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

NATIONAL ASSOCIATION OF
CHAIN DRUG STORES, et al.,

Plaintiffs,

vs.

EXPRESS SCRIPTS, INC., et al.,

Defendants.

Civil Action

No. 12-395

Transcript of proceedings on April 10, 2012, United States District Court, Pittsburgh, Pennsylvania, before Cathy Bissoon, District Judge

APPEARANCES:

For the Plaintiffs: J. Robert Robertson, Esq.
Corey W. Roush, Esq.

For the Defendants: Clifford H. Aronson, Esq.
Arthur H. Stroyd, Esq.
James A. Keyte, Esq.

Court Reporter: Richard T. Ford, RMR, CRR
6260 U.S. Courthouse
Pittsburgh, PA 15219
(412) 261-0802

Proceedings recorded by mechanical stenography; transcript produced by computer-aided transcription

(Proceedings held in open court; April 10, 2012).

THE COURT: Good afternoon. We are here for argument in the National Association of Chain Drug Stores, et al., Plaintiffs, versus Express Scripts et al., Defendants.

Can counsel please identify themselves for the record.

MR. ROBERTSON: Good afternoon, Your Honor, my name is Robby Robertson, with me I have Mr. Corey Roush, on behalf of all the Plaintiffs in the case. We also have some of the Plaintiffs actually here, Mr. David Cippel, Mr. David Smith, and Mr. William Thompson, also on behalf of the National Association of Chain Drug Stores and also on behalf of National Community Pharmacists Association we have Mr. Don Bell and Ms. Jennifer Ballard.

THE COURT: Will any of those individuals be giving testimony today?

MR. ROBERTSON: Yes, Your Honor, me or Mr. Roush, depending on what the issue is, will be questioning.

THE COURT: For Defendants?

MR. STROYD: Your Honor, Art Stroyd, Del Sole Cavanaugh Stroyd, on behalf of the Defendants.

THE COURT: Okay.

MR. ARONSON: Clifford Aronson of the firm Skadden Arps on behalf of the Defendants. I would also like to introduce Julia Brncic, who is inside counsel at Express

Scripts.

MR. KEYTE: James Keyte from Skadden Arps as well.

THE COURT: Very good.

All right. Is Plaintiff ready to proceed?

MR. ROBERTSON: Yes, Your Honor. And, Your Honor, what I will be doing is working from the podium over there because it has the plug and everything.

THE COURT: That's fine.

MR. ROBERTSON: Thank you, Your Honor.

I think that there are two pending motions, Your Honor, two main motions at issue.

THE COURT: That's correct.

MR. ROBERTSON: I will be addressing our fundamental motion now. If Your Honor wants me to then deal with the motion to dismiss, I can do that then or wait until after the other side has argued their motion.

THE COURT: I would rather you do them at the same time if you could. Many of the arguments overlap, rather than have to --

MR. ROBERTSON: All right, Your Honor. If something new comes up, I would ask to reserve a tiny bit of time to respond to something I didn't address.

THE COURT: Very good.

MR. ROBERTSON: Your Honor, we have just a few slides, I don't have very many, but I want to draw the Court's

attention to a few things that I have given the Court a copy of.

THE COURT: That's this?

MR. ROBERTSON: Yes, Your Honor.

Now, I want to start off, Your Honor, with some basic background here. I mean, in the real world, as we all know, the world in which we actually live, competition is a good thing, it's the American way of life. It is not just for sellers; it's also for buyers. Buyers and sellers both have to compete, and compete horizontally and vertically, in order for our system to work.

Under the law, mergers that may, quote, may substantially lessen competition, end quote, are illegal. That's what the statute actually says. We believe that this merger may substantially lessen competition. We believe that it will actually harm competition, but that's not the burden of proof that we have here today or any time in this case. We believe that it will harm pharmacies and customers, consumers all across America.

Now, Express Scripts, their main argument that we have seen so far -- and in their declarations they have not actually attacked any of the evidence we have put in, any of the declarations we have put in so far. What they are actually saying, we believe, is essentially they are just too big to stop. They're too big. They are too big of a company.

They have already integrated, they say. We contest that and I want to show Your Honor some things that they have been saying are not accurate.

Now, we don't believe that what they're claiming, which is gaining efficiencies by squeezing pharmacies so hard they have to cut services, that that actually helps competition or helps America at all. The way this works, Your Honor, I think we all know generally, I won't take a lot of time on it, but if most people go into a pharmacy -- and almost everybody, anybody who has insurance or works for an employer and has a plan, you go in there with a card. It's either going to be Caremark, for example, it could be Express Scripts, Medco, those are the main ones. There are some others, but those are the three big ones.

When you go in there and buy a drug, what happens is the pharmacy actually has to go out and buy the drug, stock it, give service, give advice, do what pharmacists do, then they sell the customer the drug.

But the customer doesn't actually then pay for it. The customer might have a copay, might not pay anything at all.

What happens is the large PBMs, the pharmacy benefit managers, these huge companies that act more like banks, they're the ones that end up paying and they collect the money through all the plans or through the employer plans,

the whole fabric of the system, that's how it works.

So if I am a pharmacist -- and we have pharmacists here in the back here, our clients -- they have to get the drug, stock it, give all the good advice that a pharmacist gives to make sure it doesn't -- you don't take a drug that hurts you because you are taking another drug that may conflict, and then when you make that sale, you expect to get paid by these Defendants. These Defendants occupy, as the declarations say, anywhere from 30 to 60 percent of their business. That is a large chunk of their business.

Before they merged, there were three large PBMs. Now there are two. They could get by, many of these companies, pharmacy companies and chain stores, with two. They can't get by without the two that remain because that would be way too much of their business. They can't say no to either one of them anymore. When one negotiates, if you can't say no, that takes away all of your leverage.

Why is that important? Well, because when the pharmacies then want to get paid, they go back to these folks and they don't pay them what the list price is on that drug they sold. They sometimes, and often from the declarations, don't even pay them what it costs for the pharmacy to buy the drug; not just how much it cost to have staff there and have people giving advice and have real educated pharmacists there behind the counter, not even including that.

THE COURT: That's an existing situation?

MR. ROBERTSON: Yes, yes. And it is more of an issue with Express Scripts than it was with Medco because by and large Medco's reimbursement rates were higher than Express Scripts' before the merger. So we believe -- one of our points is that's an efficiency they will combine and lower the reimbursement rates that Medco was giving. Well, that's just squeezing money out of the pharmacy, robbing Peter to pay Paul doesn't help America at all. We will go through that and show Your Honor what we mean by that.

Now, starting at the basics of antitrust, and this is kind of an odd area of the law, most people in this room, the lawyers here, have been practicing in that area, but it is an obscure area of law I think to most people. But it was written at a time when Congress wanted to stop large mergers. That's exactly what it was written for. And it was also written at a time to protect small businesses against large mergers.

The law at that time, and still is the law today, means something that aggregates market power at more than 20 to 30 percent, and in some cases, including Brown Shoe, which I have up on the screen, even a lower percentage than that.

Now, is a purpose of the antitrust law just to gain efficiencies? Some people at the Chicago store like to say that's true. That's not the law. Brown Shoe from 1962 says

that Congress has the desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets.

But what Congress wanted was decentralization. It didn't want to have large companies. It wanted to maintain the fabric of mom and pop stores and small stores throughout America. That's what the antitrust laws are about. That's what the Clayton Act is about. That's what Brown Shoe is talking about.

One might think in 1962, well, is that still the law today? It absolutely is. I just tried a case as the Defendant, happened to have lost it, H&R Block, and the judge there rightfully cited Brown Shoe because it is the current state of the law. We would like to say maybe it shouldn't be, but it is the law. And so is Philadelphia National Bank, which we will talk about.

Philadelphia National Bank just a couple years later, 1963, still the governing principle of the Supreme Court, said that you could have a combination of two companies that have a fairly, what we think, a fairly small market share, but that's enough to stop it because we don't want to have an aggregation of market power. In that case they thought that 30 percent was clear, that was clearly illegal as

a presumptive illegality. If we did nothing else and they didn't respond and we showed it was 30 percent or more, it clearly is illegal under Philadelphia National Bank, we're done, we should be focused on remedies at this point.

Here in this hearing they haven't challenged any of the actual anticompetitive effects that we have raised. No declarations submitted, nothing at all, we're stuck with this structural presumption.

Now, that inference, they can rebut, bring in evidence to show that actually this is a pro-competitive merger that is going to increase competition. We haven't seen any of that evidence, we don't believe it exists. We don't believe that simply saying there are efficiencies matters at all. It may sound like a lot, billions of dollars, the same thing Staples and Office Depot said, and billions of dollars, the Court rejected it, because efficiencies have to be merger specific, meaning they can't accomplish them except for the merger and they have to be passed through to consumers. We will show that's not at all what we are talking about here.

Now, is the market share enough? We have pled it, I will show Your Honor that, but also what they have attached, the FTC statement, actually says it is more than 40 percent. More than 40 percent in the broadest market. And they also, the statement says, they understand that that would make it presumptively anticompetitive.

Now, the FTC decided not to do anything in this case. They did not have a hearing. They did not have a hearing like this. The person who wrote this statement, which we will talk about later, very fine trial lawyer who is now a commissioner, Mr. Rosch at the time, he would not talk to us, would not hear our arguments, would not let us even talk to him at all.

We did not see any of the evidence that they had on the arguments they presented to the FTC. Nobody has. It's all -- it was all done in secret, which is the way the FTC works until they go into an adjudicative process, which they do have at the FTC. They have ALJs there and all of that. We never got that far. We haven't had our day in court yet.

The idea that the Defendants raise that we should defer to the FTC decision not to prosecute here or not to bring a challenge, that's not what the courts have held. There isn't any court out there that says, well, we should defer to an agency's decision not to bring a case. Just there isn't any law on that.

There's law on the other side that supports our position, AlliedSignal from the Seventh Circuit, for example, quoting American Stores, which is a Supreme Court case as we all know here.

The Broadcom case here in the Third Circuit, not a merger case, but it was a case where the FTC had chosen not to

do anything.

And also Tasty Baking where the courts, federal regulators, won't necessarily challenge every troublesome merger.

It is true, in fact the FTC itself has been pretty self-critical. It's done its own analysis in looking at seven mergers that were close, just like this, in terms of numbers, and they decided not to prosecute them, and they found out later that they in fact -- that there was an anticompetitive effect and prices actually did go up. So they do understand that they make mistakes, that they don't go all the way through the point of having an administrative hearing or having a court hearing like we want to have here. So a decision not to prosecute doesn't mean much at all and it is certainly not evidence.

Like the FTC, we actually have pled in the complaint what the market shares are. We have an expert report discussing market share as well, and in every market that we have alleged, we have gone from 31 percent to 50 to 60 percent, way above what the courts require, which is down to the 20 to 30 percent threshold.

In terms of a hold separate order, I think this is something that may be unusual in most cases, and I don't know if Your Honor knows, but most cases from the time the Clayton Act was written were post-consummated merger challenges. They

weren't before the fact, they were after the fact. One would think with Hart-Scott-Rodino that would change, right now it's about half and half. About half the mergers are being challenged and have hearings, actual trials that are post-consummated mergers.

I have tried three myself in the last few years. And in those, the FTC had two in the last couple years, and of the last four that the FTC had, they had two hold separates, two hold separates. One was a LabCorp case Mr. Roush and I tried. They also had a hold separate in ProMedica, which a district court entered just about a year ago. Then the FTC then had a hearing on the merits after that.

So having hold separates is not unusual. In the Ninth Circuit in American Stores the argument was you couldn't get it as a private Plaintiff. The Ninth Circuit had reversed the district court upon its holding that there should be a hold separate, that it ordered a hold separate, but the Supreme Court reversed the Ninth Circuit and ordered a hold separate, which is in fact what happened in that case.

In Tasty Baking here in this circuit there was a hold separate as well.

A bunch of other cases we have on here, I don't want to go through all of them, but just some examples of other cases where a hold separate was entered. It's part of equitable relief. A part of -- within the discretion of the

court in order to preserve the status quo, which was before we filed the lawsuit until the time we can get a hearing on the merits.

Now, what is it that we're asking now? Because, as I said the other day with Your Honor, a lot has changed in a very few days. We're trying to keep up with all of this. Huge company, we believe a huge company means huge problems for competition, but it was surprising to us that they said they had already integrated. We don't believe that's true, but we do believe that some things have changed and we want to address that.

What we want to have in this case today is a hold separate that keeps the systems separate, the systems that deal with pharmacies, the Plaintiffs in this case.

THE COURT: Well, let's start here. What do you think has happened so far as far as the integration is concerned?

MR. ROBERTSON: I think they have done a lot of planning. I think they fired a lot of senior executives or let them go and given them parachutes, whatever. The CEO of Medco is gone. A lot of the supervisors are gone. The lobbyists in Washington, DC, seem to be off on other jobs.

The system that does what I described as buying and selling of drugs with the pharmacies at different prices, Medco being higher than Express Scripts, is still separate.

It's still operating separately today. You go to a pharmacy and you walk up to the computer and you put in a drug. If it's a Medco patient, Medco is still there. You still get paid at a Medco rate, not at an Express Scripts rate. They have different numbers, Bin numbers, different systems, and I will show Your Honor some documents that relate to that, what they are telling the public on this. So that's what we are focused on.

We would also like to have their ability frozen to take the Medco, for example, mail order system and take pharmacy drugs that our pharmacists sell and force customers to buy them from Express Scripts. In other words, if I go into a pharmacy and I have a prescription, right now what Express Scripts can choose to do is say, I'm sorry, you cannot buy from that pharmacy, I have to go mail order.

We have examples in our declarations, including the one from Mr. Smith, explaining how that hurts customers, it hurts consumers. It also harms him because what they are doing is taking away some of the more expensive drugs and sales from the pharmacy and directing it to their dot-com.

THE COURT: What is your information that suggests that that will happen?

MR. ROBERTSON: That's what Express Scripts has already been doing on its own; and since they're incorporating Medco into Express Scripts, that's what we would expect to

have happen with Express Scripts.

THE COURT: When do you think that will happen?

MR. ROBERTSON: As soon as they begin to actually combine the two systems together.

THE COURT: So you think immediately upon combining the two systems that will happen?

MR. ROBERTSON: Yes, Your Honor, because once the systems are combined, then it all is Express Scripts.

The contracts that counsel mentioned the other day on the phone, he said they only change every three years or so, that's not what sets the rates. The rates are set on an almost daily basis by Express Scripts or Medco or Caremark and other PBMs. Those individual rates. It's not just one rate for one drug for Express Scripts; they have hundreds of different rates that they have. They change them all the time. They are commonly referred to as MAC rates or MAC reimbursement rates.

