

Complaint

IN THE MATTER OF

OMNICARE, INC.COMPLAINT AND FINAL ORDER IN REGARD TO ALLEGED
VIOLATIONS OF SECTION 5 OF THE FEDERAL TRADE COMMISSION
ACT AND SECTION 7 OF THE CLAYTON ACT*Docket No. 9352; File No. 111 0239**Complaint, January 27, 2012 – Decision, February 22, 2012*

This case addresses the \$760 million acquisition by Omnicare, Inc. of certain assets of PharMerica Corporation. The complaint alleges that the acquisition, if consummated, would violate Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act by substantially increasing Omnicare's bargaining leverage and otherwise reducing competition in the sale of long term care pharmacy services to Plan Sponsors. The Order dismisses the Administrative Complaint without prejudice, because Respondent has announced that it is abandoning the proposed acquisition of PharMerica, and has withdrawn its Hart-Scott-Rodino Notification and Report Form filed for the proposed transaction.

Participants

For the *Commission*: Jordan S. Andrew, Stephanie C. Bovee, Gerald A. Stein, Lore Unt, Mark Seidman, Christine L. White, and Daniel Zach.

For the *Respondent*: John D. Harkrider and Michael L. Keeley, Axinn, Veltrop & Harkrider, LLP, and Jacqueline I. Grise and Roxann E. Henry, Dewey & LeBoeuf.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by the Act, the Federal Trade Commission, having reason to believe that Respondent Omnicare, Inc.'s ("Omnicare") cash tender offer to acquire PharMerica Corporation ("PharMerica"), if consummated, would violate Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

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I.**NATURE OF THE CASE**

1. Twenty-nine million elderly or disabled Americans participate in federally subsidized Medicare Part D Plans (“Part D Plans”) to help pay for their prescription drugs; approximately 1.6 million of those beneficiaries reside in skilled nursing facilities (“SNFs”). Part D beneficiaries residing in SNFs receive their medications from the long-term care pharmacy (“LTC Pharmacy”) with which the SNF has contracted on an exclusive basis. The beneficiaries’ Part D Plan sponsors (“Part D sponsors”) reimburse the LTC Pharmacy for that service under contracts that the LTC Pharmacy negotiates directly with the Part D sponsors. Omnicare, the nation’s largest LTC Pharmacy, has made a hostile tender offer for its largest competitor, PharMerica (the “Acquisition”). The Acquisition, if successful, threatens to increase substantially Omnicare’s negotiating leverage with Part D sponsors, and is likely to result in higher reimbursement rates paid by the Part D sponsors, their beneficiaries, and ultimately, American taxpayers who subsidize the vast majority of the Part D Plans’ costs.

2. LTC Pharmacies are specialized pharmacies that do not cater to retail traffic. Instead, they package and deliver prescription medications primarily to SNFs for their residents who are receiving nursing care. Omnicare is already, by far, the largest LTC Pharmacy in the United States, controlling % of the country’s licensed SNF beds. As a result of this market position, it already enjoys considerable leverage in its negotiations with Part D sponsors. Omnicare seeks to extend its market-leading position by acquiring its largest, and only, national competitor, PharMerica, which controls % of the country’s licensed SNF beds. PharMerica’s board of directors has rejected Omnicare’s offer (and has recommended, in a publicly issued statement, that shareholders not tender their shares to Omnicare), in part because, in PharMerica’s words: “Antitrust clearance to combine competitors with #1 and #2 market share in institutional pharmacy is likely to be difficult to achieve and involve lengthy administrative and court proceedings.” Post-Acquisition, the combined firm’s only competitors would be small, regional and

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local pharmacies, none of which currently possesses substantial market share or operates in more than a few states.

3. The Centers for Medicare and Medicaid Services (“CMS”) requires Part D sponsors to provide “convenient access” to LTC Pharmacies for their beneficiaries residing in SNFs. SNFs contract exclusively with a single LTC Pharmacy to meet the prescription medication needs of all their residents. Thus, the larger the LTC Pharmacy (measured by number of SNF beds served), the more likely CMS is to require a Part D sponsor to include it in its Part D network. Sponsors that fail to satisfy CMS’s “convenient access” requirement risk being barred from offering their Part D Plans to any beneficiaries, even though SNF residents make up only a small portion of their enrollees.

