PUBLIC

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

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

RESPONDENTS' MOTION FOR DISCOVERY PURSUANT TO RULE 3.36

Pursuant to Rule 3.36 of the Commission's Rules of Practice, 16 C.F.R. § 3.36, Respondents OptumRx, Inc., OptumRx Holdings, LLC, Emisar Pharma Services LLC ("OptumRx Respondents"), Caremark Rx LLC, and Zinc Health Services, LLC ("Caremark and Zinc," together with OptumRx Respondents, the "Respondents") respectfully move for an order authorizing the issuance of subpoenas *duces tecum* to FTC Chair Lina Khan, and Commissioners Rebecca Slaughter and Alvaro Bedoya (collectively "Commissioners"). The subpoena requests a clearly defined set of documents that are highly relevant to Respondents' defenses of selective prosecution and bias.

I. INTRODUCTION

Long before the FTC's investigation was complete and this Complaint was filed, the Commissioners regularly and publicly voiced opinions that PBMs were unilaterally "price gouging" customers through "disturbingly" "unacceptable" practices, including "horrific" rebate

systems that "keep . . . [the Commissioners] up at night." OptumRx Motion for Disqualification at 2 (quoting Chair Khan, Commissioner Slaughter and Commissioner Bedoya, respectively). Now that the Respondents have been charged in accordance with the Commissioners' views, due process entitles Respondents to learn what shaped those views. Respondents seek documents reflecting the Commissioners' communications regarding PBMs, which are highly relevant to Respondents' defenses, including that the Commissioners prejudged this matter, exhibited bias against PBMs, and are engaged in selective enforcement of the FTC Act. This information is not in the possession of Complaint Counsel and can only be obtained by a subpoena to the Commissioners. The instant subpoenas are narrowly tailored to the FTC's claims and Respondents' affirmative defenses to minimize burden to the Commissioners.

II. ARGUMENT

The grant of a 3.36 motion for a subpoena is appropriate where the requested subpoena is: (1) "reasonably expected to yield information relevant to . . . [a respondent's] defenses"; (2) reasonable in scope; (3) specified with reasonable particularity; and (4) not reasonably obtainable by other means. *See* 16 C.F.R. §§ 3.31(c), 3.36(b), 3.37(a). Respondents' proposed subpoenas satisfy these requirements because they seek studies, reports, statements, and non-public communications with third parties that are not otherwise present in Complaint Counsel's investigative file and directly relate to the allegations in the Complaint:

- All Communications between the Commissioners and various nonparties and industry groups, including those known to be hostile to PBMs, relating to the Investigation, the allegations in the Complaint, drug rebate policies of PBMs and drug manufacturers, and insulin drug pricing.

- All Documents concerning Commissioner Alvaro Bedoya's participation in and attendance at the 2023 or 2024 National Alliance of Healthcare Purchasers Annual Forum.

- All Communications between the FTC Commissioners and other federal agencies and federal officials including members of congress and their staff, regarding PBMs, rebates, drug prices, insulin, or the Investigation.

- All Communications between the Commissioners and the White House including Tim Wu and any White House successors to Tim Wu.

- All studies, reports, assessments, statements, factual bases, and other evidence upon which the FTC Commissioners relied to conclude that "prior PBM-related advocacy statements and reports" "no longer reflect current market realities" as noted in the FTC's July 20, 2023 press release.

- All Documents and Communications analyzing any Commissioner's potential recusal.

- Documents sufficient to show the Commissioners' document retention policies and practices.

Exs. A, B, C. These requests pertain to several of Respondents' affirmative defenses, including that:

> 6. The Complaint fails to allege any plausible unfair act or practice arising from Optum Rx's practice of negotiating rebates for drugs, which serve as an important counterweight to drug manufacturers' discretion to set list prices for critical drugs.
>
> 26. The Complaint reflects improper selective enforcement of the FTC Act.
>
> 27. Because Chair Khan, Commissioner Bedoya, and Commissioner Slaughter have exhibited bias and prejudgment of the issues and therefore should be disqualified, the initiation and maintenance of this action violates the Due Process Clause, U.S. Const. amend. V; the FTC Act, 5 U.S.C. § 41 et seq.; the Administrative Procedure Act, 5 U.S.C. § 1001 et seq.; Federal Trade Commission regulations, 16 C.F.R. § 4.17; and federal ethics laws and regulations, 28 U.S.C. § 455; 5 C.F.R. § 2635.501(a); 5 C.F.R. § 2635.101(b)(14).
>
> 28. Because Chair Khan, Commissioner Bedoya, and Commissioner Slaughter have exhibited bias and prejudgment of the issues, the FTC cannot seek, obtain, or enforce any equitable remedy under the doctrines of unclean hands, estoppel, or other equitable doctrines.

OptumRx Affirmative Defenses 6, 26–28; *see also* Caremark and Zinc Affirmative Defenses 13, 28.

A. The Requested Discovery is Relevant to Respondents' Defenses

The discovery requests above are relevant to the Respondents' selective enforcement, case initiation bias, and adjudication bias defenses. Respondents are entitled to discovery that "may be reasonably expected to yield information relevant to the allegations of the complaint . . . or to the defenses of any respondent." 16 C.F.R. § 3.31(c)(1). Discoverable material "may include the existence, description, nature, custody, condition, and location of any books, documents, other tangible things, electronically stored information, and the identity and location of persons having any knowledge of any discoverable matter." *Id.*

a. Selective enforcement

The discovery requests are relevant to the OptumRx Respondents' Affirmative Defense 26 and Caremark and Zinc's Affirmative Defense 28, asserting "selective enforcement" of the FTC Act. OptumRx Answer at 59; Caremark and Zinc Answer at 66. Respondents seek to defend themselves by proving that, notwithstanding overwhelming evidence that insulin drug prices are the result of actions by myriad other market participants, the Commission charged only the three Respondent PBMs based on demonstrated animus against those PBMs.

To establish a selective enforcement claim, a respondent must show the lawsuit "had a discriminatory effect and that it was motivated by a discriminatory purpose." *United States v. Armstrong*, 517 U.S. 456, 465 (1996). Respondents can make such a showing with evidence (i) that they "have been singled out" among other similarly situated potential violators and (ii) that this was done "invidiously or in bad faith." *United States v. Smithfield Foods, Inc.*, 969 F. Supp. 975, 985 (E.D. Va. 1997) (cleaned up). Discovery is warranted when a respondent presents "some evidence tending to show" this discriminatory effect and discriminatory intent. *Armstrong*, 517 U.S. at 468.

Here, there is abundant evidence "'tending to show the existence' of 'different treatment of similarly situated persons.'" *United States v. McGraw-Hill Cos.*, 2014 WL 1647385 (C.D. Cal. Apr. 15, 2014) (quoting *Armstrong*, 517 U.S. at 470). The Complaint targets Respondent PBMs, but not other PBMs who engage in the same rebating and formulary design practices or non-PBM market participants that are central to, or counter-parties to, the allegedly unlawful practices. The Complaint itself confirms that non-PBM market participants impact insulin pricing, thus they "could have been," "but were not" named in a complaint. *Armstrong*, 517 U.S. at 469. "As the FTC readily admits, drug manufacturers will offer deeper discounts when their drugs must compete against other manufacturers' drugs, and plan sponsors use exclusions from their formularies to bring that competition to bear." OptumRx Answer ¶ 3; *see also* Compl. ¶¶ 43–44 (insulin manufacturer paid higher rebates to OptumRx when no other long-acting insulin manufacturers were on an OptumRx formulary). And, when announcing this lawsuit, one FTC official stated that "the Commission has exercised its discretion to move forward with suing only the PBMs and GPOs" but that the Bureau of Competition "remains deeply troubled by the role drug manufacturers play in driving up prices." Statement of FTC Bureau of Competition Dep. Dir. Rahul Rao (Sept. 20, 2024) (https://www.ftc.gov/system/files/ftc_gov/pdf/insulin-manufacturing-statement.pdf); *see also* OptumRx Affirmative Defense 6 (noting that OptumRx rebates are "an important counterweight to drug manufacturers' discretion to set list prices for critical drugs").

