

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

In the Matter of

Caremark Rx, LLC,

Zinc Health Services, LLC,

Express Scripts, Inc.,

Evernorth Health, Inc.,

Medco Health Services, Inc.,

Ascent Health Services LLC,

OptumRx, Inc.,

OptumRx Holdings, LLC, and

Emisar Pharma Services LLC,

Respondents.

Docket No. 9437

**COMPLAINT COUNSEL'S OPPOSITION TO ESI RESPONDENTS' MOTION FOR
DISCOVERY PURSUANT TO RULE 3.36**

BACKGROUND

This case is about protecting Americans struggling to afford life-saving medications like insulin. Respondents—the three largest pharmacy benefit managers (“PBMs”) plus their group purchasing organizations—together administer about 80% of all U.S. prescriptions. By leveraging their power and dominance, Respondents have crafted a drug-reimbursement system that earns them billions of dollars in rebates and fees while incentivizing drug manufacturers to *raise* list prices, thereby shifting skyrocketing medication costs onto certain patients who depend on insulin to survive.

Complaint Counsel has already produced approximately 3.9 million documents to Respondents comprising the “investigative file” in this action. 16 C.F.R. § 3.31(c)(2). Peay Decl. ¶ 5.¹ But that vast trove of information is not enough for the ESI Respondents, who now ask this Court to approve their overbroad and far-reaching fishing expedition into the files of Commissioners (including the two who are recused from this case), their staffs, and—astonishingly—“the staff of any Bureau or Office, including the Office of Policy Planning, Bureau of Competition, or the Bureau of Economics.” ESI Respondents’ Motion for Discovery Pursuant to Rule 3.36 (“Mot.”), Ex. A, at 4.

And ESI’s *sixteen* document requests—which ESI groups into two categories—are remarkably expansive: (1) all “factual materials outside of the investigative file” broadly “relating to” a string of pre-Complaint public statements, insofar as they are “relating to competition among PBMs, the price of insulin, PBM services and fees, PBM negotiated rebates, drug formularies, and the factors impacting out-of-pocket costs for insulin and other drugs

¹ Complaint Counsel also produced over 1,000 non-privileged documents outside the investigative file pursuant to a global resolution of a discovery dispute. Peay Decl. ¶ 10.

referenced in the Complaint” (“Pre-Complaint Material”); and (2) all “Communications” from Commissioners, their staffs, and the Office of Policy Planning (“OPP”) had with any nonparty (“Nonparty Communications”). Mot. at 3, 6.² The Rules limit such discovery to rare and narrow circumstances, and only after a party has satisfied a special showing of need. ESI’s motion fails to satisfy that elevated standard and should be denied.³

LEGAL STANDARD

Rule 3.31(c)(2) provides that “Complaint counsel need only search for materials that were collected or reviewed in the course of the investigation of the matter or prosecution of the case and that are in the possession, custody or control *of the Bureaus or Offices of the Commission that investigated the matter.*” 16 C.F.R. § 3.31(c)(2) (emphasis added). This information is the basis for the Complaint’s allegations and this enforcement action. Rule 3.36 provides a narrow exception that permits the Court, on request, to grant discovery from Commission offices *not* involved in the matter—such as Commissioners and OPP. But “[s]imply because the Commission has collected documents that may be relevant does not entitle respondents to them.” *In re Schering-Plough Corp.*, 2001 FTC LEXIS 199, *8 (Sept. 7, 2001).

Instead, to obtain additional materials under Rule 3.36, Respondents must show “(1) the subpoena is reasonable in scope; (2) the requested material falls within the relevancy limits for discovery under Rule 3.31; (3) the discovery cannot reasonably be obtained by other means; and (4) the subpoena complies with the requirements of Rule 3.37 (including, among other

² “Pre-Complaint Materials” refers to discovery sought by Request Nos. 1, 3, 6, 8, 10, 12 and 14, and “Nonparty Communications” refers to Request Nos. 2, 4, 5, 7, 9, 11, 13, 15, and 16.

³ ESI also seeks “[d]ocuments sufficient to show the FTC’s policies and practices regarding retention, organization, storage, access, and sequestering of Documents,” Mot., Ex. A, Request 17, but ESI’s motion does not discuss document retention policies or explain how they could be relevant. Accordingly, that request should be denied.

requirements, that the document requests specify the requested material ‘with reasonable particularity’.” *In re Intuit, Inc.*, 2022 FTC LEXIS 92, *6 (Nov. 7, 2022). Together, these elements “require[] ‘a special showing of need for subpoenas directed to the offices of the Commissioners, the General Counsel, Bureaus and Offices not involved in the matter’” because they “‘are unlikely to possess relevant, discoverable information that is not available from other sources.’” *Id.* (citing 74 Fed. Reg. 1804, 1815 (Jan. 13, 2009)). Therefore, “‘the burden (and delay) of searches for responsive records and the creation of privilege logs should not be imposed without strong justification.’” *Id.*

ARGUMENT

I. The Discovery Sought is Not Reasonably Expected to Yield Relevant Information

A. Pre-Complaint Materials are not relevant to the disputed issues in this case

ESI has not demonstrated that the Pre-Complaint Materials are relevant. First, ESI fails to offer any evidentiary basis for its claim that “[a]ccess to factual materials outside of the investigative file relating to the conduct challenged in the Complaint *has likely* influenced relevant public statements by the Commission and Commissioners.” Mot. at 3 (emphasis added). “Conjecture about the motivations of the Commission” is not enough for a Rule 3.36 subpoena. *Intuit*, 2022 FTC LEXIS 92, *15. Moreover, the Commission and Commissioner public statements that ESI quotes *pre-date the Complaint’s filing*. Information outside the investigative file related to pre-Complaint public statements is “not discoverable” absent “extraordinary circumstances.” *Id.* *8-9, *15. This is because, “once the Commission issue[s] a complaint, ‘the issue to be litigated is not the adequacy of the Commission’s pre-complaint information or the diligence of its study of the material in question but whether the alleged violation has in fact occurred.’” *Id.* *9 (quoting *In re Exxon Corp.*, 1974 FTC LEXIS 226, *2-3 (June 4, 1974)); *see also id.* *8-9 (“[P]recedent holds that ‘[t]he reasons for issuing a complaint and the information

considered or evaluated prior to issuance ‘are outside the scope of discovery, absent extraordinary circumstances.’”) (quoting *In re Axon Enter., Inc.*, 2020 FTC LEXIS 124, *2 (July 21, 2020)). ESI’s motion should thus be denied as an improper “attempt to obtain discovery into the Commission’s decision making in issuing the Complaint.” *Id.* *15.⁴

