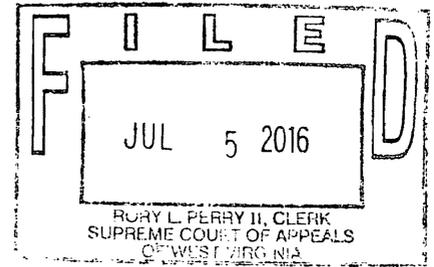


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
DOCKET NO. 16-0209



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

Defendants Below, Petitioners,

v.

Civil Action No. 11-C-144
(Circuit Court of McDowell County)

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

Plaintiffs Below, Respondents.

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I. STATEMENT OF THE CASE

II. PROCEDURAL HISTORY

This civil action was filed in McDowell County Circuit Court on July 21, 2011, by McDowell Pharmacy, Inc., Robert Brown and five other independent licensed pharmacists and pharmacies against licensed “pharmacists in charge¹” and “CVS” pharmacies all located in West Virginia and competing with plaintiffs in this same geographic area. Plaintiffs, Respondents, also joined as Defendants, Petitioners were CVS Caremark Corporation and related Caremark and CVS companies.

The Defendants, Petitioners, removed the case to the United States District Court for the Southern District of West Virginia on September 8, 2011. Defendants filed their recent motion to dismiss and to compel arbitration on April 30, 2015. A hearing on the motions was held on July 15, 2015. The Circuit Court of McDowell County denied the motion to dismiss by Order dated January 19, 2016.

III. FACTUAL SUMMARY

A. The Pharmaceutical Supply Chain

Before a discussion of the issues set forth in this Response, it is important to understand the positions of independent pharmacists and Pharmacy Benefits Managers (PBMs) in the pharmaceutical industry and the positions of the Parties in this case. “Numerous parties, intertwined through complex and often inconspicuous financial relationships, form the pharmaceutical supply chain. It is within this complicated framework that independents--located at the bottom of the pharmaceutical supply chain--claim that they are being squeezed in their negotiations with pharmacy benefit managers (PBMs).” Daniel B. Rosenthal, *Are Independent*

¹ See W.Va. Code § 30-5-23 for duties and responsibilities of pharmacists in charge.

Pharmacies in Need of Special Care? An Argument Against an Antitrust Exemption for Collective Negotiations of Pharmacists, 13 Yale J. Health Pol'y, L. & Ethics 198: Vol. 13: Iss. 1, Article 4 (2013) (footnotes omitted).

While the independent cannot bear to lose the insurer's tens of thousands of plan subscribers as customers, the PBM conversely has little incentive to negotiate with the independent. As a result, PBMs allegedly force independents into contracts of adhesion, leaving them unable, or just barely able, to cover their costs.

Daniel B. Rosenthal, *Are Independent Pharmacies in Need of Special Care? An Argument Against an Antitrust Exemption for Collective Negotiations of Pharmacists*, 13 Yale J. Health Pol'y, L. & Ethics 198: Vol. 13: Iss. 1, Article 4 (2013) (footnotes omitted). *See also*, Allison Dabbs Garrett & Robert Garis, *Leveling the Playing Field in the Pharmacy Benefit Management Industry*, 42 Val. U. L. Rev. 33 (Fall, 2007) (The retail pharmacies are generally offered a “take it or leave it” deal to be included in the network, with only the largest pharmacy chains having any ability to negotiate with the PBMs.”).

PBMs manage two-thirds of all prescriptions in the United States. Joseph C. Bourne & Ellen M. Ahrens, *Healthcare's Invisible Giants: Pharmacy Benefit Managers*, 60 Fed. Law. 50 (May 2013) (footnote omitted). The largest PBMs have annual profits in the billions and revenues in the tens of billions. *Id.* (footnote omitted).

B. The Parties

1. The Plaintiffs

The Plaintiffs in this case are independent retail pharmacies and pharmacists in the State of West Virginia. Plaintiffs operate small-town, community pharmacies and serve places such as: War, McDowell County and the vicinity; Beckley, Sophia, Crab Orchard, and the vicinity; Ceredo, Kenova, Lavalette, Huntington, and the vicinity; and Southern Morgantown and the vicinity.

2. The Defendants

In 2003, Caremark Rx, Inc. merged with Advance PCS creating a \$23 billion dollar company.

According to the Company's 2013 10K Statements: "CVS Caremark Corporation ("CVS Caremark", the "Company", "we," "our" or "us"), together with its subsidiaries, is the largest integrated pharmacy health care provider in the United States." The Lund Report reported that during an Oregon Senate Health Committee in 2013, representatives from CVS Caremark and Express Scripts said they each have about 100 million customers. Christopher David Gray, The Lund Report, *Small Pharmacies Getting Squeeze From Goliath PBMs*, 2013, available at <https://www.thelundreport.org/content/small-pharmacies-getting-squeeze-goliath-pbms>.

According to the report, the two companies control the majority of the prescription drug market, "towering over little pharmacies ... that have no choice but to accept their terms." *Id.*

3. The Circumstances Surrounding the Provider Agreements

The Plaintiffs operate small, independent pharmacies. Such pharmacies rely upon contracts with PBMs, such as Caremark CVS, in order to compete and continue in the pharmacy business. JA1759-1772. Caremark CVS is one of the largest PBMs in the country. *Id.* In order to fill client's prescriptions and be paid for them, independent pharmacies necessarily enter in to agreements with agreements with PBMs such as Caremark CVS. *Id.* CVS Caremark prepared the subject agreements. *Id.* *See also*, JA1513-1519, 1522-1523, 1538. The agreements were form agreements. *Id.* *See also*, JA 1511-1633. CVS Caremark did not advise pharmacies such as Plaintiffs of any opportunity to negotiate the form documents and Plaintiffs believed it would be futile to attempt to do so. JA 1759-1772. The agreements, documents and manuals were lengthy and complex. *Id.* Plaintiffs had no reasonable opportunity to consult legal counsel prior to

signing the agreements. Id. CVS did not provide any contact information to Plaintiffs regarding questions or concerns relating to the agreements. Id. Caremark CVS did not provide any information to explain the terms of the agreements. Id. The Plaintiffs did not understand their legal rights were being taken away by signing the PBM agreements. Id. The agreements are unfair and unreasonably favorable to Caremark CVS, and require Plaintiffs to travel to, and appear in Scottsdale, Arizona, before an arbitrator who may be biased, with limited legal rights, for unreasonably costly proceedings, with the possibility of having to pay for the entire proceedings and the costs of Caremark CVS and its attorneys, creating a substantial deterrent effect upon the Plaintiffs based upon the substantial harm it could cost Plaintiffs and their businesses. Id.

The discovery plaintiffs were allowed to pursue in this case was Court ordered production of all of the documents defendants relied upon for support of its claim for arbitration and WVRCP 30 (b)(7) depositions of all defendants. Daniel Pagnillo was designated for all subjects for all defendants. Mr. Pagnillo had no knowledge of the identify of people who prepared the contracts and agreements they are relying on in this case, JA1538 at 132, and most importantly, he did not know firsthand or second hand the conversations or communications between the plaintiffs, the different parties, the providers and the employees of Caremark or CVS with regard to arbitration and he admitted that he knew nothing else about the contracts or the negotiations. JA1538-1539 at 133-135.

Mr. Pagnillo could not recall even one conversation he had with any pharmacist about changes to provider agreements or the manuals. JA1519 at 55-56. Also, while Mr. Pagnillo admitted that they send a form letter to the targeted pharmacy, they do not keep a copy of the letter in the file. JA1511 at 24. The letter was “a form...” which was “included in the contract

packet that would explain, you know, what the contents are and what we're asking the pharmacy to provide back to us in order to contract into our network.” JA1511 at 24-25.

A manual is sent to the pharmacy but the pharmacy is not requested nor required to return it to defendants and it is not kept in the file. JA1511 at 25. These manuals are approximately 200 pages in length and cover a multitude of issues related to plaintiffs’ duties in dealing with customers, audits, credentialing networks, clinical programs, claim submissions, intellectual property, Medicare and much more. But nowhere does it deal with stealing plaintiffs’ customers as complained of in this case.

The only documents that defendants keep in a pharmacy’s file is the provider agreement that is sent back to CVS. JA1512 at 26. Since 2006, there has been anywhere from 3-5 different versions of a provider manual distributed by defendants. JA1513 at 33. Mr. Pagnillo has never discussed any amendments to a provider manual with any pharmacy, and there is no listing of pharmacies whose provider manual was amended or negotiated. JA1515 at 40-42. He didn’t remember any names, any specific instances nor the words that were changed nor could he testify as to whether the arbitration agreements were removed entirely or only partially changed. JA1516 at 42. Mr. Pagnillo referred plaintiffs to defendants’ legal department with respect to issues relating to any alteration to provider agreements. JA1516 at 43.

