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11 SUPERIOR COURT OF CALIFORNIA
12 COUNTY OF SAN DIEGO
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14 **THE PEOPLE OF THE STATE OF**
15 **CALIFORNIA,**

Plaintiff,

16
17 v.

18 **CAREMARK Rx, L.L.C., CAREMARK, L.L.C**
and CAREMARK PCS, L.L.C. formerly known
19 **as ADVANCEPCS,**

Defendant.
20

Case No: **37-2008-00077952-CU-MC-CTL**

**COMPLAINT FOR INJUNCTION,
CIVIL PENALTIES AND OTHER
EQUITABLE RELIEF**

Assign to Master Calendar

Dept:
Judge:

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22 Plaintiff, the People of the State of California ("the People" or "Plaintiff"), by its attorney
23 Edmund G. Brown Jr., Attorney General of the State of California, is informed and believes and
24 thereupon alleges as follows:

25 **JURISDICTION AND PARTIES**

26 1. Defendants at all relevant times have transacted business in the City and County of
27 San Diego and elsewhere in the State of California. The violations of law alleged herein have been
28 and are being carried out within the City and County of San Diego and elsewhere in California.

- 1 b) Operating mail order pharmacies which sell prescription drugs, including
2 more than 516 million prescriptions in 2006, directly to persons with a
3 pharmacy benefit (“Plan Participants”);
- 4 c) Administering the pharmacy benefit by processing and paying claims through
5 the operation of a proprietary computer system;
- 6 d) Providing Plan Participants, physicians, and Client Plans with information
7 about the operation of their pharmacy benefit and cards or other methods to
8 access the benefits; and,
- 9 e) Developing and managing formularies, as described further below.

10 9. Formularies are lists of drugs for which a Client Plan agrees to pay on behalf of the
11 Plan Participant, either in whole or in part. For example, “open formularies” permit payment for
12 any prescription drug. “Closed formularies” limit payment to specific drugs - for example, only
13 generics, or only one preferred brand drug within a so-called “therapeutic class.” “Tiered
14 formularies” require Plan Participants to pay lower or higher co-pays depending on whether a drug
15 is a generic, preferred brand, or non-preferred brand.

16 10. Caremark enters into contracts with drug manufacturers in which the manufacturer
17 agrees to pay rebates to Caremark based on placement of a manufacturer’s drug on a formulary.

18 11. Many drug manufacturers pay Caremark “base” rebates, typically calculated by
19 applying a flat percentage to Caremark’s purchases of that manufacturer’s drugs.

20 12. Many manufacturer contracts also contain more targeted rebates that are tied to
21 specific sales or performance goals. For example, manufacturers will typically pay Caremark
22 “market share” or “performance” rebates, where Caremark is paid a percentage rebate on a sliding
23 scale, that is tied to an increase in the market share for a specific drug.

24 13. Caremark provides mail order pharmacy services to Client Plans including
25 governmental entities and private parties.

26 14. While managing its clients’ prescription drug benefits, Caremark engages in a
27 “therapeutic interchange” or “drug switching” program, in which certain drugs that physicians
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1 prescribed for Plan Participants are targeted by Caremark for a switch from the prescribed drug to
2 a different drug.

3 15. Caremark's drug switching programs are determined largely by Caremark's desire
4 to maximize its receipt of rebates from drug manufacturers.

5 16. When Caremark solicits prospective and existing Client Plans, Caremark fails to
6 clearly and conspicuously disclose material information about its drug switching programs,
7 including the fact that it will retain rebates that it receives from the drug manufacturers as a result
8 of drug switching.

9 17. Caremark represents to physicians and to Plan Participants that drug switches save
10 Plan Participants and/or the Client Plan money, when that is not necessarily the case. In fact, some
11 drugs to which Plan Participants are switched actually cost more or approximately the same amount
12 as the originally prescribed drug.

