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

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

Plaintiffs,

v.

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

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

Defendants.

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER/PERMANENT INJUNCTION AND EXPEDITED SCHEDULE

INTRODUCTION

This case is about protecting pharmacies and patients by preserving competition in several concentrated markets that had three significant competitors prior to the merger of Express Scripts, Inc. ("ESI") and Medco Health Solutions, Inc. ("Medco") and will have only two if ESI is allowed to integrate assets from Medco Health Solutions, Inc. ("Medco") into a combined company (hereinafter the "Integration"). As a result, Plaintiffs ask this Court pursuant to Fed. R. Civ. P. 65 and Clayton Act Section 16 to issue a Temporary Restraining Order ("TRO") requiring that ESI hold the assets of Medco separately from ESI assets pending briefing and a decision regarding the preliminary injunction that Plaintiffs seek. Additionally, in conjunction with the order to hold separate or as an alternative to this order, Plaintiffs request expedited hearings on their motion for a preliminary/permanent injunction (combined under Fed. Civ. P. Rule 65(a)(2)) to minimize the impact of ESI's closing the merger despite a pending Motion for a Temporary Injunction filed on April 6, 2012. A hold-separate and expedited schedule will assist in maintaining the status quo and thereby preserve competition; prevent immediate imminent and irreparable harm to Plaintiffs, patients, and plans sponsors; and preserve the remedies available to Plaintiffs under the Clayton Act.

The justifications for a hold separate Order and expedited hearings are clear: (1) the Transaction violates Section 7 of the Clayton Act—a fact that Plaintiffs are likely to prove in a trial on the merits; (2) integration of Defendants' assets would create immediate harm to competition and to Plaintiffs by (a) destroying a vigorous competitor in an already concentrated market and (b) revealing competitively sensitive information about Medco's prices, costs, contractual terms, negotiating strategies, and customers to ESI; (3) the harm to Plaintiffs as a result of the Integration would be irreparable, including the destruction of Plaintiffs' businesses, harm to Plaintiffs' goodwill and ability to compete, antitrust injuries that cannot be recovered as damages, and diminution of Plaintiffs' ability to obtain the ultimate relief sought by this suit; (4) the harm to Plaintiffs and other persons would outweigh any hypothetical harm to Defendants caused by slightly delaying the Integration; and (5) the public, including patients, plan sponsors, and state and federal governments, would be seriously injured by the loss of competition resulting from the Integration.

ESI should not be rewarded for its decision to close the merger despite a pending TRO motion, and any costs it bears in holding the ESI and Medco assets separately (in addition to costs associated with ultimately unwinding the transaction) should not be considered by this Court in determining whether to grant Plaintiffs' motion. Indeed, it is entirely appropriate that the *acquiring* company bear the costs of any decline in value from the acquired assets under a hold separate order. *See FTC v. Weyerhaeuser Co.*, 665 F.2d 1072, 1087 (D.C. Cir. 1981). As the D.C. Circuit Court of Appeals has observed, "[i]f the transaction is consummated but divestiture is later ordered, any costs resulting from divestiture will be borne by the acquiring company, which, as generally the instigator of the transaction, is often viewed as the more appropriate party to bear any loss resulting from an antitrust violation." *FTC v. Exxon Corp.*, 636 F.2d 1336, 1344 n.26 (D.C. Cir. 1980). Thus, in weighing the equities, it is entirely appropriate that ESI should bear the risk of loss as well as the benefit of having acquired ownership of Medco. It is especially appropriate under the circumstances here. ESI accelerated the closing date for its deal to prevent Plaintiffs from seeking a temporary restraining order and should not be allowed to profit from this decision.

LEGAL STANDARD

"[O]ne of the goals of the preliminary injunction analysis is to maintain the status quo, defined as the last, peaceable, noncontested status of the parties." *Opticians Ass'n of Am. v. Indep. Opticians of Am.*, 920 F.2d 187, 197 (3d Cir. 1990) (quotation omitted). A TRO or preliminary injunction is appropriate when the plaintiff demonstrates: "(1) a likelihood of success on the merits; (2) that it will suffer irreparable harm if the injunction is denied; (3) that granting preliminary relief will not result in even greater harm to the non-moving party; and (4) that the public interest favors such relief." *Kos Pharm., Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004). The decision whether to enter a preliminary injunction is committed to the sound discretion of the trial court. *Doran v. Salem Inn, Inc*., 422 U.S. 922, 931-32 (1975); *Del. Valley Fin. Group v. Principal Life Ins. Co.*, 640 F. Supp. 2d 603, 616 (E.D. Pa. 2009).

