

**EXHIBIT A**

**Case No. 01-19-0000-4057 AWARD**

***FILED IN REDACTED FORM TO MAINTAIN BOTH  
PARTIES' CONFIDENTIALITY DESIGNATIONS FOR  
PRODUCED DOCUMENTS AND TESTIMONY***

**AMERICAN ARBITRATION ASSOCIATION**  
**AAA NO. 01-19-0000-4057**

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HUMANA HEALTH PLAN, INC., HUMANA INSURANCE COMPANY,  
and HUMANA PHARMACY SOLUTIONS, INC.,  
Represented by Crowell & Moring, LLP

Claimants,

vs.

RITE AID HDQTRS. CORP. and RITE AID CORPORATION,  
Represented by Morgan, Lewis & Bockius

Respondents.

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**OPINION AND FINAL AWARD**

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The undersigned Arbitrator, having been designated in accordance with the arbitration agreement entered into by the parties and having been duly sworn, states as follows:

## **I. PRELIMINARY STATEMENT**

This dispute arises out of an alleged breach of contractual reimbursement terms in two negotiated National Regional Chain Pharmacy Provider Agreements. The Claimants are Humana Health Plan, Inc., Humana Insurance Company, and Humana Pharmacy Solutions, Inc. (collectively, “Humana”). The Respondents are Rite Aid Hdqtrs. Corp. and Rite Aid Corporation (collectively, “Rite Aid”).

Humana filed its Demand for Arbitration on February 6, 2019. Rite Aid filed its Answering Statement on February 22, 2019.

In light of the COVID-19 pandemic, the parties agreed to a remote video-conferenced evidentiary hearing in this matter as well as to other technology and witness protocols.

A nine-day evidentiary hearing was held on November 1-5, and November 8-10, 2021. Humana was represented at the hearing by its outside counsel, Keith Harrison, Preston Pugh, Kelly Hightower Hibbert, Justin Kingsolver, Michael Pine, Tashena Middleton, and Roy Abernathy of Crowell & Moring LLP, along with Jed Wulfekotte of Stein Mitchell Beato & Missner LLP. Rite Aid was represented at the hearing by its outside counsel, Troy Brown, Margot Bloom, Su Jin Kim, Colleen Gallagher, J. Warren Rissier, Brittany Johnson, and Michael Ableson of Morgan, Lewis & Bockius LLP. In addition, there were technology representatives from each firm and from Veritas, which provided technological support and court reporting for the arbitration.

Pursuant to my Decision and Order dated February 14, 2020, the hearing was considered to have taken place in Louisville, Kentucky.

I have considered all of the testimony, including the direct examinations and full cross-examinations of witnesses at the hearing; the exhibits submitted in evidence (as well as all reasonable inferences to be derived from that evidence); and the case law and arguments presented at the hearing and in post-hearing briefs. My assessment is based on the parties’ contracts and applicable law, as well as close attention to the demeanor and content of the witnesses’ testimony,

the contemporaneous writings and actions of key actors involved, and the candor demonstrated. The facts stated in my analysis are those found by me to be true and necessary to this Opinion and Award. To the extent that my description differs from a party's position, that is the result of determinations as to relevance, burden of proof, weighing of record evidence and credibility as well as the parties' contemporaneous interactions and negotiations, and discounting inconsistent positions or rejecting certain arguments made in the arbitration.

## **II. PARTY POSITIONS**

The summary below is not an exhaustive restatement of the parties' respective assertions. I assume the parties' familiarity with the underlying facts pleaded and offered in proof by both sides and the roles of the various people who are cited, and I do not repeat here all of the background facts that gave rise to the relevant aspects of their relationship or to their later disputes except as needed.

Humana claims that Rite Aid breached the terms of two National Regional Chain Pharmacy Provider Agreements, committed fraud, and made negligent misrepresentations by falsely inflating millions of pharmacy reimbursement claims by manipulating the "usual and customary" payment metric in the parties' agreements, which resulted in overcharges to Humana.

Rite Aid disputes Humana's claims, arguing that it properly reported its retail cash prices pursuant to the terms of the parties' agreements and, therefore, did not breach the parties' agreements, commit fraud, or negligently misrepresent any claim submissions. Rite Aid further contends that Humana's claims are barred by the Voluntary Payment Doctrine.

## **III. ANALYSIS**

While, as stated above, I do not undertake an exhaustive recitation of the parties' conduct, it is important to note that conduct has been given appropriate weight when its consideration is legally necessary to resolve substantive issues presented. My evidentiary analysis does not address each element of each assertion or position taken, but rather the material and relevant evidence relating to dispositive issues, focusing on the issues pressed most heavily by the parties and critical to the disposition of the claims. The omission of an issue of fact or an argument from the discussion does not imply any specific conclusion as to how the issue was determined or whether

the issue was reached or not, but only that it was not deemed essential to support the rulings in this Opinion and Award.

I hereby find and conclude as follows:

A. Background Facts

Humana is comprised of Humana Health Plan, Inc., a health maintenance organization; Humana Insurance Co., an insurance company that provides health insurance and prescription drug coverage; and Humana Pharmacy Solutions, Inc., a pharmacy benefits manager (PBM) that manages pharmacy benefits for Humana members. Rite Aid Hdqtrs. Corp. and Rite Aid Corporation own and operate a large retail drugstore chain in the United States.

Since the early 2000s, Rite Aid contracted with Humana to accept claims for prescription benefits under Humana insurance plans and to be reimbursed by Humana subject to the terms of reimbursement provided for in the contracts.

In 2006, the pharmacy landscape changed drastically when Medicare Part D went into effect, providing millions of Medicare beneficiaries with prescription benefit assistance for the first time. In response to Medicare Part D, many big-box stores, including Walmart, Target, Kroger, and Costco, began offering generic drug discount programs, which lowered prices to as low as \$4 for certain prescription drugs. These discount programs were available to all customers, whether insured or uninsured, and thus the pharmacies generally reported the discounted prices as the U&C charge. Given the low prices and ease with which customers could obtain the discounted prices, stores like Walmart and Target began to attract and obtain a significant market share of the uninsured and underinsured pharmacy customers.

Several pharmacies sought to regain some of that market share by implementing their own discount drug programs. In September 2008, Rite Aid launched a membership program called the RX Savings Program (“RSP”). The RSP was designed to attract cash-paying customers by offering discounted pricing for certain prescription drugs to its members. To enroll in the program, a customer had to sign an enrollment form and agree to several terms, including a marketing consent that permitted Rite Aid to use the customer’s personal information to send direct,

personalized marketing; and a HIPAA waiver, to enable Rite Aid to disclose personal health information to the third party administering the RSP. There was no monetary enrollment fee.

On April 1, 2008, five months prior to launching the RSP, Rite Aid and Humana negotiated a new base contract and executed a National/Regional Chain Pharmacy Provider Agreement (the “2008 Agreement”). The 2008 Agreement defined the applicable laws and regulations, as well as the parties’ responsibilities under the agreement regarding the submission of claims and reimbursement terms. Of particular relevance to this arbitration, the key reimbursement pricing metric of the 2008 Agreement rested upon Rite Aid’s “usual and customary” (“U&C”) charge. The agreement, however, did not explicitly define U&C, and unsurprisingly (given that the 2008 Agreement was executed prior to the launch of the RSP), did not reference the RSP or RSP pricing.

In August 2013, Rite Aid and Humana renegotiated the 2008 Agreement and executed a new National/Regional Chain Pharmacy Provider Agreement (the “2013 Agreement”). The terms of the 2008 Agreement and 2013 Agreement (collectively, the “Agreements”), were materially the same, with only slight variations in the language of the provisions. The 2013 Agreement, like the 2008 Agreement, did not explicitly define U&C or reference the RSP.

In 2017, Humana learned through a series of legal actions against Rite Aid that Rite Aid, purportedly, was falsely reporting U&C prices by failing to report RSP prices as its U&C charge. On January 10, 2018, Humana sent a Notice Letter to Rite Aid inquiring about its reporting practices for U&C charges and requested cash transaction data from Rite Aid to confirm the accuracy of Rite Aid’s U&C submissions. On July 31, 2018, Rite Aid rejected Humana’s request for the cash transaction data. Rite Aid also confirmed, for the first time, that it did not include RSP prices in the U&C prices it reported to Humana.

On February 6, 2019, Humana filed its Demand for Arbitration.

B. Controlling Law

Pursuant to my Memorandum Decision Regarding Choice of Law and Venue dated February 14, 2020, the laws of the Commonwealth of Pennsylvania govern all disputes regarding matters of enforcement and interpretation of the Agreements. The laws of Kentucky govern all common law claims.

C. Claims Raised

Humana raises four claims against Rite Aid in its Demand for Arbitration: Count 1 – Breach of Contract; Count 2 – Fraud; Count 3 – Negligent Misrepresentation; and Count 4 – Unjust Enrichment. I will address each count *seriatim*.

1. Breach of Contract

Humana first seeks a ruling that Rite Aid breached the terms of the Agreements by falsely reporting U&C charges to Humana. To prevail on its breach of contract claim, Pennsylvania law requires Humana to prove, by a preponderance of the evidence, (1) the existence of a contract; (2) a breach of a duty imposed by the contract; and (3) resultant damages.

The parties do not dispute that the 2008 Agreement and 2013 Agreement were valid and enforceable contracts. The crux of this matter is whether Humana has proven that Rite Aid breached the terms of the Agreements by failing to report RSP prices as U&C charges to Humana. As Humana and Rite Aid acknowledge, the cornerstone of the reimbursement pricing metric in both Agreements is the U&C charge. Humana and Rite Aid, however, vehemently disagree on the definition of U&C.

Humana alleges that Rite Aid knew that it was required to report RSP prices as U&C, but intentionally and knowingly manipulated its U&C prices by excluding the RSP prices, and actively concealed its exclusion of those discounted prices. Humana contends that while the Agreements did not explicitly define U&C, they incorporated the National Council of Prescription Drug Programs (“NCPDP”) industry standards, which define U&C as “the amount charged to cash customers for the prescription.” Humana asserts that this definition includes all customers purchasing prescription drugs in cash, without insurance.

