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)

NOTICE OF FILING REDACTED DOCUMENT

Plaintiffs file the attached public version of their Motion *in Limine* to exclude evidence of purported benefits outside the relevant markets, and associated exhibits (ECF #212). This public version includes redactions, which are necessary to comply with court orders regarding confidentiality of party and non-party material.

Dated: November 7, 2016

Respectfully submitted,

/s/ Jon B. Jacobs

Jon B. Jacobs (D.C. Bar No. 412249)
U.S. Department of Justice
Antitrust Division, Litigation I Section
450 Fifth Street, NW, Suite 4100
Washington, DC 20530
Phone: (202) 598-8916
Facsimile: (202) 307-5802
E-mail: jon.jacobs@usdoj.gov

Attorney for United States of America

CERTIFICATE OF SERVICE

I certify that on November 7, 2016, a true and correct copy of the foregoing document was served upon the parties of record via the Court's CM/ECF system.

Dated: November 7, 2016

/s/ Jon B. Jacobs

Jon B. Jacobs (D.D.C. Bar #412249)
U.S. Department of Justice
Antitrust Division, Litigation I Section
450 Fifth Street, NW, Suite 4100
Washington, DC 20530
Telephone: (202) 514-5012
Facsimile: (202) 307-5802
E-mail: jon.jacobs@usdoj.gov

Attorney for United States of America

UNITED STATES DISTRICT COURT
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UNITED STATES OF AMERICA, et al., *Plaintiffs*, v. ANTHEM, INC. and CIGNA CORP., *Defendants*.	Case No. 1:16-cv-01493 (ABJ) (Public, Redacted Version)

PLAINTIFFS' MOTION *IN LIMINE* TO EXCLUDE EVIDENCE OF PURPORTED BENEFITS OUTSIDE THE RELEVANT MARKETS

The United States moves to preclude Anthem and Cigna from introducing evidence that the proposed merger may result in benefits outside of the relevant product and geographic markets alleged in the Complaint. Such evidence is irrelevant to the issues in this action and a waste of the Court's time.

INTRODUCTION

The ultimate question in determining whether Anthem's proposed acquisition of Cigna violates Section 7 of the Clayton Act is whether it may substantially lessen competition in any relevant market. *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 362 (1963). Plaintiffs intend to show that the merger meets that standard, not just in one market, but in dozens across the country. Anthem has suggested, however, that the harm to consumers in those markets might be justified by vague benefits that the merger may bring elsewhere. Anthem has claimed in its Answer and through the reports of its experts that the combined firm will expand geographically and increase its participation in the public exchanges established by the Affordable Care Act—specifically those where the parties are not already competing head-to-head—and that absent the

merger, Anthem will reassess its current level of participation.[1] Anthem Answer ¶¶ 2, 63. And Dr. Mark Israel, one of Anthem's expert economists, implies with little basis that the merger may benefit consumers with dual eligibility for Medicaid and Medicare. Israel Report ¶ 74. Notwithstanding the fact that these putative benefits "do not accrue to markets in which Plaintiffs have alleged harm," Dr. Israel suggests in his report that the value of such expansion "cannot be ignored when assessing the overall effects of the transaction." *Id.*

But in fact, this evidence *must* be ignored, for the Supreme Court has held that "anticompetitive effects in one market [cannot] be justified by procompetitive consequences in another." *Phila. Nat'l Bank*, 374 U.S. at 370. Once the government establishes that anticompetitive effects in a relevant market are likely, defendants' burden is to undermine and rebut that conclusion—not to argue that the harm is somehow warranted by gains elsewhere. *See infra* Part I. Because evidence of out-of-market benefits is irrelevant, it is inadmissible under Federal Rule of Evidence 402. Fed. R. Evid. 401, 402.

ARGUMENT

I. The merger's anticompetitive effects in the relevant markets cannot be justified by benefits that will supposedly accrue elsewhere.

Anthem cannot save its anticompetitive merger by pointing to effects the deal might have outside of the relevant markets. As a matter of well-established law, such effects have no bearing on the determination of this merger's legality. Rather, if Plaintiffs establish that the competitive effects are likely in a given relevant market, Defendants can only prevail by undermining the conclusion that the merger is apt to substantially lessen competition in that specific market. *See*,

[1] These public exchanges are in different states than those in which the Complaint alleged harm (Colorado and Missouri). In any event, Plaintiffs have stipulated that they will not offer evidence of the harm in the Colorado and Missouri public exchanges at trial due to the expedited schedule of this case. Stipulation Regarding Plaintiffs' Allegations Concerning the Sale of Individual Insurance Policies on Public Exchanges (Dkt. #163).

e.g., *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 715 (D.C. Cir. 2001) (holding that defendants must show that the market share statistics yielding the presumption inaccurately reflect the merger's effects in the relevant market).

