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

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

Plaintiffs,

v.

Civil Action No. 2:12-cv-00395-CB-CRE

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

Defendants.

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

In an effort to dismiss the well-pled Complaint in this case, ESI takes the proverbial "shotgun approach" in hopes that one of its arguments will stick. None do. ESI first suggests that the Complaint should be dismissed based on laches – an equitable defense that requires discovery before it can be ruled on. ESI then argues that the Plaintiffs do not have antitrust standing under Section 4 of the Clayton Act. Of course, this is a Section 16 case and the standing requirement under Section 16 is lower than under Section 4. *In re Warfarin Sodium Antitrust Litig.*, 214 F.3d 395, 399 (3d Cir. 2000) (citing *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 109-111 (1986). In any event, under both standards these Plaintiffs have already been ruled to have antitrust standing to bring suits against PBMs for anticompetitive practices that artificially depressed reimbursement rates. Third, ESI questions on *Twombly* grounds the markets alleged by Plaintiffs. A comparison of the Complaint's detailed description of the alleged markets to cases dismissed for inadequate pleading demonstrates quickly the incorrectness of ESI's position. Along the way, ESI also sprinkles in an argument that Plaintiffs did not plead irreparable harm – even though the Court recognized at the proceeding on April 3, 2012 that the "declarations . . . and complaint are very involved when you talk about the injury of the merger." Apr. 3, 2012 Tr. of Proceedings at 18:17-19. ESI even throws in an argument in a footnote that Plaintiffs did not allege adequate concentrations levels. In fact, plaintiffs have alleged concentration levels well in excess of concentration in *Philidelphia Nat'l Bank,* 374 U.S. 321, 363-65 (1963) (30-33%).[1] Indeed, the FTC closing statement relied upon by Defendants conceded that "the merger ***could be viewed as presumptively anticompetitive*** because the PBM industry is concentrated and the market share of the merged entity would be more than 40%,

[1] *See also United States v. H & R Block*, CIV.A. 11-00948 BAH, 2011 WL 5438955 (D.D.C. 2011) (presumption applied against two competitors with a combined share of only 28.4%).

even using the broadest market definition."[2] Thus, none of ESI's arguments have merit.

In *California v. American Stores*, the Supreme Court recognized the importance of vigorous private merger enforcement through injunction actions and specifically recognized that hold-separate orders and divestiture of acquired assets were available and favored remedies under Section 16 of the Clayton Act. 495 U.S. 271, 284 (1990) ("Congress also made express its view that divestiture was the most suitable remedy in a suit for relief from a § 7 violation"). In *American Stores*, the Court required defendants to "operate the acquired stores separately pending resolution of the suit." *American Stores*, 495 U.S. 271. The Court ultimately held that "Section 16, construed to authorize a private divestiture remedy, fits well in a statutory scheme that favors private enforcement, subjects mergers to searching scrutiny, and regards divestiture as the remedy best suited to redress the ills of an anticompetitive merger." *Id*. at 272.[3]

Indeed, "[f]ederal regulators will not necessarily challenge every potentially troublesome merger, which is why Congress made private enforcement 'an integral part of the congressional plan for protecting competition.'" *AlliedSignal v. B.F. Goodrich*, 183 F.3d 568, 575 (7th Cir. 1999) (citing *American Stores Co*., 495 U.S. at 284-85). As a result, "[c]ourts do not generally defer to an agency's decision not to challenge a merger," *id.* (citing, *inter alia*, *Tasty Baking Co. v. Ralston Purina, Inc*., 653 F. Supp. 1250, 1254 (E.D.Pa.1987)), and a decision by the FTC not to stop a merger "does not preclude [subsequent] independent judicial review," *Broadcom Corp. v. Qualcomm Inc*., 501 F.3d 297, 321 n.12 (3d Cir. 2007). As ESI has pointed to no valid bases for dismissing the current action, this Court should not do so.

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[2] FTC Closing Statement, Ex. 1 to Defs' Request for Judicial Notice ("Closing Stmt"). Only Commissioner Rosch believed that the Transaction did not raise such a presumption.

[3] *See also* H.R. REP. 94-499(I) P.L. 94-435, at 2589 ("The antitrust laws clearly reflect the national policy of encouraging private parties (whether consumers, businesses, or possible competitors) to help enforce the antitrust laws in order to protect competition . . . .).

LEGAL STANDARD

In considering a motion to dismiss under Rule 12(b)(6), the Court "accept[s] as true the factual allegations in the complaint and draw[s] all reasonable inferences in the plaintiff's favor." *West Penn Allegheny Health Sys., Inc. v. UPMC,* 627 F.3d 85, 91 (3d Cir.2010) (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 F. App'x. 268, 2007-2 Trade Cas. (CCH) ¶ 75905 (3d Cir. 2007). To satisfy Rule 8, a complaint must 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. County of Allegheny,* 515 F.3d 224, 234 (3d Cir. 2008). This "'does not impose a probability requirement at the pleading stage,' but instead 'simply calls 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 Allegheny Health Sys., Inc.,* 627 F.3d 85, 98 (3d Cir.2010) (quoting *Twombly,* 550 U.S. at 569, n.14).

I. Plaintiffs' Claims Are Not Barred By Laches and Injunctive Relief Is Proper

ESI's suggestion that the Court should dismiss the Complaint on the basis of Plaintiffs' "inexcusable delay" in filing its challenge to the proposed merger lacks any legal basis. As a preliminary matter, filing a Rule 12(b)(6) motion on the basis of laches is improper because any ruling on a plaintiff's purported delayed filing suit would inherently involve a fact-intensive inquiry inappropriate at this stage of the case.[4] Even if ESI could properly seek dismissal based

[4] ESI avoids addressing the overwhelming number of cases rejecting Rule 12(b)(6) motions based on laches by studiously omitting any mention of the word "laches" referring instead to Plaintiffs' "unreasonable delay." ESI's counsel made clear, however, the real basis for the

on Plaintiffs' purported delay, filing the Complaint four days *before* FTC closed its investigation and before the Transaction was consummated does not constitute laches as a matter of law. Nor could Plaintiffs have filed their Complaint sooner, since any challenge filed during the FTC review process would have run afoul of the ripeness doctrine. Indeed, requiring earlier filing as ESI suggests would ultimately subject the judicial system and potential plaintiffs and defendants to costly unnecessary and unripe lawsuits.

