STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

CHARLES GEORGE AND
CMG PHARMACEUTICALS, INC.
D/B/A AKRON PHARMACY

Plaintiffs,

MEMORANDUM DECISION

vs. Index No. 4661/2004

HEALTHNOW NEW YORK, INC., D/B/A
BLUE CROSS & BLUE SHIELD OF
WESTERN NEW YORK AND/OR
BLUE CROSS BLUE SHIELD OF
WESTERN NEW YORK AND
COMMUNITY BLUE,

Defendants.

BEFORE: **HON. JOHN M. CURRAN, J.S.C.**

APPEARANCES: **LAW OFFICES OF MARK UBA**
Mark Uba, Esq., of counsel
Attorneys for Plaintiffs

JAECKLE FLEISCHMANN & MUGEL, LLP
Mitchell J. Banas, Jr., Esq., of Counsel
Attorneys for Defendants

CURRAN, J.

Plaintiffs commenced this action in 2004, alleging that defendant Healthnow New York, Inc. d/b/a Blue Cross & Blue Shield of Western New York and/or Blue Cross Blue Shield of Western New York and Community Blue ("Healthnow") wrongfully denied them participating pharmacy status ("PPS") in HealthNow's network of Western New York health

care providers. The Complaint alleges that by that denial, and by misleading both Plaintiffs and consumers about the reasons for that denial, HealthNow has tortiously interfered with Plaintiffs' contracts and prospective business relationships, failed to afford Plaintiffs their statutory right of due process in violation of Public Health Law § 4406-d and Insurance Law § 4803, and violated General Business Law § 349. Six months after the Complaint was filed, HealthNow granted PPS to Plaintiffs George and CMG Pharmaceuticals Inc. d/b/a Akron Pharmacy (Akron Pharmacy) (Uba Affid. ¶ 11). HealthNow has moved to dismiss the Complaint and upon due consideration, the Court grants the motion.

BACKGROUND

According to the Complaint, the allegations of which the Court must consider as true, Plaintiff George is a pharmacist licensed pursuant to Title VIII of the Education Law. Mr. George had previously owned a pharmacy in Clarence which operated as a participating provider with HealthNow. Mr. George sold that pharmacy to Rite Aid Corporation in December 2001, under a written agreement containing a restrictive covenant which barred Mr. George from operating a competing pharmacy within seven (7) miles of a particular Rite Aid store for period of five (5) years. Mr. George then prepared to open a new pharmacy in Akron, New York, seven and one-half miles away from the Rite Aid store (Complaint ¶¶ 6-7, 11-13, 19). That pharmacy – now Akron Pharmacy – applied for PPS with HealthNow in June 2002 (*id*. ¶ 20).

In September 2002, Mr. George pled guilty to a federal misdemeanor charge of "misbranding a prescription drug after shipment in interstate commerce", and received a sentence of probation (Complaint ¶¶ 23, 25). According to the Complaint, this charge

originated from a prescription for Pepcid Mr. George wrote for his aunt in April 1999, while he was working as a pharmacist at Millard Fillmore Hospital (Complaint ¶ 22).

HealthNow was advised about the criminal investigation relating to Mr. George in August 2002. Thereafter, on September 2, HealthNow advised Mr. George by telephone that it had approved his new pharmacy as a provider, and that he "would receive the necessary contract documents once the criminal investigation was concluded" (Complaint ¶ 27). Then, in October 2002, HealthNow advised Mr. George by letter that his application had been denied because the pharmacy did not meet HealthNow's "minimum criteria for participation" (*id.* ¶¶ 31-32). A copy of HealthNow's "Mimum Standards Pharmacy Establishments" was enclosed with that letter (*id.*¶ 32). Mr. George was subsequently told that the denial had been based upon the following standard:

> No pharmacy will be admitted to the HealthNow New York network if the owner or any pharmacist has been found guilty of Professional Misconduct [sic] sanction against license, whether or nor stayed, misdemeanor or felony charges that identify professional ethics issues.

