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-1494 (JDB)

SPECIAL MASTER REPORT AND RECOMMENDATION NO. 4

Currently before the Special Master are two Motions to Modify the Protective Order, filed by non-parties UPMC and UMPC Health Plan, Inc. (collectively, "UPMC" or "UPMC Health Plan") (Dkt. No. 106) and non-parties Baylor Scott & White Holdings ("BSWH"), Duke University Health System, Inc. ("Duke" or "DUHS"), and Iowa Health System d/b/a UnityPoint Health ("UnityPoint" or "UnityPoint Health").[1] The Special Master recommends that the Court grant in part and deny in part these Motions.

[1] Non-party Tufts Associated Health Plans ("TAHP") also submitted an Unopposed Motion to Modify the Protective Order in *United States et al. v. Anthem Inc. and Cigna Corp*., Case No. 1:16-cv-1493(ABJ) (Dkt. No. 110). That Motion seeks to amend subsection H of the Protective Order to include the following language: "Upon the filing of a proposed order governing the disclosure of Confidential Information at trial, the Parties shall provide notice of such order to any Protected Person whose Confidential Information is expected to be used at trial." (TAHP Mot. at 1). While the Tufts Motion was not filed in this case, all parties to this case have indicated that they do not oppose the Tufts Motion. (*See* TAHP Mot. at 1; Def. Opp. at 12). The Special Master finds this to be an appropriate modification to the Protective Order in this case. The Special Master therefore recommends that the Court adopt the TAHP proposal in its entirety.

I. Background

The Court originally issued the underlying Protective Order in this case on August 12 after considering the arguments of the parties. (*See* Dkt. No. 54). In late August, the parties informed the Special Master that various non-parties objected to provisions of that Order. The Special Master subsequently issued Special Master Order No. 1 (Dkt. No. 74) and Special Master Order No. 2. (Dkt. No. 92). In relevant part, these Orders directed non-party Protected Persons[2] with objections to the Protective Order to meet and confer with the parties and, should the meet-and-confer process not resolve these concerns, to file Motions with the Special Master.[3] The parties reached agreement with numerous non-parties regarding proposed changes to the Protective Order, and the parties submitted a proposed amended Protective Order which the Court adopted. (*See* Dkt. No. 108).

The parties were not able to reach complete agreement with UPMC or BSWH/Duke/UnityPoint, and UPMC and BSWH/Duke/UnityPoint timely submitted Motions to Amend the Protective Order. The Special Master has reviewed these Motions, as well as Oppositions filed separately by Plaintiffs and Defendant Humana on behalf of itself and Defendant Aetna, and Reply briefs submitted by UPMC and BSWH/Duke/UnityPoint, and considered all of the arguments made therein. These recommendations follow.

---

[2] The Amended Protective Order defines a "Protected Person" as "any Person …. 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 this Action." [Protective Order at ¶ A(o)].

[3] The Order Appointing the Special Master to this case grants the Special Master authority over, *inter alia*, scheduling matters and motions for protective order. (Dkt. No. 53 at ¶ 2).

II. Legal Standard

Although "protective orders are not permanent or immutable and may be modified to serve important efficiency or fairness goals," the party or, in this case, non-party, which seeks to modify a protective order bears the burden of showing that good cause exists to justify the desired change. [*U.S. ex rel Pogue v. Diabetes Treatment Ctrs. of Am.*, 2004 WL 2009414 at *2 (D.D.C. May 17, 2004)(citations omitted); *Infineon Tech. A.G. v. Green Power Tech Ltd.*, 247 F.R.D. 1, 2 (D.D.C. 2005)(Bates, J.)(citations omitted)]. "'Good cause' implies changed circumstances or new situations; a continuing objection to the terms of an order does not constitute good cause to modify or withdraw a protective order." [*Infineon Tech.*, 247 F.R.D. at 2 (citing *Bayer AG & Miles, Inc. v. Barr Labs., Inc*., 162 F.R.D. 456, 464 (S.D.N.Y.1995))].

To show good cause, the party seeking to modify the protective order must provide specific facts showing the particular harm that is likely to occur in the absence of such an order and that this harm outweighs the opposing side's interests in preparing for trial. As one court has stated,

> Good cause exists under Rule 26(c) when justice requires the protection of a party or a person from any annoyance, embarrassment, oppression, or undue burden or expense, but the party requesting a protective order must make a specific demonstration of facts in support of the request as opposed to conclusory or speculative statements about the need for a protective order and the harm which will be suffered without one. Accordingly, courts apply a balancing test, weighing the movant's proffer of harm against the adversary's 'significant interest' in preparing for trial.

[*Huthnance v. District of Columbia*, 255 F.R.D. 285, 296 (D.D.C. 2008) (quoting *Fonville v. District of Columbia*, 230 F.R.D. 38, 40 (D.D.C.2005) and *Doe v. District of Columbia*, 230 F.R.D. 47, 50 (D.D.C. 2005))].

