SUPREME COURT 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

I.A.S. Part 43

Hon. Robert R. Reed

Mot. Seq. No. 1

ORAL ARGUMENT REQUESTED

PLAINTIFF STATE OF NEW YORK'S MEMORANDUM OF LAW
IN OPPOSITION TO CVS' MOTION TO DISMISS THE COMPLAINT

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PRELIMINARY STATEMENT

The New York Attorney General, on behalf of the People of the State of New York, brings this action to enjoin and remedy CVS' ongoing efforts to suppress competition in violation of New York's antitrust law, the Donnelly Act, and New York's Executive Law. Specifically, the Complaint alleges that CVS engages in an anticompetitive tie: it forces New York safety net hospitals and other health care providers ("Covered Entities") in the federal 340B Drug Pricing Program ("340B Program") to also purchase administrative services from CVS' recently-acquired subsidiary, Wellpartner LLC ("Wellpartner"), as a condition to contracting with CVS pharmacies to process 340B-eligible prescriptions filled at CVS pharmacies.

New York has properly alleged relevant product and geographic markets, as well as the elements of *per se* and (in the alternative) rule of reason tying claims under the Donnelly Act. The alleged tying and tied markets are clearly distinct products. There is economic coercion. CVS has market power in the tying market. The tie-in has resulted in exclusion of numerous competitors from the tied market. And, there has already been millions of dollars of harm, which far exceeds the *de minimis* requirement of a "not insubstantial amount of commerce." CVS is quite simply abusing its market power in one product to force hospitals and other Covered Entities to buy a second product that they do not want. This constitutes unlawful tying under antitrust law.

New York alleges that CVS has no competition in the relevant product market because that reflects market reality. *Brown Shoe Co. v. United States*, 370 U.S. 294, 325. This market is unusual: Because of the way this market is structured – by regulation and for practical reasons – a Covered Entity that benefits from including CVS in its contract pharmacy network simply cannot substitute another contract pharmacy for CVS. More specifically, the market here is properly defined as a single brand market because the operation of the 340B program is largely invisible to patients and provides them with no personal incentive to select any particular pharmacy, and because the 340B regulatory structure and anti-kickback statutes prevent Covered Entities from steering patients to – or away from –

a particular pharmacy. These factors mean that, from the perspective of a Covered Entity, there is and can be no substitute for CVS. Or, as economists would put it: cross-elasticity of demand is at or near zero. Without a contract with CVS, Covered Entities that have a significant number of patients who choose to go to CVS locations – or who use CVS mail order or CVS specialty pharmacy services – simply lose out on precious funds that they need for their operations with respect to those patients.[1] Under such circumstances, "the law permits an antitrust claimant to restrict the relevant market to a single brand of the product at issue." *US Airways, Inc. v. Sabre Holdings Corp.*, 938 F.3d 43, 64 (2d Cir. 2019).[2]

New York's allegation that the tying market is national in geographic scope also reflects market reality. In addition to retail, CVS offers mail order and specialty pharmacy services, which operate on a nationwide basis. Complaint ¶¶ 1, 50, 101. Moreover, CVS implemented the tie-in policy nationwide. *Id*. ¶ 84. New York's geographic market definition is both accurate and conservative. Here, because CVS faces no competition in the relevant product market, the relevant geographic market has less relevance than it might in other markets with multiple competitors. There is no inconsistency in how New York pleaded the relevant geographic markets, nor would it change much if the relevant market were analyzed as a statewide market instead.

CVS' motion mischaracterizes New York's civil *conduct* enforcement action as a *post hoc* merger challenge. This is not correct, and it is a distraction. New York challenges CVS' conduct, not the merger. Although the prayer for relief does seek divestiture as one of the forms of injunctive relief that might be necessary to ensure that CVS does not repeat its misdeeds, this case is not at its core an attempt to "unwind a merger." There is no authority for the suggestion that divestiture is only a remedy for antitrust merger cases. New York seeks sufficient injunctive relief (including a prohibitive

[1] For purposes of this antitrust lawsuit, it is the Covered Entities who are the consumers – in both the tying and tied markets.
[2] Given that the Donnelly Act is usually interpreted consistently with federal antitrust law, it is notable that CVS does not cite or discuss *US Airways* at all in support of its motion.

injunction and divestiture of Wellpartner), as well as equitable monetary relief (i.e., restitution and/or disgorgement of ill-gotten gains), as necessary, to ensure that justice be done. *See FTC v. Shkreli*, 581 F.Supp.3d 579, 638-43 (S.D.N.Y. 2022) (enjoining anticompetitive misconduct, banning defendant from the industry for life, and awarding disgorgement in excess of $64 million, based on federal and New York law).

