SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK, by and through LETITIA JAMES, Attorney General of the State of New York, Plaintiff, -v.- CVS HEALTH CORP., Defendant.	Index No. 452197/2022 Hon. Robert R. Reed Mot. Seq. No. 1 **ORAL ARGUMENT REQUESTED**

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT CVS HEALTH CORPORATION'S MOTION TO DISMISS THE COMPLAINT

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INTRODUCTION

This Court should reject the New York Attorney General's effort to unwind a nationwide transaction that closed five years ago and has, in the interim, brought extraordinary benefits—and hundreds of millions of dollars—to some of New York's neediest health centers.

Five years ago, CVS Pharmacy made a critical change in the way it worked with hospitals and health clinics to maximize the savings those "Covered Entities" received under the federal 340B Drug Pricing Program. Through its acquisition of 340B administrator Wellpartner, Inc., CVS Pharmacy adopted an integrated model through which its Covered Entity customers could realize the financial and regulatory benefits of consolidating 340B-administration services for CVS Pharmacies to increase 340B participation. In doing so, CVS joined the likes of Walgreens, which also employs an integrated model, and other pharmacies that have realized the considerable benefits of joining forces with 340B administrators in similar arrangements. By adopting this model, CVS Pharmacy eliminated compliance risks that had prevented Covered Entities from realizing greater savings; expanded access to pharmacies; and added hundreds of millions of dollars in 340B savings to the coffers of New York Covered Entities.

In bringing this action, the Attorney General ("AG" or "Plaintiff") ignores these measurable benefits, and focuses instead on purported complaints from a handful of Covered Entities supposedly unable or unwilling to use different administrators for different pharmacy chains—even though that is precisely what Covered Entities that contract with Walgreens and other chains already do. Under the guise of an antitrust lawsuit claiming that CVS has engaged in unlawful "tying," the Attorney General now seeks to undo years of nationwide progress by destroying the integrated model, splitting up CVS Pharmacy and Wellpartner, and sending Covered Entities back to a time when CVS pharmacies were extremely limited in the number of Covered Entities they could serve (and, conversely, Covered Entities were extremely limited in the number of CVS

pharmacies with whom they could work). Such relief would harm the Covered Entities on whose behalf the AG purports to bring this action by dramatically decreasing the amount of 340B savings they can realize. But the Court need not wade through the many factual inaccuracies in the AG's Complaint, nor need it consider the extraordinary relief it seeks, because these claims fail as a matter of law to state a claim under the Donnelly Act or the Executive Law.

First, the AG has not pled a viable relevant tying product market.[1] Instead, the AG takes the remarkable position that ***every pharmacy location*** (from a single pharmacy location operated by the nation's largest 340B pharmacy chain, Walgreens, to an independent, mom-and-pop, neighborhood pharmacy) has ***nationwide monopoly power***—a step beyond the roundly rejected "universal monopolist" theory. ***Second***, the AG's assertion that the tying product market is national in scope is unsupported and unsupportable—and it directly contradicts the claim that every pharmacy location is a monopolist of a market consisting solely of that location. ***Third***, the AG's allegations regarding the tied product market cannot support a Donnelly Act claim, because that is not the market in which the AG asserts that harm occurred. ***Finally***, with no viable Donnelly Act claim, there is no basis on which to sustain any claim under the Executive Law.

These deficiencies doom the AG's Complaint and necessitate dismissal with prejudice.

[1] In a tying claim, the "tying" product is the one customers seek to purchase; the "tied" product is the one they allegedly are required to take along with it. *See* *Columbia Gas of New York, Inc. v. New York State Elec. & Gas Corp.*, 28 N.Y.2d 117, 128 (1971).

BACKGROUND[2]

A. Factual Background

The federal 340B Drug Pricing Program allows eligible providers—hospitals and health clinics for underserved populations, known as "Covered Entities"—to buy prescription drugs at discounted prices. Compl. ¶ 25. When a 340B drug is dispensed, the patient's insurance company pays for the drug according to its usual pricing plan. The Covered Entity receives the difference between the insurer-paid drug price and the 340B drug price (minus the costs of administering the 340B program and dispensing the drug), often called "340B savings." Compl. ¶¶ 25-27. Covered Entities may enter into contracts with pharmacies ("contract pharmacies") and 340B program administrators (which the Complaint calls "third-party administrators," or "TPAs") to provide administration services, such as identifying 340B-eligible prescriptions and managing 340B drug inventories. Compl. ¶¶ 6, 7, 42-43. Plaintiff alleges that, as of July 2021, there are 4,441 Covered Entities in New York enrolled in the 340B program. Compl. ¶ 31 & n.10.