In determining whether good cause exists to justify a proposed modification, a court may consider a four-factor test. [*Infineon Tech*., 247 F.R.D. at 2 (citing *Diabetes Treatment Ctrs.*, 2004 WL 2009414 at *2-4)].[4] The first factor is whether "good cause was shown for the original protective order." [*Bayer AG & Miles, Inc. v. Barr Labs., Inc.,* 162 F.R.D. 456, 462-63 (S.D.N.Y. 1995)]. If so, "the burden is on the party seeking modification to show good cause for modification . . . ." (*Id*.) Both the original Protective Order (Dkt. No. 53) and the Amended Protective Order (Dkt. No. 108) state that they each were entered "upon good cause shown." Thus, the burden is on the movants here to establish good cause.

The second factor is the nature of the protective order, meaning whether the order was court imposed or entered upon stipulation of the parties and whether the order is a "blanket" order applicable to all discovery in a case or is a specific order applicable only to a particular document. (*Bayer*, 162 F.R.D. at 463; *Diabetes Treatment Ctrs*., 2004 WL 2009414 at *3). For purposes of these Motions, the Special Master notes that, while the original Protective Order was stipulated because parties agreed to the terms of the Order prior to its entry, the parties were sensitive to and thoroughly considered the needs and issues of non-parties in drafting the terms of the Order. [*See* Pl. Mem. re: Protective Order (Dkt. No. 64) at 2-3]. In addition, the Order is "blanket" in that it is applicable to all discovery in this case. A blanket order is appropriate here

[4] This four-factor test is intended to aid the court's determination. The factors are neither mandatory nor do they represent the only test employed by courts in assessing whether a protective order should be modified. [*see U.S. v. Microsoft Corp.*, 165 F..3d 952, 959 (D.C. Cir. 1999); *U.S. v. All Assets Held at Bank Julius Baer & Co., Ltd.*, 312 F.R.D. 16, 19 n.3 (D.D.C. 2015)]. As another court in this district has explained, "[c]ourts have used various formulae in determining whether to modify a protective order. In balancing competing interests, courts have weighed, *inter alia,* efficiency concerns, reliance interests upon the continued integrity of the protective order, and the public interest in open access to records and documents. A significant factor for many courts is whether the discovery sought will obviate the need for that party to engage in duplicative discovery." [*In re Vitamins Antitrust Litig*., 2001 WL 34088808 at *6 (D.D.C. Mar. 19, 2001)(citations omitted)].

as it encourages "just, prompt and efficient resolution of [ ] complex actions." (*Diabetes Treatment Ctrs*., 2004 WL 2009414 at *3).

The third and fourth factors are "the foreseeability [of the proposed modification] at the time of the original protective order of the modification now requested" and "the parties' reliance on the protective order." (*Bayer*, 162 F.R.D. at 463). The foreseeability of each proposed modification must be considered individually. As to reliance, the parties have engaged in discovery to date based upon the terms of the present Protective Order. To the extent that non-parties have produced evidence to date, such productions have also been made in the context of the current Order.

III. UPMC Health Plan Motion

UPMC seeks four modifications to the protective order: (1) a limitation on the disclosure of confidential information to current employees of a producing party; (2) the addition of a requirement that would provide notice to non-parties who produced discovery when their productions will be submitted in a filing with the Court; (3) the addition of language designed to protect confidential information used during hearings or trial; and (4) the addition of a notice requirement that would inform non-parties of any attempts to modify the Protective Order.

A. Disclosure of Information to Employees of the Producing Party

Section E of the Amended Protective Order, concerning permitted disclosure of confidential information, currently provides that "[n]othing in this [Protective] Order … prevents disclosure of Confidential Information by any party to any current employee of the Protected Person that designated the Confidential Information." [Amended Protective Order ¶ E(6)(b)].

UPMC takes issue with this provision, noting that UPMC "does not allow most of its own current employees access to all of its Confidential Information." Rather, UPMC shields

confidential information "from its own employees who have no need for that information" in order to "protect[ ] the confidentiality of its proprietary information." (UPMC Mot. at 4).

UPMC has proposed two alternative clauses to replace section E(6)(b). Initially, UPMC proposed that the language be amended to read:

> Nothing in this Order . . . (5)(b) [sic] prevents disclosure of Confidential Information by any party to any current employee of the Protected Person that designated the Confidential Information *where it is apparent from the face of the document that the current employee of the Protected Person has already seen the document.*

[UPMC Mot. at 4 (new proposed language emphasized)].

