

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

IN RE: \*  
\* CASE NUMBER 01-44007  
PHAR-MOR, INC., *et al.*, \*  
\* CHAPTER 11  
\*  
Debtors. \* HONORABLE KAY WOODS  
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M E M O R A N D U M O P I N I O N  
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The matter before the Court is the Objection to Proofs of Claim - McKesson ("Objection") filed on July 24, 2003 by Phar-Mor, Inc., *et al.* ("Debtor") to the proof of claim and the amended proof of claim (Claim Nos. 1360 and 2016, respectively) filed by McKesson Corporation ("McKesson"). On January 17, 2006 a hearing (the "Hearing") was held on Debtor's Objection and the responding and supplemental documentation relating thereto. Debtor was present and represented by counsel at the Hearing, but McKesson failed to appear through counsel or other representative.

For the reasons set forth below, this Court grants Debtor's Objection, in part, and allows McKesson a general unsecured claim in the total gross amount of \$16,360,833.21 (less an amount to be determined for the pharmaceutical price increase rebate), which claim is denominated Claim No. 2016.

This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334(b). Venue is proper in this Court pursuant to 28 U.S.C. §§ 1391(b), 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(B). The following constitutes this Court's findings of fact and conclusions of law pursuant to FED. R.

**BACKGROUND**

Debtor filed a voluntary petition pursuant to Chapter 11 of the Bankruptcy Code on September 24, 2001. Thereafter a Plan of Liquidation was confirmed on March 13, 2003. Pursuant to Order of the Court dated January 11, 2002, the Court established March 12, 2002 as the bar date for filing claims against the Debtor's estate. On March 7, 2002, McKesson timely filed a proof of claim against the Debtor's bankruptcy estate (the "Original Claim"), which was designated Claim No. 1360. On March 3, 2003, without leave of the Court, McKesson filed an amendment to the Original Claim (the "Amended Claim") in the amount of \$21,316,581.70, which was designated Claim No. 2016. The Amended Claim appears to amend and supersede the Original Claim. McKesson is entitled to assert only one claim for its damages. As a consequence, this Court deems the Original Claim to be disallowed in its entirety. The Amended Claim asserts that Debtor owes McKesson more than \$21 million as a result of the sale of merchandise, products and services purchased from McKesson pursuant to that certain Supply Agreement dated June 19, 1997 between Debtor and McKesson (the "Supply Agreement"), as amended by that certain Amendment to Supply Agreement dated as of November 5, 1999 (the "Amendment"). The Amended Claim includes \$8,675,391.52 as Reclamation Priority and/or Lien Claim; \$8,521,190.00 as General Unsecured Claim; and \$4,000,000.00 as Administrative Claim, for a total of \$21,196,581.52 although the face amount of Claim No. 2160 is \$21,316,581.70.

On July 24, 2003, Debtor filed the Objection, wherein Debtor set forth its objection to the Amended Claim. In addition to the

Objection, Debtor filed the following documents that elaborate and explain the objections to McKesson's claims: (i) on December 23, 2003, Debtor's Memorandum in Support of Objection to Claim and Response to Motion of McKesson Corporation to Compel Payment of Administrative Claim; (ii) on September 26, 2005, Notice of Filing of Statement of Facts in Support of the Debtor's Objection to the Gross Amount of the Amended Proof of Claim Submitted by the McKesson Corporation ("Debtor's Statement of Facts"); (iii) on October 28, 2005, Debtor's Memorandum in Support of Objection to the Gross Amount of the Proof of Claim Filed by McKesson Corporation ("Debtor's Memorandum in Support"). Debtor contends that McKesson's Amended Claim is overstated based on the amount owing to McKesson in Debtor's books and records. Debtor contends that the total gross amount of McKesson's claim is no more than \$20,047,583.23, and categorizes its objections to the Amended Claim, as follows:

1. The separate components of the Amended Claim do not add up to the total asserted amount of \$21,316,581.70.
2. McKesson has overstated the amount Debtor owes as reimbursement of previously paid development funds.
3. McKesson has failed to deduct an adjustment for the cost of goods.
4. McKesson has failed to deduct the third quarter 2001 select generic rebate.
5. McKesson has failed to deduct the third quarter 2001 repack pharmaceuticals rebate.
6. McKesson has impermissibly included a late payment penalty.
7. McKesson has failed to deduct a price increase rebate.

