

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UPTOWN DRUG COMPANY, INC.,
Plaintiff,
v.
CVS CAREMARK CORPORATION, et al.,
Defendants.

Case No. [12-cv-06559-JST](#)

ORDER GRANTING IN PART AND DENYING IN PART MOTION TO COMPEL ARBITRATION AND TO STAY ACTION AND GRANTING MOTIONS TO SEAL

Re: ECF No. 17, 18, 42

In this putative class action for violations of the California Uniform Trade Secrets Act and related claims, Defendants move to compel arbitration and to stay the action pending arbitration. Plaintiff Uptown Drug Company, Inc. (“Uptown”) opposes the motion. For the reasons set forth below, the motion to compel arbitration is GRANTED IN PART and DENIED IN PART and the motion to stay the action pending arbitration is GRANTED.

I. BACKGROUND

A. The Parties and Claims

Uptown provides pharmacy services to individuals who participate in certain group health plans. Compl. ¶¶ 1-2, 14. These group health plans provide to customers pharmacy benefits that are sponsored, administered, or insured by pharmacy benefit managers (“PBMs”). *Id.* ¶ 14.

CVS Caremark is a retail pharmacy chain that competes directly with Uptown.¹ *Id.* ¶ 1. CVS Caremark merged with Caremark Rx, the second largest PBM in the country, in 2007. *Id.* As a PBM, Caremark Rx fills prescriptions, processes prescription drug claims, negotiates discounts

¹ Defendant CVS Caremark is the corporate parent of Defendant CVS Pharmacy, Inc, which is the sole member of Defendant Caremark Rx, L.L.C. Mot. at 4, n. 4. Caremark Rx, L.L.C., in turn, is the sole member of Caremark, L.L.C. and the sole member of CaremarkPCS, L.L.C. *Id.*

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1 with manufacturers, and performs other functions for PBM plan members. Id.

2 Uptown has a business relationship with Caremark Rx’s PBM branch because many of
3 Uptown’s customers receive drug benefits under PBM prescription plans. Id. This relationship is
4 governed by a provider agreement, which allows Uptown to fill prescriptions for participants in
5 Caremark’s PBM plans at discounted prices and requires Uptown to disclose certain customer
6 information to Caremark Rx whenever it submits claims for reimbursement.

7 Uptown has disclosed customer information to Caremark’s PBM operations “in confidence
8 and solely for the purpose of adjudicating [] prescription claims.” Caremark Rx allegedly has
9 disclosed this information without authorization to Caremark’s retail pharmacies, which compete
10 directly with Uptown, for the purpose of marketing products and services to Uptown’s customers.
11 Id. ¶¶ 4, 47, 81. These unauthorized disclosures, which allegedly contravene Caremark’s own
12 internal policies and the Health Insurance Portability and Accountability Act, have resulted in
13 increased revenues for Caremark’s retail pharmacies at the expense of Uptown and other non-CVS
14 pharmacies. Id. ¶¶ 3-6, 63.

15 Uptown brings this action on its own behalf and on behalf of other similarly situated
16 pharmacies in California against Defendants CVS Caremark, CVS Pharmacy, Caremark Rx, and
17 Caremark, L.L.C. for (1) violations of California’s Uniform Trade Secrets Act (“UTSA”); (2)
18 violations of the unlawful prong of California’s Unfair Competition Law (“UCL”), California
19 Business and Professions Code section 17200; (3) violations of the unfair prong of the UCL; and
20 (4) interference with prospective economic advantage (“IPEA”).² The gravamen of the complaint
21 is that Defendants’ unauthorized disclosure of non-CVS pharmacies’ customer information
22 constitutes the misappropriation of trade secrets.

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² The putative class consists of “all retail pharmacies in California that provided confidential patient information to CVS Caremark after March 22, 2007 for purposes of utilizing CVS Caremark’s PBM services.” Compl. ¶ 69.

1 **B. Provider Agreements and Manuals**

2 In 1995, Uptown entered into an agreement with PCS Health Systems (“the PCS Provider
3 Agreement”), which is a PBM that ultimately became Caremark PCS Health in 2008 as a result of
4 various acquisitions and mergers.³ Pagnillo Decl. ¶ 14 & Ex. A, ECF No. 18;⁴ Request for
5 Judicial Notice (“RJN”), Ex. A, B., ECF No. 19.⁵ The agreement allowed Uptown to be included
6 in PCS Health’s PBM networks. See generally Pagnillo Decl., Ex. A.

7 PCS Health retained the right to amend the PCS Provider Agreement at any time as long as
8 it gave notice to the pharmacy providers, including Uptown, no less than 30 days before enacting
9 any amendment. Pagnillo Decl., Ex. A ¶ 1.3. The PCS Provider Agreement contained an
10 arbitration clause and incorporated by reference a PCS Manual. See Pagnillo Decl., Ex. A ¶ 9.5
11 (arbitration clause); id. ¶¶ 1.3, 9.7 (provider manual).

12 The PCS Provider Agreement and the incorporated PCS Manual have been amended
13 several times as a result of multiple mergers and acquisitions.⁶ Each time, PCS Health’s

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16 ³ PCS Health Systems was owned by Rite Aid Corporation until it merged with Advance PCS,
17 L.P. in 2001. RJN, Ex. A, B., ECF No. 19. Advance PCS, L.P. ultimately became Caremark PCS
18 Health, L.L.C. in 2008. Id.

