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)

PLAINTIFFS' PRETRIAL BRIEF

Anthem's proposed acquisition of Cigna—the largest merger in the history of the health-insurance industry—violates Section 7 of the Clayton Act, 15 U.S.C. § 18. To prove that a merger is presumptively unlawful under Section 7, a plaintiff need only show significantly increased concentration in one market. Plaintiffs will clear that standard by a wide margin. At trial, they will present extensive evidence that the merger is likely to have serious anticompetitive effects in dozens of markets—increasing Anthem's market power, raising prices of health-insurance plans, forcing down payments to healthcare providers, and reducing the availability and quality of healthcare services—harming consumers and healthcare providers alike. This brief sets forth the legal principles most important to proving this violation.

I. Section 7 of the Clayton Act: general principles

Section 7 deals with probabilities, not certainties. A merger is unlawful when its effect "may be" substantially to lessen competition. 15 U.S.C. § 18. The words "may be" are intentional: the statute is concerned with "probabilities, not certainties." *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962). Plaintiffs are not required to show that Anthem *will* increase prices, decrease provider reimbursement, or cause the quality of medical care to diminish. "All that is necessary is that the merger create an appreciable danger of such consequences in the future." *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1389 (7th Cir. 1986). If the merger gives Anthem substantially more market power—the ability to raise prices or reduce output, *see Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 464 (1992)—the merger violates Section 7 even if it is difficult to predict exactly how Anthem will exercise that market power. *See FTC v. H.J. Heinz Co.*, 246 F.3d 708, 713 (D.C. Cir. 2001) ("Merger enforcement . . . is directed at market power.").

Harm in a single market is sufficient to enjoin the entire transaction. A merger is unlawful under Section 7 if its effect may be substantially to lessen competition in "*any* line of commerce" in "*any* section of the country." 15 U.S.C. § 18 (emphasis added).[1] The Court need not evaluate every market alleged in the Complaint. Probable harm to national accounts alone, or to customers or providers in any of the 35 local markets, is enough to enjoin the merger. Defendants do not get a free pass to harm competition in some local markets even if their merger does not reduce competition in each of the alleged markets across the country.

II. Definition of product and geographic markets

Relevant product market definition. A relevant product market "is composed of products that have reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered." *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 404 (1956). A product market is determined by the "reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe*, 370 U.S. at 325. A product market can also be defined with reference to "such practical indicia as industry or

[1] *See also Brown Shoe*, 370 U.S. at 337 (Section 7 violated "if anticompetitive effects of [the] merger are probable in 'any' significant market"); Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶ 972a (4th ed. 2014).

public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Id*.

To define a relevant market, courts often apply the merger-analysis tools described in the Horizontal Merger Guidelines issued by the Department of Justice and Federal Trade Commission.[2] Under the Guidelines, a relevant product market consists of a set of reasonably interchangeable products such that a hypothetical monopolist of those products could impose a small but significant and non-transitory increase in price ("SSNIP") on one or all of those products.[3] If a set of products satisfies that test, they constitute an appropriate product market for antitrust analysis even if another possible collection of products would also satisfy the test.

Relevant geographic market definition. "The criteria to be used in determining the appropriate geographic market are essentially similar to those used to determine the relevant product market." *Brown Shoe*, 370 U.S. at 336. "The arena of competition affected by the merger may be geographically bounded if geography limits some customers' willingness or ability to substitute to some products, or some suppliers' willingness or ability to serve some customers." 2010 Merger Guidelines § 4.2. In healthcare provider cases, "there are often only a few hospitals in a geographic market" because "most patients prefer to go to nearby hospitals." *FTC v. Advocate Health Care Network*, Civ. No. 16-2492, 2016 WL 6407247, at *6 (7th Cir. Oct. 31, 2016); *see also FTC v. Penn State Hershey Med. Ctr.*, No. 16-2365, 2016 WL 5389289, at *5–6

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[2] *See Heinz*, 246 F.3d at 716 (applying 1992 Merger Guidelines); *United States v. H & R Block, Inc.*, 833 F. Supp. 2d 36, 52 (D.D.C. 2011) (applying 2010 Merger Guidelines); *Chi. Bridge & Iron Co. N.V. v. FTC*, 534 F.3d 410, 431 n.11 (5th Cir. 2008) ("Merger Guidelines are often used as persuasive authority when deciding if a particular acquisition violates anti-trust laws.").

