**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF TEXAS**
**VICTORIA DIVISION**

| | | |
|---|---|---|
| THE MUECKE COMPANY, INC., *et al.,* | § | |
| | § | |
| Plaintiffs, | § | |
| | § | |
| vs. | § | Case No. 6:10-cv-78 |
| | § | Hon. John D. Rainey |
| CVS CAREMARK CORPORATION, *et al.,* | § | |
| | § | |
| Defendants. | § | |

**DEFENDANTS' MOTION TO DISMISS AND COMPEL ARBITRATION**

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

**FEDERAL CASES**

**STATE CASES**



**FEDERAL STATUTES**

## DEFENDANTS' MOTION TO DISMISS AND COMPEL ARBITRATION[1]

Pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.* (the "FAA"), Defendants CVS Caremark Corporation ("CVS Caremark"), CVS Pharmacy, Inc. ("CVS Pharmacy"), Caremark Rx, L.L.C., ("Caremark Rx"), and Caremark, L.L.C. ("Caremark") (collectively, "Defendants"), respectfully move this Court to enforce the contracts governing Plaintiffs' relationships with Caremark and compel Plaintiffs to submit to arbitration all claims alleged in the Complaint, dismiss the Complaint, and stay all further proceedings.

## I. SUMMARY OF ARGUMENT

The claims asserted in Plaintiffs' Complaint are subject to mandatory arbitration pursuant to valid and enforceable arbitration provisions contained in agreements governing Plaintiffs' relationship with Caremark, one of the Defendants named in the Complaint. Each Plaintiff contracted to be included in certain retail pharmacy provider networks administered by Caremark. In connection with its inclusion in these networks, each Plaintiff received significant economic benefits, namely, access to thousands of individual consumers who are participants in group health plans providing pharmacy benefits sponsored, administered or insured by Caremark's (or an affiliate of Caremark's) clients ("PBM Plans"). Under its agreements with PBM Plans, Caremark undertakes to administer the pharmacy benefit component of the sponsor's applicable health benefit plan in accordance with the plan design features adopted by the PBM Plan sponsor. One such feature that PBM Plans may elect when negotiating with Caremark in

[1] Defendants hereby reserve their right to file a substantive Motion to Dismiss at a later date and in accordance with any schedule set by the Court, if this Court does not grant this Motion as to all counts. *See Conrad v. Phone Directories Co.*, 585 F.3d 1376, 1383 n.2 (10th Cir. 2009) (party may file Rule 12 motion to dismiss complaint following denial of motion to compel arbitration).

order to manage the cost and utilization of prescription drugs, and improve the value of their drug benefits, involves offering Plan members lower prices through price discounts from retail pharmacies that encourage members to fill their prescriptions at network pharmacies, including those operated by Plaintiffs.

Plaintiffs each confirmed their inclusion in Caremark's pharmacy networks by entering into a Provider Agreement governing their relationship with Caremark, and pursuant to which each Plaintiff agreed, among other things, that all disputes or controversies "in connection with or arising out of" the Provider Agreements "will be exclusively settled by arbitration." Notably, in a case brought by one of the very Plaintiffs before this Court (De La Rosa), the Supreme Court of Texas has already found the arbitration clause in De La Rosa's Provider Agreement—which is substantially identical to the arbitration clause at issue here—to be valid and enforceable, and therefore granted mandamus relief and ordered the trial court to compel arbitration. *In re AdvancePCS Health, L.P.*, *infra*, 172 S.W.3d 603, 608 (Tex. 2005) (per curiam) (attached hereto as Ex. 1).

An agreement to arbitrate disputes "in connection with or arising out of" a contract—as the parties have here—signifies the parties' clear intent to require arbitration of any matters having a significant relationship to that contract. Here, all of Plaintiffs' claims plainly relate to matters having a connection with or arising out of their Provider Agreements. For example, Plaintiffs allege Defendants improperly used data relating to individual PBM Plan members, which Defendants purportedly acquired solely by virtue of the fact that Plaintiffs participated in Caremark's pharmacy networks pursuant to their Provider Agreements. Plaintiffs' Provider Agreements in fact expressly set forth the manner in which the data at issue was to be collected,

transmitted, and utilized by the parties. Plaintiffs' other claims similarly relate to matters expressly governed by their Provider Agreements.

The FAA provides that "upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court *shall* make an order directing the parties to proceed with arbitration in accordance with the terms of the agreement." 9 U.S.C. § 4 (emphasis added). Thus, as the acts alleged in the Complaint are plainly "in connection with" and "arise out of" the Provider Agreements, Plaintiffs' claims must be pursued (if at all) through arbitration rather than this proceeding.

## II. BACKGROUND FACTS

### A. The Parties

Plaintiffs are retail pharmacies. Each Plaintiff is a provider participating in at least one pharmacy network operated by Defendant Caremark.[2] *See* Cmplt. at ¶¶ 13, 23, 37, 48, 70, 77, 109; *see also* Exs. A-G to the Declaration of Daniel Pagnillo ("Pagnillo Dec.") attached hereto as Exhibit 2.[3] Among other aspects of its business, Caremark offers pharmacy benefit management ("PBM") services to insurers, third party administrators, business coalitions, and employer sponsors of group health plans. The array of services Caremark and its affiliates offer its PBM clients includes the administration and maintenance of pharmacy provider networks. Exs. 2.D-

[2] Defendant CVS Caremark is the corporate parent of Defendant CVS Pharmacy, Inc, which is the sole member of Caremark Rx, L.L.C.. Caremark Rx, L.L.C. is the sole member of Caremark. Caremark Rx, L.L.C. is also the sole member of CaremarkPCS Health, L.L.C. ("CaremarkPCS"), which also provides PBM services. CaremarkPCS is not a defendant in the instant suit. The entities whose PBM Plan members fill prescriptions in the pharmacy networks that include, or included, Plaintiffs' pharmacies contract with Caremark, not the other Defendants named in the Complaint. *See* Pagnillo Dec., Exs. A-G.

[3] Exhibits A through K attached to the Pagnillo Declaration (which is attached hereto as Exhibit 2) will be referred to throughout this Motion in the following short form: Exhibit A to the Pagnillo Declaration will be referred to herein as Exhibit 2.A; Exhibit B, as 2.B, etc.

