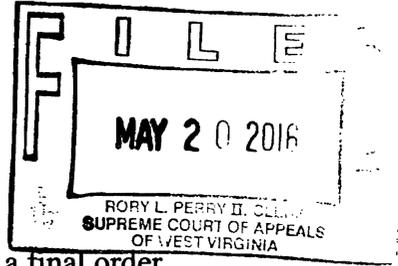


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 16-0209



**WEST VIRGINIA CVS PHARMACY,
L.L.C.**, a West Virginia Limited Liability
Company, et al.,
Petitioners

Appeal from a final order
of the Circuit Court of McDowell County
(11-C-144S)

v.

MCDOWELL PHARMACY, INC., a West
Virginia corporation, et al.,
Respondents

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I. ASSIGNMENTS OF ERROR

- A. The Circuit Court erred in disregarding Arizona law, as contractually chosen by the parties in the Provider Manual, and instead applying West Virginia law to the Arbitration Motion.
- B. The Circuit Court erred in holding that a valid arbitration agreement does not exist between Caremark and the Pharmacy Plaintiffs.
- C. The Circuit Court erred in refusing to give effect to the parties' agreement to delegate questions of scope to the arbitrator, rather than the Court.
- D. The Circuit Court erred in holding that Plaintiffs' claims fell outside the scope of the arbitration agreements.
- E. The Circuit Court erred in holding that the Pharmacy Plaintiffs' arbitration agreements with Caremark were procedurally and substantively unconscionable.
- F. The Circuit Court erred in failing to hold that the individual Plaintiffs must arbitrate and that the nonsignatory Defendants could compel arbitration.

II. STATEMENT OF THE CASE

The Circuit Court erred in refusing to compel arbitration of Plaintiffs' claims, despite the pharmacy Plaintiffs' contractual promise to arbitrate "[a]ny and all disputes in connection with or arising out of" their respective Provider Agreements with Defendant Caremark, L.L.C. ("Caremark"). While the Circuit Court correctly found that each pharmacy Plaintiff has a contract with Caremark pursuant to which it has submitted pharmacy claims for years and has received hundreds of thousands of dollars in reimbursements, the Circuit Court improperly singled out the arbitration provision in the contracts for disfavored treatment. It did so even though (1) four of the six pharmacy Plaintiffs offered absolutely no evidence to support their assertions of unconscionability, (2) the undisputed evidence shows that each pharmacy Plaintiff possessed its Provider Manual containing the operative arbitration provision at least 30 days before agreeing to be bound by its terms, and (3) *every* other court in the country to have

considered the enforceability of the arbitration provision contained in the Caremark Provider Manual has enforced it pursuant to its terms.

A. FACTUAL BACKGROUND.

1. The Pharmacy Plaintiffs Participate In Caremark's Pharmacy Network.

Plaintiffs McDowell Pharmacy Inc., Johnston and Johnston, T & J Enterprises, Inc., Griffith & Feil Drug, Inc., Waterfront Family Pharmacy, LLC and McCloud Family Pharmacy, Inc. (collectively, the "Pharmacy Plaintiffs") are all retail pharmacies included in at least one pharmacy network operated by Caremark. *See* Joint Appendix ("JA") 0114. Plaintiffs Robert Brown, Patricia Johnston, Joseph C. McGlothlin, Rickey W. Griffith, Karl Sommer, and Kevin D. McCloud (collectively, the "Individual Plaintiffs") are "pharmacists who practice in the State of West Virginia" and are each closely affiliated with one of the Pharmacy Plaintiffs. JA0061-64.

2. Defendants Reimburse Pharmacy Plaintiffs For Claims Submitted On Behalf Of Defendants' Customers.

Defendants are affiliated companies with multiple lines of business in the prescription drug and healthcare industries. Among other aspects of its business, Caremark offers pharmacy benefit management ("PBM") services to insurers, third party administrators, business coalitions, and employer sponsors of group health plans. The array of services Caremark and its affiliates offer their PBM clients includes the administration and maintenance of pharmacy networks to service PBM plan customers (or members). JA0114. In return for access to the large and lucrative market of Caremark's PBM plan customers, network pharmacy providers agree by contract to fill prescriptions for participants in Caremark's PBM plans at discounted prices. *Id.*

Defendants Dennis Canaday, Robert Taylor, Allison Dinger, and Aaron Stone (collectively, the "PIC Defendants") are pharmacists-in-charge ("PIC") at their respective CVS Pharmacy stores. The remaining Defendants are affiliated with Caremark, and with each other,

as follows: CVS Caremark Corporation (which in 2014 changed its name to CVS Health Corporation) is the corporate parent of CVS Pharmacy, Inc. (“CVS Pharmacy”), which is the sole member of Caremark Rx, L.L.C. Caremark Rx, L.L.C. is the sole member of Caremark. West Virginia CVS Pharmacy, L.L.C. is a subsidiary of CVS Pharmacy.

3. Each Pharmacy Plaintiff Is A Party To A Provider Agreement That Requires Arbitration Of This Dispute.

As the Circuit Court found correctly, each Plaintiff has a contract, called a “Provider Agreement,” with Caremark. JA0003. Each Pharmacy Plaintiff’s Provider Agreement with Caremark expressly incorporates by reference the Caremark Provider Manual. JA0127, 0132, 0138, 0183, 0197, 0211. That Provider Manual, in turn, contains an express arbitration provision requiring arbitration of “any and all disputes” between the parties. JA0425. In addition, three of the Pharmacy Plaintiffs—T & J, Griffith & Feil, and Johnston and Johnston—signed Provider Agreements that contain arbitration agreements expressly on the face of those Provider Agreements. JA0183, 0197, 0211.

a. The Provider Agreements Governing McDowell, McCloud, And Waterfront.

Plaintiff McCloud in 2006, and Plaintiffs McDowell and Waterfront in 2007, each signed a Provider Agreement directly with Caremark Inc. (now known as Caremark, L.L.C.). JA0115-16, 0125-40. Plaintiffs McCloud, McDowell, and Waterfront do not dispute that each of them signed the Provider Agreements. The Provider Agreement states that “[t]his Agreement, the Provider Manual, and all other Caremark Documents constitute the entire agreement between Provider and Caremark, all of which are incorporated by this reference as if fully set forth herein and referred to collectively as the ‘Provider Agreement.’” JA0127, 0132, 0138. Immediately above McCloud, McDowell, and Waterfront’s respective signatures, the Provider Agreement

states “[b]y signing below, Provider agrees to the terms set forth above and acknowledges receipt of the Provider Manual.” JA0128, 0133, 0139 (emphasis added).

For each of these Pharmacy Plaintiffs, the Provider Manual then in effect was the 2004 Caremark Provider Manual, which contains an arbitration provision. JA0270. The 2004 Provider Manual also contains an amendment provision, permitting amendment upon advance notice to providers. JA0269. As explained below, Caremark amended its Provider Manual in 2007, and again in 2009, and the Plaintiff Pharmacies accepted those amendments. JA0120. Each of these versions of the Provider Manual contains an arbitration provision. *Id.*

b. The Provider Agreements Governing T & J, Johnston And Johnston, And Griffith & Feil.

Plaintiffs T & J, Johnston and Johnston, and Griffith & Feil are likewise parties to a Provider Agreement with Caremark. Each of these Pharmacy Plaintiffs initially entered into a Provider Agreement with PCS Health Systems, Inc. (“PCS”) and a separate contract with Caremark, Inc., which were ultimately amended to become one Provider Agreement. At the time they agreed to the terms of the PCS Provider Agreement, it contained an express arbitration provision, JA0183, 0197, 0211, and provided further that it could be amended upon 30 days’ notice to the pharmacy, JA0177, 0191, 0205. That agreement stated further that “[t]his Agreement, its schedules, and the PCS Manual, On-Line Info, RECAP System instructions and terminal, 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.” JA0183, 0197, 0211; *see also* JA0118-19, 0219. The PCS Manual was defined as “the manual containing claims processing and program guidelines provided by PCS to Provider, as amended from time to time.” JA0184, 0198, 0212.

Griffith & Feil and Johnston and Johnston signed their Provider Agreements with PCS in

1995 and 1996, respectively. JA0118, 0190-0217. Plaintiff T & J is affiliated with Medicine Shoppe, Inc., and contracted with PCS through Medicine Shoppe. JA0176-89; *see also* JA1532.¹ T & J contracted with Medicine Shoppe and engaged it to “solicit and use its best efforts to contract, *on behalf of each participant*, with . . . pharmacy benefit managers” JA0153 (emphasis added). T & J further agreed that it would “participate in each and every Group contract accepted by Medicine Shoppe.” JA0154; *see also* JA0116. The Provider Agreement Medicine Shoppe negotiated for T & J included an arbitration provision itself, JA0183, incorporated the Provider Manual, *id.*, and allowed for PCS to amend the Provider Agreement upon notice, JA0177. Thus, T & J entered into a Provider Agreement with PCS.

In addition to their Provider Agreements, in 2003, Plaintiffs T & J, Griffith & Feil, and Johnston and Johnston also entered into Participating Pharmacy Agreements—through their respective pharmacy services administrative organizations (“PSAOs”)—with Caremark Inc. JA0116-17, 0141-75, 1532, 1534, 1536. Each such Agreement authorized Caremark to amend the Agreement upon thirty days’ notice. JA0150, 0165, 0174. For years, Caremark has paid these three Plaintiffs under their respective Provider Agreements. JA1465.

In 2000, Advance Paradigm, Inc. purchased PCS, creating AdvancePCS. *See* JA0118, 0219. Each provider in PCS’s network, including Plaintiffs T & J, Griffith & Feil, and Johnston and Johnston, were provided a notice of amendment indicating that their “PCS Provider Agreement will apply with respect to all AdvancePCS business with your pharmacy and will be referenced as the ‘AdvancePCS Provider Agreement.’” JA0219.

