PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Andrew N. Ferguson, Chair**
Rebecca Kelly Slaughter
Lina M. Khan
Alvaro Bedoya
Melissa Holyoak

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**

RESPONDENTS' OPPOSITION TO COMPLAINT COUNSEL'S
APPLICATION FOR REVIEW OF WITNESS CAPS IN THE SCHEDULING ORDER

PRELIMINARY STATEMENT

Complaint Counsel's application is a naked violation of the Commission's Rules and the ALJ's January 16, 2025 Order. The prerequisites for filing an application to the Commission for interlocutory review of an ALJ ruling and Rule 3.23(b) are unambiguous. The Commission, Complaint Counsel, and FTC ALJs have all correctly and consistently read the clear text of Rule 3.23(b) to preclude interlocutory Commission review of an ALJ's ruling where, as here, the ALJ timely denied Complaint Counsel's request to determine that interlocutory review is appropriate. Undeterred, Complaint Counsel now asks the Commission to flout the text of the Rule and the Commission's own precedent.

Months after the ALJ entered the October 23, 2024 Scheduling Order in this matter, Complaint Counsel requested a determination that two provisions of the Scheduling Order merited immediate appeal under Rule 3.23(b) ("Request"). On January 16, 2025, the ALJ timely denied the Request, and made clear that in light of his denial, "interlocutory appeal is not permitted." Order 7 n.2. Complaint Counsel promptly disregarded the ALJ's Order and filed the instant application for interlocutory review by the Commission ("Application"). Complaint Counsel's Application, however, is foreclosed not only by the ALJ's express Order, but also by the text of Rule 3.23(b) and by Commission precedent. The underlying substance of Complaint Counsel's Application fares no better. The ALJ correctly denied Complaint Counsel's Request and appropriately found extraordinary circumstances exist under Rule 3.31A(b) for additional expert witnesses.

Accordingly, Respondents request that the Commission deny the Application.

DISCUSSION

I. Complaint Counsel's Application Violates Commission Rules.

A. The text of Rule 3.23(b) prohibits Complaint Counsel's Application.

Complaint Counsel asks the Commission to contravene the clear and unambiguous text of the Commission's interlocutory appeal rule. Under Commission Rule 3.23(b), a movant "may file an application for review with the Commission within 1 day after notice that the Administrative Law Judge has issued *the requested determination* or 1 day after the deadline has passed for the Administrative Law Judge to issue a ruling on the request for determination and the Administrative Law Judge has not issued his or her ruling." 16 C.F.R. § 3.23(b) (emphasis added). As the Commission has explained, the text of the rule provides for interlocutory appeal "only when (1) the ALJ *fails to rule* on an application to take an interlocutory appeal or (2) the ALJ *grants* the application to take an interlocutory appeal." *N.C. Bd. of Dental Exam'rs*, 2011 WL 549450, at *2 (FTC Feb. 9, 2011). Neither avenue is available to Complaint Counsel here. The ALJ timely ruled on, and did not grant (or issue) Complaint Counsel's requested determination that the issues it identified are appealable under Rule 3.23(b). Order 7. Instead, the ALJ denied Complaint Counsel's Request. The Rule is clear: "No interlocutory appeal to the Commission [] may be taken" where "the ALJ denied [the] application to take an interlocutory appeal on a timely basis." *N.C. Dental*, 2011 WL 549450, at *2.

B. Complaint Counsel's interpretation of Rule 3.23(b) is unreasonable.

Complaint Counsel does not offer any precedent adopting its novel interpretation of Rule 3.23(b). Nor can it. The Commission has *never* granted review of an ALJ ruling where the ALJ timely denied a movant's request for interlocutory appeal. And for good reason: in *N.C. Dental,* the Commission relied expressly on the plain language of Rule 3.23(b) to reject an identical effort

by a movant seeking interlocutory appeal despite the ALJ's denial of its request under Rule 3.23(b). *Id*. Complaint Counsel represents that *N.C. Dental* is merely an example of the Commission exercising its discretion "not to consider an interlocutory appeal," and that "Rule 3.23(b) does not compel this limitation on the Commission's authority." Application 2. Not so. In that very matter, the Commission held that "the Commission's Rules of Practice *do not permit* [movant's] Application." 2011 WL 549450, at *2 (emphasis added). The Commission recognized the clarity of the Rule—an ALJ must determine interlocutory appeal is appropriate before the Commission may entertain a Rule 3.23(b) appeal.

Complaint Counsel emphasizes the term "issued" in an effort to torture the text of Rule 3.23(b) into suggesting interlocutory appeal may be taken irrespective of whether an ALJ issued a movant's requested determination.[1] Application 2. Complaint Counsel appears to stress the word "issued" to distract from *what* an ALJ must issue for a Rule 3.23(b) appeal to the Commission, i.e., "the requested determination"—a determination "that a ruling involves a controlling question of law or policy as to which there is substantial ground for difference of opinion and that an immediate appeal from the ruling may materially advance the ultimate termination of the litigation or subsequent review will be an inadequate remedy." 16 C.F.R. § 3.23(b). Notably, despite its emphasis on the word "issued," Complaint Counsel does not and cannot contend that the ALJ "issued the requested determination." Indeed, the ALJ declined to issue Complaint Counsel's

[1] Complaint Counsel's new interpretation of Rule 3.23(b) is a stark departure from its prior position. *See* Opposition to Application, *N.C. Dental*, No. 9343, (Feb. 8, 2011) (opposing application by a respondent identical to Complaint Counsel's Application here, and explaining "[t]he rules clearly do not permit an interlocutory appeal unless the ALJ concurs or the ALJ misses the deadline to issue an opinion" and accusing movant of "flout[ing] the Commission's rules and mak[ing] a mockery of the Commission's interlocutory appeal rule.").

requested determination.[2] Nevertheless, Complaint Counsel asks the Commission to read Rule 3.23(b) so as to render the substance of an ALJ's ruling under the Rule irrelevant, and thus make the ALJ a superfluous part of the interlocutory appeal process. Contrary to Complaint Counsel's wishes, however, the ALJ is *not* a superfluous feature of this process. 5 U.S.C. §§ 556–57; 16 C.F.R. § 3.42.

Rule 3.23's structure thwarts Complaint Counsel's reading as well. Rule 3.23(a)—"Appeals without a determination by the Administrative Law Judge"—governs the circumstances when the Commission may directly consider an interlocutory appeal. 16 C.F.R. § 3.23(a). By contrast, Rule 3.23(b) expressly requires that an ALJ determine immediate appeal is appropriate, or fail to timely rule at all, before the Commission may hear an interlocutory appeal. *See* 74 Fed. Reg. 1804 (Jan. 13, 2009) (distinguishing 3.23(a) as the provision by which "parties can ask the Commission to review without a determination by the ALJ that interlocutory review is appropriate"). Adopting Complaint Counsel's position would collapse the distinction between Rules 3.23(a) and 3.23(b) entirely, rendering Rule 3.23(b) meaningless.

Complaint Counsel implies *Auer* deference empowers the Commission to jettison its precedent and adopt Complaint Counsel's atextual interpretation of Rule 3.23(b). Application 2–3 (citing *Kisor v. Wilkie*, 588 U.S. 558 (2019)). In *Kisor*, however, the Supreme Court clarified that deference is given to agency interpretations only of "genuinely ambiguous" regulations implicating an agency's "substantive expertise," and only if the interpretation also reflects "fair and considered judgment." *Id.* at 574–79 ("[A] court may not defer to a new interpretation, whether

[2] The ALJ expressly ruled: "interlocutory appeal is not permitted." Order 7 n.2. Unfazed, Complaint Counsel filed the Application anyways, violating Rule 3.42(h) as well. 16 C.F.R. § 3.42(h) (a party who fails "to comply with a lawfully issued order or direction of an Administrative Law Judge may be considered to be in contempt of the Commission.").

or not introduced in litigation, that creates 'unfair surprise' to regulated parties"). In fact, when an agency fails to follow its own rules, "its action cannot stand and courts will strike it down." *United States v. Heffner*, 420 F.2d 809, 811 (4th Cir. 1969). Here, the Commission has already confirmed that Rule 3.23(b) is both procedural and unambiguous. *N.C. Dental*, 2011 WL 549450, at *2.

