12-4689-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

DRUG MART PHARMACY CORP., *et al.*,

Plaintiffs,

CASH & HENDERSON DRUGS, INC.; OMEGA PHARMACY, LLC; DISCOUNT DRUGS OF ELLIJAY, GA, INC.; KLEIN'S PHARMACY & ORTHOPEDIC APPLIANCES, INC.; MONROE PHARMACY, INC.; TRIANGLE PHARMACY, INC.; THE TROUTMAN DRUG CO.; GRAVES DRUG STORE EMPORIA, INC.; R.H. MOORE DRUG COMPANY OF FRANKLIN, INC.; PELTA DRUG, INC.; ACKAL'S IBERIA PHARMACY, INC.; NORTHPARK PHARMACY, LTD.; MILLER DRUGS, INC.; RICKMAN & HAILE, INC.; COLLINWOOD DRUGS; THRIFTY DRUG STORE, INC.;

(Caption Continued on Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLEES

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PHARMA-CARD, INC.; CREECH DRUG CO., INC.; FELDMAN, INC.; FAMILY PRESCRIPTION CENTER, INC.; HARRAH PHARMACY, INC.; DAVID W. GARBER; MARJORIE H. LAMAR; and LIVELY DRUG CO., INC.,

Plaintiffs-Appellants,

—against—

JOHNSON & JOHNSON; CAREMARK, L.L.C.; and EXPRESS PHARMACY SERVICES OF PA, L.L.C.,

Defendants-Appellees,

AMERICAN HOME PRODUCTS CORP, *et al.*,

Defendants.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1(a) of the Federal Rules of Appellate Procedure, defendants-appellees certify that:

1. Johnson & Johnson is a publicly held company with no parent corporation, and no one company or entity owns more than 10% of its stock.

2. Caremark, L.L.C., formerly known as Caremark Inc., is an indirect wholly-owned subsidiary of CVS Caremark Corporation, and no other company or entity owns 10% or more of Caremark, L.L.C.'s stock.

3. Express Pharmacy Services of PA, L.L.C., formerly owned by Thrift Drug, Inc., is a wholly-owned subsidiary of Caremark Rx, L.L.C., which is a wholly owned subsidiary of CVS Caremark Corporation.

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COUNTER-STATEMENT OF JURISDICTION

Defendants-appellees agree with the plaintiffs-appellants' Statement of Jurisdiction, but also note that Fed. R. Civ. P. 54(b) has been satisfied. The parties have stipulated that the district court's summary judgment ruling "will be final and binding as to the Remaining Plaintiffs and Defendants" in this litigation. (SA-1-6). Therefore, as the district court held, there was "no just reason for delay[ing]" entry of judgment. (A-59).

COUNTER-STATEMENT OF THE ISSUES

1. Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a), requires plaintiffs to establish competitive injury by showing that the alleged price discrimination substantially affects competition between plaintiffs and favored purchasers. Did the lower court correctly hold that plaintiffs' evidence of a *de minimis* number of potentially lost sales is insufficient to establish competitive injury?

2. Section 4 of the Clayton Act, 15 U.S.C. § 15, requires plaintiffs to establish antitrust injury by showing, among other things, an actual injury caused by the alleged violation. Did the lower court correctly hold that plaintiffs' evidence of a *de minimis* number of potentially lost sales is insufficient to establish antitrust injury?

COUNTER-STATEMENT OF THE CASE

Pharmacy benefit managers ("PBMs")[1] and other third parties are able to extract rebates and discounts from brand-name prescription drug ("BNPD") manufacturers, but retail pharmacists typically are not. For roughly 20 years, independent retail pharmacies have argued that the foregoing must be a violation of the antitrust laws. A class action, filed in the early 1990s, alleging a Sherman Act claim resulted in a directed verdict in favor of the manufacturer defendants at close of class plaintiffs' case-in-chief. (SPA-119). Simultaneous with the class filing, several thousand pharmacies opted out of the class case and pursued individual claims under the Robinson-Patman Act (the "RP plaintiffs").

They have fared no better. Defendants secured summary judgment in a group of "test cases" based on a failure to show antitrust injury. (SPA-120-121). The remaining RP plaintiffs then sought a different approach, proposing to show harm to each plaintiff through a complex "matching process." (SPA-122-124). A subset of 28 RP plaintiffs compared their customer data with over a decade of customer data from five of the largest "favored purchasers" in an effort to show a substantial number of transactions lost to favored purchasers possibly as a result of

[1] PBMs manage the prescription drug benefit offered by healthcare insurers as part of a health care insurance policy. *See, e.g., In re Pharm. Indus. Average Wholesale Price Litig.*, 230 F.R.D. 61, 71-75 (D. Mass. 2005) (describing how PBMs function).

alleged price discrimination. (SPA-124). The RP plaintiffs predicted that ten years of data would show "millions of lost customers." (A-2576). It did not. For all of the defendants, including the remaining defendants, Johnson & Johnson ("J&J"), Caremark, L.L.C. ("Caremark"), and Express Pharmacy Services of PA, L.L.C. ("Express Pharmacy"), the RP plaintiffs had little to nothing to show from this exercise. On average, retail pharmacies fill 22,000 to 28,000 BNPD prescriptions annually. (SPA-126-127). For J&J, each RP plaintiff involved in the matching process may have lost at most approximately .0005% to .07% of total annual BNPD transactions to a favored purchaser. For Caremark, one of the favored purchasers, no summary of transactions allegedly lost by the 28 RP plaintiffs and gained by Caremark was presented to the district court. For Express Pharmacy, no evidence or argument was presented at all.

After carefully reviewing all of the RP plaintiffs' evidence, including the matching data, the district court determined that, at best, a "de minimis" number of customers and transactions may have been lost (SPA-129), and that this was insufficient to establish "competitive injury" or "antitrust injury." (SPA-134-143). Accordingly, the district court granted summary judgment to the five BNPD manufacturer defendants and defendants Caremark and Express Pharmacy on all of

the RP plaintiffs' remaining claims under the Robinson-Patman Act ("RP Act"). (SPA-146).[2]

The RP plaintiffs in this appeal are 24 of the 28 plaintiffs that participated in the matching process (SPA-124-125), but all of the remaining RP plaintiffs that did not participate in the matching process have stipulated to be bound by this appeal. (SA-1-6; A-59). J&J, Caremark, and Express Pharmacy are the only remaining defendants-appellees. Twenty-four of the RP plaintiffs that participated in the matching process individually assert claims against J&J under Sections 2(a) and 2(d) of the RP Act. The other four RP plaintiffs that participated in the matching process have voluntarily dismissed all of their claims against J&J, Caremark, and Express Pharmacy because they could not identify a single matched customer. (SPA-126; A-2820-2823). The RP plaintiffs also assert derivative claims under Section 2(f) of the RP Act against Caremark and Express Pharmacy.

I. THE MULTI-DISTRICT LITIGATION AND THE INITIAL ROBINSON-PATMAN TEST CASES

A. Proceedings in the Northern District of Illinois

In the early 1990s, with the rise of "managed healthcare," retail pharmacies launched an attack on BNPD manufacturers over their pricing practices. In addition to several class-action complaints alleging a price-fixing

[2] The RP plaintiffs settled and voluntarily dismissed their claims against the four other drug manufacturer defendants in this litigation since filing their Notice of Appeal. (Br. at 4, n.3).

conspiracy in violation of the Sherman Act, approximately 3,700 "opt-out" independent retail pharmacies filed their own lawsuits (A-2574; SPA-118-119), asserting claims under the RP Act. (A-89-90). Plaintiffs in these cases alleged that BNPD manufacturers were granting discounts and rebates to PBMs and other favored purchasers while denying retail pharmacies comparable discounts and rebates.

BNPD manufacturers responded that PBMs and other so-called favored purchasers are able to extract discounts and rebates because of their ability to deny a manufacturer access to a PBM's formulary, and otherwise influence utilization of a manufacturer's brand-name drug. *See, e.g.*, *In re Brand Name Prescription Drugs Antitrust Litig.*, 186 F.3d 781, 787-88 (7th Cir. 1999) (Posner, J.) ("[A] hospital, nursing home, or HMO or other managed-care enterprise [in contrast to a pharmacy] has a more elastic demand because it can influence (for example through a 'formulary,' a list of approved or recommended drugs) the physician's choice of which brand (or no brand--a generic) to prescribe.").

Retail pharmacies, on the other hand, simply fill the prescription for a brand-name drug written by a doctor and have little ability to influence sales of that drug. *Id.* As a result, retail pharmacies do not typically get discounts or rebates. *Id.* To the extent there is a discount or rebate on a brand-name drug

dispensed by a retail pharmacy, that discount or rebate would go to the ultimate third-party payor – the PBM or healthcare insurer.

These cases were consolidated for pretrial purposes as a multi-district litigation in the Northern District of Illinois. (SPA-119). A class was certified in 1994, and, after class plaintiffs presented eight weeks of evidence of an alleged conspiracy among manufacturers to deny discounts or rebates to retail pharmacies in violation of Section 1 of the Sherman Act, Judge Kocoras entered a directed verdict in the manufacturer defendants' favor. (SPA-119). The Seventh Circuit affirmed that decision.[3] *See In re Brand Name Prescription Drugs Antitrust Litig.*, 186 F.3d 781, 784-88 (7th Cir. 1999), *reh'g denied*, 1999 U.S. App. LEXIS 18748, *cert. denied*, 528 U.S. 1181 (2000).

Pursuant to a case management order issued by Judge Kocoras known as "Pretrial Order No. 5" (SPA-120; A-62-88), 20 of the RP plaintiffs and 5 of the manufacturer defendants were designated to participate in "test cases" of the RP Act claims. This was done to provide "some pattern or some prediction of what

[3] While affirming the district court's decision on the broad conspiracy argument, the Seventh Circuit remanded the case to determine whether there was a triable issue regarding whether the BNPD manufacturers agreed to peg future price increases to the Consumer Price Index ("CPI"). On remand, the district court ultimately dismissed this remaining claim. *See In re Brand Name Prescription Drugs Antitrust Litig.*, MDL No. 997, 2000 U.S. Dist. LEXIS 1750, *14-15 (N.D. Ill. Feb. 9, 2000). Class plaintiffs did not appeal.

might happen if the other cases went to trial." (A-405-406). Discovery relating to these test cases proceeded as part of the MDL.

