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MODERNHEALTH HOLDINGS, INC., RICHARD
8 KATZ and IRA HALPERN

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF LOS ANGELES, CENTRAL DISTRICT

12 MODERNHEALTH HOLDINGS, INC., a
California corporation; RICHARD KATZ, an
13 individual; and IRA HALPERN, an individual,

14 Plaintiffs,

15 v.

16 CVS HEALTH CORPORATION, a Delaware
corporation; and DOES 1 through 100,
17 inclusive,

18 Defendants.

CASE NO. 18STCV05104
COMPLAINT FOR:

- (1) FRAUD;
- (2) INTENTIONAL INTERFERENCE WITH CONTRACTUAL RELATIONS;
- (3) DECLARATORY RELIEF NO. 1; AND
- (4) DECLARATORY RELIEF NO. 2.

[DEMAND FOR JURY TRIAL]

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Superior Court Of California
County Of Los Angeles

NOV 13 2018

Sherri R. Carter, Executive Officer/Clerk
By: Charlie L. Coleman, Deputy

1 Plaintiffs ModernHealth Holdings, Inc. (ModernHealth), Richard Katz (“Katz”), and Ira
2 Halpern (“Halpern”) (collectively, “Plaintiffs”) allege against Defendant CVS Health Corporation
3 (“Omnicare/CVS”) and DOES 1-100 as follows:

4 **INTRODUCTION**

5 1. This action is the result of the incompetence and malicious conduct of
6 Omnicare/CVS. Omnicare/CVS is attempting to blame ModernHealth and its principals, Katz and
7 Halpern, for the problems it created.

8 2. On August 8, 2017, Omnicare/CVS’s subsidiary Evergreen Pharmaceutical of
9 California, Inc. (“Evergreen”) entered into an Asset Purchase Agreement with ModernHealth (the
10 “APA”). Under the terms of the APA, Evergreen agreed to purchase the assets of ModernHealth
11 for \$47 million.

12 3. ModernHealth was a successful pharmacy services business established in 1975.
13 At the time of the sale, ModernHealth provided medications and pharmacy supplies to more than
14 100 skilled nursing facilities (“SNFs”) and assisted living facilities (“ALFs”) in Southern
15 California (collectively, the “Facilities”), and had annual revenues of more than \$70 million.

16 4. Evergreen is a retail pharmacy business providing medications and medical
17 supplies and equipment. Evergreen is a subsidiary of Omnicare, the nation’s largest provider of
18 pharmaceutical services to nursing homes. Omnicare, in turn, is a subsidiary of CVS.

19 5. CVS acquired Omnicare in 2015 for approximately \$12.7 billion. After Evergreen
20 acquired ModernHealth’s contracts, Omnicare/CVS assumed Evergreen’s operations with respect
21 to the contracts.¹

22 6. Under the APA, a substantial portion of the purchase price was held in escrow in
23 order to guard against the possibility that the Facilities would terminate their contracts after the
24
25

26 ¹ ModernHealth has brought a concurrent arbitration action against Evergreen pursuant to an
27 arbitration clause in the APA. As Omnicare/CVS is not a party to the APA and its arbitration
28 clause, ModernHealth has brought this action in civil court to seek remedy for Omnicare/CVS’s
fraud and misconduct.

1 sale (the "Holdback Payment"). If none of the Facilities terminated, ModernHealth would receive
2 the entirety of the Holdback Payment one year after the sale.

3 7. If 20% or more of the Facilities terminated, Evergreen would retain the Holdback
4 Payment. The Holdback Payment due to ModernHealth could not be reduced, however, by
5 terminations that were the result of Evergreen breaching the terms of its contracts with the
6 Facilities.

7 8. ModernHealth also agreed under the APA to indemnify Evergreen for any breach
8 of ModernHealth's representations and warranties. Another portion of the purchase price was held
9 in escrow to cover any such indemnity ("the Indemnity Escrow Amount"). In the absence of a
10 breach, the Indemnity Escrow Amount was to be released to ModernHealth one year after the sale.

11 9. This case stems from the loss of business that occurred after Omnicare/CVS began
12 to service ModernHealth's contracts. According to Omnicare/CVS, more than 90% of the
13 Facilities serviced by ModernHealth have terminated their agreements with Omnicare/CVS. This
14 should come as no surprise to anyone, least of all Omnicare/CVS.

15 10. First, the announcement that Omnicare/CVS would be servicing the Facilities
16 created a panic. Omnicare/CVS has a poor reputation in the industry, stemming largely from its
17 consistently shoddy customer service.

18 11. It is also well known that both CVS and Omnicare have been the focus of
19 numerous Department of Justice investigations relating to corporate fraud and kickbacks.

20 12. Dozens of Facilities terminated their agreements with ModernHealth rather than
21 transition to Omnicare/CVS.

22 13. Second, Omnicare/CVS's operational decisions created a raft of problems almost
23 immediately. Omnicare/CVS hired only a small handful of ModernHealth's 140 pharmacy
24 employees. Omnicare/CVS's decision to lay off the backbone of ModernHealth's business was
25 reckless.