Complaint Counsel also grasps at the Commission's 2023 Rule revisions for support. Application 3. But they, too, are unavailing. The revisions did not alter Rule 3.23(b) or any aspect of the interlocutory appeal process; principally, they modified proceedings so ALJs issue a "recommended" decision, rather than an "initial" decision. 88 Fed. Reg. 42872 (July 5, 2023). If anything, this *undercuts* Complaint Counsel's position, because it clarifies that all ALJ rulings are "subject to the Commission's *de novo* review following the issuance of the recommended decision." *H&R Block*, 2024 WL 4544201, at *5 (FTC Oct. 18, 2024). Like the vast majority of ALJ decisions, the time for appeal is after the hearing.

Rule 3.23(b)'s text and structure, and Commission precedent confirm interlocutory appeal is unavailable where the ALJ has timely denied the request for appeal.[3]

II. Complaint Counsel's Application Does Not Satisfy Rule 3.23(b).

Complaint Counsel's failure to meet the procedural prerequisites of Rule 3.23(b) leaves the Commission without authority to evaluate whether Complaint Counsel's Application satisfies the substantive prerequisites of the Rule. But to be clear, it does not.[4] Rule 3.23(b) requires a movant satisfy each element of a "very stringent" test, by demonstrating: "(1) the ruling involves a controlling question of law or policy; (2) there is substantial ground for difference of opinion as to

[3] Complaint Counsel argues in passing that interlocutory appeal is appropriate because the ALJ "abused his discretion in refusing to grant a request for a determination under Rule 3.23(b)." Application 3 n.3. But Complaint Counsel cites no case in which interlocutory appeal was permitted on this basis. In both cases it cites, *Kellogg*, 1974 WL 175249, *2 (May 29, 1974) and *Am. Home Prods*, 1977 WL 189027, *1 (Dec. 28, 1977), the Commission *rejected* the party's application for interlocutory appeal. Regardless, the ALJ's ruling on Complaint Counsel's request was not an abuse of discretion, as discussed herein. *Infra* II.

[4] Respondents incorporate by reference their opposition to the Request. (Ex. 1).

that controlling issue; *and* (3) immediate appeal from the ruling may materially advance the ultimate termination of the litigation + subsequent review will be an inadequate remedy." *1-800 Contacts*, 2017 WL 104384, at *3 (FTC Jan. 4, 2017). Complaint Counsel fails to satisfy even one of these requirements.

First, the Scheduling Order's provisions do not involve a controlling question of law. Determining witness limitations necessarily requires an evaluation of the specific factual considerations of a particular case, and is squarely within the ALJ's discretion "to conduct fair and impartial hearings, to take all necessary action to avoid delay in the disposition of proceedings, and to maintain order." 16 C.F.R. § 3.42(c); *see also* Order 4 ("Complaint Counsel's assertion that the Commission can determine the appropriate number of witnesses, in the context of an interlocutory appeal, without reviewing the record in the case borders on the absurd."). Complaint Counsel's attempt to reframe the issues it seeks to appeal as hypothetical questions, asking if the ALJ's factual findings "could ever" be appropriate, moves them further, rather than closer, to justiciability. Application 2. Tellingly, Complaint Counsel does not even argue that resolution of its appeal would be "determinative" of this case. *See N.C. Dental*, 2011 WL 822921, at *3 (FTC Mar. 1, 2011). These procedural disputes "do not amount to controlling questions of law." *Id*.

Second, Complaint Counsel has not shown a substantial ground for difference of opinion or offered a single instance of a court or Commission expressing a different view on any relevant issue. "[T]he mere fact that there is a lack of authority on a disputed issue does not necessarily establish some substantial ground for a difference of opinion under the statute." Order 6 (collecting cases).

Third, Complaint Counsel cannot show that immediate appeal of the Order may materially advance the ultimate termination of the litigation or that subsequent review will be an inadequate

remedy. Complaint Counsel does not even contend that immediate review of the Order would materially advance the ultimate termination of the litigation. And Complaint Counsel's own authority confirms subsequent review will be sufficient to cure any prejudice: "such rulings are all subject to the Commission's de novo review following the issuance of the recommended decision." *H&R Block*, 2024 WL 4544201, at *5.

Complaint Counsel cannot show any of the requirements for interlocutory review; the ALJ correctly denied Complaint Counsel's Request.

III. Exceptional Circumstances Exist Warranting the ALJ's Witness Allocation.

The merits of Complaint Counsel's underlying appeal are not properly before the Commission, but they are similarly defective. Rule 3.31A(b) contains "a safety valve" permitting more than five expert witnesses in "extraordinary circumstances." 74 Fed. Reg. 1804, 1813. Here, the manner in which Complaint Counsel insists on litigating this action demands opening that safety valve.

As explained by the ALJ, this action is extraordinarily unusual: "the government—over the objection of the Respondents—is pursuing a single trial to adjudicate the conduct of three separate Respondent groups, who are not alleged to be co-conspirators, and whose interests do not align for all purposes." Order 4. Indeed, Complaint Counsel has pursued Respondents together notwithstanding key factual differences between them, including that each Respondent "has their own contractual arrangements and communications with their clients, has developed distinct formulary design options and member programs, and has separate bilateral negotiations with drug manufacturers." Order 2; *see also* Compl. at ¶¶ 34-37, 42-44, 103-11, 228-29, 245-48. Requiring Respondents, who compete vigorously with each other, to share five experts, notwithstanding these divergent factual circumstances and interests, is both impractical and raises serious due process

concerns beyond those already present in this matter. *See* Motions for Separate Hearings (Ex. 2 at 7–8; Ex. 3 at 9; Ex. 4 at 4–5). With the benefit of briefing on these issues, the ALJ granted Respondents additional expert witnesses, and in part relied on this modification in ruling against Respondents' motions for separate hearings. Application Ex. 3 at 6. Re-litigating the Scheduling Order vitiates the rationale of that decision, and may require re-litigation of those motions as well.

Complaint Counsel's protestation that it will be forced to examine more witnesses than in a typical case is perplexing when Respondents' need for additional experts is a consequence of Complaint Counsel's own misjoinder of Respondents in its own complex case. *See* Order 6 ("[T]hese expenditures are a consequence of the size and complexity of a case that the government chose to bring."); *see also Pom Wonderful*, 2011 WL 734462, at *4 (FTC Feb. 23, 2011) ("Having brought broad and comprehensive charges against Respondents, Complaint Counsel cannot in fairness claim it is prejudiced when faced with a broad and comprehensive defense."). Given the circumstances of the present action, fairness dictates that Respondents are able to call an adequate number of expert witnesses.

Regarding the number of fact witnesses, Complaint Counsel has put the cart before the horse. While Complaint Counsel attempts to frame this issue as one of trial time allocation, whether Respondents have the option to call additional witnesses is not a ruling on trial time. Time allocation is an open issue the ALJ can address given the facts and circumstances of this case at a later time. *See* Application Ex. 3 at 7. Regardless, the ALJ's rulings on fact witnesses are not appropriate for interlocutory review for the same reasons stated above regarding the rulings on expert witnesses.

CONCLUSION

For these reasons, Respondents request that the Commission deny the Application.

Dated: January 23, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 23, 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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EXHIBIT 1

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

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

RESPONDENTS' OPPOSITION TO COMPLAINT COUNSEL'S REQUEST FOR AN INTERLOCUTORY APPEAL DETERMINATION

Respondents oppose Complaint Counsel's request for a determination that interlocutory appeal of the Court's October 23, 2024 order is appropriate under Rule 3.23(b) ("Request").

INTRODUCTION

Two and a half months after the Court entered the October 23, 2024 Scheduling Order ("Order"), Complaint Counsel requests a determination that two provisions of the Order now merit immediate appeal under Rule 3.23(b). Interlocutory appeals are highly disfavored, and the rulings Complaint Counsel challenges—permitting each Respondent group to call up to five expert

witnesses and up to fifteen fact witnesses at the evidentiary hearing—are quintessential procedural issues that do not meet the applicable standard. Complaint Counsel's Request also ignores that the Order came in the context of the Commission's unprecedented decision to litigate against three wholly independent Respondent groups in a single hearing without any allegation that the Respondent groups have colluded with each other. Both Complaint Counsel and the Court explicitly recognized that independent witness allocations were necessary to prevent prejudice. *See* Complaint Counsel Opp. to Mot. for Separate Hearings at 10 (no prejudice because "each Respondent group can submit its own witness list, expert witness list . . . [and] can collectively disclose more witnesses than Complaint Counsel"); *In re Caremark Rx, LLC*, 2024 WL 5078338, at *5 (FTC Nov. 14, 2024) ("Order Denying Separate Hearings") (rejecting fairness concerns in part because the Order "allows each *Respondent Group* to call five expert witnesses"). And since that time, Respondents have designed their litigation strategies in reliance on the witness caps set by this Court.

