**AMERICAN ARBITRATION ASSOCIATION**
**Commercial Arbitration Tribunal**

**In the Matter of the Arbitration between**

| | |
|---|---|
| AIDS HEALTHCARE FOUNDATION,<br><br>Claimant,<br><br>v.<br><br>PRIME THERAPEUTICS LLC,<br><br>Respondent. | No. 01-22-0000-2756<br><br>Arbitrator: Stuart M. Widman |

## INTERIM AWARD ON THE MERITS

THIS ARBITRATOR, having been designated in accordance with the arbitration agreement entered into between the above-named parties and dated November 15, 2018, and having been duly sworn and having duly heard the proofs and allegations of the Parties, hereby issues this Interim Award on the Merits, as the full determination of the merits on the claims and defenses submitted by the Parties. As this is an Interim Award, this is not a final determination subject to court review.

### Background and History of Dispute

Claimant AIDS Healthcare Foundation ("AHF" or "Claimant") brought this antitrust and common law dispute in a joint Submission To Dispute Resolution filed with the American Arbitration Association on January 20, 2022, to recover damages and obtain other relief allegedly arising out of Respondent Prime Therapeutics LLC's ("Prime" or "Respondent") fixing of prices for the drugs and related pharmaceutical services (the "Services") that AHF provided to Prime's covered members and for which Prime reimbursed AHF. AHF filed a Restated Complaint on

January 17, 2023, but the matter went to Hearing under Claimant's Second Restated Complaint ("SAC") that was filed on April 4, 2023.

In the SAC, AHF alleges that Prime abrogated the Parties' November 15, 2018 Pharmacy Participation Agreement (Chain) (the "PPA") when, in December, 2019, Prime entered into a collaboration (the "Collaboration") with its competitor Express Scripts, Inc. ("ESI"), under which Prime replaced the reimbursement terms and rates in the PPA with the reimbursement terms and rates applicable to ESI's commercial pharmacy networks starting in April 2020. As of January 2021, AHF alleges, the Medicare Part D reimbursement terms and rates in the PPA were also supplanted by those in ESI's Medicare networks. The Collaboration had an initial term of three years, but in 2022, it was extended for an additional three years, until December 31, 2025. (Exh. 47; Conlin Depos., p. 90.) Thus, it has covered every year since 2020, and is still in effect. (TR, 541.) AHF says the effect of these rate changes was to reduce the amounts that Prime paid to AHF for the Services, causing millions of dollars of damage to AHF.

The active claims in the SAC[1] are for: (i) violation of Section 1 of the Sherman Act, 15 U.S.C. §§ 1, 15, 26, for horizontal price fixing; (ii) violation of Minnesota's antitrust statute, §§ 325D.49. 325D.53, et seq. for horizontal price fixing; (iii) common law breach of contract with respect to the PPA; (iv) breach of Minnesota's implied covenant of good faith and fair dealing; and (v) unjust enrichment. AHF seeks trebled damages, a civil penalty, lost profits, declaratory relief, punitive damages, restitution, interest, attorneys' fees and costs. (SAC, pp. 18 - 20.)

Prime's January 29, 2024 Answer to the SAC only generally denied AHF's allegations but also asserted 15 Affirmative Defenses, including: (i) the antitrust claims are not *per se* violations,

[1] In December 2023, this Arbitrator replaced the prior Arbitrator who had issued various rulings that this Arbitrator adopted going forward. One prior ruling was June 20, 2023 Order Granting-In-Part And Denying-In-Part Prime's Motion To Dismiss the SAC. That Order only dismissed two claims, leaving the five other Causes Of Action in the SAC.

but rather are subject to the rule of reason; (ii) Claimant's damages are speculative; (iii) alleged damages are not causally connected to the claimed violations or breaches; and (iv) setoff. (These defenses are specifically mentioned because they became major issues in a later summary judgment motion and as the matter went to Hearing.)

There was no issue of arbitrability or jurisdiction. The Parties' broad Arbitration clause in the PPA (Section 9.10.2) said it applied "to all disputes between the parties that arise out of this Agreement, including those based upon federal and state law." Minnesota law governed, except where federal law applied (PPA, § 9.9; see also prior Arbitrator's March 23, 2023 Order On Choice Of Law), and punitive or exemplary damages were barred. (§§ 7.4, 9.10.2.) The PPA did not contain any prevailing party fee or cost shifting provision.

This Arbitrator made many rulings on discovery, confidentiality, *limine* motions, and Protective Orders, but the most consequential ruling was this Arbitrator's July 10, 2024 Ruling On Respondent's Motion For Summary Adjudication ("Sum. Adj. Ruling"). That Motion made two primary arguments: (i) on the two antitrust claims, the Collaboration must be evaluated under the rule of reason, not a *per se* standard, and under the rule of reason, there was no antitrust violation; and (ii) even if there were antitrust violations, Claimant did not suffer any recoverable antitrust damages.

The Sum. Adj. Ruling overall denied Prime's Motion, concluding there were fact issues on most of the arguments, especially damages. Nonetheless, this Arbitrator held that three of Prime's arguments failed as a matter of law: (i) the Collaboration is subject to antitrust scrutiny under the Sherman Act and the Minnesota statute because there is nothing unusual or unduly complex about the alleged horizontal price fixing in the healthcare Collaboration that makes it too hard to assess under the *per se* standard; (ii) the Collaboration was a price fixing arrangement; and (iii) prior

action or inaction by the Federal Trade Commission and Minnesota antitrust regulators was not relevant to the antitrust analysis that this Arbitrator must make. (Sum. Adj. Ruling, pp. 6 - 7, 9 - 10, 14.)

The Sum. Adj. Ruling (pp. 10 - 11) also preliminarily concluded, albeit not as a matter of law, that the Collaboration was not a proper joint venture or purchasing agreement that might be subject to the rule of reason, and Prime later conceded in its Opening Statement and Post Hearing Brief that it was neither. Accordingly, this Arbitrator's three legal conclusions were law of the case, and the fourth issue of joint venture/purchasing agreement is also factually and legally resolved for purposes of this Award.

The matter went to Hearing in Los Angeles over seven days, August 12 - 15 and 19 – 21, 2024. There were eleven witnesses, two of whom were experts (one for each side). Approximately 170 exhibits were entered into evidence, and the transcript ("TR") was over 1,200 pages. Following the Hearing, this Arbitrator tendered questions to counsel, which were addressed in concurrent October 16, 2024 Closing/Post-Hearing Briefs ("Post Brf.") and concurrent November 8, 2024 Reply/Response Briefs ("Post Reply Brf."). On December 9, 2024, the Parties filed supplemental briefs (“Suppl. Brf.”) in response to another question posed by this Arbitrator. The Hearing was then closed on December 16, 2024. Counsel are commended for their skilled advocacy, and especially for their cooperation in managing the matter while still staunchly advocating these complex claims on behalf of their clients.

## Discussion

As discussed in detail and for the reasons stated below, this Arbitrator finds and concludes:

A. Claimant has proven its two antitrust claims, because: (i) they are subject to a *per se* analysis since Prime has not shown that the procompetitive benefits are material enough to offset the substantial anticompetitive impacts of the Collaboration; (ii) AHF has shown that the Collaboration was and is an unreasonable restraint of trade; and (iii) AHF has proven its antitrust injury in the form of reduced revenues, as well as antitrust injury to the market;

B. On Claimant's common law claims, (iv) Prime wrongly abandoned the PPA by replacing the agreed-upon reimbursement rates with the lower ESI network rates, but there is no breach because AHF has not proven damages; (v) Prime did not breach the implied covenant of good faith and fair dealing; and (vi) Claimant has not proven its claim of unjust enrichment;

C. On Claimant's requested relief: (vii) AHF has sufficiently proven it suffered damages (trebled) from the Collaboration in the amount of $10,309,707, but it cannot recover damages from Prime for ESI's reduced commercial payments because AHF has not shown that those were caused by or arose out of the Collaboration; (viii) injunctive and declaratory relief are appropriate because the Collaboration is ongoing and such relief also equitably avoids later arbitrations that would seek damages for the same wrongs; and

D. The matter is continued for further evidence and argument solely on the allowance of statutory attorneys' fees and costs, and also interest, on the antitrust claims. Counsel are to confer, and by February 14, 2025, submit to this Arbitrator an agreed or separate proposal(s) to address that additional relief.

## A. Claimant Has Established Liability On The Two Antitrust Claims

As noted above, this discussion has three subparts: (i) the antitrust issues are subject to *per se* analysis; (ii) Claimant has shown that the Collaboration was an unreasonable restraint of trade; and (iii) Claimant has shown that it and the market suffered antitrust injuries. On that basis, this Arbitrator concludes that Claimant has proven that Prime violated both the federal and Minnesota antitrust statutes. Appropriate relief is addressed below (pp. 32 - 44.)

### The Antitrust Claims Are Subject To *Per Se* Analysis

This discussion also has three subparts: (i) Prime had the burden of proof to show the existence and materiality of alleged procompetitive benefits; (ii) Prime's burden was to show actual, not just plausible or anticipatory, procompetitive benefits to the patients serviced by AHF and other pharmacies; and (iii) Prime has not shown there were such redeeming or offsetting procompetitive benefits to consumers.

#### 1. Prime Has the Burden of Proving Material Procompetitive Benefits

Both sides directly or indirectly fault this Arbitrator's determination in the Sum. Adj. Ruling (pp. 11 - 13) that Prime could - and had to - offer evidence of the Collaboration's procompetitive benefits in order to support its contention that the rule of reason applies. (AHF Post Brf., p. 18; Prime Post Brf., pp. 18 - 19, 21.) Neither side was entirely wrong. The *per se* test eschews further in-depth analysis of alleged procompetitive benefits of the restraint, *Craftsman Limousine, Inc. v. Ford Motor Co.*, 363 F.3d 761, 773 (8th Cir. 2004), but the impact of an agreement on competition may best be assessed at the time it was adopted, not later. *Impax Laboratories, Inc. v. Federal Trade Commsn.*, 994 F.3d 484, 496 (5th Cir. 2021); *Craftsman Limousine, Inc. v. FTC*, 491 F.3d 380, 388 (8th Cir. 2007) (recognizing plausibility of safety justifications).