B. Proceedings in the Eastern District of New York

Following the conclusion of the class case, the RP plaintiffs' cases were remanded and consolidated in the Eastern District of New York. (SPA-119-120). The cases were assigned to Judge Glasser and Magistrate Judge Gold. After the designated RP plaintiffs had full discovery in the test cases, the designated defendants moved for summary judgment on a number of different grounds. (SPA-1-3; SPA-120).

On January 25, 2007, Judge Glasser granted summary judgment, finding that the designated RP plaintiffs had "failed to show they are entitled to damages." (SPA-59-81). The district court found that the RP plaintiffs' expert relied upon the discredited theory of "automatic damages," whereby the plaintiffs' injury and damages are inferred merely from a showing of price discrimination and general market evidence. (SPA-68; SPA-70). Judge Glasser found this evidence inadequate because "[u]nder the Robinson-Patman Act, plaintiffs must carry their burden of proof to demonstrate that they individually suffered damages . . . [but] here, plaintiffs have failed to proffer evidence that specific plaintiff pharmacies lost sales of BNPDs manufactured by defendants to any specific favored purchaser."

(SPA-74-75). Moreover, the designated plaintiffs failed to account for intervening market factors. (SPA-76-78).

Judge Glasser subsequently dismissed the designated RP plaintiffs' claims for injunctive relief (SPA-84-117), finding that having failed to show any actual injury, "the Designated Plaintiffs cannot now seek a second bite at the proverbial apple under the guise of equitable relief." (SPA-112). The district court also ordered dismissal of the designated RP plaintiffs' Section 2(d) claims on October 6, 2008. (A-397).

II. THE REMAINING RP PLAINTIFFS' ATTEMPTS TO SHOW LOST TRANSACTIONS TO FAVORED PURCHASERS

A. The RP Plaintiffs' Initial Attempts to Show "Lost Customers"

The remaining RP plaintiffs rejected the premise that the test cases should serve as a guide to resolving the remaining cases (A-1578; A-581), which was clearly the purpose behind Pretrial Order No. 5. (A-62-70). Instead, the RP plaintiffs embarked on a new approach contending that they would show harm to each RP plaintiff. (*See*, *e.g.*, A-471; A-401; A-1620).

The RP plaintiffs initially proposed using interrogatory responses from each RP plaintiff that would identify specific customers that were lost possibly as a result of the drug manufacturers' discounts to favored purchasers. (A-1604-1605). This plan was a failure. After more than six months, hundreds of

the remaining RP plaintiff pharmacies did not respond (A-420-421), and many of those that did respond provided no information about lost customers. (*See, e.g.*, A-1313-1336). As a result, the RP plaintiffs changed course. They proposed identifying allegedly lost transactions by pursuing discovery from third-party "computer vendors," such as I.M.S. Health. (A-431-432; A-1617-1618). The district court granted this request for additional third-party discovery (A-431), but the RP plaintiffs ultimately abandoned this approach as well. (A-2877-2878; *see also* A-2783 ¶¶ 34-37).

B. The Matching Process

Two years after summary judgment in the RP test cases, the remaining RP plaintiffs proposed a matching process "designed to determine the universe of potentially lost customers that Plaintiffs claim they lost as a result of the pricing practices of Defendants." (SPA-123-124). Specifically, the RP plaintiffs sought to identify customers that had stopped purchasing drugs at their pharmacies and had subsequently bought the same drugs from one of the "favored purchasers." (A-464-473). The RP plaintiffs contended the number of matches would be so significant that "any motion practice" challenging their ability to make out a prima facie RP Act claim would be "obviated." (A-596-597).

The RP plaintiffs subpoenaed five "favored purchasers" to participate in the matching process: Caremark, L.L.C., Advance PCS, Express Scripts (not to

be confused with Express Pharmacy), Medco, and Omnicare. (A-464; A-312). Four of these favored purchasers are PBMs with some mail-order capacity.[4] Omnicare is a "long-term care provider." (A-464). The RP plaintiffs contend that retail pharmacies lose substantial sales to mail-order pharmacies owned or controlled by PBMs and to entities such as Omnicare that manage prescription drugs dispensed at nursing homes and other long-term care facilities.[5]

For the vast majority of the RP plaintiffs, the matching process never got off the ground because they could not identify even a single lost customer, regardless of where the customer may have gone. As a result, 3,101 of the RP plaintiff pharmacies filed stipulations of dismissal. (A-174-307). Of the 831 remaining RP plaintiff pharmacies (A-1262), 30 were selected at random to participate in the RP plaintiffs' proposed matching process. (A-565). This number was later reduced to 28 after two of them dropped out of the litigation. (A-1310-1311; SPA-125).

The matching process proceeded as follows: First, the 28 RP plaintiffs identified 164,501 customers who allegedly ceased filling prescriptions at

[4] Mail-order pharmacies, like retail pharmacies, purchase BNPDs from wholesalers and manufacturers and dispense them to patients presenting a valid prescription.

[5] AdvancePCS was acquired by Caremark Rx, Inc. (n/k/a Caremark Rx, L.L.C.), in March 2004. It has at all times remained a distinct entity from Caremark, L.L.C. Plaintiffs never named AdvancePCS as a defendant.

their pharmacies. (A-1401 n.1). They also identified certain drugs that can be used for chronic conditions as the drugs to be used for the matching analysis, as well as certain alleged therapeutic alternatives for those drugs. (A-2787 ¶ 49; A-1403; A-544-549). They then identified the customers who had purchased any of the specified drugs from one of the 28 RP plaintiffs and the last-fill date for each drug. (A-1403). That data was then compared to data from the favored purchasers for the years 1998 to 2010. (A-1404-1405). The date ranges of data available from the favored purchasers varied, but the five favored purchasers each provided an average of approximately 10.4 years of data. (A-1405).

A "matched customer" was someone who had filled a prescription for one of the specified drugs or its therapeutic alternative[6] via one of the favored purchasers' mail-order pharmacies (or Omnicare) within six months after their last fill of that drug at one of the 28 RP plaintiff pharmacies. (SPA-125; A-2792 ¶ 67;

[6] The inclusion of therapeutic alternatives was just one of the many reasons the matching process overstates the number of potential "lost customers." If a customer filled a J&J drug at a plaintiff pharmacy, and then switched to filling a therapeutic alternative of that drug (made by a different drug manufacturer) at a mail-order pharmacy, there is no basis for the RP plaintiffs to attribute this "lost customer" to J&J's pricing practices, but that is precisely what the RP plaintiffs' matching protocol purports to do.

A-1403). Each matched customer's fills of that drug at the favored purchaser were counted as a matched transaction.[7] (A-1403).

C. The Matching Results and Summary Judgment

In proposing the matching process, the RP plaintiffs assured the district court that "at the end of the day we're going to have some material number [of matches] that isn't going to be three for a pharmacy, or five for a pharmacy." (A-2669); (*see also* A-2625) (agreeing that the case would have a "very different complexion" if the matching process showed just 45 customer matches for each RP plaintiff). The RP plaintiffs predicted that this matching process would show "millions of lost customers . . . and millions more lost transactions." (A-2576); (*see also* A-597) (expressing confidence that the RP plaintiffs could identify "millions" of potential lost transactions).

Throughout the two-and-a-half year matching process, the district court repeatedly instructed the RP plaintiffs to gather all of the evidence upon which they intended to rely in order to make out their prima facie case. (A-353; A-2882). In fact, after the parties had gathered and analyzed the matching data and

[7] RP plaintiffs demanded inclusion of so-called "near matches," which would count certain customers as a "match" notwithstanding discrepancies in the name or gender between the customer information provided by the RP plaintiffs and the favored purchasers. (A-1295-1297). Although this demand was contrary to the agreed-upon matching protocol, defendants counted these "near" matches for purposes of their summary judgment motion. (SPA-125, n.7).

the results were clear, the district court once again afforded the RP plaintiffs an opportunity to take additional discovery and submit further expert reports as part of a prima facie case. (A-341-345). They declined to do so. (SPA-124). The court also made clear that once motions for summary judgment were submitted, the RP plaintiffs would not be able to rely on "speculation about what additional discovery might reveal." (A-335-337).

The RP plaintiffs' predictions of "millions" of lost transactions were well off the mark. The matching process showed a trivial amount of matches for all of the manufacturer defendants' drugs.[8] Defendants then moved for summary judgment.

On August 16, 2012, the district court granted summary judgment for the manufacturer defendants, Caremark, and Express Pharmacy, dismissing all of the RP plaintiffs' claims.[9] The district court noted that the effect of the manufacturer defendants' pricing practices "has been carefully measured" by the

[8] Not only were these results insubstantial, a "match" at most identifies only a lost customer or lost transaction but not why the customer filled a prescription elsewhere. These matched customers could have switched where they fill a prescription for this particular drug for a variety of other reasons that are entirely independent of alleged price discrimination, such as the customer's preference for mail order delivery, the customer moving, the customer changing health plans due to a job change, or a myriad of other reasons.

[9] The parties consented to have the defendants' motion for summary judgment decided by Magistrate Judge Gold. (A-1466-1476).

matching process, "and the results undermine any contention that plaintiffs have suffered any significant loss of sales" (SPA-137), because the matching process had identified only a "*de minimis*" number of lost customers and transactions (SPA-129; SPA-141).

