

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 REQUEST FOR AN
INTERLOCUTORY APPEAL DETERMINATION PURSUANT TO RULE 3.23(B)**

Pursuant to Rule 3.23(b), Complaint Counsel respectfully requests a determination that certain provisions of the Court’s October 23, 2024 Order (the “Scheduling Order”) involve a controlling question of law or policy as to which there is substantial ground for difference of opinion and that subsequent review will be an inadequate remedy. Specifically, Complaint Counsel seeks an interlocutory appeal to the Commission regarding the Scheduling Order provisions that allow for *each Respondent group* to call up to five expert witnesses and 15 fact

PUBLIC

witnesses at the evidentiary hearing—such that Respondents, as a whole, are entitled to 15 expert witnesses and 45 fact witnesses while Complaint Counsel is limited to five expert witnesses and 25 fact witnesses. Sched. Order at 2-3; *see also* Order Den. Resp'ts' Mots. for Separate Evid. Hr'gs at 6-7 (Nov. 14, 2024).

By granting Respondents, without any argument or briefing, 15 experts—*three times* the number allotted to Complaint Counsel and allowed under the Rules—and nearly *double* the number of fact witnesses, these provisions of the Scheduling Order raise controlling questions of law or policy as to which there is substantial ground for difference of opinion, 16 C.F.R.

§ 3.23(b):

1. What constitutes “extraordinary circumstances” under Rule 3.31A(b), and whether any such circumstances could merit three times more expert witnesses than the five *per side* provided in the FTC Rules; and
2. Whether one side’s ability to call *twice* as many fact and expert trial witnesses is consistent with Rule 3.41(b)(4)’s mandate that “[e]ach side shall be allotted no more than half of the trial time.”

Subsequent review of these issues will be an inadequate remedy. Complaint Counsel will be compelled to expend substantial time and money to prepare for and respond to Respondents’ disproportionate number of expert and trial fact witnesses, wasting precious taxpayer resources that cannot later be recouped if the Commission reverses this unfair witness allocation after the merits hearing and during its review of this Court’s recommended decision.

BACKGROUND

On October 11, 2024, this Court provided the parties with an expected scheduling order in advance of a prehearing scheduling conference that the Court had set for October 21, 2024. Ex. A (Egeland Decl.) ¶¶ 5-6. Consistent with the spirit of the Rules, *cf.* 16 C.F.R. §§ 3.31A(b),

PUBLIC

3.41(b)(4)-(6), the expected scheduling order provided for equal number of fact witnesses *per side*, Ex. B (Proposed Sched. Order) at 2-3 (allotting no more than 25 fact witnesses on the final witness list per side). On October 18, 2024, the parties submitted to this Court a joint markup of proposed modifications to that order, noting areas of agreement and dispute. Ex. A (Egeland Decl.) ¶ 11; Ex. C (Joint Mark-Up). Among other things, the parties agreed to treat each Respondent group¹ as *a single party* “[f]or purposes of discovery.” Ex. C (Joint Mark-Up) at 6. Complaint Counsel, however, objected to Respondents’ proposed revisions to treat each Respondent group as *its own side* for purposes of expert and final fact witness lists.² Ex. C (Joint Mark-Up) at 2 (proposed expert witness lists) & 3 (final proposed fact witness list); Ex. A (Egeland Decl.) ¶ 8. Notably, Respondents did not file a motion seeking leave to call additional expert witnesses due to “extraordinary circumstances.” 16 C.F.R. § 3.31A(b).

On October 21, 2024, the Court held the prehearing scheduling conference, but entertained no argument, nor requested any briefing, regarding the disputes about expert and final fact witness caps in the parties’ markup of the scheduling order. Ex. D (Sched. Conf. Tr.) at 9 (“As to the requested changes that were not agreed to by all parties, I have your proposed changes and your notes and will consider all of those before deciding on the requested changes.”). Two days later, the Court entered the Scheduling Order, adopting Respondents’

¹ “Respondent group” refers to Respondents that are represented by the same counsel. *See* Ex. E (Sched. Order) at 1 n.1; *see also* Ex. C (Joint Mark-Up) at 1 n.1.

² Complaint Counsel did agree that each Respondent group was entitled to up to 15 individuals on their *preliminary* proposed witness list. Ex. C (Joint Mark-Up) at 1. The exchange of those witness lists, however, comes at the beginning of a case and is to facilitate *discovery*; final witness lists go toward trial presentation and are almost always narrower (although that is not the case with the caps on Respondents’ final witness lists here). *See* Sched. Order at 1-2, *In re Microsoft Corp.*, Dkt. No. 9412 (Jan. 4, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/d09412schedulingorder.pdf.

PUBLIC

proposals that *each Respondent group* is allowed to designate up to five expert witnesses and each call 15 fact witnesses at the evidentiary hearing. Ex. E (Sched. Order) at 2-3.

On November 14, 2024, in an order denying Respondents' motions for separate evidentiary hearings, this Court made clear that the provisions in the Scheduling Order regarding expert and final fact witness lists applied to each Respondent group separately, effectively treating each Respondent group as its own *side* for trial witnesses and ensuring that Respondents' side as a whole would be entitled to exponentially more expert and fact witnesses than Complaint Counsel. Order Den. Resp'ts' Mots. for Separate Evid. Hr'gs at 6 (Nov. 14, 2024). The Court also invited Respondents to move for a redistribution of trial time in advance of the hearing, *id.* at 7, even though Rule 3.41(b)(4) provides, without exception, that "[e]ach side shall be allotted no more than half of the trial time." 16 C.F.R. § 3.41(b)(4).

ARGUMENT

The provisions of the Scheduling Order that entitle Respondents to 15 expert witnesses (*three times* the number provided under the FTC Rules) and 45 fact witnesses at trial (almost *double* the cap for Complaint Counsel) are appropriate for interlocutory appeal to the Commission.

While FTC Rules allow a party, on a showing of "extraordinary circumstances," to obtain leave to call more than the five expert witnesses allotted per side, 16 C.F.R. § 3.31A(b), they are silent as to what constitutes "extraordinary circumstances," and, if even such circumstances were met, whether 15 experts—three times the number allotted to Complaint Counsel—should ever be allowed. The Rules also do not directly speak to whether Rule 3.41(b)(4)'s mandate that "[e]ach side shall be allotted no more than half of the trial time," could be interpreted to permit Respondents to call twice as many expert and fact witnesses as Complaint Counsel, and if so, under what circumstances. These unanswered questions are controlling ones of law and policy as

PUBLIC

to which there is substantial ground for difference of opinion, and subsequent review will be an inadequate remedy. 16 C.F.R. § 3.23(b); *see also In re Daniel Chapter One*, Dkt. No. 9329, 2009 FTC LEXIS 111, at *1-2 (May 5, 2009).

I. The disparate limitations on expert and fact witnesses involve controlling issues of law and policy as to which there is substantial ground for difference of opinion

As this Court has observed, a “question of law” refers to something a reviewing court “could decide quickly and cleanly without having to study the record.” *Daniel Chapter One*, 2009 FTC LEXIS 111, at *7 (quoting *Ahrenholz v. Univ. of Ill.*, 219 F.3d 674, 677 (7th Cir. 2000)). For purposes of Rule 3.23(b), such a question of law “is deemed controlling only if it may contribute to the determination, at an early stage, of a wide spectrum of cases.” *In re Telebrands Corp.*, Dkt. No. 9313, 2004 WL 5911685, at *4 (FTC Mar. 25, 2004); *accord In re Exxon Corp.*, Dkt. No. 9130, 1981 FTC LEXIS 27, at *1, 5-6 (Aug. 6, 1981) (accepting interlocutory appeal of pre-trial discovery order “[b]ecause of the importance of this issue not only for this matter, but for discovery requests in future cases”).

“To establish substantial ground for difference of opinion, a party seeking certification must show that a controlling legal question involves novel or unsettled authority.” *Daniel Chapter One*, 2009 FTC LEXIS 111, at *10; *accord In re Hoechst Celanese Corp.*, Dkt. No. 9216, 1990 FTC LEXIS 121, at *1-2 (May 14, 1990) (interlocutory review appropriate for ALJ’s interpretation of rule regarding discovery costs because the issue “appears to be relatively uncharted territory”); *In re Thompson Medical Co., Inc.*, Dkt. No. 9149, 1983 WL 486315, at *1 (Mar. 11, 1983) (interlocutory appeal appropriate for “controlling question of policy on which the Commission has yet provided no guidance”). “This prong has been held to require that the movant show a likelihood of success on the merits,” *Daniel Chapter One*, 2009 FTC LEXIS 111,

PUBLIC

at *11; *see also In re Schering-Plough Corp.*, Dkt. No. 9297, 2002 WL 31433937, at *6 (FTC Feb. 12, 2002).

The Scheduling Order provisions entitling Respondents to *three times* the number of expert witnesses provided in the FTC Rules absent any showing at all and *double* the number of trial fact and expert witnesses as compared to Complaint Counsel satisfy both these criteria.

A. Rule 3.31(A)(b) is silent as to what constitutes “extraordinary circumstances,” and whether 15 expert witnesses for one side is ever appropriate

Rule 3.31A(b) provides, in relevant part: “Each side will be limited to calling at the evidentiary hearing 5 expert witnesses, including any rebuttal or surrebuttal expert witnesses. A party may file a motion seeking leave to call additional expert witnesses due to extraordinary circumstances.” 16 C.F.R. § 3.31A(b). Here, the Scheduling Order provides for five expert witnesses *per Respondent group*—in other words, fifteen for *Respondents’ side*—well in excess of the limit in Rule 3.31A(b), and without any showing of need at all.

The questions of what constitutes “extraordinary circumstances” under Rule 3.31A(b), and whether the Rules contemplate one side having *three times* the number of experts provided in the Rules (and to Complaint Counsel), are controlling ones of law and policy as to which there is substantial ground for difference of opinion. They also involve novel and unsettled questions of law involving the proper interpretation of Commission Rules. *See Hoechst*, 1990 FTC LEXIS 121, at *2-3. To resolve them, the Commission need not review the record. *See Daniel Chapter One*, 2009 FTC LEXIS 111, at *7. Moreover, these issues can and do pertain to a wide spectrum of cases—specifically, any case in which a party has sought leave to call more than five expert witnesses. *See Exxon*, 1981 FTC LEXIS 27, at *1, 5-6. Review by the Commission now will enable the Commission to resolve these critical, but unanswered, questions about Rule 3.31(A)(b).

PUBLIC

Complaint Counsel respectfully submits that it is likely to succeed on appeal of these issues to the Commission. *See Schering-Plough*, 2002 WL 31433937, at *6. Regardless of how “extraordinary circumstances” is defined, Respondents failed to make such a showing here—in fact, *they made no showing of need at all*. What’s more, Rule 3.31A(b) is not a license for one side to flood the other with three times the number of expert witnesses allowed by the Rules. Indeed, when the Commission implemented Rule 3.31(A) in 2009, it made clear that based on its experience, “five expert witnesses per side is sufficient for each party to present its case in the vast majority of cases.” 74 Fed. Reg. 1804, 1813 (Jan. 13, 2009). The Commission explained that the provision allowing for additional expert witnesses upon a showing of “extraordinary circumstances” was merely a “safety valve.” *Id.* (“The Rule also has a safety valve that allows a party to seek leave to call additional expert witnesses in extraordinary circumstances.”). And the Commission expressly rejected the argument that the cap of five expert witnesses should apply “per party,” and not “per side.” *Id.* (“The Section claimed that the revision should allow each party to call five experts, instead of limiting the number of experts to five per ‘side,’” which the Commission rejected).

B. The rules are silent as to whether one side can have substantially higher trial witness caps than the other side, and if so, what showing must be made

Rule 3.41(b)(4) provides that “[e]ach side shall be allotted no more than half of the trial time within which to present its” case. Here, the Scheduling Order allows Respondents to call up to 45 fact witnesses and 15 expert witnesses at trial. In contrast, Complaint Counsel may call only 25 fact witnesses and 5 experts. Ex. E (Sched. Order) at 2-3. Consequently, Respondents are entitled to *double* the number of trial witnesses (60) as Complaint Counsel (30).

The issue of whether this gross disparity in the number of trial witnesses can be squared with the equal trial time mandate in Rule 3.41(b)(4) also involves a controlling question of law

PUBLIC

and policy as to which there is substantial ground for difference of opinion, making it appropriate for interlocutory review. The Commission can resolve this issue by interpreting Commission rules and policy, without review of the record. *See Daniel Chapter One*, 2009 FTC LEXIS 111, at *7. This issue also pertains to a wide spectrum of cases—any situation in which one side seeks a higher fact witness cap than the other side, whether by asking outright for more witnesses or by seeking to be treated as separate groups, as was the case here. *See Exxon*, 1981 FTC LEXIS 27, at *1, 5-6. Moreover, because the Rules do not directly speak to whether such disparate treatment is allowed, there is substantial ground for difference of opinion as to this novel and unsettled issue. *See Hoechst*, 1990 FTC LEXIS 121, *2-3.

Complaint Counsel, however, respectfully submits that by mandating equal division by side for trial presentation, 16 C.F.R. 3.41(b)(4), the Rules do not allow for disproportionate (and unfair) trial witness caps as between Complaint Counsel and Respondents, and thus Complaint Counsel is likely to succeed on an interlocutory appeal of this issue to the Commission. *See Schering-Plough*, 2002 WL 31433937, at *6.

II. Subsequent review is an inadequate remedy

The final requirement for an interlocutory appeal under Rule 3.23(b) is that subsequent review by the Commission will be inadequate. 16 C.F.R. § 3.23(b). That is the case here, where precious resources—both time and money—will be expended by Complaint Counsel and their expert witnesses to prepare for, and defend against, Respondents’ litany of expert and fact witnesses. Ex. A (Egeland Decl.) ¶ 24. Indeed, the Commission has recognized the “exorbitant costs” of economic experts. Statement of Chair Lina M. Khan Joined by Comm’r Rebecca Kelly Slaughter & Comm’r Alvaro M. Bedoya, *In re Tapestry, Inc.* (Dkt. No. 9429), https://www.ftc.gov/system/files/ftc_gov/pdf/khan-bedoya-slaughter-statement-tapestry-capri.pdf. Although the Commission, on review after the evidentiary hearing and this Court’s

PUBLIC

recommended decision, could cure any prejudice regarding the merits by sending the case back to this Court for a re-hearing with more equitable limitations, such relief would not address, or even begin to recoup, the taxpayer resources spent in addressing the exponentially larger number of expert and fact witnesses that the Scheduling Order provides for Respondents. Those resources would be gone forever.

CONCLUSION

For the forgoing reasons, Complaint Counsel respectfully requests an interlocutory appeal determination pursuant to Rule 3.23(b).

Dated: January 6, 2025

Respectfully submitted,

/s/ Rebecca L. Egeland

Rebecca L. Egeland

Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580
Tel: (202) 326-2990
Fax: (202) 326-3384
Email: regeland@ftc.gov

Counsel Supporting the Complaint

PUBLIC

CONFERENCE STATEMENT

Complaint Counsel has conferred with Respondents in a good faith effort to resolve the issues raised by this motion but has been unable to reach an agreement.

/s/ Rebecca L. Egeland
Rebecca L. Egeland

Counsel Supporting the Complaint

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

[PROPOSED] ORDER

Upon Complaint Counsel’s Request for an Interlocutory Appeal Determination Pursuant to Rule 3.23(b), and having considered the papers in support and in opposition thereto, it is hereby ORDERED that certain rulings in the Scheduling Order dated October 23, 2024 are appropriate for immediate review with the Commission under Rule 3.23(b).

Dated: _____

D. Michael Chappell
Chief Administrative Law Judge

Exhibit A

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

**DECLARATION IN SUPPORT OF COMPLAINT COUNSEL'S
REQUEST FOR AN INTERLOCUTORY APPEAL DETERMINATION**

1. I have personal knowledge of the facts set forth in this declaration.
2. My name is Rebecca Egeland. I am an attorney admitted to practice law in the District of Columbia. I am employed by the Federal Trade Commission and am Complaint Counsel in this action.
3. Beginning in March 2022, Commission staff conducted a non-public pre-complaint investigation of Respondents Caremark Rx, LLC, and Zinc Health Services, LLC

PUBLIC

(collectively “Caremark Respondents”); Express Scripts, Inc., Evernorth Health, Inc., Medco Health Services, Inc., and Ascent Health Services LLC (collectively “ESI Respondents”); and OptumRx, Inc., OptumRx Holdings, LLC, and Emisar Pharma Services LLC (collectively “Optum Respondents”). I have been a member of Complaint Counsel since the Commission issued the complaint in this matter on September 20, 2024.

4. On October 1, 2024, Chief Administrative Law Judge D. Michael Chappell designated His Honor to preside over this action.
5. On October 11, 2024, Judge Chappell issued an order setting a prehearing scheduling conference on October 21, 2024, and directing the parties to confer in advance of the scheduling conference.
6. The same day, Judge Chappell circulated a proposed scheduling order and requested the parties to provide a joint markup of any proposed modifications by October 18, 2024. Ex. B (Proposed Sched. Order).
7. On October 16, 17, and 18, 2024, Complaint Counsel met and conferred with Respondents to discuss modifications to the proposed scheduling order.
8. The parties agreed that for the purposes of discovery, Respondents should be considered three Respondents groups: Caremark Respondents, ESI Respondents, and Optum Respondents. Complaint Counsel did not agree that each Respondent group was therefore a separate side for purposes of expert and final fact witness lists.
9. The parties discussed Respondents’ request to increase the number of fact witnesses on the Respondents’ final witness list to 45 (compared to Complaint Counsel’s 25). Complaint counsel did not agree with such uneven split in fact witnesses because Complaint Counsel bears the burden of proof for showing each Respondent group violated the law.