In 2004, Caremark’s parent company, Caremark Rx, Inc. (n/k/a Caremark Rx, L.L.C.—also a Defendant) acquired AdvancePCS. JA0113, 0117-19, 0221. At that time, in addition to

¹ In fact, the pharmacy at T & J’s address in Huntington is registered with the West Virginia Board of Pharmacy as licensed to “Medicine Shoppe (The).” *See* www.wvbop.com.

the 2003 Caremark Inc. Participating Pharmacy Agreements, Johnston and Johnston, T & J, and Griffith & Feil were also bound by contracts with AdvancePCS. *See* JA0117-19, 0176-0219. In April 2004, Caremark Inc. and AdvancePCS jointly sent a notice of amendment to their network providers—including T & J, Johnston and Johnston, and Griffith & Feil—that both companies:

will be using the same base pharmacy provider agreement effective August 1, 2004. The new agreement will consist of the AdvancePCS Provider Agreement. . . . This new agreement will apply to all of your [] Caremark Inc. business beginning August 1, 2004 and will be called the “Caremark Provider Agreement.”

JA0221. Therefore, as of August 1, 2004, the Caremark Inc. Agreements to which Pharmacy Plaintiffs T & J, Johnston and Johnston, and Griffith & Feil were bound were amended to adopt the AdvancePCS Provider Agreement and its terms as the applicable agreement governing the parties’ relationship and thereafter called the “Caremark Provider Agreement.” In fact, the only two Pharmacy Plaintiffs to submit affidavits, Johnston and Johnston and T & J, admitted that they are parties to a contract with Caremark. JA1760, 1768.

4. The 2009 Caremark Provider Manual Governs This Dispute.

The Provider Agreement to which each Pharmacy Plaintiff is a party expressly incorporates by reference the terms of the Provider Manual then in effect. JA0121, 0127, 0132, 0138, 0183, 0197, 0211. Through an agreed upon amendment and consent process, Caremark revises the Provider Manual from time to time, and sends each new version to all network pharmacy providers, including the Pharmacy Plaintiffs. *See* JA0120. Each Provider Manual states that a pharmacy provider communicates its acceptance to the terms of the new Provider Manual by submitting claims to Caremark for payment after the effective date of the new Provider Manual. JA0120-23, 0269, 0342, 0425, 1465.

Following the acquisition of AdvancePCS in 2004, Caremark mailed the 2004 Provider Manual to all pharmacies then in its provider network. JA0120. The 2004 Provider Manual

contained an arbitration provision substantially similar to the version contained in the operative 2009 Caremark Provider Manual. JA0270.

Consistent with the amendment procedures outlined in the Provider Agreements and Provider Manual, Caremark amended the Provider Manual in 2007 and sent that amended Provider Manual to its network pharmacies, including the Pharmacy Plaintiffs, more than thirty days prior to its effective date. JA0120, 0379. Caremark also amended the Provider Manual in 2009 and sent that 2009 Provider Manual to its network providers, including the Pharmacy Plaintiffs, more than thirty days prior to its effective date. JA0120, 0971-72, 1276, *see also* JA0455 (showing Plaintiffs' receipt on February 27, 2009). It is uncontested that each Pharmacy Plaintiff received copies of the 2007 and 2009 Provider Manuals in advance, and submitted claims to Caremark for payment after the effective date of the 2007 and 2009 Provider Manuals. JA1465.² By continuing to submit claims to Caremark, each Pharmacy Plaintiff communicated its acceptance of the terms of the updated Provider Manual. JA1465. Accordingly, while each Plaintiff Pharmacy had a contractual agreement to arbitrate throughout their contracting period, through the amendment and notice process, the 2009 Provider Manual (and its arbitration provision) was the governing version when Plaintiffs filed their Complaint. JA0120, 0425.

5. The 2009 Provider Manual Contains A Mandatory Arbitration Provision Incorporating The AAA Commercial Rules.

The Provider Agreements (and, by incorporation, the Caremark Provider Manual) set forth the rights of the Pharmacy Plaintiffs to participate in Caremark's retail pharmacy networks. The Provider Agreements and Provider Manual detail the terms and conditions under which each

² Moreover, in September 2009, Caremark sent a notice to each of its providers—including Plaintiffs—informing providers of “amendments regarding the Caremark Provider Agreement (which includes the Caremark Provider Manual . . .).” JA0452. The 2009 Provider Manual begins by stating that it “supersedes all previous versions of . . . PCS, AdvancePCS, Caremark . . . provider manuals.” JA0385.

Pharmacy Plaintiff participated in Caremark’s retail pharmacy networks, JA0127, 0132, 0138, 0177, 0183, 0191, 0197, 0205, 0211, 0399; *see also, e.g.*, JA0177-79, 0191-93, 0205-07, 0393-98. The Provider Agreements state that they are to be “construed, governed and enforced in accordance with the laws of the State of Arizona.” *See* JA0127, 0132, 0138, 0183, 0197, 0211.

Most germane to this dispute, however, is that each Pharmacy Plaintiff’s Provider Agreement incorporates the following arbitration provision from the 2009 Provider Manual:

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. . . . 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.

JA0425. As this passage indicates, the arbitration provision expressly incorporated the American Arbitration Association (“AAA”) rules,³ which are publicly available on the internet, and which delegate to the arbitrator to decide its own jurisdiction and the threshold questions as to which claims are encompassed within the scope of the arbitration provision. *See* AAA Commercial Arbitration Rule R-7(a), available at <http://www.adr.org/aaa/faces/rules>; *see also* JA0879 (same).

B. PROCEDURAL HISTORY.

1. Plaintiffs Filed Their Complaint In 2011.

On August 9, 2011, Plaintiffs filed the Complaint, alleging that Defendants “use” Caremark’s PBM role in connection with Plaintiffs, and in forming pharmacy networks and prescription benefits plans, to favor CVS Caremark–owned pharmacies. *See* JA0053, 0059-60. Plaintiffs assert claims for: (1) a request to enjoin Defendants from violating W. Va. Code § 30-

³ Earlier versions of the arbitration provision also incorporated the AAA rules. JA0270, 0342.

5-7 (Count I); (2) alleged violations of W. Va. Code §§ 30-5-7 and 33-16-3q (Count II); (3) tortious interference (Count III); (4) fraud (Count IV); (5) violation of W. Va. Code § 47-18-3 (Count V); and (6) a request for punitive damages (Count VI, incorrectly labeled as “Count V”).

2. The Lower Court Incorrectly Denied Defendants’ Motion To Dismiss And Compel Arbitration.

After Defendants responded to the Complaint on July 18, 2012 following remand from federal court, by moving to dismiss the Complaint and compel arbitration, the Court provided Plaintiffs nearly three years to conduct discovery on Defendants’ motion. Finally calling an end to discovery, the Court set a date of April 30, 2015 to file an updated supplemental Motion To Dismiss And Compel Arbitration (the “Motion”). JA1808-09. The Circuit Court heard arguments on the Motion on July 15, 2015, after which the parties submitted competing proposed findings of fact and conclusions of law. The Circuit Court erroneously denied Defendants’ Motion on January 19, 2016. JA0001-27.

Although only two of the six Pharmacy Plaintiffs (T & J and Johnston and Johnston) offered any “evidence” at all to support their opposition to Defendants’ Motion—in the form of two conclusory affidavits in which they admitted both to entering into Provider Agreements with Caremark and to receiving a copy of the Caremark Provider Manual prior to entering into their respective Provider Agreements—the Circuit Court refused to compel any of the Pharmacy Plaintiffs to arbitrate. Defendants timely filed a notice of appeal on February 18, 2016.

III. SUMMARY OF ARGUMENT

The Circuit Court’s order denying Defendants’ Motion conflicts with controlling precedent from the United States Supreme Court (*see, e.g., DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015)) and from this Court (*Nationstar Mortg., LLC v. West*, No. 15-0128, 2016 W. Va.

LEXIS 202 (Apr. 7, 2016)), and with the decision of *every* court in the country to have considered the arbitration provision contained in the Caremark Provider Agreement.⁴

The Circuit Court's Order is not only incompatible with these decisions; it is also inconsistent with itself. Although the Circuit Court found that "each Plaintiff" contracted with Caremark, it later refused to compel arbitration of claims brought by three Plaintiffs (T & J, Griffith & Feil, and Johnston and Johnston) on the basis that it was unclear whether these Plaintiffs had contracted with Caremark. JA0023. Equally problematic, the Circuit Court found the arbitration provision substantively unconscionable on the basis that arbitration in Arizona was too costly for the Plaintiffs, despite admitting that Plaintiffs offered *no* evidence whatsoever to support such a finding. JA0026. And although the Circuit Court held that the parties did not validly incorporate the arbitration provision contained in the Caremark Provider Manual, it did not reject the incorporation of the Provider Manual as a whole, and in fact specifically found that Caremark reimbursed Plaintiffs pursuant to that very Provider Manual. JA0003.

The Circuit Court's factually unsupported findings and legally flawed conclusions cannot withstand review. First, the Circuit Court incorrectly applied West Virginia law, JA0016, despite its recognition that the Provider Agreements state that they are to be "construed, governed and enforced in accordance with the laws of the State of Arizona," and despite the fact that Caremark's PBM division is in Arizona, Plaintiffs submit claims to be processed in Arizona, and Plaintiffs' contracts are maintained in Arizona. JA0115, 0122-23, 0385, 0389, 0400, 0424,

⁴ See *Crawford Prof'l Drugs v. CVS Caremark Corp.*, 748 F.3d 249, 267-68 (5th Cir. 2014) ("*Crawford*"); *Grasso Enters. v. CVS Health Corp.*, No. 15-427, 2015 U.S. Dist. LEXIS 145975, at *15-16 (W.D. Tex. Oct. 28, 2015) ("*Grasso*"); *Burton's Pharmacy, Inc. v. CVS Caremark Corp.*, No. 11-2, 2015 U.S. Dist. LEXIS 122596, *2-3 (M.D.N.C. Sept. 15, 2015) ("*Burton's*"); *Uptown Drug Co. v. CVS Caremark Corp.*, 962 F. Supp. 2d 1172, 1187 (N.D. Cal. 2013) ("*Uptown*"); *CVS Pharmacy, Inc. v. Gable Family Pharmacy*, No. 2:12-cv-1057-SRB (D. Ariz. Oct. 22, 2012) at 20, *writ of mandamus denied*, *In re Gable Family Pharmacy*, No. 13-70096 (9th Cir. Mar. 27, 2013) ("*Gable*"); *The Muecke Co. Inc. v. CVS Caremark Corp.*, No. 6:10-cv-00078 (S.D. Tex. Mem. Feb. 22, 2012 ("*Muecke*"); reconsidered in part on June 27, 2014; *aff'd*, 615 F. App'x 837 (5th Cir. 2015)), at 13-14.

1508-10. For this reason, *every* other court to have considered this issue has held that Arizona bears a substantial relationship to the Provider Agreements. *See infra* at Part V.A.

Second, the Circuit Court erred in determining that the Pharmacy Plaintiffs were not parties to an enforceable arbitration agreement with Caremark. In so holding, the Circuit Court impermissibly singled out the Provider Manual’s arbitration provision for disfavored treatment, in violation of the United States Supreme Court’s mandate that arbitration agreements are to be placed on “equal footing” with any other contract. *Rent-A-Center, Inc. v. Jackson*, 561 U.S. 63, 67 (2010). The Circuit Court erred further by making repeated erroneous factual findings, and by misapplying this Court’s decision in *State ex rel. U-Haul Co. of W. Va. v. Zakaib*, 232 W. Va. 432, 752 S.E.2d 586 (2013) (“*U-Haul*”), to conclude that the parties did not validly incorporate the Provider Manual’s arbitration provision into their contract—again, a decision in conflict with *every* court to have considered the matter. *See infra* at Part V.B.

Third, the Circuit Court then incorrectly applied *U-Haul* a second time and erroneously failed to enforce the arbitration provision’s incorporation of the AAA rules, which every federal court in the country to have considered the question has held provides “clear and unmistakable” evidence of the parties’ intent to delegate questions of arbitrability to the arbitrator rather than the court. The Circuit Court then compounded this error by deciding, in only a single sentence of analysis, that Plaintiffs’ claims exceed the scope of the arbitration provision. JA0013. Yet again, this decision conflicts with the decision of *every* other court to have considered similar claims brought by pharmacies under the same arbitration language. *See infra* at Part V.C.

The Circuit Court also erred in determining that the Pharmacy Plaintiffs’ arbitration agreements were unconscionable. Despite its acknowledgment that “Plaintiffs did not show any physical evidence of their inability to pay for arbitration,” the Circuit Court nevertheless relied

on statements made by Plaintiffs' counsel at oral argument to conclude that the arbitration provision was substantively unconscionable because the Pharmacy Plaintiffs "do not have the financial ability to pay for arbitration under the AAA Rules which would create an overly harsh effect on the Plaintiffs." JA0025. The Circuit Court then relied on affidavits submitted by T & J and Johnston and Johnston—ignoring that the four remaining Pharmacy Plaintiffs offered no evidence whatsoever—to hold the arbitration provision was procedurally unreasonable, as 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." JA0026. In fact, the competent evidence before the Circuit Court demonstrates that (1) each Pharmacy Plaintiff received the 2009 Caremark Provider Manual containing the operative arbitration provision before communicating their acceptance to the contract, (2) the Provider Manual's arbitration agreement is listed in the Provider Manual's table of contents, clearly labeled with a bold heading and plainly worded, and (3) each Pharmacy Plaintiff has received hundreds of thousands of dollars in reimbursements from Caremark pursuant to its Provider Agreement, and at all times has treated its Provider Agreements as enforceable. In light of these undisputed facts, the Circuit Court's holding plainly singles out the arbitration provision alone for disfavored treatment. The Circuit Court's holding is, once again, at odds with *every* court to have considered the same discredited arguments. *See infra* at Part V.E.

Accordingly, the Circuit Court should have granted Defendants' Motion and compelled arbitration of Plaintiffs' claims. Its Order refusing to do so should be vacated in its entirety.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The assignments of error presented in this appeal raise fundamental questions of importance to any person or entity entering into a commercial contract containing an arbitration agreement. If allowed to stand, the Circuit Court's decision below will set a new standard under

West Virginia law that singles out arbitration agreements for disfavored treatment by requiring counterparties to personally explain the consequences of an arbitration provision and by invalidating such agreements as unconscionable without the production of *any* evidence in the record. The Circuit Court’s decision below conflicts with the ruling of every federal court in the country that has considered the enforceability of the arbitration agreement contained in the Caremark Provider Manual. Accordingly, this appeal is appropriate for Rule 20 argument.

V. ARGUMENT

The Circuit Court’s denial of a motion to compel arbitration “is an interlocutory ruling which is subject to immediate appeal under the collateral order doctrine.” Syl. Pt. 1, *Geological Assessment & Leasing v. O’Hara*, 236 W. Va. 381, 780 S.E.2d 647, 651 (2015) (internal quotation marks omitted); *see also* 9 U.S.C. § 16(a). This Court reviews the Circuit Court’s order denying arbitration *de novo*, *id.*, “affording no deference to the lower court’s ruling.” *Blake v. Charleston Area Med. Ctr., Inc.*, 201 W. Va. 469, 475, 498 S.E.2d 41, 47 (1997).⁵

A. THE CIRCUIT COURT ERRED IN DISREGARDING ARIZONA LAW, AS CONTRACTUALLY CHOSEN BY THE PARTIES IN THE PROVIDER MANUAL, AND INSTEAD APPLYING WEST VIRGINIA LAW TO THE ARBITRATION MOTION.

While Defendants should prevail under either West Virginia or Arizona law, the Circuit Court erred in refusing to apply the parties’ contractual choice of law provision. That error conflicts with controlling decisions by this Court, and the decision of every court to have interpreted Caremark’s Provider Agreements under nearly identical circumstances. As the Circuit Court recognized, each Provider Agreement states that it is to be “construed, governed

⁵ This Court has used differing standards of review when reviewing denials of motions to dismiss and compel arbitration. *Compare Nationstar*, 2016 W. Va. LEXIS 202, *6 (“We review a trial court’s denial of a motion to compel arbitration for an abuse of discretion”), *with Geological Assessment & Leasing v. O’Hara*, 236 W. Va. 381, 780 S.E.2d 647, 651-52 (2015) (“[b]ecause the circuit court’s ruling denied Mr. Capouillez’s motion to dismiss, we review the circuit court’s order *de novo*.”).

and enforced in accordance with the laws of the State of Arizona.” JA0014. Choice-of-law provisions in a contract are presumptively valid. *See Bryan v. Massachusetts Mut. Life Ins. Co.*, 178 W. Va. 773, 777, 364 S.E.2d 786, 790 (1987). West Virginia courts may only refuse to do so in two limited circumstances: (1) where the chosen state bears “no substantial relationship” to the parties or the transaction or (2) when the application of the law of the chosen state “would be contrary to the fundamental public policy” of West Virginia. *Id.*

The Circuit Court refused to apply the Provider Agreements’ choice of law provision, reasoning that (1) Plaintiffs’ claims did not fall within the scope of the choice of law provision, and (2) the Provider Agreements “bear[] no substantial relationship with Arizona.” JA0016. Neither conclusion is sound.

First, the Circuit Court improperly considered the application of the choice of law provision contained in the Provider Agreements to the tort claims raised by the Pharmacy Plaintiffs. “Arbitration is simply a matter of contract between the parties.” *Dan Ryan Builders, Inc. v. Nelson*, 230 W. Va. 281, 286, 737 S.E.2d 550, 555 (2012); *see also Geo. Assessment*, 780 S.E.2d at 652 (“The FAA recognizes that an agreement to arbitrate is a contract. The rights and liabilities of the parties are controlled by the state law of contracts.”). Thus, the use of tort-based choice of law principles on a motion to compel arbitration is inappropriate, even if the underlying claims sound in tort. *See, e.g., Felman Prod., Inc. v. Bannai*, 476 F. Supp. 2d 585, 586-87 (S.D. W. Va. 2007) (using English law to determine scope of arbitration provision in contract that specified use of English law where claims included fraud and unjust enrichment claims); *see also Ohio Power Co. v. Dearborn Mid-W. Conveyor Co.*, No. 5:11CV164, 2012 U.S. Dist. LEXIS 90172, at *4-5 (N.D. W. Va. June 29, 2012) (applying Ohio law to question of whether to enforce mediation provision in contract according to Ohio choice of law provision,

where plaintiff's claims included torts). West Virginia's tort-based choice-of-law principles have no application here, and the Circuit Court should have instead applied contractual choice-of-law principles—which, as explained below, require the application of Arizona law.

Second, the Circuit Court's conclusion that Arizona does not bear a substantial relationship to the Provider Agreements is equally flawed and inconsistent with the record. The Circuit Court applied the wrong test to its choice of law analysis, improperly balancing the contacts between Arizona and West Virginia to conclude that West Virginia has a better connection to the Provider Agreements. JA0016 (“Plaintiffs are individual pharmacists who serve local communities in West Virginia compared to Caremark who offers national services.”). The Circuit Court's inquiry should have been limited to whether Arizona has a substantial relationship to the Provider Agreements. *Bryan*, 178 W. Va. at 777, 364 S.E. 2d at 790.

It plainly does. While the Circuit Court justified its conclusion by noting that Caremark's corporate parent, CVS Health Corporation, is based in Rhode Island, the Circuit Court ignored that all of the functions relevant to the Provider Agreements between the Pharmacy Plaintiffs and Caremark occur in Arizona. As Daniel Pagnillo—Caremark's Director of Network Account Management and Compliance, whose office is located in Scottsdale, Arizona—averred, the aspect of Caremark's business that addresses pharmacy benefits is located in Arizona. JA0115, 0122-23. Communications with pharmacies in Caremark's network originate from Caremark's Arizona offices. *Id.* Caremark personnel in Arizona process claims from the pharmacies within Caremark's network (including the Pharmacy Plaintiffs) and handle administrative matters related to those pharmacies. *Id.* Each of the Provider Manuals sent to the Pharmacy Plaintiffs were sent from Caremark's Arizona offices. *Id.* Likewise, any contracts or other documents the Pharmacy Plaintiffs sign are returned to the Arizona offices, where they are stored. JA1508-10.

On these same facts, every other court to have considered the question has held that the Provider Agreements and Provider Manual bear a substantial relationship to Arizona and that the Arizona choice-of-law provision must be enforced. *Crawford*, 748 F.3d at 258 (Provider Manual required pharmacies “to (1) direct any inquiries, grievances, or requested changes to Caremark’s Scottsdale, Arizona office; (2) dispute a claim or request that a claim be adjusted via Caremark’s Scottsdale office; and (3) appeal any audit Caremark conducts to ensure claims accuracy to Caremark’s audit manager, located in the company’s Scottsdale office”); *Burton’s*, 2015 U.S. Dist. LEXIS 122596, *10-11 (observing that “Arizona is the ‘hub’ of Caremark’s PBM operations”); *Gable* at 15-16 n.5; *MedfusionRx, LLC v. Aetna Life Ins. Co.*, No. 12-0567, 2012 U.S. Dist. LEXIS 191045, at *12 (S.D. Miss. Dec. 21, 2012) (“*Medfusion*”). These decisions are consistent with West Virginia law. *See Bryan*, 178 W. Va. at 777-78, 364 S.E. 2d at 790.⁶

B. THE CIRCUIT COURT ERRED IN HOLDING THAT A VALID ARBITRATION AGREEMENT DOES NOT EXIST BETWEEN CAREMARK AND THE PHARMACY PLAINTIFFS.

1. The Circuit Court Singled Out The Provider Manual’s Arbitration Agreement For Discriminatory Treatment.

When interpreting arbitration agreements, “courts must place arbitration agreements on an equal footing with other contracts and enforce them according to their terms.” *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). If a state law or interpretation singles out

⁶ Although not addressed by the Circuit Court below, application of Arizona law would not violate West Virginia public policy. The Supreme Court of Appeals has emphasized that it “does not take a request to invoke our public policy to avoid application of otherwise valid foreign law lightly.” *Howe v. Howe*, 218 W. Va. 638, 646, 625 S.E.2d 716, 724 (2005). To meet their burden of invalidating the parties’ choice-of-law agreement, Plaintiffs must show that application of Arizona law “will have an adverse impact on the citizens of this state.” *Nadler v. Liberty Mut. Fire Ins. Co.*, 188 W. Va. 329, 338, 424 S.E.2d 256, 265 (1992). Plaintiffs have never attempted to meet this burden. Plaintiffs have not explained how applying Arizona law would harm West Virginia citizens, and have not pointed to any public policy established by the State of West Virginia that would be offended by the application of Arizona law here. Indeed, both Arizona and West Virginia law favor arbitration. *Requip v. Jeffrey C. Stone, Inc.*, No. 09-0091, 2010 Ariz. App. Unpub. LEXIS 830, at *5 (Ariz. Ct. App. Mar. 23, 2010); *State ex rel. Wells v. Matish*, 215 W. Va. 686, 693-94, 600 S.E.2d 583, 590-91 (2004).

arbitration agreements for discriminatory treatment, or applies a rule of general applicability to disfavor arbitration, the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (the “FAA”), preempts that rule. *Concepcion*, 563 U.S. at 340; *see also Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1204 (2012) (FAA preempts West Virginia’s prohibition of arbitration agreements in nursing home agreements). Thus, as with any other contractual obligation, courts must hold parties to the terms of their agreements to arbitrate. Syl. Pt. 1, *State ex rel. Ocwen Loan Servicing, LLC v. Webster*, 232 W. Va. 341, 356, 752 S.E.2d 372 (2013) (“The purpose of the [FAA] is for courts to treat arbitration agreements like any other contract.”).

The Circuit Court’s order violates this fundamental principle and conflicts with the FAA. The Circuit Court properly found that “[e]ach of the Plaintiffs has an agreement with Caremark,” and that pursuant to these agreements, the Pharmacy Plaintiffs “would sell particular prescription drugs to customers and would receive reimbursement from Caremark.” JA0003. Those findings are in fact confirmed by the only affidavits submitted by the Pharmacy Plaintiffs (from T & J, Johnston and Johnston), which admitted to having a contract with Caremark.⁷

The Circuit Court’s holding that the parties did not validly incorporate the Provider Manual’s arbitration provision in their Provider Agreement cannot be squared with these findings. The Circuit Court did *not* hold the Provider Agreement failed to properly incorporate the Provider Manual; to the contrary, it distinguished between the Provider Manual as a whole, and the arbitration agreement contained therein. *See* JA0018 (“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

⁷ The remaining four Pharmacy Plaintiffs did not submit any affidavits or any other evidence to support their opposition to Defendants’ Motion.

Plaintiffs) never mention arbitration.”). Indeed, the Circuit Court’s finding that the Pharmacy Plaintiffs’ contracts with Caremark permitted them to receive reimbursements from Caremark for dispensing prescription drugs, JA0003 n.5, necessarily means that the parties validly incorporated the Provider Manual; after all, the Provider Manual sets forth the terms by which the Pharmacy Plaintiffs submitted claims to Caremark and received reimbursement for those claims. *See* JA0393-0400. As a result, the Circuit Court singled out the arbitration provision from the remainder of the Provider Manual, placing it on unequal footing with other aspects of the contract. *Credit Acceptance Corp. v. Front*, 231 W. Va. 518, 532, 745 S.E.2d 556 (2013) (compelling arbitration, explaining “insofar as the circuit courts’ rulings single out arbitration for disfavored treatment, such rulings must be rejected”). This error, alone, mandates reversal.

2. The Circuit Court Made Errors Of Law And Fact In Holding That The Parties Did Not Validly Incorporate The Arbitration Agreement.

The Order reflects other errors in holding that the parties failed to incorporate the arbitration agreement into their contract. First, the Circuit Court’s holding is predicated on a clearly erroneous factual assertion. While the Circuit Court stated there was “no physical or verbal proof” that the Pharmacy Plaintiffs received amended Provider Manuals, JA0018, the only evidence is that Plaintiffs in fact did receive these Manuals. Defendants attached to Mr. Pagnillo’s affidavit copies of the FedEx delivery confirmations demonstrating that each Pharmacy Plaintiff received and signed for the 2009 Provider Manual. These shipping records demonstrate that each Pharmacy Plaintiff received the Provider Manual on February 27, 2009, and therefore had at least 30 days to review and familiarize themselves with the Provider Manual before it became effective. JA0122-23, 0455-57; *see also* JA1276. Tellingly, Plaintiffs offered no evidence to the contrary nor disputed that they received copies of the 2009 Caremark Provider

Manual before its effective date. In fact, the affidavits submitted by T & J and Johnston and Johnston confirm they received the Caremark Provider Manual in advance. JA1760, 1768.

The Circuit Court's Order is also replete with legal errors. Citing no authority to support its reasoning, the Circuit Court concluded the arbitration provision was unenforceable because 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)" to draw attention to the mandatory terms of the arbitration agreement. JA0017. Such emphasis is not required. Moreover, the Circuit Court ignored that the arbitration provision was specifically identified in the Provider Manual's Table of Contents, included a bold heading that matched the same size and style as other sub-headings throughout the Provider Manual, and was written in the same font used throughout the Provider Manual. JA0383, 0425. In other words, the arbitration agreement should be treated like every other provision in the Provider Manual, which is precisely what the FAA requires. *Concepcion*, 563 U.S. at 339; *see also Crawford*, 748 F.3d at 265 (rejecting argument that arbitration provision was inconspicuous, observing that "the arbitration clause was no less conspicuous than any other provision of the Provider Manual").

The Circuit Court justified its conclusion by stating that "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." JA0018.⁸ The Circuit Court did not cite any record evidence to support these statements—because there is none. Four of the six Pharmacy Plaintiffs did not offer *any* evidence in opposing Defendants' Motion; the two that did (T & J, Johnston and Johnston) submitted identical, conclusory affidavits that do not support the

⁸ To the extent these issues overlap with the Circuit Court's unconscionability analysis, that is addressed *infra* at Part V.E.

Circuit Court’s assertions. *See* JA1759-61, 1767-69. In any event, even if there were any evidence to support the Circuit Court’s reasoning—and there is none—Plaintiffs’ failure to read the arbitration provisions in the Provider Manual does not allow them to circumvent their contractual promise to arbitrate this dispute. *Nationstar*, 2016 W.Va. LEXIS 202, at *18.

The Circuit Court erred further in concluding there was “no mutual assent” to the periodic updates to the Provider Manual because the Pharmacy Plaintiffs were not required to sign each version of the Provider Manual. JA0018. The Provider Agreements and incorporated Provider Manual authorize Caremark to amend the Provider Manual upon notice to each pharmacy provider. *See supra* at Part II.A.4. Caremark then sends each provider—including the Pharmacy Plaintiffs—the amended Provider Manual in advance of its effective date. JA0425; *see also* JA0177, 0191, 0205, 0221, 0269, 0342. The providers, in turn, communicate their acceptance to the amended Provider Manual by submitting claims to Caremark for payment after the effective date of the amended Provider Manual. *Id.* That is precisely what occurred here, JA1465, and courts have uniformly affirmed this method of amendment-by-notice. *See Grasso*, 2015 U.S. Dist. LEXIS 145975, at *15-16 (“CVS/Caremark do not have the ability to unilaterally amend the Provider Manual and bind pharmacies to those amendments. . . . Even if CVS/Caremark were to amend the agreement and delete the arbitration clause, if a pharmacy was unhappy with the change, it could stop submitting claims.”) (internal citations omitted); *see also Crawford*, 748 F.3d at 266; *Muecke*, at 35-47; *Burton’s*, 2015 U.S. Dist. LEXIS 122596, at *2.

3. The Circuit Court Misapplied *U-Haul*.

The Circuit Court relied solely on *U-Haul* in holding that the parties did not validly incorporate by reference the arbitration agreement in the Provider Manual. In *U-Haul*, this Court set forth a three-part test to determine whether terms incorporated by reference bind the parties:

(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.