2.G at Recital A. The pharmacy providers included in such networks agree by contract to fill prescriptions for participants in Caremark's PBM Plans at discounted prices. Exs. 2.D-2.G at Recital C.

**B. The Complaint**

Plaintiffs allege that, among other activities, Defendants "unlawfully" took confidential patient data provided to Caremark in the course of Plaintiffs' filling prescriptions for participants in Caremark's PBM Plans, and used that data to encourage PBM Plan participants to fill maintenance prescriptions at retail and mail pharmacies owned by Defendants. Cmplt. at ¶¶ 67, 77, 81, 84, 86, 87, 92. Plaintiffs further allege that using patient data in this manner violated the Racketeer Influenced and Corrupt Organizations Act ("RICO") (to include a pattern of identity theft that allegedly violated the Health Information Portability and Accountability Act ("HIPAA")), and the Federal Trade Commission's ("FTC") requirement that a "firewall" be erected between CVS Caremark's retail pharmacy and PBM operations. *Id*. at ¶¶ 50, 51, 63, 66, 68, 69, 77, 81, 110-12, 132. The Complaint also alleges that Defendants' alleged use of Plaintiffs' "patient lists" and related data that was purportedly shared with Caremark by virtue of Plaintiffs' contracts with Caremark constitutes trade secret misappropriation. *Id*. at ¶¶ 123-27. The Complaint further alleges that Caremark excludes Plaintiffs from certain retail pharmacy networks in violation of Texas's Any Willing Provider ("AWP") law. *Id*. at ¶¶ 128-34.

**C. Plaintiffs' Provider Agreements**

The right of each Plaintiff to participate in Caremark's retail pharmacy network is set forth in each Plaintiff's Provider Agreement and in the Provider Manual distributed to all pharmacy providers in Caremark's networks. Each Plaintiff has entered into such Provider

Agreements with Caremark that remain in force. *See* Provider Agreements at Exs. 2.A-2.G.[4] Each Plaintiff's Provider Agreement incorporates by reference the Provider Manual, relevant excerpts of which are at Exhibit 2.J. *See* Exs. 2.A and 2.B at ¶11; Exs. 2.D-2.G at §§ 1.3, 9.7.[5]

[4] Plaintiffs Hometown, Brookshire and Kinsey's Provider Agreements were originally entered into with PCS Health Systems, Inc. ("PCS Health"), a predecessor entity of AdvancePCS, which was ultimately acquired by Caremark's parent company, Caremark Rx, in 2004. Exs. 2.C-2.E. Rogers and De La Rosa originally entered into Provider Agreements with AdvancePCS in 2002. Exs. 2.F and 2.G Following both acquisitions, all pharmacies in the network (including Hometown, Brookshire, Kinsey, Rogers and De La Rosa) were notified that their Provider Agreements remained in force and applied to all of their business going forward. Ex. H and I. For example, following the 2004 acquisition of AdvancePCS by Caremark's parent company, Caremark Rx, those pharmacies who had Provider Agreements at that time with Caremark, AdvancePCS, or both—including Hometown, Brookshire, Kinsey, Rogers and De La Rosa—were sent a Notice advising that AdvancePCS (n/k/a CaremarkPCS) and Caremark:

> will be using the same base pharmacy provider agreement effective August 1, 2004. The new Agreement will consist of the AdvancePCS Provider Agreement, along with Exhibit B to the Caremark Participating Pharmacy Agreement, all attachments to this Exhibit B, and any fee schedules which you have previously entered into with Caremark []. This new agreement will apply to all of your Caremark and CaremarkPCS business beginning August 1, 2004 and will be called the Caremark Provider Agreement.

Notice at Ex. 2.I; *see also* Exs. 2.C-2.G at §1.3 ("From time to time AdvancePCS [or PCS] may amend this Agreement, [] the AdvancePCS [or PCS] Manual or On-Line Info by giving notice to Provider of the terms of the amendment and specifying the date the amendment becomes effective, which shall not be less than 30 days after the notice."). In other words, Rogers and De La Rosa's Provider Agreements with AdvancePCS became Caremark Provider Agreements in 2004, and the terms and conditions contained in those Agreements continue to govern Rogers' and De La Rosa's relationships with Caremark. Similarly, Hometown, Brookshire, and Kinsey's Provider Agreements with PCS Health became AdvancePCS Provider Agreements in 2000, *see* Ex. 2.H, which, in turn, became Caremark Provider Agreements in 2004. Hometown later executed a new Provider Agreement with Caremark in 2010. See Pagnillo Decl., ¶ 3, Ex. 2.B.

[5] The current version of the Provider Manual is attached in its entirety as Exhibit 2.K, and, for ease of reference, any pages from the Manual to which this Motion cites are attached as Exhibit 2.J. The current version of the Manual "supersedes all previous versions of OnLine Infos, PCS policies, and PCS, AdvancePCS, Caremark, PharmaCare (which includes ClaimsPro, United Provider Services, and Eckerd HealthServices), and RxAmerica provider manuals." Ex. 2.J at 3.

Plaintiffs' Provider Agreements and the Provider Manual thus set forth the terms under which Plaintiffs may be included in the various pharmacy provider networks established and maintained by Caremark and its affiliates.[6] *See, e.g.*, Exs. 2.A and 2.B at ¶ 11; Exs. 2.C-2.G at Recital A; § 9.7; Ex. 2.J at 17.