In granting defendants' motion, Magistrate Judge Gold noted that the average loss of transactions per year represented only one quarter of one percent of the average retail pharmacy's sales of BNPDs per year, and the court found that the results were even less significant when considered on the necessary defendant-specific and plaintiff-specific basis. (SPA-127-128). In short, "no matter how analyzed, the matching process identified only a de minimis" number of potentially lost customers and transactions. (SPA-129). Given this showing, there was insufficient evidence to establish competitive injury or antitrust injury. (SPA-134-143). The *de minimis* number of "matched" customers and transactions failed to show a substantial effect on competition. (SPA-141). It also "undermin[ed] any inference that price advantages enjoyed by favored purchasers caused plaintiffs' injury." (SPA-142-143).

The district court additionally held that while the RP plaintiffs had invoked the *Morton Salt* inference as an alternative means of demonstrating competitive injury, any inference had been "rebutted." (SPA-138-140). The

"extensive, costly and time-consuming" matching process had "essentially come up empty," rebutting any possible inference. (SPA-139-140).

1. Defendant-Appellee Johnson & Johnson

J&J was one of the five manufacturer defendants that moved for summary judgment. The results of the matching process for J&J drugs were particularly meager, as seen in this chart summarizing the RP plaintiffs' uncorrected[10] matching data for J&J.

[10] The defendants argued below that certain necessary corrections needed to be made to the RP plaintiffs' matching data, but for purposes of summary judgment the defendants and Magistrate Judge Gold relied on the RP plaintiffs' "uncorrected" data. (SPA-125 n.7).

Summary of Uncorrected Plaintiff Matching Results
Johnson & Johnson

Pharmacy	Matched Customers	Average Matched Customers per Year*	Matched Transactions	Average Matched Transactions per Year*
249 Dee-Car Inc./Medical III Pharmacy**	0	0.0	0	0.0
561 Matthew E. Leon/West End Pharmacy**	0	0.0	0	0.0
566 Waschko's Pharmacy, Inc.**	0	0.0	0	0.0
109 Ackal's Iberia Pharmacy	1	0.1	1	0.1
214 Lively Drug Co., Inc.	1	0.1	4	0.4
369 Maple Avenue Pharmacy Inc.**	1	0.1	0	0.4
415 Thrifty Drug Store, Inc.	1	0.1	1	0.1
435 Creech Drug Co., Inc.	1	0.1	1	0.1
445 Family Prescription Center, Inc.	1	0.1	3	0.3
501 J. T. Lindsey/Omega Pharmacy	1	0.1	1	0.1
389 Northpark Phamacy, LTD./Acadiana East Pharmacy	2	0.2	4	0.4
461 Harrah Pharmacy, Inc.	2	0.2	11	1.1
105 Pelta Drug, Inc./James Pharmacy	3	0.3	37	3.5
420 Miller Drugs, Inc.	3	0.3	17	1.6
410 Collinwood Drugs	3	0.3	10	1.0
33 Monroe Pharmacy, Inc.	5	0.5	33	3.2
282 Cash & Hendersn Drugs, Inc.	5	0.5	19	1.8
764 Marjorie H. Lamar/Madison Drug Co	6	0.6	19	1.8
406 Rickman & Haile, Inc./Perkins Drugs	7	0.7	24	2.3
516 Discount Drugs of Ellijay, GA, Inc/Valu-Rite	7	0.7	11	1.1
211 David W. Garber/Fishburne Pharmacy	9	0.9	24	2.3
36 Triangle Pharmacy, Inc.	10	1.0	28	2.7
671 R.H. Moore Drug Co of Franklin, Inc.	11	1.1	41	3.9
850 The Troutman Drug Co.	14	1.3	56	5.4
63 Graves Drug Store Emporia, Inc.	15	1.4	52	5.0
330 Klein's Pharmacy & Orthopedic Appliances	26	2.5	126	12.1
160 Feldman, Inc./Drug Center of Newtown	28	2.7	150	14.4
717/18 Pharma-Card	221	21.2	124	11.9

*Calculated based on an average of 10.4 years of data received from PBMs.
**Pursuant to a Stipulation and Order of Dismissal, these plaintiff pharmacies dismissed their claims against J&J. (A-2820-2823).

(A-1431).[11]

[11] As discussed on pp. 18-20, *infra*, the fact that the number of Plaintiff Pharma-Card's alleged matched customers exceeded its matched transactions is because, in violation of the matching-process protocol, it manually added customers after the matching process was completed. (SPA-129 n.12). As the district court noted:

J&J had among the lowest number of matches of the manufacturer defendants. (A-1419). For J&J, 22 of the 28 Plaintiffs (79%) had ten or fewer matched customers over the entire 10.4 year period, translating to fewer than one potentially lost customer per year, on average.[12] (A-1431). Three of the RP plaintiffs had no matched customers at all.[13] (*Id.*). With the exception of Pharma-Card, the other pharmacies had fewer than three potentially lost customers per year. (*Id.*). The matching process ultimately revealed that only 384 "lost customers" across all 28 RP plaintiffs over 10.4 years could be attributed to J&J. (A-1419; A-1431).

In terms of the number of "lost transactions" the district court relied on evidence that independent pharmacies such as the RP plaintiffs fill on average 22,000-28,000 BNPD prescriptions per year. (SPA-126-127). Thus, the matching

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"Pharma-Card identified a total of 1,669 lost transactions through the matching process. I presume that the number of claimed lost transactions is smaller than the number of lost customers [of 2,586] because lost transactions were determined solely from the matching process and not manually supplemented." (*Id.*) (citations omitted).

[12] The chart of the matching results in the district court's decision actually understates the percentage of pharmacies with "10 or less lost customers." (SPA-128). Twenty-two of the 28 RP plaintiffs that participated in the matching process had 10 or fewer lost customers, which is 79%, not 64%. (A-1431). The district court appears to have mistakenly omitted the four RP plaintiffs that had zero matches for J&J.

[13] The RP plaintiffs' data inexplicably showed Plaintiff Maple Avenue Pharmacy as having one matched customer but zero matched transactions for J&J. (A-1431).

process revealed that the J&J "lost transactions" accounted for at most approximately .0005% to .07% of an RP plaintiff's total annual BNPD transactions. (A-1431).[14]

2. Defendants-Appellees Caremark and Express Pharmacy

Caremark was one of the five "favored purchasers" whose data was used in the matching process. The results for Caremark were equally small:

> Looking simply at uncorrected customer matches each year as to Caremark, without further disaggregating by manufacturer Defendant, 9 of the 28 pharmacy Plaintiffs had fewer than ten matches associated with Caremark. Of the remaining 19 pharmacies, 10 had between 11 and 35 claimed lost customers to Caremark. Disaggregating by manufacturer Defendant, the highest number of uncorrected matches to Caremark data for any pharmacy Plaintiff (Klein's Pharmacy) is 83 matched customers for all drugs sold by one manufacturer, over the entire ten-year period.

(A-1402 n.6). In other words, the highest number of potential customers that any pharmacy "lost" to Caremark for any one manufacturer defendant's drugs is just 83 over the ten year period, or 8.3 per year.

Plaintiffs presented no evidence or argument concerning Express Pharmacy.

[14] Based on average matched J&J transactions per year for RP plaintiff pharmacies, ranging from a low of 0.1 to a high of 14.4 (A-1431), out of 22,000 annual BNPD prescription fills.

3. Plaintiff-Appellant Pharma-Card

Pharma-Card Prescription Services ("Pharma-Card") was one of the 28 RP plaintiffs selected for the matching process. Pharma-Card's complaint describes it as a "local pharmacy which sells . . . drugs to the public." (A-1351). But Pharma-Card's affidavit claims that it also operates as a PBM, rather than simply as a retail pharmacy. (A-2027; Br. at 53). Moreover, unlike the other RP plaintiffs, Pharma-Card has 14 different retail locations. (A-2027; Br. at 53).

The matching results for Pharma-Card from the data provided by the favored purchasers produced few matches. The RP plaintiffs then manually added thousands of customers to the final matching results for Pharma-Card, notwithstanding that most of the added customers had already been included in the matching process and had not matched. (SPA-129; A-1405-1406; A-2805 ¶ 90-91).

These manual additions did not produce a meaningful number of potential lost customers. For J&J, Pharma-Card purported to have 221 total customer matches, which amounts to only 21.2 average potentially lost customers per year (A-1431), but 198 of these "matched customers" were manually added. (A-1440). Moreover, this was across 14 different retail locations. (SPA-129; A-2027). Based on its manual additions, Pharma-Card had, on average, only 11.9

matched J&J transactions per year across its 14 locations – this amounts to roughly one transaction per store per year. (A-1431).

As for Caremark, Pharma-Card offered some computer screen print-outs but no analysis showing what number of the manual additions involved sales allegedly lost to Caremark. (A-2066-2131). A review of those print-outs shows that very few involved Caremark. (*See* Br. at 54, citing A-2027-2028 ¶ 9, which cites to A-2066-2131). The pages also show that for many of the prescriptions that Pharma-Card did not refill, the reason the customer did not get a refill was not that the customer decided to buy the prescription for less elsewhere, but because no refill was permitted by any pharmacy. (*See, e.g.*, A-2069 ("Mandatory generic"); A-2074 ("Contraindicated if pregnant"); A-2075 (indicating "overuse" and that the prescription was filled at another pharmacy); A-2112 ("Maximum number of fills is 3.000 per lifetime")). This explains why these customers did not show up in the matching process and should not have been added by the RP plaintiffs. In any event, across all five manufacturer defendants, Pharma-Card identified a total of 228 transactions over a ten-year period at its 14 locations allegedly lost to Caremark. (A-2030-2050). This amounts to an average of just 1.6 transactions per store per year for all manufacturer defendants' drugs, or an average of 0.3 transactions per manufacturer, per store, per year.

The RP plaintiffs included the manually added Pharma-Card customers in opposing defendants' summary judgment motion. The district court noted that even including all of the manually added Pharma-Card "lost customers" the results would be "18 customers per year at each of its locations" for all of the manufacturer defendants' drugs and would not alter the outcome. (SPA-129).