In November 2017, CVS Pharmacy, Inc. acquired Wellpartner, Inc.[3] and announced that the companies would offer contract pharmacy and 340B administration services on an integrated basis for CVS contract pharmacy locations. Compl. ¶ 80. Because of the administrative and inventory burdens on pharmacies that participate as 340B contract pharmacies, a number of different pharmacy-administrator models have become common in the industry. For example, Walgreens, the nation's largest pharmacy chain, uses an integrated model, and other pharmacies have an exclusive or preferred relationship with a single administrator. *See*

[2] Well-pled allegations in the Complaint are assumed to be true solely for purposes of this Motion; facts discussed in the Introduction and Background that are not taken from the Complaint are for context; the legal arguments in this Motion do not rely upon them.

[3] Wellpartner, Inc. was converted to an LLC after the acquisition.

https://www.walgreens.com/businesssolutions/payer/340BComplete.jsp. Covered Entities and contract pharmacies face considerable compliance risks under the complex 340B program requirements, so they often turn to 340B program administrators to help navigate the regulatory thicket and manage 340B drug inventory. Compl. ¶¶ 62-63. Integrated models offer Covered Entities a "one-stop shop" where they gain access to contract pharmacies and compliance procedures.

CVS adopted the integrated model using Wellpartner's administration services because that model offers exceptional benefits to Covered Entities, including the potential for dramatically increased 340B savings through expanded access to CVS pharmacy locations. *See* Compl. ¶¶ 71, 84.[4] As the AG concedes, the integrated model applies only to CVS pharmacy locations—Covered Entities remain free to obtain contract pharmacy services from other pharmacies and to use other 340B administrators in connection with non-CVS pharmacies. Compl. ¶¶ 84, 90.

B. The Complaint

Now, nearly five years after the Federal Trade Commission cleared CVS Pharmacy's acquisition of Wellpartner, the AG has sued in an effort to undo the integrated model and unwind that transaction, and with it the extraordinary benefits realized by the Covered Entities the Complaint counts as victims. The Complaint names only CVS Health Corporation, a Delaware holding company with its principal place of business in Rhode Island. CVS Health Corporation had no

[4] Before adopting the integrated model, CVS Pharmacy was effectively unable to offer contract pharmacy services to more than one Covered Entity per store (and therefore unable to offer the savings those services would generate for the remaining Covered Entities) due to the compliance risks associated with doing so. *See* Compl. ¶ 71. While the Complaint severely downplays the compliance risks for pharmacies participating in the 340B program, *see Bays v. Walmart Inc.*, No. 21-0460, 2022 WL 1297097 (S.D. W. Va. April 29, 2022) (lawsuit against pharmacy for data breach by TPA), it is undisputed that CVS Pharmacy routinely refused Covered Entity requests to contract with CVS pharmacy locations before the Wellpartner acquisition. The integrated model cured that problem, enabling CVS pharmacies to contract with any number of Covered Entities (and, conversely, increasing the number of CVS pharmacies with whom many Covered Entities could contract), in many instances increasing the Covered Entities' 340B savings manifold.

involvement in the conduct alleged in the Complaint and is not subject to personal jurisdiction in New York. Rather than burden the Court with a motion seeking dismissal on that basis, undersigned counsel informed the Office of the Attorney General that CVS Health Corporation was not a proper defendant, and the AG has agreed to substitute CVS Pharmacy, Inc. and Wellpartner, LLC as defendants in lieu of CVS Health Corporation.[5]

The Complaint asserts two causes of action: (1) a purportedly anticompetitive "tie" of 340B administration services to CVS's 340B contract-pharmacy services under the Donnelly Act, N.Y. Gen. Bus. L. § 340 *et seq.* and (2) a piggyback claim based on the same alleged conduct under the Executive Law, N.Y. Exec. L. § 63(12). Compl. ¶¶ 113-129.

With respect to the tying claim, the Complaint asserts—as it must, under the governing antitrust law—that "CVS has sufficient economic power in the tying market." Compl. ¶ 116. But the "tying market" the Complaint asserts—"the CVS 340B Contract Pharmacy Market," Compl. ¶ 116—is gerrymandered to exclude the overwhelming majority of contract pharmacies not owned by CVS. To arrive at this crabbed market definition, the Complaint asserts that every contract pharmacy in America—regardless of its size, its lack of affiliation with a national or regional chain, or how many pharmacies it competes with in its immediate vicinity—is a monopolist of a "market" ***that consists solely of that single pharmacy location***. Compl. ¶ 97. The Complaint further asserts—again, as it must, if it is to state any viable claim—that "CVS's conduct has foreclosed . . . competition" in the tied product market, which the Complaint defines as the "340B TPA Services Market." Compl. ¶ 119. Both of these markets, the Complaint says, are national in scope. Compl. ¶¶ 101, 103. In other words, the AG asserts that, from the perspective of a Covered Entity located

[5] The parties agreed this would not waive (1) the AG's ability in the future to bring this claim against CVS Health and (2) CVS Health's objection on personal jurisdiction grounds. The parties expect the substitution to occur shortly.

in Manhattan, the Duane Reade pharmacy located a block away on the one hand is a monopolist, not reasonably interchangeable with any other pharmacy, *see* Compl. ¶ 97, 98, yet on the other hand somehow is equally convenient as a Rite Aid located in Honolulu, Hawaii, *see* Compl. ¶ 101.

