UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE RESTASIS (CYCLOSPORINE OPHTHALMIC EMULSION) ANTITRUST LITIGATION	**18-MD-2819 (NG) (LB)**
THIS DOCUMENT APPLIES TO: ALL END-PAYOR PLAINTIFF CLASS CASES	**OPINION AND ORDER ON END-PAYOR PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

GERSHON, United States District Judge:

I. INTRODUCTION

This case, brought as a class action, involves allegations that defendant Allergan, Inc., a pharmaceutical company, took several unlawful actions to delay the market entry of generic versions of its product Restasis (cyclosporine ophthalmic emulsion). The named plaintiffs are entities that provide prescription drug coverage for Restasis to their members.[1] These End-Payor Plaintiffs ("plaintiffs" or "EPPs") allege that, if a generic version of Restasis had entered the market, it would have cost significantly less than what they paid for brand Restasis and that they were damaged by paying overcharges. EPPs now seek certification under Federal Rules of Civil Procedure 23(a) and 23(b)(3) of a class of all end-payors, including consumers. For the reasons set forth below, plaintiffs' motion for class certification is granted.

Plaintiffs also move under Federal Rule of Evidence 702 to exclude the testimony of two of defendant's expert witnesses offered on this motion. Today, I separately issue a decision granting those motions (the "Daubert Decision").

II. BACKGROUND

A. Factual Background

I presume familiarity with EPPs' allegations, which are set forth in my decision denying defendant's motion to dismiss for lack of causation. *See In re Restasis (Cyclosporine Ophthalmic Emulsion) Antitrust Litig.*, 333 F. Supp. 3d 135 (E.D.N.Y. 2018). I will summarize them briefly.

[1] The named plaintiffs are 1199SEIU National Benefit Fund; 1199SEIU Greater New York Benefit Fund; 1199SEIU National Benefit Fund for Home Care Workers; 1199SEIU Licensed Practical Nurses Welfare Fund; American Federation of State, County, and Municipal Employees District Council 37 Health and Security Plan; Fraternal Order of Police, Miami Lodge 20, Insurance Trust Fund; Ironworkers Local 383 Health Care Plan; Self-Insured Schools of California; Sergeants Benevolent Association Health & Welfare Fund; St. Paul Electrical Workers' Health Plan; and United Food and Commercial Workers Unions and Employers Midwest Health Benefits Fund.

Restasis, an oil-in-water emulsion containing the active ingredient cyclosporine, is prescribed by doctors to treat dry-eye disease. It is an extremely successful drug, with annual sales of over $1.5 billion. Plaintiffs allege that, to maintain its monopoly on Restasis after its patents for the drug expired on May 17, 2014, Allergan worked to delay approval by the Food and Drug Administration ("FDA") of generic versions of Restasis by (1) filing sham citizen petitions with the FDA; (2) defrauding the U.S. Patent and Trademark Office into issuing second wave patents for Restasis; (3) using those patents to file baseless patent infringement lawsuits against generic drug makers; and (4) frustrating attempts to invalidate its patents by selling them to the Saint Regis Mohawk Tribe, which licensed them back, in order to rent the Tribe's sovereign immunity.

EPPs claim that defendant's efforts allowed it to maintain a monopoly on Restasis after its patents expired. They allege that Allergan had a strong incentive to foreclose generic entry because, once a generic enters the market, there is a quick and dramatic reduction in sales of the brand drug.

The proliferation of generic drugs was spurred by the passage of the Drug Price Competition and Patent Term Restoration Act of 1984 (the "Hatch-Waxman Act"), 98 Stat. 1585, which changed the terms under which generic products could enter the market and compete with brand drugs. Since the Hatch-Waxman Act's introduction, there has been a rapid increase in drugs' generic penetration rates—that is, the rates at which consumers purchase generic equivalents to brand name drugs when such an option is available. Between 2008 and 2013, the average generic penetration rate increased from 91 to 97 percent for all prescriptions, and it remained at 97 percent from 2013 to 2017.

It is not disputed that generic drugs are favored because they are generally much cheaper than their brand name counterparts. Between 2011 and 2013, within eight months of their market

entry, generic drugs cost an average of 74 percent less than the price of the corresponding brand drug before generic entry; they cost 90 percent less within two and a half years of entry.

The American health care system incentivizes consumers' purchase of generic drugs. All states but one have laws that either require or permit a pharmacist who is filling a prescription for a brand drug to substitute an equivalent generic when available. Higher dispensing fees and performance targets encourage pharmacists to take advantage of these laws and substitute generic drugs when possible. Health insurance plans and pharmacy benefit managers (PBMs), which many plans hire to administer their prescription drug programs, also promote the use of generics, mostly through tiered formularies that assign lower copayments or coinsurance to generic drugs compared to their brand equivalents.

The FDA has not yet approved a generic version of Restasis.

B. Procedural Background

This multi-district litigation was transferred to me in January 2018.[2] On April 4, 2018, I appointed Eric B. Fastiff of Lieff Cabraser Heimann & Bernstein, LLP; Dena C. Sharp of Girard Sharp LLP; and Joseph R. Saveri of Joseph Saveri Law Firm, Inc. as End-Payor Interim Co-Lead Counsel, and I appointed Dan Drachler of Zwerling, Schachter & Zwerling, LLP as Interim Liaison Counsel. EPPs filed a Consolidated Class Action Complaint on that same day. Because *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), precludes EPPs from asserting federal damages claims

[2] In addition to EPPs, the litigation includes other groups of plaintiffs. While the motion for class certification of the Direct Purchaser Plaintiffs ("DPPs") was pending, they announced that they and Allergan had agreed to a class settlement which awaits the court's approval. Another group of plaintiffs—referred to as the Retailer Plaintiffs—are DPPs who, in effect, opted out of the class action and also recently reached a settlement with Allergan. Finally, three entities proceeding as assignees of claims held by indirect purchasers—MSP Recovery Claims, Series LLC; MSPA Claims 1, LLC; and MAO-MSO Recovery II, LLC, Series PMPI—jointly filed a complaint in this court on May 3, 2019. These plaintiffs and defendant agreed to stay that action until I issue a ruling on EPPs' class certification motion.

under federal antitrust law, they bring their claims exclusively under various state antitrust and consumer protection laws.[3]

On September 18, 2018, I denied Allergan's motion to dismiss plaintiffs' complaint for failure to allege causation. *In re Restasis*, 333 F. Supp. 3d at 160. And on November 13, 2018, I granted in part and denied in part defendant's motion to dismiss certain of plaintiffs' state law claims. *In re Restasis (Cyclosporine Ophthalmic Emulsion) Antitrust Litig.*, 355 F. Supp. 3d 145, 162 (E.D.N.Y. 2018). EPPs filed a Corrected First Amended Consolidated Class Action Complaint on December 20, 2018, in which they incorporated my rulings on defendant's motion to dismiss and added new state law claims.

On April 10, 2019, with discovery nearly complete, EPPs moved to certify the following class:

> All persons or entities who indirectly purchased, paid and/or provided reimbursement for some or all of the purchase price for Restasis, other than for resale, in Arizona, Arkansas, California, Colorado, the District of Columbia, Florida, Hawaii, Illinois, Iowa, Kansas, Maine*, Massachusetts*, Michigan, Minnesota, Mississippi, Missouri*, Montana*, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oregon, Rhode Island, South Dakota, Tennessee, Utah, Vermont*, West Virginia, and Wisconsin from May 1, 2015,[4] through the present (in the case of Arkansas only, July 31, 2017), for consumption by themselves, their families, or their members, employees, insureds, participants, or beneficiaries.

---

[3] EPPs also brought claims for injunctive relief under the Clayton Act and for declaratory relief under the Sherman Act. They withdrew these federal claims in their class certification motion. This court retains jurisdiction over this action under the Class Action Fairness Act of 2005, which grants federal district courts original jurisdiction over "any civil action in which [] the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which . . . any member of a class of plaintiffs is a citizen of a State different from any defendant." 28 U.S.C. § 1332(d)(2).

[4] Plaintiffs originally sought certification of a class period that begins on May 17, 2014, the date the Restasis patents expired. But EPPs clarified at oral argument that the class period should begin on May 1, 2015, as a result of the conclusions of one of their merits experts that a reasonable date for generic entry would have been in May 2015.

The states marked with an asterisk are those in which EPPs assert claims only on behalf of people, not corporations.

The proposed class includes insured consumers, uninsured consumers ("cash payors"), and third-party payors ("TPPs"). TPPs are entities that pay or provide reimbursement for all or some of the cost of a drug for people whom they insure. Consumers covered by a health insurance plan offered by a TPP pay a portion of a prescribed drug's cost either through coinsurance or a copayment; the TPP pays the remainder.

EPPs have excluded the following from the proposed class:

> Allergan, its officers, directors, employees, subsidiaries, and affiliates; all federal and state government entities except for cities, towns, municipalities, or counties with self-funded prescription drug plans; all persons or entities who purchased Restasis for purposes of resale or directly from Allergan or its affiliates; fully insured health plans, *i.e.*, plans that purchased insurance covering 100 percent of their reimbursement obligations to members; any "flat copay" consumers who purchased Restasis only via a fixed dollar copayment that does not vary on the basis of the drug's status as brand or generic; PBMs; and all judges assigned to this case and any members of their immediate families.

Although not suggested by EPPs, I will also exclude all members of the chambers staff of all judges assigned to this case as well as those staff members' immediate families.

Plaintiffs' class certification motion generated extensive briefing, initially resulting in seven submissions. As discussed in the Daubert Decision, plaintiffs also filed two separate motions challenging the admissibility of evidence proffered by Dr. Laura Masselam Hatch and Dr. Kyriakos (Ken) Mandadakis—two experts Allergan relied on to oppose class certification.

On September 6, 2019, I granted defendant's request for an evidentiary hearing on class certification. At the hearing, which occurred during full day sessions on September 26 and September 27, 2019, I heard testimony from all six of the parties' experts—Todd Clark, Laura R.

Craft, and Dr. Richard G. Frank for plaintiffs, and Dr. Hatch, Dr. James W. Hughes, and Dr. Mandadakis for defendant.

On October 23, 2019, I heard extensive oral argument on EPPs' three motions. At the proceeding, I also requested that the parties provide supplemental briefing addressing several issues relating to plaintiffs' state law claims, as described below.

As in many antitrust class actions, EPPs' ability to achieve class certification depends on whether they can satisfy Rule 23(b)'s predominance requirement by showing that individualized inquiries into the elements of injury-in-fact and damages will not overwhelm the common issues. Plaintiffs rely on the analysis of Dr. Frank, principally, and also on that of Ms. Craft to show that they can prove the element of injury-in-fact through common evidence and the element of damages through substantially common evidence. Dr. Frank's analysis predicts the conditions of the but-for world—a hypothetical world free of defendant's alleged anticompetitive actions. Defendant's critiques of Dr. Frank's analysis are at the heart of its opposition to class certification.

III. LEGAL STANDARD

A plaintiff who seeks certification of a class action under Rule 23(b)(3) bears the burden of satisfying the requirements of Rule 23(a)—numerosity, commonality, typicality, and adequacy of representation—as well as those of Rule 23(b)(3): (1) that "'the questions of law or fact common to class members predominate over any questions affecting only individual members'" and (2) that "'a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.'" *In re Petrobras Secs.*, 862 F.3d 250, 260 (2d Cir. 2017) (quoting Fed. R. Civ. P. 23(b)(3)). In addition to these enumerated requirements, the Second Circuit has recognized an "implied requirement of ascertainability" in Rule 23. *Brecher v. Republic of Argentina*, 806 F.3d

22, 24 (2d Cir. 2015). A plaintiff must establish each Rule 23 requirement by a preponderance of the evidence. *Johnson v. Nextel Commc'ns, Inc.*, 780 F.3d 128, 137 (2d Cir. 2015).

A court may certify a class action only if it concludes, after a "rigorous analysis," that the proposed class meets the requirements of Rule 23(a) and (b). *Comcast Corp. v. Behrend*, 569 U.S. 27, 33−34 (2013) (internal quotation marks omitted). Such analysis may "entail some overlap with the merits of the plaintiff's underlying claim." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011); *accord Brown v. Kelly*, 609 F.3d 467, 476 (2d Cir. 2010). But courts may decide merits issues at class certification "only to the extent [] they are relevant to" the application of Rule 23. *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 568 U.S. 455, 466 (2013).

IV. ANALYSIS

A. Requirements of Rule 23(a)

1. Numerosity

Rule 23(a)(1) requires a class to be "so numerous that joinder of all members is impracticable." In the Second Circuit, numerosity is presumed for classes of 40 or more. *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995). Plaintiffs estimate that the class includes between 30,000 and 40,000 TPPs and over one million consumers. The numerosity requirement is satisfied.

2. Commonality

Rule 23(a)(2) requires that there be "questions of law or fact common to the class." A question is common to the class if 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." *Wal-Mart*, 564 U.S. at 350. Consideration of the commonality requirement obligates a district court to determine whether class members have "suffered the same

injury." *Id.* at 349−50 (internal quotation marks omitted). "Where the same conduct or practice by the same defendant gives rise to the same kind of claims from all class members, there is a common question." *Johnson*, 780 F.3d at 137−38 (internal quotation marks omitted).

EPPs' proposed trial plan makes clear that there are a host of common issues of both law and fact.[5] Plaintiffs will attempt to show through common proof that Allergan willfully maintained monopoly power by engaging in anticompetitive conduct; that such conduct delayed market entry of generic Restasis; that absent Allergan's unlawful actions, multiple generic manufacturers would have entered the market; and that the relevant market is Restasis and generic versions of the drug. In addition, EPPs proffer that they will prove classwide injury by showing that consumers and TPPs pay significantly less for generic drugs than they do for brand drugs, with Restasis being no exception, and that many institutional mechanisms promote or require the substitution of less expensive generic drugs for brand versions once a generic drug enters the market.

Plaintiffs further intend to establish classwide damages by presenting evidence of generic Restasis' penetration rate and price in the but-for world as well as the number of Restasis prescriptions purchased during the class period. Using this common proof, the jury would then be

[5] EPPs and DPPs submitted, with their respective class certification motions, proposed trial plans, both of which contemplated joint trials. On September 25, 2019, I ordered EPPs, DPPs, and Retailer Plaintiffs to meet and confer about their plans and to provide additional detail as to how they intend to try their cases to avoid inconsistent verdicts. The plaintiffs then jointly submitted a plan proposing bifurcated trials at which all plaintiffs would present, to one jury, common evidence to show that Allergan violated the laws at issue and delayed the entry of generic Restasis. Next, depending on the jury's findings, there would be separate trials on impact and damages. The plaintiffs proposed bifurcation to satisfy *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 491–94 (1968), which prohibits the admission at a direct purchaser trial of evidence that they may have passed on their overcharges to other parties, including end-payors. Retailer Plaintiffs have settled and, assuming I approve DPPs' proposed settlement, I expect EPPs to adjust their trial plan accordingly.

asked to decide whether it found that the class paid more for Restasis than it would have paid if generic Restasis had been available and, if so, how much.[6]

Finally, EPPs' proposed claims administration process relies extensively on data collected from common sources in the pharmaceutical industry to identify plaintiffs, exclude uninjured ones, and allocate individualized damages. In a thorough, uncontested report, Ms. Craft, EPPs' expert who specializes in pharmaceutical data management and analysis, showed that, for every purchase of Restasis, data is available to discern who bought it, who paid for it, and how much every payor paid.[7] This is because each prescription drug purchase generates detailed and uniform data, including the product purchased, the patient's name and insurance plan, the TPP's identity, and the amounts paid by the consumer and the TPP. Indeed, data sets from the top seven PBMs and the 15 largest pharmacy operators alone would offer data for up to 97 to 99 percent of U.S. prescription drug sales. This data can be organized relatively easily because the industry uses a uniform coding system.

