IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *et al.*, *Plaintiffs*, v. ANTHEM, INC. and CIGNA CORP., *Defendants*.	Case No. 1:16-cv-01493-ABJ

ANTHEM'S POST-TRIAL CONCLUSIONS OF LAW
PHASE II: "LARGE GROUP EMPLOYERS" & "MONOPSONY"

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I. LEGAL STANDARD

1. The statutory standard, burden of proof, and legal analysis are the same in Phase II as in Phase I. Anthem's Phase I Conclusions of Law (ECF No. 404) are equally applicable to Phase II and are incorporated herein by reference.

2. To block the Anthem-Cigna merger, Plaintiffs must prove that the "*effect*" of the merger is likely "substantially to lessen competition." 15 U.S.C. § 18 (2016) (emphasis added); Anthem Phase I COL ¶¶ 2-3. Whether Plaintiffs have proven that the acquisition is substantially likely to have anticompetitive effects is therefore the ultimate inquiry under Section 7. *See Oracle*, 331 F. Supp. 2d at 1109 ("To establish a section 7 violation, plaintiffs must show that a pending acquisition is reasonably likely to cause anticompetitive effects.").

3. *Baker Hughes* provides the analytical framework to assess the merger. 908 F.2d at 984; Anthem Phase I COL ¶¶ 5-13.

4. First, Plaintiffs must prove that the merger will result in undue concentration in properly defined, relevant product and geographic markets. Anthem Phase I COL ¶¶ 5-6, 13, 17. Only then will Plaintiffs receive an initial, rebuttable presumption that the merger is anticompetitive. *Id.* at ¶¶ 5-6. If Plaintiffs' proposed markets are inaccurate, or if Plaintiffs' market-share calculations are incorrect, Plaintiffs do not achieve any "presumption" that the merger is anticompetitive and the merger should not be blocked. *Id*. at ¶¶ 5-6, 14.

5. Defendants carry *no affirmative burden* with respect to disproving Plaintiffs' alleged product market, geographic market, or market concentration. Instead, as with any civil defense, Defendants may undermine Plaintiffs' case by simply showing that Plaintiffs have failed to carry *their* burden on each of these three elements, which Plaintiffs must establish by a preponderance of the evidence. *See Oracle,* 331 F. Supp. 2d at 1109 ("Plaintiffs have the burden

of proving a violation of Section 7 by a preponderance of the evidence."); *see also Baker Hughes*, 908 F.2d at 991-992.

6. Thus, Defendants need not offer alternative relevant market definitions, better or more complete data, or alternative market share calculations. Defendants need only demonstrate that Plaintiffs' allegations are incorrect. *See Arch Coal*, 329 F. Supp. 2d at 123 (finding plaintiffs failed to carry burden to establish their product market despite finding defendants' alternative product market was "totally unpersuasive"); Anthem Phase I COL ¶¶ 15-16.

7. While Plaintiffs' product and geographic markets need not be defined with "perfect precision" (Pls.' Phase I COL ¶ 11), their market definition — and thus also their market concentration calculations — must be "subjected to the hard economic analysis required by §7." *Baker Hughes*, 731 F. Supp. at 7, *aff'd* 908 F.2d 981. And the opinions of Plaintiffs' expert to support these alleged markets must be based on actual evidence, recognized tests, and sound, current data. *See Lantec, Inc. v. Novell, Inc.*, 306 F.3d 1003, 1025-26 (10th Cir. 2002) (holding no abuse of discretion for lower court to exclude expert testimony on product market where opinion was based on unreliable data and unsupported by cross-elasticity of demand); *Gen. Dynamics*, 415 U.S. at 505 (explaining the question is whether the probability of the "future impact" of anticompetitive effects "exists at the time of trial").

8. Second, if Plaintiffs meet their burden, Defendants may rebut Plaintiffs' initial presumption simply by showing "that the market-share statistics [give] an inaccurate account of the [merger's] probable effects on competition." *Heinz*, 246 F.3d at 715 (alteration original).

9. Because the ultimate question is whether Plaintiffs have proved that the effect of the merger is likely to substantially lessen competition, a high market concentration in a properly-defined relevant market is not alone sufficient for a court to block a transaction under

Section 7. *Gen. Dynamics*, 415 U.S. at 498 (declining to block the merger, despite a high post-merger market share, and finding statistics concerning market share and concentration are "not conclusive indicators of anticompetitive effects."); *Arch Coal*, 329 F. Supp. 2d at 130; *see also FTC v. Libbey*, 211 F. Supp. 2d 34, 49 (D.D.C. 2002) ("The purpose of defining the market and determining market power is to evaluate whether a proposed merger 'has the potential for genuine adverse effect on competition.'") (citation omitted). Accordingly, any reliance on the outdated reasoning of *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963) ("*PNB*"), without carefully evaluating anticompetitive effects, as set forth in the *Baker Hughes* framework, is wrong. *See Baker Hughes*, 908 F.2d at 990 (stating subsequent case law "carefully analyzed defendants' rebuttal evidence" rather than "accepting a firm's market share as virtually conclusive proof of its market power" as the Court did in *PNB*).

10. The "anticompetitive effects analysis" includes considering the likelihood of post-merger coordinated effects, post-merger unilateral effects, the ease of entry of new competitors, and importantly, whether the merger will result in efficiencies that outweigh the perceived anticompetitive risks. *CCC Holdings*, 605 F. Supp. 2d at 46-75 (evaluating various factors); *Arch Coal*, 329 F. Supp. 2d at 137-157; *see also* Anthem Phase I COL ¶¶ 54-70, 80-100.

11. Any one of, or combination of, these factors "can rebut a prima facie case" and satisfy Defendants' "showing" to rebut a presumption of anticompetitive harm. *Baker Hughes*, 908 F.2d at 984 (noting Supreme Court adopted a "totality-of-the-circumstances approach").

12. Defendants do not carry any burden to "disprove" Plaintiffs' case. The Supreme Court has explicitly rejected "*Philadelphia Bank*'s insistence that a defendant 'clearly' disprove anticompetitive effect, and instead described the rebuttal burden simply in terms of a 'showing.'" *Id.* at 982, 990-91 (citing *Marine Bancorporation*, 418 U.S. at 631); Anthem Phase I COL ¶ 8.

13. Imposing a heavy burden on a defendant would be particularly anomalous in a Section 7 case. "The government, after all, can carry its initial burden of production simply by presenting market concentration statistics. To allow the government virtually to rest its case at that point, leaving the defendant to prove the core of the dispute, would grossly inflate the role of statistics in actions brought under section 7." *Baker Hughes*, 908 F.2d at 992; Anthem Phase I COL ¶ 10. Thus, this modest burden squares with the logic of the burden-shifting framework.

14. Third, if Defendants successfully rebut Plaintiffs' initial presumption, "the burden of producing additional evidence of anticompetitive effect shifts to the government, and merges with the ultimate burden of persuasion, which remains with the government at all times." *Baker Hughes*, 908 F.2d at 983; *see also* Anthem Phase I COL ¶ 4 (citing authority establishing that Plaintiffs "have the burden on every element of their Section 7 challenge, and a failure of proof *in any respect* will mean the transaction should not be enjoined") (emphasis added).

