

16-0209

IN THE CIRCUIT COURT OF MCDOWELL COUNTY, WEST VIRGINIA

MCDOWELL PHARMACY, INC.,
a West Virginia corporation;
ROBERT BROWN;
JOHNSTON AND JOHNSTON, INC.,
a West Virginia corporation;
PATRICIA JOHNSTON;
T & J ENTERPRISES, INC.,
a West Virginia corporation;
JOSEPH C. MCGLOTHLIN;
GRIFFITH & FEIL DRUG, INC.,
a West Virginia corporation;
RICKEY W. GRIFFITH;
WATERFRONT FAMILY PHARMACY, LLC,
a West Virginia Limited Liability Company;
KARL SOMMER;
MCCLOUD FAMILY PHARMACY, INC.,
a West Virginia Corporation;
and **KEVIN D. MCCLOUD,**

Plaintiffs,

v.

Civil Action No. 11-C-144

WEST VIRGINIA CVS PHARMACY, L.L.C.,
a West Virginia Limited Liability Company;
DENNIS CANADAY; ROBERT TAYLOR;
ALLISON DINGER; AARON STONE;
CVS CAREMARK CORPORATION,
a Delaware corporation;
CVS PHARMACY, INC.,
a Rhode Island corporation;
CAREMARK RX, L.L.C.,
a Delaware Limited Liability Company;
and **CAREMARK, L.L.C.,**
a California Limited Liability Company,

Defendants.

**ORDER DENYING DEFENDANTS' RENEWED MOTION TO DISMISS AND
COMPEL ARBITRATION**

Pending before the Court is Defendants' Renewed Motion To Dismiss and Compel Arbitration. The above-captioned case was filed in McDowell County Circuit Court on July 21, 2011. The Defendants removed the case on September 8, 2011 to United States District Court for the Southern District of West Virginia. The case was then remanded back to McDowell County Circuit Court on June 14, 2012. Defendants' Memorandum of Law in Support of Their Motion to Dismiss and Compel Arbitration was filed on July 18, 2012. After completing further discovery, the parties agreed upon a scheduling order, and the Defendants filed Defendants' Memorandum of Law in Support of their Renewed Motion To Dismiss and Compel Arbitration on April 30, 2015.

The Court conducted a hearing on the outstanding motion on July 15, 2015. The Plaintiffs were represented by: Anthony J. Majestro, Esq. and Marvin W. Masters, Esq. Defendants were represented by Pamela C. Deem, Esq. and Michael D. Leffel, Esq. The key issue at the Hearing was whether the parties had a valid arbitration agreement. Considering the arguments presented at the Hearing, all moving documents, the parties Proposed Findings of Fact and Conclusions of Law,¹ the Court's own independent research, and based on the totality of the all the related circumstances, the Court hereby rules as follows.²

¹ Upon agreement with the parties, the Court extended the deadline for filing Proposed Findings of Fact and Conclusions of Law. Defendants filed timely. Plaintiffs filed their Proposed Findings of Fact and Conclusions of Law late due to miscommunication and illness by one of Plaintiffs' attorneys. The Court reviewed and granted Motion to Grant Plaintiffs' Leave to File Proposed Order and reviewed and analyzed the Proposed Findings of Fact and Conclusions of Law from both parties.

² Since the relationships between the Plaintiff pharmacies and the Defendants are somewhat different, each Plaintiff pharmacy will be discussed separately when necessary.

FINDINGS OF FACT

1. Individually named Plaintiffs are licensed pharmacists in West Virginia and are affiliated with the named Pharmacy Plaintiffs.
2. Individually named Defendants are pharmacists-in-charge at CVS Pharmacy stores in proximity to the Plaintiff Pharmacies.
3. Caremark, L.L.C., (hereinafter, "Caremark") offers PBM services to insurers, third party administrators, business coalitions, and employer sponsors of group health plans. These services include: administration and maintenance of pharmacy networks.³
4. All of the other Defendants are affiliated with Caremark.
5. The parent company for CVS has headquarters in Rhode Island.⁴
6. Each of the Plaintiffs has an agreement with Caremark.⁵
7. Plaintiffs McDowell Pharmacy, Inc. (hereinafter, "McDowell") in 2007; McCloud Family Pharmacy, Inc. (hereinafter, "McCloud") in 2006; and Waterfront Family Pharmacy, LLC (hereinafter, "Waterfront") in 2007 signed a Provider Agreement with Caremark, Inc. which is now Caremark and CaremarkPCS.⁶ In said agreements, there was a reference to a Provider Manual.⁷
8. McDowell, McCloud, and Waterfront Provider Agreements, at the time, were referencing a 2004 Caremark Provider Manual which had an arbitration provision⁸ and allowed for amendments to be made so long as proper notice was given.⁹

³ See Pagnillo Affidavit, ¶ 8.

⁴ See Plaintiffs' Complaint Page 3 and Transcript of Hearing July 15, 2015, Page 13, Lines 14-24.

⁵ The parties argued different views of the formation of the agreements and the terms of the agreements at the July 15, 2015 hearing. However, the Court finds that under a basic interpretation, the Plaintiffs would sell particular prescription drugs to customers and would receive reimbursement from Caremark.

⁶ See Pagnillo Affidavit, ¶¶ 12-14, Exs. A-C.

⁷ See Pagnillo Affidavit, Exs. A-C at 2.

⁸ See Pagnillo Affidavit, Ex. O at 48.