26 14. Generally speaking, long-term care pharmacies provide the same medications.
27 They do not distinguish themselves by the products they sell. Instead, pharmacies distinguish
28

1 themselves by the quality of their service (i.e., providing the correct medication, in a timely
2 manner, to the right place), and by their relationships with their customers.

3 15. The long-term care pharmacy industry is highly competitive, and strong and
4 effective service is essential to winning and retaining business. Omnicare/CVS, however, did not
5 put a high value on those ModernHealth employees who knew how to provide that service.

6 16. Omnicare/CVS's decision to acquire a \$70 million per year pharmacy business
7 without retaining the employees that knew how to meet the needs of the Facilities was like trying
8 to drive a car without tires.

9 17. Third, Omnicare/CVS breached the agreements with the Facilities by failing to fill
10 orders in a timely and professional manner. Nursing home patients take an average of 12-15
11 different medications per day, often for conditions that are chronic, painful and/or terminal. Every
12 time Omnicare/CVS makes an error, a patient suffers.

13 18. Omnicare/CVS's conduct is not only bad business, it puts lives at risk. For
14 example, one facility owner documented at least 4,500 prescription errors by Omnicare/CVS in
15 the first 60 days after the sale closed. These errors were accompanied by reports of price gouging
16 as well.

17 19. SNFs and ALFs rely on pharmacy providers to keep them compliant with laws and
18 regulations under Title 22, which dictates the Health and Safety Code of Conduct for such
19 facilities. A pharmacy provider that fails to provide adequate service puts its facilities' licenses in
20 jeopardy (not to mention the harm suffered by the patients).

21 20. Fourth, any delays, inefficiencies, and inaccuracies that arose in migrating data
22 from ModernHealth into Omnicare/CVS's system was due to the process that Omnicare/CVS
23 insisted upon. Rather than utilize an IT consultant, who would professionally facilitate an
24 automated data transfer process, Omnicare/CVS opted to input patient data manually into its
25 database.

26 21. In other words, Omnicare/CVS opted to retype all of the patient information by
27 hand. The subsequent delays, confusion, and failures of service were caused by Omnicare/CVS's
28 own data migration practices.

1 22. Fifth, Omnicare/CVS failed to provide open lines of communication for the
2 Facilities. There were frequent delays in Omnicare/CVS's responses to Facility complaints, as
3 well as excessively long hold times on the phone, and an inability to reach management personnel
4 capable of resolving issues.

5 23. Now face to face with its failures, Omnicare/CVS is trying to cast blame elsewhere.
6 It has interjected itself into the contract between ModernHealth and Evergreen. It is insisting that
7 it will retain the entirety of the Holdback Payment, because the loss of business is ModernHealth's
8 fault. False. The loss of business sustained by Omnicare/CVS is entirely its own fault.

9 24. Omnicare/CVS also contends that it is entitled to indemnity for its losses. It is
10 demanding the return of essentially the entire purchase price (including the Indemnity Escrow
11 Amount), because ModernHealth breached its representations and warranties under the APA.
12 Wrong again. ModernHealth was forthright and truthful in all of its dealings with Evergreen and
13 Omnicare/CVS.

14 25. Omnicare/CVS's accusations are a pretext. It never intended to pay ModernHealth
15 the money it was owed.

16 26. Omnicare/CVS saw this deal as a "no-lose" proposition. Its plan was to acquire a
17 successful pharmacy business and hope that the success could withstand Omnicare/CVS's poor
18 organization and customer service. But if not, Omnicare/CVS would blame its failure on
19 ModernHealth and demand all of its money back. That is not how honest business works.

20 27. As a standard operating procedure, Omnicare/CVS has no one else to blame for its
21 incompetence and deficiencies. ModernHealth brings this action to put an end to
22 Omnicare/CVS's unlawful scheme.

23 **THE PARTIES**

24 28. ModernHealth is a California corporation with its principal place of business in Los
25 Angeles County, California.

26 29. Richard Katz is an individual residing in Los Angeles, California. He is a founding
27 shareholder of ModernHealth.
28

1 36. ModernHealth actively serviced the Facilities, almost 150 different SNFs and ALFs
2 located principally in Southern California. ModernHealth's agreements with the Facilities
3 generated most of ModernHealth's revenue.

4 **B. Omnicare/CVS's Reputation in the Industry**

5 37. Omnicare became the nation's largest provider of pharmacy services to nursing
6 homes and assisted living facilities not by building up its own business, but by acquiring
7 businesses already established by others.

8 38. Despite its prolific acquisition efforts, Omnicare lacked in other areas. For
9 example, the company went for decades without human resources, legal, or tax departments. This
10 failure to adhere to business norms resulted in a struggle to integrate its acquisitions into the
11 company, as well as frequent shortcuts of its legal and compliance obligations.

12 39. Omnicare has been the focus of widely-publicized investigations by the
13 Department of Justice, among others. These investigations have involved claims relating to
14 kickbacks and Medicare billing irregularities.