So, for example, if a pharmacy buys a drug at $30 and actually pays for it at $30, Express Scripts may choose to only pay 25.

THE COURT: Did Medco do that?

MR. ROBERTSON: Not as often as Express Scripts. In fact, their rates happen to be on average higher than Express Scripts and, so, there was a way above the cost of the product for the pharmacies to then have money to pay for

hiring the pharmacist, for having the facility, for staying open on Sundays, for doing all the things that customers really want in terms of value and day-to-day support that we expect from pharmacies.

If you are getting less than the drug actually costs, not only do you not have enough money to pay for the drug, you don't have money to pay for these other things.

THE COURT: Let's assume you are wrong in terms of your analysis of the integration so far, assume it's more involved than that, assume that what they are saying is true, the integration is further along than what you have characterized as planning, firing senior executives and --

MR. ROBERTSON: In terms of the law, Your Honor, Your Honor could roll this thing completely back and rescind it. That's what Elders Grain did, that's what Judge Posner did there. That's within the Court's power. I am trying to find a way that's reasonable so that we can proceed on a quick pace to the merits of this case and at least reduce some of the harm to my clients.

THE COURT: How would this rolling back look, assuming that even what you say has happened has happened, the firing of the senior executives, the firing of the supervision, who would be running the show exactly over at Medco?

MR. ROBERTSON: The same people that are running it

right now because there are two different systems.

THE COURT: So you are suggesting that it be somebody other than ESI?

MR. ROBERTSON: The people that now work for ESI, but they will have to separate those people out and make sure they are not comparing notes --

THE COURT: So the inside ESI people would be running it?

MR. ROBERTSON: That's what the hold separate would be. From an administrative standpoint, they can still be run and HR and things like that by Express Scripts. When we do hold separates -- and I have done hold separates with the FTC, for example, we have done that. Even at LabCorp, which was a laboratory company in California, we actually supported the building maintenance and HR and administrative things. What we couldn't do is negotiate rates. We couldn't have -- we couldn't negotiate prices, which is what antitrust is mainly concerned about.

That was something that could be done. It's been done in hospital cases and even more extreme cases. The FTC entered at the end of the day with a hold separate that said, set separate negotiating teams for prices. The administration of a large company isn't what hurts my client. It's the fact that the company controls the negotiation of rates. It's the price that counts and the ability to divert sales from the

pharmacy to themselves.

We had talked in our briefs, and I won't go too much into this, but in terms of delay I think Your Honor now knows what happened here. They did not say they were going to close on Monday morning. They never did say that. They did say on the 28th that they would close as early as the following week. We then filed a lawsuit the next morning.

THE COURT: Was that lawsuit served on Defendants?

MR. ROBERTSON: Absolutely, that very same day, then the next morning I called Mr. Aronson and we had a discussion because we wanted to make sure that we did not do an ex parte TRO. We wanted to have a discussion with him. He had to get back to us on whether they would agree to certain of these issues. Got back to us at about 3:30 in the afternoon on Friday. Did not tell us they were going to close before 8 o'clock on Monday morning.

THE COURT: Tell me a little bit more about that discussion, the nature of that discussion in terms of the negotiation. Was it the negotiation of terms so you would not have to go forward with the TRO? Is that what you're suggesting happened that day?

MR. ROBERTSON: We talked about that, talked about whether there would be a hold separate and whether we could negotiate some kind of hold separate. We didn't get very far with that because his answer was -- the answer was no.

THE COURT: So there was no agreement.

MR. ROBERTSON: I asked, can you enter into a protective order because if you gave me a protective order I can find out what's going on here because we have now sued you, and typically in cases I have been in, and I have done a lot of these injunction cases, the first thing you do is get a protective order so outside counsel can share confidential information. He said no to that, he declined to do that.

I asked, can you tell me what your plans are for the company? He declined to tell me that.

Did not expect that from Friday afternoon when we had not even heard from the FTC, hadn't heard anything from them, that by 8:10 on Monday morning that they would have closed. When I called him about an hour later, he said, oh, we have already integrated.

I said, that's not possible. I don't believe it is possible and I don't believe it's accurate.

Now, they could say all day long maybe we should have sued months in advance. Well, Your Honor already hit the nail on the head the other day when we talked, which is in order to sue, we have to show threatened harm. Well, before we got to the end of the FTC process there were two problems. One was that the FTC itself had stopped the merger by filing a second request, by sending out subpoenas. Under the law the way that works, that stops the merger in its tracks. That's

where we were at that point.

So it would be difficult for me to argue in front of Your Honor two months ago that we had some immediacy of harm that was going to happen when the merger could not go forward.

Now, the courts have actually figured this out. Best case on point is South Austin Coalition by Judge Easterbrook in the Seventh Circuit in a merger case which is being reviewed as an SBC case, their merger. He dismissed the case that had been filed before the FTC had finished its review of the telecom merger and said that it was not ripe yet. It was not ripe because the parties could not close, just like we had here; and, secondly, because it would interfere with the process -- I want to explain a little bit about that -- and waste everybody's time.

Imagine if everybody had to file multiple lawsuits across the country just because we know there is an FTC investigation or a DOJ investigation when nobody can close the deal.

Part of the reason why it makes it impossible in that case, and in this case too, is that part of the agency process is to see if there's some way you can work it out, is there some remedy.

The FTC had actually talked to us about that, about a remedy, and Your Honor will see evidence later in this case

about what happened during that discussion. We know that these folks talked to the FTC about a remedy. We know that the commissioners were working on a remedy. But from the statement it says, and from Commissioner Brill's statement and also the statement in the -- by Chairman Leibowitz in the official statement there, that they only had a vote of two to two for the remedy. So they deadlocked on a remedy.

Well, if they had come up with a remedy and Your Honor had come up with a different remedy at the same time, imagine the chaos. Imagine if there were 14 district court judges around the country with different claims. And as counsel has pointed out, there were a lot of people complaining in this case, there were Congressional hearings, there were thousands of different pharmacies, there were a lot of people who were complaining, consumer groups. It's just not the law that you have to file prematurely in order to not file too late.

We did file when they said, we're going to close next week, thought we had no choice at that point. We still hadn't heard from the FTC, but we thought, if they're saying they are going to close next week, something must be happening, and we didn't imagine it would happen that fast, but it did. But at least we did sue before they even had clearance from the FTC to close the merger at all.

Now, in terms of harm, we have gone through this a

little bit on the phone. Your Honor has the declarations, and there are quite a few. We also have a couple I will focus on from Klingensmith, from David Cippel who is here; and we also have from Means Lauf Superdrug, we also have from there David Smith who is also here as well. They filed declarations to describe the immediacy of the harm.

Klingensmith, because of the behavior of Express Scripts, has had to close stores already over the last year because of this low pricing and reimbursement rates and below cost reimbursement rates. If they bring the Medco rates down to where the Express Scripts rates are, which is what we believe will happen, then he will have to close other stores. That's real. He is very concerned about it.

Mr. Smith also describes the same thing and says that the MAC list pricing has -- between these two companies that merged -- it actually started going down just a couple months ago as they were approaching the merger. Hasn't come together yet, but it started coming together.

So that tells us what the trend is. And we have actually gone out and checked to see what the pricing is, and that's in fact what has happened.

Unless they just stop because the Court says so, we expect them to keep narrowing that range and then it will be one system and it will be the Express Scripts rates. That will cause a lot of harm. In terms of diversion from

pharmacies to --

THE COURT: How close are the rates now?

MR. ROBERTSON: I am sorry?

THE COURT: How close are the rates now?

MR. ROBERTSON: They're still, from what we can tell, they're still about 3 or so percent apart, which is significant in this business. That's on average. There are 100 different rates. So for one pharmacy it could be worse than that.

We have some examples, Mr. Cippel's declaration where he showed some drugs where he is actually being reimbursed below cost, actual examples. These are Express Scripts rates, not Medco rates.

THE COURT: That is not a system that's going to -- that exists now for him?

MR. ROBERTSON: Right. But once they come together, then he is going to get those prices on those drugs from all the drugs that he buys or sells to those now combined large, large PBMs.

We also have consumer harm that Mr. Smith describes in diverting all of these sales to mail order or a lot of sales to mail order. That people are over-buying, people are not getting the prescriptions they need. There's a reason to have a local pharmacy. And if people choose to do mail order, that's one thing. But if you make them go to a mail order and

take away the ability of their local pharmacists to help them out, it not only hurts the consumer, but it hurts the goodwill of these pharmacies.

If I go into the pharmacy and I have got a prescription, I expect I can get that drug there. When I go and they say, no, I am sorry, you have to go home and fill out a form and mail it in and they will send it to you, and, by the way, they will send you the 90 days whether you want it or not.

THE COURT: In the briefing it says they have no interest in pursuing a course of conduct that would lead to pharmacies going out of business because CMS and plan sponsors need to have -- geographically need to have these pharmacies in these localities. What is your response to that?

MR. ROBERTSON: I don't think they have the same consumer interest at heart. I think the large companies tend to do a better job of having consumer interests at heart when they have to compete. When they don't have to compete, then they can tell the large plans or the big plans -- and it's happened to people, it's happened to me where they can say, you don't go to the particular AB brand store, you have to go across town to another one, that's good enough for Express Scripts. And for a large company they may not know, may not be able to change it, and the case I am thinking of it took a lot of customers and consumers complaining about it back

through their employer to get that addressed. It took a long time. There are now chains that do not do business with one or the other, Express Scripts or Medco. In fact, it's Express Scripts that seems to be the culprit in all the times I know of.

THE COURT: Isn't that their argument, that that would lead to more of those entities not doing business with them if they were to create a system where local pharmacies would go the way of the dinosaur?

MR. ROBERTSON: And they can charge larger prices if they have that much market power, No. 1.

No. 2, they can divert more sales to mail order, that saves money they will say. We have examples it doesn't save money and it is hard for an employer to know whether they are saving money or not.

We can show evidence in this case there are cases where the pharmacy can sell, for example, a generic product at a lower price than what they actually charge in mail order. With the lower price you get a real person that gets to talk to you.

I don't think that Express Scripts puts that much benefit on the real person at the counter because that's not where they make their money. They make their money by banking and managing the funds for the sale of drugs that the doctors prescribe. They don't prescribe the drugs. The drugs have to

be bought, the drugs have to be used. They don't really change that. What they change is how much people pay for it and from where they buy it.

So to say they are going to be benevolent in helping consumers out is the same old thing that AT&T said back when they were the big AT&T. That we're benevolent, we are here to help people. Well, large companies just don't do that without competition, in my experience, and I think that's what the courts and the case law shows, I think it does.

I mentioned Lauf also and Mr. Smith there. These rates, by the way, change all the time. They just don't change every three years as counsel was suggesting on the phone the other day.

They also, one of the concerns he raises in his declaration is the exchange of data, which is why we want to put a wall between the two systems. The Express Scripts people can get their hands on the data about Medco customers that pharmacies have, then approach them directly to divert sales from the pharmacy to their mail order system. That's what they can do if they have access to the prescriptions and the information about the customers and all of that. Before that, it was not a problem. Now as the two are combining it's becoming a serious threat.

We have a number of other declarations here. I think Your Honor has seen them. But I think what is different

now than what we had before, before when there were three large PBMs, as these declarations make clear, it was possible to say no to one of them. Now when there are only two, they can't say no to either of them. That takes away their clout. That is where the essence of market power comes into play here. When I'm negotiating, for example, if I want to get a job somewhere, if I have three choices, I have more leverage than if I now have two. It is a real problem if I have to say yes to those two because each of them combined has over 50 percent of my business. That is what's going on here.

Now, going to this issue of, are the eggs scrambled or not scrambled and that kind of thing. We have in the exhibits a Q&A. I would like to tender to the Court just a copy of it. I think it's in the pleadings, but just so the Court can see it a little clearer than I have it on the screen here. I will describe what the Q&A is.

What they told the Court and what they told me upon --

THE COURT: I can see it up here fine on the screen. I am familiar generally with the argument that was made.

What I am curious about is when this was captured. What's the date of this capture?

MR. ROBERTSON: We took it down just the other day after we filed the temporary restraining order. We believe

our pharmacists are telling us it is now the current Q&A.

THE COURT: So that's still on the system?

MR. ROBERTSON: That's still what we have.

MR. ROUSH: As recently as Friday we saw this online, Your Honor.

MR. ROBERTSON: In fact, the Q&A itself says that there are no changes in the networks, no changes in the contracts, and on the next page no changes to phone number, contracts, claimant's procedures. Same points of contact. We will notify you if changes occur.

They have not done that. They haven't told anybody that they have changed the networks. Only in court have they given an implication, not quite said it, but an implication the networks have been combined.

So on Friday when we saw this I checked to see with several of our Plaintiffs, what do you see in the pharmacy? Well, they are separate systems. They are separate prices. They are still Medco, they're still Express Scripts. There are still different prices for each of them and different numbers, different nomenclature. From their perspective, it's the same as it was a week ago, two weeks ago, two years ago. It hasn't changed.

Well, if it hasn't changed, we would like it not to change, and they haven't notified anybody of this. This is what they are telling the world, and they ought to stick with

it. They don't have to rehire the CEO of Medco. I don't think any of our pharmacies actually dealt with him. We don't really care he is not there. But we want the systems to stay separate the way they are now, but also want them to stop sharing information between the systems so that they can use it to use their market power to divert sales.

Now, a few other facts out there. Just on April 6th their chief medical officer said that they essentially hadn't even done due diligence yet in the merger, they're just starting.

THE COURT: Doesn't this cut against your immediacy argument then?

MR. ROBERTSON: Not because they say they are doing it. What I am trying to show is that what they are telling other people --

THE COURT: Let's assume this is correct then, let's just say you are correct and this is all true, does it not cut against the immediacy argument?

MR. ROBERTSON: It doesn't because what I am trying to find is not only a preservation of the status quo on the systems, but also to make sure that they can't use each other's systems to bargain for essentially lower reimbursement rates or for diversion. That is something, unless the Court stops them, there's nothing that is telling me that they can't do that. In fact, their own general counsel suggested that's

what they're doing. In fact, that's what his declaration actually says.

Now, what they're saying out there in the public in their 10K, for example, is that the integration is complex, costly, and time-consuming and they have only been able to conduct limited planning regarding the integration of the two companies following the merger. This is what they are telling their shareholders in securities filings, yet they are not saying the same thing here in court.

I think that there are laws in here too, but there are laws in terms of security filings that say you have to be very truthful. They haven't changed that.

