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13 UNITED STATES DISTRICT COURT  
14 NORTHERN DISTRICT OF CALIFORNIA  
15 OAKLAND DIVISION

16 CHRISTOPHER CORCORAN, et al.,

17 Plaintiffs,

18 v.

19 CVS PHARMACY, INC.,

20 Defendants.

No. 15–CV–03504–YGR

CLASS ACTION

**CVS PHARMACY, INC.’S NOTICE OF  
MOTION AND MOTION TO STRIKE  
NEW OPINIONS OF DR. KENNETH  
SCHAFERMEYER; MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT THEREOF**

21 Date: May 4, 2021

22 Time: 2:00 p.m.

23 Courtroom: 1

24 Judge: Honorable Yvonne Gonzalez Rogers  
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**NOTICE OF MOTION AND MOTION**

**TO: THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:**

PLEASE TAKE NOTICE that on May 4, 2021, at 2:00 PM, or as soon thereafter as this matter may be heard, in Courtroom 1, 4th Floor, of this Court, located at 1301 Clay Street, Oakland, California 94612, Defendant CVS Pharmacy, Inc. (“CVS”) will and hereby does move the Court to strike new opinions of Plaintiffs’ expert witness, Dr. Kenneth Schafermeyer.

This Motion is made pursuant to Federal Rules of Civil Procedure 26 and 37(b), as well as this Court’s inherent power to manage trial proceedings, *Navallier v. Sletten*, 262 F.3d 923, 941-42 (9th Cir. 2001), on the grounds that Plaintiffs have violated the Court’s order concerning Dr. Schafermeyer’s substitution for their prior expert, Dr. Hay (Dkt. No. 471).

CVS’s Motion is based upon this Notice, the accompanying Memorandum of Points and Authorities, the declaration and exhibits attached hereto, any reply memorandum, the orders, pleadings, and files in this action, and such other matters as may be presented at or before the hearing.

Dated: March 30, 2021

Respectfully submitted,

By: /s/ Andrew C. Watts  
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**STATEMENT OF ISSUES TO BE DECIDED**

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1. Whether the Court should strike Dr. Schafermeyer’s new opinion concerning an industry definition of “usual and customary price,” which violates the Court’s February 11, 2021 Order (Dkt. No. 471) because it modifies and contradicts opinions that Dr. Hay previously offered.

2. Whether the Court should strike Dr. Schafermeyer’s new opinion concerning an industry definition of “cash transaction,” which violates the Court’s February 11, 2021 Order (Dkt. No. 471) because it modifies and contradicts opinions that Dr. Hay previously offered.

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## MEMORANDUM OF POINTS AND AUTHORITIES

On January 19, 2021, more than four years after the close of discovery, Plaintiffs moved for leave to substitute Dr. Kenneth Schafermeyer for Plaintiffs' prior expert, Dr. Joel Hay, because of Dr. Hay's "debatable and divisive positions on COVID-19." Dkt. No. 468 at 1. The Court granted Plaintiffs' motion but, recognizing the extreme prejudice to CVS if Dr. Schafermeyer were permitted to introduce new opinions at this stage of the litigation,<sup>1</sup> limited Dr. Schafermeyer to only those opinions previously offered by Dr. Hay:

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Dr. Schafermeyer may not issue a new report but *may only adopt or reject opinions and/or statements* in Dr. Hay's three prior declarations and two expert reports. Dr. Schafermeyer shall take such declarations and reports, and *by using a strikethrough function*, identify those statements/opinions with which he does not agree. Those documents shall be served, and filed, by March 1, 2021.

Dkt. No. 471 at 3 (emphasis added).

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On March 1, 2021, Plaintiffs served redlined versions of two reports and three declarations from Dr. Hay. Despite the Court's order limiting him to striking-through Dr. Hay's statements, Dr. Schafermeyer added "bubble comments" to certain redlines, including the following:

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Dr. Hay's December 9, 2016 Report: In the pharmacy context, Usual & Customary (U&C) price is the cash price for which a drug is ~~sold~~.

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Associated Bubble Comment: To be more accurate, I would change the word "sold" to "offered for sale to cash paying customers (i.e., those paying without insurance)." I am not disagreeing with the previous expert; I am simplying [sic] being more precise.

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Dkt. No. 473-3, ¶ 37.