The Supreme Court held in *Philadelphia National Bank* that "anticompetitive effects in one market [could not] be justified by procompetitive consequences in another." *Phila. Nat'l Bank*, 374 U.S. at 370. In that case, two Philadelphia banks argued that combining would enable them to compete with New York banks for large loans. *Id.* The Court "reject[ed] this application of the concept of 'countervailing power,'" as well as a separate argument that Philadelphia needed a larger bank to stimulate economic development, noting:

> We are clear, however, that a merger the effect of which 'may be substantially to lessen competition' is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. A value choice of such magnitude is beyond the ordinary limits of judicial competence, and in any event has been made for us already, by Congress when it enacted the amended s 7.

Id. at 370–72; *see also RSR Corp. v. FTC*, 602 F.2d 1317, 1325 (9th Cir. 1979) (rejecting an attempt to offset anticompetitive effects in the relevant market by pointing to procompetitive effects in another market). Indeed, Section 7 states that a merger is unlawful if "in *any* line of commerce . . . in *any* section of the country, the effect of such acquisition may be substantially to lessen competition." 15 U.S.C. § 18 (emphasis added). Nothing in the statute suggests that a merger likely to have such an effect might be immunized based on its purported benefits to another line of commerce or section of the country. *Id*. And the courts have read Section 7 to mean what it says: if there is a reasonable probability that a merger will substantially lessen competition in *any relevant market*, then it cannot proceed. *See Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962) ("[I]t is necessary to examine the effects of a merger in each such economically significant submarket to determine if there is a reasonable probability that the

merger will substantially lessen competition. If such a probability is found to exist, the merger is proscribed.").

Even efficiencies within the relevant market offer only a limited defense, one that has "rarely, if ever," prevailed in saving an otherwise unlawful merger. *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 82 (D.D.C. 2015) (citation omitted) (finding no such case). Those courts that recognize the defense have done so only to the extent it bears on the merger's ultimate competitive effects in the relevant market. *See, e.g., FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1222 (11th Cir. 1991) (concluding that "whether an acquisition would yield significant efficiencies in the relevant market is an important consideration in predicting whether the acquisition would substantially lessen competition"). Courts have therefore declined to credit merger benefits that do not promote competition in the relevant market and that cannot counteract the anticompetitive effects shown by the government. *See FTC v. Penn State Hershey Med. Ctr.*, No. 16-2365, 2016 WL 5389289, at *16 (3d Cir. Sept. 27, 2016) (holding an efficiency was not cognizable where it was "unclear how [it would] counteract any of the anticompetitive effects of the merger"); *Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775, 791 (9th Cir. 2015) (holding it was not enough to show that the merger would allow better service to patients because the statute "focuses on competition, and the claimed efficiencies therefore must show that the prediction of anticompetitive effects from the prima facie case is inaccurate"); *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 153 (D.D.C. 2004), (concluding defendants "failed to carry their burden of . . . showing the impact of the alleged savings on competitiveness in the market"), *case dismissed*, No. 04-5291, 2004 WL 2066879 (D.C. Cir. 2004).

The irrelevance of out-of-market effects to a Section 7 action is bolstered by the burden-shifting framework long applied in this Circuit and others. Under this framework, once the government has shown that a merger is likely to substantially lessen competition in a relevant market and therefore presumptively unlawful, defendants seeking to rebut the presumption "must produce evidence that 'shows that the market-share statistics give an inaccurate account of the merger's probable effects on competition' *in the relevant market*." *Heinz,* 246 F.3d at 715 (emphasis added) (quoting *United States v. Citizens & S. Nat'l Bank*, 422 U.S. 86, 120 (1975)); *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 631 (1974) (holding that once the government established a prima facie case as to the Spokane market for commercial banking, the burden was on defendants to show that concentration ratios "did not accurately depict the economic characteristics of the Spokane market"); *United States v. Baker Hughes, Inc.*, 908 F.2d 981, 991 (D.C.Cir.1990) (holding a defendant can rebut the presumption either by showing why a transaction is unlikely to substantially lessen competition or by discrediting the data underlying the government's prima facie case).

