



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.,
Defendants Below, 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.,
Plaintiffs Below, Respondents.

PETITIONERS' REPLY BRIEF

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I. INTRODUCTION

Courts in no fewer than eight similar cases have addressed the enforceability of the contracting process and arbitration clauses at issue in this case. Every single case resulted in an order compelling arbitration. Without adequately explaining why or offering sufficient evidence, Plaintiffs advocate a different result. But adopting Plaintiffs' position to do so would be at odds with the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1-16, and this Court's precedent.

This is not a simple case of a difference of opinion. Because arbitration agreements must be enforced like any other contract, adopting Plaintiffs' positions (simply repeated by Amicus, of which some Plaintiffs have been or are key members) would, at a minimum, make West Virginia an outlier and change the law in many respects, including: how choice of law provisions are to be applied in general contracts; the requirements for contract formation; the standards for unconscionability; and analyzing the scope of arbitration agreements.

This Court should reject these proposed changes in the law and compel arbitration based on the clear precedent of the United States Supreme Court, this Court's own precedent, and the well-reasoned decisions of the other courts that have addressed this same agreement to arbitrate.

II. ARGUMENT

While Plaintiffs suggest taking allegations as true (Resp. at 9), the FAA requires resolution of factual issues (9 U.S.C. § 4), and this Court recently reiterated that it reviews the denial of a motion to dismiss and to compel arbitration *de novo*. See *Evans v. Bayles*, No. 15-0600, 2016 W. Va. LEXIS 427 (W. Va. June 1, 2016). Under this standard, as explained below, the Circuit Court Order should be reversed.

A. THE CIRCUIT COURT ERRED BY APPLYING WEST VIRGINIA LAW.

The choice of law provision contained in the parties' contract governs whether the Court should compel arbitration. See Defs. Br. at 14-15; see also, e.g., *Schumacher Homes of*

Centerville, Inc. v. Spencer, No. 14-441, 2016 WL 3475631, at *6 (W. Va. June 13, 2016) (arbitration provision’s enforceability is evaluated “under state contract law”). This is true no matter what the underlying substantive claims may be, as the issue is the application of an “agreement providing for the resolution of disputes . . . by resort to arbitration.” *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Coe*, 313 F. Supp. 2d 603, 610 (S.D. W. Va. 2004) (enforcing New York choice of law provision, despite underlying tort claims); *see also* Defs. Br. at 14-15.

Plaintiffs completely ignore this principle and authority, instead citing and quoting from inapplicable cases in which courts have declined to apply narrowly-worded contractual choice of law provisions to tort claims. *See* Resp. at 9-11. *None* of the cases cited by Plaintiffs addresses application of a choice of law provision to the enforcement of an arbitration provision.

Plaintiffs are also incorrect in their assertion that relevant Arizona and West Virginia law is the same and that the choice of law clause can therefore be ignored. *See* Resp. at 12. Defendants merely pointed out that arbitration should be compelled under either law. As Defendants explained, Arizona does not follow the three-part test for incorporation that Plaintiffs seek to apply under *State ex rel. U-Haul Co. v. Zakaib*, 232 W. Va. 432, 752 S.E.2d 586 (2013). *See* Defs. Br. at 21-22; *see also infra* at 4-5 (discussing standard). And though Defendants maintain that arbitration must be compelled even if *U-Haul* applies, particularly in light of this Court’s more recent decisions (*see infra* at 4-5), Arizona and West Virginia law (at least as Plaintiffs seek to apply it) is not identical on this point nor in the application of unconscionability (*see infra* at Part II.B.).

Finally, Plaintiffs do not address any of the detailed facts or reasons discussed in Defendants’ opening brief showing that the Circuit Court incorrectly concluded no “substantial relationship” exists between Arizona and the parties’ contracts. *See* Defs. Br. at 15 (discussing

relationship). Every court to have considered the question and these facts has found that Arizona bears a sufficient relationship supporting application of the Arizona choice of law provision. *See id.* at 16 (citing cases). Plaintiffs also ignore this authority entirely.

B. THERE IS NO DISPUTE THAT PLAINTIFFS ARE EACH PARTIES TO A PROVIDER AGREEMENT WITH CAREMARK.

Plaintiffs are each undisputedly parties to a contract with Caremark. Resp. at 3. As Defendants pointed out in their opening brief (Defs. Br. at 7; *see also* JA1465, 1787), each Plaintiff has submitted claims to Caremark for years, and each received hundreds of thousands of dollars in reimbursements. Plaintiffs do not argue otherwise. Indeed, contrary to the Circuit Court's assertion that there was "no confirmation that these pharmacies received the Caremark Provider Manual," Order at 22, each Plaintiff signed an agreement showing it had the Provider Manual when it first contracted (JA0128, 0133, 0139, 0189, 0203, 0217), and the undisputed evidence of the amendment process and shipping records demonstrates that each Plaintiff received the amended Provider Manual (JA0122-23, 0455-57) and accepted the amended terms by submitting claims. Plaintiffs do not argue otherwise or offer any contradictory evidence to this. Resp. at 30 (conceding Plaintiffs received 30 days' notice of the amended 2009 Provider Manual prior to its acceptance by submission of claims).

Obviously recognizing the lack of factual support for the Circuit Court's rationale, Plaintiffs raise two arguments against incorporation of the arbitration provision. First, they argue that they should not be bound by the Provider Manual's arbitration provision because it was "inserted in a complex Provider Manual which has its main purpose instructions on processing claims," Resp. at 30, and because three of the Plaintiffs originally entered into a Provider Agreement with a company called PCS (which was later acquired and the contracts amended to be with Caremark) Defs. Br. at 4-6. Plaintiffs' arguments are incorrect, ignore the evidence and

law, and are insufficient for them to avoid arbitration.

i. Plaintiffs McDowell, Waterfront, and McCloud each signed Provider Agreements that clearly and repeatedly reference the Provider Manual, which at that time contained an arbitration provision (*see* JA0270). Those Agreements stated: “[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 that “[b]y signing below, Provider agrees to the terms set forth above and acknowledges receipt of the Provider Manual.” JA0127-28, 0132-33, 0138-39.