Finally, while the Complaint recognizes the need to allege market-wide anticompetitive impact in the tied product market, it fails to do so. Instead of alleging market-wide harm in the asserted "340B TPA Services Market" (which includes TPA services to all Covered Entities, no matter the pharmacies with which they contract), Compl. ¶ 102, the Complaint alleges only harm within the much narrower slice of "TPA services to Covered Entities using CVS," Compl. ¶ 107.

LEGAL STANDARD

New York Civil Practice Law and Rule 3211(a)(7) requires dismissal where "the pleading fails to state a cause of action"; the court "must determine whether the facts as alleged fit within any cognizable legal theory." *Gomez-Jimenez v. New York Law Sch.*, 103 A.D.3d 13, 16 (1st Dep't 2012) (citation omitted). New York Civil Practice Law and Rule 3211(a)(1) requires the Court to dismiss the complaint where "the documentary evidence conclusively resolves all factual issues and [] plaintiff's claims fail as a matter of law." *Robinson v. Robinson*, 303 A.D.2d 234, 235 (1st Dep't 2003). While the court accepts well-pled facts alleged in the complaint as true, "[a]llegations consisting of bare legal conclusions, as well as factual claims [that are] inherently incredible . . . are not presumed to be true." *Biondi v. Beekman Hill House Apt. Corp.*, 257 A.D.2d 76, 81 (1st Dep't 1999) (internal quotation marks omitted). Courts, moreover, are "not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupportable based upon the undisputed facts." *Robinson*, 303 A.D.2d at 235.

ARGUMENT

A. The Complaint Fails To Plead a Donnelly Act Claim

Plaintiff asserts that CVS engaged in an "unlawful tying arrangement" in "[v]iolation of New York's Donnelly Act." Compl. ¶¶ 113-125. That claim is deficient for numerous, independent reasons, each of which requires dismissal. First, in attempting to concoct a "tying" market in which CVS has market power, Plaintiff asserts—but fails to credibly allege—that ***every*** contract pharmacy location in the 340B space is a monopolist capable of forcing Covered Entities to accept unwanted services. Second, Plaintiff fails to credibly support its assertion that the market for an inherently local product (contract pharmacy locations) is actually nationwide in scope. Third, Plaintiff fails to allege anticompetitive harm to the "tied" product market as a whole, as required for a tying claim under the Donnelly Act. For each of these independent reasons, the Court should dismiss the Donnelly Act claim.

1. To State a Tying Claim, Plaintiff Must Allege Two Relevant Product Markets

"Tying" occurs when a seller conditions sales of a product (the "tying" product) upon customers' purchase of another, separate product (the "tied" product). *See* *Columbia Gas of New York, Inc. v. New York State Elec. & Gas Corp.*, 28 N.Y.2d 117, 128 (1971); *Pyramid Co. of Rockland v. Mautner*, 581 N.Y.S.2d 562, 565 (N.Y. Sup. Ct. 1992). Not all tying arrangements violate the antitrust laws. To the contrary, "[m]any tying arrangements . . . are fully consistent with a free, competitive market." *Ill. Tool Works Inc. v. Ind. Ink, Inc.*, 547 U.S. 28, 45 (2006)[6];

[6] The Court of Appeals has instructed that the Donnelly Act "should generally be construed in light of Federal precedent and given a different interpretation only where State policy, differences in the statutory language or the legislative history justifies such a result." *X.L.O. Concrete Corp. v. Rivergate Corp.*, 83 N.Y.2d 513 (1994). Relevant to the claims brought here, "[t]he requirements for pleading 'tying' claims are identical under both the Donnelly Act and the Sherman Act." *Pyramid Co. of Rockland*, 581 N.Y.S.2d at 565.

see also *Jefferson Par. Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 12 (1984) ("Buyers often find package sales attractive; a seller's decision to offer such packages can merely be an attempt to compete effectively—conduct that is entirely consistent with the Sherman Act."). Tying is commonplace in the economy, as "[a]ll but the simplest products can be broken down into two or more components that are 'tied together' in the final sale." *Id.* at 39 (O'Connor, J., concurring). Thus, it is not "illegal to sell cars with engines or cameras with lenses." *Id.* Rather, tying can be unlawful only where a seller has "sufficient power in the tying product market to restrain competition in the market for the tied product." *Ill. Tool Works*, 547 U.S. at 36.

To survive a motion to dismiss on a tying claim under the Donnelly Act, "a plaintiff must allege: 1) two distinct products (a 'tying' product and a 'tied' product); 2) economic coercion; 3) market power in the tying product market; 4) anticompetitive impact in the tied product market and 5) involvement of a not insubstantial amount of commerce." *Pyramid Co. of Rockland*, 581 N.Y.S.2d at 565 (citing *Gonzalez v. St. Margaret's Hous. Dev. Fund Corp.*, 880 F.2d 1514 (2d Cir. 1989)); *Country Pointe at Dix Hills Home Owners Ass'n v. Beechwood Org.*, No. 21545-05, 2008 WL 4547524, at *9 (N.Y. Sup. Ct. Sept. 4, 2008). Plaintiff asserts that the tying product market is the "CVS Contract Pharmacy Market," and the tied product is the "TPA Services Market." Compl. ¶ 95. Plaintiff's allegations as to each of the alleged markets are insufficient to survive a motion to dismiss.

