IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *et al.*, *Plaintiffs*, v. ANTHEM, INC. and CIGNA CORP., *Defendants*.	Case No. 1:16-cv-01493-ABJ

ANTHEM'S OPPOSITION TO PLAINTIFFS' MOTION *IN LIMINE* TO EXCLUDE EVIDENCE OF PURPORTED BENEFITS OUTSIDE THE RELEVANT MARKETS

Anthem intends to introduce evidence establishing that its merger with Cigna, and the resultant increase in scale, will produce substantial efficiencies — largely, but not entirely, in the form of lower "reimbursement rates" to healthcare providers. Large employers who are customers of the merged entity will directly enjoy the benefits of those lower "reimbursement rates" — dollar for dollar — because these large employers overwhelmingly use administrative-services-only ("ASO") contracts under which they pay the medical expenses of their employees at the insurer's network rates. Anthem intends to prove that these cost savings will make the merger decidedly procompetitive for employers and their employees.

Through its motion *in limine*, the Antitrust Division seeks to preclude Anthem and Cigna from introducing evidence that the proposed merger may result in benefits "outside of the relevant product and geographic markets alleged in the Complaint." Mot. at 1. Putting aside that the Complaint alleges a nationwide geographic market, Complaint ¶ 26, this request is plainly premature, as this Court has not yet defined the relevant markets, and the boundaries of those

markets are hotly contested; the Court cannot exclude extra-market evidence before establishing what the market is. Furthermore, beyond prematurity, the Division's motion is overly simplistic and ignores the interrelationship between markets.

The Division seems most concerned about Anthem's contention that the proposed merger will permit the company to expand its participation in the public exchanges under the Affordable Care Act. Mot. at 1-2. The Division suggests that its unilateral (and strategic) decision to abandon its claims based on the public exchanges should preclude Anthem from offering evidence of increased participation on those exchanges. Mot. at 2 n.1. But, in making this argument, the Division ignores the nature of efficiencies based on scale. The scale benefits of the merger will allow Anthem to increase its participation on public exchanges and that increase will, in turn, lead to scale benefits that redound to commercial health insurance. The Division ignores the synergistic effects of scale, and the interrelationship of efficiencies in the public exchanges and commercial health insurance.

Anthem has no intention, or interest, in belaboring matters that are not central to the key contested issues at trial. By the same token, Anthem should not be categorically foreclosed from providing evidence that is relevant to the key contested issues.

Furthermore, increased participation on the public exchanges was part of Anthem's expressed rationale for the merger. At least by way of background, Anthem should not be precluded from briefly introducing evidence of that rationale. And the availability of health insurance on the public exchanges may present some employees with the option of using the public exchanges in lieu of employer-provided insurance. The Division's motion paints with too broad a brush; sound trial management does not require premature and crude motions *in limine*.

Lastly, the legal predicate of the Division's motion is questionable. While the Division places great weight on the Supreme Court's 1963 decision in *United States v. Philadelphia National Bank*, 374 U.S. 321, the Division wholly ignores the District of Columbia Circuit's observation in *United States v. Baker Hughes, Inc.*, 908 F.2d 981 (D.C. Cir. 1990), that, although the Supreme Court has not overruled *Philadelphia National Bank* and other precedents from that era, the Supreme Court "has cut them back sharply." *Baker Hughes*, 908 F.2d at 990. The Division itself has recognized that modern economic analysis may justify consideration of extra-market efficiencies, particularly when they are interrelated with intra-market efficiencies:

> Section 7 of the Clayton Act prohibits mergers that may substantially lessen competition "in any line of commerce . . . in any section of the country." Accordingly, the Agency normally assesses competition in each relevant market affected by a merger independently and normally will challenge the merger if it is likely to be anticompetitive in any relevant market. *In some cases, however, the Agency in its prosecutorial discretion will consider efficiencies not strictly in the relevant market, but so inextricably linked with it that a partial divestiture or other remedy could not feasibly eliminate the anticompetitive effect in the relevant market without sacrificing the efficiencies in the other market(s).* Inextricably linked efficiencies rarely are a significant factor in the Agency's determination not to challenge a merger. They are most likely to make a difference when they are great and the likely anticompetitive effect in the relevant market(s) is small.

U.S. Department of Justice and the Federal Trade Commission Horizontal Merger Guidelines, issued April 2, 1992, revised April 8, 1997, p. 31 n.36 (emphasis added). In modern antitrust jurisprudence, Section 7 requires courts to weigh a variety of factors to determine the effects of a particular transaction under "a totality-of-the-circumstances approach." *Baker Hughes*, 908 F.2d at 984. This Court should not prematurely foreclose consideration of extra-market efficiencies inextricably linked with the relevant market.

CONCLUSION

The Division's motion should be denied.

Dated: November 7, 2016
Washington, D.C.

Respectfully submitted,

/s/ *Christopher M. Curran*
Christopher M. Curran (D.C. Bar No. 408561)
J. Mark Gidley (D.C. Bar No. 417280)
George L. Paul (D.C. Bar No. 440957)
Noah Brumfield (D.C. Bar No. 488967)
Matthew S. Leddicotte (D.C. Bar. No. 487612)
WHITE & CASE LLP
701 Thirteenth Street, NW
Washington, DC 20005
Tel: +1 202 626 3600
Fax: +1 202 639 9355
ccurran@whitecase.com
mgidley@whitecase.com
gpaul@whitecase.com
nbrumfield@whitecase.com
mleddicotte@whitecase.com

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

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

hburke@whitecase.com

Richard L. Rosen
Wilson D. Mudge
Danielle M. Garten
ARNOLD & PORTER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
Telephone: +1 202 942 5072
Facsimile: +1 202 942 5999
Richard.rosen@aporter.com
Wilson.mudge@aporter.com
Danielle.garten@aporter.com

Counsel for Anthem, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on November 7, 2016, a true and correct copy of the foregoing was served via the Court's CM/ECF system, pursuant to Rule 5.4(d) of the Local Civil Rules and Rule 5(b) of the Federal Rules of Civil Procedure, upon all counsel of record.

Dated: November 7, 2016
Washington, D.C.

Respectfully submitted,

/s/ *Heather M. Burke*

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

Counsel for Anthem, Inc.