IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

NATIONAL ASSOCIATION OF CHAIN DRUG STORES; NATIONAL COMMUNITY PHARMACISTS ASSOCIATION; KLINGENSMITH DRUG INC., KOPP DRUG, INC.; LECH'S PHARMACY, PJL PHARMACY, INC.; MJR, LTD.; MJRRX, INC.; DAVID M. SMITH RPH, INC.; PROFESSIONAL SPECIALIZED PHARMACIES, LLC; ANBAR, INC,; SELLERSVILLE PHARMACY, INC.; TEP, INC.; THOMPSON ENTERPRISES INC.; BROAD AVE PHARMACY LLC; HOLLIDAYSBURG PHARMACY LLC; VALUE DRUG COMPANY; and VALUE SPECIALTY PHARMACY LLC, Plaintiffs, -against- EXPRESS SCRIPTS, INC. and MEDCO HEALTH SOLUTIONS, INC., Defendants.	Civil Action No. 12-395

DEFENDANTS EXPRESS SCRIPTS, INC.'S AND MEDCO HEALTH SOLUTIONS, INC.'S MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFFS' COMPLAINT

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Defendants Express Scripts, Inc. ("Express Scripts" or "ESI") and Medco Health Solutions, Inc. ("Medco") by their undersigned counsel respectfully submit the following Memorandum of Law in Support of their Motion to Dismiss Plaintiffs' Complaint, stating as follows:

PRELIMINARY STATEMENT

Having inexcusably delayed seeking preliminary relief to enjoin the now-completed merger of ESI and Medco, Plaintiffs now can only seek a permanent order of post-consummation divestiture. As with several cases just like this, plaintiffs' problem is that courts routinely grant motions to dismiss these types of complaints as a matter of law, if not simply because the balance of hardships so decidedly balances in favor of the merged company that there is no point in permitting the case to proceed. That certainly is the case here as well. In addition, Plaintiffs' complaint – on its face – does not adequately allege an "irreparable" injury or that a permanent divestiture order would serve the public interest. Accordingly, based on a straightforward application of the permanent injunction standards alone, the complaint must be dismissed.

Though dispositive, Plaintiffs' inexcusable delay is not the only defect in Plaintiffs' complaint. Plaintiffs also do not have antitrust standing to challenge the merger, as the gravamen of their Complaint is that Plaintiffs will be harmed as competitors of ESI's mail order and specialty dispensing services, facing too much competition from ESI following the merger. And, finally, Plaintiffs have alleged various "markets" that are so artificially vague and narrow as to render them defective as a matter of law. Indeed, courts now routinely reject cases that, on the face of the complaint, are gerrymandered to try and create antitrust concerns that do not exist – here, the conclusory allegation that the merger is a "3-2" in various PBM-related markets. For these additional reasons, as well, ESI respectfully submits that the complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

BACKGROUND

On July 21, 2011, Express Scripts and Medco publicly announced their proposed merger, valued at $29.1 billion.[1] The Federal Trade Commission ("FTC") then opened an eight month investigation into the merger, including issuing a "second request" for additional information about the merger. The FTC closed its investigation on March 30, 2012 and made a public announcement of that fact on the morning of April 2, 2012. The FTC also published a detailed Closing Statement regarding the deal, indicating that it found no "reason to believe that a violation of Section 7 of the Clayton Act has occurred or is likely to occur by means of Express Scripts' acquisition of Medco." (FTC Closing Statement at 9.) The parties consummated their merger before the stock market opened on that same morning.

As described in Defendants' Opposition to Plaintiffs' Motion for a Preliminary Injunction, Plaintiffs spent the intervening months between the announcement and consummation of the merger attempting to convince the government to challenge the transaction, but failed to take any action on their own to challenge the merger in court. Rather, Plaintiffs waited until March 29, 2012 to file their Complaint, seeking declaratory and injunctive relief pursuant to Section 16 of the Clayton Act, alleging that the ESI/Medco transaction was likely to result in a substantial lessening of competition in violation of Section 7 of the Clayton Act. Notably, the Plaintiffs waited until April 2, 2012, after the merger closed, to file their

[1] This Court can take judicial notice of the dates of the relevant events, including that (i) Plaintiffs testified before Congress in opposition to the deal on September 9, 2011 and September 20, 2011; (ii) Defendants publicly announced that the deal could close in the early part of the second quarter on March 12, 2012; (iii) Defendants publicly announced that the deal could close as early as April 2, 2012 on March 28, 2012; and (iv) the FTC voted to close its investigation on March 30, 2012.

memorandum of law in support of their Motion for a Preliminary Injunction. Defendants now move to dismiss the Plaintiffs' Complaint pursuant to Fed. R. Civ. P. 12(b)(6).

LEGAL STANDARD

Plaintiffs' Complaint falls far short of the pleading standard set forth by the Supreme Court in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). The *Twombly* court instructed that a complaint must plead "enough facts to state a claim for relief that is plausible on its face" to survive a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). *Id.* at 570. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Aschroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) ("A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" (citations omitted)).

Instead, Plaintiffs must allege sufficient facts to "nudge[] their claims across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570. Notably, in determining whether plaintiffs have met this burden, "[c]ourts are not required to credit bald assertions or legal conclusions draped in the guise of factual allegations." *Banxcorp v. Apax Partners, L.P.*, No. 10-4769 (SDW)(MCA), 2011 WL 1253892, at *2 (D. N.J. Mar. 28, 2011) (dismissing complaint brought under Section 7 of the Clayton Act based on plaintiff's failure to plead facts showing that its alleged injury was caused by the merger).

Twombly and its progeny emphasize careful application of these principles in the antitrust context, where discovery is often burdensome and expensive. *See Twombly*, 550 U.S. at 558 (noting that "'the costs of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint." (citations omitted)); s*ee also Bobrick Corp. v. Santana Prods., Inc.*, 698 F. Supp. 2d 479, 500

(M.D. Pa. 2010) ("*Twombly* and *Iqbal* instruct that federal trial courts be cognizant of the enormous costs of complex commercial litigation when addressing motions to dismiss. Motions to dismiss must be granted where there is 'no reasonably founded hope that the [discovery] process will reveal relevant evidence' to establish a viable claim." (citations omitted)).

