IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

HEALTHPRO PHARMACY & WELLNESS CENTER, Plaintiff, v. OPTUM RX, Defendant.	**Case No. 3:24-cv-01878-G**

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

EXPEDITED CONSIDERATION REQUESTED

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Plaintiff HealthPro Pharmacy & Wellness Center ("HealthPro" or "Pharmacy") respectfully submits this memorandum of law in support of its motion, pursuant to Rule 65 of the Federal Rules of Civil Procedure and Section 134A.003 of the Texas Civil Practice and Remedies Code, for an order to show cause enjoining Defendant Optum Rx ("Optum") from terminating HealthPro from its provider network, using HealthPro's confidential and trade secret information to steer the Pharmacy's patients to Optum's affiliated in-house pharmacy, and withholding reimbursement due and owed to HealthPro under both federal and state law.

Preliminary Statement

Defendant Optum, a pharmacy benefit manager ("PBM") for health insurance plans, including plans offered by its corporate affiliate, United Healthcare, is engaged in a coordinated effort to terminate scores of pharmacies across Texas solely because they are filling prescriptions for United Healthcare beneficiaries that Optum wants to dispense using its in-house, mail order pharmacy. Specifically, in an effort to control soaring costs in United Healthcare's Medicare Advantage AARP plan (MA-AARP), Optum is contacting HealthPro's patients who are beneficiaries of that plan under the guise of an "audit" to nullify or transfer those patients' prescriptions to itself.[1] As the case at bar illustrates, Optum's conduct is violative of law and the parties' agreements, including extensive reforms enacted by the Texas legislature in 2021 to stop the precise PBM abuses described here.

The instant application does not seek the Court's assistance to decide these matters—rather

[1] Just last week the Federal Trade Commission issued an interim report finding that Optum and other pharmacy benefit managers are "steering patients to their affiliated pharmacies and away from unaffiliated pharmacies." Federal Trade Commission, Interim Staff Report, "Pharmacy Benefit Managers: The Powerful Middlemen Inflating Drug Costs and Squeezing Main Street Pharmacies," July 2024, available at https://www.ftc.gov/system/files/ftc_gov/pdf/pharmacy-benefit-managers-staff-report.pdf (accessed July 16, 2024).

Plaintiff asks only that the status quo be preserved long enough to permit issue to be joined. Specifically, Optum is using non-existent and immaterial audit discrepancies as a pretext to terminate Plaintiff from its provider network—with only 10-days notice to the Pharmacy and its patients—even though its audit was concluded nearly one-year ago and found only $3,500 in allegedly invalid claims, representing **0.2%** of Plaintiff's business with Optum in 2023. Moreover, although the Pharmacy has continued to fill prescriptions for plan beneficiaries, Optum has not remitted to the Pharmacy a single cent of the hundreds of thousands of dollars in reimbursement due and owing the Pharmacy on those claims, in violation of federal and state prompt-payment laws. Hence, absent an injunction, Optum will be permitted to disembowel the Pharmacy's ability to pursue relief by virtue of its misconduct. Moreover, as further described below, the Pharmacy's application should be granted because all elements required for the issuance of an injunction favor Plaintiff.[2]

Statement of Facts

A. Optum's Termination of the Pharmacy from Its Provider Network

Plaintiff has been enrolled in Optum's provider network since in or about July 2020. The terms of the parties' agreement are contained in network enrollment forms and Optum's Provider Manual, a copy of which is annexed hereto. Declaration of Alex Whitman in Support of Plaintiff's Application, dated July 23, 2024 ("Whitman Decl."), at Ex. A, APP 004-184.

[2] Certain of Plaintiff's claims, such as its breach of contract claims, are subject to mandatory arbitration pursuant to Optum's "Provider Manual," the terms of which HealthPro had no choice but to accept in exchange for admission to Optum's network. However, Plaintiff's remaining claims, including claims for violations of Texas insurance statutes, trade secret, and tort laws, do not arise from the parties' obligations as outlined in the Provider Manual, and therefore are not subject to mandatory arbitration.

i. Optum's Initial Audit

On or about August 9, 2023, Optum concluded an audit of the Pharmacy's claims, commenced on or about April 28, 2023, in which it found that three of the Pharmacy's patients had denied authorizing the Pharmacy to dispense their medications. See Whitman Decl., Ex. B, APP 186. As a result, Optum claimed that HealthPro had been overpaid in the amount of $3,505.83. Optum stated that it would "correct or reverse the claims online to gain the final amount overpaid." Id., APP 186.

