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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Mission Wellness Pharmacy, LLC, Petitioner, v. Caremark LLC; Caremark PCS, LLC; SilverScript Insurance Company, Respondents.	No. 2:22-cv-00967-GMS **APPLICATION TO CONFIRM ARBITRATION AWARD**

Petitioner Mission Wellness Pharmacy, LLC ("Petitioner" or "Mission Wellness"), respectfully petitions the Court, pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 9 for an order confirming the final arbitration award (the "Final Award") issued by the American Arbitration Association ("AAA") arbitrator in the binding arbitration (the "Arbitration") between Mission Wellness and Respondents Caremark, LLC; Caremark PCS, LLC; and SilverScript Insurance Company (collectively, "Caremark" or "Respondents"), entitled Mission Wellness Pharmacy, LLC v. Caremark,

LLC; Caremark PCS, LLC; and SilverScript Insurance Company, AAA Case No. 01-19-0000-3552 (the "Arbitration"), and requests that the Court enter judgment upon the Final Award in its entirety. This Application is supported by the following Memorandum of Points and Authorities and is made on the following grounds.

PRELIMINARY STATEMENT

Petitioner seeks confirmation of the Final Award, which provides findings of fact and conclusions of law applicable to the parties' ongoing dispute, because Respondents have refused to satisfy the Award. Respondents' conduct predating this application consists of threats to initiate legal action against Petitioner and terminate it from Respondents' network if Petitioner files this instant Application even though the parties' arbitration agreement (the "Agreement") and federal law provides for the relief sought herein. While Respondents may argue this Application violates the parties' Agreement, Respondents are without recourse in law or contract, and should not be allowed to use inapplicable confidentiality or arbitration agreements, that have no bearing on the parties' underlying arbitration, as a sword to punish Petitioner for prevailing under the law and the Agreement governing the underlying Arbitration. Petitioner makes this Application simply to request that the Court exercise its power, as authorized by the Federal Arbitration Act (the "FAA"), to confirm the Final Award. This confirmation not only give effect to the parties' Agreement, but it also prevents Respondents from frustrating the rule of law and/or the Agreement.

MEMORANDUM OF POINTS AND AUTHORITIES
PARTIES, JURISDICTION, AND VENUE

1. Petitioner is a limited liability company with its principal place of business at 2424 Mission Street, San Francisco, California 94110. Petitioner has two (2) members, Maria Lopez and Daniel Andrzejek, each a citizen of and domiciled in San Francisco, California.

2. Upon information and belief, Respondents Caremark, LLC, Caremark PCS, LLC, and SilverScript Insurance Company are each limited liability companies,

respectively, organized and existing under the laws of Delaware with their principal places of business located in Woonsocket, Rhode Island.

3. This is a proceeding to confirm an arbitration award arising under Section 9 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 9.

4. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1332 because the parties are citizens of different states and the amount in controversy in the underlying arbitration exceeds the sum or value of $75,000, exclusive of interest and costs.

5. Venue is proper in this judicial district pursuant to 9 U.S.C. § 9 because the Arbitration occurred in this district.

BACKGROUND

6. The parties entered into an Agreement requiring them to submit to arbitration "any and all disputes between Provider and Caremark… including but not limited to, disputes in connection with, arising out of, or relating in any way to, the Provider Agreement or to Provider's participation in one or more of Caremark's networks or exclusion from any Caremark networks between Provider and Caremark." A true and correct copy of the Arbitration Agreement is attached as **Exhibit A-1** of Declaration of Daniel Andrzejek in Support of Petition to Confirm Arbitration Award and Motion to Confirm Arbitration Award (the "Andrzejek Declaration"), submitted herewith as **Exhibit A** to the Application.

7. On January 31, 2019, Petitioner initiated Arbitration with the AAA pursuant to the Arbitration Agreement and was assigned Case Number 01-19-0000-3552. The arbitration involved a dispute regarding numerous breach of contract claims, among other things.

8. On May 18, 2022, the Arbitrator issued his Final Award in favor of Mission Wellness in the total amount of $3,662,099.47, calculated as: $2,127,466.00 in damages; $247,279.29 in pre-judgment interest; and $1,287,354.18 in attorneys' fees, costs and

expenses. A true and correct copy of the Arbitrator's Final Award is attached as **Exhibit A-2** of the Andrzejek Declaration.