2. The Complaint Fails To Allege a Proper Relevant Tying Product Market in Which CVS Has Market Power

The Donnelly Act requires Plaintiff to properly allege a tying product market, and the possession of power within that market, for good reason: A defendant that lacks market power in the tying product market cannot coerce customers into purchasing the tied product, and thus cannot harm competition. *See, e.g.*, *Pyramid Co. of Rockland*, 581 N.Y.S.2d at 565 ("plaintiff's failure

to adequately allege market power in the tying market renders it incapable of alleging anticompetitive effect in the tied market"); *Columbia Gas*, 28 N.Y.2d at 128 (illegality of tying arrangement depends, among other things, on "power to coerce purchases by controlling the availability of a desired product").[7] Put differently, a tie cannot violate the Donnelly Act if customers have reasonable substitutes for the alleged tying product. "Without the leverage of market power, a seller's inefficient tie-in will fail because a rational consumer will buy the tying product from the seller's competitor." *Kaufman v. Time Warner*, 836 F.3d 137, 143 (2d Cir. 2016). As applied here, if CVS's integrated 340B services improve quality and grow savings compared to the separate services, Covered Entities will choose CVS; otherwise, they will choose competitors.

In light of these principles, Plaintiff's tying claim is plainly deficient. Plaintiff concedes that a Covered Entity may obtain its 340B savings from any pharmacy willing and able to serve as a contract pharmacy. *See* Compl. ¶ 44 ("Since 2010, HRSA has allowed Covered Entities to contract with multiple outside pharmacies to fill 340B prescriptions. The number of pharmacies that contract with Covered Entities under the auspices of the 340B Program grew 4,228% from 2010 to 2020."). Yet Plaintiff forswears the obvious product market definition—all pharmacies capable of serving as contract pharmacies to Covered Entities. The reason is clear: As a matter of law, CVS lacks the market share, in a properly defined market, necessary to support a tying claim. Plaintiff tacitly acknowledges this, never alleging that CVS commands an outsized share of

[7] In *Columbia Gas*, although the Court of Appeals rejected the tying claim, it allowed the claim proceed to trial in part because there would be a trial on other claims in any event. 28 N.Y.2d at 128. Since *Columbia Gas*, caselaw from both New York and federal courts makes clear that "in all cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product." *Ill. Tool Works*, 547 U.S. at 46; *see also Victoria T. Enters., Inc. v. Charmer Indus.*, 881 N.Y.S.2d 570, 572 (4th Dep't 2009) (tying claim "must be supported by proof of power in the relevant market").

contract pharmacies. Indeed, one of the sources upon which Plaintiff relies shows that Walgreens, not CVS, has the largest number of contract pharmacy locations in the United States.[8]

Therefore, in an effort to persuade the Court it has a viable claim, Plaintiff alleges that CVS has 100% monopoly power—not in any properly defined antitrust market, but in a gerrymandered "CVS Contract Pharmacy Market," which simply draws a line around each CVS pharmacy and ignores the overwhelming majority of contract pharmacies in New York and in the nation. But asserting that a defendant's business constitutes the entirety of a relevant market does not make it so—even on a motion to dismiss.

While market definition ordinarily is a question of fact, a plaintiff must nevertheless plead a market that, at a minimum, does not omit "other products available to consumers that are similar in character or use to the products in question"—that is, products that are "functionally interchangeable." *Cont. Guest Servs. Corp. v. Int'l Bus. Servs.*, 939 N.Y.S.2d 30, 34 (1st Dep't. 2012). Courts routinely dismiss Donnelly Act claims at the motion-to-dismiss stage where, as here, a plaintiff's alleged market definition leaves out obvious substitutes. *See, e.g.*, *id.* (dismissing Donnelly Act complaint where defined market left out interchangeable products and therefore "is too narrow a definition to constitute a plausible market"); *Lopresti v. Mass. Mut. Life Ins. Co.*, No. 12719/04, 2004 WL 2364916, at *3 (N.Y. Sup. Ct. Oct. 19, 2004) ("annuity product sold by plaintiff . . . cannot be characterized as a product market in and of itself given the other substitute investment options available").[9]

[8] *See* AIRx340B, *The Impact of Growth in 340B Contract Pharmacy Arrangements – Six Years Later* (Oct. 2020), *available at* https://340breform.org/wp-content/uploads/2021/04/AIR340B_340B-Contract-Pharmacies.pdf, *cited at* Compl. ¶ 44. In New York, one need only walk the streets around the courthouse, where Duane Reade pharmacies (a Walgreens subsidiary) outnumber CVS, to see that CVS lacks market power.

