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

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

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

BACKGROUND

This case is about protecting Americans struggling to afford life-saving medications like insulin. Respondents[1] and ESI 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 and ESI 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.[2] But that vast trove of information is not enough for Respondents, who now ask this Court to approve a fishing expedition into the files of three individual Commissioners, including (1) "[a]ll Communications" with "any non-parties to this action" including a long list of trade groups, nonprofit associations, media outlets, White House and congressional staffers, as well as "any other federal agency" or "official," and even some private individuals, "relating to" or "concerning" a broad list of topics ("Nonparty Communications"); (2) all documents "concerning" Commissioner Bedoya's attendance at an industry forum ("Forum Documents"); (3) "[a]ll studies, reports, assessments, statements, factual bases, and other evidence" relied upon in a pre-Complaint, July 20, 2023 press release that announced the FTC's withdrawal of prior PBM advocacy statements and studies ("Press Release"); and (4) all documents "concerning any

[1] As used herein, "Respondents" refers to OptumRx, Inc., OptumRx Holdings, LLC, Emisar Pharma Services LLC, Caremark Rx LLC, and Zinc Health Services, LLC.

[2] 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.

Commissioner's potential recusal." *See* Respondents' Motion for Discovery Pursuant to Rule 3.36 ("Mot."), Ex. A.[3] The Rules limit such discovery to rare and narrow circumstances, and only after a party has satisfied a special showing of need. Respondents' motion fails to satisfy that elevated standard and should be denied.

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 individual Commissioners—only where "(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 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'" because they "'are unlikely to possess relevant, discoverable information that

[3] Respondents also seek "[d]ocuments sufficient to show" the three Commissioners' "document retention policies and practices," Mot., Ex. A, Request 8, but Respondents' motion does not discuss document retention policies or explain how they could be relevant to Respondents' allegations of prejudgment and bias. Accordingly, that request should be denied. Citations to Exhibit A of the Motion incorporate Exhibits B and C of the Motion, which are substantially identical.

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 statements and press releases are not relevant to the facts of this case

Citing to public statements, Respondents' motion seeks documents that would purportedly reveal Chair Khan's, Commissioner Bedoya's, and Commissioner Slaughter's "opinions" and "views" about PBMs formed "[l]ong before the FTC's investigation was complete and this Complaint was filed." Mot. at 1-2. Respondents' focus on pre-Complaint public statements, however, ultimately reduces to an "attempt to obtain discovery into the Commission's decision making in issuing the Complaint," which is "not discoverable" absent "extraordinary circumstances." *Intuit,* 2022 FTC LEXIS 92, *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)). Complaint Counsel has already provided the documents considered and reviewed in the investigation, which underlie the Complaint; that is what's relevant to the facts of this matter and all that the Rules require. Respondents have not demonstrated the "extraordinary circumstances" necessary to seek more.

B. There is no evidence of prejudgment

Respondents frame the focus of their Requests as information related to their affirmative defenses based on Commissioner prejudgment and bias.[4] 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. Respondents do not identify any affirmative comments by any Commissioner on the merits of this case.[5] Rather, the Commissioner statements Respondents cite all predate the Complaint and are about the broad public interest in investigating the PBM industry arising from, among other sources, the Senate Finance Committee's report on insulin pricing[6] and public comments on PBM business practices.[7] 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" showing the Commissioners' openness to viewing the facts uncovered in an investigation.[8]

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[4] Respondents' have separately filed motions for disqualification, which are pending before the Commissioners.

[5] An imaginary playing card with a respondent's names on it and no more, flashed on screen by a television network during an interview with Chair Khan, is hardly evidence of prejudgment.

[6] Staff of S. Comm. on Fin., 116th Cong., *Insulin: Examining the Factors Driving the Rising Cost of a Century Old Drug* (Jan. 14, 2021).

[7] *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).

