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

NATIONAL COMMUNITY PHARMACISTS ASSOCIATION; LECH'S PHARMACY; PJL PHARMACY, INC.; MJR, LTD.; MJRRX, INC.; DAVID M. SMITH RPH, INC.; ANBAR, INC.; SELLERSVILLE PHARMACY, INC.; TEP, INC.; VALUE DRUG COMPANY; and VALUE SPECIALTY PHARMACY LLC,

Plaintiffs,

-against-

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

Defendants.

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

Judge Cathy Bissoon

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DEFENDANTS EXPRESS SCRIPTS, INC.'S AND MEDCO HEALTH SOLUTIONS, INC.'S REPLY MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS (Doc. No. 65) PLAINTIFFS' AMENDED COMPLAINT (Doc. No. 62)

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Defendants Express Scripts, Inc. and Medco Health Solutions, Inc. (collectively "Defendants" or "ESI") by and through their undersigned counsel respectfully submit this Reply Memorandum of Law in support of their Motion to Dismiss Plaintiffs' Amended Complaint, stating the following in support:

BACKGROUND

The only claim at issue in this Motion is Plaintiffs' monopsony claim relating to the "lowered reimbursement rates" they allege they will receive in connection with Defendants' purchase of retail community pharmacy services. The Court dismissed this claim without prejudice in response to Defendants' original motion to dismiss based on a lack of antitrust standing – holding that Plaintiffs failed to allege how lower reimbursement rates would flow from any anticompetitive acts, as opposed to being unilaterally set by the merged entity. (Mem. Order (Doc. 60) at 18-19.) The Court provided Plaintiffs leave to amend because the "allegations are never fully fleshed out in the complaint as to the sort of anticompetitive acts in which they expect the merged Defendants to engage." (*Id.* at 19 n.13.) The principal issue raised by this Motion is whether Plaintiffs have added allegations in the Amended Complaint that cure this defect. But there are no changes to the factual allegations, and Plaintiffs repeat the same legal arguments that they made in their prior opposition brief. Consequently, Plaintiffs' claim should be dismissed both because (1) it is barred by the Court's prior ruling, and (2) regardless of the prior ruling, as suppliers to the merged entity, Plaintiffs do not have antitrust standing to complain about the reimbursement rates they expect to receive following the merger. Plaintiffs' claim also should be dismissed because they fail to allege any anticompetitive harm in the downstream market into

which Defendants sell their services, which is an essential element of any antitrust claim brought under a monopsony theory.[1]

ARGUMENT

I. PLAINTIFFS' CLAIM IS BARRED BY THE COURT'S PRIOR RULING

There is no difference in the antitrust injury allegations in the Amended Complaint and those that were set forth in the original Complaint. Plaintiffs are effectively, *sub silentio*, moving for reconsideration of the Court's prior ruling. Plaintiffs attempt to obscure the fact that they are pursuing the identical claim by arguing that "[t]he Amended Complaint corrects this defect by explicitly alleging that the source of Plaintiffs' injury is the agreement between both Defendants as well as their coordinated actions to effect that agreement and close their anticompetitive merger." (Opp. to Mot. to Dismiss (Doc. 68) at 3.) But there was no dispute that the agreement to merge was the source of their purported injury in the initial complaint – otherwise, there would have been no basis for their Section 7 claim. In fact, Plaintiffs' current arguments as to how the merger will cause them harm are virtually identical to the arguments they made in their original opposition.[2]

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[1] In focusing on these defects in Plaintiffs' Amended Complaint, Defendants do not intend to waive any other arguments set forth in their Motion to Dismiss the Amended Complaint.

[2] In their Opposition to ESI's initial Motion to Dismiss, Plaintiffs argued: "The Complaint alleges (1) threatened loss in the form of 'reduce[d] reimbursement for the purchase of retail community pharmacy services' and loss of ability to negotiate terms resulting in 'contractual terms and business behavior detrimental to the pharmacies and competition,' and (2) a direct link between those injuries and the fact that the Transaction will enhance ESI's market power as well as increase the likelihood of coordination. Compl. ¶¶ 129-37. In other words, Plaintiffs allege that the merger will reduce competition in the purchase of retail pharmacy services, which will, in turn, injure Plaintiffs through depressed reimbursement rates and ultimately consumers through reduced quality and output. . . . Plaintiffs in fact state a quintessential monopsony claim

(cont"d)

Whether analyzed under the law-of-the-case doctrine or as an improper attempt to evade the requirements of filing a formal motion for reconsideration, Plaintiffs' attempt to have the Court reconsider its prior ruling should be rejected. *Wallace v. UAW Local 1639*, No. 06–0395–WS–M2007, WL 1589540 at *4 (S.D. Ala. May 31, 2007) ("[I]t is improper pleading to embed what amounts to a motion for reconsideration in an amended complaint. If [plaintiff] seeks reconsideration of a prior ruling . . . she should file a separate motion requesting such reconsideration."); *Ogbudimkpa v. Ashcroft*, 342 F.3d 207, 210 n.7 (3d Cir. 2003) ("'[O]nce an issue has been decided, parties may not relitigate that issue in the same case.'" (citation omitted)).