Thus, unlike in *U-Haul*, it cannot be said that Plaintiffs were “unaware” of the incorporation of the Provider Manual and its arbitration provision. Under Arizona law, the incorporation is sufficient to compel arbitration, as recognized by the courts that have analyzed these very same terms in the Provider Agreement. Defs. Br. at 21.¹ Even if the Court applies West Virginia law, rather than Arizona law as the parties agreed, the same result is required under this Court’s recent decision in *Evans*. In *Evans*, this Court reiterated its post-*U-Haul* holding in *Navient*, and held that there was a valid incorporation of an arbitration provision where the signed document “indisputably made multiple, clear references to the Brokerage

¹ Plaintiffs suggest that *Weatherguard Roofing Co. v. D.R. Ward Constr. Co.*, 214 Ariz. 344, 348 (Ariz. Ct. App. 2007), is not good law, and that if Arizona law is applied this Court should follow the “Arizona Supreme Court” decision in *Allison Steel*. Resp. at 31 n.12. But *Allison Steel* is not an arbitration decision, and is not an Arizona Supreme Court decision. It is an appellate court case addressing specific questions of indemnification. *Allison Steel Mfg. v. Superior Court*, 22 Ariz. App. 76, 79 (Ariz. Ct. App. 1974). The other case cited by Plaintiffs does not address *Weatherguard*, or arbitration, but merely states that a federal court sitting in diversity jurisdiction must predict the law of the host state and is not bound by intermediate state appellate court decisions—though Plaintiffs exclude the portion of the quote noting these decisions are “illustrative.” *Custom Homes by Via, LLC v Bank of Okla.*, No. CV-12-01017-PHX-FJM, 2013 WL 5783400, at *5 n. 5 (D. Ariz. Oct. 28, 2013). In fact, *Weatherguard*—not *Allison Steel*—continues to be followed. *See, e.g., Idearc Media, LLC v. Palmisano & Assoc., P.C.*, 929 F. Supp. 2d 939, 944 (D. Ariz. 2013); *Alliance Bank of Ariz. v. 720 Howard, LLC*, No. 1 CA-CV 12-0235, 2013 WL 267752, at *2 (Ariz. Ct. App. Jan 24, 2013). For similar reasons, Plaintiffs cannot rely on *Washington Elementary School Dist. No. 6 v. Baglino Corp.*, 169 Ariz. 58 (Ariz. 1991) (Resp. at 37), to refute *Weatherguard*, as that case also concerns indemnifying a party for its own negligence.

Agreement” containing the arbitration provision. 2016 W. Va. LEXIS 427 at *11; *see also id.* at *10-11 (discussing *Navient Sols., Inc. v. Robinette*, No. 14-1215, 2015 W. Va. LEXIS 1050 (W. Va. Nov. 4, 2015)). In short, “[a] party to a contract has a duty to read the instrument.” *Evans*, 2016 W. Va. LEXIS 427, at *11 n.12 (quotation marks omitted).

Plaintiffs assert that the facts of this case are “no different than the facts of *U-Haul*.” Resp. at 30. But they concede critically distinguishing facts: (1) each had the Provider Manual when they signed the Provider Agreement, (2) each agreed to the amendment process, and (3) each Plaintiff received the Provider Manual at least thirty days prior to its effective date. *Id.* (For the other three Plaintiffs an original arbitration agreement was in the actual Provider Agreement document they signed. *See infra* at 6.) By contrast, in *U-Haul* (1) the plaintiffs received the arbitration agreement *after* signing the contract, (2) the reference to it was so unclear that the consumers were not “aware of the Addendum and its terms” at all, and (3) the addendum was deceptively designed to resemble a “document folder advertising U-Haul products.” *U-Haul*, 232 W.Va. at 444. Even if West Virginia law applies, the facts of this case are much more like *Evans* and *Navient*. *See also* Defs. Br. at 20-24.

ii. The Provider Agreements that T & J,² Johnston and Johnston, and Griffith & Feil each signed included an arbitration provision in their text, and each stated clearly that “this agreement, its schedules, and the PCS Manual . . . contain the entire agreement between Provider and PCS” and that “[b]y 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.” JA0183, 0189, 0197, 0203, 0211, 0217. As explained in

² Plaintiffs acknowledge (Resp. at 31) that T & J’s contract was negotiated on its behalf and signed by its franchisor Medicine Shoppe Int’l (which itself is a subsidiary of a Fortune 100 business, *see* Cardinal Health, Inc., Annual Report (Form 10-K), at Ex. 21.1 (Aug. 13, 2015)). But Plaintiffs fail to note that the record shows that T & J also promised to be bound by these same terms. JA0154; JA0116.

Defendants' opening brief at 3-6, pursuant to the agreed-upon amendment process, Plaintiffs' contracts were amended to substitute Caremark and to amend the arbitration provision (via the newer Provider Manuals starting in 2004,³ and ultimately the operative 2009 Provider Manual).