II. Because any purported benefits outside the relevant markets are irrelevant under Section 7, they are inadmissible under Federal Rules of Evidence 401 and 402.

Because a substantial lessening of competition within any relevant market cannot be justified by effects elsewhere, evidence of such effects is irrelevant and inadmissible under Federal Rules of Evidence 401 and 402. Under Rule 402, "[i]rrelevant evidence is not admissible." Fed. R. Evid. 402. And Rule 401 provides that "evidence is relevant if (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Fed. R. Evid. 401.

III. Any probative value that may be gleaned from evidence of efficiencies outside the relevant markets would be substantially outweighed by the risk of wasting time.

Even if Defendants could articulate some way in which the asserted out-of-market benefits are relevant in this action, the probative value of this evidence would be substantially outweighed by the risk of wasting time and should be excluded under Federal Rule of Evidence 403, which states that a court may exclude relevant evidence "if its probative value is substantially outweighed by a danger of . . . wasting time." Fed. R. Evid. 403.

Each efficiency claim presented will consume a non-trivial amount of the Court's time due to the stringent standard such a defense must meet, and in the case of Defendants' purported out-of-market benefits, the exercise would be an avoidable waste of time as the claims fall far short of meeting that standard. Efficiencies must be merger-specific, meaning they cannot be achieved by either company alone, and verifiable, meaning they must "represent more than mere speculation and promises about post-merger behavior." *Heinz*, 246 F.3d at 720–22.

The asserted benefit of increased participation in public exchanges following the merger is neither merger-specific nor verifiable. It is not merger-specific because [redacted] It is not verifiable because Anthem has to date offered nothing to support this claimed efficiency but mere "promises about post-merger behavior." *Heinz*, 246 F.3d at 720–21.

The evidence that does exist regarding entry into public exchanges suggests the merger's effect could be the opposite of what Anthem claims, [redacted]

[redacted]

There are more than enough issues to try in the relevant markets without wasting time on legally and factually baseless claims of efficiencies elsewhere.

CONCLUSION

Plaintiffs request that the Court preclude Defendants from presenting or admitting any evidence suggesting that Anthem's proposed acquisition of Cigna will yield benefits outside of the relevant product and geographic markets alleged in the Complaint.

Dated: November 7, 2016

Respectfully submitted,

/s/ Jon B. Jacobs

Jon B. Jacobs (D.C. Bar No. 412249)
Scott I. Fitzgerald
Melanie Kiser
U.S. Department of Justice
Antitrust Division, Litigation 1 Section
450 Fifth Street, NW, Suite 4100
Washington, DC 20530
Phone: (202) 598-8916
Facsimile: (202) 307-5802
E-mail: jon.jacobs@usdoj.gov

Attorneys for United States of America

Paula Lauren Gibson
Deputy Attorney General
Office of the Attorney General of California
300 S Spring Street
Suite 1702
Los Angeles, CA 90013
Phone: (213) 897-0014
Facsimile: (213) 897-2801
E-mail: Paula.Gibson@doj.ca.gov

Attorney for the State of California

Rachel O. Davis
Assistant Attorney General
Office of the Attorney General of Connecticut
55 Elm Street
PO Box 120
Hartford, CT 06106
Phone: (860) 808-5041
Facsimile: (860) 808-5033
E-mail: rachel.davis@ct.gov

Attorney for the State of Connecticut

CERTIFICATE OF SERVICE

I certify that on November 7, 2016, a true and correct copy of the foregoing was served upon all parties of record via the Court's CM/ECF system.

Dated: November 7, 2016

/s/ Jon B. Jacobs

Jon B. Jacobs (D.D.C. Bar #412249)
U.S. Department of Justice
Antitrust Division, Litigation I Section
450 Fifth Street, NW, Suite 4100
Washington, DC 20530
Telephone: (202) 514-5012
Facsimile: (202) 307-5802
E-mail: jon.jacobs@usdoj.gov

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[PROPOSED] ORDER

Having considered Plaintiffs' Motion *in Limine* to preclude Defendants from introducing evidence that the merger may result in benefits outside of the relevant product and geographic markets alleged in the Complaint, the Court hereby grants the Motion for the reasons set forth by Plaintiffs.

SO ORDERED.

DATE: November _____, 2016

_____
AMY BERMAN JACKSON
United States District Judge