A. A Laches Defense Should Not Be Raised on a Motion to Dismiss.

Federal courts have repeatedly and overwhelmingly found Rule 12(b)(6) motions based on laches to be inappropriate, premature, and subject to summary denial. *See*, *e.g.*, *Fannie v. Chamberlain Mfg. Corp.*, 445 F. Supp. 65, 75 (W.D. Pa. 1977) (denying motion to dismiss because "[r]uling on laches at this juncture [would be] premature").[5] In fact, this Court has concluded that ruling on laches is premature *at the summary judgment stage* where material facts remain in dispute. *Morgan v. Sharon Pennsylvania Bd. of Educ.*, 472 F. Supp. 1157, 1160 (W.D. Pa. 1979) (citing *Churma v. United States Steel Corp.*, 514 F.2d 589 (3d Cir. 1975)).

B. Plaintiffs' Actions Do Not Constitute Laches as a Matter of Law.

Beyond the fact that ESI's assertions of delay are brought in a motion to dismiss, they are without merit. Under well-settled Third Circuit law, the equitable doctrine of laches bars an action "only when the delay in bringing the action both caused prejudice and was inexcusable."

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motion to dismiss in his comment to this Court on April 3, 2012: "[W]e would like to move to a motion to dismiss. . . . There are laches issues, there are standing issues, there are merits issues." Apr. 3, 2012 Tr. Of Proceedings at 18:23 – 19:2.

[5] *See also Bethesda Softworks, LLC v. Interplay Entm't Corp.*, No. DKC 09-2357, 2010 WL 3781660, at *9 (D. Md. Sept. 23, 2010) ("An affirmative defense, such as laches, is not ordinarily considered on a motion to dismiss because the plaintiff is not required to negate it in its complaint."); *Ctr. for Individual Freedom v. Ireland*, 613 F. Supp. 2d 777, 810 (S.D.W.Va. 2009) ("[L]aches, as an affirmative defense, must be stated in response to a pleading pursuant to Rule 8(c). . . . Fed. R. Civ. P. 12(b)(6) is not the proper vehicle for bringing such a request.".

Cyberworld Enter. Tech., Inc. v. Napolitano, 602 F.3d 189, 200 (3d Cir. 2010). A plain reading of the record before the Court makes clear that no such delay exists here. First, the facts as alleged in the Complaint do not support a finding of inexcusable delay. The Complaint simply alleges that the Defendants entered into an Agreement and Plan of Merger on July 20, 2011. Complaint ¶ 75. ESI announced on March 28, 2012, that it expected to close *as early as* the *week of* April 2, 2012, and Plaintiffs filed suit the next day on March 29, 2012. Then on March 30, *prior to the consummation of the merger*, Plaintiffs filed a motion for a temporary restraining order. The acquisition of Medco (the "Transaction") was consummated before 8:30 a.m. Eastern Time on April 2, 2012 – the same day that Plaintiffs filed their Memorandum in Support of the Motion for TRO/Permanent Injunction and Expedited Schedule.[6] This timeline does not constitute "inexcusable delay." Indeed, as explained in a summary judgment decision by the court in *Garabet v. Autonomous Tech. Corp.*, 116 F. Supp. 2d 1159 (C.D. Cal. 2000) – a case relied on by ESI – if plaintiffs had plausibly argued that they were waiting for FTC's decision before filing or that they chose to pursue an "administrative strategy" with FTC, such arguments might have defeated defendants' laches defense. *Id.* at 1172-73 (The Complaint in *Garabet* was filed *after* the merger was complete and *over five weeks* after FTC approval and the summary judgment opinion was issued *over sixteen months* after the complaint was filed.).

C. Filing Suit Prior to FTC Approval Would Have Been Premature and Subject to Dismissal.

ESI's assertion that Plaintiffs should have filed their Complaint pending FTC approval of the merger blatantly ignores the ripeness doctrine. A private challenge to enjoin the proposed transaction pending the FTC's investigation would have been fundamentally premature in that until the FTC closed its investigation without ordering any remedies, there existed a reasonable

[6] Plaintiffs incorporate by reference their arguments regarding laches contained in their Reply in Support of Plaintiffs' Motion for a Preliminary Injunction.

possibility that the FTC would obviate the need for a private challenge by taking action against the merger.[7] As the Seventh Circuit has recognized under similar circumstances, any such challenge would be subject to dismissal for lack of ripeness. *See South Austin Coalition Community Council v. SBC Comm. Inc.*, 191 F.3d 842, 843-45 (7th Cir. 1999) (upholding district court's dismissal of antitrust complaint filed prior to final government sign-off as premature and characterizing the action as a "gun-jumping suit"). Any suit filed by Plaintiffs prior to FTC approval on March 28, 2012 would likely have been opposed on similar grounds and would likely have suffered a similar fate. As the Third Circuit has made clear, the ripeness doctrine in the context of administrative action serves to "protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt *in a concrete way* by the challenging parties." *NE Hub Partners, L.P. v. CNG Transmission Corp.*, 239 F.3d 333, 341 (3d Cir. 2001) (emphasis added) (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967)). Thus, until the FTC completed its investigation, any suit would likely have been dismissed.

D. Dismissing the Complaint Based on Laches Would Open the Judicial System to Unripe and Unnecessary Lawsuits.

Requiring parties who oppose a proposed merger (like Plaintiffs here) to file suit prior to

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[7] Indeed, not only did Plaintiffs have several meetings with FTC with the expectation that FTC would take appropriate measures to address the antitrust concerns raised by the transaction, many others, including members of Congress and consumer groups raised concerns about the transaction and pushed the FTC to take action. *See e.g.*, *Testimony of David A. Balto to the Judiciary Subcommittee on Antitrust, Competition, Policy and Consumer Rights*, United States Senate (Dec. 6, 2011) (testifying against the merger on behalf of various consumer groups); Thomas F. Wenning, *Letter to the Hon. Jon Leibowitz Re: Proposed Merger of Express Scripts, Inc. and Medco Health Solutions* (Mar. 1, 2012) (opposing the merger on behalf of the National Grocers Association); Randy G. DeFrehn, *Letter to the Hon. Bob Goodlatte Re: Hearing on Proposed Merger of Express Scripts, Inc. and Medco* (Sept. 20, 2011) (opposing the merger on behalf of the National Coordinating Committee for Multiemployer Plans); Dan Gustafson, *Letter to the Hon. Jon Leibowitz Re: Proposed Merger of Express Scripts, Inc. and Medco Health Solutions* (Nov. 30, 2011) (opposing the merger on behalf of the AIA).

a final decision by the FTC, or else risk a laches dismissal, would create uncertainty regarding the appropriate timing of private challenges and would cause plaintiffs to file suit prematurely to preserve their ability to challenge a merger should the FTC or DOJ ultimately approve the proposed transaction. Putting aside arguments of whether such suits would be ripe, the threat of a laches dismissal would render them necessary to preserve plaintiffs' ability to challenge proposed transactions. A laches dismissal by this Court would therefore lead to cluttered court dockets due to an influx of unnecessary and unripe lawsuits as well as unnecessary litigation costs for plaintiffs and defendants in challenging and defending such suits.