Moreover, the Commissioners' own inflammatory statements about PBMs provide ample evidence of discriminatory intent, and much more than was found sufficient to support such discovery in *McGraw-Hill*. There, the Treasury Secretary called the President of McGraw-Hill to express his anger that the company's rating agency, S&P, had downgraded the credit rating of the United States, and two years later, the government brought criminal fraud charges against the

company. 2014 WL 1647385, at *12. Although the Secretary's statements were "susceptible to several interpretations," the district court found this "circumstantial but sufficient" evidence of discriminatory intent to support further discovery. *Id.* Here, by contrast, Respondents here have identified myriad anti-PBM statements by the Commissioners, many delivered at events hosted and funded by anti-PBM lobbying groups. OptumRx Respondents' Mot. for Disqualification at 2–8; Caremark and Zinc's Mot. for Disqualification at 2–9. This evidence "tends to show" an improper purpose, and Respondents are entitled to additional discovery into the source of this animus.

b. Bias

Respondents contend that Chair Khan and the Commissioners' statements evidence bias from the initiation of the complaint, through the current adjudication of the action, and that bias violates Respondents' due process rights and the FTC Act, among other laws. *See* OptumRx Affirmative Defense 27 ("[T]he initiation *and* maintenance of this action violates the Due Process Clause, U.S. Const. amend. V; the FTC Act," etc. (emphasis added)); OptumRx Affirmative Defense 28; Caremark and Zinc Affirmative Defense 13, 30. The discovery sought here is relevant to these defenses because it relates to the Commissioners' public statements made *on the merits* that signal "personal animosity against [Respondents] beyond [their] own views about antitrust law," and beyond mere "belief in the validity of the allegations." *Fed. Trade Comm'n v. Facebook, Inc.*, 581 F. Supp. 3d 34, 63–64 (D.D.C. 2022).

Here, the Commissioners and Chair Khan "show[ed] prejudgment about [a] respondent's case" by making numerous public statements revealing their bias. In nationwide television broadcasts, Chair Khan condemned Respondents' rebate practices as "kickbacks," and specifically alluded to OptumRx by displaying a custom "Anti-Monopoly" board game with a "Monopoly"

card labeled "OptumRx."[1] OptumRx Respondents' Mot. to Disqualify at 5. These condemnations are even more pointed than the actionable statement from the then-Commission Chair in *Cinderella*, who condemned false advertising and quipped that someone can "becom[e] an airline's hostess by attending a charm school," *Cinderella Career & Finishing Schs., Inc. v. FTC*, 425 F.2d 583, 590–92 (D.C. Cir. 1970)), and they go well beyond the mere "factual statements" that this Court has found insufficient to support discovery in the past, *In re Intuit, Inc.*, 2022 WL 16960890, *4–5 (FTC Nov. 7, 2022) (denying discovery into bias based on FTC Chair's retweet of FTC press release and public description of pending action).

The Commissioners' statements here also evidence far more bias than the single actionable statement in *Antonio v. SEC*, 877 F.2d 721 (8th Cir. 1989). There, an SEC Commissioner made a public statement that a respondent's bar from association with a broker-dealer was permanent when, in fact, the case was still pending and the bar had not been made permanent. *Id.* Finding prejudice in the Commissioner's statement, the Eighth Circuit nullified every Commission proceeding that occurred after the Commissioner made that speech and directed the Commission to review the evidence de novo, without that Commissioner's participation. *Id.* at 726. By contrast, here, multiple Commissioners have made multiple statements exhibiting prejudgment of the matter. *See, e.g.*, OptumRx Respondents' Mot. for Disqualification at 2–8; Caremark and Zinc's Mot. for Disqualification at 2–9

c. Discovery from Commissioners is particularly relevant to selective enforcement and bias defenses because FTC Commissioners act as investigators, prosecutors, and appellate jurists alike

Where an FTC Commissioner acts only as a prosecutor, authorizing a Complaint in federal court, the less "stringent" standards of neutrality may apply because prosecutors "are necessarily

[1] Under Chair Khan's leadership, the FTC uses the term "kickbacks" to describe "commercial bribery practices." https://tinyurl.com/yn5mep3k, at 2.

permitted to be zealous in their enforcement of the law." *Facebook, Inc.*, 581 F. Supp. 3d at 63–64 (quoting *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 248, (1980)). As the *Facebook* court explained, "a prosecutor need not be disinterested on the issue [of] whether a prospective defendant has committed the crime with which he is charged. . . . True disinterest on the issue of such a defendant's guilt is the domain of the judge and the jury—not the prosecutor." *Id.* (quoting *Wright v. United States*, 732 F.2d 1048, 1056 (2d Cir. 1984)).

But, for Complaints filed in Part III proceedings, the Commissioners do not act merely as prosecutors, but as ultimate judge and jury. The Chair and Commissioners adjudicate their own disqualification in the first instance. 16 C.F.R. § 4.17(b)(3). And on the merits of the very enforcement action they authorized, the Commissioners enjoy the final say with the administrative law judge merely recommending a decision. 16 C.F.R. § 3.51(a)(1). In other words, for cases filed in this administrative court, the Commissioners play an adjudicative role, and "[a]djudication has its own unique ethical requirements." *Facebook Inc.*, 581 F. Supp. 3d at 63. While the Commissioners' statements violate even the less stringent standards of neutrality for prosecutors, when the Commissioners act in their adjudicatory capacity, bias and prejudice concerns are at their apex. Respondents are entitled to discovery into potential bias of the ultimate decisionmakers.

B. The Discovery Is Reasonable In Scope, Stated With Particularity, And Cannot Be Otherwise Obtained

The requested discovery is reasonable in scope and stated with particularity. 16 C.F.R. §§ 3.36(b)(1), 3.37(a). The requested discovery is limited to discrete topics and specific types of materials to allow identification of readily accessible responsive materials. The requests are also narrowly tailored to support Respondents' defenses and rebut the FTC's allegations, are targeted in scope, and will impose only a limited burden. *In re Intel Corp.*, 2010 WL 2544424, at *3 (FTC June 9, 2010).

Respondents cannot otherwise obtain information about the Commissioners' communications and influences. 16 C.F.R. § 3.36(b)(3). Complaint Counsel has neither access nor an obligation to obtain it. 16 C.F.R. § 3.31(c)(2) ("Complaint counsel need only search for materials that were collected or reviewed in the course of the investigation of the matter or prosecution of the case and that are in the possession, custody or control of the Bureaus or Offices of the Commission that investigated the matter, including the Bureau of Economics."). The information sought is held by the Commissioners, including unprivileged and non-public information related to their interactions with other insulin price-influencing market participants, and other relevant internal evidence related to the allegations in this case. *See In re Axon Enter.*, 2020 WL 5701022, at *1 (FTC Sept. 17, 2020) (granting 3.36 motion where "only customers" would have the requested information). There is nothing "reasonable" about sparing a subpoena to the FTC and instead obtaining documents from nonparties when some relevant nonparties are not "readily identifiable," and regardless, they possess a mere subset of the materials sought. *In re 1-800 Contacts, Inc.*, 2016 WL 6609774, at *6 (FTC Oct. 28, 2016). Beyond the requested subpoenas, Respondents have no other way to obtain these materials.

III. CONCLUSION

An order should issue authorizing the subpoenas attached as Exhibits A, B, and C.

Dated: January 3, 2025

Respectfully submitted,

By: */s/ Samuel Liversidge*

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EXHIBIT A

Subpoena for Production of Documentary Material

Provided by the Secretary of the Federal Trade Commission, and
Issued Pursuant to Commission Rule 3.34(b), 16 C.F.R. § 3.34(b)(2010)

1. TO

Lina Khan, Chair
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

2. FROM

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

This subpoena requires you to produce and permit inspection and copying of designated books, documents (as defined in Rule 3.34(b)), or tangible things, at the date and time specified in Item 5, and at the request of Counsel listed in Item 9, in the proceeding described in Item 6.