But neither side can now complain about the evidentiary latitude that this Arbitrator granted in the Sum. Adj. Ruling. The above statements of law are at the polar extremes of the analysis. This Arbitrator essentially took the third path of applying a "quick look" approach to this horizontal agreement because it was not "immediately discernible" that the restraint had no redeeming virtue under the *per se* mode of analysis. 363 F.3d at 773. To this Arbitrator, the Collaboration was "sufficiently threatening" to put it in the *per se* category, but this Arbitrator still concluded that a more detailed consideration of the proffered justifications - reduced plan premiums and lower patient drug bills - was necessary. Essentially, this Arbitrator did not accept fully Prime's general assertions that the Collaboration had compelling plausibly procompetitive features.[2] And Prime in particular had a sufficient runway to garner its evidence on the critical feature: actual benefits to patient consumers. (Sum. Adj. Ruling, pp. 11 - 12.) Indeed, Prime agreed (Post Brf., pp. 19 - 21, 23) that enhanced consumer welfare was a proper focus for assessing any procompetitive benefits of the Collaboration.

This Arbitrator's approach also finds support in other cases, especially Supreme Court authority. For example, in *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 354 (1982), the majority looked at "business certainty", not just "economic prediction", before applying the *per se* standard, and even the dissent (at 362, 364) thought that a "demonstrable economic effect" and "realizable" economies that are "clear from the record" had to be assessed in order to depart from the rule of reason. Similarly, in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 14, 19 (1979), the Supreme Court cautioned that the *per se* mode must be "applied in the light of economic realities" by looking at the effect and purpose of the practices. See also

[2] Thus, *Medical Center At Elizabeth Place LLC v. Aetna Health System, et al.*, 922 F.3d, 719 (6th Cir. 2019), is inapt because the trial court accepted on summary judgment defendant's showing of plausibly procompetive features. Similarly, *Polk Bros. Inc. v. Forest City Enterprise, Inc.*, 776 F.2d 185 (7th Cir. 1985), is not helpful because the restraint was clearly ancillary to competitive enhancements at the time it was adapted.

*North Texas Specialty Physicians v. F.T.C.*, 528 F.3d 346, 362 (5th Cir. 2008), citing *California Dental Ass'n. v. F.T.C.*, 526 U.S. 756 (1999), for the lesson that the categories of competitive effect may overlap, so that a quick look examination must be tailored to fit the unique circumstances of each case, and an analysis of actual competitive impact may be required. Thus, this Arbitrator's more cautious and less reflexive consideration of the right antitrust test by which to analyze the Collaboration was warranted.

In the "quick look" case, the burden of proof of procompetitive benefits falls on the proponent of the restriction - typically the defendant. *California Dental,* 526 U.S. at 775, fn 12 (quick look analysis requires shifting to defendant the burden to show empirical evidence of procompetitive effects); *North Texas Specialty*, 528 F.3d at 361; *Craftsman,* 363 F.3d at 773. As required by *California Dental*, 526 U.S. at 775, fn 12, this Arbitrator had previously concluded that the Collaboration, an agreement between horizontal competitors, was a price fixing combination with actual anticompetitive effects: Prime's use of ESI's network rates in lieu of Prime's own competitively negotiated rates to set Prime's reimbursements for Services provided by AHF and other pharmacies that were in Prime's networks. (Sum. Adj. Ruling, pp. 9 – 10.) Notably, Prime does not contend that the Collaboration had no anticompetitive effects, but only that it was not "predominantly" anticompetitive. (Post Brf., A.)

Accordingly, this Arbitrator concludes that Prime has the burden to prove the significance of claimed procompetitive benefits.

2. Prime's Burden Was To Show Actual, Not Just Plausible or Anticipatory Procompetitive Benefits

Prime's heavy reliance on two cases - *In re Sulfuric Acid Antitrust Litigation*, 703 F.3d 1004 (7th Cir. 2012), and *In Re NFL'S "Sunday Ticket" Antitrust Litigation*, 2024 WL 2075942 (C.D. Cal. 2024) - as support for a lesser proof burden on procompetitive benefits is misplaced.

Prime correctly cites *Sulfuric*, 703 F.3d at 1011, that the court's vantage point on whether the *per se* or rule of reason test applies was when the challenged practice was adopted, and whether there was a reasonable belief then that it would promote enterprise and productivity - i.e. provide procompetitive benefits. However, the Seventh Circuit did not have any track record of the transaction at issue ("We do not know much about the cost structure" and "not clear that the effects would be"; at 1009, 1010), and the bulk of the decision was rooted in supposition, what "might" happen, what "may have been", what was "likely to result", what "could be regarded", and what "may well have done so". *Id*. at 1010 - 1011. In that informational void, the Seventh Circuit had to postulate on "plausible" outcomes from the three challenged activities: the shutdown agreements, the grant of exclusive territories, and the use of a joint venture. In addition, the transactional impacts of the alleged sellers' price fixing in *Sulfuric* was very complex ("a novel way of doing business"; *Id*. at 1011), with tentacles extending to a variety of market players. And the Court concluded that there could be procompetitive "socially beneficial" effects from plaintiffs' primary target in the case, the shutdown agreements, as well as territorial restrictions. *Id.* at 1011 - 1013.

The AHF/Prime case is much different. First, at the time of the Hearing, there was most of a five-year (2020 - 2024) history of actual competitive impacts - pro and/or con - that both sides, and especially Prime, could present as evidence. Both sides, and particularly Prime, were alerted to that proof burden in the July 10, 2024 Ruling On Summary Adjudication. Thus, five years after the Collaboration was implemented, what might have been initially plausible either became reality or not. Viewed otherwise, any plausibility that existed in 2020 (or 2021, when the second stage of the Collaboration was implemented) merged with what actually occurred in the marketplace that was subject to the Collaboration. Second, the price fixing here was considerably less complex and

more mono-dimensional than in *Sulfuric*. No speculation as to any impacts was necessary here, as they were readily observable.

As for "*Sunday Ticket*", Prime correctly cites it for the proposition that procompetitive rationales do not have to be quantified. *Id*. at *5 - *6. But while statistics are not a litmus test, the holding makes clear that a respondents' failure or inability to quantify such benefits is a relevant consideration when the trier of fact must assess the rationale. Thus, weak substantiation of or the lack of quantitative support for the rationale bear upon the weight given to the procompetitive proof and how (or if) it balances against or offsets the alleged anti-competitive impacts. Magnitudes of both quantitative and qualitative impacts are relevant. (This Arbitrator called it "concrete evidence"; Sum. Adj. Ruling, p. 12.)

Thus, neither *Sulfuric* nor "*Sunday Ticket"* materially reduce Prime's proof burdens with respect to procompetitive benefits. This Arbitrator looks at what Prime showed were actual benefits to consumers, not just theoretical enhancements; and this Arbitrator gives more weight to objectively substantiated benefits, albeit not to the exclusion of other proven improvements. As discussed below, this Arbitrator concludes that Prime's evidence of procompetitive benefits is insufficient, making any further inquiry into market power unnecessary, and allowing a definitive finding that the Collaboration is unlawful *per se*.

### 3. Prime Has Not Shown There Were Redeeming And Offsetting Procompetitive Benefits

The Parties substantially agree on the standards that apply in determining whether alleged procompetitive benefits effectively cancel out or override anticompetitive impacts and thereby

prevent *per se* treatment.[3] To offset the alleged anticompetitive effects, the procompetitive benefits must be "significant" or "sufficiently great" (*Maricopa*, at 351, 353 - 354), and the anticompetitive impacts must be "likely" to predominate, be obvious and plain, be "likely without redeeming virtue", and be "substantial". (See Prime Post Brief, pp. 16 - 18.)

The cases obviously do not provide a bright-line ruler for those tests for all circumstances, but the standards collectively require weighing, measuring, and comparing. This Arbitrator applies those somewhat elusive benchmarks so that, to warrant rule of reason analysis here, the balancing scale must tip decidedly in Prime's favor.

Both sides agree that the balancing scale must be applied to Prime's entire market of consumer patients, not just those of AHF.[4] (AHF Post Brief, pp. 14, 16; Prime Post Brief, pp. 19 - 21; Prime Reply Brf, p. 9.) It is undisputed that there are upwards of 20 million patients in Prime's networks that were subject to the Collaboration. (Prime Post Brief, pp. 1 - 3.) Thus, Prime's specific evidence of procompetitive benefits had to cover that entire universe of patients. However, Prime's evidence fell far short of that despite having at least one witness who probably could have presented compelling testimony and documentation if it existed.

---

[3] This Arbitrator acknowledges AHF's ongoing argument that the existence of even some procompetitive justifications do not alter the legal invalidation of horizontal price fixing agreements. (See, e.g., Post Brief, p. 12, citing *Arizona v. Maricopa County Medical Society*.) But this Arbitrator is past that, having opened the door at the Hearing to evidence of claimed procompetitive benefits.

[4] This Arbitrator previously held (Sum. Adj. Ruling, p. 12), and states again, that the economic benefits of improved cash flow from lower costs accruing to Prime and its owners do not qualify as proper procompetitive benefits for antitrust purposes. The antitrust laws are designed and intended to protect competition, not individual competitors. *Flegel v. Christian Hospital Northeast-Northwest, et al.,* 4 F.3d 682, 690 n.7 (8th Cir. 1993)*;* U*.S. v. American Airlines Group Inc., et al.*, 675 F. Supp. 3d 65, 73 (D. Mass. 2023) (collaboration between horizontal competitors violates Sherman Act despite enhancement of their shared revenues and benefits to their respective shareholders). Prime offered no authority that its or its owners' economic gains count as procompetitive benefits under this balancing, and, again, it acknowledged the focus must be on consumer – i.e., patient – benefits. Prime also erred in stating that no other horizontal agreements between PBMs were deemed *per se* violations. The Sum. Adj. Ruling (p. 6) cited two: *North Jackson Pharmacy v. Caremark RX Inc*., 385 F. Supp 2d 740 (N.D. Ill. 2005); *North Jackson Pharm. Inc. v. Express Scripts, Inc.*¸ 345 F. Supp. 2d 1279 (N.D. Ala. 2004).