Now, in terms of whether this is unusual to integrate in the wee hours of the morning on a Monday morning before 8:10 a.m., the last merger they did, which was much smaller, took them 12 to 18 months, as their CFO, Jeffrey Hall, stated in an earnings call. Again, it has to be accurate when they talk to shareholders. Also not normal when the analysts are looking at this, that in all of these combinations -- there have been a lot of them in PBMs, smaller PBMs, and also mergers including Express Scripts -- that it takes several years for this to completely come together.

And what they're telling people out there, Your Honor -- they are not saying, by the way, if you make us hold separate, the systems, that that somehow is going to keep

us from giving money back to consumers. The integration and the efficiencies, what they mean by that is squeezing out more reimbursements from pharmacies. They intend to have that help their earnings. We have this on this slide, but also more clearly in the proxy statement where they were telling the Medco shareholders why they should vote for the deal. Vote for the deal because the earnings of the combined company will be enhanced as synergies and other efficiencies arising from the merger are realized over time.

The billion dollar number they throw around, Your Honor, that is way out in the future, it's not today. But still what they're telling people is that they're doing this because they want to make more money. I don't blame them, that's what companies do. But the law says that you can't use that as a defense to a merger case when you're aggregating a lot of power in one company as an efficiency defense. Just because you can make more money is not a defense.

They also have to prove it's merger specific. That they can't do any these things absent the merger.

Now, we do understand, Your Honor, that we're asking the Court to do something that is difficult in the sense that it's a large company that we are dealing with here. And most of the clients that we have are very small, very small pharmacies that we have here. In fact, our first client

in this was a community pharmacist who came to us. This is a large company. It's a huge company. It is a huge merger.

But we also know that large mergers create large problems and create large competitive effects. It was in fact at the very beginning when this act was written that that's what the act was focused on. It was focused on large mergers and the harm that can come from them. If they say that efficiencies are great or that the structure of the market needs to change and maybe we ought to get rid of some of the smaller pharmacies and maybe it's sort of the amazon.com trend is the way to go, if that's true, they can do that on their own. They can't do that, they can't change the fabric of competition through a merger. They can do it on their own. Because of the free market system, I couldn't complain about that. But you can't do it through a merger. That's what they have done here and that's what they intend to do.

Now, I would like to address a few issues on the motion to dismiss.

THE COURT: Before you leave the PI, talk to me about why the harm to your clients is not compensable with money.

MR. ROBERTSON: I think that part of the issue is if you lose customers and lose goodwill -- and in this circuit we have cases that we have cited in our brief that call irreparable harm loss of goodwill, loss of customers -- it's

hard to get that back and you can't quantify it very easily. I can't quantify goodwill very easily.

I also think that when you have to shut down stores, as Mr. Cippel has said, you shut them down, they're gone. I think that losing a business is irreparable harm. That's what the law has been in this circuit. Other places maybe not so, but in this circuit that has been the law.

So I think that this is the kind of thing that Congress was talking about in terms of threat of harm, threat of competitive harm that the statute is designed to address. The moment someone says, oh, they can get all the damages they want, believe me, in a year when we come back and try to get damages, the first thing out of their mouths would be it's too speculative, we can't tell what it is, we can't tell whether that company would still have been in business or not, we can't tell whether Mr. Cippel would have really shut down those stores; and we can't tell what the goodwill is because it's hard to calculate, it's hard to tell what consumers really think about the fact they no longer can go to a pharmacy and they have to go to mail order. All of these things that make it irreparable in any case, any small case, if this were a dealer case, a small case, it would be irreparable harm. This is a large case, it's irreparable harm too.

Does that answer your question, Your Honor?

THE COURT: That's your position.

MR. ROBERTSON: Thank you.

And Your Honor was right that some these things overlap, so I have already covered the issue of when we filed and all of that issue.

I do want to just address briefly the claim that the complaint isn't big enough, potentially their Twombly motion, that 47 pages isn't enough, they would like to have more.

THE COURT: That's not exactly their position, but okay.

MR. ROBERTSON: Well, clearly this is more than a short plain statement. I think people have misinterpreted Twombly to try to say you have to allege all kinds of facts and every proof you need to have. That is not the way the courts are going and certainly not the courts here in the Third Circuit in the Phillips case, for example, have been going.

We read Twombly for what it says, which is it's not a higher standard in antitrust than it is in any other case. If Your Honor looks at any of the complaints that FTC or Department of Justice file in these cases, especially at the FTC, they are very short. They are short and plain statements.

We have alleged all the elements. They don't claim

we don't. Thee don't like the markets, but we have pled them. We have pled them that there are cross-elasticities of demand. We have pled all the things that show that these markets are unique. They don't agree with them, they don't like them, but that's why you have a trial. It is not a reason to dismiss the complaint.

They have also said that, well, buyer power, that's why you have a claim essentially, that really this is a good merger because it benefits consumers because there will be lower prices. We dispute that. We dispute it in the complaint; we dispute it now; we will dispute it when we have a trial.

The claim this is not antitrust injury is not correct. It's been tried here in the Third Circuit in the West Penn case, been tried in the Bellevue case. I think the Bellevue case, which NACDS, one of the Plaintiffs here, was involved with, is a key example because it is an example of West Penn and Bellevue. West Penn directly held that artificially depressed reimbursement rates constitutes an antitrust injury and said that West Penn had it right, this is a claim.

And then Bellevue Drug, which also had NACDS at the time as a Plaintiff against AdvancePCS, which is Caremark now, the other large PBM, that injury to sellers inflicted through buyers constitutes antitrust injury which is actionable by the

seller, which is the pharmacies.

Interestingly, the person who was on the defense who was arguing that buyer power wasn't a real theory was now-Commissioner Rosch, Tom Rosch. Very fine trial lawyer. I have great respect for him. We just disagree on this point, and the courts have disagreed with him too.

Frankly, I made the same argument in the Knevelbaard case in the Ninth Circuit on the defense side and lost because courts understand that competition has to go both ways and that sellers do have a right to complain about market power and buyer power.

So I think that the Defendants are just wrong. There's a Brady case we cited as well in the Eastern District of Pennsylvania also dealing with this issue.

They have also mentioned, well, that as sellers we don't have standing. These courts say that's not correct in this circuit. It's not correct in any circuit I know of. And then they say, we are not also consumers. We are in the market involving consumers. We are sellers. We sell to consumers. We sell to these PBMs.

We give value and service to consumers every day our clients do. And the fact is that several of our clients are actually purchasers from the PBMs. They actually have plans and they have large plans. Those are -- that's actually alleged in the complaint in Paragraph 109.

Also, a third way of standing is as competitors. Because if a pharmacy sells a drug and a PBM is large enough to be able to divert the sales from the pharmacy to themselves, we're competing for sale of the same product. We are competitors at that level. For specialty drugs, for example, we sell specialty drugs, and Value Drug is a specialty drug provider that gave a declaration in this case. They compete against a specialty drug component of Express Scripts.

So both as a competitor, as a consumer, and as a seller, all allege all claims are supported in every way that we can think, so I believe that we have established under the law standing here.

In terms of the markets, again, we have alleged them properly. We have alleged them according to what the law states. We have alleged them in what we believe the facts are to be. And they don't agree with us, but that's a disagreement of fact. And as the Tenet Health Care case said, determining what a market is is always a very intensive FTC fact question. It is not you read a complaint and say, gosh, I don't think I agree with that market. It is something that one should dispute as a factual matter.

They hadn't done that with any declarations except for their expert who only gets them down to 29 percent market share of one of the markets. Doesn't say what they are for

the others because they're much higher. But even there he is still above what Judge Howell just said in H&R Block said was too high. It was 28.4 in H&R Block.

Now, a lot of antitrust lawyers don't like that. In fact, some of the counsel, my friends here, and one of them is a very good friend of mine here on the other side, has even written about it saying, gosh, the DOJ brown-shoed H&R Block. Sort of I guess a figurative metaphor. But the truth is, that's the law, that is the law today, and until the Supreme Court says otherwise it remains the law.

One other point in terms of injury and standing. All the cases that they mention are Section 4 cases rather than Section 16 cases. It does make a difference because when you're seeking damages under Section 4, you have to show that you have actual harm so you can calculate what the damages are. Obviously they said we haven't proven what the actual damages are.

Well, that's sort of the opposite of what one does in an injunction setting because you are seeking irreparable harm because you can't tell what the actual damages are. That's why Section 16 under the Clayton Act only uses the word, threatened harm. The threatened harm from what? From a merger that may be to substantially harm competition, end quote. May be. That is what the language actually says. That the Warfarin case, 214 F.3d, 395, in the Third Circuit

makes this distinction and explains why the standards are different. It's a much lower standard for an injunction in terms of harm, threatened harm versus actual harm, than Section 4. We think it's a mistake for the Defendants to focus on Section 4 and ignore Section 16.

Those are the main issues. I think they also raised a final issue which was the level of a bond, which I will just address quickly, and we can get to the specifics of that should Your Honor honor our request for an injunction. We think that the Shepherd Rescue case and other cases we have cited would show that there should be either no bond or a low bond here because we are dealing with nonprofits and small companies against a huge, huge company.

But, more importantly, because the relief we're requesting is very narrow, trying to get something tailored to what they are actually doing in terms of structure, that there really shouldn't be any harm at all. It is a matter of keeping it the way it is today. But we briefed that; and if Your Honor wants to hear more about that, we can get into it.

But the bottom line is, in terms of a complaint that's properly pled, properly pleaded, that we've shown what the harm is, we've shown what the standing is, we believe we have a right, as the Supreme Court has said and all the courts that have dealt with this issue have said, as a private Plaintiff to challenge this merger. And if at the end of the

day we win the case, which we believe we will, we have asked for -- we will ask for divestiture or some other remedy that will cure the harm that's being caused by the merger. And I expect when we get to the trial and the merits that we will hear evidence on the remedy as well, which is typically what one does in the cases in my experience that I have tried.

Your Honor, do you have any more questions?

THE COURT: I don't.

MR. ROBERTSON: Thank you very much, Your Honor.

THE COURT: Why don't we hear from Defendant.

MR. STROYD: Your Honor, before we get into that, at the outset Mr. Robertson indicated that he was going to present testimony from different individuals.

THE COURT: That was my understanding. I would prefer to hear what I would envision to be an opening statement, although it -- I don't know whether that's still your intention.

MR. STROYD: Is it not your intention?

THE COURT: Mr. Robertson?

MR. ROUSH: We don't intend to put anyone on.

THE COURT: Are they redundant of the affidavits already on file?

MR. ROBERTSON: We submitted the declarations and --

MR. ROUSH: If I may, Your Honor, when you asked

the question, I don't think he quite heard you. We don't intend to put on testimony today.

MR. ROBERTSON: Your Honor, I apologize, I do wear hearing aids and sometimes when I am walking where the speaker is I can hear a little better. I apologize.

THE COURT: All right.

MR. ARONSON: Good afternoon.

THE COURT: Good afternoon.

MR. ARONSON: My name is Cliff Aronson representing the Defendants. There is so much to cover having heard that statement. I would like to make a few points before going through what I have outlined as my argument, just in rebuttal to Mr. Robertson.

He talked about the hold separate being both unusual and then I think he also said it wasn't unusual. I would point out on the slide that he presented, every one of those cases was a case in which the United States was a party. That's very different than the context of a private party, which we will talk about.

He made it sound, second point -- and I will go through this in more detail. This is a 3-to-2 merger, meaning three firms merging to two. The figure cited by him, and Your Honor is aware, said there were at least ten, at least, major players plus many fringe players. In fact, there are over 40, probably about 62 PBMs. This is not a business with just

three PBMs. We will discuss that.

He admitted, Your Honor, that reimbursement rates are going down -- the Court picked up on that -- even without this merger. Which means this has nothing to do with the merger. It's a concern for the local pharmacists, we understand, but it's not merger specific. And it's also compensable, as I believe Your Honor recognized.

He suggested that we make customers do business with us by mail. There could be nothing further from the truth. I believe the FTC pointed out the fact, it's a very complicated industry, but PBMs contract with plan sponsors who could be US Steel, it could be the US Government. The plan sponsor dictates the design of the PBM plan.

THE COURT: Mr. Aronson, you would concede, I assume, that I am not bound by anything the FTC has done thus far?

MR. ARONSON: I absolutely would concede that.

THE COURT: Okay.

MR. ARONSON: I certainly think it makes for good reading and it reflects a --

THE COURT: Your reading is different than mine then, but okay.

MR. ARONSON: He suggests that when it comes to the difficulty or the ease with which we can keep these companies separate, that we can just keep the people apart, that it's

easy to keep the systems apart. But at the same time I believe he admitted that there are no non-ESI people, Express Scripts people, who are involved in the business now. That the Medco people are now all part of Express Scripts. I think that's where I would like to start. I would like to start with the integration because I know it's of critical concern.

It's very common in transactions of all sizes that integration begin in earnest when the transaction is completed. In a transaction of this size and in the PBM industry it's even more important. What I think the Court will find here is that for all practical purposes the competition between Express Scripts and Medco ended on day one. This isn't something that came about because of the preliminary injunction hearing. It's not something that came about in the dark of the night. It's something that was in planning for many, many months. You can't do a $29 billion deal and think about integration afterwards.

So in order to understand this --

THE COURT: When you say day one, do you mean day one being the announcement of the potential merger?

MR. ARONSON: The planning began actually even before the potential merger was signed up. In order to justify a price and make a decision to go forward, it's very important to figure out how quickly the assets could be integrated and how quickly the synergies could be found in the

combined company.

One thing to say about the synergies is by contract a very large portion of them actually get passed on to the plan sponsor. So it's a direct benefit to consumers.

In terms of the integration itself, it couldn't occur until day one after the merger, the consummation of the merger. The reason is is the two companies were competitors. It would have been illegal for them to exchange competitively sensitive information, talk about their sales structures, talk about their pricing, talk about their suppliers. In fact, there was a very detailed clean team and clean room set up so that some people could work on this, but they were completely isolated from the business decision makers of the company so that on day one what was in the clean team, the competitively sensitive information, could be immediately spread out and used by the people who needed to use it to get the systems in place.

There's nothing worse --

THE COURT: Did that happen?

MR. ARONSON: Yes, it did. There's nothing worse that can happen than if Your Honor goes to your pharmacy and you try to fill your prescription and something goes wrong and you don't know who you can call or the pharmacist doesn't know who they can call at the combined company. This is a very large company. So they can't take the chance, safety

especially, that something is going to get messed up as a result of two independent companies sort of continuing to act independently after the merger.

There were requirements from the Government as to how they have to operate in terms of their systems. So there are a lot of things that dictate that they move very quickly.