In short, CVS has unlawfully used its leverage to force many Covered Entities to purchase unwanted TPA Services from its subsidiary, Wellpartner. Contrary to its unsupported statements to the Court, CVS implemented this tying scheme not for any procompetitive purpose, but, rather, to make hundreds of millions of dollars in unjust profits, at the expense of the Covered Entities and the communities they serve. This is a classic anticompetitive tying arrangement, and it should be enjoined.

BACKGROUND

The federal 340B Program provides hospitals and clinics (known as "Covered Entities") with a subsidy, based on the number and kinds of prescriptions that their patients fulfill. Complaint ¶ 27. The program is unusual, starting with the fact that the subsidy is paid by participating pharmaceutical companies, not by the federal or state government. *Id*. at ¶ 25. Another feature that makes this market unusual is that the patient – the person who decides where to have the prescription filled – is typically unaware that their prescription is classified as a 340B prescription, and the patient gets no benefit under the program. *Id*. at ¶ 28. Rather, it is a Covered Entity's job to track and submit all the necessary documentation, without any help or input from the patient. *Id*. at ¶¶ 33-35. Moreover, laws and regulations prohibit a Covered Entity from directing, or "steering," patients to (or away from) particular pharmacies.[3] *Id*. at ¶¶ 8-9, 13, 30, 33, 38-41, 51, 58, 93, 97-99. And, if the patients go to a pharmacy other than the Covered Entity's own in-house pharmacy, which is often the case, then the Covered

[3] There is no merit to CVS' unsupported suggestion that the HRSA's Patient Choice guidance somehow does in fact permit steering. Def. Mem. at 12 & n.11. The comment on the regulation on which CVS relies plainly says the contrary, i.e., that patients cannot be steered.

Entity can only collect the 340B Savings from pharmaceutical companies if the Covered Entity has a special contract with that store or brand of pharmacy. *Id.* at ¶¶ 26, 43-46. These are known as "contract pharmacies." *Id.* ¶ 6.

Thus, patients go where they choose to go – without steering by the Covered Entity or any independent incentive related to 340B – and Covered Entities need a contract with the chosen pharmacy to obtain the 340B benefit. These real-world conditions create a distinct market for CVS-brand contract services, i.e., the "CVS Contract Pharmacy Market." *Id.* at ¶¶ 97, 99. The accuracy of this product market definition is easily illustrated by the example of a Covered Entity's patient who chooses to go to a CVS store to fulfill their prescription. If that Covered Entity does not have a contract with CVS, then the Covered Entity cannot collect the benefit. *Id.* at ¶ 98. A Covered Entity cannot, for example, try to recover the benefit under a contract with Walgreens or a local pharmacy for a patient who went to CVS. *See id.* at ¶ 29. Nor can it even gently ask the patient to avoid CVS. *Id.* at ¶ 38-41, 55.

From the perspective of the Covered Entity, there is therefore no substitute for CVS. *Id.* at ¶¶ 13, 51, 86-90,97-99. Cross-elasticity of demand in the CVS Contract Services Market is at or near zero. *Id.* at ¶ 99. These circumstances are not the result of the Covered Entities' preferences or choices. *Id.* at ¶ 13. Rather, the lack of substitution arises from this highly regulated industry's structure. *Id.* at ¶ 98. The CVS Contract Services Market is therefore appropriately limited to a single brand, and CVS necessarily has market power in that market. *Id.* at ¶¶ 96-100.

Even with a contract, the Covered Entities do not receive the 340B benefit automatically. *Id.* at ¶ 42 & p.14 (flow chart). Rather, they must ensure that each prescription is eligible under the rules of the 340B program and does not result in a "duplicate" Medicaid rebate, and the Covered Entities must maintain appropriate electronic documentation of these processes that is subject to audit by HRSA. *Id.* at ¶¶ 34-35. Covered Entities also bear one hundred percent of the legal risk of errors. *Id.* at ¶¶ 36, 62. Therefore, Covered Entities typically engage a third party, known as a "Third Party Administrator" or

"TPA," to administer the program with the contract pharmacies, and to keep records in case of an audit. *Id*. at ¶¶ 59-60. There is a relevant product market for TPA services, i.e, the "TPA Services Market." *Id*. at ¶ 102. One of the TPAs in this market is Wellpartner. *Id*. at ¶ 103. Both the TPA Services Market and the CVS Contract Services Market are national in geographic scope. *Id*. at ¶¶ 101, 103.

As soon as CVS purchased Wellpartner in 2017, CVS used its market power to tie Wellpartner's often unwanted services to the CVS Contract Services Market. Complaint ¶¶ 75, 84. It began requiring Covered Entities to use Wellpartner if the Covered Entity wanted to have a 340B services contract with CVS. *Id*. at ¶¶ 75, 80-81, 84, 93. Many Covered Entities in New York therefore had to switch from their preferred TPA to Wellpartner. *Id*. at ¶¶ 85-89. Regardless of the Covered Entities' preferences, they had little choice since the alternatives were either to pay for duplicative fees for multiple TPAs (with added regulatory risk), or entirely forgo collecting the 340B Savings for patients who choose to go to CVS. *Id*. at ¶¶ 2, 76, 90-91. Competition was and continues to be harmed by the exclusion of other TPAs as a result of this tie. *Id*. at ¶ 94, 107.

