

19TH JUDICIAL DISTRICT COURT - PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

NO.: C-726389

SECTION "30"

KIM AND STEWART WIXSON, MELANIE AND CHARLIE JONES,
AIMEE AND TOMMY JOE WOODARD, JR., AND THE
LOUISIANA INDEPENDENT PHARMACIES ASSOCIATION, INC.

V.

THE STATE OF LOUISIANA THROUGH THE OFFICE OF THE GOVERNOR,
DIVISION OF ADMINISTRATION, OFFICE OF GROUP BENEFITS,
AND JAY DARDENNE, IN HIS OFFICIAL CAPACITY
AS LOUISIANA COMMISSIONER OF ADMINISTRATION

FILED:

DEPUTY CLERK

PETITION FOR INTERVENTION

NOW INTO COURT, through undersigned counsel, comes CaremarkPCS Health, L.L.C. ("Caremark"), and submits that it is entitled to intervene in the instant case for the following reasons:

I. PARTIES

1.

Intervenor, Caremark, is a foreign corporation registered to do and doing business in the State of Louisiana, with its registered office in the state located in Baton Rouge, Louisiana.

2.

According to their Petition, Plaintiffs Kim and Stewart Wixson are of lawful age and residents of Avoyelles Parish, Louisiana, Plaintiffs Melanie and Charlie Jones are of lawful age and residents of Ouachita Parish, Louisiana and Plaintiffs Aimee and Tommy Joe Woodard, Jr. are of lawful age and residents of East Baton Rouge Parish, Louisiana.

3.

According to the Petition, Plaintiff, the Louisiana Independent Pharmacies Association, Inc. ("LIPA"), is a membership association organized as a Louisiana non-profit corporation whose membership consists of independent retail pharmacies operating in the State of Louisiana.

4.

Defendants are the State of Louisiana through the Office of the Governor, Division of Administration, Office of Group Benefits ("OGB"), an agency within the executive branch of

Louisiana government, and Jay Dardenne, in his official capacity as the Commissioner of Administration for the State of Louisiana (“Commissioner”).

II. FACTS AND BACKGROUND

5.

Caremark provides to its customers pharmacy benefit management services, including plan administration, claim adjudication, formulary management, discounted drug purchase arrangements, retail pharmacy network management, prescription management systems, and clinical and disease management services.

6.

On February 21, 2020, OGB issued a request for proposals for Pharmacy Benefit Manager (“PBM”) Services for the Office of Group Benefits Self-funded Health Plan (RFP #:3000014397) (“RFP”).

7.

The RFP requested proposals from qualified proposers to provide PBM services for OGB’s self-funded prescription drug plan offered to the employees and retirees (and their dependents) of the State of Louisiana. The OGB population, between active employees, retirees and their dependents, is in excess of 200,000 individuals.

8.

Under the RFP, the selected qualified PBM would be responsible for all facets of the day-to-day operational administration of OGB’s pharmacy benefit plan including, but not limited to, adjudication and payment of pharmacy claims, network and rebate management, formulary management, call center operations, clinical management programs, auditing of pharmacies, implementation of cost-saving programs, and general and advisory services regarding pharmacy benefit design and implementation.

9.

On April 6, 2020, OGB received proposals from five (5) entities seeking the OGB PBM contract: (1) Caremark, (2) MedImpact Healthcare Systems, Inc. (“MedImpact”), (3) Express Scripts, Inc. (“ESI”), (4) OptumRx, Inc. (“OptumRx”) and (5) Clutch Health (“Clutch”).

10.

After careful and extensive review of the proposals submitted for compliance with the requirements set forth in the RFP and which proposal was in the best interests of the State of Louisiana, OGB issued a notice of intent to award the PBM contract to Caremark. Caremark’s

proposal was determined by OGB's third party independent actuarial consultant to offer superior savings to the State of Louisiana relative to the other proposals received, in excess of \$100 million over the 3-year term of the contract.

11.

MedImpact, the incumbent PBM provider, filed a protest with the Chief Procurement Officer ("CPO") of the Office of State Procurement ("OSP") contesting the award to Caremark.

12.

On January 8, 2021, the CPO issued a thorough and well-reasoned opinion denying MedImpact's protest and affirming the award of the PBM contract to Caremark.

13.

MedImpact then administratively appealed the CPO's decision to the Commissioner of Administration.

14.

Following a comprehensive review of MedImpact's appeal, the oppositions filed by Caremark and OGB, and MedImpact's reply, the Commissioner denied MedImpact's appeal on February 18, 2021, and once again affirmed award of the PBM contract to Caremark as being in the best financial interests of the State of Louisiana.

15.

MedImpact then filed an action in the 19th Judicial District Court seeking to overturn the CPO's and the Commissioner's administrative decisions upholding the award of the OGB PBM agreement to Caremark.

16.

After initially signing a judgment in favor of OGB and Caremark, rejecting the MedImpact appeal, the trial judge recalled that judgment and issued another judgment reversing the administrative decisions by the CPO and the Commissioner affirming the award of the OGB PBM contract to Caremark.

17.

