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

COMMISSIONERS: **Andrew Ferguson, Chairman**
 Melissa Holyoak
 Mark 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.

Docket No. 9437

RESPONDENTS' REPLY IN SUPPORT OF MOTION TO DISMISS

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PUBLIC**INTRODUCTION**

Complaint Counsel defend the prior Commission’s complaint by doubling down on the limitless theories of Section 5 liability that it relied on when voting out the complaint. Ignoring Chairman Ferguson’s statement in *In the matter of Grubhub, Inc.*, No. 2023157 (Dec. 17, 2024) (“Grubhub Statement”), they argue that a UMC claim requires *no* definition of the market in which Respondents compete. But that would make it impossible to assess the relevant pool of competitors or any harm to competition in that market. The UMC claim thereby disregards basic antitrust principles, and Complaint Counsel’s defense of the claim, if accepted, would transform a UMC claim into a free-for-all. Likewise misplaced is Complaint Counsel’s assertion that pleading a UAP claim requires only some harm to *some* consumer, which the Commission may later weigh, however it chooses, against the benefits to others, without any grounding in what history and tradition have established to be unfair. Permitting these theories to proceed would turn this Commission—and subsequent administrations—into mini-legislators, free to impose their own “administrative [policy] preference[s]” on the national economy. *FCC v. NextWave Pers. Commc’ns Inc.*, 537 U.S. 293, 304 (2003) (Scalia, J.).

Congress never gave the Commission such limitless authority. Though Complaint Counsel claim the mantle of textualism, in reality they ignore both Section 5’s textual constraints and basic separation-of-powers principles to aggrandize the Commission’s authority. Section 5’s text is far narrower than Complaint Counsel contend. Textual “breadth” cannot grant agencies limitless “power to decide—without any particular fidelity to the text—which policy goals” to pursue. *Michigan v. EPA*, 576 U.S. 743, 763 (2015) (Thomas, J., concurring). And statutes must be read to avoid constitutional problems and respect the limits on authority “delegated” by Congress. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 395 (2024); *accord* Ferguson Dissenting

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Statement 32-34, *In the Matter of the Non-Compete Clause Rule* (June 28, 2024) (opposing UMC rulemaking based on constitutional-avoidance canon). Yet Complaint Counsel disregard the myriad separation-of-powers, fair notice, and non-delegation problems their interpretation raises.

The reason Complaint Counsel read Section 5 as essentially limitless is because they must. The Commissioners who voted out the complaint sought a test case to override decades of precedent and eliminate constraints on the FTC's authority. They also brought this case in their own administrative tribunal to avoid Article III scrutiny. Therefore, they deliberately failed to plead the elements they claim are irrelevant. Fundamentally, the complaint challenges Respondents' rebate practices simply because actors in the free market made decisions that differ from what prior Commissioners would have preferred, even as the complaint concedes the "net price of Humalog and other insulin products" has "*decline[d]*" since the challenged practices allegedly began. Compl. ¶¶ 129-30 (emphasis added). The complaint thus improperly envisions "antitrust courts" as "central planners, identifying the proper price, quantity, and other terms of dealing." *Verizon Commc'ns Inc. v. L. Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004) (Scalia, J.).

President Trump has made it a "priority" to end Federal overreach, ensure agencies act only on the "best reading of the underlying statutory authority," and "restor[e] the constitutional separation of powers." E.O. 14219 §§ 1, 2(iii), *Ensuring Lawful Governance* (Feb. 19, 2025). Because the "guiding principle of *this* Commission is the rule of law," Ferguson PepsiCo Statement 1, *In the Matter of Non-Alcoholic Beverage Price Discrimination Investigation* (May 22, 2025), not "generalized grievances untethered from" the "statutory framework," Meador PepsiCo Statement 2, *id.*, the Commission must dismiss the complaint.

