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**

ESI 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 Express Scripts, Inc., Evernorth Health, Inc. Medco Health Services, Inc. and Ascent Health Services LLC (together the "ESI Respondents") respectfully move for an order authorizing the issuance of a subpoena *duces tecum* to Open Options Corporation ("Open Options"), an international strategy consulting firm located in Ontario, Canada. Such an order is required for the ESI Respondents to serve a subpoena on a foreign entity.

Open Options has been retained by insulin manufacturers to help them develop the prices of the insulin products they manufacture and sell. In doing so, Open Options provided insulin manufacturers with strategic pricing advice based on numerous factors unrelated to PBM rebates (or any other PBM conduct). Pricing factors that do not relate to what the Respondent PBMs undermines the Complaint's suggestion that the Respondents caused insulin prices to rise. Documents produced in discovery in this case indicate that Open Options advised insulin

manufacturers on how to maximize the profitability of their insulin products by adjusting insulin prices based on the anticipated pricing strategies of *other insulin manufacturers*.

The Complaint repeatedly admits—as it must—that the insulin manufacturers set the list prices of their drugs. Compl. ¶¶ 2, 6, 40, 119, 135, 236-41. The Complaint then spins a convoluted theory by which certain PBM practices (e.g., preferring drugs on formularies with the lowest net costs for their health plan sponsor clients) somehow "incentivize" the insulin manufacturers to increase their list prices for insulin. *See id.* ¶ 259. The pricing dynamics identified and described by Open Options in its consulting work for the insulin manufacturers have nothing to do with PBMs and directly contradict the theory of causation outlined in the Complaint. The requested information from Open Options could further contradict the Complaint's allegations and is therefore highly relevant to the ESI Respondents' defenses. To reduce any undue burden on Open Options, the subpoena requests a clearly defined, narrow set of documents.

Complaint Counsel has informed the ESI Respondents that it intends to oppose this motion, because they think it will take too much time to obtain the requested discovery. This argument is meritless. The Amended Scheduling Order entered on September 8, 2025, contains a deadline for serving subpoenas: October 9, 2025. Complaint Counsel has articulated no basis to object to discovery propounded prior to that deadline. If Complaint Counsel thought an earlier deadline for certain kinds of fact discovery was necessary, it could have raised the issue while the parties were meeting and conferring over the Amended Scheduling Order. But that did not happen. Now, Complaint Counsel's baseless opposition may delay the ability for the ESI Respondents to obtain the important information that the subpoena seeks.

I. BACKGROUND

During review of the FTC's Investigative File, ESI Respondents learned that Option Options performed certain consulting work for the insulin manufacturers. This work included, among other things, forecasting the price of insulin products, conducting simulations assessing competitive conditions among insulin manufacturers, developing competitive strategies that maximize insulin portfolio profitability, informing strategic responses to new product launches, and identifying the choices and preferences of customers and competitors.

By seeking the facts and communications relating to the presentations and reports that Open Options provided to insulin manufacturers, ESI Respondents are seeking information that would further demonstrate that insulin manufacturers set the list prices of their products based on factors wholly unrelated to the Respondent PBMs. This information is material to the allegations in the Complaint and to the ESI Respondents' defenses, and this information could not be obtained without a subpoena. As described below, ESI Respondents' subpoena is drafted to be narrowly tailored to minimize burden on Open Options.

***First*,** Open Options conducted competitive simulations for an insulin manufacturer in 2013 and 2015, related to insulin biosimilars and product launches. ESI Respondents are entitled to seek the studies, surveys, and other factual information that were part of those simulations because those facts bear on the issues in dispute in this case. In particular, to the extent that this evidence from Open Options demonstrates that factors unrelated to PBMs are relevant to how insulin prices are set by manufacturers, the evidence would tend to support the ESI Respondents' defenses and undermine Complaint Counsel's case.

Second, ESI Respondents also seek documents related to other work performed by Open Options for or on behalf of insulin manufacturers concerning pricing for insulin products

or competition between insulin manufacturers. Evidence suggests that the insulin manufacturers closely followed each other's pricing decisions, often increasing prices immediately after one of the others did so. If Open Options advised multiple insulin manufacturers regarding these pricing dynamics, that evidence would support the fact that the insulin manufacturers have incentives to increase prices that have nothing to do with PBMs. ESI Respondents have no other means of gaining access to these documents, including internal communications, studies, surveys, and other factual information held by Open Options, that were used to inform the presentations and/or reports provided to insulin manufacturers.