---

[6] In an antitrust case alleging overcharges, the typical measure of damage is the difference between the price that was actually charged and the price that a consumer would have been charged in the but-for world. *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 292 F. Supp. 3d 14, 101 (D.C.C. 2017), *aff'd*, 934 F.3d 619 (D.C. Cir. 2019).

[7] Ms. Craft is the president of OnPoint Analytics, Inc., which provides data analytics for complex litigation. In many antitrust class actions, including those involving the pharmaceutical industry, she has developed databases of discrete transactions from multiple data sources, and she has used them to identify and remove class members who were uninjured or subject to specific exclusions.

Although defendant does not challenge her credentials, I note that a court recently denied a motion to exclude Ms. Craft's opinion. *See In re Loestrin 24 FE Antitrust Litig.*, 410 F. Supp. 3d 352, 386 (D.R.I. 2019) ("[Ms. Craft] is highly experienced in pharmaceutical data management and compilation for complex litigation. She has worked closely – and managed those working closely – with pharmaceutical sales, marketing, and reimbursement data. The Court thus is convinced that she is knowledgeable about the types of data available, their presentation and formatting, and their use in analytical applications.").

In sum, EPPs' proposed methodology to try this case is replete with common evidence, and the commonality requirement is easily met here. *See*, *e.g.*, *In re Loestrin*, 410 F. Supp. 3d at 397; *In re Flonase Antitrust Litig.*, 284 F.R.D. 207, 217 (E.D. Pa. 2012).

3. Typicality

Rule 23(a)(3) requires a finding that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." "When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of minor variations in the fact patterns underlying individual claims." *Robidoux v. Celani*, 987 F.2d 931, 936−37 (2d Cir. 1993); *see also Brown*, 609 F.3d at 475. EPPs satisfy their burden here. The claims of all class members, whether named or unnamed, arise from the same alleged conduct and rest on similar legal arguments.

In a footnote in its final submission, Allergan argues that plaintiffs have not satisfied Rule 23(a)'s typicality and adequacy requirements. It claims that the named plaintiffs, which are all TPPs, are not "fulfilling their fiduciary duties to absent consumer class members" because they have requested that I certify a TPP-only class, if I conclude that the class's inclusion of consumers defeats Rule 23(b)'s predominance requirement.

Like the court in *Loestrin*, 410 F. Supp. 3d at 398, I reject this contention. EPPs have strenuously argued that I certify their entire class. Their alternative proposal shows that they are pragmatic and responsive to Allergan's arguments, not conflicted.

4. Adequacy of Representation

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." To determine if this requirement is met, courts must inquire into whether a "1) plaintiff's interests are antagonistic to the interest of other members of the class and 2)

plaintiff's attorneys are qualified, experienced and able to conduct the litigation." *Cordes & Co. Fin. Servs. v. A.G. Edwards & Sons*, 502 F.3d 91, 99 (2d Cir. 2007) (internal quotation marks omitted). "This process 'serves to uncover conflicts of interest between named parties and the class they seek to represent.'" *Id.* (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997)).

Other than the argument I rejected in the context of typicality, defendant does not challenge the named plaintiffs' or plaintiffs' counsel's adequacy. I find that the named plaintiffs are adequate class representatives and that class counsel are qualified, experienced, and able to conduct this litigation. There are no antagonistic interests between the named plaintiffs and the putative class or their counsel. Moreover, through my extensive observations of counsel, I am assured that they are well qualified to litigate this class action.

B. Requirements of Rule 23(b)(3)

Having found that plaintiffs meet Rule 23(a)'s requirements, I now must consider whether they have met the demands of Rule 23(b)(3). That rule's predominance and superiority requirements "ensure[] that the class will be certified only when it would 'achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.'" *Cordes*, 502 F.3d at 104 (quoting *Amchem*, 521 U.S. at 615).

It is at this point that Allergan's central opposition to class certification arises. Relying largely on the First Circuit's decision in *In re Asacol Antitrust Litig.*, 907 F.3d 42 (1st Cir. 2018), Allergan contends that the proposed class contains large numbers of uninjured class members, that individualized inquiries are needed to cull the uninjured from the injured, and that these inquiries

would overshadow the common questions of law or fact, compelling denial of class certification under Rule 23(b)(3).

1. Predominance

A district court may certify a class under Rule 23(b)(3) only if "the questions of law or fact common to class members predominate over any questions affecting only individual members." Therefore, "the predominance criterion is far more demanding" than Rule 23(a)'s commonality requirement. *Amchem*, 521 U.S. at 623−24. A plaintiff satisfies the requirement by showing that: "(1) resolution of any material legal or factual questions can be achieved through generalized proof, and (2) these common issues are more substantial than the issues subject only to individualized proof." *In re Petrobras*, 862 F.3d at 270 (internal quotation marks and alterations omitted).

"[P]redominance is a comparative standard[.]" *Id.* at 268. A court must "give careful scrutiny to the relation between common and individual questions in a case." *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. __, 136 S.Ct. 1036, 1045 (2016). "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.'" *Id.* (quoting 2 W. Rubenstein, Newberg on Class Actions § 4:50, at 196–97 (5th ed. 2012)) (alteration omitted). "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.'" *Id.* (quoting Newberg on Class Actions § 4:49, at 195–96). The analysis is "'more qualitative than quantitative.'" *In re Petrobras*, 862 F.3d at 271 (quoting Newberg on Class Actions, § 4:50, at

197) (alteration omitted). The essential question is whether the proposed class is "sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623.

a) Elements of an Antitrust Claim

Determining whether common questions of law or fact predominate "begins, of course, with the elements of the underlying cause of action." *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809 (2011). To establish a claim under the antitrust laws, a plaintiff must prove (1) a violation of antitrust law; (2) injury and causation; and (3) damages. *Cordes*, 502 F.3d at 105 (internal quotation marks and alternations omitted).[8]

"Predominance is a test readily met in certain cases alleging . . . violations of the antitrust laws." *Amchem*, 521 U.S. at 625. For, "where plaintiffs were 'allegedly aggrieved by a single policy of the defendant[]', and there is 'strong commonality of the violation and the harm,' this is 'precisely the type of situation for which the class action device is suited.'" *Brown*, 609 F.3d at 484 (quoting *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 146 (2d Cir. 2001)).

Defendant does not dispute that EPPs will use common proof to attempt to prove the first element of an antitrust claim—a violation of antitrust law—and this "concession does not eliminate a common issue from the predominance calculus." *See Cordes*, 502 F.3d at 108 (internal quotation marks omitted). Indeed, as detailed above, every aspect of plaintiffs' allegations of

[8] Although EPPs raise only state law claims, the parties analyze the elements of a federal antitrust claim. This is because the state antitrust statutes generally adopt these same elements and require proof of injury-in-fact and damages—the elements at issue here. Below I separately address Allergan's arguments that differences in the state statutes cause individual issues to predominate.

Defendant also asserts that "[i]njury or impact" is an element of all of EPPs' consumer protection and unjust enrichment claims. EPPs have not argued otherwise, and thus I will assume for purposes of this motion that Allergan is correct.

anticompetitive conduct can be proven through common evidence, as these allegations focus exclusively on Allergan's actions and will not vary among class members. *See id.* at 105.

The second element of an antitrust violation presents two different questions. One is legal—whether the injury at issue "is injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendant['s] acts unlawful." *See Cordes*, 502 F.3d at 106 (internal quotation marks omitted). It is uncontested that this question also will be answered through common proof—adding to the common proof in this case. *See id.* at 108. The second question—causation or "injury-in-fact," *id.* at 106—is the focus of defendant's arguments.

b) Whether, When Some Class Members Are Uninjured, Plaintiffs Can Show Injury-in-Fact Through Common Proof

EPPs have offered Dr. Frank's methodology to demonstrate that they can prove injury-in-fact through common evidence. Dr. Frank is a professor of health economics at Harvard Medical School and a Research Associate at the National Bureau of Economic Research. From 2009 to 2016, he served in several senior capacities, including Assistant Secretary for Planning and Evaluation, at the U.S. Department of Health and Human Services. He has extensively studied, and published papers on, the economics of the pharmaceutical industry.

Dr. Frank used a commonly accepted two-step method to prove classwide injury-in-fact. *See Castro v. Sanofi Pasteur Inc.*, 134 F. Supp. 3d 820, 847–48 (D.N.J. 2015) (collecting cases approving of the use of the same two-step model). This approach shows, first, that class members paid artificially inflated prices and, second, that "this price inflation occurred to substantially all class members." *Id.* at 847. Dr. Frank attempted to satisfy the second step by showing that generic Restasis would have achieved rapid and effective penetration of the market so that most purchases in the but-for world would have been for the generic.

Since a generic is not yet on the market, Dr. Frank lacked actual data regarding generic Restasis. He therefore used a yardstick approach to predict the price and penetration rate of generic Restasis in the but-for world. The approach examines the actual prices and quantities that occurred in a similar market that was not affected by defendant's behavior. Dr. Frank selected Pfizer's drug Xalatan, which is used to treat glaucoma, as his market yardstick. TPPs, insured consumers, and cash payors all paid significantly less for generic Xalatan than they had paid for Xalatan before generic entry. Additionally, the generic penetration rate for Xalatan averaged 94.3 percent over the damages period he measured.[9] Assuming that generic Restasis would have experienced the same penetration rate, Dr. Frank used common evidence to conclude that at least 94.3 percent of class members were injured by defendant's alleged conduct.

Based on his conclusion that 5.7 percent of prescriptions in the but-for world would have been for brand Restasis, Dr. Frank acknowledged that the class includes brand retainers—people who were uninjured because they would have purchased only brand Restasis even with generic alternatives.[10] Plaintiffs assert that the existence of those consumers does not defeat their ability to show classwide impact.

---

[9] Dr. Frank measured damages from February 2016 (when he assumed for purposes of his analysis a generic would have entered in the but-for world) to January 2019 (the last month for which he had data). His methodology can be adjusted to reflect the damages period found by the jury.

For TPPs and insured customers, Xalatan's generic penetration rate was 92.2 percent after six months, 96.3 percent after 12 months, and 97.8 percent after two years. For cash payors, the generic penetration rate was 89.2 percent after six months, 91.9 percent after 12 months, and 94.8 percent after two years. These penetration rates are consistent with the rates observed in the industry as a whole.

[10] Allergan refers to these people as "brand loyalists." But, as Ms. Craft explained, powerful institutional factors, which are unrelated to a consumer's preference for a particular brand, drive brand retention rates. I will thus use the term "brand retention" instead of "brand loyalty."

Allergan disagrees. It argues first that, in the Second Circuit, a class simply cannot be certified if it contains uninjured plaintiffs. Alternatively, it argues that the uninjured plaintiffs in the proposed class are too numerous and cannot be eliminated through common proof, which will cause individualized issues to predominate over the many common issues to be decided.

(1) Whether a Class May Contain Uninjured Consumers

Allergan's first proposition is simply incorrect. The Supreme Court and the Second Circuit have recognized that the existence of uninjured plaintiffs does not bar class certification. In *Tyson Foods*, 136 S.Ct. at 1044, the Supreme Court affirmed certification of a class under the Fair Labor Standards Act ("FLSA") that contained over 200 uninjured class members.[11] *See Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 276 (2014) (noting that predominance would still be satisfied if a class contained uninjured class members that "defendant might attempt to pick off" through individualized inquiries).

In *Seijas v. Republic of Argentina*, 606 F.3d 53, 56–58 (2d Cir. 2010), the Second Circuit affirmed certification of eight classes of holders of defaulted Argentine bonds, expressing no concern that summary judgment briefing revealed that "[c]omplicated questions existed [] as to which bondholders were class members and as to how much each class member could recover." Similarly, in *Sykes v. Mel S. Harris & Assocs. LLC*, 780 F.3d 70, 91 (2d Cir. 2015), the Court concluded that the possibility of uninjured plaintiffs did not defeat predominance "given the myriad common issues" in the case. And, in *Cordes*, 502 F.3d at 95–97, the Court, after reversing the district court's denial of class certification, remanded with instructions to the district court to

[11] In its petition for certiorari, the employer, Tyson Foods, asked the Court to decide, among other things, "whether a class may be certified if it contains members who were not injured and have no legal right to any damages." *Id.* at 1049 (internal quotation marks omitted). But, in its merits brief, Tyson Foods conceded that federal courts had the authority to certify such a class. *Id.*

reconsider whether the plaintiffs had satisfied Rule 23(b)'s predominance requirement even though the Court indicated that "[m]ore than ninety percent of" (and thus not all) class members were injured and the defendants argued that individualized inquiries were needed to determine whether each class member sustained antitrust injury-in-fact. *See also In re Petrobras*, 862 F.3d at 259, 261 (reversing class certification and remanding for consideration in the predominance analysis of the potential need for individualized inquiries to determine if each class member purchased its Petrobras Note in a "domestic transaction," as required by the Exchange Act and the Securities Act).

Consistent with this precedent, district courts in this Circuit have certified classes that likely or certainly contained uninjured class members. *See Dial Corp. v. News Corp.*, 314 F.R.D. 108, 120 (S.D.N.Y. 2015); *In re Air Cargo Shipping Servs. Antitrust Litig.*, 2014 WL 7882100, at *44–45 (E.D.N.Y. Oct. 15, 2014), *adopted*, 2015 WL 5093503 (E.D.N.Y. July 10, 2015); *In re Elec. Books Antitrust Litig.*, 2014 WL 1282293, at *22 (S.D.N.Y. 2014); *In re Auction Houses Antitrust Litig.*, 193 F.R.D. 162, 166–67 (S.D.N.Y. 2000).

Circuit Courts in other circuits have also accepted that class certification does not require proof that all class members are injured. *Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1136 (9th Cir. 2016); *Mims v. Stewart Title Guar. Co.*, 590 F.3d 298, 307−08 (5th Cir. 2009); *Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 677 (7th Cir. 2009); *see In re Urethane Antitrust Litig.*, 768 F.3d 1245, 1254 (10th Cir. 2014), *aff'g*, 2013 WL 2097346, at *2 (D. Kan. May 15, 2013); *In re Whirlpool Corp. Front-Loading Washer Prods. Liability Litig.*, 678 F.3d 409, 420 (6th Cir. 2012), *vacated*, 569 U.S. 901 (2013), *reinstated*, 722 F.3d 838 (6th Cir. 2013), *cert. denied*, 134 S.Ct. 1277 (2014).