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ARGUMENT

I. The UMC Claim Must Be Dismissed

A. The Complaint Never Identifies A Relevant Market

The Commission should reject Complaint Counsel’s attempt to erase the fundamental requirement that, to state a UMC claim, a complaint must contain well pled facts defining “the market where the method’s devisor competes.” Grubhub Statement at 4 & n.40. Chairman Ferguson did not “inven[t]” this requirement. Opp. 21. It instead derives from Section 5’s text, precedent, the Commission’s decisions, and classic antitrust principles that appropriately inform statutory text.

When Congress first prohibited unfair “competition” in 1914, that term’s meaning was clear: “common strife for the same objects” or “rivalry” where “two or more persons are engaged in the same business.” Webster’s Dictionary (1913).¹ That definition “obvious[ly] ... imports the existence of present or potential competitors,” meaning a relevant market. *FTC v. Raladam Co.*, 283 U.S. 643, 649 (1931). UMC claims thus must be assessed *against a relevant market of competitors*: Did the “methods” “destroy” or substantially restrict “competition” or “introduc[e] monopoly”? *Id.* at 650. As the Supreme Court recognized under the Sherman Act, whose text does not expressly refer to a market-definition requirement: “Without a definition of the market there is no way to measure the defendant’s ability to lessen or destroy competition,” *Ohio v. American Express*, 585 U.S. 529, 543 (2018) (Thomas, J.) (cleaned up), and the “proceeding must be dismissed,” *Raladam*, 283 U.S. at 653-54; accord Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 501 (5th ed. 2023); Robert H. Bork, *The Antitrust Paradox* 72-89 (1978) (noting the need for rigorous market definition in antitrust cases). So, to allege a claim of “an unfair

¹ <https://www.websters1913.com/words/Competition>.

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method of competition,” the “relevant market within which to measure the effect on competition must be defined.” *Columbia Broad. Sys., Inc. v. FTC*, 414 F.2d 974, 978 (7th Cir. 1969); *see* Grubhub Statement at 4 (citing cases).²

The prior Commission disregarded this requirement when it pronounced its own “*ipse dixit*” on the “elements of an unfair-method-of-competition claim,” unconstrained by the “statute or ... any case law,” and insisted that UMC claims need no defined market. GrubHub Statement at 3; *see* Mot. 15. The open-ended complaint thus declined to allege any market.

As a fallback, Complaint Counsel now call “PBM services” the relevant market. Opp. 19-20. But they cite no allegations in the complaint identifying or defining that market because there are no such allegations. Nor do they bother to identify which Respondents—not all of which are PBMs—compete in the un-alleged market. And Complaint Counsel cannot “amend their complaint in an opposition brief.” *Bates v. Green Farms Condo. Ass’n*, 958 F.3d 470, 483 (6th Cir. 2020).³

B. Complaint Counsel Identify No Alleged Harm In Any Market Where Respondents Plausibly Compete

Complaint Counsel likewise cannot erase—nor can the complaint satisfy—the requirement to allege *harm* to competition “in the market where the method’s devisor competes.” GrubHub Statement at 4 n.40.

To start, the Commission cannot allege harm to competition in a relevant market without defining a market. Moreover, Section 5’s reference to unfair “competition” means—at a

² *Atlantic Refining*, *Brown Shoe*, and *Raladam II* do not hold otherwise. *See* Opp. 21. At best, they hold that a respondent’s limited market *power* does not defeat a UMC claim.

³ Respondents did not “recognize” the theoretical market of PBM services. Opp. 20. Respondents simply argued in the alternative that the complaint failed plausibly to show harm in any “conceivable”—though unalleged—market. Mot. 16.

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minimum—harm that “affect[s] the business” of competitors to “the trader whose methods are assailed as unfair,” and that would ultimately “destro[y] competition and establis[h] monopoly”—i.e., conduct that impairs rivals. *Raladam*, 283 U.S. at 649-50. The “Commission is authorized to protect the public” from “that condition of affairs,” “not some other.” *Id.* at 649. *Raladam* policed these statutory limits, rejecting a UMC claim against a seller of deceptively advertised “obesity cures” when the only “danger” was to “medical practitioners” prescribing medicine, not to competitors “in the business of making or vending remedies.” *Id.* at 652-53. The Second Circuit likewise rejected a UMC claim because the challenged conduct “affect[ed] competition in another industry,” not the defendant’s. *Official Airline Guides v. FTC*, 630 F.2d 920, 927 (2d Cir. 1980).

