DISSENTING STATEMENT OF COMMISSION ER JULIE BRILL CONCERNING THE PROPOSED ACQUISITION OF MEDCO HE ALTH SOLUTIONS I NC. (MEDCO) BY EXPRESS SCRIPTS, INC. (ESI)

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A majority of the Commission has voted to set the investigation of ESI's acquisition of Medco. I cannot support this isort. In my view, the Commissi

Pharmacy benefit management providers (BBMdminister pharmaceutical benefits for most U.S. consumers under contracts with largedtheplans or directlywith employers. The three largest PBM providers in the United Statoday are ESI, CVS Caremark, and Medco. There is a reason why ESI, CVS Caremark, and dederefer to themselves as the Big Three. ESI is currently the nation's leading PBM prober with 90 million covered lives, followed by CVS Caremark with 85 million, and Medco with 65 million covered lives fitter the merger of ESI and Medco, the merged entity will be over fitness larger than the third largest firm.

Under any definition of the market, this mergwill create a highly concentrated market that should be presumed to **bike**ly to enhance market power. In the large commercial employer market, the Big Three PBMs have a **charmit** market share of between 80 and 90 per cent. This acquisition would therefore cirease Herfindahl-Hirschman Index (HHI) concentration levels in this market from 2,7604,063, an increase of over 1,300. This market definition is consistent with the approach ta

share. The pre-merger HHlowld increase from 1,939 to 2,927 post-merger, with an increase of 988. And even in an all employer market, Big Three's nearest competitor, Aetna, would have a market share well below 10 per cehtalso note that Aetna depends on a strategic relationship with CVS Caremark, under which tatter provides several key management and administrative PBM services to Aetha.sincerely wish I could agree with the majority that the PBM market will consist of at least ninsignificant competitors postnerger, plus a fringe. However, I am at a loss to see how any of thes

presumption of collusion' that attaches tonerger in such a highly concentrated market. The majority is correct that the most plausible theory of collusion or coordinated interaction in this case is customer allocation; however cannot agree with majority that the theory fails when

large-scale entry into the PBM **rke**t is difficult. As the Cominssion concluded as long ago as 1998 "[t]here are substantial entry

independent competitors. Once again, becausespasstlogue, this evidence cannot be ignored. While I admire UnitedHealth's optimism in re-ening the PBM market, find myself agreeing with Judge Collyer in CCC/Mitchell when she observed that '[t]he mere fact that new entrants and fringe firms have an intent to competesdoet necessarily mean that they are significant competitors capable of replacing lost competition." The fact of the matter is that with an infinitesimal PBM market shareday, I fear that UnitedHealth is to quote Judge Collyer – "an ant to an elephant" compared to the soon-to-be Big Two PBMs.

Along with Chairman Leibowitz, I supportectensent order placing some limitations on the ability of the merged firnto engage in certain forms exclusionary conduct, which would have at least helped provide some counterbaltanthee barriers that create a strong presumption against timely and sufficient entry and reposition unfortunately, even this limited relief was not palatable to some of my fellow Consissioners, and so did not materialize.

In sum, the legal presumption against this merger is overwhelming and is not, in my view, sufficiently rebutted by evidence regarding mpetitive effects or entry. As the D.C. Circuit observed in Heinz, "[a]s far as we can determine, no court has ever approved a merger to duopoly under similar circumstances. The parties seek to overcome the inzpresumption by proffering efficiencies, but the sefficiencies are for the mostart not cognizable and, in any event, are insufficient to rebut the presumption. As Heinz court explained, in a highly concentrated market characterized by high basine entry, the patts opposing a preliminary injunction must provide "poof of extraordinary efficiencies" in order to rebut the presumption of anticompetitive effects. I find no such proof here.

The majority of the Commission believethis merger-to-duopoly will not have anticompetitive effects. I call on the Commisstordemonstrate that the majority's hypothesis

 $^{^{23}\,\}mbox{FTCv.}$ CCCHoldings,605 F. Supp.2d 26, at 59.

²⁴ CCCHoldings at 87.

²⁵ Heinz,at 717.

²⁶ Id., at 720.

is true: three years from now, the Commonsissishould conduct a thorough analysis of this industry to determine if prices to employersaint have gone down. Wheill sincerely hope that I am wrong about the effects of thriserger, I believe – in deep sadness and not prove to be the case.

After examining the totality of the evidence – the market structure, the data, the statements of executives the merged parties and other times by, the fact that Medco would be poised to play a maverick in this market, the klapf entry capable of replicating the scale of competition lost through this merger, and the latch efficiencies to overcome the presumption of anticompetitive effects – I respectfully disserum the Commission's excision to close this investigation.