(Complaint ¶ 33). Professional misconduct was defined as under the New York State Board of Regents, including being convicted of committing an act constituting a crime under Federal law (*id.*).

Plaintiffs allege that the stated reason for the denial was false and that the real reason for the denial was to decrease competition for nearby Rite Aid stores (Uba Affid. ¶ 16, citing Complaint ¶¶15-18, 35-46, 52-54, 62-64, 95-98) The Complaint alleges on information and belief that HealthNow had established an exclusive relationship with Rite Aid as its pharmaceutical provider in the Clarence/Akron/Newstead area, until the arrangement was

challenged by competitors. Thereafter, HealthNow allegedly made an agreement with the New York State Attorney General's office, which had intervened, that it would extend PPS to "independent pharmacies" and to grocery store pharmacies in the area. Nonetheless, it is alleged that HealthNow still obtains a price advantage from Rite Aid (Complaint ¶ 15-18).

In addition, Plaintiff alleges that the minimum standards were arbitrarily and discriminatorily applied, because HealthNow continued to maintain PPS for Kenmore Prescription Center, located at 2890 Elmwood Avenue, despite the fact that one of its pharmacists, Donald Fleming, was charged with professional misconduct and received a sanction of a five year (stayed) suspension of his pharmacy license, a five-year period of probation and a $10,000 fine, after he was found guilty by the New York State Education Department's Board of Regents of erroneously dispensing refill prescriptions and holding for sale and selling a misbranded drug (Complaint ¶¶37-42). Mr. Fleming is the husband of HealthNow's former Vice President for Corporate Pharmacy Services, Renee Fleming (Complaint ¶ 43).

Six months after the instant action was commenced (i.e. in May 2004), HealthNow reversed its decision and admitted Plaintiffs to its provider network (Uba Affid. ¶ 11).

ANALYSIS

The Complaint alleges five causes of action against HealthNow: 1) tortious interference with contract; 2) tortious interference with prospective economic advantage; 3) declaratory judgment concerning violations of Public Health Law § 4406-d in HealthNow's denial of PPS to Plaintiffs; 4) declaratory judgment concerning violations of Insurance Law §

4803 in HealthNow's denial of PPS to Plaintiffs; and 5) violations of General Business Law § 349.

"Under modern pleading theory, a complaint should not be dismissed on a pleading motion so long as, when the Plaintiff is given the benefit of every possible favorable inference, a cause of action exists . . . Modern pleading rules are designed to focus attention on whether the pleader has a cause of action rather than on whether he has properly stated one (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 634, 636 [1976] [internal citation omitted]). "On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the complaint as true, accord Plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [citation omitted]). Nevertheless, "mere conclusory allegations" are not enough to defend against a motion to dismiss (*Spallina v Giannoccaro*, 98 AD2d 103, 108 [4th Dept 1983], *appeal dismissed* 62 NY2d 646 [1984]).

Tortious Interference with Contracts

Plaintiffs allege that HealthNow's decision to deny them PPS wrongfully interfered with their pre-existing business relationships with members of HealthNow's health insurance plans who are "customers . . . who patronized Plaintiffs' business in the past, and who wish to patronize Plaintiffs' Akron Pharmacy" (Complaint ¶ 50). HealthNow contends that the Complaint fails to state a cause of action for tortious interference with contract because it fails to allege any enforceable contracts that were breached, a necessary element of the cause of action (*see Foster v Churchill*, 87 NY2d 744, 749-750 [1996]; *NBT Bancorp, Inc. v*

Fleet/Norstar Fin. Group, 87 NY2d 614, 620-621 [1996]). Further, "[a]greements that are terminable at will are classified as only prospective contractual relations, and thus cannot support a claim for tortious interference with existing contracts" (*American Preferred Prescription, Inc. v Health Management, Inc.*, 252 AD2d 414, 417 [1st Dept 1998]; *see Guard-Life Corp. v S. Parker Hardware Mfg. Corp.*, 50 NY2d 183, 190-192 [1980]).

