

**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 COMMISSIONER REBECCA K. SLAUGHTER**

“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 Commissioner Slaughter’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 violate her legal and ethical duties to avoid an appearance of bias.

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.

Commissioner Slaughter’s conduct also violates ethical duties inherent in her role as an adjudicator. “[A] disinterested observer [would] conclude that [Commissioner Slaughter] 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. Commissioner Slaughter’s Bias and Prejudgment Is Shown Through Her Public Statements

Commissioner Slaughter has prejudged the facts and law relating to this action. She has repeatedly and wrongly asserted that PBMs “wield substantial power,” “undermine” fairness, and “exploit[.]...market power” over 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 Commissioner Slaughter’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 Commissioner Slaughter’s bias that bear directly on the complaint include the following:

- On May 28, 2021, then-acting Chair Slaughter asserted that PBMs are “middlemen” that undermine “[f]airness in drug pricing” through “secretive rebates . . . [and] favor larger competitors who can offer or demand bigger rebates . . .” Citing no evidence, she called for blind scrutiny of PBMs’ “exploitation of market power” and explained that “[t]his is not the way competition is supposed to work.”²
- On July 20, 2023, Commissioner Slaughter, citing no evidence, declared that “list prices and patients’ out-of-pocket costs for prescription drugs have increased as PBM rebates and fees have mushroomed.”³

² Statement of Acting Chairwoman Rebecca Kelly Slaughter Regarding the Fed. Trade Comm’n’s Report to Congress on Rebate Walls (May 28, 2021), https://www.ftc.gov/system/files/documents/public_statements/1590532/statement_of_acting_chairwoman_slaughter_regarding_the_ftc_rebate_wall_report_to_congress.pdf.

³ Statement of Commissioner Rebecca Kelly Slaughter Regarding the Comm’n Statement on Reliance on Prior PBM-Related Advocacy Statements and Reports that No Longer Reflect Current Market Realities (July 20, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/finalbksremarksontfcstatementagainstrelianceonpriorpbmadvocacy7202023.pdf.

- On July 9, 2024, the FTC released its “interim report” “on Prescription Drug Middlemen.” Commissioner Slaughter joined Chair Khan’s statement claiming the report “lays out how dominant pharmacy benefit managers can hike the cost of drugs – including overcharging patients.”⁴ Commissioner Melissa Holyoak called the claims in the Khan/Slaughter statement 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.⁵
- On August 1, 2024, Commissioner Slaughter again lauded the Commission’s release of the “interim report” and concluded that PBMs’ supposed “market dominance allows these entities to wield substantial power over drug pricing and availability. Exercise of this power by this small number of PBMs raises acute concerns for patients because PBMs have become inescapable intermediaries between prescription drug manufacturers and patients who simply need access to their medicines.”⁶

These statements by Commissioner Slaughter are factually incorrect and address the contested issues of fact and law that will be litigated in this matter. Commissioner Slaughter’s stated conclusion from 2021 that PBMs undermine “fairness in drug pricing” relates to all three counts in the Complaint, each of which alleges that PBMs’ conduct is either an unfair method of competition or an unfair act or practice. More specifically, the allegations in the Complaint mirror a number of Commissioner Slaughter’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

⁴ Fed. Trade Comm’n, *FTC Releases Interim Staff Report on Prescription Drug Middlemen*, (July 9, 2024), [https://www.ftc.gov/news-events/news/press-releases/2024/07/ftc-releases-interim-staff-report-prescription-drug-middlemen?os=TMB&ref=app#:~:text=The%20Federal%20Trade%20Commission%20today%20published.](https://www.ftc.gov/news-events/news/press-releases/2024/07/ftc-releases-interim-staff-report-prescription-drug-middlemen?os=TMB&ref=app#:~:text=The%20Federal%20Trade%20Commission%20today%20published.(emphasis added).) (emphasis added). ⁵ Commissioner Holyoak further criticized this 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. ⁵ Commissioner Holyoak further criticized this 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. ⁶ Statement of Rebecca Kelly Slaughter Regarding FTC Interim Report: Pharmacy Benefit Managers (Aug. 1, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/bks-statement-pbm-interim-report.pdf.

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 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 Commissioner Slaughter’s conclusory statements.

Commissioner Slaughter’s statements demonstrate that she has made up her mind regarding key disputed issues in this matter; any adjudicative process that involves her will lack the “very appearance of complete fairness” due process requires.

II. Disqualification of Commissioner Slaughter 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 at 754. Here, a disinterested observer of Commissioner Slaughter’s multiple statements that PBMs control drug prices and patients’ access to pharmaceuticals 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.⁷ 363 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

⁷ As Chief Counsel and Staff Director of the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee, Chair Dixon had 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.

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 “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 by Chair Dixon. Here, Commissioner Slaughter’s conduct is far worse. Commissioner Slaughter has already concluded that PBMs are “exploit[ing] market power,”⁸ “undermine” fairness,⁹ and “wield substantial power”¹⁰ over drug pricing and patient access to drugs. These issues are raised directly in the complaint and will be disputed in this litigation. *See e.g.*, Compl. ¶¶ 4 (“positioned in the center of the intricate and opaque pharmaceutical distribution chain, the PBM Respondents wield significant influence over which drugs patients can access, and at what price...”); 100 (“PBM Respondents came to wield greater control over access to commercially insured patients”); ¶ 193, 200-01, 221 (accusing ESI Respondents of “exploitative cost-shifting”). 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

⁸ Statement of Acting Chairwoman Rebecca Kelly Slaughter Regarding the Fed. Trade Comm’n’s Report to Congress on Rebate Walls (May 28, 2021), https://www.ftc.gov/system/files/documents/public_statements/1590532/statement_of_acting_chairwoman_slaughter_regarding_the_ftc_rebate_wall_report_to_congress.pdf.

⁹ *Id.*

¹⁰ Statement of Rebecca Kelly Slaughter Regarding FTC Interim Report: Pharmacy Benefit Managers (Aug. 1, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/bks-statement-pbm-interim-report.pdf.

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. Commissioner Slaughter 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 Commissioner Slaughter has already “adjudged the facts as well as the law” regarding the allegations and has decided claims in this case. *Cinderella*, 425 F.2d at 591 (internal citation omitted).

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

Commissioner Slaughter’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” or avoid “any official involvement in a covered matter.”¹¹ 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.”¹² 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.”¹³

¹¹ 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).

¹² 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.

¹³ *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.

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 United States Judges¹⁴ requires recusal of an Article III 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 Commissioner Slaughter knew she could be in a position to make findings of fact and decisions of law as a supposedly neutral arbiter. Nevertheless, she made the multiple public statements above without any concern for the appearance of impropriety she was creating. Commissioner Slaughter 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, Commissioner Slaughter has clearly failed to adhere to analogous standards of judicial ethics and impartiality.

IV. CONCLUSION

ESI Respondents respectfully request that Commissioner Slaughter be disqualified from participating in the Commission’s enforcement action against ESI Respondents.

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.

Dated: October 8, 2024

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Dated: October 8, 2024

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**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION**

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

**ORAL ARGUMENT REQUESTED
Docket No. 9437**

[PROPOSED] ORDER DISQUALIFYING COMMISSIONER SLAUGHTER

Upon Respondents Express Scripts, Inc., Evernorth Health, Inc., Medco Health Services, Inc., and Ascent Health Services LLC's Motion to Disqualify Commissioner Rebecca K. Slaughter, 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, Commissioner Rebecca K. Slaughter 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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Dated: October 8, 2024

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