DRAFT: 2024.02.03
DUE: 2024.02.05

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

OSTERHAUS PHARMACY, INC., on behalf of itself and all others similarly situated,

Plaintiff,

v.

CVS HEALTH CORPORATION, CVS PHARMACY, INC., CAREMARK Rx, L.L.C. (f/k/a/ CAREMARK Rx, INC.), CAREMARK, L.L.C., CAREMARKPCS, L.L.C., CAREMARK PCS HEALTH L.L.C., CAREMARK IPA, L.L.C., CAREMARK PART D SERVICES, LLC, AETNA INC., AETNA HEALTH HOLDINGS, LLC, AND AETNA HEALTH MANAGEMENT, LLC,

Defendants.

Case No: 2:23–cv–01500 (RSM)

Hon. Ricardo S. Martinez

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO COMPEL ARBITRATION

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Independent pharmacies are dying. They are often owned by families and beloved by communities that have relied on them for years. But giant corporations like Defendants are squeezing them out of business. *See* Victor Whitman, *Seattle-area independent pharmacies struggle to remain open. Here's why*, The Seattle Times, Oct. 20, 2023.[1] Osterhaus Pharmacy is among them.

Osterhaus Pharmacy has filed this case to challenge the unfair and anticompetitive business practices of Defendants ("Caremark"). Caremark's response is to try to force Osterhaus into a pay-to-play arbitration regime that would effectively deny Osterhaus a hearing in any forum. Caremark's arbitration provision requires Osterhaus to pay into escrow a minimum of $50,000 just to get before an arbitrator on any issue in this case, including the "gateway" question about whether its arbitration clause is enforceable. Because such an ask of a small independent pharmacy "shocks the conscience," the Court should find its delegation clause unconscionable and unenforceable.

Other one-sided provisions make the rest of Caremark's arbitration agreement unconscionable as well. They include a shortened statute of limitations, limitations on discovery, a one-sided fee shifting provision, Caremark's power to unilaterally change the terms of the arbitration clause (a power Caremark routinely exercises after it loses arbitrations), and an onerous confidentiality provision that gives Caremark alone a series of injunctive remedies enforceable in court rather than arbitration.

None of the cases that Caremark cites enforcing its varied arbitration provisions over the years addresses the issue currently before this Court. As Caremark's own explanatory

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[1] *Available at* https://www.seattletimes.com/business/seattle-area-independent-pharmacies-struggle-to-remain-open-heres-why/.

parentheticals reveal, only three of the decisions address Caremark's 2020 Provider Manual at issue here. *See Caremark LLC v. Chickasaw Nation*, 43 F.4th 1021 (9th Cir. 2022); *Caremark LLC v. Choctaw Nation*, 2022 WL 768098, at *6 (D. Ariz. Mar. 14, 2022); *Lackie Drug Store, Inc. v. Ark. CVS Pharmacy, LLC*, 2021 WL 5567360, at *4 (E.D. Ark. Nov. 29, 2021). And none of those decisions addressed the unconscionability challenges Osterhaus raises. The Chickasaw Nation merely contested the existence of the agreement and "ground[ed] its argument in sovereign-immunity principles," as did the Choctaw Nation—not state law principles of contract enforcement. *Chickasaw Nation*, 43 F.4th at 1032; *Choctaw Nation*, 2022 WL 768089, at *2. Plaintiffs in *Lackie* contested formation of any agreement to arbitrate, not unconscionability. *Lackie Drug Store*, 2021 WL 5567360, at *3–4. The remaining cases address irrelevant contract formation issues, or challenges to different terms.

Osterhaus asks the Court to deny Caremark's motion to compel arbitration (Dkt. No. 42) because Caremark's onerous adhesion contract is loaded with unconscionable terms that render it unenforceable.

I. BACKGROUND

A. Osterhaus Pharmacy served a small Iowa community for more than 60 years and was driven out of business, in part, by Caremark's unfair and anticompetitive conduct.

Ann and Bob Osterhaus opened Osterhaus Pharmacy in Maquoketa, Iowa in 1965. They were a husband-and-wife team who met at the University of Iowa, where Bob was in pharmacy school. Their son Matt Osterhaus started working at the pharmacy in 1983 and later took over the family business. Matt ran Osterhaus Pharmacy with his wife Marilyn until 2022. Osterhaus Decl. at ¶ 4.

Osterhaus Pharmacy had a small staff of primarily pharmacists and pharmacy assistants, guided by a patient-centered care model. Osterhaus Decl. at ¶10. Staff wages accounted for a

substantial portion of the pharmacy's annual costs. Osterhaus Decl. at ¶ 18. There were many years in recent history where the pharmacy's annual profits were less than $1,000. Osterhaus Decl. at ¶¶ 5, 14-16. In January 2022, after nearly 60 years of family-run operations, Matt sold Osterhaus Pharmacy, in part because of financial pressure from Caremark's increasing Direct and Indirect Renumeration Fees ("DIR Fees"). Osterhaus Decl. at ¶ 19; *see also* Dkt. No. 1 (Complaint) ¶¶ 20-21.

CVS Heath Corporation ("CVS") is one of the largest health care companies in the world. Complaint ¶ 6. Caremark is the pharmacy benefit manager (PBM) arm of CVS. *Id.* PBMs control nearly every facet of the pharmaceutical filling and dispensing industry. They decide which pharmacies can dispense drugs in Part D Plan networks, which drugs those pharmacies will dispense, and the prices, discounts, and other terms of sale applicable to reimbursement of pharmacies. *Id.* ¶ 39. Today, the "Big Three" PBMs—Caremark, Express Scripts, and OptumRx—control more than 80% of the prescriptions filled in the United States. *Id.* at ¶ 42

Osterhaus makes the following claims against Caremark: (i) illegal tying in violation of the Sherman Act; (ii) breach of implied covenant of good faith and fair dealing; (iii) unconscionability; (iv) unjust enrichment and (v) quantum meruit. ECF No. 1, at 25–27. These legal claims relate to Caremark's illegal imposition of DIR Fees. ECF No. 1, at 2; 11–13.