SUMMARY OF THE ARGUMENT

There is no procedural or substantive basis on which to overturn the district court's summary judgment ruling. The district court did not restrict the proof that the RP plaintiffs could present on any issue, including competitive injury. The district court gave the RP plaintiffs every opportunity to develop a prima facie case. Their failure to do so speaks to the merits of their claims rather than any unfairness in the court below.

On the merits, there is no dispute that demonstrating injury to competition requires that the alleged price discrimination "affect *substantially* competition" between each RP plaintiff and the favored purchasers. *See Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 180 (2006) (emphasis added). Private plaintiffs seeking damages in antitrust actions must also show antitrust injury – an actual injury caused by the alleged violation. The RP plaintiffs failed to satisfy either element. Their much-heralded matching process

showed only a *de minimis* number of customers that might have potentially been lost as a result of alleged price discrimination. (SPA-129).

On appeal, the RP plaintiffs do not challenge the results of the matching process. Instead, they argue that in the case of J&J, showing a retail pharmacy lost .0005% to .07% of its annual BNPD transactions to a favored purchaser "affects substantially competition." The RP plaintiffs contend that the term "substantially" relates to the size of the price differential rather than whether the amount of diverted or lost sales was substantial. This misreads the holding in *Volvo* and is not supported by any authority. Nor does it make any sense. A "substantial" price difference would have no effect on competition if the favored purchaser does not pass the discount on to its customers or otherwise use that differential to divert sales away from the plaintiff. It is only when the price differential – regardless of its size – causes a loss of sales that competition has been adversely affected, and the Supreme Court in *Volvo* has made clear that the impact must be substantial.

The rebuttable inference of competitive injury articulated in *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948), does not save the RP plaintiffs' claims. As the district court held, any inference under *Morton Salt* was "rebutted" by the *de minimis* matching results, which conclusively showed no substantial effect on competition even arguably attributable to defendants' alleged pricing. (SPA-140).

The RP plaintiffs asserted below that the matching process would produce large numbers of lost customers and transactions, "obviating any motion practice" on their ability to make a prima facie case. (A-596-597). The *de minimis* results of the matching process destroyed that argument, leaving the RP plaintiffs with no evidence of any actual injury caused by defendants' conduct.

The RP plaintiffs also ignore the highly individualized nature of RP Act claims. The RP plaintiffs' brief fails to identify any evidence that is specific to J&J, Caremark, or Express Pharmacy that would support a finding of either competitive injury or antitrust injury.

Finally, the RP plaintiffs challenge the district court's dismissal of their claims for equitable relief and under Sections 2(d) and 2(f), solely on the grounds that the district court erred in finding no competitive injury or antitrust injury. (Br. at 55-56). The district court's rulings on these issues were correct, and summary judgment on all of the RP Act claims should be affirmed.

ARGUMENT

I. STANDARD OF REVIEW

Courts should grant summary judgment "when, after drawing all reasonable inferences in favor of the party against whom summary judgment is sought, no reasonable trier of fact could find in favor of the nonmoving party."

H.L. Hayden Co. v. Siemens Med. Sys., Inc., 879 F.2d 1005, 1011 (2d Cir. 1989) (citations omitted).

Where, as here, the party moving for summary judgment does not bear the burden of proof at trial, the movant can meet its burden on summary judgment by showing "that there is an absence of evidence to support the nonmoving party's case." *PepsiCo., Inc. v. Coca-Cola Co.*, 315 F.3d 101, 105 (2d Cir. 2002) (citations omitted). The district court's decision granting summary judgment is reviewed *de novo*. *Am. Banana Co., Inc. v. J. Bonafede Co., Inc.*, 407 F. App'x 520, 522 (2d Cir. 2010).

There are three additional principles that are relevant here. First, summary judgment is "particularly important in antitrust litigation to prevent lengthy and drawn-out litigation that has a chilling effect on competitive market forces." *Capital Imaging Assocs. v. Mohawk Valley Med. Assocs., Inc.*, 996 F.2d 537, 541 (2d Cir. 1993) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-88, 593-94 (1986)).[15]

Second, courts should apply a narrow construction of the RP Act, and construe it in a manner "consistent[] with broader policies of the antitrust laws." *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 181 (2006)

[15] *See also Am. Banana Co.*, 407 F. App'x at 522 (citing *PepsiCo.*, 315 F.3d at 104).

(quoting *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 220 (1993)); *see also Toledo Mack Sales & Serv. v. Mack Trucks, Inc.*, 530 F.3d 204, 227 (3d Cir. 2008) ("[*Volvo*] indicated that the RPA should be narrowly construed"). Courts should avoid broad constructions that "extend beyond the prohibitions of the [RP] Act," which the Supreme Court has noted could "give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation." *Automatic Canteen Co. of Am. v. FTC*, 346 U.S. 61, 63 (1953). As the RP plaintiffs concede, the Act has been extensively criticized by both commentators and the Supreme Court.[16] (Br. at 1, 15-16).

Lastly, this is not a class action, and the RP plaintiffs may not treat themselves or the defendants as undifferentiated groups. *Drug Mart Pharmacy Corp. v. Am. Home Prods. Corp.*, 378 F. Supp. 2d 134, 139 (E.D.N.Y. 2005) (holding each RP Act plaintiff "must proffer individualized proof . . . as against each defendant."); *The Intimate Bookshop, Inc. v. Barnes & Noble, Inc.*, No. 98

[16] *See, e.g.*, Henry J. Friendly, *The Gap in Lawmaking-Judges Who Can't and Legislators Who Won't*, 63 COLUM. L. REV. 787, 793-94 (1963) ("From the outset, [the Act] was recognized to be a badly drafted statute which would impose serious interpretive problems on industry, the Federal Trade Commission, and the courts."); ROBERT H. BORK, THE ANTITRUST PARADOX 382 (1978) (referring to the "Robinson-Patman Act [as] the misshapen progeny of intolerable draftsmanship coupled to wholly mistaken economic theory"); *FTC v. Fred Meyer, Inc.*, 390 U.S. 341, (1968) (Harlan, J., dissenting) ("[T]he statute imposes a hodgepodge of confusing, inconsistent, and frequently misdirected restrictions.") (citations omitted); *Automatic Canteen Co. v. FTC*, 346 U.S. 61, 65 (1953) ("[P]recision of expression is not an outstanding characteristic of the Robinson-Patman Act.").

Civ. 5564 (WHP), 2003 U.S. Dist. LEXIS 17231, at *25 n.5 (S.D.N.Y. Sept. 30, 2003) (faulting plaintiff for failing "to disaggregate the effect and contribution of each defendant's unlawful conduct"). Each plaintiff must make out a prima facie RP Act claim against each defendant, and the Court must consider each RP plaintiff's claims separately. *See FTC v. A.E. Staley Mfg. Co.*, 324 U.S. 746, 753 (1945) (noting that the RP Act "places emphasis on individual competitive situations."); *Chawla v. Shell Oil Co.*, 75 F. Supp. 2d 626, 653-54 (S.D. Tex. 1999) (noting an RP Act "case must be analyzed from the perspective of each Plaintiff separately").

Accordingly, only evidence as to J&J, Caremark, and Express Pharmacy is relevant here – a proposition the RP plaintiffs' opening brief ignores. *Cont'l Baking Co. v. Utah Pie Co.*, 396 F.2d 161, 177 (10th Cir. 1968) (noting each defendant is liable for only its own RP violations); *see also Intimate Bookshop*, 2003 U.S. Dist. LEXIS 17231, at *25 n.5 (citing *American Booksellers Ass'n, Inc. v. Barnes & Noble, Inc.*, 135 F. Supp. 2d 1031, 1039-40 (N.D. Cal. 2001) (criticizing the plaintiffs' damage model for failing to show that "receipt of a discount from any particular publisher caused injury to any plaintiff."); *Cnty. Theatre Co. v. Paramount Film Distrib. Corp.*, 146 F. Supp. 933, 934 (E.D. Pa. 1956) ("[A]ctions against the various defendants under [the RP] Act involve

different transactions and subject matter and should properly be brought against each defendant individually.").

II. THE DISTRICT COURT PROPERLY CONSIDERED PLAINTIFFS' EVIDENCE

A. The District Court Did Not Improperly "Restrict" the Evidence That the RP Plaintiffs Could Present

The district court did not "restrict" the proof that the RP plaintiffs could present on competitive injury. (Br. at 25 n.16, 28-32). In fact, the court specifically instructed the RP plaintiffs to gather all of their evidence and gave them the opportunity to gather any additional evidence they might want to support their claims (*see, e.g.*, A-342-345; A-352-353; A-2882), but they "never did so." (A-2882; SPA-124); (*see also* A-350) (inviting the RP plaintiffs to pursue expert reports, which they declined to do).

The August 8, 2011 stipulation to which the RP plaintiffs were signatories squarely refutes the RP plaintiffs' suggestion that the matching process was devised solely to determine whether the RP plaintiffs could show "damages," rather than whether the results could be used to show the absence of competitive injury. (Br. at 10-11, 30-31). The Stipulation expressly states that the parties disagreed about the sufficiency of the matching results and whether the RP plaintiffs had "sufficient evidence to make out prima facie claims pursuant to the Robinson-Patman Act." (A-314). The stipulation provided for summary judgment

briefing "[t]o facilitate the prompt and efficient resolution of this threshold issue." (*Id.*).

The fact that the matching process was understood as a mechanism to test the viability of the RP plaintiffs' claims before undertaking more extensive, time consuming, and costly discovery was also confirmed repeatedly at hearings before the district court. (*See, e.g.*, A-1634; A-1516; A-1637; A-1644-1645). For example, after the matching process was completed, the RP plaintiffs' counsel stated to the court that "[w]e never, never agreed or understood that this would be all the evidence that could be produced to show injury to competition and anti-trust injury." (A-347). An exasperated court replied that "that begs the question . . . of why that other evidence was not gathered during the two years of fighting about matching data protocol because I don't know what - - do you want another two years for that data?" (*Id.*). The RP plaintiffs' counsel replied, "No, sir." (*Id.*).

