

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA, *et al.*,

Plaintiffs,

v.

UNITEDHEALTH GROUP
INCORPORATED, *et al.*,

Defendants.

Civil Action No. 1:22-cv-0481 (CJN)

**DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION
TO SET A TRIAL DATE AND ENTER A CASE SCHEDULE**

On January 5, 2021, Defendants UnitedHealth Group Incorporated (“UHG”) and Change Healthcare Inc. (“Change”) announced their intention to combine, with the goal of tackling the needless amount of administrative and clinical waste that permeates the healthcare system, estimated to cost \$267 billion annually. Defendants cooperated with an in-depth and lengthy investigation conducted by the Department of Justice and various state Attorneys General, supplying millions of documents, making their executives and employees available for meetings and sworn testimony, and providing numerous economic and other submissions addressing the effects of the merger.

The evidence gathered by the Government during this investigation showed that the proposed combination will not substantially lessen competition. To the contrary, the combination will be pro-competitive, will promote industry-wide efficiencies that benefit consumers, and will spur innovation for all participants in the healthcare system, not just for UHG. Despite these benefits, the Department of Justice and two states disagreed, and on February 24 they filed the

operative complaint seeking to enjoin the merger. After more than a year of investigation, the complaint is based on novel, speculative, and unsupported antitrust theories.

UHG and Change now respectfully request that the Court set a trial date of June 20, 2022, or as soon thereafter as the Court's schedule permits, and enter the other dates in Defendants' proposed case schedule, attached hereto as Exhibit A. A June 20 trial date is warranted for several reasons. Defendants' transaction was announced over 14 months ago. Since then, Defendants have been operating their businesses with ongoing uncertainty regarding the proposed transaction, which makes normal business planning difficult. Defendants are fully prepared to try their case expeditiously. A resolution of this matter is important so that the combination can proceed and consumers can begin to benefit from the efficiencies and innovation that the deal will unleash. Rather than delay things even further, the Department of Justice should be compelled to put its allegations to the test as soon as practicable.

A trial date of June 20 would be well within the mainstream for government merger actions, which frequently proceed on a significantly compressed timeline. Indeed, Defendants' proposed schedule would yield 116 days from the filing of the complaint to trial—a timeline that is comparable to the schedules set in recent government merger actions tried in this jurisdiction. *See United States v. AT&T Inc.*, No. 1:17-cv-02511-RJL (D.D.C.) (119 days from complaint to trial); *United States v. Anthem, Inc.*, No. 1:16-cv-01493-ABJ (D.D.C.) (123 days). The Government cannot plausibly claim that it would be prejudiced by such a schedule: the Government has investigated this combination for over a year, during which time the Government has reviewed more than 6.8 million documents, taken 23 depositions, obtained document and data productions from approximately 15–20 third parties, and received dozens of written submissions from Defendants and others. Their case should be ready to go. And although Defendants have not had

access to the third-party materials that the Government has been receiving for over a year and presumably has been using to build its case, Defendants nonetheless are prepared to shoulder the disproportionate burden their proposed schedule places on them in order to obtain timely resolution of this case.

Defendants are continuing to negotiate with the Government regarding other terms of a Case Management Order. Defendants ask that the Court set a case schedule now, however, for two reasons. First, many interim deadlines are approaching, and an ordered case schedule will give the parties certainty regarding due dates, avoiding needless disputes or additional meeting-and-conferring. Second, a case schedule with a known trial date may help the parties resolve disputes over other case-management provisions, as the parties will know how significantly they must expedite discovery and other litigation tasks.

In short, further delay is deeply unfair to Defendants, as well as their employees, customers, and shareholders. This matter deserves to be resolved expeditiously, and Defendants are fully prepared to put in the work and effort to see that it is. Defendants therefore request that the Court (1) set trial for June 20 or as close to that date as the Court can accommodate; and (2) enter Defendants' proposed schedule, which is attached as Exhibit A. Once the trial date is set and the case schedule is entered, the parties can then continue to confer (and hopefully reach agreement about) the remaining portions of the Case Management Order, which they have been actively negotiating.

BACKGROUND

UHG and Change announced their intention to combine over 14 months ago. Immediately thereafter, UHG and Change notified the Government of the transaction and cooperated with the Government's lengthy, in-depth investigation. That investigation stretched for well over a year,

with the Government repeatedly extending its investigation. Defendants each time agreed to the extension, expecting that once the Government had full information, it would see that the combination threatened no anti-competitive effects but rather created massive efficiencies and opportunities for innovation. Despite this, on February 24, 2022, the Department of Justice and two states filed their complaint.