3. PLACE OF PRODUCTION

Gibson, Dunn & Crutcher LLP
1700 M. St. NW
Washington, DC 20036

4. MATERIAL WILL BE PRODUCED TO

Samuel Liversidge, Esq. or designee

5. DATE AND TIME OF PRODUCTION

6. SUBJECT OF PROCEEDING

In the Matter of Caremark RX, LLC, Zinc Health Services, LLC, et al.; Docket No. 9437

7. MATERIAL TO BE PRODUCED

See Attached Requests and Specifications

8. ADMINISTRATIVE LAW JUDGE

The Honorable D. Michael Chappell
Federal Trade Commission
Washington, D.C. 20580

9. COUNSEL AND PARTY ISSUING SUBPOENA

Samuel Liversidge, Gibson, Dunn & Crutcher LLP, Counsel for OptumRx, Inc.; OptumRx Holdings, LLC; and Emisar Pharma Services LLC

Enu Mainigi, Williams & Connolly LLP, Counsel for Caremark Rx, LLC and Zinc Health Services, LLC

DATE SIGNED

SIGNATURE OF COUNSEL ISSUING SUBPOENA

INSTRUCTIONS AND NOTICES

The delivery of this subpoena to you by any method prescribed by the Commission's Rules of Practice is legal service and may subject you to a penalty imposed by law for failure to comply. This subpoena does not require approval by OMB under the Paperwork Reduction Act of 1980.

PETITION TO LIMIT OR QUASH

The Commission's Rules of Practice require that any petition to limit or quash this subpoena be filed within the earlier of ten days after service thereof or the time for compliance therewith. The original and twelve copies of the petition must be filed with the Secretary of the Federal Trade Commission, and one copy should be sent to the Commission Counsel named in Item 9.

YOUR RIGHTS TO REGULATORY ENFORCEMENT FAIRNESS

The FTC has a longstanding commitment to a fair regulatory enforcement environment. If you are a small business (under Small Business Administration standards), you have a right to contact the Small Business Administration's National Ombudsman at 1-888-REGFAIR (1-888-734-3247) or www.sba.gov/ombudsman regarding the fairness of the compliance and enforcement activities of the agency. You should understand, however, that the National Ombudsman cannot change, stop, or delay a federal agency enforcement action.

The FTC strictly forbids retaliatory acts by its employees, and you will not be penalized for expressing a concern about these activities.

TRAVEL EXPENSES

Use the enclosed travel voucher to claim compensation to which you are entitled as a witness for the Commission. The completed travel voucher and this subpoena should be presented to Commission Counsel for payment. If you are permanently or temporarily living somewhere other than the address on this subpoena and it would require excessive travel for you to appear, you must get prior approval from Commission Counsel. Witness travelers can contact the FTC travel office for guidance at (202) 326-3299 or travel@ftc.gov. PLEASE NOTE: Reimbursement for necessary transportation, lodging, and per diem expenses cannot exceed the maximum allowed for such expenses by an employee of the federal government.

A copy of the Commission's Rules of Practice is available online at http://bit.ly/FTCsRulesofPractice. Paper copies are available upon request.

RETURN OF SERVICE

I hereby certify that a duplicate original of the within subpoena was duly served: (check the method used)

○ *in person.*

○ *by registered mail.*

◉ *by leaving copy at principal office or place of business, to wit:*

via FedEx

on the person named herein on:

(Month, day, and year)

(Name of person making service)

(Official title)

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

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

ATTACHMENT TO RESPONDENTS' SUBPOENA *DUCES TECUM* TO COMMISSIONERS OF THE FEDERAL TRADE COMMISSION

Pursuant to Federal Trade Commission Rule of Practice for Adjudicative Proceedings 3.34(b), 16 C.F.R. § 3.34(b), and the Definitions and Instructions set forth below, Respondents OptumRx, Inc., OptumRx Holdings, LLC, Emisar Pharma Services LLC, Caremark Rx LLC and Zinc Health Services, LLC (collectively, "Respondents") hereby request that Commissioners produce all documents, electronically stored information, and other materials in their possession, custody, or control that are responsive to the requests made below.

DEFINITIONS

A. "You," and "Your" shall mean FTC Chair Lina Khan, FTC Commissioner Rebecca Slaughter, and FTC Commissioner Alvaro Bedoya, and any other person acting or purporting to act on behalf of or under the direction, authorization, or control of such commissioners, including such Commissioners' staff and advisors or any person who served in such roles at any time.

B. "Action" shall mean *Caremark Rx, Zinc Health Services, et al., In the Matter of (Insulin)*, FTC File No. 221-0114, Dkt. D09437.

C. "All" and "each" shall mean "each and every."

D. "And" and "or" shall be construed conjunctively or disjunctively as necessary to make the request inclusive rather than exclusive.

E. "Any" shall mean "at least one that applies, and if more than one applies, each that applies."

F. "Commissioners" shall mean any current Commissioners of the Federal Trade Commission, former Commissioners of the Federal Trade Commission who served on or after January 1, 2017, and any other person acting or purporting to act on behalf of or under the direction, authorization, or control of such commissioners, including such Commissioners' staff and advisors.

G. "Communication" shall mean any exchange, transfer, or dissemination of information, regardless of the means by which it is accomplished.

H. "Complaint Counsel" shall mean any Bureau or Office of the Federal Trade Commission involved in the Investigation or this Action, including staff, employees, representatives, consultants, agents, servants, attorneys, accountants, or any person who served in any such roles at any time.

I. "Concerning" shall mean relating to, regarding, discussing, describing, mentioning, reflecting, constituting, comprising, identifying, stating, dealing with, commenting on, connected with, analyzing, confirming, supporting, reporting, setting forth, considering, contradicting, refuting, repudiating, rebutting, undermining, pertaining to, or evidencing the subject matter of, in whole or in part.

J. "Discussing" shall mean, in whole or in part, constituting, containing, describing, or addressing the designated subject matter, regardless of the length of the treatment or detail of analysis of the subject matter, but not merely referring to the designated subject matter without elaboration. Further, these terms include any data about the designated subject matter where such data are separately set out as in a chart, listing, table, or graph.

K. "Document" shall mean any information, on paper or in electronic format, including written, recorded, and graphic materials of every kind, in the possession, custody, or control of the Company, including Communications. The term "Document" includes, without limitation: computer files; email messages; text messages; instant messages and chat logs; group chats; voicemails and other audio files; calendar entries; schedulers; drafts of documents; metadata and other bibliographic or historical data describing or relating to documents created, revised, or distributed electronically; copies of documents that are not identical duplicates of the originals in that Person's files; notes of Meetings or telephone calls; and copies of documents the originals of which are not in the possession, custody, or control of the Company.

L. "Federal Trade Commission" or "FTC" shall mean the United States Federal Trade Commission and any Bureau or Office thereof.

M. "Including" shall not be construed as limiting any request, and shall mean the same as "including, but not limited to."

N. "Insulin Manufacturer" shall mean any pharmaceutical manufacturer or other company that manufactures or markets Insulin Products, including but not limited to Eli Lilly and Company, Novo Nordisk A/S, Sanofi S.A., and Viatris Inc., Biocon Pharma Inc., MannKind Corporation, Civica Rx, or any subsidiary or affiliate thereof.

O. "Insulin Product" or "Insulin" shall mean any insulin pharmaceutical and related device, equipment, or other mechanical part approved by the FDA to treat diabetes.

P. "Investigation" shall mean the Complaint Counsel's investigation of Optum Rx, other Respondents, and Insulin Manufacturers in connection with Insulin Products, FTC File No. 2210114.

Q. "Pharmacy Benefit Manager" or "PBM" shall mean any entity or anyone acting on the entity's behalf (such as a GPO) that serves as a third-party administrator of a Plan's prescription drug programs; negotiates Rebate or fee agreements on behalf of a Plan; creates or manages a Formulary on behalf of a Plan; or otherwise deals with pharmaceutical manufacturers or sellers on behalf of a Plan.

R. "PBM 6(b) Order" shall mean the Federal Trade Commission's compulsory orders issued in regard to its 6(b) study into the PBM industry and affiliated Group Purchasing Organizations pursuant to FTC Matter No. P221200.

S. "Rebate" shall mean any payment returning a portion of a sale, or discount afforded, to a direct or indirect purchaser.

T. "Respondents" shall mean the Respondents in the Action, as well as all predecessors and successors thereof; all past or present divisions, parents, subsidiaries, and affiliates of any of the foregoing entities; all past or present owners, joint ventures, partnerships, and limited partnerships of which any of the foregoing entities is a joint venture or a limited general

partner; and all past or present directors, officers, members, employees, attorneys, agents, representatives, or other persons under the control of or purporting to act for or on behalf of any of the foregoing entities, either directly or indirectly.

