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,

v.

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

Defendants.

Civil Action No. 2:12-cv-395
Judge Cathy Bissoon

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS CERTAIN CLAIMS

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PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS CERTAIN CLAIMS

INTRODUCTION

ESI and Medco were vigorously competing in several markets when they entered into an anticompetitive agreement to merge and eliminate competition between them. (Doc. 62 ¶¶ 2, 26, 27). By entering into this agreement and closing upon it shortly *after* Plaintiffs filed their initial Complaint, ESI and Medco dramatically increased market concentration and substantially lessened competition as a whole in markets where they competed. (Id. ¶¶ 89, 91-101, 110). Defendants did not achieve these results through unilateral pricing decisions, nor through vigorous competition, nor by reaping the rewards of their ingenuity, nor by any other procompetitive or unilateral means. (Id. ¶¶ 91). Instead, Defendants achieved these results by agreeing to combine two of the Big Three PBMs. (Id. ¶¶ 91-101, 110). Plaintiffs' injuries, including, *inter alia*, reductions in reimbursement rates for retail community pharmacy services, reductions in output, diminution in the quality of Plaintiffs' services, and injuries to Plaintiffs' goodwill and businesses, flow directly from Defendants' illegal agreement and their coordinated efforts to finalize the agreement by actually merging. (Id.) Indeed, Plaintiffs would not have suffered injury but for Defendants' illegal agreement to merge and their joint actions taken to consummate this merger. (Id., at n.15, ¶¶ 26, 95).

These facts form the basis for Plaintiffs' claims brought under Section 7 of the Clayton Act and Section 1 of the Sherman Act. As alleged in the Amended Complaint, these facts state a claim upon which relief can be granted. Nonetheless, Defendants filed a motion to dismiss asking this Court to (1) ignore the clear pleading of a bilateral agreement and coordinated action; (2) apply a Sherman Act Section 2 monopoly analysis to the Amended Complaint even though

no Section 2 claim was made; and (3) adopt a heightened pleading standard based on a series of non-pleading cases even though no such heightened standard exists. Respectfully, the Court should do none of these things.

ESI and Medco's agreement to merge and the consummation of that agreement violate Section 7 of the Clayton Act ("Section 7"), which provides in relevant part that "[n]o person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital … where in any line of commerce or in any activity affecting commerce in any section of the country, the *effect of such acquisition may be substantially to lessen competition*." 15 U.S.C. § 18 (emphasis added). As pled in the Amended Complaint, Plaintiffs' Section 7 claim derives from the "acquisition" of Medco by ESI the effect of which is to substantially lessen competition. (Doc. 62, at n. 15, ¶¶ 3, 58, 64, 67, 70, 91, 94, 95). There is no question that the acquisition of Medco by ESI substantially lessens competition by eliminating one of the Big Three competitors and leaving only two significant competitors in several relevant markets, including markets for the purchase of retail pharmacy services. (Id. at ¶¶ 92-101, 110).

A contract to merge that unreasonably restrains trade also violates Section 1 of the Sherman Act ("Section 1"), which prohibits companies from entering into any "contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade" (emphasis added).[1] 15 U.S.C. § 1. The contract to merge between ESI and Medco, and the resulting combination of these two companies, fits squarely within this language and relevant case law.

[1] Defendants argue that this is not a "conspiracy" case, but the word "conspiracy" is a red herring. Section 1 expressly includes "contract[s]" and "combination[s] in the form of … trust[s] or otherwise," the former of which plainly covers Defendants' agreement to merge, and the latter of which is widely understood to refer to "trusts" and similar formal devices used to combine competitors, including modern mergers. See, e.g., California v. Am. Stores, 495 U.S. 271, 285-92 (1990) (providing an overview of the history of antitrust laws).

(Doc 62 ¶¶ 93-101, 110). The fact that this contract was an agreement to merge rather than to fix prices does not remove it from the explicit language of Section 1 or transform this bilateral agreement into unilateral conduct. Indeed, the Supreme Court has made clear that the "Sherman Act [Section 1], of course, forbids mergers effecting an unreasonable restraint of trade." See, e.g., United States v. Phila. Nat'l Bank, 374 U.S. 321, 354–55 (1963).

This Court held that Plaintiffs did not adequately plead antitrust standing in their initial Complaint because, unlike plaintiffs in West Penn Allegheny Health Sys., Inc. v. UPMC, 627 F.3d 85 (3d Cir. 2010), Plaintiffs in the present action did not assert "allegations of conspiracy between two independent defendants to force lowered reimbursement rates." (Doc 60, at 19). Accordingly, the defect in the original Complaint was that it could be read as attributing lowered reimbursement rates to unilateral actions taken by Defendants separately or as a single merged entity. (Id. (noting that "had the same lowered reimbursement rates been paid by insurance company unilaterally [in West Penn], the plaintiffs would have had "little basis for challenging [them].") (internal citations omitted)).

The Amended Complaint corrects this defect by explicitly alleging that the source of Plaintiffs' injury is the agreement between both Defendants as well as their coordinated actions to effect that agreement and close their anticompetitive merger. (Doc. 62, at n. 15, ¶¶ 91, 95). Explained another way, Defendants agreement to merge was essentially an agreement to stop competing. The antitrust theory embodied in prevailing case law predicts that the mere act of concentrating the market through a merger (a coordinated action by two competitors) can substantially lessen competition in violation of antitrust laws. E.g., F.T.C. v. H.J. Heinz Co., 246 F.3d 708, 715 (D.C.Cir. 2001) ("Merger law 'rests upon the theory that, where rivals are few, firms will be able to coordinate their behavior, either by overt collusion or implicit

understanding, in order to restrict output and achieve profits above competitive levels.'")
(quoting FTC v. PPG Indus., 798 F.2d 1500, 1503 (D.C.Cir. 1986)).