9. Caremark amended the Provider Manual for McDowell, McCloud, and Waterfront in 2007 and 2009, which had an arbitration provision.¹⁰
10. No arbitration clause was in the Provider Agreements signed by McDowell, McCloud, and Waterfront but rather was referenced in a Provider Manual (a separate lengthy document) incorporated by reference in the Provider Agreements.
11. In paragraph 13, entitled *Lawful Interpretation and Jurisdiction* in the McDowell, McCloud, and Waterfront Provider Agreements, there is a choice of law clause using Arizona law.
12. T & J Enterprises, Inc. (hereinafter, "T & J"); Johnston & Johnston, Inc. (hereinafter "Johnston & Johnston"); and Griffith & Feil Drug, Inc. (hereinafter, "Griffith & Feil") were participants in pharmacy networks which had agreements with the Defendants.
13. There are no signed agreements directly between each T & J, Johnston & Johnston, and Griffith & Feil and Caremark.
14. T & J participated in a pharmacy network, Medicine Shoppe Internet, Inc. (hereinafter, Medicine Shoppe). Under *Terms and Conditions of Participation in the Medicine Shoppe Internet Program*, there is an arbitration clause, with arbitration to take place in Missouri.¹¹
15. There is a Provider Agreement between Medicine Shoppe and PCS Health Systems, Inc. (hereinafter, "PCS") which includes through incorporation by reference a PCS Manual,¹²

⁹ See Pagnillo Affidavit, Ex. O at 47.

¹⁰ See Pagnillo Affidavit, ¶¶ 34-35.

¹¹ See Pagnillo Affidavit, Ex. F.

¹² See Pagnillo Affidavit, Ex. J at § 9.7.

- an arbitration provision,¹³ a choice of law clause using Arizona law,¹⁴ and allowed for amendments by PCS to be made so long as proper notice was given.¹⁵
16. Johnston and Johnston d/b/a Colony Drug had an affiliation with Leader Drugstores, Inc., which signed a Participation Agreement with PCS in 1995 which included: a PCS Manual incorporated by reference, an arbitration clause, a choice of law clause using Arizona law, and allowed for amendments by PCS to be made so long as proper notice was given.¹⁶
17. Griffith & Feil had an affiliation with Access Health and signed a Participation Agreement with PCS in 1995 which included: a PCS Manual incorporated by reference, an arbitration clause, a choice of law clause using Arizona law, and allowed for amendments by PCS to be made so long as proper notice was given.¹⁷
18. In 2003 Medicine Shoppe, Leader Drugstores, and Access Health entered into Caremark, Inc. Participating Pharmacy Agreements which all had the Governing Law as Illinois.¹⁸
19. In 2004, Caremark Inc.'s parent company now known Caremark Rx, L.L.C. acquired a PBM company called Advance PCS.¹⁹
20. PCS was sold to Advance Paradigm around 2000. Medicine Shoppe, Johnston and Johnston, and Griffith & Feil were given notice that the PCS Provider Agreements would remain in effect under the new name "AdvancePCS Provider Agreement" by AdvancePCS. The notice was sent with the pharmacy monthly remittance.²⁰

¹³ See Pagnillo Affidavit, Ex. J at § 9.5.

¹⁴ See Pagnillo Affidavit, Ex. J at § 9.4.

¹⁵ See Pagnillo Affidavit, Ex. J at § 1.3.

¹⁶ See Pagnillo Affidavit, Ex. K at § 9.7, § 9.5, § 9.4, § 1.3.

¹⁷ See Pagnillo Affidavit, Ex. L at § 9.7, § 9.5, § 9.4, § 1.3.

¹⁸ See Pagnillo Affidavit, Exs. E, G, and I.

¹⁹ See Pagnillo Affidavit, ¶ 21.

²⁰ See Pagnillo Affidavit, Ex. M.

21. In 2004, Caremark Rx acquired AdvancePCS and notices were mailed to Plaintiffs that AdvancePCS now Caremark PCS and Caremark, Inc. would be using the AdvancePCS Provider Agreement and will be called the "Caremark Provider Agreement" and apply to Caremark, Inc. and Caremark PCS business beginning August 1, 2004.²¹
22. T & J, Johnston & Johnston, and Griffith & Feil did not have to sign the notices. Defendants do not keep records of the notices sent to these three Plaintiffs or keep the notices in these three Plaintiffs' file.²²
23. No new agreements were formed by Caremark and T & J, Johnston & Johnston, and Griffith & Feil, but were in the form of notices with the pharmacy monthly remittance,²³ except T&J whose notices were sent to Medicine Shoppe.

CONCLUSIONS OF LAW

1. Venue and jurisdiction in the McDowell County Circuit Court are both proper in this matter.
2. Rule 12(b)(6) motions brought by a Defendant rise or fall on the issue as to whether a trial court, in appraising the sufficiency of a complaint, should dismiss the complaint, in that it appears beyond all doubt that the Plaintiff can prove no set of facts in support of the claim which would entitle the Plaintiff to relief.²⁴

²¹ See Pagnillo Affidavit, Ex. N.

²² See Pagnillo's Deposition, Pages 127-129.

²³ See Pagnillo's Deposition, Pages 127-129 and Plaintiffs' Proposed Findings of Fact and Conclusions of Law, Page 10.

²⁴ Note *Cantley v. Lincoln County Comm'n*, 221 W.Va. 468, 655 S.E.2d 490 (2007), wherein the Supreme Court of Appeals of West Virginia reversed and remanded using the following two syllabus points:

1. "Appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*." Syllabus Point 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W.Va. 770, 461 S.E.2d 516 (1995).

3. In West Virginia, a choice of law provision is presumptively valid.²⁵
4. A choice of law clause can be found to be inapplicable when the clause “does not purport to govern all disputes arising under the contract or between the parties.”²⁶
5. In West Virginia, “a choice of law provision will not be given effect when the contract bears no substantial relationship with the jurisdiction whose laws the parties have chosen to govern the agreement, or when the application of that law would offend the public policy of this state.”²⁷
6. Therefore, based on *Keyser*, a detailed factual analysis is necessary to determine whether there is no substantial relationship between the contract and Arizona.
7. The Federal Arbitration Act (hereinafter, “FAA”) provides: “A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable save upon such grounds as exist at law or in equity for the revocation of any contract.”²⁸
8. “When the Circuit Court is required to rule upon a motion to compel arbitration pursuant to the FAA, the Circuit Court must determine threshold issues of (1) whether a valid

2. “The trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” Syllabus Point 3, *Chapman v. Kane Transfer Company*, 160 W.Va. 530, 236 S.E.2d 207 (1977) quoting *Conley v. Gibson*, 355 U.S. 41, 45–46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80, 84 (1957).

²⁵ *Farley v. Orix Financial Services, Inc.*, 2:05-0917, 2007 WL 773906 (S.D. W. Va. 2007).