U. The use of the singular shall also include the plural, and vice-versa.

INSTRUCTIONS

The following instructions shall apply to the requests that follow:

1. Unless stated otherwise, the time period for the requests is January 1, 2017 through the close of fact discovery in the Action.

2. Unless a request requires the production of information protected by the attorney-client privilege, the work product doctrine, or any other applicable privilege from discovery, each requested Document shall be produced in its entirety, without abbreviation or redaction, including all attachments, appendices, exhibits, lists, schedules or other matters at any time affixed thereto. If a Document or Communication responsive to any request cannot be produced in full, it shall be produced to the extent possible with an explanation stating why production of the remainder is not possible.

3. Documents and Communications responsive to these requests shall be produced as they are kept in the ordinary course of business and labeled in such a way as to show their source, including but not limited to the files and offices where they were maintained. Documents contained in file folders, loose-leaf binders, or notebooks with tabs or labels referencing such Documents are to be produced intact with such file folders, loose-leaf binders, or notebooks. In producing Documents and Communications, all Documents and Communications that are physically attached to one another shall be left so attached. Documents and Communications that

are segregated or separated from other Documents and Communications shall be left so segregated or separated.

4. All Documents and Communications produced electronically are to include all reasonably available metadata fields, including but not limited to the date created and any custodian information.

5. If a timely objection to any portion of a request, definition, or instruction is asserted, Documents responsive to the remaining portion are to be produced.

6. If any Document is withheld, in whole or in part, for any reason, including but not limited to any claim of privilege of any kind, work-product protection, trade secret, or confidentiality, You shall submit a privilege log pursuant to 16 C.F.R. § 3.38A.

7. If you object in whole or in part to any of the requests, please state in detail the basis for your objection to the particular request and all facts upon which you rely to support your objection. In addition, you are requested to identify all Documents and Communications for which you are interposing any objection.

8. If you cannot comply with any of the requests in full after exercising due diligence to secure the Documents or Communications, so state and produce to the extent possible. Specify your inability to produce the remainder and state whatever information or knowledge you may have regarding the unproduced Documents and Communications.

9. The requests are continuing and therefore require prompt supplementation if you receive, obtain, discovery, or otherwise possess additional responsive Documents and Communications before the trial of the Action.

10. If any Document or Communication is undated and the date of its preparation cannot be determined, the Document shall be produced if otherwise responsive to these requests.

11. Unless otherwise agreed upon, each request requires a search of all Documents in Your possession, custody, or control, including Documents held by any of Your officers, directors, employees, agents, or representatives, or Documents stored in any of Your electronic databases.

12. If any Documents or Communications responsive to these requests have been destroyed or are no longer available for any reason, describe the nature of such Documents or Communications, the last known location of any copies of such Documents or Communications, the date of such destruction, the reason for such destruction, and the name of the person who ordered or authorized such destruction.

13. If any part of any request is objected to, set forth the basis for Your objection and respond to all parts of the request for production to which you do not object, pursuant to Federal Trade Commission's Rules of Practice, 16 C.F.R. § 3.37(b).

14. If you cannot respond to all or part of any request for production after exercising due diligence to secure the full information to do so, so state and answer to the extent possible, specifying Your inability to respond to the remainder. In any partial response, state whatever information or knowledge you have concerning the unanswered portion, and detail what efforts have been taken to secure the unknown information.

15. None of these requests should be construed to seek any materials produced by the recipients of the PBM 6(b) Orders in response to those Orders, except for any materials actually reviewed or accessed by a Commissioner or their staff in connection with FTC File No. 2210114 or the Complaint in this action.

REQUESTS FOR PRODUCTION

DOCUMENT REQUEST NO. 1

All Communications between You and any non-parties to this action, including, but not limited to, 3 Axis Advisors, 46brooklyn, Antonio Ciaccia, National Community Pharmacists Association, American Economic Liberties Project, American Pharmacists Association, American Medical Association, National Association of Chain Drug Stores, National Health Alliance, Open Markets, Capitol Forum, the National Alliance for Healthcare Purchaser Coalitions, The New York Times, independent pharmacists, pharmacy associations, Mark Cuban, or Cost Plus Drugs relating to the Investigation, the allegations in the Complaint, drug rebate practices of PBMs and/or drug manufacturers, or insulin drug pricing.

DOCUMENT REQUEST NO. 2

All Communications between You and Health Mart Atlas, Cardinal Health, Elevate Provider Network, AlignRx, PhRMA, or other pharmaceutical trade groups relating to the Investigation, the allegations in the Complaint, drug rebate practices of PBMs and/or drug manufacturers, or insulin drug pricing.

DOCUMENT REQUEST NO. 3

All Documents concerning Commissioner Alvaro Bedoya's participation and attendance at the 2023 or 2024 National Alliance of Healthcare Purchasers Annual Forum.

DOCUMENT REQUEST NO. 4

All Communications between You and any other federal agency, federal official, member of Congress, or congressional staffer, regarding the Investigation, the allegations in the Complaint, drug rebate practices of PBMs and/or drug manufacturers, or insulin drug pricing.

DOCUMENT REQUEST NO. 5

All Communications between You and any White House advisor, staff, employee, including but not limited to Tim Wu and any White House successors to Tim Wu, relating to the Investigation, the allegations in the Complaint, drug rebate practices of PBMs and/or drug manufacturers, or insulin drug pricing.

DOCUMENT REQUEST NO. 6

All studies, reports, assessments, statements, factual bases, and other evidence upon which You relied to conclude that "prior PBM-related advocacy statements and reports" "no longer reflect current market realities" as noted in the FTC's July 20, 2023 press release.

DOCUMENT REQUEST NO. 7

All Documents and Communications concerning any Commissioner's potential recusal.

DOCUMENT REQUEST NO. 8

Documents sufficient to show Your document retention policies and practices, all efforts made to retain, search, and produce documents responsive to these Requests.

DATED:

Respectfully submitted,

By:

Samuel Liversidge
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333 South Grand Avenue
Los Angeles, CA 90071
Tel: (213) 229-7420
SLiversidge@gibsondunn.com

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Washington, DC 20006
mike.cowie@dechert.com
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gregory.luib@dechert.com
Tel: (202) 261-3300

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

CERTIFICATION

Pursuant to 28 U.S.C. § 1746, I hereby certify under penalty of perjury that this response to the Subpoena *Duces Tecum* is complete and correct to the best of my knowledge and belief.

_____	_____
(Signature of Official)	(Title/Company)
_____	_____
(Typed Name of Official)	(Office Telephone)

CERTIFICATE OF SERVICE

I hereby certify that on January __, 2025, I caused the foregoing document to be served via email to:

Rebecca L. Egeland
Bradley S. Albert
Federal Trade Commission
600 Pennsylvania Ave. NW
Washington, DC 20580
regeland@ftc.gov
balbert@ftc.gov
1035-Insulin-DL@ftc.gov

Counsel Supporting the Complaint

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rule@rulegarza.com
howley@rulegarza.com

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

Respectfully submitted,

By: */s/ Samuel Liversidge*
Samuel Liversidge
333 South Grand Avenue
Los Angeles, CA 90071
Tel: (213) 229-7420
SLiversidge@gibsondunn.com

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

EXHIBIT B

Subpoena for Production of Documentary Material

Provided by the Secretary of the Federal Trade Commission, and
Issued Pursuant to Commission Rule 3.34(b), 16 C.F.R. § 3.34(b)(2010)

1. TO

Alvaro Bedoya, Commisioner
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

2. FROM

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

This subpoena requires you to produce and permit inspection and copying of designated books, documents (as defined in Rule 3.34(b)), or tangible things, at the date and time specified in Item 5, and at the request of Counsel listed in Item 9, in the proceeding described in Item 6.

