



**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK**

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RxUSA WHOLESALE, INC., : **Docket No. 06 CV 4343 (DRH)**
 :
 Plaintiff, : **AMENDED COMPLAINT**

- against - : **JURY TRIAL REQUESTED**

McKESSON CORPORATION, :
 :
 Defendant. :

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Plaintiff, by and through its attorneys, **The Law Firm of Michael Levine, P.C.**, complaining of the Defendant, respectfully alleges as follows, upon information and belief:

PRELIMINARY STATEMENT

This complaint is filed and this action instituted to either (i) recover money damages for the breach of a supply contract by Defendant McKesson Corporation (“McKesson”), or (ii) require McKesson to specifically perform the supply contract.

OVERVIEW

McKesson is an authorized distributor of pharmaceutical products. Plaintiff is a wholesale reseller of pharmaceutical products. In 2003, the parties entered into an agreement for the wholesale supply by McKesson of prescription pharmaceutical products to Plaintiff for resale (the “Supply Agreement”). The Supply Agreement, among other things, required that McKesson supply those products to Plaintiff from

McKesson's primary distribution center and, if that distribution center was unable to fulfill Plaintiff's orders, either (i) from another of McKesson's distribution centers or (ii) by way of drop shipment directly from the vendor.

McKesson breached the Supply Agreement by failing to deliver to Plaintiff some \$1,032,622,001.56 of pharmaceutical products that Plaintiff had ordered to fulfill orders that Plaintiff had received from its customers, which products were available for delivery by McKesson either from its primary distribution center, another of its distribution centers, or by way of drop shipment directly from the vendor. As a result of the breach by McKesson of the Supply Agreement, Plaintiff was unable to resell the ordered products and lost some \$54,160,257.88 in profits as a result. Plaintiff is, therefore, entitled to a Judgment for that amount against McKesson.

A provision in the Supply Agreement, however, prevents the recovery by Plaintiff of any "special," "consequential," "incidental" or "indirect" damages. In the circumstances at bar – to wit, the purchase of goods between vendors for resale – lost profits are "direct" and "proximate" damages and therefore may be recovered in this action. Alternatively, if such damages are deemed "consequential," the restriction on the recovery of the same under the circumstances is unenforceable and void as against the public policy of New York because the same is unconscionable and an onerous term which derived from the significant disparity in the bargaining power of the parties and resulted in the lack of Plaintiff having any meaningful choice and McKesson being able to obtain unreasonably favorable terms. Alternatively, if the restriction is enforceable,

Plaintiff is entitled to specific performance of the Supply Agreement because any available remedy at law (i) is incomplete and inadequate to accomplish substantial justice, and (ii) would be inadequate to protect the expectation interest of the Plaintiff.

JURISDICTION AND VENUE

1. This action was originally commenced in the Supreme Court of the State of New York and removed by petition of Defendants dated August 22, 2006. This Court has subject matter jurisdiction over the claims set forth herein pursuant to 28 U.S.C. § 1441 *et. seq.* (in that this action is removed from a state court), and 28 U.S.C. § 1332 (in that there is diversity of citizenship and the amount in controversy exceeds \$75,000.00).

2. Venue properly lies in this district pursuant to 28 U.S.C. § 1391(b) (in that a substantial portion of the events or omissions giving rise to the claims occurred in this district).

THE PARTIES

3. At all times relevant to this complaint, Plaintiff **RxUSA Wholesale, Inc.** (“Plaintiff”), formerly known as RxUSA International, Inc., was, and still is, a domestic corporation, duly organized and existing under, and by virtue of, the laws of the State of New York.

4. At all times relevant to this complaint, Plaintiff was, and still is, engaged in the business of, among other things, selling wholesale pharmaceutical products throughout the United States.

5. At all times relevant to this complaint, Defendant McKesson Corporation (“McKesson”) was, and still is, a foreign corporation, duly organized and existing under, and by virtue of, the laws of the State of California with offices in San Francisco, California and Delran, New Jersey, among others.

6. At all times relevant to this complaint, Defendant transacted business within the State of New York, contracted to supply goods in the State of New York, regularly did business and engaged in other persistent courses of conduct in the State of New York, and derived substantial revenue from goods used or consumed in the state of New York.

7. At all times relevant to this complaint, Defendant was, and still is, engaged in the business of selling pharmaceutical goods throughout the United States.