19 ⁴ Defendants’ motions to seal Exhibits A through F of the Pagnillo Declaration, ECF Nos. 17, 42,
20 are GRANTED, as Defendants have established that the confidential business information
21 contained in such documents is sealable.

22 ⁵ The Court takes judicial notice of the documents that Defendants filed with California’s
23 Secretary of State and Delaware’s Secretary of State for the purpose of effectuating the conversion
24 of Caremark Inc. into a limited liability company and the change of Advance PCS’s name to
25 Caremark PCS, ECF No. 19, because such documents can be accurately and readily determined
26 from sources whose accuracy cannot reasonably be questioned and no party questions their
27 authenticity. See Fed. R. Evid. 201.

28 ⁶ The PCS Provider Agreement was amended after PCS Health merged with Advance PCS, L.P. in
2000; the agreement became known as the “AdvancePCS Provider Agreement.” Pagnillo Decl. ¶¶
16-17 & Ex. B. The Advance PCS Provider Agreement was amended in 2004 when Caremark Rx
acquired AdvancePCS; the agreement became known as the “Caremark Provider Agreement.” Id.
¶ 20. Caremark has amended the Caremark Provider Agreement several times since 2004. Id. ¶¶
21-24 & Ex. D.

1 successors provided advance notice to provider pharmacies of the amendments.⁷

2 The current version of the PCS Provider Agreement and the incorporated PCS Manual is
 3 the Caremark Provider Agreement and the 2011 Caremark Provider Manual (“the 2011 Provider
 4 Manual”). The 2011 Provider Manual sets forth the rights and obligations of Uptown and
 5 Defendants with respect to Uptown’s participation in in the networks maintained by Caremark and
 6 its affiliates, as well as the terms and conditions for filling prescriptions, submitting claims for
 7 reimbursement, and receiving, sorting, and transmitting customer information. Pagnillo Decl., Ex.
 8 D at 13-20. Additionally, the 2011 Provider Manual includes provisions that clearly identify
 9 Caremark as the party that owns any customer data compiled, utilized, or transmitted in
 10 accordance with the Caremark Provider Agreement. See, e.g., Pagnillo Decl., Ex. D at 48.
 11 (“Provider agrees that the information contained in the claims systems that was obtained by and
 12 through the administration and adjudication of a claim by Provider is the property of Caremark,
 13 and Provider agrees not to claim any right, title, or interest in said information. Caremark has the
 14 right to use, reproduce, and adapt any information or data obtained from Provider in any manner
 15 deemed appropriate, even if such use is outside the scope of the Provider Agreement, provided
 16 such use is in accordance with applicable Law.”); see also id. at 13-20, 38 (providing for the
 17 collection, maintenance, transmission, and use of data related to filling prescriptions).

18 **C. The Arbitration Clause**

19 The 2011 Provider Manual contains an arbitration clause under a section entitled
 20 “Miscellaneous.” Pagnillo Decl., Ex. D at 50. It provides that:

21 **Any and all disputes in connection with or arising out of the Provider**
 22 **Agreement by the parties will be exclusively settled by arbitration** before a
 23 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

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 25 ⁷ See Pagnillo Decl. ¶ 17 (notice of AdvancePCS Provider Agreement); id. ¶¶ 18-19 & Ex. C
 26 (notice of the Caremark Provider Agreement); id. ¶ 21 (notice of 2004 Caremark Provider
 27 Manual); id. ¶ 22 (notice of 2007 Caremark Provider Manual and notice that Caremark, Inc. and
 CaremarkPCS became limited liability companies); id. ¶ 23 (notice of 2009 Caremark Provider
 Manual); id. ¶ 24 & Ex. D (notice of 2011 Caremark Provider Manual).

1 be final and binding on the parties, and judgment upon such award may be entered
 2 in any court having jurisdiction thereof. Any such arbitration must be conducted in
 3 Scottsdale, Arizona, and Provider agrees to such jurisdiction, unless otherwise
 4 agreed to by the parties in writing. . . . **Arbitration shall be the exclusive and
 5 final remedy for any dispute between the parties in connection with or arising
 6 out of the Provider Agreement;** provided, however, that **nothing in this
 7 provision shall prevent either party from seeking injunctive relief for breach
 8 of this Provider Agreement in any state or federal court of law.** . . . The terms
 9 of this Arbitration section apply notwithstanding any other provision in the
 10 Provider Agreement.

11 Id. (emphasis added).

12 **D. Motion to Compel Arbitration**

13 Defendants argue that each of the claims in the complaint must be resolved through
 14 arbitration in accordance with the arbitration clause contained in the 2011 Provider Manual,
 15 because such claims arise out of the Caremark Provider Agreement and the 2011 Provider Manual.
 16 ECF No. 18.

17 Uptown opposes the motion, arguing that (1) the arbitration clause is substantively and
 18 procedurally unconscionable and therefore is unenforceable; (2) none of the Defendants signed the
 19 original PCS Provider Agreement and therefore they cannot enforce it; (3) the arbitration clause
 20 was not incorporated into any Provider Agreement; and (4) the Court has jurisdiction to hear any
 21 claims for injunctive relief prior to deciding whether to compel arbitration. ECF No. 44.