15. Plaintiffs must carry this burden in a "significant market" to enjoin the merger. *See Gen. Dynamics*, 415 U.S. at 521; *Brown Shoe*, 370 U.S. at 337 ("[I]f anticompetitive effects of a merger are probable in any *significant* market, the merger — at least to that extent — is proscribed") (emphasis added). Foreclosure of competition "of a *de minimus* share of the market will not tend to 'substantially lessen competition.'" *Brown Shoe*, 370 U.S. at 329.

II. THE MERGER WILL NOT SUBSTANTIALLY LESSEN COMPETITION IN THE ALLEGED MARKET FOR THE SALE OF COMMERCIAL HEALTH INSURANCE TO "LARGE GROUP" EMPLOYERS

16. Plaintiffs must prove that (i) "the sale of health insurance to large-group employers" (Compl. ¶ 39) is a properly defined product market; (ii) that the 35 CBSAs (*id.* ¶ 41), individually, are properly defined geographic markets; (iii) that there is undue concentration in those markets; and (iv) ultimately, that the merger will result in anticompetitive effects in properly defined markets. *See* Anthem Phase I COL ¶¶ 1-12, 17.

A. Plaintiffs Failed To Prove A Relevant "Large Group" Product Market

17. The relevant product market is defined by interchangeability and cross-elasticity of demand. *See id.* at ¶¶ 18-22. To make this determination, the Court may consider a number of facts and factors, including the *Brown Shoe* factors. *Id.* at ¶¶ 23-35.

B. Plaintiffs Failed To Prove The 35 CBSAs Are Relevant Geographic Markets

18. Importantly, because Plaintiffs plead *each* of the 35 CBSAs as a *separate* geographic market (*see* Compl. ¶ 41), Plaintiffs must prove that "the sale of health insurance to large-group employers" is a relevant product market in each separate CBSA. *Arch Coal*, 329 F. Supp. 2d at 116 ("[P]laintiffs have the burden on every element of their Section 7 challenge."); *see also* Anthem Phase I COL ¶¶ 37-39.

19. Although a relevant geographic market need not be defined "with the precision of a NASA scientist," (Pls.' Phase I COL ¶ 37 (quotes omitted)), it does need to be defined with the precision of an expert economist, opining within a reasonable degree of economic certainty and using recognized economic tests applied to sound data and facts, in this case the "SSNIP," or "hypothetical monopolist," test. Anthem Phase I COL ¶ 40; 2010 HMG § 4.2.1.

20. A properly performed SSNIP test is the preferred means for determining the relevant geographic market. 2010 HMG § 4.2.1; *FTC v. Advocate Health Care Network*, 2016 U.S. App. LEXIS 19535, at *19-25 (7th Cir. Oct. 31, 2016) (employing hypothetical monopolist test for determination of geographic market and rejecting a test that examined only where "customers currently go" without examining where they "could practicably go"). Consequently, Prof. Dranove's failure to perform a SSNIP computation on each alleged CBSA geographic market renders his market definition (and therefore also his market concentration calculations) unsound. *See* Dranove Tr. 3707:23-24 ("What I did not do is compute the actual geographic response to a 5 percent SSNIP.").

21. Courts have also recognized the validity of a "critical loss analysis." *FTC v. Tenet Health Care Corp.*, 186 F.3d 1045, 1053-54 (8th Cir., 1999) (applying critical loss to determine geographic markets); *H&R Block*, 833 F. Supp. 2d at 64 n.19; *FTC v. Occidental Petroleum Corp.*, No. 86-900, 1986 U.S. Dist. LEXIS 26138, at *16-17 (D.D.C. Apr. 29, 1986). A "critical loss analysis" identifies the number of customers who, by switching to another product or going outside the geographic area, "could defeat a price increase by making it unprofitable." *Tenet Health*, 186 F.3d at 1053-54. If the actual loss that the firms would suffer exceeds the critical loss threshold, then the geography at issue is an improperly sized geographic market. *Id.*; *see also Sysco*, 113 F. Supp. 3d at 34 (explaining appropriate critical loss methodology); *SunGard*, 172 F. Supp. 2d. at 173, 193 n. 25 (noting no need to address critical loss due to Plaintiff's failure to properly define the market).

22. Defining a geographic market based on conclusory expert testimony without an economically-appropriate, empirical test — here, the SSNIP test — is inappropriate. *See Lantec*, 306 F.3d at 1025-26 (upholding exclusion of expert testimony on product market based on unreliable data); *Tenet Health*, 186 F.3d at 1050-51 (faulting FTC's experts for failing to conduct a "critical loss analysis" or otherwise "quantify those patients" willing to seek services available from alternative competitors in the area).

23. While a proper relevant geographic market need not include every single potential customer (*see* Pls.' Phase I COL ¶ 26), the geographic market must "identify the threshold number" of customers who, by seeking healthcare coverage from other carriers in surrounding areas, "could defeat a price increase by making [a hypothetical monopolist's SSNIP] unprofitable." *Tenet Health*, 186 F.3d at 1050. The geographic market *must* include "competitors that discipline the merging [firms'] prices." *Advocate Health*, 2016 U.S. App.

LEXIS 19535, at *33. This is a fact-specific analysis. *Compare* Pls.' Phase I COL ¶ 26 (*citing FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 338-46 (3d Cir. 2016) (finding geographic market for hospital merger properly defined where 43% of hospital's patients came from outside market)) *with Tenet Health*, 186 F.3d at 1053 (rejecting proposed geographic market because "over twenty-two percent of people . . . already use hospitals outside [the proposed market]").

C. Plaintiffs Failed To Prove Undue Market Concentration

24. Plaintiffs' flawed market definition renders their market concentration measurements a nullity. *See Oracle*, 331 F. Supp. 2d at 1154 (observing "the obvious point that if the market is not precisely defined, then the market participants and their relative shares will be economically inaccurate") (quotes omitted).

25. Although Plaintiffs rely on *Sysco* for the proposition that they may prove their market by the "closest available approximation," (Pls.' Phase I COL ¶ 37), *Sysco* does not excuse a plaintiff of its burden to collect and present evidence that would rule out the availability of closer approximations. *See* 113 F. Supp. 3d at 54-55 (noting Dr. Israel ran multiple variants of his market shares and concentration analysis); *H&R Block,* 833 F. Supp. 2d at 72 ("A *reliable*, reasonable, close approximation of relevant market share data is sufficient.") (emphasis added). Assuming that the only approximation presented is the "closest available approximation" would allow Plaintiffs to circumvent their burden of proof, and would prematurely shift the burden to Defendants to present an available closer approximation. *See SunGard*, 172 F. Supp. 2d at 185 ("[A]ny gap in the evidence is a flaw in plaintiff's case — not defendants'.").

26. Even if Plaintiffs were able to prove properly defined relevant product and geographic markets, Plaintiffs must also prove that the merger's resulting market shares would constitute *undue* concentration in those markets to achieve an initial presumption of illegality. *See Oracle*, 331 F. Supp. 2d at 1165 ("But it is plaintiffs, not defendant, who carry the burden of

proving market shares *and concentration* in order to invoke the presumptions of the case law or to sustain a showing in accordance with the Guidelines.") (emphasis added).