²⁶ *Work While U-Wait, Inc. v. Teleasy Corporation*, 2:07-00266, 2007 WL 3125269 (S.D. W. Va. 2007).

²⁷ Syl. Pt. 1, *General Elec. Co. v. Keyser*, 166 W.Va. 456, 456, 275 S.E.2d 289, 290 (1981).

²⁸ 9 U.S.C. §2.

arbitration agreement exists between the parties; and (2) whether the claims averred by the plaintiff fall within the substantive scope of that arbitration agreement.”²⁹

9. Regarding arbitration, the Supreme Court of Appeals of West Virginia recently stated, “Under the Federal Arbitration Act, 9 U.S.C. § 2, parties are only bound to arbitrate those issues that by clear and unmistakable writing they have agreed to arbitrate. An agreement to arbitrate will not be extended by construction or implication.”³⁰
10. “Under the Federal Arbitration Act, 9 U.S.C. § 2, and the doctrine of severability, only if a party to a contract explicitly challenges the enforceability of an arbitration clause within the contract, as opposed to generally challenging the contract as a whole, is a trial court permitted to consider the challenge to the arbitration clause. However, the trial court may rely on general principles of state contract law in determining the enforceability of the arbitration clause. If necessary, the trial court may consider the context of the arbitration clause within the four corners of the contract, or consider any extrinsic evidence detailing the formation and use of the contract.”³¹
11. West Virginia courts consistently find “[t]he fundamentals of a legal ‘contract’ are competent parties, legal subject-matter, valuable consideration, and mutual assent. There can be no contract, if there is one of these essential elements upon which the minds of the parties are not in agreement.”³²

²⁹ Syl. Pt. 2, *State ex rel. TD Ameritrade, Inc. v. Kaufman*, 225 W.Va. 250, 251, 692 S.E.2d 293, 294 (2010).

³⁰ Syl. Pt. 1, *State ex rel. U-Haul Co. of W. Virginia v. Zakaib*, 232 W. Va. 432, 434, 752 S.E.2d 586, 589 (2013).

³¹ Syl. Pt. 4, *State ex rel. Richmond Am. Homes of W. Va., Inc. v. Sanders*, 228 W.Va. 125, 129, 717 S.E.2d 909, 913 (2011).

³² *Wellington Power Corp. v. CNA Sur. Corp.*, 217 W.Va. 33, 37, 614 S.E.2d 680, 684 (2005).

12. Therefore, for there to be a valid and binding contract compelling arbitration, it is necessary for the moving party to show a clear manifestation of an agreement between the parties.³³
13. For mutuality of assent, “it is necessary that there be a proposal or offer on the part of one party and an acceptance on the part of the other.”³⁴
14. With a contract modification, “mutual assent is as much a requisite element in effecting a contractual modification as it is in the initial creation of a contract.”³⁵
15. When a document is incorporated by reference, “In the law of contracts, parties may incorporate by reference separate writings together into one agreement. However, a general reference in one writing to another document is not sufficient to incorporate that other document into a final agreement. To uphold the validity of terms in a document incorporated by reference, (1) the writing must make a clear reference to the other document so that the parties' assent to the reference is unmistakable; (2) the writing must describe the other document in such terms that its identity may be ascertained beyond doubt; and (3) it must be certain that the parties to the agreement had knowledge of and assented to the incorporated document so that the incorporation will not result in surprise or hardship.”³⁶
16. “While a party's failure to read a duly incorporated document will not excuse the obligation to be bound by its terms ... a party will not be bound to the terms of any document unless it is clearly identified in the agreement.”³⁷

³³ *U-Haul* at 593.

³⁴ *Ways v. Imation Enterprises Corp.* 214 W.Va. 305, 313, 589 S.E.2d 36, 44 (2003).

³⁵ *Wheeling Downs Racing Ass'n v. West Virginia Sportservice, Inc.*, 157 W.Va. 93, 98, 199 S.E.2d 308, 311 (1973).

³⁶ Syl. Pt. 2, *U-Haul* at 589.

³⁷ *U-Haul* at 597.

17. Specifically, the Supreme Court of Appeals of West Virginia asserted that, “a general reference in one writing to another document is not sufficient to incorporate that other document into a final agreement.”³⁸
18. “Under the Federal Arbitration Act, 9 U.S.C. § 2, and the doctrine of severability, where a delegation provision in a written arbitration agreement gives to an arbitrator the authority to determine whether the arbitration agreement is valid, irrevocable or enforceable under general principles of state contract law, a trial court is precluded from deciding a party's state contract law challenge to the arbitration agreement. When an arbitration agreement contains a delegation provision, the trial court may only consider a challenge that is directed at the validity, revocability or enforceability of the delegation provision itself.”³⁹
19. “Under the Federal Arbitration Act, 9 U.S.C. § 2, there are two prerequisites for a delegation provision to be effective. First, the language of the delegation provision must reflect a clear and unmistakable intent by the parties to delegate state contract law questions about the validity, revocability, or enforceability of the arbitration agreement to an arbitrator. Second, the delegation provision must itself not be invalid, revocable or unenforceable under state contract law.”⁴⁰
20. “Typical contract defenses such as laches, estoppel, waiver, fraud, duress, or unconscionability may be asserted. Under general principles of state contract law, the trial court may consider the context of the delegation provision within the four corners of the contract. In other words, in determining if the delegation provision is enforceable under generic principles of contract law, the trial court can look at other parts of the

³⁸ *Id.* 598.

³⁹ Syl. Pt. 6, *Schumacher Homes of Circleville, Inc. v. Spencer*, 235 W. Va. 335, 774 S.E.2d 1, 4-5 (2015).

