PUBLIC

UNITED STATES OF AMERICA
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,** **Respondents.**	**Docket No. 9437**

COMPLAINT COUNSEL'S OPPOSITION TO ESI'S MOTION TO COMPEL

Express Scripts ("ESI") has moved to compel one of Complaint Counsel's lawyers to sit for a deposition to describe statements made [redacted]. ESI contends that it needs this deposition to attempt to establish that counsel "admitted" [redacted] ESI's Motion to Compel ("Br.") 6. In other words, ESI wants to fish for testimony that FTC attorneys reached the legal conclusion that the insulin manufacturers were liable under Section 5. ESI apparently believes this conclusion would absolve it of liability for its own conduct.

Courts "take a critical view" of attempts to depose opposing counsel. *FTC v. U.S. Grant Res., LLC*, No. CIV.A. 04-596, 2004 WL 1444951, at *10 (E.D. La. June 25, 2004). This dispute

illustrates why. First, Complaint Counsel's statements [redacted] about the strengths or weaknesses of potential claims are not relevant to prove or disprove the validity of the complaint allegations. Indeed, attempts to use [redacted] in this way are so widely recognized as problematic that the Federal Rules of Evidence bar their admission. Second, ESI's proposed deposition is unnecessarily duplicative of information ESI already has or can easily obtain, including public FTC statements about the manufacturers' culpability; a written interrogatory response that details what Complaint Counsel [redacted]; and all the documents and testimony from the investigation and discovery related to the manufacturers' conduct. Third, the burden on Complaint Counsel from ESI's proposed deposition would significantly outweigh any minimal benefit of the discovery to ESI, particularly considering the care necessary to protect work product and deliberative process privilege. The Court should reject ESI's attempt to force a Complaint Counsel attorney to sit for an irrelevant and unnecessary deposition.

Background

During the investigation that preceded this action, the FTC [redacted] Ultimately, the Commission filed a complaint against Respondents. The complaint did not name the manufacturers, but the Bureau of Competition issued a press release stating that it was "deeply troubled by the role drug manufacturers play" in the rebating and affordability issues in this case. It explained that the Commission had exercised its "discretion" and chose to "focus[] this vital enforcement action against the PBMs, who sit at the center of the drug reimbursement system."[1]

[1] Press Release, Bureau of Competition, Statement re Lawsuit Against PBMs and Role of Manufacturers (September 20, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/insulin-manufacturing-statement.pdf. ("BC Press Release").

In September 2025, ESI began aggressively pursuing information about Complaint Counsel's legal thinking regarding the manufacturers' culpability. ESI first requested that Complaint Counsel produce a [redacted] —but never [redacted] shared with any party. *See* Decl. ¶¶ 5-6. As a [redacted] is plainly protected work product, ESI changed tack by issuing a Rule 3.33(c) deposition notice. Decl. ¶ 7; Heipp Decl. Ex. I. Topics 3-6 would require Complaint Counsel to testify about discussions [redacted] Heipp Decl. Ex. I.[2]

On September 26, in an attempt to resolve this dispute, Complaint Counsel voluntarily amended an interrogatory response to disclose [redacted] [3] *See* Decl. ¶¶ 8-10; Heipp Decl. Ex. I, Ex. K at 4-9. The response fully recounted counsel's best recollection of those statements. Decl. ¶ 10. On December 3, ESI responded that it was "hard to believe" Complaint Counsel's interrogatory response identified all its statements about [redacted] and asked—for the first time—for other [redacted] Decl. ¶ 11. Even though these new requests were largely outside the scope of ESI's deposition topics and the interrogatory, Complaint Counsel offered to work cooperatively with ESI to supplement its response to provide additional information in lieu of a deposition. Decl. ¶ 15. ESI refused this offer and filed the instant motion to compel.

[2] The notice also contained three other broad topics that asked about [redacted] ESI is no longer pursuing these topics. *See* Br. 3.

[3] Topic 6 involves [redacted]

Argument

Rule 3.31(c) provides that a party is only entitled to information "reasonably calculated to lead to the discovery of admissible evidence." 16 C.F.R. § 3.31(c)(1). The Administrative Law Judge shall limit discovery if it would be "unreasonably… duplicative" or "[t]he burden and expense of the proposed discovery" would "outweigh its likely benefit." 16 C.F.R. § 3.31(c)(2). Discovery should also be "denied or limited" to preserve an applicable privilege. 16 C.F.R. § 3.31(c)(4).

