

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

NATIONAL ASSOCIATION OF CHAIN DRUG STORES;  
NATIONAL COMMUNITY PHARMACISTS  
ASSOCIATION; KLINGENSMITH DRUG INC., KOPP  
DRUG, INC.; LECH'S PHARMACY, PJI PHARMACY, INC.;  
MJR, LTD.; MJRRX, INC.; DAVID M. SMITH RPH, INC.;  
PROFESSIONAL SPECIALIZED PHARMACIES, LLC;  
ANBAR, INC.; SELLERSVILLE PHARMACY, INC.; TEP,  
INC.; THOMPSON ENTERPRISES INC.; BROAD AVE  
PHARMACY LLC; HOLLIDAYSBURG PHARMACY LLC;  
VALUE DRUG COMPANY; and VALUE SPECIALTY  
PHARMACY LLC,

Plaintiffs,

-against-

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

Defendants.

Civil Action No. 12-395

**DEFENDANTS EXPRESS SCRIPTS, INC.'S AND MEDCO HEALTH SOLUTIONS,  
INC.'S BRIEF IN SUPPORT OF REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF  
DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' COMPLAINT**

**MEMORANDUM OF POINTS AND AUTHORITIES**

Defendants Express Scripts, Inc. and Medco Health Solutions, Inc. (collectively “ESI”) hereby request that this Court take judicial notice of Exhibits 1 through 6, attached to their Request for Judicial Notice. Rule 201(d) provides that “[a] court shall take judicial notice if requested by a party and supplied with the necessary information.” Fed. R. Evid. 201(d). A judicially noticed fact “must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b). ESI offers these documents not to prove the truth of any statements set forth in the documents but rather for the limited purpose of establishing when certain events relating to the merger occurred and when Plaintiffs had actual or constructive knowledge of those matters.

A. **FTC Records**

Exhibits 1 and 2, which are attached hereto, are the proper subject of judicial notice because they fall squarely within Rule 201(b). The FTC Closing Statement attached hereto as Exhibit 1 is publicly available at [www.ftc.gov/os/2012/04/120402expressmedcostatement.pdf](http://www.ftc.gov/os/2012/04/120402expressmedcostatement.pdf). Similarly, the letter from the FTC to Clifford Aronson, attorney for Defendants, attached hereto as Exhibit 2, is publicly available at [www.ftc.gov/os/closings/120402expressletter.pdf](http://www.ftc.gov/os/closings/120402expressletter.pdf). Both of these documents appear on the FTC’s website as attachments to its press release regarding the FTC’s investigation of the ESI-Medco merger.

This Court can take judicial notice of records of government administrative bodies. *See, e.g., In re Intelligroup Securities Litig.*, 527 F. Supp. 2d 262, 273-4 (D. N.J. 2007) (noting that “[t]he court ‘may take judicial notice of records and reports of administrative bodies,’ such as notices and opinion letters.”) (*citing Wible v. Aetna Life Ins. Co.*, 375 F. Supp. 2d 956, 965 (C.D. Cal. 2005) (taking judicial notice of a notice and opinion letter issued by the Department

of Justice). Thus, this Court may take judicial notice of the FTC's published statements indicating that it terminated its investigation into the ESI-Medco transaction without any enforcement action. *See id.* at 274 (taking judicial notice of SEC No-action letter and "acknowledging that the SEC investigation of the matters related to Intelligroup's Restatement was terminated without any enforcement action by the Commission or by a government agency having the power to instigate a prosecutorial action against Intelligroup upon the SEC's referral.").

Accordingly, this Court can take judicial notice of Exhibits 1-2 for purposes of acknowledging that (1) on March 30, 2012, the FTC informed the Defendants that it would not challenge the merger and (2) on April 2, 2012, the FTC publicly announced that it was closing its investigation into the ESI-Medco merger without any enforcement action.

**B. Press Releases from the Parties' Websites**

Defendants also request that this Court take judicial notice of Exhibits 3-4 attached hereto, each of which is a press release from one of the Plaintiffs' websites. Exhibit 3 is publicly available on Plaintiff National Community Pharmacists Association's website at [www.ncpanet.org/index.php/news-releases/2011-news-releases/1145-pharmacists-express-scripts-medco-merger-would-raise-prescription-drug-costs-reduce-patient-choice-of-pharmacy](http://www.ncpanet.org/index.php/news-releases/2011-news-releases/1145-pharmacists-express-scripts-medco-merger-would-raise-prescription-drug-costs-reduce-patient-choice-of-pharmacy). Exhibit 4 is publicly available on Plaintiff National Association of Chain Drug Store's website at <http://www.nacds.org/wmspage.cfm?parm1=7223>. Defendants submit these documents for the limited purpose of acknowledging that Plaintiffs testified before Congress in opposition to the merger on September 9, 2011 and September 20, 2011.

For purposes of a 12(b)(6) motion to dismiss, a court may take judicial notice of information publicly announced on a party's website, as long as the website's authenticity is not in dispute and "it is capable of accurate and ready determination." Fed. R. Evid. 201(b); *see*

*Doron Precision Systems, Inc. v. FAAC, Inc.*, 423 F. Supp. 2d 173, 179 n8 (S.D.N.Y. 2006).

Accordingly, this Court can take judicial notice of the fact that the Plaintiffs publicly announced that they were testifying before Congress against the ESI-Medco merger on their own websites. *See, e.g., Brodsky v. Yahoo! Inc.*, 630 F. Supp. 2d 1104, 1111 (N.D. Cal. 2009) (“The Court also grants Defendants’ request as to Exhibits 31 through 47, Yahoo! press releases, news articles, analyst reports, and third party press releases to which the SAC refers, but not for the truth of their contents.”).

C. SEC Filings

Finally, Defendants also request that this Court take judicial notice of Exhibits 5-6, attached hereto. Both of these exhibits are Form 8-K documents filed with the Securities Exchange Commission (“SEC”). Exhibit 5 is a copy of the Form 8-K dated March 12, 2012 (without exhibits), filed with the SEC by Medco Health Solutions, Inc. Exhibit 6 is a copy of the Form 8-K dated March 28, 2012 (without exhibits), filed with the SEC by Medco Health Solutions, Inc.

Courts regularly take judicial notice of a company’s SEC filings. *See, e.g., In re NAHC, Inc. Securities Litig.*, 306 F.3d 1314, 1331 (3d Cir. 2001) (upholding district court’s grant of request for judicial notice of SEC filings); *Oran v. Stafford*, 226 F.3d 275, 289 (3d Cir. 2000) (collecting circuit cases that have held that courts can take judicial notice “of properly-authenticated public disclosure documents filed with the SEC.”) Indeed, with respect to documents required by law to be filed with the SEC, “no serious question as to their authenticity can exist.” *Oran*, 226 F.3d at 289. Accordingly, this Court can take notice of Medco’s 8-K filings.

D. Conclusion

Upon proper notice, the court is required to take judicial notice of the documents listed above. *See* Fed. R. Evid. 201(d) (“A court shall take judicial notice if requested by a party and supplied with the necessary information.”). Here, ESI has requested judicial notice and furnished the Court with the necessary information. Accordingly, for the foregoing reasons, ESI respectfully requests that the Court take judicial notice of Exhibits 1 through 6, which are attached to this Request for Judicial Notice, and submitted in support of ESI’s Motion to Dismiss.

Respectfully submitted,

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