in Salem Township. In conjunction with the development, Lawrence had the original declaration of easements, covenants, and restrictions (the original declaration) drafted in May 2006. Subsequently, he amended Article IV of the original declaration in an instrument dated June 6, 2006 and recorded June 9, 2006 (the amended declaration).

[2] For ease of reference, the Sants will be referred to either collectively as the Sants or individually as Lawrence and Terri.

As will be discussed in greater detail infra, defendants argue that the amendment procedure in Article VIII of the original declaration governed the amendment process. Article VIII provides that the declaration can be amended by an instrument signed by the developer alone. In contrast, plaintiffs argue that the original declaration could only be amended by following the procedure in Article IX of the original declaration. Article IX(g) provides that "this agreement" can only be amended by following the voting procedure in the Association's bylaws. It is undisputed that the amendment procedure in Article IX(g) was *not* used in this case. Accordingly, one issue that must be resolved is whether the amendment in this case was governed by Article VIII or Article IX.

Plaintiffs all acquired property in the development. Plaintiffs Dawn and Gary Pedinelli signed a purchase agreement with the developer on October 15, 2005 and closed on May 2, 2006. Nancy and Patrick White closed on their lot, which they purchased from David and Nicole Beyersdorf, on June 17, 2008. [3] Lillian and John Mazza closed on their lot, which they purchased from Majestic Building Company, Incorporated, on September 29, 2006. [4] Only the Pedinellis closed on their property before the amended declaration was recorded.

[3] Lawrence testified that the developer had previously sold a lot to the Beyersdorfs.

[4] Lawrence testified that the developer had previously sold a lot to Majestic Building Company.

Gary Pedinelli testified to the circumstances surrounding the Pedinellis acquisition of property in the development. He explained that he and his wife received several documents, including the original declaration and the original Association bylaws before signing the purchase agreement for the property on October 15, 2005. Thereafter, he testified they had a 10–day due diligence period during which they could determine if they wanted the property and could rescind the agreement without penalty; however, after the due diligence period expired, they would lose their $38,500 down payment if they rescinded. During the due diligence period the Pedinellis had an attorney review the transaction. Gary Pedinelli reported that the attorney said they were "okay," so they let the due diligence period expire. He added that after the period expired, he and his wife stopped looking for property and started thinking about selling their house and making plans to build a new house on the Turnberry property.

***2** The Pedinellis closed on May 2, 2006. Gary Pedinelli testified that at that time he received, for the first time, a copy of the amended declaration and a copy of the amended Association bylaws. He also signed an addendum to his purchase agreement that stated the developer was not obligated to pay any of the Association's expenses. He testified that he had not seen the paperwork earlier.

Gary Pedinelli testified that the amended bylaws provided that all assessments would be equally divided among the lot owners, but that the developer was not obligated to pay anything. He testified that it was "confusing" at closing and that the documents seemed "wrong;" however, he felt trapped because he stood to lose his $38,500 down payment. He explained that he ultimately received a different property than he bargained for because he had not been looking for a property with a lot of dues' expenses. He testified that he would not have proceeded to closing if he had known about the amendment. He indicated that he was not told that the amended declaration had not been recorded or that it was not binding on him. Gary Pedinelli agreed that he never told Frank Julian, the real estate agent involved in the sale, or Lawrence that he wanted to rescind the purchase agreement before closing and that he never discussed his objections with either Lawrence or Julian.

Patrick White testified to the circumstances surrounding the Whites acquisition of property in the development. He testified that he and his wife purchased the property from the Beyersdorfs on June 17, 2008. He testified that his warranty deed was subject to restrictions of record, which he believed included the original and amended declaration. He said that his title insurance company also indicated that his title was subject to the declaration and amended declaration. He testified that, before closing, he did not receive any documentation from the developer, but added that he expected to pay $300 per year in association dues. He later learned from his neighbors that the dues would be higher. He testified that he would have made the same choice to purchase the property if he had known about the original and amended declaration because he was protected by a fiduciary duty.

Lillian Mazza testified to the circumstances surrounding the Mazzas acquisition of property in the development. She testified that she and her husband purchased their lot from Majestic Building Company on August 11, 2006 and closed on September 29, 2006. Although she was not present at closing, she testified that her husband received the original and the amended declaration at closing. She said they also received an addendum dated June 13, 2006, but she was not sure that they actually read it. She testified that they paid $300 in association dues at closing and then were shocked when the dues went up "tremendously." She said that they felt totally deceived.

The Mazzas and Pedinellis received invoices for Association dues for years 2006 to 2011 and the Whites received invoices for dues for years 2008 to 2011. The invoices indicated that the total was divided by 4 homeowners. It is undisputed that the invoices included charges for the preparation of tax returns. However, all tax returns for the pertinent years are for the developer, and it does not appear that the Association filed a tax return until 2012. It is also undisputed that the invoices included "corporate fee" charges for years when the Association was dissolved.[5] Finally, the invoices also included charges for insurance, even though it appears that the insurance policy was issued in the developer's, not the Association's name.

[5] Lawrence filed the articles of incorporation for the Association on July 1, 2005. However, on January 9, 2009, Lawrence filed for dissolution of the Association, and the Association was dissolved on March 9, 2009. While the Association was dissolved, Terri sent out invoices for payment bearing the Association's name. On November 28,

> 2011, Lawrence incorporated the Association as a for profit corporation.

***3** On December 1, 2011, plaintiffs filed a multi-count complaint against defendants, alleging breach of contract, violations of the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq.,* fraud and misrepresentation, and breach of fiduciary duties. Plaintiffs requested a declaratory judgment rendering the amended declaration void and an injunction requesting, in pertinent part, an order eliminating the amended declaration.

In October 2013, the parties filed cross-motions for summary disposition pursuant to MCR 2.116(C)(10). The trial court concluded that there were issues of fact and so conducted an evidentiary hearing. After the hearing, the court granted judgment in plaintiffs' favor. This appeal follows.

II. BREACH OF CONTRACT

Defendants raise a number of arguments with regard to the effect and interpretation of the original and the amended declarations. [6]

6 Questions of law are reviewed de novo. *Forge v. Smith,* 458 Mich. 198, 204; 580 NW2d 876 (1998). Further, the proper interpretation of a contract and the legal effect of its provisions are also reviewed de novo. *DeFrain v. State Farm Mut Auto Ins Co,* 491 Mich. 359, 366–367; 817 NW2d 504 (2012).

First, they argue that the Pedinellis are subject to the terms of the amended declaration. We disagree. The amended declaration expressly provides that it is not effective until it is recorded. Given that it is undisputed that the Pedinellis closed on their property *before* the amended declaration was recorded, the trial court did not err in finding that the Pedinellis were not subject to the amended declaration.

Next, defendants argue that the original declaration did not require the developer to pay any expenses associated with the Association. Article IV, § 2(a) of the original declaration provided:

> a. Each Owner of property within Turnberry Park Estates, by delivery of a deed transfer, ownership of a lot, agrees to bear the responsibility for their proportional share of the costs, which shall be assessed equally to the number of lots in the Community, for any maintenance, repair or replacement activity determined to be necessary by the Declarant or alternatively by a vote according to the procedures stated in Article III of the Association Bylaws of Turnberry Park Estates Home Owners Association.

Article I, § 1(k) provided that " 'Owner' shall mean and refer to the recorded Owner whether one or more persons or entities, of the fee simple title to any property, which is part of Turnberry Park Estates...." Defendants assert that the phrase "by delivery of a deed transfer" means that, because it did not transfer a deed to itself, it was never required to pay under Article IV, § 2(a). However, the developer falls within the definition of "owner" in § 1(k) because it is a fee owner of lots in the development. Further, the developer's deeds were also transferred to it. In other words, the developer did not previously own the property in perpetuity. Nothing in Article IV, § 2(a) requires the deed transfer to be from the developer to a future owner. Accordingly, under the terms of the original declaration, the developer was required to pay a proportionate share of the Association's expenses.

Defendants next argue that because the Mazzas and the Whites closed on their respective properties after the amended declaration was recorded, their title is subject to the requirements in the amended declaration. Deed restrictions are a type of contract between the buyer and the seller of the restricted property. *Bloomfield Estates Improvement Ass'n v. City of Bimingham,* 479 Mich. 206, 212; 737 NW2d 670 (2007). "A covenant is a contract created with the intention of enhancing the value of property[.]" *Terrien v. Zwit,* 467 Mich. 56, 71; 648 NW2d 602 (2002). In this case, the original declaration provided that the developer would be responsible for a proportionate share of the Association's costs. It also provided two methods to amend the declaration: the general amendment procedure in Article VIII, § 4 and the specific amendment procedure in Article IX(g). Plaintiffs contend that the procedure in Article IX(g) governed any amendment to the declaration that affected the division of the Association's costs. Defendants, however, contend that Article VIII governs because Article IX addresses the maintenance of the private roads within the development.

***4** The cardinal rule in interpreting a contract is to determine the intent of the parties. *Shay v. Aldrich,* 487 Mich. 648, 660; 790 NW2d 629 (2010). Where possible, a court must give effect to every word, phrase, and clause in a contract. *Klapp v. United Ins Group Agency, Inc,* 468 Mich. 459, 468; 663 NW2d 447 (2003). An interpretation that renders any part of a contract surplusage or nugatory is to be avoided. *Id.* Where contractual language is not ambiguous, it is construed according to its plain meaning. *Shay,* 487 Mich. at 660. "The settled rule regarding statutory construction is that a specific statutory provision controls over a related but more general statutory provision." *DeFrain v. State Farm Mut Auto Ins Co,* 491 Mich. 359, 367 n 22; 817 NW2d 504 (2012), citing *In re Haley,* 476 Mich. 180, 198; 720 NW2d 246 (2006). "The same is true with regard to contract provisions." *DeFrain,* 491 Mich. at 367 n 22.

Article IV of the original declaration provides in part:

> *Section 1. Purpose of Assessments*
>
> The assessments levied by the Declarant and / or the Association shall be used exclusively to promote the recreation, health, safety, welfare, common benefit and enjoyment of the Owners. For construction, operation and maintenance of the *Private Roads, and its easements, known as Turnberry Drive and Turnberry Court ... as well as any Common Areas or facilities located in/or within the property....*
>
> *Section 2. Obligations, Procedures, and Due Dates of Assessments*
>
> a. Each Owner of property within Turnberry Park Estates, by delivery of a deed transfer, ownership of a lot, agrees to bear the responsibility for their proportional share of the costs, which shall be assessed equally to the number of lots in the Community, for any maintenance, repair or replacement activity determined to be necessary by the Declarant or alternatively by a vote according to the procedures stated in Article III of the Association Bylaws of Turnberry Park Estates Home Owners Association.
>
> b. The annual assessment shall be sufficient for all necessary maintenance, *including the construction, reconstruction, repair or replacement of any improvements, described in Exhibit B (Turnberry Drive and Turnberry Court Private Roads) and Exhibit C (Common Areas), existing within the Community, or any other areas under the control of the Association.* Maximum reserve balance of funds shall not exceed Three Thousand Dollars ($3,000.00). [emphasis added.] [7]

[7] The amended declaration deletes Article IV, § 2(a) and replaces it with the following:

> Upon deed transfer from the Developer, each Owner of property within Turnberry Park Estates, by delivery of a deed transfer, ownership of a lot, agrees to bear the responsibility for their proportional share of the costs, which shall be assessed equally to the number of sold lots, excluding any lots owned by the Developer, in the Community, for any maintenance, repair or replacement activity determined to be necessary by the Declarant or alternatively by a vote according to the procedures stated in Article III of the Association Bylaws of Turnberry Park Estates Home Owners Association. Any combining of lots for one resident shall be recognized as one lot.

Article IX provides in part:

> The Owners of any Lot in Turnberry Park Estates ("the parties") ... as it relates to a certain roadway-easement being 66 feet in width, more or less, *particularly described in attached Exhibit B, and Common Areas described in Exhibit C,* by and between the parties hereto and their successors and assigns, hereby agreeing to each and all of the following terms and conditions:
>
> (a) The Association, upon assignment by the Declarant, shall become exclusively and solely responsible for the maintenance and repair of the Private Roads, *including snow and ice removal, identified as Turnberry Drive and Turnberry Court described in the attached Exhibit "B" and all Common Areas described in Exhibit C,* including all retention basins, as well as regular cutting of weeds and grass. The Association and the Owners who shall each and all of them be members of the Association, shall agree to each and every one of the following provisions as being a covenant running with the land, binding upon anyone with an interest in the property which comprises Turnberry Park Estates. The Association shall assess and collect sufficient funds from the Owners of the property to operate, maintain and repair each and all of the above. [emphasis added.]

***5** It is clear that the assessments discussed in Article IV are the same assessments that are elaborated upon in Article IX.

Both sections refer to the same areas and expenses, i.e., the private roads in Exhibit B and the common areas in Exhibit C to the original declaration.

Article VIII of the original declaration, which is titled "General Provisions," provides in pertinent part:

> The Declaration may be amended by an instrument signed by the Declarant only, *until such time the Declarant assigns the authority to enforce these Declarations to the Association,* then any Declaration subsequently amended must be by an instrument signed according to the voting procedures stated in Article III of the Association Bylaws of Turnberry Park Estates Home Owners Association. [emphasis added.]

The parties do not assert that the declarant, i.e., the developer, ever assigned the authority to enforce the original declaration to the Association. Thus, the developer retained the ability to amend the original declaration using "an instrument signed by" the developer only. Thus, parts of the declaration could be amended following the procedures in Article VIII.

However, amendments pertaining to the maintenance of the private roads and the common areas, i.e., the matters addressed in Article IX, are governed by a specific amendment procedure. Article IX(g) provides:

> (g) No amendment or modification of this agreement is authorized, unless the same is in writing and approved in the manner specified according to the voting procedures stated in Article III of the recorded Association Bylaws of the Turnberry Park Estates Home Owners Association.

The phrase "this agreement" refers to the maintenance agreement for the private roads and common areas, including the assessment of fees related to those matters. As noted supra, both Article IV and Article IX address the same areas and the same assessment costs. Accordingly, because a specific contract provision controls over a general one, *DeFrain,* 491 Mich. at 367 n 22, the procedure in Article IX(g) should have been followed.

Because it is undisputed that that procedure was not followed, we conclude that the amended declaration was invalid insofar as it purported to alter the division of the maintenance assessments in Article IV. However, to the extent that the costs invoiced did not pertain to the maintenance of the private roads in Exhibit B or the common areas in exhibit C of the original declaration, the amendment procedure in Article VIII would have been sufficient to amend the original declaration.

In conclusion, we affirm the trial court's finding that the Pedinellis took their property free from the terms of the amended declaration. Further, we affirm the trial court's finding that the Mazzas and the Whites are not bound by the terms of the amended declaration because it amended the original declaration in violation of the amendment procedure in Article IX; however, we also remand on this issue to determine which, if any, of the assessments charged actually pertained to the maintenance of the private roads and the common areas. To the extent that the fees charged did *not* pertain to the maintenance of the private roads and common areas, the amended declaration could be amended following the procedure in Article VIII, so the developer is not responsible for paying any portion that is not attributed to the maintenance of the private roads and common areas.

III. MCPA

***6** The trial court found that defendants violated MCL 445.903(1)(n), (s), and (bb). However, defendants argue that the MCPA should not apply to them because Lawrence is a residential home builder and is therefore exempt pursuant to MCL 445.904(1)(a) and *Liss v. Lewiston–Richard Inc,* 478 Mich. 203; 732 NW2d 514 (2007). We disagree.

MCL 445.904(1)(a) provides that the MCPA does not apply to:

> (a) A transaction or conduct specifically authorized under laws administered by a regulatory board or

> officer acting under statutory authority of this state or the United States.

In *Liss,* our Supreme Court held that "under MCL 445.904(1)(a), residential home builders are exempt from the MCPA because the general transaction of residential home building, including contracting to perform such transaction, is 'specifically authorized' by the Michigan Occupational Code (MOC), MCL 339.101 *et seq.*" *Liss,* 478 Mich. at 206. The Court explained that a residential home builder, by statutory definition, is someone " 'specifically authorized' to contract to build homes." *Id.* at 214. Thus, "[f]orming an agreement to build a home is the essence of a residential home builder's activity that is specifically authorized by law." *Id.* at 215.

In this case, however, Lawrence did not form an agreement with the Pedinellis, the Whites, or the Mazzas to build homes for them. Instead, he formed an agreement to sell the Pedinellis property, and then, in a separate capacity, served as the construction manager for them. Although Lawrence served as the construction manager, Gary Pedinelli served as his own general contractor. Further, with regard to the Whites and the Mazzas, the only agreements between them are contained in the original and the amended declarations. Thus, it is apparent that he did not form an agreement with them to build a home. The mere fact that Lawrence is a residential home builder does not exempt him from the MCPA in all of his activities. Rather, he is only exempt in conjunction with activities that are "specifically authorized" by statute. "The party claiming the exemption bears the burden of proving its applicability." *Id.* at 208. Under these facts, defendants cannot meet that burden.

Accordingly, because the residential home builders' exemption does not apply and because defendants do not otherwise challenge the trial court's ruling, we affirm the trial court's findings that defendants violated the MCPA.

IV. FRAUD OR MISREPRESENTATION

Defendants next argue that plaintiffs claim for fraud or misrepresentation is barred by the statute of limitations. [8] We disagree.