In the alternative, UPMC asks that the clause be changed to:

> Nothing in this Order . . . (5)(b) [sic] prevents disclosure of Confidential Information by any party to any current employee of the Protected Person that designated the Confidential Information *where (1) the Protected Person is a party; or (2) for nonparty Protected Persons where (a) it is apparent from the face of the document that the current employee of the Protected Person has already seen the document; (b) where the current employee holds an executive level position with the Protected Person; or (c) where the Information relates to a topic for which the current employee is appearing at a deposition as the designated representative of the Protected Person.*

[UPMC Mot. at 5 (new proposed language emphasized)].

Plaintiffs oppose these proposed modifications, and argues that UPMC has not shown "good cause" for the proposed modifications. (*See* Pl. Opp. at 3). Plaintiffs additionally argue that the UPMC's first proposal is "unworkably ambiguous;" is not easily applicable to "smaller companies and partnerships that constitute a substantial number of protected Persons in these cases;" creates unnecessary complexity with respect to Anthem Inc. and Cigna Corp., who are non-parties to this case, but parties in *United States et al v. Anthem Inc. and Cigna Corp.*, Case

No. 1:16-cv-1493(ABJ).; and conflicts with other sections of the Amended Protective Order. (Pl. Opp. at 3).[5]

The Special Master finds that UPMC has not shown good cause for this proposed modification, particularly as it would apply to all depositions in this case. This is an extraordinarily large case, involving the depositions of likely more than 50 non-parties. Requiring the parties to question a non-party's representative using only documents "where it is apparent from the face of the document that the current employee … has already seen the document"[6] would unduly complicate the use by the deposing party of documents during the deposition with a result of limiting the usefulness of any given deposition. In the alternative, UPMC's proposed modification would require the parties to contact each non-party prior to a deposition to confirm that the deponent has seen each document that may be used. This would inject unnecessary and unworkable delay into the discovery process.

As weighed against this concern, UPMC has not provided evidence of the harm that it believes that it would stem from disclosure of its own information to its own employees. Notably, none of the other 50-plus non-parties slated for deposition in this case have raised any similar concerns to the Special Master. While UPMC broadly states that limiting its' own employees access to confidential information is "[o]ne of the ways in which [it] protects the confidentiality of its proprietary information," UPMC's use of the phrase "one of the ways" suggests that it has additional methods of protecting this confidentiality and that shielding its own employees is not the sole means of guarding its information. Regardless, UPMC has

[5] Defendants Aetna and Humana do not oppose the proposed modification.

[6] The phrase "from the face of the document" also is ambiguous and may lead to further, unnecessary litigation regarding when it is sufficiently clear that a current employee has in fact seen the document at issue.

presented no declaration or other evidence describing the actual harm that may stem from the type of disclosure that might occur in a deposition setting in this particular case.

Accordingly, while the Special Master recognizes UPMC's interest in protecting the confidentiality of its information, the parties also have a valid interest in litigating this case, and efficient and productive depositions are an essential element of this litigation. UPMC has not provided specific examples of the information at risk or the harm that it fears would stem from providing UPMC-produced information to its own employees. UPMC has not shown good cause justifying the proposed modification, and the showing that it has made does not outweigh the parties' interest in maintaining provision E(6)(b) as it currently stands.

B. Submissions of Confidential Information to the Court

UPMC asks to amend section F of the Protective Order, regarding use of information designated as confidential,

> Upon receipt of an objection or challenge to the filing of a Protected Person's Confidential Information under seal, *or upon the denial of a motion to file such Information under seal or a motion to unseal such Information*, the Party that filed *or attempted to file* the Confidential Information under seal shall notify the Protected Person within three business days of the receipt of such *denial, motion,* objection or challenge, *so that the Protected Person has a reasonable opportunity to be heard prior to any ruling*.

[UPMC Mot. at 6 (new proposed language emphasized)]. None of the parties object to this change and the Special Master recommends that the Court adopt this language in its entirety.

C. Parties' Use of Confidential Information at Trial or during Hearings

Section H of the Amended Protective Order currently states that "[t]he disclosure of Confidential Information at trial will be governed by a separate Court order." UPMC proposes that this section be replaced with the following language:

> In the event that a Party wishes to use any third party Confidential Information at any hearing or at trial, the Party seeking to use such Information shall notify counsel for the third party at least seven (7) days in advance of the hearing or trial so that the Parties and the third party may meet and confer regarding the handling of the information so designated. In particular, the third party may require the exclusion from the proceedings of any person who is not authorized to have access to the Confidential Information. In the event an agreement cannot be reached, the aggrieved entity may petition the Court for relief.

(UPMC Mot. at 7).

In the alternative, UPMC proposes that section H be rewritten to provide that:

> This Court order will ensure that non-party Protected Persons who produce information designated as Confidential in this Action will be notified by the Parties in advance if their Confidential Information will be used *at trial or hearing* so that Protected Persons may determine whether *their* Confidential Information may be revealed *at trial or hearing*. Non-party Protected Persons who determine that their Confidential Information will be revealed *at trial or a hearing* may participate in considering and establishing adequate protections of their Confidential Information.