"Interlocutory appeals are disfavored, as intrusions on the orderly and expeditious conduct of the adjudicative process." *In re Daniel Chapter One*, 2009 WL 1353465, at *1 (May 5, 2009). For this reason, Rule 3.23(b) requires that a movant satisfy each element of a "very stringent" test, by demonstrating: "(1) the ruling involves a controlling question of law or policy; (2) there is substantial ground for difference of opinion as to that controlling issue; *and* (3) immediate appeal from the ruling may materially advance the ultimate termination of the litigation + subsequent review will be an inadequate remedy." *In re 1-800 Contacts, Inc.*, 2017 WL 104384, at *3 (FTC Jan. 4, 2017) (citing 16 C.F.R. § 3.23(b)).

Complaint Counsel fails to satisfy even one of these requirements. *First*, the Order's provisions do not involve a controlling question of law. The Order's provisions relate to the

orderly presentation of evidence. Such procedural disputes "do not amount to controlling questions of law." *In re N.C. Bd. of Dental Examiners*, 2011 WL 822921, at *3 (FTC Mar. 1, 2011). *Second*, Complaint Counsel has not shown a substantial ground for difference of opinion or, in fact, offered even a single instance of a court or Commission expressing a different view on any relevant issue. *Third*, Complaint Counsel has not shown, and cannot show, that immediate appeal of the Order may materially advance the ultimate termination of the litigation, nor can it show that subsequent review will be an inadequate remedy. In fact, Complaint Counsel cannot view these provisions as time sensitive, as it waited ten weeks to request an appeal.[1] Far from advancing the litigation, an interlocutory appeal now would only put more pressure on an already compressed litigation schedule; a successful appeal would prejudice respondents, require a continuance for Respondents to revamp their trial strategy, and require reevaluation of the motions for separate evidentiary hearings.

DISCUSSION

I. Complaint Counsel fails to identify a controlling question of law or policy.

Rule 3.23(b) requires that the movant first demonstrate the ruling for which review is sought involves a controlling question of law or policy. This requirement has two elements: "First, the ruling must present a question of law, meaning a 'pure' question of law"—*i.e.*, a question on which the factual record has no bearing. *In re Health Rsch. Labs., LLC*, 2021 WL 1317214, at *4 (FTC Apr. 2, 2021); *see also Ahrenholz v. Board of Trustees*, 219 F.3d 674, 677 (7th Cir. 2000) (for interlocutory appeals, "'question of law' means an abstract legal issue rather than an issue of whether summary judgment should be granted"). "Second, the question of law must be

[1] Although the Request should be denied on the merits, "it would also be appropriate to deny [it] on procedural grounds" because "[a]pplications for review may be filed within five days after notice of the Administrative Law Judge's determination." *In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 155, at *20 (FTC Oct. 17, 2000).

'controlling,' meaning the resolution of the question by appeal would be determinative in the case at hand, as well as determinative of 'a wide spectrum of cases.'" *Id.* (citation omitted). The challenged provisions of the Order do not meet either element of this threshold requirement.

A. Whether "extraordinary circumstances" exist for additional expert witnesses is not a question of law.

As this Court has explained, a "question of law" for the purposes of Rule 3.23(b) motions refers to:

> a "pure" question of law rather than merely to an issue that might be free from a factual contest. The idea was that if a case turned on a pure question of law, something the court of appeals could decide quickly and cleanly without having to study the record, the court should be enabled to do so without having to wait till the end of the case.

In re N.C. Bd. of Dental Examiners, 2011 FTC LEXIS 32, at *7 (FTC Feb. 7, 2011) (citation omitted).

The FTC rules state that the standard for additional expert witnesses per side is whether "extraordinary circumstances" exist. 16 C.F.R. § 3.31A(b). Complaint Counsel claims that this standard has not been met, but whether the standard is met is purely dependent on the facts. Here, Complaint Counsel asserts—without explanation—that "the Commission need not review the record" to resolve the issue of whether "extraordinary circumstances" warranting additional expert witnesses under Rule 3.31A(b) exist. Request at 6. Complaint Counsel does not explain how the Commission could determine whether "extraordinary circumstances" exist in this case without reference to the circumstances—*i.e.*, the specific facts of this case. Indeed, Complaint Counsel's Request expressly argues that "Respondents failed to make such a showing here[.]" Request at 7. Highlighting its untenable position, Complaint Counsel is unable to identify a single case where any court or Commission has assessed "extraordinary circumstances" in the context of Rule 3.31A(b) without consideration of case-specific facts.

The Court's decision to permit each Respondent to call the same number of witnesses that it could call if each Respondent were enforced against separately was obviously based on the particular facts and circumstances *of this case*, not some abstract legal issue. Respondents' motions for separate evidentiary hearings explained that each Respondent group is factually distinct from (and competes directly with) the others. They each "have their own discrete contractual arrangements and communications with their clients, have developed distinct formulary design options and member programs, and have separate bilateral negotiations with drug manufacturers." Caremark and Zinc Mot. for Separate Hearing at 2. As Respondents argued, among other things, forcing factually distinct Respondent groups that compete with one another to share the same expert and fact witnesses would result in substantial prejudice and violate due process. *See, e.g.*, *id.* at 7. In denying those motions, the Court specifically explained that the expanded witness limitations were central to the Court's consideration of fairness. *See* Order Denying Separate Hearings at *5–6 (finding that a single trial is not unfair and prejudicial in part because the witness limitations were revised).

In terms of fact witnesses, Complaint Counsel fails to identify any rule or law involving the numerical allocation of fact witnesses at all. Complaint counsel points only to Rule 3.41(b)(4), which involves trial time—not witness numbers. Request at 2. This Court has not made any ruling resolving a question under Rule 3.41(b)(4). *See* Order Denying Separate Hearings at *7.

Given this context, "it is manifest that the [Order] was an application of the law *to the case at hand*." *N.C. Bd. of Dental Examiners*, 2011 FTC LEXIS 32, at *9 (emphasis added). The Commission's choice to sue three non-conspiring competitors in a single proceeding is unprecedented, and if forced to combine all their witnesses together, Respondents will face

significant prejudice. If the decision as to witnesses is reversed, Respondents may seek reconsideration of their motions for separate hearings.

Complaint Counsel fails to show that the Order's provisions present a question of law as required by Rule 3.23(b)'s first prong.

B. The number of witnesses is not a controlling question of law.

The challenged provisions of the Order are not controlling questions for the separate and independent reason that they are procedural in nature and would not dispose of any claim or issue on the merits. A "*controlling*" question under Rule 3.23(b) means a question that is "determinative of this case." *Health Rsch. Labs.*, 2021 WL 1317214, at *4. In contrast, "[p]rocedural disputes," like those that Complaint Counsel challenges here, "do not amount to controlling questions of law." *N.C. Bd. of Dental Examiners*, 2011 WL 822921, at *3. "As a procedural ruling . . . that is clearly not determinative of the case," the Order "does not present a controlling question of law or policy," and thus is not immediately appealable under Rule 3.23(b). *Id.*

Complaint Counsel does not argue that the Court's rulings on witness numbers are case-determinative, or even that they will impact the outcome of this litigation at all. Instead, Complaint Counsel argues only that the Court's rulings "pertain[]" to this and other cases. Request at 6, 8. Rule 3.23(b) permits the appeal only of *controlling* questions of law, not of those which are merely pertinent. *See Health Rsch. Labs.*, 2021 WL 1317214, at *4 ("[T]he ruling is not fairly deemed determinative of this case, and therefore the question is not 'controlling.'"); *see also N.C. Bd. of Dental Examiners*, 2011 WL 822921, at *3 (denying Rule 3.23(b) request where movant "ha[d] not even demonstrated that allowing such appeal would be determinative of the instant case").

II. Complaint Counsel fails to show a substantial ground for difference of opinion.

To prevail under Rule 3.23(b), Complaint Counsel must also demonstrate that there is "substantial ground for difference of opinion" as to that question. *Health Rsch. Labs.*, 2021 WL

1317214, at *5. A principal method for "demonstrating a substantial ground for difference of opinion is by adducing conflicted and contradictory opinions of courts which have ruled on the issue." *FEC v. Club for Growth, Inc.*, 2006 U.S. Dist. LEXIS 73933, at *8 (D.D.C. Oct. 10, 2006) (quotation marks omitted). Complaint Counsel fails to do so here. *See 1-800 Contacts*, 2017 WL 104384, at *6 (denying Rule 3.23(b) request because "Complaint Counsel does not cite to any case interpreting the [Rule] differently than the [Court's] Order, or otherwise adopting Complaint Counsel's position as to the requirements of the [Rule]").