Plaintiffs wanted to know the cost of arbitration in Arizona in front of an AAA arbitrator. Mr. Pagnillo could not answer this. He could only say that in the past five years, there may have been “a couple of arbitration proceedings.” Again, he could only refer the plaintiffs to the legal department who is defending this case with outside counsel who, of course, were not designated to testify. JA1517 at 47. Mr. Pagnillo has no idea or knowledge of what an arbitration would cost in Scottsdale, Arizona nor did he know the names of any arbitrators. JA1517-1518 at 47-48,

51. The likely reason Mr. Pagnillo knew little concerning any issue is that defendants have 26,000 to 28,000 independent pharmacies which they have provider agreements with through their pharmacy network in the United States. JA1519 at 56. They also have about 8000 CVS pharmacies they manage. JA1519 at 60. Defendants also have over 200 pharmacy chains with 40,000 pharmacies in the chains in the United States. JA1519 at 62. Therefore, 6 employees and Mr. Pagnillo had 74,000 pharmacies to deal with all contract issues and maintain a file on each one. Mr. Smith had approximately 35 employees, mostly data entry personnel, with only 4 managers. JA1520 at 58-59.

Defendants claim their right to arbitration with regard to McDowell, McCloud and Waterfront pharmacies by a Provider Agreement which referenced the 200 page manual. Defendants' claim arbitration agreements with T & J, Johnston & Johnston, Griffith & Feil pharmacies through agreements with other networks. However, those agreements reference the same limitations as the Caremark manual language. The issues dealing with arbitration are limited only to those issues related to filling prescriptions, not with stealing plaintiffs' customers away. Caremark claims they sent notices to plaintiffs concerning the change in ownership but they never mentioned arbitration in this notice. See the Court's summary of the relationship of parties which is helpful in understanding the relationships. JA0003-0006. Court Order p. 3-6.

For example, the defendants claim that the plaintiffs are bound by a notice that was sent by another company "Advance Paradigm," in the year 2000, concerning Rite Aid Corporation's sale of PCS Health to Advance Paradigm. Defendants claim this sale requires arbitration of plaintiffs' claims. (JA0219.) This notice does not say plaintiffs are bound by any prior agreement and plaintiffs are not required to sign the agreement in order to participate in the plan. The only record the defendants have of this was reference to a different company's "practice was

to include this in the remittance advice that was sent to each pharmacy with their payment.” *Id.* 128. This was similar to an EOB document. Obviously, this would not be sufficient to notify another business they are agreeing to arbitrate. *Id.* 128. Defendants have no receipt of delivery of any kind and the notice was not placed nor kept in plaintiffs’ file. *Id.* 129.

IV. SUMMARY ARGUMENT

Defendants argue that this litigation must be arbitrated by the American Arbitration Association (AAA) pursuant to AAA Rules in Arizona. However, the arbitration clauses in this case limit its scope to issues only relating to the Provider Agreement. The Provider Agreement subject matter plays no role in the Defendants’ tortious and intentional misconduct in taking Plaintiffs’ customers. Further, the arbitration clause specifically states that the clause does not control Plaintiffs’ right to bring an action in any court for an injunction. Plaintiffs’ first cause of action requests the Court to issue an injunction pursuant to W.Va. Code § 30-5-23 against Defendants for causing and continuing to cause Plaintiffs irreparable harm by requiring Plaintiffs’ customers to purchase their drugs from CVS pharmacies. In other words, an employer enters into an agreement for Caremark to manage its employees’ pharmaceutical needs. The employee may have been a customer of plaintiffs for decades but Caremark tells the customer he now must get his prescriptions filled by CVS only.

In Defendants’ petition for appeal they set out what appears in their brief as organized and straightforward contracts entered into with the Plaintiffs’ in this case. That is not the circumstance. These Defendants cannot produce contracts between Plaintiffs’ and Caremark Defendants signed by Plaintiffs wherein the word “arbitration” is mentioned. In the contracts which are directly between Plaintiffs and Defendants, Defendants rely upon references to a 200 page Provider Manual for the arbitration clause. The Provider Manual is not signed and is not

placed in Defendants' pharmacy files. The manual deals with complex rules on how to fill prescriptions and documents the transactions under Defendants pharmacy plans. The contracts with other Plaintiffs are a result of purchases by Defendants of other pharmacy networks and Defendants rely upon contracts between those networks and Plaintiffs and unsigned notices of amendments or changes in ownership and manuals which are claimed to be a part of an agreement to arbitrate.

All of this begs the question of why if it is important for Defendants in this case to arbitrate all causes of action did Defendants not plainly state the same in the written signed contract with Plaintiffs. In the case where Defendants had a signed contract and could have easily inserted the arbitration clause therein, Defendants buried it in a 200 page complicated procedural manual. The only plausible answer is that Defendants did not want Plaintiffs to see it and have an opportunity to negotiate with regard to arbitration.

The causes of action in this case include: (a) a plea under W.Va. Code § 30-5-23 for an injunction; (b) a complaint alleging violation of W.Va. Statutes W.Va. Code § 7-18-3 and § 32 A-1-2, § 46 A-6-102(7) and § 33-11-4; (c) a complaint for violation of West Virginia Antitrust Act W.Va. Code § 47-18-1 et sec.; (d) common law fraud, interference with business relationships; and (e) the violation of related statutes including W.Va. Code § 33-16 and W.Va. Code § 50-5-7, § 30-5-31(g)(19)(20) and § 30-5-23.

V. STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs request the Court to permit and Order that arguments will be in accordance with the Rule of Appellate Procedure 20. The issues in this case are complex both as to the legal issues and the factual issues.

VI. STANDARD OF REVIEW

This Court reviews a trial court's denial of a motion to compel arbitration for an abuse of discretion and to determine whether the trial court's findings are supported by substantial evidence. *Nationstar Mortgage, LLC v. W.*, 785 S.E.2d 634, 637 (W. Va. 2016).

In cases, such as this, where the challenge to the arbitration clause is based on unconscionability, the issue presented is a question of law controlled by contract principles. *Id.* at 637. As with all questions of law, review of the trial court's conclusion is plenary. *Id.* For purposes of review of the Circuit Court's decision on the motion to dismiss, the complaint should be liberally construed in the light most favorable to the plaintiff and its allegations taken as true. *J.F. Allen Corp. v. Sanitary Bd. of City of Charleston*, 785 S.E.2d 627, 631 (W. Va. 2016)

VII. ARGUMENT

1. **The Circuit Court's Application of West Virginia Law is not Reversible Error.**

Defendants argue that the Circuit Court erred in applying West Virginia law in this case. Defendants, argue that the parties agreed that Arizona law should apply to this dispute. In this case, where, as below, the Defendants have consistently contended that there is no difference between West Virginia law and Arizona law, the Circuit Court did not err in applying West Virginia law.

First, as the Circuit Court recognized, a choice of law clause is only enforceable if it applies to the disputes actually being made by the parties. The limited choice of law clause in the agreements states that the agreements are to be "construed, governed and enforced in accordance with the laws of the State of Arizona." JA00114. As the Southern District and the Circuit Court correctly noted, choice of law clauses do not apply where, as here, the clause is limited to contract claims and the disputes arise out of tort claims. JA:007 at ¶ 4 & n.25 citing

Work While U-Wait, Inc. v. Teleasy Corp., No. CIV.A. 2:07-00266, 2007 WL 3125269, at *6 (S.D.W. Va. Oct. 24, 2007). This holding is consistent with decisions from multiple jurisdictions. See *FDIC Corp. v. British-American Corp.*, 755 F.Supp. 1314, 1325 (E.D.N.C.1991)(“A contractual choice-of-law provision selecting the law to govern the construction or interpretation of the contract has no impact on the law which governs claims unrelated to the construction or interpretation of the contract.”); *Glaesner v. Beck/Arnley Corp.*, 790 F.2d 384, 386 n. 1 (4th Cir.1986). This is particularly true when the disputes involve statutory claims as are at issue here. *ITCO Corp. v. Michelin Tire Corp.*, 722 F.2d 42, 50 n. 11 (4th Cir.1983) (“We are satisfied that North Carolina's courts would apply N.C.Gen.Stat. § 75–1.1 to the facts presented here without regard to the presence of the contractual choice of law provision. The nature of the liability allegedly to be imposed by the statute is ex delicto, not ex contractu. No issue of contractual construction, interpretation, or enforceability is raised by this case. The liability alleged is predicated, rather, upon actions separate and distinct from the Dealer Sales Agreement itself.”); *Glaesner v. Beck/Arnley Corp.*, 790 F.2d 384, 386 n.1 (4th Cir. 1986) (apply form state’s law to statutory claims noting: “No issue of contractual construction, interpretation, or enforceability is raised by this case. The liability alleged is predicated, rather, upon actions separate and distinct from the Dealer Sales Agreement itself.”). Indeed, the exact choice of law clause at issue here has been interpreted to exclude tort and statutory claims. *Dunafon v. Taco Bell Corp.*, Bus. Franchise Guide (CCH) ¶ 10,919 (W.D. Mo. 1996) (holding that a contract providing that “[t]he law of California applies to the *construction and enforcement* of the Agreement...” did not encompass tort claims) (emphasis added); *Jiffy Lube International, Inc. v. Jiffy Lube of Pennsylvania, Inc.*, 848 F. Supp. 569 (E.D.Pa. 1994) (holding that choice of law clause that stated “[t]his Agreement shall be *construed, interpreted, and enforced* in

accordance with the laws of the State of Maryland” did not cover tort claims) (emphasis added).