E. The Relevant Case Law Supports Injunctive Relief Here.

Despite ESI's assertions and purported case law citations to the contrary, courts grant preliminary injunctions to hold assets separate post-merger, even where (unlike here) the complaint requesting such relief is filed well *after* the closing of the merger. This is in part because in antitrust cases, "doubts as to the necessity of issuing a preliminary injunction should be resolved in favor of granting the injunction." *Consolidated Gold Fields PLC v. Minorco*, *S.A.,* 871 F.2d 252, 261 (2d Cir. 1989).[8] For example, in *Tasty Baking Co. v. Ralston Purina, Inc.*, competitor bakeries filed suit 40 days *following* the merger of one bakery company with another, seeking to enjoin the merger as a violation of Section 7 of the Clayton Act. 653 F. Supp. 1250, 1254 (E.D. Pa. 1987). A Pennsylvania federal court granted the motion for preliminary injunction, holding that the plaintiff bakeries had met the elements for a preliminary injunction. *Id.* at 1276-77. In particular, the court found that plaintiffs had shown the danger of immediate

[8] The Supreme Court has recognized the appropriateness of granting post-merger equitable relief. *Ford Motor Co. v. United States*, 405 U.S. 562, 573 (1972) ("[D]ivestiture is particularly appropriate where asset or stock acquisitions violate the antitrust laws"); *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 329, 333 (1961) (divestiture – by its nature a post-merger remedy – is the "natural remedy" for a merger that violates the Clayton Act, as divestiture is intended "to pry open to competition" markets that have been affected by an illegal acquisition).

and irreparable harm in two ways: (1) the possibility that defendants would soon engage in predatory practices would cause plaintiffs immediate damage that would occur before a completed plenary hearing and (2) defendants were likely to "bleed" the acquired company "of substantial assets and restructure [it] so that it could not easily survive on its own after divestiture." *Id.* at 1277. As a result, the court granted the preliminary injunction and rejected defendants' argument that laches barred the motion, stating that the plaintiffs had filed a timely complaint and motion for preliminary relief. *Id.*

Moreover, where parties move with particular speed to close a transaction despite the existence of a complaint challenging the merger and seeking injunctive relief, federal courts have regarded such haste with skepticism. Thus, in *Community Publishers, Inc. v. Donrey Corp.*, the court granted rescission of a merger that violated Section 7 of the Clayton Act, noting that defendants' knowledge that a complaint for injunctive relief had been filed signaled that they "went into th[e] transaction with their eyes wide open" and "were paid handsomely to gamble that this hurried up transaction would withstand antitrust scrutiny." 892 F. Supp. 1146, 1175 (W.D. Ark. 1995). The court entered a preliminary injunction order two days after the transaction closed and ultimately rescinded the transaction. *Id.* at 1178. As the court noted, given the preliminary injunction order that followed soon *after* the transaction, "there should be no difficulty in separating the assets and requiring the rescission of the asset purchase agreement." *Id.* Moreover, rescission would "be prompt, serve as a means of redressing the [antitrust] violation, and [] the most effective means [of] restoring competition." *Id.* at 1179.[9]

[9] The cases that ESI relies on contrast starkly with the situation here. For example, *Ginsburg v. InBev NV/SA*, 623 F.3d 1229 (8th Cir. 2010) involved a motion for judgment on the pleadings under Rule 12(c). *Id.* at 1230. Moreover, prior to the trial court's ruling, defendants had produced over 400,000 pages of documents on which the trial court based its likelihood of success on the merits decision. Similarly, in *Taleff v. Southwest Airlines Co.*, No. 11-02179, 2011 WL 6157467 (N.D. Cal. Nov. 30, 2011), plaintiffs filed suit *after* the merger was complete

II. Plaintiffs Have Standing To Seek Injunctive Relief under Section 16 of the Clayton Act

ESI fundamentally errs in identifying the "controlling standards" for antitrust standing by conflating the standards of Section 16 of the Clayton Act (applicable to injunctive relief in this case) with the standards of Section 4 of the Clayton Act (applicable only to damages actions and not relevant here). The standards are not the same. Section 4 requires a plaintiff to allege each of the factors from the Supreme Court's *Associated General Contractors* decision, Defendants' Memorandum in Support of their Motion to Dismiss ("MTD") at 13, whereas Section 16 requires only allegations of "(1) threatened loss or injury cognizable in equity; (2) proximately resulting from the alleged antitrust injury." *In re Warfarin Sodium Antitrust Litigation*, 214 F.3d 395, 400 (3d Cir. 2000). "While relief sought pursuant to Section 4 of the Clayton Act requires proof of loss and any damages proven are trebled, 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). Moreover, ESI incorrectly claims that the relevant standing inquiry "identifies the most appropriate plaintiff to enforce the antitrust laws based on factors such as directness and remoteness of inquiry." MTD at 13. The Third Circuit has squarely held, however, that the antitrust standing inquiry under Section 16 does not address these factors and is "not as demanding" as that under Section 4: "in contrast to the treble damage action, a claim for injunctive relief does not present the countervailing considerations – such as the risk of duplicative or ruinous recoveries" or "the spectre of a trial burdened with complex and conjectural economic analyses – that the Supreme Court emphasized when limiting the availability of treble damages." *Warfarin Sodium Antitrust Litigation*, 214 F.3d at 399-400 (citing *Mid-West Paper Products Co. v. Continental Group, Inc.*, 596 F.2d 573 (3d Cir.1979));

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and made no showing of the balance of hardships in support of their request for divestiture. In addition, the court opinion was issued nearly seven months after the suit was filed. *Id.* at *2, *4.

see also Palmyra Park Hosp., Inc. v. Phoebe Putney Memorial Hosp., 604 F.3d 1291, 1299–1300 (11th Cir. 2010) (same).

