

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

Dana Nessel ex rel. State of Michigan,

Plaintiff,

v.

Express Scripts, Inc., et al.,

Defendants.

Case No. 4:24-cv-13185-SDK-KGA
Hon. Shalina D. Kumar
Mag. Kimberly G. Altman

ORAL ARGUMENT REQUESTED

**DEFENDANTS' MOTION TO DISMISS THE COMPLAINT FOR
FAILURE TO STATE A CLAIM**

Defendants Express Scripts, Inc., Express Scripts Administrators, LLC, Medco Health Solutions, Inc., Merck-Medco¹, ESI Mail Order Processing, Inc., ESI Mail Pharmacy Service, Inc., Express Scripts Pharmacy, Inc., Evernorth Health, Inc., Express Scripts Specialty Distribution Services, Inc. (together, **Express Scripts**), and UnitedHealth Group Incorporated, Optum, Inc., OptumInsight, Inc., OptumInsight Life Sciences, Inc., OptumRx, Inc., OptumHealth Care Solutions, LLC, OptumHealth Holdings, LLC, and Optum Health Networks, Inc. (together, **Optum Rx**, and, with Express Scripts, the **Defendants**) move this Court for an Order

¹ The Complaint names “Merck-Medco” as a Defendant. No entity exists or previously existed by that name. An entity called Merck-Medco Managed Care, L.L.C. converted from a limited liability company to a Delaware corporation in May 2002 and subsequently changed its name to Medco Health Solutions, Inc., which is a named Defendant in this case.

dismissing the claims against them with prejudice pursuant to Fed. R. Civ. P. 12(b)(6). The arguments and legal basis for this motion are set forth in full in the accompanying Memorandum of Law in Support.

In accordance with Local Rule 7.1(a), counsel for Defendants contacted Plaintiff's counsel to explain the nature of this Motion and its legal basis, and to request concurrence in the relief sought. Plaintiff declined to concur.

WHEREFORE, Defendants request that this Court grant their Motion and enter an Order dismissing all claims with prejudice.

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

Dana Nessel ex rel. State of Michigan,

Plaintiff,

v.

Express Scripts, Inc., et al.,

Defendants.

Case No. 4:24-cv-13185-SDK-KGA
Hon. Shalina D. Kumar
Mag. Kimberly G. Altman

ORAL ARGUMENT REQUESTED

**DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR
MOTION TO DISMISS THE COMPLAINT FOR
FAILURE TO STATE A CLAIM**

STATEMENT OF ISSUES PRESENTED

1. Should the Court dismiss the State’s common-law public-nuisance claim for failure to state a plausible claim for relief?

2. Should the Court dismiss the State’s statutory nuisance claim for failure to state a plausible claim for relief?

3. Should the Court dismiss the State’s negligence claim for failure to state a plausible claim for relief?

4. Should the Court dismiss the State’s claim under the Drug Dealer Liability Act, MCL 691.1605, for failure to state a plausible claim for relief?

5. Are the State’s claims for common-law public nuisance, statutory public nuisance, and negligence barred by the applicable statutes of limitations?

6. Are the State’s claims preempted to the extent they apply to Defendants’ administration of prescription-drug benefits for ERISA and Medicare Part D plans?

Defendants answer “yes.”

Plaintiff likely would answer “no.”

This Court should answer “yes.”

CONTROLLING OR MOST APPROPRIATE AUTHORITIES

Defendants rely on the following authorities, as well as the additional legal authorities cited in this brief:

1. Common-law public nuisance: *Michigan ex rel. Nessel v. Cardinal Health, Inc.*, 2020 Mich. Cir. LEXIS 1796 (Mich. Cir. Ct. Nov. 17, 2020); *Detroit Bd. of Educ. v. Celotex Corp.*, 493 N.W.2d 513 (Mich. Ct. App. 1992); *Garfield Twp. v. Young*, 82 N.W.2d 876 (Mich. 1957); *Express Scripts, Inc. v. Anne Arundel County*, 353 A.3d 1084 (Md. 2026).

2. Statutory nuisance: MCL 600.3801; MCL 600.3805; *Krishna Krupa, Inc. v. City of Ferndale*, 2018 WL 3862105 (Mich. Ct. App. Aug. 14, 2018); *Michigan ex rel. Prosecuting Attorney v. Alray Northcrest Plaza*, 381 N.W.2d 731 (Mich. Ct. App. 1985).

3. Negligence: *Murdock v. Higgins*, 559 N.W.2d 639 (Mich. 1997); *Bell & Hudson, P.C. v. Buhl Realty Co.*, 462 N.W.2d 851 (Mich. Ct. App. 1990); *Henry v. Dow Chem. Co.*, 701 N.W.2d 684 (Mich. 2005); *Aldrich v. Ohm Specialty Pharm., LLC*, 2018 WL 5276416 (Mich. Ct. App. Oct. 23, 2018); *Michigan ex rel. Nessel v. Cardinal Health, Inc.*, 2020 Mich. Cir. LEXIS 1796 (Mich. Cir. Ct. Nov. 17, 2020).

4. Drug Dealer Liability Act: MCL 691.1603–05.

5. Timeliness: *City of Boston v. OptumRx, Inc.*, 169 F.4th 58 (1st Cir. 2026); *Trentadue v. Buckler Automatic Lawn Sprinkler Co.*, 738 N.W.2d 664 (Mich.

2007); *In re 1998 Dodge Dakota*, 2012 WL 4900967 (Mich. Ct. App. Oct. 16, 2012); *Yousif v. Deutsche Bank Nat'l Tr. Co.*, 2024 WL 4580393 (E.D. Mich. Aug. 22, 2024); MCL 600.3815, 600.5805, 600.5827, and 600.5855.

6. Preemption: *McKee Foods Corp. v. BFP Inc.*, 173 F.4th 242 (6th Cir. 2026); *Pharm. Care Mgmt. Ass'n v. Mulready*, 78 F.4th 1183 (10th Cir. 2023); *Alaska v. Express Scripts, Inc.*, 2024 WL 2321210 (D. Alaska May 22, 2024).

TABLE OF CONTENTS

STATEMENT OF ISSUES PRESENTED	i
TABLE OF AUTHORITIES	v
INTRODUCTION.....	1
BACKGROUND	2
LEGAL STANDARD	3
I. THE COMPLAINT FAILS TO STATE A CLAIM FOR RELIEF.....	4
A. The State Fails To Allege A Common-Law Public Nuisance.....	4
1. Lack of control	4
2. No unreasonable interference with a public right	6
B. The State Fails to Plausibly Allege a Statutory Nuisance Claim.....	8
C. The State Fails to Plausibly Allege Negligence.....	11
1. Defendants do not owe a duty of care to the State.	11
2. The State fails to allege a present physical injury.	13
D. The State Fails To State A Claim Under The DDLA.	13
II. THE PUBLIC-NUISANCE AND NEGLIGENCE CLAIMS ARE TIME-BARRED.	15
A. The State’s Common-Law Claims Are Untimely.	16
B. The State’s Statutory Nuisance Claim Is Untimely.	18
C. Tolling Does Not Save The State’s Untimely Claims.....	19
III. FEDERAL LAW PREEMPTS THE STATE’S CLAIMS.....	22
CONCLUSION.....	25