In essence the Defendants seek to impose contractual choice of law restrictions that are beyond the agreement that they made:

If the parties intended for New York law to apply to all disputes between the parties, they could have made that clear in the NDAs by including a broader choice of law provision. As written, the narrow provision only establishes that New York law will govern interpretation and construction of the contract, not that it controls non-contractual claims that are related to the contract. *See* *1163 *Med. Instrument Dev. Labs. v. Alcon Labs.*, No. C 05–1138 MJJ, 2005 WL 1926673, at *3 (N.D.Cal. Aug. 10, 2005) (contract provision that the “Agreement is to be performed in accordance with the laws of the State of Texas and shall be construed and enforced with the laws of the State of Texas” did not explicitly control non-contractual claims related to the contract); *see also Thompson & Wallace of Memphis, Inc. v. Falconwood Corp.*, 100 F.3d 429, 432–33 (5th Cir.1996) (tort claims were not governed by a choice of law clause providing that the chosen law applied to the “agreement and its enforcement”). Therefore, the Court finds that because Plaintiff’s trade secret misappropriation claim is a non-contractual “claim[] arising in tort,” it is not contemplated by the NDAs’ choice of law provisions and should be “decided according to the law of the forum state.” *See Sutter*, 971 F.2d at 407.

Vesta Corp. v. Amdocs Mgmt. Ltd., 80 F. Supp. 3d 1152, 1162-63 (D. Or. 2015).² Given that the issues arise in tort and the choice of law clause does not apply, it is clear that West Virginia law applies. *Work While U-Wait, supra*.

²*See also Maltz v. Union Carbide Chemicals & Plastics Co.*, 992 F.Supp.286 (S.D.N.Y. 1998) (holding that a contract providing that the “Agreement is to be construed in accordance with the laws of the State of New York” only covered contract claims); *Lincoln General Insurance Co. v. Access Claims Administration*, 2007 WL 2492436 at 5-7 (E.D. Cal 2007) (holding that choice of law provision that states “[t]his Agreement shall be interpreted and construed in accordance with the laws of the State of Pennsylvania” refers only to construction and interpretation of the agreement, not the substantive law that applies to any dispute arising from the relationship); *Caton v. Leach Corp.*, 896 F.2d 939, 942-43 (5th Cir. 1990) (holding that choice of law provision that “this Agreement shall be construed under the laws of the State of California” was narrow and did not govern claims for torts that did not arise out of contract); *America’s Favorite Chicken Co. v. Cajun Enterprises, Inc.*, 130 F.3d 180, 182 (5th Cir. 1997) (“On its face, the choice of law clause is restricted to the *interpretation* or *construction* of the agreements.... Since the claims [under California’s Franchise Act] do not implicate the interpretation or construction of the agreements, they are not governed by the narrow choice of law clause present here”).

Second, this Court need not engage in a difficult choice of law analysis when, as here the Defendants do not contend that there is any substantive difference in West Virginia law on the applicable issues. The Defendants repeatedly argue that the law and the result in this case is the same regardless of whether the Court applies West Virginia or Arizona law. *See, e.g.,* Appellants' Brief at pp. 31-32 & n. 14, 37 n.18. When the result of the choice of law analysis is the same is the same, this Court has held that it is not error to apply West Virginia law even in the context of the enforceability of an arbitration clause. *Schumacher Homes of Circleville, Inc. v. Spencer*, 235 W. Va. 335, 347-48, n. 13, 774 S.E.2d 1, 13-14, n.13 (2015), *cert. granted, judgment vacated on other grounds*, 136 S. Ct. 1157 (2016) (rejecting error based on failure to apply law of state directed by choice of law clause when that state's law and West Virginia law similar); *see also State ex rel. Chemtall Inc. v. Madden*, 216 W. Va. 443, 451-52, 607 S.E.2d 772, 780-81 (2004) ("If there is no material conflict [between West Virginia law and another state's law], there would be no constitutional injury in applying West Virginia law.").

Finally, choice of law clauses are not enforceable when the contract bears no substantial relationship with the jurisdiction whose laws the parties have chosen to govern the agreement. Syl. pt. 1, *General Electric Company v. Keyser*, 166 W.Va. 456, 275 S.E.2d 289 (1981). In this case, the Circuit Court made detailed findings regarding the lack of any substantial relationship between these Plaintiffs' claims and the State of Arizona. JA:0013-16. While the Circuit Court acknowledged that there is some limited connection with Arizona and some of the Defendants, its conclusion that the relationship was not substantial was not an abuse of discretion.

2. The Doctrine of Unconscionability Precludes Enforcement of the Subject Arbitration Clauses.

Congress did not depart from the general principle that unconscionability is a safety valve

in the law of contracts when it enacted the Federal Arbitration Act, but instead explicitly made state unconscionability law applicable to agreements to arbitrate:

[A]n agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract.*

9 U.S.C. § 2 (emphasis added). Congress intended “to make arbitration agreements as enforceable as other contracts, but not more so.” *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967). Consequently, “generally applicable contract defenses, such as fraud, duress, or *unconscionability*, may be applied to invalidate arbitration agreements without contravening § 2.” *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686-87 (1996). (emphasis added). And, while there is a policy favoring arbitration agreements, such agreements must not be so broadly construed as to encompass claims and parties that were not intended by the original contract. *Brown ex rel. Brown v. Genesis Healthcare Corp.*, 228 W. Va. 646, 673, 724 S.E.2d 250, 277 (2011), *cert. granted, judgment vacated sub nom. Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 182 L. Ed. 2d 42 (2012) (*Brown I*).

‘The doctrine of unconscionability, properly conceived and applied, . . . protects against fraud, duress and incompetence, without demanding specific proof of any of them,’ looking instead to the content of the contract and the positions of the parties.

Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & Econ. 293, 302 (1975).

Under West Virginia law,

The doctrine of unconscionability means that, because of an overall and gross imbalance, one-sidedness or lop-sidedness in a contract, a court may be justified in refusing to enforce the contract as written. The concept of unconscionability must be applied in a flexible manner, taking into consideration all of the facts and circumstances of a particular case.

Syl. Pt. 12, *Brown I, supra*. Unconscionability has generally been recognized to include an “absence of meaningful choice on the part of one of the parties together with contract terms

which are unreasonably favorable to the other party.” *Brown ex rel. Brown v. Genesis Healthcare Corp.*, 229 W.Va. 382, 729 S.E.2d 217, 226 (2012) (*Brown II*). A court in its equity powers is charged with the discretion to determine, on a case-by-case basis, whether a contract provision is so harsh and overly unfair that it should not be enforced under the doctrine of unconscionability. Syl. 9, *Dan Ryan Builders v. Nelson*, 230 W.Va. 281, 737 S.E.2d 550 (2012).

In most cases, in determining if all or part of a contract is unconscionable, there must be some small measure of both procedural and substantive unconscionability. Syl. Pt. 20, *Brown I, supra*. Substantive unconscionability goes to the specific terms of the contract and procedural unconscionability concerns the formation of the agreement. To be unenforceable, a contract term must—“at least in some small measure”—be both procedurally and substantively unconscionable. *Id.* at Syl. Pt. 20; *Dan Ryan Builders, Inc. v. Nelson*, 230 W.Va. 281, 289, 737 S.E.2d 550, 558 (2012).

With respect to procedural unconscionability, the Court has held:

Procedural unconscionability is concerned with inequities, improprieties, or unfairness in the bargaining process and formation of the contract. Procedural unconscionability involves a variety of inadequacies that results in the lack of a real and voluntary meeting of the minds of the parties, considering all the circumstances surrounding the transaction. These inadequacies include, but are not limited to, the age, literacy, or lack of sophistication of a party; hidden or unduly complex contract terms; the adhesive nature of the contract; and the manner and setting in which the contract was formed, including whether each party had a reasonable opportunity to understand the terms of the contract.

Syl. Pt. 17, *Brown I, supra*.

The Court reemphasized in *Brown II* that procedural unconscionability often begins with a contract of adhesion. *Id.* at 393, 729 S.E.2d at 228. The restated syllabus point 18 of *Brown I*, provides,

[a] contract of adhesion is one drafted and imposed by a party of superior strength that leaves the subscribing party little or no opportunity to alter the substantive

terms, and only the opportunity to adhere to the contract or reject it. A contract of adhesion should receive greater scrutiny than a contract with bargained-for terms to determine if it imposes terms that are oppressive, unconscionable or beyond the reasonable expectations of an ordinary person.

Syl. Pt. 11, *Brown II*, *supra*.

In *Brown I*, *supra*, the Court explained:

Procedural unconscionability addresses inequities, improprieties, or unfairness in the bargaining process and the formation of the contract. “Procedural unconscionability has been described as the lack of a meaningful choice, considering all the circumstances surrounding the transaction including ‘[t]he manner in which the contract was entered,’ whether each party had ‘a reasonable opportunity to understand the terms of the contract,’ and whether ‘the important terms [were] hidden in a maze of fine print[.]’ ” Procedural unconscionability involves a “variety of inadequacies, such as ... literacy, lack of sophistication, hidden or unduly complex contract terms, bargaining tactics, and the particular setting existing during the contract formation process.” Determining procedural unconscionability also “requires the court to focus on the ‘real and voluntary meeting of the minds’ of the parties at the time that the contract was executed and consider factors such as: (1) relative bargaining power; (2) age; (3) education; (4) intelligence; (5) business savvy and experience; (6) the drafter of the contract; and (7) whether the terms were explained to the ‘weaker’ party.”