"[I]njunctive relief is particularly suited to the preventive function of [Clayton Act] § 7 and Congress has expressly extended the availability of the injunctive remedy to private parties." *Allis-Chalmers Mfg. Co. v. White Consol. Indus. Inc.,* 414 F.2d 506, 510 (3d Cir. 1969) (granting a preliminary injunction to prevent a merger on behalf of a private plaintiff where the merger likely would further concentrate an already concentrated market) (quotation omitted); *Tasty Baking Co. v. Ralston Purina, Inc*., 653 F. Supp. 1250, 1276-77 (E.D. Pa. 1987) (same); *see also Phila. World Hockey Club, Inc. v. Phila. Hockey Club, Inc.*, 351 F. Supp. 462, 514 (E.D. Pa. 1972) (granting a preliminary injunction on behalf of a private plaintiff under the Sherman Act to prevent a potential foreclosure of competition). [1]

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 cases under Section 7 of the Clayton Act, courts should consider that permitting companies to fully merge during litigation likely would seriously and irreparably harm competition by destroying or weakening a competitor (the acquired party) even if the acquirer could ultimately divest the acquired party's assets after trial. *See Tasty Baking Co.,* 653 F. Supp. at 1276-77 (finding irreparable harm where the acquired party "could not easily survive on its own after divestiture" due, among other things, to "displacement of management and operations personnel" and the information that "would be learned by [the acquirer] during the next few months, giving defendants an unfair advantage after divestiture"); *see also AlliedSignal, Inc. v. B.F. Goodrich Co.,* 183 F.3d 568 (7th Cir. 1999) (allowing the merger to be consummated would unduly prejudice the scope of possible remedies should the merger ultimately be found to violate Section 7); *Weyerhaeuser*, 665 F.2d 1072 (ordering a hold separate pending a trial on the merits).

STATEMENT OF THE FACTS

Plaintiffs hereby incorporate by reference paragraphs 5-160 of their Complaint. Additionally, Plaintiffs attach the following Declarations: Exhibit A, Greg Ahmann (hereinafter "Ahmann Decl."); Exhibit B, George Bartell (hereinafter "Bartell Decl."); Exhibit C, David Cippel (hereinafter "Cippel Decl."); Exhibit D, Scott Cross (hereinafter "Cross Decl."),; Exhibit E, Harry Davis (hereinafter "Davis Decl."); Exhibit F, Steve DeCriscio (hereinafter "DeCriscio Decl."); Exhibit G, Greg Drew (hereinafter "Drew Decl."); Exhibit H, Robert Frankil (hereinafter "Frankil Decl."); Exhibit I, Bridget-ann Hart (hereinafter "Hart Decl."); Exhibit J, Shawn Nairn (hereinafter "Nairn Decl."); Exhibit K, Robert Narveson (hereinafter "Narveson

[1] "Congress made private [antitrust] enforcement 'an integral part of the congressional plan for

Decl."); Exhibit L, Ralph Petri (hereinafter "Petri Decl."); Exhibit M, Dr. John Simpson (hereinafter "Simpson Decl.); Exhibit N, William Thompson III (hereinafter "Thompson Decl."); Exhibit O, Greg Warren (hereinafter "Warren Decl."); Exhibit P, Dennis Wiesner (hereinafter "Wiesner Decl."); and Exhibit T, Heidi Snyder (hereinafter "Snyder Decl."), providing support for facts alleged in the Complaint and specifically providing the following:

1. Retail community pharmacies have no reasonable alternatives to contracting with PBMs for the Purchase of Retail Community Pharmacy Services.[2] Simpson Decl. at 8; Ahmann Decl. ¶ 10; Bartell Decl. ¶ 10; Cippel Decl. ¶ 12; Cross Decl. ¶ 10; Davis Decl. ¶ 10; DeCriscio Decl. ¶ 10; Drew Decl. ¶ 10; Hart Decl. ¶ 10; Frankil Decl. ¶ 10; Nairn Decl. ¶ 10; Narveson Decl. ¶ 9; Petri Decl. ¶ 10; Thompson Decl. ¶ 10.

2. The combined ESI and Medco would have the following percent shares in the Purchase of Retail Community Pharmacy Services in the listed states:

State	Percent Share Post-Transaction
Georgia	42.8 – 52%
Hawaii	60 – 61.7%
Idaho	33.3 – 45.4%
Kansas	31.7 – 42.3%
Kentucky	41.8 – 46%
Michigan	40.3 – 41.3%
Missouri	34 – 41.6%
Nevada	29.4 – 40.2%
North Carolina	46.9 – 57.8%
Ohio	38.8 – 60.4%
Pennsylvania	29.5 – 60.4%
South Carolina	32.8 – 41.5%
Vermont	35.7 – 48.5%

protecting competition.'" *California v. Am. Stores Co.,* 495 U.S. 271, 284–85 (1990).

[2] The "Purchase of Retail Community Pharmacy Services" is a defined market in the Complaint with discussion beginning at ¶ 82. It is used herein as described in the Complaint.

Virginia	38 – 47.1%
West Virginia	41.9 – 60.4%

Simpson Decl. at 33, Attachment 3.

3. The combined share of ESI and Medco will give the merged company the power to significantly lower the reimbursement rates paid to retail pharmacies and make it impossible for many retail community pharmacies, including Plaintiffs and Plaintiff Associations' members to refuse to contract with ESI-Medco for the Purchase of Retail Community Pharmacy Services regardless of whether ESI-Medco reduces reimbursement rates. Ahmann Decl. ¶ 6; Bartell Decl. ¶ 5; Cippel Decl. ¶ 6; Cross Decl. ¶ 6; Davis Decl. ¶ 6; DeCriscio Decl. ¶ 6; Drew Decl. ¶ 7; Hart Decl. ¶ 5; Frankil Decl. ¶ 6; Nairn Decl.¶ 6; Narveson Decl. ¶ 5; Petri Decl. ¶ 6; Thompson Decl. ¶ 6.