3. PLACE OF PRODUCTION

Gibson, Dunn & Crutcher LLP
1700 M. St. NW
Washington, DC 20036

4. MATERIAL WILL BE PRODUCED TO

Samuel Liversidge, Esq. or designee

5. DATE AND TIME OF PRODUCTION

6. SUBJECT OF PROCEEDING

In the Matter of Caremark RX, LLC, Zinc Health Services, LLC, et al.; Docket No. 9437

7. MATERIAL TO BE PRODUCED

See Attached Requests and Specifications

8. ADMINISTRATIVE LAW JUDGE

The Honorable D. Michael Chappell
Federal Trade Commission
Washington, D.C. 20580

9. COUNSEL AND PARTY ISSUING SUBPOENA

Samuel Liversidge, Gibson, Dunn & Crutcher LLP, Counsel for OptumRx, Inc.; OptumRx Holdings, LLC; and Emisar Pharma Services LLC

Enu Mainigi, Williams & Connolly LLP, Counsel for Caremark Rx, LLC and Zinc Health Services, LLC

DATE SIGNED

SIGNATURE OF COUNSEL ISSUING SUBPOENA

INSTRUCTIONS AND NOTICES

The delivery of this subpoena to you by any method prescribed by the Commission's Rules of Practice is legal service and may subject you to a penalty imposed by law for failure to comply. This subpoena does not require approval by OMB under the Paperwork Reduction Act of 1980.

PETITION TO LIMIT OR QUASH

The Commission's Rules of Practice require that any petition to limit or quash this subpoena be filed within the earlier of ten days after service thereof or the time for compliance therewith. The original and twelve copies of the petition must be filed with the Secretary of the Federal Trade Commission, and one copy should be sent to the Commission Counsel named in Item 9.

YOUR RIGHTS TO REGULATORY ENFORCEMENT FAIRNESS

The FTC has a longstanding commitment to a fair regulatory enforcement environment. If you are a small business (under Small Business Administration standards), you have a right to contact the Small Business Administration's National Ombudsman at 1-888-REGFAIR (1-888-734-3247) or www.sba.gov/ombudsman regarding the fairness of the compliance and enforcement activities of the agency. You should understand, however, that the National Ombudsman cannot change, stop, or delay a federal agency enforcement action.

The FTC strictly forbids retaliatory acts by its employees, and you will not be penalized for expressing a concern about these activities.

TRAVEL EXPENSES

Use the enclosed travel voucher to claim compensation to which you are entitled as a witness for the Commission. The completed travel voucher and this subpoena should be presented to Commission Counsel for payment. If you are permanently or temporarily living somewhere other than the address on this subpoena and it would require excessive travel for you to appear, you must get prior approval from Commission Counsel. Witness travelers can contact the FTC travel office for guidance at (202) 326-3299 or travel@ftc.gov. PLEASE NOTE: Reimbursement for necessary transportation, lodging, and per diem expenses cannot exceed the maximum allowed for such expenses by an employee of the federal government.

A copy of the Commission's Rules of Practice is available online at http://bit.ly/FTCsRulesofPractice. Paper copies are available upon request.

RETURN OF SERVICE

I hereby certify that a duplicate original of the within subpoena was duly served: (check the method used)

○ *in person.*

○ *by registered mail.*

◉ *by leaving copy at principal office or place of business, to wit:*

via FedEx

on the person named herein on:

(Month, day, and year)

(Name of person making service)

(Official title)

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

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

ATTACHMENT TO RESPONDENTS' SUBPOENA *DUCES TECUM* TO COMMISSIONERS OF THE FEDERAL TRADE COMMISSION

Pursuant to Federal Trade Commission Rule of Practice for Adjudicative Proceedings 3.34(b), 16 C.F.R. § 3.34(b), and the Definitions and Instructions set forth below, Respondents OptumRx, Inc., OptumRx Holdings, LLC, Emisar Pharma Services LLC, Caremark Rx LLC and Zinc Health Services, LLC (collectively, "Respondents") hereby request that Commissioners produce all documents, electronically stored information, and other materials in their possession, custody, or control that are responsive to the requests made below.

DEFINITIONS

A. "You," and "Your" shall mean FTC Chair Lina Khan, FTC Commissioner Rebecca Slaughter, and FTC Commissioner Alvaro Bedoya, and any other person acting or purporting to act on behalf of or under the direction, authorization, or control of such commissioners, including such Commissioners' staff and advisors or any person who served in such roles at any time.

B. "Action" shall mean *Caremark Rx, Zinc Health Services, et al., In the Matter of (Insulin)*, FTC File No. 221-0114, Dkt. D09437.

C. "All" and "each" shall mean "each and every."

D. "And" and "or" shall be construed conjunctively or disjunctively as necessary to make the request inclusive rather than exclusive.

E. "Any" shall mean "at least one that applies, and if more than one applies, each that applies."

F. "Commissioners" shall mean any current Commissioners of the Federal Trade Commission, former Commissioners of the Federal Trade Commission who served on or after January 1, 2017, and any other person acting or purporting to act on behalf of or under the direction, authorization, or control of such commissioners, including such Commissioners' staff and advisors.

G. "Communication" shall mean any exchange, transfer, or dissemination of information, regardless of the means by which it is accomplished.

H. "Complaint Counsel" shall mean any Bureau or Office of the Federal Trade Commission involved in the Investigation or this Action, including staff, employees, representatives, consultants, agents, servants, attorneys, accountants, or any person who served in any such roles at any time.

I. "Concerning" shall mean relating to, regarding, discussing, describing, mentioning, reflecting, constituting, comprising, identifying, stating, dealing with, commenting on, connected with, analyzing, confirming, supporting, reporting, setting forth, considering, contradicting, refuting, repudiating, rebutting, undermining, pertaining to, or evidencing the subject matter of, in whole or in part.

J. "Discussing" shall mean, in whole or in part, constituting, containing, describing, or addressing the designated subject matter, regardless of the length of the treatment or detail of analysis of the subject matter, but not merely referring to the designated subject matter without elaboration. Further, these terms include any data about the designated subject matter where such data are separately set out as in a chart, listing, table, or graph.

K. "Document" shall mean any information, on paper or in electronic format, including written, recorded, and graphic materials of every kind, in the possession, custody, or control of the Company, including Communications. The term "Document" includes, without limitation: computer files; email messages; text messages; instant messages and chat logs; group chats; voicemails and other audio files; calendar entries; schedulers; drafts of documents; metadata and other bibliographic or historical data describing or relating to documents created, revised, or distributed electronically; copies of documents that are not identical duplicates of the originals in that Person's files; notes of Meetings or telephone calls; and copies of documents the originals of which are not in the possession, custody, or control of the Company.

L. "Federal Trade Commission" or "FTC" shall mean the United States Federal Trade Commission and any Bureau or Office thereof.

M. "Including" shall not be construed as limiting any request, and shall mean the same as "including, but not limited to."

N. "Insulin Manufacturer" shall mean any pharmaceutical manufacturer or other company that manufactures or markets Insulin Products, including but not limited to Eli Lilly and Company, Novo Nordisk A/S, Sanofi S.A., and Viatris Inc., Biocon Pharma Inc., MannKind Corporation, Civica Rx, or any subsidiary or affiliate thereof.

O. "Insulin Product" or "Insulin" shall mean any insulin pharmaceutical and related device, equipment, or other mechanical part approved by the FDA to treat diabetes.

P. "Investigation" shall mean the Complaint Counsel's investigation of Optum Rx, other Respondents, and Insulin Manufacturers in connection with Insulin Products, FTC File No. 2210114.

Q. "Pharmacy Benefit Manager" or "PBM" shall mean any entity or anyone acting on the entity's behalf (such as a GPO) that serves as a third-party administrator of a Plan's prescription drug programs; negotiates Rebate or fee agreements on behalf of a Plan; creates or manages a Formulary on behalf of a Plan; or otherwise deals with pharmaceutical manufacturers or sellers on behalf of a Plan.

R. "PBM 6(b) Order" shall mean the Federal Trade Commission's compulsory orders issued in regard to its 6(b) study into the PBM industry and affiliated Group Purchasing Organizations pursuant to FTC Matter No. P221200.

S. "Rebate" shall mean any payment returning a portion of a sale, or discount afforded, to a direct or indirect purchaser.

T. "Respondents" shall mean the Respondents in the Action, as well as all predecessors and successors thereof; all past or present divisions, parents, subsidiaries, and affiliates of any of the foregoing entities; all past or present owners, joint ventures, partnerships, and limited partnerships of which any of the foregoing entities is a joint venture or a limited general

partner; and all past or present directors, officers, members, employees, attorneys, agents, representatives, or other persons under the control of or purporting to act for or on behalf of any of the foregoing entities, either directly or indirectly.