Complaint Counsel cites no case involving the allocation of witnesses. It cites only to Rule 3.31(A) and accompanying commentary. Request at 7. These authorities do not reflect substantial ground for difference of opinion; rather, the Rule and its commentary provide the "safety valve" for increasing the number of expert witnesses, *id.* (quoting 74 Fed. Reg. 1804, 1813 (Jan. 13, 2009)), which this Court has ordered on numerous occasions, *see, e.g.*, *1-800 Contacts*, 2017 WL 781385, at *2–4. Complaint Counsel offers no additional basis for a substantial ground for difference of opinion beyond asserting it may succeed on appeal and observing the "Rules do not directly speak" to fact witness allocations. Request at 8. As this Court has observed, "that the Commission could disagree with the ALJ's ruling . . . is little more than speculation and is clearly not sufficient to establish substantial grounds for difference of opinion so as to justify an interlocutory appeal." *Health Rsch. Labs.*, 2021 WL 1317214, at *5. Furthermore, "the mere fact that there is a lack of authority on a disputed issue does not necessarily establish some substantial ground for a difference of opinion under the statute." *Id.* (quotation marks omitted); *see also 1-800 Contacts*, 2017 WL 104384, at *6 ("Complaint Counsel's argument is that the Commission has not addressed the issue, and therefore Commission's guidance is appropriate. This argument

fails to demonstrate a substantial ground for difference of opinion[.]"). Complaint Counsel has not—and cannot—show substantial ground for difference of opinion as to the Order's provisions.

III. Complaint Counsel fails to show that immediate appeal will materially advance the ultimate termination of the litigation or that subsequent review will be inadequate.

As noted in Section I.B, Complaint Counsel does not contend that immediate review of the Order would materially advance the ultimate termination of the litigation. Indeed, Complaint Counsel chose to wait nearly ten weeks before challenging the Order, and a ruling on the allocation of witnesses "has absolutely no bearing on any issue that might materially advance the termination of the litigation." *N.C. Bd. of Dental Examiners*, 2011 FTC LEXIS 32, at *17. In fact, a reallocation of witnesses at this juncture would delay the ultimate resolution of this matter, since Respondents would be prejudiced by the reallocation and the Court would need to reevaluate its earlier Order denying separate hearings, which was premised in part on each Respondent being able to call their own set of witnesses.

Alternatively, "[t]o successfully demonstrate that subsequent review will be an inadequate remedy, the movant cannot rely on conclusory assertions but must provide supporting facts or legal authority." *1-800 Contacts*, 2017 WL 104384, at *7. Complaint Counsel, however, provides only "[b]are assertions in this regard." *Id.* Complaint Counsel relies exclusively on its own expert witness expenses to try to demonstrate the inadequacy of subsequent review—but Complaint Counsel is not seeking to increase its number of expert witnesses.

Notwithstanding its assertions about the cost of its five experts, Complaint Counsel itself acknowledges that it will not suffer any prejudice in the outcome of the case from the Order's provisions or from subsequent review. Request at 8–9 ("[T]he Commission, on review after the evidentiary hearing and this Court's recommended decision, could cure any prejudice regarding the merits . . . ."). Absent any valid argument about prejudice, and relying only on tenuous

assertions regarding cost and staffing constraints, Complaint Counsel cannot show that subsequent review of the Order's provisions will be inadequate. *See Health Rsch. Labs.*, 2021 WL 1317214, at *5.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Court deny Complaint Counsel's Request, preventing Complaint Counsel from seeking interlocutory review by the Commission. *See N.C. Bd. of Dental Examiners*, 2011 FTC LEXIS 185, at *4 (Rule 3.23(b) permits "interlocutory appeals to the Commission from ALJ rulings on such motions but *only* when (1) the ALJ fails to rule on an application to take an interlocutory appeal or (2) the ALJ *grants* the application to take an interlocutory appeal") (emphasis added).

Dated: January 9, 2025

Respectfully submitted,

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Counsel for Caremark Rx, LLC and Zinc Health Services, LLC

EXHIBIT 2

PUBLIC

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

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

RESPONDENTS CAREMARK RX, L.L.C. AND ZINC HEALTH SERVICES, LLC'S MOTION FOR A SEPARATE EVIDENTIARY HEARING

Pursuant to FTC Rule 3.41(b)(3), Respondents Caremark Rx, L.L.C. ("Caremark") and Zinc Health Services, LLC. ("Zinc") respectfully move for a hearing separate from the other Respondent groups. Caremark and Zinc are one of three distinct "Respondent groups" in this matter, and each Respondent group asks that they receive a hearing separate from the other Respondent groups for the reasons set forth below.

INTRODUCTION

Each of the three Respondent groups to this action comprises a pharmacy benefits manager and a group purchasing organization, but "that is where any similarities [between them] . . . end." *In the Matter of Motor Up Corp., et al.*, 1999 WL 33577393, at *3 (F.T.C. June 11, 1999) ("*Motor Up*"). Caremark and Zinc are separate from, and compete directly with, the other two Respondent groups. They have their own discrete contractual arrangements and communications with their clients, have developed distinct formulary design options and member programs, and have separate bilateral negotiations with drug manufacturers. These differences are to be expected among rivals in a competitive marketplace. And the Commission does not allege that the Respondent groups colluded or coordinated with one another in any way. Thus, "the witnesses, documentary evidence, and the ultimate facts relating to what steps each set of respondents took . . . are completely different and will require separate proof with respect to each set." *Id.*

And yet the Commission attempts to lump all Respondents together into a single adjudicative proceeding, starting with the Complaint, which often obfuscates as to which allegation applies to which Respondent. This approach is prejudicial and inefficient. A joint hearing will confuse the issues by allowing evidence associated with one Respondent to be conflated across all Respondents. And it will force the Respondents to share scant resources, including witnesses, experts, briefing limits, and deposition and hearing time. Beyond these prejudices, because Respondents are competitors, a joint hearing will introduce significant challenges associated with protecting each Respondent's confidential information. Complaint Counsel implicitly recognizes the need for separate evidence, requesting among other relief, that each of the three Respondent groups sit for separate Rule 3.33(c) depositions, but at the same time Complaint Counsel has steadfastly refused to agree that each of the separate competitor

Respondent groups has the right to ask its own questions of witnesses, present its own experts about its own data, draft its own briefs, and otherwise defend itself individually.

FTC Rule 3.41(b)(3) was designed to address these sorts of challenges by allowing ALJs to "order a separate hearing of any claim, or of any separate issue, or of any number of claims or issues" when separate hearings will promote efficiency and economy. 16 C.F.R. § 3.41(b)(3). This matter cries out for severance. Separate hearings would save time and expense while preventing the prejudice to Caremark and Zinc from being forced to defend themselves alongside separate competitors that the Commission acknowledges acted independently. Basic fairness and due process require that each Respondent have an opportunity to defend itself.

LEGAL STANDARD

"When separate hearings will be conducive to expedition and economy, the Commission or the Administrative Law Judge may order a separate hearing of any claim, or of any separate issue, or of any number of claims or issues." 16 C.F.R. § 3.41(b)(3). This rule was "specifically . . . modeled after" Rule 42(b) of the Federal Rules of Civil Procedure, which allows federal courts to order separate trials when doing so would promote convenience, avoid prejudice, or expedite and economize the proceedings. *See* Procedures and Practice Rules: Hearings; Bifurcation and Consolidation and Issuance of Decisions and Orders, 44 Fed. Reg. 62887 (Nov. 1, 1979); Fed. R. Civ. P. 42(b).

Federal courts have granted separate trials under Rule 42 to avoid "inconvenience" and "potential prejudice" to the parties. *Houseman v. U.S. Aviation Underwriters*, 171 F.3d 1117, 1122 (7th Cir. 1999). Courts have found separate trials "efficient and convenient" where the legal or factual issues "are specific to each defendant." *Gen. Pat. Corp. v. Hayes Microcomputer*, 1997 WL 1051899, at *1 (C.D. Cal. Oct. 20, 1997). And courts have ordered separate trials to limit

potential prejudice where "consolidation might lead to confusion of the issues" because the fact finder "would be required to keep straight three separate collectives." *Bowling v. DaVita, Inc.*, 2024 WL 3581678, at *4 (D. Colo. July 30, 2024).

