

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

UNITED STATES OF AMERICA, et al.,

Plaintiffs,

v.

AETNA INC. and HUMANA INC.,

Defendants.

Case No. 1:16-cv-01494 (JDB)

**PLAINTIFFS' MOTION TO ENTER PROTECTIVE ORDER
AND MEMORANDUM IN SUPPORT**

The United States and the Plaintiff States (collectively, "Plaintiffs") respectfully ask the Court to enter the proposed protective order attached hereto as Exhibit A. Prior to and following the status conference that the Court held in this matter yesterday, Plaintiffs met and conferred with Defendants regarding the appropriate scope of the protective order that should govern this action as well as *United States, et al. v. Anthem Inc. and Cigna Inc.*, No. 1:16-cv-01493 (ABJ). While the parties have narrowed the issues in dispute, despite their best efforts they were unable to reach complete agreement. Plaintiffs submit that Exhibit A, which is substantively the same as the protective order that the *Anthem* parties have agreed to, properly safeguards the rights of third parties, avoids unnecessary confusion, and promotes the efficient administration and coordination of these actions.

Defendants propose a different protective order than the one agreed to in *Anthem*. But the protective order proposed by Defendants in this action would deprive third parties of the notice that they deserve to protect their interests and would subject their confidential information to

review by a competitor's "inside" counsel. Among other things, Defendants' proposed order would undermine third parties' confidence in the treatment of their confidential information. It also would potentially impede cooperation from other third parties with government investigations in future mergers.

Should the Court decide to grant access to inside counsel, Plaintiffs request that the protective order provide that (1) third parties may designate certain competitively sensitive materials as "Highly Confidential" and by doing so limit the disclosure of those materials to outside counsel only, and (2) third parties will have a reasonable period of time to seek additional protection before their information is disclosed. Plaintiffs submit that any such order should take the form of the proposed protective order that is attached as Exhibit B to this motion.

BACKGROUND

As Plaintiffs have expressed to this Court, certain discovery-related issues common to this action and *Anthem* should be coordinated, including the terms of the protective order that governs the actions. The United States conducted a joint investigation of the two mergers at issue, and it has one investigatory file. During the investigation, the United States alone received information from more than 450 individuals and organizations, much of it containing highly sensitive business information, including among other things, strategic plans, plans for expansion or retrenchment, and pricing and margin information. Some of these third parties are individuals who provided unsolicited concerns about the proposed mergers; many are unfamiliar with the litigation process. Other third parties include insurers that compete against Aetna, Humana, Anthem, and Cigna, and doctors and hospitals who negotiate with these insurers in the ordinary course of business. These third parties provided information to the government on the

understanding that it would be kept confidential and, in the event of litigation, that it would be protected under an appropriate protective order.

On August 8, 2016, Anthem, Inc. filed a motion in *Anthem* to enter a proposed protective order. Among other things, that proposed order does not permit confidential information and documents to be disclosed to inside counsel. It also provides 10-days' notice to third parties regarding the potential disclosure of their confidential information and does not permit disclosure until after resolution of any relief sought by the third parties from this Court. Plaintiffs in *Anthem* have agreed to the language of that order because it provides adequate protection to third parties.

In this matter, Plaintiffs met and conferred with Defendants regarding the protective order that should govern this action on August 5, 8, 9, and 10. Plaintiffs proposed the same protective order to Defendants here that the parties in *Anthem* have since agreed to, and informed Defendants when that agreement with the *Anthem* parties was reached. Defendants here, however, have informed Plaintiffs that they will not agree to the same terms.

ARGUMENT

I. A single protective order best protects third parties and promotes efficient administration of these cases.

These two cases affect an extraordinary number of third parties. Given that the information provided by these third parties will be turned over to Defendants, third parties are best served if their information is governed by the same protective order in both cases. This approach would simplify an already complicated process and avoid confusion by ensuring that third parties' information is treated the same regardless of which defendant in either case receives it. It would also decrease the risk of inadvertent disclosures. Cigna agrees—it told the court in *Anthem* last night that it “believes the entry of a protective order with substantially similar terms in this case and in *United States v. Aetna, et al.*, 16-cv-1494-JDB (D.D.C.)

(“*Aetna/Humana*”) will help ensure orderly and efficient production across both actions.” Cigna Corp.’s Stmt. Position Anthem’s Mot. Protective Order (ECF No. 62).

In contrast, two separate protective orders—particularly if they involved two different notice periods, or were entered on different days such that the notice periods did not line up—would substantially increase the burden on Plaintiffs and the Court. Under the terms of the protective order agreed to by the parties in *Anthem*, each of the hundreds of affected third parties will receive notice of the protective order and have a period of 10 days to apply to the court for additional protection. For any third party that applies for additional protection, their confidential information will not be disclosed until the Court has ruled on their motion. If identical orders (or a single order governing both cases) are entered at the same time, as Plaintiffs request, then the 10-day period will be the same for all third parties—allowing for efficient, one-time resolution of any issues that arise.

Defendants’ proposed protective order would not provide adequate protection to third parties and is inconsistent with many significant terms of the agreed-upon protective order in *Anthem*. For example, the agreed-upon protective order in *Anthem* does not permit inside counsel of any defendant to review confidential information. This is necessary and advisable given the highly sensitive nature of the confidential information provided by third parties to the government. Again, Cigna agrees, and has conditioned its argument in favor of “entry of identical protective orders (or at least a protective order with substantially the same terms)” on the protective order in this case containing “the same stringent confidentiality protections found in the Protective Order that Anthem submitted” in that case. Specifically, Cigna is “strongly opposed” to a protective order that would include “permitting in-house counsel to review competitors’ confidential information.” Given that many third parties to this case are likely to be

similarly situated as Cigna (i.e., competitors of Aetna and Humana), Cigna's objection is only the first example of the issues that are likely to arise if two different protective orders are entered—one that includes access by inside counsel and one that does not.

II. Creating a special provision for disclosure to Defendants' inside counsel burdens third parties and will cause delay.

In reviewing a proposed protective order, courts balance the risk of inadvertent disclosure of commercially sensitive information to competitors against the needs of the party seeking discovery to prosecute or to defend against the claims at issue. *See e.g., Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465, 1470 (9th Cir. 1992). Disclosure to inside counsel is not a legal or practical imperative, and defendants in merger litigation frequently proceed with protective orders that are limited to outside counsel only. *See, e.g., Anthem; United States et al. v. US Airways*, No. 13-cv-01236 (D.D.C. Aug. 30, 2013) (ECF No. 55) (outside counsel only); *United States v. BCBS of Michigan*, No. 10-cv-14155 (E.D. Mich. May 14, 2012) (ECF No. 172) (outside counsel only) *United States v. Dean Foods Co.*, No. 10-cv-00059 (E.D. Wis. May 20, 2010) (ECF No. 30) (outside counsel only).