4. A pharmacy cannot counteract monopsonistic behavior by PBMs serving its location by selling retail community pharmacy services to PBMs located in other areas. Ahmann Decl. ¶ 11; Bartell Decl. ¶ 11; Cippel Decl. ¶ 14; Cross Decl. ¶ 11; Davis Decl. ¶ 11; DeCriscio Decl. ¶ 11; Drew Decl.¶ 11; Hart Decl. ¶10; Frankil Decl. ¶ 11; Nairn Decl. ¶ 11; Narveson Decl. ¶ 10; Petri Decl. ¶ 11; Thompson Decl. ¶ 11. Similarly, consumers of PBM services cannot respond to higher prices from a PBM monopolist serving their area by shifting their pharmacy purchases to a PBM serving an area a couple hundred miles away. Simpson Decl. at 10.

5. PBMs, including ESI and Medco, develop and maintain lists known as "formularies" of covered drugs where drugs not included on the formulary are not covered by insurance. PBM formularies also list preferred drugs and include disincentives for patients using non-preferred drugs. PBMs largely control which drugs are included in a given formulary; thus, PBMs dictate which drugs community retail pharmacies may offer, and likewise, which prescriptions patients may fill at community retail pharmacies. Bartell Decl. ¶¶ 13-15; Cippel Decl. ¶¶ 15-17; Cross

Decl. ¶¶ 13-15; Davis Decl. ¶¶ 13-15; DeCriscio Decl. ¶¶13-14; Drew Decl. ¶ 13-15; Frankil Decl. ¶¶ 13-15; Nairn Decl. ¶13; Petri Decl. ¶¶ 13-15; Thompson Decl. ¶¶13-14; Warren Decl. ¶ 12; Wiesner Decl. ¶¶ 11-13.

6. The merger likely will reduce the quality, quantity, and range of pharmacy services that pharmacies are able to provide to patients, thereby undermining the goodwill of community retail pharmacies, including Plaintiffs and Association Plaintiffs' members. Bartell Decl. ¶ 7; Chain Decl. ¶ 7; Cippel Decl. ¶ 7; Cross Decl. ¶ 8; Davis Decl. ¶ 7; DeCriscio Decl. ¶ 7; Drew Decl. ¶ 8; Frankil Decl. ¶ 7; Hart Decl. ¶ 6; Nairn Decl. ¶ 7; Petri Decl. ¶ 7; Thompson Decl. ¶ 7; Wiesner Decl ¶ 7.

7. Further reductions in reimbursement rates as a result of the merger will likely force community retail pharmacies, including Plaintiffs and Plaintiff Associations' members, to reduce services and, in many cases, close pharmacies altogether. Bartell Decl. ¶ 8; Cippel Decl. ¶ 8; Davis Decl. ¶ 8; DeCriscio Decl. ¶ 8; Drew Decl. ¶ 9; Frankil Decl. ¶ 8; Hart Decl. ¶ 7; Nairn Decl. ¶ 8; Petri Decl. ¶ 8; Thompson Decl. ¶ 8.

8. Entering or expanding into PBM services, and in particular, PBM services for large private employers, is extremely difficult. Walgreens Co. ("Walgreens"), a sophisticated company with a well-known brand, decades of experience in pharmacy-related services, and a substantial footprint, ultimately failed to become a significant competitor for PBM business. Walgreens exited the PBM business in 2011 after years of trying to gain a foothold among PBM customers. Warren Decl. ¶ 7.

9. Walgreens' experience demonstrates how the largest PBM competitors, including ESI and Medco, possess significant competitive advantages over smaller PBMs. These competitive advantages prevented Walgreens from effectively competing with ESI and Medco, especially for

PBM services for large commercial employers. Warren Decl. ¶ 9.

10. The demands of large commercial customers for PBM services are extensive. To service large commercial employers a PBM must offer, among other things, access to competitive pharmacy networks that provide national geographic coverage; sophisticated claims adjudication software and information systems capable of handling large volume for rebate administration, billing, accounting, reporting, and data management; and call centers and customer service operations capable of handling large volumes. Warren Decl. ¶ 10.

11. In order to be successful in competing against ESI and Medco for PBM business, particularly when competing for large private employer business, a PBM must achieve substantial scale. Scale is achieved through a large number of covered lives. Once achieved, scale provides negotiating leverage with retail pharmacy chains and pharmaceutical manufacturers in addition to other advantages. However, if a PBM is not already large enough to achieve scale, competing for the large commercial employers with the greatest number of covered lives is nearly impossible. Warren Decl. ¶ 11.

12. After several years of pursuing large commercial employers, Walgreens was forced to focus on plans with 5,000-50,000 lives, realizing that it could not compete with the biggest PBMs for the largest private employers. Indeed, throughout its history, Walgreens' PBM (which was divested in 2011) was unable to win any employers with more than 100,000 lives, except for Sprint, which was an unprofitable contract for Walgreens. Warren Decl. ¶ 20-21.

13. ESI and Medco dominate the specialty pharmacy business and enjoy significant advantages over smaller specialty pharmacy providers. Warren Decl. ¶ 16.

14. ESI and Medco effectively require most, if not all, of their large commercial employer customers to utilize exclusively ESI or Medco operations for dispensing specialty drugs to

patients. Accordingly, the opportunities for potential competitors to enter or expand their businesses and reduce costs in specialty pharmaceutical services are limited. Warren Decl. ¶ 17.

