1 SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK - CIVIL TERM - PART 43
2 -X

3 THE PEOPLE OF THE STATE OF NEW YORK,

4 by and through LETITIA JAMES,
Attorney General of the State of
5 New York, INDEX NUMBER: 452197/2022

6 Plaintiff,

7 - against -

8 CVS PHARMACY, INC., WELLPARTNER, LLC.,
CAREMARK, L.L.C., and CVS ALBANY,
9 L.L.C.,

10 Defendants.
- -X
11

12 Proceedings 60 Centre Street
New York, New York
March 2, 2023
13

14 B E F O R E :

15 HONORABLE ROBERT R. REED,

16 JUSTICE OF THE SUPREME COURT

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1 THE COURT: If I could have appearances, plaintiff
2 first.
3 MR. SASHA: Good morning, Your Honor.
4 My name is Jeremy Kasha. I'm an Assistant Attorney
5 General in the Office of the New York Attorney General,
6 representing the plaintiff.
7 MS. McFARLANE: Good afternoon, Your Honor.
8 Amy McFarlane, Deputy Bureau Chief of the Antitrust
9 Bureau, on behalf of the plaintiff, the People of the State
10 of New York.
11 MS. HOFFMAN: Good afternoon, Your Honor.
12 My name is Elinor Hoffman. I'm the Bureau Chief
13 for the Antitrust Bureau of the New York Attorney General's
14 Office.
15 MR. BLOOM: Your Honor, Bryan Bloom, Senior
16 Enforcement Counsel for the New York Attorney General.
17 MS. MAINIGI: Good morning, Your Honor.
18 Enu Mainigi, Williams & Connolly, for the CVS
19 defendants.
20 MR. PITT: Good morning -- or afternoon, Your
21 Honor.
22 Jonathan Pitt, also from Williams & Connolly, also
23 representing the CVS defendants.
24 MR. RYAN: Good afternoon, Your Honor.
25 Tom Ryan, also from Williams & Connolly, also for

1 the defendants.
2 MR. LUPKIN: Good afternoon, Your Honor.
3 Jonathan Lupkin of Lupkin PLLC, also on behalf of
4 the defendants.
5 Good afternoon.
6 MR. KASHA: And I did mean to say good afternoon.
7 I apologize, Your Honor.
8 MS. MAINIGI: I'm sure. We all messed it up.
9 THE COURT: Go ahead.
10 MS. MAINIGI: So, Your Honor, are you ready to hear
11 argument on the motion to dismiss?
12 THE COURT: Yes.
13 MS. MAINIGI: Okay. Mr. Pitt will do the argument
14 for us.
15 MR. PITT: Thank you, Your Honor. May I use the
16 podium?
17 THE COURT: Yes.
18 MR. PITT: Thank you.
19 And, Your Honor, may I -- I also brought just a
20 small demonstrative to just, sort of, allow me and hopefully
21 everyone else to follow along a little bit with --
22 THE COURT: Do we have enough to share?
23 MR. PITT: I did -- yes. And I provided it to
24 opposing counsel. We do, yes.
25 THE COURT: All right.

1 MR. PITT: So good afternoon, Your Honor, again.
2 Jonathan Pitt for the defendants.
3 Your Honor, before I get into the substantive
4 arguments -- and there are three of them that I'd like to
5 discuss with Your Honor today -- I wanted to take a quick
6 step back and provide a little bit of background on the case
7 and the transaction that's at issue in the case, the policy
8 that's at issue, as well as this 340B program that the case
9 is, kind of, at least in part about.
10 So essentially, what 340B is, is it is a way that
11 Congress devised to help fund certain hospitals and health
12 clinics, which I'll refer to as "covered entities." That's
13 how the Complaint refers to them. That's, sort of, how
14 they're referred to generally in the industry.
15 And under this program, essentially what happens is
16 drug manufacturers give a, kind of, deep discount to certain
17 health facilities, these covered entities, who are able
18 effectively to buy the drugs for a discounted price, but
19 they get reimbursed by the payer, usually an insurer, at
20 full price. And so there's a difference, and that
21 difference then goes to the covered entity, minus the
22 prescription dispensing fees and the administrative fees.
23 And because it's, kind of, a little bit complicated
24 to figure out eligibility and, kind of, if there are
25 inventory issues that the pharmacies have to figure out --

1 it gets fairly complicated -- these entities called 340B
2 administrators came into existence. The Complaint calls
3 them "TPAs" or third-party administrators. And they help
4 covered entities and contract pharmacies. That is, the
5 pharmacies that the covered entities use in order to get
6 these drugs and in order to get that difference that I was
7 talking about, which is called 340B savings.
8 These administrators help to, sort of, figure out
9 all of that, and they interface with the pharmacy and with
10 the covered entity. And that's sort of how that industry
11 arose.
12 So why did CVS acquire Wellpartner, which used to
13 be an independent third-party administrator; and why did --
14 why was there a policy that involved the integration of
15 those administrative services into the contract pharmacy
16 services?
17 The basic reason, and I won't go too heavily into
18 it because this is really by way of background, our
19 arguments don't depend on it, but I did want to make sure
20 that I was being clear.
21 The purpose for the transaction was to enable CVS
22 to open up many, many more pharmacy locations than it had
23 previously been able to do due to compliance concerns that
24 CVS, as a healthcare company, had. And so it integrated
25 the administrator into the services. And once it did that,

1 was able to allow any covered entity that wanted it, to
2 contract with any number of CVS pharmacy locations that they
3 wanted to do. And that was really what underlied the
4 transaction.
5 And the fact is -- and I'm, I guess, sort of, now
6 on page -- it's called page 2. It's the first, kind of,
7 real page of the presentation -- but it was successful.
8 That is, CEs, covered entities, have benefitted enormously
9 from this integration because they are now able to look for
10 more places to find savings.
11 So why then are we here today. Why is there a
12 Complaint filed that is alleging -- so the contrary, that
13 somehow this was bad for covered entities, or covered
14 entities didn't want it or that it raised costs. We believe
15 that's not the case. Again, not what we're here for on a
16 motion to dismiss.
17 But I think part of the reason for that is we
18 discovered that in the pre Complaint investigation that was
19 done by the Attorney General's Office -- because they have
20 the ability as I'm sure Your Honor knows to take all kinds
21 of discovery before a Complaint, and they did that. But
22 they did not take any testimony from the covered entities
23 and it's the covered entities that they say are the victims
24 on whose behalf they are suing.
25 So why am I going into all this? Well, part of the

1 reason is, one of the things that, kind of, cuts through a
2 lot of our arguments is that New York is, kind of, a -- a
3 unique state in the sense that relatively few of these
4 covered entities actually use CVS pharmacies as contract
5 pharmacies. CVS, just to be frank, just isn't all that
6 popular in New York. Independent pharmacies are extremely
7 popular in New York. There are other chains that are more
8 prevalent than CVS is. But CVS has a very low portion of
9 business when it comes to these 340B contracts between
10 pharmacies and the hospitals or clinics, the covered
11 entities.
12 And one of our concerns and one of the reasons I
13 want to contextualize it this way is that the Complaint
14 focuses all upon national -- they described some national
15 numbers, and I'll get into those in a moment -- they talk
16 about a national policy. They talk about a national market,
17 which we obviously take pretty strong issue with. But by
18 focusing on the whole country, you miss what is actually
19 different about New York. And so I want to get into that a
20 little bit.
21 So before I, sort of, get into the three major
22 arguments, what I'd like to do now while I'm, kind of, on
23 this page 3 is talk a little bit about the kind of claim
24 that the plaintiff has brought here.
25 So a tying claim under antitrust law, in its

1 simplest terms, is really just -- a tying arrangement just
2 means that someone is selling one product on the condition
3 that the customer also buy another product from that seller.
4 So we have a tying product, which they say is the
5 contract pharmacy. We have the quote, unquote, "tied"
6 product, which is the product that they say covered entities
7 are required to take, and that, in this case, is 340B
8 administrative services.
9 And in both the New York Courts and the Federal
10 Courts, there is a really strong recognition that selling
11 two things together in a package, and only in a package, is
12 usually not a problem. It's usually -- it usually does not
13 cause what's referred to as anticompetitive under the
14 antitrust laws. It's usually not a problem and, in fact,
15 it's very often a great benefit for customers. And the
16 reason for that is it can lead to better services. It can
17 lead to better products. It can lead to more efficiency.
18 So the Courts for that reason have laid out some
19 fairly stringent tests to figure out whether or not a
20 particular quote, unquote, "tie" actually violates or should
21 violate the antitrust laws. And for our purposes here, I
22 think the key requirements are, there has to be a properly
23 defined market for the tie-in product, and that's the
24 contract pharmacy services here.
25 The defendant has to have what's referred to as

