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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States of America, et)	Civil Action
al.,)	No. 16-CV-1493
)	
Plaintiffs,)	STATUS CONFERENCE
)	
vs.)	Washington, DC
)	August 12, 2016
Anthem, Inc., et al.,)	Time: 10:00 a.m.
)	
Defendants.)	

TRANSCRIPT OF STATUS CONFERENCE
HELD BEFORE
THE HONORABLE JUDGE AMY BERMAN JACKSON
UNITED STATES DISTRICT JUDGE

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1 * * * * * * P R O C E E D I N G S * * * * *

2 THE COURTROOM DEPUTY: Good morning, Your Honor.
3 Calling civil action number 16-1493, the United States of
4 America, et al. v. Anthem, Incorporated and Cigna
5 Corporation. Representing the federal government and
6 presenting argument this morning will be Mr. Jacobs and Mr.
7 Fitzgerald. Representing Anthem and others, but speaking,
8 will be Mr. Curran. Representing Cigna will be Mr. Rule.
9 We have many state plaintiffs listening in on the telephone,
10 Your Honor.

11 THE COURT: All right. Good morning. Appreciate
12 everyone's appearance here this morning and I'm glad that
13 we've decided not to have everyone introduce themselves on
14 the record or we would never get any anything done.

15 The first matter I want to take up is the referral
16 matter in connection with the special master. Judge Richard
17 Levie of JAMS has been appointed as special master in the
18 *Aetna/Humana* case. He was, in fact, one of the proposed
19 special masters that the defendants requested in this case.
20 So I take it that you have no objection to a referral to him
21 in this action, is that correct?

22 MR. CURRAN: Your Honor, Christopher Curran for
23 Anthem. We have no objection to the appointment of Judge --
24 is it Levie or Levie?

25 THE COURT: Levie.

1 MR. CURRAN: We may have some comments on the
2 proposed order of referral, but no objection to his appointment.

3 THE COURT: All right. Let's just start with the
4 individual and then we'll move to the order. With respect
5 to -- yes?

6 MR. RULE: Your Honor, for Cigna, we don't object.

7 THE COURT: Okay. Thank you. I know he's one of
8 those that you proposed also. What's your position -- I
9 understand you proposed Judge Robertson, who is also an
10 excellent choice. He is unavailable. And I understand that
11 you didn't -- while you didn't request Judge Levie, you
12 didn't oppose him in the *Aetna* case. So do you have any
13 objections to my entry of a similar order in this case?

14 MR. JACOBS: We do not oppose the appointment of
15 Mr. Levie or a referral order with the same terms as Judge
16 Bates entered in the *U.S. v. Aetna* case.

17 THE COURT: All right. Thank you. So what are
18 the issues with respect to the order that Anthem wants to
19 bring to my attention?

20 MR. CURRAN: Thank you, Your Honor. Christopher
21 Curran again. We saw your order last night, asking us to
22 review the order entered in the *Aetna* case, and I did so. I
23 have to two observations. I don't consider either
24 particularly substantive, but let me go ahead and mention
25 them.

1 The first relates to paragraph 5 of the *Aetna*
2 order. And I think Your Honor will probably recall from
3 reading this, that rulings of the special master under
4 paragraph 5 are deemed final unless he certifies them for
5 appeal. There's an exception for privilege issues. I
6 believe that that review process is not comporting with Rule 53.

7 THE COURT: Well, the parties can agree. We
8 couldn't order it, but if you agree to it, then it comports
9 with Rule 53.

10 MR. CURRAN: I don't think that's right. I think
11 under Rule 53(f), the parties may change the standard of
12 review for findings of fact, that's (f)(3), but (f)(4), in
13 contract, is categorical in saying the Court must decide de
14 novo all objections to conclusions of law made or recommended
15 by a master.

16 THE COURT: Well, he's not going to be making
17 conclusions of law with respect to the case. What we're
18 submitting to him are discovery disputes. We're not asking
19 him to make findings of fact and conclusions of law, for
20 instance, on summary judgment motions or on questions
21 related to the definition of the product market or the
22 geographical market. What we're submitting to him, if you
23 look at page 1, is all matters related to discovery,
24 privilege, motions to compel, motions for protective order,
25 scheduling, expert discovery, deposition designations for trial.

1 And it seems to me that the whole point of this
2 process is to streamline it. But, are you -- I've seen this
3 similar provision in almost every referral to a special
4 master in an antitrust case in this court. I had the same
5 question. I looked at it and I think what -- it is the
6 agreement of counsel that makes it appropriate. I don't
7 believe I could simply do this unilaterally and take away
8 your rights under the federal rules.

9 So my question is: Would you agree to this order
10 as it's been written?

11 MR. CURRAN: Yes, we do agree. We like the idea
12 of streamlining this whole process. Right? To me, its
13 strictly a matter of technical legal compliance. And this
14 order may affect the rights of nonparties. And it's because
15 of that I felt duty bound to raise the point. Okay.

16 THE COURT: Okay. And what's your other?

17 MR. CURRAN: The other point, again, this is
18 technical, but Rule 53 has certain requirements, and one of
19 them, under (b) (2), states that the appointing order must
20 direct the master to proceed with all reasonable diligence.

21 Now, I think there is an argument that the
22 timeframe set forth in this order reflect a direction of
23 reasonable diligence. But, in my experience, these orders,
24 generally, specifically and expressly state that the special
25 master shall proceed with all reasonable diligence. So, I

1 offer that, again, like the first observation --

2 THE COURT: Do you have any objection to my adding
3 a sentence to this order that says a special master shall
4 proceed with all reasonable diligence?

5 MR. JACOBS: We do not, Your Honor.

6 THE COURT: I believe that you all have received a
7 communication with him already proposing a meeting this
8 afternoon, that he plans to proceed with all reasonable
9 diligence.

10 MR. CURRAN: I have no question about that. And
11 we've accepted his invitation, Your Honor. Thank you.

12 THE COURT: I will then, with that addition, issue
13 a similar order this afternoon, assuming that I leave the
14 bench sometime today. And we'll get that out.

15 So that means that docket 52, the government's
16 motion to appoint a special master is granted in part and
17 denied in part because we're appointing one, but it's a
18 different one than you proposed in the order. My written
19 order will be issued later today.

20 With respect to the protective order, you have all
21 been in this courtroom. I don't know if you're aware that
22 Judge Bates has now entered the protective order in the
23 *Aetna* case. It is largely similar to the one the government
24 proposed in that case and the one that the parties agreed to
25 in this case. But it deals with the disputed provision

1 concerning access by in-house counsel as follows -- first of
2 all, have you all seen it? Are you aware that it's been
3 entered? Does anybody know this?

4 MR. JACOBS: We have not, Your Honor. We have not
5 had a chance to review it.

6 MR. RULE: We have not seen it, but we are aware
7 that it was entered.

8 MR. CURRAN: Your Honor, it was handed to me about
9 30 seconds before you walked through that door. So I have
10 it in hand, but haven't read it.

11 THE COURT: Okay. If anyone who has it turns to
12 page 10, as I say, I believe -- I haven't sat down and
13 looked at it word-for-word, I believe it is the protective
14 order that everyone is seeking in this case, with one
15 change, in -- on page 10, section E., permitted disclosure
16 of confidential information, E.(1) says confidential
17 information may be disclosed only to the following persons:
18 (a) is the Court and all persons assisting the Court, as
19 your proposed order proposed; (b) talks about plaintiff's
20 attorneys and paralegals and professional personnel
21 consistent with your order; (c) says outside counsel of
22 record for defendants consistent with your proposal, but
23 there is a sentence added that says defendants may file
24 motions with a special master seeking modification of this
25 provision to share confidential information with a very

1 small number of specified in-house attorneys, so long as
2 those attorneys are not involved in defendants' competitive
3 decisionmaking.

4 So it does not permit disclosure to in-house
5 attorneys and it does not contain the provision to which
6 Cigna objected, and I believe Anthem objected, and which the
7 government was not seeking. But it enables parties to seek
8 leave of the special master to request it.