Four key principles are central to Osterhaus' allegations. First, Caremark has substantial power in the market for the reimbursement of prescription drug services—*i.e.*, filling prescriptions. ECF No. 1 at 9–11. Second, Caremark abuses this market power to compel pharmacies to provide pay Caremark DIR services—*i.e.*, services measured by performance programs that PBMs use to assess DIR fees.[CITE] Third, Caremark further abuses its market power to force pharmacies to *pay* Caremark for the opportunity to provide DIR services, instead

of being paid for those services. ECF No. 1, at 14–17. Fourth, Caremark acted in bad faith by abusing its discretion by setting DIR Fees in an opaque, arbitrary, and irrational manner. ECF No. 1, at 16–17. On December 22, 2023, Caremark filed the instant motion to compel arbitration based on its pharmacy Provider Agreement. ECF No. 42.

C. Caremark's mandatory arbitration clause is laden with unconscionable terms.

The Caremark Provider Manual ("Provider Manual") contains a mandatory arbitration clause that purports to compel arbitration for all disputes between the provider and Caremark, including those that arise out of Caremark's Provider Agreement.

Caremark's contracts at issue in this case, including the arbitration provision and its delegation clause, are written by Caremark alone, and cannot be negotiated. Osterhaus Decl. ¶ 8-9. Independent pharmacies such as Osterhaus Pharmacy must accept the terms in Caremark's contracts to serve Caremark's network of patients. As a panel of arbitrators found in a recent decision, the contractual relationship between providers like Osterhaus and Caremark "is one of adhesion and [the pharmacy] had no choice but to enter into the agreement to ensure the continuity of patient care." [NYCBS Interim Order, Exhibit X to Declaration].

Substantively, as described in more detail below, the arbitration provision and delegation clause contain multiple asymmetric terms designed to prevent Osterhaus and other pharmacies from challenging Caremark's business practices *in any forum*.

Importantly, Caremark has abused its right to unilaterally amend the arbitration agreement. In response to its losses in arbitration, Caremark keeps making the terms for arbitration more onerous and unconscionable.

Independent pharmacies do not sign the Provider Manual that sets the terms for arbitration. Instead, they sign a Provider Agreement that incorporates the Provider Manual by

reference. Caremark reserves the power to unilaterally amend the Provider Manual at any time.[2] It regularly exercises that power. Independent pharmacies have no opportunity to negotiate or reject the changes Caremark makes. If an independent pharmacy submits a single claim for reimbursement to Caremark after the effective date of a unilateral amendment, Caremark considers the pharmacy to have accepted it.[3] This power to amend at any time is one-sided. Osterhaus and pharmacies cannot make similar unilateral changes—or, indeed, any changes at all.

Caremark has used its unilateral power to make it ever more difficult for an independent pharmacy to bring and win an arbitration.

1. Caremark's 2020 Provider Manual and Mandatory Arbitration Clause

Caremark's 2020 Provider Manual imposed a series of one-sided and unfair rules that together make it incredibly difficult for pharmacies, particularly smaller pharmacies such as Plaintiff, to seek redress. Caremark's arbitration provision does not permit any waiver or reduction in the escrow amount, or the fees owed to AAA more broadly, if Osterhaus and other independent pharmacies are unable to pay them.[4]

a. Delegation Provision

The 2020 Provider Manual contains a delegation provision:

[2] ECF No. 43–4 at 10 (2016 Provider Agreement, "Amendments"); ECF No. 43–5 at 10 (2018 Provider Agreement, "Amendments"); ECF No. 43–6 at 6 (2020 Provider Agreement, "15.07 Amendments").
[3] *Id.*
[4] ECF No. 43–6 at 8.

> The arbitrator(s) shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of the agreement to arbitrate, including but not limited to, any claim that all or part of the agreement to arbitrate is void or voidable for any reason.[5]

The terms and conditions set by Caremark render this Delegation Clause unconscionable.

b. Escrow Requirement

The 2020 Provider Manual requires that:

> Any party initiating an arbitration pursuant to this arbitration section shall place in escrow for the benefit of the opposing party an amount to be determined by the arbitrator(s) as sufficient to cover the estimated attorney's fees and other expenses of arbitration that will be incurred in defense of the arbitration action, which shall in no event be less than $50,000 [].[6]

Failure to place such funds in escrow constitutes material breach of the arbitration clause,[7] which has the following consequences:

> Accordingly, if Provider, its agents, counsel or arbitrator fail to abide by the terms and conditions set forth in Section 15.09 of the Provider Manual, Caremark shall be entitled to (i) specific performance, including immediate issuance of a temporary restraining order or preliminary injunction enforcing the Agreement, and to judgment for damages (including reasonable attorneys' fees and costs) caused by the breach; (ii) an option to void the dispute resolution or arbitration award; and (iii) to all other legal and equitable remedies available to Caremark.[8]

c. Asymmetric Anti-Aggregation Provision

Caremark also requires independent pharmacies to bring disputes:

> on an individual basis, not a class or representative basis, or through any form of consolidated proceedings, and the arbitrator(s) will not resolve Class Action disputes and will not consolidate arbitration proceedings without the express written permission of all parties to the Provider Agreement.

Caremark has no need to aggregate dispute resolution to make it feasible. Pharmacies do.