Of note, the allegedly discrepant claims amounted to **0.2%** of Plaintiff's business with Optum in 2023. See Verified Compl., Dkt. 1, ¶ 4.

ii. Optum's November 8, 2023, Termination Notice

Nonetheless, by letter dated November 8, 2023, Optum terminated HealthPro from its provider network. See Whitman Decl. Ex. C, APP 188-189. Specifically, Optum allegedly that two patients had not requested the Pharmacy to dispense the medication. In other words, the patients had requested the medications from their physicians and had received them from the Pharmacy, but allegedly had not requested that the Pharmacy dispense those prescriptions. In addition, Optum alleged that one patient had not received the prescribed medication. Finally, Optum claimed that the Pharmacy's owner, Dr. Omolara Sodunola, had been associated with Scepter Pharmacy, a different pharmacy that apparently was terminated by Optum at some unspecified point. See id., APP 188-189.

iii. HealthPro's December 8, 2023, Appeal

In the Pharmacy's December 8, 2023, appeal, it submitted substantial documentation, including tracking confirmations, signature logs, consent forms, and recordings, demonstrating that Optum's findings with respect to the three patients at issue were clearly erroneous and without

basis. See Verified Compl., Dkt. 1, ¶ 31 & Whitman Decl. Ex. D, APP 190-234. In addition, the Pharmacy submitted documentation, including purchase and sale agreements and filings with the Texas Secretary of State, demonstrating that Dr. Sodunola had no affiliation with Scepter Pharmacy at the time of its termination by Optum.

iv. Optum's Second Audit

On December 11, 2023—after receipt of the Pharmacy's appeal—Optum notified the Pharmacy that it supposedly had conducted a "desktop" audit involving a significantly expanded time period compared to its first audit: March 15 through October 8, 2023, a period of nearly seven months. Prior to December 11, 2023, the Pharmacy was provided no notice that Optum was undertaking a second audit, contrary to the 14-day notice required by the parties' agreement. See Whitman Decl., Ex. A at 96, APP 100.

Nonetheless, in its December 11 communication to the Pharmacy,[3] Optum claimed that it had made $367,392.83 in overpayments to the Pharmacy, consisting of: (1) $287,017.93, purportedly because it had performed an "invoice reconciliation" that determined the Pharmacy had not purchased sufficient medicines to support the billed claims; and (2) $80,374.90, purportedly because HealthPro had delivered prescriptions by mail and patients had denied that they authorized HealthPro to fill their prescriptions.

In Optum's "final audit findings," dated February 23, 2024, Optum admitted that HealthPro had no inventory discrepancies whatsoever, but notified the Pharmacy that it would be reversing

[3] Although its letter is ostensibly dated December 7, Optum admits that it did not provide notice of the audit findings to the Pharmacy until December 11, which raises significant concerns that Optum back-dated its audit letter after receiving the Pharmacy's December 8 appeal. See Verified Compl. ¶¶ 33, 34 & Whitman Decl. Ex. E, APP 235-263. Indeed, Optum allegedly used a "desktop" audit to concoct an "inventory reconciliation" shortage of hundreds of thousands of dollars. While it labeled those audit findings "preliminary," and later abandoned them completely, this example serves to highlight Optum's imperious behavior.