One thing that's important to understand is that the PBM business is not like a bread company or a bread factory like the Tasty Baking case. It's not like a newspaper company where you have independent sets of editors. The PBM business is primarily people. It's people, it's contracts. If you just look at Medco 10K, you can see that of the almost $17 billion in assets, only close to $2 billion is plant and equipment. That's what -- that's not what differentiates one PBM from the other. It's not the plant and the equipment; it's the people. It's the knowledge of how to price the contracts. It's the relationships with the plant sponsors and with the sophisticated consultants that show them how to put their business out for bid.

THE COURT: I want to hear what the nature of the integration is today as we stand here today and I also would like for you to respond to Mr. Robertson's suggestion that the website information as well as the SEC information is disingenuous in light of what you are going to tell us.

MR. ARONSON: I would be glad to, Your Honor.

First, the SEC information that was put up on the screen, if I remember correctly, was from February.

THE COURT: It was from February.

MR. ARONSON: And it was accurate in February. That is for sure. I am not saying it's not accurate now.

In terms of what's on the screen, in terms of what the pharmacists are seeing in the QAs, that's correct, that is what they are seeing and that's what's happening with the pharmacists. Again, that's not the guts of the organization. The fact that that can happen, they can still call those people, requires some type of structure to have been put in place at Express Scripts to make sure that happens so the pharmacists aren't inconvenienced and so the lives that come into the pharmacy aren't inconvenienced.

Let's talk about what has happened. Express Scripts is running the combined company right now. This is in Mr. Ebling, the general counsel's, declaration, he was intimately involved and responsible for a large part of the integration. Medco no longer has a board of directors. Its former executives, what are called the C level, the chief this and the chief that, they're gone.

The former mid-level executives, most are actually gone, vice-president level and higher.

The senior staff -- so there's C level, mid-level, and the senior staff -- virtually all have left the company.

In fact, in terms of severance payments, not all of it has been paid out, some people are on their way out, it's up to a $300 million, almost $300 million in severance payments. Those that were asked to stay --

THE COURT: Before you leave that, there was some suggestion in your materials, and forgive me if I am wrong, that some of these departures happened pre-day one as we have been calling it.

MR. ARONSON: Yes, absolutely. I think that's very important. The reason that's important is you can imagine you announce a transaction, last July, you are in an industry with 40 plus players, very dynamic, aggressive industry. There's uncertainty because people thought, well, first they have heard the complaints and there were hearings on the Hill and there were all sorts of -- if you went to the Metro in Washington, DC, to go from one station to another, you could have been handed out Kleenex tissue with an emboss saying, "Stop the Medco Merger" put out by the Plaintiffs here.

So there was a lot of uncertainty on the transaction, a big cloud over the companies during that eight-month period of time. During that time competitors were aggressively trying to hire people from Medco and from Express Scripts saying, you know what, there's uncertainty, you don't know this is ever going to come about. People saw also they were going to lose their jobs at Medco, so they saw the

writing on the wall or what they perceived to be the writing and they left.

THE COURT: Is it your suggestion that those positions once they left were left unfilled?

MR. ARONSON: I can't speak for the entire Medco organization, but I believe that they were probably mostly left unfilled, and I am about to say why I believe that. The reason I believe that is that -- and the FTC found -- Medco is a much different company today than it was at the time the merger -- I mean today it is a really different company, it doesn't really exist, but on the day the merger closed, versus when the merger was announced. Actually it's a very different company than it was a year ago.

Part of what drove this entire transaction is Medco was on a losing streak. Losing a ton of business. Its biggest customer, UnitedHealthCare, decided -- it was providing the PBM services to UnitedHealthCare. It decided to bring that PBM business into UnitedHealthCare, so UnitedHealthCare could increase the size and presence of itself in selling PBM services to plan sponsors in competition. It was a very big event in the PBM world. UnitedHealthCare is now, I don't know how you count them, but is No. 3 or No. 4 as a competitor now. They decided that they were going to bring that business in. That and a few other losses to Medco took away about a third of its business.

As a result, it was weak. It became weaker as the uncertainty with the transaction and the time passed, which is just another reason why the integration was so important. It needed management who were focused on the next day and how to deal with the bids.

So I would say that not only did the management change, but immediately -- just back to your original question, Your Honor -- immediately upon closing all of that stuff in the clean room I said was shared, but, more importantly, there was a concerted effort to get down to the materials that couldn't be shared, besides what was in the clean room, that's necessary to determine how to bid for business.

Right now is the selling season in the PBM business. This is when you have the best and final offers going on with all the plan sponsors. For some reason it occurs like in a three-month period of time. Express Scripts and Medco may have been competing for some of that. As it turns out, the competition between them, as the FTC found and as our own econometrics showed, wasn't that significant compared to the competition with others. But it was important to go in as soon as we could, as soon as the company could after the closing, when they were allowed to see this information and say: Are there situations where we were both bidding? How do we maximize the chance of winning? Are there

situations where Medco has a bid and Express Scripts can do something to help win that bid by talking to the plan sponsor? Are there situations where Medco has a bid, but the plan sponsor doesn't know who it should talk to now, we better show them there's an Express Scripts face now and show them why they should do business?

That information was used right away in order -- in the selling season in order to allow the companies to maximize their sales. That's a good thing from an antitrust perspective now that they are a single entity and there are no antitrust restrictions on them. That is the guts of the organization when it comes to competition.

What's on the website, what the pharmacy looks at as far as who is going to answer their question, who is the contact person in the call center, that's not where they compete. Where the differentiation is for competitors, as I said, the relationship with customers, the plan sponsors, and the consultants, it's the ability to price and the pricing strategy. Those pricing strategies have been shared.

Another thing that's happened is right away there were -- Express Scripts previewed and analyzed all the retail network contracts, probably about 80 percent of them so far. The reason was they wanted to determine what the reimbursement rates were and what the next steps are as to how to move forward in terms of negotiating with these pharmacies.

The Court mentioned, and we mention in our papers, the independent pharmacies are critical to Express Scripts. They're critical because CMS, as you mentioned, and plan sponsors require you to have pharmacies within a certain distance of every life in the plan. Without the independents, they can't meet those requirements. So when Walgreens -- for example, in a rural area that's obvious. A rural area it might just be independents. On average the independents are actually reimbursed higher than are the chains. Which suggests that the independents have more leverage than maybe they actually think until today -- I may be disclosing something to them -- than they actually think.

So in the rural areas that's absolutely true. But it is also true in the urban areas and metropolitan areas. Look at Walgreens. Walgreens walked away from Express Scripts because it wanted higher reimbursement rates, which rates would be higher than any rates that Express Scripts pays. The result of that is that the plan sponsors would pay more and the consumers would pay more. But the fact that Walgreens can walk away indicates where the leverage is and also indicates how important those independents and others have become to Express Scripts.

THE COURT: Where did Walgreens go?

MR. ARONSON: They -- I don't know the answer to that. I don't know the answer.

THE COURT: Okay.

MR. ARONSON: The other thing that ESI has done, Express has done in terms of the integration, is we have talked about the pharmacy side, it's the drug side, the pharmaceutical side. They compared the cost of pharmaceuticals and the negotiated rates across the board, Express Scripts versus Medco, down to the very specific drug level to determine what the costs were, what the rebates were. This is the crux of the competitiveness between PBMs, the level of rebates, what the negotiated contracts are. They did that so they are in a position to negotiate with the pharmaceutical companies right away as those negotiations are always going on.

So that information is no longer a secret. You can't take that away. You can't take the information -- the information they learned about the pharmacies is no longer a secret, this information they learned about the pharmaceutical companies.

They also -- I mentioned the RFPs, request for proposals, they looked at.

Let's move to mail order. A mail order facility is a mail order facility. There are a lot of firms, I think there are nine PBMs that have at least two mail order facilities and a number that have a single mail order facility. There is a secret apparently in Medco's success in

mail order penetration it's called, the ability to get people to use mail orders through their contracting with plan sponsors. Again, it's the plan sponsor, the plan sponsor decision.

Express Scripts never has had a high mail order penetration as Medco. Express Scripts was dying to know how they did it. Right away they have been speaking -- they got in a room and they start talking to the mail order people to try to find out what those secrets were so they could take those best practices and move them through the rest of Express Scripts.

The same with the IT, the computer systems. It's very -- the adjudication of your prescription when you go into a pharmacy is a complex process. You want to make sure that there's an immediate reimbursement, the drug is approved, there aren't any safety issues with interaction with other drugs. All PBMs have that.

But there are certain things about the IT system, I am not sure I am qualified to say what they are, are competitive differentiators. So Express Scripts wanted to learn about Medco's IT system and what makes it different right away. So they have been learning about that.

Now, they can't change -- that's the integration that's taken place. There is a lot more. But what they can't do and what does take 18 months that's in the February SEC

filing and in Mr. Hall's statement that was published somewhere, what does take 18 months is there is a very big footprint of the companies, real estate footprint. There are duplicative facilities, mail order. There are duplicative facilities, offices. There are jets that are owned by Medco. The footprint, the physical footprint will be reduced and a lot of the billion dollars that you hear about -- and because this is a public proceeding I can't go into the amounts above that -- are due to the consolidation and the elimination of duplicative unnecessary facilities. That takes time.

Putting the two IT systems together, computer systems together, while Express has been learning the secrets, that takes time too. That's not something that can be done overnight.

Now, how did Express Scripts get in a position where it actually could do this so quickly? Because you may be saying, or I know Mr. Robertson is saying, how can this happen so quickly? Well, from the day the deal -- actually before the deal was announced, there were -- and then the day the deal was announced -- there was a very large team in every functional area in Express Scripts who was assigned to come up with a plan and put that plan into effect on day one. There were over 200 people involved in the integration planning. So far over $200 million has been spent in the integration planning.

THE COURT: Pre-day one, you knew that Plaintiffs had filed a complaint in federal court asking to hold the assets separate, to hold the companies separate, did you not?

MR. ARONSON: Pre-day one -- not the day of the announcement, the day one of the closing?

THE COURT: Correct.

MR. ARONSON: Yes, we knew that there was a complaint filed on the 30th I think it was.

THE COURT: Correct. Seeking injunctive relief.

MR. ARONSON: Seeking injunctive relief.

We knew that a motion, and I believe what was a defective order, was filed at 4:02 p.m. on Friday. And we knew that the supporting affidavits and the brief were not filed until Monday. The perfected document was Monday. Before that, there was no obligation on the companies not to go forward.

And this isn't something -- their opposition is not new. We knew that they were opposed. They were up on the Hill, they say they were at the FTC, every horizontal acquisition between PBMs that's occurs, it is a very inquisitive industry, they have been an opponent to. So it was no secret they were going to oppose this.

It wasn't a secret to them. They had a strategy. They even said in their press release that when they filed their complaint, this is another part of the process, this

litigation. They have done one part, talking to the FTC, talking on the Hill. This is another part.

THE COURT: But what about the argument that you had purposefully scrambled an egg that you knew they did not want you to scramble?

MR. ARONSON: Of course, I know they still don't want any scrambling, but the companies are spending 20 -- Express Scripts spent $29 billion. It just can't stop because they have a desire for it to stop.

Obviously if there were a court order before the transaction was consummated, it's something we would have to deal with. There is still an issue as to whether it's unexcusable delay or laches, which we can get into, because there are plenty of cases -- I mean, virtually identical situations. You take In-Bev and Anheuser-Busch were merging. The Eighth Circuit ruled on this. There was an opposition to that at the last minute. The Court threw it out and said, you can't wait until the last minute.

The same is true with Southwest Airlines, which was in a merger as well. Somebody came in --

THE COURT: Had the FTC already ruled in those cases?

MR. ARONSON: In In-Bev, the Justice Department had not -- the FTC is not a ruling, it is a waiting period. It is actually important. The reason it's important is they say

they were awaiting the FTC.

THE COURT: Right.

MR. ARONSON: The FTC is a waiting period that expires. It's not that the FTC stops you in your tracks. I think that was the quote.

THE COURT: Well, their suggestion is there is case law that says that they needed to wait until the FTC had made its determination in order for their case to not be premature.

MR. ARONSON: There are cases where actions have been brought during the investigations and nobody has raised this ripeness issue. And, in fact, if that were the issue, then why have they filed the complaint before the FTC ruled? They said they were waiting for the FTC. Why did they wait -- why didn't they wait until the FTC ruled? They did it before the FTC ruled. They did it when they thought we might be able to close if the FTC didn't stop it.

In fact, I thought I heard they were talking about divestitures and other things with the FTC. So how did they know that the FTC wasn't going to let it go? It doesn't all fall in place.

If I may have one minute just to see what I have already covered here.

I just want to draw a conclusion on the integration, then move on. I think when you think about competition, when the Court thinks about competition, when

anyone thinks about competition, what you care about are the strategies, in this industry, the strategies, the pricing, the cost. All of that has been shared. You can't unscramble that. You can't -- Mr. Ebling said in his declaration, you can't tell people to unlearn that.

It's important to consider if there were such a hold separate -- and I will talk about this a little later -- how would that even be implemented? What kind of plan sponsor -- what plan sponsor would actually go to a headless organization, one that's filled with uncertainty?

These are large contracts. You don't want your employees to be inconvenienced or have a serious issue because this headless organization is the PBM now. Nobody would take a chance.

THE COURT: What about Mr. Robertson's suggestion that Medco and ESI keep their negotiations separate?

MR. ARONSON: I assume he is speaking specifically about the negotiations with -- I am not sure whether they are plan sponsors or with pharmacies.

THE COURT: Well, he was suggesting pharmacies, I think. But, I mean, he probably meant both.

MR. ARONSON: Well, one is the competitive information that makes those negotiations really independent. That makes two separate competitive entities. That information has been shared. So, I mean, if you take a person

and you say, okay, you are now the new Medco and you are now the new Express Scripts, but they have been accessing the same information, they are not independent.

Besides the fact that even if you could do it -- and I don't think you can because the information has been shared, the Humpty Dumpty is torn apart. Even if you could do it, who would be the customer? I don't think you would find a customer out there. Who would be the employees? What employees would want to work for that new organization under those circumstances? You don't expect the ones that are getting $300 million in severance to come back to work for us. That's just not going to happen.

If that was their concern, why didn't they file the complaint when we said that we were -- we complied, substantially complied with the second request back in February -- I have the date in here somewhere, we did it on February 13th or something, and that means 30 days later, unless the FTC stops the transaction, we can close. Nobody would be arguing about ripeness there. Where were they?

We went out afterwards and said, we're going to close -- we think we are going to be able to close sometime in the earlier part of the first quarter, that was the statement in March, where were they?