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On Sunday, March 14, 2021, two weeks *after* the Court-ordered deadline and the night before CVS's deposition of Dr. Schafermeyer, Plaintiffs served CVS with Dr. Schafermeyer's "Notes Regarding Previous Expert's Reports and Declarations," which, among other things, included a new definition of "cash transaction"—i.e., the type of transaction that Dr. Schafermeyer

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<sup>1</sup> Dkt. No. 471 at 2 ("[T]he Court can understand plaintiffs' concern but that concern cannot extricate Dr. Hay from the opinions which he, through his experiences and personal evaluation, created, and on which plaintiffs have knowingly based their case. Nor can they retreat therefrom at the eleventh hour.").

1 claims must be submitted as a usual and customary price. Dr. Schafermeyer’s “Note” concerning  
2 “cash transactions” referred to—and modified—a portion of Dr. Hay’s December 9, 2016 report.

3 The relevant portion of the report and “Note” are as follows:

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5 Dr. Hay’s December 9, 2016 Report: I understand that CVS created the “Health  
6 Savings Pass” (“HSP”) program to remain competitive in the face of similar  
7 standardized generic pricing programs from other national pharmacy retail chains  
8 such as Walmart and Kmart. The HSP program allowed cash-paying patients to  
9 purchase generic prescriptions for competitive prices (e.g., \$9.99 for a 90-day  
10 prescription for most drugs from November 2008 through 2010, and \$11.99 for a  
11 90-day prescription for most drugs in the program from 2011 until CVS  
12 discontinued the program in February 2016). According to Plaintiffs’ allegations,  
13 rather than recognizing that the HSP price should be included in its determination  
14 of the U&C price for drugs available under the program, CVS charged insured  
15 patients inflated prices based on an artificial and inflated U&C price.

16 Dr. Schafermeyer’s Accompanying “Note”: **More correctly:** CVS needed to offer  
17 discounted cash prices to remain competitive but HSP was not necessary to do so.  
18 According to Mr. Thomas Morrison (CVS retired Vice President for Payer  
19 Relations and Business Development): “I had to come up with a pricing structure  
20 . . . that did not impact my insured contracts. That was a show stopper.” [Morrison  
21 depo, 141:29–142:2]. HSP, therefore, was designed to offer discounts to **cash**  
22 **customers (i.e., those not being used with insurance)** but avoid representing them  
23 as U&C. See also, Sep. 21, 2008, *New Health Savings Pass Pharmacy Team*  
24 *Huddle Guide*. “[HSP] [c]annot be used in conjunction with prescription  
25 insurance.” [CVSC-0001803]. **Rxs are either cash or insurance; this is not**  
26 **insurance.**

27 Dkt. No. 479-1, Row 7 (emphasis added).

28 At his March 15, 2021 deposition, Dr. Schafermeyer made clear that, despite the express  
terms of this Court’s order, he did not intend to limit his testimony at trial to the statements in Dr.  
Hay’s reports and declarations.<sup>2</sup> He also doubled down on the two new opinions he had offered  
in his bubble comments and “Notes.”

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<sup>2</sup> Mar. 15, 2021 Deposition of Dr. Kenneth Schafermeyer (attached as Exhibit 1) at 68:2-10:

Q: Apart from the red-lined [reports and declarations], where would you suggest CVS go  
if it wants to read any opinions you’re offering in this case?

A: Well, if I wrote a report, I would suggest they look at the report, but that’s not an  
option. I don’t know where they would go. I think they would have you ask me  
questions during deposition.

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- First, Dr. Schafermeyer confirmed that, in his opinion, a pharmacy’s U&C price is *not* governed by the price a pharmacy *actually charges*, as Dr. Hay had opined, but instead by the price that a pharmacy “offers.” He testified: “Usual and customary is the lowest price *offered* to customers in an uninsured transaction.” Exhibit 1 at 197:12–198:11 (emphasis added). He continued: “[I]f we offer HSP prices to customers . . . throughout the class period then those could be represented as the price ceiling for usual and customary. *It doesn’t matter whether they were paid or not. They were offered. That’s the key point.*” *Id.* at 287:14–288:7 (emphasis added).
  - Second, Dr. Schafermeyer also stood firm on his new definition of a “cash transaction”—i.e., the transactions (or “offers”) that are relevant to determining the usual and customary price: “So prescriptions can either be insurance or noninsurance or cash, same thing. Third-party discount cards are not insurance. In fact, they even say it on the card: This is not insurance. Those are cash transactions.” *Id.* at 57:19–58:22.