OGB and Caremark timely appealed the district court's decision to the Louisiana First Circuit Court of Appeal.

18.

After briefing and oral argument, the Louisiana First Circuit Court of Appeal reversed the district court's judgment and reinstated the CPO's and the Commissioner's decisions that had

affirmed the award of the PBM contract to Caremark. The First Circuit Court of Appeals ordered the award of the OGB PBM contract to Caremark to be reinstated.

19.

MedImpact did not seek review in the Louisiana Supreme Court of the First Circuit's decision, and therefore that decision is now final.

20.

Despite the fact that Caremark was awarded the PBM contract through a fair, competitive proposal process pursuant to the Louisiana Procurement Code and prevailed in the litigation that sought to challenge that award, the Joint Legislative Committee on the Budget ("JLCB") refused to approve the award of the PBM contract to Caremark (the largest PBM in the United States and unquestionably qualified to provide its services to OGB at a superior amount of savings to the state treasury) after an intense lobbying campaign by LIPA, which included numerous untrue, reckless, intentionally misleading and defamatory and libelous statements.

21.

Despite Caremark having complied in full with the legal procurement process set forth in the Louisiana Procurement Code, the JLCB caved to the political pressure exerted by LIPA and its independent pharmacy members and refused to approve the award of the PBM contract to Caremark, notwithstanding that this award to Caremark had been approved by OGB, the CPO, the Commissioner, and the Louisiana First Circuit Court of Appeals.

22.

As noted above, the proposal submitted by Caremark, selected by OGB and affirmed by the CPO, the Commissioner and First Circuit Court of Appeal was determined by the OGB's actuary to save the State of Louisiana over \$100 million over the 3-year term of the contract.

23.

Rather than approve the award to Caremark and allow the State of Louisiana to realize that significant savings, which would clearly be in the best interests of the State, the JLCB bowed to political pressure from LIPA and its members by refusing to approve the award of the PBM contract to Caremark.

24.

From transcripts of the JLCB meetings, this refusal to approve the award of the PBM contract to Caremark, notwithstanding Caremark's respect and adherence to each and every step of the procurement process that the State of Louisiana professes to apply to any company that

chooses to do business in the State of Louisiana, was based on little more than LIPA's untrue and defamatory comments about Caremark and its business practices.

25.

Upon information and belief, based in part on numerous social media postings made by LIPA and LIPA members, Caremark submits that the true reason behind LIPA's deceptive, unfair and bad faith opposition to the award of the PBM contract to Caremark is because an affiliate of Caremark operates retail pharmacies that compete with LIPA's member pharmacies (despite that affiliate being provided no preference of any kind under the contract negotiated between Caremark and OGB).

26.

Rather than demonstrate that Louisiana makes procurement decisions based on best industry practices, the Procurement Code it professes to follow, and the rule of law, the JLCB caved to LIPA's unscrupulous disinformation campaign and rejected the award of OGB's PBM contract to Caremark, a decision which, by any measure, is purely and objectively against the best financial interests of the State of Louisiana.

27.

Therefore, for all the reasons set forth above and that follow, Caremark respectfully submits that it has a right to, and is entitled to, intervene in these proceedings.

III. LAW AND ARGUMENT

28.

Louisiana Code of Civil Procedure Art. 1091, which pertains to intervention by third parties, provides:

A third person having an interest therein may intervene in a pending action to enforce a right related to or connected with the object of the pending action against one or more of the parties thereto by:

- (1) Joining with plaintiff in demanding the same or similar relief against the defendant;
- (2) Uniting with defendant in resisting the plaintiff's demand; or
- (3) Opposing both plaintiff and defendant.

29.

The Louisiana First Circuit Court of Appeal states the requirements that must be satisfied before a party will be allowed to intervene are (1) the intervenor must have a justiciable interest in, and a connexity to, the principal action, and (2) the justiciable right must be so related or

connected to the facts or object of the principal action that a judgment on the principal action will have a direct impact on the intervenor's rights. *See e.g., Stevens Construction & Design, L.L.C. v. St. Tammany Fire Protection District No. 1, 2019-0955* (La. App. 1 Cir. 2020); 308 So.3d 724; *DePhillips v. Hospital Service District No. 1 of Tangipahoa Parish, 2017-1425* (La. App. 1 Cir. 2018); 255 So.3d 34; *IberiaBank v. Live Oak Circle Development, L.L.C., 2012-1636* (La. App. 1 Cir. 2013); 118 So.3d 27; *Palace Props., L.L.C. v. City of Hammond, 859 So. 2d 15, 20* (La. App. 1 Cir. 6/27/03).

30.

The term “justiciable right,” as it is used in the context of an intervention, is defined as “the right of a party to seek redress or a remedy against either plaintiff or defendant in the original action or both, and where those parties have a real interest in opposing it.” *See IberiaBank, 118 So.3d at 32.*

31.

Here, as explained above, the lawsuit filed by Plaintiffs seeks to enjoin OGB from proceeding with a contract properly award to and executed with Caremark through the competitive proposal process sanctioned by the Louisiana Procurement Code and upon which the State of Louisiana represents to the business community as governing the award of state contracts.