There is, in short, no support for defendant's contention that the mere existence of uninjured class members in this putative class compels denial of EPPs' motion.[12] I now will address each of the categories of class members that defendant alleges are uninjured. The first category, brand retainers, gives rise to the core disputes on this motion.

(2) Consumers Who Would Have Purchased Only the Brand in the But-For World

While defendant does not dispute that generic Restasis would have been cheaper than brand Restasis,[13] it claims there would have been more brand retainers than EPPs acknowledge, that Dr. Frank's methodology is unsound, and that individualized inquiries will therefore predominate. Relying on *Asacol*, Allergan further asserts that EPPs' proposal to use classwide proof to establish injury-in-fact violates its due process and Seventh Amendment rights to conduct individualized inquiries before the jury to identify each brand retainer, and that it also violates the Rules Enabling Act, which does not permit federal rules to "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b).

The parties vigorously dispute the percentage of prescriptions that brand Restasis would have retained in the but-for world, which they use to approximate the number of brand retainers.

---

[12] I also reject defendant's claim that *Denney v. Deustche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006), which held that a class must be defined to ensure that all class members have Article III standing, shows that the Second Circuit does not permit certification of a class containing uninjured members. To satisfy Article III standing, a class member must have been affected in a personal and individual way, but the member "'need not be capable of sustaining a valid cause of action.'" *Dubuisson v. Stonebridge Life Ins. Co.*, 887 F.3d 567, 574 (2d Cir. 2018) (quoting *Denney*, 443 F.3d at 264). Here, because they purchased Restasis, all class members have standing—whether or not they paid an overcharge. *See Torres*, 835 F.3d at 1137 n.6 (clarifying that *Denney*'s holding "signifies only that it must be possible that class members have suffered injury, not that they did suffer injury, or that they must prove such injury at the certification phase"). Notably, the *Asacol* Court found Article III standing satisfied there. 907 F.3d at 50−51.

[13] The parties' experts disagree over the extent of the price differential, but that question will be resolved by the jury through the use of common evidence.

This dispute occupies the bulk of their briefing and was the focus of the witnesses' testimony at the evidentiary hearing.

While not abandoning its claim that the Second Circuit conditions class certification on a fully injured putative class, defendant asserts that it has not "staked its claims on the premise that *every single* class member must be uninjured for a class to be certified." Allergan's Sur-Reply in Further Opposition to End-Payor Plaintiffs' Motion for Class Certification at 3 n.7. It then notes that EPPs have not cited a case in the Second Circuit in which over four percent of class members were uninjured—referring to the certified class in *In re Air Cargo*, 2014 WL 7882100, at *55.

The Supreme Court and Second Circuit, however, have never suggested that a certain percentage or number of uninjured plaintiffs would automatically bar class certification. And the Seventh Circuit explicitly eschewed such an approach. It has held that a class may be certified unless "it is apparent that it contains a great many persons who have suffered no injury at the hands of the defendant." *Kohen*, 571 F.3d at 677. And it later made clear that "[t]here is no precise measure for 'a great many,'" the determination of which is "a matter of degree, and will turn on the facts as they appear from case to case." *Messer v. Northshore Univ. HealthSystem*, 669 F.3d 802, 825 (7th Cir. 2012); *see also In re Rail Freight*, 292 F. Supp. 3d at 137–38 ("Beyond percentages, the number of uninjured class members in relationship to the size of the class also may matter.").

In any event, a review of the specific percentages addressed in other cases indicates that the percentage of uninjured class members proffered by EPPs here is well within the range that courts routinely accept. District courts in this and other Circuits have held that a class may be certified so long as a "*de minimis*" number of class members were uninjured or, conversely, "virtually all" class members were injured. *In re Rail Freight*, 292 F. Supp. 3d at 134–35; *In re*

Lidoderm Antitrust Litig., 2017 WL 679367, at *11 (N.D. Cal. Feb. 21, 2017); *In re Air Cargo*, 2014 WL 7882100, at *44–45. Although the concept of *de minimis* is not well defined, one court recently "suggest[ed] that 5% to 6% constitutes the outer limits of a *de minimis* number of uninjured class members." *In re Rail Freight*, 292 F. Supp. 3d at 137 (comparing *In re Lidoderm*, 2017 WL 679367, at *19, and *In re Nexium (Esomeprazole) Antitrust Litig.*, 297 F.R.D. 168, 179 (D. Mass. 2013), *aff'd*, 777 F.3d 9 (1st Cir. 2015), with *Vista Healthplan, Inc. v. Cephalon, Inc.*, 2015 WL 3623005, at *20 (E.D. Pa. June 10, 2015)); *see also Mayo v. USB Real Estate Secs., Inc.*, 2012 WL 4361571, at *3 (W.D. Mo. Sept. 21, 2012) (finding that a class where "at least 94%" of its members were injured was not overbroad, but declining class certification on other grounds). And recently the district court in *In re EpiPen (Epinephrine Injection, USP) Marketing, Sales Practices and Antitrust Litig.*, 2020 WL 1180550, at *32–36 (D. Kan. Mar. 10, 2020), which involved, among other allegations, delayed generic entry, certified a class where the plaintiffs' expert concluded that approximately five percent of the consumers were uninjured. Conversely, the district court in *Rail Freight*, 292 F. Supp. 3d at 141, denied certification of a class in large part because at least 12.7 percent of its members were uninjured.

EPPs argue that Dr. Frank's methodology, which yielded a 5.7 percent brand retention rate, shows that only a *de minimis* number of plaintiffs were uninjured and that a finding of classwide injury-in-fact can be made. Indeed, they claim that the number of uninjured consumers is almost certainly lower than 5.7 percent. Because a consumer need incur only one overcharge to experience antitrust injury, an individual who purchased a single generic prescription in the but-for world—even if all of his or her other purchases were for the brand drug—was injured.[14] *See*

[14] Defendant contests Dr. Frank's assertion that the percentage of patients remaining on the brand after generic entry would be lower than the percentage of brand prescriptions. Dr. Frank deemed Restasis a chronic condition, citing one study that listed the median duration of treatment as 23

In re Nexium, 777 F.3d at 27; *In re Rail Freight*, 292 F. Supp. 3d at 136; *In re Solodyn (Minocycline Hydrochloride) Antitrust Litig.*, 2017 WL 4621777, at *15 (D. Ma. Oct. 16, 2017); *In re Air Cargo*, 2014 WL 7882100, at *45.

To decide if the class contains only a *de minimis* number of uninjured plaintiffs, I must evaluate Dr. Frank's methodology to determine whether "no reasonable juror could have believed" it. *Tyson Foods*, 136 S.Ct. at 1049; *see Comcast*, 569 U.S. at 35 (criticizing lower court for not deciding whether the plaintiffs' "methodology was a just and reasonable inference or speculative" (internal quotation marks and alterations omitted)). Or, as other courts have framed it, I must determine whether EPPs have "advance[d] a workable methodology to demonstrate that antitrust injury can be proven on a class-wide basis." *See, e.g.*, *Dial Corp.*, 314 F.R.D. at 115. I therefore must assess whether Dr. Frank's decision to use Xalatan as an analog (the source of his determination of the brand retention rate) was "sufficiently reliable to merit the court's consideration of it as proof common to the class." *In re Air Cargo*, 2014 WL 7882100, at *59.

(a) Dr. Frank's Methodology to Predict But-For Brand Retention

As an initial matter, Allergan does not contest Dr. Frank's use of a yardstick approach to measure the but-for world—this is unsurprising as this approach is a generally accepted way to measure antitrust damages. *See, e.g.*, *SourceOne Dental, Inc. v. Patterson Cos.*, 2018 WL

---

months. Allergan claims that Dr. Frank misconstrued the facts, that the study he cites described a small set of people with an incurable eye disease, and that less than a quarter of patients remain on Restasis after 12 months. At oral argument, defendant also asserted that most consumers using the brand drug at the time of generic entry would have remained on the brand rather than switch to the generic. I need not resolve this dispute, as I find that class certification is appropriate even if 5.7 percent of consumers were uninjured. But I do note that defendant's own experts, whose expertise treating dry-eye disease EPPs have not challenged, testified that the disease "needs to be treated chronically," *see* Class Cert. Hr'g Tr. at 82 (Dr. Hatch), and that Restasis is "a lifelong treatment regimen," *id.* at 292 (Dr. Mandadakis).

2172667, at *4 (E.D.N.Y. May 10, 2018). Rather, Allergan takes issue with Dr. Frank's choice of Xalatan as a yardstick, contending that his conclusion that Restasis, like Xalatan, would have had a 5.7 percent brand retention rate "appears to be unreasonably low." Expert Report of Professor James W. Hughes ("Hughes Rep.") ¶ 72.

I will first state the obvious: neither side will ever prove whether its predictions are correct. The but-for world is, by definition, hypothetical. *See J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 566 (1981) ("The vagaries of the marketplace usually deny us sure knowledge of what plaintiff's situation would have been in the absence of the defendant's antitrust violation.").

Dr. Frank selected Xalatan as his market yardstick because it is also an ophthalmic product, it faced generic entry within the last 10 years, and it is featured in Allergan's own forecasting of generic entry as a useful analog. He also noted that Xalatan's generic penetration rate is consistent with the average penetration rates in the pharmaceutical industry.

The parties' arguments generally presume that a drug's generic penetration rate increases with the number of initial generic entrants.[15] In 2011, three generic versions of Xalatan initially entered the market nearly simultaneously, and a fourth entered approximately 18 months later.[16]

---

[15] Plaintiffs, through Ms. Craft's rebuttal report, offer a critique of this view. According to Ms. Craft, "the number of simultaneous generics may affect price discounts," but "its effect on the brand retention rate is not well established." Rebuttal Declaration of Laura R. Craft in Support of End-Payor Plaintiffs' Motion for Class Certification ("Craft Reb.") ¶ 74. According to her, "[t]he institutional mechanisms that drive generic adoption" can cause rapid generic penetration even with only one generic entrant. Craft Reb. ¶ 75.

[16] The exact contours of Xalatan's generic entry are not clear from the parties' submissions. According to Dr. Frank, there were initially five generic entrants, but the sales for two of them were small and quickly diminished to minimal level, so that the remaining three generic entrants accounted for 85 percent to nearly 100 percent of generic sales during the first two years. But, in a declaration submitted in the Restasis patent infringement litigation, David LeCause, Allergan's Vice President of U.S. Eye Care Sales, stated that four generics initially entered. Despite this confusion, at oral argument, counsel for both sides agreed that, for practical purposes, there were

Dr. Frank explained that his choice of Xalatan was conservative for two reasons. First, between 2011 and 2014, drugs with over $1 billion in sales in the year before generic entry averaged 8.9 generic entrants, while those with sales between $250 million and $1 billion averaged 4.9 generic entrants. With retail sales of at least $1.5 billion in the year before Dr. Frank's predicted generic launch date of February 2016,[17] Restasis falls into the former category. Xalatan, which had about $502 million in annual sales before generic entry, falls into the latter. Moreover, Xalatan had three generic entrants—fewer than the average drug with similar revenue. Second, the overall generic penetration rate in this country increased significantly after 2011. While Xalatan's generics launched in March 2011, EPPs proffer that a generic Restasis would not have entered the but-for world until 2015.[18]

Defendant's first line of attack on Dr. Frank's proposal is to offer the conclusions of its expert Dr. Hughes.[19] Dr. Hughes recently retired as the Thomas Sowell Professor of Economics at Bates College. He has served as an expert in numerous pharmaceutical antitrust cases.[20] Relying exclusively on the projections of Company A and Company B,[21] two large companies that intended

---

initially three generic entrants and a fourth entrant 18 months later.

[17] According to Dr. Frank, when adjusted to account for mail-order prescriptions, Restasis' sales were approximately $1.8 billion that year.

[18] Dr. Frank relied on these same factors to respond to defendant's criticism of his decision not to use as an analog Allergan's ophthalmic drug Alphagan P, which had only one generic entrant and higher brand retention than Xalatan. Dr. Frank explained that, in 2009, the year before Alphagan P lost exclusivity, its retail sales were only $188.8 million.

[19] I have excluded the challenged portions of defendant's other two witnesses, Dr. Hatch and Dr. Mandadakis. As I note in the Daubert Decision, however, even if I had found these experts' opinions admissible, they would not alter my decision on class certification.

[20] Although Dr. Hughes regularly serves as a defense witness in generic delay antitrust litigation, he has not published articles relevant to this topic.

[21] I have excluded the names of these companies as confidential. However, this opinion reveals

to enter the generic Restasis market, Dr. Hughes concluded that at least 14 to 25 percent of Restasis prescriptions would have remained for the brand product in the but-for world.

In 2018, Company A forecasted that there would be three initial generic entrants, a fourth six months later, and a total of six after two years. It also predicted a brand retention rate that declined over time and leveled out at 14 percent after two years. Also in 2018, Company B predicted that brand Restasis would retain a steady 25 percent of the market throughout a five-year period. Company B's prediction of the number of generic entrants was unclear. A note on the forecast indicated that it would "only assume 1 – 2 enter," but, in a different section, the forecast appeared to predict three companies at launch and a fourth after six months.[22]

Dr. Hughes's prediction of brand retention does not demonstrate the unreliability of Dr. Frank's. Rather than doing any independent analysis, Dr. Hughes merely reasoned that, because the two companies whose forecasts he relied on were "deciding whether to invest the money to enter the market," he "would expect their work in the forecast[s] to be quite diligent." Class Cert. Hr'g Tr. at 241; *accord, e.g. id.* at 164. But there are reasons to question these forecasts' reliability. Indeed, Company A's representative testified that its forecasts are conservative to avoid overstating anticipated revenues. This may explain why the company predicted a generic entry rate almost identical to Xalatan's but a lower generic penetration rate.

---

some facts about Allergan or third parties that Allergan has requested that I seal. *See* Motion to Redact and Seal Certain Documents Related to End-Payor Plaintiffs' Motion for Class Certification, Dkt. No. 456. Where it does so, it is because I have determined that the public's right—under the common law and the First Amendment—to understand the basis of my conclusions on a crucial motion in this litigation substantially outweighs the factors that favor sealing. *See Brown v. Maxwell*, 929 F.3d 41, 47–51 (2d Cir. 2019); *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982); *Liberty Re (Bermuda) Ltd. v. Transamerica Occidental Life Ins. Co.,* 2005 WL 1216292, at *6 (S.D.N.Y. May 23, 2005).

[22] At oral argument, EPPs' counsel asserted that Company B's representative confirmed that the company forecasted three initial entrants and a fourth six months later.