Cigna has already stated that it is strongly opposed to allowing Defendants' inside counsel access to its confidential information. The Department of Health and Human Services has also expressed to the United States that it is seriously concerned about, among other things, competitive bidding information being disclosed to inside counsel of a competing bidder. Others of the over 450 third parties in this case could be expected to take similar positions. Defendants' proposal to limit disclosure to inside counsel that do not participate in competitive decisionmaking does not adequately protect third parties for at least three reasons. First, Defendants have not identified the inside counsel that they propose to disclose information to (despite requests from Plaintiffs), so neither Plaintiffs nor any third party may make their own

evaluation of whether the person is involved in competitive decisionmaking.¹ Second, there is no guarantee that the designated inside counsel will not be involved in competitive decisionmaking in the future, including, for example, if the person receives a promotion. Third, Defendants reserve the right to add to the list of inside counsel at any time, offering no clarity to third parties about what information will be disclosed to whom and when.

Further, Defendant's proposed protective order unreasonably burdens third parties with the requirement of continuously monitoring the Court's docket to see if any Defendant has filed an affidavit or declaration to expand the list of people who can now access the third parties' documents. Far from moving this case along expeditiously, such a process would invite multiple objections every time a new attorney is added. Defendants have not identified any compelling reason that inside counsel would need access to the confidential information of third parties that is sufficient to overcome the many reasons counseling in favor of a single protective order limited to outside counsel only.

At a minimum, any protective order providing for disclosure to inside counsel should limit such disclosure to Confidential Information, and exclude inside counsel from accessing Highly Confidential Information. Third parties should not be concerned that their most sensitive business documents could be seen by their competitors. In addition, third parties should have the benefit of knowing upon receipt of the protective order which inside counsel would be permitted to access Confidential Information—and sufficient time to challenge the disclosure to those

¹ Defendant's proposed protective order defines inside counsel as counsel of Defendants "who have filed an affidavit or declaration certifying that they do not participate in competitively sensitive decision-making for their employer and have signed the Agreement Concerning Confidentiality." Despite repeated requests, Defendants have not provided the names of any of the attorneys who they anticipate would file such affidavits or declarations.

specific individuals. These additional protections are included in the protective order that Plaintiffs have attached as Exhibit B to this motion.

III. Defendant's proposed notice provisions are unreasonably burdensome and do not adequately protect third parties.

Defendants' proposed protective order would allow Plaintiffs only one day to contact over 450 third parties. Similarly, it does not give those third parties sufficient time to seek any modifications to the protective order they might deem necessary. As proposed, Defendant's protective order would allow a litany of persons, including outside vendors, outside trial consultants, testifying and consulting experts, and Defendant's outside counsel, to view a third party's documents before the third party has a chance to move for additional protection from this Court. The agreed-upon protective order in *Anthem* allows third parties a short but reasonable 10-day period of time to determine whether to seek additional protection. This is consistent with protective orders entered in similar cases, including *United States v. AB Electrolux*, No. 15-cv-1039-EGS (D.D.C. July 16, 2015) (ECF No. 29) (ten days); *United States et al. v. US Airways*, No. 13-cv-01236 (D.D.C. Aug. 30, 2013) (ECF No. 55) (ten days), and *United States et al. v. AT&T Inc. and T-Mobile USA, Inc.*, No. 11-cv-01560-ESH (D.D.C. Nov. 10, 2011) (ECF No. 79) (ten days).

CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that the Court grant this motion and enter the protective order that is attached hereto as Exhibit A, or issue an order providing that the same protective order will govern both this case and *Anthem*. In the alternative, should the Court decide to permit disclosure to inside counsel, Plaintiffs argue for entry of the protective order attached hereto as Exhibit B.

Dated August 11, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on August 11, 2016, I caused a true and correct copy of the foregoing to be served upon the parties of record via the Court's CM/ECF system.

/s/ Craig Conrath

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– Exhibit A –

United States, et al. v. Aetna Inc. and Humana Inc., No. 16-cv-1494 (JDB)

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

UNITED STATES OF AMERICA, et al.,

Plaintiffs,

v.

AETNA INC. and HUMANA INC.,

Defendants.

Case No. 1:16-cv-01494 (JDB)

PROTECTIVE ORDER

The Court, upon good cause shown and in accordance with Rule 26(c)(1) of the Federal Rules of Civil Procedure, ORDERS as follows:

A. Definitions

(1) As used herein:

(a) “Actions” means collectively the following actions: the action by the United States and certain states against Anthem, Inc. and Cigna Corp., Case No. 1:16-cv-01493 (ABJ), and the action by the United States and certain states against Aetna Inc. and Humana Inc., Case No. 1:16-cv-01494 (JDB).

(b) “Confidential Information” means (i) any trade secret, confidential research, development, commercial, or competitively sensitive information, as such terms are used in Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure; (ii) any transcript or other material containing such information that has not been published or otherwise made publicly available; and (iii) any “Personally Identifiable Information” or “Protected Health Information,” as such terms are defined in this Order.

(c) “Defendants” means Aetna Inc. and Humana Inc., and their divisions, subsidiaries, affiliates, partnerships and joint ventures, and all directors, officers, employees, agents (including counsel), and representatives of the foregoing.

(d) “Disclosed” means shown, divulged, revealed, produced, described, transmitted, or otherwise communicated, in whole or in part.

(e) “Document” means documents or electronically stored information as defined in Rule 34(a) of the Federal Rules of Civil Procedure.

(f) “Including” means including, but not limited to.

(g) “Investigation” means the pre-Complaint investigation of the Agreement and Plan of Merger among Anthem and Cigna dated July 23, 2015, and the Agreement and Plan of Merger among Aetna Inc. and Humana Inc. dated July 2, 2015.

(h) “Investigation Materials” means non-privileged correspondence, documents, data, written information or statements, transcripts of testimony, declarations (including drafts), affidavits (including drafts), or any other materials that: (i) were exchanged between any Defendant, or affiliated person or entity, and any Plaintiff, either voluntarily or under compulsory process, during and in connection with the Investigation; or (ii) were exchanged between any Party, or that Party’s counsel or agent, and any non-party not having an attorney-client or common-interest relationship with the Party (*e.g.*, experts, consultants, counsel for co-Defendants, and counsel for states’ attorneys generals), either voluntarily during the Investigation or in response to any request issued during and in connection with the Investigation.

(i) “Litigation Materials” means non-privileged documents, written information, or other materials that (i) any Protected Person provides to any Party, either

voluntarily or under compulsory process, in connection with these Actions; (ii) constitute any communication between any Party and any non-party or Protected Person in connection with these Actions; (iii) any Defendant, or affiliated person or entity, provides to any Plaintiff, either voluntarily or under compulsory process, in connection with these Actions; or (iv) any Plaintiff provides to any Defendant in connection with these Actions.