In opposition, Plaintiffs allege that relationships between pharmacists and patients, like those between doctors and patients, may be "contractual relationship[s] subject to unlawful interference" (*Comprehensive Community Development Corp v Lehach*, 223 AD2d 399, 400 [1st Dept 1996]; *see Chime v Sicuranza*, 221 AD2d 401, 402 [2nd Dept 1995]; *Saha v Record*, 177 AD2d 763, 765 [3rd Dept 1991]). With respect to the analogy to the doctor-patient relationship which Plaintiffs seek to draw, however, the case law cited by them in favor of that contention pertains to active or on-going doctor/patient relationships (*see e.g. Comprehensive Community Devel. Corp.*, 223 AD2d at 399 [doctor charged with tortious interference stole patient records from former employer]; *Chime*, 221 AD2d at 401 [alleged campaign by fellow employee doctors to divert Plaintiff's patients to their care]). Because at the time of HealthNow's denial of PPS to Plaintiffs in October 2002, Plaintiffs owned no operating pharmacy which could partner such relationships, their so-called "pre-existing" patient relationships – which were at best terminable at will and may have been "sold" to Rite Aid with the sale of the Clarence pharmacy – cannot support a claim for tortious interference with contractual relations. In any event, Mr. George's relationship with customers is more like a retail-consumer relationship than like a doctor-patient relationship, and the former (absent an express or implied in fact contract) will not support a claim for tortious interference with

contractual relations, (*see e.g. Hammerhead Ent., Inc. v Brezenoff,* 551 F Supp 1360, 1368 [SDNY 1982], *affd* 707 F2d 33 [2d Cir], *cert denied* 464 US 892 [1983]). The Complaint is phrased purely in speculative terms by alleging that HealthNow "members *would continue* as customers of plaintiffs' businesses" (Complaint, ¶ 51 [emphasis added]) and fails to allege the breach of any active or on-going contract of which HealthNow was aware. For these reasons, therefore, the first cause of action is dismissed.

Tortious Interference with Prospective Economic Advantage

HealthNow also asserts that the Complaint fails to state a cause of action for tortious interference with prospective economic advantage, otherwise known as interference with prospective contractual relations (*see NBT Bancorp, Inc. v Fleet/Norstar Fin. Group*, 87 NY2d at 614). The elements of that cause of action are: 1) that HealthNow knew of the proposed contract(s) between Plaintiffs and third parties, 2) that HealthNow intentionally interfered with those proposed contracts; 3) that the proposed contracts would have been entered into were it not for HealthNow's interference, 4) that HealthNow used "wrongful means" or acted for the sole purpose of harming Plaintiffs (*see Snyder v Sony Music Entertainment, Inc.*, 252 AD2d 94, 299-300 [1st Dept 1999])[1]; and 5) that Plaintiffs suffered damages as a result (*see* NY PJI 3:57).

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[1] As stated by the Fourth Department, "[i]t is well settled that, '[w]here there has been no breach of an existing contract, but only interference with prospective contract rights, ... [a] plaintiff must show more culpable conduct on the part of the defendant'"(*Jim Ball Chrysler LLC v Marong Chrysler-Plymouth, Inc.*, 19 AD3d 1094, 1095 [4th Dept], *lv denied* 5 NY3d 709 [2005], quoting *NBT Bancorp Inc. v Fleet/Norstar Fin. Group*, 87 NY2d 614, 621 [1996] [internal citation omitted]).

HealthNow argues that Plaintiffs have failed to allege any facts that show it employed "wrongful means" to interfere with Plaintiffs' purported prospective economic advantage. The Court of Appeals has defined "wrongful means" as including physical violence, fraud or misrepresentation, or malicious prosecution (*see Carvel Corp. v Noonan*, 3 NY3d 182, 191-192 [2004]). Further, the "conduct constituting tortious interference with business relations is, by definition, conduct directed not at the plaintiff itself, but at the party with which the plaintiff has or seeks to have a relationship," here, the prospective customers of the pharmacy (*Carvel Corp. v Noonan*, 3 NY3d at 192).

