

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
Miami-Dade Division

CASE NO. 13-21158-CIV-LENARD/GOODMAN

MONICA BARBA and JONATHAN )  
REISMAN, on behalf of themselves and all )  
others similarly situated, )

Plaintiffs, )

v. )

SHIRE U.S., INC., a New Jersey )  
Corporation, SHIRE, LLC, a Kentucky )  
Limited Liability Company, and DOES 1 )  
through 100, inclusive, )

Defendants. )

**REDACTED ECF VERSION**

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REPORT AND RECOMMENDATIONS ON  
**PLAINTIFFS' RENEWED MOTION FOR CLASS CERTIFICATION**

Pursuant to 28 U.S.C. § 636(b)(1)(B), the District Court has referred (D.E. 218) to the undersigned for a Report and Recommendation on the Plaintiffs' Renewed Motion for Class Certification (D.E. 217). Having considered the case record, the parties' briefing and supplemental submissions, and oral arguments of counsel, the undersigned recommends that Plaintiffs' Renewed Motion for Class Certification (D.E. 217) be granted.

## **I. BACKGROUND**

Judge Lenard thoroughly discussed Plaintiffs' allegations in her September 4, 2015 Sealed Order granting in part and denying in part Shire's motion to dismiss.<sup>1</sup> (D.E. 230.) The undersigned assumes familiarity with that Order. Furthermore, as Shire's disputes regarding class certification focus mostly on standing, ascertainability, and damages issues, many of the core factual disputes in this case are not implicated by Plaintiffs' Renewed Motion for Class Certification and the associated briefing.<sup>2</sup> Accordingly, the undersigned provides only a brief summary of this action. To the extent additional factual development is necessary below, the undersigned will provide such background in the discussion.

This is a putative antitrust consumer indirect purchaser class action in which Plaintiffs assert antitrust and unfair trade practices claims pursuant to the Florida Deceptive and Unfair Trade Practices Act ("FDUPTA"). In short, Plaintiffs allege that Shire, the manufacturer of brand Adderall XR ("AXR"), made payments totaling in excess of [REDACTED] to manufacturers of generic AXR to settle patent litigation Shire was likely to lose (D.E. 279-3 (Report of Bruce Sunstein)) in exchange for a multiple year delay of generic entry into the market. (See D.E. 233-2, D.E. 233-3 (Report and Errata of Dr. McGuire); D.E. 279-13 (Report of Christian Tregillis).)

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<sup>1</sup> The Order was entered on the ECF Docket on September 8, 2015.

<sup>2</sup> The undersigned has reviewed the parties' summary judgment filings and understands that much of Plaintiffs' case in chief is not in dispute at summary judgment either. (D.E. 238 at 6, n.7) ("The challenged [settlement] terms and business arrangements are not relevant to this Renewed Motion [for summary judgment] ....").

Plaintiffs assert that this arrangement violated antitrust laws as set forth in the Supreme Court's *FTC v. Actavis* opinion, 133 S. Ct. 2223 (2013), and caused damages of roughly [REDACTED] to Florida consumers (D.E. 233-16, 279-43 (Report and Errata of Dr. Meredith Rosenthal)).

Plaintiffs filed a Renewed Motion for Class Certification ("Plaintiffs' Motion") on June 19, 2015. (D.E. 217.) Plaintiffs contend that, absent Defendants' actions, cheaper generic AXR would have been available in the market as early as January 1, 2007. (Pl. Op. Br. at 10-11;<sup>3</sup> *see also* D.E. 233-2 (McGuire Report) at ¶¶ 248-250.) Plaintiffs seek to certify the following class:

All persons who purchased (for personal or household use) and/or paid for some or all of the purchase price for brand Adderall XR in Florida between January 1, 2007 through March 31, 2009.

Excluded from the Class are: (1) Third Party Payors; (2) Persons and entities who purchased directly from Defendants; (3) Persons and entities who purchased only for resale purposes; (4) "Flat co-pay" "Cadillac Plan" customers who made purchases only via fixed dollar co-payments that do not vary between Adderall XR and its generic equivalent; (5) Patients with insurance coverage including a flat-rate co-pay provision; (6) Governmental entities; (7) Shire, their officers, directors, affiliates, legal representatives, employees, co-conspirators, successors, subsidiaries and assigns, and entities in which Shire has a controlling interest; and (8) The judges, justices, magistrate or judicial officers presiding over this matter.

(D.E. 217, at 12.)

After Plaintiffs filed their Renewed Motion, but before they filed their Reply memorandum, the District Court granted in part and denied in part Defendants' motion to dismiss. (D.E. 230.) The Renewed Motion for Class Certification was fully briefed upon submission of Plaintiffs' Reply memorandum on September 14, 2015. (D.E. 233.) On October 16, 2015, the undersigned held oral argument on Plaintiffs' Motion. (D.E. 303, 310.) During the hearing, the Court directed Plaintiffs to submit a Notice of Filing pointing to citations in the

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<sup>3</sup> Page citations reference the page number assigned by ECF, with the exception of memoranda related to the Motion (D.E. 217-1, D.E. 227, D.E. 233) and Shire's summary judgment motion (D.E. 238, D.E. 279, D.E. 320), as Shire did not file redacted Memoranda on ECF. (D.E. 227.)

record wherein the parties' experts discuss "potential sources of information such as actual physicians, healthcare providers, insurance carriers, and the like." (D.E. 310 (Hr'g Tr. at 98:8-11). Plaintiffs complied on October 23, 2015. (D.E. 328 (Notice of Filing).)

## II. STANDARD OF REVIEW

District courts enjoy broad discretion in deciding whether to certify a class. *Freeman v. Motor Convoy, Inc.*, 700 F.2d 1339, 1347 (11th Cir. 1983.) Before engaging in the Rule 23 analysis, however, the district court must first determine whether at least one named representative has "individual standing to raise the legal claims of the class" and whether the "proposed class is adequately defined and clearly ascertainable." *See See Prado-Steiman v. Bush*, 221 F.3d 1279 (11th Cir. 2000) ("a class representative must be part of the class and possess the same interest and suffer the same injury as the class members"); *Little v. T-Mobile USA, Inc.*, 691 F.3d 1302, 1304 (11th Cir. 2012) (ascertainability is an "implied prerequisite" to class certification).

Once standing and ascertainability are established, the moving party must affirmatively demonstrate, through "evidentiary proof," compliance with each of the requirements specified in Federal Rule of Civil Procedure Rule 23(a) and at least one of the three requirements set forth in Rule 23(b.) *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013). The four Rule 23(a) requirements are typically referred to as "numerosity, commonality, typicality, and adequacy of representation." *Valley Drug Co. v. Geneva Pharm., Inc.*, 350 F.3d 1181, 1188 (11th Cir. 2003). Plaintiffs have chosen here to proceed under Rule 23(b)(3), pursuant to which a class action may be maintained if "questions of law or fact predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Certification is proper only if

the trial court is “satisfied, after a rigorous analysis” that the prerequisites of Rule 23 are met. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551-52.

A court is not to decide the merits of the case at certification stage, though “[s]ometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question.” *General Tel. Co. of the S.W. v. Falcon*, 457 U.S. 147, 160 (1982); *see also Powers v. Government Employees Insurance Co.*, 192 F.R.D. 313, 316 (S.D. Fla. 1998) (stating that “[c]lass certification is strictly a procedural matter”). Even so, Rule 23 does not grant courts a “license to engage in free-ranging merits inquiries at the certification stage.” *Amgen Inc. v. Conn. Retirement Plans and Trust Funds*, 133 S. Ct. 1184, 1194-95 (2013.) Courts should consider merits issues “to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied.” *Id.* at 1195; *see also Vega*, 564 F.3d at 1260 (reviewing certification decision within “mandates of Rule 23, **and whether [plaintiff’s] complaint, as pled**, can sustain class certification under Rule 23”) (emphasis added). “As long as the district court’s reasoning stays within the parameters of Rule 23’s requirements for certification of a class, the district court decision will not be disturbed.” *Fitzpatrick v. General Mills*, 635 F.3d 1279, 1282 (11th Cir. 2011).

### III. DISCUSSION

#### A. Elements of Class Certification Not in Dispute

At the outset, it is worth noting that Defendants do not contest Plaintiffs’ satisfaction of any of the Rule 23(a) requirements. Instead, Shire contends that (i) Plaintiffs lack standing to assert their claims and therefore cannot serve as class representatives; (ii) the class is not ascertainable because certain class members without damages allegedly cannot be identified and excluded; and (iii) that individualized damages issues predominate over common liability and damages ones. The undersigned first addresses each of Shire’s contentions in turn.