When CVS began implementing its anticompetitive tie-in scheme, it discarded a project it already had well under way to build a "backbone" with the help of Sentry, another TPA, which would have allowed multiple Covered Entities to contract with CVS for services at the same location – something that CVS previously did not do. *Id*. at ¶¶ 71-72. The Sentry backbone would have been a substantially less restrictive alternative to achieve any purported procompetitive goal of CVS' tying scheme because it would have left the TPA market unencumbered, allowing Covered Entities to use numerous competing TPAs, not just the one owned by CVS. *Id*. at ¶¶ 72, 74. But CVS rejected this pro-competitive alternative in favor of its scheme to profit unjustly by reducing competition. *Id*. at ¶ 74.[4]

[4] CVS' arguments concerning Walgreens, Defs. Mem. at 3-4, 9-10, are misplaced because Walgreens' conduct is irrelevant to CVS' wrongdoing. In any event, the website cited by CVS does not support their assertion that Walgreens also requires Covered Entities to use a single TPA. If CVS is aware of other wrongdoing that we do not know, they know how to reach the Antitrust Bureau to file a complaint.

LEGAL STANDARD

New York's pleadings must be liberally construed. CPLR § 3026. The question is whether "from [the Complaint's] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (1977); *see also Bovino v. Village of Wappingers Falls*, 215 A.D.2d 619, 620 (2nd Dep't 1995). "The facts pleaded are to be presumed to be true and are to be accorded every favorable inference, although bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration." *Doria v. Masucci*, 230 A.D.2d 764, 765 (1996) (citing *Morone v. Morone*, 50 N.Y.2d 481, 484 (1980)); *see also Bovino*, 215 A.D.2d at 620. Moreover, whether the complaint will later survive a motion for summary judgment, or whether the Plaintiff will ultimately be able to prove their claims at trial, play no part in the determination of a pre-discovery CPLR § 3211(a)(7) motion to dismiss. *See EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 19 (2005).

In most contexts – including the law of tie-ins – New York's antitrust law, the Donnelly Act, is interpreted consistently with federal antitrust law and precedent. *Anheuser-Busch, Inc. v. Abrams*, 71 N.Y.2d 327, 335 (1988) ("[T]he Donnelly Act . . . should generally be construed in light of Federal precedent and given a different interpretation only where State policy, differences in statutory language or the legislative history justify such a result."); *Pyramid Co. of Rockland v. Mautner*, 581 N.Y.S.2d, 153 Misc. 2d 458, 462 (N.Y. Sup. Ct. 1992) (noting that "[t]he requirements for pleading 'tying' claims are identical under both the Donnelly Act and the Sherman Act"). Since market definition is necessarily fact specific, courts hesitate to grant motions to dismiss on the basis of market definition, unless "the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand," or fails to take into account real-world "interchangeable substitute products." *Chapman v. New York State Div. for Youth,* 546 F.3d 230, 238 (2d Cir. 2008) (quoting *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 436 (3d Cir. 1997)).

ARGUMENT

A plaintiff asserting a *per se* antitrust tying claim "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.*, 581 N.Y.S.2d at 565, 153 Misc. 2d at 462 (citing *Gonzalez v. St. Margaret's Hous. Dev. Fund Corp.*, 880 F.2d 1514 (2d Cir. 1989)).

New York's Complaint satisfies all five elements. First, New York alleges that "[t]he relevant markets at issue in this lawsuit are (1) the CVS Contract Pharmacy Market; and (2) the TPA Services Market," which are unquestionably distinct products. Complaint ¶¶ 95-103. Second, the Complaint alleges economic coercion. *Id.* at ¶¶ 74-76, 86-90, 106, 116-117. Third, New York expressly alleges that CVS has market power in the tying product market. *See id*. at ¶¶ 13, 49, 52-58, 76, 96, 99, 100, 116-18. Fourth, the Complaint alleges market-wide anticompetitive impact in the tied market, the TPA Services Market. *See, e.g., id.* at ¶¶ 3, 14-16, 74, 86-7, 90, 94, 100, 107-108 (Covered Entities switched away from Wellpartner's competitors in the TPA Services Market). Fifth, there are allegations of a "not insubstantial amount of commerce." *Id*. at ¶ 87 (individual Covered Entities claiming up to $1.4 million in otherwise avoidable costs caused by CVS' tying scheme); ¶ 108 ("A not insubstantial volume of commerce is affected by CVS' tie", involving "[h]undreds of Covered Entities"). This is far in excess of the *de minimis* amount under the standard. *See Gonzalez*, 880 F.2d at 1518 ("$600,000 of commerce clearly meets 'any test of substantiality'") (quoting *Yentsch v. Texaco, Inc.*, 630 F.2d 46, 58 (2d Cir. 1980)).