Here, this substantial lessening of competition will translate into reduced reimbursement rates and reduced output because ESI-Medco acquired its current market power not by legally competing but rather by entering into an unlawful agreement. Not only is that agreement unlawful because it concentrates the market by substantially limiting competition, it also "increases the likelihood of anticompetitive coordinated interactions" between ESI-Medco, CVS Caremark (the other remaining "Big Three" (now "Big Two") competitor), and smaller competitors. (Doc. 62 ¶110(b)). In addition to adding the above language, which makes clear that Plaintiffs are asserting a theory of harm based on coordinated conduct, Plaintiffs added a Section 1 claim (discussed above) that more explicitly targets Defendants' bilateral agreement to merge (Doc. 62 ¶¶ 27, 110).

Defendants have ignored the numerous allegations in the Amended Complaint regarding Defendants' coordinated actions in an attempt to recast Plaintiffs' claims as claims for *unilateral* monopolization. (Doc. 66, at 8, 13-25). Indeed, Defendants have gone so far as to urge this Court to adopt standards from unilateral monopolization cases under Section 2 of the Sherman Act ("Section 2") even though the pled Section 7 and Section 1 claims have entirely different elements. See, e.g., Phila. Nat'l Bank, 374 U.S. at 362-65 (1963) (finding that a merger need only create an appreciable danger of anticompetitive coordination to be presumptively illegal, which contrasts sharply with Section 2's requirements concerning monopoly power and exclusionary conduct); Brown Shoe Co. v. United States, 370 U.S. 294 (1962) (holding that a merger resulting in a merged entity that controlled 20-57 percent of various geographic markets substantially lessened competition without requiring any allegations or evidence of "exclusionary

or predatory" conduct); Fraser v. Major League Soccer, L.L.C., 284 F.3d 47, 60 at n. 9 (1st Cir. 2002) ("Whereas section 2 requires monopoly power or a prospect of it…something less than monopoly power is required to condemn mergers under section 7's 'substantially lessen competition' test."); Fricke-Parks Press, Inc. v. Fang, 149 F. Supp. 2d 1175, 1182 (N.D. Cal. 2001) (noting that "section 1 claims do not require the plaintiff to demonstrate the section 2 elements of 'predatory or anticompetitive conduct' and a 'dangerous probability of achieving 'monopoly power'") (internal citations omitted).

Defendants have also asked this court to establish a heightened pleading standard for buyer-power merger cases by suggesting legal standards drawn from inapplicable post-trial and post-discovery decisions – not decisions based on the adequacy of the pleadings. (Doc. 66, at 4-5 (citing decisions on the merits after full evidentiary hearings to assert a heightened market definition standard), 5-6 (doing the same for anticompetitive effects and antitrust injury), 11-12 (the same for market power)). Furthermore, Defendants have misconstrued this Court's August 27, 2012 Order by conflating its rulings on one market definition (regarding the dismissed PBM market) with its rulings on the retail community pharmacy market.[2] (Id. at 7). Finally, Defendants have invented a straw man definition of "retail community pharmacy services" that excludes chain pharmacies despite the fact that the Amended Complaint does *not* define this phrase to exclude chain pharmacies from the market and despite the fact that the accepted industry definition of the phrase "retail community pharmacy services" (as reflected in the definition of the phrase in the Social Security Act) *explicitly includes* chain pharmacies. (Id., at

9-12).

Plaintiffs request that the Court decline Defendants' invitation to import elements from Section 2 monopolization cases into a case where Plaintiffs have not currently asserted any claims under Section 2. Plaintiffs further request that the Court apply pleading standards that are consistent with relevant and binding jurisprudence instead of the heightened standards proposed by Defendants. Under the appropriate standards, Plaintiffs have properly alleged violations of Sections 1 and 7 by adequately pleading an agreement, antitrust standing, relevant markets, and competitive effects. (Doc. 62 ¶¶ 3, 57, 58, 64, 67, 70, 91, 94, 95, 110 (agreement); 30 n. 15, ¶¶ 3, 58, 64, 67, 70, 91, 94, 95, 110 (standing); 65-73, 89 (relevant markets); 89, 91-101, 110 (competitive effects)).

LEGAL STANDARD

In considering a Rule 12(b)(6) motion to dismiss, the Court is to "accept as true the factual allegations in the complaint and draw all reasonable inferences in the plaintiff's favor." West Penn, 627 F.3d at 91 (internal citation omitted). "The defendant bears the burden to demonstrate that the complaint fails to state a claim." Untracht v. Fikri, 454 F. Supp. 2d 289, 304-05 (W.D. Pa. 2006), aff'd, 249 Fed. Appx. 268 (3d Cir. 2007). To satisfy Rules 8 and 12(b)(6), a complaint must only contain factual allegations that, taken as a whole, render the plaintiff's entitlement to relief plausible. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 569 n. 14 (2007); Phillips v. Cnty of Allegheny, 515 F.3d 224, 234 (3d Cir. 2008). These rules "'do[ ]

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[2] This Court's previous ruling found that Plaintiffs failed to "explain[ ] the difference in the product supplied to . . . consumers" in the alleged *market for the provision of drugs to beneficiaries of large employer drug plans*. (Doc. 60, at 20-21). The Court's ruling did not in any way pertain to the market that was re-alleged in the Amended Complaint that pertained to the *provision of retail pharmacy services*. As discussed herein, the Court's concern with the allegations regarding the market for retail pharmacy services focused on whether Plaintiffs had adequately alleged cognizable antitrust injury – not market definition. (Id., at 19).

not impose a probability requirement at the pleading stage,' but instead 'simply call[ ] for enough facts to raise a reasonable expectation that discovery will reveal evidence of' the necessary element." Phillips, 515 F.3d at 234 (quoting Twombly, 550 U.S. at 556). Furthermore, the Supreme Court in Twombly expressly rejected the notion that a "'heightened' pleading standard applies in antitrust cases." West Penn, 627 F.3d at 98 (3d Cir. 2010) (quoting Twombly, 550 U.S. at 569, n.14).