Each Provider Agreement also sets forth the contracting parties' respective rights and obligations as well as the terms and conditions governing how Plaintiffs are to fill prescriptions presented to their pharmacies by participants in PBM Plans, and the manner in which Plaintiffs are to receive, store, and transmit data belonging to individual Plan participants. *See, e.g.*, Exs. 2.C-2.G at §§ 2.5, 2.6, 3.1; Ex. 2.J at 11-16. Plaintiffs' Provider Agreements and Provider Manual also include provisions (directly relevant to the Complaint) identifying Caremark as the party that owns the data compiled, utilized or transmitted pursuant to the parties' arrangement. For example, the Provider Manual incorporated into each Plaintiff's Provider Agreement expressly states:

---

[6] As is discussed in further detail below (*see infra* Pt. III.A.3), that Plaintiffs' Provider Agreements are with Caremark and its PBM affiliates does not alter that Plaintiffs' claims against *all* Defendants are within the scope of the arbitration clauses at issue. For the reasons set forth in Part III.A.3, Plaintiffs are estopped from avoiding arbitration against the non-signatory Defendants both because Plaintiffs implicitly rely on the existence of the Provider Agreements to assert their claims against those Defendants, and because Plaintiffs allege that all Defendants—including those Defendants who are not signatories to the Provider Agreements—engaged in "substantially interdependent and concerted" conduct. *Grigson v. Creative Artists Agency*, L.L.C., 210 F.3d 524, 527, 531 (5th Cir. 2000); (affirming grant of motion to compel arbitration brought by non-signatories to arbitration agreement where non-signatories and signatories were "charged with interdependent and concerted misconduct"). At a minimum, any claims against non-signatories must be stayed pending arbitration of their claims against Caremark. *See Hill v. G E Power Sys.*, 282 F.3d 343, 347-48 (5th Cir. 2002) (finding stay was necessary where Plaintiff claimed that signatory and non-signatory "acted in concert" and Plaintiff's claims against each were "inherently inseparable" from one another).

> Provider has no right to use, reproduce or adapt any information, data, work, compilation . . . obtained from, provided by, or owned by Caremark or Plan Sponsor . . .
>
> Provider agrees that the information contained in the claims systems that was obtained by and through the administration and adjudication of a claim by Provider is the property of Caremark, and Provider agrees not to claim any right, title, or interest in said information.
>
> Caremark has the right to use, reproduce, and adapt any information or data obtained from Provider in any manner deemed appropriate, even if such use is outside the scope of the Provider Agreement, provided such use is in accordance with applicable Law.

Ex. 2.J at 40; *see also id*. at 11, 12 and 32 (setting forth numerous other provisions governing the collection, maintenance, transmission, and use of data). Section 6.2 of the Brookshire, Kinsey, Rogers, and De La Rosa Provider Agreements contains substantially identical language. Exs. 2.C-2.G at § 6.2..

**D. Arbitration Provision Incorporated Into Each Plaintiff's Provider Agreement**

Perhaps most important, for purposes of the instant Motion, each Plaintiff's Provider Agreement incorporates the following provision of the Provider Manual explicitly specifying how disputes are to be resolved:

> **Arbitration**
>
> Any and all disputes in connection with or arising out of the Provider Agreement by the parties will be exclusively settled by arbitration before a single arbitrator in accordance with the Rules of the American Arbitration Association. 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 on the parties, and judgment upon such award may be entered in any court having jurisdiction thereof. . . . Arbitration shall be the exclusive and final remedy for any dispute between the parties in connection with or arising out of the Provider Agreement; provided, however, that nothing in this provision shall prevent either party from seeking injunctive relief for breach of this Provider Agreement in any state or federal court

> of law. . . . The terms of this Arbitration section apply notwithstanding any other provision in the Provider Agreement.

Ex. 2.J at 43.[7] Thus, all six Plaintiffs have entered into agreements with Caremark which require the parties to arbitrate disputes such as those pleaded in the Complaint.

## III. ARGUMENT

Plaintiffs expressly agreed that all disputes "in connection with or arising out of" their Provider Agreements "will be exclusively settled by arbitration before a single arbitrator in accordance with the rules of the American Arbitration Association." Ex. 2.J at 43. Having received the economic benefits of the Provider Agreements, Plaintiffs cannot now repudiate their obligations thereunder. Accordingly, because the claims in the Complaint fall squarely within the scope of the arbitration clause contained in the Provider Manual expressly incorporated into each Plaintiffs' Agreement, those claims must be arbitrated, and Plaintiffs' claims before this Court must be dismissed.

### A. Plaintiffs' Claims Are Subject To Arbitration.

Law and public policy dictate that where parties have entered into a valid agreement to arbitrate, it must be enforced. The FAA[8] provides: "A written provision in any . . . contract

---

[7] Plaintiffs not only have failed to bring their dispute before the proper forum—an arbitrator—but they have not followed the contractually mandated procedures for providing notice of a dispute. The same arbitration provision quoted above requires the parties to attempt to resolve their disputes among themselves before resorting to arbitration. Specifically, the party potentially initiating arbitration must issue a "Dispute Notice" requesting a meeting "for the purpose of resolving the dispute" potentially to be arbitrated. *Id*. Once such a Notice is issued, the parties must "negotiate in good faith to resolve the dispute in a mutually acceptable manner" and the initiating party may proceed to arbitration only "[i]f despite the good faith efforts of the parties [they] are unable to resolve their dispute within thirty (30) days after the issuance of the Dispute Notice, or if the parties fail to meet within such thirty (30) days." *Id*. Here, Plaintiffs have not followed any of these procedures.

[8] The FAA applies to the Plaintiffs' Provider Agreements, both as a matter of law and by agreement. *See Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 178 (3d Cir. 1999) (arbitration

evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

The FAA reflects a "congressional declaration of a liberal federal policy favoring arbitration agreements." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.,* 460 U.S. 1, 24 (1983). "Congress enacted the FAA to replace judicial indisposition to arbitration with a 'national policy favoring [it] and plac[ing] arbitration agreements on equal footing with all other contracts.'" *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 581 (2007) (quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)). As recently noted by the Supreme Court, "[t]he FAA reflects the fundamental principle that arbitration is a matter of contract [and] requires courts to enforce [arbitration agreements] according to their terms." *Rent-a-Center, W. Inc. v. Jackson*, -- U.S. --, 130 S.Ct 2772, 2776 (2010) (citations omitted). "Congress' clear intent, in the Arbitration Act, [was] to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H. Cone*, 460 U.S. at 22.