One thing I know is they were busy preparing affidavits because if you look at the declarations,

declarations they filed, some were prepared before they even filed that complaint.

So this is, with all due respect, it is a strategic move. Whoever heard of filing a TRO a piece at a time? If there's an emergency, there's an emergency. And you don't elongate it over a weekend so that you have some type of negotiating leverage because we wrote the check for $29 billion and now we have got to deal with the uncertainty.

I think all one needs to do is go to these trade associations' websites. You will see press release after press release about the problems with the PBM industry. This is a strategy. I think it was very telling that when they filed their complaint that they said, this is part of the process. It is part of their process. But that's not a reason to tear apart a $29 billion deal or to take those synergies and throw them out the door. It's really a very big problem here.

Can we talk about the delay? I would like to move to the delay. Some of it I covered.

We cite the cases which I am just going to refer to again, the Eighth Circuit Ginsburg case dismissing the challenge of the merger of A-B and In-Bev. The complaint was filed six days before the shareholder vote. The Eighth Circuit said: In some cases lack of diligence in seeking Section 7 relief has completely barred the equitable remedy of

divestiture.

But even if Plaintiffs were not so dilatory as to trigger the defense of laches, their failure to obtain a preliminary injunction that would make the divestiture remedy easy to administer and sure must be taken into account in fashioning an appropriate remedy.

THE COURT: What's your response to the Seventh Circuit case Mr. Robertson cited to?

MR. ARONSON: The Seventh Circuit case I believe involved the communications, telecommunications business. The telecommunications business antitrust and -- antitrust issues are looked at both by the United States Department of Justice as well as the Federal Communications Commission.

The Federal Communications Commission, unlike the FTC or the DOJ, really can structure relief in really aggressive ways. An example would be in the Comcast/NBC-U transaction. The FCC changed the paradigm of competition for certain content. They put in rules that never existed before.

It would be very hard when you have an FCC case to come in and try to structure some relief not knowing where the FCC was going to come out at. So that's a very different industry.

Here the cases where -- I think the only case they cite might be Tasty Baking as an example, but Tasty Baking was, first of all, it was post-consummation. Nobody raised

the laches issue. And the Court suggested there was such secrecy in putting the deal together that nobody was meant to know that the deal even existed let alone closed or was going to close.

THE COURT: Mr. Robertson has also suggested that there was a substantial amount of secrecy with respect to this case.

MR. ARONSON: There can't be secrecy when he cites a February SEC document saying what our planning is for the integration. There can't be secrecy when we publicly announced the transaction the day back in July of last year and every step of the way have put out SEC 8K after 8K. The one that said, our plan is to close, if conditions are satisfied, the first half of the year. It then became more specific. We complied with Hart-Scott, there's a 30-day waiting period.

It became more specific. We now plan to close the earlier part of the second quarter.

Then it became more specific, we said, we are going to close as early as April 2nd subject to conditions being satisfied.

There's no secret there. The earlier part of the second quarter, as they say in their papers, is clearly April 2nd.

And the next release is clearly April 2nd. There

is no secret.

The other thing about Tasty Baking is I said the PBM business is not a bread factory. The thing about Tasty Baking is these were two baking companies, I think Drake and I forget the name of the other. They had separate baking factories for them, which they hadn't integrated even post-consummation. They had separate brand names, which they hadn't integrated even post-consummation. And separate retail stores that sold their product, still not integrated after consummation. So that's very different than Medco and Express Scripts. No management, sharing of information, et cetera.

The other case they cite is Community Publishers. I think that, first of all, that's in the Eighth Circuit so that's where the Ginsburg case is. So to the extent it's inconsistent, I think the Eighth Circuit gets higher authority than the Western District of Arkansas.

But besides that, this is a case which they don't say, where the United States was involved. The United States joined the case. If you read the case history carefully, you see that there were allegations that there actually was a Hart-Scott-Rodino filing required, but they snuck around the Hart-Scott-Rodino Act so nobody would know about it. That's very different than the situation here.

And I think when you think about these line of cases, going back to American Stores, which they cite, Supreme

Court case, that's a case where the issue was, do private parties, in that case it was the Attorney General of California, do private parties have the right to divestiture. The Court considered that issue. But in considering that issue, specifically said that, specifically said that in the concurring opinion by I think Justice Kennedy, said that when there's Section 7, there can be -- I am sorry, when there is Hart-Scott, there could be a laches issue. This should put a parameter on how we look at this going forward.

That concern about Hart-Scott and the fact that there is some notice, there is some time, is a real concern. We've gone through the process. We shouldn't have to do it over again.

And while Your Honor doesn't have to take the FTC's opinion for anything, it certainly is demonstrative, and an agency charged with enforcing the antitrust laws, an agency that is expert in not only antitrust, but health care, and an agency that is very aggressive on health care, as you can see from the cases they bring, and in fact an agency which has a lower burden when it goes to court to get an injunction chose not to act. They chose not to act even though they heard from them. And they specifically addressed every one of their concerns in the closing statement.

If you actually look at how they address this in the closing statement and compare it to the Chain Drug website

when they announce the first day of the announcement of the merger that we were going to merge, so back in July, you see that those were the concerns they had back then. Those concerns identified on their website are the concerns that were addressed.

I would like to next move to the issue as to whether they meet Rule 65, immediate and irreparable standard, which Your Honor mentioned the other day starting at the status conference. It seems like they have two main claims. Express Scripts can force plan sponsors to use mail order rather than local pharmacies and over time the pharmacies might go out of business some time in the future. And, second, because Express Scripts is a monopsony or duopsony, which sounds like a disease, it is going to force the pharmacies out of business by paying them too little and, again, over some period of time consumers will lose out.

Well, I don't think any of those meet the requirement of immediacy. The harm is not something that you can say, well, there's one step and next step and next step and some time in the future it may occur. It's something that can't be indeterminate, it can't be speculated. As Your Honor said in the Brown decision, a showing of irreparable harm is insufficient if the harm will occur only in the indefinite future. Rather, the moving party must make a clear showing of immediate irreparable harm.

So there are these steps. The step is we're going to cut reimbursement to them without saying when, that's No. 1.

Two, we are going to divert customers to mail, without saying when.

Then and only then, and I am quoting their papers, it will almost certainly force some Plaintiffs out of business. That can't be the standard. That can't meet the standard, almost certainly force some. I mean, who are we talking about here?

And the case law is consistent with our view here. The Hart Intercivic case, the District of Delaware says: The Plaintiff's allegations of loss do not seem imminent in that case. Rather, if the loss occurs at all, it appears likely to result incrementally as contractual relationships expire.

There are these contracts; whether they expire or whether they are noticeable I don't think is that important because what they're talking about is extremely speculative and, as a matter of fact, and the company has been consistent, the testimony on the Hill under oath is consistent, they cannot just go out and terminate or hurt or force out of business pharmacies because what service will they be selling then? You can't look at the pharmacy interaction with PBMs without understanding that there are 40 plus PBMs who are competing on the selling of PBM services. If all of a sudden

you are a PBM without pharmacies, you're a PBM who can't sell services. In order to buy into their theory, you have got to really think there are only three PBMs out there.

THE COURT: You don't need all the pharmacies, do you?

MR. ARONSON: Well, you certainly don't need all the pharmacies. And the reason is there are more pharmacies than there are Starbucks, more pharmacies than there are McDonald's. But you do need enough pharmacies to meet the CMS requirements if you are having a US contract, you need enough pharmacies for the plan sponsors. And it depends on the plan sponsor. They may want to inconvenience their employees and try to save money or they may, like Skadden Arps, allow me to go to any pharmacy I want. So that plan would have a lot of pharmacies, 60,000 pharmacies overall probably. Other plans might have 40,000. But that's what the differentiator is.

So I think when we talk about immediate, what I found as the most astounding and telling statement is when they filed their litigation -- I am sorry, when the FTC closed its investigation, again, the trade associations put out a press release. I quote: NACDS and NCPA also will closely monitor the combined entity. In addition to fighting the litigation, we will not hesitate to bring any anticompetitive conduct to the attention of the appropriate government authorities and the courts to ensure that patients' plan

sponsors and pharmacy interests are protected.

If the harm is so imminent, what are they monitoring? If they can monitor it prospectively for the very anticompetitive conduct they complain about here that's immediate and irreparable, what are they monitoring? It is certainly suggestive that they can keep a track of what's going on and they can do something about it. Well, if they can do something about it, I would suggest that they haven't met their Rule 65 burden.

My partner, James Keyte, is going to discuss the motion to dismiss in a few minutes, argue the motion to dismiss. I think he will address some of the injury issues. But one I want to point out, they talk about the loss of goodwill.

The loss of goodwill can be irreparable injury. But there's case law that suggests that if you're -- the case law suggests that under Hart Intercivic, courts should be wary of accepting Plaintiff's arguments that loss of goodwill and reputation are imminent in the face of the undisputed fact of the Plaintiffs' well-established substantial business entity. The Plaintiffs here say that they're the health care provider most accessible to consumers today. They see patients up to four times as often as other health care professionals. They play, those are these, play a particularly critical role in rural and otherwise under-served areas, and they serve as an

invaluable resource to patients seeking health care services.

I have seen other references that they're the pillar of the community.

The suggestion that they're going to lose that goodwill because their reimbursement rates are going to go down and they are going to be driven out of business just does not necessarily make sense that it's going to be so irreparable as to meet the Rule 65 standard.

THE COURT: What about Mr. Robertson's argument that in this circuit harm to goodwill is irreparable?

MR. ARONSON: I think harm to goodwill can be irreparable in this circuit. However, just because there's harm -- I think there's a question as to whether there's actually harm to goodwill.

What I was trying to address is that it's not clear that there's harm to goodwill based upon their declarations. Not clear that if you're the pillar of the community, if you see patients more than any other health care provider, that your goodwill will actually be affected by a merger which then could lower reimbursement rates, which are apparently going down by themselves anyway, which could cause the pharmacies maybe to close, and that's going to get rid of goodwill.

It just doesn't -- I don't think it meets the standard. We're talking about extraordinary relief here which is the whole purpose of Rule 65.

THE COURT: How about a loss of business, is that irreparable?

MR. ARONSON: I think the case law might say that's irreparable. But, again, their loss of a business is so speculative and so many steps away, the PBMs, as I mentioned, they have been arguing that the PBM mergers are anti-competitive. They did it back in Caremark AdvancePCS; I worked on that. They did it back on Express Scripts WellPoint; I worked on that. So did Mr. Robertson's law firm, by the way. And they have been making those same arguments. But based upon the trade associations' own information, the Drug Store Trade Association, the number of storefronts has actually increased in number. The profitability has actually increased over the last -- I can't remember whether it's two or four years. So to suggest that these PBMs are driving them out of business with these lower reimbursements, it's just not a fact.

The concern, I think it was up on the Hill, one of the Plaintiffs, who may be in the courtroom, testified in front of the Senate, and under examination by Senator Lee said: The problem is we can't compete with mail order. They sell at too low a price.

That's not an antitrust concern. That's a competition concern. Not what the -- from an antitrust perspective, we want prices to be low.

We talked about the harm to them. I would like to focus briefly on the harm to Express Scripts and to consumers if a preliminary injunction is granted here. It's laid out in great detail in Mr. Ebling's declaration. But I mention the starting point has to be safety. The worst outcome is that something is imposed on these companies and there is some inefficiency introduced or some uncertainty and somebody gets hurt. I mean, it's not an overstatement. This is a concern if you go through the company and you see they have a chief medical officer, they have people who are involved in making sure the consumers are protected and that safety is foremost.

So that's the first concern, if you start disassembling the organization, that something very bad could happen. As Mr. Ebling said in his declaration: In the event of a hold separate order, I believe the leadership vacuum and uncertain future at a held separate legacy Medco would create operational risks at Medco's mail order and specialty pharmacies and degradation of its mail order specialty product offering. Operating without management sales staff is just a nonstarter. That would not be good.

There's a huge impact on not only Medco if it was asked to go out and separate for a period of time and asked to go out, there's an impact on Express Scripts obviously because it paid $29 billion, there's also that cloud, once again, on the legacy Medco, the legacy Express Scripts.

With 40 PBMs plus, actually 62 out there, employees will be lost, key employees will be lost, customers will be lost. Not to mention that the billion dollars in synergies will at least be delayed, some it may actually be lost as a result of slowing this down.

That careful planning, the $200 million already spent will be lost. I think it's $2 million a day is what it cost us for the billion dollars in efficiencies that we don't get to do every day there is a delay.

I mentioned $200 million before about being spent to integrate the companies; it actually has been $230 million.

Just to mention the bond. The bond is not a discretionary issue. There has to be a bond. That's what the rule says. The cases they cite, it's quite remarkable, the cases they cite are FTC cases, Weyerhaeuser and other cases. The FTC doesn't have to get a bond. There is a statute that says there's no bond required.

That's very different than here. We are talking about a $29 billion merger. We are talking about a billion dollars plus in synergies. We're talking about a company that's being injured through uncertainty and through employees and everything else. The bond should be at least a billion dollars. We could document that.

I mean, the injury to Express Scripts will be huge. What they're talking about sounds like if it's an antitrust

issue, it could be compensated by money, but I am not sure it's an antitrust issue, it's a competition issue.

Then, lastly, I would like to talk about likelihood of success on the merits. Some of this I alluded to and I won't go into that in detail. But we did point out in our papers issues with respect to their market definition, with respect to their reliance on historical market shares, on the weakness of their allegations of anticompetitive effects. We pointed to the FTC's decision, which is good reading, and important here because I am sure they spent a lot of time trying to figure out, how do we address this.

And the Plaintiffs say there's a presumption based upon this old case law. Supreme Court, it's good case law. But it's not -- also there are merger guidelines that everybody uses to evaluate mergers that are being cited by the courts. There are new cases that have approached this under the merger guidelines and the approach of modern day antitrust.

So, fine, if they want to rely on the presumption, let them. However, the presumption is based on this high market share. The high market share is built upon a faulty market definition. The faulty market definition is embedded with faulty market shares.

Let me explain what I mean. If you -- one of the most obvious things is that if the market is defined very

narrowly as only national PBMs that can serve large plan sponsors, it will have less players than if it's all PBMs, like the FTC found. So that's why -- whether the market is narrow or broad makes a big difference. So they start with this narrow market definition.

But the case law is clear that you measure markets by looking at the cross-elasticity of supply and demand. So are there other PBM companies who may not be serving that narrowly defined market of customers that could? Well, as the FTC found, there are at least ten that are bidding on major contracts with a bunch of fringe players. So either the market has to be redefined to be broader, taking into account the elasticities on the supply side, or you have got to include those people in looking at how many people are in the market.