1 market power or dominance in that tying product market. And
2 the plaintiff has to allege and prove anticompetitive harm
3 in the tied product market. Again, here, the market for
4 340B administrative services. And what that means under the
5 law that we cited in our papers is market-wide harm,
6 oftentimes referred to as substantial foreclosure.
7 In other words, it has to be the case that other
8 340B administrators have no genuine ability to compete
9 for -- to provide 340B services, administrative services.
10 And here, our argument here is that the plaintiff fails to
11 meet that test for three reasons, and they're independent
12 reasons, any one of which we believe merits dismissal of
13 this Complaint.
14 Those reasons are summarized on page 4 of the
15 handout here. And what I'm going to do is I'm, sort of,
16 going to start with this last requirement that I talked
17 about, which is the requirement to allege and prove
18 market-wide anticompetitive harm.
19 So the first point just to be clear on, the
20 Donnelly Act. New York's antitrust law is, as the cases
21 say, concerned with broad harm to a market. Not with
22 conduct that is said to affect just a sliver of the market.
23 And the global reinsurance case that we've cited in our
24 papers speaks to that point.
25 So have a tying claim under New York or Federal

1 law, the plaintiff has to allege and prove substantial
2 foreclosure in tied product market, that is here, that 340B
3 administrators other than Wellpartner, are shut out of the
4 market and can't compete.
5 Now, the plaintiff actually agrees that it has to
6 allege market-wide harm in the tied product market, which it
7 says at page 7 of its opposition. But even though they
8 agree with the requirement, they don't meet the requirement.
9 And the reason is this:
10 The plaintiff says that the tied product market is
11 the market for what it calls, again, TPA administrative
12 services or 340B TPA services -- third-party administrative
13 services -- that are provided to covered entities. The only
14 allegations about harm in the tied product, in that market,
15 are about foreclosures in a very small subset of that
16 market, and that is the TPA services market. Not at large,
17 but the TPA services that are provided specifically with
18 respect to CVS contract pharmacies.
19 And as we'll talk about in a second, that matters
20 because, as it happens, very few relatively speaking, very
21 few New York covered entities actually contract with even
22 one CVS pharmacy. So we're talking about a very small
23 sliver of the market that they themselves say is the tied
24 product market. And that's what the law says you can't do.
25 You can't bring a tying claim based upon harm that only

1 occurs in a small sliver of the tied product market.
2 Now, we've raised this issue in our motion. The
3 plaintiff didn't respond to it in their opposition. They
4 acknowledge the need to show market-wide harm, but at this
5 point it wasn't responded to. It's been more than five
6 years since the policy that they're challenging went into
7 effect, since CVS started integrating its administrative
8 services with its contract pharmacy services, but there
9 aren't any allegations in the Complaint about whether this
10 has had an effect on that broader tied product market of
11 340B administrative services, kind of, at large.
12 And there isn't even an allegation in the Complaint
13 about whether a single covered entity has decided to move
14 all of its 340B TPA work to Wellpartner as opposed to just
15 the CVS related 340B TPA work. And it's not a technicality.
16 It matters because it means that what they'd missed is the
17 key focus in the Donnelly Act and its purpose which is to
18 address, again, market-wide harm. And in a tying case, that
19 means market-wide harm in the tied product market.
20 So the next point that I wanted to get to is on
21 page 6. And this is now the other product market that's
22 defined, the tie-in product market, the one for contract
23 pharmacy services. The plaintiff says that the tie-in
24 product market here is the market for CVS contract pharmacy
25 services. And the first thing, Your Honor, to note about

1 that is the plaintiff has really strenuously avoided the
2 obvious market and, frankly, the correct market, which is
3 contract pharmacy services generally.
4 Instead, what they're trying to do is they're
5 trying to, sort of, gerrymander a CVS specific market as
6 though there aren't thousands of other pharmacies in New
7 York that provide these services.
8 So why are they doing this? The reason is actually
9 pretty simple. They don't want to acknowledge that CVS
10 pharmacies just aren't that popular in New York. And that's
11 what this chart here, this pie chart is showing. That the
12 sliver in the upper right shows, that at the time these
13 policies that they're challenging went into effect,
14 14 percent of covered entities in New York contracted with
15 even a single CVS pharmacy location.
16 So they have to allege for purposes of this tie-in
17 claim, that CVS contract pharmacies are a, sort of called,
18 must have for covered entities of New York. That is, that
19 covered entities in New York don't have any choice but to
20 contract specifically with CVS pharmacies as contract
21 pharmacies. And of course they can't do that because of
22 what's in this chart. Because, again, the reality is that
23 very few covered entities in New York actually do contract
24 with CVS pharmacies. So it's pretty difficult to call CVS a
25 so-called must-have pharmacy.

1 So what the plaintiff did was they -- they found a
2 way around the obvious and we say correct market definition,
3 which would be the one that would include all pharmacy
4 services -- they found a way around that by saying that
5 every pharmacy -- every single pharmacy, doesn't matter how
6 big or small. The smallest independent pharmacy on the
7 corner, the, you know -- a great big Duane Reade -- all of
8 them are monopolists; have market power in their own little
9 market that just consists of that one pharmacy.
10 They spend a lot of time in their papers trying to
11 defend a so-called one brand market or single brand market.
12 And single brand markets are less favored in the case law.
13 It doesn't mean they never happen, but they are disfavored.
14 This is much more extreme than just a single brand market.
15 This is, as we've put it, an everyone-is-a-monopolist
16 theory. And so on page 7 here, we describe a little bit
17 about that.
18 So first point about that theory, no Court that
19 we're aware of has ever accepted it. No Court has ever
20 accepted that kind of market definition where every
21 participant is its own market, and, therefore, is a
22 monopolist, because there's no one to compete with because
23 the market consists just of that one store, that one
24 pharmacy. And there's a good reason for that and it's
25 because it's simply not plausible.

1 So what the plaintiff says to that is, well, this
2 market is very different. This market is different because
3 of Federal regulations and because of the way of the
4 regulations work, they say, you can't replace lost 340B
5 savings if you can't contract with a CVS, with anything
6 else, with another contract pharmacy or savings from another
7 contract pharmacy. And they say the reason for this is that
8 it's not permissible for these hospitals, these covered
9 entities, to quote, unquote, "steer" patients to a
10 particular pharmacy. And there are two answers to that.
11 The first answer is, even if the regulations say
12 that a covered entity cannot force a patient to go to the
13 pharmacy of the covered entity's choice, that doesn't mean
14 that they're not allowed to market to their patients. And,
15 in fact, we know that covered entities do exactly that.
16 They market. They tell patients which contract or which
17 pharmacies are or not in network. They even give discount
18 cards in some instances to try to encourage patients to go
19 to a particular pharmacy.
20 So the first point is just because you can't force
21 a patient to go to a particular pharmacy, that, in itself,
22 does not mean that every single pharmacy is now suddenly its
23 own market and that there's no ability for patients to know
24 or understand what pharmacy they're going to and whether
25 it's a contract pharmacy.

1 But the second point is, it's just not true that a
2 covered entity is unable to replace savings that it would
3 lose if it no longer contracted with a CVS pharmacy. A
4 covered entity can, in fact, replace those savings with
5 savings from any other contract pharmacy where its patients
6 go to fill prescriptions. And that's why it matters so
7 much, that in New York, CVS has such a small percentage of
8 contract pharmacy relationships because there are lots of
9 other options for covered entities.
10 Now, importantly, the plaintiff does not allege
11 that there is any covered entity, much less all covered
12 entities, that contract already with every single pharmacy
13 at which their patients fill prescriptions. They can't
14 allege that because it isn't the case. And what that means
15 is that as long as there are other contract pharmacies where
16 their patients fill prescriptions, if they lose savings from
17 a CVS pharmacy, they can go to a different pharmacy and
18 replace those savings. A final, just quick point about that
19 argument.
20 They refer to this regulatory structure as being
21 unique. This is unusual. That's why we have such an
22 unusual every-pharmacy-is-a-monopolist type of market. But,
23 in fact, this kind of situation isn't really unique at all.
24 In fact, it happens all the time in our economy. And I
25 think the Coke and Pepsi example that we included in our

1 reply brief is probably as good as any to show that. Which
2 is, you know, if a retailer buys Coke and is unable to buy
3 Pepsi, but, you know, there are some of its customers who
4 would prefer Pepsi, that retailer will lose out on those
5 Pepsi sales. If a customer will only drink Coke, they'll
6 lose out. But nobody would ever suggest that Coke and Pepsi
7 are somehow in different markets, they're not all in the
8 soft drink market.
9 Last argument, and this begins on the following
10 page, page 8, is about the geographic market. So two
11 dimensions to a profit -- to a market, rather, in an
12 antitrust case. That the relevant market consists of a
13 product market dimension and a geographic market dimension.
14 Product market means what, in the eyes of a customer, which
15 products are substitutable for each other. Geographic
16 markets refers to what's known as the effective area of
17 competition. That is, where do customers go to look for the
18 products they want to buy.
19 Now, the plaintiff says that the geographic market
20 for contract pharmacy services is national, the whole
21 country. And they say this, they say, because CVS operates
22 nationally; its integration was a national integration. But
23 that isn't how a geographic market gets defined. A
24 geographic market gets defined by where do customers
25 actually make their purchases?

