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

NATIONAL COMMUNITY PHARMACISTS ASSOCIATION; LECH'S PHARMACY; PJL PHARMACY, INC.; MJR, LTD.; MJRRX, INC.; DAVID M. SMITH RPH, INC.; ANBAR, INC.; SELLERSVILLE PHARMACY, INC.; TEP, INC.; VALUE DRUG COMPANY; and VALUE SPECIALTY PHARMACY LLC,

Plaintiffs,

-vs.-

EXPRESS SCRIPTS, INC. and MEDCO HEALTH SOLUTIONS, INC.,

Defendants.

Civil Action No. 2:12-cv-00395
Judge Cathy Bissoon

ELECTRONICALLY FILED

DEFENDANTS EXPRESS SCRIPTS, INC.'S AND MEDCO HEALTH SOLUTIONS, INC.'S MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFFS' AMENDED 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' Amended Complaint, specifically with regard to the purchase of retail community pharmacy services, stating as follows:

PRELIMINARY STATEMENT

This Honorable Court previously dismissed Plaintiffs' claim, *inter alia*, that the merger between ESI and Medco violates Section 7 of the Clayton Act, 15 U.S.C. § 18, in the alleged market for the purchase of retail community pharmacy services (the so-called monopsony claim), but without prejudice to Plaintiffs to replead this specific claim. Aug. 27, 2012 Memorandum Order (Doc. 60, at 19). The allegations in the Amended Complaint are not materially different than those in the original Complaint. Indeed, other than now trying to cast their claim as a "conspiracy" rather than a merger challenge, Plaintiffs do not even attempt to address the shortcomings of the monopsony claim as specifically set forth in the Court's Memorandum Order. Moreover, the Amended Complaint does not adequately allege any proper relevant markets in which to assess the alleged anticompetitive effects of the merger (as required for any Section 7 claim), nor does it adequately allege any probable market-wide harm to competition (as opposed to harm just to Plaintiffs themselves) either in any upstream input market or downstream output market – again, basic requirements of a Section 7 monopsony claim. Accordingly, Defendants respectfully submit that the monopsony claim again should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6), this time with prejudice.

BACKGROUND[1]

In the Memorandum Order, this Court dismissed all but one of Plaintiffs' claims brought in its original Complaint pursuant to Fed. R. Civ. P. 12(b)(6). (Doc. 60, at 22). Some of Plaintiffs' original claims were dismissed with prejudice, while others were dismissed without prejudice to Plaintiffs to amend the claims. On September 10, 2012, Plaintiffs[2] filed their Amended Complaint, which limited the alleged violation of Section 7 to two relevant product markets: "(a) the purchase of retail community pharmacy services" and "(b) the provision of Clinical Specialty Drugs."[3] (Doc. 62 ¶¶ 1, 64). Defendants now move to dismiss the Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6) with respect to the claim relating to the purchase of retail community pharmacy services.

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[1] Defendants have set forth the background regarding the merger and the events leading up to the filing of Plaintiffs' action in our Opposition to Plaintiffs' Motion for Preliminary Injunction (Doc. 46); our Memorandum of Law in Support of our Motion to Dismiss Plaintiffs' Complaint (Doc. 43); the Declaration of Clifford H. Aronson (Doc. 46, Ex. 1); and the Declaration of Keith J. Ebling (Doc. 46, Ex. 2). The Court has set forth the relevant procedural background from the time of the filing of this action until its Memorandum Order (Doc. 60, at 1-2). Defendants incorporate each of the foregoing by reference herein.

[2] Significantly, not all of the original Plaintiffs joined in the Amended Complaint. Rather, the following original Plaintiffs voluntarily dismissed the entire action on September 10, 2012 (Doc. 61): National Association of Chain Drug Stores; Thompson Enterprises, Inc.; Klingensmith Drug Inc.; Kopp Drug, Inc.; Broad Ave Pharmacy LLC; Professional Specialized Pharmacies, LLC; and Hollidaysburg Pharmacy LLC. Unless otherwise noted, the term "Plaintiffs" used herein refers to the Plaintiffs who filed the Amended Complaint.

[3] While our current motion does not involve Plaintiffs' claim relating to Clinical Specialty Drugs, Defendants do not concede the legal or factual validity of that claim nor do we waive any defenses to that claim.

LEGAL STANDARD

A. The 12(b)(6) Standard and Law of the Case

The Amended Complaint still falls well short of the pleading standard set forth by the Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). While the Court must credit all well-pled facts and reasonable inferences therefrom for purposes of a Rule 12(b)(6) motion, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice," and a "pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Aschroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation 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, "courts 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). The Court itself noted that the original Complaint failed to satisfy these pleading requirements on both the necessary elements of establishing antitrust injury and proper market definitions. (Doc. 60, at 15-16, 19-22).