B. Supplemental Affidavits Were Properly Rejected

As noted above, Magistrate Judge Gold made it clear to the RP plaintiffs that they should gather all the evidence upon which they intended to rely (A-353; A-2882), and that once motions for summary judgment had been submitted, the RP plaintiffs should not rely on "speculation about what additional discovery might reveal" (A-337); (*see also* A-335-337; A-347; A-352-354; A-2882).

Notwithstanding this admonition, after defendants moved for summary judgment, the RP plaintiffs sought to supplement the results of the matching process, filing affidavits purportedly identifying additional "lost customers." (A-1694-2570).

The district court properly rejected this tactic, citing the Parties' August 8, 2011 Stipulation. (SPA-130). Supplementing the matching process with additional "lost customers" contravened the express language in the stipulation that the matching process would determine "***the universe*** of potential lost customers that Plaintiffs claim they lost." (*Id.*).

The district court further held that the supplemental affidavits were "not properly considered as evidence of plaintiffs' lost sales." (*Id.*). These affidavits failed to identify the specific customers that were lost or to which favored purchaser they were lost, and they provided no explanation why these "lost customers" were not identified through the matching process. (SPA-130). Moreover, they were untimely, as these names should have been disclosed in initial interrogatory responses or, at the latest, when the customer lists used in the matching process were due. (A-420; A-475-76).

C. The Evidence from RP Plaintiff Pharma-Card Was Considered and Found Inadequate

The RP plaintiffs additionally argue that the district court "wrongly refused to consider" much of the evidence presented by Pharma-Card. (Br. at 54).

This is incorrect in two respects. First, the manual supplementation was improper. The district court correctly held that the RP plaintiffs had offered "no convincing explanation for the failure of the matching process to identify the [added] lost customers," and this attempt to manually supplement contravened the terms of the Parties' August 8, 2011 Stipulation about the matching process. (SPA-130).

Second, the district court nonetheless did consider the Pharma-Card evidence and found: (1) Pharma-Card submitted over 2,000 of these manually-added lost customers to the matching process and only 5 were identified as having matched; (2) Pharma-Card nonetheless manually added these thousands of customers who did not match to the matching results; and (3) even if those manual additions were taken into account, they showed an insubstantial number of potential lost customers at each of Pharma-Card's 14 separate retail locations. (SPA-129, n.12).

There are three additional reasons why the Pharma-Card data does not create a triable issue of fact as to injury to competition or antitrust injury. First, the Pharma-Card documents consist of little more than lists of claimed lost customers, which provide virtually no information as to whom the customers purportedly switched, much less that they switched to one of the favored purchasers. (A-2030-2050). Second, as the RP plaintiffs admit, a "large portion" of the purportedly "lost" customers went to a PBM that the RP plaintiffs chose not to include in the

matching process (Br. at 54; SPA-130 n.13). Thus, these new "lost" customers were outside the agreed upon matching protocol. (SPA-130, n.13). Finally, Pharma-Card claims that it is not only a retail pharmacy but also a PBM (A-2027; Br. at 53), which introduces an entirely new theory into the case about one PBM losing customers to other PBMs, which is outside the scope of its complaint. (A-1351; A-1378-1385).

* * *

For all of these reasons the district court rulings as to the infirmities of the RP plaintiffs' evidence were well-founded and should be affirmed.

III. THE DISTRICT COURT CORRECTLY HELD THAT THE EVIDENCE DID NOT SHOW INJURY TO COMPETITION

Injury to competition is a requisite element of a Section 2(a) claim.[17] *See George Haug Co. v. Rolls Royce Motor Cars Inc.*, 148 F. 3d 136, 141 (2d Cir. 1998). The evidence presented on summary judgment failed to satisfy that element. (SPA-137-141).

[17] Section 2(a) provides, in relevant part, "It shall be unlawful for any person engaged in commerce . . . to discriminate in price between different purchasers of commodities of like grade and quality, . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . . ." 15 U.S.C. § 13(a).

The Supreme Court has made clear that for "secondary line" RP Act cases such as this that involve alleged discrimination by a supplier to its customers, a "hallmark of the requisite competitive injury [for RP Act purposes] . . . is the diversion of sales or profits from a disfavored purchaser to a favored purchaser." *Volvo*, 546 U.S. at 177. Moreover, that price discrimination must "affect *substantially* competition between [plaintiff] and the 'favored' [purchaser]." *Id.* at 180 (emphasis added); *see also United Magazine Co., Inc. v. Murdoch Magazines Distrib.*, 279 F. App'x 14, 18 (2d Cir. 2008) (finding plaintiff must show price discrimination "of such magnitude as to affect substantially competition" between competitors); 15 U.S.C. § 13(a) (prohibiting price discrimination where the effect "may be *substantially* to lessen competition") (emphasis added).

Courts have regularly dismissed plaintiffs' Section 2(a) claims where, as here, plaintiffs have failed to show that the price discrimination "affect[ed] substantially competition." *See, e.g.*, *Volvo*, 546 U.S. at 180 (diversion of sale of twelve trucks that would have generated $30,000 in profit to plaintiff found insubstantial); *Boise Cascade Corp. v. FTC*, 837 F.2d 1127 at 1135, 1145 (D.C. Cir. 1988) (diversion of 162 accounts deemed "quite small" and insufficient to show displaced sales); *Chrysler Credit Corp. v. J. Truett Payne Co.*, 670 F.2d 575, 580-81 (5th Cir. 1982) (four percent drop in market share for one year period found insufficient for competitive injury); *Lupia v. Stella D'Oro Biscuit Co.*, 586 F.2d

1163, 1171 (7th Cir. 1978) (RP Act claim dismissed where "plaintiff has not alleged that its sales lost due to . . . price discrimination were more than 'de minim[i]s.'").

A. The Matching Process Demonstrated the Absence of Competitive Harm

The vast majority of the RP plaintiffs could not identify even a single potentially "lost" customer, and dismissed their claims as a result. For the remaining RP plaintiffs that did attempt to identify lost customers, the matching process demonstrated conclusively that the number of customers allegedly "lost" or "diverted" to a favored purchaser was trivial.

It was not surprising that the number of matches was trivial. To the extent a PBM like Caremark may receive a discount or rebate on a given drug, it is on all prescriptions for a BNPD, including prescriptions filled at retail pharmacies by consumers with a prescription drug benefits plan managed by the PBM. *See, e.g.*, *In re Pharm. Indus. Average Wholesale Price Litig.*, 230 F.R.D. 61, 71-74 (D. Mass. 2005) (discussing how PBMs pass discounts to their plans' beneficiaries via prescription fills at retail and mail-order pharmacies). The only potentially "lost" customer or transaction for a retail pharmacy would be where the customer decides to fill a prescription through one of the favored purchasers' mail-order pharmacies (or Omnicare) rather than at a retail pharmacy; however, prescriptions filled via mail order, as a general matter, are small in number. *See id.* at 72 (noting "the

relatively small number of prescriptions dispensed through mail-order pharmacies").

Nor can the RP plaintiffs base their claims against J&J, Caremark, and Express Pharmacy on lost sales of all of the manufacturer defendants' drugs in the aggregate. Each RP plaintiff must come forward with a number of lost sales attributable to J&J for their claims against J&J, and attributable to Caremark or Express Pharmacy for their claims against those defendants, showing a substantial effect on competition. And for those two defendants, the number of "lost" customers or transactions is truly *de minimis*.

Beyond the matching results, the RP plaintiffs made no showing that their "market evidence" or generalized interrogatory responses have any connection to the pricing practices of J&J, Caremark, or Express Pharmacy. (*See* Br. at 7) (admitting that the RP plaintiffs' interrogatory responses were "incomplete" in that they "could not definitively determine what became of any particular customer" after they stopped purchasing from the plaintiff pharmacies); (*see also* SPA-73-75) (rejecting the designated plaintiffs' reliance on aggregate market evidence in the test cases and emphasizing the need for individualized proof in RP cases).

B. A *De Minimis* Number of Diverted Sales Does Not "Affect Substantially Competition"

On appeal, the RP plaintiffs do not dispute the district court's analysis of the matching results and the finding that the matches were *de minimis*. (SPA-124-129). Instead, they contend that a single diverted transaction is sufficient to show harm to competition. (Br. at 32-43). None of the arguments in support of this argument withstands scrutiny.

First, RP plaintiffs argue that the district court conflated the "competitive injury" analysis with the "antitrust injury" analysis. (Br. at 33). This is incorrect. The district court separately analyzed competitive injury (SPA-134-141) and antitrust injury (SPA-141-143), and it applied the correct legal standards to each. To support their argument, the RP plaintiffs point to Magistrate Judge Gold's use in his competitive injury analysis of an earlier ruling by Judge Glasser holding that a plaintiff "must proffer individualized proof of lost customers or profits as against each defendant." (SPA-135).[18] Although Judge Glasser's quotation comes from his analysis of antitrust injury, the requirement of individualized proof is a general principle that applies equally to showing competitive harm and antitrust injury. *See FTC v. A.E. Staley Mfg. Co.*, 324 U.S.

[18] *Drug Mart Pharmacy Corp. v. Am. Home Prods. Corp.*, 378 F. Supp. 2d 134, 139 (E.D.N.Y. 2005) ("[A] plaintiff asserting a claim under the [Robinson-Patman] Act must proffer individualized proof of lost customers or profits as against each defendant.").

746, 753 (1945) (noting that the RP Act "places emphasis on individual competitive situations.").

Second, the RP plaintiffs argue that because the text of the statute requires only that the effect of the price discrimination "may be" to lessen competition substantially, there is no need to show that the effect is likely to be "substantial." (Br. at 33-34). This text simply means that the harm, which must be substantial, can be either actual or probable.[19] As the Supreme Court made clear in *Volvo*, an RP plaintiff does not meet the statutory standard where, as here, plaintiff cannot show that the alleged price discrimination had (or may have) a "substantial" effect on competition. *See, e.g., Volvo*, 546 U.S. at 167; *see also United Magazine*, 279 F. App'x at 18 (finding that *Volvo* requires evidence that the price discrimination "affect[s] substantially competition"); *Interstate Cigar Co. v. Sterling Drug, Inc.*, 655 F.2d 29, 31 (2d Cir. 1981) (dismissing claim because plaintiff failed to show that discounts "would tend to lessen competition substantially").

