UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, et al., *Plaintiffs*, v. AETNA, INC. and HUMANA, INC., *Defendants*.	Case No. 1:16-cv-01494-JDB

PLAINTIFFS' MOTION TO ENTER SCHEDULING AND CASE MANAGEMENT ORDER AND MEMORANDUM IN SUPPORT

Plaintiff United States and the Plaintiff States (collectively, "Plaintiffs") respectfully request that the Court enter the Proposed Scheduling and Case Management Order attached as Exhibit A. In accordance with Rule 26(f) of the Federal Rules of Civil Procedure and Rule 16.3 of the Local Civil Rules, the Plaintiffs and Defendants have met and conferred regarding the scheduling matters set forth in Local Rule 16.3, and relatively few areas of disagreement remain. For these remaining provisions, the Plaintiffs have proposed language that will more efficiently and more fairly manage the pretrial proceedings within the schedule outlined by the Court, protect the rights of third parties by ensuring consistency with *United States v. Anthem*, and create a more complete record on which the Court can render a decision after trial.

1. CASE SCHEDULE

Initial Disclosures. The Defendants have added to the Court's proposed schedule a deadline for the exchange of initial disclosures, the scope of which is addressed in paragraph 11 of the Plaintiffs' proposed order. Under this provision, the Plaintiff United States must produce non-privileged data it obtained from the Department of Health and Human Services ("HHS")

during its pre-complaint investigation. The United States is currently working diligently to prepare this information for production, having already made substantial progress preparing third-party materials, which it prioritized for production in both merger cases. The United States has proposed that it commit to produce its initial disclosures promptly and on a rolling basis, but in any event, no later than September 5, 2016. The United States is working to produce these materials expeditiously and will do so on a rolling basis as soon as they are available, but the logistical challenges posed by producing so much information (i.e., the third-party and merging party materials) at one time make it difficult to agree to an absolute deadline before September 5.

Investigation Materials. The Court has proposed that Investigation Materials be produced by September 5, 2016. The United States is fully prepared to meet and, in all likelihood, beat that deadline with respect to third-party materials, which Plaintiff United States has been assembling and preparing for some time. Instead, the third-party materials that are in our document review database are ready to be produced as soon as the Protective Order notice period has concluded.

However, the materials collected from the four merging parties during the Plaintiffs' pre-complaint investigation are voluminous. Producing them presents practical and technological issues that will make it difficult for the Plaintiff United States to complete the production of these materials by September 5. The United States and its electronic discovery vendor are working diligently toward this goal, but the limitations of computer processing power and speed pose significant barriers. Based on current estimates from the vendor, a complete copy and transfer of the files, which amount to approximately 14 terabytes of data in total, cannot be assured before September 16. A copy of a letter submitted to the Court in the *Anthem* action describing these issues is attached as Exhibit B.

The Antitrust Division is often on the receiving end of massive electronic productions of this kind, and they seldom occur without unexpected issues and delays. Plaintiffs have proposed several ways to avoid or mitigate these technological challenges:

- The quickest and most efficient method would be that each of the four merging parties could obtain their own investigation materials from each other. Considering the Defendants' wish for a speedy pretrial schedule, this method likely would get them the investigation materials in the shortest amount of time.
- A second option would be for Aetna and Humana to agree to swap each other's productions and obtain from the United States the investigation materials produced by Anthem and Cigna. If the United States can forego producing Aetna's and Humana's productions back to them, the burden and time to produce these materials could be significantly reduced.
- A third option—though one that presents its own problems—would be for each of the merging parties to permit the Plaintiffs to copy the hard drives and other physical media that they originally produced. However, the parties' original productions contained a number of errors that the United States has worked to fix, including missing text, image, and load files, corrupted or inaccessible files, and documents missing key pieces of metadata. The United States could copy the parties' original drives if each of the merging parties could reach agreement with each other on how to treat materials on these drives that were inadvertently produced and subsequently clawed back under claims of privilege, but they would still have to deal with the errors that these drives originally contained.

2. PRODUCTION OF DISCOVERY MATERIALS ACROSS CASES

Plaintiffs' Proposed Language:

A. *Documents, Interrogatories, and Admissions.* Any discovery request, response to a discovery request, notice of non-party subpoena, and response to a subpoena by a non-party served by any Party in the Health Insurance Cases must be produced to all Parties in the Health Insurance Cases, with all objections being preserved. The Special Master shall coordinate, as necessary and consistent with this Order, discovery between this case and United States, et al. v. Anthem, Inc., et al., Case No. 1:16-cv-01493 (ABJ) (D.D.C.).

B. *Non-Party Materials*. For any materials received by a Party from persons who are not Parties in either of the Health Insurance Cases, the Party must provide the other Parties in the Health Insurance Cases with the materials and information identified in, and in the manner described in, Paragraph 19 of this Order.

C. *Depositions*. If a non-party is subpoenaed for deposition in both Health Insurance Cases, the Parties will use their best efforts to minimize the burden on the non-party.

D. *Experts.* Expert discovery will not be coordinated across the Health Insurance Cases.

E. *Production to Plaintiffs*. For purposes of this paragraph only, the Defendants may provide one copy of non-party document productions to the United States on behalf of the State Plaintiffs in both Health Insurance Cases. The Plaintiff States' rights to those productions are the same as if the documents were produced to the Plaintiff States.