15 40. Omnicare has reached a series of settlements with government agencies totaling at
16 least \$276 million. These settlements include but are not limited to the following:

- 17 • In 2006, Omnicare paid \$49.5 million to settle Medicaid fraud charges that it
18 switched the drugs of senior citizens in long-term care facilities in an attempt to
19 evade Medicaid price ceilings.
- 20 • In 2009, Omnicare paid \$98 million to settle allegations by the federal and state
21 governments that it took kickbacks from Johnson & Johnson in violation of the
22 False Claims Act and other statutes.
- 23 • In 2012, Omnicare paid \$50 million to the DOJ to settle claims that it gave drugs to
24 nursing home residents without valid prescriptions in violation of the Controlled
25 Substances Act and related regulations.
- 26 • In 2013, Omnicare paid over \$4 million to settle claims brought under the False
27 Claims Act that it solicited and received kickbacks from Amgen Inc.
- 28

- 1 • In 2014, Omnicare paid \$124.2 million to the federal and state governments to
- 2 settle claims that it defrauded Medicare and Medicaid by offering improper
- 3 financial incentives to nursing homes in return for their continued business.
- 4 • In 2016, Omnicare paid \$28.1 million as part of a settlement with the DOJ relating
- 5 to kickbacks it received from Abbott Laboratories disguised as “grants” and
- 6 “educational funding.”
- 7 • In 2017, Omnicare paid \$23 million to resolve a whistleblower lawsuit brought
- 8 under the False Claims Act relating to Medicaid fraud and kickbacks it received
- 9 from Organon USA, Inc.

10 41. Omnicare has repeatedly acquired pharmacy businesses, including recent

11 acquisitions in Alabama and Illinois. And Omnicare subsequently lost those businesses through

12 its ineptitude and organizational deficiencies.

13 42. Omnicare is known for providing poor service to customers. Over the years,

14 Omnicare has developed a reputation for mislabeling prescriptions, untimely deliveries and

15 pursuing profits to the detriment of the health and safety of nursing home residents.

16 43. CVS Health Corp. also has a poor reputation in the pharmacy industry. It is

17 frequently among the pharmacy businesses most cited for infractions by the California State Board

18 of Pharmacy, and has also reached a number of settlements concerning unlawful activity by its

19 pharmacies throughout the country. For example:

- 20 • In 2009, CVS paid \$2.25 million to settle accusations by the Federal Trade
- 21 Commission that it failed to protect sensitive financial and medical information of
- 22 its customers and employees.
- 23 • In 2011, CVS agreed to paid \$17.5 million to the federal government and ten states
- 24 relating to Medicaid fraud stemming from inflated prescription claims.
- 25 • In 2014, CVS was fined \$658,500 for its pharmacists’ failures to consult with
- 26 patients on new or changed prescriptions.

27

28

- 1 • In 2016, CVS agreed to pay \$8 million to resolve allegations that its Maryland
2 pharmacies dispensed controlled substances pursuant to prescriptions that were not
3 issued for a legitimate medical purpose.
- 4 • In 2016, CVS paid another \$3.5 million to settle claims that its Massachusetts
5 pharmacies filled forged prescriptions for addictive painkillers and other drugs
6 more than 500 times.
- 7 • In 2017, CVS paid \$5 million to resolve allegations under the Controlled
8 Substances Act that its pharmacies failed to keep and maintain accurate records of
9 controlled substances.
- 10 • In 2018, CVS agreed to pay \$1.5 million to settle allegations by the federal
11 government that it violated the Controlled Substances Act by failing to timely
12 report the loss or theft of controlled substances, including dangerous opioids.

13 **C. Negotiations Concerning the APA**

14 44. ModernHealth entered into negotiations with Omnicare/CVS to sell its pharmacy
15 business in March 2017. Omnicare/CVS was eager to make a deal, as ModernHealth was a strong
16 competitor in the market for long-term care pharmacy services in Southern California.

17 45. Omnicare/CVS conducted extensive due diligence, and became intimately familiar
18 with ModernHealth’s business and operations.

19 46. ModernHealth made available to Omnicare/CVS all of its books and records,
20 including, but not limited to, service contracts, billing reports, profitability reports, drug utilization
21 and dispensing reports, patient facesheets, Facility filling preferences, and written answers to
22 Omnicare/CVS’s “Supplemental Due Diligence Requests.”

23 47. Omnicare/CVS was represented by its own counsel throughout this process. That
24 counsel conducted a detailed review of ModernHealth’s Facility contracts, to confirm that they
25 were in compliance with Medicare regulations.

26 48. Further, the accounting firm PricewaterhouseCoopers went to ModernHealth’s
27 offices and conducted a thorough audit on behalf of Omnicare/CVS. The firm was given full
28

1 access to ModernHealth's contracts with the Facilities, as well as its billing matrix and price
2 structure.

3 49. Omnicare/CVS specifically asked to exclude 13 SNFs from the APA.
4 Omnicare/CVS had a sour relationship with the owner of these 13 Facilities and did not want to do
5 business with him.

