

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

In the Matter of

**Caremark Rx, LLC;
Zinc Health Services, LLC;
Express Scripts, Inc.;
Evernorth Health, Inc.;
Medco Health Services, Inc.;
Ascent Health Services LLC;
OptumRx, Inc.;
OptumRx Holdings, LLC;
and
Emisar Pharma Services LLC,**

Respondents.

Docket No. 9437

**COMPLAINT COUNSEL'S OPPOSITION TO OPTUM RESPONDENTS' MOTION
TO COMPEL INTERROGATORY RESPONSES**

In the middle of discovery, Optum seeks to compel Complaint Counsel to answer a set of textbook contention interrogatories “now” or “be precluded from introducing evidence relating to specific Plans or Payers at the Evidentiary Hearing and related briefing.” *See* Optum’s Mot. Compel Interrog. Resps. (“Mot.”) at 4. In doing so, Optum attempts to rewrite this Court’s discovery deadlines and relevant Part 3 Rules. But discovery has months to go and Rule 3.35(b)(2) is clear: contention interrogatories “need not be answered until after designated discovery has been completed.” There is a good reason for this. As courts routinely explain, compelling answers to contention interrogatories before all relevant discovery has been taken is inefficient, unfair, produces little useful information, and does not clarify or narrow the issues for

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trial. This is particularly true here, where Optum has no real need for early answers because its interrogatories involve its own conduct and any answers provided now would require supplementation when discovery ends.

Because Optum has failed to justify a departure from Rule 3.35(b)(2)'s clear timing provision, and because doing so would force Complaint Counsel to prematurely take a position on how it would prove its case at trial, the Court should deny Optum's request. The Court should also deny Optum's baseless attempt to dictate what evidence Complaint Counsel may use to support its contentions.

BACKGROUND

On January 21, 2025, at the outset of fact discovery, Optum served the nine interrogatories at issue in its motion. Decl. ¶ 3. Each interrogatory quotes or alludes to an allegation in the Complaint and asks for the facts or evidence Complaint Counsel will use to support the allegation. *See, e.g.*, Interrogatory No. 3 ("Describe in detail the Bases of Support for Your allegation at paragraph 201 of the Complaint . . ."). One month later, Complaint Counsel served a more than 50-page response and indicated it would supplement its responses at the close of discovery, consistent with FTC Rule 3.35(b)(2). Decl. ¶¶ 4-5.

Complaint Counsel's responses include detailed, substantive answers that explain and support its allegations. For example, Interrogatory 2 asks for facts supporting the allegation in paragraph 221 of the Complaint that "a patient may end up paying more than the drug's entire net cost to the payer" when their cost-sharing contribution is based on inflated list prices in highly rebated drug classes. Complaint ¶ 221. The response explains (with cites to the record) that patients sometimes pay coinsurance or deductible payments for insulin prescriptions based on list price, and that certain insulin list prices far exceed their net costs. Parrott Decl. Ex. A at 16-18. It also cites an Optum document that states that [REDACTED]

[REDACTED]

[REDACTED] *Id.*

Complaint Counsel's responses also note that many of Optum's interrogatories contain inaccurate premises about evidence Complaint Counsel must use to prove its claims.

Interrogatory 2, for example, suggests that Complaint Counsel must identify "specific [Optum] plans" where a patient "paid 'more than the drug's entire net cost to the payer'" and precisely quantify each payment to prove the allegation in Complaint paragraph 221. *See id.* at 14-15 (objecting to Interrogatory 2). Complaint Counsel may ultimately develop and use evidence about specific plans, but it might also prove its allegation through other means, such as Optum documents and testimony admitting that insulin net costs are much lower than list prices and certain patients pay cost-sharing based on list price.

Fact discovery remains ongoing. Depositions have just begun and will likely extend through at least May. Decl. ¶ 10. To date, only two Optum individual witnesses have been deposed. *Id.* Numerous relevant third-party depositions, including payer depositions, also remain. *Id.* Optum only substantially completed its document production on December 9, 2025 when it produced over 115,000 documents in response to document requests that were served more than a year prior.¹ Decl. ¶¶ 7-8. Complaint Counsel is currently reviewing these documents as well as other productions. Decl. ¶¶ 8-9. And the parties have not exchanged expert reports or taken expert depositions. Decl. ¶¶ 11-14 (explaining relevance of expert testimony).

