

**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' RESPONSE TO DEFENDANTS' MOTION
REQUESTING JUDICIAL NOTICE**

Courts evaluating a Rule 12(b)(6) motion to dismiss generally consider only the allegations in the complaint, exhibits attached to the complaint, matters of public record, and documents that form the basis of a claim. *See In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir.1997); *Pension Benefit Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir.1993). A document forms the basis of a claim if the document is "integral to

or explicitly relied upon in the complaint.” *Burlington Coat Factory*, 114 F.3d at 1426 (emphasis omitted).

While a court reviewing a motion to dismiss under Rule 12(b)(6) may take judicial notice of a fact “not subject to reasonable dispute in that it is either (1) generally known or (2) capable of accurate and ready determination,” Fed.R.Evid. 201(b), the court’s consideration of “facts beyond the corners of the complaints” is subject to significant limitations. *In re Warfarin Sodium Antitrust Litig.*, 214 F.3d 395, 400 (3d Cir. 2000) (reversing a district court’s grant of a 12(b)(6) motion where the “court impermissibly cited and relied on facts beyond the corners of the complaint” and improperly applied Clayton Act Section 4 to Clayton Act Section 16 claims). For instance, a court may take judicial notice of “public records” to establish the existence of such a record but not for the truth of the facts asserted therein. *Lum v. Bank of America Corp.*, 361 F.3d 217, 222 n.3 (3d Cir. 2004).

Defendants have asked the Court to take notice of a statement published by the FTC as a “public record” created by an administrative body. Defendants request notice of this document ostensibly “for the purposes of establishing (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.” 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 (“Notice Mem.”), at 3. However, Defendants’ brief in support of its motion to dismiss cites the FTC statement for entirely different purposes. *E.g.*, Defendants Express Scripts, Inc.’s and Medco Health Solutions Inc.’s Memorandum of Law in Support of Their Motion To Dismiss Plaintiffs’ Complaint, at 10 (citing the FTC statement for its brief

statements regarding monopsony power); *id.* at 12 (citing the FTC statement as alleged support for Defendants’ argument that Plaintiffs failed to plead that the Transaction would harm the public interest); *id.* at 18 (citing the FTC statement as alleged support for Defendants’ argument that Plaintiffs failed to properly plead a market); *id.* at 19 (citing the FTC statement as alleged support for Defendants’ argument that Plaintiffs lack standing because “lower reimbursement rates generally translate to lower prices for consumers”—a proposition that has, in any event, been definitively rejected by the Third Circuit in *West Penn Allegheny Health System, Inc. v. UPMC*, 627 F.3d 85, 91 (3d Cir.2010)); *id.* at 20 (same).

Defendants have no grounds to request that the Court consider the FTC statement for the purpose of establishing the above facts (*i.e.*, to establish the truth of statements within the FTC record). *Lum*, 361 F.3d at 222 n.3. Moreover, Plaintiffs hereby stipulate the two facts that *ostensibly* form the basis of Plaintiffs’ request for judicial notice with respect to this document, rendering Defendants’ request for judicial notice with respect to this document and the Court’s reliance on this document for these two facts unnecessary.

Defendants also have asked the Court to take notice of Plaintiffs’ press releases to establish that “Plaintiffs publicly announced that they were testifying before Congress against the ESI-Medco merger on their own websites” and “Plaintiffs testified before Congress in opposition to the merger on September 9, 2011 and September 20, 2011.” Notice Mem. at 3. Without taking a position on the propriety of the Court’s consideration of these two documents, Plaintiffs hereby stipulate to both of these facts, rendering Defendants’ request for judicial notice and the Court’s reliance on this document for these two facts unnecessary.

Defendants also have asked the Court to take notice of Defendants’ SEC filings, but they do not explain the facts or purposes for which they request judicial notice. Notice Mem. at 4. As

Defendants' authorities make clear, SEC filings are subject to judicial notice for certain purposes (e.g., proving that defendants made "cautionary statements" in securities litigation) but not for other purposes (e.g., the truth of statements contained in the filings). *In re NAHC, Inc., Securities Litig.*, Civ. A. 00-4020, 2001 WL 1241007 at*5 (E.D. Pa. Oct. 17, 2001), *aff'd In re NAHC, Inc. Securities Litig.*, 306 F.3d 1314 (3d Cir. 2001).

CONCLUSION

For the foregoing reasons, Plaintiffs request that Defendants' Request for Judicial Notice in Support of Defendants' Motion to Dismiss Plaintiffs' Complaint be granted only for the four factual points stipulated by Plaintiffs.

DATED: April 9, 2012

Respectfully submitted,

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