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 AMICUS CURIAE NATIONAL COMMUNITY PHARMACISTS ASSOCIATION IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AND COMPEL ARBITRATION

Amicus Curiae National Community Pharmacists Association ("NCPA"), through the undersigned counsel, submits this brief in opposition to Defendants' Motion to Dismiss and Compel Arbitration, and as support therefor, states as follows:

INTEREST OF AMICUS CURIAE

The NCPA is a national association that represents more than 23,000 independent community pharmacies and is committed to restoring, maintaining, and promoting high-quality pharmacy care to support the health and well-being of the public. NCPA members serve a vital need in many communities by ensuring access to healthcare, particularly in small towns and underserved communities.

This case concerns serious allegations that the Defendants systematically misuse patients' confidential health information, misappropriate independent pharmacies' patient lists, and restrict patients' access to independent pharmacies. Defendant Caremark, LLC, as a pharmacy benefits manager ("PBM"), operates as a middleman in the prescription drug industry, connecting employer-sponsored and private pharmacy benefits plans, pharmaceutical manufacturers, and pharmacies. It is an economic necessity for independent pharmacies such as Plaintiffs and NCPA members to join PBM networks because over 220 million Americans receive pharmacy benefits through a private or employer-sponsored pharmacy benefits plan administered by a PBM. Three PBMs, CVS Caremark, Medco, and Express Scripts (the "Big 3"), control as much as 95% of the market.[1] The concentration, opaqueness, and complexity of the PBM market has lead to "rampant anticompetitive and deceptive conduct" by PBMs and enforcement actions which have resulted in penalties and fines of over $370 million.[2]

This case arose because CVS, the largest pharmacy chain, acquired Caremark, the largest PBM. As detailed at length in the complaint, the Defendants misuse the confidential patient information that independent pharmacies provide to Caremark pursuant to the necessary PBM-relationship to force consumers away from their pharmacy of choice. This conduct violates the Health Information Portability and Accountability Act ("HIPAA") and the Texas pharmacy choice law, competitively disadvantages independent pharmacies, and ultimately harms patients.

In an act of near ultimate chutzpah, the Defendants attempt to defeat this action by attempting to invoke an arbitration clause purportedly incorporated in Plaintiffs' Provider Agreements, some of which are over a decade old and most of which are not signed by any

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[1] Fast Facts, Prescription Policy Choices Best Practices, http://www.policychoices.org/pharmacy_benefit_managers.shtml (last visited May 30, 2011).

[2] *Hearing on S.B. 154 Before the S. Insurance, Commerce and Labor Comm.*, 2009-2010 Leg., 128th General Assemb. (Ohio 2010) (statement of David Balto, Senior Fellow, Center for American Progress).

Defendant in this action. It is unfathomable that, absent coercion or a severe imbalance in bargaining power or knowledge, a pharmacy would enter into this type of provision with its major competitor (CVS) that dominates many pharmacy markets. Even ignoring those clear deficiencies, the arbitration clause is so egregious as to be unenforceable because the arbitration clause was not subject to negotiation between the parties; was imposed on Plaintiffs who are not experienced in negotiating or drafting contracts and lacked any bargaining power; and was incorporated by reference to one provision buried within a 170-page Provider Manual. In addition, the arbitration clause contains a fee-shifting provision that is one-sided because it discourages independent pharmacies from pursuing even meritorious claims and contradicts protections that Plaintiffs have under federal law; is unilaterally amendable at Defendants' sole discretion; and its application to these claims and parties is beyond any independent pharmacy's reasonable understanding of the arbitration clause. Therefore, Defendants' Motion to Dismiss and Compel Arbitration should be denied.

ARGUMENT

I. This Court should refuse to compel arbitration because the Provider Agreement is a contract of adhesion and the arbitration clause is unconscionable and its application to these claims is beyond the reasonable expectation of the Plaintiffs.

The arbitration clause at issue in this case is unenforceable under Arizona law[3] because the Provider Agreements are contracts of adhesion and the arbitration clause is (1) unconscionable; (2) its application to this case would be beyond the reasonable expectations of the Plaintiffs; or (3) both. *See Maxwell v. Fidelity Fin. Servs., Inc.*, 907 P.2d 51, 58 (1995) ("'[R]easonable expectations' and unconscionability are two distinct grounds for invalidating or limiting the enforcement of a contract . . . .").

[3] *See* Defs' Motion to Compel Arbitration at 11 n.9 ("Plaintiffs' Provider Agreements are all, '[u]nless otherwise mandated by applicable Law . . .[to] be construed, governed and enforced in accordance with the laws of the State of Arizona.'").

A. The Provider Agreements are contracts of adhesion because Defendants abused the disparate bargaining power between an independent pharmacy and a PBM to unilaterally impose the Provider Agreements on the Plaintiffs.

