

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
VICTORIA DIVISION**

**THE MUECKE COMPANY, INC., )  
BRUCE ROGERS d/b/a )  
ROGERS PHARMACY, )  
BROOKSHIRE BROS. PHARMACY )  
OF KIRBYVILLE TEXAS, )  
DE LA ROSA PHARMACY, INC., )  
HOMETOWN PHARMACY, LC, and )  
ROBERTY KINSEY INVESTMENTS, INC., )  
d/b/a KINSEY’S PHARMACY )  
Plaintiffs, )**

v. )

**CASE NO. 6:10-cv-00078  
JURY**

**CVS CAREMARK CORPORATION, )  
CVS PHARMACY, INC., )  
CAREMARK RX, LLC, and )  
CAREMARK, LLC )  
Defendants. )**

**BRIEF OF AMICI CURIAE CONSUMER FEDERATION OF AMERICA, U.S. PUBLIC  
INTEREST RESEARCH GROUP AND THE NATIONAL LEGISLATIVE  
ASSOCIATION ON PRESCRIPTION DRUG PRICES IN OPPOSITION TO  
DEFENDANTS’ MOTION TO DISMISS AND COMPEL ARBITRATION**

**INTRODUCTION**

Amici Curiae Consumer Federation of America, U.S. Public Interest Research Group and the National Legislative Association on Prescription Drug Prices (collectively, the “Amici”) are leading advocates for competitive markets, which benefit all consumers by promoting lower prices, choice and innovation. The Amici, concerned with the abusive, anti-consumer conduct of pharmacy benefit managers, especially CVS Caremark, respectfully submit this brief in opposition to Defendants’ Motion to Dismiss and Compel Arbitration because this case raises crucial issues of protecting consumer privacy and preserving consumer choice. The conduct

alleged in the complaint potentially harms thousands of consumers and these claims should be resolved by a court and not through arbitration.

### **INTEREST OF AMICI CURIAE**

The Amici are public interest groups and advocates for competitive health care markets. Amicus Curiae Consumer Federation of America (“CFA”) is composed of over 280 state and local affiliates representing consumer, senior-citizen, low-income, labor, farm, public power and cooperative organizations. CFA represents consumer interests before federal and state regulatory and legislative agencies, participates in judicial proceedings as amicus curiae, and conducts research and public education.

Amicus Curiae U.S. Public Interest Research Group (“U.S. PIRG”), the federation of state Public Interest Research Groups, works on behalf of American consumers using the time-tested tools of investigative research, media exposés, grassroots organizing, advocacy and litigation. U.S. PIRG’s mission is to deliver persistent, result-oriented public interest activism that protects our health, encourages a fair, sustainable economy, and fosters responsive, democratic government.

Amicus Curiae National Legislative Association on Prescription Drug Prices (“NLARx”) is a national nonprofit, nonpartisan organization of state legislators who support policies to reduce prescription drug prices and expand access to affordable medicines.

The Amici have long been concerned by the egregious, deceptive, and anticompetitive conduct of pharmacy benefits managers (“PBMs”). Although PBMs can help lower the cost of drugs, because of the lack of competition and transparency, they have the ability to harm consumers by engaging in deceptive practices. To police this market a coalition of over 30 state attorneys generals have brought cases against each of the three major PBMs—Express Scripts,

Medco and CVS Caremark—for fraud; misrepresentation to plan sponsors and patients; kickback schemes; and failure to meet ethical and safety standards, resulting in over \$370 million in damages.<sup>1</sup> While these egregious abuses by PBMs have certainly established PBM conduct as a general area of considerable public concern, the Amici are specifically concerned with the conduct of CVS Caremark alleged in this case.

This case raises issues directly relevant to millions of consumers across the nation. Plaintiffs assert that CVS Caremark has both violated patient privacy by sharing protected health information, in contravention of the Health Information Portability and Accountability Act (“HIPAA”) and has limited patient choice by forcing patients to obtain prescriptions from CVS-owned pharmacies, in violation of the Texas Any Willing Provider statute. The Plaintiffs allege these practices are in violation of the Racketeer and Influenced Corrupt Organizations Act (“RICO”). The Amici submit this brief because arbitration is an inadequate mechanism to protect the rights of consumers in resolving these claims, and the conduct alleged in this case raise matters of widespread public interest, including the preservation of patient choice and the protection of patient privacy. A case of such considerable interest to consumers must be adjudicated openly, in a court of law, and not by means of private arbitration. Amici therefore respectfully request that this Court deny Defendants’ Motion to Dismiss and Compel Arbitration.

