ORAL ARGUMENT SCHEDULED FOR MARCH 24, 2017

Nos. 17-5024 (lead), 17-5028 (consolidated)

IN THE

United States Court of Appeals for the District of Columbia Circuit

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UNITED STATES OF AMERICA, et al.,

Plaintiffs-Appellees,

v.

ANTHEM, INC. and CIGNA CORP.,

Defendants-Appellants.

On Appeal from the
United States District Court for the District of Columbia
Case No. 1:16-cv-1493 (Hon. Amy Berman Jackson)

BRIEF OF APPELLEES THE UNITED STATES OF AMERICA AND PLAINTIFF STATES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Plaintiffs-Appellees United States of America and Plaintiff States certify as follows:

A. Parties and Amici

The parties who appeared before the district court and who are before this Court are:

1. Plaintiffs-Appellees

- United States of America
- State of California
- State of Connecticut
- State of Colorado
- District of Columbia
- State of Georgia
- State of Iowa
- State of Maine
- State of Maryland
- State of New Hampshire
- State of New York
- State of Tennessee
- Commonwealth of Virginia

2. Defendants-Appellants

- Anthem, Inc.
- Cigna Corp.

3. There were no amici or intervenors in the district court.

Before this Court, a group of antitrust economists and business professors filed a brief as *amici curiae* in support of Anthem.

Signatories to that brief are listed as Michael Akemann, Dr. Benoît Durand, Jerry A. Hausman, Dr. Gregory K. Leonard, Prof. Will Mitchell, Prof. Melissa A. Schilling, and J. Douglas Zona Ph.D.

B. Rulings Under Review

1. The Order of the Honorable Amy Berman Jackson, U.S. District Court for the District of Columbia, entered on February 8, 2017, which is reprinted in the Joint Appendix (JA) at JA198-209, and

2. The Memorandum Opinion accompanying that Order, also entered on February 8, 2017, which is reprinted in the Sealed Joint Appendix (SA) at SA1-140. The public, redacted version of that Opinion is reprinted in the Government's Supplemental Appendix (GSA) at GSA1-140.

Neither the Order nor the Opinion has been published in the *Federal Supplement*.

C. Related Cases

The case now pending before this Court in consolidated appeals was not previously before this Court or any court other than the district court below. Counsel is not aware of any related case pending before this Court or any court.

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GLOSSARY

ASO:	Administrative services only
Br.:	Brief for Defendant-Appellant Anthem, Inc.
CMO:	Chief Medical Officer
Government:	Appellees United States of America and Plaintiff States California, Connecticut, Colorado, District of Columbia, Georgia, Iowa, Maine, Maryland, New Hampshire, New York, Tennessee, and Commonwealth of Virginia
GSA:	Government's Supplemental Appendix
HHI:	Herfindahl-Hirschmann Index
JA:	Joint Appendix
Merger Guidelines:	Dep't of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines* (2010)
SA:	Sealed Joint Appendix

INTRODUCTION

This appeal arises from the government's challenge to the largest proposed merger in the history of the health insurance industry, between two of the four national carriers, Appellants Anthem, Inc., and Cigna Corporation. After hearing from 28 fact witnesses and five experts and considering over 1400 exhibits and excerpts from over 100 depositions, the district court concluded that the merger was likely to substantially lessen competition in at least two markets in violation of Section 7 of the Clayton Act. The court enjoined the merger on that basis.

The court rejected on factual grounds the centerpiece of Anthem's defense and the focus of its appeal—that the anticompetitive effects will be outweighed by the merger's efficiencies because the merger would yield a "Cigna product at the Anthem price" and save $2.4 billion in medical costs. Anthem failed to demonstrate that "its plan is achievable or that it will benefit consumers as advertised." GSA8. The asserted benefits were not likely to happen or did not depend on the merger, and thus were not cognizable efficiencies that could justify a merger that would eliminate the vigorous competition between Anthem

and Cigna and with other carriers. The loss of that competition in an already highly concentrated market with substantial barriers to entry was likely to raise prices and diminish innovation. The district court's determination that the merger likely would lessen competition reflects an application of modern antitrust principles and rests on a firm evidentiary foundation. It should not be disturbed on appeal.

STATEMENT OF ISSUES

1. Whether the district court acted within its discretion, and did not clearly err, when it rejected Anthem's claimed medical cost savings because they were not cognizable efficiencies and thus could not justify a merger that otherwise likely would substantially lessen competition in the market for the sale of health insurance to national accounts.

2. Whether the district court acted within its discretion, and did not clearly err, when it determined that the merger likely would substantially lessen competition in the market for the sale of health insurance to large group employers in Richmond, Virginia.

3. If this Court rules for Appellants as to both of these markets, whether this Court should remand for findings on the additional markets in which the merger was alleged to violate Section 7.

PERTINENT STATUTE

Section 7 of the Clayton Act, 15 U.S.C. § 18, is reprinted in the Addendum to this Brief.

STATEMENT OF THE CASE

Anthem and Cigna appeal from a decision and order by the District Court for the District of Columbia (Hon. Amy Berman Jackson) enjoining their proposed merger because it violates Section 7. To "facilitate expedited consideration of this appeal," Anthem "has chosen to focus" on its efficiencies defense, that is, the claimed medical cost savings. Mot. to Expedite 8; Anthem Brief (Br.) 2. Anthem does not dispute that the merger would be anticompetitive but for these claimed savings. As to the national accounts market, it abandoned any challenge to the district court's findings on market definition, that entry and expansion would be insufficient to preserve competition, that sophisticated buyers could not defeat post-merger price increases, that the merger would harm innovation, and that Anthem's other proffered efficiencies were insufficient to justify the otherwise anticompetitive merger.

A. Background

Anthem and Cigna sell commercial health insurance plans to employers for their employees. As relevant here, they sell to two types of employers: "large group," which most states consider to be employers with more than 50 employees, GSA17, and, within that category, "national accounts," which have around 5000 or more employees and typically operate in multiple states, GSA1, 30-34.

Insurers contract with healthcare providers—physicians, hospitals, and others—to develop a network of providers for members. *See* GSA6, 18. Provider contracts establish "reimbursement rates" at which providers are paid. GSA153-54 (Swedish). Provider contracts increasingly include "value-based" care arrangements, which involve more innovative fee structures. GSA155-56 (Swedish). Unlike the traditional fee-for-service model, a value-based care arrangement rewards providers for achieving health-outcome targets. *Id*. The "move from a pure fee-for-service based system to a more value-based model" is a "growing trend" because value-based care offers customers "a means of both lowering the cost and improving the outcome of the delivery of healthcare in this country." GSA9.

Anthem is the largest of the nationwide Blue Cross Blue Shield Association companies. GSA14. With some exceptions, each Blue member is granted an exclusive license to provide health insurance under the Blue brand in a designated territory. GSA20. Anthem's territory consists of all or part of fourteen states. GSA14. Each Blue licensee contracts with providers in its territory, and Anthem's customers—under the "Blue Card" program—may use providers under contract with any Blue licensee. GSA20. [redacted]

Cigna generally does not offer rates as low as Anthem's; it instead focuses "on ways to improve member health and employer cost outcomes." GSA90 (citing, e.g., GSA173-75 (Cordani); JA399-402 (Drozdowski)). Cigna was an early leader in promoting value-based care arrangements that reduce members' utilization of expensive procedures and promote member wellness. JA253-54 (Cordani); GSA207 (Smith). Cigna offers better and more complete data on patients, which providers consider necessary to develop collaborative

care options that lower costs and improve health outcomes. *See* GSA121 n.51. As Cigna's CEO David Cordani explained, "healthcare costs have been rising," so the right approach to controlling costs "could not be limited to lowering the cost of care when a patient got sick—the effort had to be refocused on encouraging and sustaining health." GSA119 (citing JA257). Cigna's customers have the lowest medical-cost trend among the big insurers. *See* GSA365 (DX334); GSA203-04 (Smith).

Anthem and Cigna market fully insured plans, in which the insurer covers the healthcare costs incurred by the employees, and "administrative services only" plans (or ASO), in which the employer pays its employees' medical costs, and the health insurer provides "claims administration, claims adjudication, and access to a network of health providers" for a fee. GSA6, 19. "Larger employers tend to purchase ASO plans because they can spread the risk of the medical costs over a larger number of covered lives." GSA19.

In July 2015, Anthem and Cigna agreed to merge and started to plan their post-merger integration. GSA14, 93. Their relationship soon soured, however, with each accusing the other of frustrating the

integration planning. By mid-2016, Cigna had stopped participating altogether. GSA15.

After a year-long investigation, the United States, eleven states, and the District of Columbia (the government) sued to block the merger because it would violate Section 7 of the Clayton Act by substantially lessening competition (1) in the sale of health insurance to national accounts in the fourteen Anthem states and in the United States as a whole, JA109-14 (Compl. ¶¶ 19-37); (2) in the sale of health insurance to large group customers in 35 metropolitan regions, JA115-20 (Compl. ¶¶ 38-50); and (3) for the purchase of healthcare services in these same 35 regions, JA124-28 (Compl. ¶¶ 64-75).