Moreover, the FAA explicitly requires that a court "shall" enter an order directing arbitration where the parties have entered into an arbitration agreement. 9 U.S.C. § 4. The court must grant an application to compel arbitration "unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation which would cover the dispute at

---

clause is within the scope of FAA when contracts involve commerce as defined by FAA); Ex. 2.J at 43. The parties are plainly engaged in commerce within the meaning of the statute. *See, e.g.*, Cmplt. at ¶¶ 23, 24, 32, 33, 80, 83. *See Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 268 (1995) (adopting a broad interpretation of § 2 of the FAA, 9 U.S.C. § 2, which provides that an arbitration clause in "a contract evidencing a transaction involving commerce" falls within the scope of the FAA).

issue." *Pennzoil Exploration & Prod. Co. v. Ramco Energy*, 139 F.3d 1061, 1067 (5th Cir. 1998) (internal quotation marks omitted); *see also Primerica Life Ins. Co. v. Brown*, 304 F.3d 469, 471 (5th Cir. 2002) ("[A]ll doubts concerning the arbitrability of claims should be resolved in favor of arbitration."). Thus, determining whether a dispute is subject to arbitration involves two considerations: "(1) whether a valid agreement to arbitrate between the parties exists; and (2) whether the dispute in question falls within the scope of that arbitration agreement." *Pennzoil*, 139 F.3d at 1065. Here, both conditions are met.

1. Plaintiffs' Arbitration Clauses Are Valid And Enforceable.

The arbitration clauses incorporated into each of Plaintiffs' Provider Agreements are clear. "When deciding whether the parties agreed to arbitrate the dispute in question, courts generally should apply ordinary state-law principles that govern the formation of contracts. . . . In applying state law, however, due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself must be resolved in favor of arbitration." *Webb v. Investacorp*, 89 F.3d 252, 258 (5th Cir. 1996) (citations and internal quotation marks omitted).

Here, there can be no question each Plaintiff's agreement to arbitrate disputes "in connection with or arising out of" its Provider Agreement is valid and enforceable. Indeed, in a prior case brought by one of the very Plaintiffs before this Court (De La Rosa), the Supreme Court of Texas already has found an arbitration provision that is identical in all material respects to the clause contained in the Provider Manual to be valid and enforceable, and therefore granted

mandamus relief and ordered the trial court to compel arbitration. *In re AdvancePCS*, *supra*, 172 S.W.3d at 609, at Ex. 1.[9]

The arbitration provision in the Provider Manual is clear, legible, and written in plain language, and is equally binding on both parties. *See id*. at 172 S.W.3d at 607-08 (finding that substantially identical arbitration language was equally binding on Plaintiff De La Rosa and AdvancePCS).[10] Under *Pennzoil* and the law of this Circuit, this fact is strong evidence of the parties' intent to arbitrate. *See Webb*, 89 F.3d at 259 ("[T]he arbitration clauses themselves are not one-sided in the sense that they cause [plaintiffs] to relinquish their access to the courts because, by the same provisions, [defendant] has relinquished the same right."); *see also Blair v. Scott Specialty Gases*, 283 F.3d 595, 603 (3d Cir. 2002) ("[w]hen both parties have agreed to be bound by arbitration, adequate consideration exists and the arbitration agreement should be enforced."); *Johnson v. Circuit City Stores, Inc.*, 148 F.3d 373, 378 (4th Cir. 1998). Moreover, Plaintiffs each have been members of Caremark's PBM networks for years and have at all times treated the Provider Agreements as valid and effective. Indeed, they have filled thousands of prescriptions thereunder for hundreds of participants of benefit plans and submitted claims for those services to Caremark in accord with the terms of the Agreements and the Provider Manual

[9] Plaintiffs' Provider Agreements are all, "[u]nless otherwise mandated by applicable Law . . . [to] be construed, governed and enforced in accordance with the laws of the State of Arizona." *See* Exs. 2.A and 2.B at ¶ 13; Exs. 2.C-2.G at § 9.4. As noted in *In re AdvancePCS*, "Texas and Arizona law do not differ on any point" relevant to the enforceability of the arbitration provisions. 172 S.W.3d at 606, at Ex. 1.

[10] As noted by the court in *City of Cottonwood v. James L. Fann Contracting, Inc.*, 877 P.2d 284, 289-92 (Ariz. Ct. App. 1994), an arbitration provision is enforceable under Arizona law if the parties mutually consented to be bound by the agreement, the agreement is supported by adequate consideration, and no defense such as fraud or mistake exists. Here, the Provider Agreements were plainly supported by adequate consideration since mutual promises to submit to arbitration are alone sufficient consideration for an arbitration agreement to be enforceable. *Valdiviezo v. Phelps Dodge Hidalgo Smelter, Inc.*, 995 F. Supp. 1060, 1066-67 (D. Ariz. 1997).

incorporated therein. Caremark in turn processed those claims and paid the agreed upon reimbursement rates. Having received the economic benefits of the Provider Agreements, Plaintiffs cannot now repudiate their obligations thereunder.

2. Plaintiffs' Claims Are Subject To The Arbitration Clause, And Are All Within The Scope Of Their Agreements To Arbitrate.

Plaintiffs cannot avoid their agreement to arbitrate by asserting that their claims do not fall within the scope of the arbitration agreements. Indeed, the FAA gives the arbitrator the power to determine the scope of the arbitration clause as well as the merits. *Sharon Steel Corp. v. Jewell Coal & Coke Co.*, 735 F.2d 775, 779 (3d Cir. 1984). Accordingly, the Supreme Court held in *Green Tree Financial Corp. v. Bazzle* that where an agreement provides for arbitration of any dispute arising under or relating to a contract, any question about the scope of the arbitration agreement is itself a dispute arising under or relating to the contract and must be submitted to arbitration. 539 U.S. 444, 453 (2003); *see also Shaw Group, Inc. v. Triplefine Int'l Corp.*, 322 F.3d 115, 121-22 (2d Cir. 2003) (contract's provision that all disputes "concerning or arising under" the contract shall be submitted to arbitration evinced a "clear and unmistakable agreement to arbitrate arbitrability"); *Pedcor Mgmt. Co., Inc. Welfare Benefit Plan v. Nations Pers. of Tex., Inc.*, 343 F.3d 355, 363 (5th Cir. 2003) (explaining that *Green Tree* held that "arbitrators should be the first ones to interpret the parties' [arbitration] agreement"). Accordingly, any question about whether Plaintiffs' claims fall within the scope of the arbitration clause is therefore a question that arises under the Agreements and must be resolved by the arbitrator.