Second, the Pre-Complaint Materials related to the Commission policy statements quoted in ESI’s motion are irrelevant because “the Complaint makes no allegations regarding violations [of those publications].” *Id.* *7-8. And ESI’s contention that “the Commission withdrew its prior guidance related to PBMs,” Mot. at 3, is inconsequential. *Intuit*, 2022 FTC LEXIS 92, *7 (finding claim that Commission “sought to retract [published] guidance does not support a finding that [related] materials are relevant”).

Third, ESI fails to show that any of the Pre-Complaint Materials related to certain “statements of the Commissioners” are relevant to its affirmative defense of prejudgment. Mot. at 5-6.⁵ The standard for a prejudgment defense is whether “the adjudicative decisionmaker made affirmative comments on the merits of the case.” *Intuit*, 2022 FTC LEXIS 92, *13.⁶ ESI does not

⁴ ESI’s reliance on both *1-800 Contacts* decisions to argue relevance is misplaced because, unlike there, Complaint Counsel here is “directly argu[ing] that the Requested Documents are not relevant.” *In re 1-800 Contacts, Inc.*, 2016 FTC LEXIS 190, *11 (Oct. 28, 2016); *see also In re 1-800 Contacts, Inc.*, 2016 FTC LEXIS 233, *10 (Dec. 20, 2016) (“Complaint Counsel does not deny that Requests 1 and 2 seek relevant information.”).

⁵ Respondents filed motions to disqualify the three non-recused Commissioners that are now pending before those Commissioners.

⁶ The cases ESI cites related to prejudgment are inapt here; none granted Rule 3.36 subpoenas and each involved public statements expressly referencing the allegedly prejudged matters. *See New York v. Salazar*, 701 F. Supp. 2d 224, 241-43 (N.D.N.Y. 2010) (granting “very limited discovery” only after “evidence show[ed]” “direct access” and “ability to influence [the] decision,” plus “government’s grossly belated production” of documents); *NEC Corp. v. U.S. Dep’t of Commerce*, 958 F. Supp. 624, 629-30 (Ct. Int’l Trade 1997) (noting specific comments evidencing “advance commitment about the outcome of a dumping investigation”); *Exxon Mobil Corp. v. Healey*, 215 F. Supp. 3d 520, 522-23 (N.D. Tex. 2016) (citing comments specifically referencing Exxon and “the outcome of the Exxon investigation” before it officially began); (Continued...)

identify any affirmative comments by any Commissioner on the merits of this case. Rather, the Commissioner statements that ESI quotes are about the broad public interest in investigating the PBM industry arising from, among other sources, the Senate Finance Committee’s report on insulin pricing⁷ and public comments on PBM business practices.⁸ But statements outlining the general concerns about PBM business practices that may warrant an *investigation* are a far cry from prejudging the merits of a specific *enforcement action*. In fact, the statements cited by Respondents use cautionary words such as “may” or “appear,” showing the Commissioners’ openness to viewing the facts uncovered in an investigation.

B. Nonparty Communications are not relevant to the facts of this case

ESI also fails to show the relevance of the Nonparty Communications it seeks, merely speculating that they might “underly, support, or contradict the allegations in the Complaint.” Mot. at 6. But Rule 3.36 does not entitle ESI open-book discovery into Commissioner and OPP communications with nonparties on such a flimsy basis. *See Schering-Plough*, 2001 FTC LEXIS 199, *8; *Intuit*, 2022 FTC LEXIS 92, *15.

Further, ESI fails to explain why it is seeking OPP’s communications. OPP had no role in the investigation or in drafting the allegations in the Complaint, and will not prosecute or decide this case. Peay Decl. ¶ 8.

Bowers v. U.S. Parole Comm’n, 760 F.3d 1177, 1184-85 (11th Cir. 2015) (permitting limited discovery because court previously ruled “it was clear [decision-maker] had failed to act independently and without bias” in that case).

⁷ Staff of S. Comm. on Fin., 116th Cong., *Insulin: Examining the Factors Driving the Rising Cost of a Century Old Drug* (Jan. 14, 2021), <https://www.finance.senate.gov/imo/media/doc/Insulin%20Committee%20Print.pdf>.

⁸ *See* FTC-2022-0015, *Solicitation for Public Comments on the Business Practices of Pharmacy Benefit Managers and Their Impact on Independent Pharmacies and Consumers* (Feb. 24, 2022), <https://www.regulations.gov/docket/FTC-2022-0015/document>.

Finally, the Court should reject ESI's effort to obtain Nonparty Communications "relating to the 6(b) PBM Interim Report." Mot., Ex. A, Request 5. As part of a global resolution of a discovery dispute, Respondents "agree[d] not to seek Rule 3.36 discovery from the Commissioners" or "from any other Commission offices, including the Office of Policy Planning, of any materials produced by the recipients of the PBM 6(b) Orders in response to those Orders." Peay Decl. ¶ 9. ESI provides no reason why Nonparty Communications related to the 6(b) PBM Interim Report could be relevant, a particularly notable omission given ESI has agreed not to seek any related factual materials from that report.

