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

ORDER DENYING RESPONDENTS' MOTIONS FOR SEPARATE EVIDENTIARY HEARINGS

I.

On October 18, 2024, Respondents Express Scripts, Inc., Evernorth Health, Inc., Medco Health Services, Inc., and Ascent Health Services LLC ("ESI Respondents") filed a Motion for a Separate Evidentiary Hearing, pursuant to Federal Trade Commission ("FTC") Rule 3.41(b)(3), 16 C.F.R. § 3.41(b)(3) ("ESI Motion"). Respondents Caremark Rx, LLC and Zinc Health Services, LLC ("Caremark Respondents") filed a similar Motion for a Separate Evidentiary Hearing on October 22, 2024 ("Caremark Motion"). Respondents OptumRx, Inc., OptumRx Holdings, LLC, and Emisar Pharma Services LLC ("Optum Respondents") filed a Motion for a Separate Evidentiary Hearing the following day, on October 23, 2024 ("Optum Motion") (collectively, "Motions"). FTC Complaint Counsel filed a consolidated Opposition to the

Motions on November 4, 2024.[1]

Subsequent to the filing of Complaint Counsel's Opposition to the Motions, each Respondent group filed a Motion for Leave to File a Reply to Complaint Counsel's Opposition, together with a proposed Reply. Complaint Counsel filed an Opposition to the Motions for Leave to File a Reply.

The Motions for Leave to File a Reply are **GRANTED**. As explained below, the Motions for a Separate Evidentiary Hearing are **DENIED**.

II.

Respondents Caremark Rx, Inc. ("Caremark"), Express Scripts, Inc. ("ESI") and Optum Rx, Inc. ("Optum") are pharmacy benefit managers ("PBMs"). According to the Complaint, PBMs provide pharmacy benefit management services for health plans, health plan sponsors and individual health plan policy holders. Complaint ¶¶ 3, 28. In summary, the Complaint challenges the conduct of the PBM Respondents, and their related group purchasing organizations ("GPOs") in using manufacturer rebates off the wholesale acquisition cost ("WAC"), or "list price," of insulin to influence whether or how a particular insulin product is placed on drug formularies – the lists of preferred and non-preferred drugs used by health plans. Respondent Zinc Health Services, LLC acts as GPO for Caremark. Complaint ¶ 17. Respondent Ascent Health Services, LLC acts as GPO for ESI. *Id.* at ¶ 22. Respondent Emisar Pharma Services, LLC acts as GPO for Optum. *Id.* at ¶ 27. According to the Complaint, Respondents compete for health plan clients, in part, on the basis of manufacturer rebates and obtain fees and other compensation related to the negotiated manufacturer rebates. The Complaint contends that Respondents' conduct in leveraging the threat of exclusion from drug formularies to obtain higher rebates for health plan clients, and thereby higher profits for PBMs, has resulted in increased list prices for insulin and the exclusion of lower priced insulin from drug formularies. Respondents deny these and other material allegations.

The Complaint asserts three counts of violations of the FTC Act. Count I alleges that Respondents' unjustified favoring of high list price insulin products with high rebates and fees for their formularies, and exclusion of lower list price versions with lower rebates and fees, constitutes an unfair method of competition in violation of Section 5(a) of the FTC Act. Complaint ¶¶ 255-61. Count II asserts that Respondents' exclusion of low WAC insulin products from their formularies, in favor of identical high WAC insulin products, is an unfair practice because it causes, and is likely to cause, substantial injury to insulin consumers whose out-of-pocket costs are based on list prices, which cannot reasonably be avoided and is not outweighed by any benefits to consumers or competition, in violation of Section 5(a) and (n) of the FTC Act. Complaint ¶¶ 262-67. Count III avers that Respondents' conduct in shifting the cost of high insulin prices onto certain insulin patients is an unfair practice because it causes these patients harm that cannot reasonably be avoided and is not outweighed by any benefits to consumers or

[1] At the prehearing scheduling conference held on October 21, 2024, Complaint Counsel requested leave to file a single opposition to the Respondents' three separate motions within ten days of the last-filed motion. The request was granted.

competition, in violation of FTC Act Section 5(a) and (n). Complaint ¶¶ 268-74. Respondents deny their conduct violated the FTC Act.