Regardless, however, it could not be disputed in any event that Plaintiffs' claims are controversies "in connection with or arising out of" the Agreements at issue. Indeed, Plaintiffs' Complaint alleges that Caremark misused consumer data transferred to it by Plaintiffs solely as a

result of the requirements of Plaintiffs' Provider Agreements, and that Caremark improperly excluded Plaintiffs from PBM networks, membership in which is governed by those Agreements. As discussed above, these Agreements directly address the ownership and use of such data as well as membership in Caremark's PBM networks. Accordingly, Plaintiffs' claims are not only "in connection with" or "arise out of" the Provider Agreements, they are directly governed by them, and are thus subject to mandatory arbitration under the liberal Federal policy in favor of such resolution.

Moreover, "courts distinguish 'narrow' arbitration clauses that only require arbitration of disputes 'arising out of' the contract from broad arbitration clauses governing disputes that 'relate to' or 'are connected with' the contract." *Pennzoil*, 139 F.3d at 1067. "Broad arbitration clauses . . . are not limited to claims that literally 'arise under the contract,' but rather embrace all disputes between the parties having a significant relationship to the contract regardless of the label attached to the dispute." *Id.*; *see also SDB Trade Int'l, L.P. v. E&E Group, LLC*, No. H-08-226, 2008 U.S. Dist. LEXIS 101302, *17-18 (S.D. Tex. May 15, 2008) ("[A] dispute 'arises out of or relates to' a contract if the legal claim underlying the dispute could not be maintained without reference to the contract."). "If the court finds that the clause is broad, any dispute between the parties falls within the scope of the clause if it is connected with or related to the contract." *Jureczki v. Banc One Tex., N.A.*, 252 F. Supp. 2d 368, 374 (S.D. Tex. 2003); *see also Pers. Sec. & Safety Sys. v. Motorola Inc.*, 297 F.3d 388, 392-95 (5th Cir. 2002) (provision in parties' product development agreement requiring arbitration of disputes "arising out of or relating to" the agreement required arbitration of claims relating to violation of a separate stock purchase agreement); *Valentine Sugars, Inc. v. Donau Corp.*, 981 F.2d 210, 213 n.2 (5th Cir. 1993) ("When parties include such a broad arbitration clause, they intend the clause to reach all

aspects of the relationship."). Here, as noted at the outset, the arbitration clauses contained in the Provider Agreements are broad, and govern all disputes "connect[ed] with" the Agreements in any respect. Accordingly, Plaintiffs' claims must be arbitrated. *See, e.g., Pennzoil*, 139 F.3d at 1067.

a. *RICO Claim*

It is well-settled that RICO claims may be arbitrated. *Shearson/American Express v. McMahon*, 482 U.S. 220, 223, 239 (1987) (finding plaintiff's RICO claim was subject to arbitration where contract required arbitration of "any controversy arising out of or relating to my accounts" and noting, "RICO's text and legislative history fail to reveal any intent to override the provisions of the Arbitration Act"); *PacifiCare Health Sys. v. Book*, 538 U.S. 401, 407 (2003) (allowing arbitration of physicians' RICO claims against managed care health plan alleging plan failed to pay reimburse them for treating members of defendant's health plan); *R.M. Perez & Assoc., Inc. v. Welch*, 960 F.2d 534, 539 (5th Cir. 1992) (affirming motion to compel RICO arbitration where agreements provided "any controversy between us arising out of or relating to this agreement or the breach thereof shall be settled by arbitration").

Here, Plaintiffs' RICO claim falls squarely within the broad scope of the parties' agreement to arbitrate claims "in connection with" the Provider Agreements. Indeed, the thrust of Plaintiffs' RICO claim is that Defendants allegedly misused HIPAA-protected consumer information Plaintiffs provided as a result of the requirements of the Provider Agreements. *See, e.g.*, Cmplt. at ¶¶ 109, 112. The Provider Agreements and Provider Manual incorporated therein contain detailed provisions identifying which party (Caremark) owns the data compiled, utilized or transmitted pursuant to the parties' arrangement, the manner in which the parties are to receive, store, and transmit data relating to individual plan participants, and how such data may

be used, reproduced or otherwise utilized. *See, e.g.,* Exs. 2.C-2.G at §§ 2.5, 2.6, 3.1, 3.3, 6.2; Ex. 2.J at 11-16, 32, 40 ("Provider agrees that the information contained in the claims systems that was obtained by and through the administration and adjudication of a claim by Provider is the property of Caremark, and Provider agrees not to claim any right, title, or interest in said information.").

There can be no doubt Plaintiffs' RICO claims are connected with and/or arise out of their Provider Agreements. Indeed, were it not for those Agreements, Plaintiffs never would have transmitted or utilized the data whose misuse they complain of. Accordingly, Plaintiffs' RICO claim must be arbitrated.[11]

b. *Trade Secret Misappropriation Claim*

Plaintiffs' trade secret misappropriation claim also is not only "related to" and closely "connected with" the Provider Agreements, but is in fact governed by them, and therefore must be arbitrated. In support of their claim, Plaintiffs allege they have a trade secret interest in their "patient lists, prescription files and integrated patient information" which they disclosed to Caremark by virtue of being included in Caremark's PBM networks, and that Defendants "use(d) and disclose(d)" that information "without the Plaintiffs' authorization." Cmplt. ¶¶ 125-27. As discussed above, however, Plaintiffs' Provider Agreements each contain detailed provisions expressly addressing the parties' authorized use, dissemination, and ownership of the

[11] Plaintiffs have alleged only supplemental subject matter jurisdiction over Counts II and III. Cmplt. ¶ 20. Thus, assuming their RICO claim is referred to arbitration, this Court would no longer have federal jurisdiction over the remaining state law claims, and they must be dismissed for lack of jurisdiction. *Allen v. Texas DOT*, 186 Fed.Appx. 501, 504 (5th Cir. 2006) ("[w]ithout a federal cause of action before it, the district court acted within its discretion in declining to exercise jurisdiction over [plaintiff's remaining] state law claims."); *Gray v. Sage Telecom, Inc.*, 410 F. Supp. 2d 507, 513 (N.D. Tex. 2006) (compelling arbitration of federal claim and declining to exercise jurisdiction over remaining state law claims).

information Plaintiffs claim constitutes their trade secrets. In other words, the Provider Agreements expressly govern the use of the very information Plaintiffs allege Defendants misappropriated. *See* Exs. 2.C-2.G at § 6.2; Ex. 2.J. at 11, 12, 40.

