UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFFS' SUPPLEMENTAL MEMORANDUM
ON THE BUY-SIDE CASE

As requested, Plaintiffs submit this memorandum addressing the relevance of certain issues relating to the "buy-side" allegations in the second phase of trial. To be clear, the Court does not need to address these issues to decide this case. As highlighted in the first phase of trial, Anthem's central defense—that its so-called "medical-network" savings outweigh the harm from this merger—fails the basic test of the case law: the purported savings are not cognizable. Defendants' executives have undermined Anthem's attempt to validate the extent of those so-called savings and testified that most of them will come from rebranding, which is not merger-specific. Thus, even leaving aside the buy-side evidence, Plaintiffs will prove that Anthem's acquisition of Cigna will likely harm competition downstream—for national accounts as well as for large-group employers in 35 local markets.

To establish buy-side harm in Phase II, however, Plaintiffs need not predict with precision the extent to which Anthem will lower reimbursement rates, but must show only that the merger will likely give Anthem increased market power that risks harm to providers through lower reimbursement, diminished quality, or reduced innovation. As explained below, the Court

does not need to decide whether allowing Anthem to lower rates would be "good" or "bad" for society more broadly. The Court does not need to find that those rates will fall below providers' marginal costs or Medicare reimbursement rates. And while Plaintiffs have provided the Court with evidence that Anthem's plan to lower rates (if carried out) would likely harm patients, the Court need not answer the question whether lower rates on balance will reduce output or quality of care, or otherwise cause consumer harm. In the end, Anthem's suggestion that it will cure rising healthcare costs by supplanting competition and replacing the judgment of Congress with its own promise to lower prices in a responsible way is not only lacking in evidence, but it is also irrelevant as a matter of law.

I. This Court need not—and should not—decide whether the effects of reduced competition for the purchase of healthcare services are "good" or "bad" for society.

Anthem's argument—that it should be allowed to extinguish competition with Cigna to push down rates paid to doctors and hospitals to lower the nation's healthcare costs—is not a valid defense under the antitrust laws. "The heart of our national economic policy long has been faith in the value of competition." *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978) (citation omitted). The antitrust laws embody an "assumption that competition is the best method of allocating resources in a free market," *id.*, and a recognition "that all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers." *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 423 (1990) (quoting *Prof'l Eng'rs*, 435 U.S. at 695). The statutory policy "precludes inquiry into the question whether competition is good or bad." *Id.* at 424*; see also FTC v. Alliant Techsystems Inc.*, 808 F. Supp. 9, 23 (D.D.C. 1992) (quoting *Professional Engineers* in preliminarily enjoining a merger under Section 7). Thus, a merger that substantially lessens competition in any relevant market is illegal even if, "on some ultimate reckoning of

social or economic debits and credits, it may be deemed beneficial." *United States v. Phila. Nat'l. Bank*, 374 U.S. 321, 371 (1963).

The Supreme Court has repeatedly held that social-policy arguments are not valid defenses under the antitrust laws. In *Professional Engineers*, a trade association tried to justify a ban on competitive bidding on the ground that price competition might lead to lower engineering standards and thus would endanger public safety. 435 U.S. at 679, 694–95. The Supreme Court rejected the notion that "because of the special characteristics of a particular industry, monopolistic arrangements will better promote trade and commerce than competition." *Id.* at 689. The attempt to impose the association's "views of the costs and benefits of competition on the entire marketplace" was "nothing less than a frontal assault on the basic policy of the Sherman Act." *Id.* at 695.

Similarly, in *Superior Court Trial Lawyers Association*, an association of private attorneys who routinely competed for court appointments to represent indigent clients agreed to boycott the D.C. government to obtain higher rates, which the lawyers argued would improve the quality of their representation. 493 U.S. at 414, 421–23. The Court acknowledged the potential social benefits of this goal but condemned the boycott, reiterating that it cannot consider "whether competition is good or bad." *Id.* at 424.

Likewise, in *Arizona v. Maricopa County Medical Society*, doctors collectively agreed to a maximum fee schedule for certain health plans, arguing that the schedules enabled insurers to better calculate their risk and thus save patients money. 457 U.S. 332, 339, 341–42 (1982). But the Supreme Court rejected the argument about the reasonableness of the fee schedules, "an inquiry we have so often condemned." *Id.* at 350. In fact, the Court condemned the "reasonable rates" defense as early as 1897, when it observed the inherent difficulty of trying to determine

what level of rates is, in fact, reasonable. *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 331–32 (1897). If courts entertained such an inquiry, the "infinite variety of facts entering into the question" would make proof so formidable as to undermine the law. *Id.* at 331–32; *see also United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 220–23 (1940) ("[t]hose who fixed reasonable prices today would perpetuate unreasonable prices tomorrow").[1]