Courts "generally take a critical view" of an attempt to depose opposing counsel because it "presents a unique opportunity for harassment" and is "burdensome and disruptive." *U.S. Grant Res.*, 2004 WL 1444951, at *9-10 (cleaned up).[4] Indeed, courts have found depositions of government attorneys to be "inappropriate" when there are "other means to obtain the information sought." *Id*. Here, ESI's deposition notice inappropriately seeks testimony that is (1) irrelevant and inadmissible, (2) duplicative of materials ESI already has, and (3) unduly burdensome for Complaint Counsel.

I. ESI's topics are not reasonably calculated to yield relevant and admissible evidence

ESI contends that "[t]he extent to which independent conduct by third parties caused" the harm alleged in the complaint "is obviously relevant." Br. 6. But even assuming the *facts* about the manufacturers' conduct are relevant, Complaint Counsel's statements characterizing those facts [redacted] are not. Indeed, ESI appears to want a legal opinion

[4] *See also SEC v. Contrarian Press*, No. 16-CV-6964 (VSB), 2020 WL 7079484, at *2–3 (S.D.N.Y. Dec. 2, 2020) (denying 30(b)(6) deposition designed to "probe specific information directly related to [the government's] investigation."); *SEC. v. Buntrock*, 217 F.R.D. 441, 446 (N.D. Ill. 2003), aff'd, No. 02 C 2180, 2004 WL 1470278 (N.D. Ill. June 29, 2004); *United States v. Philip Morris Inc.*, No. CV 99-2496 (GK), 2002 WL 35667874, at *1, *4 (D.D.C. Nov. 15, 2002).

from Complaint Counsel that the insulin manufacturers violated Section 5.[5] *See, e.g.,* Br. 6 ("Complaint Counsel appears to have admitted that [redacted] That is not an appropriate use of a Rule 3.33(c) deposition. *See JPMorgan Chase Bank v. Liberty Mut. Ins.Co.*, 209 F.R.D. 361, 362 (S.D.N.Y. 2002) ("30(b)(6) depositions, are designed to discover facts, not contentions or legal theories…").

Indeed, frustration with this tactic led to Federal Rule of Evidence 408, which provides that settlement statements are "not admissible" to "to prove or disprove" a claim.[6] ESI contends that [redacted] Br. 8-9. But that myopic view has been rejected by the vast majority of courts. *See, e.g.*, *Portugues-Santana v. Rekomdiv Int'l*, 657 F.3d 56, 63 (1st Cir. 2011) (Rule 408's "prohibition applies equally to settlement agreements between… a plaintiff and a third party" because such evidence would "discourage settlements.") (cleaned up).[7] Perhaps recognizing the weight of this authority, ESI further argues that evidence can still be discoverable even if it is not ultimately admissible. Br. 8. But the information sought must "appear[] reasonably calculated to *lead to* the discovery of admissible evidence." 16 C.F.R. § 3.31(c)(1) (emphasis added). ESI's brief makes clear that its end goal from the deposition is to use the information that Rule 408 prohibits, i.e., [redacted]

[5] The opinion of FTC Staff is legally meaningless, in any event, as only the Commission can vote to issue a complaint.

[6] The "Federal Rules of Evidence are persuasive authority for FTC adjudicative proceedings" and often referenced to inform decisions. *See, e.g.*, *Rambus Inc.*, No. 9302, 2003 WL 21223850, at *1 n.1 (Apr. 21, 2003).

[7] *See also Branch v. Fidelity & Cas. Co.*, 783 F.2d 1289, 1294 (5th Cir. 1986); *United States v. Contra Costa Cnty. Water Dist.*, 678 F.2d 90, 92 (9th Cir. 1982); *C & E Servs., Inc. v. Ashland Inc.*, 539 F. Supp. 2d 316, 319–20 (D.D.C. 2008); *see also* 2 Stephen A. Saltsburg *et al.*, Federal Rules of Evidence Manual § 408.02[3](4) (2025) ("Rule 408 applies even if the settlement is between a party to the litigation and a third party.") (available in Lexis).

Even if Rule 408 does not directly apply, its underlying rationales point to the same result. First, settlement statements are not useful evidence because they may be "motivated by a desire for peace." *Contra Costa*, 678 F.2d at 92 (citing the Notes to Rule 408). Courts have recognized that statements about "the strength of [a party's] position" are of "minimal probative value" because they "do not tend to prove or actually prove" the underlying facts. *Scottsdale Ins. Co. v. McGrath*, No. 19-cv-7477 (LJL), 2024 WL 4512210, at *6 (S.D.N.Y. Oct. 17, 2024) (cleaned up).

