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SERVICES, INC.; REDDISH PHARMACY,
INC.; JABOS PHARMACY; OAK TREE
PHARMACY; APEX PHARMACY; AMRUT JAL,
LLC*

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI**

15 TRONE HEALTH SERVICES, INC.;
16 REDDISH PHARMACY, INC.; JABOS
17 PHARMACY, INC.; OAK TREE
PHARMACY; APEX PHARMACY; and
AMRUT JAL, LLC.

18 || Plaintiffs.

19 || vs.

Express Scripts Holding Company, Express Scripts, Inc., Express Scripts Mail Order Processing, Inc., Express Scripts Mail Pharmacy Service, Inc., and Does 1-20.

Defendants

Case No.:

COMPLAINT FOR:

- (1) ATTEMPTED MONOPOLIZATION**
 - (2) UNFAIR COMPETITION**
 - (3) BREACH OF CONTRACT**
 - (4) BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING**
 - (5) INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE**
 - (6) VIOLATION OF THE UNIFORM TRADE SECRETS ACT**
 - (7) FRAUD**

Trial Date: None Set

1 Plaintiffs Trone Health Services, Inc.; Reddish Pharmacy, Inc.; Jabos Pharmacy, Inc.; Oak
2 Tree Pharmacy; Apex Pharmacy; and Amrut JAL, LLC (“Plaintiffs”), by and through the
3 undersigned counsel, bring this action against defendants Express Scripts Holding Company
4 (“Express Scripts Holding”), Express Scripts, Inc. (“ESI”), Express Scripts Mail Order Processing,
5 Inc. (“ES Mail Order”), Express Scripts Mail Pharmacy Service, Inc. (“Express Scripts Mail
6 Pharmacy”) and Express Scripts Pharmacy, Inc. (“Express Scripts Pharmacy”) (collectively,
7 “Express Scripts” or “Defendants”). Plaintiffs allege as follows:

8 **INTRODUCTION**

9 1. This case seeks to put a stop to Defendants’ anti-competitive and unfair practice of
10 stealing Plaintiffs’ (retail pharmacies) customer information and prescription data and using it to
11 forcefully divert Plaintiffs’ customers to Defendants’ own mail order pharmacy business. This
12 practice of prescription “slamming”¹ has generated billions of dollars in illegal profits for the
13 Defendants and has gained Defendants a strangle hold on the most profitable categories of
14 customers and prescriptions.

15 2. ESI is the largest Pharmacy Benefit Manager (“PBM”) in the United States. Like
16 other PBMs, ESI occupies a powerful role in the prescription fulfillment process, acting as the
17 middleman between the insurers, employers and government agencies who provide prescription
18 drug coverage (“third party payors”) on the one hand and retail pharmacies who dispense
19 prescription drugs on the other hand. In its role as middleman, ESI is entrusted by Plaintiffs –
20 pursuant to contract – with confidential, proprietary information regarding Plaintiffs’ customers
21 and those customers’ prescriptions so that Plaintiffs can fill prescriptions and be paid for doing so.
22 But rather than using that information for the narrow purpose for which it is provided, Defendants
23 use the information for their own self-serving and unlawful purpose: to forcibly switch customers
24

25

¹ “Slamming” is a term originally used in the telecommunications industry to describe the illegal
26 practice of switching a consumer’s long distance telephone provider without permission.
27 *Consumer Fraud in the United States: An FTC Survey*, Federal Trade Commission (Aug. 2004) at
28 p. ES1 (“‘slamming’ – a situation in which a consumer’s long distance telephone service is
switched from one carrier to another without the consumer’s permission.”) Defendants have
found a new industry in which to pursue this scheme long outlawed by the FTC.

1 from Plaintiffs' retail pharmacies to Defendants' own mail-based pharmacies without Plaintiffs' or
2 their customers' authorization.

3 **JURISDICTION AND VENUE**

4 3. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C.
5 §1331 and 28 U.S.C. §1367(a). This Court also has jurisdiction over this action pursuant to 18
6 U.S.C. §1332(a)(1) because the controversy is between citizens of different States and the amount
7 in controversy exceeds \$75,000, exclusive of interest and costs.

8 4. Venue is proper in this District under 28 U.S.C. §§1391 because each of the
9 Defendants resides, for purposes of venue, in this District and are subject to personal jurisdiction
10 in this District and because a substantial part of the events or omissions giving rise to Plaintiff's
11 claims occurred in this District.

12 **PARTIES**

13 5. Plaintiff Trone Health Services, Inc. ("Trone") is an Idaho corporation with its
14 principal place of business in Meridian, Idaho. Trone operates independent pharmacies dispensing
15 prescription medicine primarily to patients who live and/or work nearby. Trone entered into a
16 Pharmacy Provider Agreement with Express Scripts, Inc., an example of which is attached to this
17 Complaint as Exhibit A.

18 6. Plaintiff Reddish Pharmacy, Inc. ("Reddish") is an Idaho corporation with its
19 principal place of business in Nampa, Idaho. Reddish operates as an independent pharmacy
20 dispensing prescription medicine primarily to patients who live and/or work nearby. Reddish
21 entered into a Pharmacy Provider Agreement with Express Scripts, Inc. like that attached to this
22 Complaint as Exhibit A.

23 7. Plaintiff Jabos Pharmacy, Inc. ("Jabos") is a Tennessee corporation with its
24 principal place of business in Newport, Tennessee. Jabos operates as an independent pharmacy
25 dispensing prescription medicine primarily to patients who live and/or work nearby. Jabos entered
26 into a Pharmacy Provider Agreement with Express Scripts, Inc. like that attached to this
27 Complaint as Exhibit A.

28 8. Plaintiff Oak Tree Pharmacy ("Oak Tree") is an Oregon corporation with its

1 principal place of business in Salem, Oregon. Oak Tree operates as an independent pharmacy
2 dispensing prescription medicine primarily to patients who live and/or work nearby. Oak Tree
3 entered into a Pharmacy Provider Agreement with Express Scripts, Inc. like that attached to this
4 Complaint as Exhibit A.

5 9. Plaintiff Apex Pharmacy (“Apex”) is an Oregon corporation with its principal place
6 of business in Portland, Oregon. Apex operates as an independent pharmacy dispensing
7 prescription medicine primarily to patients who live and/or work nearby. Apex entered into a
8 Pharmacy Provider Agreement with Express Scripts, Inc. like that attached to this Complaint as
9 Exhibit A.