In *FCI USA, Inc. v. Tyco Elecs. Corp.*, No. 2:06-CV-128 2006 U.S. Dist. LEXIS 48874 (E.D. Tex. Jul. 18, 2006), the court found a claim of trade secret misappropriation was subject to arbitration where, as here, the parties' agreement "included a clause that covered the use of confidential information exchanged." 2006 U.S. Dist LEXIS 48874 at *7. In referring the claim to arbitration, the court noted:

> Because the use of confidential information was a term of the contract, the misappropriation of trade secrets based on information received during the relationship governed by the contract "involv[es] a term" of the contract within the scope of the Arbitration Clause. Further, following the test by the Fifth Circuit, because the relationship set forth in the contract gives rise to the claims, the claims are "so interwoven with the contract that [they can] not stand alone."

*Id*. (quoting *Ford v. NYLCare Health Plans of Gulf Coast*, 141 F.3d 243 (5th Cir. 1998)). *See also OJSC Ukrnafta v. Carpatsk Petroleum Corp.*, No. H-09-891 2009 U.S. Dist. LEXIS 29451, *12 (S.D. Tex. Apr. 7, 2009) (finding misappropriation of trade secrets claims fell within scope of parties' agreement to arbitrate any claims "connected with" parties' joint venture agreement). As in *FCI USA*, Plaintiffs' trade secret claim here is squarely connected with, governed by and "interwoven with" the Provider Agreements, and is therefore subject to mandatory arbitration.

c. *Any Willing Provider Law Claim*

Last, Plaintiffs' claim that Defendants violated the Texas AWP statute is also "related to" or "connected with" their Provider Agreements and thus must be arbitrated. In essence, Plaintiffs allege they have been excluded from some of the pharmacy networks created or maintained by Caremark or its affiliates by prohibiting them "from providing maintenance

medications" to participants in PBM Plans, and Caremark's agreements with these clients "establish[] pharmacy networks that provide incentives for the members of such plans to utilize CVS Caremark-owned retail and mail order pharmacies to fill prescriptions for their maintenance medications and correspondingly disincentivizes their use of non-CVS pharmacies." Cmplt. at ¶¶ 128, 131.

Plaintiffs' ability to be included in Caremark's pharmacy networks, including the ones from which they claim exclusion, is governed by their Provider Agreements and the Provider Manual. *See* Exs 2.A and 2.B at Sch. A; Exs. 2.C-2.G at 4.1; Ex. 2.J at 17-18. Plaintiffs' AWP claim thus is directly related to and connected with Plaintiffs' Provider Agreements. Put most simply, Plaintiffs' contend by way of their AWP claim that Plaintiffs' Provider Agreements are unenforceable to the extent they conflict with Texas law. It is uncontroversial that arbitrators are fit not only to interpret contracts but to resolve whether contracts are enforceable. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 406 (1967). *See also Corvel Corp. v. Southwest Louisiana Hosp. Ass'n*, No. 05-1330, 2007 WL 594904, *1-2 (W.D. La. Feb. 21, 2007) (claim brought under Louisiana's AWP statute relating to payment of hospital by preferred provider organization ("PPO") was required to be arbitrated where parties' PPO network agreement required arbitration of "any disputes or problems that may arise [there]under"). The AWP claim addresses the terms on which the parties must conduct business, and as such is plainly "related to" or "connected with" Plaintiffs' Provider Agreements and, therefore, must be arbitrated.[12]

[12] Plaintiffs' efforts to assert claims on behalf of two putative classes—some of whose members may not be parties to their own Provider Agreements with Caremark—do not in any way insulate Plaintiffs from mandatory arbitration, and, on the contrary, disables them from asserting class claims in court. *See, e.g.*, *Caudle v. American Arbitration Ass'n*, 230 F.3d 920,

3. Plaintiffs' Claims Against All Defendants Are Subject To Arbitration.

Although Plaintiffs' Provider Agreements are with Caremark, and not the other Defendants in this case, Plaintiffs' claims against all Defendants must be arbitrated. "Although arbitration is a matter of contract that generally binds only signatories, a party to an arbitration agreement may be equitably estopped from litigating its claims against non-parties in court and may be ordered to arbitration." *Brown v. Pac. Life Ins. Co*, 462 F.3d 384, 398 (5th Cir. 2006). Specifically, the Fifth Circuit has recognized:

> equitable estoppel allows a nonsignatory to compel arbitration in two different circumstances. *First, 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*. . . . *Second, application of equitable estoppel is warranted when the signatory to the contract containing an arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract*. *Otherwise the arbitration proceedings between the two signatories would be rendered meaningless and the federal policy in favor of arbitration effectively thwarted*.

*Grigson*, 210 F.3d at 527 (quoting *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999) (emphasis in original)).

It is not necessary to satisfy both of *Grigson*'s tests for a party to be equitably estopped from avoiding arbitration against non-signatories to arbitration agreements. *See Jureczki*, *supra*, 252 F. Supp. 2d at 376 ("The *Grigson* court stressed that this is not a rigid test, and that each case turns on its facts."). But here, both are fulfilled.

---

921 (7th Cir. 2000) ("A procedural device aggregating multiple persons' claims in litigation does not entitle anyone to be in litigation; a contract promising to arbitrate the dispute removes the person from those eligible to represent a class of litigants.").

a. *Plaintiffs' Claims Arise Out Of The Provider Agreements.*

Plaintiffs' claims against the non-signatory Defendants plainly derive from their contractual relationship with Defendant Caremark. Thus, those claims must be arbitrated. Plaintiffs' RICO claim alleges that all Defendants improperly disclosed "individually identifiable protected health information received by Caremark" as a result of Plaintiffs participating in Caremark's networks pursuant to their Agreements (*see, e.g.*, Cmplt. at ¶ 109), and Plaintiffs' trade secret misappropriation claim alleges Defendants' misuse of Plaintiffs' "patient lists and integrated patient information," which were again provided as a specific result of Plaintiffs participating in Caremark's networks pursuant to their Agreements *See, e.g.*, Cmplt. at ¶ 126. Moreover, the collection and use of all of the allegedly misused information is specifically governed by the Provider Agreements and the Provider Manual incorporated into those Agreements. *See* Exs. 2.C-2.G at Recital (A); §§ 3.1; 6.2; Ex. 2.J at 11-16; 40. Plaintiffs' AWP claim similarly alleges that they are being improperly excluded from certain of Caremark's PBM Plans and that such plans "disfavor and discriminate against non-CVS Pharmacies in the sale of maintenance medications." Cmplt. at ¶ 131. However, Plaintiffs' inclusion in such plans is governed by their Provider Agreements. *See* Exs. 2.A and 2.B at Sch. A; Exs. 2.C-2.G at §4.1; Ex. 2.J. at 17-18.