(UPMC Mot. at 8).

UPMC argues that without the inclusion of such a provision, "the Parties effectively are asking third parties to trust that they will provide adequate protections at trial." (UPMC Mot. at 7).

Plaintiffs object to UPMC's request as premature. (*See* Pl. Opp. at 4). Plaintiffs also argue that the unopposed modification proposed by Tufts Associated Health Plans ("TAHP"), which provides that "[u]pon the filing of a proposed order governing the disclosure of Confidential Information at trial, the Parties shall provide notice of such order to any Protected Person whose Confidential Information is expected to be used at trial" (*see* FN. 1, *supra*) is sufficient to protect the interests of non-parties. (*See* Pl. Opp. at 4)[7].

[7] Defendants Aetna and Humana do not oppose this request.

UPMC replies that the TAHP modification is not sufficient because it would not permit non-parties to be heard before the Court enters a trial-related protective order. (UPMC Reply at 5-6). UPMC also notes that the TAHP proposal "provides no protection where information may be disclosed or used during pre-trial hearings." (*Id*. at 6).

The Court specifically chose *not* to address in the original or Amended Protective Order the treatment of confidential information at trial. The Protective Order ensures that a separate order will be entered before the start of trial, and the TAHP modification ensures that non-parties will be informed when that order is entered. UPMC has presented no reasons – and certainly none rising to the level of "good cause" – that warrant second-guessing the Court's judgment on this matter.[8]

With respect to UPMC's concerns about the disclosure of information during pre-trial hearings, the current Protective Order governs the pre-trial use of confidential information, including specific limitations on the permitted disclosure of such information. [*See* Amended Protective Order, ¶¶ E(1)(a-i)]. The Order likewise requires that anyone who views confidential information must execute an Agreement Concerning Confidentiality in which that person declares that he or she has read the Protective Order, agrees to be bound by its terms, and understands that failure to abide by its terms may result in civil and criminal penalties for contempt of court. [*See* Protective Order ¶ E(2) and Appendix A)]. UPMC has noted a specific concern that its information may be disclosed at a pre-trial *Daubert* hearing. Counsel to the parties have each executed the Agreement Concerning Confidentiality. If the parties elect to use

[8] The Special Master is also troubled by the portion of UPMC's proposed modification which requires the parties to provide notice to non-parties prior to use of confidential information "so that Protected Persons may determine whether their Confidential Information may be revealed at trial or hearing." Such language arguably can be read as granting non-parties the unilateral right to determine what evidence a party may or may not present when litigating this case.

confidential information in such a setting, their Counsel will do so under the strictures of Section E of the Protective Order. UPMC has not presented any specific facts showing why these protections are not adequate.

For these reasons, the Special Master recommends that the Court deny UPMC's Motion as to this request.

d. Notice to Non-parties of Attempts to Modify the Protective Order

Finally, UPMC asks that the Protective Order be amended to expressly inform non-parties when any party moves to amend the Protective Order. UPMC proposes the following language:

> The Parties acknowledge that third parties are producing documents in reliance on the protections afforded in this Protective Order. To the extent that any party or other entity seeks to modify the Protective Order in a way that would impact the rights of third parties who have produced documents with confidentiality designations, those third parties will be given reasonable notice and a meaningful opportunity to be heard on the proposed modification.

(UPMC Mot. at 9). UPMC argues that this language is necessary because "if the Parties have the right to seek modification of the Protective Order in ways that may impact third parties … then due process and basic rules of fairness require notice to those third parties and an opportunity to be heard." (*Id*. at 10).

Plaintiffs oppose this proposed modification, noting that any motion to amend the Protective Order will be publicly noted on the docket. (*See* Pl. Opp. at 4). Plaintiffs further argue that providing such notice would be "unduly burdensome on any party given the large number of the non-parties in these matters." (Pl. Opp. at 4).

Defendants also oppose UPMC's proposal as to this modification, stating that while they "will endeavor to provide the notice requested by UPMC," they oppose formally incorporating

this requirement into the Protective Order "due to the large number of Protected Persons and the accelerated pace of the litigation." (Def. Opp. at 11).

UPMC has not shown any "specific reasons" justifying this request. If any party moves to amend the Protective Order to, as UPMC suggests, "[seek] to include several other categories of persons who would have access to the information" (UPMC Mot. at 10), that party's motion will be publicly filed and listed on the Court's public docket for this case.