¹ Optum produced fewer than 10,000 litigation documents prior to December 9. Decl. ¶ 8. Some of these requests focused on plan-related information that is highly relevant to Optum's interrogatories. Decl. ¶ 7, n.2.

Complaint Counsel sought to reach agreement with Optum on a supplementation date after discovery is complete but in advance of the evidentiary hearing. Decl. ¶ 5. Rather than come to reasonable terms, Optum moved to compel supplemental answers immediately.

ARGUMENT

Interrogatories 2 through 10 are classic contention interrogatories that do not need to be answered until discovery closes. Because Optum has not met its burden to require early responses and because such disclosure would be prejudicial to Complaint Counsel, the Court should reject Optum’s efforts to compel answers to contention interrogatories while relevant discovery is ongoing. *See, e.g., In re Impax Labs.*, No. 9373, 2017 WL 2570856, at *3 (F.T.C. June 12, 2017) (denying request to compel response before the close of discovery because party was “still in the process of reviewing tens of thousands of documents” and party and third party depositions were outstanding); *In re Pom Wonderful LLC and Roll International Corp.*, No. 9344, 2011 WL 1055398, at *4-5 (F.T.C. March 16, 2011) (deferring supplementary response to a contention interrogatory until after “completion” of fact and expert depositions).² The Court should also deny Optum’s efforts to censor Complaint Counsel’s interrogatory responses.

I. Interrogatories 2-10 are contention interrogatories that do not need to be answered until close of discovery under Rule 3.35(b)(2)

Contention interrogatories ask a party “to take a position,” “state what it contends,” or “state all facts upon which it bases a contention.” *Impax*, 2017 WL 2570856, at *2; *see also Campbell v. Facebook Inc.*, No. 13-CV-05996-PJH, 2015 WL 3533221, at *2, *6 (N.D. Cal. June 3, 2015) (asking a party to “identify all facts that support your allegation in paragraph 3 of

² *See also United States v. Berkeley Heartlab, Inc.*, No. 9:11-CV-1593-RMG, 2017 WL 11673301, at *2 (D.S.C. Apr. 3, 2017); *Par Pharm., Inc. v. TWi Pharms., Inc.*, No. CCB-11-2466, 2012 WL 12548935, at *1 (D. Md. Oct. 4, 2012).

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your complaint” is a contention interrogatory) (cleaned up)).³ For example, Interrogatory 3 asks Complaint Counsel to “[d]escribe in detail the Bases of Support” for an allegation in “paragraph 201 of the Complaint” and to provide “all supporting evidence”⁴ produced by any party. It also asks Complaint Counsel to identify the “specific Payers,” if any, that it will use to support this allegation. “[D]efer[ring] an answer to contention interrogatories until the close of discovery” is “the default position required by the FTC’s amended Rule 3.35(b)(2).” *Impax*, 2017 WL 2570856, at *2.

II. Optum has not adequately justified its need to deviate from Rule 3.35(b)(2)

Optum’s two stated reasons for deviating from Rule 3.35(b)(2)’s clear timing provision are without merit. First, Optum insists it needs to know what Optum plans Complaint Counsel will use to prove its contentions so it can “take discovery.” Mot. 2. But courts routinely reject efforts to force premature responses to contention interrogatories that are “directed to the proponents’ own statements and conduct” because a party “know[s] what their own behavior was” and, therefore, has “no real need for early answers.” *In re Checking Acct. Overdraft Litig.*, No. 09-MD-02036-JLK, 2010 WL 5136043, at *3 (S.D. Fla. Dec. 16, 2010) (citing *Convergent*, 108 F.R.D. at 334-35) (cleaned up);⁵ *see also Impax*, 2017 WL 2570856, at *3 (rejecting argument that early responses to contention interrogatories were necessary to take

³ *See also In re Convergent Techs. Sec. Litig.*, 108 F.R.D. 328, 332 (N.D. Cal. 1985) (contention interrogatories often “ask[] an opposing party to state all the *facts* on which it *bases* some specified contention”); *Impax*, 2017 WL 2570856 at *1-2 (cleaned up) (asking for “all [supporting] facts” of a defense is a contention interrogatory because it asks a party to “commit to a position and give factual specifics supporting its claims.”).