TABLE OF AUTHORITIES

	<u>Page(s)</u>
<u>Cases</u>	
<i>In re 1998 Dodge Dakota</i> , 2012 WL 4900967 (Mich. Ct. App. Oct. 16, 2012)	18
<i>Adkins v. Mong</i> , 425 N.W.2d 151 (Mich. Ct. App. 1988).....	11
<i>Alaska v. Express Scripts, Inc.</i> , 2024 WL 2321210 (D. Alaska May 22, 2024)	25
<i>Aldrich v. Ohm Specialty Pharm., LLC</i> , 2018 WL 5276416 (Mich. Ct. App. Oct. 23, 2018)	11
<i>Attorney General v. PowerPick Players’ Club of Mich., LLC</i> , 783 N.W.2d 515 (Mich. Ct. App. 2010).....	10
<i>Bainbridge v. Yamaha Motor Corp.</i> , 989 U.S. Dist. LEXIS 17728 (W.D. Mich. Mar. 27, 1989).....	24
<i>Bell & Hudson, P.C. v. Buhl Realty Co.</i> , 462 N.W.2d 851 (Mich. Ct. App. 1990).....	11
<i>Bell Atl. Corp. v. Twombly</i> , 550 U.S. 544 (2007).....	3, 14
<i>Briscoe v. Fine</i> , 444 F.3d 478 (6th Cir. 2006)	23
<i>Buczkowski v. McKay</i> , 490 N.W.2d 330 (Mich. 1992).....	12
<i>Cataldo v. U.S. Steel Corp.</i> , 676 F.3d 542 (6th Cir. 2012)	15
<i>In re Certified Question from Fourteenth Dist. Ct. of App. of Tex.</i> , 740 N.W.2d 206 (Mich. 2007).....	12
<i>Chandler v. Wackenhut Corp.</i> , 465 F. App’x 425 (6th Cir. 2012)	19

<i>Charter Twp. of Ypsilanti v. Dahabra</i> , 979 N.W.2d 725 (Mich. Ct. App. 2021).....	9
<i>Church of the Word v. Bloomer</i> , 2025 WL 1572330 (E.D. Mich. June 3, 2025)	19
<i>City of Boston v. OptumRx, Inc.</i> , 169 F.4th 58 (1st Cir. 2026).....	2, 15, 18, 19, 21, 22
<i>Cloverleaf Car Co. v. Phillips Petrol. Co.</i> , 540 N.W.2d 297 (Mich. Ct. App. 1995).....	5
<i>Colaiani v. Stuart Frankel Dev. Corp.</i> , 2009 WL 1717388 (Mich. Ct. App. June 18, 2009).....	17
<i>Detroit Bd. of Educ. v. Celotex Corp.</i> , 493 N.W.2d 513 (Mich. Ct. App. 1992).....	4, 8, 16
<i>Dirette v. Dairy Queen of Prudenville</i> , 2014 WL 132441 (Mich. Ct. App. Jan. 14, 2014).....	6
<i>Do Sung Uhm v. Humana Inc.</i> , 620 F.3d 1134 (9th Cir. 2010)	24
<i>Express Scripts, Inc. v. Anne Arundel County</i> , 353 A.3d 1084 (Md. 2026)	6, 7, 15
<i>Garfield Twp. v. Young</i> , 82 N.W.2d 876 (Mich. 1957).....	6, 7
<i>Gelman Scis., Inc. v. Dow Chem. Co.</i> , 508 N.W.2d 142 (Mich. Ct. App. 1993).....	5
<i>Goldman v. BCBSM Found.</i> , 841 F. Supp. 2d 1021 (E.D. Mich. 2012)	24
<i>Halbrook v. Honda Motor Co.</i> , 569 N.W.2d 836 (Mich. Ct. App. 1997).....	12
<i>Henry v. Dow Chem. Co.</i> , 701 N.W.2d 684 (Mich. 2005).....	11, 13

Henry v. Dow Chem. Co.,
905 N.W.2d 601 (Mich. 2018).....16

Hensley Mfg. v. ProPride, Inc.,
579 F.3d 603 (6th Cir. 2009)14

Hill v. Sears, Roebuck & Co.,
822 N.W.2d 190 (Mich. 2012).....11

State ex rel. Hunter v. Johnson & Johnson,
499 P.3d 719 (Okla. 2021).....7, 8

Kintigh v. Abbott Pharmacy,
503 N.W.2d 657 (Mich. Ct. App. 1993).....12

Krishna Krupa, Inc. v. City of Ferndale,
2018 WL 3862105 (Mich. Ct. App. Aug. 14, 2018)9

Kuznar v. Raksha Corp.,
750 N.W.2d 121 (Mich. 2008).....16

Lemson v. GM Corp.,
238 N.W.2d 414 (Mich. Ct. App. 1975).....20

Marilyn Froling Revocable Living Tr. v. Bloomfield Hills Country Club,
769 N.W.2d 234 (Mich. Ct. App. 2009).....19

McCree v. Cont’l Mgmt., LLC,
2021 WL 1050115 (Mich. Ct. App. Mar. 18, 2021).....19

McKee Foods Corp. v. BFP Inc.,
173 F.4th 242 (6th Cir. 2026)3, 22, 23, 24

McLain v. Roman Cath. Diocese of Lansing,
22 N.W.3d 284 (Mich. 2024).....16

McLemore v. Regions Bank,
682 F.3d 414 (6th Cir. 2012)23

Med. Marijuana, Inc. v. Horn,
604 U.S. 593 (2025).....14

<i>Morse v. Colitti</i> , 896 N.W.2d 15 (Mich. Ct. App. 2016).....	16
<i>Murdock v. Higgins</i> , 559 N.W.2d 639 (Mich. 1997).....	11
<i>In re Nat’l Prescription Opiate Litig.</i> , 458 F. Supp. 3d 665 (N.D. Ohio 2020)	13
<i>Naturale & Co. v. City of Hamtramck</i> , 614 F. Supp. 3d 575 (E.D. Mich. 2022)	4
<i>Michigan ex rel. Nessel v. Cardinal Health, Inc.</i> , 2020 Mich. Cir. LEXIS 1796 (Mich. Cir. Ct. Nov. 17, 2020)	1, 5, 12, 16
<i>New England Health Care Emps. Pension Fund v. Ernst & Young, LLP</i> , 336 F.3d 495 (6th Cir. 2003)	2, 15
<i>KN ex rel. Newton v. Just.</i> , 2025 WL 3650897 (Mich. Ct. App. Dec. 16, 2025).....	5
<i>Pharm. Care Mgmt. Ass’n v. Mulready</i> , 78 F.4th 1183 (10th Cir. 2023)	24
<i>Michigan ex rel. Prosecuting Att’y v. Bobenal Invs., Inc.</i> , 314 N.W.2d 512 (Mich. Ct. App. 1981).....	10
<i>Michigan ex rel. Prosecuting Attorney v. Alray Northcrest Plaza</i> , 381 N.W.2d 731 (Mich. Ct. App. 1985).....	10
<i>Rodic v. Thistledown Racing Club, Inc.</i> , 615 F.2d 736 (6th Cir. 1980)	15
<i>Roseville Plaza, L.P. v. U.S. Gypsum Co.</i> , 811 F. Supp. 1200 (E.D. Mich. 1992)	5, 16
<i>Schaendorf v. Cons. Energy Co.</i> , 739 N.W.2d 402 (Mich. Ct. App. 2007).....	5, 8
<i>Sholberg v. Truman</i> , 852 N.W.2d 89 (Mich. 2014).....	4