II. The Discovery Sought is Not Reasonable in Scope or Stated with Particularity

A. ESI's requests are overbroad in both source and subject

ESI's expansive requests are overbroad in two key ways. First, ESI's subpoena, as drafted, demands production of materials from *every employee of the FTC*. See Mot., Ex. A at 4 (defining "FTC Personnel" broadly as "*staff of any Bureau or Office, including the Office of Policy Planning, Bureau of Competition, or the Bureau of Economics*" (emphasis added)). Document requests targeting the entire Commission "are not reasonable in scope." *1-800 Contacts*, 2016 FTC LEXIS 190, *16.⁹

Second, ESI's requests seek an unreasonably unbounded scope of material. The requests:

- Rely on broad connective phrases, such as "relating to," "related to," "concerning," or "regarding," Mot., Ex. A, Requests 1-16, (which is improper because "subpoena requests that seek documents 'concerning' or 'relating to' have been found to lack the 'reasonable particularity' required." *1-800 Contacts*, 2016 FTC LEXIS 190, *17));

⁹ ESI also seeks discovery from "any current Commissioners," Mot. at 2, which would include two who are recused from this case. ESI does not explain what relevant materials the recused Commissioners could possess or why it is seeking them. Given neither will be voting on this case, materials they may possess (if any) would not be relevant to ESI's prejudgment defense and are not discoverable for all the other reasons in this brief, and requests targeting them are not reasonable in scope or stated with sufficient particularity.

- Seek materials “relating to” enormously broad and sweeping topics, such as “competition among PBMs, Formularies, Rebates, Insulin Product or Other Referenced Drug Pricing, or out-of-pocket costs for Insulin Products or Other Referenced Products,” Mot., Ex. A, Requests 1-13, 15-16¹⁰;
- Demand materials “*outside of the investigative file ... relating to Insulin Products,*” ten other named drugs, “any Other Referenced Drug,” or “‘future products’ that support or contradict the claim that the PBM Respondents are ‘likely to cause substantial injury to consumers whose out-of-pocket costs are based on the list prices of drugs,’” *id.*, Request 14 (emphasis added); and
- Request “[a]ll Data, surveys, studies, or other factual information” (a notably expansive demand when ESI also defines “Data” as “any ... material that captures information”) and “[a]ll Communications” (further enlarged by ESI’s separate definition of “Communications” as “any transmission, exchange or transfer of information ... by any means),” *id.* at 2-3 & Requests 1-15.

Reading the above language together reveals the incredible breadth of ESI’s requests.

The universe of potentially responsive materials at the Commission is unfathomable. For example, ESI’s requests could sweep in materials from any open or closed nonpublic law enforcement investigation that touches on PBMs, drug rebates and pharmaceutical pricing even if it involves parties and drugs far afield from those in this case. Subpoenas that broad are manifestly improper. *See 1-800 Contacts*, 2016 FTC LEXIS 190, *16-17 (denying as overbroad Rule 3.36 request seeking materials “relating to competition in the contact lens industry”). The Commission cannot disclose any such nonpublic investigations and Respondents should not be permitted to take discovery on them here. *See Schering-Plough*, 2001 FTC LEXIS 199, *8 (“The Commission ... has enormous powers to compile highly confidential information from non-parties” that “expect, in providing this information ... [their] confidentiality will be maintained wherever possible.”).

¹⁰ ESI also defines “Insulin Product” broadly as any drug or device approved by the U.S. Food and Drug Administration to treat diabetes and “Other Referenced Drug” as any branded drug alleged in the Complaint and their generic alternatives. Mot., Ex. A at 4, 6.

Given these numerous deficiencies, ESI plainly fails to “meet its burden of demonstrating that its document requests [are] reasonable in scope and stated with sufficient particularity.”

I-800 Contacts, 2016 FTC LEXIS 233, *12.¹¹

B. ESI’s requests can be satisfied from other sources

ESI’s requests also seek materials that are publicly available. For example, ESI seeks “[a]ll Data, surveys, studies, or other factual information” relating to two Commission policy statements. Mot., Ex. A, Requests 1 & 3. Those publications are publicly available, entirely unredacted, and contain comprehensive citations to their supporting materials.¹² And ESI’s request for materials related to the Commission’s press release announcing this action, Mot., Ex. A, Request 6—a statement that links to the Complaint¹³—is satisfied by ESI’s receipt of the investigative file. No Rule 3.36 discovery is warranted.

CONCLUSION

For those reasons, ESI’s motion should be denied.

¹¹ For the same reasons, ESI’s motion also fails to establish the “good cause” required by Rule 3.31(c)(2) to obtain discovery outside the investigative file from other Commission offices “that investigated the matter,” like the Bureaus of Competition or Economics.

¹² *See*

https://www.ftc.gov/system/files/ftc_gov/pdf/Policy%20Statement%20of%20the%20Federal%20Trade%20Commission%20on%20Rebates%20and%20Fees%20in%20Exchange%20for%20Excluding%20Lower-Cost%20Drug%20Products.near%20final.pdf;
https://www.ftc.gov/system/files/ftc_gov/pdf/CLEANPBMStatement7182023%28OPPFinalRevisionsnoon%29.pdf.

¹³ *See* <https://www.ftc.gov/news-events/news/press-releases/2024/09/ftc-sues-prescription-drug-middlemen-artificially-inflating-insulin-drug-prices>.

Dated: January 13, 2025

Respectfully submitted,

/s/ Rebecca L. Egeland

Rebecca L. Egeland

Barrett J. Anderson

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Counsel Supporting the Complaint

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THE FEDERAL TRADE COMMISSION
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**Caremark Rx, LLC,
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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 OPPOSITIONS
TO RESPONDENTS' MOTIONS FOR DISCOVERY PURSUANT TO RULE 3.36**

1. I have personal knowledge of the facts set forth in this declaration.
2. My name is Lauren Peay. 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. I am a Deputy Assistant Director in the Health Care Division within the Bureau of Competition of the Federal Trade Commission. The Health Care Division was responsible

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for conducting the investigation and is involved in prosecuting the above-captioned action. I participated in the investigation and assisted in drafting the allegations in the Complaint in this action.

