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**

RESPONDENTS' OPPOSITION TO NON-PARTY ELI LILLY AND COMPANY'S MOTION TO QUASH IN PART RESPONDENTS' RULE 3.33(C) SUBPOENA

The Court should reject the efforts by Eli Lilly and Company ("Lilly") to avoid a valid Rule 3.33(c) subpoena. Lilly and the other insulin manufacturers are not typical third parties: their decisions to set and raise insulin list prices are the subject of the supposed harm to consumers alleged in the Complaint. Lilly's decision to increase its list prices over many years is among the core issues in the case and is central to Respondents' defenses, as Complaint Counsel appears to acknowledge.[1] Indeed, the FTC has suggested that Lilly and the other insulin manufacturers play a "concerning and active role . . . in driving up prices of life-saving medications like insulin."[2] Respondents seek testimony from Lilly pursuant to Rule 3.33(c) to

[1] *See* Status Conference (Sept. 5, 2025), Tr. at 68 ("You heard from all three respondents that the price of insulin is the manufacturer's fault.")

[2] *See* "Statement of FTC Bureau of Competition Deputy Director Rahul Rao on Lawsuit Against PBMs and the Role of Drug Manufacturers in Distorting Competition in the U.S Drug Distribution System" (Sept. 20, 2024), *available at* https://www.ftc.gov/system/files/ftc_gov/pdf/insulin-manufacturing-statement.pdf

uncover information about oral discussions with Complaint Counsel in which they discussed these very issues: Lilly's decisions to increase the list prices of their insulin products, the decisions to later hold or reduce the list price of certain insulin products, and Complaint Counsel's apparent view that *Lilly's conduct* (not Respondents' conduct) harmed competition and harmed consumers. Such discussions are not privileged and are highly relevant; discovery should be allowed.

Lilly also seeks to shield from discovery any ongoing communications with the Administration about Lilly potentially further reducing costs for insulin. According to its public website, Lilly's insulin drugs are already widely available to the public for just $35 per month.[3] And recently, Lilly has very publicly struck deals with the Administration to lower the list price of certain other drugs.[4] If another such deal is currently being negotiated that would further impact the already-low list prices of insulin drugs, that fact would be clearly relevant to Complaint Counsel's ability to prove that the supposed harm here is not "reasonably avoidable," 15 U.S.C. § 45(n). It is also relevant to Respondents' argument that this case is moot because insulin is readily available at low prices to anyone who needs it.

ARGUMENT

Respondents are entitled to discovery "to the extent that it may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent." 16 C.F.R. § 3.31(c)(1). "A nonparty seeking to quash a subpoena has the burden of demonstrating why discovery should be denied." *Matter of Homeadvisor, Inc.*,

[3] https://insulins.lilly.com/lilly-insulin-value-program

[4] *See* "Fact Sheet: President Donald J. Trump Announces Major Developments in Bringing Most-Favored-Nation Pricing to American Patients" (Nov. 6, 2025), *available at* https://www.whitehouse.gov/fact-sheets/2025/11/fact-sheet-president-donald-j-trump-announces-major-developments-in-bringing-most-favored-nation-pricing-to-american-patients/

No. 9407, 2022 WL 4483130, at *2 (ALJ Sept. 26, 2022) (citing *In re Polypore Int'l, Inc.*, No. 9327, 2008 WL 4947490, at *6 (ALJ Nov. 14, 2008) (denying motion to quash subpoena *ad testificandum*); *FTC v. Dresser Indus., Inc*., 1977 U.S. Dist. LEXIS 16178 at *12 (D.D.C.). The burden on the nonparty increases to a "heavy burden" if the information sought is relevant. *Matter of Phoebe Putney Health Sys., Inc.,* No. 9348, 2013 WL 2444710, at *4 (ALJ May 30, 2013) ("Parties resisting discovery of relevant information carry a *heavy burden* of showing why discovery should be denied.") (citing *In re Polypore Int'l*, 2008 FTC LEXIS 155, *16 (Nov. 15, 2008)) (emphasis added).

