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**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

COMMISSIONERS: **Andrew N. Ferguson, Chairman**
 Melissa Holyoak
 Mark R. Meador

In the Matter of

Caremark Rx, LLC,

Zinc Health Services, LLC,

Express Scripts, Inc.,

Evernorth Health, Inc.,

Medco Health Services, Inc.,

Ascent Health Services LLC,

OptumRx, Inc.,

OptumRx Holdings, LLC, and

Emisar Pharma Services LLC,

Respondents.

Docket No. 9437

**COMPLAINT COUNSEL’S MOTION TO
LIFT THE STAY OF ADMINISTRATIVE ADJUDICATION**

Complaint Counsel requests that the Commission lift the stay of the administrative adjudication and enter the proposed order as early as July 15, 2025 to ensure that the case proceeds in a timely manner.

BACKGROUND

On March 31, 2025, the parties jointly moved for an expedited order to stay the adjudication because, at the time, no sitting Commissioner was not recused and participating in

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the matter. On April 1, 2025, the Commission, pursuant to the authority delegated to the General Counsel by 16 C.F.R. § 0.7(b), granted the parties' motion. Order Staying Administrative Adjudication, *In re Insulin*, No. 9437 (Apr. 1, 2025). The Commission ordered that (1) the "Part 3 adjudicative proceeding is hereby stayed . . . for a minimum of 105 days," at which time it "may be lifted by the Commission upon motion by one or more of the parties in the proceeding"; and (2) "the date of the evidentiary hearing shall be set 225 days from the date the stay is lifted." *Id.* at 2.

On April 3, 2025, Chairman Ferguson issued a statement that, "[a]fter closely consulting with [the] agency's ethics attorneys," he would "no longer recuse [him]self from the matter to ensure that the case can continue." *Statement of Chairman Andrew N. Ferguson*, F.T.C. (Apr. 3, 2025). On April 16, 2025, Mark R. Meador was sworn in as an FTC Commissioner.

On July 2 and 3, 2025, Complaint Counsel proposed to Respondents that the parties jointly move to lift the stay. Respondents refused to join such motion and further represented that they oppose this motion. They noted their position that the administrative adjudication should remain stayed while the collateral constitutional challenge was pending in the Eighth Circuit and informed Complaint Counsel of their plans to file a motion to dismiss the proceeding.

ARGUMENT

The Commission should lift the stay in its entirety as early as July 15, 2025—the earliest date permissible under the Commission's April 1, 2025 order (i.e., the 105th day following entry of the stay). The original stay rationale no longer applies as there is now one or more sitting Commissioners available to participate in this matter. Against that backdrop, the rationale for resuming the proceeding is overwhelming. The Rules make clear that the "Commission's policy is to conduct [formal adjudicative] proceedings expeditiously." 16 C.F.R. § 3.1. And "all parties

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shall make every effort at each stage of a proceeding to avoid delay.” *Id.*; *cf.* 16 C.F.R. § 3.41(b) (“Hearings shall proceed with all reasonable expedition, and . . . without suspension until concluded.”). This proceeding “is of the utmost importance to the American people,” *Statement of Chairman Andrew N. Ferguson*, and Respondents should not be able to delay the prospective relief sought in this case.

Any new argument Respondents may raise to maintain the stay and delay this critically important litigation is unavailing.¹

First, the Commission should reject any argument that this proceeding should be stayed pending resolution of a not-yet-filed motion to dismiss. Rule 3.22(b) explicitly states in relevant part that a “motion under consideration by the Commission shall not stay proceedings before the Administrative Law Judge unless the Commission so orders.” 16 C.F.R. § 3.22(b). The purpose of this provision is “to ensure that discovery and other prehearing proceedings continue while the Commission deliberates over the dispositive motions.” *In re LabMD*, No. 9357, 2013 WL 6826948, at *2 (F.T.C. Dec. 13, 2013) (quoting FTC Rules of Practice, Interim Final Rules with Request for Comment, 74 Fed. Reg. 1804, 1810 (Jan. 13, 2009)).

Consistent with this rule, the Commission has routinely rejected previous efforts to stay administrative adjudication for motions to dismiss based on concerns about “wasting the resources” of the Commission and respondents. *In re RagingWire Data Centers, Inc.*, No. 9386, 2020 WL 91293, at *1 (F.T.C. Jan. 6, 2020) (collecting cases).² As the Commission has

¹ Under Rules 3.22(d) and 4.3(c), Respondents’ oppositions to this motion are due on July 18. *See* 16 C.F.R. §§ 3.22(d) & 4.3(c). The Commission can set a “shorter time” for a response (such as July 14) to ensure that Respondents’ opposition(s) are filed prior to July 15. 16 C.F.R. § 3.22(d).

² *See also In re LabMD*, 2013 WL 6826948, at *2 (rejecting “ruinous litigation costs” and “extensive and abusive discovery” as legitimate bases for a stay).

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explained, “routine discovery costs do not outweigh the competing public interest in the efficient and expeditious resolution of litigated matters.” *In re RagingWire*, 2020 WL 91293, at *1 (quoting *In re La. Real Estate Appraisers Bd.*, No. 9374, 2018 FTC Lexis 7, *3 (F.T.C. Jan. 12, 2018)). These expenses “are normal consequences of litigation, routinely borne by litigants while dispositive motions are pending,” *id.*, and “do[] not constitute irreparable injury,” even if “substantial and unrecoverable.” *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 244 (1980) (citations omitted). There is no reason for the Commission to deviate from this well-settled practice in this case, which raises serious concerns about Respondents’ allegedly unfair and unlawful practices that drive up drug prices for vulnerable patients.

