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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 BRYON STAFFORD, Individually and  
12 on Behalf of All Others Similarly  
13 Situated,  
14 Plaintiff,  
15 v.  
16 RITE AID CORPORATION,  
17 Defendant.

Case No.: 3:17-cv-1340-AJB-JLB

**ORDER DENYING DEFENDANTS'  
MOTION TO DISMISS PLAINTIFF'S  
SECOND AMENDED COMPLAINT  
(Doc. No. 32)**

18 Defendant Rite Aid Corporation's motion to dismiss challenges many of Stafford's  
19 allegations regarding Rite Aid's allegedly unlawful two-tiered pricing scheme which  
20 caused Bryon Stafford and others to pay artificially inflated copayments for prescription  
21 drugs. However, at the motion to dismiss stage, the Court must accept as true all well-pled  
22 allegations and draw all inferences in favor of Stafford. Through this lens, the Court finds  
23 Stafford plausibly alleged the challenged causes of action. Accordingly, Rite Aid's motion  
24 to dismiss is **DENIED**. (Doc. No. 32)

25 **I. BACKGROUND**

26 Stafford brings a potential class action against Rite Aid for an alleged price  
27 discrimination scheme involving Rite Aid's Rx Savings Program, ("Rx Program").  
28 (Doc. No. 30.) The Rx Program, available to the general public, provides access to a

1 significant price cut on certain generic drugs. (*Id.* ¶ 9.) Stafford alleges Rite Aid failed to  
2 report the Rx Program prices to insurers, where they would be used to calculate the co-  
3 pays that insured customers pay when they pick up a prescription—the “usual and  
4 customary” price. (*Id.* ¶ 11.) This failure, Stafford asserts, distorted the overall prescription  
5 calculations, resulting in higher copays. (*Id.*) Based on this alleged scheme, Stafford brings  
6 claims for negligent misrepresentation and unjust enrichment, as well as claims under the  
7 California Consumer Legal Remedies Act and the California Unfair Competition Law.

## 8 **II. LEGAL STANDARD**

9 A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the pleadings  
10 and allows a court to dismiss a complaint upon a finding that the plaintiff has failed to state  
11 a claim upon which relief may be granted. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir.  
12 2001). The court may dismiss a complaint as a matter of law for: “(1) lack of a cognizable  
13 legal theory or (2) insufficient facts under a cognizable legal claim.” *SmileCare Dental*  
14 *Grp. v. Delta Dental Plan of Cal.*, 88 F.3d 780, 783 (9th Cir. 1996) (citation omitted).  
15 However, a complaint survives a motion to dismiss if it contains “enough facts to state a  
16 claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570  
17 (2007).

18 Notwithstanding this deference, the reviewing court need not accept legal  
19 conclusions as true. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). It is also improper for the  
20 court to assume “the [plaintiff] can prove facts that [he or she] has not alleged . . . .”  
21 *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S.  
22 519, 526 (1983). On the other hand, “[w]hen there are well-pleaded factual allegations, a  
23 court should assume their veracity and then determine whether they plausibly give rise to  
24 an entitlement to relief.” *Iqbal*, 556 U.S. at 679. The court only reviews the contents of the  
25 complaint, accepting all factual allegations as true, and drawing all reasonable inferences  
26 in favor of the nonmoving party. *Thompson v. Davis*, 295 F.3d 890, 895 (9th Cir. 2002).

## 27 **III. DISCUSSION**

28 Rite Aid moves to dismiss on five grounds: (1) failure to allege negligent

1 misrepresentation, (Doc. No. 32-1 at 13); (2) failure to plead CLRA and UCL standing,  
2 (*Id.* at 21); (3) failure to allege a CLRA claim, (*Id.* at 23); (4) failure to allege a UCL claim,  
3 (*Id.* at 25); and (5) improper request for unjust enrichment, (*Id.* at 31).

4 **A. Negligent Misrepresentation**

5 Rite Aid alleges Stafford did not adequately plead the elements of negligent  
6 misrepresentation. (*Id.* at 13.) Negligent misrepresentation requires (1) a misrepresentation  
7 of a material fact, (2) which is made without reasonable grounds for believing it to be true,  
8 (3) with the intent to induce reliance on the misrepresented fact, (4) that justifiable reliance  
9 occurs, and (5) resulting damage. *Ragland v. U.S. Bank Nat'l Ass'n*, 209 Cal. App. 4th 182,  
10 196 (2012).