PUBLIC

10. The parties also discussed Respondents' request to exceed the expert witness limit set by Rule 3.31A(b) of no more than five expert witnesses per side but were unable to reach an agreement. In an effort to compromise, Complaint Counsel expressed willingness to accept up to seven experts collectively for all Respondents, while Respondents proposed to have up to 12. Given the time constraints and inability to reach an agreement on the number of expert witnesses, the parties resolved to continue discussions about increasing the expert witness limit provided under the rules after the scheduling conference.
11. On October 18, 2024, the parties submitted a joint markup of proposed modifications to Judge Chappell's proposed scheduling order, noting areas of agreement and disagreement in the comments. Ex. C (Joint Mark-Up).
12. The joint markup included Respondents' proposed change to the January 10, 2025, deadline for Respondents to serve their proposed expert witness list. The original text read:
"Respondents serve proposed expert witness list." Ex. B (Proposed Sched. Order) at 1.
Respondents proposed changing it to: "Each Respondent group serves proposed expert witness list." Ex. C (Joint Mark-Up) at 2.
13. Neither side understood this redline to modify the total number of experts called by Respondents, only to allow each Respondent group (i.e., Caremark Respondents, ESI Respondents, and Optum Respondents) to submit their own expert witness list. The redline text of the proposed scheduling order was silent as to Respondents' total number of experts, as the parties agreed to continue discussing this issue. Indeed, the joint markup submitted to Judge Chappell had a comment from Respondents explaining that the "parties are in joint discussion over a potential forthcoming motion to call additional expert witnesses pursuant to Rule 3.31A(b)." Ex. C (Joint Mark-Up) at 2.

PUBLIC

14. On October 21, 2024, Judge Chappell held a scheduling conference where His Honor addressed the parties' proposed changes to the scheduling order. Judge Chappell did not invite any argument and asked no questions about any of the requested changes to the scheduling order at the scheduling conference or at any other time. Judge Chappell only noted that "[a]s to the requested changes [to the scheduling order] that were agreed to by all parties, most of those will be included in the scheduling order; some will not. As to the requested changes that were not agreed to by all parties, I have your proposed changes and your notes and will consider all of those before deciding on the requested changes." Ex. D (Sched. Conf. Tr.) at 9.
15. On October 23, 2024, Judge Chappell issued the Scheduling Order, where His Honor accepted most of Respondents' unilateral changes to which Complaint Counsel had objected. Ex. E (Sched. Order). These included:
- a. Allowing each Respondent group to serve its own proposed expert witness list. *Id.* at 2.
 - b. Allowing each Respondent group to include up to 15 fact witnesses on Respondents' final proposed witness list (or up to 45 in total) in contrast to Complaint Counsel's 25 fact witness limit. *Id.* at 2-3.
 - c. Omitting the requirement that depositions be limited to 7 hours and be split evenly between the two sides. *Id.* at 7; Order Den. Resp'ts' Mots. for Separate Evid. Hr'gs at 6 (Nov. 14, 2024).
 - d. Allowing each Respondent group up to 3.5 hours of record time for depositions of any witness whose testimony concerns more than one Respondent group. Ex. E (Sched. Order) at 7. In other words, any non-party deposition could be an "Extended

PUBLIC

Deposition” that is presumptively 14 hours long, with Respondents allowed up to 10.5 hours of record time, while Complaint Counsel is limited to 3.5 hours (but still maintains the burden of proof).

16. Between October 18 and 23, 2024, each Respondent group filed a motion for a separate evidentiary hearing, which Complaint Counsel opposed in a single motion on November 4, 2024.
17. On October 25, 2024—consistent with parties’ prior negotiations and Respondents’ comment in the joint markup submitted to Judge Chappell—ESI Respondents emailed Complaint Counsel requesting a joint meeting with counsel of all Respondents to continue conversations on expert witness limits.
18. On October 28, 2024, and then again on November 14, 2024, Complaint Counsel conferred with Respondents to negotiate increasing Respondents’ expert limit in an effort to reach a compromise and avoid motion practice.
19. On November 14, 2024, Judge Chappell issued an order denying Respondents’ motions for separate evidentiary hearings.
20. In that order, Judge Chappell noted that “[a]lthough Rule 3.31A(b) states each *side* is limited to calling five expert witnesses at the evidentiary hearing, the Scheduling Order issued in this case, allows each *Respondent group* to call five expert witnesses at the evidentiary hearing.” Order Den. Resp’ts’ Mots. for Separate Evid. Hr’gs at 6 (Nov. 14, 2024) (emphasis in original).
21. In other words, under the Scheduling Order (as interpreted by Judge Chappell’s subsequent order on the motions for separate hearings), Respondents may call up to 15 expert witnesses (as compared to five for Complaint Counsel) despite never moving for additional expert

PUBLIC

witnesses or making any showing of “extraordinary circumstances” under Rule 3.31A(b). Moreover, under the Scheduling Order, Complaint Counsel has only two weeks (between July 9 and 23, 2025) to rebut up to 15 Respondent expert witness reports and about three weeks (between July 9 and July 31, 2025) to depose up to 15 Respondent expert witnesses. Ex. E (Sched. Order) at 2-3.

22. In the order denying separate evidentiary hearings, Judge Chappell also invited Respondents to ask for more trial time than Complaint Counsel. Judge Chappell noted that “[r]egarding hearing time allocation, Rule 3.41(b) provides that evidentiary hearings ‘should be limited to no more than 210 hours’ and that trial time is to be split evenly between each side. This provision was not addressed in the Scheduling Order. However, the potential for unfairness can be addressed through a motion for an equitable distribution of trial time among the parties filed in advance of the hearing.” Order Den. Resp’ts’ Mots. for Separate Evid. Hr’gs at 7 (Nov. 14, 2024).
23. Although the three Respondent groups may have some unique facts, Complaint Counsel will have to address facts pertaining to each of the three Respondent groups at trial. Complaint Counsel has the burden of proving violations of the law against each Respondent group. A distribution of trial time per Respondent group, as opposed to per side as the Rules require, would significantly hinder Complaint Counsel’s ability to prove its case.
24. The increase in the number of Respondents’ fact witnesses in the final exhibit list from 25 to 45 and the tripling of Respondents’ experts from five to 15 will increase the resources, time, and costs necessary to litigate this matter. Complaint Counsel will need to increase its staffing to take the additional fact and expert depositions. Moreover, Complaint Counsel will

PUBLIC

need to expend significant additional money on experts and their support teams to both prepare rebuttal reports and rebut Respondents' expert testimony at trial.

I declare under penalty of perjury that the foregoing is true and correct. Executed on January 6, 2025, in Washington, DC.

/s/ Rebecca L. Egeland
Rebecca L. Egeland

Exhibit B

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.,)	
)	DOCKET NO. 9437
Medco Health Services, Inc.,)	
)	
Ascent Health Services LLC,)	
)	
OptumRx, Inc.,)	
)	
OptumRx Holdings, LLC, and)	
)	
Emisar Pharma Services LLC,)	
)	
Respondents.)	

**PROPOSED
SCHEDULING ORDER**

- December 3, 2024 - Complaint Counsel serves preliminary proposed witness list (not including experts) with a brief summary of the proposed testimony.
- December 17, 2024 - Respondents serve preliminary proposed witness list (not including experts) with a brief summary of the proposed testimony.
- December 27, 2024 - Complaint Counsel serves proposed expert witness list.
- January 10, 2025 - Respondents serve proposed expert witness list.
- May 2, 2025 - Deadline for parties to serve document requests, interrogatories,

and subpoenas, except for discovery for purposes of authenticity and admissibility of exhibits.

- May 30, 2025 - Deadline for parties to serve requests for admissions, except for requests for admissions for purposes of authenticity and admissibility of documents.
- June 13, 2025 - Close of fact discovery, except for discovery permitted under Rule 3.24(a)(4), depositions of experts, and discovery for purposes of authenticity and admissibility of exhibits.
- June 27, 2025 - Complaint Counsel serves expert witness reports.
- July 1, 2025 - Complaint Counsel serves final proposed witness and exhibit lists, including depositions, copies of all proposed exhibits (except for demonstrative, illustrative, or summary exhibits and expert-related exhibits), the basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness. Complaint Counsel’s final proposed witness list shall include no more than twenty-five fact witnesses.

Complaint Counsel provides the Administrative Law Judge (ALJ) with courtesy copies of final proposed witness and exhibit lists, the basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness, including expert witnesses.
- July 11, 2025 - Respondents serve expert witness reports. Respondents’ expert reports shall include (without limitation) rebuttal, if any, to Complaint Counsel’s expert witness report(s).
- July 15, 2025 - Parties intending to offer confidential materials of an opposing party or non-party as evidence at the hearing must provide notice to the opposing party or non-party, pursuant to 16 C.F.R. § 3.45(b).¹
- July 15, 2025 - Respondents serve final proposed witness and exhibit lists, including depositions, copies of all proposed exhibits (except for demonstrative, illustrative, or summary exhibits and expert-related exhibits), the basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness. Respondents’

¹ The Standard Protective Order states that if a party or third party wishes in camera treatment for a document or transcript that a party intends to introduce into evidence, that party or third party shall file an appropriate motion with the ALJ within five days after it receives notice of a party’s intent to introduce such material. Appendix A to Commission Rule 3.31. Commission Rule 3.45(b) states that parties who seek to use material obtained from a third party subject to confidentiality restrictions must demonstrate that the third party has been given at least ten days’ notice of the proposed use of such material. To resolve this apparent conflict, this Scheduling Order requires that the parties provide at least ten days’ notice to the opposing party or third parties to allow for the filing of motions for in camera treatment.

PUBLIC

final proposed witness list shall include no more than twenty-five fact witnesses.

Respondents provide the ALJ with courtesy copies of final proposed witness and exhibit lists, the basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness, including expert witnesses.

- July 23, 2025 - Complaint Counsel to identify rebuttal expert witness(es) and serve rebuttal expert witness report(s). Any such reports are to be limited to rebuttal of matters set forth in Respondents' expert witness reports. If material outside the scope of fair rebuttal is presented, Respondents will have the right to seek appropriate relief (such as striking Complaint Counsel's rebuttal expert witness report(s) or seeking leave to submit surrebuttal expert witness report(s)).
- July 29, 2025 - Deadline for parties to depose expert witnesses (including rebuttal expert witnesses) and exchange expert-related proposed exhibits.
- July 29, 2025 - Deadline to file motions for in camera treatment of proposed trial exhibits. *See* Additional Provision 15.
- August 5, 2025 - Deadline for parties to file motions in limine to preclude admission of evidence. *See* Additional Provision 16.
- August 5, 2025 - Deadline for parties to file responses to motions for in camera treatment of proposed exhibits.
- August 5, 2025 - Complaint Counsel files pretrial brief supported by legal authority.
- August 12, 2025 - Deadline for parties to file responses to motions in limine to preclude admission of evidence.
- August 12, 2025 - Parties exchange objections to final proposed witness lists and exhibit lists, serving courtesy copies on the ALJ. Parties are to review the Commission's Rules on the admissibility of evidence before filing objections to exhibits and only raise objections that are necessary and valid.
- August 19, 2025 - Parties exchange proposed stipulations as to law, facts, the admissibility of proposed exhibits, and the expertise of any expert witnesses.
- August 19, 2025 - Respondents file pretrial brief supported by legal authority.
- August 26, 2025 - Final prehearing conference begins at 10:00 a.m. Eastern Time. The parties shall meet and confer prior to the final prehearing conference regarding trial logistics and proposed stipulations as to law, facts, admissibility of exhibits, and expertise of any expert witnesses. To the extent the parties have agreed to stipulate to any issues of law, facts, admissibility of exhibits, and/or expertise of

PUBLIC

any expert witnesses, the parties shall prepare a list of such stipulations and submit a copy of the stipulations to the ALJ one business day prior to the final prehearing conference. At the final prehearing conference, the parties' list of stipulations shall be marked as "JX1" and signed by each party, and the list shall be offered into evidence as a joint exhibit. No signature by the ALJ is required. Any subsequent stipulations may be offered as agreed to by the parties.

Also at the final prehearing conference, the parties may present any objections to the final proposed witness lists and proposed exhibits. All proposed exhibits will be admitted or excluded to the extent practicable. To the extent the parties agree to the admissibility of proposed exhibits, the parties shall prepare a list identifying each proposed exhibit to which admissibility is stipulated, which shall be offered into evidence as a joint exhibit marked as "JX2" and signed by each party. No signature by the ALJ is required.

August 27, 2025 - Evidentiary Hearing begins at 10:00 a.m. Eastern Time.

ADDITIONAL PROVISIONS

Filings

1. For all papers that are required to be filed with the Office of the Secretary, the parties shall serve a courtesy copy on the Office of the Administrative Law Judges (OALJ) by email to: oalj@ftc.gov. The courtesy copy should be transmitted at or shortly after the time of any electronic filing with the Office of the Secretary. Courtesy copies must be transmitted to the OALJ by email directly and the FTC E-filing system shall not be used for this purpose. Certificates of service for any pleading shall not include the email address of any particular OALJ personnel, but rather shall designate only 600 Pennsylvania Ave., NW, Rm. H-110, Washington, DC, 20580 as the place of service. **The subject line of all submissions to oalj@ftc.gov shall set forth the docket number, case name, and title of the submission.** The parties are not required to serve a courtesy copy on the OALJ in hard copy, except upon request. Discovery requests and discovery responses are to be exchanged between the parties and shall not be submitted to the OALJ.

2. The parties shall serve each other by email and shall include "Docket 9437" in the subject line. All attached documents shall be in .pdf format. In the event that service by email is not possible, the parties may serve each other through any method authorized under the Commission's Rules of Practice. 16 C.F.R. § 4.4.

3. Each pleading that cites to an unpublished opinion(s) or opinion(s) not available on LEXIS or WESTLAW shall include a copy of such opinion(s) as an exhibit.

4. Each motion (other than a motion to dismiss, motion for summary decision, or a motion for in camera treatment) shall be accompanied by a separate signed statement representing that counsel for the moving party has conferred in good faith with opposing counsel in an effort to resolve the issues raised by the motion, describing those efforts. In addition, pursuant to Rule 3.22(g), for each motion to quash filed pursuant to Rule 3.34(c), each motion to compel or determine sufficiency pursuant to Rule 3.38(a), or each motion for sanctions pursuant to Rule 3.38(b), the required signed statement must also recite the date, time, and place of each conference between counsel and the names of all parties participating in each such conference. Motions that fail to include such separate statement may be denied on that ground.

5. By signing and presenting a pleading, written motion, or other filing, an attorney or pro se litigant certifies that either: (1) no portion of the filing was drafted by generative artificial intelligence (“AI”) (such as ChatGPT, Microsoft Copilot, Harvey.AI, or Google Gemini), or (2) any language in the filing that was drafted by generative AI was checked for accuracy by human attorneys or paralegals using printed legal reporters and/or online legal databases. Any filing that fails to comply with these mandatory certification requirements may be stricken on that ground.

6. In relevant part, Rule 3.22(c) states:

All written motions shall state the particular order, ruling, or action desired and the grounds therefor. Memoranda in support of, or in opposition to, any dispositive motion shall not exceed 10,000 words. Memoranda in support of, or in opposition to, any other motion shall not exceed 2,500 words. Any reply in support of a dispositive motion shall not exceed 5,000 words and any reply in support of any other motion authorized by the Administrative Law Judge or the Commission shall not exceed 1,250 words.

If a party chooses to submit a motion without a separate memorandum, the word count limits of Rule 3.22(c) apply to the motion. If a party chooses to submit a motion with a separate memorandum, absent prior approval of the ALJ, the motion shall be limited to 750 words and the word count limits of Rule 3.22(c) apply to the memorandum in support of the motion. This provision applies to all motions filed with the ALJ, including those filed under Rule 3.38.

7. If papers filed with the Office of the Secretary contain in camera or confidential material, the filing party shall mark any such material in the complete version of their submission with **{bold font and braces}**. 16 C.F.R. § 3.45(e). Parties shall be aware of the rules for filings containing such information, including Rule 4.2.

Discovery

8. Each party is limited to serving on each opposing party: fifty requests for production of documents, including all discrete subparts; twenty-five interrogatories, including all discrete subparts; and twenty requests for admissions, including all discrete subparts, except that there shall be no limit on the number of requests for admission for authentication and admissibility of exhibits. There is no limit to the number of sets of discovery requests the parties may issue, so long as the total number of each type of discovery request, including all subparts, does not exceed these limits.

PUBLIC

9. The parties will serve any objection to a document request within ten business days of service of the request. The parties will meet and confer to attempt to resolve any disputes and to discuss timing of production within three business days of the objection being served. The party responding to a document request will make a good-faith effort to produce responsive documents as expeditiously as possible, including by making productions on a rolling basis.

