

No. 14-41213

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*In the United States Court of Appeals  
for the Fifth Circuit*

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**THE MUECKE COMPANY INCORPORATED; BRUCE ROGERS,  
Individually and doing business as Rogers Pharmacy; BROOKSHIRE  
BROTHERS PHARMACY OF KIRBYVILLE, TEXAS; DE LA ROSA  
PHARMACY, INCORPORATED; HOMETOWN PHARMACY, LC;  
ROBERT KINSEY INVESTMENTS, INCORPORATED,  
doing business as Kinsey’s Pharmacy,**

*Plaintiffs–Appellants*

v.

**CVS CAREMARK CORPORATION; CVS PHARMACY,  
INCORPORATED; CAREMARK RX, L.L.C.,**

*Defendants–Appellees*

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ON APPEAL FROM C.A. No. 6:10-CV-00078  
IN THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
VICTORIA DIVISION

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**CONSUMER ACTION AND UNITED STATES PUBLIC INTEREST  
RESEARCH GROUP’S MOTION FOR LEAVE TO FILE AMICUS BRIEF**

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TO THE HONORABLE UNITED STATES COURT OF APPEALS:

Pursuant to Federal Rule of Appellate Procedure 29 and Fifth Circuit Rule  
Rule 29.1, Consumer Action and United States Public Interest Research Group (the  
“Amici”) move this Court for leave to file an amicus brief in support of Plaintiffs-

Appellants. A copy of the brief the Amici seek leave to file is attached hereto and submitted to the Court pending disposition of this motion for leave to file.

The Amici are public interest groups and advocates for competitive health care markets. The Amici hope to assist this Court by providing additional context and perspective as the Court analyzes the issues in this case and their public policy implications in a way that compliments the arguments raised by counsel for the parties to this appeal.

Amicus Curiae Consumer Action has been a champion of underrepresented consumers nationwide since 1971. A non-profit 501(c)(3) organization, Consumer Action focuses on consumer education that empowers low- and moderate-income and limited-English-speaking consumers to financially prosper. It also advocates for consumers in the media and before lawmakers to advance consumer rights and promote industry-wide change. Consumer Action has worked for many years to prohibit corporate use of binding mandatory arbitration (BMA) clauses—legal requirements tucked into the fine print of contracts that force millions of consumers unwittingly to waive their right to access the courts. Consumer Action has a record of successfully challenging consumer mandatory arbitration requirements. With representation by Trial Lawyers for Public Justice, Consumer Action and Darcy Ting in 2003 prevailed as plaintiffs in *Ting vs. AT&T*, ensuring that AT&T will not impose mandatory arbitration on its California customers. As a

plaintiff in the 1998 case *Badie vs. Bank of America*, Consumer Action was successful in its challenge to the enforceability of a new, across-the-board arbitration requirement for all of the bank's existing deposit and credit card account agreements.

Amicus Curiae United States 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.

The Amici are leading advocates for competitive markets, which benefit all consumers by promoting lower prices, choice, and innovation. The Amici have long been concerned by the egregious, deceptive, and anticompetitive conduct of pharmacy benefits managers, especially CVS Caremark. Although PBMs can help lower the cost of prescription drugs, they have the ability to harm consumers because of a lack of competition and transparency. The conduct alleged in the underlying case potentially harms thousands of consumers, and these claims should be resolved by a court and not through mandatory arbitration.

## CONCLUSION

For these reasons, the Amici respectfully request that the Court grant them leave to file the amicus curiae brief submitted with this motion.

Respectfully submitted,

*/s/D. Todd Smith*

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## CERTIFICATE OF SERVICE

I hereby certify that, on February 27, 2015, I e-filed this motion and served it on the following counsel of record through the Fifth Circuit's CM/ECF site:

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## CERTIFICATE OF COMPLIANCE

Pursuant to the Fifth Circuit's ECF Filing Standards and the rules cited below, I hereby certify that:

1. Any required privacy redactions have been made. 5TH CIR. R. 25.2.13.
2. The electronic submission of this motion is an exact copy of the paper document. 5TH CIR. R. 25.2.1.
3. This document has been scanned for viruses with the most recent version of a commercial virus-scanning program (Bitdefender Virus Scanner) and is free of viruses.

