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 PRETRIAL BRIEF

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November 10, 2016

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Anthem hereby submits this Pretrial Brief "setting forth the applicable legal standard to be applied and [Anthem's] legal theories." Order at 3, Oct. 4, 2016, ECF No. 178. Given the bifurcated trial, this Brief will focus largely on the first phase of the trial, relating to alleged "national accounts."

INTRODUCTION

The U.S. Department of Justice's Antitrust Division and a handful of State AGs seek to enjoin a merger they acknowledge is likely to reduce healthcare costs for millions of working Americans. The Complaint affirmatively alleges that the proposed merger is likely to reduce the "reimbursement rates" paid to healthcare providers. *See, e.g.*, Compl. ¶¶ 64 (alleging merger will "likely lead to lower reimbursement rates"); 75 (alleging "Anthem plans to lower reimbursement rates by applying its generally lower rates to the Cigna membership it acquires"). Furthermore, the Complaint acknowledges that these lower "reimbursement rates" will be passed on directly to employers because the overwhelming majority of large employers — those at issue here — contract to bear the healthcare costs of their employees: "Most large employers buy self-insured plans (also known as administrative-services-only or 'ASO' contracts), under which the employer retains most of the risk of its employees' healthcare costs and pays the insurer an administrative fee for access to the insurer's network of doctors and hospitals and for processing medical claims." *Id.* ¶ 16.

The economic expert for the Antitrust Division and State AGs similarly opines that "the merger will result in lower provider rates" and similarly acknowledges that these lower provider rates directly benefit employers self-insuring under ASO contracts. Dranove Expert Report ¶¶ 328, 28-29, 55, 101. And that economic expert also acknowledges that everyday Americans are the ultimate beneficiaries of the lower "reimbursement rates" because the employers are

serving as "*de facto* purchasing agents for their employees and employees' dependents." *Id.* ¶ 24.

Thus, this is an extraordinary action in which federal and state competition authorities are, according to their own allegations, seeking to deprive American consumers of lower healthcare costs. Despite the extraordinary nature of the allegations, the Complaint — and the evidence — must be evaluated under conventional legal standards. Those standards are set forth in the leading case of *United States v. Baker Hughes, Inc.*, 908 F.2d 981 (D.C. Cir. 1990):

> The basic outline of a section 7 horizontal acquisition case is familiar. By showing that a transaction will lead to undue concentration in the market for a particular product in a particular geographic area, the government establishes a presumption that the transaction will substantially lessen competition. *See United States v. Citizens & Southern Nat'l Bank*, 422 U.S. 86, 120-22, 45 L. Ed. 2d 41, 95 S. Ct. 2099 (1975); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 363, 10 L. Ed. 2d 915, 83 S. Ct. 1715 (1963). The burden of producing evidence to rebut this presumption then shifts to the defendant. *See, e.g., United States v. Marine Bancorporation*, 418 U.S. 602, 631, 41 L. Ed. 2d 978, 94 S. Ct. 2856 (1974); *United States v. General Dynamics Corp.*, 415 U.S. 486, 496-504, 39 L. Ed 2d 530, 94 S. Ct. 1186 (1974); *Philadelphia Bank*, 374 U.S. at 363. If the defendant successfully rebuts the presumption, the burden of producing additional evidence of anticompetitive effect shifts to the government, and merges with the ultimate burden of persuasion, which remains with the government at all times. *See Kaiser Aluminum & Chem. Corp. v. FTC*, 652 F.2d 1324, 1340 & n. 12 (7th Cir. 1981).

908 F.2d at 982-83 (footnote omitted). In *Baker Hughes* itself, the District of Columbia Circuit applied this burden-shifting framework in affirming an order by this Court denying a request by the Antitrust Division to enjoin a merger.