$61,676.10 in invalid claims, or 3.8% of Plaintiffs' with Optum in 2020. See Verified Comp., Dkt. 1, ¶ 41.

v. Optum's March 13, 2024, Revised Termination Notice

Only seven days prior to the hearing on HealthPro's appeal from Optum's November 8, 2023, termination notice, Optum served the Pharmacy with an amended termination notice that alleged discrepancies in an additional nine claims. See Verified Compl., Dkt. 1, ¶ 38 & Whitman Decl. Ex. F, APP 265-266. Specifically, eight patients allegedly had been prescribed and received the medications at issue, but had not requested that the Pharmacy fill those prescriptions. One additional patient denied receiving the medication. Finally, Optum claimed that the Pharmacy had violated the no-mailing provisions of the agreement without specification as to how often or when those mailings occurred. Similarly, Optum claimed that the Pharmacy was in violation of an unidentified "non-solicitation" provision, a new allegation that was never raised in Optum's audit determination and which, therefore, HealthPro could not appeal or otherwise dispute on the merits.

vi. Plaintiff's March 19, 2024, Appeal

In its response, the Pharmacy again submitted substantial documentation refuting Optum's allegations. For example, the Pharmacy submitted an Optum communication expressly which established that Optum had waived the no-mailing restrictions of the parties' contract following the pandemic. Likewise, the Pharmacy submitted patient consent forms, proofs of delivery, recordings, and emails, refuting Optum's erroneous claims. See Verified Compl., Dkt. 1, ¶ 41 & Whitman Decl. Ex. G, APP 267-276.

vii. Optum's March 26, 2024, Appeal Denial

One week later, Optum rejected the Pharmacy's appeal and upheld its "original decision" to terminate the Pharmacy. Contrary to the overwhelming documentary proof submitted by the

Pharmacy, Optum's notice provided only a conclusory statement that "Pharmacy was unable to provide additional information or clarifying information to overturn the original basis of termination." See Verified Compl., Dkt. 1, ¶ 43 & Whitman Decl., Ex. H, APP 278. Optum stated that the Pharmacy would be terminated, effective May 20, 2024.

viii. Plaintiff's April 29, 2024, Dispute Notice

On April 29, 2024, the Pharmacy served Optum with a litigation hold and dispute notice in which it requested that Optum provide additional information as to the basis for its decisions and engage in good faith discussions. See Whitman Decl. Ex. I, APP 280-283. As a result, Optum stayed the Pharmacy's termination and scheduled a dispute resolution hearing for July 11, 2024.

ix. Optum's July 15, 2024, Termination Notice

At the parties' hearing on July 11, the Pharmacy attempted to negotiate settlement terms that would permit the Pharmacy's continued participation the Optum's network subject to whatever conditions Optum believed appropriate. After all, by this point, Optum had permitted the Pharmacy to remain in network for eight months from the original termination notice, and the Pharmacy was offering significant concessions to avoid litigation. Nonetheless, a mere two business days later, Optum summarily stated that it had "decided to uphold the original decision to terminate." See Whitman Decl. Ex. J, APP 285. This time, however, Optum provided only 10-days notice of termination. See id., APP 285.

B. Optum's Misappropriation of the Pharmacy's Trade Secrets

Unbeknownst to HealthPro, while the foregoing audits were underway, Optum was using the Pharmacy's confidential and trade secret information to solicit HealthPro's patients and transfer them to Optum's in-house pharmacy. The Pharmacy only learned of this recently, when it received a prescription transfer request from Optum for a Pharmacy patient that, in fact, did not

want her prescription transferred to Optum. Upon review of the Pharmacy's prescription management software, HealthPro then learned that numerous other patient prescriptions were transferred to Optum's in-house pharmacy.

ARGUMENT

To obtain injunctive relief, a movant must show: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury absent an injunction; (3) the threatened injury to the movant outweighs the threatened harm to the party to be enjoined; and (4) granting the injunction will not disserve the public interest. Considerate Commerce Inc. v. Isp Elecs. LLC, No. 3:23-cv-2140-E-BN, 2024 U.S. Dist. LEXIS 111032, *6 (N.D. Tex. June 5, 2024) (quotations omitted).

I. Plaintiff Has Demonstrated a Substantial Likelihood of Success on its Claims

Optum's termination of the Pharmacy based on the audits at issue violates Texas law, which is expressly referenced and incorporated into the parties' agreement: "The parties agree all audits will be conducted in accordance with applicable laws and any additional required language to be included in the Agreement or [Provider Manual] by such applicable laws shall be deemed included for the term of the Agreement and a period of five (5) years thereafter or in accordance with applicable law." Whitman Decl. Ex. A, at 96, APP 100; id. ("Audits will be conducted in accordance with applicable laws and state regulatory guidelines.").