Conversely, Rite Aid claims that it has always reported its “usual and customary retail price” consistent with the terms of the Agreements. Rite Aid agrees with Humana that the Agreements do not specifically define U&C. Rite Aid nevertheless contends that the Agreements required it to report the “usual and customary *retail* price,” which Rite Aid interprets to mean the

“ [REDACTED] ” Tr. 1559:23-1560:5; 1638:22-1639:04. Moreover, because [REDACTED]



the RSP is a membership program, Rite Aid claims that the Agreements did not require it to report RSP prices as U&C, and thus they were properly excluded.

a. Garbe

The conflict presented is neither novel nor unique to the industry, as the parties point to various other arbitrations and court decisions addressing these exact issues. While I am of the opinion that this arbitration does have unique factual considerations that distinguish it from those decisions, I have carefully analyzed and weighed the implications of the primary appellate opinion on this topic, *United States ex rel Garbe v. Kmart Corp.*, 824 F.3d 632 (7th Cir. 2016), particularly since both Humana and Rite Aid rely on the decision in crafting their arguments. Accordingly, I discuss these at some length.

In *Garbe*, a *qui tam* action, the United States District Court for the Southern District of Illinois was asked to consider whether Kmart violated the federal False Claims Act and analogous state laws by “misrepresenting its ‘usual and customary’ prices for certain generic prescription drugs and thereby overcharging Medicare Part D programs,” as well as other federal and state prescription drug programs. *United States ex rel. Garbe v. Kmart Corp.*, 73 F. Supp. 3d 1002 (S.D. Ill. 2014). Beginning in 2004, Kmart launched a series of generic drug discount programs that were designed to compete with mail order pharmacies. In 2009, Kmart implemented the Prescription Savings Club (“PSC”). The program was accessible by anyone who paid a ten-dollar “enrollment fee.” Upon enrolling in the program, PSC members received discounts on certain generic prescription drugs. Kmart did not report these discounted prices for PSC members as U&C prices to the government and other third-party payors.

Kmart filed a motion for partial summary judgment based on the definition of U&C price, upon which liability for the submission of false claims rested. Kmart argued that the NCPDP definition of U&C did not control; rather, the applicable statute, regulation, and/or contract with Kmart defined the U&C charge. In support thereof, Kmart offered expert witness testimony that the NCPDP “definitions merely explain the format for how a pharmacy claim should be submitted” and were not mandatory. *Id.* at 1014.

Conversely, the Relator asserted that U&C is defined by the NCPDP as “the amount charged cash customers for the prescription exclusive of sales tax or other amounts claimed,” and

represents “the value that a pharmacist is willing to accept as their total reimbursement for dispensing the product/service to a cash paying customer.” *Id.* The Relator’s expert witness, who previously served on the NCPDP, testified that “[s]ince HIPAA requires the use of the NCPDP standard for pharmacy claim submissions, the NCPDP standard and its associated implementation guide must be followed without deviation.” *Id.* at 1014. The expert further opined that “the U&C charge is ‘strictly defined by the NCPDP’” and can be defined as the “cash price to the general public.” *Id.*

The district court found that “the NCPDP definition of U & C price is not meant to be ‘mandatory,’ but to instead explain the format for how a pharmacy claim should be submitted.” *Id.* Nevertheless, the court determined that the “standard across the pharmacy industry for U & C price falls in line with [the] NCPDP definition” and is “generally referred to within the industry as the ‘**cash price to the general public**,’ which is the amount charged cash customers for the prescription, exclusive of sales tax or other amounts claimed.” *Id.* at 1014-15 (emphasis in original).

The court noted, however, that “individual payers may further define U & C price specifically in their statutes or regulations or in their payer sheets, electronic prescription claim instructions, or contracts.” *Id.* at 1015. Ultimately the court held that “the NCPDP definition (which reflects the industry standard) of ‘cash price to the general public’ controls, unless further defined by an individual state statute or relevant contract and/or payer sheet.” *Id.* at 1016.

The court then rejected Kmart’s argument that “the enrollment requirement for its discount programs took these discount programs out of the purview of U & C price, since they were not offered to the ‘general public[,]’” but were instead, offered to “members of a private club or group.” *Id.* In doing so, the court relied on Black’s Law Dictionary and case law addressing private clubs versus the general public, and held that “the members of Kmart’s generic discount programs are part of the ‘general public’ (as opposed to a private group or club) because of the open eligibility of the programs, *i.e.* anyone is eligible to join the program.” *Id.* at 1017. By way of further clarification, the court specifically noted that the enrollment process was rudimentary and only required basic demographic information. *Id.*

The Seventh Circuit accepted Kmart’s interlocutory appeal from various rulings by the district court, including the issue of “whether Kmart’s ‘discount’ prices were offered to the ‘general public.’” *Garbe*, 824 F.3d at 635. Kmart had relied on the definition of “general public” from two online dictionaries for the proposition that members of a “particular group” or “particular organization” are not members of the general public, and therefore, its members represent “a subset of its customer base.” *Id.* at 643. In rejecting Kmart’s rationale, the court explained “We are given no reason to think that there was any meaningful selectivity for the people who joined Kmart’s programs, and thus that they could be distinguished in any way from the ‘general public.’” *Id.* Further, the court found that “[t]he evidence submitted shows that the barriers to joining the Kmart ‘programs’ were almost nonexistent, to the extent they were enforced at all” and noted that Kmart “typically offered its ‘discounts’ in return for nothing more than assent, demographic data the pharmacy already needed to fill a prescription and a nominal fee.” *Id.* Thus, the court concluded that “[c]ash customers walking into Kmart do not cease to be members of the general public the minute they are offered—or pushed into—‘membership’ in Kmart’s ‘discount program.’” *Id.*

The Seventh Circuit also found that its “reading of ‘general public’ is consistent with the regulatory structure that gave rise to the ‘usual and customary’ price term.” Citing to various Medicare and Medicaid regulations, the court concluded that “[t]aken together, ‘[t]he purpose of these regulations is clear: state agencies are not to pay more for prescribed drugs than the prevailing retail market price.’ Regulations related to ‘usual and customary’ price should be read to ensure that where the pharmacy regularly offers a price to its cash purchasers of a particular drug, Medicare Part D receives the benefit of that deal.” *Id.* Finally, the court explained that “[t]he CMS Manual has long noted that ‘where a pharmacy offers a lower price to its customers throughout a benefit year’ the lower price is considered the ‘usual and customary’ price rather than ‘a one-time ‘lower cash’ price,’ even where the cash purchaser uses a discount card.” *Id.* The court concluded, based on this analysis, that,

Allowing Kmart to insulate high “usual and customary” prices by artificially dividing its customer base would undermine a central purpose of the statutory and regulatory structure. The “usual and customary” price requirement should not be frustrated by so flimsy a device as Kmart’s “discount programs.” Because Kmart offered the terms of its “discount programs” to the general public and made them the lowest prices for which its drugs were widely and



consistently available, the Kmart “discount” prices at issue represented the “usual and customary” charges for the drugs.

*Id.* at 645.

b. *Garbe’s Application to Rite Aid’s RSP*

Humana argues that the result here should be no different from the result in *Garbe*, noting that the issues in *Garbe* are nearly identical to the issues in this arbitration. Humana contends that under the default rule established by *Garbe*, “the NCPDP definition (which reflects the industry standard) of ‘cash price to the general public’ controls, unless further defined by an individual state statute or relevant contract and/or payor sheet.” *Garbe*, 73 F. Supp. 3d at 1016. Humana argues that the parties did not further define U&C in the Agreements.

Although Rite Aid acknowledges that the Agreements do not specifically define U&C, Rite Aid disputes the applicability of the *Garbe* default rule, arguing that the term “retail” in the description of U&C in section 2.2 of the Agreements reflects the parties’ agreement to adopt a different U&C definition. Specifically, Rite Aid asserts that “retail” means the shelf price. Humana assails this interpretation of the Agreements and argues that the term “retail” describes the “brick-and-mortar” pharmacy location as opposed to wholesale, mail order, specialty, and hospital pharmacies.

i. *The Agreements*

I find that both parties have offered rational competing interpretations of *Garbe’s* significance. Accordingly, to resolve this dispute, I first undertook a painstaking review of the language in the Agreements. Under Pennsylvania law, “the intent of the parties to a written contract is to be regarded as being embodied in the writing itself, and when the words are clear and unambiguous the intent is to be discovered only from the express language of the agreement.” *Stewart v. McChesney*, 444 A.2d 659, 661 (Pa. 1982). In ascertaining the parties’ intention, “effect must be given to all the provisions in the contract.” *Id.* at 662.

The core component of this aspect of the dispute is the language of section 2.2 in the Agreements. Section 2.2 of the 2008 Agreement provides:

2.2



Section 2.2 (emphasis supplied). Similarly, section 2.2 of the 2013 Agreement provides:

2.2



[REDACTED]

Section 2.2 (emphasis supplied).

Although section 2.2 does not define “usual and customary retail price,” I find that the remaining provisions of the Agreements shed further light on the meaning and the intent of this phrase. In particular, the Agreements contain several provisions and schedules addressing and defining, with specificity, the reimbursement terms. For instance, section 4.3 of the 2008 Agreement provides, in relevant part:

4.3 [REDACTED]

Exhibit D provides, in relevant part:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

\*\*\*

[REDACTED]

Finally, paragraph 5 of Exhibit C provides:

[REDACTED]

Notably, there is no reference to the term “retail” associated with “usual and customary” within these reimbursement terms in the 2008 Agreement.

The reimbursement terms set forth in the 2013 Agreement similarly do not contain the term “retail.” To the contrary, Section 4.3 of 2013 Agreement provides, in relevant part:

[REDACTED]

Exhibit D provides, in relevant part:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Finally, paragraph 6 of Exhibit C provides:

[REDACTED]

Although there are slight variations in the language of these reimbursement provisions in the 2013 Agreement, the terms are materially the same as the 2008 Agreement. Again, the word “retail” is not included in any reference to “usual and customary” in these provisions.

I note that I do not find the absence of the word “retail” to be dispositive. However, when viewed in their totality, and giving effect to all of the provisions in the contracts, I find that the Agreements tend to demonstrate that Rite Aid’s reliance on the single use of “retail” in section 2.2

as proof that the parties contracted out of the *Garbe* default rule by modifying “usual and customary” is unconvincing and unsubstantiated.