On February 8, 2017, the district court issued a 140-page opinion and enjoined the merger. The court recognized that "Section 7 of the Clayton Act prohibits mergers or acquisitions 'where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition.'" GSA22 (quoting 15 U.S.C. § 18).

Plaintiffs bear "the initial burden to prove that the merger would result in 'undue concentration in the market for a particular product in

a particular geographic area.'" GSA23 (quoting *United States v. Baker Hughes Inc.*, 908 F.2d 981, 982 (D.C. Cir. 1990)). "If plaintiffs establish the prima facie case, defendants must present evidence to rebut the presumption by 'affirmatively showing why a given transaction is unlikely to substantially lessen competition, or by discrediting the data underlying the initial presumption in the government's favor.'" *Id.* (quoting 908 F.2d at 991). If defendants make that showing, "'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.'" GSA24 (quoting 908 F.2d at 983). "A court may enjoin a merger based on proof of probable harm to any market alleged." GSA25 (citing *United States v. Pabst Brewing Co.*, 384 U.S. 546, 549 (1966)).

Applying this framework, the court concluded the merger was likely to substantially lessen competition in the market for the sale of health insurance to national accounts in the fourteen Anthem states and to large customers in Richmond, Virginia.

B. Competition For National Accounts

1. To analyze the competitive effects of the merger, the court first defined the relevant product and geographic markets. GSA25.

The court found that "[t]he sale of health insurance to national accounts with more than 5000 employees is a relevant product market." GSA26. This market includes both fully insured and ASO products. GSA35. The court found "the industry universally recognizes that national accounts exhibit different needs and characteristics," GSA30, and Anthem itself "defines national accounts as multi-state employers with more than 5000 eligible employees," GSA32 (citing GSA146 (Swedish)). This qualitative evidence was confirmed by the "hypothetical monopolist test"—"a primary tool used by economists to determine whether the alleged set of products is relevant for antitrust purposes." GSA34 (citing Dep't of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines* § 4.1.1 (2010) (*Merger Guidelines*)). The government's expert economist, Professor David Dranove, testified that national accounts constitute a relevant market because a hypothetical monopolist in the sale of health insurance to national accounts would

impose "a small but significant and non-transitory increase in price." GSA34-35.

The district court also found that the fourteen states where Anthem operates were an appropriate geographic market because, among other things, "Anthem's exclusive territory is where the acquisition will have a direct and immediate effect on competition." GSA3.

2. The court then assessed the merger's effect on concentration in this market because a merger resulting in "undue concentration" is presumptively unlawful. GSA23.

The national accounts market is highly concentrated, with only four significant competitors—Aetna, Anthem, Cigna, and United. *See* GSA55-56, 66. Based on data on insurers' enrollments, Anthem has a 41% share of the market and Cigna 6% (or 40% and 8% under an alternate methodology).[1] GSA52.

[1] The district court found it appropriate to include all lives covered by Blue licensees in calculating Anthem's market share, noting that "Anthem counts these lives itself" in internal calculations. GSA54. Without including all Blues' lives, the merger still would be presumptively unlawful under the *Merger Guidelines* thresholds. GSA53 n.15.

Dranove testified that the merger would substantially increase concentration. GSA53. To measure concentration, he used the "Herfindahl-Hirschmann Index" or "HHI."[2] According to the *Merger Guidelines*, a market with a post-merger HHI over 2500 is a highly concentrated market and an HHI increase of 200 or more in such a market triggers a presumption that the merger is anticompetitive. GSA53 (citing *Merger Guidelines* § 5.3). Depending on which set of market shares was used, the post-merger HHI would be 3000 or 3124, with an increase of 537 or 641—"well over the presumptive limits in the Merger Guidelines." *Id*.

The merger also would substantially increase prices. Dranove used a merger simulation technique to predict that the merger would increase prices to national accounts by $219.7 million. GSA58. He also estimated harm using an upward pricing pressure analysis—$383.8 million a year, or $930.3 million a year when "incorporating the fact that win/loss data suggests that Anthem and Cigna are close competitors." GSA58-59. Along with the share and concentration

[2] For a description of the HHI, see *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1081 n.12 (D.D.C. 1997); *Merger Guidelines* § 5.3.

figures, these predicted price effects established the government's prima facie case that the merger likely would substantially lessen competition in the market for national accounts. GSA60.

3. The court next considered whether Anthem had presented evidence to rebut the presumption of anticompetitive effects. GSA60, 64. Pointing to evidence regarding competition between Anthem and Cigna, customer sophistication, entry and expansion, and innovation, the court found that Anthem had met its burden. GSA61-64. Accordingly, the burden shifted back to the government.

4. The district court went on to consider the evidence as a whole to determine whether the merger likely would substantially lessen competition. Relying on economic testimony as well as documents and testimony of industry participants, the court found substantial head-to-head competition between Anthem and Cigna. GSA65. Analyzing win/loss data, Dranove found that each firm wins substantially more business from the other than their market shares would predict. GSA67. When Cigna is the incumbent and it loses a renewal bid, it loses to Anthem 60% of the time, whereas the share-based prediction would be 44%. *Id.*

Although Anthem's expert, Dr. Mark Israel, presented a different view, *see* GSA68-69, the court found that the "documentary record" supported Dranove's conclusion "that Anthem unquestionably competes directly and aggressively against Cigna for national accounts." GSA70. On numerous occasions, Anthem cut prices to avoid losing business to Cigna. *Id.* Anthem would "guarantee a 0% trend [in a customer's total medical costs] whenever replacing Cigna or Aetna." GSA71 (quoting [redacted]).

The court also found that "reducing the number of national carriers from four to three is significant." GSA73. It "will affect the solicitation of proposals and reduce the avenues for negotiation with the bidder for national accounts." *Id.* Anthem argued that powerful customers could prevent price increases, but the evidence showed that "the loss of one competitor from the four major carriers alters the RFP and negotiating dynamic, even with strong advocates on the other side." GSA74.

Anthem contended that entry could replace the lost competition, but the court disagreed. Anthem established "the mere existence," but not "the growing market significance, of any of the alternatives to the

major carriers." GSA76. And "[d]eveloping a provider network alone can take months, if not years." GSA77.

The district court also found that the merger would likely "slow innovation." GSA92. Unlike other insurers, "Cigna has relied on innovation to compete," and its value-based care strategies have spurred Anthem and other insurers to improve their own products. GSA90-91 (citing [redacted]). The court found that the merger "will inhibit Cigna's incentive to innovate." GSA91. Moreover, the evidence showed that Anthem's "efforts to move members out of Cigna's network, or to require Anthem network providers to apply Anthem rates to Cigna patients, will erode Cigna's relationships with its providers"—relationships that are fundamental to Cigna's capacity to innovate. GSA91.

5. Anthem's central defense was the claim that the merger would allow it to extract lower reimbursement rates from doctors and hospitals and pass those savings on. Israel projected that Anthem would save $2.4 billion by moving Cigna customers to lower Anthem reimbursement rates or, where Cigna had lower rates, the reverse. GSA96. An integration planning team working with consultants from

McKinsey estimated similar savings. GSA93. The court accepted that efficiencies could establish a defense to a merger, but required that they be "merger-specific" and "verifiable." GSA99-103 (citing *Merger Guidelines* § 10; *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 721-22 (D.C. Cir. 2001)). The court concluded Anthem's claimed medical cost savings were neither. GSA101.

Anthem claimed it would achieve savings by offering "the Cigna product at a lower Anthem price" through "contractually forcing providers to extend the fee schedules that Anthem has already secured." GSA104, 110. But the evidence showed "the Cigna model depends upon collaboration" that requires "a higher level of compensation." GSA111, 119. Cigna's collaborative arrangements are "aimed at lowering utilization" and, thus, are "central to the value based approach and medical cost trend guarantees that Cigna is selling." GSA11. The court found that nothing prevents Anthem from offering the programs that Cigna's customers value without the merger. GSA111-12.

Anthem claimed it would achieve savings "through rebranding Cigna customers" as Anthem customers, but "rebranding is nothing more than marketing the Anthem product to existing Cigna customers

and persuading them to buy it, and Cigna customers can do that now." GSA106.

The court further found the claimed medical cost savings were not verifiable in part because "Anthem has yet to detail a plan for how to achieve those savings for Cigna customers." GSA118. Anthem's documents and witnesses established that "providers may not accept the obligation to extend lower Anthem fee schedules to Cigna patients without a fight," GSA112, that "any reduction in provider costs will take years to come to fruition," GSA113, and that "there are reasons to doubt that providers will be willing to engage in the collaborative efforts embodied in their contracts with Cigna if they are forced to accept lower Anthem rates at the same time," GSA119.

Lastly, the court found that the promised medical cost savings were not cognizable efficiencies because they do not result "from the carriers' or the providers' operating more efficiently." GSA125. There was no showing that "the merger will result in increased output or enhanced quality at the same cost"—to the contrary, "the quality of the Cigna offering will in fact degrade," leaving customers without "the opportunity to choose between contracts that emphasize cost as the

number one factor and those that are more focused on the nature of the collaborative offering." GSA125-26. Anthem's ability to push down provider rates "seem[ed] better characterized as an application of market power." GSA130.