9. On May 19, 2022, Petitioner sent an email to counsel for Respondents requesting that Respondents confirm whether they would pay Petitioner $3,662,099.47, calculated as: $2,127,466.00 in damages; $247,279.29 in pre-judgment interest; and $1,287,354.18 in attorneys' fees, costs and expenses, no later than May 26, 2022. Petitioner also reminded Respondents' counsel that interest on the award began to accrue on a per diem basis beginning May 18, 2022. **Exhibit A-3** of the Andrzejek Declaration.

10. On May 24, 2022, counsel for Respondents sent an email responding to Petitioner, stating that Respondents "would not be in a position to respond to [Petitioner's] request by [May 26, 2022]." Respondents also threatened to not only terminate Petitioner from Respondents' network, but to initiate litigation against Petitioner if it sought to confirm the Final Award.

11. Counsel for Petitioner responded on May 25, 2022 stating that although Respondents threats were unfounded and not supported by the Agreement governing the parties' arbitration, Petitioner agreed to provide Respondents with an additional seven (7) days, or until June 2, 2022 to confirm in writing whether they would fully comply with the Final Award. Id.

12. As of the date of this filing, Respondents have not confirmed whether they will comply with the Arbitrator's Final Award and pay Petitioner the damages, accruing interest, and attorneys' fees ordered therein. Indeed, Respondents never intended to comply with the Final Award. As indicated in footnote 1 of Respondents' Response In Support of Petitioner's Motion to File Application to Confirm Arbitration Award Under Seal, Respondents indicated that a Motion to Vacate the Final Award is forthcoming (Doc. 8). While the Final Award demonstrates Respondents' failure to comply with federal law, their telegraphed Motion to Vacate signals their lack of accountability and responsibility.

13. The Arbitration Agreement governing the parties' arbitration proceedings provides that "the award of the arbitrator(s) will be final and binding on the parties, and

judgment upon such award may be entered in any court having jurisdiction thereof." See **Exhibit A-1** of the Andrzejek Declaration.

14. Thus, Petitioner now seeks to exercise its right under 9 U.S.C. § 9 and the parties' Agreement to file this instant Petition seeking an Order from this Court confirming of the Arbitrator's Final Award of damages, pre-judgment interest, and attorneys' fees, costs and expenses.

LEGAL AUTHORITY

The parties' Agreement includes a provision to arbitrate disputes before an arbitrator of the AAA, as well as a provision that such arbitrator's awards "will be final and binding on the parties, and judgment upon such award may be entered in any court having jurisdiction thereof. **Exhibit A-1** of the Andrzejek Declaration. Under the Federal Arbitration Act, any party to an arbitration may, "at any time within one year after the award is made," "apply to the court … for an order confirming the award." 9 U.S.C. § 9. "A confirmation proceeding under 9 U.S.C. § 9 is intended to be summary; confirmation can only be denied if an award has been corrected, vacated, or modified in accordance with the Federal Arbitration Act." Taylor v. Nelson, 788 F.2d 220, 225 (4th Cir. 1986); see also Hall Street Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 582, 128 S.Ct. 1396, 1402 (2008) ("An application for any of these orders will get streamlined treatment as a motion, obviating the separate contract action that would usually be necessary to enforce or tinker with an arbitral award in court. § 6. Under the terms of § 9, a court 'must' confirm an arbitration award 'unless' it is vacated, modified, or corrected 'as prescribed' in §§ 10 and 11.") (footnote omitted). ("[T]he Court's function in confirming or vacating an arbitration award is severely limited. If it were otherwise, the ostensible purpose for resort to arbitration, i.e., avoidance of litigation would be frustrated." Amicizia Societa Navegazione v. Chilean Nitrate & Iodine Sales Corp., 274 F.2d 805, 808 (2d Cir. 1960).

"[A] party's failure to petition to vacate an arbitration award within the relevant statutory limitations period will preclude the assertion of affirmative defenses in a subsequent action to confirm the award." Int'l Longshoremen's & Warehousemen's Union,

Local 32 v. Pac. Mar. Ass'n, 773 F.2d 1012, 1019 (9th Cir. 1985); accord Brotherhood of Teamsters & Auto Truck Drivers Local No. 70 v. Celotex Corp., 708 F.2d 488, 490 (9th Cir.1983); Sheet Metal Workers' International Association, Local No. 252 v. Standard Sheet Metal, Inc., 699 F.2d 481, 483 (9th Cir.1983).

In the underlying Arbitration, Petitioner alleged, among other things, that Respondents assessed certain fees against Petitioner in violation of the parties' contractual relationship. After a full hearing and testimony, the Arbitrator issued his Final Award on May 18, 2022 awarding Petitioner $3,662,099.47, calculated as: $2,127,466.00 in damages; $247,279.29 in pre-judgment interest; and $1,287,354.18 in attorneys' fees, costs and expenses. See **Exhibit A-2** of the Andrzejek Declaration.