First and foremost, contrary to Optum's termination of the Pharmacy for "mailing on a retail contract," Texas' PBM reform statute expressly provides: "pharmacy benefit manager may not as a condition of a contract with a pharmacist or pharmacy prohibit the pharmacist or pharmacy from: (1) mailing or delivering a drug to a patient on the patient's request." Tex. Ins. Code. § 1369.557. Hence, Optum's contractual restrictions against mail-order prescriptions are

contravened by Texas law and unenforceable. In addition, Optum waived contractual restrictions against mail-order as a result of the pandemic, and never notified the Pharmacy that, as of May 11, 2023, any further mailings would result in termination. Moreover, putting Texas' statute aside, it would further contravene public policy to permit Optum to suddenly ban delivery to patients who had been receiving their prescriptions in that manner for years. That is all so where, as hear, Optum's termination was based on purportedly discrepant claims amounting to 0.2% of the Pharmacy's business with Optum throughout 2023.

Second, Texas law also prohibits Optum's termination of the Pharmacy based on its February 23, 2024, "final audit findings." Specifically, Section 843.340 of the Texas Insurance Code provides: "The health maintenance organization must complete the audit on or before the 180th days after the date the clean claim is received by the health maintenance organization." Tex. Ins. Code § 843.340(d) (emphasis supplied); id. § 843.344 (Texas' statute applies "to a person, including a pharmacy benefit manager, with whom a health maintenance organization contracts to process or pay claims"); id. § 843.002(24) (defining "provider" to include a "pharmacy"). Nonetheless, Optum's second audit alleged invalid claims back to March 23, 2023. See Whitman Decl. Ex. E, APP 235-263. Accordingly, pursuant to Texas law, Optum was prohibited from terminating the Pharmacy based on any alleged discrepant claims prior to August 27, 2023, or 180-days before February 23, 2024.

Third, the timing and circumstances of Optum's second audit also establish a prima facie case of retaliatory action prohibited by Texas law. Indeed, Optum flatly admits that after receipt of the Pharmacy's December 8, 2023, appeal, it served HealthPro with a second audit notice on December 11, 2023. Accordingly, Optum is prohibited from terminating HealthPro. See Tex. Ins. Code § 843.281(b) (prohibiting termination of a provider who "appealed a decision of the health

maintenance organization"); id. § 1369.559 ("A pharmacy benefit manager may not retaliate against a pharmacist or pharmacy based on the pharmacist's or pharmacy's exercise of any right or remedy under this chapter. Retaliation prohibited by this section includes (1) terminating or refusing to renew a contract with the pharmacist or pharmacy; (2) subjecting the pharmacist or pharmacy to increased audits. . . ").

Fourth, Optum's withholding of hundreds of thousands of dollars in reimbursement due and owing the Pharmacy constitutes yet another violation of Texas law and Optum's own agreement. Optum is required to "pay the total amount of [a prescription] claim through electronic funds transfer not later than the 18th day after the date on which the claim was affirmatively adjudicated," or to make a determination within 30 days whether the claim is, in fact, payable and provide written notice of such to the Pharmacy. See Tex. Ins. Code §§ 843.339(a); 843.338; id. § 843.350 (prohibiting recoupment on "overpayment" absent written notice within 180 days and opportunity to appeal); accord Optum Rx 2024 Provider Manual, at 106 ("Withheld amounts due to audit findings that are not documented within three (3) months are subject to refunding to Clients without further appeal."). In short, an injunction is necessary to prevent Optum from bankrupting the Pharmacy through prohibited retaliatory action. See Tex. Ins. Code § 1369.559 (defining prohibited retaliation as "failing to promptly pay the pharmacist or pharmacy any money owed by the pharmacy benefit manager to the pharmacist or pharmacy").