Anthem claimed other "general and administrative savings," but the court found they too had "yet to be verified," GSA101, and in any event would not offset the predicted harm to competition, GSA118. Accordingly, the court found that the merger would harm competition in the fourteen-state market for national accounts, and enjoined the merger on that basis. GSA1, 25. The district court did not reach the question of whether the merger would harm competition for national accounts in a nationwide market. *See* GSA72 n.22.

C. Competition For Large Group Customers In Local Markets

The government presented ample evidence that competition to sell health insurance to large customers would be substantially lessened in 35 metropolitan regions. The government established that in 33 of the 35 regions, the merger is presumptively unlawful based on market shares and concentration. GSA294 (Dranove); [redacted]. At trial, the government presented live testimony for a selection of local

markets, including in New Hampshire, Virginia, and Northern California. *See* GSA130. [redacted]

The court ruled on just one of these markets—Richmond, Virginia. GSA130-31. Market share and concentration figures established that the merger is presumptively unlawful in that properly defined market. GSA131-32, 135 (citing [redacted]). Testimony from Anthem witnesses and documents confirmed that the parties are close competitors in Richmond, and Anthem did little to show that entry or expansion would combat the loss of competition. GSA138-39. This provided an additional basis for enjoining the merger. GSA140.

D. Competition For The Purchase Of Healthcare Services

The government also claimed that the merger would substantially lessen competition in the market to buy healthcare services in 35 metropolitan markets, and thus harm healthcare providers by depressing reimbursement rates and reducing innovation that benefits

providers. Pls.' Phase II Proposed Findings of Fact ¶¶ 124-31, 150-53 (Dist. Ct. Dkt. Nos. 432, 483).

The government presented evidence that the merger was presumptively unlawful based on market shares and concentration. Competition among insurers allows providers to negotiate for more favorable terms, including collaborative relationships providers find attractive. GSA307 (Dranove); [redacted]. The government showed that the merger would eliminate this competition and give the merged firm market power in purchasing healthcare services. Pls.' Phase II Proposed Findings of Fact ¶¶ 139-47.

The court declined to decide "whether the merger should be enjoined on the grounds that it would create a monopsony on the buying side of the equation." GSA130.

STANDARD OF REVIEW

This Court reviews a "district court's decision to issue an injunction for abuse of discretion." *United States v. Philip Morris USA Inc.*, 566 F.3d 1095, 1110 (D.C. Cir. 2009). It "appl[ies] *de novo* review to the district court's conclusions of law." *Heinz*, 246 F.3d at 713. And it "will set aside the court's factual findings only if they are 'clearly

While Anthem emphasizes the massive effort spent projecting the $2.4 billion in savings, deriving that number was merely accounting. Anthem failed to detail practical steps that could achieve the savings. Its expert Dr. Israel was little help, offering nothing but an "academic exercise" untethered from business realities. GSA107 n.42.

Some Anthem witnesses spoke of exercising "affiliate clauses" in Anthem provider agreements to give Cigna customers access to Anthem's rates, but, as the court found, this would lead to tension with providers and result in contract renegotiations. Anthem's CEO denied that it would "drop the hammer" on providers in this way, and testified that whether and when to use contractual language and renegotiation to achieve lower rates remains to be determined. So, any strategy for achieving cost savings by exercising contractual clauses or renegotiating provider agreements is speculative and unverifiable.

Anthem never mentions the Blue Cross Blue Shield "best efforts" rules, but they significantly limit Anthem's options post-merger. Because Anthem could lose its right to sell under the Blue brand and be penalized billions of dollars unless it convinces many current Cigna customers to move to Anthem contracts, Anthem witnesses testified

that as soon as the merger is consummated it will try to convince Cigna customers to switch to Anthem contracts. But this rebranding would only result in Cigna customers buying the same Anthem product that they can buy today but have chosen not to. The district court correctly found that any medical cost savings achieved in this way are not merger-specific.

Anthem now focuses its efficiencies defense on the claim that the merger will result in something new—a "Cigna product at the Anthem price"—that would save customers $2.4 billion. But this is "an oversimplification that is not supported by the evidence." GSA122-23. The court found Anthem had not seriously addressed the practical hurdles to offering this new product and Anthem shows no error in this finding. Moreover, the court properly found that Anthem does not need a merger to adopt a different business strategy and develop the types of customer-facing programs offered by Cigna. Nothing about the merger changes whether a Cigna-type product at low Anthem prices could be achieved.

Anthem's defense is not bolstered by the government's allegations that the merger would substantially lessen competition in the purchase

of healthcare services, enabling the merged firm to force down provider rates. These rate reductions would arise from the alleged Section 7 violation and are an exercise of market power. In any event, the government never alleged, let alone proved, anything close to the Anthem's $2.4 billion figure.

As the district court stressed, Anthem does not contend that the merger will enable anyone to operate more efficiently, increase output, or improve quality. To the contrary, the court found reason to believe that "the quality of the Cigna offering will in fact degrade." GSA125.

The district court separately found that the merger violates Section 7 because it would substantially lessen competition in the sale of health insurance to large group employers in Richmond, Virginia. The merger of two firms with combined market shares of 64-78% would greatly increase concentration in an already concentrated market and eliminate substantial head-to-head competition that would not be replaced by the expansion or entry of other firms. The document Anthem singles out for criticism represented only a small part of the evidence supporting the court's findings, and the court was entitled to

credit the expert's opinion that prices would increase in Richmond even with the claimed cost savings.

Finally, even if the Court rules for Anthem, it should deny Anthem's request to direct entry of judgment in its favor. Substantial factual issues remain unresolved—the district court did not reach all of the government's claims—and remand to the district court would be necessary.

ARGUMENT

I. THE DISTRICT COURT PROPERLY HELD THAT THE CLAIMED MEDICAL COST SAVINGS WERE NOT COGNIZABLE EFFICIENCIES

The district court enjoined the Anthem-Cigna merger because the evidence at trial established that the effect of the proposed merger "may be substantially to lessen competition." GSA140. Anthem does not seriously dispute any findings underlying the court's conclusion that the merger violates Section 7, except those relating to its claimed medical cost savings. *See* Mot. to Expedite 8; Br.2. Anthem's argument (Br.10) that the district court "declined to consider billions of dollars" in efficiencies is doomed, however, by the district court's well-supported findings that the claimed cost savings are not cognizable.

A. The Court's Ruling Was Grounded In Detailed Factual Findings, Not A Misunderstanding Of Section 7

Section 7 of the Clayton Act prohibits mergers "where in any line of commerce . . . in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18. Section 7 was motivated by Congress's "concern with the protection of competition . . . and its desire to restrain mergers only to the extent that such combinations may tend to lessen competition." *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962).

Of course, as Anthem observes, Section 7, like other antitrust laws, is "a consumer welfare prescription." Br.12 (quoting *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 107 (1984)). Consumer welfare is the object, and preserving competition is the means chosen by Congress to achieve it. Congress's determination that competition is the means to consumer welfare is premised on the "assumption that competition is the best method of allocating resources in a free market." *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978). The "economic concept of competition" is unquestionably the governing

standard. *Baker Hughes*, 908 F.2d at 991 n.12 (quoting *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1386 (7th Cir. 1986)).

Thus, a merger's lawfulness under Section 7 turns on its probable effect on competition. The district court did not "reject[] the last 50 years of antitrust law" or "misperceive the maintenance of competitive rivalry as an end in itself" (Br.11), by focusing on competition. Likewise, there is nothing "stunning," let alone "dangerous" (Br.11, 15), about the court's correct characterization of the statement from *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1223 (11th Cir. 1991), that "a defendant seeking to overcome the presumption [of illegality] 'must demonstrate that the intended acquisition would result in significant economies and that these economies ultimately would benefit competition, and hence, consumers." *See* GSA127. The court correctly interpreted the Eleventh Circuit's statement (quoted in *Heinz*, 246 F.3d at 720) to mean that Section 7 seeks to advance consumer welfare by preserving competition. As the Ninth Circuit elaborated: "[T]he language of the Clayton Act must be the linchpin of any efficiencies defense. The Act focuses on competition, so any defense must demonstrate that the prima facie case portray[s] inaccurately the

merger's probable effects on competition." *Saint Alphonsus Med. Ctr.-Nampa, Inc. v. St. Luke's Health Sys.*, 778 F.3d 775, 790 (9th Cir. 2015) (citation and internal quotation marks omitted).

The primacy of competition is especially important here because Anthem's defense is premised on the idea that consumer welfare is promoted by eliminating competition in the purchase of healthcare services, and thereby reducing reimbursement rates. The policy of the antitrust laws—including Section 7—bars the argument that anticompetitive effects promote consumer welfare and thus justify an anticompetitive merger. *Cf. N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958) ("the policy unequivocally laid down by the [Sherman] Act is competition"). Section 7 surely would not allow all insurers in a relevant market to merge even if the resulting monopolist insurer could "obtain lower discount rates for [its] customers," Br.17. Moreover, the Clayton Act does not require courts to analyze the healthcare system and decide whether favoring insurers over providers best promotes "consumer welfare." Any such determination is reserved for the political branches.