[8] Respondents sometimes excise such qualifying language, *see* Statement of Commissioner Slaughter (June 7, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/SlaughterStatement-PBM6%28b%29Study6.7.2022_FINAL_.pdf (discussing "apparent" distortions in the insulin market) or trim some statements of context to make it appear that the claim is the Commissioner's own, when the Commissioner was merely referencing views expressed by others. *E.g.*, Remarks by Chair Khan (March 4, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/2024.03.04-chair-khan-remarks-at-the-white-house-roundtable-on-pbms.pdf (discussing "stories we hear from patients and healthcare workers"); Capital Forum, Transcript of Interview with Commissioner Bedoya (Jun. 15, 2023), (Continued…)

2023 PBM Press Release: Respondents seek documents relied upon in a July 2023 Commission press release "warn[ing] against reliance on the Commission's prior conclusions" regarding PBMs "particularly given the FTC's ongoing study of the PBM industry to update its understanding of the industry and its practices."[9] But as this court recognized in *Intuit*, "guidance publications do not constitute binding law" and are not relevant sources of discovery, even if the Commission may have relied upon them in issuing the complaint. 2022 FTC LEXIS 92, *8-9. Here, far from showing prejudgment or bias, the Press Release simply states that prior advocacy "*may* no longer accurately reflect the current PBM industry" (emphasis added), a point also reflected in Respondents' own filings commenting on the "rapidly changing health care industry."[10]

Nonparty Communications and Forum Documents: Respondents fail to provide any evidentiary bases for what relevant information they believe is contained in the Nonparty Communications and Forum Documents, how or why any of the named parties (and all nonparties) are relevant, or how Commissioner Bedoya's attendance at an industry forum is relevant to prejudgment or bias. Accordingly, these requests should be denied. *Intuit*, 2022 FTC LEXIS 92, *15 (finding that "unsupported and vague allegation[s] do[] not evince prejudgment").

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https://thecapitolforum.com/resources/transcript-of-interview-with-ftc-commissioner-alvaro-bedoya/ (discussing "allegations" and "stories you hear about pharma").

[9] https://www.ftc.gov/news-events/news/press-releases/2023/07/ftc-votes-issue-statement-withdrawing-prior-pharmacy-benefit-manager-advocacy.

[10] *E.g.*, CVS Health Corporation, Form 10-K for the fiscal year ended Dec. 31, 2022 (Feb. 8, 2023), 39-40 (describing the "highly competitive and evolving business environment" of its PBM business and referring to "the rapidly changing health care industry").

C. Selective enforcement is outside the scope of discovery

Respondents' selective enforcement affirmative defense does not justify their discovery requests on the Commissioners. Respondents' selective enforcement defense is effectively an inquiry into the Commission's decision making in issuing a complaint. But "precedent holds that the Commission's decision making in issuing a complaint is outside the scope of discovery in the ensuing administrative litigation." *In re LabMD, Inc.*, 2014 FTC LEXIS 35, *9 n.3 (Feb. 21, 2014); *see also id.* *9 (collecting cases denying as irrelevant discovery into defenses such as selective enforcement). The exception to this general rule banning discovery is extraordinarily limited: "Respondents must show some evidence of bad faith," and "[s]peculation is not evidence that the Commission acted in bad faith." *In re Synchronal Corp.*, 1992 FTC LEXIS 61, *3-4 (Mar. 5, 1992) (citations omitted).

Respondents cannot claim "selective prosecution" here. The FTC did not single out one of the big PBMs. Instead, the FTC brought this enforcement action against each of the three largest PBMs in the country. Nor is the FTC required to sue every PBM or every market participant—like drug manufacturers or health plans. "That other competitors engaged in the same practices alleged in the Complaint is not a defense." *Synchronal Corp.*, 1992 FTC LEXIS 61, *4. As the Supreme Court has recognized, the decision whether to proceed against one firm before others "depends on a variety of factors peculiarly within the expert understanding of the Commission… [T]he Commission alone is empowered to develop that enforcement policy best calculated to achieve the ends contemplated by Congress." *Moog Indus., Inc. v. FTC*, 355 U.S. 411, 413 (1958).

U.S. v. McGraw-Hill Cos., Inc., 2014 U.S. Dist. LEXIS 59408 (C.D. Cal. Apr. 15, 2014), cited by Respondents, is entirely differently situated. In that case, unlike here, the government had sued only one of the three major rating agencies. *Id.* *32. Moreover, in *McGraw-Hill*, the

defendant presented evidence that the government had retaliated for exercising a constitutionally protected right: the Secretary of the Treasury had allegedly threatened defendant's CEO that its "conduct would be looked at very carefully" after downgrading the government's credit rating. *Id.* *34-35. Respondents here do not (and cannot) allege any similar retaliation by the Commission for Respondents' exercise of a constitutionally protected right.

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

A. Respondents' requests are overbroad in both source and subject

Respondents' expansive requests are overbroad in three key ways.