As for Company B, although brand retention rates are known to decrease over time, that company forecasted that Restasis' brand retention rate would remain flat at 25 percent over five years. Dr. Hughes initially testified that the generic manufacturers' forecasts are "very serious" because "[t]hey try to take a lot of factors into account." *Id.* at 183. But, when asked about Company B's prediction of an unchanging rate, he speculated that the company "used very few assumptions and the more assumptions you use[,] the more assumptions that can be wrong." *Id.* at 267. Dr. Hughes's adherence to a forecast that does not reflect real world conditions, and a defense of it that defies his own economic principles, call into question his methodology.

Defendant also argues that Xalatan, a solution, is an inappropriate analog for Restasis, a complex emulsion. Plaintiffs do not dispute that emulsions are more complex than solutions and, as such, more difficult to reproduce by generic manufacturers. While Restasis' complex composition is not contested, the significance of the drug's composition on Restasis' but-for brand retention rate is.

Allergan asserts that Restasis' composition would have led to significant brand retention in the but-for world, making Xalatan an unrealistic analog. To support its position, it references a January 2019 statement from then-FDA Commissioner Scott Gottlieb that complex drugs, including eye drops, "are harder to 'genericize' under traditional approaches" and thus "often face less competition" and some industry analysts who predicted limited competition for Restasis because of its complexity.[23]

[23] Defendant cites *Statement from FDA Commissioner Scott Gottlieb, M.D., on 2019 Efforts to Advance the Development of Complex Generics to Improve Patient Access to Medicines*, Jan. 30, 2019, www.fda.gov/news-events/press-announcements/statement-fda-commissioner-scott-gottlieb-md-2019-efforts-advance-development-complex-generics; Jefferies, *Akorn (AKRX): ANDA to Restasis Disclosed; Could Become AKRX's Largest Opportunity—If Approved* (transmitted in an email dated July 16, 2015); and RBC Capital Markets, *Allergan, Inc.: Restasis Guidelines Major Setback; But AGN Still Attractive at Current Valuation*, June 24, 2013.

But, as EPPs note, Allergan has offered no empirical evidence showing that a drug's complexity influences its brand retention rate, let alone a metric by which to determine how much more complex Restasis is than Xalatan or, even more importantly, how much its complexity affects its generic penetration rate. And it certainly has not shown that the empirical factors Dr. Frank cites that influence generic entry—including the size of the brand drug's market before generic entry—are rendered irrelevant (or even less significant) in the context of a complex drug.

Allergan further criticizes Dr. Frank's reliance on the company's own internal forecasts of the effects of generic entry on Restasis, many of which used Xalatan as an analog, to support his selection of the drug. Defendant asserts that those forecasts accounted for factors that would have led to aggressive generic penetration in the actual world but would not have existed in the but-for world. It argues that Dr. Frank did not consider those differences when he conducted his analysis.

EPPs respond by casting doubt on the accuracy of defendant's claims that its forecasts all predicted aggressive generic entry, as some of the forecasts selected analog drugs with only one initial generic entrant. In any event, even if all of Allergan's forecasts predicted aggressive generic entry, there is no indication that they led Dr. Frank astray. With three initial generic entrants in 2011, Xalatan is hardly the "very aggressive" choice Dr. Hughes said it was. *See* Class Cert. Hr'g Tr. at 188. Perhaps the most powerful evidence of this comes from Dr. Hughes himself: Company A's forecast—which Dr. Hughes deemed an accurate measure of the but-for world—predicted a nearly identical pattern of generic entry as Xalatan's.[24]

[24] It is also possible that, in the but-for world, Allergan may have tried to retain more of the market by introducing its own generic version of Restasis—that is, an "authorized generic." According to Dr. Frank, 68 percent of drugs with high sales include an authorized generic at generic entry. One of Xalatan's generic entrants was an authorized one.

Defendant also asserts that the conclusions of Dr. Jeffrey Leitzinger, DPPs' expert, regarding brand retention show why Dr. Frank's analysis was misguided. By averaging 72 forecasts from five generic manufacturers, Dr. Leitzinger predicted a but-for brand retention rate of 11.5 percent after three years.[25] Dr. Frank responded that the use of averaging is accurate only when the data relied upon is similar and based on equal expertise. Since Dr. Leitzinger did not analyze the accuracy of the underlying forecasts (or even account for the generic manufacturers' own view of their accuracy), Dr. Frank criticized his method for giving "undue weight to the generic companies' projections, which are often imprecise and unrealistic." Rebuttal Declaration of Richard G. Frank in Support of Class Certification of Restasis End-Payors ¶ 16. Dr. Frank's defense of his methodology, including why he did not find Dr. Leitzinger's methodology more accurate than his own, was persuasive, and I am satisfied that Dr. Frank's decision to use a yardstick approach was sound and workable.

Relying heavily on the evidence from Dr. Hatch and Dr. Mandadakis that I excluded in the Daubert Decision, defendant further contends that Dr. Frank did not account for eye care providers' unique skepticism of generic drugs, which would have made them hesitant to switch patients to generic Restasis in the but-for world. Dr. Frank convincingly responds that any such skepticism would have been accounted for by his choice of Xalatan, which is also an ophthalmic product, as an analog.

Allergan's assertions about eye care providers' skepticism of generic drugs are thus relevant to class certification only if it can show that these providers are especially skeptical of

[25] It is noteworthy that, on average, these generic manufacturers predicted a brand retention rate that was significantly lower than that predicted by Dr. Hughes, who relied exclusively on single forecasts created by each of two companies.

complex generic ophthalmic drugs generally or of Restasis in particular.[26] Daubert Dec. at 14. Defendant's evidence on these points is far from conclusive. It relies heavily on a survey commissioned by Bank of America of just 75 ophthalmologists in which 78 percent stated that they viewed generics as potentially different from the brand (although the majority of that group still prescribe generics); 24 percent said they would not prescribe generic Restasis under the then-existing FDA bioequivalence guidance; and 27 percent said they would prescribe the generic only to new patients. Bank of America Merrill Lynch, *Allergan: Tidbits from ophthalmology survey*, at 5–6 (Aug. 7, 2013).

---

[26] One piece of evidence cited by Dr. Hughes fails to make this critical distinction. Dr. Hughes wrote that "brand loyalty" is especially high for ophthalmic products in part because "the design of the bottle and eyedropper are very important for ophthalmic drugs, especially with regards to ease of use and precision of the quantity dispensed." Hughes Rep. ¶ 82. He cited an article in which an ophthalmologist, after asserting that the design of the bottle and eyedropper could make a generic drug less user-friendly, described the packaging of generic Xalatan products as an example. Dr. Yvonne Ou, *Glaucoma Eye Drops: Is There a Difference Between Brand Name and Generic*, Bright Focus Foundation, Mar. 24, 2017 ("Ou Article"), www.brightfocus.org/glaucoma/article/glaucoma-eye-drops-there-difference-between-brand-name-and-generic. This article's reference to Xalatan, of course, undercuts Dr. Hughes' claim that concerns about a generic's inferior packaging could impede the drug's rapid and effective penetration of the market.

Defendant also cites a study of Medicare Part D recipients that found that, in 2013, eye care providers prescribed brand drugs to Medicare patients at the highest rate relative to all other physician specialties. Dr. Paula A. Newman-Casey, et al., *Brand Medications and Medicare Part D: How Eye Care Providers' Prescribing Patterns Influence Costs*, 125 Ophthalmology 332 (2018), www.ncbi.nlm.nih.gov./pmc/articles/PMC5732892. The authors did not determine the precise reasons for the difference, although they did acknowledge, among other possibilities, some doctors' concerns about the efficacy of generic drugs. They also noted, however, that brand medications' "[h]igh costs result in less frequent medication purchases and lead to lower medication adherence," citing a study of 8,427 patients with open-angle glaucoma who were 39 percent more likely to have reduced medication adherence if they were prescribed the brand name drug. *Id.* The authors deemed it "likely critically important to prescribe less expensive [generic] medications as first-line therapies to help decrease the risk of cost-related medication nonadherence." *Id.* The Ou Article similarly acknowledged that the "[d]ecreased cost of glaucoma drops has been shown to increase adherence, or compliance with taking a medication as prescribed."

Most importantly, even if defendant had proffered stronger evidence of physician resistance, it has not bridged the gap between eye care providers' preferences and generic penetration rates. Indeed, the Bank of America survey itself acknowledged that "other factors (such as payor coverage)" often override physician preference, and, therefore, "most of the ophthalmic drugs that have gone generic in recent years have faced significant erosion." *Id.* at 1. Allergan notes that EPPs' expert Mr. Clark acknowledged that, if a large percentage of doctors wrote "dispense as written" on their prescriptions for a particular brand drug, it could increase the brand penetration rate. But Mr. Clark also described such a situation as extremely uncommon, citing prescriptions for thyroid medication as a rare exception. According to Ms. Craft, Allergan's former CEO David Pyott agreed, testifying at his deposition that "those days of writing dispense [as] written to [] override generics, they are history." Craft Reb. ¶ 56. In short, defendant has not shown that Dr. Frank's analysis is unreliable because of his failure to account for eye care providers' potential resistance to generic drugs.

Defendant further argues that the underperformance of a generic version of Restasis manufactured by Teva Pharmaceutical Industries Ltd. ("Teva") in Canada supports its claim that Restasis would have experienced significant brand retention in the United States. Teva's product entered the Canadian market in May 2018; after 11 months, it captured only a low percentage of sales—less than many other generic ophthalmic products in Canada had achieved. Allergan claims that Teva's experience shows that physician resistance to prescribing generic Restasis would have led to significant brand retention in the United States.

In response, EPPs retained Mr. Clark to compare the marketplaces for drugs in the United States and Canada and to determine whether the experience of Teva's generic was instructive as to how generic versions of Restasis would have performed in the United States. Mr. Clark,

president of a life sciences industry advisory firm, concluded that Teva's generic sold poorly largely because it cost nearly the same as the brand and was not placed on Canada's provincial formularies. In a surrebuttal report, Dr. Hughes criticized Mr. Clark's findings, claiming that other generic drugs that shared the characteristics cited by Mr. Clark performed better in Canada. At the hearing, Mr. Clark took issue with Dr. Hughes's methodology.

The experience of Teva's generic in the Canadian pharmaceutical market does not render Dr. Frank's choice of Xalatan unreliable. The Canadian market is dramatically different from that of the United States. In 2018, Canadians spent about $30.7 billion on retail prescription drugs, while Americans spent between $360 and $520 billion. The smaller Canadian market reduces incentives for generic manufacturers to enter. In addition, insurance arrangements in Canada differ markedly from those in the United States, and the promotion of prescription drugs is more strictly regulated. Notably, Teva's representative said that the company did not account for the experience of its Canadian generic when it forecasted generic Restasis' performance in the United States.

In sum, Allergan requests that I find unreliable Dr. Frank's conclusion that Restasis would have penetrated the market in the but-for world at a rate consistent with the average market penetration rate of all drugs. I decline to do so. Dr. Frank offered persuasive reasons for choosing Xalatan as a yardstick and equally persuasive reasons why the choice was conservative. Additionally, having observed his testimony, I found Dr. Frank to be a thorough, thoughtful, and credible witness. Defendant may make its case to a jury, but it has not given me a basis to say that Dr. Frank's use of Xalatan as an analog is unsound. Thus, EPPs have met their burden to show that they can present classwide proof of injury-in-fact and that the number of brand retainers is *de minimis*.

Finally, defendant sometimes argues that I need to determine on this motion not only whether Dr. Frank's methodology is sound enough to go to the jury, but what Restasis' brand retention rate would have been in the but-for world. If that were in fact the standard, I would readily accept Dr. Frank's analysis as establishing that brand retainers would account for no more than 5.7 percent of consumer class members.

(b) Plaintiffs' Methodology to Remove Brand Retainers from the Judgment

I now address Allergan's argument, supported largely by *Asacol*, that it is entitled to individualized inquiries at the liability phase of trial to identify brand retainers in the but-for world and that EPPs' proposed methodology to exclude them from the class is insufficient.[27]

EPPs propose that, using Dr. Frank's damages methodology, which relies exclusively on common proof, the jury will remove purchases that would have remained for the brand in the but-for world from the total damages award. Therefore, the experts' dispute over the brand retention *rate*

> does not undermine the fact that both experts rely on common proof (as opposed to individual proof) to estimate the impact Brand Loyalists have on the aggregate damages number under both of their models. Estimating the number of Brand Loyalist purchases (using a common proof methodology) is a sufficiently reliable method to remove purchases from the aggregate damages award.

See In re Lidoderm, 2017 WL 679367, at *19.[28]

---

[27] I note that defendant's argument appears contingent on a finding that the brand retention rate would be higher than that predicted by Dr. Frank—a finding I have not made. Notably, the district court in *Asacol* concluded that the rate there would have been 10 percent. 907 F.3d at 45. I will nevertheless address defendant's argument, in part because it is not obvious that the *Asacol* Court's holding would have differed if that Court had been faced with a lower percentage of uninjured class members.

[28] EPPs' model distinguishes this case from two cited by defendant, *Jensen v. Cablevision Sys. Corp.*, 372 F. Supp. 3d 95, 129 (E.D.N.Y. 2019), and *Vacariello v. XM Satellite Radio, Inc.*, 295 F.R.D. 62, 74 (S.D.N.Y. 2013), in which the district courts denied class certification due, in part,

This model also ensures that Allergan will not be forced to pay a penny more than the damages the jury determines it caused, protecting its due process rights.

> [I]n cases in which aggregate liability can be calculated in such a manner, 'the identity of particular class members *does not implicate the defendant's due process interest at all'* because '[t]he addition or subtraction of individual class members affects neither the defendant's liability nor the total amount of damages it owes to the class.'

See Briseno v. ConAgra Foods, Inc., 844 F.3d 1121, 1132 (9th Cir. 2017) (quoting *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 670 (7th Cir. 2015)) (emphasis added); *accord In re EpiPen*, 2020 WL 1180550, at *37.

In *Hickory Secs. Ltd. v. Republic of Argentina*, 493 F. App'x 156 (2d Cir. 2012), another iteration of the Argentine bondholders' class actions at issue in *Seijas*, the Second Circuit indicated its approval for a damages model similar to EPPs'. The *Hickory* Court reversed the district court's entry of an aggregate damages award because it did not "sufficiently account[] for non-continuous bondholders," who were excluded from the classes. *Id.* at 158–59. On remand, the Court instructed the district court to see if it could calculate aggregate damages that account, in "a reasonably accurate, non-speculative" way, for the volume of bonds that did not belong in the classes at issue. *Id.* at 160. By removing the percentage of prescriptions that would have remained for brand Restasis in the but-for world from the total damages amount, EPPs' proposal does precisely that.