1 So that's why we thought that, perhaps, the best
2 way to show why their geographic market is wrong is simply
3 to look at a map. And, here, you know -- again, our concern
4 about this market definition is that what it means at the
5 end of the day is that a covered entity located in New York,
6 say, down the street here, is -- regards as a substitute.
7 It could just as easily in effect contract with the Duane
8 Reade down the street or the independent pharmacy down the
9 street, as it could with a contract pharmacy located in
10 Honolulu, Hawaii. The whole country is the relevant
11 geographic market. That's what that means.
12 And our point here is that that's both implausible,
13 and it's also inconsistent with the plaintiff's other
14 allegations. Because the plaintiffs allege -- and this is
15 on page 9 here, in paragraph 8 of their Complaint -- they
16 say that patients use the pharmacies that tend to be closest
17 to where they live or work. And we think that that's just
18 plainly inconsistent with the idea that there could possibly
19 be a national geographic market here.
20 So the plaintiff has two responses to this. First,
21 they say, well, specialty pharmacies are national, even if
22 retail pharmacies aren't. Specialty pharmacies are the
23 pharmacies that prescribe much more complicated, usually
24 more expensive drugs, oftentimes but not always, through
25 mail order, and other items. And they say, well, especially

1 pharmacies are national, they say. There are two problems
2 with that argument.
3 The first is even if you were to look at the
4 specialty pharmacy market, if it is one, again, specialty
5 pharmacies -- at the time of the integration here that's at
6 issue, only 14 percent of New York covered entities were
7 contracting with any CVS pharmacy, including specialty.
8 So what are their allegations about specialty
9 pharmacy. How can they suggest that specialty is -- could
10 be a source of market power. They allege that there's a
11 27 percent market share for CVS, nationwide. They don't
12 allege for what we think are clear reasons. They don't
13 allege what that percentage looks like for New York covered
14 entities. And it's only been New York covered entities that
15 the Attorney General can sue over or on behalf of.
16 So they don't tell us that, but they do tell us
17 that nationwide, there's a 27 percent share. Even
18 20 percent or 27 percent, though, as a matter of law, is too
19 small on its own to confer market power. But the second
20 point about that argument is even if specialty pharmacies
21 were nationwide --
22 THE COURT: Well, does it matter that if they have
23 27 percent but the next biggest -- next biggest share is
24 20 percent and then everyone else -- independent pharmacies.
25 So doesn't that matter?

1 MR. PITT: Well, it -- it could, but with those
2 kinds of numbers, the Courts have recognized that you're not
3 going to be able to exert market power with that small a
4 share. That less than 30 percent number, that's been
5 recognized by a number of Courts, as being, sort of, the,
6 almost the bare minimum threshold.
7 But actually, I think Your Honor's question speaks
8 a little bit to my second point about this argument, which
9 is that, let's say that it is a nationwide -- specialty
10 pharmacies are nationwide. Let's say 27 percent is correct.
11 The plaintiff doesn't define separate markets for specialty
12 and retail. It defines one market for all the contract
13 pharmacies. And specialty, they tell us in the Complaint,
14 constitutes only 40 percent of 340B pharmacy revenues. So
15 again, you're talking still, about a tiny sliver of this
16 market that they're addressing when they talk about
17 specialty or CVS specialty.
18 The second thing that they tend to say or that they
19 have said about this geographic market definition, is they
20 say, well, it doesn't really matter anyway because they
21 chose the -- took a conservative approach, and so it doesn't
22 really matter whether the market is geographic or not. We
23 think, Your Honor, respectfully, that it does matter.
24 As a general matter, geographic market is important
25 because, if you're not picking the right geographic area to

1 focus on, then you are not looking at the true market
2 realities for, in this case, the New York covered entities.
3 And a nationwide market doesn't do that and as I've, sort
4 of, said, that matters here for the reason that so many New
5 York covered entities tend not to contract with CVS
6 pharmacies. New York is known for its lack of reliance on
7 big pharmacy chains.
8 So, Your Honor, I think that sort of summarizes
9 what our major points were. I am very glad to respond to
10 any questions from Your Honor, but that was pretty much what
11 our arguments were.
12 Thank you.
13 MR. SASHA: Good afternoon, Your Honor.
14 THE COURT: Good afternoon.
15 MR. SASHA: New York has properly pleaded a single
16 brand product market in this case and the tie-in market
17 because there is, and can be no substitution, from the
18 perspective of safety net hospitals and other covered
19 entities. This is not about the retail pharmacy market.
20 The market here concerns covered entities' access to 340B
21 benefits for which they need a 340B contract. Only a 340B
22 contract with CVS will give covered entities access to
23 benefits associated with CVS customers. There is,
24 therefore, no substitution under the commercial realities of
25 this market.

1 The context here is important. The 340B program is
2 a Federal benefit specifically intended for safety net
3 hospitals and other eligible clinics known as covered
4 entities. Here in New York, these clinics and covered
5 entities and hospitals are not-for-profits. This system
6 exists for the broader public benefit, to improve health
7 services particularly in under-served and rural communities.
8 Patients are generally unaware that when they go to
9 pharmacies outside the hospital or clinic where they were
10 treated, their prescriptions sometimes give rise to a 340B
11 benefit that accrues to the hospital where it was
12 prescribed, but it can only be accessed if that hospital has
13 a 340B contract with that pharmacy.
14 Permit me re-emphasize this. To to access this
15 benefit for CVS customers, the covered entity must have a
16 340B contract with CVS. No other pharmacy can give a
17 covered entity access to that 340B benefit that arises from
18 CVS' customers. Without a 340B contract with CVS, the
19 benefit just goes away. No one gets it. You cannot get it
20 somewhere else.
21 This is easily illustrated. Imagine there's a CVS
22 pharmacy on my left, and another brand of pharmacy on my
23 right. To access the 340B benefit associated with the CVS
24 customers who go to the store on the left, the covered
25 entity must have a contract with CVS. Just like to access

1 the 340B benefit with the other pharmacy's customers on the
2 right, the covered entity needs a 340B contract with that
3 pharmacy.
4 They cannot give access to the 340B benefit that
5 arises for each other's customers. It's not that they don't
6 want to, or that they choose not to, or it's a contractual
7 thing that they don't. They cannot do it under the
8 regulatory scheme.
9 And to be clear here, the question is not whether
10 covered entities contract with more than one pharmacy. They
11 very often do. The question is that. The question is are
12 they substitutes?. You can think of it like an access key.
13 CVS has the only key to the 340B benefit associated with its
14 customers. There is literally can be no substitute. This,
15 of course, gives CVS quite a lot of power. Market power,
16 probably monopoly power, though we don't have to prove that.
17 Now, CVS likes to make a big deal of the fact that
18 other pharmacies hold their own key to access those 340B
19 benefits. This misses the point because it's not the
20 holding of the key that is the wrongful conduct here. That
21 single brand product market that's created by the market
22 structure is just that, a result of the market structure:
23 The laws and regulations that govern this industry.
24 The problem here isn't the fact of the single brand
25 product market. It's that CVS and Wellpartner have misused

1 their market power to force a tying on the covered entities
2 that, in very many cases, they do not want. That is the
3 wrongful conduct. Therefore, focusing on whether or not
4 other pharmacies also have a single brand product market is
5 neither here nor there. The question is the tying.
6 Now, there cannot really be a serious question that
7 there is a tying. They announced it in extremely explicit
8 words, nakedly using the word "exclusive." There also can't
9 really be a serious question about substitution. For those
10 CVS customers, no other pharmacy in the world could give
11 access to that key to unlock those 340B benefits.
12 Now, antitrust markets are determined by reference
13 to substitution, which is sometimes referred to as
14 interchangeability. Not by a standard of must-haves or
15 something like that. It's a question of substitution.
16 There's a term called cross-elasticity of demand,
17 which is the economist's way of measuring in quantifying
18 substitutability. When cross-elasticity of demand is at
19 one, then two products are entirely interchangeable and they
20 are presumably in the same market. When cross-elasticity is
21 at zero, which is what we have alleged in paragraph 99 of
22 our Complaint, then they're inherently not substitutable and
23 they are not in the same market. This is the test used in
24 antitrust cases.
25 So the question as applied here is, which