[8] If there is no factual dispute, this Court reviews de novo whether a claim is barred by the statute of limitations. *Sills v. Oakland Gen Hosp,* 220 Mich.App 303, 307; 559 NW2d 348 (1996).

Plaintiffs' claims for fraud and misrepresentation are governed by a six-year limitation period. See *Blue Cross & Blue Shield of Mich. v. Folkema,* 174 Mich.App 476, 481; 436 NW2d 670 (1988) ("In actions for fraud or misrepresentation the applicable limitation period is six years."). Given that the alleged misrepresentation and fraud occurred 2006 at the earliest, the limitations period would expire in 2012. The suit in this case was brought in 2011, so it was timely.

***7** Next, defendants argue that the trial court erred in finding that plaintiffs' claims for fraud and misrepresentation were meritorious. We agree in part.

We have described the relationship between fraud and misrepresentation as follows:

> Common-law fraud or fraudulent misrepresentation entails a defendant making a false representation of material fact with the intention that the plaintiff would rely on it, the defendant either knowing at the time that the representation was false or making it with reckless disregard for its accuracy, and the plaintiff actually relying on the representation and suffering damage as a result. Silent fraud is essentially the same except that it is based on a defendant suppressing a material fact that he or she was legally obligated to disclose, rather than making an affirmative misrepresentation. [*Alfieri v. Bertorelli,* 295 Mich.App 189, 193; 813 NW2d 772 (2012) (citation omitted).]

Here, the Whites and Mazzas cannot establish a claim for fraud or misrepresentation against defendants because they did not purchase their properties from defendants. Instead, the Whites purchased from the Beyersdorfs and the Mazzas purchased from Majestic Builders. Thus, defendants did not make *any* representations to the Whites and the Mazzas at closing. See *Forge v. Smith,* 458 Mich. 198, 212; 580 NW2d 876 (1998) (holding that the plaintiffs' claim for

misrepresentation failed because the plaintiffs could not show that the defendant had made a representation of a past or existing fact). Thus we reverse the trial court's order to the extent that it found the Whites and the Mazzas had a valid cause of action for fraud or misrepresentation based on the amended declaration.

However, the Pedinellis were presented with the amended declaration for the first time at closing. They were not told that the amendment was not legally effective and binding until it was recorded. Defendants represented to the Pedinellis that the amendment was binding on them when they sent invoices charging the Pedinellis under the terms of the amended declaration even though the Pedinellis did not take subject to the amended declaration, which was not recorded until after they closed. In sending the invoices, it is clear that defendants intended the Pedinellis to rely on them and actually pay the amount assessed. Further, Gary Pedinelli's testimony demonstrates that he did, in fact, rely on the representation and pay the invoices that were issued pursuant to the amended declaration instead of the original. Thus, we affirm the trial court's finding that the Pedinellis had a claim for fraud and misrepresentation based on the amended declaration.

In addition, to the extent that plaintiffs brought a claim for fraud based on defendants' misrepresentation regarding the dissolution of the Association and the charges for tax returns, corporate fees, and the payment of insurance premiums that were not actually incurred by the Association, we conclude that the trial court did not err in finding plaintiffs' claims meritorious. The record shows that the Association was dissolved in 2009, but that Terri continued to send invoices to plaintiffs using the Association's name. Defendants' representations on the invoice indicated that they expected plaintiffs to rely on the statements and pay the bill. Further, in reliance on the bill, plaintiffs actually paid the bill for a number of years. The same rationale applies to the inclusion of charges relating to the tax returns for the developer and the insurance premiums for the developer. The charges were on the invoices because defendants wanted plaintiffs to pay them. In reliance on the invoices, plaintiffs actually paid and were, as a result, damaged. Accordingly, the claim for misrepresentation as to the representations on the invoices was meritorious and the trial court's ruling is affirmed.

V. BREACH OF FIDUCIARY DUTY

***8** Defendants next argue that plaintiffs' claims for breach of fiduciary duty are barred by the statute of limitations. We agree in part.

"A claim of breach of fiduciary duty or breach of trust accrues when the beneficiary knew or should have known of the breach." *Prentis Family Foundation Inc v. Barbara Ann Karmanos Cancer Institute,* 266 Mich.App 39, 47; 698 NW2d 900 (2005), quoting *Bay Mills Indian Community v. Michigan,* 244 Mich.App 739, 751; 626 NW2d 169 (2001). Thus, "when a claim accrues is subject to an objective standard" and a plaintiff "is deemed to be aware of a possible cause of action when he becomes aware of an injury and its possible cause." *Prentis Family Foundation,* 266 Mich.App at 48 (quotation omitted). Here, the Pedinellis were aware of the amended declaration at closing in 2006. Likewise, because the amended declaration was recorded in June 2006, the Whites were on constructive notice of it in 2008 and the Mazzas were on constructive notice of it in September 2006. Thus, the Whites' claim for breach of fiduciary duty with regard to the amended declaration accrued in June 2008, and the Pedinellis and the Mazzas' claims accrued in 2006. [9] Accordingly, the limitations period for the Pedinellis and the Mazzas would have run in 2009 and the period for the Whites would have run in June 2011. The complaint was not filed until December 2011. Thus, the claim for breach of fiduciary duty based on the amended declaration was barred by the statute of limitations. [10]

9 "[A] fiduciary relationship arises from the reposing of faith, confidence, and trust and the reliance of one on the judgment and advise of another." *Prentis Family Foundation,* 266 Mich.App at 43 (alteration in original; quotation omitted). If there is no fiduciary relationship, then the fiduciary has no duty "to act for the benefit of the principal regarding matters within the scope of the relationship." *Id.* In this case, it is not clear that the Sants owed a fiduciary duty to the Whites and the Mazzas when they amended the declaration. At that point in time, the Mazzas and the Whites were only prospective buyers and had no relationship with defendants whatsoever. The parties, however, do not address this issue. Assuming *arguendo,* that there was a fiduciary duty owed to the Whites and the Mazzas, as detailed supra, the limitations period expired before they filed their claim.

[10] Further, to the extent that plaintiffs argue the Sants breached their fiduciary duties by exempting themselves from paying a portion of the costs that benefit the Sants only—such as mowing the lawn along the easement in front of the developer's lots—we conclude that claim is also time-barred. Because the payment structure was authorized in the amended declaration, any objection to the payment of fees associated with maintaining the easement would have accrued in June 2008 for the Whites and in 2006 for the Mazzas and the Pedinellis.

However, to the extent that plaintiffs argue the Sants breached their fiduciary duty when they invoiced them for the preparation of tax returns in 2008, 2009, and 2010, we conclude that the claims were not time-barred. It is clear that the breach of fiduciary duty claims were timely as to the tax returns from 2009 and 2010. Further, the claim pertaining to the 2008 tax return preparation charge accrued, at the earliest, on January 5, 2009, which is when plaintiffs were invoiced for the charges associated with the 2008 tax return. Thus, the three-year limitations period would have expired in January 2012. The complaint was filed in December 2011. Accordingly, the claims based on the tax returns were not barred by the limitations period. [11]

[11] On appeal, defendants do not argue that the substance of plaintiffs' breach of fiduciary duty claims lacked merit. Accordingly, we affirm the trial court's finding that defendants breached their fiduciary duty when they charged plaintiffs for tax returns filed on behalf of the developer.

We reverse the trial court's decision insofar as the court found that defendants had breached their fiduciary duty to plaintiffs with regard to the circumstances surrounding the amended declaration because those claims are barred by the statute of limitations. However, we affirm the balance of the breach of fiduciary duty claims as they pertain to charging plaintiffs for tax returns filed on behalf of the developer.

VI. CONCLUSION

In conclusion, we affirm the trial court's finding that the original declaration obligated the developer to pay a proportionate share of the Association's expenses. As to the Pedinellis, we affirm the trial court's ruling that they took their property free from the terms of the amended declaration as it was not recorded until after their closing.

***9** However, because the amended declaration was recorded prior to the closings of the Mazzas and the Whites purchases, we must address the trial court's holding that the amended declaration is *void ab initio* because it was adopted in violation of the amendment procedure in Article IX. We agree, as discussed above, that to the degree the assessments were for the purposes set forth in Article IX, they are void because they were not adopted consistent with that article's requirements. However, it is not clear from the present record whether all of the assessments pertained to the maintenance described in Article IX. To the degree they do not, we conclude that they could have been amended under the procedure in Article VIII. On remand, therefore, the trial court shall determine, which, if any, of the assessments were not for the purposes described in Article IX. As to those assessments, compliance with Article IX procedures was not required, so the developer could properly reallocate responsibility for their payment under the Article VIII procedures.

Additionally, we affirm the trial court's findings that defendants violated the MCPA.

We also affirm the trial court's ruling in plaintiffs' favor on their claims for misrepresentation based on the improper invoices for tax returns, and we affirm the trial court's finding that the Pedinellis had a claim for fraud and misrepresentation based on the amended declaration. However, we reverse the trial court insofar as it found that the Whites and the Mazzas had a valid cause of action for fraud or misrepresentation based on the amended declaration.

Finally, because it is barred by the statute of limitations, we reverse the trial court's decision to the extent that it found defendants breached their fiduciary duty with regard to the circumstances surrounding the amended declaration. However, we affirm the balance of the breach of fiduciary duty claims as they pertain to charging plaintiffs for tax returns filed on behalf of the developer.

Affirmed in part, reversed in part, and remanded for further proceedings. We do not retain jurisdiction.

All Citations

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United States District Court,
E.D. Michigan,
Southern Division.

AMERICAN AUTOMOBILE ASSOCIATION, INC., Plaintiff,
v.
ADVANCED AMERICAN AUTO WARRANTY SERVICES, Inc., Defendant.

Civil Action No. 09–CV–12351.
|
Nov. 16, 2009.

Attorneys and Law Firms

Michael A. Sneyd, Kerr, Russell, Detroit, MI, for Plaintiff.

Hattem A. Beydoun, Jeffrey P. Thennisch, Dobrusin and Thennisch, Pontiac, MI, for Defendant.

OPINION AND ORDER (1) DISMISSING COUNT V OF THE COMPLAINT, (2) DENYING DEFENDANT'S MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(6), and (3) DENYING PLAINTIFF'S REQUEST FOR AN ORDER UNDER FED. R. CIV. P. 11(c)(3)

PAUL D. BORMAN, District Judge.

I. INTRODUCTION

***1** This is a trademark infringement case. Plaintiff American Automobile Association, Inc. ("AAA" or "Plaintiff") claims that Defendant Advanced American Auto Warranty Services, Inc. ("Defendant") knowingly and willfully infringed on its trademarks in a manner that has caused consumers to falsely believe that Plaintiff is affiliated with Defendant or has endorsed Defendant's products and services.

Plaintiff is a not-for-profit corporation providing over 50 million members throughout the United States, including Michigan, with products and services such as insurance and warranty coverage, travel, vacation, and automobile products and services, financial advice, and discounts. Defendant is a corporation that advertises and sells automobile-related roadside assistance and warranty products and services.

The Complaint, which was filed on June 17, 2009, contains six counts as follows:

Count I: Federal Trademark Infringement, 15 U.S.C. § 1114

Count II: Federal Trademark Infringement and Unfair Competition, 15 U.S.C. § 1125(a)

Count III: Federal Trademark Dilution, 15 U.S.C. § 1125(c)

Count IV: Federal Trademark Cyberpiracy, 15 U.S.C. § 1125(d)

Count V: Trademark Infringement, Mich. Comp. Laws § 429.42

Count VI: Unfair Competition, Mich. Comp. Laws § 445.901

In its response to Defendant's Motion to Dismiss, Plaintiff states that it will not pursue Count V. *See* Pl.'s Resp. at 1 n. 1. Plaintiff also stated at oral argument that it was withdrawing this claim. Therefore, the Court will summarily dismiss Count V.

Now before the Court is Defendant's Motion to Dismiss Pursuant to Fed.R.Civ.P. 12(b)(6) [docket entry 14]. Plaintiff filed a response and Defendant filed a reply. The Court heard oral argument on November 5, 2009. In its response brief, Plaintiff argues that the filing of Defendant's motion violates Fed.R.Civ.P. 11(b) and asks the Court to issue an order pursuant to Rule 11(c)(3) requiring Defendant to show cause why it has not violated Rule 11. [1] For the reasons that follow, the Court will deny Defendant's Motion to Dismiss but decline to issue an order under Rule 1 1(c)(3).

[1] Plaintiff's Rule 11 argument is addressed in Section V of this Opinion and Order.

II. BACKGROUND

Plaintiff has registered more than 70 trademarks with the United States Patent and Trademark Office. Compl. at ¶ 18. This case arises out of Defendant's alleged infringement of certain of these trademarks. Specifically, the trademarks that are "particularly relevant to this action" include those eight that are listed in the chart contained in paragraph 18 of the Complaint. *See id.* Plaintiff has used these marks "in interstate

commerce to identify a wide range of products and services for decades." *Id.* at ¶ 15. Moreover, as stated in the Complaint,

> [o]nly AAA member clubs and those entities that are part of AAA's network of approved service providers are authorized to use or display the AAA Marks. AAA has been selective in authorizing entities to use the AAA Marks in connection with their own products and services. Consequently, AAA members and the public know that any business or website that displays the AAA Marks has been granted permission to do so only because the business maintains an excellent reputation for quality, integrity, reliability, and service.
>
> ***2** 16. As a result of AAA's history and experience providing high quality products and services through the AAA local clubs, and as a result of the continuous and extensive advertising, promotion, and sale of products and services under the AAA Marks, those trademarks have acquired substantial value and fame in the United States and in other countries.
>
> 17. Further, the AAA Marks are widely recognized by consumers in this country and abroad and have acquired enormous goodwill as trademarks identifying high quality and reliable products and services. Indeed, the AAA Marks are distinctive such that consumers recognize that goods and services marketed under the AAA Marks originate, or are approved or endorsed by, AAA and the AAA local clubs.

Id. at ¶¶ 15–17.

Defendant advertises and sells its products and services under, among others, the marks "AAA Warranty Services, Inc.," "A.A.A. Warranty Service, Inc.," "AAA Warranty Service," "AAA Warranty," and "AAA Advanced American Auto & Leasing." *Id.* at ¶ 7. Additionally, Defendant, at one time, has used the following domain names: AAA–WARRANTY.COM, AAAWARRANTY.NET, AAAWARRANTYBYNET.COM, THEAAAWARRANTY.COM, THEAAA–WARRANTY.COM, AAA–WARRANTIES.COM, WARRANTYAAA.COM, WARRANTY–AAA.COM, AAA–WS.COM, AAA–GCC.COM, and AAA–ASIA.COM. *Id.* at ¶¶ 1, 22, 25–26. Defendant apparently continues to use some of these domain names while others are no longer in use. *See id.* at ¶ 28.

According to Plaintiff, it never authorized Defendant to use its trademarks and Defendant's use of the above-listed marks and domain names is "confusingly similar to AAA's famous and distinctive marks ." *Id.* at ¶¶ 2, 20. As stated in the Complaint,

> 22. In or around February 2008, AAA began receiving reports from consumers confused by a company named "AAA Warranty" selling automobile warranties. Immediately upon learning of these reports, AAA investigated the matter and contacted Defendant regarding its use of the infringing business name and unlawful registration and use of the domain name AAA–WARRANTY.COM.
>
> 23. On or about March 5, 2008, AAA sent Defendant a letter to Defendant's business address, requesting that Defendant cease use of the AAA Marks in connection with its business and that it cancel its registration for the domain name AAA–WARRANTY.COM.
>
> 24. Defendant's counsel responded in a letter dated April 1, 2008, denying that Defendant had infringed AAA's Marks or that the website had been registered in bad faith. Thereafter, the two parties entered into extensive and detailed negotiations in an attempt to reach an amicable resolution of the matter. Despite these extensive efforts over a period of months, Defendant ultimately declined to settle and refused to cease the Infringing Uses.

Id. at ¶¶ 22–24. Moreover,

> 29. Despite having been notified repeatedly that its continued, unauthorized Infringing Uses constitute actionable trademark infringement, trademark dilution, cyberpiracy, and unfair competition, Defendant persists in its unlawful use of the AAA Marks, both in actively advertising its business and through using and registering the Infringing Domain Names.
>
> ***3** 30. On information and belief, Defendant's Infringing Uses have been and continue to be of commercial value to Defendant.
>
> 31. On information and belief, at the time Defendant began its Infringing Uses, and at all times thereafter, it was aware, or had reason to know, of AAA's rights in the AAA Marks and knew that those trademarks are distinctive and have become famous and valuable.

> 32. Defendant's Infringing Uses lessen the capacity of the AAA Marks to identify and distinguish the produces and services provided or endorsed by, or affiliated with, AAA under the AAA Marks and, thus, dilute the distinctive quality of the AAA Marks and damage the reputation, recognition, and goodwill consumer's associate with AAA's products and services.

Id. at ¶¶ 29–32.

Plaintiff seeks injunctive relief and monetary damages. *See* Compl. at pp. 14–16.

III. LEGAL STANDARD UNDER FED. R. CIV. P. 12(b)(6)

Fed.R.Civ.P. 12(b)(6) provides for the dismissal of a case where the complaint fails to state a claim upon which relief can be granted. When reviewing a motion to dismiss under Rule 12(b)(6), a court must "construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff." *DirectTV, Inc. v. Treesh,* 487 F.3d 471, 476 (6th Cir.2007). But the court "need not accept as true legal conclusions or unwarranted factual inferences." *Id.* (quoting *Gregory v. Shelby County,* 220 F.3d 433, 446 (6th Cir.2000)). "[L]egal conclusions masquerading as factual allegations will not suffice." *Eidson v. State of Tenn. Dep't of Children's Servs.,* 510 F.3d 631, 634 (6th Cir.2007).