The only serious question raised by CVS is whether New York erred by pleading a single brand tying market, *i.e.*, a tying market that includes only the CVS brand of contract pharmacies. To begin, any dismissal on this basis would be premature: "Because market definition is a deeply fact-intensive inquiry, courts hesitate to grant motions to dismiss for failure to plead a relevant product market." *Chapman*, 546 F.3d at 238 (quoting *Todd v. Exxon Corp.*, 275 F.3d 191, 199-200 (2d Cir. 2001));

accord Brown Shoe Co., 370 U.S. at 325 (identifying factors that inform the market definition analysis including "the product's peculiar characteristics and uses, . . . distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.")

Here, the Complaint clearly alleges a product market with reference to both the rule of "reasonable interchangeability of use" as well as to "cross-elasticity of demand," and therefore should not be dismissed on the pleadings. *Brown Shoe*, 370 U.S. at 325; Complaint ¶¶ 13, 51, 86-90, 97-99 (interchangeabililty); ¶ 99 (cross-elasticity of demand "at or near zero"). But, even assuming *arguendo* that market definition can be a basis for dismissal, New York's product market accurately reflects the real-world operation of the 340B program, which was created by statute and is subject to myriad regulatory strictures. The bulk of CVS' remaining arguments are derivative of the single brand product market question.

A. Single Brand Product Markets in Antitrust Law

It is well-established that single brand product markets are sometimes appropriate in antitrust cases, including in tying cases. *See, e.g., US Airways,* 938 F.3d at 66 (quoting *Brown Shoe*, 370 U.S. at 325). This is such a case.

"A relevant market must include all products that are reasonably interchangeable and all geographic areas in which such reasonable interchangeability occurs." *Pyramid Co*., 581 N.Y.S.2d at 565, 153 Misc. 2d at 463 (citing *Brown Shoe*, 370 U.S. 294). "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe*, 370 U.S. at 325. The relevant product market "includes the product or service at issue as well as its substitutes." *US Airways, Inc.,* 938 F.3d at 66 (citing *Brown Shoe*, 370 U.S. at 325).

It is well established that "*a single brand of a product or service may be a relevant market* under [antitrust law] … *if no substitute exists* for that brand's products or services." *US Airways*, 938 F.3d at 66 (quoting *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 482 (1992))

(emphasis added); *see also* *FTC v. Shkreli*, 581 F. Supp. 3d 579, 626 (S.D.N.Y. 2022). For example, in *US Airways*, the court found that "US Airways sufficiently pleaded that there are no viable substitutes available to the travel agents who use Sabre's services," and therefore permitted a single brand product market definition. *US Airways,* 938 F.3d at 66.

The argument for a single brand market is even stronger here than in *US Airways*. In that case, the Second Circuit reinstated an improperly dismissed counterclaim by US Airways concerning Sabre Holdings' "GDS" airline reservation platform for travel agents, alleging a single brand market which it defined as "the distribution of GDS services to Sabre subscribers." *Id.* at 64-65. Overruling the District Court, the Second Circuit held that US Airways had sufficiently pleaded a single brand product market based on the facts that "travel agents are locked into the Sabre platform" because of "prohibitively high costs of switching" and the "incentive payment structure." *Id.* at 66. Based on these allegations, the court held that US Airways had "successfully alleged that the Sabre platform is not interchangeable with other booking alternatives," and that "there is thus no 'cross-elasticity of demand between the product itself and substitutes for it.'" *Id.* (quoting *Brown Shoe*, 370 U.S. at 325).

Here, New York also alleges, in detail, that Covered Entities have no substitute for CVS in the Contract Pharmacy Market. Complaint ¶¶ 13, 51, 86, 90, 97-99. The case for a single brand product market is even stronger here than in *US Airways* because New York alleges *total exclusion* of competitors from the market. Complaint ¶¶ 12, 82, 84. In contrast, US Airways was permitted to assert a single brand market claim based on "high costs of switching" and Sabre's "incentive payment structure," which are presumably only partial barriers – rather than the absolute bar on competitors, like here. *US Airways*, 938 F.3d at 66.

Specifically, the Complaint alleges that there are no substitutes for CVS in the tying market, in part because of the so-called "Anti-Steering Rule" that prohibits Covered Entities from directing patients to particular pharmacies over others. Complaint ¶¶ 8, 13, 30, 33, 38, 40, 41, 48, 51, 58, 93, 97-99. New York therefore alleges that "[b]ecause Covered Entities cannot steer their patients from CVS

to another pharmacy, the cross-elasticity of demand for CVS 340B retail and specialty Contract Pharmacy services and any potential alternative Contract Pharmacy is at or near zero." Complaint ¶ 99; *compare US Airways, Inc.*, 938 F.3d at 66 ("cross-elasticity of demand for Sabre GDS service and any potential alternative is at or near zero"). Aside from the federal Anti-Steering Rule, the Complaint also alleges that steering is in practice prohibited by Covered Entity's concern about violating federal or state anti-kickback statutes. Complaint ¶¶ 41, 98.