6 50. On August 8, 2017, ModernHealth entered into the APA with Evergreen. Under
7 the terms of the APA, Evergreen purchased ModernHealth's assets, including: prescription and
8 patient records, tangible property, intellectual property as well as ModernHealth's contracts with
9 the Facilities.

10 **D. The Purchase Price**

11 51. Evergreen agreed to pay \$47 million to acquire the assets of ModernHealth, plus
12 an amount equal to the value of the inventory of ModernHealth's business, up to a maximum of
13 \$2.3 million. (APA, §1.2.)

14 52. The purchase price would be reduced if Facilities terminated their agreements prior
15 to the close date or if there was a drop in the "Contract Date Bed Count" (the number of beds
16 serviced by ModernHealth on the close date).

17 **E. The Holdback Payment**

18 53. The APA provided that \$7.05 million of the purchase price would be placed in
19 escrow as a "Holdback Payment." That Holdback Payment would be released to ModernHealth
20 one year after closing, subject to the "Deferred Period Bed Count" (the number of beds serviced
21 under ModernHealth's agreements one year after closing).

22 54. If the Deferred Period Bed Count was equal to or greater than the Contract Date
23 Bed Count, ModernHealth would receive the entire Holdback Payment. If the Deferred Period
24 Bed Count was between 80 and 100% of the Contract Date Bed Count, then ModernHealth would
25 be entitled to a pro-rated portion of the Holdback Payment.

26 55. The Deferred Period Bed Count would not be adjusted by contracts terminated as a
27 result of a material breach by Evergreen. In other words, Evergreen would not be entitled to retain
28 the Holdback Payment if Facilities terminated their contracts because Evergreen failed to perform.

1 56. At the time of sale, Omnicare/CVS did not intend to pay the Holdback Payment to
2 ModernHealth. It always intended to keep the Holdback Payment to itself.

3 **F. The Indemnity Provision and Escrow Amount**

4 57. ModernHealth and its founding shareholders agreed to indemnify Evergreen from
5 any losses resulting from or arising out of the breach of any representation, warranty, or covenant
6 made by ModernHealth in connection with the sale. (APA, §6.2.)

7 58. The agreement allowed for \$1,997,500 of the purchase price to be placed in escrow
8 to cover any potential indemnity payments (the "Indemnity Escrow Amount"). In the event that
9 no claim for indemnification had been made within twelve months after the close of the deal, the
10 Indemnity Escrow Amount was to be released to ModernHealth.

11 59. Like the Holdback Payment, Omnicare/CVS never intended to release the
12 Indemnity Escrow Amount to ModernHealth. It always intended to keep the Indemnity Escrow
13 Amount for itself.

14 **G. The Transition Period**

15 60. The transition of the business from ModernHealth to Omnicare/CVS required
16 Omnicare/CVS to take over all active patients and prescriptions; establish initial visits with all
17 Facilities; build a rapport with the bigger corporate groups that owned multiple Facilities; and fill
18 the staffing and training needs necessary to absorb ModernHealth's business. Comparable
19 transitions in other pharmacy acquisitions have taken up to a year to complete.

20 61. Here, Omnicare/CVS insisted on completing the transition in seven weeks (from
21 August 8, 2017 to October 1, 2017). Omnicare/CVS said that it had "other deals" to complete,
22 and that the transition had to be completed within 60 days.

23 62. The 60-day deadline had nothing to do with the interests of the Facility residents.
24 Omnicare/CVS was instead focused on its other business deals.

25 63. Omnicare/CVS also insisted on completing the transition prior to closing the deal.
26 Omnicare/CVS's deadline was extremely unusual. The industry norm for pharmacy acquisitions
27 is to transition customers after the closing, not before.
28

1 **H. The Announcement and Fallout**

2 64. ModernHealth notified the Facilities of the sale in mid-August 2017.

3 65. ModernHealth immediately began to receive calls from concerned Facilities who
4 were familiar with Omnicare/CVS's reputation. Several Facilities had previously contracted with
5 Omnicare/CVS and had cancelled due to poor service.

6 66. Other Facilities provided notice that they were cancelling their contracts with
7 ModernHealth. One Facility even paid a substantial early-cancellation fee so that it would not
8 have to do business with Omnicare/CVS.

9 67. On September 28, 2017, three days before closing, ModernHealth and Evergreen
10 executed the First Amendment to the APA. This First Amendment included an updated list of
11 contracts excluded from the sale. This list accounted for the Facilities who had cancelled their
12 contracts after receiving notice of the sale.

13 68. Between August 8, 2017, and September 28, 2017, the list of excluded contracts
14 grew from 13 to 41. The Contract Date Bed Count was reduced from 10,229 to 8,695.

15 69. As a result of the Facility terminations, the Purchase Price was reduced from \$47
16 million to \$39,950,000.

17 70. The Holdback Payment was reduced to \$5,992,500. And the Indemnity Escrow
18 Amount was reduced to \$1,697,875.

19 71. ModernHealth fully and accurately disclosed those Facilities that decided to
20 terminate prior to the close date. ModernHealth made these disclosures even though it resulted in
21 a multi-million dollar reduction in the purchase price it would ultimately receive.