Second, the strong public policy of promoting settlements "necessitates the inadmissibility of [settlement] negotiations in order to foster frank discussion." *Contra Costa*, 678 F.2d at 92 (citations omitted). This is especially true in complex "multiparty" litigations, similar to this matter, where settlement discussions with one party could later be used by another party "to prejudice a separate and discrete claim." *See Branch,* 783 F.2d at 1294 (cleaned up). Government enforcers might be chilled from frankly discussing settlement if other parties could later use those statements to argue that "outsiders were responsible for the damages claimed in the present suit." 2 Christopher B. Mueller and Laird C. Kirkpatrick, Federal Evidence, § 4:59 (4th ed.) (available in Westlaw).

II. ESI's topics are duplicative

The Court should separately reject ESI's proposed deposition because it is "unreasonably cumulative [and] duplicative" of other discovery that ESI already has, and ESI has "had ample opportunity by discovery in the action to obtain the information sought." 16 C.F.R. § 3.31(c)(2).

First, contrary to ESI's claim that Complaint Counsel "seeks to hide" its view that the insulin manufacturers' conduct contributed to the harm in this case (Br. 6), the Bureau of Competition issued a *public press release* saying as much: on the same day this suit was filed, a

then-Deputy Bureau Director publicly announced that the three manufacturers had a "concerning and active role… in the challenged conduct."[8]

Second, Complaint Counsel provided an interrogatory response that recounts, in detail, the information shared with [redacted] Decl. ¶¶ 9-10. Complaint Counsel also produced [redacted] Decl. ¶ 4. When ESI later asked for information about other discussions [redacted]—which are likely outside the scope of its notice—Complaint Counsel offered to work cooperatively to supplement our response.[9] Decl. ¶¶ 11, 15. ESI rejected this offer, seemingly to force one of Complaint Counsel's attorneys to sit for a deposition. Decl. ¶ 16.

Third, all of the record facts Complaint Counsel [redacted] Complaint Counsel provided ESI with our full investigative file, which includes more than two million documents produced by the insulin manufacturers, the transcripts of all investigational hearings involving the manufacturers, and all written communications between complaint counsel and the insulin manufacturers. Decl. ¶ 4. And at least one of the insulin manufacturers has agreed to sit for a deposition about the terms of its affordability programs. Eli Lilly's Motion to Quash Respondents' Rule 3.33(c) Subpoena 1 (Dec. 29, 2025).

[8] BC Press Release.

[9] Complaint Counsel has continued to engage with Optum and agreed to further amend its interrogatory regardless of the outcome of this motion to compel. Decl. ¶ 17.

III. The burden of ESI's proposed deposition outweighs any benefit

The Court should separately reject ESI's proposed deposition because "[t]he burden and expense of the proposed discovery" on Complaint Counsel "outweigh its likely benefit." 16 C.F.R. § 3.31(c)(2)(iii). As detailed above, the deposition would provide ESI with little benefit because the information it seeks is irrelevant and duplicative. On the other hand, Complaint Counsel would face not only the normal burden of preparing a 3.33(c) witness to testify on a broad set of topics, but also the burden of constantly maintaining the boundaries of privileged information—which necessarily pervades ESI's topics.

Courts frequently cite the burden of protecting privilege as a key reason for disfavoring depositions of opposing counsel. *See, e.g., Philip Morris*, 2002 WL 35667874 at *1, *4 (denying 30(b)(6) deposition of government attorney because such depositions "tend to disrupt the adversarial system… [and] inevitably raise work product and attorney-client privilege objections"). Although Complaint Counsel's [redacted] may not be privileged, counsel's more general "mental impressions, conclusions, opinion, or legal theories," concerning its investigation and [redacted] are core opinion work product and "generally afforded near absolute protection from discovery." *In re Cendant Corp. Sec. Litig.*, 343 F.3d 658, 663 (3d Cir. 2003) (citations omitted); *see also* FTC Rule 3.31(c)(5).[10] Indeed, this dispute arose from ESI's desire to obtain [redacted]—a quintessential example of opinion work product. *See United States ex rel. Griffis v. EOD Tech., Inc.*, No. 3:10-CV-204-TRM-DCP, 2024 WL 4920594, at *9 (E.D. Tenn. Apr. 23, 2024).