DISCUSSION

I. The Claims Against Each Respondent Involve Different Witnesses, Documentary Evidence, and Facts.

FTC adjudicative bodies have consistently held that "express differences of fact weigh against consolidation because different evidence will be necessary to prove many of the allegations." *Motor Up*, 1999 WL 33577393, at *2.

In *Motor Up*, Complaint Counsel argued that consolidation of an action against several manufacturers of motor oil additives was warranted because: (1) the respondents operated in the same industry and had "similar" practices; (2) the "same evidence" could be introduced concerning certain issues, including evidence of general "industry practices"; (3) the respondents all faced the same allegations; and (4) "the proposed orders for relief issued by the Commission against each are virtually identical." *Id.* at *1–2. This Court rejected that argument, explaining:

> Although similarities of fact and law do exist, the proof in each proceeding will undoubtedly be different. There will be different witnesses, different documents, and different facts in each case. The fact that at least some of the evidence may be the same does not provide an adequate basis for ordering consolidation of these matters. The differences in the evidence needed to prove the allegations in the instant cases dictate against consolidation.

Id. at *3 (internal citations omitted).

Similarly, in *F. W. Fitch Co. & F. W. Fitch Manufacturing Co.*, the Commission was confronted with the question whether to consolidate an FTC action regarding advertisers of shampoo products. 46 F.T.C. 1122, 1122–24 (Feb. 1, 1950). The Commission noted that the respondents operated in the same industry and had "common advertising objectives." *Id.* at 1130.

Nevertheless, the Commission held that "it would be impractical and confusing to consolidate such matters into one series of hearings" because of factual distinctions between the respondents. *Id.* "In other words," the Commission explained, "it would be necessary to try each case on its merits and it would be impractical to consolidate all the cases and have one series of hearings." *Id.*

Here, individual factual issues predominate. The Commission paints Respondents with a broad brush, papering over differences by dubbing them collectively as "PBMs." But even the Complaint reveals the factual distinctions among the Respondents. As an initial matter, the Commission does not allege that the Respondents colluded or acted in concert with one another. To the contrary, the Commission alleges that the Respondents individually engaged in formulary negotiations with manufacturers. Compl. ¶¶ 42–44. And the Commission acknowledges that each Respondent group offers different formularies with "different drug exclusion levels, ranging from open to more closed." *Id.* at ¶ 34, *see also id.* at ¶¶ 35–37. The Commission further alleges that each Respondent group makes different formulary placement and exclusion decisions, which change regularly. *See, e.g.*, *id.* at ¶¶ 103–11, 245–48. The Commission also acknowledges that each Respondent group offers different member affordability programs its clients. *See id.* at 228–30.

These factual differences among the Respondents go to the heart of the Commission's allegations. Take the Commission's central allegation that the Respondents "systematically prefer high list price insulin products" on their formularies. *Id.* at ¶ 256; *see also id.* at ¶ 263. The evidence relevant to this claim will differ dramatically. For example, the Commission alleges that "Respondents" excluded "modest[ly] discount[ed]" insulin products like Eli Lilly's long-acting insulin Basaglar in favor of higher net-cost products. *Id.* at ¶¶ 111, 235. But Caremark *preferred* Basaglar—the first insulin follow-on biologic drug—with its lower list price and lower net cost on

Caremark's most popular formulary over the higher list price and higher net cost Lantus in 2017 right after Basaglar launched. *See* Answer and Defenses of Respondents Caremark and Zinc, at *5–6 (Oct. 9, 2024). And when Sanofi cut the list price of Lantus by 78% in 2024, Lantus again became the preferred long-acting insulin on this Caremark template formulary over Basaglar, which as of 2024 had both a higher list price and higher net cost than Lantus. *Id.* Complaint Counsel hides behind blanket allegations against "Respondents" to avoid dealing with these contradictory, Caremark-specific facts.

As these examples illustrate, individual factual issues abound, and as in *Motor Up*, "the witnesses, documentary evidence, and the ultimate facts relating to what steps each set of respondents took . . . are completely different and will require separate proof." 1999 WL 33577393, at *3; *see also In re Chrysler Motors Corp., et al.*, 1976 FTC LEXIS 448, at *7–8 (F.T.C. Mar. 19, 1976). The proof for and against each Respondent in this matter will "undoubtedly be different," and those differences "dictate against consolidation." *Motor Up*, 1999 WL 33577393, at *3.

II. Trying All Respondents Collectively Will Cause Significant Prejudice.

ALJs in FTC adjudications have recognized that "requiring each respondent to defend against all admitted evidence rather than only that evidence which is relevant to its particular practices" may result in "confusion [that] would severely impair the individual respondent's ability to have his case heard solely on its merits," thus prejudicing the respondents. *In re Chrysler*, 1976 FTC LEXIS 448, at *5; *see id.* at *5–9.

Allowing this action to proceed against all Respondents collectively would prejudice Caremark and Zinc by forcing them to defend against evidence that has nothing to do with them. For the same reason, a consolidated proceeding would likely confuse the issues. As noted, there

are innumerable individual factual issues. At best, these differences will be muddled in consolidated proceedings, and at worst, evidence related to one Respondent may be improperly imputed across all Respondents.

This prejudice alone is enough to warrant severance, but the Respondents also face a second significant form of prejudice. As described below, a consolidated action would force the Respondents to share limited resources to defend themselves:

- *Witnesses.* The default scheduling order gives each side 25 witnesses. Thus, Caremark and Zinc would only get eight witnesses, while Complaint Counsel would get a full complement of 25.

- *Experts.* FTC Rule 3.31A(b) states that "[e]ach *side* will be limited to calling at the evidentiary hearing 5 expert witnesses, including any rebuttal or surrebuttal expert witnesses." 16 C.F.R. § 3.31A(b) (emphasis added). Under this rule, Complaint Counsel would be able to put up five experts who could opine as to all Respondents collectively. The Respondents could not do the same. Not only would the Respondents have to split five experts among themselves, the Respondents' experts would not be able to provide opinions applicable to all Respondents collectively because, as competitors, each Respondent has separate, confidential data that cannot be shared with the other Respondents. *See infra* § III. Joint experts would also create issues associated with getting client input as well as abiding by the Protective Order and the antitrust laws. Further, as a matter of strategy, the three competing Respondents may not agree on the experts to hire and the content of their testimony.

- *Briefing Limits.* The procedure in Part 3 envisions briefing limits "per side," but did not envision a situation where the "side" was actually three cases in one. This advantages Complaint Counsel, which can—indeed, has already in its Complaint—make collective arguments against all the Respondents. By contrast, and as has been discussed previously, the Respondents have distinct facts and must make arguments that apply individually. As such, a consolidated action would allow Complaint Counsel more space to make its arguments. And as with sharing experts, joint briefs create issues with getting client input and abiding by the Protective Order and the antitrust laws.

- *Deposition Time.* The procedure in Part 3 splits a 7-hour deposition between each side. Thus, Complaint Counsel would have 3.5 hours to depose each third-party witness while each Respondent would only get 70 minutes. This truncated time limit would result in extreme prejudice, especially with respect to key third party witnesses that deal separately with each Respondent, such as insulin manufacturers, plan sponsors, and benefit consultants that have worked independently with

multiple Respondents over a period of more than a decade that is covered by the allegations.

- *Hearing Time.* FTC Rule 3.41(b) caps evidentiary hearings at 210 hours, and "[e]ach *side* shall be allotted no more than half of the trial time." 16 C.F.R. § 3.41(b) (emphasis added). Under this rule, each Respondent would get less than 40 hours to put on its case defending against collective allegations with facts specific to each Respondent. Meanwhile, Complaint Counsel would have 105 hours to make its case collectively against the Respondents.

In sum, trying this case collectively would result in substantial prejudice to Caremark and Zinc. A consolidated proceeding would confuse the issues and would tie the Respondents' hands behind their backs by forcing them to share limited resources.

III. Trying All Respondents Collectively Will Cause Substantial Inefficiencies.

As this Court has recognized, consolidation can cause inherent inefficiencies. Consolidation can "add to [] costs and delays" because "[e]ach set of respondents might feel compelled to be represented by counsel and in person at all combined hearings, even though only part of the evidence submitted might be relevant and material to the issues in their case." *Motor Up,* 1999 WL 33577393, at *3; *see also In re Food Fair Stores, Inc., et al. and Giant Food Shopping Center, Inc.*, 52 F.T.C. 1152, 1154 (Apr. 25, 1956).