(j) “Outside Counsel of Record” means the firms of attorneys representing a Defendant in these Actions.

(k) “Party” means any Plaintiff or any Defendant in these Actions. “Parties” means collectively the Plaintiffs and Defendants in these Actions.

(l) “Person” means any natural person, corporate entity, partnership, association, joint venture, governmental entity, trust, or business entity.

(m) “Plaintiff” means the United States of America and all of its employees, agents, and representatives, and the Plaintiff States.

(n) “Plaintiff States” means the States of Delaware, Florida, Georgia, Illinois, Iowa, and Ohio, the Commonwealths of Pennsylvania and Virginia, and the District of Columbia, their respective Attorneys General, and other authorized representatives of their respective Attorneys General.

(o) “Protected Person” means any Person (including a Party) that, either voluntarily or under compulsory process, has provided or provides (i) Investigation Materials in connection with the Investigation, or (ii) Litigation Materials in connection with these Actions.

(p) “Personally Identifiable Information” or “PII” means any information about an individual, including education, financial transactions, medical history, criminal, employment history, or information which can be used to distinguish or trace an individual’s

identity, such as their name, social security number, date and place of birth, mother's maiden name, biometric records, including any other personal information which is linked or linkable to a specific individual.

(q) "Protected Health Information" or "PHI," as defined in 45 C.F.R. § 160.103, means individually identifiable health information that is transmitted or maintained in electronic media or any other form or medium. The term does not include individually identifiable health information (i) in education records covered by the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g; (ii) in records described at 20 U.S.C. § 1232g(a)(4)(B)(iv); (iii) in employment records held by a covered entity in its role as employer; and (iv) regarding a person who has been deceased for more than 50 years.

(r) "Individually Identifiable Health Information," as defined in 45 C.F.R. § 160.103, is a subset of health information, including demographic information collected from an individual, and (i) created or received by a healthcare provider, health plan, employer, or healthcare clearinghouse; and (ii) relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and (1) that identifies the individual; or (2) with respect to which there is a reasonable basis to believe the information can be used to identify the individual.

B. Notice

(1) Within three business days after the Court's entry of this Order, the applicable Party must give notice of this Order to each Protected Person (or, if represented by counsel, the Protected Person's counsel) that provided Investigation Materials to that Party and who provided

an email address, facsimile number, or physical address. Notice must be given by sending a copy of this Order by email, facsimile, or overnight delivery.

(2) If a Protected Person determines that this Order does not adequately protect its Confidential Information, it may, after meeting and conferring with the Parties within 10 calendar days after receipt of a copy of this Order, seek additional protection from the Court for its Confidential Information. If a Protected Person seeks additional protection from the Court, the information for which additional protection has been sought will not be provided to other Persons until the Protected Party and the Parties have agreed or the Court has ruled on the Protected Party's motion.

(3) **Confidential Health Information.** The Parties acknowledge that information produced in the Investigations and in discovery in this litigation, regardless of its designation under this Order, may contain personal and health information that may be subject to the protections of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), the applicable requirements of the Standards for Privacy of Individually Identifiable Health Information and its implementing regulations issued by the U.S. Department of Health and Human Services (45 C.F.R. Parts 160-64, HIPAA Privacy Regulations), and state regulations protecting the confidentiality of individually identifiable personal and health information. The Parties and all Persons who sign the agreement set forth in Appendix A hereto agree to take all measures necessary to comply with the requirements of these laws and any other applicable laws governing the privacy of personal and health information.

C. Designation of Confidential Information

(1) **Right to Confidential Designation.** A Protected Person may designate as "Confidential Information" any Investigation Materials or Litigation Materials, to the extent such

information constitutes Confidential Information as defined in subparagraph A(1)(b) of this Order. Such designations constitute a representation to the Court that the Protected Person (and counsel, if any) in good faith believes that the Investigation Materials or Litigation Materials so designated constitute Confidential Information.

In addition, in the event that a Party produces information of the other Party and does not designate it as Confidential or a non-Party produces information of a Party and does not designate it as Confidential, then such Party has the right to object and designate the information as Confidential so long as such Party has a good faith belief that the information constitutes Confidential Information. In such an event, the designated information must be treated in accordance with its Confidential Information designation in the same manner as if the producing Party or producing non-Party had designated the information as Confidential.

(2) **Waiver.** Any production of documents, information, transcripts of testimony, or other materials not designated as Confidential Information will not be deemed a waiver of any future claim of confidentiality concerning such information if it is later designated as Confidential Information. However, the disclosure of any information for which disclosure was proper at the time disclosed will not be deemed improper regardless of any such subsequent confidentiality designation.

(3) **Inadvertent Non-Designation.** If at any time before the trial of these Actions, a Protected Person realizes that it should have designated as Confidential Information any documents, testimony, or other materials that the Person previously produced during discovery in these Actions, it may so designate such documents, testimony, or other materials by notifying the Parties in writing. After receiving such notice, the Parties must thereafter treat the newly

designated information as Confidential Information in accordance with the Protected Person's new designation under the terms of this Order.

(4) **Inadvertent Disclosure.** In the event of a disclosure of any Confidential Information to any Persons not authorized to receive such disclosure under this Order, the Party responsible for having made the disclosure must promptly notify the Protected Person whose material has been disclosed and provide to such Protected Person all known relevant information concerning the nature and circumstances of the disclosure.

The disclosing Party must also promptly take all reasonable measures to retrieve the improperly disclosed material and to ensure that no further or greater unauthorized disclosure or use thereof is made. Unauthorized or inadvertent disclosure does not change the confidential status of any disclosed material or waive the right to maintain the disclosed material as containing Confidential Information.

(5) **Designation of Investigation Materials.** Investigation Materials submitted by a Protected Person, and any other materials that are entitled to confidentiality under the Antitrust Civil Process Act, 15 U.S.C. § 1313(c)(3), the Hart–Scott–Rodino Antitrust Improvement Act, 15 U.S.C. § 18a(h), or under any other federal or state statute, regulation, or precedent concerning documents in the possession of any Plaintiff, and any information taken from any portion of such document, however that information is recorded or transmitted, will be treated in the first instance as Confidential Information under this Order. Such material may be disclosed only in accordance with the procedures set forth in this Order. The confidentiality of such materials may later be challenged under the provisions of section D below.

(6) **Designation of Litigation Materials.** The following procedures govern the process for Protected Persons to designate as Confidential Information any information that they disclose in these Actions after this Order is entered:

(a) *Copy of order.* When discovery is sought from a non-party in these Actions after entry of this Order, a copy of this Order must accompany the discovery request.