27. This market share determination cannot be presumed from business documents particularly when they "contain no discussion of interchangeability with other products, nor do they attempt an analysis of cross-price elasticity of demand." *U.S. Horticultural Supply, Inc. v. Scotts Co.*, No. 04-5182, 2009 U.S. Dist. LEXIS 2327, at *60-61 (E.D. Pa. Jan. 13, 2009). Business documents are particularly irrelevant where there is no evidence that a "market" referenced in the business documents "conform[s] to the antitrust definition of a market." *Id.*

28. Despite the Merger Guidelines' purported thresholds, there is no market concentration threshold that is *per se* anticompetitive, and market share statistics alone are not sufficient to block a merger under Section 7. *See* Anthem Phase I COL ¶¶ 43-53; *see also Marine Bancorporation*, 418 U.S. at 631 (adopting *General Dynamics*' conclusion that concentration ratios "can be unreliable indicators of actual market behavior"); 2010 HMG § 5.3, at 19 ("The purpose of these [HHI] thresholds is not to provide a rigid screen to separate competitively benign mergers from anticompetitive ones[.]").

29. The handful of cases on which Plaintiffs rely, which involve plaintiffs demonstrating *prima facie* cases based on establishing defendants' market shares around 30% (Pls.' Phase I COL ¶ 34, citing *PNB*), do not establish that similar market share thresholds for undue concentration are appropriate in the markets at issue here because "[a]lthough the Supreme Court has not overruled these section 7 precedents, it has cut them back sharply." *Baker Hughes*, 908 F.2d at 990; *see also* Douglas H. Ginsburg & Joshua D. Wright, *Philadelphia Nat'l Bank: Bad Economics, Bad Law, Good Riddance*, 80 Antitrust L.J. 201, 213 (2015) (summarizing economic and legal developments regarding the market share presumption, and

noting decline in FTC and lower court reliance on the presumption regarding market shares). Indeed, courts have found the presumption of anticompetitive effects from a combined market share at a set percentage to be "unwarranted." *Oracle*, 331 F. Supp. 2d at 1123 (rejecting 1997 Merger Guidelines' position that a 35% combined market share in a unilateral effects claim in a differentiated market is sufficient to presume anticompetitive effects); *H&R Block*, 833 F. Supp. 2d at 84 (rejecting idea of threshold in unilateral effects claim).

30. Indeed, the agencies and courts have approved numerous mergers with shares much higher than the *PNB* purported threshold because, in those instances, the market shares did not adequately reflect nor predict the likely post-merger anticompetitive effects. *FTC v. Butterworth Health Corp.*, No. 96-2440, 1997 U.S. App. LEXIS 17422, at *6 (6th Cir. July 8, 1997) (permitting merger resulting in greater than 65% post-closing market share); *Baker Hughes*, 908 F.2d at 983 n.3 (permitting merger resulting in greater than 76% post-closing market share); *SunGard*, 172 F. Supp. 2d at 117-18 (permitting merger of two of the three major disaster recovery firms resulting in greater than "at least" 35% market share); *United States v. Waste Mgmt.*, 743 F.2d 976, 980-81 (2nd Cir. 1984) (permitting merger resulting in greater than 48% post-closing market share); *HTI Health Servs. v. Quorum Health Grp.*, 960 F. Supp. 1104, 1115, 1126-27 (S.D. Miss. 1997) (permitting merger resulting in 100% post-closing market share); *see also* Commentary at 26 ("As an empirical matter, the unilateral effects challenges made by the Agencies nearly always have involved combined shares greater than 35%.").

31. Because the purpose of the market definition is to outline a market in which to evaluate market share and concentration (and ultimately, anticompetitive effects), Plaintiffs' market concentration calculations must reflect the "market" as Plaintiffs define it; they cannot pick-and-choose what data to include in their calculations. *FTC v. Freeman Hosp.*, 69 F.3d 260,

268 (8th Cir. 1995) ("Without a well-defined relevant market, an examination of a transaction's competitive effects is without context or meaning."); *see also SunGard*, 172 F. Supp. 2d at 181.

D. Defendants Can Rebut Plaintiffs' *Prima Facie* Case With Evidence That Market Share Statistics Inaccurately Predict Post-Merger Competitive Effects, Including Evidence That The Merger's Efficiencies Outweigh Any Potential Harm

32. Even if Plaintiffs were able to achieve the initial presumption of illegality based on market definition and concentration, Defendants can rebut that presumption with a showing that those "market-share statistics [give] an inaccurate account of the [merger's] probable effects on competition." *Heinz*, 246 F.2d at 715. Defendants' showing of pro-competitive benefits or the unlikelihood of anticompetitive effects — including by providing merger-specific, verifiable efficiencies or the enhancement of innovation — are sufficient to rebut the initial presumption. Anthem Phase I COL ¶¶ 54-79, 96-100. Defendants can also show that coordinated anticompetitive conduct is unlikely (*id.* at ¶¶ 83-85), that unilateral anticompetitive effects are unlikely (*id.* at ¶¶ 86-91), or that new competitors could easily enter the market (*id.* at ¶¶ 92-95).

33. Where market share statistics are volatile and shifting, as when a market consists of a small number of buyers and the loss of a single customer (or account) would represent a large percentage of a firm's current market share (*see* Anthem Phase II FOF § V.A.1), market share statistics would be an inaccurate picture of the post-merger competitiveness. *See Baker Hughes*, 908 F.2d at 986 (finding market concentration statistics inaccurately reflect competition where the market is "easily skewed"). "The [less] compelling the prima facie case, the [less] evidence the defendant must present to rebut it successfully." *Id.* at 991.

1. Defendants' Efficiencies Are Cognizable And Merger Specific

34. Efficiencies includes anything that "enable[s] the surviving company to compete more effectively," such as "savings in cost" or improved quality. *United States v. LTV Corp.*,

No. 84-884, 1984 U.S. Dist. LEXIS 24598, at *41 (D.D.C. 1984); *see also Tenet Health*, 186 F. 3d at 1054 (identifying efficiencies resulting in better quality); *United States v. Country Lake Foods, Inc*., 754 F. Supp. 669, 674 (1990) (identifying efficiencies resulting in lower costs); William Kolasky, *The Merger Guidelines and the Integration of Efficiencies into Antitrust Review of Horizontal Mergers* (2002), at 2 (An efficiency is a "more efficient means to produce and distribute their goods, or . . . way[ ] to offer superior or additional features for the same cost.").

35. A court's evaluation of efficiencies, therefore, focuses on the "consumer welfare standard — that is, asking whether mergers would result in the distribution of wealth away from consumers." *See* ABA Section of Antitrust Law, *Mergers and Acquisitions: Understanding the Antitrust Issues*, p. 234 (4th ed. 2015); Kolasky at 32 ("Efficiencies that benefit consumers immediately through lower prices and increased output will receive the most weight . . . ."). This concern is incorporated into the Merger Guidelines by "requiring that the cost savings be passed on to consumers." *Id.*; *see also Univ. Health*, 938 F.2d at 1223 (stating efficiencies must "benefit competition, and hence, customers"); *Heinz*, 246 F.3d at 720.