Atlantic Refining did not eliminate this requirement. Opp. 20. Instead, it recognized a UMC claim where a party that competed “at three levels” “impaired *competition* at [all] three levels”: Atlantic sponsored the sale of Goodyear products to Atlantic’s own wholesale and retail outlets on a commission basis, which “foreclosed” competing manufacturers, wholesalers, and retailers from their respective markets. *Atl. Refin. Co. v. FTC*, 381 U.S. 357, 360, 370 (1965) (emphasis added). Here, no such foreclosure of competitors is alleged in any market.

Complaint Counsel cannot satisfy the requirement of harm to competition in a market where Respondents compete because the purported harm the complaint *actually* alleges is to *certain patients who consume insulin products*, Compl. ¶¶ 259, 56-73, 92-98; Opp. 20, and Respondents do not compete to sell services to those patients.⁴

⁴ The same goes for the suggestion of “harm to competition among insulin manufacturers who are forced to compete by raising (not lowering) their prices.” Opp. 20. Respondents do not compete to manufacture insulin drugs. Nor is there *harm to competition* among manufacturers. Rather, Respondents’ practices allegedly “induc[e] rival manufacturers to compete.” Compl. ¶ 258.

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Nor does the complaint allege harm in some unalleged market related to PBM services. Complaint Counsel’s theory—spun for the first time in their Opposition—is that the strategy of negotiating rebates is simultaneously detrimental to plan sponsors (because rebate values are “illusory” and resulting formularies are “worse,” Opp. 17), yet so attractive to them that one PBM’s adoption of that strategy “forces” every other PBM to “adop[t] the same practice” or lose business, Opp. 18. This self-contradictory theory also contradicts the complaint, which alleges that Respondents actively compete. Compl. ¶¶ 106, 170, 173. Moreover, Complaint Counsel’s theory makes no sense. If prioritizing low-WAC, low-rebate drugs were better for plans, nothing would prevent a competing PBM from pursuing that approach and explaining its benefits to plans to win their business.

C. No Facts Connect The Alleged Harm To Some Patients To Any Unfair Methods

Complaint Counsel do not fundamentally dispute that, in order to be “unfair,” a method of competition must “significantly lesse[n] competition” through “collusive, coercive, predatory, or exclusionary conduct.” *E.I. du Pont de Nemours & Co. v. FTC* (“*Ethyl*”), 729 F.2d 128, 140, 142 (2d Cir. 1984); Mot. 21-22. But Complaint Counsel try to conflate that standard with an invented and inapplicable alternate standard: Unfair competition “impairs competition or competitors for reasons other than efficiency,” such as through “unscrupulous conduct ‘characterized by deception, bad faith, fraud, or oppression’ that distorts competitive conditions.” Opp. 14-15 (citation omitted).

That subjective standard has no grounding in precedent, tradition, or history. And Complaint Counsel cannot meet it anyway. The complaint alleges that PBMs compete with each other to serve plans, some of which made plan design decisions the prior Commissioners did not like. What Complaint Counsel decry as a “race to the bottom,” Opp. 19, is the normal operation of American free-market capitalism: the “introduction” of a new product, service, or preference

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that “gain[s] acceptance in [the] market” will induce many to adopt the same or similar practices, while “coerc[ing]” no one, *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 287 (2d Cir. 1979) (Sherman Act). Mot. 20-21. Complaint Counsel do not address this “well forged” Sherman Act precedent, and no “different result is warranted by the unique features of” Section 5. *Boise Cascade Corp. v. FTC*, 637 F.2d 573, 581-82 (2d Cir. 1980).