ARGUMENT

I. Plaintiffs Have a Reasonable Probability of Succeeding on the Merits of their Claims.

To establish the requisite likelihood of success on the merits, a plaintiff need only demonstrate a "reasonable probability of eventual success in the litigation." *Kershner v. Mazurkiewicz,* 670 F.2d 440 (3d Cir. 1982). In a Clayton Act § 7 case, "eventual success in litigation" is predicated upon Plaintiffs' ability to prove that the result of a merger "*may be* substantially to lessen competition." *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962). The Clayton Act is concerned "with probabilities, not certainties." *Id.*; *Allis-Chalmers Mfg. Co. v. White Consol. Indus. Inc.,* 414 F.2d 506 (3d Cir. 1969)*; FTC v. H.J. Heinz Co.,* 246 F.3d 708, 713 (D.C. Cir. 2001). Thus, "if the moving party establishes a reasonable probability of a § 7 violation the 'possibility that the court may decide the right to permanent relief adversely to plaintiff does not preclude it from granting the temporary relief.'" *Allis-Chalmers Mfg*., 414 F.2d at 511 (quoting *Bergen Drug Co. v. Parke, Davis & Co.*, 307 F.2d 725, 727 (3d Cir. 1962).

Plaintiffs' claims in this case have much more than a *reasonable probability* of eventually proving that the result of the Transaction "*may be* substantially to lessen competition." Available evidence, including Defendant Medco's own public admissions, establish a presumption that the Transaction violates Section 7 of the Clayton Act by combining two of the only three significant competitors in concentrated markets for the Purchase of Retail Community Pharmacy Services in various geographic markets and the Provision of Full-Service, Nationwide PBM Services to Large Private Employers in the United States.[3] Indeed, as the court in *H.J. Heinz* stated, "**no court has ever approved a merger to duopoly**." 246 F.3d at 713 (emphasis added). A merger to duopoly (or duopsony[4]) is precisely what Defendants propose.

Supreme Court precedent establishes that mergers that substantially increase market concentration in already concentrated markets presumptively violate the Clayton Act. *See United States v. Continental Can Co*., 378 U.S. 441, 461 (1964) (suggesting that a resulting 25 percent market share for the merged firm triggers the presumption); *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 363-65 (1963) (holding that a merger resulting in a merged entity that controlled 30-33 percent of the market triggered a presumption that the merger substantially lessened competition); *Brown Shoe Co., Inc. v. United States*, 370 U.S. 294 (1962) (holding that a merger resulting in a merged entity that controlled 20-57 percent of various geographic markets substantially lessened competition). Courts and regulatory agencies interpreting Supreme Court precedent have found that establishing a presumption of illegality under the Clayton Act requires that a plaintiff "show that the merger would produce 'a firm controlling an undue percentage share of the relevant market, and [would] result [ ] in a significant increase in the concentration of firms in that market.'" *H.J. Heinz,* 246 F.3d at 715 (quoting *Phila. Nat'l Bank,* 374 U.S. at

[3] Plaintiffs' emphasis for the purposes of this motion is on these two markets, which are defined herein by reference to the Complaint, ¶¶ 129-137, 145-153. Nonetheless, Plaintiffs have also pled and continue to allege that the Transaction would substantially lessen competition in the markets for the Provision of Clinical Specialty Pharmacy Services and the Provision of Prescription Drugs to Beneficiaries of Large Plan Sponsors.

[4] A "duopsony" is the buyer-side equivalent of a "duopoly." Therefore, a duopsony exists in a buying market where there are only two significant buyers. In *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc.*, 549 U.S. 312 (2007), the court made clear that buyer side-claims and seller-side claims should be treated the same under U.S. antitrust laws. Similarly, the Court in *Mandeville Island Farms v. Am. Crystal Sugar Co.*, previously stated that "[t]he [Sherman Act] does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. Nor does it immunize the outlawed acts because they are done by any of these." 334 U.S. 219, 236 (1948).

363).[5] As the Third Circuit has explained, "there can be no doubt that § 7 was designed to arrest the rising tide of economic concentration and to curb, in its incipiency, a lessening of competition made probable by the possession of market power acquired via corporate acquisitions within the scope of § 7." *Allis-Chalmers Mfg*., 414 F.2d at 517.

In this case, public statements by Medco's CEO, David Smith, confirm that the relevant markets are concentrated with only three significant PBM competitors:

> Q… I think, obviously, **everyone's always focused on your two primary competitors**. Are you seeing any **behavioral** changes from the smaller PBMs out there potentially getting more aggressive [on price] or has that behavior been kind of consistent as well?
> A. (Snow)...For the most part, I would tell you that …**I'm not seeing a lot of secondary PBMs in the mix at all. I'm really not.** You may see a name pop up here and there, but that's not really common at all.[6]

Public filings by a smaller PBM, Catalyst, further confirm that relevant markets are concentrated and dominated by the few large PBMs:

> **The industry is highly consolidated and dominated by a few large, profitable, well-established companies** with significant financial and marketing resources, purchasing power and other competitive advantages that we do not have. Scale is a particularly important factor in negotiating prices with pharmacies and drug manufacturers. **A limited number of large firms, particularly the combined Medco Health Solutions, Inc., and Express Scripts, Inc., if the proposed merger between those companies occurs, as well as CVS/Caremark Rx, Inc.,**