As set forth in the Complaint's Notice of Contemplated Relief, the proposed remedy for the alleged violations includes prohibiting Respondents from: (1) excluding or disadvantaging low WAC versions of high WAC drugs made by the same manufacturers; (2) accepting compensation based on a drug's list price or a related benchmark; and (3) designing, or assisting with designing, a benefit plan that bases patients' deductibles or coinsurance on the list price, rather than net price, of a drug.

III.

Respondents rely on FTC Rule 3.41(b)(3), which states in pertinent part:

> (b) Expedition. Hearings shall proceed with all reasonable expedition, and, insofar as practicable, shall be held at one place and shall continue, except for brief intervals of the sort normally involved in judicial proceedings, without suspension until concluded. . . .
>
> > (3) 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) (hereafter, "Rule").

As the Commission recognized when adopting Rule 3.41(b)(3), separate hearings are conducive to expedition and economy, and therefore appropriate, only in "relatively unusual" cases. 44 Fed. Reg. 62887 (F.T.C. Final Rule Nov. 1, 1979). The burden of demonstrating that separate trials will be conducive to expedition and economy is on Respondents. The ultimate decision whether to order separate hearings is within the discretion of the court. *See Houseman v. U.S. Aviation Underwriters*, 171 F.3d 1117, 1121 (7th Cir. 1999) (referencing decision whether to bifurcate trial under Federal Rule of Civil Procedure 42(b)).[2]

Although the motions of the Caremark Respondents, the ESI Respondents and the Optum Respondents do not set forth identical arguments in support of separate trials, their similarity permits a discussion of these arguments together rather than with reference to each motion filed. *See In re Motor Up*, No. 9291-92, 1999 WL 33577393, at *1 (F.T.C. June 11, 1999); *In re Chrysler Motors Corp. et al.*, No. 9072-74, 1976 FTC LEXIS 448, at *3 (Mar. 19, 1976).

Respondents' arguments in support of conducting separate trials for each Respondent group can be summarized as follows: (1) Proving the alleged violations by each Respondent group will involve different facts, documents and witnesses; (2) Hearing distinct evidence

[2] The provisions in Rule 3.41(b)(3) relating to separate trials are "modeled after" Federal Rule of Civil Procedure 42. 44 Fed. Reg. 62887. *See* Fed. R. Civ. P. 42(b) ("For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims. When ordering a separate trial, the court must preserve any federal right to a jury trial."). Federal decisions under Federal Rule of Civil Procedure 42(b) are therefore relevant.

pertaining to each Respondent group in a single hearing will be confusing; and (3) A single trial for the three Respondent groups risks unfairness and prejudice, resulting from exposure of each Respondent group's confidential business information to its co-Respondent competitors and from having to divide limitations on witnesses, briefs, and deposition and trial time.

Complaint Counsel respond that Respondents have failed to demonstrate that separate trials will be more expeditious or economical than a single trial because: (1) Common issues of law and fact outweigh the limited differences in Respondent-specific proof; (2) The potential for confusion in a single trial is minimal and manageable; and (3) Respondents' concerns about confidentiality are addressed by the issuance of the Protective Order and provisions in the Rules for in camera orders, and provisions in the Scheduling Order have eliminated Respondents' concerns about limitations on witnesses, depositions and briefing.

IV.

A.