10. Compliance with the scheduled close of discovery requires that the parties serve subpoenas and discovery requests sufficiently in advance of the discovery cut-off date and that all responses and objections will be due on or before that date, unless otherwise noted. Any motion to compel a response to a discovery request or to seek certification of a request for court enforcement of a non-party subpoena shall be filed within thirty days of service of the response and/or objection to the discovery request or within twenty days after the close of discovery, whichever first occurs; except that, where the parties have been engaged in negotiations over a discovery dispute, including negotiations with any non-party with regard to a subpoena, the deadline for the motion to compel shall be five business days of reaching an impasse.

11. One Rule 3.33(c) deposition notice of each Respondent shall be permitted. Depositions of all individuals designated as representatives for purposes of a 3.33(c) deposition notice shall count as one deposition for purposes of this paragraph, even if the noticed entity designates multiple individuals to provide testimony. The parties shall consult and coordinate the time and place of the deposition prior to confirming any deposition. The parties shall use reasonable efforts to reduce the burden on witnesses noticed for depositions and to accommodate witness schedules. The deposition of any person may be recorded by video, provided that the deposing party notifies the deponent and all parties of its intention to record the deposition by video at least five days in advance of the deposition. No deposition, whether recorded by video or otherwise, may exceed a single, seven-hour day, unless otherwise agreed to by the parties or ordered by the ALJ. The parties may agree upon and submit to the ALJ a remote deposition protocol.

12. The parties shall serve upon one another, at the time of issuance, copies of all subpoenas for documents and subpoenas for testimony. For subpoenas for testimony, the party seeking the deposition shall consult with the other parties before the time and place of the deposition is scheduled. Unless the parties otherwise agree, at the request of any party, the time and allocation for a non-party deposition that has been cross-noticed shall be divided evenly between each side. If both Complaint Counsel and Respondents notice any non-party fact deposition (including any Rule 3.33(c) deposition), the seven hours of record time will be divided equally between the sides. Unused time in any side's allocation of deposition time shall not transfer to the other side. To the extent a deposition involves a non-party and is not cross-noticed, the party who did not notice the deposition will have thirty minutes available to them and the party seeking the deposition will have six hours and thirty minutes.

13. Every documentary subpoena to a non-party shall include a cover letter requesting that (1) the non-party Bates-stamp each document with a production number and any applicable confidentiality designation prior to producing it and (2) the non-party provide to the other parties copies of all productions at the same time as they are produced to the requesting party. If a non-party fails to provide copies of productions to both sides, within three business days of receiving the documents, the requesting party shall produce all materials received pursuant to the non-party subpoena, as well as all materials received voluntarily in lieu of a subpoena, including

PUBLIC

declarations or affidavits obtained from a non-party. If a party serves a non-party subpoena for the production of documents or electronically stored information and a subpoena commanding attendance at a deposition, the deposition date must be at least seven calendar days after the original return date for the document subpoena, unless a shorter time is required by unforeseen logistical issues in scheduling the deposition, or a non-party produces those documents at the time of the deposition, as agreed to by all parties involved.

14. A party that obtains a declaration, note of support, or affidavit from a party or non-party witness will promptly produce it to the other party(ies), and in any event not later than (1) three business days before the party or non-party is scheduled to be deposed and (2) seven calendar days before the end of fact discovery. Declarations, notes of support, or affidavits produced after this date shall not be admitted into evidence or used in the administrative proceeding except upon a showing of good cause. The parties reserve all rights and objections with respect to the use and/or admissibility of any declaration, note of support, or affidavit. No declaration, note of support, or affidavit will be admitted unless a fair opportunity was available to depose the declarant.

Motions

15. If a party intends to offer confidential materials of an opposing party or non-party into evidence at the hearing, in providing notice to such non-party, the party is required to inform each non-party of the strict standards for motions for in camera treatment for evidence to be introduced at trial. 16 C.F.R. § 3.45; *In re Otto Bock Healthcare North American*, 2018 WL 3491602, at *1 (July 2, 2018); *In re 1-800 Contacts, Inc.*, 2017 FTC LEXIS 55 (Apr. 4, 2017). Motions for in camera treatment must be supported by a declaration or affidavit by a person qualified to explain the confidential nature of the documents. *In re 1-800 Contacts, Inc.*, 2017 FTC LEXIS 55 (Apr.4, 2017); *In re North Texas Specialty Physicians*, 2004 FTC LEXIS 66 (Apr. 23, 2004). Each party or non-party that files a motion for in camera treatment shall provide one copy of the documents for which in camera treatment is sought to the ALJ.

16. Motions in limine are strongly discouraged. Motion in limine refers “to any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered.” *In re Daniel Chapter One*, 2009 FTC LEXIS 85, *18-20 (Apr. 20, 2009) (citing *Luce v. United States*, 469 U.S. 38, 40 n.2 (1984)). Evidence should be excluded in advance of trial on a motion in limine only when the evidence is clearly inadmissible on all potential grounds. *Id.* (citing *Hawthorne Partners v. AT&T Technologies, Inc.*, 831 F. Supp. 1398, 1400 (N.D. Ill. 1993); *SEC v. U.S. Environmental, Inc.*, 2002 U.S. Dist. LEXIS 19701, at *5-6 (S.D.N.Y. Oct. 16, 2002)). Moreover, the risk of prejudice from giving undue weight to marginally relevant evidence is minimal in a bench trial such as this where the ALJ is capable of assigning appropriate weight to evidence.

Witnesses

17. The final proposed witness lists shall represent counsel’s good faith designation of all potential witnesses whom the parties reasonably expect may be called upon in their case-in-chief. A general designation that a party reserves the right to call anyone on the opposing party’s witness list is insufficient. A party shall promptly notify the opposing party of changes to witness lists to facilitate completion of discovery within the dates of this Scheduling Order. The final proposed witness lists may not include additional witnesses not listed in the preliminary

PUBLIC

proposed witness lists, who have not been deposed, or for whom affidavits/declarations have not been submitted, unless by consent of all parties, or, if the parties do not consent, by an order of the ALJ upon a showing of good cause.

18. If any party wishes to offer a rebuttal witness other than a rebuttal expert witness, the party shall file a request in writing in the form of a motion to request a rebuttal witness. That motion shall be filed as soon as possible after the testimony sought to be rebutted is known and shall include: (a) the name of any witness being proposed (b) a detailed description of the rebuttal evidence being offered; (c) citations to the record, by page and line number, to the evidence that the party intends to rebut; and (d) shall demonstrate that the witness the party seeks to call has previously been designated on its witness list or adequately explain why the requested witness was not designated on its witness list.

19. Witnesses shall not testify to a matter unless sufficient evidence is introduced to support a finding that the witness has personal knowledge of the matter. F.R.E. 602.

20. Witnesses not properly designated as expert witnesses shall not provide opinions beyond what is allowed in F.R.E. 701.

21. The parties are required to comply with Rule 3.31A and with the following:

(a) At the time an expert is first listed as a witness by a party, that party shall provide to the other parties:

(i) Materials fully describing or identifying the background and qualifications of the expert, all publications authored by the expert within the preceding ten years, and all prior cases in which the expert has testified or has been deposed within the preceding four years; and

(ii) Transcripts of such testimony in the possession, custody, or control of the producing party or the expert, except that transcript sections that are under seal in a separate proceeding need not be produced.

(b) At the time an expert witness report is produced, the producing party shall provide to the other parties all documents and other written materials relied upon by the expert in formulating an opinion in this case, subject to the provisions of paragraph (g) below, except that documents and materials already produced in the case need only be listed by Bates number.

(c) It shall be the responsibility of a party designating an expert witness to ensure that the expert witness is reasonably available for deposition in keeping with this Scheduling Order. Unless otherwise agreed to by the parties or ordered by the ALJ, expert witnesses shall be deposed only once and each expert deposition shall be limited to one day for seven hours.

(d) Each expert witness report shall include a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the expert witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the expert; and the compensation to be paid for the study and testimony.

(e) A party may not discover facts known or opinions held by an expert witness who has been retained or specially employed by another party in anticipation of this litigation or preparation for hearing and who does not provide an expert report or will not act as a testifying expert.

(f) At the time of service of the expert witness reports, a party shall provide opposing counsel:

(i) A list of all commercially-available computer programs used by the expert witness in the preparation of the report;

(ii) A copy of all data sets used by the expert witness, in native file format and processed data file format; and

(iii) All customized computer programs used by the expert witness in the preparation of the report or necessary to replicate the findings on which the expert witness' report is based.

(g) Expert witnesses' disclosures and reports shall comply in all respects with Rule 3.31A, except that neither side must preserve or disclose:

(i) Any form of communication or work product shared between any of the parties' counsel and their expert witness(es), or between any of the expert witnesses themselves;

(ii) Any form of communication or work product shared between an expert witness and persons assisting the expert witness;

(iii) An expert witness' notes, unless they constitute the only record of a fact or an assumption relied upon by the expert witness in formulating an opinion in this case;

(iv) Drafts of expert witness reports, analyses, or other work product; or

(v) Data formulations, data runs, data analyses, or any database-related operations not relied upon by the expert witness in the opinions contained in the expert witness' report.

22. If the expert witness reports prepared for either party contain confidential information that has been granted in camera treatment, the party shall prepare two versions of its expert witness report(s) in accordance with Additional Provision 7 of this Scheduling Order and Rule 3.45(e).

23. An expert witness's testimony is limited to opinions contained in that expert witness' report provided to the opposing party. No opinion will be considered, even if included in an expert report, if the underlying and supporting documents and information have not been properly provided to the opposing party. Unless an expert witness is qualified as a fact witness, an expert witness shall provide opinion testimony; expert testimony is not considered for the purpose of establishing the underlying facts of the case.

Proceedings

24. In the event that the evidentiary hearing in this matter is conducted remotely by video conference, in advance of the hearing, the parties may take expert depositions for the purpose of perpetuating trial testimony (i.e., a trial deposition) and submit such trial testimony as an exhibit in lieu of presenting the expert's live testimony at the hearing. This trial deposition may be conducted in addition to any deposition of an expert witness for purposes of discovery (discovery deposition). Although a party may submit trial depositions in lieu of live video testimony at trial for all expert witnesses in the case, a party may elect to conduct trial depositions for all or fewer than all experts.

25. The final exhibit lists shall represent counsel's good faith designation of all trial exhibits other than demonstrative, illustrative, or summary exhibits. Additional exhibits may be added after the submission of the final exhibit lists only by consent of all parties, or, if the parties do not consent, by an order of the ALJ upon a showing of good cause.

26. Properly admitted deposition testimony and properly admitted investigational hearing transcripts are part of the record and need not be read in open court. Videotape deposition excerpts that have been admitted in evidence may be presented in open court only upon prior approval by the ALJ.

27. The parties shall provide to one another, the ALJ, and the court reporter at least forty-eight hours in advance, not including weekends and holidays, a list of all witnesses to be called on each day of the hearing, subject to possible delays or unforeseen circumstances.

Exhibits

28. The parties shall provide one another with copies of any demonstrative, illustrative, or summary exhibits (other than those prepared for cross-examination) twenty-four hours before they are used with a witness.

29. Complaint Counsel's exhibits shall bear the designation "PX," Respondents' exhibits shall bear the designation "RX," and joint exhibits shall bear the designation "JX," or some other appropriate designation. Complaint Counsel's demonstrative exhibits shall bear the designation "PXD" and Respondents' demonstrative exhibits shall bear the designation "RXD," or some other appropriate designation. If demonstrative exhibits are used with a witness, the exhibit will be marked and referred to for identification only. Any demonstrative exhibits referred to by any witness may be included in the trial record, but they are not part of the evidentiary record and may not be cited to support any disputed fact. Both sides shall number the first page of each exhibit with a single series of consecutive numbers. When an exhibit consists of more than one page, each page of the exhibit must bear a consecutive control number or some other consecutive page number.

30. At the final prehearing conference, counsel will be required to introduce all exhibits they intend to introduce at trial. The parties shall confer and eliminate duplicative exhibits in advance of the final prehearing conference and, if necessary, during trial. To that end, the parties shall agree in advance of the final prehearing conference to the identification of joint exhibits. Counsel shall contact the court reporter regarding submission of exhibits.

Page Limitations

31. Pretrial briefs shall not exceed fifty pages per side, post-trial initial briefs shall not exceed seventy-five pages per side, post-trial reply briefs shall not exceed fifty pages per side, and post-trial initial findings of fact and conclusions of law shall not exceed one hundred pages per side, unless otherwise agreed to by the parties or ordered by the ALJ.

Exhibit C

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,)
Respondents.)

DOCKET NO. 9437

PROPOSED
SCHEDULING ORDER

December 3, 2024 - Complaint Counsel serves preliminary proposed witness list (not including experts), which will include no more than 35 individuals, with a brief summary of the proposed testimony.

December 17, 2024 - ~~Respondents~~ Each Respondent group¹ serves its serve preliminary proposed witness list (not including experts), which will include no more than 15 individuals.

Commented [A1]: This is a joint change to which all parties agree.

¹ "Respondent group" refers to Respondents that are represented by the same counsel. For the avoidance of doubt, the Respondent groups are: (1) Caremark Rx, LLC, and Zinc Health Services, LLC, (2) Express Scripts, Inc., Evernorth Health, Inc., Medco Health Services, Inc., and Ascent Health Services LLC, and (3) OptumRx, Inc., OptumRx Holdings, LLC, and Emisar Pharma Services LLC.

PUBLIC

with a brief summary of the proposed testimony.

- December 27, 2024 - Complaint Counsel serves proposed expert witness list.
- January 10, 2025 - Each Respondent groups serves proposed expert witness list.
- May 2, 2025 - Deadline for parties to serve document requests, interrogatories, and subpoenas, except for discovery directed to witnesses who did not appear on either side's preliminary lists—provided that the disclosure is propounded within two weeks of that witness's disclosure—and discovery for purposes of authenticity and admissibility of exhibits.
- May 30, 2025 - Deadline for parties to serve requests for admissions, except for requests for admissions for purposes of authenticity and admissibility of documents.
- June 13, 2025 - Close of fact discovery, except for discovery permitted under Rule 3.24(a)(4), depositions of experts, and discovery for purposes of authenticity and admissibility of exhibits.
- June 27, 2025 - Complaint Counsel serves expert witness reports.
- July 1, 2025 - Complaint Counsel serves final proposed witness and exhibit lists, including depositions, copies of all proposed exhibits (except for demonstrative, illustrative, or summary exhibits and expert-related exhibits), the basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness. Complaint Counsel's final proposed witness list shall include no more than twenty-five fact witnesses.

Complaint Counsel provides the Administrative Law Judge (ALJ) with courtesy copies of final proposed witness and exhibit lists, the basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness, including expert witnesses.
- July 11, 2025 - Respondents serve expert witness reports. Respondents' expert reports shall include (without limitation) rebuttal, if any, to Complaint Counsel's expert witness report(s).
- July 15, 2025 - Parties intending to offer confidential materials of an opposing party or non-party as evidence at the hearing must provide notice to the opposing party or non-party, pursuant to 16 C.F.R. § 3.45(b).²

Commented [A2]: Respondents request this change, Complaint Counsel disagrees.

Commented [A3]: Respondent comment - The parties are in joint discussion over a potential forthcoming motion to call additional expert witnesses pursuant to Rule 3.31A(b).

Commented [A4]: Complaint Counsel request the following dates, Respondents disagree:

April 11 - Deadline for RFPs, etc.
 May 9 - Deadline for RFAs
 May 23 - Close of fact discovery
 June 18 - CC expert reports due
 July 9 - RC expert reports due
 July 23 - CC rebuttal reports

Respondents request the following dates, Complaint Counsel disagree:

May 2 - Deadline for RFPs, etc. (no change)
 May 9 - Deadline for RFAs
 June 6 - Close of fact discovery (one week earlier than original)
 June 13 - CC expert reports due (one week after close of fact discovery)
 July 9 - RC expert reports due (3.5 weeks after CC report)
 July 23 - CC rebuttal reports (2 weeks after RC reports)

Commented [A5]: This is a joint change to which all parties agree.

² The Standard Protective Order states that if a party or third party wishes in camera treatment for a document or

PUBLIC

July 15, 2025 - Respondents serve final proposed witness and exhibit lists, including depositions, copies of all proposed exhibits (except for demonstrative, illustrative, or summary exhibits and expert-related exhibits), the basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness. Respondents' final proposed witness list shall include no more than ~~twenty-five~~ fifteen fact witnesses per Respondent group. Respondent groups may examine other Respondent group's witnesses

Commented [A6]: Respondents request this change, Complaint Counsel disagrees.

Respondents provide the ALJ with courtesy copies of final proposed witness and exhibit lists, the basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness, including expert witnesses.

July 23, 2025 - Complaint Counsel to identify rebuttal expert witness(es) and serve rebuttal expert witness report(s). Any such reports are to be limited to rebuttal of matters set forth in Respondents' expert witness reports. If material outside the scope of fair rebuttal is presented, Respondents will have the right to seek appropriate relief (such as striking Complaint Counsel's rebuttal expert witness report(s) or seeking leave to submit surrebuttal expert witness report(s)).

July 29, 2025 - Deadline to file motions for in camera treatment of proposed trial exhibits. *See* Additional Provision 15.

~~July 29, 2025~~ August 5, 2025 - Deadline for parties to depose expert witnesses (including rebuttal expert witnesses) and exchange expert-related proposed exhibits.