36. Merger-specific efficiencies are those "likely to be accomplished with the proposed merger and unlikely to be accomplished in the absence of either the proposed merger or another means having comparable anticompetitive effects." 2010 HMG § 10. This formulation — which has been unchanged in the Merger Guidelines since 1997 — has been cited with approval, including by Courts in this District. *See, e.g.*, *FTC v. Cardinal Health*, 12 F. Supp. 2d 34, 62 (D.D.C. 1998); *see also Arch Coal*, 329 F. Supp. 2d at 150 (citing 1997 HMG § 4 with approval); *Heinz*, 246 F.2d at 721-22; *Staples I*, 970 F. Supp. at 1088; *CCC Holdings*, 605 F. Supp. 2d at 72; *Sysco*, 113 F. Supp. 3d at 82. The Guidelines should be considered a

party admission, and the Antitrust Division should not be allowed to walk away from them. The fact that *H&R Block* used the word "could" instead of "likely" when *paraphrasing* the 2010 Guidelines, after extensively quoting from them, does not indicate that the court intended to break so drastically from the Guidelines' established test. *See* 833 F. Supp. 2d at 89 ("*In other words*, a 'cognizable' efficiency claim must represent a type of cost saving that could not be achieved without the merger . . . .") (emphasis added).

37. The "likely" standard explains *Staples I*: Defendants need not "prove their efficiencies by clear and convincing evidence in order for those efficiencies to be considered by the Court" because "[t]hat would saddle Section 7 defendants with the nearly impossible task of rebutting a possibility with a certainty, a burden that was rejected . . . ." 970 F. Supp. at 1089.

38. Merger-specific efficiencies are those that are not likely to be obtained by "either company alone." *See Heinz*, 246 F.3d at 721-22. The Division and FTC clarified that the requirement for merger specificity was that the efficiencies are not likely to be obtained by *one or the other* when they revised the 1997 Guidelines (cited by *Heinz*) in 2010 and removed the "either firm" language. The current 2010 Guidelines, endorsed by *H&R Block*, 833 F. Supp. 2d at 89, among others, do not include the "either" language. *See* 2010 HMG § 10; *see*, *e.g.*, *FTC v. Lab Corp. of Am.*, No. 10-1873 AG, 2011 U.S. Dist. LEXIS 20354, at *53-54 (C.D. Cal. Feb. 22, 2011) (endorsing 2010 Guidelines on efficiencies); *Sysco*, 113 F. Supp. 3d at 82 (same).

39. As the 2006 Merger Commentary makes clear "*any efficiency* that enables the combined firm to achieve lower costs for a given quantity and quality of product than the firms *likely* would achieve without the proposed merger is merger-specific." Commentary § 4, at 50 (emphasis added); *see also* Anthem Phase 1 COL ¶ 65.

40. For example, even in *Heinz*, the court declined to credit defendants' efficiencies only because defendants had not put forth adequate proof to satisfy the preliminary injunction standard. 246 F.3d at 720. Indeed, the court recognized that the defendants' alleged efficiencies, if proven, could be sufficient, noting that the FTC may ultimately "accept [defendants'] rebuttal arguments . . . including their efficiencies defense, and permit the merger to proceed." *Id.* at 725.

41. In any event, by basing their monopsony allegations on Defendants' efficiencies, Plaintiffs effectively concede that those efficiencies are more than vague and speculative assertions, and that they are merger-specific. *See* Pls.' Phase I COL ¶¶ 51-52.

42. Plaintiffs have suggested that, under *PNB*, a merger that will substantially lessen competition "is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial." Pls.' Phase I COL ¶ 58 (quoting *PNB*, 374 U.S. at 371). But courts in this Circuit, and Plaintiffs' own Merger Guidelines, have clearly recognized that "efficiencies resulting from the merger may be considered in rebutting the government's *prima facie* case." *Sysco*, 113 F. Supp. 3d at 8; *see* Anthem Phase I COL ¶¶ 55-57; 2010 HMG § 10; *Baker Hughes*, 908 F.2d at 990 ("Although the Supreme Court has not overruled these section 7 precedents, it has cut them back sharply."); *Oracle*, 331 F. Supp. 2d at 1111 (observing trend "in these cases is away from the 'very strict merger decisions of the 1960's'").

43. Reconciling *PNB* and courts' clear recognition of the weight efficiencies have in the anticompetitive effects analysis necessarily means that cognizable, merger-specific efficiencies do not raise the same concerns as the vague assertions at issue in *PNB*. Indeed, the "ultimate reckoning" language in *PNB* came not in the context of an efficiency, but of a claim that a larger bank would "bring business to the area and stimulate its economic development." *PNB*, 374 U.S. at 371.

2. The Merger Is Unlikely To Result In Unilateral Effects

44. Plaintiffs recognize that this case should be evaluated only under a unilateral effects analysis, rather than coordinated effects. *See* Pls.' Phase I COL ¶ 38.

45. In a unilateral effects case, the focus is on head-to-head competition in order to determine whether a particular competitor provides a unique constraint on pricing "independent of competitive responses from other firms." *H&R Block*, 833 F. Supp. 2d at 81, 88-89; *Swedish Match*, 131 F. Supp. 2d at 169. "[T]he key point . . . is whether a significant percentage of consumers view [the competitors] as their first and second choice." *CCC Holdings*, 605 F. Supp. 2d at 68; *Whole Foods*, 548 F.3d at 1036 n.1 (noting "[i]n such a situation it might not be necessary to understand the market definition").

46. When the merging parties (a) infrequently "meet on the battlefield" of competition when measured against their other competitors and (b) are not view by customers as each other's "next best" substitute, substantial unilateral effects are unlikely to arise. *Sysco,* 113 F. Supp. 3d at 61-62 ("[E]ven if the merging parties had large market shares, if they were not particularly close competitors, then market shares might overstate the extent to which the merger would harm competition"); *Oracle,* 331 F. Supp. 2d at 1169; 2010 HMG §§ 6.1-6.2.

47. Moreover, anticompetitive effects are "unlikely . . . if non-merging parties offer very close substitutes for the products offered by the merging firms," or can reposition themselves to do so. 2010 HMG § 6.1.

3. Ease Of Entry Shows Anticompetitive Effects Are Unlikely

48. The D.C. Circuit has held that defendants need not produce specific proof of entry because they "cannot realistically be expected to prove that new competitors will 'quickly' or 'effectively' enter" the properly defined market. *Baker Hughes*, 908 F.2d at 987-88. Instead, rather than "a degree of clairvoyance," all defendants must show is that barriers to entry are not

"significant." *Id.* This is because, "[i]n the absence of significant barriers, a company probably cannot maintain supracompetitive pricing for any length of time." *Id.* (citing *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 532-33 (1973) and *Syufy*, 903 F.2d 659).

49. Even if potential entrants have not attained prior success, evidence of firms entering a properly defined market supports the proposition that entry (and the *threat of entry*, *see Baker Hughes*, 908 F.2d at 988) will check anticompetitive effects because it confirms that barriers to entry are low and that alternative options do "exert competitive pressure on that market." *Id.* (citing *Falstaff Brewing*, 410 U.S. at 532-33); *United States v. Gillette Co.*, 828 F. Supp. 78, 85 (D.D.C. 1993) ("Although it may take a significant investment of time and money to build market share, the record demonstrates that there are new entrants into the fountain pen market which are able to check increases in price.").

E. By Failing To Put Forth Additional Evidence Of Anticompetitive Effects In Response To Defendants' Rebuttal Evidence, Plaintiffs Have Not Satisfied Their Ultimate Burden To Prove That Anticompetitive Effects Are Likely

50. Plaintiffs have not presented any evidence or authority to overcome Defendants' rebuttal evidence. *Baker Hughes*, 908 F.2d at 983.

