

**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION**

COMMISSIONERS: **Lina M. Khan, Chair**
 Rebecca Kelly Slaughter
 Alvaro M. Bedoya
 Melissa Holyoak
 Andrew Ferguson

**IN THE MATTER OF INSULIN:
CAREMARK RX, ET AL.**

ORAL ARGUMENT REQUESTED
Docket No.

disqualify themselves. If they fail to do so, Rule 4.17 requires that the full Commission act and disqualify each of the Three Commissioners.⁵

BACKGROUND

The Three Commissioners have a lengthy track record of making public statements that indicate serious bias against Caremark, Zinc, and other PBMs. These statements demonstrate that the Three Commissioners have prejudged the Respondent PBMs' liability in this matter.

Chair Khan has vilified PBMs for the entirety of her professional career,⁶ calling PBMs "powerful intermediaries at the center of the U.S. m2

distortions in pharmaceutical markets.”⁹ For his part, Commissioner Bedoya has declared that the effect of PBMs’ rebates can be “horrific, and frankly, keep [him] up at night.”¹⁰

The Three Commissioners often make such disparaging statements at one-sided events hosted by anti-PBM special interest groups. For example, the Three Commissioners have frequently spoken at events hosted by the National Community Pharmacists Association (“NCPA”), a self-described anti-PBM lobbying organization funded by PBM counterparties that stand to profit at the expense of employers and patients from policies that impair PBMs, such as the instant attempted regulatory change masquerading as litigation. For instance, in June 2022—after the FTC commenced its “inquiry” into PBMs¹¹ and the insulin investigation—Chair Khan spoke at an event cohosted by NCPA lobbyists at which she asserted that PBMs’ “decisions help to determine which medicines are prescribed, which pharmacies patients can use, and the prices that patients ultimately pay at the pharmacy counter.”¹² And in October 2022, Chair Khan headlined the NCPA’s annual convention and commended the NCPA’s work opposing PBMs.¹³

⁹ Slaughter, Statement Regarding the Use of Compulsory Process, *supra* note 2, at 1.

¹⁰ The Capitol Forum, Fireside Chat with Commissioner Alvaro Bedoya, *supra* note 3.

¹¹ See FTC Order to File Special Report, No. P221200 (June 6, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221200PBMMModelOrder.pdf; see also FTC Launches Inquiry Into Prescription Drug Middlemen Industry, Fed. Trade Comm’n (June 7, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-launches-inquiry-prescription-drug-middlemen-industry>.

¹² Lina Khan, Chair, Fed. Trade Comm’n, Remarks at American Economic Liberties Project and the National Community Pharmacists Association: How Pharmacy Benefit Managers Impact Drug Prices, Communities, and Patients, at 1 (June 22, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/Remarks-Lina-Khan-Economic-Liberties-National-Community-Pharmacists-Association.pdf.

¹³ See *supra* note 4.

Event participants wore anti-PBM paraphernalia, including pins that vilified PBMs as “bloodsuckers” and shirts depicting PBMs as vampires.¹⁴

But the Three Commissioners’

available.”¹⁷ And she has asserted that “rebates that PBMs demand may function as kickbacks that raise costs and limit access to affordable medicines.”¹⁸

Similarly, more than a year before the FTC began its investigation into PBMs, Commissioner Slaughter stated that “[f]airness in drug pricing is undermined by a complex system of rebates” and that “[t]his is not the way competition is supposed to work.”¹⁹ Like Chair Khan, Commissioner Slaughter continued to make such statements after the FTC’s investigation began, further asserting her belief that PBM rebates are connected to higher drug prices by claiming that

that rebates “drive up the list price.”²² These incorrect assertions, among others, are the exact sorts of factual disputes at issue in Count I of the FTC’s complaint.

Count II. The Thre. [T]-8 (h)20 (r)-6 (e)4 (u. [T]-8 (h)20 (r) ItC4365.6 (e)4 (u.mc]TJETQq0 0 612 7

whether Caremark’s and Zinc’s “formulary exclusion practices” are “unfair” have already made that determination. Compl. ¶ 265.

Count III. The Three Commissioners have similarly prejudged liability as to Count III, which alleges that the Respondent PBMs’ rebating practices exploit consumers by “shift[ing] the cost of high insulin prices of drugs onto certain insulin patients.” Compl. ¶ 269. Chair Khan has claimed that “PBMs practically determine . . . the amount patients will pay at the pharmacy counter,”²⁷ that PBMs “engage in tactics that hike the price of drugs, deprive patients of access to certain medicines,”²⁸ and that Americans are “[t]oo often . . . price gouged for [life-saving] medications.”²⁹ Commissioner Slaughter has attributed alleged increases in “patients’ out-of-pocket costs” to “mushroom[ing]” “PBM rebates and fees,”³⁰ and she has called PBMs’ “rebating practices” an “anticompetitive exploitation of market power.”³¹ And Commissioner Bedoya has concluded that “[w]e all know” that PBM rebating “isn’t fair” and is “not what fair markets look like.”³² He has further suggested that PBMs’ rebate negotiations “may create a conflict of interest” and “may also be commercial bribery.”³³ Indeed, in joint testimony to the House and Senate

²⁷ Khan, Statement Regarding 6(b) Study of Pharmacy Benefit Managers, *supra* note 7, at 1.

²⁸ Khan, Remarks at the White House Roundtable on PBMs, *supra* note 1, at 1.

²⁹ *Id.*

³⁰

Judiciary Committees, the Three Commissioners jointly and inaccurately described PBMs as “middlemen who can dictate the pricing and access to life-saving drugs for so many Americans.”³⁴

Remarkably, these biased public statements continue unabated, even after the instant

decisionmaking.’” (quoting *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972))). As such, agency officials, like the Three Commissioners, may not adjudicate a case when “a disinterested observer may conclude that (the agency) has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.” *Cinderella*, 425 F.2d at 591 (internal quotation marks omitted); *see also Am. Cyanamid Co. v. Fed. Trade Comm’n*, 363 F.2d 757, 766 (6th Cir. 1966). Accordingly, courts have disqualified agency officials in situations in which the officials have made public statements that “give the appearance that the case has been prejudged.” *Cinderella*, 425 F.2d at 590.

DISCUSSION

The Three Commissioners’ prior public statements plainly demonstrate that they have prejudged this case. Courts have unequivocally held that Commissioners must recuse themselves when their prior statements and actions convey *even an appearance* that they have prejudged a respondent’s liability. That standard is more than met here. Any “disinterested observer” would conclude that the Three Commissioners have “in some measure adjudged the facts as well as the law of [this] case in advance of hearing it.” *Id.* (internal quotation marks omitted). It defies credulity to suggest otherwise.

The Three Commissioners’ conduct here closely mirrors—and, in fact, surpasses—the actions of former FTC Chair, Paul Rand Dixon. Appellate courts delivered a trio of rulings against Dixon for his failure to recuse. First, in *Texaco, Inc. v. Fed. Trade Comm’n*, the D.C. Circuit vacated an FTC order based on Dixon’s public statements. 336 F.2d 754. In that action, the Commission alleged that Texaco used coercive tactics to cause its petroleum dealers to buy tires, batteries, and accessories from a rubber company from which Texaco allegedly received commissions. *Id.* at 757. Dixon gave a speech before a group of petroleum dealers—*i.e.*, those

conclusion in the event he deems it necessary to do so after consideration of the record.” *Id.* The court further explained that recusal must follow from statements that “give the appearance that [a Commissioner] has already prejudged the case and that the ultimate determination of the merits will move in predestined grooves.” *Id.*

The Three Commissioners here stand on even worse footing than Chair Dixon. In each of his cases, Dixon’s conduct ran afoul of due process requirements by giving a single speech or producing a single writing. By contrast, the Three Commissioners here have *for years*, through *numerous* public speeches and writings during a live investigation, issued a steady drumbeat of anti-PBM rhetoric that reveals their predetermined positions on the exact issues raised in this case. The Three Commissioners’ prior statements do not merely evince an appearance of bias or prejudgment—although that would be sufficient to require disqualification—the statements are proof-positive that Caremark’s and Zinc’s fates have been determined in the minds and *statements* of those who seek to adjudicate this matter. Nor were the Three Commissioners’ statements and beliefs expressed only before the outset of the investigation. *See* Majority Statement Order Denying Petition for Recusal, *In the Matter of Meta Platforms, Inc., et al.*, No. 9411 (Feb. 1, 2023)

due process and federal ethics requirements.”). The Three Commissioners’ biases were demonstrated even after the investigation began.

CONCLUSION

For the foregoing reasons, Caremark and Zinc respectfully request that Chair Khan, Commissioner Slaughter, and Commissioner Bedoya be disqualified from participating in the Commission's enforcement action against Caremark and Zinc.

