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)

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I. ANTHEM'S MERGER WITH CIGNA WOULD VIOLATE SECTION 7 OF THE CLAYTON ACT.

1. Section 7 of the Clayton Act prohibits a merger "where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition." 15 U.S.C. § 18.

2. Congress designed Section 7 "to arrest incipient threats to competition." *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158, 170–71 (1964). It is "a prophylactic measure" meant to stop competitive harms before they can occur. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485 (1977).

3. One of the threats to competition Section 7 guards against is the creation of market power, *see FTC v. Proctor & Gamble Co.*, 386 U.S. 568, 577 (1967), which is the ability of an entity "to raise price and restrict output," *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 464 (1992). In a Section 7 analysis, "[t]he core question is whether a merger may substantially lessen competition." *Proctor & Gamble*, 386 U.S. at 577.

4. In examining a merger's legality under Section 7, courts consult the framework described in the Department of Justice and Federal Trade Commission's Horizontal Merger Guidelines. *See, e.g.*, *United States v. H & R Block, Inc.*, 833 F. Supp. 2d 36, 52 (D.D.C. 2011) (applying 2010 Guidelines); *see also Chi. Bridge & Iron Co. N.V. v. FTC*, 534 F.3d 410, 431 n.11 (5th Cir. 2008) ("Merger Guidelines are often used as persuasive authority when deciding if a particular acquisition violates anti-trust laws.").

A. Section 7 of the Clayton Act deals with probabilities, not certainties.

5. "To show that a merger is unlawful, a plaintiff need only prove that its effect '*may be* substantially to lessen competition.'" *California v. Am. Stores Co.*, 495 U.S. 271, 284 (1990)

(quoting 15 U.S.C. § 18). "Congress used the words '*may* be substantially to lessen competition' . . . to indicate that its concern was with probabilities, not certainties." *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962). There is no requirement that the plaintiff prove a likely price increase or other anticompetitive effect; "'[a]ll that is necessary is that the merger creates an appreciable danger of such consequences in the future.'" *H & R Block*, 833 F. Supp. 2d at 49 (quoting *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1389 (7th Cir. 1986)); *see also* 4 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 914e (4th ed. 2014) ("The statute does not require such proof of price increases of a given magnitude; rather, it requires only reasonable evidence showing that the effect of a merger 'may be' substantially to 'lessen competition.'").

B. Harm in a single market is sufficient to enjoin the transaction.

6. A merger is unlawful under Section 7 if its effect may be substantially to lessen competition in "*any* line of commerce" in "*any* section of the country." 15 U.S.C. § 18 (emphasis added). Thus, a merger violates Section 7 "if anticompetitive effects of a merger are probable in 'any' significant market." *Brown Shoe*, 370 U.S. at 337; *see also* Areeda & Hovenkamp, *supra*, ¶ 972a.

7. Accordingly, proof of probable harm to any market alleged in the Complaint—national accounts alone or any one of the 35 local markets—is enough to enjoin the merger. *United States v. Pabst Brewing Co.*, 384 U.S. 546, 549 (1966) ("The Government may introduce evidence which shows that as a result of a merger competition may be substantially lessened through the country, or on the other hand it may prove that competition may be substantially lessened only in one or more sections of the country. In either event a violation of § 7 would be proved.").

II. MARKET DEFINITION

A. Courts define markets pragmatically to help determine whether a transaction will create or enhance a defendant's ability to exercise market power.

8. To assess a merger's likely competitive effects, courts often begin by defining the relevant product and geographic markets in which the merging parties compete. *FTC v. Swedish Match*, 131 F. Supp. 2d 151, 156 (D.D.C. 2000).

9. The relevant market is the "locus of competition, within which the anti-competitive effects of a merger [are] to be judged." *Brown Shoe*, 370 U.S. at 320–21. Defining relevant markets enables a court to determine whether market power exists, *Gen. Indus. Corp. v. Hartz Mountain Corp.*, 810 F.2d 795, 804 (8th Cir. 1987), and thus to "provide an adequate basis for measuring the effects of a given acquisition," *United States v. Cont'l Can Co.*, 378 U.S. 441, 457 (1964).

10. A relevant market has two components—"a product market (the 'line of commerce') and a geographic market (the 'section of the country')." *Brown Shoe*, 370 U.S. at 324 (quoting 15 U.S.C. § 18).

11. "Congress prescribed a pragmatic, factual approach to the definition of the relevant market and not a formal, legalistic one." *Brown Shoe*, 370 U.S. at 336. Markets, whether product or geographic, need not be defined with perfect precision. *See Pabst Brewing*, 384 U.S. at 549. "The 'market,' as most concepts in law or economics, cannot be measured by metes and bounds." *Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594, 611 (1953). In *FTC v. Staples*, this Court defined a product market limited to customers that spent at least $500,000 annually, accepting Plaintiffs' contention that while there was no "magic place that [was] the right place" to draw the line, doing so was "necessary for practical and analytical purposes."

FTC v. Staples, Inc. (Staples II), Civ. No. 15-2115, 2016 WL 2899222, at *8 n.10 (D.D.C. May 17, 2016).