Brown I, at 681, 285.

With respect to substantive unconscionability, the Court held,

Substantive unconscionability involves unfairness in the contract itself and whether a contract term is one-sided and will have an overly harsh effect on the disadvantaged party. The factors to be weighed in assessing substantive unconscionability vary with the content of the agreement. Generally, courts should consider the commercial reasonableness of the contract terms, the purpose and effect of the terms, the allocation of the risks between the parties, and public policy concerns.

Syl. Pt. 19, *Brown I*. The Court recognized in *Brown II* that:

[s]ubstantive unconscionability may manifest itself in the form of ‘an agreement requiring arbitration only for the claims of the weaker party but a choice of forums for the claims of the stronger party.’ ‘Some courts suggest that mutuality of obligation is the locus around which substantive unconscionability analysis revolves.’ ‘Agreements to arbitrate must contain at least ‘a modicum of bilaterality’ to avoid unconscionability.’

229 W. Va. at 393, 729 S.E.2d at 228 (footnotes omitted).

Further, in *State ex rel. Richmond American Homes v. Sanders*, 228 W. Va. 125, 129, 717 S.E.2d 909, 913 (2011), the Court stated that when “an agreement to arbitrate imposes high costs that might deter a litigant from pursuing a claim, a trial court may consider those costs in assessing whether the agreement is substantively unconscionable.” In Syllabus Point 4 of *State ex rel. Dunlap v. Berger*, 211 W.Va. 549, 567 S.E.2d 265 the Court also held:

[p]rovisions in a contract of adhesion that if applied would impose unreasonably burdensome costs upon or would have a substantial deterrent effect upon a person seeking to enforce and vindicate rights and protections or to obtain statutory or common-law relief and remedies that are afforded by or arise under state law that exists for the benefit and protection of the public, are unconscionable; unless the court determines that exceptional circumstances exist that make the provisions conscionable. In any challenge to such a provision, the responsibility of showing the costs likely to be imposed by the application of such a provision is upon the party challenging the provision; the issue of whether the costs would impose an unconscionably impermissible burden or deterrent is for the court.

“No single, precise definition of substantive unconscionability can be articulated” because “the factors to be considered vary with the content of the agreement at issue.” *Brown I*, 228 W.Va. at 683–84, 724 S.E.2d at 287–88. “Accordingly, courts should assess whether a contract provision is substantively unconscionable on a case-by-case basis.” *Id.*

In addition to the factors set forth above, other factors have been utilized in determining whether a contract is unconscionable, including but not limited to:

- The degree of economic compulsion motivating the adhering party³
- Overall gross imbalance/one-sidedness in the contract⁴
- Costs that deter plaintiffs from pursuing claims, the risk that a claimant may have to bear substantial costs, and any substantial deterrent effect upon a person seeking to enforce or vindicate rights⁵

³ Syl. Pt. 17, *Brown I*, at 673, 277.

⁴ *McGinnis v. Cayton*, 173 W.Va. 102, 113, 312 S.E.2d 765, 776 (1984). Syl. Pt. 12, *Brown I*, *supra*. Syl. Pt. 4, *Brown II*, *supra*.

⁵ *State ex rel. Richmond American Homes of West Virginia, Inc. v. Sanders*, 228 W.Va. 125, 137, 717 S.E.2d 909, 921 (2011). Syl. Pt. 4, *State ex rel. Dunlap v. Berger*, 211 W.Va. 549, 567 S.E.2d 265 (2002).

- Bias of the arbitrator⁶
- Whether remedies or warranties have been taken away⁷

The circuit court was correct in finding that the arbitration provision here is both procedurally and substantively unconscionable. There is an abundance of reasons to support the circuit court's determination, and there are numerous factors that render the arbitration provision unenforceable.

Taking into consideration the facts and circumstances of the case, the circuit court found a lack of a real and voluntary meeting of the minds, and an overall imbalance and one-sidedness to the Defendant's arbitration provision, that precludes its enforcement. *See* JA0001-0027. To begin with, Defendant's arbitration provision was a non-negotiable term in an adhesion contract. The Plaintiffs are independent community based, single pharmacies in West Virginia as compared to Caremark, which is one of the nation's largest managers of prescription benefits.⁸ The Plaintiffs competitive bargaining power, as against Caremark, a "meandering giant, healthcare behemoth, a Goliath" was negligible.⁹

Additionally, the Plaintiffs do not have the same level of sophistication or understanding about the arbitration clause as Caremark and its attorneys who drafted the language. Caremark, unlike Plaintiffs who are small-town pharmacies, have the advantage of full-time, in house legal counsel departments drafting its Agreements and advising it on its Agreements. JA1513-1519,

⁶ *State ex rel. Dunlap v. Berger*, 211 W.Va. at 549 n. 12, 567 S.E.2d at 280 n. 12. *Toppings v. Meritech Mortgage Servs., Inc.*, 212 W.Va. 73, 7, 569 S.E.2d 149, 149 (2002) (per curium).

⁷ *State ex rel. Dunlap v. Berger*, 211 W.Va. at 560 n. 6, 567 S.E.2d at 276 n. 6.

⁸ Jennifer Kolton, *Why We Should Care About Meandering Giants*, 2007, Illinois Business Law Journal, available at <http://www.law.ilinois.edu/bljournal/post/2007/04/03/Why-We-Should-Care-About-Meandering-Giants.aspx> & Change to Win, *CVS Caremark: An Alarming Merger Two Years Later*, 2009, available at <http://prescriptiondrugdiscounts.net/files/cvs%20an-alarming-merger.pdf>.

⁹ *See* footnote 14, *supra*. *See also*, Christopher David Gray, The Lund Report, *Small Pharmacies Getting Squeeze From Goliath PBMs*, 2013, available at <https://www.thelundreport.org/content/small-pharmacies-getting-squeeze-goliath-pbms>.

1522-1523, 1538. Furthermore, the Provider Agreements here were lengthy and complex and small pharmacies such as Plaintiffs had no reasonable opportunity to understand such agreements or consult with legal counsel prior to signing them. JA1759-1772.

The circuit court found substantive unconscionability because the arbitration process established by the Provider Agreement was one-sided to benefit the Defendants. Arbitration was mandated to take place in Arizona, a significant distance from where the events complained of occurred, in West Virginia, and the arbitration clause was in a lengthy manual where the heading arbitration was in bold, but there was 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). JA0017.¹⁰ It is also unduly oppressive in that it exculpates Caremark from its misconduct and substantially impairs the Plaintiffs' right to pursue remedies for their losses. The circuit court considered an arbitration clause in the 2009 Provider Manual that states:

Any and all disputes in connection with or arising out of the Provider Agreement by the parties will be exclusively settled by arbitration before a single arbitrator in accordance with the Rules of the American Arbitration Association. The arbitrator must follow the rule of Law, and may only award remedies provided for in the Provider Agreement. The award of the arbitrator will be final and binding upon the parties, and judgment upon such award may be entered in any court having jurisdiction thereof. Any such arbitration must be conducted in Scottsdale, Arizona, and Provide Agrees to such jurisdiction, unless otherwise agreed to by the parties in writing. The expenses of arbitration, including reasonable attorney fees, will be paid for by the party against whom the award of the arbitrator is rendered. Except as required by law, neither a party nor an arbitrator may disclose the existence, contents or results of any dispute or arbitration

¹⁰ The mere fact that Caremark's arbitration provision was in the same size font and under the same type headings does not mitigate the unconscionable effect here. *See State ex rel. Dunlap v. Berger*, 211 W.Va. at 560 n.6, 567 S.E.2d at 276 n. 6, (“[R]eliance on a ‘written warning’ misses the point. The legal enforceability *vel non* of exculpatory provisions in contracts of adhesion has little to do with whether there are self-serving caveats in a document that is not going to be read, and everything to do with whether the provisions would operate to deprive people of important rights and protections that the law secures for them.”); *State ex rel. Richmond Am. Homes of W. Virginia, Inc. v. Sanders*, 228 W. Va. 125, 138-39, 717 S.E.2d 909, 922-23 (2011) (same).

hereunder without the prior consent of both parties. 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.

These terms establish an arbitration process that lack any modicum of bilaterality or mutuality—it limits the Plaintiffs' rights and not Caremark's. The provision allows only for “remedies provided for in the Provider Agreement.” Poignantly, the only “remedies” provided for in the Provider Agreement are remedies that may be sought by Caremark.