## ARGUMENT

### **I. This Court should refuse to compel arbitration because the case addresses matters of significant public concern that ought to be tried in the open judicial proceedings of a court of law.**

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<sup>1</sup> *The Effects of Regulatory Neglect on Health Care Consumers: Hearing Before the Consumer Protection, Product Safety, & Insurance Subcomm. of the S. Comm. on Commerce, Science & Transportation*, 111th Cong. (July 16, 2009) (statement of David Balto, Senior Fellow, Center for American Progress), available at [http://www.americanprogress.org/issues/2009/07/balto\\_testimony.html](http://www.americanprogress.org/issues/2009/07/balto_testimony.html).

The conduct of the Defendants at issue in this case reaches well beyond the individual Plaintiffs and entails significant implications for the public at large. For one, the case involves serious allegations that CVS Caremark violates the privacy of patients by sharing protected health information gained by Caremark with CVS for the purposes of marketing its prescription products to individual consumers. The 2007 merger between CVS, the nation's largest retail pharmacy, and Caremark, one of the largest PBMs in the country, allowed CVS to access the most competitively sensitive information of rival pharmacies that do business with Caremark. Recognizing this competitive concern, CVS Caremark pledged that their PBM and pharmacy businesses would operate with a strict firewall, thus preventing the retail component of the company from obtaining the private and competitively sensitive information of their competitors.<sup>2</sup>

As alleged in the complaint CVS Caremark violated this pledge. The complaint documents how CVS Caremark's marketing activities, as well as its publicly-acknowledged IT infrastructure, have led to significant ongoing violations of patient privacy and improper sharing of protected health information. More specifically, the case involves claims that the Defendants use a joint IT platform in order to tap into personal medical information for marketing purposes, such as to try to force patients to switch existing prescriptions with independent pharmacies to CVS Caremark-owned operations.

This conduct is not new to CVS Caremark. In 2009, both the Federal Trade Commission ("FTC") and the Department of Health and Human Services ("HHS") investigated CVS Caremark's activities. The FTC filed a complaint and consent order against the company finding

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<sup>2</sup> The firewall was consistent with earlier Federal Trade Commission actions that required a firewall when pharmaceutical manufacturers acquired PBMs. See *Merck & Co., Inc.*, 127 F.T.C. 156 (1999); *Eli Lilly and Company, Inc.*, 120 F.T.C. 243 (1995).

incidents of CVS Caremark's failure to protect patient privacy in 15 cities across the U.S. *See In the Matter of CVS Caremark Corporation*, FTC, File No. 072-3119 (June 18, 2009). The same unlawful conduct led to a \$2.25 million fine by HHS against CVS Caremark for potential HIPAA violations. *See Resolution Agreement, Department of Health and Human Services, Office for Civil Rights* (January 15, 2009).

The National Community Pharmacist Association ("NCPA") has collected over 300 complaints about the conduct of CVS Caremark many of which involve the misuse of personal healthcare information. Typically the complaints describe instances where, "a patient will receive a letter in the mail from CVS Caremark that indicates that 'according to their records' the patient has recently filled a prescription for a certain drug on a certain date."<sup>3</sup> These letters include the patient's name, the patient's last refill, the date of the refill and the drug name, and have even been sent for prescriptions of a highly sensitive nature. Using the information entrusted to PBMs for the purposes of pharmacy claims administration in order to market target audiences constitutes a blatant disregard for the privacy of patients. Given the enormity of CVS Caremark, covering an estimated 134 million lives, this alleged conduct is a serious violation of HIPAA and of great concern to consumers nationwide.

CVS Caremark's conduct also violates consumers' ability to choose their pharmacy, effectively forcing them to go to CVS stores. Since acquiring Caremark, CVS has used its "Maintenance Choice" program with employers, health plans and other plan sponsors. The program requires patients to receive all medications for chronic conditions at a CVS pharmacy, or through the CVS Caremark mail-order operation, effectively excluding all non-CVS

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<sup>3</sup> Letter from Nat'l Cmty. Pharmacists Ass'n, Consumer Action, U.S. PIRG, Patient Privacy Rights, Privacy Journal, Private Citizen, Inc. and Privacy Rights Clearinghouse to Georgina Verdugo, Director of Office for Civil Rights, U.S. Dept. of Health and Human Servs., and Jon Leibowitz, Chairman, Federal Trade Comm. (Nov. 20, 2009) (describing CVS Caremark's egregious disregard of protected healthcare information).

pharmacies from participating as a contract provider, even when they agree to meet the terms and requirements of the plan. These restrictive arrangements reduce consumer choice, and in turn diminish competition, especially in terms of service and quality. A consumer's community pharmacy often can provide better service and counseling, and more attentive service.