As discussed in detail below, Plaintiffs' Amended Complaint still fails to meet this pleading burden and thus should be dismissed. Under the law-of-the-case doctrine, "once an issue has been decided, parties may not relitigate that issue in the same case." *Ogbudimkpa v. Ashcroft*, 342 F.3d 207, 210 n.7 (3d Cir. 2003) (citing *Waldorf v. Shuta*, 142 F.3d 601, 616 n.4 (3d Cir. 1998)); *see also Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 815-16

(1988) ("'As most commonly defined, the doctrine [of the law of the case] posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.'" (alteration in original) (citation omitted)). The law-of-the-case doctrine clearly applies to those issues that this Court decided in ruling on ESI's prior motion to dismiss, including the sufficiency of Plaintiffs' monopsony allegations. Plaintiffs' failure to address the Court's instructions regarding deficiencies with the Plaintiffs' monopsony claims provides an independent reason for dismissal with prejudice of the Amended Complaint.

B. Proper Analytical Framework for a Private Section 7 Monopsony Claim

To survive a motion to dismiss on a Section 7 claim challenging a merger, a private plaintiff must allege at a minimum (i) a viable relevant product and geographic market and (ii) a viable theory of how and why the merger is likely to substantially harm competition in that market – and not just harm to itself. Moreover, to adequately allege a Section 7 claim under a monopsony theory of competitive harm, a plaintiffs must sufficiently allege competitive harm in both a properly pled upstream input market (where the plaintiff sells and defendant buys) and a properly pled downstream output market (where the defendant sells).

1. The Section 7 Market Definition Requirement

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. Inc., 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 at issue, "[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) ("[T]he 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). Thus, "in cases where a plaintiff's allegations regarding the relevant market are facially insufficient, dismissal may be granted based on that deficiency." (Doc. 60, at 16).

2. <u>Anticompetitive Effects and Antitrust Injury</u>

A plaintiff alleging a claim under Section 7 of the Clayton Act also must allege facts showing that the merger may substantially lessen competition in the relevant markets. *See, e.g., United States v. Baker Hughes, Inc.*, 908 F.2d 981, 982 n.1 (DC Cir. 1990); *Oracle*, 331 F. Supp. 2d at 1110. This is a requirement not only under the substantive elements of Section 7, but also for the antitrust injury standing requirements of Section 16 of the Clayton Act, 15 U.S.C. §

26. Because the federal antitrust laws are intended to protect competition, not competitors, it is insufficient for a plaintiff to allege that the anticompetitive effects of an illegal merger will merely harm itself. *See Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 111-13 (1986). As with other elements of an antitrust claim, the complaint must allege facts – not mere conclusions – as to these competitive effects.

Significantly, Plaintiffs here are not alleging a conventional Section 7 claim, *i.e.*, that the merger of ESI and Medco will cause higher prices in some output market to consumers.[4] Rather, they are alleging a "monopsony" or "oligopsony" theory of competitive harm, *i.e.*, that the merger will cause lower prices charged upstream to Plaintiffs as sellers to Defendants. However, to allege a viable theory of monopsony harm, it is not sufficient simply to allege that defendants have monopsony power in a properly alleged purchase or input market. Plaintiff also must also allege that the defendants' monopsony power enables them to engage in predatory or exclusionary conduct that harms competition in that relevant input market. *See In re Beef Indus. Antitrust Litig.*, 907 F.2d 510, 515-16 (5th Cir. 1990); *Ocean State Physicians Health Plan, Inc. v. Blue Cross & Blue Shield of Rhode Island*, 883 F.2d 1101, 1110 (1st Cir. 1989); *Kamine/Besicorp Allegany L.P. v. Rochester Gas & Elec. Corp.*, 908 F. Supp. 1194, 1203 (W.D.N.Y. 1995). In addition, courts require that this exclusionary or predatory conduct also results in market-wide harm in a properly defined relevant *output* market. *See Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 321 (2007); *Been v. O.K. Indus., Inc.*, 495 F.3d 1217, 1232 (10th Cir. 2007); *United States v. Syufy Enters.*, 903 F.2d 659, 671 (9th Cir.

[4] In fact, the original Complaint did have such claims, but those claims were dismissed with prejudice either by the Court or voluntarily by Plaintiffs when they failed to amend such claims, as noted below in Section II.D.2.

