PUBLIC

UNITED STATES OF AMERICA
BEFORE 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.**	**Docket No. 9437**

ESI RESPONDENTS' MOTION FOR DISCOVERY PURSUANT TO RULE 3.36

Pursuant to Rule 3.36 of the Commission's Rules of Practice, 16 C.F.R. § 3.36, Respondents Express Scripts, Inc., Evernorth Health, Inc., Medco Health Services, Inc., and Ascent Health Services LLC (together the "ESI Respondents") respectfully move for an order authorizing the issuance of a subpoena *duces tecum* to the Commissioners of the Federal Trade Commission, including their staff, and the Office of Policy Planning. The subpoena requests a clearly defined, relevant set of documents.

I. INTRODUCTION

After many years of explicitly recognizing the procompetitive benefits of Pharmacy Benefit Managers ("PBMs") and the services they provide, in 2021 the Commission dramatically changed position and began publicly asserting that those same practices are harmful to competition and consumers. Many Commission and Commissioner statements since 2021 relate directly to the allegations in the Complaint, including statements about insulin prices, drug formularies,

negotiated rebates, competition among PBMs, and consumer prices. To the extent that the Commission (or individual Commissioners) were relying on facts to support the post-2021 anti-PBM statements, those facts are relevant to the disputed issues in this case. To the extent that the anti-PBM statements lack factual support, the lack of factual support itself is relevant to issues of bias and prejudgment. By seeking the facts (if any) and communications relating to the Commission's and Commissioners' public statements about the conduct challenged in this case and the purported impact of that conduct on competition and consumers, ESI Respondents are plainly seeking information that is material to the allegations and to their defenses and that could not be obtained without a subpoena. ESI Respondents' subpoena is drafted to be narrowly tailored to the FTC's claims and ESI Respondents' defenses to minimize burden.

First, the Commission and individual Commissioners have issued numerous statements related to the state of competition between PBMs, pharmaceutical pricing (including insulin pricing), out-of-pocket costs for consumers, and the impact that PBMs have on costs to payors and patients. ESI Respondents are entitled to the studies, surveys, data, and other factual information that relate to those statements, because those facts bear on the issues in dispute in this case.

Second, ESI Respondents also seek non-public communications between the Commissioners, their staffs, or the Office of Policy Planning on one hand, and nonparties to this action on the other, relevant to FTC File No. 2210114 or this action, including the related statements and comments described above. ESI Respondents' requests are directly tied to the allegations of the Complaint and are relevant to its defenses. ESI Respondents have no means of determining the nonparties to this action with which the Commissioners or others communicated about the disputed issues in this case and no other reasonable means of acquiring the requested communications.

II. ARGUMENT

Under the FTC rules, a 3.36 motion should be granted where the requested subpoena: (1) is "reasonably expected to yield information relevant to … [a respondent's] defenses"; (2) is reasonable in scope; (3) is specified with reasonable particularity; and (4) seeks documents that are not reasonably obtainable by other means. *See* 16 C.F.R. §§ 3.31(c), 3.36(b), 3.37(a). ESI Respondents' proposed subpoena satisfies these requirements.

A. The Requested Discovery Is Relevant

Non-Public Data, Studies, Surveys, and Factual Information. ESI Respondents seek factual information including data, studies, and surveys relating to the issues in dispute in this case, including any factual information relating to competition among PBMs, the price of insulin, PBM services and fees, PBM negotiated rebates, drug formularies, and the factors impacting out-of-pocket costs for insulin and other drugs referenced in the Complaint. Access to factual materials outside of the investigative file relating to the conduct challenged in the Complaint has likely influenced relevant public statements by the Commission and Commissioners. By way of example, in 2023 the Commission withdrew its prior guidance related to PBMs, stating that the Commission has information purportedly demonstrating that there have been "substantial changes … over the last two decades" in market conditions involving PBMs. Federal Trade Commission, *Federal Trade Commission Statement Concerning Reliance on Prior PBM-Related Advocacy Statements and Reports That No Longer Reflect Current Market Realities*, at 1 (July 20, 2023). Whether market dynamics have changed such that conduct the Commission previously viewed as procompetitive is now somehow unfair is a central dispute in this case. *See* Compl. ¶¶ 29-31, 99-102 (claiming market dynamics have changed). Likewise, the Commission's 2022 Policy Statement on Rebates and Fees states that the conduct alleged in this case may "shift costs and

misalign incentives in a way that ultimately increases patients' costs and stifles competition from lower-cost drugs." Federal Trade Commission, *Policy Statement of the Federal Trade Commission on Rebates and Fees in Exchange for Excluding Lower-Cost Drug Products*, at 1 (June 16, 2022). Whether PBMs' negotiation of rebates, which reduce the net cost of drugs for plan sponsors clients, increase patient costs will be a disputed issue in this case. *See* Compl. ¶¶ 2, 9, 99-111, 218-224 (claiming rebates incentivized increased list prices and higher costs).