[5] ECF No. 43–6 at 7.
[6] ECF No. 43–6 at 8.
[7] ECF No. 43–6 at 8.
[8] ECF No. 43–6 at 7.

d. Asymmetric Remedies

The 2020 Provider Manual states:

> In no event may the arbitrator(s) award indirect, consequential, or special damages of any nature, lost profits or savings, punitive damages, injury to reputation, or loss of customers or business.[9]

This broad limitation of remedies is markedly one-sided, given that pharmacies are the only party likely to recover these categories of relief.

e. Asymmetric Fee Shifting

Caremark's arbitration clause provides that:

> The expenses of arbitration, including reasonable attorneys' fees, will be paid by the party against whom the final award of the arbitrator(s) is rendered, except as otherwise required by Law.[10]

This change to the standard American rule has an outsized impact on small family operations, such as Osterhaus. Further, when pharmacies bring antitrust claims, as Osterhaus does here, they are ordinarily entitled to attorneys' fees if they win but do not have to pay them if they lose. In cases like this one, the fee shifting provision benefits only Caremark and only harms pharmacies.

f. Asymmetric Discovery Limitations

The 2020 Provider Manual limits fact discovery to:

> documents and information for which there is a direct, substantial, and demonstrable need and where such documents and information can be located and produced at a cost that is reasonable in the context of all surrounding facts and circumstances. Further, when the cost and burden of e-discovery are disproportionate to the likely importance of the requested materials, the arbitrator may deny the requests or require that the requesting party advance the reasonable cost of production to the other side. Absent a showing of exceptional circumstances, as determined by the arbitrator(s), the parties shall be limited to one corporate representative deposition per party with each deposition subject to a four-hour time limit.[11]

[9] ECF No. 43–6 at 7.
[10] ECF No 43–6 at 7.
[11] ECF No. 43–6 at 7.

These discovery limitations advantage Caremark and harm pharmacies like Osterhaus, who bear the burden of proof and lack access to the data and evidence available to Caremark.

g. Statute of Limitations

The 2020 Provider Manual establishes timeframes within which disputes must be filed, effectively creating a statute of limitations of six (6) months:

> Disputes must be filed within the following time frames: i) for audit disputes, within six (6) months from the date of the final audit findings; ii) for termination related disputes, within six (6) months from date of the notification of termination; and iii) for all other disputes, within six (6) months from the date on which the facts giving rise to the dispute first arose…[12]

Moreover, a demand for an arbitration agreement must be filed "within six (6) months from the date of the issuance of the Dispute Notice."[13]

h. Confidentiality Provision

Caremark ensures that any arbitration be conducted in secrecy by requiring that:

> a party, its employees, agents, consultants, authorized representatives, counsel, or arbitrator(s) shall not disclose the existence, content or results of any dispute or arbitration hereunder without the prior written consent of both parties.[14]

This clause allows Caremark to take advantage of information asymmetries and to punish and retaliate against pharmacies who assert contractual rights without recourse.

II. LEGAL STANDARD

The Federal Arbitration Act makes a written provision to arbitrate "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. The FAA makes "arbitration agreements as enforceable as other contracts, but not more so." *Morgan v. Sundance, Inc.*, 596 U.S. 411, 418 (2022). Arbitration

[12] ECF No. 43–6 at 8.
[13] ECF No. 43–6 at 8
[14] ECF No 43–6 at 7

agreements are subject to all "generally applicable contract defenses, such as fraud, duress, or unconscionability." *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 68 (2010).

An arbitration clause may delegate to an arbitrator "gateway" questions of arbitrability, including whether an arbitration clause is enforceable, if it does so clearly and unmistakably. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). A delegation provision "is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other." *Lim v. TForce Logistics, LLC*, 8 F.4th 992, 1000 (9th Cir. 2021). When a party "specifically challenges a delegation provision under Section 2 of the FAA, the federal court must consider the challenge before ordering compliance with it." *Bielski v. Coinbase, Inc.*, 87 F.4th 1003, 1009 (9th Cir. 2023). If the court determines that the delegation provision is unconscionable and declines to sever it from the underlying arbitration provision, then the court may also determine that the underlying arbitration provision is unenforceable for the same reasons. *Lim*, 8 F.4th at 1005–1006.

The parties agree that Arizona law governs Osterhaus's unconscionability challenge to Caremark's arbitration provision. Under Arizona law, "[u]nconscionability is generally divided into two facets: (1) procedural unconscionability, which addresses unfair surprise or other things that mean bargaining did not proceed as it should and (2) substantive unconscionability, which addresses the relative fairness of the obligations assumed by reference to the actual terms of the contract." *Desert Peak Homeowners Ass'n v. Pinnacle at Desert Peak Condo. Ass'n*, 2015 WL 8166006, at *3 (Ariz. Ct. App. Dec. 8, 2015).

An arbitration provision that is either procedurally or substantively unconscionable is unenforceable under Arizona law. *Maxwell v. Fid. Fin. Servs., Inc.*, 907 P.2d 51, 59 (1995)

(concluding that a claim of unconscionability "can be established with a showing of substantive unconscionability alone" under Arizona law, "especially in cases involving either price-cost disparity or limitation of remedies."); *Clark v. Renaissance West, LLC*, 232 Ariz. 510, 514, 307 P.3d 77, 82 (Ct. App. 2013) (finding an agreement unenforceable based on substantive unconscionability alone); *Dueñas v. Life Care Ctrs. Of America, Inc.*, 236 Ariz. 130, 135 (Ct. App. 2014) (rejecting defendant's contention that plaintiff must prove both procedural and substantive unconscionability because "[e]ither doctrine can provide an independent defense to enforceability.").

Courts are not limited to the terms of the specific provision at issue when interpreting a contract; the court may consider the entire contract in assessing the unconscionability of a challenged provision. *Bielski*, 87 F.4th at 1011–13 (applying California law) ("If the provision delegates all disputes arising out of the Arbitration Agreement, how can the court not look to the Arbitration Agreement to understand the delegation provision's meaning?"); *see also Holley-Gallegly v. TA Operating, LLC*, 74 F. 4th 997, 1002 (9th Cir. 2023); *Nickerson v. Green Valley Recreation, Inc.*, 228 Ariz. 309, 319, 265 P.3d 1108, 1119 (Ariz. Ct. App. 2011) (considering "all parts of the contract together" when conducting an analysis for subjective unconscionability of a provision).

III. ARGUMENT

The arbitration provision in the 2020 Provider Manual is unconscionable and unenforceable. The delegation clause is unenforceable if it is either procedurally or substantively unconscionable. It is both. Given that the delegation clause is unenforceable, the Court should consider whether the arbitration provision as a whole is also unconscionable. Again, either substantive or procedural unconscionability suffices; the arbitration provision is both. In the alternative, if the Court were to send this matter to arbitration, it should exercise its discretion to

stay this case. Doing so would be more just than a dismissal.