⁴⁰ Syl. Pt. 8, *Id.* at 5.

contract that relate to, support, or are otherwise entangled with the operation of the delegation provision.”⁴¹

21. “A contract term is unenforceable if it is both procedurally and substantively unconscionable. However, both need not be present to the same degree. Courts should apply a ‘sliding scale’ in making this determination: the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the clause is unenforceable, and vice versa.”⁴²
22. “Procedural unconscionability is concerned with inequities, improprieties, or unfairness in the bargaining process and formation of the contract. Procedural unconscionability involves a variety of inadequacies that results in the lack of a real and voluntary meeting of the minds of the parties, considering all the circumstances surrounding the transaction. These inadequacies include, but are not limited to, the age, literacy, or lack of sophistication of a party; hidden or unduly complex contract terms; the adhesive nature of the contract; and the manner and setting in which the contract was formed, including whether each party had a reasonable opportunity to understand the terms of the contract.”⁴³
23. “Substantive unconscionability involves unfairness in the contract itself and whether a contract term is one-sided and will have an overly harsh effect on the disadvantaged party. The factors to be weighed in assessing substantive unconscionability vary with the content of the agreement. Generally, courts should consider the commercial

⁴¹ *Id.* at 12.

⁴² Syl. Pt. 9, *Brown v. Genesis Healthcare Corp.*, 229 W. Va. 382, 386, 729 S.E.2d 217, 221 (2012).

⁴³ Syl. Pt. 10, *Id.*

reasonableness of the contract terms, the purpose and effect of the terms, the allocation of the risks between the parties, and public policy concerns.”⁴⁴

DISCUSSION

I. Plaintiffs’ Motion to Dismiss

When applying the traditional standard for a Rule 12(b)(6) Motion to Dismiss, this Court recognizes that the historical standard is not applicable in determining whether or not the motion should be granted. In particular, this Court, in evaluating the sufficiency of the complaint based on law set out in *Cantley*, concludes that there is a set of facts upon which the Plaintiffs’ claims would entitle them to relief. However, it is not the set of facts that is truly at issue in the above-captioned case. Rather, Plaintiffs’ claim in light of the Defendants’ Motion to Compel is at issue.

II. Claims Brought in Plaintiffs’ Complaint

The specific claims in Plaintiffs’ complaint include: Count I - injunctive relief for violations of the West Virginia Code; Count II – violations of West Virginia Code §33-16-3q and §33-11-4; Count III – Tortious Interference; Count IV – Fraud; Count V – violations of West Virginia Code §47-18-3, West Virginia Restraint on Trade; and punitive damages. At the hearing on the Motion To Dismiss and Compel Arbitration, Plaintiffs made a distinction that the claims alleged in the complaint do not arise from the agreements/arrangements Plaintiffs had with Caremark regarding processing of pharmacy benefits.⁴⁵

A similar issue was analyzed in federal court wherein a choice of law clause was so narrow in scope that the agreement is to be “governed by and construed in accordance with”

⁴⁴ Syl. Pt. 12, *Id.*

⁴⁵ See Transcript of Hearing July 15, 2015, Pages 37-38.

New York law, and the allegation in the complaint was tort based fraud.⁴⁶ The choice of law clause was found to be inapplicable because the clause “does not purport to govern all disputes arising under the contract or between the parties.”⁴⁷

In the present case, there is a jurisdictional mandate in the Agreement stating it is to be “construed, governed and enforced in accordance with the laws of the State of Arizona without regard to choice of law provisions.”⁴⁸ Here, some claims in Plaintiffs’ complaint are predominantly tort-based claims unrelated to any of the Provider Agreements or the reimbursements between the Plaintiffs and Caremark. Therefore, in the present case, the choice of law clause is inapplicable and West Virginia law should be applied. Further, if Plaintiffs’ claims from the complaint are unrelated to the Provider Agreement then the arbitration clause would not be an issue in said case. The arbitration clause states, “any and all disputes in connection with or arising out of the Provider Agreement[.]” Tort based claims are not directly related to the Provider Agreements/Provider Manuals governing the relationship and reimbursements between Plaintiffs and Caremark.

Even if the claims presented in Plaintiffs’ Complaint would come within the Provider Agreement/Provider Manuals section on communication between Caremark and Plaintiffs’ customers or Caremark’s relationship with customers, the Court finds West Virginia law would still apply based on the reasoning below.

III. Choice of Law Clause

The Defendants argue that all of the Plaintiffs are bound by a choice of law clause in the Provider Agreements stating the agreements are to be “construed, governed and enforced in

⁴⁶ *Work While U-Wait, Inc. v. Teleasy Corporation*, 2:07-00266, 2007 WL 3125269 (S.D. W. Va. 2007).

⁴⁷ *Id.*

⁴⁸ See Pagnillo Affidavit, Exs. A-C ¶ 13, Exs. J-L at § 9.4.

accordance with the laws of the State of Arizona.”⁴⁹ To prove the point that Arizona has a relationship to the contracts between the parties, the Defendants show: Caremark’s offices that address pharmacy benefits is in Arizona, communication originates in Arizona, claims are processed in Arizona, Daniel Pagnillo’s affidavit states that Plaintiffs’ contracts are maintained in Arizona, Provider Manuals were sent from Arizona, and Mr. Pagnillo’s Affidavit was signed/notarized in Arizona.⁵⁰

The Defendants also argue this case “closely resembles”⁵¹ *Farley v. Orix Financial Services, Inc.* where the Court did not invalidate a choice of law provision requiring application of New York law because the Defendant was incorporated and had a principal place of business in New York with all payments to be made in New York.⁵² However, this Court disagrees with this characterization and finds a clear distinction between *Farley* and the present case. The Defendants previously told the Court during the hearing on said motion that the parent company for CVS has headquarters is in Rhode Island.⁵³

Furthermore, in filings the Defendants stated: West Virginia CVS is a citizen of Rhode Island; CVS Caremark Corporation is incorporated in Delaware with a principal place of business in Rhode Island; CVS Pharmacy, Inc. is incorporated and has a principal place of business in Rhode Island; Caremark Rx is a citizen of Rhode Island; and Caremark is a citizen of Rhode Island.⁵⁴ Therefore, none of the corporate Defendants have been incorporated or have a principal place of business in Arizona which is distinct from *Farley*.

⁴⁹ See Pagnillo Affidavit, Exs. A-C ¶ 13, Exs. J-L at § 9.4.

⁵⁰ See Defendants’ [Proposed] Findings of Fact and Conclusions of Law, Pages 11-12, filed Oct. 7, 2015.

⁵¹ See Defendants’ [Proposed] Findings of Fact and Conclusions of Law, Page 12, filed Oct. 7, 2015.

⁵² See Defendants’ [Proposed] Findings of Fact and Conclusions of Law, Pages 12-13, filed Oct. 7, 2015.

⁵³ See Plaintiffs’ Complaint Page 3 and Transcript of Hearing July 15, 2015, Page 13, Lines 14-24.

⁵⁴ See Defendants Notice of Removal, Pages 5-6, ¶¶ 14-18.

In *Bryan v. Massachusetts Mut. Life Ins. Co.*, the Supreme Court of Appeals of West Virginia stated (but did not analyze) that a choice of law clause would be upheld using Massachusetts law when Defendants were in Massachusetts, and contract performance was in West Virginia. However, one key point from this case is that all parties agreed that Massachusetts law should apply to the issues involved in the case.⁵⁵ This is contrary to the present case, where there is a distinct dispute as to whether West Virginia or Arizona law should apply and more analysis is necessary to determine which law should apply.⁵⁶

While the Defendants put emphasis on Mr. Pagnillo's offices in Arizona, the Court notes several details that show that Arizona bears no substantial relationship to the contracts in said case.⁵⁷ All pharmacy files are stored electronically, and the location of the server is unknown.⁵⁸ Defendants also argue contracts are maintained in Arizona. However, only part of the contract is maintained on a server, any documents signed by the individual pharmacies including provider agreements. The document most important to this lawsuit that includes the arbitration clause, is the Provider Manual which is not kept in the electronic files by Caremark but a copy is maintained by the individual pharmacies in West Virginia. Thus, the policy of Caremark is to leave the document with the arbitration clause in West Virginia with the Plaintiff pharmacies.⁵⁹

⁵⁵ *The Bryan v. Massachusetts Mut. Life Ins. Co.*, 178 W.Va. 773, 777-778, 364 S.E.2d 786, 790 (1987).

⁵⁶ The above-captioned case needs a more in depth analysis of the "no substantial relationship" issue compared to other less complex choice of law cases including: *Riffe v. Magushi*, 859 F.Supp. 220, 222 (1994); *Shaw v. Dawson Geophysical Co.*, 657 F.Supp.2d 740, 745-746 (2009).

⁵⁷ The Court is aware and reviewed several out-of-state cases cited by the Defendants that come to the opposite conclusion. However, this Court's decision is based solely on West Virginia case law in determining whether there is a valid choice of law provision and more specifically that there is no substantial relationship between Arizona and the contracts.

⁵⁸ See Pagnillo's Deposition, Page 18, Lines 12-19.

⁵⁹ See Pagnillo's Deposition, Pages 22-25, 36.

Additionally, some of the employees of Mr. Pagnillo and Shawn Smith work outside of the state of Arizona.⁶⁰ If a particular pharmacy has an issue with a contract, this issue is handled and resolved by legal counsel in Irving, Texas – Attorney Thao Pham.⁶¹ Attorney Pham in Texas or her predecessor is the person who prepared the different versions of the contracts.⁶²

Furthermore, Plaintiffs are individual pharmacies and pharmacists who serve local communities in West Virginia compared to Caremark who offers national services. Some of the Plaintiffs signed a form agreement with Caremark which gave them no reasonable opportunity to consult with legal counsel to understand the terms of the agreements to be signed.⁶³ Specifically, Caremark works with about 26,000 to 28,000 independent pharmacies across the country.⁶⁴ Caremark also works with about 7,000 to 8,000 CVS pharmacies.⁶⁵ Caremark contracts with about 200 chains, working with 35,000 to 40,000 pharmacies.⁶⁶

A key point is that the claims brought in Plaintiffs' complaint are under West Virginia law. Plaintiffs, who signed contracts with Caremark, signed their part of the contract in West Virginia. The customers are going to Plaintiffs' West Virginia pharmacies; the prescription drug transactions are occurring in West Virginia. By looking at all of these facts cumulatively and the totality of the related circumstances, under West Virginia case law, the contracts bears no substantial relationship with Arizona, and thus the choice of law clause is invalid and West Virginia law should be applied to contractual arguments brought by the parties.

IV. Arbitration Clause

⁶⁰ See Pagnillo's Deposition, Pages 54-56.

⁶¹ See Pagnillo's Deposition, Pages 68-70.

⁶² See Pagnillo's Deposition, Page 133.

⁶³ See Plaintiffs' Proposed Findings of Facts and Conclusions of Law, Pages 2-3.

⁶⁴ See Pagnillo's Deposition, Page 56, Lines 17-22.

⁶⁵ See Pagnillo's Deposition, Page 60, Lines 10-18.

⁶⁶ See Pagnillo's Deposition, Pages 61-62.

An arbitration clause can be found in the 2009 Provider Manual which states:

Arbitration

Any and all disputes in connection with or arising out of the Provider Agreement by the parties will be exclusively settled by arbitration before a single arbitrator in accordance with the Rules of the American Arbitration Association Any such arbitration must be conducted in Scottsdale, Arizona, and Provider agrees to such jurisdiction, unless otherwise agreed to by the parties in writing Arbitration shall be the exclusive and final remedy for any dispute between the parties in connection with or arising out of the Provider Agreement; provided, however, that nothing in this provision shall prevent either party from seeking injunctive relief for breach of this Provider Agreement in any state or federal court of law The terms of this Arbitration section apply notwithstanding any other provision in the Provider Agreement.

The Court finds that a valid arbitration agreement does not exist between Caremark and any of the Plaintiff pharmacies using the doctrine of severability and using general principles of state contract law. First, the above arbitration clause is in the lengthy Provider Manual where the heading arbitration is in bold but there is no visual emphasis (no underlining, bold, italics, different font size, separating the arbitration clause on an individual page from the rest of the terms in the manual) added to mandating arbitration or that the arbitration has to occur in Scottsdale, Arizona.⁶⁷

The Court also finds that there was no mutual assent between the Plaintiffs and Caremark. McDowell, McCloud, and Waterfront Provider Agreements at the time were referencing a 2004 Caremark Provider Manual which had an arbitration provision⁶⁸ and allowed for amendments to be made so long as proper notice was given.⁶⁹ Caremark amended the Provider Manual for McDowell, McCloud, and Waterfront in 2007 and 2009, which had

⁶⁷ See 2009 Provider Manual.