As stated by the Supreme Court,

> [t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." [*Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 556, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)]. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.,* at 556, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. *Ibid.* Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.' " *Id.,* at 557, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (brackets omitted).

Ashcroft v. Iqbal, —— U.S. ——, ——, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009). A plaintiff's factual allegations, while "assumed to be true, must do more than create speculation or suspicion of a legally cognizable cause of action; they must show *entitlement* to relief." *League of United Latin Am. Citizens v. Bredesen,* 500 F.3d 523, 527 (6th Cir.2007) (emphasis in original). Thus, "[t]o state a valid claim, a complaint must contain either direct or inferential allegations respecting all the material elements to sustain recovery under some viable legal theory." *Bredesen,* 500 F.3d at 527.

IV. ANALYSIS

A. Defendant's Position

***4** Defendant argues that each count in Plaintiff's Complaint should be dismissed under Fed.R.Civ.P. 12(b)(6). Defendant's principal argument is that each count fails to state a claim upon which relief can be granted because, although Plaintiff states in its Complaint that "AAA has registered with the United States Patent and Trademark Office more than 70 of its AAA Marks," Compl. at ¶ 18, it does not "identify which *particular* mark of the 'AAA Marks,' serves as a basis for each count of the Complaint" (emphasis added). In other words, Defendant claims that it is unclear from the Complaint which of the "more than 70 ... AAA Marks" are "actually be asserted against the Defendant in this action." Defendant contends that all six counts contained in Plaintiff's Complaint should be dismissed on this basis.

Defendant also advances three additional arguments, one relating specifically to Count II and two relating specifically to Count VI. With respect to Count II, Defendant contends that Plaintiff's federal unfair competition claim fails to state a claim upon which relief can be granted because Plaintiff has not alleged, as it must, that "the false designation [has] a substantial economic effect on interstate commerce." *Johnson v. Jones,* 149 F.3d 494, 502 (6th Cir.1998). According to Defendant, "Plaintiff does not allege *any* effect, substantial or otherwise, that Defendant's alleged false designation of origin has resulted in an effect on interstate commerce" (emphasis added).

Additionally, Defendant argues that Count VI, Plaintiff's unfair competition claim under the Michigan Consumer Protection Act ("MCPA"), is barred by a statutory provision

that provides an exemption for regulated conduct or transactions. *See* Mich. Comp. Laws § 445.904(1)(a) (stating that the MCPA does not apply to any "transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States"). Defendant also contends, for the first time in its reply brief, that Count VI should be dismissed because the MCPA does not regulate the conduct complained of in this case. [2]

[2] The Court will not address this argument because it was raised for the first time in Defendant's reply brief. *See, e.g., United States v. Crozier,* 259 F.3d 503, 517 (6th Cir.2001) ("[w]e will generally not hear issues raised for the first time in a reply brief").

B. Discussion

Defendant's three arguments are addressed, in turn, below.

1. Defendant's First Argument

First, Defendant argues that it is unclear which particular mark serves as the basis for each count of the Complaint. As Defendant correctly points out, each cause of action asserted by Plaintiff in this case requires an allegation that a particular mark has been infringed. For example, Plaintiff's federal trademark infringement claim (Count I) is governed by 15 U.S.C. § 1114(1), which states that trademark infringement occurs if a person, acting without the permission of a trademark's owner, "use[s] in commerce any reproduction, counterfeit, copy, or colorable imitation of *a registered mark* in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive" (emphasis added). In order to demonstrate that confusion is likely, courts in this circuit consider eight factors: (1) strength of the plaintiff's mark; (2) relatedness of the goods; (3) similarity of the marks; (4) evidence of actual confusion; (5) marketing channels used; (6) likely degree of purchaser care; (7) defendant's intent in selecting the mark; (8) likelihood of expansion of the product lines. *See Frisch's Rests., Inc. v. Elby's Big Boy of Steubenville, Inc.,* 670 F.2d 642, 648 (6th Cir.1982). Defendant argues that while Plaintiff alleges that it has over 70 registered marks and that eight such marks are "particularly relevant to this action," it does not allege that any of these marks are infringed or that any of them serve as the basis underlying the counts contained in the Complaint. As such, Defendant contends that the Court will be unable to perform the eight-factor "likelihood of confusion" test as to factors (1) and (3), above, because these factors require an examination of the particular mark allegedly infringed, which, again, Defendant contends is not stated in the Complaint.

***5** In its Complaint, Plaintiff states that "[t]his action arises out of Defendant's knowing and willful violation of Plaintiff's rights in its famous and distinctive AAA trademarks ('AAA Marks')." Compl. at ¶ 2. Later in the Complaint, Plaintiff states that eight such marks are "particularly relevant to this action" and lists them in the chart contained in paragraph 18 of the Complaint. *Id.* at ¶ 18. Plaintiff then "repeats and realleges the[se] allegations" in each count of the Complaint. Based on these averments, and having closely examined the Complaint in the aggregate, it is clear that (1) Plaintiff is alleging that the eight marks contained in the chart have been infringed and (2) it is these marks that are being asserted in this case, providing the basis for the claims contained in the Complaint. Although Defendant could have pled its case more clearly, the Court finds that the Complaint survives the plausibility standard of *Twombly* and *Iqbal,* discussed in Section III.

2. Defendant's Second Argument

Defendant's second argument is directed at Count II only. Defendant contends that Plaintiff's federal unfair competition claim fails to state a claim upon which relief can be granted because Plaintiff has not alleged, as it must under *Johnson,* quoted above, that the false designation has a substantial economic effect on interstate commerce.

The plaintiff in *Johnson,* an architect licensed to practice in three states including Michigan, brought suit against another architect and others alleging that his architectural plans and drawings were altered and used without his permission in violation of 15 U.S.C. § 1125(a). *See* 149 F.3d at 496. The plans and drawings at issue concerned the construction of a house located in Michigan. *See id.* at 497. One of the defendants argued that the plaintiff failed to satisfy the "substantial economic effect on interstate commerce" requirement because "the ... house is located in Michigan" and is "bought and sold only in Michigan ... and, therefore, a false designation as to the designing architect cannot affect interstate commerce." *Id.* at 502. The Sixth Circuit rejected

this argument, stating that the defendant "fundamentally misperceive[d] the nature of th[e] case." *Id.* The court explained that "the house is only part of the 'goods or services' at issue" and that "[the parties'] *services as architects* are the more relevant 'goods or services.' " *Id.* (emphasis added). Because the plaintiff was licensed to practice, and actually did practice, in three separate states, the court determined that the "substantial economic effect on interstate commerce" requirement was satisfied, holding that if a defendant's "false designation hinders [the plaintiff's] ability to conduct his interstate ... business, it affects interstate commerce." *Id* .

Applying *Johnson* to the present case, it is clear that Plaintiff has sufficiently alleged a "substantial economic effect on interstate commerce." In its Complaint, Plaintiff states that it "provides its over 50 million members with products and services throughout the United States," Compl. at ¶ 6, that it "use[s] [its] Marks ... in interstate commerce to identify a wide range of products and services," *id.* at ¶ 15, that its "trademarks have acquired substantial value and fame in the United States and in other countries," *see id.* at ¶ 16, and that "Defendant has ... profited from [the] unauthorized use of the AAA Marks ... to the detriment of AAA and its customers." *See id.* at ¶ 5. Boiled down, then, Plaintiff alleges that its "ability to conduct [its] interstate ... business" has been hindered. *See Johnson,* 149 F.3d at 502. Accordingly, Plaintiff has sufficiently alleged a "substantial economic effect on interstate commerce" and Defendant's second argument is therefore unpersuasive.

3. Defendant's Third Argument

***6** Defendant's third argument is directed at Count VI only. Defendant argues that Plaintiff's state law claim for unfair competition under the MCPA should be dismissed pursuant to Mich. Comp. Laws § 445.904(1)(a). Defendant relies solely upon *Smith v. Globe Life Ins. Co.,* 460 Mich. 446, 597 N.W.2d 28 (1999), discussed below, in support of its argument.

The MCPA prohibits "[u]nfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce." Mich. Comp. Laws § 445.903. Under Mich. Comp. Laws § 445.904(1)(a), the exemption on which Defendant relies in this case, the MCPA "does not apply to ... [a] transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States." As stated by the Michigan Supreme Court, "the relevant inquiry is not whether the *specific* misconduct alleged by the plaintiffs is 'specifically authorized.' Rather, it is whether the *general* transaction is specifically authorized by law." *Smith,* 460 Mich. at 465, 597 N.W.2d 28 (emphasis added). For example, in *Smith,* a case involving allegedly fraudulent insurance practices in connection with the sale of a credit life insurance policy, the Court determined that the relevant "transaction or conduct" (i.e., the "general transaction") was the sale of credit life insurance and not the *fraudulent* sale of credit life insurance (i.e., the "specific transaction"). *See id.* at 465–466, 597 N.W.2d 28.

Defendant argues that § 445.904(1)(a) applies in the present case because its business is regulated by the Office of Financial and Insurance Regulation and the Michigan Department of Energy, Labor & Economic Growth. As stated by Defendant,

> Plaintiff's allegations arise out of Defendant's sale of automobile insurance and warranties. In Michigan the sale of automobile insurance is regulated by The Office of Financial and Insurance Regulation .... In regards to warranties, the Michigan Department of Energy, Labor & Economic Growth regulates the warrantors of aftermarket vehicle protection devices, systems and services sold in Michigan. Therefore, Defendant's alleged activates [sic] are exempt from liability under the MCPA.

(certain citations omitted).

This argument is clearly without merit. As Plaintiff correctly notes, the allegations in this case do not "arise out of Defendant's sale of automobile insurance and warranties," as Defendant argues. In fact, the nature of Defendant's business is irrelevant. What is relevant is Defendant's registration of business and domain names. Put differently, while the MCPA does not apply to "[a] transaction or conduct specifically authorized under laws administered by a regulatory board," the relevant "transaction or conduct" in this case is the registration of business and domain names, not the sale of insurance and warranties.[3] By contrast, the relevant

"transaction and conduct" in *Smith,* the sole case on which Defendant relies, was the sale of a credit life insurance policy, which is a practice that is "specifically authorized under laws administered by a regulatory board." Therefore, Defendant's argument that § 445.904(1)(a) is relevant here simply because its business—the sale of car insurance and warranties—is regulated by the state is inconsistent with the plain language of the exemption and must be rejected.

[3] As Plaintiff notes, the registration of business names is governed by Michigan's Business Corporation Act, which states, in relevant part, that a corporate name "[s]hall not contain a word or phrase, an abbreviation, or derivative of a word or phrase, the use of which is prohibited or restricted by any other statute of this state, unless in compliance with that restriction." Mich. Comp. Laws § 450.1212(1)(c). The Act also provides that "[t]he fact that a corporate name complies with this section does not create substantive rights to the use of that corporate name." *Id.* at § 450.1212(3).

These provisions demonstrate that the Michigan legislature intended to link the conduct in this case—the registration of business names—to other laws, such as the MCPA. Therefore, Plaintiff is correct that "[t]he MCPA's prohibition on '[u]nfair, unconscionable, or deceptive methods, acts, of practices in the conduct of trade or commerce' ... restricts the [Business Corporation Act's] naming provision" and, accordingly, "Michigan ... law does not ... authorize Defendant's [alleged] use of infringing or confusingly similar AAA-related business names."

V. PLAINTIFF'S REQUEST FOR AN ORDER UNDER RULE 11(c)(3)

***7** Plaintiff argues that the filing of Defendant's motion constitutes a violation of Rule 11(b)[4] and that the Court should issue an order under Rule 11(c)(3)[5] requiring Defendant to show cause why it has not violated Rule 11. The Court will decline to issue such an order because the arguments advanced by Defendant in its motion, although "wobbly," are not clearly frivolous, and the Court will decline to find a Rule 11 violation.

[4] Rule 11(b) reads as follows:

> **(b) Representations to the Court.** By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:
> (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
> (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
> (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

[5] Rule 11(c)(3) reads as follows: "On its own, the court may order an attorney, law firm, or party to show cause why conduct ... has not violated Rule 11(b)."

VI. ORDER

For the reasons stated above,

IT IS ORDERED that Count V of the Complaint is dismissed.

IT IS FURTHER ORDERED that Defendant's Motion to Dismiss [docket entry 14] is denied.

IT IS FURTHER ORDERED that Plaintiff's request for an order under Fed.R.Civ.P. 11(c)(3) is denied.

All Citations

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Steven HINDERER and Kathleen Hinderer, Plaintiffs-Appellants,
v.
Marcus SNYDER, Chelsea Builders, Inc., and Jason Eason, Defendants-Appellees,
and
Donald Barker, Defendant.

No. 339759
|
January 29, 2019

Washtenaw Circuit Court, LC No. 15-001131-CK

Before: Cameron, P.J., and Beckering and Ronayne Krause, JJ.

Opinion

Per Curiam.

***1** In this dispute arising from the construction of a substantial addition to a residential home, plaintiffs, Steven and Kathleen Hinderer, appeal the trial court's orders dismissing their claims against defendants Marcus Snyder, Chelsea Builders, Inc., and Jason Eason, for their work and involvement in the construction of the addition in 2009. [1] By March 2010, the Hinderers identified numerous problems with Chelsea Builders' work, and according to the Hinderers, Chelsea Builders refused to rectify the problems and did not complete the project. On November 6, 2015, the Hinderers filed their complaint against defendants. The trial court granted defendants' motion for summary disposition based on the applicable statute of limitations and laches. For the reasons more fully explained below, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

[1] The Hinderers also named Donald Barker as a defendant on their original complaint, but they never served him. The trial court later dismissed him from the case, and he is not a party to this appeal.

I. PERIOD OF LIMITATIONS

The Hinderers first argue that the trial court erred when it dismissed their claims for breach of contract (Count I); breach of warranty (Count II); violation of the builders' trust fund act (Count III); fraud (Count IV); negligent construction (Count VII); and violation of the Michigan Consumer Protection Act (MCPA), see MCL 445.901 *et seq.* (Count VIII); on the ground that those claims were each barred by the applicable statutes of limitations.

A. STANDARD OF REVIEW AND LAW

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Barnard Mfg. Co., Inc. v. Gates Performance Engineering, Inc.*, 285 Mich. App. 362, 369; 775 N.W.2d 618 (2009). We also review de novo whether the trial court properly interpreted and applied the relevant statutes. *Pransky v. Falcon Group, Inc.*, 311 Mich. App. 164, 173; 874 N.W.2d 367 (2015).

A party is entitled to have the trial court dismiss a plaintiff's action when the claim is barred by the applicable statute of limitations. See MCR 2.116(C)(7). As this Court has explained, a party can establish that it is entitled to summary disposition under MCR 2.116(C)(7) in two distinct ways: it can show that immunity is apparent on the face of the pleadings or it can present evidence to establish that, notwithstanding the allegations in the plaintiff's complaint, there is no factual dispute that he or she is entitled to immunity as a matter of law. *Yono v. Dep't of Transp. (On Remand)*, 306 Mich. App. 671, 678-680; 858 N.W.2d 128 (2014), rev'd on other grounds, 499 Mich. 636 (2016).

B. CONTRACT AND WARRANTY CLAIMS

A person cannot "bring or maintain an action to recover damages or money due for breach of contract" unless the party brings the action within six years. MCL 600.5807(1), (9). [2] A breach of contract claim accrues "at the time the wrong upon which the claim is based was done regardless of the time when damage results." MCL 600.5827. That is, a breach

occurs when the breaching party fails to perform as required under the agreement. See *Cordova Chemical Co. v. Dep't of Natural Resources*, 212 Mich. App. 144, 153; 536 N.W.2d 860 (1995).

2 The Legislature amended the statute effective May 7, 2018. The changes affected the numbering and wording of the relevant provisions but did not alter the substance. See 2018 PA 15.

***2** In this case, the Hinderers alleged that the parties entered into an oral agreement for the construction of an addition to the Hinderers' home using the "broad outline of the draft contract dated November 16, 2009," but with the understanding that additional terms applied. Although the Hinderers alleged that the parties entered into the agreement, they did not allege that Snyder participated in any capacity other than as the duly authorized representative of Chelsea Builders. Indeed, even the alleged draft agreement the Hinderers attached to the complaint showed that the agreement was between Chelsea Builders and the Hinderers.[3] The Hinderers then alleged that "[d]efendants" breached the agreement in the "numerous ways" stated under their factual allegations, which included—but was not limited to—"refusing to complete the project," "demanding payments in excess of the amount agreed," "refusing to correct code violations," "failing to perform the work under the contractual standards," and by "failing to work in a manner so as to prevent damage to the existing structure and addition." The Hinderers similarly alleged, in relevant part, that "[d]efendants" expressly warranted the quality of the materials and workmanship and warranted that the materials and workmanship would comply with building codes and standards. The Hinderers further alleged that "[d]efendants" breached the warranties by providing substandard materials and performing substandard work.