B. The sale of commercial health insurance to national accounts is a relevant product market.

12. A relevant product market "is composed of products that have reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered." *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 404 (1956). A product market is determined by the "reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe*, 370 U.S. at 325. Thus, "courts look at 'whether two products can be used for the same purpose, and, if so, whether and to what extent purchasers are willing to substitute one for the other.'" *H & R Block*, 833 F. Supp. 2d at 51 (quoting *FTC v. Staples, Inc. (Staples I)*, 970 F. Supp. 1066, 1074 (D.D.C. 1997)).

13. Courts often define markets with reference to "practical indicia" including "industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Brown Shoe*, 370 U.S. at 325. Courts often refer to these as the "*Brown Shoe* factors." *Staples II*, 2016 WL 2899222, at *9 ("Courts routinely rely on the *Brown Shoe* factors to define the relevant product market.").

14. "[T]he determination of the relevant product market is 'a matter of business reality . . . of how the market is perceived by those who strive for profit in it.'" *Swedish Match*, 131 F. Supp. 2d at 159 (quoting *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 46 (D.D.C. 1998)); *see also Eastman Kodak*, 504 U.S. at 482 ("The proper market definition in this case can be determined only after a factual inquiry into the 'commercial realities' faced by consumers.").

15. “[E]vidence of ‘“industry or public recognition of the submarket as a separate economic” unit’”—one of the *Brown Shoe* factors—“‘matters because we assume that economic actors usually have accurate perceptions of economic realities.’” *FTC v. Whole Foods Market, Inc.*, 548 F.3d 1028, 1045 (D.C. Cir. 2008) (Tatel, J., concurring) (quoting *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 218 n.4 (D.C. Cir. 1986)); *see also FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 30 (D.D.C. 2015); *FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26, 39–44 (D.D.C. 2009); *Swedish Match*, 131 F. Supp. 2d at 162.

16. “When determining the relevant product market, courts often pay close attention to the defendants’ ordinary course of business documents.” *H & R Block*, 833 F. Supp. 2d at 52–53 (describing such documents as “strong evidence” for defining the relevant product market); *see also Whole Foods*, 548 F.3d at 1045; *CCC Holdings*, 605 F. Supp. 2d at 41–42; *Swedish Match*, 131 F. Supp. 2d at 162; *Cardinal Health*, 12 F. Supp. 2d at 49; *Staples I*, 970 F. Supp. at 1076.

17. The relevant market need only include “reasonable substitutes.” *Sysco*, 113 F. Supp. 3d at 26. “[T]he mere fact that a firm may be termed a competitor in the overall marketplace does not necessarily require that it be included in the relevant product market for antitrust purposes.” *Id.* (quoting *Staples I*, 970 F. Supp. at 1075).

18. Another means to define a relevant market that courts often use is the hypothetical monopolist test described in the Department of Justice and Federal Trade Commission’s Horizontal Merger Guidelines. *See, e.g.*, *H & R Block*, 833 F. Supp. 2d at 51–52.

19. The hypothetical monopolist test asks “whether a hypothetical monopolist who has control over the products in an alleged market could profitably raise prices on those products.” *Staples II*, 2016 WL 2899222, at *12. Specifically, the test asks whether a profit-

maximizing hypothetical monopolist over all products in a candidate market would impose a small but significant and non-transitory increase in price (“SSNIP”)—typically five or ten percent—on one or all of those products. U.S. Dep’t of Justice & Fed. Trade Comm’n, Horizontal Merger Guidelines § 4.1.1 (2010) (“Merger Guidelines”). The profitability of such a price increase turns on whether higher prices “would drive consumers to an alternative product” or to forego purchases altogether. *Whole Foods*, 548 F.3d at 1038. If not enough customers would switch to an alternative, that set of products constitutes an appropriate product market for antitrust analysis. Merger Guidelines § 4.1.1.

20. “The key question for the Court is whether . . . products are sufficiently close substitutes to constrain any anticompetitive . . . pricing after the proposed merger.” *H & R Block*, 833 F. Supp. 2d at 55. Only products that prevent a hypothetical monopolist from significantly increasing prices should be included in the relevant market. *See id.* at 51–52.

21. Within a relevant product market, there may be additional markets—sometimes termed “submarkets”—“which, in themselves, constitute products markets for antitrust purposes.” *Brown Shoe*, 370 U.S. at 325 (citing *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 593–595 (1957)); *Cont’l Can*, 378 U.S. at 457–58 (“That there may be a broader product market . . . does not necessarily negative the existence of submarkets . . . .”).

22. One such submarket exists “when sellers can discriminate, e.g., by profitably raising price to certain targeted customers but not to others,” in which case regulators “may evaluate competitive effects separately by type of customer.” Merger Guidelines § 3. When a merger’s effects could vary significantly for different customers, this Court has defined markets around these different customer groups. *See, e.g.*, *Staples II*, 2016 WL 2899222, at *8 (recognizing the concept of a “targeted” or “price discrimination” market in antitrust law); *Whole*

Foods, 548 F.3d at 1037–41 (upholding finding of a narrower market of core customers for premium, natural, and organic supermarkets rather than grocery store customers generally). "Antitrust laws exist to protect competition, even for a targeted group that represents a relatively small part of an overall market." *Staples II*, 2016 WL 2899222, at *16.