Plaintiffs suggest (Resp. at 31) that there is nevertheless inadequate proof of contracting between these three Plaintiffs and Caremark. The evidence, however, shows the use of an agreed-upon amendment process, with notice and then Plaintiffs consent by continuing to submit claims. JA0120-23, 0269, 0342, 0425, 1465. These Plaintiffs cannot suggest they have no contract with Caremark; their brief concedes it (Resp. at 3), as do the only two that even provided an affidavit, JA 1760 ¶¶ 3, 6 (T & J), JA 1771 ¶¶ 3, 6 (Johnston & Johnston). In addition, each pharmacy Plaintiff continues to submit claims to Caremark pursuant to the Provider Agreement and Provider Manual. JA1465. Every court to consider this amendment process, even when the Provider Agreement was originally with PCS, has compelled arbitration, and Plaintiffs offer nothing to support a different result here. *See* Defs. Br. at 20.⁴

In short, each Plaintiff had an arbitration provision in its original contract, either through incorporation of the Provider Manual (for McDowell, Waterfront, and McCloud), or in the text of the Provider Agreement itself (for T & J, Johnston and Johnston, and Griffith & Feil), which would survive and cover Plaintiffs' claims. Defs. Br. at 3-6 (discussing process). In turn, the operative arbitration provision, adopted by the contractually agreed upon amendment process, is the version found in the 2009 Provider Manual. *See* Defs. Br. at 25-26 (collecting cases).

³ As explained in Defendants' opening brief (Defs. Br. at 5), these Plaintiffs also had contracts with Caremark, Inc. in 2003, but they were merged to be one contract in 2004.

⁴ *See, e.g., Muecke Co. v. CVS Caremark Corp.*, No. CV V-10-78, 2012 WL 12535439, at *15-16 (S.D. Tex. Feb. 22, 2012), *rep. & recomm. adopted sub nom.*, No. CV V-10-78, 2012 WL 12535440 (S.D. Tex. Mar. 29, 2012), *aff'd sub nom.*, 512 F. App'x 395 (5th Cir. 2013), *and on reconsideration*, No. CV V-10-78, 2014 WL 11281393 (S.D. Tex. Sept. 30, 2014), *aff'd sub nom.*, 615 F. App'x 837 (5th Cir. 2015); *Crawford*, 748 F.3d at 266; *Burton's Pharm., Inc. v. CVS Caremark Corp.*, No. 1:11cv2, 2015 U.S. Dist. LEXIS 122596, at *5 (M.D.N.C. Sept. 15, 2015).

C. THE CIRCUIT COURT ERRED IN HOLDING THAT THE ARBITRATION AGREEMENTS WITH CAREMARK ARE UNCONSCIONABLE.

Plaintiffs concede that they must show *both* procedural and substantive unconscionability. *See* Resp. at 14. But, Plaintiffs then *admit* that (1) each Plaintiff received a copy of the current Provider Manual, with its arbitration provision, at least thirty days before the Provider Manual went into effect, Resp. at 30, (2) the Provider Manual sets out its arbitration provision in a separate section with a bold heading and written in the same size and font used throughout the Provider Manual, Resp. at 18, and (3) there is no evidence to support Plaintiffs' claims that they cannot afford arbitration, Resp. at 21. Given these key admissions, and the complete lack of record evidence to the contrary, Plaintiffs' assertions of procedural and substantive unconscionability must fail.

1. The Arbitration Clause Is Not Procedurally Unconscionable.

Each Plaintiff has the burden of proving procedural unconscionability. *Nationstar Mortg., LLC v. West*, 785 S.E.2d 634, 638 (W. Va. 2016). Here, only two pharmacy Plaintiffs provided any evidence of any kind, in the form of affidavits containing only conclusory assertions. JA1760, ¶ 15, JA1764, ¶ 15, 1768, ¶ 15. The others submitted nothing.

Even disregarding this paucity of evidence, Plaintiffs do not offer any basis to refuse to enforce the parties' arbitration agreements. First, while Plaintiffs claim that the "arbitration provision was a non-negotiable term" in the Provider Manual, the record demonstrates, and Plaintiffs concede (Resp. at 20 n.11), that Defendants produced to Plaintiffs examples of Provider Agreements in which Caremark agreed to remove or modify the arbitration provision. *See* JA0975.⁵ Plaintiffs provide no contrary proof that they attempted, or that Caremark denied

⁵ Plaintiffs offer no evidence that these pharmacies in the samples were prohibited from entering into an arbitration agreement, Resp. at 20 n.11, or that Caremark categorically refused to negotiate. And while Plaintiffs state that Mr. Pagnillo could not remember discussing with any pharmacy different terms for its

Plaintiffs the right, to negotiate any terms in the Provider Agreement. *See also* JA1514.⁶

Moreover, even if Plaintiffs had offered proof that the Provider Agreement is a contract of adhesion, they failed to address numerous opinions holding that such a contract is not procedurally unconscionable *per se*. *See, e.g., Nationstar*, 785 S.E.2d at 640 (arbitration clause in contract of adhesion); *New v. GameStop, Inc.*, 232 W. Va. 564, 578, 753 S.E.2d 62, 76 (2013) (“bald assertions that the arbitration agreement is procedurally unconscionable because the agreement was not subject to negotiation . . . are simply not sufficient”).

Second, Plaintiffs allege they had no “reasonable opportunity to understand such agreements or consult with legal counsel prior to signing them.” Resp. at 18. Plaintiffs cite no evidence to support this assertion—because there is none.⁷ In fact, a pharmacy must affirmatively contact Caremark to request a copy of the Provider Agreement, JA1510, 21:22- JA1511, 22:2 (deposition of Daniel Pagnillo), at which point Caremark then sends a copy of the requested Provider Agreement and Provider Manual. JA1511, 22:1-2. Caremark does not impose a deadline to return the completed contract materials, and the pharmacy may take as much time as it needs to review the packet’s contents (or hire an attorney to do so). *Id.* Plaintiffs

Provider Agreement, he in fact testified that it had been done—just not by him personally. JA1514-15.