8. Debtor asserts that the entire claim should be classified as a general unsecured claim.

On August 25, 2003, McKesson filed McKesson Corporation's Preliminary Response to Objection to Proofs of Claim ("Preliminary Response"). On October 14, 2003, McKesson filed McKesson Corporation's Supplemental Brief in Response to Objection to Proofs of Claim (the "Supplemental Response"). In the Preliminary Response, McKesson argues that it holds an administrative expense claim in the amount of \$4,000,000.00 and a reclamation claim in the amount of \$8,675,391.52, both of which should not be classified as general unsecured claims. McKesson also argues that Debtor does not have the right to assert setoff or recoupment against McKesson's claim. In the Supplemental Response, McKesson sets forth its arguments about the administrative expense claim. Additionally, McKesson contends that the one and one-half percent (1.5%) increase in the purchase price is not a penalty, but even if, *arguendo*, it is a penalty, there is no basis to deny McKesson that portion of its claim. McKesson also argues that Debtor is not entitled to any rebates or credits because (i) Debtor defaulted in the payment terms in the Supply Agreement, and (ii) Debtor waived its right to assert entitlement to rebates and credits.

The Court (Chief Judge William T. Bodoh presiding) held a hearing on the Objection on June 10, 2003. Prior to Judge Bodoh's retirement in January 2004, he did not issue a decision based on that hearing. This Court entered an Order dated August 18, 2005 that held that McKesson was entitled to payment of the \$4,000,000.00 allowed administrative expense claim, which could not be reconsidered, and further held that Debtor is entitled to recoup the amount, if any, that it may be awarded in its pending breach of contract lawsuit

before making a distribution on McKesson's general unsecured claim. The Court also noted that the reclamation issue was on appeal and the priority and amount of the asserted reclamation claim was, accordingly, still at issue.

As a consequence, the issues to be argued and decided at the Hearing involved Debtor's right to assert rebates and credits and McKesson's right to assert the increased purchase price. The Court ordered the parties to submit a Joint Stipulation of Facts and simultaneous briefs on their respective positions. After three joint stipulations of time in which to file these documents, Debtor alone requested (and received) several additional extensions of time to file a statement of facts and a brief. Debtor's Statement of Facts was filed on September 26, 2005 and Debtor's Memorandum in Support was filed October 28, 2005. McKesson did not seek any further extensions of time to file its statement of facts or brief, but on November 4, 2005, McKesson filed a motion requesting a month to respond to the Debtor's statement of facts and brief. Based upon the original order for simultaneous briefs, this Court denied McKesson's request for further time and set oral argument on the Objection for January 17, 2006 at 9:30 a.m.

#### **LEGAL STANDARD**

FED. R. BANKR. P. 3001(f) provides that "[a] proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim." Because McKesson timely filed the Original Claim, it constitutes prima facie evidence of the validity and amount of the claim asserted therein. Debtor asserts that McKesson filed the Amended Claim without leave of the Court. The Amended Claim increased the amount of the

Original Claim, but did not assert any new basis for liability. The Amended Claim, like the Original Claim, asserts that Debtor is indebted to McKesson based upon goods, products and services purchased, but not paid for, pursuant to the Supply Agreement and the Amendment. It is within the discretion of the Court to allow an amendment to a claim. *In re Pyramid Building Co.*, 87 B.R. 38, 40 (Bankr. N.D. Ohio, 1988) ("Amendment to proofs of claim is freely permitted to cure defects in a filed claim, to describe a claim with greater particularity or to plead a new theory of recovery on the facts in the original claim. . . . Amendment is not permitted as a guise for filing untimely claims.") (internal citations omitted.) Since the Amended Claim does not assert any new claims, but merely amends a prior timely filed claim, it is deemed to amend and supersede the Original Claim and, thus, constitutes prima facie evidence of the validity and amount of the claim asserted therein.

