

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

**IN RE:
NIASPAN ANTITRUST LITIGATION**

MDL NO. 2460

**THIS DOCUMENT RELATES TO:
ALL ACTIONS**

MASTER FILE NO. 13-MD-2460

ORDER

AND NOW, this 20th day of March, 2018, upon consideration of the joint letter brief of the parties related to a discovery dispute concerning defendants' efforts to obtain discovery from Kaiser Health Foundation ("Kaiser"), University of Pittsburgh Medical Center ("UPMC"), UnitedHealth Group ("United"), the United States Department of Veterans Affairs ("VA"), and BCBS Michigan (Doc. No. 508, filed February 28, 2018), following a telephone conference with the parties, through counsel, on March 16, 2018, **IT IS ORDERED** that the requested discovery is appropriate, and that, as a consequence, plaintiffs' request for entry of a protective order with respect to Kaiser, UPMC, United, the VA, and BCBS Michigan is **DENIED**. The parties shall proceed in accordance with the guidelines provided by the Court during the telephone conference.

IT IS FURTHER ORDERED that defendants' request to amend the First Amended Scheduling Order (Doc. No. 251, filed August 21, 2015) to permit defendants to take up to twenty-eight (28) depositions is **GRANTED**.

The decision of the Court is based on the following:

Defendants seek discovery from two groups of entities; End Payor Plaintiffs ("EPPs") ask the Court to enter a protective order barring discovery from both groups. First, defendants seek discovery from Kaiser, UPMC, United, and the VA regarding the interchangeability of other products with Niaspan. Jt. Letter, Doc. No 508 at 2-3, exs. 7-9. Defendants contend that this

discovery is relevant to the issue of the interchangeability of other products with Niaspan and, thus, to market definition. *Id.* at 3. In response, the End Payor Plaintiffs (“EPPs”) argue the “relevant market [is] based on practical indicia of the presence or absence of cross-price elasticity of demand” and that “stray documents produced by absent class members” are therefore irrelevant. *Id.* at 12. The Court agrees with defendants.

The Third Circuit has relied on similar evidence of the interchangeability of products to establish market definition. In *Mylan Pharms. Inc. v. Warner Chilcott Pub. Ltd. Co.*, 838 F.3d 421, 436 (3d Cir. 2016), that court affirmed the district court’s finding of interchangeability for various acne products based on evidence that:

Managed care organizations have sought to constrain patients to substitute Doryx with other, less costly tetracyclines to treat acne. Some organizations have removed Doryx as a reimbursable medication; others have limited any reimbursement. A number of managed care organizations sent notices to healthcare providers urging them to substitute other oral tetracyclines for Doryx.

Defendants in this case now seek these same types of documents from Kaiser, UPMC, United, and the VA.

Second, defendants seek documents from BCBS Michigan related to the “effect of prescription drug costs, including the costs of Niaspan, on the premiums charged by BCBS Michigan for its insurance plans.” Doc. No. 508 at 5. Defendants argue that, unlike federal law, the Michigan Antitrust Reform Act (“MARA”) permits a “pass on” defense.¹ Under a “pass on” defense, a defendant argues that an antitrust plaintiff has recouped damages by passing overcharges on to its customers through higher prices — or, in this case, to its insureds through higher premiums. *See In re Niaspan Antitrust Litig.*, No. 13-md-2460, 2015 U.S. Dist. LEXIS 92534, at *3 n.4 (E.D. Pa. July 9, 2015) (DuBois, J.). According to defendants, the MARA

¹ Federal law generally does not permit defendants to raise the “pass on” defense. *Hanover Shoe v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968).

permits the “pass on” defense because it requires indirect purchasers such as EPPs to make a showing of “actual damages” and Michigan courts have interpreted this provision as requiring a “rigorous analysis” of the damages suffered by a plaintiff. *A & M Supply Co. v. Microsoft Corp.*, 654 N.W.2d 572, 603 (Mich. Ct. App. 2002).

EPPs respond with two contentions. First, they argue that this Court already concluded by Order dated July 9, 2015, that defendants cannot obtain discovery from the EPPs related to the “pass on” defense. Order, Doc. No. 233 at 4. Second, EPPs contend that even if the MARA permitted defendants to raise a “pass on” defense, the raising of premiums would not constitute a “pass on.” To the contrary, they argue that the raising of premiums “is a forward-looking projection of future costs based on countless variables and actuarial projections.” Jt. Letter at 11; *see, e.g., United Wis. Servs. v. Abbott Labs.*, 220 F.R.D. 672, 690 (S.D. Fla. 2004).