There was simply no negotiation between the Plaintiffs and Defendants as to the terms of the Provider Agreements because independent pharmacies have no choice but to do business with PBMs. As described in an ongoing antitrust case, "[w]hen Caremark approaches independent pharmacies . . . for inclusion in Caremark's network, it presents such pharmacies with . . . a Hobson's choice between (1) being included in the network and accepting unconscionably low reimbursement rates for drugs dispensed to Plan Subscribers and (2) being left out of the network and thereby losing access to the large volume of business represented by Plan Subscribers who have an incentive to patronize network pharmacies." *North Jackson Pharmacy, Inc. v. Caremark RX, Inc.*, 385 F.Supp.2d 740, 745 (N.D. Ill. 2005). As the authors of a recent article describing the PBM industry further explain:

> Retail pharmacies are highly motivated to acquiesce to PBMs' pricing demands to assure that they will be included in the PBM's network of retail pharmacies, resulting in an increase in the pharmacy's market share. Exclusion from the network means that plan participants' claims cannot be processed automatically and the burden of additional paperwork will cause participants to avoid retail pharmacies that are not included in their network. The retail pharmacies are generally offered a "take it or leave it" deal to be included in the network, with only the largest pharmacy chains having any ability to negotiate with the PBMs.[4]

As testament to the economic reality, Caremark, one of the nation's largest PBMs, has relationships with over 60,000 retail pharmacies in the United States which constitutes 99% of all retail pharmacies nationwide.[5]

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[4] Allison Dabbs Garrett & Robert Garis, *Leveling the Playing Field in the Pharmacy Benefit Management Industry*, 42 VAL. U. L. REV. 33, 46 (2007).
[5] *Saban v. Caremark RX, L.L.C.*, 2011 WL 1356943, at *16 (N.D. Ill. Apr. 11, 2011).

These Provider Agreements are contracts of adhesion because they are standardized contracts, drafted by the Defendants, which were presented to the Plaintiffs with "only the opportunity to adhere to the contract or to reject it." *See Huff v. Bekins Moving & Storage Co.*, 702 P.2d 1341, 1343 (Ariz. 1985). *See also Broemmer v. Abortion Servs. of Phoenix, Ltd.*, 840 P.2d 1013, 1016 (Ariz. 1992) ("An adhesion contract is typically a standardized form offered on a 'take it or leave it' basis[.]"). Caremark's dominance meant that Plaintiffs and NCPA members had no real "choice" when agreeing to do business with Caremark. Plaintiffs simply had no power to require (and Defendants had no incentive to offer) negotiation as to the terms of the Provider Agreements.

B. The arbitration clause is unconscionable because the arbitration clause is extremely one-sided and the manner in which the arbitration clause was included in the Provider Agreement was unfair.

Since the Provider Agreements are contracts of adhesion, the arbitration clause contained within is unenforceable because it is unconscionable. Unconscionability typically includes both a procedural and a substantive component but the United States District Court for the District of Arizona has recently held that, under Arizona law, a finding of <u>either</u> procedural <u>or</u> substantive unconscionability is sufficient to render a contractual provision unconscionable. *R&L Ltd. Inv. v. Fidelity Fin. Servs., Inc.*, 729 F.Supp.2d 1110, 1114 (D. Ariz. 2010). Regardless of the *R&L Ltd.* court's disjunctive characterization, the arbitration clause in this case is <u>both</u> procedurally <u>and</u> substantively unconscionable.

1. The arbitration clause is procedurally unconscionable.

The arbitration clause is procedurally unconscionable because of the disparate level of bargaining power and experience between the parties as well as the surreptitious manner in which the arbitration clause was purportedly incorporated in the Provider Agreements by reference to one provision of a 170-page Provider Manual. Procedural unconscionability addresses "'unfair surprise,' fine print clauses, mistakes or ignorance of important facts or other things that mean bargaining did not proceed as it should" and hinges on analysis of "age, education, intelligence, business acumen and experience, relative bargaining power, who drafted the contract, whether the terms were explained to the weaker party, whether alterations in the printed terms were possible, [and] whether there were alternative sources of supply for the goods in question." *Maxwell*, 907 P.2d at 57-58 (citations omitted).