17 Dr. Schafermeyer’s opinions as to the purported industry definitions of U&C and “cash”  
18 are not only new, but fundamentally conflict with and change the opinions which Dr. Hay  
19 previously offered and on which Plaintiffs previously based their theory:

20 ***U&C Definition:*** From the inception of this case, Plaintiffs have alleged that CVS should  
21 have submitted its HSP program price as its U&C price because, “under industry standards and  
22 CVS’s own definition,” the U&C price is “the most common price paid by CVS’s cash-paying  
23 customers.” Third Amended Complaint (Dkt. No. 101), ¶ 70. *See also* Plaintiffs’ Opening Appeal  
24 Brief (attached as Exhibit 2) at 2 (“For years, CVS excluded from its usual and customary prices  
25 the *most common* and customary cash prices *it actually charged* to the general public through its  
26 program.” (emphasis added)). Dr. Hay concurred, opining that the HSP price fell within the  
27 purported industry definition of U&C because “the HSP prices themselves are the single most  
28 common cash prices appearing in the transaction data as many as 52 times more than the next most

1 common cash prices.” Dec. 9, 2016 Report of Dr. Joel Hay (Dkt. 474-1), ¶ 10. *See also id.* ¶ 40  
2 (“A U&C price based on CVS’s HSP price is the appropriate U&C price” because HSP “is the  
3 most common cash price for the covered drugs”); Oct. 3, 2016 Decl. of Dr. Joel Hay (Dkt. No.  
4 172-6), ¶ 39 (“For a pharmacy to submit U&C prices to TPPs and PBMs that are not routinely paid  
5 by cash customers, much less not paid at all, is contrary to the industry standard of a U&C price  
6 and the concept of the U&C fee screen.”). But Dr. Schafermeyer’s opinion would eschew this  
7 purported industry standard—and all of Dr. Hay’s “most common” calculations upon which  
8 Plaintiffs previously relied—in favor of a new industry standard that completely ignores the prices  
9 a pharmacy *actually charges* in favor of the price the pharmacy “*offers*.”

10 “**Cash**” **Transactions**: Dr. Schafermeyer’s definition of a “cash” transaction—i.e., any  
11 transaction other than an insured transaction—is also new and directly contradicts Dr. Hay’s  
12 definition. In his opinions and calculations, Dr. Hay defined a “cash” customer to mean a patient  
13 who purchased a prescription at CVS without using *any form* of prescription benefit, not just  
14 someone who purchased the prescription without insurance. Dr. Hay’s definition of “cash  
15 transactions” thus excluded, among other things, purchases using cash discount cards (i.e., AARP  
16 cards or GoodRx). *See, e.g.*, Nov. 9, 2016 Dep. of Dr. Joel Hay (attached as Exhibit 3) at 27:2-16  
17 (“[T]he algorithm I applied was to look at whether or not those transactions were, indeed, paid for  
18 out of pocket without benefit of insurance and without any discount cards or anything else other  
19 than cash.”); Mar. 17, 2017 Dep. of Dr. Joel Hay (attached as Exhibit 4) at 33:1-12 (“Q: Is a non-  
20 cash transaction synonymous with a purchase using insurance? A: Well, I think it – it includes  
21 transactions purchases using insurance. I can’t think of anything besides that, but I – I suppose it  
22 could also include purchases that are bought with other discount programs. There may be some  
23 other examples as well. Q: Are you referring to like cash discount cards? A: Yeah. Things like  
24 union discount cards, things of that nature.”); Dkt. No. 474-3 at Exhibit C, ¶ 8 (identifying cash  
25 discount cards as a distinct “type of purchase” separate and apart from “cash transactions” or “third  
26 party payor purchases”). But Dr. Schafermeyer’s definition of “cash” expressly *includes* cash  
27 discount cards—and any other “non-insurance” transactions—thereby (1) changing the types of  
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1 transactions CVS allegedly should have considered in submitting its U&C price to Plaintiffs’  
 2 PBMs, and (2) invalidating all of the “cash”-based calculations previously offered by Dr. Hay (and  
 3 rebutted by CVS’s expert, Brett Barlag).

4 In sum, Dr. Schafermeyer’s two new opinions fundamentally change Plaintiffs’ theory as  
 5 to why CVS allegedly should have submitted HSP as its U&C price. If permitted, Dr.  
 6 Schafermeyer’s new theories would allow Plaintiffs to modify their expert opinions at the eleventh  
 7 hour in response to CVS’s successful criticisms of Dr. Hay’s prior opinions. Dr. Schafermeyer’s  
 8 opinions also would render irrelevant and erroneous *all* of Dr. Hay’s “cash”-based calculations,  
 9 and Mr. Barlag’s rebuttal calculations which demonstrated that HSP was not, in fact, the most  
 10 common price charged by CVS.