51. Plaintiffs equate reductions in price "arising from the enhancement of market power" with reductions that "arise from an *anticompetitive* increase in market power" — without citing a single case in support of their interpretation. *See* Pls.' Phase I COL ¶ 60 (citing 2010 HMG § 12). Regardless, case law requires only that the efficiencies "do not arise from anticompetitive *reductions in output or service*." *See* Pls.' Phase I COL ¶ 51 (quoting *H&R Block*, 833 F. Supp. 2d at 89); *see also Fruehauf Corp.*, 603 F.2d at 353-54 ("[W]hether or not the degree of market concentration, the height of entry barriers, the size of the merging firms, and the extent of foreclosure match or exceed the benchmarks incorporated into the Justice

Department's guidelines, the Commission still bears the burden of showing the likelihood that the future effect of [a merger] may be substantially to lessen competition.").

52. Plaintiffs have recognized courts' approval of volume-based discounts as cognizable efficiencies, but Plaintiffs have attempted to graft on the additional, unsupported requirement that the volume-based discount "result from any new volume (members) for providers." *See* Pls.' Phase I COL ¶ 61.

53. Plaintiffs argue that the Court should not credit Defendants' efficiencies because "lower prices exacted by a merged firm due, instead, to its increased market power that harms the seller are precisely the type of harm to competition the antitrust laws prohibit." *Id.* at ¶ 62. But accepting mere allegations that the merger may substantially lessen competition in the buy-side market would impermissibly relieve Plaintiffs of their burden to prove what is otherwise a distinct claim under Section 7. Thus, to the extent that Plaintiffs claim the merger's enhancement of Defendants' buying power will constitute monopsony, Plaintiffs must be able to separately prove — not assume — the elements of their monopsony case.

III. THE MERGER WILL NOT SUBSTANTIALLY LESSEN COMPETITION FOR THE PURCHASE OF HEALTHCARE SERVICES

54. Plaintiffs independently seek to block the merger on the ground that, post-merger, Anthem will have monopsony power — the anticompetitive form of buying market power — over healthcare providers. *See* Compl. ¶ 64.

55. Market power is defined as any ability to control prices and output. *See* 2B Areeda & Hovenkamp, *Market Power and Market Definition, in* Antitrust Law: An Analysis of Antitrust Principles and Their Application, § 501 (4th ed. 2016) ("Market power is the ability to raise price profitably by restricting output."); *Rothery Storage*, 792 F.2d at 230 (Wald, J., concurring) ("[A] defendant lacking significant market power cannot act anticompetitively by

reducing output and increasing prices."); *accord K.M.B. Warehouse Distribs. v. Walker Mfg. Co.*, 61 F.3d 123, 129 (2d Cir. 1995) ("[U]nless a firm has the ability to raise unilaterally prices and profitably maintain those prices above competitive levels and/or restrict output in the market, anticompetitive behavior . . . will not harm consumer welfare.") (quotes omitted); *Ryoko Mfg. Co. v. Eden Servs.*, 823 F.2d 1215, 1232 (8th Cir. 1987) ("Market power generally is defined as the power of a firm to restrict output and thereby increase the selling price of its goods in the market."); *Ball Mem'l Hosp.*, 784 F.2d at 1331 (describing market power as "the ability to raise price significantly higher than the competitive level by restricting output").

56. Pure commodity markets aside, most firms possesses *some* degree of buying power. *See* Peter C. Carstensen, *Buyer Power and the Horizontal Merger Guidelines: Minor Progress on an Important Issue*, 14 U. Pa. J. Bus. L. 775, 783 (2012) ("Any buyer that is not a pure price taker has some buyer power. Even an individual customer at an auto dealership can have some power as she negotiates a lower price.").

57. But just as not all market power on the sell-side is illegal monopoly power, not all market power on the buy-side is anticompetitive monopsony power. For example, in evaluating the merger of Caremark Rx and Advance PCS — two pharmacy benefit managers, or "PBMs" — the FTC considered whether the merger would confer upon the two PBMs monopsony power over drug dispensing by retail pharmacies and explained that "it is important not to equate market concentration on the buyer side with this kind of power [*i.e.* monopsony power]." Statement of the Fed. Trade Comm'n, *In the Matter of Caremark Rx, Inc. / Advance PCS*, File No. 031 0239 (2004). In approving the merger and finding that it would not result in monopsony power despite an increase in buy-side market power, the FTC reasoned that "[n]or do competition and consumers suffer when the increased bargaining power of large buyers allows

them to obtain lower input prices *without decreasing overall input purchases*." *Id.* (emphasis added). The FTC also specifically noted that "[i]t is likely that some of the PBM's increased shares [of the gains flowing from contracts] would be passed through to PBM clients." *Id.*; *see also* Statement of the Fed. Trade Comm'n Concerning the Proposed Acquisition of Medco Health Solutions By Express Scripts, Inc., File No. 111-0210 (2012) (finding merger would not result in monopsony power because no evidence of reduced output).

58. Nor is any disparity in bargaining power *prima facie* evidence of anticompetitive behavior. Indeed, David Hyman, former Special Counsel to the FTC, acknowledged such a position in the health care market is "silly," clarifying that while "sellers . . . have a natural tendency to conflate what is good for them with what is good for society," the interests of consumers "are sufficiently at odds with those of providers that we should generally discount provider complaints about disparities in bargaining power — an insight that flows naturally from the maxim that the purpose of antitrust is to protection [sic] competition, not competitors." *Examining Competition in Group Health Care*: *Hearing Before the S. Comm. On the Judiciary*, 109th Cong. (2006) (Statement of David A. Hyman).

59. In other words, even if Plaintiffs were to prove that the merger would result in an increase in Anthem's market power on the buying side, this increase is not *necessarily* anticompetitive; indeed, an increase in market power on the buy-side, and the savings it can enable, is often *pro*-competitive. *See United States v. Archer-Daniels-Midland Co.*, 781 F. Supp. 1400, 1422 (S.D. Iowa 1991) (approving merger and noting "consolidation of buying power is an effective means of counteracting any potential market power that might be exercised by sellers").

60. Plaintiffs argue that a "countervailing power" defense has been rejected, relying on *PNB* and *Kiefer-Stewart*. Pls.' Phase I COL ¶ 66. These cases reject only a defense that a

merger will provide the resulting firm with a better position vis-a-vis the firm's horizontal competitors; these cases do *not* address whether improving the firm's bargaining position upstream with its suppliers is anticompetitive. *See PNB*, 374 U.S. at 370 (citing *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211, 214-215 (1951)).

A. Buy-Side Market Power Is Often Pro-Competitive

61. Because an increase in buy-side market power is often *pro*-competitive, a finding of monopsony power is rare. Am. Antitrust Inst., *Views of the American Antitrust Institute On the Proposed Horizontal Merger Guidelines*, at 9 n.11 (2010) ("[M]onopsony power is rare in the economy because it tends to occur only in markets in which a dominant buyer (or group of coordinating buyers) obtains inputs from small, competitive sellers.").