The wrongful means alleged consist of HealthNow denying Plaintiffs' application for PPS in order to assist Rite Aid, its favored pharmacy partner, and also misrepresenting that it had denied the application because of Mr. George's misdemeanor conviction. However, Plaintiffs have failed to allege any facts showing that a contract or similar business relationship would have been entered into but for HealthNow's wrongful conduct. Absent such causation allegations, the cause of action for interference with prospective economic advantage must fail (*A.S. Rampell, Inc. v Hyster Co.*, 3 NY2d 369, 376 [1957]; *Pacheco v United Medical Assoc., P.C.*, 305 AD2d 711, 712-713 [3rd Dept 2003] [Boomer & Green, dissenting], *appeal dismissed* 72 NY2d 914 [1988]). At best, Plaintiffs have alleged that they were given a false reason for the result (i.e., denial of PPS) but that the result causing the interference (the failure to meet the "minimum standard") was correct. Under this analysis, the conclusory allegations in the Complaint (¶¶ 62-63) are inadequate.

Furthermore, if the denial was also to HealthNow's economic advantage, that does not make the denial fraudulent or wrongful as defined under the case law (*see generally,*

Guard-Life Corp., 50 NY2d at 194 [collecting cases concerning "wrongful means"]; *Jim Ball Chrysler LLC v Marong Chrysler-Plymouth, Inc.*, 19 AD3d 1094, 1095 [4th Dept], *lv denied* 5 NY3d 709 [2005]). Moreover, HealthNow argues that the Kenmore Prescription Center and Akron Pharmacy were not similarly situated with respect to the application of the minimum standards, because the former had an existing PPS, while Plaintiffs were applying for PPS (*cf.* Public Health Law § 4406-d; Insurance Law §4803, discussed *infra*). Finally, the alleged misrepresentations, if any, did not operate to interfere with Plaintiffs relationships with customers; no such relationships were possible in the absence of PPS. Thus, the motion to dismiss the second cause of action is granted.

Public Health Law § 4406-d; Insurance Law § 4803

Plaintiffs' third and fourth causes of action allege that, as required by Public Health Law § 4406-d and the virtually identical Insurance Law § 4803, HealthNow made available to Plaintiffs its written application procedures and minimum qualification requirements for health care professionals, such as Plaintiffs, to be considered for PPS with HealthNow. However, Plaintiffs claim that those written qualifications were allegedly false and misleading, and applied in an arbitrary, capricious and discriminatory fashion, in that HealthNow refused to extend PPS to Plaintiffs allegedly because Mr. George was convicted of a federal misdemeanor, while at the same time extending PPS to the Kenmore Prescription Center, despite the fact that a pharmacist employed by that entity had been found guilty of "Professional Misconduct sanction against license,. . .felony charges that identify professional ethics issues" (Complaint ¶¶68-80, 81-93). Plaintiffs seek a declaration that HealthNow

violated the two statutes, that the denial of PPS to Plaintiffs was null and void, and that Plaintiffs are entitled to PPS.

Plaintiffs' memorandum of law does not contain any contentions in support of the third and fourth causes of action, and, therefore, the motion as to that cause of action is technically unopposed. However, at oral argument Plaintiffs counsel asserted that the two statutes were violated by HealthNow because of its failure to promulgate and distribute accurate minimum qualification requirements for PPS, and that such a failure was a violation that was capable of repetition yet evading review.