[9] Federal antitrust cases under the Sherman Act are in accord. *E.g.*, *Chapman v. N.Y. State Div. for Youth*, 546 F.3d 230, 238 (2d Cir. 2008) (affirming dismissal of antirust claim where "it is

Allegations of single-brand markets—like Plaintiff's proposed market—are particularly disfavored, and regularly dismissed at the pleading stage. *See, e.g.*, *Victoria T. Enterprises*, 881 N.Y.S.2d at 572-73 (two different brands of vodka were not each separate product markets, but rather part of broader "wine and liquor market").[10] Courts have reasoned that "[i]f the market were so defined, of course [the brand company] would have market power, being the sole seller. But such a narrow definition makes no sense in terms of real world economics, and as a matter of law [a court] cannot adopt it." *Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468, 479-80 (3d Cir. 1992) (en banc).

For instance, in *Truetox Laboratories, LLC v. Healthfirst PHSP*, Justice Borrok recently granted a motion to dismiss a Donnelly Act claim for which the plaintiff attempted to gerrymander the relevant product market for "clinical laboratory services" to include only those services "within [defendant's] network." 129 N.Y.S.3d 728, 2020 WL 4556907 at *4 (N.Y. Sup. Ct. Aug. 6, 2020). Recognizing that "the alleged market must be plausible," the court noted that there was "no reason why laboratory services that currently fall within the Defendants' network are not interchangeable with laboratories that service other healthcare insurers in the same region." *Id.* at *3-4. Based on

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apparent that the proper market" was broader than plaintiffs' alleged market); *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 436-39 (3d Cir. 1997) ("Where the plaintiff . . . alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff's favor, the relevant market is legally insufficient and a motion to dismiss may be granted.").

[10] Again, federal cases dismissing such complaints are legion. *See, e.g.*, *Shaw v. Rolex Watch, U.S.A., Inc.*, 673 F. Supp. 674, 678-79 (S.D.N.Y. 1987) ("[C]ourts have consistently refused to restrict a relevant market to a company's trademarked product. . . . This Court does not need protracted discovery to state with confidence that Rolex watches are reasonably interchangeable with other high quality timepieces."); *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1063-64 (9th Cir. 2001) (affirming dismissal, rejecting plaintiff's "conclusory assertion that the 'UCLA women's soccer program' is 'unique' and hence 'not interchangeable with any other program in Los Angeles'"); *Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.*, 732 F.2d 480, 488 (5th Cir. 1984) ("[A]bsent exceptional market conditions, one brand in a market of competing brands cannot constitute a relevant product market.").

the face of the complaint, the court ruled that "a specific market for clinical laboratory service that is constrained by the Defendants' network," is "simply under-inclusive and too narrow" to survive dismissal. *Id.* at *4.

The same reasoning applies here. Plaintiff alleges a market for certain healthcare services that is artificially limited to only CVS pharmacy locations, yet gives no credible reasons why CVS contract pharmacies are somehow situated differently than the myriad other pharmacies in the same region that offer the same 340B contract pharmacy services to Covered Entities.

Recognizing this conundrum, Plaintiff attempts to justify this single-brand, single-location market based on alleged 340B "anti-steering" prohibitions. In particular, Plaintiff alleges that "[s]ince Covered Entities cannot, by law, steer their patients to a particular pharmacy, and since patients themselves are not generally involved or even aware of the 340B program, CVS has monopoly power as to contract pharmacy services for 340B prescriptions filled at CVS pharmacies." Compl. ¶ 13. Putting aside Plaintiff's misunderstanding about what the Health Resources & Services Administration (HRSA) guidance permits,[11] Plaintiff's argument proves too much. It would mean that every single pharmacy location in America is a monopolist of its own one-store "market," capable of forcing Covered Entities to accept unwanted services.

Plaintiff boldly embraces this extraordinary "market" definition, specifically alleging that "[s]ince a Covered Entity cannot substitute one Contract Pharmacy in response to a price increase, ***each Contract Pharmacy***, such as CVS, that provides substantial savings to a Covered Entity ***is***

[11] HRSA's Patient Choice guidance requires only that a Covered Entity "inform the patient of his or her freedom to choose a pharmacy provider," and that patients be given the opportunity to "obtain the drug(s) from the pharmacy provider of his or her choice." 75 Fed. Reg. 10272-01, 10278 (2010). That guidance does not prevent Covered Entities from encouraging patients to use certain pharmacies through marketing or other efforts.

its own relevant market." Compl. ¶ 97.[12] Therein lies the critical difference between the hordes of cases that reject single-brand markets, and Plaintiff's asserted market definition: Plaintiff goes ***further*** than merely arguing that CVS is a monopolist in its own relevant market,[13] arguing instead that ***every*** contract pharmacy—including small, neighborhood pharmacies such as Downtown Pharmacy (https://340bopais.hrsa.gov/pharmacydetails/18780), an independent, locally owned retail pharmacy located about 0.5 miles from the Courthouse at 165 William Street—is a monopolist.