Prime's evidence of the benefits to patients was primarily "how" it could pass through the cost savings to patients, "ways" it could do that, and forms it can take (Prime Post Brief, pp. 9 - 12, 24), not specific concrete evidence of actual pass-throughs. To the extent it offered actuals, that evidence covered only six patients. (TR, 865 – 866, 929 – 930, 1044 - 1049; Exh. 2118). Considering the 20-million patient universe and the variety of ways Prime said patients could benefit, six examples are an insignificant and inadequate number and basis upon which a conclusion of material benefits could arise.

Nor was that evidence of the six patients compelling. Prime's expert, Dr. Maness, presented "specific examples" of "actual dollar savings" to only three patients for only one medication each. But he did not say whether those patients were randomly selected or not. It certainly would have been easy to find three cases out of 20 million to illustrate the desired point. Nor did he testify that those were clearly representative of other patients. In addition, he referred to the patients' "savings" or reduced "payments", without specifically linking them to the alleged passed-through lowered costs of deductible, co-insurance, or copayment. He certainly did not hint at any cost savings on premiums.

Ms. Kracke and Mr. Hermes gave even less specific information about their personal benefits, testifying only generally about a "drop in price", a "reduction in her pharmacy cost", and not hitting his out-of-pocket maximum. But they also did not offer any specific magnitudes or comparisons to pre-Collaboration deductibles, co-insurance, or copayments, let alone premiums. (TR, 865 - 866, 929 - 930.) Absent the necessary extent and framing from those three witnesses, this Arbitrator cannot conclude that those alleged benefits were "material."

Ultimately, Prime nonetheless asked this Arbitrator to extrapolate the "snapshot" of those six examples onto the 20 million patients. (Prime Post Brief, p. 25.) This Arbitrator will not do

that, especially because Prime had a seemingly ideal witness who presumably had access to and could have offered robust testimony and documentary evidence of the specific (or at least substantiated estimates of) magnitudes of benefits passed through in the form of lower deductibles, lower co-insurance, lower co-payments, and lower premiums. Matt Hermes is the Vice President of Pharmacy Operations at Health Care Service Corporation (HCSC), a part owner of Prime, which has 9.5 million Prime patients (Prime Post Brf., p. 10; TR, 908 – 909, 914) – that is, almost half of Prime's total number of patients affected by the Collaboration.

Prime profiled Hermes as "the only person who's going to be testifying from a health plan." (TR, 906.) Thus, his testimony was important on this issue. Nonetheless, he had little knowledge of the underlying metrics of the alleged pass-through benefits. (TR, 912, 920- 921, 932: no breakdown of what HCSC does with savings, 943.) Moreover, his testimony was mostly that patients "could pay less" or "would see savings" (TR, 918, 928), but he only offered hypotheticals, not specific amounts. Indeed, nowhere did he actually say that any or all of those four patient obligations *actually* went down across the patient universe post-Collaboration. Even then, he conceded the patient benefits, including premium calculations that were opaque and beyond his personal knowledge, were determined by plan sponsors, and that HCSC had no control over those. (TR, 900 - 901, 921 - 922, 961 - 964.) And beyond all that, he did not know if any of his generalities about benefit pass-through was due to Project Sequoia (TR, 931), a near-fatal gap of causation that Prime had to establish.

Thus, this critical witness Hermes came nowhere close to providing the necessary material and concrete evidence of patient benefits, either as gross pass-through amounts for all four potential benefits or as separate amounts for each type of benefit for HCSC's patient universe. Instead, he just offered the same generalities about how it could be done – evidence which this

Arbitrator had already said was insufficient to establish the procompetitive benefits. (Sum. Adj. Ruling, pp. 11 – 12.) Nor did Prime present any actuary to testify about the gross amount of reduced premiums, admitting it was hard to tie cost savings to "specific premium". (Prime Post Brf., p. 11.)

Both sides made use of the analyses sponsored by Mr. Altstaedter, AHF's director of pharmacy finance, in which he reviews AHF's key metrics. (TR, 489.) In Exhibit 1283, he presented statistics, charts, and graphs that attempted to show how drug costs were shared among different payors, including patients, under Prime's commercial and Medicare plans during 2019 - 2023. He looked only at patients' co-payments, not deductibles or other potential patient obligations such as co-insurance and premiums. (TR, 493, 502, 514 - 515.) Dr. Maness critiqued that presentation as looking too much at the primary payor's percentages and not showing just patient cost. (TR, 1027, 1031.)

But dollar data is presented for patients on Exhibit 1283.1 - .5. That shows the co-pay amounts for commercial and Medicare pre- and post-Collaboration. Curiously, the data trends in opposite directions for commercial compared to Medicare. For commercial, the co-pay average annual dollar amounts go steadily down over 2019 - 2023: 3.43; 2.62; 2.46; 2.11; 1.69. However, for Medicare, they go steadily up over 2020 - 2023: .88; 1.20; 1.32; 1.69. Looking at just this disparate trending, this Arbitrator cannot conclude that the Collaboration had an overall positive impact on patient cost. Moreover, the data does not present a full picture of benefits because it does not consider deductibles, co-insurance, and premium - the other cost factors that Prime says would improve with cost savings pass throughs.

Dr. Maness presented his own version of Exhibit 1283 data in Exhibits 2116 and 2117. But those clearly centered on just percentages, not dollar amounts, and Dr. Maness did not offer any

opinions on overall dollar amounts that benefited patients. Indeed, he contrasted the "potential" dollar benefits with the actual dollar savings that his few examples allegedly showed. (TR, 1040, 1042.) Thus, this Arbitrator also does not see enough convincing evidence of procompetitive benefits from these alternative views to overcome the existing lack of evidence.

Overall, therefore, Prime did not present adequate evidence of the actual procompetitive benefits to patients that it said were derived from the Collaboration.

The restraint here was an agreement among horizontal buyers of the Services from AHF and similarly situated pharmacies. Such agreements are properly condemnable under Section 1 of the Sherman Act and the Minnesota antitrust statute as *per se* violations. *United States v. Socony-Vacuum Oil Co., Inc., et al.*, 60 S.Ct. 811 (1940); *West Penn Allegheny Health System, Inc. v. UPMC, et a*l., 627 F.3d 85, 104 (3d Cir. 2010) (on motion to dismiss, conspiracy to depress reimbursement rates not moderated by unclear assertion that agreement enabled defendant to lower insurance premiums); *Knevelbaard Dairies v. Kraft Foods, Inc., et al*., 232 F.3d 979, 987 - 988 (9th Cir. 2000) (*per se* claim based on horizontal agreement among cheese makers to lower milk prices paid to producers).

Accordingly, this Arbitrator holds that, applying the scale of anti- versus procompetitive impacts, Prime has not shown that the procompetitive benefits were sufficiently great or significant. To the contrary, AHF has met its burden, and the evidence instead shows that the anticompetitive effects predominated, were substantial, and were without redeeming value. *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co*., 472 U.S. 284, 298 (1985) (burden on plaintiff to show *per* se analysis applies); *Koefoot, et al., v. American College of Surgeons, et al.*, 652 F. Supp 882, 886 (N.D. Ill. 1987) (same). Therefore, the *per se* standard, as pleaded by AHF, applies here, not the rule of reason.

Claimant Has Shown That the Collaboration
Was an Unreasonable Restraint Of Trade

The Parties agree (AHF Post Brf., p. 29; Prime Post Brf., p. 17) that under the two applicable antitrust statutes, an antitrust violation requires proof: (i) of a contract or combination among two or more entities, and (ii) that the agreement unreasonably restrained trade.[5] There is no dispute that the Collaboration satisfied the first test, nor any doubt that the Collaboration affected interstate commerce. Thus, on the issue of liability, the issue of unreasonable restraint remains.

Now that the *per se* standard is deemed to apply, AHF has a lighter burden of proving unreasonableness. Even though there is some presumption of unreasonableness under *per se* restraints, AHF must still prove the substance of the restraint. *Craftsman Limousine, Inc. v. FTC*, 491 F.3d at 387. AHF has shown that.

This Arbitrator previously concluded that, as a matter of law, the Collaboration was a price-fixing agreement that affected Prime's pricing of its reimbursements to AHF and the industry. (Sum. Adj. Ruling, pp. 9 - 10.) It was also an unreasonable restraint because it undermined - even abandoned - the previously negotiated contract reimbursement rates between AHF and Prime under their PPA.

More specifically, under the Collaboration, Prime aligned its payment rates to pharmacies, including AHF, to ESI's payment rates under ESI's networks. Prime used ESI's more favorable – i.e., lower - retail network rates as payment standards for Prime's own national retail networks. Prime adjudicated and paid claims from AHF and other pharmacies consistent with the then-current ESI pricing rules. (Exh. 46.124 - .126.)

[5] Only the Sherman Act has a requirement of an effect on interstate commerce. And, of course, damages or another justified remedy must be proven to obtain relief.

To ensure that alignment of rates, Prime and ESI implemented numerous pricing restrictions – “guardrails”, “minimums”, “maximums”, and “targets” - upon Prime that it had to hit or fall within in the aggregate over each year of the Collaboration. Prime was prohibited from going outside the guardrails or below ESI's floor pricing for every pharmacy provider in each of Prime's pharmacy networks. (See references to the record in AHF Post Brf., p. 32, fn 11.)

To monitor Prime's pricing, it and ESI held weekly meetings that closely tracked the price fixing against the guardrails. ESI additionally sent monthly, quarterly, and year-end reports to Prime that showed whether and how Prime met the ESI targets. ESI even made a true-up payment to Prime based on year-end results if Prime did not precisely hit the aggregate set reimbursement rates. (See AHF Post Brf., p. 33 and fn 12 for record cites.) As AHF's expert, Dr. Richman, testified, the Collaboration placed Prime's pricing solely under ESI's roof. (TR, 262.)

The Collaboration also replaced Prime's prior performance-quality pharmacy price concession (“PPC”) incentive program with ESI's direct and indirect reimbursement ("DIR") program for network pharmacies in Medicare Part D. The goal was to reduce by an additional 9% the compensation paid to Prime's network pharmacies. (AHF Post Brf., p. 33.) Unlike the rate setting that affected front-end payments, this component of the Collaboration allowed back-end adjustments that recaptured payments already made. The form did not alter the substance, however: ESI's DIR program also substituted for Prime's original contractual incentive program, and it subjected AHF and other pharmacies to terms that belonged to Prime's competitor ESI.