1990); *Kamine/Besicorp* , 908 F. Supp. at 1203. Finally, allegations of harm just to a plaintiff itself are insufficient as a matter of law. *See Les Shockley Racing, Inc. v. Nat'l Hot Rod Ass'n*, 884 F.2d 504, 508 (9th Cir. 1989).

ARGUMENT

I. PLAINTIFFS' AMENDED COMPLAINT SHOULD BE DISMISSED BECAUSE IT DOES NOT ALLEGE FACTS THAT ADEQUATELY SUPPORT ITS SECTION 7 PRIVATE CAUSE OF ACTION

This Court has already held that Plaintiffs' original Complaint should be dismissed on numerous grounds, including the failure to define relevant markets and failure to define the likely anticompetitive effects from the merger in those markets. (Doc. 60, at 18-22). Significantly, while the Court provided detailed explanations for its original decision, the allegations of the Amended Complaint do not rectify these failing. Indeed, as described below, a close reading and comparison of Plaintiffs' new monopsony claim alleged in the Amended Complaint with the defective monopsony claim in the original Complaint reveal that the two claims are essentially identical.

Moreover, the defects set forth in the Court's Memorandum Order, which Plaintiffs have failed to rectify, are far from the only problems with the Plaintiffs' amended monopsony claim. The Amended Complaint fails to allege a viable relevant product market in which to assess the likely competitive impact of the merger, a *sine qua non* of any Section 7 claim. As a result, Plaintiffs cannot properly allege that the merger will result in increased market power by ESI. Further, Plaintiffs cannot allege any cognizable harm in any credible, relevant market, either upstream in any input market or downstream in any output market, both of which are required to plead a valid theory of monopsony harm.

A. This Is a Section 7 Merger Challenge, Not a Section 1 Conspiracy Case

As a threshold matter, Plaintiffs cannot rectify the inadequacies of their original pleading by attempting to treat this case as a "conspiracy" between competing buyers of services – subject to *per se* condemnation under Section 1 of the Sherman Act, 15 U.S.C. § 1 – rather than a merger subject to Section 7 requirements and analysis. In fact, this Court essentially already covered this ground in distinguishing *West Penn* in its original Memorandum Order.

Thus, the Court rejected the original monopsony claim for the lack of alleged antitrust injury flowing from the merger – *i.e.*, reduced, "suboptimal" reimbursement rates paid by community pharmacies to the merged Defendants was not harm that Section 7 was intended to redress. The Court also observed that the Plaintiffs' alleged injury was not the result of any Section 1 conspiracy, thereby distinguishing *West Penn Allegheny Health System, Inc. v. UPMC*, 627 F.3d 85 (3d Cir. 2010), *cert. denied*, 132 S. Ct. 98 (2011). (Doc. 60, at 19).

Now, in its response, Plaintiffs have added several references in the Amended Complaint to the fact that the merger was the result of an "agreement" between ESI and Medco. (*See, e.g.*, Doc. 62 ¶¶ 3, 58, 64, 67, 70, 91, 94, 95). But, this fact was already well understood by the Court when it issued its Memorandum Order. Indeed, the Court expressly noted that the "record reflects that, on July 21, 2011, Defendants entered into an agreement and plan of merger." (Doc. 60 at 1 (emphasis added)). Instead, the Court focused on the lack of any alleged ongoing Section 1 conspiracy between competing buyers. As the Court correctly concluded, the conspiracy standards of *West Penn* are inapplicable to Section 7, which has its own standards of competitive harm. (Doc 60, at 19). And, like *West Penn*, most cases that have upheld allegations of a monopsony/oligopsony claim involved allegations of conspiracies by buyers to fix the price of inputs from sellers. *See, e.g.*, *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S.

219 (1948); *Todd v. Exxon Corp.*, 275 F.3d 191 (2d Cir. 2001); *Nat'l Macaroni Mfrs. Ass'n v. FTC*, 345 F.2d 421 (7th Cir. 1965). In contrast, Plaintiffs here still do not (and cannot) allege that Express Scripts and Medco are engaging in a monopsony price-fixing conspiracy. Rather, the record is undisputed that Express Scripts and Medco have been a single entity since the closing of the merger on April 2, 2012, and thus are incapable of engaging in any conspiracy with each other to lower reimbursement rates (or in any other illegal conspiracy). *See Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).