I further find that in addition to the absence of the word “retail” in the provisions governing claim submission and reimbursement, there are two more factors that lend credence to Humana’s position.

First, with respect to the 2008 Agreement, it is important to note that at the time the parties executed the 2008 Agreement, the RSP did not exist. To now claim that the language of the 2008 Agreement supports the conclusion that the term “retail” operates to exclude RSP prices does not, in my judgment, reflect the realities of the parties’ negotiations.

Second, all other references to the word “retail” in the Agreements tend to support Humana’s assertion that “retail” references the “brick-and-mortar” pharmacy locations. For example, in the 2008 Agreement, Exhibit F states: “

[REDACTED]

In the 2013 Agreement, the parties agreed upon an expanded list of definitions. I note in particular paragraph 1.16, which provides:

[REDACTED]

Again, this definition tends to support Humana’s assertion that the word “retail” references the “brick-and-mortar” pharmacy locations, as opposed to other types of pharmacy locations, including mail order pharmacies, which are explicitly defined in section 1.17, and are referenced in section 2.2 of the 2013 Agreement.



ii. Policy Arguments, and Documentary and Testimonial Evidence

Because I did not find the language of the Agreements alone to be dispositive, I also carefully considered all of the arguments and documentary and testimonial evidence offered by the parties during the course of this arbitration.

First, I considered Rite Aid's argument that while the parties may have agreed to transmit information in accordance with the NCPDP standard data field format, they did not agree that the NCPDP would govern the reimbursement terms or U&C reporting obligations under the Agreements. Rite Aid contends, through its expert witness Catherine Graeff, a former board member of the NCPDP, that the NCPDP does not create definitions to be used as contractual terms, and in fact, lacks the authority to do so. Ex. R576, at 5-8. Specifically, Rite Aid argues that the NCPDP Antitrust Policy and Medicare Part D's non-interference clause preclude this conclusion. *See* 42 U.S.C. § 1395w-111(i); Tr. 3048:25-3050:14.

I am not persuaded by Rite Aid's argument in this regard. While I do find that Medicare Part D's non-interference clause prohibits the government from mandating pricing provisions of pharmaceutical agreements and taking away free will contracting, it does not suggest that the parties cannot adopt this guidance. Ms. Graeff even acknowledged that if contracting parties agreed to adopt "[REDACTED]" Tr. 3052:9-14. I reach the same general conclusion regarding any anti-trust provisions. In my view, there is nothing in the NCPDP Antitrust Policy to suggest that contracting parties cannot voluntarily and affirmatively adopt NCPDP language as guidance, which is what Humana alleges happened here.

(a) Context and Purpose of Pharmacy Agreements

Humana argues that in addition to the language of the Agreements, the context and purpose of the Agreements support the conclusion that the parties intended to, and did, adopt the NCPDP definition. During the arbitration, Humana relied on the opinions of two industry experts, Dr. Kenneth Schafermeyer and Dr. Susan Hayes, who testified that the purpose and function of U&C is to ensure that insured customers do not pay more for a drug than uninsured customers. Tr. 877:7-22; 1743:10-16. Dr. Schafermeyer explained that through this U&C concept, the insurance

companies negotiate their expectation to obtain lower prices for their members than what cash customers are paying. Tr. 877:13-15. Dr. Hayes opined that U&C therefore “ [REDACTED] ” Ex. H146, at 5. This protects the value and utility of insurance. Tr. 1743:10-16.

All of Humana’s witnesses echoed this definition and understanding. Significantly, Linda Van Hook, Humana’s Director and Operational Risk Manager, who negotiated the 2008 Agreement, testified that throughout the course of her career, she understood U&C to be “ [REDACTED] ” Tr. 368:12-22; 369:4-10. Laura White, Humana’s Director of Pharmacy Contracting, who negotiated the 2013 Agreement, testified that she understood U&C to be, consistent with the NCPDP standard, “ [REDACTED] ” Tr. 624:11-17.

Humana further argues that the “lesser-of” formula (detailed in Exhibit D to the Agreements, which is set forth in more detail above) supports Humana’s position that the parties accepted U&C to mean the lowest cash price. Dr. Schafermeyer explained that the “lesser of” logic is “ [REDACTED] ” in all pharmacy contracts like the Agreements at issue and ensures that Humana pays the lesser of either the pharmacy’s U&C price or the negotiated price per the contract. Tr. 883:5-9, 16-21; 886:1-16.

Rite Aid witnesses testified to a different understanding of U&C. William Wolfe, Rite Aid’s former Senior Vice President of Managed Care and Government Affairs, testified that his definition of U&C was “ [REDACTED] ” Tr. 1493:16-1494:2. If a contract did not contain a specific definition of U&C, Mr. Wolfe testified that Rite Aid always submitted its retail price – “ [REDACTED] ” – because in his view “ [REDACTED] ” Tr. 1487:15-23; 1524:5-21.

Robert Thompson, Rite Aid’s former Executive Vice President of Pharmacy, also testified that Rite Aid “ [REDACTED] ” Tr. 2023:11-15. Although he interchangeably referred to “cash” and “retail



cash prices,” Mr. Thompson testified that he defined “retail cash price” as “[REDACTED]” Tr. 2022:2-12; 2023:1-7. In contrast to Humana’s view, Mr. Thompson testified that he understood the retail cash price “[REDACTED]” Tr. 2023:8-10.

Although Mr. Wolfe testified that no industry participants complained about Rite Aid’s submission of “retail” price prior to the launch of the RSP, he (and other Rite Aid witnesses) acknowledged that as the drug prescription coverage market grew, the insurers and PBMs began to gain leverage with pharmacies and used that leverage during contract negotiations. Mr. Wolfe testified that PBMs “[REDACTED]” including “lesser-of” formulas that enabled them to increase their profits by reducing the amount they had to reimburse pharmacies. Tr. 1519:4-11, 1519:18-22, 1520:15-23. Although Rite Aid argues that the “lesser-of” logic is not a guarantee that PBMs will get the lowest rates available to any pharmacy customer, Dianne Mason, Rite Aid’s Senior Director of Managed Care, agreed with Humana’s witnesses that the “lesser-of” logic was designed to prevent insured customers from being in a situation where they “[REDACTED]” by not using their insurance. Mason Dep. Designations 143:7-144:12.

I find that this evidence shows that Rite Aid understood that through all of the pricing metrics contained in the Agreements, including U&C and the “lesser-of” formula, Humana believed that it had negotiated what it viewed as a guarantee that its members would pay a lower price than what an uninsured customer would pay for the same drug. By extension, Rite Aid shared an understanding that these metrics were important to Humana and, since they informed the reimbursement amounts, depended upon a complete and accurate set of the prices made available by Rite Aid to all of its cash customers, as the NCPDP standards required.

While Rite Aid seemingly does not disagree that it had the obligation to submit accurate data regarding the prices it charged to cash customers, Rite Aid advances three arguments that it believes remove RSP members from this category of cash customers and demonstrate that the RSP program is not subsumed within the NCPDP definition of U&C.

(1) Cash Customers

First, Rite Aid relies on the testimony offered by its industry expert, Pamela Wyett, that insurers and PBMs began including lesser-of formulas in their contracts when there were still only two types of transactions – insurance and cash. Ex. R577. Ms. Wyett testified that with the advent of pharmacy discount programs, the industry created a third category of pharmacy transactions that is distinct from insurance and cash transactions. *Id.*; Tr. 2648:23-2649:5, 2674:8-16. Thus, in addition to insurance customers (those who use a funded pharmacy benefit), and cash customers (those who “ [REDACTED]”), Rite Aid contends that there is a third category of customers who use an unfunded pharmacy benefit (*i.e.*, membership discount programs like the RSP). Ex. R577. In Ms. Wyett’s opinion, RSP members, who use a benefit program, are distinguishable from members “ [REDACTED].” *Id.* at 28.

Ms. Mason also offered testimony regarding this third category of pharmacy customers, stating, "[REDACTED] " Mason Dep. Designations, at 129:11-14. She further explained, "[REDACTED]"

Conversely, Humana asserts that there are only two categories of pharmaceutical customers: those who pay for prescriptions with insurance, and those who do so without insurance (also known as “cash customers”). Dr. Schafermeyer testified that U&C is the price offered to “cash customers” or “cash-paying customers,” i.e., those customers “[REDACTED]” [REDACTED]” Tr. 886:17-23; 887:25-888:3. Dr. Susan Hayes similarly defined “cash customers” as those who either do not have insurance, or elect not to use their insurance benefits at the time of purchase. 1745:19-1746:1.

As previously discussed, the NCPDP standards define “Usual and Customary Charge” as the “[a]mount charged cash customers for the prescription exclusive of sales tax or other amounts claimed.” Explanatory materials published by the NCPDP echo this definition. In response to a question in November 2010, these materials explain that U&C is “the value that a pharmacist is willing to accept as their total reimbursement for dispensing the product/service to a cash-paying customer.” See Ex. H176, NCPDP, Telecommunication Version 5 Questions, Answers, and Editorial Updates (Nov. 2010), at 39. Although Rite Aid is correct in its assertion that the NCPDP does not define “cash customer,” I nonetheless do not find Rite Aid’s categorical division of “non-insurance” customers to be credible or supported by any evidence.

First, despite her attempt to distinguish contracted customers and noncontracted customers, Ms. Mason acknowledged that both types of customers are cash customers. Mason Dep. Designations, at 128:8-15, 129:11-14, 130:14-19. Second, Rite Aid’s internal documents demonstrate that Rite Aid referred to the RSP as a “[REDACTED]” targeting “[REDACTED]” or “[REDACTED]” Exs. H24, H43. These internal documents do not mention or otherwise carve out the distinction between the types of non-insured customers that Rite Aid is now advancing.