⁶ Though they do not rely on it in their argument section, Plaintiffs assert that Caremark does not keep a copy of the Provider Manual in each Plaintiff’s file. Resp. at 4-5. In fact, Caremark keeps a copy of each version of the Provider Manual on its electronic system. JA0115, ¶ 11. Caremark also maintains in its files (and produced) copies of all signed contract documents between the parties, as well as other notices sent to Plaintiffs and shipping records demonstrating the delivery of the Provider Manual to each Plaintiff. JA0115, ¶ 11, 1509-11. Plaintiffs also criticize Caremark’s corporate representative witness Daniel Pagnillo, asserting that he did not have firsthand information regarding the communications and negotiations with Plaintiffs at the time Plaintiffs joined Caremark’s network and signed their Provider Agreements. Resp. at 4. But he was familiar with the business records, and Plaintiffs have not alleged there were any additional oral communications. Relatedly, Plaintiffs assert that Caremark “refused to provide responses to the majority” of Plaintiffs’ discovery requests. Resp. at 21. This is not true. The Circuit Court itself limited Plaintiffs’ overbroad discovery requests and Caremark provided full and complete responses to each of these operative requests. JA0965-82.

⁷ This paucity of evidence is particularly noteworthy, as if it existed, Plaintiffs would have introduced it to show any steps they took to attempt to negotiate their contracts or any communications they had with Caremark regarding their Provider Agreements.

provided no evidence to the contrary here. Moreover, Plaintiffs admitted that they each received subsequent amended versions of the Provider Manual at least thirty days before they took effect, plenty of time for Plaintiffs (or their counsel) to review the document before deciding whether to agree to be bound by its terms. *See* Resp. at 30. While Plaintiffs assert that “CVS did not provide any contact information to Plaintiffs regarding questions or concerns relating to the agreements,” Resp. at 4, the Provider Manual lists multiple help desk numbers staffed by Caremark representatives. *See* JA0224, 0308, 0385.

Third, Plaintiffs claim that they are not on the “same level of sophistication” as Caremark and suggest the Provider Agreement is complex. There is no requirement that parties be equally sophisticated. While Plaintiffs assert Caremark had in-house attorneys (Resp. at 18), that is no basis for finding unconscionability. In addition, Plaintiffs (who carry the burden of proof) provide no evidence as to their own size, age, lack of sophistication, or inability to understand the contract, or ability to retain counsel. *Nationstar*, 785 S.E.2d at 641; *Coup v. Scottsdale Plaza Resort, LLC*, 823 F. Supp. 2d 931, 949 (D. Ariz. 2011); *Perry v. NorthCentral Univ., Inc.*, No. CV-10-8229, 2011 U.S. Dist. LEXIS 106051, at *17 (D. Ariz. Sept. 19, 2011). (In fact, T & J admits that its contracting was handled by its franchisor. Resp. at 31; *see also supra* n.5.) Plaintiffs are not uneducated consumers. They are businesses and pharmacies within a complex legal and regulatory framework encompassing both State and Federal laws and regulations.⁸

2. The Provider Agreement Is Not Substantively Unconscionable.

Plaintiffs make two claims in support of substantive unconscionability: (1) that the

⁸ *See, e.g.*, 21 U.S.C. § 801 *et seq.* (Federal Controlled Substances Act), W. Va. Code § 60A-1-115 (W. Va. Uniform Controlled Substances Act), W. Va. Leg. R. §§ 15 *et seq.* (regulations governing the Licensure and Practice of Pharmacy), 21 C.F.R. §§ 200.5 *et seq.* (federal pharmaceutical regulations); *see also Paduano v. Express Scripts, Inc.*, 55 F. Supp. 3d 400, 418 (E.D.N.Y. 2014) (describing pharmacy as a “sophisticated corporate entit[y]”). A pharmacist’s license in the state of West Virginia also requires that an individual “present to the Board [of Pharmacy] satisfactory evidence that he or she is a *graduate of an approved school of pharmacy.*” W. Va. Leg. R. § 15-1-5.2.3 (emphasis added).

Provider Manual limits the remedies available to Plaintiffs, while providing no such limitation on Caremark; and (2) that they cannot afford arbitration. Neither argument withstands scrutiny.

First, Plaintiffs' argument that the arbitrator may only grant remedies in Caremark's favor and bars any recovery for damages by Plaintiffs is a misinterpretation of the Provider Manual, and of its arbitration provision. *See* Resp. at 19-20. The arbitration requirement is mutual, despite any suggestion by Plaintiffs to the contrary. JA0425.

Second, this attacks the remedies terms of the Provider Agreement. But "a party's challenge to another provision of the contract . . . does not prevent a court from enforcing a specific agreement to arbitrate." *Rent-A-Center W., Inc. v. Jackson*, 561 U.S. 63, 70 (2010).

Third, any asserted limitation on remedies for Plaintiffs must be read in light of the requirement that the "arbitrator must follow the rule of Law." JA0425. The clearest interpretation of the contract language read as a whole is that it excludes certain remedies where permitted by Law, but would not exclude remedies required by Law. Plaintiffs have not pointed to anything to suggest that the arbitrator would ignore this requirement. Nor have Plaintiffs pointed to anything to suggest the arbitrator would refuse to sever any invalid limitation on remedies, which is expressly required by the Provider Agreement and Arizona law.⁹

Fourth, even if Plaintiffs' interpretation of the Provider Manual were reasonable, it is an issue for the arbitrator, not this Court. *See PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401 (2003). In *PacifiCare*, the Supreme Court held that "since we do not know how the arbitrator will construe the remedial limitations, the questions whether they render the parties' agreements

⁹ *See* JA0183, 0197, 0211 ("if any provision of this Agreement should be rendered unenforceable or invalid under applicable Law, that provision will be ineffective to the extent of such unenforceability or invalidity without invalidating the remaining provisions of this Agreement"); JA0127, 0132, 0138 (similar); *see also Longnecker v. Am. Express Co.*, 23 F. Supp. 3d 1099, 1111-12 (D. Ariz. 2014) (where contract contained a severability provision, unconscionable portions of contract could be severed and arbitration compelled); *Wernett v. Serv. Phoenix, LLC*, No. 09-168, 2009 WL 1955612, at *9 (D. Ariz. July 6, 2009) (compelling arbitration and severing unconscionable provisions).

unenforceable and whether it is for courts or arbitrators to decide enforceability in the first instance are unusually abstract . . . the proper course is to compel arbitration.” *Id.* at 407. Here, as in *PacificCare*, and as courts have found in other cases involving the Caremark Provider Manual, Plaintiffs’ arguments turn on how the Provider Manual is interpreted, a question that must first be answered by the arbitrator. *See Paduano v. Express Scripts, Inc.*, 55 F. Supp. 3d 400, 419-20 (E.D.N.Y. 2014) (holding it was for the arbitrator, not the court, to construe Caremark Provider Agreement’s remedy provisions); *see also, e.g., In re Cotton Yarn Antitrust Litig.*, 505 F.3d 274, 292 (4th Cir. 2007) (interpretation of contractual limitations provision had to be left to arbitrator, even where it may have barred action).