Plaintiffs fail to meet this pleading burden, and their antitrust claims should be dismissed.

ARGUMENT

I. PLAINTIFFS' COMPLAINT SHOULD BE DISMISSED BECAUSE PLAINTIFFS ARE NOT ENTITLED TO PERMANENT INJUNCTIVE RELIEF

Plaintiffs' Complaint includes a single claim for relief for violation of Section 7 of the Clayton Act. Section 16 of the Clayton Act provides a private cause of action for injunctive relief for a violation of the Clayton Act, including Section 7, "when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue." 15 U.S.C. § 26.

Since the merger has already closed, the only permanent relief under Section 16 that Plaintiffs can seek is a divestiture. *See Ginsburg v. InBev NV/SA*, 623 F.3d 1229, 1233 (8th Cir. 2010) ("As the acquisition has now occurred, [plaintiffs] conceded at oral argument that the *only* equitable relief to which they would be entitled, if they ultimately prevailed on their potential competition theories, is divestiture."). Plaintiffs do not dispute this reality. *See* Tr. Apr. 3, 2012 H'rg at 7:3-13. To obtain permanent injunctive relief, a plaintiff must prove: "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the

plaintiff and defendant, a remedy in equity is warranted; (4) and that the public interest would not be disserved by a permanent injunction." *Emcore Corp. v. Optium Corp.*, No. 7-326, 2010 WL 235126, at *1 (W.D. Pa. Jan. 15, 2010) (*citing eBay v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)). Here, Plaintiffs' failure to allege facts supporting any of these essential elements.

A. <u>Plaintiffs Fail To Plead Facts Supporting Their Irreparable Injury Allegations</u>

As to the first two elements of a claim for permanent injunctive relief, Plaintiffs fail to plead facts showing they have suffered any injury, much less "irreparable injury." Harm is not irreparable if it can be remedied through monetary damages. *See, e.g.*, *Schering-Plough Healthcare Prods., Inc. v. Neutrogena Corp.*, Civ. No. 09-642-SLR, 2010 WL 3418203, at *2 (D. Del. Aug. 20, 2010) (denying plaintiff's request for permanent injunction due to plaintiff's failure to provide sufficient evidence of irreparable harm).

Failure to plead this element, alone, requires dismissal of the associated claim, as there is no point going forward with a claim for which the remedy sought is unavailable. *See, e.g.*, *Taleff v. Sw. Airlines Co.*, No. C 11-02179 JW, 2011 WL 6157467, *4 (N.D. Cal. Nov. 30, 2011) (granting motion to dismiss § 7 claim and denying permanent injunctive relief where "Plaintiffs ha[d] not demonstrated that the remedies available at law, <u>such as monetary damages</u>, would be inadequate." (emphasis added)); *see also Old Republic Ins. Co. v. Hansa World Cargo Serv., Inc.*, 170 F.R.D. 361, 385 (S.D.N.Y. 1997) (collecting cases) (granting motion to dismiss claim for injunctive relief because "'potential injury ... justify[ing] the granting of injunctive relief ... must be irreparable; that is, *it must be the kind of injury for which an award of money cannot compensate.*' . . . 'Thus, if it appears that the potential harm to the [requesting] party is simply a monetary loss, the potential injury is normally not deemed irreparable[,] and hence does not justify injunctive relief.'" (citations omitted)).

Here, Plaintiffs allege that they "will be irreparably harmed by the consummation of the proposed acquisition in their capacity as sellers of pharmacy services to Defendants, customers of PBM services, and as competitors against Defendants' mail-order and specialty pharmacies." (Compl. ¶ 35.)[2] Based solely on the face of the complaint, each of these three alleged harms are purely monetary injuries, and the allegations of irreparable harm are only conclusory and speculative assertions of no import. *See Twombly*, 550 U.S. at 555.

With respect to the purported harm they will incur as sellers of pharmacy services to Defendants, Plaintiffs' Complaint is replete with allegations that the combined ESI-Medco entity will be able to negotiate "[f]urther reductions in reimbursement rates" with pharmacies. (Compl. ¶¶ 38, 46, 50, 54, 58, 62, 66, 71.) Reductions in how much money pharmacies are reimbursed by definition can be compensated by money damages. Thus, this "harm" cannot provide the basis for permanent injunctive relief.

With respect to their alleged harm as customers of PBM services, Plaintiffs fail even to identify which Plaintiff is a customer of either Express Scripts or former Medco in the alleged market for large private employers. This is particularly problematic in light of Plaintiffs' concession that "[s]ome of the Associations' members have opted not to participate for various reasons." (Compl. ¶ 34 n.14.) In any event, Plaintiffs fail to allege facts supporting any claim of harm to Plaintiffs in their capacity as purchasers of PBM services, much less any irreparable harm that could not be rectified through monetary damages.

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[2] Plaintiffs also state – in purely conclusory terms – that they will be irreparably harmed by the ESI-Medco merger because it is possible that some Plaintiffs could be compelled "to close their businesses" in the face of increased competition from the merged firm. *See, e.g.*, Compl. ¶ 142. Because the Complaint provides no factual predicate for this assertion, which is both speculative and contingent on future events, these allegations fail to "nudge[] their claims across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570.