10 10. Plaintiff Amrut JAL, LLC (“Amrut”) is an Indiana corporation with its principal
11 place of business in Terre Haute, Indiana. Amrut operates as an independent pharmacy dispensing
12 prescription medicine primarily to patients who live and/or work nearby. Amrut entered into a
13 Pharmacy Provider Agreement with Express Scripts, Inc. like that attached to this Complaint as
14 Exhibit A.

15 11. Express Scripts, Inc. (“ESI”) is a corporation duly organized and existing under the
16 laws of the State of Delaware, with its principal place of business in St. Louis, Missouri. ESI
17 conducts substantial business in California. It is one of the largest Pharmacy Benefit Managers in
18 the nation. ESI entered into Pharmacy Provider Agreements with each of the Plaintiffs and/or
19 with pharmacy groups in which each of the Plaintiffs are members.

20 12. Express Scripts Mail Order Processing, Inc. (“ES Mail Order”) is a corporation
21 duly organized and existing under the laws of the State of Delaware, with its principal place of
22 business in St. Louis, Missouri. ES Mail Order dispenses prescription medication through the
23 mail.

24 13. Express Scripts Mail Pharmacy Service, Inc. (“ES Mail Pharmacy”) is a
25 corporation duly organized and existing under the laws of the State of Delaware, with its principal
26 place of business in St. Louis, Missouri. ES Mail Pharmacy dispenses prescription medication
27 through the mail.

28 14. Express Scripts Pharmacy, Inc. (“ES Pharmacy”) is a corporation duly organized

and existing under the laws of the State of Delaware, with its principal place of business in St. Louis, Missouri. ES Pharmacy dispenses prescription medication through the mail.

15. Defendant Express Scripts Holding Company (“ES Holding”) is a corporation duly organized and existing under the laws of the State of Delaware, with its principal place of business in St. Louis, Missouri. ES Holding dominates and controls its subsidiaries, including ESI, ES Mail Order, ES Mail Pharmacy and ES Pharmacy, operates them collectively as a single enterprise and directed their conduct alleged herein.

8 16. The true names, roles and/or capacities of Defendants named as DOES 1 through
9 10, inclusive, are currently unknown to Plaintiffs and, therefore, are named as Defendants under
10 fictitious names. Plaintiffs will identify their true identities and their involvement in the
11 wrongdoing at issue if and when they become known.

12 17. The acts alleged to have been done by Defendants, and each of them were
13 authorized, ordered or done by their directors, officers, agents, partners, employees or
14 representatives while actively engaged in the management of each defendant's respective affairs.

NATURE OF THE ACTION

16 18. Plaintiffs are retail pharmacies who collectively fill prescriptions for hundreds or
17 thousands of patients each day, most of whom live or work within a handful of miles from
18 Plaintiffs. Plaintiffs devote considerable effort to attract and keep those patients. They maintain a
19 sufficient supply of medicines to meet patient demand; they maintain accessible and attractive
20 retail spaces; they devote resources to marketing and advertising; and they purchase or lease
21 electronic systems necessary to collect, organize and maintain customer and prescription
22 information.

23 19. Most of Plaintiffs' patients pay for their prescriptions with insured, pre-paid or
24 government-sponsored prescription drug benefits. As a result, Plaintiffs' primary source of
25 revenue is income earned by filling prescriptions for privately and publicly insured patients in
26 exchange for payments from those patients' insurers, employer-sponsored health plans or
27 government sponsored health plans.

28 20. In order to fill prescriptions for government- or privately-insured patients and to

1 receive payment in exchange for doing so, Plaintiffs and other pharmacies must enter into
2 contracts that establish the terms and conditions under which those prescriptions may be filled.
3 Among other things, those contracts specify the rates at which Plaintiffs will be reimbursed for
4 dispensing prescribed medications to those patients and set out the procedures Plaintiffs must
5 follow to confirm coverage and obtain reimbursement.

6 21. Rather than enter into thousands or tens of thousands of separate contracts with
7 thousands or tens of thousands of pharmacies throughout the country in order to specify
8 reimbursement rates and other conditions for reimbursing those pharmacies when they fill
9 prescriptions, third party payors contract with PBMs like ESI who, in turn, contract with
10 individual pharmacies or groups of pharmacies to fill prescriptions for the beneficiaries of those
11 government- and private-insurers. ESI is the largest such PBM in the United States.

12 22. Because insurers, employers and governments rarely, if ever, are willing to contract
13 directly with individual pharmacies and because pharmacies generally do not receive payment
14 from third party payors for filling prescriptions in the absence of a contract, Plaintiffs and other
15 pharmacies have no choice other than to contract with PBMs like ESI in order to obtain the right
16 to fill prescriptions for insured patients and be paid for doing so. Accordingly, each of the
17 Plaintiffs has entered into contracts with ESI for the right to fill prescriptions for beneficiaries of
18 the third party payors represented by ESI. An example of those contracts is attached to this
19 complaint as Exhibit A.

20 23. When Plaintiffs and other pharmacies fill prescriptions for patients whose
21 prescription drug benefits are provided by a third party payor covered by their contract with ESI,
22 ESI becomes involved in certain steps of those transactions in order to (1) provide confirmation
23 whether and to what extent the patients who brought their prescriptions into the pharmacy are
24 insured for those prescriptions, (2) confirm how much the pharmacy filling the prescriptions will
25 be paid for serving its customer, and (3) ultimately convey third party payors' payments to the
26 pharmacy that filled the prescriptions.

27 24. When Plaintiffs' insured customers ask Plaintiffs to fill prescriptions (or when
28 those customers' doctors call prescriptions in to Plaintiffs), Plaintiffs solicit and collect

1 information regarding the customers and the prescriptions the customers are seeking to have
2 Plaintiffs fill and enter that information into their specialized computer systems. In the case of
3 new customers, Plaintiffs also solicit and obtain other identifying and relevant identifying and
4 useful information from the customers and then record that information into their computer
5 systems. For existing customers, Plaintiffs retrieve previously-collected and -recorded identifying
6 and other relevant customer information from their computer systems. Plaintiffs expend
7 considerable effort, energy and capital to develop, collect, compile and maintain that customer
8 information, and take reasonable steps to maintain the confidentiality of that information.