13 18. With respect to certain drug therapies, a switch from one drug to another in the same
14 therapeutic class often requires the Plan Participant to undergo one or more tests, and may require
15 one or more doctor visits, to monitor the new drug therapy and ensure the new drug's efficacy. Plan
16 Participants would not have incurred these additional health care costs but for Caremark's drug
17 switches.

18 19. Caremark, in its contracts with retail network pharmacies, fails to require the
19 pharmacy to disclose to the Plan Participant if the pharmacy's usual and customary ("U&C") price
20 for the drug is less than the applicable co-payment and fails to require the retail pharmacy to allow
21 the Plan Participant to pay the U&C price, if it is lower than the applicable co-payment.

22 20. Caremark engages in a variety of programs and activities for which drug
23 manufacturers and other business entities pay Caremark to perform. For example, Caremark sells
24 various kinds of data it derives from its records of prescription sales to Plan Participants. Caremark
25 distributes this information and marketing materials to physicians and Plan Participants to promote
26 particular drugs to those physicians and Plan Participants.

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1 21. Caremark also enters into contractual agreements with drug manufacturers to market
2 and promote specific drugs to physicians, through mailings and other communications with those
3 physicians.

4 22. Caremark fails to clearly and conspicuously disclose to Client Plans and physicians
5 that it engages in these marketing and promotional activities on behalf of drug manufacturers, that it
6 receives fees from the drug manufacturers for performing these activities, and that it collects those
7 fees for its own benefit.

8 23. Previously dispensed drugs are sometimes returned to Caremark's mail order
9 pharmacies, either because the drug could not be successfully delivered to the Plan Participant, or
10 because the drug was returned or rejected by the Plan Participant, or for some other reason.

11 24. Since at least 1999, through at least June 2003, Caremark has restocked and re-
12 shipped previously dispensed drugs that have been returned to its mail order pharmacies.

13 25. Caremark fails to clearly disclose to Plan Participants that it restocks and re-ships
14 previously dispensed drugs.

15 26. Caremark, itself and through the mail order pharmacies, is engaged in the practice
16 of pharmacy and is licensed to do so under the laws of various states in which its mail order
17 pharmacies are located. As a licensed pharmacy, Caremark owes certain duties to the Plan
18 Participants whose prescriptions it receives, fills, or arranges to fill.

19 27. Caremark employs licensed professional pharmacists and licensed, certified, or
20 designated pharmacy technicians who perform or assist in performing professional pharmacy
21 services for Plan Participants.

22 28. Caremark represents to Client Plans and to Plan Participants, directly or by
23 implication, that it will provide the same professional pharmacy services performed by professional
24 pharmacists at non-mail order pharmacies. These services, if properly performed, assure quality
25 of care for Plan Participants through prevention of adverse drug interactions, verification of drug
26 strength and dosage regimens, recommendation of alternative medically appropriate drugs, and
27 monitoring outcomes.

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1 Participant to undergo one or more tests, and may have required
2 one or more doctor visits, to monitor the new drug therapy and
3 ensure the new drug's efficacy. Plan Participants would not have
4 incurred these additional health care costs but for Caremark's drug
5 switches;

6 c) Caremark, in its contracts with retail network pharmacies, failed to require
7 the pharmacy to disclose to the Plan Participant if the pharmacy's usual
8 and customary ("U&C") price for the drug is less than the applicable co-
9 payment and failed to require the retail pharmacy to allow the Plan
10 Participant to pay the U&C price, if it is lower than the applicable co-
11 payment.

12 d) Caremark failed to clearly and conspicuously disclose to Client Plans and
13 physicians that it engages in marketing and promotional activities on behalf
14 of drug manufacturers, that it receives fees from the drug manufacturers for
15 performing these activities, and that it collects those fees for its own
16 benefit. Such marketing and promotional activities include, but are not
17 limited to,

18 i) Caremark sells and distributes various kinds of data it derives from
19 its records of prescription sales to Plan Participants;

20 ii) Caremark distributes marketing materials to physicians and Plan
21 Participants to promote particular drugs to those physicians and
22 Plan Participants; and,

23 iii) Caremark enters into contractual agreements with drug
24 manufacturers to market and promote specific drugs to physicians,
25 through mailings and other communications with those physicians.