The implications of such a position are extreme, and blink at reality. As Plaintiff would have it, for example, a tiny, independent neighborhood pharmacy in the area—which, according to Plaintiff, is a "monopolist" of its own one-participant market—could not seek to manage its own 340B administration and drug inventory (rather than working with the TPAs hired by Covered Entities) without incurring antitrust liability for an illegal "tie." And by Plaintiff's logic, that same small, independent neighborhood pharmacy could one day decide to double its prices, and major health systems such as Mount Sinai and NYU Langone—beholden to that pharmacy's "monopoly power"—would have no choice but to accept it. The Court should reject this absurd "Everyone-Is-a-Monopolist" market definition. *See* *Generac Corp. v. Caterpillar Inc.*, 172 F.3d 971, 977 (7th Cir. 1999) ("Not even the most zealous antitrust hawk has ever argued that Amoco gasoline, Mobil gasoline, and Shell gasoline are three separate product markets, yet that absurd result would follow if we recognized Olympian trademarked generator sets as a separate market in this case.").

The Complaint does not allege that even a bare majority of Covered Entities contract with even a single CVS pharmacy location. And the publicly available facts upon which the Complaint

[12] All emphases herein are supplied unless otherwise noted.

[13] Plaintiff's allegations about CVS's relationship with Pharmacy Benefit Manager (PBM) CVS Caremark, Compl. ¶¶ 52-58, are irrelevant to its "Everyone-is-a-Monopolist" market definition, which Plaintiff applies to ***all*** contract pharmacies regardless of PBM relationships.

relies, *see* Compl. ¶ 31 & n.10, show why. Those facts—of which the Court can and should take judicial notice[14]—demonstrate beyond cavil that Covered Entities ***do not*** view every contract pharmacy (or CVS pharmacies in particular) as a "must-have" pharmacy with which they are forced to contract. The HRSA-maintained public database of all contract pharmacy relationships in the United States upon which the Complaint relies, *see* https://340bopais.hrsa.gov, reveals innumerable examples of covered entities that choose not to contract with CVS or other major pharmacies, despite being in close proximity (and therefore likely having patients that use those pharmacies). For example, Community Healthcare Market, headquartered at 60 Madison Avenue with locations around the city, contracts with 82 contract pharmacies, including numerous Duane Reade, Walgreens, and Rite Aid pharmacies, but does not contract with a single CVS pharmacy.[15] In fact, at the time the challenged conduct went into effect, approximately ***86 percent of New York covered entities that used contract pharmacies for 340B savings did not contract with a single CVS pharmacy location***. *See* Office of Pharmacy Affairs Data, June 18, 2018 (current data available at https://340bopais.hrsa.gov/). And 71 percent of New York covered entities did not contract with ***any*** of the major national chains (Walgreens, Walmart, Rite Aid, Albertsons, Safeway, CVS, Ahold, Costco, and Publix). *Id.*

The publicly available data on which the Complaint relies thus show that Plaintiff's market definition is far too narrow to survive, even at this stage. If CVS were a "must have" provider in

[14] *Siwek v. Mahoney*, 39 N.Y.2d 159, 163 n.2 (1976) ("Data culled from public records is, of course, a proper subject of judicial notice."); *LaSonde v. Seabrook*, 933 N.Y.S.2d 195, 199 n.8 (1st Dep't 2011) ("[c]ourt has discretion to take judicial notice of material derived from official government web sites"); *Pyramid Co. of Rockland*, 581 N.Y.S.2d at 566 (in tying case, relying on "plaintiff's own market analysis" in publicly available environmental impact statement, to hold "complaint, fails to identify a proper relevant market as required by the Donnelly Act").

[15] *Compare* https://340bopais.hrsa.gov/cedetails/8840 *with* https://www.cvs.com/store-locator/cvs-pharmacy-locations/New-York/New-York.

this category, its contracts with Covered Entities would reflect that fact. CVS does not have the "power to coerce" Covered Entities to use Wellpartner's administrative services, as required for a tying claim—any Covered Entity that wishes not to use Wellpartner may join the 86 percent of New York Covered Entities that chose not to include CVS in their contract pharmacy network at all. *See* *Columbia Gas*, 28 N.Y.2d at 128; *Pyramid Co. of Rockland*, 581 N.Y.S.2d at 565.

Because Plaintiff fails to allege a proper "tying" market in which CVS has market power, its Donnelly Act claim should be dismissed.