So that's one issue. And because they focus on a very narrow market, they focus on incorrect market shares. But even putting aside the narrow market and the incorrect market shares, there's a fundamental misunderstanding by them of the way the market works. A plan sponsor, large company, medium size company, they don't just call up the PBM and say, I want a -- can you give me some services. They use consultants, they design a bidding process, a request for proposal, they invite PBMs to submit proposals for the business. A PBM will get anywhere -- I am sorry, a plan

sponsor will get anywhere from eight to twelve proposals.

Then that twelve is narrowed to eight, or the eight narrowed to six, and six narrowed to four, then two might have a bake-off for the best and final offer. In that type of market, that's referred to as a bidding contest. In a bidding contest, past market shares are not indicative of future market significance. It could be as easy as, if you have got ten people, your market share would be one over ten, or 10 percent. Past market share doesn't show you are going to win the next piece of business.

That's especially true here in this bidding model, and it's especially true because the PBM business is highly dynamic. All one needs to look at is the fact that Medco lost a third of its business over the last year, year and a half, its market share that their economist is citing based upon a stock analyst report includes that business. Well, that obviously overstates the significance of Medco.

It also understates the significance of UnitedHealthCare. United is the largest health care provider in the United States. It actually has relationships with I think it's 40 percent of the Fortune 500 companies on its health care side. The number may actually be higher. They already have a PBM. They bring in all of these lives to their PBM. Who's to think that United's market share actually reflects future market significance? The FTC didn't think

that. I would say that it's not what the companies think either if you were to look at their internal business plans.

So when one looks at presumptions or uses presumptions, it's got to be based on appropriate measures. And the measures they're using are wrong, and we go into further detail talking about the elasticities and the historical market shares.

I would like to refer to anticompetitive effects. They suggest that there are huge anticompetitive effects arising from this transaction. Again, I would refer to the FTC's economics. The FTC, again, did 200 interviews, listened to the Plaintiffs and other people advocate a position. They looked at millions of pages of documents. They also did econometrics. We on behalf of the companies did econometrics. What those econometrics showed was Medco and Express Scripts were not each other's closest competitors.

So back to the bidding contest, which there was a bake-off at the end, if ESI, Express Scripts, was there, it was much more likely there was going to be somebody else we were competing with than Medco. The reverse was also true. If I were in a protected courtroom, I would tell you who those people are, but they are not each other.

That was very significant to the FTC and it should be significant to people looking at this from an antitrust perspective. Because if you are not close competitors, the

removal of what competition does exist doesn't affect market conditions.

The other type of anticompetitive question that courts and the FTC and authorities are concerned with is one called coordinated interaction. Will the market be structured in such a way and are the products such that it's easier to collude post-transaction as a result of this merger? I mean, can you sort of look at somebody, a competitor, wink your eye at them and they will know where your pricing is going and you will know where their pricing is going? Anyone who has tried to understand the PBM business would know that just cannot occur here.

First of all, you have got the large number of PBMs.

Secondly, you have got the sophisticated plan sponsors and their consultants.

Third, it's hard enough -- it is very easy to say PBM, it is hard to describe it and how it's sold. Sometimes with health care, like normal health care insurance; sometimes apart. The PBMs that are in the business, some are affiliated with insurance companies; some aren't. Some are affiliated with retail pharmacies; some are not. Some are owned by the Blues plans; some are not.

There are all of these different players, different cost curves, a high degree of heterogeneity. The business is

highly complex and not transparent. You can't say what's the price of the PBM product because the PBM product is designed for the specific plan sponsor. What one plan sponsor has in their design may be different than another plan sponsor.

It's very difficult to understand what the pricing is and there is no transparency. What I mean by that is Express Scripts doesn't know what Catalyst or SXC or Prime or United or Cigna or Aetna are charging for their products. They often don't even know if those companies are the PBM behind a certain plan. So the notion that you could somehow engage in coordinated interaction just doesn't work.

Now, this is something I have spent the last eight months on. This is something they've spent the last eight months on. Dr. Simpson, their economist, apparently did not. He's looking at an analyst's report, I think it's a guy named Gill who wrote an analyst's report. Dr. Rozanski, our economist from the Bates White, one of the top econometricians in the country, spent months looking at the actual bid data and running econometrics, doing all the stuff that Mr. Robertson did when he was at the FTC how long ago, a year ago. Fancy things, UPP, diversion analyses, critical loss analysis, merger simulations. They all came out in favor of the fact that the merger would not result in a price increase.

So for them to come in last minute, after we close the merger, sustained all of these costs associated with it,

rather than inconveniencing us a month before or two months before and letting the court hear it properly, to come in with that kind of evidence and suggest that this should be stopped in its tracks just makes no sense and it's inconsistent with the law. I don't know that we could find a single case where hold separate and divestiture was held post-consummation by a private action. It would be highly unusual.

At this point if the Court doesn't have questions to me, I would like to turn it over to Mr. Keyte to address the motion to dismiss.

THE COURT: That's fine.

MR. ARONSON: Thank you very much.

MR. KEYTE: Thank you, Your Honor.

Well, I guess part of my challenge is to weave what Mr. Robertson said relating to the motion to dismiss versus the PI.

THE COURT: I would ask you not to be redundant.

MR. KEYTE: I will try.

As well as to separate out some of the issues Mr. Aronson addressed on the merits and to look at this precisely in the framework of what can you decide as a matter of law.

We have broken that really into pieces: Should this case go forward as a matter of law, as a matter of equity, as a matter of standing, and as a matter of merits,

but not getting into all of the issues that Mr. Aronson talked about.

First I wanted to start with the equitable principles and focus on permanent injunctive relief. The same principles apply. There's no dispute as to the law that under Broadcom those same principles apply.

So there still is a question about the balance of the hardships, is a permanent injunctive relief appropriate, is that equity warranted under a balance of the hardships also including issues of inexcusable delay? That is an appropriate inquiry on a motion to dismiss and I will get into the cases that say that and limited to that. No one disputes that standard.

So the question is, do courts actually decide this question of equity as a matter of law at this stage in the case? If they do, why do they do that? And then does that apply here as well?

Well, the first question is, of course they do. They decide this issue, should a case go forward as a matter of law on permanent injunctive relief as a matter of the equities right now at this stage. This is precisely what happened in Taleff on a 12(b)(6) motion. It is what happened in Ginsburg on a 12(c) motion.

Now, what do the Plaintiffs have to say about that? They don't say anything about that. They don't address the

issue of whether this can and should be decided on a matter of law when that's what the most recent cases do.

In fact, what they say is that Ginsburg, well, that involved a 12(c) motion and there was some discovery. Well, that's precisely our point. It's a 12(c) motion and the discovery didn't matter. Because what the court found there is that because of the equities, coupled with the inexcusable delay, it would never come out the other way. There was nothing more to do, no amount of discovery was going to change those fundamental facts.

That's what we have here as well.

So what was the rationale in those cases? You heard it over and over again. It's a combination of hardship on the Defendants that are in the process of integrating -- and there's no dispute that there's a process of integration going on here -- and in combination with inexcusable delay.

Now, we have no dispute here, we talked at length about what does that mean in light of American Stores, under Ginsburg, under Taleff. I did want to highlight that Ginsburg and Mercy Health, those did involve cases where it was a few days before or a week before; and applying these equitable principles in Ginsburg, they still dismissed the case under 12(c).

So the few days didn't matter. The week didn't matter. Why is that? It's because the Supreme Court

basically said, let me tell you when the clock should run. In American Stores, yes, they had it before them, they had the case before them, they had to talk about divestiture as a remedy, they had to tell everybody, let me tell you when the clock started, as Mr. Aronson explained, they explained the clock started when the parties had notice of the intentions to go forward with the deal. Not every little secret piece along the way, but when there was notice of the parties' intentions well before the completion or any kind of settlement with the Government. So the clock started when they knew this deal was going forward.

We've had a motion about judicial notice, about SEC disclosures. So those are really undisputed facts about when the clock started. It started at least eight months ago. It's actually, as a matter of fact, more egregious than the cases that have decided this as a matter of law and have dismissed the cases, and that's Taleff and Ginsburg.

The key also is that I know Mr. Robertson is going to get up and talk about all the discovery he needs, and he has mentioned that, but these facts will not change. These precise facts as the issue of the balance of the hardships and inexcusable delay cannot change as a result of discovery. You can be six days from now, six weeks from now, or six months from now, and that's not going to change. That's why these courts have in fact dismissed those cases at this point once

it is clear that those issues and those outcomes will not change.

So even before you get to the question of standing or you get to the question of merits and market definition, the case should be dismissed. There is no law on the other side of this issue. Yes, in Tasty Baking they addressed laches, but they found there that on the facts laches didn't apply. But with the benefit of the framework set by American Stores, it's clear here that it does apply, and it applies in a more compelling way than in Ginsburg and than in Taleff, and there is no dispute about it and Mr. Robertson has had nothing to say about that.

THE COURT: How do you respond to the argument that Mr. Robertson makes that he did in fact file a motion for TRO prior to the merger here?

MR. KEYTE: The question is, do you get court relief prior to consummation? That's what they are looking for. In Ginsburg, they made the Plaintiffs file a PI earlier, much earlier than that, to get the issue going. So if it's too late, that's Mr. Robertson's fault, that's his clients' fault.

If they want to play the game, can we win or persuade the FTC to do something and we will just hold off, well, that clock started seven or eight months ago according to the Supreme Court and Justice Kennedy. So if you want to

play the game, you have to -- that's the risk. I might win in front of the FTC, but they could do it much earlier to preserve what they want to do with this Court.

As Mr. Aronson explains, that's much different than having the FTC involved where they're changing the industry. This is concurrent jurisdiction. They can have this going any time after those eight months, and certainly in February and in March.

THE COURT: What about Mr. Robertson's argument about the FTC and the courts potentially crafting competing or inconsistent remedies in a transaction like this?

MR. KEYTE: Well, to some extent that is fine because, you know, that's essentially a part of what American Stores is saying. You might have a different result. You might have a different result in court, you might have a different result with the FTC or the DOJ. Their job is to get into the courthouse when they're on notice that this thing may happen. They're on notice, according to the Supreme Court, followed by Ginsburg, followed by Taleff, at least eight months ago.

So this is why these other courts in Mercy and Ginsburg say, hey, a couple of days here and there, that's not your problem. Your problem is you are on notice of this a long time ago and you decided to, in a sense, stick with one strategy, which is the FTC, or let's say it's the DOJ, where

you always had the strategy of Section 16 of the Clayton Act. You have those rights. Come to court. There is no ripe in this issue. That's a separate issue for an FCC or some other jurisdiction. There's no ripeness issue. This happens, frankly, all the time.

Then you, in an orderly fashion, deal with the court on whether you need a PI hearing, and you do it in a way in which you can actually litigate these issues pre-closing. That's because all the courts know that if you let it go, integration must occur. It's inevitable. It's planned for months, and these equities necessarily occur. That's why when you have a combination of hardship on the merging parties and inexcusable delay, you dismiss the case.

They tried the strategy. They lost at the FTC, they didn't get in front of the court to try to seek relief, and that's their fault.

With respect to -- obviously irreparable harm applies in the permanent injunctive relief. Mr. Aronson went over those points. But they are relevant to this as well. In their complaint there really are nothing but conclusory allegations of somebody might have a problem with goodwill, somebody might go out of business. Given the concrete nature of the compensable harm that's laid out in the complaint, that too is a factor. I think it's somewhat piling on on the hardship point, but certainly it is relevant.

Now, let me briefly address standing. It is a complicated issue in antitrust. We agree completely that for a damages action, you need to prove more. You need to prove that you're directly harmed and these other things. I don't have an issue at all, we don't have an issue at all with Mr. Robertson on the law.

But the key point is for Section 16 of the Clayton Act, you have to prove or adequately allege antitrust injury, the type of injury the antitrust laws care about. That's not just: I am making less money, I'm losing business, I will lose business to mail order, I might even go out of business. If that's a result of competition, you do not have antitrust standing even if it is injury in fact under Article 3. It's been the law for a long, long time. It was clarified in Cargill that it applies to permanent injunction actions. We have no question about that.

What we do question is their purported standing as a competitor, as a supplier, and as a consumer, and let's go briefly through each of those.

On the competitor standing, this is the rarest kind of standing. But it only -- only occasionally do courts even find it. Where is that? It's really because of the Supreme Court's decision in Cargill that said, we don't really trust competitor complaints because competitors don't like competition. They don't like to lose business when a merger

creates a more efficient or even a more aggressive competitor that's trying to get its share. So they reserved in that case, well, if there is a likelihood demonstrable of predatory pricing, something that would be illegal under the antitrust laws, then maybe a competitor can prove standing.

So there's case after case where a Plaintiff complains about somebody having a competitive advantage and they're going to lose business. That is all that's going on here. Somebody might shift to mail order; somebody might have more lives and be more attractive to pharmacies or to employer groups. More lives. When you have more lives, that is scale, but it's pro-competitive. That's all this complaint does on a competitor's side. There are no allegations, let alone detail that allegation of illegal conduct that flows from the merger itself.

They use the word "forcing" over and over again, but all they are really talking about when you get to the facts, which is required under Twombly, all they are really talking about is competitive advantage from being more attractive. And that's not enough. And there are no cases that the Plaintiffs cite here that applies to their facts. Whereas Cargill and its progeny certainly says, this is just vigorous competition.

It also applies to the exclusive agreements. They say there will be more exclusive agreements from

pharmaceutical companies and specialty. Those are giving them discounts to promote their products. Perfectly lawful, perfectly fine. If that somehow, I don't know even know how there is supposed to be more of that as a result of the transaction, if it's because there's more lives, well, that's also more attractive, and that's just competition. That's at Paragraph 100 of the complaint, Your Honor.

Now, with respect to sellers of pharmacy services, there seems to be two theories. One theory is, well, I am a seller of pharmacy services and these vertically integrated PBMs that also have mail order or specialty, they're going to shift business away from me. Because they have more scale, I will have more business shifted away from me and I will be harmed.

There too there's a Third Circuit case of Alberta Gas, which basically says shifting away to another means of distribution is not antitrust injury when it flows from a merger.

That's exactly what's happening here. They are really talking about -- they are talking about mail order being more with this merger for potentially more business shifting to mail order from pharmacies. That's exactly the kind of harm that could be harm in fact, but is not antitrust injury because it's basically shifting the means of which you get the prescriptions to the consumer. I think it's harm to

them in fact, but it's not an antitrust injury because it's not caused by that which makes the merger unlawful; it's just a change in business strategy even I think Mr. Robertson admitted was kind of an evolutionary change going on. That's furthered by the merger. That doesn't matter because it's not flowing from that which makes it unlawful, some predatory acts that are enabled by the merger.

