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 SUPPLEMENTAL CONCLUSIONS OF LAW
RELATING TO THE JANUARY 23, 2017 OPINION IN *UNITED STATES V. AETNA*

WHITE & CASE LLP
701 Thirteenth Street, NW
Washington, DC 20005

1155 Avenue of the Americas
New York, New York 10036

ARNOLD & PORTER KAYE SCHOLER
601 Massachusetts Avenue, NW
Washington, DC 20001

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Counsel for Anthem, Inc.

I. *AETNA* CONFIRMS THAT THE MEDICAL COST SAVINGS HERE SHOULD BE CREDITED AND WEIGHED AGAINST ANY POSSIBLE ANTICOMPETITIVE HARM

1. *United States v. Aetna, Inc.* confirms that efficiencies should be taken into account by the Court, and that the procompetitive effects generated by the efficiencies should be weighed against any possible anticompetitive effects. *See* No. 16-cv-01494, slip op. at 148 (D.D.C. Jan. 23, 2017) (assessment of efficiencies involves determining whether cognizable efficiencies "might diminish or outweigh" any "competitive harm"). Moreover, *Aetna* emphatically establishes that the efficiencies analysis focuses on effects on customers, making pass-through a critical piece of the analysis. *Id.* at 147 ("[T]he companies must 'demonstrate that their claimed efficiencies would benefit customers[.]'"). The decision therefore further supports denying the injunction here based on Dr. Israel's analysis that calculated $2.4 billion in medical cost savings that will be enjoyed almost fully by the combined firm's corporate customers, and Dr. Israel's findings that those efficiencies will swamp any possible anticompetitive effects. *See* Anthem Phase I FOF ¶¶ 248, 252, 365-69; Anthem Phase II FOF ¶¶ 338, 355-57.

2. *Aetna* held that the relevant question is whether efficiencies will (1) pass through (2) to consumers in the markets at issue. *Id.* at 147, 150, 154. Although the Court held that Aetna failed to satisfy these two requirements, here they are largely uncontested. Aetna had conceded that pass-through would be only 42%. *Id.* at 150. In contrast, Dr. Israel presented unrebutted empirical analyses demonstrating that $2.4 billion in medical cost savings will be passed through at a rate of 98% to self-insured customers (constituting the large majority of customers at issue), and at a rate of 86% to fully-insured customers. Anthem Phase II FOF ¶ 355. This disparity in pass-through is not surprising because *Aetna* involved sales of fully-insured products to individuals with no bargaining leverage (*Aetna* slip op. at 5, 7-8); here, sales

are to sophisticated companies that predominantly self-insure. *See* Anthem Phase I FOF ¶¶ 55, 172; Israel Tr. 4363:6-12.

3. Aetna's failure to attribute the efficiencies to the markets at issue also stands in stark contrast to this case, in which Dr. Israel tailored his efficiencies calculations and merger simulations to the markets at issue. *See* Anthem Phase I FOF ¶ 254 (best-of-best efficiencies calculated only from providers serving both Anthem and Cigna patients); *id.* ¶¶ 367-69 (Dr. Israel modeled the merger effects in both geographic markets at issue in Phase I); Anthem Phase II FOF ¶¶ 338, 356 (Dr. Israel modeled the merger effects in the states at issue in Phase II).

4. *Aetna* also suggested that efficiencies can be verified by an expert's robust analysis. *Aetna* Slip op. at 153. But Aetna's expert adopted the integration team's estimate "without much analysis." *Id.* Here, Dr. Israel conducted his own robust analysis of medical cost savings by analyzing two billion claims, and utilizing a conservative implementation of an economic model of bargaining. Anthem Phase I FOF ¶¶ 252-54, 277; Anthem Phase II FOF ¶¶ 336-37. The *Aetna* Court did not suggest that the medical cost savings there — had they been verified — would nevertheless fail because of a lack of merger-specificity. This is consistent with Dr. Israel's conclusion (and Dr. Dranove's concession) that the efficiencies here are merger-specific because they result from combining Anthem's lower rates with Cigna's customer-facing offerings. Anthem Phase II FOF ¶¶ 14, 348-50.

5. In *Aetna*, the Court could not conclude that the efficiencies were verifiable where plaintiffs raised concerns about the reliability of defendants' "best of two contracts" efficiencies estimates that defendants' experts failed to "wrestle with" through robust analysis. *Aetna* Slip op. at 152-53. But here, Dr. Israel's analysis overcomes any similar concerns. For example, the *Aetna* Court was concerned that defendants identified discount differentials only at a particular

point in time. *Id.* at 151-52. Here, by contrast, Dr. Israel's best-of-best calculation incorporated one year of claims data, not simply a snapshot of discount differentials at a single point in time. Israel Tr. 1852:19-1854:1. The discount differential rates Dr. Israel calculated are also corroborated by other evidence of similar discount differentials, such as consultant analyses. Anthem Phase I FOF ¶ 258 (discount differentials consistent with industry data). Additionally, *Aetna*'s recognition that not all providers will readily accept lower rates does not undermine Dr. Israel's efficiencies calculations, as his economic model accounts for provider pushback. Anthem Phase II FOF ¶¶ 336-37. Furthermore, there is no indication in *Aetna* that the parties could invoke affiliate clauses to automatically switch provider contracts, as is an option for many contracts here. *See* Anthem Phase II FOF ¶ 343.