3. The Complaint Fails To Allege a Proper Relevant Geographic Market for the Tying Product

"A plaintiff alleging a violation of the Donnelly Act must identify a proper relevant market," including a proper relevant geographic market that "must include . . . all geographic areas in which such reasonable interchangeability occurs." *Pyramid Co. of Rockland*, 581 N.Y.S.2d at 566. "[F]ailure to sufficiently allege a geographic market is fatal to [a] Donnelly Act claim." *Simon & Son Upholstery, Inc. v. 601 W. Assocs. LLC.*, Nos. 390376-00, 604837-98, 2003 WL 22231540, at *4 (N.Y. Sup. Ct. Aug. 27, 2003). As with product markets, courts dismiss Donnelly Act claims where the complaint's geographic market allegations are implausible or inconsistent with allegations in the complaint. *See, e.g.*, *Pyramid Co. of Rockland*, 581 N.Y.S.2d at 566 (dismissing Donnelly Act claim where "plaintiff's own market analysis" showed "competitors cannot be limited . . . to the geographic area" defined in complaint); *Benjamin of Forest Hills Realty, Inc. v. Austin Sheppard Realty*, 823 N.Y.S.2d 79, 83-84 (2d Dep't 2006) (dismissing Donnelly Act claim where plaintiffs' alleged geographic market was "patently under-inclusive").

Here, Plaintiff alleges "[t]he geographic scope of the CVS Contract Pharmacy Market is the United States," explaining that "a Covered Entity anywhere in the State ***could*** contract with

CVS Specialty and CVS retail stores nationwide." Compl. ¶ 101. This market definition is both implausible and inconsistent with the Complaint's other allegations.

This nationwide market definition cannot be squared with Plaintiff's allegations that "[a] Covered Entity typically seeks to enter into a Contract Pharmacy relationship with a particular pharmacy based on the volume of the Covered Entity's patients' prescriptions filled at that pharmacy," Compl. ¶ 9, and "regardless of a Covered Entity's network of Contract Pharmacies, patients continue to fill scripts at their preferred pharmacy—usually the pharmacy most convenient to where they live or work," Compl. ¶ 8. It cannot be simultaneously true that, on the one hand, every pharmacy location constitutes its own relevant market because patients of a Covered Entity who live near that pharmacy will tend to fill their prescriptions there and, on the other, that the market is national in scope.

Thus, while it is theoretically possible that a Covered Entity in New York ***could*** contract with a CVS pharmacy in Iowa, that assertion defies common sense and does not reflect the market realities alleged in Plaintiff's complaint. *See* *FTC v. Advocate Health Care Network*, 841 F.3d 460, 476 (7th Cir. 2016) ("[T]he relevant geographic market does not include every competitor. It is the area of ***effective*** competition." (internal quotation marks omitted)). Plaintiff's own allegations suggest the geographic market is local, not national. *See* *Mathias v. Daily News, L.P.*, 152 F. Supp. 2d 465, 483 (S.D.N.Y. 2001) (dismissing claim for failure to define "precise geographic market" where plaintiffs made "contradictory" allegations of "narrow, 'tri-state area' market" and "broader national market" (citation omitted)).

Plaintiff's alleged market is also inconsistent with numerous cases involving hospitals, such as those that participate in the 340B program. For instance, in *Advocate Health Care Network*, the Federal Trade Commission proved that "Eighty percent of those patients drive less than

20 minutes or 15 miles to their chosen hospital. Ninety-five percent of those patients drive 30 miles or less . . . to reach a hospital." 841 F.3d at 474. Similarly, in *FTC v. OSF Healthcare System*, 852 F. Supp. 2d 1069 (N.D. Ill. 2012), the court found that "the area encompassing a 30-minute drive-time radius from [the hospital] is an appropriate geographic market to use in this case." *Id.* at 1077. Given Plaintiff's allegation that patients "usually" use "the pharmacy most convenient to where they live or work," Compl. ¶ 8, it would be incongruous for the relevant market for hospitals to be inherently local, and yet the market for contract pharmacies to be national. Plaintiff has provided no allegations that explain that incongruity.

Because Plaintiff's inconsistent allegations do not support a national market for contract pharmacy services to New York Covered Entities, the Court should dismiss the Donnelly Act claim.

4. The Complaint Fails To Allege Market-Wide Anticompetitive Impact in the Tied Product Market

Plaintiff's tying claim suffers from another fundamental problem. The Donnelly Act requires "market-wide" anticompetitive effects to state a claim. *Global Reinsurance Corp. U.S. Branch v. Equitas Ltd.*, 18 N.Y.3d 722, 733 (2012). Yet Plaintiff's complaint never alleges any market-wide anticompetitive impact in the "tied" product market it defines—TPA services. Instead, its allegations are limited to a small subset of the defined TPA services market—"TPA services ***to Covered Entities using CVS***." Compl. ¶ 107.

