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**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 REQUEST FOR AN  
INTERLOCUTORY APPEAL DETERMINATION PURSUANT TO RULE 3.23(B)**

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witnesses at the evidentiary hearing—such that Respondents, as a whole, are entitled to 15 expert witnesses and 45 fact witnesses while Complaint Counsel is limited to five expert witnesses and 25 fact witnesses. Sched. Order at 2-3; *see also* Order Den. Resp'ts' Mots. for Separate Evid. Hr'gs at 6-7 (Nov. 14, 2024).

By granting Respondents, without any argument or briefing, 15 experts—*three times* the number allotted to Complaint Counsel and allowed under the Rules—and nearly *double* the number of fact witnesses, these provisions of the Scheduling Order raise controlling questions of law or policy as to which there is substantial ground for difference of opinion, 16 C.F.R.

§ 3.23(b):

1. What constitutes “extraordinary circumstances” under Rule 3.31A(b), and whether any such circumstances could merit three times more expert witnesses than the five *per side* provided in the FTC Rules; and
2. Whether one side’s ability to call *twice* as many fact and expert trial witnesses is consistent with Rule 3.41(b)(4)’s mandate that “[e]ach side shall be allotted no more than half of the trial time.”

Subsequent review of these issues will be an inadequate remedy. Complaint Counsel will be compelled to expend substantial time and money to prepare for and respond to Respondents’ disproportionate number of expert and trial fact witnesses, wasting precious taxpayer resources that cannot later be recouped if the Commission reverses this unfair witness allocation after the merits hearing and during its review of this Court’s recommended decision.

### **BACKGROUND**

On October 11, 2024, this Court provided the parties with an expected scheduling order in advance of a prehearing scheduling conference that the Court had set for October 21, 2024. Ex. A (Egeland Decl.) ¶¶ 5-6. Consistent with the spirit of the Rules, *cf.* 16 C.F.R. §§ 3.31A(b),

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3.41(b)(4)-(6), the expected scheduling order provided for equal number of fact witnesses *per side*, Ex. B (Proposed Sched. Order) at 2-3 (allotting no more than 25 fact witnesses on the final witness list per side). On October 18, 2024, the parties submitted to this Court a joint markup of proposed modifications to that order, noting areas of agreement and dispute. Ex. A (Egeland Decl.) ¶ 11; Ex. C (Joint Mark-Up). Among other things, the parties agreed to treat each Respondent group<sup>1</sup> as *a single party* “[f]or purposes of discovery.” Ex. C (Joint Mark-Up) at 6. Complaint Counsel, however, objected to Respondents’ proposed revisions to treat each Respondent group as *its own side* for purposes of expert and final fact witness lists.<sup>2</sup> Ex. C (Joint Mark-Up) at 2 (proposed expert witness lists) & 3 (final proposed fact witness list); Ex. A (Egeland Decl.) ¶ 8. Notably, Respondents did not file a motion seeking leave to call additional expert witnesses due to “extraordinary circumstances.” 16 C.F.R. § 3.31A(b).

On October 21, 2024, the Court held the prehearing scheduling conference, but entertained no argument, nor requested any briefing, regarding the disputes about expert and final fact witness caps in the parties’ markup of the scheduling order. Ex. D (Sched. Conf. Tr.) at 9 (“As to the requested changes that were not agreed to by all parties, I have your proposed changes and your notes and will consider all of those before deciding on the requested changes.”). Two days later, the Court entered the Scheduling Order, adopting Respondents’

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<sup>1</sup> “Respondent group” refers to Respondents that are represented by the same counsel. *See* Ex. E (Sched. Order) at 1 n.1; *see also* Ex. C (Joint Mark-Up) at 1 n.1.

<sup>2</sup> Complaint Counsel did agree that each Respondent group was entitled to up to 15 individuals on their *preliminary* proposed witness list. Ex. C (Joint Mark-Up) at 1. The exchange of those witness lists, however, comes at the beginning of a case and is to facilitate *discovery*; final witness lists go toward trial presentation and are almost always narrower (although that is not the case with the caps on Respondents’ final witness lists here). *See* Sched. Order at 1-2, *In re Microsoft Corp.*, Dkt. No. 9412 (Jan. 4, 2023), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/d09412schedulingorder.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/d09412schedulingorder.pdf).

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proposals that *each Respondent group* is allowed to designate up to five expert witnesses and each call 15 fact witnesses at the evidentiary hearing. Ex. E (Sched. Order) at 2-3.

On November 14, 2024, in an order denying Respondents' motions for separate evidentiary hearings, this Court made clear that the provisions in the Scheduling Order regarding expert and final fact witness lists applied to each Respondent group separately, effectively treating each Respondent group as its own *side* for trial witnesses and ensuring that Respondents' side as a whole would be entitled to exponentially more expert and fact witnesses than Complaint Counsel. Order Den. Resp'ts' Mots. for Separate Evid. Hr'gs at 6 (Nov. 14, 2024). The Court also invited Respondents to move for a redistribution of trial time in advance of the hearing, *id.* at 7, even though Rule 3.41(b)(4) provides, without exception, that "[e]ach side shall be allotted no more than half of the trial time." 16 C.F.R. § 3.41(b)(4).

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to which there is substantial ground for difference of opinion, and subsequent review will be an inadequate remedy. 16 C.F.R. § 3.23(b); *see also In re Daniel Chapter One*, Dkt. No. 9329, 2009 FTC LEXIS 111, at \*1-2 (May 5, 2009).

**I. The disparate limitations on expert and fact witnesses involve controlling issues of law and policy as to which there is substantial ground for difference of opinion**

As this Court has observed, a “question of law” refers to something a reviewing court “could decide quickly and cleanly without having to study the record.” *Daniel Chapter One*,

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at \*11; *see also In re Schering-Plough Corp.*, Dkt. No. 9297, 2002 WL 31433937, at \*6 (FTC Feb. 12, 2002).

The Scheduling Order provisions entitling Respondents to *three times* the number of expert witnesses provided in the FTC Rules absent any showing at all and *double* the number of trial fact and expert witnesses as compared to Complaint Counsel satisfy both these criteria.

**A. Rule 3.31(A)(b) is silent as to what constitutes “extraordinary circumstances,” and whether 15 expert witnesses for one side is ever appropriate**

Rule 3.31A(b) provides, in relevant part: “Each side will be limited to calling at the evidentiary hearing 5 expert witnesses, including any rebuttal or surrebuttal expert witnesses. A party may file a motion seeking leave to call additional expert witnesses due to extraordinary circumstances.” 16 C.F.R. § 3.31A(b). Here, the Scheduling Order provides for five expert witnesses *per Respondent group*—in other words, fifteen for *Respondents’ side*—well in excess of the limit in Rule 3.31A(b), and without any showing of need at all.

The questions of *In re Schering-Plough Corp.*, Dkt. No. 9297, 2002 WL 31433937, at \*6 (FTC Feb. 12, 2002) are not presented here.



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and policy as to which there is substantial ground for difference of opinion, making it appropriate for interlocutory review. The Commission can resolve this issue by interpreting Commission rules and policy, without review of the record. *See Daniel Chapter One*, 2009 FTC LEXIS 111, at \*7. This issue also pertains to a wide spectrum of cases—any situation in which one side seeks a higher fact witness cap than the other side, whether by asking outright for more witnesses or by seeking to be treated as separate groups, as was the case here. *See Exxon*, 1981 FTC LEXIS 27, at \*1, 5-6. Moreover, because the Rules do not directly speak to whether such disparate treatment is allowed, there is substantial ground for difference of opinion as to this novel and unsettled issue. *See Hoechst*, 1990 FTC LEXIS 121, \*2-3.

Complaint Counsel, however, respectfully submits that by mandating equal division by side for trial presentation, 16 C.F.R. 3.41(b)(4), the Rules do not allow for disproportionate (and unfair) trial witness caps as between Complaint Counsel and Respondents, and thus Complaint Counsel is likely to succeed on an interlocutory appeal of this issue to the Commission. *See Schering-Plough*, 2002 WL 31433937, at \*6.

## **II. Subsequent review is an inadequate remedy**

The final requirement for an interlocutory appeal under Rule 3.23(b) is that subsequent review by the Commission will be inadequate. 16 C.F.R. § 3.23(b). That is the case here, where precious resources—both time and money—will be expended by Complaint Counsel and their expert witnesses to prepare for, and defend against, Respondents’ litany of expert and fact witnesses. Ex. A (Egeland Decl.) ¶ 24. Indeed, the Commission has recognized the “exorbitant costs” of economic experts. Statement of Chai

See Exxon





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**CONFERENCE STATEMENT**

Complaint Counsel has conferred with Respondents in a good faith effort to resolve the issues raised by this motion but has been unable to reach an agreement.