All of that is true in this case. But the Respondents here would also face unique inefficiencies because they are direct competitors. As competitors, each Respondent must protect its confidential information from the others. A consolidated hearing would thus require the parties to develop and implement a rigorous process for protecting such information, which would likely come at significant time and expense for the Respondents. And, because at least some information would likely need to be restricted to outside counsel's eyes only, the Respondents' employees would be excluded from key briefing, expert materials, and facts that outside counsel must present collectively. As this Court has explained, the need for such "additional procedures necessary to

deal separately with separate proprietary information" counsels in favor of severance. *Motor Up*, 1999 WL 33577393 at *3.

* * *

"Under the circumstances, there is no adequate basis on which to deny respondents a separate factual record and a separate decision . . . ." *In re Chrysler*, 1976 FTC LEXIS 448, at *8. The Commission's allegations against each Respondent hinge on the specific evidence presented as to *that Respondent* alone, and so there is no benefit to consolidating this action. Conversely, separate hearings will eliminate the significant prejudice associated with consolidation and will serve the purposes of efficiency and economy.

CONCLUSION

For the foregoing reasons, Caremark and Zinc respectfully requests that this matter be severed into separate evidentiary hearings under FTC Rule 3.41(b)(3).

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DATED: October 22, 2024

Respectfully submitted,

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By: */s/ Rani Habash*

Counsel for Caremark Rx, L.L.C. and Zinc Health Services, LLC

EXHIBIT 3

PUBLIC

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

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

ESI RESPONDENTS' MOTION FOR A SEPARATE EVIDENTIARY HEARING

Pursuant to Rule 3.41(b)(3) of the Commission's Rules of Practice, Respondents Express Scripts, Inc., Evernorth Health, Inc., Medco Health Services, Inc., and Ascent Health Services LLC (the "ESI Respondents"[1]) move for a separate evidentiary hearing in the above-captioned matter.

[1] The term "ESI Respondents" is used here only for ease of reference to refer collectively to these four entities. The ESI Respondents reserve all rights to make future arguments that one or more of these entities is not a proper party to this action.

I. INTRODUCTION

The Commission's decision to join numerous unrelated Respondents in the same action creates an inherently unfair and inefficient process that prejudices the ESI Respondents. The Complaint contains no allegation that the Respondents have colluded with each other or are otherwise coordinating their actions. The Commission must therefore introduce evidence showing that each Respondent's separate conduct independently violated the law. But the Commission seeks to sidestep this requirement and lump all Respondents' conduct together. Requiring the ESI Respondents to defend themselves *and* their competitors in the same evidentiary hearing is not only unwieldy and inefficient, but will cause significant prejudice to the ESI Respondents from being unfairly painted with evidence unrelated to them or their conduct.

Rule 3.41(b)(3) permits an Administrative Law Judge to order "a separate hearing of any claim, or of any separate issue, or of any number of claims or issues" when separate hearings "will be conducive to expedition and economy." 16 CFR § 3.41(b)(3). Whether the ESI Respondents' individual efforts to lower drug costs for health plan sponsors (e.g., employers, unions, governments) constitutes a violation of Section 5 of the FTC Act is a "separate issue" from whether their competitors have violated Section 5, and the Commission can establish its case against the ESI Respondents only by introducing evidence specific to them. Similarly, any remedy related to the ESI Respondents' conduct is a "separate issue" from remedies applicable to other Respondent groups, each of which has different formularies with different insulin drugs included or preferred (or excluded or non-preferred).

The ESI Respondents have different documents and data, different fact witnesses, different experts, different contracts, different negotiations, different clients, and different insured members than their competitors. A single hearing where this evidence will be introduced

would generate significant inefficiencies because it will require a process for protecting each competitor's confidential information from the others, procedures to distinguish evidence that applies to one Respondent from evidence that applies to the others, and special care to avoid generalized evidence from being improperly attributed to each of the Respondents. Separate hearings would help mitigate these problems and promote the efficiency of the proceedings. *See In the Matter of Motor Up Corp., et al.*, 1999 WL 33577393 (F.T.C. June 11, 1999) ("*Motor Up*") (holding that "different witnesses, different documents, and different facts… needed to prove the allegations" counsels against a consolidated hearing).

To the extent that there are efficiencies from conducting certain proceedings jointly, those efficiencies could be maintained without prejudicing each Respondent. For example, if there are common witnesses relevant to the claims against each Respondent; those witnesses could be examined once, or their testimony could be introduced via trial deposition.

II. RULE 3.41 PERMITS THE ADMINISTRATIVE LAW JUDGE TO ORDER SEPARATE HEARINGS TO PROMOTE JUDICIAL ECONOMY AND PREVENT PREJUDICE TO RESPONDENTS

Rules 3.41(b)(2) and 3.41(b)(3) provide the Administrative Law Judge with broad discretion to consolidate or bifurcate issues or claims in the interest of judicial economy and efficiency. These rules were specifically modeled after Rule 42(b) of the Federal Rules of Civil Procedure, which allows the federal courts to order separate trials in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy. *See* 44 Fed. Reg. 62887 (Nov. 1, 1979) ("These procedures [in Rule 3.41(b)] are specifically permitted under and are modeled after the Federal Rules of Civil Procedure. Rule 42 grants the district court discretion to consolidate or bifurcate issues for trial.").

Under Federal Rule of Civil Procedure 42, trial courts have "considerable discretion in determining how a trial is to be conducted." *Angelo v. Armstrong World Indus.*, 11 F.3d 957, 964 (10th Cir. 1993); *see also In re Bendectin Litig.*, 857 F.2d 290, 308 (6th Cir. 1988) ("Rule 42(b) is sweeping in its terms and allows the court, in its discretion, to grant a separate trial of any kind of issue in any kind of case.") (quoting Wright & Miller, *Federal Prac. & Proc.* § 2389). In complex litigation involving multiple defendants, courts have bifurcated proceedings and ordered multiple trials for individual defendants or groups of defendants when doing so would "avoid a great deal of confusion" and to "streamline the evidence." *In re Genetically Modified Rice Litig.*, 2010 WL 816157, at *1 (E.D. Mo. Mar. 3, 2010); *see Houseman v. U.S. Aviation Underwriters*, 171 F.3d 1117 (7th Cir. 1999) (affirming bifurcation of two defendants' trials because of the "inconvenience to the first [defendant] and the potential prejudice to the second [defendant]"); *General Patent Corp. v. Hayes Microcomputer, et al.*, 1997 WL 1051899 (C.D. Cal. Oct. 20, 1997) (granting bifurcation of defendants where the issues were "specific to each defendant because they involve the particular products made by each defendant").

Indeed, courts have held that joinder is not appropriate when factual circumstances are merely *similar*; "for proper joinder, all of the FTC's claims must arise out of the *same* set of circumstances." *FTC v. Endo Pharms., Inc.*, No. 16-1440, 2016 WL 6124376, at *5 (E.D. Penn. Oct. 20, 2016) (emphasis in original); *see also Precision Assocs., Inc. v. Panalpina World Transp. (Holding) Ltd*., No. 08-42, 2013 WL 6481195, at *39 (E.D.N.Y. Sept. 20, 2013) (holding that the test for joinder "cannot be met merely by joining together defendants that have no relationship other than that they violated the law in the same way against the same plaintiff"); *Spaeth v. Mich. State Univ. Coll. of Law*, 845 F. Supp. 2d 48, 53 (D.D.C. 2012) ("[Plaintiff] cannot join defendants who simply engaged in similar types of behavior, but

who are otherwise unrelated; some allegation of concerted action between defendants is required."). As explained below, similar considerations justify separate hearings in this case.