22 **E. Jurisdiction**

23 The Court has jurisdiction over this action under 28 U.S.C. § 1332(d)(2).

24 **II. LEGAL STANDARD**

25 “With limited exceptions, the Federal Arbitration Act (FAA) governs the enforceability of
 26 arbitration agreements in contracts involving interstate commerce.” Kramer v. Toyota Motor
 27 Corp., 705 F.3d 1122, 1126 (9th Cir. 2013). The FAA “embodies the national policy favoring
 28 arbitration and places arbitration agreements on equal footing with all other contracts.” Buckeye
Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006). It requires the enforcement of an
 arbitration clause in a contract unless grounds exist “at law or in equity for the revocation of any
 contract.” 9 U.S.C. § 2. An arbitration clause may be revoked by “generally applicable contract
 defenses, such as fraud, duress, or unconscionability.” Rent-A-Center, West, Inc. v. Jackson, 130
 S.Ct. 2772, 2776 (2010).

1 A party bound by an arbitration clause may bring a petition in district court to compel
 2 arbitration. 9 U.S.C. § 4. When a party files such a petition, “the district court’s role is limited to
 3 determining whether a valid arbitration agreement exists and, if so, whether the agreement
 4 encompasses the dispute at issue. If the answer is yes to both questions, the court must enforce the
 5 agreement.” Lifescan, Inc. v. Premier Diabetic Services, Inc., 363 F.3d 1010, 1012 (9th Cir.
 6 2004). “[T]he party resisting arbitration bears the burden of proving that the claims at issue are
 7 unsuitable for arbitration.” Green Tree Fin. Corp. Alabama v. Randolph, 531 U.S. 79, 91 (2000).
 8 Where the claims alleged in a complaint are subject to arbitration, the Court may stay the action
 9 pending arbitration. 9 U.S.C. § 3.

10 III. DISCUSSION

11 A. The Arbitration Clause is Valid and Enforceable Under the FAA

12 1. The Court Must Decide Whether Arbitration Clause is Valid

13 When a party to a contract challenges the validity of an arbitration clause, as opposed to
 14 the validity of the contract containing the arbitration clause as a whole, the court must determine
 15 whether the arbitration clause is valid and enforceable. Nagrampa v. MailCoups, Inc., 469 F.3d
 16 1257, 1263-64 (9th Cir. 2006) (holding that when a party challenges “not the invalidity of the
 17 contract as a whole, but rather the arbitration provision itself, then the federal courts must decide
 18 whether the arbitration provision is invalid and unenforceable under 9 U.S.C. § 2 of the FAA”).

19 Here, Uptown challenges the validity of the arbitration clause in the 2011 Provider Manual
 20 on the ground that the clause is unconscionable. Because Uptown’s unconscionability challenge is
 21 to the arbitration clause and not to the 2011 Provider Manual as a whole, the Court, and not the
 22 arbitrator, must determine whether the arbitration clause is valid.

23 2. The Validity of the Arbitration Clause Is Governed by California Law

24 When deciding whether an arbitration agreement is valid, courts “apply general state-law
 25 principles of contract interpretation, while giving due regard to the federal policy in favor of
 26 arbitration by resolving ambiguities as to the scope of arbitration in favor of arbitration.” Mundi
 27 v. Union Security Life Insur. Co., 555 F.3d 1042, 1043 (9th Cir. 2009) (citations and internal
 28 quotation marks omitted). A district court exercising diversity jurisdiction must apply the law of

1 the state in which it sits when determining the validity of an arbitration clause. See Nagrampa,
 2 469 F.3d at 1280 (holding that district courts in California exercising diversity jurisdiction over a
 3 contract dispute “must apply California law to determine whether the arbitration provision in the
 4 []contract is unconscionable”). Where an arbitration agreement contains a choice-of-law clause, a
 5 district court must determine whether to enforce the law chosen by the parties based on the
 6 conflict-of-laws rules of the forum state. See Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487,
 7 496 (1941).

8 Here, Defendants contend that the PCS Provider Agreement contains a choice-of-law
 9 provision requiring that the agreement be construed and enforced in accordance with Arizona law,
 10 and they argue that the application of Arizona law is justified because the parties’ obligations
 11 under the Agreement are substantially performed in Arizona. See Supp. Pagnillo Decl. ¶ 6.

12 Uptown opposes the application of Arizona law to the question of whether the arbitration
 13 agreement is valid and argues that California law should apply instead because neither the parties
 14 nor the transactions at issue in the complaint have a substantial relationship to Arizona.

15 The Court concludes that it need not reach the question of whether the PCS Provider
 16 Agreement’s choice-of-law provision should be enforced because Defendants have not shown that
 17 the Caremark Provider Agreement, which is the current iteration of the PCS Provider Agreement,
 18 contains a choice-of-law provision. The choice-of-law provision cited by Defendants is contained
 19 in the 1995 PCS Provider Agreement, which has been amended multiple times since 1995.⁸
 20 Without any evidence showing that the choice-of-law provision in the 1995 PCS Provider
 21 Agreement continues to govern the parties’ contractual relationship, the Court cannot enforce that
 22 provision.⁹

23 Accordingly, because the Court has diversity jurisdiction over this action, California law
 24

25 ⁸ The choice-of-law provision requires that the Agreement “be construed, governed and enforced
 26 in accordance with the laws of the State of Arizona” unless applicable law mandates otherwise.
 27 See Pagnillo Dec., Ex. A at § 9.4.

28 ⁹ As Plaintiff points out, the test for unconscionability is the same under either California or
 Arizona law, so it does not appear that the choice-of-law provision would affect the outcome in
 any event.

1 governs the determination of whether the arbitration provision in the 2011 Provider Manual is
2 unconscionable.