B. The Amended Complaint Fails to Allege a Properly Defined Relevant Product Market – an Essential Section 7 Element

Even before addressing the particular nuances and requirements of alleged Section 7 monopsony claims, it is evident on the face of Plaintiffs' amended pleading that they cannot meet the fundamental market definition element of Section 7.[5]

Plaintiffs allege that the relevant product market is limited to "the purchase of retail community pharmacy services." (Doc. 62 ¶¶ 2, 64). But the Amended Complaint nowhere provides a factual basis to exclude purchases of retail chain pharmacies services or purchases of all pharmacy services. *See Queen City Pizza*, 124 F.3d at 436 (noting that relevant market must include reasonably interchangeable substitutes); *see also Syncsort Inc. v. Sequential Software Inc.*, 50 F. Supp. 2d 318, 332 (D. N.J. 1999) (dismissing complaint where plaintiff's proposed

[5] *See, e.g.*, *Brown Shoe*, 370 US at 324 ("Determination of the relevant market is a *necessary predicate* to a finding of a violation of the Clayton Act because the threatened monopoly must be one which will substantially lessen competition within the area of effective competition." (emphasis added)); *Marine Bancorp., Inc.*, 418 U.S. at 618 ("Determination of the relevant product and geographic markets is 'a necessary predicate' to deciding whether a merger contravenes the Clayton Act."); *Oracle*, 331 F. Supp. 2d at 1110 (defining a relevant product and geographic market "is a 'necessary predicate' to finding anticompetitive effects.').

market definition failed to "mention any potential entrants into the market" and "failed to mention other products available from other suppliers which are comparable to or substitutable" with defendant's product). Specifically, Plaintiffs provide no definition of what distinguishes chain versus community pharmacies (other than perhaps membership in NCPA), nor do they explain why chain pharmacies cannot provide the same services as community pharmacies, which they in fact do. Plaintiffs simply cannot credibly allege that chain pharmacies and even mail order pharmacies do not compete with community pharmacies. To the contrary, the Amended Complaint expressly alleges that Plaintiffs compete directly with ESI's mail order pharmacy. (Doc. 62 ¶ 31 ("Plaintiffs and NCPA's members *compete* by offering through their retail community pharmacies many of the same drugs that the PBMs provide through their mail and specialty pharmacies. . . .") (emphasis added)); (*id.* at ¶ 33 ("Members of NCPA will be irreparably harmed by the merger in their capacity as sellers of pharmacy services to Defendants and *as competitors against Defendants' mail-order* and specialty pharmacies.") (emphasis added)).

Likewise, as the Court has already noted in dismissing another of Plaintiffs' faulty claims, "a plaintiff cannot permissibly narrow a market to a specific group of consumers without explaining the difference in the product supplied to those customers." (Doc. 60, at 20). In that instance, the Court dismissed Plaintiffs' claim related to an alleged market for the provision of drugs to beneficiaries of large plan sponsors, noting that "Plaintiffs provide no reason why the provision of drugs to beneficiaries of large private employers differs in any way from the provision of drugs to the beneficiaries of smaller employers, or to the public at large." (*Id.*) While the present motion involves an alleged input market affecting sellers, rather than an output

market affecting consumers, in both instances, Plaintiffs again have improperly tried to limit the relevant market to an arbitrary subset of parties that are allegedly harmed by the merger.

C. The Amended Complaint Fails to Allege Sufficient Market Power in any Relevant Product Market

Even if the Court were to accept Plaintiffs' deficient pleadings on a relevant product market, the Amended Complaint still should be dismissed because it fails properly to allege that the merger would result in substantially increased market power in Plaintiffs' alleged input market. *See United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 501 (1974). The Amended Complaint utterly lacks any allegations of market shares or market concentration figures in the alleged relevant market for the purchase of retail community pharmacy services. Instead, as described below, the market concentration figures that Plaintiffs do allege measure purported shares in markets that are either much broader or much narrower than the alleged relevant market.

Specifically, the Amended Complaint alleges that the merged ESI/Medco controls "over a 50 percent share of individual pharmacy prescriptions" in various unspecified state markets and "over one third of individual pharmacy prescriptions" in a national market. (Doc. 62 ¶ 89). Plaintiffs appear to conflate the Defendants' alleged share of all pharmacy prescriptions in various geographic markets with their share of "purchases of retail community pharmacy services." However, Plaintiffs have only alleged the latter as a relevant product market (Doc. 62 ¶¶ 2, 64), so allegations as to market concentration in the former are irrelevant to their monopsony claim. *See, e.g., Shoppin' Bag of Pueblo, Inc. v. Dillon Cos.*, 783 F.2d 159, 165 (10th Cir. 1986) (affirming district court's exclusion of evidence of market share outside of relevant market on grounds that such evidence was irrelevant to establish market share in relevant market); *see also United States v. Am. Cyanamid Co.*, 719 F.2d 558, 566 (2d. Cir, 1983)

("An initial step in determining whether such foreclosure constitutes a violation of Section 7 is to determine the relevant markets and the market shares of the acquiring and acquired firms' shares *in those markets*.") (emphasis added). Conversely, Plaintiffs have alleged the Defendants' share of purchases of pharmacy services from certain individual Plaintiffs (*e.g.*, Doc. 62 ¶¶ 35, 38, 42, 46 & 51), but again, the Defendants' alleged share of purchases from individual Plaintiffs is not the same as market-wide concentration for the purchases from community pharmacies as a whole.