9 25. Although Plaintiffs keep their customer and prescription information confidential,
10 ESI requires Plaintiffs to include that customer information and prescription data in the claims for
11 payment they submit to ESI. The information that ESI requires Plaintiffs to include in their claims
12 includes: the customer's identity, address, and insurer, the medication prescribed, the prescribing
13 doctor, the quantity prescribed and the dosage prescribed. ESI also requires Plaintiffs to include
14 information concerning the patient's mailing address and the number of refills authorized by the
15 prescription, even though ESI does not need that information to confirm coverage or perform any
16 other function in connection with filling the prescription.

17 26. For Plaintiffs, transmitting this customer information and prescription data to ESI is
18 not optional. It is required. Thus, for example, the ESI contract attached as Exhibit A requires the
19 contracting pharmacy to verify its customers' eligibility for coverage "utilizing ESI's then current
20 on-line system or other method(s) approved by ESI and set forth in the Provider Manual." If
21 Plaintiffs fill a prescription without transmitting to ESI the information and data that ESI demands,
22 Plaintiffs will not be paid for filling that customer's prescription ... even if the prescription was, in
23 fact, within the customer's insurance coverage. Indeed, ESI will not process or administer those
24 claims at all, will not confirm the existence and extent of those customers' insurance coverage for
25 the prescriptions Plaintiffs have been asked to fill and will not reimburse Plaintiffs for filling those
26 customers' prescriptions.

27 27. If Plaintiffs submit claims that do include the customer information and
28 prescription data that ESI requires, ESI will then process and administer those claims.

1 28. ESI maintains databases that record the eligibility of the various beneficiaries of its
2 third party payor clients for prescription drug coverage and the extent and type of coverage to
3 which those beneficiaries are entitled. ESI's databases also reflect the list of approved,
4 reimbursable medications (known as formularies) that is applicable to each such beneficiary and
5 any differences in coverage for medications based on whether or not they are on the applicable
6 formulary or other factors.

7 29. After ESI receives Plaintiffs' claims (including the customer and prescription
8 information Plaintiffs are required to include with those claims), it administers and processes
9 Plaintiffs' claims by, *inter alia*, causing its computer systems to compare information included in
10 Plaintiffs' claims against the databases ESI maintains. Through that comparison, ESI obtains
11 additional information regarding the patient and his or her prescription, such as the patient's
12 eligibility for coverage, the amount of any co-pay that should be charged to the patient and any
13 special requirements applicable to the prescribed medicines (such as any quantity or dosage
14 restrictions for that medication; any requirements to dispense a generic version of the prescribed
15 medication; or any requirement or preference for a therapeutically equivalent medication).

16 30. ESI then transmits to Plaintiffs some or all of the additional information it has thus
17 obtained so that the prescriptions can be filled in accordance with the terms of the customers'
18 insurance benefits.

19 31. After filling the customers' prescriptions, Plaintiffs submit requests for payment to
20 ESI. Using funds obtained from its third party payor clients, ESI is then supposed to pay to
21 Plaintiffs the amounts due for those prescriptions according to the formula reflected in the contract
22 between Plaintiffs and ESI.

23 32. ESI pervades Plaintiffs' every transaction with customers who receive prescription
24 drug coverage from third party payors with whom ESI has contracted. Because of the position it
25 has staked out for itself – between Plaintiffs and the third party payors who provide prescription
26 drug coverage to Plaintiffs' customers – ESI has access to extensive information regarding the
27 identity of and contact information for Plaintiffs' customers, the medicines Plaintiffs' customers
28 have been prescribed and, for maintenance drugs and other types of prescriptions with multiple

1 refills, the schedule on which those prescriptions can be filled. Significantly, ESI does not
2 actually need all of the information it requires Plaintiffs to provide in order to confirm patients'
3 coverage or to reimburse Plaintiffs for filling patients' prescriptions. Instead, it requires Plaintiffs
4 to provide some of that information solely so that it can engage in the unfair, illegal and
5 anticompetitive scheme at issue in this action.

6 33. Moreover, Plaintiffs are required to disclose that customer information and
7 prescription data to ESI for an extremely large portion of the prescriptions they fill. ESI is the
8 largest PBM in the country. Through its contracts with many of the largest providers of insured
9 and pre-paid prescription drug benefits in the country (including, for example, Anthem,
10 UnitedHealth Group, Wellpoint, various Blue Cross/Blue Shield entities and the Department of
11 Defense), ESI is responsible for processing the prescription drug benefits of more than 25% of
12 insured patients in the United States, meaning that ESI receives customer information and
13 prescription data for more than 1 in 4 of the insured prescriptions that Plaintiffs fill for their
14 customers. All told, ESI processes – and therefore receives customer information and prescription
15 data regarding – nearly 1.4 billion prescriptions each year.

16 34. Plaintiffs have no ability to prevent ESI from obtaining access to the customer
17 information and prescription data they are required to transmit to ESI. ESI mandates that
18 Plaintiffs disclose that information to ESI, or ESI will not approve the filling of customers'
19 prescriptions and will not convey payments to Plaintiffs for filling those customers' prescriptions.

20 35. There is no alternative method by which Plaintiffs can obtain payment from third
21 party payors for filling prescriptions on behalf of those customers. ESI will not remit payment to
22 Plaintiffs unless they provide the information and, since prescription drugs are generally costly,
23 customers who have insured or pre-paid prescription drug coverage are unwilling to forego access
24 to that coverage when it is available to them.

25 36. When Plaintiffs transmit their customer information and prescription data to ESI,
26 they do so solely because it is mandated by ESI and solely for the purpose of facilitating and
27 completing their own transactions with their customers. To that end, the information that
28 Plaintiffs transmit to ESI is entrusted to ESI exclusively so that ESI can perform the functions it

1 has agreed to perform to enable Plaintiffs to complete those transactions and be paid for doing so,
2 and for no other purpose.

3 37. Express Scripts, however, uses the customer information and prescription data that
4 Plaintiffs disclose to ESI for purposes other than the purpose for which that information and data
5 was disclosed to ESI. Worse, Express Scripts uses that entrusted customer information and
6 prescription data for its own benefit and to Plaintiffs' detriment by stealing Plaintiffs' customers
7 and monopolizing the market.