3 The Hinderers did not allege that Eason entered into any agreement with them.

The Hinderers allege that these acts or omissions occurred after the parties orally agreed to begin the project and after construction commenced on November 9, 2009. Assuming these allegations to be true and construing them in favor of the Hinderers, which this Court must do, see *Maiden v. Rozwood*, 461 Mich. 109, 119; 597 N.W.2d 817 (1999), the Hinderers alleged that the breach of the agreement and the warranties occurred on or after November 9, 2009. The Hinderers filed their original complaint on November 6, 2015, which means that—as alleged—their breach of contract and warranty claims were timely. See MCL 600.5807(9); MCL 600.5827. Therefore, to the extent that the trial court dismissed the Hinderers' breach of contract and warranty claims as untimely, it erred.

C. BUILDERS' TRUST FUND ACT

As for their claim under the builders' trust fund act, see MCL 570.151 *et seq.*, the Hinderers alleged that Chelsea Builders and Snyder were contractors for purposes of the act and that the Hinderers paid them more than $ 43,000 to purchase materials in the spring of 2009. They wrote that they continued to make scheduled payments, which totaled over $ 98,000. They further alleged that Chelsea Builders and Snyder did not use the money to purchase the materials that were to be used in the project or to pay laborers, subcontractors, or materialmen, and that they also appropriated the money for their own use in violation of the builders' trust fund act. More specifically, the Hinderers alleged that Chelsea Builders and Snyder failed to pay two subcontractors and failed to return the funds to the Hinderers.

This Court has held that the six-year period of limitations stated under MCL 600.5813 applies to a claim under the builders' trust fund act. See *DiPonio Constr. Co., Inc. v. Rosati Masonry Co., Inc.*, 246 Mich. App. 43, 56; 631 N.W.2d 59 (2001). A claim under the builders' trust fund act accrues when the contractor receives money for either the labor or materials necessary to make an improvement, appropriates the money to his or her own use, and fails to pay subcontractors or materialmen that the contractor engaged to furnish labor or provide materials. *Id.* at 57-58; see also *BC Tile & Marble Co., Inc. v. Multi Bldg. Co., Inc*, 288 Mich. App. 576, 585; 794 N.W.2d 76 (2010) (stating the elements of a claim under the builders' trust fund act).

On appeal, Chelsea Builders and Snyder argue that the Hinderers' claim under the act had to have accrued in the spring of 2009 because that was the period within which the Hinderers alleged that Chelsea Builders and Snyder received the funds to purchase materials for the project. The Hinderers, by contrast, argue that the claim accrued when Chelsea Builders and Snyder refused to refund the money or transfer the materials that it had purchased. Neither position is correct. Although the Hinderers suggested that Chelsea Builders and Snyder could be liable under the act for failing to purchase the materials that they agreed to purchase, or by failing to return the funds that were paid for that purpose, the act applies only

when the contractor or subcontractor appropriates the money for his or her own use after having engaged a subcontractor or materialman to provide services or materials and leaves the subcontractor or materialman unpaid. See *BC Tile*, 288 Mich. App. at 585; see also MCL 570.152 (providing that it is unlawful for a contractor or subcontractor to appropriate funds paid to him or her for any purpose other than to first pay laborers, subcontractors, or materialmen). As such, neither the failure to purchase the materials in advance of the project, nor the failure to return any funds that were not needed to pay laborers, subcontractors, or materialmen were a violation of the act. Because a contractor's failure to engage a subcontractor or purchase materials from a materialman does not violate the act, those failures cannot serve as the point at which such a claim accrues. See MCL 600.5827 (stating that a claim accrues when the wrong is complete). Therefore, to the extent that the Hinderers rely on those allegations to establish their claim under the builders' trust find act, they failed to state a claim upon which relief could be granted. See MCR 2.116(C)(8).

***3** Nevertheless, the Hinderers did allege that Chelsea Builders and Snyder accepted the money, appropriated it to their own use, and left two subcontractors unpaid. If Chelsea Builders or Snyder engaged the services of a subcontractor and used the money for a purpose other than to pay the contractors first, it violated the act. See *BC Tile*, 288 Mich. App. at 585; MCL 570.152. Because the Hinderers alleged that the two subcontractors provided services during the construction project, which they alleged to have begun on or after November 9, 2009, the Hinderers alleged a timely claim under the builders' trust fund act with regard to the failure to pay those two subcontractors. As such, the trial court erred to the extent that it determined that the Hinderers claim under the builders' trust fund act was untimely under the applicable six-year period of limitation. MCL 600.5813.

D. FRAUD

The Hinderers' fraud claims were also subject to a six-year period of limitations. See MCL 600.5813; *Boyle v. Gen. Motors Corp.*, 468 Mich. 226, 228 n.2; 661 N.W.2d 557 (2003). A claim of fraud accrues when the wrong was done—not when it was discovered, *Boyle*, 468 Mich. at 231-232, and the wrong is done when the plaintiff is harmed, *id.* at 231 n.5.

The Hinderers did not state with particularity whether and when they suffered any harm from the alleged misrepresentations. See MCR 2.112(B)(1) (providing that the party alleging fraud must state the circumstances constituting the fraud with particularity); *Cooper v. Auto Club Ins. Ass'n*, 481 Mich. 399, 414; 751 N.W.2d 443 (2008) (stating that every element of the fraud claim must be pleaded with particularity); see also *Frank v. Linkner*, 500 Mich. 133, 150; 894 N.W.2d 574 (2017) (stating that, to determine when a claim accrued under MCL 600.5827, courts must look to the harm alleged in the plaintiff's cause of action). The Hinderers did allege that some misrepresentations occurred before construction began and that others occurred after construction began. Construing the allegations in the light most favorable to the Hinderers, see *Maiden*, 461 Mich. at 119, any harm from the misrepresentations alleged to have occurred after construction began would have had to have occurred on or after November 9, 2009. Thus, the Hinderers' claims of fraud—while lacking in particularity with regard to the nature and timing of the harm actually suffered—nevertheless were timely to the extent that they involved misrepresentations that occurred during the construction project. See MCL 600.5813; *Boyle*, 468 Mich. 231-232. Moreover, as for the misrepresentations that the Hinderers alleged to have occurred before the construction began, they may have been able to amend their pleadings to more clearly state when the harm occurred, and leave to amend should be freely given to correct such deficiencies. See MCR 2.118(A)(2). Consequently, on this record, the trial court erred to the extent that it dismissed as untimely the Hinderers' claims of fraud that occurred during the construction project.

E. NEGLIGENT CONSTRUCTION OF AN IMPROVEMENT

Our Legislature provided that no "person" can "maintain an action to recover damages for injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective or unsafe condition of an improvement to real property ... against any contractor making the improvement, unless the action is commenced within" "[s]ix years after the time of occupancy of the completed improvement, use, or acceptance of the improvement." MCL 600.5839(1)(a). This period of limitations applies to tort actions; it does not apply to contract actions. See *Miller-Davis Co. v. Ahrens Constr., Inc.*, 489 Mich. 355, 370; 802 N.W.2d 33 (2011). In order for a claim to sound in tort when acting pursuant to a contract, the tortfeasor must have breached a duty that was separate and distinct from the duties imposed under the contract. See *Bailey v. Schaaf (On Remand)*, 304 Mich. App. 324,

332-340; 852 N.W.2d 180 (2014) (examining the distinction between contractual liability and tort liability), vacated on other grounds 497 Mich. 927 (2014). Indeed, our Supreme Court explained that it was error for this Court to expand the application of MCL 600.5839(1) to all actions brought against a contractor involving an improvement, including those brought for damage to the improvement itself. *Miller-Davis Co.*, 489 Mich. at 367.

***4** Under Count VII, which was titled "Negligence in Construction," the Hinderers alleged numerous breaches that they claimed caused various harms. The Hinderers alleged that Chelsea Builders and Snyder harmed their property through negligent construction practices. Specifically, they alleged that Chelsea Builders and Snyder failed to properly protect the property from the elements during construction, which harmed both the original structure and the improvements made. They similarly claimed that Chelsea Builders and Snyder used "excessive, damaging force," which damaged the property, and used "unsafe methods" in demolishing the sunporch to make room for the new addition. These claims, and similar ones stated under Count VII, to the extent that they state a claim at all, do not appear to involve harms "arising out of the defective or unsafe condition of an improvement." MCL 600.5839(1). Rather, as Chelsea Builders and Snyder argue on appeal, these claims appear to involve ordinary negligence, which would be subject to the three-year period of limitations stated under MCL 600.5805, as amended by 2011 PA 162, in addition to the statute of repose stated under MCL 600.5839(1).

Notwithstanding the apparent application of former MCL 600.5805(10), currently MCL 600.5805(2), to the defective or unsafe condition of an improvement, this Court has held that MCL 600.5839 established a six-year period of limitations and period of repose for all claims involving negligent workmanship during the construction of an improvement. See *Citizens Ins. Co. v. Scholz*, 268 Mich. App. 659, 665-671; 709 N.W.2d 164 (2005) (discussing what constitutes a defective or dangerous improvement subject to the six-year statute of repose and what constitutes ordinary negligence). The Court in *Citizens* relied heavily on MCL 600.5805, as amended by 2002 PA 715, and our Supreme Court's interpretation of that provision in *Ostroth v. Warren Regency, GP, LLC* (*Ostroth I*), 263 Mich. App. 1; 687 N.W.2d 309 (2004), aff'd 474 Mich. 36 (2006), to conclude that the Legislature intended MCL 600.5839 to apply to all actions arising from the construction of an improvement in addition to actions arising from the defective nature of the improvement itself. See *Citizens*, 268 Mich. App. at 664-665. Our Supreme Court noted that, under MCL 600.5805(14), as amended by 2002 PA 715, the Legislature stated that all claims against contractors shall be "as provided" in MCL 600.5839. *Ostroth v. Warren Regency, GP, LLC* (*Ostroth II*), 474 Mich. 36, 41; 709 N.W.2d 589 (2006), quoting former MCL 600.5804(14) (quotation marks omitted). Relying on that language, our Supreme Court concluded that the Legislature intended MCL 600.5839 to serve as both a statute of limitations and a statute of repose. *Id.* at 44-45.

Since the decisions in *Ostroth II* and *Citizens Ins.*, the Legislature amended MCL 600.5805 to no longer state that the claims against contractors shall be "as provided" by MCL 600.5839. Instead, MCL 600.5805, as amended by 2011 PA 162, stated under MCL 600.5805(15), currently MCL 600.5805(14), that the "periods of limitation under this section are subject to any applicable period of repose established in section [MCL 600.]5838a, [MCL 600.]5838b, or [MCL 600.]5839." With this amendment, the Legislature modified the statutory scheme to preclude MCL 600.5839 from being applied as a statute of limitations, clarifying that it was a statute of repose that should be applied in addition to any applicable period of limitations. Cf. *Ostroth II*, 474 Mich. at 44-45 (stating that there was no evidence that the Legislature intended MCL 600.5839 to be only a statute of repose and instead concluding that the Legislature intended that provision to be both a statute of limitations and repose). Because the periods of limitations are now subject to the period of repose stated under MCL 600.5839, see former MCL 600.5805(15), courts must apply both the applicable period of limitations and the applicable period of repose. As such, the Hinderers could not bring a claim involving negligent construction of an improvement against a contractor unless they brought the claim within three years after the claim first accrued, see former MCL 600.5805(1) and (10), and within six years "after the time of occupancy of the completed improvement, use, or acceptance of the improvement," MCL 600.5839(1)(a). Because any tort claim involving negligence during the construction of the improvement necessarily accrued before Chelsea Builders and Snyder stopped working on the property in April 2010, and the Hinderers did not bring the claims until November 2015, the claims stated under Count VII were untimely. See former MCL 600.5805(10).

***5** The trial court did not err to the extent that it dismissed the Hinderers' claims under Count VII as untimely under MCR 2.116(C)(7).

F. MICHIGAN CONSUMER PROTECTION ACT

The Hinderers also argue on appeal that their claims under the MCPA were timely under the applicable statute of limitation. The trial court, however, did not dismiss these claims as untimely under the applicable period of limitations. Instead, it determined that Chelsea Builders and Snyder were exempt from the requirements of the MCPA and that the MCPA claims were barred by the doctrine of laches. Consequently, we need not address whether these claims were barred by the applicable period of limitations.

II. LACHES

A. STANDARD OF REVIEW

The Hinderers next argue that the trial court erred when it dismissed their claims under the equitable doctrine of laches. This Court reviews de novo a trial court's decision on a motion for summary disposition and reviews de novo whether the trial court properly applied an equitable doctrine to the facts of the case. See *Knight v. Northpointe Bank*, 300 Mich. App. 109, 113; 832 N.W.2d 439 (2013). "A question of fact exists when reasonable minds could differ as to the conclusions to be drawn from the evidence." *Dextrom v. Wexford Co.*, 287 Mich. App. 406, 416; 789 N.W.2d 211 (2010). This Court reviews a trial court's findings of fact in support of the application of the doctrine of laches for clear error. *Shelby Charter Twp. v. Papesh*, 267 Mich. App. 92, 108; 704 N.W.2d 92 (2005).

B. ANALYSIS

The doctrine of laches arose from the requirement that a complainant in equity must come to the court with a clean conscience, in good faith, and after acting with reasonable diligence. *Knight*, 300 Mich. App. at 114. "If a plaintiff has not exercised reasonable diligence in vindicating his or her rights, a court sitting in equity may withhold relief on the ground that the plaintiff is chargeable with laches." *Id.* Although timing is important, laches is not triggered by the passage of time alone; rather, it is the prejudice occasioned by the delay that justifies application of the doctrine to bar a claim. *Id.* at 114-115. The defendant bears the burden of proving that the plaintiff's lack of diligence prejudiced the defendant sufficiently to warrant application of the doctrine of laches. See *Yankee Springs Twp. v. Fox*, 264 Mich. App. 604, 612; 692 N.W.2d 728 (2004).

In their original motion for summary disposition, Chelsea Builders and Snyder argued that the doctrine of laches applied to bar all of the Hinderers' claims because the documentation the Hinderers submitted to the trial court and the other record evidence showed that, although they were aware of their claims six years earlier, they had inexplicably delayed bringing them. During that time, they proceeded to have contractors perform work and alterations to the home. In that way, the delay resulted in the loss of evidence, which prejudiced the defense.

In response, the Hinderers stated that photos, scans, and reports documenting the defects existed. Further, they had submitted some photos and reports that they claim document the condition of the property before any changes were made and offered Kathleen Hinderer's affidavit in which she averred that there was further documentation establishing the defective condition of the improvements. They also maintained that they advised Chelsea Builders and Snyder of the defects so as to allow them the opportunity to correct them. Finally, they asserted that the delay was not unreasonable because they were pursuing their claims against Chelsea Builders and Snyder through a state agency.

***6** In ruling on the original motion for summary disposition, the trial court characterized the Hinderers' delay as inexcusable and stated that it was reasonable to infer that significant evidence had been lost. The trial court, however, did not address the evidence that permitted an inference that the Hinderers' delay was reasonable in light of their efforts to secure compensation without proceeding to court, and it did not address the Hinderers' evidence that they sufficiently documented the construction work to allow Chelsea Builders and Snyder to present a reasonable defense, which implicated whether the delay prejudiced Chelsea Builders. The trial court also did not discuss whether Chelsea Builders and Snyder had the ability to obtain additional evidence in their defense by deposing the persons involved in the original and subsequent improvements.

In their second motion for summary disposition, Chelsea Builders and Snyder did not specifically raise the doctrine of laches. They argued that the trial court should dismiss the Hinderers' breach of contract, warranty, and fraud claims for the same reasons argued in their first motion for summary

disposition, which included laches. The trial court granted the second motion for summary disposition and dismissed all of the Hinderers' claims except their MCPA claim. In granting the motion, the trial court mentioned laches, but it did not address the evidence in support of applying the doctrine of laches to bar the claims. It also did not discuss the possible factual dispute involving whether the doctrine could be properly applied.

Chelsea Builders and Snyder did address the issue of laches in their supplemental brief as it might apply to the Hinderers' claims under the MCPA. And the Hinderers reiterated their earlier arguments with regard to the doctrine of laches as it might apply to their MCPA claim. Specifically, they maintained that they had taken reasonable steps to assert their rights before resorting to the courts, which included filing a claim with Chelsea Builders' insurer and preserving the evidence before proceeding to complete the project. Chelsea Builders also discussed the prejudice prong of the doctrine of laches and presented evidence that the Hinderers' dramatically altered the property.

At the hearing to consider whether to dismiss the Hinderers' MCPA claims, the trial court discussed its decision to apply laches more specifically. It stated that it had not "seen and probably won't ever see another case as clear an example of laches." It agreed with defense counsel and stated that it believed that the Hinderers had "lulled" Chelsea Builders and Snyder into believing that they were just going to pursue their complaints with the state agency and the insurer. The trial court again did not carefully analyze the evidence implicating whether the Hinderers' delay in filing suit was reasonable and did not discuss the evidence tending to show that Chelsea Builders and Snyder were not prejudiced by the delay.