The parties quickly attempted to negotiate a scheduling order. On the same day the Government filed its complaint, it sent Defendants its proposed Case Management Order, which proposed a trial beginning August 29 at the earliest—186 days after the Court’s eventual entry of the Case Management Order. Ex. B (Feb. 24, 2022 Email from J. Keeney). Defendants responded by proposing that trial begin on June 20—116 days after the filing of the complaint. Ex. C (Mar. 2, 2022 Email from A. Sidrys). Defendants also included a streamlined case schedule that would provide both parties with reasonable discovery, in light of the massive investigation the Government has already conducted, while allowing the case to move at a more efficient pace. *Id.* Late in the evening on March 7, the Government responded by still insisting that trial begin in late August. Ex. D (Mar. 7, 2022 Email from J. Keeney). The following morning, Defendants offered to meet the Government in the middle: Although Defendants would greatly prefer a June 20 trial date, they offered to compromise with the Government and agree to a mid-July trial date, if the parties could reach agreement. Ex. E (Mar. 8, 2022 Email from A. Sidrys). The Government yet again rejected Defendants’ offer, instead proposing an August 17 trial date, but ***only if*** Defendants waived the right to file dispositive motions. Ex. F (Mar. 8, 2022 Email from J. Keeney).

ARGUMENT

Defendants respectfully request that the Court (1) set a trial date of June 20, or as close to that date as the Court’s schedule permits, and (2) enter Defendants’ proposed case schedule,

attached hereto as Exhibit A. Once the trial date is set and the case schedule is entered, the parties will hopefully be able to quickly finalize their negotiations over the remaining provisions of the Case Management Order.

I. Defendants’ Proposed Trial Date Is Well Within The Norm For Government Merger Suits

Merger cases like this one are inherently time-sensitive. There are numerous parties—including the merging firms, customers, employees, and shareholders—that “have a vested interest in the adjudication of [a merger] case without delay.” *United States v. US Airways Grp., Inc.*, 979 F. Supp. 2d 33, 35 (D.D.C. 2013). That is why the Clayton Act provides that when the government sues to enjoin a merger, “the court shall proceed, as soon as may be, to the hearing and determination of the case.” 15 U.S.C. § 25. And it is why judges in this district and in courts across the country routinely set speedy schedules in government merger challenges, recognizing that everyone involved has a significant interest in seeing prompt, efficient resolution of the challenge.

The Defendants’ proposed schedule—under which trial would start 116 days after the complaint was filed—is fully in line with the schedules set by courts in other government merger cases. For example, in the Government’s challenge to the merger between AT&T and Time Warner—which was recently tried in this jurisdiction—Judge Leon set a trial date 119 days after the complaint was filed, which is very close to what Defendants seek here. Compl., *United States v. AT&T Inc.*, No. 1:17-cv-02511-RJL (D.D.C. Nov. 20, 2017), ECF No. 1; Suppl. Scheduling Order, *United States v. AT&T Inc.*, No. 1:17-cv-02511-RJL (D.D.C. Mar. 7, 2018), ECF No. 72 (trial scheduled to begin on March 19, 2018). The chart below shows other examples where courts expedited the date of the trial or evidentiary hearing (and the broader case schedule) in government merger cases:

Case Name	Complaint Filed	Days to Trial/Hearing
<i>United States v. SunGard Data Sys., Inc.</i> , No. 1:01-cv-02196-ESH (D.D.C.)	Oct. 22, 2001	17
<i>United States v. Franklin Elec. Co.</i> , No. 3:00-cv-00334-bbc (W.D. Wis.)	May 31, 2000	62
<i>United States v. Oracle Corp.</i> , No. 3:04-cv-00807-VRW (N.D. Cal.)	Feb. 26, 2004	102
<i>United States v. AT&T, Inc.</i> , No. 1:17-cv-02511-RJL (D.D.C.)	Nov. 20, 2017	119
<i>United States v. Anthem, Inc.</i> , No. 1:16-cv-01493-ABJ (D.D.C.)	July 21, 2016	123
<i>United States v. AB Electrolux</i> , No. 1:15-cv-01039-EGS (D.D.C.)	July 1, 2015	131
<i>United States v. Aetna Inc.</i> , No. 1:16-cv-01494-JDB (D.D.C.)	July 21, 2016	137
<i>United States v. Energy Sols., Inc.</i> , No. 1:16-cv-01056-SLR (D. Del.)	Nov. 16, 2016	159
<i>United States v. Sabre Corp.</i> , No. 1:19-cv-01548-LPS (D. Del.)	Aug. 20, 2019	160

As the examples above show, Defendants' proposal is well within the mainstream and achievable by the parties. It is also the proposal that best respects the interests and expectations of all the many stakeholders affected by UHG and Change's combination. For more than 14 months, business leaders at UHG and Change have been kept in limbo on whether to build strategies for a merged firm or two separate ones. Employees need certainty on where and for whom they may be working. And customers should get the benefit of the efficiencies and innovation that the combination is poised to generate. All of those stakeholders deserve clarity—and deserve it with the greatest expedition feasible.