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[5] *See also Hosp. Corp. of America v. FTC,* 807 F.2d 1381, 1384, 1392 (7th Cir.1986) (holding that Defendants violated Section 7 where the acquisition increased market share of second largest firm from 14 to 26 percent and increased the market share of the four largest firms from 79 to 91 percent); *United States v. H & R Block, Inc.,* CIV.A. 11-00948 BAH, 2011 WL 5438955 (D.D.C. 2011) (combined market share of less than 30 percent in a concentrated market established a presumption of illegality); *Tasty Baking Co. v. Ralston Purina, Inc*., 653 F. Supp. 1250, 1276-77 (E.D. Pa. 1987) (holding that a combined market share of 34-77 percent established a presumption of illegality warranting the granting of a preliminary injunction and noting that "[n]othing else need be shown to demonstrate that defendants' acquisition impermissibly creates a probable anticompetitive effect"); *Elco Corp. v. Microdot Inc*., 360 F. Supp. 741, 750-52 (D. Del. 1973) (merger resulting in a 31 percent share where concentration among the top two firms would be about 50 percent established a presumption).

[6] Bloomberg Transcript, Medco Q2 2010 Earnings Call, at 12 (July 22, 2010) (emphasis added).

have an aggregate market share of approximately 70% of prescription volume.[7] These statements underscore that the Integration would lead to a "significant increase in concentration," because the Integration would leave only two substantial competitors. Thus, this is a classic "three-to-two" merger—the type of merger that courts have uniformly found unlawful and enjoined. *E.g.*, *FTC v. H.J. Heinz Co.,* 246 F.3d 708 (D.C. Cir. 2001); *H & R Block*, CIV.A. 11-00948 BAH, 2011 WL 5438955 (D.D.C. 2011); *United States v. United Tote*, 768 F. Supp. 1064 (D. Del. 1991); *United States v. Ivaco, Inc.*, 704 F. Supp. 1409 (W.D. Mich. 1989).

Market share data from retail community pharmacies and the conclusions to date of Dr. John Simpson—former FTC economist who has testified in three other merger cases— confirm that market concentration levels resulting from the merger would be well in excess of levels of concentration required to establish a presumption under *Brown Shoe*, *Philadelphia National Bank* and their progeny. Indeed, data show that the combined market share of ESI and Medco in local markets for the Purchase of Retail Community Pharmacy Services are between 29.5 and 61.7 percent in Hawaii, Idaho, Kansas, Kentucky, Michigan, Missouri, North Carolina, Nevada, Ohio, Pennsylvania, South Carolina, Virginia, Vermont, and West Virginia, with CVS Caremark Corp. accounting for much of the remaining shares. Simpson Decl. at 33, Attachment 3. Therefore, the *lowest* estimated combined shares of ESI and Medco are approximately equal to or exceed combined market shares at issue in *Continental Can*, *Philadelphia National Bank*, *Tasty Baking Co.*, *Elco Corp.*, and *H & R Block*. *See also Liggett & Myers, Inc. v. FTC*, 567 F.2d 1273, 1275–76 (4th Cir. 1977) (merger held illegal with a four-firm concentration of 54 percent share and a combined 15 percent share of defendants); *Marathon Oil Co. v. Mobil*

[7] Catalyst Health Solutions 10-K for the year ending December 31, 2011 (emphasis added).

Corp., 530 F. Supp. 315, 323–24 (D.C. Ohio 1981) (four-firm concentration, 53 percent; combined share, 17 percent); *United States v. Amax, Inc*., 402 F. Supp. 956, 959 (D. Conn. 1975) (four-firm concentration, 67 percent; combined share, 6 percent); *In re RSR Corp*., 88 F.T.C. 800 (1976), aff'd 602 F.2d 1317, 1324–25 (9th Cir. 1979) cert. denied, 445 U.S. 927 (1980) (four-firm concentration, 72 percent; combined share, 19 percent.). Dr. Simpson's analysis of market concentration resulting from the merger according to the Herfindahl-Hirschmann Index (HHI) likewise shows that the merger will substantially increase concentration in numerous local markets. Simpson Decl. at 36, Attachment 6.

In the national market for the Provision of Full-Service, Nationwide PBM Services to Large Private Employers in the United States, research by Morgan Stanley (not performed for this case) and Dr. Simpson shows that 42 out of the top 50 "Fortune 50" companies use the Big Three PBMs (ESI, Medco, and CVS Caremark). Simpson Decl. 32, Attachment 2. Of this group, twenty-one use Medco (42 percent) and nine use ESI (18 percent) giving the combined companies a 60 percent share of this group, with CVS/Caremark accounting for another 24 percent. Aside from these three (two after the merger), there is no PBM that serves more than one of the Fortune 50.[8]

Such high post-merger market concentrations establish a prima facie case under Section 7 of the Clayton Act and a presumption in favor of barring the merger. *E.g*., *Tasty Baking Co*., 653 F. Supp. at 1264 (holding that combined market shares ranging from the mid-30s to the 70s in concentrated markets established a presumption of illegality in various local markets and a national market). This presumption may be rebutted only by a showing "that the market-share