4. Omnicare’s exclusive contractual relationships with a large number of the nation’s 16,000-plus SNFs are the source of its market-leading position. Because Omnicare serves far more SNF beds than any other LTC Pharmacy, it is often able to extract higher prices and other more favorable contract terms from Part D sponsors. As Omnicare’s CEO recently explained to investors, “[Omnicare] basically control[s] 50% of the patient . . . population in the nursing home agencies. . . . So with that type of leverage and market share, you know, we’re in a different and unique position when we’re negotiating our contracts with [Part D sponsors].”

5. Omnicare has explicitly and successfully invoked the risk that Part D sponsors face if they fail to contract with it in its negotiations with several Part D sponsors. Indeed, Omnicare’s standard negotiating practice is to threaten to terminate its participation in the Part D sponsor’s LTC Pharmacy network if the sponsor refuses its demand for higher rates or better terms. To drive home that risk, Omnicare has repeatedly threatened to bring the impasse to CMS’s attention, placing CMS approval of the sponsor’s entire Part D business at risk. A number of the largest Part D sponsors have capitulated to Omnicare’s demands to avoid the risk that CMS would refuse to approve their Part D Plan network without Omnicare.

6. Post-Acquisition, Omnicare would control approximately 57% of all of the licensed SNF beds in the United States. The

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high pre- and post-merger market shares and concentration levels render the Acquisition presumptively unlawful under the relevant case law and the U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines (“Merger Guidelines”). Evidence from CMS, as well as market participants including Part D sponsors, Pharmacy Benefit Managers (“PBMs”) (which assemble LTC Pharmacy networks on their own behalf and on behalf of other Part D sponsors), SNFs, other LTC Pharmacies, and Omnicare and PharMerica themselves, confirms this strong presumption of illegality.

7. The combined firm would have unparalleled power in its negotiations with the Part D sponsors. Already a “should have,” Omnicare’s post-Acquisition market share will almost certainly make it a “must have” for every Part D Plan seeking to meet CMS’s “convenient access” requirement. This will significantly increase Omnicare’s bargaining leverage because Omnicare’s threats to terminate the Part D sponsor if it refuses to agree to Omnicare’s contractual demands will represent an unacceptable risk. Without the combined firm in its network, a Part D Plan would be unlikely to meet CMS’s access requirement. And no Part D sponsor would rationally put its entire Part D business at risk in negotiations with the combined entity over reimbursements for the small percentage of its Part D beneficiaries who reside in SNFs.

8. Omnicare’s use of termination threats to get price increases from Part D sponsors will likely escalate post-Acquisition as the combined firm flexes its increased bargaining leverage to extract even higher prices and better terms. The cost of these price increases ultimately will, in the end, largely be borne by the federal government, which subsidizes the overwhelming majority (74.5%) of each Part D Plan’s costs; as well as many Part D beneficiaries, who will be forced to pay higher premiums, deductibles, and co-pays to receive Part D benefits.

9. Even if the combined firm is not ultimately deemed necessary to meet CMS’s “convenient access” requirement, the acquisition of PharMerica’s significant additional SNF relationships will further increase Omnicare’s already substantial bargaining leverage over Part D sponsors. Omnicare and

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PharMerica are also each other's closest competitors for a significant number of SNFs, providing additional leverage for Omnicare in negotiations with Part D sponsors post-Acquisition.

II.**THE RESPONDENT**

10. Respondent Omnicare is incorporated in Delaware and is headquartered at 1600 RiverCenter II, 100 East RiverCenter Boulevard, Covington, Kentucky 41011. Omnicare owns and operates approximately 204 LTC Pharmacy facilities located in 44 states, which serve approximately licensed SNF beds through its exclusive contracts with SNF operators. In 2010, Omnicare generated total revenues of approximately \$6.1 billion.