Anthem cites Supreme Court decisions from outside the merger context, but none casts doubt on the district court's assessment of Anthem's asserted efficiencies. *See, e.g.*, *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 320-21 (2007) (entertaining the possibility of a meritorious "predatory bidding" claim even though challenged conduct could not harm downstream consumers); *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993) (harm to individual competitors "is of no moment if competition is not injured"). And while Anthem characterizes *Baker Hughes* as "holding Section 7 requires 'a judgment whether the challenged acquisition is likely to hurt consumers,'" Br.12 (quoting 908 F.2d at 990 n.12), the full quotation in *Baker Hughes* from Judge Posner's decision in *Hospital Corporation of America* makes clear that competition remains the "'lodestar that shall guide the contemporary application of the antitrust laws.'" *Baker Hughes*, 908 F.2d at 990-91 n.12 (quoting 807 F.2d at 1386).

Anthem's efficiencies defense failed, not for policy reasons, but because the trial evidence demonstrated that the medical cost savings

were not verified, were not specific to the merger, and were not even real efficiencies.

B. The District Court Did Not Clearly Err In Finding The Medical Cost Savings Neither Verifiable Nor Merger-Specific

To be cognizable, efficiencies must be "verifiable, not merely speculative." *St. Luke's*, 778 F.3d at 791. Efficiencies also must be merger-specific; that is, "they must be efficiencies that cannot be achieved by either company alone because, if they can, the merger's asserted benefits can be achieved without the concomitant loss of a competitor." *Heinz*, 246 F.3d at 722; *see also FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 348 (3d Cir. 2016). The verifiability requirement ensures that the claimed benefits are likely to be achieved with the merger, while the merger-specificity requirement ensures that the benefits could not practically be achieved without the otherwise anticompetitive merger.

Before crediting the merging parties' claimed efficiencies, the district court "must undertake a rigorous analysis of the kinds of efficiencies being urged by the parties in order to ensure that those 'efficiencies' represent more than mere speculation and promises about

post-merger behavior." *Heinz*, 246 F.3d at 721. The district court undertook this "rigorous analysis" of Anthem's claimed efficiencies and found them wanting. GSA102-23.

Anthem claims that its merger with Cigna would result in $2.4 billion of cognizable efficiencies in the form of medical cost savings extracted from providers. It contends it would achieve these purported savings and offer customers something new—a Cigna-like product at Anthem's lower prices—by persuading current Cigna customers to enter into Anthem contracts and by exercising contractual provisions in, and renegotiating, provider agreements. *See, e.g.*, Br.37. As the district court correctly found, however, the avenues Anthem identifies for achieving the purported cost savings are unlikely to succeed, do not depend upon the anticompetitive merger, or both. Anthem's arguments fall far short of showing the district court's decision was "clearly erroneous." *See* Br.36.

1. The court properly found that a "Cigna product at the Anthem price" is a "dubious proposition"

The putative "Cigna product at the Anthem price" (GSA119) is the centerpiece of Anthem's efficiencies defense. *See, e.g.*, Br.17, 27, 34. Anthem argues that the merger will allow it to market a product

"incorporating Cigna's customer-facing program that some customers value, with the generally lower Anthem provider rates." Br.26. Anthem proffers a mix of strategies for achieving this imagined product, but the trial revealed significant practical impediments that Anthem has not seriously addressed. Taken together, the evidence made the "'Cigna product at the Anthem price' or 'best of both worlds' scenario touted by Anthem and Dr. Israel" a "dubious proposition." GSA119.

a. Practical impediments make a "Cigna product at the Anthem price" unlikely

Two key findings underlie the court's conclusion that a "Cigna product at the Anthem price" was "an oversimplification that is not supported by the evidence." GSA122-23.

First, the district court found (GSA106-08) that any strategy for offering a "Cigna product at the Anthem price" must take account of the Blue Cross Blue Shield "best efforts" rules in Anthem's licensing agreement, which require that 80% of Anthem's revenues within its fourteen state exclusive territory, and 66% of its national revenues, be from Blue-branded products. GSA106; GSA229-30 (Schlegel). Anthem will be out of compliance with these rules when the merger is consummated, GSA150 (Swedish); GSA233-34 (Schlegel), and a failure

to comply within the requisite time period could result in the loss of Anthem's license to do business under the Blue brands and a penalty of nearly $3 billion. GSA106-07 & n.41; GSA243-44 (Schlegel). Anthem intends to comply with the "best efforts" rules. GSA107-08; *see* GSA143-44 (Swedish); GSA243-44 (Schlegel).

To come into compliance, Anthem must "rebrand" Cigna customers as Anthem customers. GSA234-240 (Schlegel); JA375 (Matheis). As Anthem executive Stephen Schlegel testified, rebranding involves converting Cigna customers into Anthem customers by moving them to Anthem plans, "utilizing [Anthem's] contracts and utilizing [Anthem's] licenses." JA346; GSA106, 119 n.49. Rebranded customers will not retain their current Cigna product—with the Cigna provider network and Cigna provider relationships. JA349 (Schlegel). But it is the Cigna provider contracts, which Anthem labels inefficient, that help create the features Cigna customers value.

Second, Anthem cannot simply recreate the Cigna product under Anthem's provider network and brand because the two companies' products reflect fundamentally different strategies for providing value to customers. GSA255-56 (Israel); GSA213-14 (Dranove); GSA122.

Anthem offers customers access to industry-leading unit discounts from providers' fees. GSA55. To compete effectively, Cigna seeks to lower customers' medical costs through programs that reduce utilization. GSA90; JA262-64 (Cordani); GSA210-214 (Dranove). Some customers prefer Cigna and others prefer Anthem.

Employers that choose Cigna even though its provider rates are higher than Anthem's tend to do so because Cigna lowers healthcare expenses through wellness programs and provider collaboration that reduce the need for expensive healthcare. *See* JA272, 274 (Cordani); GSA198-200 (Thackeray). Cordani testified that Cigna "can dramatically reduce the number of emergency room visits and dramatically reduce the number of one-day admits to a hospital" with its program to get asthmatics to use their "controlling therapies." JA279-80. He explained, "if one party has a 2 percent lower discount for the emergency room service, you would assume that's a savings. But the [emergency room visits] will never happen if the clinical programs are working." JA280.

Cigna's model "depends upon collaboration" with providers much more than a traditional fee-for-service model. GSA111; JA268-72

(Cordani). The model aims to reduce total cost by aligning provider incentives with better clinical outcomes and extending the care team beyond doctors to include nurses, health coaches, case managers, and others to engage individual members on their health issues. JA272 (Cordani). Services offered under these programs include free health screenings, making nurses available to patients to explain health issues and how best to manage them, and tracking information such as whether patients are refilling prescriptions. GSA120 n.50; JA257-58, 268-72 (Cordani).

The district court found that it "takes a higher level of compensation to encourage and enable physicians and hospitals to participate in the arrangements that are aimed at lowering utilization and are central to the value based approach and medical cost trend guarantees that Cigna is selling." GSA111; JA268-76 (Cordani); JA550-52 (Rowe). [redacted]

[redacted]

For example, Cigna and hospital consortium Granite Health work together to identify metrics and focus on ways of improving patient care. As explained by Rachel Rowe of Granite, Cigna pays Granite a per-patient care coordination fee in addition to the fees paid to Granite member hospitals for specific services and provides additional financial incentives to Granite to achieve medical cost and quality goals. JA549-57; GSA120 n.50.

Anthem never explained how it would be able to build or maintain collaborative arrangements with providers—which it would need to offer Cigna's customer-facing programs—while at the same time pressuring providers for lower rates. [redacted]

[redacted] Yet that is what would be needed for Anthem to offer a "Cigna product at the Anthem price."

Cordani testified that trying to force providers to perform the same services while not offering them the same value they receive under their current Cigna contracts would "dramatically unwind" Cigna's collaborative arrangements. GSA121-22; JA284-85 (Cordani). Cigna's collaborative provider arrangements "cannot just be pulled out of Cigna and plugged into Anthem." GSA195 (Cordani). Anthem argues that "Cordani is biased" (Br.44), but, as the district court noted, his testimony was corroborated by other evidence. GSA122; *see also* JA519 (Dranove). Moreover, "[e]valuation of the credibility of witnesses must be left to the factfinder," *United States v. Project on Gov't Oversight*, 454 F.3d 306, 313 (D.C. Cir. 2006), and the court was entitled to credit Cordani.

b. Israel's abstract accounting exercise does not overcome these practical impediments

Anthem's efficiencies defense was presented principally through Dr. Israel, its economic expert. He calculated what the savings would be "if the lowest provider rates already negotiated by Anthem were made available to existing Cigna customers, and if the prevailing Cigna

rates were made available to existing Anthem customers." GSA95. In his "best-of-best" world, the merged firm "would be able to achieve the best price that either firm had obtained separately," GSA96; JA437-38 (Israel), and "medical costs for current Cigna customers would thereby be reduced by approximately $1.5 billion, and medical costs for current Anthem customers would be reduced by $874 million, for a total of $2.4 billion in savings." GSA96. The claimed $2.4 billion of savings are not tied to the relevant product market, *see* GSA267 (Israel), and only about a third of Anthem and Cigna insured lives are employed by national account customers. JA1280 (PX125); JA1795 (PX284).