I. Lilly Has Not Met Its Burden To Avoid Topic 3.

A. A Deposition On Topic 3 Is Reasonably Expected To Yield Relevant Information.

Topic 3 seeks testimony regarding discussions between Lilly and Complaint Counsel relating to "any potential complaint" the Commission considered bringing against Lilly. Non-Party Eli Lilly and Company's Mot. to Quash in Part Resp'ts' Rule 3.33(c) Subpoena ("Mot.") at 3. Lilly argues that facts about its "role in the industry do nothing to prove or disprove the FTC's allegations." *Id.* at 4. The FTC's Complaint, however, makes clear that Lilly's and other insulin manufacturers' decisions to set and raise the list prices of their insulin drugs over many years, and the reasons for those decisions, are central questions in the case. Complaint Counsel blames Respondents for increases in the price of insulin. *See, e.g.*, Compl. ¶ 119 ("insulin manufacturers dramatically increased list prices" to "offset" PBM rebates). One of Respondents' defenses, *see e.g.*, Answer and Defenses of ESI Respondents, is that the manufacturers' independent decisions to raise the list prices of their insulin products over many years caused the supposed harm alleged in the Complaint and therefore Complaint Counsel cannot establish that Respondents violated the FTC Act. *Cf. Rambus v. F.T.C.*, 522 F.3d 456 (D.C. Cir. 2008) (setting

aside FTC decision because Commission failed to prove that the defendant's conduct was a but-for cause of the claimed anticompetitive effect); 15 U.S.C. § 45(n) (proving unfair acts or practices requires showing that the act or practice "causes or is likely to cause substantial injury to consumers").

In oral conversations that Complaint Counsel and now Lilly are seeking to shield from Respondents, Complaint Counsel appear to have proposed a theory at odds with their theory in this case—that *Lilly's decisions*, not Respondents' conduct—caused the alleged harm to competition and consumers. The extent to which Complaint Counsel stated that it was not Respondents, but Lilly, that controlled the pricing that supposedly harmed competition and consumers is relevant to the allegation that Respondents "caused" the harm alleged in the Complaint and to Respondents' defense that the alleged harm was instead caused by actions taken by third parties, including Lilly. Statements by Lilly on these topics are also relevant. *See, e.g., Guy v. Convergent Outsourcing*, No. C22-1558 MJP, 2023 WL 4637318, at *4 (W.D. Wash. July 20, 2023) ("Plaintiffs have failed to show how Section 5 of the FTC Act is intended to protect Plaintiffs from [an injury] caused by a third party."). To be clear, Respondents do not allege that Lilly violated the FTC Act. Instead, the relevance of this discovery is that the very actions that Complaint Counsel alleges caused harm were not under the control of Respondents, but another party.

Lilly does not seriously dispute relevance. Instead, it attempts to point to one line from an order in *Matter of LabMD* stating that "pre-Complaint attorney communications" are not proper subjects of discovery. *See Matter of LabMD, Inc.*, No. 9357, 2014 WL 985170, at *4 (ALJ Feb. 25, 2014). But Lilly misreads the context of that order and ignores entirely a subsequent order in the same case that *granted* the respondent's request for a deposition regarding facts uncovered by

Commission attorneys during their pre-Complaint investigation. *See Matter of LabMD, Inc.*, No. 9357, 2014 WL 1100693, at *13–14 (ALJ Mar. 10, 2014). What these orders stand for is that respondents generally are not permitted to inquire into the privileged "decision making processes" of the FTC or the privileged "legal reasoning or mental processes" of FTC personnel when deciding whether to issue a complaint. *Id.* at *14. But Respondents' subpoena to Lilly does not seek any privileged information about the FTC's decision-making process. Rather, Respondents seek testimony about non-privileged statements made by Complaint Counsel and Lilly in their discussions regarding the facts underlying the Complaint's allegations, including Lilly's decisions to increase its list prices, the reasons for those decisions, and the impact of those decisions on competition and consumers. "Respondents' right to inquire into the factual bases for allegations cannot credibly be disputed." *Id.* at *12.

