PUBLIC

UNITED STATES OF AMERICA
THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of **Caremark Rx, LLC,** **Zinc Health Services, LLC,** **Express Scripts, Inc.,** **Evernorth Health, Inc.,** **Medco Health Services, Inc.,** **Ascent Health Services LLC,** **OptumRx, Inc.,** **OptumRx Holdings, LLC, and** **Emisar Pharma Services LLC,** **Respondents.**	**Docket No. 9437**

COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENTS' MOTIONS FOR SEPARATE EVIDENTIARY HEARINGS

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INTRODUCTION

Respondents' motions for separate hearings should be denied. The Commission voted out a single complaint against all Respondents for a good reason. Respondents are accused of violating the same laws by engaging in the same type of conduct. To prove this, Complaint Counsel will submit a great deal of common evidence and argument that applies to all Respondents equally. This is not a case where Complaint Counsel seeks to consolidate separate, unrelated cases into a single hearing. To the contrary, from the beginning, the Respondents were investigated collectively because they engaged in common patterns of conduct that are now subject to common proof in litigation. In circumstances as these, "it would be wasteful to conduct three separate trials."[1] Respondents have not shown otherwise.

ARGUMENT

I. Substantial common issues of law and fact make a single hearing the efficient and logical choice.

The core principle of FTC Rule 3.41 is that "[h]earings shall proceed with all reasonable expedition."[2] The goal is to provide a fair process to all parties as quickly as possible and with minimal expenditure of taxpayer funds. This is consistent with the overall nature of the Part 3 Rules, which direct that "the Administrative Law Judge and counsel for all parties shall make every effort at each stage of a proceeding to avoid delay."[3]

In line with this directive, the FTC has long issued single complaints against multiple parties accused of the same conduct even where there is no allegation of collusion. Most

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[1] *In re Automotive Breakthrough Sciences, Inc.*, 1995 FTC LEXIS 378, at *3 (F.T.C. Dec. 18, 1995).

[2] 16 C.F.R. § 3.41(b).

[3] 16 C.F.R. § 3.1.

recently, in *FTC. v. Syngenta Crop Protection*, the FTC charged the second and third largest crop-protection product manufacturers in the United States with operating similar anticompetitive loyalty programs.[4] The FTC filed a single complaint even though it included no allegations of collusion and the specific details of the defendants' contracts differed.[5] Similarly, *In re Ethyl Corp*, *et al*., the FTC challenged and enjoined non-collusive conduct by the nation's two largest manufacturers of lead antiknock gasoline additives.[6]

While Rule 3.41(b)(3) gives the Administrative Law Judge ("ALJ") the ability to order separate hearings, this is to be done only when it is "conducive to expedition and economy."[7] As stated in the announcement of the Rule 3.41 amendment cited by Respondents, it would be an unusual case where multiple hearings are faster and more efficient than one.[8] The "general principle [is] that a single trial tends to lessen the delay, expense and inconvenience to all parties."[9] It would certainly be unusual in a case like this, where there are substantial common issues of fact and law.

A. Much of Complaint Counsel's evidence will apply across Respondents.

As the Complaint in this case makes clear, the contours of the challenged conduct are the same across each Respondent. For example, each Respondent uses exclusive flagship commercial formularies that allow them to extract rebates and fees from drug manufacturers in

[4] 711 F.Supp.3d 545, 557 (2024) (decision denying motion to dismiss).

[5] *See id*. at 558-59 (discussing differences in Syngenta and Corteva's loyalty programs).

[6] 1983 WL 486336 at *1 (F.T.C. Mar. 22, 1983) (*vacated on other grounds by E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128 (2nd Cir. 1984)).

[7] 16 C.F.R. § 3.41(b)(3).

[8] 44 Fed. Reg. 62887 (Nov. 1, 1979) ("Separate trials will be appropriate in those *relatively unusual* cases where they will be conducive to expedition and economy.") (emphasis added).