First, many requests seek "All Communications," which Respondents define as "any exchange, transfer, or dissemination of information, regardless of the means by which it is accomplished." Mot., Ex. A., Definition G. Contrary to Respondents' arguments, Mot. at 8, this far-reaching definition makes no attempt to "narrowly tailor[]" Respondents' requests to the types of communications Respondents claim are relevant, and its "regardless" clause disclaims any attempt to do so. Thus, the Commissioners would potentially have to log every podcast, television program, bus stop advertisement, or any other "exchange, transfer, or dissemination of information" they saw, said, or heard. Furthermore, Respondents' requests for "All Communications" extends to every conceivable nonparty to this action—an unimaginably broad universe.

Second, Respondents' requests rely on broad phrases, such as "relating to," "regarding," or "concerning." "[S]ubpoena requests that seek documents 'concerning' or 'relating to' have been found to lack the 'reasonable particularity' required." *In re 1-800 Contacts, Inc.*, 2016 FTC LEXIS 190, *17 (Oct. 28, 2016) (citation omitted).

Third, Respondents seek materials "relating to" enormously broad and sweeping topics, including "the Investigation, the allegations in the Complaint, drug rebate practices of PBMs

and/or drug manufacturers, or insulin drug pricing." These requests could sweep in materials from any open or closed nonpublic law enforcement investigation that touches drug rebates and pharmaceutical pricing even if it involves parties and drugs far afield from those in this case. The Commission cannot disclose any such nonpublic investigations, and Respondents should not be permitted to take discovery on them here. *See In re Schering-Plough*, 2001 FTC LEXIS 199, *8 (Sept. 7, 2001) ("The Commission … has enormous powers to compile highly confidential information from nonparties" that "expect, in providing this information … [their] confidentiality will be maintained wherever possible.").

Given these numerous deficiencies, Respondents plainly fails to "meet its burden of demonstrating that its document requests [a]re reasonable in scope and stated with sufficient particularity." *1-800 Contacts*, 2016 FTC LEXIS 233, *12.

B. Respondents improperly seek privileged materials

Some of Respondents' requests seek material that is likely entirely privileged, and Respondents lack the strong justification necessary to impose such a burden on the Commissioners. *See Intuit*, 2022 FTC LEXIS 92, *6 ("In adopting Rule 3.36, "[t]he Commission believed that the lack of useful additional information likely to be available from these offices suggested that the burden (and delay) of searches for responsive records and the creation of privilege logs should not be imposed without strong justification."). For instance, Respondents' request for the documents about why any Commissioner—going back to 2017—may or may not have ever been recused from any matter (besides being breathtakingly overbroad and irrelevant to the merits of this case) appears targeted at privileged, internal agency deliberations protected by, at least, attorney-client and deliberative process privileges. Similarly, the request for "All Communications" with "any White House advisor, staff, employee" likely delves into materials

protected by executive privilege, and Respondents have failed to show a strong justification as to why they should be entitled to these materials.

C. Respondents' requests can be satisfied from other sources

Respondents also seek materials that are publicly available. For example, Respondents request "All studies, reports, assessments, statements, factual bases, and other evidence upon which You relied to conclude that 'prior PBM-related advocacy statements and reports' 'no longer reflect current market realities' as noted in the [Press Release]." The documents responsive to this request can be identified by looking at the footnotes of the corresponding statement, which are unredacted and cite to public sources.

CONCLUSION

For those reasons, Respondents' motion should be denied.

Dated: January 13, 2025

Respectfully submitted,

/s/ Rebecca L. Egeland

Rebecca L. Egeland
Barrett J. Anderson
Brian Morganelli

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Counsel Supporting the Complaint

PUBLIC

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In the Matter of **Caremark Rx, LLC,** **Zinc Health Services, LLC,** **Express Scripts, Inc.,** **Evernorth Health, Inc.,** **Medco Health Services, Inc.,** **Ascent Health Services LLC,** **OptumRx, Inc.,** **OptumRx Holdings, LLC, and** **Emisar Pharma Services LLC,** **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

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").

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

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.

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 <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>; 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 <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>; 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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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. <MJPerry@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. <MJPerry@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?

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Partner

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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 <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,

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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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 <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,

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 <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

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 <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,

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.

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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

<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>
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 <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>
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' 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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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:

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

Secretary of the Commission
Clerk of the Court

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

Administrative Law Judge

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

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Counsel Supporting the Complaint