ARGUMENT

I. Defendants violated Section 7 of the Clayton Act and Section 1 of the Sherman Act by entering into a contract to merge that substantially lessened competition.

a. Plaintiffs have adequately pled each element of a Section 7 and Section 1 case.

The elements of a properly pled Section 7 claim are (1) an acquisition; (2) a product market, (3) a geographic market, and (4) probable anticompetitive impact. Allis-Chalmers Mfg. Co. v. White Consol. Indus., Inc., 414 F.2d 506, 517 (1969); United States v. Pennzoil Co., 252 F. Supp. 962, 971 (W.D. Pa. 1965). In addition, private plaintiffs seeking injunctive relief must plead standing under Section 16, which requires allegations of (1) threatened loss or injury cognizable in equity (2) proximately resulting from the alleged antitrust injury. In re Warfarin Sodium Antitrust Litig., 214 F.3d 395, 400 (3d Cir. 2000). "While relief sought pursuant to Section 4 of the Clayton Act requires proof of loss . . . , injunctive relief under section 16 ***only requires a threat of loss***." Id. at 399 (citing Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 109-111 (1986)) (emphasis added). "[T]he evident import of Congress' reference to '*threatened* loss or damage' [in Section 16] is not to constrict the availability of injunctive remedies against violations that have already begun or occurred, but rather to expand their availability against harms that are as yet unrealized." Am. Stores Co., 495 U.S. at 282, n. 8

(citing Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130 (1969)).

Section 1 of the Sherman Act prohibits any "*contract*, combination in the form of a trust or otherwise, or conspiracy in restraint of trade," including mergers that effect an unreasonable restraint of trade. 15 U.S.C. § 1 (emphasis added); see, e.g., Phila. Nat'l Bank, 374 U.S. at 354–55 ("The Sherman Act [Section 1], of course, forbids mergers effecting an unreasonable restraint of trade.") The standards applicable to Section 1 are substantively the same as the standards applicable to Section 7. United States v. Rockford Mem'l Corp., 898 F.2d 1278, 1281-82 (7th Cir. 1990) ("A transaction violates section 1 of the Sherman Act if it restrains trade; it violates the Clayton Act if its effect may be substantially to lessen competition. But both statutory formulas require, and have received, judicial interpretation; and the interpretations have, after three quarters of a century, converged") (citing 2 Areeda & Turner, Antitrust Law, ¶ 304 (1978)).

Plaintiffs have adequately pled market definition for their Section 7 and Section 1 claims by alleging numerous facts sufficient to define the relevant markets with reference to the rule of reasonable interchangeability (e.g., "the purchase of other goods and services (by potential customers of a retail community pharmacy) is not reasonably interchangeable with the purchase of retail pharmacy services, as pharmacy services and its inputs are specialized and not saleable to buyers not seeking these specific services"). (Doc. 62 ¶ 66). Such pleading is legally sufficient to withstand a motion to dismiss. Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 436 (3d Cir. 1997); see also Newcal Indus. v. Ikon Office Solution, 513 F.3d 1038, 1045 (9th Cir. 2008) (noting that an antitrust complaint "survives a Rule 12(b)(6) motion unless it is apparent from the face of the complaint that the alleged market suffers a fatal legal defect").

Plaintiffs have also adequately alleged probable anticompetitive impact by pleading market concentration, the effects of the merger on coordination in the market, the combined

firms' market power, and the likely future pricing practices of the remaining competitors. (Doc. 62 ¶¶ 87-89, 91-101). In fact, based solely on concentration figures alleged in the Amended Complaint, this merger is *presumptively illegal* under controlling case law. See Phila. Nat'l Bank, 374 U.S. at 363-65 (holding that a merger resulting in a merged entity that controlled 30-33 percent of the market triggered a presumption that the merger substantially lessened competition); followed by United States v. H&R Block, 833 F. Supp. 2d 36, 71 (D.D.C. 2011); see also Mem. in Supp. of Pls' Mot. for a TRO/Permanent Inj. & Expedited Schedule, which Plaintiffs herein incorporate by reference (Doc. 23, at 9-13).

In addition, Plaintiffs have adequately pled antitrust standing by alleging (1) a significant "threatened loss or injury" in the form of "reduce[d] reimbursement for the purchase of retail community pharmacy services," lost ability to negotiate resulting in "contractual terms and business behavior detrimental to the pharmacies and competition," reduced output, and diminished quality of Plaintiffs' services (which injures Plaintiffs' goodwill); as well as (2) a proximate link between those injuries and Defendants' illegal agreement to merge, which eliminates competition between two of the Big Three PBMs (buyers of retail community pharmacy services), increases the likelihood of coordination in the market, and increases Defendants' ability to impose non-competitive pricing on Plaintiffs. (Doc. 62, at 30 n .15, ¶¶ 91, 94-96, 98-101, 110(b)); In re Warfarin Sodium Antitrust Litig., 214 F.3d at 399-400.

b. Plaintiffs' Amended Complaint cures the defects identified by the Court.

This Court held that Defendants did not adequately plead antitrust standing in their initial Complaint because, unlike plaintiffs in West Penn, Plaintiffs did not properly plead that their injuries in the form of reduced reimbursement rates, reduced output, and diminution in the quality of their services, were attributable to a conspiracy under the antitrust laws. (Doc 60, at

19). Thus, Plaintiffs understand that the Court read the Complaint as leaving open the possibility that Plaintiffs attributed their injuries to what either ESI or Medco would have imposed unilaterally.