Beyond its articulation and application of the burden-shifting framework under Section 7, *Baker Hughes* has particular relevance to this action. *Baker Hughes* emphatically held that modern merger analysis — tracing back at least to *United States v. General Dynamics Corp.*, 415

U.S. 486 (1974) — requires a "totality-of-the-circumstances approach," an "overall assessment of future competitiveness," and a "comprehensive inquiry," all aimed at determining the probable effects of the proposed merger. *Baker Hughes*, 908 F.2d at 984, 986, 988. This broad inquiry requires consideration of a "variety of factors," including the prospect of efficiencies from the merger. *Id.* at 985 (citing, among other authorities, U.S. Dep't of Justice and Fed. Trade Comm'n, Merger Guidelines §§ 3.21-3.5 (1984)); *see also* U.S. Dep't of Justice and Fed. Trade Comm'n, Horizontal Merger Guidelines § 10 (2010) ("Guidelines"). In *Baker Hughes*, the District of Columbia Circuit, in affirming, endorsed this Court's findings that the government's prima facie case had "flawed underpinnings" because "the government's statistics were misleading"; that the "sophistication" and "bargaining power" of the merging parties' customers would arrest any potential anticompetitive effects; and that competitors' entry, or even the *threat* of entry, was likely to preserve competition. Each of these findings has parallels here.

This Court has applied *Baker Hughes*, in a series of Antitrust Division merger challenges, in ways highly relevant to this action. *See, e.g.*, *United States v. SunGard Data Sys.*, 172 F. Supp. 2d 172 (D.D.C. 2001) (denying injunction); *United States v. Gillette Co.*, 828 F. Supp. 78 (1993) (denying injunction); *see also United States v. Oracle Corp.*, 331 F. Supp. 2d 1098 (N.D. Cal. 2004) (denying injunction). Furthermore, this Court has also applied *Baker Hughes* in ways relevant here in preliminary injunction cases under Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 53(b) (2016). *See, e.g.*, *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109 (D.D.C. 2004) (denying preliminary injunction); *FTC v. R.R. Donnelly & Sons Co.*, No. 90-cv-1619, 1990 U.S. Dist. LEXIS 11361 (D.D.C. Aug. 27, 1990) (denying preliminary injunction). (It should be noted, however, that the FTC's burden for a preliminary injunction under Section 13 is lighter than the Antitrust Division's burden here. *See FTC v. H.J. Heinz Co.*,

246 F.3d 708, 714-15 (D.C. Cir. 2001) (holding, in Section 13(b) challenge, FTC need not establish violation of Section 7 of the Clayton Act but need only raise serious and substantial questions warranting proceedings at FTC administrative tribunal).)

At trial, Anthem intends to establish that the Antitrust Division and State AGs cannot carry their burden under *Baker Hughes* and its progeny. They cannot carry their initial burden of making a prima facie case of undue concentration in a properly defined market. *SunGard*, 172 F. Supp. 2d at 185 (holding "any gap in the evidence is a flaw in plaintiff's case — not defendants'"); *see also Arch Coal*, 329 F. Supp. 2d at 116 (holding, even in an FTC action, the government plaintiffs "have the burden on every element of their Section 7 challenge, and a failure of proof in any respect will mean the transaction should not be enjoined").

Even if the Division and the AGs somehow could establish a prima facie case, they cannot carry their burden of overcoming Anthem's evidence and showing that the merger is otherwise likely to cause a substantial lessening of competition. *Baker Hughes*, 908 F.2d at 983 (establishing burden of proof in an antitrust proceeding always rests with the government). Instead, Anthem will establish that its proposed merger with Cigna would be a decidedly procompetitive transaction, bringing lower healthcare costs — as well as greater innovation — to millions.

I. PRIMA FACIE CASE

As to the "national account" issue, the Complaint alleges a relevant market that is unsupportable in both its product and geographical dimensions. *Brown Shoe Co. v. United States*, 370 U.S. 294, 324 (1962) ("The 'area of effective competition' must be determined by reference to a product market (the 'line of commerce') and a geographic market (the 'section of the country')."). Only through its unsupportable market definition can the Complaint assert

undue concentration, let alone its hyperbolic charge that the proposed merger would "leave national accounts with only three meaningful options." Compl. ¶ 19.

A. Product Market

The Complaint alleges the relevant product market is "the sale of commercial health insurance to national accounts." *Id.* ¶ 20. The Complaint does not define "national accounts" other than to say that "[w]ithin large groups" — alleged to be employers with 50 or 100 employees, depending on the state — "the industry recognizes a subset of the largest employers with employees in more than one state called 'national accounts.'" *Id.* ¶ 16. The Complaint seems to allege that such "national accounts" may only be served by insurers having a nationwide network of healthcare providers: "only four insurers offer a nationwide commercial network sufficient to serve the country's largest employers, known as 'national accounts.'" *Id.* ¶ 8(a). These allegations are unsupportable.