[9] *Sensitron, Inc. v. Wallace*, 504 F. Supp. 2d 1180, 1186 (D. Utah 2007).

exchange for coverage.[10] Each Respondent systematically disfavored low-WAC insulin products on their flagship commercial formularies, instead preferring the high-WAC versions that carried high rebates and fees.[11] As insulin list prices increased because of Respondents' conduct, so did the WAC-based fees collected by each Respondent.[12] Each Respondent retains some portion of the rebates and fees extracted from insulin manufacturers, but also uses them to attract commercial payer clients by offering rebate guarantees.[13] Thus each Respondent shaped competition for PBM services around guaranteed rebates, leading commercial payers to prioritize the size of rebate guarantees when selecting a PBM.[14] Though Complaint Counsel may use some different documents and witnesses to prove these allegations for each Respondent, the evidence can most efficiently be presented and considered together because Respondents' conduct and the resulting effects were the same.

Moreover, much of the evidence needed to prove Complaint Counsel's allegations will be common across the Respondents. Complaint Counsel will introduce common proof to establish facts about diabetes and insulin medications, the drug distribution chain, other industry participants' behavior in response to the Respondents' conduct, and patient harm. Specifically, Complaint Counsel intends to offer evidence at the hearing that insulin is a life-saving medication,[15] that PBMs generally occupy a central role in the drug distribution system and

[10] Complaint ¶¶ 34-44.

[11] Complaint ¶¶ 144-150.

[12] Complaint ¶¶ 166-169.

[13] Complaint ¶ 172.

[14] Complaint ¶ 173.

[15] Complaint ¶¶ 74-91.

wield significant power,[16] that insulin manufacturers responded to the prevalence of rebates and exclusive formularies by raising insulin list prices,[17] that insulin manufacturers launched low list price versions of their products, but saw little uptake,[18] and that certain patients were harmed from being forced to use high list price insulin.[19] All of this evidence will be relevant against each Respondent and should be heard once in a single hearing rather than three separate times.

Complaint Counsel also expects to present evidence from medical, industry, and economic experts that will express opinions applicable to all Respondents. Among other things, this will include evidence about the contracting dynamics between PBMs and health plans, the importance of insulin treatment to patients with diabetes, and the effects of Respondents' conduct on list-price-sensitive patients. As with the factual evidence, the evidence from Complaint Counsel's experts will apply to all Respondents.

B. Each Respondent is charged with violating the same laws in the same way.

Complaint Counsel has alleged here that all Respondents have violated Section 5 of the FTC Act in the same way through the same course of conduct. This is in contrast to cases cited by Respondents where defendants faced different types of claims,[20] sold different products,[21] or contributed differently to the injuries alleged.[22] Here all Respondents are charged with violating Section 5(a) of the FTC Act through the unfair method of competition of favoring high list price

[16] Complaint ¶¶ 28-33, 38.

[17] Complaint ¶¶ 119-131.

[18] Complaint ¶¶ 132-143, 158-161.

[19] Complaint ¶¶ 92-98.

[20] *In re Genetically Modified Rice Litig.*, 2010 WL 816157 at *1 (E.D. Mo. Mar. 3, 2010).

[21] *General Patent Corp. v. Hayes Microcomputer, et al.*, 1997 WL 1051899 at *1 (C.D. Cal. Oct. 20, 1997).

[22] *Houseman v. U.S. Aviation Underwriters*, 171 F.3d 1117, 1122 (7th Cir. 1999).

insulin products with high rebates and fees over similar low list price products.[23] All Respondents are charged with violating Sections 5(a) and (n) of the FTC Act through the unfair practice of systematically excluding low WAC insulin products from their most used formularies.[24] And all Respondents are charged with violating Sections 5(a) and (n) of the FTC Act through the unfair practice of shifting the costs of high insulin prices to list-price-sensitive patients.[25] To remedy those violations, Complaint Counsel is seeking the same relief from all Respondents, including an order prohibiting Respondents from: excluding or disadvantaging low-WAC versions of high-WAC drugs; accepting list price based compensation; and designing benefit plans that base patient out-of-pocket costs on the list prices of drugs.[26]

C. Each Respondent has raised essentially the same defenses.

As with Complaint Counsel's affirmative case, Respondents' defenses overlap substantially with one another and entail common proof. For example, in their answers to the Complaint, each Respondent argues that insulin net prices have declined as a result of their conduct,[27] that the requested remedies would result in higher health insurance premiums and drug costs,[28] and that health plan sponsors are the ones that control the benefit design for their members.[29] Much of the evidence supporting or refuting these defenses will go well beyond Respondent-specific facts and instead come from third parties and experts. Indeed, the

[23] Complaint ¶¶ 255-261.

[24] Complaint ¶¶ 262-267.

[25] Complaint ¶¶ 268-274.