Plaintiffs' methodology offers additional protection to defendant. To collect damages, consumers will be required to submit sworn affidavits declaring, among other things, that they

---

to the need for individualized inquiries to determine whether each class member was injured. The plaintiffs in those cases, unlike EPPs, did not offer a method of classwide proof to separate uninjured class members from those who were injured.

would have purchased a generic version of Restasis if it had been available.[29] There is nothing novel about this approach. Self-identifying affidavits are an accepted means to establish a class member's entitlement to recovery in class action litigation. *See, e.g.*, *Briseno*, 844 F.3d at 1131−32; *Mullins*, 795 F.3d at 667−72. For instance, in consumer protection cases, many courts in this Circuit have accepted self-identifying affidavits to establish proof of a product's purchase (a prerequisite, of course, to injury) where such evidence does not otherwise exist. *See, e.g.*, *Hasemann v. Gerber Prods. Co.*, 331 F.R.D. 239, 270−72 (E.D.N.Y. 2019); *Ebin v. Kangadis Food Inc.*, 297 F.R.D. 561, 567 (S.D.N.Y. 2014).

Here, by contrast, the data available in the pharmaceutical industry, detailed by Ms. Craft, ensures that only those who actually purchased Restasis will receive damages. "The detail and specificity of this electronically recorded data is truly exceptional in the realm of consumer goods purchases." Declaration of Laura R. Craft in Support of End-Payor Plaintiffs' Motion for Class Certification ¶ 24. This unique fact provides protections to Allergan that are regularly absent from consumer class actions. The data will show exactly how many purchases a consumer made and exactly how much he or she paid for each one. Where courts have accepted the use of affidavits to establish something as essential as a class member's proof of purchase of a product at issue, I see no reason to reject their use to discern a consumer's hypothetical purchasing activity in the but-for world.

[29] Allergan insists that it will challenge each plaintiff in the claims process to assure that no uninjured plaintiff receives an award. There are two responses to this. Realistically, the likelihood that Allergan would choose to undertake the time and expense to challenge each plaintiff is remote. This is because any award against it, having already been reduced by the percentage of uninjured plaintiffs found by the jury, will not change. If it nonetheless chooses this path, it may effectively use the affidavit process to cull those plaintiffs it wishes to challenge.

As Allergan stresses, a proposal similar to that of EPPs was rejected by the Court in *Asacol*, which was also an antitrust class action alleging that the defendant pharmaceutical manufacturers worked to prevent generic entry. *See* 907 F.3d at 44−45. Where the district court found that 10 percent of class members had not been injured, *id.* at 45, the First Circuit held that a claims process that relies on affidavits "provides defendants no meaningful opportunity to contest whether an individual would have, in fact, purchased a generic drug had one been available," in violation of the defendants' Seventh Amendment and due process rights, *id.* at 53. The *Asacol* Court also rejected the plaintiffs' proposal to instruct the jury to remove the percentage of uninjured consumers from the aggregate damages amount. *Id.* at 55−56. It reasoned that "[a]ccepting plaintiffs' proposed procedure for class litigation would [] put us on a slippery slope, at risk of an escalating disregard of the difference between representative civil litigation and statistical observations of tendencies and distributions." *Id.*; *accord In re Thalomid and Revlimid Antitrust Litig.*, 2018 WL 6573118, at *12–13 (D.N.J. Oct. 30, 2018) (relying on *Asacol* and Third Circuit precedent to deny, with leave to renew, class certification after the plaintiffs' expert determined that up to 10 percent of consumer class members were brand retainers).[30]

But the Second Circuit has accepted the use of representative evidence and statistical observations to prove classwide injury. In *Cordes*, the Second Circuit recognized that the plaintiffs in that antitrust class action may show that "injury-in-fact is susceptible to common proof" through

[30] Allergan also relies on the D.C. Circuit's recent decision in *Rail Freight*, 934 F.3d at 620, which affirmed the district court's denial, on remand, of class certification because the class contained too many uninjured members. Although the D.C. Circuit cited *Asacol* with approval, *see id.* at 624, 627, the plaintiffs' model in *Rail Freight* was different from that in *Asacol* as well as from EPPs'. The plaintiffs in *Rail Freight* "insist[ed] that each member of the proposed class *was* injured," even though their own expert's model found that over 2,000 class members were not. *Id.* at 623–24. Thus, unlike here, the plaintiffs had not proposed a method to remove uninjured plaintiffs through common evidence, leaving the D.C. Circuit to conclude that it must be done through "full-blown, individual trials." *Id.* at 625.

the use of a "single formula," observing that, if the district court on remand were to agree that the plaintiffs' formula could show injury-in-fact, the predominance requirement would "likely" be met. 502 F.3d at 106−08. In *Petrobras*, where the plaintiffs were required to prove that they had purchased Petrobras Notes in a "domestic transaction," the Second Circuit indicated that they might have satisfied the predominance requirements if they had "suggest[ed] a form of representative proof that would answer the question of domesticity for individual class members." 862 F.3d at 272 (citing *Tyson Foods*, 136 S.Ct. at 1045−46).[31]

Defendant's argument, buoyed by *Asacol*, that the Seventh Amendment, Due Process Clause, and Rules Enabling Act require that it be permitted to challenge each class member's ability to show injury at the liability stage of trial is also inconsistent with *Tyson Foods*. *Tyson Foods* affirmed certification of a class in which the jury awarded aggregate damages without determining which individual class members' FLSA rights had been violated by the employer Tyson Foods. 136 S.Ct. at 1049−50. Tyson Foods asked the Court to determine whether, "where class plaintiffs cannot offer proof that all class members were injured, they must demonstrate instead that there is some mechanism to identify the uninjured class members prior to judgment and ensure that uninjured members (1) do not contribute to the size of any damage award and (2) cannot recover such damages." *Id.* at 1049 (internal quotation marks omitted). Deeming "the question whether uninjured class members may recover [] one of great importance," the Court

[31] Defendant unpersuasively argues that EPPs' proposed methodology to show classwide impact is prohibited by the Supreme Court's decision in *Wal-Mart*. But there is no basis to compare the proposed class here to the class in *Wal-Mart* of 1.5 million female employees alleging employment discrimination in 3,400 stores. 564 U.S. at 357. The Court there found that Rule 23(a)'s lenient commonality requirement was not met as there was not even a single common question. *Id.* at 359. And it rejected the use of "sample cases" to extrapolate the percentage of women who were discriminated against by their local supervisors. *See id.* at 348, 357–58. Dr. Frank's use in this case of a market yardstick to show classwide impact in the but-for world bears no resemblance to the "trial by formula" condemned in *Wal-Mart*. *See id.* at 367.

nonetheless found its resolution "premature" since the damages award at issue had not yet been distributed. *Id.* at 1050. In a concurrence, Chief Justice John Roberts agreed that the issue was not ripe for the Court's resolution, but stated that "Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not," and thus the jury's award could not stand "if there is no way to ensure that [it] goes only to injured class members." *Id.* at 1053.

As described above, uninjured class members here will "not contribute to the size of any damage award," and, by identifying and removing such class members during the claims administration process, plaintiffs' proposal satisfies Chief Justice Roberts's concerns. It also is in line with *Hickory*, in which the Second Circuit expressed no concern that uninjured class members had not been identified during the liability phase. *See* 493 F. App'x at 160. I therefore disagree with the First Circuit's conclusion in *Asacol* that defendant has a constitutional right to remove these individuals at the liability stage of trial. Notably, in a comprehensive opinion, the court in *EpiPen* predicted that *Asacol*'s analysis would not be followed by the Tenth Circuit, and it explicitly rejected the constitutional underpinnings of *Asacol*, upon which the defendants there, as here, relied. 2020 WL 1180550, at *28–32, *36–37.

(c) Defendant's Argument That Individual Inquiries Are "Likely Impossible"

While stressing its absolute right to question every individual class member to determine if he or she would have purchased generic Restasis in the but-for world, Allergan simultaneously argues that determining the hypothetical actions of a consumer is "next to impossible here because there is still no evidence of what patients actually did once a generic version of Restasis hit the

market in the U.S." Allergan's Memorandum of Law in Opposition to End-Payor Plaintiffs' Motion for Class Certification ("Opp.") at 27.[32]

This argument only buttresses plaintiffs' case. If defendant were correct that individualized inquiries would be futile, Dr. Frank's reliance on aggregate data is not just a reasonable way to account for brand retention in the but-for world; it is the only way. A finding otherwise "would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery[.]" *See Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264 (1946); *see In re Namenda Direct Purchaser Antitrust Litig.*, 331 F. Supp. 3d 152, 209 (S.D.N.Y. 2018) ("Defendants are not entitled to the benefit of [the] doubt when the very reason we cannot know the answer to [a] question is because of their alleged wrongdoing.").

Finally, Allergan's argument about the likely impossibility of individualized proof does not appear limited to class actions. If I were to accept this argument, it would lead to the untenable conclusion that in generic delay cases in which there is not yet a generic on the market—potentially because of the efficacy of a defendant's anticompetitive conduct—an individual plaintiff could not establish injury-in-fact. *Tyson Foods* accepted the plaintiffs' method of proving classwide liability in part because they could have relied on the same method to establish individual liability. 136

[32] It also claims that the lack of a generic Restasis prevents the parties from examining "[o]ne of the factors that will likely drive especially high brand loyalty rates here [–] each patient's idiosyncratic medical issues, such as the likelihood that a patient would experience side effects and/or efficacy problems with the generic and their likely response if they experienced such side effects." *Id.* But a class member who experienced side effects from a generic would still be injured because he or she paid at least one overcharge. *See, e.g.*, *In re Nexium*, 777 F.3d at 27.

S.Ct. at 1046–48. By analogy, I view with great skepticism an argument against class certification that would prevent individual lawsuits as well.[33]

In sum, Allergan may not defeat class certification by insisting that it has a right to individualized inquiries while also claiming that those inquiries would be fruitless.[34] EPPs have presented a reasonable methodology to eliminate brand retainers' purchases from the damages calculation and to remove them from the class before judgment. I therefore find that the existence of a small percentage of consumers who were unharmed by generic foreclosure does not doom this class action.

Indeed, defendant's assertion that a small percentage of brand retainers should prevent over one million people and 30,000 to 40,000 TPPs from suing collectively runs afoul of Rule 23, as interpreted by the Supreme Court and Second Circuit. Most of these class members have low value claims and no economic incentive to bring individual lawsuits. Rule 23(b)(3) was designed with such plaintiffs "dominantly in mind." *Amchem*, 521 U.S. at 617; *Sykes*, 780 F.3d at 81. A district court bound by *Asacol* recently deemed the First Circuit's decision "likely a death knell for pharmaceutical, antitrust class actions brought by indirect purchasers," leaving "most putative class members' claims . . . unremedied." *In re Intuniv Antitrust Litig.*, 2019 WL 3947262, at *7

---

[33] At oral argument, Allergan contended that the continued absence of a generic entrant weighs against class certification because it evidences the weakness of plaintiffs' case. But the overall strength of plaintiffs' case is not relevant to class certification. *See, e.g.*, *In re Initial Pub. Offerings Secs. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006) ("a district judge should not assess any aspect of the merits unrelated to a Rule 23 requirement").

[34] Defendant further argues that, even if a generic enters the market during this litigation, consumers' purchasing decisions would likely still provide insufficient data to show what they would have done in the but-for world. It is true that whether a consumer purchased a generic version of Restasis in the actual world is not open-and-shut proof that he or she would have done the same in the but-for world. But this data nonetheless would provide insight into his or her actions in the but-for world. *See In re Flonase*, 284 F.R.D. at 222; *In re Cardizem CD Antitrust Litig.*, 200 F.R.D. 326, 343 (E.D. Mich. 2001).

n.8 (D. Mass. Aug. 21. 2019). Another such court was "troubled that over ninety percent of consumers in the proposed EPP class may have been injured by Defendants' alleged unlawful conduct, but now have no practical recourse under antitrust law." *In re Loestrin*, 410 F. Supp. 3d at 404.

* * *

In addition to brand retainers, which plaintiffs acknowledge exist within the class, Allergan argues there are other less significant categories of uninjured plaintiffs that also affect the predominance balance. As will be seen, these alleged categories either do not exist, are purely speculative, or at most create a small number of issues that can be dealt with using common proof or a relatively trivial number of individual inquiries.

(3) Consumers with Flat Copayment Plans

EPPs have excluded from the class consumers with flat copayment plans because they pay the same for both brand and generic drugs. Dr. Frank notes that the existence of this small group of consumers does not affect his classwide damages calculation because, when an insured consumer has a flat co-payment, the entire overcharge is borne by the TPP. These consumers thus affect only the distribution of damages between consumers and TPPs during the claims administration process.

Allergan argues that EPPs have not offered a way to use common proof to identify and exclude consumers with flat copayment plans, but sworn statements submitted to the court by PBMs OptumRx, Inc. and Prime Therapeutics LLC indicate otherwise. These PBMs confirmed that they are aware of the terms of the plans for the TPPs they service and that the PBMs can sort their data to exclude purchases by consumers with flat copayment plans.

Dr. Hughes does not contest that PBMs can identify and exclude flat copayors, but instead argues that there are *de facto* flat copayment plans that are not easily identifiable. He lists a coinsurance plan with a payment cap; an insurance plan that would have placed the generic drug on the same tier that the brand drug previously occupied; and individuals who qualify for "Full Extra Help" under Medicare's Low Income Subsidy Program.

Ms. Craft and Dr. Frank persuasively respond that Dr. Hughes's examples are based on either an unrealistic but-for price for generic Restasis, the unlikely and speculative actions of insurance plans in the but-for world, or an incorrect description of Medicare's program. In addition, these consumers constitute a *de minimis* group—around 0.4 percent of insured consumers.[35]

In short, the need to identify (solely to exclude from a damages award) consumers with official or *de facto* flat copayment plans does not defeat predominance. *But cf. Vista Healthplan*, 2015 WL 3623005, at *19 (predominance requirement not satisfied in part because the plaintiffs' expert conceded that individualized inquiries were the only method to identify uninjured class members, including those with flat copayments).

[35] Ms. Craft and Dr. Frank both initially estimated that the percentage of individuals covered by employer-sponsored prescription drug plans that have flat copayments was 0.32. But, adjusting for numbers cited by Dr. Hughes in his report, Ms. Craft increased the percentage to 0.4 percent in her rebuttal report. This percentage may be a slight underestimate as it does not include individuals covered by Medicaid or by health insurance that is not sponsored by an employer.

EPPs explain that defendant's assertion that up to four percent of insured consumers fall into this category is incorrect because it includes consumers with coinsurance, whose payments are impacted by a drug's price.

(4) Consumers Who Used Coupon or Copayment Assistance Programs

Defendant offers coupon or copayment assistance programs that reduce the cost of brand Restasis for insured consumers to as low as $5 for a prescription. It asserts that, as a result, some consumers paid less for brand Restasis than they would have paid for a generic and that individualized inquiries are necessary to identify and exclude these individuals from the class.

I conclude that Allergan's issuance of coupons creates a *de minimis* number of unharmed class members, as most consumers who used coupons still paid overcharges. *See In re Thalomid and Revlimid*, 2018 WL 6573118, at *14. According to Dr. Frank, consumers who used coupons made out-of-pocket payments of an average of $48 per prescription, and the vast majority of those consumers would have paid an average of $11 per prescription for generic Restasis in the but-for world. Furthermore, Dr. Frank asserts, and defendant does not contest, that the coupons limiting consumers' payments to $5 applied to just three percent of prescriptions, making it unlikely that a consumer who used such a coupon on one purchase would not have paid an overcharge on another purchase.