III.**THE TARGET OF THE ACQUISITION**

11. Omnicare plans to acquire PharMerica, which is incorporated in Delaware and is headquartered at 1901 Campus Place, Louisville, Kentucky 40299. PharMerica owns and operates approximately 97 pharmacy facilities in 43 states, and controls approximately licensed SNF beds. In 2010, PharMerica had total annual revenues of approximately \$1.8 billion.

IV.**JURISDICTION**

12. Omnicare and each of its relevant operating subsidiaries, are, and at all relevant times have been, engaged in activities in or affecting "commerce" as defined in Section 4 of the FTC Act, 15 U.S.C. § 44, and Section 1 of the Clayton Act, 15 U.S.C. § 12.

13. PharMerica and each of its relevant operating subsidiaries, are, and at all relevant times have been, engaged in activities in or affecting "commerce" as defined in Section 4 of the FTC Act, 15 U.S.C. § 44, and Section 1 of the Clayton Act, 15 U.S.C. § 12.

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14. The Acquisition constitutes an acquisition subject to Section 7 of the Clayton Act, 15 U.S.C. § 18.

V.**THE ACQUISITION**

15. Through its hostile cash tender offer announced publicly on September 7, 2011, and currently set to expire on February 17, 2012, Omnicare proposes to acquire all outstanding shares of PharMerica to obtain ownership and control of the company. The value of the proposed Acquisition is approximately \$760 million.

VI.**OVERVIEW OF PART D BENEFITS PROVIDED TO SNF RESIDENTS**

16. Medicare Part D has been in effect since January 1, 2006. Roughly 1.1 billion prescriptions per year are processed under Part D on behalf of the approximately 29 million beneficiaries enrolled in Part D Plans. The majority of patients receiving care at SNFs at any given time in the United States are enrolled in and receive benefits from a Part D Plan.

17. SNF residents may be covered by Medicare Part A or Part D when they first enter the facility. Medicare Part A is a federal program that subsidizes inpatient hospital costs for Medicare beneficiaries, as well their initial stay at a SNF upon release from the hospital (up to the first 100 days). Because the average SNF resident stays well beyond the initial Medicare Part A period, and because some residents are already receiving Part D benefits at the time they enter the SNF, a minority of SNF residents at any given time receive Part A benefits. CMS provides a per diem payment to SNFs to cover Part A residents' cost of care, including prescription medications. SNFs are then responsible for the actual cost of their care. Part A SNF residents almost always receive Part D benefits after their Part A benefits expire.

18. Five actors are involved in providing Medicare Part D benefits to SNF residents:

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- a. Medicare Part D beneficiaries – select the SNF where they will reside and receive care, and the Part D Plan that covers their medication costs. Beneficiaries do not select the LTC Pharmacies that provide their medications while they reside in a SNF.
- b. SNFs – care for Part D beneficiaries and other patients residing in their facilities. SNFs typically select a single LTC Pharmacy to provide the prescription medications for all of the SNF’s residents, including Part D beneficiaries. SNFs do not pay for LTC Pharmacy services covered by Part D; that responsibility falls to the Part D sponsors. Indeed, SNFs are generally not even aware of the rates negotiated by Part D sponsors and the LTC Pharmacies. SNFs do not contract with Part D sponsors for drug coverage.
- c. LTC Pharmacies (e.g., Omnicare and PharMerica) – dispense and deliver medication for the SNFs’ residents, typically on an exclusive basis. LTC Pharmacies contract with (and receive reimbursement payments from) Part D sponsors for providing pharmacy services to the sponsors’ beneficiaries residing at those SNFs with which the LTC Pharmacy has a contract.
- d. Part D sponsors – offer Medicare beneficiaries, including those residing in SNFs, Part D prescription drug plans. Sponsors contract with and pay LTC Pharmacies to provide medications to their beneficiaries residing in SNFs serviced by the LTC Pharmacy.
- e. CMS – approves and contracts with private sponsors that provide Part D Plans to Medicare beneficiaries. CMS subsidizes the majority (approximately 74.5%) of each Part D Plan’s costs.

19. CMS regulations require each Part D sponsor to provide “convenient access” to LTC Pharmacies for plan beneficiaries residing at SNFs. If a sponsor does not meet its “convenient

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access” obligation, CMS may prohibit the sponsor from offering Part D Plans in all or part of the country.

VII.**THE RELEVANT PRODUCT MARKET**

20. The relevant product market in which to analyze the competitive effects of the Acquisition is the sale of LTC Pharmacy services to Part D sponsors for their SNF resident beneficiaries.

21. An appropriate relevant product or service market is found by determining whether a hypothetical monopolist of LTC Pharmacy products and services could profitably raise prices by a small but significant amount. Due to CMS regulations and the needs of Part D Plan beneficiaries residing in SNFs, no other services are reasonably interchangeable with those provided by LTC Pharmacies. Part D Plan beneficiaries residing in SNFs are typically immobile, cognitively impaired, or severely ill, and require medication to be ordered, delivered and administered to them at regular intervals. CMS regulations require Part D sponsors to establish LTC Pharmacy networks to meet the special pharmaceutical needs of their SNF resident beneficiaries. Accordingly, Part D sponsors could not substitute retail or mail order pharmacy services, or any other type of service, for LTC Pharmacy services.

VIII.**THE RELEVANT GEOGRAPHIC MARKET**

22. The relevant geographic market in which to analyze the effects of the Acquisition is the United States.

23. An appropriate geographic market is determined by examining the geographic boundaries within which a hypothetical monopolist for the services at issue could profitably raise prices by a small but significant amount.

24. Part D Plans provide benefits to their beneficiaries throughout the country. Part D sponsors typically contract with

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LTC Pharmacies to provide pharmacy services from all of their locations in the United States. A hypothetical monopolist controlling all of the LTC Pharmacies in the country could profitably increase prices to Part D sponsors for LTC Pharmacy services by at least a small but significant amount.

25. Omnicare's and PharMerica's own documents and statements to investors assess market share on a national level and focus on providing LTC Pharmacy services to Part D sponsors nationally. CMS, Part D sponsors, and PBMs (contracting on behalf of Part D sponsors), confirm that Part D sponsors purchase LTC Pharmacy services nationally.

IX.**MARKET STRUCTURE AND THE ACQUISITION'S
PRESUMPTIVE ILLEGALITY**

26. Part D sponsors satisfy CMS's "convenient access" requirement by contracting with LTC Pharmacies that contract with SNFs. Each SNF bed is served by only one LTC Pharmacy, since each SNF typically enters into an exclusive contract with one LTC Pharmacy. The number and share of SNF beds that a LTC Pharmacy has under contract reflects that LTC Pharmacy's importance to a sponsor's Part D Plan network and ability to satisfy CMS's "convenient access" requirement. Therefore, shares in the relevant market are best measured by the number of licensed SNF beds a LTC Pharmacy services. In its business documents and in statements to investors, Omnicare routinely uses the number of SNF beds to measure its market share.

27. The Acquisition reduces the number of national LTC Pharmacies in the United States from two to one, leaving only small, regional and local pharmacies to compete with Omnicare post-Acquisition. Omnicare's post-Acquisition market share would be approximately 57%, as measured by licensed SNF beds. Under relevant case law and the Merger Guidelines, the Acquisition is presumptively unlawful.

28. The Merger Guidelines measure market concentration using the Herfindahl-Hirschman Index ("HHI"). Under that test, a merger or acquisition is presumed likely to create or enhance

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market power (and presumed illegal) when the post-merger HHI exceeds 2,500 points and the merger or acquisition increases the HHI by more than 200 points. The market concentration levels here exceed these thresholds by a wide margin. The post-Acquisition HHI level would be at least 3,253, with an increase of 1,404 points. The HHI figures are summarized in the following table.

LTC Pharmacy	Pre-Acquisition Market Share	Post-Acquisition Market Share
Omnicare	%	57%
PharMerica	%	--
Next Largest LTC Pharmacy	2%	2%
All others combined	41%	41%
Pre-Acquisition HHI		at least 1,849
Post-Acquisition HHI		at least 3,253
HHI Increase		1,404

X.

ANTICOMPETITIVE EFFECTS

29. Omnicare currently possesses considerable bargaining leverage over Part D sponsors because it controls a high percentage of the SNF beds in this country. Omnicare uses that leverage to obtain better prices and other more favorable contract terms than other LTC Pharmacies.

30. Omnicare has substantial leverage in negotiations with sponsors because even now there is doubt among Part D sponsors that they could meet CMS's "convenient access" requirement without Omnicare in their networks. Since Part D went into effect in 2006, CMS has not had occasion to reach a conclusion as to whether or not a participating Part D Plan must include Omnicare in its network. But Omnicare has exploited Part D sponsors'

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uncertainty about the need to have Omnicare in their networks to extract higher prices and better terms because sponsors doubt that they could offer their plans at all without reaching an agreement with Omnicare. If a Part D sponsor fails to obtain CMS approval to offer a Part D Plan, it would affect more than just the sponsor's beneficiaries residing in SNFs – the affected Part D sponsor would be barred from participating in Medicare Part D, which would mean losing an entire line of business, and for many sponsors, losing millions of beneficiaries and millions of dollars in revenues.

31. Before Omnicare's CEO, John Figueroa opened negotiations with one of the largest Part D sponsors, he asked his chief negotiator:

His
chief negotiator responded:

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■

32. Omnicare also derives negotiating leverage from the fact that, if Omnicare and a Part D sponsor fail to reach an agreement, the Part D sponsor would likely lose most, if not all, of its beneficiaries residing in Omnicare-served SNFs. If Omnicare refuses to participate in a Part D sponsor's network, affected SNFs would likely assist the sponsor's beneficiaries to switch to a covered Part D Plan rather than switching LTC Pharmacies. CMS regulations are designed to provide SNF residents with tremendous flexibility in selecting a Part D Plan, and CMS specifically contemplates that SNF residents will select a Part D Plan that includes the SNF's LTC Pharmacy in its network. The SNFs' other options would be to either bring in a second LTC Pharmacy to serve the out-of-network Part D Plan's beneficiaries, or switch LTC Pharmacies altogether. Neither of these options are likely because they would: upset the exclusive relationship

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that exists between the SNF and its LTC Pharmacy; increase the risk of medication errors; and create other administrative, regulatory, and coordination of care problems.

33. In a number of recent negotiations, Omnicare has threatened to terminate its contracts with Part D sponsors to obtain higher prices and better terms. Part D sponsors have capitulated to Omnicare's demands to avoid the substantial risk of not having Omnicare in their networks.

34. Omnicare's own documents and statements demonstrate that Omnicare currently has unique bargaining leverage because of its share of SNF beds. For example, in a recent public statement to financial analysts and investors, John Figueroa, Omnicare's CEO, stated:

[Omnicare] basically control[s] 50% of the patient, you know, population in the nursing home agencies. So it is pretty difficult for a patient who walks into a nursing home that is contracted with Omnicare to pick a new pharmacy. I mean they can't do it. The easier thing for them to do is actually change their [Part D Plan]. . . . So with that type of leverage and market share, you know, we're in a different and unique position when we're negotiating our contracts with [Part D Plans].

Omnicare's description of the negotiating dynamics are consistent with the tactics it employs in its negotiations with the Part D sponsors and their outcomes.

35. The CEO's view is not an isolated one within the company. In documents prepared for investor meetings, Omnicare executives wrote that,

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36. Omnicare acknowledges that, as the largest LTC Pharmacy in the country, Part D sponsors would find it difficult to meet their beneficiaries' needs without Omnicare in their networks, and that this fact gives Omnicare significant bargaining leverage. For example, in a document prepared for an earnings call, Omnicare wrote that,

Just weeks before launching its hostile tender offer, Omnicare explained to potential lenders:

37. As the country's second-largest LTC Pharmacy, PharMerica also has leverage in negotiations with Part D sponsors, though substantially less than that of Omnicare. PharMerica has fewer SNF beds under contract than Omnicare does, therefore it is less likely that CMS would determine that a Part D Plan would not meet the "convenient access" requirement without PharMerica in its network. As a result, PharMerica generally receives lower prices and other less favorable terms than Omnicare.

38. Post-Acquisition, the combined firm would almost certainly become a "must have" for every Part D sponsor. At a minimum, it would be much less likely that any Part D Plan could meet CMS's "convenient access" requirement without the combined firm in its network. As the Chief Medical Officer of the Center for Medicare at CMS, testified:

While some ambiguity may exist as to whether a Sponsor could drop either PharMerica or Omnicare from its LTC pharmacy network, that ambiguity would be eliminated by the companies' proposed consolidation. Post-consolidation it would be virtually impossible for a Sponsor to establish convenient access without the combined firm in its network due to the sheer number of LTC pharmacies that Omnicare would own.

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39. Post-Acquisition, Omnicare would use its substantially greater bargaining leverage as a “must have” to increase prices for Part D sponsors to levels significantly above those that sponsors currently pay Omnicare or PharMerica. Indeed, PharMerica’s CEO testified that

40. Even if Part D sponsors could exclude the combined firm from their LTC Pharmacy networks and meet CMS’s “convenient access” requirement, Omnicare would possess a substantially greater number of exclusive SNF relationships post-Acquisition. A number of those SNFs, especially larger chains, consider Omnicare and PharMerica to be their two best choices for LTC Pharmacy services. The Acquisition, therefore, decreases the already low likelihood that SNFs would switch LTC pharmacies if Omnicare were to withdraw from a Part D sponsor’s network. As a result, the Acquisition will further entrench Omnicare’s bargaining leverage in negotiations with Part D sponsors and give it the ability and incentive to extract higher prices and other more favorable terms.

41. If Part D sponsors have higher LTC Pharmacy costs as a result of the Acquisition, these increased costs will likely be passed on to CMS and in the end, largely borne by U.S. taxpayers, as the federal government subsidizes the majority of Part D’s costs. Medicare Part D beneficiaries likely also will pay higher costs since Part D sponsors will have to cover some or all of the remainder of the cost increases with higher premiums, co-pays, and deductibles.

42. According to CMS, “Omnicare’s proposed acquisition of PharMerica appears likely to result in higher reimbursement rates (or to slow the likely decline in reimbursement rates) and thereby to increase the cost to CMS (and therefore the U.S. government and U.S. taxpayers) as well as any individuals who pay out-of-pocket costs in connection with such services.” CMS’s testimony is confirmed by the testimony of a number of the largest Part D sponsors.

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XI.**ENTRY CONDITIONS**

43. Neither entry by new LTC Pharmacies, nor expansion by the remaining small, local and regional LTC Pharmacies, will deter or counteract the Acquisition's likely harm – higher prices paid by Part D sponsors (and others) as a result of the combined firm's increased bargaining leverage.

44. Typically, entry sufficient to counteract the anticompetitive effects of an acquisition is likely where higher post-acquisition prices induce firms to quickly enter the relevant market, providing additional supply and competition which ultimately drive prices back down. That competitive mechanism is absent here. The higher prices charged by the combined entity to Part D sponsors post-Acquisition are not likely to provide timely market opportunities for other LTC Pharmacies to win SNF business because any post-Acquisition price increases to Part D sponsors will likely not impact SNFs. If no opportunity is created to win additional SNF business, no new or fringe LTC Pharmacy is likely to be able to undermine the leverage against Part D sponsors that Omnicare will gain by acquiring PharMerica. Indeed, to the extent that the combined entity chooses to offer slightly better terms to SNFs for their Medicare Part A business after it raises its prices to Part D sponsors, Omnicare will be able to further entrench its share of SNF beds, and hence, its leverage against the Part D sponsors.