3 **3. Uptown Has Not Shown that the Arbitration Clause is Unconscionable**

4 Under California law, “unconscionability has both a procedural and a substantive element,
5 the former focusing on oppression or surprise due to unequal bargaining power, the latter on
6 overly harsh or one-sided results.” Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d
7 669, 690 (Cal. 2000) (citation and internal quotation marks omitted). Procedural and substantive
8 unconscionability “must both be present in order for a court to exercise its discretion to refuse to
9 enforce a contract or clause under the doctrine of unconscionability. But they need not be present
10 in the same degree.” Id. (internal citation omitted). “In other words, the more substantively
11 oppressive the contract term, the less evidence of procedural unconscionability is required to come
12 to the conclusion that the term is unenforceable, and vice versa.” Id.

13 Here, Uptown provides no evidence to establish that the arbitration clause is procedurally
14 unconscionable. Accordingly, Uptown’s unconscionability challenge to the validity of the
15 arbitration clause fails.

16 **a. Procedural Unconscionability**

17 The “[p]rocedural unconscionability analysis focuses on oppression or surprise.”
18 Nagrampa., 469 F.3d at 1280 (citation and internal quotation marks omitted). “Oppression arises
19 from an inequality of bargaining power that results in no real negotiation and an absence of
20 meaningful choice,” while “[s]urprise involves the extent to which the supposedly agreed-upon
21 terms are hidden in a prolix printed form drafted by the party seeking to enforce them.” Id.
22 (citation omitted).

23 Here, Uptown argues that the arbitration clause is procedurally unconscionable on the
24 grounds that (1) “every retail pharmacy must do business with CVS Caremark’s PBM business,”
25 as “CVS Caremark is the largest provider of prescriptions and related health services in the
26 nation”; (2) Caremark presented the arbitration clause to Uptown on a take-it-or-leave-it basis
27 without providing Uptown any opportunity to negotiate it; (3) Caremark reserved the right to
28 unilaterally modify the terms of the arbitration clause; (4) the arbitration clause is in the “middle

1 of a 217-page document” and does not contain an opt-out clause or an explanation of the rights
2 that Uptown gave up in light of the arbitration clause. Mot. at 9-10.

3 The Court concludes that Uptown has failed to show that the arbitration clause is
4 procedurally unconscionable.

5 First, Uptown’s unconscionability arguments focus on Caremark and on the amendments
6 that Caremark and its affiliates have made to the Caremark Provider Agreement and the Caremark
7 Provider Manual. Uptown ignores, however, that an arbitration clause has been a part of
8 Uptown’s contractual relationship with PCS Health and its successors continually for the last
9 eighteen years. Indeed, the 1995 PCS Provider Agreement, which was drafted and implemented
10 by a non-Caremark entity, contained provisions that are nearly identical to the ones Uptown now
11 finds objectionable in the 2011 Provider Manual, namely an arbitration provision without an
12 express opt-out clause and provisions that allow PCS Health to unilaterally amend the Agreement
13 at any time as long as it gives advance notice to the provider pharmacies.¹⁰ Pagnillo Decl., Ex. A
14 ¶¶ 1.3, 9.5. Uptown provides no evidence to establish either the existence of a power imbalance
15 between Uptown and PCS Health or that Uptown lacked any meaningful choice when it decided to
16 enter into a contract containing an arbitration clause with PCS Health in 1995.

17 Second, Uptown’s unconscionability challenges to the Caremark Provider Agreement and
18 the 2011 Provider Manual are conclusory and unsupported by the evidence before the Court.
19 Uptown complains of Caremark’s superior bargaining power but it provides no evidence to show
20 that the realities of the industry in which it operates compel it to do business with Caremark on
21 Caremark’s terms. The only fact that Uptown has offered on this issue is that Caremark is the
22 largest PBM in the country. There is no evidence regarding Caremark’s market share, the
23 existence and market share of competitors, the existence of alternative retail partners, or the other
24 mechanisms, if any, by which patients choose a pharmacy. Without such information, the Court
25 cannot conclude, solely on the basis of Caremark’s being the largest PBM, that there was no real
26 negotiation or that Uptown had no meaningful choice. At best, Caremark’s leadership position

27 _____
28 ¹⁰ Both of these provisions were written in plain language and in conspicuous typeface and can be
readily found in the 12-page PCS Provider Agreement.

1 may explain why Uptown *wanted* to do business with Caremark, but it does not compel the
2 conclusion that Uptown *had* to do business with Caremark.

3 Uptown also argues that the arbitration clause in the 2011 Provider Manual is
4 unconscionable because Caremark presented it to Uptown on a take-it-or-leave-it basis and
5 because Caremark reserved the right to unilaterally modify the clause. This argument is
6 unpersuasive, given that Caremark complied with its contractual obligation to give advance notice
7 to Uptown each time it amended the Caremark Provider Agreement. See Pagnillo Decl. ¶¶ 16-24;
8 Supp. Pagnillo Decl. ¶¶ 4-5. The purpose of the advance-notice requirement presumably was to
9 give provider pharmacies an opportunity to exit their contractual relationship with Caremark if
10 they objected to the proposed amendments. Also, Uptown has submitted no evidence to show that
11 it could not have negotiated to alter the terms of the proposed amendments, or that it could not
12 have terminated its business relationship with Caremark and established a relationship with an
13 alternative partner in the event that Caremark refused to negotiate.