The rest of Complaint Counsel’s standard swaps out one set of conclusory adjectives and nouns (coercive, exploitative, and restrictive) for another (deception, fraud, bad faith, oppression, and unscrupulous). But the complaint alleges none of these things. The complaint contains no deceptive-acts-or-practices claim, or allegations of deception or fraud. It concededly did not allege anticompetitive intent, Opp. 22-23, so there is no allegation of bad faith. And “oppression” and “unscrupulous” are subjective labels that do nothing to explain why the conduct here is unfair especially when disconnected from any longstanding public policy. Complaint Counsel’s reliance on such “vague” concepts is “understandable,” since doing so “maximizes agency power,” but they are not the type of “clear and definite” standards that give affected parties adequate guidance. *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting). Regardless, the conduct here is neither oppressive nor unscrupulous because the allegations show that PBMs are *competing* in the free market to provide a service for which there is demand (i.e., that has gained acceptance). *Berkey Photo*, 603 F.2d at 287.

Complaint Counsel’s attempts to analogize Respondents’ conduct to cases finding viable UMC claims underscore how detached this complaint is from the FTC Act and traditional antitrust principles. For example, Complaint Counsel compare (at 16) Respondents’ alleged practices to candy sales that encouraged gambling among children. *FTC v. R.F. Keppel & Bro.*, 291 U.S. 304 (1934). But *Keppel* is readily distinguishable. There, the defendant was engaged in a “practice”

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that (1) “the common law and criminal statutes have long deemed contrary to public policy”—gambling and the exploitation of “children, too young to be capable of exercising an intelligent judgment ... , to purchase an article less desirable ... than that offered at a comparable price”—and (2) resulted in a “substantial diversion of trade” away from competitors, who were excluded from the market by their “powerful moral compulsion” against exploiting children. *Id.* at 308-09, 313. By contrast, longstanding legal policy does not prohibit PBM selective-contracting practices, and courts and the Commission have embraced those practices as pro-competitive. Mot. 23. The complaint does not plausibly allege that Respondents induced plans—unlike children, sophisticated commercial actors—to use formularies or set plan designs they do not want. Quite the opposite: Some sponsors prefer formularies that prioritize lowest net costs, others prefer formularies that prioritize expanded choices of drugs, and others design their own custom formularies. Compl. ¶¶ 34, 50. And there is no allegation that any would-be competing PBMs have been excluded from the market, for moral or other reasons.⁵

D. Respondents’ Practices Serve Independent Legitimate Business Reasons

Complaint Counsel do not dispute that the existence of an “independent [legitimate] business reason” would undercut their claims. Mot. 23 (citing *Ethyl*, 729 F.3d at 139-40); Opp. 22. Were it otherwise, many forms of “legitimate competition” might be falsely mistaken for illicit exclusionary conduct, and enforcement against such competition would be “costly” because it would chill legitimate business practices that “the antitrust laws are designed to protect.” *Trinko*, 540 U.S. at 414 (Sherman Act).

⁵ *FTC v. Texaco, Inc.*, 393 U.S. 223 (1968), and *Atlantic Refining* are similarly distinguishable. The complaint does not allege that any Respondent has “dominant economic power” to “foreclose competition,” *Texaco*, 393 U.S. at 228-29, or “excluded [rivals] from selling” in the marketplace, *Atl.*, 381 U.S. at 370.

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Complaint Counsel respond that raising an “independent business reason” is “plainly premature” on a “motion to dismiss.” Opp. 22. But courts regularly “dismiss Section 1 complaints when there is an independent business justification for the observed conduct and no basis for rejecting it.” *In re: McCormick & Co.*, 217 F. Supp. 3d 124, 132 (D.D.C. 2016) (collecting cases); *cf. In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 1186, 1195 (9th Cir. 2015) (dismissing Sherman Act claim where “the complaint itself, perhaps maladroitly, provide[d] ample independent business reasons”). There is no reason to treat the Commission’s claims differently.