[3] U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines § 4.1.1 (2010) ("2010 Merger Guidelines"); *see also H & R Block*, 833 F. Supp. 2d at 52 (applying hypothetical monopolist test).

(3d Cir. Sept. 27, 2016) (defining geographic market locally as "the four counties encompassing and immediately surrounding Harrisburg, Pennsylvania"). For similar reasons, courts typically define the geographic markets in which insurance companies purchase healthcare services from hospitals and physician groups, as well as the markets for the sale of commercial health insurance (including access to those providers), as local. *See United States v. Blue Cross Blue Shield of Mich.*, 809 F. Supp. 2d 665, 673 (E.D. Mich. 2011) (complaint sufficiently alleged "consumers demand access to local providers and, therefore, the health insurance markets are local"). Geographic markets can also be aggregated—as with the markets for national accounts—for administrative convenience. *See ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559, 565 (6th Cir. 2014), *cert. denied*, 135 S. Ct. 2049 (2015) (aggregating product markets).

"Price discrimination" markets. With some products, sellers can "price discriminate," raising prices to certain targeted customers and not others. In these situations—which include the markets for commercial health insurance—the effects of a merger can vary significantly for different customers, and so courts will define markets around different customer groups. "Antitrust laws exist to protect competition, even for a targeted group that represents a relatively small part of an overall market." *FTC v. Staples, Inc.*, Civ. No. 15-2115, 2016 WL 2899222, at *16 (D.D.C. May 17, 2016). "If a hypothetical monopolist could profitably target a subset of customers for price increases, the Agencies may identify relevant markets defined around those targeted customers, to whom a hypothetical monopolist would profitably and separately impose at least a SSNIP." 2010 Merger Guidelines § 4.1.4. Courts in this District have applied this section in defining price discrimination markets. *See Staples*, 2016 WL 2899222, at *8, 17; *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1037–38 (D.C. Cir. 2008) (applying 1992 Merger Guidelines § 1.12). Because insurers bid for these accounts individually, they can identify and target most of the relevant customers and suppliers in this case—national accounts, large-group employers, hospitals, and many physician practices. Most of the relevant markets in this case are thus properly considered "price discrimination" markets.

Markets and market shares need not be defined with perfect precision. The alleged markets in this case are reasonably drawn and well-recognized by the industry, including Anthem and Cigna, and thus easily satisfy Plaintiffs' burden. "The 'market,' as most concepts in law or economics, cannot be measured by metes and bounds." *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594, 611 (1953). That holds true for both product and geographic markets. *See Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 331–32 (1961). Likewise, plaintiffs "need not present market shares and HHI estimates with the precision of a NASA scientist. The 'closest available approximation' often will do." *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 54 (D.D.C. 2015) (quoting *FTC v. PPG Indus., Inc.*, 798 F.2d 1500, 1505 (D.C. Cir. 1986)).

III. Anticompetitive effects and the presumption of illegality

Market share data can create a presumption of illegality. A merger significantly increasing concentration in an already concentrated market is presumptively illegal. *See United States v. Phila. Nat'l Bank*, 374 U.S. 321, 363–65 & n.42 (1963); *Sysco*, 113 F. Supp. 3d at 52. In *Philadelphia National Bank*, the Supreme Court found that a combined market share of 30% was sufficient to establish that presumption. 374 U.S. at 364; *see also FTC v. Swedish Match*, 131 F. Supp. 2d 151, 166 (D.D.C. 2000). Courts also routinely apply the Herfindahl–Hirschman Index ("HHI") thresholds set forth in the Merger Guidelines in determining a merger is presumptively unlawful. *See Heinz*, 246 F.3d at 716 (applying thresholds from 1992 Merger Guidelines); *H & R Block*, 833 F. Supp. 2d at 71–72 (applying 2010 Merger Guidelines). HHIs are calculated by summing the squares of the individual firms' market shares. 2010 Merger Guidelines § 5.3.