Public Health Law § 4406-d and Insurance Law § 4803, which contain virtually identical language, require that a health care plan (as defined) and an insurer which offers a managed care product "shall, upon request" make available to health care professionals their written application procedures and minimum qualification requirements which must be met in order to be considered a participating provider (*see* Public Health Law § 4406-d [1]; Insurance Law § 4803 [a]).[2]

CPLR § 3001 provides that "[t]he supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a *justiciable controversy* whether or not further relief is or could be claimed"

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[2] With the exception of subsections 4406-d(1) and 4803(a), the remaining provisions of those statutes apply only with respect to the termination of PPS, or, as to some provisions, to a non-renewal; by their terms, those provisions do not apply to new applications for PPS (*see* Public Health Law § 4406-d [2]; Insurance Law § 4803 [b]), and thus, are not applicable here. To the extent that Plaintiffs seek in the third and fourth causes of action process due to parties whose PPS is terminated or is not renewed, those portions of the third and fourth causes of action are dismissed.

(emphasis added). Thus, the decision whether to render a declaratory judgment is left to the court's discretion (*see Matter of Morgenthau v Erlbaum*, 59 NY2d 143, 148, *cert denied* 464 US 993 [1983]). Further, "[i]n order to maintain an action for a declaratory judgment, a party must present a concrete, actual controversy for adjudication," not an "abstract, hypothetical issue, the determination of which would not have an immediate practical effect and would not necessarily resolve the matter" (*Fragoso v Romano*, 268 AD2d 457 [2nd Dept 2000]).

Since the filing of the Complaint, Plaintiffs have been granted PPS with HealthNow (Uba Affid. ¶ 11). Thus, allegations in the Complaint concerning arbitrary, capricious or discriminatory application of the minimum qualification requirements are indisputably contradicted by the admitted facts. Any allegations, not contained in the Complaint, that HealthNow may in the future fail to apply those minimum requirements appropriately cannot state a concrete, actual controversy for adjudication. "[I]t is settled that the 'courts will not entertain a declaratory judgment action when any decree that the court might issue will become effective only upon the occurrence of a future event that may or may not come to pass'" (*New York Public Interest Research Group, Inc. v Carey,* 42 NY2d 527, 531 [1977] [internal citation omitted]).

To the extent that the third and fourth causes of action seek an order directing that Plaintiffs be awarded PPS, Plaintiffs have already received that relief; any damages that Plaintiffs may have suffered during the period of the denial of PPS must be sought under traditional common law causes of action. Therefore, the court determines that the Complaint fails to state causes of action for declaratory judgment under Public Health Law § 4406-d or Insurance Law § 4803, and the third and fourth causes of action are dismissed.

General Business Law § 349

HealthNow asserts that no cause of action under General Business Law (GBL) § 349 can be stated because Plaintiffs are not consumers of Health Now's services, and because the Complaint does not allege that HealthNow acted in a materially deceptive or misleading way, or that it did or said anything to consumers; rather, this is a private dispute between two businesses.

GLB § 349 renders unlawful "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service" (General Business Law § 349 [a]). Pursuant to GBL § 349 (h):

> any person who has been injured by reason of any violation of this section may bring an action in his own name . . . to recover his actual damages or fifty dollars, whichever is greater. . .. The court may, in its discretion, increase the award of damages to an amount not to exceed three times the actual damages up to one thousand dollars, if the court finds the defendant willfully or knowingly violated this section. The court may award reasonable attorney's fees to a prevailing Plaintiff.

(General Business Law § 349 [h]). The elements of a cause of action under this statute are: (1) the challenged conduct was "consumer-oriented;" (2) defendant engaged in deceptive or materially misleading acts or practices; and (3) plaintiff was injured by reason of defendant's deceptive or misleading conduct (*Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, NA*, 85 NY2d 20, 25 [1995]; *DeAngelis v Timberpeg East, Inc.*, 51 AD3d 1175, 1177 [3rd Dept 2008]).

Plaintiffs suing under General Business Law § 349 "must, at the threshold, charge conduct that is consumer oriented. The conduct need not be repetitive or recurring but defendant's acts or practices must have a broad impact on consumers at large" (*New York Univ.*

v Continental Ins. Co., 87 NY2d 308, 320 [1995]; *see Oswego Laborers' Local 214 Pension Fund*, 85 NY2d at 25). The statute was not intended to reach "private contract disputes unique to the parties" (*New York Univ.*, 87 NY2d at 320).