Respondents point to allegations in the Complaint acknowledging that the PBM Respondents offer different formularies, with varying levels of exclusion, and that each Respondent group makes different formulary and exclusion decisions. *See, e.g.*, Complaint ¶¶ 34-37; 103-11, 245-48. In relying on the purported existence of distinct facts, witnesses and evidence, Respondents attempt to analogize to motions to consolidate separate cases into a single trial. *See* 16 C.F.R. § 3.41(b)(2) ("When actions involving a common question of law or fact are pending before the Administrative Law Judge, the Commission or the Administrative Law Judge may order a joint hearing of any or all the matters in issue in the actions."); Fed. R. Civ. P. 42(a) ("If actions before the court involve a common question of law or fact, the court may" consolidate the cases or join "for hearing or trial any or all matters at issue . . . ."); *Motor Up*, 1999 WL 33577393 at *1 (denying motion to consolidate separate actions for deceptive advertising, where separate fact questions predominated, including different advertised products and different advertising claims). Respondents have not cited any case in which the Commission or the Administrative Law Judge decided to split a single case into multiple hearings.

Respondents' analogy to consolidation of separate cases is unpersuasive. The instant case arose from a single investigation into the collective conduct of Respondents, based on a single legal theory. The Commission has already determined, by issuing a single complaint, that the violations at issue present sufficient common issues of law and fact. The determinative issue is whether separating the claims for trial will nevertheless be more economical and expeditious. In any event, the instant case presents far more commonality of law and fact than difference. Each Respondent group is charged with violating Section 5(a), through unfair competition or unfair practice, arising from alleged systematic exclusion of low WAC insulin products from each group's most common formularies and alleged harm resulting therefrom. Moreover, the Complaint seeks the same relief against all Respondents.

Viewed as a whole, much of the case will involve proof of matters common to all three Respondent groups, such as facts about diabetes and insulin medications, the drug distribution chain, other industry participants' behavior in response to the Respondents' alleged conduct, and

alleged consumer harm. Other common matters, likely to be the subject of expert witness testimony, include contracting between PBMs and health plans, insulin treatment, and the price effects of Respondents' alleged conduct on patients. Presenting such common evidence three times in three separate trials is neither economical nor expeditious.

Apparently acknowledging the existence of common issues of law and fact, Respondents propose a joint hearing covering the common matters, followed by three separate hearings for the three separate Respondent groups. However, having four trials risks even higher costs and more delay than three trials, and clearly more than in the case of one trial. Furthermore, what the parties might consider joint, or common, evidence as opposed to evidence against a particular respondent might vary, leaving the joint trial "to deteriorate very rapidly into a contest of objections as to whether particular material is or is not appropriately addressed during that particular phase." *United States v. Am. Tel. & Tel. Co.*, 83 F.R.D. 323, 336 (D.D.C. 1979).[3] This is not a recipe for an economical or expeditious resolution of the case.

B.

Respondents' contention that a single hearing will confuse the issues, by allowing evidence associated with one Respondent to be conflated across all Respondents, is without merit. Respondents assert that in order to counteract such confusion, each Respondent group will have to rebut all evidence offered against any Respondent group. The potential for confusion is a proper consideration, particularly with a jury trial. *Bowling v. DaVita, Inc.*, No. 21-CV-03033-NYW-KAS, 2024 WL 3581678, at *4 (D. Colo. July 30, 2024) (denying consolidation including because "the jury would be required to keep straight three separate collectives, some of which have overlapping allegations and some of which do not"); *In re Genetically Modified Rice Litig.*, No. 4:06MD1811 CDP, 2010 WL 816157, at *1 (E.D. Mo. Mar. 3, 2010) (determining that separate trials would avoid confusion by streamlining evidence and simplifying legal instructions for the jury). However, this is a bench trial, and Part III cases typically involve multiple Respondents. The alleged distinctions in evidence to be presented here, such as different formularies and different negotiating practices, are not so complex as to raise a meaningful risk that evidence against one Respondent will, due to confusion, be applied against a different Respondent. In addition, any purported or suspected confusion can be alleviated by proper record citation in post-trial briefing. Accordingly, the contention that each Respondent group will therefore be prejudiced by having to rebut at a single trial all evidence presented against any Respondent group is unsupported.

C.

Respondents' concern that a single trial risks unfairness and prejudice through exposure of their confidential business information to their co-Respondent competitors is misplaced. The Protective Order mandated by Appendix A to Rule 3.31, which has been entered in this case, protects all confidential information produced in discovery, including that produced by Respondents themselves, from disclosure to anyone other than the Administrative Law Judge, the

[3] Respondents allude to an alternative proposal of trial depositions as a substitute for one or more witness appearances; however, Respondents provide no details or otherwise explain how trial depositions would work in practice.