## B. Plaintiffs Have Standing

Defendants contend that the putative class cannot be certified because Plaintiffs lack standing. (See Def. Opp. at 10.) Specifically, Defendants contend that Plaintiffs lack standing because their claims are time-barred. (*Id.* at 1, 10 (“the **entire** period of injury, which coincides with the proposed class period, falls **outside** the applicable statute of limitations period”) (emphasis in original)). Upon rigorous analysis of the pertinent facts, I conclude that Plaintiffs have sufficiently demonstrated that they possess standing.

### 1. Constitutional Standing

Shire does not contest the elements of constitutional standing, but instead argues that Plaintiffs’ individual claims are time-barred. I nevertheless address the elements of standing before turning to Shire’s statute of limitations argument.

Constitutional standing is not an exacting burden; rather, it is a “threshold” jurisdictional inquiry. See *In re Deepwater Horizon*, 739 F.3d 790, 798 (5th Cir. 2014). To demonstrate standing, a plaintiff simply must show (i) an injury-in-fact; (ii) a causal connection to the challenged conduct; and (iii) a likelihood of or a susceptibility to redress by a favorable judgment. *Lujan v. Defenders of Wildlife*, 504 U.S. 550, 560-61 (1992); see also *In re Deepwater Horizon*, 739 F.3d at 799, 804-06 (explaining that standing inquiry becomes “gradually stricter as the parties proceed through ‘the successive stages of litigation’” and finding that at the class certification stage that the named plaintiffs need only “allege” standing) (internal citation omitted); *Common Cause/ Georgia v. Billups*, 554 F.3d 1340, 1351 (11th Cir. 2009) (injury need not be “significant” to confer standing; rather, a small injury, even “an identifiable trifle” is sufficient). “[S]tanding in no way depends on the merits of the plaintiff’s contention that particular conduct is illegal.” *Warth v. Seldin*, 422 U.S. 490, 500 (1975).

The Court is satisfied that Plaintiffs satisfy these requirements. It is undisputed that

Plaintiffs each made one or more purchases of AXR during the Class Period. (Pl. Op. Br. at 16; D.E. 217-47 (Barba Dep. 13:13-19, 14:11-21, 37:3-6); D.E. 217-48 (Reisman Dep. 19:13-15, 17:21-25, 18:5-9; 33:16-21); Def. Opp. at 7.) Those purchases were allegedly made at supra-competitive prices because of Defendants' allegedly anti-competitive conduct. (*Id.*) This is not conjectural or hypothetical harm, but rather concrete and particularized injury. *See Lujan*, 504 U.S. at 560. To compensate for their injuries, Plaintiffs seek monetary damages, a very conventional form of redress. *See e.g., Resnick v. AvMed, Inc.*, 693 F.3d 1317 (11th Cir. 2012) (monetary damages sufficient to show injury-in-fact). Plaintiffs' alleged injuries caused by Defendants are susceptible to redress by an award of money damages. *See, e.g., Fla. Stat. Ann.* § 501.211 (permitting recovery of actual damages).

## **2. Fraudulent Concealment**

As the District Court previously observed, (D.E. 230 at 24) claims under FDUPA are subject to a four-year statute of limitations. Whether calculated from the first day of the proposed class period (i.e., January 1, 2007) or the last (i.e., March 31, 2009), more than four years elapsed before Plaintiffs filed their initial complaint on April 2, 2013. (D.E. 1.) Plaintiffs concede the application of the four-year statute of limitations, but argue their claims are saved by operation of the fraudulent concealment doctrine. (*See* Pl. Reply Br. at 1; D.E. 230 at 12-36; D.E. 279 at 5-10; D.E. 279-1 at 4-5 (Pl. SMF ¶ 21); D.E. 310 (Hr'g Tr.) at 12-36.)

The District Court previously ruled that the fraudulent concealment doctrine is available as a mechanism to toll an otherwise time-barred FDUTPA claim. (D.E. 230 at 29.) The District Court then conducted a thorough analysis and concluded that the FAC adequately alleged the elements necessary for Plaintiffs to invoke the fraudulent concealment doctrine. (*Id.* at 40.) Thus, the District Court has already found that Plaintiffs have a "possibility" or reasonable "likelihood" of redressing their claims, as is required to satisfy the standing requirement. This should end the

inquiry. *See, e.g., In re Deepwater Horizon*, 739 F.3d at 803-06 (in addressing standing of named plaintiffs in Rule 23 context, “it is sufficient for standing purposes that the plaintiffs seek recovery for an economic harm that they **allege** they have suffered” (emphasis added and internal quotations and citation omitted)).

Nevertheless, assuming *arguendo* that I must look beyond the FAC and the District Court’s September 4 Order, I conclude that there is sufficient evidence in the record to support fraudulent concealment tolling. I begin by noting, however, that the issue of fraudulent concealment is one that—where subject to a genuine dispute of material fact—is appropriately left for the trier of fact. (D.E. at 230-34, 40.) Because I only explore this merits issue for purposes of class certification, my findings are not binding on a later fact-finder at summary judgment or trial. *See, e.g., In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 522 F.3d 6, 24 (5th Cir. 2008) (collecting cases).

As the District Court previously ruled, to establish fraudulent concealment, a claimant must allege and establish (1) successful concealment of the cause of action, (2) fraudulent means to achieve that concealment, and (3) plaintiff exercised reasonable care and diligence in seeking to discover the facts that form the basis of the claims. (D.E. 230 at 32.) Although fraudulent concealment is a fact dispute more appropriately resolved in a merits setting, I find that Plaintiffs have identified sufficient facts in the record supporting fraudulent concealment tolling. (D.E. 279 (Pls’ S.J. Opp’n,) at 3-13; D.E. 279-1 (Pls’ Statement of Facts (“SMF”), at ¶¶ 21-22).)

Shire contends in its papers, and reiterated at oral argument, that the company’s press releases fully disclosed all aspects of the settlements that Plaintiffs contend were concealed. (Def. Opp. at 12; D.E. 310 (Hr’g Tr.) at 14:2-15:7, 18:5-19:25.) The undersigned directed Shire to file those materials, which Shire did shortly after the hearing. (D.E. 308). The undersigned has

carefully reviewed these materials, as well as the others identified in Shire's briefing. I agree with Plaintiffs' characterizations of these materials. These press releases are "generically worded" (D.E. 279 at 10) and really disclose nothing other than the fact that a patent litigation settlement occurred containing a license date many years before patent expiry and that several other business agreements were executed the same day. None of these materials, individually or collectively, expressly discloses the particular aspects of those agreements and deals that Plaintiffs contend are anticompetitive—something which Shire continues to deny. Nor can it be reasonably argued that this information even if one assumes it was collectively known to class members, put class members in the exercise of reasonable diligence on notice of an antitrust claim for damages against Shire.

By contrast, Plaintiffs point to evidence of active and willful concealment of the alleged anticompetitive reverse payments made to both Impax and Barr/Teva. Shire's [REDACTED]  
[REDACTED]  
[REDACTED] (D.E. 279-12, D.E. 279-19; *see also* 279-1 (SMF ¶ 21).)

Although Shire's counsel attempted to explain away these statements based on the limiting language of "settlement agreements," I find this argument unpersuasive because Plaintiffs' contention is that all of the agreements (settlement and license agreements and side deals) were in fact part and parcel of and/or linked to the settlement agreements. This contention is supported by the evidence in the record, as Plaintiffs have pointed to numerous admissions in the record that the Shire-Impax Carbatrol Promotional Services Agreement ("PSA") was [REDACTED]  
[REDACTED]  
[REDACTED] (D.E. 279 at 5; D.E. 279-1 (SMF ¶ 21); D.E. 279-16 through D.E. 279-18.) Shire

appears not to dispute that the Barr/Teva side deals – the Adderall IR sale and the Women’s Health Collaboration – were [REDACTED] (D.E. 310 (Hr’g Tr.) at 27 ([REDACTED]) Thus, I credit Plaintiffs’ argument that Shire’s representations [REDACTED] constituted active and willful attempts to conceal the alleged reverse payments.

Putting aside whether Shire’s press releases were adequate disclosures, I now turn to whether the challenged aspects of the settlements were concealed. Taking the Shire/Impax settlement first, Plaintiffs point to [REDACTED] (D.E. 279 at 7; D.E. 279-1 (SMF ¶ 21); D.E. 279-13; D.E. 279-14; 279-15.) Plaintiffs need not prove a negative or, in other words, submit proof that something was not disclosed because it is difficult to imagine how than might be done. Notably, Shire did not accept Plaintiffs’ challenge to identify [REDACTED] disclosed. (D.E. 305.) Furthermore, Plaintiffs have also asserted that the specific financial terms of the Shire-Impax Carbatrol PSA were not made public (D.E. 279 at 6), which Shire does not contest in its summary judgment Reply brief (D.E. 305.) This is important because one can only discover that a payment had been made (and the value thereof) through analysis of the specific financial terms of the Shire-Impax PSA – and specifically a close look by an expert in the field of business valuations (D.E. 279-1 (SMF ¶ 21); D.E. 279-13 (Tregillis Report) at ¶¶ 1-5.)