23. In *Staples II*, this Court found that the sale of "consumable office supplies" to a targeted subset of the merging parties' customers—"specifically large B-to-B customers who spend $500,000 or more on office supplies annually"—was a relevant product market. *Id.* at *8. ("B-to-B" customers are businesses who "purchase office supplies for their own use." *Id.* at *3.) In so doing, it rejected the defendants' claim that the proposed market was "gerrymandered and artificially narrow," concluding that the industry recognized these customers as a "separate economic entity" based on Staples' testimony that "the $500,000 spend mark is a 'threshold' that requires 'closer attention' to be paid to the customer" and evidence that vendors identified and segmented customers based on their spend. *Id.* at *9. This Court also found large B-to-B customers distinct in their demand for "sophisticated technology" such as customizable product catalogs and utilization reports, which they use to control costs; "personalized, high quality customer service," including dedicated account managers that understand their needs; and "[n]ationwide delivery to dispersed geographic locations" on a next-day basis. *Id.* at *11.

C. The 14 Anthem states and the United States are relevant geographic markets.

24. A relevant geographic market is the area "where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate." *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 357 (1963).

25. Courts have recognized that "[a]n element of fuzziness" is inherent in defining geographic markets. *United States v. Conn. Nat'l Bank*, 418 U.S. 656, 669 (1974). For that

reason, such markets need not be defined "with scientific precision," *id.*, nor "by metes and bounds as a surveyor would lay off a plot of ground," *Pabst Brewing*, 384 U.S. at 549.

26. Nothing requires plaintiffs' relevant market to include all potential customers or participants. *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 338–46 (3d Cir. 2016) (finding a geographic market definition correct even when 43.5% of a hospital's patients came from outside the defined market).

27. "The criteria to be used in determining the appropriate geographic market are essentially similar to those used to determine the relevant product market." *Brown Shoe*, 370 U.S. at 336. The geographic market must "'correspond to the commercial realities' of the industry." *Id.*; *Penn State Hershey Med. Ctr.*, 838 F.3d at 338.

28. The hypothetical monopolist test applies to the definition of a relevant geographic market just as it does to a product market: i.e., courts ask whether a profit-maximizing hypothetical monopolist over all the relevant products sold in that particular geographic area would impose a SSNIP. *See* Merger Guidelines § 4.2.

29. When a court defines the relevant product market around national customers as a group, it typically defines the relevant geographic market as national in scope. *See, e.g.*, *Sysco*, 113 F. Supp. 3d at 49; *Cardinal Health*, 12 F. Supp. 2d at 50. In addition, courts may aggregate geographic markets for the sake of "analytical convenience" when those smaller markets have similar competitive conditions. *Cf. Staples II*, 2016 WL 2899222, at *8 (citing *ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559, 565–68 (6th Cir. 2014) (aggregating product markets)). Because national accounts, by definition, have employees dispersed throughout the country and Defendants themselves recognize national accounts as a target market, it is appropriate to define the relevant geographic market as nationwide.

30. Courts recognize geographic submarkets, just as they do product submarkets. *Brown Shoe*, 370 U.S. at 336–37 ("[J]ust as a product submarket may have § 7 significance as the proper 'line of commerce,' so may a geographic submarket be considered the appropriate 'section of the country.'"). Accordingly, the 14 Anthem states—in which the loss of competition between Anthem and Cigna will be especially pronounced—are also an appropriate geographic submarket in which to analyze the effects of the merger on competition for national account customers, because national accounts in these states face similar market conditions.

III. THE MERGER WOULD SUBSTANTIALLY INCREASE CONCENTRATION AND IS PRESUMPTIVELY UNLAWFUL.

31. A merger is presumptively unlawful if it would "produce 'a firm controlling an undue percentage share of the relevant market'" and result "'in a significant increase in the concentration of firms in that market.'" *Heinz*, 246 F.3d at 715 (quoting *Phila. Nat'l Bank*, 374 U.S. at 363). "Such a showing establishes a 'presumption' that the merger will substantially lessen competition." *Id.*

32. "'Market concentration is a function of the number of firms in a market and their respective market shares.'" *Staples II*, 2016 WL 2899222, at *17 (quoting *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 123 (D.D.C. 2004)).

33. "The measurement of market shares and market concentration is not an end in itself, but is useful to the extent it illuminates the merger's likely competitive effects." Merger Guidelines § 4.0. In speaking of competitive effects, the Supreme Court noted, "Such a prediction is sound only if it is based upon a firm understanding of the structure of the relevant market." *Phila. Nat'l Bank*, 374 U.S. at 362. Thus, to predict competitive effects with accuracy, a market-share measurement must reflect the reality of a market, in all its complications. Here, for example, attributing to Anthem the market shares of the other Blue plans reflects the reality of

the relationship these plans have to each other and to the market in which they coordinate to compete against other insurers, as well as the fact that they benefit financially from each other's customers.

34. While there is no fixed threshold for significant market concentration, the Supreme Court in *Philadelphia National Bank* specifically held a post-merger market share of 30 percent triggered the presumption of illegality. 374 U.S. at 364 ("Without attempting to specify the smallest market share which would still be considered to threaten undue concentration, we are clear that 30% presents that threat."); *see also Cont'l Can*, 378 U.S. at 461 (holding a merger presumptively anticompetitive where the acquiring firm's market share increased from 21.9% to 25% and the number of market competitors reduced from five to four). The D.C. Circuit and this Court have found the presumption applied when the merging parties would have had market shares in that same 30 percent range. *Heinz*, 246 F.3d at712 (combined firm market share of 32.8%); *H & R Block*, 833 F. Supp. 2d at 72 (combined firm market share of 28.4%).