In any event, the various share concentration figures that Plaintiffs allege (ranging from 28 to 56 percent) are insufficient as a matter of law to allege a monopsony theory of competitive harm. Courts have typically required buyer market share in the 70-80%-plus range for the relevant purchasing market, either unilaterally (for a monopsony) or collectively (for an oligopsony). *See, e.g.*, *Mandeville Island Farms*, 334 U.S. at 223 (defendants sugar refiners controlled all purchases of sugar beets in relevant market); *Todd*, 275 F.3d at 208-09 (allegations that defendants oil companies collectively had 80-90 percent share for market for purchase of services from managerial, professional and technical employees in the oil industry was sufficient to survive Rule 12(b)(6) motion); *Nat'l Macaroni Mfr*s., 345 F.2d at 426 ("'[W]here all or the dominant firms in a market combine to fix the composition of their product with the design and result of depressing the price of an essential raw material, they violate the rule against price-fixing agreements. . . .'"). In fact, the Amended Complaint concedes that there are other remaining PBMs that compete with ESI in the alleged monopsony market. (Doc. 62 ¶ 26 ("ESI and Medco competed in the markets (among others) for the purchase of retail pharmacy services. . . .")). These deficiencies render Plaintiffs' claims insufficient to withstand a motion to dismiss. *See Campfield v. State Farm Mut. Auto. Ins. Co.*, 532 F.3d 1111, 1118 (10th Cir. 2008)

(relevant market for monopsony claim must include all potential buyers for plaintiffs' products, not just defendant).

D. The Amended Complaint Fails to Allege Anticompetitive Effect or Antitrust Injury

Regardless of proper market definition, the Amended Complaint also fails to provide any specific or credible allegations that the merger will cause competitive harm in either an upstream input market or a downstream output market – both of which are required for a Section 7 monopsony claim.

In dismissing the original monopsony claim, the Court specifically held that Plaintiffs' allegations of anticompetitive effects and antitrust injury resulting from the merger were deficient:

> Plaintiffs do allege that, if Defendants adopted "non-competitive, or even below-cost prices" they would be forced to do business with them anyway. See, e.g., (Doc. 1 ¶ 37); see also id. ¶ 130 (referencing reimbursement rates "below competitive levels[.]" However, these allegations are never fully fleshed out in the complaint as to the sort of anticompetitive acts in which they expect the merged Defendants to engage. Indeed, in their prayer for relief, Plaintiffs assert that Defendants' merger would result [in] reimbursement rates that would decline to a "suboptimal level[,]" which is a nebulous term at best.

(Doc. 62, at 19 n. 13 (first and third alterations in original)).

Yet, the Amended Complaint does not allege any new, material, well-pled facts to remedy these identified defects. Rather, Plaintiffs simply add some talismanic and cursory language that the merger and resulting lower reimbursement rates will result in "reduced output." (Doc. 62 ¶ 100). By way of comparison, Paragraph 4 of the original Complaint alleged that proposed acquisition "would (a) reduce the quality of pharmacy services provided to patients and (b) raise patient's healthcare costs by increasing PBM fees and prices for prescription drugs." (Doc. 1 ¶4). In contrast, the same paragraph in the Amended Complaint alleges the completed

merger "*will* (a) reduce the quality *and diminish the output* of pharmacy services provided to patients and (b) raise patient's healthcare costs by increasing PBM fees and prices for prescription drugs." (Doc. 62 ¶ 4 (emphases added)). With the exception of these italicized portions, the language is identical. Similarly, Plaintiffs add the following cursory allegation to Paragraph 94 of the Amended Complaint: "This reduction in reimbursement rates will, in turn, reduce output in markets for the sale of retail pharmacy services." (Doc. 62 ¶ 94).