Even if the Anti-Steering Rule and anti-kickback statutes did not bar Covered Entities from influencing their patients' choice of pharmacy, hospitals and other Covered Entities would be hard-pressed to direct patient pharmacy choice. After all, patients generally do not know what the 340B program is, or that their prescriptions are somehow involved with the program. *See id.* ¶¶ 13, 28, 97. Moreover, patients have no personal financial incentive to change their choice of pharmacy, since patients do not get any portion of the 340B benefit themselves. Complaint ¶¶ 28. The patients' lack of visibility into the operation of the 340B program, and lack of personal incentive, combined with the Anti-Steering Rule and anti-kickback statutes, make substitution impossible. *Id.* ¶ 29-30.

CVS glosses over the Anti-Steering Rule by mis-citing federal Health Resources Service Administration ("HRSA") guidance that actually supports New York's allegations. CVS does not address New York's other bases for alleging that there is no substitution – i.e., that patients have no knowledge or incentive, as well as anti-kickback statutes – separate from the Anti-Steering rule. The other authorities cited by CVS are inapposite because they involved industries where there clearly were substitutions, or for other reasons, such as vagueness, that are not pertinent here. CVS does not raise or discuss the leading relevant authority, *US Airways,* at all.

To begin, even CVS had to acknowledge that HRSA's guidance on the rule specifically enshrines the patient's "freedom to choose a pharmacy provider" and right to select "the pharmacy provider of his or her choice." *See* Def. Mem. at 12 n.11 (quoting 75 Fed. Reg. 10272-01, 10278

(2010)).[5] Despite the clear language in the HRSA guidance and the allegations in the Complaint, CVS nonetheless contends – with no support – that the HRSA "guidance does not prevent Covered Entities from encouraging patients to use certain pharmacies through marketing or other efforts." Def. Mem. at 12. n. 11. Nothing in the HRSA guidance suggests that steering by Covered Entities – of any kind – is allowed.

In any event, New York specifically and with sound support alleges the contrary, i.e., that "[u]nder the terms of the 340B Program, Covered Entities are not permitted, and have never been permitted, to direct or steer patients to any particular pharmacy." Complaint ¶ 30. Indeed, the Complaint even quotes one of *Defendant's internal documents* instructing its employees, when providing TPA services to Covered Entities, to "[r]eview all communications and promotional materials for the 340B program to ensure that all patients have a right to choose their pharmacy and *no steerage to Contract Pharmacies is occurring*." *Id.* ¶ 40 (emphasis added).

CVS' factual dispute about steering (if there truly is a dispute) can only be addressed at trial, not on a motion under CPLR 3211. *See Guggenheimer*, 43 N.Y.2d at 275; CPLR 3026 (liberal construction of pleadings). In any event, CVS also fails to address New York's allegations that steering may also be prohibited by other laws, including federal or state kickback statutes, separate and apart from the HRSA rule, or that there is no substitution because patients have no knowledge of the 340B Program and have no incentive to change their behavior. Complaint ¶ 41.

The cases cited by CVS also do not support dismissal. To begin, Justice Borrok's decision in the *Truetox* case is correct but readily distinguishable. Indeed, the reasoning of *Truetox Labs., LLC v. Healthfirst PHSP*, 129 N.Y.S.3d 728 (N.Y. Sup. Ct. 2020), supports New York – not CVS. In *Truetox*,

[5] The following sentence in the HRSA guidance confirms some of New York's allegations: "When a patient obtains a drug from a pharmacy other than a covered entity's contract pharmacy or the covered entity's in-house pharmacy, the manufacturer is not required to offer this drug at the 340B price." 75 Fed. Reg. 10272-01, 10278 (2010); *accord* Complaint ¶ 93 ("Knowing that Covered Entities could not effectively steer patients to a particular pharmacy, and that Covered Entities were therefore beholden to CVS if they wanted to realize 340B Savings from prescriptions filled at CVS pharmacies, CVS mandated the use of Wellpartner TPA services for Covered Entities seeking to contract with CVS retail and specialty pharmacies.")

Justice Borrok correctly rejected a proposed product market definition that excluded certain competitors based on plaintiff's "preference." *Id*. at *4. Specifically, the *Truetox* plaintiff's product market definition "fail[ed] to account for any interchangeable products – i.e. laboratory services – that could be secured outside of the Defendants' existing network." *Id*. New York's Complaint specifically pleads the contrary: A single brand product market "is an unavoidable consequence of the market structure and rules of the 340B program – *not the Covered Entities' preferences or choice*." Complaint ¶ 13 (emphasis added); *see also id.* ("Under these circumstances, there is no interchangeable product.)