Each of the cases cited by ESI in its antitrust standing argument deals with the standards for Section 4 ***damages*** actions, not the standards for injunctive relief applicable to this case. As set forth below, when the correct standards are applied, Plaintiffs who are sellers of retail community pharmacy services, purchasers of full-service, nationwide PBM services, and competitors in various markets clearly have standing to challenge the merger and pursue claims for injunctive relief.[10]

A. Standing as sellers of retail community pharmacy services

The Complaint alleges (1) threatened loss in the form of "reduce[d] reimbursement for the purchase of retail community pharmacy services" and loss of ability to negotiate terms resulting in "contractual terms and business behavior detrimental to the pharmacies and competition," and (2) a direct link between those injuries and the fact that the Transaction will enhance ESI's market power as well as increase the likelihood of coordination. Compl. ¶¶ 129-37. In other words, Plaintiffs allege that the merger will reduce competition in the purchase of retail pharmacy services, which will, in turn, injure Plaintiffs through depressed reimbursement rates and ultimately consumers through reduced quality and output. Despite ESI's attempt to characterize these allegations as something out of the mainstream of antitrust law, MTD at 19-20, Plaintiffs in fact state a quintessential monopsony claim in which a dominant buyer exercises market power to drive rates below the competitive level, which in turn results in reduced quality or reduced output to consumers. *See West Penn Allegheny Health Sys., Inc. v. UPMC,* 627 F.3d

[10] Even if Plaintiffs brought Section 4 claims, which they did not, they would still have standing, as demonstrated by the district court cases which held that that Plaintiff NCPA and other community retail pharmacy plaintiffs had standing to bring suits against PBMs for anticompetitive practices that artificially depressed reimbursement rates. *See infra* p. 12.

85, 91 (3d Cir.2010). ESI asserts that Plaintiffs "are only alleging harm to themselves as suppliers of pharmacy services rather than harm that coincides with anticompetitive injury to a market." MTD at 20. That is untrue – Plaintiffs allege that the depressed reimbursements to Plaintiffs will "ultimately reduce the quality of retail community pharmacy services by forcing retail community pharmacies to reduce hours and limit other services for patients." Compl. ¶ 134. In *West Penn*, the Third Circuit held that a similar set of plaintiffs had standing to assert a similar set of allegations. *West Penn*, 627 F.3d at 91. As the court in *West Penn* stated, artificially depressed reimbursement rates resulting from an abuse of buyer power can cause "suboptimal output, reduced quality, allocative inefficiencies, and (given the reductions in output) higher prices for consumers in the long run." *Id.* at 104; *see also Vogel v. American Soc'y of Appraisers*, 744 F.2d 598, 601 (7th Cir. 1984) ("monopoly and monopsony are symmetrical distortions of competition from an economic standpoint"); *United States v. Pennzoil*, 252 F. Supp. 962 (W.D. Pa. 1965) (granting preliminary injunction where the transaction "will substantially lessen competition in the purchase of Penn Grade crude in the Penn Grade crude producing area").

ESI also mischaracterizes Plaintiffs' claim as alleging "a mere 'wealth transfer'" from Plaintiffs to vertically-integrated PBMs. The Complaint plainly alleges that the harm in question results not simply from shifting business from Plaintiffs to PBMs, but rather from the reduction in output and quality of pharmacy services that will result from such a shift of business. Compl. ¶¶ 134-35. This is a cognizable antitrust injury under controlling authority. *See West Penn*, 627 F.3d at 104.

In support of its standing argument for this market, ESI basically relies on no cases, MTD at 19-20 – possibly because two district court decisions in this circuit have specifically held that

Plaintiff NCPA and other community retail pharmacy plaintiffs had antitrust standing to assert monopsony claims against PBMs for anticompetitive practices that artificially depressed reimbursement rates for NCPA members and individual pharmacies.[11] *Bellevue, Drug Co. v. Advance PCS*, No. Civ. A. 03-4731, 2004 WL 724490 (E.D. Pa. 2004 Mar. 2, 2004) (finding antitrust standing under the more restrictive Section 4 standing test in suit against AdvancePCS, a PBM); *Brady Enter., Inc. v. Medco Health Solutions, Inc.*, No. Civ.A. 03-4730, 2004 WL 173651 (E.D. Pa. August 3, 2004) (finding standing under Clayton Section 16 ***against Medco*** for depressed reimbursement rates). NACDS and NCPA have brought buying-side claims in this case in the same capacity that NCPA brought such claims in *Bellevue* and *Brady* – as a representative of member pharmacies injured by artificially depressed reimbursement rates.

B. Standing as consumers of full service, nationwide PBM services

Plaintiffs also have standing to bring claims against ESI as purchasers in the market for the provision of full service, nationwide PBM services to large employers. It is well-settled that consumers in a relevant market have antitrust standing to pursue relief for price increases and reductions in service, which are paradigmatic examples of antitrust injuries. *See, e.g, In re Warfarin Sodium Antitrust Litigation*, 214 F.3d 395 (3d. Cir. 2000). The Complaint alleges (1) a threatened loss as a result of the merged firm "unilaterally rais[ing] prices," "manipulate[ing] their drug formularies," and "selective[ly] designat[ing] high margin drugs as 'specialty drugs'," thereby reducing customer choice, and (2) a proximate link between these injuries and the fact that the Transaction will enhance ESI's market power and create a likelihood of potential

[11] ESI's suggestion that lower reimbursement rates generally translate to lower prices for consumers is at best a disputed fact which is inappropriate for resolution on a motion to dismiss. Indeed, ESI's statement is contradicted by Plaintiffs' factual allegation, which must be accepted as true for purposes of this motion, that "reduced reimbursement rates likely will not be passed to plan sponsors or patients [because] PBMs typically charge more to plan sponsors than they reimburse to pharmacy service providers, retaining the difference as profit." Compl. ¶ 37.

coordination, thereby allowing ESI to force uncompetitive pricing and contractual terms upon large employers. Compl. ¶¶ 145-153. The Complaint also alleges that NACDS' membership includes "large firms that are purchasers of full-service, nationwide PBM services in the United States." *Id.* ¶ 109.

ESI ignores these allegations and argues that the Complaint is deficient because it does not identify any ***specific*** plaintiff that is a consumer in the relevant market, but ESI offers no authority indicating that Plaintiffs must do so and this frivolous contention should be disregarded. There is no question that Plaintiffs may pursue claims against ESI as purchasers in the market for the provision of full service, nationwide PBM services to large employers.