11 **i. Duty**

12 Rite Aid argues Stafford failed to show Rite Aid owed him a duty to include the Rx  
13 Program prices in its usual and customary (“U&C”) prices. (Doc. No. 32-1 at 13.) Rite Aid  
14 alleges that there is no legal basis establishing an obligation to report the Rx Program  
15 prices, that under California law, programs like the Rx Program are not to be considered in  
16 calculating U&C prices, and that retailers are not legally obligated to disclose pricing  
17 schemes. (*Id.* at 13–16.) Stafford asserts “The National Council for Prescription Drug  
18 Programs (“NCPDP”) sets the industry standards for pharmacy claims to [third party  
19 payors], and Rite Aid follows these standards at its pharmacies for each prescription  
20 transaction.” (Doc. No. 34 at 11; Doc. No. 30 ¶ 28.) Stafford also notes that Rite Aid uses  
21 a NCPDP standard form “to report its “usual and customary” price for the prescription  
22 being filled to [third party payors].” (Doc. No. 34 at 11; Doc. No. 30 ¶ 30.)

23 Whether or not the NCPDP gives rise to a mandatory duty is not determinative here.  
24 To the extent Stafford pleads it, however, the Court is bound to accept that allegation as  
25 true. Nevertheless, under California law, “[a] cause of action for negligent  
26 misrepresentation will also exist where information is given in a business or professional  
27 capacity for such a purpose.” *Friedman v. Merck & Co.*, 107 Cal. App. 4th 454, 481 (2003).  
28 “California courts have recognized a cause of action for negligent misrepresentation, i.e.,

1 a duty to communicate accurate information, in two circumstances . . . The second situation  
2 arises where information is conveyed in a commercial setting for a business purpose.” *Id.*  
3 at 477.

4 Here, Rite Aid owes a duty because they are conveying pricing information in a  
5 commercial setting for that purpose by reporting pricing to Rx Program participants,  
6 prescription consumers, and third party payors. Thus, they have a duty to report that  
7 information accurately. Stafford has plausibly alleged that Rite Aid knew about its own  
8 two-tiered pricing scheme, failed to communicate the differences in prices it charged Rx  
9 Program participants to third-party payors, thus inflating the prices charged to insureds.  
10 (Doc. No. 30 ¶¶ 8–13.) Thus, Stafford has plausibly alleged a duty under these theories.

11 Next, Rite Aid argues a California Health and Safety code precludes a duty to  
12 provide information as Stafford asserts. Rite Aid states that discount programs “cannot be  
13 deemed to be, or taken into consideration in the calculation of, ‘usual and customary’ prices  
14 required in contracts between providers and insurers. . . .” under Cal. Health & Safety Code  
15 § 1371.22. (Doc. No. 32-1 at 14.) Stafford claims the provision only applies to “contracts  
16 between a health care service plan and a provider of health care that requires the provider  
17 accept, as payment from the plan, the lowest payment rate charged by the provider to any  
18 patient or third party without regard to whether the payment is cash or insurance-based.”  
19 (Doc. No. 34 at 13.) Here, Stafford has not alleged any facts pertaining to contracts between  
20 any health service plan and a provider of health care. Thus, the Court finds it is inapplicable  
21 to the facts at hand.

22 Finally, Rite Aid points out it has no duty to disclose its pricing structure to  
23 customers. (Doc. No. 32-1 at 16.) However, Rite Aid’s contention misses the theory of  
24 Stafford’s case. Stafford does not suggest Rite Aid needs to inform each customer about  
25 its pricing structure. Stafford alleges, though, that Rite Aid has a duty to disclose the actual  
26 U&C prices, which encompasses both pricing schemes, and failed to do so when it failed  
27 to include the lower price point in its reporting. Stafford maintains he has shown several  
28 ways in which Rite Aid does have a duty to Stafford to accurately report the U&C prices.

1 (See Doc. No. 34 at 14 (“Plaintiff pleads the plausible existence of Rite Aid’s duty to  
2 disclose through law, industry standard, contract, and Rite Aid’s affirmative actions and  
3 statements.”).) Thus, the Court finds, at this juncture, Stafford has plausibly stated Rite Aid  
4 owed him a duty.

5 ***ii. Misrepresentation or Intent to Deceive***

6 Rite Aid next contends that Stafford failed to “allege any misrepresentation or intent  
7 to deceive plaintiff by Rite Aid.” (Doc. No. 32-1 at 17.) Rite Aid points to Stafford’s  
8 acknowledgment of the Rx Program and its availability as evidence it did not misrepresent  
9 anything or deceive Stafford. (Doc. No. 32-1 at 18.) However, Stafford is correct that his  
10 (or any consumer’s) knowledge of the Rx Program does not mitigate the misrepresentation.  
11 (Doc. No. 34 at 16.) The misrepresentation Stafford alleges in his SAC is the inflated U&C  
12 prices due to Rite Aid’s not reporting its Rx Program prices. (*Id.*; Doc. No. 30 ¶¶ 16, 115.)