35. In implementing the presumption from *Philadelphia National Bank*, courts often look to the market-concentration thresholds defined in the Merger Guidelines. *Heinz*, 246 F.3d at 716 (applying the 1992 Merger Guidelines); *H & R Block*, 833 F. Supp. 2d at 71–72 (applying presumption thresholds from 2010 Guidelines). The Merger Guidelines measure market concentration by the Herfindahl–Hirschmann Index (HHI), "calculated by summing the squares of the individual firms' market shares." Merger Guidelines § 5.3. "Sufficiently large HHI figures establish the [plaintiffs'] prima facie case that a merger is anti-competitive." *Heinz*, 246 F.3d at 716.

36. According to the Merger Guidelines, a post-merger market is "highly concentrated" when the HHI is 2500 or greater. When a merger increases the HHI by 200 or

more points and will result in a highly concentrated market, the merger is "presumed to be likely to enhance market power," Merger Guidelines § 5.3, and thus is presumptively unlawful, *H & R Block*, 833 F. Supp. 2d at 71–72 (applying presumption thresholds from 2010 Guidelines).

37. Plaintiffs "need not present market shares and HHI estimates with the precision of a NASA scientist. The 'closest available approximation' often will do." *Sysco*, 113 F. Supp. 3d at 54 (quoting *FTC v. PPG Indus., Inc.*, 798 F.2d 1500, 1505 (D.C. Cir. 1986)).

38. The presumption of illegality based on concentration measures applies in cases that involve "unilateral effects," such as this one, in which the merger eliminated head-to-head competition. *See ProMedica Health Sys.*, 749 F.3d at 568–70 (upholding application of HHI-based presumption to hospital merger where greater share increased hospital's bargaining leverage against insurers).

39. Once plaintiffs establish the merger is presumptively unlawful, the burden shifts to the defendants to show "that the market-share statistics [give] an inaccurate account of the [merger's] probable effects on competition." *Heinz*, 246 F.3d at 715 (alterations in original) (quoting *United States v. Citizens & S. Nat'l Bank*, 422 U.S. 86, 120 (1975)). "If the defendant successfully rebuts the presumption, the burden of producing additional evidence of anticompetitive effects shifts to the government, and merges with the ultimate burden of persuasion, which remains with the government at all times." *United States v. Baker Hughes Inc.*, 908 F.2d 981, 983 (D.C. Cir. 1990).

IV. THE MERGER WOULD ELIMINATE COMPETITION BETWEEN ANTHEM AND CIGNA AND DIMINISH INNOVATION.

40. Plaintiffs can also prove a Section 7 violation by presenting evidence the transaction will likely lead to a substantial lessening of competition in the relevant market. *See*

Whole Foods, 548 F.3d at 1036 (Demonstrating market concentration "does not exhaust the possible ways to prove a § 7 violation on the merits.").

41. "Mergers that eliminate head-to-head competition between close competitors often result in a lessening of competition." *Staples II*, 2016 WL 2899222, at *20 (citing Merger Guidelines § 6). "The elimination of competition between two firms that results from their merger may alone constitute a substantial lessening of competition." Merger Guidelines § 6. Particularly in a "highly concentrated market," the loss of "significant head-to-head competition" is "certainly an important consideration when analyzing possible anti-competitive effects," *Staples I*, 970 F. Supp. at 1083, because the loss of such a competitive constraint may allow the merged firm to raise prices, restrict output, or otherwise exercise market power.

42. This type of anticompetitive effect, known as a "unilateral effect," is likely "if the acquiring firm will have the incentive to raise prices or reduce quality after the acquisition, independent of competitive responses from other firms." *H & R Block*, 833 F. Supp. 2d at 81. "The extent of direct competition between the products sold by the merging parties is central to the evaluation of unilateral price effects." Merger Guidelines § 6.1.

43. Defendants' ordinary course of business documents are particularly informative when evaluating the significance of direct competition between the two merging firms. *See, e.g.*, *Staples II*, 2016 WL 2899222, at *21; *H & R Block*, 833 F. Supp. 2d at 81–82; *Heinz*, 246 F.3d at 717; *Swedish Match*, 131 F. Supp. 2d at 169–70.

44. Courts also consider the testimony of industry participants to determine the likely competitive effects of a merger. *See, e.g.*, *Staples II*, 2016 WL 2899222, at *21–24; *United States v. Bazaarvoice, Inc.*, No. 13-cv-00133, 2014 WL 203966, at *61–62 (N.D. Cal. Jan. 8, 2014); *H & R Block*, 833 F. Supp. 2d at 73–75.

45. A history of head-to-head competition between the two merging firms makes post-merger anticompetitive effects more likely. *See, e.g.*, *Staples II*, 2016 WL 2899222, at *20 (looking at the instances in which defendants bid against each other for a customer); *H & R Block*, 833 F. Supp. 2d at 81–82 (finding relevant instances where H & R Block considered offerings and prices of TaxACT in setting its own offerings and prices); *Heinz*, 246 F.3d at 718 (concluding defendants compete with each other because of "evidence that the two do in fact price against each other").