There is also a gross disparity in bargaining power between any individual Plaintiff and the Defendants. PBMs such as the Defendants do not <u>need</u> any particular independent pharmacy to participate in their network. Conversely, it is an economic necessity for an independent pharmacy to be part of one or several PBM networks. As another independent pharmacist explained, "if I say 'I'd like to negotiate,' the PBM will tell me the customers under their plan can go to the Walgreens down the street. That means I'll lose a chunk of business, but more importantly, I'll lose the 30-year relationship with Mrs. Jones who is covered by that PBM."[6]

Independent pharmacies are typically small, family-owned-and-operated businesses; the average independent pharmacy has annual sales of only $4 million.[7] In stark contrast, the "Big 3" are publicly-traded, multi-billion dollar companies; and in 2009, CVS Caremark's annual revenue for its PBM division alone was approximately $50 billion.[8] The Provider Agreement, and the arbitration clause purportedly incorporated therein, was drafted by the Defendants, not the Plaintiffs. Independent pharmacies such as the Plaintiffs are neither experienced nor in the

[6] Emily Maltby, *The Death of the Corner Pharmacy*, CNNMoney.com, (June 16, 2009) http://money.cnn.com/2009/06/16/smallbusiness/small_pharmacies_fight_for_suivival.smb/index.htm.
[7] Nat'l Cmty. Pharmacists Ass'n, Independent Pharmacy Today, http://www.ncpanet.org/index.php/home/independent-pharmacy-today (last visited June 7, 2011).
[8] *Saban*, 2011 WL 1356943 at *16.

business of drafting or negotiating these complex contracts. PBMs such as the Defendants, however, are very experienced using complex contracts to extract maximum profits.[9]

Additionally, the arbitration clause is one provision within a 170-page document. As one independent pharmacist described his Provider Agreement, "[Provider Agreements] have become egregious, with 15 to 20 pages of legal documents and red tape that we can't understand. As the PBM industry has shrunk to a handful of companies, they take more and more and give us less and less."[10] Moreover, the terms of these "agreements" have been amended unilaterally by the Defendants an unknown number of times, without Plaintiffs' consent.

Although Plaintiffs are businesses themselves, the complexity of the PBM industry and disparate bargaining power puts independent pharmacies in a position analogous to that of the consumer in the many cases finding consumer contracts of adhesion procedurally unconscionable. *See, e.g.*, *R&L Ltd.*, 729 F.Supp.2d at 1116 n.2. In *R&L Ltd.*, an investor sought relief for alleged violations of the Arizona Securities Act and consumer fraud. *Id.* at 1112. The court acknowledged that the plaintiff was a corporation, but looked beyond its corporate status to the characteristics of the principal when evaluating procedural unconscionability of the arbitration clause within the relevant contract. *Id.* at 1116 n.2.

2. The arbitration clause is substantively unconscionable.

The arbitration clause is substantively unconscionable because it is unduly unfair to independent pharmacies and stacks the deck in the Defendants' favor. Substantive unconscionability concerns the relative fairness of the actual terms of the contract and is present when "contract terms are so one-sided as to oppress or unfairly surprise an innocent party, [or

[9] *See* Christy A. Rentmeester & Robert Garis, *Rebates and Spreads: Pharmacy Benefit Management Practices and Corporate Citizenship*, 33 J. HEALTH POL. POL'Y & L. 943, 947-950 (2008) (explaining how PBMs derive revenue from drug manufacturer rebates and spread pricing).

[10] Emily Maltby, *The Death of the Corner Pharmacy*, CNNMoney.com, (June 16, 2009) http://money.cnn.com/2009/06/16/smallbusiness/small_pharmacies_fight_for_suivival.smb/index.htm

there is] an overall imbalance in the obligations and rights imposed by the bargain. . . .” *Maxwell*, 907 P.2d at 58 (citations omitted).

The arbitration clause in this case is “so one-sided as to oppress” because it stipulates that “[t]he expenses of arbitration, including attorney’s fees, will be paid for by the party against whom the award of the arbitrator is rendered.” Defs.’ Mot., Ex. 2.K at p. 43 (emphasis added). This language suggests that if an independent pharmacy were to lose in arbitration, it would not only be out its own expenses but it would also be on the hook for the cost of the arbitration proceeding as well as Defendants’ attorney’s fees. The arbitration clause is oppressive because, for an independent pharmacy with limited resources, the risk of not just coming away empty-handed but actually owing the PBM a significant amount destroys any incentive to pursue even meritorious claims—especially when dealing with claims for relatively small damage amounts. The attorney-fee-shifting provision in the arbitration clause is also imbalanced because it does not contain a cap or qualifier. Multi-billion dollar PBMs can kill two birds with one stone when facing disputes: hiring more lawyers at higher rates has the dual effect of (1) increasing its chances at prevailing on the merits and; (2) incentivizing the independent pharmacy to drop the claim for fear of having to pay for the exponentially increasing attorney’s fees. This PBM tactic abuses the independent pharmacy’s miniscule size relative to the multi-billion dollar PBM.