The Provider Agreement provides that nonadherence of the Provider to any of the provisions set forth in the Provider Agreement, “is a breach of the Provider Agreement and subject to immediate termination *and other remedies.*” JA0400. Caremark’s “termination rights are in addition to any and all other right and remedies that may be available to Caremark under the Provider Agreement or at Law of equity.” JA0401. The 2009 Manual under “Right and Remedies in the Event of Termination or Breach” further provides:

In the event Provider breaches any provision of the Provider Agreement, in addition to all other termination rights, Caremark shall have the right to (i) suspend any and all obligations of Caremark under and in connection with the Provider Agreement, (ii) impose reasonable handling, investigation and/or improper use fees, and/or (iii) offset against any amounts owed to Provider under the Provider Agreement (including amounts that are paid to Caremark on behalf of a Plan Sponsor) or under any other Agreement between Caremark and Provider, any amounts required to be paid by Provider to Caremark. *These rights and remedies are in addition to any other rights and remedies that may be available to Caremark under the Provider Agreement or at Law or equity.*

JA0401 (emphasis added).

The “Remedies” section of the 2009 Provider Manual states:

Provider acknowledges that any unauthorized disclosure or use of information or data obtained from or provided by Caremark would cause immediate and irreparable injury or loss that cannot be fully remedied by monetary damages.

Accordingly, if Provider should fail to abide by the provision and terms set forth in these sections of the Provider Manual (Intellectual Property, Confidentiality, and

Proprietary Rights), *Caremark will be entitled to* specific performance, including immediate issuance of a temporary restraining order or preliminary injunction enforcing the Agreement, and judgment for damages (including reasonable attorneys' fees and costs) caused by the breach, *and all other remedies provided by the Provider Agreement and applicable Law.*"

JA0423 (emphasis added).

The arbitration provision provides that that arbitrator "may only award remedies provided for in the Provider Agreement." The only remedies provided for in the Agreement, other than the ability to seek injunctive relief for breach of the Provider Agreement, are remedies for Caremark. The Agreement does not otherwise provide "remedies" for the Plaintiffs/Providers. *See* JA0383-0450. Further, the provision limits Plaintiffs to arbitration, while preserving the rights of Caremark to seek any remedy at law or in equity.¹¹ These factors firmly establish an overall imbalance and unfairness of the arbitration process created by Caremark's agreement, such that the arbitration provision is unconscionable and unenforceable.

Plaintiffs sought additional information through discovery requests bearing on the following factors: information about relationships/bias with the arbitrators and the cost of travel

¹¹ This provision can be contrasted with the provision found enforceable in *State ex rel. AT&T Mobility v. Wilson*, 226 W.Va. 572, 703 S.E.2d 543 (2010) and *Shorts v. AT&T Mobility*, 2013 WL 2995944 (W.Va. No. 11-1649, June 17, 2013) (memorandum decision); *AT&T Mobility v. Concepcion*, 131 S.Ct. 1740 (2011). Here, Plaintiffs risk paying for the costs of arbitration and the arbitrator as well as other administrative fees, and, if Caremark had its way, not only Caremark's attorneys' fees and costs but also the attorneys' fees and costs of the other Defendants who were not even signatories to the arbitration agreement. The Plaintiffs' only remedy is injunctive relief and they would have to incur time and travel expenses to Scottsdale, Arizona and hire attorneys who are familiar with Arizona laws. Further, while Caremark claims that Plaintiffs could have negotiated their contracts, despite being one of the largest PBMs in the nation, Caremark presented only a handful of contracts in which the arbitration provision was negotiated. *See* JA0929, 0978. Significantly, these provisions were negotiated with a handful of government entities who, according to their state laws, could not enter into arbitration agreements. *Id.* Government contracts with state agencies are not equivalent to contracts with independent pharmacies or pharmacists.

and arbitration in Arizona; the manner and setting in which the contract was formed, including whether each party had a reasonable opportunity to understand the terms of the contract; the bargaining process; and the formation of the contract and all of the circumstances surrounding the transaction including the manner in which the contract was entered, whether each party had a reasonable opportunity to understand the terms of the contract, and whether the terms were explained to the Plaintiffs. Defendants refused to provide responses to the majority of these requests despite the fact that Defendants had been ordered to provide such information. Plaintiffs sought sanctions for Defendants' refusals, to no avail. Rather than sanctioning the Defendants, the Court ruled that there would be no more discovery. JA2004, ll. 1-2.

Further, while the Court did note that there was not any physical evidence of Plaintiffs' inability to pay the costs of arbitration (JA0026), Plaintiffs did present evidence that the average costs of complex arbitrations, for the arbitrator fees alone, exceeds \$100,000 per case. JA2000. There is an identifiable risk here that Plaintiffs may have to bear substantial costs in seeking to enforce or vindicate their rights. Plaintiffs would have to spend time away from their independently owned pharmacies and incur expenses in travelling across the country. They would have to do so to risk paying for the costs of arbitrator as well as thousands of dollars in arbitration fees (JA2000), and, if Caremark had its way, not only Caremark's attorneys' fees and costs but also the attorneys' fees and costs of the other Defendants who were not even signatories to the arbitration agreement.

The United State Supreme Court has observed that "the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum." *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 90 (2000). A typical arbitration requires an up-front payment from the parties of a filing fee to a designated arbitration

provider, such as the AAA. Those fees can be substantial and even prohibitive. For example, in one case, a plaintiff pursuing an employment discrimination claim was required to pay an initial, non-refundable filing fee of \$500 to the American Arbitration Association, filing fees of \$3,750, and an additional charge of \$150 for each day of the hearing and half the cost of an arbitrator. *Spinetti v. Serv. Corp. Int'l*, 324 F.3d 212, 217 (3d Cir. 2003). In *State ex rel. Dunlap v. Berger*, 567 S.E.2d 265 (W.Va. 2002), plaintiff alleged that a jewelry retailer fraudulently added the cost of life and property insurance to the amount charged for jewelry. The store sought to enforce an arbitration agreement making the customer responsible for “a \$500 minimum, non-refundable administrative fee; a \$150 daily hearing fee; a \$150 daily room rental fee; . . . processing fees, reporting service fees, and possible postponement fees.” *Id.* at 282. *See also Mendez v. Palm Harbor Homes, Inc.*, 45 P.3d 594, 605 (Wash. Ct. App. 2002) (requirement that mobile home purchaser pay filing fee of \$2,000, plus share of arbitrators’ fees, to resolve \$1,500 claim was unconscionable); *Phillips v. Associates Home Equity Serv., Inc.*, 179 F. Supp. 2d 840, 847 (N.D. Ill. 2001) (\$4,000 filing fee for arbitration of plaintiff’s Truth in Lending Act claim “would effectively preclude her from vindicating her federal statutory rights.”).

In addition to the filing fee, the parties are responsible for compensating the individual arbitrator hearing the case. Arbitrators require payment in advance, and rates of \$1,800 per day or more are not unusual. *See, e.g., Spinetti*, 324 F.3d at 217 (“a mid-range arbitrator in Western Pennsylvania charges approximately \$250 an hour with a \$2,000-per-day minimum”); *Phillips*, 179 F. Supp. 2d at 846 (arbitrators in Chicago compensated up to \$5,000 per day with an average of \$1,800 per day); *Ting*, 182 F. Supp. 2d at 917 (noting that AAA arbitrators in Northern California were paid an average of \$1,899 per day, with some arbitrators charging almost double that). These charges apply not only to hearing time, but to time expended on motions and

discovery rulings, “study time,” and travel time. *See Camacho v. Holiday Homes, Inc.*, 167 F. Supp. 2d 892, 897, 894 (W.D. Va. 2001).

Importantly, the actual cost of going to arbitration is unknown to the consumer or employee at the outset. The First Circuit recently noted that some arbitrations of franchise disputes have reportedly cost \$100,000 and \$150,000 (for one arbitrator) and \$300,000 and \$400,000 (for a three-person arbitration panel). *Awuah v. Coverall North America, Inc.*, 554 F.3d 7, 12 (2009).

The inescapable conclusion is that the drafters of such provisions, such as Caremark, are not seeking an inexpensive forum; their aim is to make arbitration too expensive for claimants, such as Plaintiffs to vindicate their rights. That is the only conclusion that can be drawn from an arbitration process that leaves a victorious consumer worse off than one who simply stays home. An arbitration agreement “that prohibits use of the judicial forum as a means of resolving statutory claims must also provide for an effective and accessible alternative forum.” *Id.* Prohibitive costs, as the Idaho Supreme Court has pointed out, “turns the purposes of arbitration upside down. It is an expensive alternative to litigation that precludes the [weaker party] from pursuing the claim.” *Murphy v. Mid-West Nat’l Life Ins. Co. of Tenn.*, 78 P.3d 766, 768 (Idaho 2003).

Another device used to discourage individuals from invoking their arbitral rights is to require that the arbitration take place in a distant location. For example, in *Bolter v. Superior Court (Harris Research, Inc., r/p/i)*, 104 Cal. Rptr. 2d 888 (Cal. Ct. App. 2001), where defendant Harris was a large international corporation and plaintiffs were small “Mom and Pop” franchisees located in California, the court held unconscionable an arbitration clause that required arbitration in Utah. The court pointed out that the provision “requires franchisees

wishing to resolve any dispute to close down their shops, pay for airfare and accommodations in Utah, and . . . [hire] counsel familiar with Utah law. *Id.* at 909. The court suggested that “Harris understood those terms would effectively preclude its franchisees from ever raising any claims against it, knowing the increased costs and burden on their small businesses would be prohibitive.” *Id.* at 910. *See also, Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1290 (9th Cir. 2006) (*en banc*); *Bragg v. Linden Research, Inc.*, 487 F. Supp. 2d 593, 610 (E.D. Pa. 2007); *Philyaw v. Platinum Enters., Inc.*, 54 Va. Cir. 364, 2001 WL 112107, at *3 (2001); *Casarotto v. Lombardi*, 901 P.2d 596, 597 (Mont. 1995), *rev'd on other grounds sub nom. Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996).