22 72. At no time did ModernHealth withhold or conceal any information relating to the
23 Facilities from Evergreen. ModernHealth was entirely open, honest and forthcoming at all times.

24 **I. Omnicare/CVS's Staffing Decisions**

25 73. Both before and during the transition period, ModernHealth repeatedly told
26 Omnicare/CVS that it should hire ModernHealth's employees. These employees had good
27 relationships and strong connections with the Facilities that would enable Omnicare/CVS to
28 service customer needs and retain business. Omnicare/CVS failed to do so.

1 74. Omnicare/CVS did not even interview ModernHealth's personnel for its job
2 openings until two weeks before the deal closed, after many of ModernHealth's employees had
3 already arranged for employment elsewhere.

4 75. Ultimately, Omnicare/CVS hired only 25 of ModernHealth's 140 pharmacy
5 employees. The employees hired by Omnicare/CVS included pharmacy technicians and only one
6 of ModernHealth's sales representatives (but no management personnel).

7 76. ModernHealth's employees had spent years developing effective relationships with
8 the Facilities. Those relationships constituted a significant reason why ModernHealth was able to
9 retain the Facilities' business in a highly competitive market.

10 77. The Facilities trusted in the service and lines of communication offered by
11 ModernHealth employees, and were confident that any issues would be resolved swiftly and
12 effectually. The Facilities had no such trust in the new faces they dealt with at Omnicare/CVS, if
13 indeed there was anyone with whom to communicate at all.

14 78. Omnicare/CVS delayed in building up and training its own staff to handle the
15 influx of Facilities that followed the acquisition. Omnicare/CVS simply did not have the
16 necessary personnel in place to address the needs of the Facilities, let alone personnel with whom
17 the Facilities were already familiar and in whom they trusted.

18 **J. Omnicare/CVS Fails to Perform Under the Contracts with the Facilities**

19 79. The sale closed on October 1, 2017, and Omnicare/CVS immediately began to
20 service the contracts with the Facilities.

21 80. In the months after closing, Omnicare/CVS utterly failed to meet the needs of the
22 Facilities and their patients. Its flawed practices resulted in late deliveries, medication errors and
23 failing to fill prescriptions at all.

24 81. The Jewish Home for the Aging ("JHA") owned several facilities whose contracts
25 were serviced by Omnicare/CVS under the terms of the APA. JHA documented at least 4,500
26 prescription errors in the first 60 days after closing.

1 82. Further complicating matters, Omnicare/CVS's inability to fulfill prescriptions in a
2 timely fashion frequently resulted in their pharmaceutical order queue reaching the maximum
3 allowable capacity of incoming faxes. Omnicare/CVS was thus unable to accept any new orders.

4 83. Omnicare/CVS even lacked the bandwidth or capacity to handle the influx of calls
5 from Facilities calling to complain.

6 84. Prior to the sale, ModernHealth had provided many of the Facilities with onsite
7 Cubex automated drug dispensing systems. The Facilities relied on these devices for emergency
8 doses and first doses for new patients. The Facilities were familiar with the Cubex machines and
9 were happy with their performance.

10 85. After closing, Omnicare/CVS refused to let the Facilities keep their Cubex
11 machines. Instead, Omnicare/CVS replaced them with Omnicells, a different type of automated
12 drug dispensing system. The Facilities were not familiar with the Omnicells, and Omnicare/CVS
13 failed to provide sufficient coordination or instruction for their use.

14 86. Adding insult to injury, Omnicare/CVS failed to provide the Facilities with the
15 information necessary to register the Omnicell machines. Omnicare/CVS was not even aware that
16 the devices needed to be registered with the state until so instructed by ModernHealth. Facilities
17 rely heavily on the automated drug dispensing systems to administer medications to patients
18 before the pharmacy sends the supply for the next dose.

19 87. One Facility found that its bills rose between \$7,000 and \$10,000 per month
20 immediately following the transition from ModernHealth to Omnicare/CVS. Upon review, the
21 Facility discovered that the increase stemmed from Omnicare/CVS's medication billing. Though
22 Omnicare/CVS was providing the same medications that ModernHealth had provided, it was
23 charging as much as 10 times more for those medications.

24 88. SNFs and ALFs are heavily regulated under California's Title 22. Title 22 contains
25 the Health and Safety Code of Conduct for such facilities, as well as corresponding federal
26 regulations. These regulations set a high standard for patient care that facilities must meet to
27 continue operation.

28

1 89. Omnicare/CVS's repeated failures in customer service—its inability to provide the
2 Facilities with the correct medication in a timely fashion—made it virtually impossible for the
3 Facilities to meet the compliance standards imposed by state and federal law.

4 90. Omnicare/CVS's deficiencies thus meant more than just unhappy customers—they
5 put the Facilities in serious jeopardy of violations on their licenses and compromises in patient
6 health. The Facilities were forced to go elsewhere to fill their medication needs.

