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

12 UNITED STATES DISTRICT COURT  
13 EASTERN DISTRICT OF MISSOURI

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

17 Plaintiffs,

18 vs.

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

22 Defendants.

Case No.:

- FIRST AMENDED 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 divert Plaintiffs’ customers to Defendants’ own mail order pharmacy business. This practice of  
12 prescription “slamming”<sup>1</sup> has generated billions of dollars in illegal profits for the Defendants and  
13 has gained Defendants a strangle hold on the most profitable categories of customers and  
14 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 <sup>1</sup> “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

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

3 15. Defendant Express Scripts Holding Company (“ES Holding”) is a corporation duly  
4 organized and existing under the laws of the State of Delaware, with its principal place of business  
5 in St. Louis, Missouri. ES Holding dominates and controls its subsidiaries, including ESI, ES  
6 Mail Order, ES Mail Pharmacy and ES Pharmacy, operates them collectively as a single enterprise  
7 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.

15 **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 they are required by their contracts with ESI to transmit that customer information and  
11 prescription data to ESI. ESI requires Plaintiffs to supply that customer and prescription  
12 information when Plaintiffs process prescriptions. If Plaintiffs do not provide that customer and  
13 prescription information, ESI will not confirm the existence and extent of those customers'  
14 insurance coverage for the prescriptions Plaintiffs have been asked to fill and will not reimburse  
15 Plaintiffs for filling those customers' prescriptions. Although not actually needed to confirm  
16 coverage, among the information that ESI requires Plaintiffs to provide are the customer's  
17 identity, the customer's address, the customer's insurer, the medication prescribed, the prescribing  
18 doctor, the quantity prescribed, the dosage prescribed and the number of refills prescribed by the  
19 doctor.

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

26         27. When Plaintiffs electronically transmit customer information and prescription data  
27 to ESI's computer systems, that information and data is automatically compared against the  
28 databases maintained by ESI in order to verify those customers' eligibility for coverage and to

1 identify any special requirements applicable to the prescribed medicines (such as any quantity or  
2 dosage restrictions for that medication; any requirements to dispense a generic version of the  
3 prescribed medication; or any requirement or preference for a therapeutically equivalent  
4 medication) so that the prescriptions can be filled in accordance with the terms of the customers'  
5 insurance benefits.

6         28. For Plaintiffs, transmitting this customer information and prescription data to ESI is  
7 not optional. It is required. Thus, for example, the ESI contract attached as Exhibit A requires the  
8 contracting pharmacy to verify its customers' eligibility for coverage "utilizing ESI's then current  
9 on-line system or other method(s) approved by ESI and set forth in the Provider Manual." If  
10 Plaintiffs fill a prescription without transmitting to ESI the information and data that ESI demands,  
11 Plaintiffs will not be paid for filling that customer's prescription ... even if the prescription was, in  
12 fact, within the customer's insurance coverage.

13         29. Upon filling their customers' prescriptions, Plaintiffs record in their computer  
14 systems information to reflect what was dispensed and in what quantity. That information is then  
15 transmitted to ESI together with a request for payment of the amount due to Plaintiffs under the  
16 formula reflected in the contract between Plaintiffs and ESI. Using funds obtained from its third  
17 party payor clients, ESI is then supposed to pay to Plaintiffs the amounts due for those  
18 prescriptions.

19         30. ESI pervades Plaintiffs' every transaction with customers who receive prescription  
20 drug coverage from third party payors with whom ESI has contracted. Because of the position it  
21 has staked out for itself – between Plaintiffs and the third party payors who provide prescription  
22 drug coverage to Plaintiffs' customers – ESI has access to extensive information regarding the  
23 identity of and contact information for Plaintiffs' customers, the medicines Plaintiffs' customers  
24 have been prescribed and, for maintenance drugs and other types of prescriptions with multiple  
25 refills, the schedule on which those prescriptions can be filled. Significantly, ESI does not  
26 actually need all of the information it requires Plaintiffs to provide in order to confirm patients'  
27 coverage or to reimburse Plaintiffs for filling patients' prescriptions. Instead, it requires Plaintiffs  
28

1 to provide some of that information solely so that it can engage in the illegal scheme at issue in  
2 this action.

