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

COMMISSIONERS: **Andrew N. Ferguson, Chair**
Mark R. Meador

In the Matter of:

Caremark Rx, LLC;

Zinc Health Services LLC;

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.

**CAREMARK RX, LLC AND ZINC HEALTH SERVICES LLC'S EXPEDITED MOTION
TO WITHDRAW THE MATTER FROM ADJUDICATION**

Respondents Caremark Rx, LLC and Zinc Health Services LLC (“Caremark and Zinc”) move the Commission on an expedited basis to withdraw this matter from adjudication so the Commission can evaluate whether this executive action is consistent with the policies of the Trump Administration, and to allow for discussion with the Commission about whether any concerns about insulin pricing have already been, or could be, resolved without further litigation.

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Caremark and Zinc request expedited consideration of this motion to avoid the FTC's devotion of significant resources to this case under the hearing date and schedule the parties will propose to the Commission and Administrative Law Judge. Complaint Counsel declined Caremark and Zinc's request to join this motion to remove the case from Part 3 adjudication.

I. THE FTC IS AN EXECUTIVE AGENCY AND ITS ACTIONS SHOULD ALIGN WITH THE TRUMP ADMINISTRATION'S POLICIES

The Trump Administration should withdraw this matter from adjudication so that it can evaluate whether to continue this "zombie" executive action, which is proceeding without a Trump-approved Commissioner having the opportunity to consider whether the current Commission would have filed this (or any) case in this form and in this forum. No President Trump-approved FTC Commissioner participated in the decision to pursue this executive action: the complaint was voted out by three Commissioners appointed by former President Biden, all of whom have since been fired or replaced by President Trump. Because the prior administration brought this case in Part 3 and not in federal court, the "Part 3 wall" has prevented any Trump-approved Commissioner from communicating with or providing direction to the career staff acting as Complaint Counsel.

The Trump Administration and Chairman Ferguson have made clear that Article II requires agencies like the FTC to follow the President's directives and policies and to remain subject to the

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President's ongoing supervision and control.¹ Consistent with this position, the Trump-approved FTC Commissioners should be given an opportunity to: (i) decide whether the totality of the circumstances indicates a violation of law may have occurred that warrants the commitment of significant FTC resources; (ii) decide whether to pursue this executive action under Chair Khan's 2022 Unfair Methods of Competition Policy Statement, as it is currently structured;² (iii) determine whether this or some modified action is better litigated in federal court; (iv) determine whether to sue the non-conspiring Respondents in a single action or individual actions; and (v) ascertain whether Caremark and Zinc have already taken, or would be willing to take, actions that would resolve any remaining concerns.

The last two issues are acute here because the prior administration's decision to sue three competing, non-conspiring Respondents together created a flawed case structure. Caremark's

¹ See “Ensuring Accountability for All Agencies,” Exec. Order No. 14215, 90 Fed. Reg. 10447 (Feb. 18, 2025) (ordering that officials of the Executive Branch “remain subject to the President’s ongoing supervision and control.”); Br. for the Petitioners at 4, *Trump v. Slaughter*, No. 25-332 (Oct. 10, 2025) (“[the FTC’s] powers are executive.”); Application to Stay the Judgment of the United States District Court for the District of Columbia and Request for Administrative Stay, *Slaughter v. Trump*, No. 25-5261 (U.S. Sept. 4, 2025), Dkt. No. 25A264; Defendants’ Memorandum in Support of Cross-Motion for Summary Judgment and in Opposition to Plaintiffs’ Motion for Summary Judgment, *Slaughter v. Trump*, No. 25-cv-00909-LLA (D.D.C Apr. 23, 2025), Dkt. No. 33. Letter from Acting Solicitor General Sarah M. Harris to Speaker Mike Johnson (Feb. 25, 2025), <https://www.justice.gov/oip/media/1391861/dl?inline> (“[T]he Department intends to urge the Supreme Court to overrule *[Humphrey’s Executor]*”); Statement of Chairman Andrew N. Ferguson (March 18, 2025) (“President Donald J. Trump is the head of the executive branch and is vested with all of the executive power in our government. I have no doubts about his constitutional authority to remove Commissioners. . . .”), https://www.ftc.gov/system/files/ftc_gov/pdf/chairman-ferguson-statement.pdf.

² In particular, the Commissioners should address whether the FTC supports the continued reliance on the 2022 Unfair Methods of Competition Statement, which is the basis of the UMC claim in this case (Count 1) without stating a relevant market or an allegedly unfair method (rather than result) of competition. *See* Respondents Rule 3.22 Motion to Dismiss at 13 (citing Statement of Comm'r Mark Meador, *Antitrust Myth Busting* at 3 (May 5, 2025)). The pending Motion to Dismiss—though meritorious—is necessarily narrowly focused on pleading standards and does not create an opportunity for Commissioners to undertake this comprehensive review.