Furthermore, EPPs have indicated that common data probably can be used to determine which consumers used coupons and to what extent. According to Ms. Craft, the data generated by pharmaceutical transactions could be used to link transactions with and without coupons to the same consumer. Additionally, Allergan's own data may allow the parties to identify coupon users through common proof. Ms. Craft explained that the coupon programs were designed to collect consumers' data to aid defendant's marketing efforts. During discovery, Allergan apparently provided only aggregate coupon data to EPPs, claiming that its individualized data had been lost. Having examined the contracts between Allergan and its coupon processors, Ms. Craft opined that

it is "highly implausible given the commercial value of the data and the large expense incurred in its collection" that the data is truly gone. Craft Reb. ¶ 52.

In sum, defendant has not persuaded me that its use of coupon programs creates predominance concerns.

(5) Consumers Who Would Have Purchased a Different or No Brand Drug in the But-For World

Allergan asserts that it devoted substantial resources to marketing Restasis and that Restasis usage rates were particularly susceptible to these efforts. Defendant claims that, once a generic enters, brand manufacturers generally discontinue these efforts, and, as a result, some customers who purchased Restasis in the real world may have purchased Xiidra (another dry-eye medication) or no drug at all in the but-for world. These uninjured consumers, defendant argues, cannot be identified and excluded from the class through the use of common proof.

Dr. Frank criticized the assumption upon which this argument is based: Dr. Hughes's claim that there would be a "likely reduction in total [Restasis] prescriptions in the but-for world." Hughes Rep. ¶ 94. According to Dr. Frank, Dr. Hughes relied on a misrepresentation of the findings of one study to argue that purchases of the molecule form (*i.e.*, brand and generic forms combined) of a drug decrease after generic entry. Dr. Frank indicated that, often, any decline in demand for the molecule form of a drug caused by a decline in promotion after generic entry is offset by an increase in demand resulting from generics' lower price. While Dr. Frank acknowledged at his deposition that the sales of the molecule form of drugs sometimes do decline after market entry, he said that he considered that possibility while conducting his analysis and found it unlikely here, since Allergan's own models predicted a steady increase in total molecule sales after generic entry.

Defendant's argument about this category of so-called uninjured class members is based on speculation and thus insufficient to defeat class certification. *See Amgen*, 568 U.S. at 469–70; *In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 121–22 (2d Cir. 2013).

(6) Potentially Uninjured Third-Party Payors

Defendant argues that individualized inquiries are also required to identify and exclude certain categories of uninjured TPPs.[36] EPPs argue, and I agree, that, even though a percentage of insured consumers would have remained on the brand, there is no sound basis to conclude that any TPP would not have been injured as it would have paid at least one overcharge for Restasis. *In re EpiPen*, 2020 WL 1180550, at *32–34; *In re Loestrin*, 410 F. Supp. 3d at 404−05; *In re Solodyn.*, 2017 WL 4621777, at *18.

Defendant's argument that some TPPs were uninjured because they received rebates from Allergan is also meritless. In *Nexium*, the First Circuit observed that "[t]here is some disagreement as to whether [] rebates are passed-through as a discounted price when the PBMs bill the TPPs or whether TPPs are charged the list price and then refunded a portion based on the rebate amount." 777 F.3d at 28 n.23. If they fall into the latter category, as EPPs contend, then "the rebates are only a damages setoff and do not affect the fact of injury." *Id.*; *accord In re Thalomid and Revlimid*, 2018 WL 6573118, at *14. This is because "antitrust injury occurs the moment the purchaser incurs an overcharge, whether or not that injury is later offset." *In re Nexium*, 777 F.3d at 27.[37]

---

[36] Dr. Frank's assertion that TPPs bore about 90 percent of the class' overcharges is uncontested.

[37] Defendant's reliance on *Minpeco, S.A. v. Conticommodity Servs., Inc.*, 676 F. Supp. 486, 488−90 (S.D.N.Y. 1987), to argue otherwise is not persuasive, as that case holds only that damages offsets should be accounted for in the ultimate assessment of damages, not that the existence of these offsets renders a party uninjured in the first place. The same can be said about *Abrahamson v. Fleschner*, 568 F.2d 862, 878–79 (2d Cir. 1977), another case cited by Allergan, which addressed

If, however, rebates fall into the former category (that is, if they serve to discount the initial price a TPP pays for a prescription), they still do not raise predominance concerns. Dr. Frank has challenged Dr. Hughes's assertion that the rebates offered to certain TPPs must have reduced the price of Restasis so dramatically that the TPPs would have paid more for a generic. Dr. Frank explains that Dr. Hughes relied on an unrealistically high price for generic Restasis in the but-for world. At minimum, "[Dr. Frank's] analysis suffices for purposes of the class certification motion . . . ." *In re Lidoderm*, 2017 WL 679367, at *21; *see In re Solodyn*, 2017 WL 4621777, at *18. Notably, even if Dr. Hughes' price calculations were accurate, a TPP would still have been injured if it paid just one overcharge on a purchase of Restasis. *See In re Solodyn*, 2017 WL 4621777, at *18.

In addition, Allergan asserts that some TPPs who possessed stop-loss insurance may not have been injured and can only be identified through individualized inquiries. But reimbursements from stop-loss insurance are post-injury offsets that are "irrelevant to the question of impact." *In re Thalomid and Revlimid*, 2018 WL 6573118, at *14.

Defendant also argues that a TPP would not suffer injury if, in the but-for world, a patient experienced side effects from generic Restasis, leading to additional medical visits and participation in a costly appeals process to demand coverage for the brand drug. Allergan's argument again is not grounded in the law, as a TPP's payment of a single overcharge renders it injured. *See, e.g.*, *In re Lidoderm*, 2017 WL 679367, at *21. And speculative claims about class members' medical reaction to a non-existent drug cannot defeat class certification. *See, e.g.*, *Amgen*, 568 U.S. at 469–70.

---

the measure of damages under the Investment Advisors Act of 1940. Consistent with these cases, Dr. Frank subtracted rebates from his calculation of TPPs' damages.

Defendant further claims that individualized inquiries are necessary to determine which TPP, among the many potential payors, paid any overcharge. It claims that PBMs (which are excluded from the class) often share in a prescription's cost through their role obtaining rebates from drug manufacturers and sharing these rebates with their TPP customers. Allergan also claims that PBMs offer discount guarantees and price protection to their TPP customers and, in doing so, share with these TPPs the risk of negotiating reimbursement terms and drug price increases.

In response, EPPs have submitted declarations from the PBMs Express Scripts, Inc., OptumRx, Inc., and Prime Therapeutics LLC. The PBMs explain that they are hired to provide various services to assist in the administration of their clients' health plans. Nothing in those declarations suggests that a PBM directly or indirectly pays for its customers' prescription drug purchases. Ms. Craft also credibly and persuasively testified that PBMs serve only as agents for TPPs and do not pay for prescription drugs themselves. Allergan has provided no evidence to refute these representations.

I find that PBMs are not end-payors and, accordingly, their exclusion from the class does not create predominance concerns. *See, e.g.*, *In re Loestrin*, 410 F. Supp. 3d at 405; *In re Thalomid and Revlimid*, 2018 WL 6573118, at *23; *In re Lidoderm*, 2017 WL 679367, at *6–7, *25; *but cf. Vista Healthplan*, 2015 WL 3623005, at *9−13 (finding class unascertainable, in part, because PBMs may share the cost of a prescription); *In re Skelaxin (Metaxaolone) Antitrust Litig.*, 299 F.R.D. 555, 569–77 (E.D. Tenn. 2014) (denying class certification on ascertainability (and several alternative) grounds where plaintiffs' expert suggested that, while PBMs were excluded from the class, they might pay for the cost of some prescriptions); *In re Wellbutrin XL Antitrust Litig.*, 308

F.R.D. 134, 148−51 (E.D. Pa. 2015) (decertifying an end-payor class in part because the plaintiffs did not show that they could "ascertain which PBMs, if any, are members of the class").[38]

To summarize, the existence of a relatively small number of uninjured class members does not preclude a finding of predominance under Rule 23(b)(3).

c) Plaintiffs' Aggregate Damages Proposal

The third and final element of an antitrust claim is damages. *Cordes*, 502 F.3d at 105. EPPs propose that the jury issue an award of aggregate damages that accounts for classwide harm. Their "model is relatively straightforward as aggregate class-wide damages equal the difference between the costs paid by class members for [brand Restasis] in the actual world versus the costs class members would have paid for [generic Restasis] in the 'but-for' world." *In re Flonase*, 284 F.R.D. at 232 (approving similar damages methodology). These damages would then be distributed to injured class members during the claims administration process.

Defendant argues that the need for individualized damages determinations weighs against a finding of predominance. Although a court must consider the fact that damages calculations will be individualized in the predominance analysis, class certification under Rule 23(b)(3) does not require a court to conclude "that damages are capable of measurement on a classwide basis." *Roach v. T.L. Cannon Corp.*, 778 F.3d 401, 402, 405 (2d Cir. 2015). Further, where, as here, the

[38] Dr. Hughes also criticized EPPs' failure to exclude from the class insurers who function in an Administrative Services Only (ASO) capacity. As their name indicates, ASOs solely administer health plans on behalf of a health insurer; they do not pay for the drugs themselves. While Dr. Hughes does not assert otherwise, he claims the contractual relationships between TPPs and ASOs would cause various administrative difficulties, requiring individualized inquiries to determine exactly who is entitled to recoup an overcharge. But Dr. Hughes admitted during his hearing testimony that he had offered no specific case in which a conflict between a TPP and ASO may arise. I trust that, pursuant to the terms of their agreements, ASOs and TPPs will submit proper claims. To the extent they do not, these issues can be addressed during the claims administration process, with the aid of the robust data attached to each pharmaceutical transaction.

legal and factual questions raised by the second element of an antitrust claim are common to the class, "the predominance requirement of Rule 23(b)(3) is likely met." *Cordes*, 502 F.3d at 108.

Here, while the claims administration process will include individualized damages calculations, many of the questions relevant to the damages distribution will be answered through common proof. The entire process depends on the extensive and particularized data created in the pharmaceutical industry that reveals the number of prescriptions purchased by each consumer and how much each end-payor paid for each prescription. These common components will significantly narrow the scope of individualized damages calculations, which will likely involve simple arithmetic. *See In re U.S. Foodservice Inc.*, 729 F.3d at 123 (the measure of overcharge damages in a RICO class action "is straightforward"). Thus, individualized damages calculations "will not qualitatively outweigh the plaintiffs' reliance on common proof." *See In re Air Cargo*, 2014 WL 7882100, at *63.

Defendant also argues that Dr. Frank's damages calculations do not satisfy the Second Circuit's standard for aggregate damages. "'The use of aggregate damages calculations is well established in federal court and implied by the very existence of the class action mechanism itself.'" *Hickory Secs.*, 493 F. App'x at 159 (quoting *In re Pharm. Indus. Average Wholesale Price Litig.*, 582 F.3d 156, 197 (1st Cir. 2009)). The Second Circuit has accepted the use of aggregate classwide damages so long as they "roughly reflect" the harm caused to plaintiffs. *Id.* at 158 (internal quotation marks omitted).

Upon careful scrutiny of Dr. Frank's methodology to calculate classwide damages, I find that it arrives at amounts that, at minimum, "roughly reflect" the harm caused by defendant. *Hickory Secs.*, 493 F. App'x at 158. The result of this methodology would "accurately reflect the number of plaintiffs actually injured by defendant[]" and bear a direct "relationship to the amount

of economic harm actually caused by defendant[]." *Cf. McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 231 (2d Cir. 2008).

To determine overcharges for each of the three categories of class members (TPPs, insured consumers, and cash payors), Dr. Frank determined the monthly average price each category paid for a prescription of Restasis in the actual world and subtracted his predicted but-for price. He then reduced those numbers for TPPs and uninsured consumers according to Xalatan's data. In the case of insured consumers, he used weighted averages from the Kaiser Family Foundation's annual survey regarding generic copay and coinsurance amounts. Dr. Hughes challenges Dr. Frank's use of Xalatan's prices as a yardstick as well as his use of averages to calculate damages. I find Dr. Frank's use of the data he relied upon and his use of averages in this context a reasonable way to measure overcharges. *See In re Air Cargo*, 2014 WL 7882100, at *61−62 (collecting cases in which "courts have permitted the use of averages to calculate overcharges").

Critically, Dr. Frank used Xalatan's monthly generic penetration rate to omit from his damages calculations the prescriptions that would have remained for the brand even after generic entry in the but-for world. He factored these figures in by determining the quantity of prescriptions that were subject to overcharges each month, based on the actual number of Restasis prescriptions, and reducing it by Xalatan's corresponding generic penetration rate. Dr. Frank then multiplied the per-month overcharge by the quantity of generic Restasis that would have been purchased each month and added the monthly totals together.[39]

Dr. Frank adjusted his overcharge totals based on the assumption that Allergan would not have provided rebates to TPPs and coupons to insured consumers in the but-for world. And he

[39] Dr. Frank calculated damages for two different scenarios in the but-for world—one in which generic products replaced prescriptions for Restasis MultiDose (a product Allergan launched in March 2017) and one in which they did not.

eliminated from his damages calculations uninjured entities not in the class—including insured consumers with flat copays, federal and state governmental entities, and fully insured health plans.

These actions ensure that Dr. Frank's aggregate damages formulation does not create substantial danger that defendant would be overpaying. *Cf. McLaughlin*, 522 F.3d at 231 (rejecting aggregate damages calculation that was "likely to result in an astronomical damages figure"); *In re Rail Freight*, 292 F. Supp. 3d at 143–44 (finding plaintiffs' classwide damages model unreliable because it, in part, assessed damages to uninjured class members).

Dr. Frank's methodology is especially appropriate here, where it is impossible to measure the true harm caused by Allergan's alleged conduct. Courts recognize that, "[g]iven the inherent difficulty of identifying a 'but-for world,'" antitrust damages need not "be measured with certainty." *Behrend v. Comcast Corp.*, 655 F.3d 182, 203 (3d Cir. 2011), *rev'd on other grounds*, 569 U.S. 27 (2013). Rather, they must be demonstrated as "a matter of just and reasonable inference, although the result be only approximate." *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931). If plaintiffs cannot prove their damages with precision, "[t]he most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." *Bigelow*, 327 U.S. at 265; *accord Story Parchment Co.*, 282 U.S. at 563; *In re Elec. Books*, 2014 WL 1282293, at *16. For these reasons, the "burden of proving antitrust damages is not as rigorous as in other types of cases." *New York v. Julius Nasso Concrete Corp.*, 202 F.3d 82, 88 (2d Cir. 2000).