Commented [A7]: Respondents request this change, Complaint Counsel disagrees.

August 5, 2025 - Deadline for parties to file motions in limine to preclude admission of evidence. *See* Additional Provision 16.

Respondent comment - Expert depositions must be completed between July 23 and this date. CC proposes 6 days for these depositions. RC proposes 13 days.

August 5, 2025 - Deadline for parties to file responses to motions for in camera treatment of proposed exhibits.

August 5, 2025 - Complaint Counsel files pretrial brief supported by legal authority.

August 12, 2025 - Deadline for parties to file responses to motions in limine to preclude admission of evidence.

August 12, 2025 - Parties exchange objections to final proposed witness lists and exhibit lists, serving courtesy copies on the ALJ. Parties are to

transcript that a party intends to introduce into evidence, that party or third party shall file an appropriate motion with the ALJ within five days after it receives notice of a party's intent to introduce such material. Appendix A to Commission Rule 3.31. Commission Rule 3.45(b) states that parties who seek to use material obtained from a third party subject to confidentiality restrictions must demonstrate that the third party has been given at least ten days' notice of the proposed use of such material. To resolve this apparent conflict, this Scheduling Order requires that the parties provide at least ten days' notice to the opposing party or third parties to allow for the filing of motions for in camera treatment.

PUBLIC

review the Commission’s Rules on the admissibility of evidence before filing objections to exhibits and only raise objections that are necessary and valid.

August 19, 2025 - Parties exchange proposed stipulations as to law, facts, the admissibility of proposed exhibits, and the expertise of any expert witnesses.

August 19, 2025 - Respondents Each Respondent Group files its pretrial brief supported by legal authority.

Commented [A8]: Respondents request this change, Complaint Counsel disagrees.

August 26, 2025 - Final prehearing conference begins at 10:00 a.m. Eastern Time. The parties shall meet and confer prior to the final prehearing conference regarding trial logistics and proposed stipulations as to law, facts, admissibility of exhibits, and expertise of any expert witnesses. To the extent the parties have agreed to stipulate to any issues of law, facts, admissibility of exhibits, and/or expertise of any expert witnesses, the parties shall prepare a list of such stipulations and submit a copy of the stipulations to the ALJ one business day prior to the final prehearing conference. At the final prehearing conference, the parties’ list of stipulations shall be marked as “JX1” and signed by each party, and the list shall be offered into evidence as a joint exhibit. No signature by the ALJ is required. Any subsequent stipulations may be offered as agreed to by the parties.

Also at the final prehearing conference, the parties may present any objections to the final proposed witness lists and proposed exhibits. All proposed exhibits will be admitted or excluded to the extent practicable. To the extent the parties agree to the admissibility of proposed exhibits, the parties shall prepare a list identifying each proposed exhibit to which admissibility is stipulated, which shall be offered into evidence as a joint exhibit marked as “JX2” and signed by each party. No signature by the ALJ is required.

August 27, 2025 - Evidentiary Hearing begins at 10:00 a.m. Eastern Time.

Respondents will move the Commission to change the hearing date from the currently scheduled August 27, 2025, to September 15, 2025; Complaint Counsel will not oppose this motion. If this short extension is granted, the parties may jointly move to adjust the dates above.

Commented [A9]: This is a joint change to which the parties agree.

ADDITIONAL PROVISIONS

PUBLIC

Filings

1. For all papers that are required to be filed with the Office of the Secretary, the parties shall serve a courtesy copy on the Office of the Administrative Law Judges (OALJ) by email to: oalj@ftc.gov. The courtesy copy should be transmitted at or shortly after the time of any electronic filing with the Office of the Secretary. Courtesy copies must be transmitted to the OALJ by email directly and the FTC E-filing system shall not be used for this purpose. Certificates of service for any pleading shall not include the email address of any particular OALJ personnel, but rather shall designate only 600 Pennsylvania Ave., NW, Rm. H-110, Washington, DC, 20580 as the place of service. The subject line of all submissions to oalj@ftc.gov shall set forth the docket number, case name, and title of the submission. The parties are not required to serve a courtesy copy on the OALJ in hard copy, except upon request. Discovery requests and discovery responses are to be exchanged between the parties and shall not be submitted to the OALJ.

2. The parties shall serve each other by email and shall include “Docket 9437” in the subject line. All attached documents shall be in .pdf format. In the event that service by email is not possible, the parties may serve each other through any method authorized under the Commission’s Rules of Practice. 16 C.F.R. § 4.4.

3. Each pleading that cites to an unpublished opinion(s) or opinion(s) not available on LEXIS or WESTLAW shall include a copy of such opinion(s) as an exhibit.

4. Each motion (other than a motion to dismiss, motion for summary decision, or a motion for in camera treatment) shall be accompanied by a separate signed statement representing that counsel for the moving party has conferred in good faith with opposing counsel in an effort to resolve the issues raised by the motion, describing those efforts. In addition, pursuant to Rule 3.22(g), for each motion to quash filed pursuant to Rule 3.34(c), each motion to compel or determine sufficiency pursuant to Rule 3.38(a), or each motion for sanctions pursuant to Rule 3.38(b), the required signed statement must also recite the date, time, and place of each conference between counsel and the names of all parties participating in each such conference. Motions that fail to include such separate statement may be denied on that ground.

5. By signing and presenting a pleading, written motion, or other filing, an attorney or pro se litigant certifies that either: (1) no portion of the filing was drafted by generative artificial intelligence (“AI”) (such as ChatGPT, Microsoft Copilot, Harvey.AI, or Google Gemini), or (2) any language in the filing that was drafted by generative AI was checked for accuracy by human attorneys or paralegals using printed legal reporters and/or online legal databases. Any filing that fails to comply with these mandatory certification requirements may be stricken on that ground.

6. In relevant part, Rule 3.22(c) states:

All written motions shall state the particular order, ruling, or action desired and the grounds therefor. Memoranda in support of, or in opposition to, any dispositive motion shall not exceed 10,000 words. Memoranda in support of, or in opposition to, any other motion shall not

PUBLIC

exceed 2,500 words. Any reply in support of a dispositive motion shall not exceed 5,000 words and any reply in support of any other motion authorized by the Administrative Law Judge or the Commission shall not exceed 1,250 words.

If a party chooses to submit a motion without a separate memorandum, the word count limits of Rule 3.22(c) apply to the motion. If a party chooses to submit a motion with a separate memorandum, absent prior approval of the ALJ, the motion shall be limited to 750 words and the word count limits of Rule 3.22(c) apply to the memorandum in support of the motion. This provision applies to all motions filed with the ALJ, including those filed under Rule 3.38.

7. If papers filed with the Office of the Secretary contain in camera or confidential material, the filing party shall mark any such material in the complete version of their submission with **{bold font and braces}**. 16 C.F.R. § 3.45(e). Parties shall be aware of the rules for filings containing such information, including Rule 4.2.

Discovery

~~8.~~ For purposes of discovery, there are three Respondent parties. Each Respondent group is a single party.

Commented [A10]: This is a joint change to which the parties agree.

~~8-9.~~ Each party is limited to serving on each opposing party: fifty requests for production of documents, including all discrete subparts; twenty-five interrogatories, including all discrete subparts; and ~~twenty-three~~ requests for admissions, including all discrete subparts, except that there shall be no limit on the number of requests for admission for authentication and admissibility of exhibits. There is no limit to the number of sets of discovery requests the parties may issue, so long as the total number of each type of discovery request, including all subparts, does not exceed these limits.

Commented [A11]: Complaint Counsel request this change, Respondents disagree.

~~9-10.~~ The parties will serve any objection to a document request within ten business days of service of the request. The parties will meet and confer to attempt to resolve any disputes and to discuss timing of production within three business days of the objection being served. The party responding to a document request will make a good-faith effort to produce responsive documents as expeditiously as possible, including by making productions on a rolling basis.

~~10-11.~~ Compliance with the scheduled close of discovery requires that the parties serve subpoenas and discovery requests sufficiently in advance of the discovery cut-off date and that all responses and objections will be due on or before that date, unless otherwise noted. Any motion to compel a response to a discovery request or to seek certification of a request for court enforcement of a non-party subpoena shall be filed within thirty days of service of the response and/or objection to the discovery request or within twenty days after the close of discovery, whichever first occurs; except that, where the parties have been engaged in negotiations over a discovery dispute, including negotiations with any non-party with regard to a subpoena, the deadline for the motion to compel shall be five business days of reaching an impasse.

~~11-12.~~ One Rule 3.33(c) deposition notices of each Respondent group shall be permitted, with the total deposition time of each Respondent group being limited to 8 hours. Depositions of all individuals designated as representatives for purposes of a 3.33(c) deposition notice shall count as one deposition for purposes of this paragraph, even if the noticed entity

Commented [A12]: Complaint Counsel request this change, Respondents disagree.

PUBLIC

designates multiple individuals to provide testimony. The parties shall consult and coordinate the time and place of the deposition prior to confirming any deposition. The parties shall use reasonable efforts to reduce the burden on witnesses noticed for depositions and to accommodate witness schedules. The deposition of any person may be recorded by video, provided that the deposing party notifies the deponent and all parties of its intention to record the deposition by video at least five days in advance of the deposition. No Rule 3.33(c) deposition, whether recorded by video or otherwise, may exceed a single, seven-hour day, unless otherwise agreed to by the parties or ordered by the ALJ. The parties may intend to agree upon and submit to the ALJ a remote deposition protocol.

Commented [A13]: Respondents request this change, Complaint Counsel disagrees.

Commented [A14]: This is a joint change to which all parties agree.

~~12.13.~~ 13.13. The parties shall serve upon one another, at the time of issuance, copies of all subpoenas for documents and subpoenas for testimony. For subpoenas for testimony, the party seeking the deposition shall consult with the other parties before the time and place of the deposition is scheduled. Unless the parties otherwise agree, for any witness who separately engaged or whose testimony concerns more than one Respondent group, each Respondent group will be allocated up to three and a half hours of record time (“Extended Depositions”). Unless the parties otherwise agree and except for Extended Depositions, at the request of any party, the time and allocation for a non-party deposition that has been cross-noticed shall be divided evenly between each side. If both Complaint Counsel and one or more Respondent group Respondents notice any non-party fact deposition (including any Rule 3.33(c) deposition), the seven hours of record time will be divided equally between them sides. Unused time in any side’s allocation of deposition time shall not transfer to the other side. To the extent a deposition involves a non-party and is not cross-noticed, the party who did not notice the deposition will have thirty minutes available to them and the party seeking the deposition will have six hours and thirty minutes. For purposes of allocating deposition time under this Scheduling Order, former employees, consultants, agents, contractors, or representatives of the parties are considered party witnesses if they are represented by Respondents’ counsel or if any Respondent is paying for the witness’ counsel, and Respondents may not subpoena depositions of their own witnesses. For any deposition of a non-party that provided a declaration, the side that obtained the declaration will have one hour of record time, and the other side will have six hours of record time.

Commented [A15]: Respondents request these changes, Complaint Counsel disagrees.

Commented [A16]: Complaint Counsel request this change, Respondents disagree.

Commented [A17]: Respondents request this change, Complaint Counsel disagrees.

~~13.14.~~ 14.14. Every documentary subpoena to a non-party shall include a cover letter requesting that (1) the non-party Bates-stamp each document with a production number and any applicable confidentiality designation prior to producing it and (2) the non-party provide to the other parties copies of all productions at the same time as they are produced to the requesting party. If a non-party fails to provide copies of productions to both sides, within three business days of receiving the documents, the requesting party shall produce all materials received pursuant to the non-party subpoena, as well as all materials received voluntarily in lieu of a subpoena, including declarations or affidavits obtained from a non-party. If a party serves a non-party subpoena for the production of documents or electronically stored information and a subpoena commanding attendance at a deposition, the deposition date must be at least seven calendar days after the original return date for the document subpoena, unless a shorter time is required by unforeseen logistical issues in scheduling the deposition, or a non-party produces those documents at the time of the deposition, as agreed to by all parties involved.

~~14.15.~~ 15.15. A party that obtains a declaration, note of support, or affidavit from a party or non-

PUBLIC

party witness will promptly produce it to the other party(ies), and in any event not later than (1) three business days before the party or non-party is scheduled to be deposed and (2) ~~seven~~^{thirty} calendar days before the end of fact discovery. Declarations, notes of support, or affidavits produced after this date shall not be admitted into evidence or used in the administrative proceeding except upon a showing of good cause. The parties reserve all rights and objections with respect to the use and/or admissibility of any declaration, note of support, or affidavit. No declaration, note of support, or affidavit will be admitted unless a fair opportunity was available to depose the declarant.

Commented [A18]: Respondents request this change, Complaint Counsel disagrees.

Motions

~~15~~¹⁶. If a party intends to offer confidential materials of an opposing party or non-party into evidence at the hearing, in providing notice to such non-party, the party is required to inform each non-party of the strict standards for motions for in camera treatment for evidence to be introduced at trial. 16 C.F.R. § 3.45; *In re Otto Bock Healthcare North American*, 2018 WL 3491602, at *1 (July 2, 2018); *In re 1-800 Contacts, Inc.*, 2017 FTC LEXIS 55 (Apr. 4, 2017). Motions for in camera treatment must be supported by a declaration or affidavit by a person qualified to explain the confidential nature of the documents. *In re 1-800 Contacts, Inc.*, 2017 FTC LEXIS 55 (Apr.4, 2017); *In re North Texas Specialty Physicians*, 2004 FTC LEXIS 66 (Apr. 23, 2004). Each party or non-party that files a motion for in camera treatment shall provide one copy of the documents for which in camera treatment is sought to the ALJ.

~~16~~¹⁷. Motions in limine are strongly discouraged. Motion in limine refers “to any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered.” *In re Daniel Chapter One*, 2009 FTC LEXIS 85, *18-20 (Apr. 20, 2009) (citing *Luce v. United States*, 469 U.S. 38, 40 n.2 (1984)). Evidence should be excluded in advance of trial on a motion in limine only when the evidence is clearly inadmissible on all potential grounds. *Id.* (citing *Hawthorne Partners v. AT&T Technologies, Inc.*, 831 F. Supp. 1398, 1400 (N.D. Ill. 1993); *SEC v. U.S. Environmental, Inc.*, 2002 U.S. Dist. LEXIS 19701, at *5-6 (S.D.N.Y. Oct. 16, 2002)). Moreover, the risk of prejudice from giving undue weight to marginally relevant evidence is minimal in a bench trial such as this where the ALJ is capable of assigning appropriate weight to evidence.

Witnesses

~~17~~¹⁸. The final proposed witness lists shall represent counsel’s good faith designation of all potential witnesses whom the parties reasonably expect may be called upon in their case-in-chief. A general designation that a party reserves the right to call anyone on the opposing party’s witness list is insufficient. A party shall promptly notify the opposing party of changes to witness lists to facilitate completion of discovery within the dates of this Scheduling Order. The final proposed witness lists may not include additional witnesses not listed in the preliminary proposed witness lists, who have not been deposed, or for whom affidavits/declarations have not been submitted, unless by consent of all parties, or, if the parties do not consent, by an order of the ALJ upon a showing of good cause.

~~18~~¹⁹. If any party wishes to offer a rebuttal witness other than a rebuttal expert witness, the party shall file a request in writing in the form of a motion to request a rebuttal witness. That motion shall be filed as soon as possible after the testimony sought to be rebutted is

PUBLIC

known and shall include: (a) the name of any witness being proposed (b) a detailed description of the rebuttal evidence being offered; (c) citations to the record, by page and line number, to the evidence that the party intends to rebut; and (d) shall demonstrate that the witness the party seeks to call has previously been designated on its witness list or adequately explain why the requested witness was not designated on its witness list.

~~19.20.~~ Witnesses shall not testify to a matter unless sufficient evidence is introduced to support a finding that the witness has personal knowledge of the matter. F.R.E. 602.

~~20.21.~~ Witnesses not properly designated as expert witnesses shall not provide opinions beyond what is allowed in F.R.E. 701.

~~21.22.~~ The parties are required to comply with Rule 3.31A and with the following:

(a) At the time an expert is first listed as a witness by a party, that party shall provide to the other parties:

(i) Materials fully describing or identifying the background and qualifications of the expert, all publications authored by the expert within the preceding ten years, and all prior cases in which the expert has testified or has been deposed within the preceding four years; and

(ii) Transcripts of such testimony in the possession, custody, or control of the producing party or the expert, except that transcript sections that are under seal in a separate proceeding need not be produced.

(b) At the time an expert witness report is produced, the producing party shall provide to the other parties all documents and other written materials relied upon by the expert in formulating an opinion in this case, subject to the provisions of paragraph (g) below, except that documents and materials already produced in the case need only be listed by Bates number.

(c) It shall be the responsibility of a party designating an expert witness to ensure that the expert witness is reasonably available for deposition in keeping with this Scheduling Order. Unless otherwise agreed to by the parties or ordered by the ALJ, expert witnesses shall be deposed only once and each expert deposition shall be limited to one day for seven hours.

(d) Each expert witness report shall include a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information ~~considered relied upon~~ by the expert witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the expert; and the compensation to be paid for the study and testimony.

(e) A party may not discover facts known or opinions held by an expert witness who has been retained or specially employed by another party in anticipation of this litigation or preparation for hearing and who does not provide an expert report or will not act as a testifying expert.