Plaintiffs cured that defect by clearly pleading in the Amended Complaint that the *bilateral* contract to merge and the *bilateral* combination of ESI and Medco are the cause of Plaintiffs' injuries.[3] (Doc. 62, at 30 n. 15, ¶¶ 64, 67, 70, 91, 94, 95). The contract to merge between Defendants caused structural changes in the marketplace that unreasonably restrain trade and substantially lessen competition by (1) eliminating head-to-head competition between Defendants and (2) creating market concentration that facilitates anticompetitive coordination. (Doc. 62, at 30 n. 15, ¶¶ 25, 64, 67, 70, 91, 94, 95, 97, 110 (providing that the agreement between Defendants will "promote potential coordination on…reimbursement rates," increase the "likelihood of anticompetitive coordinated interactions between the remaining competitors," and "increase the likelihood that the remaining 'Big Two' PBMs could substantially reduce competition through successful coordination.").

The new allegations (combined with those in the first Complaint that were re-pled in the Amended Complaint) make clear that Plaintiffs' injuries are not caused by unilateral pricing that would have existed without the merger. Indeed, the effect of the merger on the structure of the market injures Plaintiffs irrespective of each firm's unilateral pricing practices after the merger because market concentration resulting from the anticompetitive bilateral merger

[3] Defendants gloss over new allegations in the Amended Complaint concerning Defendants' coordinated conduct and argue that "Plaintiffs here still do not (and cannot) allege that Express Scripts and Medco are engaging in monopsony price-fixing conspiracy….[because] Express Scripts and Medco have been a single entity since the closing of the merger on April 2, 2012, and are thus incapable of engaging in a conspiracy with each other to lower reimbursement rates (or in any other illegal conspiracy)." This is a red herring. Companies cannot avoid claims that a merger is unlawful simply by consummating the merger. E.g., Cmty. Publishers, Inc. v. Donrey Corp., 892 F. Supp. 1146, 1175 (W.D. Ark. 1995); Tasty Baking Co. v. Ralston Purina, Inc., 653 F. Supp. 1250, 1254 (E.D. Pa. 1987).

diminishes Plaintiffs' ability to negotiate fair contracts with all purchasers in the market (not just Defendants) due to the reduced competition for purchasing opportunities. In other words, Plaintiffs no longer have three large PBMs to use as negotiating leverage against each other and smaller players; rather, Plaintiffs now must negotiate in a structural environment that promotes pricing complacency and implicit or explicit coordination among purchasers. (Id. ¶¶ 89, 91, 94, 95, 97, 110(b), (d), (e)); see also William Kovacic, Quantitative Analysis of Coordinated Effects, 76 Antitrust L.J. 2 (2009) (providing the economic and legal theory of coordinated effects).

Plaintiffs have pled numerous facts establishing a structural case based on a coordinated action theory, including undue market concentration, transparency in contractual pricing and other terms, and high quantities of small transactions. (Id. ¶¶ 89, 97). Moreover, Plaintiffs' injuries, as alleged in the Amended Complaint, are sufficiently "proximate" to Defendants' bilateral agreement in violation of the antitrust laws to qualify for standing under Section 16. The court in In re Warfarin explained that whether a plaintiff's injury "is too remote from the alleged violation to confer Section 4 Clayton Act standing, depends upon the relationship of the injury alleged and the types of injury that Congress was targeting when it legislated particular anticompetitive conduct as unlawful." 214 F.3d at 400. In In re Warfarin, the court held that an alleged agreement to fix prices proximately caused injuries to consumer-plaintiffs even though they were only indirectly harmed (their purchases were from one or more middlemen) because the plaintiff consumers were "foreseeable and necessary victims" of the agreement to fix prices. Id. Furthermore, plaintiffs in that case suffered injury resulting from the price-effects of the unlawful agreement to fix prices, which plainly is one type of injury that Congress targeted with the antitrust laws. Id.

Retail community pharmacies are "foreseeable and necessary victims" of Defendants' agreement to stop competing for the purchase of retail community pharmacy services, which will depress reimbursement rates, reduce output, and diminish the quality of pharmacy services. Plaintiffs are, in fact, the *direct* victims of this agreement. (E.g. Doc. 62 ¶¶ 3, 110(b), (d)). Moreover, anticompetitive effects on pricing, output, and the quality of services resulting from agreements to reduce competition plainly are the types of injury that Congress targeted when it enacted the antitrust laws. West Penn, 627 F.3d at100 (explaining that cognizable "[a]nticompetitive effects include increased prices, reduced output, and reduced quality"). Indeed, Plaintiffs in the present case have asserted theories of harm and causality that closely parallel theories asserted by plaintiffs in the seminal Section 16 private merger enforcement case – California v. Am. Stores Co., 495 U.S. 271 (1990). In American Stores, plaintiffs argued that the acquisition, "if consummated, would cause considerable loss and damage to [Plaintiff]: Competition and potential competition in many relevant geographic markets will be eliminated [and] the prices of food and non-food products might be increased." Id. at 276 (internal quotations omitted). The same theory of causality – a reduction of competition caused by a merger, which will lead to adverse price effects – underpins Plaintiffs' theory of causality here. (E.g., Doc. 62, at 30 n. 15, ¶¶ 64, 67, 70, 91, 94, 95, 110(b)).

Plaintiffs also assert a Section 1 claim based on the same facts. Courts have recognized that an agreement to merge is subject to Section 1. Indeed, Section 1 "forbids mergers affecting an unreasonable restraint of trade." See, e.g., Phila. Nat'l Bank, 374 U.S. at 354–55. To that end, the essence of Plaintiffs' Section 1 claim is that the merger agreement between ESI and Medco is a "contract, combination… or conspiracy in restraint of trade" that threatens injury to competition and to Plaintiffs. Case law recognizing that anticompetitive mergers violate Section

1 confirms the adequacy of Plaintiffs' pled argument that the threatened injuries resulting from this anticompetitive merger flow from ESI's and Medco's *bilateral* conduct and thus violate Section 1. See Am. Needle, Inc. v. Nat'l Football League, —— U.S. ——, 130 S.Ct. 2201, 2208 (2010) ("Section 1 applies only to concerted action that restrains trade").

c. Defendants' elemental arguments are baseless.

i. Defendants' market definition arguments are specious.