So Alberta Gas -- and they didn't really have anything to say about Alberta Gas -- controls that issue.

The second one with respect to the sellers relates to this duopsony theory. Well, the interesting thing about that is I think Plaintiffs concede that there needs to be a restriction in output in pharmacy dispensing services at the end of the day. You can't just have lower prices that could be passed on to consumers on the sell side and then say, that's a problem because it's coming out of my pocket. That would just be what is essentially a wealth transfer between the pharmacies and the PBMs. There needs to be harm to competition.

The courts have said, In Re Beef case, that needs to be a restriction in output. Here's their problem. They talk about West Penn and Bellevue. They didn't really reach the output issue. They didn't really discuss it. But what did discuss it, which they cite to in Paragraph 113, is the Caremark/AdvancePCS transaction. If I could, Your Honor, I am

not sure that you have that, but I wanted to hand up, if I could, the copy of the statement there.

MR. ROBERTSON: Do you have a copy for us?

MR. KEYTE: Yes, I do. I assume you cited it in your brief, I thought you would. But I am happy -- I might give you a highlighted copy.

MR. ROBERTSON: Your Honor, without belaboring it, just to state on the record the same objection to that as we did the previous FTC statement. I don't want to waste any time with the Court on that, but just so it's clear for the record.

THE COURT: I understand.

MR. KEYTE: That's fine. It is incorporated into the complaint.

The point there is they explain the monopsony theory, they explain in detail that there needs to be this very kind of sophisticated theory to apply, especially because it leads to lower prices in the first instance that can be passed through. Well, you need to restrict output in pharmacy services. It's not just their pharmacy services; it's market-wide dispensing services.

In this very matter that they cite in their complaint the FTC says, no. And the reason why, which we explained in our brief, is that the prescriptions will be filled. You are not going to have an output reduction in

pharmacy services. What you're going to get out of these transactions, even if you assume lower reimbursement rates, is passed through to the employer groups and no reduction in output, in the services, because even if they do shift, shift around from mail or to pharmacies, the prescriptions will be filled. So the very closing statement that they rely on for another issue in their complaint really is dispositive on this second part of seller's standing.

So what do they do? It's kind of expected. Well, now they are a consumer. They are a consumer, they're an employer group. But the funny thing, if you look at their complaint, in Paragraph 32 and Paragraph 34 and at Note 14, they don't know who they are.

You have the first part of the complaint that says, some association members also purchased PBM services directly or indirectly. Then there is a footnote that says, some of the association members have opted not to participate for various reasons. So you just kind of -- you don't even know who the Plaintiffs are.

Certainly the named Plaintiffs, as the Court may be aware, don't fit the category because they need, in order to be able to talk about monopsony and duopsony, they need large employer groups and a couple other adjectives I will get to. So the named Plaintiffs aren't a consumer here.

Then they won't name the other ones because they

have people opting out. So you don't really have a Plaintiff.

But the reason they have it in the complaint is because consumer standing is really the only one we can't really fight about when it comes to as a matter of fact. So here they don't really have basically any Plaintiffs, and that wouldn't be the kind of case they would probably want to pursue.

Let me talk briefly about the Section 7 merits and I will stick to the law, I think I am, I will stick to the law.

THE COURT: That's good.

MR. KEYTE: Mr. Robertson leaves the Court with the impression I think that, well, market definition and concentration figures, very fact intensive, I have a long complaint, how could it not be, you know. Well, the law has come a long way from the days when you can just essentially throw out a market definition that defines the market so narrowly you can have high market shares. It's come a long way from that.

And the controlling case in the Third Circuit is Queen City Pizza. They don't really deal with that. That's where they enunciate the principle that if you do not lay out in the facts in the case that show both there is not interchangeability with other products and there isn't cross-elasticity in your complaint, you win a motion to

dismiss.

It's followed by a very important case here, which is Invacare, which basically says you can't break out customers into their own markets unless the product is different, the product itself.

Then you have another case, which is Total Benefit Services, which we cite at Page 23, that says you can't differentiate under that same theory between public and private groups of customers.

Well, their complaint really violates every one of those rules on its face. What is the motive? The motive is obvious. I want to be able to say, they say in their complaint, I want to be able to say duopsony and monopsony. I can't say that if there's ten significant competitors.

So how do I do that? Well, how I do that is I have to create -- I have to put a lot of adjectives in any market definition, which is full service, nationwide PBM services to large private employers. For that, under Queen City Pizza, you would have to actually allege facts, not just language, that they can't turn, that that kind of employer couldn't turn to some other PBM and that other PBMs could not supply those employers. And they don't lay that out. They simply assert it because they need to try to have high market shares.

In fact, on some markets, they go through, and you read probably the hypothetical monopolies test and they talk

about a lack of elasticity and things like that. Nowhere under this market definition do they say that PBMs one through three have no, in a sense, competitive interaction or are not an option for employer groups with PBMs four through ten. They don't even try. They are not going to try to say there's no cross-elasticity of an either demand or supply from one through three versus four through ten.

And, in fact, at Paragraph 10 they highlight that United, which is not one of these three, has the best buy. They say, well, it's 40 out of 50. There is just 40 out of 50 at the end of the day. But all of that highlights is they are all competing, you can't measure the market shares by the outcomes. It's where is the allegation -- there shouldn't be even ten. Where's the allegation there is no competitive interplay of any kind in terms of the product itself and in terms of cost elasticity between, I will call them, large PBMs, medium PBMs, small PBMs? It's not there. And the courts now say if it's not there, if it's not there because it can't really be there, if it's not there, you dismiss the complaint as a matter of law.

This is why --

THE COURT: Do I dismiss the complaint with or without prejudice?

MR. KEYTE: I think you dismiss the complaint with prejudice.

THE COURT: Under what theory?

MR. KEYTE: Under the theory that they have been -- they know how to do this. They do it in other paragraphs. They do it for other theories. They have been at it for eight months. They cannot allege facts that would show on the face of the pleading a lack of cross-elasticity of supply and demand here.

THE COURT: I don't know that, do I? I know that only because you are telling me that.

MR. KEYTE: It is absent, it is -- they do describe in I think Paragraph 15 that PBMs sell to all of these, public, private, everybody. So they kind of have in their complaint that everybody is in the game. Then they just in a conclusory way show in the adjectives to get down to a three to two, both on the buy side and sell side.

So they know what they are doing and they can't meet the standard of showing that there's a distinct product.

Now, I know that Mr. Robertson is going to say, no, you have to have -- if they are a big employer, you have to have a nationwide network. Of course. The small and medium PBMs have nationwide networks. That is not a different product, that's just a different customer.

So they can't say it's a different product and they can't say that there's a lack of cross-elasticity between them. They did it in other areas. They know they don't have

the facts to do it. So to some extent with the long complaint I think they're hoping to just squeeze by and try to create fact disputes on that.

Then I think --

THE COURT: Hold on for one second. You said they are hoping to squeeze by and try to create fact disputes on that. If your theory is correct, there should not be any fact disputes.

MR. KEYTE: There won't be. If we actually had to go through this and have discovery on this issue, there wouldn't be any fact disputes. Then we would be back in front of you on summary judgment. We would have experts and all of this stuff and we would just say, we told you.

It's because they -- it is just not the economic reality that their papers talk about, you have to talk about marketplace realities, commercial realities. Well, the commercial reality is PBMs can service employers of all sizes; and since employers of all sizes and shapes can turn to, other than the big three, they can't allege facts that say otherwise. That's an independent basis to dismiss the complaint.

The -- and, of course, everything else flows from that. Mr. Robertson can talk about presumptions of anticompetitive effects. Well, in actual competitive effects, for him it all depends on the three to two. He is not up here

saying, Your Honor, even if you say it's a ten to nine case or I have to kind of concede that, that there's going to be anti-competitive effects. He knows that that -- that he would lose that, that that cannot be the case.

So his concentration figures are all dependent on duopsony, so-called duopsony, and monopsony. So the whole case comes tumbling down on that legal issue, which is controlled by Third Circuit law.

Now, anything else I would say I believe would overlap with Mr. Aronson, so I thank you.

THE COURT: Okay. Let's take a five-minute break.

(Recess taken).

(Back on record in open court).

THE COURT: Okay. Mr. Robertson.

MR. ROBERTSON: Yes, Your Honor, thank you.

Allow me to try to go in order of what we just heard. I won't go over everything, just the things I can try to match.

Some of the things we heard from actually both counsel involve a lot of evidence that they want to offer as argument, but they're testifying. That evidence isn't in the record. They could have, should have, this is a hearing on a PI. We offered evidence. They have not. They just have argument. That's not something that the Court should follow as being fact in my view.

THE COURT: Although you will concede with respect to the PI motion the burden is on you.

MR. ROBERTSON: Yes, Your Honor, but I offered evidence.

THE COURT: Okay.

MR. ROBERTSON: And I think that normally in all PIs I have done the other side is supposed to offer evidence to show what I said isn't true. If they do that, the Court can decide which one is right. If you don't offer any evidence, you can't just argue that I'm wrong. An evidentiary hearing means you have evidence, in my view, in my experience anyway.

Now, a good example is all of this stuff they said their expert had done. Very interesting, I would love to see that work. They didn't submit any of that, it's not in his declaration, it's not here, it's not before the Court. So we can't argue about it and let the Court guess what it says.

Now, in terms of the first thing that counsel mentioned, Mr. Aronson, and I will say that just to be clear as to which counsel we're talking about, that there are no private cases and then later he talked about Tasty Baking, which was a private case, and American Stores, which was a private case. The reason why it's a private case, Your Honor may not know, but the AGs can only sue on behalf of consumers. So that's why it comes under the private side of the statute.

We heard American Stores being cited over and over again as precedent. Obviously the Supreme Court is the highest precedent in the land -- I know you have heard about that lately in the newspaper. But a one out of nine justice concurrent statement is not. That's why no one has followed it, no court has.

And also it's not what Justice Kennedy said. What he said is that the State of California could have sued four months earlier. Well, they had sued four months after the FTC had finished, after the merger had closed. That was the point that he was making. But it's not precedent. We can't keep referring to, oh, following American Stores, the Court should follow American Stores and follow Justice Kennedy's concurrence.

There are some concurrences of some cases we all know where other justices join and it has the majority. A great antitrust case is the Hyde case, is a concurrence that is often cited because it made the most sense. But not in this case. It's one justice and no courts following it. The cases they said followed it don't follow it, don't even mention Justice Kennedy's concurrence.

They say you can't have a market with a particular group of customers. Actually many of these cases do. Staples/Office Depot did. Whole Foods did. The market justice people seeking premium, natural organic stores, I was

actually on that case, I was counsel on that case, and, yes, you do do that. We will discuss that as we get into the other side of the argument.

I heard that the mail order was still in physical locations and haven't changed, interesting point I didn't know. I think that's good to know now because that helps with our argument.

Having integration commonly done that fast, I have never seen it in my life, not even in small cases that I have done.

THE COURT: Let's assume that it's done. Let's assume all the secrets are out. Where does that leave you?

MR. ROBERTSON: That still I ask for a hold separate, and there is nobody that I know of, unless they are just brilliant, that can memorize the rates of millions of rates. They have hundreds of rates just for the different pharmacies, not just for the individual --

THE COURT: Presumably they don't have one person doing that.

MR. ROBERTSON: You have to be pretty smart to memorize all of that.

And I don't have a problem taking the risk that if you separate them now and move the documents back and separate them apart that people aren't going to remember enough to know how to set a particular price on a particular drug in one of

the hundreds of rates to be identical to the other. I think that would be very difficult for them to do.

Now, in terms of they were planning for months. On Friday morning they didn't know it was going to be Monday morning. The FTC hadn't told them yet. So all of this planning, it's interesting they would do that anyway. That doesn't have anything to do with what they did between Friday when they found out, we don't know when it was, but sometime during the day, and Monday morning at 8:10. That doesn't have anything to do with the fact they planned months and months in advance for a decision that could have happened at any time, not just that particular weekend.

In terms of there being separate systems, I heard counsel say that he agreed that there are separate systems. Well, that's going to be very important as I get into what the hold separate should be. I thought that was key, a key admission.

Now, in terms of all of this stuff about their Medco is somehow failing before the merger, a failing firm defense, if they want to try that, I would be happy as can be, because they can't meet the elements of a failing firm defense. Failing firm defense requires a company to be unprofitable, about ready to go into bankruptcy, and that nobody else would buy them. There's no evidence anybody else had even made an offer or that it was offered for anybody else

to buy. There are no elements of a failing firm defense. But I would love to try that because there's no facts to support that.

They mention a lot of business about selling to plans, meaning the employers. I don't think I have asked them to stop selling to employers. They can do that. That wasn't what we were proposing, what we were talking about. We were talking about their relationships with the pharmacists.

They mention, Mr. Aronson mentioned in response to the issue of holding the systems separate that putting systems together takes time. I agree. They haven't done it yet. So that's why we want to keep it where it is.

They mentioned a lot of cases that talk about people filing during the FTC review period. Love to see them.

In terms of their issuance of the 8K and why do we file when we did. They issued an 8K saying they are going to close the next week; we filed the next day, that's why we did it on that day. We filed when we thought we really had to do something. We were told up until that point that they were negotiating a remedy. Didn't look like all of a sudden when we saw an 8K saying we were going to close next week that there was a remedy in the works. First time it occurred to us there wasn't going to be a remedy, and you can tell from the statement of the FTC they were real close, it ended up being a 2 to 2 vote on the remedy.

In terms of -- well, people work now at Medco -- at Express Scripts, not Medco, okay, in all hold separates that's typically the case. In LabCorp, LabCorp paid the wages of the west coast company. The companies are merged, of course, the human resource element is going to be together and, in fact, they have to pay and make sure they keep those key employees. That's typical, that's typical in a hold separate that that occurs. It occurs in every, every hold separate order and, Your Honor, I could give you a dozen of them, that's usually in the hold separate order, nothing that is unusual about that.

Why did we file the TRO and then the pleadings on Monday morning? Never occurred to us they would actually close before 8:10 on Monday morning. But what actually happened is we had to get, because we didn't want to do an ex parte TRO, under the rules here we wanted to talk with counsel. We did that. Then he didn't get back to us until 3:30 in the afternoon. We talked with the clerk here in court and found out that we had been assigned a judge and we were told that the magistrate would hear TROs, but we had to go ahead and get the TRO there so a new judge could be reassigned. That was our understanding of how that worked and in fact that's what happened.