*/s/ Rebecca L. Egeland*  
Rebecca L. Egeland

*Counsel Supporting the Complaint*

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**In the Matter of**

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**Ascent Health Services LLC,**

**OptumRx, Inc.,**

**Respondents.**

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10. The parties also discussed Re

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14. On October 21, 2024, Judge Chappell held a scheduling conference where His Honor addressed the parties' proposed changes to the scheduling order. Judge Chappell did not invite any argument and asked no questions about any of the requested changes to the scheduling order at the scheduling conference or at any other time. Judge Chappell only noted that "[a]s to the requested changes [to the scheduling order] that were agreed to by all parties, most of those will be included in the scheduling order; some will not. As to the requested changes that were not agreed to by all parties, I have your proposed changes and your notes and will consider all of those before deciding on the requested changes." Ex. D (Sched. Conf. Tr.) at 9.
15. On October 23, 2024, Judge Chappell issued the Scheduling Order, where His Honor accepted most of Respondents' unilateral changes to which Complaint Counsel had objected. Ex. E (Sched. Order). These included:
- a. Allowing each Respondent group to serve its own proposed expert witness list. *Id.* at 2.
  - b. Allowing each Respondent group to include up to 15 fact witnesses on Respondents' final proposed witness li





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witnesses or making any showing of “extraordinary circumstances” under Rule 3.31A(b). Moreover, under the Scheduling Order, Complaint Counsel has only two weeks (between July 9 and 23, 2025) to rebut up to 15 Respondent expert witness reports and about three weeks (between July 9 and July 31, 2025) to depose up to 15 Respondent expert witnesses. Ex. E (Sched. Order) at 2-3.

22. In the order denying separate evidentiary hearings, Judge Chappell also invited Respondents to ask for more trial time than Complaint Counsel. Judge Chappell noted that “[r]egarding hearing time allocation, Rule 3.41(b) provides that evidentiary hearings ‘should be limited to no more than 210 hours’ and that trial time is to be split evenly between each side. This provision was not addressed in the Scheduling Order. However, the potential for unfairness can be addressed through a motion for an equitable distribution of trial time among the parties filed in advance of the hearing.” Order Den. Resp’ts’ Mots. for Separate Evid. Hr’gs at 7 (Nov. 14, 2024).

23. Although the three Respondent groups may have some unique facts, Complaint Counsel will have to address facts pertaining to each of the three Respondent groups at trial. Complaint Counsel has the burden of proving violations of the law against each Respondent group. A distribution of trial time per Respondent group, as opposed to per side as the Rules require, would significantly hinder Complaint Counsel’s ability to prove its case.

24. The increase in the number of Respondents’ fact witnesses in 2 c o s e e r n e n d e s

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need to expend significant additional money on experts and their support teams to both prepare rebuttal reports and rebut Respondents' expert testimony at trial.

I declare under penalty of perjury that the foregoing is true and correct. Executed on

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UNITED STATES OF AMERICA  
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In the Matter of	)	
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Caremark Rx, LLC,	)	
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Zinc Health Services, LLC,	)	
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Express Scripts, Inc.,	)	
	)	
Evernorth Health, Inc.,	)	
	)	DOCKET NO. 9437
Medco Health Services, Inc.,	)	
	)	
Ascent Health Services LLC,	)	
	)	
OptumRx, Inc.,	)	
	)	
OptumRx Holdings, LLC, and	)	
	)	
Emisar Pharma Services LLC,	)	
	)	
Respondents.	)	

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**PROPOSED  
SCHEDULING ORDER**

- December 3, 2024 - Complaint Counsel serves preliminary proposed witness list (not including experts) with a brief summary of the proposed testimony.
- December 17, 2024 - Respondents serve preliminary proposed witness list (not including experts) with a brief summary of the proposed testimony.
- December 27, 2024 - Complaint Counsel serves proposed expert witness list.
- January 10, 2025 - Respondents serve proposed expert witness list.
- May 2, 2025 - Deadline for parties to serve document requests, interrogatories,

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and subpoenas, except for discovery for purposes of authenticity and admissibility of exhibits.

- May 30, 2025 - Deadline for parties to serve requests for admissions, except for requests for admissions for purposes of authenticity and admissibility of documents.
- June 13, 2025 - Close of fact discovery, except for discovery permitted under Rule 3.24(a)(4), depositions of experts, and discovery for purposes of authenticity and admissibility of exhibits.
- June 27, 2025 - Complaint Counsel serves expert witness reports.
- July 1, 2025 - Complaint Counsel serves final proposed witness and exhibit lists, including depositions, copies of all proposed exhibits (except for demonstrative, illustrative, or summary exhibits and expert-related exhibits), the basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness. Complaint Counsel's final proposed witness list shall include no more than twenty-five fact witnesses.  
  
Complaint Counsel provides the Administrative Law Judge (ALJ) with courtesy copies of final proposed witness and exhibit lists, the basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness, including expert witnesses.
- July 11, 2025 - Respondents serve expert witness reports. Respondents' expert reports shall include (without limitation) rebuttal, if any, to Complaint Counsel's expert witness report(s).
- July 15, 2025 - Parties intending to offer confidential materials of an opposing party or non-party as evidence at the hearing must provide notice to the opposing party or non-party, pursuant to 16 C.F.R. § 3.45(b).<sup>1</sup>
- July 15, 2025 - Respondents serve final proposed witness and exhibit lists, including depositions, copies of all proposed exhibits (except for demonstrative, illustrative, or summary exhibits and expert-related exhibits), the basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness. Respondents'

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<sup>1</sup> The Standard Protective Order states that if a party or third party wishes in camera treatment for a document or transcript that a party intends to introduce into evidence, that party or third party shall file an appropriate motion with the ALJ within five days after it receives notice of a party's intent to introduce such material. Appendix A to Commission Rule 3.31. Commission Rule 3.45(b) states that parties who seek to use material obtained from a third party subject to confidentiality restrictions must demonstrate that the third party has been given at least ten days' notice of the proposed use of such material. To resolve this apparent conflict, this Scheduling Order requires that the parties provide at least ten days' notice to the opposing part



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any expert witnesses, the parties shall prepare a list of such stipulations and submit a copy of the stipulations to the ALJ one business day prior to the final prehearing conference. At the final prehearing conference, the parties' list of stipulations shall be marked as "JX1" and signed by each party, and the list shall be offered into evidence as a joint exhibit. No signature by the ALJ is required. Any subsequent stipulations may be offered as agreed to by the parties.

Also at the final prehearing conference, the parties may present any objections to the final proposed witness lists and proposed exhibits. All proposed exhibits will be admitted or excluded to the extent practicable. To the extent the parties agree to the admissibility of proposed exhibits, the parties shall prepare a list identifying each proposed exhibit to which admissibility is stipulated, which shall be offered into evidence as a joint exhibit marked as "JX2" and signed by each party. No signature by the ALJ is required.

August 27, 2025 - Evidentiary Hearing begins at 10:00 a.m. Eastern Time.

## ADDITIONAL PROVISIONS

### Filings

1. For all papers that are required to be filed with the Office of the Secretary, the parties shall serve a courtesy copy on the Office of the Administrative Law Judges (OALJ) by email to: [oalj@ftc.gov](mailto:oalj@ftc.gov). The courtesy copy should be transmitted at or shortly after the time of any electronic filing with the Office of the Secretary. Courtesy copies must be transmitted to the OALJ by email directly and the FTC E-filing system shall not be used for this purpose. Certificates of service for any pleading shall not include the email address of any particular OALJ personnel, but rather shall designate only 600 Pennsylvania Ave., NW, Rm. H-110, Washington, DC, 20580 as the place of service. **The subject line of all submissions to [oalj@ftc.gov](mailto:oalj@ftc.gov) shall set forth the docket number, case name, and title of the submission.** The parties are not required to serve a courtesy copy on the OALJ in hard copy, except upon request. Discovery requests and discovery responses are to be exchanged between the parties and shall not be submitted to the OALJ.

2. The parties shall serve each other by email and shall include "Docket 9437" in the subject line. All attached documents shall be in .pdf format. In the event that service by email is not possible, the parties may serve each other through any method authorized under the



4. Each motion (other than a motion to dismiss, motion for summary decision, or a motion for in camera treatment) shall be accompanied by a separate signed statement representing that counsel for the moving party has conferred in good faith with opposing counsel in an effort to resolve the issues raised by the motion, describing those efforts. In addition, pursuant to Rule 3.22(g), for each motion to quash filed pursuant to Rule 3.34(c), each motion to compel or determine sufficiency pursuant to Rule 3.38(a), or each motion for sanctions pursuant to Rule 3.38(b), the required signed statement must also recite the date, time, and place of each conference between counsel and the names of all parties participating in each such conference. Motions that fail to include such separate statement may be denied on that ground.

5. By signing and presenting a pleading, written motion, or other filing, an attorney or pro se litigant certifies that either: (1) no portion of the filing was drafted by generative artificial intelligence (“AI”) (such as ChatGPT, Microsoft Copilot, Harvey.AI, or Google Gemini), or (2) any language in the filing that was drafted by generative AI was checked for accuracy by human attorneys or paralegals using printed legal reporters and/or online legal databases. Any filing that fails to comply with these mandatory certification requirements may be stricken on that ground.

