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

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

RESPONDENTS CAREMARK RX, L.L.C. AND ZINC HEALTH SERVICES, L.L.C.'S MOTION FOR LEAVE TO FILE A REPLY IN SUPPORT OF THEIR MOTION FOR A SEPARATE EVIDENTIARY HEARING

Pursuant to 16 CFR § 3.22(d), Respondents Caremark Rx, L.L.C. ("Caremark") and Zinc Health Services, L.L.C. ("Zinc") respectfully move for leave to file a reply in response to Complaint Counsel's Opposition to Respondents' Motions for Separate Evidentiary Hearings. The reply will respond to certain misstatements of law in Complaint Counsel's opposition brief. Respondents Caremark and Zinc represent that these clarifications could not have been raised in their principal brief.

Respondents Caremark and Zinc met and conferred with Complaint Counsel on November 8, 2024, and expressed their concerns with Complaint Counsel's misstatements, including its incorrect reliance upon *FTC v. Syngenta Crop Protection AG*, 711 F. Supp. 3d 545 (M.D.N.C. 2024). Complaint Counsel stated that it opposes Respondents' request to file a reply. Nonetheless, Complaint Counsel *unilaterally* filed a notice stating that it "mistakenly relied on [*Syngenta*] as an example of an FTC case brought against multiple defendants for engaging in similar anticompetitive conduct without any allegation of an unlawful agreement between the defendants." Complaint Counsel apparently takes the position that it can file supplemental submissions withdrawing its arguments without explanation or leave, but Respondents cannot file anything to explain why Complaint Counsel's arguments are wrong.

The proposed reply brief is conditionally filed with this motion and complies with the timing and word count requirements set forth in Rule 3.22 (c)–(d).

Dated: November 12, 2024

Respectfully submitted,
/s/ Enu Mainigi

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Respondents Caremark Rx, L.L.C. ("Caremark") and Zinc Health Services, L.L.C. ("Zinc") respectfully submit this reply to clarify misstatements of law in Complaint Counsel's memorandum in opposition to Caremark and Zinc's Motion for a Separate Evidentiary Hearing.

I. Contrary to Complaint Counsel's Assertions, It Identified No Case Where the Commission Brought a Single Complaint Against Multiple Unrelated, Non-Coordinating Respondents.

Complaint Counsel would have this Court believe that it is unremarkable for the Commission to "issue[] single complaints against multiple parties accused of the same conduct even where there is no allegation of collusion." Opp. Br. at 1. Yet Complaint Counsel offers not a single example of such a case. All of the cases it cites involved allegations of coordinated activity.

Complaint Counsel's lead example was *FTC v. Syngenta Crop Protection AG*, 711 F. Supp. 3d 545 (M.D.N.C. 2024), which it claimed "included no allegations of collusion," Opp. Br. at 2. That is not so, as Complaint Counsel apparently now concedes. Following a meet and confer with Respondents, Complaint Counsel filed a notice withdrawing its reliance on *Syngenta* and acknowledging that it "mistakenly relied on [*Syngenta*] as an example of an FTC case brought against multiple defendants for engaging in similar anticompetitive conduct without any allegation of an unlawful agreement between the defendants." Complaint Counsel did not deign to explain why its reliance on *Syngenta* was mistaken, but here is the reason: In *Syngenta*, the Commission alleged that one respondent, Syngenta, supplied two brand-name active ingredients in herbicide products to the other respondent, Corteva. *Id.* at 560. Syngenta allegedly "struck this agreement as an incentive to keep Corteva from purchasing generics of these two [active ingredients]," and "[i]n exchange, Syngenta [would] not penalize distributors . . . who buy Corteva products containing these two Syngenta [active ingredients]." *Id.* Thus, *Syngenta* plainly alleged collusive and coordinated activity between the respondents.

Complaint Counsel also cites *In re Ethyl Corp.*, 101 F.T.C. 425, 1983 WL 486336 (1983), *vacated by E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128 (2nd Cir. 1984), but that case too

involved allegations of coordination between the respondents. The core issue in that case was whether the challenged practices "promote price uniformity by providing a vehicle for communicating current price information," thereby "facilitating pricing coordination" between competitors. *Id.* at *127.