46. A merger can also substantially lessen competition by "diminish[ing] innovation." Merger Guidelines § 1. "Competition often spurs firms to innovate." *Id.* § 6.4. A merger is likely to diminish innovation if it would "encourag[e] the merged firm to curtail its innovative efforts below the level that would prevail in the absence of the merger." *Id.* Innovation in a market is particularly at risk if the merger eliminates a "maverick" firm—"i.e., a firm that plays a disruptive role in the market to the benefit of customers," typically through "new technology or business model," or some other form of innovation. *Id.* § 2.1.5. Accordingly, in assessing the competitive effects of a merger, courts consider whether the relevant market would lose an "aggressive competitor" or innovator. *See, e.g.*, *H & R Block*, 833 F. Supp. 2d at 79 (noting TaxACT's "impressive history of innovation" and how its distinctive product offerings pushed the industry towards lower pricing and forced other competitors to innovate as well).

47. Evidence of likely future price increases, including through expert economists' simulations of a merger's future competitive effects, can establish the potential anticompetitive effects of a merger. *Sysco*, 113 F. Supp. 3d at 67 (finding a merger simulation "strengthens the FTC's *prima facie* case"); *H & R Block*, 833 F. Supp. 2d at 88 (finding merger simulations have

"some probative value in predicting the likelihood of a potential price increase after the merger").

48. To evaluate the merger's effect in non-Anthem states, the Guidelines advise that a merger that leads to a partial (but not complete) end to competition between firms, such as a partial acquisition—or, in this case, the changing relationship between Cigna and the Blue plans in non-Anthem states—"may nevertheless present significant competitive concerns." Merger Guidelines § 13. Such a merger "can lessen competition by giving the acquiring firm the ability to influence the competitive conduct of the target firm," by "reducing the incentive of the acquiring firm to compete," and by "giving the acquiring firm access to non-public, competitively sensitive information from the target firm." *Id.* "The details of the post-acquisition relationship between the parties, and how those details are likely to affect competition, can be important," and "the specific facts of each case must be examined to assess the likelihood of harm to competition." *Id.*

V. ABSENCE OF COUNTERVAILING FACTORS

A. Defendants' purported efficiencies cannot save this merger.

(i) Defendants bear a heavy burden to establish an efficiencies defense.

49. Courts are cautious in considering the possibility of an efficiencies defense. The Supreme Court has never recognized an efficiencies defense to a § 7 claim. *Heinz*, 246 F.3d at 720. And "none of the reported appellate decisions have actually held that a § 7 defendant has rebutted a prima facie case with an efficiencies defense." *Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775, 789 (9th Cir. 2015). Indeed, this Court has noted it is "not aware of any case . . . where the merging parties have successfully rebutted the government's *prima facie* case on the strength of the efficiencies." *Sysco*, 113 F. Supp. 3d at 82.

50. "High market concentration levels require 'proof of extraordinary efficiencies'" to rebut the presumption of likely anticompetitive effect. *H & R Block*, 833 F. Supp. 2d at 89 (quoting *Heinz*, 246 F.3d at 720).

51. This Court has held that "cognizable efficiencies"—i.e., those efficiencies the law will recognize—"'are merger-specific efficiencies that have been verified and do not arise from anticompetitive reductions in output or service.'" *Id.* (quoting Merger Guidelines § 10). Defendants must show the alleged efficiencies outweigh the "'possibly greater benefits [that] can be achieved by the public through existing, continued competition.'" *Sysco*, 113 F. Supp. 3d at 86 (quoting *Cardinal Health*, 12 F. Supp. 2d at 63).

(ii) Defendants' purported efficiencies are neither merger-specific nor verifiable.

52. For efficiencies to be merger-specific, they "must represent a type of cost saving that could not be achieved without the merger." *H & R Block*, 833 F. Supp. 2d at 89. An efficiency that could be achieved by either merging company individually "through existing, continued competition" is not merger-specific. *Cardinal Health*, 12 F. Supp. 2d at 63; *Sysco*, 113 F. Supp. 3d at 86.

53. A company's ability to obtain a particular cost savings more quickly via the merger does not make the savings merger-specific. *See Arch Coal*, 329 F. Supp. 2d at 151–52. At most, the cognizable efficiency is limited to the acceleration of the cost savings that can be verified. Merger Guidelines § 10 n.13.

54. In addition, "the estimate of the predicted saving must be reasonably verifiable by *an independent party*." *H & R Block*, 833 F. Supp. 2d at 89 (emphasis added). "The court must 'undertake a rigorous analysis of the kinds of efficiencies being urged by the parties in order to ensure that those "efficiencies" represent more than mere speculation and promises about post-

merger behavior.'" *Sysco*, 113 F. Supp. 3d at 82 (quoting *Heinz*, 246 F.3d at 721). To the extent estimates of efficiencies are based on the subjective judgments of the parties, courts will not credit them. *See, e.g.*, *H & R Block*, 833 F. Supp. 2d at 91; *Arch Coal*, 329 F. Supp. 2d at 152.