Accordingly, Plaintiffs' claims against the non-signatory Defendants specifically allege that those Defendants acted in concert with Caremark to exploit information provided by Plaintiffs to Caremark pursuant to their Provider Agreements, or to improperly exclude Plaintiffs from networks governed by those Agreements. *See Jureczki*, 252 F. Supp. 2d at 376 ("[B]ecause the requirements and processes for withdrawing funds from that account are necessarily governed by the plaintiffs' contract with Bank One, the court concludes that the plaintiffs must

rely on the terms of their written agreement with Bank One to assert their claims against the non-signatory defendants."). Accordingly, Plaintiffs' claims against all Defendants are intertwined with and arise out of the Provider Agreements and therefore must be arbitrated.

b. *Plaintiffs Allege That Caremark And The Non-Signatory Defendants Engaged In Interdependent And Concerted Misconduct.*

Second, as Plaintiffs allege "substantially interdependent and concerted misconduct by both the nonsignatory [Defendants]" and Caremark, Plaintiffs' claims against the non-signatory Defendants must be arbitrated for that reason alone. *Grigson*, 210 F.3d at 527 (plaintiff, a party to an arbitration agreement, estopped from refusing to arbitrate claims against defendants who were not parties to arbitration agreement where the defendants were alleged to have engaged in concerted and interdependent misconduct); *see also Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 757-758 (11th Cir. 1993) (compelling arbitration against parent corporation who had acquired subsidiary that signed arbitration agreement, even though parent corporation was not a party to the arbitration agreement, because claims against parent were "intimately founded in and intertwined with the underlying contract"); *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 320-21 (4th Cir. 1988) ("When the charges against a parent company and its subsidiary are based on the same facts and are inherently inseparable, a court may refer claims against the parent to arbitration even though the parent is not formally a party to the arbitration agreement."); *Bloxom v. Landmark Publ'g Corp.*, 184 F. Supp. 2d 578, 582-83 (E.D. Tex. 2002) (arbitration with non-signatory parent and sister corporations compelled where plaintiff alleged substantially interdependent and concerted misconduct).

Here, Plaintiffs' claims are asserted against all four of the Defendants, without any attempt to distinguish conduct by Caremark from conduct by non-signatories to their Provider Agreements. *See, e.g.*, Cmplt. ¶¶ 35 ("Defendants use this database network to aggregate, store,

and transmit to its various business units the personal information of the member patients…"); 69 ("After the Defendants compile and mine Plaintiffs' proprietary patient lists and the integrated protected health information, Defendants target and direct market their retail pharmacy and mail-order pharmacy services to those patients…"); 81 ("Defendants . . . unlawfully appropriate, disclose and misuse [] information in order to gain a competitive and financial advantage."). Plaintiffs' claims all allege interdependent and concerted action among Caremark and its affiliated Defendants. Indeed, the essence of Plaintiffs' claims is that Caremark engaged in a conspiracy with its affiliated Defendants to misuse and misappropriate information and to exclude Plaintiffs from portions of its networks.

Thus, it is clear from the face of the Complaint that Plaintiffs' claims against Caremark are intertwined with their claims against the non-signatory Defendants. *See Jureczki*, 252 F. Supp. 2d 378 (finding the second prong of *Grigson* was met where "neither the factual nor the legal allegations asserted in plaintiffs' complaint distinguish between the individual defendants"). Accordingly, all claims against all Defendants must be arbitrated.[13]

[13] In the alternative, even if this Court finds that Plaintiffs are not estopped from avoiding arbitration against the non-signatory Defendants, their claims against those Defendants must be stayed pending arbitration of the claims against Caremark. Although Defendants do not believe that such a course would be judicially efficient because it would split intertwined claims, the Court has the power to compel arbitration as to some parties and to stay these proceedings as to other parties. "If a suit against a nonsignatory is based upon the same operative facts and is inherently inseparable from the claims against a signatory, the trial court has discretion to grant a stay if the suit would undermine the arbitration proceedings and thwart the federal policy in favor of arbitration." *Hill v. G E Power Sys*., 282 F.3d 343, 347-48 (5th Cir. 2002) (finding stay was necessary where Plaintiff claimed that signatory and non-signatory "acted in concert" and Plaintiff's claims against each were "inherently inseparable" from one another); *Harvey v. Joyce*, 199 F.3d 790, 796 (5th Cir. 2000) (finding stay necessary where requiring non-signatory to proceed to litigation of claims "inherently inseparable" from claims against signatory would render arbitration against signatory "both redundant and meaningless"); *Sam Reisfeld & Son Imp. Co. v. S.A. Eteco*, 530 F.2d 679, 681 (5th Cir. 1976 ) ("If the parent corporation was forced to try the case, the arbitration proceedings would be rendered meaningless and the federal policy in

**B. Plaintiffs' Requests For Injunctive And Class Relief Do Not Allow Them To Escape Arbitration.**

1. Plaintiffs' Request For Injunctive Relief Also Must Be Arbitrated.

Although the arbitration provision in the Provider Manual contains a limited exception to mandatory arbitration—namely, 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," Ex. 2.J. at 43 (emphasis added)—this exception has no application here as Plaintiffs' limited request for injunctive relief is not based on any alleged "breach[es] of th[eir] Provider Agreement[s]." *See* Cmplt. ¶ 135-36 (requesting an injunction requiring them to be admitted into certain of Caremark's networks, and preventing Defendants from using data "except solely for the purpose of adjudication of pharmacy benefit claims."). Indeed, Plaintiffs' Complaint does not even mention the existence of their Provider Agreements, let alone any breach of those Agreements. Plaintiffs thus cannot contend that their request for injunctive relief is intended to cure any breach of those Agreements, and their claims must therefore be arbitrated.