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ON APPEAL FROM C.A. No. 6:10-CV-00078  
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**BRIEF OF AMICUS CURIAE CONSUMER ACTION AND UNITED  
STATES PUBLIC INTEREST RESEARCH GROUP**

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**THE MUECKE COMPANY INCORPORATED; BRUCE ROGERS, Individually and doing business as Rogers Pharmacy; BROOKSHIRE BROTHERS PHARMACY OF KIRBYVILLE, TEXAS; DE LA ROSA PHARMACY, INCORPORATED; HOMETOWN PHARMACY, LC; ROBERT KINSEY INVESTMENTS, INCORPORATED, doing business as Kinsey’s Pharmacy,**

*Plaintiffs–Appellants*

v.

**CVS CAREMARK CORPORATION; CVS PHARMACY, INCORPORATED; CAREMARK RX, L.L.C.,**

*Defendants–Appellees*

\* \* \*

**CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made so that the Judges of this Court may evaluate possible disqualification or recusal.

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**Defendants–Appellees:**

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## INTEREST OF AMICI CURIAE

This brief is filed on behalf of Consumer Action and United States Public Interest Research Group (the “Amici”) in support of Plaintiffs–Appellants, The Muecke Company Incorporated; Bruce Rogers, Individually and d/b/a Rogers Pharmacy; Brookshire Brothers Pharmacy of Kirbyville, Texas; De La Rosa Pharmacy, Incorporated; Hometown Pharmacy, LC; and Robert Kinsey Investments, Incorporated d/b/a Kinsey’s Pharmacy. The Amici are public interest groups and advocates for competitive health care markets.

Amicus Curiae Consumer Action has been a champion of underrepresented consumers nationwide since 1971. A non-profit 501(c)(3) organization, Consumer Action focuses on consumer education that empowers low- and moderate-income and limited-English-speaking consumers to financially prosper. It also advocates for consumers in the media and before lawmakers to advance consumer rights and promote industry-wide change. Consumer Action has worked for many years to prohibit corporate use of binding mandatory arbitration (BMA) clauses—legal requirements tucked into the fine print of contracts that force millions of consumers unwittingly to waive their right to access the courts. Consumer Action has a record of successfully challenging consumer mandatory arbitration requirements. With representation by Trial Lawyers for Public Justice, Consumer Action and Darcy Ting in 2003 prevailed as plaintiffs in *Ting vs. AT&T*, ensuring

that AT&T will not impose mandatory arbitration on its California customers. As a plaintiff in the 1998 case *Badie vs. Bank of America*, Consumer Action was successful in its challenge to the enforceability of a new, across-the-board arbitration requirement for all of the bank's existing deposit and credit card account agreements.

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No party's counsel has authored this brief either in whole or in part. No party or its counsel contributed money that was intended to fund preparing or submitting the brief. No person other than the Amici and their counsel have contributed money intended to fund preparing or submitting the brief. *See* FED. R. APP. P. 29(c)(5).

The Amici file this brief under a Rule 29 motion for leave to file.

## INTRODUCTION AND SUMMARY OF THE ARGUMENT

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 support of Plaintiffs–Appellants’ appeal. The conduct alleged in the underlying case potentially harms thousands of consumers, and these claims should be resolved by a court and not through mandatory arbitration.

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 prescription drugs, they have the ability to harm consumers because of a lack of competition and transparency. To police this market, a coalition of more than 30 state attorneys general have brought cases against each of the two major PBMs—Express Scripts<sup>1</sup> and CVS Caremark—for fraud; misrepresentation to plan sponsors and patients; kickback schemes; and failure to meet ethical and safety standards. *See The Effects of Regulatory Neglect*

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<sup>1</sup> Express Scripts acquired the other leading PBM, Medco in 2012.

<sup>2</sup> *CVS Caremark Settles FTC Charges: Failed to Protect Medical and Financial Privacy of Customers and Employees; CVS Pharmacy Also Pays \$2.25 Million to Settle Allegations of HIPAA Violations*, <http://www.ftc.gov/news-events/press-releases/2009/02/cvs-caremark-settles-ftc-chargesfailed-protect-medical-financial>; *see also FTC Approves Final Settlement with CVS Caremark*, <http://www.ftc.gov/news-events/press-releases/2012/05/ftc-approves-final-settlement->

*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 <https://www.americanprogressaction.org/issues/regulation/news/2009/07/16/6407/the-effects-of-regulatory-neglect-on-health-care-consumers/>. These cases have resulted in over \$370 million in damages. *Id.* In addition, the government, including the Federal Trade Commission and Health and Human Services, has levied fines against CVS Caremark for various privacy violations, violations of the Health Insurance Portability and Accountability Act (HIPAA), and deceptive Medicare Part D pricing to consumers.<sup>2</sup> See *In the Matter of CVS Caremark Corporation*, FTC, File No. 072-3119 (June 18, 2009); *Resolution Agreement, Department of Health and Human Services, Office for Civil Rights* (January 15, 2009). 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.