Plaintiffs' product and geographic markets concerning "the purchase of retail community pharmacy services" have not changed since their original Complaint. Thus, Plaintiffs' defense of these markets in their opposition to Defendants' first motion to dismiss applies with equal force here. (Doc. 49, at 15-17). Although Defendants imply that this Court dismissed these markets in its August 27, 2012 Order, the Court actually dismissed an unrelated PBM-services market that Plaintiffs have not repled. (Doc. 60, at 20-21).

Defendants also argue incorrectly that Plaintiffs failed to distinguish between mail order services and retail community pharmacy services. In fact, the Amended Complaint provides empirical data showing that mail order services and retail community pharmacy services are not substitutes in the eyes of consumers. (Doc. 62 ¶ 10). The Amended Complaint also alleges numerous distinctions between brick-and-mortar retail community pharmacy services and mail order drug services, including differences in accessibility and convenience, differences in drug interaction services, and differences in patient adherence rates. (Doc. 62 ¶¶ 8-12). The fact that pharmacies compete with mail order drug providers in other markets, such as markets for the provision of specialty drugs, is irrelevant to the claims currently at issue, which relate to a market for the "purchase" of retail community pharmacy services. Indeed, pharmacies and mail order drug providers clearly do not compete for the *purchase* of any type of pharmacy services. Thus,

Defendants' entire argument is premised on a misstatement of Plaintiffs' buyer-side claims and specifically Plaintiffs' *purchasing* market. See Sprint Nextel Corp. v. AT & T Inc., 821 F. Supp. 2d 308, 324 (D.D.C. 2011) ("Where monopsony power is the concern, what matters is market concentration on the buying side of the market, not the selling side…That there may be and, indeed, by all accounts is, healthy competition among firms that *sell* mobile wireless devices is irrelevant to understanding whether, by acquiring T–Mobile, AT & T could so increase its *buying* power as to dictate terms to device manufacturers and otherwise impair plaintiffs' access to these necessary inputs"). Accordingly, Defendants' argument entirely misses the mark.

Defendants further argue that "the Amended Complaint nowhere provides a factual basis to exclude purchases of retail chain pharmac[y] services or purchases of all pharmacy services." (Doc. 66, at 11-12). No such factual basis is found because Plaintiffs have not excluded purchases of such services. Indeed, the phrase "retail community pharmacy services" is a defined industry term established by Section 1927(k)(10) of the Social Security Act, ("SSA") that explicitly *includes* chain pharmacy services. 42 U.S.C. 1396r-8(k)(10). As defined in the SSA, "retail community pharmacy . . . means an independent pharmacy, a chain pharmacy, a supermarket pharmacy, or a mass merchandiser pharmacy that is licensed as a pharmacy by the State and that dispenses medications to the general public at retail prices." Id. Thus, the plaintiffs in this case include chain pharmacies that have been injured by Defendants' agreement to stop competing for the purchase of retail community pharmacy services. For instance, LPG is a chain that offers relevant retail community pharmacy services in five locations. (Doc. 62 ¶ 37).

ii. Defendants' arguments regarding market power are unfounded.

Defendants assert that the Amended Complaint "fails properly to allege that the merger would result in substantially increased market power in Plaintiffs' alleged input market …

[because] 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.'" (Doc. 66, at 11). Plaintiffs have not conflated any markets; rather, Defendants have conflated their straw man market comprised only of non-chain pharmacy services with Plaintiffs' actual market that includes all retail pharmacy services. Plaintiffs have properly pled market share figures and market power in this broader alleged market. (Doc. 62 ¶ 89).

Defendants have also notably relied on a Tenth Circuit Court of Appeals decision concerning *evidentiary* rulings (during a twelve day jury trial on the merits) to concoct a pleading standard for market share that goes well beyond controlling pleading standards. (Doc. 66, at 11 (citing Shoppin' Bag of Pueblo, Inc. v. Dillon Cos., 783 F.2d 159, 165 (10th Cir. 1986)). Defendants' proposed heightened pleading standard is not the law and is not applicable here (or in any 12(b)(6) motion to dismiss). See, e.g., West Penn., 627 F.3d at 98 (quoting Twombly, 550 U.S. at 569, n.14) (providing that no heightened pleading standards apply to cases alleging claims under the antitrust laws).

Defendants also cite a handful of monopsonization cases under Section 2 for the absurd proposition that Plaintiffs are required to allege market shares in the range of 70-80% for relevant purchasing markets. (Doc. 66, at 12). However, as discussed in more detail below, Plaintiffs have not asserted claims for monopsonization under Section 2. This is a *merger case*, and Plaintiffs' allegations concerning market concentration in the alleged market render this merger presumptively illegal due to the increased threat of coordinated action post-merger. Specifically, the Horizontal Merger Guidelines promulgated by the Department of Justice and the Federal Trade Commission provide that markets in which the Herfindahl–Hirschman Index

("HHI") (a measure of concentration) is between 1,500 and 2,500 points are considered moderately concentrated, and markets in which the HHI is in excess of 2,500 points are considered highly concentrated. U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 5.3, § 12 (2010).[4] Moreover, transactions where the HHI increases by more than 200 points in a highly concentrated market are presumed likely to enhance market power. Id.

Plaintiffs have alleged that this merger results in increases in concentration of over *1000 points* in markets where concentration already exceeds an *HHI of 3000*. (Doc. 62 ¶ 89). This level of concentration places this case squarely within the body of merger law for which a merger is considered to presumptively increase market power. (See Doc. 23, at 9-15). Moreover, the antitrust laws clearly prohibit mergers that substantially lessen competition regardless of whether they are mergers to monopoly, which Defendants appear to be claiming is the standard. Id.; Fraser, 284 F.3d at n. 9 (1st Cir. 2002) (citing Columbia Metal Culvert Co. v. Kaiser Aluminum & Chem. Corp., 579 F.2d 20, 27 n. 11 (3d Cir.1978); United States v. Rice Growers Ass'n of Calif., No. S-84-1066 EJG,1986 WL 12562, at *12 (E.D. Cal., Jan. 31, 1986) (ordering divestiture in merger case when increased concentration of buyer power reduced competition substantially)

iii. Defendants' arguments concerning antitrust injury are inapplicable.