14 Uptown further contends that the arbitration clause in the 2011 Provider Manual is
15 unconscionable because it “lurks unremarkably in the middle of a 217-page document” and does
16 not contain an express opt-out clause or an explanation of the rights that Uptown would give up in
17 light of the arbitration clause. This argument is unconvincing for two reasons. First, upon review
18 of the 2011 Provider Manual, the Court cannot conclude that the arbitration clause is
19 “unremarkable” or hidden or that it does not contain an explanation of the implications of its
20 existence. While Uptown is correct in noting that the 2011 Provider Manual is more than 200
21 pages, the Manual contains a very thorough table of contents that very clearly states that the
22 arbitration clause at issue is located on pages 49 and 50 of the Manual. The arbitration clause
23 itself is written in reasonably sized text and in plain language and explains that “[a]rbitration shall
24 be the exclusive and final remedy for any dispute between the parties in connection with or arising
25 out of the Provider Agreement; provided, however, that nothing in this provision shall prevent
26 either party from seeking injunctive relief for breach of this Provider Agreement in any state or
27 federal court of law.” Pagnillo Decl., Ex. D at 50. Second, while Uptown is correct that the
28 arbitration clause does not contain an express “opt-out” clause, Uptown has not shown that the

1 advance-notice requirement for proposed amendments discussed above is not the functional
2 equivalent of an opt-out clause.

3 Finally, the authorities that Uptown cites in support of its procedural unconscionability
4 arguments are not on point, because they deal with situations involving unsophisticated
5 individuals who were presented with take-it-or-leave-it contracts by parties who had
6 overwhelming bargaining power. See, e.g., Bowlin v. Goodwill Indus. of Greater E. Bay, Inc., 12-
7 cv-01593 NC, 2013 WL 269131, at *4 (N.D. Cal. Jan. 24, 2013) (finding procedural
8 unconscionability because individual employee was presented with a form contract and was
9 denied the opportunity to negotiate the contract's terms by his employer); Sparks v. Vista Del Mar
10 Child & Family Servs., 207 Cal. App. 4th 1511, 1523 (Cal. Ct. App. 2012) (finding procedural
11 unconscionability because individual employee was presented with an arbitration provision buried
12 in an employee handbook); Nagrampa v. MailCoups, Inc., 469 F.3d 1257, 1284 (9th Cir. 2006)
13 (finding minimal procedural unconscionability because franchisor presented a contract to an
14 unsophisticated first-time franchisee on a take-it-or-leave-it basis and franchisor had
15 "overwhelming" bargaining power). The agreement here involves two business entities, and
16 Uptown provides no evidence to show that it was in any way unsophisticated or that PCS Health
17 or its successors, including Caremark, had overwhelming relative bargaining power.

18 **b. Substantive Unconscionability**

19 Because Uptown has not shown that the arbitration clause is procedurally unconscionable
20 to any degree, the court need not inquire into whether the agreement is substantively
21 unconscionable, as both procedural and substantive unconscionability must be established for an
22 unconscionability challenge to succeed. See Kilgore v. KeyBank, Nat. Ass'n, 673 F.3d 947, 964
23 (9th Cir. 2012) ("Because we hold that the arbitration clause in the parties' contract is not
24 procedurally unconscionable, we need not address whether the terms of that clause are
25 substantively unconscionable.").

26 **4. The Arbitration Clause Can Be Enforced Against Uptown**

27 **a. Caremark, L.L.C. Is the Successor to PCS Health**

28 Uptown argues that the arbitration clause cannot be enforced against it because Defendants

1 have not shown that Caremark, L.L.C. is a successor to PCS Health with respect to the 1995 PCS
2 Provider Agreement.

3 The evidence submitted by Defendants shows (1) that PCS Health was owned by Rite Aid
4 Corporation until it merged with Advance PCS, L.P. in 2001, and that Advance PCS, L.P.
5 ultimately became Caremark PCS Health, L.L.C. in 2008, RJN, Ex. A, B., ECF No. 19; (2) that
6 Caremark, Inc. and Caremark PCS, Inc. amended the AdvancePCS Provider Agreement, which
7 was the immediate successor to the 1995 PCS Provider Agreement, after Caremark Rx acquired
8 Advance PCS in 2004, Pagnillo Decl. ¶¶ 18, 22 & Ex. C; and (3) that Caremark gave notice to
9 Uptown that the resulting Caremark Provider Agreement was with Caremark Inc. and Caremark
10 PCS, Inc., which ultimately became Caremark, L.L.C. and Caremark PCS, L.L.C., respectively.
11 Pagnillo Decl. ¶¶ 14-24 & Ex. C.

12 Based on this evidence, the Court concludes that both Caremark, L.L.C. and Caremark
13 PCS, L.L.C. are successors to PCS Health with respect to the 1995 PCS Provider Agreement and
14 that these entities can enforce the Agreement.

15 **b. The Provider Manuals Were Incorporated into the Provider**
16 **Agreements**

17 Uptown argues that the arbitration clause at issue cannot be enforced against it because
18 “there is no provision that clearly purports to incorporate any ‘Caremark Provider Manual’ into the
19 Provider Agreement, and Defendants have not submitted any evidence that an original ‘PCS
20 Manual’ existed in the first place that could have subsequently been amended.” Opp’n at 13.