None of the three cases Lilly cites to support a supposed requirement of a "particularized showing" requires such a showing. First, the court in *DIRECTV, Inc. v. Puccinelli*, 224 F.R.D. 677 (D. Kan. 2004), expressly *declined* to decide whether a heightened standard was necessary and noted that "a number of courts have refused to apply such a heightened standard." *Id.* at 686-87. Lilly's citation to an order from this Court in *Matter of 1-800-Contacts*, No. 9372, 2017 WL 360334 (ALJ Jan. 17, 2017), also fails. The order does not require any heightened or "particularized" showing; it merely concludes that particular discovery requests were not relevant based on the facts of that case. *Id.* at *8-9. Finally, the magistrate judge's report and recommendation from the District of Delaware cited by Lilly itself recognizes that the Third Circuit requires no "particularized showing." *See Magten Asset Mgmt. Corp. v. Nw. Corp.*, No. CV 04-1494-JJF, 2007 WL9811153, at *8 (D. Del. June 14, 2007).

Lilly also argues that "a more rigorous relevance standard to non-party subpoenas than to general discovery between the parties" should be applied. Mot. at 2. But this Court has already rejected the same exact argument. *Matter of Homeadvisor, Inc.,* No. 9407, 2022 WL 4483130, at *4 (ALJ Sept. 26, 2022) (rejecting argument that a "higher standard of relevance" should apply for a nonparty). It should do so once again here.

B. The Testimony Sought Is Not Privileged Or Protected From Discovery.

Lilly further objects to Topic 3(a)—but not any of the other parts of Topic 3—as "undiscoverable settlement communications." Mot. at 4. Lilly cites the Sixth Circuit's adoption of a so-called "settlement privilege" in *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976 (6th Cir. 2003), to bar discovery into its communications with Complaint Counsel. Notably, Complaint Counsel apparently disagrees with Lilly on this privilege question, as Complaint Counsel does not even attempt to argue that such communications are privileged. *See* Complaint Counsel's Opposition to ESI's Motion to Compel at 5-6. Furthermore, *Goodyear* is an outlier; no other Circuit has decided to transform Federal Rule of Evidence 408 into a *privilege*, when on its face the rule is plainly addressed only to admissibility. *See In re MSTG, Inc.*, 675 F.3d 1337, 1342 (Fed. Cir. 2012) (rejecting the existence of a settlement privilege and noting that the Sixth Circuit is the "only one of our sister circuits to adopt such a privilege"); *see also In re Gen. Motors Engine Interchange Litig.*, 594 F.2d 1106, 1124 (7th Cir. 1979) (finding "no convincing basis" for the proposition that "the conduct of settlement negotiations is protected from examination by some form of privilege"); *Matsushita Elec. Indus. Co. v. Mediatek, Inc.*, No. C-05-3148MMC(JCS), 2007 WL 963975, at *4 (N.D. Cal. Mar. 30, 2007) (noting that "[m]any courts have rejected the existence of a privilege" and collecting cases); *Ramiro Aviles v. S&P Global, Inc.*, No. 17-CV-2987 (JPO) (KHP), 2021 WL 5855536, at *2 ("Cases within [the Second Circuit] decline to recognize a privilege that would preclude

discovery of settlements or settlement negotiations."); *Big Baboon Corp. v. Dell, Inc.*, No. CV 09-01198SVW, 2010 WL 3955831, at *3 (C.D. Cal. Oct. 8, 2010) ("Despite the Sixth Circuit's apparent recognition of a settlement negotiation privilege, courts in the Ninth Circuit have been reluctant to adopt a similar rule.").

