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BY THE COURT:

DATE SIGNED: June 29, 2023

Electronically signed by Judge James Morrison
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT BRANCH II MARINETTE COUNTY

OPTUM, RX, Inc.
Plaintiff,

v.

MARINETTE-MENOMINEE PRESCRIPTION CENTER, LTD, et al.
Defendants.

DECISION AND ORDER

Case No.: 22-CV-68

This case involves a request by Optum, RX (hereinafter "Optum") and a number of pharmacies (hereinafter collectively "the pharamcies") in which Optum seeks to enforce arbitration provisions with respect to disputes between Optum on the one hand and the pharamcies on the other. The matter has been exhaustively briefed and argued and the Court has considered carefully all of the arguments. Based upon the foregoing the Court is denying the motions of Optum to stay these proceedings and order the pharmacies to submit to binding arbitration. Strictly for purposes of explanation, this involves a request on the part of Optum to require arbitration and a defense on the part of the pharmacy that the arbitration clauses sought to be enforced are unconscionable. The pharmacies argue that the formulation of the clauses, their imposition in the first place, was unconscionable and the arbitration scheme as applied is likewise and independently substantively unconscionable. A key aspect of the position of the pharmacies is that the scheme of arbitration which requires each individual pharmacy separately arbitrate its disputes, that

is bilateral arbitration, and the terms of that arbitration, combine to make the entire scheme unconscionable.

Optum argues that the parties have agreed to arbitration in the Provider Agreement (with the exception of one pharmacy, Elevate) and that all parties are bound by the arbitration scheme as a result of the Provider Manual and that any consideration of unconscionability based upon the fact that multilateral arbitration is a matter which this Court is precluded from considering at all based upon a recent Supreme Court case, Viking River Cruises, 142 S. Ct. 1906 (2022).

The Court will turn to that issue first.

Optum relies on the *Viking River Cruises* case 142 S. Ct. 1906 (2022) to support the proposition that this Court cannot consider the fact that the arbitration clause at issue here requires individual, that is bilateral, one on one, arbitration as a factor in and of itself, to find an arbitration clause either procedurally or substantively unconscionable. This Court believes that this a misplaced reliance or a misreading of that case.

Because *Viking River* is the most recent statement of the United States Supreme Court with respect to the Federal Arbitration Act (FAA) this Court believes it is important to distinguish that case from the facts and circumstances applicable here.

As the Court understands the arguments made by Optum, they essentially come down to an argument that this Court cannot even consider the requirement of bilateral arbitration as a factor <u>at all</u> in this Court's analysis as to whether the arbitration clause sought to be enforced now which would require roughly fifty separate arbitration proceedings rather than allowing the consolidation of those proceedings is unconscionable. It is, as I understand the argument of the Optum to be that this Court cannot even consider the implications of bilateral as opposed to multi-party arbitration at all because that matter is resolved under *Viking River Cruises*. It was not.

Viking River involved an action brought by an employee of Viking River Cruises under the California Private Attorney General's Act (PAGA). The U.S. Supreme Court spends several pages of its opinion describing that the California legislature made a policy determination that California did not have adequate resources to individually monitor and enforce certain of its labor laws so it was, in effect, enlisting the assistance of individual litigants (as a private Attorney General) to enforce those laws and as a part of that scheme also allowed the litigant to aggregate the claims of others. The Supreme Court spends a good deal of time of writing about whether this is a Class Action in the classic sense or a representative action because PAGA included a provision that prohibited the enforcement of any "Class Action Waiver" in employment contracts in California; all very important to the resolution of that case but not controlling here.

The Supreme Court stated:

> "This Court's FAA precedents treat bilateral arbitration as the prototype of the individualized and informal form of arbitration protected from undue State interference by the FAA." (emphasis added)

Optum argues strenuously that this establishes the mandate that FAA, and the Supreme Court precedents interpreting it, establish that the very nature of arbitration is a bilateral, not multi-party arrangement (at least, at a minimum, unless the parties specifically agree to expand it to allow for multi-party litigation) and that therefore this Court is precluded from considering whether a claim that precludes multiparty arbitration can invalidate the agreements at issue here.

This Court believes that a proper reading of that Supreme Court precedent is that the Supreme Court indeed views arbitration prototypically as an informal, streamlined matter of dispute resolution and starts from the proposition that that is prototypically, that is usually, bilateral. There is nothing in *Viking River* ordering trial courts to mindlessly stop the inquiry as to whether a challenge to the fairness and reasonableness of a particular

arbitration provision based upon a multi-party challenge could be unconscionable. That is not the holding of *Viking River*.

Strictly, from a legal standpoint, the Supreme Court decision in *Viking River* dealt with the invalidation of a California law outlawing a class action waiver in contracts between employees and their employers. That is also not our case here at all, so it is not a binding precedent not should it be and it does not preclude the analysis here in any event. Speaking for the Court, Justice Alito stated:

> "The FAA was enacted in response to judicial hostility to arbitration. Section II of the Statute makes arbitration agreements 'valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." (emphasis added)

He goes on to say:

> "as we have interpreted this provision [of the FAA] contains two clauses:
>
> An enforcement mandate which renders agreements to arbitrate enforceable as a matter of Federal Law and a savings clause which permits invalidation of arbitration clauses on grounds applicable to any contract." (emphasis added)

He then goes on further to state:

> "A Court may invalidate an arbitration agreement based upon 'generally applicable contract defense like fraud or unconscionability, but not on legal rules that apply only to arbitration or derive their meaning from the fact that an agreement to arbitrate is at issue."

In other words normal contract defenses apply.

That is precisely what the pharmacies are asking this Court to do in this case; to consider whether standard contract law principles relating to unconscionability apply and there is nothing in *Viking River* that mandates that this Court must stop its inquiry as to reasonableness or fairness merely because the pharmacies are raising the issue of the alleged unfairness of mandatory bilateral arbitration. There remains, of course, the other issues about notice, the nature of the arbitration itself, three arbitrators, ten years of

experience, the limitations on discovery, etc. Those the Court will deal with momentarily but this Court rules that *Viking River* is not dispositive or controlling on the question of bilateral/multi-party arbitration as a prohibited inquiry.

Having decided that *Viking River* not only does not preclude this Court from considering normal questions of unconscionability but actually specifically ratifies that inquiry, the Court now turns to the argument that has been raised by the parties.

Optum argues that the parties agreed to binding arbitration, in fact, not once when they entered into the original Provider Agreement but, again every time a party submitted a claim or received a payment under that agreement or under the Provider Manual because all parties specifically agreed to follow the Provider Manual, even agreeing to allow Optum to unilaterally change the Provider Manual (and hence the Provider Agreement) from time and time and without notice.

The pharmacies argue that such an arrangement was unconscionable *ab initio* because it was an adhesion (take it or leave it) contract, and further that the actual operation of the arbitration clause, bilateral, three arbitrators, ten years experience in each case in the medical field, paper only, and ultimately very restricted discovery was separately unconscionable not only *ab initio* but as applied, substantively.

Parties should be free to make agreements which are not otherwise illegal whether they are wise or in the best interest of the parties or not. Parties should be held to the legal agreements which they make. Courts should enforce those legal agreements. In enforcing those agreements courts should look to the governing law and obviously follow both controlling law, statutory or common law, State or Federal. This is stating the obvious except that the application of this process is not entirely simple.

The parties appear to agree that with respect to the questions of unconscionability regarding arbitration that there is not substantial difference between the law under the Federal Arbitration Act or applicable statutory law in Wisconsin. There is an argument as to whether California or Wisconsin law should apply but this Court thinks that it is clear that with respect to contract formation issues such as those facing the Court today that Wisconsin law, statutory and decisional should apply. It is clear that under *Viking River* the United State Supreme Court holds that its precedent clearly empowers, indeed requires, Courts to decide contract formation issues and defenses (under normal contract law principles) at least in so far as they do not contradict the Federal Arbitration Act.

Both sides in this dispute request this Court to consider the decisions of other jurisdictions, California, Illinois and Florida in particular. On the questions of unconscionability, the Pharmacies wish this Court to follow the decisions of the California Court of Appeals which the pharmacies believe are favorable to their position notwithstanding that the controlling decision, Prescription Care, was not only not published, but that when Mr. Cuker, on behalf of the pharmacies specifically requested the Court to order publication of that Decision (so that it could be cited elsewhere) the California Court of Appeals declined to do so. The pharmacies also urged the Court that it consider the *Copper Bend* Decision where the Illinois trial court had found unconscionability and precluded arbitration but, lo and behold on April 14 of this year the Illinois Appellate Court reversed that Decision and specifically instructed the trial court to compel arbitration. No surprise Optum urges this Court to follow the Court of Appeals decision there and the pharmacies urge that this Court follow the dissenting opinion of that Illinois Appellate Court.

Optum urges this Court to accept the very recent trial court decision in the Florida case of *Optum v. South Miami Pharmacy*, 2022-005838-CA-01 where that trial court specifically found that a provision precluding multi-party arbitration was not unconscionable.

In fact, Optum argues that wherever a Court has been asked to look at this issue, with apparent exception of California, Courts have found that the preclusion of multi-party arbitration, a keystone of the arguments of the pharmacies in this case, is not a valid grounds to find procedural or substantive unconscionability. *Comity* is the principle that Courts in different jurisdictions should consider and give respect to the decision of "sibling" courts in other jurisdictions. The essence of Optum's argument is that all other courts that have looked at this question of multi-party arbitration have found, (whether *Viking River* requires it or not) that that should not be a factor in determining unconscionability.

This Court certainly has great respect for the decision of judges throughout the United States and no criticism whatsoever for the decision of courts in California, Illinois or Florida with respect to the issues before them and the decisions that they have recently made. This Court does not have a binding obligation, however, to follow the decisions of those courts for any number of reasons, one of which can be that the facts and circumstances in individual cases can bear on these issues. This is hardly the place to

engage in a law review article about the concept of the laboratory of democracy inherent in our Federal system. Different states take different approaches to comparable problems and then need to live with the consequences of those decisions.

It is apparently the position of the United State Supreme Court, with the exception of Justice Thomas, that if Congress chose to do so it could amend the Federal Arbitration Act to take away the role of individual States in determining whether particular contract formation issues remain within the discretion of the various States. As *Viking River* makes abundantly clear Congress has not done this so far and in fact the U.S. Supreme Court has made it abundantly clear in *Viking River* that considerations of contract formation/operation arising out of unconscionability claims remain an area for individual jurisdictions to apply their individual laws. It is, therefore, for this Court to decide whether and to what extent arbitration clauses in this case are or are not unconscionable either as adopted or applied.

The pharmacies claim that the arbitration provisions were unconscionable from the beginning both procedurally and substantively. The very nature of unconscionability is implicated when one party has superior, in this case, far superior bargaining position and the provision at issue is offered "on a take it or leave it" basis. The pharmacies further argue that the provisions requiring arbitration should be found by this Court to be procedurally unconscionable from the beginning, *ab initio*, but also that the Court should find the substance of the provisions to be unconscionable as implemented. With respect to substantive unconscionability the pharmacies argue several things. First, they claim that the whole purpose of arbitration is the simplification of process and reduction of expenses and time to decision but that these provisions are frustrated, in fact totally negated, by the specific requirements of three arbitrators (each of which has ten years of healthcare experience) conducting arbitration in California, extraordinarily limited discovery, interrogatories, etc. The pharmacies claim that these limitations together with the generally relatively small amount of money at issue in a particular dispute for each pharmacy (at least in the case of individual pharmacies) render it practically nonsensical and certainly noneconomical for a pharmacy to commence expensive, remote, arbitration so that in fact those pharmacies will simply abandon otherwise meritorious claims because the cost to arbitrate is simply too high - but this would not apply if pharmacies could aggregate claims.