Sills v. Oakland Gen. Hosp.,
559 N.W.2d 348 (Mich. Ct. App. 1996).....20

Stoneman v. Collier,
288 N.W.2d 405 (Mich. Ct. App. 1979).....20

Tioga Pub. Sch. Dist. No. 15 v. U.S. Gypsum Co.,
984 F.2d 915 (8th Cir. 1993)8

Trentadue v. Buckler Automatic Lawn Sprinkler Co.,
738 N.W.2d 664 (Mich. 2007).....16

Universal Bearing Co. v. Baker Bearing Co.,
2013 WL 1211463 (E.D. Mich. Mar. 25, 2013).....20

US Framing Int’l LLC v. Cont’l Bldg. Co.,
134 F.4th 423 (6th Cir. 2025)8

Michigan ex rel. Wayne Cnty. Prosecutor v. Bennis,
527 N.W.2d 483 (Mich. 1994).....9

Wyser-Pratte Mgmt. Co. v. Telxon Corp.,
413 F.3d 553 (6th Cir. 2005)22

Yousif v. Deutsche Bank Nat’l Tr. Co.,
2024 WL 4580393 (E.D. Mich. Aug. 22, 2024).....15, 21

Rules/Statutes

21 U.S.C. § 829(a)3

29 U.S.C. § 1144(a)22

42 C.F.R. § 423.10024

42 C.F.R. § 423.120(b)(2).....24

42 C.F.R. § 423.15324

42 C.F.R. § 423.440(a).....24

42 U.S.C. § 1395w-26(b)(3)24

42 U.S.C. § 1395w-112(g).....24

Fed. R. Civ. P. 9(b)19, 21

Fed. R. Civ. P. 12(b)(6).....2, 3

MCL 600.38011, 9, 10, 18

MCL 600.38059

MCL 600.38159, 18

MCL 600.580516

MCL 600.582716

MCL 600.585519, 21

MCL 691.160313

MCL 691.160414

MCL 691.16051, 13, 14

Other Authorities

Restatement (Third) of Torts: Liab. for Econ. Harm

 § 8 cmt. g (Am. L. Inst. 2020)8

INTRODUCTION

The State of Michigan wrongly blames Defendants for alleged harms from third parties’ diversion and misuse of a highly regulated lawful product—prescription opioids—under legal theories rejected by Michigan courts. The Court should dismiss the complaint for three reasons.

First, the State fails to state a claim for relief. The only Michigan court to adjudicate a similar complaint dismissed the common-law public-nuisance and negligence claims. *Michigan ex rel. Nessel v. Cardinal Health, Inc.*, 2020 Mich. Cir. LEXIS 1796, at *4–15 (Mich. Cir. Ct. Nov. 17, 2020) (**Exhibit 1**). Those claims should likewise be dismissed here because Defendants lack control over third parties’ misuse of prescription opioids and do not owe the State a duty. The statutory nuisance claim fails because the alleged nuisance does not involve “[a] building, vehicle, boat, aircraft, or place.” MCL 600.3801(1). And the Drug Dealer Liability Act claim fails because the State does not allege that it was “injured by an individual abuser” or that the PBM Defendants “participated in illegal marketing.” MCL 691.1605(1).

Second, the nuisance and negligence claims are time-barred. The State alleges harms dating back decades, but public records—including the State’s own prior opioid lawsuits—confirm that it knew or should have known of its claims by 2019. For those reasons, the First Circuit affirmed the dismissal of a materially identical

opioid lawsuit against Defendants filed in January 2024. *City of Boston v. OptumRx, Inc.*, 169 F.4th 58, 60–62 (1st Cir. 2026). This case is even more untimely.

Third, the ERISA and Medicare Part D statutes preempt the State’s claims at least inasmuch as they pertain to ERISA and Medicare Part D health plans.

BACKGROUND

In 2019, the State filed a lawsuit against opioid distributors claiming that they had contributed to an opioid epidemic in Michigan. *See* Compl., *Michigan ex rel. Nessel v. Cardinal Health, Inc.*, No. 19-016876-NZ (Mich. Cir. Ct. Dec. 17, 2019) (**Exhibit 2**).² In February 2021, the State filed a similar complaint against McKinsey, in which the State alleged that “pharmacy benefit managers” (“PBMs”) and their “mail order pharmacies” helped manufacturers “obtain and maintain broad formulary coverage” for prescription opioids. Compl., *Michigan v. McKinsey & Co., Inc.*, No. 21-000072-CP (Mich. Cir. Ct. Feb. 4, 2021) (**Exhibit 3**, ¶¶ 20, 23).

Despite those lawsuits, the State waited until 2024 to file this suit. The State alleges that Defendants—including PBMs and mail-order pharmacies—contributed to an “oversupply” of opioids in Michigan, Compl. ¶¶ 115, 164, 586, which third-party criminals diverted into “an illegal, secondary market,” *id.* ¶¶ 562(a), 568, 575,

² “A court that is ruling on a Rule 12(b)(6) motion may consider materials in addition to the complaint if such materials are public records,” such as a “complaint” filed in a separate case. *New England Health Care Emps. Pension Fund v. Ernst & Young, LLP*, 336 F.3d 495, 501 (6th Cir. 2003).

586, 605, 623, and which led to “[i]ncreased costs and expenses for the State relating to healthcare services, law enforcement, the criminal justice system, social services, and education systems.” *Id.* ¶¶ 562(f), 575, 579, 588, 610, 628.

The State alleges that the mail-order pharmacy defendants filled opioid prescriptions in Michigan. *Id.* ¶¶ 21, 25, 28, 34, 70, 89, 417. But pharmacies do not decide whether a patient should be prescribed an opioid medication; that is the role of a licensed doctor. 21 U.S.C. § 829(a); Compl. ¶ 446. PBMs are even further afield. They “do not manufacture, market, or prescribe opioid medications.” *In re Nat’l Prescription Opiate Litig.*, No. 1:17-md-2804 (N.D. Ohio July 15, 2019), Dkt. 1848 at 2 (**Exhibit 4**). Instead, PBMs process claims for insurance coverage of prescription medications for health plans, including Medicare Part D plans and employer plans governed by ERISA. Compl. ¶¶ 45, 118, 362–68, 373; *McKee Foods Corp. v. BFP Inc.*, 173 F.4th 242, 250 (6th Cir. 2026). So, while PBMs are involved in insurance payments, they never have physical possession or control of prescription opioids. Compl. ¶¶ 115–16, 119, 160–61.

LEGAL STANDARD

To survive a Rule 12(b)(6) motion to dismiss, a plaintiff must plead “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A complaint “must contain more than labels and conclusions,” and “[t]he court need not accept as true a legal conclusion couched as

a factual allegation, or an unwarranted factual inference.” *Naturale & Co. v. City of Hamtramck*, 614 F. Supp. 3d 575, 578 (E.D. Mich. 2022) (citations omitted).