The Plaintiffs here, faced with the having to leave their business, incur travel expenses, and risk having to pay not only arbitration costs and fees in a complex case, but also the attorneys' fees and costs for multiple billion dollar corporations, are effectively prevented by that risk from seeking to vindicate their rights. This is especially true in light of the fact that the arbitration provision in question appears to provide no remedies, other than injunctive relief, for the Plaintiffs even if they were successful in arbitration. All of these factors support the circuit court's conclusion Caremark's arbitration provision is unconscionable and unenforceable.

3. Plaintiffs' Causes of Action are not within the Scope of the Arbitration Agreement

Plaintiffs'/Respondents' causes of action are tort actions that in no way relate to their contractual relationships with Defendants/Petitioners, and, since these causes of action do not relate to the Parties' contract, these action fall outside the scope of the Caremark's arbitration provision. “In addition, the fact that the choice of law clause in the agreement is limited to contract claims and not the tort claims alleged by Plaintiffs here is further evidence that the parties did not intend the arbitration agreement to govern the Plaintiffs' non-contractual claims.

In their Complaint, Plaintiffs, in a nutshell, allege: Defendants, in violation of West Virginia law, entered into a scheme and design to intentionally and unlawfully take Plaintiffs' customers, to interfere with Plaintiffs' customer relationships and secure Plaintiffs' customers for themselves by unlawful and tortious means; Defendants tell and direct West Virginia residents that they must consult with and purchase their drugs from a CVS pharmacy or through a CVS mail order pharmacy, thus forcing West Virginians to consult and purchase their drugs from defendants in order to be reimbursed under the customer's own insurance; Defendants benefit from their plan and scheme; The purpose of their plan and scheme is to increase their share of the market for pharmacy services and drug store sales in each of the markets where each Plaintiff competes for business and to increase profits by unlawful and tortious means and ends; Defendants' acts violate West Virginia law, including but not limited to *West Virginia Code* §§ 30-5-7, 30-5-23, 32A-1-2, 33-11-4, 33-16-3, and 47-18-3; Defendants tortuously and unlawfully interfered with Plaintiffs and their relationship with their customers in Plaintiffs' market areas in West Virginia; Defendants' conduct was deceptive, fraudulent and false and in restraint of trade; and Plaintiffs have been harmed by Defendants' unlawful and tortious conduct. JA0049-0079.

Caremark's arbitration provision provides that "[a]ny 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 . . ." JA 0425 (emphasis added).

Plaintiffs' causes of action stand alone. They do not arise from any provision or obligation of Caremark under the Parties' contracts. They are not related to any provision in the Parties' contracts. The contracts cover the procedures, rights and obligations of the parties relating to Caremark's reimbursement of monies for prescriptions filled by the Providers. In

contrast, Plaintiffs' actions are based upon West Virginia tort law-wholly unrelated to the provisions in the contracts. In fact, not only the Plaintiffs, but every independent pharmacy and/or pharmacist in the State of West Virginia has the same causes of action against the Defendants, regardless of whether they have a contract with Caremark.

The Plaintiffs in this case, unlike the cases in other jurisdictions that Defendants rely so heavily upon, did not plead causes of action, such as trade secret misappropriation, arising out of the Parties' contracts. Moreover, Petitioners' argument that every court in the country to have considered the arbitration provision contained in the Caremark Agreement is in conflict with the circuit court's order here, is flatly deceptive. For example, all of the plaintiffs in *Crawford Prof'l Drugs v. CVS Caremark Corp.*, 748 F.3d 249 (5th Cir. 2014), *Grasso Enters. v. CVH Health Corp.*, No. 15-427, 2015 WL 6550548 (W.D. Tex. Oct. 28, 2015), *Burton's Pharmacy, Inc. v. CVS Caremark Corp.*, No. 11-2, 2015 WL 5430354 (M.D.N.C. Sept. 15, 2015), *Uptown Drug Co. v. CVS Caremark Corp.*, 962 F.Supp.2d 1172 (N.D.Cal.2013), *CVS Pharmacy, Inc. v. Gable Family Pharmacy*, No. 2:12-cv-1057-SRB (D.Ariz. Oct. 22, 2012), *writ of mandamus denied, In re Gable Family Pharmacy*, No. 13-70096 (9th Cir. Mar. 27, 2013), and *The Muecke Co. Inc. v. CVS Caremark Corp.*, No. 6:10-cv-00078 (S.D. Tex. Mem. Feb. 22, 2012), reconsidered in part on June 27, 2014, *aff'd*, 615 F.App'x 837 (5th Cir. 2015), plead trade secret misappropriation or other actions involving patient information confidentiality or discrimination among network pharmacies. All of the causes of actions, as found by the courts, arose out of the agreements between the parties and the agreements were intertwined with the causes of action, unlike the causes of action here. The violations complained of here are tort actions that are not merely "labeled" as tort actions. They are actions based on and arising out of and based upon

statutory and common tort law in West Virginia, and Plaintiffs do not have to rely upon the Provider Agreement to meet the elements of any of these causes of action.

The difference between Plaintiffs' causes of action and the pleadings in these other jurisdictions were contrasted by the Court in *Uptown, supra*, at 1185-1187. There, the court found that Uptown's misappropriation claims were dependent upon and intertwined with the Caremark Provider Agreement. In contrast, however, the court found that "Uptown's claim for violations of the unfair prong of the UCL is not founded or intimately intertwined with the Caremark Provider Agreement" and fell outside of the arbitration clause. *Id.* at 1186-1187. Plaintiffs' claims here, like the statutory claims in *Uptown*, are not founded or intimately intertwined with the Caremark Provider Agreement and are not within the scope of the subject arbitration clause. Inasmuch as they are not within the scope of the arbitration clause, Plaintiffs cannot be required to submit them to arbitration. *United Steelworkers of America v. Warrior Gulf Nav. Co.*, 363 U.S. 574, 582, 80 S.Ct. 1347, 1354 (1960).

Plaintiffs' argument with regard to scope is even more persuasive as to the application of the arbitration agreement for the benefit of nonsignatories. While the circuit court did not specifically address the issue of whether the nonsignatory Defendants can compel Plaintiffs to arbitrate, Plaintiffs arguments and the Court's findings of facts and conclusions of law effectively preclude Defendants' argument in this respect. Defendants rely upon Arizona law to argue that courts have uniformly compelled arbitration based upon equitable estoppel under Arizona law. However, as set forth in Plaintiffs' argument on choice of law, *infra*, the circuit court correctly found that Arizona law does not apply to this dispute. Further, as set forth above, Plaintiffs' causes of action are not within the scope of the alleged arbitration agreement. The case cited by Defendants is not applicable here where the causes of action are tort claims

that are not “inextricably bound up with the obligations imposed by the agreement containing the arbitration clause.”

In *Crawford Prof'l Drugs, Inc. v. CVS Caremark Corp.*, 748 F.3d 249, 260 (5th Cir. 2014), the Fifth Circuit, relying upon California law, reasoned as follows:

California courts recognize that “[a]s a general matter, one cannot be required to submit a dispute to arbitration unless one has agreed to do so.” *Goldman v. KPMG LLP*, 173 Cal.App.4th 209, 92 Cal.Rptr.3d 534, 542 (2009). Nevertheless, “it is well-established that[] ... a nonsignatory to an arbitration clause may, in certain circumstances, compel a signatory to arbitrate, based on ordinary contract and agency principles.” *Id.* “Equitable estoppel applies when the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting [its] claims against the nonsignatory.” *Id.* at 541 (quoting *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir.1999)) (internal quotation marks omitted). “The reason for this equitable rule is plain: One should not be permitted to rely on an agreement containing an arbitration clause for its claims, while at the same time repudiating the arbitration provision contained in the same contract.” *DMS Servs., Inc. v. Superior Court*, 205 Cal.App.4th 1346, 140 Cal.Rptr.3d 896, 902 (2012). “The focus is [therefore] on the nature of the claims asserted by the plaintiff against the nonsignatory defendant.” *Boucher v. Alliance Title Co.*, 127 Cal.App.4th 262, 25 Cal.Rptr.3d 440, 447 (2005).

There is no basis for equitable estoppel in this case. Plaintiffs here are not relying upon the terms of the agreement between the Parties for their claims. The nature of the claims here are tort claims, and they are not related to the agreement between the parties.