C. Standing as competitors of Defendants in several markets

Based on a flawed understanding of controlling principles and the Complaint's allegations, ESI argues that Plaintiffs have no standing to bring antitrust claims as competitors of ESI in the markets (1) for the provision of Clinical Specialty Drugs, (2) for the provision of full service, nationwide PBM services to large employers, and (3) for the provision of drugs to beneficiaries of large employers. ESI relies on *Cargill, Inc. v. Montfort of Colo., Inc.*, 479 U.S. 104, 114-15 (1986) for the proposition that courts are skeptical of competitor standing in antitrust cases, but *Cargill* expressly declined to create a rule against competitor challenges to horizontal acquisitions. *See id*. at 120-22. Indeed, it is well-recognized that conduct can injure competitors in ways that also injure consumers, including through higher prices, diminished service, and reduced quality. *See, e.g., Palmyra Park Hosp., Inc. v. Phoebe Putney Mem'l Hosp.*, 604 F.3d 1291, 1303 (11th Cir. 2010); *see also West Penn*, 627 F.3d at 102 ("As a general matter, the class of plaintiffs capable of satisfying the antitrust-injury requirement is limited to consumers and ***competitors*** in the restrained market, and to those whose injuries are the means by which the defendants seek to achieve their anticompetitive ends.") (emphasis added). Competitors have standing when their own injuries align with harms to consumers. *Palmyra Park Hosp.,* 604 F.3d at 1303-04.

Contrary to ESI's argument, Plaintiffs' injuries as competitors do not result from "too much competition," MTD at 17, but rather from ESI's post-merger ability – based on increased market power – to shift business from retail pharmacies to ESI's own mail order and specialty pharmacies. Compl. ¶¶ 3, 23, 34, 140, 147, 150, 152, 158. While this surely will injure the retail pharmacy plaintiffs and those retail pharmacies represented by the association plaintiffs, it will also injure consumers by limiting choices that they currently have, reducing output of retail community pharmacy services, and reducing quality of pharmacy services. *Id*. at ¶¶ 3, 10-12, 132, 152, 155, 158. ESI simply ignores these allegations. Plaintiffs' injuries are aligned with the harm to consumers that will result from the merger and therefore provide Plaintiffs antitrust standing as competitors to ESI.[12] *Palmyra Park Hosp.,* 604 F.3d at 1303-04; *New York Medscan LLC v. New York University School of Medicine*, 430 F. Supp. 2d 140, 147-48 (holding that competitor plaintiffs had alleged antitrust standing under more stringent Section 4 standards when they alleged that defendants' conduct caused injury to plaintiffs as well as decreased quality, price, and output of relevant services); *see also Blue Shield of Virginia v. McCready*, 457 U.S. 465, 484 (1982) (finding antitrust standing for purposes of Section 4 of the Clayton Act when plaintiff's injuries were "inextricably intertwined" with injuries to direct victims of antitrust violation). Moreover, ESI's assertion that Plaintiffs' injuries would result from increased efficiencies is a factual dispute not relevant to a motion to dismiss. *Tasty Baking Co.*

[12]In a footnote, ESI argues that its ability to secure exclusive distribution agreements, which form a portion of Plaintiffs' claim, "generally enhance[s] competition." MTD at 17 n.6. Obviously, a practice that enhances competition in some circumstances can be anticompetitive in others. In any event, whether such agreements will enhance or harm competition is a question of fact not appropriate for consideration in a motion to dismiss.

v. Ralston Purina, Inc., 653 F. Supp. 1250, 1254 (E.D. Pa. 1987).

III. Plaintiffs Have Alleged Legally Sufficient Relevant Markets

Market definition typically requires a fact intensive inquiry that is not amenable for resolution on a motion to dismiss. *See Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 436 (3d Cir. 1997) (explaining "general rule" that "in most cases, proper market definition can be determined only after a factual inquiry into the commercial realities faced by consumers"); *Syufy Enterprises v. American Multicinema, Inc.*, 793 F.2d 990, 994 (9th Cir. 1986) (defining the "[r]elevant market is a factual issue which is decided by the jury")*; FTC v. Tenet Health Care Corp.*, 186 F.3d at 1052 (8th Cir. 1999) ("The proper market definition can be determined only after a factual inquiry into the commercial realities faced by consumers."). In certain circumstances, antitrust complaints may be dismissed for failure to allege a facially cognizable relevant market, but only where a 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." *Queen City Pizza*, 124 F.3d at 436; *see also Newcal Indus. Inc. 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' market allegations fall into neither of these two categories. Instead, the Complaint includes numerous facts sufficient to define each of the relevant markets with reference to the rule of reasonable interchangeability, and each market includes all reasonably substitutable products.[13] The markets are therefore legally sufficient to withstand a motion to

[13] ESI's suggestion that Plaintiffs' market allegations are insufficient and "conclusory," MTD at 20, does not fare well when Plaintiffs' careful explanation of each market in compared to those

dismiss. *Queen City Pizza*, 124 F.3d at 436.

A. The market for the purchase of retail community pharmacy services

ESI does not contest Plaintiffs' definition of a relevant product market for the purchase of retail community pharmacy services but instead argues that the statewide geographic markets associated with this product market are insufficient to state a claim because some PBMs negotiate network agreements that span more than one state.[14] MTD at 20. Whether ESI's assertion is true or not is irrelevant on a motion to dismiss. The Complaint alleges that retail community pharmacies in a given state can only sell pharmacy services to PBMs that are permitted by statute or regulation to operate within that state, and that retail community pharmacies could not sell pharmacy services to PBMs operating solely in other states in the face of a hypothetical monopolist decreasing reimbursement rates. Compl. ¶¶ 86-87. This is precisely how geographic markets are analyzed in cases involving monopsony allegations – by asking where, geographically, a seller of goods or services could turn if faced with a small but significant price decrease by a hypothetical monopsonist. *In re Southeastern Milk Antitrust Litigation*, 801 F.Supp.2d 705 (E.D.Tenn. 2011); U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 4.2.2 (2010). The Complaint makes clear that the only such alternative for a retail pharmacy operating in a particular state is to sell its services to a different

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pled in cases in which courts have dismissed complaints for failure to allege legally sufficient markets. In *Queen City Pizza*, for example, plaintiffs attempted to limit the relevant market to ingredients and supplies approved by Domino's. The court found it patently obvious from the face of the complaint that the Domino's-approved ingredients and supplies were reasonably interchangeable with those that were not Domino's approved. *Id*. at 438; *see also Golden Gate Pharmacy Servs. v. Pfizer, Inc.*, 2010 WL 1541257 at *2 (N.D. Cal. April 16, 2010) (granting motion to dismiss when complaint included no facts explaining boundaries of relevant market); *Shaw v. Rolex Watch, U.S.A., Inc.*, 673 F. Supp. 674, 679 (S.D.N.Y. 1987) (dismissing claim with proposed market of "Rolex watches" and stating that "[t]his Court does not need protracted discovery to state with confidence that Rolex watches are reasonably interchangeable with other high quality timepieces"). No such facial deficiencies are present here.