A timely filed proof of claim will be allowed unless there is an objection thereto. FED. R. BANKR. P. 3007 provides that an objection to a claim must be in writing and filed, with notice of a hearing thereon. Debtor complied with Rule 3007 by filing the Objection. By filing the Objection, the burden shifts to the Debtor to produce sufficient evidence to rebut the prima facie claim. If Debtor meets its burden of rebutting the prima facie claim, McKesson has the burden to establish, by the preponderance of evidence, the amount and priority of its claim. *In re Nelson*, 206 B.R. 869, 878 (Bankr. N.D. Ohio, 1997) ("At the hearing, the objector bears the initial burden of presenting evidence sufficient to overcome the presumption of validity given to the proof of claim. Once sufficient

evidence is presented to overcome the presumption, the burden shifts to the claimant to prove the validity and amount of the claim by a preponderance of evidence.")

McKesson's claims are all based on alleged unpaid amounts arising under the Supply Agreement and/or the Amendment. The Amended Claim, in essence, asserts damages from breach of contract. The Supply Agreement and the Amendment specifically state that they are to be governed by Ohio law. (Supply Agreement at Section 26(C).) Neither party has asserted that the Supply Agreement and/or the Amendment are ambiguous. Under Ohio law, the meaning of an unambiguous contract is a question of law to be determined by the Court from the language used therein. *Inland Refuse Transfer Co. v. Browning-Ferris Industries of Ohio, Inc.*, 15 Ohio St.3d 312, 322 (1984) ("If a contract is clear and unambiguous, then the interpretation is a matter of law and there is no issue of fact to be determined.") *Latina v. Woodpath Development Co.*, 57 Ohio St.3d 212, 214 (1991) ("The agreement of the parties to a written contract is to be ascertained from the language of the instrument, and there can be no intent or implication inconsistent with the express terms thereof.") (internal citation omitted.) and *Rose Metal Industries, Inc. v. Waters*, 63 Ohio App.3d 662, 668 (1990) ("Where the terms of a contract are unambiguous, the court cannot create a new contract by finding an intent not expressed in the clear language of that contract.") As a consequence, this Court can and will analyze the Supply Agreement and the Amendment to determine the amount of McKesson's allowed claim, including whether Debtor is entitled to credits and rebates and whether McKesson is entitled to assert the unilateral price increase.

#### **DISCUSSION OF ELEMENTS OF CLAIM**

The Court will review and discuss each element to Debtor's Objection.

**A. The Mathematical Discrepancy**

Debtor notes that the Amended Claim, on its face, asserts a claim amount of \$21,316,581.70, although the separate elements of the claim add up to \$21,196,581.52. This is a difference of \$120,000.18. Despite requests for an explanation for this discrepancy, McKesson has provided no explanation. As a consequence, since McKesson bears the burden of establishing the amount of its claim, Debtor's objection to the mathematical discrepancy is well taken. McKesson is not entitled to the allowance of \$120,000.18, which is not substantiated in the claim.

**B. Repayment of Development Funds**

As part of its claim, McKesson asserts that Debtor owes it \$450,000.00 as repayment of certain development funds that McKesson had prepaid to the Debtor. There does not appear to be a dispute between the parties that McKesson is entitled to claim an amount for the repayment of development funds; the dispute is as to the amount that can be claimed. Section 8 of the Supply Agreement which was styled "Purchase Commitment and Development Funds," originally covered this element of the claim that is in dispute. Section 6 of the Amendment, however, provides that:

The Developmental Funds subsection in Section 8 of the Supply Agreement will be deleted in its entirety and replaced with the following:

In consideration for the initial two years of the four-year term extension as specified in Section 3 of this Amendment, McKesson agrees to pay to Phar-Mor the following amounts:

- (i) the sum of \$1,000,000 ("Developmental Funds") within ten (10) days of the Select Implementation Date as herein defined. For

purposes hereof, the Select Implementation Date shall mean the date on which all Phar-Mor and Pharmhouse locations are fully participating in the McKesson Select Generics auto-substitution program; and

(ii) the sum of \$500,000 ("Continuing Commitment Funds") on November 15, 2001.