55. "The difficulty in substantiating efficiency claims in a verifiable way is one reason why courts 'generally have found inadequate proof of efficiencies to sustain a rebuttal of the government's case.'" *H & R Block*, 833 F. Supp. 2d at 91 (quoting *Heinz*, 246 F.3d at 720).

56. "'[D]elayed benefits from efficiencies (due to delay in the achievement of, or the realization of customer benefits from, the efficiencies) will be given less weight because they are less proximate and more difficult to predict.'" *CCC Holdings*, 605 F. Supp. 2d at 73 (citing 1997 Horizontal Merger Guidelines).

(iii) Anticompetitive harm in one market cannot be overcome by alleged efficiencies in another.

57. The antitrust laws are concerned first and foremost with preserving competition and the economic freedom competition promotes. *See United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972) ("Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise.").

58. Because a merger is unlawful if it would substantially lessen competition in any one market, *see Pabst Brewing*, 384 U.S. at 549, the law 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; *see also St. Luke's*, 778 F.3d at 789 (rejecting argument that "the merger would allow the defendant to compete for efficiently *outside* the relevant market"). Competition "cannot be foreclosed with respect to one sector of the economy because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy." *Topco Assocs.*, 405 U.S. at 610. "[A] merger the effect of which 'may be

substantially to lessen competition' is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial." *Phila. Nat'l Bank*, 374 U.S. at 371.

59. Accordingly, defendants cannot point to benefits outside national accounts to overcome the presumption of harm in national accounts.

(iv) Defendants' alleged medical-network synergies are not procompetitive purchasing efficiencies.

60. While defendants can demonstrate purchasing efficiencies (i.e., that a merger will promote competition by lowering input costs) to justify a merger, courts do not credit such efficiencies when they arise from an anticompetitive increase in market power. *See* Merger Guidelines § 12. "Reduction in prices paid by the merging firms *not arising from the enhancement of market power* can be significant in the evaluation of efficiencies from a merger." *Id.* (emphasis added).

61. Purchasing efficiencies can be procompetitive and not the result of market power where they result from economies of scale that benefit the seller—for instance, if the merged firm "reduce[s] transaction costs," *id.*, or can take advantage of "volume-based discounts," *id.*, or "administrative and bulk-purchase savings," *Grp. Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 215 (1979). Here, Defendants concede that the claimed medical-network synergies do not result from any new volume (members) for providers.

62. Lower prices exacted by a merged firm due, instead, to its increased market power that harms the seller are precisely the type of harm to competition the antitrust laws prohibit. *See United States v. Rice Growers Ass'n of Cal.*, Civ. No. 84-1066, 1986 WL 12562, at *12 (E.D. Cal. Jan 31, 1986) (finding acquisition unlawful under Section 7 when "the effect of such acquisition may be substantially to lessen competition in the market for the purchase or acquisition for milling of paddy rice grown in California"); *United States v. Pennzoil Co.*, 252 F.

Supp. 962, 985 (W.D. Pa. 1965) (holding that merger of parties will "substantially lessen competition in the purchase of Penn Grade crude in the Penn Grade crude producing area"); *cf. Mandeville Island Farms v. Am. Crystal Sugar Co.*, 334 U.S. 219, 236 (1948) (finding an agreement among California sugar refiners on the price to be paid for sugar beets to violate the antitrust laws); *Todd v. Exxon Corp.*, 275 F.3d 191, 201 (2d Cir. 2001) (holding that the antitrust laws "also appl[y] to abuse of market power on the buyer side"); *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 321–22 (2007).

63. For that reason, a merger that enhances buy-side market power, even if it may result in lower prices for consumers, violates Section 7. *See West Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, 103–105 (3d Cir. 2010) (exercise of monopsony power not justified by consumer benefit in Section 1 analysis); *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 988 (9th Cir. 2000) (consumer benefit did not justify buyer conspiracy under Section 1).

64. In *Knevelbaard Dairies*, the Ninth Circuit considered a case involving a conspiracy among cheese makers that reduced the prices they paid for milk. The defendants argued such a conspiracy would benefit, not harm, consumers by reducing cheese prices. The Ninth Circuit rejected that argument, holding that "the central purpose of the antitrust laws, state and federal, is to preserve competition" and that cases discussing how competition leads to low prices for consumers "do not mean that conspiracies among buyers to depress acquisition prices are tolerated." *Knevelbaard Dairies*, 232 F.3d at 988.

65. This same principle protects doctors against injury from insurer market power, even if competitively harming doctors might allow insurers to charge some consumers lower premiums. *See West Penn*, 627 F.3d 85. In *West Penn*, the second-largest hospital system in Pittsburgh, West Penn, sued the largest hospital and the local Blue Cross licensee (Highmark),

alleging they had conspired to drive down West Penn's reimbursement rates. Defendants argued that reduced rates did not constitute antitrust injury and that consumers, in turn, would benefit from lower premiums. The Third Circuit disagreed, noting that any reduction in premiums would not necessarily benefit subscribers because "the premium reductions would have been achieved only by taking action that tends to diminish the quality and availability of hospital services." *Id.* at 103–104. Regardless of whether that reduction in output or quality occurred, the Third Circuit noted that the defendant's argument "reflects a basic misunderstanding of the antitrust laws": "Highmark's improperly motivated exercise of monopsony power, like the collusive exercise of oligopsony power by the cheese makers in *Knevelbaard*, was anticompetitive and cannot be defended on the sole ground that it enabled Highmark to set lower premiums on its insurance plans." *Id.* at 105.