THE RELEVANT FACTS

8. Heretofore, and on or about October 1, 2003, the Plaintiff (and certain affiliated companies) entered into an agreement with Defendant wherein and whereby Defendant agreed to a multi-year program for the wholesale supply of prescription

pharmaceutical products by Defendant to Plaintiff for resale by Plaintiff (the “Supply Agreement”).

9. Pursuant to the terms of the Supply Agreement, Plaintiff was required to, and did, designate McKesson as a primary supplier and to purchase from McKesson substantially all of the pharmaceutical products that Plaintiff would purchase for resale.

10. The Supply Agreement specifically provided as follows (at ¶3B thereof):

In the event that the primary distribution center servicing any Customer is temporarily out of stock of any prescription items, such distribution center will utilize McKesson’s National Distribution Network to make those items available for Facility order. If the item is not available within the McKesson network, it will be drop-shipped from the vendor if stock is available.

11. Similarly, the Supply Agreement specifically provided as follows (at ¶16 thereof):

If service from any McKesson distribution center to any Customer Facility is interrupted or delayed because of strike, lockout, labor dispute, fire or other casualty, or any other reasons beyond the reasonable control of McKesson, McKesson will take such action as may be reasonably necessary, without additional cost or expense to Customer, to maintain service as mutually agreed upon to affected Facilities from an alternate McKesson Distribution Center.

12. Thus, the parties made it clear, on the face of the Supply Agreement, that the prompt and complete fulfillment of Plaintiff’s orders was critically important and would be ensured by McKesson regardless of the circumstances impeding such complete fulfillment.

13. From or about October of 2003 through or about the first quarter of 2006, Plaintiff placed orders to McKesson for an aggregate of \$1,483,587,185.78 of pharmaceutical products.

14. Notwithstanding the quantity of the said orders, McKesson delivered to Plaintiff, from or about October of 2003 through or about the first quarter of 2006, a total of \$450,965,184.22 of goods.

15. Thus, McKesson failed to deliver, or “omitted,” an aggregate of \$1,032,622,001.56 of pharmaceutical products that Plaintiff had ordered and were necessary to fulfill orders that Plaintiff had received from its customers for the same.

16. At the time of the placement by Plaintiff to McKesson of the said orders, Plaintiff in fact had orders from its customers for such products and was ready, willing and able to perform its obligations pursuant to the Supply Agreement and had fulfilled all of its duties as of that date.

17. At the time of the placement of the said orders by Plaintiff to McKesson, McKesson knew that Plaintiff had placed the orders for the purpose of resale of the ordered goods to Plaintiff’s customers.

18. At the time that Plaintiff placed the said orders, McKesson had a contractual obligation to either (i) fulfill the orders in full from McKesson's primary distribution center servicing Plaintiff, or (ii) utilize McKesson's National Distribution Network to obtain and deliver the ordered items in full to Plaintiff, or (iii) arrange for the ordered items to be drop-shipped from the manufacturers thereof to Plaintiff.

19. McKesson breached the Supply Agreement in that it entirely refused and/or failed to either (i) fulfill Plaintiff's orders in full from McKesson's primary distribution center servicing Plaintiff, or (ii) utilize McKesson's National Distribution Network to obtain and deliver the ordered items in full to Plaintiff, or (iii) arrange for the ordered items to be drop-shipped from the manufacturers thereof to Plaintiff.

20. At the time that the said orders were placed by Plaintiff, McKesson in fact could have fulfilled those orders in full from its Distribution Center servicing Plaintiff, or from another Distribution Center operated by McKesson, or by arranging a drop ship to Plaintiff from the manufacturer of the ordered goods. McKesson, therefore, had the power to perform the Supply Agreement on its part.

21. In fact, when McKesson failed and/or refused to fulfill Plaintiff's orders from the Distribution Center that was supplying Plaintiff, Plaintiff personally contacted other Distribution Centers operated by McKesson and ascertained that all of Plaintiff's ordered goods could be supplied by other of McKesson's Distribution Centers within geographic

proximity of Plaintiff's business location, for the same cost as Plaintiff was then paying for deliveries from the McKesson Distribution Center then supplying goods to Plaintiff.

22. At that time, Plaintiff specifically demanded that McKesson honor the Supply Agreement and permit those other McKesson Distribution Centers to supply such goods to Plaintiff.