9 So, I realize you've had exactly 30 seconds to
10 think about it. But, if you can tell me now, I would like
11 to know. And if not, perhaps by the end of this hearing you
12 can tell me, because everyone did specifically request the
13 entry of identical protective orders in both cases. And I
14 was sort of thinking I would be able to go first this
15 morning, but he beat me to the punch. And I don't believe
16 this is inconsistent with what you're proposing, it just
17 adds -- it doesn't shut the door on the in-house counsel
18 possibility. So what's your position?

19 MR. JACOBS: Speaking for the plaintiffs, Your
20 Honor, we agree with your assessment and we do not object to
21 your entry of a protective order under the same terms.
22 We've always thought that having a protective order that's
23 identical in both cases is important. And we also thought
24 it was important that the orders be entered on the same day,
25 since third parties have certain rights to object within a

1 certain time. And so if you enter it today with that
2 provision, third -- the burden on third parties will be
3 minimized.

4 THE COURT: Well, and given the demands that
5 discovery is going to impose in this case and the defendants'
6 desire to move very expeditiously to begin discovery, I'm
7 very interested in entering this today.

8 So, Mr. Curran, do you have a position?

9 MR. CURRAN: You are correct that our number one
10 concern is expedition. And in light of that, we have no
11 objection to this proposed language.

12 THE COURT: Mr. Rule?

13 MR. RULE: Your Honor, we agree that expedition is
14 important. We also continue to oppose the provision of
15 confidential information to in-house counsel. We think that
16 will slow the process down. And as long as that additional
17 sentence does not in any way change the burden on the parties
18 to get access -- have the in-house counsel get access to the
19 information, we wouldn't oppose the protective order.

20 THE COURT: All it says -- and, you know, if you
21 want to read it over and let me know for sure later this
22 morning -- it simply says defendants may file motions with
23 the special master seeking modification of this provision.
24 The provision says only that permitted disclosure is outside
25 counsel of record.

1 So, they can seek modification of that to share
2 with a very small number of specified in-house attorneys.
3 It doesn't say they're going to get it, it just says they
4 can seek it.

5 MR. RULE: Your Honor, I think with that
6 explanation, not having read it but having heard you read
7 it, I don't think we would have any objection to that.

8 THE COURT: All right. Well, I'm going to ask
9 you, because I think this is important and you did have a
10 specific objection to this provision, for you to take the
11 copy that has been handed around, take a look at it, and
12 I'll ask you again later, just to be sure for the record,
13 whether you object or not. Because my goal would be to
14 enter it as soon as I leave the bench also, along with the
15 other order.

16 MR. RULE: Understood, Your Honor.

17 THE COURT: All right.

18 MR. CURRAN: Your Honor, I have just given that page
19 of the order to Mr. Rule's colleague so he can review that.

20 May I raise one other point on the protective order?

21 THE COURT: Yes.

22 MR. RULE: And again, I don't want to be a
23 nuisance here, but this is paragraph (b)(2) it appears on --
24 I guess the pagination is different in the two cases. I
25 don't know which order -- or, which form you may be looking at.

1 THE COURT: I'm looking at his right now.

2 MR. CURRAN: It's the same language. If you look
3 at (b) (2) on page 4, it's toward the bottom.

4 THE COURT: Okay.

5 MR. CURRAN: And that first sentence, to me, is
6 ambiguous. It begins, "If a protected person determines
7 that this order does not adequately protect its confidential
8 information, it may, after meeting and conferring with the
9 parties within ten calendar days after receipt of a copy of
10 this order," comma, "seek additional protection from this
11 court for its confidential information."

12 I think, because of the misplacement of the comma,
13 the last comma in that sentence, the ten calendar days seems
14 to be referring to the period for the meeting and
15 conferring, rather than for the objection. So I propose to
16 Your Honor that there -- a comma be placed after it says,
17 "After meeting and conferring with the parties," a comma
18 should be inserted there, "within ten calendar days after
19 receipt of a copy of this order," and then that comma should
20 come out, "seek additional protection from this Court."

21 THE COURT: So what you're saying is the seeking
22 protection has to occur within ten calendar days, not the
23 meeting and conferring?

24 MR. CURRAN: And I think that's the intent of my
25 provision. But that is my point, Your Honor, yes.

1 THE COURT: Do you have any problem with that?

2 MR. JACOBS: Your Honor, our concern is with third
3 parties, particularly -- we have a large number, over 400,
4 some are not represented. If, along with Cigna, who is
5 studying the other provision, if we could give some
6 additional thought to this. You know, I thought that the
7 ten days may apply to the meet and conferring, instead of
8 seeking extra protection of the Court. I do think this is
9 one --

10 THE COURT: Where was the comma in the copy that
11 you provided to me and the copy that you provided to Judge
12 Bates?

13 MR. JACOBS: In the same place. And I -- you
14 know, I do think that -- I agree with Mr. Curran, that there
15 is a significance to the placement of the comma. And how
16 the *Aetna* case has -- the order has been entered in the
17 *Aetna* case, if I'm a third-party and I receive notice from
18 both cases, if I have different deadlines for doing things,
19 to object, I don't think that makes sense.

20 THE COURT: I think that's a problem. I mean, one
21 of the reasons, Mr. Curran, if you were saying to me that we
22 lost a comma that was in what everybody proposed before and
23 that has changed the meaning, that's one thing. But what
24 you're saying is I'd now like you to change the meaning by
25 changing the commas. And I'm not sure that that's -- I

1 mean, we can do whatever we want, but I think it's -- the
2 whole point of this was to agree to something. You agreed
3 to something, you proposed it, it was proposed in the other
4 case, Judge Bates has entered it. Everybody has told me
5 they want the same thing as Judge Bates. You may have to
6 live with this at this point.

7 I'm happy to try to find out what Judge Bates
8 meant, but I think it was incumbent upon all of you to have
9 it say what you meant and not try to change what it means
10 now. And I can't -- I don't --

11 MR. CURRAN: Well --

12 THE COURT: I mean, if I had signed the order that
13 you docketed three days ago, this is what it would say, right?

14 MR. CURRAN: Yeah, yeah.

15 THE COURT: That you docketed twice three days ago.

16 MR. CURRAN: That's right. That's right. We are
17 quite round-heeled in our negotiations with the government
18 when it comes to things that are holding up our receipt of
19 discovery. So we would have agreed to almost any term that
20 they proposed because we knew any negotiation would delay
21 discovery. That's the background here.

22 So when I see this provision, which I think is
23 mistakenly ambiguous, and I think if Mr. Jacobs is right in
24 his interpretation, that the ten days relates to the meeting
25 and conferring, then this provision sets no time period by

1 which an objecting party shall seek Court review. And it
2 further states that the materials don't get produced until
3 the Court resolves the objection. That can't be what's
4 intended.

5 So maybe one approach would be, Your Honor, to
6 sign the order as it is. Perhaps Your Honor can confer with
7 Judge Bates and the two of you could issue some joint
8 statement as to the proper interpretation of that provision.

9 THE COURT: Mr. Jacobs?

10 MR. JACOBS: Your Honor, we would advocate you
11 entering the order without any changes. We certainly don't
12 object to you consulting with Judge Bates. But I would say
13 that if within the ten-day period a third-party does come to
14 Anthem and raise an objection, Anthem is certainly free to
15 file something with the special master to try to expedite
16 the process.

17 I think Mr. Curran is anticipating a situation
18 where a third-party, within ten days, raises an objection,
19 meets and confers with Anthem and then just sits back and
20 does not file a motion to compel, so that its material never
21 has to be produced. I think the special master can take
22 care of those unique circumstances.

23 THE COURT: Well, one of the things that the order
24 referring to the special master includes is protective
25 orders. So if I sign this order we will have a protective

1 order. I can confer with Judge Bates, if we both decide to
2 modify them jointly and add a comma, we can do that. Or you
3 can also raise it with a special master and then by
4 agreement of the parties, or at his recommendation, we can
5 add the comma. But we probably should get at least a
6 protective order signed and on the docket in our case, along
7 with the one that's already on the docket in his case. Does
8 that make sense to you?