62. Indeed, over the last century of jurisprudence, only *two* courts have blocked mergers due to concerns over enhanced purchasing power. *See United States v. Rice Growers Ass'n*, No. S-84-1066 (EJG), 1986 U.S. Dist. LEXIS 30507 (E.D. Cal. 1986); *United States v. Pennzoil Co.*, 252 F. Supp. 962 (W.D. Pa. 1965). Plaintiffs' contention that all mergers should be condemned when the transaction gives rise to enhanced bargaining leverage (*see* Tr. 2959:10-12) is subject to no limiting principle, and if applied broadly, would call into question most, if not all, strategic mergers. Both *Rice Growers* and *Pennzoil* are readily distinguishable.

63. First, both cases predate *Baker Hughes* and therefore neither analyzed the proposed mergers under the subsequently adopted burden-shifting framework for merger cases and thus relied almost entirely on the *PNB* presumption. Perhaps reflecting their pre-*Baker Hughes* vintage, defendants in neither *Rice Growers* nor *Pennzoil* advanced arguments on the lack of anticompetitive effects or procompetitive justifications. Additionally, both cases were decided before modern jurisprudence addressing when purchasing power can raise antitrust concerns. *See Weyerhauser*, 549 U.S. at 319; *Kartell*, 749 at 930-31.

64. Second, neither involved the kind of sophisticated and powerful upstream sellers at issue in this case. In *Rice Growers*, the sellers were a multitude of small rice farmers in no position to invest in a mill of their own. *Rice Growers*, 1986 U.S. Dist. LEXIS 30507 at *11-12. In *Pennzoil*, the upstream sellers were over 2,000 independent oil producers whose average output was "less than one-third barrel a day" and thus similarly in no position to bypass the merged firms' refineries and transport infrastructure. 252 F. Supp. at 970. This is not the case here, where providers — and particularly hospitals, from which the bulk of the medical cost savings are expected to come — have a variety of options to disintermediate insurers. Anthem Phase II FOF §§ III. E, V.E. And, many have substantial market power in their own right. *Id.*

65. Third, *Rice Growers* and *Pennzoil* involved facts that raise concerns over output effects. In *Rice Growers*, the allegation was that the defendant mill owners (seeking to effectuate acquisition of a rice milling operation) would drive down pricing, and thus output, of rice from independent rice growers in a purchase market in which the federal government was already trying to support output. 1986 U.S. Dist. LEXIS 30507, at *12-13. Similarly, in *Pennzoil*, the court noted that the merger "contemplate[d] the unification of a substantial share" of not just a single market, but the entire supply chain, which would deposit uncheck control of output at every level. 252 F. Supp. at 981-82.

66. Fourth, evidence in both cases suggested a finding of potential coordinated effects, which are not at issue here. *Rice Growers*, 1986 U.S. Dist. LEXIS 30507, at *33 (finding troubling facts suggestive of pre-merger coordination); *Pennzoil*, 252 F. Supp. at 984 (explaining potential price coordination).

B. Section 7 Merger Analysis Is Applied To Plaintiffs' Monopsony Claims

67. Calling monopsony the "mirror image" of monopoly means that courts apply the same framework and consider the same factors in their legal analysis. *See Weyerhaeuser*, 549

U.S. at 325 (noting "general theoretical similarities of monopoly and monopsony"); *Khan v. State Oil Co.*, 93 F.3d 1358, 1361 (7th Cir. 1996) (fixing maximum resale price "is a form of monopsony pricing, which is *analytically* the same as monopoly or cartel pricing and so treated by the law") (emphasis added). Plaintiffs acknowledge that the same legal standards apply to sell- and buy-side cases, (Pls.' Supp. Mem. On The Buy-Side Case, ECF 410, at 5 ("Pls.' Monopsony Br.")), and admit that their *prima facie* case simply establishes an initial, rebuttable, presumption of unlawfulness. Pls.' Phase I COL ¶ 39. Thus, the familiar *Baker Hughes* burden-shifting framework applies.

C. Plaintiffs Failed To Prove Relevant Buy-Side Product Market — The Relevant Monopsony Product Market Must Include Government Purchasers

68. Like a product market for a sell-side case, a relevant product market for monopsony is defined by cross-elasticity of demand and interchangeability. "When defining buyer product markets, the crucial question ought to be what alternatives are open to the producer of the inputs used by the merging buyers." *See* Carstensen, at 813.

69. Thus, while the questions on the buy- and sell-sides may be mirror images, "both the product and geographic dimensions can be and often are quite different for the downstream selling side markets in which the parties are involved." *Id.* Plaintiffs therefore cannot simply cite to analyses or tests performed in their sell-side case to satisfy their obligations to prove their buy-side case. *Id.* at 813 ("[T]he evaluation of the merger . . . must focus on where sellers can sell and not where buyers might buy."); *Todd v. Exxon Corp.*, 275 F.3d 191, 202 (2d Cir. 2001) (distinguishing market as one of "competing buyers" seen as being reasonably good substitutes).

70. Importantly, because government payors are the largest purchasers of healthcare services, the government through its Medicare and Medicaid programs must be considered part of the relevant product market. *See United States v. Aetna, Inc.*, No. 3:99-cv-01398-H, ECF

No. 1 (Compl.) (N.D. Tex. 1999) (defining the relevant product market for the purchase of health care services to include "governmental health insurers"); Anthem Phase II FOF § VIII.A.

D. Plaintiffs Failed To Prove A Relevant Buy-Side Geographic Market Separate From Their Relevant Sell-Side Geographic Market

71. Similarly, even though Plaintiffs allege the same geographic areas — the 35 CBSAs — for in their "large group" and monopsony cases, the relevant geographic market is not necessarily the same for sell-side and buy-side allegations because reasonable interchangeability would be assessed from a different perspective. *See* Carstensen, at 813.

72. When looking at the *buy-side*, the question is not where patients go for health care services, but where providers look for buyers of healthcare services (*i.e.*, payors). Even if patients were to limit their choice of provider by CBSA, that conclusion does not establish that providers limit their search for purchasers of healthcare services buyers to CBSAs. *Id.* at 812 ("As in the case of product market definition, the challenge in geographic market definition [in a buy-side case] is to understand where sellers can realistically look for alternative outlets for their goods."); Org. for Econ. Cooperation & Dev. ("OECD"), *Policy Roundtable: Monopsony and Buyer Power*, at 249 (2008) (DX0825) (explaining after defining the relevant product market, "[o]ne then asks whether a hypothetical monopsonist at that location would maximise [sic] profits by reducing the paid price below prevailing levels . . . . The smallest region for which the answer is yes, or some slight larger region, is the relevant geographic market"); *see also* Tr. 4499:12-16 (Plaintiffs acknowledging OECD report describes monopsony analysis).

73. Even if Plaintiffs succeed in proving that the 35 CBSAs are properly-defined geographic areas for their "large group" case, Plaintiffs must independently test their monopsony geographic market allegations with the same rigor and must take into account the same factors as with their sell-side case. *See supra* ¶¶ 18-23; Anthem Phase I COL ¶¶ 37-40.