In addition to the above statements, as detailed in the ESI Respondents' motions to disqualify Chair Lina Khan, Commissioner Alvaro Bedoya, and Commissioner Rebecca Slaughter, each of the Commissioners has made factual statements regarding the state of competition between PBMs, pricing of pharmaceutical products (including insulin), out-of-pocket costs, and/or the effect of drug formularies on pricing and availability of pharmaceutical products. These statements include:

- Chair Khan has publicly claimed that PBMs "keep drug prices high," claimed that PBMs control "the medicines consumers are or have not been able to access," stated that the rebates PBMs negotiate for their clients "may function as kickbacks that raise costs and limit access to affordable medicines," and stated that PBMs "determine who gets access to what medicines and at what price." *See* ESI Respondents' Mot. to Disqualify Chair Lina Khan, at 2-3; *see, e.g.*, Compl. ¶¶ 2, 6, 11, 119-181 (claiming challenged conduct increased out-of-pocket costs and increased list prices).

- Commissioner Bedoya has publicly claimed that PBMs "control our access to insulin," claimed that it "appears … companies compete to raise [insulin prices]," suggested that PBMs determine "what medicine [people] get, what they pay for it, and how they will get it" with the goal of "mak[ing] money," and reasoned that "that's not what fair markets look like," that PBMs create a market dynamic where uninsured pay "full freight" on "exorbitantly expensive drug[s] that they need to survive," and that PBMs serve as a "gatekeeper to [] population[s] of insured [patients]," and claimed that rebates "drive[] up the list price." *See* ESI Respondents' Mot. to Disqualify Commissioner Bedoya, at 2-3; *see, e.g.*, Compl. ¶¶ 148, 181, 193, 218, 263 (claiming PBMs function as a "gatekeeper" and control "access" to insulin).

- Commissioner Slaughter has claimed that PBMs are "middlemen" that have undermined "[f]airness in drug pricing" through "secretive rebates," stated that PBMs have used "exploitation of market power" in a way that undermines how "competition is supposed to work," suggested that "list prices and patients' out-of-pocket costs for

> prescription drugs have increased as PBM rebates and fees have mushroomed." *See* ESI Respondents' Mot. to Disqualify Commissioner Slaughter, at 2-3; *see, e.g.*, Compl. ¶¶ 7, 54, 220, 221, 230, 257 (claiming that rebates result in an "unfair and exploitative cost-shifting" and that PBMs "deliberately obscure[]" the effects of rebates).

If the Commission had access to facts, studies, or analyses that supported any of the identified statements, those facts are discoverable because they bear directly on the disputed issues in this case. *See In re 1-800 Contacts, Inc.*, 2016 WL 7634657, at *3-5 (FTC Dec. 20, 2016) (granting 3.36 motion seeking facts supporting policy statements); *see also In re 1-800 Contacts, Inc.*, 2016 WL 6609774, at *4-5 (FTC Oct. 28, 2016) (explaining that relevant discovery from the FTC includes "reports, studies, and analyses of competitive conditions" in the relevant market and analyses of "sales and prices" in the relevant market).

Separate and apart from the relevance of these requested documents to the FTC's factual allegations, the data, surveys, studies, and factual information relating to statements of the Commissioners are also relevant to ESI Respondents' defense in this action that the Commissioners have improperly "prejudged" the merits of the case. *Cinderella Career & Finishing Schs., Inc. v. FTC*, 425 F.2d 583, 589-92 (D.C. Cir. 1970). To obtain discovery on prejudgment, a party does not need to show "conclusive evidence" of prejudgment but need only show "preliminarily" that a government official's actions were "predetermined." *New York v. Salazar*, 701 F. Supp. 2d 224, 242-43 (N.D.N.Y. 2010); *NEC Corp. v. U.S. Dep't of Commerce*, 958 F. Supp. 624, 632 (Ct. Int'l Trade 1997) ("[W]ell-nigh irrefragable proof" of decisionmaker's prejudgment is not necessary to obtain discovery). The "anticipatory" comments of the Commissioners outlined above are plainly sufficient to permit further discovery regarding the data and other factual information on which Chair Khan, Commissioner Bedoya, and Commissioner Slaughter relied to support their statements. *E.g.*, *Exxon Mobil Corp. v. Healey*, 215 F. Supp. 3d 520, 522-23 (N.D. Tex. 2016) (statement prior to issuance of a CID that "[f]ossil fuel companies

… deceived investors and consumers" warranted discovery into state attorney general's "comments and actions"); *cf. Bowers v. U.S. Parole Comm'n*, 760 F.3d 1177, 1184-85 (11th Cir. 2015) (permitting discovery to determine whether government decisionmaker "acted independently and without bias").[1]

Communications with Non-Parties. ESI Respondents also seek the communications between the Commissioners or the Office of Policy Planning and nonparties to this action that underly, support, or contradict the allegations in the Complaint. ESI Respondents are "entitled to discovery of facts that form the basis for the allegations of the Complaint." *In re LabMD, Inc.*, 2014 WL 1100693, at *9 (FTC Mar. 10, 2014) (permitting discovery as to the relationship between the FTC and a nonparty). ESI Respondents' requests are targeted at those communications that are relevant and in the Commissioners' or the Office of Policy Planning's possession, custody, or control.