Although the evidence suggests that Anthem is unlikely to use the increased market power it would gain to benefit society, Anthem's arguments to increase its market power to lower healthcare costs are in any event "better directed to the Legislature," which "may consider the exception that [courts] are not free to read into the statute." *Maricopa Cnty.*, 457 U.S. at 354–55. But "[a] value choice of such magnitude is beyond the ordinary limits of judicial competence, and in any event has been made for us already, by Congress when it enacted the amended § 7." *Phila. Nat'l Bank*, 374 U.S. at 371. Ultimately, Anthem's defense that its acquisition of Cigna will enable it to lower reimbursement rates "confirms rather than refutes the anticompetitive purpose and effect" of the acquisition. *Prof'l Eng'rs*, 435 U.S. at 693.

II. Plaintiffs need not prove that provider rates will fall below marginal cost or Medicare reimbursement rates.

Anthem also insists that Plaintiffs' buy-side claims fail unless Plaintiffs prove that the merger will cause provider rates to fall below certain specific levels—either the providers' marginal costs, or the rates at which Medicare reimburses those providers, or both. Because Plaintiffs need not prove that *any* price effects will occur, much less by a specified amount,

[1] Anthem's argument would also justify anticompetitive mergers among sellers, if the higher post-merger prices were deemed a "reasonable" way to counteract low prices. But courts have rejected the "the age-old cry of ruinous competition and competitive evils" as a defense as well. *Socony-Vacuum Oil Co.*, 310 U.S. at 221–22. If a shift in policy priorities is to be made, "it must be done by the Congress. Certainly Congress has not left [courts] with any such choice." *Id.* at 222; *see also United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610–11 (1972) (firms lack ability "to determine the respective values of competition in various sectors of the economy").

Anthem's argument is incorrect.

As a general rule, merger analysis does not require a comparison of post-merger prices with marginal costs. It is the creation or enhancement of market power, and the resulting risk of anticompetitive harm, that makes a merger unlawful under Section 7. *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 577 (1967). Thus, a merger giving a firm a large share of, and substantially increasing concentration in, the relevant market is presumptively unlawful. *Phila. Nat'l Bank*, 374 U.S. at 363. Section 7 does not require further proof of a price effect or other particular type of harm; "[a]ll that is necessary is that the merger create an appreciable danger of such consequences in the future." *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1389 (7th Cir. 1986). "Sufficiently large HHI figures establish [a] prima facie case that a merger is anti-competitive." *Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775, 786 (9th Cir. 2015) (quoting *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 716 (D.C. Cir. 2001)).

Because monopsony is the "mirror image" of monopoly, "similar legal standards" apply to antitrust claims involving buy-side markets. *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 321–22 (2007) (citation omitted).[2] Thus, large enough post-merger market shares and concentration statistics establish a plaintiff's prima facie case in buy-side cases too. *See United States v. Rice Growers Ass'n of Cal.*, Civ. No. S-84-1066, 1986 WL 12562 (E.D. Cal. Jan. 31, 1986); *United States v. Pennzoil Co.*, 252 F. Supp. 962 (W.D. Pa. 1965). In

[2] Anthem is wrong that *Weyerhaeuser* deviated from the mirror-image principle. See Anthem's Proposed Conclusions of Law ¶ 72. *Weyerhaeuser* involved a buy-side predatory bidding theory, in which a defendant bids up input prices to force out rivals in the hopes of gaining monopsony power, and then profitably lowers those prices once its rivals have left the market. That theory is the mirror image of a sell-side predatory-pricing theory: Just as the successful predatory seller can use its monopoly power to raise prices and capture monopoly profits downstream without lowering prices in the input market, the successful predatory buyer "'can use its power as the predominant buyer of inputs to force down input prices and capture monopsony profits' without 'raising prices on the output market to recoup its losses.'" *id.* (quoting *Weyerhaeuser*, 549 U.S. at 321–22, 325).

Rice Growers, the district court cited *Philadelphia National Bank* in concluding that a merger that substantially increased concentration in the already concentrated "market for the purchase of paddy rice in California" violated Section 7. 1986 WL 12562, at *11–12. In *Pennzoil*, the district court held the merger of the second and third largest purchasers of Penn Grade crude would "substantially lessen competition in the purchase of Penn Grade crude" on the basis of market share and concentration figures, also citing *Philadelphia National Bank*. 252 F. Supp. at 985. In neither case did the court inquire whether input prices would be pushed below marginal costs.