#### 11 LEGAL STANDARD

12 “District courts have broad discretion to manage discovery and to control the course of  
 13 litigation under Federal Rule of Civil Procedure 16.” *Hunt v. Cty. of Orange*, 672 F.3d 606, 616  
 14 (9th Cir. 2012) (internal citation omitted). This includes the “discretion to fashion remedies for  
 15 the violation of its discovery orders.” *United States v. Spillone*, 879 F.2d 514, 522 (9th Cir. 1989).

#### 16 ARGUMENT

17 The Court should strike Dr. Schafermeyer’s two new opinions—(1) that the U&C price is  
 18 the lowest price that CVS “offered,” and (2) that “cash” transaction means any type of transaction  
 19 that does not use insurance.

20 1. These new opinions squarely violate this Court’s Order setting the conditions on  
 21 Plaintiffs’ ability to designate Dr. Schafermeyer as a testifying expert years after the close of  
 22 discovery. To effectuate the Court’s requirement that Dr. Schafermeyer “*may only adopt or*  
 23 *reject*” Dr. Hay’s prior opinions, and not offer new ones, the Order required Dr. Schafermeyer, by  
 24 March 1, 2021, to “take [Dr. Hay’s] declarations and reports, and by using a strikethrough function,  
 25 identify those statements/opinions with which he does not agree.” Dkt. No. 471 at 3 (emphasis  
 26 added). The Court did not authorize Dr. Schafermeyer to offer new definitions of U&C and “cash”  
 27 transactions—whether through the use of “bubble comments,” “notes,” or otherwise. On the  
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1 contrary, the Court expressly forbade that when it instructed that Dr. Schafermeyer “*may only*  
2 *adopt or reject*” – i.e., he may not add or modify. *See Guinnane v. Dobbins*, 479 F. Supp. 3d 989,  
3 996 n.5 (D. Mont. 2020) (requiring strict compliance because “Enterprise has demonstrated that if  
4 given an inch, it will take a mile”).

5 2. Dr. Schafermeyer claimed to be “clarifying” Dr. Hay’s opinions, but (even  
6 assuming arguendo this Court’s Order had allowed such clarifications), that is a gross  
7 mischaracterization of what Dr. Schafermeyer did.

8 a. Regarding “*usual & customary price*,” Dr. Hay had opined that a purported  
9 industry standard required CVS to submit as its U&C price the “most common” price that it  
10 actually charged to “cash” customers. Dr. Schafermeyer, however, intends to tell the jury that the  
11 most commonly charged price is completely irrelevant and that U&C is determined not by the  
12 prices that a pharmacy actually charges “cash” customers but instead by the lowest price that a  
13 pharmacy “offers.” Exhibit 1 at 258:23–259:9 (Q: “If CVS operated the [HSP] program and  
14 therefore made the price available, even if no customers ever enrolled in it, it still would be CVS’s  
15 usual and customary price, correct?” A: “. . . I would stand by the fact if CVS offered it and that  
16 was available to customers then that would be usual and customary.”). *See also id.* at 287:14–  
17 288:7 (“It doesn’t matter whether [HSP prices] were paid or not. They were offered. That’s the  
18 key point.”).

19 b. Dr. Schafermeyer’s new definition of “*cash transaction*” similarly seeks to  
20 redefine which prescription purchases are relevant to calculating a pharmacy’s U&C price. Dr.  
21 Schafermeyer intends to tell the jury that a “long-held industry perspective” dictates that a “cash  
22 transaction” means all prescription purchases other than those using third-party insurance. Exhibit  
23 1 at 106:12–107:22. This definition of “cash”—i.e., anything and everything other than  
24 insurance—not only contradicts Dr. Hay’s opinion as to what constitutes a “cash” transaction—  
25 i.e., not cash discount transactions—but also undermines all of Dr. Hay’s “cash”-based  
26 calculations. The Court should not permit Plaintiffs to smuggle in new opinions on these  
27 fundamental issues years after the close of fact discovery under the guise of substitution. Indeed,  
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1 courts routinely cull opinions offered by “substitute” experts that extend beyond those offered by  
2 the original expert. *See, e.g., Vedros v. Northrop Grumman Shipbuilding, Inc.*, 2015 WL 4042123,  
3 at \*2 (E.D. La. July 1, 2015) (striking expert opinions that exceeded bounds of prior expert’s  
4 testimony because “[t]he decision to allow a substitute expert to testify was based on the  
5 understanding that the substitute report and testimony would not go beyond the original expert’s  
6 report”).