Markets with HHIs of 2500 or over are "highly concentrated." *Id.* "Mergers resulting in highly concentrated markets that involve an increase in the HHI of more than 200 points will be presumed to be likely to enhance market power." *Id.* This court has treated a merger—where it increased the HHI by over 200 points and left the market highly concentrated—as presumptively unlawful even where the combined firm had less than a 30% share. *See H & R Block*, 833 F. Supp. 2d at 72.

Once plaintiffs establish the presumption, the burden shifts to defendants to show "that the market-share statistics [give] an inaccurate account of the [merger's] probable effects on competition." *Heinz*, 246 F.3d at 715 (alterations in original) (quoting *United States v. Citizens & S. Nat'l Bank*, 422 U.S. 86, 120 (1975)). In this case, Plaintiffs intend to show the opposite—that the market shares significantly understate the likely competitive harm.

IV. Plaintiffs' buy-side case

Anthem's proposed merger also threatens competition for the purchase of healthcare services, which Plaintiffs intend to prove in the "buy-side," or monopsony, part of the case. Similar legal principles apply to buy-side markets as courts apply to sell-side ones.

The antitrust laws prohibit anticompetitive mergers between buyers, not just sellers. The antitrust laws "also appl[y] to abuse of market power on the buyer side." *Todd v. Exxon Corp.*, 275 F.3d 191, 201 (2d Cir. 2001). Monopsony (where there is only one buyer in a market) and monopoly have a "close theoretical connection"—monopsony is "'the 'mirror image' of monopoly." *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 321–22 (2007) (quoting John B. Kirkwood, *Buyer Power and Exclusionary Conduct*, 72 ANTITRUST L.J. 625, 652 (2005)). Section 7 thus protects against anticompetitive mergers between buyers. Health insurers are purchasers of providers' healthcare services. *See Grp. Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 214 (1979).

A similar presumption of illegality applies in a buy-side case. As with a "sell-side" case, a "buy-side" merger is unlawful when its likely effect is to substantially reduce competition. *See United States v. Rice Growers Ass'n of Cali.*, Civ. No. 84-1066, 1986 WL 12562, at *12 (E.D. Cal. Jan. 31, 1986) (competition for "purchase or acquisition for milling of paddy rice grown in California"); *United States v. Pennzoil Co.*, 252 F. Supp. 962, 985 (W.D. Pa. 1965) (competition "in the purchase of Penn Grade crude").[4] Because monopsony is the mirror image of monopoly, *see Weyerhaeuser*, 549 U.S. at 321–22, courts apply the traditional burden-shifting framework of Section 7 when analyzing a merger between buyers. When a merger substantially increases concentration in a concentrated market of buyers, the merger is presumed unlawful. *See Rice Growers*, 1986 WL 12562, at *12; *Pennzoil*, 252 F. Supp. at 985.

Plaintiffs need only prove an increase in Anthem's bargaining leverage. In sell-side cases, including those in the healthcare industry, plaintiffs need only prove increased concentration or increased market power, which creates a likelihood that anticompetitive effects will occur. *See Hosp. Corp. of Am.*, 807 F.2d at 1389. For example, mergers between hospitals that substantially increase their bargaining leverage over health insurers are presumed illegal. *Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775, 786, 788 (9th Cir. 2015); *ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559, 570 (6th Cir. 2014). Under the mirror-image principle, mergers between health insurers substantially increasing their bargaining leverage over physician groups, hospitals, or other providers are illegal.

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[4] *Cf. Todd*, 275 F.3d at 201 (Sotomayor, J.) ("a horizontal conspiracy among buyers to stifle competition is as unlawful as one among sellers").

There is no requirement of proving downstream harm in a buy-side case. To establish buy-side harm, it is sufficient to show the merger will increase Anthem's bargaining leverage over providers, which will likely reduce reimbursement rates. Plaintiffs need not take the extra step of proving that those lower rates will restrict access to medical care, reduce the quality of medical care, or otherwise harm patients. Although the merger will likely have such effects (as Plaintiffs intend to show), the law is clear that "suppliers . . . are protected by antitrust laws even when the anti-competitive activity does not harm end-users." *Telecor Commc'ns, Inc. v. Sw. Bell Tel. Co.*, 305 F.3d 1124, 1134 (10th Cir. 2002); *cf. Fishman v. Estate of Wirtz*, 807 F.2d 520, 539 (7th Cir. 1986) (conspiracy to eliminate competition to buy Chicago Bulls team was illegal though unlikely to affect output of Bulls games; no "burden of articulating how the welfare of the ultimate consumer has been diminished by an injury to competition at *another level*"); *Heinz*, 246 F.3d at 719 ("no court has ever held that a reduction in competition for wholesale purchasers is not relevant unless the plaintiff can prove impact at the consumer level").