4. Rule 3.31(c) concerns the scope of discovery in Federal Trade Commission adjudicative proceedings. Rule 3.31(c)(2) provides that “Complaint counsel need only search for materials that were collected or reviewed in the course of the investigation of the matter or prosecution of the case and that are in the possession, custody or control of the Bureaus or Offices of the Commission that investigated the matter, including the Bureau of Economics.” These materials are referred to as the “investigative file” of the case.
5. The investigative file in the above-captioned action includes materials produced by the Respondents in this case and various third parties, as well as other documents and information collected and reviewed by Complaint Counsel during its investigation. The investigative file contains approximately 3.9 million documents. Complaint Counsel has produced the entire investigative file in this action to Respondents in rolling productions.
6. OptumRx Respondents, ESI Respondents, and Caremark and Zinc issued requests for production to Complaint Counsel on October 24, 25, and 29, 2024 respectively. Complaint Counsel served responses and objections to each of these requests for production on November 7, 8, and 13, 2024.
7. The parties began engaging in meet and confers on November 13, 2024 regarding disagreements over the appropriate scope of Respondents’ requests for production. One of the specific disagreements pertained to materials related to a market inquiry concerning pharmacy benefit managers (“PBMs”) conducted by the Office of Policy Planning under Section 6(b) of the FTC Act (“6(b) Materials”).

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8. The Office of Policy Planning is not part of the Health Care Division or the Bureau of Competition; rather, it is a separate Office within the Commission. The Office of Policy Planning had no role in the investigation and had no part in drafting the allegations in the Complaint. The Office of Policy Planning has not participated, and will not be involved, in prosecuting or deciding this action.
9. To resolve the discovery disputes over Respondents' requests for production issued to Complaint Counsel, the parties reached a global resolution on December 13, 2024, which is memorialized in email correspondence, a fair and accurate copy of which is attached as Exhibit A to this declaration. While Complaint Counsel did not and does not concede that materials beyond the investigative file are relevant to this action, it agreed to produce additional materials outside the investigative file as part of this global resolution (discussed below in Paragraph 10). In addition to production commitments by Complaint Counsel, this resolution provides in relevant part:
 - a. Complaint Counsel agrees that it will not rely on, or introduce into evidence, any materials produced or submitted to the FTC in response to the FTC's 6(b) PBM orders or CIDs issued in non-Insulin investigations unless those materials were also submitted in response to FTC File No. 2210114. To the extent Respondents or Third Parties submitted the same materials in any other FTC investigations or studies and FTC File No. 2210114, such materials have been produced to Respondents as part of this action's investigative file, FTC File No. 2210114.
 - b. Aside from potential privilege challenges and RFPs seeking documents based on newly discovered information, Respondents may not (1) challenge

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Complaint Counsel's discovery responses and productions in response to Respondents' first set of RFPs to Complaint Counsel or (2) issue subsequent requests that seek the production of any category of documents that is responsive to Respondents' first set of RFPs and thus part of this global resolution.

- c. Each Respondent Group agrees not to seek Rule 3.36 discovery from the Commissioners of any materials produced by the recipients of the PBM 6(b) Orders in response to those Orders, except for any materials actually reviewed or accessed by a Commissioner or their staff relevant to FTC File No. 2210114. Each Respondent Group also agrees not to seek Rule 3.36 discovery from any other Commission offices, including the Office of Policy Planning, of any materials produced by the recipients of the PBM 6(b) Orders in response to those Orders.

10. In response to Respondents' requests for production and pursuant to the global resolution, Complaint Counsel produced additional non-privileged materials, which included correspondence with certain government agencies and correspondence with third parties concerning settlement negotiations. These additional materials number over 1,000 documents, most of which Complaint Counsel already produced in rolling productions, with the most recent occurring on December 19, 2024. Complaint Counsel will soon make a final rolling production of additional materials numbering around 500 documents.
11. Complaint Counsel's productions to date include all the material Complaint Counsel relied on when drafting the complaint in this action.

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I declare under penalty of perjury that the foregoing is true and correct. Executed on
January 13, 2025, in Washington, DC.

/s/ Lauren Peay
Lauren Peay

Exhibit A

From: [Hansell, Sophia A.](#)
To: [Black, Armine](#)
Cc: [Dan Howley](#); [Rani Habash](#); [Limarzi, Kristen C.](#); [Albert, Bradley Scott](#); [Peay, Lauren](#); [McCluer, Kelly](#); [Hong, Cindy](#); [Triplett, Amanda](#); [EXT spyser@wc.com](#); [Reck, David](#); [Milici, Jennifer](#); [Perry, Michael J.](#); [AMufti@wc.com](#); [Rebecca E. Weinstein](#); [Parrott, Matthew C.](#); [Liversidge, Samuel](#)
Subject: RE: CC discovery disputes
Date: Friday, December 13, 2024 1:54:01 PM

Thank you. Wishing everyone a nice weekend.

Sophia A. Hansell
Partner

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SHansell@gibsondunn.com

GIBSON DUNN

Gibson, Dunn & Crutcher LLP
1700 M Street, N.W., Washington, D.C. 20036-4504

From: Black, Armine <ablack1@ftc.gov>
Sent: Friday, December 13, 2024 4:29 PM
To: Hansell, Sophia A. <SHansell@gibsondunn.com>
Cc: Dan Howley <Howley@RuleGarza.com>; Rani Habash <rani.habash@dechert.com>; Limarzi, Kristen C. <KLimarzi@gibsondunn.com>; Albert, Bradley Scott <BALBERT@ftc.gov>; Peay, Lauren <lpeay@ftc.gov>; McCluer, Kelly <kmcluer1@ftc.gov>; Hong, Cindy <chong1@ftc.gov>; Triplett, Amanda <atriplett@ftc.gov>; EXT spyser@wc.com <spyser@wc.com>; Reck, David <DReck@gibsondunn.com>; Milici, Jennifer <Jennifer.Milici@wilmerhale.com>; Perry, Michael J. <MPerry@gibsondunn.com>; AMufti@wc.com; Rebecca E. Weinstein <Weinstein@RuleGarza.com>; Parrott, Matthew C. <MParrott@gibsondunn.com>; Liversidge, Samuel <SLiversidge@gibsondunn.com>
Subject: RE: CC discovery disputes

Counsel,

We have an agreement. Have a nice weekend.