ARGUMENT

I. THE COMPLAINT FAILS TO STATE A CLAIM FOR RELIEF.

A. The State Fails To Allege A Common-Law Public Nuisance.

To state a claim for common-law public nuisance, the State must allege that Defendants “unreasonabl[y] interfere[d]” with “a right common to all members of the general public,” while maintaining “control” over the nuisance-causing instrumentality. *Sholberg v. Truman*, 852 N.W.2d 89, 92, 95 n.9 (Mich. 2014) (citations omitted). The State has not satisfied those elements here.

1. Lack of control

Defendants do not “control” the opioids that allegedly caused the nuisance. “Liability cannot extend to where an object constituting part of the nuisance or the dangerous condition is removed from defendants’ . . . control.” *Detroit Bd. of Educ. v. Celotex Corp.*, 493 N.W.2d 513, 522 (Mich. Ct. App. 1992) (citation omitted). In *Celotex*, the plaintiff brought a nuisance claim against manufacturers, distributors, and installers of asbestos in Detroit schools. *Id.* at 516–17. The court held the defendants could not be liable for any nuisance allegedly caused by their asbestos products because they “gave up ownership and control of their products when the products were sold.” *Id.* at 522. Applying this requirement, Michigan courts regularly dismiss nuisance claims challenging products outside the defendant’s

control. *E.g.*, *KN ex rel. Newton v. Just.*, 2025 WL 3650897, at *5 (Mich. Ct. App. Dec. 16, 2025) (sprinkler); *Schaendorf v. Cons. Energy Co.*, 739 N.W.2d 402, 408–09 (Mich. Ct. App. 2007) (electricity); *Cloverleaf Car Co. v. Phillips Petrol. Co.*, 540 N.W.2d 297, 301 (Mich. Ct. App. 1995) (gasoline); *Gelman Scis., Inc. v. Dow Chem. Co.*, 508 N.W.2d 142, 144 (Mich. Ct. App. 1993) (industrial solvent); *Roseville Plaza, L.P. v. U.S. Gypsum Co.*, 811 F. Supp. 1200, 1210 (E.D. Mich. 1992) (asbestos), *aff’d*, 31 F.3d 397 (6th Cir. 1994).

The only Michigan court to consider the State’s common-law public-nuisance theory in the opioid context *dismissed* the claim for lack of control. The State alleged that opioid distributors were responsible for the “creation and fueling of the illicit market for opioids.” *Cardinal Health*, 2020 Mich. Cir. LEXIS 1796, at *13–14. The court held that “it is nevertheless the actual opioids themselves that cause the State’s harm,” which occurs after “those opioids are out of Defendants’ control and being sold on the street, prescribed by a pill mill, or otherwise misused.” *Id.* at *15.

The same is true here. The State alleges that since “2010,” the alleged nuisance has been fueled by illicit opioids like “heroin” and “illicitly manufactured fentanyl,” Compl. ¶¶ 307–08, which even the State does not contend are within Defendants’ control, *id.* ¶¶ 129–30 (alleging conduct related solely to “prescription opioid transactions”). As for *lawful* prescription opioids, the State alleges that its injuries occur only after the prescriptions have been unlawfully “abused and

diverted” by third parties. *Id.* ¶¶ 351, 397. The mail-order pharmacies cannot exercise control over prescription opioids once they have been dispensed to patients, and the PBMs never physically possess or control prescription opioids. *Id.* ¶¶ 115–16, 119, 160–61; *see Express Scripts, Inc. v. Anne Arundel County*, 353 A.3d 1084, 1092 (Md. 2026) (“PBMs play no role in the physical distribution of prescription drugs” (citation omitted)). This lack of control warrants dismissal.

2. No unreasonable interference with a public right

A public right is not “peculiar to one individual, or several,” and an unreasonable interference with a public right must harm all “those who come in contact with” it. *Garfield Twp. v. Young*, 82 N.W.2d 876, 879 (Mich. 1957) (citation omitted); *see Durette v. Dairy Queen of Prudenville*, 2014 WL 132441, at *3 (Mich. Ct. App. Jan. 14, 2014) (alleged nuisance must “*always* affect[] the general public”).

Here, the State does not (and cannot) allege that prescription opioids “always” harm “those who come in contact with” them. *Durette*, 2014 WL 132441, at *3; *Garfield Twp.*, 82 N.W.2d at 879 (citation omitted). To the contrary, the State admits that prescription opioids are “FDA-approved,” not “inherently defective,” Compl. ¶ 574, and are regularly prescribed for “legitimate medical purposes under federal law . . . by practitioners acting in the usual course of professional practice,” *id.* ¶ 466. Because prescription opioids have “approved uses” and serve “legitimate

medical needs,” *id.* ¶¶ 213, 389, 456, 466, 568, 585, they do not harm all “those who come in contact with” them. *Garfield Twp.*, 82 N.W.2d at 879 (citation omitted).

The Supreme Court of Maryland recently rejected a materially identical common-law public-nuisance claim against Defendants for similar reasons. “[O]pioid consumption is not only lawful but may be medically necessary,” so “opioids do not cause harm to everyone who consumes them.” *Anne Arundel*, 353 A.3d at 1130. There simply is no “public right to be free from the adverse effects associated with a lawful product being diverted, misused, or abused.” *Id.* at 1131. Recognizing such “a general common law ‘public right’ would permit nuisance liability to be imposed on an endless list of manufacturers, distributors, and retailers of manufactured products that are intended to be used lawfully.” *Id.* The legislature “is far better suited to address societal concerns related to opioid diversion and abuse.” *Id.*; accord *State ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719, 731 (Okla. 2021) (rejecting public-nuisance claim against opioid manufacturers).

Maryland is not alone. A “national trend of courts” has “refus[ed] to allow products-based public nuisance claims for economic damages.” *Anne Arundel*, 353 A.3d at 1126–27 (collecting cases). The latest Restatement of Torts likewise recognizes that nuisance “[l]iability” for economic losses from lawful products “has been rejected by most courts . . . because the common law of public nuisance is an

inapt vehicle for addressing the conduct at issue.” Restatement (Third) of Torts: Liab. for Econ. Harm § 8 cmt. g (Am. L. Inst. 2020).

That conclusion is consistent with longstanding Michigan law that a defendant “cannot be liable for nuisance” merely because it occupies some position in the supply chain of an allegedly “harmful” product. *Schaendorf*, 739 N.W.2d at 408. “[M]anufacturers, sellers, or installers of defective products may not be held liable on a nuisance theory for injuries caused by” an allegedly unsafe product; “[t]o hold otherwise would significantly expand, with unpredictable consequences, the remedies already available to persons injured by products.” *Celotex*, 493 N.W.2d at 521; *see also Hunter*, 499 P.3d at 729 (citing *Celotex*); *Tioga Pub. Sch. Dist. No. 15 v. U.S. Gypsum Co.*, 984 F.2d 915, 920 (8th Cir. 1993) (same).

The State’s common-law public-nuisance claim fails as a matter of law, just as in *Celotex*, *Anne Arundel*, and the other authorities cited above. If the Court is “conflicted between choosing a narrow interpretation of [Michigan public-nuisance] law and a broader one that greatly expands liability,” this Court “should favor the narrower interpretation.” *US Framing Int’l LLC v. Cont’l Bldg. Co.*, 134 F.4th 423, 435 (6th Cir. 2025) (citation omitted).