U. The use of the singular shall also include the plural, and vice-versa.

INSTRUCTIONS

The following instructions shall apply to the requests that follow:

1. Unless stated otherwise, the time period for the requests is January 1, 2017 through the close of fact discovery in the Action.

2. Unless a request requires the production of information protected by the attorney-client privilege, the work product doctrine, or any other applicable privilege from discovery, each requested Document shall be produced in its entirety, without abbreviation or redaction, including all attachments, appendices, exhibits, lists, schedules or other matters at any time affixed thereto. If a Document or Communication responsive to any request cannot be produced in full, it shall be produced to the extent possible with an explanation stating why production of the remainder is not possible.

3. Documents and Communications responsive to these requests shall be produced as they are kept in the ordinary course of business and labeled in such a way as to show their source, including but not limited to the files and offices where they were maintained. Documents contained in file folders, loose-leaf binders, or notebooks with tabs or labels referencing such Documents are to be produced intact with such file folders, loose-leaf binders, or notebooks. In producing Documents and Communications, all Documents and Communications that are physically attached to one another shall be left so attached. Documents and Communications that

are segregated or separated from other Documents and Communications shall be left so segregated or separated.

4. All Documents and Communications produced electronically are to include all reasonably available metadata fields, including but not limited to the date created and any custodian information.

5. If a timely objection to any portion of a request, definition, or instruction is asserted, Documents responsive to the remaining portion are to be produced.

6. If any Document is withheld, in whole or in part, for any reason, including but not limited to any claim of privilege of any kind, work-product protection, trade secret, or confidentiality, You shall submit a privilege log pursuant to 16 C.F.R. § 3.38A.

7. If you object in whole or in part to any of the requests, please state in detail the basis for your objection to the particular request and all facts upon which you rely to support your objection. In addition, you are requested to identify all Documents and Communications for which you are interposing any objection.

8. If you cannot comply with any of the requests in full after exercising due diligence to secure the Documents or Communications, so state and produce to the extent possible. Specify your inability to produce the remainder and state whatever information or knowledge you may have regarding the unproduced Documents and Communications.

9. The requests are continuing and therefore require prompt supplementation if you receive, obtain, discovery, or otherwise possess additional responsive Documents and Communications before the trial of the Action.

10. If any Document or Communication is undated and the date of its preparation cannot be determined, the Document shall be produced if otherwise responsive to these requests.

11. Unless otherwise agreed upon, each request requires a search of all Documents in Your possession, custody, or control, including Documents held by any of Your officers, directors, employees, agents, or representatives, or Documents stored in any of Your electronic databases.

12. If any Documents or Communications responsive to these requests have been destroyed or are no longer available for any reason, describe the nature of such Documents or Communications, the last known location of any copies of such Documents or Communications, the date of such destruction, the reason for such destruction, and the name of the person who ordered or authorized such destruction.

13. If any part of any request is objected to, set forth the basis for Your objection and respond to all parts of the request for production to which you do not object, pursuant to Federal Trade Commission's Rules of Practice, 16 C.F.R. § 3.37(b).

14. If you cannot respond to all or part of any request for production after exercising due diligence to secure the full information to do so, so state and answer to the extent possible, specifying Your inability to respond to the remainder. In any partial response, state whatever information or knowledge you have concerning the unanswered portion, and detail what efforts have been taken to secure the unknown information.

15. None of these requests should be construed to seek any materials produced by the recipients of the PBM 6(b) Orders in response to those Orders, except for any materials actually reviewed or accessed by a Commissioner or their staff in connection with FTC File No. 2210114 or the Complaint in this action.

REQUESTS FOR PRODUCTION

DOCUMENT REQUEST NO. 1

All Communications between You and any non-parties to this action, including, but not limited to, 3 Axis Advisors, 46brooklyn, Antonio Ciaccia, National Community Pharmacists Association, American Economic Liberties Project, American Pharmacists Association, American Medical Association, National Association of Chain Drug Stores, National Health Alliance, Open Markets, Capitol Forum, the National Alliance for Healthcare Purchaser Coalitions, The New York Times, independent pharmacists, pharmacy associations, Mark Cuban, or Cost Plus Drugs relating to the Investigation, the allegations in the Complaint, drug rebate practices of PBMs and/or drug manufacturers, or insulin drug pricing.

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DOCUMENT REQUEST NO. 3

All Documents concerning Commissioner Alvaro Bedoya's participation and attendance at the 2023 or 2024 National Alliance of Healthcare Purchasers Annual Forum.

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DOCUMENT REQUEST NO. 5

All Communications between You and any White House advisor, staff, employee, including but not limited to Tim Wu and any White House successors to Tim Wu, relating to the Investigation, the allegations in the Complaint, drug rebate practices of PBMs and/or drug manufacturers, or insulin drug pricing.

DOCUMENT REQUEST NO. 6

All studies, reports, assessments, statements, factual bases, and other evidence upon which You relied to conclude that "prior PBM-related advocacy statements and reports" "no longer reflect current market realities" as noted in the FTC's July 20, 2023 press release.

DOCUMENT REQUEST NO. 7

All Documents and Communications concerning any Commissioner's potential recusal.

DOCUMENT REQUEST NO. 8

Documents sufficient to show Your document retention policies and practices, all efforts made to retain, search, and produce documents responsive to these Requests.

DATED:

Respectfully submitted,

By:

Samuel Liversidge
Gibson, Dunn & Crutcher LLP
333 South Grand Avenue
Los Angeles, CA 90071
Tel: (213) 229-7420
SLiversidge@gibsondunn.com

Kristen C. Limarzi
Michael J. Perry
Sophia A. Hansell
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Washington, DC 20036
KLimarzi@gibsondunn.com
MJPerry@gibsondunn.com
SHansell@gibsondunn.com
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Matthew C. Parrott
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Irvine, CA 92612
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Attorneys for Respondents OptumRx, Inc.; OptumRx Holdings, LLC; and Emisar Pharma Services LLC

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csinger@wc.com
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Email: spyser@wc.com

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Michael Cowie
Rani Habash
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Dechert LLP
1900 K Street NW
Washington, DC 20006
mike.cowie@dechert.com
rani.habash@dechert.com
gregory.luib@dechert.com
Tel: (202) 261-3300

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

CERTIFICATION

Pursuant to 28 U.S.C. § 1746, I hereby certify under penalty of perjury that this response to the Subpoena *Duces Tecum* is complete and correct to the best of my knowledge and belief.

_____	_____
(Signature of Official)	(Title/Company)
_____	_____
(Typed Name of Official)	(Office Telephone)

CERTIFICATE OF SERVICE

I hereby certify that on January __, 2025, I caused the foregoing document to be served via email to:

Rebecca L. Egeland
Bradley S. Albert
Federal Trade Commission
600 Pennsylvania Ave. NW
Washington, DC 20580
regeland@ftc.gov
balbert@ftc.gov
1035-Insulin-DL@ftc.gov

Counsel Supporting the Complaint

Charles F. Rule
Daniel J. Howley
Rule Garza Howley LLP
901 7th Street NW
Washington, DC 20001
rule@rulegarza.com
howley@rulegarza.com

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

Respectfully submitted,

By: */s/ Samuel Liversidge*
Samuel Liversidge
333 South Grand Avenue
Los Angeles, CA 90071
Tel: (213) 229-7420
SLiversidge@gibsondunn.com

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

EXHIBIT C

Subpoena for Production of Documentary Material

Provided by the Secretary of the Federal Trade Commission, and
Issued Pursuant to Commission Rule 3.34(b), 16 C.F.R. § 3.34(b)(2010)

1. TO

Rebecca Kelly Slaughter, Commisioner
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

2. FROM

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

This subpoena requires you to produce and permit inspection and copying of designated books, documents (as defined in Rule 3.34(b)), or tangible things, at the date and time specified in Item 5, and at the request of Counsel listed in Item 9, in the proceeding described in Item 6.