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<sup>2</sup> *CVS Caremark Settles FTC Charges: Failed to Protect Medical and Financial Privacy of Customers and Employees; CVS Pharmacy Also Pays \$2.25 Million to Settle Allegations of HIPAA Violations*, <http://www.ftc.gov/news-events/press-releases/2009/02/cvs-caremark-settles-ftc-chargesfailed-protect-medical-financial>; see also *FTC Approves Final Settlement with CVS Caremark*, <http://www.ftc.gov/news-events/press-releases/2012/05/ftc-approves-final-settlement-cvs-caremark>.

This case raises issues directly relevant to millions of consumers across the nation. Plaintiffs–Appellants 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. 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. In addition, 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 grant the relief Plaintiffs–Appellants have requested on appeal.

## **ARGUMENT**

- I. This Court should refuse to compel arbitration consistent with the lower court’s original ruling because the case addresses matters of significant public concern that should be tried in the open judicial proceedings of a court of law.**

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>3</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

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<sup>3</sup> "CVS maintains a comprehensive firewall separating the businesses and records of CVS and Caremark." Request for Rehearing of Denial of Petition to Quash or Limit Compulsory Process, In the Matter of CVS Caremark Corp., File No. 0723119 at 4 (Dec. 3, 2008), available at <http://www.ftc.gov/sites/default/files/documents/petitions-quash/cvs-caremark-ftc/081203cvslatteraffirming.pdf>. Additionally, 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).

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 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.” 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). 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.

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 large company 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 practices that concern consumers. A class of community pharmacists is better able to mount the legal effort necessary to battle a multi-billion dollar company.

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 pharmacy industry in the future. Setting a legal precedent that would protect these companies from public scrutiny would only allow the abusive conduct 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.

## **II. Compelling arbitration will severely limit remedies otherwise available to Plaintiffs**

Part of the remedy sought by the proposed classes of independent pharmacies is mandatory and prohibitive injunctive relief to enjoin Defendants—Appellees from misusing or disclosing the protected patient information of Plaintiffs. Granting such relief, particularly class-wide, is typically beyond the authority of arbitrators, or at the very least such authority would be subject to

dispute when the agreement is silent as to the authority of the arbitrator, as is the case here. David A. Attisani and Jennifer A. Brennan, *An Elephant in the (Arbitration) Room—The Power of Panels and Its Outer Limits*, 16 ARIAS US Quarterly 1, 5 (2009). Even if arguably an arbitrator did have the authority to issue the requested permanent injunctive relief in this instance, there is no enforcement mechanism. For example, arbitrators lack contempt power to enforce and injunctive relief they grant. Moreover, the arbitration language of the provider agreement specifies that remedy is limited to “remedies provided for in the provider agreement.” While amici are not privy to the provider agreement at issue, it is doubtful that it contains a remedy of CVS Caremark to cease the misuse of protected health information. As a result, forcing resolution of this case in arbitration not only denies the ability for class-wide relief, but it would deprive Plaintiffs–Appellants of any ability to cure the deficiencies of the Defendants–Appellees’ conduct, obtain cessation of wrongful business practices, or secure complete relief. Such a result would seriously jeopardize consumer interests allowing harmful wrongdoing to continue unchecked. The equities should be weighed heavily against such a result, which would be contrary to consumer interests and to the public interest in enforcement of existing law.

## CONCLUSION

For these reasons, Amici respectfully request that this Court grant the relief Plaintiffs–Appellants have requested and remand the case to the district court.

Respectfully submitted,

*/s/D. Todd Smith*

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*Counsel for Amicus Curiae*

Dated this 27th day of February, 2015.

## CERTIFICATE OF SERVICE

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## CERTIFICATE OF COMPLIANCE

Pursuant to the Fifth Circuit's ECF Filing Standards and the rules cited below, I hereby certify that:

1. This brief complies with the type-volume limitations of FED. R. APP. P. 32(a)(7)(B) because this brief contains 2,479 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) and 5TH CIR. R. 32.1 because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Mac 2011 in 14-point Times New Roman typeface for text and 12-point for footnotes.

3. Any required privacy redactions have been made. 5TH CIR. R. 25.2.13.

4. The electronic submission of this brief is an exact copy of the paper document. 5TH CIR. R. 25.2.1.

5. This document has been scanned for viruses with the most recent version of a commercial virus-scanning program (Bitdefender Virus Scanner) and is free of viruses.

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