13 With regard to Rite Aid’s argument that Stafford failed to plead any intent to deceive,  
14 negligent misrepresentation does not include an “intent to deceive” element. *Anderson v.*  
15 *Deloitte & Touche*, 56 Cal. App. 4th 1468, 1476 (1997) (“Negligent misrepresentation is  
16 the assertion of a false statement, honestly made in the belief it is true, but without  
17 reasonable ground for such belief.”). “[T]he broad statements that ‘scienter’ is an element  
18 of every cause of action for deceit, and that an ‘intent to deceive’ is essential, are untrue,  
19 since neither is a requisite of negligent misrepresentation.” *Id.* (citing 5 Witkin, Summary  
20 of Cal. Law (9th ed. 1988) Torts, § 722, p. 821). “Negligent misrepresentation differs from  
21 fraud in that it does not require ‘intent to deceive or defraud,’ but only an ‘assertion, as a  
22 fact, of that which is not true, by one who has no reasonable ground for believing it to be  
23 true.’” *BNSF Ry. Co. v. San Joaquin Valley R. Co.*, No. CV F 08–1086 AWI SMS, 2011  
24 WL 590445, at \*3 (E.D. Cal. Feb. 10, 2011) (quoting Cal. Civ. Code § 1572(2)).

25 Here, Stafford alleges that “Rite Aid had no reasonable grounds to believe that these  
26 misrepresentations and/or omissions were true. The prices that Rite Aid reported to third-  
27 party payors were substantially (and unjustifiably) higher than the prices it charged under  
28 its RSP to cash-paying customers.” (Doc. No. 30 ¶ 116.) Thus, the Court finds Stafford has

1 plausibly pled a misrepresentation occurred.

2 **iii. Reasonable Reliance**

3 Next, Rite Aid argues Stafford “was required to either plead that the ‘usual and  
4 customary’ price representation was communicated to him and he reasonably relied on it  
5 or that it was communicated to his agent, who then relied on it to plaintiff’s detriment,” but  
6 that “[h]e pled neither.” (Doc. No. 32-1 at 18.) “It is well established that questions of fact  
7 cannot be resolved or determined on a motion to dismiss for failure to state a claim upon  
8 which relief can be granted.” *Cook, Perkiss & Liehe, Inc. v. Northern California Collection*  
9 *Service, Inc.*, 911 F.2d 242, 245 (9th Cir. 1990). Moreover, Courts have held that justifiable  
10 reliance “is ordinarily a question for the jury, but may be decided at the summary judgment  
11 stage where the facts support only one conclusion.” *Honolulu Disposal Service, Inc. v.*  
12 *American Ben. Plan Adm’rs, Inc.*, 433 F. Supp. 2d 1181, 1190 (D. Haw. 2006).

13 Here, at the motion to dismiss stage, the Court cannot determine this question of  
14 fact. Further, even under the summary judgment standard, the Court does not have enough  
15 facts before it to determine whether there is only one conclusion supported. Thus, the Court  
16 declines Rite Aid’s request to dismiss on this element. Nevertheless, Stafford did allege  
17 reliance, stating he “would not have purchased generic prescription drugs from Rite Aid  
18 for more than RSP Prices but for Rite Aid’s misrepresentations and/or omissions.”  
19 (Doc. No. 30 ¶ 118.)

20 **iv. Damages**

21 Rite Aid asserts Stafford did not include enough facts to determine whether his  
22 copayments were indeed higher due to Rite Aid’s alleged scheme, thus showing he was  
23 actually damaged. (Doc. No. 32-1 at 19.) Rite Aid states Stafford “fail[ed], however, to  
24 allege any information about his insurance plan, including the manner in which copayments  
25 are calculated, or the prescriptions he purchased.” (*Id.*) However, at the motion to dismiss  
26 stage, the Court is required to take all well-pled allegations as true. *Iqbal*, 556 U.S. at 679  
27 (“[w]hen there are well-pleaded factual allegations, a court should assume their veracity  
28 and then determine whether they plausibly give rise to an entitlement to relief.”).

1 Here, Stafford alleged the Rx Program price was “\$9.99 for a thirty-day supply.”  
2 (Doc. No. 30 ¶ 21.) He alleges that because this cost was not included in the usual and  
3 customary pricing, he “paid copayments that were either substantially higher than the price  
4 of \$9.99 for a thirty-day supply, or significantly more than the copayment would have been,  
5 had Rite Aid reported the true” U&C price. (*Id.*) As such, Stafford alleges he paid inflated  
6 prices, which he “would not have paid . . . but for Rite Aid’s wrongful conduct.” Taking  
7 these allegations as true, the Court finds Stafford plausibly pled damages resulting from  
8 Rite Aid’s alleged unlawful conduct.