21 “Under California law, for one document to incorporate another document by reference,
22 [t]he reference to the incorporated document must be clear and unequivocal and the terms of the
23 incorporated document must be known or easily available to the contracting parties.” Cariaga v.
24 Local No. 1184 Laborers Int’l Union of N. Am., 154 F.3d 1072, 1074 (9th Cir. 1998) (citation and
25 internal quotation marks omitted).

26 Here, Defendants have submitted evidence showing that the PCS Manual was clearly and
27 unequivocally incorporated into the original 1995 PCS Provider Agreement. See Pagnillo Decl.,
28 Ex. A ¶ 9.7 (providing that the “Entire Agreement” consists of “[t]his Agreement, its schedules,

1 and the PCS Manual . . .”) (emphasis added). Defendants also have shown that the Caremark
 2 Provider Manual, which is an amended version of the PCS Manual, also was clearly and
 3 unequivocally incorporated into the Caremark Provider Agreement and that Caremark sent copies
 4 of the Caremark Provider Manual to Uptown. See Supp. Pagnillo Decl., Ex. F (letter clarifying
 5 that Caremark Provider Agreement “includes the Caremark provider Manual”); see also Pagnillo
 6 Decl. ¶¶ 21-24 (declaring that Caremark sent to pharmacy providers various versions of the
 7 Caremark Provider Manual).

8 **c. Nonparties Can Compel Arbitration under California Law**

9 Uptown argues that Defendants CVS Caremark, CVS Pharmacy, and Caremark Rx cannot
 10 enforce the arbitration clause at issue with respect to the claims that Uptown has asserted against
 11 them because they are not signatories to any of the Provider Agreements. Defendants counter that,
 12 under the doctrine of equitable estoppel, each of them can compel the arbitration of Uptown’s
 13 claims even though Caremark, L.L.C is the only Defendant who is a party to the 2011 Provider
 14 Manual.

15 “Generally, the contractual right to compel arbitration may not be invoked by one who is
 16 not a party to the agreement and does not otherwise possess the right to compel arbitration.”
 17 Kramer v. Toyota Motor Corp., 705 F.3d 1122, 1126 (9th Cir. 2013) (citation and internal
 18 quotation marks omitted). Yet, “[t]he United States Supreme Court has held that a litigant who is
 19 not a party to an arbitration agreement may invoke arbitration under the FAA if the relevant state
 20 contract law allows the litigant to enforce the agreement.” Id. at 1128 (citation omitted).

21 Under California law, “where a nonsignatory seeks to enforce an arbitration clause, the
 22 doctrine of equitable estoppel applies in two circumstances: (1) when a signatory must rely on the
 23 terms of the written agreement in asserting its claims against the nonsignatory or the claims are
 24 intimately founded in and intertwined with the underlying contract, and (2) when the signatory
 25 alleges substantially interdependent and concerted misconduct by the nonsignatory and another
 26 signatory and the allegations of interdependent misconduct [are] founded in or intimately
 27 connected with the obligations of the underlying agreement.” Id. at 1128-29 (internal citations and
 28

1 quotation marks omitted).¹¹ The underlying purpose of the doctrine of equitable estoppel is to
2 “preclude[] a party from claiming the benefits of a contract while simultaneously attempting to
3 avoid the burdens that contract imposes.” Mundi, 555 F.3d at 1045 (citation and internal
4 quotation marks omitted).

5 Here, the application of equitable estoppel is justified with respect to three out of the four
6 claims asserted in the complaint.

7 Uptown’s claims for (1) violations of the UTSA, (2) violations of the unlawful prong of
8 the UCL, and (3) IPEA, are founded and intertwined with the Caremark Provider Agreement.
9 Each of these claims is predicated on Defendants’ alleged misappropriation of the customer
10 information that Uptown disclosed to Caremark by virtue of Uptown’s inclusion in Caremark’s
11 PBM networks.¹² Uptown’s inclusion in Caremark’s PBM networks, in turn, is governed by the
12 Caremark Provider Agreement. The terms of the Caremark Provider Agreement expressly
13 addresses the use, dissemination, and ownership of the customer information that Defendants
14 allegedly misappropriated. See, e.g., Pagnillo Decl., Ex. D at 48 (“Provider agrees that the
15 information contained in the claims systems that was obtained by and through the administration
16 and adjudication of a claim by Provider is the property of Caremark, and Provider agrees not to
17 claim any right, title, or interest in said information. Caremark has the right to use, reproduce, and
18 adapt any information or data obtained from Provider in any manner deemed appropriate, even if
19 such use is outside the scope of the Provider Agreement, provided such use is in accordance with
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22 ¹¹ The Court applies California law to the equitable estoppel issue because this action invokes the
23 Court’s diversity jurisdiction, and, as discussed above, Defendants have not shown that the
24 operative Caremark Provider Agreement contains a choice-of-law provision. Moreover, Plaintiff
and Defendants all agree that the Court should apply the test set forth in Kramer v. Toyota Motor
Corp., 705 F.3d 1122 (9th Cir. 2013).

25 ¹² See, e.g., Compl. ¶ 81 (UTSA claim) (“Such misappropriation of plaintiff’s and Class members’
26 trade secrets and confidential patent/customer information violates the UTSA.”); id. ¶ 85
27 (Unlawful UCL claim) (“Defendants have violated § 17200’s prohibition against engaging in
28 ‘unlawful’ acts or practices by, as alleged above, misappropriating plaintiff’s and Class members’
trade secrets . . . in violation of UTSA”); id. ¶¶ 104-105 (IPEA claim) (“In misappropriating
plaintiff’s and Class members’ proprietary information and data for its financial gain . . .
Defendants . . . disrupted the existing or prospective relationship between plaintiff and Class
members and defendants’ beneficiaries.”).