This same structural approach applies in markets where hospitals individually negotiate their provider contracts with insurers and where the reimbursement rates they agree upon "are determined by each party's bargaining power." *ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559, 562 (6th Cir. 2014), *cert. denied,* 135 S. Ct. 2049 (2015). An insurer's bargaining leverage "depends primarily on the number of patients it can offer a hospital provider" and a hospital's leverage increases "to the extent patients view a hospital's services as desirable or even essential." *Id.* Courts have thus held mergers among hospitals to be presumptively unlawful where a significant increase in market concentration meant the hospital would gain substantially increased leverage that it could use to extract higher reimbursement rates from insurers. *See id.* at 569–70; *St. Luke's*, 778 F.3d at 786. Applying the mirror-image principle, a merger that significantly increases an insurer's market share—thus giving it substantially increased leverage to extract lower reimbursement rates from hospitals—is also unlawful.

While evidence of price effects is not required in merger cases, it can be probative, *see United States v. H & R Block, Inc.*, 833 F. Supp. 2d 36, 88 (D.D.C. 2011). But when it is addressed, the relevant price-effect question in a buy-side case is not whether prices are likely to be pushed below marginal cost, but simply whether they are likely to be "lower than they would

have been but for" the challenged act. *Todd v. Exxon Corp.*, 275 F.3d 191, 214 (2d Cir. 2001). In *Todd v. Exxon*, a case under Section 1 of the Sherman Act challenging oil companies' exchange of salary information, it was enough that plaintiffs alleged "salary levels across the integrated oil and petrochemical industry have been artificially depressed because the information exchange has reduced competitive incentives." *Id.* at 214. Similarly, in *Knevelbaard Dairies v. Kraft Foods*, a conspiracy among cheese makers to reduce prices for milk purchases violated Section 1, even though the conspiracy—colluding to reduce a government-set price floor—was unlikely to have pushed milk prices below marginal cost. *See* 232 F.3d 979, 986–97 (9th Cir. 2000).

Anthem's proposed marginal-cost standard, moreover, would be extremely difficult to administer. "[M]arginal cost, an economic abstraction, is notoriously difficult to measure and 'cannot be determined from conventional accounting methods.'" *United States v. AMR Corp.*, 335 F.3d 1109, 1116 (10th Cir. 2003) (citation omitted). Furthermore, though price should equal marginal cost in a textbook model of perfect competition with homogenous goods, in this market—involving differentiated products and services—equilibrium prices should be above sellers' marginal costs. *See* Paul A. Samuelson & William D. Nordhaus, *Economics* 188–89 (McGraw-Hill, 17th ed. 2001). And as a practical matter, there is no guarantee that Anthem (or another firm claiming a similar defense) would know when to stop lowering prices. Indeed, Anthem's CEO, Joe Swedish, testified that Anthem does not know when it offers prices that are above or below providers' marginal costs. Trial Tr. 11/22/16, 315:19–24 (Swedish).

For similar reasons, Plaintiffs are not required to prove that provider rates will fall below Medicare reimbursement rates. While Anthem suggests that Medicare rates are a good proxy for marginal costs, the stipulation regarding Medicare rates does not, as Anthem claims, mean that inpatient Medicare rates actually compensate providers for their costs of treating Medicare

patients. It merely states these inpatient "rates are *intended* to cover the costs that reasonably efficient providers would incur in furnishing care." Stipulation ¶ 8 (Dkt. #200 at 4) (emphasis added).

The cases Anthem relies upon are inapposite.[3] *Brooke Group* and *Kartell* both addressed allegations that a single firm's low prices were the mechanism that harmed competition, whereas here it is the merger that harms competition, and low reimbursement rates are simply the result. Those cases simply show that when firms unilaterally lower their prices they are not ordinarily subject to antitrust liability. The plaintiff in *Brooke Group* challenged one cigarette company's low prices on the basis they would drive out competition, give the company market power, and allow it to increase prices. 509 U.S. at 212. In that context, the plaintiff had to "prove that the prices complained of are below an appropriate measure of its rival's costs." *Id.* at 222.

In fact, the *Kartell* decision shows exactly why Anthem is misguided in relying on cases addressing unilateral conduct. In refusing to apply "horizontal agreement" principles to an insurer's unilaterally setting low reimbursement rates, the First Circuit specifically distinguished the case from one involving, as a merger does,[4] the concerted activity or combination of "otherwise independent buyers in order to suppress their otherwise competitive instinct to bid up price." *Kartell*, 749 F.2d at 925, 930.[5] As the *Kartell* court emphasized, "the antitrust problems at

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[3] Trial Tr. 12/15/16 2971:16–25 (citing *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), *Weyerhaeuser*, 549 U.S. 312, and *Kartell v. Blue Shield of Mass., Inc.*, 749 F.2d 922 (1st Cir. 1984)); *see also* Anthem's Proposed Conclusions of Law ¶¶ 72–77.