In *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979 (9th Cir. 2000), the Ninth Circuit addressed this issue in a case involving a conspiracy among cheese makers that reduced the prices they paid for milk. The defendants argued that such a conspiracy would benefit, not harm, consumers by reducing cheese prices. The Ninth Circuit rejected that argument, holding that "the central purpose of the antitrust laws, state and federal, is to preserve competition" and that cases discussing how competition leads to low prices for consumers "do not mean that conspiracies among buyers to depress acquisition prices are tolerated." *Id.* at 988.

That principle protects doctors against insurer market power even where consumers may pay lower premiums. *See West Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85 (3rd Cir. 2010). In *West Penn*, the second-largest hospital system in Pittsburgh, West Penn, sued the largest hospital and the local Blue Cross licensee (Highmark), alleging they had conspired to reduce West Penn's rates. Defendants argued that reduced rates did not constitute antitrust injury and that consumers, in turn, would benefit from lower premiums. The Third Circuit disagreed, noting that any reduction in premiums would not necessarily benefit subscribers because "the premium reductions would have been achieved only by taking action that tends to diminish the quality and availability of hospital services." *Id.* at 103–04. Regardless of whether that reduction in output or quality occurred, the Third Circuit noted that defendants' argument "reflects a basic misunderstanding of the antitrust laws": "Highmark's improperly motivated exercise of monopsony power, like the collusive exercise of oligopsony power by the cheese makers in *Knevelbaard,* was anticompetitive and cannot be defended on the sole ground that it enabled Highmark to set lower premiums on its insurance plans." *Id.* at 105.

V. Defendants' efficiencies defenses

Defendants have a heavy burden to overcome the presumption of harm with an efficiency defense. Although a defendant may theoretically rebut a presumption of harm with an efficiencies defense, courts are extremely cautious when evaluating these arguments. Indeed, "[t]he Supreme Court has never expressly approved an efficiencies defense to a § 7 claim." *St. Luke's,* 778 F.3d at 788–89 (citing *Heinz,* 246 F.3d at 720). And "none of the reported appellate decisions have actually held that a § 7 defendant has rebutted a prima facie case with an efficiencies defense." *Id.* at 789. Moreover, the courts of appeals have tightly circumscribed its availability. Efficiencies can rebut a presumption of harm only if "the proposed merger will create a more efficient combined entity and thus increase competition" rather than decrease it. *Id.* at 790. Efficiencies also must be merger-specific and verifiable. *See H & R Block,* 833 F. Supp. 2d at 89 (citing 2010 Merger Guidelines § 10).

Out-of-market efficiencies are not relevant. The relevant market is the "locus of competition[] within which the anti-competitive effects of a merger [are] to be judged." *Brown Shoe*, 370 U.S. at 320–21. Because a merger is illegal if it would likely harm competition in any market, the law does not allow "anticompetitive effects in one market [to] be justified by procompetitive consequences in another." *Phila. Nat'l Bank*, 374 U.S. at 370; *see also St. Luke's*, 778 F.3d at 789 (Ninth Circuit rejected "argument that the merger would allow the defendant to compete more efficiently *outside* the relevant market").

Defendants' medical/network synergies are not procompetitive purchasing efficiencies. Where firms enhance or exercise buy-side market power to lower the price they pay for goods or services, as Anthem proposes to do so here, courts have found a violation.[5] Procompetitive purchasing efficiencies permitted by the antitrust laws involve very different facts. "Reduction in prices paid by the merging firms *not arising from market power* can be significant in the evaluation of efficiencies from a merger . . . ." 2010 Merger Guidelines § 12 (emphasis added). For example, a merger could "lead to a reduction in prices paid by the merged firm . . . by reducing transactions costs or allowing the merged firm to take advantage of volume-based discounts." *Id.* In a 1979 case, the Supreme Court provided an example of how purchasing efficiencies can be achieved without violating the antitrust laws:

> Suppose, for example, that an insurance company entered into a contract with a large retail drug chain whereby its policyholders could obtain drugs under their policies only from stores operated by this chain. The justification for such an agreement would be administrative and bulk-purchase savings resulting from obtaining all of the company's drug needs from a single dealer.