The district court found that Israel's "economic model diverges from the reality of the business circumstances," GSA107 n.42, and is "largely abstract," GSA105 n.40. Israel offered no opinion as to how, post-merger, either insurer's customers could gain access to lower rates, other than to posit "a hypothetical negotiation with providers," and assert that "economic logic" suggests that "the two companies' combined volume will affect the outcome." GSA105; GSA259-60, 263-64 (Israel).

To project specific cost savings based on his bulk-purchasing rationale, Israel just assumed that Anthem contracts for exactly what

Cigna contracts for, but pays substantially less. *See* JA441 (Israel) ("[I]n the negotiation models, it's bringing the volume together. It's bulk buying."). The district court, however, found that because Anthem's and Cigna's plans are so different, Israel's "bulk purchasing analogy falls apart." GSA111.

Anthem argues that the court's rejection of the "bulk buying paradigm" to explain how customers would gain access to a Cigna product at the Anthem price is "impossible to square with the District Court's conclusion that the parties compete in the same product market and are particularly close competitors." Br.31. But Anthem misses the import of the court's finding. Cigna does not compensate healthcare providers at an unnecessarily high hourly rate. It uses a different approach to contracting with providers to make its value-based strategy work. GSA111; GSA178-86 (Cordani); JA550-52 (Rowe); [redacted] [redacted] GSA214-15 (Dranove).

The district court properly found that a "Cigna product at the Anthem price" is unlikely to occur for real-world reasons and that Israel offered no solution. These findings inform the rest of the court's detailed assessment of Anthem's efficiencies defense and support the

court's conclusion that the medical cost savings claimed by Anthem are neither verifiable nor merger-specific.

2. The medical cost savings are not verifiable

Before crediting billions of dollars of claimed efficiencies, the district court's "rigorous analysis" must include a careful look at the steps the merging parties propose to achieve them. "If this were not so, then the efficiencies defense might well swallow the whole of Section 7 of the Clayton Act because management would be able to present large efficiencies based on its own judgment and the Court would be hard pressed to find otherwise." *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 91 (D.D.C. 2011). *See also University Health*, 938 F.2d at 1223 ("a defendant [cannot] overcome a presumption of illegality based solely on speculative, self-serving assertions").

Anthem's claims do not withstand "rigorous analysis." The claimed savings are aspirations quantified through an accounting exercise disconnected from practical realities. [redacted]

a. The claimed savings for current Cigna customers are speculative and unlikely to be achieved

Most of the claimed cost savings projected by Israel would come from Cigna customers accessing lower Anthem rates. Anthem contends these savings would be achieved through "a combination of (i) using 'affiliate language' in Anthem's contracts with providers, (ii) enticing Cigna customers to switch to a new Anthem product, and (iii) renegotiating discounts with providers." Br.37. But Anthem's integration team and senior executives failed to provide adequate answers for how these tools would result in billions of dollars of savings.

Simply invoking affiliate clauses (described at GSA94) would not yield the cost savings Anthem claims. Many provider agreements have termination clauses, JA412 (Drozdowski), and the district court found that "doctors could rebel and negotiate more favorable terms." GSA113. Moreover, invoking affiliate clauses without rebranding would not convert any Cigna customers to the Anthem (Blue) brand, and so would not help Anthem come into compliance with the "best efforts" rules. GSA113-14; JA409 (Drozdowski).

Anthem contends it would rely on some combination of the affiliate clauses and renegotiating, but at trial Anthem CEO Joe

Swedish "adamantly resisted" the suggestion that Anthem would "drop the hammer" on providers in this way. GSA113; *cf.* GSA162-64 (Swedish). Swedish explained that whether Anthem would invoke affiliate clauses or initiate negotiations with providers to lower rates was a decision that "would play out over a lengthy period of time." JA246-47. Anthem's head of integration planning Dennis Matheis testified that Anthem would need to evaluate strategy "geography-by-geography, provider-by-provider." JA362.

Anthem's hesitance makes sense given the tensions that invoking affiliate clauses and renegotiating rates likely would create with providers. Anthem complains (Br.38) that the court "improperly credited anecdotal evidence" about provider pushback, but much of the evidence was from Anthem and Cigna executives. Colin Drozdowski, who led Anthem's network cost savings team, stated that if the company invoked affiliate clauses or sought to negotiate lower rates, "[i]n all circumstances [he] would expect strong provider resistance, as they view this as an incremental discount with no corresponding incremental value (no new members)." JA2150 (PX54). [redacted]

[redacted] *See also* JA376 (Matheis) (invoking affiliate clause will cause "provider abrasion"); JA399 (Drozdowski) (forcing Cigna providers to accept Anthem rates could "create enhanced tension"); [redacted].

Anthem also says it would try to "entice" Cigna customers to switch to an Anthem product. This rebranding strategy would help Anthem come into compliance with the "best efforts" rules, but it would not automatically make available a *Cigna* product at the Anthem price. *See* GSA194 (Cordani) ("It's a different product, a different technology, a different service model, different clinical models, different support structure."). Instead, the former Cigna customers would be buying an *Anthem* product at Anthem prices—something they can do today. *See infra* pp. 52-53.

b. The claimed savings for current Anthem customers are speculative and unlikely to be achieved

More than a third of Anthem's claimed medical cost savings would come from Anthem customers gaining access to lower Cigna rates. GSA96. The district court found the record "devoid of plans" to enable

Anthem members "to enjoy any existing superior discounts." GSA114-15. Anthem argues that this finding was clear error based on testimony referring to "exercising Anthem's affiliate clause, re-branding, and re-contracting with providers." Br.41-42.

Anthem refers to "Anthem's affiliate clause," but it would need to invoke *Cigna*'s provider contracts, not Anthem's, to access lower Cigna rates. As the district court found, "[e]ven if Cigna's provider contracts contain affiliate provisions, the Blue Cross Blue Shield Association rules would bar the merged company from invoking them." GSA115; [redacted] JA379 (Matheis). This finding is uncontested.

Anthem never explains how "re-branding" would allow Anthem customers to gain access to Cigna's lower rates. Anthem never claimed it would try to convince *Anthem* customers to move to *Cigna* contracts, and doing so would exacerbate Anthem's "best efforts" compliance problem.

Lastly, Anthem contends that Anthem customers would gain access to lower Cigna rates through "re-contracting" because "the combined company will bring more lives to the providers than Cigna alone." Br.42. But Israel's "best-of-best" projections did not examine

why Cigna had lower rates than Anthem, and the record reflected that the reason was not always higher enrollment. For example, Cigna was able to negotiate lower rates with some providers for the providers' *own employees* and, in other cases, the provider wanted to help Cigna compete better. GSA115; *see* GSA250-51 (Singhal); JA512 (Dranove). As the district court correctly found, "nothing in the expert's negotiation model explains why providers would continue to be willing to provide that sort of support after a merger." GSA115; *see also* GSA251-52 (Singhal) (lead McKinsey consultant on Anthem integration team acknowledging that Anthem does not know why Cigna has lower rates for any particular provider).

c. Anthem's lack of a plan supports the court's finding that cost savings are unverifiable

Anthem argues that it was clearly erroneous for the district court to find that "a significant portion of the medical cost savings . . . have yet to be verified" given that the integration team and Israel both "evaluated billions of claims" to make their projections. Br.36-37 (quoting GSA101). But verifiability is not a question of how much effort the accountants put in. There must be sufficient evidence showing that

the efficiencies were likely to occur, i.e., they were not "speculative." *Heinz*, 246 F.3d at 721; *Hershey Medical Center*, 838 F.3d at 348.

Here, the evidence raised serious concerns about whether the projected cost savings "can actually be achieved." GSA112; *see also* [redacted]. And Anthem has not developed a workable plan for selling a "Cigna product at the Anthem price" or achieving medical cost savings another way. Matheis testified that "[t]he steering committee has not taken up the long-term question with regard to brand strategy." GSA247. Anthem does not know the extent to which it will use rebranding or exercise affiliate clauses, JA362, 372-74 (Matheis), and it has only a "general plan" for coming into compliance with the "best efforts" rules, GSA234-35 (Schlegel). [redacted] The district court properly found that Anthem "has yet to detail a plan for how to achieve [the claimed medical cost] savings." GSA118.

The district court also appropriately considered the strained relationship between Anthem and Cigna in weighing whether the

claimed efficiencies are likely to be achieved. "The record contains compelling evidence of the deterioration in the merging parties' relationship." GSA116; *see, e.g.*, [redacted]. Anthem argues that this evidence should not be considered because it "would make the efficiencies defense unavailable in hostile takeovers" (Br.43), but Anthem's own CEO told the Anthem board that the success of the merger in achieving the efficiencies claimed here would turn on pre-closing effort, GSA170 (Swedish); [redacted]. Cigna has withdrawn from all pre-merger integration efforts and provided "compelling testimony undermining the projections of future savings." GSA9; *see, e.g.*, JA696, GSA189-91 (Cordani). It was not clear error for the district court to conclude that these unusual circumstances "impair the Court's ability to credit" the claimed cost savings. GSA117.

d. Israel's methodology was seriously flawed

In addition to the district court's well-founded concerns about whether the claimed medical cost savings ever would materialize, the court also was entitled to find that the method Israel used to project them was badly flawed. Israel's "best-of-best" approach ignored what customers ultimately paid for healthcare. JA280-81 (Cordani). Cordani explained that the average prices on which Israel focused are "only a portion of the equation," and that any comparison of provider rates should take into account total healthcare expenses. JA279; GSA114; *see also supra* pp. 5-6, 33-35. Anthem cites (Br.40-41, 44) to Israel's contrary testimony, but the court was entitled to credit Cordani's testimony rather than Israel's "academic exercise," GSA107 n.42.

