UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA, et al., Plaintiffs-Appellees, v. ANTHEM, INC., Defendant-Appellant.	Appeal No. 17-5024 District Ct. No. 1:16-cv-01493-ABJ District Judge: Hon. Amy Berman Jackson

APPELLANT ANTHEM, INC.'S
REPLY IN FURTHER SUPPORT OF ITS EMERGENCY
MOTION FOR EXPEDITED CONSIDERATION OF APPEAL

Yesterday, the Delaware Court of Chancery ("Delaware Court") issued a temporary restraining order enjoining Cigna from terminating the Merger Agreement, thereby preserving the largest merger in the history of the healthcare industry that is poised to create $2.4 billion in medical cost savings annually. *See* Exh. A hereto (Order and Transcript). In doing so, the Delaware Court found that (i) Anthem has a colorable claim that Cigna cannot terminate, (ii) consummation of the Merger is still possible, and (iii) Anthem would be irreparably injured by termination. Tr. 37-48. The Delaware Court advised Cigna and Anthem to proceed with a preliminary injunction hearing the week of April 10, 2017, where the court will address whether or not Cigna can terminate the Merger Agreement

after April 30, 2017. Tr. 48. Contrary to Appellees' assertion to this Court, then, Cigna's purported termination did not "gut" Anthem's arguments for expedition. Rather, the developments in the Delaware Court only confirm that expedition by this Court is warranted.

ARGUMENT

Appellees do not dispute that expedited review is warranted where delay will cause irreparable injury, the decision under review is subject to substantial challenge, and the public has an interest in prompt disposition. Opp'n at 5-6. Each of those factors are satisfied here.

I. ANTHEM WILL SUFFER IRREPARABLE HARM WITHOUT EXPEDITED REVIEW

Appellees' lead argument is that Anthem will not suffer irreparable harm from delay because Cigna had purported to terminate the Merger Agreement. Opp'n at 6 (calling Cigna's step a "dispositive development"). But, yesterday, the Delaware Court enjoined Cigna from terminating the Merger Agreement. And the irreparable harm the Delaware Court found Anthem faced from Cigna's purported termination is the same irreparable harm Anthem faces if it is denied expedited review by this Court: the loss of a transformative $54 billion Merger and appeal rights. Mot. 5-7; Tr. 46 ("[c]learly, the loss of the transaction" and loss of "opportunity to pursue appeal" are irreparable harm).

Appellees also incorrectly argue lack of irreparable harm because expedited review is futile. Appellees rely upon declarations Anthem submitted to the District Court in August 2016, at the outset of this action, estimating the timeframe needed for state regulatory approvals at that point. Opp'n at 8-10. Appellees neglect to mention that the District Court questioned those estimates at that time, in setting the trial schedule: "I think establishing a schedule based on the assumption that we have to accord the state regulators 120 days to decide after I've already approved the deal, if I approve the deal, that seems excessive, especially since we could be filing position papers and factual information with the state regulators in the interim." *United States v. Anthem*, No. 1:16-cv-01493, ECF No. 71 (Aug. 21, 2016) at 22:4-9. In the six months since then, Anthem has indeed pushed forward with the state regulators wherever possible and has substantially advanced its position in several states, such that Anthem does not expect to need anything near 120 days for completion. *See* Exh. B hereto (Danilson Decl.). Appellees must appreciate as much because at no time between January 1, 2017 (120 days prior to April 30), and the District Court's decision on February 8 did they move for a directed verdict or otherwise raise this supposed mootness to the District Court.

Moreover, estimating the speed of state regulatory proceedings is demonstrably an uncertain exercise. As Anthem acknowledged in its Motion (at 7), Anthem may not be able to secure all the state regulatory clearances by

April 30. There is, however, a path forward after April 30 if certain state regulatory approvals are still outstanding because Anthem believes that Cigna cannot terminate even after April 30, 2017, in light of its breaches of the Merger Agreement.[1] The Delaware Court will determine whether Cigna can terminate after April 30, 2017, during the week of April 10. Nonetheless, even with additional time after April 30 for closing, expedition is necessary because a lengthy delay will prejudice the ability to pursue regulatory approvals and impact the Parties' alternative strategies and initiatives for a longer period of time. *See, e.g.*, Danilson Decl. ¶ 3.

II. THE ORDER IS SUBJECT TO SUBSTANTIAL CHALLENGE

Appellees make no serious effort to address Anthem's substantive arguments which show that the District Court's decision is subject to substantial challenge.

First, Appellees do not even mention the District Court's rejection of 50 years of antitrust law that establishes the consumer welfare standard as the touchstone of antitrust analysis. The Supreme Court has recognized that antitrust laws are a "consumer welfare prescription." *NCAA* v. *Bd. of Regents*, 468 U.S. 85, 107 (1984); *see also Atl. Richfield, Co.* v. *USA Petr. Co.*, 495 U.S. 328, 340 (1990)

[1] Appellees wrongly claim that Anthem's Motion is inconsistent with Anthem's February 15, 2016 press release about its lawsuit against Cigna which alleges that Cigna cannot terminate the Merger Agreement at all. Opp'n at 10 n.5. In fact, Anthem's Motion could not have been more clear in making that point: "Anthem disputes that Cigna has a right to terminate at all, but Cigna disagrees." Mot. at 6.