Defendants also rely upon *Brantley v. Republic Mortg. Ins. Co.*, 424 F.3d 392 (4th Cir. 2005). However, this Court has not adopted the standard set forth in *Brantley*. As recognized by this Court: “[A]rbitration is simply a matter of contract between the parties; it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration.” *Brown I* at 672, 276, citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995). Moreover, “*such agreements must not be so broadly construed as to encompass claims and parties that were not intended by the original contract.*” *Id.* at 672-673, 276-277 (emphasis added). The nonsignatories were not intended to be parties to the Provider Agreement. As specifically stated in the Agreement: “Except for the

indemnification provisions, no term or provision in the Agreement is for the benefit of any person who is not a party to the Agreement and no such party shall have any right or cause of action under the agreement.” JA0269.

4. Defendants’ Failed to Establish that Plaintiffs Agreed to the Arbitration Clause with Defendants.

This court’s precedent on formation of an agreement to arbitrate is clear:

In the context of whether the parties have agreed to arbitrate the merits of a dispute (which is, under one definition, the “arbitrability” of a question), the United States Supreme Court said, “Courts should not assume that the parties agreed to arbitrate arbitrability unless there is ‘clea[r] and unmistakabl[e]’ evidence that they did so.” Likewise, this Court has found that “parties are only bound to arbitrate those issues that by clear and unmistakable writing they have agreed to arbitrate,” and that an “agreement to arbitrate will not be extended by construction or implication.

Schumacher Homes of Circleville, Inc. v. Spencer, No. 14-0441, 2016 WL 3475631, at *9 (W. Va.) (footnotes omitted) (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. at 944, 115 S.Ct. at 1924; Syl. Pt. 10, *Brown I*, 228 W.Va. at 657, 724 S.E.2d at 261). When a party attempts to incorporate an arbitration agreement by reference into a contract it must meet three requirements:

In the law of contracts, parties may incorporate by reference separate writings together into one agreement. However, a general reference in one writing to another document is not sufficient to incorporate that other document into a final agreement. To uphold the validity of terms in a document incorporated by reference, (1) the writing must make a clear reference to the other document so that the parties’ assent to the reference is unmistakable; (2) the writing must describe the other document in such terms that its identity may be ascertained beyond doubt; and (3) it must be certain that the parties to the agreement had knowledge of and assented to the incorporated document so that the incorporation will not result in surprise or hardship.

Syl. pt. 2, *State ex rel. U-Haul Co. of W. Virginia v. Zakaib*, 232 W. Va. 432, 752 S.E.2d 586, 589 (2013). In this case, the Circuit Court properly found that the Plaintiffs had not agreed to the arbitration clauses advanced by the Defendants.

First, with respect to the McDowell, McCloud and Waterfront plaintiffs who signed the Caremark Provider Agreement, it is clear that the standard for incorporation by reference has not been met. The arbitration agreement was intentionally inserted in a complex Provider Manual which has as its main purpose instructions on processing claims. Nothing in the Provider Agreement provides any clue to the Plaintiffs that they are agreeing to arbitrate non-contractual disputes in Arizona. The Circuit Court correctly determined that this attempted incorporation did not comply with the test from *U-Haul*:

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

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

The Defendants attempt to distinguish *U-Haul* on the grounds that they provided each version of the Provider Manual thirty-days prior to it taking effect and that language inside the agreement somehow conveyed it was contractual. This is in reality no different than the facts of *U-Haul*. As Justice Workman explained in her concurring opinion in *U-Haul*:

The fact that the petitioner's prior contracts with the respondents made no mention of an arbitration clause does not establish a "course of dealing" between the parties; rather, it establishes a consistent but unilateral course of conduct on the part of the petitioner in attempting to hide the arbitration clause from its customers. To accept the dissent's position to the contrary would be to elevate the adage, "fool me once, shame on you; fool me twice, shame on me," to the status of a legal principle.

232 W. Va. at 448, 752 S.E.2d at 602 (Workman, J., concurring). It is the attempt to hide material contractual language in a manual with unrelated instructions that is the issue. *Id.* On this record *U-Haul* is controlling.

The Defendants also argue that Plaintiffs Johnston & Johnston, Griffith & Fell, and Plaintiff T&J Enterprises, signed Provider Agreements with the arbitration clauses included in the signed documents. All three of the agreements were signed with PCS Health, not the Caremark/CVS Defendants. In addition, Plaintiff T&J Enterprises never signed the PCS Health agreement; rather it was executed by Plaintiff's franchisor, the Medicine Shop International, Inc. The consulted factual chain the Defendants attempt to use to link these Plaintiffs with arbitration clauses with them clearly is insufficient.

The Circuit Court recognized that Defendants failed to establish the existence of arbitration agreements agreed to by Plaintiffs. These conclusions were not an abuse of discretion and should be affirmed.¹²

5. The Plaintiffs Did Not Delegate The Issues Of The Scope Of The Arbitration Clause And Whether The Arbitration Clause Is Unconscionable To The Arbitrator.

The Defendants challenge the Circuit Court's conclusion rejecting their claim that the parties agreed that to delegate issues of the scope of the arbitration clause and its enforceability to the arbitrator.

¹² Defendants argue that under Arizona law, the attempt at incorporation was sufficient. For this proposition they cite an Arizona Court of Appeals opinion, *Weatherguard Roofing Co. v. D.R. Ward Const. Co.*, 214 Ariz. 344, 152 P.3d 1227 (Ct. App. 2007). Because the opinion is only the opinion of the Court of Appeals, it is not binding. See *Custom Homes By Via LLC v. Bank of Oklahoma*, No. CV-12-01017-PHX-FJM, 2013 WL 5783400, at *5 (D. Ariz. Oct. 28, 2013) ("We recognize that decisions by the Arizona Court of Appeals, published or not, are not binding authority."). The *Weatherguard* Court, recognized but distinguished the Arizona Supreme Court's opinion in *Allison Steel Mfg. Co. v. Superior Court*, 22 Ariz.App. 76, 80, 523 P.2d 803, 807 (1974), which (like *U-Haul*) placed stricter requirements on the incorporation by reference of material terms in a contract. Assuming that Arizona law governs on this question, this Court should apply the stricter requirements of *Allison Steel*.

This Court has recently set forth the test for the determination of whether the parties have agreed to delegate scope and enforceability questions to the arbitrator:

[W]hen a party seeks to enforce a delegation provision in an arbitration agreement against an opposing party, under the FAA there are two prerequisites for a delegation provision to be effective. First, the language of the delegation provision must reflect a clear and unmistakable intent by the parties to delegate state contract law questions about the validity, revocability, or enforceability of the arbitration agreement to an arbitrator. Second, the delegation provision must itself be valid, irrevocable and enforceable under general principles of state contract law.

Schumacher Homes of Circleville, Inc. v. Spencer, No. 14-0441, 2016 WL 3475631, at *10 (W. Va. June 13, 2016) (“*Schumacher II*”). This is the exact test that the Circuit Court applied. JA:10 at ¶ 19. The Circuit Court correctly that found that the Defendants failed to meet their burden with respect to either of the two requirements. Consideration of the validity of a delegation requires the Court to sever the delegation clause from the arbitration agreement and determine its validity and enforceability apart from the arbitration clause as a whole. *Schumacher II, supra*.

A. The Defendants have not established that the Plaintiffs clearly and unmistakably delegated scope and enforceability questions to the arbitrator.

The adoption of the clear and unmistakable standard “reflects a ‘heightened standard’ of proof of the parties’ ‘manifestation of intent. *Schumacher II, supra* at p*9 (quoting *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 70, n.1 (2010)). The basis for this heightened standard is the recognition that “the question of who would decide the unconscionability of an arbitration provision is not one that the parties would likely focus upon in contracting, and the default expectancy is that the court would decide the matter.” *Schumacher II, supra* at p*9 (citations and internal quotations omitted); *see also First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943-45 (1995). “Thus, the Supreme Court has decreed, *a contract’s silence or ambiguity about*

the arbitrator's power in this regard cannot satisfy the clear and unmistakable evidence standard. *Schumacher II, supra* at p*9 (emphasis added) (citations and internal quotations omitted); *see also First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943-45 (1995).

The clear and unmistakable standard is imposed upon the party seeking to establish delegation as a matter of a federal law qualification to ordinary state contract law. *First Options of Chicago, Inc.*, 514 U.S. at 944 (“This Court, however, has . . . added an important qualification [to state-law principles that govern the formation of contracts], applicable when courts decide whether a party has agreed that arbitrators should decide arbitrability: Courts should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so.” (internal quotations omitted)). Thus, because federal law governs, on this point the issue of whether Arizona or West Virginia law applies is moot.

The face of the alleged arbitration clause itself does not come close to mentioning delegation of the scope of arbitration or of the enforceability of the provision let alone meeting the heightened standard of clear and unmistakable intent. The clause purports to send all disputes “arising out of the provider agreement” to arbitration. JA:0425. Given the provision’s silence on disputes concerning either the enforceability or scope of the arbitration agreement, the Circuit Court’s conclusion that the standard for delegation has not been met is most assuredly correct. As the Fourth Circuit has noted:

We have therefore found that an arbitration clause “committ[ing] all interpretive disputes ‘relating to’ or ‘arising out of’ the agreement” does not satisfy the “clear and unmistakable” test. *Id.* at 330; *see also E.I. DuPont de Nemours & Co. v. Martinsville Nylon Emps.’ Council Corp.*, 78 F.3d 578 (4th Cir.1996) (unpublished) (holding “clear and unmistakable” test not met where contract provided for arbitration of “[a]ny question as to the interpretation of this Agreement or as to any alleged violation of any provision of this Agreement”).