Chelsea Builders and Snyder had the burden to demonstrate that the Hinderers' claim should be barred under the doctrine of laches. *Yankee Springs Twp.*, 264 Mich. App. at 612. And whether to apply the doctrine of laches may depend on the resolution of factual disputes about the reasonableness of the delay and the prejudice occasioned by the delay. See *Eberhard v. Harper-Grace Hosps.*, 179 Mich. App. 24, 39-40; 445 N.W.2d 469 (1989). In this case, there was evidence that would permit a trial court sitting in equity to find that the Hinderers' delay was unreasonable and prejudiced Chelsea Builders and Snyder. But there was also evidence from which the trial court could have found that the Hinderers proceeded with due diligence or that the delay did not prevent Chelsea Builders or Snyder from defending the claims. Whether treated as a decision on a motion for summary disposition under MCR 2.116(C)(7) or (C)(10), there was a factual dispute on which reasonable minds may differ about whether the doctrine of laches should apply, and as such, this issue cannot be resolved on a motion for summary disposition. See *White v. Taylor Distributing Co., Inc.*, 275 Mich. App. 615, 630; 739 N.W.2d 132 (2007) (stating that trial courts may not resolve factual disputes or determine credibility in ruling on a motion for summary disposition).

***7** For the same reason, we decline to consider the Hinderers' argument that the doctrine of unclean hands bars Chelsea Builders and Snyder from asserting laches as a defense. See *Attorney General v. PowerPick Players' Club of Mich., LLC*, 287 Mich. App. 13, 52; 783 N.W.2d 515 (2010) (stating that one with unclean hands may not assert the equitable defense of laches). The record requires further factual development to determine whether that equitable doctrine might apply. See, e.g., *Mudge v. Macomb Co.*, 458 Mich. 87, 109; 580 N.W.2d 845 (1998). Further, although this Court has held that the equitable doctrine of laches applies to actions at law, see *Tenneco Inc. v. Amerisure Mut. Ins. Co.*, 281 Mich. App. 429, 456; 761 N.W.2d 846 (2008), our Supreme Court has stated that the equitable doctrine of unclean hands "is only relevant in equitable actions," see *Rose v. Nat'l Auction Group*, 466 Mich. 453, 467-468; 646 N.W.2d 455 (2002). Hence, it is unclear whether the equitable doctrine of unclean hands can be used in an action at law to defeat the application of laches.

The trial court erred to the extent that it applied the doctrine of laches to bar the Hinderers' claims without first holding a trial or evidentiary hearing to resolve the factual disputes underlying the proper application of that doctrine.

III. MCPA

A. STANDARD OF REVIEW

The Hinderers next argue that the trial court erred when it determined that Chelsea Builders and Snyder were exempt from the requirements of the MCPA and dismissed their MCPA claims in part on that basis. This Court reviews de novo a trial court's decision on a motion for summary disposition. *Barnard Mfg.*, 285 Mich. App. at 369. This Court also reviews de novo whether the trial court properly interpreted and applied the relevant statutes. *Pransky*, 311 Mich. App. at 173.

B. ANALYSIS

The Legislature prohibited certain "[u]nfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce" in the MCPA. MCL 445.903(1). However, it also provided that the MCPA does not apply to a "transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States." MCL 445.904(1). The party claiming the exemption has the burden of proving it. MCL 445.904(4).

Our Supreme Court first examined the scope of this exemption in *Attorney General v. Diamond Mtg. Co.*, 414 Mich. 603; 327 N.W.2d 805 (1982). In that case, the Court had to determine whether Diamond Mortgage was exempt from the MCPA for claims involving home loans because it was licensed as a real estate broker, and the licensing act at the time, MCL 451.201 *et seq.*, as repealed by 1980 PA 299, contemplated that real estate brokers would negotiate such loans. *Id.* at 606, 616. The *Diamond* Court held that Diamond Mortgage was not exempt because, "[w]hile the license generally authorizes Diamond to engage in the activities of a real estate broker," it did not specifically authorize the conduct at issue. *Id.* at 617. The Court acknowledged that no act specifically authorizes "misrepresentations or false promises," but it disagreed that its construction rendered the exemption meaningless. *Id.* It explained that the exemption would apply even when a party attached such labels to a transaction or conduct if the underlying transaction or conduct had been specifically authorized under the laws administered by a regulatory board. *Id.*

In *Smith v. Globe Life Ins. Co.*, 460 Mich. 446; 597 N.W.2d 28 (1999), our Supreme Court returned to the exemption stated under MCL 445.904(1) and again rejected the contention that the exemption only applies when the allegedly wrongful conduct was itself authorized by law. The Court explained that the "relevant inquiry is not whether the specific misconduct alleged by the plaintiff" is specifically authorized by law, but rather "whether the general transaction is specifically authorized by law, regardless of whether the specific misconduct alleged is prohibited." *Id.* at 465.

***8** Our Supreme Court examined the meaning of the term "specifically authorized" as it applied to residential builders in *Liss v. Lewiston-Richards, Inc.*, 478 Mich. 203; 732 N.W.2d 514 (2007). The Court reiterated that the focus must be on the "general transaction" and whether it has been "explicitly sanctioned" by law and not whether the specific misconduct had been prohibited. See *id.* at 212-213. The Court concluded that residential home building was conduct that was exempt from the MCPA because the occupational code, specifically MCL 339.2401 *et seq.*, authorized residential home building. *Liss*, 478 Mich. at 214. The Court clarified that residential homebuilding was authorized under the occupational code because the code required the home builder to have a license and a license constituted formal permission to do something or carry on some business. *Id.* at 214 n.39. The Court also noted that there were only a limited number of instances where a "non-licensed builder" was permitted to act as a residential builder. *Id.* at 214. The Court concluded that, with limited exceptions, residential home building was a transaction specifically authorized under the occupational code:

> The clear import of the statutory scheme is that there are only a few instances where one can engage in the business of a residential home builder without having a license. Therefore, with limited exceptions, contracting to build a residential home is a transaction "specifically authorized" under the [Michigan Occupational Code], subject to the administration of the Residential Builders' and Maintenance and Alteration Contractors' Board. [*Id.* at 215.]

Notably, in both *Diamond Mtg.* and *Liss*, our Supreme Court emphasized that the defendant was either exempt or not exempt from the MCPA on the basis of the conduct that was specifically authorized for someone holding the relevant license. In *Diamond Mtg.*, the Court concluded that Diamond Mortgage was not exempt from the MCPA because its real estate broker's license did not authorize it to make loans. *Diamond Mtg.*, 414 Mich. at 617; see also *Smith*, 460 Mich. at 464 (recognizing that the transaction at issue in *Diamond Mtg.* was not exempt from the MCPA because the conduct was not specifically authorized under the defendant's real estate broker's license). By contrast, in *Liss*, the builder had a residential builder's license, which specifically authorized it

to engage in the business of residential building and so it was exempt from the MCPA when engaged in such conduct. *Liss*, 478 Mich. at 214-215, 214 n.39.

In this case, the Hinderers alleged that Chelsea Builders and Snyder were engaged in the business of residential construction and alteration but did not have a residential builder's license. Accepting those allegations to be true, see *Maiden*, 461 Mich. at 119, Chelsea Builders and Snyder were not specifically authorized by the occupational code to engage in residential building. As such, the exemption stated under MCL 445.904(1)(a) did not apply to the conduct at issue. *Liss*, 478 Mich. at 214-215; *Diamond Mtg.*, 414 Mich. at 617. Consequently, the trial court erred when it determined that the exemption stated under MCL 445.904(1)(a) applied because the "transaction or conduct" was "specifically authorized under laws administered by a regulatory board ...." The occupational code does not authorize persons to conduct residential building without a license.

On appeal, Chelsea Builders and Snyder maintain that the case law must be read to examine whether the conduct or transaction at issue was authorized under some regulatory scheme without regard to whether the individual engaging in the conduct or transaction held the requisite license that would allow him or her to engage in the conduct or transaction. We disagree. In *Diamond Mtg.*, our Supreme Court did not examine whether the issuing of loans secured by mortgages was an activity that was authorized under any regulatory scheme; rather, it examined whether the license held by the defendant in that case authorized the issuing of loans secured by mortgages and determined that it did not. Similarly, in *Liss*, our Supreme Court explained that it is the holding of a license that confers the authority to act under the regulatory scheme. Consequently, the relevant inquiry is not whether the conduct was authorized generally under some regulatory scheme, but whether the license actually held by the defendant authorized the general conduct or transaction at issue. It follows that a person who does not hold the license to engage in the relevant conduct cannot claim the exemption under MCL 445.904(1)(a). See *Liss*, 478 Mich. at 214-215; *Diamond Mtg.*, 414 Mich. at 617.

***9** The trial court erred when it determined that the exemption stated under MCL 445.904(1)(a) applied to the facts as alleged in this case. Therefore, it erred to the extent that it dismissed the Hinderers' claims on that basis, and we reverse this aspect of the trial court's decision.

IV. PIERCING THE CORPORATE VEIL

The Hinderers also argue that the trial court erred by dismissing their claim for piercing the corporate veil as stated under Count V of their complaint.

Corporations and other artificial entities are legal fictions. *Green v. Ziegelman*, 310 Mich. App. 436, 450; 873 N.W.2d 794 (2015). Courts indulge a presumption that the entity is separate and distinct from its owners absent some abuse of the corporate form. *Id.* at 451. A court sitting in equity may, however, pierce the veil of corporate structure and impose liability on the owners to prevent fraud or injustice. *Id.* "[P]iercing the veil of a corporate entity is an equitable remedy sparingly invoked to cure certain injustices" and not a separate cause of action. *Gallagher v. Persha*, 315 Mich. App. 647, 654; 891 N.W.2d 505 (2016). Whether to pierce the corporate veil depends on the specific facts of the each case, see *Rymal v. Baergen*, 262 Mich. App. 274, 293-294; 686 N.W.2d 241 (2004), and the proponent seeking to disregard the separate existence of the entity bears the burden to prove facts that would justify doing so, see *Green*, 310 Mich. App. at 454 (discussing the elements that the complainant must establish to justify disregarding an entity's separate existence). The party asking the trial court to disregard the separate existence of an entity may do so in his or her original complaint or may do so in a subsequent complaint after a judgment has been entered against the entity. See *Gallagher*, 315 Mich. App. at 665-666. Thus, a plaintiff must specifically ask the trial court to disregard the separate existence of an entity and must allege facts that, if true, would justify doing so.

In a separate count (Count V) of their third amended complaint, the Hinderers alleged that Snyder could be personally liable for the wrongs committed by Chelsea Builders because he was Chelsea Builders' officer at the time. They also alleged that the trial court could impose personal liability on Snyder because Snyder used Chelsea Builders as a "mere instrumentality" to commit frauds and wrongs on the Hinderers, which caused them to suffer an "unjust loss." They further alleged that he failed to maintain Chelsea Builders' corporate form, mingled his personal funds with the corporation's funds, and made improper distributions that left Chelsea Builders without assets to pay creditors. If found to be true, these allegations might justify the trial court's exercise of equitable power to disregard the separate existence of Chelsea Builders and impose personal liability on Snyder for any

judgment against Chelsea Builders. See *Green*, 310 Mich. App. at 454. Accordingly, because we have concluded that the trial court erred when it dismissed some of the Hinderers' claims against Chelsea Builders, we agree that their claim that the trial court should disregard Chelsea Builders' separate existence remains a viable remedy.

V. CLAIMS AGAINST EASON

A. STANDARD OF REVIEW

Finally, the Hinderers argue that the trial court erred when it dismissed their claims against Eason, as stated under Count VI of their complaint, for failure to state a claim. This Court reviews de novo a trial court's decision on a motion for summary disposition. *Barnard Mfg.*, 285 Mich. App. at 369.

B. ANALYSIS

***10** A trial court should dismiss a claim under MCR 2.116(C)(8) when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. See *Maiden*, 461 Mich. at 119.

Under Count VI of their complaint, the Hinderers alleged generally that Eason participated in the events at issue by signing a draft version of an agreement on Chelsea Builders' behalf and by applying for the building permit that Chelsea Builders used in the improvement project at issue. They then conclude from these general allegations that Eason could be held personally liable for the "portion of the work not done and for the defects of the work actually done for which he pulled the permit as well as for all code violations and violations of law which occurred during the construction regarding the Plaintiff's project."

In Count VI, the Hinderers did not identify any viable common law or statutory cause of action against Eason. Although they alleged that Eason's signature appeared on a draft agreement, the Hinderers also alleged that they did not accept the draft agreement. As such, they failed to state a contract claim against Eason. See *Huntington Nat'l Bank v. Daniel J. Aronoff Living Trust*, 305 Mich. App. 496, 508; 853 N.W.2d 481 (2014) (stating that an essential element of a breach of contract claim involves proving that the parties actually entered into a binding agreement).

Similarly, although the Hinderers alleged that Eason engaged in wrongful conduct by applying for the building permit, they did not identify any common law or statutory cause of action that could make Eason liable for any and all harms arising from the project associated with the building permit. On appeal, the Hinderers suggest that Eason might be liable under MCL 339.2405(1), which provides that a corporation or other entity may obtain a license through a qualifying officer and states that the "qualifying officer is responsible for exercising the supervision or control of the building or construction operations" by the entity. However, the Hinderers did not make any allegations against Eason involving MCL 339.2405(1), and on appeal they maintain that Eason was not in fact a qualifying officer. Consequently, as alleged under Count VI, the Hinderers failed to state any claim against Eason that was cognizable under Michigan law.

Although the trial court did not specifically discuss the grounds for dismissing the claim against Eason, it had the authority to dismiss the claim against Eason on its own initiative because it was evident from the pleadings that he was entitled to judgment as a matter of law under MCR 2.116(C)(8). See MCR 2.116(I)(1) (providing that a trial court must "render judgment without delay" when the "pleadings show that a party is entitled to judgment as a matter of law").

The trial court did not err when it dismissed Count VI of the Hinderers' third amended complaint.

VI. CONCLUSION

For the reasons stated, we reverse the trial court's decision to dismiss the Hinderers' breach of contract, warranty, and fraud claims as untimely. We also reverse the trial court's decision to dismiss the Hinderers' claim under the builders' trust fund act to the extent that they alleged that Chelsea Builders and Snyder appropriated the funds for their own use. We affirm the trial court's decision to dismiss the Hinderers' negligent construction claims as untimely.

***11** We also reverse the trial court's decision to grant summary disposition on the ground that the Hinderers were guilty of laches; there is a question of fact as to whether laches apply, which could not be resolved on a motion for summary disposition. We also reverse the trial court's determination that Chelsea Builders and Snyder were exempt from application of the MCPA. The Hinderers' may continue to demand to pierce

the corporate veil to the extent that the Hinderers have viable remaining claims against Chelsea Builders. Finally, we affirm the trial court's decision to dismiss Count VI of the Hinderers' complaint for failure to state a claim.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Because none of the parties prevailed in full, we order that none may tax costs. See MCR 7.219(A).

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United States District Court, W.D. Michigan, Southern Division.

FOMCO, LLC, Plaintiff,
v.
HEARTHSIDE GROVE ASSOCIATION, et al., Defendants.

Case No. 1:20-cv-1069
|
Signed 06/29/2021

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OPINION

HALA Y. JARBOU, UNITED STATES DISTRICT JUDGE

***1** FOMCO, LLC, which does business as Hearthside Grove, brought this action against Defendants Hearthside Grove Association (the "Association") and Holiday Vacation Rentals, LLC ("HVR"), asserting various claims under federal and state law. FOMCO provides real estate services, including real estate development and the leasing and management of residential condominiums located within campground developments. (*See* Compl. ¶ 14, ECF No. 1.) One of its developments is named Hearthside Grove, located in Petoskey, Michigan. FOMCO apparently formed a homeowners' association, called Hearthside Grove Association, to manage the common areas of that development. FOMCO is no longer associated with the Hearthside Grove development. Its complaint takes issue with the continued use of the Hearthside Grove name and logo by the Association and by HVR, which advertises, sells, and rents lots at Hearthside Grove. Before the Court is Defendants' motion to dismiss Count VI of the complaint, which asserts a claim under Michigan's Consumer Protection Act (MCPA), Mich. Comp. Laws § 445.901 *et seq.* For the reasons herein, the Court will grant the motion in part, dismissing the claim against HVR.

I. STANDARDS

Defendants rely on Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure for dismissal of the complaint. Rule 12(b)(1) permits dismissal for lack of subject matter jurisdiction. Rule 12(b)(6) permits dismissal of failure to state a claim.

A complaint may be dismissed for failure to state a claim if it fails " 'to give the defendant fair notice of what the ... claim is and the grounds upon which it rests.' " *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). While a complaint need not contain detailed factual allegations, a plaintiff's allegations must include more than labels and conclusions. *Twombly*, 550 U.S. at 555; *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."). The court must determine whether the complaint contains "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 679. "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—that the pleader is entitled to relief." *Id.* (quoting Fed. R. Civ. P. 8(a)(2)).

Assessment of the complaint under Rule 12(b)(6) must ordinarily be undertaken without resort to matters outside the pleadings; otherwise, the motion must be treated as one for summary judgment under Rule 56. *Wysocki v. Int'l Bus. Mach. Corp.*, 607 F.3d 1102, 1104 (6th Cir. 2010). "However, a court may consider exhibits attached to the complaint, public records, items appearing in the record of the case, and exhibits attached to defendant's motion to dismiss, so long as they are referred to in the complaint and are central to the claims contained therein, without converting the motion to one for summary judgment." *Gavitt v. Born*, 835 F.3d 623, 640 (6th Cir. 2016).

II. ANALYSIS

A. Subject Matter Jurisdiction

***2** Defendants' argument regarding subject matter jurisdiction is not entirely clear. Defendants apparently contend that, because Count VI fails to state a claim, the Court cannot exercise jurisdiction over it. That argument puts the cart before the horse. The Court must first determine whether it has jurisdiction. If the Court lacks subject matter jurisdiction, then it would be improper for the Court to dismiss Count VI for failure to state a claim.