Commission, and their associated personnel; outside counsel of record and their associates and employees; and outside consultants, such as expert witness, who agree to be bound by the Protective Order. Thus, while Respondents' outside counsel will have access to all information, Respondents' employees are barred from seeing the confidential materials of their competitor co-Respondents. In addition, pursuant to Rule 3.45, each Respondent is entitled to move for in camera treatment of any materials to be offered into evidence, which, if granted, will keep such materials "confidential and not placed on the public record of the proceeding . . . ." 16 C.F.R § 3.45(a). Materials subject to an in camera order can be exposed only to the submitting Respondent(s), "their counsel, authorized Commission personnel, and court personnel concerned with judicial review . . . provided that the Administrative Law Judge, the Commission and reviewing courts may disclose such in camera material to the extent necessary for the proper disposition of the proceeding." *Id.* Antitrust administrative trials often involve confidential business information, including that belonging to co-respondent competitors, such as in a horizontal merger case or a conspiracy case, and the court is experienced with protecting such information from exposure. For all these reasons, the production and potential use of confidential business information does not risk prejudice to Respondents or justify ordering separate trials.[4]

Lastly, Respondents contend that a single trial for the three Respondent groups is unfair and prejudicial because each Respondent group must share certain limitations, contained in the Rules and in the form scheduling order provided to the parties prior to the filing of Respondents' Motions, regarding witnesses, briefs, and deposition and trial time. However, the final Scheduling Order issued in this case on October 23, 2024, after the filing of Respondents' Motions, addresses Respondents' fairness concerns. Specifically:

Fact witnesses: Under the Scheduling Order, Complaint Counsel's final witness list is limited to twenty-five fact witnesses for its case against the three Respondent groups and each Respondent group is limited to fifteen fact witnesses per Respondent group.

Expert witnesses: Although Rule 3.31A(b) states each *side* is limited to calling five expert witnesses at the evidentiary hearing, the Scheduling Order issued in this case, allows each *Respondent group* to call five expert witnesses at the evidentiary hearing.

Briefing limits: The Scheduling Order provides: "All pretrial and post-trial briefing [page limits] shall be per Respondent group (for avoidance of doubt, Complaint Counsel will have an equal limitation of pages)."

Deposition time: The Scheduling Order omitted the default seven-hour limit to be split between each side for all depositions. Instead, the Scheduling Order provides that for any witness whose testimony concerns more than one Respondent group, each Respondent group is allocated up to three and a half hours of record time. Furthermore, if Complaint Counsel and one or more

[4] Respondents contend that it is unfair for Respondents' employees and in-house counsel to be barred from access to confidential materials, as required by the Protective Order and Rule 3.45(a). A motion for separate trials is not a venue for seeking amendments to the Commission's Rules. Moreover, separate trials in this case would not eliminate the potential for confidential materials belonging to one Respondent group to be produced in discovery or offered into evidence at the trial of another Respondent group. Thus, the same issues of confidentiality would arise even if separate trials were granted.

Respondent group notice any non-party fact deposition (including any Rule 3.33(c) deposition), the parties are required to agree to an equitable distribution of the seven hours of record time. For any deposition of a non-party that provided a declaration, the side that obtained the declaration will have one hour of record time, and the other side will have six hours of record time.

Regarding hearing time allocation, Rule 3.41(b) provides that evidentiary hearings "should be limited to no more than 210 hours" and that trial time is to be split evenly between each side. This provision was not addressed in the Scheduling Order. However, the potential for unfairness can be addressed through a motion for an equitable distribution of trial time among the parties filed in advance of the hearing.

V.

Having fully considered the Motions for Separate Evidentiary Hearings, and for the reasons explained above, Respondents have failed to demonstrate that separate hearings will be conducive to expedition and economy. Accordingly, the Motions are DENIED.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: November 14, 2024