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current insulin pricing and programs already address the allegations in the Complaint and, as Complaint Counsel recognizes, have driven down insulin prices. *See Compl.* ¶¶ 129-130, 205-207. If the FTC disagrees, Caremark has indicated through this motion a willingness to engage directly with the Commissioners to collaboratively discuss and potentially resolve any remaining concerns. The Part 3 wall erected by the prior administration’s choice to avoid federal court has made such dialogue impossible and prevents the current Commissioners from exercising oversight.

Moreover, this Part 3 administrative adjudication raises fundamental concerns related to separation of powers and due process that are not present when the Commission brings law enforcement actions in federal court before a neutral Article III judge. *See e.g. Securities and Exchange Commission v. Jarkesy*, 603 U.S. 109, 127 (2024) (“we have repeatedly explained that private rights may not be removed from Article III courts”); *id* at 143 (“The shift from a court to an ALJ didn’t just deprive Mr. Jarkesy of the right to an independent judge and jury. He also lost many of the procedural protections our courts supply in cases where a person’s life, liberty, or property is at stake.”) (Gorsuch J. and Thomas J. concurring). The current Commissioners should decide how and whether to utilize Part 3, not delegate those decisions to the prior administration. U.S. Const. art. II. § 1, cl. 8 (President must “preserve, protect, and defend the Constitution of the United States”); *see also* 5 U.S.C. § 3331. Withdrawing this matter from adjudication will allow the Commission to decide whether a Part 3 administrative adjudication in which the FTC serves as prosecutor and judge is the appropriate venue for this important matter of public concern.

This matter is *sui generis*. Cases brought in federal court by the prior administration face no prohibition on FTC Commissioners conferring with FTC staff, the defendants, or other interested parties. For example, because the Commission’s now withdrawn Robinson-Patman Act case against PepsiCo was brought in federal court during the Biden Administration, the

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Commission was able to review the evidence and change course. The rationale for reconsidering the wisdom of the case against PepsiCo applies *a fortiori* to this case. In *PepsiCo*, Chairman Ferguson and Commissioner Holyoak both participated in evaluating whether there was “reason to believe” a law violation had occurred and whether an enforcement action was in the public interest, and both dissented from the Commission’s decision to issue the complaint. Dissenting Statement of Comm’r Andrew N. Ferguson, *In the Matter of Non-Alcoholic Beverages Price Discrimination Investigation*, Matter No. 2210158 (Jan. 17, 2025); Dissenting Statement of Comm’r Melissa Holyoak, *In the Matter of PepsiCo, Inc.*, Matter No. 2210158 (Jan 17, 2025). Unlike *PepsiCo* and any other carryover case from the prior administration, the existence of the “Part 3 wall” prevents the Commission from directing the course of this executive action and deciding whether it comports with the Trump Administration’s priorities.

So long as this matter is in active adjudication, the Commission cannot benefit from probing FTC staff, Caremark and Zinc, and other interested parties to ensure the Complaint being prosecuted under their authority in an administrative court is consistent with the policies of this Administration.

II. WITHDRAWAL FROM ADJUDICATION WOULD ALLOW DISCUSSION WITH THE COMMISSION

The Commission has the inherent authority to withdraw a matter from adjudication. *See* 16 C.F.R. §3.11 (stating that an administrative complaint is “[t]he *Commission’s* complaint”) (emphasis supplied); Order Withdrawing Matter from Adjudication for Thirty Days, *In the Matter of Cabell Huntington Hosp., et al.*, Docket No. 9366 (F.T.C. Mar. 24, 2016) <https://www.ftc.gov/system/files/documents/cases/032416withdrawalorder.pdf>. In *Cabell Huntington Hosp.*, the Commission exercised this inherent authority and issued an Order withdrawing a Part 3 matter from adjudication. *Id.* Prior Commissions have granted a party’s

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motion to withdraw a matter from adjudication, for example, to “allow for discussion with the Commission regarding the proper resolution of [a] matter.” Mot. to Withdraw Matter from Adjudication, *In the Matter of Amgen Inc. and Horizon Therapeutics*, Docket No. 9414 (Aug. 23, 2023); Order Withdrawing Matter from Adjudication, *In the Matter of Amgen, Inc. and Horizon Therapeutics*, Docket No. 9414 (Aug. 23, 2023); *see also* Order Withdrawing Matter From Adjudication, *In the Matter of Intercontinental Exchange and Black Knight*, Docket No. 9413 (Jul. 25, 2023) (granting Complaint Counsel’s motion to withdraw from adjudication for purposes of discussing potential resolution).