Optum argues seriously and persuasively that the cases which this Court can and should consider all support its position that these provisions are not unconscionable either procedurally or substantively. Optum also argues, not surprisingly, that because the arbitration provisions which it claims binds the parties indicate that it is the arbitrator and not a Court that will decide questions of irritability that this Court's review should highly deferential for the power of the arbitrator at a minimum.

This Court asked the parties to provide a list of what the parties thought were undisputed facts. While there are even some disputes there I am advising the parties that I am relying on the following facts in making my determinations here. I am not ignoring the other facts that the parties have set forth but I am discounting their importance and advising both sides the facts upon which I rely to make the decisions I am making here.

1. All of the pharmacies who are respondents in this Wisconsin case, except Elevate, entered into Provider Services Agreements that contained a separate dispute resolution provision calling for binding arbitration, as well as an appropriate delegation clause delegating to the arbitrators the power to decide all questions relating to arbitration including the availability and scope of arbitration. The provider services agreement entered into by the parties also included a provision that empowered Optum to create and periodically update a Provider Manual, allowing Optum to change the manual from time to time, without notice and under which the parties agreed to be bound by the those changes.

2. All of the pharmacies assert, and I believe it is not contested, that none of the pharmacies actually negotiated their provider services agreement independently nor did any of the pharmacies have any direct contact with Optum or ever sign the Provider Services Agreement. Rather each of the pharmacies who are respondents in this action were represented by PSAOs and those organization actually, on behalf of the pharmacies negotiated and entered into and signed the Provider Services Agreements. While the pharmacies assert that they did not actually negotiate or physically sign the agreements they are not contesting that in each case the PSAO was acting as their agent with proper authority and that the pharmacy is ultimately bound under principles of agency to what the PSAO negotiated and signed on their respective behalf's.

*2.*a. *Elevate,* working through a PSAO negotiated a Provider Services Agreement that did not include binding arbitration. The Court understands that the desire to omit binding arbitration was intentional, certainly not a mere oversight. The Provider Services Agreement ultimately negotiated and signed on behalf of Elevate did not include a binding

arbitration provision. It is the position of Optum that the Provider Services Agreement bound Elevate to the terms of a Provider Manual, and changes to it, and that by accepting services, products and or payments Elevate was bound to exactly the same provisions with respect to arbitration, both existence and scheme as all of the other pharmacies.

3. From the beginning, Optum promulgated a Provider Manual which contained specific and detailed dispute resolution, binding arbitration, bilateral, and in many respects the same as exists now.

4. Two California cases, *Prescription Care Pharmacy v. Optum, Inc*. 2020 WL 4932554 (August 24, 2020) and *Platt, LLC v. Optum, Inc.* 2023 Westlaw 2507259 (March 15, 2023) found provisions of the Provider Manual unconscionable. In response to Prescription Care decided on August 24, 2020 Optum took steps to "correct" the deficiencies found in the California case by modifying the Provider Manual and placing those modifications in the online version of the Provider Manual. That occurred in September of 2020; however, those changes to the Operating Manual which addressed significant issues of unconscionability were not affirmatively communicated to any of the pharmacies until mid December 2020 when Optum sent an email to the pharmacies highlighting a number of changes in the Provider Manual at least one of which was a specific reference to changes in the dispute resolution/arbitration provisions of the manual. All of the parties agree that no later than December 31, 2020 all of the pharmacies would have had a reasonable opportunity to be aware of, examine and object to any of those changes. So that from and after January 1, 2021 any claim of lack of notice in and off itself would be waived going forward.

Each of the parties has provided sworn testimony that that pharmacy did not individually negotiate the provider services agreement and did not sign it. Each of the pharmacies admits that they followed the Provider Services Manual at least as to the day to day operations of their business with Optum, providing claim information, submitting claims, and receiving payments.

5. It is clear and appears to be uncontradicted that even though the PSAO acting on behalf of Elevate specifically negotiated a provider services agreement that did not include an arbitration provision at all, Elevate did receive and did follow the Provider Manual in exactly the same fashion as the other pharmacies.