These new allegations by themselves do not "fully flesh[] out" the alleged anticompetitive acts and effects that will result from the merger, as instructed by the Court. Rather, they are bereft of any factual specificity and simply parrot the substantive legal requirements of Section 7 of the Clayton Act and the standing requirements of Section 16 of the Clayton Act. *See Aschroft v. Iqbal*, 558 U.S. at 678; *Twombly*, 550 U.S. at 570; *Ginsburg v. InBev NV/SA*, 623 F.3d 1229, 1232-33 (8th Cir. 2010) (applying *Twombly* to Clayton Act merger challenge and dismissing claims). Significantly, the Amended Complaint contains no other allegation that provides any additional specific facts to support the defective monopsony claim.[6]

1. Plaintiffs Do Not Allege Likely Misconduct or Market-Wide Harm in an Upstream Input Market

The Amended Complaint also fails to allege that ESI's increased monopsony power as a result of the merger enables it to engage in predatory or exclusionary conduct – an independent defect in their monopsony claim. *See In re Beef Indus. Antitrust Litig.*, 907 at 515-16 ("[T]o

[6] In addition, as already noted above in Section II.B, this new language appears to allege a reduction of output for all retail pharmacy services and thus is inconsistent with Plaintiffs' alleged relevant product market of "the purchase of retail *community* pharmacy services." Again, Plaintiffs' repeated conflation of the alleged competitive effects in these two different markets necessarily precludes them from being able to allege the requisite anticompetitive effects in either market.

demonstrate that [defendant] was a predatory oligopsonist seeking to increase its market share through an illegal form of competition, [plaintiffs] would be required to show predatory or exclusionary conduct on the part of [defendant]."); *Ocean State Physician Health Plan*, 883 F.2d at 1110 (defendants' "policy of insisting on a supplier's lowest price – assuming that the price is not 'predatory' or below the supplier's incremental cost – tends to further competition on the merits and, as a matter of law, is not exclusionary"); *Kamine/Besicorp*, 908 F. Supp. at 1203. For example, Plaintiffs do not allege that the merger confers on ESI the power to exclude any other PBM from buying retail pharmacy services from Plaintiffs, such as by requiring exclusive and/or long-term contracts with community pharmacies (which it does not). *See Syufy Enters.*, 903 F.2d at 671 ("Without the power to exclude competition, large companies that try to throw their weight around may find themselves sitting ducks for leaner, hungrier competitors."); *Westchester Radiological Assocs. P.C. v. Empire Blue Cross & Blue Shield of New York, Inc.*, 707 F. Supp. 708, 713 (S.D.NY.), *aff'd per curiam*, 884 F.2d 707 (2d Cir. 1989).

Westchester Radiological Associates is particularly instructive. There, the district court dismissed a monopsony claim brought by a group of radiologists against Blue Cross of New York, a purchaser of radiological services, finding that:

> the Radiologists have (1) no evidence that Blue Cross has done anything to prevent its competitors from negotiating with hospitals to buy the same bundle of services that Blue Cross buys, (2) no evidence that Blue Cross has attempted to control agreements between the hospitals and other insurers, (3) no evidence that Blue Cross interferes in any way with the relationship between the radiologists and patients who are not covered by Blue Cross, and (4) no evidence that Blue Cross directly tells, or even suggests to, the hospitals what to pay radiologists.

707 F. Supp. at 713. Similarly, here, the Amended Complaint contains no allegations that the merger would provide ESI with greater ability to prevent competing PBMs from contracting with

community pharmacies or otherwise to interfere with relationships between community pharmacies and the beneficiaries of drug plans administered by competing PBMs.

In any event, while Plaintiffs provide some allegations that the merger will cause harm to themselves (and other community pharmacies whose interests they purport to represent) due to so-called "suboptimal" reimbursement rates, they do not provide any specific facts to support their new allegation that the merger would "diminish the output of [all] pharmacy services" (Doc. 62 ¶ 4) in the upstream market. The Amended Complaint provides no factual allegation as to how or why the merger will reduce the output of services from pharmacies (such as chains and mail order) other than community pharmacies. This fatal omission is predictable, of course, as Plaintiffs cannot credibly allege that the merger would reduce the overall number of prescriptions being written by physicians and other medical providers, which is wholly outside the control of Defendants. Thus, "[a]though proof of plaintiffs' allegations would establish harm to their business interests, such proof would not, standing alone, show injury to competition in the market as a whole." *Les Shockley Racing*, 884 F.2d at 508 (affirming dismissal of monopsony claim by operators of jet-powered drag race vehicles against drag race exhibitors because plaintiffs' complaint alleged harm only to themselves and failed to allege any harm to competing operators of jet-powered vehicles).[7]

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[7] To the extent that Plaintiffs are only alleging that the merger would reduce output solely for community pharmacy service, such an arbitrarily limited market effect must fail, as explained above in Section II.B and as the Court has already noted when it dismissed Plaintiffs' claim related to the provision of drugs to beneficiaries of large employer drug plans. (Doc. 60 at 20-21).