[19] *Cf. Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962) (interpreting similar language under Section 7 of the Clayton Act and stating that "Congress used the words '*may be* substantially to lessen competition' (emphasis supplied), to indicate that its concern was with probabilities, not certainties. Statutes existed for dealing with clear-cut menaces to competition; no statute was sought for dealing with ephemeral possibilities.") (footnote omitted).

The district court correctly applied this standard, finding that the matching results "carefully measured" the effect of the pricing practices and showed that there had not been a substantial effect on competition. (SPA-137). As the district court noted, the matching process showed an average loss of 54 transactions per year, which is "only about one quarter of one per cent" of the 22,000 to 28,000 BNPD prescriptions filled each year by the average retail pharmacy. (SPA-127). Moreover, the results were "similarly insignificant" when examined on the requisite per-plaintiff and per-defendant basis. (SPA-127-128). Indeed, J&J and Caremark's percentages are even lower than other defendants' percentages. *See* pages 14-18, *supra*.

Contrary to the RP plaintiffs' argument, the district court's holding does not read "an undefined 'substantiality' threshold" into the statute. (Br. at 2). First, the *statute* uses the word "substantially" to describe the requisite effect on competition. 15 U.S.C. § 13(a). Second, the district court did not need to define substantial; as the Supreme Court has recognized, "substantial" necessarily means something that is not *de minimis*. *See Fortner Enters. v. U.S. Steel Corp.*, 394 U.S. 495, 501 (1969)[20] ("[In defining the] requirement that a 'not insubstantial' amount of commerce be involved [under the Sherman Act] . . . the controlling

[20] *Overruled on other grounds, U.S. Steel Corp. v. Fortner Enters.*, 429 U.S. 610, 622 (1977) (*Fortner II*).

consideration is simply whether a total amount of business, substantial enough in terms of dollar-volume so as not to be merely *de minimis*, is foreclosed to competitors by the tie."); *Brown Shoe*, 370 U.S. at 329 ("[F]oreclosure of a *de minimis* share of the market will not tend 'substantially to lessen competition'" under the Clayton Act.) (citing 15 U.S.C. § 18).[21]

Requiring a substantial impact on competition from the price discrimination is inherent in the nature of the antitrust laws, which are intended to protect the competitive process, not competitors. As the Supreme Court has noted, interpretations of the RP Act must not be "geared more to the protection of existing competitors than to the stimulation of competition." *Volvo*, 546 U.S. at 181; *see also Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993) ("It is axiomatic that the antitrust laws were passed for the protection of competition, not competitors.") (quotation marks omitted).

The facts of this case illustrate this point. The antitrust laws should not be used to inhibit purchasers from being able to extract lower prices from

[21] *See also Hanson v. Pittsburgh Plate Glass Indus., Inc.*, 482 F.2d 220, 224 n.8 (5th Cir. 1973) ("[D]e minimis sales do not violate section 2(a) since the section applies only where the effect of such discrimination may be *substantially* to lessen competition.") (citations omitted); *Whitaker Cable Corp. v. FTC*, 239 F.2d 253, 256 (7th Cir. 1956) ("The Act was not intended to reach every remote, adverse effect on competition. The effect must be substantial. And we construe the Act to require substantial, not trivial or sporadic, interference with competition to establish violation of its mandate. . . . Any other construction would turn the Act into a price control law contrary to its manifest purposes.") (citations omitted).

BNPD manufacturers, thereby enhancing competition among competitors, where, as the matching process revealed, the impact on competition between the RP plaintiffs and the favored purchasers is virtually nonexistent.

C. The Precedents on Which the District Court Relied Are Not Distinguishable

In *Volvo*, a franchised dealer of heavy-duty Volvo trucks alleged that Volvo was offering favorable prices to its competitors to reduce the number of franchised dealers. *Volvo*, 546 U.S. at 170-71. Plaintiff cited two instances in which plaintiff and a competitor were competing for the same sale and the competitor had been offered a favorable price. *Id.* at 172. In one instance, plaintiff lost the sale of 12 trucks, which would have generated $30,000 in gross profits to the plaintiff. *Id.* at 180. The Supreme Court held that this did not show competitive injury because the loss of sales and profit "was not of such magnitude as to affect *substantially* competition between [plaintiff] and the 'favored' Volvo dealer." *Id.* at 180 (emphasis added).

The RP plaintiffs attempt to explain away the "substantially" language in *Volvo*, arguing that the Supreme Court was commenting on whether the price differential was substantial. (Br. at 18, 35). But that simply misreads the quoted sentence in which the Supreme Court makes clear that the word "substantially" is modifying the phrase "affect competition" and not the size of the price differential in a given instance. *Volvo*, 546 U.S. at 180; *see also United Magazine*, 279 F.

App'x at 18 (finding that *Volvo* requires evidence that the price discrimination "affect[s] substantially competition"). *Volvo*'s holding is consistent with the statute, which prohibits price discrimination where the *effect* may be "substantially to lessen competition." 15 U.S.C. § 13(a) (emphasis added).

Nor would it make sense to apply the "substantially" requirement to the size of the price differential. Even a substantial price differential might have no impact on competition, depending on the circumstances. The only true measure of competitive effect is the degree to which the price discrimination actually causes sales to be diverted to the favored purchaser, and thus affects a competitor's relative sales.

The RP plaintiffs also attempt to distinguish *Volvo* on the grounds that it was decided after a "lengthy and detailed factual inquiry." (Br. at 35). Here, the district court conducted a lengthy and detailed factual inquiry based on the matching process proposed by the RP plaintiffs. The results of that detailed factual inquiry conclusively showed that the effect, if any, on competition was at best minimal.

The Organization for Competitive Markets' *amicus* brief contends that the district court misinterpreted *Volvo* to stand for the proposition that "secondary-line [RP Act] plaintiffs can no longer prove harm via individual damage." (Dkt. No. 673, p. 12). Nothing in the district court's opinion eliminates the ability to

prove a substantial effect on competition through an individual plaintiff showing a substantial loss of sales and profits. The point of *Volvo* is that the magnitude of the harm to the disfavored purchaser must be sufficient to show an effect that substantially harms competition. As *Volvo* makes clear, the Act prescribes price discrimination "only to the extent that it threatens to injure competition." *Volvo*, 546 U.S. at 176 (quoting *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 220 (1993)).[22] The RP plaintiffs simply could not meet this requirement.

The RP plaintiffs similarly misconstrue this Court's ruling in *United Magazine*, arguing that the "substantially" language in that case referred only to the "price differential." (Br. at 36-37). But as in *Volvo*, this Court made clear that in determining whether there is competitive injury a plaintiff must show a substantial effect on competition. *United Magazine*, 279 F. App'x at 17-18. ("[Plaintiff] would have to show that any 'price discrimination between' United Magazine and Levy was 'of such magnitude as to affect substantially competition between' the two competitors.") (quoting *Volvo*, 546 U.S. at 180).

[22] The remainder of the *amicus* briefs filed in this action are largely devoted to arguments about the work of community pharmacies, and other issues unrelated to the RP plaintiffs' evidence of competitive injury and antitrust injury. *See* Dkt. No. 673, pp. 15-17; Dkt No. 259-3, p. 12-16. These arguments are irrelevant to this appeal and should be disregarded. *See* Fed. R. App. P. 29(b)(2) (requiring *amicus* briefs to be "relevant to the disposition of the case").

The RP plaintiffs concede that in *Interstate Cigar*, this Court held that showing the discounts at issue would "tend to lessen competition substantially" was an "essential condition precedent" to establishing a Section 2(a) claim. *Interstate Cigar*, 655 F.2d at 31. The RP plaintiffs attempt to distinguish *Interstate Cigar* as "inapposite" because the Court noted that the discounts at issue in that case may have actually increased competition. (Br. at 37). But that is precisely why an RP plaintiff must show that the alleged adverse effect on competition is likely to be substantial. Otherwise, the RP Act could be used to thwart procompetitive conduct and protect competitors rather than competition.

Finally, the other circuit court decisions that the district court cited are also not distinguishable. For example, in *Chrysler Credit*, the Fifth Circuit held that competitive injury under Section 2(a) requires a plaintiff to "demonstrate that the likely effect of the alleged price discrimination was to allow a favored competitor to draw *significant* sales or profits away from him, the disfavored competitor." 670 F.2d at 580 (emphasis added). As in *Chrysler Credit*, the matching results in this case affirmatively show that "significant sales or profits" were not drawn away from plaintiffs. *Id.* at 580.[23]

[23] *See also Boise Cascade*, 837 F.2d 1145 (finding 162 accounts that had been reportedly lost were "quite small," and were "strikingly low" in proportion to the thousands of accounts of a typical dealer); *Lupia*, 586 F.2d at 1171("[Plaintiff] ha[d] not alleged that its sales lost due to secondary price discrimination were more than 'de minim[i]s'."); *De Modena v. Kaiser Found. Health Plan*,743 F.2d 1388,

Accordingly, the district court correctly found that the RP plaintiffs' *de minimis* evidence of lost customers and transactions did not make out a prima facie showing of competitive injury. (SPA-140-141).

D. The Matching Process Conclusively Rebutted Any *Morton Salt* Inference

The RP plaintiffs argue that, notwithstanding the outcome of the matching process, they are entitled to an "inference" of competitive injury under *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948), because BNPD manufacturers had a longstanding practice of giving discounts and rebates to the favored purchasers.[24] (Br. at 24). The district court correctly held that any inference under *Morton Salt* had been "rebutted."[25] (SPA-139-140).

1394 (9th Cir. 1984) (acknowledging that certain sales could be considered "de minimis" for RP Act claims, but a court should also look at the "impact . . . on competition," rather than just "the percentage of an organization's total sales.").