Here, it is clear that the Court possesses subject matter jurisdiction over Count VI. The Court has original subject matter jurisdiction over the federal claims in the complaint because they arise under federal law. *See* 28 U.S.C. § 1331. The Court has supplemental jurisdiction over the other claims, including Count VI, because they are part of the "same case or controversy" as the federal claims. *See* 28 U.S.C. § 1367(a). It is true that the Court can decline to exercise supplemental jurisdiction, but the Court sees no reason to do so at this stage. Thus, the Court will not dismiss Count VI for lack of subject matter jurisdiction.

B. Failure to State a Claim

Defendants raise three arguments in favor of dismissal for failure to state a claim:

(1) Defendants are exempt from the MCPA under Mich. Comp. Laws § 445.904; (2) the MCPA does not apply to a claim where there is no transaction between the plaintiff and defendant and the plaintiff is a business entity; and (3) the MCPA does not apply to the Association because it does not operate a business.

1. Exemption

The MCPA prohibits "[u]nfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce." Mich. Comp. Laws § 445.901. By its terms, the MCPA does not apply to a "transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States." Mich. Comp. Laws § 445.904(1)(a). When determining whether this exemption applies, "the relevant inquiry 'is whether the general transaction is specifically authorized by law, regardless of whether the specific misconduct alleged is prohibited.' " *Liss v. Lewiston-Richards, Inc.*, 732 N.W.2d 514, 518 (Mich. 2007). A general transaction that is not specifically authorized is one that is " 'explicitly sanctioned.' " *Id.* at 520.

The parties disagree about what constitutes the relevant "transaction specifically authorized by law." In its complaint, FOMCO's MCPA claim focuses on Defendants' "for-profit real estate services," which FOMCO contends constitute "trade or commerce" under the MCPA. (Compl. ¶ 128.) Here, FOMCO is ostensibly referring to Defendants' "for profit services of the rental and sale of real estate." (*Id.* ¶ 40.) FOMCO alleges that Defendants' use of the Hearthside Grove name has caused consumers to mistakenly do business with Defendants, believing that they were transacting with FOMCO. (*Id.* ¶ 130.) This conduct has "resulted in increased sales of Defendants' real estate services while hindering the sale of Plaintiff's real estate and real estate development services." (*Id.* ¶ 77.) Thus, according to the complaint, the transactions at issue for purposes of the MCPA claim are the rental and sale of real estate.

Real estate brokers and salespersons are regulated by Michigan's Occupational Code, Mich. Comp. Laws § 339.2501 *et seq.*; thus, their real estate transactions are exempt from the MCPA. *See Love v. Ciccarelli*, No. 243970, 2004 WL 981164, at *4 (Mich. Ct. App. May 6, 2004); *Timmons v. DeVoll*, Nos. 241507, 249015, 2004 WL 345495, at *6 (Mich. Ct. App. Feb. 24, 2004). The complaint alleges that the Association "partnered" with HVR, and that the lots for sale or rent are listed on websites owned and operated by HVR. (Compl. ¶¶ 41, 59, 60, 63.) The Court takes judicial notice of public records indicating that HVR is a licensed real estate broker. (*See* ECF No. 15-3.) Thus, HVR's real estate transactions are exempt from the MCPA, whether or not HVR improperly used the Hearthside Grove name in connection with those transactions.

***3** Nevertheless, FOMCO argues that it states a claim against *the Association* because the Association is not a licensed real estate broker. The Association allegedly used the words "HEARTHSIDE GROVE ASSOCIATION ... in conjunction with for profit services of the rental and sale of real estate," starting in December 2019. (Compl. ¶ 40.) And in August 2020, it allegedly launched a website at www.hearthsidegroveassociation.com "for the rental and sale of real estate." (*Id.* ¶ 57.) FOMCO contends that the relevant "transaction or conduct" is the Association's "commercial use of business names, trademarks, and domain names which are

confusingly similar to [FOMCO's] [m]arks." (Pl.'s Resp. Br. 12, ECF No. 27.) In other words, the Association advertised the rental or sale of lots at Hearthside Grove. This conduct, FOMCO argues, is not exempt from the MCPA because the Association is not a licensed real estate broker. As such, its conduct would not be specifically authorized by Michigan's Occupational Code. The Association does not point to any other regulation that "specifically authorizes" its conduct. Consequently, the Association has not shown that, based on the facts the Court can consider at this stage, it is entitled to the exemption in the MCPA.

2. Conducting Business

The Association also argues that the MCPA does not apply to it because it does not engage in any business at all. The MCPA applies only to "the conduct of a business providing goods, property, or service[s].... and includes the advertising, solicitation, offering for sale or rent, sale, lease or distribution of a service or property[.]" Mich. Comp. Laws § 445.902(g) (defining "trade or commerce"). Although the Association used the Hearthside Grove name on its website, FOMCO alleges that HVR owned and operated the websites with the real estate listings. Apart from maintaining a website with links to HVR's websites, FOMCO does not allege that the Association itself managed or was involved in the listing, rental, or sale of real estate at Hearthside Grove. Moreover, the Association does not own the lots at Hearthside Grove (Compl. ¶ 48), so there is no reason to believe that it engaged in any transactions for their rental or sale. Simply using a name on a website that directs the user to a real estate broker's website is not conducting a business providing real estate or real estate services.

On the other hand, as FOMCO indicates, the Association's website contains a page titled "Hearthside Grove Association Lot Sales," which states, "Our experienced staff is ready to make your dreams a reality." (ECF No. 1-6, PageID.57.) This page suggests that the Association did more than create a website passively directing users to HVR. The page suggests that the Association's staff was directly involved in marketing the lots for sale in Hearthside Grove. Thus, it is plausible to infer that the Association was involved in the business of "advertising, solicitation, offering for sale" of real estate, on behalf of the lot owners, which is conduct covered by the MCPA.

Defendants point to the Association's by-laws and articles of incorporation to argue that it is a non-profit association, incapable of operating a business engaged in "trade or commerce." However, FOMCO correctly notes that the Association's status at its creation does not rule out the possibility that it has operated as a business since that time, subjecting it to the MCPA. Thus, as to the Association, Defendants' first and third arguments in favor of dismissal of the MCPA claim are not persuasive.

3. Business Requirement

Defendants also argue that a claim under the MCPA requires a commercial transaction between the plaintiff and defendant; it does not apply to an action between business competitors who have not entered such a transaction. Defendants' argument finds little support in the text of the MCPA or the case law.

The MCPA permits a "person who suffers a loss as a result of a violation of this act" to bring an action to recover damages. Mich. Comp. Laws § 445.911(2). The MCPA defines "person" as "an individual, corporation, limited liability company, trust, partnership, incorporated or unincorporated association, or other legal entity." Mich. Comp. Laws § 445.902(1)(d). Thus, the text of the MCPA does not preclude a business from bringing claims. Nor does it require a transaction between the plaintiff and the defendant. It simply requires "a loss as a result of a violation." It is not difficult to see how a defendant's use of "deceptive methods" in dealing with consumers, particularly where that deception involves the improper use of the plaintiff's name, could result in a loss to a plaintiff.

***4** Many courts have allowed MCPA claims by a business alleging that conduct by a business competitor has caused confusion in the marketplace through the use of confusingly similar trademarks and domain names. Indeed, courts in the Sixth Circuit have repeatedly stated that, when the MCPA claim is based on a competitor's use of a confusingly similar name, the test for liability under the MCPA *is the same* as the test for liability under claims of unfair competition and trademark infringement. *See, e.g.*, *Coach Servs., Inc. v. Source II, Inc.*, 728 F. App'x 416, 417 (6th Cir. 2018); *Kibler v. Hall*, 843 F.3d 1068, 1082-83 (6th Cir. 2016); *Homeowners Grp., Inc. v. Home Mktg. Specialists, Inc.*, 931 F.2d 1100, 1105 (6th Cir. 1991); *Choice Hotels Int'l, Inc. v. Apex Hosp., LLC*, No. 1:11-cv-00896, 2012 WL 2715716, at *2 (W.D. Mich. June 13, 2012). And the Michigan Court of Appeals has said the

same thing. *See, e.g.*, *APCO Oil Co. v. Knight Enters., Inc.*, No. 262536, 2005 WL 2679776, at *3 (Mich. Ct. App. Oct. 20, 2005) ("Similar to the Michigan Consumer Protection Act, the Lanham Act prohibits the use of words or symbols in such a way as to likely cause confusion or mistake as to some attribute of a good."). Those statements would make no sense if a business competitor could not bring a claim under the MCPA.

Granted, some courts have concluded that a business entity cannot bring a claim because the "trade or commerce" regulated by the MCPA involves "the conduct of a business providing goods, property, or service *primarily for personal, family, or household purposes*[.]" Mich. Comp. Laws § 445.902(1)(g) (emphasis added). When a business purchases a product, the MCPA generally does not apply to that transaction because the corporation's purchase is "primarily for business or commercial rather than personal purposes[.]" *Zine v. Chrysler Corp.*, 600 N.W.2d 384, 393 (Mich. Ct. App. 1999); *accord Slobin v. Henry Ford Health Care*, 666 N.W.2d 632, 634-35 (Mich. 2003). However, the commercial transactions at issue in this case are for the purchase and rental of real estate by "consumers," ostensibly for personal purposes. (*See* Compl. ¶ 50.) Thus, the personal-purpose requirement is satisfied.

Defendants rely on cases concluding that a business could not bring a MCPA claim because the business transaction at issue was not for "personal, family, or household purposes." *See, e.g.*, *Cosmetic Dermatology & Vein Ctrs. of Downriver P.C. v. New Faces Skin Care Ctrs., Ltd.*, 91 F. Supp. 2d 1045, 1060 (E.D. Mich. 2000) ("No purchase or transaction was involved ... within the meaning of the act," i.e., for personal, family, or household purposes.); *Beaver v. Figgie Int'l Corp.*, No. 87-1362, 1988 WL 64710, at *4 (6th Cir. June 24, 1988) (Plaintiff "did not lease the scaffolding planks to the Board for 'personal, family, or household purposes.' "); *Robertson v. State Farm Fire & Cas. Co.*, 890 F. Supp. 671, 673 (E.D. Mich. 1995) ("Since the coverage sought was not 'primarily for personal, family or household purposes,' the MCPA does not apply."); *Burba v. Mills*, No. 201787, 1998 WL 1990366, at *1 (Mich. Ct. App. Sept. 4, 1998) ("[T]he MCPA does not apply in this case because defendants did not enter into this transaction for personal or household purposes[.]"). For the reasons discussed in the previous paragraph, those cases are distinguishable.

The Court is not persuaded by the reasoning in *Watkins & Son Pet Supplies v. Iams Co.*, 107 F. Supp. 2d 883 (S.D. Ohio 1999), which concluded that the MCPA "does not create a private right of action for a business entity." *Id.* at 893. That court provided little support for its assertion that the "majority of cases" have decided that a business competitor could not bring a MCPA claim. *Id.* at 892. Strangely, that court relied on several federal court decisions in support of its decision, including *Beaver* and *Robertson*, instead of a Michigan Court of Appeals case which held that a business entity could bring a justiciable claim against another company. *See id.* at 892 (citing *Michaels v. Amway Corp.*, 522 N.W.2d 703, 707 (Mich. Ct. App. 1994)). This Court puts more weight on a decision by a state court interpreting its own law than on non-binding decisions by a federal court. Moreover, reliance on the decisions in *Beaver* and *Robertson* was misplaced. As discussed above, those decisions turned on the nature of the transaction at issue rather than the identity of the plaintiff.

III. CONCLUSION

***5** In short, the Court has jurisdiction over FOMCO's claim. The Court will dismiss the claim against HVR in Count VI because its actions are exempt from the MCPA. However, the Court is not persuaded that FOMCO fails to state a MCPA claim against the Association. Thus, the Court will grant the motion to dismiss Count VI as to HVR only.

An order will enter in accordance with this Opinion.

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United States District Court, E.D. Michigan, Southern Division.

Roderick COMER, Plaintiff,
v.
ROOSEN VARCHETTI & OLIVIER, PLLC, and Cavalry SPV I, LLC, Defendants.

Case No. 17-13218
|
Signed 11/01/2018

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OPINION AND ORDER DENYING IN PART AND GRANTING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT [19]

Nancy G. Edmunds, United States District Judge

***1** Plaintiff Roderick Comer ("Plaintiff") has brought this action against Defendants Roosen Varchetti & Olivier, PLLC ("Roosen") and Calvary SPV I, LLC ("Calvary"), alleging violations of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692, the Michigan Collection Practices Act ("MCPA"), Mich. Comp. Laws § 445.251, the Michigan Occupational Code ("MOC"), Mich. Comp. Laws § 339.915, and the Michigan Consumer Protection Act, Mich. Comp. Laws § 445.901, as well as other state law claims. The alleged violations stem from the recording and maintaining of a judgment lien against his property based on a judgment obtained against his spouse. The matter is now before the Court on Defendants' motion for summary judgment on all claims. For the reasons discussed below, the Court DENIES IN PART and GRANTS IN PART Defendants' motion.

I. Background

Plaintiff is the sole owner of real property located at 1935 Smith Street, Ypsilanti, Michigan 48198 in Washtenaw County. He resides there along with his spouse. Roosen, a collection law firm, obtained a default judgment in the amount of $984.35 against Plaintiff's spouse and in favor of Calvary on April 7, 2016. (Dkt. #19-2, Pg ID 110.) Roosen filed a notice of judgment lien with the Washtenaw County Record of Deeds on May 9, 2016. (Dkt. #19-3, Pg ID 112.) The notice includes the last four digits of Plaintiff's spouse's social security number, her name, and her last known address and states that it attaches to "the judgment debtor's current or future interest in real property." (*Id.*) The lien was recorded on May 24, 2016. (*Id.*)

In August of 2016, Plaintiff applied for a home equity loan on his property. (Dkt. #23-3, Pg ID 193.) As part of this process, the title company prepared a report, dated August 31, 2016, which showed the notice of the judgment lien, identifying Calvary as the "PLAINTIFF" and Plaintiff's spouse as the "DEFENDANT." (Dkt. #19-4, Pg ID 115-16.) The report also states that "JUDGMENT RECORD REFLECTS A SEARCH WHICH WAS LIMITED TO PARTY/PARTIES AS TITLED." (*Id.* at Pg ID 116.) Plaintiff's application for the home equity loan was denied and the bank informed Plaintiff that the title company would not insure his home due to the presence of the lien and that title insurance was a requirement for refinancing. (Dkt. #23-3, Pg ID 193-94.) Plaintiff alleges that he contacted the Defendants approximately four or five times to resolve this matter, but they have refused to remove the lien on the property. (Dkt. #1-1, Pg ID 6.)

Plaintiff filed his lawsuit against Defendants in the Washtenaw County Circuit Court on August 29, 2017. Defendants removed the case to this Court. This matter is now before the Court on Defendants' motion for summary judgment. (Dkt. #19.) Plaintiff filed a response to Defendants' motion and Defendants filed a reply. (Dkts. #23, 24, 27.) The Court heard oral arguments on the motion on October 17, 2018.

II. Summary Judgment Standard

It is well established that summary judgment under Federal Rule of Civil Procedure 56 is proper when " 'the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.' " *United States S.E.C. v. Sierra Brokerage Servs., Inc.*, 712 F.3d 321, 326-27 (6th Cir. 2013) (quoting Fed. R. Civ. P. 56(a)). When reviewing the record, " 'the court must view the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in its favor.' " *Id.* at 327 (quoting *Tysinger v. Police Dep't of Zanesville*, 463 F.3d 569,

572 (6th Cir. 2006)). Furthermore, the " 'substantive law will identify which facts are material,' and 'summary judgment will not lie if the dispute about a material fact is genuine, that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.' " *Id.* at 327 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). When considering the material facts on the record, a court must bear in mind that "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson*, 477 U.S. at 252, 106 S.Ct. 2505.

III. Analysis

A. Whether the Judgment Lien was Valid Under Michigan Law

***2** Defendants argue that they are entitled to summary judgment because the filing of the judgment lien was lawful pursuant to the Michigan Judicial Lien Act ("MJLA"). [1] The MJLA was made effective in 2004 and allows a creditor to enforce a judgment held against a debtor by recording a judgment lien on the appropriate property. *See Thomas v. Dutkavich*, 290 Mich.App. 393, 803 N.W.2d 352, 404 (Mich. Ct. App. 2010). If a notice of judgment lien is properly recorded with the register of deeds for the county in which the property is located, the judgment lien attaches to the "judgment debtor's interest in the real property." Mich. Comp. Laws § 600.2803. The notice of judgment lien must conform to certain technical requirements and must be served on the judgment debtor. Mich. Comp. Laws § 600.2805. The judgment lien expires five years after the date that it was recorded, unless it is extinguished as set forth by the statute. Mich. Comp. Laws § 600.2809. The lien does not give the creditor the right to foreclose on the property. Mich. Comp. Laws § 600.2819. Instead, the statute sets forth that the debtor shall pay the amount due to the creditor at the time of the sale or refinancing of the property limited to his or her equity in the property. *Id.* Defendants argue that the judgment lien was proper because it only mentioned Plaintiff's spouse's name and only attached to her interest in the property. [2]

1 Defendants also argue that two of Plaintiff's claims are time barred, as will be discussed below.

2 At oral argument, Defense counsel also argued that Defendants had followed the MJLA and recorded the judgment lien in the county where the judgment was obtained. However, that is not correct. The statute sets forth that the lien is to be recorded in the county where the property is located. *See* § 600.2803. Therefore, the creditor must first make a determination as to whether the debtor has a property interest in that particular county. Only if there is an appropriate property may the creditor record the lien with the register of deeds for that county.