9 MR. CURRAN: That sounds fine, Your Honor. Thank
10 you very much.

11 MR. JACOBS: That sounds fine with us, as well.

12 MR. RULE: Your Honor, I'm a sufficiently quick
13 study, but we don't object to the entry of the protective
14 order.

15 THE COURT: Oh, great.

16 MR. RULE: Again, not having read the rest of it,
17 I'm -- I understand that there are no other changes, except --
18 it's not a change, the one issue that was raised by Anthem.

19 THE COURT: I am under the impression that the
20 only difference between the two provisions that were
21 submitted to Judge Bates in the first place was the question
22 of in-house counsel. So, I believe that he has not changed
23 anything, but I haven't had any more time than you have to
24 look at it.

25 So, I will ascertain that there are no other

1 changes before I sign it. But I believe it is your order,
2 with that one sentence added.

3 MR. RULE: Thank you, Your Honor.

4 THE COURT: All right. Thank you. I just want to
5 take up one procedural matter about how we're going to move
6 through things. If I can just have Mr. Curran and Mr. Rule
7 and counsel for the government briefly at the bench.

8 (Bench discussion:)

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

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(The following proceedings were had in open court:)

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THE COURT: At this point what I would like to

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take up is the scheduling order. I've received dueling

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proposals from both sides. My general observations are that

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Anthem's proposed schedule is probably too short and that

21

the government's proposed schedule is probably too long.

22

That probably comes as no surprise to anyone.

23

I am approaching the matter at this moment with

24

the assumption that April 30th is a hard date. But I

25

believe that counting back 120 days for the regulators in

1 the state insurance area, to find that then I have to issue
2 my opinion by the end of December. I think that's a less
3 hard date and it's more in the lines of an estimate.

4 I think establishing a schedule based on the
5 assumption that we have to accord the state regulators 120
6 days to decide after I've already approved the deal, if I
7 approve the deal, that seems excessive, especially since we
8 could be filing position papers and factual information with
9 the state regulators in the interim. Also, the only way to
10 give them 120 days would give me less than 120 days to make
11 my decision, and I don't think that makes any sense, given
12 the nature of this proceeding.

13 My current thinking, and I have some questions
14 that I want to ask before I issue what the ultimate schedule
15 is going to be, is I'm going to aim for a decision by the
16 end of January. I'm going to require at least 30 days to
17 issue that decision after I've received the statement of
18 facts and the conclusions of law. So they're going to be
19 due about a week after we've heard evidence, though there is
20 going to be a week in the middle of the taking of the
21 evidence when I'm not going to be able to hear you. And so
22 you'll have a lot of time during the schedule to be working
23 on your statement of facts and conclusions of law, and you
24 should be doing that as we go anyway.

25 So, I'm thinking that the trial itself is going to

1 have to end at the end of January -- end of December or
2 early January, and that means it will probably have to
3 begin, given the amount of time its going to take, in mid to
4 late November. Because it has to be consistent with all of
5 the various scheduling demands and also other obligations on
6 my calendar that can't be moved. If that is when the trial
7 is going to be, that means, basically, the discovery is
8 going to have to close in early November or the end of October.

9 There's a lot of factors that I've considered to
10 get me to this point. I've read everything that was
11 submitted to Judge Bates initially about scheduling and I've
12 read what you've provided. I acknowledge that the
13 government is asking in good faith for the time it believes
14 it needs. But it is also true that the government had a
15 year of discovery before we got here and the date of the
16 filing of the complaint was 100 percent within its control.

17 But I also want to acknowledge that the time it
18 took them to investigate was somewhat driven by the time it
19 took Anthem to produce the necessary documents, and that
20 Anthem's demands for expedition in discovery and in reaching
21 a determination are somewhat inconsistent with its own pace
22 of production to date. They're also inconsistent with the
23 volume and broad scope of the material it seeks to receive
24 from the government and from others.

25 So, the defendants, if they want to maintain this

1 kind of schedule and this kind of expedition and not change
2 anything about April 30th, may have to tamp down their
3 expectations on the number of depositions and the breadth of
4 the subpoenas because if discovery is going to end at the
5 end of October or early November, it's approximately 12
6 weeks. For instance, we wouldn't be able to spend 350
7 hours, which is about 35 days, on nonparty depositions, if
8 you only have 12 weeks for discovery. So, all these things
9 are interrelated.

10 It's also worth noting that the April 30th day
11 isn't driven by any external factors outside the parties'
12 control. The merger, parties may extend it by agreement.
13 And Anthem has told me, Well, Cigna can, but it won't, which
14 raises the obvious question, well, whose problem should that
15 be? Does it make sense to force the government and the
16 Court and the special master and the third parties and the
17 state regulators to abide by an extremely ambitious schedule
18 in order to review a merger between two parties that don't
19 seem to want to merge? I don't know how to answer that
20 question.

21 So, in the end, we may need to just set a schedule
22 that's the most fair compromise we can come up with, without
23 plumbing the depths of that question. In order to do that,
24 I don't need any more information from the parties about how
25 long it took to get other cases to trial. It will take a

1 lot of time and effort to dig up those cases, lay the facts
2 side by side, try to figure out if they're similar or
3 different, who needs more time than the other, and all that
4 time could be spent in crafting a schedule that works for
5 you. So let's craft a schedule that works for you and not
6 worry about what the schedule was that worked for AT&T.

7 So to do that, I would like to get a better
8 handle, if we can, on what's actually going to be in dispute
9 in this action, if you know; you may not know yet. But the
10 complaint alleges multiple product markets. The first is a
11 section IV of the complaint, the sale of commercial health
12 insurance to national accounts.

13 One geographic market for that product is alleged
14 to be the 14 states where Anthem sells under a Blue license.
15 That's alleged to be a single relevant geographic market.
16 And another is the entire United States, is alleged to be
17 the relevant geographic market for that particular product,
18 the national accounts.

19 Does either defendant know at this time if they
20 intend to challenge either that characterization of the
21 first relevant product market or the description of the
22 geographic markets for that product?

23 MR. CURRAN: Your Honor, at this time Anthem
24 intends to challenge both of those allegations as to the
25 product market and the relevant geographic market.

1 But if I may add a sentence on two on top of that,
2 I mean, basically our overall defense theory is that there
3 are so many alternatives for customers out there that
4 regardless of how you view the product market and the
5 geographic markets, their post-merger customers will have a
6 multitude of competitive alternatives. And we intend to be
7 able to show Your Honor, prove to Your Honor, through
8 witnesses and documents, that that's the case, and that
9 there is no threat of substantial lessening of competition,
10 no matter how you define the product markets and the
11 geographic markets.

12 THE COURT: Well, would that point towards
13 stipulations on some of those issues that could streamline
14 some of what has to be tried, if that's the -- if it doesn't
15 matter?

16 MR. CURRAN: Yeah, I think --

17 THE COURT: I mean, I'm not asking you right now,
18 but I think we have so much to do and we have so little
19 time, and the point you just raised, if that's the point and
20 that's what I really need to consider and focus on, if
21 there's anything we can do to limit the steps along the way
22 before we get to the point, I want everybody to think really
23 hard and really creatively about that.

24 And I'm asking these questions not to box you in
25 to your position, but to try to find out where there is

1 going to be room to either stipulate or put an issue aside.
2 I'm just trying to find out. All I've read is the complaint.
3 So it's helpful to me to start finding out where your
4 pressure points are.

5 MR. CURRAN: And you're right to be focussing on
6 the complaint. And we stand ready to address case management
7 approaches that can streamline things. For example, I think
8 it's paragraph 8 of the complaint, the government identifies
9 certain specific markets. I think they talk about Los Angeles,
10 New York, and a couple other major metropolitan areas. Why
11 don't we focus on those and have those as the illustrative
12 markets? They picked them. They're the ones who identified
13 those markets in the complaint.