[26] Complaint at pp. 44-45.

[27] Caremark Answer at 4-5, ESI Answer at 6-8, Optum Answer at 4-5.

[28] Caremark Answer at 7, ESI Answer at 13, Optum Answer at 6.

[29] Caremark Answer at 6-7, ESI Answer at 4-6, Optum Answer at 7.

Respondents stress that there are certain "key third party witnesses that deal separately with each Respondent, such as insulin manufacturers, plan sponsors, and benefit consultants that have worked independently with multiple Respondents over a period of more than a decade" who are vital to each Respondent's defense.[30] It will be much more efficient for the ALJ to hear this evidence once, rather than three separate times as Respondents appear to envision.

Likewise, the affirmative defenses raised by Respondents are nearly identical. Each Respondent raises many of the same affirmative defenses on Constitutional and statutory grounds, including, for example, that the Complaint violates Article III of the Constitution, and that the Complaint is preempted by the McCarran-Ferguson Act.[31] These affirmative defenses will involve few—if any—Respondent-specific facts, and can be resolved collectively in a single hearing and set of briefing. In fact, Respondents here have each incorporated by reference the affirmative defenses raised by one-another in their answers to the Complaint, acknowledging the substantial overlap in how they plan to defend against Complaint allegations.[32]

[30] Caremark Motion for Separate Hearing at 7-8. *See also* ESI Motion for Separate Hearing at 9.

[31] Caremark Answer at 62, 66 (5th and 29th defenses), ESI Answer at 60-61 (26th and 30th defenses), Optum Answer at 59-60 (22nd and 34th defenses). Each respondent also raises defenses on the grounds that the Complaint violates their 7th Amendment right to jury trial; is an impermissible rulemaking under the Administrative Procedures Act; is untimely and barred by the doctrine of laches; is invalid because there was not a full Commission vote; that their conduct is permitted or required by other laws; that the restrictions on the removal of Commissioners and the ALJ violate Article II of the Constitution; and that Section 5 of the FTC Act violates the non-delegation doctrine. *See* Caremark Answer at 62-66, ESI Answer at 59-62, Optum Answer at 57-60.

[32] Caremark Answer at 67, ESI Answer at 62, Optum Answer at 57.

D. Given the factual and legal overlap, holding multiple hearings would be impractical and require substantial duplication.

"A bifurcated trial may be considered inappropriate if it would result in duplication of effort, undue delay or expense, or inconvenience."[33] Multiple hearings in this case will result in substantial duplication of effort from the parties, the witnesses, and the ALJ. As discussed above, the overlapping evidence that would have to be covered in each hearing falls into three general categories: general factual background; evidence from third parties; and evidence from expert witnesses. Much of the evidence in these categories will have to be elicited from a combination of third-party and expert witnesses.

In the case of third parties, these witnesses would be required to appear and offer the same or highly similar testimony at three separate hearings if Respondents' motions were granted. This would be highly inconvenient and burdensome for the witnesses and the third-party companies themselves.

And in the case of Complaint Counsel's expert witnesses, they would have to appear in each hearing to offer many of the same opinions as to each Respondent. This would not only take significantly more time but would also substantially increase the FTC's expense of taxpayer funds on expert witnesses, as the experts would be required to go through multiple rounds of preparation and testimony. It would be wasteful and inefficient to hear from these third parties and experts three times at separate hearings, rather than once.[34]

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[33] *Princeton Biochemicals Inc. v. Beckman Instruments Inc.*, 180 F.R.D. 254, 256 (D.N.J. 1997).

[34] *See In re Automotive Breakthrough Sciences, Inc.*, et al., 1995 FTC LEXIS 378 (F.T.C. Dec. 18, 1995) (finding that due to common issues of fact and law, "it would be wasteful to conduct three separate trials. If these cases were not consolidated, duplicative expert and lay testimony would have to be elicited[.]").