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

13 32. Plaintiffs have no ability to prevent ESI from obtaining access to the customer  
14 information and prescription data they are required to transmit to ESI. ESI mandates that  
15 Plaintiffs disclose that information to ESI, or ESI will not approve the filling of customers’  
16 prescriptions and will not convey payments to Plaintiffs for filling those customers’ prescriptions.

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

22 34. When Plaintiffs transmit their customer information and prescription data to ESI,  
23 they do so solely because it is mandated by ESI and solely for the purpose of facilitating and  
24 completing their own transactions with their customers. To that end, the information that  
25 Plaintiffs transmit to ESI is entrusted to ESI exclusively so that ESI can perform the functions it  
26 has agreed to perform to enable Plaintiffs to complete those transactions and be paid for doing so,  
27 and for no other purpose.

28 35. Express Scripts, however, uses the customer information and prescription data that

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

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

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

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

26 39. In violation of the contracts between ESI and Plaintiffs, ESI and the other  
27 Defendants have used, and continue to use, the customer information and prescription data that  
28 Plaintiffs provide to ESI for purposes other than the ones for which Plaintiffs provide that

1 information and data. In particular, ESI and the other Defendants use that customer information  
2 and prescription data to (1) identify customers and prescriptions that they want to forcibly switch  
3 from Plaintiffs' retail pharmacies to Express Scripts own mail-order pharmacy, (2) place  
4 restrictions on those customers' accounts to prohibit those customers from having their  
5 prescriptions refilled by Plaintiffs, (3) automatically mail re-fills for those customers'  
6 prescriptions, regardless of the customers' desire for the medication, and (4) obtain monopoly  
7 power over the most profitable prescriptions.

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

17 41. By prohibiting Plaintiffs from refilling those prescriptions, Express Scripts means  
18 to monopolize the relevant market and thereby ensure that the revenues generated from those  
19 refills go to it, rather than Plaintiffs.

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

24 a. Patients receive no financial benefit when they are required to obtain their  
25 refills from Express Scripts rather than Plaintiffs. State "Any Willing Provider" laws  
26 prohibit Express Scripts from requiring patients to pay different co-insurance, co-payment  
27 or deductibles based on whether they fill a prescription via mail order or at a retail  
28

1 pharmacy.<sup>2</sup>

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

9 43. In fact, Express Scripts' practice of forcing Plaintiffs' customers to obtain their  
10 refills from Express Scripts' own mail order pharmacy does not just lack benefits for patients and  
11 third party payors, it can have serious negative effects on patients' health.

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

21 b. Most prescription medications are supposed to be stored at temperatures  
22 between 68 and 77 degrees Fahrenheit, with temporary exposure to temperatures between  
23 59 and 86 degrees considered acceptable. Likewise, many prescription medications are  
24 supposed to be kept in relatively dry conditions and not exposed to high humidity.

25 However, medicines dispensed by mail order frequently exceed these temperatures and

26 \_\_\_\_\_  
27 <sup>2</sup> To the extent Express Scripts does charge lower co-payments, requires lower deductibles  
28 and/or provides a larger supply of medication to patients via mail order than it permits retail  
pharmacies to supply, such conduct would violate numerous states' "Any Willing Provider" laws.

1 remain unprotected from high humidity for extended periods of time.

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

12 44. Express Scripts' practice of using the customer information and prescription data  
13 that Plaintiffs and other pharmacies entrust to it for the purpose of diverting customers to its own  
14 mail order pharmacy business has been incredibly successful for Express Scripts and extremely  
15 costly to Plaintiffs. By misusing the customer information and prescription data that Plaintiffs and  
16 other pharmacies entrust to it, Express Scripts has been able to expand its mail order pharmacy  
17 business with incredible speed and now threatens to monopolize the relevant market.

18 45. Indeed, between 2009 and 2013, Express Scripts' mail order revenue nearly  
19 quintupled – growing from less than \$8 billion to \$37.6 billion. During that same period, the  
20 number of prescriptions Express Scripts filled via mail order tripled – increasing from 41.8 million  
21 prescriptions in 2009 to 141.2 million prescriptions in 2013. But for Express Scripts' "mail  
22 conversion program" and, more specifically, its misuse of the customer information and  
23 prescription data that Plaintiffs and other pharmacies entrust to ESI in order to process their own  
24 transactions with customers, all or nearly all of that \$37.6 billion in revenue collected by Express  
25 Scripts in 2013 would have been collected by Plaintiffs and other retail pharmacies.