UPMC contends that expecting non-parties to monitor the docket in this case is "an incredibly unfair and undue burden to impose on non-parties." (UPMC Reply at 7). As previously noted, trial is scheduled to begin in this case on November 21. UPMC has not demonstrated, in any way, that monitoring a public docket for a period of just over two months places an undue burden on any non-party, and in particular a sophisticated entity such as UPMC. At any rate, UPMC has not offered any showing to support its burdensomeness argument and, in this District, "[t]he court entertains the burdensome objection only when the responding party demonstrates how the document is 'overly broad, burdensome, or oppressive, by submitting affidavits or offering evidence which reveals the nature of the burden.'" [*U.S. ex rel Fisher v. Network Software Assoc.,* 217 F.R.D. 240, 246 (D.D.C. 2003)].

Accordingly, the Special Master recommends that the Court deny this requested modification.

IV. Baylor Scott & White Holdings, Duke University Health System, Inc., and owa Health System Motion

Baylor Scott & White Holdings, Duke University Health System, and UnityPoint Health submit one motion which seeks five modifications to the Protective Order, all premised on these non-parties' belief that Defendants' outside counsel should not have access to confidential

information if those outside counsel are involved in Defendants' competitive decision-making. (*See* BSWH et al. Mot. at 4-8).

A. Outside counsel access to protected information

BSWH, Duke, and UnityPoint first ask that the Protective Order be modified to expressly prevent outside counsel who are engaged in competitive decision making on behalf of defendants or any competitor from having access to confidential information. (BSWH et al. Mot. at 4-6). The proposal would also prevent outside counsel from participating in competitive decision making for a period of three years after conclusion of this litigation. (*Id*.) The three non-parties here argue that this provision is warranted because "anyone involved in competitive decision-making is at risk for inadvertently disclosing or using the confidential information when advising on the client's business decisions." (*Id*. at 5). Defendants oppose the proposed modification as "overbroad and plainly unworkable." (Def. Opp. at 2).[9]

The non-parties have not shown good cause for their proposed limitations because they have not provided "specific facts" showing that they are likely to suffer harm if these provisions are not included. Notably, the risk of inadvertent disclosure is much lower with respect to outside counsel than it is with respect to inside counsel. As noted in Special Master Report and Recommendation No. 2,

> Concerns relevant to in-house counsel are not applicable to those of outside counsel. … A company's in-house counsel, and in particular [in-house counsel who advise healthcare insurance companies] have many duties and obligations to their clients, including providing advice regarding competitively sensitive matters such as litigation with healthcare providers and/or contract negotiations regarding reimbursement rates. … By contrast, the outside counsel and outside professionals who Defendants have retained for

[9] Plaintiffs do not oppose the modifications because the modifications would not impact them in any way. (Pl. Opp. at 2).

> purposes of this case have one primary obligation: to represent Defendants during the pendency of this litigation and, possibly, throughout the merger process.

[*See* Report & Recommendation No. 2 (Dkt. No. 112) at 10].

BSWH, Duke, and UnityPoint have not presented any evidence suggesting that any outside counsel in this case is or might be involved in Defendants' competitive decision-making beyond their duties in this particular case. To the contrary, it appears that the entire scope of Defendants' outside counsels' duties relate to this case.

Moreover, the current Protective Order expressly prevents any individual who obtains confidential information under the terms of the Order from using that information in any context other than the instant litigation. Any outside counsel who receives such information is likewise required to execute an agreement verifying that he or she agrees to be bound by the terms of the Order and may be held in contempt of court for any violations of the Order. (*See* Protective Order at Appx. A). BSWH, Duke, and UnityPoint have not provided any specific facts suggesting that these safeguards are insufficient to prevent against inadvertent disclosure of information.

As weighted against this showing, Defendants have presented persuasive reasons that recommend against the proposed modification. Notably, the Special Master agrees that it would be inappropriate to "require each defense attorney to determine, prior to accessing a Protected Person's confidential information, whether she or he currently provides representation arguably involving competitive decision-making to *any* competitor or potential competitor of the Protected Person - even on topics unrelated to the confidential information." [Def. Opp. at 2 (emphasis in original)]. Indeed, the language proposed by these non-parties is significantly

overbroad, particularly because the non-parties have not shown any real need to restrict Defendants' counsel in this manner.[10]

Likewise, the non-parties' speculations regarding potential future harms are not sufficient to justify imposing a three-year ban which would potentially prevent any current defense counsel who views confidential information from representing any competitor of any non-party who provided information in this case. Indeed, because it is not always possible to anticipate who may be considered a business competitor in particular situations, the proposed modification may force defense counsel to make an untenable choice between providing fulsome representation in this case, or being able to provide such representation in future cases. [*See Gen-Probe Inc. v. Becton, Dickinson and Co.*, 267 F.R.D. 679, 687 (S.D. Cal. 2010)].

For all of these reasons, the Special Master recommends that the non-parties' Motion be denied with respect to this request.

B. Disclosure of Identities of Outside Counsel who Access Information

BSWH, Duke and UnityPoint next ask that the Protective Order be modified to require the parties to provide non-parties with a list of each outside counsel who received confidential information in this matter. (BSWH et al. Mot. at 6-7). In support of this request, the non-parties state that "[t]here presumably will be attorneys who work on this matter who do not enter an appearance in court," and argue that non-parties have a right to know whether insurance companies with whom they engage in contract negotiations are represented by outside counsel

[10] Oddly, the proposal is at once too broad in the limits it would place on Defendants' counsel, and too narrow in that it does not apply to Plaintiffs' counsel. Indeed, while the non-parties express concerns that Defendants' counsel may one day represent a non-party competitor, the non-parties apparently have no concerns about any hypothetical harm that may occur if a counsel to Plaintiffs elects to enter the private sector and represent a non-party competitor.

who viewed the non-party's confidential information. (*Id*.) Defendants oppose this request as "unduly burdensome and unnecessary."[11]

The non-parties have not shown good cause for this request. As noted, the Protective Order expressly prevents counsel from using any confidential information learned through this litigation from using that information in any other proceeding. The non-parties have not presented any evidence indicating that this provision does not adequately protect against misuse of their confidential information. To the contrary, their described harms are speculative at best.

By contrast, Defendants present a detailed explanation of the burden that the provision would entail:

> The proposed provision would require each of the three defense law firms involved in this litigation to maintain a list of attorneys, paralegals, assistants, and other support staff that *actually* accessed the confidential information of each of roe than fifty third parties. Plainly, not *all* timekeepers will access information produced by *all* third parties; some will not access confidential information at all. Others may ski a filing in which a third party's information was aggregated into charts or a snippet of confidential information was paraphrased. Given the pace of this litigation it is unreasonable to assume that each attorney or staff person, no matter her or his role, will necessarily recall each third party whose information the individual encountered in documents, expert reports, drafts, briefing, explanatory charts, testimony, or otherwise. The three law firms would additionally need to share this information to compile over 75 master lists of the individuals who accessed each third party's information.

(Def. Opp. at 5).

In their Reply, the non-parties suggest that Defendants can reduce this burden by contemporaneously "running a list of timekeepers and confirming whether they accessed any Confidential Information during the litigation." (BSWH et al. Reply at 3). Given the pace of this

[11] Plaintiffs do not oppose this modification because it would not impact them.

litigation, however, requiring Defendants to track contemporaneously which individuals view what material and at what time risks compromising the efficiency with which this case is being litigated or, worse, compromising Defendants' counsels' ability to litigate using the full range of appropriately available discovery. Indeed, it seems that it would be far less burdensome for BSWH, Duke, and UnityPoint to simply ask opposing counsel in any future litigation whether that opposing counsel has viewed their confidential information at any time. Regardless, "weighing the movant's proffer of harm against the adversary's 'significant interest' in preparing for trial," the non-parties' proposal is not warranted here. (*Huthnance*, 255 F.R.D. at 296).

C. Definition of Competitive Decision-Making

BSWH, Duke and UnityPoint ask that the phrase "competitive decision-making" be expressly defined in the Protective Order as follows:

> "Competitive Decision-Making" means advising clients on business decisions involving contracts, marketing, employment, pricing, product design, purchasing, mergers and acquisitions, and other decisions vis-à-vis a competitor, made in the light of similar information regarding the competitor."

(BSWH et al. Mot. at 7).

Alternatively, the non-parties propose amending the definition of "Outside Counsel of Record" to mean:

> The firms or attorneys representing a Defendant in this Action (i) who do not participate in Competitive Decision Making for any Defendant or any competitor of any Protected Person whose Confidential Information is produced in this Action on any subjects related to the Confidential Information at issue; (ii) who will not participate in any Competitive Decision-Making for any Defendant or any competitor of any Protected Person whose Confidential Information is produced in this Action on any subjects related to the Confidential Information at issue for a period of three (3) years after the conclusion of this Action, and iii) who will abide by the provisions of this Protective Order.

(BSWH et al. Reply at 3-4).

Both Plaintiffs and Defendants oppose this proposed modification as unnecessary and not properly targeted to this litigation. (*See* Pl. Opp. at 3-4; Def. Opp. at 6).

The non-parties have not shown good cause for including this specific definition in the Protective Order. First, for the reasons noted in section IV(a) of this Report and Recommendation, *supra*, there is no good cause to amend the Order to expressly limit disclosure to counsel who verify that they are not and will not be involved in competitive decision-making. As such, there is no reason to provide a definition of this phrase.