26 e) Since at least 1999, through at least June 2003, Caremark has restocked and
27 re-shipped previously dispensed drugs that have been returned to its mail
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1 order pharmacies. Caremark failed to clearly disclose to Plan Participants
2 that it restocks and re-ships previously dispensed drugs.

3 32. The representations set forth above were known, or by the exercise of reasonable
4 care should have been known, by Defendants to be untrue or misleading when made.

5 **SECOND CAUSE OF ACTION**
6 **Violations of Business and**
7 **Professions Code Section 17200**
8 **(Acts of Unfair Competition)**

9 33. Plaintiff realleges and incorporates by reference paragraphs 1 through 31,
10 inclusive, of the First Cause of Action, as though set forth fully herein.

11 34. Beginning at an exact date unknown to plaintiff and continuing to the present,
12 Defendants, have engaged in unfair competition as defined in Business and Professions Code
13 section 17200. Such unfair competition includes, but is not limited to, the following acts or
14 practices:

- 15 a) Defendants have violated Business and Professions Code section 17500 as
16 alleged in paragraph 30 and 31 of the above First Cause of Action.
- 17 b) Defendants have engaged in certain unfair and/or deceptive acts or
18 practices and procedures at Caremark's mail order pharmacies, retail
19 pharmacies, customer call centers, and corporate offices, related to
20 Caremark's drug interchange practices, and disclosures to Client Plans,
21 health care providers, prescribers, and Plan Participants concerning
22 Caremark's drug interchange practices;
- 23 c) Defendants have engaged in certain unfair and/or deceptive acts or
24 practices relating to disclosures to prescribers and Plan Participants
25 relating to drug interchange practices and potential cost savings;
- 26 d) Defendants have engaged in certain unfair and/or deceptive acts or
27 practices relating to Caremark's receipt of payment from pharmaceutical
28 manufacturers for the distribution of information and materials to health
care providers, prescribers, and Plan Participants, and disclosures to Client

1 Plans, health care providers, prescribers, and Plan Participants concerning
2 that practice, and the disclosure and retention of rebates and other
3 payments received from pharmaceutical manufacturers;

4 e) Defendants have engaged in certain unfair and/or deceptive acts or
5 practices relating to Caremark's disclosures to Client Plans, health care
6 providers, prescribers, and Plan Participants related to Caremark's receipt
7 of manufacturer payments;

8 f) Defendants have engaged in certain unfair and/or deceptive acts or
9 practices relating to Caremark's practice of restocking returned drugs;

10 g) Defendants have engaged in certain unfair and/or deceptive acts or
11 practices relating to Caremark's provision, or lack of a provision, in its
12 contracts with retail network pharmacies requiring the pharmacy to disclose
13 to the Plan Participants if such pharmacy's U&C price for the particular
14 drug dispensed is less than the applicable co-payment;

15 h) Defendants have engaged in certain unfair and/or deceptive acts or
16 practices relating to Caremark's provision, or lack of a provision, in its
17 contracts with retail network pharmacies allowing the Plan Participant to
18 pay either the co-payment or the U&C price, whichever is lower;

19 j) Defendants have engaged in certain unfair and/or deceptive acts or
20 practices relating to provisions in Caremark's contracts with retail
21 pharmacies regarding procedures that the retail pharmacies must follow
22 when implementing a drug interchange as part of any Caremark drug
23 interchange program; and

24 k) Defendants have engaged in certain unfair and/or deceptive acts or
25 practices relating to compliance by Caremark pharmacists with
26 pharmaceutical ethical principles and guidelines, to the extent failure to
27 comply violated consumer protection statutes.

28 **WHEREFORE**, Plaintiff prays that:

