

**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION**

COMMISSIONERS: **Lina M. Khan, Chair**
 Rebecca Kelly Slaughter
 Alvaro M. Bedoya
 Melissa Holyoak
 Andrew Ferguson

**IN THE MATTER OF INSULIN:
CAREMARK RX, ET AL.**

**ORAL ARGUMENT REQUESTED
Docket No. 9437**

**RESPONDENTS EXPRESS SCRIPTS, INC., EVERNORTH HEALTH, INC., MEDCO
HEALTH SERVICES, INC., AND ASCENT HEALTH SERVICES LLC’S MOTION TO
DISQUALIFY CHAIR LINA M. KHAN**

“An administrative hearing . . . must be attended . . . with the [] appearance of complete fairness. Only thus can the tribunal conducting a quasi-adjudicatory proceeding meet the basic requirement of due process.” *Texaco, Inc. v. Fed. Trade Comm’n*, 336 F.2d 754, 760 (D.C. Cir. 1964), *vacated and remanded on other grounds*, 381 U.S. 739 (1965). Here, the basic requirements of due process require Chair Khan’s disqualification because: (1) she has made repeated (incorrect) prejudgments about Express Scripts, Inc., Evernorth Health, Inc., Medco Health Services, Inc., and Ascent Health Services LLC’s (“ESI Respondents”)¹ conduct reflecting her actual bias against ESI Respondents with respect to issues in dispute in this action; and (2) her statements and appearances at anti-PBM events violate her legal and ethical duties to

¹ “ESI Respondents” is used for ease of reference and is not an admission or reflection of the corporate realities, functions, or forms of these separate entities.

avoid an appearance of bias. “[A] disinterested observer [would] conclude that [Chair Khan] has in some measure” prejudged this case, *Cinderella Career & Finishing Sch., Inc. v. Fed. Trade Comm’n*, 425 F.2d 583, 591 (D.C. Cir. 1970) (internal quotation marks omitted).

Due process requires her disqualification.

I. Chair Khan’s Bias and Prejudgment Is Shown Through Her Public Statements

Chair Khan has prejudged the facts and law relating to this action. She has repeatedly and wrongly asserted that PBMs “control” drug pricing and patient access to drugs. These assertions will be contested in this litigation and ESI Respondents, if given the fair opportunity, will prove that Chair Khan’s pre-determined conclusions about PBMs are false and that the evidence shows the opposite. But no amount of evidence will suffice in the absence of an impartial adjudicator. Examples of Chair Khan’s bias that bear directly on the Complaint, include the following:

- While a law student, Chair Khan published an article claiming that PBMs “keep drug prices high.”²
- On June 8, 2022, Chair Khan called PBMs “powerful intermediaries” that can “practically determine which medicines are prescribed . . . and the amount patients will pay at the pharmacy counter.”³
- On June 22, 2022, Chair Khan spoke at an event cohosted by the National Community Pharmacists Association (“NCPA”), an anti-PBM lobbyist organization funded by entities that would profit from anti-PBM action. She repeated that PBMs “determine which medicines are prescribed . . . and the prices that patients ultimately pay at the pharmacy counter.”⁴
- On May 4, 2023, Chair Khan again claimed PBMs control “the medicines consumers are or have not been able to access” and that the FTC is “looking at the magnitude of harm”

² Lina Khan, *How to Reboot the FTC*, Politico (April 13, 2016), <https://www.politico.com/agenda/story/2016/04/ftc-antitrust-economy-monopolies-000090/>.

³ Statement of Chair Lina M. Khan Regarding 6(b) Study of Pharmacy Benefit Managers, No. P221200 (June 8, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/Statement-Khan-6b-Study-Pharmacy-Benefit-Managers.pdf.

⁴ Remarks of Chair Lina M. Khan American Economic Liberties Project and the National Community Pharmacists Association How Pharmacy Benefit Managers Impact Drug Prices, Communities, and Patients (June 22, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/Remarks-Lina-Khan-Economic-Liberties-National-Community-Pharmacists-Association.pdf.

caused by PBMs.⁵

- On February 14, 2024, Chair Khan again asserted that PBMs increase drug prices and control access to drugs, claiming that drug rebates “demand[ed]” by PBMs “may function as kickbacks that raise costs and limit access to affordable medicines.”⁶
- On April 15, 2024, Chair Khan stated that PBMs are “obscure” “middlemen” and reiterated that PBMs “determine who gets access to what medicines and at what price.” She claimed that drugs available at pharmacies “are not the most affordable medicines for Americans,” but instead are drugs “on which the PBMs are getting the biggest kickback from the drug manufacturer,” and that PBMs may prevent patient access to generic drugs.⁷

These statements by Chair Khan are factually incorrect and address contested issues of fact and law that will be litigated in this matter.⁸ The allegations in the Complaint mirror a number of Chair Khan’s statements: that ESI Respondents use the “threat of exclusion” from formularies in a way that has supposedly led to “artificially inflated list prices” that increase costs for consumers, Compl. ¶¶ 5-6; that PBMs “act as middlemen” that “wield significant influence over which drugs patients can access, and at what price[s]” by “leverag[ing]” their lists of preferred pharmaceuticals to secure rebates off list price for their clients, thereby “forc[ing]” [uncovered] consumers to “pay” “artificially inflated,” “higher out-of-pocket costs,” and thus “shift[ing] the cost . . . onto certain insulin patients,” Compl. ¶¶ 4, 5, 30, 38, 100, 113, 200, 259, 269; and that PBMs use negotiating leverage to raise list prices and rebates to increase their own profits rather

⁵ American Economic Liberties Project, 2023 Anti-Monopoly Summit (May 4, 2023), https://www.youtube.com/watch?v=_MUdBWApI9k&t=3928s.

⁶ Remarks by Chair Lina M. Khan As Prepared for Delivery at the Am. Medical Assoc. Nat’l Advocacy Conference (Feb. 14, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/remarks-chair-khan-ama-national-advocacy-conference.pdf.

⁷ Senator Bernie Sanders, LIVE with FTC Chair Lina Khan (April 15, 2024), <https://www.youtube.com/watch?v=-C99FUnGnJU>.

⁸ Commissioner Holyoak called Chair Khan’s claims regarding PBM overcharges “attempts to mislead the public into thinking that the [FTC Interim PBM] Report draws any conclusion about the prices patients pay for healthcare,” regardless of what the evidence actually shows. Commissioner Holyoak further criticized the FTC’s failure to meet the Commission’s historically “rigorous” standards and exacerbation of “ideological schisms.” Dissenting Statement of Commissioner Melissa Holyoak, In the Matter of the Pharmacy Benefit Managers Report, No. P221200 (July 9, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/Holyoak-Statement-Pharmacy-Benefit-Managers-Report.pdf.

than to lower prices, Compl. ¶¶ 138-39, 143-44, 177. Each of these allegations will be contested by the ESI Respondents in this litigation and each echoes Chair Khan's conclusory statements.

Chair Khan's statements demonstrate that she has already made up her mind regarding the key questions at issue in this matter; any adjudicative process that involves her will lack the "very appearance of complete fairness" due process requires.

II. Disqualification of Chair Khan is Required Because She Has Impermissibly Prejudged the Facts of This Case

Courts vacate FTC orders when a commissioner's public statements would lead "a disinterested observer" to conclude the commissioner "ha[d] in some measure adjudged the facts as well as the law of a particular case in advance of hearing it." *Cinderella*, 425 F.2d at 591 (internal citation omitted); *see also Am. Cyanamid Co. v. Fed. Trade Comm'n.*, 363 F.2d 757 (6th Cir. 1966); *Texaco*, 336 F.2d 754. Here, a disinterested observer of Chair Khan's multiple statements that PBMs control patient drug access and cost could come to no other conclusion than that she has prejudged the facts and the law as to PBMs.

In *Texaco*, the court vacated an FTC order where then-Chair Paul Rand Dixon gave a speech evidencing his bias and prejudgment and continued to participate in a law enforcement matter related to the subject of his speech. Chair Dixon, speaking before a group of petroleum *retailers* pointed the finger at petroleum *suppliers*, against whom the Commission had a pending administrative enforcement action. 336 F.2d at 759. Chair Dixon told the retailers, who would benefit from a law enforcement action against the suppliers, "[y]our problems are many, and many of them are the problems of the [FTC] too We at the Commission are well aware of the practices which plague you and we have challenged their legality in many important cases." *Id.* The court held that "a disinterested reader of Chairman Dixon's speech could hardly fail to

conclude that he had in some measure decided in advance that Texaco had violated the Act.” *Id.* (internal quotations omitted).

Chair Dixon again failed to abide by the requirements of due process in *American Cyanamid*, where the court vacated an FTC order because Dixon had overseen the publication of a report evidencing his bias and prejudgment.⁹ 363 F.2d at 765. The court observed that the report included conclusions that the respondents had “consummate[ed] . . . arrangements” that had “controlled [the] marketing of [the products at issue],” thus “demonstrat[ing] to [the court] that [Dixon] then had formed the opinion that [] prices quoted by petitioners were artificially high” and held that Chair Dixon had already endorsed “conclusions as to facts.” *Id.* at 765-66. “Our system of law has always endeavored to prevent even the probability of unfairness,” and “[w]herever there may be reasonable suspicion of unfairness, it is best to disqualify.” *Id.* at 763, 767; *In re Boston’s Children First*, 244 F.3d 164, 167 (1st Cir. 2001) (whenever the question of “disqualification is a close one, the balance tips in favor of recusal”).

In *Cinderella*, the court again vacated an FTC order because Chair Dixon’s statements gave the appearance of bias. The FTC issued an order holding that a charm school’s advertisements were deceptive because they claimed graduates could become flight attendants. That order was vacated on appeal and the court held that Chair Dixon violated due process when he gave a biased speech to the National Newspaper Association, in which he asked: “What standards are maintained on [a newspaper’s] advertising acceptance? What would be the attitude toward accepting good money for . . . [ads claiming one could] becom[e] an airline’s hostess by attending a charm school?” *Id.* at 589-92. The court held that an FTC commissioner may not

⁹ As Chief Counsel and Staff Director of the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee, Chair Dixon previously investigated “the same parties” and “many of the same facts and issues” later investigated by the FTC under his direction. 363 F.2d at 763.

“make speeches which give the appearance that [a] case has been prejudged” because doing so “may have the effect of entrenching a Commissioner in a position which he has publicly stated, making it difficult, if not impossible, for him to reach a different conclusion in the event he deems it necessary to do so after consideration of the record.” *Id.* at 590.

These three court decisions vacated or set aside FTC orders, holding that Chair Dixon’s bias denied the petitioners due process, and each involved a *single* speech or a *single* writing. Chair Khan’s conduct is far worse. She has repeatedly and inaccurately referred to PBM-negotiated rebates as “kickbacks;” accused PBMs of “price gouging;” claimed PBMs may be “artificially inflat[ing]” drug prices;” asserted that PBMs “practically determine which medicines are prescribed to patients,” and that PBMs “dictate” the “prices that patients ultimately pay at the counter.” In *Cinderella*, Chair Dixon made only an oblique reference to facts in dispute in an FTC enforcement matter. The court nonetheless held that it was “reasonable,” given the “timing” of the speech, to conclude that a “disinterested observer would connect [Chair Dixon’s] remarks . . . inextricably with [the pending] case.” *See Cinderella*, 425 F.2d at 592, n.10. Chair Khan has been far more direct in her remarks, explicitly accusing PBMs of misconduct while multiple investigations of PBMs were ongoing. These statements leave any reasonable person with the impression that Chair Khan has already “adjudged the facts as well as the law” regarding the allegations and claims in this case. *Cinderella*, 425 F.2d at 591 (internal citation omitted).

III. Disqualification of Chair Khan is Required by the Ethical Standards that Government Law Enforcement Officials and Judicial Officials Must Uphold

Chair Khan’s continued participation in this matter also violates her ethical duty of impartiality and the FTC’s own ethics guidelines. Federal ethics rules require that all federal officials must “avoid an appearance of loss of impartiality in the performance of . . . official duties,” and an official’s “political . . . association[s] . . . may raise an appearance question” that

requires recusal.¹⁰ The FTC’s own ethics orientation advises personnel to “avoid any actions creating the appearance that they are violating the law or ethical standards” and requires them to “act impartially and not [to] give preferential treatment to any private organization or individual.”¹¹ An adjudicator’s attendance at even a single event or conference that is “predominantly” in favor of one side of a dispute requires disqualification. *In re Sch. Asbestos Litig.*, 977 F.2d 764, 782 (3d Cir. 1992). Recognizing this ethical obligation, a prior FTC Commissioner recused herself because her participation as an adjudicator “would likely create an undue distraction from the important issues raised” and “would not serve the public interest.”¹²

Chair Khan’s attendance at multiple political and trade group events made up of parties aligned against PBMs precisely illustrates the conduct that warrants recusal under the federal ethics rules and the FTC’s own ethics guidance. On October 3, 2022, she headlined NCPA’s annual convention—where NCPA executives wore obscene clothing vilifying PBMs (Exhibit A)—and praised the trade association for helping guide the FTC’s anti-PBM work.¹³

If an Article III judge engaged in similar conduct, recusal would be required. For judges, “[a]n insistence on the appearance of neutrality is not some artificial attempt to mask imperfection in the judicial process, but rather an essential means of ensuring the reality of fair adjudication.” *Williams v. Pennsylvania*, 579 U.S. 1, 15 (2016). The Code of Conduct for U.S.

¹⁰ 5 C.F.R. § 2635.501(a); Mem. to Designated Agency Ethics Officials Regarding Recusal Obligation and Screening Arrangements, OGE Informal Advisory Mem. 99 X 8, 1999 WL 33308429, at *2 (Apr. 26, 1999).

¹¹ Ethics Orientation for New FTC Employees, at 10-11 (rev. June 2019), https://www.ftc.gov/system/files/ftc_gov/pdf/UD-ieo-for-new-ftc-employees.pdf.

¹² *In the Matter of LabMD, Inc.*, Docket No. 9357, Statement of Commissioner Julie Brill (Dec. 14, 2013), https://www.ftc.gov/system/files/documents/public_statements/568831/d09357_statement_of_commissioner_brill.pdf.

¹³ Lina Khan, X (Oct. 3, 2022), <https://x.com/linakhanFTC/status/1577004971664384000?s=20&t=vQK9yX1FG1uZLhu9IfLOvQ>; 2022 NCPA Annual Convention with Federal Trade Commission Chair Lina Kahn, https://www.youtube.com/watch?v=GuAKnpI_X78.

Judges¹⁴ requires recusal of a judge who appears incapable of impartiality: “[a] judge should avoid impropriety and the appearance of impropriety in all activities” and “[a]n appearance of impropriety occurs when reasonable minds . . . would conclude that the judge’s honesty, integrity, impartiality, temperament, or fitness to serve as a judge is impaired.”¹⁵ On March 4, 2024, Chair Khan attended a “White House Roundtable” related to “Prescription Drug Middlemen,” where she again criticized PBMs.¹⁶ The other speakers were selected by the White House and expressed only anti-PBM viewpoints. Chair Khan participated in this calculated political event notwithstanding that she knew she could be in a position to make findings of fact and decisions of law as a supposedly neutral arbiter. Chair Khan should face a no less stringent standard than that applied to a federal judge when she sits as an administrative adjudicator given her authority to make findings of fact and conclusions of law. Based on the conduct described above, Chair Khan has clearly failed to adhere to analogous standards of judicial ethics and impartiality.

IV. CONCLUSION

Express Scripts respectfully requests that Chair Khan be disqualified from participating in the Commission’s enforcement action against Express Scripts.

¹⁴ U.S. Courts, Guide to Judiciary Policy – Vol. 2: Ethics and Judicial Conduct, Ch. 2: Code of Conduct for U.S. Judges (rev. March 2019), https://www.uscourts.gov/sites/default/files/code_of_conduct_for_united_states_judges_effective_march_12_2019.pdf.

¹⁵ *Id.* at 4.

¹⁶ Remarks by Chair Lina M. Khan As Prepared for Delivery White House Roundtable on PBMs (March 4, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/2024.03.04-chair-khan-remarks-at-the-white-house-roundtable-on-pbms.pdf.

Dated: October 8, 2024

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Dated: October 8, 2024

Respectfully submitted,

RULE GARZA HOWLEY LLP

By: /s/ Justin T. Heipp
Justin T. Heipp

EXHIBIT A



Dr. Glaucomflecken  @D... · 10/3/22 ...
**Had an awesome time at #NCPA2022.
Thanks for listening to my Vis*ne rant
and for sending me home with this cool
pin.**



CVS Pharmacy

 46

 79

 1.9K









This obscene pin was distributed among attendees during the 2022 NCPA annual convention at which Chair Kahn was the keynote speaker.



The booth for NCPA's political action committee at the October 3, 2022, NCPA convention at which Chair Khan was the keynote speaker. On materials used throughout the event, PBMs were presented as blood-sucking vampires.



The CEO of NCPA addresses the annual convention wearing a t-shirt that was distributed to event attendees, again, depicting PBMs as blood-sucking vampires.



Chair Khan speaking with the NCPA CEO during the 2022 convention keynote.

**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION**

COMMISSIONERS: **Lina M. Khan, Chair**
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**IN THE MATTER OF INSULIN:
CAREMARK RX, ET AL.**

**ORAL ARGUMENT REQUESTED
Docket No. 9437**

[PROPOSED] ORDER DISQUALIFYING CHAIR KHAN

Upon Respondents Express Scripts, Inc., Evernorth Health, Inc., Medco Health Services, Inc., and Ascent Health Services LLC's Motion to Disqualify Chair Lina M. Khan, having been fully briefed and upon review of all filings, it is hereby:

ORDERED that the petition is **GRANTED**; and it is further

ORDERED that pursuant to Rule 4.17 of the Commission's Rules of Practice, 16 C.F.R. § 4.17, Chair Lina Khan is hereby **DISQUALIFIED** from participating the above-captioned matter.

Dated _____, 2024.

By the Commission.

April J. Tabor, Secretary

CERTIFICATE OF SERVICE

I hereby certify that on October 8, 2024, I caused the foregoing document to be filed electronically using the FTC's E-Filing system, which will send notification of such filing to:

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