6. In relevant part, Rule 3.22(c) states:

All written motions shall state the particular order, ruling, or action desired and the grounds therefor. Memoranda in support of, or in opposition to, any dispositive motion shall not exceed 10,000 words. Memoranda in support of, or in opposition to, any other motion shall not exceed 2,500 words. Any reply in support of a dispositive motion shall not exceed 5,000 words and any reply in support of any other motion authorized by the Administrative Law Judge or the Commission shall not exceed 1,250 words.

If a party chooses to submit a motion without a separate memorandum, the word count limits of Rule 3.22(c) apply to the motion. If a party chooses to submit a motion with a separate memorandum, absent prior approval of the ALJ, the motion shall be limited to 750 words and the word count limits of Rule 3.22(c) apply to the memorandum in support of the motion. This provision applies to all motions filed with the ALJ, including those filed under Rule 3.38.

7. If papers filed with the Office of the Secretary contain in camera or confidential material, the filing party shall mark any such material in the complete version of their submission with **{bold font and braces}**. 16 C.F.R. § 3.45(e). Parties shall be aware of the rules for filings containing such information, including Rule 4.2.

### **Discovery**

8. Each party is limited to serving on each opposing party: fifty requests for production of documents, including all discrete subparts; twenty-five interrogatories, including all discrete subparts; and twenty requests for admissions, including all discrete subparts, except that there shall be no limit on the number of requests for admission for authentication and admissibility of exhibits. There is no limit to the number of sets of discovery requests the parties may issue, so long as the total number of each type of discovery request, including all subparts,

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9. The parties will serve any objection to a document request within ten business days of service of the request. The parties will meet and confer to attempt to resolve any disputes and to discuss timing of production within three business days of the objection being served. The party responding to a document request will make a good-faith effort to produce responsive documents as expeditiously as possible, including by making productions on a rolling basis.

10. Compliance with the scheduled close of discovery requires that the parties serve subpoenas and discovery requests sufficiently in advance of the discovery cut-off date and that all responses and objections will be due on or before that date, unless otherwise noted. Any motion to compel a response to a discovery request or to seek certification of a request for court enforcement of a non-party subpoena shall be filed within thirty days of service of the response and/or objection to the discovery request or within twenty days after the close of discovery, whichever first occurs; except that, where the parties have been engaged in negotiations over a discovery dispute, including negotiations with any non-party with regard to a subpoena, the deadline for the motion to compel shall be five business days of reaching an impasse.

11. One Rule 3.33(c) deposition notice of each Respondent shall be permitted. Depositions of all individuals designated as representatives for purposes of a 3.33(c) deposition notice shall count as one deposition for purposes of this paragraph, even if the noticed entity designates multiple individuals to provide testimony. The parties shall consult and coordinate the time and place of the deposition prior to confirming any deposition. The parties shall use reasonable efforts to reduce the burden on witnesses noticed for depositions and to accommodate witness schedules. The deposition of any person may be recorded by video, provided that the deposing party notifies the deponent and all parties of its intention to record the deposition by video at least five days in advance of the deposition. No deposition, whether recorded by video or otherwise, may exceed a single, seven-hour day, unless otherwise agreed to by the parties or ordered by the ALJ. The parties may agree upon and submit to the ALJ a remote deposition protocol.

12. The parties shall serve upon one another, at the time of issuance, copies of all subpoenas for documents and subpoenas for testimony. For subpoenas for testimony, the party seeking the deposition shall consult with the other parties before the time and place of the deposition is scheduled. Unless the parties otherwise agree, at the request of any party, the time and allocation for a non-party deposition that has been cross-noticed shall be divided evenly between each side. If both Complaint Counsel and Respondents notice any non-party fact deposition (including any Rule 3.33(c) deposition), the seven hours of record time will be divided equally between the sides. Unused time in any side's allocation of deposition time shall not transfer to the other side. To the extent a deposition involves a non-party and is not cross-noticed, the party who did not notice the deposition will have thirty minutes available to them and the party seeking the deposition will have six hours and thirty minutes.

13. Every documentary subpoena to a non-party shall include a cover letter requesting that (1) the non-party Bates-stamp each document with a production number and any applicable confidentiality designation prior to producing it and (2) the non-party provide to the other parties copies of all productions at the same time as they are produced to the requesting party. If a non-party fails to provide copies of productions to both sides, within three business days of receiving the documents, the requesting party shall produce all materials received pursuant to the non-party subpoena, as well as all materials received voluntarily in lieu of a subpoena, including

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declarations or affidavits obtained from a non-party. If a party serves a non

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proposed witness lists, who have not been deposed, or for whom affidavits/declarations have not been submitted, unless by consent of all parties, or, if the parties do not consent, by an order of the ALJ upon a showing of good cause.

18. If any party wishes to offer a rebuttal witness other than a rebuttal expert witness, the party shall file a request in writing in the form of a motion to request a rebuttal witness. That motion shall be filed as soon as possible after the testimony sought to be rebutted is known and shall include: (a) the name of any witness being proposed (b) a detailed description of the rebuttal evidence being offered; (c) citations to the record, by page and line number, to the evidence that the party intends to rebut; and (d) shall demonstrate that the witness the party seeks to call has previously been designated on its witness list or adequately explain why the requested witness was not designated on its witness list.

19. Witnesses shall not testify to a matter unless sufficient evidence is introduced to support a finding that the witness has personal knowledge of the matter. F.R.E. 602.

20. Witnesses not properly designated as expert witnesses shall not provide opinions beyond what is allowed in F.R.E. 701.

21. The parties are required to comply with Rule 3.31A and with the following:

(a) At the time an expert is first listed as a witness by a party, that party shall provide to the other parties:

(i) Materials fully describing or identifying the background and qualifications of the expert, all publications authored by the expert within the preceding ten years, and all prior cases in which the expert has testified or has been deposed within the preceding four years; and

(ii) Transcripts of such testimony in the possession, custody, or control of the producing party or the expert, except that transcript sections that are under seal in a separate proceeding need not be produced.

(b) At the time an expert witness report is produced, the producing party shall provide to the other parties all documents and other written materials relied upon by the expert in formulating an opinion in this case, subject to the provisions of paragraph (g) below, except that documents and materials already produced in the case need only be listed by Bates number.

(c) It shall be the responsibility of a party designating an expert witness to ensure that the expert witness is reasonably available for deposition in keeping with this Scheduling Order. Unless otherwise agreed to by the parties or ordered by the ALJ, expert witnesses shall be deposed only once and each expert deposition shall be limited to one day for seven hours.

(d) Each expert witness report shall include a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the expert witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the expert; and the compensation to be paid for the study and testimony.

(e) A party may not discover facts known or opinions held by an expert witness who has been retained or specially employed by another party in anticipation of this litigation or preparation for hearing and who does not provide an expert report or will not act as a testifying expert.

(f) At the time of service of the expert witness reports, a party shall provide opposing counsel:

(i) A list of all commercially-available computer programs used by the expert witness in the preparation of the report;

(ii) A copy of all data sets used by the expert witness, in native file format and processed data file format; and

(iii) All customized computer programs used by the expert witness in the preparation of the report or necessary to replicate the findings on which the expert witness' report is based.

(g) Expert witnesses' disclosures and reports shall comply in all respects with Rule 3.31A, except that neither side must preserve or disclose:

(i) Any form of communication or work product shared between any of the parties' counsel and their expert witness(es), or between any of the expert witnesses themselves;

(ii) Any form of communication or work product shared between an expert witness and persons assisting the expert witness;

(iii) An expert witness' notes, unless they constitute the only record of a fact or an assumption relied upon by the expert witness in formulating an opinion in this case;

(iv) Drafts of expert witness reports, analyses, or other work product; or

(v) Data formulations, data runs, data analyses, or any database-related operations not relied upon by the expert witness in the opinions contained in the expert witness' report.

22. If the expert witness reports prepared for either party contain confidential information that has been granted in camera treatment, the party shall prepare two versions of its expert witness report(s) in accordance with Additional Provision 7 of this Scheduling Order and Rule 3.45(e).

23. An expert witness's testimony is limited to opinions contained in that expert witness' report provided to the opposing party. No opinion will be considered, even if included in an expert report, if the underlying and supporting documents and information have not been properly provided to the opposing party. Unless an expert witness is qualified as a fact witness, an expert witness shall provide opinion testimony; expert testimony is not considered for the purpose of establishing the underlying facts of the case.

### **Proceedings**

24. In the event that the evidentiary hearing in this matter is conducted remotely by video conference, in advance of the hearing, the parties may take expert depositions for the purpose of perpetuating trial testimony (i.e., a trial deposition) and submit such trial testimony as an exhibit in lieu of presenting the expert's live testimony at the hearing. This trial deposition may be conducted in addition to any deposition of an expert witness for purposes of discovery (discovery deposition). Although a party may submit trial depositions in lieu of live video testimony at trial for all expert witnesses in the case, a party may elect to conduct trial depositions for all or fewer than all experts.