[8] Similarly high percentages apply to companies in the Fortune 100, 200 and 300. *See* Complaint at ¶ 108; *see also* Exhibit U, Dissenting Statement of Commissioner Julie Brill

statistics g[i]ve an inaccurate account of the acquisition['s] probable effects on competition." *United States v. Citizens & Southern Nat'l Bank*, 422 U.S. 86, 120 (1975); *United Tote*, 768 F. Supp. at 1068-69. The burden of proof in rebutting this presumption is on Defendants. *Id.*; *Tasty Baking* Co. 653 F. Supp. at 1264.[9]

II. Injunctive Relief is Necessary to Prevent Irreparable Injury to Plaintiffs.

To satisfy the irreparable harm criteria, "a plaintiff must demonstrate potential harm which cannot be redressed by a legal or an equitable remedy following a trial." *Acierno v. New Castle County*, 40 F.3d 645, 653 (3d Cir. 1994) (quotation omitted). "Grounds for irreparable injury include loss of control of reputation, loss of trade, and loss of good will." *Pappan Enters., Inc. v. Hardee's Food Sys., Inc.*, 143 F.3d 800, 805 (3d Cir. 1998). "As a general matter, a 'purely economic injury, compensable in money, cannot satisfy the irreparable injury requirement,' but 'an exception exists where the potential economic loss is so great as to threaten the existence of the movant's business.'" *Minard Run Oil Co. v. United States Forest Serv.*, 670 F.3d 236 (3d Cir. 2011) (quotations omitted).

Pre-merger antitrust cases under Section 7 of the Clayton act often present exceptional cases of irreparable injury because the immediate destruction of a competitor and intermingling of assets, competitively sensitive information, and personnel resulting from the merger immediately and irreversibly reduces competition between the merging parties. *Tasty Baking Co.*, 653 F. Supp. at 1276-77. Mergers that are fully integrated eliminate the acquired party and

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Concerning the Proposed Acquisition of Medco Health Solutions Inc. (Medco) by Express Scripts, Inc. (ESI), FTC File No. 111-0210 at 2-3 (April 2, 2012).

[9] Defendants might argue that the $1 billion dollars in efficiencies that they estimate are enough to rebut the presumption. No court in history, however, has ever found that efficiencies justify an otherwise anticompetitive merger. As a result, Defendants' likelihood of success on this argument is low. *H.J. Heinz Co.,* 246 F.3d at 720-21.

render returning to the precise status quo *ex ante* through post-trial equitable relief highly difficult. Thus, in approving preliminary equitable relief, courts have found that the completion of mergers during the pendency of Section 7 cases "might unduly prejudice the scope of a possible remedy should the merger ultimately be found to violate Section 7." *AlliedSignal, Inc.*, 183 F.3d at 576.

In this case, Integration of the two companies would create an immediate and irreversible harm to competition by destroying Medco and leaving only two significant competitors in the relevant markets. Indeed, the court's concerns in *Tasty Baking Co.* about the harm to competition immediately flowing from a merger also apply here, where "displacement of [Medco's] management and operations personnel" would likely occur; where operational capacity would be lost due to ESI's "assumption of [Medco's] administrative functions;" and where Medco's information "would be learned by [ESI] during the next few months, giving defendants an unfair advantage after divestiture." In fact, the mere transfer of pricing data (including prices paid to pharmacies, paid to drug manufacturers, and charged to plans and patients), information about negotiating strategy, and other terms of competition that vigorous competitors would never disclose to one another in ordinary circumstances would increase the likelihood of anticompetitive coordination between the parties by making Defendants' pricing, costs, and competitive initiatives entirely transparent to one another. *See* U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 7.2 (2010) ("A market typically is more vulnerable to coordinated conduct if each competitively important firm's significant competitive initiatives can be promptly and confidently observed by that firm's rivals."). Because final injunctive relief cannot fully restore competition, denying a temporary injunction requiring a hold separate at this stage would "unduly prejudice the scope of a possible remedy should the merger ultimately be found to violate Section 7." *AlliedSignal, Inc.*, 183 F.3d 568.

Traditional non-antitrust factors provide independent grounds for finding that Plaintiffs would suffer irreparable harm absent a hold separate order and expedited hearings. Specifically, Plaintiffs and the Associations' members already are operating under significant financial strain due to low reimbursement rates in the concentrated market for the Purchase of Retail Community Pharmacy Services. For this reason, Plaintiff Klingensmith Drug was recently forced to close locations and lay off numerous employees. Cippel Decl. ¶ 9. Plaintiff Hometown Pharmacies (Professional Specialized Pharmacies, LLC) has also been forced to close two separate stores in the last eighteen months primarily due to pressures related to poor and even below-cost reimbursements from PBMs. Nairn Decl. ¶ 8. Further cuts to reimbursement rates and diversion of customers to ESI-Medco's proprietary mail-order specialty pharmacies will almost certainly force some Plaintiffs out of business. Bartell Decl. ¶ 8; Drew Decl. ¶ 9; Davis Decl. ¶ 8; Petri Decl. ¶ 8; Cross Decl. ¶ 8; Nairn Decl. ¶ 8; DeCriscio Decl. ¶ 8; Frankil Decl. ¶ 8, Thompson Decl. ¶ 8. Indeed, for essentially every community pharmacy individually participating in this suit, this Transaction would "threaten the existence of [their] businesses." *Minard Run Oil Co.*, 670 F.3d at 255; *see* Hart Decl. ¶ 7; Cippel Decl. ¶ 8; Bartell Decl. ¶ 8; Drew Decl. ¶ 9; Davis Decl. ¶ 8; Petri Decl. ¶ 8; Frankil Decl. ¶ 8; Cross Decl. ¶ 8; Nairn Decl. ¶ 8; DeCriscio Decl. ¶ 8; Narveson Decl. ¶ 7; Thompson Decl. ¶ 8.