(b) *Deposition testimony.* Within five business days of receipt of the final transcript, the Party who noticed the deposition must provide the final transcript to the deponent. All transcripts of depositions taken in these Actions after entry of this Order will be treated as Confidential Information in their entirety until the date 10 business days after the date when a complete and final copy of the transcript has been made available to the deponent (or the deponent's counsel, if applicable).

Within 10 business days following receipt of the final transcript, the deponent may designate as Confidential Information any portion of the deposition transcript, by pages and lines, and any deposition exhibits provided by the deponent or the deponent's employer. To be effective, these designations must be provided in writing to Plaintiffs' and Defendants' counsel. Any portion of the transcript or exhibits not so designated will not be treated as Confidential Information, despite any prior designation of confidentiality.

When a Party is entitled under this Order to question a deponent about a document or information that has been designated by a different Protected Person as Confidential Information, the Party that asked such questions must designate as Confidential the portion of the transcript relating to such Confidential Information.

(c) *Documents.* A Protected Person who designates as Confidential Information any document that they produced in these Actions must stamp or otherwise mark

each page containing Confidential Information with the designation “CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER” in a manner that will not interfere with legibility or audibility. If the entire document is not Confidential Information, the Protected Person making the designation must stamp or label only those pages that contain Confidential Information.

(d) *Electronic Documents and Data.* Where a Protected Person produces electronic files and documents in native electronic format, the electronic files and documents must be designated by the Protected Person for protection under this Order by appending to the file names or designators information indicating whether the file contains Confidential Information, or by any other reasonable method for appropriately designating such information produced in electronic format, including by making such designations in reasonably accessible metadata associated with the files.

When Confidential Information is produced in electronic format on a disk or other medium that contains exclusively Confidential Information, the “CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER” designation may be placed on the disk or other medium. When electronic files or documents in native form are printed for use at deposition, in a court proceeding, or for provision in printed form to any person described in subparagraph E(1)(c), the Party printing the electronic files or documents must affix a legend to the printed document saying “CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER” and include the production number and designation associated with the native file, or use another reasonable method for appropriately designating such information.

D. Challenges to Confidential Designation

(1) Any Party who objects to any designation of confidentiality may at any time before the trial of these Actions provide a written notice to the Protected Person who made the

designation and all Parties stating with particularity the grounds for the objection. All materials objected to will continue to be treated as Confidential Information pending resolution of the dispute. If the objecting Party and the Protected Person cannot reach agreement on the objection within ten business days of the Party's written notice, either the objecting Party or the Protected Person may raise the dispute with the Court. The producing Party or non-Party bears the burden of persuading the Court that the material is in fact Confidential Information.

(2) While any dispute concerning the designation of confidentiality is pending before the Court, the designated information must be treated in accordance with its Confidential Information designation under this Order until the Court rules on the motion. If the Protected Person fails to move the Court in accordance with this paragraph, or if the Court finds the designation of Confidential Information to have been inappropriate, the challenged designation will be considered rescinded. The Parties thereafter are not required to treat the information as Confidential Information under this Order.

(3) The Parties' entry into this Order does not preclude or prejudice either the Protected Person or the objecting Party from arguing for or against any designation, establish any presumption that a particular designation is valid, or alter the burden of proof that would otherwise apply in a dispute over discovery or disclosure of information.

E. Permitted Disclosure of Confidential Information

- (1) Confidential Information may be disclosed only to the following Persons:
 - (a) the Court and all Persons assisting the Court in these Actions, including law clerks, court reporters, and stenographic or clerical personnel;

(b) Plaintiffs' attorneys, paralegals and other professional personnel (including support and IT staff), agents, or independent contractors retained by Plaintiffs to assist in these Actions, whose functions require access to the information;

(c) Outside Counsel of Record for Defendants including such Outside Counsel's attorneys, paralegals, and other professional personnel (including support and IT staff), agents, or independent contractors retained by the Defendants to assist in these Actions, whose functions require access to the information. In-house counsel for Defendants, however, are excluded and may not have access to any Confidential Information under this Order;

(d) any person retained by a Party to serve as a testifying or consulting expert in these Actions, including employees of the firm with which the expert or consultant is associated or independent contractors who assist the expert's work in these Actions;

(e) outside vendors or service providers (such as copy-service providers and document-management consultants) retained by a Party to assist that Party in these Actions;

(f) outside trial consultants (including graphics consultants) retained by a Party to assist in prosecuting or defending these Actions;

(g) any mediator or arbitrator that the Parties engage in these Actions or that this Court appoints;

(h) authors, addressees, and recipients of particular information designated as Confidential Information solely to the extent they have previously had lawful access to the particular Confidential Information that was disclosed or is to be disclosed; and

(i) persons for whom counsel for Plaintiffs or Defendants believes in good faith previously received or had access to the document, unless the person indicates that he or she did not have access to the document.

(2) Before any information designated as Confidential Information may be disclosed to any Person described in subparagraphs E(1)(d)–(f) of this Order, the Person must first read this Order or must have otherwise been instructed on his or her obligations under the Order by this Court or counsel for a Party, and must have executed the Agreement Concerning Confidentiality attached hereto as Appendix A. Counsel for the Party making the disclosure must retain a copy of such executed agreements for a period of at least one year following the final resolution of these Actions.

(3) Each Person described in Paragraph E(1) of this Order who receives Confidential Information may not disclose that Confidential Information to any other Person, except as provided in this Order.

(4) Recipients of Confidential Information under this Order may use such material solely for the prosecution and defense of these Actions and not for any business, commercial, or competitive purpose, or in any other litigation proceeding.

(5) Nothing in this Order:

(a) limits a Protected Person's use or disclosure of its own Confidential Information;

(b) prevents disclosure of Confidential Information by any party to any current employee of the Protected Person that designated the Confidential Information;

(c) prevents disclosure of Confidential Information by any Party with the consent of the Protected Person that designated the material as Confidential Information;

(d) prevents disclosure by a Party of Confidential Information that is (i) publicly known through no fault of that Party; (ii) lawfully acquired by or known to that Party independent of receipt in discovery in these Actions; (iii) previously produced, disclosed, or

provided to that Party without an obligation of confidentiality and not by inadvertence or mistake; or (iv) produced in accordance with an order of this Court;

(e) prevents the United States, subject to taking appropriate steps to preserve the further confidentiality of such information, from retaining or disclosing Confidential Information (i) in the course of any other legal proceedings in which the United States is a party; (ii) to secure compliance with a Final Judgment that is entered in these Actions; or (iii) for law-enforcement purposes, or as may be required by law; or

(f) prevents the United States' retention or use or disclosure of Confidential Information outside the context of these Actions to the extent permitted by applicable law or regulation governing such pre-complaint discovery, including the Hart-Scott-Rodino Act, 15 U.S.C. § 18a, and the Antitrust Civil Process Act, 15 U.S.C. §§ 1311-14, or as required by law, court order, or regulation.