Second, the administrative adjudication should not be stayed pending resolution of Respondents’ collateral constitutional challenge. Rule 3.41(f) provides in relevant part that the “pendency of a collateral federal court action that relates to the administrative adjudication shall not stay the proceeding: (i) Unless a court of competent jurisdiction, or the Commission for good cause, so directs.” 16 C.F.R. § 3.41(f).

No “good cause” exists for the Commission to keep the adjudication stayed under Rule 3.41(f). As the Commission has previously explained, “[t]he stay of administrative proceedings pending judicial review . . . , like stays of trial court proceedings pending appellate review in federal court, would be ‘an intrusion into the ordinary processes of administration and judicial review.’” *In re LabMD, Inc.*, 2013 WL 6826948, at *3-4 (quoting *Nken v. Holder*, 556 U.S. 418, 427 (2009)). Respondents have failed twice to convince a federal court to enjoin this administrative proceeding while the collateral action is pending. Both the Eastern District of Missouri and the Eighth Circuit have refused to do so. *See Order, Express Scripts, Inc. v. FTC*, No. 25-1383 (8th Cir. Mar. 20, 2025); *Express Scripts, Inc. v. FTC*, No. 4:24-CV-01549-MTS,

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2025 WL 521812, at *1 (E.D. Mo. Feb. 18, 2025). The Commission should deny a third attempt to unnecessarily delay proceedings.

CONCLUSION

Complaint Counsel respectfully requests that the Commission lift the stay of the administrative adjudication as early as July 15, 2025, and set the new hearing date 225 days thereafter.³

Dated: July 7, 2025

Respectfully submitted,

/s/ Rebecca L. Egeland

Rebecca L. Egeland

Bradley S. Albert

Armine Black

Lauren Peay

Federal Trade Commission

600 Pennsylvania Avenue, NW

Washington, DC 20580

Tel: (202) 326-2990

Fax: (202) 326-3384

Email: regeland@ftc.gov

Counsel Supporting the Complaint

³ For the avoidance of doubt, Complaint Counsel's February 25, 2025 Motion for a Later Evidentiary Hearing Date is now moot.

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CONFERENCE STATEMENT

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

/s/ Rebecca L. Egeland

Rebecca L. Egeland

Counsel Supporting the Complaint

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[PROPOSED] ORDER

IT IS HEREBY ORDERED THAT Complaint Counsel's Motion to Lift the Stay of Administrative Adjudication is **GRANTED**;

IT IS FURTHER ORDERED THAT the stay be lifted effective July [], 2025;

IT IS FURTHER ORDERED THAT the evidentiary hearing in this proceeding is set for 225 days from the date the stay is lifted; and

IT IS FURTHER ORDERED THAT the Administrative Law Judge newly presiding over this matter hold a scheduling conference within ten days of the lifting of the stay to consider

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any modifications to the previous scheduling order necessary or appropriate to effectuate the terms of this order or “to ensure the just and expeditious disposition of the proceeding.” 16

C.F.R. § 3.21(f).

By the Commission, Commissioner Holyoak recused.

Dated: _____

April J. Tabor,
Secretary

PUBLIC**CERTIFICATE OF SERVICE**

I hereby certify that on July 7, 2025, I caused the foregoing document to be filed electronically using the FTC's E-Filing System, which will send notification of such filing to:

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

The Honorable Jay L. Himes
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, NW
Room H-144
Washington, DC 20580
OALJ@ftc.gov

*Secretary of the Commission
Clerk of the Court*

Administrative Law Judge

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

Enu Mainigi
Craig D. Singer
Steven M. Pyser
WILLIAMS &
CONNOLLY LLP
680 Maine Avenue SW
Washington, DC 20024
emainigi@wc.com
csinger@wc.com
spyser@wc.com

Daniel J. Howley
Charles F. (Rick) Rule
Margot Campbell
Justin T. Heipp
RULE GARZA HOWLEY
901 7th Street NW, Suite 600
Washington, DC 20006
howley@rulegarza.com
rule@rulegarza.com
campbell@rulegarza.com
heipp@rulegarza.com

Samuel Liversidge
GIBSON, DUNN & CRUTCHER
LLP
333 South Grand Avenue
Los Angeles, CA 90071
SLiversidge@gibsondunn.com

Mike Cowie
Rani A. Habash
DECHERT LLP
1900 K Street NW
Washington, DC 20006
mike.cowie@dechert.com
rani.habash@dechert.com

Jennifer Milici
Perry A. Lange
John W. O'Toole
WILMERHALE
2100 Penn. Ave. NW
Washington, DC 20037
jennifer.milici@wilmerhale.com
perry.lange@wilmerhale.com
john.otoole@wilmerhale.com

Sophia A. Hansell
Michael J. Perry
Matthew C. Parrott
GIBSON, DUNN & CRUTCHER
LLP
1700 M Street NW
Washington, DC 20036
shansell@gibsondunn.com
mjperry@gibsondunn.com
mparrott@gibsondunn.com

*Counsel for Respondents
Caremark Rx LLC; Zinc
Health Services, LLC*

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

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

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/s/ Rebecca L. Egeland
Rebecca L. Egeland
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Avenue, NW
Washington, DC 20580
(202) 326-2290
regeland@ftc.gov

Counsel Supporting the Complaint