In the event that the Supply Agreement is terminated by either party for any reason during the term hereof (other than a material breach of the Supply Agreement by McKesson that is not cured by McKesson within sixty (60) days of Phar-Mor's notice thereof, upon termination for which Phar-Mor shall not be required to repay such amounts already paid), Phar-Mor shall immediately reimburse to McKesson the then applicable portion of the above-specified Developmental Funds and Continuing Commitment Funds as determined by the following pro-rata reimbursement formulas:

**Reimbursement Formula for Previously Paid Development Funds**

$$[\$1,000,000] \quad \text{times} \quad \frac{\text{Number of months remaining in the Supply Agreement between the date of termination and } \underline{\text{November 15, 2003}}}{60}$$

Thus, the Amendment provides a formula for determining the amount that Debtor had to reimburse McKesson in the event the Supply Agreement was terminated by either party for any reason before the end of the four-year term extension. McKesson claims that the amount Debtor must reimburse it is \$450,000.00. Debtor claims that the amount of reimbursement is only \$383,333.33. Debtor calculates this amount by using the formula, set forth above. Debtor argues that the Supply Agreement was terminated by Section 25(B) of the Post-Petition Supply Agreement between Debtor and McKesson, which had an effective date of December 13, 2001 because that is the date this Court entered Final Order (1) Approving Supply Agreement with McKesson Corporation, (2) Authorizing the Debtors to Obtain Credit in

Connection Therewith, (3) Granting Various Administrative Claims and (4) Modifying the Automatic Stay (the "Final Order"). Section 19 of the Post-Petition Supply Agreement states: "This agreement supersedes any and all prior McKesson agreements and discount plans in which any Customer pharmacy may currently be participating and such agreements are hereby terminated and rejected by Customers." As a consequence, Debtor contends that when the Court entered the Final Order, the Supply Agreement was terminated as of that date - December 13, 2001.

Debtor used the prescribed formula and multiplied \$1,000,000.00 by 23/60 (23 is the number of remaining months of the Amendment, *i.e.*, from December 2001 to November 2003) to reach \$383,333.33. McKesson arrives at \$450,000.00 by using 27/60 as the multiplier. In order to arrive at a claim for \$450,000.00, McKesson has to consider the Supply Agreement terminated as of September 24, 2001 (the "Petition Date") and then calculate full months for September, October and November 2001 to arrive at 27 months as the remaining months of the Supply Agreement. Even if, *arguendo*, there was a basis to use the Petition Date as the termination date for the Supply Agreement, the remaining months would be 26 rather than 27 since the period between September 24, 2001 and November 15, 2001 is less than two months.

There is, however, no basis to use the Petition Date as the termination date for the Supply Agreement. Section 19 of the Post-Petition Supply Agreement sets forth several specific conditions precedent before the Post-Petition Supply Agreement would be effective and thus terminate the Supply Agreement. Most of those conditions precedent were fulfilled by this Court's entry of the Final Order dated December 13, 2001. This Court agrees with Debtor that

the Supply Agreement was terminated, pursuant to the terms of the Post-Petition Supply Agreement, when the Court entered the Final Order. As a result, the correct application of the formula permits McKesson to claim only \$383,333.33 for reimbursement of Development Funds.

**C. Price Increase for Price of Merchandise Sold**

McKesson asserts as part of its Amended Claim that it is entitled to an increase in the price of the Merchandise of one and one-half percent (1.5%) (the "Price Increase"). McKesson relies on Section 9 of the Supply Agreement, which states, in relevant part:

If for whatever reason payments are not made as indicated herein, any late payments will result in a one and one-half percent (1.5%) increase in the purchase price of the Merchandise, and a one percent (1%) service charge will be imposed semi-monthly on all balances delinquent more than fifteen (15) days. In the unlikely event any penalties do occur, both parties agree to meet and resolve this issue as soon as practical.

(Supply Agreement, Section 9 at 4.) As a consequence, McKesson calculates this part of its claim as Purchases of \$20,883,331.00 x 1.5% = \$313,249.98.

Debtor acknowledges that it has not paid certain invoices for merchandise purchased from McKesson for the three weeks ending September 14, 2001 (Debtor's Memorandum in Support at 14). Debtor contends, however, that McKesson is not entitled to retroactively impose the Price Increase and that the Price Increase constitutes a penalty that is not enforceable under Ohio law. Debtor notes that the "penalty" terminology was negotiated by McKesson (a Fortune 500 company) and is in addition to the one percent (1%) semi-monthly interest charge. Debtor relies on *Bear Sterns Government Securities*,

*Inc. v. Dow Corning Corp.*, 419 F.3d 543 (6th Cir. 2005) to support its position that a penalty clause is not enforceable as a component of a bankruptcy claim. Debtor further states that if, *arguendo*, this

component is allowable, McKesson has overstated it and it should be  $\$20,427,915.01 \times 1.5\% = \$306,418.73$ .