⁴ Optum’s demand for “all evidence” is improper. Interrogatories that demand “every fact” supporting an allegation are overbroad as a party should not be required to “provide a narrative account of its case.” *Hiskett v. Wal-Mart Stores, Inc.*, 180 F.R.D. 403, 404-05 (D. Kan. 1998) (cleaned up); *Haggarty v. Wells Fargo Bank, N.A.*, No. 10–2416 CRB (JSC), 2012 WL 4113341, at *2 (N.D. Cal. Sept. 18, 2012) (collecting cases). To the extent Optum requests a list of “each and every plan” responsive to its interrogatories, its request is also unduly burdensome. *See* Mot. 6.

⁵ *See also Campbell*, 2015 WL 3533221, at *4 (courts should be “especially vigilant” when a defendant has “adequate access to much of the evidence related to its misconduct”).

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“appropriate discovery”). Optum’s interrogatories do not seek any facts unknown or unavailable to Optum. Rather, they are directed at its own conduct, including its interactions with its own clients and other third parties. Indeed, Optum has equal access to the “*terabytes* of data and document productions” in this matter (Mot. 5) and is in a better position than Complaint Counsel to understand its own conduct.

Second, Optum suggests that the timing provision in Rule 3.35(b)(2) does not apply if there was a pre-complaint investigation. *See* Mot. 5. But nothing in the text of the rule indicates such a distinction. And Rule 3.35 guides Part 3 proceedings, which are almost always preceded by a pre-complaint investigation. Optum’s argument rings especially hollow here, where Optum failed to provide relevant materials during the investigation and has had full access to the investigative file since fall 2024. Decl. ¶¶ 8, 15.

III. Complaint Counsel will be prejudiced if the Court grants Optum’s motion

While Optum has not substantiated a need for early revisions to responses to its contention interrogatories, Complaint Counsel will be significantly prejudiced if required to supplement its interrogatory responses contrary to Rule 3.35(b)(2). First, and most troublingly, Optum insists that Complaint Counsel identify any “Plans or Payers” that may be relevant to its contentions “now” or else “be precluded from introducing evidence relating” to such plans at trial. Mot. 4. This request is entirely inconsistent with the FTC Rules and fundamentally unfair. Optum failed to produce information relevant to its interrogatories in the investigation and delayed producing relevant documents in this litigation. Decl. ¶¶ 7-8, 15. Fact and expert discovery necessary to fully and accurately respond to Interrogatories 2-10 remains ongoing—this includes depositions of Optum and payer witnesses, expert discovery, and reviewing the more than 115,000 documents Optum produced in December, many of which relate to the

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interrogatories at issue. Decl. ¶¶ 6-14. Optum’s request would prevent Complaint Counsel from relying on evidence it has not yet had a fair opportunity to collect and review.

Second, “forcing [a party] to prematurely take a position” while the record is in flux produces an “artificial narrowing of the issues, instead of an informed paring down.” *In re Northfield Lab ’ys Inc. Sec. Litig.*, 264 F.R.D. 407, 412 (N.D. Ill. 2009) (cleaned up). This is unfair to the responding party who must “unnecessarily and unnaturally dissect her theory of her lawsuit and articulate theories which may not be fully developed.” *Storie v. United States*, 142 F.R.D. 317, 319 (E.D. Mo. 1991).⁶ It is premature to force Complaint Counsel to decide whether it will prove its allegations by, for example, focusing on certain specific payers, or by using other types of evidence (such as the evidence already cited in its initial responses).

Third, Optum’s requested schedule would require Complaint Counsel to submit at least three amendments to Interrogatories 2-5, and 8 (one now, a second after fact discovery, and a third after expert discovery) and at least two amendments to Interrogatories 6-7 and 9-10 (one each after fact and expert discovery). *See* Mot. 8-9; Decl. ¶¶ 12-14. Courts recognize that compelling a response to a contention interrogatory when a party will need to respond again after “other phases of discovery[] lacks finality and compounds the time, effort and cost of the litigation.” *Checking*, 2010 WL 5136043, at *3. Ordering multiple rounds of “tentative” responses is “unnecessarily burdensome” and undermines judicial efficiency, *see Campbell*, 2015 WL 3533221, at *6, which is antithetical to “the Commission’s policy . . . to conduct [Part 3] proceedings expeditiously.” 16 C.F.R. § 3.1.

⁶ *See also Lawrence v. First Kansas Bank & Tr. Co.*, 169 F.R.D. 657, 663-64 (D. Kan. 1996) (“prematurely filed contention interrogatories apparently designed more to trap the opponent than to discover” and that seek “evidentiary minutiae” are “susceptible to abuse”) (cleaned up); *Convergent*, 108 F.R.D. at 337 (early “contention interrogatories” can “be used to impose great burdens on opponents” and create “counterproductive friction between parties”).

IV. Optum's attempt to limit Complaint Counsel's interrogatory responses is improper

Optum's request to limit Complaint Counsel's interrogatory responses to only "OptumRx-specific evidence and without citing the Complaint" (Mot. 8, 11) is unfounded and inconsistent with the language of its own interrogatories. Interrogatory responses must be amended if they are materially "incomplete or incorrect." 16 C.F.R. § 3.31(e). Ironically, Optum's request would make Complaint Counsel's responses to many of its interrogatories incomplete because they explicitly request evidence from other "Respondent PBMs." *See, e.g.*, Interrogatories 3, 7, 9. Even where the interrogatory does not specifically request such evidence, Complaint Counsel included such evidence where it was relevant to its contentions. Optum should not get to arbitrarily dictate what evidence Complaint Counsel uses to support its contentions.

Finally, Complaint Counsel's inclusion of Complaint citations in its interrogatory responses is not improper. Unlike *Anderson* (Mot. 8), where the responder merely "referr[ed]" to "paragraphs of the Complaint in lieu of providing a written answer," Complaint Counsel's responses provided detailed explanations of its contentions and included many citations to the record, including Optum's own documents. *Anderson v. United Parcel Serv., Inc.*, 2010 WL 4822564, at *6 (D. Kan. Nov. 22, 2010).

CONCLUSION

If Optum does not have the discovery it needs to prepare for trial it has no one to blame but itself. As with every complex litigation, both sides must simultaneously review discovery within the deadlines set by the Rules and the Court. Optum has had Complaint Counsel's investigative file, initial disclosures, and preliminary witness list for over a year (and has always had possession of its own documents). Optum will receive other relevant disclosures, such as

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Complaint Counsel's exhibit lists and expert reports, in due course. And, consistent with Rules 3.35(b)(2) and 3.31(e), Complaint Counsel will revise any materially incomplete responses to Optum's contention interrogatories after the close of relevant discovery. The Court should deny Optum's motion in full.⁷

Dated: April 16, 2026

Respectfully submitted,

/s/ Rebecca L. Egeland

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⁷ Optum's unsupported demand that it be able to reopen discovery after relevant deadlines have passed (Mot. 9) is not ripe for resolution and, in any event, should be denied.

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Respondents.**

Docket No. 9437

**Declaration in Support of Complaint Counsel's Opposition to
Optum Respondents' Motion to Compel Interrogatory Responses**

1. My name is Andrew Kennedy. I am an attorney admitted to practice law in the District of Columbia. I am employed by the Federal Trade Commission and am Complaint Counsel in this action.
2. I have personal knowledge of the facts set forth in this declaration.
3. On January 21, 2025, Optum served its Second Set of Interrogatories on Complaint Counsel.
4. Complaint Counsel served a more than 50-page set of responses and objections on February 21, 2025.¹ We objected to Interrogatories 1-10 as contention interrogatories that

¹ Complaint Counsel submitted an amended response to Interrogatories 2-10 with minor changes on December 12, 2025. In addition, we amended our response to Interrogatory 11 on September 26, 2025 and January 16, 2026.

seek “an opinion or contention that relates to fact or the application of law to fact.” 16 C.F.R. § 3.35(b)(2).

5. Rather than entirely deferring substantive answers until after the close of discovery (as is allowed under the FTC Rules), we provided preliminary answers and indicated that we would supplement our answers, if necessary, after the close of discovery.² Our intent in doing so was to be as forthcoming as possible while preserving the opportunity to sift through, analyze, and weigh information produced through discovery. As we have explained to Optum’s counsel, we do not intend to wait until three days before the hearing to amend our interrogatory responses (even though this is the deadline set by FTC Rule 3.35(b)(2)). Optum’s Mot. to Compel Interrog. Resp., Parrott Decl. Ex. C. By filing its motion to compel, Optum has apparently rejected our offer to negotiate a date by which we would supplement our responses after the close of discovery but before the evidentiary hearing. *See id.* at 2.
6. Discovery is ongoing.
7. Complaint Counsel served its First Set of Requests for Production to Optum on October 23, 2024. The requests included numerous specifications directed at information and communications related to plan sponsors and payers.³
8. By the time Optum served its Second Set of Interrogatories on Complaint Counsel, it had produced fewer than 60 documents in response to Complaint Counsel’s First Set of Requests for Production. Between December 2024 and the end of November 2025, Optum had produced fewer than 10,000 documents. On December 9, 2025—thirteen months after Complaint Counsel served its document requests—Optum produced more than 115,000 documents, followed by additional productions in December 2025 and January 2026.⁴ Complaint Counsel is actively reviewing these documents and other materials, such as data that Optum has produced.
9. Complaint Counsel is also reviewing documents produced by third parties, and other PBMs, many of which were also produced in this litigation.
10. Fact depositions began on December 16, 2025 and are ongoing. At the time of this declaration, Complaint Counsel has taken depositions of two Optum individual witnesses.