1 pharmacies can be substituted for a covered entity's 340B
2 contract with CVS? And the answer was none. None can. New
3 York alleges that under the commercial realities of this
4 market, there, therefore, is no substitution.
5 And just to drive home the point, I'm going to
6 refer to paragraphs 13, 51, 86 through 90, as well as 97
7 through 99, of our Complaint. And paragraph 99 is the one
8 that specifically alleges that cross-elasticity of demand is
9 at or near zero.
10 Now, of course, if they take issue with some of
11 these facts, they're welcome to do that. They're entitled
12 to their defense. But a factual defense is not a basis to
13 dismiss the Complaint. We are at the motion to dismiss
14 stage, so if they have a factual question about whether or
15 not cross-elasticity of demand is actually zero, or whether
16 or not another brand of pharmacy could, in fact, somehow
17 magically help a covered entity get access to CVS customers,
18 which they certainly can't, but if they want to challenge
19 that factually, that is a basis to deny the motion, not to
20 grant it.
21 Now, a word about the anti-steering role, which
22 comes up a lot in the papers. Counsel didn't mention it
23 much. I just want to mention that the anti-steering roles
24 are part of the market structure.
25 First of all, HRSA guidance is quite clear. The

1 patient gets to choose where to go, and the covered entity
2 has to inform the patient of that right. And we think that
3 the Court can simply take judicial notice under CPLR 4511B
4 and that will appropriately end this part of the inquiry
5 right here. However, to the degree there is a question of
6 fact about just how steerable patients are, once again, this
7 is a question of fact and would necessitate the denial of
8 the pending motion.
9 Now, I would also like to point out that CVS'
10 argument that small clinics and safety net hospitals can
11 control where their customers go, as a matter of common
12 sense, should be taken with a grain of salt, or two.
13 As we allege in our Complaint and mention in our
14 brief, patients typically go where it's convenient. We all
15 know this. Caregivers also have more important things to
16 discuss with their patients, like follow-up treatment,
17 follow-up appointments, physical therapy. This probably is
18 not high on the priority list.
19 On the contrary, who would probably have more
20 control over its customers? CVS. In addition to the
21 rewards programs that many pharmacies employ, there are
22 allegations in our Complaint concerning CVS' relationship
23 with its corporate affiliate, Caremark, which is a pharmacy
24 benefit.
25 Now, I don't want to get too much in the weeds, but

1 pharmacy benefit manager -- there's only three in the
2 country and CVS and its corporate affiliates own one of
3 them -- they're the ones who help insurance plans determine
4 how much of a co-pay for this drug, as opposed to that. Do
5 you have to try this one before that. But they also can do
6 things -- and we have this allegation in our Complaint at
7 paragraph 54 and 55 -- that, for example, CVS can tell
8 patients on the plans for which the PBM, or CVS' affiliate,
9 their PBM, Caremark -- tells patients if you want a 90-day
10 supply of your prescription, you have to go to CVS. If you
11 go to another pharmacy, you can only get a 30-day supply.
12 Well, that's not directly at issue in this case. But what
13 it does show is that if anybody has control over their
14 customers, it's CVS, not the covered entities.
15 But before moving off this point, it's important to
16 say that if CVS wants to hang their defense on how much
17 factual flexibility there may actually be concerning the
18 anti-steering role, good luck to them. However, it is a
19 factual question and definitely would require the denial of
20 the motion to dismiss.
21 Now, I'd like to turn to the authorities and,
22 particularly, the US Airways vs. Sabre Holdings case. This
23 is the lead case. It's not really new law, but it's a very
24 good example of what the law actually is.
25 The Second Circuit in that case in 2019 -- it's

1 relatively recent -- wrote: "A single brand of a product or
2 a service may be a relevant market if no substitute exists
3 for that brand's product or services." They didn't pull
4 this out of thin air. They pulled this out of Supreme Court
5 authority. And the Donnelly Act follows Federal law in most
6 respects, and there are some small areas of difference. But
7 not here. I think we are in agreement that in this respect,
8 Federal and New York law are the same.
9 Now, in the US Airways case, the Second Circuit
10 cites four factors that were alleged -- or four allegations
11 that were alleged by US Airways which justify the single
12 brand product market in that case. The first one is
13 actually the exact same thing we have alleged here, that
14 cross-elasticity of demand is at or near zero.
15 The Second Circuit said that was enough to justify
16 the case going forward on the single brand product market,
17 and so it is here too. And that could also end this portion
18 of the inquiry, but we have more to say on this.
19 The other three allegations that in US Airways the
20 Court focused on were allegations that were really questions
21 of degree. It would be costly to multi-home. It would be
22 hard to transition. They might lose some benefits or
23 incentives if they use two different platforms. That was
24 used enough to allow them to go forward. But here, we're
25 not saying it's costly or expensive, although there are

1 costs and expenses associated with those few hospitals who
2 will hire TPAs. What we're saying here, the single brand
3 product market arises from what I illustrated earlier. That
4 the pharmacy on the right can never give access to a covered
5 entity for a CVS customer, and vice versa. That's the
6 market structure here.
7 That's even stronger than it was in US Airways.
8 And that's why the appropriate, the only way to frame this
9 case is as a single brand product market -- or the correct
10 way. And I will point out, it wasn't a discretionary call.
11 The Second Circuit remanded it. The District Court would
12 proceed it. From what I can tell from following along the
13 litigation, the plaintiff is proceeding well through summary
14 judgment there.
15 Now, defendants brief relies heavily on the Truetox
16 case. Truetox was correctly decided by Justice Borrok, but
17 it is not a leading case. It's not a purported case. It's
18 an example of a poorly conceived and pleaded antitrust claim
19 that had to be thrown out.
20 In that case, Truetox, which is apparently a
21 medical testing laboratory, was suing Healthfirst because
22 Healthfirst network had decided to only contract with two
23 other labs -- I believe it was Quest Diagnostics and
24 Labcorp, who are the, from what I understand, the biggest
25 players there -- and chose not to include Truetox.

1 From that fact alone, they've concluded that the
2 product market only included two brands. That doesn't fly,
3 and that's not what we're alleging here. This is not a
4 situation of a regulatory market structure where, like, as I
5 point out, a store on the left and a store on the right --
6 access has to be gotten to independently through separate
7 contracts.
8 Indeed, when I went and looked up the Truetox
9 Complaint on NYSCEF, just to show how poorly it was pleaded,
10 and probably because the facts just weren't there, there was
11 no mention of substitution. No mention of
12 interchangeability. No mention of cross-elasticity of
13 demand. So the Truetox case teaches nothing, other than
14 that the standard is substitution and interchangeability,
15 which is easily met here.
16 Now, I would like to talk about this market-wide
17 impact issue that counsel spent quite some time on. You
18 know, we have widely, sort of, market-wide impact. And I'd
19 like to point out that there seems to be an assumption in
20 CVS' discussion about that point. That the market-wide
21 impact requires total foreclosure, complete exclusion from
22 the market, or something like that.
23 Well, we cite here in our brief -- and it's not at
24 all true that we didn't respond in our brief and I don't
25 follow this up with counsel. Here on the -- just a

1 moment -- page 7 of our opposition brief, we cite two
2 authorities that point out, first of all, that for the
3 purposes of that test, a $600,000 effect on commerce in the
4 tied market was clearly enough; "clearly meets any test of
5 substantiability' [sic]." The words, "clearly meets any
6 test of substantiality." And that's the Gonzalez case, 880
7 F.2d 1502.
8 Now, here, we've alleged specifically that there
9 was market-wide impact in the tied market for TPA services.
10 And we cite paragraphs, among others, 107 through 108.
11 Covered entities switched away from Wellpartner's
12 competitors in the TPA services market. That switching, as
13 long as it meets some, you know, test of substantiality, is
14 the market-wide impact, the fact that they were pushed away.
15 In terms of the dollar amount, I cannot right now
16 tell you what it is, but I do think it's going to be far in
17 excess of $600,000, market-wide. Far in excess of that. So
18 the idea that we haven't responded is wrong.
19 And I do want to emphasize that the impact in the
20 TPA services market does not require that all competitors of
21 Wellpartner simply cease to exist. There is no such
22 requirement under tying law. This is made up, so to speak.
23 Now, what I want to say about the Global Insurance
24 case that CVS likes to refer to, is that what that case
25 actually stands for is a very different proposition, that