Looking at the Supply Agreement as a whole, it is clear that McKesson provided Debtor with a one and one-half percent (1.5%) discount on the cost of the merchandise because it was a volume purchaser. Section 7 of the Amendment, which replaced Section 19 of the Supply Agreement, covers the cost of goods sold. Pursuant to these sections, McKesson was to invoice Debtor at "Cost Plus 0.0%" and then rebate to Debtor "the amount of 1.50% on discountable Rx purchases and .10% of discountable OTC purchases." (Amendment, Section 7, at 4.) The Price Increase came into effect if Debtor was late in making payments, effectively taking away the rebate. Although the terminology of the Supply Agreement is regrettable, there is no basis to infer that the Price Increase does not constitute true liquidated damages rather than an unenforceable penalty. It is true that the Price Increase is in addition to the interest charge on late payments, which is high, but both terms were negotiated by and between two large sophisticated business entities. This Court holds that the Price Increase is not an unenforceable penalty under Ohio law and does constitute an allowable element of McKesson's Amended Claim. The Court finds further that McKesson's calculation is not supported and that Debtor's value of \$306,418.73 is the appropriate amount of the Price Increase.

#### **D. Rebate Entitlement**

Debtor asserts that it is entitled to several different rebates, which McKesson has not taken into account in calculating its claim. McKesson contends that Debtor's entitlement to rebates and credits was conditioned upon its timely payment of its obligations to

McKesson. Since Debtor acknowledges that there are three weeks of invoices for which it did not pay McKesson, McKesson asserts that Debtor is not eligible for any rebates or credits. McKesson relies on Section 9, paragraph C of the Supply Agreement to support its position that it is entitled to change a payment term or limit total credit if there was a payment default. This section further states that if Debtor meets its commitment to sales volume and timely payment, McKesson would not propose any increase to the Supply Agreement's cost of goods schedule. Based on this section, McKesson argues that because Debtor did not pay for certain invoiced goods in September 2001, it was entitled to retroactively change the payment terms and eliminate the rebates. In addition, McKesson asserts that Debtor has waived its entitlement to rebates and credits by not providing McKesson with a timely written report of any disputes regarding the cost, price or amount of goods shipped or received, pursuant to Section 9 of the Supply Agreement.

Debtor argues that the rebates were not conditioned upon payment and, in fact, there were occasions when McKesson issued rebate checks to Debtor when payment had not been made. Debtor attached the affidavit of Martin Seekely, Chief Financial Officer and Vice President of Phar-Mor, Inc. ("Seekely Affidavit") to the Debtor's Statement of Facts, which states that McKesson issued checks for the Cost of Goods Adjustment and the Select Generic Rebate regardless of whether Debtor paid McKesson for the purchase of the goods that were the subject of these adjustments. (Seekely Affidavit at ¶¶ 4-5, 6.) Copies of checks in support of this argument were attached to the Seekely Affidavit.

The Court will first deal with the waiver argument. Section

26 of the Supply Agreement covers various miscellaneous topics. Subsection A provides that the Supply Agreement embodies the entire agreement between the parties. Subsection F of the Supply Agreement provides that "failure of either party to enforce at any time or for any period of time any one or more of the provisions thereof shall not be construed to be a waiver of such provisions or of the right of such party thereafter to enforce each such provision." (Supply Agreement, Section 26F, at 19.) As a consequence, McKesson's argument that Debtor has waived its ability to assert an entitlement to rebates and credits is not supported by the express language of the Supply Agreement itself. Under Ohio law, the party asserting waiver must prove that waiver actually occurred.

It was up to the defendant to assume and carry the burden of proving the waiver by the greater weight of evidence, but in so doing he was required to prove a clear, unequivocal, decisive act of the party against whom the waiver was asserted, showing such a purpose or acts amounting to an estoppel on the latter's part.

*The White Co. v. The Canton Transportation Co.* , 131 Ohio St. 190, 198-99 (1936). Although McKesson asserts that Debtor has waived the ability to assert an entitlement to rebates by failing to identify a dispute at the end of the year and asking for detailed information, McKesson has offered no facts that would support the characterization of this failure as a waiver, especially given the express contractual language that states that failure to enforce a provision of the agreement is not to be construed as a waiver. This Court finds that McKesson's argument concerning waiver does not have merit.