Although the fee-shifting provision appears to be reciprocal in nature, it has the intended and actual effect of coercing independent pharmacies to forgo pursuing claims against the Defendants. *Cf. Bahry v. Montage Mktg., LLC*, 2011 WL 181408, at *4 (D. Nev. Jan. 14, 2011). The plaintiffs in *Bahry* brought claims, *inter alia*, stemming from the defendants’ alleged violation of the Interstate Land Act and the defendants moved to compel arbitration. *Id.* at *1. The court contrasted the language of the Interstate Land Sales Act, which allowed purchaser or lessee to recover attorney's fees from developers who violated the Act, with the language in Title II of the Civil Rights Act of 1964, which gives the court discretion to award the prevailing party reasonable attorney's fees. *Id.* at *4. On that distinction, the court held that the fee-shifting provisions were substantively unconscionable because under the arbitration clause "Defendants receive a potentially substantial benefit while Plaintiffs do not." *Id.* at *4-5.

Like the language of the Interstate Land Sales Act, the Racketeer and Influenced Corrupt Organizations Act ("RICO") provides that a successful plaintiff may recover for attorney's fees but does not afford a similar right for prevailing defendants. *See* 18 U.S.C. § 1964(c). Therefore, the fee-shifting nature of the arbitration clause in the Provider Agreement is contrary to the statutory protection afforded to individuals who bring private RICO suits and is consequently substantively unconscionable. *See Bahry*, 2011 WL 181408, at *4; s*ee also R&L Ltd.*, 729 F.Supp.2d at 1117 (finding fee shifting provision substantively unconscionable because it nullified plaintiff's statutory protection provided under Arizona's Securities Act).

Additionally, the arbitration clause is unilaterally amendable by the Defendants but independent pharmacies such as the Plaintiffs are not afforded this same right. This "overall imbalance of rights and obligations" is further reason for this Court to find the arbitration clause substantively unconscionable. *See Batory v. Sears Roebuck & Co.*, 456 F.Supp.2d 1137, 1140 (D. Ariz. 2006) (quoting *Maxwell*, 907 P.2d at 58).

C. Application of the arbitration clause to these claims is beyond the reasonable expectation of the Plaintiffs.

Terms contained within contracts of adhesion are unenforceable if they are "beyond the range of reasonable expectation" of the adhering party. *Broemmer*, 840 P.2d at 152. It is beyond the reasonable expectation of independent pharmacies like Plaintiffs and NCPA members that, when agreeing to do business with PBMs, they were also agreeing to arbitrate with their major competitor or arbitrate these particular claims. There is no basis for finding that these Plaintiffs or any pharmacy would have believed that by entering into a contract with Caremark they were agreeing to arbitrate with their major competitor. It is also beyond the Plaintiffs' reasonable expectation that that scope of the arbitration clause ("any and all disputes in connection with or arising out of <u>this [Provider] Agreement</u> . . . ." Defs.' Mot., Ex. 2.K at p. 43 (emphasis added)) encompasses a private right of action under the RICO based on the predicate act of Defendants' alleged violations of HIPAA. *Cf. Wachovia Bank, N.A. v. Schmidt*, 445 F.3d 762 (4th Cir. 2006) (denying defendant's motion to compel arbitration after finding that plaintiff's claims of civil conspiracy, fraud, negligent misrepresentation, unfair trade practices, and breach of fiduciary duties were not significantly related to the promissory note which contained the arbitration clause).

Additionally, applying the arbitration clause to Plaintiffs' claims against non-signatory parties is beyond Plaintiff's reasonable expectations of the arbitration clause. The arbitration clause in this case consistently frames the scope of the arbitration clause in relation to the parties. Defs.' Mot., Ex. 2.K at p. 43 ("The award of the arbitrator will be final and binding <u>on the parties</u> . . . . [a]ny such arbitration must be conducted in Scottsdale, Arizona and Provider agrees to such jurisdiction, unless otherwise agreed to <u>by the parties</u>.") (emphasis added). Moreover, the Provider Agreement's own terms specifically limit its scope to the signatory parties to the agreement. *See* Defs.' Mot., Ex. 2.K at p. 42 ("Except for the indemnification provisions, no term or provision in the Provider Agreement is for the benefit of any person who is not a party to the Provider Agreement and no such party shall have any right or cause of action under the Provider Agreement."). Based on this language, it is beyond the range of Plaintiffs' reasonable expectations that the arbitration agreement extends to anyone other than a party to the agreement, much less to CVS Pharmacy, who was and remains a direct competitor with the Plaintiffs.

CONCLUSION

For the reasons set forth in this Brief and Plaintiffs' Response, NCPA respectfully requests that this Court deny Defendants' Motion to Dismiss and Compel Arbitration.

Dated this 9th day of June, 2011.

Respectfully submitted,

/s/D. Todd Smith

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