Moreover, and significantly, none of Rite Aid’s witnesses could cite to any authority, including industry publications or peer reviewed literature, that used the term “funded pharmacy benefit,” or that otherwise supported their position that “cash” customer excludes customers using a discount program. See Tr. 2786:5-2787:23; 1643:3-10; 2142:21-2143:11. In fact, Rite Aid’s expert, Ms. Graeff, acknowledged that NCPDP documents do not carve out any categories of cash prices (as do those charged by discount programs including the RSP). Tr. 3112:13-17. I find this testimony to be important in light of the fact that the NCPDP’s definition of U&C, which has remained unchanged since 1996, predates Medicare Part D and all discount programs, including the RSP. The NCPDP did not update or modify the definition of “Usual and Customary Charge,” including its reference to “cash customers,” following the launch of the RSP and other discount programs. Tr. 3089:12-16. For these reasons, I do not accept Rite Aid’s argument that the RSP program is not subsumed within the NCPDP definition of U&C on this basis.



(2) Enrollment Requirement

Rite Aid further argues that RSP members were not “cash customers” because the RSP was indisputably a membership enrollment program. Rite Aid is correct that a customer was required to enroll in the RSP in order to receive the benefits of the program, including prescription drug discounts. The enrollment form contained two lines for the customer’s signature. As a condition of enrollment, the first line required the customer to sign a HIPAA waiver that authorized Rite Aid to share the customer’s health information with the administrator of the RSP. Tr. 1499:13-16; 2029:16-22. The second line required the customer to consent to receiving marketing communications called “Additional Health Savings Information” from Rite Aid and the administrator of the RSP. Tr. 1499:17-19; 2029:22-2030:9. Upon assent to these terms, the customer was a member of the RSP.

This enrollment process, and the customer’s “affirmative action,” has been categorically rejected as an artifice by all courts and arbitrators who have addressed this issue. I do not disagree with the rationale undergirding those determinations. Accordingly, I find that Rite Aid has not established this as a sufficient basis upon which to remove members from a “cash customer” designation.

(3) Adjudication

Finally, Rite Aid also attempts to distinguish RSP members from cash customers by claiming that the RSP transactions, in contrast to retail cash transactions, were “adjudicated” by a third party. Tr. 1499:20-22. Rite Aid’s witnesses testified that the RSP had its own BIN and PCN numbers, which were necessary to route the claims. Tr. 1509:1-6, 1507:7-14. In her expert report, Ms. Wyett asserted that “[REDACTED]” – in this case, ScriptSave, followed by Envision. *See* R577, at 7; Tr. 2030:12-23; 2922:2-5. Ms. Wyett further stated that “[REDACTED]” *Id.*

In contrast to the adjudication process for RSP transactions, Ms. Wyett describes a cash transaction as one that



Ex. R577, at 8 (emphasis in original).

Humana's witnesses do not disagree with Ms. Wyett's opinions in this regard. Robert Beckley, a former member and chairman of the NCPDP Board of Trustees, testified that a "true adjudication" of a typical insurance claim is a multi-step process that examines patient eligibility, drug coverage, price determinations, and drug utilization review. Tr. 1354:13-1355:3. Adjudication is necessary in these situations because the pharmacy does not possess the information; the pharmacy has to obtain the information from the health plan or PBM.

But Mr. Beckley also contrasted a "true adjudication" of an insurance claim with a "fake adjudication" of a cash transaction, which does not engage in this multi-step review. According to Mr. Beckley, "[REDACTED]" Tr. 1350:3-12. Mr. Beckley explained that a cash transaction does not require eligibility determinations because there are no terms or conditions, arrangements, or a third-party that provides benefits or is "[REDACTED]" Ex. H150 at ¶ 44.

Mr. Beckley observed that "[REDACTED]"  
 [REDACTED]  
 [REDACTED]  
 [REDACTED]" *Id.* at ¶ 46; Tr. 1355:4-9. Several Rite Aid witnesses corroborated Mr. Beckley's assertion in this regard, as Mr. Thompson, Mr. Wolfe, and Ms. Farrell all testified that Rite Aid set the RSP, decided which drugs appeared on the formulary, and maintained eligibility and enrollment information. Tr. 2148:4-2149:20; 1661:8-1662:14, 3007:4-3008:17. I find this testimony to be significant in that it suggests that Rite Aid's adjudication process was a mere pretense.

Moreover, this exact argument was analyzed and rejected by *Garbe*. There, the court found Kmart's adjudication process, which is similar to Rite Aid's adjudication process, to be a "sham" and concluded that it had no impact on Kmart's U&C. *Garbe*, 824 F.3d, at 636. In line with this view, Rite Aid's own expert witness, Ms. Graeff, conceded that "[REDACTED]

" Tr. 3111:5-3112-1. Accordingly, I do not find this adjudication process to be a characteristic of the RSP that distinguishes its members from ordinary cash customers such that the NCPDP definition of U&C would not apply to the RSP.

(b) Course of Performance

Rite Aid further disputes Humana's assertion that the parties adopted the NCPDP definition of U&C, claiming that Humana developed this theory during litigation. Rite Aid insists that Humana's conduct – as shown through testimony and internal emails and memoranda – establishes that Humana and Rite Aid always shared an understanding that RSP prices did not constitute U&C.

Rite Aid first notes that Humana knew about the RSP since its inception – a point that Humana does not dispute. Rite Aid also identifies several internal emails in the months after the RSP launched which, Rite Aid asserts, demonstrate that Humana knew RSP prices were not reported as U&C:

- In a March 2009 email chain, Humana personnel discussed a complaint by a Humana member that was not permitted to use his Humana Flexible Savings Account card at a Rite Aid pharmacy with the RSP, and was told that Rite Aid could "[REDACTED]" Ex. R138. Within that chain, Terry Spicer noted that "[REDACTED]" Both Mr. Spicer and Carrie Lovell acknowledged that this issue did not occur with other providers, like Walmart, Kroger, Target, and K-Mart "[REDACTED]" and they "[REDACTED]"
- In a June 2009 email, Mr. Spicer acknowledged that while "[REDACTED]" Ex. R153. He further explained that "[REDACTED]" *Id.*



- In an August 2013 email, Bryan Duke referred to Walmart's generic drug program as its "[REDACTED]" but characterized pharmacy membership programs, like the RSP, as a "[REDACTED]" Ex. H158.

Rite Aid also relies heavily on the 2009 report prepared by Humana entitled "Retail Generic Incentive Impact Report," which included an analysis of the percentage of claims submitted to Humana that were reimbursed at the U&C price and those that were reimbursed pursuant to the lesser-of reimbursement methodology. Ex. R125. Rite Aid contends that this report demonstrates that Humana knew that pharmacies, like Rite Aid, that offered membership discount programs were submitting a higher percentage of claims under the lesser-of formula, and this, in turn, indicated that it was submitting a higher U&C price and not the RSP prices. *Id.*

While I find that the evidence presented by Rite Aid suggests that Humana questioned or assumed that Rite Aid may not be reporting RSP prices as U&C, I do not agree that the evidence demonstrates that Humana had actual knowledge or shared an understanding with Rite Aid that RSP prices did not constitute U&C. To the contrary, competing evidence offered by Humana paints a different picture.

First, contemporaneous documents produced by Humana establish that in the immediate months before Rite Aid launched the RSP, Humana understood U&C to be the lowest price charged to a customer without insurance. In particular, a slide from in-house training and instructional materials dated August 17, 2007, provided the following description of U&C:

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

Ex. H15, Slide 13.

In August 2008, shortly after the parties executed the 2008 Agreement, and shortly before Rite Aid launched the RSP, Humana authored a White Paper entitled "Commercial Lessor-of-

Three Logic,” in which it defined U&C to be “[REDACTED]” Ex. R.102, at 675. Terry Spicer, a former Humana employee and author of the paper, testified that this definition reflected Humana’s understanding of the purpose of U&C – to ensure that insured customers did not pay more for their prescription than an uninsured customer. Tr. 1171:10-19, 1174:17-1175:4, 1216:24-1217:8.

Humana also relies heavily on a February 2010 email exchange between Laura White, Humana’s Director of Pharmacy Contracting, and Dianne Mason, Rite Aid’s Director of Managed Care Services, to justify its belief that RSP prices constituted U&C. Ms. Mason testified that she was “[REDACTED]” and worked on “[REDACTED]” including the contracts between Rite Aid and Humana. Tr. 32:18-33:13. In this email exchange, Ms. White informed Ms. Mason that a Humana member “[REDACTED]” Ex. H29 at 980.

In her response, Ms. Mason stated: “[REDACTED]” Ex. H29 at 979.

Two minutes after her response to Ms. White, Ms. Mason forwarded the email to William Wolfe, Rite Aid’s Senior Vice President of Government affairs, stating: “[REDACTED]” Ex. H29 at 979.

While I disagree with Humana that this email is dispositive proof of Rite Aid’s intent, I do find it to be significant, particularly Ms. Mason’s use of the word “[REDACTED]” and her testimony that she used the word “[REDACTED]” because it was more succinct than saying “[REDACTED]” Tr. 260:2-17. I am, candidly, troubled by that testimony given the volume of evidence suggesting that Rite Aid never intended to disclose that it was not reporting RSP prices as U&C.