Despite the fact that Plaintiffs' pleading of facts supporting antitrust injury did not change, Defendants' motion to dismiss makes arguments regarding antitrust injury that were not raised in the previous motion to dismiss. Those arguments and the case citations supporting them are entirely inapplicable to this case. Specifically, Defendants contend that Plaintiffs have

[4] "[The] Merger Guidelines are often used as persuasive authority when deciding if a particular acquisition violates anti-trust laws." Chicago Bridge & Iron Co. N.V. v. F.T.C., 534 F.3d 410, 432 at n.11 (5th Cir. 2008); see also Allis-Chalmers Mfg., 414 F.2d at 517 (applying an earlier version of the guidelines and noting that it accorded with prevailing law).

only alleged harm to themselves rather than to broader markets; this is plainly false, and Defendants' supporting cases are easily distinguished from this one. (E.g., Doc 62 ¶ 89, 93, 94, 96, 98, 103, 110(b) (alleging market-wide harm that diminishes competition and injures all providers of retail pharmacy services)).

For instance, plaintiff in Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, (1986) – a competitor of the defendant – complained that *it* would be injured as a result of *increased* competition against defendants after defendants merged. Id. at 113-119. By contrast, the alleged injury in the present case is directly attributable to a *reduction in competition* brought about by the merger. Moreover, Plaintiffs in this case do not compete against Defendants in the market for the purchase of retail pharmacy services. (E.g., Doc. 62 ¶ 94). For the same reasons, Pool Water Products v. Olin Corp., 258 F.3d 1024, 1035 (9th Cir. 2001), is inapposite. In that case, plaintiffs complained about being undercut by a competitor's pricing, which was the result of vigorous competition. The opposite scenario is presented here, where reduced reimbursement rates flow from a reduction in competitive pressure in markets for the purchase of retail pharmacy services. (E.g., Doc. 62 ¶ 22); see Rice Growers Ass'n, 1986 WL 12562, at *12.

II. Defendants incorrectly assert that this is a Section 2 monopsony case.

The essential defect in Defendants' monopsony arguments is that they conflate merger law under Section 7 of the Clayton Act and Section 1 of the Sherman Act with unilateral monopsony law under Section 2 of the Sherman Act. Indeed, virtually every case Defendants cite with regard to their monopsony arguments is a Section 2 monopsony case.[5] A close reading

[5] E.g., In re Beef Indus. Antitrust Litig., 907 F.2d 510 (5th Cir. 1990); Been v. O.K. Indus., Inc., 495 F.3d 1217 (10th Cir. 2007) (monopsony analysis under the Packers and Stockyards Act); Campfield v. State Farm Mut. Auto. Ins. Co., 532 F.3d 1111 (10th Cir. 2008); Kamine/Besicorp Allegany L.P. v. Rochester Gas & Elec. Corp., 908 F.Supp. 1194 (W.D.N.Y. 1995); Kartell v. Blue Shield of Massachusetts, Inc., 749 F.2d 922 (1st Cir. 1984); Ocean State Physicians Health Plan, Inc. v. Blue Cross & Blue Shield of Rhode Island, 883 F.2d 1101 (1st Cir. 1989); United States v. Syufy Enter., 903 F.2d 659 (9th Cir. 1990).

of these cases and relevant case law reveals that Defendants have invented new pleading requirements for merger cases by grafting Section 2 monopoly and monopsony law onto Plaintiffs' Section 7 and Section 1 claims. Since Plaintiffs have not pled *any* Section 2 monopsony claims (or any other Section 2 claims) and Plaintiffs do not allege that this is a merger to a monopoly or monopsony, Defendants' cases and their newly-invented pleading standard are irrelevant.

A brief overview of the differences between Section 2, Section 7, and Section 1 reveals that Defendants' statutory bait-and-switch does not work. Section 2 claims for monopolization and monopsonization – claims that Plaintiffs have *not* asserted – target anticompetitive *unilateral* conduct by dominant firms. As the Court explained in Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004), *all Section 2 claims* must allege and prove some form of exclusionary or other illicit conduct as well as monopoly power or a dangerous probability of achieving monopoly power. Id. at 407-411 (discussing the outer boundaries of Section 2 liability and holding that plaintiffs' claims fell outside of those boundaries). This requirement does not exist in merger cases where firms are creating market power by agreeing to combine with rivals rather than unilaterally through business acumen, superior products, or historic accident.

Section 2 monopsony claims also require allegations (and ultimately, proof) of some form of exclusionary or other illicit conduct, such as predatory pricing, as well as monopsony power or the dangerous probability of achieving monopsony power. E.g., Weyerhaeuser Co. v. Ross-Simmons, 549 U.S. 312, 321-22 (2007) (providing that Section 2 monopsony claims are the "mirror" image of monopoly claims). Defendants conveniently turn this proposition on its head by arguing that the requirement to plead "exclusionary" conduct, which is found solely in

Section 2 case law and is rooted in unique Section 2 policy, must occur in all buyer-side claims regardless of the statute under which they are brought.

Defendants have then gone a step further and concocted an entirely new pleading requirement that not only does not exist in Section7 and Section 1 jurisprudence, it also does not exist in Section 2 jurisprudence. To that end, Defendants claim that plaintiffs bringing buyer-side claims must plead both a downstream and an upstream market instead of the single market required in seller-side cases. (Doc. 66, at 6, 17-18). In making this argument, Defendants have not cited *a single* merger case under Section 7 or Section 1. Instead, they have cited a handful of Section 2 monopsony decisions that were based on the merits (as opposed to the adequacy of the pleadings in those cases).