The Court agrees with defendants on this issue. In applying the “rigorous analysis” required by the MARA’s “actual damages” provision, Michigan courts have conducted detailed factual assessments that consider factors such as the number of products involved, the rate of overcharge for each product, the rate of overcharge to each indirect purchaser, and variations in the overcharges over time. *A & M*, 654 N.W.2d at 600, 603. Two federal courts have concluded that Michigan law permits defendants to raise the “pass on” defense “in order to give proper effect to the term ‘actual damages’ under the MARA.” *In re Vitamins Antitrust Litig.*, 259 F. Supp. 2d 1, 8-9 (D.D.C. 2003); *accord In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 07-md-1827, 2012 U.S. Dist. LEXIS 182373, at *1 (N.D. Cal. Dec. 26, 2012) (citing *In re Vitamins Antitrust Litig.*, 259 F. Supp. 2d 1). This Court agrees.

EPPs’ two arguments are unavailing. First, in its July 9, 2015, Order, this Court denied defendants’ request for discovery related to the “pass on” defense on the assumption that “the state laws involved in this case follow federal antitrust law,” expressly stating that it was not

ruling “on the propriety of the requested discovery in the event that applicable state law does not follow federal antitrust law.”² *In re Niaspan Antitrust Litig.*, 2015 U.S. Dist. LEXIS 92534, at *6-7. According to Michigan courts, however, the assessment of actual damages required by the MARA in indirect purchaser suits differs from “the presumptions or inferences that might otherwise prevail in direct purchaser federal antitrust cases.” *Ren v. Philip Morris Inc.*, No. 00-004035-CZ, 2002 WL 1839983, at *5 (Mich. Ct. App. June 11, 2002). Because the MARA requires a showing of actual damages suffered by indirect purchasers that has no analog in federal cases, this Court concludes that Michigan law differs from federal law and its July 9, 2015, Order is no bar to defendant’s requested discovery.

Likewise, on the present state of the record, the Court rejects EPPs’ second contention that the raising of premiums does not constitute a “pass on” for purposes of the “pass on” defense. EPPs’ argument does not adequately account for the fact that insurance companies’ decisions to raise premiums are based on actuarial analyses to “enable[e] the insurer to collect [the costs of coverage] in advance from insureds.” *Int’l Bhd. of Teamsters v. Philip Morris*, 196 F.3d 818, 824 (7th Cir. 1999). Based on this rationale, two courts of appeals have concluded that insurance companies did not have standing to bring antitrust claims, in part because they may pass on higher medical costs through higher premiums. *Id.* at 825; accord *SEIU Health & Welfare Fund v. Philip Morris Inc.*, 249 F.3d 1068, 1074 (D.C. Cir. 2001). The Seventh Circuit, for example, concluded that because insurance companies may raise premiums to cover higher costs, insurers “are just financial intermediaries. They collect the premiums and spend them to provide the contracted-for care; their books balance whether the costs of care are high or low.” *Int’l Bhd. of Teamsters*, 196 F.3d at 824. Similarly, in this case, the discovery requested by

² This caveat was required because the parties did not brief the law of the numerous states at issue in the case. *In re Niaspan Antitrust Litig.*, 2015 U.S. Dist. LEXIS 92534, at *6.

defendants is relevant to the question whether the insurer members of the putative EPP class recouped their losses by charging higher premiums.

Finally, EPPs argue with respect Kaiser, UPMC, United, and BCBS Michigan that defendants may not obtain discovery from absent members of the putative EPP class.³ The Court disagrees. Discovery may be obtained from absent class members “(1) where the information requested is relevant to the decision of common questions, (2) when the discovery requests are tendered in good faith and are not unduly burdensome and (3) when the information is not available from the class representative.” *Kline v. First W. Gov’t Sec.*, No. 83-1076, 1996 U.S. Dist. LEXIS 3329, at *9 (E.D. Pa. Mar. 11, 1996). As noted above, defendant’s requested discovery is relevant to market definition and the “pass on” defense, questions common to the class. Further, the requests are targeted at four major “market player[s],” as opposed to the entire putative class, and are not unduly burdensome. Finally, as defendants argue, the information is not available from the named plaintiffs because they are not managed care organizations and do not analyze costs and benefits of prescription drugs. Jt. Letter at 4.

The Court thus denies EPPs’ request for a protective order with respect to Kaiser, UPMC, United, the VA, and BCBS Michigan. With respect to these entities, the requested discovery is appropriate. Plaintiffs have not shown good cause for entry of a protective order.

BY THE COURT:

/s/ Hon. Jan E. DuBois

DuBOIS, JAN E., J.

³ The EPPs’ proposed definition of the putative EPP class in their Class Complaint expressly excludes “[a]ll federal or state government entities other than cities, towns or municipalities with self-funded drug plans.” Doc. No. 46, ¶ 148. The VA is thus not an absent member of the putative EPP class. Defendants also dispute whether UPMC is a member of the putative EPP class, but the Court concludes that it is not necessary to reach that issue at this time.