9 **v. *Economic Loss Doctrine***

10 Finally, Rite Aid states that the economic loss rule bars Stafford’s claim (Doc. No.  
11 32-1 at 20.) The plethora of case law on this issue is in favor of Rite Aid’s position. “The  
12 economic loss doctrine provides that a plaintiff’s tort recovery of economic damages is  
13 barred unless such damages are accompanied by some form of harm to person or property,  
14 or the action falls under an exception.” *Strumlauf v. Starbucks Corporation*, 192 F. Supp.  
15 3d 1025, 1035 (N.D. Cal. 2016). “Thus, in actions for negligence, liability is limited to  
16 damages for physical injuries and recovery of economic loss is not allowed.” *Id.*

17 Stafford points to two cases which have permitted negligent misrepresentation cases  
18 to proceed despite this well-established rule. In *Sheet Metal Workers*, the Court held that  
19 although CVS’s assertion of the economic loss doctrine may be true, “at this stage, the  
20 Court must take what the Plaintiffs pled at face value.” *Sheet Metal Workers Local No. 20*  
21 *Welfare and Benefit Fund v. CVS Health Corporation*, 221 F. Supp. 3d 227, 238 (D. R.I.  
22 2016). CVS had argued “that Plaintiffs’ claims stem from CVS’s contractual duty to charge  
23 them the U & C price.” *Id.* The *Sheet Metal Workers* court noted, however, that a recent  
24 decision in another case had “rejected the same argument[.]” *Id.*

25 In *Corcoran v. CVS Health Corporation*, the case *Sheet Metal Workers* was referring  
26 to, CVS argued “that Plaintiffs’ fraud and negligent misrepresentation claims are nothing  
27 more than disguised breach of contract claims, which should be dismissed under the  
28 economic loss doctrine.” 169 F. Supp. 3d 970, 988 (N.D. Cal. 2016). The Court rejected

1 that argument, stating:

2 To support dismissal, Defendants contend the SAC does not allege any  
3 wrongdoing independent of its contractual obligation to report an accurate U  
4 & C price to third-party payors. Not so. The gravamen of Plaintiffs’  
5 allegations is that CVS created the HSP program to report misleading U & C  
6 prices in a manner that contravened industry standards with the intent to  
7 deceive Plaintiffs and class members. Plaintiffs additionally allege that CVS  
8 misrepresented the availability of the HSP program and their ability to  
9 participate therein. These allegations undoubtedly fall outside of CVS’s  
10 contractual obligations to third party payors.

11 *Id.* (emphasis added). In quoting this case, the *Sheet Metal Workers* court added the same  
12 emphasis as above. *Sheet Metal Workers*, 221 F. Supp. 3d at 238.

13 Stafford, similar to plaintiffs in *Sheet Metal Workers* and *Corcoran*, pled that Rite  
14 Aid “orchestrated a fraudulent scheme that violated industry standards.” *Id.* Stafford  
15 alleged Rite Aid created the Rx Program—“[t]he lynchpin of the scheme—to report  
16 “falsely inflated ‘usual and customary’ prices for the drugs to third-party payors. . . .”  
17 (Doc. No. 30 ¶¶ 9, 11.) Additionally, Stafford alleges Rite Aid does “not advise customers  
18 using insurance that the drug being purchased may be cheaper if they paid with cash  
19 through the RSP, a program that Rite Aid touts as being helpful for people who do not have  
20 insurance or who are uninsured.” (*Id.* ¶ 14.) The *Corcoran* court found identical facts “f[e]ll  
21 outside of CVS’s contractual obligations to third party payors.” *Corcoran*, 169 F. Supp. 3d  
22 at 988. And thus, while discovery may show “the only basis for the claims is in contract,”  
23 the Court finds the economic loss doctrine does not bar Stafford’s claim at this stage. *Sheet*  
24 *Metal Workers*, 221 F. Supp. 3d at 238. Depending on discovery, Rite Aid could revisit  
25 this issue in summary judgment.

## 26 **B. CLRA and UCL Standing**

27 Next, Rite Aid attacks Stafford’s standing to plead CLRA and UCL claims, arguing  
28 he failed to allege (1) actual reliance on a misrepresentation (2) which was detrimental.  
(Doc. No. 32-1 at 21.) However, the Court found, *supra* pp. 4–5, 5–6, that Stafford  
plausibly alleged both the misrepresentation and reliance elements.