("[L]ow prices benefit consumers regardless of how those prices are set."); *Weyerhaeuser Co.* v. *Ross-Simmons Hardwood Lumber Co*., 549 U.S. 312, 319 (2007) ("[D]epriving consumers of the benefits of lower prices . . . does not constitute sound antitrust policy."). In the face of this controlling precedent, the District Court tossed aside $2.4 billion in medical cost savings for American consumers because it concluded that an antitrust court should not consider benefits to consumers. *See* SA102. This was an error of law that is reviewed *de novo* by this Court, not by a clearly erroneous standard as Appellees suggest (Opp'n at 13-14). *United States v. Baker Hughes, Inc.*, 908 F.2d 981, 983 (D.C. Cir. 1990). Moreover, that "[e]ven Cigna agrees" is hardly noteworthy in light of the District Court's finding that "the elephant in courtroom" was that both the Appellees and Cigna were "raising questions about Anthem's characterization of the outcome of the merger" and that Cigna was "actively warning against it." JA206.

Second, although the Opposition cites to the Antitrust Division's own definition of "merger-specific efficiencies" — "merger-specific efficiencies are only those efficiencies likely to be accomplished with the proposed merger and unlikely to be accomplished in the absence of . . . the proposed merger . . ." (U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 4 (2010)) — the Opposition ignores the District Court's application of the incorrect legal standard. The District Court's Opinion changed the examination of efficiencies

from whether they are "unlikely" absent the merger to whether they are *impossible* absent the merger. *See* SA103. And this change ignored the "unlikely" standard applied by courts in this Circuit. *See FTC* v. *Cardinal Health*, 12 F. Supp. 2d 34, 62 (D.D.C. 1998) ("The Guidelines also contend that the efficiencies must be 'merger specific,' in other words 'likely to be accomplished with the proposed merger and unlikely to be accomplished in the absence of either the proposed merger or another means having comparable anti-competitive effects.'") (quoting 1997 HMG § 4); *see also FTC* v. *Staples*, 970 F. Supp. 1066, 1089 (D.D.C. 1997) (finding that defendants need not perform "the nearly impossible task of rebutting a possibility with a certainty," and must merely provide a "prediction backed by sound business judgment" to weigh when plaintiffs' asserted harms are speculative). This, too, is legal error subject to *de novo* review.

Appellees mistakenly suggest that this action has a long tail left, stating that Anthem "at best" is "looking at a remand to the District Court." Opp'n at 7. In fact, Anthem demonstrates in its merits brief that the appropriate crediting of the medical cost savings would offset all of the claimed anticompetitive effects of the Merger (and that Appellees have otherwise failed to carry their burden). Thus, a ruling in Anthem's favor on this appeal may end this action without any need for remand. *See League of Women Voters of the United States v. Newby*, 838 F.3d 1, 6-7 (D.C. Cir. 2016) (finding "no reason to remand to the district court" where

"this court has a full record, both in the district court and on appeal" and where "the parties amply and ably briefed and litigated" the issues). Furthermore, if a remand really would be necessary, then expedition is all the more necessary to speed this action to its ultimate conclusion.

III. EXPEDITED APPEAL IS IN THE PUBLIC INTEREST

Finally, Appellees incorrectly assert that an expedited appeal is not in the public interest because it would prevent members of the healthcare industry from weighing in on a case of "potential significance" and would "not allow for the careful deliberation that a case of this magnitude and complexity demands." Opp'n at 15.

First, the appeal of a decision that impacts a $54 billion transformative Merger should not be jeopardized to accommodate unidentified third parties with no prior involvement in this case who did not themselves object to Anthem's Motion. Appellees do not, and cannot, offer any reason that such additional input is suddenly critical on appeal. Nor do Appellees assert that these submissions cannot be provided on an expedited schedule.

Second, Appellees' argument that the "the magnitude and complexity" of the case demands a longer period for appellate review contradicts their argument that the District Court's decision is not subject to substantial challenge, because the issues here are straightforward and amenable to resolution without much

consideration. *See* Opp'n at 13 (arguing that Anthem is unable to show that the District Court's decision is "clearly erroneous"). In any event, Appellees offer no support for their argument that expedited review will impact this Court's ability to carefully deliberate this case, which is more than capable of deciding appeals on an expedited basis.

Third, Appellees' argument that "no court has ever held that efficiencies justified an otherwise anti-competitive merger" (Opp'n at 13) does not support potentially mooting an appeal in this case, where Anthem presented efficiencies that, unlike other cases, overwhelm the purported anticompetitive impact. Moreover, the relative paucity of the judicial treatment of the efficiencies defense — together with the District Court's profound skepticism of the efficiencies defense — only underscores the need for authoritative appellate guidance.

Fourth, Appellees conspicuously fail to consider that, if Anthem's claimed efficiencies are valid, consumers will be deprived of those efficiencies if this merger dies on the vine. Opp'n at 14-15. Expedition will help ensure that consumers will not be so deprived.

* * *

Lastly, giving Appellees three weeks to submit their brief is sufficient and reasonable given Anthem took five days after the District Court Opinion to submit its appeal brief. Appellees are fully conversant with the facts and law having just

tried and briefed them in the District Court. Appellees strain credulity in suggesting that they need *more* time than normal — "at least 45 days" — to respond to the brief that Anthem was able to submit in five days. Opp'n at 16.

CONCLUSION

For these reasons and the reasons set forth above and in its Motion, Anthem respectfully requests that this Court enter an expedited briefing schedule for this matter as described in the Motion.

Dated: February 16, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27(d)(2) of the Federal Rules of Appellate Procedure, the undersigned hereby certifies that:

1. This document complies with the word limit of Fed. R. App. P. 27(d)(2) because this document contains 1852 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman font, size 14.

/s/ *Matthew S. Leddicotte*
Matthew S. Leddicotte

CERTIFICATE OF SERVICE

I hereby certify that on February 16, 2017, I caused to be served an electronic copy of the foregoing Anthem, Inc.'s Reply in Further Support of its Emergency Motion for Expedited Consideration of Appeal via the CM/ECF system, under Circuit Rule 25(f), upon all counsel of record.

/s/ *Christopher M. Curran*
Christopher M. Curran