[10] Internal agency decision-making about possible [redacted] is further protected by the deliberative process privilege because it is "predecisional" and "deliberative in nature." *FTC v. AMG Servs., Inc.*, 291 F.R.D. 544, 560 (D. Nev. 2013) (citations omitted).

Moreover, because ESI seeks to ask about statements that occurred more than a year ago, the testifying attorney would need to rely on attorneys' written notes and general mental impressions of the conversations. Courts have routinely held that attorney notes and recollections are protected work product. *See Hickman v. Taylor*, 329 U.S. 495, 512–13 (1947) (denying discovery request requiring an attorney to "testify as to what he remembers or… wr[o]te down" in witness interviews); *Baker v. Gen. Motors Corp*., 209 F.3d 1051, 1054 (8th Cir. 2000) ("Attorney notes reveal an attorney's legal conclusions because, when taking notes, an attorney often focuses on those facts that she deems legally significant.").[11] The burden of preparing and testifying in a way that provides all of the information sought but fully protects privileged information would be significant.

Conclusion

ESI's proposed deposition seeks information that is irrelevant and inadmissible; duplicative of evidence ESI already possesses; and unduly burdensome for Complaint Counsel. The Court should deny ESI's motion and order that the deposition not be taken.

Dated: January 8, 2026

Respectfully submitted,

/s/ Rebecca L. Egeland

Rebecca L. Egeland
Derek E. Diaz
Andrew Kennedy

Federal Trade Commission
Bureau of Competition
600 Pennsylvania Avenue, NW
Washington, DC 20580
Telephone: (202) 326-2990
Fax: (202) 326-3384
Email: regeland@ftc.gov

[11] Courts have also held that attorney notes from interviews during an investigation are protected by the deliberative process privilege. *See* 291 F.R.D. at 560-61 (citations omitted).

Counsel Supporting the Complaint

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CERTIFICATE OF SERVICE

I hereby certify that on January 8, 2026, 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

Secretary of the Commission
Clerk of the Court

The Honorable Jay L. Himes
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, NW
Room H-110
Washington, DC 20580
OALJ@ftc.gov

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:

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

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

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

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

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

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

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 OptumRx, Inc.; OptumRx Holdings, LLC; Emisar Pharma Services LLC

/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

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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**

Declaration in Support of Complaint Counsel's Opposition to ESI's Motion to Compel

1. My name is Andrew Kennedy. I am an attorney admitted to practice law in the District of Columbia. I am employed by the Federal Trade Commission and am Complaint Counsel in this action.
2. I have personal knowledge of the facts set forth in this declaration.
3. During the investigation that preceded this action, the Commission [redacted]

[redacted]

4. Consistent with our discovery obligations, Complaint Counsel produced its written communications exchanged with the insulin manufacturers' outside counsel as part of its Investigative File,[1] including [redacted] and related emails that referenced a [redacted].[2] Though not included as an exhibit to ESI's motion, some of the [redacted]

5. On September 5, 2025, counsel for ESI emailed Complaint Counsel requesting a meet and confer because "Complaint Counsel did not produce its [redacted] even though ESI believed that [redacted]

6. On September 10, I and some of my colleagues met and conferred with ESI. We stated that we did not share or read aloud [redacted]. We noted that, consistent with FTC Rule 3.31(c)(2) and other privileges, such as deliberative process and work product, we were not obligated to produce documents we did not share with any outside parties. We further explained that,

[1] The investigative file also includes more than 2 million documents produced by the insulin manufacturers themselves, and the transcripts of all investigational hearings involving the manufacturers.

[2] *See, e.g.,* Heipp Decl. Ex. A, ¶ 3 [redacted]; Ex. B, ¶ 3 (same); Ex. C, ¶ 3 (same); Ex. D at 1 (same); Ex. E at 1 (same); Ex. F at 1 (same); Ex. G at 2 (email exchange [redacted]).