8 38. Until relatively recently, Express Scripts filled a comparatively small number of
9 prescriptions directly and had few direct dealings with patients when it came to filling their
10 prescriptions. Beginning in approximately 2009, however, Express Scripts decided to leverage its
11 power over Plaintiffs and other pharmacies in order to significantly expand its own mail-order
12 pharmacy business and monopolize the most profitable prescriptions of its clients' beneficiaries.
13 In order to do that and in violation of its contracts with Plaintiffs, Express Scripts is using its
14 access to Plaintiffs' confidential customer information and prescription data.

15 39. In order to achieve its goal of monopolizing those prescriptions, Express Scripts
16 took a number of short-cuts. Foremost among those shortcuts is its practice of forcefully
17 switching Plaintiffs' customers – without Plaintiffs' or those customers' consent – from having
18 their prescription re-fills fulfilled at Plaintiffs' pharmacies to fulfilling those re-fills itself through
19 Express Scripts' own mail order pharmacy business. Express Scripts calls this practice its "mail
20 conversion program".

21 40. In order to facilitate its "mail conversion program" and accomplish its goal to
22 acquire a monopoly in the relevant market, Express Scripts requires Plaintiffs, as a condition of
23 remitting insurers' payments for filling prescriptions, to disclose customer and prescription
24 information to ESI that is not actually necessary to confirm a customer's eligibility for insurance
25 coverage, but which is instead necessary for Express Scripts to convert Plaintiffs' customers to
26 mail order and fill their prescriptions by mail, including, *inter alia*, those customers' mailing
27 addresses and details regarding the number and nature of refills provided for in the customers'
28 prescriptions.

1 41. In violation of the contracts between ESI and Plaintiffs, ESI and the other
2 Defendants have used, and continue to use, the customer information and prescription data that
3 Plaintiffs provide to ESI for purposes other than the ones for which Plaintiffs provide that
4 information and data. In particular, ESI and the other Defendants use that customer information
5 and prescription data to (1) identify customers and prescriptions that they want to forcibly switch
6 from Plaintiffs' retail pharmacies to Express Scripts own mail-order pharmacy, (2) place
7 restrictions on those customers' accounts to prohibit those customers from having their
8 prescriptions refilled by Plaintiffs, (3) automatically mail re-fills for those customers'
9 prescriptions, regardless of the customers' desire for the medication, and (4) obtain a monopoly
10 over the most profitable prescriptions issued to its clients' beneficiaries.

11 42. In many cases, the first time that Plaintiffs or their customers learn that a
12 prescription has been switched to Express Scripts' own mail order pharmacy is when those
13 customers ask Plaintiffs to refill their prescriptions. Just as they did when those customers came
14 to Plaintiffs to fill their prescriptions the first time (*i.e.*, for the initial fill of the prescriptions),
15 Plaintiffs submit claims that include information about the customer and the prescription refill to
16 ESI. However, rather than receiving a confirmation that the prescription re-fill is covered by the
17 customer's insurance, as was the case when the prescription was originally filled, Plaintiffs are
18 notified that the prescription has been switched to "mandatory mail order" and that only ES Mail
19 Order, ES Mail Pharmacy or ES Pharmacy will be permitted to fulfill the prescription's refills.

20 43. By prohibiting Plaintiffs from refilling those prescriptions, Express Scripts means
21 to monopolize the relevant market and thereby ensure that the revenues generated from those
22 refills go to it, rather than Plaintiffs.

23 44. Express Scripts' purpose is not to benefit patients or the third party payors who
24 ultimately pay for patients' prescriptions. Indeed, there is no lawful benefit generated for anyone
25 other than Express Scripts when patients are required to obtain their refills from Express Scripts
26 rather than Plaintiffs.

27 a. Patients should receive no financial benefit when they are required to obtain
28 their refills from Express Scripts rather than Plaintiffs. Many states' "Any Willing

1 Provider” laws prohibit health plans and their agents like Express Scripts from requiring
2 patients to pay different co-insurance, co-payment or deductibles based on whether they
3 fill a prescription via mail order or at a retail pharmacy.²

4 b. Nor do third party payors benefit financially from Express Scripts’
5 practices, since Plaintiffs and other retail pharmacies could provide those refills on the
6 same financial terms as Express Scripts’ mail order pharmacy fills them. Indeed, many
7 states’ “Any Willing Provider” laws dictate that any licensed pharmacy that is willing to
8 accept the same financial terms that Express Scripts’ mail order pharmacy receives when it
9 refills those prescriptions must be allowed to refill the prescriptions. Despite these laws,
10 Express Scripts prohibits Plaintiffs from performing those refills on any financial terms.

11 45. In fact, not only does Express Scripts’ practice of forcing Plaintiffs’ customers to
12 obtain their refills from Express Scripts’ own mail order pharmacy create no benefits for patients
13 and third party payors, it can have serious negative effects on patients’ health.

14 a. Temperature and humidity levels commonly experienced by medications
15 while they are in the mail can significantly reduce the efficacy of those medications.
16 Although Express Scripts ships some medications in packaging designed to control
17 temperatures, most medications are shipped without any special packaging. As a result,
18 most medications Express Scripts delivers via its mail order pharmacy are subjected to
19 whatever temperatures and humidity levels can be found in mail delivery vehicles and
20 patients’ mail boxes. Those temperatures and humidity levels often far exceed the
21 temperatures and humidity levels at which FDA regulations require medications to be

22

23 ² To the extent Express Scripts does charge lower co-payments, requires lower deductibles
24 and/or provides a larger supply of medication to patients via mail order than it permits retail
25 pharmacies to supply, such conduct would violate numerous states’ “Any Willing Provider” laws.
26 For example, in Tennessee, Express Scripts causes higher co-pays to be charged to Blue
27 Cross/Blue Shield of Tennessee beneficiaries if they fill prescriptions in retail pharmacies than if
28 they fill prescriptions via Express Scripts’ own mail order pharmacy. For three months’ supply of
medication obtained via one of Plaintiffs’ retail pharmacies, beneficiaries must pay three full
months of co-pays, while three months’ supply of medication obtained via Express Scripts’ mail
order pharmacy requires the payment of just 2.5 months of co-pays. That violates Tennessee’s
Any Willing Provider law, Tenn. Code § 56-7-117.

1 stored.