1 the individual injury to a particular person or entity is
2 not market-wide impact. So if one company says wait a
3 minute. I got cut out of this deal. I was hurt -- that's
4 not market-wide impact. We're not making any such
5 allegations. We are here arguing for the economy of the
6 State of New York, talking about all safety net hospitals
7 and covered entities -- whether they are CVS customers or
8 could be CVS customers or used to be CVS customers -- under
9 these contracts.
10 So I should add here this 14 percent contract with
11 CVS, first of all, that number is not in our Complaint, so
12 it has no business playing any role on the motion to
13 dismiss.
14 Second of all, I don't know if the number is true
15 or not because it tells us very little. It says nothing
16 about how big these covered entities are. A small clinic
17 does not have any the same number of patients or dollar
18 volume as Mount Sinai or NYU Langone, or any of the other
19 larger hospital systems. So this 14 percent, aside from not
20 being in the Complaint, and aside from being a question of
21 fact, tells us very little.
22 But the other thing it doesn't tell us is how many
23 covered entities just threw up their hands and gave up and
24 said we're not going to do this. We're not going to buy
25 into this. In antitrust law that's classic outlaw

1 restriction, and that's classic antitrust harm.
2 Now, I'd like to talk about some of the other
3 authorities and, in particular, in the context of the
4 geographic market issue. You know, we've heard the term
5 "gerrymandering," and I know they were applying it to the
6 product market, but it's curious, because it was CVS that
7 was trying to gerrymander a very clear geographic market
8 definition. In paragraph 101, in extremely unambiguous
9 terms, New York alleges: "The geographic scope of a CVS
10 contract pharmacy market is the United States."
11 Now, to begin, if they have a question about the
12 scope of the geographic market and its impact on liability
13 or remedies, those are questions of facts that can be
14 resolved in the process of litigation. It is not a basis to
15 dismiss the case.
16 But I'd like to call to the attention, an
17 authority --
18 THE COURT: Does it matter for the Donnelly Act
19 that, that's -- what you said?
20 MR. SASHA: I'm sorry, Your Honor?
21 THE COURT: Does it matter what the Donnelly Act --
22 in terms of what your reach is, your reach of the Attorney
23 General's Office, that you're talking about?
24 MR. SASHA: Well, I think there might be a separate
25 question at the remedies stage, and I do hope we get there,

1 when we seek an injunction to enjoin this conduct and
2 enforce -- of Wellpartner, about whether or not that order
3 will only apply in New York or nationally.
4 And I think Your Honor is probably more familiar
5 with the outer bounds of this Court's authority than we are.
6 But I would respectfully submit that that particular issue
7 doesn't really have a place here on the motion to dismiss.
8 I'd like to talk about an authority that CVS cites,
9 and it's called Benjamin of Forest Hills Realty vs. Austin
10 Sheppard Realty, 823 NYS2d 79. And on page 95 it talks
11 about what a geographic market is, and that is, quote, "The
12 area in which such reasonable interchangeability can occur."
13 In other words, this -- and that's correct. Just like in
14 the product market, it is a question of substitution.
15 Interchangeability.
16 So the question here is, in what geography would a
17 covered entity have to look to find a substitute for a CVS,
18 for a CVS 340B contract. If they don't like the tying, a
19 particular covered entity in New York doesn't like the
20 tying, can they get around the problem by talking to a
21 pharmacy in New Jersey, California, Pennsylvania, Hawaii?
22 No, they can't. There is no geography within which that
23 substitution can happen, therefore, we pleaded a national
24 market.
25 Once again, if they have a question about this,

1 they can challenge it as a question of fact at trial. It's
2 not a basis to dismiss. We have very plausibly and clearly
3 pled that national market.
4 I'd also like to add that there are a lot of facts
5 that make the market very national. First of all, contrary
6 to the way it's being depicted, covered entities do not
7 contract with individual CVS locations. Does not happen.
8 They contract with CVS. As we see it in New York, they do
9 it through one of their subsidiaries, CVS Albany. And it's
10 a national contract which covers their national mail order
11 service; their at least partially national specialty
12 pharmacies, much of which is distributed by mail. And then
13 they'll be an appendix listing which stores it applies to.
14 But coming back to the which geography would be a
15 substitute, if they don't like that contract which includes
16 the tying, can they go to New Jersey and say, hey, some
17 pharmacy, give me a contract without the tie-in, that would
18 give me access to the CVS customers' 340B benefit. There is
19 no such substitution. That is why we have pled a geographic
20 market nationally.
21 Now, I'd like to address some of the issues that
22 were raised in defendants' slides and presentation, much of
23 which I think covers what I've said, but I think it's worth
24 calling him out specifically on.
25 First of all, at the beginning of the presentation,

1 counsel was talking about using Wellpartner to increase
2 access for covered entities. I just want to point out that
3 if you look at paragraph 70 and the following of our
4 Complaint, you will see that, before they choose to do that,
5 they have already set up a system to multi-home, meaning,
6 allowing individual pharmacy locations to serve multiple
7 safety net hospital, which is what they claim the benefit
8 was. They've already set up a way to do that using what's
9 referred to as in the Complaint as the Century [phonetic].
10 Century is another one of the TPAs that competes with
11 Wellpartner and they do both sides of the business. They
12 have helped CVS prepare a system to do the same thing
13 without an anticompetitive tie. But instead, CVS chose to
14 implement an anticompetitive tie.
15 Now, I don't think those facts are at issue before
16 the Court, specifically on this motion to dismiss. But
17 having it raised by the other side, I couldn't let that lie
18 without calling out that particular fact.
19 Now, I'd like to -- sorry. I'm just going to skip
20 over the ones already covered in my presentation.
21 I'd like to talk about counsel's use of the "small
22 sliver" expression. Now, one can't just start carving out
23 little portions of things and say, ah-ha, it's too small.
24 Or, this is a must-have.
25 First of all, on the must-have issue, must-have is

1 not the standard for market definition in antitrust cases.
2 It sometimes comes up to the factual issue in other kinds of
3 markets, but that is not the standard and it is not
4 applicable here.
5 Now, to pull up their 14 percent number, or any
6 other particular number, which is not in our Complaint and,
7 therefore, could not be the basis for a dismissal -- is to,
8 kind of, slice-and-dice to look for something. They were
9 trying to prove a point, I guess, that the harm was small.
10 But the harm in a TPA market is substantial if it exceeds
11 $600,000, which it will by orders of magnitude. And if
12 there's a question about that, once again, that's a question
13 of fact which would require a dismissal.
14 THE COURT: Tell me again. The 600,000 comes from
15 where?
16 MR. SASHA: There is a case which specifically says
17 -- Gonzalez vs. St. Margaret's Housing Development Fund
18 Corporation, 880 F.2d 1514 at 1518. And the quote is:
19 "$600,000 of commerce clearly meets any test of
20 substantiality." And that's under the substantial effects
21 on commerce in the tied market.
22 Now, in this case here, although I couldn't give
23 you an exact number, we do know that the fees paid in the
24 TPA services market, at least -- and once again, this isn't
25 -- well, I think we do have numbers like this in the

1 Complaint. The fees are in the hundreds of thousands of
2 dollars, monthly or quarterly. And we're talking about, by
3 their own admission, at least 300 covered entities in New
4 York.
5 So 300, you know, per quarter, per month, something
6 measured in the hundreds of thousand dollars, across
7 hundreds of entities in the state, we're clearly beyond that
8 de minimus threshold.
9 Now, if -- if they have a question about that, if
10 they factually want to challenge that, we're not trying to
11 deprive CVS of the right to make factual challenges. I
12 don't think it's going to get them far and I'm not very
13 worried about it. But it is a question of fact that
14 requires dismissal of the motion -- a denial of the motion.
15 Now, I'd also like to take issue with the statement
16 that our theory has never been accepted by any Court. This
17 is wrong. The single brand product market theory has been
18 accepted by many Courts the best example being US Airways
19 and the cases cited therein.
20 Now, they're confusing the issue, because as I
21 pointed out when we talked about the access to the keys, the
22 market structure does create presumably a single brand
23 product market associated with each pharmacy. But that's
24 not the wrongful conduct here. In some antitrust cases, it
25 is.