B. Countervailing market power is not a defense.

66. It is no defense to Anthem's acquisition of substantial market power that some hospitals with which Anthem negotiates may themselves possess market power. A merger that would substantially lessen competition in one relevant market is not justified by the fact that it may offset market power in another. The Supreme Court already rejected a similar "application of the concept of 'countervailing power'" in antitrust law. *Phila. Nat'l Bank*, 374 U.S. at 370; *see also Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 214 (1951).

67. Similarly, it is no defense that Anthem claims to need the merger to lower hospital rates to a more "reasonable" level, allegedly closer to its marginal costs. The Supreme Court found a "reasonable prices" defense contrary to the antitrust laws more than a century ago. *See United States v. Trans-Mo. Freight Ass'n*, 166 U.S. 290, 331–32, 339 (1897).

68. In rare cases, a market has such few, powerful customers that their participation is "likely to promote competition even in a highly concentrated market." *Baker Hughes*, 908 F.2d at 986. These "power buyers" are not merely large companies or sophisticated consumers; they exist where "a product is esoteric and its market small," even "miniscule"; where "'concentration has existed for some time but there is no proof of overpricing, excessive profit or any decline in quality, service or diminishing innovation'"; where market shares are so "volatile" that "every [individual product] sold . . . increased the seller's market share by two to five percent" and "[a] contract to provide multiple [products] could catapult a firm from last to first place." *Id.* In short, such markets are "unusual." *Id.* They bear no relation to the commercial health insurance markets at issue in this case. "[T]he presence of some large sophisticated customers" is not sufficient to qualify. *United States v. United Tote, Inc.*, 768 F. Supp. 1064, 1085–86 (D. Del. 1991) (rejecting power buyers theory because the market at issue had a mix of "large, sophisticated facilities" as well as smaller ones). And while "courts have found that the existence of power buyers can be considered in their evaluation of an anti-trust case," "courts have not yet found that power buyers alone enable a defendant to overcome the government's presumption of anti-competitiveness." *Cardinal Health*, 12 F. Supp. 2d at 58 (refusing to rebut the Government's *prima facie* Section 7 case even though some power buyers existed in the market).

C. Anthem has not demonstrated that entry or expansion by other firms will counteract the anticompetitive effects of its merger with Cigna.

69. To counteract a merger's anticompetitive effects, entry or expansion by would-be competitors must be "'timely, likely, and sufficient in its magnitude, character, and scope.'" *H & R Block*, 833 F. Supp. 2d at 73 (quoting Merger Guidelines § 9). "'Determining whether there is ease of entry hinges upon an analysis of barriers to new firms entering the market or existing firms expanding into new regions of the market.'" *CCC Holdings*, 605 F. Supp. 2d. at 47

(quoting *Cardinal Health*, 12 F. Supp. 2d at 55). Defendants bear the burden of demonstrating ease of entry in the relevant market. *See Swedish Match*, 131 F. Supp. 2d at 170–71.

70. "In order to deter the competitive effects of concern, entry must be rapid enough to make unprofitable overall the actions causing those effects and thus leading to entry, even though those actions would be profitable until entry takes effect" and "rapid enough that customers are not significantly harmed by the merger, despite any anticompetitive harm that occurs prior to the entry." Merger Guidelines § 9.1. "Even if the prospect of entry does not deter the competitive effects of concern, post-merger entry may counteract them." *Id.*

71. "Entry is likely if it would be profitable, accounting for the assets, capabilities, and capital needed and the risks involved, including the need for the entrant to incur costs that would not be recovered if the entrant later exists." *Id.* § 9.2.

72. Entry or expansion must be of such magnitude, character, and scope that it will "'fill the competitive void that will result'" if the merger is consummated. *H & R Block*, 833 F. Supp. 2d at 73 (quoting *Swedish Match*, 131 F. Supp. 2d at 169). "'The prospect of entry into the relevant market will alleviate concerns about adverse competitive effects only if such entry will deter or counteract any competitive effects of concern so the merger will not substantially harm customers.'" *Staples II*, 2016 WL 2899222, at *22 (quoting Merger Guidelines § 9).

73. Admissions by a defendant regarding the presence of barriers to entry in its market are given substantial weight. *See, e.g.*, *CCC Holdings*, 605 F. Supp. 2d at 49–50.

74. "The mere existence of potential entrants does not by itself rebut the anti-competitive nature of an acquisition." *Chi. Bridge*, 534 F.3d at 436. The defendant must do more than identify other firms that compete in the relevant market and might possibly expand. *See H & R Block*, 833 F. Supp. 2d at 73–77 (finding the eighteen companies offered by defendants as

entrants post-merger insufficient because they were unlikely to expand to replace the competition that would be eliminated by the acquisition).