25. The final exhibit lists shall represent counsel's good faith designation of all trial exhibits other than demonstrative, illustrative, or summary exhibits. Additional exhibits may be added after the submission of the final exhibit lists only by consent of all parties, or, if the parties do not consent, by an order of the ALJ upon a showing of good cause.

26. Properly admitted deposition testimony and properly admitted investigational hearing transcripts are part of the record and need not be read in open court. Videotape deposition excerpts that have been admitted in evidence may be presented in open court only upon prior approval by the ALJ.

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In the Matter of	)	
Caremark Rx, LLC,	)	
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Evernorth Health, Inc.,	)	
Medco Health Services, Inc.,	)	DOCKET NO. 9437
Ascent Health Services LLC,	)	
OptumRx, Inc.,	)	
OptumRx Holdings, LLC, and	)	
Emisar Pharma Services LLC,	)	
Respondents.	)	
_____	)	

**PROPOSED  
SCHEDULING ORDER**

December 3, 2024 - Complaint Counsel serves preliminary proposed witness list (not including experts), which will include no more than 35 individuals, with a brief summary of the proposed testimony.

December 17, 2024 - ~~Respondents~~ Each Respondent group<sup>1</sup> serves its serve preliminary proposed witness list (not including experts), which will include no more than 15 individuals.

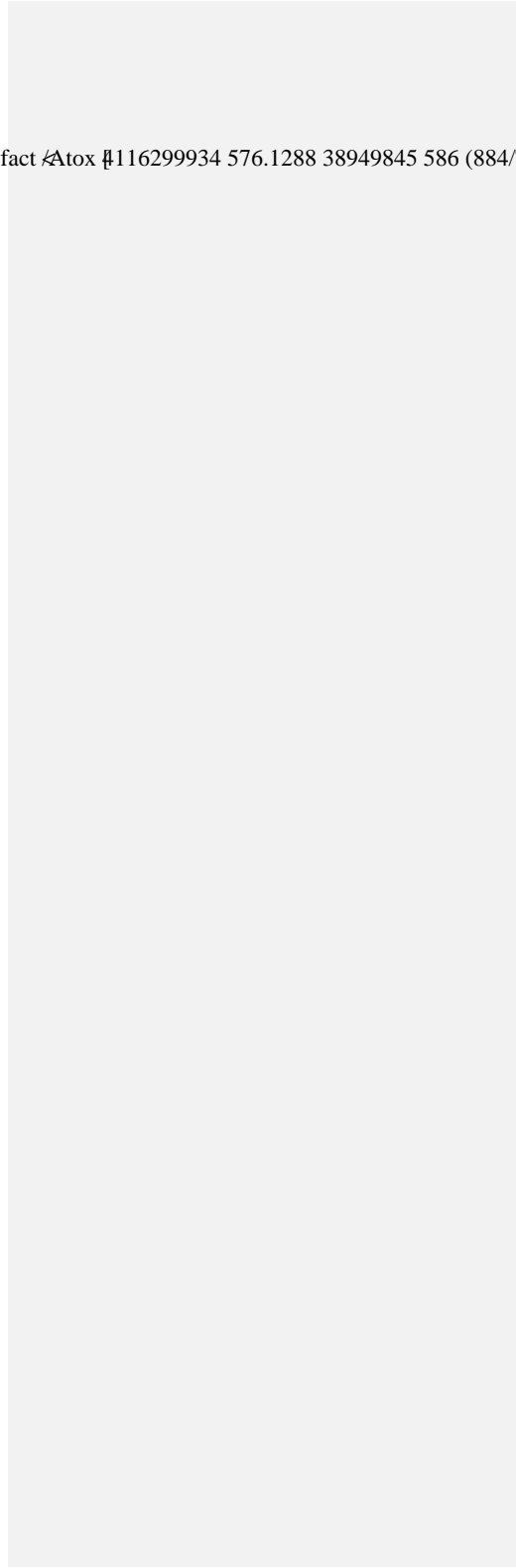
Commented [A1]: This is a joint change to which all parYes agree.

<sup>1</sup> "Respondent group" refers to Respondents that are represented by the same counsel. For the avoidance of doubt, the Respondent groups are: (1) Caremark Rx, LLC, and Zinc Health Services, LLC, (2) Express Scripts, Inc., Evernorth Health, Inc., Medco Health Services, Inc., and Ascent Health Services LLC, and (3) OptumRx, Inc., OptumRx Holdings, LLC, and Emisar Pharma Services LLC.



**PUBLIC**

with a brief summary of the propose pettsey. TJEMC /PE/P tifact /Atox #116299934 576.1288 38949845 586 (884/Ty



PUBLIC

July 15, 2025 - Respondents serve final proposed witness and exhibit lists, including depositions, copies of all proposed exhibits (except for demonstrative, illustrative, or summary exhibits and expert-related exhibits), the basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness. Respondents' final proposed witness list shall include no more than ~~twenty-five~~ fifteen fact witnesses per Respondent group. Respondent groups may examine other Respondent group's witnesses

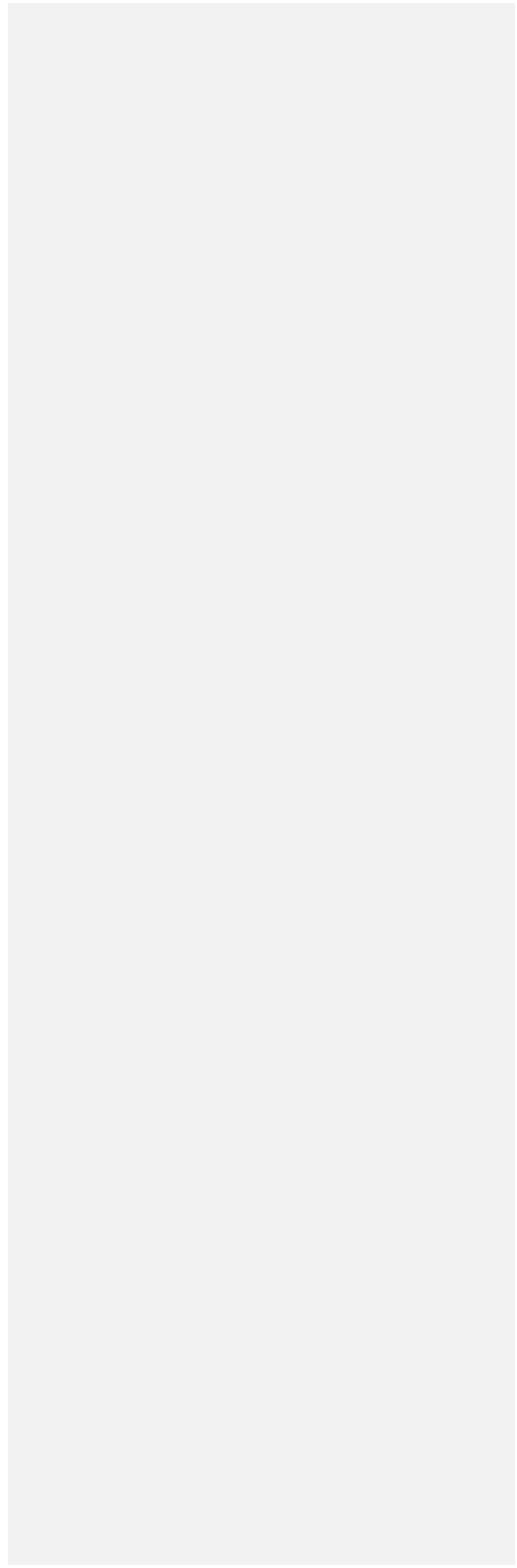
[Redacted]

[Redacted]

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**PUBLIC**

- review the Commission's Rules on the admissibility of evidence before filing objections to exhibits and only raise objections that are necessary and valid.
- August 19, 2025 - Parties exchange proposed stipulations as to law, facts, the admissibility of proposed exhibits, and the expertise of any expert witnesses.
- August 19, 2025 - supported by legal authority.
- August 26, 2025 - Final prehearing conference begins at 10:00 a.m. Eastern Time.