The Final Award was entered less than one year ago. This Application for an Order confirming the Final Award is timely. Further, the Final Award has not been vacated, modified, or corrected, nor has any party sought to vacate, modify or correct the Final Award pursuant to the FAA. As such, the Application should be granted.

WHEREFORE, Petitioner respectfully requests that this Court enter an Order:

A. Confirming the Arbitrator's May 18, 2022 Final Award in its entirety and entering judgement thereon;

B. Granting Petitioner post-judgment interest on the Final Award in the amount of $576.91[1] per day in accordance with A.R.S. § 44-1201, from May 18, 2022 until the Final Award is fully satisfied; and

C. Granting such other and further relief as may be appropriate.

RESPECTFULLY submitted this June 20, 2022.

IANNITELLI MARCOLINI, P.C.

By /s/ Daniel P. Velocci
Daniel P. Velocci
John C. Marcolini
Attorneys for Petitioner

[1] Calculated as $3,662,099.47 x 5.75% (1% plus the prime rate of 4.75%) divided by 365.

FRIER LEVITT, L.L.C.

By /s/ Jonathan E. Levitt, Esq.
Jonathan E. Levitt (admitted P*ro Hac Vice*)
Todd Mizeski (P*ro Hac Vice* application to be submitted)
Steven Bennet (P*ro Hac Vice* application to be submitted)

EXHIBIT A-2

AMERICAN ARBITRATION ASSOCIATION
Commercial Tribunal

Case Number: 01-19-0000-3552

Mission Wellness Pharmacy, LLC
-vs-
Caremark, LLC; Caremark PCS, LLC;
SilverScript Insurance Company

FINAL AWARD

I, Charles Pereyra-Suarez, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreement (as contained at Page 44 of the pertinent Caremark Provider Manual) entered into by the above-named parties, and having been duly sworn, and having heard the proofs and allegations of the parties, each represented by counsel, hereby AWARD as follows:

1. Introduction

Claimant Mission Wellness Healthcare, LLC ("Claimant" or "Mission Wellness") represented by Frier & Levitt has alleged six causes of action against Respondents Caremark, LLC; Caremark PCS, LLC; and Silverscript Insurance Company ("Respondents" or "Caremark" or "Silverscript") represented by Nixon Peabody.

Claimant seeks asserted damages of $2,127,466.00 plus pre-judgment interest of $247,279.29, for a total of $2,374,745,29. Claimant also seeks attorneys' fees, costs and expenses in the amount of $1,287,354.18 (applying a 125% "lodestar" calculation in light of the asserted "rare" and "exceptional" circumstances arising from numerous asserted discovery violations by Respondents during the three-year duration of these arbitration proceedings). Indeed, Claimant's counsel points out that the Arbitrator had awarded $84,424.00 in sanctions against Respondents on August 14, 2020, as a result of their discovery violations up to that point in time. The Arbitrator granted leave to Claimant's counsel to renew Claimant's ongoing sanctions requests at the close of the evidentiary hearing, based upon alleged continuing sanctionable conduct by Respondents throughout the duration of the case. Claimant also seeks prospective injunctive relief against Respondents.

Respondents, who did not file any counterclaims, assert that Claimant has not proved its case or its alleged damages as to any of the six alleged causes of action. Additionally, Respondents assert that Claimant was not prejudiced in any way by any of the alleged discovery violations. Respondents request a ruling that they are the prevailing parties in this arbitration. Respondents also request an award of attorneys' fees, costs and expenses in the total amount of $1,112,985.61.

The evidentiary hearing took place virtually via Veritek electronic platform on February 7, 8, 9, 10 and 11, 2022. Veritek prepared daily transcripts of the evidentiary hearing proceedings. (The virtual evidentiary hearing followed numerous conference calls, hearings and other communications with counsel to discuss discovery and scheduling issues, cross motions for summary judgment, and the like.)

During the five-day evidentiary hearing, the Arbitrator had the opportunity to hear, consider and evaluate the credibility of Claimant's witnesses Daniel Andrzejek and Maria Lopez of Mission Wellness, Ge Bai (expert witness) and Laura Coe (expert witness); as well as Respondents' witnesses Michael Murphy, Gina Redner, Steven McCall, Glenn Amnott, and Stephen Kacmarek (expert witness). In addition, the Arbitrator had the opportunity to review and evaluate numerous deposition transcripts, documents, exhibits and other materials that were admitted into evidence.