[14] Plaintiffs have alternatively pled a national market that Defendants have not challenged. Compl. ¶ 90.

PBM operating in that same state. ESI's assertion that some PBMs operate in more than one state and may be able to negotiate contracts that cover more than one state does not change this limitation on a retail pharmacy's options if faced with a decrease in reimbursement rates and therefore does not affect the geographic market analysis – particularly on a motion to dismiss.

ESI's further argument that the geographic market definition is deficient because it does not identify market shares or PBMs operating in specific states finds no support in the law. The relevant geographic market should "correspond to the commercial realities of the industry," *Brown Shoe Co. v. United States*, 370 U.S. 294, 336 (1962), and be "sufficiently defined so that the Court understands in which part of the country competition is threatened." *FTC v. Cardinal Health*, 12 F. Supp. 2d 1, 49 (D.D.C. 1997). There is no requirement that Plaintiffs identify each competitor in each market or even market shares.[15] Indeed, the Supreme Court has even explained that the boundaries of a relevant geographic market need not be defined with "scientific precision," *United States v. Conn. Nat'l Bank,* 418 U.S. 656, 669 (1974), or "by metes and bounds as a surveyor would lay off a plot of ground." *United States v. Pabst Brewing Co.*, 384 U.S. 546, 549 (1966). Plaintiffs' statewide geographic markets easily pass this threshold.

B. The market for the provision of Clinical Specialty Drugs

ESI provides no legal support for its argument that the relevant market for the provision of Clinical Specialty Drugs is insufficient because the Complaint does not identify which drugs are included and whether those drugs overlap with Designated Specialty Drugs. The Complaint defines two categories of specialty drugs: Designated Specialty Drugs and Clinical Specialty Drugs. Compl. ¶ 91. It then explains that there are no reasonable substitutes for Clinical Specialty Drugs because they require complex and specialized storage, control and security,

[15] Notably, market shares for the statewide geographic markets are set forth in Plaintiffs' memorandum in support of their Motion for a Temporary Restraining Order/Permanent Injunction and Expedited Schedule. [Dkt. 23].

handling, administration, and patient monitoring. *Id.* at 91, 98. Designated Specialty Drugs are different – although designated as "specialty drugs," they do not necessarily require the same storage, control, handling, administration and monitoring. *Id*. at 92, 98. The Complaint then explains that cross-elasticity of demand between the provision of Clinical Specialty Drugs and the provision of other drugs is low or zero and explains why. The Complaint also alleges facts regarding barriers to entry into the market for the provision of Clinical Specialty Drugs. *Id*. at 99-100. Under well-established law, Plaintiffs need not plead more. *Queen City Pizza*, 124 F.3d at 436. ESI does not present any basis to conclude that the market is facially insufficient; therefore, the motion to dismiss should not succeed. *See id*. *See also Newcal*, 513 F.3d at 1045.

C. The market for the provision of full service, nationwide PBM services to large employers

ESI argues that the market for the provision of full service, nationwide PBM services to large employers is insufficient because defining product markets "by focusing on a particular customer type or size . . . ***where the services provided to all customers are identical***" is impermissible. MTD at 25 (emphasis added). ESI ignores (1) that whether the services provided to large employers are identical is a question of fact and (2) that the Complaint clearly asserts that services provided to large employers are not identical to those provided to others.[16] Large private employers require full service, nationwide PBM services, whereas smaller employers do not require the same breadth or geographic scope of PBM services.[17] Compl. ¶¶ 104, 110, 114. Smaller employers therefore can choose from regional as well as national PBMs, whereas large

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[16] Indeed, all three district court cases cited by ESI in support of this point dealt with situations in which there were *no differences* in the products or services sold or where the plaintiff presented *no reason t*o exclude other sellers or buyers from the market. *See* Mot. at 23, 25.

[17] Contrary to ESI's suggestion that there are no distinctions among the services provided to large employers and those provided to other employers, ESI itself implies in its Opposition to Plaintiffs' Motion for Preliminary Injunction that there is some distinction and that Medco was stronger "with larger employers" whereas ESI was stronger "among so-called 'mid-market' customers." *Id.* at 22.

employers are limited to only those PBMs that can provide nationwide services as well as the full breadth of PBM services that the large employers require, including mail-order and specialty pharmacy services. Id. ¶¶ 104, 110, 114.[18]

The approach of focusing on a group of customers with unique requirements is also squarely supported by Section 7 case law. In *FTC v. Staples, Inc.*, the court held that the sale of "consumable office supplies" by office superstores was not in the same market as the sale of the same products by other retailers because a sufficient number of customers "do not go elsewhere for their supplies" and would not switch to non-superstore retailers in the face of increases in superstore prices. 970 F. Supp. 1066, 1078, 1082 n.13 (D.D.C. 1997).[19] Accordingly, ESI offers no basis to conclude that the market for the provision of full service, nationwide PBM services to large employers is insufficiently defined.

D. The market for the provision of drugs to beneficiaries of large employers

ESI contests the market for the provision of drugs to beneficiaries of large employers on the same grounds as the market for the provision of full service, nationwide PBM services to large employers – that limiting the market to "large employers" is impermissible. MTD at ¶¶ 23-24. This argument fails for the same reasons discussed above. As the Complaint explains, large employers require unique services that are different than those required by smaller employers and could not switch to the more limited services that are acceptable to smaller

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[18] The FTC recognized this dynamic when assessing the competitive effects of the merger of two large PBMs, Caremark and AdvancePCS, in 2004. In its analysis, the FTC looked to the merger's effects on "the large employers that are more likely to desire the broad service offerings of national, full-service PBMs. *Statement of the Federal Trade Commission in the Matter of CaremarkRx., Inc./Advance PCS*, at 2 (2004).