Fifth, Optum's July 15, 2024, 10-day notice period to the Pharmacy of termination is arbitrary and capricious on its face. Indeed, the Court need look no further than Optum's prior communications to conclude that Optum's termination notice is retaliatory. For example, in its November 8, 2023, termination notice, Optum provided four months' notice. In addition, while Optum's contract permits "immediate" termination in certain circumstances, Optum's audits failed

to substantiate a basis for "immediate" termination. Nonetheless, 10-days' notice effectively is "immediate" for the Pharmacy and its patients, and "unreasonable" as a matter of law. See Tex. Ins. Code § 843.309 ("A contract between a health maintenance organization and a physician or provider must provide that reasonable advance notice shall be given to an enrollee of the impending termination from the plan of a physician or provider who is currently treating the enrollee."). That Optum provided only 10-days' notice smacks of a transparent attempt to limit the Pharmacy's remedies at law, which all the more demonstrates why an injunction is necessary here.

Sixth, the Pharmacy has established a prima facie case that Optum has "steered" its patients to a corporate affiliate in violation of Texas law. Indeed, Texas law provides: "A health benefit plan issuer or pharmacy benefit manager may not steer or direct a patient to use the issuer's or manager's affiliated provider through any oral or written communication." Tex. Ins. Code § 1369.554 ("Prohibition on Certain Communications). Even more specifically, and particularly relevant here: "A health benefit plan issuer or pharmacy benefit manager may not solicit a patient or prescriber to transfer a patient prescription to the issuer's or manager's affiliated provider." Id. 1369.554(c) (emphasis added). Contrary to Texas' PBM reform law—which was intended to stamp-out exactly the type of anti-competitive and predatory conduct that the United Health conglomerate engaged in here—Optum contacted the Pharmacy's patients and transferred them to Optum's corporate affiliated pharmacy. See Verified Compl., Dkt. 1, ¶¶ 57-61 & Whitman Decl. Ex. K, APP 287-288.

Seventh, in so doing, Optum violated Texas audit prohibitions against contact with providers' patients absent notice to the Pharmacy, which was not provided. See Verified Compl. ¶¶ 94-96. Specifically, Section 843.3385 of the Texas Insurance Code provides, in pertinent part:

> If a health maintenance organization needs additional information from a treating participating physician or provider to determine payment, the health maintenance

> organization . . . shall request in writing that the physician or provider provide an attachment to the claim that is relevant and necessary for clarification of the claim. . . . If a health maintenance organization requests an attachment or other information from a person other than the participating physician or provider who submitted the claim, the health maintenance organization shall provide notice containing the name of the physician or provider from whom the health maintenance organization is requesting information to the physician or provider who submitted the claim.

Tex. Ins. Code § 843.3385(a) & (e) (emphasis supplied). In other words, while Texas audit law plainly contemplates contacts with providers, it does not contemplate that patients will be contacted in the ordinary course. And such a rule is reasonable: Optum, a complete stranger to Plaintiff's patients, should not be contacting them to ask for information that reveals communications protected by the physician-patient privilege, such as whether they authorized their physician to send the prescriptions at issue to Plaintiff.

Indeed, Optum's audit purportedly found that HealthPro's patients had not consented to receiving their prescriptions from the Pharmacy based on undocumented and unrecorded conversations between Optum's investigators and those patients. To respond to these allegations, HealthPro was forced to obtain information, such as recordings and patient consent forms, from those patients' treating physicians. That raises the question: Why didn't Optum simply contact the prescribing physician to ask which pharmacy the patients had elected to fill their prescriptions? The answer is simple: Optum was attempting to generate false denials from patients who, months later, would naturally have no recall of such an odd question.