232 W. Va. at 444, 752 S.E.2d at 598.

The *U-Haul* court then held that the defendant had not validly incorporated the terms of its "Addendum" into the short rental contract signed by the plaintiffs. *Id.* This conclusion was based on three factors: (1) the reference to the separate Addendum in the short rental contract was "quite general with no detail provided to ensure that U-Haul's customers were aware of the Addendum and its terms," (2) the Addendum was designed to look "more like a document folder advertising U-Haul products . . . than a legally binding contractual agreement," and therefore could confuse consumers; and (3) "most troubling to [the] Court," U-Haul provided the Addendum to its customers only *after* they signed the short rental contract. *Id.*

U-Haul does not support the Circuit Court's holding. First, as explained above, Arizona law rather than West Virginia law should have governed the Circuit Court's analysis. *See supra*, Part V.A.⁹ Under Arizona law, a document is incorporated by reference so long as there is "clear and unequivocal" language in the contract that the document is to be incorporated. *Weatherguard Roofing Co. v. DR Ward Construction Co.*, 214 Ariz. 344, 346-47 (Ariz. Ct. App. 2007) (general conditions were validly incorporated by reference, even though conditions were not attached to the contract, where contract stated the "attached General Conditions are part of the subcontract"). The clear and repeated references in the Provider Agreement to the Provider

⁹ Even if the Circuit Court were correct that tort-based claims fall outside of the Provider Agreement's choice of law provision—and it is not, *see supra* Part V.A—the incorporation of the Provider Manual is plainly a matter of contract interpretation, which the parties agreed would be governed by Arizona law. Thus, under even the narrowest interpretation of the choice of law provision, *U-Haul* does not apply.

Manual plainly meet this standard. *See* JA0127-28, 0132-33, 0138-39 (“[t]his Agreement, the Provider Manual, and all other Caremark Documents constitute the entire agreement between Provider and Caremark, all of which are incorporated by this reference as if fully set forth herein and referred to collectively as the ‘Provider Agreement’” and “[b]y signing below, Provider agrees to the terms set forth above and acknowledges receipt of the Provider Manual”); JA0183, 0197, 0211 (“this agreement, its schedules, and the PCS Manual . . . contain the entire agreement between Provider and PCS”); JA0189, 0203, 0217 (“By signing below, the undersigned represents and warrants to PCS Health Systems, Inc. that (i) it has read the PCS Agreement . . . and the other PCS Documents, and (ii) agrees to be bound by such agreements”). Moreover, Arizona courts have *rejected* the view that an arbitration agreement must be specifically referenced in the incorporating language. *Weatherguard*, 214 Ariz. at 348.

Even if this Court were to apply West Virginia law to determine the validity of the Provider Agreement’s incorporation of the Provider Manual, the facts of this case are critically different than *U-Haul*. Here, unlike *U-Haul*, nothing was hidden from the Pharmacy Plaintiffs in their Provider Agreements. The Provider Agreements that Plaintiffs McDowell, Waterfront, and McCloud each signed clearly and repeatedly reference the Provider Manual; indeed, each Pharmacy Plaintiff signed the Provider Agreement and acknowledged receipt of the Provider Manual and agreement to its terms. *See* JA0115-16, 0127-28, 0132-33, 0138-39. Similarly, the Provider Agreements that T & J, Johnston and Johnston, and Griffith & Feil each signed state clearly that the Provider Agreement includes the “PCS Manual.” JA0183, 0197, 0211.¹⁰ These Plaintiffs further received an additional notice in 2004 that after Caremark purchased

¹⁰ Any purported surprise of an arbitration agreement is particularly unpersuasive as to Plaintiffs T & J, Johnston and Johnston, and Griffith & Feil, as the PCS form Provider Agreement contains an arbitration provision on its face. JA0183, 0197, 0211.

AdvancePCS, “both companies will be using the same base pharmacy provider agreement effective August 1, 2004” and that this provider agreement would be called the “Caremark Provider Agreement.” JA0221. These Plaintiffs then received the 2004 version of the Caremark Provider Manual, which included an arbitration provision materially identical to the version contained in the 2009 Caremark Provider Manual. JA0270.

Moreover, unlike the unusual appearance of the *U-Haul* addendum that was found to be confusing to the individual consumers and unclear as to whether it was a contract document, the Caremark Provider Manual itself has the appearance of a binding contract. Mirroring a similar provision in the Pharmacy Plaintiffs’ Provider Agreements, the Provider Manual states on the first page of content following the Table of Contents that the Provider Manual is “incorporated into the Provider Agreement with Caremark” and that “[n]onadherence to any of the provisions or terms of the Provider Agreement (which includes the Provider Manual and all other Caremark Documents) will be a breach of the Provider Agreement with Caremark.” JA0224, 0308, 0385. The Pharmacy Plaintiffs have adhered to its non-arbitration provisions for years while participating in Caremark’s network. JA1465. Tellingly, the Pharmacy Plaintiffs have never denied that they have otherwise adhered to the Provider Manual’s non-arbitration provisions, and the two affidavits that Plaintiffs have offered in support of their position (on behalf of T & J and Johnston and Johnston) acknowledge that the Provider Agreement refers to the Provider Manual and that Plaintiffs were provided copies of the Manual. *See* JA1760, 1768.

Finally, unlike the plaintiffs in *U-Haul*, each of the Pharmacy Plaintiffs received a copy of the 2009 Provider Manual *before* it took effect. The FedEx shipping records attached to Mr. Pagnillo’s affidavit demonstrate that, consistent with the amendment procedures in the Provider Agreements and Provider Manual, each Pharmacy Plaintiff received, and signed for, the 2009

Provider Manual on February 27, 2009, at least 30 days prior to the 2009 Provider Manual's effective date. JA0177, 0191, 0205, 455-57, 1276. Thus, while the *U-Haul* plaintiffs received the invalidly incorporated addendum only *after* signing a form contract that purported to incorporate the addendum, the Pharmacy Plaintiffs each had at least 30 days to review the 2009 Provider Manual before agreeing to its terms by submitting claims for reimbursement.

Thus, none of the factors that led the *U-Haul* court to find an invalid incorporation by reference occurred here. By contrast, the Provider Agreement clearly references the Provider Manual several times, the front cover of the Provider Manual makes clear that it is the Provider Manual referenced in the Provider Agreement (and Plaintiffs have never asserted any doubt as to which document is the Provider Manual), and the Pharmacy Plaintiffs' adherence to the other terms of the Provider Manual for years leaves no doubt that they assented to its terms.¹¹

4. The Circuit Court's Order Ignores That Three Pharmacy Plaintiffs Signed A Provider Agreement Containing An Arbitration Agreement On Its Face.

Even if the Circuit Court was correct in holding that the Provider Agreements fail to validly incorporate the Provider Manual's arbitration provision—and it was not—it erred, at a minimum, in refusing to compel arbitration as to T & J, Johnston and Johnston, and Griffith & Feil. The Provider Agreements signed by each of these Plaintiffs contain an arbitration provision requiring arbitration before the AAA in Scottsdale, Arizona—just like the Provider Manual's arbitration provision. JA0183, 0197, 0211. Thus, the Court need not even engage in any incorporation by reference analysis to compel arbitration as to these three Pharmacy Plaintiffs.

¹¹ In *U-Haul*, this Court characterized its test as consistent with decisions by the Fifth Circuit and California courts, among others. *See* 232 W. Va. at 442-43 & n.12, 752 S.E.2d at 596-97 & n.12. Notably, the Fifth Circuit in *Crawford*, and a California district court in *Uptown*, upheld the incorporation of the Provider Manual by reference in the Provider Agreement. *See Crawford*, 748 F.3d at 262-63; *Uptown*, 962 F. Supp. at 1183.

The Circuit Court acknowledged this fact but, in a footnote, refused to compel arbitration as to these three Plaintiffs, stating “[w]hile the three Plaintiffs might have previously assented to arbitration with PCS Health Systems, Inc. (and this is 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.” JA0023. This conclusion is inconsistent with the record.

First, it conflicts with the Circuit Court’s own finding that “[e]ach of the Plaintiffs has an agreement with Caremark.” JA0003. Second, it ignores that two of these same Plaintiffs (T & J, Johnston and Johnston) offered affidavits in which they *admitted* that they “entered into a provider agreement with Caremark” and admitted further that they received the Provider Manual that was “referred to in the agreement” JA1760, 1768. Third, the undisputed evidence is that each of the six Pharmacy Plaintiffs received and signed for the 2009 Provider Manual more than 30 days prior to its effective date. JA0455-57. Fourth, the undisputed evidence is that each Pharmacy Plaintiff is a member of Caremark’s pharmacy network and has submitted claims to Caremark for reimbursement for many years. JA1465. The Pharmacy Plaintiffs have filled (and continue to fill) prescriptions on behalf of participants in all of the PBM plans, and they continue to submit claims for those services under the terms of the Agreements and Provider Manual. JA1465. Caremark, in turn, has processed and paid the agreed reimbursements to the Pharmacy Plaintiffs. JA1465. Indeed, Plaintiffs’ Complaint focuses on the alleged use of information they provided to Caremark while doing business under the Provider Agreements. JA0053-60.

Moreover, courts in other jurisdictions considering these exact agreements found others similarly situated to the Pharmacy Plaintiffs—including both those who originally signed Provider Agreements with Caremark Inc. and those who had agreements with PCS—are parties

to operative Provider Agreements with Caremark that have been validly amended from time to time in conformance with the parties' contracts, and include the Provider Manual. *See, e.g., Crawford*, 748 F.3d at 254, 266; *Muecke*, at 36-47; *Uptown*, 962 F. Supp. 2d at 1178-79. There is no factual or legal basis to deviate from the sound reasoning of these numerous other courts.

Finally, to the extent the Circuit Court questioned whether T & J, Johnston and Johnston, and Griffith & Feil were parties to a contract with Caremark at all, that is for the arbitrator to decide. *See Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445-46 (2006).

C. THE CIRCUIT COURT ERRED IN REFUSING TO GIVE EFFECT TO THE PARTIES' AGREEMENT TO DELEGATE QUESTIONS OF SCOPE TO THE ARBITRATOR, RATHER THAN THE COURT.

The Circuit Court erred further in failing to give effect to the parties' incorporation of the AAA Commercial Rules and therefore refusing to defer to the arbitrator to decide whether Plaintiffs' claims are subject to arbitration. The Provider Manual's arbitration provision states that the parties' arbitration must be conducted "in accordance with the Rules of the American Arbitration Association." JA0425. As every case to address these contracts has held, that incorporation provides clear and unmistakable evidence that the arbitrator, rather than the court, must determine arbitrability.¹² That is because the AAA Rules provide: "The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." *See* AAA Commercial Arbitration Rule R-7(a), available at <http://www.adr.org/aaa/faces/rules>.