Here, the independent business justification leaps off the page: PBM rebate agreements and selective formularies lower healthcare costs by stimulating manufacturer price competition. *See* Mot. 8-10, 23-24. The complaint asserts there is “no justification” for “using rebate value instead of net prices to *attract clients*.” Compl. ¶ 233 (emphasis added). But applying “common sense” to the complaint’s allegations supplies an “obvious alternative explanation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679, 682 (2009). Clients have diverse preferences. Although some “clients” may prefer to “tak[e] rebates out of the equation,” Compl. ¶ 174, others prefer to receive and use rebates to, for example, reduce premiums, reduce out-of-pocket costs, or apply rebates at the point of sale, *id.* ¶¶ 34-37, 55, 66, 184, 196-97, 235. Providing these clients rebate value at their request allows them to “select among alternative offers”—the outcome of healthy “competition” that is the “best method of allocating resources in a free market.” *Nat’l Soc’y of Pro. Eng’rs v. United States*, 435 U.S. 679, 695 (1978).

Because the complaint concedes independent legitimate business reasons for Respondents’ alleged conduct, it must at least allege “anticompetitive intent,” Mot. 24-25 (citing *Ethyl*)—but Complaint Counsel concede that they do not, Opp. 22-23. That is fatal—despite Complaint

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Counsel’s argument that anticompetitive intent is only “one possible way to establish a Section 5 violation,” Opp. 23—because the complaint doesn’t satisfy Section 5 in any other way.

II. The UAP Claims Must Be Dismissed

A. No Established Legal Policy Supports The UAP Claims

In light of Section 5’s “history,” an act or practice is not unfair unless it violates “‘clear and well-established’ policies that are expressed in the Constitution, statutes, or the common law.” *LabMD v. FTC*, 894 F.3d 1221, 1227, 1231 (11th Cir. 2018). Complaint Counsel incorrectly resist this requirement because the complaint does not allege that Respondents’ practices violate any policy established by law.

Complaint Counsel’s argument—focused on 15 U.S.C. § 45(n)—flips Section 5’s history on its head. Long before subsection (n), Congress prohibited “unfair methods of competition” in 1914, and the term “unfair” (in subsection (a)) brought with it the “old soil” of established notions of unfairness. *Twitter, Inc. v. Taamneh*, 598 U.S. 471, 484 (2023) (Thomas, J.) (interpreting statutory term narrowly based on its “familiar” established common-law meaning). That “standard of ‘unfairness’” requires showing the targeted conduct is “against public policy” as reflected in *existing* law, not the Commission’s *current* preferences. *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 454 (1986). By using the same term when later prohibiting “unfair” acts or practices in 1938, Congress imported the same history and tradition. Antonin Scalia & Bryan A. Garner, *Reading Law* 170 (2012) (“[W]ord[s] or phrase[s] [are] presumed to bear the same meaning throughout a text.”). The Commission’s power to apply those settled principles to new practices does not entail *redefining* unfairness by divorcing it from history, tradition, and text. That would make the term a free-floating vessel into which any Commission could pour its personal predilections du jour.

Section 5(n) did not change this. Rather than expand the Commission’s discretion to decide what constitutes unfairness, Section 5(n) further constrains that discretion by declaring that the

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Commission “shall have no authority” to deem a practice unfair “unless” it satisfies particular statutory criteria. 15 U.S.C. § 45(n). Section 5(n)’s requirements are thus necessary, but not sufficient, criteria for demonstrating unfairness. *FTC v. Wyndham Worldwide Corp.*, 799 F.3d 236, 244 (3d Cir. 2015) (“§ 45(n) may not identify all of the requirements for an unfairness claim.”). The only change Section 5(n) made to the “old soil” of “unfair’s” historical meaning was to make clear, by adding further criteria, that settled policy *alone* could not establish unfairness. That change is consistent with Congress reining in the Commission after it regulated based only on a general sense of personal values, Mot. 4-5, and contrary to Complaint Counsel’s ahistorical claim that Congress somehow *expanded* the Commission’s discretion via Section 5(n). Thus, the Eleventh Circuit correctly read Section 5(n)’s text and its history when it concluded that the FTC “must” allege that the challenged act “meets the consumer-injury factors listed [in 15 U.S.C. § 45(n)] *and* is grounded in well-established legal policy.” *LabMD*, 894 F.3d at 1229 & n.24 (emphasis added).