Debtor asserts that it is entitled to the following rebates:

Cost of Goods Rebate	\$304,687.36
3rd Quarter Select Generic Rebate	\$421,782.30

3rd Quarter Repack Pharmaceuticals  
Rebate

\$ 42,612.17

This Court does not find support in the Supply Agreement for McKesson's argument that it could retroactively change the payment terms in the event that Debtor was in default of making timely payments. In the event of a payment default, McKesson expressly had the ability to charge interest on late payments of one percent (1%) semi-monthly and to impose the Price Increase. As a consequence, this Court will not infer that McKesson also had the right to retroactively eliminate the rebates and credits as a change in payment terms (although arguably McKesson did have that right with respect to future sales of merchandise). The next issue is whether Debtor is entitled to the asserted rebates since it has not paid McKesson for these invoices. The Court could find no provision of the Supply Agreement or the Amendment that conditioned Debtor's right to rebates on timely payment or payment at all. Neither the Supply Agreement nor the Amendment has any special definition sections, so it is presumed that words have their normal and usual meaning. The definition of "rebate" in Black's Law Dictionary states: "Rebate. *n.* A return of part of a payment, serving as a discount or reduction." (BLACK'S LAW DICTIONARY 1295 (8th ed. 2004).) The normal and usual meaning of rebate is understood to require payment first. The parties did not cite to this Court any case law on the issue of entitlement to rebates in circumstances similar to those found in the instant case. The Court has been unable to find any such cases on its own.

The Debtor provides evidence that the course of conduct between the parties was for McKesson to send rebate checks to Debtor regardless of whether payment had been made. McKesson has not refuted this argument or the Seekely Affidavit. Thus, even though the usual

meaning of the term "rebate" would seem to require payment first, by virtue of the fact that the Supply Agreement and the Amendment do not condition entitlement to rebates and credits upon payment, and the parties' course of conduct negates any such condition, this Court finds that Debtor is entitled to a reduction in the amount of McKesson's Amended Claim for the amount of the rebates as set forth above.

#### E. Pharmaceutical Price Increase Rebate

Debtor claims that Section 4 of the Supply Agreement provides for a rebate based on certain pharmaceutical price increases. That section provides:

For prescription drug items only that incur price increases and for which McKesson receives the opportunity from the manufacturer to obtain additional inventory or is allowed additional allocation buys, a rebate will be paid to [Debtor] for the difference between the old price and new price based on average purchases made by [Debtor] for these items for the thirty (30) days prior to the announced increase. McKesson guarantees that the savings associated with this rebate will not fall below .12% of total [Debtor] purchases for each one year period of the Agreement.

(Supply Agreement at Section 4.) Debtor estimates the amount of this rebate to be "approximately \$500,000.00." Debtor concedes that, if this Court allows a deduction from the Amended Claim for this element, that further proceedings will be necessary, absent an agreement of the parties, to determine the amount of the pharmaceutical price increase rebate.

McKesson does not specifically address this element.<sup>1</sup> Although McKesson does not specifically address this rebate, the Court

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<sup>1</sup>This is probably because the pharmaceutical price increase rebate was specifically identified for the first time in the Debtor's Memorandum in Support. Since McKesson neither filed a brief nor appeared at the hearing, it has presented no argument to dispute Debtor's assertion of entitlement to this rebate.

will assume that McKesson's position regarding the rebate would be the same as the other rebates, *i.e.*, that Debtor is not entitled to the rebate since it defaulted in payment of certain invoices.

As set forth above, a rebate generally is understood to be a return of a portion of an amount paid. The parties' course of conduct appears to have negated the necessity for payment. Even if that were not true, here the pharmaceutical price increase rebate relates to an entire year, not just the three week period of unpaid invoices. To permit McKesson to keep the rebate for the amounts actually paid during the year would be a windfall for McKesson. Moreover, not only is this rebate not expressly conditioned on payment by Debtor, McKesson **guaranteed** that the rebate would not be less than .12% of the total purchases by Debtor for each one year period of the Supply Agreement. As a consequence, this Court finds that Debtor is entitled to a reduction of McKesson's Amended Claim in an amount equal to the pharmaceutical price increase rebate, with such amount subject to further determination by this Court if the parties fail to agree to the amount of the rebate. Because the amount of the pharmaceutical price increase rebate cannot yet be determined, but has only been estimated by Debtor, this Court acknowledges that the total gross amount of McKesson's Amended Claim is still subject to further hearing regarding the amount to be deducted for the pharmaceutical rebate.