The Court of Appeals instructs that dismissal is proper "where the complaint simply does not allege a [defendant's] basic capacity to inflict *market-wide* anticompetitive injury." *Global Reinsurance Corp.*, 18 N.Y.3d at 733 ("It is market-wide effect that is crucial to an antitrust claim under the Sherman Act or Donnelly Act."); *see also Cenedella v. Metro. Museum of Art*, 348 F. Supp. 3d 346, 362 (S.D.N.Y. 2018) (dismissing Donnelly Act claim where "plaintiff does not plead

facts indicating how the alleged conspiracy affects New York City's contemporary art market as a whole"). In the context of a tying claim, it is the "tied" product market in which this impact must be alleged. *Pyramid Co. of Rockland*, 581 N.Y.S.2d at 565; *see* Country Pointe, 2008 WL 4547524, at *9 (dismissing tying claim where Plaintiff failed to alleged how arrangement impaired competition in "market as a whole, as opposed to simply having a claimed adverse effect on the Country Pointe homeowners"). Put another way, "[f]or a tie to create an anticompetitive effect there must be 'a substantial threat that the tying seller will acquire market power ***in the tied product market***.'" *In re Wireless Tel. Serv. Antitrust Litig.*, 385 F. Supp. 2d 403, 424 (S.D.N.Y. 2005) (quoting *Jefferson Parish*, 466 U.S. at 38). While Plaintiff acknowledges it must plead that "CVS's conduct has foreclosed, and continues to foreclose, competition in the ***340B TPA Services Market***, affecting a substantial volume of commerce in this market," Compl. ¶ 119, beyond this conclusory assertion, the Complaint has failed to do so.

The reason for this failure is that Plaintiff's claim is fundamentally inconsistent: Although Plaintiff has gerrymandered the definition of the tying product market to include only ***CVS*** Contract Pharmacies, its tied market definition is for ***all*** TPA services, regardless of the contract pharmacy being used. Given these inconsistent markets, Plaintiff does not, and cannot, allege that the CVS/Wellpartner integrated offering has market-wide effects in the tied product market. Instead, Plaintiff alleges only that "[t]his tie has foreclosed other providers of 340B Program TPA services from competing to provide ***340B Program TPA services to Covered Entities using CVS retail and specialty Contract Pharmacies***." Compl. ¶ 107. This allegation ignores TPA services for the 86% of New York Covered Entities that chose not to contract with CVS pharmacies. *See supra,* p. 14. And Plaintiff concedes that even the small percentage of Covered Entities that use CVS pharmacies can and do use other TPAs for non-CVS pharmacies. Despite allegations of "spillover

effects" based on Plaintiff's view that "Covered Entities do not like to work with multiple TPAs," Plaintiff admits that some Covered Entities "continued to work with their legacy TPA for all pharmacies other than CVS pharmacies." Compl. ¶ 90, 107.

Most telling is what Plaintiff does ***not*** allege. It has been almost five years since CVS Pharmacy acquired Wellpartner and began offering an integrated solution. Yet Plaintiff provides ***no*** allegations that the asserted TPA services market is any less robust in terms of competitors. Plaintiff has ***not*** alleged that the "tying arrangements have driven numerous [TPAs] from the market, have deterred entry into the [TPA] market, [or] have had deleterious effects on the development of [TPA] technology," as some courts have found sufficient to survive a motion to dismiss. *See In re Wireless Tel. Serv. Antitrust Litig.*, 385 F. Supp. 2d at 424. Just the opposite—Plaintiff's allegations show that Covered Entities continue to have a multitude of choices in this space, "includ[ing] Wellpartner, Sentry, RxSolutions, MacroHelix, and others." Compl. ¶ 103; *see Jefferson Parish*, 466 U.S. at 38 (O'Connor, J., concurring) (no threat to competition exists "if the tied-product market is occupied by many stable sellers who are not likely to be driven out by tying").

Because Plaintiff has failed to allege market-wide effects in the alleged tied product market, its Donnelly Act claim should be dismissed.

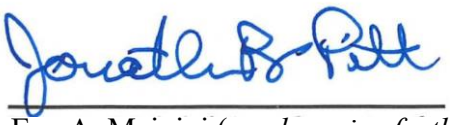
B. The Executive Law Claim Should Be Dismissed Because It Rises and Falls with the Donnelly Act Claim

New York Executive Law § 63(12) requires "repeated fraudulent or illegal acts or otherwise demonstrate persistent fraud or illegality in the carrying on, conducting or transaction of business." Plaintiff does not allege any fraud or illegality other than the alleged violation of the Donnelly Act. Compl. ¶ 127. Therefore, because the Donnelly Act claim should be dismissed for several independent reasons, so too should the Executive Act claim.

CONCLUSION

For the foregoing reasons, the Court should dismiss the claims with prejudice.

Dated: September 19, 2022



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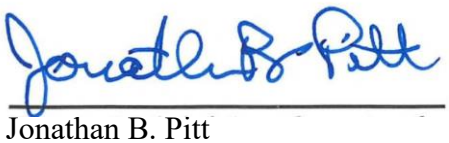
WORD COUNT CERTIFICATION

I hereby certify that, pursuant to Rule 17 of the Rules of the Commercial Division of the Supreme Court, the above Memorandum of Law in Support of Defendant CVS Health Corporation's Motion to Dismiss contains 6,342 words, exclusive of the caption, table of contents, table of authorities, and signature block.

Dated: September 19, 2022



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