Each individual plaintiff and the Associations' members would also suffer irreparable harm in the form of loss of goodwill and reputation because they will be forced to reduce hours and services and will be unable to serve patients who are forced to use ESI-Medco's mail-order and designated specialty drug services. *Bergen Drug Co.,* 307 F.2d 725 (granting a preliminary injunction and holding that permanent loss of business and goodwill resulting from an imminent antitrust harm was "irreparable harm"); *see* Hart Decl. ¶ 7; Cippel Decl. ¶ 7; Wiesner Decl. ¶ 7; Bartell Decl. ¶ 7; Drew Decl. ¶ 8; Davis Decl. ¶ 8; Petri Decl. ¶ 7; Frankil Decl. ¶ 7; Cross Decl. ¶ 7; Nairn Decl. ¶ 7; DeCriscio Decl. ¶ 7; Narveson Decl. ¶ 6; Thompson Decl. ¶ 7.

Finally, one individual plaintiff (Value Drug Company) and various members of the Associations are drug wholesalers and distributors that indirectly sell products and services into the market for the Purchase of Retail Pharmacy Services. Injuries suffered by these plaintiffs cannot be remedied with damages because *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) and its progeny prohibit indirect claims for damages under U.S. antitrust laws.[10] Nonetheless, case law from the Third Circuit recognizes that indirect participants in a market suffer cognizable injuries and can pursue injunctive relief under the antitrust laws. *E.g.*, *In re Warfarin Sodium Antitrust Litig.*, 214 F.3d 395 (3d Cir. 2000). Thus, the injuries of wholesalers and other indirect participants in the market for the Purchase of Retail Pharmacy Services may only be remedied through injunctive relief.

III. Granting Preliminary Injunctive Relief Would Not Harm Defendants

The Court must also analyze the "extent [to which] the defendants will suffer irreparable harm if the preliminary injunction is issued." *Opticians Ass'n of Am. v. Indep. Opticians of Am.*, 920 F.2d 187, 192 (3d Cir.1990) (quotation omitted). "Irreparable harm" has the same meaning for defendants as for plaintiffs, and therefore such "harm must be of a peculiar nature, so that compensation in money alone cannot atone for it." *Kos Pharm., Inc. v. Andrx Corp.*, 369 F.3d 700, 727 (3d Cir. 2004), (quoting *Pappan,* 143 F.3d at 805). Plaintiffs know of no harm to Defendants that would justify denying a temporary freezing of the status quo while the Court

[10] *Illinois Brick* was decided on a buyer-side claim, but cases interpreting it have also found that it applies equally to seller-side claims. *E.g.*, *In Re Beef Indus. Antitrust Litig.*, 600 F.2d 1148 (5th Cir. 1979).

determines whether the Transaction violates Section 7 of the Clayton Act.

IV. Granting Preliminary Injunctive Relief Would Serve the Public Interest

"As a practical matter, if a plaintiff demonstrates both a likelihood of success on the merits and irreparable injury, it almost always will be the case that the public interest will favor the plaintiff." *Am. Tel. and Tel. Co. v. Winback and Conserve Program, Inc.*, 42 F.3d 1421, 1427 n.8 (3d Cir. 1994). Furthermore, preliminary injunctive relief in this case serves two clear and vital public interests: (1) the public interest in effective enforcement of the antitrust laws, which reinforces "a smoothly functioning and unobstructed system of commerce," *Bergen Drug Co.*, 307 F.2d at 727-28; and (2) the public interest in preserving patient health and protecting against the rise in overall healthcare costs.

"Congress made private [antitrust] enforcement 'an integral part of the congressional plan for protecting competition." *California v. Am. Stores Co.,* 495 U.S. 271, 284–85 (1990). Consistent with this goal, the Third Circuit has acknowledged on numerous occasions that evidence of a federal antitrust violation in a private lawsuit may in itself supply a public interest rationale sufficient to justify an injunction. *See*, *e.g.*, *Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 803 (3d Cir. 1989) (discussing various antitrust cases and distinguishing those cases from more stringent standards for other cases). In this instance, Plaintiffs seek to prevent a merger to duopoly and duopsony to protect the interests of small businesses, patients, and plan sponsors. *See, e.g.*, *Brown Shoe Co., Inc. v. United States*, 370 U.S. 294, 316 (1962) (noting that one of the "considerations cited in support of the [Clayton Act was] the desirability of retaining 'local control' over industry and the protection of small businesses").