Finally, Plaintiffs' injury allegations based on their status as competitors of Express Scripts are all premised on the allegation – speculative in its own right –that Plaintiffs "stand to lose business diverted from them to PBM-owned mail-order facilities and specialty pharmacies." (Compl. ¶ 24.) Again, even if the Complaint contained non-conclusory facts supporting such an allegation – which it does not – lost sales or market share clearly are compensable in money damages. *See, e.g.*, *Aurora World, Inc. v. Ty Inc.*, 719 F. Supp. 2d 1115, 1169 (C.D. Ca. 2009) ("potential loss of market share does not constitute irreparable injury."); *Fin. Equip. Co., Inc. v. Silva*, No. 10–C–794, 2010 WL 4782786, at *12-13 (E.D. Wis. Nov. 17, 2010) (denying injunctive relief because "injury alleged, i.e., loss of business, is likely more appropriately rectified with monetary damages from lost profits."). Because Plaintiffs' alleged harm can be remedied entirely by monetary damages, Plaintiffs are not entitled to injunctive relief, and their Complaint should be dismissed. *See IMG Fragrance Brands, LLC v. Houbigant, Inc.*, 679 F. Supp. 2d 395, 412 (S.D.N.Y. 2009) (finding plaintiff's "ninth cause of action for a permanent injunction must be dismissed because [plaintiff] has not alleged that it has no adequate remedy at law").[3]

Accordingly, even before reaching the subject of Plaintiffs' inexcusable delay and its implications for balancing the hardships, Plaintiffs' Complaint is defective on its face as one purely seeking injunctive relief.

[3] Plaintiffs also complain repeatedly about purported harm that will befall ultimate consumers. Of course, they have no standing to complain about harm to consumers, and, in any event, given that their primary claim is that their own reimbursement rates will be reduced, their purported concern for consumers is more than a bit disingenuous.

B. <u>Plaintiffs Unreasonably Delayed Filing Their Complaint</u>

As to the third and fourth elements of a claim for permanent injunctive relief, Plaintiffs' own allegations, coupled with incontrovertible facts as to which the Court can take judicial notice, demonstrate that the equities and balance of hardships weigh dispositively in favor of Defendants.

As several courts in similar circumstances have recognized, divestiture is an extreme remedy, and private plaintiffs shoulder a particularly heavy burden in seeking to undo an already-consummated merger. *Ginsburg,* 623 F.3d at 1233. Indeed, even with respect to a governmental enforcement action, the Supreme Court has cautioned that the mere availability of the divestiture remedy "does not, of course, mean that such power should be exercised in every situation in which the [federal] Government would be entitled to such relief." *California v. Am. Stores Co.*, 495 U.S. 271, 295 (1990) (noting that the burden for parties seeking divestiture pursuant to the Clayton Act Section 16 is even higher than the federal government's burden under Section 15). As a specific example, the Court explained that "equitable defenses such as laches . . . may protect consummated transactions from belated attacks by private parties when it would not be too late for the Government to vindicate the public interest." *Id.* at 296. Since *American Stores*, courts have made clear that private plaintiffs may not obtain the equitable relief of divestiture where their delay would result in hardship on the merged company.

The Eight Circuit's opinion in *Ginsburg v. InBev NV/SA* is instructive. 623 F.3d at 1235. In *Ginsburg*, the court considered a group of consumers' challenge to InBev's acquisition of Anheuser-Busch. As with the ESI-Medco deal, the parties' intent to merge was "highly publicized." *Id.* at 1231. Nonetheless, plaintiffs waited until three months after the announcement of the proposed merger to file their complaint for injunctive relief on September 10, 2008. *See id.* Despite filing the complaint in September, plaintiffs then waited until November 3, 2008 to file a

motion for a preliminary injunction, nine days before the shareholders voted to approve the transaction. *See id.* On November 18, 2008, the date on which the merger closed, the court denied the plaintiffs' motion for a preliminary injunction, *id.*, and, after several appeals and other motion practice, the court granted the defendants' motion for judgment on the pleadings on October 27, 2010. *See id* at 1236. The court emphasized that "[a]s the acquisition has now occurred, [plaintiffs] conceded at oral argument that the *only* equitable relief to which they would be entitled, if they ultimately prevailed . . ., is divestiture." *Id.* at 1233.

The court further explained, "[a]s Plaintiffs are private, indirect purchasers rather than a federal antitrust enforcement agency, divestiture's 'far reaching effects put it at the least accessible end of a spectrum of injunctive relief.'" *Id.* at 1234 (citations omitted). According to the court, filing the complaint three months after the deal was announced – and filing for a preliminary injunction nine days before the merger was approved – constituted "inexcusable delays" that warranted denial of a post-merger divestiture as a matter of law. *Id.* at 1235.

Finally, emphasizing the extreme difference between a pre-merger remedy and divestiture, the court explained why the complaint for permanent injunctive relief could not survive. As the court explained, pre-merger divestiture is "simple, relatively easy to administer and sure," "[b]ut this is only true before the transaction is consummated, or if stock or discreet tangible assets are all that later need to be divested." *Id.* at 1234 (quotations and citations omitted). By contrast, divestiture is an inappropriate remedy, especially where the parties have already begun integration of personnel and business segments:

> In some cases, lack of diligence in seeking § 7 relief has completely barred the equitable remedy of divestiture. . . . But even if Plaintiffs were not so dilatory as to trigger the defense of laches, their failure to obtain a preliminary injunction that would make the divestiture remedy "easy to administer and sure" must be taken into account in fashioning an appropriate remedy.

Id. at 1235 (citations omitted). In these situations, divestiture is "barred as a matter of law, and judgment dismissing the[] Complaint at this stage of the litigation was appropriate." *Id.* at 1236 (emphasis added).

Similarly, in *Taleff v. Sw. Airlines*, the court denied plaintiffs' tardy request for injunctive relief challenging the merger between Southwest Airlines and Air Tan. *See* 2011 WL 6157467. Again, the court highlighted the extraordinary nature of the relief sought by plaintiffs: "Plaintiffs have not cited any case in which a federal court has ordered divestiture of a completed merger involving the integration of ongoing business activities in a suit brought by private plaintiffs under Section 7 of the Clayton Act; nor is the Court aware of any such cases." *Id.* at *5 n11.