The district court also questioned Israel's projections because they were "based solely on invoices and not a comparison of the fee schedules themselves." GSA114. He failed to take into account service mix (i.e., different patients, different procedures). JA529-30 (Dranove). Israel also failed to take into account when Anthem's and Cigna's contracts were signed, *see* GSA265-66 (Israel), even though differences in reimbursement rates could be due to the timing of the provider

negotiation, *see* GSA252 (Singhal). Government expert Ronald Quintero found that $815 million of the $2.4 billion resulted from situations where Israel found that Anthem's discount was at least 25% more than Cigna's, an inexplicably large difference that Quintero concluded was the result of issues such as "the claims mix for a particular period" or the timing of provider discount negotiations. JA544.

e. The district court did not place an undue burden on Anthem

Anthem argues (Br.45) that the district court imposed asymmetrical burdens on the government and the merging parties, but the court did not depart from established precedent in concluding that Anthem's claimed medical cost savings are unverifiable. This Court has demanded "a rigorous analysis" and "proof of extraordinary efficiencies" for a merger presenting "high market concentration levels." *Heinz*, 246 F.3d at 719-20. Other courts require similar scrutiny of claimed efficiencies. *Hershey Medical Center*, 838 F.3d at 349 (efficiencies defense requires "demanding scrutiny"); *University Health*, 938 F.2d at 1223 (holding defendants could not rely on efficiencies when they did not "specifically explain" how they "would be created and maintained").

There is no error in inquiring whether real-world considerations pose substantial obstacles to the achievement of aspirations. In *United States v. Aetna Inc.*, Civ. No. 16-1494, 2017 WL 325189 (D.D.C. Jan. 23, 2017), for example, the defendant health insurers contended that the merged firm would be able to obtain the lower of the rates Aetna and Humana separately negotiated with providers prior to the merger. Judge Bates rejected these claimed efficiencies in part because "there are real impediments to fully implementing a best of the two contracts approach, as the providers may object to being switched from a contract with a higher reimbursement rate to one with a lower rate." *Id.* at *72.

Nor are these standards inconsistent with Section 7's concern with "probabilities, not certainties." *Brown Shoe*, 370 U.S. at 323. In *Baker Hughes*, this Court was mindful of not imposing too heavy a burden of production on the defendant in rebutting the government's prima facie case, particularly in light of the fact that the government "can carry its initial burden of production simply by presenting market concentration statistics." 908 F.2d at 992. But the Court explained that "[t]he more compelling the prima facie case, the more evidence the defendant must present to rebut it successfully." *Id.* at 991. Here, the government did

not rest on market concentration data, but offered substantial additional evidence of competitive harm that would result from the merger. *See* GSA64-92. And the district court found "the United States ha[d] carried its burden notwithstanding Anthem's introduction of this evidence" of claimed medical cost savings. GSA102.

3. The claimed medical cost savings are not merger-specific

Anthem was required to show not only that the medical cost savings likely would result from the merger, but also that they could not practically be achieved "without the concomitant loss of a competitor." *Heinz*, 246 F.3d at 720-21. The district court questioned whether any of the projected medical cost savings were merger-specific given that they were "expressly based upon the application of existing provider rates to those providers' existing patient volume." GSA104. Anthem's response is that a "Cigna product combined with an Anthem discount structure" would be a new product, so any associated efficiencies would be merger-specific. JA456 (Israel).

But, as the district court found, the rebranding that would need to occur to satisfy the "best efforts" rules would not result in a merger-specific reduction in medical costs. And, to the extent Anthem could

offer a "Cigna product at the Anthem price" post-merger, nothing prevents that today. Indeed, Anthem's strongest incentive to do so is competition from Cigna—an incentive that would be eliminated by the proposed merger. *Cf. H&R Block*, 833 F. Supp. 2d at 80 ("merged firm will have a greater incentive to migrate customers into its higher-priced offerings").

a. Anthem's plan to rebrand does not lead to a merger-specific reduction in medical costs

To bring the merged company into compliance with the "best efforts" rules, Anthem must move many Cigna customers to the Anthem (Blue) brand. GSA107. Anthem plans to begin as soon as the merger closes. JA343, 345-46 (Schlegel); JA1599, 1606 (Matheis). As Anthem's head of integration planning explained, its strategy of trying to convince Cigna customers to switch to Anthem contracts would be "no different than if you're out selling new business in the market on a day-to-day basis." GSA106 (quoting JA374 (Matheis)).

Thus, cost savings achieved by "rebranding," i.e., converting existing Cigna customers to Anthem products, are not merger-specific. GSA108. As the court explained, "any customers that value [Anthem's large] discounts above other aspects of the contractual arrangement can

choose Anthem as their carrier today." GSA6; *see* GSA221 (Dranove). On its own, rebranding brings nothing new to the market.

Anthem argues that the district court misunderstood rebranding. First, Anthem explains that, in rebranding, "a *customer* may choose to change its Cigna-branded contract to a Blue-branded contract," and "doing so would not necessitate changes in any provider contract." Br.33 (citing JA374). But the district court did not misunderstand; this is exactly what the court correctly found would bring nothing new to the market. GSA106; JA374. Second, Anthem argues that it can invoke the affiliate clause in existing provider contracts to offer low Anthem rates to Cigna customers "without changing the Cigna customer contract or product features." Br.33. As discussed above, however, the district court rejected Anthem's contention (Br.33) that it could simply combine "Cigna's customer-facing programs" with "the generally lower Anthem provider rates." *See* GSA119; *supra* pp. 31-40.

b. Improving Anthem's product does not depend on the merger

Anthem's efficiencies defense also founders on the fact that "there is nothing stopping Anthem from improving its wellness programs, or any other offerings that Cigna now does better, on its own." GSA6. In

Heinz, one of the principal claimed merger benefits was that Heinz's access to Beech-Nut's recipes would "make its product more attractive and permit expanded sales at prices lower than those charged by Beech-Nut." 246 F.2d at 722. The Court rejected this efficiencies defense because "neither the district court nor the appellees addressed the question whether Heinz could obtain the benefit of better recipes" without merging. *Id.*

Anthem contends that the district court committed legal error by requiring Anthem to prove that it was "*impossible*" to achieve the medical cost savings absent the merger. Br.24-25. But the court did not "bypass any consideration" (Br.25) of whether Anthem practically could develop a Cigna-like product without the merger. Rather, the district court reasoned that the path Anthem had mapped for achieving the efficiencies ultimately depended on the efficacy of mechanisms that are available without the merger.

Anthem witnesses touted the company's innovation and quality leadership, GSA224-27 (Kendrick); JA401-02 (Drozdowski), and the court found that Anthem was "very involved in the health insurance industry's transition from a pure fee-for-service model to a more value-

based approach." GSA121 n.51; *see* JA400-01 (Drozdowski); GSA164-67 (Swedish); GSA360-61 (Kehaly). The record showed that Cigna's innovation in the market had spurred Anthem to consider more collaborative arrangements with providers. GSA91. [redacted]

If Anthem has been less successful than Cigna in implementing value-based programs, that most likely is because Anthem pursues a different strategy. The record showed that Anthem has a "very different attitude" towards provider collaboration and often adopts "more of a take it or leave it" approach with providers. GSA121 n.51; [redacted] GSA270-80 (Rowe) (discussing Granite's difficulties developing a value-based collaborative relationship with Anthem); [redacted].

Anthem could develop better wellness programs or value-based products if it chose to do so. To the extent Anthem could do this while also preserving its lower provider rates, the medical cost savings are not

merger-specific. *See* JA517 (Dranove); *see also Hershey Medical Center*, 838 F.3d at 351 (hospitals were "capable of independently engaging in risk-based contracting," so claim that merger would enhance their ability to do so was not merger-specific); *St. Luke's*, 778 F.3d at 791 (noting district court rejected argument that merger was necessary for hospital to transition to integrated care model). Conversely, if Anthem could not develop a Cigna-type product at its own lower provider rates then the claimed medical cost savings are unachievable, with or without the merger. *See* GSA341-42 (Dranove).

c. The government's claim that the merger would harm providers does not help Anthem

Anthem argues (Br.31) that the medical cost savings must be merger-specific efficiencies because the government alleged in its complaint that "provider rates will go down *as a result of the merger*." More precisely, the government alleged that the merged company would force rates down *through the exercise of market power* over healthcare providers. *See supra* pp. 16-17. Anthem is wrong to say (Br.31) that the district court "never grappled with the clear import of" the government's allegation. As the court well understood, the import of the government's allegations is that the medical cost savings are not

cognizable efficiencies. Rather, they are manifestations of the anticompetitive effects the merger would have in the vertically related markets in which Anthem and Cigna purchase healthcare services. No court has suggested that *anticompetitive* effects in one market can be used to offset anticompetitive effects in another. They are not efficiencies, as the court indicated. *See infra* pp. 58-63.