B. The State Fails to Plausibly Allege a Statutory Nuisance Claim.

The State’s statutory public-nuisance claim, Compl. ¶ 584, fails to satisfy the statute’s requirement that a public nuisance involve certain types of *property*—

namely, a building, vehicle, boat, aircraft, or place. “MCL 600.3801 prescribes what may be considered an abatable public nuisance[.]” *Charter Twp. of Ypsilanti v. Dahabra*, 979 N.W.2d 725, 733 (Mich. Ct. App. 2021). It defines a public nuisance as (1) a “building, vehicle, boat, aircraft, or place” that is used for certain prohibited activities, including prostitution, gambling, and unlawful sale of controlled substances, and (2) “[a]ll furniture, fixtures, and contents of a building, vehicle, boat, aircraft, or place described in subsection (1)” MCL 600.3801. In the same vein, MCL 600.3805 specifies that the defendant in a statutory public-nuisance claim may be “any person . . . who owns, leases, conducts, or maintains the building, vehicle, boat, aircraft, or place.” Other provisions reinforce that the statute’s domain is limited to nuisances involving these types of property. *E.g.*, MCL 600.3815(1) (“[E]vidence of the general reputation of the building, vehicle, boat, aircraft, or place is admissible for the purpose of proving the existence of the nuisance.”).

Simply put, the statute’s purpose is “to eliminate the use of *property* in connection with the conduct proscribed in MCL 600.3801.” *Krishna Krupa, Inc. v. City of Ferndale*, 2018 WL 3862105, at *5 (Mich. Ct. App. Aug. 14, 2018) (emphasis added); *see Michigan ex rel. Wayne Cnty. Prosecutor v. Bennis*, 527 N.W.2d 483, 491–92 (Mich. 1994) (purpose of the statute is “to eliminate . . . by statutory procedure, the use of property, real or personal, in connection with gambling, prostitution, and illicit sale of liquor”) (emphasis and quotation omitted).

Consistent with the statutory text and purpose, Michigan appellate decisions uniformly apply the statute only to buildings, vehicles, boats, aircraft, or places used for a prohibited activity. *E.g.*, *Attorney General v. PowerPick Players' Club of Mich., LLC*, 783 N.W.2d 515 (Mich. Ct. App. 2010); *Michigan ex rel. Prosecuting Attorney v. Alray Northcrest Plaza*, 381 N.W.2d 731, 734 (Mich. Ct. App. 1985). Absent an allegation that such property is being used for a prohibited activity, a plaintiff “fail[s] to state a claim for abatement of a public nuisance.” *Alray*, 381 N.W.2d at 734; *Michigan ex rel. Prosecuting Att’y v. Bobenal Invs., Inc.*, 314 N.W.2d 512, 515 (Mich. Ct. App. 1981) (A “complaint fails to state a cause of action” under MCL 600.3801 when “it does not allege that the premises involved [t]herein were being used for the [prohibited] purpose.”). The State does not allege Defendants maintain a “building, vehicle, boat, aircraft, or place” being used for prohibited conduct, so its statutory nuisance claim fails.

The State tries to evade dismissal by pointing to MCL 600.3801(3), which provides: “All controlled substances and nuisances shall be enjoined and abated as provided in this act and the court rules.” That provision does not change the statutory definition of a nuisance, expand the statutory cause of action, or otherwise alter the requirement permeating the nuisance abatement statute and caselaw that a nuisance must involve a building, vehicle, boat, aircraft, or place. So MCL 600.3801(3) cannot save the State’s fatally flawed claim.

C. The State Fails to Plausibly Allege Negligence.

The State's negligence claim fails because it cannot plausibly allege that Defendants breached a legal duty owed to the State or that it has suffered a present physical injury. *Murdock v. Higgins*, 559 N.W.2d 639, 643 (Mich. 1997); *Henry v. Dow Chem. Co.*, 701 N.W.2d 684, 690 (Mich. 2005).

1. Defendants do not owe a duty of care to the State.

The existence of a duty is a question of law for the Court. *Murdock*, 559 N.W.2d at 642. Various factors may bear on the issue, but if a “relationship between the parties . . . is lacking, then it is unnecessary to consider any of the remaining factors.” *Hill v. Sears, Roebuck & Co.*, 822 N.W.2d 190, 196 (Mich. 2012) (cleaned up). If the alleged injuries result from third parties' criminal acts, there is “no duty to protect” the plaintiff “in the absence of some special relationship . . . or some special circumstance.” *Bell & Hudson, P.C. v. Buhl Realty Co.*, 462 N.W.2d 851, 853 (Mich. Ct. App. 1990).

Applying these rules, the Michigan Court of Appeals has held that a pharmacy does not owe a duty to a member of the public injured by a third party that misused prescription opioids the pharmacy dispensed. *Aldrich v. Ohm Specialty Pharm., LLC*, 2018 WL 5276416, at *1, *5 (Mich. Ct. App. Oct. 23, 2018); see *Adkins v. Mong*, 425 N.W.2d 151, 154 (Mich. Ct. App. 1988) (“there exists no legal duty on the part of a pharmacist to monitor and intervene with a customer's reliance on drugs

prescribed by a licensed treating physician”); *Kintigh v. Abbott Pharmacy*, 503 N.W.2d 657, 658 (Mich. Ct. App. 1993) (similar); *cf. Buczkowski v. McKay*, 490 N.W.2d 330, 331, 334–37 (Mich. 1992) (ammunition seller does not owe duty to third party shot by inebriated customer). The court in *Cardinal Health* applied the same principle to dismiss the State’s opioid-related negligence claim, holding that prescription-opioid distributors do not owe a duty to protect the State from alleged “harm as a result of the illegal secondary market for opioids.” 2020 Mich. Cir. LEXIS 1796, at *10. Although distributors may owe a duty to consumers, there was no special relationship between the State and the distributors to support the existence of a legal duty. *Id.* at *11.

The absence of a special relationship is dispositive here. The State’s claimed injuries stem entirely from third parties who “abused, misused, and diverted” prescription opioids “for illicit purposes so as to injure the People of the State of Michigan.” Compl. ¶¶ 560, 568; *see, e.g., id.* ¶¶ 306, 351, 498–99, 507, 527, 562. The State does not allege that Defendants had any relationship with the State—let alone the requisite “special relationship”—that imposed a legal duty to protect the State from third parties’ “misuse” of lawful medications. *Halbrook v. Honda Motor Co.*, 569 N.W.2d 836, 840 (Mich. Ct. App. 1997). In the absence of such a relationship, “no duty can be imposed.” *In re Certified Question from Fourteenth Dist. Ct. of App. of Tex.*, 740 N.W.2d 206, 213 (Mich. 2007).

2. The State fails to allege a present physical injury.

To recover in negligence, “a plaintiff must demonstrate a present physical injury to person or property *in addition to* economic losses that result from that injury in order to recover under a negligence theory.” *Henry*, 701 N.W.2d at 690. “A financial ‘injury’ is simply not a present physical injury, and thus not cognizable[.]” *Id.* at 691. The State alleges that it has suffered “social and economic costs,” Compl. ¶¶ 624, 576, 579, 628, but fails to allege a concomitant present physical injury to person or property. Accordingly, the Court should “reject [the State’s] negligence claim on the grounds that [its] alleged injuries are not the type of ‘physical injury to person or property,’ as opposed to ‘economic’ injury, required by Michigan law.” *In re Nat’l Prescription Opiate Litig.*, 458 F. Supp. 3d 665, 693–94 (N.D. Ohio 2020) (dismissing opioids-based negligence claim for lack of present physical injury).