II. ARGUMENT

A motion for a subpoena pursuant to Rule 3.36 should be granted where the requested subpoena: (1) is "reasonably expected to yield information relevant to . . . [a respondent's] defenses"; (2) is reasonable in scope; (3) is specific with reasonable particularity; and (4) seeks documents that are not reasonably obtainable by other means. *See* 16 C.F.R. §§ 3.31(c), 3.36(b), 3.37(a). ESI Respondents' proposed subpoena satisfies these requirements.

A. The Requested Discovery is Relevant

Project Chateau and Project Chateau II. ESI Respondents seek all documents, including internal communications, studies, surveys, and other factual information relating to the particular projects that Open Options performed for one insulin manufacturer in 2013 and 2015 – code-named Project Chateau and Project Chateau II, respectively. Documents related to these two projects produced already in discovery delve into issues that are in dispute in this case, including the price of insulin and nature of competition among insulin manufacturers. As the requested documents include the underlying information that was used to create the presentations, those documents are discoverable because they bear directly on the disputed issues in this case. *See In*

re 1-800 Contacts, Inc., 2016 WL 6609774, at *4-5 (FTC Oct. 28, 2016) (explaining that relevant discovery includes "reports, studies, and analyses of competitive conditions" in the relevant market and analyses of "sales and prices" in the relevant market).

Other Work Performed for or on Behalf of Insulin Manufacturers. ESI Respondents seek all documents including internal communications, studies, surveys, and other factual information relating to work performed by Open Options for or on behalf of insulin manufacturers. ESI Respondents' request consists only of work related to issues in dispute in this case: (1) the pricing of insulin products or (2) competition between insulin manufacturers. Again, as the requested documents include the underlying information used to create presentations and reports, those documents are discoverable because they bear directly on the disputed issues in this case. *See In re 1-800 Contacts, Inc.*, at *4-5.

B. The Discovery is Reasonable In Scope, Stated With Particularity, And Cannot Be Otherwise Reasonably 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 ESI Respondents' defenses and rebut the Complaint's allegations and will impose only a limited burden. *In re Intel Corp.*, 2010 WL 2544424, at *304 (FTC June 9, 2010).

Furthermore, ESI Respondents cannot otherwise reasonably obtain the discovery. 16 C.F.R. §§ 3.36(b)(3). While certain presentations and reports are provided to the various insulin manufacturers, to whom ESI Respondents have outstanding subpoenas, the documents requested in this subpoena are exclusively held by Option Options and encompass nonpublic surveys,

studies, analyses, internal communications, and other factual information. Beyond the requested subpoena, ESI Respondents have no other reasonable means of obtaining these materials.

Finally, pursuant to Rule 3.36(b)(4), the ESI Respondents have a good faith belief that the discovery requested is permitted under the treaties and laws of Canada and that any additional procedural requirements will be met before the subpoena is served. Canada is a party to the Hague Service Convention, and service can be effectuated by mail, by a Canadian process server, or by an enforcement officer of the Ministry of the Attorney General in Ontario.[1]

Complaint Counsel's proffered objection to this motion—that the discovery sought in the attached subpoena may take too long to obtain—is not a factor that the Rules of Practice contemplate for subpoena applications under Rule 3.36, nor does the argument negate any of the factors that should be considered under the rules. To the extent that Complaint Counsel's opposition is motivated by gamesmanship to delay the issuance of the subpoena, such behavior should not be rewarded.

III. CONCLUSION

An order should issue authorizing the subpoena attached as Exhibit A.

[1] *See* Hague Conference on Private International Law, "Canada – Central Authority & Practical Information," *available at* https://www.hcch.net/en/states/authorities/details3/?aid=248.

Dated: September 17, 2025

Respectfully submitted,

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

CONFERENCE STATEMENT

Pursuant to Paragraph 4 of the Proposed Amended Scheduling Order in this, I hereby certify that counsel for Respondents Express Scripts, Inc., Evernorth Health, Inc., Medco Health Services, Inc. and Ascent Health Services, LLC, the moving parties, conferred with Complaint Counsel on September 15, 2025, in an effort in good faith to resolve by agreement the issues raised by the motion and have been unable to reach such an agreement.

/s/ Daniel J. Howley
Counsel for Express Scripts, Inc., Evernorth Health, Inc., Medco Health Services, Inc., and Ascent Health Services LLC

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[PROPOSED] ORDER ON ESI RESPONDENTS' MOTION FOR DISCOVERY PURSUANT TO RULE 3.36

Upon consideration of the ESI Respondents' Motion for Discovery Pursuant to Rule 3.36:

IT IS HEREBY ORDERED that the ESI Respondents' motion is GRANTED.