With respect to the supposed costs of arbitration (Resp. at 21-24), Plaintiffs admit there is no evidence of their own inability to pay. *See id.* at 21. This alone dooms their argument. *See* Defs. Br. at 36; *see also Nationstar*, 785 S.E.2d at 643 (party resisting arbitration had no factual support for claims that the costs of arbitration were “oppressive,” and generalized claims that arbitration was expensive were not sufficient to establish unconscionability). Plaintiffs claim they wanted discovery on costs (Resp. at 3), but Defendants provided information on arbitrator time for the one full arbitration conducted, and Plaintiffs did not seek rate information from the AAA. Courts that have considered similarly unsupported claims of unconscionability as to the Caremark Provider Manual have rejected those arguments, and this Court should as well. *See, e.g., Crawford*, 748 F.3d at 266-68; *Burton’s*, 2015 U.S. Dist. LEXIS 122596, at *16-20.

Plaintiffs do little to respond beyond pointing to other cases, which have nothing to do with Plaintiffs’ own circumstances, and is instead a “generic allegation of unfairness in the costs involved in arbitration.” *Nationstar*, 785 S.E.2d at 643 (internal quotation marks omitted). Indeed, Plaintiffs’ own authority does little to help them. While citing *Spinetti v. Service Corp.*

International, 324 F.3d 212 (3d Cir. 2003), for the expenses that can be expected in arbitration, that court had before it specific factual evidence regarding the costs that the plaintiff employee was required to pay the AAA, as well as her own personal inability to pay. *See id.* at 217; *see also Awuah v. Coverall N. Am., Inc.*, 554 F.3d 7, 13 (1st Cir. 2009) (while acknowledging reports of panels costing between \$100,000 and \$400,000 that Plaintiffs cite here, also stating that “how burdensome arbitration would be” in that case “is uncertain”). And even in *Spinetti*, the court *enforced* the arbitration provision—simply ruling that the defendant should pay the costs and fees involved. Other cases cited by Plaintiffs rejected unconscionability arguments for the very same reason that Plaintiffs’ arguments fail: a lack of evidence to support those arguments. *See, e.g., State ex rel. Dunlap v. Berger*, 211 W. Va. 549, 567, 567 S.E.2d 265, 283 (2002) (costs of arbitration could not support finding of unconscionability, where the lower court “made no determination about the likely costs of arbitration”). And while Plaintiffs claim that arbitration “leaves a victorious consumer worse off than one who simply stays home,” Resp. at 23, this is patently untrue given the cost-shifting mechanism, *see* JA0425.

This is also true as to the costs of travel to Arizona. Plaintiffs cite cases for the proposition that travel costs in theory may be prohibitive for small businesses that are parties to arbitration provisions. *See* Resp. at 24. But, Plaintiffs offer no proof as to what *their* travel costs would be or their inability to pay. Even those cases cited by Plaintiffs are again inapposite. The court in *Bolter v. Superior Court*, 104 Cal. Rptr. 2d 888 (Cal. Ct. App. 2001), did not decline to enforce the arbitration clause at issue, but instead ordered that arbitration proceed with the venue provision severed. *See id.* at 895. Plaintiffs’ other cases fare no better, as they either involve rulings that are not based on assertions of extraordinary expense, or were supported by evidence not present here, such as declarations of personal financial information. *See* Resp. at 24.

Identical arguments raised under the Caremark Provider Manual have been rejected. *See, e.g., Crawford*, 748 F.3d at 268 (substantive unconscionability not found, in part due to “Plaintiffs’ failure to point to any record evidence detailing what it will cost to travel to Arizona, who will be traveling, and how much costs will be”); *Burton’s*, 2015 U.S. Dist. LEXIS 122596, at *17 (North Carolina pharmacies did not “provide any support” for claims that arbitrating in Arizona presented an unreasonable burden, and thus failed to show unconscionability). And the Provider Manual itself permits the parties to agree to conduct the arbitration elsewhere—a provision that Plaintiffs have never invoked. *See* JA0425. In sum, while none of the provisions are substantively unconscionable, if this Court reaches these issues and finds that they were, the Court should simply sever any offending provisions and compel arbitration consistent with the Provider Agreements’ severability provision and Arizona law. *See supra* at 10 n.9.