⁶⁸ See Pagnillo Affidavit, Ex. O at 48.

⁶⁹ See Pagnillo Affidavit, Ex. O at 47.

arbitration provisions.⁷⁰ While the McDowell, McCloud, and Waterfront Provider Agreements mention the Provider Manual, incorporated by reference in Paragraph 11 entitled *Entire Agreement* and these three Plaintiffs had to acknowledge receipt of the Provider Manual with a signature, these three Provider Agreements (signed by the three Plaintiffs) never mention arbitration.⁷¹ Having an arbitration clause in a distinctly separate and lengthy document and not having to agree specifically to the terms in the arbitration provision, there was no mutual assent among the parties. The Plaintiffs were not aware of the ramifications of the arbitration clause, the arbitration would need to take place in Arizona, the time and expense of arbitration, and how arbitrating would mean that a potential court case could not be litigated in West Virginia, where they are located. Without this complete awareness of arbitration, and Defendants lack of explanation of arbitration, the Court finds that the Plaintiffs did not assent and therefore there was no mutual assent to the terms of the arbitration provision. These three Plaintiffs did not even have to sign new Provider Agreements when the Provider Manual was modified in 2007 and 2009. Newer versions of the manual were distributed to the Plaintiffs and thus there was no mutual assent with (no physical or verbal proof) as to the acceptance of the modifications/arbitration provision made in the newer versions of the Provider Manual.

Plaintiffs T & J, Johnston & Johnston, and Griffith & Feil also did not mutually assent to the arbitration provision in their agreements with Caremark. These three Plaintiffs participated/had affiliation with pharmacy networks and through these affiliations eventually had an indirect arrangement with Caremark. Specifically, there are no direct agreements signed between these three Plaintiffs and Caremark. As corporations merged, notices were given to these Plaintiffs

⁷⁰ See Pagnillo Affidavit, ¶¶ 34-35.

⁷¹ See Pagnillo Affidavit, Exs. A-C.

allegedly binding them to Caremark and arbitration.⁷² T&J did not even receive the notices directly, but rather their notices were sent to Medicine Shoppe. Based on the facts where Caremark did not keep copies of the notices that made the connection between these three Plaintiffs and Caremark, the three Plaintiffs did not have to sign the notices,⁷³ and there are no signed agreements between each of the three Plaintiffs and Caremark explicitly binding the parties to arbitration, the Court finds there was no mutual assent from the parties agreeing that the arbitration clause was a term of the contract.

Defendants must show a clear manifestation of an agreement (including the arbitration clause). The Court finds that the Defendants have not met this burden. Regardless of how each Plaintiff formed a relationship/understanding with Caremark, summarily, the Court finds each Plaintiff was never put on proper notice that specifically Caremark intended to form a binding contract as to arbitration through the language found in the 2009 version of the Provider Manual.

The facts with Plaintiffs McDowell, McCloud, and Waterfront are similar to the factual circumstances in *U-Haul*, in regards to incorporation by reference.⁷⁴ Based on the three-part test discussed in *U-Haul*, under the first prong, the three Provider Agreements for McDowell, McCloud, and Waterfront did mention the Provider Manual, and these Plaintiffs had to acknowledge receipt of the Provider Manual by signing the Provider Agreement. However, these Plaintiffs were not aware of all the terms that bound them in the Provider Manual including

⁷² See Pagnillo's Deposition, Pages 127-129.

⁷³ See Pagnillo's Deposition, Pages 127-129.

⁷⁴ The Supreme Court of Appeals of West Virginia analyzed two other issues not present in the above-captioned case including the appearance of the addendum and the timing in providing a copy of the addendum. The *U-Haul* Court said, "The lack of a detailed description is compounded by the fact that the Addendum itself was designed to look more like a document folder." *U-Haul* at 598. By choosing to use the word, "compounded," and by definition, the Supreme Court of Appeals of West Virginia is stating that the appearance of the addendum increases and makes the situation even worse from the lack of detailed description. This Court's focus was on the lack of detailed description of the incorporation by reference of the Provider Manual.

the arbitration clause. Plaintiffs T & J, Johnston & Johnston, and Griffith & Feil had indirect arrangements with PCS which included the arbitration clause and incorporated a PCS Manual⁷⁵ which was distinctly different than the Caremark Provider Manual. Yet, at this point in time when these three Plaintiffs signed their agreements with PCS, Caremark did not have a relationship with the Plaintiffs. Only in a notice, not signed by T & J, Johnston & Johnston, and Griffith & Feil, did the subsequent agreements “include the Caremark Provider Manual.”⁷⁶ There is no direct document (provider agreement) between these three Plaintiffs and Caremark or notices requiring the signature of these Plaintiffs. In conclusion, there was no document between any of the Plaintiffs and Caremark which reiterated or explained the arbitration clause or that arbitration would take place in Arizona, other than in a lengthy Provider Manual. The central point is that the smaller in length Provider Agreement signed by some Plaintiffs and Caremark did not directly mention the arbitration clause or critical language from the arbitration clause that would be necessary for all the Plaintiffs to comprehend prior to entering into an agreement with Caremark.

Under prong two, for some Plaintiffs the identity of the arbitration clause within the Provider Manual cannot be obtained by a few references of the Provider Manual in a Provider Agreement. Under the third prong, while some of the Plaintiffs may have knowledge of the incorporated document entitled Provider Manual, these Plaintiffs were not made aware of the ramifications of the arbitration clause leading to surprise and hardship. For McDowell, McCloud, and Waterfront general form Provider Agreements were used by Caremark. Caremark sent T & J, Johnston & Johnston, and Griffith & Feil generalized notices, not requiring a

⁷⁵ See Pagnillo Affidavit, Exs. J-L at § 9.5 and § 9.7.