Allergan contends that Dr. Frank's damages calculations do not satisfy the demands of *Hickory* because, "[a]s in *Asacol*, the damages here are incremental rather than fixed." Opp. at 35. That Court concluded that "the aggregate damage amount is the sum of damages suffered by a number of individuals, such that proving that the defendant is not liable to a particular individual

. . . reduces the amount of the possible total damage." *In re Asacol*, 907 F.3d at 55. That is not the case here. By removing a percentage of prescriptions from the total damages calculation, EPPs' model is not dependent on any individual class member's actions in the but-for world. If, in the claims administration process, defendant successfully challenges a class member's representation in his or her affidavit that he or she would have purchased generic Restasis, defendant would have identified someone who falls within the percentage of uninjured plaintiffs whose prescriptions were removed from the damages award. While that class member would not recover, the aggregate damages amount would not be affected.

I conclude that EPPs' method to determine and allocate classwide damages is reasonable and will not cause individual issues to predominate.

d) Predominance Concerns Raised by Multiple State Laws

EPPs' claims, under the laws of 31 states and the District of Columbia, arise under 31 antitrust laws, five consumer protection laws, and the unjust enrichment statute of California.[40] The statutes in play, while similar, are not identical. "In a motion for class certification, plaintiff bears the burden of providing an extensive analysis of state law variations to determine whether there are insuperable obstacles to class certification." *Lyon v. Caterpillar, Inc.*, 194 F.R.D. 206, 219 (E.D. Pa. 2000) (internal quotations marks omitted). Therefore, I must determine whether the variations in state case law "swamp" common legal issues and defeat the predominance requirement. *In re Pharm. Indus. Aver. Whol. Price List*, 252 F.R.D. 83, 98 (D. Mass. 2008); *see also In re Polyurethane Foam Antitrust Litig.*, 2015 WL 4459636, at *4 (N.D. Ohio July 21, 2015) ("In the end, the question is not whether the 15 state consumer protection and unfair competition

[40] Defendant categorizes these slightly differently, classifying Missouri's antitrust statute as a consumer protection law, but that does not affect the analysis here.

laws are different—they are—but whether those differences overwhelm common issues."). As the Second Circuit has held, "[v]ariations in state laws do not necessarily prevent a class from satisfying the predominance requirement," so long as "district courts . . . do more than take the plaintiff's word that no material differences exist. . . . Rather district courts themselves must undertake a considered analysis of the differences in state laws." *Langan v. Johnson & Johnson Consumer Cos.*, 897 F.3d 88, 97 (2d Cir. 2018) (citations omitted).

Here, I found insufficient the charts initially offered by EPPs to meet their burden. Therefore, at my direction at oral argument, they submitted additional support for their trial plan. They have now grouped the states' laws according to the various statutes' requirements and drafted proposed questions for the jury that address the differences between these laws.

Plaintiffs contend that a multistate class action is appropriate because the elements of most statutes are substantially similar, any differences fall into predictable patterns that can be separated into tranches, and the court, in charging the jury and providing the jury with an appropriate verdict sheet, will resolve any remaining variations. As to the antitrust statutes, EPPs argue that each state's antitrust statute mirrors the federal antitrust laws, contains a federal harmonization provision, and/or has been interpreted in harmony with federal laws. Except in one regard discussed below and certain issues reserved for summary judgment, *see infra* footnote 41, Allergan does not dispute that this is the case. As a result, plaintiffs argue, a single set of questions on the verdict sheet can be used to resolve questions of Allergan's liability.

With regard to the consumer protection statutes, plaintiffs maintain that they can prove violations of the statutes at issue here—those of Arkansas, California, Colorado, Montana, and Vermont—based on Allergan's allegedly unfair, unconscionable, and/or deceptive conduct through the presentation of common proof. Even so, several of the consumer protection statutes

require additional proof. Specifically, California requires proof that Allergan violated another law, *Korea Supply Co. v. Lockheed Martin Corp.*, 63 P.3d 937, 943 (Cal. 2003); Colorado requires a showing that defendant knowingly made a false representation, Colo. Rev. Stat. § 6-1-105(1)(e); and Vermont requires proof that Allergan's misconduct was likely to affect a consumer's conduct, *Carter v. Gugliuzzi*, 716 A.2d 17, 23 (Vt. 1998). Additionally, as discussed below, multiple states' antitrust and consumer protection statutes have different standards for the imposition of enhanced damages. EPPs argue that the statutes' differences are resolvable through proposed additional jury questions.

Defendant, on the other hand, argues that these differences will predominate over common issues and render adjudication of the class unmanageable. In addition to the issues related to additional proofs identified above, Allergan argues that the antitrust statutes of Florida, Michigan, and Minnesota require a greater showing of individual impact than the other states' antitrust statutes and that the antitrust and consumer protection statutes of Colorado, Illinois, and Montana prohibit class actions entirely. Allergan does not argue that any single issue is determinative, but rather that the cumulative effect of the state law variations defeats predominance.[41]

(1) Choice-of-Law Analysis

Neither side addressed choice-of-law concerns in the initial briefing. I raised the issue at oral argument because "[c]ourts must exercise care in conducting a choice-of-law analysis in a putative Rule 23(b)(3) class action . . . in order to determine whether any conflicts in governing

[41] In its initial briefing, defendant cited more perceived differences between the states' antitrust and consumer protection laws than it raises now. At oral argument and in subsequent briefing, defendant has acknowledged that many of the issues it had raised to defeat class certification are more appropriate for summary judgment. Therefore, I do not address them now.

law will overwhelm the ability of the trier of fact meaningfully to advance the litigation through classwide proof." *Johnson*, 780 F.3d at 141.

At oral argument, EPPs initially stated that their class definition included both purchases of Restasis made by residents of the class states and purchases of Restasis made in the class states by non-residents. In an attempt to avoid possible conflicts of law, EPPs have since limited the class to consumers who purchased Restasis in the class states, regardless of the consumer's state of residence. Defendant responds that plaintiffs have not adequately analyzed the issues and that choice-of-law considerations compound the problems of this multi-state class action.

When deciding matters of state law, a federal court generally must apply the choice-of-law principles of the state in which it sits. *See Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). Adding a layer of complexity, this action is a consolidation of cases filed in this court and cases transferred from California and Texas. In a multidistrict litigation, "the transferee court applies the choice of law rules of the state in which the action first was filed." *In re Rezulin Prods. Liab. Litig.*, 390 F. Supp. 2d 319, 329 (S.D.N.Y. 2005) (citations omitted). Thus, I must apply the choice-of-law rules of California, New York, and Texas to the cases arising therefrom.

Defendant acknowledges that California and New York courts employ variations on the same choice-of-law analysis—the "government interest test"—and it does not genuinely dispute that, under that analysis, the state of purchase provides the appropriate substantive law for consumer class members' claims. *See, e.g.*, *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 594 (9th Cir. 2012) (applying California's choice-of-law rule in determining that "each class member's consumer protection claim should be governed by the consumer protection laws of the jurisdiction in which the transaction took place"); *In re Grand Theft Auto Video Game Consumer Litig.*, 251

F.R.D. 139, 147, 150 (S.D.N.Y. 2008) (applying law of state of purchase under New York and California choice-of-law rules). I agree with this uncontroversial analysis.

I therefore focus on three issues on which the parties disagree: (1) whether the law of a state other than the state of purchase would apply to consumers' purchases under Texas's choice-of-law analysis, (2) whether the law of the state in which a TPP has its principal place of business should apply to its claims, and (3) whether the law of the state to which a consumer's mail-order prescription was delivered should apply to the claims of both consumers and TPPs.

Unlike New York and California, Texas applies the "most significant relationship" test of the Restatement (Second) Conflict of Laws (1971) ("the Restatement"). *Johnson*, 780 F.3d at 145 (citing *Spence v. Glock, Ges.m.b.H.*, 227 F.3d 308, 311–12 (5th Cir. 2000)). The Restatement lists numerous factors to consider when determining which state has the most significant relationship to a case.[42] Restatement § 6(2). The factors vary somewhat in importance from one field of law to another, and additional factors apply when considering tort claims such as those at issue here.[43] *See In re Wellbutrin XL Antitrust Litig.*, 282 F.R.D. 126, 135 (E.D. Pa. 2011) ("'antitrust violations are essentially tortious acts. . . .'") (quoting A*ssociated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 547 (1983) (Marshall, J., dissenting)); *In re Flonase Antitrust Litig.*,

[42] These general factors include: "(a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability, and uniformity of result, and (g) ease in the determination and application of the law to be applied." Restatement § 6(2).

[43] The additional factors applicable to tort cases include: "(a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicile, 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." Restatement § 145. The Restatement further provides that "[t]hese contacts are to be evaluated according to their relative importance with respect to the particular issue." *Id.*

815 F. Supp. 2d 867, 882 (E.D. Pa. 2011) (same). Under this analysis, "[t]he applicable law will usually be the local law of the state where the injury occurred." Restatement §§ 156(2) (addressing the tortious character of the conduct); 158(2) (addressing the interest entitled to legal protection).

Defendant argues that, under the most significant relationship test, the state where the anticompetitive activities occurred, or the states where plaintiffs and defendant are residents, may have the most significant contacts to the case. I disagree. As the court in *Wellbutrin* reasoned in a thorough analysis of the relevant state policies and contacts,

> The place of purchase is where the relationship between the parties is centered; it is where the transaction with the alleged overcharge actually occurs. A place-of-purchase rule protects justified expectations because an in-state transaction will be governed by the antitrust laws and/or consumer protection laws of that state and not by the chance location of the TPP's principal place of business, the location of the TPP's PBM, or an individual purchaser's residence. This approach will also provide consistent results because all purchases within a state will be treated uniformly.

282 F.R.D. at 135. While some of the Restatement's factors favor other states, consideration of the factors as a whole and in the context of this case indicates that a consumer's place of purchase—that is, where he or she was injured by overpaying—has the most significant contacts or relationships with the particular issue. *See id.*; *In re Flonase*, 815 F. Supp. 2d at 882; *In re Relafen Antitrust Litig.*, 221 F.R.D. 260, 277 (D. Ma. 2004).

Johnson v. Nextel Commc'ns, 780 F.3d 128, is relied upon by defendant because it found class members' home states to have the most significant contacts. But *Johnson*'s analysis fully supports plaintiffs' position, not Allergan's. The Second Circuit in *Johnson* found the place of injury of critical importance for tort claims, but, under the wholly different facts in that case, the place of economic injury was the class members' home states. *Id.* at 142–44. Here, the place of injury is the place of purchase. Accordingly, I conclude that, under the choice-of-law analysis of

New York, California, and Texas, the law of the place of purchase applies to each consumer class member's claims.

As to TPP class members, Allergan argues that, under a government interest analysis, the law of the state of a TPP's principal place of business should apply. On the contrary, the law of the TPPs' insured consumer's place of purchase governs the TPPs' claims under the most significant relationship test and the government interest test. Under the government interest analysis, "[i]f conflicting conduct-regulating laws are at issue, the law of the jurisdiction where the tort occurred will generally apply because that jurisdiction has the greatest interest in regulating behavior within its borders." *Cooney v. Osgood Mach., Inc.*, 81 N.Y.2d 66, 72 (N.Y. 1993). Here, the consumer's antitrust injury or consumer protection injury takes place in the state where the drug is purchased, and, without a consumer's purchase in that state, the TPP would not be injured. As a result, under either the government interest test or the most significant interest test, the state that would be most impaired if its laws were not applied, the state with the greatest contacts, and the state with the most significant interest in preventing antitrust and consumer protection violations is the state in which a TPP's insured consumer purchased Restasis.[44] Moreover, this result will provide "certainty, predictability, and uniformity of result," Restatement § 6(2)(f), and promote "ease in the determination and application of the law to be applied." Restatement § 6(2)(g).

[44] *Cf. In re Flonase*, 815 F. Supp. 2d at 882–83 (applying state law of consumers' place of purchase using Pennsylvania's choice of law principles which "require[] an inquiry both into the number and nature of contacts at issue, as set forth in the Restatement (Second) of Conflict of Laws, as well as the policies and governmental interests underlying the issue"); *In re Wellbutrin XL*, 282 F.R.D. at 135 (same); *but see In re K-Dur Antitrust Litig.*, 2008 WL 2660783, at *5 (D.N.J. Mar. 19, 2008) (applying state law of TPPs' principal place of business using government interest analysis); *In re Rezulin*, 392 F. Supp. 2d at 611 n.85 (same).

Finally, the parties disagree as to which state's law governs mail-order prescriptions. Defendant asserts that the law of the state of the consumer's residence should govern, while EPPs argue that, under both the government interest test and the most significant interest test, the law of the state where the drug was delivered (presumably, this generally would be the state of residence) should apply to both consumers and TPPs. I conclude that it is reasonable to treat the place of receipt of mailed drugs as the place of purchase and, therefore, the place of injury. In other words, it is reasonable to treat drugs received by mail-order the same as drugs received at a retail location.

In sum, choice-of-law considerations do not raise issues that defeat predominance.

(2) Proof of Antitrust Impact

Allergan argues that the antitrust laws of Florida, Michigan, and Minnesota require "a somewhat stronger and more precise showing of individual impact" than the laws of the other states at issue, quoting *In re Relafen*, 221 F.R.D. at 282, and *In re Digital Music Antitrust Litig.*, 321 F.R.D. 64, 99 (S.D.N.Y. 2017), which adopts this phrase from *Relafen* without discussion. As a result, defendant argues that the existence of uninjured plaintiffs precludes class certification under Florida, Michigan, and Minnesota antitrust laws.

A careful review of the law in these three states, and of the analysis made by the court in *Relafen*, leads me to a different conclusion—namely, that the requirements for showing individual impact, and also damages, are essentially the same in all of the states under which plaintiffs sue. I discern no heightened standard, explicit or implicit, in the cases upon which *Relafen* relies, and therefore there are no individualized issues regarding these three states.

In *Gordon v. Microsoft Corp.*, 2001 WL 366432, at *4 (D. Minn. March 30, 2001), cited by *Relafen*, 221 F.R.D. at 281, the United States District Court for the District of Minnesota noted the "consistency" with which Minnesota courts had denied certification of indirect purchaser

classes, but, after a close and comprehensive analysis of those cases, certified a class of indirect purchasers of Microsoft products. *Gordon* concluded that denial in the prior cases had been on "narrow grounds rather than pursuant to any general rule." *Id.* In addressing the earlier denials, the *Gordon* court highlighted the individual complexities of determining injury in *Keating v. Philip Morris, Inc.*, 417 N.W.2d 132 (Minn. App. 1987), where cigarette purchasers unsuccessfully sought class certification. 2001 WL 366432, at *5. In *Keating*, the complicated chain of distribution, and the likely unavailability of purchase records—two issues entirely absent here—made individualized issues predominant and made the proposed class unmanageable.[45] 417 N.W.2D at 137. The court in *Gordon* also expressly found that plaintiffs need not "*prove* class-wide fact of injury or individual damages at the class certification stage," but only a viable method for doing so. 2001 WL 366432, at *7 (emphasis in original).