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

1 business.

2 47. Although Express Scripts demands that Plaintiffs provide customer information and  
3 prescription data regarding all of their ESI-covered customers when filling those customers'  
4 prescriptions, it does not force all of those customers to switch all of their prescriptions to Express  
5 Scripts' mail order pharmacy. Instead, the criteria Express Scripts applies for determining which  
6 of Plaintiffs' customers it will force to switch to Express Scripts' mail order pharmacy insures that  
7 Express Scripts "converts" to its mail order program the most profitable customers and  
8 prescriptions, leaving Plaintiffs with the prescriptions that must be filled at a loss or very narrow  
9 profit margins under the reimbursement formulas Express Scripts imposes upon them.

10 48. Payments to pharmacies from third party payors vary based on several factors.  
11 However, name brand prescription drugs – particularly name brand drugs used to treat chronic  
12 conditions (also known as "maintenance medications") – generally produce more positive net cash  
13 flow than other drugs, such as generic (*i.e.*, off-patent) medications. As a result, for pharmacies  
14 and other sellers of prescription drugs, the most desirable and profitable prescriptions are generally  
15 those for name-brand maintenance medications.

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

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

7           51.     Express Scripts heralds to its insurer customers the fact that less than 20% of the  
8 1.4 billion prescriptions it processes for retail pharmacies each year are for name brand  
9 medications (meaning that 80% of those prescriptions are for often loss-inducing generic  
10 medications). Left out of that statistic, however, is the fact that the comparably small number of  
11 name-brand drugs dispensed by Plaintiffs and other retail pharmacies is actually a consequence of  
12 Express Scripts’ conduct to shift profitable name-brand prescriptions away from Plaintiffs and  
13 other retail pharmacies to Express Scripts’ own, competing, mail order pharmacy business.

14           52.     Indeed, even while Express Scripts trumpets that just 20% of the prescriptions  
15 filled by Plaintiffs and retail pharmacies that it had a hand in processing were filled with name-  
16 brand medications, more than 37% of the prescriptions Express Scripts has forcibly moved from  
17 Plaintiffs and other retail pharmacies to its own mail order pharmacy business are filled with  
18 name-brand drugs. As Express Scripts explained in its 2012 10K, “[t]he [mail order] generic fill  
19 rate is lower than the retail generic fill rate as fewer generic substitutions are available among  
20 maintenance medications (*e.g.*, therapies for chronic conditions) commonly dispensed from [mail  
21 order] pharmacies compared to acute medications which are primarily dispensed by pharmacies in  
22 our retail networks.”

23           53.     By using the customer information and prescription data that Plaintiffs entrust to  
24 ESI in order to identify and then forcibly switch customers to Express Scripts’ own mail order  
25 pharmacy, Express Scripts has stolen profits that otherwise would have been earned by Plaintiffs.  
26 By targeting the particular customers and prescriptions that it has targeted, Express Scripts has  
27 ensured that it took the most profitable segment of Plaintiffs’ customer base. As Express Scripts  
28 reported in its 2012 10K, the company realized a \$1.5 billion increase in mail order revenue from

1 2011 to 2012 solely because of “inflation on branded drugs and higher claims volumes attributed  
2 to the success of mail conversion programs.” According to Express Scripts 2013 10K, it realized a  
3 \$4.7 billion increase in mail order revenues between 2012 and 2013.

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

9 55. Nothing in Plaintiffs’ contracts with ESI permits Express Scripts to use the  
10 customer information and prescription data that Plaintiffs provide to ESI for the purpose of taking  
11 business from them. Nevertheless, Express Scripts (including ESI) is using that information and  
12 data precisely for the purpose of taking business from Plaintiffs.