Armine
(they/them)

From: Hansell, Sophia A. <SHansell@gibsondunn.com>
Sent: Friday, December 13, 2024 2:21 PM
To: Black, Armine <ablack1@ftc.gov>
Cc: Dan Howley <Howley@RuleGarza.com>; Rani Habash <rani.habash@dechert.com>; Limarzi, Kristen C. <KLimarzi@gibsondunn.com>; Albert, Bradley Scott <BALBERT@ftc.gov>; Peay, Lauren <lpeay@ftc.gov>; McCluer, Kelly <kmcluer1@ftc.gov>; Hong, Cindy <chong1@ftc.gov>; Triplett, Amanda <atriplett@ftc.gov>; EXT spyser@wc.com <spyser@wc.com>; Reck, David <DReck@gibsondunn.com>; Milici, Jennifer <Jennifer.Milici@wilmerhale.com>; Perry, Michael J.

<MPerry@gibsondunn.com>; AMufti@wc.com; Rebecca E. Weinstein
<Weinstein@RuleGarza.com>; Parrott, Matthew C. <MParrott@gibsondunn.com>; Liversidge,
Samuel <SLiversidge@gibsondunn.com>
Subject: RE: CC discovery disputes

Counsel,

We are largely okay with your additional language, subject to a small tweak highlighted below in yellow. If your team accepts this tweak I believe we have an agreement. To ensure alignment, I have set out below what we understand to be the final terms of the agreement.

1. Complaint Counsel agrees that it will not rely on, or introduce into evidence, any materials produced or submitted to the FTC in response to the FTC's 6(b) PBM orders or CIDs issued in non-Insulin investigations unless those materials were also submitted in response to FTC File No. 2210114. To the extent Respondents or Third Parties submitted the same materials in any other FTC investigations or studies and FTC File No. 2210114, such materials have been produced to Respondents as part of this action's investigative file, FTC File No. 2210114.
2. Week of December 16 productions: Complaint Counsel agrees to produce (1) deprivileged communications with government entities except for state AGs, DOJ, and materials related to sealed action(s) and (2) a partial privilege log for documents and communications with government entities except for state AGs, DOJ, and materials related to sealed action(s).
3. By January 9, Complaint Counsel hopes to produce a full privilege log, along with any deprivileged communications with state AGs, DOJ, and materials related to sealed action(s).
4. Production timing for settlement materials: Complaint Counsel will produce these materials no later than the week of December 16.
5. Aside from potential privilege challenges and RFPs seeking documents based on newly discovered information, Respondents may not (1) challenge Complaint Counsel's discovery responses and productions in response to Respondents' first set of RFPs to Complaint Counsel or (2) issue subsequent requests that seek the production of any category of documents that is responsive to Respondents' first set of RFPs and thus part of this global resolution.
6. Each Respondent Group agrees not to seek Rule 3.36 discovery from the Commissioners of any materials produced by the recipients of the PBM 6(b) Orders in response to those Orders, except for any materials actually reviewed or accessed by a Commissioner or their staff **relevant to in connect with** FTC File No. 2210114. Each Respondent Group also agrees not to seek Rule 3.36 discovery from any other Commission offices, including the Office of Policy Planning, of any materials produced by the recipients of the PBM 6(b) Orders in response to those Orders.

Thanks,
Sophie

Sophia A. Hansell

Partner

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SHansell@gibsondunn.com

GIBSON DUNN

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1700 M Street, N.W., Washington, D.C. 20036-4504

From: Black, Armine <ablack1@ftc.gov>
Sent: Thursday, December 12, 2024 5:29 PM
To: Hansell, Sophia A. <SHansell@gibsondunn.com>
Cc: Dan Howley <Howley@RuleGarza.com>; Rani Habash <rani.habash@dechert.com>; Limarzi, Kristen C. <KLimarzi@gibsondunn.com>; Albert, Bradley Scott <BALBERT@ftc.gov>; Peay, Lauren <lpeay@ftc.gov>; McCluer, Kelly <kmccluer1@ftc.gov>; Hong, Cindy <chong1@ftc.gov>; Triplett, Amanda <atriplett@ftc.gov>; EXT spyser@wc.com <spyser@wc.com>; Reck, David <DReck@gibsondunn.com>; Milici, Jennifer <Jennifer.Milici@wilmerhale.com>; Perry, Michael J. <MPerry@gibsondunn.com>; AMufti@wc.com; Rebecca E. Weinstein <Weinstein@RuleGarza.com>; Parrott, Matthew C. <MParrott@gibsondunn.com>
Subject: RE: CC discovery disputes

Sophie,

We are working to produce the materials as soon as possible. At this point, we do not expect that they will be ready on December 16 and don't want to make commitments we can't meet.

Armine
(they/them)

From: Hansell, Sophia A. <SHansell@gibsondunn.com>
Sent: Thursday, December 12, 2024 5:18 PM
To: Black, Armine <ablack1@ftc.gov>
Cc: Dan Howley <Howley@RuleGarza.com>; Rani Habash <rani.habash@dechert.com>; Limarzi, Kristen C. <KLimarzi@gibsondunn.com>; Albert, Bradley Scott <BALBERT@ftc.gov>; Peay, Lauren <lpeay@ftc.gov>; McCluer, Kelly <kmccluer1@ftc.gov>; Hong, Cindy <chong1@ftc.gov>; Triplett, Amanda <atriplett@ftc.gov>; EXT spyser@wc.com <spyser@wc.com>; Reck, David <DReck@gibsondunn.com>; Milici, Jennifer <Jennifer.Milici@wilmerhale.com>; Perry, Michael J. <MPerry@gibsondunn.com>; AMufti@wc.com; Rebecca E. Weinstein <Weinstein@RuleGarza.com>; Parrott, Matthew C. <MParrott@gibsondunn.com>
Subject: RE: CC discovery disputes

Thanks, Armine.

You'll recall that we had asked if you would agree to make a good faith effort to produce the materials on December 16, or as soon thereafter as your IT resources permit. Do you have a response for us on that?