Like in *Ginsburg*, the *Southwest* court found that "because Plaintiffs delayed in filing their suit until after Defendants' merger had already been consummated, the remedy of divestiture is now unavailable to Plaintiffs." *Id.* at 4 (emphasis added). The court further noted that "[a] similar conclusion has been reached by other courts that have considered lawsuits brought by private plaintiffs who: (1) sought divestiture of companies that had already combined their operations as the result of a merger, where (2) the plaintiffs' delay in filing suit meant that the court, if it were to order a divestiture, would have to compel defendants that had already integrated their operations to separate themselves into two distinct companies." *Id.* The court explained that in these situations, defendants "'would suffer serious prejudice and hardship as a result of divestiture,'" and therefore "divestiture was 'barred as a matter of law.'" *Id.* at *5 (*quoting Antoine L. Garabet, M.D., Inc. v. Autonomous Techs. Corp.*, 116 F. Supp. 2d 1159, 1173 (C.D. Cal. 2000)).

Other courts have reached similar conclusions where the plaintiffs have unreasonably delayed filing merger challenges until the eleventh hour. Indeed, no court has ever granted divestiture where, as here, private plaintiffs consciously delayed filing their motion for

preliminary injunctive relief until after consummation of the merger. *See Glendora v. Gannett Co. Inc.*, 858 F.Supp. 369, 372 (S.D.N.Y. 1994) ("Potentially disruptive remedies such as divestiture of completed transactions involving integration of ongoing business activities have never been granted in private suits under Section 7."); *Garabet*, 116 F. Supp. 2d at 1173 (discussing plaintiff's delay in filing suit and finding that "[t]he Court therefore finds that divestiture is barred as a matter of law.").[4]

These cases are dispositive on this motion; indeed, the facts of which this Court may take judicial notice here are much more egregious than in any of their prior cases. Plaintiffs dragged their heels for eight months before filing a complaint, and then only perfected a motion for TRO after the transaction had closed. *See supra* pp. 2-3. As the courts noted in both *Ginsburg* and *Southwest*, divestiture is no longer a suitable remedy as a matter of law.

Finally, the public interest would be disserved by a divestiture. "While the public certainly has a strong interest in the enforcement of the antitrust laws, it would not in any way serve those interests for the Court to enjoin activities that have not been shown to have anticompetitive tendencies." *Delco LLC v. Giant of Maryland, LLC*, No. 07-3522 (JBS), 2007 WL 3307018, at *20 (D. N.J. Nov. 8, 2007). Here, apart from conclusory and speculative allegations, plaintiffs offer no facts that would demonstrate anticompetitive tendencies resulting from the merger. This is in sharp contrast to the conclusions of the FTC, <u>which exists to serve</u>

[4] Notably, none of these courts discussed *Tasty Baking*, where plaintiffs alleged that defendants had enhanced market power from the merger. *Tasty Baking Company v. Ralston Purina, Inc.*, 653 F. Supp. 1250 (E.D. Pa. 1987). There, the court rejected a laches defense, emphasizing that "[s]ome details of that deal were kept secret," and concluding "that defendants took special steps to reduce the risk of a pre-consummation lawsuit to restrain the acquisition." *Id.* at 1254, 1277. In contrast here, Plaintiffs cannot dispute that the transaction was highly publicized, multiple government agencies reviewed the transaction and Plaintiffs had ample opportunity to challenge the transaction before it closed. *See supra* pp. 2-3.

the public, describing why it decided not to challenge the Express Scripts-Medco: "we do not have reason to believe that the transaction is likely to cause unilateral anticompetitive effects, enhance the likelihood of successful coordination, or facilitate the exercise of monopsony power in any relevant market in which the merging parties participate." (FTC Closing Statement at 2.)[5] To the contrary, the public interest would be disserved by an injunction because ESI's clients would not lost significant benefits from the anticipated synergies and resulting cost savings. (*See id.* at 4 ("many [clients] believe that the merger will lead to lower prices for PBM services.").)

In sum, because Plaintiffs have failed to allege facts establishing the elements of a claim for permanent injunctive relief, their claim should be dismissed with prejudice.

II. PLAINTIFFS' COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO PLEAD FACTS ESTABLISHING THEIR ENTITLEMENT TO RELIEF UNDER THEIR SUBSTANTIVE ANTITRUST CLAIM

In addition to failing to plead a basis for permanent injunctive relief, Plaintiffs also fail to plead facts sufficient to state a substantive claim for relief under Section 7 of the Clayton Act. Plaintiffs allege that the merger will harm competition in four different purported markets: (a) the provision of Clinical Specialty Drugs; (b) the provision of full service, nationwide PBM services to large employers; (c) the purchase of retail community pharmacy services; and (d) the provision of drugs to beneficiaries of large employers.

Plaintiffs' claim based on each purported market fails as a matter of law for one or more reasons, including that Plaintiffs failed to plead facts (i) demonstrating they have "antitrust standing" to pursue a claim based on the alleged market, (ii) supporting their alleged product and

[5] *See In re Intelligroup Securities Litig.*, 527 F. Supp. 2d 262, 274 (taking judicial notice of SEC No-action letter and "acknowledging that the SEC investigation of the matters related to Intelligroup's Restatement was terminated without any enforcement action by the Commission or by a government agency having the power to instigate a prosecutorial action against Intelligroup upon the SEC's referral.").

geographic market definitions, and (iii) where relevant, supporting their claim that the merger will substantially lessen competition in the alleged markets. Each of these requirements is an essential element of a Clayton Act Section 7 claim.