45. Only the combined firm will benefit from the expected price increase to Part D sponsors. New LTC Pharmacy entrants (and fringe players) will not benefit from the higher Part D rates because they will not have the bargaining leverage necessary to obtain those rates from Plan D sponsors. For this reason too, the post-Acquisition elevated Part D prices will not encourage entry into the LTC Pharmacy market, and will not reduce the combined firm's bargaining leverage.

46. The remaining small, local and regional LTC Pharmacies are not likely to grow significantly after the Acquisition. Even if they were to do so, they would need to grow to more than twenty times their current size to even approach Omnicare's share post-

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Acquisition, and even then, they would not be able to undermine Omnicare's increased bargaining leverage unless their twenty-fold growth came primarily at Omnicare's expense. Such growth (or entry on such a scale) is highly unlikely to occur in a timely manner sufficient to undermine Omnicare's leverage with Part D sponsors.

XII.**EFFICIENCIES**

47. Respondent Omnicare will be unable to establish the existence of significant, cognizable, and merger-specific efficiencies sufficient to counteract the anticompetitive effects of the Acquisition.

XIII.**VIOLATIONS**

48. The allegations of Paragraphs 1 through 47 above are incorporated by reference as though fully set forth herein.

49. The Acquisition, if consummated may substantially lessen competition in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and would be an unfair method of competition in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

NOTICE

Notice is hereby given to the Respondent that the twenty-seventh day of June, 2012, at 10:00 a.m. is hereby fixed as the time, and Federal Trade Commission offices, 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580, as the place when and where an evidentiary hearing will be had before an Administrative Law Judge of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under the Federal Trade Commission Act and the Clayton Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in the complaint.

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You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the fourteenth (14th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material facts to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint and, together with the complaint, will provide a record basis on which the Commission shall issue a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding. In such answer, you may, however, reserve the right to submit proposed findings and conclusions under Rule 3.46 of the Commission's Rules of Practice for Adjudicative Proceedings.

Failure to file an answer within the time above provided shall be deemed to constitute a waiver of your right to appear and to contest the allegations of the complaint and shall authorize the Commission, without further notice to you, to find the facts to be as alleged in the complaint and to enter a final decision containing appropriate findings and conclusions, and a final order disposing of the proceeding.

The Administrative Law Judge shall hold a prehearing scheduling conference not later than ten (10) days after the answer is filed by the Respondent. Unless otherwise directed by the Administrative Law Judge, the scheduling conference and further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the pre-hearing scheduling conference (but in any event no later than five (5) days after the answer is filed by the Respondent). Rule 3.31(b) obligates counsel for each party, within five (5) days of receiving the Respondent's answer,

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to make certain initial disclosures without awaiting a discovery request.

NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in any adjudicative proceedings in this matter that the Acquisition challenged in this proceeding violates Section 7 of the Clayton Act, as amended, or Section 5 of the FTC Act, as amended, the Commission may order such relief against Respondent as is supported by the record and is necessary and appropriate, including, but not limited to:

1. If the Acquisition is consummated, divestiture or reconstitution of all associated and necessary assets, in a manner that restores two or more distinct and separate, viable and independent businesses in the relevant market, with the ability to offer such products and services as Omnicare and PharMerica were offering and planning to offer prior to the Acquisition.
2. A prohibition against any transaction between Omnicare and PharMerica that combines their businesses in the relevant market, except as may be approved by the Commission.
3. A requirement that, for a period of time, Omnicare and PharMerica provide prior notice to the Commission of acquisitions, mergers, consolidations, or any other combinations of their businesses in the relevant market with any other company operating in the relevant market.
4. A requirement to file periodic compliance reports with the Commission.
5. Any other relief appropriate to correct or remedy the anticompetitive effects of the Acquisition or to restore PharMerica as a viable, independent competitor in the relevant market.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this complaint to be signed by its Secretary and its

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official seal to be hereto affixed, at Washington, D.C., this twenty-seventh day of January, 2012.