Unlike claims for monopolization or monopsonization under Section 2, claims against unlawful mergers under Section 7 *do not* require allegations or proof of exclusionary conduct, monopoly power, or a "dangerous probability of achieving monopoly power." Phila. Nat'l Bank, 374 U.S. at 363-65 (holding that a merger resulting in a merged entity that controlled 30-33 percent of the market triggered a presumption that the merger substantially lessened competition; no allegations of exclusionary or predatory conduct were required to trigger this presumption); Brown Shoe Co., 370 U.S. 294 (1962) (holding that a merger resulting in a merged entity that controlled 20-57 percent of various geographic markets substantially lessened competition; no allegations of exclusionary or predatory conduct were necessary); United States v. H & R Block, 833 F. Supp. 3d 36 (D.D.C. 2011) (applying the same presumption based on similar market shares; no allegations of exclusionary or predatory conduct were necessary); see also F.T.C. v. Elders Grain, Inc., 868 F.2d 901, 906 (7th Cir. 1989) ("The theory of competition and monopoly that has been used to give concrete meaning to section 7 teaches that an acquisition which

reduces the number of significant sellers in a market already highly concentrated and prone to collusion by reason of its history and circumstances is unlawful in the absence of special circumstances.”).

Identical standards apply whether the claim is a buyer- or a seller-side claim. E.g., United States v. Cargill, Inc., No. Civ.A. 991875GK, 2000 WL 1475752 (D.D.C. 2000) (entering a consent decree against Cargill for claims, *inter alia*, that the proposed acquisition would substantially lessen competition for grain purchasing services in nine relevant markets in violation of Section 7 and where Plaintiff did not allege exclusionary conduct); United States v. Aetna, Inc., No. 3-99 CV 1398-8, 1999 WL 1419046, at 16* (N.D. Tex. 1999) (entering a consent decree against Aetna for claims similar to the present claims, *inter alia*, that “the proposed acquisition thus would give Aetna the ability to unduly depress physician reimbursement rates in Houston and Dallas, likely leading to a reduction in quantity or degradation in the quality of physicians,” and where Plaintiff did not allege exclusionary conduct or ongoing conspiracies); see also, Complaint, United States v. George’s Foods, Case 5:11-cv-00043-gec (W.D. Va. 2011) (attached as Exhibit 1 along with the Final Judgment in that case, which has been attached as Exhibit 2) (reviewing chicken processor acquisition of competing facility, which increased monopsony power, where Plaintiff did not allege any exclusionary conduct or increased power in the market for processing chickens).

Section 1 claims also do not require plaintiffs to demonstrate the Section 2 elements of “predatory or anticompetitive conduct,” “monopoly power” or a “dangerous probability of achieving ‘monopoly power.’ ” Fricke-Parks Press, 149 F. Supp. 2d at 1182 (citing D & S Redi–Mix v. Sierra Redi–Mix & Contracting Co., 692 F.2d 1245, 1247–49 (9th Cir.1982)); see generally Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1432–33 (9th Cir.1995). For

example, West Penn – cited by Plaintiffs in their prior opposition brief and in the Court's August 27, 2012 Order – involved a buyer-side Section 2 claim *and* a buyer-side Section 1 claim. Notably, the Third Circuit did *not* require any evidence of exclusionary or predatory conduct regarding the Section 1 claim when it reviewed the district court's ruling on a motion to dismiss. West Penn, 627 F.3d at 99-105. The Third Circuit upheld the Section 1 claim because plaintiff in that case – just as here – properly pled (1) an agreement; (2) buying power; and (3) reduced reimbursement rates.[6] Id. at 100 – 105. Moreover, Defendants have not cited and Plaintiffs are not aware of any case that has ever held or implied that Section 2 law should be applied to Section 1 merger cases.

Finally, Defendants' argument that Plaintiffs must allege and prove both a downstream output market and an upstream input market misstates and improperly relies on Section 2 law.

Defendants cite Weyerhauser and Been v. O.K. Industries, Inc., 495 F.3d 1217 (10th Cir. 2007), in support of their position, but those cases are inapposite. As Defendants admit, Been was an action under Section 202(a) of the Packers and Stockyard Act, 7 U.S.C. § 192(a). (Doc. 66, at 8 n.8). Nonetheless, Defendants contend that Been also "addresses monopsony conduct under Section 2 of the Sherman Act." Of course, *this case is not a Section 2 monopsony case*. Furthermore, while the court in Been used the phrase "output market," it did not find that plaintiffs must in Section 202(a) and/or Section 2 cases (much less Section 7 or Section 1 merger cases) plead both output and input markets rather than merely an output restriction, as Plaintiffs

[6] The primary difference between West Penn and the present case is that West Penn was not a merger case. Merger cases are unique because they analyze the likelihood of future anticompetitive effects whereas non-merger cases analyze existing antitrust injuries. Merger cases, thus, focus on whether a merger alters the structure of markets such that the probability of future antitrust injuries becomes greater. Specifically, merger law "rests upon the theory that, where rivals are few, firms *will be able to coordinate their behavior*, either by overt collusion or implicit understanding, in order to restrict output and achieve profits above competitive levels." H.J. Heinz Co., 246 F.3d at 715 (emphasis added).

did here throughout the Amended Complaint. (Doc. 62 ¶¶ 23, 94-101, 110). In fact, the court in West Penn rejected this premise:

> The fallacy of th[e defendants'] argument becomes clear when we recall that the central purpose of the antitrust laws ... is to preserve competition. It is competition-not the collusive fixing of prices at levels either low or high-that these statutes recognize as vital to the public interest. The Supreme Court's references to the goals of achieving "the lowest prices, the highest quality and the greatest material progress," [N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958)], and of "assur[ing] customers the benefits of price competition," [Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519 (1983)], ***do not mean that conspiracies among buyers to depress acquisition prices are tolerated***.