[24] The RP plaintiffs incorrectly assert that "there is no dispute that Defendants, since at least 1993, have provided substantial discounts and rebates to favored purchasers with whom Plaintiffs directly compete." (Br. at 24). In fact, defendants do not concede that there is competition between the plaintiffs and the favored purchasers. For example, defendants do not concede that PBMs and retail pharmacies compete. Defendants have also long contended that their pricing practices are permissible under the Act, but those arguments are beyond the scope of the issues in this appeal.

[25] The district court did not affirmatively find that the RP plaintiffs were entitled to such an inference; rather, the district court ruled that to the extent "any" inference applied, it "has been rebutted." (SPA-138-140).

The Supreme Court long ago stated: "[i]t is well settled that where [a] plaintiff's case is based upon an inference or inferences, that the case must fail upon proof of undisputed facts inconsistent with such inferences." *Penn. R. Co. v. Chamberlain*, 288 U.S. 333, 341 (1933) (citations omitted).[26] Consistent with this longstanding principle, the Supreme Court has held that the *Morton Salt* inference "may be overcome by evidence breaking the causal connection between a price differential and lost sales or profits." *Falls City Indus. v. Vanco Beverage, Inc.*, 460 U.S. 428, 435 (1983). And in *Volvo*, the Supreme Court referred to it as a permissive inference, not an irrebuttable presumption. *See Volvo*, 546 at 177 (referring to the inference as a "permissible" one that "may" arise under certain circumstances). Likewise, the D.C. Circuit has held that "[s]pecific, substantial evidence of absence of competitive injury . . . is . . . sufficient to rebut what is, after all, only an inference." *Boise Cascade Corp. v. FTC*, 837 F.2d 1127, 1144 (D.C. Cir. 1988); *see also George Haug Co. v. Rolls Royce Motor Cars Inc.*, 148 F.3d 136, 142 (2d Cir. 1998) (*Morton Salt* "*permits* an inference of injury to

[26] *Overruled on other grounds by Lavender v. Kurn*, 327 U.S. 645 (1946). More recent cases have also relied on this principle. *See, e.g.*, *Selle v. Gibb*, 567 F. Supp. 1173, 1182 (N.D. Ill. 1983), *aff'd* 741 F.2d 896 (7th Cir. 1984) ("Where the case of a plaintiff is based on an inference or inferences, it must fail upon proof of undisputed facts inconsistent with such inference or inferences."); *see also Fenner v. General Motors Corp.*, 657 F.2d 647, 651 (5th Cir. 1981) ("An inference may be unreasonable if it is at war with uncontradicted or unimpeached facts.") (citations omitted); *Daniels v. Twin Oaks Nursing Home*, 692 F.2d 1321, 1327 (11th Cir. 1982) (same).

competition from evidence of a substantial price difference over time.") (emphasis added).

The RP plaintiffs contend that the *Morton Salt* inference "cannot be rebutted" in this case because they submitted "direct evidence of displaced sales." (Br. at 25-26). This argument is based on a misreading of the Supreme Court's holding in *Falls City*. The Supreme Court did not hold in *Falls City* that the *Morton Salt* inference becomes irrebuttable once plaintiffs have shown *any* lost sales or profits; rather, the language relied on by the RP plaintiffs (Br. at 25) is an affirmative statement about circumstances where, as here, the inference could be rebutted because the evidence did not show a substantial effect on competition. *Falls City Indus. v. Vanco Beverage, Inc.*, 460 U.S. 428, 435 (1983). Indeed, following the sentence quoted by the RP plaintiffs, the Supreme Court cited a treatise that expressly rejected the inflexible view that the RP plaintiffs propose. *Id.* (citing FREDERICK ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 182 (Little, Brown and Co., 1962) ("[T]he Supreme Court [in *Morton Salt*] ordained no blanket or conclusive presumption as to competitive injury.")).

The upshot of the RP plaintiffs' argument is that the *Morton Salt* inference eliminates the statutory requirement that the defendants' price discrimination "affect substantially competition." *Volvo* rejects such an approach. And the results of the matching process illustrate precisely why the *Morton Salt*

inference should be rebuttable: the meager number of matches for J&J and Caremark over a 10-year period conclusively shows an absence of competitive injury.

Because the matching data affirmatively shows an absence of competitive injury, the inference has been rebutted. *Boise Cascade*, 837 F.2d at 1148 n.19 (explaining that the *Morton Salt* inference "can . . . be rebutted by a showing that injury [to competition] is nonexistent."). The district court stressed that it had afforded the RP plaintiffs ample opportunity to "undertake[] an extensive[], costly and time-consuming effort to trace the customers they claim to have lost to favored purchasers because of price discrimination, but [they] essentially c[a]me up empty." (SPA-139).

In reply, the RP plaintiffs may argue, as they did in their summary judgment briefing below, that some courts have held that the *Morton Salt* inference cannot be overcome by evidence that competition was not harmed. *See Chroma Lighting v. GTE Prods. Corp.*, 111 F.3d 653, 657-58 (9th Cir. 1997) (finding that proof of no harm to competition cannot overcome the *Morton Salt* inference because Congress intended the RP Act to "protect individual competitors, not just market competition"); *see also J.F. Feeser, Inc. v. Serv-A-Portion, Inc.*, 909 F.2d 1524, 1535 (3d Cir. 1990) ("evidence of injury to a competitor may satisfy the component of competitive injury").

In *Volvo*, however, the Supreme Court expressly warned against "interpretation[s of the RP Act] geared more to the protection of existing *competitors* than to the stimulation of *competition*." *Volvo*, 546 U.S. at 181. This language in *Volvo*, which is consistent with the *Boise Cascade* decision, repudiates the reasoning of *Chroma Lighting* and *J.F. Feeser*. (*See* SPA-133-134, n.18) (questioning the "continued viability" of *Chroma Lighting* and *J.F. Feeser* in light of *Volvo*).

Accordingly, this Court should affirm the district court's holding that the RP plaintiffs failed to make out a prima facie case of injury to competition and that any *Morton Salt* inference is rebuttable and has been rebutted here.

IV. THE DISTRICT COURT CORRECTLY HELD THAT THE RP PLAINTIFFS DID NOT SHOW ANTITRUST INJURY

A. The RP Plaintiffs Failed to Show Any Actual Injury Caused by the Challenged Conduct

The absence of antitrust injury independently warranted dismissal of the RP plaintiffs' Section 2 claims, because Section 4 of the Clayton Act requires a private plaintiff to make a showing of such injury. *See Gatt Communs., Inc. v. PMC Assocs., L.L.C.*, 711 F.3d 68, 75-77 (2d Cir. 2013).[27]

[27] The *Morton Salt* inference is not applicable to antitrust injury and thus does not relieve each plaintiff of its burden of showing that it suffered antitrust injury as a result of each defendant's conduct. *See J. Truett Payne v. Chrysler Motors Corp.*, 451 U.S. 557, 561 (1981); (SPA-67-68).

As the district court correctly determined, the *de minimis* lost sales "cannot support a finding of a causal connection between lost sales and the alleged price discrimination," as required for antitrust injury. (SPA-142-143); *see, e.g.*, *Chrysler Credit*, 670 F.2d at 581-82 ("Evidence of a slight decrease in market share roughly coincident with the alleged violation is not sufficient [for antitrust injury]."); *Allen Pen Co. v. Springfield Photo Mount Co.*, 653 F.2d 17, 23 (1st Cir. 1981) (Breyer, J.) (finding that plaintiff's evidence was "clearly inadequate" to establish antitrust injury because the affected sales were "a tiny fraction of its total business"); *Hygrade Milk and Cream Co. v. Tropicana Prods., Inc.*, 1996 U.S. Dist. LEXIS 6598, at *58 (S.D.N.Y. May 16, 1996) (finding that "a limited loss of sales cannot possibly show that Plaintiffs suffered any actual injury," notwithstanding evidence of "substantial price discrimination over time").

As noted previously, the matching process revealed only 384 potentially lost customers for a J&J BNPD across all 28 RP plaintiffs (over 10.4 years), representing lost transactions of .0005% to .07% of total annual BNPD transactions per plaintiff pharmacy. (A-1431.) The numbers for Caremark are equally small. See pages 14-18, *supra*.

B. None of the RP Plaintiffs' Attempts to Challenge the District Court's Opinion Have Merit

Contrary to the RP plaintiffs' assertion, the First Circuit's decision in *Allen* fully supports the district court's analysis. *Allen* held that the plaintiff had

not suffered antitrust injury because, among other reasons, the sales affected by the alleged price discrimination were only about two percent of the plaintiff's sales and thus insufficient to constitute injury. 653 F.2d at 21, 23. The RP plaintiffs argue that the First Circuit's use of the term "affected sales" in that case referred to the defendant's total sales to the plaintiff, "not the amount of sales lost to a favored purchaser." (Br. at 49-50). This distinction is immaterial. The First Circuit's decision was that where the product with the purportedly disfavored pricing was a "tiny fraction" of the plaintiff's sales, that pricing could not have caused the plaintiff injury, especially where the plaintiff failed to show that it had gone out of business or experienced an absolute drop in its sales. 653 F.2d at 23. The same is true here (although here, the percentage of affected sales is much smaller).

Moreover, unlike the plaintiff in *Allen*, the RP plaintiffs offered no evidence that even the trivial number of matched customers changed from a retail pharmacy to a mail-order pharmacy (or some other favored purchaser) because of price discrimination, rather than for some other reason. (*See* SPA-76-78) (faulting the designated RP plaintiffs for failing to account for factors other than price discrimination that could have caused their damages).