In any event, Justice Borrok's reasoning supports New York, despite the outcome in *Truetox*. The court there held that the hallmark of product market definition is interchangeability, and that "[p]roducts are reasonably interchangeable when there is sufficient cross-elasticity of demand, *i.e.*, where a slight price increase of one product would result in consumers switching to another product." *Truetox*, 129 N.Y.S.3d 728 (quoting *Cont. Guest Servs. Corp. v. Intl. Bus Servs*., Inc., 92 A.D.3d 570, 572 (1st Dep't 2012); *Todd v. Exxon Corp*., 275 F.3d 191, 201 (2d Cir. 2001)). Here, New York has amply pleaded that there are no substitutes, hence no interchangeability. Complaint ¶¶ 13, 51, 86, 90, 97-99. The Complaint specifically alleges that cross-elasticity of demand "is at or near zero." *Id*. ¶ 99. Thus, this case easily satisfies the *Truetox* standard.

The remaining authorities cited by CVS also fail to undermine the alleged single brand product market in this case. For example, the Seventh Circuit's finding that gasoline brands are not markets unto themselves is neither surprising nor relevant, since the gasoline markets do not share the Anti-Steering Rule or involve third parties who are unaware of and unaffected by the economic consequences of their choices, as alleged here. *Generac Corp. v. Caterpillar Inc.*, 172 F.3d 971, 977 (7th Cir. 1999); *see* Complaint ¶¶ 8, 13, 30, 33, 38, 40, 41, 48, 51, 58, 93, 97-99 (anti-steering); 13, 28, 97 (patients unaware); 97 (patients unaffected). See *Chapman,* 546 F.3d at 238 (market definition inquiry is "deeply fact-intensive," and should be based on "practical indicia").

Victoria T. Enters., Inc. v. Charmer Indus., Inc., 63 A.D.3d 1698, 1699 (4th Dep't 2009), which found that Absolut vodka is part of the larger wine and liquor market, is similarly inapposite because that industry does not have the distinguishing features (i.e., Anti-steering Rule, as well as the fact that patients are unaware and have no incentive to alter their behavior) that, together and separately, amount to a lack of substitution. Complaint ¶¶ 13, 51, 86, 90, 97-99 (no substitution); *id.* ¶ 99 (cross-elasticity of demand "is at or near zero.")

Columbia Gas of N.Y. v New York State Elec. & Gas Corp., 28 N.Y.2d 117 (1971), is also distinguishable. In that case, the Court of Appeals rejected tying allegations where both the tying and tied products were the same thing (electricity) and, moreover, there was no coercion because the supposed tie was an optional discount, not a hard condition. *Id.* at 128. This is far afield and has no bearing here since the CVS Contract Services Market is unquestionably distinct from the TPA Services Market, and the tying arrangement was declared to be "exclusive" by CVS' own written announcement to the Covered Entities. *See, e.g.,* Complaint ¶ 12 (announcing that "Wellpartner would be 'exclusive'"); *id.* at ¶ 82 ("[I]nternal documents explain a plan to make Wellpartner the 'only option' if Covered Entities want access to 340B Savings arising from transactions at CVS stores.") In other words, this is not about discounts; the issue here is a hard-and-fast coercive condition. In any event, the Court of Appeals in *Columbia Gas* confirmed that the antitrust laws can prohibit tying arrangements which decline "to sell or supply the one item unless his customer also takes the second." *Columbia Gas*, 28 N.Y.2d at 128. As CVS itself concedes, "the illegality of tying arrangements depends in part on the 'power to *coerce* purchases by controlling the availability of a desired product.'" Def. Mem. at 9 (quoting *Columbia Gas*, 28 N.Y. 2d at 128) (emphasis added). New York alleges exactly such coercion.

Complaint ¶¶ 2, 12, 49, 75, 90, 104, 106, 108, 117 (allegations of "force" or of having been "compelled").[6]

Unlike here, the tying claim in Pyramid Co., 581 N.Y.S. 2d 562, failed because the tying product market definition was "too vague" and because the plaintiff had not alleged market power. *Id.* at 565. In this case, the alleged tying market is anything but vague, and the Complaint alleges market power. Complaint ¶¶ 99-100, 117.

Finally, CVS challenges the single brand market definition with a simplistic argument that the relevant market could not be single brand because, if so, then every one-off mom-and-pop pharmacy would also be a monopolist of its own single-brand market. Def. Mem. at 2, 12-13. Thanks to the regulatory framework of the 340B program and market conditions, this may be true in some cases, but it is irrelevant. Defendants play this off as a *reductio ad absurdum* argument. But this is an unhelpful distraction. CVS would have the Court forget that – unlike CVS – small independent pharmacies are not using their market power to effectuate an anticompetitive scheme. No mom-and-pop pharmacy in New York has purchased a TPA product and then used its market power to foist that TPA on its Covered Entity customers to ensure fatter profits for itself. And even if, *arguendo*, a mom-and-pop were to exploit its latent market power through a tie or some other kind of anticompetitive conduct, it might only have market power as to one or two Covered Entities and might therefore lack the scale necessary to be able to achieve market-wide harm, unlike the extensive harm CVS has caused in this case. Complaint ¶¶ 3, 14-16, 74, 86-7, 90, 94, 100, 107-108 (allegations of market-wide harm).