⁷⁶ See Defendants’ [Proposed] Findings of Fact and Conclusions of Law, Page 20, filed Oct. 7, 2015 and Pagnillo Affidavit, Ex. S.

signature, regarding the inclusion of the Caremark Provider Manual to the prior agreements with Caremark's predecessors.⁷⁷ As Plaintiffs' argued, T&J did not receive notices directly from Caremark, but rather their notices were sent to Medicine Shoppe. In *U-Haul*, The Supreme Court of Appeals of West Virginia noted:

Both U-Haul's pre-printed Rental Contracts and electronic contracts succinctly referenced the Addendum. However, such a brief mention of the other document simply is not a sufficient reference to the Addendum to fulfill the proper standard. The reference to the Addendum is quite general with no detail provided to ensure that U-Haul's customers were aware of the Addendum and its terms, including its inclusion of an arbitration agreement.⁷⁸

The concentration for the Supreme Court of Appeals of West Virginia is that a "brief mention" of the other document is insufficient. For McDowell, McCloud, and Waterfront, the Defendants argue the Provider Manual was incorporated by reference in Paragraph 11 entitled *Entire Agreement* and these three Plaintiffs had to acknowledge receipt of the Provider Manual with a signature, in the three Provider Agreements.⁷⁹ The Court finds that using the terminology "Provider Manual" several times in these three Provider Agreements without any further description as to the contents of the Provider Manual is consistent with *U-Haul's* "brief mention" of the Addendum. Just like *U-Haul*, no extra details were provided in the Provider Agreements for these three Plaintiffs to ensure these Plaintiffs were aware of the Provider Manual and its terms "including its inclusion of an arbitration agreement."⁸⁰ The word arbitration is not even mentioned once in any of these three Provider Agreements. Without any further details beyond the brief mentioning of the Provider Manual, consistent with *U-Haul*, the Court finds that the

⁷⁷ See Defendants' [Proposed] Findings of Fact and Conclusions of Law, Page 20, filed Oct. 7, 2015 and Pagnillo Affidavit, Ex. S.

⁷⁸ *U-Haul* at 598.

⁷⁹ See Pagnillo Affidavit, Exs. A-C.

⁸⁰ *U-Haul* at 598.

Provider Manual and more specifically, the arbitration clause, were not properly nor sufficiently incorporated by reference in the Provider Agreements of McDowell, McCloud, and Waterfront.

All plan pharmacies including T & J, Johnston & Johnston, and Griffith & Feil received a notice in September 2009, which amended Section 9.7 of the original agreements for the three Plaintiffs signed by Medicine Shoppe in 1996, Colony Drug in 1995, and Griffith & Feil in 1995 with PCS Health Systems, Inc.⁸¹ The Original Section 9.7 entitled *Entire Agreement* in the PCS Health Systems, Inc. Provider Agreement in relevant parts reveals, “This Agreement, its schedules, and the PCS Manual . . . contain the entire agreement between Provider and PCS relating to the rights and the obligations of all parties concerning the provision of Pharmacy Services hereunder.”⁸² The September 2009 Notice amends said portion to say, “This Agreement, its schedules, the Caremark Provider Manual . . . contain the entire agreement between Provider and Caremark relating to rights and the obligations of all parties concerning the provision of Pharmacy Services hereunder.”⁸³

This notice did not have to be signed by these three pharmacies. Additionally, there is no confirmation that these pharmacies received the Caremark Provider Manual. The structure of the September 2009 Notice does not emphasize by bold, italics, capitalization, or underlining the incorporation by reference of the Provider Manual and lacks an explanation or even the use of the word arbitration.⁸⁴ Similar to the *U-Haul* analysis, above, for McDowell, McCloud, and Waterfront, the 2009 Notices for T & J, Johnston & Johnston, and Griffith & Feil a “brief mention,” as discussed in *U-Haul*, of the Caremark Provider Manual and with no detail or

⁸¹ See Pagnillo Affidavit, Exs. J-L.

⁸² See Pagnillo Affidavit, Exs. J-L, § 9.7.

⁸³ See Pagnillo Affidavit, Ex. S.

⁸⁴ *Id.*

explanation of the arbitration provision fails to meet the three-part test in *U-Haul*. Thus, without these three Plaintiffs agreeing to arbitrate based on *U-Haul*, the incorporation by reference with an arbitration clause is invalid.⁸⁵ Therefore, the Court finds that the Caremark Provider Manual was not properly nor adequately incorporated by reference for T & J, Johnston & Johnston, and Griffith & Feil.⁸⁶

V. Delegation Provision

Even if each of the six Plaintiffs had agreements that validly incorporated the Caremark Provider Manual by reference (which this Court finds did not happen based on the analysis in Section IV of this Order entitled Arbitration Clause), there would be a second issue of the delegation provision. The relevant part of the arbitration clause in the 2009 Provider Manual states, “Any and all disputes in connection with or arising out of the Provider Agreement by the parties will be exclusively settled by arbitration before a single arbitrator in accordance with the Rules of the American Arbitration Association.” The Rules of the American Arbitration Association (hereinafter, “AAA”) are not listed in the Provider Manual. The AAA rules can be found online and Rule R-7 reads, “The arbitrator shall have the power to rule on his or her own

⁸⁵ See Transcript of Hearing July 15, 2015, Page 25.

⁸⁶ The Court is aware that T & J, Johnston & Johnston, and Griffith & Feil originally had arbitration clauses within the documents that they signed with PCS Health Systems, Inc. in Section 9.5 entitled Arbitration in the PCS Health Systems, Inc. Provider Agreement. However, through merged corporations, notices then sent by Caremark, and the use of the Caremark Manual – which had a separate and distinct arbitration clause in a lengthy document incorporated by reference that was not signed by these three Plaintiffs – over many years the assent to arbitration with these three Plaintiffs is not clear and unmistakable. While the three Plaintiffs might have previously assented to arbitration with PCS Health Systems, Inc. (and this an issue the parties disagree upon) in a signed document, this assent would not automatically transfer to Caremark especially with all of the notices and the Caremark Provider Manual which the Defendants have admitted is the focal point of the Case. See Defendants’ [Proposed] Findings of Fact and Conclusions of Law, Section C, entitled, *The 2009 Caremark Provider Manual Governs This Dispute*. Furthermore, in 2003 Medicine Shoppe, Leader Drugstores, and Access Health entered into Caremark, Inc. Participating Pharmacy Agreements which all had the Governing Law as Illinois. Even for T&J, under *Terms and Conditions of Participation in the Medicine Shoppe Internet Program*, there is an arbitration clause, with arbitration to take place in Missouri. Thus, there were multiple arbitration clauses, with multiple locations.

jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim.”⁸⁷

Thus, the reference to the AAA rules becomes a second incorporation by reference where a *U-Haul* analysis is necessary. Looking to *U-Haul*'s three elements for valid incorporation, there are some issues in terms of the ease of finding the AAA rules. Caremark did not give instructions or website address in finding said website.⁸⁸ Once getting to the website, there are many different sets of rules beyond the necessary rule regarding the powers designated to the arbitrator. Furthermore, a small independent owner of a pharmacy would have to read through all the rules to find the applicable rule to the case. The Rules are not written in plain language where an unsophisticated single business owner would be able to easily comprehend meaning.

Additionally, there is a chain of documents at issue as to whether they were incorporated by reference. Plaintiffs signed a Provider Agreement either with Caremark or PCS Health Systems, Inc. which directly references or alternatively through Notices references a second document, the Caremark Manual. Once the arbitration clause is located in the lengthy Provider Manual, Plaintiffs have to go to a third document, the AAA rules which can be found on the internet to determine whether a court or an arbitrator would determine the scope of arbitrability.⁸⁹ The Court finds that Plaintiffs' assent to the reference of the AAA is not unmistakable (due to the effort and diligence necessary for individual pharmacies to get to the AAA rules, no further explanation of AAA rules in Caremark documents, and no signed agreement directly between the

⁸⁷https://www.adr.org/aaa/faces/rules/searchrules?_afLoop=4926031995673108&_afWindowMode=0&_afWindowId=rekg8yf8f_1#%40%3F_afWindowId%3Drekg8yf8f_1%26_afLoop%3D4926031995673108%26_afWindowMode%3D0%26_adf.ctrl-state%3Drekg8yf8f_83

⁸⁸ The Court also spent some time finding the AAA rules and are not as easy to navigate as Defendants argue. The Defendants mistakenly gave the website address that sent the Court to the Alabama Department of Revenue, *See* Page 24 of Defendants' Proposed Findings of Fact and Conclusions of Law.

⁸⁹ *See* Transcript of Hearing July 15, 2015, Pages 30-32.

Plaintiffs and Caremark that specifically uses the word arbitration/has an arbitration clause). The Plaintiffs did not have full knowledge of the AAA rules and the impact and hardship these rules would have on potential lawsuits. Based on the reasoning above and looking solely at the delegation provision under *Schumacher*, the above-captioned case fails to meet the second prerequisite of making an effective delegation provision: wherein the provision cannot be invalid, revocable, or unenforceable. Furthermore, the discussion below on unconscionability would also impact the validness/enforceability of the delegation provision and notably any agreements/arrangements between each of the Plaintiffs and Caremark.

VI. Unconscionability

The Court finds that there is both procedural and substantive unconscionability. Specifically in terms of procedural unconscionability, there is a lack of a meeting of the minds, in the form of mutual assent as analyzed earlier in this order under the section entitled, "Arbitration Clause." As also analyzed above, by looking at the totality of all the related circumstances, all of the Plaintiffs entered agreements with Caremark wherein, the arbitration clause was in a lengthy separate document and incorporated by reference. Plaintiffs are individual community-based, single pharmacies in West Virginia who entered into agreements with Caremark to increase business.

Substantively, the arbitration clause is one-sided to benefit the Defendants where arbitration is mandated to take place in Arizona, which is significant distance from where the events occurred, West Virginia. Further, the Plaintiffs are community-based, single pharmacies who do not have the financial ability to pay for arbitration under the AAA Rules which would create an overly harsh effect on the Plaintiffs. During the Court Hearing on said motion, Attorney Anthony Majestro articulated the burden and financial costs arbitration would place on

the Plaintiffs including: the money to file the cases for arbitration, each of the Plaintiffs' cases would be reviewed individually, payment of having arbitrators, traveling across the country for the arbitration, making witnesses available in Arizona, and paying for mediation prior to the arbitration.⁹⁰ However, the Court also notes that Plaintiffs did not show any physical evidence of their inability to pay for arbitration.

Two Plaintiffs, Joseph C. McGlothlin and Patricia Johnston each have affidavits which provide support for procedural and substantive unconscionability. The affidavits state the Plaintiffs entered into agreements with Caremark to stay competitive in the pharmacy business and were necessary to continue to prepare prescriptions for clients. The Caremark form agreement was prepared by Caremark, and the Plaintiffs were not advised of the opportunity to negotiate the agreement, and they believed there was no use in doing so. To the Plaintiffs, the agreement and manual seemed lengthy and complex, and the Plaintiffs had no reasonable opportunity to understand the terms of the agreement or consult with legal counsel prior to signing the agreements. Plaintiffs stated that Caremark provided no information explaining the terms of the agreement and the Plaintiffs were not aware of legal rights that were relinquished when signing the agreement.⁹¹

Based on the totality of the related circumstances, the Defendants' Motion to Dismiss is hereby DENIED. Defendants' Motion to Compel Arbitration is hereby DENIED.

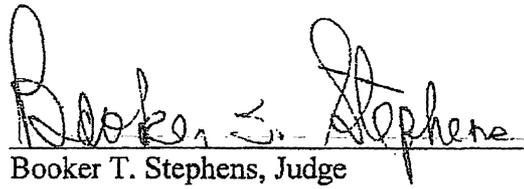
The objection and exception of the Defendants are noted regarding the Court's ruling. It is so **ORDERED**.

The Clerk is directed to forward a copy of this Order to all counsel of record.

⁹⁰ See Transcript of Hearing July 15, 2015, Pages 35-37.

⁹¹ See Affidavit of Joseph C. McGlothlin on November 17, 2014 and Affidavit of Patricia Johnston on May 29, 2015.

ENTER this 14th day of January, 2016.


Booker T. Stephens, Judge

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