The Complaint conflates two very different products into the term "commercial health insurance." *SunGard*, 172 F. Supp. 2d at 181 ("Not only is the proper definition of the relevant product market the first step in this case, it is also the key to the ultimate resolution in this type of case, since the scope of the market will necessarily impact any analysis of the anticompetitive effects of the transaction."). The Complaint acknowledges: "[m]ost large employers buy self-insured plans." Compl. ¶ 16. They enter into ASO contracts under which they pay a set fee for access to an insurer's medical provider network and for claims processing, but unlike with a fully-insured plan, they pay the medical expenses of their employees. In contrast, only a small minority of large employers are fully-insured, meaning that they pay premiums and obtain actual insurance coverage. The Complaint does not provide any economic basis for conflating ASO contracts and actual insurance into a single product market. *General Dynamics*, 415 U.S. at 498

("Only examination of the particular market — its structure, history, and probable future — can provide the appropriate setting for judging the probable anticompetitive effects of the merger.") (quotation omitted).

Even more problematic, the Complaint defines the product market in terms of sales "to national accounts." Compl. ¶ 20. Contrary to the allegations of the Complaint (¶ 16), there is no industry consensus for the meaning of the term "national account," either as to the number of employees or their geographic spread. *Brown Shoe*, 370 U.S. at 325 (identifying "industry or public recognition of the submarket as a separate economic entity" as a "practical indicia" useful in identifying product markets). Different companies in the industry give the term different meanings, change the meaning over time, or do not recognize the term at all. *United States v. Baker Hughes, Inc.*, 731 F. Supp. 3, 7 (D.D.C. 1990) (expressing concern that "the relevant product market proposed by plaintiff is too amorphous to be subjected to the hard economic analysis required by § 7"), *aff'd Baker Hughes*, 908 F.2d at 981. The Complaint itself does not define the term with any precision, merely alleging that "national accounts" are some unspecified "subset of the largest employers with employees in more than one state." Compl. ¶ 16.

The Complaint alleges that "national accounts" are "distinct customers with unique characteristics" (*id.* ¶ 21), but the evidence will show otherwise. *Brown Shoe*, 370 U.S. at 325 (denoting full list of seven "practical indicia" to be considered). In fact, "national accounts" as defined in the Complaint are not distinct and share many characteristics with other large-group customers who do not fall within the Complaint's definition. (The Complaint nests "national accounts" within "large-group employers," which it also asserts are "distinct." Compl. ¶ 39.)

The Complaint alleges that "a hypothetical monopolist of commercial health insurance sold to national accounts" could profitably impose a small but significant and non-transitory

price increase ("SSNIP"). *Id.* ¶ 22. But this allegation ignores that any "national accounts" — the most sophisticated and resourceful commercial enterprises in the world — would have a multitude of options to defeat any attempted price increase by the hypothetical monopolist. *Baker Hughes*, 908 F.2d at 986, 992 (highlighting customer sophistication "was likely to promote competition even in a highly concentrated market"); *R.R. Donnelley*, 1990 U.S. Dist. LEXIS 11361, at *4 (recognizing "sophistication and bargaining power of buyers play a significant rule in assessing the effects of a proposed transaction"); Guidelines § 8. The options available to these sophisticated and resourceful customers include using different insurers (including regional and local insurers) and vertically integrated hospital systems in different regions of the country ("slicing"), using third-party administrators ("TPAs"), using multicarrier private exchanges, and directly contracting with healthcare providers. *See Arch Coal*, 329 F. Supp. 2d at 122 (finding products to be "reasonably interchangeable" does not require a showing that "all buyers will substitute").

The Complaint seems to assume that the nation's biggest corporations would meekly submit to an attempted price increase by nationwide-network insurers. Evidence and reason suggest otherwise. While some employers may *prefer* to use a single insurer for all of their employees nationwide, the availability of a multitude of other insurance options ensures that these large corporations can resist any supracompetitive price increase. *See SunGard*, 172 F. Supp. 2d at 182-83 (rejecting Antitrust Division's narrow product market where customer heterogeneity in purchasing preferences and practices indicates broader market), *injunction pending appeal denied, United States v. SunGard Data Sys.*, No. 01-cv-5398 (D.C. Cir. Nov. 15, 2001); *see also Oracle*, 331 F. Supp. 2d at 1130 ("Customer preferences towards one product over another do not negate interchangeability.").