627 F.3d at 105 (emphasis added) (quoting Knevelbaard Dairies v. Kraft Foods, Inc., 232 F.3d 979. 988 (9th Cir. 2000) (alleging collusion among cheese manufactures to depress the price of milk that they purchased). Consistent with West Penn, this Court already held in its previous ruling that Plaintiffs adequately alleged an output restriction. (Doc 60, at 18-19; Doc. 62 ¶¶ 23, 94-101, 110 (pleading output restrictions)).

Moreover, adopting a heightened pleading requirement that applies only to buyer-side claims would violate the teachings of Weyerhauser and the Horizontal Merger Guidelines § 5.3, § 12 (2010) (indicating that analysis of buyer and seller markets should use "essentially the same framework"). As the Supreme Court stated in Weyerhauser, "similar legal standards should apply to claims of monopolization and to claims of monopsonization" and "asymmetric treatment of monopoly and monopsony has no basis in economic analysis."[7] 549 U.S. at 321-22 (citing Noll, "Buyer Power" and Economic Policy, 72 Antitrust L.J. 589, 591 (2005)).

Defendants' attempt to use Weyerhauser in support of a contrary position is unavailing. First, Weyerhauser was a predatory bidding case under Section 2, while this is a merger case

[7] Despite being a Section 2 case, Weyerhauser's general teaching that buy-side and sell-side claims should be treated similarly is still instructive here especially given that it is also consistent with the Horizontal Merger Guidelines.

alleging undue concentration, reduced reimbursement rates, output restrictions, and diminished quality (not predatory bidding or buying) under Sections 7 and 1. The unique elements of a predatory bidding or buying claim do not apply to this case. Second, the Weyerhauser Court did not state that "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,'" as alleged by Defendants. (Doc. 66, at 17). Defendants clipped segments from various parts of the Court's decision to create a sentence that has a completely different meaning than the actual decision of the Court. Weyerhauser, 549 U.S. at 321.

Defendants' string of hospital case citations is inapplicable and unavailing. All of these cases involved insurers' negotiations of prices with hospitals and other health providers; *none* involved a merger or other agreement between *competitors* that restrained prices. Defendants in those cases managed to cut costs without entering into agreements with competitors, which is unambiguously procompetitive unless it amounts to an abuse of monopoly power under Section 2 (again this has not been alleged here). Austin v. Blue Cross & Blue Shield of Ala., 903 F.2d 1385, 1390 (11th Cir. 1990); Ocean State Physician Health Plan, 883 F.2d 1101, 1110-11 (1st Cir. 1989); Kartell v. Blue Shield of Mass., 749 F.2d 922, 924-26 (1st Cir. 1984), Travelers Ins. Co. v. Blue Cross of W. Pa., 481 F.2d 80, 84-85 (3d. Cir. 1973), and Westchester Radiological Assocs. P.C. v. Empire Blue Cross, 707 F. Supp. 708, 715-16 (S.D.N.Y. 1989).

III. Law of the case does not bar Plaintiffs' amended claims.

As an initial matter, Defendants cited the wrong standard from Ogbudimkpa v. Ashcroft, 342 F.3d 207 (3d Cir. 2003), which pertained to the well-established principle that "the trial court must proceed in accordance with the mandate and the law of the case *as established on*

appeal." Bankers Trust Co. v. Bethlehem Steel Corp., 761 F.2d 943, 949 (3d Cir. 1985) (emphasis added). No appellate court has issued a ruling on this case. The Third Circuit provided the non-appellate standard in In re Pharmacy Benefit Managers Antitrust Litigation, 582 F.3d 432, 439 (3d Cir. 2009) (citing Swietlowich v. County of Bucks, 610 F.2d 1157, 1164 (3d Cir. 1979)): "law of the case doctrine does not preclude a trial judge from clarifying or correcting an earlier, ambiguous ruling… [and] a trial judge has the discretion to reconsider an issue and should exercise that discretion whenever it appears that a previous ruling, even if unambiguous, might lead to an unjust result." See also Arizona v. California, 460 U.S. 605, 618 (1983) ("Law of the case directs a court's discretion, it does not limit the tribunal's power.").

Of course, even that standard does not apply here. First, this Court did not rule that a bilateral merger that threatens to substantially harm competition and hence Plaintiffs is "unilateral" conduct. Instead, the Court found that the Complaint did not attribute the harm to the merger itself rather than to unilateral conduct. That issue was expressly addressed by the Amended Complaint. It is the merger, a bilateral act resulting from an agreement between competitors, that gave Defendants the alleged illegal power to harm competition and Plaintiffs. Second, the Court's previous ruling on a motion to dismiss regarded a different complaint with different claims. To that end, the Court has not determined whether the Amended Complaint properly pleads that Defendants' bilateral agreement to merge and their coordinated actions in furtherance of that agreement satisfy requirements for standing.

Furthermore, even when the law of the case doctrine is applicable, it does not apply with the same strength to a court's review of interlocutory decisions as it does to a court's review of final judgments. In re Anthanassious, 418 F. App'x 91, 95 (3d Cir. 2011) (citing United States v. Jerry, 487 F.2d 600, 605 (3d Cir.1973) ("so long as [a] district court has jurisdiction over the

case, it possesses inherent power over interlocutory orders, and can reconsider them when it is consonant with justice to do so.”)). The Court’s dismissal of Plaintiffs’ retail pharmacy claim “without prejudice” was just such an interlocutory order. The Court “possesses inherent power over interlocutory orders [such that it] can reconsider them when it is consonant with justice to do so.” Jerry, 487 F.2d at 605; see also Wilkins v. Osborne, 112 F.3d 512 (4th Cir. 1997) (providing that dismissals without prejudice are interlocutory orders).

CONCLUSION

For the forgoing reasons, this court should deny ESI-Medco’s motion to dismiss the retail pharmacy claims in the Plaintiffs’ Amended Complaint. Plaintiffs have gone far beyond what the law requires to plead their case against this merger, which is unlawful and has already harmed Plaintiffs substantially. Plaintiffs thus ask this Court for a ruling that denies the motion to dismiss and orders this case to proceed expeditiously.

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