While a debtor spouse may have an interest in a property, a judgment lien does not necessarily attach to the property solely on the basis of that interest. In fact, the MJLA explicitly states that "[a] judgment lien does not attach to an interest in real property owned as tenants by the entirety unless the underlying judgment is entered against *both* the husband and wife." Mich. Comp. Laws § 600.2807 (emphasis added). This is a codification of the common law rule that "property held as a tenancy by the entireties is not liable for the individual debts of either party." *Walters v. Leech*, 279 Mich.App. 707, 761 N.W.2d 143, 147 (Mich. Ct. App. 2008).

Here, Plaintiff does not own the property along with his spouse as a tenancy by the entireties, but instead is the sole owner. Defendants cite to the case of *Thomas*, 803 N.W.2d at 406, to argue that Michigan recognizes that a wife has a dower interest in property held by her husband, even if she is not on the title. "[D]ower is a contingent estate that becomes vested on the death of the husband and is to be protected before and after vesting." *Id.* at 406 (citing *Oades v. Standard Sav. & Loan Assoc.*, 257 Mich. 469, 241 N.W. 262, 263 (Mich. 1932)). In *Thomas*, the issue was whether a judgment lien had properly attached to the property of the debtor spouse despite the non-debtor spouse's dower interest. *Id.* at 406. The court answered that question in the affirmative, noting that the recording of the judgment lien "in and of itself" did not deprive the non-debtor spouse of her dower interest. *Id.* at 408. The court also noted that the non-debtor spouse had participated in the closing and execution of the deed to the property to a third-party, "thereby voluntarily extinguishing or relinquishing her dower interest." *Id.*

Here, unlike in *Thomas*, the spouse who owns the property does not have any liability on the underlying judgment. The property belongs to Plaintiff alone and the debtor spouse is the one with the dower interest. To allow the lien to attach to Plaintiff's property in this case would run contrary to the rationale behind the rule regarding tenancies by the entireties, which is to protect the innocent spouse's interest in the property. *See Walters*, 761 N.W.2d at 150 (holding that

child-support liens may not be imposed upon property held as a tenancy by the entireties despite the interest in children being supported by their noncustodial parents because "there is also an important interest in protecting an innocent spouse's property"). Moreover, the debtor spouse's dower interest in this case is even farther removed than if it were a tenancy by the entireties, to which the judgment lien would not attach unless the judgment was against both parties. The Court therefore finds that a judgment lien does not attach to the property of a spouse who does not have any liability on the underlying judgment based on the debtor spouse's dower interest alone.[3] In light of this finding, there is no need to address Plaintiff's additional argument that Defendants were required to first pursue collection efforts against the debtor's personal property before recording the judgment lien.[4]

3 Defendants argue that the judgment lien attaches to any future interest Plaintiff's spouse may acquire in the property as well. Defendants do not state what that future interest may be. If Plaintiff's spouse were to later acquire an interest in the property as a tenant by the entireties, as noted above, the judgment lien would still not attach because Plaintiff does not have any liability on the underlying judgment. *See* § 600.2807.

4 Plaintiff cites to the case of *George v. Sandor M. Gelman, PC*, 201 Mich.App. 474, 506 N.W.2d 583, 585 (Mich. Ct. App. 1993), to argue that Defendants were required to pursue collection efforts against the debtor's personal property prior to asserting a lien against her interests in real property. *See id.* ("In Michigan, direct attachment of a debtor's real estate is disfavored."). As Defendants correctly note, that rule was set forth in the context of a writ of execution. The MJLA does not allow the creditor to foreclose on property as the creditor may do pursuant to a writ of execution. *See* § 600.2819. The rationale for the rule requiring collection efforts be pursued against personal property first is therefore not applicable in this case.

***3** Defendants also argue that the judgment lien did not implicate Plaintiff's property rights. They cite to the case of *Weatherseal Home Improvements, Inc. v. Sable*, No. 314079, 2014 Mich. App. LEXIS 1938, 2014 WL 5306000 (Mich. Ct. App. Oct. 16, 2014), in support of that proposition. In that unpublished case, the issue was whether a creditor was entitled to payment under the judgment lien following the sale of the property held by the parties as a joint tenancy. *Id.* at *4-5. The court held that because the debtor spouse had no equity in the property, the judgment lien holder was not entitled to any proceeds from the sale. *Id.* at *6.

The limited holding in *Weatherseal* does not speak to the issue of whether a judgment lien impairs a non-debtor spouse's interests in property. The fact that the creditor was not entitled to payment under the facts of that case does not mean that the property owner's rights were not implicated. In *Thomas*, 803 N.W.2d at 399, the judgment lien was similarly not discharged upon the sale of the property and the purchaser brought a quiet-title action. After holding that the lien properly attached to the property despite the non-debtor spouse's dower interest, the court also held that the lien remained attached to the property and was not discharged by the sale of the property. *Id.* at 408. The court recognized that the lien implicated the purchaser's property rights but reasoned that this was not unfair to him because he had constructive notice of the lien and decided to proceed with the sale "knowing that the judgment lien remained a cloud on the title and could be problematic." *Id.* at 411.

In this case, Plaintiff, who has no liability on the underlying judgment, was unable to obtain refinancing on his home due to the lien. Even though the judgment lien stated that the judgment debtor was Plaintiff's spouse, the Court finds that this did not cure the improper legal burden placed on Plaintiff's home. Having concluded that the lien did not properly attach to Plaintiff's home and does compromise Plaintiff's rights, the Court will now address the remaining arguments made by the parties regarding each of Plaintiff's claims.

B. Plaintiff's Fair Debt Collection Practices Claims

Plaintiff alleges that the judgment lien in this case violated multiple provisions of the FDCPA, including 15 U.S.C. § 1692e, which prohibits "false, deceptive, or misleading representation or means in connection with the collection of any debt" and 15 U.S.C. § 1692f, which prohibits "unfair or unconscionable means to collect or attempt to collect any debt."[5]

5 Each of these sections of the statute includes a list of conduct that is a violation of that section. Plaintiff alleges that Defendants' conduct fits several categories. For purposes of this discussion,

there is no need to address each separately. *See, e.g.*, *Currier v. First Resolution Inv. Corp.*, 762 F.3d 529, 535 (6th Cir. 2014) (stating that because the plaintiff had plausibly alleged an unfair debt collection practice under the broad meaning of § 1692f, there was no need "to go into the details of whether the practice is also unfair because it is an attempt to collect an amount not authorized by the creditor card agreement or by law under § 1692f(1)").

The stated purpose of the FDCPA is "to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses." 15 U.S.C. § 1692(e). According to the Sixth Circuit, FDCPA violations should be analyzed under a "least sophisticated consumer" standard. *Smith v. Transworld Sys., Inc.*, 953 F.2d 1025, 1028 (6th Cir. 1992). As applied, this standard is "lower than simply examining whether particular language would deceive or mislead a reasonable debtor." *Smith v. Computer Credit, Inc.*, 167 F.3d 1052, 1054 (6th Cir. 1999) (citation omitted).

***4** In *Currier v. First Resolution Inv. Corp.*, 762 F.3d 529, 535 (6th Cir. 2014), the Sixth Circuit considered whether the filing and failing to release an invalid lien violated the FDCPA. The court noted that the FDCPA is " 'extraordinarily broad' " and found that maintaining an invalid lien "falls comfortably within the kinds of practices Congress has identified as unfair under § 1692f of the FCPA." *Id.* at 533, 535 (citations omitted). The court reasoned that the judgment lien in that case placed an improper legal burden on Plaintiff's home, restricting her rights in her own property. *Id.* at 534. The court stated that "[t]he least sophisticated consumer, indeed most consumers, would regard filing a lien on the debtor's home using a state procedure that does not authorize such action as an 'unfair or unconscionable means to collect or attempt to collect' the debt." *Id.* at 535 (quoting 15 U.S.C. § 1692f). The court also found that filing and maintaining an invalid lien for a month can also be characterized as a threat to take an action that cannot legally be taken within the meaning of § 1692e(5). *Id.* at 535.

The Court finds that the filing of the judgment lien in this case similarly falls within the ambit of the FDCPA. As discussed above, the judgment lien did not properly attach to Plaintiff's property in this case. Therefore, there are genuine issues of material fact as to whether the judgment lien in this case would mislead the least sophisticated consumer and whether the least sophisticated consumer would regard the filing of the lien as an unfair or unconscionable means to attempt to collect a debt. *See Hartman v. Great Seneca Fin. Corp.*, 569 F.3d 606, 613 (6th Cir. 2009) (holding that where a jury could find that the least sophisticated consumer would be misled by a debt collection document, summary judgment for the defendant was improper under § 1692e and § 1692f). Thus, the FDCPA claims in this case survive the motion for summary judgment.

C. Plaintiff's Michigan Collection Practices Claims

Plaintiff also alleges violations of the MCPA, which are similar to the alleged violations of the FDCPA. "MCPA claims which 'simply duplicate ... claims under the FDCPA' need not be addressed separately." *Newman v. Trott & Trott, P.C.*, 889 F.Supp.2d 948, 967 (E.D. Mich. 2012) (citation omitted). Thus, summary judgment is improper on Plaintiff's MCPA claims for the same reasons it is improper on his FDCPA claims.

D. Plaintiff's Michigan Occupational Code Claims

Plaintiff also alleges violations of the MOC. In their motion, Defendants argue that "a person or entity engaged in debt collection activities is either a 'a collection agency' under the Occupational Code or a 'regulated person' under the MCPA but not both." *Misleh v. Timothy E. Baxter & Assocs.*, 786 F.Supp.2d 1330, 1337 (E.D. Mich. 2011) (listing cases that have recognized this). [6] Here, Plaintiff has alleged that Defendants are regulated persons under the MCPA but has not alleged that they are collection agencies under the MOC. Defendants are therefore entitled to summary judgment on Plaintiff's MOC Claim.

6 The *Misleh* court noted:

> The Occupational Code's definition of a "collection agency" includes language that exactly mimics the MCPA's definition of a "regulated person," with the result that those who are ***excluded*** from the definition of a "collection agency" are ***included*** as "regulated persons" under the MCPA. *Compare* Mich. Comp. Laws § 339.901(b) (providing that a "[c]ollection agency does not include a person whose collection activities are confined and are directly related to the operation of a business other than that of a collection agency" and then specifying a non-exhaustive list of entities

> that are not collection agencies, including "[a]n attorney handling claims and collections on behalf of clients and in the attorney's own name"), *with* Mich. Comp. Laws § 445.251(g) (defining "regulated person" to ***include*** the persons excluded under the Occupational Code — namely, those "whose collection activities are confined and are directly related to the operation of a business other than that of a collection agency").
>
> *Misleh*, 786 F.Supp.2d at 1337.

E. Plaintiff's Michigan Consumer Protection Act Claim

***5** Plaintiff has also brought a claim under the Michigan Consumer Protection Act, which prohibits "[u]nfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce." *See* Mich. Comp. Laws § 445.903(1). Defendants argue that the conduct at issue is exempt from the statute, which sets forth an exemption for any "transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States." Mich. Comp. Laws § 445.904(1)(a). In *Liss v. Lewiston-Richards, Inc.*, 478 Mich. 203, 732 N.W.2d 514, 521 (Mich. 2007), the Michigan Supreme Court held that residential home builders who had formed an agreement to build a home fell within this exception to the statute. The court reasoned that "[r]esidential home builders are licensed under the MOC and are regulated by the Residential Builders' and Maintenance and Alteration Contractors' Board, which oversees licensing and handles complaints filed against residential builders. Moreover, there is a set of administrative rules promulgated to regulate the licensing procedure." *Id.* at 520. The court noted that the home builders were engaged in activities that were "permitted by the MOC to be performed only by licensed residential home builders." *Id.* at 521.

Here, while the filing of a judgment lien is generally authorized under the Michigan Judicial Lien Act, there is no similar licensing or administrative process that regulates lien filing. The Court therefore finds that the exemption does not apply in this case and Plaintiff's claim under the Michigan Consumer Protection Act survives Defendants' motion. In light of this finding, there is no need to address Plaintiff's alternate argument that Defendants had waived any exemption argument under the Michigan Consumer Protection Act by failing to plead it as an affirmative defense.

F. Plaintiff's Slander of Title and Negligence Claims

Plaintiff has also brought a claim for slander of tile and seeks damages pursuant to Mich. Comp. Laws § 565.108. In order to prove slander of title in Michigan, "plaintiff must establish that defendant 'maliciously published false matter disparaging [plaintiff's] title, causing [it] special damages.' " *GKC Mich. Theaters, Inc. v. Grand Mall*, 222 Mich.App. 294, 564 N.W.2d 117, 119-20 (Mich. Ct. App. 1997) (quoting *Sullivan v. Thomas Org., P.C.*, 88 Mich.App. 77, 276 N.W.2d 522, 525 (Mich. Ct. App. 1979)). Michigan courts have held that "damages in removing the cloud from a plaintiff's title are recoverable in a slander of title action." *Id.* at 120.

As the Court has concluded, the judgment lien in this case did not properly attach to Plaintiff's property. In *Cole v. Cardoza*, 441 F.2d 1337, 1343 (6th Cir. 1971), the Sixth Circuit considered whether an invalid federal tax lien created a cloud on the title of the property. In that case, the lien was invalid because the property was a tenancy by the entireties and only one spouse was liable for the underlying tax judgment. The court noted that under Michigan law, "a cloud upon a title can be merely an apparent defect and that if it 'has a tendency, even in the slightest degree, to cast doubt upon the owner's title, and to stand in the way of a full and free exercise of his ownership,' it should be removed." *Id.* at 1343 (citing *Whitney v. Port Huron*, 88 Mich. 268, 50 N.W. 316, 317-18 (Mich. 1891)). The court held that because "the existence of a federal tax lien on the public land records pertaining to appellants' property would make a prospective buyer or mortgagee hesitant to commit himself until the tax lien was removed," it constituted a cloud on the title, which the appellants were entitled to have declared a nullity. *Id.* at 1343-44.

While in *Cole* a title examination did not disclose whether the tax lien was levied against one spouse or against both, *see id.*, and here the lien does state that Plaintiff's spouse is liable for the underlying judgment, the lien in this case similarly creates a cloud on the title of Plaintiff's home, *see, e.g.*, *Fischre v. United States*, 852 F.Supp. 628, 629-30 (W.D. Mich. 1994) (declaring an invalid tax lien a nullity despite stating that the cloud on the title of the property was "diminished" because the lien clearly identified only one spouse as the judgment debtor). Whether Defendants placed the lien on the property maliciously, as is required for a slander of title claim, is a question of fact. [7] Summary judgment is therefore improper on Plaintiff's slander of title claim.

[7] To establish malice, Plaintiff would need to prove that Defendants knowingly filed the lien with the intent to cause Plaintiff injury. *See GKC Mich. Theaters*, 564 N.W.2d at 121 n.3.

***6** Similarly, Plaintiff bases his negligence claim on the invalid lien recorded and maintained against his property. This claim also raises questions of fact and thus summary judgment is improper.

G. Plaintiff's Encumbering Property to Harass Claim

Plaintiff has also brought an encumbering property to harass claim under Mich. Comp. Laws § 565.25(3), which makes a party liable for penalties for the encumbrance of property through the recording of an instrument "without lawful cause with the intent to harass or intimidate any person." Defendants argue that the lien here is "an instrument of encumbrance authorized by state statute or federal statute" and they are therefore exempt from this statute. *See* Mich. Comp. Laws § 565.25(2)(b). In light of the Court's finding regarding the invalidity of the lien, the exemption to the statute does not apply in this case. Because there are material issues of fact regarding whether Defendants had the intent to harass or intimidate, Defendants are not entitled to summary judgment on this claim.

H. Whether Plaintiff's FDCPA and Defamation Claims are Time Barred

Defendants argue that Plaintiff's FDCPA and defamation claims are time barred because the relevant statute of limitations for both claims is one year. *See* 15 U.S.C. § 1692(k)(d); Mich. Comp. Laws § 600.5805(9). Defendants note that the lien was filed on May 24, 2016, and Plaintiff filed his lawsuit more than one year later. In his complaint, however, Plaintiff states that he "learned of the lien in approximately August of 2016."

There are two types of limitations periods: either a statute of limitations starts when the party knew or should have known of the injury, known as the discovery rule, or a statute of limitations runs from the date of the injury, known as the occurrence rule. *See Rotkiske v. Klemm*, 890 F.3d 422, 423 (3d Cir. 2018) (en banc). While the FDCPA does not explicitly incorporate either model, it states that the limitations period starts "from the date on which the violation occurs." 15 U.S.C. § 1692k(d). Thus, it appears to implicitly call for an occurrence rule. In *Rotkiske*, 890 F.3d at 423, the Third Circuit held that the discovery rule did not apply to FDCPA cases in part due to the language of the statute which "implicitly excludes a discovery rule." The court further noted that often FDCPA claims are based on repetitive contacts by phone or mail and that these violations will be apparent to consumers "the moment they occur." *Id.* at 426.