² Complaint Counsel has provided a substantive response to each interrogatory except Interrogatory 9 which it will amend after discovery closes.

³ For example, Specification 2 requested: “all documents relating to communications about any Insulin Product between the Company and any Plan Sponsor, [or] Payor...”; Specification 16 requested: “all documents discussing... the use of List Price (or a benchmark correlated to List Price) for Insulin Products as a basis for Cost-sharing, rebates, fees, or other payments”; Specification 18 requested: “all documents relating to requests for proposals, bids, offers, or models or analyses... between the Company and commercial Plan Sponsors [or] Payors...”; Specification 19 requested: “all strategy and planning documents relating to requests for proposals, bids, or offers for PBM or GPO services between the Company and commercial Plan Sponsors [or] Payors... including but not limited to underwriting for Pharmacy Benefit Plans and the promotion, marketing, or offering of the Company’s Standard Formulary options”; and Specification 20 requested: “all documents relating to communications with commercial Plan Sponsors [or] Payors... concerning Pharmacy Benefit Plan Design.”

⁴ In contrast, Complaint Counsel produced its investigative file in the fall of 2024.

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Complaint Counsel expects to take at least seven additional Optum individual witness depositions. Depositions of third parties and former Respondents are also ongoing and will continue through at least May.

11. Expert discovery is ongoing and reports have not yet been served nor have expert depositions been scheduled.
12. Complaint Counsel has retained Susan Hayes, PhD as an expert in this matter. Dr. Hayes is the Principal and Lead Investigator at Pharmacy Investigators & Consultants. She specializes in pharmacy benefit consulting for major clients, including plan sponsors and employers. Dr. Hayes advises her clients on employee benefit design and provides strategic guidance in negotiating agreements with PBMs. We expect portions of her report will inform our responses to Optum's contention interrogatories, likely including Interrogatories 2-5 and 8.
13. Complaint Counsel has retained Aaron S. Kesselheim, MD, JD, MPH as an expert in this matter. Dr. Kesselheim is a physician, researcher, and academic who specializes in pharmaceutical policy, contracting, and pricing. We expect portions of Dr. Kesselheim's report will inform our responses to Optum's contention interrogatories, likely including Interrogatories 2 and 7.
14. Complaint Counsel has retained Daniel O'Brien, PhD as an expert in this matter. Dr. O'Brien is an economist with expertise in the economics of industrial organization. We expect portions of Dr. O'Brien's report will inform our responses to Optum's contention interrogatories, likely including Interrogatories 4, 6-7, and 9-10.
15. During the investigation that preceded this action, the Commission issued a Civil Investigative Demand ("CID") to UnitedHealth Group (Optum's parent) dated November 22, 2023, that included specifications related to one or more of the interrogatories now at issue. Specification 3 of the CID requested that Optum identify plans whose members' coinsurance and deductible out-of-pocket payments for insulin were based on pre-rebate list prices.⁵ Such plans are likely to include patients that pay cost-sharing amounts that exceed the net cost of their insulin prescription to the payer after accounting for rebates and fees. Optum ultimately did not respond to this Specification of the CID, even though in February and March 2024 it indicated to Complaint Counsel that [REDACTED].⁶

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 16, 2026, in Washington, DC.

/s/ Andrew Kennedy

Andrew Kennedy

⁵ See Parrott Decl. Ex. C, fn. 2 (comparing CID Specification 3 to Optum's Interrogatory 2).

⁶ *Id.*

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CERTIFICATE OF SERVICE

I hereby certify that on April 16, 2026, I caused the foregoing document to be filed electronically using the FTC's E-Filing System, which will send notification of such filing to:

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*Secretary of the Commission
Clerk of the Court*

The Honorable Jay L. Himes
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Administrative Law Judge

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

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