2 b. Most prescription medications are supposed to be stored at temperatures
3 between 68 and 77 degrees Fahrenheit, with temporary exposure to temperatures between
4 59 and 86 degrees considered acceptable. Likewise, many prescription medications are
5 supposed to be kept in relatively dry conditions and not exposed to high humidity.
6 However, medicines dispensed by mail order frequently exceed these temperatures and
7 remain unprotected from high humidity for extended periods of time.

8 c. The efficacy of medications can be severely compromised when those
9 medications are exposed to high or low temperatures. For example, a study performed by
10 the Veterans Affairs Medical Center in Phoenix, Arizona, revealed that high temperatures
11 to which medications shipped by mail are commonly exposed causes Formoterol, a
12 commonly prescribed asthma medication, to clump and its capsules to distort, resulting in a
13 significant decline in the amount of medication dispensed when patients attempt to use
14 their inhalers. Likewise, Lorazepam and Diazepam can lose as much as 75 percent and
15 25 percent of their potency, respectively, when exposed to temperatures exceeding 98
16 degrees. Other commonly prescribed medications can experience equally significant
17 reductions in their efficacy because of high temperatures or humidity.

18 d. Delivery problems with medications dispensed through Express Scripts'
19 mail order pharmacy can also threaten patients' health. Many of the medications that
20 Express Scripts requires to be filled through its own mail order pharmacy are so-called
21 maintenance medications used to treat long-term or chronic health conditions such as
22 asthma, diabetes, hypertension and high cholesterol. Most patients who suffer from those
23 conditions must take their prescribed medication daily or more frequently. Yet, when
24 weather or other factors prevent timely delivery of those patients' medications via mail
25 order, the patients are frequently left without critical medicines even though they could
26 readily and promptly obtain those medications from a local retail pharmacy.

27 46. Express Scripts' practice of using the customer information and prescription data
28 that Plaintiffs and other pharmacies entrust to it for the purpose of diverting customers to its own

1 mail order pharmacy business has been incredibly successful for Express Scripts and extremely
2 costly to Plaintiffs. By misusing the customer information and prescription data that Plaintiffs and
3 other pharmacies entrust to it, Express Scripts has been able to expand its mail order pharmacy
4 business with incredible speed and now threatens to monopolize the relevant market.

5 47. Indeed, between 2009 and 2016, Express Scripts' mail order revenue more than
6 quintupled – growing from less than \$8 billion to \$43.9 billion. During that same period, the
7 number of prescriptions Express Scripts filled via mail order tripled – increasing from 41.8 million
8 prescriptions in 2009 to 199.7 million prescriptions in 2016. But for Express Scripts' "mail
9 conversion program" and, more specifically, its misuse of the customer information and
10 prescription data that Plaintiffs and other pharmacies entrust to ESI, all or nearly all of that
11 \$43.9 billion in revenue collected by Express Scripts in 2016 would have been collected by
12 Plaintiffs and other retail pharmacies.

13 48. Worse, Express Scripts has not just forcibly moved a portion of Plaintiffs' re-fill
14 business to its own mail order pharmacy, it has used the customer information and prescription
15 data that Plaintiffs entrust to it in order to target the most profitable segments of that re-fill
16 business.

17 49. Although Express Scripts demands that Plaintiffs provide customer information and
18 prescription data regarding all of their ESI-covered customers when filling those customers'
19 prescriptions, it does not force all of those customers to switch all of their prescriptions to Express
20 Scripts' mail order pharmacy. Instead, the criteria Express Scripts applies for determining which
21 of Plaintiffs' customers it will force to switch to Express Scripts' mail order pharmacy insures that
22 Express Scripts "converts" to its mail order program the most profitable customers and
23 prescriptions, leaving Plaintiffs with the prescriptions that must be filled at a loss or very narrow
24 profit margins under the reimbursement formulas Express Scripts imposes upon them.

25 50. Payments by third party payors for prescribed medications vary based on multiple
26 factors. However, generic (*i.e.*, off-patent) drugs – particularly those used to treat chronic
27 conditions (also known as "maintenance medications") – generally produce more positive net cash
28 flow for pharmacies than other drugs, such as name brand (*i.e.*, patented) medications. This is

1 because, although name brand medications are generally more expensive than generic
 2 medications, drug manufacturers receive and retain a much larger share of the monies paid for
 3 brand-name drugs they manufacture and sell than for generic drugs they manufacture and sell.
 4 Indeed, according to one recent study, pharmacies receive and retain just \$3 of every \$100 spent
 5 on brand-name medicines they dispense, whereas they receive and retain \$32 of every \$100 spent
 6 on generic medications they dispense. Express Scripts acknowledges the higher profitability of
 7 generic medicines in its shareholder reports, stating “as ingredient cost on generic drugs is
 8 incrementally lower than the price charged, higher generic fill rates generally have a favorable
 9 impact on our gross profit.” In addition, because most maintenance medications are commonly
 10 prescribed drugs, demand for those medications is generally consistent and high. As a result,
 11 maintaining an adequate inventory of maintenance medications generally involves lower
 12 administrative burdens and financial costs than for other types of medication. For these reasons,
 13 for pharmacies, the most desirable and profitable prescriptions are generally those for generic
 14 maintenance medications.

15 51. Indeed, the profits Plaintiffs earn on filling those prescriptions are critical to offset
 16 losses or minuscule profits that Plaintiffs often suffer filling other types of prescriptions. When
 17 they entered into their contracts with ESI, Plaintiffs did so with the understanding and on the
 18 expectation that they would be forced to fill some prescriptions at a loss or very small profit,
 19 because their cost to fill those prescriptions (including ingredient costs, overhead and other
 20 expenses) exceeds the payments the contracts entitled them to receive for doing so. However,
 21 Plaintiffs also understood and expected that the losses sustained on those prescriptions would be
 22 offset by positive net revenues earned on other prescriptions – particularly prescriptions for
 23 generic medications with multiple re-fills, such as generic maintenance medications. Express
 24 Scripts (including ESI) was aware of Plaintiffs’ expectations when entering into those contracts
 25 and, indeed, likewise expected that, under the contracts, the positive net revenues Plaintiffs earned
 26 on prescriptions for generic medications, including prescriptions with multiple re-fills, would
 27 offset the negative net revenue Plaintiffs would earn when filling other prescriptions.