As agreed, counsel submitted simultaneous pre-hearing briefs on or about January 31, 2022; simultaneous post-hearing briefs on or about March 21, 2022; simultaneous opposition briefs on or about April 11, 2022; and simultaneous reply briefs on or about April 25, 2022. The briefing by counsel encompassed the merits of the parties' respective positions, their respective fee applications, and the Claimant's renewed sanctions motion. All of those extensive briefs--with exhibits, attachments and related materials--are incorporated herein by reference. Also incorporated herein by reference are all of the voluminous submissions, orders and docket entries in this case beginning with the Claimant's arbitration demand that was filed on or about January 31, 2019.

The parties' pertinent positions, and the Arbitrator's analysis of the positions, are set forth below.

2. The Claimant's Positions

Summarizing witness testimony and other evidence offered during the evidentiary hearing, Claimant's counsel recount that Daniel Andrzejek ("Daniel") and Maria Lopez ("Maria"), a married couple, purchased community specialty pharmacy Mission Wellness in 2005 in order to serve HIV patients in Caremark's Medicare Part D patient population in the underprivileged Mission District of San Francisco, California. Maria, who is president of Mission Wellness, is an experienced pharmacist who holds a doctorate in pharmacy from UC San Francisco. Daniel, who acts as CFO, holds a degree in economics from Yale.

Maria and Daniel borrowed more than $2 million in recent years to stay in Caremark's network and to shoulder the $2,127,466.00 of direct and indirect remuneration ("DIR") fees that Caremark "unilaterally" recouped from Claimant Mission Wellness. Claimant was barely scraping by in 2016 and 2017, and operated at a clear loss from 2018 through 2021. Indeed, their counsel aver, Caremark recouped 150% of Mission Wellness' net profit in 2020.

Daniel articulated his view that Mission Wellness is entitled to reasonable contractual terms and conditions, and that it is not reasonable for Caremark to pay Mission Wellness a negative reimbursement rate under "take-it-or-leave-it" contractual terms. Further, Daniel testified that

Respondents are aggressive competitors of Mission Wellness and actually tried to buy Mission Wellness during the pendency of these arbitration proceedings.

Claimant Mission Wellness has asserted six causes of action against Respondents:

(1) Breach of the "Compliance With Laws" provision in the Caremark Provider Manual because the Performance Network Program ("PNP") violates the Any Willing Provider Law (the "AWPL"), 42 C.F.R. Section 423.505(b)(18) and 42 U.S.C.A. Section 1395w-104(b)(1)A.

(2) Breach of contract based on Caremark's assessment of PNP fees on "inapplicable claims."

(3) Breach of contract because Claimant was "disadvantaged" under the PNP through mean imputation.

(4) Breach of the Federal Prompt Pay Law, 42 C.F.R. Section 423.520.

(5) Breach of the implied covenant of good faith and fair dealing, under applicable Arizona law.

(6) Conversion, under applicable Arizona law.

Claimant's counsel assert that Respondent Silverscript is liable for Caremark's breaches of the parties' contract through well-established agency principles.

Claimant's counsel elaborated at length in their voluminous briefing regarding the six causes of action, the applicable law and facts.

Expert witness Laura Coe testified about, and set forth in detail in her expert report, her methodology to calculate Claimant's damages in the amount of $2,127,466.00. She set forth a myriad of reasons why the Respondents' DIR Program is not actuarially sound, is flawed, and is not reasonable or relevant to Mission Wellness as a specialty pharmacy. Those reasons include, but are not limited to, the use of retail metrics that do not apply to specialty pharmacies; mean imputation; lack of statistical significance; the misleading use of uniform distribution to rank pharmacies; misleading language; lack of predictability; and lack of opportunity to improve performance scores. Ms. Coe emphasized that she was greatly hampered in her work by the lack of documentation and information that had been requested from Respondents but not provided to Claimant.

Expert witness Ge Bai also testified regarding what she views as flaws in DIR fees generally and as applied in this case.

Claimant's counsel submitted a separate Proposed Order on Claimant's Motion for Sanctions--including attorneys' fees, costs and expenses, as well as adverse inferences.

3. The Respondents' Positions

Respondents' counsel assert that all six of the Claimant's causes of action can be properly adjudicated based on the evidence presented during the evidentiary hearing and the applicable law. Further, Respondents' counsel assert that there are no missing documents or discovery that impeded Claimant's ability to prosecute its claims or that would hamper the Arbitrator's ability to adjudicate them. The discovery issues that have been raised by Claimant throughout the case are described as "fabricated."