Sophia A. Hansell

Partner

T: +1 202.887.3625 | M: +1 412.889.1927

SHansell@gibsondunn.com

GIBSON DUNN

Gibson, Dunn & Crutcher LLP

1700 M Street, N.W., Washington, D.C. 20036-4504

From: Black, Armine <ablack1@ftc.gov>

Sent: Thursday, December 12, 2024 5:11 PM

To: Hansell, Sophia A. <SHansell@gibsondunn.com>

Cc: Dan Howley <Howley@RuleGarza.com>; Rani Habash <rani.habash@dechert.com>; Limarzi, Kristen C. <KLimarzi@gibsondunn.com>; Albert, Bradley Scott <BALBERT@ftc.gov>; Peay, Lauren <lpeay@ftc.gov>; McCluer, Kelly <kmcccluer1@ftc.gov>; Hong, Cindy <chong1@ftc.gov>; Triplett, Amanda <atriplett@ftc.gov>; EXT spyser@wc.com <spyser@wc.com>; Reck, David <DReck@gibsondunn.com>; Milici, Jennifer <Jennifer.Milici@wilmerhale.com>; Perry, Michael J. <MJPerry@gibsondunn.com>; AMufti@wc.com; Rebecca E. Weinstein <Weinstein@RuleGarza.com>; Parrott, Matthew C. <MParrott@gibsondunn.com>

Subject: RE: CC discovery disputes

Counsel,

We are ok with your addition to item 5.

Regarding 3.36 subpoenas, thank you for your proposed language. However, we would like an assurance that Respondent will not seek Rule 3.36 subpoenas to other parts of the agency, not just the offices of individual Commissioners. We would also object to any overbroad 3.36 subpoenas to Commissioners seeking 6(b) materials that bear no relevance to the insulin investigation or the litigation at hand. We propose some modifications to your language to capture both points: "Each Respondent Group agrees not to seek Rule 3.36 discovery from the Commissioners of any materials produced by the recipients of the PBM 6(b) Orders in response to those Orders, except for any materials actually reviewed or accessed by a Commissioner or their staff **relevant to** in connect with [FTC File No. 2210114](#). Each Respondent Group also agrees not to seek Rule 3.36 discovery from any other Commission offices, including the Office of Policy Planning, of any materials produced by the recipients of the PBM 6(b) Orders in response to those Orders." Please let us know if all Respondents are willing to make this commitment.

Assuming we reach an agreement, we are on track to produce settlement materials and other materials listed in my December 10 email next week.

Armine

(they/them)

From: Hansell, Sophia A. <SHansell@gibsondunn.com>

Sent: Thursday, December 12, 2024 9:51 AM

To: Black, Armine <ablack1@ftc.gov>

Cc: Dan Howley <Howley@RuleGarza.com>; Rani Habash <rani.habash@dechert.com>; Limarzi, Kristen C. <KLimarzi@gibsondunn.com>; Albert, Bradley Scott <BALBERT@ftc.gov>; Peay, Lauren <lpeay@ftc.gov>; McCluer, Kelly <kmccluer1@ftc.gov>; Hong, Cindy <chong1@ftc.gov>; Triplett, Amanda <atriplett@ftc.gov>; EXT spyser@wc.com <spyser@wc.com>; Reck, David <DReck@gibsondunn.com>; Milici, Jennifer <Jennifer.Milici@wilmerhale.com>; Perry, Michael J. <MJPerry@gibsondunn.com>; AMufti@wc.com; Rebecca E. Weinstein <Weinstein@RuleGarza.com>; Parrott, Matthew C. <MParrott@gibsondunn.com>

Subject: RE: CC discovery disputes

Counsel,

Thanks for the meet and confer and the follow up call yesterday. Per your request on our follow up call, each of the copied Respondent Groups agrees not to seek Rule 3.36 discovery from the Commissioners of any materials produced by the recipients of the PBM 6(b) Orders in response to those Orders, except for any materials actually reviewed or accessed by a Commissioner or their staff.

We are also confirming that we agree to the language you added to item 5 with a modest caveat: Aside from potential privilege challenges and RFPs seeking documents based on newly discovered information, Respondents may not (1) challenge Complaint Counsel's discovery responses and productions in response to Respondents' first set of RFPs to Complaint Counsel or (2) issue subsequent requests that seek the production of any category of documents that is responsive to Respondents' first set of RFPs and thus part of this global resolution.

Can you please provide your positions on the open items from yesterday's meet and confer? To the extent the above proposals are not acceptable to you please provide times when you are available to meet and confer.

Thank you,
Sophie

Sophia A. Hansell

Partner

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SHansell@gibsondunn.com

GIBSON DUNN

Gibson, Dunn & Crutcher LLP

1700 M Street, N.W., Washington, D.C. 20036-4504

From: Black, Armine <ablack1@ftc.gov>

Sent: Tuesday, December 10, 2024 5:31 PM

To: Hansell, Sophia A. <SHansell@gibsondunn.com>

Cc: Dan Howley <Howley@RuleGarza.com>; Rani Habash <rani.habash@dechert.com>; Limarzi, Kristen C. <KLimarzi@gibsondunn.com>; Albert, Bradley Scott <BALBERT@ftc.gov>; Peay, Lauren <lpeay@ftc.gov>; McCluer, Kelly <kmcccluer1@ftc.gov>; Hong, Cindy <chong1@ftc.gov>; Triplett, Amanda <atriplett@ftc.gov>; EXT spyser@wc.com <spyser@wc.com>; Reck, David <DReck@gibsondunn.com>; Milici, Jennifer <Jennifer.Milici@wilmerhale.com>; Perry, Michael J. <MJPerry@gibsondunn.com>; AMufti@wc.com; Rebecca E. Weinstein <Weinstein@RuleGarza.com>; Parrott, Matthew C. <MParrott@gibsondunn.com>

Subject: RE: CC discovery disputes

Counsel,

Below are Complaint Counsel's revisions. We accepted many of your changes but not all. In particular, we believe your addition to the first paragraph defeated the purpose of reciprocity, so we reverted to our original language. We also spelled out some of the language in paragraphs 1 and 5. For timing, we made edits that reflect our best, good faith estimates to-date. We are available tomorrow at 10-11 am if you would like to discuss.