14 We are happy to accept their challenge as to those
15 markets and we can focus on those. And if they've got some
16 other markets they want to raise, fine. But this doesn't
17 have to -- I mean, some of their submissions talk about 90
18 different markets and so forth. Our defense -- we're happy
19 to approach this any way that's necessary. If we have to go
20 through each of the 90 markets, great. We don't think
21 that's necessary. We think we can show Your Honor that
22 there are multiple competitive alternatives in every one of
23 those geographic areas.

24 THE COURT: All right. I heard that. I want to
25 keep walking through the complaint and asking the questions

1 that I have. Obviously, I'm going to give you many
2 opportunities to try to streamline the case and work on the
3 case management issue.

4 Section Roman numeral V of the complaint is a
5 different allegation. We're not talking about national
6 accounts anymore, we're talking about sale of health
7 insurance to large group employers, more than 50 employees,
8 or more than 100 in certain states. So, do the -- and the
9 U.S. alleges that there are 35 metropolitan areas, each of
10 which would be a relevant geographic market. And I think
11 this may be what you were referring to just now. I'm not
12 sure if you were still talking about the national accounts.

13 Do the defendants intend to dispute that that's a
14 relevant product, the sale of health insurance to large
15 group employers?

16 MR. CURRAN: Yes, Your Honor. We think that these
17 demarcations between and among the markets, as alleged in
18 the complaint, are not well-founded as a matter of economics
19 and law.

20 THE COURT: The geographic markets or the product
21 markets?

22 MR. CURRAN: Both. Both.

23 THE COURT: And then with respect to the sale of
24 individual health insurance on the public exchanges, is that
25 a relevant product market, in your view?

1 MR. CURRAN: That one, Your Honor, I think I want
2 to consult with our economists more about those public
3 exchanges under Obamacare.

4 THE COURT: Do you -- can you estimate for me
5 right now, do you know, kind of, what proportion of Anthem
6 or Cigna business is even devoted to the sale of individual
7 policies, particularly in those two states?

8 MR. CURRAN: People on my team know. I know it's
9 a -- a fraction, a smaller percent.

10 MR. PAUL: Smaller.

11 MR. CURRAN: Small.

12 MR. PAUL: Less than 10.

13 MR. CURRAN: Less than 10 percent.

14 THE COURT: And similarly for Cigna? Were you the
15 first people that said small?

16 MR. RULE: Yes, Your Honor. Our participation in
17 the public exchange is small and very limited at this point.
18 We're committed to them, but it is small.

19 THE COURT: Okay. Thank you.

20 MR. CURRAN: Your Honor, not to get ahead of us,
21 but one of the efficiencies and synergies we see from this
22 merger is that Anthem is committed to --

23 THE COURT: All right. This is really not the
24 time to argue the merger.

25 MR. CURRAN: I'm sorry. I thought you wanted our

1 position on the allegations, but -- thank you.

2 THE COURT: No, I didn't ask for your position.
3 I'm just asking if you're going to dispute them or not. I'm
4 not asking for the substantive answer. I'm just trying to
5 figure out how many days we need for trial and where we're
6 going to be able to compress and where we're not. I think
7 it's really important to try to stick to what we're trying
8 to get to now. I'll give you an opportunity to raise, at
9 the end, anything you think I need to hear.

10 MR. CURRAN: Thank you.

11 THE COURT: Mr. Jacobs, with respect to the
12 government, when we get to your second issue, the sale of
13 the health insurance to the large group employers, are we
14 going to need to consider all 35 metropolitan areas
15 separately, or do we consider them in combination?

16 MR. JACOBS: Each of those relevant geographic
17 markets, if we find any competitive harm that is not
18 outweighed by pro competitive benefits would be enough to
19 enjoin the merger.

20 THE COURT: Each alone?

21 MR. JACOBS: Each alone.

22 THE COURT: To enjoin it nationwide?

23 MR. JACOBS: Each alone. And here's how we are,
24 at this point, thinking of presenting the evidence to you:
25 We identified so many because of the scope, we think, of the

1 harm. We do not intend to put on live witnesses in each and
2 every one of these 35 markets. We know that would be
3 impractical. What we are considering doing is, through our
4 economist, presenting you with market share data that will
5 show that in most of these markets the merger is
6 presumptively unlawful. The burden then shifts to Anthem to
7 dispute them or show pro competitive justifications. And
8 then picking probably three feature markets where we present
9 live witnesses to you, both in the market we're talking
10 about now, which is the downstream sale of health insurance
11 to these large group employers, as well as the upstream
12 market in the same 35 markets, the purchase of the
13 contracting for doctor and other health care providers.

14 So, we will, in total, present evidence to you on
15 all of these markets. But in terms of trial time, I can
16 assure you, we've not intended -- we are not intending to
17 present live witnesses for all 35.

18 THE COURT: So is your focus primarily the national
19 accounts?

20 MR. JACOBS: We will present some evidence on the
21 national accounts market. We will present it on the large
22 group market that we're talking about now, as well as the
23 monopsony claims, the upstream purchase of physician
24 services, for example, as well as individual.

25 THE COURT: All right. Well, let me ask you

1 something: If the Court were to find for the government in
2 connection with the national accounts or the large group
3 employers, would that be the end of the case? Would there
4 be any need to go on to the allegations concerning the
5 individual policies sold on the exchanges or the purchasing
6 of health care services?

7 MR. JACOBS: There would not.

8 THE COURT: But conversely, if I found that the
9 merger passes muster, notwithstanding the alleged adverse
10 effect on the competition in the market for the sale of
11 national accounts or the large group accounts, is it the
12 government's position that the impact on the sale of
13 individual policies in certain counties in two states is
14 enough to require enjoining the merger in its entirety?

15 MR. JACOBS: It would, Your Honor. And there's
16 case law to support that in any relevant product and
17 geographic market, if the merger is -- violates section 7,
18 that is enough to enjoin the entire merger. There is also
19 the upstream cases I've mentioned.

20 THE COURT: But if the first two were -- if it
21 passed muster for the first two and you're just talking
22 about this small aspect of their business, in a small
23 portion of the country, is that something that more likely
24 could be resolved through some sorts of agreements or
25 structuring or other -- I guess what I'm trying to find out

1 is are there parts of this case that we can put aside
2 because they're either going to ride with the larger parts
3 of the case or they're not? And if we can't, we can't. But
4 I'm trying to get everybody to think creatively about what
5 are we really fighting about and what's going to fall or not
6 with the larger parts of the case.

7 MR. JACOBS: Unfortunately, I don't think I can.
8 If there was a proposed remedy to the anticompetitive harm
9 for some of these markets that we have proved, then the
10 trial could be on just one or two other markets. We did
11 engage in discussions before filing the complaint. And our
12 remedy policies are not secret, they're on our internet site
13 and have certain criteria. And defendants' proposal to us
14 just didn't meet that criteria.

15 So now with a complaint with all four of these
16 relevant product markets, I have not thought of a way in
17 which we can just hold a trial on one or two of these
18 markets.

19 THE COURT: All right. And I take it that with
20 respect to the market for purchasing health insurance
21 services, that you don't feel that that rises and falls with
22 the first two. If there's enough competitors to make it not
23 anticompetitive for the first two theories, then wouldn't
24 there be enough competitors buying health care services? Or
25 are they just entirely different inquiries?

1 MR. JACOBS: Not necessarily. They are different
2 inquiries because it's a very different market, acquiring
3 health services from doctors and others upstream versus the
4 sale to employers and others downstream.

5 THE COURT: Has there been any change in the status
6 of the case concerning whether there are proposed remedies?

7 MR. JACOBS: There has not.

8 THE COURT: Is the government -- and one thing I
9 think some other judges have done in these cases, is there's
10 an extraordinary amount of work that lawyers have to do to
11 get prepared for trial, to do the discovery and get ready,
12 and that needs to proceed and not be delayed by potential
13 settlement discussions that are going on. But they can be
14 going on on a parallel track. I think Judge Kollar-Kotelly
15 said each team would have its department of war and its
16 department of state.

17 So is that something that the government is
18 willing to undertake in this case? I realize you're going
19 to have to two trials going at the same time. But is there
20 some thought of continuing to think about remedies and think
21 about a negotiated solution while this is going on? Is
22 there a willingness to do that?