7 91. Omnicare/CVS's incompetence resulted in a mass exodus. The Facilities were not
8 willing to place both their patients and their livelihoods at risk because of Omnicare/CVS's
9 ineptitude. According to Omnicare/CVS, all but six Facilities terminated their contracts within the
10 first year.

11 92. Many of the Facilities sent termination notices to Omnicare/CVS. Those notices
12 stated that the Facilities were cancelling due to material breaches on the part of Omnicare/CVS:

- 13 • The Providence Group terminated because Omnicare/CVS “materially breached the terms
14 of the agreement and is in default,” and stated that “Omnicare’s failure to provide the
15 duties and services per the terms of the agreement amounts to negligence . . .”
- 16 • Sun Mar Managed Facilities terminated multiple contracts because Omnicare/CVS’s
17 performance “has jeopardized the health and safety of an enormous amount of residents in
18 the various facilities.”
- 19 • Generations Healthcare terminated their contracts after Omnicare/CVS took over because
20 they were “encountering gross errors which are putting our residents at risk.”
- 21 • The JHA accused Omnicare/CVS of “defaults of material obligations and breach of terms,”
22 including, but not limited to “inconsistent medication deliveries” and “failure to provide
23 adequate resolution of issues despite ongoing communication.”
- 24 • Valley Convalescent terminated because after Omnicare/CVS began servicing their
25 contract, “drugs were not delivered for days.”
- 26 • Knolls West terminated because Omnicare/CVS’s conduct resulted in “too many problems
27 that could potentially put my facility/patients at risk.”
28

- 1 • At Home In Ojai terminated after “numerous issues which have made it very difficult for
2 us to provide medication management in a timely and accurate manner.”

3 **K. Omnicare/CVS Blames ModernHealth For Its Own Incompetence**

4 93. On September 26, 2018, ModernHealth received a letter from Omnicare/CVS titled
5 “Indemnification Notice.”

6 94. The Indemnification Notice asserted that ModernHealth and its founding
7 shareholders were in breach of multiple provisions of the APA, including representations and
8 warranties made therein.

9 95. The Indemnification Notice asserts that Omnicare/CVS had suffered damages of no
10 less than \$37,811,000, plus several million dollars in consequential damages. In other words,
11 Omnicare/CVS believes it is entitled to recover essentially the entire purchase price.

12 96. The Indemnification Notice purports to seek indemnity from ModernHealth, as
13 well as its principals Rick Katz and Ira Halpern pursuant to the terms of the APA. Omnicare/CVS
14 also stated its intention to withhold the entirety of the Indemnity Escrow Amount and Holdback
15 Payment.

16 97. The Indemnification Notice accuses ModernHealth of: (1) failing to disclose that
17 Facilities had terminated or intended to do so; (2) referring Facilities to competitors; (3) failing to
18 properly transfer ModernHealth’s data; and (4) failing to meet with Facilities to smooth the
19 transition.

20 98. Omnicare/CVS sent this notice even though it is not a party to the APA or to the
21 First Amendment thereto. ModernHealth has not received any similar indemnification notice from
22 Evergreen.

23 99. ModernHealth provided all disclosures required under the APA. Those disclosures
24 were incorporated into the First Amendment and signed by Evergreen. ModernHealth did not
25 know about any Facility terminations or threatened terminations that were not so disclosed.

26 100. ModernHealth attempted to convince the Facilities to not terminate their contracts
27 and to stay through the transition to Omnicare/CVS. ModernHealth did this in good faith.
28

1 101. At no time did ModernHealth attempt to convince Facilities to terminate their
2 contracts. Nor did ModernHealth attempt to convince Facilities to switch to another pharmacy.

3 102. The Indemnification Notice further accused ModernHealth of convincing Facilities
4 to postpone termination until just after closing in order to drive up the purchase price. It cites one
5 facility, Elim Assisted Living, that had sent ModernHealth a termination letter after learning about
6 the sale.

7 103. ModernHealth had contacted Elim, and convinced it to rescind the termination.
8 This was disclosed in the First Amendment. Evergreen signed a written amendment that discloses
9 the very fact that Omnicare/CVS is now accusing ModernHealth of concealing.

10 104. Shortly thereafter, Omnicare/CVS failed to meet with Elim to facilitate the
11 transition. The already shaky customer relationship quickly fell apart as a result of
12 Omnicare/CVS's incompetence. Elim decided to terminate its contract shortly after the deal
13 closed. Elim terminated its contract despite ModernHealth's efforts, not because of them.

14 105. ModernHealth devoted multiple employees to collecting and preparing the
15 necessary data for transfer to Omnicare/CVS. Beginning August 19, 2017, ModernHealth made a
16 transfer of data to Omnicare/CVS every day, up to and including October 2, 2017—the day after
17 closing.

18 106. At no time did Omnicare/CVS object to the format of the data. Instead,
19 Omnicare/CVS took the data and then inputted it into its database manually (by re-typing all of the
20 information). Omnicare/CVS also refused to hire an IT subcontractor that could have solved the
21 issue.