B. The Discovery Is Reasonable In Scope, Stated With Particularity, And Cannot Be Otherwise Reasonably Obtained

The requested discovery is reasonable in scope and stated with particularity. 16 C.F.R. §§ 3.36(b)(1), 3.37(a). The requested discovery is limited to discrete topics and specific types of materials to allow identification of readily accessible responsive materials. The requests are also narrowly tailored to support ESI Respondents' defenses and rebut the FTC's allegations and will impose only a limited burden. *In re Intel Corp.*, 2010 WL 2544424, at *3-4 (FTC June 9, 2010). ESI Respondents exclude from their requests materials produced in response to the Commission's 6(b) Orders, except for any such materials actually reviewed or accessed by a Commissioner or his or her staff relevant to FTC File No. 2210114 or the Complaint in this action.

[1] The decision in *In re Intuit, Inc.*, 2022 WL 16960890 (FTC Nov. 7, 2022), is distinguishable. The statements discussed in this motion are far more than what the Court there found to be neutral "press releases" but instead reflect factual and legal conclusions as to the merits. *Id.* at *4-6.

Furthermore, Respondents cannot otherwise reasonably obtain the discovery. 16 C.F.R. § 3.36(b)(3). The documents sought are held by the Commissioners, including their staff, or the Office of Policy Planning and encompass nonpublic data, surveys, studies, analyses, or other factual information and information regarding the Commissioners' and the Office of Policy Planning's nonpublic communications with nonparties who are not readily identifiable. *1-800 Contacts*, 2016 WL 6609774, at *6-7 (finding documents could not be reasonably obtained from other sources where nonparties did not possess all of the requested material and the alternative to the subpoena to the FTC was "try[ing] to obtain [the documents] via subpoenas to multiple non-parties" and where relevant nonparties were not "readily identifiable"). Beyond the requested subpoena, ESI Respondents have no other reasonable means of obtaining these materials.

III. CONCLUSION

An order should issue authorizing the subpoena attached as Exhibit A.

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Dated: January 2, 2025

Respectfully submitted,

/s/ Jennifer Milici
Jennifer Milici
Perry A. Lange
John W. O'Toole
WILMER CUTLER PICKERING
HALE AND DORR LLP
2100 Pennsylvania Ave. NW
Washington, D.C. 20037
Telephone: (202) 663-6000
Facsimile: (202) 663-6363
jennifer.milici@wilmerhale.com
perry.lange@wilmerhale.com
john.otoole@wilmerhale.com

Charles F. Rule
Daniel J. Howley
Margot Campbell
Derek W. Moore
Justin T. Heipp
RULE GARZA HOWLEY LLP
901 7th Street NW
Washington, D.C. 20001
(202) 843-9280
rule@rulegarza.com
howley@rulegarza.com
campbell@rulegarza.com
moore@rulegarza.com
heipp@rulegarza.com

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

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CONFERENCE STATEMENT

Pursuant to Paragraph 4 of the Scheduling Order entered in this matter on October 23, 2024, I hereby certify that counsel for Respondents Express Scripts, Inc., Evernorth Health, Inc., Medco Health Services, Inc., and Ascent Health Services LLC, the moving parties, conferred by teleconference with Complaint Counsel on December 20, 2024. On January 2, 2025, Complaint Counsel informed Respondents that they oppose this motion.

/s/ Jennifer Milici

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

EXHIBIT A

Subpoena for Production of Documentary Material

Provided by the Secretary of the Federal Trade Commission, and
Issued Pursuant to Commission Rule 3.34(b), 16 C.F.R. § 3.34(b)(2010)

1. TO

Commissioners of the Federal Trade Commission
Office of Policy Planning
600 Pennsylvania Ave., NW
Washington, DC 20580

2. FROM

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

This subpoena requires you to produce and permit inspection and copying of designated books, documents (as defined in Rule 3.34(b)), or tangible things, at the date and time specified in Item 5, and at the request of Counsel listed in Item 9, in the proceeding described in Item 6.

3. PLACE OF PRODUCTION

Wilmer, Cutler, Pickering, Hale & Dorr LLP
2100 Pennsylvania Avenue, NW
Washington, DC 20037

4. MATERIAL WILL BE PRODUCED TO

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

5. DATE AND TIME OF PRODUCTION

TBD

6. SUBJECT OF PROCEEDING

In the Matter of Caremark Rx, LLC, et al. ("Insulin"), FTC Dkt. No. 9437

7. MATERIAL TO BE PRODUCED

See attached Subpoena Duces Tecum Attachment to the Federal Trade Commission and Office of Policy Planning

8. ADMINISTRATIVE LAW JUDGE

The Honorable D. Michael Chappell
Federal Trade Commission
Washington, D.C. 20580

9. COUNSEL AND PARTY ISSUING SUBPOENA

Jennifer Milici
Wilmer, Cutler, Pickering, Hale, & Dorr LLP
2100 Pennsylvania Avenue, NW
Washington, DC 20037
202-663-6000
Counsel for Respondents Express Scripts, Inc., Evernorth Health, Inc., Medco Health Services, Inc., and Ascent Health Services LLC

DATE SIGNED

SIGNATURE OF COUNSEL ISSUING SUBPOENA

INSTRUCTIONS AND NOTICES

The delivery of this subpoena to you by any method prescribed by the Commission's Rules of Practice is legal service and may subject you to a penalty imposed by law for failure to comply. This subpoena does not require approval by OMB under the Paperwork Reduction Act of 1980.