F. Use of Information Designated Confidential

If any documents, testimony, or other materials designated under this Order as Confidential Information are included in any pleading, motion, exhibit, or other paper to be filed with the Court, the Party seeking to file such material must comply with this Court's Local Civil Rule 5.1(h). Nothing in this Order restricts the Parties or any interested member of the public from challenging the filing of any Confidential Information under seal.

G. Disclosure of Documents Containing PII and PHI

Any PII or PHI produced to any Party, whether during the course of the Investigation or these Actions, is considered Confidential Information under this Order without the need for any Protected Person or Party to designate it as such.

H. Treatment of Confidential Information at Trial

The disclosure of Confidential Information at trial will be governed by a separate Court order.

I. Procedures upon Termination of These Actions

(1) The obligations imposed by this Order survive the termination of these Actions unless the Court, which retains jurisdiction to resolve any disputes arising out of this Order, orders otherwise. Within 90 days after receiving notice of the entry of an order, judgment, or decree terminating these Actions, all Persons having received information designated as Confidential Information must either (i) return the material and all copies thereof to the Protected Person (or the Protected Person's counsel if represented by counsel) that produced it; or (ii) destroy or delete the Confidential Information such that it cannot be reassembled, reconstructed, or used in any way.

(2) Notwithstanding the above Paragraph (I)(1), counsel for the Parties are entitled to retain Confidential Information, contained in court papers, deposition and trial transcripts and exhibits, and work product, provided that the Parties and their counsel and employees do not disclose the portions of court papers, deposition transcripts, exhibits, or work product containing information designated as Confidential Information to any Person except under Court order or agreement with the Protected Person that produced the Confidential Information or as otherwise permitted in this Order.

(3) All Confidential Information returned to the Parties or their counsel by the Court likewise must be disposed of in accordance with this Paragraph. Nothing in this Paragraph, however, restricts the rights of the Parties under Paragraphs (E)(4) or (E)(5) of this Order.

J. Right to Seek Modification

Nothing in this Order limits any Person, including members of the public, Party, or Protected Person from seeking further or additional protections of any of its materials or modification of this Order upon motion duly made under the rules of this Court, including that certain material not be produced at all or is not admissible evidence in these Actions or any other proceeding.

K. The Privacy Act

Any order of this Court requiring the production of any document, information, or transcript of testimony constitutes a court order within the meaning of the Privacy Act, 5 U.S.C. § 552a(b)(11).

L. Persons Bound by This Order

This Order is binding on the Parties to these Actions, their attorneys, and their successors, personal representatives, administrators, assigns, parents, subsidiaries, divisions, affiliates, employees, agents, retained consultants and experts, and any persons or organizations over which they have direct control.

IT IS SO ORDERED.

DATED: _____

UNITED STATES DISTRICT JUDGE

APPENDIX A

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

UNITED STATES OF AMERICA, et al.,

Plaintiffs,

v.

AETNA INC. and HUMANA INC.,

Defendants.

Case No. 1:16-cv-01494 (JDB)

AGREEMENT CONCERNING CONFIDENTIALITY

I, _____, am employed as _____ by _____.

I hereby certify that:

1. I have read the Stipulated Protective Order entered in the above-captioned action, and understand its terms.

2. I agree to be bound by the terms of the Stipulated Protective Order entered in the above-captioned action and agree to use the information provided to me only as explicitly provided in this Protective Order.

3. I understand that my failure to abide by the terms of the Stipulated Protective Order entered in the above-captioned action will subject me, without limitation, to civil and criminal penalties for contempt of Court.

4. I submit to the jurisdiction of the United States District Court for the District of Columbia solely for the purpose of enforcing the terms of the Stipulated Protective Order entered in the above-captioned action and freely and knowingly waive any right I may otherwise have to object to the jurisdiction of said Court.

5. I make this certification this ____ day of _____, 20__.

SIGNATURE

– Exhibit B –

United States, et al. v. Aetna Inc. and Humana Inc., No. 16-cv-1494 (JDB)

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

UNITED STATES OF AMERICA, et al.,

Plaintiffs,

v.

AETNA INC. and HUMANA INC.,

Defendants.

Case No. 1:16-cv-01494 (JDB)

PROTECTIVE ORDER

The Court, upon good cause shown and in accordance with Rule 26(c)(1) of the Federal Rules of Civil Procedure, ORDERS as follows:

A. Definitions

(1) As used herein:

(a) “Actions” means collectively the following actions: the action by the United States and certain states against Anthem, Inc. and Cigna Corp., Case No. 1:16-cv-01493 (ABJ), and the action by the United States and certain states against Aetna Inc. and Humana Inc., Case No. 1:16-cv-01494 (JDB).

(b) “Confidential Information” means (i) any trade secret, confidential research, development, commercial, or competitively sensitive information, as such terms are used in Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure; (ii) any transcript or other material containing such information that has not been published or otherwise made publicly available; and (iii) any “Personally Identifiable Information” or “Protected Health Information,” as such terms are defined in this Order.

(c) “Defendants” means Aetna Inc. and Humana Inc., and their divisions, subsidiaries, affiliates, partnerships and joint ventures, and all directors, officers, employees, agents (including counsel), and representatives of the foregoing.

(d) “Disclosed” means shown, divulged, revealed, produced, described, transmitted, or otherwise communicated, in whole or in part.

(e) “Document” means documents or electronically stored information as defined in Rule 34(a) of the Federal Rules of Civil Procedure.

(f) “Highly Confidential Information” means any Confidential Information which the Protected Person, as defined herein, reasonably believes to be so competitively sensitive that it is entitled to extraordinary protections.

(g) “Including” means including, but not limited to.

(h) “Inside Counsel” means inside counsel of Defendants identified on Attachment 1 to this Protective Order, who have filed an affidavit or declaration certifying that they do not participate in competitively sensitive decision-making for their employer and have signed the Agreement Concerning Confidentiality in Appendix A to this Order.

(i) “Investigation” means the pre-Complaint investigation of the Agreement and Plan of Merger among Anthem and Cigna dated July 23, 2015, and the Agreement and Plan of Merger among Aetna Inc. and Humana Inc. dated July 2, 2015.

(j) “Investigation Materials” means non-privileged correspondence, documents, data, written information or statements, transcripts of testimony, declarations (including drafts), affidavits (including drafts), or any other materials that: (i) were exchanged between any Defendant, or affiliated person or entity, and any Plaintiff, either voluntarily or under compulsory process, during and in connection with the Investigation; or (ii) were

exchanged between any Party, or that Party's counsel or agent, and any non-party not having an attorney-client or common-interest relationship with the Party (*e.g.*, experts, consultants, counsel for co-Defendants, and counsel for states' attorneys generals), either voluntarily during the Investigation or in response to any request issued during and in connection with the Investigation.