22 **L. Omnicare/CVS Threatens to Withhold the Holdback Payment**

23 107. On October 25, 2018, ModernHealth received a letter from Omnicare/CVS
24 containing Omnicare/CVS's calculation of the Deferred Patient Bed Count. According to
25 Omnicare/CVS, the Deferred Period Bed Count is 507.

26 108. When Omnicare/CVS took over ModernHealth, the total number of beds serviced
27 was 8,695.
28

1 109. Omnicare/CVS's letter claimed that the loss of business resulted from
2 "Termination for reason other than material breach by [Omnicare/CVS]." The letter then asserted
3 that Omnicare/CVS intends to withhold the entire Holdback Payment pursuant to section 1.2(f)(iii)
4 of the APA.

5 110. Omnicare/CVS sent this letter even though it is not a party to the APA or to the
6 First Amendment thereto. ModernHealth has not received any similar letter concerning the
7 Holdback Payment from Evergreen.

8 111. Omnicare/CVS has wrongfully, maliciously, and unlawfully withheld the Holdback
9 Payment from ModernHealth. Omnicare/CVS drove away more than 90% of the business. The
10 Facilities terminated their contracts not because of any breach by ModernHealth, but because
11 Omnicare/CVS failed to deliver medications and supplies in a timely or accurate fashion, thus
12 putting the Facilities at risk of violating their compliance standards. Omnicare/CVS failed to
13 provide services and support in accordance with their operative agreements, thus putting patient
14 lives at risk.

15 112. Omnicare/CVS knows why the Facilities terminated their contracts. It knows that
16 it bears the fault for its loss of business, not ModernHealth. It is nevertheless attempting to shift
17 the blame onto ModernHealth, in an effort to gain for itself the Holdback Payment and Indemnity
18 Escrow Amount to which ModernHealth is entitled, and to claw back the purchase price.

19
20 **FIRST CLAIM FOR RELIEF**

21 **(Fraud)**

22 113. ModernHealth repeats and realleges each and every foregoing and subsequent
23 allegation contained in the Complaint, and further alleges as follows:

24 114. Evergreen is a subsidiary of Omnicare/CVS, and Omnicare/CVS controls
25 Evergreen. Omnicare/CVS dictates the decisions made by Evergreen.

26 115. Omnicare/CVS and Evergreen agreed to enter into a conspiracy for the purpose of
27 defrauding ModernHealth. The intended result of the conspiracy was to benefit Evergreen by
28 millions of dollars, which would in turn benefit its parent company Omnicare/CVS.

1 116. Omnicare/CVS and Evergreen acted in concert at all relevant times and were
2 jointly aware of the fraudulent conduct. Both intended that the fraudulent conduct be committed.

3 117. Omnicare and Evergreen arranged for a substantial portion of the purchase price for
4 ModernHealth's assets, almost 20%, to be withheld for a year after closing, in the form of the
5 Holdback Payment and the Indemnity Escrow Amount. Evergreen promised to release those
6 amounts to ModernHealth after a year if certain conditions were fulfilled.

7 118. Neither Omnicare nor Evergreen, however, ever intended to pay those amounts to
8 ModernHealth, but always intended to keep them for themselves.

9 119. ModernHealth relied on Omnicare/CVS and Evergreen's misrepresentations. It
10 would never have agreed to enter into the APA had it known that Omnicare/CVS and Evergreen
11 intended to keep those payments for themselves.

12 120. Omnicare/CVS and Evergreen knew that their representations were false and/or
13 acted with utter disregard and recklessness as to their truth. Omnicare/CVS and Evergreen knew,
14 intended and/or understood that ModernHealth would rely on these misrepresentations. Their
15 purpose in making these representations was to retain for themselves the Holdback Payment and
16 Indemnity Escrow Amount.

17 121. As a direct and proximate result of Omnicare/CVS's fraud, as alleged herein,
18 ModernHealth has been damaged in an amount to be determined at trial, but exceeding \$10
19 million.

20 122. In doing the acts alleged herein, Omnicare/CVS acted with oppression, fraud, and
21 malice. Therefore, ModernHealth is entitled to punitive damages.

22 **SECOND CLAIM FOR RELIEF**

23 **(Tortious Interference With Contract)**

24 123. ModernHealth repeats and realleges each and every foregoing and subsequent
25 allegation contained in the Complaint, and further alleges as follows:

26 124. ModernHealth and Evergreen entered into a valid, written, fully-executed APA and
27 First Amendment thereto.

28 125. Omnicare/CVS knew of the APA.

1 126. Pursuant to section 6.8(h) of the APA, ModernHealth is entitled to the entirety of
2 Indemnity Escrow Amount. ModernHealth is also entitled to the entirety of the Holdback
3 Payment, pursuant to section 1.2(f) of the APA

4 127. Omnicare/CVS instructed Evergreen not to release the Holdback Payment or the
5 Indemnity Escrow Amount to ModernHealth, and otherwise prevented Evergreen from complying
6 with the APA.

