IN THE DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

IN RE: DIRECT PURCHASER INSULIN PRICING LITIGATION

Case No. 3:20-cv-3426-BRM-LHG

Document Filed Electronically

ORAL ARGUMENT REQUESTED

Motion return date: May 3, 2021

PHARMACY BENEFIT MANAGER DEFENDANTS' BRIEF SUPPORTING THEIR RULE 12(b)(6) MOTIONS TO DISMISS THE FIRST AMENDED CLASS ACTION COMPLAINT

(Counsel Listed on Next Page)



Thomas P. Scrivo O'TOOLE SCRIVO, LLC

14 Village Park Road Cedar Grove, NJ 07009 T: (973) 239-5700 tscrivo@oslaw.com

Brian D. Boone (pro hac vice)

ALSTON & BIRD LLP

101 S. Tyron St., Ste. 4000

Charlotte, NC 28280

T: (704) 444-1000

brian.boone@alston.com

John M. Snyder (pro hac vice)

ALSTON & BIRD LLP

950 F. Street, NW

Washington, D.C. 20004

T: (202) 239-3300

john.snyder@alston.com

D. Andrew Hatchett (pro hac vice)

ALSTON & BIRD LLP

1201 W. Peachtree St. NW, Ste. 4900

Atlanta, GA 30309

T: (404) 881-7000

andrew.hatchett@alston.com

Attorneys for Defendants OptumRx, Inc., Optum, Inc., OptumRx Holdings, LLC, *United Healthcare Services, Inc., and UnitedHealth Group*

Kevin H. Marino John D. Tortorella

MARINO, TORTORELLA & BOYLE, P.C.

437 Southern Boulevard Chatham, New Jersey 07928

T: (973) 824-9300 F: (973) 824-8425

kmarino@khmarino.com

itortorella@khmarino.com

Enu A. Mainigi (pro hac vice) Daniel M. Dockery (pro hac vice)

WILLIAMS & CONNOLLY LLP

725 Twelfth Street, N.W. Washington, D.C. 20005

T: (202) 434-5000

F: (202) 434-5029

emainigi@wc.com

ddockery@wc.com

Attorneys for Defendants CVS Health Corporation, CaremarkPCS Health LLC, Caremark LLC, and Caremark RX LLC



Drew Cleary Jordan

MORGAN, LEWIS & BOCKIUS LLP

502 Carnegie Center Princeton, NJ 08540-6289

T: (202) 739-5962 F: (609) 919-6701

drew.jordan@morganlewis.com

Jason R. Scherr (pro hac vice)
Patrick A. Harvey (pro hac vice)
MORGAN, LEWIS & BOCKIUS
LLP

1111 Pennsylvania Avenue, NW Washington, DC 20004

T: 202.739.3000 F: 202.739.3001

jr.scherr@morganlewis.com patrick.harvey@morganlewis.com

Attorneys for Defendants Express Scripts Holding Company, Express Scripts Inc., and Medco Health Solutions, Inc.



TABLE OF CONTENTS

INTR	CODUC	CTION		1					
BAC	KGRO	UND .		2					
LEGA	LEGAL STANDARD4								
ARG	UMEN	VT		5					
I.	THE ANTITRUST CLAIMS AGAINST THE PBMS FAIL RULE 8'S PLAUSIBILITY STANDARD.								
	A.		iffs do not allege that the PBMs participated in a ontal price-fixing conspiracy.	6					
	B.	Plaintiffs fail to allege anticompetitive vertical agreements plausibly violating the rule of reason							
	C.		iffs fail to plausibly allege that the PBMs joined an arching conspiracy" to fix WAC prices.	8					
II.	THE ROBINSON-PATMAN ACT CLAIM FAILS ON ITS FACE12								
	A.	The Robison-Patman Act claims fail because Plaintiffs do not allege a buyer-seller relationship, a fiduciary duty, or sham payments							
	B.	Plaint	iffs lack standing to assert a claim under Section 2(c)	14					
III.	THE RICO CLAIMS FAIL THE APPLICABLE PLEADING STANDARDS								
	A.	Plaint	iffs fail to allege predicate acts of racketeering	16					
		1.	The Anti-Kickback Statute is not a RICO predicate	17					
		2.	A rebate-based AKS violation does not violate the Travel Act.	17					
		3.	Even if the AKS could serve as a RICO predicate, Plaintiffs do not allege an AKS violation.	19					



		4.	Plaintiffs fail to allege mail and wire fraud with particularity.	22			
	B.	Plaintiffs fail to allege proximate causation or injury					
		1.	Plaintiff wholesalers were not directly injured by an alleged RICO scheme premised on the AKS or mail or wire fraud.	27			
		2.	Plaintiffs' failure to allege reliance also defeats their RICO claims predicated on mail and wire fraud	30			
		3.	Plaintiffs fail to allege any concrete financial injury	32			
	C.		ntiffs fail to plausibly allege that each PBM operated and aged a RICO enterprise's affairs rather than its own affairs	33			
	D.		ntiffs fail to allege the existence of a RICO enterprise nct from the alleged racketeering.	38			
IV.	PLA	INTIF	FS FAIL TO ALLEGE A RICO CONSPIRACY	40			
CON	CONCLUSION						



DOCKET

Explore Litigation Insights



Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time** alerts and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.