Respondents' vague suggestion that common issues could be efficiently resolved separately is unworkable. For example, Respondents claim that common evidence "might be consolidated, presented in a joint hearing or through trial depositions, or otherwise streamlined to preserve efficiency and avoid duplication."[35] But Respondents provide no details as to how this would work in practice. It would be an inefficient, logistical nightmare; Courts faced with similar proposals under Rule 42(b) have reached the same conclusion. For example, in *U.S. v. American Telephone & Telegraph Co.*, the court found it would be "impossible logically or practically to separate out the 'background' of this litigation from the other issues."[36]

Even assuming it would be possible to sort out common issues, the practical problems would persist. For example, in the joint hearing proposed by Respondents, a witness would either have to offer all testimony at the same time, including topics common to all Respondents and topics relevant to only one or two of the Respondents—which would give rise to all the same issues Respondents claim will lead to confusion and difficulty handling confidential information[37]—or be limited to testifying only about issues common to all Respondents at the joint hearing. If limited to common issues at the joint hearing, the witness would have to return to appear at up to three individual hearings.

Trial depositions would face the same issues Respondents raise concerning confusion and confidential information. Moreover, trial depositions, while a useful tool where witnesses are expected to be unavailable, are not a perfect substitute for live testimony. The ALJ is best positioned to evaluate witness credibility during live testimony. Moreover, given the number of

[35] ESI Motion for Separate Hearing at 8.

[36] 83 F.R.D. 323, 335 (D.D.C. 1979).

[37] Caremark Motion for Separate Hearing at 6, 8; ESI Motion for Separate Hearing at 5, 8; Optum Motion for Separate Hearing at 5.

witnesses that are likely to concern multiple Respondents, this approach would require a large number of trial depositions. As such, trial depositions of common witnesses are not a workable substitute.

II. Respondents' arguments for separate hearings are flawed.

Respondents have failed to show that "separate hearings will be conducive to expedition and economy" under Rule 3.41(b)(3). Respondents have not cited a single case where the Commission or the ALJ decided to split a single case into multiple hearings. And federal courts considering Rule 42(b) motions to bifurcate make it clear that where plaintiffs bring a single case, "the burden is on the defendant to convince the court that a separate trial is proper in light of the general principle that a single trial tends to lessen the delay, expense and inconvenience to all parties."[38] The "movant must justify bifurcation on the basis of substantial benefits that it can be expected to produce."[39] Respondents have not carried this burden.

A. Respondents will not be prejudiced by separate proceedings.

Respondents' concern that "evidence related to one Respondent may be improperly imputed across all Respondents" is misplaced.[40] This is a bench trial where the ALJ is fully "capable of assigning appropriate weight to evidence."[41] Thus, the risk of prejudice from the Court attributing to other Respondents facts that are uniquely damaging to only one Respondent

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[38] *Sensitron, Inc. v. Wallace*, 504 F. Supp. 2d 1180, 1186 (D. Utah 2007) (quoting *Patten v. Lederle Labs*, 676 F. Supp. 233, 238 (D. Utah 1987)).

[39] *Svege v. Mercedes-Benz Credit Corp.*, 329 F. Supp. 2d 283, 284 (D. Conn. 2004) ("Bifurcation is thus the exception, not the rule, and movant must justify bifurcation on the basis of substantial benefits that it can be expected to produce.") (citing *Dallas v. Goldberg*, 143 F. Supp. 2d 312, 315 (S.D.N.Y. 2001)).

[40] Caremark Motion for Separate Hearing at 7. *See also* ESI Motion for Separate Hearing at 5; Optum Motion for Separate Hearing at 4-5.

[41] *See* Scheduling Order ¶ 17.

is minimal. The notion that Respondents must "defend themselves *and* their competitors in the same evidentiary hearing" is self-imposed by Respondents.[42]

Other prejudice concerns that Respondents cited due to having to share limited resources to defend themselves are largely moot in light of the Court's Scheduling Order.[43] For example, Respondents complain about the prejudice of sharing witness lists and briefing pages,[44] but the Scheduling Order resolved each of these issues in Respondents' favor. Now, each Respondent group can submit its own witness list, expert witness list, pretrial brief, post-trial briefs, and findings of fact and conclusions of law. Not only that, but Respondents collectively can disclose more witnesses than Complaint Counsel and each Respondent group gets the full allocation of pages for the briefing.[45] Even with depositions, which are typically divided equally per side, the Scheduling Order envisions a departure from this standard procedure, giving each Respondent group more time on the record.

B. Respondents' confidential information can be fully protected in a single hearing.

The existence of some confidential information that Respondents would like to keep from each other does not require separate hearings.[46] Nearly every case before the ALJ involves the confidential information of multiple parties and non-parties. What is more, in merger cases, which are the bulk of competition cases in front of the ALJ, the Respondents are typically direct

[42] ESI Motion for Separate Hearing at 7 (emphasis in original). *See also* Caremark Motion for Separate Hearing at 6; Optum Motion for Separate Hearing at 5.