PETITION TO LIMIT OR QUASH

The Commission's Rules of Practice require that any petition to limit or quash this subpoena be filed within the earlier of ten days after service thereof or the time for compliance therewith. The original and twelve copies of the petition must be filed with the Secretary of the Federal Trade Commission, and one copy should be sent to the Commission Counsel named in Item 9.

YOUR RIGHTS TO REGULATORY ENFORCEMENT FAIRNESS

The FTC has a longstanding commitment to a fair regulatory enforcement environment. If you are a small business (under Small Business Administration standards), you have a right to contact the Small Business Administration's National Ombudsman at 1-888-REGFAIR (1-888-734-3247) or www.sba.gov/ombudsman regarding the fairness of the compliance and enforcement activities of the agency. You should understand, however, that the National Ombudsman cannot change, stop, or delay a federal agency enforcement action.

The FTC strictly forbids retaliatory acts by its employees, and you will not be penalized for expressing a concern about these activities.

TRAVEL EXPENSES

Use the enclosed travel voucher to claim compensation to which you are entitled as a witness for the Commission. The completed travel voucher and this subpoena should be presented to Commission Counsel for payment. If you are permanently or temporarily living somewhere other than the address on this subpoena and it would require excessive travel for you to appear, you must get prior approval from Commission Counsel. Witness travelers can contact the FTC travel office for guidance at (202) 326-3299 or travel@ftc.gov. PLEASE NOTE: Reimbursement for necessary transportation, lodging, and per diem expenses cannot exceed the maximum allowed for such expenses by an employee of the federal government.

A copy of the Commission's Rules of Practice is available online at http://bit.ly/FTCsRulesofPractice. Paper copies are available upon request.

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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.**	**Docket No. 9437**

RESPONDENTS EXPRESS SCRIPTS, INC., EVERNORTH HEALTH, INC., MEDCO HEALTH SERVICES, INC., AND ASCENT HEALTH SERVICES LLC'S SUBPOENA *DUCES TECUM* ATTACHMENT TO THE FEDERAL TRADE COMMISSION

Pursuant to Rules 3.34 and 3.36 of the Federal Trade Commission's Rules of Practice (16 C.F.R. §§ 3.34, 3.36), Respondents Express Scripts, Inc., Evernorth Health, Inc., Medco Health Services, Inc., and Ascent Health Services LLC (collectively, "ESI Respondents"), by and through their attorneys, request that the Commissioners, including their staff, and the Office of Policy Planning produce all documents, electronically stored information, and other materials in their possession, custody, or control that are responsive to the requests made below.

DEFINITIONS

1. "Action" means the above-captioned litigation, *In the Matter of Caremark Rx, LLC, et al.*, FTC Docket No. 9437 (F.T.C.).

2. The terms "all," "any," and "each" shall be construed as encompassing any and all; and "every" means each and every.

3. The terms "and" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery request all responses that might otherwise be construed to be outside of its scope. The use of the singular form of any word includes the plural and vice versa.

4. "Commissioners" means any current Commissioners of the Federal Trade Commission, former Commissioners of the Federal Trade Commission who served on or after January 1, 2021, and any other person acting or purporting to act on behalf of or under the direction, authorization, or control of such commissioners, including such Commissioners' staff and advisors.

5. "Communication(s)" means any transmission, exchange or transfer of information (in the form of facts, ideas, inquiries, or otherwise) by any means, including all written, electronic, telephonic, oral or other inquiries, dialogues, discussions, conversations, interviews, correspondence, consultations, negotiations, agreements, understandings, meetings, letters, notes, telegrams, advertisements, computer mail, e-mail and any other Documents evidencing any verbal or nonverbal interaction between persons.

6. The terms "concerning" and "regarding" mean to comprise, reflect, record, memorialize, embody, discuss, contradict, evaluate, consider, review or report on, concern, refer to, or relate to the subject matter of the Request or to have been created, generated or maintained in connection with or as a result of the subject matter of the Request.

7. "Data" shall mean any recorded information, including but not limited to, all spreadsheets, databases, images, audio or video files, logs, metadata, or any other material that captures information. "Data" encompasses structured data (such as databases or tables), unstructured data (such as email or word processing documents), and any embedded or associated

metadata. It shall also include all drafts, versions, deletions, and hidden or deleted information, whether stored on local computers, servers, cloud storage, mobile devices, or other data storage locations.