23. McKesson, through its officer Pat Blake and its agents Peter Pasquale and Brian Ferreria, refused to permit any other McKesson Distribution Center to supply Plaintiff, notwithstanding that the other McKesson Distribution Centers that Plaintiff contacted indicated that they could easily supply Plaintiff with all of the product that Plaintiff ordered and were eager to do so.

24. Moreover, at the time that McKesson failed and/or refused to fulfill Plaintiff's orders from the Distribution Center that was supplying Plaintiff, Plaintiff personally contacted several manufacturers of the ordered products and ascertained that the manufacturers would, in fact, drop ship the ordered products to Plaintiff if McKesson agreed to that procedure.

25. For example, on or about May 25, 2004, Plaintiff ascertained from one Vincent Bilinski, a new wholesale account representative for pharmaceutical manufacturer Bristol-Myers Squibb Company, Inc. ("BMS") that BMS would agree to

set up a drop ship arrangement to ship product directly to Plaintiff, if McKesson agreed to that. McKesson, however, notwithstanding its contractual obligation, refused to do so.

26. By way of further example, on or about June 23, 2004, Dwight Cannon, on behalf of pharmaceutical manufacturer Pfizer, advised Plaintiff that Pfizer was willing to provide “drop shipments” or “dock to dock” shipments of product ordered by Plaintiff, if McKesson would agree to that. McKesson, however, notwithstanding its contractual obligation, refused to do so.

27. Plaintiff received such consents to such “drop shipments” or “dock to dock” shipments directly from many other pharmaceutical manufacturers as well, including major manufacturers Sanofi-Aventis Pharmaceuticals, Inc., Novartis Pharmaceuticals Corporation and Wyeth Pharmaceuticals. In all cases, however, McKesson, notwithstanding its contractual obligation, refused to consent to any “drop shipments” or “dock to dock” shipments.

AS AND FOR A FIRST CAUSE OF ACTION:

28. Plaintiff repeats, reiterates and realleges each and every allegation heretofore contained in paragraphs “1” through “23,” inclusive, hereinabove, with the same force and effect as though more fully set forth herein at length.

29. In violation of paragraph 3B of the Supply Agreement, McKesson failed and/or refused to deliver to Plaintiff all of the goods ordered by Plaintiff, omitted large

quantities of good ordered by Plaintiff from its deliveries to Plaintiff, failed and/or refused to utilize McKesson's national distribution network to attempt to fulfill Plaintiff's orders, and failed and/or refused to arrange for, or agree to, drop-shipments or dock-to-dock shipments from the manufacturers of the goods even though stock was then available.

30. Plaintiff was unable to obtain the ordered goods elsewhere, despite attempts by Plaintiff to do so. Thus, Plaintiff was unable to exercise its rights to "cover" pursuant to the Uniform Commercial Code of the State of New York.

31. As a direct and proximate cause of McKesson's breach of contract, as hereinabove described, the Plaintiff was caused to, and did, incur direct and proximate damages of Fifty Four Million, One Hundred Sixty Thousand, Two Hundred Fifty Seven Dollars and Eighty Eight cents (\$54,160,257.88).

32. In the event of a determination that Plaintiff is contractually barred from collecting its actual damages, or that the calculation of money damages is too uncertain, then (i) any available remedies at law are incomplete and inadequate to accomplish substantial justice, and (ii) money damages would be inadequate to protect Plaintiff's expectation interest, such that compelling McKesson to specifically perform the Supply Agreement is appropriate.

33. Moreover, in this case any remedy at law would not be as certain, prompt, complete and efficient to attain the ends of justice and its prompt administration as would compelling McKesson to specifically perform the Supply Agreement.

34. Additionally, performance of the Supply Agreement will not impose a disproportionate or inequitable burden on McKesson.

AS AND FOR A SECOND, ALTERNATIVE, CAUSE OF ACTION:

35. Plaintiff repeats, reiterates and realleges each and every allegation heretofore contained in paragraphs “1” through “23,” inclusive, hereinabove, with the same force and effect as though more fully set forth herein at length.

36. In the event of a determination that the Plaintiff’s damages are not direct and proximate, but rather are “special,” “consequential,” “incidental” or “indirect,” the same are still recoverable by Plaintiff, notwithstanding any term in the Supply Agreement to the contrary, for the following reasons.