6. The changes made subsequent to the Prescription Care decision included substantial limitations on discovery, limited interrogatories and depositions.

7. It is agreed that the number of customers potentially available to the various pharmacies as members of the Optum "group" would constitute between 20 and 25 percent of the universe of pharmacy customers fully available in those regions of Wisconsin where the pharmacies operated.

As the Supreme Court made clear in *Viking River*, an agreement to arbitrate a civil dispute is just that, an agreement, and it is enforced as it has been negotiated and agreed to between the parties. Agreements to arbitrate clearly constitute substantial limitations upon ones normal litigation rights, for example, choice of venue, bilateral or multi-party litigation potential, discovery, and undoubtedly most importantly, the right to judicial supervision review and appeal. As such, this Court needs to look at issues of the formation of that agreement in the first place to see if there actually was such a meeting of the minds limiting the rights of the parties in this fashion.

This Court must take a step back from the details of this dispute to state that the Court is aware that people sign things all the time which bind themselves to onerous provisions and in which they sacrifice important rights and remedies. For example, try adding an App to your cell phone and find that in the process you go through eighteen to twenty pages of fine print, legalese, identifying and limiting all of your privacy rights, ownership of content, etc. Open a brokerage account and find that you have specifically agreed that disputes with respect to that account will be settled by arbitration in New York City, most certainly by a panel of arbitrators friendly to the brokerage industry. Buy any vehicle in the United States and while the dealer touts its "warranty protection" understand what the manufacturer/dealer is actually saying is that your normal common law warranties of merchantability are being traded for a specific set of undertakings on the part of the manufacturer that actually and substantially limits their otherwise applicable common law liabilities.

This list could go on virtually forever. It is a regrettable but actual fact that many contracts containing arbitration provisions (and other surrenders of valuable rights) are almost always provided on a take it or leave it basis by an actor with far greater knowledge and often far greater bargaining position than the party agreeing to those surrenders. Courts must be mindful of that when Courts are asked to enforce such agreements especially where those agreements give up rights to have disputes decided in ones home jurisdiction, by a jury of ones peers, after full discovery and subject to judicial oversight and review. This is not to say that there are not legitimate reasons for arbitration but this

is to say that the imposition and implementation of these procedures needs to meet a test of minimal fairness and reasonableness.

This Court will take notice of the fact that organizations including Optum tend to be large and powerful purveyors of critically important prescription drugs. The products which Optum and others provide to pharmacies are critically and increasingly important to the health of virtually every American. The healthcare system in which we find ourselves today, for all its marvels and therapies, is increasingly characterized by mega-organizations of healthcare providers, drug and device manufacturers, medical care practice groups, large inter-state hospital systems, and huge HMO and other patient service groups. In fact, the vast majority of people in the United States who receive healthcare receive it through some sort of group, whether it is a large insurance plan, an HMO, an Affordable Care Act exchange, etc. The pharmacy industry is not exempt from any of these trends, in fact, the Marinette/Menominee Prescription Center, Ltd, a local "hometown pharmacy" apparently privately owned and operated is becoming increasingly a smaller and smaller percentage of the way Americans get their critically needed prescription medications and devices. More and more of these dispensaries are becoming parts of mega groups themselves. For example, in this case, the Wisconsin Hometown Pharmacy Group apparently has more than 50 such small pharmacies which have aggregated together in some fashion. On the other hand, Walgreens and CVS are two large pharmacy companies who command substantial portions of the market and wield comparable clout comparable to that of companies such as Optum. In order for a typical consumer to be able to get a prescription filled that consumer must increasingly do so through a plan which has been negotiated "for that consumer" by the consumer's healthcare provider, insurance company, employer, HMO, etc. Add to all of that the increasing consolidation of all of these entities and we have a situation where an individual pharmacy, even a pharmacy group such as Hometown, knows that for it to be able to compete in the market place it must make arrangements with pharmacy benefit providers such as Optum or its competitors.