This Arbitrator again (Sum. Adj. Ruling, pp. 9 - 10) disagrees with Prime that the Collaboration was not an unreasonable restraint because it provided Prime with some flexibility in setting day-to-day prices on individual Services to individual pharmacies. (Prime Post Brf., p. 6.) This Arbitrator still concludes that the "micro" flexibility that Prime had under the Collaboration

did not substantively alter the "macro" effects of an overall replacement of Prime's pricing and incentive treatment with ESI's rates and clawback terms. At its core, the Collaboration ended price competition between Prime and ESI, previously horizontal competitors in the national PBM market for pharmacy goods and services.

As it did for the Sum. Adj. Ruling, Prime again (Post Brf., p. 26) contends that AHF cannot establish unreasonableness because AHF has not shown that its or market output decreased as a result of the Collaboration. Reduced output is often a benchmark for seller-imposed price fixing - typically, a two-dimensional market with only sellers and buyers - where the conspirators' higher prices may combine with (via reduced supply) or result in (via lower demand) lesser output. That paradigm has observable price elasticity.

This Arbitrator disagrees with Prime for two reasons. First, as developed at the Hearing (TR, 1112 - 1119), in this unique buyer-side price fixing, the market is really three-sided: Prime as buyer; the pharmacies as sellers; and the demand driven by patients' medical needs as prescribed by treating doctors. That is a much less price elastic environment due to the personal importance of healthcare. In that space, the pricing between Prime and AHF doubtfully affects demand because demand originates outside the usual two-dimensional space and payment is largely handled by insurance.

Second, this Arbitrator gives little weight to Prime's evidence (Prime Post Brf., p. 26) that the volume ("overall output") of AHF's services – total prescriptions, prescription revenues, and patient count - increased. Such evidence is typically of little consequence, *Flegel*, 4 F.3d at fn 7, and, in any event, Prime did not adequately show that those increases were causally linked to the Collaboration as opposed to other market forces such as an increasing patient population. Nor has Prime presented any evidence of output changes for the broader pharmacy market.

Therefore, this Arbitrator concludes that reduced output is not an antitrust litmus test here, and that AHF has proven that the Collaboration was an unreasonable restraint, thereby satisfying the second test on liability.

AHF Has Shown That It and the
Market Suffered Antitrust Injuries

Prime correctly points out (Post Brf., pp. 25 - 27; Reply Brf., pp. 10 - 12) that, beyond proving the Collaboration was an unreasonable restraint, AHF must also show that it and the market suffered antitrust injuries. *Atlantic Richfield Company v. USA Petroleum Company*, 495 U.S. 328, 336 - 345 (1990) ("ARCO"), makes clear that an antitrust plaintiff must, even in a *per se* case, independently establish that its harm "stem[med] from a competition-reducing aspect or effect of the defendant's behavior", or that the unlawful agreement "caused [plaintiffs] an injury for which the antitrust laws provide relief." This has been viewed as a standing requirement of private parties, *Weil Insurance Agency, Inc. v. Manufacturers Life Insurance Company, et al.*, 815 F.Supp. 1320, 1323 - 1324 (N.D. Cal. 1992), and the "right of action" exists only to the plaintiff that suffered an antitrust injury.

While this Arbitrator later addresses the issue of damages, this Arbitrator has little trouble concluding at this juncture that AHF suffered an antitrust injury as a result of the Collaboration. AHF has presented clear evidence that its revenues declined once the ESI rates took effect in 2020 and (for Medicare Part D) in 2021. AHF's losses stemmed from the competition-reducing effect of the Collaboration, and the Collaboration caused AHF injury for which the antitrust laws provide an opportunity for relief. The rates at which Prime reimbursed AHF post-Collaboration were set

between horizontal competitors and replaced the previously existing competitively-negotiated rates.[6]

Notably, both *ARCO* (at 342 - 343) and *Weil* (at 1323 - 1324) say that the antitrust injury must be incurred by the private plaintiff; they say nothing about an antitrust injury affecting the entire market or other impacted players. See also *Stamatakis Industries, Inc. v. King, et al.*, 965 F.2d 469, 471 (7th Cir. 1992), looking at only what the plaintiff had to show about the source of its loss. Prime nonetheless posits (Post Reply Brf., p. 11, n. 7) that AHF also had to identify a market-wide impact from the Collaboration, citing *Star Discount Pharmacy, Inc., et al. v. Medimpact Healthcare Systems, Inc., et al.*, 2014 WL 4470720, at *7 - *9 (N.D. Ala. Sept. 10, 2014) *aff'd*, 614 F. App'x 988 (11th Cir. 2015). See also *Volmar Distributors, Inc., et al. v. The New York Post Co., Inc., et al.*, 825 F.Supp. 1153, 1160 (S.D.N.Y. 1993).

But the evidence was clear that the Collaboration also had a wide-ranging impact upon pharmacies nationwide. Indeed, much of the evidence of that impact came from Prime, which proudly stated that it had 20 million patients within its national networks who were served by at least a thousand different pharmacies across the country. (TR, 1195.) It also conceded its $2.5 billion of cost savings that arose from the Collaboration - cost reductions that reflected the nationwide reduction of reimbursements to pharmacies. (TR, 1131: Prime had national network; Exh. 108, p. 33: Prime is “national PBM”; Prime Post Brf., pp. 2 – 3: Prime owners are health plans “around the country.”) The purpose and effect of the Collaboration were clear: it was designed to, and had the desired effect of, pegging Prime's reimbursements to nationwide pharmacies to ESI's rates so that Prime could save those costs across its pharmacy networks. AHF

[6] Prime's reliance on alleged lower patient costs is misplaced. First. AHF's claims are based on its own direct injury, not derivative of the patients. Whatever benefits the patients received bears upon the method of analysis - *per se* or rule of reason - and not upon whether AHF suffered an antitrust injury. Moreover, the above discussion on the absence of consumer benefits belies Prime's assertions.

is and was emblematic of the larger class affected by the Collaboration. Thus, pharmacies nationwide also suffered antitrust injuries in the form of reimbursements below competitively-based pricing.

In addition, as AHF's expert Barak Richman testified (TR, 256, 261, 274 - 275), and which Prime (Dr. Maness) did not rebut (TR, 1104: in the vacuum of Prime's disappearance, it would be difficult to replace), the Collaboration had the contra-competitive effect of keeping afloat Prime, a weak competitor and potential market casualty, thereby making the PBM market more concentrated and less competitive.

Thus, whether viewed from the perspective of just AHF, other impacted pharmacies, or PBMs, the Collaboration caused antitrust injuries to AHF as well as to the overall markets. Accordingly, this Arbitrator concludes that AHF has also proven that necessary aspect of its antitrust claims.

For the foregoing reasons, this Arbitrator concludes that AHF has proven that Prime violated both the Sherman Act and Minnesota's antitrust statute.[7]

B. AHF Has Not Proven Its Common Law Claims

The SAC has three common law claims: breach of contract (Fourth Cause Of Action), breach of Minnesota's implied covenant of good faith and fair dealing (Fifth Cause Of Action), and unjust enrichment (Sixth Cause Of Action). This Arbitrator finds that AHF has not proven that Prime breached their Agreement; has not proven that Prime breached the implied covenant; and has not proven that Prime was unjustly enriched. Accordingly, an Interim Award on those claims is entered in favor of Prime and against AHF.

[7] This conclusion, like the others that decide whether Prime is or is not liable on the respective Causes Of Action, is one of the declarations that Claimant seeks in its Prayer for Relief.

AHF Has Not Proven Its Breach of Contract Claim

Under governing Minnesota law, a contract breach requires proof of: (i) the existence of a contract between the Parties; (ii) Claimant's performance; (iii) Prime's nonperformance or violation of the contract's terms; and (iv) damages. *Trebelhorn v. Agrawal*, 905 N.W. 2d 237, 246 (Minn. Ct. App. 2017); see also, *Lyon Financial Services, Inc. v. Illinois Paper and Copier Co.*, 848 N.W. 2d 539, 543 (Minn. 2014) (damages as an element of defendant's breach; *Jensen v. Duluth Area YMCA,* 688 N.W. 2d 574, 578 – 579 (Minn. Ct. App. 2004).

Prime does not contest the second aspect of AHF's performance, but it does challenge whether a contract existed, whether Prime violated its terms, and whether AHF suffered damages as a result. This Arbitrator finds that a contract did exist between the Parties and that Prime did violate its terms. However, this Arbitrator finds that AHF has not proven that Prime breached the PPA because AHF has not proven its contract damages of lost net profits. Accordingly, an Interim Award is entered in favor of Prime and against AHF on the Fourth Cause Of Action for breach of contract.

This Arbitrator is unimpressed by Prime's arguments that a contract did not exist and that Prime did not violate its terms. To the former, Prime's Post-Hearing Brief (pp. 12 – 13, 27 - 30) concedes, as Prime must, that their PPA set the terms and conditions by which Prime was to pay AHF for the Services that AHF provided. Prime's point that AHF's claim covers acts and events that fall outside the contract is an argument on the merits - the scope and coverage of the contract - not that the contract does not exist. (See also Prime Tenth Affirmative Defense on limitations, which again acknowledges the existence of the PPA, but defends on the merits - indeed, on the PPA's terms.) And, of course, Exhibit 55 was the stipulated PPA.

Prime's contention that it did not violate the PPA's terms is equally without merit. Under the Collaboration, Prime subcontracted (Prime Post Brf., p. 27) to ESI the determinations of the lower reimbursement rates for Prime's networks of pharmacies, or (viewed the opposite) "leased" from ESI the latter's lower network rates that were to apply to Prime networks of pharmacies. Whatever the label, the substance is the same: Prime assigned to ESI the primary right and responsibility of setting the rates to which AHF and the other the Prime pharmacies were subject. As discussed above (pp. 16 - 17), Prime and ESI established strict parameters for Prime's actual payments to the pharmacies, and Prime's minor flexibility within those benchmarks did not alter ESI's ultimate control over how much was reimbursed. In addition, Prime substituted, without AHF's consent, the much higher ESI DIR fees in lieu of Prime's lower PPC assessments, further resulting in substantially lower overall payments to AHF.