But we did want to make sure that we got the TRO filed, after I talked to Mr. Aronson and explained that's what

we were going to do and we were moving for a TRO, and I explained my conversation with the court earlier, so we did exactly what we were supposed to do.

In terms of the Seventh Circuit case, the FTC restructured the deal. Well, FTC does it all the time. In fact, there are ten times as many consent orders that they do every year than actually go to court and litigate. It's typical what the FTC does, the Department of Justice does the same thing, where typically you look for some kind of conduct remedy or a divestiture of some kind. Restructuring the deal is commonly what all the agencies do in these cases and we understood that's what was actually going on, and you can tell that from the statement.

Tasty Baking, this business about it being secret, that's a bunch of baloney, Your Honor. I hate to say it. But you look at the dates in the case, it was made public and they filed six weeks later. Court didn't have a problem with that. They saw they were moving fast. For us to move in one day and get this thing done, a lot of people on my team didn't sleep, haven't slept since almost for a few weeks, we moved as fast as we could in trying to get our people together, our clients together, and get the evidence in here for today. We have been working very, very hard. To say we are sitting on our hands is, frankly, insulting.

Now, the deference to the FTC, I think I have

discussed that. I think the law is clear. I don't need to waste any time on that.

I could pick out statements from what the FTC said and I am going to point Your Honor to a couple of them. We could do that all day long. Let's look at cases where it has actually been decided in front of courts and after hearings, which the two statements they put in do not.

In terms of whether there are enough pharmacies, I thought I heard counsel say maybe there are too many pharmacies. That's not something for them to decide. Competition should decide that, not a merger. Not a merger. They may think it's more efficient to get rid of pharmacies. And if competition leads to that result, that's one thing. But for a merger to do that, that's why we have the Clayton Act.

In terms of, well, we can just go complain to the FTC later and maybe they will do something, I wish that were true. Judge, the Court can take judicial notice of this, Intel took six years before they filed a complaint. I was the lead counsel. It's in the record. It took Unical, which I also tried, I tried that case, nine years from the beginning of the investigation to the time the filing got there. My clients don't have that kind of time, Your Honor.

In terms of goodwill, I think our declarations speak for themselves. But they also mentioned not just going

out of business, but Defendants skipped over the reduction of services. Very clear in the Klingensmith declaration and Mr. Smith and Mr. Cippel both talk about reducing services because they can't afford them. When you reduce services, then your customers come in and they can't be served or they can't get service on Sunday, they can't get the service that they have had for years, they don't like it, you lose goodwill. Very simple. And customers are harmed.

THE COURT: Aren't you asking me to make multiple jumps? Isn't that suggestion making multiple speculative jumps?

MR. ROBERTSON: Not when you have a declaration that says, we will reduce services. That's what they expect to have happen. It's not speculation. It's the only evidence in the record. Their argument is speculation. When you have people who make declarations and make those statements, then that is not speculation. And Mr. Cippel knows, because he has been through this process from his interaction with Express Scripts over the last year where he has had to close two stores, he has had to reduce services. This is not speculation for him. It's real. It's real. That's why he signed that declaration. That is evidence, and the Court doesn't have anything to the contrary, and this is an evidentiary hearing. So I would submit to the Court that that is what the evidence is.

THE COURT: So you're suggesting to the Court that simply because it appears in a declaration, that I should -- that that should answer my questions about speculation? Suppose that your declarants are speculating?

MR. ROBERTSON: I don't think -- I suppose if I could take your hypothetical, let's suppose they are just guessing, then, Your Honor, you could decide that that's speculative. But that's not the way they're written. That's not what he is saying. And Your Honor is here obviously for a purpose, to make a decision. And Your Honor has every right to make whatever decision Your Honor wants to make; otherwise, we wouldn't be here. So I am trying to give the Court what we have, the best evidence we have, and only to point out that we don't see evidence on the other side.

Now, in terms of all of this good stuff Mr. Aronson was mentioning that they have internal business plans that talk about what the market is and all of these things, we've never seen them. They are not before the Court. It's interesting, but it is not before the Court.

On the bond issue that we don't -- we only cite FTC cases. We actually cite no FTC cases. We cite two private suits that are in our brief. So that is just -- he was just mistaken on that point.

In terms of --

THE COURT: So are you saying that 65(c) is

discretionary?

MR. ROBERTSON: Yes, Your Honor. That's what the rule is here in the Third Circuit. It may be different elsewhere, but that's the way it is here.

He mentioned that they may lose customers, but there is no evidence of that.

They have a different view of market shares; no evidence of that.

They have different evidence of elasticity; that's not before the Court.

Saying that, he also said he agreed with the presumption, but they didn't rebut the presumption with evidence.

One of the first things Mr. Aronson mentioned was this issue with Walgreens. That is in Plaintiffs' Exhibit 22, which was one of the things I had up on the screen earlier, this is the Q&A. The Q&A goes through a couple of things. First it says: How will the merger impact my reimbursement? Will my remittance schedule change? Which, of course, is what we are here fighting over.

It says: Decision has not yet been made on how remittances will be handled. Accordingly, it is business as usual until decisions are made.

Then the question is: Walgreens is not in the Express Scripts network, but is in Medco's network. Will

Walgreens be included in the merged company's network?

Well, for the time being there are no changes in the Express Scripts network or the Medco network. As of this date, Walgreens is not in the Express Scripts network. We remain open to having Walgreens in the Express Scripts network, but only at rates and terms that are right for Express Scripts clients.

Now, pretty clear that Walgreens is one large chain in the association. They're not a plaintiff in the case. But it was raised by counsel as if they, because they have some great market power, that they have some clout over this new company. Doesn't appear so. This new company could say, you get the rates you have already bargained for with Medco, that's fine with us. Instead they want to get lower reimbursement rates and will keep them out until they agree with that. That is a big chain.

What about all the community pharmacists we represent? Where do they stand? How much clout do they have? And I submit to the Court they have a heck of a lot less than Walgreens, that's for sure.

Now, also on the laches stuff, I think we briefed this to death and I don't want to go too much further into it except some of the cases and the way they cite them, I think they are inaccurate, I think they speak for themselves. One of the things that was raised in a couple of the cases was

that they did not actually try to work with the FTC during the process, for example, on the Garabet case, and said if they can show that they engaged in a sustained administrative strategy, that would change the way the court looked at it.

I have heard, and I think we can now all agree, that we have had a sustained strategy trying to fight this burden for a long time. So I think that their cases just don't fit and don't apply to this case.

In turning to the motion to dismiss, very briefly, I mention again the American Stores issue. I think we led off with that. They made it sound like that was binding precedent. It's not even close. And it's not also what Justice Kennedy said.

In terms of he mentioned Tasty Baking, again, they filed that case I believe six weeks, 40 some days after the holding. They were moving fast. We moved in one day and that was pretty fast, faster than I have ever been able to pull something like this off with as big a team as we have been able to get volunteers.

In terms of that there's injury and it must be from competition and not from some other source, well, not only have we alleged that it comes from a lessening of competition, which we have, they don't really say we don't, they just want to argue facts and make it sound like it isn't true. That's called a motion for summary judgment or an evidentiary

hearing, which we are here on one day, today, and I don't see any evidence of that.

We have been saying that it's due to lack of competition. Our evidence is that it's from less competition, and we have alleged that, and the cases actually say that the claims that we have are, if proven, are harm to competition. On a motion to dismiss, we believe that the Court has to accept the facts as true as pled. Accepting the facts as true, we have alleged harm from competition.

Counsel, Mr. Keyte, mentioned the Cargill case a couple of times. Very interesting case. Interesting part about it at the end is that the Court said you could have a claim for below cost pricing as a competitor. We have one here. That's exactly what one of the biggest complaints is, that they pay below our cost for even buying the drugs much less any other cost. That is below cost pricing.

Counsel even went on to say that if we did that, that would be illegal. Well, I welcome that. Because then when we prove that case, they have a real problem because it's illegal. Well, it is what they're doing.

Now, he then went on to say, there is no case that describes this buyer power, for example. Well, West Penn did, Bellevue did, and in fact it was exactly that issue. And in the health care industry it was exactly the same issue. And as the Third Circuit said, West Penn got it right.

I don't know if I used the word revolutionary, but if I did, I think that some of the things they do because they now have power, that they have, maybe I characterized as revolutionary, I am not sure I would use the word.

THE COURT: I think you said evolutionary.

MR. ROBERTSON: Okay. I just don't usually say that word. It just kind of puzzled me there for a minute. But I can at least agree it sure sounded about what they're doing.

In terms of their argument that buyer power is not a claim, again, West Penn and Bellevue, and they mentioned a line from one of the Commission's statements, and the fact is that the Third Circuit doesn't agree with them. That's what West Penn says. Bellevue case couldn't agree with them. Happens to be the same attorney who is now a commissioner who wrote that statement.

The courts just don't agree with them. It is not surprising. People don't agree with commissioners at the FTC all the time. If they did, they would have an easier job, and I worked there, as counsel mentioned, for most of the last ten years, and I wish everybody always agreed with me. They just don't.

The FTC is out there doing things that are not always what the law is because they're trying to shift the law in different directions, that's part of what an agency does,

it's built in, I believe.

What they think and what their opinions are are not law until you have a case that's adjudicated in front of a judge and goes up where an Article III judge says, that's the law. I think that goes all the way back to the beginning of time in this country and it still is still true today.

He mentioned we didn't have any other cases that were private cases on the laches defense. We have the Fannie case in the Western District of Pennsylvania, 445 F.Supp 65, it's in our brief. Morgan versus Sharon, again Western District of Pennsylvania. We did cite cases. There are cases on point.

Now, he mentioned that no one would ever think of looking at these big 3 as the big 3. That's some fiction I guess we made up. He didn't use the word fiction, but just to abbreviate what I think his argument was. Well, the CEO of Medco in our complaint, we are not pleading this stuff, said: Everyone is always focused on your two primary competitors. I am not seeing a lot of secondary PBMs in the mix at all, I am really not. That's what he said, quote.

And also in terms of coordination, Medco's CEO said and we quoted him: There are many reasons why you should believe the pricing environment will be responsible and stable, and because there's no reward for irresponsibility on the pricing side -- have there been one example of, wow, that

was aggressive. And he goes on to say, no.

That's what you see in an environment where coordination is more likely. No one is sticking their neck out to be more aggressive. The one company that was before this merger was Medco. Medco was a maverick. As Commissioner Brill said, they're the ones that were disrupting the game here. They were paying pharmacies more than Express Scripts was. That's because they were being competitive.

Now, this is a statement that was just made just last year. So it's not like we can't rely on what they're saying as evidence, which we put in our complaint, it's properly pled, there was no contrary evidence, and I think unless the Court just thinks it should be disbelieved for whatever reason, I think that it is the only evidence in the case on that point.

In terms of fact there may be one or two, and I can get the names of the one or two that opted out of the thousands of the pharmacies in the group, that doesn't change anything. In fact, there are lots of cases, class actions are a good example, where you have people that will opt out for whatever reason, and they do, but for the associations, and it is only from one association, the other associations and private Plaintiffs here, they're not opting out, they're here, they are standing strong.

THE COURT: Who are these "some" that are referred

to in the paragraphs that counsel pointed to?

MR. ROBERTSON: I am sorry?

THE COURT: Who are the some, S-O-M-E, that the complaint --

MR. ROBERTSON: I would tell you, Your Honor, I would rather do it not in open court because I don't have the authority to say it. I would be happy to submit it to Your Honor in a separate document if I could do that. I think there are our own reasons for not wanting to participate and it is their choice. It is very few. I think it is only two, but I can find out the exact number and let Your Honor know, from what we know at this point.

In terms of there being any difference between national PBMs and local PBMs, counsel made it sound like it's all the same, any PBM in a small town can be a national PBM. He made it sound like that was what the FTC was saying in their statement back in the Caremark deal. That's not accurate. That's not what the FTC said. Actually they had a concern about large employers at the time. They stated that: The reason why they didn't have a concern was that there was competition from the remaining independent full service PBMs with national scope. They listed Medco, Express Scripts, and Caremark. Two of those are now merged. And they mentioned there were significant additional competition from several health plans, that would include United, and several retail

pharmacy chains, that would include Walgreens, which got out of the business since then, couldn't do it, couldn't hack it.

So the world has changed. But there they told us they were agreeing with us that there was an issue, a difference for a full service national PBM, and that there was competition which now no longer exists both from Walgreens and also from Express Scripts and Medco because the two are now merged.

So to read into that something different like they would come up with the same decision based on that statement I think is reading too much into it, but we have alleged that there is a difference between -- I think it's Paragraph 105 and 106, 107, we explain what the difference is for national PBMs, and when you are a large company with 100,000 employees scattered across the United States, you want a PBM that happens to be scattered across the United States and has contracts with all the pharmacies all across the United States, not just some place in East Texas or something. So there is a difference.

Is it a different product? Yes, it is. As much as it is going to a large store to buy office supplies like Staples and Office Depot, one could also buy paper somewhere else, and that was their defense. That was their defense. You could buy paper anywhere else. The Court didn't buy that. It said, no, but there is competition at a different level

between you two companies and, in fact, that's what we quoted in the complaint, that their own CEOs were saying they were doing. So that is what the actual evidence is, not argument.

Then finally, my friend, Mr. Keyte said: And then if this is a fact issue, we can come back with evidence. Well, that was today. On a motion to dismiss you don't come back with evidence either; you file a motion for summary judgment after there has been some discovery. But coming back with evidence is not an argument for a motion to dismiss.

I think I tried my best, Your Honor, to just hit the highlights and not redo anything that I did before. I just want to reiterate that we really believe this is harmful to our clients and we believe that we have come here as Congress intended to an Article III judge and we're asking for help. Unless Your Honor has any more questions, that concludes my remarks.

THE COURT: Okay. I just had one more question for either Mr. Aronson or Mr. Keyte. With respect to Mr. Robertson's argument that there is no evidence of record that you all have presented on the issues that you discussed, how do you respond to that?

MR. ARONSON: Yes, Your Honor. The evidence of record, which obviously was put together very quickly, that's when this turned into a PI motion just a couple days ago, is the affidavit -- the declaration of Mr. Ebling, which is very

detailed on the integration, and the declaration of George Rozanski, who is an economist that's been immersed in these facts. That's our factual evidence, and I would ask the Court to read a good reading of the FTC as well.

THE COURT: The Court will take the arguments under advisement and will issue a decision in due course. The Court will stand in recess.

(Record closed).

C E R T I F I C A T E

I, Richard T. Ford, certify that the foregoing is a correct transcript from the record of proceedings in the above-titled matter.

S/Richard T. Ford _____