As noted previously, to the extent PBMs and other third-party payors are able to obtain discounts and rebates, these discounts will include prescriptions filled at retail pharmacies. Thus, the discounts may have increased the favored

purchasers' profits but would not have necessarily diverted sales to the favored purchasers. Nor did the RP plaintiffs account for consumer preference for the convenience of mail-order pharmacies, customers changing pharmacies as a result of a move or a change in jobs, or a myriad of other possible reasons that customers may change where they fill their prescriptions. *See Camarda v. Snapple Distribs.*, 346 F. App'x 690, 692-93 (2d Cir. 2009) (affirming dismissal with prejudice because plaintiffs failed to "make some showing that the injury to [their] business[es] was not caused by factors unrelated to the defendant's price discrimination"); (*see also* SPA-78) ("For this [failure to account for other causal factors] alone, defendants' motion for summary judgment is granted.").

Plaintiffs assert that the district court's reliance on *Hygrade Milk* was "misplaced." Yet they concede that in *Hygrade Milk* the plaintiff's evidence of lost customers amounted to an "insignificant loss of sales" that was insufficient to establish antitrust injury. (Br. at 50-51). The same is true here.[28]

The RP plaintiffs assert that "their" market share "substantially declined during the relevant period," but they did not introduce any evidence regarding the market share of the specific RP plaintiffs at issue in this case. (Br. at

[28] Plaintiffs note that the *Hygrade Milk* court held that another plaintiff survived summary judgment. (Br. at 51). But that plaintiff showed a 68% decline in market share and that there was a "fair degree of certainty that [the defendant's] discriminatory promotional programs were a material cause of [the plaintiff]'s injury." *Hygrade Milk*, 1996 U.S. Dist. LEXIS 6598, at *54-56 (citations omitted).

51). Instead, the RP plaintiffs provided only general market information regarding retail pharmacies, PBMs, and mail-order pharmacies, without any evidence linking the claimed market trends to the specific RP plaintiffs – let alone J&J, Caremark, or Express Pharmacy. (A-1679-1693).[29]

This generalized evidence is not sufficient to make out a prima facie RP Act claim on behalf of any RP plaintiff. (*See* SPA-73-75) (rejecting the designated plaintiffs' reliance on aggregate market evidence in the test cases and emphasizing the need for individualized proof in RP Act cases); *Hygrade Milk*, 1996 U.S. Dist. LEXIS 6598, at *57-58 (dismissing claims where Plaintiffs made "no specific claim that their sales . . . declined").

The RP plaintiffs rely on a single affidavit of a member of a benefits committee that claims to have participated in a decision to leave Plaintiff Pharma-Card for Express Scripts, a favored purchaser. (Br. at 51-52). But the RP plaintiffs admit that the customers affected by that benefits committee's decision "did not

[29] Not only is Plaintiffs' market evidence irrelevant to the individual claims at issue, it is also misleading. Recent data from the National Community Pharmacies Association shows that the average independent retail pharmacy owner earned almost $274,000 in personal income in 2009, and average revenues per pharmacy were $4.026 million in 2009, almost double the average revenue of $1.967 million in 1999. (A-2754-2755). Moreover the number of independent retail pharmacies increased by about 400 between 2008 and 2009 despite the severe recession. (A-2715; A-608). Plaintiffs make additional allegations in their brief regarding trends in the number of retail pharmacies nationwide, but these assertions are unsupported by any evidence and should therefore be disregarded. (Br. at 5).

show up in [the] matching process" (A-2913), meaning that the data did not show that any of the customers had actually switched to Express Scripts from Pharma-Card. Moreover, the RP plaintiffs offer no evidence tying this decision to switch to Express Scripts to the pricing practices of J&J, Caremark, or Express Pharmacy. This affidavit is precisely the type of "speculative and insignificant" evidence that *Hygrade Milk* found insufficient to establish antitrust injury. *Hygrade Milk*, 1996 U.S. Dist. LEXIS 6598, at *58-60.

The RP plaintiffs cite Judge Glasser's earlier summary judgment ruling in the test cases for the proposition that a plaintiff only needs to provide evidence of "some damage" for antitrust injury, but this argument misconstrues Judge Glasser's decision. (Br. at 48). Judge Glasser correctly ruled that there are "two related but distinct inquiries" under Section 4 of the Clayton Act. (SPA-64). First, the RP plaintiffs must prove "the fact of antitrust injury;" *i.e.*, "that they were in fact injured by the price discrimination, that the injury is of the type the Act was intended to prevent, and that the injury is causally connected with the violation of the Act." (SPA-64 n.44). Second, the RP plaintiffs must "make a showing regarding the amount of damages in order to justify an award by the trier of fact." (SPA-64).

Judge Glasser's initial ruling in the test cases focused on the second issue. The designated defendants were granted summary judgment because the RP

plaintiffs in the test cases failed to show a cognizable theory of damages. In the subsequent summary judgment ruling now on appeal, the district court held that the RP plaintiffs failed to meet their burden as to the first issue – the fact of antitrust injury. (SPA-141-143).[30]

C. The RP Plaintiffs Misconstrue the Text of the Clayton Act and Cases Awarding Nominal Damages

The RP plaintiffs make two additional arguments for why the Court erred in its antitrust injury analysis, neither of which has merit. First, they make a textual argument that the district court "read the 'amount in controversy' language out of Section 4" by requiring them to "show more than *de minimis* lost sales." (Br. at 45). But they cite no cases that support their contention that the statutory language regarding the amount in controversy somehow excuses or softens a plaintiff's burden of showing antitrust injury. Moreover, this Court has specifically rejected such broad readings of the language of Section 4. *See Port Dock & Stone Corp. v. Oldcastle Northeast, Inc.*, 507 F.3d 117, 121 (2d Cir. 2007) (finding that despite the "broad language" of Section 4, courts have "carefully parsed antitrust standing" and have required a showing of antitrust injury); *see also Assoc. Gen.*

[30] Moreover, Judge Glasser's statement that a plaintiff must show "some damages" does not mean that any showing of damages is sufficient, even if it is *de minimis*, as the RP plaintiffs contend. (Br. at 48). Judge Glasser's ruling makes clear that a plaintiff "is still required to put forth *substantial relevant evidence*" of damages. (SPA-65) (emphasis added) (quoting *Chrysler Credit*, 670 F.2d at 582).

Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 535 (1983) (rejecting the view that the language of Section 4 should be read to provide a recovery for every harm flowing from an antitrust violation).

Second, the RP plaintiffs argue that because nominal damages can be awarded, a *de minimis* loss of sales should be sufficient in an RP case. (Br. at 46). This argument, once again, conflates antitrust injury and damages. (SPA-64) (noting that these are "related but distinct inquiries"). Nominal damages are only awarded under Section 4 of the Clayton Act *after* a plaintiff has already established antitrust injury. Indeed, in the *United States Football League* case cited by the RP plaintiffs, the jury awarded nominal damages only "*after* finding antitrust injury," as the RP plaintiffs acknowledge. (Br. at 46) (emphasis added) (quoting *United States Football League v. National Football League*, 842 F.2d 1335, 1377 (2d Cir. 1988) (finding that the district court properly instructed the jury that Section 4 required the plaintiff to prove an injury caused by defendant's violation of the antitrust laws)). Once a plaintiff has shown antitrust injury, nominal damages might be permissible where, for example, the trier of fact is unable to separate out the losses caused by the wrongful act from other potential causes. *See United States Football League*, 842 F.2d at 1377. Thus, the fact that some plaintiffs have received nominal damages does not mean that a plaintiff can prove a causal link between an actual injury and price discrimination based on a trivial loss of sales.

* * *

The RP plaintiffs matching process demonstrated the absence of antitrust injury because it fails to show any causal relationship between the RP plaintiff's alleged injury and any price discrimination engaged in by J&J or received by Caremark or Express Pharmacy. Summary judgment on this alternative ground should be affirmed.

V. THE DISTRICT COURT PROPERLY DISMISSED PLAINTIFFS' CLAIMS FOR EQUITABLE RELIEF AND UNDER SECTIONS 2(D) AND 2(F) OF THE ROBINSON-PATMAN ACT

The district court dismissed claims for equitable relief under Section 16 of the Clayton Act, 15 U.S.C. § 26, based on the RP plaintiffs' failure to establish competitive injury. (SPA-143-145). The district court relied on Judge Glasser's earlier holding that

> [i]f the plaintiff cannot show itself to have suffered some actual injury of the type the antitrust laws were intended to prevent from a purportedly anticompetitive practice in which the defendant has engaged for a substantial portion of time, the plaintiff is effectively presumed to be unable to establish the existence of a threat of future injury arising from that same conduct in the future, at least absent some plausible explanation why a practice that has not created cognizable injury in the past creates a credible risk of doing so in the future if permitted to continue.

(SPA-111). Because the district court's ruling on competitive injury was correct, this Court should affirm the district court's dismissal of the RP plaintiffs' claims for equitable relief.[31]

Plaintiffs only challenge the dismissal of their claims under Sections 2(d) and 2(f) of the RP Act based on the district court's holdings as to competitive injury and antitrust injury. (Br. at 56). For the reasons described above, the district court's rulings were correct, and therefore the Section 2(d) and 2(f) claims should also be dismissed.[32]

[31] Dismissal of Plaintiffs' claims for equitable relief is additionally warranted by Plaintiffs' failure to establish antitrust injury. (*See* SPA-110-111); *Van Dyk Research Corp. v. Xerox Corp.*, 631 F.2d 251, 255 n.2 (3d Cir. 1980); *Merit Motors, Inc. v. Chrysler Corp.*, 569 F.2d 666, 670 n.14 (D.C. Cir. 1977); *Ashley Meadow Farms, Inc. v. Am. Horse Shows Ass'n, Inc.*, 624 F. Supp. 856, 858 (S.D.N.Y. 1985).

[32] The RP plaintiffs also have not identified the number of matches specific to Caremark, or any other evidence that is specific to any particular plaintiff's claims against Caremark. As noted previously, such individualized evidence is required for an RP Act claim. *Drug Mart Pharmacy Corp. v. Am. Home Prods. Corp.*, 378 F. Supp. 2d 134, 139 (E.D.N.Y. 2005).

CONCLUSION

Defendants respectfully request that this Court affirm the district court's grant of summary judgment as to all of the RP plaintiffs' claims.

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