PPA Section 9.7 prohibited such an assignment or substitution to any entity that did not control Prime, was not controlled by Prime, or was not under common control with Prime. ESI, a horizontal competitor of Prime pre-Collaboration, certainly did not fall within that allowed class of assignees, and Prime does not attempt to argue that it does. Thus, Prime committed a specific violation of the PPA in that respect.

Prime also committed a more fundamental, and thus equally impactful, violation by simply abandoning the PPA rate schedules (PPA Exhibit B) that were operative pre-Collaboration. Under the Collaboration, the PPA rate schedules became a nullity. For its ongoing term (PPA Section 61), it was understood and expected by both Parties that the PPA rate schedules would govern. Prime ended that with the Collaboration.

Indeed, Prime (futilely) tries (Post Brf., pp. 27 - 28; Prime Reply, p. 13) to defend that the contract claim fails *because* "none of the reimbursements that AHF complains of is for a Prime

network listed in the Prime PPA." But that is precisely the point: the Collaboration totally replaced the agreed-upon rate schedules with ESI's. Stated otherwise, since the PPA expressly provides for and "applies to the use of Prime's Pharmacy Networks" (Prime Post Reply, p. 13), it was a clear violation to substitute ESI's network rates for the PPA's.[8] Simply put, Prime was to reimburse AHF according to PPA Exhibit B, but post-Collaboration it did not.

Prime asserts a special defense to one component of the contract claim for DIR fees. Prime contends that AHF expressly agreed to the DIR fees, and AHF therefore waived that claim of breach. This Arbitrator disagrees.

Prime's argument rests on two points: (i) the AHF/ESI PPA (Exh. 29) was amended on numerous occasions in 2020 to 2023, to which AHF either expressly agreed or impliedly consented by not objecting; and (ii) the amendments included three Network Protocols for Prime (Exhs. 38, 112, 113) which specified DIR performance standards and rates applicable to the claims submitted by AHF. Pieced together, Prime contends, those allowed ESI to recapture prior reimbursements as post-payment performance adjustments because Prime was technically a "Sponsor" under the broad definition in the AHF/ESI PPA (Exh. 29.002) and the Network Protocols. (Prime Post Brf., pp. 14 -15, 30 - 31.)

Prime is correct as to just those two pieces. On October 6, 2020 - one month before the Collaboration was extended to Medicare - AHF signed an updated Exhibit A - ES1000 (Exh. 33) with ESI that included a Medicare Part D Performance Program Schedule Attachment (Exh. 33.012 - 013). That Attachment said that a Provider (AHF) "shall be assessed certain per claim reimbursement adjustments" based on its performance when measured against certain metrics. The

[8] Nor can Prime find shelter (Post Brf., p. 27; Reply, p. 13) that the fault lies with its plan owners who (of course) decided to opt into ESI's lower rate schedules. That option only arose from the Prime/ESI Collaboration, and Prime knowingly pitched it with the specific purpose of saving its owners billions in costs. Thus, the initial fault is Prime's. In any event, a contract breach does not require intent.

Attachment applied to claims that are covered by the "Participating Sponsor's Medicare Part D Prescription Drug Program", but only if the Participating Sponsor "implements a Medicare Part D Performance Program".

The AHF/ESI PPA defines "Prescription Drug Program" as "any group or individual plan, policy, agreement or other arrangement offered or provided by a Sponsor, which includes payment for pharmacy services or pharmaceutical products...." It also defined "Sponsor" as "any contracted client of ESI related to a Prescription Drug Program." AHF contends that Prime does not fit within the substantive and real-world meaning of "Sponsor", and therefore the Network Protocols cannot apply. This Arbitrator agrees.

The interactive structure of the U.S. pharmacy distribution and reimbursement system (Exh. 117), Prime's statements in its post-Hearing briefs, and its witnesses' testimony help unravel these conflicting views. As to the former, and as abundant evidence confirmed, PBMs like Prime have contractual relationships with third-party payors (such as HCSC), with drug manufacturers, and of course with pharmacies like AHF. Prime, however, does not-have a direct relationship with the U.S. Center for Medicare and Medicaid Services (CMS). As relevant here, that relationship belongs mostly to the third-party payors, which are the plan issuers. A "Prescription Drug Program" under the AHF/ESI PPA (Section 1.5) therefore must be only the plans, policies, agreements, or arrangements that the plan issuers created under authority granted by CMS. But since Prime has no such direct authority, it cannot be the Sponsor of any such "Prescription Drug Program", and therefore the AHF claims do not qualify as "Applicable Claims" under Section 1.1 of Exhibit 33.

Further, there is no evidence that Prime - a PBM - ever implemented a Medicare Part D Performance Program, which is another condition for the imposition of a Network Protocol upon

AHF. (Exh. 33.012.) Post-Collaboration, the only applicable performance program was ESI's DIR program. Prime does not offer any evidence in its post-Hearing submissions of its own, independent Performance Program post-Collaboration. Absent that fulfilled condition, too, no Network Protocol is triggered as between AHF, ESI, and Prime.

Nor does Prime qualify as a "client" under the definition of "Sponsor" in Exhibit 29 (Section 1.9). Prime's post-Hearing briefs (Post Brf., pp. 1, 3, 7 - 8) and its witnesses repeatedly called its plan issuers and plan owners its "clients" or "customers". (TR, 784, 815: customers are health plan clients such as HCSC; Conlin Depos., p. 22: "Prime's clients are health plans, large employer groups ...."; Kracke Depos., pp. 56, 106: health plans are sponsors, clients are health plans.) That must be the same industry meaning and intent in the AHF/ESI PPA. Therefore, the real world status makes "client" a narrow term that does not include Prime, and that further removes Prime from the scope of "Sponsor". (See also Exh. 29.006, Section 3.1.a, putting ESI as PBM as the only entity that Provider can look to for payment, and not to Sponsor. That contrasts sharply here, where Prime is AHF's PBM and thus AHF's primary source of reimbursement.)

Thus, Prime's argument fails to establish some essential points: Prime cannot be a "Sponsor" as that term is used in the industry and by Prime; Prime did not implement its own Medicare Part D Prescription Drug Program; and Prime did not implement its own Medicare Part D Performance Program. The latter two are unique to plan issuers, which are both Prime's and ESI's clients. Prime's attempt to look at just selected documents and selected terms is not the full story. Accordingly, this Arbitrator finds that the Network Protocols were not binding on AHF, that AHF did not consent or acquiesce to them, and that AHF could therefore claim DIR damages.

Yet, despite the foregoing conclusions of violation, this Arbitrator must find for Prime on the Fourth Cause Of Action because AHF has not proven its entitlement to contract damages. As

noted, under Minnesota law, a breach of contract claim fails as a matter of law if the plaintiff cannot establish damages caused by the breach. *Jensen v. Duluth Area YMCA*, 688 N.W.2d at 578 - 579. Additionally, contract damages in this type of case are based upon lost profits, not just lost revenues. *Hydra-Mac, Inc. v. Onan Corp*., 450 N.W.2d 913, 920 - 921 (Minn. 1990); *Cardinal Consulting Co. v. Circo Resorts, Inc.*, 297 N.W.2d 260, 266 (Minn. 1980); *Deutz & Crow Company, Inc. v. Anderson*, 354 N.W.2d 482, 488 - 489 (Minn. Ct. App. 1984). Lost profits are calculated by deducting saved expenses from decreased revenues, where the result must be evidenced by at least an approximation. *Poppler, et al. v. Wright Hennepin Cooperative Electric Assoc.*, 834 N.W.2d 527, 546 - 547 (Minn. Ct. App. 2013) (claims for negligence, trespass, and nuisance, not contract).

Here, unlike its other claims, AHF's prayer for relief on the contract claim (SAC, p. 19) uniquely asked for "lost profits" as a component of its contract damages. However, AHF's damages evidence was bundled into one component - lost gross revenues (reimbursements) resulting from both Prime's use of ESI's lower reimbursement rates and from ESI's clawback of DIR fees. While that methodology fits the two antitrust claims, under Minnesota law it is not the apt calculus for the contract claim. See also *Deaktor, et al. v. Fox Grocery Company*, 475 F.2d 1112 (3d Cir. 1973) (insufficient evidence to support plaintiffs' claim of lost net profits).

Indeed, AHF actually acknowledges (Post Reply, p. 21) that it "does not seek to recover lost profits", so it did not provide that financial analysis or information. Instead, AHF suggests (Suppl. Brf., p. 3) that lost profits are not a more accurate measurement of its contract damages, but the lost profits standard is the law. AHF also says that neither its expenses nor its volume of sales changed, but AHF does not source that to the evidentiary record, and therefore this Arbitrator cannot consider those unsupported arguments.

Without that essential proof of damages for the Fourth Cause Of Action, this Arbitrator must conclude that, irrespective of Prime's violations, AHF's contract claim fails as a matter of law. Accordingly, an Interim Award is entered in favor of ESI and against AHF on the Fourth Cause Of Action.

AHF Has Not Proven Breach Of The
Implied Covenant of Good Faith and Fair Dealing

As applied here, the claim of breach of Minnesota's implied covenant of good faith and fair dealing has four components, all of which must arise out of the parties' express contractual rights and obligations: (i) the Respondent's unjustifiable hindrance of the Claimant's performance of the contract; or (ii) Respondent's interference with the performance of a condition precedent; (iii) the Respondent's ulterior motive in preventing the occurrence of (i) or (ii); and (iv) damages caused by the alleged breach. *OmegaGenesis Corp. v. Mayo Foundation For Medical Education And Research*, 132 F.Supp.3d 1119, 1127 (D. Minn. 2015) (no breach where no ulterior motive to hinder performance and no damages); *In re Hennepin County 1986 Recycling Bond Litigation* 540 N.W.2d 494, 502 - 503 (Minn. 1995) (breach alleged, mentioning the two tests in (i) and (ii) above); *Metropolitan Transportation Network, Inc., et al. v. Collaborative Student Transportation of Minnesota, LLC, et al.*, 6 N.W.3d 771, 782 (Minn. Ct. App. 2024) (no hindrance of other's performance where no contractual duty to perform); *Minnwest Bank Central v. Flagship Properties LLC, et al.*, 689 N.W. 2d 295, 303 (Minn. Ct. App. 2004) (no breach where no ulterior motive because no underlying contractual duty); *Sterling Capital Advisors, Inc. v. Herzog, et al.*, 575 N.W. 2d 121, 125 (Minn. Ct. App. 1998) (no breach where no ulterior motive to prevent other party's performance). In other words, the covenant’s extra-contractual duties are to not commit (i) and (ii) above. This Arbitrator concludes that Prime did neither.