This Court should likewise reject the invitation to be an outlier. It should, instead, adopt the prevailing interpretation of the Federal Rules of Evidence that "a party is not allowed to use Rule 408 as a screen for curtailing his adversary's right of discovery." *In re Subpoena Issued to C.F.T.C.*, 370 F. Supp. 2d 201, 211 (D.D.C. 2005) (quoting *Weinstein's Federal Evidence* § 408.07).

C. Respondents Are Not Limited To A Single Avenue Of Discovery.

Lilly next argues that its subpoena should be quashed because Respondents could seek similar discovery from Complaint Counsel. Mot. at 4. While it is true that the ESI Respondents are seeking related discovery from Complaint Counsel, "[t]he mere fact that discovery is being sought from multiple sources or discovery methods is not a basis for denying discovery." *Matter of LabMD, Inc.,* No. 9357, 2014 WL 1100693, at *10 (ALJ Mar. 10, 2014) (citing 16 CFR 3.31(a) ("Parties may obtain discovery by *one or more* of the following methods…"); *see also Matter of Ecm Biofilms, Inc.*, No. 9358, 2014 WL 1245860, at *4-5 (ALJ Mar. 18, 2014) (declining to place limits on "duplicative" discovery requested of a nonparty and the respondent). "Nor does Rule 3.33 require a showing of particular need, in order to take a deposition." *Matter of LabMD, Inc.,* No. 9357, 2014 WL 1100693, at *10 (ALJ Mar. 10, 2014). The fact that Respondents are seeking similar discovery on an important issue from one other source—i.e., the only other participant in the bilateral conversations—is prudent lawyering and is not a reason to quash Lilly's subpoena.

II. Discovery On Topic 2(f) Is Appropriate.

A. A Deposition On Topic 2(f) Is Reasonably Expected To Yield Relevant Information.

Lilly also seeks to quash Topic 2(f) on relevance grounds. Mot. at 6-7. Topic 2(f) calls for testimony regarding Lilly's discussions with any federal or state governmental entity about insulin prices and affordability from January 2025 to the present. *Id.* at 1. Lilly acknowledges that *existing* programs that reduce prices for their insulins are relevant. Mot. at 6. This is true in part because such programs undermine Complaint Counsel's ability to prove that the supposed harm identified in the Complaint is not "reasonably avoidable" as required by Section 5(n) of the FTC Act. *See* 15 U.S.C. § 45(n). Indeed, because of existing affordability programs (including those offered by Lilly), insulin is already widely available for $35 or less per monthly supply.[5]

Lilly attempts to split hairs by distinguishing between *existing* programs and discussions about potential *future* programs. But any such discussions could quickly end in final agreements at any time; the fact that negotiations may be ongoing does not make them irrelevant. *See, e.g.*, *Matter of Microsoft Corp. & Activision Blizzard, Inc.*, No. 9412, 2024 WL 126515, at *5 (ALJ Jan. 5, 2024) (denying a motion to quash "deposition testimony related to terms that were proposed but not included in" an agreement "and negotiations with or consideration of any potential purchasers"). To the extent that Lilly is currently negotiating with the Administration to expand the scope of its insulin affordability programs or further reduce the price of its insulins, those facts would make it even less likely that Complaint Counsel can prove that the Complaint's supposed harm is not reasonably avoidable. Lilly's assertion that these facts are not relevant should be rejected. *See Matter of 1-800 Contacts, Inc.*, No. 9372, 2016 WL 6809937, at *3 (ALJ

[5] *See supra* note 2.

Nov. 4, 2016) ("Conclusory assertions that discovery is not relevant do not adequately support a motion to quash.").

CONCLUSION

For the reasons stated above, the Court should deny Lilly's motion to quash Topics 3 and 2(f) of Respondents' Rule 3.33(c) subpoena.

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Respectfully submitted,

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I hereby certify that on January 9, 2026, I filed the foregoing document electronically using the FTC's E-Filing system, which will send notification of filing to:

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