Thus, to the extent that Plaintiffs need demonstrate some quantum of proof of fraudulent concealment in the context of class certification, the undersigned finds that Plaintiffs have met that burden with respect to the Shire-Impax reverse payments.

I reach the same conclusion with respect to the alleged Barr/Teva reverse payments.

Beginning with the royalty, Shire again did not accept Plaintiffs' challenge to identify where the alleged low Barr/Teva royalty was publicly disclosed.<sup>4</sup> (D.E. 305.) Furthermore, with respect to the Adderall IR and Womens' Health Collaboration side deals, Shire's own CEO one day after the settlement and side deals were executed publicly asserted these deals were "fair value" transactions that "stood on [their] own terms." (D.E. 279-1 at 4-5 (Pl. SMF ¶ 21); D.E. 279-19 at 7.) Yet, a detailed examination by Plaintiffs' expert relying on internal Shire documents proves that these and other similar statements made by Shire's CEO were misleading, inaccurate, or simply untrue. (D.E. 279 at 5-6; D.E. 279-1 (SMF ¶ 21); D.E. 279-13 (Tregillis Report); D.E. 279-21, 279-22, 279-23 [REDACTED]; D.E. 279-23, 279-24, 279-25 [REDACTED] I am thus satisfied that the alleged reverse payments from Shire to Barr/Teva were actively and willfully concealed.

Overall, the expert analyses of Plaintiffs' experts Mr. Tregillis and Dr. McGuire (D.E. 279-1 (SMF ¶ 21); D.E. 279-13, 279-14, 279-15) find over [REDACTED] in disguised payments to Impax and Barr/Teva, in direct contradiction to Shire's public SEC filing assertions that no payments were in fact made.

The event study performed by Dr. McGuire – which Shire contends shows that the public knew about the anticompetitive nature of its settlements – does not alter this conclusion. What investors might have divined about Shire's license agreements from trade publications or information directly from Shire, the fact remains Shire withheld the material terms of those agreements from consumers and analysts alike; represented to the public the side deals with Impax and Barr/Teva were separate; and explicitly trumpeted [REDACTED]

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<sup>4</sup> As for the characterization of [REDACTED], the undersigned assigns significant weight to Shire's own in-house counsel's admission under oath that [REDACTED] (D.E. 279 at 9; D.E. 279-1 (SMF ¶ 21); D.E. 279-26 (Deposition of Scott Applebaum)).

██████████.<sup>5</sup> (D.E. 233-2 (McGuire Rep.) at fn 30.)

For instance, Shire cites an excerpt from Dr. McGuire's report that ██████████

██████████ (D.E. 308-1 at 5-6.) ██████████

This falls well short of knowledge sufficient to state an antitrust claim. That an agreement between two competitors—by definition, a literal restraint of trade—might risk antitrust exposure is nothing more than a truism. This reference does not suggest that financial news services were aware of the details of Shire's settlement with Barr/Teva. Indeed, as discussed above, Plaintiffs cite evidence that Shire's CEO publicly stated that the settlements did not involve any payments, and did not pose any antitrust concern.

Finally, one of Shire's own experts argues that ██████████

██████████ (D.E. 238 (Collins Decl., Ex. 3) Expert Report of Gregory Bell, Ph.D. at ¶ 81).) To the extent Shire's own expert Ph.D economist opines that ██████████, reasonable consumers cannot be presumed to have synthesized from financial market chatter behind a subscriber paywall that delayed entry of generic AXR was due to unspecified, non-disclosed terms Shire's patent litigation settlements. At most, this presents a question of competing inferences and credibility

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<sup>5</sup> Shire's reliance on *Aggrenox Antitrust Litig.*, No. 3:14-md-2516 (SRU), 2015 WL 1311352 (D. Conn. Mar. 23, 2015) is misplaced. That was a motion to dismiss decision. The District Court here has already found Plaintiffs plausibly allege fraudulent concealment. Further, unlike here, in *Aggrenox* the defendant "publicly disclose[d] the precise terms of the challenged settlement or their associated dollar values." *Id.* at \*17. As the District Court already ruled, the FAC here details with specificity *how* Shire concealed its reverse payment agreements and various side deals. (FAC ¶¶ 56-76; D.E. 125 at 9; D.E. 230 at 12-36.)

best decided by a jury. *See Morton's Market, Inc. v. Gustafson's Dariy, Inc.*, 198 F.3d 823, 832-33 (11th Cir. 1999) (stating "we have held, along with a majority of the circuits, that the issue of when a plaintiff is on 'notice' of his claim is a question of fact" and collecting cases). *See also* D.E. 230 at 40 (citing cases and quoting *Am. Home Assur. Co. v. Weaver Agg. Transp. Inc.*, 990 F. Supp. 2d 1254, 1272 (M.D. Fla. 2013) and *Chiquita Brands Int'l, Inc. Alien Tort Statute & S'holder Deriv. Litig.*, 690 F.Supp. 2d 1296, 1307 (S.D. Fla. 2010) (questions of fact regarding equitable tolling based on fraudulent concealment are questions of fact precluding dismissal as a matter of law)). In short, the undersigned credits Plaintiffs' arguments regarding [REDACTED] [REDACTED] (D.E. 279 at 7-10; D.E. 279- 14 at ¶137; D.E. 238 at ¶ 48; D.E. 279-19 at 7; D.E. 279-1 (Pl. SMF ¶ 21).)

Defendants' principal case, *Carter v. West Publishing Company*, 225 F.3d 1258 (11th Cir. 2006), is distinguishable. In *Carter*, a Title VII case, the named plaintiffs failed to file any EEOC charge within 180 days. The plaintiffs failed to present any evidence that the underlying discrimination was concealed, and admitted at deposition that "it wasn't a secret." *Id.* at 1266. In contrast, Plaintiffs here present ample evidence that the anticompetitive aspects of Shire's patent settlements were not disclosed or otherwise discoverable.

Also, although it was decided on summary judgment, the undersigned finds the Eleventh Circuit's reasoning in *Morton's*, 198 F.3d at 832-33, an antitrust case, persuasive. The *Morton's* court reversed a district court's granting of summary judgment for defendants because material facts existed as to fraudulent concealment. *Id.* While the defendants in *Morton's* had pointed to certain facts "which might have caused a plaintiffs to inquiry, or could have led to evidence supporting his claim," that did not defeat the applicability of the doctrine. *Id.* Rather, the defendants "succeeded in demonstrating only that there is a jury question regarding the tolling of

the statute of limitations by fraudulent concealment.” Shire has done no more than this here. At best, they have pointed to some contrary evidence that a factfinder may consider. As that is not enough to grant summary judgment—a true merits determination—it surely is not enough at the class certification stage, either. *See Kennedy v. Tallant*, 710 F.2d 711, 718 (11th Cir. 1983); *see also In re Urethane Antitrust Litig.*, 237 F.R.D. 440, 452 (D. Kan. 2006) (certifying antitrust class over objection based on fraudulent concealment; “the common issue of concealment will predominate because the key inquiry will focus on the defendant’s conduct – that is, what the defendants did – rather than on the plaintiffs’ conduct.”); *see also In re WorldCom, Inc. Sec. Litig.*, 219 F.R.D. 267, 303 (S.D.N.Y. 2003) (“the existence of even a meritorious statute of limitations defense does not necessarily defeat certification”).

Another instructive antitrust case is *In re Copper Antitrust Litigation*, 436 F.3d 782, 791-92 (7th Cir. 2006), wherein an appellate court reversed a grant of summary judgment for the defendants. The *Copper* defendant attempted to refute the plaintiffs’ evidence of fraudulent concealment “with references to articles that reveal information...it contends, should have prompted further inquiry.” (*Id.*) “But this evidence does not, by itself, erase the contrary evidence that the plaintiffs have proffered. The doctrine of fraudulent concealment protects both the diligent and the non-diligent plaintiff . . . from the expiration of claims the factual basis for which was shrouded by the veil of fraudulent concealment.” *Id.* (internal quotations omitted); *cf. Drayton v. Western Auto Supply Co.*, 2002 U.S. App. LEXIS 28211 (11th Cir. Mar. 11, 2002) (affirming certification where district court was not “convinced” that plaintiffs should have known of discriminatory segregation policy earlier, and applying equitable tolling.)