8. The terms "discuss" or "discussing" means in whole or in part constituting, containing, describing, or addressing the designated subject matter, regardless of the length of the treatment or detail of analysis of the subject matter, but not merely referring to the designated subject matter without elaboration. In addition, a document that "discusses" another document includes the other document itself (e.g., a document that "discusses" an agreement or contract includes the agreement or contract itself). Further, these terms include any operating or financial data about the designated subject matter where such data are separately set out as in a chart, listing, table, or graph.

9. "Document(s)" means any information, on paper or in electronic format, including written, printed, recorded, and graphic materials of every kind, in the possession, custody, or control of FTC Personnel or Commissioners. The term "Documents" includes, without limitation: computer files; email messages; text messages; instant messages and chat logs; group chats; voicemails and other audio files; calendar entries; schedulers; drafts of documents; metadata and other bibliographic or historical data describing or relating to documents created, revised, or distributed electronically; notes of Meetings or telephone calls; and copies of documents the originals of which are not in the possession, custody, or control of FTC Personnel or Commissioners. This term includes the transmittal or transfer of communications and information (in the form of facts, ideas, inquiries, or otherwise) by any means, including email, instant messages, text messages, iMessages, WhatsApp Messages, Telegram, and Signal messages.

"Document(s)" include the original and, separately, each non-identical copy (including, but not limited to, non-identical copies containing unique notes, inserted material, or attachments).

10. "Federal Trade Commission" or "FTC" means the Federal Trade Commission, Commissioners and his or her staff, and any other person acting or purporting to act on behalf of or under the direction, authorization, or control of the Federal Trade Commission.

11. "Formulary" means a Payor's, Health Care Provider's or PBM's list of medicines, drugs, or pharmaceutical products that are approved to be prescribed, covered, or reimbursed at a hospital, in a particular health system, or under the pharmaceutical benefit of a health insurance policy.

12. "FTC Personnel" means the staff of any Bureau or Office, including the Office of Policy Planning, Bureau of Competition, or the Bureau of Economics.

13. "Health Care Provider" refers to any doctor, hospital, clinic, or other Person or entity that provides health care services.

14. "Insulin Manufacturer" means any pharmaceutical manufacturer or other company that manufactures or markets Insulin Products, including but not limited to Viatris, Inc.; Biocon Pharma Inc.; Eli Lilly and Company; Novo Nordisk A/S; Sanofi S.A. or its U.S. subsidiary Sanofi-Aventis U.S. LLC (collectively, "Sanofi"); MannKind Corporation; Civica Rx; or any subsidiary thereof.

15. "Insulin Product" means each insulin pharmaceutical and related device, equipment, or other mechanical part approved by the U.S. Food and Drug Administration to treat diabetes, including those Insulin Products marketed in pen, cartridge, or vial presentation in the United States.

16. "List Price" means the WAC price at which an Insulin Product is listed.

17. "Meeting" means an assembly of two or more people, in-person or via telephone, voiceover-IP, video, video conferencing, other similar means of communication.

18. "Payor" means any entity, other than the receiving patient, that pays or reimburses in whole or in part for the administration or sale of a pharmaceutical product. Payors include, but are not limited to, Plan Sponsors, federal and state government programs such as TRICARE, Medicare, and Medicaid; private insurers and health-maintenance organizations (HMOs); and health-and-welfare funds.

19. "PBM" or "Pharmacy Benefit Manager" means any entity that negotiates Rebate agreements; creates or manages a Formulary; or otherwise deals with pharmaceutical manufacturers or sellers and serves as a third-party administration of a Payor's or Plan Sponsor's Pharmacy Benefit Plan.

20. "Person" includes the FTC, Commissioners, and FTC Personnel and means any natural person, corporate entity, sole proprietorship, partnership, association, governmental entity, or trust, including any individuals employed by, serving as the agent of, or are otherwise contracted or affiliated with the Person or any subsidiaries thereof.

21. "Pharmacy" refers to any entity, including mail-order vendors, retail vendors, hospitals, clinics, and inpatient facilities, that dispenses pharmaceutical products to patients, including pursuant to a prescription issued by a Health Care Provider.

22. "Pharmacy Benefit Plan" means a plan that provides insurance coverage to a patient for certain drugs from Pharmacies and other drug sources, often serviced by a PBM.

23. "Plan Sponsor" means the financial entities (e.g., Self-Funded employers, insurance companies, union health plans) that pay for prescription drugs through Pharmacy Benefit Plans.

24. "Price" or "Pricing," when used with regard to one or more products, means the amount charged by the supplier for such product(s) or the amount paid by the buyer of such product(s) to the seller, whether or not the seller is the manufacturer of the product(s). The terms "price" and "pricing" also include amounts denominated as price, gross price, net price, average price, unit price, effective price, dead net price, Rebate, package price, bundled price, discount, credit, charge or chargeback, allowance, debit, or any other payment or receipt of anything of value incurred in whole or in part as a result of the sale of the applicable product.

25. "Pre-Complaint Investigation" means the FTC's gathering and assessment of facts, evidence, Documents, Data, and other information necessary to determine whether to initiate formal legal action against Respondents or any Insulin Manufacturer.