**F. McKesson's Entire Claim Should be Classified as Unsecured**

This Court entered a Memorandum Opinion and Order dated August 18, 2005, which provided that \$4,000,000.00 encompassed within the Amended Claim was entitled to be paid as an administrative expense claim. Debtor was directed to immediately pay McKesson this amount.

At the Hearing, Debtor represented that such amount had, indeed, been paid and, thus, should be deducted from the gross amount of McKesson's claim. This Court so finds and holds.

The gross amount of McKesson's Amended Claim also includes \$8,675,391.52 that is asserted as a reclamation claim (the "Reclamation Amount"). The issue of McKesson's entitlement to and the amount of any Reclamation Amount has not been determined. One of the issues that will impact this determination is on appeal to the Sixth Circuit Court of Appeals. As a consequence, this Court finds and holds that the gross amount of McKesson's Amended Claim includes the Reclamation Amount, but, at present, the Court makes no determination about whether, and to what extent, the Reclamation Amount may be entitled to be classified as other than a general unsecured claim. The remainder of the claim is properly classified as a general unsecured claim.

As set forth above, the amount of the pharmaceutical price increase rebate is also subject to further proceedings.

#### SUMMARY

In summary, Debtor's Objection is granted in part and denied in part. McKesson's Amended Claim is allowed in the gross amount, as follows:

Invoices for 8/27/01 to 9/17/01	\$20,427,915.07 <sup>2</sup>
Repayment of support personnel <sup>3</sup>	5,416.66
Repayment of Development Funds	383,333.33
Cost of Goods Rebate	(304,687.36)
3rd Qtr. Select Generic Rebate	(421,782.30)
3rd Qtr Repack Phar. Rebate	(42,612.17)
Price Increase	<u>313,249.98</u>
Total	\$20,360,833.21
Less payment of Administrative Claim	<u>\$ 4,000,000.00</u>

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<sup>2</sup>Because the starting point is the total of unpaid invoices, the math discrepancy is already accounted for.

<sup>3</sup>The parties are in agreement that this amount is due and owing and it is included in McKesson's Amended Claim.

Total	\$16,360,833.21
Less Pharmaceutical Price	
Increase Rebate (to be determined)	

As set forth above, the gross amount of this claim must be reduced by \$4 million to account for payment of the administrative claim expense. In addition, as set forth above, the invoices that account for the reclamation claim asserted by McKesson are included in the gross amount of this claim. At this time, the Court is not in a position to determine how much, if any, of such amount should be recognized as a reclamation claim rather than categorized as a general unsecured claim. In addition, this Court is aware that Debtor has asserted the right of recoupment arising from alleged breach of the Supply Agreement by McKesson in an adversary proceeding that is presently pending. Accordingly, this Opinion determines only the gross amount of McKesson's Amended Claim. Still to be determined are: (i) amount of pharmaceutical price increase rebate; (ii) amount, if any, of McKesson's reclamation claim; and (iii) amount, if any, of Debtor's recoupment.

An appropriate Order will follow.

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**HONORABLE KAY WOODS**  
**UNITED STATES BANKRUPTCY JUDGE**

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

IN RE: \*  
\* CASE NUMBER 01-44007  
PHAR-MOR, INC., et al., \*  
\* CHAPTER 11  
\*  
Debtors. \* HONORABLE KAY WOODS  
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\*\*\*\*\*  
ORDER ALLOWING GENERAL UNSECURED CLAIM OF MCKESSON  
\*\*\*\*\*

For the reasons set forth in this Court's Memorandum Opinion entered this date, Debtor's Objection is granted in part and denied in part. McKesson's Amended Claim is allowed in the gross amount, as follows:

Invoices for 8/27/01 to 9/17/01	\$20,427,915.07
Repayment of support personnel	5,416.66
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Total	\$20,360,833.21
Less payment of Administrative Claim	<u>\$ 4,000,000.00</u>
Total	\$16,360,833.21
Less Pharmaceutical Price Increase Rebate (to be determined)	

IT IS SO ORDERED.

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HONORABLE KAY WOODS  
UNITED STATES BANKRUPTCY JUDGE