28 52. Despite knowing and sharing Plaintiffs’ expectations, Express Scripts has

1 specifically targeted for forced mail-order conversion the very customers and transactions upon
2 which Plaintiffs depend to keep their pharmacies afloat. In fact, Express Scripts has made it part
3 of its business model to use the customer information and prescription data that Plaintiffs and
4 other retail pharmacies must provide to it in order to identify and forcibly “convert” those
5 customers and transactions to its own, competing pharmacy business.

6 53. More than that, Express Scripts has made particular effort to target generic
7 maintenance medications for forced mail order conversion. Indeed, in recent years, Express
8 Scripts has heralded to its investors that it has successfully increased the percentage of mail order
9 prescriptions it filled with generic medications rather than less profitable name-brand medications.
10 According to Express Scripts, 80.8% of the mail order prescriptions it filled during 2016 were
11 filled with generic medications rather than name-brand medications. That represents a significant
12 increase over the 60.2% of mail order prescriptions that Express Scripts filled with generic
13 medications in 2010.

14 54. By using the customer information and prescription data that Plaintiffs entrust to
15 ESI in order to identify and then forcibly switch customers to Express Scripts’ own mail order
16 pharmacy, Express Scripts has stolen profits that otherwise would have been earned by Plaintiffs.
17 By targeting the particular customers and prescriptions that it has targeted, Express Scripts has
18 ensured that it took the most profitable segment of Plaintiffs’ customer base for itself. According
19 to Express Scripts’ reports to shareholders, the number of prescriptions that Express Scripts filled
20 via mail order increased from 54.1 million in 2010 to almost 120 million in 2016 while the
21 revenues it collected from those prescriptions increased from \$13.4 billion to \$43.7 billion during
22 that same period. In its shareholder reports, Express Scripts has attributed this growth in its mail
23 order business at least in part to its “mail conversion programs”.

24 55. Nothing in Plaintiffs’ contracts with ESI permits ESI or Express Scripts to use the
25 customer information and prescription data obtained, collected and provided by Plaintiffs to ESI
26 for any purpose other than to process the retail prescription transactions occurring in those
27 pharmacies between Plaintiffs and their customers. Nevertheless, Express Scripts (including ESI)
28 is using that information and data for purposes other than the ones for which Plaintiffs provide it.

1 56. Nothing in Plaintiffs' contracts with ESI permits Express Scripts to use the
 2 customer information and prescription data that Plaintiffs provide to ESI for the purpose of taking
 3 business from them. Nevertheless, Express Scripts (including ESI) is using that information and
 4 data precisely for the purpose of taking business from Plaintiffs.

5 57. Indeed, Express Scripts' practice of diverting to its mail order pharmacy business
 6 the customer information and prescription data entrusted to ESI by Plaintiffs, rather than utilizing
 7 that information and data for the limited purpose for which it was provided (to process
 8 prescription drug claims), violates the Health Insurance Portability and Accountability Act of 1996
 9 as amended ("HIPAA") and the Health Information Technology for Economic and Clinical Health
 10 Act ("HITECH Act"). While HIPPA permits persons in lawful possession of patient data to use
 11 that data, it requires that the data be used only to advance the purpose for which it was provided.
 12 Here, Plaintiffs provided ESI personally identifiable patient data for two purposes: (1) to confirm
 13 whether and to what extent the patients who brought their prescriptions to Plaintiffs are insured for
 14 those prescriptions, and (2) to collect payment for filling the prescriptions. Plaintiffs did not
 15 authorize Express Scripts or any other entity to use this information for the purpose of providing
 16 health care services directly to the patients.

17 58. In addition to diverting the information provided by Plaintiffs and putting it to uses
 18 other than those for which it was provided (uses that are different from those that Plaintiffs'
 19 contracts contemplate), Express Scripts has also engaged, and continues to engage, in practices
 20 designed to obtain advantages for Express Scripts to the detriment of Plaintiffs and thereby
 21 increase the likelihood that prescriptions will be refilled through Express Scripts' own mail order
 22 business rather than at Plaintiffs' retail pharmacies:

23 a. First, for many insurance plans, the co-pay that beneficiaries must pay when
 24 filling a prescription are lower (generally 1/3 lower) when they fill a prescription by mail
 25 order than when they fill a prescription at a retail pharmacy. In other words, the system is
 26 rigged so that, from the patient's point of view, filling a prescription via mail order is
 27 cheaper than filling a prescription at a retail pharmacy. Since Plaintiffs are required by
 28 contract to collect co-pays from patients in the amounts specified through Express Scripts'

1 system, Plaintiffs cannot compete with mail order by reducing the amount they collect
2 from patients who come in to fill prescriptions.

3 b. Second, for some insurance plans, beneficiaries are required to fill
4 prescriptions for certain kinds of medications via mail order from Express Scripts. Patients
5 do not even have the option to fill those prescriptions at a retail pharmacy. Such rules
6 effectively exclude Plaintiffs from segments of the prescription drug market and deprive it
7 of any opportunity or ability to compete with Express Scripts for that business.

8 c. When fulfilling prescription re-fills via mail order, Express Scripts sends
9 patients a 90-day supply of their medication. By rules devised and implemented by
10 Express Scripts, Plaintiffs are prohibited from dispensing a 90-day supply of medication to
11 those same patients. Instead, Express Scripts' rules restrict Plaintiffs to providing a 30-day
12 supply. In some cases, after selecting one of Plaintiffs' patients to target for its mail order
13 business, Express Scripts reduces the supply Plaintiffs can provide to those customers from
14 30 days to 20 or 10 days.

15 59. The damages inflicted on Plaintiffs as a result of Express Scripts' conduct has been
16 substantial. Indeed, as a direct result of Express Scripts' conduct, the volume of prescriptions
17 filled by Plaintiffs has dropped significantly with most of those lost prescriptions being the ones
18 that would otherwise have generated the greatest profit to Plaintiffs.

19 60. Prior to filing this suit, Plaintiffs, through their counsel, attempted to informally
20 resolve the matters and disputes described herein with Express Scripts, through its counsel. From
21 September 13, 2017 through March 21, 2018, Plaintiffs, through their counsel, communicated with
22 Express Scripts in writing and telephonically regarding the matters described in this complaint in
23 an effort to achieve an informal resolution of these issues. Those efforts were unsuccessful.