1           Moreover, the Ninth Circuit recently stated “[t]hough ‘a previously deceived  
2 plaintiff’ suing under the UCL, FAL, and CLRA ‘may have standing to seek injunctive  
3 relief,’ the plaintiff must still show ‘that she faces an imminent or actual threat of future  
4 harm caused by [the defendant’s] allegedly false advertising.’” *Lanovaz v. Twinings North  
5 America, Inc.*, 726 Fed. App’x 590 (9th Cir. June 6, 2018) (quoting *Davidson v. Kimberly-  
6 Clark Corp.*, 889 F.3d 956, 970 (9th Cir. 2018)). Stafford indeed alleged future harm by  
7 stating he “anticipates filing future prescriptions for these generic drugs at a Rite Aid  
8 pharmacy, and thus, faces the prospect of paying additional inflated copayments in the  
9 future if Rite Aid continues its wrongful conduct.” (Doc. No. 30 ¶ 22.)

10           Thus, the Court finds Stafford has alleged standing under both the CLRA and the  
11 UCL.

### 12           **C.    CLRA Claim**

13           Rite Aid argues there are “three fundamental flaws with plaintiff’s CLRA  
14 allegations.” (Doc. No. 32-1 at 24.)

15           The Consumer Legal Remedies Act, (“CLRA”), prohibits certain “unfair methods  
16 of competition and unfair or deceptive acts or practices in a transaction intended to result  
17 or that results in the sale or lease of goods or services to any consumer.” Cal. Civ. Code  
18 § 1770(a). In general, to bring a CLRA claim, the plaintiff must show that: (1) the  
19 defendant’s conduct was deceptive; and (2) that the deception caused defendant to be  
20 harmed. *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1022 (9th Cir. 2011) (internal  
21 quotation marks omitted), *abrogated on other grounds by Comcast Corp. v. Behrend*, 569  
22 U.S. 27 (2013).

23           Stafford alleges violations of CLRA Cal. Civ. Code § 1770(a)(5), (7), (9), and (16).  
24 (Doc. No. 30 ¶ 101.) These sections represent specific unfair methods of competition which  
25 are unlawful:

26           (5) Representing that goods or services have sponsorship, approval,  
27 characteristics, ingredients, uses, benefits, or quantities that they do not have  
28 or that a person has a sponsorship, approval, status, affiliation, or connection  
that he or she does not have. . . .

1 (7) Representing that goods or services are of a particular standard, quality,  
2 or grade, or that goods are of a particular style or model, if they are of another.

3 . . .

4 (9) Advertising goods or services with intent not to sell them as advertised. .

5 ..

6 (16) Representing that the subject of a transaction has been supplied in  
accordance with a previous representation when it has not. . . .

7 Cal Civ. Code § 1770(a)(5), (7), (9), and (16).

8 First, Rite Aid argues that “plaintiff does not explain which alleged violations are  
9 attributable to which alleged wrongful conduct.” (*Id.*) To this argument, Stafford notes Rite  
10 Aid did not provide any legal backing for its claim that Stafford was required to plead with  
11 such specificity. (Doc. No. 34 at 22.) Federal Rule of Civil Procedure 8 only requires “a  
12 short and plain statement of the grounds for the court’s jurisdiction,” and “a short and plain  
13 statement of the claim showing that the pleader is entitled to relief.” Stafford’s SAC has  
14 met that threshold.

15 Second, Rite Aid asserts “there are no specific allegations suggesting that Rite Aid  
16 had any obligation to this plaintiff, as a matter of its contracts or otherwise, to consider  
17 RSP prices in setting usual and customary prices.” (Doc. No. 32-1 at 25.) As to this  
18 argument, the Court found, *supra* pp. 3–4, that Stafford plausibly pled Rite Aid owed him  
19 a duty. Moreover, Stafford alleges that “Rite Aid owed a duty to Plaintiff, the Class, and  
20 Subclass to provide them with accurate information regarding the prices of its generic  
21 prescription drugs.” (Doc. No. 30 ¶ 114.)

22 Third, Rite Aid states “the alleged reporting of ‘usual and customary’ prices to an  
23 insurance company that are somehow false does not violate the express provisions of the  
24 CLRA.” (Doc. No. 32-1 at 25.) For support, Rite Aid cites to a case purporting to hold that  
25 “[a]llegations of false or deceptive pricing are not covered by Section 1770(a)(5).” (*Id.*)  
26 However, that court held “[m]isrepresentations regarding the value of similar goods are not  
27 encompassed by the plain language of sections 1770(a)(5) and (7).” *Jacobo v. Ross Stores,*  
28 *Inc.*, No. cv-15-04701-MWF-AGR, 2016 WL 3483206, at \*4 (C.D. Cal. June 17, 2016)

1 (emphasis added). Here, Stafford has not made comparisons to other goods, but has  
2 adequately pled plausible facts supporting a CLRA § 1770(a)(5) claim.