II. PLAINTIFFS DO NOT HAVE STANDING TO CHALLENGE THE MERGER

There is no basis for reconsideration of the Court's prior ruling because Plaintiffs still have failed to allege facts that would confer them with antitrust standing to challenge Defendants' merger. This fundamental point is made clear in the primary case Plaintiffs rely upon as support for their claim: *West Penn Allegheny Health System, Inc. v. UPMC*, 627 F.3d 85, 102 (3d Cir. 2010), *cert. denied*, 132 S. Ct. 98 (2011). Indeed, as the Court previously found, Plaintiffs have relied upon an inapposite portion of the holding in the case. *West Penn* was not a merger case – the holding that Plaintiffs cite relates to an actual conspiracy to fix reimbursement rates between two separate legal and economic entities in violation of Section 1 of the Sherman Act. As the Third Circuit held in *West Penn* and this Court found in its prior decision, "had the same lowered

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in which a dominant buyer exercises market power to drive rates below the competitive level, which in turn results in reduced quality or reduced output to consumers. *See W. Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, 91 (3d Cir. 2010)." (Opp. to Mot. to Dismiss (Doc. 49) at 10 (emphases added).)

reimbursement rates been paid by insurance company unilaterally, the plaintiffs would have had 'little basis for challenging [them].'" (Mem. Order at 19 (*citing W. Penn*, 627 F.3d at 103).)

In their Opposition, Plaintiffs emphasize that they allege the merger will reduce competition in the PBM market, which will lead to lower reimbursement rates in the upstream market in which Plaintiffs participate. But the Third Circuit also rejected that theory in *West Penn*: "West Penn participates in the insurance market not as a consumer or a competitor but as a supplier – it sells hospital services to insurers. A supplier does not suffer an antitrust injury when competition is reduced in the downstream market in which it sells goods or services." *W. Penn*, 627 F.3d at 102; *see also Serfecz v. Jewel Food Stores*, 67 F.3d 591, 597 (7th Cir. 1995) ("Suppliers to direct market participants typically cannot seek recovery under the antitrust laws because their injuries are too secondary and indirect to be considered 'antitrust injuries.'"); *Ginsburg v. InBev NV/SA*, 623 F.3d 1229, 1234 (8th Cir. 2010) ("Never has a federal court ordered divestiture at the request of a private party who was neither a customer nor a competitor of the merging parties."); *Stamatakis Indus. Inc. v. King*, 965 F.2d 469, 471 (7th Cir. 1992) ("[A] producer's loss is no concern of the antitrust laws, which protect consumers from suppliers rather than suppliers from each other."). Because Plaintiffs' alleged injury stems from their status as sellers of retail community pharmacy services, they do not have standing to challenge the merger in that capacity.

III. PLAINTIFFS FAIL TO ALLEGE MARKET-WIDE HARM IN A DOWNSTREAM OUTPUT MARKET

While Plaintiffs allege that the merger may lead to a reduction in their output, that sort of derivative harm is insufficient to state a claim. An essential element of any antitrust claim brought on a monopsony theory is that the challenged conduct cause anticompetitive harm in a downstream market into which the Defendants sell their services. *See Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 321 (2007) (anticompetitive conduct by a monopsonist in an

input market is unlikely to cause competitive harm if the alleged conduct does not "present a risk of significantly increased concentration in the market in which the monopsonist sells"); *Kamine/ Besicorp Allegany L.P. v. Rochester Gas & Elec. Corp.*, 908 F. Supp. 1194, 1203 (W.D.N.Y. 1995) ("[M]onopsony power *per se* does not create an antitrust concern" if the risk that the monopsonist can simultaneously raise prices to its own buyers "is slight or nonexistent").

Here, Plaintiffs fail even to attempt to allege the merger will cause any competitive harm in a downstream output market for PBM services (or any other downstream market). Plaintiffs' only response is to argue that Defendants have misstated the relevant standard. (Opp. at 18-19.) In a sleight of hand, Plaintiffs argue that Defendants have not cited any monopsony cases applying this requirement in the merger context as opposed to claims under Section 2 of the Sherman Act. But that is because there are no cases in which a merger has been blocked by a private party on a monopsony theory. Plaintiffs themselves fail to cite a single decision involving a Section 7 monopsony claim, much less a decision finding that the economics of a monopsony claim in the merger context somehow differ such that they should be exempt from the requirements that apply to all antitrust claims brought under a monopsony theory. Plaintiffs cite only to consent decrees, which are negotiated agreements rather than court decisions and have no precedential value. *See, e.g., Williams v. Vukovich*, 720 F.2d 909, 920 (6th Cir. 1983) (in the context of a consent decree, the "court has no occasion to resolve the merits of the disputed issues or the factual underpinnings of the various legal theories advanced by the parties"); *U.S. v. Cargill Inc.*, No. Civ.A. 97–CV616L, 1997 WL 599424, at *1 (W.D.N.Y. July 22, 1997) (parties "consent[] to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein, and without this Final Judgment constituting any evidence against or an admission by any party with respect to any issue of law or fact herein"). Again, the principal case upon which Plaintiffs themselves rely as to

the purported standard – *West Penn* – was a Section 1 conspiracy case rather than a Section 7 merger case.[3]

CONCLUSION

For all the foregoing reasons, Plaintiffs' monopsony claim should be dismissed.

Respectfully submitted,

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[3] Plaintiffs also fail to cite a single case in which a merger was enjoined under Section 1 of the Sherman Act. The only case they cite that even relates to such a claim is *United States v. Philadelphia National Bank*, 374 U.S. 321, 324 (1963), wherein the Supreme Court found that the merger violated Section 7 of the Clayton Act and held "we need not, and therefore do not, reach the further question of alleged violation of Section 1 of the Sherman Act."

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