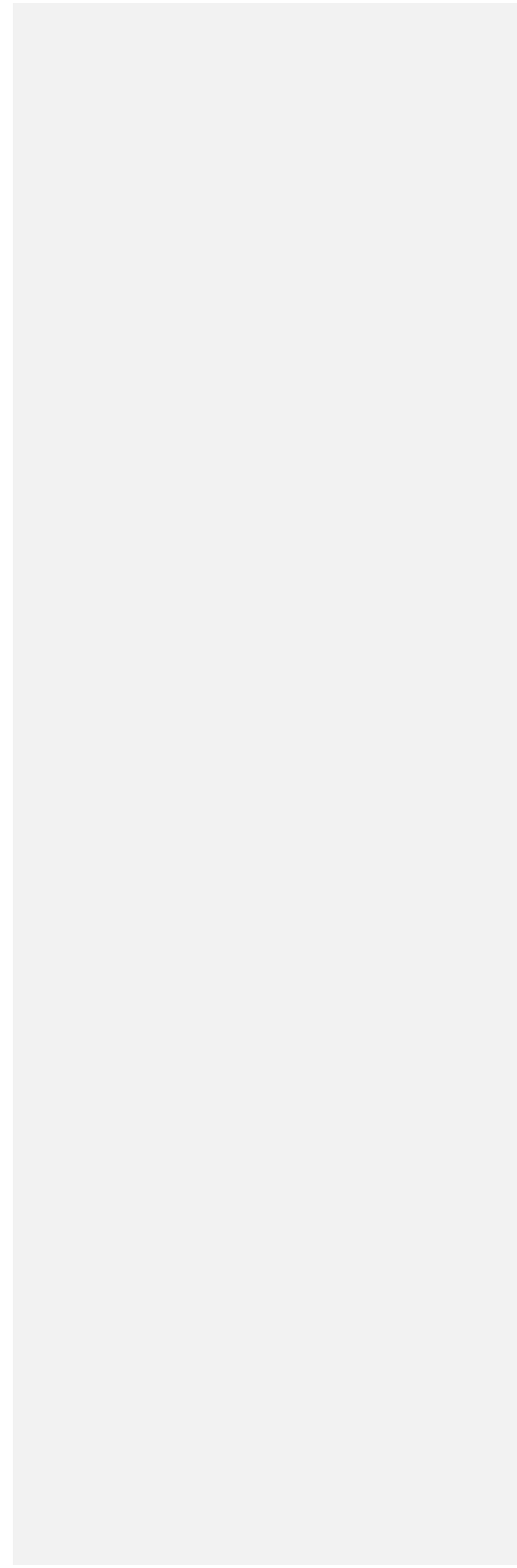
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**Filings**

1. For all papers that are required to be filed with the Office of the Secretary, the parties shall serve a courtesy copy on the Office of the Administrative Law Judges (OALJ) by email to: oalj@ftc.gov. The courtesy copy should be transmitted at or shortly after the time of any electronic filing with the Office of the Secretary. Courtesy copies must be transmitted to the OALJ by email directly and the FTC E-filing system shall not be used for this purpose. Certificates of service for any pleading shall not include the email address of any particular OALJ personnel, but rather shall designate only 600 Pennsylvania Ave., NW, Rm. H-110, Washington, DC, 20580 as the place of service. **The subject line of all submissions to oalj@ftc.gov shall set forth the docket number, case name, and title of the submission.** The parties are not required to serve a courtesy copy on the OALJ in hard copy, except upon request. Discovery requests and discovery responses are to be exchanged between the parties and shall not be submitted to the OALJ.

2. The parties shall serve each other by email and shall include “Docket 9437” in the subject line. All attached documents shall be in .pdf format. In the event that service by email is not possible, the parties may serve each other through any method authorized under the Commission’s Rules of Practice. 16 C.F.R. § 4.4.

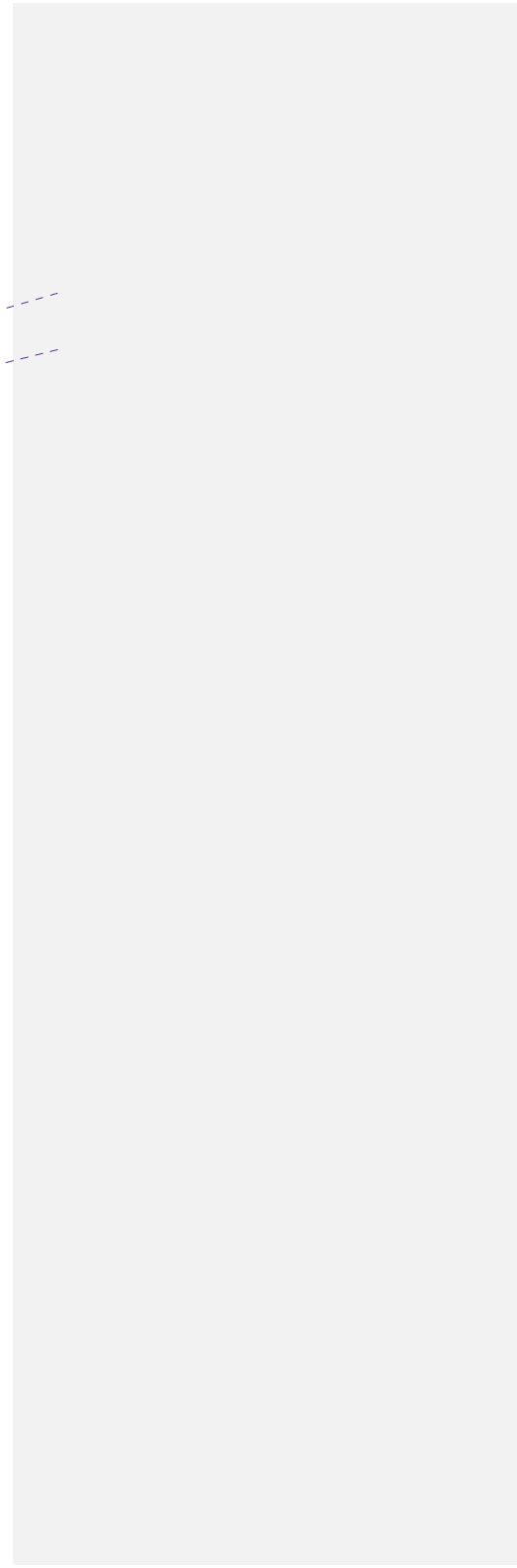
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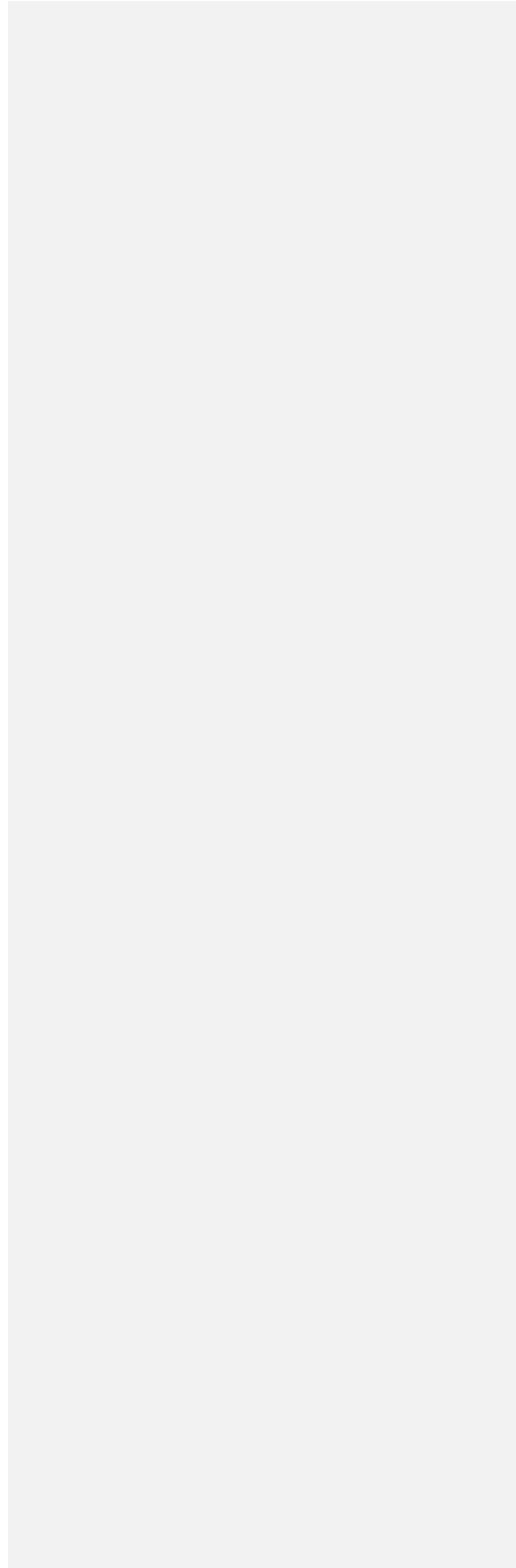
designates multiple individuals to provide testimon



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party witness will promptly produce it to the other party(ies), and in any event not later than (1)