Every Federal Court of Appeals to squarely address the issue has held that the express incorporation of the AAA Rules into the Caremark Provider Manual shows the parties' clear

¹² While two district courts initially reached the arbitrability issue, both were reversed by the relevant federal Court of Appeals. *See Crawford*, 748 F.3d at 263; *Uptown*, 962 F. Supp. 2d 1172, *reversed in part*, No. 13-16686 (9th Cir. Nov. 27, 2015).

agreement to delegate the question of arbitrability to the arbitrator.¹³ Likewise, the courts considering the Caremark Provider Manual's incorporation of the AAA Rules have held it provides "clear and unmistakable evidence that the parties to the Provider Agreement agreed to arbitrate arbitrability" and so the question "whether the Plaintiffs' claims are subject to arbitration must be decided in the first instance by the arbitrator, not a court." *Crawford*, 748 F.3d at 263; *see also Muecke*, at 49-56; *Medfusion*, 2012 U.S. Dist. LEXIS 191045, at *14-15.

Despite this universal authority, the Circuit Court refused to give effect to the parties' incorporation of the AAA rules, reasoning that the "effort and diligence necessary for individual pharmacies to get to the AAA rules," the absence of any "further explanation of AAA rules in Caremark documents," and the purported lack of a "signed agreement directly between the Plaintiffs and Caremark that specifically uses the word arbitration/has an arbitration clause" meant the incorporation of the AAA rules did not delegate questions of arbitrability to the arbitrator. None of these reasons withstands scrutiny.

First, the AAA Rules are available on the internet to the public. *See* AAA Commercial Arbitration Rules and Mediation Procedures, available at <https://www.adr.org>. Thus, they are as easily accessible to Plaintiffs as they are to Caremark employees, or anyone else with access to a computer. While the Circuit Court suggested that it was a hardship for a "small independent owner of a pharmacy" to review the AAA Rules, courts have routinely enforced the incorporation of the AAA Rules even in consumer disputes, as well as in disputes involving

¹³ *See, e.g., Oracle Am., Inc. v. Myriad Group A.G.*, 724 F.3d 1069, 1074 (9th Cir. 2013); *Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.*, 687 F.3d 671, 674 (5th Cir. 2012); *Green v. SuperShuttle Int'l, Inc.*, 653 F.3d 766, 769 (8th Cir. 2011); *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366, 1373 (Fed. Cir. 2006); *Terminix Int'l Co. v. Palmer Ranch LP*, 432 F.3d 1327, 1332 (11th Cir. 2005); *Contec Corp. v. Remote Solution Co.*, 398 F.3d 205, 208 (2d Cir. 2005); *see also United States ex rel. Beauchamp v. Academi Training Ctr., Inc.*, No. 11-371, 2013 U.S. Dist. LEXIS 46433 (E.D. Va. Mar. 29, 2013), at *15-16 ("the seven circuits that have explicitly addressed this question have held that the express adoption of these rules presents clear and unmistakable evidence that the parties agreed to arbitrate arbitrability").

commercial entities and their owners, like Plaintiffs. *See, e.g., Harrington v. Pulte Home Corp.*, 211 Ariz. 241, 249 n. 9 (Ariz. Ct. App. 2005) (AAA rules are “available publicly, on-line”).

Second, the Circuit Court cited no authority for its suggestion that Caremark had an obligation to explain the AAA Rules to the Plaintiffs. Plaintiffs had ample time to review the Provider Manual when it was updated in 2009 (or during any of the earlier amendments). Indeed, the law of this Court is clear that a “party to a contract has a duty to read the instrument,” and its counterparty has no obligation to explain or point out its terms. *Syl. Pt. 4, Am. States Ins. Co. v. Surbaugh*, 231 W. Va. 288, 745 S.E.2d 179 (2013). Arizona courts have likewise rejected the argument that a party has any obligation to provide the AAA rules or discuss the consequences of their incorporation. *See Perry v. NorthCentral University, Inc.*, No. 10-8229, 2011 U.S. Dist. LEXIS 106051, at *17-18 (D. Ariz. Sept. 19, 2011) (applying incorporation of AAA rules, though not explained or provided to plaintiff, because plaintiff “had the intellectual capacity to read and understand the arbitration provisions, and . . . the ability and opportunity through the internet to access and review the rules of the American Arbitration Association”).

Third, as explained above, each of the Pharmacy Plaintiffs is a party to a Provider Agreement with Caremark. Each of those Provider Agreements expressly incorporates the Provider Manual as part of that contract. And each of the Pharmacy Plaintiffs has continued to submit claims to Caremark, receiving hundreds of thousands of dollars in reimbursement.

In reaching its flawed conclusion, the Circuit Court “look[ed] solely at the delegation provision under *Schumacher*.” JA0025 (citing *Schumacher Homes of Circleville v. Spencer*, 235 W. Va. 335, 774 S.E.2d 1, 31-32 (W. Va. 2015)). The United States Supreme Court recently vacated that opinion in *Schumacher Homes of Circleville, Inc. v. Spencer*, 136 S.Ct. 1157 (2016), remanding it for further consideration in light of *DIRECTV, Inc. v. Imburgia*, 577 U.S. ___, 136

S. Ct. 463 (2015). Moreover, *Schumacher* is readily distinguishable. Unlike *Schumacher*, the AAA rules are not vague in defining the scope of the arbitrator's power to determine gateway issues. In fact, the AAA rules expressly state that “[t]he Arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the *existence, scope or validity* of the arbitration agreement”—the exact objections Plaintiffs raised below.

Further, for the same reasons that the Provider Manual was validly incorporated into the Provider Agreement, the incorporation by reference to the AAA Rules meets the three-prong test enunciated in *U-Haul*. The Provider Manual specifically refers to the AAA Rules such that Plaintiffs' assent to that document is unmistakable, especially given that Plaintiffs were given advance notice and ample time to review the relevant provisions when the Provider Manual was updated in 2009. The AAA Rules are available on the internet to the public at large. Plaintiffs' claims that they are somehow blindsided by these rules ring hollow, especially considering that Plaintiffs are businesses and business owners subject to considerable regulation by both federal and state agencies which, like the AAA, publish their rules and regulations on the internet.

D. THE CIRCUIT COURT ERRED IN HOLDING THAT PLAINTIFFS' CLAIMS FELL OUTSIDE THE SCOPE OF THE ARBITRATION AGREEMENTS.

The Circuit Court compounded its error in refusing to give effect to the parties' delegation of arbitrability questions by holding that the scope of the arbitration provision did not encompass Plaintiffs' claims. JA0013. Each Pharmacy Plaintiff's Provider Manual states that all disputes “in connection with or arising out of” the Provider Agreement are subject to arbitration. JA0270, 0342, 0425. Once again, courts around the country considering similar claims brought by pharmacies against Caremark under the very same broad arbitration language have compelled pharmacies like Plaintiffs to arbitrate their disputes with these same Defendants. *Crawford*, 748 F.3d at 261; *Muecke* at 14; *Gable* at 3; *Uptown*, 962 F. Supp. 2d at 1187.

The Circuit Court departed from these cases and, in the single sentence devoted to its scope analysis, concluded that “[t]ort based claims are not directly related to the Provider Agreements/Provider Manuals governing the relationship and reimbursements between Plaintiffs and Caremark.” JA0013. The Circuit Court did not provide any further explanation, apparently relying on the tort label that Plaintiffs affixed to their claims. That is undoubtedly error. Courts construing a broad arbitration clause must look to the substance of the dispute, not the labels a litigant gives it. *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 319 (4th Cir. 1988). Indeed, this Court and Arizona courts alike have frequently compelled arbitration of tort-based claims under arbitration agreements with similar language. *New v. GameStop, Inc.*, 232 W. Va. 564, 578, 753 S.E.2d 62, 75 (2013); *Harrington*, 211 Ariz. at 254.

Moreover, the Circuit Court applied the wrong standard in its analysis by requiring that Plaintiffs’ claims be “directly related” to the Pharmacy Plaintiffs’ Provider Agreements. There is a presumption of arbitrability, *Nationstar*, 2016 W. Va. LEXIS 202, at *8 n.10, and agreements providing for arbitration of “all disputes arising in connection with” the underlying contract “must be construed to encompass a broad scope of arbitrable issues.” *J.J. Ryan*, 863 F.3d at 321. Such “broad” arbitration agreements encompass not only explicit disagreements concerning the subject contract, but also any claim that has a “significant relationship” with the agreement. *Am. Recovery Corp. v. Computerized Thermal Imaging*, 96 F.3d 88, 93 (4th Cir. 1996).

Plaintiffs’ claims clearly meet this standard. Plaintiffs’ allegations arise from activities taken pursuant to the Provider Agreement and Provider Manual. Plaintiffs specifically allege that Defendants “created, published, distributed and provided to prescription drug benefit plan members benefit and/or membership cards which exclusively or semi-exclusively identify . . . CVS pharmacies [as] the only one or one of two pharmacies . . . where the member or recipient

may purchase their prescription drugs.” JA0056-57, 0059-60 (alleging Defendants “set about to use their [PBM] business to require their members . . . purchase their drugs from defendants’ drug stores”). Setting aside labels, these claims clearly are in connection with or arise out of—indeed depend upon—Plaintiffs’ Provider Agreements, and Plaintiffs’ participation in Caremark’s provider networks, because the “improper means” to which Plaintiffs refer relate to Defendants using data that Plaintiffs provided to Defendants pursuant to the Provider Agreement. *Id.* As other courts have decided, allegations that Defendants used such “improper means” to target network pharmacies’ customers are inextricably bound up with the Provider Agreement. *Crawford*, 748 F.3d at 261; *Muecke* at 14; *Gable* at 3; *Uptown*, 962 F. Supp. 2d at 1187; *Burton’s*, 2015 U.S. Dist. LEXIS 122596 at *31-32.

E. THE CIRCUIT COURT ERRED IN HOLDING THAT THE PHARMACY PLAINTIFFS’ ARBITRATION AGREEMENTS WITH CAREMARK WERE PROCEDURALLY AND SUBSTANTIVELY UNCONSCIONABLE.