The stated view of Respondents' counsel is that Count 1 is legally deficient on its face because that claim is based on a statute without a private right of action, and because the AWPL does not apply to reimbursement disputes.

Count 2 fails, according to Respondents' counsel, based on the clear, unambiguous language of the parties' contract defining "applicable claims."

According to Respondents' counsel, Count 3 fails based on the evidentiary record because Caremark did not disadvantage Claimant but treated it the same as the 66,000 other pharmacies that participate in its networks.

Respondents' counsel assert that Count 4 fails as a matter of law because there is no private right of action under the Federal Prompt Pay Law, and because the Centers for Medicare and Medical Services ("CMS") expressly permits assessment of post-point-of-sale rebates on pharmacies based on performance programs.

According to Respondents' counsel, Count 5 and Count 6 also fail based on the law and evidence at the evidentiary hearing, and because Caremark's exercise of its contractual rights cannot amount to bad faith. Moreover, counsel argue, the economic loss rule precludes Claimant's conversion claim which is nothing more than a rehash of Claimant's breach of contract claim.

Respondents' counsel argue that Claimant has no viable claims against Respondent Silverscript because Silverscript did not have a direct contractual relationship with Mission Wellness.

Finally, Respondents' counsel oppose the injunctive relief requested by Claimant's counsel as unwarranted and beyond the Arbitrator's authority under the circumstances presented here.

Respondents' witnesses Michael Murphy, Gina Redner, Steven McCall, Glenn Amnott, and Stephen Kacmarek (expert witness) testified in support of Respondents' positions and were cross-examined by Claimant's counsel. That testimony is set forth in the hearing transcripts. Mr. Kacmarek tasked himself with rebutting Ms. Coe's expert witness testimony and expert report. He challenged Ms. Coe's calculations, methodology and conclusions, which he described as "absurd." He opined that Claimant has sustained no damages in this case.

4. The Arbitrator's Analysis

By a strong preponderance of the evidence, Claimant Mission Wellness has proved its case as to all six causes of action.

Having reviewed, analyzed, researched and considered the extensive briefs of counsel, as well as the testimony and other evidence offered at the evidentiary hearing, the Arbitrator is persuaded that he has the jurisdiction and authority to grant the Claimant's requested relief; that the Claimant has proved its case and its requested damages; and that the Claimant's renewed sanctions motion should be granted. The Arbitrator has decided to rule in Claimant's favor on all of the many contested legal issues and theories, based on the briefs, evidence and arguments presented by Claimant's counsel.

Having heard and analyzed in detail the parties' discovery disputes from the early stages of the case through conclusion of the evidentiary hearing, the Arbitrator has concluded that the numerous discovery issues raised by Claimant's counsel have been largely meritorious and anything but fabricated.

Accordingly, it is ordered that Claimant's adverse inference is hereby granted and it is found that Caremark's measurements of Mission Wellness' performance as shown on the trimester reports referenced at the hearing for years 2016 to 2021 are not accurate because Caremark could not support the performance scores.

Further, it is ordered that Claimant's adverse inference is hereby granted and it is found that there is no logical basis for the conversion of the FOPS to the "variable rate" as shown on the trimester reports for the years 2016 to 2021, because Caremark could not provide the calculations of the conversion that are thus neither reasonable and relevant.

Further, it is ordered that Claimant's adverse inference is hereby granted and it is found that Caremark's measurement of statistically insignificant (non-credible) volumes of patients for medication adherence performance, as shown on the trimester reports for years 2016 to 2021, are incorrect because Caremark could not support the medication adherence scores.

Further, it is ordered that Claimant's adverse inference is hereby granted and it is found that Caremark's calculation of mean imputation is incorrect, as shown on the trimester reports for years 2016 to 2021, because Caremark could not support the calculation of the mean imputation.

Further, it is ordered that Claimant's adverse inference is hereby granted and it is found that Caremark's calculation of the five patients whose adherence was measured for the HIV therapeutic class for the specialty component on the trimester report for Trimester 1 of 2020 is not accurate because Caremark could not support the medication adherence score.

Further, as requested by Claimant's counsel in their renewed sanctions motion, it is ordered that Respondents shall remit payment to Claimant for reasonable attorneys' fees, costs and expenses, in the amount of $1,287,354.18, incurred in prosecuting this arbitration.

In deciding the issues in this case, the Arbitrator found the testimony and report of Claimant's expert witness Laura Coe to be cogent, thorough, compelling, and far more persuasive than the testimony offered by Respondents' expert witness Stephen Kacmarek. Contrary to the testimony of Mr. Kacmarek, the Arbitrator found Ms. Coe's testimony to be anything but "absurd."