Moreover, community pharmacies often serve underserved rural and inner city areas. CVS Caremark's restricted networks violate Texas's Any Willing Provider statute, which stipulates that any health care provider willing to meet the terms and agreements of the contract has the right to participate as a contract provider. TEX. INS. CODE ART. 21.52B.

While this claim is indeed significant to the Plaintiffs, whose customers have been forced to use CVS-owned stores, it is also of great concern to the consumers who have been forced to leave their pharmacy of choice as a result of this program. Many consumers have complained of being forced to leave the pharmacies they have used for years, often where they go for the first line of health care, and where they have built trusting relationships with their community pharmacist. Other consumers have been forced to travel great distances from their homes. These violations of the Texas Any Willing Provider statute diminish price, service, and quality competition.

Resolving this lawsuit in federal court is the most effective means to address CVS Caremark's unlawful conduct. Consumers are not positioned to feasibly challenge these practices. The organizational logistics and the costs involved in bringing a suit against a PBM make legal action an exceedingly difficult enforcement avenue for consumers. Community pharmacies, on the other hand, are far better positioned than individual patients to challenge the problematic PBM practices that concern consumers. A class of community pharmacists is better able to mount the legal effort necessary to battle a multi-billion dollar PBM. Yet the arbitration

provision forced into the Plaintiffs' contract by the incredibly disparate bargaining power between PBMs and independent pharmacies prevents the pharmacies from protecting the interests of their patients.

When community pharmacists enter in to contracts with PBMs, there is an incredible disparity of bargaining power. The major PBMs have far superior market power and much more experience in the business of negotiations. Community pharmacies are forced into "take-it-or-leave-it" contracts with the major PBMs if they want to participate in their networks, while PBMs are actually incentivized to exclude community pharmacies to drive business to their own operations. For most community pharmacies to remain vital, they must contract with CVS Caremark, which is why CVS Caremark has relationships with over 60,000 retail pharmacies in the U.S., constituting 99% of all retail pharmacies nationwide. *Saban v. Caremark RX, LLC*, 2011 WL 1356943 at \*16 (N.D. Ill. Apr. 11, 2011). The arbitration provision in the Plaintiff's contract is merely a result of the dominant bargaining power of PBMs. And community pharmacies are not in the business of negotiating contracts or arbitration provisions buried in 170 pages of complicated provider agreements.

Because of the egregious nature of the alleged violations of patient privacy and choice in this case, it would only be appropriate to try this case in the open judicial proceedings of a court of law. Arbitration proceedings are nonpublic and in this instance, because of the extent of the harm to consumers here, a poor venue for vindication of consumer rights. Such matters of prominent public interest ought to be aired in a public forum, open to the scrutiny of the public.

Compelling this case to the confines of private arbitration would not only prevent the public from observing the proceedings in this particular case, in which consumers undoubtedly

hold a strong interest, it would also establish a precedent of foreclosing public judicial scrutiny of the PBM industry in the future. The wrongs alleged in this case are just a sample, albeit among the most egregious, of a broader, industry-wide pattern of wrongful and unlawful practices by PBMs. Setting a legal precedent that would protect PBMs from public scrutiny would only allow the abusive conduct of PBMs toward independent pharmacies and consumers to continue. Compelling this case to arbitration would, therefore, be in conflict with the best interests of the public.

As the violations in this suit extend well beyond the parties and have a real and significant impact on the public at large, this case should be openly adjudicated in a court of law.

### **CONCLUSION**

For the reasons set forth in this Brief and Plaintiffs' Response, CFA, U.S. PIRG and NLARx respectfully request that this Court deny Defendants' Motion to Dismiss and Compel Arbitration.

Dated this 9th day of June, 2011.

Respectfully submitted,

*/s/D. Todd Smith* \_\_\_\_\_  
D. Todd Smith  
S.D. No. 37831  
State Bar No. 00797451  
SMITH LAW GROUP, P.C.  
1250 Capital of Texas Highway South  
Three Cielo Center, Suite 601  
Austin, Texas 78746  
Telephone: (512) 439-3230  
Fax: (512) 439-3232



David A. Balto (Attorney-in-Charge)  
District of Columbia Bar No. 412314  
LAW OFFICES OF DAVID BALTO  
1350 I Street NW, Suite 850  
Washington, DC 20005  
Telephone: (202) 789-5424  
Fax: (202) 589-1819

ATTORNEYS FOR AMICI CURIAE  
CONSUMER FEDERATION OF AMERICA,  
U.S. PUBLIC INTEREST RESEARCH GROUP  
AND THE NATIONAL LEGISLATIVE  
ASSOCIATION ON PRESCRIPTION DRUG  
PRICES