6. Finally, Dr. Israel is the only expert in this case that weighed efficiency-benefits versus possible harms, as mandated by the *Aetna* Court. *See Aetna* Slip op. at 148, 155. Dr. Israel's merger simulations show that the efficiencies outweigh potential harms in all markets at issue, and that the merger remains procompetitive even when only one-third of the efficiencies calculated by Dr. Israel are credited. Anthem Phase I FOF ¶¶ 365-69, 372; Anthem Phase II FOF ¶¶ 356-57; *see also* Anthem Phase II FOF ¶ 361 (contrary to Plaintiffs' naked assertions in Pls.' Phase II FOF Appendix B, Dr. Israel's empirical analysis shows that the merger is procompetitive even absent efficiencies). Dr. Dranove did not do the required balancing. Anthem Phase II FOF ¶ 358.

II. *AETNA* CONFIRMS THAT HUMANA IS AN EXISTING COMPETITOR OR RAPID ENTRANT FOR NATIONAL ACCOUNTS

7. *Aetna* acknowledged that Humana is a nationwide competitor in health insurance generally, or at least a rapid entrant. The Court stated that Humana is a "large health insurance compan[y] with [a] national footprint[]," and is "regarded by industry participants as [a]

member[] of the 'Big 5' health insurers . . . ." *Aetna* Slip op. at 3; *see, e.g.*, Anthem's Phase I FOF ¶¶ 94-95; Anthem's Phase II FOF ¶¶ 243, 260, 269, 272, 299.

8. This finding contradicts Plaintiffs' arguments in this case that Humana is not a true "national" competitor, and that there is no threat of Humana's entry. *See, e.g.*, Pls.' Phase I FOF ¶ 301 (arguing that Humana is "not a national player with a network breadth and depth to fall into the national category"). Indeed, as a plaintiff in *Aetna*, the DOJ conceded that Humana "has a broad national footprint and competes in every state and the District of Columbia." Pls.' Proposed FOF and COL at ¶ 2, *United States v. Aetna, Inc.*, No. 16-cv-01494 (D.D.C. Jan. 23, 2017), ECF No. 277-1. As a party here, the DOJ should not be allowed to retract that admission. *See Foothill Hosp.-Morris L. Johnston Mem. v. Leavitt*, 558 F. Supp. 2d 1, 8 n.12 (D.D.C. 2008) (finding it "incredulous" that defendant Secretary of the U.S. Department of Health and Human Services attempted to "disavow" statements it made in other litigations as they "constitute admissions of the defendant," citing to Fed. R. Evid. 801(d)(2)).

9. As Anthem stated in its Phase I Findings of Fact, Humana currently serves "national accounts" and will be building a twenty-two state network of 25,000 providers across the Northeast in about one year without hiring additional employees. Anthem's Phase I FOF ¶¶ 94-95. Thus, after the Anthem-Cigna merger, four competitors with nationwide reach will remain, in addition to the host of other competitors and solutions established at trial. *See* Anthem Phase I FOF § III; Anthem Phase II FOF ¶¶ 33-34.

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Respectfully submitted,

/s/ *Christopher M. Curran*
Christopher M. Curran (D.C. Bar No. 408561)
J. Mark Gidley (D.C. Bar No. 417280)
George L. Paul (D.C. Bar No. 440957)

Matthew S. Leddicotte (D.C. Bar. No. 487612)
WHITE & CASE LLP
701 Thirteenth Street, NW
Washington, DC 20005
Tel: +1 202 626 3600
Fax: +1 202 639 9355
ccurran@whitecase.com
mgidley@whitecase.com
gpaul@whitecase.com
mleddicotte@whitecase.com

Robert A. Milne, *pro hac vice*
Jack E. Pace III, *pro hac vice*
Martin M. Toto, *pro hac vice*
Michael E. Hamburger, *pro hac vice*
WHITE & CASE LLP
1155 Avenue of the Americas
New York, NY 20036
Tel: +1 212 819 8200
Fax: +1 212 354 8113
rmilne@whitecase.com
jpace@whitecase.com
mtoto@whitecase.com
mhamburger@whitecase.com

Heather M. Burke, *pro hac vice*
WHITE & CASE LLP
3000 El Camino Real
5 Palo Alto Sq., 9th Floor
Palo Alto, CA 94306
Tel: +1 (650) 213 0300
Fax: +1 (650) 213 8158
hburke@whitecase.com

Richard L. Rosen
Wilson D. Mudge
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
Telephone: +1 202 942 5072
Facsimile: +1 202 942 5999
richard.rosen@apks.com
wilson.mudge@apks.com

Counsel for Anthem, Inc