IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *et al.*, *Plaintiffs*, v. AETNA INC., and HUMANA INC., *Defendants*.	Civil Action No. 1:16-cv-1494-JDB

DEFENDANTS' POSITION STATEMENT REGARDING THE TIMING OF THESE PROCEEDINGS AND COORDINATION WITH *UNITED STATES V. ANTHEM, INC.*

In advance of the status conference scheduled for August 4 at 10:00 a.m., the Court has directed the parties to "file explanations of their positions as to the timing of proceedings and whether proceedings should or should not be conducted jointly with those in [*United States v. Anthem, Inc.*,] 16-cv-1493, up to and including trial." Minute Order, 16-cv-1494 (July 29, 2016). As further explained below, Defendants Aetna Inc. and Humana Inc. respectfully submit that this case (which includes two counts involving two different product markets, and a transactional deadline of December 31, 2016) should be tried over a two-week period in mid-fall, and *before* the *Anthem* matter (which involves four counts and four product markets, and a transactional deadline of April 30, 2017), for which Anthem apparently intends to seek a three-week trial. Aetna and Humana also respectfully submit that the best course would be to coordinate certain discovery and pretrial matters in the two cases to the extent such coordination facilitates efficiency, but not to consolidate them for trial or any other purpose.

1. The Aetna–Humana merger agreement is subject to a contractual deadline of December 31, 2016.[1] Aetna Form 8-K, item 8.01 (June 24, 2016), http://goo.gl/PBcA0q. Aetna and Humana believe that this trial can be completed within a two-week period, and that commencing the trial in mid-fall would allow sufficient time for the Court to reach a decision before the parties' contractual deadline at the end of the year. Given the Government's extensive and lengthy investigation, the parties should be prepared for a trial on that schedule. Conducting a subsequent trial in the *Anthem* matter would not prejudice the parties to that transaction, since their deal will not expire until April 30, 2017. *See* Anthem, Inc. and Cigna Corporation, Anthem–Cigna Merger Proposal (Oct. 28, 2015), http://goo.gl/qAc5th (stating that the Anthem–Cigna transaction is subject to a final deadline of April 30, 2017); Caroline Humer, *Cigna Says Anthem Deal Could Close in 2017; Anthem Sticks to 2016*, Yahoo! Finance (May 6, 2016), http://goo.gl/pnylJ3 (same).[2]

Trying the Aetna–Humana case before the Anthem–Cigna case makes the most sense for two additional reasons. First, Aetna and Humana signed their merger agreement on July 2, 2015, three weeks before Anthem and Cigna signed theirs on July 23, 2015. Pursuant to the Hart-Scott-Rodino Act of 1976 (15 U.S.C. § 18a), Aetna and Humana notified the Department of Justice of their intent to merge on July 19, 2015. Anthem and Cigna filed on August 27, 2015—more than a month later. The Government's investigation of the Aetna–Humana transaction has preceded its investigation of Anthem–Cigna from the beginning, and since the

[1] Due to the Government's protracted investigation of this matter—which involved multiple extensions of time and ultimately spanned more than a year—Aetna and Humana have already been forced to extend the original transaction deadline of June 30, 2016, to the end of this year.

[2] Both transactions are subject to review by insurance officials in certain states. Regulators in 18 of the 20 states where Aetna and Humana were required to file change-of-control applications have already approved the transaction, with the remaining reviews underway.

Government filed its lawsuits in both cases within an hour of one another on July 21, 2016, neither case has proceeded further than the other in litigation.

Second, the issues raised in this case are more discrete than those in *Anthem*. The Government claims that the Aetna–Humana merger will have anticompetitive effects within two alleged product markets (Medicare Advantage and commercial health insurance sold on the public exchanges). By contrast, the Government contends that the Anthem–Cigna merger will have anticompetitive effects in four different alleged product markets (commercial health insurance sold to national accounts, commercial health insurance sold to large groups, commercial health insurance sold on the public exchanges, and the purchase of healthcare services by commercial health insurers), necessitating more complex analyses than the Court will have to conduct in this case. Indeed, Anthem's proposal for a three-week trial (Ex. 1 To Reply In Support Of Expedited Status Conf., *Anthem* (July 28, 2016), Dkt. No. 17-1 at 5)—compared to the two weeks Aetna and Humana are respectfully requesting—underscores the point.