Internal memoranda further show that prior to the launch of the RSP, Rite Aid recognized the risk that payers would challenge Rite Aid's submission of U&C charges if it did not report its discount prices as U&C as others did, or use the RSP as a point to negotiate lower reimbursement rates. Tr. 1604:23-1608:23; Ex. H39 at 380. But rather than notify payers like Humana, Mark de Bruin, Rite Aid's former Executive Vice President of Pharmacy, made the recommendation to [REDACTED] [REDACTED] by having a third party administer the RSP. Ex. H24 at 685. Mr. de Bruin admitted that Rite Aid sought to implement discount prices that would provide value to cash customers, without attracting the attention of commercial payers or Medicaid, by suggesting that Rite Aid was "[REDACTED]"

Various internal emails further demonstrate that Rite Aid anticipated issues and was in fact challenged by PBMs and health care providers, but did not report their position until and unless they were directly confronted with it first:

- In November 2008, Medco, a PBM, informed Rite Aid that it considered RSP prices to be U&C because there was no enrollment fee to enroll in the RSP. When Ruth Lightner, the Senior Director of Managed Care, relayed her conversation with Medco to Mr. Wolfe, she indicated that Medco "[REDACTED]" Ex. H254. During the arbitration, Ms. Lightner and Mr. Wolfe testified that the use of the phrase "[REDACTED]" was used because Medco's interpretation was not consistent with their understanding of U&C and was "[REDACTED]" Tr. 2571:5-19; 1531:12-24. In a later email dated February 20, 2009, Ms. Lightner sent an email to Bill Wolfe with the text from the NCPDP data dictionary's definition of U&C. Tr. 2598:25-2600:12.
- In 2010, Connecticut Medicaid informed Rite Aid that it considered RSP prices to be U&C. Rite Aid subsequently included RSP prices in its calculation of U&C for all State Medicaid Agencies. Tr. 2093:17-2094:18.
- In July 2011, Rite Aid received from Caremark, a PBM, a Network Update applicable to the Federal Employee Plan ("FEP"). The update indicated that the FEP expected Rite Aid to report RSP prices as U&C. In response, Ms. Lightner emailed Ms. Mason a proposed revision to the definition of U&C, stating "[REDACTED]" Rite Aid subsequently reported RSP prices as U&C. Tr. 1554:14-24; 2616:18-24. Significantly, no changes were made to the contract language, which defined U&C as "[REDACTED]"

- In August 2011, Express Scripts, a PBM, directly asked Ms. Mason “[REDACTED]” Ex. R269. Ms. Mason told Express Scripts that Rite Aid did not view the RSP as U&C because it was “[REDACTED]” Ex. H57. She further explained that the contract language excluded “[REDACTED]” in the “[REDACTED]” of U&C. *Id.* Tr. 2565:12-2566:10, 2601:12-19.
- In 2012, Rite Aid relaunched the RSP with “[REDACTED]” Ruth Lightner admitted that the revision was designed for the purpose of mitigating U&C risk. Tr. 2630:16-2631:8

In sum, I am unable to reconcile Rite Aid’s current confident assertion that RSP prices do not constitute U&C with its failure to convey that position with equal clarity to its contractual partners, including Humana, when it mattered most – and when confronted with a direct inquiry. To the contrary, Rite Aid never disclosed to Humana that it did not consider RSP prices to be U&C and did not report those prices as U&C. Rite Aid further confirmed in this arbitration that it never intended to disclose this information because it was not obligated to do so. Tr. 2962:5-2964:3, 1556:1-21.

After listening to all of the evidence presented, and upon making credibility determinations as I am required to do, I believe the evidence demonstrates that Rite Aid sought to conceal this information from Humana with the intent to realize higher profits. I do not accept Rite Aid’s contention that Humana knew about its reporting practices and shared the understanding and belief that RSP prices were excluded from U&C.

In light of the foregoing, I further conclude Humana has credibly demonstrated that the language of the Agreements, combined with the documentary and testimonial evidence, support the conclusion that the parties adopted the NCPDP definition of U&C. As such, I find that Rite Aid’s interpretation of U&C as the “usual and customary *retail* price” or “the shelf or list price paid by a customer who pays without any sort of benefit program, whether insurance or a membership program” is inaccurate, unsupported by the record, and does not provide a justifiable defense for excluding RSP prices from U&C.

Finally, and critically, Rite Aid has failed to demonstrate how its “retail” prices constitute U&C when the evidence establishes that it sold prescriptions at RSP prices five times more often than at retail prices, and in certain years, fourteen to fifteen times more often. Tr. 2211:6-11;



2214:10-12. Specifically, the cash transaction data produced by Rite Aid for 2009 through 2019 reveals that Rite Aid sold more than 140 million prescriptions at RSP prices, compared to the 28 million prescriptions at the “retail” price. H147. I find that Rite Aid’s exclusion of RSP data from its U&C price indisputably compromised the accuracy of U&C.

Based on the foregoing, I conclude that the documentary and testimonial evidence presented in this matter demonstrate that Humana has satisfied its burden of proving, by a preponderance of the evidence, that Rite Aid breached the 2008 Agreement and the 2013 Agreement. By virtue of Rite Aid’s breach, which resulted in inaccurate claim submissions to Humana for over a decade, it is clear that Humana suffered damages from the breach, which will be addressed in detail *infra*, in Section 4.

### iii. Voluntary Payment Doctrine

Rite Aid argues that even if Humana’s interpretation of the Agreements is correct, Humana’s breach of contract claim is barred by the Voluntary Payment Doctrine. Briefly stated, this doctrine requires a showing that Humana possessed full knowledge of the facts and nonetheless proceeded with Rite Aid’s understanding of U&C.

I find that the evidence demonstrates, unequivocally, that Humana had knowledge of: (1) the existence of the RSP; (2) public information, including publicly advertised formulary lists; and (3) Rite Aid’s claim submissions to Humana.

I further find that Humana’s witnesses credibly argued that Humana lacked the information and ability to obtain information necessary to ascertain Rite Aid’s true U&C prices. Specifically, although Humana had a “small window” into what Rite Aid submitted for Humana members, Humana needed Rite Aid’s cash transaction data, to which it had no access, to determine what prices cash customers were actually paying. Tr. 563:1-564:8; 1444:5-1445:14. To that point, Humana refuted Rite Aid’s position that the Agreements provided Humana with audit rights to determine if it was overpaying Rite Aid. In particular, Section 5.2 of the Agreements, which grants Humana the right to review and audit pharmacy records, is expressly “[REDACTED]” Thus, while Humana certainly could have invoked this audit provision to examine records pertaining to Humana members, it could not, as

Rite Aid suggests, examine the records and data concerning non-Humana members that was necessary for Humana to determine an accurate U&C price.

Further, Rite Aid's contention that public information was available to Humana, while true, is unavailing. First, Humana witnesses credibly testified that even with publicly available information, including publicly advertised RSP prices, Humana did not have insight into what prices non-Humana customers actually paid to Rite Aid pharmacies without cash transaction data. Tr. 563:20-564:8; 567:9-568:22; 572:12-573:15; 1445:9-14; 1777:9-22; 1976:25-1977:2; Easley Dep. Designations 58:16-59:14. Second, the vast majority of drugs dispensed to Humana members were not listed on the public formulary lists. Thus, there were hundreds to thousands of drugs for which there was no information. Tr. 673:19-674:5; 2352:23-2355:3. Third, the public information was not stable. To the contrary, both Humana and Rite Aid witnesses acknowledged that these public formularies were constantly changing and were subject to variability based on quantity, costs, and changes to the drug lists. Tr. 1501:21-1502:24.

Accordingly, Rite Aid has not carried its burden of establishing the application of the Voluntary Payment Doctrine.

## 2. Fraud, Negligent Misrepresentation, and Unjust Enrichment

In addition to its breach of contract claim, Humana asserts three tort claims sounding in fraud, negligent misrepresentation, and unjust enrichment. With respect to its fraud and negligent misrepresentation claims, Humana contends that Rite Aid made affirmative misrepresentations as to Rite Aid's true U&C price with each claim submission by failing to submit RSP prices as U&C, thereby falsely inflating the U&C price. Humana further alleges that Rite Aid's failure to report RSP prices as its U&C induced overpayments from Humana and constitutes an unjust enrichment.

While Humana claims that it can pursue these tort claims even where a valid contract exists, Rite Aid argues that the Economic Loss Rule bars Humana's claims. Specifically, Rite Aid asserts that its relationship with Humana and its U&C reporting obligations are governed by a contract, so that any purported breach of its duties can only be addressed through a breach of contract claim. Humana disputes Rite Aid's assertion based on non-precedential case law that purports to establish that Rite Aid had an independent duty – that is, a duty separate from those imposed by the Agreements – to disclose that Rite Aid was not reporting RSP prices as its U&C.

Kentucky courts have established the following rule: “A breach of duty which arises under the provisions of a contract between the parties must be addressed under contract, and a tort action will not lie. A breach of duty *arising independently* of any contract duties between the parties, however, may support a tort action.” See *Nami Resources Co., LLC v. Asher Land and Mineral, Ltd.*, 554 S.W.3d 323, 336 (Ky. 2018) (quoting *Superior Steel, Inc. v. Ascent at Roebling's Bridge, LLC*, 540 S.W.3d 770, 792 (Ky. 2017)). Thus, while the Kentucky Supreme Court did not expand the scope of the Economic Loss Rule to preclude, in that case, a negligent misrepresentation claim, it nonetheless remains incumbent upon Humana to establish the existence of an independent duty with respect to each of its tort claims. I find that Humana has not done so here.

Humana contends that Rite Aid had an independent duty of good faith and honesty and relies on *Laurel Grocery Co., LLC v. Freshway, Inc.*, 6:18-CV-243-REW, 2019 WL 7290469 (E.D. Ky. Dec. 30, 2019), and *Loxodonta Aviation, LLC v. Delta Priv. Jets, LLC*, No. CV:19-109-DLB-CJS, 2020 WL 4516829 (E.D. Ky. Aug. 5, 2020). But Humana’s reliance on *Laurel Grocery* and *Loxodonta Aviation* is misplaced, as those cases are distinguishable.

First, the procedural posture of those cases renders them inapplicable here. In those cases, the question of an independent duty arose in the context of motions to dismiss; accordingly, the courts were required to accept all allegations as true and consider them in a light most favorable to the plaintiff. Under that standard of review, the court did not find the existence of a duty, but instead determined that on the then-existing record, the allegations plausibly supported a fiduciary relationship that would create an independent duty and permitted the claims to temporarily survive.

Further, *Laurel Grocery*, if anything, supports the opposite conclusion here. In that case, the court addressed various decisions that explained that inducement and misrepresentation claims based on *pre-contract* conduct are the types of claims that do not arise from the contractual obligations; rather, they are independent. See *Laurel Grocery*, 2019 WL 7290469 at \*21. That is simply not the case here.

Similarly, the *Loxodonta* court determined that because the plaintiff’s allegations of fraud relied on *pre-contractual* conduct, in addition to alleged continued misrepresentations made during contract period, plaintiff would be permitted to plead fraud along with breach of contract. *Loxodonta*, 2020 WL 4516829 at \*15. Nevertheless, and contrary to Humana’s claim that the

court preserved the fraud claim, the court ultimately determined that the fraud claim was not preserved because the plaintiff failed to adequately plead when or where the fraudulent misrepresentations were made. *Id.* at \*16-17.