Shire’s statute of limitations and tolling arguments apply to the entire Class Period and, therefore, demonstrate standing is one of many common questions susceptible to classwide proof

and cannot defeat certification. The District Court's September 4 Order cites numerous authorities affirming that fraudulent concealment is a fact question best addressed neither on a motion to dismiss nor summary judgment (and, presumably, certainly not class certification), but is appropriately left for trial. (D.E. 230 at 40.)

**C. The Class is Ascertainable**

**1. Ascertainability Requires Only that the Class Be Defined Without Ambiguity**

Although not mentioned in Rule 23, “[b]efore a district court may grant a motion for class certification, a plaintiff seeking to represent a proposed class must establish that the proposed class is adequately defined and clearly ascertainable.” *Little*, 691 F.3d at 1304 (affirming district court’s finding that plaintiffs failed to demonstrate ascertainability where they “made no effort to separate out” putative class members whose claims may have been barred due to arbitration agreements or class action waivers) (internal quotations omitted). This threshold issue relates to whether the putative class can be identified: “[a]n identifiable class exists if its members can be ascertained by reference to objective criteria.” *Bussey v. Macon Cnty. Greyhound Park, Inc.*, 562 Fed. Appx. 782, 787 (11th Cir. 2014) (unpublished); *Mullins v. Direct Digital, LLC*, 795 F.3d 654 (7th Cir. 2015) (affirming class certification and holding “[t]he class need only be ascertainable”) (emphasis in original); *Keller v. Macon County Greyhound Park, Inc.*, No. 3:07-CV-1098-WKW, 2011 WL 1085976, \*4 (M.D. Ala. March 24, 2011) (“[u]ncertainties about the existence or number of individuals who have suffered actual damages do not render a class description amorphous or imprecise”).

These “objective criteria” should be “administratively feasible,” meaning that identifying class members should be “a manageable process that does not require much, if any, individual inquiry.” *Id.* By contrast, an individual inquiry is necessary when “mini-trials” are required to verify class membership. See *Karhu v. Vital Pharm., Inc.*, --- Fed. Appx. ---, 2015 WL 3560722,

at \*3 (11th Cir. June 9, 2015) (unpublished and non-precedential opinion affirming district court’s denial of class certification where plaintiff failed to propose a realistic method of identifying purchasers of over-the-counter diet pills.) Self-identification-based ascertainment (such as through affidavits) is administratively feasible where plaintiffs propose “a case-specific and demonstrably reliable method for screening each self-identification.” *Id.* at \* 3, n.5 (citing *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013)).<sup>6</sup> As set forth below, Plaintiffs have demonstrated with evidence a demonstrably reliable case-specific method for screening each self-identification.

## **2. Defendants’ Ascertainability Challenges Fail Legally and Factually**

Shire does not challenge whether the proposed Class is “adequately defined,” which is the appropriate class certification inquiry. *Keller*, 2011 WL 1085976, at \*3-\* 4 (“The class need only be ascertainable ... A class must not be amorphous or imprecise in order to pass the ascertainability requirement”) (emphasis in original). The Court agrees that the proposed Class definition is “sufficiently definite” to enable the Court to determine who fits within the proposed definition. The class definition is not vague because it identifies a group of individuals (purchasers of Adderall XR) harmed in a particular way (overcharged for Adderall XR) during a specific timeframe (January 1, 2007 to March 31, 2009) in a particular geographic area (Florida.) The definition is not based on subjective criteria, as it focuses on the act of purchasing a prescription maintenance drug. *See* Pl. Op. Br. at 13 (citing *Pottinger v. Miami*, 720 F. Supp. 955, 957 (S.D. Fla. 1989)). Accordingly, if Shire prevails on the merits, *res judicata* will bar Class Members from re-litigating their claims. *Mullins*, 795 F.3d at 661.

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<sup>6</sup> Shire urges this Court to also require Plaintiffs to proffer “evidentiary support that the method will be successful.” Def. Opp. at 14 (citing a parenthetical for *Carrera*, 727 F.3d at 306 at the end of a string cite at *Karhu*, 2015 WL 3560722 at \*3). The Court declines to impose this heightened standard, as it is not the law in the Eleventh Circuit.

Shire conflates identifying individual class members with the need for an ascertainable class definition. Nevertheless, Plaintiffs have proposed—and demonstrated with evidence—a method for establishing individuals’ class membership through self-identification. (Pl. Op. Br. at 13, Pl. Reply Br. at 2-5.) Specifically, Plaintiffs propose that potential Class Members may come forward as having purchased AXR in Florida between January 1, 2007 and March 31, 2009. (*Id.*) Plaintiffs argue class membership can be verified or screened using documentation, including potential Class Members’ pharmacy, prescription and medical records. (Pl. Op. Br. at 13; D.E. 217-47; D.E. 217-48 (attaching Plaintiffs’ pharmacy and prescription records)). These records reflect “(i) at least one purchase of AXR (ii) during the Class Period (iii) for which the class member paid more than zero dollars.” (Pl. Op. Br. at 13; Pl. Reply Br. at 3; D.E. 217-54 (Rubinstein Decl. at ¶¶ 18, 20, 21, 27, 29).)

In further support of Plaintiffs’ contention that Adderall XR purchase records exist, are accessible to consumers and are useful for screening self-identifying affidavits by potential Class Members, Plaintiffs submitted the expert declaration and testimony of Elan Rubinstein, Pharm.D., MPH, Dr. Rubinstein, a certified pharmacist with decades of experience in the pharmacy benefits field and adjunct industries. (D.E. 217-54 at 12; D.E. 233-5.) Dr. Rubinstein confirmed a transaction record is generated for every prescription purchase, which contains data elements and data prescription standards that are proffered by the National Council for Prescription Drug Programs (NCPDP). (D.E. 217-54 (Rubinstein Decl. at ¶¶ 20-24).) In keeping with the NCPDP standards, these uniform transaction records identify the patient, the date of the purchase and the amount paid by the patient (the “core data” elements available). *Id.* Dr. Rubinstein opined that “every single piece of information that you could want to understand how a person uses a prescription drug” is recorded and maintained. (D.E. 280-1 (Rubinstein Dep.

77:10-78:22).) Dr. Rubinstein confirmed (D.E. 217-54 (Rubinstein Decl. at ¶ 38)), and Shire's rebuttal expert, Robert N. Navarro, Ph.D., agrees (D.E. 233-6 (Navarro Dep. 61:7-9)), that Florida pharmacies keep these records for at least ten years.

Plaintiffs submitted evidence explaining how this data could be reliably used to ascertain the class, i.e., screen self-identification without resort to mini trials. Dr. Rubinstein opined that, “[w]ith prescription drugs you’ve got an amazing amount of data to analyze” and that data can be analyzed easily and efficiently. (D.E. 280-1 (Rubinstein Dep. 77:17-78:2)). If required by the Court to confirm class membership, Class Members can submit their pharmacy records. Flat co-payers, who are specifically excluded from the Class, may be screened out by comparing the amounts paid for generic and branded drugs, a task which Dr. Rubinstein opines can be done quickly and accurately. (*Id.* at 78:5-22.)

Shire argues Plaintiffs have failed to provide any objective criteria for determining class membership that does not involve much, if any, individualized inquiry. (Def. Opp. at 4.) Shire posits the following four challenges to Plaintiffs’ proposed screening of class membership: (i) Plaintiffs failed to produce evidence that pharmacies have data covering the proposed Class Period or the data necessary to ascertain a person’s membership in the Class; (ii) Plaintiffs failed to demonstrate patient-level prescription data is available to all Florida consumers due to pharmacy closures and pharmacy benefit managers (PBMs) do not have the data; (iii) consumers will not remember which pharmacies they used or what sort of prescription plan they had during the Class Period; and, (iv) an “extensive investigation” would be required to identify and remove flat co-payors, who are specifically excluded from the proposed class definition .

In support of their arguments, Shire relies on an unpublished Eleventh Circuit decision, *Karhu*, 2015 WL 3560722, and two Third Circuit district court opinions, *In re Wellbutrin XL*

*Antitrust Litig.*, No. 08-2433, 2015 WL 3970858 (E.D. Pa. June 30, 2015) (decertifying indirect purchaser class which included TPPs and consumers), *appeal granted*, No. 15-2875 (3d Cir. Aug. 10, 2015) and *Vista Healthplan, Inc. v. Cephalon, Inc.*, no. 2:06-cv-1833, 2015 WL 3623005 (E.D. Pa. June 10, 2015) (declining to certify indirect purchaser class which included TPPs and consumers.) These opinions are distinguishable from this action (*Karhu*) and are unpersuasive (*Wellbutrin* and *Cephalon*).