Complaint Counsel also ignore the constitutional concerns their contrary interpretation would raise. If the word “unfair” gave the Commission “unbridled discretion” to prohibit conduct without any grounding in historical and traditional legal policies, it would raise obvious non-delegation problems, *Kent v. Dulles*, 357 U.S. 116, 128 (1958), and deprive regulated parties of “fair warning” of what Section 5 prohibits, *Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986) (Scalia, J.). Those problems are not solved by equating unfairness with Section 5(n) because Section 5(n) does not define “injury” or specify how the Commission should weigh harms to some consumers against other benefits. Accordingly, formal, longstanding legal policies must provide additional guides, or else Section 5 would impermissibly “authoriz[e] [the Commission] to legislate” in its own right. *FCC v. Consumers’ Rsch.*, 145 S. Ct. 2482, 2510 (2025). The

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Supreme Court has endorsed this view. Mot. 26-27 (citing *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972)).

Even if Congress did not require evaluating public policies, the FTC Policy Statement on Unfairness does. That statement “emphasize[d] the importance of examining outside statutory policies and established judicial principles for assistance” in assessing UAP claims. FTC Policy Statement on Unfairness (Dec. 17, 1980). And this case is not the rare one where “convincing independent evidence” of “unjustified consumer injury” might excuse the absence of established public policy. *Id.*; *see supra*, at 8-9; Mot. 26-28. Established policy is a critical, practical limit that prevents the FTC from “gallivanting across the land searching for monsters to destroy,” *A Conversation with Commissioner Ferguson*, Mercatus Center (June 13, 2024).

A public policy “should be declared or embodied in *formal* sources such as *statutes, judicial decisions, or the Constitution* as interpreted by the courts.” FTC Policy Statement on Unfairness, *supra* (emphasis added). Yet Complaint Counsel point primarily to *informal* sources, such as a Senate Finance Committee “staff report” and other agencies’ press releases. Opp. 31-32. Those sources are hardly “clear and well-established” public policy. *LabMD*, 894 F.3d at 1231. It’s more like “entering a crowded cocktail party and looking ... for one’s friends.” *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring in judgment) (discussing legislative history).

The only statutes Complaint Counsel cite do not identify established public policies. Complaint Counsel point to a federal statute requiring plan sponsors (not PBMs) to cap insulin prices for Medicare patients. Opp. 31. But that statute says nothing about the fairness of rebates and formulary practices for non-Medicare patients. If anything, Congress’s rejection of an earlier bill that capped insulin prices for *commercial* plans shows Congress considered and decided against it. *See* Juliette Cubanski, *The Facts About the \$35 Insulin Copay Cap in Medicare*, KFF

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(June 12, 2024) (explaining the “vast majority of Republicans voted to remove” provision extending cap to commercial plans). Complaint Counsel also cite three state statutes requiring plan sponsors to use “point-of-sale rebates,” Opp. 31, but these “isolated decisions” do not evince a “widely shared” public policy against rebates themselves, FTC Policy Statement on Unfairness, *supra*.

Conversely, Complaint Counsel have no persuasive response to the judicial decisions and statutes that expressly bless rebating and formulary practices that lower net drug costs. Mot. 28. They suggest these authorities are irrelevant because they address practices in the context of “Medicare, Medicaid, and other health plans.” Opp. 31-32 n.21. This argument is unavailing because the complaint seeks relief that would apply to all the benefit plans that Respondents’ clients offer, including government clients. Compl. Notice of Contemplated Relief. Moreover, Complaint Counsel cite a Medicare-related statute as a valid indicator of public policy concerning PBMs. Opp. 31. What is good for Complaint Counsel should be good for Respondents.