**PUBLIC**

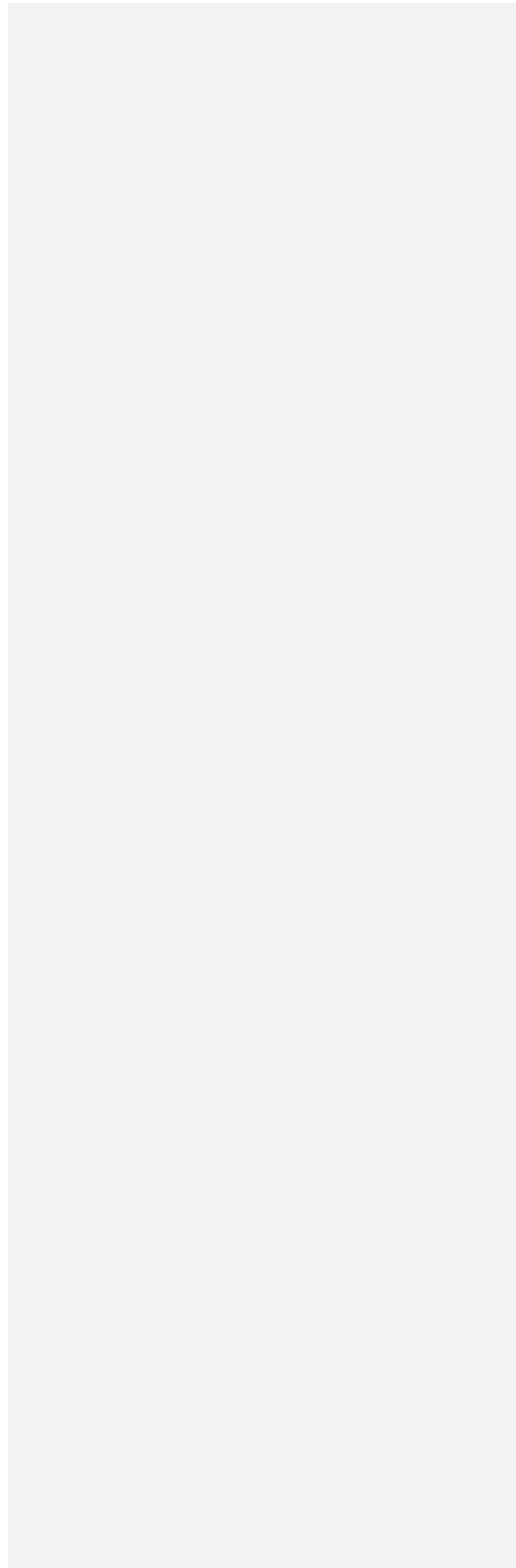
known and shall include: (a) the name of any witness being proposed (b) a detailed description of the rebuttal evidence being offered; (c) citations to the record, by page and line number, to the evidence that the party intends to rebut; and (d) shall demonstrate that the witness the party seeks

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- (ii) A copy of all data sets used by the expert witness, in native file format and processed data file format; and
- (iii) All customized computer programs used by the expert witness in the preparation of the report or necessary to replicate the findin

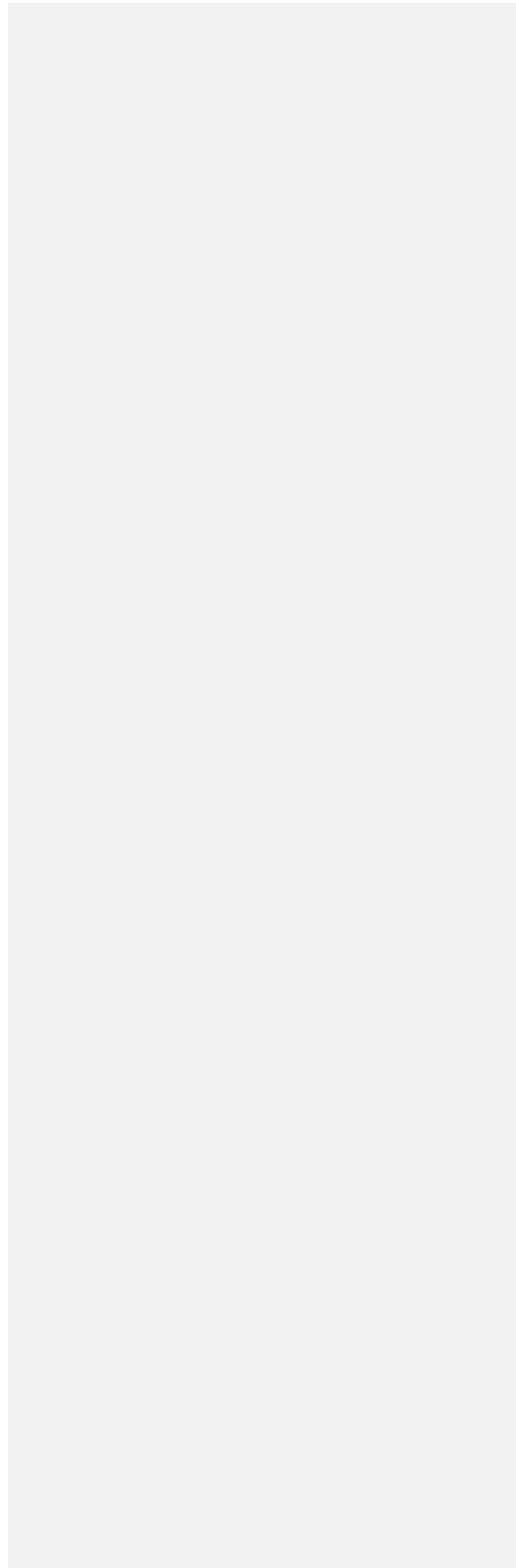
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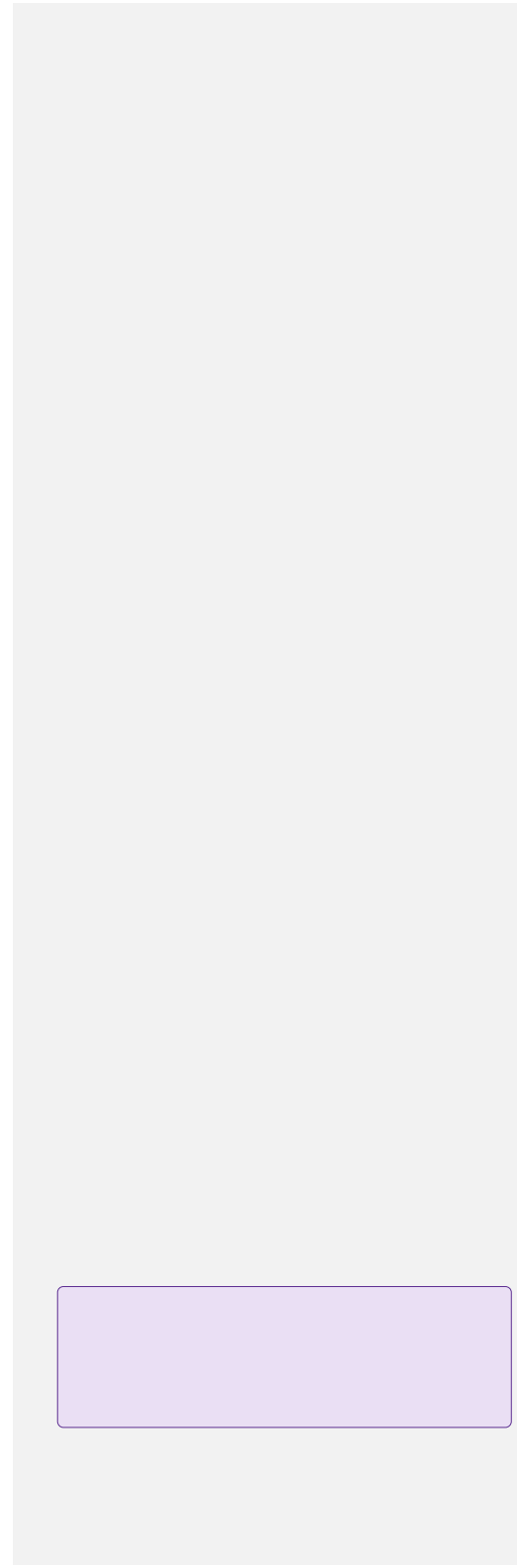
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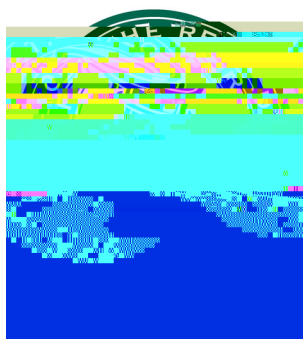


**In the Matter of:**

Caremark RX, et al.

*October 21, 2024*  
*Prehearing Scheduling Conference*

**Condensed Transcript with Word Index**



For The Record, Inc.  
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Prehearing Scheduling Conference

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Caremark RX, et al.

10/21/2024

1

1 UNITED STATES OF AMERICA  
2 FEDERAL TRADE COMMISSION

3  
4 In the Matter of: )  
5 CAREMARK RX, et al. ) Docket No. 9437  
6 Respondent. )

7  
8  
9  
10 TELEPHONIC PREHEARING SCHEDULING CONFERENCE  
11 MONDAY, OCTOBER 21, 2024  
12 4:00 P.M.