D. THE PARTIES AGREED TO DELEGATE ARBITRABILITY QUESTIONS.

Plaintiffs agree that parties can delegate arbitrability to the arbitrator. Plaintiffs note this is an issue of federal law (Resp. at 33), but ignore that every federal Court of Appeals to squarely address the issue has held that express incorporation of the AAA Rules is “clear and unmistakable” evidence of delegation to the arbitrator. Defs. Br. at 27 n.13; *see also Brennan v. Opus Bank*, 796 F.3d 1125 (9th Cir. 2015). Indeed, every case considering the Caremark Provider Manual’s incorporation of the AAA Rules has so held.¹⁰

Plaintiffs’ cases do not carry the day. Resp. at 34-36. Their only federal appellate case,

¹⁰ *Crawford*, 748 F.3d at 263, *Muecke*, 2012 WL 12535439, at *49-56, *Medfusion Rx, LLC v. Aetna Life Ins. Co.*, No. Civ. A. 3:12cv567, 2012 U.S. Dist. LEXIS 191045, at *14-15 (S.D. Miss. Dec. 21, 2012), *Burton’s*, 2015 U.S. Dist. LEXIS 122596, at *24-26 (applying Caremark Provider Manual); *see also Sys. Res. & Applications Corp. v. Rohde & Schwarz Fed. Sys., Inc.*, 840 F. Supp. 2d 935 (E.D. Va. 2012) (permissive incorporation of AAA commercial rules in combination with waiver provision in contract constituted clear and unmistakable evidence of parties intended for arbitrator to determine scope); *Sher v. Goldman Sachs*, No. CCB-11-2796, 2012 WL 1377066 (D. Md. Apr. 19, 2012) (scope to be decided by arbitrator when all potential forums’ rules allowed for arbitrator to determine own jurisdiction).

Quilloin, never addressed the issue because the parties never raised it. See *Quilloin v. Tenet HealthSystem Phila., Inc.*, 673 F.3d 221, 229 (3d Cir. 2012). The opinion in *Ajamian v. CantorCO2e, L.P.*, 137 Cal. Rptr. 3d 773, 789 (Cal. Ct. App. 2012), offers only state-court dicta that is inconsistent with how the federal Courts of Appeals have decided the question of incorporation of the AAA rules based on federal law. *Ajamian* refused to decide the issue because (unlike here) the agreement did not actually mandate use of the AAA rules. *Id.* Plaintiffs' reliance on *50 Plus Pharmacy v. Choice Pharmacy Systems, LLC*, 463 S.W.3d 457 (Mo. Ct. App. 2015), is misplaced because the court's decision turned on the fact that an asset purchase agreement signed by both parties placed jurisdiction of any disputes in the "federal and state courts of or located within the State of Missouri," contradicting the incorporated arbitration provision. *Id.* at 461. *Schumacher* also is of no help. Nothing in *Schumacher* suggests that arbitrability cannot be delegated by incorporating the AAA rules. See 2016 WL 3475631, at *10. *Moody v. Metal Supermarket Franchising Am., Inc.*, No C 13-5098 PJH, 2014 WL 988811 (N.D. Cal. Mar. 10, 2014) (Resp. at 36), was abrogated by the Ninth Circuit in *Brennan*, 796 F.3d at 1131 (incorporation of AAA rules in commercial contract delegated arbitrability questions to arbitrator), as recognized in *Interdigital Tech. Corp. v. Pegatron Corp.*, No. 15-CV-02584-LHK, 2016 WL 234433, at *6 (N.D. Cal. Jan. 20, 2016). Additionally, *Tompkins* (which the Ninth Circuit in *Brennan* made clear may in fact be incorrect should it reach the issue, 796 F.3d at 1131) is limited to consumer cases, specifically consumer "clickwrap" agreements. It also states that "when contracting parties are *commercial entities*, incorporation of AAA rules in an arbitration constitutes 'clear and unmistakable evidence' that the parties intended to arbitrate arbitrability." See *Tompkins v. 23andMe, Inc.*, 5:13-CV-05682-LHK, 2014 WL 2903752, at *11-12 (N.D. Cal. June 25, 2014) (emphasis added). Thus, even if the Court were to follow the

minority view of lower federal courts with regard to consumer contracts, it would not assist Plaintiffs. They are not consumers, let alone unsophisticated ones.

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

Even if this Court reaches the scope question—and it should not for the reasons discussed above—the Court should still compel arbitration. No matter how Plaintiffs dress up their allegations, their claims fall within the broad scope of the arbitration provision in the Provider Agreement, particularly because any doubts should be resolved in favor of arbitration. *See, e.g., Schumacher*, 2016 WL 3475631, at *7; *Burton's*, *supra* at *9 (holding broad Caremark clause).

Plaintiffs assert that their claims “are not founded or intimately intertwined” with their contracts with Caremark. Resp. at 27; *see also* Amicus at 7. But that is not the test for determining scope. The agreement covers any claim (regardless of name) with a “significant relationship” to the contract, even if the claim does not actually “implicate[] the terms of” that contract. *Am. Recovery Corp. v. Computerized Thermal Imaging*, 96 F.3d 88, 93 (4th Cir. 1996). Plaintiffs claim that Defendants “entered into a scheme to intentionally and unlawfully take plaintiffs’ customers,” and improperly told Plaintiffs’ customers that “in order to be reimbursed” for prescriptions “under the customer’s own insurance” they would need to use Defendants’ pharmacies or mail order facilities to fill their prescriptions. *See* JA0053, ¶¶ 22-4; 0054, ¶ 29; 0064, ¶¶ 74, 78; 0072-73, ¶ 115; 0074, ¶ 122; 0077, ¶ 131. For this to affect customers who receive covered, or reimbursable prescriptions filled by the pharmacy Plaintiffs, those Plaintiffs must be providing prescription drugs to those customers under the terms of the Provider Agreement (for Caremark’s PBM clients’ customers or members) under the terms of the Provider Agreements. Otherwise, there would be no existing reimbursement or benefits being threatened or business allegedly being disrupted by Defendants’ actions.

Relatedly, Plaintiffs claim that Defendants are “misleading” Plaintiffs’ patients by informing them that they may only be reimbursed for filling prescriptions at CVS-brand or mail-order pharmacies. JA0057, ¶¶ 39-41. But the Provider Manual itself limits the services for which the pharmacy Plaintiffs may seek reimbursement for dispensing prescriptions. *See, e.g.*, JA0393 (“Provider must only submit claims for which Pharmacy Services were provided to an Eligible Person and for Covered Items.”). Thus, the question of whether Plaintiffs’ customers are somehow being misled, or tortiously diverted to CVS pharmacies, will require reference to the Provider Agreement to determine whether Plaintiffs would even have been eligible to provide services to those patients.