The evidence will show that large employers, including "national accounts," seek not a discrete product but instead a solution to their need to provide healthcare for their employees. A multitude of solutions exist, and large employers can mix and match, in various permutations, among the available solutions. *SunGard*, 172 F. Supp. 2d at 191 n.22 (holding customer willingness to switch "solutions" undermined Division's alleged product market).

The Complaint's focus on nationwide networks as the sole solution for "national accounts" also overlooks that Anthem itself does not own a nationwide network. Anthem sells commercial insurance in only 14 states; it is a regional insurer. Under the Blue Cross Blue Shield Association, Anthem rents the networks of other Blues across the country as necessary to serve its customers. This is a type of "slicing" solution. Other regional insurers similarly piece together rental networks in parts of the country. By including Anthem as an alternative for "national accounts" seeking a nationwide network, the Complaint unwittingly acknowledges that "national accounts" have available solutions well beyond insurers that own nationwide networks.

B. Geographic Market

For its geographic market, the Complaint alleges two inconsistent alternatives. Neither withstands evidence and analysis. *Brown Shoe*, 370 U.S. at 336-37 ("The geographic market selected must . . . both correspond to the commercial realities of the industry and be economically significant.") (quotation omitted).

As its first alternative, the Complaint alleges the geographic market to be the 14 (non-contiguous) states in which Anthem holds a BCBS license and sells commercial insurance. Compl. ¶ 24. This allegation lacks economic coherence and appears to be nothing more than gerrymandering. Indeed, the patchwork of the 14 Anthem states (*id.* ¶ 41) — licensing territories acquired randomly by Anthem over the years — makes Elbridge Gerry's salamander-shaped

electoral district look positively sensible. This "single" geographic market would include areas where Anthem is not the only Blue (*e.g.*, California and parts of New York) and where competitive conditions are otherwise radically dissimilar.

The Complaint seeks to justify its improbable 14-state geographic market with reference to national accounts "headquartered in the Anthem states." *Id.* ¶ 24. While this appropriately recognizes that Anthem is a regional competitor in commercial health insurance rather than one that owns a national network, the allegation otherwise lacks economic sense. "[N]ational accounts headquartered in the Anthem states" are not required to purchase their commercial insurance in those states. *Id.* ¶ 24. A hypothetical monopolist selling commercial health insurance in the 14 Anthem states could not impose an SSNIP; the "national accounts" would immediately seek their commercial health insurance in other areas. *Arch Coal*, 329 F. Supp. 2d at 123 (holding "the proposed geographic market would be too narrow" if buyers respond with an out-of-region purchase); Guidelines § 4.2.1.

The Complaint's fallback alternative geographic market, the entire United States as a "single relevant geographical market" (Compl. ¶ 26), also cannot withstand evidence and analysis. The Complaint alleges that "[n]ational accounts headquartered throughout the United States have similar options for health insurance" (*id.* ¶ 26), but this ignores that large employers have widely varying footprints where their employees work and live, and the competitive conditions in various locales vary widely as well. (Indeed, in its later claim related to "large-group employers" — a category that subsumes "national accounts" — the Complaint alleges geographic markets that are more localized. *Id.* ¶ 42.) Very few "national accounts" have employees spread across the entire country.

While alleging a nationwide geographic market, the Complaint acknowledges that, unlike Cigna, Anthem does not have a "nationwide provider network," but that Anthem nonetheless competes nationwide directly through "cedes" from other Blues and indirectly through "BlueCard fees." *Id.* ¶¶ 26-28. Anthem will establish that episodic "cedes" and flat-rate "BlueCard fees" are a far cry from having the ability to compete beyond Anthem's 14 states; indeed, a prime reason for the proposed merger is to provide Anthem with Cigna's nationwide network so that Anthem may for the first time become a true nationwide competitor.

C. Concentration

The Complaint's flawed market definition renders the Complaint's concentration measurement a nullity. *Oracle*, 331 F. Supp. 2d at 1098 (observing "the obvious point that if the market is not precisely defined, then the market participants and their relative shares will be economically inaccurate") (quotations omitted). Plaintiffs cannot satisfy their burden of establishing undue concentration in their amorphously defined markets, let alone any properly defined market(s). There is no presumption that the proposed merger is likely to substantially lessen competition.