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

25 57. In addition to diverting the information provided by Plaintiffs and putting it to uses  
26 other than those for which it was provided (uses that are different from those that Plaintiffs’  
27 contracts contemplate), Express Scripts has also engaged, and continues to engage, in practices  
28 designed to obtain advantages for Express Scripts to the detriment of Plaintiffs and thereby

1 increase the likelihood that prescriptions will be refilled through Express Scripts' own mail order  
2 business rather than at Plaintiffs' retail pharmacies:

3           a.       First, for many insurance plans, the co-pay that beneficiaries must pay when  
4 filling a prescription are lower (generally 1/3 lower) when they fill a prescription by mail  
5 order than when they fill a prescription at a retail pharmacy. In other words, the system is  
6 rigged so that, from the patient's point of view, filling a prescription via mail order is  
7 cheaper than filling a prescription at a retail pharmacy. Since Plaintiffs are required by  
8 contract to collect co-pays from patients in the amounts specified through Express Scripts'  
9 system, Plaintiffs cannot compete with mail order by reducing the amount they collect  
10 from patients who come in to fill prescriptions.

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

16           c.       When fulfilling prescription re-fills via mail order, Express Scripts sends  
17 patients a 90-day supply of their medication. By rules devised and implemented by  
18 Express Scripts, Plaintiffs are prohibited from dispensing a 90-day supply of medication to  
19 those same patients. Instead, Express Scripts' rules restrict Plaintiffs to providing a 30-day  
20 supply. In some cases, after selecting one of Plaintiffs' patients to target for its mail order  
21 business, Express Scripts reduces the supply Plaintiffs can provide to those customers from  
22 30 days to 20 or 10 days.

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

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1 **FIRST CLAIM FOR RELIEF**

2 **(Attempted Monopolization)**

3 **(Against All Defendants)**

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

6 60. Maintenance medications paid for by customers of ESI are a distinct relevant  
7 market or submarket. Patients who suffer the ailments treated by these maintenance medications  
8 cannot substitute their maintenance medications with medicines designed for other ailments  
9 because those other medications will not treat the condition from which they suffer. Nor can they  
10 substitute other medications designed to treat the same ailment (to the extent such medications  
11 even exist) if those medications are not on the formulary (list of approved medications) maintained  
12 by ESI because, in that event, the patients will be forced to pay for the medications themselves  
13 rather than having them paid for by their insurer or other third party payor. Likewise, those  
14 patients cannot substitute medications paid for by means other than ESI's insurance company and  
15 other third party payor customers because, if they attempt to acquire the medications through some  
16 other method of payment, they will be forced to bear the financial burden of the medication  
17 themselves, thereby negating the purpose of maintaining insurance in the first place.

18 61. The geographic market relevant to this action is the United States. ESI operates  
19 primarily in the United States. The health insurers and other third party payors it represents also  
20 operate primarily in the United States. Finally, patients holding prescriptions for maintenance  
21 medication issued by United States doctors are only permitted to fill those prescriptions in the  
22 United States.

23 62. Defendants' mail order pharmacy operates in interstate commerce. It ships  
24 medications across state lines from central processing centers to patients' homes across the United  
25 States.

26 63. Defendants have willfully engaged in a course of conduct, including  
27 anticompetitive and exclusionary predatory actions, with the specific intent of monopolizing the  
28 market for maintenance medications paid for by ESI's customers, and there is a dangerous

1 probability that, unless restrained, they will succeed in obtaining a monopoly in violation of  
2 Section 2 of the Sherman Act, 15 U.S.C. § 2.

3 64. Plaintiffs have been damaged by Defendants' attempt to monopolize the relevant  
4 market in an amount to be proved at trial.

5 **SECOND CLAIM FOR RELIEF**

6 **(Unfair Competition)**

7 **(Against All Defendants)**

8 65. Plaintiffs incorporate by reference the allegations set forth in paragraphs 1 through  
9 58 above as if fully set forth herein.

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

15 67. Plaintiffs are required to transmit confidential customer data to ESI in order to  
16 confirm those customers' eligibility for prescription benefits and in order to receive payment for  
17 filling those customers' prescriptions. However, Plaintiffs expect – and the parties contracts  
18 require – ESI to maintain the confidentiality of that information by using it only for the purposes  
19 for which it was provided.

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

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

25 **THIRD CLAIM FOR RELIEF**

26 **(Breach of Contract)**

27 **(Against Express Scripts, Inc.)**

28 70. Plaintiffs incorporate by reference the allegations set forth in paragraphs 1 through

1 58 above as if fully set forth herein.

2 71. As set forth herein, each of the Plaintiffs, on the one hand, and ESI, on the other  
3 hand, entered into Pharmacy Provider Agreements, an exemplar of which is attached hereto as  
4 Exhibit A.