24 **FIRST CLAIM FOR RELIEF**

25 **(Attempted Monopolization)**

26 **(Against All Defendants)**

27 61. Plaintiffs incorporate by reference the allegations set forth in paragraphs 1 through
28 61 above as if fully set forth herein.

1 62. Maintenance medications paid for by ESI's third party payor customers are a
2 distinct relevant market or submarket.

3 a. Patients who suffer the ailments treated by these maintenance medications
4 cannot substitute medicines designed for other ailments for the medications prescribed to
5 them because (1) those other medications will not treat the condition from which they
6 suffer and (2) federal and state laws require a valid prescription to dispense such
7 prescription medications.

8 b. Patients also cannot substitute other medications designed to treat the same
9 ailment (to the extent such medications even exist) if those medications are not on the
10 formulary (list of approved medications) maintained by ESI because, in that event, the
11 patients will be forced to pay for the medications themselves rather than having them paid
12 for by their insurer or other third party payor. Insured patients ordinarily do not purchase
13 medications not covered by their insurance, regardless of the price of the non-covered
14 medication.

15 c. Likewise, those patients cannot substitute medications paid for by means
16 other than ESI's insurance company and other third party payor customers because, if they
17 attempt to acquire the medications through some other method of payment, they will be
18 forced to bear the financial burden of the medication themselves, thereby negating the
19 purpose of maintaining insurance in the first place.

20 63. The geographic market relevant to this action is the United States.

21 a. ESI operates primarily in the United States.

22 b. The health insurers and other third party payors ESI represents also operate
23 primarily in the United States.

24 c. Finally, patients holding prescriptions for maintenance medication issued by
25 United States doctors are only permitted to fill those prescriptions in the United States.

26 64. Defendants' mail order pharmacy operates in interstate commerce. It ships
27 medications across state lines from central processing centers to patients' homes across the United
28 States.

1 65. Defendants have willfully engaged in a course of conduct, including
2 anticompetitive and exclusionary predatory actions, with the specific intent of monopolizing the
3 market for maintenance medications paid for by ESI's customers. That monopolistic intent is
4 demonstrated by, *inter alia*, the fact that ESI does not permit Plaintiffs to fill prescriptions on any
5 economic terms if those prescriptions are subject to mandatory mail order; ESI simply prohibits
6 Plaintiffs from filling those prescriptions at all. The only reason for prohibiting Plaintiffs from
7 filling those prescriptions on any economic terms is to acquire a monopoly over those
8 prescriptions. Were defendants' purpose otherwise, there would be no reason to prohibit Plaintiffs
9 from filling those prescriptions on the same terms as Defendants' mail order pharmacies.

10 66. There is a dangerous probability that, unless restrained, Defendants will succeed in
11 obtaining a monopoly in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. As alleged
12 herein, ESI not only has the ability to prohibit Plaintiffs and all other pharmacies from
13 participating in the relevant market, it has and continues to exercise that ability.

14 67. Plaintiffs have been damaged by Defendants' attempt to monopolize the relevant
15 market in an amount to be proved at trial.

SECOND CLAIM FOR RELIEF

(Unfair Competition)

(Against All Defendants)

19 68. Plaintiffs incorporate by reference the allegations set forth in paragraphs 1 through
20 58 above as if fully set forth herein.

69. Plaintiffs develop, compile, and maintain customer information only through the
expenditure of significant effort and expense. Much of the customer information developed and
maintained by Plaintiffs is not generally available to the public from other sources, and Plaintiffs
take reasonable steps to maintain the secrecy of their customer files containing that non-public
information.

26 70. Plaintiffs are required to transmit confidential customer data to ESI in order to
27 confirm those customers' eligibility for prescription benefits and in order to receive payment for
28 filling those customers' prescriptions. However, Plaintiffs expect – and the parties contracts

1 require – ESI to maintain the confidentiality of that information by using it only for the purposes
2 for which it was provided.

3 71. Despite the confidential nature of that customer information, ESI shares it with the
4 other Express Scripts defendants in order to assist those other Express Scripts defendants to steal
5 Plaintiffs' customers by switching them to Express Scripts' own mail order pharmacy.

6 72. Plaintiffs are damaged by Express Scripts' acts of unfair competition alleged herein
7 an amount to be proven at trial.

THIRD CLAIM FOR RELIEF

(Breach of Contract)

(Against Express Scripts, Inc.)

11 73. Plaintiffs incorporate by reference the allegations set forth in paragraphs 1 through
12 58 above as if fully set forth herein.

13 74. As set forth herein, each of the Plaintiffs, on the one hand, and ESI, on the other
14 hand, entered into Pharmacy Provider Agreements, an exemplar of which is attached hereto as
15 Exhibit A.

16 75. Plaintiffs have fully performed all material covenants, conditions and obligations
17 required by them to be performed by reason of the contracts, except to the extent waived, excused
18 or made impossible by ESI's breach of the contract.

19 76. Section 5.3 of the contracts provides: ESI “shall ... comply with all federal and
20 state laws, rules and regulations regarding the confidentiality of patient information, including, but
21 not limited to, compliance with [HIPPA] and [the HITECH Act]” and regulations thereunder.

22 77. As set forth herein, Express Scripts has materially breached the contracts by failing
23 to comply with all federal and state laws, rules and regulations regarding the confidentiality of
24 patient information, including provisions of HIPPA and the HITECH Act.

25 78. As a direct and proximate result of ESI's breaches of contract, Plaintiffs have
26 suffered, and will continue to suffer in the future, damages in an amount to be proven at trial, plus
27 interest allowable under applicable law.

FOURTH CLAIM FOR RELIEF

(Breach of Implied Covenant of Good Faith and Fair Dealing)

(Against Express Scripts, Inc.)

4 79. Plaintiffs incorporate by reference the allegations set forth in paragraphs 1 through
5 58 above as if fully set forth herein.

6 80. The Pharmacy Provider Agreements entered into between Express Scripts and
7 Plaintiffs contain a covenant of good faith and fair dealing implied as a matter of law. The
8 covenant of good faith and fair dealing imposes upon each party thereto a duty to cooperate with
9 the other to enable performance and achievement of the expected benefits of the contract and
10 prohibits them from engaging in any activity or conduct which would prevent the other party from
11 receiving the expected benefits of the contract or that evades the spirit of the transaction.