D. The State Fails To State A Claim Under The DDLA.

Michigan’s Drug Dealer Liability Act (DDLA) creates a cause of action for a “person injured by an individual abuser” to sue “a person who participated in illegal marketing of the controlled substance actually used by the individual abuser.” MCL 691.1605. The State has not validly pleaded the elements of this claim.

Individual abuser. The complaint does not plausibly allege or identify any “individual abuser.” An “individual abuser” is an “individual” who unlawfully uses a controlled substance. MCL 691.1603(2). The State asserts that “Michigan residents

who use opioid drugs . . . are ‘individual abusers’ under the DDLA.” *Id.* ¶ 599. But it must do more than allege mere “labels and conclusions,” and “a formulaic recitation of the elements of a cause of action” will not do. *Hensley Mfg. v. ProPride, Inc.*, 579 F.3d 603, 609 (6th Cir. 2009) (quoting *Twombly*, 550 U.S. at 555). The State never identifies or plausibly alleges any actual “individual abuser.”

Injured by. The State also fails to allege that it was “injured by” an individual abuser. MCL 691.1605. To “injure” means to “cause harm or damage to” or to “hurt.” *Med. Marijuana, Inc. v. Horn*, 604 U.S. 593, 600–01 (2025) (citation omitted); see *Bainbridge v. Yamaha Motor Corp.*, 1989 U.S. Dist. LEXIS 17728, at *6 (W.D. Mich. Mar. 27, 1989) (**Exhibit 5**) (dramshop act requires plaintiff to allege he was “physically injured, killed, or . . . sustained property damage”). The State does not allege that any individual abuser *injured* it—such as by damaging State property. The State’s alleged injuries are “costs” it incurred for law enforcement and social services, Compl. ¶ 600, yet the State does not allege that it incurred those costs because it was “injured by” individual abusers.

Participation in illegal marketing. The State cannot plausibly allege that the PBM Defendants “participate in illegal marketing” of any controlled substance, because they do not “manufacture,” “deliver,” dispense, distribute, or prescribe opioid medications. MCL 691.1604(3)(a)–(b); see Ex. 4 at 2; Compl. ¶¶ 116–26. Nor do they do so “in violation of state or federal law.” MCL 691.1604(3). “[T]he

administration of benefit plans for opioid medications [is a] lawful activit[y].” *Anne Arundel*, 353 A.3d at 1130. And while the State vaguely alleges Defendants violated “pharmacy laws and regulations” related to “dispensing controlled substances,” it acknowledges those allegations apply only to the “mail order pharmacies,” not the PBMs. *E.g.*, Compl. ¶¶ 493–96.

II. THE PUBLIC-NUISANCE AND NEGLIGENCE CLAIMS ARE TIME-BARRED.

“If the allegations” in the complaint “show that relief is barred by the applicable statute of limitations, the complaint is subject to dismissal for failure to state a claim.” *Cataldo v. U.S. Steel Corp.*, 676 F.3d 542, 547 (6th Cir. 2012) (cleaned up); *see Yousif v. Deutsche Bank Nat’l Tr. Co.*, 2024 WL 4580393, at *2 (E.D. Mich. Aug. 22, 2024) (Kumar, J.) (dismissing “claims [that] would be time-barred even with tolling”). In evaluating a timeliness issue, courts may “consider materials in addition to the complaint if such materials are public records or are otherwise appropriate for the taking of judicial notice,” *New England*, 336 F.3d at 501 (citations omitted), such as “proceedings in other courts of record,” *Rodic v. Thistledown Racing Club, Inc.*, 615 F.2d 736, 738 (6th Cir. 1980) (citation omitted). As the First Circuit concluded in affirming the dismissal of a nearly identical public- nuisance claim against Defendants, “[t]he pleadings and undisputed public documents properly considered on [a] motion to dismiss” show that the State’s claims are untimely. *Boston*, 169 F.4th at 62.

A. The State’s Common-Law Claims Are Untimely.

The negligence claim is subject to a three-year statute of limitations. *Kuznar v. Raksha Corp.*, 750 N.W.2d 121, 128 (Mich. 2008). The common-law public-nuisance claim, premised on harm from a product, is “a products liability action” subject to the “three-year period.” *Celotex*, 493 N.W.2d at 519–20 (citing MCL 600.5805(12)); *Cardinal Health*, 2020 Mich. Cir. LEXIS 1796, at *8 (same); *Roseville Plaza*, 811 F. Supp. at 1210 (same). Because the complaint was filed on October 24, 2024, the claims are untimely if they accrued before October 24, 2021.

Michigan has “put an end to courts employing extra-statutory discovery rules to toll accrual dates.” *McLain v. Roman Cath. Diocese of Lansing*, 22 N.W.3d 284, 291 (Mich. 2024); see *Trentadue v. Buckler Automatic Lawn Sprinkler Co.*, 738 N.W.2d 664, 672 (Mich. 2007). That means the State’s claims accrue when “the act and the injury first occur,” not when the State discovered them. *Morse v. Colitti*, 896 N.W.2d 15, 30 (Mich. Ct. App. 2016); see *Henry v. Dow Chem. Co.*, 905 N.W.2d 601, 601 (Mich. 2018) (In negligence and nuisance cases, “[t]he wrong is done when the plaintiff is harmed.”); MCL 600.5827.

The State alleges that it was “harmed” by Defendants’ conduct and “the proliferation of opioid pharmaceuticals” beginning in “the late 1990s,” Compl. ¶¶ 505, 206, 307, and that the State has tracked those injuries since at least 2000, *id.* ¶¶ 501, 516. The complaint also alleges that certain of its injuries “peak[ed]” around

“2012” to “2016.” *Id.* ¶¶ 521, 525. Those allegations are more than sufficient to conclude that the State’s alleged harm occurred long before 2021. *Colaianne v. Stuart Frankel Dev. Corp.*, 2009 WL 1717388, at *2–4 (Mich. Ct. App. June 18, 2009).

Indeed, in 2019, the State filed public-nuisance and negligence claims against opioid distributors for the exact same injuries it alleges here. *See* Ex. 2. Both complaints allege that “Defendants’ failures to prevent the diversion of prescription opioids in Michigan has created an unprecedented public health epidemic” that “has ravaged communities and families across the State.” *Compare* Compl. ¶ 513, *with* Ex. 2 ¶ 194. Both complaints allege that “[s]ince 2014,” the State has “increased spending on Medication Assisted Treatments (MATs) to address opioid addiction.” *Compare* Compl. ¶ 523, *with* Ex. 2 ¶ 198. And both complaints allege that Defendants’ conduct “contributed to increased law enforcement costs,” citing a pre-arrest diversion program initiated in 2016 or 2017. *Compare* Compl. ¶ 526, *with* Ex. 2 ¶ 201. Numerous other injury-related allegations from the 2019 complaint appear to have been copied and pasted here with minimal to no modification. The alleged injuries here also mirror those the State asserted in a February 2021 complaint, where the State sought redress for “billions of dollars for increased costs in health care, child welfare, criminal justice, and many other programs needed to abate the epidemic.” *Compare* Ex. 3 ¶ 29, *with* Compl. ¶¶ 520–26. That complaint—filed eight months prior to the statute-of-limitations cutoff—described “mail-order

pharmacies” and “pharmacy benefit managers” and alleged that they helped manufacturers “obtain and maintain broad formulary coverage.” Ex. 3 at ¶¶ 20, 23. The State’s common-law claims thus accrued well before October 2021.