Humana also seeks to evade application of the Economic Loss Rule by attempting to distinguish between Rite Aid's "reporting obligations" (which Humana seemingly concedes is governed by the Agreements) and its "conduct." Specifically, Humana claims that Rite Aid engaged in fraudulent conduct to conceal its breach of contract and induce Humana to continue the parties' relationships, which falls outside the realm of the duties imposed by the Agreements.

While I agree that Humana proved precisely that, upon my review of the arguments presented during the hearing and in the post-hearing briefs, I find this to be an artificial distinction inasmuch as Humana relies upon the same acts and omissions to support its breach of contract action as it does to support its tort claims. Specifically, all of Humana's allegations implicate Rite Aid's reporting practices (*i.e.*, its failure to report RSP prices as U&C) and Rite Aid's failure to disclose its understanding of U&C and exclusion of RSP prices from its U&C prices, even when confronted with the issue by Humana. As I have already determined with respect to Humana's breach of contract claim, these issues are governed by the Agreements. Humana has not identified any duty independent of the Agreements that required Rite Aid to report RSP prices as U&C in its claim submissions to Humana or disclose to Humana that it did not report RSP prices as U&C.

Accordingly, I find that the Economic Loss Rule, which works to preclude a recovery in tort for a purely economic loss and seeks to prevent contract law from drowning in a "sea of tort," *see East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 866 (1986), bars Humana's claims of fraud, negligent misrepresentation, and unjust enrichment, which were brought under Counts II, III, and IV.

### 3. Conclusion

Based on the foregoing findings and conclusions, the undersigned Arbitrator hereby enters judgment in favor of Humana on Count I (Breach of Contract).



#### 4. Damages

In a breach of contract action, Pennsylvania law permits the non-breaching party to recover compensatory damages that put it “as nearly as possible in the same position it would have occupied had there been no breach.” *Helpin v. Trustees of Univ. of Pennsylvania*, 10 A.3d 267, 270 (Pa. 2010). Additionally, Pennsylvania law authorizes an award of prejudgment interest at a rate of 6.0% simple interest. *Cresci Const. Services, Inc. v. Martin*, 64 A.3d 254, 265 (Pa. Super. 2013); 41 Pa. Stat. § 202.

To support its claim for damages, Humana relies on the expert report and testimony of Michael Petron, a certified public accountant and certified fraud examiner. In his report, Mr. Petron offers four conclusions:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

*See Ex. H147 at 34 (emphasis in original) (footnotes omitted).*

Rite Aid argues that Mr. Petron’s conclusions are unreliable, speculative, and grossly inflated. Although Rite Aid maintains that no damages should be awarded to Humana, it argues that if any are, a proper calculation should be closer to \$192,370. In support of its positions, Rite Aid relies on its expert witness, Jed Smith, a Certified Public Accountant with experience analyzing healthcare data, including for some of the largest pharmacies, health insurers, and PBMs.

I have carefully reviewed the competing views and opinions offered by each witness through their expert reports, rebuttal reports, supplemental reports, and testimony. At the outset, I acknowledge that one of Rite Aid's principal complaints is that Mr. Petron does not, and admittedly cannot, offer a precise measure of damages sustained by Humana. While Pennsylvania law unequivocally prohibits an award of speculative damages, Humana aptly notes that "compensation for breach of contract cannot be justly refused because proof of the exact amount of loss is not produced, for there is judicial recognition of the difficulty or even impossibility of the production of such proof. What the law does require in cases of this character is that the evidence shall with a fair degree of probability establish a basis for the assessment of damages." *Aiken Indus., Inc. v. Estate of Wilson*, 383 A.2d 808, 812 (Pa. 1978). I find that the purpose of, and need for, this pronouncement is obvious when viewed in the context of this case, which involves over 70 million claims spanning more than a decade. To require Humana to calculate the precise amount of loss attributable to each and every claim submission by Rite Aid, particularly where, as here, Humana only possesses a limited set of data, would be virtually impossible, leaving Humana without any recourse for Rite Aid's transgressions.

Moreover, Mr. Petron does not purport to establish damages with certainty, and has thoroughly explained his reasoning and justification for offering a conservative range. Mr. Petron testified that he analyzed approximately 77 million Humana transactions, but could only match 3.5 percent of these with an actual record of a Rite Aid cash transaction that occurred on the same day, at the same pharmacy location, for the same drug that Humana reimbursed. Tr. 2224:23-2225:6. Mr. Petron explained that this is because "[REDACTED]" Tr. 2225:8-10. "[REDACTED]" Tr. 2225:10-13. Nevertheless, Mr. Petron explained, "[REDACTED]" Tr. 2225:18-22. Thus, Mr. Petron testified that he had "[REDACTED]" of transactions that could not be matched, that would enable me to determine a reasonable, and supported, approximation of the damages sustained by Humana. Tr. 2226:1-7; 2228:10-12. It is within this context that I have reviewed Mr. Petron's methodology for calculating Humana's damages.



Mr. Petron's conclusions rest upon two principal data sets produced by Rite Aid – one set containing RSP transactions from May 1, 2009 through February 6, 2019, and one set containing retail price cash transactions – as well as data produced by Humana containing claim submissions from Rite Aid from January 1, 2007 to April 21, 2021. Ex. H147 at 12-16; Tr. 2207:21-25. Mr. Petron also relied upon Dr. Hayes' expert report and testimony, particularly with respect to her definition of U&C as the "lowest widely and consistently available price." Tr. 2206:10-17.

a. Mr. Petron's Conclusion I

With this information, Mr. Petron first analyzed "[REDACTED]" by analyzing "[REDACTED]" H137 at ¶ 47. According to Mr. Petron, this analysis revealed that Rite Aid sold prescription drugs to its cash customers at RSP prices anywhere from five to fifteen times more often than it did at full retail price. *Id.* at ¶ 52. Going one step further, Mr. Petron "[REDACTED]" and discovered that RSP transactions outnumbered full retail price transactions and that thousands of drugs were sold to RSP customers, but not to customers at the retail cash price. *Id.* at ¶¶ 53-54. Based on this data, Mr. Petron concluded that the RSP prices were widely and consistently available, in accordance with Dr. Hayes' definition.

As I previously explained in my analysis of the breach of contract claim, I am of the opinion that, for a number of reasons, Rite Aid has failed to demonstrate how its "retail" prices constitute U&C, particularly in light of the evidence establishing that RSP transactions significantly outnumbered cash transactions. For these reasons, I find that Mr. Petron's first conclusion, that "RSP prices were widely and consistently available for Rite Aid cash paying customers" is supported by the evidence.

b. Mr. Petron's Conclusions II-IV (Calculation of Damages)

Mr. Petron then analyzed the data to determine a reasonable calculation of damages. Mr. Petron's analysis consisted of three categories: (1) direct overcharges; (2) extrapolated damages; and (3) interest.

i. Direct Overcharges

With respect to direct overcharges, Mr. Petron testified that using the data produced by Rite Aid in this arbitration, he engaged in a multi-step process. First, he combined the retail cash transactions as well as the RSP transactions “[REDACTED]” Tr. 2223:17-23. Next, he aggregated all of transactions for the same drug, the same quantity, and the same month, and rank-ordered all of these transactions from lowest price to highest price. Tr. 2276:9-2277:7.

Once Mr. Petron had a ranking of transactions, he excluded the lowest percentile price based on Dr. Hayes’ testimony that “[REDACTED]” Tr. 2228:14-23. Mr. Petron opined that “[REDACTED]” See Tr. 3289; H147 at 24. Using what he described as a “conservative approach,” Mr. Petron identified the 10<sup>th</sup> and 25<sup>th</sup> percentile prices, which he thereafter referenced as the “true U&C.” Mr. Petron clarified that the 10<sup>th</sup> and 25<sup>th</sup> percentiles were “[REDACTED]” and that this was “[REDACTED]” but a “[REDACTED]” Tr. 2226:18-25.

Mr. Petron then compared the true U&C prices (as defined by the 10<sup>th</sup> and 25<sup>th</sup> percentiles he identified) to the prices paid by Humana and its members. Tr. 2264:8-16. Specifically, Mr. Petron calculated the difference between the 10<sup>th</sup> percentile true U&C and the price submitted to and paid by Humana, and alternatively, the difference between the 25<sup>th</sup> percentile true U&C and the price submitted to and paid by Humana. These, in Mr. Petron’s opinion, represent the overcharges to Humana. Mr. Petron performed this analysis at three levels: a national level; a regional level; and a state level, and “[REDACTED]” Tr. 2243:11-14; 2277:4-7.

Rite Aid challenges Mr. Petron’s methodology and analysis on several grounds and argues that his calculations should be reduced accordingly.

(a) Arbitrary Calculations

Rite Aid first challenges Mr. Petron's calculations on grounds that he arbitrarily calculated "true U&C" prices that are based on overly broad definitions of relevant transactions, time periods, and geographic locations. Rite Aid relies on Mr. Smith's rebuttal expert report and associated testimony to establish these alleged errors.

(1) broad definitions of relevant transactions

First, Mr. Smith opines that Mr. Petron's calculations are inaccurate because he did not consider all "noninsurance transactions." Specifically, Mr. Smith testified that the "retail cash transaction data" upon which Mr. Petron relied in his calculations consisted of unadjudicated cash data, *i.e.*, "[REDACTED]" Tr. 3190:23-3191:8. In his opinion, this data "[REDACTED]"  
[REDACTED]  
[REDACTED]  
[REDACTED]" *Id.* Mr. Smith pointed out that in addition to the unadjudicated cash data and the RSP data, "[REDACTED]" Tr. 3191:9-16. Thus, he claimed the 10<sup>th</sup> and 25<sup>th</sup> percentiles Mr. Petron identified were inaccurate. Tr. 3192:1-13. But Mr. Smith's testimony fails to account for the fact that these other types of noninsurance transactions were not considered by Mr. Petron because Rite Aid did not produce that data. Tr. 3322:18-3323:3.

(2) broad time and geographic metrics

Second, Mr. Smith argued that Mr. Petron's calculations are inaccurate because he used an "[REDACTED]"  
[REDACTED]  
[REDACTED]" Ex. R.579 at ¶ 29. Mr. Smith contends that there is "[REDACTED]"  
[REDACTED]" and cites to the opinions offered by Ms. Wyett, Mr. Duke, and Dr. Hayes that U&C should be calculated based on the price of the drug, at the same store, on the same day. *Id.*; Tr. 3200:4-6. Mr. Smith claimed that "[REDACTED]"

” Tr. 3208:7-11.