A. Caremark's Delegation Clause Is Substantively Unconscionable.

Contracts are substantively unconscionable if they contain "terms so one-sided as to oppress or unfairly surprise an innocent party, an overall imbalance in the obligations and rights imposed by the bargain, and significant cost-price disparity." *Maxwell v. Fid. Fin. Servs., Inc.*, 907 P.2d 51, 58 (1995). An arbitration agreement or delegation clause is substantively unconscionable if "the fees and costs to arbitrate are so excessive as to deny a potential litigant the opportunity to vindicate his or her rights." *Estate of Harmon v. Avalon Care Ctr.*, 2015 WL 302292, at *3 (Ariz. Ct. App. 2015) (citations and quotations omitted). A finding that an arbitration clause, or the delegation clause underlying it, is substantively unconscionable renders it unenforceable. *Clark v. Renaissance W.*, LLC, 232 Ariz. 510, 512, 307 P.3d 77, 79 (Ariz. Ct. App. 2013) ("An unconscionable contract is unenforceable.") (citations omitted). The costs and asymmetry of the escrow provision render the delegation clause substantively unconscionable.

1. The Escrow Provision Imposes Unreasonable and Excessive Costs

The escrow requirement makes it excessively expensive for Osterhaus to challenge the delegation clause. For an arbitrator to rule on delegation, Osterhaus Pharmacy must place in escrow at least $50,000. But Osterhaus did not and does not have available a *minimum* of $50,000 to place in escrow. Osterhaus Decl. at ¶ 13–16.

Further, to challenge the arbitration provision, Osterhaus may have to pay significantly more than $50,000. Caremark interprets the escrow provision in a manner that is even more draconian than is obvious from its text; Caremark recently demanded that a pharmacy with a single location put $200,000 in escrow for a single arbitration.[15] Caremark's position is

[15] Order No. 7 at 10, New York Cancer and Blood Specialists (NYCBS) v. Caremark.

apparently that the escrow amount should be the "forecasted amount of potential claims that could be submitted by Provider based on Provider's historical Caremark adjudicated paid claims experience (e.g., previous rolling twelve months)" in addition to an amount to cover attorneys' fees and other expenses. CITE Current Manual.

Caremark also has argued that the escrow provision requires that a small independent pharmacy operating more than one storefront place in escrow a separate $50,000 at minimum for each location.[16] It has contended that the Anti-Aggregation Provision requires pharmacies to bring claims on a storefront-by-storefront basis. *See* [NYCBS Procedural Ruling, Exhibit x to Declaration]; *Caremark LLC v. AIDS Healthcare Found.*, 2022 WL 4267791, at *3, 6 (D. Ariz. Sept. 15, 2022) (where, in litigation against a chain of pharmacies providing services to HIV/AIDS patients, CVS "filed a Motion to Sever, arguing AHF's claims constituted a class action that the Provider Manual prohibited" because it sought to bring an arbitration on behalf of its different locations). Under Caremark's interpretation, a pharmacy with two different storefronts must bring two arbitrations, make two escrow payments totaling $100,000 or more, and pay two sets of arbitrators.

Caremark does not permit any waiver or reduction in the escrow amount, despite Osterhaus' inability to pay. ECF No. 43–6 at 8. Arizona courts have found arbitration fees that were a fraction of the costs imposed by Caremark to be unconscionable, including where the plaintiff was not required to remit the fees in an up-front, lump sum, as Osterhaus is required to do here. *See, e.g.*, *Clark v. Renaissance W., LLC*, 232 Ariz. 510, 512, 307 P.3d 77, 79 (Ariz. Ct. App. 2013) (finding $22,800 in arbitration fees substantively unconscionable); *Estate of Harmon v. Avalon Care Ctr.*, 2015 WL 302292 (Ariz. Ct. App. 2015) (finding an estimated $28,500 in

[16] Order No. [7?] at 10–11, New York Cancer and Blood Specialists (NYCBS) v. Caremark.

arbitration fees rendered arbitration clause substantively unconscionable). Here, Osterhaus Pharmacy cannot afford the minimum $50,000 to place in escrow, given the modest profits of the family business, which often fall below $1,000 a year. Osterhaus Decl. at ¶¶ 13-16. Nor can he afford the additional costs of travel from Iowa to Scottsdale, Arizona—where Caremark mandates the arbitration must occur—or the additional fees and costs associated with arbitration.

2. The Escrow Provision Is Effectively One-Sided

The $50,000 minimum escrow requirement is asymmetrical and unfair. This provision effectively affects only the pharmacies in disputes involving DIR fees. As the party that is responsible for reimbursement, Caremark enjoys a self-help option when there are disputed fees: it simply subtracts or "claws back" any fees it believes it is owed from the pharmacy's reimbursement in subsequent months. Osterhaus Decl. at ¶ 17. For example, assume that a pharmacy and Caremark disagree over whether $100,000 in DIR fees should be withheld. Caremark withholds reimbursements. That then forces the pharmacy to bring an arbitration, which requires it to put at least $50,000 in escrow.

3. The Unilateral Remedies Clause Exacerbates the Delegation Clause

The unilateral remedies clause is also one-sided and unfair, when combined with the escrow provision. The remedies clause entitles *only Caremark* to injunctive relief, damages, and an option to void any award in arbitration (all without having to make an escrow payment) in the event of a material breach by either the independent pharmacy *or an arbitrator*. Caremark can treat a decision by the arbitrator not to impose an escrow payment as a material breach and seek unilateral remedies. Osterhaus and other independent pharmacies have no reciprocal right to void the result of arbitration if the arbitrator imposes an escrow payment or if Caremark commits a material breach. ECF No. 43–6 at 7. The remedies provision also provides Caremark with the

right to forego arbitration and go directly to court in the event of a breach of the arbitration provision.

The Court should deem the delegation clause unenforceable as substantively unconscionable.