B. The CVS Contract Pharmacy Services Market Is National

The relevant geographic market "must include … all geographic areas in which … reasonable interchangeability occurs." *Pyramid Co. of Rockland*, 153 Misc.2d at 463 & 103. New York alleges

[6] The Court of Appeals reminds us that it has "previously declared that [the Donnelly Act] encourages a 'strong public policy in favor of free competition for New York' and represents 'a public policy of the first magnitude.'" *Columbia Gas*, 28 N.Y.2d at 127 (quoting *Matter of Aimcee Wholesale Corp. [Tomar Prods.]*, 21 N.Y. 2d 621, 625, 626 (1968)).

that the tying market (the CVS Contract Pharmacy Market) is national in scope. Complaint ¶ 101. Defendants quibble with this geographic market, but it is correct and has been properly pleaded. The allegation of a national market scope is based on the facts that CVS has retail stores in locations nationwide, and that some Covered Entities' patients also use mail order and specialty pharmacy services, which are offered on a national basis. Complaint ¶¶ 1, 50, 101. Furthermore, the exclusive tie-in scheme was conceived of, announced and implemented by CVS at the national level, by CVS Pharmacy, Inc., and it is now in effect at all CVS locations (including mail order and specialty pharmacy services). Complaint ¶¶ 80-84. New York therefore conservatively alleged a national market. In any event, because CVS faces no competition in that market, the relevant geographic market has less relevance than it might in other markets with multiple competitors. The analysis would not change much if the relevant market were assumed to be, for example, statewide instead of national.

The authorities cited by CVS support New York. For example, *FTC v. Advocate Health Care Network, L.P.*, 841 F.3d 460 (7th Cir. 2016), describes an iterative process to determine geographic scope based – like here – on substitutability. *Id.* at 468-69 ("the market can be as large as the globe"). There is no substitution here, and this is true at a national level. Complaint ¶¶ 13, 51, 86, 90, 97-99. The *Advocate Health* standard thus vindicates New York. CVS' reliance on *Mathias v. Daily News, L.P.*, 152 F. Supp. 2d 465 (S.D.N.Y. 2001), is also misplaced. In *Mathias*, the court found that the geographic market had not been pleaded with "precision" because the pleading advanced two inconsistent geographic market theories. *Id.* at 483. This is not the case here, where New York unambiguously alleges a national market. Complaint ¶ 101. There is no inconsistency solely because CVS thinks we meant to plead, or should have pleaded, something else.[7]

[7] CVS' "inconsistency" argument may arise from their apparent misunderstanding of the defined term "CVS" in a sentence they quote from ¶ 97 of the Complaint. *See* Def. Mem. at 12-13 (incorrectly assuming that the term "CVS" in ¶ 97 refers to individual store locations). CVS seems to forget that the Complaint defines "CVS" to be the national corporate entity – not individual CVS store locations. *See* Complaint at p.1 (defined term "CVS" in introductory paragraph).

C. New York Has Properly Pleaded A Per Se Case And, Therefore, The Court Must Disregard CVS' Purported "Efficiency Defense"

It is well established that naked tying restraints warrant *per se* treatment. *See, e.g., Continental Airlines, Inc. v. United Air Lines, Inc.*, 120 F. Supp. 2d 556, 564 (E.D. Va. 2000) ("the common thread" of *per se* case law is that such cases involve "naked restraints on trade" intended to "stifl[e]" competition) (quoting *White Motor Co. v. United States*, 372 U.S. 253 at 263 (1963)). The restraint here is naked because it is express and "exclusive", meaning that CVS informed the Covered Entities that it intended to simply disallow all of Wellpartner's competitors – not merely disadvantage them. Complaint ¶¶ 12, 84 (quoting CVS' announcement that the Wellpartner tie-in would be "exclusive"). Thus, CVS chose to "stifl[e] … competition" and make more money by excluding all of its subsidiary's competitors. This makes it a "naked restraint on trade" subject to *per se* scrutiny. *Continental Airlines*, 120 F. Supp. 2d at 564; Complaint ¶¶ 80-83 (quoting internal documents showing that the anticompetitive tie-in scheme was intended to make billions of dollars, and that CVS knew it would be bad for Covered Entities). *See also* Susan Creighton, Ranking Exclusionary Conduct, Fall Forum, Nov. 15, 2005 (available at: https://www.justice.gov/atr/ranking-exclusionary-conduct) (defining naked restraints to mean conduct "likely … to produce only anticompetitive effects").