B. The State’s Statutory Nuisance Claim Is Untimely.

A claim under the nuisance abatement statute must be “filed within 90 days after any act, any violation, or the existence of a condition described in” section 600.3801. MCL 600.3815(3); *see In re 1998 Dodge Dakota*, 2012 WL 4900967, at *1–3 (Mich. Ct. App. Oct. 16, 2012) (dismissing untimely claim under earlier version of MCL 600.3815(3)). Thus, to be timely, the State must plausibly allege that Defendants maintained a nuisance “described in” MCL 600.3801 on or after July 26, 2024. But the complaint is devoid of any plausible allegations of unlawful conduct in this decade, let alone on or after July 26, 2024. To the contrary, the complaint is filled with assertions that the alleged unlawful conduct occurred “prior to 2017,” Compl. ¶¶ 344, 347, 354, and that by 2017, Defendants had “implemented programs aimed at addressing opioid overutilization and abuse,” *id.* ¶¶ 398, 156, 200, 239, 264, 344, 361, 402–04, 409–12, 414; *see Boston*, 169 F.4th at 60 (“[T]he most recent actions alleged” in complaint were “remedial measures [d]efendants took to address the opioid epidemic, not actionable misconduct.” (citation omitted)). The State’s statutory nuisance claim is untimely under MCL 600.3815.

C. Tolling Does Not Save The State’s Untimely Claims.

The State invokes two tolling doctrines: continuing wrong and fraudulent concealment. Compl. ¶¶ 529–40. But “[t]he continuing wrongs doctrine has . . . been ‘completely and retroactively abrogated’ in Michigan, including in nuisance cases.” *McCree v. Cont’l Mgmt., LLC*, 2021 WL 1050115, at *5 (Mich. Ct. App. Mar. 18, 2021) (citation omitted); see *Marilyn Froling Revocable Living Tr. v. Bloomfield Hills Country Club*, 769 N.W.2d 234, 249 (Mich. Ct. App. 2009). Even if the doctrine existed in Michigan law, the State does not allege wrongful conduct in or after October 2021. See *supra* II.B; *Boston*, 169 F.4th at 63–64 (concluding in similar circumstances that continuing wrong doctrine is inapplicable).

The fraudulent concealment doctrine fares no better. Under Michigan law, fraudulent concealment is governed exclusively by statute, MCL 600.5855. When applicable, it permits an untimely action to be commenced “within 2 years after the [plaintiff] discovers, or should have discovered, the existence of the claim or the identity of the person who is liable for the claim.” *Chandler v. Wackenhut Corp.*, 465 F. App’x 425, 430 (6th Cir. 2012). “Under Federal Rule of Civil Procedure 9(b), allegations of fraudulent concealment must be pled with particularity.” *Church of the Word v. Bloomer*, 2025 WL 1572330, at *3 (E.D. Mich. June 3, 2025). The plaintiff must “allege the time, place, and content of the alleged misrepresentation,” as well as “wrongful concealment of [defendants’] actions” and a failure to discover

the operative facts with “due diligence.” *Universal Bearing Co. v. Baker Bearing Co.*, 2013 WL 1211463, at *3–4 (E.D. Mich. Mar. 25, 2013) (citations omitted).

The complaint falls far short of these requirements. It is devoid of particularized allegations that the mail-order pharmacy Defendants engaged in misrepresentations or fraud. *See Stoneman v. Collier*, 288 N.W.2d 405, 407 (Mich. Ct. App. 1979) (Fraudulent concealment “does not operate against persons who do not participate in the concealment.”). As to the PBM Defendants, the complaint lacks the “time, place, and content” of any “affirmative acts or misrepresentations that were designed to prevent subsequent discovery.” *Sills v. Oakland Gen. Hosp.*, 559 N.W.2d 348, 352 (Mich. Ct. App. 1996).

The State also fails to plausibly allege diligence. “[A] plaintiff must fully plead the facts and circumstances surrounding its belated discovery and the delay which has occurred must be shown to be consistent with the requisite diligence.” *Universal Bearing*, 2013 WL 1211463, at *4 (cleaned up). Other than two assertions that the State “could not have acquired . . . knowledge [of its claims] earlier through the exercise of reasonable diligence,” Compl. ¶¶ 536, 540, the State “has not pled one fact showing an effort on [its] part to investigate the cause of [its] injuries nor has [it] alleged one instance in which the defendants had sought to hinder any such investigation,” *Lemson v. GM Corp.*, 238 N.W.2d 414, 416 (Mich. Ct. App. 1975).

Even if the State satisfied Rule 9(b), it failed to file suit “within 2 years after” it “discover[ed], or should have discovered” the claims against Defendants. MCL 600.5855; *Yousif*, 2024 WL 4580393, at *2. The First Circuit’s recent decision in *Boston* is directly on point. There, the court affirmed the dismissal of a materially identical public-nuisance action filed in January 2024—nine months before this suit—against Defendants. 169 F.4th at 60–63. The court concluded that the claim, which was likewise subject to a three-year statute of limitations under Massachusetts law, was untimely because the plaintiff “had ample reason to know of [alleged] PBM wrongdoing and had ample means to discover the facts to support a claim against PBMs before 2021.” *Id.* “[F]rom 2018 to 2019, at least seventy-four lawsuits, all a matter of public record, were filed by other cities, towns, and counties . . . against the PBM defendants.” *Id.* at 63; *see Exhibit 6*. The first was filed by a Texas county in January 2018. *Id.* (citing Compl., *County of Webb v. Purdue Pharma, L.P.*, No. 1:18-OP-45175 (N.D. Ohio Jan. 25, 2018), Dkt. 1 (**Exhibit 7**)). Soon after, the county’s counsel filed letters on the public docket of the national opioid multi-district (**MDL**) arguing that “PBMs are necessary parties to any effort to abate the opioid crisis.” *In re Nat’l Prescription Opiate Litig.*, No. 1:17-md-2804 (N.D. Ohio Jan. 31, 2018), Dkt. 108 (**Exhibit 8**); *see id.* (N.D. Ohio Sept. 14, 2018), Dkt. 978-6 (**Exhibit 9**). Given these public filings, the First Circuit held that “it is not plausible that the City was not aware of these prior litigations.” *Boston*, 169 F.4th at 63.