III. TRYING ALL RESPONDENTS TOGETHER WOULD CONFUSE THE ISSUES BECAUSE THE CLAIMS AGAINST EACH RESPONDENT INVOLVE DIFFERENT FACTS, EVIDENCE, WITNESSES, AND CIRCUMSTANCES

The Respondents are all part of the same industry and arguably have some similar business practices, but "that is where any similarities . . . end." *Motor Up*, 1999 WL 33577393 at *3. The Commission's claims against each Respondent must rise or fall based on the evidence introduced as to *that* Respondent. Evidence suggesting that one Respondent violated Section 5 has no bearing on the question of whether a different, unrelated Respondent, acting unilaterally, also violated Section 5. Here, there are no allegations of coordinated conduct between the ESI Respondents and the other Respondents with which they compete. The ESI Respondents offer different services and different standard formulary offerings, and their negotiations with manufacturers and clients are entirely separate from the negotiations of their competitors (of which the ESI Respondents have no knowledge). Thus, the documents, witnesses, and expert testimony relating to the allegations against the ESI Respondents, and their defenses, will be unique to them. A single hearing in which separate evidence concerning the ESI Respondents is presented together with evidence that has no bearing on the claims against them will be confusing, prejudicial, and will cause complications and delay.

For similar reasons, the ALJ refused to consolidate a Part 3 case against multiple respondents when doing so would have "the negative potential for creating complications and confusion, causing delay, and increasing the burdens of the defense." *In re Motor Up*, 1999 WL 33577393, at *2 (citing *In re Chrysler Motors Corp., et al.*, 1976 FTC LEXIS 448, *6 (March 19, 1976)). In *Motor Up*, FTC complaint counsel moved the ALJ to consolidate actions against multiple different marketers of similar products, arguing that consolidation was warranted

because the respondents all sold and marketed similar products and advertised them in similar ways; some of the same evidence about industry practices would be introduced against all respondents; all respondents were claimed to have made unsubstantiated claims about their products; and the relief sought by the Commission against each respondent was virtually identical. *Id.* at *1.

Despite the limited points of commonality that complaint counsel had identified, the ALJ denied the motion to consolidate. The ALJ held: "Although similarities of fact and law do exist, the proof in each proceeding will undoubtedly be different. There will be different witnesses, different documents, and different facts in each case." *Id.* at *3 (internal citations omitted). Furthermore, the ALJ found that consolidating cases with such distinct sets of evidence "may even add to the costs and delays" of the proceeding because any potential efficiencies from a consolidated proceeding would be outweighed by the confusion inherent in trying multiple respondents simultaneously for different conduct with different evidence. The ALJ held:

> Any potential time savings in the testimonial process is outweighed by: (1) additional procedures necessary to deal separately with separate proprietary information; (2) additional procedures to distinguish testimony that is generic from that which applies to Motor Up and from that which applies to [another respondent]; and (3) the possibility of confusion of all parties concerned.

Id.; *see also F.W. Fitch Co. and F.W. Fitch Manufacturing Co.*, 46 F.T.C. 1122, 1950 FTC LEXIS 122 (Feb. 1, 1950) (Commission order refusing to consolidate "all members of an industry committing similar marketing acts" because, although they may have had "common advertising objectives," the respondents' advertisements would be different and "it would be necessary to try each case on its merits").

As explained in detail below, the same considerations that drove the decision to keep respondents separate in *Motor Up* justify separating the Respondents in this case. One need look

no further than the Complaint itself to appreciate the "express differences of fact" between the Respondents here. *Motor Up*, 1999 WL 33577393 at *2.

a. Different Formulary Development Processes and Decisions

Counts I and II in the Complaint are rooted in the allegation that the PBM Respondents supposedly "systematically prefer high list price insulin products" on their formularies. ¶¶ 256, 263. However, the Complaint acknowledges that "[t]he PBM Respondents" offer *different* standard formularies featuring "different drug exclusion levels," formulary designs, and coverage. ¶¶ 32-37. Allegations about other Respondents and not applicable to the ESI Respondents appear throughout the Complaint and illustrate the detailed level of Respondent-specific evidence that will be presented on this issue. The formulary decisions discussed in the Complaint, including bilateral negotiations with drug manufacturers, associated offers from the manufacturers, formulary modeling scenarios and decisions on whether to prefer or exclude certain drugs on standard formularies, and whether and how particular plan sponsors may choose to construct their custom formulary arrangements, are wholly unique to each PBM Respondent (and each PBM Respondent's clients).[2] Evidence related to these formulary decisions by the ESI Respondents and its clients will be completely different from evidence presented by the other Respondents.

b. Different Plan Sponsor Clients

Count III in the Complaint appears to focus on the benefit designs that some of Express Scripts' plan sponsor clients have adopted and the impact that those benefit designs may have on certain members. ¶ 269. However, Express Scripts serves a distinct set of clients with unique

[2] Commissioner Slaughter has already recognized that the ESI Respondents made different formulary decisions from other PBMs when she praised the decision to add a new insulin drug to an Express Scripts' standard formulary in 2022. *See Statement of Commissioner Rebecca Kelly Slaughter*, June 7, 2022, *available at* https://www.ftc.gov/system/files/ftc_gov/pdf/SlaughterStatement-PBM6%28b%29Study6.7.2022_FINAL_.pdf.

needs and preferences. For example, one of Express Scripts' clients is a large federal government agency whose requirements are different from other plan sponsors. Evidence related to these plan sponsors' decisions about how to structure their drug benefits will require documents and witnesses specific to the ESI Respondents' clients.

IV. SEPARATE HEARINGS WOULD BE EFFICIENT AND WOULD AVOID PREJUDICE

a. Trying Three Competitors Together Creates Significant Practical Problems

The Respondents are fierce competitors. Trying them all simultaneously in the same evidentiary hearing would inevitably create practical challenges for protecting and managing the flow of confidential and proprietary information.[3] Just as ALJ Chappell found in *Motor Up*, the need for special procedures to "deal separately with separate proprietary information" counsels in favor of bifurcation. *Motor Up*, 1999 WL 33577393 at *3. The Complaint includes several references to the Respondents' pricing, profit, and marketing information. *See e.g.,* ¶¶ 44, 46-49, 116-18. Should there be only one hearing, the practical challenge of ensuring that information is properly protected and not disclosed to competitors would be significant and would likely consume considerable time and resources.

b. Any Truly Common Evidence Would Not Necessarily Be Duplicated

Although much of the evidence supporting the Commission's claims and the ESI Respondents' defenses is distinct, there may be some common evidence. For example, testimony regarding the general structure of the pharmaceutical supply chain and the benefits of selective contracting may apply broadly and might be consolidated, presented in a joint hearing or through trial depositions, or otherwise streamlined to preserve efficiency and avoid duplication. But, as

[3] Indeed, Complaint Counsel already cannot keep the Respondents straight, having mistakenly identified two of the other Respondents' employees as being affiliated with the ESI Respondents in their initial disclosures.

described above, the bulk of the evidence as to whether the ESI Respondents are liable under Section 5 does not relate to their competitors and vice versa; dumping that evidence together in a single hearing would be confusing, inefficient, and prejudicial.

c. A Joint Trial Would Prejudice the ESI Respondents' Ability to Defend Themselves

The Part 3 Rules do not contemplate a single action against unrelated Respondents that are not alleged to be colluding or otherwise coordinating their actions. The Respondents have asked Complaint Counsel for any analogous precedent that could be drawn upon, but so far they have provided none. The standard practices were designed for cases against a single respondent or multiple respondents alleged to have agreed or coordinated with one another. Applying those procedures here prejudices the ESI Respondents' ability to mount a full defense. Yet Complaint Counsel have already shown an unwillingness to acknowledge the risk of prejudice or provide reasonable accommodations during negotiations over the proposed scheduling order, including by insisting that the ESI Respondents share everything from experts to briefing pages with their competitors, each of which is defending its own separate conduct. For example, Complaint Counsel have refused to agree to any modification of the default deposition limits, which would provide the ESI Respondents with only *70 minutes* of deposition time with key witnesses. Without a separate hearing, the ESI Respondents will be subject to significant prejudice and denied a fair opportunity to defend themselves.

V. CONCLUSION

For the foregoing reasons, the ESI Respondents respectfully request that the ALJ grant a separate evidentiary hearing pursuant to Rule 3.41(b)(3).

Dated: October 18, 2024

Respectfully submitted,

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CONFERENCE STATEMENT

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

/s/ Charles F. Rule

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

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CERTIFICATE OF SERVICE

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EXHIBIT 4

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

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

OPTUMRX, INC.'S; OPTUMRX HOLDINGS LLC'S; AND EMISAR PHARMA SERVICES LLC'S MOTION FOR A SEPARATE EVIDENTIARY HEARING

Pursuant to Rule 3.41(b)(3) of the Commission's Rules of Practice, Respondents OptumRx, Inc.; OptumRx Holdings LLC; and Emisar Pharma Services LLC (the "Optum Rx Respondents") move for a separate evidentiary hearing in the above-captioned matter and join ESI Respondents' October 18, 2024 Motion for a Separate Evidentiary Hearing.[1] Due process

[1] The Optum Rx Respondents are amenable to reasonable coordination of pre-hearing discovery involving the other Respondents, subject to the positions set forth in the parties' October 18, 2024 proposed Scheduling Order submission. The Optum Rx Respondents hereby reserve all other motions provided for by the Rules of Practice.

and the Court's interest in administering fair and efficient proceedings in this case warrant granting separate evidentiary hearings to each of the three Respondent groups (*i.e.*, the Optum Rx Respondents, the ESI Respondents, and the Caremark Respondents).

The factual allegations concerning the Optum Rx Respondents are materially different from the factual allegations against the other Respondents, all of whom are fierce competitors. The Optum Rx Respondents designed materially different formulary offerings that covered a range of "low WAC" insulins, took unique approaches in negotiations with insulin manufacturers, and offered noticeably different pharmacy benefit management services to plan sponsor clients. It is unfair for the Commission to lump Respondents' conduct together in a Complaint that, in many respects, elides these significant differences, and expect fierce competitors to jointly defend each other's conduct in the same action. This is especially troubling given the Commission's position that all Respondents' conduct was illegal "whether viewed individually or collectively." (Compl. ¶ 214.) Further, much of the alleged conduct implicates highly competitively sensitive information, and the Protective Order in this case does not permit each Respondent to know crucial details about the actions taken by its co-Respondents. And for good reason: the Respondents in this case are not alleged to have conspired, and they never should be privy to the competitively sensitive information of each other. A single hearing in which separate evidence concerning the Optum Rx Respondents is mixed together with evidence about the other Respondents' conduct will be confusing, prejudicial, and will cause inefficiencies and delay. For those and the following reasons, separate hearings should be permitted.

First, the Complaint concedes that the Optum Rx Respondents and the other Respondents are fierce competitors. (Compl. ¶¶ 171-73.) The Complaint also claims that "[i]n 2023, Optum

administered [only] approximately 22% of total prescription in the U.S.," clearly acknowledging that the Optum Rx Respondents play a limited role in this industry. (Compl. ¶ 26.) In a conduct case *not* alleging a conspiracy or an anticompetitive merger, it is highly unusual (if not unprecedented) to join competitors in the same action, claim that they represent an entire industry, and expect them to defend themselves *jointly* in a Part 3 proceeding.

Second, the Complaint acknowledges that the rebate rates and structures that the Optum Rx Respondents negotiated with insulin manufacturers, and the formulary design decisions made by the Optum Rx Respondents, were significantly different from those of the other Respondents. (*Compare, e.g.,* Compl. ¶ 44 with ¶ 49; *id.* ¶¶ 116-118.) For example, the Complaint alleges that "Optum changed its Premium Formulary such that its 2024 formulary now covers the low WAC versions of insulin products on the same formulary tier as the respective high WAC versions," (Compl. ¶ 247), yet the Complaint still lumps Optum Rx in with the other Respondents when it claims that all "PBM Respondents continue to exclude low WAC insulin products," (Compl. page 40). The Complaint also acknowledges that Optum Rx's 2023 Premium formulary offering "preferred" significantly different drugs than the formulary offerings of the other Respondents. (Compl. ¶ 111; *id.* ¶ 110). In other places, the Complaint implies that all Respondents took the same actions concerning their formulary offerings *without alleging anything specific about the Optum Rx Respondents*. (*See, e.g.*, Compl. ¶¶ 49, 114, 154, 157, 199.) Simply alleging that all the Respondents excluded "low WAC" insulin drugs (which is not accurate) glosses over material factual differences given the diverse formulary design parameters, strategies and goals, and drug inclusions and exclusions that each Respondent made at different points in time. In light of these divergent facts, it would be unfair and inefficient to force all Respondents to defend against these claims jointly. *See, e.g.*, *F.W. Fitch Co. and F.W. Fitch Manufacturing Co.*,

46 F.T.C. 1122, 1950 FTC LEXIS 122, *15-16 (Feb. 1, 1950) (Commission order explaining that consolidation of multiple actions against independent competitors would be "impractical and confusing" where "it would be necessary to try each case on its merits").

Third, the Complaint acknowledges that the Optum Rx Respondents' allegedly "unfair" conduct did not begin until 2016 (Compl. ¶¶ 105; 118), yet the Complaint tries to hold Optum Rx responsible for conduct that allegedly occurred *in 2012* (*id.* ¶¶ 5, 99-100). This is grossly unfair and inefficient. *See In the Matter of Motor Up Corp., et al.*, 1999 WL 33577393, at *3 (F.T.C. June 11, 1999) ("*Motor Up*") (recognizing inefficiencies and unfairness where "[e]ach set of respondents might feel compelled to be represented by counsel and in person at all combined hearings, even though only part of the evidence submitted might be relevant and material to the issues in their case"). Even more jarringly, the Complaint acknowledges that insulin list prices began rising *in 1999*, before several of the Optum Rx respondents even existed. (Compl. ¶ 92.) Clearly, the Optum Rx Respondents will be prejudiced if they must defend against claims that are based on evidence that has nothing to do with them and events in which they were never involved.

Fourth, a joint trial would violate due process by denying the Optum Rx Respondents a fair opportunity to defend themselves. "'[A]n agency does not have unlimited discretion to consolidate cases.'" *Zacharias v. SEC*, 569 F.3d 458, 467 (D.C. Cir. 2009) (quoting *Nassar and Co. v. SEC*, 566 F.2d 790, 792 n.4 (D.C. Cir. 1977)). That is because, as a "fundamental requirement of due process," parties must be afforded an "opportunity to be heard 'at a meaningful time and in a meaningful manner,'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)), including an "opportunity to present every available defense," *Lindsey v. Normet*, 405 U.S. 56, 66 (1972). Here, the FTC's

consolidated action prejudices the Optum Rx Respondents' ability to develop, prepare, and ultimately present their defenses. For example, Complaint Counsel has insisted that the Optum Rx Respondents share experts, briefs, and deposition time with their competitors. *See* ESI Respondents' Oct. 18, 2024 Mot. for Separate Hearings at 9. It is prejudicial to force the Optum Rx Respondents to defend against expansive claims based in part on other Respondents' conduct, *see supra* at 2-4, while simultaneously giving the Optum Rx Respondents a fraction of the opportunities to defend their own conduct that they would normally receive in an ordinary proceeding. Without a separate hearing, therefore, the Optum Rx Respondents will lose the "reasonable opportunity to present evidence on [their] behalf" that due process requires. *Colmenar v. INS*, 210 F.3d 967, 971 (9th Cir. 2000). The Court should order separate hearings to avoid these constitutional concerns.

Fifth, rebate rates, rebate agreement terms, and formulary design decisions reflect highly sensitive dimensions of competition, and all parties involved (PBMs, manufacturers, and plan sponsors) go to great lengths to protect their contracts from their competitors. Otherwise, a coordinated race-to-the-bottom effect would occur and competition in this industry would be destroyed. Accordingly, Respondents in this action are not privy to key details about their competitors' contracts or formularies. Complaint Counsel even acknowledge this is true by *redacting* large swaths of highly competitively sensitive information from the Complaint. And yet the Protective Order in this case prohibits each Respondent from receiving that information or learning about the actions taken by its competitors. So there is no way this case, in its current form, could be tried fairly or efficiently such that each Respondent knows the evidence being asserted against it. Separate hearings would help mitigate this problem, while continuing to protect competitively sensitive information. *See Motor Up*, 1999 WL 33577393, at *3 (holding

that "different witnesses, different documents, and different facts… needed to prove the allegations dictate against consolidation" of hearings).

* * * *

As ESI Respondents' motion explains—which the Optum Rx Respondents hereby join—Rule 3.41(b)(3) permits the Administrative Law Judge to order "a separate hearing of any claim, or of any separate issue, or of any number of claims or issues" when separate hearings "will be conducive to expedition and economy." 16 CFR § 3.41(b)(3). Those circumstances exist in this case. Further, the Due Process Clause of the Fifth Amendment requires separate evidentiary hearings in this case.

Dated: October 23, 2024

Respectfully submitted,

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By: */s/ Samuel Liversidge*

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CONFERENCE STATEMENT

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 23, 2024, I filed the foregoing document electronically using the FTC's E-Filing system, which will send notification of filing to:

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I further certify that on October 23, 2024, I caused the foregoing document to be served via email to:

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