37. To the extent that the Supply Agreement contained a provision, at paragraph 19(Q), which purported to limit the liability of McKesson for “special,” “consequential,” “incidental” or “indirect” damages, the same is unconscionable and void as against public policy under the law of the State of New York.

38. To the extent that the Supply Agreement contained a provision, at paragraph 19(Q), which purported to limit the liability of McKesson for “special,” “consequential,” “incidental” or “indirect” damages, the same is unenforceable because the same is an onerous term which derived from the significant disparity in the bargaining power of the parties and resulted in the lack of Plaintiff having any meaningful choice and McKesson being able to obtain unreasonably favorable terms.

39. As such, Plaintiff is entitled to recover its “special,” “consequential,” “incidental” or “indirect” damages.

40. In the event that the damages alleged in the First Cause of Action hereinabove are deemed to be “special,” “consequential,” “incidental” or “indirect,” Plaintiff was caused to, and did, incur those damages in the amount of Fifty Four Million, One Hundred Sixty Thousand, Two Hundred Fifty Seven Dollars and Eighty Eight cents (\$54,160,257.88).

AS AND FOR A THIRD CAUSE OF ACTION:

41. Plaintiff repeats, reiterates and realleges each and every allegation heretofore contained in paragraphs “1” through “23,” inclusive, hereinabove, with the same force and effect as though more fully set forth herein at length.

42. Pursuant to ¶7 of the Supply Agreement, McKesson was and is required to accept for return any and all goods which have become unsaleable by virtue of expiration date, damage or otherwise.

43. Pursuant to the said paragraph in the Supply Agreement, McKesson is required to accept such goods, whenever offered for return, as long as the goods fall within the specific contractual definition of “unsaleable goods.”

44. In reliance upon the said contractual provision, Plaintiff sold the goods it purchased from McKesson to customers, and gave to its customers the same right to return the goods.

45. Heretofore, and in or about July of 2006, McKesson announced to Plaintiff that it (McKesson) would not accept the return of any goods from Plaintiff, whether the same fell within the contractual definition of “unsaleable goods” or otherwise.

46. Consistent with that announcement, McKesson has actually rejected the return of specific goods sought to be returned by Plaintiff.

47. The refusal by McKesson to accept the return of “unsaleable goods” from Plaintiff constitutes a breach of the Supply Agreement.

48. As a result of the breach of contract by McKesson, as hereinabove described, Plaintiff will incur damages equivalent to the return value of the goods that McKesson refuses to accept for return, which value is presently incapable of precise calculation because of its continuing nature, but which value will be proven at the time of the trial of this action.

49. Alternatively, in the event that the calculation of money damages for McKesson's breach of contract by refusing to accept returns is too uncertain, then any available remedies at law are incomplete and inadequate to accomplish substantial justice, and (ii) money damages would be inadequate to protect Plaintiff's expectation interest, such that compelling McKesson to specifically perform the Supply Agreement is appropriate.

WHEREFORE, Plaintiff respectfully demands Judgment against McKesson as follows:

1. Upon the First Cause of Action, in the amount of Fifty Four Million, One Hundred Sixty Thousand, Two Hundred Fifty Seven Dollars and Eighty Eight cents (\$54,160,257.88), or, alternatively, compelling McKesson to specifically perform the Supply Agreement to the extent of delivering to the Plaintiff, in resalable condition, all of the pharmaceutical products ordered by Plaintiff from McKesson from October of 2003 through or about the first quarter of 2006.

2. Upon the Second Cause of Action, in the amount of Fifty Four Million, One Hundred Sixty Thousand, Two Hundred Fifty Seven Dollars and Eighty Eight cents (\$54,160,257.88).

3. Upon the Third Cause of Action, in such amount as is proven at the time of trial to be the return value of any and all unsaleable goods which McKesson refuses to accept for return from Plaintiff, or, alternatively, compelling McKesson to specifically perform the Supply Agreement to the extent of accepting the return of any and all unsaleable goods from Plaintiff.

4. Upon All Causes of Action, such pre-Judgment interest as is lawfully applicable, the costs and taxable disbursements of this action, including reasonable attorneys' fees, and such other, further and different relief as to the Court may seem just, proper and equitable in the premises.

Dated: September 18, 2006

The Law Firm of Michael Levine, P.C.

By: /s/ Michael Levine
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