(k) "Litigation Materials" means non-privileged documents, written information, or other materials that (i) any Protected Person provides to any Party, either voluntarily or under compulsory process, in connection with these Actions; (ii) constitute any communication between any Party and any non-party or Protected Person in connection with these Actions; (iii) any Defendant, or affiliated person or entity, provides to any Plaintiff, either voluntarily or under compulsory process, in connection with these Actions; or (iv) any Plaintiff provides to any Defendant in connection with these Actions.

(l) "Outside Counsel of Record" means the firms of attorneys representing a Defendant in these Actions.

(m) "Party" means any Plaintiff or any Defendant in these Actions. "Parties" means collectively the Plaintiffs and Defendants in these Actions.

(n) "Person" means any natural person, corporate entity, partnership, association, joint venture, governmental entity, trust, or business entity.

(o) "Plaintiff" means the United States of America and all of its employees, agents, and representatives, and the Plaintiff States.

(p) "Plaintiff States" means the States of Delaware, Florida, Georgia, Illinois, Iowa, and Ohio, the Commonwealths of Pennsylvania and Virginia, and the District of Columbia,

their respective Attorneys General, and other authorized representatives of their respective Attorneys General.

(q) “Protected Person” means any Person (including a Party) that, either voluntarily or under compulsory process, has provided or provides (i) Investigation Materials in connection with the Investigation, or (ii) Litigation Materials in connection with these Actions.

(r) “Personally Identifiable Information” or “PII” means any information about an individual, including education, financial transactions, medical history, criminal, employment history, or information which can be used to distinguish or trace an individual’s identity, such as their name, social security number, date and place of birth, mother’s maiden name, biometric records, including any other personal information which is linked or linkable to a specific individual.

(s) “Protected Health Information” or “PHI,” as defined in 45 C.F.R. § 160.103, means individually identifiable health information that is transmitted or maintained in electronic media or any other form or medium. The term does not include individually identifiable health information (i) in education records covered by the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g; (ii) in records described at 20 U.S.C. § 1232g(a)(4)(B)(iv); (iii) in employment records held by a covered entity in its role as employer; and (iv) regarding a person who has been deceased for more than 50 years.

(t) “Individually Identifiable Health Information,” as defined in 45 C.F.R. § 160.103, is a subset of health information, including demographic information collected from an individual, and (i) created or received by a healthcare provider, health plan, employer, or healthcare clearinghouse; and (ii) relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or

future payment for the provision of health care to an individual; and (1) that identifies the individual; or (2) with respect to which there is a reasonable basis to believe the information can be used to identify the individual.

B. Notice

(1) Within three business days after the Court's entry of this Order, the applicable Party must give notice of this Order to each Protected Person (or, if represented by counsel, the Protected Person's counsel) that provided Investigation Materials to that Party and who provided an email address, facsimile number, or physical address. Notice must be given by sending a copy of this Order by email, facsimile, or overnight delivery.

(2) If a Protected Person determines that this Order does not adequately protect its Confidential Information or Highly Confidential Information, it may, after meeting and conferring with the Parties within 10 calendar days after receipt of a copy of this Order, seek additional protection from the Court for its Confidential Information or Highly Confidential Information. If a Protected Person seeks additional protection from the Court, the information for which additional protection has been sought will not be provided to other Persons until the Protected Party and the Parties have agreed or the Court has ruled on the Protected Party's motion.

(3) **Confidential Health Information.** The Parties acknowledge that information produced in the Investigations and in discovery in this litigation, regardless of its designation under this Order, may contain personal and health information that may be subject to the protections of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), the applicable requirements of the Standards for Privacy of Individually Identifiable Health Information and its implementing regulations issued by the U.S. Department of Health and

Human Services (45 C.F.R. Parts 160-64, HIPAA Privacy Regulations), and state regulations protecting the confidentiality of individually identifiable personal and health information. The Parties and all Persons who sign the agreement set forth in Appendix A hereto agree to take all measures necessary to comply with the requirements of these laws and any other applicable laws governing the privacy of personal and health information.

C. Designation of Confidential Information and Highly Confidential Information

(1) **Right to Confidential Designation.** A Protected Person may designate as “Confidential Information” or “Highly Confidential Information” any Investigation Materials or Litigation Materials, to the extent such information constitutes Confidential Information or Highly Confidential Information as defined in subparagraphs A(1)(b) and A(1)(f) of this Order. Such designations constitute a representation to the Court that the Protected Person (and counsel, if any) in good faith believes that the Investigation Materials or Litigation Materials so designated constitute Confidential Information or Highly Confidential Information.

In addition, in the event that a Party produces information of the other Party and does not designate it as Confidential Information or Highly Confidential Information, or a non-Party produces information of a Party and does not designate it as Confidential Information or Highly Confidential Information, then such Party has the right to object and designate the information as Confidential Information or Highly Confidential Information so long as such Party has a good faith belief that the information constitutes Confidential Information or Highly Confidential Information. In such an event, the designated information must be treated in accordance with its Confidential Information or Highly Confidential Information designation in the same manner as if the producing Party or producing non-Party had designated the information as Confidential Information or Highly Confidential Information.

(2) **Waiver.** Any production of documents, information, transcripts of testimony, or other materials not designated as Confidential Information or Highly Confidential Information will not be deemed a waiver of any future claim of confidentiality concerning such information if it is later designated as Confidential Information or Highly Confidential Information. However, the disclosure of any information for which disclosure was proper at the time disclosed will not be deemed improper regardless of any such subsequent confidentiality designation.

(3) **Inadvertent Non-Designation.** If at any time before the trial of these Actions, a Protected Person realizes that it should have designated as Confidential Information or Highly Confidential Information any documents, testimony, or other materials that the Person previously produced during discovery in these Actions, it may so designate such documents, testimony, or other materials by notifying the Parties in writing. After receiving such notice, the Parties must thereafter treat the newly designated information as Confidential Information or Highly Confidential Information in accordance with the Protected Person's new designation under the terms of this Order.

(4) **Inadvertent Disclosure.** In the event of a disclosure of any Confidential Information or Highly Confidential Information to any Persons not authorized to receive such disclosure under this Order, the Party responsible for having made the disclosure must promptly notify the Protected Person whose material has been disclosed and provide to such Protected Person all known relevant information concerning the nature and circumstances of the disclosure.