The resolution of this case will also be significantly simplified due to the fact that a single overriding issue will largely—if not completely—resolve the Government's primary count, which alleges anticompetitive effects in a purported market limited to "Medicare Advantage" (a form of Medicare administered by private insurers). The Government's entire theory of alleged anticompetitive effects rests on an erroneous effort to define the product market in a way that excludes original Medicare (administered by the Government), despite the facts that (a) Medicare Advantage was specifically created as a functional alternative to original Medicare; (b) enrollees must select between original Medicare and Medicare Advantage plans, which serve the identical purpose of providing health benefits to Medicare-eligible consumers; and (c) approximately 70% of seniors choose to enroll in original Medicare over Medicare Advantage. Indeed, as the State of Florida (a

plaintiff here) Office of Insurance Regulation explained when approving Aetna's acquisition of Humana's Florida-based affiliates through this merger, "Medicare Advantage, the private market product, competes directly with Traditional Medicare. Accordingly, when considering the impact of the acquisition, the private market is only a portion of the Medicare market." Consent Order, Fla. Office of Ins. Reg., *In re Application for the Indirect Acquisition of Humana Health Ins. Co. by Aetna Inc.*, Case No. 185926-16-CO at ¶ 19 (Feb. 15, 2016). Once the product market is properly defined to include original Medicare, the Government's case crumbles on its core claim.[3]

For these reasons, Aetna and Humana respectfully request that this matter be set for trial in mid-fall.[4]

2. This case should not be consolidated with *Anthem* for purposes of pretrial proceedings or trial. The Government has publicly recognized that the two merger

[3] The Government's allegations with regard to Medicare Advantage fail for additional reasons beyond its failure to include original Medicare in the product market. Among other things, the Government cannot show anticompetitive effects even in a putative product market that includes only Medicare Advantage. Moreover, to address any perceived competition concerns, Aetna and Humana have already entered into an agreement with Molina Health Care, by which Molina has agreed to purchase certain of the companies' Medicare Advantage assets in all of the counties identified in the complaint. *See* News Release, *Aetna and Humana Agree to Sell Certain Medicare Advantage Assets to Molina Healthcare, Inc.* (Aug. 2, 2016), http://goo.gl/nCs3B7. These divestitures will provide yet another basis for disposing of the Government's Medicare Advantage claims.

[4] Setting a trial date will bring much needed focus to the parties' case-management negotiations. To date, the Government has taken the position that it cannot estimate the amount of time necessary for discovery or trial without additional information from Aetna and Humana about how the companies intend to defend the case. Given the Government's lengthy investigation of the transaction—which included the production of more than seven million documents from Aetna and Humana, depositions of 16 company executives, and the companies' submission of multiple white papers addressing the Government's concerns—the claim that it needs yet more information in order to set a case-management schedule is difficult to comprehend.

challenges "involve different products" and "different markets," and that the cases should therefore "go to trial separately." Remarks of William Baer, DOJ Antitrust Chief On Health Care Mergers, CNBC (July 21, 2016), http://goo.gl/vGcO5f. Given the Principal Deputy Associate Attorney General's statements, Aetna and Humana do not anticipate that the Government will ask the Court to consolidate the cases. Nonetheless, Aetna and Humana are prepared to fully brief the issue of consolidation if it is raised at any point. For present purposes, Aetna and Humana merely observe that the two cases are highly distinct from each other in a number of key respects. As noted above, the two cases center on very different issues and markets, and they involve allegations about purported effects in disparate—and separately defined—markets affecting groups of largely distinct people.[5] Consequently, there is no substantial overlap in the issues to be tried and resolved. In addition, the cases have no defendants in common, and Aetna and Humana do not anticipate that any witnesses will be called to testify in both cases. And a joint trial would gravely prejudice Aetna and Humana by combining these two enormously complex and data-intensive cases into a massive and unwieldy proceeding unlikely to produce a decision by year-end.

For all of these reasons, there is no basis for consolidating this case with *Anthem* for trial. That does not mean that the two cases cannot be *coordinated* for certain pre-trial purposes to facilitate the efficient—though independent—conduct of pretrial proceedings. The parties in both cases may need discovery from some of

[5] Although the Government claims that both mergers will give rise to anticompetitive effects in an alleged product market for commercial health insurance sold on the public exchanges, the alleged geographic markets underlying these claims do not overlap at all. *Compare* Compl. ¶ 47, *Aetna* (July 21, 2016), Dkt. No. 1, *with* Compl. ¶ 55, *Anthem* (July 21, 2016), Dkt. No. 1. Nor could this similarity in one of the product markets at issue in each case outweigh the many important differences between the two cases (as the Government has recognized in acknowledging that consolidation is not warranted).

the same third parties, and the discovery process should be coordinated so as to minimize the burden on those third parties. Aetna and Humana respectfully submit that, once the Court has set trial dates in the two matters, the parties to both cases should be directed to meet and confer on procedures for streamlining and coordinating discovery to the greatest extent possible. In addition, Aetna and Humana would be open to having the Court appoint a single Special Master to preside over discovery disputes in the two cases, in order to ensure consistent treatment of both. Such an appointment would ease the Court's burden of presiding over discovery, while simultaneously ensuring that the cases proceed smoothly along the expedited schedules that these merger challenges will necessitate.

* * * * *

For the foregoing reasons, Aetna and Humana respectfully request that the Court schedule trial to commence in mid-fall 2016, before the *Anthem* trial, and order coordinated—but not consolidated—pretrial proceedings in the two cases.

Date: August 2, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 2, 2016, a true and correct copy of the foregoing was served via the Court's CM/ECF system or via electronic mail, pursuant to Rule 5.4(d) of the Local Civil Rules and Rule 5(b) of the Federal Rules of Civil Procedure, upon the following:

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