3 Rite Aid also attacks Stafford’s § 1770(a)(9) claim, stating that “plaintiff was sold  
4 prescription drugs at the price he was quoted.” However, Rite Aid’s contention ignores  
5 Stafford’s allegations. Stafford alleges he was not sold at the price quoted because “Rite  
6 Aid presented that it charged him copayments based on the true U&C price for the  
7 prescription generic drugs purchased, when, in fact, Rite Aid charged Plaintiff inflated  
8 copayments based on fraudulent U&C prices.” (Doc. No. 34 at 24.) Thus, unlike plaintiff  
9 in *Taylor v. Nike, Inc.*, Stafford made plausible allegations of a § 1770(a)(9) violation. No.  
10 3:16-cv-00661-MO, 2017 WL 663056, at \*8 (D. Or. Feb. 17, 2017) (“Here, there are no  
11 allegations that the items sold were different than what Nike purported them to be at the  
12 time of purchase, or that Ms. Taylor purchased products at a different price than was  
13 advertised.”)

14 Finally, Rite Aid challenges Stafford’s allegations under § 1770(a)(16) stating that  
15 Stafford was required “to allege that Rite Aid represented the allegedly false reported  
16 ‘usual and customary’ price to be in accord with a prior representation,” but that “no such  
17 allegation appears in the FAC.” (Doc. No. 32-1 at 25.) Stafford responds that he pled “Rite  
18 Aid represented to Plaintiff that the copayments it charged were calculated based on the  
19 true U&C prices reported to TPPs [third party payors], when, in fact, they were not.”  
20 (Doc. No. 34 at 24.) Again, the Court finds Stafford has plausibly pled facts supporting a  
21 § 1770(a)(16) claim.

#### 22 **D. UCL Claim**

23 Rite Aid asserts Stafford’s allegations under the UCL fail as well, stating “Plaintiff  
24 has not alleged a statutory or contractual obligation for Rite Aid to calculate ‘usual and  
25 customary’ prices in a way that accounts for [Rx Program] prices.” (Doc. No. 32-1 at 25.)  
26 Rite Aid goes on to argue that even if Stafford “does plead the existence of such an  
27 obligation, it could only be contractual and therefore not form the basis of a UCL claim.”  
28 (*Id.*) California’s statutory unfair competition laws broadly prohibits unlawful, unfair, and

1 fraudulent business acts. *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134,  
2 1143 (2003).

3 ***i. Unlawful Prong***

4 The UCL’s unlawful prong prohibits “anything that can properly be called a business  
5 practice and that at the same time is forbidden by law.” *Cel-Tech Communications, Inc. v.*  
6 *Los Angeles Cellular Telephone Co.*, 20 Cal. 4th 163, 180 (1999). Thus, the UCL allows  
7 injured consumers to “borrow[] violations from other laws by making them independently  
8 actionable as unfair competitive practices.” *Korea Supply Co.*, 29 Cal. 4th at 1143.  
9 Accordingly, to the extent Stafford’s CLRA and negligent misrepresentation claims  
10 survive, his unlawful UCL claim does, too.

11 ***ii. Unfair Prong***

12 The unfair prong has been defined in various ways, including practices which offend  
13 public policy, which are immoral or unethical, are oppressive or substantially injurious to  
14 consumers. *McKell v. Washington Mutual, Inc.*, 142 Cal. App. 4th 1457, 1473 (2006). An  
15 unfair practice can also be one in which the utility of the practice is outweighed by a  
16 victim’s harm. *South Bay Chevrolet v. Gen. Motors Acceptance Corp.*, 72 Cal. App. 4th  
17 861, 886–87 (1999). Finally, it has also been defined as “a practice that is (i) substantially  
18 injurious to the consumer, where (ii) the injury is not outweighed by countervailing benefits  
19 to consumers or competition, and (iii) the injury is not one that consumers themselves could  
20 reasonably have avoided.” *Pirozzi v. Apple, Inc.*, 966 F. Supp. 2d 909, 922 (N.D. Cal.  
21 2013).