A. Controlling Principles

Antitrust Standing. Antitrust standing is a requirement "in addition to, and distinct from, the constitutional requirement of injury in fact." *Warren Gen. Hosp. v. Amgen Inc.*, 643 F.3d 77, 84 n.8 (3d Cir. 2011). The Supreme Court has adopted a multi-factor test for determining whether a private plaintiff has antitrust standing. S*ee Assoc. Gen. Contractors of Cal. v. Cal. State Council of Carpenters*, 459 U.S. 519, 537-41 (1983). This test identifies the most appropriate plaintiff to enforce the antitrust laws based on factors such as directness and remoteness of injury. The complete test, as articulated by the Third Circuit, requires the court to examine:

> (1) the causal connection between the antitrust violation and the harm to the plaintiff and the intent by the defendant to cause that harm, with neither factor alone conferring standing; (2) whether the plaintiff's alleged injury is of the type for which the antitrust laws were intended to provide redress; (3) the directness of the injury, which addresses the concerns that liberal application of standing principles might produce speculative claims; (4) the existence of more direct victims of the alleged antitrust violations; and (5) the potential for duplicative recovery or complex apportionment of damages.

City of Pittsburgh v. W. Penn Power, 147 F.3d 256, 264 (3d Cir. 1998) (footnote omitted) (citations omitted). The second prong of this test relates to antitrust injury, or "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful," *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). Notably, antitrust injury is a "necessary but insufficient condition of antitrust standing." *Barton & Pittinos, Inc. v. SmithKline Beecham Corp.*, 118 F.3d 178, 182 (3d Cir. 1997).

Market Definition. Because it is impossible to assess the competitive effects of a merger without analyzing its competitive effects in a particular market, proof of relevant product and geographic markets is a "necessary predicate" of any claim under Section 7 of the Clayton Act. *United States v. E.I. du Pont de Nemours & Co*., 353 U.S. 586, 593 (1957); *see also FTC v. Freeman Hosp.*, 69 F.3d 260, 268 (8th Cir. 1995) ("Without a well-defined relevant market, an examination of a transaction's competitive effects is without context or meaning."). Thus, a plaintiff cannot state a claim pursuant to Section 7 without alleging facts that support properly defined relevant markets. *See, e.g., FTC v. Arch Coal*, 329 F. Supp. 2d 109, 119 (D.D.C. 2004) (plaintiff "bears the burden of proof and persuasion in defining the relevant market").

The Supreme Court has stated that "[t]he outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe Co v. United States*, 370 U.S. 294, 325 (1962). While this interchangeability analysis necessarily examines how customers use the products being considered, "[c]ustomer preferences towards one product [or seller] over another do not negate interchangeability." *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1131 (N.D. Cal. 2004) ("the issue is not what solutions the customers would *like* or *prefer* . . .; the issue is what they *could* do in the event of an anticompetitive price increase"). Importantly, in its seminal *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, the Third Circuit held that "[w]here the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff's favor, the relevant market is legally insufficient and a motion to dismiss may be granted." 124 F.3d 430, 436 (3d Cir. 1997).

Anticompetitive Effects. A plaintiff alleging a claim under Section 7 of the Clayton Act must allege facts showing that the merger may substantially lessen competition in the relevant markets. *See United States v. Baker Hughes*, *Inc.*, 908 F.2d 981, at 982 n1 (D.D.C. 1990); *Oracle*, 331 F. Supp. at 1110. As with other elements of an antitrust claim, the complaint must allege facts – not mere conclusions – as to these competitive effects.

B. Application To The Alleged "Markets"

1. The Complaint Fails To State A Claim Related To Clinical Specialty Drugs In The United States

Plaintiffs' allegations related to clinical specialty drugs are based on the fear that those Plaintiffs with specialty pharmacy businesses will lose business to Express Scripts' own internal specialty pharmacy business. In other words, Plaintiffs allege that they will be harmed as competitors of the merged firm in the provision of "Clinical Specialty Drugs." (Compl. ¶¶ 91-103.) Plaintiffs' Clinical Specialty Drug claim fails both because Plaintiffs' lack standing to make such a claim and because they have failed to allege a well-defined, cognizable market.

a. Plaintiffs lack competitive standing in the sale of specialty drugs.

In order for a competitor to allege antitrust injury arising from a merger, it must show that "the actual injury [that] the plaintiff alleges" corresponds with "the anticipated anticompetitive effect[s]" of the merger. *Port Dock & Stone Corp. v. Oldcastle NE, Inc.*, 507 F.3d 117, 122-23 (2d Cir. 2007) (noting that the "rationale for condemning a merger lies in its potential for supracompetitive pricing, not in its potential for cost savings and other efficiencies"). Accordingly, courts generally are skeptical of a competitor's claim that its rivals' activity harms competition because a competitor "stand[s] to gain" when markets are less competitive and prices rise. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582-83 (1986).

Instead, what courts generally find is that competitors fear increased competition from the merged entity, which cannot constitute an "antitrust injury" – a threshold requirement for antitrust standing. *See, e.g.*, *Brunswick Corp.*, 429 U.S. at 481, 487-88 (rejecting small bowling centers' claim that they suffered injury in the form of lost profits when a rival purchased competing bowling alleys that were about to go out of business because, even assuming the acquisition violated Section 7, the plaintiff's injury was attributable to an increase in competition); *Remington Prods., Inc. v. N. Am. Philips, Corp.*, 755 F. Supp. 52, 58 (D. Conn. 1991) (holding that plaintiff's "alleged injury of lost profits due to *increased* competition would not be attributable to the aspects of the acquisition that would make it unlawful").

The Supreme Court's decision in *Cargill* is instructive. In that case (as here), plaintiff contended that the merger would provide Cargill with a competitive advantage:

> Monfort's first claim is that after the merger, Excel would lower its prices to some level at or slightly above its costs in order to compete with other packers for market share. Excel would be in a position to do this because of the multi-plant efficiencies its acquisition of Spencer would provide. To remain competitive, Monfort would have to lower its prices; as a result, Monfort would suffer a loss in profitability, but would not be driven out of business.

See Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 114-5 (1986). In this context, the Court rejected the plaintiff's argument that "§ 7 of the Clayton Act is broad enough . . . to support a finding of antitrust injury whenever a competitor is faced with a threat of losses from increased competition." *Id.* at 116. Instead, the Court concluded that "[t]he kind of competition that [plaintiff] alleges here, competition for increased market share, is not activity forbidden by the antitrust laws. It is simply, as petitioners claim, vigorous competition." *Id.*

Similarly here, Plaintiffs simply are complaining that they will suffer injury from too much competition in the "market" for Clinical Specialty Drugs. Plaintiffs allege in conclusory terms that

the merger will increase the merging parties' market share and enhance their negotiating power with pharmaceutical manufacturers (Compl. ¶ 139), but the essence of their "competitor" claim is that the merged firm will become too attractive to the pharmaceutical manufacturers, whose decision it is to choose how and through whom they will distribute their branded specialty drugs. For example, Plaintiffs complain that "[t]he ability of a PBM proprietary specialty pharmacy to secure exclusive distribution agreements with manufacturers of Clinical Specialty Drugs constitutes a significant competitive advantage over other specialty pharmacies. Indeed, drug manufacturers typically award exclusive agreements to firms with access to more lives." (Compl. ¶ 100 (emphasis added); *see also id.* at ¶ 139 (alleging that Plaintiffs "will have difficulty competing in the specialty pharmacy market because they lack this built-in preferred access to a large pool of lives") (emphasis added)). Therefore, according to the Complaint, Plaintiffs' threatened loss of business is attributable to Defendants' "competitive advantage" (i.e., competition on the merits), rather than any anticompetitive practice – let alone an anticompetitive practice that harms Plaintiffs in a way that also harms consumers.[6] Thus, Plaintiffs have not pled antitrust injury, and they lack standing to pursue their claims as a competitor.

b. Plaintiffs do not allege a distinct market for "Clinical Specialty Drugs."

Plaintiffs' claim based on specialty drugs also fails because the Complaint does not adequately define a relevant antitrust market. Plaintiffs allege a market for "'specialty drugs' . . . that should be dispensed and managed through a specialty pharmacy because they require

[6] To the extent Plaintiffs suggest that Defendants' ability to secure exclusive distribution agreements from drug manufacturers is anticompetitive (Compl. ¶¶ 100, 139), it is well-recognized that such agreements generally enhance competition. *See Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 890 (2007); *Elecs. Comm'ns Corp. v. Toshiba Am. Consumer Prods., Inc.*, 129 F.3d 240, 245 (2d Cir. 1997) (noting that "exclusive distributorship arrangements are presumptively legal"). And the Complaint provides no reason to believe that exclusive distribution agreements would be anticompetitive in this instance.

specialized storage, control and security, handling, administration, and patient monitoring to achieve successful clinical outcomes." (Compl. ¶ 91.) But Plaintiffs do not allege facts indicating which drugs "should be dispensed and managed through a specialty pharmacy." *Id.* Nor do Plaintiffs' allegations demonstrate the extent to which these so-called "Clinical Specialty Drugs" overlap or differ from "Designated Specialty Drugs" from the formulary lists of PBMs.

Defendants' share of the supposed market for the provision of specialty drugs, however, will inevitably vary based on what drugs are considered in or out of the market. In turn, without adequate allegations as to the definition of the relevant product market for the provision of specialty drugs, Plaintiffs cannot show that the merger would result in an anticompetitive effect in that market and their claims should be dismissed. *See United States v. Engelhard*, 970 F. Supp. 1463, 1485 (M.D. Ga. Apr. 3, 1997), *aff'd*, 126 F.3d 1302 (11th Cir. 1997) (denying a request for a permanent injunction, because, "[i]f the market is incorrectly defined, the market shares would have no meaning").[7]

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[7] Significantly, even if the market for the provision of "specialty drugs" were properly defined, which it is not, Plaintiffs have not alleged facts that would demonstrate that the transaction violates Section 7. For a transaction to be anticompetitive under Section 7, Plaintiffs, at a minimum, must prove that the transaction will lead to "undue concentration" in a properly defined market. *See United States v. Baker Hughes*, 908 F.2d 981, 982 (D.C. Cir. 1990). Here, the FTC found in its Closing Statement regarding the transaction that "[a]lthough it is difficult to determine market shares for specialty pharmacy services (assuming this were a relevant market), the merged firm's share appears to be approximately 30%" and "[s]everal dozen [other] specialty pharmacies currently operate in the United States." (FTC Closing Statement at 8-9); *see also* (Compl. ¶ 126 (alleging a share of ~31%).) Plaintiffs have not alleged any contrary facts that suggest that the merged ESI-Medco firm has a dominant share of the market, nor have Plaintiffs provided any factual predicate for their assertion that the merged firm would have a competitive advantage over the Plaintiffs or <u>any other specialty pharmacy</u> in the provision of specialty drugs.

2. Plaintiffs' Allegations Related To The "Market" For Purchases Of Retail Community Pharmacy Services Fail As A Matter Of Law

Plaintiffs allege they will suffer two types of harm in their capacity as suppliers in the market in which PBMs purchase retail community pharmacy services for the benefit of their customers. (Compl. ¶¶ 82-90.) They allege that the merger will cause their reimbursement rates to go down and that the merger also will lead Express Scripts to divert more business away from Plaintiffs in favor of Express Scripts' own internal mail-order and specialty pharmacy businesses. (Compl. ¶ 131.) Apart from being a dispute simply about money, *supra* pp. 5-7, Plaintiffs do not adequately allege an antitrust injury as a seller of dispensing services, nor, again, do they adequately allege a relevant antitrust market.

a. Plaintiffs do not allege standing as a supplier of pharmacy services.