Furthermore, nothing in Texas law or Optum's Provider Manual requires Plaintiff to obtain or maintain documentation of "dispensing consent." Accord Tex. Ins. Code § 843.340(b) ("The health maintenance organization may not request as a part of the audit information that is not contained in, or is not in the process of being incorporated into, the patient's medical or billing record maintained by a participating physician or provider."). And here, Optum's communications

with Plaintiff's patients are particularly suspect: all of the patients who purportedly told Optum's investigators that they had not authorized the Pharmacy to dispense their prescriptions were beneficiaries of United Healthcare's MA-AARP plan. Likewise, all of the transferred patients were beneficiaries of United Healthcare's MA-AARP plan. That is no coincidence. United Health is losing money hand-over-fist on Medicare Part C given rising medical loss ratios; it is, therefore, particularly motivated to reverse prescription claims or capture Plaintiff's margin on prescriptions dispensed to United Health MA-AARP beneficiaries for its own benefit. In other words, this audit was a complete sham.

Similarly, Optum misappropriated the Pharmacy's confidential and trade secret information further to its scheme. Specifically, Optum is contracted as a claim administrator with health benefit plans to establish provider networks for beneficiaries of those plans. In that capacity, Optum gained access to the Pharmacy's confidential and trade secret information in the form of patient lists, contact information, prescription history, and the Pharmacy's drug acquisition costs and pricing information. See Tex. Civ. Prac. & Rem. Code Ann. § 134A.002(6) (defining "trade secret" as "financial data, or list of actual or potential customers . . . if the owner of the trade secret has taken reasonable measures under the circumstances to keep the information secret and the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by another person who can obtain economic value from the disclosure or use of the information.") (internal cites and punctuation omitted); accord Humanity Medical Center, Inc. v. Artica, No. 8:23-cv-1792-WFJ, 2023 U.S. Dist. LEXIS 225349, *5-*6 (M.D. Fl. Dec. 19, 2023) (rejecting argument that "the names of Humanity patients are not trade secrets because this information is 'known to the network' of medical providers, insurers, health maintenance organizations, and management

service organizations"); Human Regenerative Tech. v. Precision Allograft Solutions, No. SA-24-CV-00147-JKP, 2024 U.S. Dist. LEXIS 88182, *15-*16 (W.D. Tex. May 15, 2024) (issuing injunction based showing that the information at issue potentially could be found to be a trade secret later in the litigation).

Finally, Optum's termination of the Pharmacy and ensuing administrative process was the antithesis of good faith. At a minimum, good faith required Optum to provide the Pharmacy with a modicum of information that would permit the Pharmacy to understand and address Optum's allegations, not merely reiterate bald assertions that were contradicted by the Pharmacy's evidentiary submissions. Yet, at each step in the process, Optum refused to engage with the Pharmacy's evidence, and simply parroted its "original findings" with no substantiation whatsoever, let alone any response as to why the compelling evidence submitted by the Pharmacy had been rejected as insufficient. Cf. Tex. Ins. Code § 843.306 (requiring a "written explanation of the reasons for termination"). In short, Optum's process was no process at all, but a pre-determined outcome that would permit Optum to usurp the Pharmacy's most valuable assets for itself. Hence, for all of the foregoing reasons, an injunction should issue because Plaintiff has demonstrated a substantial likelihood of success on its claims.

II. Plaintiff Will Suffer Irreparable Harm Absent an Injunction

Given that Optum is one of three major PBMs that control 80% of the prescription claims processing and pharmacy networks in the country; Optum conducted a sham audit that targeted beneficiaries in United Healthcare's MA-AARP plan to steer them to a corporate affiliate in violation of Texas law; Optum is withholding hundreds of thousands of dollars in reimbursement due and owing the Pharmacy in violation of Texas law; Optum is usurping the Pharmacy's most valuable assets in the form of its goodwill and patients in violation of Texas law; and Optum is