B. The Delegation Clause Is Procedurally Unconscionable Because It Was Presented in a Way that Deprived Osterhaus of Meaningful Choice

Arbitration clauses are procedurally unconscionable where there is "unfairness in the bargaining process." *Edwards v. Vemma Nutrition*, No. 17–cv–02133, 2018 WL 637382, at *4 (D. Ariz. 2018). "[T]he fundamental question is whether one party to a contract has unfairly or surreptitiously deprived the other of the right of access to the courts." *Dueñas v. Life Care Ctrs. of Am., Inc.*, 336 P.3d 763, 768 (Ariz. Ct. App. 2014). To prove procedural unconscionability, courts examine factors influencing the "the real and voluntary meeting of the minds of the contracting party: age, education, intelligence, business acumen and experience, relative bargaining power, who drafted the contract, whether the terms were explained to the weaker party, whether alterations in the printed terms were possible [and] whether there were alternative sources of supply of the goods in question." *Maxwell v. Fidelity Fin. Servs.*, 184 Ariz. 82, 89, 907 P.2d 51, 58 (1995), quoting *Johnson v. Mobil Oil Corp.*, 415 F. Supp. 264, 268 (E.D. Mich. 1976). A finding that an arbitration clause, or the delegation clause underlying it, is procedurally unconscionable renders the clause unenforceable. *Clark v. Renaissance W.*, LLC, 232 Ariz. 510, 512, 307 P.3d 77, 79 (Ariz. Ct. App. 2013) ("An unconscionable contract is unenforceable.") (citations omitted).

The delegation clause is procedurally unconscionable for two primary reasons: (i) the markedly unequal bargaining power between the parties, depriving independent pharmacies of the ability to negotiate terms; and (ii) Caremark's unilateral right to alter the terms of the contract

without input from Plaintiff or similar pharmacies.

1. Caremark Has Imposed an Unconscionable Contract of Adhesion.

Caremark has imposed a contract of adhesion. While a "contract of adhesion is not *per se* unconscionable," courts considering unconscionability will look to factors including "relative bargaining power" and "whether alterations in the printed terms were possible." *Longnecker v. Am. Exp. Co.*, 23 F. Supp. 3d 1099, 1109 (D. Ariz. 2014); *see also Dueñas v. Life Care Ctrs. of Am., Inc.*, 236 Ariz. 130, 137, n.2 (Ariz. Ct. App. 2014) (recognizing that "a contract of adhesion may raise heightened concerns"); *Schnellecke Logistics USA LLC v. Lucid USA Inc.*, No. 22-cv-01893-PHX-SMB, 2023 WL 5432321, at *4 (D. Ariz. Aug. 23, 2023) (applying California law) ("An arbitration agreement is at least minimally procedurally unconscionable if it is an adhesion contract.").

Caremark has conceded in other forums that pharmacies have no bargaining power and the arbitration provision and delegation clause are take-it-or-leave-it. In an arbitration, Caremark's counsel admitted that its contracts are contracts of adhesion, even though its counsel "hates the term."[17] Likewise, in a deposition in the same case, Caremark's representative testified that out of their network of thousands of pharmacies, only four pharmacies have ever negotiated terms with Caremark. *Id.*

An arbitrator in a similar case found that Caremark imposes contracts of adhesion and independent pharmacies have no bargaining power, concluding that "CVS had considerable bargaining leverage as one of the largest PBM's [sic]. A pharmacy would lose out on large amounts of business if it did not sign up to CVS' networks." [AHF Arbitration Decision, Exhibit X to Declaration]. Moreover, "those networks were exclusive and there was no alternative if

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[17] Order No. 7 [at X].

AHF wanted to serve the members of the plans in CVS' networks. The parties did not engage on a level playing field. CVS and its health plan partners set the terms." *Id.*

Caremark's contracts meet the test for procedural unconscionability. There was no "real and voluntary meeting of the minds" between Caremark and Osterhaus. Caremark "drafted the contract" and then presented its contract on a take it or leave it basis. *Maxwell v. Fidelity Fin. Servs.*, 184 Ariz. 82, 89, 907 P.2d 51, 58 (1995) (citations omitted).

Because of Caremark's market power, Osterhaus had no choice but to accept the terms. The parties have dramatically unequal bargaining power. Caremark is the largest PBM in the nation, controlling approximately 34% of the market for pharmacy benefit services. In Iowa, the PBM services market is particularly concentrated. Caremark controls a sizable portion of Osterhaus Pharmacy's patients, and Osterhaus has no choice but to participate in Caremark's networks or lose a critical mass of patients seeking services. The disparity in bargaining power between Osterhaus and Caremark is dramatic.

Caremark also has an extraordinary advantage in business acumen and experience. Caremark never explained the terms of the delegation provision it imposed on Osterhaus. Osterhaus could not afford compliance officers or lawyers to interpret or attempt to negotiate these terms. Osterhaus Decl. at ¶ 10. Caremark's right to unilateral alteration of the terms for arbitration—including the escrow requirement—were buried in a massive Provider Manual.

Under Arizona law, "substantive unconscionability sometimes helps confirm or provide evidence of procedural unconscionability." *Maxwell, at 89.* No reasonable party with bargaining power would agree to the delegation provision, in conjunction with the Escrow provision and the unilateral ability of Caremark to modify the contract at its whim.

2. Caremark's Unilateral Power Renders the Delegation Clause Illusory

Both the delegation clause and the arbitration clause as a whole are procedurally unconscionable because of Caremark's unilateral ability to alter their terms without notice or input. The arbitration clause permits Caremark to unilaterally amend the Provider Manual at any time, ECF No. 43–6 at 6 , a power it exercises regularly. Osterhaus is deemed to have accepted any amendments merely by continuing to submit reimbursement requests.

An arbitration agreement that permits only the stronger party to make unilateral changes to it is unconscionable. *Batory v. Sears, Roebuck and Co.*, 465 F.Supp.2d 1137, 1140 (D. Ariz. 2006) (finding that defendant's unilateral right to modify terms of dispute resolution clause rendered it unconscionable); *Longnecker v. Am. Exp. Co.*, 23 F. Supp. 3d 1099, 1109 (D. Ariz. 2014) (stating unilateral right to modify contract is unconscionable when exercised).