The disclosing Party must also promptly take all reasonable measures to retrieve the improperly disclosed material and to ensure that no further or greater unauthorized disclosure or use thereof is made. Unauthorized or inadvertent disclosure does not change the confidential

status of any disclosed material or waive the right to maintain the disclosed material as containing Confidential Information or Highly Confidential Information.

(5) **Designation of Investigation Materials.** Investigation Materials submitted by a Protected Person, and any other materials that are entitled to confidentiality under the Antitrust Civil Process Act, 15 U.S.C. § 1313(c)(3), the Hart–Scott–Rodino Antitrust Improvement Act, 15 U.S.C. § 18a(h), or under any other federal or state statute, regulation, or precedent concerning documents in the possession of any Plaintiff, and any information taken from any portion of such document, however that information is recorded or transmitted, will be treated in the first instance as Highly Confidential Information under this Order. Such material may be disclosed only in accordance with the procedures set forth in this Order. The confidentiality of such materials may later be challenged under the provisions of section D below.

(6) **Designation of Litigation Materials.** The following procedures govern the process for Protected Persons to designate as Confidential Information or Highly Confidential Information any information that they disclose in these Actions after this Order is entered:

(a) *Copy of order.* When discovery is sought from a non-party in these Actions after entry of this Order, a copy of this Order must accompany the discovery request.

(b) *Deposition testimony.* Within five business days of receipt of the final transcript, the Party who noticed the deposition must provide the final transcript to the deponent. All transcripts of depositions taken in these Actions after entry of this Order will be treated as Highly Confidential Information in their entirety until the date 10 business days after the date when a complete and final copy of the transcript has been made available to the deponent (or the deponent's counsel, if applicable).

Within 10 business days following receipt of the final transcript, the deponent may designate as Confidential Information or Highly Confidential Information any portion of the deposition transcript, by pages and lines, and any deposition exhibits provided by the deponent or the deponent's employer. To be effective, these designations must be provided in writing to Plaintiffs' and Defendants' counsel. Any portion of the transcript or exhibits not so designated will not be treated as Confidential Information or Highly Confidential Information, despite any prior designation of confidentiality.

When a Party is entitled under this Order to question a deponent about a document or information that has been designated by a different Protected Person as Confidential Information or Highly Confidential Information, the Party that asked such questions must designate as Confidential or Highly Confidential the portion of the transcript relating to such Confidential Information or Highly Confidential Information.

(c) *Documents.* A Protected Person who designates as Confidential Information or Highly Confidential Information any document that they produced in these Actions must stamp or otherwise mark each page containing Confidential Information or Highly Confidential Information with the designation "CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER" or "HIGHLY CONFIDENTIAL (OUTSIDE COUNSEL ONLY) – SUBJECT TO PROTECTIVE ORDER" in a manner that will not interfere with legibility or audibility. If the entire document is not Confidential Information or Highly Confidential Information, the Protected Person making the designation must stamp or label only those pages that contain Confidential Information or Highly Confidential Information.

(d) *Electronic Documents and Data.* Where a Protected Person produces electronic files and documents in native electronic format, the electronic files and documents

must be designated by the Protected Person for protection under this Order by appending to the file names or designators information indicating whether the file contains Confidential Information or Highly Confidential Information, or by any other reasonable method for appropriately designating such information produced in electronic format, including by making such designations in reasonably accessible metadata associated with the files.

When Confidential Information or Highly Confidential Information is produced in electronic format on a disk or other medium that contains exclusively Confidential Information or Highly Confidential Information, the “CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER” or “HIGHLY CONFIDENTIAL (OUTSIDE COUNSEL ONLY) – SUBJECT TO PROTECTIVE ORDER” designation may be placed on the disk or other medium. When electronic files or documents in native form are printed for use at deposition, in a court proceeding, or for provision in printed form to any person described in subparagraph E(1)(d), the Party printing the electronic files or documents must affix a legend to the printed document saying “CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER” or “HIGHLY CONFIDENTIAL (OUTSIDE COUNSEL ONLY) – SUBJECT TO PROTECTIVE ORDER” and include the production number and designation associated with the native file, or use another reasonable method for appropriately designating such information.

D. Challenges to Confidential Designation

(1) Any Party who objects to any designation of confidentiality may at any time before the trial of these Actions provide a written notice to the Protected Person who made the designation and all Parties stating with particularity the grounds for the objection. All materials objected to will continue to be treated as Confidential Information or Highly Confidential Information pending resolution of the dispute. If the objecting Party and the Protected Person

cannot reach agreement on the objection within 10 business days of the Party's written notice, either the objecting Party or the Protected Person may raise the dispute with the Court. The producing Party or non-Party bears the burden of persuading the Court that the material is in fact Confidential Information or Highly Confidential Information.

(2) While any dispute concerning the designation of confidentiality is pending before the Court, the designated information must be treated in accordance with its Confidential Information or Highly Confidential Information designation under this Order until the Court rules on the motion. If the Protected Person fails to move the Court in accordance with this paragraph, or if the Court finds the designation of Confidential Information or Highly Confidential Information to have been inappropriate, the challenged designation will be considered rescinded. The Parties thereafter are not required to treat the information as Confidential Information or Highly Confidential Information under this Order.

(3) The Parties' entry into this Order does not preclude or prejudice either the Protected Person or the objecting Party from arguing for or against any designation, establish any presumption that a particular designation is valid, or alter the burden of proof that would otherwise apply in a dispute over discovery or disclosure of information.

E. Permitted Disclosure of Confidential Information and Highly Confidential Information

- (1) Confidential Information may be disclosed only to the following Persons:
- (a) the Court and all Persons assisting the Court in these Actions, including law clerks, court reporters, and stenographic or clerical personnel;
 - (b) Plaintiffs' attorneys, paralegals and other professional personnel (including support and IT staff), agents, or independent contractors retained by Plaintiffs to assist in these Actions, whose functions require access to the information;

(c) Outside Counsel of Record for Defendants including such Outside Counsel's attorneys, paralegals, and other professional personnel (including support and IT staff), agents, or independent contractors retained by the Defendants to assist in these Actions, whose functions require access to the information;

(d) any person retained by a Party to serve as a testifying or consulting expert in these Actions, including employees of the firm with which the expert or consultant is associated or independent contractors who assist the expert's work in these Actions;

(e) outside vendors or service providers (such as copy-service providers and document-management consultants) retained by a Party to assist that Party in these Actions;

(f) outside trial consultants (including graphics consultants) retained by a Party to assist in prosecuting or defending these Actions;

(g) any mediator or arbitrator that the Parties engage in these Actions or that this Court appoints;

(h) authors, addressees, and recipients of particular information designated as Confidential Information solely to the extent they have previously had lawful access to the particular Confidential Information that was disclosed or is to be disclosed;

(i) persons for whom counsel for Plaintiffs or Defendants believes in good faith previously received or had access to the document, unless the person indicates that he or she did not have access to the document; and

(j) Inside Counsel as defined in Paragraph A(1)(h) of this Order.