2. Plaintiffs Also Fail to Allege Market-Wide Harm in a Downstream Output Market

While the Amended Complaint pays lip service to the requirement of competitive harm in the input market for pharmacy services, it is wholly silent on the requirement of alleging market-wide anticompetitive harm in an output market. As the Supreme Court found in *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312 (2007), predatory bidding by a monopsonist in an input market is unlikely to cause competitive harm if the alleged conduct does not "present a risk of significantly increased concentration in the market in which the monopsonist sells," *i.e.,* the output market. *Id.* at 321. Similarly, the Tenth Circuit held that a

> plaintiff must show that the monopsonist's practices have caused or are likely to cause the anticompetitive effect associated with monopsonies, namely the arbitrary manipulation of market prices by unilaterally depressing seller prices on the input market with the effect (or likely effect) of increasing prices on the output market.

Been, 495 F.3d at 1232.[8]

Indeed, even assuming that the merger would increase ESI's monopsony power in the upstream market, "monopsony power *per se* does not create an antitrust concern" if the risk that the monopsonist can simultaneously raise prices to its own buyers "is slight or nonexistent." *Kamine/Besicorp*, 908 F. Supp. at 1203. In *Kamine/Besicorp* the plaintiff, which was a power cogenerator that sold power to defendant, alleged that the defendant, the local utility, was a monopsonist for the purchase of electric power in the local market. Kamine sought a preliminary injunction to enjoin defendant from purchasing power from plaintiff at a lower price, which

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[8] Although the plaintiffs in *Been* actually brought their action under Section 202(a) of the Packers and Stockyard Act, 7 U.S.C. § 192(a), the Tenth Circuit's analysis addressed monopsony conduct under Section 2 of the Sherman Act.

plaintiff alleged was "predatory" and would drive the plaintiff out of business. The district court denied the injunction, explaining that:

> Kamine's allegations, however, fail to indicate a truly anticompetitive effect as a result of RG & E's actions. The chief danger associated with monopsony power – market power on the buying side of the market – occurs when a company has significant market power *both "upstream"* and "downstream," meaning that the company can control the level of demand for the product that it buys and the level of supply for the product that it sells to its own buyers. Such a market position allows the company to demand a low price from its suppliers while *simultaneously raising the prices it charges its buyers*.

Id. (emphases added). Not surprisingly, no court ever has held a merger violated Section 7 on an monopsony or oligopsony theory absent a showing that the merged firm would also have market power in the downstream output market.

The Amended Complaint simply fails to allege that the merger will cause any competitive harm in a downstream output market for PBM services (or any other downstream market). In fact, the Court has already dismissed with prejudice Plaintiffs' prior claim in the original Complaint that the merger would reduce competition in a market for the provision of full-service, nationwide PBM services to large private employers. (Doc. 60 at 21-22). The original Complaint also alleged that the merger would cause harm in another output market – for the provision of drugs to beneficiaries of large plan sponsors – but the Court dismissed this claim, albeit without prejudice to replead, so long as Plaintiffs timely amended the claim. (Doc. 60, at 20-21, 22). Plaintiffs then dropped this claim from its Amended Complaint, thereby conceding that this claim is dismissed with prejudice and that they can allege no facts to support this theory of anticompetitive harm in an output market.

Indeed, courts have consistently found that alleged monopsony power – particularly in health care markets – often will result in <u>lower prices in the output market</u> and thus are not anticompetitive. *See, e.g., Austin v. Blue Cross & Blue Shield of Alabama*, 903 F.2d 1385, 1390

(11th Cir. 1990); *Ocean State Physician Health Plan*, 883 F.2d at 1110-12; *Kartell v. Blue Shield of Massachusetts, Inc.*, 749 F.2d 922, 928-31 (1st Cir. 1984); *Travelers Ins. Co. v. Blue Cross of W. Pennsylvania*, 481 F.2d 80, 84 (3d Cir. 1973); *Westchester Radiological Associates*, 707 F. Supp. at 715-16.

3. Plaintiffs Wholly Fail to Allege an Antitrust Injury

Finally, Plaintiffs' failure adequately to allege competitive harm in either an upstream input market or a downstream output market (or, for that matter, in any properly pled relevant market) necessarily means that they cannot properly allege antitrust injury, which is a requirement of antitrust standing under Section 16 of the Clayton Act. *See Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 113 (1986) ("Accordingly, we conclude that in order to seek injunctive relief under § 16, a private plaintiff must allege threatened loss or damage 'of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful.'" (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977))).