IT IS HEREBY FURTHER ORDERED that the ESI Respondents are authorized to issue the subpoena attached as Exhibit A to the motion.

ORDERED: _____

Jay L. Himes
Administrative Law Judge

Date: _____

CERTIFICATE OF SERVICE

I hereby certify that no portion of this filing was drafted by generative artificial intelligence ("AI") (such as ChatGPT, Microsoft Copilot, Harvey AI) and that on September 17, 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 Jay Himes
Office of Administrative Law Judges
Federal Trade Commission
600 Pennsylvania Ave. NW, Rm. H-110
Washington, DC 20580
oalj@ftc.gov

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

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Lauren Peay
Rebecca L. Egeland
Federal Trade Commission
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Tel: (202) 326-2990
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Counsel for Caremark Rx, LLC and Zinc Health Services, LLC

Respectfully submitted,

/s/ Daniel J. Howley
Counsel for Express Scripts, Inc., Evernorth Health, Inc., Medco Health Services, Inc., and Ascent Health Services LLC

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

Open Options
General Counsel
1203-20 Erb Street West
Waterloo, ON N2L1T2
Canada

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

Rule Garza Howley LLP
901 7th St., NW Suite 600
Washington, DC 20001
202.843.9280

4. MATERIAL WILL BE PRODUCED TO

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

5. DATE AND TIME OF PRODUCTION

6. SUBJECT OF PROCEEDING

In re Caremark Rx, LLC, et al. (Insulin), FTC Dkt. No. 9437.

7. MATERIAL TO BE PRODUCED

See attached Request for Production of Documentary Material, Open Options General Counsel 1203-20 Erb Street West, Waterloo, ON N2L1T2 Canada

8. ADMINISTRATIVE LAW JUDGE

The Honorable Jay L. Himes
Federal Trade Commission
Washington, D.C. 20580

9. COUNSEL AND PARTY ISSUING SUBPOENA

Counsel for Respondents Express Scripts, Inc., Evernorth Health, Inc., Medco Health Services, Inc., and Ascent Health Services LLC
Rick Rule, Esq.
Rule Garza Howley LLP
901 7th St., NW Suite 600
Washington, DC 20001
202.843.9280

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.

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ATTACHMENT TO ESI RESPONDENTS' SUBPOENA *DUCES TECUM* ISSUED TO OPEN OPTIONS CORPORATION

Pursuant to the Federal Trade Commission's ("FTC" or the "Commission") Rules of Practice (the "Rules"), 16 C.F.R. § 3.36, and the Definitions and Instructions set forth below, Respondents Express Scripts, Inc. ("ESI"), Evernorth Health, Inc., Medco Health Services, Inc., and Ascent Health Services LLC (collectively "ESI Respondents") hereby request that Open Options Corporation ("Open Options") produce all Documents, electronically stored information, and Data in its possession, custody, or control responsive to these requests for production ("Requests").

DEFINITIONS

1. "Open Options," "You," "Your," or "Yours" means Open Options Corporation, its domestic and foreign predecessors, successors, divisions, wholly or partially owned subsidiaries, affiliates, partnerships, and joint ventures; and all directors, officers, employees, consultants, agents, and representatives of the foregoing.
2. "Action" means the above-captioned litigation, In the Matter of Caremark Rx, LLC, et al., FTC Docket No. 9437 (F.T.C.).
3. "Insulin Product" means each insulin pharmaceutical and related device, equipment, or other mechanical part used to treat diabetes, including those Insulin Products marketed, now or in the past, in pen, cartridge, or vial presentations under the brands Humalog, Insulin Lispro, Basaglar, Lyumjev, Rezvoglar, Lantus, Toujeo, Soliqua, Apidra, Admelog, Actrapid, Awiqli, Fiasp, Insulatard, Levemir, Novolin, Mixtard, NovoLog, NovMix, NovoRapid, Ryzodeg, Tresiba, Xultophy, Insulin Aspart, Insulin Degludec, Insulin Icodec and any unbranded version of the foregoing that Insulin Manufacturers market in pen, cartridge, or vial presentations.
4. "Insulin Manufacturers" means any pharmaceutical manufacturer or other company that manufactures or market Insulin Products, including but not limited to Sanofi S.A. or its U.S. subsidiary Sanofi-Aventis U.S. LLC; Eli Lilly and Company; Novo Nordisk A/S; Viatris Inc.; Biocon Biologics Ltd.; MannKind Corporation; Civica Rx; or any subsidiary thereof.
5. The terms "all," "any," and "each" shall be construed as encompassing any and all; and "every" means each and every.