1 It's like in that US Airways case, it was a
2 monopolization case. So the single brand product market
3 wasn't just the tying market; it was the wrongful market in
4 that case because it was a Section 2 monopolization case.
5 But this is a tying case and the wrongful conduct is the
6 tie.
7 The monopoly that they have in the single brand
8 product market that's created by the market structure is not
9 the wrongful conduct, whether it's CVS or another pharmacy.
10 It's the tying that's the wrongful conduct. That's what's
11 alleged to be wrong. So they have market power and even
12 monopoly power in their single brand market, not by
13 wrongdoing; by virtue of the market structure. However,
14 they choose to implement a tie, to the detriment of covered
15 entities, and that's what the wrongful conduct is. So the
16 "everyone-is-a-monopolist has never been accepted by a
17 Court," this is really not right.
18 First of all, Courts do accept, in appropriate
19 circumstances, single brand product markets.
20 Second of all, the wrongful conduct here isn't the
21 monopolization. We're not saying, therefore, every mom and
22 pop pharmacy in New York is also committing the same
23 violation here, unless they too are committing -- are
24 implementing a similar tie. The issue is the tie.
25 And with that, Your Honor, I'll answer any

1 questions you have or reserve the chance to oppose or
2 respond if opposing counsel has anything further to say.
3 THE COURT: Someone goes first, someone goes
4 second, and then we have a reply. That's usually how it
5 works.
6 Go ahead.
7 MR. PITT: Thank you, Your Honor.
8 Thank you, Your Honor. I'll try to be brief.
9 There's just a few things that Mr. Kasha had mentioned that
10 I'd like to respond to.
11 I'll start with the last thing he said. The issue
12 is the tie. Very clearly, under New York and Federal law, a
13 tie is not actionable, cannot be actionable, without market
14 power in the tie-in product market. No claim without it.
15 And I just want to be very clear that, in addition to the
16 market-wide impact or market-wide harm argument that you're
17 making, that is what we are challenging. That they have not
18 plausibly alleged market power.
19 Mr. Kasha mentioned many times it's a fact issue
20 and it can't be decided on a motion to dismiss. Market
21 definition is a fact issue. The cases recognize that
22 although market definition is often a fact issue where the
23 allegations are implausible or where they're inconsistent,
24 then it is absolutely appropriate. And there are many cases
25 that do so. We cited a number in our papers, but there are

1 many more where Courts do indeed, and should, dismiss a
2 case, that has not stated in a proper legal claim because
3 there is no plausible claim of market power.
4 On the issue of substitution, so whether a covered
5 entity can substitute for a different contract pharmacy for
6 a particular customer who went to CVS is not the relevant
7 question. The question is can a covered entity replace
8 savings that it won't get if it doesn't contract with CVS
9 with savings from a different contract pharmacy. And our
10 answer to that is absolutely, they can, and they do. And
11 the Complaint does not plausibly allege otherwise.
12 All they say is, well, for that patient who would
13 have gone to the CVS, you can't get the savings associated
14 with that prescription. But that is not the test, and that
15 is why we focused on this 14 percent number and let me talk
16 about that for a brief minute.
17 For the first time now today, we hear from the
18 plaintiff that the 14 percent issue was something that
19 cannot be considered. A couple of things on that. First,
20 we brought that up in our opening brief. At no time in
21 their opposition did they suggest that it would somehow be
22 improper for Your Honor to consider it.
23 Second, they rely on that same data in their
24 Complaint, which I think we point out in our reply brief.
25 Third, the Court can take judicial notice of these

1 government statistics, again, under a case law that we've
2 cited in our papers. So we do think it's appropriate. But
3 even if Your Honor didn't, it is still the case that every
4 pharmacy is its own monopolist, and that is what they
5 acknowledge in their opposition they are doing. Because for
6 any given pharmacy, if you don't have a contract with that
7 one pharmacy, then you can't get access to the savings
8 unlocked, as they put it, by the key, because they don't
9 have the contract with it. If a patient fulfills a
10 prescription at that one pharmacy, you miss out on the funds
11 associated with that one patient. And I would again, raise
12 the Coke-Pepsi discussion that we had in our brief and that
13 I mentioned a moment ago, which is to say that doesn't mean
14 that they are each their own market.
15 Next point is PBMs. Just a minor correction. I'm
16 not sure whether Mr. Kasha misspoke, but I did hear him say
17 that there are only three PBMs. That's not the case. There
18 are, I believe, somewhere in the order of 40 or more PBMs.
19 It is certainly the case that there are three PBMs that are
20 larger than the others, but it is not at all the case, and I
21 don't believe they allege that there are only three PBMs.
22 And on that point about PBMs, if CVS' ownership of
23 a PBM gave it market power, which is what I believe they're
24 trying to suggest, then again, you would see many, many more
25 covered entities in New York contracted with CVS because

1 they would have to.
2 Let me talk briefly to this must-have issue. It is
3 -- the reason I use the phrase "must-have" -- it's not my
4 phrase; I didn't come up with it. It's in the case law --
5 is that the fundamental point about tying arrangement is it
6 has to be the case. Again, most ties, not anticompetitive.
7 Not a problem. Only a problem if the customer has no other
8 choice but to purchase the product, the tying product, from
9 the defendant. That's what the standard is.
10 Now, when I say "no other choice," I'm speaking a
11 little bit euphemistically. They have to have market power
12 or dominance in that tying product market. And that's why I
13 refer to it as a must-have.
14 The Sabre case, very quickly. They use it to say
15 that, well, a single brand market can be permissible. I
16 agree. A single -- under the right circumstances, a single
17 brand market can be permissible. The allegations don't
18 support a single brand market here for the reasons that I
19 described.
20 And in any event, their idea of what it means to be
21 a single brand market is again, that every single pharmacy
22 has market power because the customers that go there are
23 associated with savings that can only be unlocked by
24 contracting with that particular pharmacy. For the reasons
25 I've already said, that is, again, not how the market is

1 defined.
2 I also heard that we were somehow suggesting that
3 complete, 100 percent foreclosure was a requirement in the
4 tied product market. That is not our position. It is not
5 what we were saying.
6 The test is substantial foreclosure. And on this
7 point, I really do want to be clear because I think the
8 quote that you just heard from, I believe, it was the
9 Gonzalez case, that is actually referring to a different
10 prong of the test.
11 There is a prong in the test that the tie has to
12 affect a not insubstantial amount of commerce. Frankly,
13 that is a prong that is almost always met in tying cases.
14 It is not controversial, and it is completely distinct from
15 the issue of whether or not there is market-wide
16 anticompetitive harm, which was the issue that we were
17 addressing.
18 On the geographic market question, again, the
19 question isn't whether it is possible for someone in New
20 York to contract with a pharmacy in California or Kansas or
21 Hawaii. It is a question of whether it is a reasonable
22 substitute, and on basic plausibility standards, it is not.
23 And two more very quick points. It was suggested
24 that covered entities have to contract with CVS, the entity
25 at large. That is not the case. I don't believe it's even

1 alleged in the Complaint that way nor it could it be because
2 under the HRSA regulations, they have to have a contractual
3 relationship with the pharmacy location; separate contracts
4 with the pharmacy location. So this is not the case, that
5 contracting is a nationwide process.
6 Final point, again, this is on a factual issue that
7 I think, frankly, we agree is not relevant to the three
8 arguments that we're presenting, but they raised this issue
9 of the backbone and I simply want Your Honor to understand.
10 They say we just abandoned the backbone because we
11 wanted supposedly to dominate the different market. In
12 fact, in 2017, the backbone was not a viable solution. It's
13 certainly true, we tried to do that as a solution, and that
14 solution didn't work. It was a failure in 2017, and that is
15 the reason why CVS then looked to acquire a third-party
16 administrator so that it could integrate the services.
17 And with that, Your Honor, I thank you again very
18 much for the time you've given us.
19 THE COURT: Okay.
20 MR. KASHA: Your Honor, we believe we've responded
21 to all of those points, so I have nothing further to add.
22 However, if you have any questions, I would be pleased to
23 respond.
24 THE COURT: No.
25 MR. KASHA: Thank you.

1 MR. PITT: Thank you.
2 THE COURT: I have a motion that's come before me
3 which is to dismiss the Complaint. We've heard from the
4 parties today. I have the benefit of their papers in
5 support of opposition and reply. The Court will rule.
6 To understand the State's antitrust claim as
7 asserted against CVS, we must first understand the
8 background of how the Federal 340B drug pricing program
9 works. Namely, the program allows eligible providers --
10 these are hospitals and health clinics for underserved
11 populations, such as uninsured people or Medicaid recipients
12 -- to essentially buy prescription drugs at a discounted
13 price.
14 When a 340B drug gets dispensed, the patient's
15 insurance company pays for the drug according to its usual
16 pricing plan, but then the covered entity receives the
17 difference between the insurer-paid drug price and the 340B
18 drug price, often called the "340B savings."
19 The drugs can be dispensed at an inhouse pharmacy
20 associated with a covering entity, or at a regular
21 commercial non inhouse pharmacy. If the patient goes to a
22 pharmacy other than a covered entity's own inhouse pharmacy,
23 then the covered entity can collect the 340B savings only if
24 the covered entity has a special contract with that store or
25 brand of pharmacy. These are known as contract pharmacies.