(f) At the time of service of the expert witness reports, a party shall provide opposing counsel:

(i) A list of all commercially-available computer programs used by the expert witness in the preparation of the report;

Commented [A19]: Respondents request this change, Complaint Counsel disagrees.

PUBLIC

- (ii) A copy of all data sets used by the expert witness, in native file format and processed data file format; and
- (iii) All customized computer programs used by the expert witness in the preparation of the report or necessary to replicate the findings on which the expert witness' report is based.

(g) Expert witnesses' disclosures and reports shall comply in all respects with Rule 3.31A, except that neither side must preserve or disclose:

- (i) Any form of communication or work product shared between any of the parties' counsel and their expert witness(es), or between any of the expert witnesses themselves;
- (ii) Any form of communication or work product shared between an expert witness and persons assisting the expert witness;
- (iii) An expert witness' notes, unless they constitute the only record of a fact or an assumption relied upon by the expert witness in formulating an opinion in this case;
- (iv) Drafts of expert witness reports, analyses, or other work product; or
- (v) Data formulations, data runs, data analyses, or any database-related operations not relied upon by the expert witness in the opinions contained in the expert witness' report.

~~22-23~~. If the expert witness reports prepared for either party contain confidential information that has been granted in camera treatment, the party shall prepare two versions of its expert witness report(s) in accordance with Additional Provision 7 of this Scheduling Order and Rule 3.45(e).

~~23-24~~. An expert witness's testimony is limited to opinions contained in that expert witness' report provided to the opposing party. No opinion will be considered, even if included in an expert report, if the underlying and supporting documents and information have not been properly provided to the opposing party. Unless an expert witness is qualified as a fact witness, an expert witness shall provide opinion testimony; expert testimony is not considered for the purpose of establishing the underlying facts of the case.

Proceedings

25. The parties understand that there is a possibility that the evidentiary hearing in this matter may be conducted remotely by video conference and express a preference to conduct the evidentiary hearing in this matter in person.

Commented [A20]: This is a joint change to which all parties agree.

~~24-26~~. In the event that the evidentiary hearing in this matter is conducted remotely by video conference, in advance of the hearing, the parties may take expert depositions for the purpose of perpetuating trial testimony (i.e., a trial deposition) and submit such trial testimony as an exhibit in lieu of presenting the expert's live testimony at the hearing. This trial deposition may be conducted in addition to any deposition of an expert witness for purposes of discovery (discovery deposition). Although a party may submit trial depositions in lieu of live video testimony at trial for all expert witnesses in the case, a party may elect to conduct trial depositions for all or fewer than all experts.

~~25-27~~. The final exhibit lists shall represent counsel's good faith designation of all trial

PUBLIC

exhibits other than demonstrative, illustrative, or summary exhibits. Additional exhibits may be added after the submission of the final exhibit lists only by consent of all parties, or, if the parties do not consent, by an order of the ALJ upon a showing of good cause.

~~26-28.~~ Properly admitted deposition testimony and properly admitted investigational hearing transcripts are part of the record and need not be read in open court. Videotape deposition excerpts that have been admitted in evidence may be presented in open court only upon prior approval by the ALJ.

~~27-29.~~ The parties shall provide to one another, the ALJ, and the court reporter at least forty-eight hours in advance, not including weekends and holidays, a list of all witnesses to be called on each day of the hearing, subject to possible delays or unforeseen circumstances.

Exhibits

~~28-30.~~ The parties shall provide one another with copies of any demonstrative, illustrative, or summary exhibits (other than those prepared for cross-examination) twenty-four hours before they are used with a witness.

~~29-31.~~ Complaint Counsel’s exhibits shall bear the designation “PX,” Respondents’ exhibits shall bear the designation “RX,” and joint exhibits shall bear the designation “JX,” or some other appropriate designation. Complaint Counsel’s demonstrative exhibits shall bear the designation “PXD” and Respondents’ demonstrative exhibits shall bear the designation “RXD,” or some other appropriate designation. If demonstrative exhibits are used with a witness, the exhibit will be marked and referred to for identification only. Any demonstrative exhibits referred to by any witness may be included in the trial record, but they are not part of the evidentiary record and may not be cited to support any disputed fact. Both sides shall number the first page of each exhibit with a single series of consecutive numbers. When an exhibit consists of more than one page, each page of the exhibit must bear a consecutive control number or some other consecutive page number.

~~30-32.~~ At the final prehearing conference, counsel will be required to introduce all exhibits they intend to introduce at trial. The parties shall confer and eliminate duplicative exhibits in advance of the final prehearing conference and, if necessary, during trial. To that end, the parties shall agree in advance of the final prehearing conference to the identification of joint exhibits. Counsel shall contact the court reporter regarding submission of exhibits.

Page Limitations

~~31-33.~~ All pretrial and posttrial briefing addressed in this paragraph shall be per Respondent Group (for avoidance of doubt, Complaint Counsel will have an equal limitation of pages). Pretrial briefs shall not exceed fifty pages per Respondent Group, post-trial initial briefs shall not exceed seventy-five pages per Respondent Group, post-trial reply briefs shall not exceed fifty pages per Respondent Group, and post-trial initial findings of fact and conclusions of law shall not exceed one hundred pages per Respondent Group, unless otherwise agreed to by the parties or ordered by the ALJ.

Commented [A21]: Respondents request this change, Complaint counsel disagrees.

Respondent comment - Respondent Counsel request the ability to submit their own briefs for each of the three Respondent Groups.

Exhibit D

In the Matter of:

Caremark RX, et al.

October 21, 2024
Prehearing Scheduling Conference

Condensed Transcript with Word Index



For The Record, Inc.
(301) 870-8025 - www.ftrinc.net - (800) 921-5555

Prehearing Scheduling Conference

PUBLIC

Caremark RX, et al.

10/21/2024

1	<p>1 UNITED STATES OF AMERICA</p> <p>2 FEDERAL TRADE COMMISSION</p> <p>3</p> <p>4 In the Matter of:)</p> <p>5 CAREMARK RX, et al.) Docket No. 9437</p> <p>6 Respondent.)</p> <p>7</p> <p>8</p> <p>9</p> <p>10 TELEPHONIC PREHEARING SCHEDULING CONFERENCE</p> <p>11 MONDAY, OCTOBER 21, 2024</p> <p>12 4:00 P.M.</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17 BEFORE THE HONORABLE D. MICHAEL CHAPPELL</p> <p>18 Chief Administrative Law Judge</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25 Reported by: Susanne Bergling, RMR-CRR-CLR</p>	3
---	--	---

2	<p>1 APPEARANCES:</p> <p>2</p> <p>3 ON BEHALF OF THE FEDERAL TRADE COMMISSION:</p> <p>4 BECKY EGELAND, ESQ.</p> <p>5 ARMINE A. BLACK, ESQ.</p> <p>6 Federal Trade Commission</p> <p>7 600 Pennsylvania Avenue, N.W.</p> <p>8 Washington, D.C. 20580</p> <p>9 regeland@ftc.gov</p> <p>10</p> <p>11 ON BEHALF OF RESPONDENT CAREMARK AND ZINC</p> <p>12 HEALTH SERVICES:</p> <p>13 ENU A. MAINIGI, ESQ.</p> <p>14 CRAIG SINGER, ESQ.</p> <p>15 JONATHAN PITT, ESQ.</p> <p>16 STEVEN PYSER, ESQ.</p> <p>17 ALTUMASH MUFTI, ESQ.</p> <p>18 Williams & Connolly</p> <p>19 680 Maine Avenue, S.W.</p> <p>20 Washington, D.C. 20024</p> <p>21 emainigi@wc.com</p> <p>22</p> <p>23 and</p> <p>24</p> <p>25</p>	4
---	--	---

1	<p>1 ON BEHALF OF RESPONDENTS EXPRESS SCRIPTS, EVERMORE</p> <p>2 HEALTH, MEDCO HEALTH SERVICES, ASCEND HEALTH SERVICES:</p> <p>3 DAN HOWLEY, ESQ.</p> <p>4 CHARLES (RICK) RULE, ESQ.</p> <p>5 MARGOT CAMPBELL, ESQ.</p> <p>6 JUSTIN HEIPP, ESQ.</p> <p>7 Rule Garza Howley</p> <p>8 901 7th Street, N.W.</p> <p>9 Washington, D.C. 20001</p> <p>10 howley@rulegarza.com</p> <p>11</p> <p>12 and</p> <p>13</p> <p>14 JENNIFER MILICI, ESQ.</p> <p>15 PERRY LANGE, ESQ.</p> <p>16 Wilmer Hale</p> <p>17 2100 Pennsylvania Avenue, N.W.</p> <p>18 Washington, D.C. 20037</p> <p>19 (202) 663-6000</p> <p>20 jennifer.milici@wilmerhale.com</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	3
---	---	---

Prehearing Scheduling Conference

PUBLIC

Caremark RX, et al.

10/21/2024

5

1 PROCEEDINGS
 2 - - - - -
 3 (Proceeding called to order at 4:03 p.m.)
 4 THE COURT: Let's go on the record. This is the
 5 prehearing scheduling conference in Docket Number 9437,
 6 in the matter of Caremark Rx, et al. I'm Judge
 7 Chappell.
 8 This scheduling conference is being conducted
 9 telephonically and is being transcribed by a court
 10 reporter who is on the line with us.
 11 Will the court reporter please state your name
 12 for the record.
 13 THE REPORTER: Susanne Bergling, with For the
 14 Record, Court Reporters.
 15 THE COURT: Thank you.
 16 I have chosen to conduct this scheduling
 17 conference telephonically. This choice will save time
 18 and, more importantly, taxpayer money, and other
 19 resources for a short scheduling conference with a
 20 limited agenda, which is merely procedural and is not
 21 evidentiary.
 22 This also allows access to and makes the hearing
 23 available to the public in much larger numbers than
 24 could attend in the courtroom.
 25 I need to confirm that the public line is up and

6

1 working.
 2 OPEN EXCHANGE: The public line is up and
 3 working, sir.
 4 THE COURT: Thank you very much.
 5 I'll need everyone to mute your phones when you
 6 are not speaking to prevent feedback and echoes. Also,
 7 before you speak on this call, I need you to identify
 8 yourself for the court reporter.
 9 I will now take appearances of those designated
 10 to speak for the parties, and I need you to identify
 11 also who is on this call for your client or party.
 12 I'll start with Complaint Counsel, for the
 13 Government.
 14 MR. EGELAND: Good afternoon, Your Honor. This
 15 is Becky Egeland for Complaint Counsel. With me I have
 16 my colleague, Armine A. Black, who with Your Honor's
 17 permission will handle some of the questions on the
 18 proposed scheduling order for Complaint Counsel.
 19 THE COURT: Okay.
 20 And for Respondents?
 21 MS. MAINIGI: Good afternoon, Your Honor. This
 22 is Enu Mainigi for Respondent Caremark. Also with me
 23 are Steve Pyser and Al Mufti from Williams & Connolly,
 24 and Rani Habash from Dechert.
 25 THE COURT: Thank you.

7

1 Next?
 2 MR. HOWLEY: Good afternoon, Your Honor. This is
 3 Dan Howley from Rule Garza Howley for the ESI
 4 Respondents, and that's Express Scripts, Evermore
 5 Health, Medco Health Services, Ascend Health Services,
 6 and with me on the line is Rick Rule, Margot Campbell,
 7 and Justin Heipp, from my law firm, along with Jennifer
 8 Milici and Perry Lange from Wilmer Hale.
 9 THE COURT: Okay. Any other Respondents?
 10 MR. LIVERSIDGE: Yes, Your Honor. This is Samuel
 11 Liversidge from Gibson, Dunn & Crutcher, for the Optum
 12 Rx Respondents, which is Optum Rx Inc., Optum Rx
 13 Holdings, and MSR Pharma Services, and with me are my
 14 colleagues, Michael Perry, Sophia Hansell, and Matthew
 15 Parrott.
 16 THE COURT: All right. I'm trying to keep track
 17 of all this. Are there any other Respondents?
 18 (No response.)
 19 Hearing nothing. I will assume that they're
 20 covered. Did I hear someone speak for Zinc Health
 21 Services, LLC?
 22 MS. MAINIGI: Your Honor, that would be the
 23 Caremark Respondents. This is Enu Mainigi.
 24 THE COURT: I didn't hear that. Did you say that
 25 at the beginning?

8

1 MS. MAINIGI: Your Honor, I did not. My
 2 apologies. We are also appearing on behalf of Zinc
 3 Health Services.
 4 THE COURT: Let's start again for a clear record.
 5 Who do you represent?
 6 MS. MAINIGI: Your Honor, this is Enu Mainigi
 7 from Williams & Connolly, and we are here representing
 8 Caremark Rx, as well as Zinc Health Services. Also with
 9 me are Steve Pyser and Al Mufti from Williams &
 10 Connolly, as well as Ronnie Habash from Dechert.
 11 THE COURT: Great, thank you.
 12 And just to make the record clear, there's a
 13 group called the ESI Respondents, and they are Express
 14 Scripts, Inc., Evermore Health, Inc., Medco Health
 15 Services, Inc., and Ascent Health Services, LLC. Is
 16 that correct?
 17 MR. HOWLEY: Yes, Your Honor, that is correct.
 18 THE COURT: And we have one law firm representing
 19 the ESI Respondents.
 20 MR. HOWLEY: We have the Rule Garza Howley firm
 21 and also Wilmer Hale.
 22 THE COURT: So two for the ESI Respondents,
 23 correct?
 24 MR. HOWLEY: That's correct.
 25 THE COURT: Thank you.

Prehearing Scheduling Conference

PUBLIC

Caremark RX, et al.

10/21/2024

9

1 Also on the line with me are my Attorney
 2 Advisors. In addition, I will note that the press and
 3 public have access to the scheduling conference through
 4 a toll-free telephone connection that allows them to
 5 listen in. Therefore, you are cautioned not to reveal
 6 any confidential information.
 7 Let's talk about the scheduling order. The
 8 parties were provided a proposed scheduling order in
 9 advance of this conference, and the parties submitted
 10 proposed changes -- a number of changes to the
 11 scheduling order. As to the requested changes that were
 12 agreed to by all parties, most of those will be included
 13 in the scheduling order; some will not.
 14 As to the requested changes that were not agreed
 15 to by all parties, I have your proposed changes and your
 16 notes and will consider all of those before deciding on
 17 the requested changes. The scheduling order will be
 18 issued no later than October 23rd.
 19 I note that a motion for a separate evidentiary
 20 hearing has been filed by the ESI Respondents, and I did
 21 see the certificate of conference, thank you. I just
 22 want to verify for the record, does the Government
 23 oppose this motion?
 24 MR. EGELAND: Yes, Your Honor. The Government
 25 does oppose this motion. This is Becky Egeland speaking

10

1 for Complaint Counsel. We also understand from
 2 Respondents that the other Respondents plan to file
 3 similar motions for separate evidentiary hearings, and
 4 we proposed that given that they are all likely similar
 5 in nature, that Complaint Counsel file one consolidated
 6 opposition.
 7 We propose to file it ten days after the last
 8 Respondent motion is filed, and we propose to limit our
 9 opposition to 5000 words or less instead of the 7500
 10 word limit across three separate oppositions.
 11 We believe that will be more efficient for Your
 12 Honor to read a single and shorter consolidated response
 13 instead of three separate oppositions.
 14 THE COURT: Always glad to hear the parties are
 15 working out some issues. I appreciate that. And just
 16 so we're clear, I'll let the Respondents speak up who
 17 are going to file a motion for separate evidentiary --
 18 just let me know the name of the Respondent and when you
 19 intend to file, if you know.
 20 MS. MAINIGI: Your Honor, this is Enu Mainigi for
 21 Caremark and Zinc, and we would expect to file our
 22 motion within the next 24 to 48 hours.
 23 THE COURT: Okay.
 24 MR. LIVERSIDGE: Your Honor, Sam Liversidge for
 25 Optum Rx and the Optum Respondents, and, likewise, we

11

1 intend to file our motion in the next 24 to 48 hours.
 2 THE COURT: Okay. And I've got a list of
 3 Respondents here, and with that, does that include all
 4 the listed Respondents in the case? And what I mean is,
 5 does that include -- have we covered all the pending --
 6 all the listed Respondents, and by the time these
 7 motions are filed, I will have a motion for separate
 8 hearing from all Respondents? Is that correct? Anyone
 9 can answer.
 10 MR. LIVERSIDGE: That's correct.
 11 THE COURT: All right, so no one is going to be
 12 left out. All right, that's good.
 13 I understand Respondents have filed a Complaint
 14 for declaratory and injunctive relief in the Eastern
 15 District of Missouri. Now, is that filed by all
 16 Respondents or separate Respondents? Who wants to give
 17 me an update on that, on how it was filed and an update
 18 on that case at this time?
 19 MR. HOWLEY: Your Honor, this is Dan Howley
 20 representing the ESI Respondents. Our clients filed
 21 that action, but that does not relate directly to the
 22 insulin action before this Court. That relates to the
 23 interim 6(b) order issued by the Commission unrelated to
 24 PBM conduct.
 25 THE COURT: Okay. Okay, that's not one of these

12

1 constitutional claims being filed parallel as we're
 2 seeing pop up often now? It's not one of those?
 3 In other words, it's a direct -- a direct attempt
 4 to block the administrative proceeding? It's not one of
 5 those?
 6 MR. LIVERSIDGE: That's not what's currently on
 7 file. I can't tell you something like that won't be
 8 filed in the future, but it's not currently on file.
 9 The current lawsuit in the Eastern District of Missouri
 10 relates to just the interim 6(b) order, and it does
 11 include constitutional claims -- sorry, the 6(b) report
 12 that was issued. I misspoke.
 13 THE COURT: Okay. I would still like to be
 14 updated on what's going on with that case, anything
 15 that's -- any substantive orders issued in that case,
 16 okay?
 17 MR. LIVERSIDGE: Understood, Your Honor. Right
 18 now service has been made, and I believe the time to
 19 reply is upcoming, and we can update Your Honor with
 20 anything substantial.
 21 THE COURT: Okay. And for all the Respondents,
 22 if you're prepared to answer on the public record, are
 23 there any current plans to file any other parallel
 24 proceedings in this case?
 25 MS. ARTHAUD: Judge Chappell, this is Victoria.