Turning to Michigan, although its statute requires proof of "actual damages," Mich. Comp. Laws Ann. § 445.778(2), that language, as interpreted by Michigan courts, does not require a showing of damages inconsistent with that proposed by EPPs here. *Ren v. Philip Morris Inc.*, 2002 WL 1839983 (Mich. Cir. Ct. June 11, 2002), which was not cited by *Relafen*, but is relied upon by Allergan, is particularly instructive. The *Ren* court found that "common issues of law or fact would likely predominate relative to the issue of the existence of injury in fact" despite the plaintiffs' expert's inability to "show that each and every member of the class was necessarily subjected to paying an illegal overcharge and hence was impacted." *Id.* at *11. This, the court held, was because the "inability to show injury as to a few does not defeat class certification where the plaintiffs can show widespread injury to the class." *Id.* (quoting *In re Cardizem CD Antitrust*

[45] The facts in *Ludke v. Philip Morris Cos.*, 2001 WL 1673791 (Minn. Dist. Ct. Nov. 21, 2001), relied upon by *Relafen*, were similar to those in *Keating*.

Litig., 200 FRD 297, 321 (E.D. Mich. 2001)). While the court in *Ren* rejected a class that sought to aggregate damages and then "simply award[ ] each member of the class the average of the class wide damages," it observed that an end-payor class "might not founder on the issue of computation of individual damages . . . where the number of purchasers of the product are readily identifiable and reliable records for individual purchases exist." *Id.* at *15–16. That, of course, is the situation here.

Finally, the law in Florida also does not support a heightened standard. For example, in *Execu-Tech Business v. Appleton Papers*, 743 So. 2d 19 (Fla. App. 4 Dist. 1999), cited by *Relafen*, the appellate court upheld the trial court's denial of certification of an end-payor class where the trial court had rejected the plaintiffs' expert evidence and had concluded that there was no reasonable methodology for generalized proof of classwide impact and damages. Thus, while the court acknowledged its skepticism of end-payor classes, its holding was based upon the lack of sufficient evidence needed to avoid individual inquiries.

As *Relafen* also noted, a different Florida court had certified an end-payor class where, in contrast to *Execu-Tech*, the plaintiffs' expert economists had "identified methodologies for demonstrating the individual impact of" the defendants' behavior. *In re Relafen*, 221 F.R.D. at 281 (citing *In re Fla. Microsoft Antitrust Litig.*, 2002 WL 31423620, at *11 (Fla. Cir. Ct. Aug. 26, 2002)). The *Florida Microsoft* court held that Microsoft's claim that some class members were not harmed and may even have benefitted from its conduct presented, at most, matters of fact for the jury, and did not impact class certification. Perhaps most significantly, in a case decided since *Relafen*, a Florida appellate court has expressly accepted that uninjured class members do not automatically preclude class certification in end-payor class actions. *Miami-Dade Expressway v. Tropical*, 250 So.3d 751 (Fla. App. 3 Dist. 2018).

Rollins, Inc. v. Butland, 951 So. 2d 860, 866 (Fla. Dist. Ct. App. 2006), upon which Allergan relies, is not to the contrary. The court there refused to allow the plaintiffs to demonstrate classwide impact merely through a "pattern and practice" of deception. *Id.* at 873. It found that such a method would insufficiently show that class members were impacted by the same misconduct and therefore, in violation of due process, the defendants would be denied their ability to defend against the claims. No such issue exists here.

In sum, the laws in these three states, like the laws of the other states at issue, permit the use of EPPs' methodologies to determine classwide impact and damages and to cull before judgment any uninjured class members.[46]

(3) Vermont

EPPs bring a claim of deception against Allergan under Vermont's Consumer Protection Act, Vt. Stat. Ann. Tit. 9 §§ 2453 *et seq.*, which requires, in addition to elements common to the other consumer protection claims, that the claimed deception "must be material, that is, likely to affect the consumer's conduct or decision regarding the product." *Carter*, 716 A.2d at 23. To address this, plaintiffs' proposed verdict form includes a question asking if "Allergan's deceptive misconduct was likely to affect the consumer's conduct or decision regarding Restasis." Allergan argues that the inclusion of Vermont's deception claim greatly increases the difficulty of managing a certified class.

[46] It is also worth noting that many courts have certified end-payor classes containing claims under the laws of Minnesota, Michigan, and/or Florida without any discussion of a higher standard of individual impact. *See, e.g.*, *Hosp. Auth. of Metro. Gov't of Nashville and Davidson County, Tenn. v. Momenta Pharmaceuticals, Inc.*, 2019 WL 4573433 (M.D. Tenn. Sept. 20, 2019); *In re Lidoderm*, 2017 WL 679367; *In re Terazosin Hydrochloride*, 220 F.R.D. 672 (S.D. Fla. 2004). Indeed, in *In re Nexium*, 297 F.R.D. at 175, the very judge who wrote the decision in *Relafen*, did precisely that.

To the extent defendant argues, as it did in a withdrawn motion to dismiss, that Vermont's statute requires consumer-facing conduct and that EPPs are unable to meet that burden, this argument must be saved for summary judgment. If, however, Allergan is asserting that the inclusion of the additional jury question makes the case unmanageable, I am unpersuaded. Adding this question, and an appropriate jury charge, would not be onerous, and obtaining a common answer would not defeat the predominance of the common issues. Indeed, I accept plaintiffs' representation that they would use the same proof to answer this question as they would all others. I therefore find that the inclusion of EPPs' claims under Vermont law does not defeat predominance.

(4) Scienter – Arkansas & Colorado

Defendant argues that the consumer protection statutes of Arkansas and Colorado require a showing of scienter, rendering the class unmanageable because "there would have to be a separate phase of trial or a unique set of jury instructions in order for the jury to determine what scienter was required." Opp. at 38–39. Though Allergan acknowledged at oral argument that the court would determine the level of scienter that is required and instruct the jury to apply it to the facts, it still argues that including states with a scienter requirement would cause individual issues in those states to predominate.

The parties agree that EPPs' claim, pursuant to the catch-all provision of the Arkansas Deceptive Trade Practices Act, Ark. Code Ann. § 4-88-107(a)(10), does not contain a scienter requirement. Allergan argues, however, that plaintiffs' patent-related allegations fall more appropriately under a different subsection of the same statute, which prohibits "[k]nowingly making a false representation as to the characteristics, ingredients, uses, benefits, alterations, source, sponsorship, approval, or certification of goods or services or as to whether goods are

original or new or of a particular standard, quality, grade, style, or model." Ark. Code Ann. § 4-88-107(a)(1). Defendant argues that EPPs' Arkansas claim therefore requires a different standard for scienter than the other class claims, contributing to the overall complexity of jury instructions.

As an initial matter, because EPPs bring their claim under only the catch-all provision, defendant's argument is, in essence, a motion to dismiss that claim and is inappropriately raised in opposition to class certification. *See Amgen*, 568 U.S. at 466. And, even if defendant ultimately manages to transform EPPs' current Arkansas claim into one under subsection (a)(1), the inclusion of a single jury question as to whether defendant possessed the requisite scienter would not defeat predominance. *See In re Pharm. Indus. Aver. Whol. Price List*, 252 F.R.D. at 100 ("In the context of plaintiffs' theory in this case, the varying standards governing a defendant's scienter do not pose insuperable management issues because the Court can ask the jury specific questions. . . .").

The same analysis applies to the Colorado statute under which plaintiffs sue, which requires a showing that defendant "knowingly" made a false representation. Colo. Rev. Stat. § 6-1-105(1)(e).

In sum, the need for a jury to determine scienter under one or two statutes does not defeat predominance or render the class unmanageable.

(5) Enhanced Damages

Defendant raises concerns regarding the availability of enhanced damages, whether treble or punitive, under some states' antitrust and consumer protection statutes. At oral argument, it conceded that this issue "is not important by itself" and that it has pressed the issue only because it "adds to the manageability." Oral Arg. Tr. at 165.

EPPs propose three questions to account for states that require an additional finding for an award of enhanced damages. The inclusion of these questions, even when added to the other

questions regarding liability and damages, does not cause individual issues to predominate or render the class unmanageable.

(6) State Law Bans on Class Actions

Allergan also argues that Colorado, Illinois, and Montana ban class actions, precluding certification of a class that includes those states' claims. *See* 740 Ill. Comp. Stat. § 10/7(2); Mont. Code Ann. § 30-14-133(1); Colo. Rev. Stat. § 6-1-113(2). Having carefully reviewed the parties' supplemental papers, I find that this issue is a legal question common to all class members within each state. Whether the statutes of Colorado, Illinois, and Montana bar recovery through a class action is more appropriately resolved on summary judgment; my decision on these questions is unnecessary for the purposes of class certification. *See Amgen*, 568 U.S. at 466. For efficiency's sake, I will rely on the parties' current briefing on these questions when I consider defendant's forthcoming summary judgment motion.

In conclusion, EPPs have met their burden of demonstrating, through an extensive analysis of state law variations, that class certification does not present insuperable obstacles. None of the issues raised by Allergan is alone so material as to prevent certification. Even when taken together, the differences cited by Allergan address factual and legal questions common to the entire class, or discrete subsections thereof; are remediable by additional questions to the jury; and/or are more appropriately raised on summary judgment.

2. Superiority

Rule 23(b)(3) permits class certification only where "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." The Rule provides a list of factors to be considered in this assessment:

> (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)(A)−(D).

EPPs have shown that litigating this case as a class is superior to other methods of adjudication. None of the factors listed in Rule 23(b)(3) counsels against certification. First, since the class contains thousands of TPPs, some with relatively small claims, and at least one million consumers, "proceeding individually would be prohibitive," not advantageous, for the majority of class members. *See Seijas*, 606 F.3d at 58. Thus, "substituting a single class action for numerous trials in a matter involving substantial common legal issues and factual issues susceptible to generalized proof will achieve significant economies of 'time, effort and expense, and promote uniformity of decision.'" *In re U.S. Foodservice Inc.*, 729 F.3d at 130−31 (quoting Fed. R. Civ. P. 23 advisory committee's notes).

Second, the only cases brought by or against class members regarding this controversy are pending before me. Third, I do not see any reason why this litigation cannot remain concentrated in this court. Plaintiffs have effectively litigated these actions before me, and defendant has not argued that they cannot continue to do so. Finally, no one has a greater interest than I do in ensuring that this class action is manageable before certifying it. Based on my familiarity with the case, I am confident that this litigation can be managed as a class action.

Defendant makes two arguments against a finding of superiority. It first relies on its assertions, raised in the context of predominance, regarding the need for individualized inquiries.

As set forth above, the individualized determinations required by this class action are relatively minimal. They do not make this class action unmanageable or inappropriate.

Nor am I persuaded by defendant's second argument, that the mere possibility of a *parens patriae* action in an antitrust case renders a class action an inferior mechanism to resolve EPPs' claim. *See Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 266 (1972). This is especially true where the Federal Trade Commission ("FTC") and New York Attorney General chose not to bring such an action against Allergan regarding Restasis. *See Bryan v. Amrep Corp.*, 429 F. Supp. 313, 318−19 (S.D.N.Y. 1977) ("The possibility that the FTC may at some future time secure refunds for the class is not an adequate reason to deny a class determination in this case, which seeks present and independent relief.").

C. Ascertainability

In the Second Circuit, the ascertainability doctrine "requires only that a class be defined using objective criteria that establish a membership with definite boundaries." *In re Petrobras*, 862 F.3d at 264. As defendant does not contest, that "modest threshold" is easily met here. *See id.* at 269. The class is objectively defined as consisting of any person or entity who purchased Restasis not for resale in specific states during a discrete period. *See In re Solodyn*, 2017 WL 4621777, at *13−14.

V. APPOINTING CLASS COUNSEL AND CLASS REPRESENTATIVES

Rule 23(g) requires me to appoint class counsel at the time of certification. In doing so, I must consider

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class.

Fed. R. Civ. P. 23(g)(1)(A)(i)–(iv).

EPPs' current interim counsel seek appointment as class counsel. As discussed above in the context of Rule 23(a)(4)'s adequacy requirement, it is undisputed that these lawyers satisfy the requirements of Rule 23(g)(1)(A). I carefully reviewed the qualifications, experience, and resources of these attorneys when I appointed them to their interim roles, and the attorneys' work since then, including on this motion, serves as further assurance that they are extremely qualified and able to represent the certified class. I have no hesitation that these lawyers will "fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(4). Therefore, Girard Sharp LLP, Lieff Cabraser Heimann & Bernstein, LLP, and Joseph Saveri Law Firm, Inc. are appointed as co-lead counsel for class plaintiffs, and Zwerling, Schachter & Zwerling, LLP is appointed as liaison counsel for the class.

Additionally, 1199SEIU National Benefit Fund; 1199SEIU Greater New York Benefit Fund; 1199SEIU National Benefit Fund for Home Care Workers; 1199SEIU Licensed Practical Nurses Welfare Fund; American Federation of State, County, and Municipal Employees District Council 37 Health and Security Plan; Fraternal Order of Police, Miami Lodge 20, Insurance Trust Fund; Ironworkers Local 383 Health Care Plan; Self-Insured Schools of California; Sergeants Benevolent Association Health & Welfare Fund; St. Paul Electrical Workers' Health Plan; and United Food and Commercial Workers Unions and Employers Midwest Health Benefits Fund are appointed as class representatives.

VI. CONCLUSION

Plaintiffs' motion for class certification is granted. The class is defined as:

> All persons or entities who indirectly purchased, paid and/or provided reimbursement for some or all of the purchase price for Restasis, other than for resale, who made their purchases in Arizona, Arkansas, California, Colorado, the District of Columbia, Florida, Hawaii, Illinois, Iowa, Kansas, Maine*, Massachusetts*, Michigan, Minnesota, Mississippi, Missouri*, Montana*, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oregon, Rhode Island, South Dakota, Tennessee, Utah, Vermont*, West Virginia, and Wisconsin from May 1, 2015, through the present (in the case of Arkansas only, July 31, 2017), for consumption by themselves, their families, or their members, employees, insureds, participants, or beneficiaries.

In the states marked with an asterisk, class members are only consumers, not TPPs.

Excluded from the class are:

> Allergan, its officers, directors, employees, subsidiaries, and affiliates; all federal and state government entities except for cities, towns, municipalities, or counties with self-funded prescription drug plans; all persons or entities who purchased Restasis for purposes of resale or directly from Allergan of its affiliates; fully insured health plans, *i.e.*, plans that purchased insurance covering 100 percent of their reimbursement obligations to members; any "flat copay" consumers who purchased Restasis only via a fixed dollar copayment that does not vary on the basis of the drug's status as brand or generic; PBMs; and all judges assigned to this case and their chambers staff and any members of the judges' or chambers staff's immediate families.

When a court certifies a Rule 23(b)(3) class, Rule 23(c)(2)(B) provides that "the court must direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Plaintiffs are directed to submit to the court a proposed plan for notice to class members, which should include a proposed form of notice.

SO ORDERED.

Dated: May 5, 2020
Brooklyn, New York

/S/
NINA GERSHON
United States District Judge