These cases stand in sharp contrast to this one, where, as Complaint Counsel concedes, there are no allegations of collusive or coordinated activity among Respondents. Complaint Counsel cannot point this Court to a single precedent where the Commission has filed a complaint against multiple parties that are not alleged to have colluded or coordinated with each other.

II. Common Claims and Requests for Relief Do Not Support a Consolidated Proceeding.

Complaint Counsel argues that this Court should decline to hold separate evidentiary hearings because "[e]ach Respondent is charged with violating the same law" and because Complaint Counsel "is seeking the same relief from all Respondents," which, according to Complaint Counsel, is "in contrast to cases cited by Respondents." Opp. Br. at 4–5.

As an initial matter, this argument assumes Complaint Counsel's conclusion: Just because Complaint Counsel alleges that Respondents broke the law in the same way, does not make it so. Ultimately, Complaint Counsel will have to prove its allegations, and doing so will require "different witnesses, different documents, and different facts in each case." *In re Motor Up Corp., et al.*, 1999 WL 33577393, at *3 (F.T.C. June 11, 1999). Nor does Complaint Counsel claim that its common claims could be supported by the same witnesses.

In any event, Complaint Counsel is wrong that "seeking the same relief" for "violating the same law" justifies a consolidated hearing. FTC ALJs have repeatedly decided to hold separate hearings even where all respondents faced the same claims and where Complaint Counsel sought the same relief. For example, in *Motor Up*, this Court held that separate hearings were appropriate

even where Complaint Counsel brought the same allegations against both respondents and where "the proposed orders for relief issued by the Commission against each are virtually identical." *Motor Up*, 1999 WL 33577393, at *1. And in *Chrysler Motors Corp.*, the ALJ held that separate hearings were warranted even where "virtually identical issues of law and fact exist in each proceeding" and "the proposed relief is nearly identical in each proceeding." *In re Chrysler Motors Corp., et al.*, 1976 FTC LEXIS 448, at *1, *7–8 (F.T.C. Mar. 19, 1976).

III. Complaint Counsel Misinterprets Rule 3.41.

Complaint Counsel asserts that certain cases cited by Caremark and Zinc are inapplicable because they involve situations where parties sought to consolidate separate actions, rather than seeking to separate consolidated actions. Opp. Br. at 11–12.

As an initial matter, Complaint Counsel itself relies on cases in which parties sought to consolidate actions. *See* Opp. Br. at 1, 7 (citing *In re Automotive Breakthrough Sciences, Inc.*, 1995 FTC LEXIS 378 (F.T.C. Dec. 18, 1995) (case in which Complaint Counsel moved to consolidate separate actions)). More importantly, Complaint Counsel's position is misguided because the same standard applies to requests to combine or to separate hearings. Rules 3.41(b)(2) and (3) give ALJs the authority to *either* consolidate *or* separate hearings when doing so would be "conducive to expedition and economy." 16 C.F.R. § 3.41(b)(2)–(3). It is of no moment that "[t]he Commission voted out a single complaint," Opp. Br. at 13; what matters is whether separate hearings would serve the purposes of fairness and efficiency. As discussed in Caremark and Zinc's Motion for a Separate Evidentiary Hearing, fairness and efficiency are served by separating hearings in this case.

IV. Conclusion.

For the reasons stated above and for the reasons stated in Caremark and Zinc's Motion for a Separate Evidentiary Hearing, Caremark and Zinc respectfully request a separate evidentiary hearing in this matter.

Dated: November 12, 2024

Respectfully submitted,
/s/ Enu Mainigi

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PROPOSED ORDER

Upon consideration of Respondents Caremark Rx, L.L.C. and Zinc Health Services, L.L.C.'s Request for Leave to File a Reply in Support of their Motion for a Separate Evidentiary Hearing:

IT IS HEREBY ORDERED, that the Motion is GRANTED.

ORDERED: _____

D. Michael Chappell
Chief Administrative Law Judge

Date: _____

CERTIFICATE OF SERVICE

I hereby certify that on November 12, 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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I further certify that on November 12, 2024, I caused the foregoing document to be served via email to:

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