3. PLACE OF PRODUCTION

Gibson, Dunn & Crutcher LLP
1700 M. St. NW
Washington, DC 20036

4. MATERIAL WILL BE PRODUCED TO

Samuel Liversidge, Esq. or designee

5. DATE AND TIME OF PRODUCTION

6. SUBJECT OF PROCEEDING

In the Matter of Caremark RX, LLC, Zinc Health Services, LLC, et al.; Docket No. 9437

7. MATERIAL TO BE PRODUCED

See Attached Requests and Specifications

8. ADMINISTRATIVE LAW JUDGE

The Honorable D. Michael Chappell
Federal Trade Commission
Washington, D.C. 20580

9. COUNSEL AND PARTY ISSUING SUBPOENA

Samuel Liversidge, Gibson, Dunn & Crutcher LLP, Counsel for OptumRx, Inc.; OptumRx Holdings, LLC; and Emisar Pharma Services LLC

Enu Mainigi, Williams & Connolly LLP, Counsel for Caremark Rx, LLC and Zinc Health Services, LLC

DATE SIGNED

SIGNATURE OF COUNSEL ISSUING SUBPOENA

INSTRUCTIONS AND NOTICES

The delivery of this subpoena to you by any method prescribed by the Commission's Rules of Practice is legal service and may subject you to a penalty imposed by law for failure to comply. This subpoena does not require approval by OMB under the Paperwork Reduction Act of 1980.

PETITION TO LIMIT OR QUASH

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YOUR RIGHTS TO REGULATORY ENFORCEMENT FAIRNESS

The FTC has a longstanding commitment to a fair regulatory enforcement environment. If you are a small business (under Small Business Administration standards), you have a right to contact the Small Business Administration's National Ombudsman at 1-888-REGFAIR (1-888-734-3247) or www.sba.gov/ombudsman regarding the fairness of the compliance and enforcement activities of the agency. You should understand, however, that the National Ombudsman cannot change, stop, or delay a federal agency enforcement action.

The FTC strictly forbids retaliatory acts by its employees, and you will not be penalized for expressing a concern about these activities.

TRAVEL EXPENSES

Use the enclosed travel voucher to claim compensation to which you are entitled as a witness for the Commission. The completed travel voucher and this subpoena should be presented to Commission Counsel for payment. If you are permanently or temporarily living somewhere other than the address on this subpoena and it would require excessive travel for you to appear, you must get prior approval from Commission Counsel. Witness travelers can contact the FTC travel office for guidance at (202) 326-3299 or travel@ftc.gov. PLEASE NOTE: Reimbursement for necessary transportation, lodging, and per diem expenses cannot exceed the maximum allowed for such expenses by an employee of the federal government.

A copy of the Commission's Rules of Practice is available online at http://bit.ly/FTCsRulesofPractice. Paper copies are available upon request.

RETURN OF SERVICE

I hereby certify that a duplicate original of the within subpoena was duly served: (check the method used)

○ *in person.*

○ *by registered mail.*

◉ *by leaving copy at principal office or place of business, to wit:*

via FedEx

on the person named herein on:

(Month, day, and year)

(Name of person making service)

(Official title)

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

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

ATTACHMENT TO RESPONDENTS' SUBPOENA *DUCES TECUM* TO COMMISSIONERS OF THE FEDERAL TRADE COMMISSION

Pursuant to Federal Trade Commission Rule of Practice for Adjudicative Proceedings 3.34(b), 16 C.F.R. § 3.34(b), and the Definitions and Instructions set forth below, Respondents OptumRx, Inc., OptumRx Holdings, LLC, Emisar Pharma Services LLC, Caremark Rx LLC and Zinc Health Services, LLC (collectively, "Respondents") hereby request that Commissioners produce all documents, electronically stored information, and other materials in their possession, custody, or control that are responsive to the requests made below.

DEFINITIONS

A. "You," and "Your" shall mean FTC Chair Lina Khan, FTC Commissioner Rebecca Slaughter, and FTC Commissioner Alvaro Bedoya, and any other person acting or purporting to act on behalf of or under the direction, authorization, or control of such commissioners, including such Commissioners' staff and advisors or any person who served in such roles at any time.

B. "Action" shall mean *Caremark Rx, Zinc Health Services, et al., In the Matter of (Insulin)*, FTC File No. 221-0114, Dkt. D09437.

C. "All" and "each" shall mean "each and every."

D. "And" and "or" shall be construed conjunctively or disjunctively as necessary to make the request inclusive rather than exclusive.

E. "Any" shall mean "at least one that applies, and if more than one applies, each that applies."

F. "Commissioners" shall mean any current Commissioners of the Federal Trade Commission, former Commissioners of the Federal Trade Commission who served on or after January 1, 2017, and any other person acting or purporting to act on behalf of or under the direction, authorization, or control of such commissioners, including such Commissioners' staff and advisors.

G. "Communication" shall mean any exchange, transfer, or dissemination of information, regardless of the means by which it is accomplished.

H. "Complaint Counsel" shall mean any Bureau or Office of the Federal Trade Commission involved in the Investigation or this Action, including staff, employees, representatives, consultants, agents, servants, attorneys, accountants, or any person who served in any such roles at any time.

I. "Concerning" shall mean relating to, regarding, discussing, describing, mentioning, reflecting, constituting, comprising, identifying, stating, dealing with, commenting on, connected with, analyzing, confirming, supporting, reporting, setting forth, considering, contradicting, refuting, repudiating, rebutting, undermining, pertaining to, or evidencing the subject matter of, in whole or in part.

J. "Discussing" shall mean, in whole or in part, constituting, containing, describing, or addressing the designated subject matter, regardless of the length of the treatment or detail of analysis of the subject matter, but not merely referring to the designated subject matter without elaboration. Further, these terms include any data about the designated subject matter where such data are separately set out as in a chart, listing, table, or graph.

K. "Document" shall mean any information, on paper or in electronic format, including written, recorded, and graphic materials of every kind, in the possession, custody, or control of the Company, including Communications. The term "Document" includes, without limitation: computer files; email messages; text messages; instant messages and chat logs; group chats; voicemails and other audio files; calendar entries; schedulers; drafts of documents; metadata and other bibliographic or historical data describing or relating to documents created, revised, or distributed electronically; copies of documents that are not identical duplicates of the originals in that Person's files; notes of Meetings or telephone calls; and copies of documents the originals of which are not in the possession, custody, or control of the Company.

L. "Federal Trade Commission" or "FTC" shall mean the United States Federal Trade Commission and any Bureau or Office thereof.

M. "Including" shall not be construed as limiting any request, and shall mean the same as "including, but not limited to."

N. "Insulin Manufacturer" shall mean any pharmaceutical manufacturer or other company that manufactures or markets Insulin Products, including but not limited to Eli Lilly and Company, Novo Nordisk A/S, Sanofi S.A., and Viatris Inc., Biocon Pharma Inc., MannKind Corporation, Civica Rx, or any subsidiary or affiliate thereof.

O. "Insulin Product" or "Insulin" shall mean any insulin pharmaceutical and related device, equipment, or other mechanical part approved by the FDA to treat diabetes.

P. "Investigation" shall mean the Complaint Counsel's investigation of Optum Rx, other Respondents, and Insulin Manufacturers in connection with Insulin Products, FTC File No. 2210114.

Q. "Pharmacy Benefit Manager" or "PBM" shall mean any entity or anyone acting on the entity's behalf (such as a GPO) that serves as a third-party administrator of a Plan's prescription drug programs; negotiates Rebate or fee agreements on behalf of a Plan; creates or manages a Formulary on behalf of a Plan; or otherwise deals with pharmaceutical manufacturers or sellers on behalf of a Plan.

R. "PBM 6(b) Order" shall mean the Federal Trade Commission's compulsory orders issued in regard to its 6(b) study into the PBM industry and affiliated Group Purchasing Organizations pursuant to FTC Matter No. P221200.

S. "Rebate" shall mean any payment returning a portion of a sale, or discount afforded, to a direct or indirect purchaser.

T. "Respondents" shall mean the Respondents in the Action, as well as all predecessors and successors thereof; all past or present divisions, parents, subsidiaries, and affiliates of any of the foregoing entities; all past or present owners, joint ventures, partnerships, and limited partnerships of which any of the foregoing entities is a joint venture or a limited general

partner; and all past or present directors, officers, members, employees, attorneys, agents, representatives, or other persons under the control of or purporting to act for or on behalf of any of the foregoing entities, either directly or indirectly.

U. The use of the singular shall also include the plural, and vice-versa.

INSTRUCTIONS

The following instructions shall apply to the requests that follow:

1. Unless stated otherwise, the time period for the requests is January 1, 2017 through the close of fact discovery in the Action.