1 applicable Law.”); see also id. at 13-20, 38 (providing for the collection, maintenance,
2 transmission, and use of data related to filling prescriptions and submitting claims for
3 reimbursement).

4 To prevail on a claim for misappropriation of trade secrets, a plaintiff must prove: “(1) the
5 existence of a trade secret, and (2) misappropriation of the trade secret.” See AccuImage
6 Diagnostics Corp v. Terarecon, Inc., 260 F. Supp. 2d 941, 950 (N.D. Cal. 2003) (citing Cal. Civ.
7 Code § 3426.1(b)). Misappropriation is defined in part as the “[d]isclosure or use of a trade secret
8 of another without express or implied consent by a person who . . . [a]t the time of disclosure or
9 use, knew or had reason to know that his or her knowledge of the trade secret was . . . [a]cquired
10 under circumstances giving rise to a duty to maintain its secrecy or limit its use.” See Cal. Civ.
11 Code § 3426.1(b)(2). Here, to prevail on each of the misappropriation-based claims, Uptown will
12 have to prove that Caremark disclosed the customer data at issue without authorization despite
13 knowing that it had a duty to maintain the data’s secrecy or to limit its use. The question of
14 whether Caremark was to any extent barred from disclosing or using Uptown’s customer data
15 must be answered by looking at the terms of the Caremark Provider Agreement, because that
16 contract explicitly governs the collection and use of such information and because it provides the
17 underlying basis for Uptown’s disclosure of such information. Uptown must establish that
18 Caremark’s use of that information exceeded the scope of use permitted under the Provider
19 Agreement. As Uptown’s misappropriation claims are “intimately founded and intertwined with
20 the underlying contract obligations,” and because Uptown alleges that Defendants acted in concert
21 in misappropriating Uptown’s customer data, the application of equitable estoppel is justified with
22 respect to these claims.¹³ Kramer, 705 F.3d at 1129 (citation omitted). Accordingly, nonsignatory
23 Defendants may compel the arbitration of these claims.

24 Uptown does not dispute that the Caremark Provider Agreement governs its inclusion in
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26 ¹³ Uptown alleges that Defendants engaged in substantially concerted misconduct when they
27 misappropriated the customer data at issue for their own financial gain. See, e.g., Compl. ¶ 82
28 (UTSA claim) (“Defendants’ conduct discussed above proximately caused and is causing
damage”); id. ¶ 86 (Unlawful UCL claim) (“Defendants have violated § 17200”); id. ¶ 99 (IPEA
claim) (“Defendants interfered with an actual prospective economic relationship”).

1 Caremark’s PBM networks. Instead, Uptown argues that all of its claims are independent of the
 2 Caremark Provider Agreement because it “never mentions the Provider Manual or any of its
 3 provisions in the Complaint, and never mentions the Provider Agreement other than to disavow
 4 the notion that Plaintiff’s claims arise thereunder.” Opp’n at 19. That Uptown never refers to the
 5 Caremark Provider Agreement by name in the complaint is not dispositive of the question of
 6 whether Uptown’s claims are intertwined with the Agreement, because the complaint is replete
 7 with implicit references to that contract.¹⁴ Moreover, the dependent relationship between
 8 Uptown’s misappropriation claims and the Provider Agreement is evident from the simple fact
 9 that, absent the Provider Agreement, Uptown would have no claims against Defendants with
 10 respect to the customer information at issue, because in that scenario, Uptown would not have
 11 been required to disclose such information to Defendants.

12 In contrast, Uptown’s claim for violations of the unfair prong of the UCL is not founded or
 13 intimately intertwined with the Caremark Provider Agreement. This claim is premised on
 14 Defendants’ exclusion of Uptown and the putative class members from certain Maintenance
 15 Choice networks that Caremark’s PBM branch established with third-party insurers and plan
 16 sponsors. Compl. ¶¶ 53-65. As a result of this alleged exclusion, Uptown and the putative class
 17 members have allegedly suffered monetary losses because they cannot provide pharmacy services
 18 to the members of such networks. *Id.* Defendants contend that this claim arises out of the
 19 Caremark Provider Agreement because a provision in the Agreement states that Caremark “may
 20 make available to Provider the opportunity to participate in Caremark or Plan Sponsor Networks.”
 21 See Pagnillo Decl., Ex. D at 21; Mot. at 12. Because this provision does not create any rights or
 22 duties with respect to the Maintenance Choice networks, the Court cannot conclude that Uptown’s

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 24 ¹⁴ See, e.g., Compl. ¶ 14 (“Uptown Drug is a qualified provider under defendants’ various
 25 pharmacy benefit management programs.”); *id.* ¶ 27 (“In order to adjudicate the patient’s claim,
 26 CVS Caremark . . . for claims processing”); *id.* ¶ 43 (“Plaintiff’s and Class members’ pharmacy patient
 27 lists, including the demographic information and prescription history of each patient, are
 28 proprietary and confidential. Plaintiff and Class Members only disclose such information to CVS
 Caremark’s PBM operation for the purpose of claims adjudication, and the Pharmacy Services
 segment is required to keep such information confidential, and to use it only for the authorized
 purpose of pharmacy benefits management.”).

1 claim has any significant foundation in that provision or in the Agreement as a whole.