The point is not that Congress expressly “immunize[d] the alleged anticompetitive and unfair rebate practices” from “federal competition and consumer protection laws.” Opp. 31-32 n.21. Rather, Congress is aware of and permits rebating practices like those the complaint proposes to forbid, which undermines any notion that such selective-contracting practices are contrary to public policy. Mot. 28. With Congress actively regulating rebates and formularies and other administrative cops on the beat, *id.* at 6-8, there is no reason for the Commission to strain its statutory authority to step in.

B. The Complaint Concedes That Third-Party Practices Sever Any Causal Link

Complaint Counsel do not dispute that under Section 5(n), a practice cannot be unfair unless it “cause[s]” consumers’ alleged “injury.” Here, the complaint concedes that multiple independent actors set list prices (drug manufacturers), select formularies and exclusively design

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benefit plans, including copayment levels (plan sponsors), and choose plans (individuals enrolled in commercial health plans)—severing any link between Respondents and the allegation that “some” patients “pay more” for insulin. Compl. ¶ 264; Mot. 28-31.⁶

Complaint Counsel thus shift focus to an alternate theory not alleged in the complaint: that Section 5(n) reaches conduct that “facilitate[s]” or “contribute[s] to” another party’s Section 5 violation. Opp. 25. But the complaint does not allege that drug manufacturers, plans, or patients have violated Section 5. It never alleges, for example, that sponsors prioritized lower premiums over out-of-pocket costs, since employers are “free” under ERISA to decide how much to spend on employee benefits plans and how to allocate those expenditures. *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995). And the Commission has not brought claims against drug manufacturers. The Commission cannot target Respondents for allegedly “facilitating” conduct that the complaint never claims is unlawful.

Nor does the complaint adequately allege that Respondents “facilitate[d]” or “contribute[d]” to the relevant third-party conduct. Opp. 25. Instead, the allegation is that Respondents “incentiviz[e]” others to act in certain ways. Compl. ¶¶ 191, 216, 221, 231, 254; Opp. 26. But “incentiviz[ing]” or “encouraging” third parties to act does not suffice. Mot. 31-32; e.g., *Marceau v. Int’l Bhd. of Elec. Workers*, 618 F. Supp. 2d 1127, 1167-68 (D. Ariz. 2009) (“[T]he causal chain is simply too attenuated” to show that “discounts and incentives” caused alleged injuries.). Complaint Counsel are wrong to dismiss those authorities as inapposite simply because “they do not involve an unfairness claim or the FTC Act.” Opp. 25 n.15. Courts generally read the causation requirement in Section 5(n) to include proximate cause—even if not “*the most*

⁶ Respondents are not “attempt[ing] to blame injured patients.” Opp. 25 n. 14. The point is that consumers in an open market who *choose* high-deductible plans may prefer savings from lower monthly premiums or may use widely available insulin affordability programs to reduce costs.

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proximate cause.” *Wyndham Worldwide Corp.*, 799 F.3d at 246. When third parties take unaided “additional steps” to cause the alleged harm, the defendant is not liable. *FTC v. Kochava, Inc.*, 671 F. Supp. 3d 1161, 1172 (D. Idaho 2023).

Complaint Counsel’s reliance on *FTC v. Neovi, Inc.*, 604 F.3d 1150 (9th Cir. 2010) is thus inapt. There, the website operator filled requests to create and deliver checks it knew were likely fraudulent. *Id.* at 1157. The fraudsters needed the website’s active assistance to inflict harm on others because “[w]ithout the” software, “users would not be able to create and deliver checks.” *Id.* at 1155. Here, by contrast, the complaint does not allege any fraud or that manufacturers or sponsors require the assistance or approval of Respondents. Mot. 30-31 (citing allegations).