[43] Oct. 23, 2024 Scheduling Order.

[44] Caremark Motion for Separate Hearing at 7-8; ESI Motion for Separate Hearing at 9; Optum Motion for Separate Hearing at 4-5.

[45] Scheduling order at 1 (35 *vs*. 45 witnesses on initial lists); *Id*. at 11.

[46] Caremark Motion for Separate Hearing at 8; ESI Motion for Separate Hearing at 8; Optum Motion for Separate Hearing at 5.

rivals. The ALJ has extensive experience with protecting confidential information in such circumstances through the FTC's *in camera* procedures.[47]

Regardless of whether there is one hearing or three in this case, there will be confidential material from both third parties and Respondents subject to *in camera* orders. Such materials will need to be redacted in public filings and any drafts Respondents' counsel share with their clients. Separate hearings would not change that. During hearings, *in camera* sessions always exclude anyone not entitled to access to the confidential information under discussion. In a single hearing, *in camera* sessions could easily be limited to outside counsel for all Respondents, Complaint Counsel, the ALJ, and associated staff. This would allow outside counsel for Respondents to know what evidence is being presented and give them a chance to respond, while protecting confidential information from disclosure to the Respondents' employees. Respondents' suggestion that efficiency could be preserved by presenting common evidence in a joint hearing or through trial depositions[48] would require the same protections for Respondents' confidential information as a single hearing addressing all issues.

C. The cases cited by Respondents do not support separate hearings in these circumstances.

Respondents improperly rely on Part 3 actions where counsel sought to consolidate multiple separate cases into one, such as *In re Motor Up Corp.*,[49] *In re Chrysler Motors Corp.*,[50]

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[47] *See generally* 16 C.F.R. § 3.45.

[48] *See, e.g.*, ESI Motion for Separate Hearing at 8.

[49] 1999 FTC LEXIS 260 (F.T.C. Jun. 11, 1999) (moving to consolidate three separately filed cases against marketers of motor oil additives).

[50] 1976 FTC LEXIS 448 (F.T.C. Mar. 19, 1976) (moving to consolidate separate cases against different automakers where "the only hint of any common witnesses in complaint counsel's motion is the suggestion that experts who 'might' be called would provide testimony relevant to all three cases").

In re Food Fair Stores, Inc.,[51] and *F.W. Fitch Co. & F.W. Fitch Manufacturing Co.*[52] That difference in posture is significant. This is not a case where the Commission voted out separate complaints that Complaint Counsel seeks to consolidate because of some overlap. This case originated as a single investigation into the conduct of the three Respondents. From the beginning, Complaint Counsel investigated the conduct of Respondents collectively, considered and analyzed the evidence against them collectively, and developed a coherent theory of how the Respondents' conduct has violated the law. The Commission, in turn, voted out a single complaint against the Respondents. Complaint Counsel now simply opposes the efforts of Respondents to inefficiently divide a single case with common proof into three separate cases.

Respondents' reliance on cases discussing joinder in federal court is also unpersuasive.[53] Joinder under the Federal Rules of Civil Procedure requires a higher standard than consolidation under the FTC's rules of practice. Under the permissive joinder rules, multiple defendants can only be joined if "any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and any question of law or fact common to all defendants will arise in the action."[54] More importantly, the issue at hand is not whether multiple cases can be joined

[51] 1956 FTC LEXIS 32 at *1-2 (F.T.C. Apr. 25, 1956) (moving to consolidate as many as 13 separate cases).

[52] 1950 FTC LEXIS 122 at *13 (F.T.C. Feb. 1, 1950) (dandruff shampoo distributors urging the Commission to sue all other distributors in the country and consolidate the proceedings).

[53] *See* ESI Motion for Separate Hearing at 4 (citing *FTC v. Endo Pharms., Inc.*, 2016 WL 6124376 (E.D. Penn. Oct. 20, 2016), *Precision Assocs., Inc. v. Panalpina World Transp. (Holding) Ltd.*, 2013 WL 6481195 (E.D.N.Y. Sept. 20, 2013), and *Spaeth v. Mich. State Univ. Coll. Of Law*, 845 F. Supp. 2d 48, 53 (D.D.C. 2012)).