26. "Other Referenced Drugs" means any of the drugs named in the Complaint in this Action, and their unbranded, biosimilar or generic alternatives, including but not limited to treatments for Hepatitis C, autoimmune diseases, and inflammatory conditions, including but not limited to Epclusa/Harvoni, Cyltezo, Amjevita, Enbrel, and Taltz.

27. "Rebate" means a retrospective payment returning a portion of the List Price paid for a drug to the direct or indirect purchaser.

28. The terms "relate," "related to," and "relating to" mean, in whole or in part, addressing, analyzing, concerning, constituting, containing, commenting on, discussing, describing, identifying, referring to, reflecting, reporting on, stating, or dealing with.

29. The term "relied on" means considered in drafting or compiling the substance of, cited in, or serve as the factual authority for statements made in Documents or Data.

30. "Wholesale Acquisition Cost" or "WAC" means the pharmaceutical manufacturer's price for a drug to wholesalers or direct purchasers in the United States, not including prompt pay

or other discounts, Rebates or reductions in Price, as reported in wholesale price guides or other publications of drug pricing data.

31. "6(b) Orders" refers to the June 2022 orders for the 6(b) Study of Pharmacy Benefit Managers, including Documents or Data discussing, relating to or regarding the decision to issue the orders and the related gathering and assessment of facts, evidence, data, and other information stemming from those orders.

32. "6(b) PBM Interim Report" refers to the interim report issued by the Federal Trade Commission titled "Pharmacy Benefit Managers: The Powerful Middlemen Inflating Drug Costs and Squeezing Main Street Pharmacies" and dated July 2024.

GENERAL INSTRUCTIONS

1. ESI Respondents seek production of the Documents set forth in the numbered Requests below that are in Commissioners' or FTC Personnel's possession, custody, or control. A Document is to be deemed in Commissioners' or FTC Personnel's possession, custody, or control if Commissioners or FTC Personnel (a) own such document in whole or in part; (b) have a right by contract, statute or otherwise, to use, access, inspect, examine, or copy such document on any terms; or (c) have an express or implied understanding that Commissioners or FTC Personnel may use, access, inspect, examine or copy such document on any terms.

2. In addition to the specific instructions set forth below, these Requests incorporate by reference all provisions of the Protective Order Governing Confidential Material, as entered by Chief Administrative Law Judge Chappell on October 1, 2024 ("Protective Order"). Subject to a valid claim of privilege, please produce the entire document if any part of that document is responsive.

3. Any alteration of a responsive Document, including any marginal notes, handwritten notes, underlining, stamps, drafts, revisions, modifications, and other versions of a responsive Document is a separate and distinct Document and it must be produced in addition to the unaltered responsive Document.

4. No part of a Request may be left unanswered, or Documents not produced, merely because a different portion of a Request is objected to. Where an objection is made to any Request, or subpart thereof, the objection must state with specificity all grounds for the objection. If an objection is made to any Request, the response shall state whether Documents are being withheld from production on the basis of such objection, or whether inspection and production of the responsive Documents will occur not withstanding such objection.

5. If Document or Data contains both privileged and non-privileged information, portions of the document that are not privileged must be produced. If a document or a portion of a document is withheld from production the grounds of privilege (e.g., attorney-client privilege), including deliberative process privilege, or other protection, the document or portion of the document may be withheld from production but must be identified on a privilege log which identifies the following: the Document Bates number, the author, the date, all recipients, the basic nature of the Document (e.g., letter, reports, notes), a description of the document's subject matter and the grounds on which the privilege or protection is asserted.

6. If no Document responsive to a Request exists, please state so in response.

7. Each Document should be produced in the manner, form and position in which it is kept in the ordinary course of business.

8. None of these requests should be construed to seek any materials produced by the recipients of the PBM 6(b) Orders in response to those 6(b) Orders, except for any materials

actually reviewed or accessed by a Commissioner or their staff relevant to FTC File No. 2210114 or the Complaint in this Action.

9. Unless otherwise stated, each request covers Documents and information from January 1, 2021, through the close of fact discovery in this Action.

REQUESTS FOR PRODUCTION

DOCUMENT REQUEST NO. 1

All Data, surveys, studies, or other factual information relating to competition among PBMs, Formularies, Rebates, Insulin Product or Other Referenced Drug Pricing, or out-of-pocket costs for Insulin Products or Other Referenced Drugs relating to the Commission's June 16, 2022 Policy Statement of the Federal Trade Commission on Rebates and Fees in Exchange for Excluding Lower-Cost Drug Products.

DOCUMENT REQUEST NO. 2

All Communications between Commissioners or the Office of Policy Planning and nonparties to this Action relating to the Commission's June 16, 2022 Policy Statement of the Federal Trade Commission on Rebates and Fees in Exchange for Excluding Lower-Cost Drug Products or the statements made therein concerning competition among PBMs, Formularies, Rebates, Insulin Product or Other Referenced Drug Pricing, or out-of-pocket costs for Insulin Products or Other Referenced Drugs.