Caremark's unilateral changes to the terms of arbitration demonstrate that the delegation clause is one-sided and renders its arbitration agreements illusory in practice. For example, Caremark unilaterally imposed the $50,000 escrow requirement. Similarly, Caremark's 2023 Provider Manual states that any ruling allowing a class action or consolidated arbitration (including an arbitrator allowing a chain to file an arbitration on behalf of all its stores) would be contrary to the parties' intent and subject to immediate judicial review. Cite. Under this new provision, if Caremark successfully prevents plaintiffs from consolidating their claims, they cannot pursue judicial relief; yet if plaintiffs are permitted to bring a class or consolidated action in arbitration, Caremark is entitled to immediate review in court.

Caremark is thus not meaningfully bound by its arbitration agreements. It can change them freely. They bind only Osterhaus and other pharmacies. From Caremark's perspective, the agreements are illusory.

C. THE UNDERLYING ARBITRATION PROVISION IS UNENFORCEABLE BECAUSE IT IS SUBSTANTIVELY UNCONSCIONABLE.

The arbitration agreement in the Caremark Provider Manual imposes significant, one-sided costs and restrictions that deter independent pharmacies from seeking to vindicate their rights. They render unconscionable not only the delegation clause but also the arbitration agreement as a whole.

If this Court determines that the delegation provision is unconscionable and therefore unenforceable, it may then assess the enforceability of the underlying arbitration agreement. *Lim*, 8 F.4th at 1006 ("Because the district court correctly held that the delegation clause was unenforceable as procedurally and substantively unconscionable, the district court properly proceeded to determine the gateway issue of arbitrability.").

Because the unconscionable provisions are as fundamental to the underlying arbitration agreement as they are to the delegation provision specifically, the entire arbitration agreement should be held unenforceable. *Id.* ("[T]he district court correctly concluded that the same bases for concluding that the delegation clause was procedurally and substantively unconscionable [. . .] also rendered the arbitration provision unconscionable."); *Bielski*, 87 F.4th at 1011 (affirming "a party may use the same arguments to challenge both the delegation provision and arbitration agreement, so long as the party articulates why the argument invalidates each specific provision.").

1. The Underlying Arbitration Agreement Is Unconscionable.

The underlying arbitration agreement—Section 15.09 of the Provider Manual, taken as a whole—is unconscionable for the same reasons that the delegation provision is. In addition, as described in detail below, Caremark has unilaterally changed the rules regarding discovery and aggregation to deter pharmacies from bringing claims.

2. Arbitration Imposes Unconscionable Costs and Risks on Pharmacies.

The arbitration agreement has a fee-shifting provision. Cite. That imposes an excessive burden should Osterhaus Pharmacy lose an arbitration, requiring it to pay Caremark's attorneys' fees and costs. Prevailing-party fee shifting is unconscionable when the statutory scheme that gives rise to the plaintiffs' substantive claims allow fee shifting only to a prevailing plaintiff. *See Lim*, 8 F.4th at 1004 (applying California law). Osterhaus has brought claims under federal antitrust laws, entitling it to recover attorneys' fees if it prevails. 15 U.S.C. §15(a). Caremark has no similar right under the statute if Osterhaus loses. Caremark's fee-shifting provisions thus benefits only Caremark.

Caremark's expensive arbitrator rules make matters worse. It requires a three-arbitrator panel. Cite. That is one reason that the costs of arbitrating against Caremark are daunting. Evidence of those costs comes from past arbitrations. For example, in arbitrations involving CVS arising out of similar (and perhaps less complex) claims:

- In *New York Cancer & Blood Specialists v. Caremark, LLC*, the arbitrator awarded $1,786,254.92 in attorneys' fees and expenses. Ex. XX, Davis Decl. at ¶ XX; NYCBS Final Award at 25. A motion to confirm this award is pending in a federal district court.
- In *Mission Wellness Pharmacy, LLC v. Caremark, LLC*, the arbitrator awarded $1,287,354.18 in attorneys' fees and expenses. Ex. XX, Davis Decl. at ¶ XX; MWP Final Award at 5–6. This fee award was confirmed by a federal district court. Ex. XX, Davis Decl. at ¶ XX; MWP Confirmation Order at 11.
- In *AIDS Healthcare Foundation v. CVS Caremark*, the claimant sought

$727,239.03 in attorneys' fees and expenses. Ex. XX, Davis Decl. ¶ at XX; AHF Final Award at 60. The arbitrator awarded $365,799.44 in fees and expenses, not because the fees and expenses sought were unreasonable, but for other issues, including block billing and a request for fees on unsuccessful issues or claims, which were deemed impermissible by the arbitrator. *Id.* at 60–61. This fee award was confirmed by a federal district court. Ex. XX, Davis Decl. at ¶ XX; AHF Confirmation Order at 24.

These exorbitant, one-sided costs render arbitration substantively unconscionable because they functionally deny pharmacies the right to challenge Caremark's conduct. *See, e.g.*, *Zaborowski v. MHN Gov't Servs., Inc.*, 601 F. App'x 461, 463 (9th Cir. 2014) (applying California law) (finding "[t]he costs-and-fee-shifting clause results in an unreasonable and unexpected allocation of risks [. . . because its] effect is to chill [plaintiffs] from seeking vindication of their statutory rights by pursuing claims in arbitration.") (quotations and citations omitted).

3. The Abbreviated Statute of Limitations Is Unconscionable.

Caremark's statute of limitations provision requires Osterhaus to bring disputes within six months from the date on which the facts giving rise to a dispute first arise. Cite. This provision too is substantively unconscionable, depriving Osterhaus of his right to initiate a claim beyond an abbreviated period. *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1175 (9th Cir. 2003) (finding one year statute of limitations provision for arbitrating claims substantively unconscionable because "the benefit of this provision flows only to" defendant); *see also In re Juul Labs, Inc., Antitrust Litig.*, 555 F. Supp. 3d 932, 955 (N.D. Cal. 2021) (one-year limitation in arbitration clause is substantively unconscionable); *Newton v. Am. Debt Servs., Inc.*, 854 F.