The Circuit Court erred in holding the Pharmacy Plaintiffs’ arbitration agreements were unconscionable and unenforceable, JA0025-26, and its opinion ignores the extensive analyses performed by other courts regarding these exact agreements, all reaching the same conclusion that these agreements are not procedurally or substantively unconscionable. *See Crawford*, 748 F.3d at 263-67; *Grasso*, 2015 U.S. Dist. LEXIS 145975 at *18-20; *Uptown*, 962 F. Supp. 2d at 1180-82; *Medfusion*, 2012 U.S. Dist. LEXIS 191045 at *15-16.

“To conclude that a contractual term is unenforceable on grounds of unconscionability requires a finding that the provision in issue is both procedurally and substantively unconscionable.” *Nationstar*, 2016 W. Va. LEXIS 202 at *8-9 (internal quotations omitted).¹⁴

¹⁴ Under Arizona law, while a contract may be unenforceable based on either procedural or substantive unconscionability, *Dueñas v. Life Care Ctrs. of Am.*, 236 Ariz. 130, 135 (Ct. App. 2014), Arizona courts set a high bar for invalidating an arbitration agreement as unconscionable, recognizing that “[c]ourts

Plaintiffs bear the burden to prove unconscionability. *Id.* at *9. Plaintiffs have not met this burden, and the Circuit Court erred by invalidating the arbitration agreement as unconscionable. Only two of the six Plaintiffs offered *any* evidence to support their assertions of unconscionability; even these Plaintiffs merely provided identical conclusory affidavits devoid of any factual detail or backup. This lack of evidence, alone, requires reversal. *Coup v. Scottsdale Plaza Resort, LLC*, 823 F. Supp. 2d 931, 954 (D. Ariz. 2011); *GameStop*, 232 W. Va. at 578, 753 S.E.2d at 75. Not only was the Circuit Court’s holding factually incorrect, but it also finds no support in the law of either West Virginia or Arizona and is—once again—at odds with the careful analysis of other jurisdictions reviewing these exact agreements. *See supra*.

1. The Arbitration Clause Is Not Procedurally Unconscionable.

The Circuit Court based its determination of procedural unconscionability on its view that “the arbitration clause was in a lengthy separate document and incorporated by reference,” the arbitration agreement appeared in a “form agreement” that Caremark prepared, the Plaintiffs asserted that they “are individual community-based, single pharmacies in West Virginia who entered into agreements with Caremark to increase business,” and the Plaintiffs claimed that they “had no reasonable opportunity to understand the terms of the agreement or consult with legal counsel prior to signing the agreements.” JA0025-26.

As this Court has held recently, these facts do not support a finding of procedural unconscionability. In *Nationstar*, the lower court refused to compel arbitration of a complaint brought by two consumers alleging predatory lending and fraud against the lender and servicer of their mortgage, holding the “[plaintiff’s] lack of sophistication in financial matters and the

should not assume an overly paternalistic attitude toward the parties to a contract by relieving one or another of them of the consequences of what is at worst a bad bargain . . . and in declaring the [contract] at issue here unconscionable, we would be doing exactly that.” *Estate of Nelson v. Rice*, 12 P.3d 238, 243 (Ariz. Ct. App. 2000) (citations omitted).

absence of an ‘opt-out’ provision by which the borrowers could reject the arbitration provision and still obtain the loan funds” rendered the arbitration agreement unconscionable. *Nationstar*, 2016 W. Va. LEXIS 202 at *5. The lower court in *Nationstar* noted a lack of “evidence in the record that the arbitration provision was specifically bargained for or that Plaintiffs . . . had the ability to opt-out of resolving potential disputes through arbitration[,]” and that “Plaintiffs were simply not in a position to fully understand the fact that they were relinquishing the right to utilize the court system in signing the arbitration agreement.” *Id.* at *10.

This Court reversed. First, noting that “upon distillation,” the lower court’s opinion—like the Circuit Court’s decision below—was “grounded in the adhesive nature of the contract,” this Court observed that a contract of adhesion did not render it unconscionable:

Courts around the country have recognized that the need for pre-printed form contracts is a stark reality of today’s mass-production/consumer culture. Despite even severe disparities in bargaining power, these agreements are most often enforced, at least as they comport with the reasonable expectations of the parties. A contrary rule would slow commerce to a crawl.

Id. at *11 (quotation omitted).¹⁵

Further, this Court rejected the plaintiffs’ contention that the enforceability of an arbitration provision turned on whether the parties bargained for the provision, *id.* at *17, instead holding that “the enforceability of an arbitration clause does not require separate consideration when the contract as a whole is supported by adequate consideration.” *Id.*; *see also Dan Ryan Builders*, 230 W. Va. at 283, 737 S.E.2d at 552; *GameStop*, 232 W. Va. at 578 (“The petitioner’s bald assertions that the arbitration agreement is procedurally unconscionable because the agreement was not subject to negotiation . . . are simply not sufficient.”).

¹⁵ This Court’s approach to adhesive contracts in *Nationstar* is consistent with *Concepcion*. *See* 563 U.S. at 346-47 (“the times in which consumer contracts were anything other than adhesive are long past”).

This Court also rejected the argument that the arbitration agreement was procedurally unconscionable because plaintiffs were given the contract containing the arbitration agreement during the mortgage closing, a process that lasted “approximately fifteen to twenty minutes.” *Nationstar*, 2016 W. Va. LEXIS 202 at *17. Pointing out that the plaintiffs did not offer evidence they were “denied the right to read the agreement or that they lacked the capacity to understand the arbitration clause,” nor offered evidence that “they were coerced into signing the document,” this Court reasoned that the plaintiffs had a duty to read their mortgage contract and the “fact that the Wests may have signed a document without reading it first does not excuse them from the binding effect of the agreements contained in the executed document.” *Id.* at *18.

Arizona law mandates the same result. Under Arizona law, a contract of adhesion is “fully enforceable” absent other evidence demonstrating it is unconscionable. *Brady v. Universal Tech. Inst. of Ariz., Inc.*, No. 09-1044, 2009 U.S. Dist. 122810, at *6-7 (D. Ariz. Dec. 17, 2009). As in West Virginia, mere inequality in bargaining power between the parties does not make the Provider Agreements unconscionable. *EEOC v. Cheesecake Factory, Inc.*, No. 08-1207, 2009 U.S. Dist. LEXIS 41883, at *7 (D. Ariz. May 6, 2009). Likewise, even if Plaintiffs failed to read the arbitration clause before submitting claims under the 2009 Provider Manual, it dooms their allegations of procedural unconscionability. *See, e.g., Coup*, 823 F. Supp. 2d at 949 (“Plaintiffs’ admitted failure to read the employee manual and Dawson’s alleged failure to give each Plaintiff enough time to read each single-page Acknowledgment do not render Dawson’s arbitration policy and clause procedurally unconscionable.”).

The Circuit Court’s determination of procedural unconscionability is wholly incompatible with West Virginia and Arizona law. First, as in *Nationstar*, the Circuit Court’s opinion distills to its view that Plaintiffs’ arbitration agreements were contained within contracts

of adhesion. JA0024-26. Under both West Virginia and Arizona law, even if true, that fact does not mandate a finding of procedural unconscionability. *Nationstar*, 2016 W. Va. LEXIS 202 at 4; *Brady*, 2009 U.S. Dist. LEXIS 122810, at *6-7. Second, the Circuit Court erroneously relied on unsupported findings that Plaintiffs lacked sophistication. *Nationstar*, 2016 W. Va. LEXIS 202 at *13. In fact, Plaintiffs all own heavily regulated and licensed businesses, which requires the ability to read and follow complex regulations (or seek legal assistance to do so). Plaintiffs offered no evidence as to their age, lack of sophistication, or inability to understand the arbitration provisions. *Nationstar*, 2016 W. Va. LEXIS 202 at *17; *Coup*, 823 F. Supp. 2d at 949; *Perry*, 2011 U.S. Dist. LEXIS 106051 at *17. Finally, as in *Nationstar*, the record is devoid of evidence that Caremark coerced any Plaintiff into signing its Provider Agreement, or that, outside of Plaintiffs' own conclusory statements, Caremark imposed any time pressures on Plaintiffs to do so. *See, e.g., EEOC*, 2009 U.S. Dist. LEXIS 41883 at *7 (arbitration agreement in handbook enforceable in the absence of any evidence that employer placed time pressure on employees to sign). In fact, while this Court in *Nationstar* enforced an arbitration clause contained in an agreement that the plaintiffs received 20 minutes before signing, the undisputed evidence in the record here is that each Plaintiff had at least 30 days to review and investigate the 2009 Provider Manual before communicating its acceptance to the contract. JA0455-57.

2. The Provider Agreement Is Not Substantively Unconscionable

The Circuit Court erred further in concluding Plaintiffs' arbitration agreement is substantively unconscionable. The Circuit Court based this determination on its view that Plaintiffs "do not have the financial ability to pay for arbitration under AAA Rules." JA0025. The Circuit Court admitted, however, that "Plaintiffs did not show any physical evidence of their inability to pay for arbitration," and that its determination was based solely on statements by

Plaintiffs' counsel at the July 15, 2015 hearing on Defendants' Motion. JA0025-26. The Circuit Court's holding—unsupported by any evidence or citation to legal authority—must be vacated.¹⁶

“[T]he party challenging costs as unreasonably burdensome has burden to prove costs likely to be imposed.” *Nationstar*, 2016 W. Va. LEXIS 202 at *23 (citing *Dunlap v. Berger*, 211 W. Va. 549, 567 S.E.2d 265 (2002) (quotation marks omitted). “Statements made by lawyers do not constitute evidence in a case,” and therefore do not assist in satisfying this burden. *W.Va. Fire & Cas. Co. v. Mathews*, 209 W. Va. 107, 112 n.5, 543 S.E.2d 664, 669 (2000).