E. Plaintiffs Failed To Prove Undue Market Concentration

74. Like the sell-side case, to receive an initial presumption of harm, Plaintiffs must next show that the merger will result in undue monopsony market concentration (in a properly defined monopsony product and geographic market). *See supra* ¶¶ 24-31. And, for the same reasons that market concentration, alone, is not sufficient to establish a violation of Section 7 in a sell-side case (*see supra* ¶¶ 26-28), Plaintiffs cannot succeed on their buy-side case simply by showing that the merger will result in increased market concentration. Jonathan M. Jacobson & Gary J. Dorman, *Joint Purchasing Monopsony, and Antitrust*, 36 Antitrust Bull. 1, 58-60 (1991) ("There is no way to determine with any precision what the minimum market share level should be in a buying-side case . . . [p]articularly in view of the ever-present peril that the relevant market will be defined too narrowly . . . any lower threshold [than 50% market share] runs too great a risk of condemning harmless or beneficial purchasing power."). Indeed, if anything, any presumption based on market shares should be higher in buy-side cases, as there is no economic consensus around the "'critical' levels of buyer concentration and market shares." *Id.* at 59 n.163 (noting consensus with Areeda and Turner that "the minimum aggregate market share should be higher in buying-side cases than in the selling side context").

F. Plaintiffs' *Prima Facie* Case Can Be Overcome By A Showing Either That The Merger Is Unlikely To Substantially Lessen Competition Or That Plaintiffs' Showing Is Unreliable

75. Plaintiffs' argument that "all the case law requires [them] to show is that Anthem will acquire the additional market power necessary to have an effect on rates," (Tr. 2959:10-12), rests on the *PNB* presumption and ignores Defendants' ability to rebut that initial presumption. Plaintiffs also ignore their responsibility to prove the ultimate question in a Section 7 case — whether the merger will result in anticompetitive effects. *Supra* ¶ 2.

76. Whether the merger will result in anticompetitive effects requires careful attention in a buy-side case because aggressive price negotiations and obtaining volume-based discounts are permissible competitive activities. *See, e.g.*, *W. Penn*, 627 F.3d at 103 ("A firm that has substantial power on the buy side of the market (i.e., monopsony power) is generally free to bargain aggressively when negotiating the prices it will pay for goods and services."); *Kartell*, 749 F.2d at 929 ("A legitimate buyer is entitled to use its market power to keep prices down."); *Austin v. Blue Cross & Blue Shield*, 903 F.2d 1385, 1390 (11th Cir. 1990) ("Efforts to obtain lower prices for subscribers are not anti-competitive."); *Ocean State Physicians Health Plan, Inc. v Blue Cross & Blue Shield*, 883 F.2d 1101, 1110 (1st Cir. 1989); *Westchester Radiological Assocs. P.C. v. Empire Blue Cross & Blue Shield*, 707 F. Supp. 708, 710 (S.D.N.Y. 1989).

77. Failing to distinguish between permissible negotiating conduct by large buyers and illegal monopsony abuses may "chill the very conduct the antitrust laws are designed to protect." *Brooke Grp.*, 509 U.S. at 226.

78. Courts have also rejected the argument that a defendant's possession of substantial market power, or even monopoly power, would warrant greater scrutiny of volume-based discounts. In *Kartell*, the court described as "false, as a matter either of law or logic," the proposition that "the law forbids a buyer with market power to bargain for 'uncompetitive' or 'unreasonable' prices." 749 F.2d at 927; *see also Westchester Radiological*, 707 F. Supp. at 715 ("Even assuming that Blue Cross uses its market power to obtain favorable prices from hospitals . . . [t]he law does not prevent a buyer with market power from negotiating a good price. . . .").

79. Similarly, courts have declined to credit arguments that there is necessarily illegal anticompetitive conduct where the lower prices will in turn lead to even greater market share. *See, e.g.*, *Brooke Grp.*, 509 U.S. at 224 ("[D]iscouraging a price cut and forcing firms to

maintain supracompetitive prices, thus depriving consumers of the benefits of lower prices in the interim, does not constitute sound antitrust policy."); *Ocean State,* 883 F.2d at 1111 ("Such an outcome — more business at lower prices — would not ordinarily run afoul of the antitrust laws."); *Kartell*, 749 F.2d at 930 ("Considered in and of itself . . . lower price, is good — even if it helps the monopolist maintain his market power. . . ."). Otherwise, *every merger* involving some combination of purchasing power would be *per se* illegal.

80. Courts have consistently held, however, that "market share alone is insufficient to establish market power," as it "may or may not reflect *actual* power" to effectuate anticompetitive harms to market participants. *See Reazin v. Blue Cross & Blue Shield, Inc.*, 899 F.2d 951, 967 (10th Cir. 1990) (emphasis original). Even if this Court were to adopt Plaintiffs' theory that any increase in "market power" rises to monopsony, Plaintiffs' own definition of illegal market power includes an analysis of price and output. *See* Pls.' Pre-Trial Br. at 2 (defining "market power" as "the ability to raise prices or reduce output"); Pls.' Monopsony Br. at 5. Thus, an anticompetitive effects analysis on the buy-side must be done.

81. Instead, regardless of whether Plaintiffs are pursuing a buy- or sell-side case, merger law rests upon the theory that a merger that should be blocked is one that will provide firms with the power "to restrict output and achieve profits above competitive levels." *Heinz*, 246 F.3d at 715-16; *PPG Indus.*, 798 F.2d at 1503. "It is this reduction in output and elevation of price that has been the historic concern of antitrust." *Oracle*, 331 F. Supp. 2d at 1114. Plaintiffs themselves acknowledge that whether a merger may substantially lessen competition is dependent on the resulting merged entity's ability "to raise price and restrict output." *See* Pls.' Phase I COL ¶ 3 (quoting *Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 464 (1992)).

Plaintiffs agree that output restriction, price increase, or other anticompetitive effect, is the primary inquiry under Section 7. Pls.' Phase I COL ¶¶ 3, 5.

82. Defendants may therefore present direct evidence that undermines the reliability of market shares to predict the anticompetitive effects that Section 7 ultimately seeks to prevent, including that: (1) the purchase price will remain above competitive levels; (2) output will not decrease; and (3) savings will be passed-through to consumers. *See FTC v. Ind. Fed. of Dentists,* 476 U.S. 447, 460 (1986) ("[P]roof of actual detrimental effects, such as a reduction of output, can obviate the need for an inquiry into market power, which is but a surrogate for detrimental effects.") (quotes omitted); *see also* Anthem Phase II FOF § VIII.C.

1. Post-Merger Prices Will Be At Or Above Competitive Levels

83. In a monopsony case, pricing below competitive levels is a reliable method for a court to determine whether a merger is likely to have anticompetitive effects. *See Kartell*, 749 F.2d at 927 ("[T]he antitrust laws interfere with a firm's freedom to set even uncompetitive prices only in special circumstances, where, for example, a price was below incremental cost."); *Brooke Grp.*, 509 U.S. at 223 ("Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition. . . . We have adhered to this principle regardless of the type of antitrust claim involved."); FTC Statement on Medco-Express Scripts Merger, at 7 ("As a general matter, transactions that allow firms to reduce the costs of input products have a high likelihood of benefitting consumers, since lower costs create incentives to lower prices" and "[o]nly in special circumstances does an increase in power in negotiating input prices adversely impact consumers."); 1997 HMG § 0.1 (stating monopsonist "depress[es] the price paid for a product to a level that is below the competitive price and thereby depress[es] output"); U.S. Dep't of Justice & Fed. Trade Comm'n, Improving Health Care: A Dose of Competition, 6:19 (2004) ("Improving Health Care") ("[T]he

Agencies should be concerned only if the transaction or practice leads to prices below competitive levels.").