Supp. 2d 712, 732 (N.D. Cal. 2012) ("Both California courts and the Ninth Circuit have found that shortening statutorily-mandated statute of limitations contributes to a finding of substantive unconscionability."). Given that Caremark requires pharmacies to invest extraordinarily high up-front costs to initiate arbitration, the dramatic reduction in potential damages from a shortened statute of limitations further skews the playing field in favor of Caremark. *See, e.g.*, 15 U.S.C. § 15(b) (setting statute of limitations for federal antitrust claims to four years).

4. The One-Sided Remedy for Breach Is Unconscionable.

Caremark also imposes a one-sided remedy provision for breach of the arbitration clause. If a pharmacy breaches the arbitration provision, including its confidentiality requirements, Caremark is entitled to injunctive relief and damages, an option to void any award in arbitration, and other legal and equitable remedies. ECF No. 43–6 at 7. Pharmacies have no reciprocal remedies for a Caremark breach. *Id*.

5. The Limitations on Discovery Are Unconscionable.

Caremark imposes strict limitations on discovery that benefit it and harm pharmacies. Pharmacies like Osterhaus bear the burden of proof but do not have access to the data and evidence available to Caremark. Pharmacies are limited to only discovery for which there is a "direct, substantial, and demonstrable need." ECF No 43-6 at 7. The arbitrator may deny requests when the cost of e-discovery is "disproportionate to the likely importance of requested materials" or require the pharmacy to advance the costs of production to the other side. *Id.* The one-sided and onerous nature of Caremark's discovery limitations here strengthen the substantive unconscionability of the arbitration agreement as a whole because they impede only pharmacies' ability to present their claims.

Further, Caremark uses its power to unilaterally amend the terms of arbitration to make

discovery ever more difficult. For example, the current Provider Manual Prevents an independent pharmacy from discovery concerning other providers, disputes, and arbitration matters. Cite. This restriction is asymmetric. Caremark has in its possession information concerning other providers, disputes, and arbitration matters. Osterhaus and other independent pharmacies do not. Worse yet, the arbitration agreement provides that any attempt by a pharmacy to seek discovery on those matters is a violation of the agreement and subjects the pharmacy to termination and other penalties. The current Provider Manual also prohibits any interrogatories or requests for admission absent agreement of the parties. The relevant discoverable material at issue, however, is already in Caremark's hands. The discovery limitations in the arbitration agreement therefore only practically work to restrict pharmacies and not Caremark, and the severity of these limitations impede and prevent pharmacies from sufficiently presenting their claims.

6. The Anti-Aggregation Provision Is Unconscionable.

The arbitration agreement purports to prevent a pharmacy chain, a group of pharmacies sharing a single contract with Caremark, or pharmacies with common ownership from arbitrating in a single action. ECF No. 43-6 at 7. Other than raising costs, and deterring arbitration, this provision makes no sense. It increases costs, decreases efficiency, and risks inconsistent outcomes.

7. The Confidentiality Provision Is Unconscionable.

Caremark's confidentiality provision is substantively unconscionable. It requires the parties to keep confidential any decision of the arbitrator. ECF No. 43-6 at 7. That does not affect Caremark. It is a repeat player. It knows about past arbitration decisions and can and does use them to its advantage.

In contrast, Osterhaus Pharmacy, and other pharmacies, lack access to many past

arbitration decisions. They cannot use them to assess the viability of claims, learn about Caremark's unlawful behavior, discover relevant law or evidence, or as examples of ruling against Caremark.[18]

This asymmetry renders the Caremark confidentiality provision substantively unconscionable. *Larsen v. Citibank FSB*, 871 F.3d 1295 (11th Cir. 2017) ("where the outcomes of prior arbitration proceedings themselves remain concealed, as the arbitration agreement requires, prospective claimants have little context in which to assess the value of discovered documents or work product from prior disputes.") (applying Washington law).

The confidentiality provision also enables Caremark to retaliate and punish pharmacies without recourse. Breach of the Confidentiality Provision entitles *only Caremark*—not pharmacies—to injunctive relief, damages, and an option to void arbitration awards.[19]

D. THE UNDERLYING ARBITRATION PROVISION IS UNENFORCEABLE BECAUSE IT IS PROCEDURALLY UNCONSCIONABLE.

In this case, the arbitration provision as a whole is procedurally unconscionable for the same reasons as the delegation clause. *Bielski*, 87 F. 4th at 1011 ("[A] party may use the same arguments to challenge both the delegation provision and arbitration agreement, so long as the party articulates why the argument invalidates each specific provision."). As with the delegation clause in particular, the underlying arbitration agreement as a whole is also the product of unequal bargaining power and was also drafted by Caremark with no opportunity for Osterhaus to participate in drafting the terms of the arbitration agreement. The underlying arbitration agreement is therefore equally procedurally unconscionable.

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[18] An exception sometimes occurs when Caremark compels pharmacies to enforce their arbitration awards in court.
[19] ECF No 43–6 at 7

E. THE DELEGATION PROVISION AND THE UNDERLYING ARBITRATION AGREEMENT SHOULD NOT BE SAVED BY SEVERING OR MODIFYING THE UNCONSCIONABLE TERMS.

Given that the delegation provision implicates several unconscionable terms, it is not readily susceptible to severance and should be struck. "The [c]ourt has three options in the event it determines that a clause of a contract is unconscionable as a matter of law [. . .]: 1) refuse to enforce the contract; (2) enforce the remainder of the contract without the unconscionable clause; or (3) limit the application of the unconscionable clause as to avoid any unconscionable result." *Batory v. Sears, Roebuck and Co.*, 456 F. Supp. 2d 1137, 1141 (D. Ariz. 2006).

In some cases, "the unconscionable terms permeate[] the arbitration provision in such a way as to invalidate the entire arbitration agreement," particularly where "there are multiple provisions in the [arbitration agreement] that are unconscionable." *Longnecker v. Am. Exp. Co.*, 23 F. Supp. 3d 1099, 1111–12 (D. Ariz. 2014) (internal quotations and citations omitted).