Additionally, assuming *arguendo* that there were reason to include a definition of "competitive decision-making," the non-parties have not shown that the proffered definition is tailored to limit the risk of any particular harm to their interests. The non-parties are all health-care providers, and this case involves the merger of health insurers, yet the non-parties ask to include such topics as "employment" and "marketing" advice under the umbrella of prohibited competitive decision-making. Putting aside the safeguards designed to prevent counsel from using confidential information learned through this litigation in any other context, it is not clear from the proposed definition what possible risk of harm justifies this broad definition.[12]

The non-parties' alternative proposal, to amend the definition of "Outside Counsel of Record," is not acceptable. It proposes to dictate who Defendants may hire to represent

[12] The non-parties suggest that their proffered definition "is based on factors discussed in case law and additional factors important to the protection of Confidential information," citing cases without explanation. Each case cited, however, concerned the dissemination of information to *in-house*, rather than outside, counsel, and therefore is inapplicable here. (*See FTC v. Sysco Corp.*, 83 F. Supp. 32 1, 4 (D.D.C. 2015); *FTC v. Whole Foods Mkt., Inc.*, 2007 WL 2059741 at *1 (D.D.C. July 6, 2007); *Intervet, Inc. v. Merial, Ltd.*, 241 F.R.D. 55, 55-56 (D.D.C. 2007); *U.S. Steel Corp. v. United States*, 730 F.2d 1465, 1468 (Fed. Cl. 1984)].

themselves in this matter. BSWH, Duke, and UnityPoint have not provided any argument which justifies such an extraordinary measure.

D. Certification of Destruction of Confidential Information

BSWH, Duke and UnityPoint ask that if, at the conclusion of litigation, the parties elect to delete or destroy non-party confidential information rather than returning it, the Protective Order require the parties to certify formally that the material has been deleted or destroyed. (BSWH et al. Mot. at 7-8). Plaintiffs object to this request as overly burdensome. Defendants do not object to this request.

The non-parties contend that this proposed modification is appropriate because "the Non-parties are concerned that the Plaintiffs will not be able to account for and destroy all copies of any Confidential Information they produce in this Action." (Reply at 4). The non-parties' justification rests on mere speculation, however. They have provided no specific facts showing that Plaintiffs will actually be unable to comply with the Protective Order's provisions in this regard. The Special Master assumes that Plaintiffs will comply with the terms of the Protective Order, particularly as Plaintiffs' counsel have executed a signed agreements pledging to do so. The non-parties have not shown good cause for this modification.

E. Penalty Provision

BSWH, Duke and UnityPoint's initial Motion asked that a penalty provision be added to the Protective Order. (BSWH et al. Mot. at 8). Plaintiffs and Defendants both opposed such a provision as unnecessary. (Pl. Opp. at 5; Def. Opp. at 8). In their Reply brief, BSWH, Duke and UnityPoint agreed not to further pursue this request. The request is therefore moot.

F. Time Period in which Protected Persons must move for relief if there is a dispute regarding any confidentiality designation.

Finally, BSWH, Duke and UnityPoint note that section D(2) of the Protective Order "does not specify a time period in which Protected Persons must move for relief if there is a dispute regarding any confidentiality designation" and ask that protected persons be required to make such a motion within 2 days of the conclusion of a meet-and-confer session. (BSWH et al. Mot. at 9; Reply at 5). The Parties have agreed to this provision, and the Special Master recommends that it be included in full.

V. Conclusion

For the foregoing reasons, the Special Master recommends that the Court:

(1) Amend Section H of the Protective Order to incorporate the language provided by Tufts Associated Health Plan's Unopposed Motion to Amend the Protective Order, filed in *United States et al. v. Anthem Inc. and Cigna Corp*., Case No. 1:16-cv-1493(ABJ) (Dkt. No. 110); and

(2) Grant UPMC Health Plan's Motion to the extent that it seeks to amend section F of the Amended Protective Order; and

(3) Deny UPMC Health Plan's Motion to the extent that it seeks to amend the remainder of the Amended Protective Order; and

(4) Grant the Motion of Baylor Scott & White Holdings, Duke University Health System Inc. and Iowa Health System d/b/a UnityPoint Health to the extent that it seeks modification of Section D(2) of the Amended Protective Order; and

(5) Deny the remainder of the Motion submitted by Baylor Scott & White Holdings, Duke University Health System Inc. and Iowa Health System d/b/a UnityPoint Health.

A proposed Second Amended Protective Order which incorporates the recommended modifications is attached to this Report and Recommendation.

VI. Certification

Because this recommendation involves the interests of non-parties to this case, the Special Master, pursuant to paragraph 5 of the appointment order (Dkt. 53) certifies this Report and Recommendation for appeal to the Court. Pursuant to paragraph 5, UPMC Health Plan and Baylor Scott & White Holdings, Duke University Health System Inc. and Iowa Health System d/b/a UnityPoint Health have 48 hours from the entry of this Report and Recommendation to file a brief noting an appeal. If UPMC or Baylor Scott & White Holdings, Duke University Health System Inc. and Iowa Health System d/b/a UnityPoint Health elect not to appeal to the Court, they are requested to notify the Court and the parties as soon as possible.