22 As discussed throughout this Court’s order, Stafford has adequately pled he was  
23 harmed by Rite Aid’s allegedly fraudulent practices, to which there is no benefit to the  
24 consumer, but financial benefit to Rite Aid. (*See* Doc. No. 30 at ¶ 48 (“Rite Aid was able  
25 to collect artificially inflated copayments from consumers, as well as artificially inflated  
26 residual amounts from third-party payors.”).) Rite Aid’s acknowledgement that its prices  
27 were advertised on its website and provided to customers (and thus could have avoided  
28 injury) is futile in the face of Stafford’s theory of his case. Rite Aid did not disclose it failed

1 to report the Rx Program prices in the U&C prices, which, according to Stafford, is the  
2 underlying misrepresentation and could not have been avoided. Thus, the Court finds  
3 Stafford stated a claim under this prong as well.

4 **iii. Fraudulent Prong**

5 Next, the fraudulent prong requires specific allegations giving notice of the alleged  
6 misconduct forming the fraud charge, economic injuries resulting from the fraudulent  
7 conduct (i.e. causation), and a showing that “members of the public are likely to be  
8 deceived.” *Sybersound Records, Inc. v. UAV Corp.*, 517 F.3d 1137, 1152 (9th Cir. 2008);  
9 *Pirozzi*, 966 F. Supp. 2d at 920. Rite Aid persists in their belief that Stafford has not alleged  
10 any facts demonstrating “Rite Aid departed from the requirements of a contract with  
11 plaintiff’s insurer and or concealed the RSP prices.” (Doc. No. 32-1 at 28.)

12 However, again, Rite Aid fails to comprehend Stafford’s theory. The fact that Rite  
13 Aid “publicly advertised the RSP program and the prices of the generic drugs available  
14 under it” does not save Rite Aid from potentially fraudulent conduct: Rite Aid’s failure to  
15 include the Rx Program pricing in its reporting of the U&C prices which inflated Stafford’s  
16 copayments, thus “concealing its true U&C price.” (Doc. No. 34 at 27.)

17 Rite Aid also argues Stafford’s complaint fails to plead specific facts, such as “when  
18 he made his purchases, where he made those purchases, what he purchased, how much he  
19 paid, or what, if any, specific deceptive or misleading statements were made. . . .”  
20 (Doc. No. 32-1 at 29.) Rite Aid cites a case for support, arguing that Stafford must plead  
21 “the name of the persons who made the allegedly fraudulent representations, their authority  
22 to speak, to whom they spoke, what they said or wrote, and when it was said or written.”  
23 (*Id.* (quoting *Lopez v. Wells Fargo Bank, N.A.*, No. 16-cv-811-AJB-DHB, 2017 WL  
24 1336764, at \*4 (S.D. Cal. Apr. 5, 2017).) However, that case concerns fraudulent  
25 inducement. *Id.* Those requirements make sense when holding a corporation liable for the  
26 actions of an employee who is accused of fraudulently inducing a consumer—which were  
27 the precise allegations in *Lopez* when a member of Wells Fargo “advised Plaintiff to stop  
28 making timely loan payments” leading to foreclosure on plaintiff’s home. *Id.* at \*1.

1 However, here, no analogous situation is claimed to exist. Stafford is not alleging that a  
2 member of Rite Aid fraudulently induced him into paying his copayment price instead of  
3 the Rx Program price. Rather, Stafford alleges Rite Aid created a two-tiered pricing scheme  
4 to artificially inflate the U&C prices by purposefully not including the lower Rx Program  
5 prices. Thus, requiring Stafford to allege who he spoke to, what they said, and when it was  
6 said would be irrelevant.

7 As to the sufficiency of Stafford’s allegations, the Court finds Stafford’s complaint  
8 is specific enough to give Rite Aid notice of its alleged misconduct.

9 *iv. Damages under the UCL*<sup>1</sup>

10 Rite Aid also argues the UCL claims must be dismissed because Stafford only claims  
11 damages. (Doc. No. 32-1 at 27.) “A UCL action is equitable in nature; damages cannot be  
12 recovered.” *Korea Supply Co.*, 29 Cal. 4th at 1144. However, “an individual may recover  
13 profits obtained to the extent that these profits represent monies given to the defendant or  
14 benefits in which the plaintiff has an ownership interest.” *Id.* at 1148. “[A]n order for  
15 restitution is one ‘compelling a UCL defendant to return money obtained through an unfair  
16 business practice to those persons in interest from whom the property was taken, that is, to  
17 persons who had an ownership interest in the property or those claiming through that  
18 person.’” *Id.* at 1149 (quoting *Krause v. Trinity Management Services, Inc.*, 23 Cal. 4th  
19 116, 126–27 (2000) (superseded by statute on other grounds)).