Here, the unconscionable arbitration terms include:

1. the escrow provision, which erects large barriers to bringing an arbitration;
2. the unilateral amendment provision, which Caremark uses frequently to modify the terms of arbitration;
3. the reduced statute of limitations, which dramatically restricts the claims of pharmacies;
4. the exclusion of lost profits and consequential damages, which is one-sided, given that pharmacies are the only party that would likely recover these categories of relief;
5. the fee-shifting provision, which includes both attorneys' fees and arbitration costs, dramatically increases the risk of litigation, and harms only pharmacies when they bring claims with asymmetric fee-shifting provisions, including

under federal antitrust law;

6. the discovery limitations, which deprive pharmacies of evidence that is overwhelmingly in Caremark's possession;
7. the unilateral remedies clause, which entitles only Caremark, but not the pharmacy, to injunctive relief, damages, and an option to void an arbitration award in the event of breach by the pharmacy or an arbitrator;
8. the anti-aggregation provision, which increases costs for pharmacies; and
9. the confidentiality provision, which deprives pharmacies but not Caremark of valuable information.

The severability provision in Caremark's clause should not save an arbitration agreement that is so permeated with substantively unconscionable terms and was imposed in a procedurally unconscionable way. Allowing companies to load their arbitration clauses with unfair terms and then avoid a finding of unenforceability by severance encourages unfairness. *See Burnett v. Pagliacci Pizza, Inc.*, 470 P.3d 486, 498 (Wash. 2020) (applying same severability standard Arizona does and explaining that permitting severance when a clause if permeated with unconscionability "only encourages those who draft contracts of adhesion to overreach. If the worst that can happen is the offensive provisions are severed and the balance enforced, the dominant party has nothing to lose by inserting one-sided, unconscionable provisions."). Unconscionable arbitration provisions should be discouraged.

VI. ARBITRATION SHOULD ENTAIL A STAY, NOT DISMISSAL.

If the Court grants Caremark's motion, Osterhaus respectfully requests that the Court retain jurisdiction and stay the action pending the outcome of arbitration. Section 3 of the FAA provides that courts "shall on application of one of the parties stay the trial of the action until such arbitration has been had." 9 U.S.C. § 3; *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333,

345 (2011) (Section "3 requires courts to stay litigation of arbitral claims pending arbitration of those claims").

When a court finds that all claims raised in an action are subject to arbitration, it has discretion either to stay or to dismiss the action. *Johnmohammadi v. Bloomingdale's*, 755 F.3d 1072, 1073–74 (9th Cir. 2014). There is a "preference for staying an action pending arbitration rather than dismissing it." *MediVas, LLC v. Marubeni Corp.*, 741 F.3d 4, 9 (9th Cir. 2014); *see also Hoober v. Movement Mortg., LLC*, 382 F. Supp. 3d 1148, 1163 (W.D. Wash. 2019) (staying case pending arbitration).

In choosing between a stay and dismissal, courts evaluate the fairness to the parties, judicial efficiency, and the potential harmful consequences from denying a stay. *Winfrey v. Kmart Corp.*, 692 F. App'x 356, 357 (9th Cir. 2017) (stating that court has discretion to decide whether it is efficient for its own docket and fairest course for the parties to enter a stay pending resolution of arbitration); *E.W. Bank v. Bingham*, 992 F. Supp. 2d 1130, 1136 (W.D. Wash. 2014) (evaluating whether the parties would suffer "any hardship or inequity" absent a stay).

Here, considerations of fairness and potential harm warrant a stay. Caremark has a history of retaliating against pharmacies for initiating arbitration against Caremark over DIR fees. For example, in November 2021, in response to arbitration challenging Caremark's assessment of DIR fees, Caremark terminated some AIDS Healthcare Foundation ("AHF") pharmacy contracts, excluding AHF pharmacies from participating in one of Caremark's networks. *See* [AHF Retaliation Letter, Exhibit X to Declaration]. When AHF asked for the reason of the termination, a Caremark representative wrote: "Our contracting options are constrained by the results of a recent arbitration between our respective companies. I suggest you

discuss your question below with your leadership and/or legal counsel."[20]

Similarly, in 2021, Caremark threatened to terminate Mission Wellness Pharmacy LLC if it brought an action to confirm and enforce an arbitration award. *Mission Wellness Pharmacy, LLC,v. Caremark LLC*, No. 2:22-cv-00967-GMS, Tr. 7 (D. Ariz. June 9. 2023) ("They wrote back five days later saying that if you—they threatened to terminate Maria and Dan and Mission Wellness from the Medicare Part D network if they chose to file this proceeding to confirm the award.").

Congressional testimony by counsel who brings arbitrations against Caremark reveals other examples of retaliation by PBM against pharmacies for bringing challenges to DIR programs, but because of the secretive nature of arbitrations, the full extent of retaliation is likely much greater than known. [Levitt Testimony at 34, Exhibit X to Declaration].

If the Court issues a stay and retains jurisdiction, it can enforce any arbitration award and protect Osterhaus, and potentially other pharmacies, from retaliation.

V. CONCLUSION

The delegation provision in Caremark's arbitration agreement is unconscionable. So is the arbitration agreement as a whole. Plaintiff therefore respectfully requests the Court deny Defendants' motion to compel arbitration. In the alternative, Plaintiff respectfully requests that the Court retain jurisdiction and stay the action pending the outcome of arbitration.

Dated: February 5, 2024

Respectfully submitted,

/s/[NAME]

[NAME]

[20] Exhibit 15, AHF v. Caremark, ECF No. 61–9.

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing **Opposition to Defendants' Motion to Compel Arbitration** was filed electronically on February 5, 2024, in compliance with the Court's Electronic Filing Procedures for Civil and Criminal Cases (Amended 03/07/2023) and served on all counsel who have consented to electronic service in compliance with Federal Rule of Civil Procedure 5(b)(2)(E) and W.D. Wash. Local Civil Rule 5(b).

/s/[NAME]

[NAME]