(2) Highly Confidential Information may be disclosed only to the persons set forth in subparagraphs E(1)(a)-(i) above.

(3) Before any information designated as Confidential Information or Highly Confidential Information may be disclosed to any Person described in subparagraphs E(1)(d)–(f) of this Order, the Person must first read this Order or must have otherwise been instructed on his or her obligations under the Order by this Court or counsel for a Party, and must have executed the Agreement Concerning Confidentiality attached hereto as Appendix A. Counsel for the Party making the disclosure must retain a copy of such executed agreements for a period of at least one year following the final resolution of these Actions.

(4) Each Person described in Paragraphs E(1) and E(2) of this Order who receives Confidential Information or Highly Confidential Information may not disclose that information to any other Person, except as provided in this Order.

(5) Recipients of Confidential Information or Highly Confidential Information under this Order may use such material solely for the prosecution and defense of these Actions and not for any business, commercial, or competitive purpose, or in any other litigation proceeding.

(6) Nothing in this Order:

(a) limits a Protected Person's use or disclosure of its own Confidential Information or Highly Confidential Information;

(b) prevents disclosure of Confidential Information or Highly Confidential Information by any party to any current employee of the Protected Person that designated the Confidential Information or Highly Confidential Information;

(c) prevents disclosure of Confidential Information or Highly Confidential Information by any Party with the consent of the Protected Person that designated the material as Confidential Information or Highly Confidential Information;

(d) prevents disclosure by a Party of Confidential Information or Highly Confidential Information that is (i) publicly known through no fault of that Party; (ii) lawfully acquired by or known to that Party independent of receipt in discovery in these Actions; (iii) previously produced, disclosed, or provided to that Party without an obligation of confidentiality and not by inadvertence or mistake; or (iv) produced in accordance with an order of this Court;

(e) prevents the United States, subject to taking appropriate steps to preserve the further confidentiality of such information, from retaining or disclosing Confidential Information or Highly Confidential Information (i) in the course of any other legal proceedings in which the United States is a party; (ii) to secure compliance with a Final Judgment that is entered in these Actions; or (iii) for law-enforcement purposes, or as may be required by law; or

(f) prevents the United States' retention or use or disclosure of Confidential Information or Highly Confidential Information outside the context of these Actions to the extent permitted by applicable law or regulation governing such pre-complaint discovery, including the Hart-Scott-Rodino Act, 15 U.S.C. § 18a, and the Antitrust Civil Process Act, 15 U.S.C. §§ 1311-14, or as required by law, court order, or regulation.

F. Use of Information Designated Confidential

If any documents, testimony, or other materials designated under this Order as Confidential Information or Highly Confidential Information are included in any pleading, motion, exhibit, or other paper to be filed with the Court, the Party seeking to file such material must comply with this Court's Local Civil Rule 5.1(h). Nothing in this Order restricts the Parties or any interested member of the public from challenging the filing of any Confidential Information or Highly Confidential Information under seal.

G. Disclosure of Documents Containing PII and PHI

Any PII or PHI produced to any Party, whether during the course of the Investigation or these Actions, is considered Highly Confidential Information under this Order without the need for any Protected Person or Party to designate it as such.

H. Treatment of Confidential Information and Highly Confidential Information at Trial

The disclosure of Confidential Information and Highly Confidential Information at trial will be governed by a separate Court order.

I. Procedures upon Termination of These Actions

(1) The obligations imposed by this Order survive the termination of these Actions unless the Court, which retains jurisdiction to resolve any disputes arising out of this Order, orders otherwise. Within 90 days after receiving notice of the entry of an order, judgment, or decree terminating these Actions, all Persons having received information designated as Confidential Information or Highly Confidential Information must either (i) return the material and all copies thereof to the Protected Person (or the Protected Person's counsel if represented by counsel) that produced it; or (ii) destroy or delete the Confidential Information or Highly Confidential Information such that it cannot be reassembled, reconstructed, or used in any way.

(2) Notwithstanding the above Paragraph (I)(1), counsel for the Parties are entitled to retain Confidential Information and Highly Confidential Information, contained in court papers, deposition and trial transcripts and exhibits, and work product, provided that the Parties and their counsel and employees do not disclose the portions of court papers, deposition transcripts, exhibits, or work product containing information designated as Confidential Information or Highly Confidential Information to any Person except under Court order or agreement with the

Protected Person that produced the Confidential Information or Highly Confidential Information, or as otherwise permitted in this Order.

(3) All Confidential Information or Highly Confidential Information returned to the Parties or their counsel by the Court likewise must be disposed of in accordance with this Paragraph. Nothing in this Paragraph, however, restricts the rights of the Parties under Paragraphs (E)(5) or (E)(6) of this Order.

J. Right to Seek Modification

Nothing in this Order limits any Person, including members of the public, Party, or Protected Person from seeking further or additional protections of any of its materials or modification of this Order upon motion duly made under the rules of this Court, including that certain material not be produced at all or is not admissible evidence in these Actions or any other proceeding.

K. The Privacy Act

Any order of this Court requiring the production of any document, information, or transcript of testimony constitutes a court order within the meaning of the Privacy Act, 5 U.S.C. § 552a(b)(11).

L. Persons Bound by This Order

This Order is binding on the Parties to these Actions, their attorneys, and their successors, personal representatives, administrators, assigns, parents, subsidiaries, divisions, affiliates, employees, agents, retained consultants and experts, and any persons or organizations over which they have direct control.

IT IS SO ORDERED.

DATED: _____

UNITED STATES DISTRICT JUDGE

APPENDIX A

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

UNITED STATES OF AMERICA, et al.,

Plaintiffs,

v.

AETNA INC. and HUMANA INC.,

Defendants.

Case No. 1:16-cv-01494 (JDB)

AGREEMENT CONCERNING CONFIDENTIALITY

I, _____, am employed as _____ by _____.

I hereby certify that:

1. I have read the Stipulated Protective Order entered in the above-captioned action, and understand its terms.

2. I agree to be bound by the terms of the Stipulated Protective Order entered in the above-captioned action and agree to use the information provided to me only as explicitly provided in this Protective Order.

3. I understand that my failure to abide by the terms of the Stipulated Protective Order entered in the above-captioned action will subject me, without limitation, to civil and criminal penalties for contempt of Court.

4. I submit to the jurisdiction of the United States District Court for the District of Columbia solely for the purpose of enforcing the terms of the Stipulated Protective Order entered in the above-captioned action and freely and knowingly waive any right I may otherwise have to object to the jurisdiction of said Court.

5. I make this certification this ____ day of _____, 20__.

SIGNATURE