2. Unless a request requires the production of information protected by the attorney-client privilege, the work product doctrine, or any other applicable privilege from discovery, each requested Document shall be produced in its entirety, without abbreviation or redaction, including all attachments, appendices, exhibits, lists, schedules or other matters at any time affixed thereto. If a Document or Communication responsive to any request cannot be produced in full, it shall be produced to the extent possible with an explanation stating why production of the remainder is not possible.

3. Documents and Communications responsive to these requests shall be produced as they are kept in the ordinary course of business and labeled in such a way as to show their source, including but not limited to the files and offices where they were maintained. Documents contained in file folders, loose-leaf binders, or notebooks with tabs or labels referencing such Documents are to be produced intact with such file folders, loose-leaf binders, or notebooks. In producing Documents and Communications, all Documents and Communications that are physically attached to one another shall be left so attached. Documents and Communications that

are segregated or separated from other Documents and Communications shall be left so segregated or separated.

4. All Documents and Communications produced electronically are to include all reasonably available metadata fields, including but not limited to the date created and any custodian information.

5. If a timely objection to any portion of a request, definition, or instruction is asserted, Documents responsive to the remaining portion are to be produced.

6. If any Document is withheld, in whole or in part, for any reason, including but not limited to any claim of privilege of any kind, work-product protection, trade secret, or confidentiality, You shall submit a privilege log pursuant to 16 C.F.R. § 3.38A.

7. If you object in whole or in part to any of the requests, please state in detail the basis for your objection to the particular request and all facts upon which you rely to support your objection. In addition, you are requested to identify all Documents and Communications for which you are interposing any objection.

8. If you cannot comply with any of the requests in full after exercising due diligence to secure the Documents or Communications, so state and produce to the extent possible. Specify your inability to produce the remainder and state whatever information or knowledge you may have regarding the unproduced Documents and Communications.

9. The requests are continuing and therefore require prompt supplementation if you receive, obtain, discovery, or otherwise possess additional responsive Documents and Communications before the trial of the Action.

10. If any Document or Communication is undated and the date of its preparation cannot be determined, the Document shall be produced if otherwise responsive to these requests.

11. Unless otherwise agreed upon, each request requires a search of all Documents in Your possession, custody, or control, including Documents held by any of Your officers, directors, employees, agents, or representatives, or Documents stored in any of Your electronic databases.

12. If any Documents or Communications responsive to these requests have been destroyed or are no longer available for any reason, describe the nature of such Documents or Communications, the last known location of any copies of such Documents or Communications, the date of such destruction, the reason for such destruction, and the name of the person who ordered or authorized such destruction.

13. If any part of any request is objected to, set forth the basis for Your objection and respond to all parts of the request for production to which you do not object, pursuant to Federal Trade Commission's Rules of Practice, 16 C.F.R. § 3.37(b).

14. If you cannot respond to all or part of any request for production after exercising due diligence to secure the full information to do so, so state and answer to the extent possible, specifying Your inability to respond to the remainder. In any partial response, state whatever information or knowledge you have concerning the unanswered portion, and detail what efforts have been taken to secure the unknown information.

15. None of these requests should be construed to seek any materials produced by the recipients of the PBM 6(b) Orders in response to those Orders, except for any materials actually reviewed or accessed by a Commissioner or their staff in connection with FTC File No. 2210114 or the Complaint in this action.

REQUESTS FOR PRODUCTION

DOCUMENT REQUEST NO. 1

All Communications between You and any non-parties to this action, including, but not limited to, 3 Axis Advisors, 46brooklyn, Antonio Ciaccia, National Community Pharmacists Association, American Economic Liberties Project, American Pharmacists Association, American Medical Association, National Association of Chain Drug Stores, National Health Alliance, Open Markets, Capitol Forum, the National Alliance for Healthcare Purchaser Coalitions, The New York Times, independent pharmacists, pharmacy associations, Mark Cuban, or Cost Plus Drugs relating to the Investigation, the allegations in the Complaint, drug rebate practices of PBMs and/or drug manufacturers, or insulin drug pricing.

DOCUMENT REQUEST NO. 2

All Communications between You and Health Mart Atlas, Cardinal Health, Elevate Provider Network, AlignRx, PhRMA, or other pharmaceutical trade groups relating to the Investigation, the allegations in the Complaint, drug rebate practices of PBMs and/or drug manufacturers, or insulin drug pricing.

DOCUMENT REQUEST NO. 3

All Documents concerning Commissioner Alvaro Bedoya's participation and attendance at the 2023 or 2024 National Alliance of Healthcare Purchasers Annual Forum.

DOCUMENT REQUEST NO. 4

All Communications between You and any other federal agency, federal official, member of Congress, or congressional staffer, regarding the Investigation, the allegations in the Complaint, drug rebate practices of PBMs and/or drug manufacturers, or insulin drug pricing.

DOCUMENT REQUEST NO. 5

All Communications between You and any White House advisor, staff, employee, including but not limited to Tim Wu and any White House successors to Tim Wu, relating to the Investigation, the allegations in the Complaint, drug rebate practices of PBMs and/or drug manufacturers, or insulin drug pricing.

DOCUMENT REQUEST NO. 6

All studies, reports, assessments, statements, factual bases, and other evidence upon which You relied to conclude that "prior PBM-related advocacy statements and reports" "no longer reflect current market realities" as noted in the FTC's July 20, 2023 press release.

DOCUMENT REQUEST NO. 7

All Documents and Communications concerning any Commissioner's potential recusal.

DOCUMENT REQUEST NO. 8

Documents sufficient to show Your document retention policies and practices, all efforts made to retain, search, and produce documents responsive to these Requests.

DATED:

Respectfully submitted,

By:

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

CERTIFICATION

Pursuant to 28 U.S.C. § 1746, I hereby certify under penalty of perjury that this response to the Subpoena *Duces Tecum* is complete and correct to the best of my knowledge and belief.

_____	_____
(Signature of Official)	(Title/Company)
_____	_____
(Typed Name of Official)	(Office Telephone)

CERTIFICATE OF SERVICE

I hereby certify that on January __, 2025, I caused the foregoing document to be served via email to:

Rebecca L. Egeland
Bradley S. Albert
Federal Trade Commission
600 Pennsylvania Ave. NW
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regeland@ftc.gov
balbert@ftc.gov
1035-Insulin-DL@ftc.gov

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

Respectfully submitted,

By: */s/ Samuel Liversidge*
Samuel Liversidge
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SLiversidge@gibsondunn.com

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

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 on a Microsoft Teams Conference on December 20, 2024 at 2pm ET between Armine Black and Bradley Scott for Complaint Counsel; Kristen Limarzi, Sophia Hansell, and Katherine Maddox Davis for the OptumRx Respondents; and Altumash Mufti for Caremark and Zinc, but has been unable to reach such an agreement.

Respectfully submitted,

By: */s/ Samuel Liversidge*
Samuel Liversidge
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Los Angeles, CA 90071
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Counsel for Respondents OptumRx, Inc.; OptumRx Holdings, LLC; and Emisar Pharma Services LLC

PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

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**

PROPOSED ORDER

Upon consideration of Respondents OptumRx, Inc.; OptumRx Holdings, LLC; Emisar Pharma Services LLC; Caremark Rx LLC; and Zinc Health Services, LLC's Motion for Discovery Pursuant to Rule 3.36 , IT IS HEREBY ORDERED that the Motion is GRANTED.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: _____

PUBLIC

CERTIFICATE OF SERVICE

I hereby certify that on January 3, 2025 I filed the foregoing document electronically using the FTC's E-Filing system, which will send notification of filing to:

April Tabor
Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm H-113
Washington, DC 20580
ElectronicFilings@ftc.gov

The Honorable D. Michael Chappell
Office of Administrative Law Judges
Federal Trade Commission
600 Pennsylvania Ave. NW, Rm. H-110
Washington, DC 20580
oalj@ftc.gov

I further certify that on January 3, 2025, I caused the foregoing document to be e-served to:

Rebecca L. Egeland
Bradley S. Albert
Federal Trade Commission
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regeland@ftc.gov
balbert@ftc.gov
1035-Insulin-DL@ftc.gov

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Respectfully submitted,

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