Prehearing Scheduling Conference

PUBLIC

Caremark RX, et al.

10/21/2024

13

1 If I could just interject for a moment. Open Exchange,
 2 we understand that the public line is having some severe
 3 echo problems. I'm wondering if there is something that
 4 you can do on your end to improve the quality of the
 5 call for the public to call into.
 6 OPEN EXCHANGE: It's fixed.
 7 MS. ARTHAUD: Okay.
 8 THE COURT: All right, that sounds like the voice
 9 of authority, so with that, we will proceed. Thank you.
 10 THE REPORTER: Judge Chappel, this is the Court
 11 Reporter --
 12 THE COURT: Let's -- I didn't get an answer to my
 13 last question, so let's have the Court Reporter read
 14 back the last question.
 15 THE REPORTER: Judge, this is the Court
 16 Reporter --
 17 MS. MAINIGI: Your Honor, this is Enu --
 18 THE COURT: Court Reporter, go ahead.
 19 THE REPORTER: I just wanted to remind everyone,
 20 I need them to say their name every time they speak.
 21 THE COURT: All right. Good point.
 22 Does anyone need my pending question read back
 23 before we learned there might be a problem with the
 24 public line?
 25 MS. MAINIGI: Your Honor, this is Enu Mainigi on

14

1 behalf of Caremark and Zinc. We have not filed any sort
 2 of affirmative constitutional action, but that is
 3 certainly something that we continue to consider.
 4 THE COURT: Okay. Anything from the other
 5 Respondents?
 6 MR. LIVERSIDGE: Your Honor, Sam Liversidge for
 7 the Optum Rx Respondents. Likewise, we are considering
 8 our options in that regard. We have not yet made a
 9 final decision whether we are going to file a separate
 10 action.
 11 MR. HOWLEY: And, Your Honor, this is Dan Howley
 12 on behalf of the ESI Respondents. We are in a similar
 13 position.
 14 THE COURT: All right. Have we covered all the
 15 Respondents?
 16 MR. HOWLEY: Yes.
 17 THE COURT: Okay. Let's talk about the
 18 possibility of settlement. I trust the parties have
 19 attempted to settle this matter. Does the Government
 20 want to go first to provide the status of any settlement
 21 discussions?
 22 MR. EGELAND: Sure. Thank you, Your Honor. This
 23 is Becky Egeland for Complaint Counsel.
 24 We have not received any offers of settlement
 25 from any of the Respondents. We are always open to any

15

1 remedy or settlement proposal, but there are no
 2 settlement negotiations currently underway.
 3 THE COURT: Okay. And who wants to speak for
 4 Respondent?
 5 MR. LIVERSIDGE: Your Honor, this is Sam
 6 Liversidge for the Optum Rx Respondents. In our
 7 meetings with the Complaint Counsel and Commissioners
 8 leading up to the filing of this action, we invited a
 9 settlement offer. We have received no settlement offers
 10 to date. We continue to be willing to evaluate a
 11 settlement offer that relates to the insulin products
 12 that are at issue in the Complaint, but nothing has been
 13 provided to date.
 14 THE COURT: Any other Respondents?
 15 MS. MAINIGI: Yes, Your Honor, Enu Mainigi with
 16 Caremark and Zinc. Similarly, we have asked Complaint
 17 Counsel, both before and after the filing of the
 18 Complaint, for any settlement proposals, and we have not
 19 been offered any beyond the requested relief that's in
 20 the current Complaint. We obviously remain open to
 21 considering any reasonable proposals from Complaint
 22 Counsel or the Commission.
 23 THE COURT: Anyone else?
 24 MR. HOWLEY: Your Honor, this is Dan Howley on
 25 behalf of the ESI Respondents. We're similarly situated

16

1 in that we have discussed the concept of settlement with
 2 the Complaint Counsel, but we do not appear to be very
 3 close right now. We're happy to continue to discuss and
 4 will consider any proposal that Complaint Counsel may
 5 have.
 6 THE COURT: All right. Does that cover all
 7 Respondents?
 8 MR. LIVERSIDGE: It does, Your Honor.
 9 MR. EGELAND: Yes, Your Honor.
 10 THE COURT: All right, thank you.
 11 All right. What I just heard, the Government
 12 said we haven't heard a proposal from Respondent.
 13 Respondent said we haven't heard a proposal from the
 14 Government. Well, of course, that's absurdity if
 15 anybody has any intention of ever settling this case.
 16 So I would strongly suggest and encourage the
 17 parties to get serious about trying to find some path
 18 forward to some type of settlement, at least talk about
 19 it, and stop waiting for the other side to offer
 20 something, and see if you can at least break the ice on
 21 this issue. Is that understood?
 22 MR. EGELAND: Your Honor, this is Becky Egeland
 23 from Complaint Counsel. That is understood. Thank you.
 24 MS. MAINIGI: Your Honor, Enu Mainigi for
 25 Caremark and Zinc. Yes, understood.

Prehearing Scheduling Conference

PUBLIC

Caremark RX, et al.

10/21/2024

17

1 MR. LIVERSIDGE: Your Honor, Sam Liversidge for
 2 Optum Rx. That is understood.
 3 MR. HOWLEY: Your Honor, Dan Howley from the ESI
 4 Respondents. That's understood for us as well.
 5 THE COURT: Okay. I think that's all
 6 Respondents, correct?
 7 MR. HOWLEY: Correct.
 8 THE COURT: Okay. Anything further from the
 9 Government?
 10 MR. EGELAND: Your Honor, this is Becky Egeland
 11 from Complaint Counsel. The only other thing I have is
 12 just to ask Your Honor how you would like Complaint
 13 Counsel to proceed regarding our proposal to file one
 14 consolidated opposition to Respondents' motions for
 15 separate hearings, if you would like us to file a motion
 16 for leave for that or just to file it.
 17 THE COURT: No, I -- actually, I -- I thought I
 18 was -- I thought I answered that, but, no, I encourage
 19 that. Thank you. That's approved.
 20 MR. EGELAND: Okay. Thank you, Your Honor.
 21 THE COURT: If that's a motion, it's granted.
 22 MR. EGELAND: Thank you, Your Honor. I just
 23 wanted to clarify that. Nothing further from Complaint
 24 Counsel.
 25 THE COURT: Okay. And from any of the

19

1
 2 CERTIFICATE OF REPORTER
 3
 4
 5 I, Susanne Bergling, do hereby certify that the
 6 foregoing proceedings were recorded by me via stenotype
 7 and reduced to typewriting under my supervision; that I
 8 am neither counsel for, related to, nor employed by any
 9 of the parties to the action in which these proceedings
 10 were transcribed; and further, that I am not a relative
 11 or employee of any attorney or counsel employed by the
 12 parties hereto, nor financially or otherwise interested
 13 in the outcome of the action.
 14
 15
 16
 17
 18 s/Susanne Bergling
 19 SUSANNE BERGLING, RMR-CRR-CLR
 20
 21
 22
 23
 24
 25

18

1 Respondents?
 2 MS. MAINIGI: Your Honor, Enu Mainigi for
 3 Caremark and Zinc. Nothing further from us.
 4 MR. LIVERSIDGE: Your Honor, Sam Liversidge for
 5 the Optum Rx Respondents. Nothing further here.
 6 MR. HOWLEY: And, Your Honor, Dan Howley for the
 7 ESI Respondents. Nothing further for us.
 8 THE COURT: And that's everyone, correct?
 9 MR. HOWLEY: Correct.
 10 MR. EGELAND: Yes, Your Honor.
 11 THE COURT: All right. Hearing nothing further,
 12 thank you for your time, and we are adjourned.
 13 MR. LIVERSIDGE: Thank you, Your Honor.
 14 (Whereupon, at 4:20 p.m., the telephonic hearing
 15 was concluded.)
 16
 17
 18
 19
 20
 21
 22
 23
 24
 25

Prehearing Scheduling Conference

PUBLIC

Caremark RX, et al.

10/21/2024

[20]

A	B			
absurdity 16:14	back 13:14,22	colleagues 7:14	14:4,14,17 15:3,14	9:24,25 14:22,23
access 5:22 9:3	Becky 2:4 6:15 9:25	Commission 1:2 2:3	15:23 16:6,10 17:5	16:9,22,22 17:10
action 11:21,22 14:2	14:23 16:22 17:10	2:6 11:23 15:22	17:8,17,21,25 18:8	17:10,20,22 18:10
14:10 15:8 19:9,13	beginning 7:25	Commissioners	18:11	emainigi@wc.com
addition 9:2	behalf 2:3,11 3:9 4:1	15:7	courtroom 5:24	2:21
adjourned 18:12	8:2 14:1,12 15:25	Complaint 6:12,15	cover 16:6	employed 19:8,11
administrative 1:18	believe 10:11 12:18	6:18 10:1,5 11:13	covered 7:20 11:5	employee 19:11
12:4	Bergling 1:25 5:13	14:23 15:7,12,16	14:14	encourage 16:16
advance 9:9	19:5,18,19	15:18,20,21 16:2,4	COWIE 3:3	17:18
Advisors 9:2	beyond 15:19	16:23 17:11,12,23	CRAIG 2:14	Enu 2:13 6:22 7:23
affirmative 14:2	Black 2:5 6:16	concept 16:1	Crutcher 3:14 7:11	8:6 10:20 13:17,25
afternoon 6:14,21	break 16:20	concluded 18:15	current 12:9,23	15:15 16:24 18:2
7:2		conduct 5:16 11:24	15:20	ESI 7:3 8:13,19,22
agenda 5:20		conducted 5:8	currently 12:6,8	9:20 11:20 14:12
agreed 9:12,14	C	conference 1:10 5:5	15:2	15:25 17:3 18:7
ahead 13:18	C 5:1	5:8,17,19 9:3,9,21		ESQ 2:4,5,13,14,15
al 1:5 5:6 6:23 8:9	call 6:7,11 13:5,5	confidential 9:6	D	2:16,17 3:1,2,3,10
allows 5:22 9:4	called 5:3 8:13	confirm 5:25	D 1:17 5:1	3:11,12,13 4:3,4,5
ALTUMASH 2:17	Campbell 4:5 7:6	connection 9:4	D.C 2:8,20 3:6,16	4:6,14,15
AMERICA 1:1	Caremark 1:5 2:11	Connolly 2:18 6:23	4:9,18	et 1:5 5:6
answer 11:9 12:22	5:6 6:22 7:23 8:8	8:7,10	Dan 4:3 7:3 11:19	evaluate 15:10
13:12	10:21 14:1 15:16	consider 9:16 14:3	14:11 15:24 17:3	Evermore 4:1 7:4
answered 17:18	16:25 18:3	16:4	18:6	8:14
anybody 16:15	case 11:4,18 12:14	considering 14:7	date 15:10,13	evidentiary 5:21
apologies 8:2	12:15,24 16:15	15:21	days 10:7	9:19 10:3,17
appear 16:2	cautioned 9:5	consolidated 10:5	Dechert 3:4 6:24	Exchange 6:2 13:1,6
appearances 2:1 6:9	certainly 14:3	10:12 17:14	8:10	expect 10:21
appearing 8:2	certificate 9:21 19:2	constitutional 12:1	deciding 9:16	Express 4:1 7:4 8:13
appreciate 10:15	certify 19:5	12:11 14:2	decision 14:9	
approved 17:19	changes 9:10,10,11	continue 14:3 15:10	declaratory 11:14	F
Armine 2:5 6:16	9:14,15,17	16:3	designated 6:9	Federal 1:2 2:3,6
ARTHAUD 12:25	Chappel 13:10	correct 8:16,17,23	direct 12:3,3	feedback 6:6
13:7	Chappell 1:17 5:7	8:24 11:8,10 17:6	directly 11:21	file 10:2,5,7,17,19
Ascend 4:2 7:5	12:25	17:7 18:8,9	discuss 16:3	10:21 11:1 12:7,8
Ascent 8:15	CHARLES 4:4	counsel 6:12,15,18	discussed 16:1	12:23 14:9 17:13
asked 15:16	Chief 1:18	10:1,5 14:23 15:7	discussions 14:21	17:15,16
assume 7:19	choice 5:17	15:17,22 16:2,4,23	District 11:15 12:9	filed 9:20 10:8 11:7
attempt 12:3	chosen 5:16	17:11,13,24 19:8	Docket 1:5 5:5	11:13,15,17,20
attempted 14:19	claims 12:1,11	19:11	Dunn 3:14 7:11	12:1,8 14:1
attend 5:24	clarify 17:23	course 16:14		filing 15:8,17
attorney 9:1 19:11	clear 8:4,12 10:16	court 5:4,9,11,14,15	E	final 14:9
authority 13:9	client 6:11	6:4,8,19,25 7:9,16	E 5:1,1	financially 19:12
available 5:23	clients 11:20	7:24 8:4,11,18,22	Eastern 11:14 12:9	find 16:17
Avenue 2:7,19 4:17	close 16:3	8:25 10:14,23 11:2	echo 13:3	firm 7:7 8:18,20
	colleague 6:16	11:11,22,25 12:13	echoes 6:6	first 14:20
		12:21 13:8,10,12	efficient 10:11	fixed 13:6
		13:13,15,18,18,21	Egeland 2:4 6:14,15	foregoing 19:6

Prehearing Scheduling Conference

PUBLIC

Caremark RX, et al.

10/21/2024

[21]

<p>forward 16:18 further 17:8,23 18:3 18:5,7,11 19:10 future 12:8</p>	<p>13:17,25 14:6,11 14:22 15:5,15,24 16:8,9,22,24 17:1 17:3,10,12,20,22 18:2,4,6,10,13</p>	<p>K 3:5 keep 7:16 know 10:18,19</p>	<p>Michael 1:17 3:11 7:14 MIKE 3:3 Milici 4:14 7:8</p>	<p>14:25 15:20 oppose 9:23,25 opposition 10:6,9 17:14</p>
<p>G</p>	<p>Honor's 6:16 HONORABLE 1:17 hours 10:22 11:1 Howley 4:3,7 7:2,3,3 8:17,20,20,24 11:19,19 14:11,11 14:16 15:24,24 17:3,3,7 18:6,6,9 howley@rulegarz... 4:10</p>	<p>L</p>	<p>Missouri 11:15 12:9 misspoke 12:12 moment 13:1 MONDAY 1:11 money 5:18 motion 9:19,23,25 10:8,17,22 11:1,7 17:15,21 motions 10:3 11:7 17:14 MSR 7:13 Mufti 2:17 6:23 8:9 mute 6:5</p>	<p>oppositions 10:10 10:13 options 14:8 Optum 3:9 7:11,12 7:12 10:25,25 14:7 15:6 17:2 18:5 order 5:3 6:18 9:7,8 9:11,13,17 11:23 12:10 orders 12:15 outcome 19:13</p>
<p>I</p>	<p>I</p>	<p>N</p>	<p>N</p>	<p>P</p>
<p>Government 6:13 9:22,24 14:19 16:11,14 17:9 granted 17:21 Great 8:11 GREG 3:2 group 8:13</p>	<p>ice 16:20 identify 6:7,10 importantly 5:18 improve 13:4 include 11:3,5 12:11 included 9:12 information 9:6 injunctive 11:14 insulin 11:22 15:11 intend 10:19 11:1 intention 16:15 interested 19:12 interim 11:23 12:10 interject 13:1 invited 15:8 issue 15:12 16:21 issued 9:18 11:23 12:12,15 issues 10:15</p>	<p>limit 10:8,10 limited 5:20 line 5:10,25 6:2 7:6 9:1 13:2,24 list 11:2 listed 11:4,6 listen 9:5 Liversidge 3:10 7:10,11 10:24,24 11:10 12:6,17 14:6 14:6 15:5,6 16:8 17:1,1 18:4,4,13 LLC 7:21 8:15 LLP 3:4 LUIB 3:2</p>	<p>N 5:1 N.W 2:7 3:5,15 4:8 4:17 name 5:11 10:18 13:20 nature 10:5 need 5:25 6:5,7,10 13:20,22 negotiations 15:2 neither 19:8 note 9:2,19 notes 9:16 number 5:5 9:10 numbers 5:23</p>	<p>P 5:1 p.m 1:12 5:3 18:14 parallel 12:1,23 Parrott 3:13 7:15 parties 6:10 9:8,9,12 9:15 10:14 14:18 16:17 19:9,12 party 6:11 path 16:17 PBM 11:24 pending 11:5 13:22 Pennsylvania 2:7 4:17 permission 6:17 Perry 3:11 4:15 7:8 7:14</p>
<p>H</p>	<p>J</p>	<p>M</p>	<p>O</p>	<p>O</p>
<p>Habash 3:1 6:24 8:10 Hale 4:16 7:8 8:21 handle 6:17 Hansell 3:12 7:14 happy 16:3 Health 2:12 4:2,2,2 7:5,5,5,20 8:3,8,14 8:14,15 hear 7:20,24 10:14 heard 16:11,12,13 hearing 5:22 7:19 9:20 11:8 18:11,14 hearings 10:3 17:15 Heipp 4:6 7:7 hereto 19:12 Holdings 7:13 Honor 6:14,21 7:2 7:10,22 8:1,6,17 9:24 10:12,20,24 11:19 12:17,19</p>	<p>Jennifer 4:14 7:7 jennifer.milici@w... 4:20 JONATHAN 2:15 Judge 1:18 5:6 12:25 13:10,15 Justin 4:6 7:7</p>	<p>M 3:15 Maine 2:19 Mainigi 2:13 6:21 6:22 7:22,23 8:1,6 8:6 10:20,20 13:17 13:25,25 15:15,15 16:24,24 18:2,2 Margot 4:5 7:6 matter 1:4 5:6 14:19 Matthew 3:13 7:14 mean 11:4 Medco 4:2 7:5 8:14 meetings 15:7 merely 5:20</p>	<p>O 5:1 obviously 15:20 October 1:11 9:18 offer 15:9,11 16:19 offered 15:19 offers 14:24 15:9 okay 6:19 7:9 10:23 11:2,25,25 12:13 12:16,21 13:7 14:4 14:17 15:3 17:5,8 17:20,25 open 6:2 13:1,6</p>	<p>Pharma 7:13 phones 6:5 PITT 2:15 plan 10:2 plans 12:23 please 5:11 point 13:21 pop 12:2 position 14:13 possibility 14:18 prehearing 1:10 5:5 prepared 12:22 press 9:2 prevent 6:6</p>

Prehearing Scheduling Conference

PUBLIC

Caremark RX, et al.

