UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

BURTON'S PHARMACY, INC., d/b/a BURTON'S HEALTH MART PHARMACY; PIKE'S PHARMACY, INC.; and DILWORTH DRUGS, LLC, d/b/a DILWORTH DRUG, for themselves and all others similarly situated,	)	
Plaintiffs,	)	
v.	)	**CASE NO. 1:11-cv-2**
CVS CAREMARK CORPORATION, a Delaware Corporation; CVS PHARMACY, INC., a Delaware Corporation; CAREMARK RX, LLC, a Delaware Limited Liability Company; and CAREMARK, LLC, a California Limited Liability Company	)	
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 therefore, states as follows:

INTRODUCTION AND SUMMARY OF ARGUMENT

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 patients away from their pharmacy of choice. This conduct violates North Carolina's Pharmacy of Choice Act ("PCA"), N.C. Gen. Stat. § 58-51-37, and North Carolina's Unfair and Deceptive Trade Practices Act ("UDTPA"), N.C. Gen. Stat. § 75-1.1 et seq.; competitively disadvantages independent pharmacies; and ultimately harms patients.

[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).

In an act of near ultimate chutzpah, the Defendants attempt to defeat this action by invoking an arbitration clause purportedly incorporated into each Plaintiff's Provider Agreements, despite the fact that no Defendant is a signatory party for two of the three relevant Provider Agreements. It is also unfathomable that, absent coercion or a severe imbalance in bargaining power, any independent pharmacy would agree to arbitrate these claims with its direct competitor (CVS Pharmacy), who dominates many pharmacy markets.

In addition to these 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 lacked any bargaining power; was incorporated by reference to one provision buried within a 170-page Provider Manual; and contains a fee-shifting provision that is one-sided because it discourages independent pharmacies from pursuing even meritorious claims. Moreover, both the Plaintiffs' claims and most of the parties against whom they are asserted are beyond the scope of the arbitration clause. Therefore, this Court should deny Defendants' Motion to Dismiss and Compel Arbitration.

ARGUMENT

I. This Court should refuse to compel arbitration because the arbitration clause purportedly incorporated into the Provider Agreement is invalid

A. The arbitration clause is invalid because it is unconscionable

The arbitration clause at issue in this case is invalid under North Carolina law[3] because it is both substantively and procedurally unconscionable. [4] *See Rite Color Chem. Co. v. Velvet*

[3] *See* Pltfs' Opp'n to Defs' Motion to Dismiss and Compel Arbitration at 12-14 (contending that this Court should not honor the choice of law clause within the Provider Agreement stating this agreement should be interpreted in accordance with Arizona law; and instead, should apply North Carolina law).

[4] Even if Arizona law applies, the arbitration clause is equally unconscionable and consequently unenforceable. *See R&L Ltd. Inv. v. Fidelity Fin. Servs., Inc.*, 729 F.Supp2d 1110, 1114 (D. Ariz. 2010) (citing *Maxwell v. Fidelity Fin. Servs., Inc.*, 907 P.2d 51,59 (Ariz. 1995) (holding that, under Arizona law, a finding of either substantive unconscionability or procedural unconscionability is sufficient to render a clause unenforceable).

Textile Co., 411 S.E.2d 645, 649 (N.C. 1992). Unconscionability requires both a procedural and a substantive component and North Carolina law uses a sliding scale approach whereby a "pronounced substantive unfairness" makes up for a "minimal degree of procedural unfairness" and vice versa. *Tillman v. Commercial Credit Loans, Inc.*, 655 S.E.2d 362, 370 (N.C. 2008).

1. The arbitration clause is procedurally unconscionable.

The arbitration clause is procedurally unconscionable because of the disparate level of bargaining power between the parties, the absence of any real choice when Plaintiffs entered into these agreements, and the surreptitious manner in which the arbitration clause was purportedly incorporated in the Provider Agreements. Procedural unconscionability concerns "'bargaining naughtiness' in the form of unfair surprise, lack of meaningful choice, and an inequality in bargaining power." *Tillman*, 655 S.E.2d at 370 (quoting *Rite Color*, 411 S.E.2d at 648)).

First, there is a gross disparity in bargaining power between any individual Plaintiff and the Defendants. PBMs do not need 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. Independent pharmacies are typically small, family-owned-and-operated businesses; the average independent pharmacy has annual sales of only $4 million.[5] 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.[6] As one 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

[5] Nat'l Cmty. Pharmacists Ass'n, Independent Pharmacy Today, http://www.ncpanet.org/index.php/home/independent-pharmacy-today (last visited June 7, 2011).
[6] *Saban v. Caremark RX, L.L.C.*, 2011 WL 1356943, at *16 (N.D. Ill. Apr. 11, 2011).

of business, but more importantly, I'll lose the 30-year relationship with Mrs. Jones who is covered by that PBM."[7]

Second, 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.[8]

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.[9] Plaintiffs and similarly situated independent pharmacies across

[7] 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.
[8] Allison Dabbs Garrett & Robert Garis, *Leveling the Playing Field in the Pharmacy Benefit Management Industry*, 42 VAL. U. L. REV. 33, 46 (2007).
[9] *Saban*, 2011 WL 1356943 at *16.

the nation simply have no power to require (and Defendants had no incentive to offer) negotiation as to the terms of the Provider Agreements.

Thirdly, the arbitration clause is one provision buried within a 170-page Provider Manual, purportedly incorporated by reference within an already extensive Provider Agreement. As another 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] The Provider Agreement and Provider Manuel were drafted by the Defendants—not the Plaintiffs—and the terms of these "agreements" have also been amended unilaterally by the Defendants an unknown number of times without Plaintiffs' consent.