[4] Courts treat mergers as concerted conduct subject not only to Section 7 of the Clayton Act but also to Section 1 of the Sherman Act. *See United States v. First Nat'l Bank & Trust Co. of Lexington*, 376 U.S. 665, 673 (1964); *United States v. Rockford Mem'l Corp.*, 898 F.2d 1278, 1283 (7th Cir. 1990) (hospital merger violated Section 1).

[5] *Weyerhaeuser*, 549 U.S. 312, also cited by Anthem, dealt with unilateral conduct too. Plaintiffs rely on this case only for the proposition—in cases involving concerted as well as unilateral conduct—that the same principles apply in buy-side and sell-side cases.

issue when a single firm sets price . . . are very different from those associated with agreements by competitors to limit independent decision-making." *Id.* at 930. Decisions involving only the former are "simply not on point" for cases such as this one focused on the latter. *Id; see also Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768 (1984) ("[c]oncerted activity . . . is judged more sternly than unilateral activity").

In two cases Anthem cited in its Proposed Conclusions, the defendants simply lacked the "monopsony power," or "dangerous probability" of acquiring it, required for a Section 2 claim.[6] Section 7 incorporates no such requirement—it was intended to arrest "incipient monopolies and trade restraints outside the scope of the Sherman Act." *Brown Shoe Co. v. United States*, 370 U.S. 294, 318 n.32 (1962). Insisting that Section 7 claims must also satisfy Section 2 standards would "do[] violence to the congressional objective" of Section 7. *Phila. Nat'l Bank*, 374 U.S. at 362.

III. Plaintiffs need not prove that lower provider rates will reduce output or quality of care, or otherwise cause consumer harm.

Anthem has also suggested that injuring buy-side competition is not unlawful unless downstream consumers are likely to be harmed by reduced output, lower quality, or lessened innovation. This too is contradicted by case law applying the traditional structural presumption to buy-side merger claims. *See Rice Growers*, 1986 WL 12562; *Pennzoil*, 252 F. Supp. 962.

Indeed, numerous courts have explicitly rejected this argument. In *Telecor Communications v. Southwestern Bell Telephone*, the defendant argued that "monopsony" is "not actionable unless it 'injure[s] consumers by forcing up the price of the end product.'" 305 F.3d

[6] *See* Anthem's Proposed Conclusions of Law ¶ 77 (citing *United States v. Syufy Enterp.*, 903 F.2d 659 (9th Cir. 1990) and *In re Beef Indus. Antitrust Litig.*, 907 F.2d 510 (5th Cir. 1990). Anthem also cites *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990)), *see id.* at ¶¶ 73, 78, a case on the antitrust standing of a firm suing its competitor that has no bearing on liability issues in a government's suit to enjoin a merger. That case simply extended the logic of predatory pricing cases to hold that a company cannot complain about its competitor's above-cost prices, regardless of the exact antitrust claim used, *see id.* at 337, and is irrelevant here.

1124, 1133 (10th Cir. 2002) (citation omitted). But the Tenth Circuit found this argument "unpersuasive" because "[t]he Supreme Court's treatment of monopsony cases strongly suggests that suppliers . . . are protected by antitrust laws even when the anti-competitive activity does not harm end-users." *Id* at 1133–34 (citing *Mandeville Island Farms v. Am. Crystal Sugar Co.*, 334 U.S. 219, 235–36 (1948)). Likewise, the Ninth Circuit in *Knevelbaard Dairies* said that a conspiracy by cheese makers to depress milk prices could not be defended on the ground it lowered cheese prices to consumers: "the central purpose of the antitrust laws, state and federal, is to preserve competition. It is competition—not the collusive fixing of prices at levels either low or high—that these statutes recognize as vital to the public interest." 232 F.3d at 988; *see also W. Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, 105 (3d Cir. 2010) (health insurer's "improperly motivated exercise of monopsony power . . . was anticompetitive and cannot be defended on the sole ground that it enabled [the insurer] to set lower premiums on its insurance plans").

Moreover, even where Anthem can point to price reductions downstream, it ignores other types of longer-term harm that can result to downstream consumers from reduced buy-side competition. As the Third Circuit recognized, when insurers gain leverage through reduced competition to lower reimbursement rates, it "tends to diminish the quality and availability of hospital services." *W. Penn Allegheny Health Sys.*, 627 F.3d at 104 (citing, e.g., *Brown v. Pro Football, Inc.*, 50 F.3d 1041, 1061 (D.C. Cir.1995) (Wald, J., dissenting)). These same concerns have been echoed in the testimony already presented. *See, e.g.*, Trial Tr. 12/18/16, 3166:10–3167:3 (Gorse). For such reasons, the Clayton Act does not allow "anticompetitive effects in one market [to] be justified by procompetitive consequences in another." *Phila. Nat'l Bank*, 374 U.S. at 370.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on December 19, 2016, I caused the foregoing document to be served upon all counsel of record via the Court's EM/ECF system.

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