

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Andrew N. Ferguson, Chairman  
Rebecca Kelly Slaughter  
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 OPPOSITION TO RESPONDENTS’ MOTION TO STAY  
DISCOVERY AND SUSPEND THE EVIDENTIARY HEARING DATE**

Respondents’ motion to stay discovery and suspend the evidentiary hearing date should be denied for the same reasons outlined in Complaint Counsel’s motion to lift the administrative stay. FTC Rules of Practice are clear: 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), and “[h]earings shall proceed with all reasonable expedition, and . . . without suspension until concluded,” 16 C.F.R. § 3.41(b). The purpose of these rules 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)). Accordingly, the Commission has routinely denied motions to stay for motions to dismiss. *See, e.g., In re RagingWire Data Centers, Inc.*, No. 9386, 2020 WL 91293, at \*1 (F.T.C. Jan. 6, 2020); *In re La. Real Estate Appraisers Bd.*, No. 9374, 2018 FTC Lexis 7, at \*3 (F.T.C. Jan. 12, 2018); *In re LabMD, Inc.*, 2013 WL 6826948, at \*1-3; *N. C. Bd. Dental Examiners*, No. 9343, 2010 WL 955005 (F.T.C. Nov. 15, 2010). Respondents have not cited a single Commission decision to the contrary.

Respondents appear to acknowledge the Commission’s policy and practice yet press largely the same flawed arguments they raised in their opposition to lifting the administrative stay.

First, they argue that discovery should be stayed because of the presence of “threshold” legal issues that should be decided by motion to dismiss. Mot. Stay at 3. But dispositive motions often raise threshold issues. The Commission has not treated it as sufficient grounds for a stay in FTC adjudicative proceedings. *See, e.g., In re La. Real Estate Appraisers Bd.*, 2018 FTC Lexis 7, at \*3 (denying stay where motion to dismiss raised the state action immunity defense); *In re RagingWire*, 2020 WL 91293, at \*1 (denying stay where motion to dismiss argued failure to allege materiality); *In re LabMD*, 2013 WL 6826948, at \*1-3 (denying stay where motion to dismiss argued lack of Section 5 authority over certain data-security practices). Besides, for reasons Complaint Counsel will explain in its forthcoming opposition, Respondents’ motion to dismiss is meritless and should be denied in its entirety.

Second, Respondents argue that a stay of discovery would save significant resources, asserting that weighing costs of discovery against the Commission's interest in expediency may come out differently here than it does in other Commission cases that "target a single or a small number of related (or conspiring) entities with relatively more straightforward legal claims." Mot. Stay at 4. Beyond making generalized assertions about the discovery burdens here, Respondents' argument focuses on the impact of what they refer to as "group pleading." Mot. Stay at 4-5. But they fail to provide more than a conclusory explanation of how this "dramatically increases the costs and complexity of discovery." Mot. Stay at 4. Indeed, as Respondents acknowledge by citing *Bell Atlantic v. Twombly*, as a general matter, "antitrust discovery can be expensive." Mot. Stay at 4-5 (citing 550 U.S. 544, 560 & n.6 (2007)). The Commission memorialized its rule against stays against this backdrop, balancing the costs of discovery against the public interest in the efficient resolution of FTC proceedings. *See generally* FTC Rules of Practice, Interim Final Rules with Request for Comment, 74 Fed. Reg. 1804, 1810 (Jan. 13, 2009). And as the Commission explained just last week: "discovery costs 'are normal consequences of litigation, routinely borne by litigants while dispositive motions are pending' and '[g]enerally . . . do not outweigh the competing public interest in the efficient and expeditious resolution of litigated matters.'" Order Lifting Stay of Administrative Adjudication at 2, *In re Insulin*, No. 9437 (Aug. 27, 2025) (quoting *In re RagingWire*, 2020 WL 91293 at \*1).

One further note. Respondents assert that "a stay of discovery will result in no concrete harm to anyone." Mot. Stay at 2. But as the complaint plausibly alleges, Respondents' unfair and unlawful practices turn normal price competition on its head by inducing manufacturers to *increase* their list prices to compete for access to PBMs' formularies. Consequently, many

diabetics and other vulnerable patients are stuck paying significantly more for life-saving medications like insulin, to the extent they can afford them at all.

In sum, Respondents have failed to justify stay in this case. But should the Commission impose a stay pending the resolution of Respondents' motion to dismiss—which it should not do—it should deny Respondents' request that the stay be lifted only upon motion and that the parties be ordered to meet and confer on an evidentiary hearing date. Once the motion to dismiss is resolved, there is no longer cause for discovery to be paused. To impose these additional hurdles would be inconsistent with the Commission's interest in conducting proceedings expeditiously and Respondents' duty to "make every effort at each stage of a proceeding to avoid delay." 16 C.F.R. § 3.1.

Complaint Counsel respectfully requests that the Commission deny Respondents' motion.

Dated: September 3, 2025

Respectfully submitted,

/s/ Rebecca L. Egeland

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CERTIFICATE OF SERVICE

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

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*Administrative Law Judge*

I certify that no portion of the filing was drafted by generative artificial intelligence ("AI") (such as ChatGPT, Microsoft Copilot, Harvey.AI, or Google Gemini). I also certify that I caused the foregoing document to be served via email to:

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