Nationstar guides this Court to reject claims of substantive unconscionability based on “speculative” claims that the costs of arbitration were “oppressive.” *Nationstar*, 2016 W. Va. LEXIS 202 at *23. This Court rejected the lower court's finding that costs would be oppressive when the “circuit court has provided this Court *with no factual basis for its conclusion.*” *Id.* (emphasis added). The Court's description of the evidence in *Nationstar* perfectly summarizes the only evidence before the Circuit Court here: “An unadorned averment, couched hypothetically, that they could not ‘afford substantial arbitration costs’ is not sufficient to meet their burden of demonstrating that such costs would be unreasonably burdensome.” *Id.* at *25.¹⁷ In fact, the conclusory affidavits here were submitted on behalf of only *two* Pharmacy

¹⁶ Again, the Circuit Court's ruling cannot be squared with numerous rulings that the Provider Agreement and Provider Manual are not substantively unconscionable. *See, e.g., Crawford*, 748 F.3d at 266-68; *Grasso*, 2015 U.S. Dist. LEXIS 145975, at *14-20; *Burton's*, 2015 U.S. Dist. LEXIS 122596, at *16-20.

¹⁷ *See also United States ex rel TBI Invest. Inc. v. BrooAlexa LLC1*, 119 F. Supp. 3d 512 (S.D. W. Va. 2015) (rejecting claims that costs of arbitration were oppressive when provided with “no specific information regarding [plaintiff's] own finances or how these potential costs would present an unreasonable burden.”); *TDytko v. Chesapeake Appalachia, LLC*, No. 5:13CV150, 2014 U.S. Dist. LEXIS 73706, at *25 (N.D. W. Va. May 30, 2014) (“Accordingly, the plaintiffs' speculation as to the costs of arbitration, without more, provides insufficient support for a finding of substantive unconscionability.”); *Heller v. TriEnergy, Inc.*, 877 F. Supp. 2d 414, 430 (N.D. W. Va. 2012) (“This conclusory allegation, without more, is inadequate to show the costs likely to be imposed by the application of the cost sharing provision at issue. Even assuming the truth of this allegation, the Hellers have failed to provide any evidence that would lead this Court to find that the costs would impose upon him an unconscionably impermissible burden or deterrent.”).

Plaintiffs—*four* of the Pharmacy Plaintiffs offered *no* evidence whatsoever to support their claims of unconscionability.

The result is no different under Arizona law. *See Harrington*, 211 Ariz. at 253 (affidavits with “conclusory statements” as to financial position insufficient to support claim that arbitration was cost-prohibitive). The *Harrington* court noted that plaintiffs could not “show arbitration will put them in any worse position than litigation in allowing them to pursue their claims.” *Id.*; *see also Dueñas*, 236 Ariz. at 137 (“Dueñas provided no evidence of the costs she could expect to incur based on her claims” or “evidence regarding the financial circumstances of either the estate or the statutory beneficiaries.”).

Even if this Court were to defer to the Circuit Court’s acceptance of T & J’s and Johnston and Johnston’s naked allegations, it still must reverse its substantive unconscionability determination. Substantive unconscionability is determined on a case-by-case basis, based on a review of factors including “the commercial reasonableness of the contract terms, the purpose and effect of the terms, the allocation of the risks between the parties, and public policy concerns.” *State ex rel. Johnson Controls, Inc. v. Tucker*, 229 W. Va. 486, 495, 729 S.E.2d 808, 817 (2012) (internal quotation marks and quoting citation omitted).¹⁸ Rather than analyze these factors, the Circuit Court reiterated the facts supporting its claim of procedural unconscionability, JA0026, insufficiently supporting its claims of substantive unconscionability. *See, e.g., Montgomery v. Applied Bank*, 848 F. Supp. 2d 609, 617 (S.D. W.Va. 2012) (lack of an opt-out clause “is evidence that the Agreement was a contract of adhesion, which does not address the substantive unconscionability of a contract.”).

¹⁸ Likewise, Arizona courts consider factors such as: “contract terms so one-sided as to oppress or unfairly surprise an innocent party, an overall imbalance in the obligations and rights imposed by the bargain, and significant cost-price disparity.” *Harrington*, 211 Ariz. at 252 (internal quotation marks and quoting citation omitted).

The only portion of the arbitration provision that the Circuit Court held to be unconscionable was its designation of Scottsdale, Arizona as the default location. The Circuit Court ignored, however, that the Provider Manual authorized the parties to mutually agree on an alternative location. JA0425. Plaintiffs' failure to even attempt to exercise this right cannot allow them to circumvent their contractual promise to arbitrate altogether.

F. THE CIRCUIT COURT ERRED IN FAILING TO HOLD THAT THE INDIVIDUAL PLAINTIFFS MUST ARBITRATE AND THAT THE NONSIGNATORY DEFENDANTS COULD COMPEL ARBITRATION.

Because the Circuit Court erroneously invalidated the Pharmacy Plaintiffs' arbitration agreements, it did not address whether the Individual Plaintiffs were subject to arbitration, or whether all Defendants were entitled to compel arbitration of Plaintiffs' claims. Plaintiffs have never disputed that the Individual Plaintiffs are subject to arbitration to the same extent the Pharmacy Plaintiffs are subject to arbitration. Nor have Plaintiffs disputed that the nonsignatory Defendants are as equally able to compel arbitration as is Caremark (the counterparty to each Pharmacy Plaintiffs' Provider Agreement) itself. Accordingly, Plaintiffs have waived any such challenges to arbitration involving these parties. *See, e.g., State v. J.S.*, 233 W. Va. 198, 205, 757 S.E.2d 622, 629 (arguments not raised below are deemed waived).

1. All Plaintiffs Are Subject To Arbitration.

The Individual Plaintiffs own and/or are closely associated with the Pharmacy Plaintiffs. By using “[w]ell established common law principles” such as “agency,” “veil piercing/alter ego” and “estoppel,” non-signatories may compel another, or be compelled, to arbitrate by an arbitration provision within a contract executed by others. *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 416-17 (4th Cir. 2000). Further, nonsignatory plaintiffs, such as the Individual Plaintiffs, can be compelled to arbitrate claims against a signatory where the nonsignatory's claims “are based upon the same facts and are inherently

inseparable” from those brought by a signatory plaintiff. *See Benefits In A Card, LLC v. TALX Corp.*, No. 06- 03655, 2007 U.S. Dist. LEXIS 16321, at *6-7 (D.S.C. Mar. 6, 2007) (limited liability company could be compelled to arbitrate claims where arbitration contract signed by member in individual capacity). Here, the Complaint reflects that the claims of all the Plaintiffs are identical. *See, e.g.*, JA0061-65. Further, the Complaint fails to explain what harm the Individual Plaintiffs suffered, or what theories the Individual Plaintiffs rely on to recover.

2. Plaintiffs Must Arbitrate Their Claims Against All Defendants

Plaintiffs have never disputed that all of the named Defendants are entitled to compel arbitration to the same extent as Caremark itself. As the Fifth Circuit held in addressing similar claims dealing with the same contract language and similar claims by pharmacies, Arizona law permits a nonsignatory to compel arbitration based on equitable estoppel when the plaintiff’s “claims against the nonsignatory Defendants are founded in and inextricably bound up with the obligations imposed by the agreement containing the arbitration clause.” *See, e.g., Crawford*, 748 F.3d at 260-61; *see also Brantley v. Republic Mortg. Ins. Co.*, 424 F.3d 392, 395-96 (4th Cir. 2005). Other courts, addressing similar allegations against the same Defendants, have uniformly compelled arbitration based on equitable estoppel under Arizona law. *Muecke*, 615 F. App’x at 842; *Gable* at 9-18; *Burton’s*, 2015 U.S. Dist. LEXIS 122596 at *27-32.

Here, Plaintiffs’ claims against the nonsignatory Defendants are “bound up” with the terms of the Pharmacy Plaintiffs’ contracts with Caremark and thus must be arbitrated. Tellingly, Plaintiffs do not make any attempt to distinguish Caremark’s conduct from conduct by non-signatories. *See* JA0059-60 (“Defendants . . . set about to use their benefits management business to require their members or patients to purchase their drugs from defendants’ drug stores or purchase their drugs from defendants’ own direct-mail order businesses.”); *see also* JA0059, 0060, 0065-66 (alleging alter ego and agency status). Instead, Plaintiffs allege that the

Defendants utilized “methods and means” of targeting plan members to convince them to fill their prescriptions at CVS Pharmacies. JA0056. The alleged methods and means of collecting, transmitting and/or using the Pharmacy Plaintiffs’ customer information to further the alleged conspiracy, and the services for which the Pharmacy Plaintiffs can and cannot be reimbursed for relating to covered customers, are governed by the Provider Agreements and Provider Manual. *See, e.g.*, JA0393-98, 0414, 0422. Therefore, the issues raised against the nonsignatory Defendants arise from the Provider Agreement and Provider Manual, are intertwined with the Provider Agreement and Provider Manual, and therefore must be arbitrated.¹⁹

VI. CONCLUSION

The Circuit Court’s order denying Defendants’ motion to compel arbitration should be reversed, and this matter should be remanded for further proceedings.

Dated this 20th day of May, 2016.



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¹⁹ *See Crawford*, 748 F.3d at 267-68 (holding Caremark Defendants may compel arbitration of similar claims under the terms of the Provider Manual’s arbitration agreement); *Muecke*, at 13-14 (same); *Gable*, at 20 (same); *see also Adkins v. Labor Ready, Inc.*, 185 F. Supp. 2d 628, 641 (S.D. W. Va. 2001) (plaintiff estopped from denying application of arbitration clause where he “does not seek to distinguish his claims against” the signatory defendants from non-signatories).

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 16-0209

**WEST VIRGINIA CVS PHARMACY,
L.L.C.**, a West Virginia Limited Liability
Company, et al.,

Petitioners,

Appeal from a final order
of the Circuit Court of McDowell County
(11-C-144S)

v.

MCDOWELL PHARMACY, INC., a West
Virginia corporation, et al.,

Respondents.

CERTIFICATE OF SERVICE

I, Pamela C. Deem, counsel for Petitioners, do hereby certify that copies of the **“Petitioners’ Brief”** and accompanying **“Joint Appendix” (Volumes 1 and 2)** have been served this the 20th day of May, 2016, via First Class U.S. Mail to counsel of record as follows:

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A handwritten signature in cursive script, reading "Pamela C. Deem", written in black ink above a horizontal line.

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