C. Complaint Counsel Fail To Substantiate The Complaint’s Conclusory Weighing Of Costs And Benefits

To excuse the complaint’s failure to plead “substantial injury” that is “not outweighed by countervailing benefits to consumers or to competition,” 15 U.S.C. § 45(n), Complaint Counsel attack a straw man. Respondents have not argued that the complaint must include a “quantitatively precise cost-benefits” analysis. *Contra* Opp. 28. Even where an agency “need not quantify all costs [and benefits] ‘with rigorous exactitude,’” it at least “must consider them all.” *Citizens Telecomms. Co. v. FCC*, 901 F.3d 991, 1010 (8th Cir. 2018); *cf. Michigan*, 576 U.S. at 752 (Scalia, J.) (statutory “phrase ‘appropriate and necessary’ requires at least some attention to cost” and whether a regulation “does significantly more harm than good”). Thus, a complaint lacking non-conclusory allegations showing that harm outweighs benefits is defective as a matter of law. Grubhub Statement at 5; *Rollins v. Wackenhut Servs.*, 802 F. Supp. 2d 111, 123 (D.D.C. 2011) (dismissing design-defect claim absent “specific allegations to suggest” that “magnitude of the danger from the product outweighed the costs”), *aff’d*, 703 F.3d 122 (D.C. Cir. 2012); *Cal. Crane Sch., Inc. v. Google LLC*, 722 F. Supp. 3d 1026, 1041 n.11 (N.D. Cal. 2024) (dismissing unfair

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competition claim because complaint “does not address the possible benefits to consumers”), *aff’d*, 2025 WL 2541913 (9th Cir. Sept. 4, 2025).

The complaint here “state[s] in conclusory terms” that the harms “outweighs” the benefits, without alleging “any fact with respect to the [actual] costs” or how those costs outweigh countervailing benefits. *Chan v. DOT*, 782 F. Supp. 3d 39, 79, 83 (S.D.N.Y. 2025) (dismissing complaint). The complaint just vaguely asserts that “many” “list-price-sensitive patients” pay an unspecified “high” amount for certain drugs and asks the Commission to trust the conclusory assertion that these undetermined price increases “are significantly more harmful than the possibility of slightly lower premiums”—a procompetitive benefit the complaint acknowledges but never addresses with specificity. Compl. ¶¶ 6, 185, 226.

Complaint Counsel insist the alleged harms “necessarily outweigh [the acknowledged] benefits” of rebate practices because one report claimed some employers allocate 70% of rebates to reduce their contributions to premiums rather than patient premiums. Opp. 28. First, “Payers”—not PBMs—“choose whether to retain the rebates or apply them at the point of sale.” Compl. ¶ 55. Second, under that theory, consumers are harmed any time a plan sponsor retains any part of a rebate, and that supposed harm outweighs any benefit to anyone else. But Complaint Counsel’s deceptively “[s]imple math,” *id.*, ignores the multiple ways plan sponsors can deploy rebate savings to lower costs for patients, such as by reducing patients’ shared costs like “out-of-pocket” expenditures—as the Commission has previously acknowledged, Mot. 33-34. Regardless, employers need not pass 100% of rebates on to premiums for the benefits of rebates to outweigh their costs. Rebates lower net drug costs so employers and employees pay less in total and employers can continue to offer their employees prescription drug benefits. Compl. ¶¶ 38, 55, 129-31, 186, 247. How that benefit is *allocated* between employers and employees (or between

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lower premiums and other benefits to employees) is irrelevant for Section 5 purposes and is generally left to employers. *Curtiss-Wright*, 514 U.S. at 78. Inferring net harm to the public every time an employer retains some portion of a rebate would go far beyond even the complaint. Complaint Counsel cannot cure the complaint's defects by inventing new theories on the fly.

CONCLUSION

The Commission should dismiss the complaint.

Dated: September 30, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2025 I filed the foregoing document electronically using the FTC's E-Filing system, which will send notification of filing to:

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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 further certify that on September 30, 2025, I caused the foregoing document to be e-served to:

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