The "deceptive acts or practices" alleged in the Complaint are the following: "HealthNow's **deceptive statements regarding its denial of participating provider status to Plaintiffs** resulted in a mistaken belief by Plaintiffs and consumers that Plaintiffs were ineligible for participating provider status based on Mr. George's misdemeanor plea in September 2002" (Complaint ¶ 95 [emphasis supplied]); and, further, that those deceptive statements "led consumers mistakenly to believe that HealthNow's actions were based on the organization's interest in putting the safety and care of patients first, whereas, in fact, those actions were based on HealthNow's desire to provide preferential treatment" to the Kenmore Prescription Center and to "maintain a preferential business relationship with Rite Aid" (*id.* ¶ 96). The Complaint further states:

> HealthNow's deceptive statements, preferential treatment to corporate "insiders," concealment, and maintenance of a preferential business relationship with Rite Aid has substantially inconvenienced its members in the Akron and Newstead communities, some of whom must travel many miles simply to fill a prescription. HealthNow's deceptive actions have substantially and wrongfully restricted those consumers' options for pharmacy services.

(Complaint ¶ 97).

Initially, although Plaintiffs allege misleading statements, the complaint itself does not detail what they were. However, in opposition to the motion, Plaintiffs' counsel submits what appears to be at least a partial source of the allegations in the complaint, a letter written by a Pharmacy Benefits Specialist at HealthNow, and sent to an apparent subscriber of

HealthNow who is also a potential consumer of pharmacy products in Akron (Uba Affid. Exhibit A). The letter states in pertinent part:

> Thank you for your phone call regarding Akron Pharmacy. We'd like to take a minute to explain the reason for the store's non-participating status with Community Blue.
>
> Community Blue has strict credentialing standards by which we determine if a provider will be able to participate in our network. The credentialing, based on national standards, is done for all of our health care providers. The pharmacist at Akron Pharmacy did not meet our criteria for reasons we are unable to disclose at this time. As always, we put the safety and care of our patients first when making these types of decisions.

(Uba Affid., Exhibit A). The letter further stated that it recognized possible inconvenience in having to travel outside of Akron for prescription services, and suggested that the consumer take his business to Rite Aid, providing the address, phone number, hours and business practices of the Rite Aid in question.

The Court may consider this submission in deciding the motion, because affidavits submitted by Plaintiffs on a CPLR 3211 (a) (7) motion "must be given their most favorable intendment" (*Arrington v New York Times Co.*, 55 NY2d 433, 442 [1982], *rearg denied* 57 NY2d 669 [1982]; *see also Pharmhealth Infusion, Inc. v Rohm Servs. Corp.*, 249 AD2d 950 [4th Dept 1998]). In addition, the fact that only one such "act" is alleged is not determinative of whether Plaintiffs state a cause of action under GBL § 349 (*see Oswego Laborers' Local 214 Pension Fund*, 85 NY2d at 25).

Plaintiffs cannot, however, establish that such allegedly deceptive and unfair acts – misleading statements to consumers designed to cover up the favoring of corporate insiders or other anti-competitive behavior – caused Plaintiffs any harm, pecuniary or otherwise, which is a vital element of a GBL § 349 claim (*see Oswego Laborers' Local 214 Pension Fund,* 85 NY2d

at 25; *Medical Soc. of State of N. Y. v Oxford Health Plans, Inc.*, 15 AD3d 206, 207 [1st Dept 2005]) . The harm alleged to have been suffered by Plaintiffs, such as loss of profits, good will, business disruption, damage to relationships with financial institutions (*see* Complaint ¶ 99) was not caused by any such acts or practices (misleading statements to consumers, anti-competitive behavior or favoring corporate insiders) but by HealthNow's denial of PPS to Plaintiffs.

For all of the above reasons, therefore, the motion to dismiss the fifth cause of action is granted.

Defendant shall settle order with Plaintiffs.

DATED: July 28, 2009

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HON. JOHN M. CURRAN, J.S.C.