12 81. Plaintiffs have fully performed all covenants, conditions and obligations required
13 by it to be performed by reason of the contract, except to the extent waived, excused or made
14 impossible by ESI's breaches of the contracts.

15 82. ESI breached its duty of good faith and fair dealing owed to Plaintiffs by using the
16 patient information supplied to it pursuant to contracts' requirements in order to take customers
17 away from Plaintiffs and move those customers to Express Scripts' competing mail order
18 pharmacy. By this conduct, ESI has denied, and continues to deny, Plaintiffs the benefits they
19 expect under the contracts, namely, the ability to fill prescriptions including refills, for the
20 beneficiaries of ESI's customers and be compensated for doing so.

21 83. As a direct and proximate result of its breach of the implied covenant of good faith
22 and fair dealing, Plaintiffs have been damaged in an amount to be proven at trial.

FIFTH CLAIM FOR RELIEF

(Interference with Prospective Economic Advantage)

(Against All Defendants)

26 84. Plaintiffs incorporate by reference the allegations set forth in paragraphs 1 through
27 58 above as if fully set forth herein.

28 | 85. Prior to engaging in the conduct set forth herein, Defendants were fully aware that

1 Plaintiffs had relationships with their customers which were very likely to result in economically
2 advantageous relationships between Plaintiffs and those customers, namely, Plaintiffs have a valid
3 and reasonable expectation that customers who fill prescriptions at Plaintiffs will, to the extent
4 they refill the prescription pursuant to a pre-authorized refill prescribed by their doctor, also obtain
5 those refills at Plaintiffs' pharmacies.

6 86. Defendants were aware of this expectation because information regarding the
7 approved refills is provided by Plaintiffs to ESI in connection with submitting prescription
8 information.

9 87. Defendants were not justified in engaging in the conduct alleged herein but rather
10 did so with the intent to interfere with and/or destroy the economically advantageous relationships
11 between Plaintiffs, on the one hand, and their customers, on the other hand.

12 88. As a proximate result of the conduct of Defendants, Plaintiffs have been damaged
13 in an amount to be proven at trial.

SIXTH CLAIM FOR RELIEF

(Violation of Uniform Trade Secrets Act)

(Against All Defendants)

17 89. Plaintiffs incorporate by reference the allegations set forth in paragraphs 1 through
18 58 above as if fully set forth herein.

19 90. Plaintiffs' customer information is a protectable trade secret. Plaintiffs develop,
20 compile and maintain that customer information only through the expenditure of significant effort
21 and expense. Much of the customer information so developed and maintained by Plaintiffs is not
22 generally available to the public from other sources, and Plaintiffs take reasonable steps to
23 maintain the secrecy of their customer information files containing that non-public information.

91. By the improper means alleged above, defendants obtained Plaintiffs' secret and
proprietary customer information.

26 92. At the time it acquired Plaintiffs' secret and proprietary customer information, ESI
27 knew or had reason to know that it acquired knowledge of Plaintiffs' secret and proprietary
28 customer information under circumstances giving rise to a duty to maintain the secrecy of that

information or to limit its use of that information to the narrow purposes for which it was provided, namely to confirm customers' eligibility for insured prescription benefits and so that Plaintiffs would receive payment for filling those customers' prescriptions.

4 93. At the time the other Express Scripts defendants acquired Plaintiffs' secret and
5 proprietary customer information from ESI, they knew or had reason to know that ESI had an
6 obligation to maintain the confidentiality of that information and to use it only for the purposes for
7 which it was provided, namely to confirm customers' eligibility for insured prescription benefits
8 and so that Plaintiffs would receive payment for filling those customers' prescriptions.

9 94. However, rather than using the information solely for the purposes for which it was
10 provided, ESI conveyed that information to other Express Scripts defendants so that Express
11 Scripts could use that information to compete unfairly with Plaintiffs.

95. Plaintiffs are damaged by Express Scripts' acts of unfair competition alleged herein
an amount to be proven at trial.

SEVENTH CLAIM FOR RELIEF

(Fraud)

(Against Express Scripts, Inc.)

17 96. Plaintiffs incorporate by reference the allegations set forth in paragraphs 1 through
18 58 above as if fully set forth herein.

19 97. At various times throughout Plaintiffs' relationship with ESI, including at the time
20 Plaintiffs executed their provider agreements with ESI and each time Plaintiffs sought to fill a
21 prescription for patients whose insurance was supplied by one of ESI's customers, ESI demanded
22 that Plaintiffs supply their confidential customer data to ESI. ESI represented that the supplied
23 customer information would be used (1) to confirm those customers' eligibility for insured
24 prescription benefits and (2) to reimburse Plaintiffs for filling those customers' prescriptions.

25 98. However, ESI concealed from Plaintiffs and failed to disclose to Plaintiffs that it
26 intended to use and would use that customer information supplied by Plaintiffs for the purpose of
27 switching Plaintiffs' customers to Express Scripts' own mail order pharmacy and prohibiting them
28 from re-filling their prescriptions at Plaintiffs' pharmacies.

1 99. ESI and Plaintiffs were, at all relevant times, in a contractual relationship with one
2 another such that ESI had a duty to disclose that omitted and concealed information to Plaintiffs.

3 100. That undisclosed and omitted information was material to Plaintiffs, such that, had
4 Plaintiffs been aware of that undisclosed and omitted information, they would have behaved
5 differently.

6 101. At all relevant times, Plaintiffs were unaware of the undisclosed and omitted
7 information.

8 102. ESI's failure to disclose the undisclosed and omitted information has proximately
9 caused injury to Plaintiffs in an amount to be proved at trial.

PRAYER FOR RELIEF

11 WHEREFORE, Plaintiffs pray for judgment against defendants, and each of them jointly
12 and severally, as follows:

- 13 (1) For damages in an amount to be proven at trial;

14 (2) For the declaratory, equitable, injunctive and/or monetary relief as appropriate for

15 the particular causes of action;

16 (3) For pre- and post-judgment interest;

17 (4) For exemplary damages;

18 (5) For such other and further relief as this Court may deem just and proper.

DEMAND FOR JURY TRIAL

Plaintiffs demand a trial by jury on all claims so triable and an advisory jury for a factual determination on all equitable claims.

1 DATED: March 28, 2018

Respectfully submitted,

2 CUNEO GILBERT & LaDUCA, LLP

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