[5] *E.g., Mandeville Island Farms v. Am. Crystal Sugar Co.*, 334 U.S. 219, 236 (1948); *West Penn Allegheny Health*, 627 F.3d at 105; *Knevelbaard Dairies*, 232 F.3d at 988; *Rice Growers*, 1986 WL 12562, at *12; *Pennzoil*, 252 F. Supp. at 985.

Grp. Life & Health, 440 U.S. at 215. In the merger context, if two merging firms consolidate their purchases from a supplier, that supplier may benefit from economies of scale and thus offer lower input prices to the merged firm via a volume discount. By contrast, Plaintiffs will prove that Anthem's proposed medical/network efficiencies do not provide doctors or hospitals with an incremental benefit. Instead, Anthem will be demanding "an incremental discount with no corresponding incremental value (no new members)." Compl. ¶ 73, Dkt. #1 at 27.

Anthem's efficiency claim is extraordinary and would allow it to harm competition in one market (the purchase of provider services) so long as some of its anticompetitive profits are shared with consumers in another market.[6] This claim ignores the Supreme Court's insistence that the antitrust laws protect suppliers as well as consumers. *See Mandeville Island Farms*, 334 U.S. at 236. Moreover, "merely shift[ing] revenue among the participants in the market" does not establish "true efficiencies." *FTC v. ProMedica Health Sys., Inc.*, No. 3:11 CV 47, 2011 WL 1219281, at *36 (N.D. Ohio Mar. 29, 2011).

Countervailing market power is not a defense. It is no defense that a merger will enable Anthem to better counteract the market power possessed by some hospitals. The Supreme Court "reject[ed]" a similar "application of the concept of 'countervailing power'" in *Philadelphia National Bank*. 374 U.S. at 370; *see also Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211, 214 (1951) (rejecting defense that concerted price-setting among sellers was justified to offset alleged conspiracy among buyers). A contrary view would allow Anthem and other insurers to grow to counterbalance large providers, and then providers to grow to counterbalance

[6] Plaintiffs will prove at trial that Anthem's greater market power over downstream customers will enable it to increase its administrative fees, thereby reducing the amount of anticompetitive rents it shares with them.

the larger insurers. This arms race could end with a monopolist hospital bargaining with a monopolist insurer in each market—hardly the intent of the antitrust laws.

Similarly, it is no defense that the merger is needed to enable Anthem to lower hospital rates to a more "reasonable" level, allegedly closer to their marginal costs. The Supreme Court rejected the "reasonable prices" defense as contrary to the antitrust laws more than a century ago. *See United States v. Trans-Mo. Freight Ass'n*, 166 U.S. 290, 331–32, 339 (1897).

Plaintiffs' buy-side allegations are relevant to assessing defendants' medical/network efficiencies defense in Phase I of the trial. Anthem's central defense—that its greater market power will result in so-called "medical/network savings"—is linked to the buy-side harm in this case. Anthem's medical/network savings all stem from the increased market power (bargaining leverage over providers) it will obtain by acquiring Cigna. As a result, the Court should reject those savings as non-cognizable efficiencies based on the evidence in Phase I of the trial. If the Court does not reach this conclusion in Phase I, however, Plaintiffs will prove in Phase II that this greater market power will enable Anthem to unlawfully reduce reimbursement rates to providers in the 35 local markets. This evidence will give this Court an independent basis on which to find the merger unlawful. It will also further show that Anthem's claimed savings all will derive from its unlawful exercise of market power and therefore cannot rebut Plaintiffs' proof of harm to competition in national accounts and local commercial markets.

VI. The preferred remedy of injunction

Where Plaintiffs have established that a merger violates Section 7, the preferred remedy is for the court to issue a "full stop injunction" preventing the parties from completing their unlawful merger. *PPG Indus.*, 798 F.2d at 1506–07.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on November 10, 2016, I caused the foregoing document to be served upon all counsel of record via the Court's EM/ECF system.

Dated: November 10, 2016

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