Dated: October 8, 2024

Respectfully submitted,

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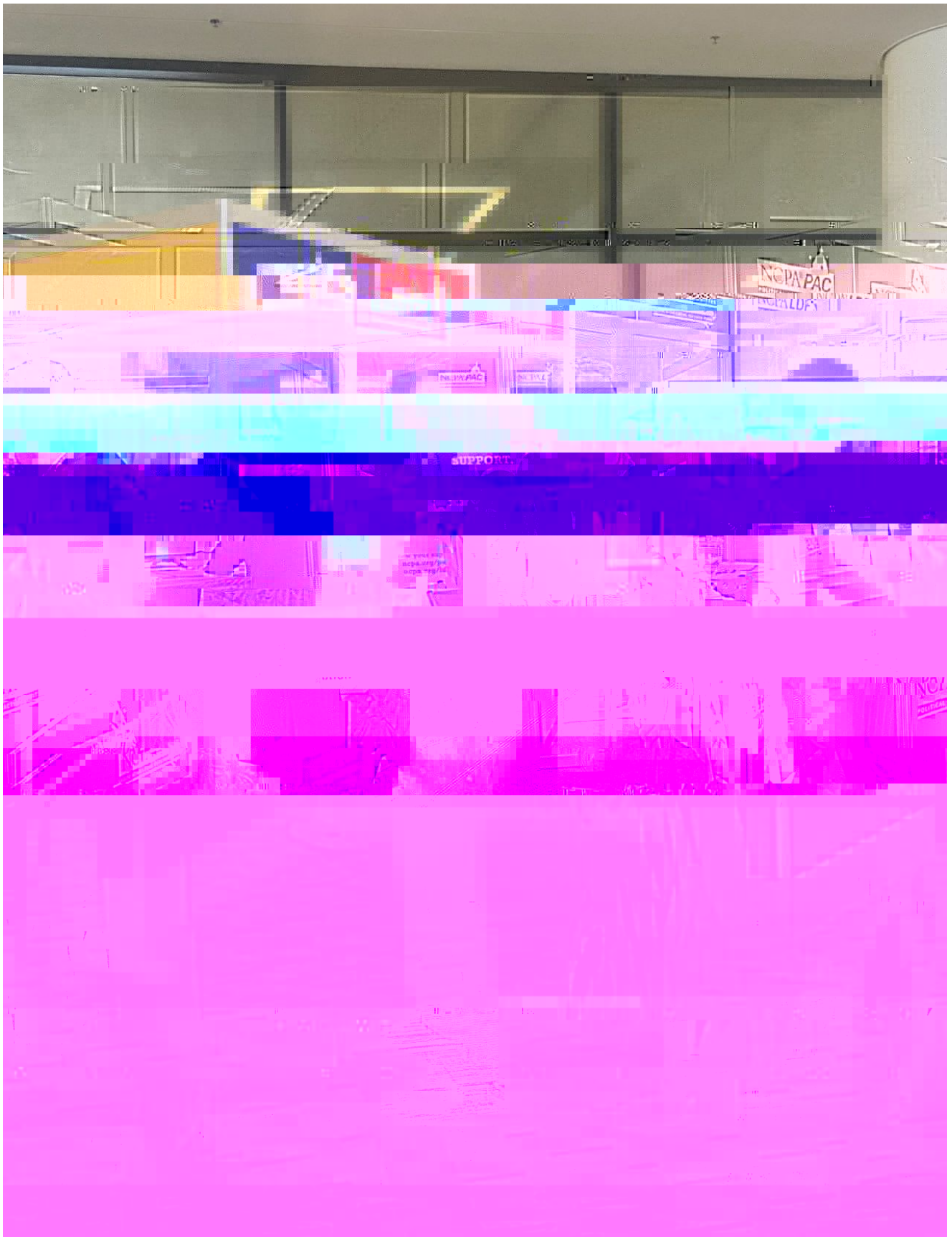
EXHIBIT 1

FTC Chairwoman Lina Khan faces ethics complaint over alleged bias against pharmacy benefit managers

 [washingtonexaminer.com](https://www.washingtonexaminer.com)

EXCLUSIVE — _____

BIDEN FCC NOMINEE ON TRACK FOR CONFIRMATION, OPENING PATH TO NET NEUTRALITY DEBATE



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