AHF initially says (Post Brf., p. 39) its Fifth Cause Of Action is based on Prime's unjustifiable hindrance of AHF's performance, citing *Hennepin*. In support, however, AHF argues that the interference consisted of underpaying AHF by replacing the PPA rates with ESI's lower rates. In its Reply Brief (p. 19), AHF elaborates that Prime had an ulterior motive to not perform Prime's contractual obligations because Prime wanted to grab the $2.5 billion of cost savings: essentially a motive of "cheating the pharmacies" and greed for its and its owners' benefit.[9]

This Arbitrator concludes that the implied covenant claim has not been proven for two reasons: (i) neither of the two primary tests of breach have been shown, and (ii) damages have not been proven. To the first point, there is no evidence that AHF's performance under the PPA was hindered at all. Indeed, AHF alleged (SAC, ¶ 54) that it "has performed any conditions precedent to demanding performance by Prime"; the evidence was unrebutted that AHF provided the Services that the PPA required of it; and Prime made no attempt to challenge AHF's full performance. Since AHF's sole basis to impose the covenant was that Prime hindered AHF's performance, this Arbitrator must conclude that the claim has not been proven. Nor would it have helped AHF to suggest that Prime prevented a condition from being completed, as AHF alleged that all of those were fulfilled too and it did not present any evidence to support that second approach.

As mentioned above, as this Arbitrator construes it, Minnesota law makes the ulterior motive an additional test for both hindrance of performance and prevention of a condition. It is not a freestanding third test of breach of the covenant. Thus, even though the evidence showed that Prime acted in bad faith by imposing the Collaboration in lieu of the PPA's payment terms in order

[9] Prime contends (Post Brf., pp. 31 - 32; Reply, pp. 15 - 16) that, for the reasons discussed above, it had no underlying contractual obligations, but this Arbitrator has already rejected those arguments.

to maximize its and its owners' revenues and profits, that alone does not satisfy the covenant tests. Therefore, Prime's bad faith cannot save the Fifth Cause Of Action.

Additionally, even if the liability tests were satisfied, AHF has not proven its resultant damages. The implied covenant claim is a contract-based claim under Minnesota law, so proof of breach also requires proof of contract damages. *OmegaGenesis*, 132 F.Supp.3d at 1127. As noted above (pp. 26 - 27), that proof requires a showing of lost profits, but AHF has only presented evidence of lost gross revenues, not lost profits. For this reason also, AHF has not established liability on the implied covenant claim.

Accordingly, an Interim Award is also entered in favor of Respondent and against Claimant on the Fifth Cause Of Action.

Claimant Has Not Proven Its Claim for Unjust Enrichment

As pleaded in the Sixth Cause Of Action, a claim for unjust enrichment exists here if Claimant conferred a benefit upon Respondent, Respondent knowingly received and retained it, and such retention would be unlawful, illegal, or immoral. *Herlache v. Rucks*, 990 N.W.2d 443, 450 - 453 (Minn. 2023) (benefit of cash paid); *Spice Corp. v. Foresight Marketing Partners, Inc.*, 2011 WL 6740333 at *19 (D. Minn. 2011) (no unjust enrichment where funds received were paid forward); *Metropolitan Transportation Network*, 6 N.W.2d at 786 (defining "unjust" retention as one that is illegal or unlawful); *Schumacher v. Schumacher*, 627 N.W.2d 725, 729 (Minn. Ct. App. 2001) (unjust retention of goods and services). The benefit can include either a direct transfer to Respondent or value given to a third person that indirectly benefits Respondent.

This Arbitrator concludes that AHF has shown it conveyed benefits to Prime that Prime unjustly retained, but the claim nonetheless falls because it cannot be sustained where, as here, a contract exists between the Parties.

As for the benefits conferred, AHF says (Post Brf., p. 40; Reply Brf., p. 20) it conveyed and Prime improperly retained two different benefits: (i) the Services for the patients; and (ii) the reimbursement money that Prime failed to pay AHF under the Collaboration. Prime did receive and kept the indirect benefits of the former by having its patient members' healthcare needs met under the Prime networks. This Arbitrator is not convinced as to the second, however, because there was no transfer or conveyance of those funds by AHF to Prime; instead, they were either paid by the patient members as premiums to the plans, which in turn funded Prime's reimbursements to the pharmacies, or they were paid by patients to AHF as co-payments or other patient obligations. But a claim for unjust enrichment exists only upon the Respondent's receipt of something from the Claimant; the creation of an alleged debt arising from Respondent's non-payment of amounts claimed due is not a receipt. Nonetheless, the unpaid reimbursements are still relevant: they show the value of the former benefits that Prime received from AHF.

Prime retorts (Post Brf., 32 - 33; Reply Brf., 16 - 17) that: (i) it did not retain any benefits because it passed through to its plan owners the savings from unpaid reimbursements; and (ii) any retention by it was not "unjust". This Arbitrator disagrees with both points.

As to Prime's retention, Prime acknowledged (Post Brf., p. 24; TR, 648) that it passed through about 95% of the cost savings, and it kept 5%. Using the acknowledged $2.5 billion of total costs saved (for the period for which evidence was offered), Prime kept approximately $100 million. That amount far exceeds AHF's claimed (or as later shown, allowed) damages. Additionally, this Arbitrator has already held that Prime violated the antitrust laws - a finding of "unjust" (illegal or unlawful) behavior. Thus, AHF has met its factual burden on the unjust enrichment claim.

However, the claim is barred for legal reasons: an unjust enrichment claim is not allowed when, as here, a valid contract exists between the Parties. *Sterling Capital Advisors, Inc.*, 575 N.W.2d 121, 126 - 127 (existence of express contract precludes unjust enrichment recovery). Indeed, AHF conceded (Post Brf., p. 39) that this claim depends on a finding that no contract exists between the Parties, but this Arbitrator has concluded that there was. It makes no difference that relief is not awarded to AHF on the breach of contract claim, as even in *Sterling* (at 124) the contract claim was denied but still no unjust enrichment claim was allowed.

Accordingly, an Interim Award is also entered in favor of Respondent and against Claimant on the Sixth Cause Of Action.

C. Claimant Is Awarded Damages and Other Relief on the Antitrust Claims

This section includes multiple discussions: (i) Claimant has proven its antitrust damages arising from the reduced reimbursement rates;[10] (ii) Claimant has proven its damages arising from DIR fees; (iii) Claimant may not recover from Prime the amounts that ESI failed to pay or wrongly paid AHF under the ESI/AHF contract; (iv) Claimant is entitled to injunctive relief, but only as to the antitrust claims and only as to itself; and (v) Claimant is entitled to declaratory judgment, and the declarations are made in the above discussions and conclusions on liability of those Causes of Action. (See fn 7.) It is not necessary to discuss damages on the three common law claims, as that was either addressed above (Fourth Cause of Action for breach of contract) or liability has not been proven. (Fifth and Sixth Causes of Actions for breach of the implied covenant of good faith and fair dealing and for unjust enrichment.)

[10] Claimant's Prayer For Relief on the Minnesota antitrust claim also sought "a civil penalty of $50,000." Claimant sourced that (Post Brf., p. 46) to Minnesota Statutes section 325D.56, but a private plaintiff is not entitled to that. *Hoffman v. Delta Dental Plan of Minnesota*, 517 F. Supp. 564, 573 – 574 (D Minn. 1981). Thus, that relief is denied.

The Parties agree on the standards that apply to prove damages. (AHF Post Brf., pp. 41 - 42; Prime Post Brf., p. 36, and cited authority therein.) Damages can be a just and reasonable estimate based on relevant data; should be proved with reasonable certainty; need not be a specific dollar amount shown with mathematical precision; can be derived from inferential evidence; but cannot be based on mere speculation or guesswork; and must result from the alleged wrong. This Arbitrator applies those somewhat malleable guideposts below to the various categories of claimed damages.

Claimant Has Proven and Is Awarded
Damages for Improperly Imposed DIR Fees

Applying the above standards to prove antitrust damages, this Arbitrator holds that Claimant has proven and may recover a net base amount (i.e., before trebling) of $1,818,271 for DIR fees that Prime improperly collected from AHF for the three years 2021 - 2023.[11] This Arbitrator concludes that AHF, through its witness Megan Englehart, convincingly showed the amount of DIR damages that Prime caused AHF.

Ms. Englehart is AHF's director of reconciliation in the pharmacy finance department. In that capacity, she is responsible for accounting cash receipts, which includes determining shortfalls against billed amounts, such as when DIR fees are assessed. (TR, 323, 328, 350 - 351.) As noted, DIR fees are post-payment assessments that recapture prior payments of Medicare Part D claims if, in the PBM's determination, the pharmacy does not meet certain performance metrics. (TR, 326, 354, 360.)[12] The DIR fees assessed against AHF post-Collaboration were based on ESI's DIR schedules.

[11] CMS barred post-point of sale DIR fees starting in 2024, so AHF sought only DIR damages for 2021 – 2023 transactions.

[12] This discussion does not address, because it is not necessary, whether AHF did or did not meet the metrics and whether Prime or ESI properly applied them.

Prior to the Collaboration in 2020, Prime had its own PPC program, a less impactful version of DIR fees, which only recaptured about $20,000 per year from AHF. (Exh. 10; TR, 338 - 339, 341.) With the Collaboration, applying ESI rates, Prime's clawbacks soared to over $299,000 for 2021, to over $578,000 for 2022, and to over $1.1 million for 2023. (Exh. 10; TR, 334 - 336, 342.) That full three-year total is $1,990,947.33. (TR, 337.) Also, the means of fee assessment changed materially with the Collaboration. Under Prime's PPC, Prime generally sent a quarterly or year-end notice of expected PPC fees, coupled with a single year-end invoice for the year's full amount, which AHF allowed Prime to recoup from upcoming payments. With the Collaboration, however, Prime started deducting DIR from each payment coming to AHF, resulting in short payments throughout the year. (TR, 343, 345.) Thus, the Collaboration substituted and brought upon AHF significantly higher and continuously imposed performance fees than what AHF and Prime had agreed upon under their PPA.