I find Mr. Smith’s opinions and calculations addressing time and geographic metrics to be unconvincing and problematic.

While it is true that Humana’s proffered definition of U&C is based on the same drug, same store, and same day theory, Mr. Petron testified, credibly, that “

” Tr. 2310:4-15. He further explained that he had to “

” Tr. 2309:4-23.

Mr. Smith did not, and could not, disprove Mr. Petron’s assertion that this type of transaction data was unavailable. To the contrary, Mr. Smith acknowledged that approximately 97% of Humana’s claims could not be matched with a Rite Aid claim on the same store, same drug, same day basis. Tr. 3345:5-22. Mr. Smith’s approach to this issue was to “

Tr. 3336:18-3337:4. Mr. Smith has not demonstrated that this approach – to exclude significant portions of the limited transaction data that is available – is based on any testimony or a reasonable basis, and I find that his approach fails to recognize or account for the testimony offered throughout this arbitration that even when there is not a matching Rite Aid claim, a U&C price still exists. Tr. 2225:18-22. Accordingly, I do not find Mr. Smith’s opinion on this issue to be reliable and will not reduce the damages calculated by Mr. Petron on this basis.

### (3) arbitrary prices and percentiles

Next, Rite Aid argues that Mr. Petron arbitrarily aggregated the transactions and selected the 10<sup>th</sup> and 25<sup>th</sup> percentiles to identify “true U&C.” Mr. Smith opines that Mr. Petron’s analysis in this regard fails for two reasons.

First, he contends that Mr. Petron’s analysis “

” and improperly measures prices charged, rather than prices available. Ex.



R579 at ¶ 19. Upon my review of the testimony and the competing expert reports, I find that I cannot accept Mr. Smith's opinion in this regard. Unlike Mr. Petron, who examined the aggregated prices to identify the price most widely and consistently available, Mr. Smith admitted that he did not analyze whether or not RSP prices were widely and consistently available. Tr. 3293:12-3294:7. Further, Humana, in my view, successfully challenged Mr. Smith's opinion in light of his prior testimony (albeit in another matter) that calculating U&C prices "[REDACTED]" was "[REDACTED]" Tr. 3307:12-16. Lastly, I find Mr. Petron's testimony and explanations as to his reasons for using the prices charged to Humana in his analysis to be credible and convincing; specifically, his testimony that "[REDACTED]" Tr. 2258:4-7.

Second, Mr. Smith claimed that although Mr. Petron alleged that he relied upon Dr. Hayes' opinions, there is no support in the record – in Dr. Hayes' report or otherwise – that instructed Mr. Petron to use the 10<sup>th</sup> and 25<sup>th</sup> percentile to identify true U&C. Tr. 3210:1-10. Similarly, Mr. Smith testified that Mr. Petron misinterpreted Dr. Hayes' testimony that "[REDACTED]" because rather than "[REDACTED]" he only removed the single lowest price. Tr. 3211:11-3212:12. Mr. Smith argued that this was inaccurate because "[REDACTED]" Tr. 3213:6-8. In fact, Mr. Smith claimed that he analyzed this issue and revealed that "[REDACTED]" Tr. 3218:18-24.

Mr. Petron agreed that he could have used other methodologies to calculate damages, including "[REDACTED]" Tr. 2255:18-2256:8. But Mr. Petron claimed that the formularies he received "[REDACTED]" because "[REDACTED]" and "[REDACTED]" Tr. 2256:9-18.

Upon his request, Mr. Petron received a “[REDACTED]” of a subset of the internal price lists from Rite Aid that contained “[REDACTED]” Tr. 2258:23-2259:12. With this information, Mr. Petron prepared a supplemental report regarding his analysis of the more detailed price list. Mr. Petron discovered that when he used the internal price lists to calculate damages, his calculations were within one percent of his calculations using his methodology from his original expert report, with the damages being half a percent higher using the internal price lists. Ex. H372; Tr. 2261:12-2263:12.

I find this testimony to be significant. While I recognize and appreciate Rite Aid’s argument that there is the potential that additional one-time prices, or special prices, could have been factored into Mr. Petron’s calculations, I find that Mr. Petron’s analysis accounted for and attempted to mitigate the impact of these possibilities, which is demonstrated by his supplemental analysis. Accordingly, I do not find Mr. Petron’s calculations to be unreliable for these reasons.

(b) Audit Provisions

Next, Rite Aid argues that Humana’s damages are limited by the audit provisions in the Agreements, and should be reduced to exclude all damages before January 1, 2014. Rite Aid cites to section 5.2 of the 2008 Agreement, which provides, in relevant part:

[REDACTED]

Rite Aid contends that because the 2008 Agreement expired on December 31, 2013, Humana is no longer entitled to audit claims under the agreement and cannot seek damages under the 2008 Agreement. I disagree.

As Humana explained during its closing arguments, Humana is not seeking to review or audit claims pursuant to section 5.2 of the 2008 Agreement, and the claims in this arbitration do



not arise out of any rights or obligations from this provision. Instead, Humana has raised breach of contract, fraud, negligent misrepresentation, and unjust enrichment claims against Rite Aid and seeks accompanying damages.

Although records and claim information pertaining to Humana members are a necessary part of Humana's evidence in this matter, I do not find that section 5.2 is implicated. Specifically, section 5.2 does not contain any language that purports to impose a statute of limitations on any of the claims raised in this arbitration or that would otherwise limit Humana's request for damages based on these claims. To impose such a limitation would, in my view, exceed the scope of section 5.2. Accordingly, I will not restrict Humana's recovery of damages based on this provision.

(c) Post-Garbe

Rite Aid also seeks to limit Humana's damages to the transactions that occurred from January 9, 2017 (the date the *Garbe* decision became final) to October 31, 2020 (when Rite Aid terminated the RSP). Rite Aid argues that the impact of *Garbe* could only have occurred after the decision became final. In support thereof, Rite Aid relies on *United States v. SuperValu Inc.*, 9 F.4th 455, 468 (7th Cir. 2021), for the proposition that it was "objectively reasonable" for Rite Aid not to report RSP prices as U&C before the *Garbe* decision. Thus, Rite Aid believes that if any damages are to be awarded using Humana's theory of recovery, the proper range of damages for the post-*Garbe* period should be between \$10,423,203 and \$18,982,578.

I do not find any basis in law or fact to support these arguments. First, and most importantly, I emphasize that my decisions above do not rest on *Garbe* alone. As I have discussed throughout this opinion, and as I explain further below, my decisions rest on several factors. In any event, I note that there is no pronouncement in *Garbe* establishing that its application is prospective only. Thus, I do not find Rite Aid's argument in this regard to be persuasive.

Moreover, Rite Aid's reliance on *SuperValu* is misplaced. In that case, the court was considering whether the scienter component of the False Claims Act was satisfied. *SuperValu*, 9 F.4th at 467-68. The court found that scienter was not met because under the facts of that case, it was objectively reasonable for SuperValu to interpret U&C to exclude its competitor price-matching prices. *See SuperValu*, 9 F.4th at 469.

In reaching its decision, the court found significant that SuperValu interpreted its “set, retail price for a prescription drug,” to be the “price it charges to the general public,” but did not view its competitor price-matching price as the price that it charged to the general public. *Id.* SuperValu based its interpretation on the fact that the “price-match program depended upon the prices charged by local competitors and initially applied only upon customer request.” *Id.* “In short, while its program was available to any customer requesting a valid price match, SuperValu would not necessarily charge all or most of its customers lower, price-matched costs.” *Id.*

The Seventh Circuit found this interpretation to be objectively reasonable. In so holding, the court rejected the Relator’s reliance on *Garbe* for the proposition that it “foreclose[d] any argument on objective reasonableness.” *Id.* The *SuperValu* court found that while *Garbe* held that “the correct interpretation of U&C price included certain discount program prices—it did not hold that this was the *only* objectively reasonable interpretation of the term.” *Id.* at 470. The court further suggested that these types of decisions depend upon fact-specific inquiries and engagement with the specific text at issue (in that case, a regulatory text), explaining that while “SuperValu’s interpretation of U&C is incorrect under *Garbe* [this] does not de facto render its interpretation unreasonable.” *Id.*

I find that Rite Aid’s argument misses the point by seeking, as the Relator did in *SuperValu*, a blanket application of another court’s holding without conducting a fact specific inquiry. I also find that the facts and elements that were relevant in *SuperValu* are quite distinguishable from the relevant facts and elements in this arbitration.

As I have explained throughout this opinion, I have not found any credible documentary or testimonial evidence to support Rite Aid’s position that the parties understood U&C to exclude RSP prices. To the contrary, the language of the Agreements, Rite Aid’s internal memoranda, and witness testimony combined to demonstrate that from the inception of the Agreements, the parties understood U&C to include the prices offered to cash customers. While *Garbe* is instructive and clearly factored into my conclusions, it was but one of many factors that led to my decision. Accordingly, I will not limit Humana’s damages to the post-*Garbe* era.

(d) California

Finally, Rite Aid asserts that Mr. Petron's calculations must be reduced to exclude transactions from California on grounds that California has expressly prohibited insurers from arguing that the RSP prices are U&C. In support of this argument, Rite Aid relies on California Bus. & Prof. Code § 657(c), which provides:

Notwithstanding any provision in any health care service plan contract or insurance contract to the contrary, health care providers are hereby expressly authorized to grant discounts for health or medical care provided to any patient the health care provider has reasonable cause to believe is not eligible for, or is not entitled to, insurance reimbursement, coverage under the Medi-Cal program, or coverage by a health care service plan for the health or medical care provided. Any discounted fee granted pursuant to this section shall not be deemed to be the health care provider's usual, customary, or reasonable fee for any other purposes, including, but not limited to, any health care service plan contract or insurance contract.

Humana disputes the applicability of this provision, arguing that it only applies to "health care providers" such as hospitals. Upon my review, I disagree with Humana's interpretation, but not its conclusion.