In *Cargill*, the plaintiff beef packer had sought and obtained an injunction in the district court against the acquisition by defendant beef packer of another competing beef packer. Plaintiff alleged, *inter alia*, "a threat of a loss of profits stemming from the possibility that [defendant], after the merger, would lower its prices to a level at or only slightly above its costs," thus forcing plaintiff to lower its own prices and/or lose business to defendant. 479 U.S. at 114. The Supreme Court held that "the threat of loss of profits due to possible price competition following a merger does not constitute a threat of antitrust injury" and reversed and remanded

the action.[9] *Id.* at 117. Similarly, Plaintiffs here only provide specific allegations of injury to themselves stemming from the merger, which does not establish antitrust injury under *Cargill*. *See Pool Water Prods. v. Olin Corp.*, 258 F.3d 1024, 1035 (9th Cir. 2001) ("The Supreme Court has made clear . . . that a decrease in profits from a reduction in a competitor's prices, so long as the prices are not predatory, is not an antitrust injury."). Here, Plaintiffs attempt to link their own harm with competitive harm in an overall market as set forth in their new allegation that Defendants' "reduction in reimbursement rates will, in turn, reduce output in markets for the sale of retail pharmacy services." (Doc. 62 ¶ 94). As a matter of law, however, this is no different than alleging injury to themselves, which is not an "antitrust injury."

II. THE DISMISSAL OF PLAINTIFFS' CLAIM SHOULD BE WITH PREJUDICE

Plaintiffs' failure to correct the defects identified by this Court in its Memorandum Order warrants dismissal of Plaintiffs' claims with prejudice. "Under the law of the case doctrine, once an issue is decided, it will not be relitigated in the same case, except in unusual circumstances. . . . The purpose of this doctrine is to promote the 'judicial system's interest in finality and in efficient administration.'" *Hayman Cash Register Co. v. Sarokin*, 669 F.2d 162, 165 (3d Cir. 1981) (citation omitted). Thus, courts have held that where the court provides plaintiffs with notice of the defects in the complaint, and plaintiffs fail to correct these defects, the law of the case doctrine compels dismissal with prejudice:

> The law of the case doctrine militates against re-deciding issues of law previously resolved in the same case. Under the law of the case, these claims must be dismissed. Because Plaintiffs have failed to amend these claims so that they

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[9] The Supreme Court also held that plaintiff's other theory of competitive harm – that the defendant would engage in predatory pricing to drive plaintiff out of business – was not properly pled and unsupported by the evidence. 479 U.S. at 118-19.

> could withstand a motion to dismiss, this Court concludes that no amendment could make them withstand a motion to dismiss and that amendment is futile. Because amendment is futile, Counts II and III will be dismissed with prejudice.

Haesler v. Novartis Consumer Health, Inc., Civ. No. 05-372 (JAG), 2006 WL 2689830, at *7 (D.N.J. Sept. 18, 2006) (citations omitted), *aff'd*, 266 F. App'x 173 (3d Cir. 2008); *see also Taggart v. Wells Fargo Home Mortg. Inc.*, No. 10-cv-00843, 2012 WL 4462787, at *5 (E.D. Pa. Sept. 27, 2012) ("Because each claim in the amended complaint is identical to the Plaintiff's original complaint, the reasons for dismissal would apply in this instance and amendment would be futile."); *Hall v. United Techs., Corp.*, 872 F. Supp. 1094, 1102-03 (D. Conn. 1995) (collecting cases and finding that dismissal with prejudice is appropriate where plaintiff fails to correct defects in complaint after being given notice by the court). Because this Court already put the Plaintiffs on notice of the defects in their monopsony claim and Plaintiffs failed to correct these deficiencies in their Amended Complaint, their monopsony claim should be dismissed with prejudice.

CONCLUSION

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

Respectfully submitted,

DEL SOLE CAVANAUGH STROYD LLC

By: */s/ Arthur H. Stroyd, Jr.*

Arthur H. Stroyd, Jr.
Pa. ID No. 15910
astroyd@dscslaw.com
Stephen J. Del Sole
Pa. ID No. 73460
sdelsole@dscslaw.com

200 First Avenue, Suite 300
Pittsburgh PA 15222
(412) 261-2172

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
Clifford H. Aronson
(Admitted Pro hac vice)
clifford.aronson@skadden.com
James Keyte
(Admitted Pro hac vice)
james.keyte@skadden.com
Paul M. Eckles
(Admitted Pro hac vice)
paul.eckles@skadden.com
Thomas Pak
(Pro hac vice motion pending)
thomas.pak@skadden.com

Four Times Square
New York, New York 10036-6522
Telephone: (212) 735-3000
Facsimile: (212) 735-2000

Attorneys for Defendants Express Scripts, Inc. and Medco Health Systems, Inc.