AHF was surprised by the unexpected increase in performance fees post-Collaboration. (TR, 325.) Eventually, Ms. Engelhart investigated, including communicating with Prime about the reduced payments. Prime acknowledged that the reductions were due to DIR, and Prime's payment documents also coded the deductions as DIR fees. (TR, 340 - 341, 344.) Ms. Engelhart accounted for each individual claim; totaled the payment shortfalls; validated and verified the DIR deductions "to the penny"; and was confident that her calculations were accurate and complete. (TR, 331, 336, 339, 348.) Indeed, Prime did not challenge her calculations, instead mostly relying on the discredited application of the Network Protocols.[13] This Arbitrator easily concludes that Ms. Engelhart's methodology and calculations are reliable.

[13] Prime expert Dr. Maness critiqued (TR, 1069) AHF's DIR calculations as erroneously including generic drugs, but Ms. DeStefano said (TR, 535, 549) that the actual DIR damage calculation was for just branded drugs and the data on generics was "just informational". In any event, Dr. Maness seemed to focus on percentage rates, not dollar amounts.

In AHF's ultimate damages calculations, presented by Ms. DeStefano (Exh. 1284)[14], it appears she accepted but did not strictly incorporate Ms. Engelhart's dollar amounts for 2021 - 2023. Rather, using those amounts as a basis to determine AHF's overall percentage rate of payment, Ms. DeStefano calculated AHF's damages for those three years based on comparative percentages of reimbursement pre- and post-Collaboration. In doing so, Ms. DeStefano did not break out AHF's DIR fees for those three years but included them in the gross Medicare Part D damage calculations. (TR, 555, 558: "Dollar impact" on Exhibit 1284 is the combination of Medicare Part D rate shortage and DIR fee.) Nonetheless, Ms. DeStefano acknowledged Ms. Engelhart's actual calculation of $1.9 million of gross DIR fees, saying that roughly accounted for 50% of AHF's overall Medicare Part D damages of $3.8 million for both shorted reimbursements and DIR clawbacks based on Exhibit 1284. (TR, 558 - 559.) Based on Exhibit 1289, that percentage grew to 56% ($1.9 million out of $3.4 million).

For this aspect of AHF's damages, this Arbitrator holds that the actual gross numbers presented by Ms. Engelhart are the accurate presentation. Notably, Ms. Engelhart and Ms. DeStefano also concur that there were no DIR damages from Prime for 2024. (TR, 327 - 328: no time-of-sale DIR in 2024; Exhs. 1284, 1289: no 2024 "MEDD w DIR" percentages for Prime Brand, indicating none taken.) Nor did AHF seek DIR damages from ESI under that agreement. (TR, 605.) Thus, this Arbitrator concludes that Claimant's gross DIR damages are $1,990,947.33

But to be totally fair (TR, 556), Ms. DeStefano reduced the gross DIR fee total by the estimated (and later adjusted; Exh. 1289) $172,676 of PPC fees that AHF would have paid, but

[14] Exhibit 1289 was a corrected calculation, but that only adjusted 2024 numbers, not the relevant 2021 - 2023 numbers on DIR. Notably, Ms. DeStefano testified only about Exhibit 1284, not the corrected Exhibit 1289. Only Dr. Maness testified about the substance in Exhibit 1289, but that did not address the DIR dollar amounts. (TR, 1171, 1173, 1186.)

did not, during 2021- 2023 under the PPA if the Collaboration had not been in place. This Arbitrator accepts that adjustment as a warranted but-for damage adjustment.[15] When the $172,676 is deducted from the overall gross total, AHF's net DIR damage amount is $1,818,271.33.

Accordingly, Claimant has proven with reasonable certainly that AHF suffered damages from the improper assessment of DIR fees in the amount of $1,818,271. An Interim Award in that amount (before trebling) is therefore entered in favor of Claimant and against Respondent on the two antitrust claims collectively.

Claimant May Not Recover From Prime
The Amounts That ESI Failed To Pay To AHF

AHF includes in its damages the $3,029,291 (AHF Post Brf., p. 46; Exh. 1289) that ESI allegedly did not pay AHF when ESI annually calculated its contractual effective rate ("brand effective rate" or "BER") under the 2017 AHF/ESI PPA. (Exhs. 29, 33; TR, 175 – 178, 400, 419.) This Arbitrator concludes that AHF may not recover that amount because the loss arose solely from ESI's decisions and actions under just its contract with AHF and did not arise directly out of the Collaboration, or out of the PPA, or under any other theory of recovery against Prime. This Arbitrator disagrees with AHF (Post Brf., p. 46) that the BER underpayments can be ascribed to the Collaboration and therefore become another item of AHF's damages.

The AHF/ESI agreement provided (Exhs. 29.006, 33.001 – 002) that ESI would reimburse AHF at an "overall annual effective rate", which, for commercial claims, would be an "aggregate based on ESI's entire applicable book of business." The BER was exclusively ESI's calculation of commercial reimbursements it owed to AHF. AHF acknowledged, and this Arbitrator observed,

[15] Ms. Engelhart calculated the actual total PPC fees for 2019 and 2020 at $40,326.22 (Exh. 10, line 7), which would extend to just $80,652 for the years 2021 - 2024. However, Ms. DeStefano aptly adjusted for increased revenues over those later years, justifying the larger addback. The larger addback, which this Arbitrator applies, works in Prime's favor by reducing AHF's net DIR damages.

that those payments were solely "ESI's contractual obligations to AHF", and solely underpayments "according to the ESI form contract … between ESI and AHF." (AHF Post Brf., pp. 35, 44.) Neither side points out, and this Arbitrator did not find, any specific reference in that agreement to the blending of Prime's commercial payments with ESI's in determining ESI's effective reimbursement rate.

In making its calculations, however, ESI factored in Prime's commercial transactions under the Collaboration, using that to find an overall average of ESI's effective rate. (TR, 418.) AHF is correct that nothing in the ESI/AHF agreement permitted ESI to do that. But that is precisely why these damages are not recoverable: because any allegedly wrong calculation arose solely from ESI's unilateral calculation under just that agreement.

This Arbitrator does not accept AHF's argument (Post Brf., p. 44) that ESI's underpayments are sufficiently tied to the Collaboration merely because ESI was wrongly motivated to recover from AHF any amounts that ESI paid to Prime under Collaboration guarantees. Nor does it matter that ESI used Prime's Collaboration payments to arrive at the allegedly reduced BER. The correlation of those aspects to the Collaboration may be strong, but neither are shown to be express or implied features of the Collaboration to which Prime agreed or of which Prime had advance knowledge. The difference between the recovery of DIR damages (for example) and the nonrecovery of BER damages is that the Collaboration permitted ESI's DIR program to be superimposed onto the PPA, whereas there is no evidence that the Collaboration permitted ESI to include Prime's commercial transactions in ESI's BER calculations. ESI's calculations and payments to AHF were still exclusively attributable to ESI's decisions and actions. Notably, AHF does not cite any provision of the PPA connecting Prime to ESI's unilateral actions.

To be recoverable, any antitrust damages must be caused by or be the result of the antitrust injury. AHF has not shown that connection, as AHF's proffered link of ESI's calculations to the Collaboration is too tenuous to make any BER underpayments an item of damage recoverable from Prime. It is therefore not necessary to discuss AHF's calculation of the $3,029,291 or the law that, AHF says, allows it to recover this alleged injury from co-conspirator Prime. And this Arbitrator makes no findings (because none is needed for this case) whether ESI rightly or wrongly applied its averaging methodology in arriving at the BER totals.

AHF Is Entitled To Commercial Damages
Attributable To the Usage of ESI's Rates

Based on corrected Exhibit 1289, Claimant claims total damages of $6,465,860. Of that, this Arbitrator has allowed a net of $1,818,271 for DIR but disallowed $3,029,291 for ESI BER. The remaining amount, $1,618,298, is therefore comprised of claimed commercial and Medicare Part D damages attributable to Prime's improper usage of ESI's lower reimbursement rates for those two lines of business.

In Exhibit 1289, AHF says those commercial damages total only $18,932. In his counter analysis, based on the prior Exhibit 1284, Dr. Maness candidly calculated those damages to be about $56,000. (TR, 1066.) Accordingly, there is consensus that AHF did suffer some commercial damages due to Prime's layering of ESI's commercial rates onto the PPA. This Arbitrator therefore also awards AHF commercial damages (before trebling) of just the $18,932 that Ms. DeStefano calculated, and an Interim Award in that amount is also entered in favor of Claimant and against Respondent.

AHF Is Entitled To Medicare Part D Damages
Attributable To the Usage of ESI's Rates

Ms. DeStefano did not separate the DIR damages from the reimbursement rate damages in corrected Exhibit 1289. (TR, 555, 606.) But, as noted, she did accept Ms. Engelhart's calculation of the actual amount from the three years 2021 – 2023. Thus, deducting the net DIR damages from the total of net Medicare Part D damages on Exhibit 1289, this Arbitrator calculates that the amount solely deemed attributable to Prime's usage of ESI's Medicare Part D rates is $1,599,366 ($3,417,637 minus $1,818,271).

In determining the impact of the Collaboration on AHF's Medicare Part D reimbursements, Ms. DeStefano compared AHF's post-Collaboration receipts to the presumed world that would have existed absent the shift in those reimbursement rates. To do so, she first created a constant percentage baseline that was derived from the actual Medicare Part D receipts in 2020, the year before the Collaboration took effect for Medicare Part D. (TR, 555, 596 - 598.) She then compared that to the percentage payment for each year 2021 - 2024 to arrive at a percentage delta for each year. From that she calculated the annual dollar damages for those years, resulting in her gross total of $3,590,313 inclusive of DIR. (TR, 555, 558 - 559.)