The same public records compel the same result here. *See Wyser-Pratte Mgmt. Co. v. Telxon Corp.*, 413 F.3d 553, 565 (6th Cir. 2005) (facts alleged in earlier complaint by different plaintiff “provide[] inquiry notice sufficient to start the limitations period” for subsequent plaintiff). The State *affirmatively alleges* that it was aware of “other opioids litigation” across the country, including in the MDL Compl. ¶ 167. And the State has acted as *amicus curiae* in the MDL since August 2018. *See In re Nat’l Prescription Opiate Litig.*, No. 1:17-md-2804 (N.D. Ohio Aug. 10, 2018), Dkt. 874 (**Exhibit 10**). By 2019, the State’s outside counsel, Baron & Budd, was filing claims against Defendants in an MDL *bellwether* case at *the same time* it was representing the State in opioid litigation. *See id.*, Dkt. 2613 ¶¶ 284–99, 1134–48 (**Exhibit 11**); Ex. 2. By February 2021, the State alleged that “mail-order pharmacies” and “pharmacy benefit managers” helped manufacturers “obtain and maintain broad formulary coverage.” Ex. 3 at ¶¶ 20, 23. These public records “bolster[]” the conclusion that the State knew or reasonably should have known of its claims against Defendants before October 2021. *Boston*, 169 F.4th at 63.

III. FEDERAL LAW PREEMPTS THE STATE’S CLAIMS.

ERISA Preemption. “ERISA contains an express preemption clause, which provides that ERISA ‘supersede[s] any and all State laws [that] . . . relate to any employee benefit plan.’” *McKee Foods*, 173 F.4th at 262–63 (quoting 29 U.S.C. § 1144(a)). “Both the Supreme Court and [the Sixth Circuit] have emphasized the

broad scope of ERISA’s expansive pre-emption provision.” *Briscoe v. Fine*, 444 F.3d 478, 497 (6th Cir. 2006). That scope covers state common-law and statutory claims. *See McKee Foods*, 173 F.4th at 263; *McLemore v. Regions Bank*, 682 F.3d 414, 425 (6th Cir. 2012). A state-law claim “relates to” an ERISA plan if it seeks to “(1) mandate employee benefit structures or their administration; (2) provides alternative enforcement mechanisms; or (3) binds employers or plan administrators to particular choices or preclude uniform administrative practice.” *McLemore*, 682 F.3d at 425.

Earlier this year, the Sixth Circuit held in *McKee Foods* that ERISA preempted Tennessee laws regulating PBM pharmacy networks, copays, and coinsurance rates. 173 F.4th at 262–69. The court explained that PBMs “perform certain functions for ERISA health benefit plans” and when state laws “encroach” on a plan’s “autonomy” to “structure and design [benefits] as they see fit[,] . . . ERISA prevents such state-level interference.” *Id.* at 266. Like the PBM regulations in *McKee Foods*, the State’s claims here improperly seek to “mandate employee benefit structures or their administration” and “bind . . . plan administrators to particular choices” about prescription-drug-plan design. *McLemore*, 682 F.3d at 425. The State’s theory of liability is premised on PBM decisions about how to “craft formulary UM offerings” for clients, most of which are ERISA plans. Compl. ¶¶ 131, 125–26. Indeed, the State seeks to impose liability precisely because it believes the PBM Defendants “should have been offering” different plan benefit structures that would have “limit[ed] the

quantity or flow” of opioid medications. *Id.* ¶ 403; *see also id.* ¶ 190. These matters are central to the design and administration of ERISA plans. *McKee Foods*, 173 F.4th at 264. The State’s claims therefore relate to ERISA plans and are preempted. *Cf. Goldman v. BCBSM Found.*, 841 F. Supp. 2d 1021, 1028 (E.D. Mich. 2012) (ERISA preempted claim regarding “denial of prescription drug benefits”).

Medicare Act Preemption. Like ERISA preemption, Medicare Part D preemption is “unmistakably broad.” *Pharm. Care Mgmt. Ass’n v. Mulready*, 78 F.4th 1183, 1205–06 (10th Cir. 2023). Part D’s preemption clause provides that the “standards established under [Part D] shall supersede any State law or regulation.” 42 U.S.C. § 1395w-26(b)(3); *see also* 42 U.S.C. § 1395w-112(g); 42 C.F.R. § 423.440(a); *Do Sung Uhm v. Humana Inc.*, 620 F.3d 1134, 1148–58 (9th Cir. 2010).

The State attempts to impose liability on the PBM Defendants based on how prescription opioids were selected, priced, and covered—including by Medicare Part D plans. *See* Compl. ¶¶ 125–26, 131, 362–69, 403. But the PBM Defendants and their Part D clients administer pharmacy benefits according to regulations adopted by the Centers for Medicare and Medicaid Services (**CMS**), which adopts detailed standards governing Part D formularies, drug coverage, and utilization management. *E.g.*, 42 C.F.R. §§ 423.100, 423.120(b)(2)(i)–(iii), 423.153. Indeed, CMS approves the very formularies for which the State seeks to hold the PBMs liable. 42 C.F.R. § 423.120(b)(2)(iv). By second-guessing the content of formularies and policies

approved by CMS, the State's claims run headlong into Part D's preemption clause. *See Alaska v. Express Scripts, Inc.*, 2024 WL 2321210, at *11 (D. Alaska May 22, 2024) (Medicare Part D preempted Alaska's opioid-related claims for Part D plans).

CONCLUSION

The Court should dismiss the complaint with prejudice.

Dated: May 15, 2026

Respectfully submitted,

/s/ John F. Rhoades

John F. Rhoades (P75575)
Michelle Mayfield (P86423)
Erik Joseph Kandah (P88358)
DYKEMA GOSSETT PLLC
777 Woodward Avenue, Suite 400
Detroit, MI 48226
(313) 568-6800
jrhoades@dykema.com
mmayfield@dykema.com
ekandah@dykema.com

Jonathan G. Cooper (*admitted*)
QUINN EMANUEL URQUHART
& SULLIVAN LLP
555 13th St. NW, Suite 600
Washington, DC 20004
(202) 538-8000
jonathancooper@quinnemanuel.com

*Counsel for Evernorth Health, Inc.,
Express Scripts, Inc., Express Scripts
Administrators, LLC, Medco Health
Solutions, Inc., ESI Mail Pharmacy
Service, Inc., Express Scripts
Pharmacy, Inc., ESI Mail Order
Processing, Inc., and Express Scripts
Specialty Distribution Services, Inc.*

/s/ Irina N. Kashcheyeva

Irina N. Kashcheyeva (P72575)
Ki Lee Kilgore (P85461)
FOLEY & LARDNER LLP
500 Woodward Avenue, Suite 2700
Detroit, MI 48226
(313) 234-7100
ikashcheyeva@foley.com
kkilgore@foley.com

Brian D. Boone (*admitted*)
Caitlin Van Hoy (*admitted*)
ALSTON & BIRD LLP
1120 South Tryon Street, Suite 300
Charlotte, NC 28203
(704) 444-1000
brian.boone@alston.com
caitlin.vanhoy@alston.com

*Counsel for OptumRx, Inc.,
UnitedHealth Group Incorporated,
Optum, Inc., OptumInsight, Inc.,
OptumInsight Life Sciences, Inc.,
OptumHealth Care Solutions, LLC,
OptumHealth Holdings, LLC, and
Optum Health Networks, Inc.*

CERTIFICATE OF SERVICE

I hereby certify that on May 15, 2026, I electronically filed the above documents with the Clerk of the Court via ECF, which will send notifications of such filing to all counsel of record.

/s/ Erik J. Kandah
Erik J. Kandah