Moreover, the government did not allege that the merger would result in a "Cigna product at the Anthem price"—an essential element of Anthem's efficiencies defense. To the contrary, the government alleged that the merger would harm consumers by eliminating competition that leads insurers like Cigna to develop innovative value-based relationships with providers. *See* JA124, 127-28 (Compl. ¶¶ 64, 74-75); *see also* GSA210-15 (Dranove); GSA91. And the court agreed that the merger was likely to harm innovation and degrade the existing Cigna product. GSA125-26. *Cf. Merger Guidelines* § 10 (cognizable efficiencies "do not arise from anticompetitive reductions in output or service").

Nor is there any basis for Anthem's misleading suggestion (Br.8-9, 31) that the government admitted that lower provider rates totaling

$2.4 billion would be passed on to Anthem's customers. While the government recognized that there would be *some* reduction in provider reimbursement rates as a result of the merged firm's exercise of market power, its expert indicated that it would be far less than claimed by Anthem. *See* GSA324-25 (Dranove).

Anthem also incorrectly asserts that the evidence of "near-complete pass through" was unrebutted. Anthem documents show that passing savings through was "[n]ot the optimal solution to capture most value from deal," JA2159 (PX727), and the court found Anthem "considered a number of ways to capture the network savings for itself and not pass them through to the customers as it insisted in court that it would," GSA7-8. Furthermore, more than 25% of the claimed $2.4 billion in medical cost savings came from fully insured accounts (GSA338 (Israel)), and Israel recognized that these cost reductions would not automatically be passed through to employers. JA658-59.

C. The Claimed Savings Are Not Efficiencies

The last of the reasons given by the district court for why the claimed efficiencies are not cognizable is that "it is questionable whether the medical cost savings can be characterized as an 'efficiency'

at all." GSA101. The district court reasoned that, "[e]ven if increased purchasing power on the supply side can be viewed as an efficiency in some scenarios, the facts of this case do not fit the paradigm." GSA125. The "promised reduction in customers' total medical costs does not result from" anyone "operating more efficiently, and there has been no showing that the merger will result in increased output or enhanced quality at the same cost."[3] *Id*. To the contrary, the court found that "the merger would harm consumers by reducing or weakening the Cigna value based offerings which aim to reduce medical costs by reducing utilization and by engaging with, rather than simply reducing the fees paid to, providers." GSA129.

Economics distinguishes between a "real" savings and a "pecuniary" savings. The former enlarges the pie shared by all members of society. The latter enlarges one slice by shrinking one or more other slices. A savings is real when the same output is produced

[3] Anthem misunderstands (Br.19-23) the court's observation that medical cost savings do not arise from efficiencies in the performance of administrative services, GSA123-24. The court's point was not that the medical cost savings are outside the relevant market. Rather, it was reinforcing the fact that the savings do not reflect any claimed effect of the merger on the resources expended on the administrative services Anthem and Cigna provide; i.e., they are not efficiencies at all.

using fewer resources or more output is produced using the same resources. *See* F.M. SCHERER & DAVID ROSS, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 130 (3d ed. 1990). Dranove testified that the medical cost savings are "not an economic efficiency as economists would describe it" because they do not entail "reducing the amount of societal resources brought to bear in producing healthcare services." GSA219.

Allowing an otherwise anticompetitive merger because it makes some better off at the expense of others makes little sense and disregards the test Congress prescribed in Section 7. *See 60 Minutes with Douglas H. Ginsburg, Assistant Attorney General, Antitrust Division*, 55 ANTITRUST L.J. 255, 269 (1986) ("[W]ith respect to the role of efficiencies in a merger analysis, we do not take into account pecuniary gains[;] only real resource savings [from] what are arguably efficiencies."). "While pecuniary savings increase the profitability of the firm and are an incentive to merge, they are not a gain to society and should not properly be included in the trade-off of cost savings and deadweight loss. The benefit to the newly merged firm that can extract lower input prices from its suppliers is offset exactly by the loss to the

suppliers . . . .” 4A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 970e, at 37 (4th ed. 2016).

Anthem cites no case for the proposition that its merger can be defended on the basis of its ability to take a larger slice of a fixed pie, even if it gives its customers the lion’s share of that larger slice. While this Court has not directly addressed the issue, two circuits have indicated that a cost savings could constitute a cognizable efficiency only if it entails a real resource saving. *Hershey Medical Center*, 838 F.3d at 349 (cognizability requires that merger efficiencies “be shown in what economists label ‘real’ terms”); *University Health*, 938 F.2d at 1223 (“Economies employed in defense of a merger must be shown in what economists label ‘real’ terms.”). Both circuits cite Justice Harlan’s concurrence in *FTC v. Procter & Gamble Co.*, 386 U.S. 568 (1967). He disagreed with the majority’s position that Section 7 does not admit an efficiencies defense, but he agreed that Procter & Gamble’s ability to purchase advertising more cheaply than other firms did not give rise to “true efficiencies.” 386 U.S. at 604. “Economies employed in defense of a merger must be shown in what economists label ‘real’ terms, that is in terms of resources applied to the accomplishment of the objective.” *Id.*

Anthem asserts that lowering providers' prices as a result of the merger would be "procompetitive" because it would move them "toward, not away from, the competitive level." Br.51. But the district court found "no evidence that the rates charged by the thousands of providers in Anthem's network . . . are inflated due to the providers' market power." GSA128. Sensibly, the court was reluctant to take evidence on whether the prices charged by all of the doctors, hospitals, and other providers were supra-competitive. Courts are ill-equipped to make such determinations, and antitrust law does not require them. *Cf. Kartell v. Blue Shield of Mass., Inc.*, 749 F.2d 922, 927 (1st Cir. 1984) (noting "judicial recognition of the practical difficulties of determining what is a 'reasonable,' or 'competitive,' price").

Moreover, the government contended that reductions in provider rates would be manifestations of the upstream anticompetitive effects from the merger. GSA296-332 (Dranove). Although the district court did not rule on that claim, it concluded that, since Anthem's efficiencies defense was based on its "ability to exercise the muscle it has already obtained by virtue of its size, with no corresponding increase in value or output, the scenario seems better characterized as an application of

market power rather than a cognizable beneficial effect of the merger." GSA130.

* * *

Anthem incorrectly argues (Br.46) that the district court "abdicated its responsibility to balance the likely benefits of the merger against any potential harm." The court carefully considered the evidence of likely harm to competition from the merger alongside the evidence regarding Anthem's efficiencies defense and found that the claimed efficiencies "do not outweigh the anticompetitive effects of the merger." GSA92; *see generally* GSA92-130. Because the court correctly found that Anthem's medical cost savings were not cognizable, even if the nature of the *claimed* efficiencies was such as to place them "on par with the consumer-harming direct price increases" as economist and business professor amici contend (Appellant Amici Br.4), the absence of cognizable efficiencies moots the argument. Without cognizable efficiencies, there was nothing for the court to balance.

II. THE MERGER IS ALSO LIKELY TO SUBSTANTIALLY LESSEN COMPETITION IN RICHMOND, VIRGINIA

The district court's injunction rests on a second ground: the merger is "likely to cause anticompetitive harm in the market for the

sale of medical insurance coverage to large group employers" in Richmond, Virginia. GSA130. This finding offers an independent basis for the Court to affirm.

A. Ample Evidence Supports The District Court's Finding

Anthem contends that the district court "relied on a single, unreliable document" as the "*sole* evidence of net anticompetitive effects in Richmond." Br.52-54. Far from it; the court's finding was based on substantial testimony and documentary evidence. *See* GSA134-40.

The court credited Dranove's testimony that Anthem and Cigna's combined market share is 64-78% and that the post-merger HHI in Richmond would be between 4350 and 6277, reflecting an increase of 1371 or 1918. GSA135-36; *see* [redacted]. These numbers "are well in excess of what the Guidelines would deem to be presumptively unlawful." GSA135.

The court also credited evidence showing that the merger would eliminate substantial head-to-head competition. GSA138. For example, Charles King, President of Anthem Virginia, "admitted that Anthem competes head-to-head with Cigna in Richmond, and that Cigna is the

second strongest player in that market." *Id.* And "numerous Anthem documents refer[] to Cigna as one of Anthem's closest competitors." *Id.*

The court further relied on the testimony of insurance broker Thomas Hawthorne, who explained that competitors outside of the Richmond market would not affect competition there because "Richmond-based clients want a network with providers conveniently located where their employees live." GSA138-39. And the testimony of would-be competitors showed that they would not "provide the necessary competition to overcome the anticompetitive effects of the merger" in Richmond. GSA138; *see* GSA138-39.

Finally, the court credited Dranove's testimony "that even if he factored 100% of Dr. Israel's claimed efficiencies into his analysis, the merger would still have an anticompetitive effect in the Richmond market." GSA140.