By the Commission, Commissioner Rosch dissenting.

ORDER DISMISSING COMPLAINT

On January 27, 2012, the Federal Trade Commission issued the Administrative Complaint in this matter, having reason to believe that Respondent Omnicare, Inc.'s cash tender offer to acquire PharMerica Corporation, if consummated, would violate Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18. Complaint Counsel and Respondent have now filed a Joint Motion to Dismiss Complaint, which states that Respondent is abandoning the proposed acquisition of PharMerica, and has withdrawn its Hart-Scott-Rodino Notification and Report Form filed for the proposed transaction.¹

The Commission has determined to dismiss the Administrative Complaint without prejudice, as the most important elements of the relief set out in the Notice of Contemplated Relief in the Administrative Complaint have been accomplished without the need for further administrative litigation.² In particular, Respondent has announced that it is abandoning the proposed acquisition of PharMerica, and has withdrawn its Hart-Scott-Rodino Notification and Report Form

¹ See Joint Motion To Dismiss Complaint (February 21, 2012), at <http://www.ftc.gov/os/adjpro/d9352/120221omnicaremtn.pdf>.

² See, e.g., *In the Matter of Thoratec Corporation and HeartWare International, Inc.*, Docket No. 9339, Order Dismissing Complaint (August 11, 2009), at <http://www.ftc.gov/os/adjpro/d9339/090811thoatecorder.pdf>; *In the Matter of CSL Limited and Cerberus-Plasma Holdings, LLC*, Docket No. 9337, Order Dismissing Complaint (June 22, 2009), at <http://www.ftc.gov/os/adjpro/d9337/090622commorderdismisscomplaint.pdf>.

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filed for the proposed transaction. As a consequence, the Respondent would not be able to effect the proposed transaction without filing a new Hart-Scott-Rodino Notification and Report Form.

For the foregoing reasons, the Commission has determined that the public interest warrants dismissal of the Administrative Complaint in this matter. The Commission has determined to do so without prejudice, however, because it is not reaching a decision on the merits. Accordingly,

IT IS ORDERED THAT the Administrative Complaint in this matter be, and it hereby is, dismissed without prejudice.

By the Commission.

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IN THE MATTER OF

**AMERIGAS PROPANE, L.P.,
AMERIGAS PROPANE, INC.,
ENERGY TRANSFER PARTNERS, L.P.,
AND
ENERGY TRANSFER PARTNERS, GP, L.P.**

CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT AND
SECTION 7 OF THE CLAYTON ACT

*Docket No. C-4346; File No. 121 0022
Complaint, January 10, 2012 – Decision, February 24, 2012*

This consent order addresses the \$2.9 billion acquisition by AmeriGas Propane, L.P. of four entities owned by ETP, Heritage Operating, L.P., Heritage GP, LLC, Titan Energy Partner, L.P., and Titan Energy GP, L.L.C. The complaint alleges that the acquisition, as originally proposed, would violate Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act by substantially lessening competition in the market for preparing, filling, distributing and selling propane exchange cylinders in the United States and in certain regional areas within the United States. The consent order requires the Respondents to comply with all the terms of Amendment 2, including all terms pertaining to the provision of transition services by AmeriGas to Heritage Propane Express, LLC until such time as Heritage Propane Express, LLC is sold to another entity, or, barring a sale, for a period of one year. The Order also requires that, for a period of two years, ETP cannot sell the Heritage Propane Express assets without prior written approval of the Commission.

Participants

For the *Commission*: Tom Dahdouh, Susan Huber and Erika Wodinsky.

For the *Respondents*: Alan D. Rutenberg and Jay Varon, Foley & Lardner LLP; William D. Vigdor, Vinson & Elkins.

COMPLAINT

Pursuant to the Clayton Act and Federal Trade Commission Act (“FTC Act”), and its authority thereunder, the Federal Trade Commission (“Commission”), having reason to believe that Respondent AmeriGas Propane, L.P. (“AmeriGas”), intends to