In any event, any sound measurement of concentration would have to include all market participants, not just those with nationwide provider networks. *Arch Coal*, 329 F. Supp. 2d at 124 (explaining market concentration calculations consider "the individual market shares of all of the participants in the market"). And Anthem may not properly be consolidated with all other Blues nationwide, as the Complaint does. Compl. ¶ 31 (calculating market share of "Anthem (together with the other Blues)"). The evidence will show that the various Blues are not a single firm; notwithstanding their participation in the BCBSA, they are separate firms that at times compete with one another and that at all times separately seek to maximize their own profits.

II. COMPETITIVE EFFECTS

At trial, Anthem will prove that its merger with Cigna will result in a single firm that complementarily combines and synergistically builds upon the relative strengths of each constituent firm. Anthem's superior cost position within its 14-state footprint will add to the attractiveness of Cigna's 50-state footprint. Cigna's specialty business and health-focused value proposition, with its innovative health and wellness programs, will add to the attractiveness of Anthem's own value-based programs. Indeed, the increased scale from the merger will permit better collaboration with providers than either of the merged firms could achieve on their own. The merger will, in short, create a formidable national competitor, with an advantageous cost structure and an improved array of product offerings. *Heinz*, 246 F.3d at 720 (recognizing efficiencies from a merger may produce lower prices, improved quality and new products). The nation's largest employers, who overwhelmingly self-insure under ASO contracts, will be particular beneficiaries of the merger. They will directly enjoy the improved discounts and innovations made possible by merger.

The merger will not harm competition for these customers. The Complaint attempts to portray Anthem and Cigna as "close" competitors of one another, such that the loss of competition between them will reduce competition more generally. Compl. ¶¶ 33-36. This portrayal is based on a small handful of highly selective competitive interactions between the companies, and distorts the true competitive landscape. *FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26, 69, 71 (D.D.C. 2009) ("Without credible evidence that [any single competitor] is a more distant third choice for a significant share of the market to support the predictions of [an expert's] models, the Court cannot conclude that the merger is likely to result in unilateral price elevations."). At trial, Anthem will establish that customers do not consider Cigna to be the

closest substitute for Anthem; in fact, Anthem's closest competitor is United Healthcare and Cigna's closet competitor is Aetna. As such, the decrease in competition from the absence of the direct rivalry between the two firms will be small and easily offset by the massive efficiencies that will be passed on to customers.

Furthermore, the nation's largest employers have the sophistication, resources and competitive alternatives to ensure competitive pricing. These employers, and their well-informed consultants, use competitive bidding to leverage competition among major national insurers, regional players, slicing options, TPAs, rental networks, private exchanges, vertically integrated providers and direct contracting. *SunGard*, 172 F. Supp. 2d at 182-83 (noting diversified options among solutions providers mitigate the prospect of supracompetitive pricing). Entry, and potential entry, from these sources and elsewhere, forecloses any possibility of supracompetitive pricing. *Baker Hughes*, 908 F.2d at 987-88 (confirming that entry can restore competition and explaining that "[i]f barriers to entry are insignificant," even "the *threat* of entry can stimulate competition in a concentrated market, regardless of whether entry ever occurs").

At trial, Anthem will establish that its membership in BCBSA, which itself is an efficiency-enhancing joint venture (*see Texaco, Inc. v. Dagher*, 547 U.S. 1, 6 n.1 (2006)), will not diminish Anthem's incentives to compete through the Cigna brand in the 36 states where Anthem does not hold a Blue license. Anthem will have powerful incentives to win business through Cigna in those states because the margins on such business far exceed any BlueCard fees to be earned if another Blue happens to win the business.

All told, Anthem intends to prove at trial that its merger with Cigna is procompetitive, efficiency-enhancing and directly beneficial to all customers, "national accounts" or otherwise.

Dated: November 10, 2016
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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 10, 2016, a true and correct copy of the foregoing Pretrial Brief was served via the Court's CM/ECF system, pursuant to Rule 5.4(d) of the Local Civil Rules and Rule 5(b) of the Federal Rules of Civil Procedure, upon all counsel of record.

Dated: November 10, 2016
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