Plaintiffs further claim that they are injured in part by loss of reputation with health care plans, an injury that could only be felt if Defendants are acting in their role as a PBM between Plaintiffs and the health plans, which is a role solely defined and governed by the Provider Agreement. *See* JA0067, ¶ 88(d); 0069, ¶ 97(d); 0072, ¶ 113(d); 0076, ¶ 130(d).¹¹ This Court must look at what proof of Plaintiffs’ claims, and Defendant’s defenses, will involve. On that basis, the claims clearly are sufficiently connected to the Provider Agreement.

Thus, regardless of the label applied to their claims, Plaintiffs’ claims relate to the various Provider Agreements because they are related to Caremark’s reimbursement of claims submitted by Plaintiffs, members’ eligibility to be reimbursed for their prescriptions, and Caremark’s use of information gathered from Plaintiffs—all issues directly addressed by the Provider Manual. For these reasons, Plaintiffs’ claim that any pharmacy in West Virginia could bring these claims—

¹¹ Before trying unsuccessfully to avoid the impact of the other court decisions, in an earlier complaint (later dismissed) (*see* JA0089), Plaintiffs more openly alleged the evidence that they hope to rely on to support their claims involves Defendants’ alleged use of “private information that patients provide to non-CVS pharmacies.” JA0466, ¶ 38; *see also* JA0467 ¶ 39 (alleging that Caremark shares patient information gleaned from the PBM business). The use of this information is clearly governed by the Provider Agreement. *See, e.g.* JA0340, JA0422 (discussing Caremark’s right to use patient data).

with or without a contract with Caremark—is simply untrue. *See* Resp. at 26 (and it is also irrelevant, because Plaintiffs do have contracts with Caremark that touch on these issues). Plaintiffs’ final suggestion, that the claims fall outside the scope because they sound in tort instead of contract (*see id.* at 26-27), is likewise wrong. *See, e.g., Long v. Silver*, 248 F.3d 309, 317-19 (4th Cir. 2001) (compelling arbitration of numerous non-contract claims where arbitration provision addressed disputes “arising out of or relating to” the contract in question).

For these reasons, Plaintiffs cannot factually distinguish *Muecke* and other cases (*see* Resp. at 26), as those cases included not only claims of misappropriation of trade secrets, but also allegations of improper interference with business relations, improper exclusions from benefit networks, RICO claims, and more.¹²

Notably, Plaintiffs wrongly rely on *Uptown*. Resp. at 27; Amicus at 7-11. The District Court in *Uptown* required arbitration of the *Uptown* plaintiffs’ misappropriation and other claims, including a claimed based on alleged interference with business relations which lies at the heart of Plaintiffs’ claims here. *Id.* It errantly denied arbitration of claim that Caremark excluded plaintiffs from certain networks in violation of the unfairness prong only of the California Unfair Competition Law. *Uptown*, 962 F. Supp. 2d at, 1186. This portion of the UCL claim was based on an alleged exclusion of the pharmacy from certain benefit networks. *Id.* at 1186. However, the court applied the wrong standard for determining scope, and overlooked

¹² *See Crawford*, 748 F.3d at 255-56 (claims alleging that Caremark collected proprietary patient information, accepted payments from drug companies to directly market certain drug to patients, and conspired with nonsignatories to deny plaintiffs’ customers right to use pharmacy of their choosing); *Muecke*, 2012 WL 12535439, at *9 (same and RICO claim); *see also CVS Pharmacy, Inc. v. Gable Family Pharmacy*, No. CV 12-1057-PHX-SRB, 2012 U.S. Dist. LEXIS 191047, at *3 (D. Ariz. Oct. 22, 2012); *Grasso Enters., LLC v. CVS Health Corp.*, 143 F. Supp. 3d 530, 535 (W.D. Tex. 2015) (allegations regarding Caremark’s claims review and reimbursement process to obtain clients); *Burton’s*, 2015 U.S. Dist. LEXIS 122596, at *4 (misappropriated patient data to obtain clients and restricted certain pharmacy patients from submitting claims through plaintiffs); *Uptown Drug Co. v. CVS Caremark Corp.*, 962 F. Supp. 2d 1172, 1184 (N.D. Cal. 2013) (tortious interference claim based alternatively on misappropriation of patient data and exclusion from certain PBM networks).

that the Provider Agreement covers which networks the pharmacy can and cannot participate in. *See* JA0399. Thus, the courts in *Crawford*, *Burton's* and *Muecke* rejected this approach based on similar claims. *See, e.g., Burton's*, 2015 U.S. Dist. LEXIS 122596, at *25-26 (“without a Provider Agreement with Defendants, Plaintiffs would not be able to participate in any Caremark network,” and the “Provider Agreements control which networks they may participate in and provide that Caremark may establish networks in which not all providers may participate”); *Crawford Prof'l Drugs, Inc. v. CVS Caremark Corp.*, No. 2:12-cv-114, 2012 U.S. Dist. LEXIS 191046, at *52 (S.D. Miss. Oct. 24, 2012) (same effect); *Muecke*, 2012 WL 12535439, at *22 (same). Moreover, the Ninth Circuit in *Uptown* reversed the district court's refusal to compel arbitration of all aspects of the UCL claim. Order at 2, *Uptown Drug Co. v. CVS Caremark Corp.*, Nos. 13-16686, 13-16692, and 13-1670 (9th Cir. Nov. 27, 2015), ECF no. 50.