6. The terms "and" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery request all responses that might otherwise be construed to be outside of its scope. The use of the singular form of any word includes the plural and vice versa.
7. The terms "concerning" and "regarding" mean to comprise, reflect, record, memorialize, embody, discuss, contradict, evaluate, consider, review or report on, concern, refer to, or relate to the subject matter of the Request or to have been created, generated or maintained in connection with or as a result of the subject matter of the Request.
8. The terms "relate," "related to," and "relating to" mean, in whole or in part, addressing, analyzing, concerning, constituting, containing, commenting on, discussing, describing, identifying, referring to, reflecting, reporting on, stating, or dealing with.
9. "Document(s)" mean any information, on paper or in electronic format, including written, printed, recorded, and graphic materials of every kind, in the possession, custody, or control of Open Options, including memoranda, interview notes, presentations, correspondence, and billing records. The term "Documents" 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; notes of Meetings or telephone calls; and copies of documents the originals of which are not in the possession, custody, or control of Open Options. This term includes the transmittal or transfer of communications and information (in the form of facts, ideas, inquiries, or otherwise) by any means, including email, instant messages, text messages, iMessages, WhatsApp Messages, Telegram, and

Signal messages. "Document(s)" include the original and, separately, each non-identical copy (including, but not limited to, non-identical copies containing unique notes, inserted material, or attachments).

10. "Price" or "Pricing," when used with regard to one or more products, means the amount charged by the supplier for such product(s) or the amount paid by the buyer of such product(s) to the seller, whether or not the seller is the manufacturer of the product(s). The term "price" also includes amounts denominated as price, gross price, net price, average price, unit price, effective price, dead net price, Rebate, package price, bundled price, discount, credit, charge or chargeback, allowance, debit, or any other payment or receipt of anything of value incurred in whole or in part as a result of the sale of the applicable product.

INSTRUCTIONS

1. ESI Respondents seek production of the Documents set forth in the numbered Requests below that are in Your possession, custody, or control. A Document is to be deemed in Your possession, custody, or control if You (a) own such document in whole or in part; (b) have a right by contract, statute or otherwise, to use, access, inspect, examine, or copy such document on any terms; or (c) have an express or implied understanding that You may use, access, inspect, examine or copy such document on any terms.
2. In addition to the specific instructions set forth below, these Requests incorporate by reference all provisions of the Protective Order Governing Confidential Material, as entered by Chief Administrative Law Judge Chappell on October 1, 2024 ("Protective Order"). Subject to a valid claim of privilege, please produce the entire document if any part of that document is responsive.
3. Any alteration of a responsive Document, including any marginal notes, handwritten notes, underlining, stamps, drafts, revisions, modifications, and other versions of a responsive Document is a separate and distinct Document and it must be produced in addition to the unaltered responsive Document.
4. No part of a Request may be left unanswered, or Documents not produced, merely because a different portion of a Request is objected to. Where an objection is made to any Request, or subpart thereof, the objection must state with specificity all grounds for the objection. If an objection is made to any Request, the response shall state whether Documents are being withheld from production on the basis of such objection, or whether inspection and production of the responsive Documents will occur not withstanding such objection.

5. For any Document withheld or redacted, in whole or in part, based on any claim of privilege or work product protection, You shall, pursuant to 16 C.F.R. § 3.38A and any additional provisions as detailed in the Protective Order, produce a privilege log that describes the nature of Documents, communications, or tangible things not produced or disclosed, in a manner that will enable Counsel for ESI Respondents to assess the claim of privilege.
6. If no Document responsive to a Request exists, please state so in Your response.
7. Each Document should be produced in the manner, form and position in which it is kept in the ordinary course of business.

REQUESTS FOR PRODUCTION

DOCUMENT REQUEST NO. 1

All Documents created by, or shared with, You since 2013 in connection with Open Option's work regarding 2013 Project Chateau and 2015 Project Chateau II.

DOCUMENT REQUEST NO. 2

All Documents created by, or shared with, You since 2013 in connection with any work undertaken by You for or on behalf of Insulin Manufacturers concerning or relating to (1) Insulins Product pricing or (2) competition among manufacturers of Insulin Products in the United States.