This is all highly relevant to this circumstance because this Court must consider whether there was a meaningful bargained for exchange between the pharmacies on the one hand and Optum on the other hand. Regarding arbitration, the Court must look to the facts and circumstances as they existed at the time of the formulation of this contract not to how the drama has played out down the road. The pharmacies argue that if they wanted

to do business at all as a practical matter they needed to make a deal with Optum because Optum controlled something on the order of one-quarter of the pharmacy market, that is customers, available to pharmacies in Wisconsin. Those customers whose benefits are provided through the Optum pharmacy exchange can only go to those pharmacies that have made a deal with Optum and while it is true that 75 to perhaps 80% of the customers are not associated with Optum it is undoubtedly also true that most of those customers are associated with some other pharmacy group so as a practical matter, in the real world, pharmacies can make and have made a credible argument that they simply cannot do business if 20-25% of their total market is foreclosed to them because they have not been able to make a deal with Optum. This puts Optum in the driver's seat. As the Court understands it, indeed the product which Optum is providing is not drugs and other devices to pharmacies but pharmacy benefit customers.

This Court considers the situation with *Elevate* to be critical to the overall decision in this case because the PSAO for *Elevate* negotiated a Provider Agreement that did not provide for arbitration, but *Elevate* still finds itself subject to arbitration because the Provider Manual, not negotiated but simply applied, controlled that relationship. This is significant for two reasons. Elevate negotiated not to have to arbitrate and Optum was able to avoid that specific agreement by putting arbitration in the back door through the Provider Manual and that shows exactly how intransigent Optum was with respect to losing or for that matter modifying arbitration provisions.

It is true that some Courts, such as the Florida trial court have stated that pharmacies could simply go to different pharmacy benefit managers. Perhaps that is true but that is not how this Court understands this market. It is the customers that Optum delivers but by not contracting with Optum these pharmacies are precluded from a very statistically significant part of the market.

This is a motion on the part of Optum to enforce an arbitration provision which this Court finds was unconscionable in its inception and also in its unilateral modification; in the manner that it was imposed on a "take it or leave it" basis and on the substance of how the arbitration scheme actually works.

As to whether or not the provisions are also substantively unconscionable other Courts have found, Florida for example, the opposite of this Court's ruling that these provisions, (paper only, limited discovery, 3 arbitrators each of which as ten years of experience, arbitrations in Orange County, California) are reasonable and not

unconscionable. This Court is most influenced by the fact that when Elevate, through its PSAO, specifically negotiated a Provider Agreement that excluded arbitration and Optum agreed to that provision in the Provider Agreement but then immediately implemented a Provider Manual that imposed precisely that arbitration scheme on *Elevate* and from this Court must conclude that Optum was not dealing in good faith. This conduct causes the Court also to be seriously concerned about whether the entire arbitration scheme, as conceived and applied, and as amended, is unconscionable. Optum gets to decide the terms of an arbitration agreement even when they have agreed there will not be one, decides when and if it will change those terms, changes those terms without advance notice or negotiation, implements those terms for several months before it affirmatively notifies the pharmacies that substantial, unfavorable changes in the arbitration provisions are being implemented. This Court finds that conduct to be unconscionable as well. When the Court considers the cost of the arbitration (three arbitrators, ten years of experience, limited discovery, etc.) the Court can only conclude that in all but the most substantial disputes the cost of proceeding to arbitration will substantially outweigh any benefit that could be achieved in arbitration and that this will undoubtedly have a substantial chilling effect upon pharmacies presenting objectively meritorious positions. “You can’t fight City Hall so why try” appears to be the result that this scheme creates. This is the product of a one sided agreement foisted upon pharmacies who need to make a deal with Optum or have a substantial part of a market closed to them and this is fundamentally unfair.

Based upon the foregoing the Court decides and Orders that the Optum Motion to Compel Arbitration is denied based upon the fact that the contract suffers from an unconscionable procedural defect in its formation, the take it or leave it nature of the contract and its subsequent amendments via the Provider Manual.