The United States Supreme Court has also held that *per se* treatment is also appropriate for tying cases "where the existence of forcing is probable." *Jefferson Par. Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 15 (1984). New York alleges, in detail, that CVS' conduct "forces" Covered Entities to accept the tie-in. Complaint at ¶¶ 2, 12, 49, 75, 90, 104, 106, 108, 117 (allegations of "force" or having been "compelled"). New York has also alleged that this "force" has already driven some Covered Entities to acquiesce. *Id*. at ¶¶ 86-90. Since these harms have already happened, the "existence of forcing" is a certainty, which is of course even more than "probable." *See Jefferson Par.*, 466 U.S. at 15. This is a second, independent, basis to hold that this a *per se* case.

Defenses bases on purported efficiencies are not permitted in *per se* cases. *See, e.g., National Collegiate Athletic Assn. v. Board of Regents of University of Oklahoma*, 468 U.S. 85, 103-104 (1984) ("*Per se* rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct"); *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 289 (1985) (discussing differences between *per se* and rule of reason analyses, including defenses). Since New York has properly pleaded a *per se* case, for purposes of this CPLR 3211 motion, the Court must disregard CVS' purported efficiency defense. Def. Mem. at 4 & n.4 (asserting, contrary to the Complaint's allegations, that the tie-in led to "expanded access").

Even under the more permissive rule of reason, which New York has pled in the alternative, CVS' arguments fail. Complaint at ¶¶ 106-110. In a rule of reason case, after a three-step structured burden-shifting framework, there is a balancing test. *See, e.g., Glob. Reins. Corp.-U.S. Branch v. Equitas Ltd.*, 867 N.Y.S.2d 16, 20 Misc. 3d 1115(A) at *16-17 (N.Y. Sup. Ct. 2008) (quoting *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs.*, 996 F.2d 537, 543 (2d Cir. 1993)). Yet, even if CVS makes it that far, it will nevertheless lose under the rule of reason if there is evidence that there was a "less restrictive alternative" to the challenged conduct. *Id*. at 17 (defense based on purported pro-competitive benefits fails if "legitimate" objectives "could have been achieved by less restrictive alternatives.") An alternative is less restrictive if it "would be less prejudicial to competition as a whole." *Id*.; *North Am. Soccer League, LLC v. United States Soccer Fed., Inc.*, 883 F.3d 32, 45 (2d Cir. 2018).

New York here alleges that there is no valid procompetitive justification, and that that CVS implemented the exclusionary tie-in after it had already developed a less restrictive alternative, which it greedily never deployed in favor of its tie-in scheme. Complaint ¶¶ 70, 72, 109-110, 121. Therefore, CVS' purported efficiency defense would necessarily fail. In any event, CVS' unsupported assertion

should be taken with a grain of salt, since their own documents reflect that the real goal of CVS' tie-in was "[r]eturn [v]alue to [s]hareholders," by as much as $2 billion in incremental revenue. *Id.* ¶ 80.[8]

D. New York Has Properly Pleaded The Executive Law Claim

New York's Executive Law authorizes the Attorney General to seek an injunction and equitable monetary relief against "any person [who] engage[s] in repeated fraudulent or illegal acts or otherwise demonstrate[s] persistent fraud or illegality in the carrying on, conduction or transaction of business." N.Y. Exec. Law § 63(12). Anticompetitive acts can such constitute "persistent fraud or illegality." *Shkreli*, 581 F. Supp. 3d. 579, 627-8 ("'Any conduct which violates state or federal law or regulation is actionable' under Executive Law § 63(12)") (quoting *People ex rel. Vacco v. World Interactive Gaming Corp.*, 185 Misc.2d 852, 714 N.Y.S.2d 844, 848 (N.Y. Sup. Ct. 1999)). The Executive Law claim here is therefore properly pleaded for the same reasons that the Donnelly Act claim is properly pleaded.

[8] One way to streamline the case that would avoid unnecessary discovery, battles of experts and motion practice – and also allow a shorter trial – would be to rule now that this case can and will proceed on *per se* basis, as New York has pleaded. *See, e.g.*, Manual for Complex Litigation (4th ed.) at § 30.1 ("Effective management of antitrust litigation requires identifying, clarifying, and narrowing pivotal factual and legal issues as soon as practicable"). Indeed, "[u]nless the judge and the attorneys give early attention to these issues, substantial time may be wasted" on summary judgment procedures later. *Id.*

CONCLUSION

For the reasons stated above, CVS' motion to dismiss should be denied. In the alternative, New York should be permitted to amend the Complaint.

Dated: October 19, 2022
New York, New York

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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 Plaintiff State of New York's Memorandum of Law in Opposition to CVS' Motion to Dismiss The Complaint, dated October 19, 2022, contains 6,663 words, exclusive of the caption, tables of contents, table of authorities and signature block.

Dated: October 19, 2022

Jeremy R. Kasha