2. The arbitration clause is substantively unconscionable.

The arbitration clause is substantively unconscionable because it is unduly unfair to Plaintiffs and stacks the deck in the Defendants' favor. Substantive unconscionability concerns "harsh, one-sided, and oppressive contract terms." *Tillman*, 655 S.E.2d at 370.

The arbitration clause in this case is harsh 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." Mem. Supp. Defs.' Mot. to Dismiss & Compel Arb., Ex. 1.F 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

[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

significant amount destroys any incentive to pursue even meritorious claims—especially when dealing with claims for relatively small damage amounts. *See* Decl. of Michael G. Wimer, Pls.' Opp'n to Defs.' Mot. to Dismiss & Compel Arb., Ex. E (stating that bringing individual claims in this case would be "impractical" and "foolhardy"). The fee-shifting provision in the arbitration clause is further oppressive 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.

B. This Court can apply North Carolina law governing unconscionability because it is a generally applicable state contract law doctrine.

This Court has the power to invalidate the arbitration clause under the preceding North-Carolina-law-based argument because it is based on generally applicable state contract law doctrine, not a rule specific to arbitration agreements. The Federal Arbitration Act ("FAA") permits a court to declare an arbitration agreement unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract" including "generally applicable contract defenses, such as fraud, duress, or unconscionability." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1746 (2011) (internal quotation marks and citations omitted).

Unlike the *Discover Bank* rule abrogated by the Supreme Court in *Concepcion*—which was specific to the enforceability of class action waiver provisions—Plaintiffs' North-Carolina-law-based challenges to the validity of the arbitration clause are not specific to arbitration

agreements. *See, e.g.*, *Rite Color.*, 411 S.E.2d 645 (assessing the unconscionability of the price in a contract for the sale of chemicals as a defense to a breach of contract claim).

Moreover, because of the differences between the challenged contract provisions in *Concepcion* and this case, application of unconscionability to the arbitration agreement in this case would not be "in a fashion that disfavors arbitration." *Cf. Concepcion*, 131 S. Ct. at 1747. In *Concepcion*, the provisions governing arbitration in the disputed contract were extremely solicitous to the plaintiff because, *inter alia*, the location of arbitration had to be in the county in which the customer was billed and AT&T could not seek reimbursement of attorney's fees from the consumer, even if AT&T prevailed at arbitration. *Concepcion* at 1744. In contrast, the arbitration clause in this case mandates that "[a]rbitration . . . will be conducted in Scottsdale, Arizona;" and "the expenses of arbitration, including attorney's fees, will be paid for by the party against whom the award of the arbitrator is rendered." Mem. Supp. Defs.' Mot. to Dismiss & Compel Arb., Ex. 1.F at p. 43 (emphasis added).

Compelling arbitration without first considering generally applicable state law defenses would put the arbitration clause in this case on "unequal footing" with other contracts, which is contrary to the FAA's purpose of putting arbitration agreements on the same level as other contracts. *See Allied-Bruce Terminix Co. v. Dobson*, 513 U.S. 265, 281 (1995).

II. This Court should refuse to compel arbitration because application of the arbitration clause to these claims and as they pertain to all Defendants would be beyond the scope of the purported arbitration agreement.

Even if this Court determines the arbitration clause is valid, the scope of the arbitration clause encompasses neither these particular claims—which do not rely on the existence of the Provider Agreement—nor as they pertain to all Defendants. In addition to the validity of the arbitration agreement, in order for this Court to compel arbitration the dispute in question must

fall within the scope of the agreement to arbitrate. *Glass v. Kidder Peabody & Co.*, 114 F.3d 446, 453 (4th Cir. 1997).

Plaintiffs' claims are based on the PCA and the UDTPA are beyond the scope of the arbitration clause ("any and all disputes in connection with or arising out of this [Provider] Agreement . . . ." Mem. Supp. Defs.' Mot. to Dismiss & Compel Arb., Ex. 1.F at p. 43 (emphasis added)) because they are independent of the Provider Agreement and the Provider Manual purportedly incorporated therein. Unlike a claim over a reimbursement rate or disputed payment, the claims in this case do not share a "significant relationship" to the Provider Agreement or the Provide Manual because they are premised on Defendants' collective and systematic misuse of patient information as a competitive advantage relative to independent pharmacies. *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 the scope of the arbitration clause. The arbitration clause in this case consistently frames the scope of the arbitration clause in relation to the parties. *See* Mem. Supp. Defs.' Mot. to Dismiss & Compel Arb., Ex. 1.F at p. 43 ("The award of the arbitrator will be final and binding on the parties . . . . [a]ny such arbitration must be conducted in Scottsdale, Arizona and Provider agrees to such jurisdiction, unless otherwise agreed to by the parties.") (emphasis added). Moreover, the Provider Agreement by its own terms specifically limits the scope of the agreement to the signatory parties. *See* Mem. Supp. Defs.' Mot. to Dismiss & Compel Arb., Ex. 1.F 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."). Defendants' appeals to "well-established common law principles" of equitable estoppel are inapplicable, especially since Defendant CVS Pharmacy, both today and at the time the Provider Agreements were formed, is/was a direct competitor with the Plaintiffs.

CONCLUSION

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

Dated this 23rd day of June, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of June, 2011, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system, and service on all counsel of record will be automatically accomplished through the Notice of Electronic Filing.

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