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

8 73. Section 5.3 of the contracts provides: ESI "shall ... comply with all federal and  
9 state laws, rules and regulations regarding the confidentiality of patient information, including, but  
10 not limited to, compliance with [HIPPA] and [the HITECH Act]" and regulations thereunder.

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

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

17 **FOURTH CLAIM FOR RELIEF**

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

19 **(Against Express Scripts, Inc.)**

20 76. Plaintiffs incorporate by reference the allegations set forth in paragraphs 1 through  
21 58 above as if fully set forth herein.

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

28 78. Plaintiffs have fully performed all covenants, conditions and obligations required

1 by it to be performed by reason of the contract, except to the extent waived, excused or made  
2 impossible by ESI's breaches of the contracts.

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

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

11 **FIFTH CLAIM FOR RELIEF**

12 **(Interference with Prospective Economic Advantage)**

13 **(Against All Defendants)**

14 81. Plaintiffs incorporate by reference the allegations set forth in paragraphs 1 through  
15 58 above as if fully set forth herein.

16 82. Prior to engaging in the conduct set forth herein, Defendants were fully aware that  
17 Plaintiffs had relationships with their customers which were very likely to result in economically  
18 advantageous relationships between Plaintiffs and those customers, namely, Plaintiffs have a valid  
19 and reasonable expectation that customers who fill prescriptions at Plaintiffs will, to the extent  
20 they refill the prescription pursuant to a pre-authorized refill prescribed by their doctor, also obtain  
21 those refills at Plaintiffs' pharmacies.

22 83. Defendants were aware of this expectation because information regarding the  
23 approved refills is provided by Plaintiffs to ESI in connection with submitting prescription  
24 information.

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

28 85. As a proximate result of the conduct of Defendants, Plaintiffs have been damaged

1 in an amount to be proven at trial.

2 **SIXTH CLAIM FOR RELIEF**

3 **(Violation of Uniform Trade Secrets Act)**

4 **(Against All Defendants)**

5 86. Plaintiffs incorporate by reference the allegations set forth in paragraphs 1 through  
6 58 above as if fully set forth herein.

7 87. Plaintiffs' customer information is a protectable trade secret. Plaintiffs develop,  
8 compile and maintain that customer information only through the expenditure of significant effort  
9 and expense. Much of the customer information so developed and maintained by Plaintiffs is not  
10 generally available to the public from other sources, and Plaintiffs take reasonable steps to  
11 maintain the secrecy of their customer information files containing that non-public information.

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

14 89. At the time it acquired Plaintiffs' secret and proprietary customer information, ESI  
15 knew or had reason to know that it acquired knowledge of Plaintiffs' secret and proprietary  
16 customer information under circumstances giving rise to a duty to maintain the secrecy of that  
17 information or to limit its use of that information to the narrow purposes for which it was  
18 provided, namely to confirm customers' eligibility for insured prescription benefits and so that  
19 Plaintiffs would receive payment for filling those customers' prescriptions.

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

25 91. However, rather than using the information solely for the purposes for which it was  
26 provided, ESI conveyed that information to other Express Scripts defendants so that Express  
27 Scripts could use that information to compete unfairly with Plaintiffs.

28 92. Plaintiffs are damaged by Express Scripts' acts of unfair competition alleged herein

1 an amount to be proven at trial.

2 **SEVENTH CLAIM FOR RELIEF**

3 **(Fraud)**

4 **(Against Express Scripts, Inc.)**

5 93. Plaintiffs incorporate by reference the allegations set forth in paragraphs 1 through  
6 58 above as if fully set forth herein.

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

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

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

19 97. That undisclosed and omitted information was material to Plaintiffs, such that, had  
20 Plaintiffs been aware of that undisclosed and omitted information, they would have behaved  
21 differently.

22 98. At all relevant times, Plaintiffs were unaware of the undisclosed and omitted  
23 information.

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

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**PRAYER FOR RELIEF**

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

- (1) For damages in an amount to be proven at trial;
- (2) For the declaratory, equitable, injunctive and/or monetary relief as appropriate for the particular causes of action;
- (3) For pre- and post-judgment interest;
- (4) For exemplary damages;
- (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.

DATED: October \_\_\_\_, 2016

Respectfully submitted,

CUNEO GILBERT & LaDUCA, LLP  
Michael J. Flannery

By \_\_\_\_\_  
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