75. Entrants must be significant enough to "compete effectively, *i.e.*, affect pricing." *CCC Holdings*, 605 F. Supp. 2d at 59. Without substantial growth in market share, competitors that are as "an ant to an elephant" are too small to be a meaningful constraint on prices. *Id.* at 58 (finding the relative size of competitors to the defendants important to determining whether expansion would counteract the anticompetitive effects of the merger). In short, entrants must be "of a sufficient scale to compete on the same playing field" as the merged firm. *Chi. Bridge*, 534 F.3d at 430.

76. "The history of entry into the relevant market is a central factor in assessing the likelihood of entry in the future." *Cardinal Health*, 12 F. Supp. 2d at 56. The absence of significant entry in the market, such as in commercial health insurance markets, indicates that there are high barriers to entry. *See FTC v. H.J. Heinz Co.*, 116 F. Supp. 2d 190, 196 (D.D.C. 2000) (rejecting an ease of entry defense where "[t]here have been no significant entries in the baby food market in decades"); *CCC Holdings*, 605 F. Supp. 2d at 47–49 (finding past entrants unpersuasive because they either were unsuccessful or gained only a small market share relative to defendants, among other reasons).

77. One significant barrier is network effects, which exist when "'the utility that a user derives from consumption of the good increases with the number of other agents consuming the good.'" *United States v. Microsoft Corp.*, 253 F.3d 34, 49 (D.C. Cir. 2001) (quoting Michael L. Katz & Carl Shapiro, *Network Externalities, Competition, and Compatibility*, 75 Am. Econ. Rev. 424, 424 (1985)). New entrants in such a market face a "chicken-and-egg problem": companies will not enter a new market "without an existing customer base because the costs and

risks are prohibitive" but customers will not commit to a new company without a demonstrated ability to meet their needs. *Sysco*, 113 F. Supp. 3d at 81. Incumbent firms in such a market enjoy a substantial advantage over entrants and fringe competitors in attracting and maintaining customers. *Microsoft*, 253 F.3d at 55–56. The health-insurance industry has significant network effects, creating substantial barriers to entry that would facilitate Anthem's exercise of market power post-merger.

78. "Reputation can be a considerable barrier to entry where customers and suppliers emphasize the importance of reputation and expertise." *CCC Holdings*, 605 F. Supp. 2d at 54–55; *see also Sysco*, 113 F. Supp. 3d at 80–81; *H & R Block*, 833 F. Supp. 2d at 75 ("Building a reputation that a significant number of consumers will trust requires time and money.").

79. Industries that require significant upfront investments to compete necessarily impose barriers to entry. *See Sysco*, 113 F. Supp. 3d at 80 (finding barriers to entry where industry is "extraordinarily capital and labor intensive"); *CCC Holdings*, 605 F. Supp. 2d at 50 ("The difficulty and cost of developing and maintaining an entirely new parts and labor database that is accepted by the market would be significant barriers to new entrants."); *Swedish Match*, 31 F. Supp. 2d at 171 (finding high barriers to entry where evidence showed "substantial sunk costs in plant construction, product development, and marketing" were required to compete).

80. High switching costs can also serve as a barrier to entry by insulating incumbent suppliers from competition and deterring expansion by fringe firms. *See CCC Holdings*, 605 F. Supp. 2d at 49.

D. A "dynamic market" still requires standard antitrust analysis.

81. That a market may be termed "dynamic," or that an industry is undergoing change, does not insulate an otherwise anticompetitive merger. A dynamic market "does not

appreciably alter our mission in assessing the alleged antitrust violations in the present case." *Microsoft*, 253 F.3d at 49–50 (rejecting Microsoft's defense to monopolization claim that relevant market was "technologically dynamic" and that any entrenchment by current market leaders would be curbed by innovation). "The Court's mission is to assess the alleged antitrust violations presented, irrespective of the dynamism of the market at issue." *Bazaarvoice*, 2014 WL 203966, at *76 (citing *Microsoft*, 253 F.3d at 49–50).

82. Substantial HHI figures establish the presumption in a dynamic market just as in a static market. *Bazaarvoice*, 2014 WL 203966, at *36. Once plaintiffs establish the presumption, it is defendants' burden to show plaintiffs' market share figures do not accurately predict the likely competitive effects, whether due to likely changes in the market or for other reasons. *Citizens & S. Nat'l Bank*, 422 U.S. at 120.

VI. THE PREFERRED REMEDY IS AN INJUNCTION OF THE MERGER.

83. This Court has the authority "to prevent and restrain" violations of Section 7 of the Clayton Act. 15 U.S.C. § 25. Such violations occur whenever a merger's effect may be to lessen competition substantially in any relevant market. *Brown Shoe*, 370 U.S. at 335.

84. "[A] merger which produces a firm controlling an undue percentage share of the relevant market, and results in significant increase in concentration of firms in that market is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects." *Phila. Nat'l Bank*, 374 U.S. at 363.

85. Accordingly, the preferred remedy for a merger violating Section 7 is for the court to issue a "full stop injunction" preventing the parties from completing their unlawful merger. *PPG Indus.*, 798 F.2d at 1506–07.

86. Once the government establishes that a merger violates Section 7, "all doubts as to the remedy are to be resolved in its favor." *United States v. E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 334 (1961).

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CERTIFICATE OF SERVICE

I certify that on December 15, 2016, a true and correct copy of the foregoing was served upon all counsel of record via the Court's CM/ECF system.

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