*Karhu* was a false advertising case that involved a proposed class of non-prescription dietary supplement purchasers. There, plaintiffs proposed identifying class members using sales data which listed third-party retailers (i.e. not class members) who sold the diet pills and self-identification through potential class members' affidavits. *Karhu*, 2015 WL 3560722 at \*2 - \*4. In its unpublished non-precedential opinion, the Eleventh Circuit panel found that neither method was administratively feasible there, as the plaintiff failed to explain how either one would "aid class-member identification." (*Id.* at \*4). Further, there, it was unlikely that purchasers of an over-the-counter diet pill, which the court found was similar to others on the market would have receipts or other records to confirm class membership. (*Id.* at \*2). Here, in contrast, prescription records are available from many sources, such as pharmacies, PBMs, insurance providers, and physicians or healthcare providers. *See* D.E. 328 (at Composite Ex. 1.)

Although *Wellbutrin* and *Cephalon* also involve allegations of delayed generic entry of pharmaceutical drugs, they are, likewise, unavailing. Both of these cases emanate from the Third Circuit, whose ascertainability case law has been the subject of heavy criticism by other federal appellate courts, *see, e.g., Mullins*, 795 F.3d at 661-672). The proposed indirect purchaser classes in both actions included TPPs (such as PBMs or health plans) and both generic and brand purchasers. *Wellbutrin*, 2015 WL 3970858 at \* 149-150; *Cephalon*, 2015 WL 3623005 at \* 9-13.

Here, the proposed Class consists of consumers only so none of the attendant issues identified by those courts applies here. Plaintiffs contend, and the undersigned agrees, that other consumer class actions alleging generic suppression are more analogous to the this case. *See* Pl. Reply Br. at 4-5 (citing *In re Nexium Antitrust Litig.*, 777 F.3d 9 (1st Cir. 2015) (affirming class certification); *In re Terazosin Hydrochloride Antitrust Litig.*, 220 F.R.D. 672 (S.D. Fl. 2004); *In re Flonase*, 284 F.R.D. 207 (E.D. Pa. June 18, 2012) (certifying class)).

As set forth below, the undersigned also finds Shire's remaining arguments unavailing.

**a) Defendants' Speculation Regarding Ease of Access to Prescription Records Is Undermined Factually and Presents a Manageability/Claims Administration Issue Not Relevant to Class Certification**

Shire speculates that Class Members would not remember which pharmacies they used or what sort of prescription plans they had for their Adderall XR prescriptions from 2007 to 2009. (Def. Opp. at 18.) The Court does not find this argument persuasive. There is no evidence in the record demonstrating consumers will not recall this information. As Plaintiffs point out, it is undisputed that AXR is a once-daily maintenance drug, typically refilled as an ongoing prescription, making recollection likely. (*See* D.E. 233-6 (Navarro Dep. 21:9-24.) Moreover, Courts in this district (including this Court), in other districts in Florida, and throughout the country routinely require consumers to remember this exact type of information.<sup>7</sup> In other words, Shire's speculative focus on consumers' alleged lack of memory does not defeat class certification. (Pl. Rep. Br. at 4.) Further, both class representatives in this action recalled their pharmacies and insurers during the Class Period (Pl. Op. Br. at 13), and Dr. Navarro himself had

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<sup>7</sup> *See, e.g.*, D.E. 233-7, 233-8, 233-9, 233-10 (Fact Sheets and Claims Forms from this District requiring plaintiffs to recall all pharmacies used in last 10 years; when and where they bought corn starch in last 5 years; and, provide records from pharmacies, or authorize claims administrator to request same for class members). It is also undisputed AXR is a once-daily maintenance drug, typically refilled as an ongoing prescription, making recollection likely. *See* D.E. 233-6 (Navarro Dep. 21:9-24.)

no difficulty recalling more than four pharmacies he has used. (D.E. 233-6 (Navarro Dep. 176:2-177:6).) Dr. Navarro admits it is a “simple process” for consumers to request their prescription records, and that Florida law requires pharmacies to provide consumers with copies of their records. *See* D.E. 233-6 at 8-9 (Navarro Dep. 118:11-17; 126:9-14.) Accordingly, Shire’s argument lacks merit.

Shire also speculates that Plaintiffs’ evidence fails to demonstrate pharmacies have data for that time frame on grounds “38% of the Florida pharmacies that existed during the proposed class period have closed.” (Def. Opp. at 17.) The undersigned finds this argument unpersuasive, as Dr. Navarro testified Florida law requires notice and transfer of consumers’ pharmacy records to a new pharmacy, and Dr. Navarro could not identify a single instance in which this did not happen. (D.E. 233-6 (Navarro Dep. 115:24-116:3).) Further, 38% of pharmacies by no means equals 38% of Adderall XR prescriptions in Florida. As pointed out by Dr. Rubinstein, Walgreens alone has nearly half the South Florida market, with other retail pharmacy chains like CVS and Rite Aid not far behind. (D.E. 217-54 (Rubinstein Decl. at ¶ 34); D.E. 280-1 at 58:11-25.) These three pharmacies dominate total prescriptions. *Id.* Thus, the 38% of pharmacies that closed are likely to constitute a minimal number of prescriptions. And in fact, most of these records were likely transferred to a retail pharmacy chains such as Walgreens, CVS or Rite Aid. Moreover, in response to the undersigned’s questions (*see* Mtn. Hr’g Tr. at 96:24-25; *see generally id.* at 96:21-98:11; October 19, 2015 Order (D.E. 309), Plaintiffs gave notice of numerous citations in the record in which the parties’ experts, discuss the availability of prescription records from “physicians or healthcare providers,” (D.E. 309), and “insurance carriers and the like” (*see* D.E. 310 (Hr’g Tr. at 98:8-11); D.E. 328 (Notice of Filing)).

Accordingly, membership in the Class can be confirmed with documents readily

available to potential Class Members. Unlike *Karhu*, 2015 WL 3560722, self-identification is proper, as there exists a wealth of documents available for screening and verifying class membership.

**b) Defendants’ Flat Co-Payor Ascertainability Arguments Are Unavailing**

Shire argues “extensive individual investigation would be required to identify and remove” individuals who fall within exceptions (4) and (5) of the proposed class definition. (Def. Opp. at 18.) The parties agree these individuals suffered no injury because they have “flat co-pay” provisions in their insurance plans, and thus would have paid the same price for either generic or brand Adderall XR. Shire incorrectly frames this is an ascertainability issue, but at this stage of the litigation these individuals are specifically excluded from the Class. (Pl. Op. Br. at 12.) *See also In re Nexium*, 777 F.3d at 14 (affirming certification where flat co-payers were specifically excluded from the class definition); *In re Terazosin*, 200 F.R.D. at 692 (“the Court finds that flat co-payers are not part of the proposed classes, as defined, and therefore present no obstacle to class certification”); *In re Flonase Antitrust Litig.*, 284 F.R.D. at 218 (certifying consumer class with flat co-payers excluded)). This manageability issue is irrelevant to deciding whether the proposed Class should be certified as defined.

In any case, flat co-payors can be identified and excluded. *See In re Nexium*, 777 F.3d at 30, n.26 (certifying class and excluding flat co-payors) (citing *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S.Ct. 2398, 2408 (2014)). Plaintiffs have submitted evidence that Class Members’ prescription records can be analyzed easily and efficiently. *See, e.g.*, D.E. 280-1 at p.31 (Rubinstein Dep. 78:5-22). This includes screening out flat co-payers by comparing the amounts paid for generic and branded drugs, which Dr. Rubinstein states can be done quickly and accurately. (*Id.*) Shire fails to rebut this evidence. Although Dr. Navarro admits Dr. Rubinstein’s comparison method is feasible, he contends this method cannot identify all Florida

consumers with flat co-pays during the entire Class Period. (D.E. 227-2 (Navarro Rep. ¶ 25); D.E. 233-6 (Navarro Dep. 257:1-258:21.))