84. Plaintiffs admit that price is probative of anticompetitive effects. *See* Plaintiffs' Monopsony Br. at 6.

85. Because lower prices are advantageous for consumers — and consumer welfare is the ultimate goal of the antitrust laws (*see Brooke Grp.*, 509 U.S. at 221 (describing "traditional concern" of antitrust law as "consumer welfare and price competition"); *Baker Hughes*, 908 F.2d at 991, n.12 (overarching question in a Section 7 case is "whether the challenged acquisition is likely to hurt consumers")) — courts are far more hesitant to condemn a firm's use of market power if it is being used to drive prices down on the buy-side as anticompetitive, in stark contrast to the use of market power to drive prices up on the sell-side. *See Ocean State*, 883 F.2d at 1110 ("[S]uch a policy insisting on a supplier's lowest price — assuming that the price is not 'predatory' or below the supplier's incremental cost — tends to further competition on the merits and, as a matter of law, is not exclusionary."); *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 116 (1986) ("To hold that the antitrust laws protect competitors from the loss of profits due to such price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share.").

86. That Section 7 is concerned with "probabilities not certainties," (Pls.' Phase I COL ¶ 5), does not relieve Plaintiffs from showing an "appreciable danger" that the reduction in price will be anticompetitive. *Id.* at ¶ 3. The marginal cost threshold is therefore a "judicial recognition of the practical difficulties in determining what is a 'reasonable,' or 'competitive,' price." *Kartell*, 749 F.2d at 927; *Eisai, Inc. v. Sanofi Aventis U.S., LLC*, 821 F.3d 394, 408 (3d Cir. 2016) (finding "it is beyond the practical ability of a judicial tribunal" to ascertain if above-

cost prices may be anticompetitive "without courting intolerable risks of chilling legitimate price-cutting"). This showing is sufficient to prove that the merger will not have anticompetitive effects. *See Gen. Dynamics*, 415 U.S. at 498 (finding market statistics are not conclusive evidence of anticompetitive effects).

2. The Merger Will Not Result In Reduced Output

87. The Merger Guidelines note that "[m]arket power on the buying side of the market is not a significant concern" as long as that power cannot be leveraged to inefficiently reduce long run output. 2010 HMG § 12, at 32-33 (looking to whether the merger will "depress the price paid . . . *and* inefficiently reduc[e] supply") (emphasis added); *see also* Improving Health Care, at 6:13-14 ("The exercise of monopsony power causes competitive harm because the monopsonist will . . . supply too little output.").

88. Innumerable antitrust cases treat output as synonymous with quantity. *See, e.g.*, *In re McCormick & Co.*, No. 15-1825, 2016 U.S. Dist. LEXIS 156583, at *26 (D.D.C. Nov. 11, 2016) ("[A]greement with retailers to fill individual containers with less pepper did not restrict the total supply of pepper. . . ."); *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995); *Gen. Leaseways v. Nat'l Truck Leasing Ass'n*, 744 F.2d 588, 594 (7th Cir. 1984).

89. The absence of evidence that any providers are likely to reduce output demonstrates that the merger is unlikely to result in anticompetitive harm. *See* Areeda & Hovenkamp, § 501 (explaining hallmark of illegal monopsonist power, unlike the procompetitive exercise of market power to reduce costs, is that "[t]he monopsonist, like the monopolist, 'exercises' it power by reducing output . . . .").

3. Cost Savings Here Will Be Passed On To Consumers

90. Similarly, where the lower prices obtained by the post-merger firm due to its increased bargaining leverage are passed on to the consumers, those lower prices do not reflect

illegal, anticompetitive monopsony. *See id.* (analyzing *Kartell*, stating "[t]o the extent Blue Cross was simply passing its lower buying prices on to its own consumers in the form of lower premiums or increased coverage, the low buying prices did not reflect monopsony"). Therefore, that post-merger, Anthem will pass-on the costs savings to consumers also shows that the merger will not result in anticompetitive monopsony power. Anthem Phase II FOF §§ VII.A.3, VII.D.

91. When cost savings are "passed through to customers" in a fashion that offsets any potential anticompetitive resource misallocation, that exercise is not a "wealth transfer" (*see* Tr. 4928:24-4929:3) — but a cognizable, merger-specific efficiency in line with the "consumer welfare prescription" of antitrust law. *See* 2010 HMG § 10; Anthem Phase 1 COL ¶ 65.

4. Plaintiffs' Coordinated Effects And Collusion Cases Are Inapposite

92. Plaintiffs' reliance on cases involving coordinated effects is misplaced in light of their admission that there is no evidence of coordinated effects here, and Plaintiffs are proceeding upon a theory of unilateral effects. *See* Pls.' Phase I COL ¶ 38.

93. "Mergers among competitors eliminate competition, including price competition, but they are not *per se* illegal. . . ." *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 23 (1973). Yet Plaintiffs rely on price fixing and group boycott cases, which are resolved under a *per se* standard of illegality. *See* Pls.' Monopsony Br., at 2-4 (citing eight different price-fixing cases); *see also* Pls.' Phase I COL ¶ 66 (citing additional price-fixing cases).

94. Plaintiffs similarly rely on *Arizona v. Maricopa County Medical Society* to argue that courts have rejected a "reasonable rates defense." 457 U.S. at 340-41 (1982). But *Maricopa County* is a *price-fixing case* — the issue was whether the *per se* illegally-fixed price was defensible as "reasonable." The Court did not decide the distinct question of whether antitrust law sets marginal cost as the enforceable competitive level. *Cf. Kartell*, 749 F.2d at 930

(articulating "very different" antitrust concerns between single firm negotiating prices and competitors conspiring "to limit independent decisionmaking" as in *Maricopa*).

95. These cases do not provide the appropriate framework or standards for analyzing the unilateral effects of a merger for which purpose the combined company is regarded as a single firm. *See Maricopa*, 457 U.S. at, at 356 ("In such joint ventures, the partnership is regarded as a single firm competing with other sellers in the market."); *see also W. Penn*, 627 F.3d at 103 (acknowledging there would be no basis to find an antitrust violation had the parties not colluded); *Meredith Corp. v. Seasac, LLC*, 1 F. Supp. 3d 180, 221 (S.D.N.Y. 2014) ("[C]oncerted conduct among multiple entities presents special antitrust dangers not presented by unilateral conduct, warranting scrutiny even in the absence of incipient monopoly.") (quotes omitted); *Union Carbide Corp. v. Montell N.V.*, 944 F. Supp. 1119, 1147 (S.D.N.Y. 1996) ("Antitrust law makes a clear distinction between unilateral and concerted conduct.").

96. Nor do they support Plaintiffs' argument that an impact on output or price is superfluous to a monopsony analysis under Section 7. *See Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007) ("Resort to per se rules is confined to restraints, like those mentioned, that would *always or almost always tend to . . . decrease output*.") (emphasis added); *Rothery Storage*, 792 F.2d at 229 (holding that *per se* treatment is "confined to practices of the type that almost always decrease output rather than increasing efficiency").

97. Moreover, unlike here, none of Plaintiffs' cases consider the availability of pro-competitive effects like "volume-based discounts" generated from the permissible negotiating conduct of large buyers in a commercial bargaining context. *Grp. Life*, 440 U.S. at 215.

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