II. Defendants' Proposed Case Schedule Would Not Prejudice The Government

The Government cannot plausibly claim that it would be prejudiced by Defendants' trial date or broader case schedule. To begin with, the Government already has a mountain of information as a result of its 14-month investigation. During that investigation, Defendants

produced more than 6.8 million documents comprising more than 28.9 million pages from more than 150 custodians. Defendants produced hundreds of data sets and provided dozens of interrogatory responses. The Government deposed 23 witnesses from UHG and Change—including the current and former CEOs of UHG, the CEO of Change, and the current and former CEOs of OptumInsight, UHG’s health-technology subsidiary. And Defendants submitted numerous white papers, letters, and slide decks responding to targeted follow-up questions from the Government.

The Government also revealed to Defendants that it issued civil investigative demands to third parties. In response, the Government received document productions from around 15 third parties and data productions from around 20 third parties. While the Government has had months to sort through that voluminous third-party discovery, Defendants have never seen any of it. Thus, to the extent anyone is disadvantaged by a compressed schedule, it is Defendants. Defendants are willing to accept that handicap, however, to obtain the prompt resolution that their firms, employees, customers, and shareholders deserve.

Moreover, Plaintiffs have significant manpower dedicated to this case. Twenty-five attorneys—including twenty trial attorneys—appear in the Department of Justice signature block in the complaint. Five attorneys appear in New York’s signature block, and four more appear in Minnesota’s. As this show of force—thirty-four attorneys in all—makes clear, Plaintiffs have the resources to move this case along expeditiously, particularly in light of the year-long head start they have had.

CONCLUSION

Defendants respectfully request that the Court (1) set a trial date of June 20, or as close to that date as the Court’s schedule permits, and (2) enter Defendants’ proposed case schedule,

attached hereto as Exhibit A. Once the trial date is set and the case schedule is entered, the parties should be able to quickly finalize their negotiations over the remaining provisions of the Case Management Order.

Dated: March 8, 2022

Respectfully submitted,

By: /s/ Craig S. Primis

Craig S. Primis

Matthew J. Reilly, P.C. (D.C. Bar No. 457884)
Craig S. Primis, P.C. (D.C. Bar No. 454796)
K. Winn Allen, P.C. (D.C. Bar No. 1000590)

KIRKLAND & ELLIS LLP

1301 Pennsylvania Avenue, N.W.

Washington, DC 20004

Telephone: (202) 389-5000

Facsimile: (202) 389-5200

matt.reilly@kirkland.com

craig.primis@kirkland.com

winn.allen@kirkland.com

Anne M. Sidrys (admitted *pro hac vice*)

KIRKLAND & ELLIS LLP

300 North LaSalle

Chicago, IL 60654

Telephone: (312) 862-2000

Facsimile: (312) 862-2200

asidrys@kirkland.com

Charles Loughlin (D.C. Bar. No. 448219)

Justin W. Bernick (D.C. Bar. No. 988245)

Leigh L. Oliver (D.C. Bar. No. 493654)

HOGAN LOVELLS US LLP

555 Thirteenth Street, NW

Washington, D.C. 20004

Telephone: (202) 637-5600

Facsimile: (202) 637-5910

leigh.oliver@hoganlovells.com

chuck.loughlin@hoganlovells.com

justin.bernick@hoganlovells.com

*Counsel for Defendant UnitedHealth Group
Incorporated*

Sara Y. Razi (D.C. Bar No. 473647)

Abram J. Ellis (D.C. Bar No. 497634)

Nathaniel Preston Miller (D.C. Bar No.

1021557)

**SIMPSON, THACHER & BARTLETT
LLP**

900 G Street, NW

Washington, DC 20001

Telephone: 202-636-5500

Facsimile: 202-636-5502

sara.razi@stblaw.com

aellis@stblaw.com

preston.miller@stblaw.com

David I. Gelfand (D.C. Bar No. 416596)

**CLEARY GOTTlieb STEEN &
HAMILTON LLP**

2112 Pennsylvania Ave, N.W.

Washington, DC 20037

Telephone: 202-974-1500

Facsimile: 202-974-1999

dgelfand@cgsh.com

*Counsel for Defendant Change Healthcare
Inc.*