Even if the issue of flat co-payers were to be examined under Rule 23(b)(3) predominance, or without the benefit of Dr. Rubinstein's testimony,<sup>8</sup> the undersigned reaches the same conclusion. Relying on Dr. Navarro's declaration at Paragraph 18, Shire originally stated that "[a]bout 4 to 5% of plans had flat co-pay provisions from 2007 to 2009." (Def. Opp. at 10.) However, during his deposition, Dr. Navarro confirmed the number of flat co-payers without damages is actually only 1.2 percent of insured consumers nationwide—and logically the same number would be proportionate for Florida. (D.E. 133-6 (Navarro Dep. 245:3-248:13); D.E. 244-3 at 21 (Rubinstein Dep. 79:7-80:12)). The remaining 3-4% of flat co-payers (e.g., those with flat co-insurance rates) do indeed have damages and are included in Dr. Rosenthal's damages analysis. D.E. 233-4 (Rosenthal Rep. ¶¶ 54, 64, Attachments C.5a, C.5b); D.E. 233-16 (Rosenthal Errata)). The Court finds this number to be *de minimis*. "What counts as a 'de minimis' deviation 'from a prescribed standard must, of course, be determined with reference to the purpose of the standard.'" *In re Nexium*, 777 F.3d at 30 (finding 5.8% of all prescriptions to be *de minimis*) (quoting *Wisconsin Dept. of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 232 (1992)). Accordingly, relying Eleventh Circuit authority, the First Circuit defined *de minimis* "in functional terms...if common issues 'truly predominate over individualized issues in a lawsuit, then the addition or subtraction of any of the plaintiffs from the class [should not] have a substantial effect on the substance or quantity of evidence offered.'" *Id.* at 31 (quoting *Vega*, 564

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<sup>8</sup> Shire has moved to exclude Dr. Rubinstein's testimony about a method to identify flat co-payers. (D.E. 244). I do not need to decide this motion now because, first, it does not impact Dr. Rubinstein's other opinions, which Shire does not challenge. And, second, even were this one aspect of his opinions excluded, the undersigned still finds that the number of flat co-payers is *de minimis* and does not preclude class certification.

F.3d at 1270); *see, e.g., Wyche v. Madison Parish Police Jury*, 635 F.2d 1151 (5th Cir. 1981) (total deviation of 4.11 percent qualifies as ‘sufficiently de minimis’ in reapportionment action); *Cash & Henderson Drugs, Inc. v. Johnson & Johnson*, 799 F.3d 202 (2d Cir. 2015) (pharmacy’s loss of slightly more than 1% of drug transactions/year had *de minimis* effect on competition).

The record supports the undersigned’s conclusion that “the number of uninjured members here is not so large as to render the class impractical or improper, or to cause non-common issues to predominate.” (*In re Nexium*, 777 F.3d at 30.) Shire’s argument that some consumers may have not purchased any other prescription medications, and thus, their records will not reveal whether they are flat co-payers, is without merit for the same reason. (Def. Opp. at 19, n 11.) Shire has put forth no evidence demonstrating the number of individuals, if any, of the estimated 1.2 percent fall within this group. Finally, Dr. Rosenthal’s analysis finds no damages for the flat co-payers (who are excluded from the Class), thus there is no *Comcast* issue because in doing so she “measure[d] only those damages attributable” to Shire’s reverse payments. *See Comcast*, 133 S. Ct. at 1433.

**c) Defendants’ Brand Loyalist Ascertainability Arguments Are Unavailing**

In arguing that Plaintiffs’ proposed ascertainability method fails to identify so-called brand loyalists, Shire conflates ascertainability and manageability issues. (Def. Opp. at 16.) Identifying which Class Members would have purchased brand AXR even if a generic were available is not necessary *prior to* class certification. The existence of brand loyalists would only be an issue *after* a class is certified and *after* a finding of liability by the trier of fact. (Pl. Op. Br. at 23 (citing *In re Terazosin*, 220 at 699 (“an aggregate judgment allocation will become an intra-class matter accomplished pursuant to a court-approved plan of allocation)). *See also* D.E. 217-3 (Plaintiffs’ Trial Plan.) Moreover, “[i]mposing a stringent version of ascertainability because of concerns about administrative inconvenience renders the manageability criterion of

the superiority requirement superfluous.” *Mullins*, 795 F.3d at 663.

First, Dr. Rosenthal’s analysis finds that brand loyalists were indeed damaged by Shire’s suppression of generic AXR, and thus, they are properly included within the Plaintiffs’ class definition. (Pl. Reply Br. at 8; D.E. 233-4 (Rosenthal Rep. ¶¶ 54, 64, Attachments C.5a, C.5b); D.E. 233-16 (Rosenthal Errata)). Shire’s argument that Dr. Rosenthal’s zeroing of certain quarters of negative damages was improper and/or violates *Comcast* is unavailing. As explained in Plaintiffs’ Opposition to summary judgment (D.E. 279 at 19-24), Dr. Rosenthal zeroed certain quarters of negative damages based on the principle that one who breaks the law should not incidentally benefit from the law-breaking activities. (Pl. Reply Br. at 8; D.E. 233-4 (Rosenthal Rep. ¶¶ 54, 64, Attachments C.5a, C.5b; D.E. 233-16 (Rosenthal Errata)). The zeroing is entirely derivative of Plaintiffs’ core theory of liability and there is no *Comcast* issue. (Pl. Op. Br. at 23; D.E. 233-4 (Rosenthal Decl. ¶¶ 34-50)). Even putting zeroing aside, Dr. Rosenthal still finds positive damages for brand loyalists thus making them injured class members. (D.E. 233-4 (Rosenthal Rep. ¶¶ 58; D.E. 233-16; D.E. 279 at 21-22; D.E. 279-1 (Pl. SMF ¶ 44)).)

Plaintiffs further argue that courts have rejected similar uninjured consumer arguments in certifying similar classes. *See* Pl. Reply Br. at 10 (citing *In re Nexium*, 777 F.3d at \*24-25 (collecting cases and holding a *de minimis* number of uninjured class members is permissible and does not preclude class certification) and *In re Delta/ AirTran Baggage Fee Antitrust Litig.*, 1:09-md-02089, ECF 549, slip op. at 20 (N.D. Ga. Aug. 5, 2015) (“that some members of the class may not have suffered actual injury is not fatal to class certification...a determination of actual individual injury is not necessary at this time”)). This authority is persuasive.

The undersigned also find applicable to this case Honorable Judge William G. Young’s description of the method he “devised for culling the uninjured from the injured class members if

[they] had gotten to the damages phase of the litigation.” *In re Nexium (Esomeprazole) Antitrust Litig.*, No. 12-md-02409-WGY, 2015 WL 4720033, at \*25 (D. Mass. July 30, 2015). Following trial of the class’ claims, he described his prospective method as follows: “shift to the Defendants the burden of going forward with evidence of lack of injury to particular class members” because “one who bears the affirmative position on a legal issue (here, the Defendants claiming non-injury due to brand loyalty, discounts, and the like) ought to come forward with evidence of that circumstance.” (*Id.*) Judge Young reasoned: “by that stage the Defendants would have been adjudicated antitrust violators, so making them come forward with evidence to mitigate the damages seemed only logical.” (*Id.*) Plaintiffs propose (D.E. 217-3), and I agree, that the same process could apply here to remove potentially uninjured consumers, such as brand loyalists. *See Gilmore v. U.S.*, 93 F.2d 774, 776 (5th Cir. 1938) (the burden of proof rests upon the party who substantially asserts the affirmative of the issue). Accordingly, Plaintiffs have met their burden to demonstrate that the proposed Class is adequately defined and clearly ascertainable.

**D. Dr. Rosenthal’s Treatment of [REDACTED] Is Appropriate and Does Not Create a Comcast Issue**

The undersigned further finds that Dr. Rosenthal’s treatment of the [REDACTED] [REDACTED] is appropriate and does not, as Defendants claim, create a Comcast issue precluding certification.

[REDACTED], as testified by Shire’s head of commercial contracting [REDACTED]. (D.E. 217-53 at 152:14-21; D.E. 279 at 20; D.E. 279-1 at SMF ¶ 26). Shire’s [REDACTED]  
[REDACTED]  
[REDACTED] (D.E. 217-45 at 29:11-25.) [REDACTED]

(D.E. 279 at 20-21; D.E. 279-1 at SMF ¶ 26; D.E. 279-29)). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (D.E. 279 at 20; D.E. 279-1 at SMF ¶ 26; D.E. 279-31.)

[REDACTED]

[REDACTED]

[REDACTED]

It is well settled that “the presence of individualized damages issues does not prevent a finding that the common issues in the case predominate.” *Allapattah Servs., Inc. v. Exxon Corp.*, 333 F.3d 1248, 1261 (11th Cir. 2003.) However, while “[damages c]alculations need not be exact,...at the class certification stage (as at trial), any model supporting a ‘plaintiff’s damages case must be consistent with its liability case, particularly with respect to the alleged anticompetitive effect of the violation.’” *Comcast*, 133 S. Ct. at 1433.