23 MR. JACOBS: There's absolutely a willingness.
24 We're always willing to hear any proposals that the
25 defendants have.

1 I think in terms of the case schedule, where this
2 affects things the most, is one of the disputed issues that
3 we highlighted for you in the joint report, whether if they
4 come in -- our concern is if they come in late in the
5 discovery period, even after fact discovery has closed, with
6 a proposed remedy, and we need to evaluate that. We're
7 going to need discovery from the proposed buyer, from the
8 defendants, and potentially even third parties to find out
9 whether that proposed remedy is really going to fix the
10 entire case or portions of the case, so we don't have to try
11 all four of these relevant products.

12 THE COURT: Well, I don't want to do anything in a
13 case management order that would forestall or chill the idea
14 of proposing remedies and trying to work it out. I mean,
15 it's better to have a solution, a business solution that
16 suits the parties and suits the government than having an
17 all-or-nothing ruling from the Court.

18 So, you know, I think we need -- we don't want to
19 bake anything into the management order that says those
20 discussions are going to happen, but they have may have to
21 be coupled with, if late proposals come in, they may have to
22 be coupled with flexibility on the April 30th. I mean, you
23 can't have everything.

24 All right. I have a couple of questions for Mr.
25 Curran, just about the status of things. First of all,

1 what's your thought about having some sort of negotiations
2 proceeding in tandem? And that would not be, by the way,
3 with Judge Levie. He's coming in to do discovery disputes.
4 If there would be a neutral mediator, it would have to be
5 something else.

6 MR. CURRAN: Like the United States, we have
7 changed the name from department of war to department of
8 defense. But we have both the department of defense and a
9 department of state that stand ready for both.

10 Yes. I will say, I share Your Honor's concern
11 that certain considerations and proposals could deter the
12 possibility of working out a problem, because -- I think
13 it's already happening, because the government has made it
14 pretty clear that if we have any proposal to solve any
15 alleged problem, then our whole proposed schedule gets blown
16 up. And particularly taking that together with what Mr.
17 Jacobs said about if a single location in the United States
18 has got a problem, then the whole deal is off? Even if
19 billions of dollars in savings are delivered to Americans
20 elsewhere in the country? I mean, that dynamic is kind of a
21 whipsaw that prevents progress.

22 THE COURT: I think he has a point, when you say
23 that the date that is one 100 percent within the merging
24 party's control is fixed cannot be changed, that imposes
25 demands on the discovery schedule and the trial schedule and

1 you can't say we need to come in the day before trial, or be
2 able to come in at any point with a remedy if we're going to
3 remain inflexible about that. So --

4 MR. CURRAN: May I address that?

5 THE COURT: Sure.

6 MR. CURRAN: First of all, yes, we do take the
7 position that that April 30th date is fixed. And, Your
8 Honor, you're familiar, of course, some transactions are
9 hostile takeovers. This one certainly didn't start out that
10 way. But there are cases where the target is not willing
11 but, nonetheless, its shareholders vote to approve a
12 transaction over the objection of management.

13 The Clayton Act, it's § 15, so it's 15 U.S.C. § 25,
14 contemplates the need for speed here. It's like --

15 THE COURT: I'm not opposed to the need for speed.
16 I'm giving you speed. I'm saying that your insistence on
17 the speed may require backing down on insistence on other
18 things that are inconsistent with the speed.

19 MR. CURRAN: Okay. But, a couple of points:
20 Number one, the merger transaction was signed over a year
21 ago. Right? That's when that April 30th date was set. So
22 this is not gaming it or anything. The Department of
23 Justice could have brought the lawsuit a heck of a lot
24 earlier. They chose the timing of when the lawsuit was
25 brought.

1 And then, maybe more importantly, if we're right,
2 if we're right that this merger can bring efficiencies that
3 will save Americans billions of dollars, then that shouldn't
4 be put at risk due to the possibility of delay. Okay?

5 THE COURT: Are there any issues involving third
6 parties to this action that can independently affect or
7 derail the merger that I need to know about? Such as issues
8 related to Blue Cross Blue Shield. Is there anything other
9 than what's going on between your two parties and what's
10 going on between the United States and you that is something
11 that could affect the status of the schedule of this matter?

12 MR. CURRAN: Of course. It's the Departments of
13 Insurance, and it's the -- particularly the Departments of
14 Insurance in four states; Colorado, Connecticut, Georgia,
15 and New Hampshire. Coincidentally, they're all plaintiffs
16 in this action, those states, and they're all on the phone
17 today.

18 Your Honor thought our estimation of 120 days
19 seemed excessive, and of course Judge Bates said the same
20 thing in a footnote in his order. I thought that, too, when
21 I first heard the 150-day estimate I heard.

22 THE COURT: I have read everything you've given me
23 on this issue. I'm not saying that you're not proposing it
24 in good faith or you don't have reasons to propose it. We
25 can't do it. You cannot have a decision by December 31st

1 because that means if I have to think about all the hundreds
2 of thousands of pages you're going to give me of statements
3 of fact and conclusions of law and I want a month to decide
4 and write my opinion, which ordinarily I don't give myself a
5 deadline at all, then that would mean that all the evidence
6 would have to be in by the end of November, which would mean
7 you wouldn't have any time to do the discovery that you want
8 to do, not to mention what they want to do.

9 So I'm going to try, I'm telling you, I'm aiming
10 towards the end of January. And I think that takes all of
11 your concerns into account as best I can. I can't give you
12 120 days and realistically give everybody the number of days
13 for trial they want, give everybody the amount of discovery
14 they want, manage my own calendar with all the things I have
15 to do, and as Judge Bates pointed out, do a well-reasoned,
16 thoughtful decision, which is what you want and everybody wants.

17 MR. CURRAN: Two comments, Your Honor. Number
18 one, we will -- we stand ready to tamp down our expectations
19 on discovery, as Your Honor said in some earlier comments.
20 We will do -- we will adjust and carry any burden necessary
21 to get a prompt resolution of this.

22 Number two, the states -- we don't want these
23 states to be taking so long to be doing these regulatory
24 reviews. They're on the phone, maybe Your Honor can get
25 them to commit.

1 THE COURT: All right. I wasn't talking about
2 anything that you said has to happen after I rule. So I
3 understand about the state approval. So I was asking if
4 there was anything else out there. There's some discussion
5 about the rules related to membership in Blue Cross that
6 could affect this. And I just wondered if that's an issue
7 or that's not an issue right now?

8 MR. CURRAN: From our perspective, that's not an
9 issue as to the consummation of the merger. And the only
10 concern we have is the one I referred to with the state DOIs.

11 THE COURT: All right. Putting aside the amount
12 of material in the media about the merger, there's plenty on
13 the docket that refers to, you've both been very frank,
14 about the contentious nature of the parties to the merger.
15 I mean, they get along --

16 MR. CURRAN: Not the counsel.

17 THE COURT: The contentious nature of the merger.
18 Is there any reason why the parties shouldn't be required to
19 keep me apprised of the status of those issues as we go
20 along, such as if they initiate negotiations to terminate or
21 unwind or if there are issues concerning compliance with the
22 terms of the agreement among yourselves, that that shouldn't
23 be brought to my attention?

24 MR. CURRAN: No. I think that would be
25 appropriate, for you to request that. But, I will say that

1 there's no right to terminate by either company individually
2 until April 30th.

3 THE COURT: I understand that. But I thought
4 there are -- I mean, you can negotiate whatever you want to
5 negotiate in the meantime. And as I understand it, there
6 are contractual obligations that each side has to comply
7 with that could be deemed a breach by one side or the other.
8 And so I want to know if something happens to change the
9 underlying assumption, which is that we're marching towards
10 April 30th.

11 MR. CURRAN: Certainly, Your Honor. If there were
12 a discussion among the companies to -- an agreement, I
13 guess, to mutually agree to terminate the merger, that would
14 become an item that would have to be publicly disclosed and
15 we would immediately call it to your attention.