1. We propose the following language to capture Respondents' request as well as Complaint Counsel's desire for reciprocity: "Complaint Counsel agrees that it will not rely on, or introduce into evidence, any materials produced or submitted to the FTC in response to the FTC's 6(b) PBM orders or CIDs issued in non-Insulin investigations unless those materials were also submitted in response to FTC File No. 2210114. To the extent Respondents or Third Parties submitted the same materials in any other FTC investigation or study and FTC File No. 2210114, such materials have been produced to Respondents as part of this action's investigative file, FTC File No. 2210114. Respondents agree that they will not rely on, or introduce into evidence, any documents responsive to Complaint Counsel's discovery requests that were not produced to Complaint Counsel before the close of fact discovery."
2. Week of December 16 productions: we can agree to produce (1) deprivileged communications with government entities except for state AGs, DOJ, and materials related to sealed action(s) and (2) a partial privilege log for documents and communications with government entities except for state AGs, DOJ, and materials related to sealed action(s).
3. By January 9: we hope to produce a full privilege log, along with any deprivileged communications with state AGs, DOJ, and materials related to sealed action(s).
4. Production timing for settlement materials: Complaint Counsel will produce these materials no later than the week of December 16.
5. For avoidance of doubt, this "global resolution of outstanding discovery requests served on Complaint Counsel" does not limit Respondents' rights to seek additional discovery from Complaint Counsel or to challenge any defects in subsequent discovery responses, consistent with the Part III Rules. In particular, Respondents reserve the right to seek additional information about, as well as the production of, any material identified on Complaint Counsel's privilege logs. Aside from potential privilege challenges, Respondents may not (1) challenge Complaint Counsel's discovery responses and productions in response to Respondents' first set of RFPs to Complaint Counsel or (2) issue subsequent requests that

seek the production of any category of documents that is responsive to Respondents' first set of RFPs, and thus part of this global resolution.

Armine
(they/them)

From: Black, Armine

Sent: Tuesday, December 10, 2024 12:16 PM

To: Hansell, Sophia A. <SHansell@gibsondunn.com>

Cc: Dan Howley <Howley@RuleGarza.com>; Rani Habash <rani.habash@dechert.com>; Limarzi, Kristen C. <KLimarzi@gibsondunn.com>; Albert, Bradley Scott <BALBERT@ftc.gov>; Peay, Lauren <lpeay@ftc.gov>; McCluer, Kelly <kmcccluer1@ftc.gov>; Hong, Cindy <chong1@ftc.gov>; Triplett, Amanda <atriplett@ftc.gov>; EXT spyser@wc.com <spyser@wc.com>; Reck, David <DReck@gibsondunn.com>; Milici, Jennifer <Jennifer.Milici@wilmerhale.com>; Perry, Michael J. <MJPerry@gibsondunn.com>; AMufti@wc.com; Rebecca E. Weinstein <Weinstein@RuleGarza.com>; Parrott, Matthew C. <MParrott@gibsondunn.com>

Subject: RE: CC discovery disputes

Thank you – we will email our reactions to Respondents' revisions later today. If we need to meet and confer, we are available tomorrow at 10-11 am in case you want to pencil it in.

Armine
(they/them)

From: Hansell, Sophia A. <SHansell@gibsondunn.com>

Sent: Monday, December 9, 2024 4:49 PM

To: Black, Armine <ablack1@ftc.gov>; Peay, Lauren <lpeay@ftc.gov>

Cc: Dan Howley <Howley@RuleGarza.com>; Rani Habash <rani.habash@dechert.com>; Limarzi, Kristen C. <KLimarzi@gibsondunn.com>; Albert, Bradley Scott <BALBERT@ftc.gov>; McCluer, Kelly <kmcccluer1@ftc.gov>; Hong, Cindy <chong1@ftc.gov>; Triplett, Amanda <atriplett@ftc.gov>; EXT spyser@wc.com <spyser@wc.com>; Reck, David <DReck@gibsondunn.com>; Milici, Jennifer <Jennifer.Milici@wilmerhale.com>; Perry, Michael J. <MJPerry@gibsondunn.com>; AMufti@wc.com; Rebecca E. Weinstein <Weinstein@RuleGarza.com>; Parrott, Matthew C. <MParrott@gibsondunn.com>

Subject: RE: CC discovery disputes

Counsel,

I believe we are close to reaching an agreement. Collective revisions from the three Respondent Groups are marked in red below. If any of this merits further discussion please propose times when you are available to meet and confer tomorrow.

Thank you,
Sophie

1. We propose the following language to capture Respondents' request as well as Complaint Counsel's desire for reciprocity: "Complaint Counsel agrees that it will not rely on, or introduce into evidence, **any materials produced or submitted to the FTC in response to the FTC's 6(b) PBM orders or CIDs issued in non-Insulin investigations, other than materials produced by Respondents in this action, and Complaint Counsel need not produce such materials** as part of the insulin investigation file. **Except for documents discovered after the close of fact discovery**, Respondents agree that they will not rely on, or introduce into evidence, any documents responsive to Complaint Counsel's discovery requests that were not produced to Complaint Counsel before the close of fact discovery. **Respondents commit to prompt production to Complaint Counsel of any such documents.**"
2. Week of December 16 productions: we can agree to produce (1) deprivileged communications with government entities except for state AGs, DOJ, and materials related to sealed action(s) and (2) a partial privilege log for documents and communications with government entities except for state AGs, DOJ, and materials related to sealed action(s).
3. ~~Early~~ **By January 9**: we expect to produce a full privilege log, along with any deprivileged communications with state AGs, DOJ, and materials related to sealed action(s).
4. Production timing for settlement materials: **Complaint Counsel will produce these materials no later than December 11, 2024** ~~we expect to have a timing update early next week.~~
5. For avoidance of doubt, this "global resolution of outstanding discovery requests served on Complaint Counsel" does not limit Respondents' rights to seek additional discovery from Complaint Counsel or to challenge any defects in subsequent discovery responses, consistent with the Part III Rules. In particular, Respondents reserve the right to seek additional information about, as well as the production of, any material identified on Complaint Counsel's privilege logs.