To the limited extent Dr. Maness specifically confronted the Medicare rate calculations, he critiqued Exhibit 1289 as applying an erroneous baseline that did not account for real world changes in the discount rates. (TR, 1061, 1071 - 1076.) Exhibit 2123 (Demonstrative 9 at the Hearing) displayed his alternative depictions of where and how Ms. DeStefano erred and why her ultimate Medicare Part D damage calculations are unreliable. Thus, Dr. Maness inferentially[16]

[16] It is only inferential because Dr. Maness charted and evaluated only commercial rates, not Medicare rates under PPA Exhibit B.

contends that downward trends in commercial rates belie Ms. DeStefano's constant baseline over 2021 - 2024 for Medicare Part D claims.

This Arbitrator concludes that Ms. DeStefano's Medicare Part D baseline is reasonably correct and that Dr. Maness has not undermined it. First, as noted, Ms. DeStefano's baseline was based on actual data for 2020, but she also considered future changes in the Prime rates in determining that. (TR, 61.) Second, Dr. Maness candidly conceded (TR, 1072 - 1074) that his first two alternatives either "didn't seem like a real realistic way" to assess the baseline or was somewhat unreliable as "still a little aggressive". He did not similarly abandon his third or fourth alternatives, but he still could not vouch for the likely outcome in the but-for world. (TR, 1074 - 1075.)

Third, and most importantly, this Arbitrator sees a fundamental flaw in Dr. Maness' analyses: the use in each alternative of ESI rates to support the supposed downward trend, coupled with the relative minimization of Prime's rates during 2021 - 2024 in his presentation. As to the use of ESI rates, Dr. Maness had earlier distanced ESI's actions from Prime's, contending that ESI's independent commercial calculations had no bearing on Prime's exposure. (TR, 1061 - 1062.) To then use ESI rates in the trending analysis is contrary to that distancing.

And in doing so, the more telling evolution of Prime's rate was minimized. Exhibit 2123 showed that Prime's post-Collaboration discount rates were both above and below Ms. DeStefano's baseline. A rough view shows that the total spaces above and below the baseline - i.e., better and worse discount rates for AHF - were about the same. Thus, over the 2021 - 2024 period in Exhibit 2123, that would roughly even out into the baseline that Ms. DeStefano used. Similarly, Dr. Maness' extrapolation of Prime's pre-Collaboration rates into 2021 - 2024 was drastically off from the chart of Prime's actual pricing.

Dr. Maness thus based his views on questionable data. This Arbitrator therefore concludes that Ms. DeStefano's constant Medicare Part D baseline was reasonable and that her methodology using that baseline calculated a reasonably certain damage amount attributable to Prime's usage of ESI's Medicare Part D reimbursement rates. That amount is the above-stated $1,599,366, and an Interim Award in that amount is also entered in favor of Claimant and against Respondent.

Total Damages and Trebling

The sum of the three categories of damages - DIR and decreased reimbursements for both commercial and Medicare Part D - is $3,436,569. Those all arise from Prime's violation of the Sherman Act and the Minnesota Statute on antitrust. Under both Federal and Minnesota antitrust law, such damages shall be trebled. 15 U.S.C. § 15(a); Minnesota Statutes § 325D.57. This Arbitrator concludes that trebling is not barred by the contractual limit (PPA, §§ 7.6, 9.10.2) on exemplary or punitive damages. *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 575 - 576 (1982); *Phelps v. Commonwealth Land Title Ins. Co.*, 537 N.W.2d 271, 277 (Minn. 1995).

The math is straightforward: trebling results in total damages of $10,309,707. An Interim Award is therefore entered in favor of Claimant AIDS Healthcare Foundation and against Respondent Prime Therapeutics LLC in that amount on the First and Second Causes of Action. All other damage claims are denied.

AHF Is Entitled To Injunctive Relief, But Only On
The Antitrust Claims and Only As To AHF

There is a disconnect between AHF's requested relief in the SAC and its requested relief in its Post-Hearing briefs. In the SAC (pp. 18 - 20), the Prayer For Relief asks for injunctive relief on the two antitrust Causes Of Action, but only "against threatened or future loss or damage to

AHF". The Prayer does not also ask for injunctive relief with respect to future loss or damage incurred by other pharmacies nationwide by reason of the antitrust violations.

AHF's post-Hearing briefing goes beyond that, asking for injunctive relief with respect to nationwide pharmacies, not just AHF. (See Post Brf., pp. 47 - 48; Post Reply, pp. 22 - 23.) In opposition, Prime contends (Post Brf., pp. 39 - 40; Post Reply, p. 19) that injunctive relief is unwarranted on the antitrust claims because AHF has not shown there was a violation of antitrust injury, and also that a nationwide injunction is inappropriate.

This Arbitrator concludes that injunctive relief is warranted for the two antitrust claims, but only as to AHF. It is obviously denied as to any other Causes Of Action because no liability was proven as to those.

The statute, Section 16 of the Clayton Act, 15 U.S.C. § 26 is clear: Claimant may get "injunctive relief ... against threatened loss or damage by a violation of the antitrust laws." The burden of proof is on Claimant to show "a significant threat of injury from an impending violation ... or from a contemporary violation likely to continue or recur", especially where unlawful acts have already been committed and whose commission in the future can be fairly anticipated from past behavior. *Zenith Radio Corp. v. Hazeltine Research, Inc., et al.*, 395 U.S. 100, 131 - 132 (1969). See also *St. Jude Medical, Inc. v. Carter, et al.*, 913 N.W.2d 678, 684 - 685 (2018) (under Minnesota law, injunctive relief appropriate for threatened future injury that "will in all probability result", particularly where there was evidence of past actual harm); *State of Minnesota by Smart Growth Minneapolis v. City of Minneapolis*, 7 N.W.3d 418, 430, 432 (Minn. Ct. App. 2024) (injunction proper that is explicitly authorized by statute, but must be necessary and appropriate and not impose unnecessary hardship on the enjoined party). Minnesota Statutes section 325D.58

also permits injunctive relief for a violation of Minnesota antitrust laws. Prime does not contest these standards.

With the above findings and Interim Award on the antitrust claims, AHF has clearly proven the predicates for injunctive relief: Prime violated the two antitrust statutes; Prime is liable for damages for 2021 to 2024, which are continuing; Prime's Collaboration with ESI is continuing under the agreed extension (at least through December 2025); Prime clearly prioritized its and its owners' cost savings and profits over its contract with AHF, and shows no sign of altering that business decision; the prospect of ongoing harm to AHF from the Collaboration, if not enjoined, is likely inevitable; and, balancing the benefits and burdens, an injunction is necessary to also avoid likely and significant additional attorneys' fees and costs if AHF were instead forced to further challenge, and Prime to defend, the legality of the Collaboration in later arbitration or litigation.

Thus, there was nothing indicating that Prime's violation had terminated or would cease in the foreseeable future. *Zenith*, 395 U.S. at 132. Accordingly, this Arbitrator finds there is an impending threat of an ongoing antitrust violation arising from a contemporary violation that is likely to continue, and that the statute explicitly permits injunctive relief under those circumstances.

But for two reasons the injunction is limited to Prime's dealings with AHF and does not extend to Prime's dealings with other pharmacies nationwide. First, since the SAC only sought injunctive relief on the antitrust claims as to AHF, this Arbitrator concludes it would be improper to award more expansive injunctive relief. Second, while this Arbitrator has broad discretion in fashioning any relief that is just and equitable (see AAA Rule R-47), AHF has not shown that, for

this case, it is entirely necessary or appropriate to correct Prime's antitrust violations for the other pharmacies too.

Therefore, on the two antitrust claims in the First and Second Causes Of Action, an injunction is entered in favor Claimant and against Respondent as follows: from and after the issue date of this Interim Award, Prime is permanently enjoined from participating in the Collaboration, and from applying or imposing the terms of the Collaboration, upon or with respect to the reimbursements made to AHF for the drugs and other pharmaceutical services that AHF provides to members of any healthcare benefit plans for which Prime is the PBM. All other requests for injunctive relief are denied.

It is not for this Arbitrator to prescribe the specific steps that Prime must take to unwind the application of the Collaboration to AHF, but Prime is to move promptly to complete that task. Also, recognizing that Prime's full implementation of this injunction may take many weeks, this Arbitrator additionally orders Prime to pay to AHF any improperly reduced reimbursements that may be processed under the Collaboration during that process of unwinding, such payments to be made within thirty (30) days of completion of the process. As this matter continues to address any fees and cost shifting, this Arbitrator at least temporarily retains jurisdiction over this remedy.

**Conclusion**

For the reasons stated above, an Interim Award is entered as follows:

A. On Claimant's two antitrust claims in the First and Second Causes Of Action, an Interim Award is entered in favor of Claimant and against Respondent, on which Claimant is awarded a single recovery of trebled damages in the amount of $10,309,707 and injunctive relief that, from and after the issue date of this Interim Award, Respondent is permanently enjoined from participating in the Collaboration, and from applying or imposing the terms of the Collaboration,

upon or with respect to the reimbursements made to AHF for the drugs and other pharmaceutical services that AHF provides to members of any healthcare benefit plans for which Respondent is the PBM. All other requests for damages and injunctive relief are denied.

B. On Claimant's three common law claims in the Fourth, Fifth, and Sixth Causes Of Action, an Interim Award is entered in favor of Respondent and against Claimant, and thus no relief is awarded to Claimant on them.

C. Based on the relief granted in A, under the Clayton Act, 15 U.S.C. § 15(a), and Minnesota Statutes Section 325D.57, Claimant is entitled to reasonable attorneys' fees and costs. Clamant also seeks interest under Minnesota Statutes Section 549.09 on the damages awarded. (SAC, p. 19.) Therefore, the matter is continued for further evidence and argument on (preferably both via written submissions) the allowance of attorneys' fees, costs, and interest on the two antitrust claims. Counsel are to confer, and by February 14, 2025, submit to this Arbitrator an agreed or separate proposal(s) to address that additional relief.

D. Except as expressly granted herein, all other claims, defenses, assertions, or arguments are denied or deemed immaterial to the above merits holdings.

DATE: January 17, 2025

/s/ Stuart M. Widman
Stuart M. Widman, Arbitrator