The Sixth Circuit has not decided the issue of whether the discovery rule applies in FDCPA cases, *see Ruth v. Unifund CCR Partners*, 604 F.3d 908, 914 (6th Cir. 2010) (leaving the question of "whether the FDCPA incorporates a discovery rule" "for another day"), but both the Fourth and Ninth Circuits have applied the discovery rule in FDCPA cases, although they did not address the text of the statute, *see Lembach v. Bierman*, 528 Fed. App'x 297, 302 (4th Cir. 2013) (reasoning that plaintiffs "had no way of discovering the alleged violation until they actually saw the fraudulent signatures" and that the defendant "should not be allowed to profit from the statute of limitations when its wrongful acts have been concealed"); *Mangum v. Action Collection Serv., Inc.*, 575 F.3d 935, 939 (9th Cir. 2009) (holding that "our usual discovery rule jurisprudence can apply to the statute of limitations for an FDCPA action"). And even the Third Circuit recognized that there are some instances that may warrant the tolling of the statute of limitations under the FDCPA. *See Rotkiske*, 890 F.3d at 428 (noting that to the extent certain FDCPA claims deal with "false, deceptive, or misleading representations," federal district courts may "avoid patent unfairness in such cases" by applying equitable tolling).

***7** Here, the alleged FDCPA violations are based on the filing and maintaining of an invalid lien. In contrast to the type of violations discussed in *Rotkiske* that may be apparent the moment they occur, an invalid lien may not come to the attention of a property owner until he or she attempts to sell or refinance the property. Applying the occurrence rule in the context of an invalid lien would therefore put the onus on property owners to regularly search for liens on their property. Thus, there is a compelling reason to avoid unfairness under the circumstances by applying the discovery rule. In addition to the uncertainty regarding the application of the discovery rule, there is a question of fact as to when Plaintiff was put on notice of the invalid lien. The title report that indicated the presence of the lien was dated August 31, 2016, and Plaintiff's lawsuit was filed within one year of that date—on August 29, 2017. If Plaintiff received notice of the lien on the date of the title report, his lawsuit was timely filed under the discovery rule. The Court therefore finds that that the issue of whether Plaintiff's FDCPA claims are time-barred survives this motion for summary judgment. [8]

8 Plaintiff does not address the question of whether the discovery rule is applicable in this case. Instead, Plaintiff argues that the date of the filing of the lien is not the only relevant date for purposes of his FDCPA claims and that continued collection efforts can restart the limitations period. In light of the Court's finding, there is no need to address this issue. To the extent, however, that this can be construed as an argument that the continuing violation theory applies in FDCPA cases, the Court notes that the Sixth Circuit does not appear to agree with this reasoning. *See Slorp v. Lerner, Sampson & Rothfuss*, 587 Fed. App'x 249, 258 (6th Cir. 2014) (unpublished) (holding that on-going debt-collection litigation is not a continuing violation of the FDCPA and that the limitations period starts when a debt-collection suit is filed).

Plaintiff concedes that his defamation claim was filed after the statute of limitations had run. Defendants are therefore entitled to summary judgment on that claim.

I. Whether the Quiet Title and Exemplary Damages Counts Should be Dismissed

Defendants argue that the claims for quiet title and exemplary damages should be dismissed because they are remedies and not causes of action. A suit to quiet title is "functionally a form of declaratory judgment action." *Thomas v. Urban P'ship Bank*, No. 12 C 6257, 2013 U.S. Dist. LEXIS 59818, at *19, 2013 WL 1788522 (N.D. Ill. Apr. 26, 2013) (citation omitted). Moreover, Michigan law provides a statutory basis for a quiet title action. *See* Mich. Comp. Laws § 600.2932. In light of the Court's finding regarding the invalidity of the lien, Plaintiff may seek a declaration regarding the lien. Similarly, whether Plaintiff is entitled to exemplary damages depends on certain questions of fact that are not resolved by this motion.

IV. Conclusion

For the above-stated reasons, Defendants' motion for summary judgment (Dkt. # 19) is DENIED IN PART and GRANTED IN PART. More specifically, the claims under the Federal Debt Collection Practices Act, the Michigan Collection Practices Act, and the Michigan Consumer Protection Act as well as for negligence, quiet title, slander of title, encumbering property to harass, and exemplary damages survive this motion (Counts I, II, IV, VI, VII, VIII, IX, X). The defamation claim is time barred and the motion for summary judgment is granted as to that claim (Count V). The motion is also granted as to Plaintiff's claim under the Michigan Occupational Code (Count III).

SO ORDERED.

All Citations

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United States District Court, D. Nevada.

MING CHU WUN, Plaintiff,
v.
NORTH AMERICAN COMPANY FOR LIFE AND HEALTH INSURANCE, et al., Defendants.

No. 2:11–CV–00760–KJD–CWH.
|
March 15, 2012.

Attorneys and Law Firms

Robert Duane Frizell, Callister & Frizell, Las Vegas, NV, for Plaintiff.

Matthew T. Milone, Jones Vargas, Las Vegas, NV, for Defendants.

ORDER

KENT J. DAWSON, District Judge.

***1** Before the Court is Defendant North American Company For Life and Health Insurance's ("North American") Motion to Dismiss (# 14) and Defendant Ding–Ho Wang's Motion to Dismiss (# 16). Plaintiff Ming Chu Wun has filed an opposition to these two Motions (# 19) and Defendants have filed replies (20, 21).

I. Background

On May 13, 2009 Defendant Wang sold Plaintiff an annuity issued by Defendant North American. Wang and Plaintiff conducted much of the discussion of the annuity in the Chinese language. According to the Complaint, Wang promised Plaintiff that, *inter alia,* the annuity would pay an 8% contract bonus for each of the first 10 contract years in which a withdrawal was not made and that the minimum index growth cap for each fund would be 8%.

After the annuity was issued, Plaintiff discovered that it did not include the 8% bonus credit that Wang allegedly promised her. The Complaint states that Wang represented to Plaintiff that the bonus credit issue could be solved in various ways, but ultimately the issue was not resolved. Additionally, Plaintiff avers that the index growth cap rates for the funds in the annuity are below the 8% that Wang promised to Plaintiff. Plaintiff asserts causes of action for: (1) securities fraud; (2) deceptive trade practices; (3) fraud; (4) insurance bad faith; (5) breach of contract; (6) Breach of the Implied Covenant of Good Faith and Fair Dealing; (7) breach of fiduciary duty; (8) tortious bad faith; and, (9) negligent misrepresentation.

II. Discussion

A. Legal Standard For Motion to Dismiss

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal,* 129 S.Ct. 1937, 1949 (2009) (citing *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007)). Plausibility, in the context of a motion to dismiss, means that the plaintiff has plead facts which allow "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* The *Iqbal* evaluation illustrates a two prong analysis. First, the Court identifies "the allegations in the complaint that are not entitled to the assumption of truth," that is, those allegations which are legal conclusions, bare assertions, or merely conclusory. *Id.* at 1949–51. Second, the Court considers the factual allegations "to determine if they plausibly suggest an entitlement to relief." *Id.* at 1951. If the allegations state plausible claims for relief, such claims survive the motion to dismiss. *Id.* at 1950.

B. Securities Fraud

"Section 10(b) of the Exchange Act of 1934, 15 U.S.C. § 78j(b), makes it unlawful for any person ... [t]o use or employ, in connection with the purchase or sale of any security ... any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe [.]" *In re Daou Sys., Inc.,* 411 F.3d 1006, 1014 (9th Cir.2005) (quotation omitted). Pursuant to section 10(b), the SEC promulgated Rule 10b–5, which makes it unlawful:

> ***2** (a) To employ any device, scheme, or artifice to defraud,
>
> (b)To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon

any person, in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b–5.

To prove a violation of Rule 10b–5, a plaintiff must demonstrate "(1) a material misrepresentation or omission of fact, (2) scienter, (3) a connection with the purchase or sale of a security, (4) transaction and loss causation, and (5) economic loss." *Zucco Partners, LLC v. Digimarc Corp.,* 552 F.3d 981, 990 (9th Cir.2009). Section 3(a)(8) of the Securities Act exempts from its provisions "[a]ny insurance or endowment policy or annuity contract or optional annuity contract, issued by a corporation subject to the supervision of the insurance commissioner of any state" 15 U.S.C. § 77c(a)(8). The Supreme Court has held that certain types of "variable annuities" with characteristics that make them operate like securities are not exempt from the Securities Act. *SEC v. Variable Annuity Life Insur. Co.,* 359 U.S. 65, 71–72, 79 S.Ct. 618 (1959).

In her opposition to the Motion to Dismiss, Plaintiff argues that the annuity at issue was variable and thus falls outside the safe harbor. However, Plaintiff does not use the term "variable" in the Complaint and does not plead facts showing that the annuity she purchased was variable. Specifically, Plaintiff does not claim that the annuity lacked any guaranteed return—only that the return she received was less than she expected. She has not pled facts showing that payments were directly dependent on the performance of the investments that Defendant American made with her premiums. *See, e .g. Malone v. Addison Ins. Marketing, Inc.,* (225 F. Supp2d 743, 750–751) (finding annuity was not variable when it had a minimum guaranteed return and did not hold money in separate account). Annuities that provide a guarantee in addition to excess interest based on a formula tied to an index are regulated by the Nevada Insurance Commissioner pursuant to NRS 688A and are within the Exchange Act safe harbor. *See Nevada Division of Insurance Report on Nevada Insurance Market, February 2011* at 19. Accessed on 3/12/12 at http:// www.doi.nv.gov/sinfo/doc/InsuranceMktReportB.pdf. Plaintiff has not pled facts showing that the annuity at issue is a security. Accordingly, her claim for violations of state and federal securities laws fails and is dismissed.

C. Deceptive Trade Practices

The Nevada Unfair and Deceptive Trade Practices Act ("DTPA"), found at NRS 598 *et seq.,* prohibits a variety of fraudulent and unfair dealings in the course of conducting business. NRS 598.0955(1)(a) provides exemption from the DTPA for "[c]onduct in compliance with the orders or rules of, or statute administered by, a federal, state or local governmental agency."

***3** Defendants argue that Plaintiff's DTPA claim is barred because the Insurance Commissioner has exclusive authority over insurance carriers pursuant to NRS 57. *See Brown v. State Farm Fire and Cas. Co.,* 2011 WL 2295162 (D. Nev. June 8, 2011) (finding no private right of action for breach of regulatory or administrative codes). Here, the conduct that is alleged in the Complaint—misrepresenting the terms of an annuity—is not "conduct in compliance" with NRS 57 or the rules of the Insurance Commissioner. Plaintiff is not suing pursuant to the regulatory or administrative codes, but under NRS 41.600(2)(e) which specifically provides a private right of action for violations of DTPA. *See Weaver v. Aetna Life Ins. Co.,* 2008 WL 4833035, 4 (D.Nev.2008) (denying motion to dismiss DTPA claim against insurance carrier). Since the alleged conduct does not constitute conduct exempt from the Deceptive Trade Practices Act the DTPA claim survives.

E. Fraud and Negligent Misrepresentation

Fed.R.Civ.P. 9(b) provides that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." The elements of intentional misrepresentation or common law fraud in Nevada are: (1) a false representation made by the defendant; (2) defendant's knowledge or belief that the representation is false (or insufficient basis for making the representation); (3) defendant's intention to induce the plaintiff to act or to refrain from acting in reliance upon the misrepresentation; (4) plaintiff's justifiable reliance upon the misrepresentation; and (5) damage to the plaintiff resulting from such reliance. *Bulbman, Inc. v. Nev. Bell,* 825 P.2d 588, 592 (Nev.1992).

Plaintiff's complaint identifies that in approximately May of 2009 in Las Vegas, Wang acting on behalf of North American, represented that the annuity he sought to sell Plaintiff would pay an 8% bonus credit and would have a minimum index growth cap rate of 8%. Plaintiff alleges that she relied on these statements, that they were false, and that they caused her damage. Plaintiff adequately states her claims for fraud and negligent misrepresentation.

G. Breach of Contract

To state a claim for breach of contract in Nevada, a Plaintiff must demonstrate (1) the existence of a valid contract, (2) that plaintiff performed or was excused from performance, (3) that the defendant breached, and (4) that the plaintiff sustained damages. *See Calloway v. City of Reno,* 993 P.2d 1259, 1263 (2000).

The Complaint avers that Plaintiff and Wang, acting as an agent for North American, agreed to certain terms of an annuity. Plaintiff claims that she performed her obligations under the parties' agreement, but that Defendants "failed to honor the agreed upon and promised 8% bonus and 8% index growth cap rate." (Compl.¶ 93.) Plaintiff avers that these promises formed part of the agreement between the parties. This claim as stated is sufficient to sustain a cause of action for breach of contract against North American at this stage. However, Plaintiff has not pled facts showing that Wang was a party to the agreement between Plaintiff and North American. Accordingly, the Breach of Contract claim is dismissed as to Wang.

H. Insurance Bad Faith

***4** Nevada's definition of bad faith is (1) an insurer's denial of (or refusal to pay) an insured's claim (2) without any reasonable basis and (3) the insurer's knowledge or awareness of the lack of any reasonable basis to deny coverage, or the insurer's reckless disregard as to the unreasonableness of the denial. *Pioneer Chlor Alkali Co., Inc. v. Nat'l Union Fire Insurance Co.,* 863 F.Supp. 1237, 1244 (D.Nev.1994).

Plaintiff does not allege facts showing a refusal by North American to pay a claim without any reasonable basis since North American is paying Plaintiff pursuant to the annuity. The allegations of the Complaint are focused on the amount owed to Plaintiff and not a refusal to pay. Further, the facts pled by Plaintiff do not demonstrate that North American's conduct constitutes a knowing lack of reasonableness. Accordingly, the claim for bad faith is denied.

I. Implied Covenant of Good Faith and Fair Dealing

To state a claim of breach of the covenant of good faith and fair dealing, plaintiff must allege: (1) plaintiff and defendants were parties to an agreement; (2) the defendants owed a duty of good faith to the plaintiff; (3) the defendants breached that duty by performing in a manner that was unfaithful to the purpose of the contract; and (4) the plaintiff's justified expectations were denied. *Perry v. Jordan,* 900 P.2d 335, 338 (Nev.1995). In Nevada, an implied covenant of good faith and fair dealing exists in every contract. *Consolidated Generator–Nevada v. Cummins Engine,* 971 P.2d 1251, 1256 (Nev.1998).

The Complaint avers that Plaintiff and Wang, acting as an agent for North American, agreed to certain terms of an annuity but that Defendants failed to live up to the agreement. Specifically, Plaintiff claims that her justified expectations were denied when North American "failed to honor the agreed upon and promised 8% bonus and 8% index growth cap rate." (Compl.¶ 93.) Accordingly, the claim for breach of the implied covenant of good faith and fair dealing survives as to North American. This claim fails against Wang because, as discussed *supra,* Wang was not in a contractual relationship with Plaintiff.

J. Breach of Fiduciary Duty

An insurance contract is a special contract that can be fiduciary in nature, but does not create a fiduciary relationship. *Martin v. State Farm Mut. Auto. Ins. Co.,* 960 F.Supp. 233 (Dist.Nev.1997). The Nevada Supreme Court has affirmed that an insurer's duty to its policyholder is "akin" to a fiduciary relationship; however, it also clarified that this conclusion "does not equate to the creation of a new cause of action." *Powers v. United Servs. Auto. Ass'n.,* 979 P.2d 1286, 1288 (Nev.1999).

Plaintiff argues that the Nevada Supreme Court created a cause of action for breach of fiduciary duty against an employer in *Insurance Co. of the West v. Gibson Tile Co., Inc.,* 122 Nev. 455, 134 P.3d 698 (Nev.2006). In that case, which cites *Powers* approvingly, the issue was a jury instruction describing a fiduciary relationship, and not a cause of action for breach of fiduciary duty against an insurer. Since Nevada does not recognize this cause of action against an insurer or an insurance agent, the claim for breach of fiduciary duty fails.

K. Tortious Bad Faith

***5** A claim for breach of the duty of good faith and fair dealing can be rooted in tort or contract law. This claim sounds in tort when a "special element of reliance or fiduciary duty" exists between the parties. *Great Am. Ins. Co. v. Gen. Builders, Inc.,* 113 Nev. 346, 934 P.2d 257, 263 (1997). When such a relationship exists, tort recovery is appropriate if "the party in the superior or entrusted position" has engaged in "grievous and perfidious conduct." *Id.* (quoting *K Mart Corp. v. Ponsock,* 103 Nev. 39, 732 P.2d 1364, 1371 (1987)). Although tort liability for breach of the covenant of good faith and fair dealing is limited to "rare and exceptional cases," the

Nevada Supreme Court holds that the relationship between an insurer and an insured is one such case. *Id.*

Plaintiff's claim fails against Wang because Nevada Courts have never recognized the required special relationship between an insurance agent and an insured. The Court has doubts about whether the allegations of the Complaint could plausibly rise to the level of "grievous and perfidious" conduct by North American required to support this cause of action. However, the Court cannot say as a matter of law, that Plaintiff failed to state a claim for Tortious Bad Faith against North American. Accordingly, the claim survives against North American.

III. Conclusion

IT IS HEREBY ORDERED THAT North American Company For Life and Health Insurance's Motion to Dismiss (# 14) is **GRANTED** in part and **DENIED** in part.

IT IS FURTHER ORDERED THAT Defendant Ding–Ho Wang's Motion to Dismiss (# 16)is **GRANTED** in part and **DENIED** in part.

All Citations

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