20 That is precisely what Stafford is alleging here. Stafford alleges Rite Aid received  
21 an inflated copayment due to its unlawful actions, and Stafford requests restitution from  
22 the “wrongfully acquired portion of the copayments charged by Rite Aid.” (Doc. No. 34 at  
23 26.) Although Rite Aid claims Stafford failed to allege “he would not have purchased the  
24 prescriptions [sic] drugs if he had known that the calculation of their price did not reflect  
25 \_\_\_\_\_

26 <sup>1</sup> Rite Aid also argues Stafford’s UCL claims should be dismissed because the remedies at  
27 law are unsupported under the UCL. (Doc. No. 32-1 at 26–27.) However, this argument  
28 again assumes Stafford’s claims are grounded only in contract law—a contention the Court  
rejects.

1 RSP prices,” (Doc. No. 32-1 at 27), Stafford does allege he “would not have paid those  
2 inflated amounts but for Rite Aid’s wrongful conduct.” (Doc. No. 30 ¶ 23.) The Court finds  
3 the distinction nominal. The Court also finds Stafford’s representation that he is seeking  
4 restitution adequate and not grounds for dismissal of his UCL claims.

#### 5 **E. Unjust Enrichment**

6 In their final argument,<sup>2</sup> Rite Aid states there is no unjust enrichment cause of action,  
7 which Stafford pleads. (Doc. No. 32-1 at 31.) However, the Ninth Circuit has suggested  
8 otherwise. In *Astiana v. Hain Celestial Grp., Inc.*, the Ninth Circuit held that unjust  
9 enrichment and restitution “describe the theory underlying a claim that a defendant has  
10 been unjustly conferred a benefit ‘through mistake, fraud, coercion, or request.’” 783 F.3d  
11 753, 762 (9th Cir. 2015). “The return of the benefit that was unjustly given is what is  
12 ‘typically sought’ in a quasi-contract cause of action.” *Id.*

13 Here, similar to the plaintiff in *Astiana*, Stafford has adequately alleged a quasi-  
14 contract cause of action by alleging that Defendant was “unjustly enriched” by its  
15 “wrongful conduct” and “the imposition of artificially inflated prices on Plaintiff. . .” such  
16 that “Rite Aid’s retention of such funds under circumstances making it inequitable to do so  
17 constitutes unjust enrichment.” (Doc. No. 30 ¶¶ 108, 110.) Although this may run counter  
18 to some of Stafford’s theory, “[a] party may set out 2 or more statements of a claim or  
19 defense alternatively or hypothetically, either in a single count or defense or in separate  
20 ones.” Fed. R. Civ. P. 8(d)(2); *Astiana*, 783 F.3d at 762–63.

21 Thus, the Court finds Stafford has plausibly alleged unjust enrichment and declines,  
22 at the motion to dismiss stage, to dismiss this claim. Should the prevailing theory become  
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24 <sup>2</sup> Rite Aid also argues that Stafford “cannot use contracts to bootstrap liability under other  
25 theories such as the UCL, CLRA or common law theories such as negligence because  
26 [p]ermitting such recovery would completely destroy the principle that a third party cannot  
27 sue on a contract to which he or she is merely an incidental beneficiary.” (Doc. No. 32-1  
28 at 31–32 (internal quotations and citations omitted).) However, as Stafford states, “Plaintiff  
is not seeking to hold Rite Aid liable for violating the terms of any contract to which he is  
not a party.” (Doc. No. 34 at 25 n.9.)


1 rooted in contract, or otherwise change in such a way that makes unjust enrichment  
2 unavailable as a cause of action, Rite Aid can revisit this in a summary judgment motion.

3 **IV. CONCLUSION**

4 At the motion to dismiss stage, plaintiff's burden is relatively low. Stafford only  
5 needs to allege plausible allegations supporting each cause of action. Whether or not those  
6 allegations prove to be true is not an issue before the Court at this threshold. That inquiry  
7 is better suited for a summary judgment motion. At this juncture, the Court must take as  
8 true Stafford's allegations regarding Rite Aid's alleged pricing scheme and existence of a  
9 duty—which seems to be the thread through many of Rite Aid's challenges. To this end,  
10 the Court finds Stafford's second amendment complaint plausibly states a claim for  
11 negligent misrepresentation, has standing under both the CLRA and the UCL, has stated  
12 claims under both the CLRA and the UCL, and unjust enrichment. Accordingly, Rite Aid's  
13 motion to dismiss is **DENIED**. (Doc. No. 32.)

14 **IT IS SO ORDERED.**

15  
16 Dated: September 28, 2018

  
17 Hon. Anthony J. Battaglia  
18 United States District Judge  
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