DOCUMENT REQUEST NO. 3

All Data, surveys, studies, or other factual information relating to competition among PBMs, Formularies, Rebates, Insulin Product or Other Referenced Drug Pricing, or out-of-pocket costs for Insulin Products or Other Referenced Drugs relating to the Commission's July 20, 2023 Statement Concerning Reliance on Prior PBM-Related Advocacy Statements and Reports That No

Longer Reflect Current Market Realities, including without limitation the Data, surveys, studies, or factual information relied on for the statements that "substantial changes have taken place over the last two decades," the "PBM industry has changed significantly over the last two decades," the "changes and emerging trends in the industry," and that "[p]harmaceutical markets have evolved."

DOCUMENT REQUEST NO. 4

All Communications between Commissioners or the Office of Policy Planning and nonparties to this Action relating to the Commission's July 20, 2023 Statement Concerning Reliance on Prior PBM-Related Advocacy Statements and Reports That No Longer Reflect Current Market Realities or the statements made therein concerning competition among PBMs, Formularies, Rebates, Insulin Product or Other Referenced Drug Pricing, or out-of-pocket costs for Insulin Products or Other Referenced Products.

DOCUMENT REQUEST NO. 5

All Communications between Commissioners or the Office of Policy Planning and nonparties to this Action relating to the 6(b) PBM Interim Report or the statements made therein concerning competition among PBMs, Formularies, Rebates, Insulin Product or Other Referenced Drug Pricing, or out-of-pocket costs for Insulin Products or Other Referenced Drugs.

DOCUMENT REQUEST NO. 6

All Data, surveys, studies, or other factual information relating to competition among PBMs, Formularies, Rebates, Insulin Product or Other Referenced Drug Pricing, or out-of-pocket costs for Insulin Products or Other Referenced Drugs considered in connection with the Commission's September 20, 2024 press release announcing this Action, including without limitation the Data, studies, or factual information relied on for the statements that "insulin drug costs have skyrocketed over the past decade thanks in part to powerful PBMs," the "role drug

manufacturers like Eli Lilly, Novo Nordisk, and Sanofi play in driving up list prices of life-saving medications like insulin," or that "shed light on the concerning and active role that the insulin manufacturers—Eli Lilly, Sanofi, and Novo Nordisk—play in the challenged conduct."

DOCUMENT REQUEST NO. 7

All Communications between Commissioners or the Office of Policy Planning and nonparties to this Action relating to the Commission's September 20, 2024 press release or the statements made therein concerning competition among PBMs, Formularies, Rebates, Insulin Product or Other Referenced Drug Pricing, or out-of-pocket costs for Insulin Products or Other Referenced Drugs.

DOCUMENT REQUEST NO. 8

All Data, surveys, studies, or other factual information related to the statements of Chair Lina Khan identified in Respondents' Motions to Disqualify Chair Lina Khan that concern competition among PBMs, Formularies, Rebates, Insulin Product or Other Referenced Drug Pricing, or out-of-pocket costs for Insulin Products or Other Referenced Drugs.

DOCUMENT REQUEST NO. 9

All Communications between Chair Lina Khan or Chair Lina Khan's staff and nonparties to this Action relating to the statements of Chair Lina Khan identified in Respondents' Motions to Disqualify Chair Lina Khan that concern competition among PBMs, Formularies, Rebates, Insulin Product or Other Referenced Drug Pricing, or out-of-pocket costs for Insulin Products or Other Referenced Drugs.

DOCUMENT REQUEST NO. 10

All Data, surveys, studies, or other factual information related to the statements of Commissioner Alvaro Bedoya identified in Respondents' Motions to Disqualify Commissioner

Alvaro M. Bedoya that concern competition among PBMs, Formularies, Rebates, Insulin Product or Other Referenced Drug Pricing, or out-of-pocket costs for Insulin Products or Other Referenced Drugs.

DOCUMENT REQUEST NO. 11

All Communications between Commissioner Alvaro Bedoya or Commissioner Alvaro Bedoya's staff and nonparties to this Action relating to the statements of Commissioner Alvaro Bedoya identified in Respondents' Motions to Disqualify Commissioner Alvaro M. Bedoya that concern competition among PBMs, Formularies, Rebates, Insulin Product or Other Referenced Drug Pricing, or out-of-pocket costs for Insulin Products or Other Referenced Drugs.

DOCUMENT REQUEST NO. 12

All Data, surveys, studies, or other factual information related to the statements of Commissioner Rebecca Slaughter identified in Respondents' Motions to Disqualify Commissioner Rebecca K. Slaughter that concern competition among PBMs, Formularies, Rebates, Insulin Product or Other Referenced Drug Pricing, or out-of-pocket costs for Insulin Products or Other Referenced Drugs.

DOCUMENT REQUEST NO. 13

All Communications between Commissioner Rebecca Slaughter or Commissioner Rebecca Slaughter's staff and nonparties to this Action relating to the statements of Commissioner Rebecca Slaughter identified in Respondents' Motions to Disqualify Commissioner Rebecca K. Slaughter that concern competition among PBMs, Formularies, Rebates, Insulin Product or Other Referenced Drug Pricing, or out-of-pocket costs for Insulin Products or Other Referenced Drugs.