Sophia A. Hansell

Partner

T: +1 202.887.3625 | M: +1 412.889.1927

SHansell@gibsondunn.com**GIBSON DUNN**

Gibson, Dunn & Crutcher LLP

1700 M Street, N.W., Washington, D.C. 20036-4504

From: Black, Armine <ablack1@ftc.gov>**Sent:** Friday, December 6, 2024 5:31 PM**To:** Hansell, Sophia A. <SHansell@gibsondunn.com>; Peay, Lauren <lpeay@ftc.gov>**Cc:** Dan Howley <Howley@RuleGarza.com>; Rani Habash <rani.habash@dechert.com>; Limarzi, Kristen C. <KLimarzi@gibsondunn.com>; Albert, Bradley Scott <BALBERT@ftc.gov>; McCluer, Kelly

<kmcluer1@ftc.gov>; Hong, Cindy <chong1@ftc.gov>; Triplett, Amanda <atriplett@ftc.gov>; EXT spyser@wc.com <spyser@wc.com>; Reck, David <DReck@gibsondunn.com>; Milici, Jennifer <Jennifer.Milici@wilmerhale.com>; Perry, Michael J. <MJPerry@gibsondunn.com>; AMufti@wc.com; Rebecca E. Weinstein <Weinstein@RuleGarza.com>

Subject: RE: CC discovery disputes

Counsel,

We disagree with the characterizations in your email. For example, yesterday, we provided you our timing estimates for the production of the non-privileged federal and state agency materials and our privilege log. We also considered further your request to prioritize government communications not involving state AGs or the DOJ. Below is Complaint Counsel's position in an effort to reach a global resolution of outstanding discovery requests served on Complaint Counsel.

1. We propose the following language to capture Respondents' request as well as Complaint Counsel's desire for reciprocity: "Complaint Counsel agrees that it will not rely on, or introduce into evidence, any materials produced by third parties to the FTC during this action's pre-complaint phase, outside of what Complaint Counsel has or will produce to Respondents as part of the insulin investigation file. Respondents agree that they will not rely on, or introduce into evidence, any documents responsive to Complaint Counsel's discovery requests that were not produced to Complaint Counsel before the close of fact discovery."
2. Week of December 16 productions: we can agree to produce (1) deprivileged communications with government entities except for state AGs, DOJ, and materials related to sealed action(s) and (2) a partial privilege log for documents and communications with government entities except for state AGs, DOJ, and materials related to sealed action(s).
3. Early January: we expect to produce a full privilege log, along with any deprivileged communications with state AGs, DOJ, and materials related to sealed action(s).
4. Production timing for settlement materials: we expect to have a timing update early next week.
5. Manufacturer advocacy: we plan to produce them today, along with some other materials, following the standard production protocol. You will receive an FTP link separately.

Armine
(they/them)

From: Hansell, Sophia A. <SHansell@gibsondunn.com>

Sent: Friday, December 6, 2024 11:44 AM

To: Black, Armine <ablack1@ftc.gov>; Peay, Lauren <lpeay@ftc.gov>

Cc: Dan Howley <Howley@RuleGarza.com>; Rani Habash <rani.habash@dechert.com>; Limarzi, Kristen C. <KLimarzi@gibsondunn.com>; Albert, Bradley Scott <BALBERT@ftc.gov>; McCluer, Kelly <kmcluer1@ftc.gov>; Hong, Cindy <chong1@ftc.gov>; Triplett, Amanda <atriplett@ftc.gov>; EXT spyser@wc.com <spyser@wc.com>; Reck, David <DReck@gibsondunn.com>; Milici, Jennifer <Jennifer.Milici@wilmerhale.com>; Perry, Michael J. <MJPerry@gibsondunn.com>;

AMufti@wc.com; Rebecca E. Weinstein <Weinstein@RuleGarza.com>

Subject: CC discovery disputes

Armine, Brad, and team:

We are eager to bring our negotiation of Complaint Counsel's potential production of the settlement documents you are withholding on relevance grounds to a close. As you know, we have been conferring about these documents for almost a month, since at least November 13 (see Optum Respondents' letters of November 15 and November 19).

In recap: we sent you our written positions about a potential "global resolution" of all three Respondent Group's concerns with Complaint Counsel's production of the investigative file on December 4, and conferred about those positions on December 5. At our meet and confer, you were not willing to provide specific dates by which you would produce the settlement documents, the non-privileged federal and state agency materials, or your privilege log. You were also unwilling to provide us any information about the approximate volume of documents that are subject to your privilege review to inform our negotiation of a reasonable schedule. You rejected our proposed compromise that would expedite production of the CMS, DOL, and Minnesota DOI privilege log while affording Complaint Counsel a significantly longer timeline to log the state AG and DOJ documents (i.e., those state and federal agencies that may have some measure of antitrust enforcement jurisdiction and, therefore, may involve a more nuanced privilege assessment).

To move things forward, consistent with the requests we made on yesterday's call, we ask that you please provide in writing by EOD a specific offer that makes clear the conditions upon which Complaint Counsel is willing to produce the settlement documents, including a clear production schedule to which you are willing to commit. We require this information to make a decision about whether we can reach a negotiated resolution or whether we are at impasse. Given that these negotiations have been ongoing for more than three weeks, we expect you have had sufficient time to carefully consider these issues and are able to get back to us today without further delay.

Relatedly, we are asking again that you send a courtesy copy of the two inadvertently omitted Lilly advocacy documents today (or, if it is your preference, presumably you can bates stamp these two documents and produce copies today via email).

Thank you,
Sophie

Sophia A. Hansell
Partner

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GIBSON DUNN

Gibson, Dunn & Crutcher LLP
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CERTIFICATE OF SERVICE

I hereby certify that on January 13, 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:

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Federal Trade Commission
600 Pennsylvania Avenue, NW
Room H-113
Washington, DC 20580
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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:

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regeland@ftc.gov

Counsel Supporting the Complaint