16 THE COURT: All right. I mean, I may want to know
17 a little before the public.

18 MR. CURRAN: Okay. That I'd have to maybe consult
19 with some security disclosure experts.

20 THE COURT: Just to get some sense of what's
21 happening.

22 All right. Now I have some questions just about
23 the dueling proposals. Why is there a provision in the
24 proposed schedule -- and one of you can answer this -- that
25 says the parties will file any motions for judgment of the

1 pleadings or motions for summary judgment, and it's injected
2 into the schedule at a point before discovery is even
3 complete. Is anyone actually contemplating a motion for
4 judgment on the pleadings in this case and, if so, on what
5 basis?

6 MR. CURRAN: Well, I guess the government will
7 have to address whether the plaintiffs intend to move for
8 judgment on the pleadings.

9 THE COURT: But I'm asking you. I don't
10 understand the thought process behind a dispositive motion,
11 particularly a motion for summary judgment before discovery
12 has been completed and before the expert reports have been
13 exchanged. Sort of seem to me that we have an issue of
14 disputed material fact here that's going to turn on expert
15 testimony and that's what the whole case is about.

16 MR. CURRAN: Yeah, yeah. The monopsony claim is a
17 little out there, Your Honor. The idea that this merger
18 will drive reimbursement rates so low that it will harm
19 doctors and other health care providers, that claim may well
20 be vulnerable to a motion for summary judgment. That's -- I
21 think that's what we were thinking when we had that idea,
22 the theoretical idea.

23 Now, it may be, Your Honor, that that doesn't make
24 sense, even if it's meritorious, because that's the same 35
25 markets that are being addressed in the other counts.

1 THE COURT: It seems that it's totally tied into
2 it and the effort that would be involved in drafting motions
3 for summary judgment, attaching factual material to back it
4 up, not to mention arguing and, oh, wait, my reading it and
5 deciding it and writing about it at a time when you want to
6 be in this courtroom presenting evidence, I was --

7 MR. CURRAN: I agree. So, Your Honor, to streamline
8 the scheduling, we agree to forgo any such motions in order
9 to move the case along.

10 THE COURT: When this was in your schedule were
11 you thinking about defense motions or were you thinking
12 about government motions?

13 MR. JACOBS: We were really thinking about defense
14 motions. And, Your Honor, if there are any pretrial motions
15 that need to be filed after discovery is over, there is an
16 entry later in both schedules for pretrial motions.

17 THE COURT: Motions in limine.

18 MR. JACOBS: Motions in limine, Daubert motions,
19 other motions.

20 THE COURT: When you say Daubert motions, I think
21 everybody told Judge Bates, and certainly since I think all
22 we're talking about here are economists, are you actually
23 anticipating Daubert hearings or Daubert motions in this case?

24 MR. JACOBS: We hope there will not be a need for
25 that. I believe we will probably have an efficiencies

1 expert, as well as an economist.

2 THE COURT: All right. What is the defense's
3 realistic thought about whether we will be having Daubert
4 hearings?

5 MR. CURRAN: I think it will be highly unlikely.
6 Again, the only reason we preserve the idea is we haven't
7 seen the expert reports. If, you know, somebody comes
8 forward with a palm reading expertise, we may want to raise
9 this. I don't mean this quite so facetiously. Sometimes
10 even economists start opining on things beyond their area of
11 expertise. But in a bench trial we can just raise that with
12 Your Honor.

13 THE COURT: That would seem to be more objections
14 during -- even motions in limine, as opposed to a Daubert
15 issue.

16 MR. CURRAN: We're willing to forgo that or
17 conflate it into the trial.

18 THE COURT: At least I understand how much time I
19 need to provide for it or whether it's a realistic thing
20 that needs to be baked into the trial. That's what I'm
21 trying to figure out, what am I really going to be putting
22 on my list of things to do? My general approach, my plan
23 would be to very quickly tell you these are my trial dates,
24 these are the dates that I expect certain things provided to
25 me; the expert reports, the deposition designations,

1 etcetera, this is when I want my findings of facts and
2 conclusions of law, and then to say, with respect to the
3 rest of the case management order, I will await the
4 recommendations of the special master. And you can figure
5 out within there when you want to exchange your expert
6 reports, when you want to have your depositions. I don't
7 need to micromanage that. I just need you all to be here on
8 the day of trial, ready to go. And so I think -- I don't
9 plan to have a lot of detail in the next thing I plan to issue.

10 What is the current expectation on the question of
11 whether there's going to be a motion for preliminary
12 injunction? The defendants seem to indicate that it was
13 unnecessary. And given the expedited schedule and the idea
14 that merging PIs with the merits, I'm just not exactly sure
15 what kind of motion --

16 MR. CURRAN: Yeah. We cannot close until all the
17 regulatory restraints are gone. So I think it's academic to
18 even talk about preliminary injunction. So I propose we not
19 talk about it and we not address it; it's wholly unnecessary.
20 And if such a motion were to be brought, that probably would
21 be our number one defense, that an injunction is not
22 necessary because there's no threat, no imminent threat of
23 closing. These companies, Your Honor, are not going to, in
24 the dead of night, go out and close this deal. They can't.

25 THE COURT: All right. What's the government's

1 position on whether we actually have to plan for motions for
2 preliminary injunction in this case management order?

3 MR. FITZGERALD: Good morning, Your Honor. Scott
4 Fitzgerald for the United States.

5 The situation we want to avoid is one where the
6 parties close before you're able to make a decision on the
7 merits. We think if they're right, that there's no way for
8 them to close, they should be willing to agree to a
9 provision that says they won't. The fact they're not
10 willing to do that creates some uncertainty, and that's why
11 we've asked the Court to enter an order making sure that
12 doesn't happen.

13 THE COURT: This does seem to be a little bit of
14 semantics going on here. As I understand it, they're saying
15 they can't go and seek state regulatory approval until I've
16 ruled, and they can't merge until they've got the regulatory
17 approval. But it seems to me that there ought to be a
18 sentence or two that both sides can live with that sums that up.

19 Does the government have an idea at this point how
20 many experts it is intending to call?

21 MR. JACOBS: Your Honor, right now we think
22 there's the two I mentioned before, an expert economist and
23 in our rebuttal case an efficiencies expert.

24 THE COURT: All right. Why, if this expert is
25 important to your case, are you saving it for rebuttal?

1 MR. JACOBS: Because he or she would only respond
2 to the defendants' efficiencies defense, which would be put
3 on in the defense case-in-chief.

4 THE COURT: Does the defense have some idea at
5 this point what we're talking about in terms of numbers of
6 experts?

7 MR. CURRAN: Ballpark, three or four. That
8 probably includes economists, as well as, perhaps, an
9 industry expert.

10 THE COURT: All right. The government estimates
11 that it needs three weeks to try its case. And I take it
12 you mean 15 trial days, and that doesn't include a rebuttal
13 case, is that correct?

14 MR. JACOBS: No, Your Honor. We were including
15 our rebuttal case in that.

16 THE COURT: Okay. And was that estimate, assuming
17 that your witnesses would briefly give their direct
18 testimony, to be followed by cross, or was that only
19 assuming direct provided to me in writing first?

20 MR. JACOBS: That assumed that some portion of our
21 direct testimony would be put in on paper. We were hoping
22 that as trial came closer, we would have some flexibility on
23 determining which witnesses would be most efficiently
24 presented to you on paper versus through live testimony.

25 THE COURT: All right. I mean, I generally think

1 it may be more helpful for comprehension and for the cross-
2 examination to have the witness summarize what -- at least
3 give some of their direct testimony in the courtroom and
4 then be cross-examined, so I've got it all at the same time.
5 But I was also going to ask for the expert reports well
6 prior to the trial. I was going to ask for the deposition
7 designations well prior to the trial, and some outlines of
8 what your factual presentation is likely to include, which
9 is slightly different than written direct testimony. And I
10 don't -- but I think either way, I'm probably going to come
11 out the same in terms of what the number of trial days are
12 and then we'll make it fit.