The issuance of a hold separate (and ultimate injunctive relief) would also serve the vital public interest in improving patient health and lowering overall healthcare costs. Specifically, the Transaction will result in the combined ESI-Medco having sufficient market power to restrict consumer access to retail pharmacies and force consumers to use the firm's proprietary mail-order and specialty pharmacies, which will increase overall health care costs by reducing the beneficial services provided by pharmacies. As an example, approximately half of all patients in the U.S. do not take their medications as prescribed.[11] This results not only in sub-optimal patient health outcomes, but also in as much as $100 billion in excess hospitalizations alone.[12] Frequent access to patients leaves pharmacists well-situated to monitor and counsel patients regarding proper use of prescribed medications. Indeed, one retrospective analysis of data published over 40 years found that in-store face-to-face counseling was the most effective at driving patient adherence.[13] Furthermore, studies have shown that the effect of restricting pharmacy choice by *forcing* patients to mail-order (rather than to local pharmacies), as a combined ESI-Medco would likely increasingly do, can be particularly pernicious.[14]

Healthcare costs for consumers will also go up as a result of the merger because PBMs are not always incentivized to pursue the most cost-effective policies regarding dispensing generics. Dispensing generics is an almost universally accepted effective way to keep healthcare costs down with one study estimating that every 2 percent increase in generic utilization in

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[11] Reed Abelson and Natasha Singer, Pharmacists Take Larger Role on Health Team, NY Times, Aug. 13, 2010, *available at* http://www.nytimes.com/2010/08/14/health/14pharmacist.html.

[12] New England Healthcare Inst., Thinking Outside the Pillbox: A System-wide Approach to Improving Patient Medication Adherence for Chronic Disease, NEHI Research Brief, August 2009, *available at* http://www.nehi.net/uploads/full_report/pa_issue_brief_final.pdf.

[13] Ex. Q, Cutrona et al., *Modes of Delivery for Interventions to Improve Cardiovascular Medication Adherence*, Am. J. Managed Care, 2010; 16(12): 929-942; *see also* Ex. R, Troyen A. Brennan et al., *An Integrated Pharmacy-Based Program Improved Medication Prescription and Adherence Rates in Diabetes Patients*, 31 Health Affairs 120 (Jan. 2012).

[14] Ex. S, Joshua N. Liberman et al., *Adherence to Medication Under Mandatory and Voluntary Mail Benefit Designs*, 17 Am. J. Managed Care e260, e260 (July 2011).

Medicaid saves taxpayers $1 billion annually.[15] However, PBMs like ESI and Medco that have mail-order pharmacies, however, tend to dispense generics at a much lower rate than retail pharmacies.[16] PBMs often dispense expensive brand name drugs rather than generic equivalents because the PBMs have negotiated significant payments and rebates for themselves from manufacturers of those drugs. Generics manufacturers do not offer such financial payments, so PBMs are not incentivized to promote generic drugs in the same way. Given the size of a combined ESI-Medco in terms of lives covered, drug manufacturers will pay even more to guarantee that their brand name medications are on ESI-Medco's formulary, and ESI-Medco will in turn be positioned to increase its dispensing of brand name drugs thereby increasing the overall cost of health care.

Another public interest that would be served by a TRO is the public interest in assuring that health care is widely accessible in the United States. Retail community pharmacists are the healthcare providers most accessible to consumers today. Indeed, pharmacists generally see patients up to four times as often as other health care professionals.[17] Pharmacists play a particularly critical role in rural and otherwise underserved areas – areas where the U.S. faces a considerable physician shortage.[18] In such areas, retail community pharmacists serve as an

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[15] *Savings: An Economic Analysis of Generic Drug Usage in the U.S.*, Generic Pharm. Ass'n, at 1 (Sept. 2011), *available at* http://www.gphaonline.org/sites/default/files/GPhA%20IMS%20Study%20WEB%20Sep20%2011.pdf.

[16] *See* 2010-2011 Prescription Drug Cost and Plan Benefit Design Report at 28, *available at* http://www.benefitdesignreport.com/Portals/0/2010-2011_BDR_R1.pdf.

[17] Andrew Tolve, The Community Pharmacy's Role in Patient Adherence, Eye for Pharma, Oct. 5, 2011, *available at* http://social.eyeforpharma.com/patients/community-pharmacy%E2%80%99s-role-patient-adherence.

[18] Suzanne Sataline and Shirley S. Wang, Medical Schools Can't Keep Up, Wall St. J., Apr. 12, 2010, *available at* http://online.wsj.com/article/SB10001424052702304506904575180331528424238.html; Karen

invaluable resource to patients seeking basic health care services and advice regarding prescription drug usage.[19] The power that a combined ESI-Medco will have to force patients to use mail-order and specialty on certain drugs and to force pharmacies to accept lower reimbursement rates on other drugs, will ultimately restrict consumer access to these services, which will increase overall health costs and result in a lower overall quality of care to patients.

CONCLUSION

For the foregoing reasons, Plaintiffs request that Defendants be (1) ordered to hold separate Medco's assets to preserve the viability of the Medco assets and to protect against the intermingling of competitively sensitive information; and (2) hearings for a preliminary and permanent injunction be expedited.

Cheung, Physician Shortage to Quadruple Within Decade, AAMC Says, Health Leaders Media, Jan. 4, 2011, *available at* http://www.healthleadersmedia.com/page-1/PHY-258409/Physician-Shortage-to-Quadruple-Within-Decade-AAMC-Says##.

[19] For example, 18 percent of all flu shots are now provided by pharmacists, and pharmacists vaccinate difficult to reach patients who do not have a primary care physician. Centers for Disease Control and Prevention, *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6023a3.htm?s_cid+ mm6023a3_w.

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