10/21/2024

[22]

<p>problem 13:23 problems 13:3 procedural 5:20 proceed 13:9 17:13 proceeding 5:3 12:4 proceedings 12:24 19:6,9 products 15:11 proposal 15:1 16:4 16:12,13 17:13 proposals 15:18,21 propose 10:7,8 proposed 6:18 9:8 9:10,15 10:4 provide 14:20 provided 9:8 15:13 public 5:23,25 6:2 9:3 12:22 13:2,5 13:24 Pyser 2:16 6:23 8:9</p> <hr/> <p style="text-align: center;">Q</p> <hr/> <p>quality 13:4 question 13:13,14 13:22 questions 6:17</p> <hr/> <p style="text-align: center;">R</p> <hr/> <p>R 5:1 Rani 3:1 6:24 rani.habash@dec... 3:7 read 10:12 13:13,22 reasonable 15:21 received 14:24 15:9 record 5:4,12,14 8:4 8:12 9:22 12:22 recorded 19:6 reduced 19:7 regard 14:8 regarding 17:13 regeland@ftc.gov 2:9 relate 11:21 related 19:8 relates 11:22 12:10 15:11</p>	<p>relative 19:10 relief 11:14 15:19 remain 15:20 remedy 15:1 remind 13:19 reply 12:19 report 12:11 Reported 1:25 reporter 5:10,11,13 6:8 13:10,11,13,15 13:16,18,19 19:2 Reporters 5:14 represent 8:5 representing 8:7,18 11:20 requested 9:11,14 9:17 15:19 resources 5:19 Respondent 1:6 2:11 3:9 6:22 10:8 10:18 15:4 16:12 16:13 Respondents 4:1 6:20 7:4,9,12,17 7:23 8:13,19,22 9:20 10:2,2,16,25 11:3,4,6,8,13,16 11:16,20 12:21 14:5,7,12,15,25 15:6,14,25 16:7 17:4,6 18:1,5,7 Respondents' 17:14 response 7:18 10:12 reveal 9:5 Rick 4:4 7:6 right 7:16 11:11,12 12:17 13:8,21 14:14 16:3,6,10,11 18:11 RMR-CRR-CLR 1:25 19:19 Ronnie 8:10 Rule 4:4,7 7:3,6 8:20 Rx 1:5 3:9 5:6 7:12 7:12,12 8:8 10:25 14:7 15:6 17:2</p>	<p>18:5</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>S 5:1 S.W 2:19 s/Susanne 19:18 Sam 10:24 14:6 15:5 17:1 18:4 Samuel 3:10 7:10 save 5:17 scheduling 1:10 5:5 5:8,16,19 6:18 9:3 9:7,8,11,13,17 Scripts 4:1 7:4 8:14 see 9:21 16:20 seeing 12:2 separate 9:19 10:3 10:10,13,17 11:7 11:16 14:9 17:15 serious 16:17 service 12:18 Services 2:12 4:2,2 7:5,5,13,21 8:3,8 8:15,15 settle 14:19 settlement 14:18,20 14:24 15:1,2,9,9 15:11,18 16:1,18 settling 16:15 severe 13:2 short 5:19 shorter 10:12 side 16:19 similar 10:3,4 14:12 similarly 15:16,25 SINGER 2:14 single 10:12 sir 6:3 situated 15:25 sliversidge@gibso... 3:17 Sophia 3:12 7:14 sorry 12:11 sort 14:1 sounds 13:8 speak 6:7,10 7:20 10:16 13:20 15:3</p>	<p>speaking 6:6 9:25 start 6:12 8:4 state 5:11 STATES 1:1 status 14:20 stenotype 19:6 Steve 6:23 8:9 STEVEN 2:16 stop 16:19 Street 3:5,15 4:8 strongly 16:16 submitted 9:9 substantial 12:20 substantive 12:15 suggest 16:16 supervision 19:7 Sure 14:22 Susanne 1:25 5:13 19:5,19</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>take 6:9 talk 9:7 14:17 16:18 taxpayer 5:18 telephone 9:4 telephonic 1:10 18:14 telephonically 5:9 5:17 tell 12:7 ten 10:7 thank 5:15 6:4,25 8:11,25 9:21 13:9 14:22 16:10,23 17:19,20,22 18:12 18:13 thing 17:11 think 17:5 thought 17:17,18 three 10:10,13 time 5:17 11:6,18 12:18 13:20 18:12 toll-free 9:4 track 7:16 Trade 1:2 2:3,6 transcribed 5:9 19:10</p>	<p>trust 14:18 trying 7:16 16:17 two 8:22 type 16:18 typewriting 19:7</p> <hr/> <p style="text-align: center;">U</p> <hr/> <p>understand 10:1 11:13 13:2 understood 12:17 16:21,23,25 17:2,4 underway 15:2 UNITED 1:1 unrelated 11:23 upcoming 12:19 update 11:17,17 12:19 updated 12:14</p> <hr/> <p style="text-align: center;">V</p> <hr/> <p>verify 9:22 Victoria 12:25 voice 13:8</p> <hr/> <p style="text-align: center;">W</p> <hr/> <p>waiting 16:19 want 9:22 14:20 wanted 13:19 17:23 wants 11:16 15:3 Washington 2:8,20 3:6,16 4:9,18 we're 10:16 12:1 15:25 16:3 Williams 2:18 6:23 8:7,9 willing 15:10 Wilmer 4:16 7:8 8:21 wondering 13:3 word 10:10 words 10:9 12:3 working 6:1,3 10:15</p> <hr/> <p style="text-align: center;">X</p> <hr/> <p style="text-align: center;">Y</p> <hr/> <p style="text-align: center;">Z</p> <hr/>
---	---	---	--	--

Prehearing Scheduling Conference

PUBLIC

Caremark RX, et al.

10/21/2024

[23]

<p>Zinc 2:11 7:20 8:2,8 10:21 14:1 15:16 16:25 18:3</p>	<p>901 4:8 9437 1:5 5:5</p>		
<hr/>			
0			
<hr/>			
1			
<hr/>			
<p>1700 3:15 1900 3:5</p>			
<hr/>			
2			
<hr/>			
<p>20001 4:9 20006 3:6 20024 2:20 20036 3:16 20037 4:18 202 4:19 2024 1:11 20580 2:8 21 1:11 2100 4:17 23rd 9:18 24 10:22 11:1</p>			
<hr/>			
3			
<hr/>			
4			
<hr/>			
<p>4:00 1:12 4:03 5:3 4:20 18:14 48 10:22 11:1</p>			
<hr/>			
5			
<hr/>			
<p>5000 10:9</p>			
<hr/>			
6			
<hr/>			
<p>6(b) 11:23 12:10,11 600 2:7 663-6000 4:19 680 2:19</p>			
<hr/>			
7			
<hr/>			
<p>7500 10:9 7th 4:8</p>			
<hr/>			
8			
<hr/>			
9			
<hr/>			

Exhibit E

**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.,)	
)	DOCKET NO. 9437
Medco Health Services, Inc.,)	
)	
Ascent Health Services LLC,)	
)	
OptumRx, Inc.,)	
)	
OptumRx Holdings, LLC, and)	
)	
Emisar Pharma Services LLC,)	
)	
Respondents.)	

SCHEDULING ORDER

- December 3, 2024 - Complaint Counsel serves preliminary proposed witness list (not including experts), which will include no more than 35 individuals, with a brief summary of the proposed testimony.
- December 17, 2024 - Each Respondent group¹ serves its preliminary proposed witness list (not including experts), which will include no more than 15 individuals, with a brief summary of the proposed testimony.
- December 27, 2024 - Complaint Counsel serves proposed expert witness list.

¹ “Respondent group” refers to Respondents that are represented by the same counsel. The Respondent groups are: (1) Caremark Rx, LLC, and Zinc Health Services, LLC, (2) Express Scripts, Inc., Evernorth Health, Inc., Medco Health Services, Inc., and Ascent Health Services LLC, and (3) OptumRx, Inc., OptumRx Holdings, LLC, and Emisar Pharma Services LLC.

- January 10, 2025 - Each Respondent group serves proposed expert witness list.
- May 2, 2025 - Deadline for parties to serve document requests, interrogatories, and subpoenas, except for discovery directed to witnesses who did not appear on either side's preliminary lists – provided that the discovery is propounded within two weeks of that witness's disclosure – and discovery for purposes of authenticity and admissibility of exhibits.
- May 9, 2025 - Deadline for parties to serve requests for admissions, except for requests for admissions for purposes of authenticity and admissibility of documents.
- June 6, 2025 - Close of fact discovery, except for discovery permitted under Rule 3.24(a)(4), depositions of experts, and discovery for purposes of authenticity and admissibility of exhibits.
- June 18, 2025 - Complaint Counsel serves expert witness reports.
- July 1, 2025 - Complaint Counsel serves final proposed witness and exhibit lists, including depositions, copies of all proposed exhibits (except for demonstrative, illustrative, or summary exhibits and expert-related exhibits), the basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness. Complaint Counsel's final proposed witness list shall include no more than twenty-five fact witnesses.

Complaint Counsel provides the Administrative Law Judge (ALJ) with courtesy copies of final proposed witness and exhibit lists, the basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness, including expert witnesses.
- July 9, 2025 - Respondents serve expert witness reports. Respondents' expert reports shall include (without limitation) rebuttal, if any, to Complaint Counsel's expert witness report(s).
- July 15, 2025 - Parties intending to offer confidential materials of an opposing party or non-party as evidence at the hearing must provide notice to the opposing party or non-party, pursuant to 16 C.F.R. § 3.45(b).²

² The Standard Protective Order states that if a party or third party wishes in camera treatment for a document or transcript that a party intends to introduce into evidence, that party or third party shall file an appropriate motion with the ALJ within five days after it receives notice of a party's intent to introduce such material. Appendix A to Commission Rule 3.31. Commission Rule 3.45(b) states that parties who seek to use material obtained from a third

- July 15, 2025 - Respondents serve final proposed witness and exhibit lists, including depositions, copies of all proposed exhibits (except for demonstrative, illustrative, or summary exhibits and expert-related exhibits), the basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness. Respondents' final proposed witness list shall include no more than fifteen fact witnesses per Respondent group. Respondent groups may examine other Respondent group's witnesses.
- Respondents provide the ALJ with courtesy copies of final proposed witness and exhibit lists, the basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness, including expert witnesses.
- July 23, 2025 - Complaint Counsel to identify rebuttal expert witness(es) and serve rebuttal expert witness report(s). Any such reports are to be limited to rebuttal of matters set forth in Respondents' expert witness reports. If material outside the scope of fair rebuttal is presented, Respondents will have the right to seek appropriate relief (such as striking Complaint Counsel's rebuttal expert witness report(s) or seeking leave to submit surrebuttal expert witness report(s)).
- July 29, 2025 - Deadline to file motions for in camera treatment of proposed trial exhibits. *See Additional Provision 16.*
- July 31, 2025 - Deadline for parties to depose expert witnesses (including rebuttal expert witnesses) and exchange expert-related proposed exhibits.
- August 5, 2025 - Deadline for parties to file responses to motions for in camera treatment of proposed exhibits.
- August 5, 2025 - Complaint Counsel files pretrial brief supported by legal authority.
- August 6, 2025 - Deadline for parties to file motions in limine to preclude admission of evidence. *See Additional Provision 17.*
- August 12, 2025 - Deadline for parties to file responses to motions in limine to preclude admission of evidence.
- August 12, 2025 - Parties exchange objections to final proposed witness lists and exhibit lists, serving courtesy copies on the ALJ. Parties are to

party subject to confidentiality restrictions must demonstrate that the third party has been given at least ten days' notice of the proposed use of such material. To resolve this apparent conflict, this Scheduling Order requires that the parties provide at least ten days' notice to the opposing party or third parties to allow for the filing of motions for in camera treatment.

review the Commission’s Rules on the admissibility of evidence before filing objections to exhibits and only raise objections that are necessary and valid.

August 19, 2025 - Parties exchange proposed stipulations as to law, facts, the admissibility of proposed exhibits, and the expertise of any expert witnesses.

August 19, 2025 - Each Respondent group files its pretrial brief supported by legal authority.

August 26, 2025 - Final prehearing conference begins at 10:00 a.m. Eastern Time. The parties shall meet and confer prior to the final prehearing conference regarding trial logistics and proposed stipulations as to law, facts, admissibility of exhibits, and expertise of any expert witnesses. To the extent the parties have agreed to stipulate to any issues of law, facts, admissibility of exhibits, and/or expertise of any expert witnesses, the parties shall prepare a list of such stipulations and submit a copy of the stipulations to the ALJ one business day prior to the final prehearing conference. At the final prehearing conference, the parties’ list of stipulations shall be marked as “JX1” and signed by each party, and the list shall be offered into evidence as a joint exhibit. No signature by the ALJ is required. Any subsequent stipulations may be offered as agreed to by the parties.,

Also at the final prehearing conference, the parties may present any objections to the final proposed witness lists and proposed exhibits. All proposed exhibits will be admitted or excluded to the extent practicable. To the extent the parties agree to the admissibility of proposed exhibits, the parties shall prepare a list identifying each proposed exhibit to which admissibility is stipulated, which shall be offered into evidence as a joint exhibit marked as “JX2” and signed by each party. No signature by the ALJ is required.

August 27, 2025 - Evidentiary Hearing begins at 10:00 a.m. Eastern Time.

ADDITIONAL PROVISIONS

Filings

1. For all papers that are required to be filed with the Office of the Secretary, the parties shall serve a courtesy copy on the Office of the Administrative Law Judges (OALJ) by email to: oalj@ftc.gov. The courtesy copy should be transmitted at or shortly after the time of

any electronic filing with the Office of the Secretary. Courtesy copies must be transmitted to the OALJ by email directly and the FTC E-filing system shall not be used for this purpose. Certificates of service for any pleading shall not include the email address of any particular OALJ personnel, but rather shall designate only 600 Pennsylvania Ave., NW, Rm. H-110, Washington, DC, 20580 as the place of service. **The subject line of all submissions to oalj@ftc.gov shall set forth the docket number, case name, and title of the submission.** The parties are not required to serve a courtesy copy on the OALJ in hard copy, except upon request. Discovery requests and discovery responses are to be exchanged between the parties and shall not be submitted to the OALJ.

2. The parties shall serve each other by email and shall include “Docket 9437” in the subject line. All attached documents shall be in .pdf format. In the event that service by email is not possible, the parties may serve each other through any method authorized under the Commission’s Rules of Practice. 16 C.F.R. § 4.4.

3. Each filing that cites to an unpublished opinion(s) or opinion(s) not available on LEXIS or WESTLAW shall include a copy of such opinion(s) as an exhibit.

4. Each motion (other than a motion to dismiss, motion for summary decision, or a motion for in camera treatment) shall be accompanied by a separate signed statement representing that counsel for the moving party has conferred in good faith with opposing counsel in an effort to resolve the issues raised by the motion, describing those efforts. In addition, pursuant to Rule 3.22(g), for each motion to quash filed pursuant to Rule 3.34(c), each motion to compel or determine sufficiency pursuant to Rule 3.38(a), or each motion for sanctions pursuant to Rule 3.38(b), the required signed statement must also recite the date, time, and place of each conference between counsel and the names of all parties participating in each such conference. Motions that fail to include such separate statement may be denied on that ground.