[redacted]

7. On the same call, we noted that we were in discussions with Optum regarding our response to an interrogatory that related to a similar issue.[3] We proposed that ESI attend a joint call to discuss whether an amendment to Optum's interrogatory would resolve both ESI's and Optum's requests. ESI also indicated on this call that it intended to issue a 3.33(c) notice to Complaint Counsel, which it did on September 15. Heipp Decl. Ex. I.
8. On September 15, Complaint Counsel, ESI, and Optum had a joint call. We explained that we had serious concerns about the relevance and duplicative nature of both Optum and ESI's discovery requests, and that they raised serious deliberative process and work product concerns. Regardless, in an attempt to reach a compromise, we offered to amend our response to Optum's interrogatory to describe our statements [redacted]
9. On September 26, Complaint Counsel followed through with this commitment and submitted its amended response to Optum's interrogatory. Heipp Decl. Ex. K.[4] Complaint Counsel's amended response described "what Complaint Counsel told [redacted]

[3] Optum's interrogatory, among other things, asked that Complaint Counsel "identify[] all Documents or Things" that support [redacted] that it produced as part of its investigative file. Heipp Decl. Ex. J at 50-52. FTC-PROD-00099607, FTC-PROD-00099597, and FTC-PROD-00099657, which are referenced in Optum's Interrogatory 11 are [redacted] similar to, or the same as, those attached as Exhibits D, E, and F to the Heipp Declaration. Complaint Counsel initially objected to this interrogatory as, by its text, it seeks to discover attorney mental impressions (and any supporting record documents) that underlie [redacted] that was never shared with a third party. *Id.*

[4] On the same day, Complaint Counsel submitted a set of objections and responses to ESI's deposition topics.

[redacted] Heipp Decl. Ex. K at 4.

10. Our amended response was directly responsive to Topics 3-5 of ESI's notice, which specifically request testimony regarding what Complaint Counsel said about [redacted] and provides our best recollection of everything that we said about [redacted] on those calls.[5]

11. On December 3, ESI sent Complaint Counsel a letter claiming that it was "hard to believe that, in conversations about the [redacted] Heipp Decl. Ex. L. ESI also cited two specific new issues that it wanted more information on: [redacted] *Id.* In its letter, ESI also offered to narrow its request to Topics 3-6 which cover [redacted] *Id.*

12. On December 12, Complaint Counsel, Optum and ESI jointly met and conferred. We reiterated our concern about ESI's proposed deposition, noting that a deposition of opposing counsel necessarily implicates privilege—particularly when we are being asked

[5] *See* Heipp Decl. Ex. I. Topic 3 requests information about [redacted] Topic 4 requests information about [redacted] Topic 5 requests information about [redacted]

to reconstruct oral conversations from more than a year ago—and it is difficult to disentangle what is in our records and memories from our mental impressions.

13. In response to the implication that our supplemental interrogatory response was somehow incomplete, we confirmed to counsel that it accurately captured our best recollection of what we told [redacted] referenced in Topics 3-5. We further explained that [redacted] We also stated that we were not trying to hide anything and asked counsel to tell us what additional information they claimed they needed that they did not already have.

14. Counsel for Optum asked if, in addition to the calls to discuss the [redacted] referenced in Topics 3-5, [redacted] (We had held calls of this nature with each of the PBM Respondents.) We indicated that we needed to review our records and, separately, confer as a team, but we may be willing to provide an additional supplemental response discussing what we said on any such calls.

15. On December 19, we jointly met and conferred with ESI and Optum again. We explained that we were standing by our objections to the 3.33(c) deposition given the previous concerns we had expressed. But we offered to further amend our interrogatory response in lieu of the deposition. In making this offer, we committed to working cooperatively with counsel to identify any further information they claimed they needed and come to an agreement as to what should be added to an amended interrogatory response. In response

to concerns about timing, we also explained that we believed an amendment to an interrogatory response would more quickly provide them with the information they seek than a 3.33(c) deposition. We also asked counsel if they planned to file a motion to compel. Counsel for ESI indicated that they would think about our offer and would get back to us quickly.

16. Counsel for ESI did not contact us until the night of December 30 when they sent an email after business hours stating that they planned to file a motion to compel, which they then filed later that evening.

17. On January 6, Complaint Counsel separately met with Optum regarding the information discussed in paragraph 14 of this declaration. We explained that these calls [redacted] conduct more generally. But they did not involve discussion of a [redacted], which is the focus of Optum's interrogatory. Regardless, Complaint Counsel committed to amend its response to Optum's interrogatory to disclose what concerns it orally shared with [redacted] on these calls and will do so by January 16, regardless of the outcome of ESI's motion to compel.

I declare under penalty of perjury that the foregoing is true and correct. Executed on January 8, 2026, in Washington, DC.

/s/ Andrew Kennedy
Andrew Kennedy