Peabody Holding Co., LLC v. United Mine Workers of Am., Int'l Union, 665 F.3d 96, 102 (4th Cir. 2012); *see also Quilloin v. Tenet HealthSystem Philadelphia, Inc.*, 673 F.3d 221, 230 (3d Cir. 2012) (language requiring employee to arbitrate before AAA any all disputes related to employment agreement insufficient to constitute agreement to delegate issue of arbitrability to arbitrator). Indeed, while the standard is a heightened one, compliance is not difficult: “Those who wish to let an arbitrator decide which issues are arbitrable need only state that ‘all disputes concerning the arbitrability of particular disputes under this contract are hereby committed to arbitration,’ or words to that clear effect.” *Peabody Holding, supra* (quoting *Carson v. Giant Food, Inc.*, 175 F.3d 325, 330-31 (4th Cir. 1999); *see also Schumacher II, supra* p*7, n.27 (citing clause from *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010), providing “The Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable” as example of clause meeting the heightened standard).

In this case, the Defendants do not even attempt to argue that the arbitration clause itself meets the heightened standard for delegation. Instead, they argue that because the arbitration clause purports to require arbitration “in accordance with the Rules of the American Arbitration Association and because those rules give the arbitrator the power to rule on his or her jurisdiction, the parties have agreed to delegate questions of arbitrability to the arbitrator. *See* Appellant’s Brief at 8, 26; (citing AAA Rule R-7 (“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 or to the arbitrability of any claim or counterclaim.”)).

So, in contrast to *Schumacher*, where the arbitration provision at least provided that “[t]he arbitrator(s) shall determine all issues regarding the arbitrability of the dispute,” *Schumacher II*, 2016 WL 3475631, at p*2, here, at best the parties signed a contract that allegedly incorporated the Provider Manual which, buried in its provisions, was an arbitration clause that merely stated that arbitration purportedly should be conducted under the AAA Rules, when one of those Rules gives the arbitrator the power to determine his or her jurisdiction and when the AAA Rules were not attached to the any of the documents provided to the Plaintiffs. *Cf. Schumacher II, supra* p*7, n.27 (citing clear delegation clause from *Rent-A-Center, West, Inc. v. Jackson*). The Defendants’ tortured analysis here is far short of a clear and unmistakable intent by the parties to delegate arbitrability.

A number of courts have rejected the Defendants’ claim here that adoption of the AAA rules amounts to a delegation of questions of arbitrability to the arbitrator. Indeed, in *Schumacher II*, this Court cited *Ajamian v. CantorCO2e, L.P.*, 203 Cal.App.4th 771, 782, 137 Cal.Rptr.3d 773, 782 (2012), for the proposition that “a contract’s silence or ambiguity about the arbitrator’s power [to determine arbitrability] cannot satisfy the clear and unmistakable evidence standard.” 2016 WL 3475631, at *9 & n. 44. Notably, *Ajamian* Court criticized the exact claim the Defendants make here with respect to the incorporation of the AAA rules:

[W]e seriously question how it provides *clear* and *unmistakable* evidence that an employer and an employee intended to submit the issue of the unconscionability of the arbitration provision to the arbitrator, as opposed to the court. There are many reasons for stating that the arbitration will proceed by particular rules, and doing so does not indicate that the parties’ motivation was to announce who would decide threshold issues of enforceability.

Ajamian, 203 Cal. App. 4th at 790. The *Ajamian* Court echoed the concerns of the Circuit Court here:

Moreover, the reference to AAA rules does not give an employee, confronted with an agreement she is asked to sign in order to obtain or keep employment, much of a clue that she is giving up her usual right to have the court decide whether the arbitration provision is enforceable. Assuming that an employee reads the arbitration provision in the proposed agreement, notes that disputes will be resolved by arbitration according to AAA rules, and even has the wherewithal and diligence to track down those rules, examine them, and focus on the particular rule to which appellants now point, the rule merely states that the arbitrator shall have “the power” to determine issues of its own jurisdiction, including the existence, scope and validity of the arbitration agreement. This tells the reader almost nothing, since a court *also* has power to decide such issues, and nothing in the AAA rules states that the AAA arbitrator, as opposed to the court, *shall* determine those threshold issues, or has *exclusive* authority to do so, particularly if litigation has already been commenced.

Id. (emphasis in original). Other courts have reached similar results. *See supra* at 789-90 (collecting cases); *50 Plus Pharmacy v. Choice Pharmacy Sys., LLC*, 463 S.W.3d 457, 461 (Mo. Ct. App. 2015) (collecting cases); *see also Tompkins v. 23andMe, Inc.*, 2014 WL 2903752 at p*11 (N.D. Cal. 2014); *Moody v. Metal Supermarket Franchising America Inc.*, 2014 WL 988811 at p*3 (N.D. Cal. 2014).

B. The alleged delegation provision is not been shown to be valid, irrevocable and enforceable under general principles of state contract law.

The Circuit Court found that the alleged delegation provision contained in the AAA rules was not valid, irrevocable and enforceable under West Virginia contract law. JA:024-25. This conclusion was correct.

The Circuit Court based its conclusion on *U-Haul*. JA:024. As noted above in *U-Haul*, this Court rejected the argument that a bare reference (or “brief mention”) to a contractual addendum in a contract was sufficient to incorporate the arbitration clause in the addendum into the contract. *U-Haul*, 232 W. Va. at 444, 752 S.E.2d at 598. The *U-Haul* Court also emphasized the fact that the customer was not provided the incorporated document at the time the contract being entered into. *Id.* Thus the Court concluded, “there simply is no basis upon which to

conclude that a U-Haul customer executing the Rental Agreement possessed the requisite knowledge of the contents of the Addendum to establish the customer's consent to be bound by its terms.” *Id.*

Application of this holding to these facts is even easier. First the terms relied upon here (the AAA Rules) are allegedly incorporated by a document (the Provider Manual) that itself is incorporated by reference. Even if the Court disagrees with the Circuit Court and finds the arbitration clause in the Provider Manual itself was incorporated, the link to the incorporation of the AAA Rules is even more tenuous. As the Circuit Court concluded, the requirement that the party have knowledge of what it was purportedly agreeing to was not met in this case. JA:0024. This conclusion is certainly correct given the clear and unmistakable standard applicable to delegation clauses. The same result is mandated by Arizona law as contractual clauses which require “stringent standard” of proof of intent by “clear and unequivocal terms” cannot be established through incorporation by reference. *Washington Elementary Sch. Dist. No. 6 v. Baglino Corp.*, 169 Ariz. 58, 61, 817 P.2d 3, 6 (1991) (citing *Allison Steel Mfg. Co. v. Superior Court In & For Pima Cty.*, 22 Ariz. App. 76, 80, 523 P.2d 803, 807 (1974))

Finally, in order to be valid, the delegation clause must be irrevocable. *Schumacher II, supra*. The arbitration clause here requires arbitration to be conducted pursuant to the AAA Rules without any requirement that the rules in effect at the time of contracting be used when a dispute arises. Recognizing that the AAA Rules change over time, an arbitration clause incorporating AAA Rules incorporates the rules as they exist at the time the dispute brought before the AAA. *See* AAA Rule R-1(a). Thus, AAA Rule R-7(a) could change at the whim of the AAA without the agreement of the parties to the agreements here. As even the language of the contracts is sufficient to incorporate AAA Rule R-7(a) and construe it as a valid delegation

clause, because the AAA can change its rules, the alleged delegation is not irrevocable. Moreover, an alleged agreement to a Rule that can be changed cannot constitute a clear and unmistakable intent by the parties to delegate under *Schumacher II*, *Rent-A-Center*, and *First Options*. Cf. *Moody*, 2014 WL 988811, at p*3 (“The court finds that the Agreements’ general reference to the ‘then current commercial arbitration rules of the AAA’ is not the type of ‘clear and unmistakable’ delegation required . . . thus finds that the threshold question of arbitrability remains with the court.”).

CONCLUSION

Plaintiffs, Respondents, request the Court to enter an Order upholding and confirming the Circuit Court’s Order denying defendants’ motion to dismiss and denying arbitration and award plaintiffs fees and costs and for such other, further and general relief as the Court deems just and proper.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
DOCKET NO. 16-0209

WEST VIRGINIA CVS PHARMACY, L.L.C., et al.,

Petitioners,

v.

(Civil Action No. 11-C-144-S)
(Honorable Booker T. Stephens)

MCDOWELL PHARMACY, INC., et al.,

Respondents,

CERTIFICATE OF SERVICE

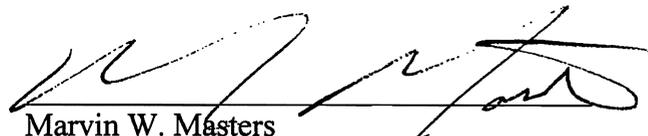
I, Marvin W. Masters, counsel for Plaintiffs, do hereby certify that true and exact copies of the foregoing "Respondents' Brief" were served upon:

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