5. By signing and presenting a pleading, written motion, or other filing, an attorney or pro se litigant certifies that either: (1) no portion of the filing was drafted by generative artificial intelligence (“AI”) (such as ChatGPT, Microsoft Copilot, Harvey.AI, or Google Gemini), or (2) any language in the filing that was drafted by generative AI was checked for accuracy by human attorneys or paralegals using printed legal reporters and/or online legal databases. Any filing that fails to comply with these mandatory certification requirements may be stricken on that ground.

6. In relevant part, Rule 3.22(c) states:

All written motions shall state the particular order, ruling, or action desired and the grounds therefor. Memoranda in support of, or in opposition to, any dispositive motion shall not exceed 10,000 words. Memoranda in support of, or in opposition to, any other motion shall not exceed 2,500 words. Any reply in support of a dispositive motion shall not exceed 5,000 words and any reply in support of any other motion authorized by the Administrative Law Judge or the Commission shall not exceed 1,250 words.

If a party chooses to submit a motion without a separate memorandum, the word count limits of Rule 3.22(c) apply to the motion. If a party chooses to submit a motion with a separate

memorandum, absent prior approval of the ALJ, the motion shall be limited to 750 words and the word count limits of Rule 3.22(c) apply to the memorandum in support of the motion. This provision applies to all motions filed with the ALJ, including those filed under Rule 3.38.

7. If papers filed with the Office of the Secretary contain in camera or confidential material, the filing party shall mark any such material in the complete version of their submission with **{bold font and braces}**. 16 C.F.R. § 3.45(e). Parties shall be aware of the rules for filings containing such information, including Rule 4.2.

Discovery

8. For purposes of discovery, there are three Respondent parties. Each Respondent group is a single party.

9. Each party is limited to serving on each opposing party: fifty requests for production of documents, including all discrete subparts; twenty-five interrogatories, including all discrete subparts; and thirty-five requests for admissions, including all discrete subparts, except that there shall be no limit on the number of requests for admission for authentication and admissibility of exhibits. There is no limit to the number of sets of discovery requests the parties may issue, so long as the total number of each type of discovery request, including all subparts, does not exceed these limits.

10. The parties will serve any objection to a document request within ten business days of service of the request. The parties will meet and confer to attempt to resolve any disputes and to discuss timing of production within three business days of the objection being served. The party responding to a document request will make a good-faith effort to produce responsive documents as expeditiously as possible, including by making productions on a rolling basis.

11. Compliance with the scheduled close of discovery requires that the parties serve subpoenas and discovery requests sufficiently in advance of the discovery cut-off date and that all responses and objections will be due on or before that date, unless otherwise noted. Any motion to compel a response to a discovery request or to seek certification of a request for court enforcement of a non-party subpoena shall be filed within thirty days of service of the response and/or objection to the discovery request or within twenty days after the close of discovery, whichever first occurs; except that, where the parties have been engaged in negotiations over a discovery dispute, including negotiations with any non-party with regard to a subpoena, the deadline for the motion to compel shall be five business days of reaching an impasse.

12. Rule 3.33(c) deposition notices of each Respondent group shall be permitted, with the total deposition time of each Respondent group being limited to 8 hours. Depositions of all individuals designated as representatives for purposes of a 3.33(c) deposition notice shall count as one deposition for purposes of this paragraph, even if the noticed entity designates multiple individuals to provide testimony. The parties shall consult and coordinate the time and place of the deposition prior to confirming any deposition. The parties shall use reasonable efforts to reduce the burden on witnesses noticed for depositions and to accommodate witness schedules. The deposition of any person may be recorded by video, provided that the deposing party notifies the deponent and all parties of its intention to record the deposition by video at least five days in advance of the deposition. No deposition, whether recorded by video or otherwise, may exceed a

single, seven-hour day, unless otherwise agreed to by the parties or ordered by the ALJ. The parties may agree upon and submit to the ALJ a remote deposition protocol.

13. The parties shall serve upon one another, at the time of issuance, copies of all subpoenas for documents and subpoenas for testimony. For subpoenas for testimony, the party seeking the deposition shall consult with the other parties before the time and place of the deposition is scheduled. For any witness who separately engaged or whose testimony concerns more than one Respondent group, each Respondent group will be allocated up to three and a half hours of record time (“Extended Depositions”). Unless the parties otherwise agree and except for Extended Depositions, at the request of any party, the time and allocation for a non-party deposition that has been cross-noticed shall be divided evenly between each side. If Complaint Counsel and one or more Respondent group notice any non-party fact deposition (including any Rule 3.33(c) deposition), the parties will agree to an equitable distribution of the seven hours of record time. Unused time in any side’s allocation of deposition time shall not transfer to the other side. To the extent a deposition involves a non-party and is not cross-noticed, the party who did not notice the deposition will have thirty minutes available to them and the party seeking the deposition will have six hours and thirty minutes. For purposes of allocating deposition time under this Scheduling Order, former employees, consultants, agents, contractors, or representatives of the parties are considered party witnesses if they are represented by Respondents’ counsel or if any Respondent is paying for the witness’ counsel. For any deposition of a non-party that provided a declaration, the side that obtained the declaration will have one hour of record time, and the other side will have six hours of record time.

14. Every documentary subpoena to a non-party shall include a cover letter requesting that (1) the non-party Bates-stamp each document with a production number and any applicable confidentiality designation prior to producing it and (2) the non-party provide to the other parties copies of all productions at the same time as they are produced to the requesting party. If a non-party fails to provide copies of productions to both sides, within three business days of receiving the documents, the requesting party shall produce all materials received pursuant to the non-party subpoena, as well as all materials received voluntarily in lieu of a subpoena, including declarations or affidavits obtained from a non-party. If a party serves a non-party subpoena for the production of documents or electronically stored information and a subpoena commanding attendance at a deposition, the deposition date must be at least seven calendar days after the original return date for the document subpoena, unless a shorter time is required by unforeseen logistical issues in scheduling the deposition, or a non-party produces those documents at the time of the deposition, as agreed to by all parties involved.

15. A party that obtains a declaration, note of support, or affidavit from a party or non-party witness will promptly produce it to the other party(ies), and in any event not later than (1) three business days before the party or non-party is scheduled to be deposed and (2) fourteen calendar days before the end of fact discovery. Declarations, notes of support, or affidavits produced after this date shall not be admitted into evidence or used in the administrative proceeding except upon a showing of good cause. The parties reserve all rights and objections with respect to the use and/or admissibility of any declaration, note of support, or affidavit. No declaration, note of support, or affidavit will be admitted unless a fair opportunity was available to depose the declarant.

Motions

16. If a party intends to offer confidential materials of an opposing party or non-party into evidence at the hearing, in providing notice to such non-party, the party is required to inform each non-party of the strict standards for motions for in camera treatment for evidence to be introduced at trial. 16 C.F.R. § 3.45; *In re Otto Bock Healthcare North American*, 2018 WL 3491602, at *1 (July 2, 2018); *In re 1-800 Contacts, Inc.*, 2017 FTC LEXIS 55 (Apr. 4, 2017). Motions for in camera treatment must be supported by a declaration or affidavit by a person qualified to explain the confidential nature of the documents. *In re 1-800 Contacts, Inc.*, 2017 FTC LEXIS 55 (Apr.4, 2017); *In re North Texas Specialty Physicians*, 2004 FTC LEXIS 66 (Apr. 23, 2004). Each party or non-party that files a motion for in camera treatment shall provide one copy of the documents for which in camera treatment is sought to the ALJ.

17. Motions in limine are strongly discouraged. Motion in limine refers “to any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered.” *In re Daniel Chapter One*, 2009 FTC LEXIS 85, *18-20 (Apr. 20, 2009) (citing *Luce v. United States*, 469 U.S. 38, 40 n.2 (1984)). Evidence should be excluded in advance of trial on a motion in limine only when the evidence is clearly inadmissible on all potential grounds. *Id.* (citing *Hawthorne Partners v. AT&T Technologies, Inc.*, 831 F. Supp. 1398, 1400 (N.D. Ill. 1993); *SEC v. U.S. Environmental, Inc.*, 2002 U.S. Dist. LEXIS 19701, at *5-6 (S.D.N.Y. Oct. 16, 2002)). Moreover, the risk of prejudice from giving undue weight to marginally relevant evidence is minimal in a bench trial such as this where the ALJ is capable of assigning appropriate weight to evidence.

Witnesses

18. The final proposed witness lists shall represent counsel’s good faith designation of all potential witnesses whom the parties reasonably expect may be called upon in their case-in-chief. A general designation that a party reserves the right to call anyone on the opposing party’s witness list is insufficient. A party shall promptly notify the opposing party of changes to witness lists to facilitate completion of discovery within the dates of this Scheduling Order. The final proposed witness lists may not include additional witnesses not listed in the preliminary proposed witness lists, who have not been deposed, or for whom affidavits/declarations have not been submitted, unless by consent of all parties, or, if the parties do not consent, by an order of the ALJ upon a showing of good cause.

19. If any party wishes to offer a rebuttal witness other than a rebuttal expert witness, the party shall file a request in writing in the form of a motion to request a rebuttal witness. That motion shall be filed as soon as possible after the testimony sought to be rebutted is known and shall include: (a) the name of any witness being proposed (b) a detailed description of the rebuttal evidence being offered; (c) citations to the record, by page and line number, to the evidence that the party intends to rebut; and (d) shall demonstrate that the witness the party seeks to call has previously been designated on its witness list or adequately explain why the requested witness was not designated on its witness list.

20. Witnesses shall not testify to a matter unless sufficient evidence is introduced to support a finding that the witness has personal knowledge of the matter. F.R.E. 602.

21. Witnesses not properly designated as expert witnesses shall not provide opinions beyond what is allowed in F.R.E. 701.

22. The parties are required to comply with Rule 3.31A and with the following:

(a) At the time an expert is first listed as a witness by a party, that party shall provide to the other parties:

(i) Materials fully describing or identifying the background and qualifications of the expert, all publications authored by the expert within the preceding ten years, and all prior cases in which the expert has testified or has been deposed within the preceding four years; and

(ii) Transcripts of such testimony in the possession, custody, or control of the producing party or the expert, except that transcript sections that are under seal in a separate proceeding need not be produced.

(b) At the time an expert witness report is produced, the producing party shall provide to the other parties all documents and other written materials relied upon by the expert in formulating an opinion in this case, subject to the provisions of paragraph (g) below, except that documents and materials already produced in the case need only be listed by Bates number.

(c) It shall be the responsibility of a party designating an expert witness to ensure that the expert witness is reasonably available for deposition in keeping with this Scheduling Order. Unless otherwise agreed to by the parties or ordered by the ALJ, expert witnesses shall be deposed only once and each expert deposition shall be limited to one day for seven hours.

(d) Each expert witness report shall include a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the expert witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the expert; and the compensation to be paid for the study and testimony.

(e) A party may not discover facts known or opinions held by an expert witness who has been retained or specially employed by another party in anticipation of this litigation or preparation for hearing and who does not provide an expert report or will not act as a testifying expert.

(f) At the time of service of the expert witness reports, a party shall provide opposing counsel:

(i) A list of all commercially-available computer programs used by the expert witness in the preparation of the report;

(ii) A copy of all data sets used by the expert witness, in native file format and processed data file format; and

(iii) All customized computer programs used by the expert witness in the preparation of the report or necessary to replicate the findings on which the expert witness' report is based.

(g) Expert witnesses' disclosures and reports shall comply in all respects with Rule 3.31A, except that neither side must preserve or disclose:

- (i) Any form of communication or work product shared between any of the parties' counsel and their expert witness(es), or between any of the expert witnesses themselves;
- (ii) Any form of communication or work product shared between an expert witness and persons assisting the expert witness;
- (iii) An expert witness' notes, unless they constitute the only record of a fact or an assumption relied upon by the expert witness in formulating an opinion in this case;
- (iv) Drafts of expert witness reports, analyses, or other work product; or
- (v) Data formulations, data runs, data analyses, or any database-related operations not relied upon by the expert witness in the opinions contained in the expert witness' report.

23. If the expert witness reports prepared for either party contain confidential information that has been granted in camera treatment, the party shall prepare two versions of its expert witness report(s) in accordance with Additional Provision 7 of this Scheduling Order and Rule 3.45(e).

24. An expert witness's testimony is limited to opinions contained in that expert witness' report provided to the opposing party. No opinion will be considered, even if included in an expert report, if the underlying and supporting documents and information have not been properly provided to the opposing party. Unless an expert witness is qualified as a fact witness, an expert witness shall provide opinion testimony; expert testimony is not considered for the purpose of establishing the underlying facts of the case.

Proceedings

25. In the event that the evidentiary hearing in this matter is conducted remotely by video conference, in advance of the hearing, the parties may take expert depositions for the purpose of perpetuating trial testimony (i.e., a trial deposition) and submit such trial testimony as an exhibit in lieu of presenting the expert's live testimony at the hearing. This trial deposition may be conducted in addition to any deposition of an expert witness for purposes of discovery (discovery deposition). Although a party may submit trial depositions in lieu of live video testimony at trial for all expert witnesses in the case, a party may elect to conduct trial depositions for all or fewer than all experts.

26. The final exhibit lists shall represent counsel's good faith designation of all trial exhibits other than demonstrative, illustrative, or summary exhibits. Additional exhibits may be added after the submission of the final exhibit lists only by consent of all parties, or, if the parties do not consent, by an order of the ALJ upon a showing of good cause.

27. Properly admitted deposition testimony and properly admitted investigational hearing transcripts are part of the record and need not be read in open court. Videotape deposition excerpts that have been admitted in evidence may be presented in open court only upon prior approval by the ALJ.

28. The parties shall provide to one another, the ALJ, and the court reporter at least forty-eight hours in advance, not including weekends and holidays, a list of all witnesses to be called on each day of the hearing, subject to possible delays or unforeseen circumstances.

Exhibits

29. The parties shall provide one another with copies of any demonstrative, illustrative, or summary exhibits (other than those prepared for cross-examination) twenty-four hours before they are used with a witness.

30. Complaint Counsel's exhibits shall bear the designation "PX," Respondents' exhibits shall bear the designation "RX," and joint exhibits shall bear the designation "JX," or some other appropriate designation. Complaint Counsel's demonstrative exhibits shall bear the designation "PXD" and Respondents' demonstrative exhibits shall bear the designation "RXD," or some other appropriate designation. If demonstrative exhibits are used with a witness, the exhibit will be marked and referred to for identification only. Any demonstrative exhibits referred to by any witness may be included in the trial record, but they are not part of the evidentiary record and may not be cited to support any disputed fact. Both sides shall number the first page of each exhibit with a single series of consecutive numbers. When an exhibit consists of more than one page, each page of the exhibit must bear a consecutive control number or some other consecutive page number.

31. At the final prehearing conference, counsel will be required to introduce all exhibits they intend to introduce at trial. The parties shall confer and eliminate duplicative exhibits in advance of the final prehearing conference and, if necessary, during trial. To that end, the parties shall agree in advance of the final prehearing conference to the identification of joint exhibits. Counsel shall contact the court reporter regarding submission of exhibits.

Page Limitations

32. All pretrial and post-trial briefing addressed in this paragraph shall be per Respondent group (for avoidance of doubt, Complaint Counsel will have an equal limitation of pages). Pretrial briefs shall not exceed fifty pages per Respondent group, post-trial initial briefs shall not exceed seventy-five pages per Respondent group, post-trial reply briefs shall not exceed fifty pages per Respondent group, and post-trial initial findings of fact and conclusions of law shall not exceed one hundred pages per Respondent group, unless otherwise agreed to by the parties or ordered by the ALJ.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: October 23, 2024

PUBLIC

CERTIFICATE OF SERVICE

I hereby certify that on January 6, 2025, 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

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

*Secretary of the Commission
Clerk of the Court*

Administrative Law Judge

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

Enu Mainigi
Craig D. Singer
Steven M. Pyser
WILLIAMS &
CONNOLLY LLP
680 Maine Avenue SW
Washington, DC 20024
emainigi@wc.com
csinger@wc.com
spyser@wc.com

Daniel J. Howley
Charles F. (Rick) Rule
Margot Campbell
Justin T. Heipp
RULE GARZA HOWLEY
901 7th Street NW, Suite 600
Washington, DC 20006
howley@rulegarza.com
rule@rulegarza.com
campbell@rulegarza.com
heipp@rulegarza.com

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

Sophia A. Hansell
Michael J. Perry
Matthew C. Parrott
GIBSON, DUNN & CRUTCHER
LLP
1700 M Street NW
Washington, DC 20036
shansell@gibsondunn.com
mjperry@gibsondunn.com
mparrott@gibsondunn.com

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

Jennifer Milici
Perry A. Lange
John W. O'Toole
WILMERHALE
2100 Penn. Ave. NW
Washington, DC 20037
jennifer.milici@wilmerhale.com
perry.lange@wilmerhale.com
john.otoole@wilmerhale.com

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

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

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

PUBLIC

/s/ Rebecca L. Egeland
Rebecca L. Egeland
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Avenue, NW
Washington, DC 20580
(202) 326-2290
regeland@ftc.gov

Counsel Supporting the Complaint