Following her submission of a Declaration in Support of Class Certification (D.E. 217-55), Dr. Rosenthal used the method set forth in her Declaration to actually calculate damages by comparing what consumers paid in the ‘actual’ world (delayed generic entry) with the ‘but-for’ world (earlier generic entry.) (D.E. 233-4 (Rosenthal Rep.) at ¶¶ 47-57, *accord.* D.E. 217-55 at ¶¶ 34-45.) [REDACTED]

[REDACTED]

[REDACTED]

Dr. Rosenthal’s report was served before the District Court’s Order on Shire’s motion to dismiss, which held, in relevant part, that the named class representatives did not have standing to seek liability based on [REDACTED]. (D.E. 230 at 64.) At the class certification hearing,

Shire argued that Dr. Rosenthal's exclusion of [REDACTED] from her 'but-for' scenario ran afoul of *Comcast*. (D.E. 310 (Hr'g Tr. at 74-76)).

Defendants' argument is unavailing. [REDACTED] did not even exist during the Class Period nor is there any evidence Shire would have thought of this unique rebate strategy for a January 2007 or January 2008 generic entry. Thus, the issue is not whether Dr. Rosenthal should have 'excluded' [REDACTED] for her 'but-for' world, but rather whether Shire is entitled to an offset by including in the 'but-for' world that which had not been conceived of in the real world. Shire's argument at the class certification hearing that "Dr. Rosenthal [is] seeking damages in the class period based upon a claim that is no longer in the case" (*id.* at 75-76) is not accurate. Rather, it is Shire who raises an equitable defense to Dr. Rosenthal's damage calculation by arguing it is entitled to an offset based on conduct it claims it *would have* engaged in (a factual assertion Plaintiffs dispute).

Though Plaintiffs do not have standing to seek liability based on [REDACTED], they are certainly entitled to respond to Shire's defense on the issue. Whether Shire is entitled to an equitable offset (legal dispute) and whether the rebates 'would have existed' in the 'but-for' world (factual dispute) are not affected by the District Court's holding regarding standing. With respect to the legal dispute, it is axiomatic that a defendant is not entitled to an equitable offset for illegal conduct (which will be decided by the fact-finder.) Dr. Rosenthal does opine that [REDACTED] [REDACTED] were contrary to public policy and injurious to consumers. (D.E. 233-4 (Rosenthal Rep. at ¶¶ 11, 12(d), 18-19, 26; D.E. 241-3 (Rosenthal Dep. at 75:6-78:8)). Further, aside from that legal question, whether the rebate agreements would have even existed is a fact dispute – a question left for the ultimate fact-finder. Accordingly, Dr. Rosenthal's methodology does not run afoul of *Comcast*.

### **E. Rule 23(a) Requirements Are Met**

As stated, Plaintiffs must affirmatively demonstrate the Rule 23(a) elements of numerosity, commonality, typicality, and adequacy. Fed. R. Civ. P. 23(a)(1.) Shire does not contest numerosity, commonality, or adequacy, and its only argument against typicality is based on its contention Plaintiffs do not have standing. Def. Opp. at 9. Still, the Court has rigorously analyzed each requirement and, as set forth below, finds these elements are satisfied.

#### **1. Numerosity**

Rule 23(a)(1) requires members of a class to be “so numerous that joinder of all members is impracticable.” The Rule does not establish a precise numerical threshold and imposes a “generally low hurdle.” *Vega*, 564 F.3d at 1267. “Nevertheless, a plaintiff still bears the burden of making *some* showing, affording the district court the means to make a supported factual finding, that the class actually certified meets the numerosity requirement.” *Id.* (emphasis in original.) Plaintiffs presented evidence demonstrating that since at least 2008, tens of thousands of AXR prescriptions were dispensed monthly in Florida. (D.E. 217-46 (Florida prescription data provided by Shire)). The sheer size of prescriptions filled in Florida during just a portion of the Class Period is sufficiently large for the Court to presume joinder would be impracticable.

#### **2. Commonality**

Rule 23(a)(2) requires “questions of law or fact common to the class.” Plaintiffs bear a “relatively light burden” to prove the commonality requirement, as “[t]his part of the rule does not require that all the questions of law and fact raised by the dispute be common or that the common questions of law or fact predominate over individual issues.” *Vega*, 564 F.3d at 1268 (internal quotations omitted.) Rather, “[c]ommonality requires that there be at least one issue whose resolution will affect all or a significant number of the putative Class Members.” *Williams v. Mohawk Indus., Inc.*, 568 F.3d 1350 (11th Cir. 2009) (commonality is a “low

hurdle”). “[I]n the antitrust context, courts in this Circuit have consistently held that allegations of price-fixing, monopolization, and conspiracy by their very nature involve common questions of law or fact.” *In re Terazosin*, 220 F.R.D. at 686 (collecting cases). *See also Natchitoches Parish Hosp. Serv. Dist. v. Tyco Int’l, Ltd.*, 247 F.R.D. 253 (D. Mass. 2008) (same).

This low hurdle has been met here, as Plaintiffs cite several common questions of law and fact that affect all class members. Among them are: (1) whether Shire had market and/or monopoly power, (2) whether Shire maintained such power through anticompetitive or unlawful activity, and (3) whether Shire engaged in anticompetitive activity. (Pl. Mem. at 15.) Because these, and many other, common questions of law and fact are applicable to the claims of all class members, the Court finds the commonality is satisfied.

### **3. Typicality**

As the name suggests, typicality requires that “the claims or defense of the representative parties [to be] typical of the claims or defenses of the class.” Fed. R. Civ. P. 23(a)(3.) “A class representative must possess the same interest and suffer the same injury as the class members in order to be typical[.]” *Cooper v. Southern Co.*, 390 F.3d 695, 713 (11th Cir. 2004) (citation omitted.) Yet, “typicality does not require identical claims or defenses.” *Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1337 (11th Cir. 1984.) Rather, typicality “is established if the claims or defenses of the class and the class representative arise from the same event or pattern or practice and are based on the same legal theory.” *Id.* “A defense will not defeat typicality if it applies to all members of the proposed class.” *Ticknor v. Rouse’s Enterprises, LLC*, Nos. 12–1151, 12–2964, 2014 WL 1764738, at \*4, n 19 (E.D. La. May 2, 2014).

Plaintiffs assert they have met the typicality requirement by virtue of the fact that all of the members of the proposed Class have been subjected to overcharges for their payments of

Adderall XR during the Class Period because of Shire's same unlawful conduct. (Pl. Mem. at 15-16.) Plaintiffs' claims share the same essential characteristics as the claims of the Class at large. In a single footnote, Shire contests the element of typicality, based solely on its standing argument. (See Def. Opp. at 12, n. 8.) This undeveloped argument is insufficient to defeat typicality. As discussed above, the Court finds Plaintiffs have adequately demonstrated, for purposes of class certification, that they have standing. Moreover, Shire's statute of limitations defense is not unique to Ms. Barba and Mr. Reisman. (See Def. Opp. at 1.) Even if Shire re-argues Plaintiffs' claims are time-barred at trial, this defense clearly generates common questions susceptible to classwide proof and cannot defeat certification. *Kennedy v. Tallant*, 710 F.2d at 718. Accordingly, the Court finds Plaintiffs are typical.

#### **4. Adequacy**

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." This turns on whether: (1) any substantial conflicts exist between the representatives and the class; and (2) the representatives will adequately prosecute the action." *Valley Drug Co. v. Geneva Pharms., Inc.*, 350 F.3d 1181, 1189 (11th Cir. 2003).

The record reveals that Plaintiffs have also demonstrated their commitment to pursue their claims on behalf of the Class, as they have been deposed, responded to extensive written discovery and produced relevant documents. (D.E. 217-2 at ¶ 5.) Plaintiffs' counsel have also demonstrated a willingness and ability to dedicate the resources and expertise necessary to fairly and adequately represent a class and successfully manage a class action to its conclusion. (*Id.* at ¶¶ 6, 53-56; D.E. 217-49 through 217-52 (firm resumes)). Plaintiffs' attorneys are highly qualified, as they have substantial experience in prosecuting complex litigation cases, including antitrust class actions on behalf of indirect purchasers. (*Id.*) There appear to be no conflicts

between Plaintiffs and putative class members, or between Plaintiffs' counsel and the putative class members. The Court finds Plaintiffs and their counsel will adequately represent the Class.

**F. Rule 23(b) Is Satisfied**

**1. Predominance**

The undersigned similarly finds that Rule 23(b)(3) is satisfied. Common issues predominate if they have a "direct impact on every Class Member's effort to establish liability that is more substantial than the impact of individual issues in resolving the claim or claims of each Class Member." *Vega*, 564 F.3d at 1270.