13 The defendant, I guess, estimated six to eight
14 days, and that was for its case-in-chief. You made that
15 pretty clear in the pleadings. So, ultimately, if I decide
16 that the government needs 15 or it needs 10 or it needs 12,
17 I'm not inclined to make sure that each side gets equal
18 number of days. I think each side needs to have an equal
19 opportunity to put on their case. And if your case is
20 shorter, then you may get fewer days. So I just want to let
21 you know that at the outset.

22 I expect that my order will involve something less
23 than the 22 days or so of hearing testimony that's being
24 requested. What is the parties' position -- we've got
25 Thanksgiving, we've got a week in early December where I'm

1 not going to be able to hear testimony -- about consecutive
2 days versus breaking it up? Do you have a point of view
3 about that?

4 MR. CURRAN: No. Again, our paramount consideration
5 is getting the thing done. Breaking it up is perfectly
6 fine. We know from the public calendar, Your Honor at least
7 has scheduled a trial, although that might be before --
8 that's in November, I guess, a criminal trial.

9 In short, breaking it up is perfectly fine. We'll
10 adjust to your schedule.

11 THE COURT: All right. Okay. All right. Does
12 the government have any position about whether we need to
13 run these all consecutive or whether we can break it up just
14 to get -- I would like to get as much as early as possible.
15 I think it's -- it may be easier to retain it having it all
16 back to back, but it may be helpful for everybody to have an
17 occasional day to catch their breath and to structure their
18 testimony for the next day. I've been in an eight-week
19 trial and I know what that's like.

20 MR. JACOBS: Plaintiffs agree that the trial does
21 not have to be on consecutive trial dates. I do think what
22 you're currently thinking about the timing of trial, that
23 that does raise some issues. I know you've read all of our
24 submissions on this and you've read our justification for
25 our proposed start of trial in early January. I was

1 wondering if I could just supplement that argument with one
2 thing that did not make it in the papers because it just
3 happened earlier on Wednesday, and it affects this issue
4 about the holidays.

5 On Wednesday, as you know, Judge Bates set trial
6 in *Aetna* for December 5, 13 trial days. And he asked lead
7 counsel for the United States, is there any problem with
8 both cases being tried at once? And as the follow-up
9 question from Judge Bates indicated, that was clearly a
10 resource issue. And Mr. Conrath, representing the United
11 States, said there is no issue. And there's not, in terms
12 of resources.

13 I do think that there is an argument that our
14 trial should start later than the *Aetna* case for just a few
15 reasons. One, that is a simpler case than ours. There they
16 have two relevant product markets, here we have four. And
17 in your questions to Mr. Curran, it's very clear that they
18 plan on contesting everything and having three to four
19 experts. So, there doesn't seem to be any narrowing of issues.

20 We do expect that there will be at least some
21 witnesses who will have to testify at both trials. And
22 there may be some inconvenience there in terms of having
23 them prepare for and give testimony in two different
24 courtrooms. And finally, because our trial is more complex,
25 I would ask for a longer trial period. And if we do start

1 in mid to late November or early December, that really does
2 get us into the holidays.

3 I would just ask you to consider those factors in
4 considering the start of the trial date, in light of what
5 the Court has said about how fixed this April 30 date is.

6 THE COURT: Well, if we have anything close to the
7 number of trial days you need and the number of trial days
8 they need, even assuming Mr. Curran could be in two places
9 at once, this trial is going to be longer than Judge Bates'
10 trial. So if we, basically, fill January with the trial and
11 with the submission to me of the findings of fact and
12 conclusions of law, I don't get to start even writing my
13 opinion until February.

14 Let's assume that I can't do it in a week. We're
15 not -- this is not going to get resolved until the end of
16 February, according to your schedule, which seems to be --
17 significantly impose upon the schedule that I'm being given
18 as -- I'm being told that what I'm doing is already
19 impossible. It makes it even more impossible. And then you
20 do have the issues of counsel's unavailability. And I think
21 the parties are entitled to have the lawyers that they want
22 to try the case.

23 I don't see that we can do this whole thing in
24 January. What I am doing is trying to figure out, is there
25 some portion of it we can do in January and thus, you know,

1 keep pushing down and down into December, out of November,
2 to give you the maximum amount of time for discovery.

3 I regret the impact this is going to have on all
4 of your holidays, and surely all of your associates'
5 holidays, and your lawyers' holidays, but I just don't see
6 any way around that.

7 MR. JACOBS: I would just conclude by saying that
8 given the Court's view on how hard and fast April 30 is,
9 that you just decide to start the trial as late as you think
10 is practicable.

11 THE COURT: That is what I'm going to try to do.
12 And, obviously -- and I guess, Mr. Rule, this is to you in
13 particular -- if there comes a time when there's flexibility
14 as to April 30, everyone should let me know.

15 It is, as I said at the beginning, a bizarre
16 situation that we are doing all of this for the benefit of a
17 merger that may not be desired. It's a lot of -- we're
18 turning a lot of people upside down and doing an
19 extraordinary amount of work, even the third parties are
20 going to have to produce on a very short schedule. And so,
21 if Cigna becomes more enamored of the merger, then maybe we
22 have more time.

23 MR. RULE: Your Honor, I appreciate that and
24 understand it. I was going to get up anyway and tell you
25 that I think it's important from Cigna's perspective to

1 correct the record. Cigna has said that it's committed to
2 this transaction. It is committed to this transaction. We
3 are deferring to Anthem, subject to reserving our right to
4 speak for Cigna and to protect Cigna's interest because
5 that's the custom; they're the buyer and they've contracted
6 for the right to lead strategy.

7 But it is true that there is -- there are press
8 stories about contention between the parties. But, it's
9 also true that Cigna has made clear, from the board all the
10 way down, including senior management, that they are
11 committed to this agreement and that they are committed to
12 their obligation to litigate this case. And they will do so.

13 We can't say what will happen on April 30th. You
14 know, just like I assume for Anthem, that decision will be a
15 board decision and it will be subject to the facts and
16 circumstances that occur then.

17 But, I just want to make it clear that the company
18 is committed to this transaction. You know, if anything
19 changes, as Your Honor requested and as Mr. Curran agreed,
20 certainly Cigna agrees that we will inform Your Honor of any
21 changes. But as of now, there should be no doubt that we're
22 committed to this agreement and we're committed to litigating
23 to defend the agreement.

24 THE COURT: Every document that's been submitted
25 to me on the question of scheduling has said you can't

1 assume, notwithstanding the fact that the merger partners
2 can mutually agree to extend April 30th, that there is any
3 wiggle room in April 30th. And what you're saying to me is
4 slightly different than that and it puts a slightly
5 different color on it, and it may not move the whole trial
6 to February, I don't think I'm going to give that to the
7 defendants -- I mean, to the plaintiffs.

8 But, I need to know if we have some room to
9 maneuver here or we don't? Everybody needs to know. And it
10 affects the discovery that you're going to be able to take,
11 it affects everything.

12 MR. RULE: Your Honor, that's fair. I would say
13 that the merger agreement speaks for itself. Cigna is
14 committed to that agreement and to its responsibilities
15 under that agreement. Under the agreement, either party can
16 extend the deadline at January 31st, assuming there are no
17 other breaches, if there -- if one party wants to because of
18 pending regulatory approval. On April 30th either party can
19 withdraw.

20 So it requires both parties to agree to it. And
21 all I'm saying is that I can't tell you, I can't make a
22 representation, I can't speculate as to what Cigna's board
23 will do on April 30th, because there's a lot of time, a lot
24 of water under the bridge.

25 It's Anthem's position that the agreement does say

1 that. It does say that both parties have to agree to extend
2 it. I'm not in a position to tell Your Honor what the board
3 of Cigna will do on that date, and so as I --

4 THE COURT: Is it not your position that the
5 agreement says that? Does the agreement say something --

6 MR. RULE: No. The agreement definitely says that
7 on April 30th either party can withdraw. I just can't
8 represent that -- what Cigna's board would do on April 30th,
9 because I don't know what the circumstances are. But it
10 would be their decision. They certainly haven't opined at
11 this point.

12 As I understand Anthem's position, it is that
13 since they can't assume or guarantee that the agreement will
14 be extended on April 30th because it requires an agreement
15 of both parties to do that, that's why -- as I understand
16 it, they believe that April 30th is a real deadline that
17 Your Honor ought to take into account. You know, from that
18 perspective, that's a fair assertion.