13  
14  
15  
16  
17 BEFORE THE HONORABLE (,eE2P s80M CID 1MCID 1MCID 1MCID 1MP4)TjEMC P t4(,eEe4:00 P.M. )TjEMC P M CID 1MCID 1MP4  
142Susanne Berg

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7

1 PROCEEDINGS  
 2 - - - - -  
 3 (Proceeding called to order at 4:03 p.m.)  
 4 THE COURT: Let's go on the record. This is the  
 5 prehearing scheduling conference in Docket Number 9437,  
 6 in the matter of Caremark Rx, et al. I'm Judge  
 7 Chappell.  
 8 This scheduling conference is being conducted  
 9

1 Next?  
 2 MR. HOWLEY: Good afternoon, Your Honor. This is  
 3 Dan Howley from Rule Garza Howley for the ESI  
 4 Respondents, and that's Express Scripts, Evermore  
 5 Health, Medco Health Services, Ascend Health Services,  
 6 and with me on the line is Rick Rule, Margot Campbell,  
 7 and Justin Heipp, from my law firm, along with Jennifer  
 8 Milici and Perry Lange from Wilmer Hale.

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1 Also on the line with me are my Attorney  
 2 Advisors. In addition, I will note that the press and  
 3 public have access to the scheduling conference through  
 4 a toll-free telephone connection that allows them to  
 5 listen in. Therefore, you are cautioned not to reveal  
 6 any confidential information.

7 Let's talk about the scheduling order. The  
 8 parties were provided a proposed scheduling order in  
 9 advance of this conference, and the parties submitted  
 10 proposed changes -- a number of changes to the  
 11 scheduling order. As to the requested changes that were  
 12 agreed to by all parties, most of those will be included  
 13 in the scheduling order; some will not.

14 As to the requested changes that were not agreed  
 15 to by all parties, I have your proposed changes and your  
 16 notes and will consider all of those before deciding on  
 17 the requested changes. The scheduling order will be  
 18 issued no later than October 23rd.

19 I note that a motion for a separate evidentiary  
 20 hearing has been filed by the ESI Respondents, and I did  
 21 see the certificate of conference, thank you. I just  
 22 want to verify for the record, does the Government  
 23 oppose this motion?

24 MR. EGELAND: Yes, Your Honor. The Government  
 25 does oppose this motion. This is Becky Egeland speaking

10

1 for Complaint Counsel. We also understand from  
 2 Respondents that the other Respondents plan to file  
 3 similar motions for separate evidentiary hearings, and  
 4 we proposed that given that they are all likely similar  
 5 in nature, that Complaint Counsel file one consolidated  
 6 opposition.

7 We propose to file it ten days after the last

11

1 intend to file our motion in the next 24 to 48 hours.

2 THE COURT: Okay. And I've got a list of  
 3 Respondents here, and with that, does that include all  
 4 the listed Respondents in the case? And what I mean is,  
 5 does that include -- have we covered all the pending --  
 6 all the listed Respondents, and by the time these  
 7 motions are filed, I will have a motion for separate  
 8 hearing from all Respondents? Is that correct? Anyone  
 9 can answer.

10 MR. LIVERSIDGE: That's correct.

11 THE COURT: All right, so no one is going to be  
 12 left out. All right, that's good.

13 I understand Respondents have filed a Complaint  
 14 for declaratory and injunctive relief in the Eastern  
 15 District of Missouri. Now, is that filed by all  
 16 Respondents or separate Respondents? Who wants to give  
 17 me an update on that, on how it was filed and an update  
 18 on that case at this time?

19 MR. HOWLEY: Your Honor, this is Dan Howley  
 20 representing the ESI Respondents. Our clients filed  
 21 that action, but that does not relate directly to the  
 22 insulin action before this Court. That relates to the  
 23 interim 6(b) order issued by the Commission unrelated to  
 24 PBM conduct.

25 THE COURT: Okay. Okay, that's not one of these

12

1 constitutional claims being filed parallel as we're  
 2 seeing pop up often now? It's not one of those?

3 In other words, it's a direct -- a direct attempt  
 4 to block the administrative proceeding? It's not one of  
 5 those?

6 MR. LIVERSIDGE: That's not what's currently on  
 7 file. I can't tell you something like that won't be

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1 If I could just interject for a moment. Open Exchange,  
2 we understand that the public line is having some severe  
3 echo problems. I'm wondering if there is something that  
4 you can do on your end to improve the quality of the  
5 call for the public to call into.

6 OPEN EXCHANGE: It's fixed.



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**UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
OFFICE OF ADMINISTRATIVE LAW JUDGES**

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In the Matter of )  
Caremark Rx, LLC, )  
Zinc Health Services, LLC, )  
Express Scripts, Inc., )  
Evernorth Health, Inc., )  
Medco Health Services,(e)-10 (al), 35Td(, )Tj13.9.65Td() )TjT\*( )Tj-0.004 Tc 0.004 Tw -21 -1.15 Td(Z)-A (s)-1 )  
Zarces5 (,)2-1 (k)- P (er)4 ( S)-1 (k)-6 (ar)--8 (er)-1 (v)-4 (i)-6 (c)-10 (es)-5 5 (at)3 (L)-3 (C)TJ9 (,)TJ0 Tc 0 Tw

DOCKET NO. 9437

- January 10, 2025 - Each Respondent group serves proposed expert witness list.
- May 2, 2025 - Deadline for parties to serve document requests, interrogatories, and subpoenas, except for discovery directed to witnesses who did

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- July 15, 2025 - Respondents serve final proposed witness and exhibit lists, including depositions, copies of all proposed exhibits (except for demonstrative, illustrative, or summary exhibits and expert-related exhibits), the basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness. Respondents' final proposed witness list shall include no more than fifteen fact witnesses per Respondent group. Respondent groups may examine other Respondent group's witnesses.
- Respondents provide the ALJ with courtesy copies of final proposed witness and exhibit lists, the basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness, including expert witnesses.
- July 23, 2025 - Complaint Counsel to identify rebuttal expert witness(es) and serve rebuttal expert witness report(s). Any such reports are to be limited to rebuttal of matters set forth in Respondents' expert witness reports. If material outside the scope of fair rebuttal is presented, Respondents will have the right to seek appropriate relief (such as striking Complaint Counsel's rebuttal expert witness report(s) or seeking leave to submit surrebuttal expert witness report(s)).
- July 29, 2025 - Deadline to file motions for in camera treatment of proposed trial exhibits. *See* Additional Provision 16.
- July 31, 2025 - Deadline for parties to depose expert witnesses (including rebuttal expert witnesses) and exchange expert-related proposed exhibits.
- August 5, 2025 - Deadline for parties to file responses to motions for in camera treatment of proposed exhibits.
- August 5, 2025 - Complaint Counsel files pretrial brief supported by legal authority.
- August 6, 2025 - Deadline for parties to file motions in limine to preclude admission of evidence. *See* Additional Provision 17.
- August 12, 2025 - Deadline for parties to file responses to motions in limine to preclude admission of evidence.
- August 12, 2025 - Parties exchange objections to final proposed witness lists and exhibit lists, serving courtesy copies on the ALJ. Parties are to

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party subject to confidentiality restrictions must demonstrate that the third party has been given at least ten days' notice of the proposed use of such material. To resolve this apparent conflict, this Scheduling Order requires that the parties provide at least ten days' notice to the opposing party or third parties to allow for the filing of motions for in camera treatment.



any electronic filing with the Office of the Secretary. Courtesy copies must be transmitted to the OALJ by email directly and the FTC E-filing system shall not be used for this purpose. Certificates of service for any pleading shall not include the email address of any particular OALJ personnel, but rather shall designate only 600 Pennsylvania Ave., NW, Rm. H-110, Washington, DC, 20580 as the place of service. **The subject line of all submissions to oalj@ftc.gov shall set forth the docket number, case name, and title of the submission.** The parties are not required to serve a courtesy copy on the OALJ in hard copy, except upon request. Discovery requests and discovery responses are to be exchanged between the parties and shall not be submitted to the OALJ.

2. The parties shall serve each other by email and shall include “Docket 9437” in the subject line. All attached documents shall be in .pdf format. In the event that service by email is not possible, the parties may serve each other through any method authorized under the

memorandum, absent prior approval of the ALJ, the motion shall be limited to 750 words and the word count limits of Rule 3.22(c) apply to the memorandum in support of the motion. This provision applies to all motions filed with the ALJ, including those filed under Rule 3.38.

7. If papers filed with the Office of the Secretary contain in camera or confidential material, the filing party shall mark any such material in the complete version of their submission with **{bold font and braces}**. 16 C.F.R. § 3.45(e). Parties shall be aware of the rules for filings containing such information, including Rule 4.2.

### **Discovery**

8. For purposes of discovery, there are three Respondent parties. Each Respondent group is a single party.

9. Each party is limited to serving on each opposing party: fifty requests for production of documents, including all discrete subparts; twenty-five interrogatories, including all discrete subparts; and thirty-five requests for admissions, including all discrete subparts, except that there shall be no limit on the number of requests for admission for authentication and admissibility of exhibits. There is no limit to the number of sets of discovery requests the parties may issue, so long as the total number of each type of discovery request, including all subparts, does not exceed these limits.