September 22, 2016

/s/ Hon. Richard A. Levie (Ret.)
Hon. Richard A. Levie (Ret.)
Special Master

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, et al., **Plaintiffs,** **v.** **AETNA INC., et al.,** **Defendants.**	**Civil Action No. 16-1494 (JDB)**

[Proposed] SECOND AMENDED 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) "Action" means the above captioned action, including any related discovery, pre-trial, trial, post-trial, or appellate proceedings.

(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), Civil Investigation demands, informal requests for information, and 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 counsel for a Party who provided legal services to the Party in connection with the Investigation 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 general), either voluntarily during and in connection with the Investigation or in response to any request issued during and in connection with the Investigation, where such communications were made for the purposes of 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 this Action; (ii) constitute any communication between any Party and any non-party or Protected Person in connection with this Action; (iii) any Defendant, or affiliated person or entity, provides to any Plaintiff, either

voluntarily or under compulsory process, in connection with this Action; or (iv) any Plaintiff provides to any Defendant in connection with this Action.

(j) "Outside Counsel of Record" means the firms or attorneys representing a Defendant in this Action.

(k) "Party" means any Plaintiff or any Defendant in this Action. "Parties" means collectively the Plaintiffs and Defendants in this Action.

(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 this Action.

(p) "Personally Identifiable Information" or "PII" means any information about an individual, including education, financial transactions, medical history, criminal history, 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 this Action, 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 this Action, 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 this Action after this Order is entered:

(a) *Copy of order.* When discovery is sought from a non-party in this Action 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 this Action 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.

Nothing in subsection C(6)(b) shall be interpreted to expand the categories of individuals entitled to possess or review Confidential Information under section E of the Protective Order.

(c) *Documents*. A Protected Person who designates as Confidential Information any document that they produced in this Action 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 this Action 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 within two days of the conclusion of a meet-and-confer session, 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 this Action, 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 this Action, 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 this Action,

whose functions require access to the information. Defendants may file motions with the Special Master seeking modification of this provision to share Confidential Information with a very small number of specified in-house attorneys, so long as those attorneys are not involved in Defendants' competitive decision-making. Should a Defendant file such a motion, then Defendant shall contemporaneously notify the Protected Person whose Confidential Information is the subject of such motion, and that Protected Person shall be afforded all rights as set forth in Paragraphs 2-5 of the Order Appointing the Special Master [Dkt. 53], including but not limited to the right to respond to such a motion and be heard at oral argument before the Special Master (if any);

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

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

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

(g) any mediator or arbitrator that the Parties engage in this Action 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 who counsel for Plaintiffs or Defendants believe 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 this Action.

(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 this Action and not for any business, commercial, or competitive purpose, or in any other litigation proceeding.

(5) In the event that any Party seeks to use any third-party Confidential Information in any deposition taken with respect to this Action, such Information shall not be shared with anyone other than those persons identified in paragraph E(1) of the Protective Order. Party representatives and/or in-house counsel for the Parties may not attend that portion of the depositions, and will not be provided copies of the transcripts or exhibits for such portions of the depositions.

(6) 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 express written 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 this Action; (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; to secure compliance with a Final Judgment that is entered in this Action; 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 this Action 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. Upon receipt of an objection or challenge to the filing of a Protected Person's Confidential Information under seal, or upon the denial of a motion to file such Information under seal or a motion to unseal such Information, the Party that filed or attempted to file the Confidential Information under seal shall notify the Protected Person of such denial, motion, objection or challenge within three business days of the receipt of such objection or challenge, so that the Protected Person has a reasonable opportunity to be heard prior to any ruling.

G. Disclosure of Documents Containing PII and PHI

Any PII or PHI produced to any Party, whether during the course of the Investigation or this Action, 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. Upon the filing of a proposed order governing the disclosure of Confidential Information at trial, the Parties shall provide notice of such order to any Protected Person whose Confidential Information is expected to be used at trial.

I. Procedures upon Termination of This Action

(1) The obligations imposed by this Order survive the termination of this Action 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 this Action, 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), Plaintiffs' attorneys and Outside Counsel of Record who were permitted access to Confidential Information pursuant to Section E(1)(c) are entitled to retain Confidential Information contained in court papers, deposition and trial transcripts and exhibits, and work product, provided that Plaintiffs' attorneys and Outside Counsel of Record 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, expands or 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 this Action 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 this Action, 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.

SO ORDERED.

JOHN D. BATES
United States District Judge

Dated:
September __, 2016

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, et al., **Plaintiffs,** **v.** **AETNA INC., et al.,** **Defendants.**	**Civil Action No. 16-1494 (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