7 128. Omnicare/CVS's conduct was intended to deprive ModernHealth of the Indemnity
8 Escrow Amount and Holdback Payment, so that it may keep these amounts for itself.
9 Omnicare/CVS thus intended to disrupt the APA and deprive ModernHealth of the benefits to
10 which it is entitled under the APA.

11 129. As a direct and proximate result of Omnicare/CVS's conduct as alleged herein,
12 ModernHealth has been damaged in an amount to be determined at trial, but exceeding \$10
13 million.

14 130. Omnicare/CVS's conduct was malicious, oppressive, and fraudulent, justifying an
15 award of punitive damages.

16 **THIRD CLAIM FOR RELIEF**

17 **(Declaratory Relief)**

18 131. ModernHealth repeats and realleges each and every foregoing and subsequent
19 allegation contained in the Complaint, and further alleges as follows:

20 132. An actual and present controversy has arisen between ModernHealth, on the one
21 hand, and Omnicare/CVS, on the other, regarding ModernHealth's alleged breaches of the APA.

22 133. Omnicare/CVS alleges that ModernHealth is in breach of multiple provisions of the
23 APA, including the representations and warranties made therein. Omnicare/CVS further asserts
24 that it is entitled to indemnity from ModernHealth, and may thus recover from ModernHealth an
25 amount equal to virtually the entire purchase price, including both the Indemnity Escrow Amount
26 and the Holdback Payment.

27 134. ModernHealth contends that it has performed all conditions, covenants, and
28 promises required on its part to be performed in accordance with the APA, except for those

1 conditions, covenants, and promises which were excused and/or that it was prevented from
2 performing by the acts or omissions on the part of Omnicare/CVS or Evergreen.

3 135. In particular, ModernHealth contends that it was truthful and forthright with respect
4 to each of the representations and warranties it made in connection with the APA. ModernHealth
5 therefore contends that Omnicare/CVS is not entitled to indemnity for its losses.

6 136. A judicial declaration is thus necessary and appropriate so that the parties may
7 ascertain their respective rights, duties, and obligations.

8 137. ModernHealth requests that the Court issue a judicial declaration that
9 ModernHealth is in compliance with its obligations under the APA, and that Omnicare/CVS is not
10 entitled to indemnity for its losses.

11 **FOURTH CLAIM FOR RELIEF**

12 **(Declaratory Relief)**

13 138. ModernHealth repeats and realleges each and every foregoing and subsequent
14 allegation contained in the Complaint, and further alleges as follows:

15 139. An actual and present controversy has arisen between ModernHealth, on the one
16 hand, and Omnicare/CVS, on the other, regarding the distribution of the Holdback Payment.

17 140. Omnicare/CVS alleges that it is entitled to withhold the entirety of the Holdback
18 Payment, as the Deferred Period Bed Count fell to less than 80% of the Contract Date Bed Count
19 within 12 months of the closing date of the sale.

20 141. ModernHealth contends that the reduced bed count is a result of Omnicare/CVS's
21 material breaches of the contracts with the Facilities, and so such losses should not be counted
22 against the Deferred Period Bed Count.

23 142. ModernHealth therefore contends that the Deferred Period Bed Count is equal to
24 the Contract Date Bed Count, and ModernHealth is entitled to the entirety of the Holdback
25 Payment.

26 143. A judicial declaration is thus necessary and appropriate so that the parties may
27 ascertain their respective rights, duties, and obligations.

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144. ModernHealth requests that the Court issue a judicial declaration that the discrepancy between the Contract Date Bed Count and the Deferred Period Bed Count is due to Omnicare/CVS's material breaches of contracts with the Facilities, and that ModernHealth is thus entitled to the entirety of the Holdback Payment.

PRAYER FOR RELIEF

WHEREFORE, ModernHealth prays for judgment against Omnicare/CVS as follows:

- (1) Compensatory, special, and consequential damages according to proof at trial;
- (2) Pre- and post-judgment interest at the maximum legal rate;
- (3) Punitive damages;
- (4) Attorneys' fees, costs and expenses incurred herein;
- (5) A judicial declaration that ModernHealth is in compliance with its obligations under the APA, that Omnicare/CVS is not entitled to indemnity for its losses, and that ModernHealth is entitled to the entirety of the Indemnity Escrow Amount;
- (6) A judicial declaration that the discrepancy between the Contract Date Bed Count and the Deferred Period Bed Count is due to Omnicare/CVS's material breaches of contracts with the Facilities, and that ModernHealth is thus entitled to the entirety of the Holdback Payment; and
- (7) For any further relief that the court deems just and proper.

DATED: November 13, 2018

Respectfully submitted,

MILLER BARONDESS, LLP



By:

BRIAN A. PROCEL
Attorneys for Plaintiffs MODERNHEALTH
HOLDINGS, INC., RICHARD KATZ and IRA
HALPERN

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DEMAND FOR JURY TRIAL

ModernHealth hereby demands its action be tried to a jury.

DATED: November 13, 2018

MILLER BARONDESS, LLP



By: _____

BRIAN A. PROCEL
Attorneys for Plaintiffs MODERNHEALTH
HOLDINGS, INC., RICHARD KATZ and IRA
HALPERN