[54] Fed. R. Civ. P. 20(a)(2).

under federal court rules or consolidated under FTC rules but whether "separate hearings will be conducive to expedition and economy" under Rule 3.41(b)(3).

Respondents' other federal cases are no better. In *In re Genetically Modified Rice Litig.*, the claims at issue were separated because plaintiff's claims against one defendant were tort claims, while those against the other were contract claims.[55] In *Houseman v. U.S. Aviation Underwriters*, bifurcation was granted because the plaintiff had belatedly added a second defendant to the case and the trial schedule would have prejudiced that defendant's ability to defend itself.[56] In *Bowling v. DaVita*, the cases the plaintiff sought to consolidate involved different sets of allegations with applicable law that varied by state.[57] And in *General Patent Corp. v. Hayes Microcomputer*, a patent case was bifurcated where patent validity and enforceability were potentially dispositive issues that could be resolved before turning to the defendant specific infringement and damages claims.[58] None of these are apposite here.[59]

CONCLUSION

The Commission voted out a single complaint against these three Respondents, alleging that each has violated the same laws through the same types of conduct. Separating the case into three separate hearings would require duplication of effort and is unnecessary to protect the interests of the Respondents. For these reasons, a single hearing is the most logical, efficient, and

[55] 2010 WL 816157 at *1 (E.D. Mo. Mar. 3, 2010).

[56] 171 F.3d 1117, 1122 (7th Cir. 1999).

[57] 2024 WL 3581678 at *4 (D. Colo. Jul. 30, 2024).

[58] 1997 WL 1051899 at *1 (C.D. Cal. Oct. 20, 1997).

[59] The Optum Respondents also cite to *Zacharias v. SEC*, but in this case the D.C. Circuit rejected the argument that one defendant's case should have been severed in an administrative case before the SEC. 569 F.3d 458, 467 (D.C. Cir. 2009).

cost-effective way to proceed in this case. Complaint Counsel respectfully requests that Respondents' motions for separate hearings be denied.

Dated: November 4, 2024

Respectfully submitted,

/s/ Nicholas Leefer

Nicholas Leefer
Rebecca Egeland
Amanda Triplett

Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580
Tel: (202) 326-3573
Email: nleefer@ftc.gov

Counsel Supporting the Complaint

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CERTIFICATE OF SERVICE

I hereby certify that on November 4, 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:

April Tabor
Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW
Room H-113
Washington, DC 20580
ElectronicFilings@ftc.gov

Secretary of the Commission
Clerk of the Court

The Honorable D. Michael Chappell
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, NW
Room H-110
Washington, DC 20580
OALJ@ftc.gov

Administrative Law Judge

I also certify that I caused the foregoing document to be served via email to:

Enu Mainigi
WILLIAMS & CONNOLLY LLP
680 Maine Avenue SW
Washington, DC 20024
emainigi@wc.com

Mike Cowie
DECHERT LLP
1900 K Street NW
Washington, DC 20006
mike.cowie@dechert.com

Rani A. Habash
DECHERT LLP
1900 K Street NW
Washington, DC 20006
rani.habash@dechert.com

Counsel for Respondents Caremark Rx LLC; Zinc Health Services, LLC

Daniel J. Howley
RULE GARZA HOWLEY
901 7th Street NW, Suite 600
Washington, DC 20006
howley@rulegarza.com

Charles F. (Rick) Rule
RULE GARZA HOWLEY
901 7th Street NW, Suite 600
Washington, DC 20006
rule@rulegarza.com

Jennifer Milici
WILMERHALE
2100 Penn. Ave. NW
Washington, DC 20037
jennifer.milici@wilmerhale.com

Counsel for Respondents Express Scripts, Inc.; Evernorth Health, Inc.; Medco Health Services, Inc.; Ascent Health Services LLC

Samuel Liversidge
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
SLiversidge@gibsodunn.com

Sophia A. Hansell
GIBSON, DUNN & CRUTCHER LLP
1700 M Street NW
Washington, DC 20036
shansell@gibsondunn.com

Counsel for Respondents OptumRx, Inc.; OptumRx Holdings, LLC; Emisar Pharma Services LLC

/s/ Nicholas Leefer
Nicholas Leefer
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Avenue, NW
Washington, DC 20580
(202) 326-3573
nleefer@ftc.gov

Counsel Supporting the Complaint