The undersigned begins by remarking that virtually every single liability issue in this case is subject to common proof. Among these common issues are the elements of Plaintiffs' FDUPTA claims and the defenses that Shire has asserted: (1) the definition of the relevant product market; (2) Shire's market power within the relevant product market; (3) proof of and valuation of Shire's alleged reverse payments; (4) proof of Shire's anticipated future litigation costs; (5) the but-for generic entry date as found in Dr. McGuire's expert report; (6) Shire's alleged fraudulent concealment of its antitrust violations; (7) Shire's procompetitive justifications premised upon FDA approval of generic AXR ANDAs. These are common questions. *In re Terazosin Hydrochloride*, 220 F.R.D. at 695 (finding same elements as those noted here were susceptible to classwide proof).

The undersigned further remarks that nearly all of Shire's arguments in opposition to class certification focus either on the manageability of distributing a class aggregate damages award (which Shire lacks standing to challenge, *In re Urethane Antitrust Litig.*, 768 F.3d 1245, 1269 (10th Cir. 2014) (citing and quoting *Allapattah*, 333 F.3d at 1258); *see also In re Terazosin*, 220 F.R.D. at 699 ("Assuming the jury renders an aggregate judgment, allocation will become an intra-class matter accomplished pursuant to a court-approved plan of allocation, and such

individual damages allocation issues are insufficient to defeat class certification” (citation omitted)), or upon the presence of supposed individualized damages issues. These arguments are largely limited to a very small number of individuals (flat co-payors and brand loyalists), and in fact the vast majority of these two small groups suffered damages according to Dr. Rosenthal.

Even assuming the undersigned accepts Shire’s arguments pertaining to individualized damages issues, the Eleventh Circuit has held that “‘the presence of individualized damages issues does not prevent ’” certification of a Rule 23(b)(3) class. *Sacred Heart*, 601 F.3d at 1178 (quoting *Klay*, 382 F.3d at 1259). In providing guidance regarding the effects of individualized damages on certification of Rule 23(b)(3) classes, the Eleventh Circuit has stated that “[i]ndividualized damages issues are of course least likely to defeat predominance ‘where damages can be computed according to some formula, statistical analysis, or other easy or essentially mechanical method[ ].’” *Sacred Heart*, 601 F.3d at 1179 (quoting *Klay*, 382 F.3d at 1259–60). “The relevant inquiry, however, is still whether questions of ‘liability to the class ... predominate[ ] over ... individual issues relating to damages[.]’ ” *Id.* (quoting *Allapattah*).

Regarding causation/antitrust impact, courts routinely certify indirect purchaser pharmaceutical antitrust class actions, including Florida subclasses. *In re Terazosin*, 220 F.R.D. at 696-97 (“fact of antitrust injury is susceptible to common proof”); *In re Nexium*, 297 F.R.D. at 172-73 (accepting end-payors’ argument in generic suppression case that “long-standing precedent [ ] show that common antitrust impact predominates over any individual differences in damages incurred”); *Flonase*, 284 F.R.D. at 225 (“Indirect Purchasers have demonstrated that they can establish impact to this class of consumers...through class-wide evidence.”).

Here, evidence of common Class impact includes proof that: (1) prices for AXR were higher than they would have been absent Defendants’ conduct; and (2) a substantial number of

Class Members purchased and/or paid for their AXR at a supracompetitive price. Proof of widespread antitrust impact within the Class can be relatively easily accomplished through well-accepted methodologies and using actual historical data of how the AXR market dynamics would have changed had generic entry come earlier, and had the generics been adequately supplied after generic entry. (See D.E. 217-55 (Rosenthal Dec. at ¶¶ 38-49). At trial, Dr. Rosenthal will rely on sales and pricing data to make this showing. (*Id.* at ¶¶ 36, 37.)

With respect to Count IV, Rule 23(b)(3) is satisfied. Here, Plaintiffs intend to prove the numerous side deals with Impax and Teva were reverse payments to delay entry of generic AXR and “offend established public policy” and are “immoral, unethical, oppressive, scrupulous, or substantially injurious to consumers.” *PNR, Inc. v. Beacon Prop. Mgmt.*, , 842 So. 2d 773, 777 (S.D. Fla. Mar. 13, 2003). To do so, Plaintiffs will rely on common evidence, including Plaintiffs’ experts and Shire’s own documents and testimony. Resolution of these issues, all of which focus on Shire’s activities, need only be decided once as to the entire Class.

Defendants argue that predominance is not satisfied. First, Defendants contend that a significant number of uninjured class members (brand loyalists) remain within the class definition. (D.E. 227 at 20-21.) Second, Defendants claim that Plaintiffs’ expert has failed to measure damages resulting from the conduct on which liability is premised, violating *Comcast*. *Id.* at 21-22. Third, Defendants argue that Plaintiffs’ ‘aggregate damage’ model fails to calculate the amount of damages for any individual Class Member. (*Id.* at 24.) The undersigned has already addressed Defendants’ second argument, and does not find that its first or third arguments defeat predominance.

Regarding potentially uninjured class members included in the class, the Plaintiffs’ expert (Dr. Rosenthal) dropped flat co-payers and brand loyalists’ benefit to zero. This satisfies

*Comcast* because in doing so she “measure[d] only those damages attributable” to Shire’s reverse payments.

Defendant’s criticism of aggregate damage models is also unavailing. “The use of aggregate damages calculations is well established in federal court and implied by the very existence of the class action mechanism itself.” *In re Pharm. Indus. Average Wholesale Price Litig.*, 582 F.3d 156, 197-98 (1st Cir. 2009) (AstraZeneca’s challenge to the aggregate damages methodology “fail[ed] in the starting gate”); *accord In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 534 (6th Cir. 2008); *see also Terazosin*, 220 F.R.D. at 699; *In re Polyurethane Foam Antitrust Litig.*, No. 10-2196, 2014 WL 6461355, at \*44 (N.D. Ohio Nov. 17, 2014). Indeed, Defendants conceded at oral argument that they do not contest the use of an aggregate damages model. (D.E. 310 (Hr’g Tr. at 88:20-89:2.) Predominance has been satisfied.

## **2. Superiority**

The undersigned also finds a class action is superior to other methods of dispute resolution. The relevant factors include “(A) the Class Members’ interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against Class Members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the likely difficulties in managing a class action.” Fed. R. Civ. P. 23(b)(3).

These factors support superiority here. First, Class Members’ individual damages are likely small, as each Class Member paid only approximately \$10-\$25 per prescription or refill of AXR. (*See* D.E. 217-53 (Jones Dep at 101:23-102:1)). Second, there are no other class actions pending against Defendant on behalf of Florida consumers regarding Shire’s anticompetitive conduct. Third, since Plaintiffs bring their claims under Florida law on behalf of Florida

consumers, concentrating the litigation in this forum is appropriate. And finally, prosecution of this case as a class action presents far fewer management problems than the alternative: the prosecution of hundreds or thousands of separate lawsuits. Superiority has been satisfied.

#### **IV. RECOMMENDATIONS**

For the reasons described above, I respectfully recommend that the District Court:

1) Certify the following class:

All persons who purchased (for personal or household use) and/or paid for some or all of the purchase price for brand Adderall XR in Florida between January 1, 2007 through March 31, 2009.

Excluded from the Class are: (1) Third Party Payors; (2) Persons and entities who purchased directly from Defendants; (3) Persons and entities who purchased only for resale purposes; (4) "Flat co-pay" "Cadillac Plan" customers who made purchases only via fixed dollar co-payments that do not vary between Adderall XR and its generic equivalent; (5) Patients with insurance coverage including a flat-rate co-pay provision; (6) Governmental entities; (7) Shire, their officers, directors, affiliates, legal representatives, employees, co-conspirators, successors, subsidiaries and assigns, and entities in which Shire has a controlling interest; and (8) The judges, justices, magistrate or judicial officers presiding over this matter.

2) Set a schedule for Plaintiffs to submit a proposed notice plan; and

3) Deny as moot Plaintiffs' original motion for class certification (D.E. 83.)

#### **V. OBJECTIONS**

Pursuant to 28 U.S.C. § 636(b)(1) and Local Magistrate Rule 4(b), the parties have fourteen (14) days after being served with a copy of this Report and Recommendations to serve and file written objections, if any, with the Honorable Joan A. Lenard, United States District Judge. Each party may file a response to the other party's objection within seven (7) days of the objections.

**RESPECTFULLY RECOMMENDED**, in Chambers, in Miami, Florida, the \_\_\_\_th day of \_\_\_\_\_, 2015.

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Jonathan Goodman  
UNITED STATES MAGISTRATE JUDGE

**Copies furnished to:**

The Honorable Joan A. Lenard

All counsel of record

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 30th day of October, 2015, I electronically filed the forgoing with the Clerk of Court using the CM/ECF system which will send notification of filing to all counsel of record.

By: /s/ Brian T. Ku  
Brian T. Ku, Esq. (Fla. # 610461)