acting in bad faith and with a retaliatory purpose to terminate the Pharmacy from its provider networks in violation of Texas law; the law in the Fifth Circuit is well-established that the Pharmacy will suffer irreparable harm absent an injunction. Direct Biologics, LLC v. McQueen, 63 F. 4th 1015, 1022 (5th Cir. 2023) (holding that loss of goodwill and competitive advantage are immeasurable, therefore, a legal remedy for money damages is inadequate); Kia Am., Inc. v. McAdams, No. W-23-CV-00722-ADA, 2023 U.S. Dist. LEXIS 220091, *6 (W.D. Tx. Oct. 20, 2023) (holding that "Texas law is clear that injuries to goodwill and competitive position are irreparable"); Heil v. Trailer Intern. Co. v. Kula, 542 Fed. Appx. 329, 335 (5th Cir. 2013) ("When a defendant possesses trade secrets and is in a position to use them, harm to the trade secret owner may be presumed."); Human Regenerative Tech., 2024 U.S. Dist. LEXIS 88182, at *18 (granting injunction where, as here, respondent was using trade secrets to compete again the movant in the marketplace); Park Irmat Drug Corp. v. OptumRx, Inc., 152 F. Supp. 3d 127, 132 (S.D.N.Y. 2016) ("[G]iven the significant difficulties inherent in attempting to quantify the impact that termination from Optum's network will have on Irmat's business, the Court finds that Irmat has met its burden of showing an actual and imminent injury for which it lacks an adequate remedy at law.").

III. The Balance of Harms Favors Plaintiff

Optum is part of a publicly traded corporation with more than $330 billion in annual revenues and a market cap of more than $500 billion. It operates provider networks for insurance plans that contain tens of thousands of providers. Hence, there will be no harm to Optum or the beneficiaries of the health insurance plans Optum serves in the event an injunction is granted prohibiting the Pharmacy's termination from Optum's networks and restraining Optum from using the Pharmacy's trade secrets to its further advantage during the pendency of any arbitration or litigation. In contrast, HealthPro and its patients will be significantly harmed if the Pharmacy is

terminated. Indeed, certain patients may not even learn of the termination until their periodic refills or maintenance medicines do not arrive, including insulins for diabetic patients and inhalers for asthmatics. The risk of severe harm caused by Optum's termination of the Pharmacy on short notice clearly favors the issuance of an injunction here. Accord Whitman Decl. Ex. L, APP 289-303 (attaching Landmark Drug Corp. v. Optum Rx, Slip Op., N.J. Super. Ct. (Dec. 5, 2023) ("Optum has demonstrated, by twice pushing back Landmark's termination date, that no immediate harm will result in Landmark continuing to operate as a network pharmacy. On the other hand, Landmark has demonstrated that termination of its membership in the Optum network will result in serious harm through loss of customers, disrupted operations, and potential termination of partnerships with physician providers.")).

IV. The Public Interest Would Not be Disserved by an Injunction

Although HealthPro's claims are meritorious in their own right, the Court should consider that they are brought against a company that is the subject of Congressional hearings, FTC probes, CMS warnings, and sweeping state reforms, including here in Texas, all directed at stopping the undesirable and anti-competitive misconduct Optum and other major PBMs have perpetrated against consumers and independent pharmacies like Plaintiff.[4] That these PBMs have operated in their self-interests with unfettered impunity for years could not be more clear from Texas' decisive legislative action. Indeed, courts have held that the public interest is best served by enforcing a remedy provided for by Texas law. See Human Regenerative Tech., 2024 U.S. Dist. LEXIS 88182,

[4] The Centers for Medicare & Medicaid Services (CMS) recently authored an open letter to payors and PBMs that the agency is closely monitoring "network adequacy standards" because "the increasing level of vertical integration that is occurring among plans, PBMs, and their own pharmacies has the potential to result in anticompetitive behavior and place independent pharmacies at a disadvantage." Centers for Medicare & Medicaid Services, CMS Letter to Plans and Pharmacy Benefit Managers, CMS (Dec. 14, 2023), https://www.cms.gov/newsroom/fact-sheets/cms-letter-plans-and-pharmacy-benefit-managers (last accessed July 20, 2024).

at *21. Hence, enjoining Optum would not disserve the public interest.

Conclusion

For the foregoing reasons, Optum, including all corporate affiliates, should be enjoined from terminating Plaintiff from Optum's provider networks and from using Plaintiff's confidential and trade secret information for competitive advantage.

Dated: July 23, 2024

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CERTIFICATE OF SERVICE

In accordance with Federal Rule of Civil Procedure 5, the undersigned hereby certifies that all counsel of record are being served with a copy of this document via the Court's CM/ECF notification system by email on this 23rd day of July, 2024.

/s/ Alex J. Whitman
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