Here, the unique circumstances of this case warrant withdrawal from adjudication. Neither Caremark nor Complaint Counsel have any information about the views of the current Commission on insulin pricing. Withdrawal from adjudication will allow Caremark, Zinc, and Complaint Counsel to obtain guidance and direction from the Commissioners. Space for this evaluation would be particularly valuable here because the specific harm the Complaint purports to address has been resolved. *See Sean Heather, Fixing the Biden FTC Mess: The Section 5 Policy Statement*, U.S. Chamber of Commerce (Oct. 27, 2025) (“[T]he FTC’s case leans heavily on dated insulin pricing concerns. But in today’s market, insulin prices are no longer a significant barrier for patients”), <https://www.uschamber.com/antitrust/fixing-the-biden-ftc-mess-the-section-5-policy-statement>.

Withdrawal from adjudication will allow the Commission to decide whether concerns about insulin pricing have already been resolved and, if not, whether the Commission, Caremark, and Zinc are able to collaborate on a resolution that could resolve remaining concerns and deliver meaningful benefits to Americans far sooner than protracted litigation.

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CONCLUSION

For the foregoing reasons, and in light of nearly fifty depositions beginning on December 16, 2025, the Commission should withdraw this matter from adjudication on an expedited basis.

Dated: December 2, 2025

Respectfully submitted,

/s/ Enu Mainigi
Enu Mainigi
Craig Singer
Steven Pyser
Kathryn Hoover
Williams & Connolly LLP
680 Maine Avenue SW
Washington, DC 20024
emainigi@wc.com
csinger@wc.com
spyser@wc.com
khoover@wc.com
Tel: (202) 434-5000

Michael Cowie
Rani Habash
Elena Kamenir
Dechert LLP
1900 K Street NW
Washington, DC 20006
mike.cowie@dechert.com
rani.habash@dechert.com
elena.kamenir@dechert.com
Tel: (202) 261-3300

*Counsel for Caremark Rx, LLC and
Zinc Health Services, LLC*

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CONFERENCE STATEMENT

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

Dated: December 2, 2025

Respectfully submitted,

/s/ Steven Pyser

Steven Pyser
Williams & Connolly LLP
680 Maine Avenue SW
Washington, DC 20024
spyser@wc.com
Tel: (202) 434-5000

*Counsel for Caremark Rx, LLC and
Zinc Health Services, LLC*

PUBLIC**CERTIFICATE OF SERVICE**

I hereby certify that no portion of the filing was drafted by generative artificial intelligence (“AI”) (such as ChatGPT, Microsoft Copilot, Harvey.AI, or Google Gemini) and that on December 2, 2025, 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 also certify that I caused the foregoing document to be served via email to:

<p>Bradley S. Albert Lauren Peay Rebecca L. Egeland Federal Trade Commission 600 Pennsylvania Avenue, NW Washington, DC 20580 regeland@ftc.gov</p> <p><i>Counsel Supporting the Complaint</i></p>	<p>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</p> <p>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</p> <p><i>Counsel for Respondents</i> <i>Express Scripts, Inc.; Evernorth Health, Inc.; Medco Health Services, Inc.; Ascent Health Services LLC</i></p>	<p>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</p> <p><i>Counsel for Respondents</i> <i>OptumRx, Inc.; OptumRx Holdings, LLC; Emisar Pharma Services LLC</i></p>
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Respectfully submitted,

/s/ Steven Pyser _____

Steven Pyser
Williams & Connolly LLP
680 Maine Avenue SW
Washington, DC 20024
spyser@wc.com
Tel: (202) 434-5000

*Counsel for Caremark Rx, LLC and
Zinc Health Services, LLC*

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Respondents.

[PROPOSED] ORDER GRANTING CAREMARK RX, LLC AND ZINC HEALTH SERVICES LLC'S MOTION TO WITHDRAW THE MATTER FROM ADJUDICATION

Having considered Respondents Caremark Rx, LLC and Zinc Health Services LLC's Motion to Withdraw,

IT IS HEREBY ORDERED, that Respondents' Motion is GRANTED.

IT IS FURTHER ORDERED that this matter be, and hereby is, withdrawn from adjudication as it relates to Caremark Rx, LLC and Zinc Health Services LLC.

By the Commission.

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Dated: _____

By: _____

April J. Tabor
Secretary