B. The District Court Did Not Clearly Err In Crediting Professor Dranove's Net Harm Calculations

Anthem claims that the district court clearly erred by relying on a supposedly "unreliable" document. Br.53-55. The challenged document, JA1266, is a table summarizing Dranove's merger simulations and upper pricing pressure analyses for the 35 local

markets. Dranove compared the savings required to prevent anticompetitive price increases after the merger with Israel's claimed savings from the merger. JA702-03. The comparison took into account *all* of Anthem's claimed medical-cost savings in the local markets. JA703. It did not "ignor[e]" them. *Contra* Br. 53. Both Dranove's merger simulations and his upper pricing pressure analyses concluded that in certain markets, including Richmond, "the merger would still have an anticompetitive effect" even if he assumed that "100% of Dr. Israel's claimed efficiencies" would be realized. GSA140; *see* JA1266 (markets marked "Yes").

Anthem (Br.54) calls this table "facially incredible" on the sole basis of a note at the bottom stating that in certain markets, identified with an asterisk, "no amount of cost savings could offset employer harm." JA1266. Anthem identifies no specific fault with the body of the table or with the underlying analysis. *See* Br.52-56. Anthem has therefore forfeited any challenge to these aspects of Dranove's analysis. *See Williams v. Lew*, 819 F.3d 466 471 (D.C. Cir. 2016).

Moreover, the court relied on Dranove's designation of Richmond in JA1266 as a "Yes" market, but not on the note. *See* GSA140 (citing

JA702-04); JA703 ("where [the table] says yes, that means that the increase in price is going to be positive"). For Dranove's merger simulations, some "Yes" markets included an asterisk, indicating they were "even worse than just yes." JA712-13. As the court later clarified with the government's counsel, it could "just ignore the asterisks" because "the yes is enough." JA714-15. In any event, the upward pricing pressure analyses concluded that Richmond was a "Yes" market, without any asterisk. JA1266.

Dranove further testified that the merger would cause additional adverse "dynamic effects associated with quality and innovation over the long run." GSA291; *see also* GSA331-35. Anthem does not challenge that testimony, and it separately supports the district court's decision.

Anthem argues that the district court "abuse[d its] discretion" by relying on the analysis reflected in JA1266. Br.53. At trial, however, Anthem objected only to the supposed nondisclosure of the table. GSA345-48. It therefore has forfeited its belated reliability objection. *See* Fed. R. Evid. 103(a); *Anderson v. Grp. Hospitalization, Inc.*, 820 F.2d 465, 469-70 (D.C. Cir. 1987).

C. The District Court Rightly Found That Other Competitors Would Not Overcome The Merger's Anticompetitive Effects

Lastly, Anthem attacks—as supposedly "belied by the record"—the district court's determination that other competitors in Richmond are insufficient to overcome the merger's anticompetitive effects. Br.55-56. Not so. The court's finding is fully supported by its reliance on live testimony from three fact witnesses (Hawthorne of Scott Insurance, King of Anthem Virginia, and George Wheeler of Bon Secours Health System), deposition testimony from four additional witnesses ([redacted]), Professor Dranove's testimony, and documentary evidence. *See* [redacted]; GSA283, 286-88, 351-52, 355-58, [redacted]. The court properly concluded that "other players in and around the Richmond market"—Bon Secours, [redacted], Piedmont Community Health, and Gateway Health—"do not appear interested in entering the Richmond market or able to compete at a level that could dull the merger's anticompetitive effects."

GSA138-39. Anthem cannot show that this finding was clearly erroneous.

Anthem nevertheless argues against the district court's finding by first pointing to testimony about five non-merging firms now competing in the market and suggesting that the mere *existence* of those other competitors will prevent the merger's anticompetitive effects. But when a merger will significantly increase concentration in an already highly concentrated market, the law rightly presumes anticompetitive harm even though other firms will continue to compete in that market. *Baker Hughes*, 908 F.2d at 983. If the existence of a few small competitors could undermine the government's proof, merger to anything short of monopoly would be unchallengeable.

Anthem also cites to evidence purporting to show that there are "multiple insurers already active in Virginia, who are poised to enter and expand into Richmond." Br.55. The district court considered that evidence and determined that it did not show what Anthem claims. GSA139-40. Anthem references two other potential competitors ([redacted] and VCU Health, Br.56), but both are insufficient. [redacted] And there is no

evidence that VCU Health has plans to sell commercial products in Richmond. *See* JA656-67 (Fowdur).

Anthem thus has not shown that the district court's finding of anticompetitive harm in the Richmond market was clearly erroneous. The court's decision should be affirmed.

III. EVEN IF THIS COURT AGREES WITH ANTHEM'S ARGUMENTS, THE PROPER REMEDY IS REMAND

If the Court nevertheless rules for Anthem, it should deny Anthem's request to direct entry of "judgment in favor of Anthem," Br.57, and instead "remand for further proceedings to permit the trial court to make the missing findings" regarding the efficiencies and the government's other theories of relief. *Pullman-Standard v. Swint*, 456 U.S. 273, 291 (1982); *see also United States v. TDC Mgmt. Corp.*, 827 F.3d 1127, 1132 (D.C. Cir. 2016).

Even if the Court rules that the district court erroneously failed to consider cognizable efficiencies, the merits are not yet decided. A remand is warranted for the district court, in the first instance, to resolve specific challenges to Israel's methodology for projecting savings (*see supra* pp. 48-49), determine what saving are cognizable, and, if

there are any, weigh them in light of the merger's anticompetitive effects.

In addition, the district court did not rule on the plaintiffs' additional claims that the merger would lessen competition in the sale of health insurance (1) to national account employers in the whole United States, JA111-14 (Compl. ¶¶ 26-37), (2) to large group employers in 34 local markets other than Richmond, JA115-20 (Compl. ¶¶ 38-50), or (3) in the purchase of healthcare services from providers in 35 local markets, JA124-28 (Compl. ¶¶ 64-75). The factfinding required to resolve these claims would make remand the appropriate remedy.

CONCLUSION

The judgment of the district court should be affirmed.

Dated: March 13, 2017

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 12,934 words, excluding the portions exempted by Fed. R. App. P. 32(f).

/s/ Scott A. Westrich
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CERTIFICATE OF SERVICE

I certify that on March 13, 2017, I caused the public, redacted version of the foregoing to be filed through this Court's appellate CM/ECF filer system, which will serve a notice of electronic filing on all registered counsel.

In addition, I caused two paper copies of the sealed, unredacted version of the foregoing and two paper copies of the public, redacted version to be served by hand delivery on:

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Addendum

§ 18. Acquisition by one corporation of stock of another

No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No person shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more persons engaged in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

This section shall not apply to persons purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce or in any activity affecting commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: *Provided*, That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Secretary of Transportation, Federal Power Commission, Surface Transportation Board, the Securities and Exchange Commission in the exercise of its jurisdiction under section 79j of this title,[1] the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Board, or Secretary.

(Oct. 15, 1914, ch. 323, § 7, 38 Stat. 731; Dec. 29, 1950, ch. 1184, 64 Stat. 1125; Pub. L. 96–349, § 6(a), Sept. 12, 1980, 94 Stat. 1157; Pub. L. 98–443, § 9(*l*), Oct. 4, 1984, 98 Stat. 1708; Pub. L. 104–88, title III, § 318(1), Dec. 29, 1995, 109 Stat. 949; Pub. L. 104–104, title VI, § 601(b)(3), Feb. 8, 1996, 110 Stat. 143.)

REFERENCES IN TEXT

Section 79j of this title, referred to in text, was repealed by Pub. L. 109–58, title XII, § 1263, Aug. 8, 2005, 119 Stat. 974.

AMENDMENTS

1996—Pub. L. 104–104, in sixth par., struck out ''Federal Communications Commission,'' after ''Secretary of Transportation,''.

1995—Pub. L. 104–88, in sixth par., substituted ''Surface Transportation Board'' for ''Interstate Commerce Commission'' and inserted '', Board,'' after ''vesting such power in such Commission''.

1984—Pub. L. 98–443 substituted ''Secretary of Transportation'' for ''Civil Aeronautics Board'' and ''Commission or Secretary'' for ''Commission, Secretary, or Board'' in sixth par.

1980—Pub. L. 96–349, substituted ''person'' for ''corporation'' wherever appearing in first and second pars.; substituted ''persons'' for ''corporations'' in second par. and first sentence of third par.; and inserted ''or in any activity affecting commerce'' after ''commerce'' wherever appearing in first, second, and third pars.

1950—Act Dec. 29, 1950, amended section generally so as to prohibit the acquisition of the whole or any part of the assets of another corporation when the effect of the acquisition may substantially lessen competition or tend to create a monopoly.

EFFECTIVE DATE OF 1995 AMENDMENT

Amendment by Pub. L. 104–88 effective Jan. 1, 1996, see section 2 of Pub. L. 104–88, set out as an Effective Date note under section 1301 of Title 49, Transportation.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–443 effective Jan. 1, 1985, see section 9(v) of Pub. L. 98–443, set out as a note under section 5314 of Title 5, Government Organization and Employees.

EFFECTIVE DATE OF 1980 AMENDMENT

Pub. L. 96–349, § 6(b), Sept. 12, 1980, 94 Stat. 1158, provided that: ''The amendments made by this section [amending this section] shall apply only with respect to acquisitions made after the date of the enactment of this Act [Sept. 12, 1980].''

TRANSFER OF FUNCTIONS

Federal Power Commission terminated and functions, personnel, property, funds, etc., transferred to Sec-

[1] See References in Text note below.