10. The parties will serve any objection to a document request within ten business days of service of the request. The parties will meet and confer to attempt to resolve any disputes and to discuss timing of production within three business days of the objection being served. The party responding to a document request will make a good-faith effort to produce responsive documents as expeditiously as possible, including by making productions on a rolling basis.

11. Compliance with the scheduled close of discovery requires that the parties serve subpoenas and discovery requests sufficiently in advance of the discovery cut-off date and that all responses and objections will be due on or before that date, unless otherwise noted. Any motion to compel a response to a discovery request or to seek certification of a request for court enforcement of a non-party subpoena shall be filed within thirty days of service of the response and/or objection to the discovery request or within twenty days after the close of discovery, whichever first occurs; except that, where the parties have been engaged in negotiations over a discovery dispute, including negotiations with any non-party with regard to a subpoena, the deadline for the motion to compel shall be five business days of reaching an impasse.

12. Rule 3.33(c) deposition notices of each Respondent group shall be permitted, with the total deposition time of each Respondent group being limited to 8 hours. Depositions of all

single, seven-hour day, unless otherwise agreed to by the parties or ordered by the ALJ. The parties may agree upon and submit to the ALJ a remote deposition protocol.

13. The parties shall serve upon one another, at the time of issuance, copies of all subpoenas for documents and subpoenas for testimony. For subpoenas for testimony, the party seeking the deposition shall consult with the other parties before the time and place of the deposition is scheduled. For any witness who separately engaged or whose testimony concerns more than one Respondent group, each Respondent group will be allocated up to three and a half hours of total time for testimony. If a witness is not available for deposition, the party seeking the deposition shall file a motion with the ALJ for a continuance of the deposition. The party seeking the deposition shall file a motion with the ALJ for a continuance of the deposition if a witness is not available for deposition.

## Motions

16. If a party intends to offer confidential materials of an opposing party or non-party into evidence at the hearing, in providing notice to such non-party, the party is required to inform each non-party of the strict standards for motions for in camera treatment for evidence to be introduced at trial. 16 C.F.R. § 3.45; *In re Otto Bock Healthcare North American*, 2018 WL 3491602, at \*1 (July 2, 2018); *In re 1-800 Contacts, Inc.*, 2017 FTC LEXIS 55 (Apr. 4, 2017). Motions for in camera treatment must be supported by a declaration or affidavit by a person qualified to explain the confidential nature of the documents. *In re 1-800 Contacts, Inc.*, 2017 FTC LEXIS 55 (Apr.4, 2017); *In re North Texas Specialty Physicians*, 2004 FTC LEXIS 66 (Apr. 23, 2004). Each party or non-party that files a motion for in camera treatment shall provide one copy of the documents for which in camera treatment is sought to the ALJ.

17. Motions in limine are strongly discouraged. Motion in limine refers “to any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered.” *In re Daniel Chapter One*, 2009 FTC LEXIS 85, \*18-20 (Apr. 20, 2009) (citing *Luce v. United States*, 469 U.S. 38, 40 n.2 (1984)). Evidence should be excluded in advance of trial on a motion in limine only when the evidence is clearly inadmissible on all potential grounds. *Id.* (citing *Hawthorne Partners v. AT&T Technologies, Inc.*, 831 F. Supp. 1398, 1400 (N.D. Ill. 1993); *SEC v. U.S. Environmental, Inc.*, 2002 U.S. Dist. LEXIS 19701, at \*5-6 (S.D.N.Y. Oct. 16, 2002)). Moreover, the risk of prejudice from giving undue weight to marginally relevant evidence is minimal in a bench trial such as this where the ALJ is capable of assigning appropriate weight to evidence.

## Witnesses

18. The final proposed witness lists shall represent counsel’s good faith designation of all potential witnesses whom the parties reasonably expect may be called upon in their case-in-chief. A general designation that a party reserves the right to call anyone on the opposing party’s witness list is insufficient. A party shall promptly notify the opposing party of changes to witness lists to facilitate completion of discovery within the dates of this Scheduling Order. The final proposed witness lists may not include additional witnesses not listed in the preliminary proposed witness lists, who have not been deposed, or for whom affidavits/declarations have not been submitted, unless by consent of all parties, or, if the parties do not consent, by an order of the ALJ upon a showing of good cause.

19. If any party wishes to offer a rebuttal witness other than a rebuttal expert witness, the party shall file a request in writing in the form of a motion to request a rebuttal witness. That motion shall be filed as soon as possible after the testimony sought to be rebutted is known and shall include: (a) the name of any witness being proposed (b) a detailed description of the rebuttal evidence being offered; (c) citations to the record, by page and line number, to the evidence that the party intends to rebut; and (d) shall demonstrate that the witness the party seeks to call has previously been designated on its witness list or adequately explain why the requested witness was not designated on its witness list.

20. Witnesses shall not testify to a matter unless sufficient evidence is introduced to support a finding that the witness has personal knowledge of the matter. F.R.E. 602.

21. Witnesses not properly designated as expert witnesses shall not provide opinions beyond what is allowed in F.R.E. 701.

22. The parties are required to comply with Rule 3.31A and with the following:

(a) At the time an expert is first listed as a witness by a party, that party shall provide to the other parties:

(i) Materials fully describing or identifying the background and qualifications of the expert, all publications authored by the expert within the preceding ten years, and all prior cases in which the expert has testified or has been deposed within the preceding four years; and

(ii) Transcripts of such testimony in the possession, custody, or control of the producing party or the expert, except that transcript sections that are under seal in a separate proceeding need not be produced.

(b) At the time an expert witness report is produced, the producing party shall provide to the other parties all documents and other written materials relied upon by the expert in formulating an opinion in this case, subject to the provisions of paragraph (g) below, except that documents and materials already produced in the case need only be listed by Bates number.

(c) It shall be the responsibility of a party designating an expert witness to ensure that the expert witness is reasonably available for deposition in keeping with this Scheduling Order. Unless otherwise agreed to by the parties or ordered by the ALJ, expert witnesses shall be deposed only once and each expert deposition shall be limited to one day for seven hours.

(d) Each expert witness report shall include a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the expert witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the expert; and the compensation to be paid for the study and testimony.

(e) A party may not discover facts known or opinions held by an expert witness who has been retained or specially employed by another party in anticipation of this litigation or preparation for hearing and who does not provide an expert report or will not act as a testifying expert.

(f) At the time of service of the expert witness reports, a party shall provide opposing counsel:

(i) A list of all commercially-available computer programs used by the expert witness in the preparation of the report;

(ii) A copy of all data sets used by the expert witness, in native file format and processed data file format; and

(iii) All customized computer programs used by the expert witness in the preparation of the report or necessary to replicate the findings on which the expert witness' report is based.

(g) Expert witnesses' disclosures and reports shall comply in all respects with Rule 3.31A, except that neither side must preserve or disclose:





### **Exhibits**

29. The parties shall provide one another with copies of any demonstrative, illustrative, or summary exhibits (other than those prepared for cross-examination) twenty-four hours before they are used with a witness.

30. Complaint Counsel's exhibits shall bear the designation "PX," Respondents' exhibits shall bear the designation "RX," and joint exhibits shall bear the designation "JX," or some other appropriate designation. Complaint Counsel's demonstrative exhibits shall bear the designation "PXD" and Respondents' demonstrative exhibits shall bear the designation "RXD," or some other appropriate designation. If demonstrative exhibits are used with a witness, the exhibit will be marked and referred to for identification only. Any demonstrative exhibits referred to by any witness may be included in the trial record, but they are not part of the evidentiary record and may not be cited to support any disputed fact. Both sides shall number the first page of each exhibit with a single series of consecutive numbers. When an exhibit consists of more than one page, each page of the exhibit must bear a consecutive control number or some other consecutive page number.

31. At the final prehearing conference, counsel will be required to introduce all exhibits they intend to introduce at trial. The parties shall confer and eliminate duplicative exhibits in advance of the final prehearing conference and, if necessary, during trial. To that end, the parties shall agree in advance of the final prehearing conference to the identification of joint exhibits. Counsel shall contact the court reporter regarding submission of exhibits.

### **Page Limitations**

32. All pretrial and post-trial briefing addressed in this paragraph shall be per Respondent group (for avoidance of doubt, Complaint Counsel will have an equal limitation of pages). Pretrial briefs shall not exceed fifty pages per Respondent group, post-trial initial briefs shall not exceed seventy-five pages per Respondent group, post-trial reply briefs shall not exceed fifty pages per Respondent group, and post-trial initial findings of fact and conclusions of law shall not exceed one hundred pages per Respondent group, unless otherwise agreed to by the parties or ordered by the ALJ.

ORDERED:



D. Michael Chappell  
Chief Administrative Law Judge

Date: October 23, 2024



**PUBLIC**

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