32.

Accordingly, Caremark submits that it has a “justiciable right” in the instant proceeding because the injunctive relief sought by Plaintiffs seeks to prohibit OGB from going forward with the PBM contract award to Caremark notwithstanding the order of the First Circuit of Appeals to reinstate the award of the PBM contract to Caremark, and despite OGB having no other practical option for providing pharmacy benefits to the employees and retirees of the State of Louisiana and their dependents, in less than one month from today

33.

Furthermore, Caremark’s justiciable right is so related or connected to the facts and object of this action that a judgment in this action will clearly have a direct impact on Caremark’s rights. Specifically, a judgment as prayed for by Plaintiffs would prevent Caremark from obtaining and moving forward with the PBM contract awarded by OGB.

34.

Therefore, Caremark clearly satisfies the requirements for intervention and should be recognized as an Intervenor joining with Defendants against Plaintiffs, pursuant to La. Code of Civ. Pro. art. 1091. Caremark notes that it was recognized as a permitted intervenor in all of the preceding administrative and judicial appeals which have taken place thus far over the tortured history of this procurement process.

35.

Pursuant to La. Code of Civ. Pro. Art. 1033, Caremark need not obtain leave of court for the instant Petition for Intervention as an answer has not been filed by any Defendant.

36.

Alternatively, and in addition to its right to intervene pursuant to La. Code of Civ. Pro. art. 1091, Caremark submits that, pursuant to La. Code of Civ. Pro. art. 641, it is also an indispensable party to the instant proceeding and that no adjudication of Plaintiffs' request for injunctive relief can be made without joinder of Caremark.

37.

La. Code of Civ. Pro. art. 641 provides that a person *shall* be joined as a party in an action when that person "claims an interest relating to the subject matter of the action and is so situated that the adjudication of the action in that person's absence may . . . as a practical matter, impair or impede his ability to protect that interest." See *Terrebonne Parish School Bd. v. Bass Enterprises Production Co.*, 2002-2119 (La. App. 1 Cir. 8/8/03), 852 So. 2d 541, 544.

38.

It is well-settled that an adjudication made without the participation of an Article 641 party is an absolute nullity. See, e.g., *Night and Day Partners, Ltd. v. Great American Real Food Fast, Inc.*, 37,927 (La. App. 2 Cir. 3/17/04), 876 So. 2d 850; *Frey v. American Quarter Horse Ass'n.*, 95-157 (La. App. 5 Cir. 7/25/95), 659 So. 2d 849.

39.

As detailed above, there can be no question that Caremark clearly "claims an interest relating to the subject matter of the action." Indeed, OGB's decision to award the PBM contract to Caremark and OGB's intent to proceed with that PBM contract form the entire predicate of Plaintiffs' request for injunctive relief in this case, a case in which the procurement process that the State of Louisiana professes to offer to the national business community was instead

perverted by political influence and the whims of JLCB (which, despite its name, acted in complete disregard for what is in the best budgetary interests of the State of Louisiana).

40.

Additionally, Caremark is “so situated that the adjudication of the action in [Caremark’s] absence may . . . as a practical matter, impair or impede [Caremark’s] ability to protect that interest.” *Terrebonne Parish School Bd., supra*. In fact, adjudication of this matter without Caremark would (not may) severely impair and impede Caremark’s ability to protect its interests in the PBM contract it was fairly and lawfully awarded.

41.

While Plaintiffs’ Petition only names OGB and Commissioner Dardenne as the defendants in this case, Caremark is also a real party in interest, as Caremark will be severely harmed, prejudiced and suffer significant damages should this Court enjoin OGB from going forward with and executing the PBM contract with Caremark.

42.

This is particularly true since Caremark, in good faith and at the request of OGB, proceeded with the actions necessary for the contract to be timely implemented on January 1, 2023, to ensure the timely and uninterrupted provision of pharmacy services to the OGB member population. In contrast, the JLCB and the plaintiffs apparently have no hesitation in forgoing over \$100 million in savings for the state treasury and causing mass confusion and potential harm to OGB enrollees for the sake of political expedience.

43.

Finally, as noted above, because an adjudication made without the participation of an Article 641 party is an absolute nullity, issuance of injunctive relief in this case without the participation of Caremark would render any such injunctive relief a nullity.

WHEREFORE, Intervenor, CaremarkPCS Health, L.L.C., prays that its Petition for Intervention be filed into the record of these proceedings and that it be recognized as opposing the claims of Plaintiffs and that after due proceedings are had, judgment be rendered in favor of Defendants and Intervenor, denying the relief sought in Plaintiffs’ Petition.

Respectfully submitted,

THE DEMMONS LAW FIRM, LLC.

s/Larry E. Demmons

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**COUNSEL FOR INTERVENOR,
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing **PETITION FOR INTERVENTION** has been served upon:

**KIM AND STEWART WIXSON, MELANIE AND CHARLIE JONES,
AIMEE AND TOMMY JOE WOODARD, JR., AND THE
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via email this 8th day of December, 2022.

s/Larry E. Demmons

LARRY E. DEMMONS