Absent adequate allegations that Plaintiffs suffer an injury from a reduction in output for pharmacy dispensing services, Plaintiffs cannot claim that any injury that they suffer is a result of the creation of a "monopsony" (i.e., one dominant firm purchasing Plaintiffs' services) or "duopsony" (i.e., two dominant firms purchasing Plaintiffs' services). *See In re Beef Indus. Antitrust Litig.*, 907 F.2d 510, 516 (5th Cir. 1990) (evidence that cattle ranchers' payment of low feed prices did not result in reduction of actual feed purchases undermined monopsony claim). Moreover, as the FTC noted in its Closing Statement, lower reimbursement rates generally translate to lower prices for consumers. (FTC Closing Statement at 8 ("[a]lthough retail pharmacies might be concerned about this outcome, a reduction in dispensing fees following the merger could benefit consumers by lowering health care costs.").) Indeed, the FTC rejected a nearly identical theory of monospony harm when it closed its investigation regarding Caremark's acquisition of AdvancePCS, concluding that the merger of the two PBM service providers would not result in a "monopsony or oligopsony outcome – *i.e.*, one in which overall purchases from

pharmacies are reduced – even if the acquisition enables the merged PBM (or PBMs as a group) to reduce the dispensing fees they pay to retail pharmacies. Characteristics of the relevant market make monopsony or oligopsony power unlikely."[8]

Here, as well, Plaintiffs are only alleging harm to themselves as suppliers of pharmacy services rather than harm that coincides with anticompetitive injury to a market. Thus, even if what Plaintiffs allege is true – that the merged firm will shift dispensing services to its mail-order and specialty pharmacy businesses – there would be no change in the output of these services, but rather a mere "wealth transfer" between Plaintiffs and vertically-integrated PBMs (and their clients). *See* FTC Closing Statement in Caremark/AdvancePCS (explaining that "a shift in purchases from an existing source to a *lower-cost, more efficient* source is not an exercise of monopsony power"). Accordingly, because Plaintiffs have not adequately pled antitrust injury, they lack standing to bring their claims as a "supplier."

b. Plaintiffs' market allegations in the supplier market are inadequate.

Plaintiffs' claims related to the purchase of retail community pharmacy services also fail to state a claim because Plaintiffs' conclusory geographic market allegations do not adequately allege a relevant market. Plaintiffs posit, in conclusory fashion, the existence of 51 separate state-wide geographic markets for the purchase of retail pharmacy services, yet they ignore the fact that PBMs negotiate network agreements with pharmacies that span many states. *See* Compl. ¶ 67 (acknowledging multi-state operations of Plaintiff Value Specialty Pharmacy and providing multi-state data related to Plaintiff's relationship with Defendants).

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[8] Statement of the FTC, *In the Matter of Caremark Rx, Inc./Advance PCS*, File No. 0310239, at 2-3 (Feb. 11, 2004), available at http://www.ftc.gov/os/caselist/0310239/040211ftcstatement0310239.pdf (hereafter "FTC Closing Statement in Caremark/AdvancePCS").

Plaintiffs' Complaint also is devoid of any specific facts regarding the alleged "state-wide" markets. Nowhere, for example, do Plaintiffs give the Defendants' combined market share for any specific state, nor the identity of the PBMs that operate within a specific state. Plaintiffs suggest that only three PBMs operate on a nationwide basis but allege no facts to support the claim. Indeed, their own Complaint references other PBMs, including major players such as United and Catalyst. (Compl. ¶ 21, 107 n16.) These deficiencies provide another basis for dismissal of Plaintiffs' claims related to retail community pharmacy services. *See Banxcorp*, 2011 WL 1253892, at *2 (dismissing Section 7 claim and finding "[c]ourts are not required to credit bald assertions or legal conclusions draped in the guise of factual allegations.").

3. Plaintiffs' Complaint Does Not State A Claim Related To The "Market" For Provision Of Drugs To Beneficiaries Of Large Plan Sponsors In Local Markets

Plaintiffs also allege that they are harmed as providers of drugs to beneficiaries of large plan sponsors. (Compl. ¶¶ 118-122.) Similar to Plaintiffs' clinical specialty claim discussed above, Plaintiffs essentially complain that the merged firm will force customers to favor its own mail order and specialty pharmacies relative to retail pharmacies. While somewhat unclear, Plaintiffs here are casting themselves either as a competitor (for which they lack standing for the reasons stated above) or as a jilted supplier of pharmacy services that are unhappy with the PBM's vertical integration into mail-order pharmacy services. Either way, Plaintiffs' claim as a provider again fails for lack of standing and for failure to define a relevant market.

a. Plaintiffs' lack standing as a supplier/ competitor for dispensing drugs to beneficiaries.

As a threshold matter, courts have held that the suppliers or distributors of merging parties generally lack standing to assert antitrust claims regarding a transaction. *See, e.g.*, *Serpa Corp. v. McWane, Inc.*, 199 F.3d 6, 11 (1st Cir. 1999) ("[A] commercial intermediary, such as a

distributor or sales representative, generally lacks standing because its antitrust injury is too remote."); *Fischer v. NWA, Inc.*, 883 F.2d 594, 600 (8th Cir. 1989) (holding that a regional airline lacked standing to challenge a merger between two commercial airlines because it did not suffer antitrust injury when one of the commercial airlines terminated its exclusive regional service agreement); *Reading Int'l v. Oaktree Capital Mgmt.*, 317 F. Supp. 2d 301, 335 (S.D.N.Y. 2003) ("Under *Associated General Contractors*, courts have held that suppliers to direct market participants 'typically cannot seek recovery under the antitrust laws because their injuries are too secondary and indirect to be considered antitrust injuries.'" (quoting *Serfecz v. Jewel Food Stores*, 67 F.3d 591, 597-98 (7th Cir. 1995)).