DOCUMENT REQUEST NO. 14

All Data, surveys, studies, or other factual information outside of the investigative file in this Action relating to Insulin Products, Humira, Cyltezo, Harvoni, Epclusa, Abrilada, Amjevita, Hulio, Hyrimoz, Repatha, Praluent, or any Other Referenced Drugs or "future products" that support or contradict the claim that the PBM Respondents are "likely to cause substantial injury to consumers whose out-of-pocket costs are based on the list prices of drugs."

DOCUMENT REQUEST NO. 15

All Communications between Commissioners or the Office of Policy Planning their staff and nonparties to this Action relating to competition among PBMs, Formularies, Rebates, Insulin Product or Other Referenced Drug Pricing, or out-of-pocket costs for Insulin Products or Other Referenced Drugs.

DOCUMENT REQUEST NO. 16

Documents sufficient to identify every nonparty to the Action interviewed, communicated with, or otherwise engaged with by the Commissioners or their staff or Office of Policy Planning not involved in the Pre-Complaint Investigation, regarding competition among PBMs, Formularies, Rebates, Insulin Product or Other Referenced Drug Pricing, or out-of-pocket costs for Insulin Products or Other Referenced Drugs.

DOCUMENT REQUEST NO. 17

Documents sufficient to show the FTC's policies and practices regarding retention, organization, storage, access, and sequestering of Documents that the FTC is obligated to produce in connection with its Initial Disclosures, 16 C.F.R. § 3.31(b)(2).

Dated: January 2, 2025

Respectfully submitted,

/s/ Jennifer Milici
Jennifer Milici
Perry A. Lange
John W. O'Toole
WILMER CUTLER PICKERING
HALE AND DORR LLP
2100 Pennsylvania Ave. NW
Washington, D.C. 20037
Telephone: (202) 663-6000
Facsimile: (202) 663-6363
jennifer.milici@wilmerhale.com
perry.lange@wilmerhale.com
john.otoole@wilmerhale.com

Charles F. Rule
Daniel J. Howley
Margot Campbell
Derek W. Moore
Justin T. Heipp
RULE GARZA HOWLEY LLP
901 7th Street NW
Washington, D.C. 20001
(202) 843-9280
rule@rulegarza.com
howley@rulegarza.com
campbell@rulegarza.com
moore@rulegarza.com
heipp@rulegarza.com

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

PUBLIC

UNITED STATES OF AMERICA
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.**	**Docket No. 9437**

[PROPOSED] ORDER ON ESI RESPONDENTS' MOTION FOR DISCOVERY PURSUANT TO RULE 3.36

Upon consideration of ESI Respondents' Motion for Discovery Pursuant to Rule 3.36:

IT IS HEREBY ORDERED that ESI Respondents' motion is GRANTED.

IT IS HEREBY FURTHER ORDERED that ESI Respondents are authorized to issue the subpoena to the Commissioners of the Federal Trade Commission and the Office of Policy Planning attached as Exhibit A of the Motion.

ORDERED:

_____

D. Michael Chappell
Chief Administrative Law Judge

Date: _____

PUBLIC

CERTIFICATE OF SERVICE

I hereby certify that on January 2, 2025, I filed the foregoing document electronically using the FTC's E-Filing system, which will send notification of filing to:

April Tabor
Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm H-113
Washington, DC 20580
ElectronicFilings@ftc.gov

The Honorable D. Michael Chappell
Office of Administrative Law Judges
Federal Trade Commission
600 Pennsylvania Ave. NW, Rm. H-110
Washington, DC 20580
oalj@ftc.gov

I further certify that on January 2, 2025, I caused the foregoing document to be served via email to:

Rebecca L. Egeland
Bradley S. Albert
Armine Black
Federal Trade Commission
600 Pennsylvania Ave. NW
Washington, DC 20580
Email: regeland@ftc.gov
Tel: (202) 326-2990
regeland@ftc.gov
balbert@ftc.gov
ablack1@ftc.gov
1035-Insulin-DL@ftc.gov

Counsel Supporting the Complaint

Mike Cowie
Rani A. Habash
DECHERT LLP
1900 K Street NW
Washington, DC 20006
Tel: 202-261-3339
mike.cowie@dechert.com
rani.habash@dechert.com

Enu Mainigi
Craig Singer
Steven Pyser
WILLIAMS & CONNOLY LLP
680 Maine Ave. SW
Washington, DC 20024
Tel: 202-434-5420
emaingini@wc.com
csigner@wc.com
spyser@wc.com

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

Sophia A. Hansell
Michael J. Perry
Matthew C. Parrott
GIBSON, DUNN & CRUTCHER LLP
1700 M Street NW
Washington, DC 20006
Tel: 202-887-3625
SHansell@gibsondunn.com
MJPerry@gibsondunn.com
MParrott@gibsondunn.com

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

Respectfully submitted,

/s/ Jennifer Milici

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