1 Plaintiff alleges that as of July 2021, there are 4,441
2 covered entities in New York enrolled in the 340B program.
3 Patients are typically unaware that their
4 prescription is classified as a 340B prescription, as
5 patients do not personally receive the benefits of the
6 program. Those benefits instead flow to the covered
7 entities. Another feature of the program is that the
8 covered entities are, according to plaintiff's reading of
9 the regulations, prohibited from directing or steering
10 patients to or away from a particular pharmacy. The
11 relevant language reads as follows: Covered entities must,
12 quote, "inform the patient of his or her freedom to choose a
13 pharmacy provider," unquote, and that, quote, "if the
14 patient does not elect to use the contracted service, the
15 patient may obtain the drugs from the pharmacy provider of
16 his or her choice," unquote.
17 Because of the complexity of the program, potential
18 compliance issues, and occasional difficulty in
19 administering the program, many covered entities hire 340B
20 program administrators -- also called "third-party
21 administrators" or shortened to "TPAs" -- to provide
22 administration services, identify 340B eligible
23 prescription -- prescriptions, and manage 340B drug
24 inventories on behalf of the covered entity.
25 In November of 2017, CVS pharmacy acquired,

1 Wellpartner, a company that offers third-party administrator
2 services, and announced that the company would offer a
3 contract pharmacy and 340B administration services on an
4 integrated or -- excuse me, announced that the companies
5 would offer contract pharmacy and 340B administration
6 services on an integrated basis for CVS contract pharmacy
7 locations. In other words, CVS began requiring covered
8 entities to use Wellpartner if the covered entity wanted to
9 have a 340B services contract with CVS.
10 According to the Complaint, many covered entities
11 had to switch from their preferred TPA to Wellpartner. Some
12 of the covered entities, according to the Complaint, would
13 rather continue working with the TPAs they already have a
14 relationship with, both for financial and efficiency
15 reasons. However, CVS is not the only pharmacy operating on
16 the integrated basis. For example, Walgreens also uses an
17 integrated model. The integrated model applies only to CVS
18 pharmacy locations. That is, covered entities remain free
19 to obtain contract pharmacy services from other pharmacies
20 and to use other 340B administrators in connection with
21 non-CVS pharmacies.
22 Now, in the case before us, the Attorney General
23 for the State of New York takes issue with CVS' business
24 model which ties contract pharmacy services and 340B
25 administration services to one another. The State asserts

1 two causes of action. One, an allegedly anticompetitive tie
2 of 340B administration services to CVS' 340B contract
3 pharmacy services. And that is alleged to violate the
4 Donnelly Act, which is at New York General Business Law
5 Section 340.
6 The second cause of action is a claim based upon
7 the same alleged conduct under the Executive Law, which is
8 at New York Executive Law Section 63 Subsection 12. In this
9 motion, CVS seeks to dismiss for failure to state both
10 causes of action.
11 Now, in most contexts, including the law of tie-ins
12 -- T-I-E dash I-N-S, New York's Antitrust Law, the Donnelly
13 Act is interpreted consistently with Federal Antitrust Law
14 and precedent. See Anheuser-Busch vs. Abrams at 71 NY2d
15 327, at 335. There, the Court wrote: "The Donnelly Act
16 should generally be construed and in light of Federal
17 precedent and given a different interpretation only where
18 State policy, differences in statutory language or the
19 legislative history justify such a result," unquote.
20 Now, to allege a per se antitrust tying claim,
21 T-Y-I-N-G, plaintiff must assert, one, Two distinct
22 products; a tying product and a tie product; and, two,
23 economic coercion; and, three, market power in the tying
24 product market; four, anticompetitive impact in the tied
25 market -- in the tied product market; and, five, involvement

1 of a not insubstantial amount of commerce. See Gonzalez vs.
2 St. Margaret's Housing Development Fund Incorporated --
3 Corporation, at 880 F.2d 1514.
4 The State argues that it has satisfied all five
5 elements of the claims, and although this Court is satisfied
6 that the State has successfully alleged four out of the five
7 elements of the claim, this Court holds that New York has
8 essentially erred by playing a -- by pleading a single brand
9 tying market. That is, a tying market that includes only
10 the CVS brand of contract pharmacies. Accordingly, in this
11 Court's view, the State has not successfully alleged the
12 third element of the tying claim.
13 "Tying" occurs when a seller conditions sales of a
14 product -- the tying product -- upon customers -- customers'
15 purchase of another separate product. That is, the tie
16 product. See Columbia Gas of New York vs. New York State
17 Electric and Gas Corp. at 28 NY2d 117 at 128.
18 However, not all tying arrangements violate the
19 Antitrust Laws. Instead, many tying arrangements are fully
20 consistent with a free, competitive market. See Illinois
21 Tool Works vs. Indiana, Inc. at 547 US 28 at 45. For
22 example, it is not illegal to sell cars with engines or
23 cameras with lenses. Rather, tying can be unlawful where a
24 seller has sufficient power in the tying product market to
25 restrain competition in the market for the tied product.

1 The Donnelly Act requires plaintiff to properly
2 allege a tying product market and the possession of power
3 within that market. A defendant that lacks market power in
4 the tying product market cannot coerce customers into
5 purchasing the tied product and, thus cannot harm
6 competition.
7 Put differently, a tie cannot violate the Donnelly
8 Act if customers have reasonable substitutes for the alleged
9 tying product. Without the leverage of a market -- of
10 market power, a seller's inefficient tie-in will fail
11 because a rational consumer will buy the tying product from
12 the seller's competitor. See Kaufman vs. Time Warner at 836
13 F.3d 137 at 143.
14 In light of these principles, the plaintiff's tying
15 claim is, in this Court's view, deficient. More
16 specifically, this Court holds that plaintiff's claim fails
17 due to its failure to properly define the relevant market.
18 Plaintiff concedes that a covered entity may obtain
19 its 340B savings from any pharmacy willing and able to serve
20 as a contract pharmacy. Yet, plaintiff rejects the most
21 natural product market definition. That is, all pharmacies
22 capable of serving as contract pharmacies to covered
23 entities. Instead, plaintiff asserts that tying product
24 market is the, quote, "CVS contract pharmacy market,"
25 unquote.

1 According to the Complaint, the accuracy of this
2 product market definition is illustrated by the example of a
3 covered entity's patient who chooses to go to a CVS store to
4 fulfill their prescription. If that covered entity does not
5 have a contract with CVS, then the covered entity cannot
6 collect the benefit. A covered entity cannot, for example,
7 try to recover the benefit under a contract with Walgreens
8 or a local pharmacy for a patient who went to CVS.
9 And according to the State, in light of the
10 so-called anti-steering regulation, the covered entity
11 cannot even ask the patient to avoid CVS. From the
12 perspective of the covered entity, there is, therefore, from
13 the patient -- from the plaintiff's standpoint, no
14 substitute for CVS. The CVS contract services market is,
15 therefore, according to the plaintiff appropriately limited
16 to a single brand, and CVS necessarily has market power in
17 that market.
18 At the same time, plaintiff acknowledges that a
19 Donnelly Act claim should be dismissed where the alleged
20 product market is improperly and narrowly defined, and where
21 the definition, quote, "fails to take into account real
22 world interchangeable substitute products," unquote.
23 Moreover, plaintiff also does not dispute that single brand
24 markets are regularly dismissed at the pleading stage, as
25 the single brand markets theory is highly disfavored. See,

1 for example, Victoria T. Enterprises vs. Charmer Industries
2 at 881 NY2, 570 at 572-73. Here, the Court noted that two
3 different brands of vodka were not each separate product
4 markets but rather part of a broader wine and liquor market.
5 Courts have reasoned that, quote, "If the market
6 were so narrowly defined, of course the brand company would
7 have market power being the sole seller. But such a narrow
8 definition makes no sense in terms of real world economics,
9 and as a matter of law, a Court cannot adopt it." See Town
10 Sound & Custom Tops vs. Chrysler Motors Corp., 959 F.2d, 468
11 at 479-80.
12 You should also see Tanaka vs. The University of
13 Southern California, at 252 F.3d 1059 at 1063-64. There,
14 the Ninth Circuit, affirming dismissal, rejecting
15 plaintiff's conclusory assertion that the UCLA women's
16 soccer program is unique and hence not interchangeable with
17 any other program in Los Angeles. You might also see Domed
18 Stadium Hotel, Inc. vs. Holiday Inn, at 732 F.2d 480 at 488,
19 where the Fifth Circuit wrote that, "Absent exceptional
20 market conditions, one brand in a market of competing brands
21 cannot constitute a relevant product market."
22 In defense of it's single brand definition,
23 plaintiff states that single brand markets are, quote,
24 "sometimes appropriate in antitrust cases and may be
25 permissible if no substitute exists for that brand's