2 Accordingly, nonsignatory Defendants may not compel the arbitration of this claim.

3 **B. The Arbitration Clause Encompasses Uptown’s Misappropriation-Based Claims**

4 “Under established law, [t]he question whether the parties have submitted a particular
5 dispute to arbitration, i.e., the question of arbitrability, is an issue for judicial determination
6 [u]nless the parties clearly and unmistakably provide otherwise.”¹⁵ In re Van Dusen, 654 F.3d
7 838, 843 (9th Cir. 2011) (citations and internal quotation marks omitted). To fall within the scope
8 of an arbitration clause, a claim need only “touch matters covered by the contract containing the
9 arbitration clause and all doubts are to be resolved in favor of arbitrability.” Simula, Inc. v.
10 Autoliv, Inc., 175 F.3d 716, 721 (9th Cir. 1999) (citation omitted).

11 Here, the arbitration clause provides that “[a]ny and all disputes in connection with or
12 arising out of the Provider Agreement by the parties will be exclusively settled by arbitration . . .”
13 Pagnillo Decl., Ex. D at 50.

14 As discussed above, Uptown’s misappropriation-based claims are founded on the
15 Caremark Provider Agreement. As such, they arise out of the Provider Agreement and thus fall
16 within the scope of the arbitration clause. For this reason, and because each of the Defendants
17 may move to compel the arbitration of these claims regardless of whether they signed the
18 Agreement, Defendants’ motion to compel the arbitration of these claims is GRANTED.

19 In contrast, Uptown’s claim under the unfair prong of the UCL does not touch matters
20 covered by the Provider Agreement and therefore falls outside of the arbitration clause. For this
21 reason, and because nonsignatory Defendants cannot compel the arbitration of this claim,
22 Defendants’ motion to compel arbitration of this claim is DENIED.

23 **C. The Action is Stayed Pending Arbitration**

24 The FAA provides that “upon any issue referable to arbitration under an agreement in

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26 ¹⁵ Defendants argue that the parties delegated the question of arbitrability to the arbitrator by
27 expressly incorporating the rules of the American Arbitration Association in the arbitration clause.
28 Mot. at 10. Because the Ninth Circuit has not addressed in a published opinion the question of
whether such incorporation is sufficient to submit the question of arbitrability to the arbitrator, and
because there is disagreement among the lower courts on this issue, the Court concludes that the
question of arbitrability in this case is for judicial determination.

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1 writing for such arbitration, the court in which the suit is pending, upon being satisfied that the
2 issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall
3 on application of one of the parties stay the trial of the action until such arbitration has been had in
4 accordance with the terms of the agreement[.]” 9 U.S.C. § 3.

5 Defendants move to stay the litigation of any claims that the Court finds unsuitable for
6 arbitration until the arbitration of all other claims is completed.

7 Uptown opposes Defendants’ request and urges the Court to “maintain its jurisdiction over
8 this case in order to consider requests for injunctive relief, even over those claims which the Court
9 may find are suitable for arbitration.” Opp’n at 24.

10 Having concluded that all misappropriation-based claims are subject to arbitration, the
11 Court finds that a stay of the remaining claim for violations of the unfair prong of the UCL is
12 warranted. See Kilgore, 673 F.3d at 955 (“The federal case must be stayed while the parties
13 proceed to arbitration.”).

14 The Court will not consider Uptown’s requests for injunctive relief at this time, as such
15 requests are wholly derivative of the claims asserted in the complaint and thus are subject to the
16 same arbitration analysis and conclusions as the claims from which they stem.¹⁶ See Compl. ¶¶
17 109-115 (requesting permanent injunction (1) requiring Defendants to admit Uptown and the
18 putative class members into the Maintenance Choice networks; and (2) barring Defendants from
19 disclosing or otherwise using Uptown’s customer information except for the purpose of
20 adjudicating Uptown’s benefit claims). Consequently, all requests for injunctive relief that derive
21 from Uptown’s misappropriation-based claims must be resolved through arbitration, and the
22 request for injunctive relief in connection with the remaining UCL claim is stayed pending
23 arbitration.

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26 _____
27 ¹⁶ The arbitration clause contains an exception, which provides that that “nothing in this provision
28 shall prevent either party from seeking injunctive relief for breach of this Provider Agreement in
any state or federal court.” Pagnillo Dec., Ex. D at 50. Uptown’s requests for injunctive relief do
not fall within this exception to arbitration, because the injunctive relief that Uptown seeks is not
meant to address any breaches of the Provider Agreement.

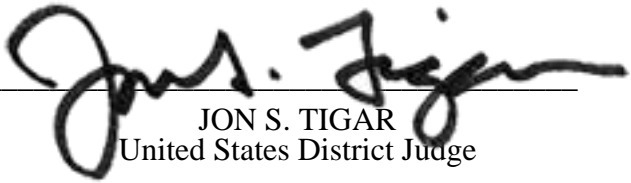
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IV. CONCLUSION

Defendants' motion to compel arbitration is granted in part and denied in part. The motion is granted with respect to Uptown's claims for (1) violations of the UTSA, (2) violations of the unlawful prong of the UCL, and (3) interference with prospective economic advantage. The motion is denied with respect to Uptown's claim for violations of the unfair prong of the UCL. This action is stayed pending the completion of arbitration.

IT IS SO ORDERED.

Dated: July 22, 2013



JON S. TIGAR
United States District Judge

United States District Court
Northern District of California