Finally, Plaintiffs' passing statement that they are not subject to arbitration because they seek injunctive relief (Resp. at 7) is waived because it is not developed, ignores the language of the operative arbitration provision (which permits judicial injunctive relief only to halt or prevent a breach of contract), and ignores that every court to address this issue has rejected it.¹³

F. PLAINTIFFS' NEW OPPOSITION TO EQUITABLE ESTOPPEL LACKS MERIT AND, REGARDLESS, ANY REMAINING CLAIMS MUST BE STAYED.

Plaintiffs also raise, for the first time in this litigation, an argument in opposition to Defendants' application of equitable estoppel. Resp. at 27-28. As Plaintiffs acknowledge, “the circuit court did not specifically address the issue of whether the nonsignatory Defendants can compel Plaintiffs to arbitrate,” Resp. at 27, and Defendants raised that as an error.

¹³ *See, e.g., Crawford*, 748 F.3d at 261 n.7 (ordering arbitration despite injunctive relief claim); *Grasso*, 143 F. Supp. 3d at 535 (same); *Burton's*, 2015 U.S. Dist. LEXIS 122596, at *2 (“Plaintiffs request injunctive and declaratory relief as well as damages”), *report and rec. adopted*, No. 1:11CV2, 2015 U.S. Dist. LEXIS 139432 (M.D.N.C. Oct. 14, 2015); *MedfusionRX*, 2012 U.S. Dist. LEXIS 191045, at *12-14 (rejecting argument that seeking injunctive relief, standing alone, is exempted from arbitration).

If the Court nonetheless addresses this issue, it should rule in Defendants' favor. Each court that has considered whether to permit Caremark's affiliates to invoke the arbitration provision in the Provider Manual has done so—even in *Crawford*, the case Plaintiffs rely upon in their brief.¹⁴ Here, as explained above, Plaintiffs' claims are interwoven with how Caremark determines eligibility for claim reimbursement, the networks in which Plaintiffs can participate and customers for which they can be reimbursed by Caremark, and how Caremark is permitted to use patient information obtained from pharmacies—all matters that are covered in detail in the Provider Agreement. *See supra* at 15-16. Plaintiffs' claims cannot be evaluated without analysis of the Provider Agreement. *See also* Defs. Br. at 29-31; *supra* at 15-18.

Further, as in *Burton's*, Plaintiffs have pled that Defendants acted in concert to carry out this alleged misconduct, without differentiating between Defendants. *See* JA0059-61, ¶¶ 47-55. This provides an independent basis to compel arbitration as to the nonsignatory Defendants. *See Burton's*, 2015 U.S. Dist. LEXIS 122596, at *30-32; *see also J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.3d 315, 320-21 (4th Cir. 1988).

Plaintiffs claim that this Court “has not adopted the standard” used in *Brantley v. Republic Mortgage Ins. Co.*, 424 F.3d 392 (4th Cir. 2005), but this is misleading. Arizona law governs. *See supra* at Part II.A. Even if West Virginia law applies, this Court *has* recognized that equitable estoppel may be employed by a nonsignatory. *See Caperton v. A.T. Massey Coal Co.*, 225 W. Va. 128, 153, 690 S.E.2d 322, 347 (2009) (“a range of transaction participants,

¹⁴ *See* 748 F.3d at 261 (because various tort claims, including alleged refusal to participate and be reimbursed in some networks, were “inextricably bound up with the obligations imposed by the agreement containing the arbitration clause,” nonsignatories to the agreement could compel arbitration) (quotations omitted); *see also, e.g., Muecke*, 615 F. App'x at 842 (nonsignatories could compel arbitration where tort claims and RICO claim were “bound up with the provider agreements”); *Burton's*, 2015 U.S. Dist. LEXIS 122596, at *30-32 (plaintiffs referred to Caremark and its affiliates collectively in the complaint, and plaintiffs would need to rely upon the terms of those agreements for their claims); *Gable*, 2012 U.S. Dist. LEXIS 191047, at *19-32 (tort claims bound up with those agreements).

signatories and non-signatories, may benefit from and be subject to a forum selection clause”). And this Court has recognized that this includes circumstances where it is “reasonably foreseeable” that the nonsignatory would seek to enforce a forum selection clause, or where the claims arise “either directly or indirectly” from the contract containing the provision. *Caperton*, 225 W. Va. at 153 (internal quotation marks omitted). Courts have compelled arbitration with nonsignatories based on *Caperton*, and thus even under West Virginia law, arbitration should be compelled. See *Schultz v. Dan Ryan Builders, Inc.*, No. 3:12-cv-15, 2013 U.S. Dist. LEXIS 93722, at *42-43 (N.D. W. Va. July 3, 2013) (claims against signatory and nonsignatory were “based on the same facts” and “so intertwined that they are inherently inseparable”).

Plaintiffs also cite the third-party beneficiary disclaimer in the Provider Manual, see Resp. at 28-29, to preclude application of equitable estoppel. However, “[e]quitable estoppel . . . overrides a no non-party rights provision in the same way that it overrides an arbitration provision stating that it only applies to disputes between parties.” *Muecke*, 615 F. App’x at 842 (analyzing Caremark Provider Manual provision). As this Court noted in an analogous situation, “a non-party to a contract need not be a third-party beneficiary in order for the forum-selection clause to be binding against such non-party.” *Caperton*, 225 W. Va. at 150.

Finally, even if this Court held that the nonsignatory Defendants may not compel arbitration, the claims against those Defendants should be stayed. See, e.g., *Chempower, Inc. v. Robert McAlpine, Ltd.*, 849 F. Supp. 459, 461 (S.D. W. Va. 1994) (“judicial economy and avoidance of confusion and possible inconsistent results” favor a complete stay).

III. CONCLUSION

For all of these reasons, the Circuit Court’s Order should be reversed.

Dated this 27th day of July, 2016.



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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.,

Defendants Below, 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.,

Plaintiffs Below, Respondents.

CERTIFICATE OF SERVICE

I, Pamela C. Deem, counsel for Petitioners, do hereby certify that true and accurate copies of the foregoing **“Petitioners’ Reply Brief** have been served this the 27th day of July, 2016, via First Class U.S. Mail upon counsel of record as follows:

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