2. Plaintiffs' Putative Class Allegations Do Not Alter The Fact That Plaintiffs' Claims Must Be Arbitrated.

Moreover, it is well-established that, "arbitration clauses should be enforced even where they may render class relief unavailable." *Kahn v. Option One Mortg. Corp.*, No. 05-5268, 2006 U.S. Dist. LEXIS 1695, *20 (E.D. Pa. Jan. 18, 2010); *see also Johnson v. West Suburban Bank*, 225 F.3d 366, 377 (3d Cir. 2000) (rejecting argument that arbitration would be inappropriate because it prevented plaintiffs' ability to bring class action). The Supreme Court recently held in *Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.*, -- U.S. --, 130 S.Ct 1758, 1776 (2010), that unless a

---

favor of arbitration effectively thwarted"). Indeed, as is discussed *infra* at Part III.C, to the extent this Court finds that any of Plaintiffs' claims are not subject to arbitration, those claims should be stayed pending resolution of all claims that are subject to arbitration.

contract specifically provides for arbitration of class claims, class relief is not available. Here, the parties' contracts do not provide for or even contemplate class arbitration. Accordingly, and as *Stolt-Nielsen* confirms, Plaintiffs' misguided attempt to bring their claims on behalf of a putative class in no way obviates that their claims are all subject to arbitration.

**C. Any Claims Not Subject To Arbitration Must Be Stayed Pending Arbitration**.

Finally, even were this Court to determine that any portion of Plaintiffs' claims were not subject to arbitration, the Court should stay any further proceedings before it pending completion of arbitration. *See* 9 U.S.C. § 3. ("[U]pon any issue referable to arbitration under an agreement in writing for such arbitration, the court [] shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement."). A District Court has discretion to stay causes of action it deems are not subject to arbitration. *M & I Elec. Indus., Inc. v. Rapistan Demag Corp.*, 814 F. Supp. 545, 547 (E.D. Tex. 1993); *Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840, 856 (2d Cir. 1987); *see also Air Freight Servs. v. Air Cargo Transp.*, 919 F. Supp. 321, 324 (N.D. Ill. 1996) ("[A] court should stay litigation pending arbitration even when the arbitration would not necessarily resolve all of the issues raised by the parties in the litigation.").

As detailed above, Plaintiffs' claims are entirely interrelated. Thus, staying litigation of any non-arbitrable claims would allow an arbitrator to resolve issues of fact and law common both to arbitrable and non-arbitrable claims (assuming this Court finds there are any such claims)—and to do so relatively inexpensively and expediently, while conserving judicial resources. *HG Estate, LLC v. Corporacion Durango, S.A. de C.V.*, 271 F. Supp. 2d 587, 595-96 (W.D.N.Y. 2003) (finding that, "in determining the order in which the parties' disputes will be addressed, primacy should go to the arbitration clause" and noting that staying litigation pending

arbitration would be more efficient because, among other things, "the preclusive effects of arbitration upon litigation are more certain than the reverse"). Accordingly, if any claims were found not to be subject to arbitration, any such claims should be stayed pending resolution of the arbitrable claims in the interests of efficiency and judicial economy.

Defendants further request that the Court extend the time to answer Plaintiffs' Complaint (if necessary) until twenty days following the Court's ruling on the instant Motion.

## IV. CONCLUSION AND RELIEF REQUESTED

For the foregoing reasons, Defendants respectfully request that this Court grant their Motion to Compel Arbitration, dismiss the Complaint and stay remaining proceedings,[14] and extend the time to respond to Plaintiffs' Complaint (if necessary) until twenty days following the Court's ruling on the instant Motion.

Dated: December 6, 2010

Respectfully submitted,

/s Frank E. Pasquesi (with permission)
Frank E. Pasquesi
Attorney-In-Charge
Illinois State Bar No. 6205455
321 N. Clark St.
Suite 2800
Chicago, IL 60654
(312) 832-4500 (telephone)
(312) 832-4700 (facsimile)
Email: fpasquesi@foley.com

[14] Plaintiffs may, of course, pursuant to their Provider Agreements, initiate arbitration in the American Arbitration Association.

Of Counsel:

**FOLEY & LARDNER LLP**
Robert H. Griffith
Lisa M. Noller
321 N. Clark St.
Suite 2800
Chicago, IL 60654
(312) 832-4500 (telephone)
(312) 832-4700 (facsimile)
Email: fpasquesi@foley.com
Email: rgriffith@foley.com
Email: lnoller@foley.com

**ANDREWS KURTH LLP**
Timothy E. Taylor
1717 Main Street
Suite 3700
Dallas, TX 75201
(214) 659-4541 (telephone)
(214) 659-4797 (facsimile)
Email: timtaylor@andrewskurth.com
Texas Bar No.: 19723895
So. Dist. Tex. Bar No.: 612845

**ANDREWS KURTH LLP**
Scott A. Brister
111 Congress Avenue
Suite 1700
Austin, TX 78701
(512) 320-9200 (telephone)
(512) 320-9292 (facsimile)
Email: scottbrister@andrewskurth.com
TX Bar No.: 00000024
So. Dist. Tex. Bar No.: 1820

*Attorneys for Defendants*

**CERTIFICATE OF CONFERENCE**

On December 3, 2010, counsel for Defendants conferred with Plaintiffs' counsel, and Plaintiffs' counsel is opposed to the relief requested herein.

/s Frank E. Pasquesi (with permission)

**CERTIFICATE OF SERVICE**

I hereby certify that on December 6, 2010, I electronically filed the foregoing Defendants' Motion to Compel Arbitration and this Certificate of Service with the Clerk of the Court using the CM/ECF system, and further caused the same to be served on the following counsel of record via ECF filing. A separate copy of the motion and exhibits filed under seal was served on counsel of record via certified mail, return receipt requested.

/s Timothy E. Taylor
Timothy E. Taylor