

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

<b>IN RE: NATIONAL PRESCRIPTION</b>	)	<b>CASE NO. 1:17-MD-2804</b>
<b>OPIATE LITIGATION</b>	)	
	)	<b>SPECIAL MASTER COHEN</b>
<b>THIS DOCUMENT RELATES TO:</b>	)	
<b>“PBM Cases”</b>	)	
	)	<b><u>DISCOVERY RULING</u></b>
	)	<b><u>REGARDING “BFSF” DOCUMENTS</u></b>

Discovery Agenda Item no. 422 relates to a discovery dispute raised by the Plaintiff seeking an order compelling ESI to produce certain documents related to remuneration associated with administrative service fee contracts. Plaintiffs served discovery upon ESI as follows:

Identify and describe all audits, reports and consulting agreements related to Opioid Remuneration including, not limited to, internal/external valuation reports, compliance with the safe harbor provision of the federal Anti-Kickback Statute, “fair market value” assessments for services rendered and/or all other consulting agreements which address, in whole or in part, fees for services rendered and produce all documents related thereto.

Unsatisfied with ESI’s response, Plaintiff seeks an order compelling disclosure of all responsive documents, including documents related to any analysis of a “bona fide service fee” or “fair market value” of the administrative service fees rendered. The dispute was letter briefed and argued during the parties’ May 8, 2025 discovery conference with the undersigned. During this discovery conference, ESI confirmed it will continue to search for the documents in question and will produce what it finds. *See, e.g.*, Tr. at 28:1-3 (May 8, 2025); *see also* email from Matthew Wasserman to Special Master Cohen (May 15, 2025) (“Express Scripts has produced or will produce the assessments it locates or produce a privilege log, as Plaintiffs request.”).

The Special Master made rulings on the record and adds as follows. Documents related to whether remuneration paid by a manufacturer to a PBM is a “bona fide serve fee” are discoverable

and must be produced. This includes documents related to the “fair market value” of services provided by PBMs to manufacturers, compliance with federal regulations including the “safe harbor” provisions of the federal Anti-Kickback Statute, the determination of the fee percentage(s) referenced in contracts with manufacturers, and all audits, reports and consulting agreements related thereto. By way of example, Express Scripts recently produced an August 6, 2015 “Memorandum to Express Scripts Holding Company providing Fair Market Value analysis of Rebate Administration Services” from Apogenics, Inc. *See* ESI\_MDL\_004794802–4794820. This document, as well as related communications, data, policies, reports, agreements, reliance materials, and analyses, are examples of the types of documents which are discoverable and must be produced.

Similarly, any documents ESI has provided to or received from companies or individuals, including third parties and/or employees, regarding or related to any “bona fide service fee” or “fair market value” analysis, must be produced. One example of such a document is the August 21, 2015 letter and attestation from ESI to its client MVP Healthcare, regarding “Direct and Indirect Remuneration.” *See* ESI\_MDL\_004794797–4794801. In addition, ESI must produce any documents it has relied upon or does rely upon for its “bona fide service fee” or “fair market value” analyses.

Although ESI confirmed during the May 8, 2025 hearing that it has not withheld any of these documents based on privilege, if it does so in the future it must list them on a privilege log. Finally, this ruling applies equally to Optum, assuming it received the same discovery request.

Any party choosing to object to any aspect of this Ruling must do so on or before May 29, 2025.

**Respectfully submitted,**

/s/ David R. Cohen

**David R. Cohen**

**Special Master**