1 products or services." Plaintiff then exclusively relies on
2 a Second Circuit case accepting a single brand market in US
3 Airways vs. Sabre Holdings Court, at 938 F.3d, 43 at
4 page 65. But the facts in Sabre are different from those
5 herein.
6 In Sabre, the Court acknowledged that, quote,
7 "where the plaintiff alleges a proposed relevant market that
8 clearly does not encompass all interchangeable substitute
9 products, the relevant market is legally insufficient and a
10 motion to dismiss may be granted." In that case, the Court
11 focused on actions taken by Sabre to lock customers into the
12 Sabre product and to impose exclusive use of its product,
13 making it switching to a competitor infeasible. As a result
14 and the Court emphasized there, that, quote, "Travel agents
15 that use Sabre almost all use only Sabre services and they
16 rarely, if ever, switch to another provider," unquote.
17 Here, by contrast, the covered entities typically
18 work with multiple contract pharmacies and plaintiff's own
19 Complaint recognizes that reality. See the Complaint at
20 paragraph 67 and 90. And plaintiff does not allege that CVS
21 has done anything to prevent switching to competing
22 pharmacies or to make switching costly. Plaintiff argues
23 that "the case for a single brand product market is even
24 stronger here than in Sabre because New York alleges total
25 exclusion of competitors from the market." And that's from

1 the Complaint at paragraph 12, 82 and 84. But the
2 paragraphs plaintiff cites focus on CVS' exclusive use of
3 Wellpartner in an entirely different market. That is, the
4 tied 340B services market.
5 Sabre was analyzing the costs of switching to a
6 competitor in the relevant market being analyzed. CVS has
7 done nothing to exclude competitors from the tying contract
8 pharmacy product market.
9 Instead, this case more resembles Truetox Labs vs.
10 Healthfirst, at 129 NYS3d 728. In that case, Justice Borrok
11 of the Commercial Division in the Supreme Court here granted
12 a motion to dismiss a Donnelly Act case for which the
13 plaintiff attempted to distort the relevant product market
14 for clinical laboratory services to include only those
15 services within defendant's network. The citation again is
16 at 129 NYS3d 728.
17 Recognizing that the alleged market must be
18 plausible, the Court noted that there was no reason why
19 laboratory services that currently fall within the
20 defendant's network are not interchangeable with laboratory
21 services -- with laboratories that service other healthcare
22 insurers in the same region. Based on the fact -- facts of
23 the Complaint, the Court ruled that a specific market for
24 clinical laboratory service that is constrained by the
25 defendant's network, is simply under-inclusive and too

1 narrow to survive dismissal.
2 The same reasoning applies here. Plaintiff alleges
3 the market for certain healthcare services that is
4 artificially limited to only CVS locations. They give no
5 truly plausible reasons why CVS contract pharmacies are
6 somehow situated differently than the myriad of other
7 pharmacies in the same region, that offer the same 340B
8 contract pharmacy services to covered entities.
9 Plaintiff only asserts that covered entities have
10 no substitutes for any contract pharmacies because, one, the
11 anti-steering rule prohibits covered entities from directing
12 a patient to particular pharmacies; and, two, the patient
13 generally did not know that their prescriptions provide 340B
14 benefits to covered entities.
15 Based on these alleged conditions, plaintiff
16 hypothesizes that covered entities are forced or compelled
17 to contract with any contract pharmacies at which plaintiffs
18 fill prescriptions, regardless of the conditions imposed.
19 That theory contradicts what actually happens in the market
20 and the realities of who the covered entities are choosing
21 to contract with.
22 For example, the Court here will take judicial
23 notice of the publicly available data that would show that
24 at the time the challenged conduct went into effect,
25 approximately 86 percent of New York covered entities that

1 used contract pharmacies for 340B savings, did not contract
2 with a single CVS pharmacy location.
3 And 71 percent of New York covered entities did not
4 contract with any of the major national chains: Walgreens,
5 Walmart, Rite Aid, Albertsons, Safeway, CVS, Ahold,
6 A-H-O-L-D, Costco or Publix, P-U-B-L-I-X. In other words,
7 CVS did not have the power to coerce covered entities to use
8 Wellpartner's administrative services as required for a
9 tying claim, as any covered entity that wished not to use
10 Wellpartner could join the 86 percent of New York covered
11 entities that chose not to include CVS and their contract
12 pharmacy network at all. Because plaintiff fails to allege
13 a proper tying market in which CVS has market power, the
14 Donnelly Act claim is dismissed.
15 The plaintiff's assertion is about the
16 anti-steering rule and that patient incentives also lacked
17 merit. First, and with regard to the anti-steering
18 allegations, plaintiff contests CVS' argument that HRSA
19 guidance, H-R-S-A, does not prevent covered entities from
20 encouraging patients to use certain pharmacies through
21 marketing and/or other efforts. But the only guidance
22 plaintiff points to is a statement that covered entities
23 must inform the patient of his or her freedom to choose a
24 pharmacy provider, and that if the patient does not elect to
25 use the the contracted service, the patient may obtain the

1 drugs from the pharmacy provider of his or her choice. That
2 language does not appear to prevent covered entities from
3 marketing or otherwise informing their patients about which
4 pharmacies will provide 340B benefits.
5 Importantly, a manual for 340B program published
6 with the support of HRSA explains that, quote, "It is
7 critical to establish a plan for marketing 340B service to
8 patients," unquote. In this Court's view, this is plain
9 language. It's not a matter for discovery. It's a matter
10 of simply for assessing the language as it is written on the
11 document.
12 Plaintiff also suggests that kickback statutes may
13 prevent steering, but the plaintiff does not explain how
14 these statutes could prevent marketing by covered entities
15 or why HRSA would endure such supposedly illegal actions.
16 Second, as to consumer awareness, plaintiff's
17 statement that, quote, "Patients generally do not know what
18 the 340B program is," or that their prescriptions are
19 somehow involved with the program, and that patients lack
20 personal incentives to use contract pharmacies is based on
21 plaintiff's presumption that marketing is not permitted.
22 Through marketing, covered entities can make their patients
23 aware of how filling a prescription at certain pharmacies
24 benefits the covered entity that the patients use. Because
25 plaintiff's impermissibly narrow market definition cannot be

1 reconciled with the commercial realities on the ground, the
2 State's Donnelly Act claim is dismissed.
3 With respect to the plaintiff's second cause of
4 action, the plaintiff acknowledges that its Executive Law
5 claim rises or falls with the Donnelly Act claim. That's
6 because the Donnelly Act claim is dismissed, so too is the
7 Executive Law claim.
8 Accordingly, the defendant's motion to dismiss is
9 granted in its entirety, and both causes of action are
10 dismissed.
11 I'm directing counsel for the moving party order a
12 copy of the transcript of today's proceedings and present it
13 to Mr. O'Connor, the clerk of Part 43. Mr. O'Connor will
14 present it to the Court, and after review in chambers, the
15 transcript will be so-ordered and then uploaded with a gray
16 sheet order together, reflecting the Court's decision and
17 order of this date.
18 MR. LUPKIN: Your Honor, would it be possible,
19 after the so-order of the transcript, that you put on the
20 record now that the clerk is directed to enter judgment in
21 accordance with the decision, so that we have one piece of
22 paper that is appealable and not two?
23 THE COURT: That's fine.
24 MR. LUPKIN: Thank you very much. So the order
25 will reflect that the clerk will enter judgment accordingly.

1 THE COURT: Yes.
2 MR. LUPKIN: Thank you very much, Your Honor.
3 MR. KASHA: Your Honor, if I may, just to preserve
4 the State's rights, I'm not asking for an order of procedure
5 he referred to about so-ordering and sending up the judgment
6 at the same time. I just want to make sure that that
7 wouldn't eliminate our chances to seek leave to replead or
8 to file an amended Complaint should we choose to do that.
9 We're obviously going to be thinking about whether we do
10 that or take it upstairs --
11 THE COURT: I didn't say it was with prejudice.
12 MR. KASHA: Okay. Thank you very much, Your Honor.
13 * * *
14
15 The foregoing is hereby certified to be a true and
16 accurate transcript of the proceedings as transcribed from
17 the stenographic notes.
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19 _____
ANNE BROWN, RPR
20 SENIOR COURT REPORTER
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