Section 657(d) specifically defines "health care provider" as

any person licensed or certified pursuant to Division 2 (commencing with Section 500) of the Business and Professions Code, or licensed pursuant to the Osteopathic Initiative Act, or the Chiropractic Initiative Act, or licensed pursuant to Chapter 2.5 (commencing with Section 1440 ) of Division 2 of the Health and Safety Code; and any clinic, health dispensary, or health facility, licensed pursuant to Division 2 (commencing with Section 1200) of the Health and Safety Code.

California Bus. & Prof. Code § 657(d). Division 2 (commencing with Section 500), identifies various professions, including, under Chapter 9, "Pharmacy." Thus, and contrary to Humana's understanding, it appears, for purposes of section 657(d), that a pharmacy is considered a health care provider.

Nevertheless, and despite my disagreement with Humana's interpretation, I do not find that section 657(c) prohibits insurers from arguing that RSP prices are U&C. Section 657(a) explains

that the California Legislature found that “[i]n 1994, an estimated 6.6 million of California’s 32 million residents did not have any health insurance and were ineligible for Medi-Cal.” *Id.* at 657(a)(2). The Legislature further found that “[m]any of California’s uninsured cannot afford basic, preventative health care resulting in these residents relying on emergency rooms for urgent health care, thus driving up health care costs.” *Id.* at 657(a)(3). To provide uninsured Californians with access to “basic, preventative health care at affordable prices” and “to encourage prompt payment of health or medical care claims,” the Legislature permits health care providers to grant discounts as provided for in section 657(c). *See id.* at 657(a)(5), (b), (c).

Notably, however, section 657(c) permits health care providers to exclude those discounted fees that are granted, “pursuant to this section,” to patients that are “not eligible for, or [are] not entitled to, insurance reimbursement, coverage under the Medi-Cal program, or coverage by a health care service plan.” *Id.* at 657(c). The testimony offered during the course of this arbitration established that the RSP prices were available to any member of the general public who enrolled in the program. There is no evidence that Rite Aid tailored RSP prices to qualifying individuals pursuant to section 657(c) or otherwise offered any discount prices pursuant to the goals and purpose of section 657, as described above. The fact that the RSP, by happenstance, also offered discounts to customers that do not have prescription benefit coverage does not, in my view, bring the RSP within the purview of section 657(c). Accordingly, I reject Rite Aid’s request for a reduction in damages for pharmacies in California.

(e) Determinations

Based on all the foregoing, I am of the opinion that Humana adequately offered a reasonable and conservative approach to calculating damages under significant constraints, both in terms of access to relevant data and the breadth of transactions that occurred during the relevant time periods. I am thus presented with a range of damages from which I am to decide what reasonably and adequately compensates Humana for Rite Aid’s failure to report RSP prices as U&C. After considering all of the testimony and evidence I find that Mr. Petron’s 25th percentile, under the state level analysis, is appropriate and reasonable.

As I previously discussed, I recognize and appreciate that given the volume of transactions and the limited data available to Mr. Petron, he cannot guarantee that his analysis eliminated every



one-time or special price that would otherwise be excluded from a U&C price calculation. Nevertheless, I find that Mr. Petron's analysis accounted for this possibility through his self-described "conservative approach" to calculating the damages using the 10<sup>th</sup> and 25<sup>th</sup> percentiles. I am satisfied, based on the expert reports and testimony offered by the parties, that the 25<sup>th</sup> percentile will reduce the likelihood of the issues raised by Rite Aid and reflects a reasonably accurate measure of damages.

For similar reasons, I will adopt Mr. Petron's state level calculation. While I have found as credible Mr. Petron's testimony that he could not calculate damages at the "same drug, same store, and same day" level because that information was not available to him, I also find Rite Aid's argument (and its witnesses' testimony) that drug pricing under the RSP varied significantly across regions and states to be credible.

Accordingly, based on Mr. Petron's 25<sup>th</sup> percentile calculations under the state level analysis, I find that \$69,587,572 reflects the amount of direct overcharges that Humana is entitled to recover.

## ii. Extrapolated Damages

As a second category of damages, Mr. Petron extrapolated damages for the periods of time for which Rite Aid did not produce transaction data. With respect to the September 29, 2008 to April 30, 2009 time frame, Mr. Petron matched Humana transactions with the true U&C prices he calculated for those prescription drugs in May 2009, which was "[REDACTED]" Ex. H147, at ¶¶ 69-70. Similarly, with respect to the February 7, 2019 to April 21, 2021 time frame, Mr. Petron matched Humana transactions with the true U&C prices he calculated in January 2019, which was "[REDACTED]" *Id.* at ¶ 71. Using this methodology, Mr. Petron calculated damages ranging from \$12,913,698 to \$24,394,852.

Rite Aid argues that this methodology is flawed for two reasons.

First, Rite Aid challenges the use of the May 2009 and January 2019 data as representative RSP data sets. Rite Aid claims that Mr. Petron has artificially inflated the damages because these



data sets do not account for the fact that the program was “[REDACTED]” Ex. R579. I disagree with Rite Aid’s assessment and characterization.

Second, Rite Aid contests Mr. Petron’s extrapolated damages for the time period after the RSP ended on October 31, 2020. Rite Aid claims that these damages should be deducted from Mr. Petron’s calculations. In response, Humana contends that there is “[REDACTED]” because Mr. Petron’s analysis included data that is not RSP data. Tr. 3335:15-19. I agree with Rite Aid, and I do not find Humana’s response to be adequate or convincing. This arbitration is centered on Humana’s claims that Rite Aid improperly inflated U&C prices by excluding RSP prices from its U&C prices. Humana has not alleged or established that upon termination of the RSP, Humana continued to be overcharged based on an exclusion of a particular set of prices that no longer existed. Accordingly, I find that Mr. Petron’s calculations for extrapolated damages must be reduced by \$683,252, which is the amount Mr. Smith identified as improperly calculated by Mr. Petron for this time period. Ex. R579, at 45-46.

Under his state level, 25<sup>th</sup> percentile calculation (which I have already accepted), Mr. Petron found extrapolated damages in the amount of \$12,913,698. After deducting \$683,252 for the amount of damages for the time period between November 1, 2020 and April 21, 2021, I find that Humana is entitled to \$12,230,446 in extrapolated damages.

### iii. Interest

Lastly, Mr. Petron calculated prejudgment interest accrued between the date Rite Aid dispensed each prescription and the date the arbitration hearing commenced (November 1, 2021), “[REDACTED]” Ex. H147, at ¶ 76. Mr. Petron’s calculations range from \$40,776,318 to \$143,834,643, broken down as follows:

1. Using a 6.0% simple interest rate, the standard rate for prejudgment interest on contract claims under Pennsylvania law (41 Pa. Stat. § 202), Mr. Petron calculated a range of \$40,776,318 and \$75,911,374. Ex. H310.

2. Using a rate of 8.0%, compounded annually, the standard for liquidated damages claims under Kentucky law (Ky. Rev. Stat. § 360.010), Mr. Petron calculated a range of \$77,477,830 to \$143,834,643. Ex. H-147, at ¶¶ 75-76.
3. Using a rate of 6.0%, compounded annually, the standard for unliquidated damages claims under Kentucky law (Ky. Rev. Stat. § 360.040(1)), Mr. Petron calculated a range of \$53,007,606 and \$98,485,043. Ex. H-147, at ¶¶ 75-76; Ex. H310.

Based on my conclusion that the Economic Loss Rule bars Humana's tort claims, Humana is not entitled to any damages, including interest, under Kentucky law. Accordingly, it is unnecessary for me to address Humana's calculations under Kentucky law or Rite Aid's arguments disputing these calculations.

Under Pennsylvania law, a party that prevails on a breach of contract action is entitled to prejudgment interest as a matter of right if the disputed amount is "specified in the contract" or can be "ascertained from the terms of the contract such that at the time of the breach, the breaching party can proffer a tender." *Cresci Const. Services, Inc.*, 64 A.3d at 265. Neither condition is met here. "In all other circumstances, including an award of consequential damages, prejudgment interest is awarded as a matter of discretion." *Id.*

Humana and Rite Aid agree that in light of my conclusion that Humana established a breach of contract, I am authorized under Pennsylvania law to award prejudgment interest at a rate of 6.0% simple interest, and I invoke my discretion to do so here. Mr. Petron's calculations at the 25<sup>th</sup> percentile, under the state level analysis, establish prejudgment interest in the amount of \$40,776,318.

However, in light of my prior determination that Mr. Petron's calculations for extrapolated damages must be reduced by \$683,252 for the time period of November 1, 2020 to April 21, 2021, I must also reduce prejudgment interest by a commensurate amount. I have performed an exhaustive review of Mr. Petron's and Mr. Smith's testimonies and reports (including all exhibits to their reports) in search of a proper basis to factor-in my commensurate reduction of prejudgment interest for these extrapolated damages, but have found nothing – from either side – that provides

sufficient guidance. Accordingly, I am exercising my discretion to make what I consider to be an appropriate reduction in the amount of \$30,000.

To reach this number, I took Mr. Petron's calculations of damages and prejudgment interest from his report and supplemental report, determined a monthly average of interest for 2020 and 2021, and then calculated an approximate measure of interest for the time period of November 1, 2020 to April 21, 2021. I consider \$30,000 to be a reasonable and appropriate reduction, particularly in the absence of necessary guidance from both experts that would enable me to calculate the reduction with more precision.

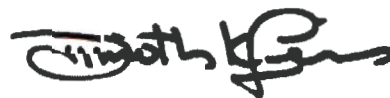
For these reasons, I find that Humana is entitled to an award of prejudgment interest in the amount of \$40,746,318.

#### **IV. FINAL AWARD**

Accordingly, I **FINALLY AWARD** as follows with respect to the claims in this arbitral proceeding:

- Based on the foregoing, Humana is entitled to recover damages for breach of contract at the 25<sup>th</sup> percentile, under the state level analysis.
- Humana is awarded:
  - \$69,587,582 for direct overcharges;
  - \$12,230,446 for extrapolated damages; and
  - \$40,746,318 for prejudgment interest.

This Award in the amount of \$122,564,346 is in full settlement of all claims submitted in this Arbitration. All claims not expressly granted herein are hereby denied.



Dated: April 22, 2022

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Timothy K. Lewis