19 But it does not and should not be taken as an
20 indication that Cigna is not committed to this agreement or
21 not committed to litigating to defend it. And the extent to
22 which over time we're differing to them, we're doing that
23 because by custom the buyer tends to take the lead, and also
24 we've got a contract where they reserve the right to lead
25 the strategy. And so in order to try to expedite this, you

1 know, we certainly want to cooperate with that.

2 But I just want Your Honor to understand the
3 agreement does say what it says. But, it should be
4 absolutely clear that Cigna is committed to this agreement
5 and committed to its obligations under the agreement.

6 THE COURT: That may be absolutely clear. You've
7 made some other things absolutely not so clear. But, I
8 appreciate what you're trying to tell me.

9 And it looks like Mr. Curran now wants to say
10 something.

11 MR. CURRAN: Yes. Thank you, Your Honor. Just a
12 couple of observations, maybe, to put Mr. Rule's comments in
13 perspective. You have the merger agreement, and maybe
14 you've had an opportunity to look at it. The \$1.8 billion
15 breakup fee, which is payable to Cigna, is contingent on
16 Cigna's compliance with the merger agreement, including
17 litigating this case, subject to our strategic direction.

18 So of course Mr. Rule has to say that Cigna is
19 committed to the agreement and that it's committed to
20 litigating the matter, otherwise the \$1.8 billion is at
21 risk. Your Honor, you've seen the press. I can confirm
22 that the relations --

23 THE COURT: I'm not going to make -- I have enough
24 materials on the docket, I'm not going to make any decisions
25 based on what I read in the press. I think that would be

1 completely inappropriate. The discussion of the willingness
2 of the parties to extend the time is on the record in this
3 case. You've put it in, the government put it in, everybody
4 put it in.

5 MR. CURRAN: Right.

6 THE COURT: I don't want the penalty to be because
7 I didn't do what I could do in a schedule to make this work.
8 But I also don't want to put unnecessary and extraordinary
9 pressures on everyone to try a major case and handle
10 enormous amounts of discovery in a truncated schedule, if
11 the parties have within their control the ability to give us
12 more time.

13 MR. CURRAN: If we had that ability, Your Honor,
14 we would exercise it. We don't want to rush through this.
15 It's thrust upon us. That's the situation. And it's not
16 just Anthem's desire to get the deal closed; I already
17 referred to the efficiencies and the consumer savings.
18 There are also --

19 THE COURT: I don't think --

20 MR. CURRAN: I know you don't want to hear that
21 but --

22 THE COURT: This isn't a PR opportunity. This is
23 a scheduling conference, notwithstanding the fact --

24 MR. CURRAN: This Court and the D.C. Circuit has
25 recognized that these merger cases have a lot of stakeholders

1 who have interests at risk; employees, suppliers,
2 shareholders, various others. There are a 100,000 employees
3 of the two companies combined.

4 THE COURT: And the government would say all that
5 is at risk the other way. I understand there is a lot at
6 stake. That's why I'm trying to come up with the right
7 schedule.

8 MR. CURRAN: Okay. My whole point here, and I'll
9 wrap it up, is that when things are in limbo, when a major
10 merger or transformative transaction like this is in limbo,
11 a lot of stakeholders suffer and that's why deals fall
12 apart, when there's too much delay.

13 THE COURT: We are going to have a schedule and
14 everybody is going to know what it is very shortly and then
15 we'll work with it.

16 MR. CURRAN: Thank you.

17 THE COURT: And I'm not going to change the
18 schedule unless the parties are committed, mutually
19 committed to changing the schedule. Once I enter it, that's
20 going to be it.

21 Yes.

22 MR. JACOBS: Your Honor, just briefly. On the
23 point that you raised, you know, you don't want to set a
24 schedule that, I think, kills the deal, essentially is what
25 you were saying. In looking at other cases, courts have

1 expedited discovery where the deal may be threatened by
2 external factors. In the recent Staples case that happened.

3 THE COURT: Look, you said that in your pleadings
4 and I asked that question. I understand that. You know
5 what I'm faced with, I've articulated that very point. But
6 you've heard everything I've been told. I don't see how I
7 can, consistent with everything that's in the record, have a
8 trial that results in a decision at the end of February.

9 MR. JACOBS: I think, given what you heard from
10 Mr. Rule, who represents Cigna, that you can. Because I
11 think the April 30 deadline -- and what will happen then, if
12 this trial is litigated and Anthem wins, if they're able to
13 take that victory in hand, the state insurance commissions
14 who, you know, look at a variety of issues, but in part they
15 look at competitive issues, if April 30 comes and they go to
16 Cigna and they say we need just a little more time to get a
17 couple more states to check the boxes, what will happen?
18 Our point has always been we don't know. And you shouldn't
19 rush this case to trial on an assumption that Cigna will say
20 no on April 30.

21 When you asked that question of Mr. Rule right
22 now, he said I don't know what will happen. That's our only
23 point, that Mr. Rule's statement to you supports our
24 argument here.

25 THE COURT: I understand that and I think we're

1 really back to where we started, which is the schedule that
2 Anthem asked me to impose is too fast and -- but I don't
3 know that I can make it as expansive as what you're asking
4 for now, notwithstanding the fact that it's not expansive by
5 any normal definition of that term.

6 All right. Mr. Rule?

7 MR. RULE: I just want to make it clear that I'm
8 not --

9 THE COURT: Every time you make something clear,
10 it gets less clear, you understand.

11 MR. RULE: I just want to make it clear that we --
12 I can't make any representation about what will happen on
13 April 30th. That's -- that is what I'm clearly saying. The
14 agreement, though, does give either side the ability to
15 walk, no matter, you know, what's going on. And I think
16 both parties will undoubtedly look at the facts and
17 circumstances at that point and make a decision.

18 But I certainly -- we would agree and defer to the
19 points that Anthem has made. Apart from the question of
20 just trying to speculate what's going to happen and what
21 parties are going to do on April 30th, that there are a lot
22 of reasons, both consistent with how this District has
23 handled merger cases, what the parties are committed to
24 doing, and I think with Your Honor's guidance this morning,
25 that we can in fact litigate this case in a fashion that,

1 you know, reaches Your Honor's position of having a
2 decision, certainly before February.

3 And so, we are very much committed to that and
4 Your Honor should have no doubt that we are committed to
5 trying to get this done as quickly as possible, consistent
6 with everything you said here this morning.

7 THE COURT: Well, I think given Mr. Curran's
8 statement this morning, while on the one hand he said we
9 intend to -- we dispute the characterization of the relevant
10 product market, we dispute all the definitions of the
11 geographic markets, he also said if you assume that those
12 are correct, there will be so much competition in the market
13 anyway, that this will be beneficial price-wise for the
14 population of the United States and there will be plenty of
15 competition and this merger should go forward. If the
16 defendants can prove that this merger should go forward,
17 given their definition of the product market and the
18 geographic market, then you need to think about if we can
19 take any of those issues off the table and make them part of
20 a stipulation and try the case that you have stood up here
21 and tried to try since you got here. And I think then we
22 may get it done sooner and in a shorter period of time and
23 we may actually get it done in the period that you've got.

24 MR. RULE: Understood, Your Honor. I certainly
25 want to say, on behalf of Cigna, too, that we agree with

1 Anthem, that there is plenty of competition in this market
2 and that this merger is not anticompetitive and I believe we
3 can show it and I think we can show it in the schedule that
4 Mr. Curran has presented to the Court.

5 THE COURT: All right. I look forward to hearing
6 more from everyone, and I know I will. Thank you very much
7 for your time this morning.

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CERTIFICATE OF OFFICIAL COURT REPORTER

I, JANICE DICKMAN, do hereby certify that the above and foregoing constitutes a true and accurate transcript of my stenograph notes and is a full, true and complete transcript of the proceedings to the best of my ability.

Dated this 12th day of August, 2016.

/s/ _____

Janice E. Dickman, CRR, RMR
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