The Third Circuit's decision in *Alberta Gas* illustrates Plaintiffs' lack of standing to pursue their claims as suppliers. In that case, the plaintiff methanol producer challenged its competitor's acquisition of a firm that had plans to begin producing methanol, but would first have needed to purchase large quantities of the product before its manufacturing plant became operational. *See Alberta Gas Chems. Ltd. v. E.I. Du Pont De nemours and Co.*, 826 F.2d 1235, 1237 (3d Cir. 1987). The plaintiff claimed that it suffered injury in the form of lost sales because its competitor terminated these plans after the acquisition. *See id.* at 1241. The Third Circuit rejected this theory because the plaintiff's injury flowed not from the elimination of a competitor, but from the loss of a future consumer. *See id.* at 1242. The court explained that "a private plaintiff must show that it was injured because the acquiring and the acquired firms are competitors in a field of commerce." *Id.*

Here, as in *Alberta Gas*, Plaintiffs in essence allege that they will lose customers because the merged firm will "divert" business away to its mail-order and specialty pharmacy businesses. (Compl. ¶¶ 131, 135, 158.) This alleged harm cannot constitute antitrust injury because it would

flow from the merged firm's decision to change its business model rather than a loss of competition between the merging parties. In economic reality, Plaintiffs are no different from the jilted suppliers or distributors typically denied standing to pursue merger challenges. *See, e.g.*, *Serpa Corp*, 199 F.3d at 12. The fact that the merged firm might choose to favor its own vertically-integrated pharmacies, rather than Plaintiffs' retail pharmacies, does not alter the analysis or provide Plaintiffs with standing. *See Alberta Gas*, 826 F.2d at 1244-45 (recognizing that it is efficient for a vertically-integrated firm to engage in "self-dealing").

b. Plaintiffs do not adequately allege a "market" for large plans sponsors.

Plaintiffs also fail to demonstrate that the provision of drugs to beneficiaries of "large plan sponsors" constitutes a relevant market. The law is well established that any attempt to define narrow relevant product markets by focusing on a particular customer type or size must fail where the services provided to all customers are identical. *See Invacare v. Respironics*, No. 1:04-CV-1580, 2006 WL 3022968, at *6 (N.D. Ohio Oct. 23, 2006) ("a product market cannot be divided by type of customer unless the plaintiff can identify a 'difference in the *product* supplied to that group of customers'")); *see also Total Benefit Svcs. Inc. v. Group Ins. Admin., Inc.*, 875 F. Supp. 1228, 1234-36 (E.D. La. 1995) (rejecting product market definition of self-funded health plans provided to "governmental, quasi-governmental and municipal entities" because "nongovernmental customers purchased substantially similar services"); *PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, No. 2:03-CV-107 (TJW), 2009 WL 938561 at *3-4 (E.D. Tex. Apr. 6, 2009) (rejecting plaintiff's proposed product market definition of "wholesale sale of brand-name women's accessories to independent retailers" because plaintiff presented no reason to exclude "other retailers selling exactly the same products").

Here, Plaintiffs' conclusory references to "large plan sponsors" render their allegations insufficient to plead a relevant product market as a matter of law. Plaintiffs make no attempt whatsoever to explain why purchasers of the same goods and services (i.e., small and mid-size plan sponsors) are excluded from the alleged "market." Plaintiffs do not explain how the provision of drugs to beneficiaries of "large plan sponsors" differs from the provision of drugs to beneficiaries of smaller plan sponsors. In fact, Plaintiffs do not even attempt to define what constitutes a "large" plan sponsor.

These deficiencies are fatal to Plaintiffs' claim related the provision of drugs to beneficiaries of large employers. The Plaintiffs' alleged market is inadequate as a matter of law because it excludes products that are "not only interchangeable [but] identical," *Int'l Tel. and Tel. Corp. v. Gen. Tel. & Elecs. Corp.*, 518 F.2d 913, 933 (9th Cir. 1975). Accordingly, their claims related to this market should be dismissed.

4. Plaintiffs' Complaint Does Not State A Claim Related To The "Market" For The Provision Of Full Service, Nationwide PBM Services To Large Private Employers In The United States

Finally, Plaintiffs allege that they are harmed as consumers of full service, nationwide PBM services to large private employers in the United States. (Compl. ¶¶ 104-117.) While paying lip service to traditional antitrust principles, Plaintiffs' claim as a consumer also fails adequately to allege antitrust standing and, again, fails to define a relevant market.

a. Plaintiffs' "consumer" market includes no consumer.

As discussed above, the Complaint fails to identify a single plaintiff that qualifies as a large private employer. Therefore, they do not even satisfy basic Article III standing as to this purported market. Plaintiffs also do not adequately set forth how competition or consumers would be harmed in this purported market. The Complaint includes only conclusory, unsupported statements with

respect to this market and does not satisfy the pleading requirements articulated by the Supreme Court. *See Twombly*, 550 U.S. at 555.

b. Plaintiffs gerrymander the "market" for PBM consumers as well.

Plaintiffs also fail to demonstrate that the provision of PBM Services to "large private employers" constitutes a relevant market. Plaintiffs' allegations related this "market" simply ignore fundamental market definition principles in order to gerrymander high market shares. Specifically, Plaintiffs' complaint excludes numerous buyers and sellers from the market, alleging markets for "the provision of full service, nationwide PBM services to large private employers in the United States." (Compl. ¶ 81 (emphasis added).) Yet, Plaintiffs make no attempt whatsoever to explain why sellers of the same goods and services are excluded from the alleged "market." Plaintiffs do not even attempt to define what constitutes a "large" private employer. Similarly, Plaintiffs provide no factual predicate for distinguishing between the provision of PBM services to large or small employers or public or private employers. Indeed, they concede the FTC did not make such a distinction in its analysis of other PBM transactions. (Compl. ¶ 113 (FTC "identified 'the provision of [PBM] services by national full-service PBM firms' as a relevant market").)

As discussed above, any attempt to define narrow relevant product markets by focusing on a particular customer type or size must fail where the services provided to all customers are identical. *See Invacare,* 2006 WL 3022968, at *6 ("a product market cannot be divided by type of customer unless the plaintiff can identify a 'difference in the *product* supplied to that group of customers'")). Thus, Plaintiffs' allegations related to the product market for the "provision of PBM services to large private employers" are deficient for many of the same reasons that Plaintiffs' market for the provision of drugs to beneficiaries of "large plan sponsors" is not a relevant antitrust market.

CONCLUSION

For all the foregoing reasons, Plaintiffs' Complaint should be dismissed.

Respectfully submitted,

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