7 3. Dr. Schafermeyer’s new opinions severely compound the prejudice to CVS from  
8 Plaintiffs’ substitution of a new expert at this stage in the litigation. The parties spent the better  
9 part of the last five years litigating whether HSP prices were the “most common” prices that CVS  
10 charged during the class period, and Plaintiffs relied on Dr. Hay’s “most common” opinion in  
11 convincing the Ninth Circuit to reverse this Court’s summary judgment order. Exhibit 2 at 2 (“For  
12 years, CVS excluded from its usual and customary prices the *most common* and customary cash  
13 prices *it actually charged* to the general public through its program.” (emphasis added)). The  
14 parties’ dispute was based both on Dr. Hay’s definition of “usual and customary” as the “most  
15 common” price and on Dr. Hay’s opinion that a “cash” transaction did not include cash discount  
16 cards. Because that was Plaintiffs’ articulated theory, CVS’s expert Brett Barlag performed dozens  
17 of calculations to demonstrate that the HSP prices were not, in fact, the “most common” prices  
18 CVS charged and that CVS submitted as its U&C price the price it actually charged in “cash  
19 transactions” as Dr. Hay defined that term. *See, e.g., Dec. 9, 2016 Expert Report of Brett E. Barlag*  
20 (Dkt. No. 287-6), ¶ 91 (“In this way, Dr. Hay can say ‘the HSP prices of \$11.99 and \$9.99 are  
21 greater than 44 times and 52 times more common than the second most common prices,’ even  
22 though HSP purchases represent only 0.67% of all CVS’s purchases for HSP-eligible drugs”); Jan  
23 27, 2017 Rebuttal Report of Brett E. Barlag (Dkt. No. 287-13), ¶ 40 (“In other words, using Dr.  
24 Hay’s own numbers, the U&Cs submitted to PBMs and TPPs *are* paid by Cash customers 98.39%  
25 of the time.” (emphasis in original)).

26 Dr. Schafermeyer’s new opinions are a brazen attempt to extricate Plaintiffs from Dr. Hay’s  
27 flawed opinions and Mr. Barlag’s rebuttals. Worse yet, because the parties have never litigated  
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1 Dr. Schafermeyer's new and different definitions of "usual and customary" and "cash transaction,"  
2 CVS has not had the opportunity to marshal evidence contradicting his opinions. Nor will CVS  
3 have the opportunity before trial to re-run all of the various analyses performed by Dr. Hay and  
4 Mr. Barlag to include the roughly 26 million cash discount card records in the transaction data.<sup>3</sup>  
5 This is precisely the prejudice that the Court's order permitting substitution was intended to  
6 prevent, Dkt. No. 471 at 2 (recognizing the prejudice to CVS if Plaintiffs were permitted to offer  
7 new expert testimony "at the eleventh hour"), and upon which numerous Courts have struck novel  
8 opinions offered by substitute experts. *See Dennis v. Sherman*, 2010 WL 3928332, at \*10 (W.D.  
9 Tenn. Oct. 4, 2010) ("This Court has attempted to reach a similarly equitable solution by permitting  
10 Ms. Dennis to substitute Dr. Johnson as an expert witness. However, the opinions espoused by  
11 Dr. Johnson in her deposition testimony deviate from those of Dr. Schwartz in a way that unfairly  
12 prejudices the Defendant."); *PacifiCorp v. Gas Transmission Nw. Corp.*, 2013 WL 12433260, at  
13 \*5 (D. Or. Nov. 26, 2013) ("Allowing GTB to offer this testimony would require PacifiCorp to  
14 investigate the equipment at these other compressor stations, which certainly imposes an undue  
15 burden in light of the fast-approaching trial date. Accordingly, I find it appropriate to exclude this  
16 opinion.").

### 17 CONCLUSION

18 For the foregoing reasons, CVS respectfully requests that the Court prohibit Dr.  
19 Schafermeyer from offering his opinions that (1) a pharmacy's U&C customary price is the  
20 lowest price a pharmacy "offers" to cash paying customers, and (2) that "cash" includes all  
21 transactions other than those made with third-party insurance.  
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27 <sup>3</sup> To put this change in perspective, the transaction data includes 5.8 million HSP purchases and  
28 27.1 million cash purchases. Dec. 9, 2016 Expert Report of Brett E. Barlag (Dkt. No. 287-6),  
Fig. 5.

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Dated: March 30, 2021

Respectfully submitted,

By: s/ Andrew C. Watts

Enu Mainigi (*Pro Hac Vice*)  
Craig D. Singer (*Pro Hac Vice*)  
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