[19] *See also FTC v. Whole Foods Market, Inc.*, 548 F.3d 1028, 1038 (D.C. Cir. 2008) ("[W]hen one or a few firms differentiate themselves by offering a particular package of goods or services, it is quite possible for there to be a central group of customers for whom only [that package] will do . . . . [F]ringe competition for individual products within a package may not protect customers who need the whole package from market power . . . .") (internal quotations and citations omitted).

employers. Compl. ¶¶ 104, 110, 114. Defining a market limited to those large employers (and their employees) is entirely consistent with economic reasoning and case law, *see, e.g.*, *Staples*, 970 F. Supp. at 1078, 1082 n.13, and therefore is sufficient to withstand a motion to dismiss.

E. Anticompetitive Effects of the Merger

ESI purports to challenge the Complaint's allegations of anticompetitive effects resulting from the merger, but in fact only argues – in a footnote – that Plaintiffs have failed to allege undue concentration in the market for the provision of Clinical Specialty Drugs.[20] MTD at 18 n.7. Even this limited argument is misplaced. As ESI concedes, Plaintiffs allege a market share of approximately 31% in the market for the provision of Clinical Specialty Drugs. Compl. ¶ 126. Under relevant Supreme Court precedent mergers that substantially increase market concentration in already concentrated markets presumptively violate the Clayton Act, and a resulting 31% market share is sufficient to trigger this presumption. *See United States v. Phila. Nat'l Bank*, 374 U.S. 321, 363-65 (1963) (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); *see also* Mem. in Supp. of Pls' Mot. for a Temporary Restraining Order/Permanent Injunction and Expedited Schedule at 9-13. [Dkt. 23].

IV. <u>Plaintiffs Have Pled Irreparable Harm</u>

ESI's arguments regarding irreparable harm either ignore or mischaracterize many of Plaintiffs' central allegations regarding harm and do nothing to undermine the legal sufficiency of those claims.[21] In the Complaint, Plaintiffs allege at least four types of irreparable harm likely

[20] To the extent ESI argues that its conduct generally is not anticompetitive, it is raising a factual question that should not be decided on a motion to dismiss.

[21] Notably, the very first case cited by ESI on the issue of irreparable harm, *Schering-Plough Healthcare Prods., Inc. v. Neutrogena Corp.*, involved a court ordering that "the parties . . . proceed with limited discovery addressed to the four permanent injunction factors." 2010 WL 3418203, *2 (D.Del. 2010).

to result from the merger, any one of which would independently suffice to justify injunctive relief: (1) harm to competition through the destruction of a competitor, thereby reducing the overall competitiveness of the market, Compl. at ¶ 129; (2) substantial loss of business and possible bankruptcy, Compl. at ¶ 3, 38, 46, 50, 54, 58, 62, 66, 71, 131, 134, and 136; (3) loss of goodwill and reputation, Compl. at ¶¶ 42, 45, 49, 53, 57, 61, 65, 70, 132, 135, 141, and 152; and (4) the unavailability of monetary damages as a result of *Illinois Brick* for Plaintiffs who are indirect sellers of products and services into the market for the Purchase of Retail Pharmacy Services, Compl. at ¶ 72.[22] ESI chose to address only certain of these injury claims; thus, even if all of ESI's lack of irreparable harm arguments were accepted (they should not be), the case would still not be dismissible on these grounds.

With respect to the allegations in the Complaint that the merger will give ESI market power such that it will be able to force reductions in reimbursement rates, ESI asserts that this cannot be irreparable because it can be compensated by money damages. Def. Br. at 6. However, the Third Circuit recognizes an exception to the general rule that purely monetary harms cannot constitute irreparable harm "where the potential economic loss is so great as to threaten the existence of the movant's business." *Minard Run Oil Co. v. United States Forest Serv.*, 670 F.3d 236 (3d Cir. 2011). Without analysis or discussion, ESI dismisses Plaintiffs' injury claims under this exception by stating that "the Complaint provides no factual predicate for this assertion." Def. Br. at 6 n.2. Quite the contrary, the Complaint contains extensive support for the likelihood of this harm as a result of this merger. Compl. at ¶ 3, 38, 46, 50, 54, 58, 62, 66, 71, 131, 134, and 136. This type of support is analogous to *Minard Run*, where the Third Circuit upheld a finding of irreparable harm under this exception based on the testimony of several business owners that they would probably be forced to "shut down or go bankrupt" if the complained of conduct

[22] ESI does not rebut this alleged irreparable harm; in fact, it does not address it at all in its brief.

continued. 670 F.3d at 255.

ESI mischaracterizes Plaintiffs' claims that the merger will result in a permanent loss of goodwill and reputation as one of merely a loss of market share and lost profits and thus a harm that can be remedied by damages. Def. Br. at 7. This ignores the substance of Plaintiffs' injury claims with respect to goodwill and reputation. Plaintiffs allege that their reputations and the goodwill they have with patients will be ***irreparably*** harmed when as a result of the Transaction they are forced to cut hours and patient services and are no longer able to service patients. Complaint at ¶¶ 42, 45, 49, 53, 57, 61, 65, 70, 132, 135, 141, and 152. "Within the Third Circuit, courts have found that injury to goodwill…[is] the type[] of injur[y] which would constitute irreparable harm that cannot be compensated with monetary damages." *Fisher Bioservices, Inc. v. Bilcare, Inc.*, No. Civ. A. 06-567, 2006 WL 1517382, *20 (E.D. Pa. 2006). Furthermore, just such a harm was accepted by the Third Circuit as sufficient grounds to support the issuance of a preliminary injunction in the context of an antitrust claim in *Bergen Drug Co. v. Parke, Davis & Co.*, where the anticompetitive harm alleged was permanent loss of business and harm to plaintiff's goodwill. 307 F.2d 725.[23]

Furthermore, ESI incorrectly implies that Plaintiffs are required to establish that they have already been harmed as a result of this transaction. Def. Br. At 5 ("Plaintiffs fail to plead facts showing they have suffered any injury…"). In other parts of its brief, ESI suggests that Plaintiffs' claims of harm are merely "speculative." Def. Br. at 6 n.2, 7. ESI's arguments incorrectly demand a level of certainty that is neither possible nor required in challenges under

