

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

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

Plaintiffs,

v.

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

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

Defendants.

**PLAINTIFFS' AMENDED MOTION FOR A TEMPORARY RESTRAINING
ORDER/PERMANENT INJUNCTION AND EXPEDITED SCHEDULE**

On March 30, 2012, Plaintiffs requested a Temporary Restraining Order pursuant to Section 16 of the Clayton Antitrust Act, 15 U.S.C. § 26, and Rule 65 of the Federal Rules of Civil Procedure, to prevent and restrain the Defendants from violating Section 7 of the Clayton Act, 15 U.S.C. § 18. Specifically, Plaintiffs request that Defendants be enjoined by a Temporary Restraining Order from consummating the proposed acquisition of Medco Health Solutions, Inc.

(“Medco”) by Defendant Express Scripts, Inc. (“ESI”) pending entry by the Court of a final judgment in this action, or in the alternative, that ESI be ordered to hold separate Medco’s assets and operations after consummating the proposed acquisition and pending entry by the Court of a final judgment in this action.

While that motion was pending before the Court, defendants closed their merger without any notice to Plaintiffs or the Court, sometime before 8:30 am today.¹ Plaintiffs continue to seek a hold separate order and further ask for an expedited schedule for a permanent injunction hearing on the merits. Under the Clayton Act, § 7, the standard for injunctive relief is the same regardless of whether the merger is challenged before or after the closing of a merger. *See, e.g., FTC v. Elders Grain, Inc.*, 868 F.2d 901 (7th Cir.1989) (ordering rescission post closing); *Chicago Bridge & Iron Co. N.V. v. FTC*, 534 F.3d 410 (5th Cir.2008) (ordering divestiture post closing).

In requesting the restraining order, Plaintiffs ask that this Court maintain the status quo to preserve competition; to prevent immediate imminent and irreparable harm to them, to patients, and to plans sponsors; and to preserve remedies available to Plaintiffs under the Clayton Act.

The Motion is based on the following grounds:

1. On July 20, 2011, Defendant Express Scripts, Inc. (“ESI”) and Medco Health Solutions, Inc. (“Medco”) entered into an Agreement and Plan of Merger, pursuant to which ESI would ultimately acquire Medco for 0.81 shares of ESI and \$28.80 in cash per Medco share, for a total of approximately \$29 billion.

¹ Plaintiffs’ Counsel offered to agree to a Protective Order with Defendants’ Counsel to allow a discussion about the timing of the merger; Defendants’ Counsel refused. Also, this morning, the FTC announced that it had voted 3-0-1 not to oppose the merger. Commissioner Brill wrote a dissenting opinion indicating that she believed that the merger to duopsony and duopoly raised significant anticompetitive concerns.

2. In filings before the Securities and Exchange Commission (“SEC”) on March 28, 2012, Medco and ESI each represented that they might consummate the proposed acquisition as early as the week of April 2, 2012.
3. On March 29, 2012, Plaintiffs filed a Complaint alleging that Defendant ESI’s proposed acquisition of Medco violates Section 7 of the Clayton Act, 15 U.S.C. § 18.
4. Unless enjoined by this Court, Plaintiffs will suffer immediate and irreparable harm resulting from an imminent and irreversible reduction to competition caused by the intermingling of information and assets held by the Defendants.
5. Such a reduction in competition will also cause serious harm to the public, including patients, plan sponsors, and state and federal governments. Thus, granting the requested relief will be in the public interest.
6. The harm to Plaintiffs and the public will outweigh any hypothetical harm to Defendants caused by slightly delaying this anticompetitive acquisition or by slightly delaying the integration of Defendants’ assets.
7. There is a substantial likelihood that Plaintiffs will establish at trial that the acquisition of Medco by ESI would violate Section 7 of the Clayton Act, 15 U.S.C. § 18.
8. Counsel for Plaintiffs has conferred with counsel for Defendants prior to seeking relief.

The Fed. R. Civ. P. 65(b) Affidavit regarding the same is attached hereto as Exhibit A.

This emergency motion is accompanied by a Memorandum in Support of Plaintiffs’ Motion for a Temporary Restraining Order/Permanent Injunction and Expedited Schedule. A proposed Order is attached as Exhibit B.

WHEREFORE, Plaintiffs pray that Defendants be ordered to hold separate Medco's assets and operations after consummating the proposed acquisition and that the Court order expedited discovery and a hearing on the motion for an injunction on the merits as soon as practicable.

DATED: April 2, 2012

Respectfully submitted,
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