[23] The cases cited by ESI on this issue are not on point. For example, in *Aurora World, Inc. v. Ty Inc.*, the court found that the plaintiff had not established that it had any goodwill or reputation in the market to be lost. 719 F.Supp.2d 1115, 1169. Conversely, the Complaint is replete with statements and evidence regarding the high esteem in which pharmacists are held by the public. *See, e.g.,* Compl. at ¶ 6-8. Moreover, the *Fin. Equip. Co., Inc. v. Silva* court did not even address a claim of a loss of goodwill and reputation in the context of its irreparable harm analysis. No. 10-C-794, 2010 WL 4782786, at *11-13 (E.D. Wis. Nov. 17, 2010)

Section 7. Indeed, the Supreme Court has stated that the Clayton Act is concerned "with probabilities, not certainties." *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962). Furthermore, such challenges and preliminary injunctive relief are generally intended to prevent the harm from occurring or continuing to occur. That being said, ESI unwittingly admits – indeed argues vehemently—that one of those alleged harms has already occurred—namely that Medco has already been destroyed as a competitor. ESI cannot have it both ways. Plaintiffs' Complaint alleges facts sufficient to satisfy the irreparable harm requirement for injunctive relief, and it should not be dismissed on that ground.

V. Plaintiffs Have Pled Public Equity and Balance of the Merits

Preliminary injunctive relief in this case serves at least two crucial public interests: (1) the public interest in effective enforcement of the antitrust laws and (2) the public interest in preserving patient health and protecting against an increase in overall healthcare costs. Compl. at ¶¶ 4, 7-9, 11-12. In its brief, ESI relies almost exclusively on a combination of the Federal Trade Commission Statement Concerning the Proposed Acquisition of Medco Health Solutions by Express Scripts, Inc. ("FTC Statement") and vague, conclusory, and speculative statements to support its claim that the public interest would be served by dismissal.

ESI's reliance on the FTC Statement to support its claims regarding the public interest is both improper and misplaced. As a preliminary matter, ESI's reliance as the factual basis for its otherwise unsupported claims that the Transaction has not been shown to have anticompetitive tendencies is improper. In Defendants' Brief in Support of Request for Judicial Notice in Support of Defendants' Motion to Dismiss, ESI only asked this court to take notice of the statement of the FTC for purposes of establishing the timing of certain events. Def. Br. at 2 ("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…"). Having failed to request that the Court take judicial notice of the specific substantive arguments and conclusions of the FTC contained therein, ESI's reliance on such information as fact in its brief is improper. Fed. R. Evid. 201(d).

Furthermore, ESI's references to the FTC Statement do nothing to rebut Plaintiffs' argument that the public interest favors the issuance of a hold separate (and ultimate injunctive relief) here. It is well-established that FTC review of a proposed merger "provides no immunity from private suit and is of no moment whatsoever in a subsequent civil action." *First and First, Inc. et al. v. Dunkin' Donuts, Inc.*, Civ. A. No. 90-1060, 1990 WL 36139, at *71 n.3 (E.D. Pa. Mar. 27, 1990). "[F]ederal regulators will not necessarily challenge every potentially troublesome merger, which is why Congress made private enforcement 'an integral part of the congressional plan for protecting competition.'" *AlliedSignal v. B.F. Goodrich*, 183 F.3d 568, 575 (7th Cir. 1999) (citing *American Stores Co*., 495 U.S. at 284-85). Given the role of private enforcement, "[c]ourts do not generally defer to an agency's decision not to challenge a merger." *Id.* (citing, *inter alia*, *Tasty Baking Co. v. Ralston Purina, Inc*., 653 F.Supp. 1250, 1254 (E.D.Pa.1987)). Thus, a decision by the FTC to not stop a merger "does not preclude [subsequent] independent judicial review." *Broadcom Corp. v. Qualcomm Inc*., 501 F.3d 297, 321 n.12 (3d Cir. 2007). Indeed, if it did, as ESI implies, there would be no reason for Congress to permit private suits in such a context as it has explicitly done in the Clayton Act.

Lastly, the only case cited by ESI with respect to the question of the public's interest in effective enforcement of the antitrust laws, is hardly analogous to the circumstances of the present case. In *Delco LLC v. Giant of Maryland, LLC*, the court found that the public interest in effective antitrust enforcement did not militate in favor of plaintiffs in a case where plaintiffs had still failed to define the relevant product and geographic markets for their Section 7 claims months after the complaint was originally filed. 2007 WL 3307018 (D. N.J. Nov. 8, 2007). This is not comparable to this case where the Complaint was filed with properly defined product and geographic markets.

VI. Dismissal with Prejudice Is Not Appropriate

The Third Circuit has repeatedly recognized that "dismissals with prejudice are drastic sanctions," that are "only appropriate in limited circumstances and doubts should be resolved in favor of reaching a decision on the merits." *Bull v. United Parcel Serv., Inc.*, 665 F.3d 68, 80 (3d Cir. 2012); *Lopez v. Cousins*, 435 F. App'x 113, 115 (3d Cir. 2011); *Briscoe v. Klaus*, 538 F.3d 252, 257 (3d Cir. 2008); *Dover v. Diguglielmo*, 181 F. App'x 234, 236–37 (3d Cir. 2006); *Emerson v. Thiel College*, 296 F.3d 184, 190 (3d Cir. 2002). Dismissals with prejudice should only be used in "extreme" situations, where parties and their counsels have displayed "flagrant bad faith" and "callous disregard" of their responsibilities. *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643 (1976). Therefore, dismissals under Fed. R. Civ. P. 12(b)(6) for failure to show entitlement to relief pursuant to Rule 8, are, if granted, almost always without prejudice. *See, e.g.*, *Pennavaria v. Walton*, No. 10-cv-0415, 2010 WL 2650413, at *4 (W.D. Pa June 30, 2010).[24]

CONCLUSION

For the forgoing reasons, this court should deny ESI's motion to dismiss Plaintiffs' Complaint. To the extent that this court finds any of Plaintiffs' claims deficient, those claims should be dismissed *without* prejudice pursuant to law of this circuit.

[24] *See, also Scott v. Luther*, No. 09-55J, 2010 WL 2683159, at *3 (W.D. Pa May 27, 2010); *Lombardi v. Allstate Ins. Co.*, No. 08-949, 2009 WL 1811540, at *10 (W.D. Pa June 23, 2009); *Tegg Corp. v. Beckstrom Elec. Co.*, 2008 WL 2682602, at *9 (W.D. Pa July 1, 2008).

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Respectfully submitted,

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