Explanation: The Plaintiffs believe that certain ground rules should be established now for how document and deposition discovery should be coordinated between this case and the *Anthem* case. By laying out a simple plan for discovery in both cases, the Plaintiffs hope to avoid needless discovery disputes, quickly share important discovery with all Parties, and reduce the burden imposed on third parties responding to subpoenas in both cases. Similar language has

been used in prior cases brought by the United States. *E.g.*, Discovery and Coordination Order, *United States v. American Express Co.*, No. 10-04496 (E.D.N.Y. Apr. 30, 2015). The provisions proposed here are parallel to those proposed yesterday in the *Anthem* case. Taking a parallel approach in both cases would ease the burden on third parties and reduce confusion for all involved by creating a process that is as clean and straightforward as possible under the circumstances.

If the Court determines that this approach is not appropriate, the Plaintiffs believe that some provision must be made to clarify how, for example, an Anthem document produced to the United States in the *Anthem* case, but is also relevant to an issue in this case, should be treated. An alternative provision would allow discovery from *Anthem* to be used in *Aetna* and vice versa to the extent necessary, but would not involve the automatic production proposed by the Plaintiffs above. Such an alternative provision could be: "If a Party intends to rely upon any discovery produced in United States, et al. v. Anthem, Inc. and Cigna Corp., Case No. 1:16-cv-01493-ABJ, but not produced in this action, such discovery shall be disclosed to the other Parties no later than 7 days before such Party intends to rely on it." Third parties could also comply with their subpoenas by submitting a single production to be used in both cases.

3. NUMBER OF INTERROGATORIES AND REQUESTS FOR ADMISSION

Plaintiffs' Proposed Language:

> *Interrogatories*. Interrogatories are limited to 25 per side, including discrete subparts. Defendants may serve up to 2 interrogatories on the Plaintiff States on discrete issues common to those plaintiffs and the service of such interrogatories will reduce the count of remaining interrogatories by an equal number and not multiplied by the number of Plaintiff States. The Parties must respond in writing to interrogatories within 20 days after they are served.
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> *Requests for Production*. There is no limit on the number of requests for production of documents.

> *Requests for Admission.* Requests for admission are limited to 10 per side, including discrete subparts. Requests for admission relating solely to the authentication or admissibility of documents, data, or other evidence will not count against these limits. The Parties must respond in writing to requests for admission within 20 days after they are served.

Explanation: The Plaintiffs propose that each side be permitted to pose an equal number of interrogatories (25)—the presumptive limit—and requests for admission (10) to the other side. In contrast, the Defendants are seeking both an expedited trial and the authority to serve a total of 70 interrogatories: 20 on the United States and 5 on each of the Plaintiff States. Considering that the presumptive limit on interrogatories under Rule 33(a)(1) is 25, the Defendants' proposal would impose burdens on all parties far in excess of their utility as a discovery tool. Instead of spending the accelerated pretrial discovery period meaningfully preparing for trial, both Plaintiffs and Defendants would waste much of the next several months responding to interrogatories.

The Defendants have also proposed that they be permitted to pose separate interrogatories to the Plaintiff States. Separate interrogatories are not warranted and will not be productive because the Plaintiffs have brought this law enforcement action collectively, alleging the same claims and seeking the same relief. The contested issues are common to all the Plaintiffs. This action does not involve the kind of separate discovery needs that might apply if, for example, many different plaintiffs each had different damages claims.

Despite the fact that the Defendants cannot identify any examples of issues or facts unique to particular states as Plaintiffs for which they would need to seek separate discovery, the Plaintiffs could accept the Defendants being permitted to use up to 2 of their 25 interrogatories collectively on the Plaintiff States on discrete issues common to those plaintiffs. These interrogatories would reduce the count of remaining interrogatories by an equal number but

would not be multiplied by the number of Plaintiff States. This marks an effort by the Plaintiffs to find a compromise that is meaningful and fair to both sides, consistent with this discovery schedule. The Plaintiffs' compromise approach would afford the Defendants the ability to seek discovery of the Plaintiff States on a currently unidentified issue that applies to the Plaintiff States but does not apply equally to the Plaintiff United States—if there is such an issue—while not simply increasing the number of interrogatories for one side but not the other.

4. PRIVILEGE LOGS

Plaintiffs' Proposed Language:

> *Privilege Logs.* The Parties agree that the following privileged or otherwise protected communications may be excluded from privilege logs:
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> (a) any documents or communications sent solely between counsel for the Defendants (or persons employed by or acting on behalf of such counsel);
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> (b) any documents or communications sent solely between counsel for the United States (i.e., persons acting in the capacity of counsel for the U.S. Department of Justice, U.S. Department of Health and Human Services, the Office of Personnel Management, or any other federal governmental agency) or persons employed by or acting on behalf of such counsel;
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> (c) any documents or communications sent solely between counsel for the state attorneys general or all persons employed or acting on behalf of such counsel;
>
> (d) any documents or communications sent among counsel for the United States and counsel for states attorneys general and all persons employed or acting on behalf of such counsel;
>
> (e) documents that were not directly or indirectly furnished to any non-party, such as internal memoranda, and that were authored by the Parties' outside counsel (or persons acting on behalf of such counsel) or by counsel for the Plaintiffs (or persons employed by Plaintiffs);

(f) documents or communications sent solely between outside counsel for the Parties (or persons employed by or acting on behalf of) and employees or agents of each Party;

(g) documents or communications exchanged between outside counsel for either Defendant and inside counsel for either Defendant;

(h) privileged draft contracts;

(i) draft regulatory filings;

(j) non-responsive, privileged documents attached to responsive documents; and

(k) documents or communications solely relating to:

i. preparation of state regulatory filings (not including preparation of filings relating to mergers, acquisitions, or sales),

ii. ERISA,

iii. tax,

iv. environmental,

v. OSHA,

vi. personal injury,

vii. employment discrimination or wrongful termination,

viii. preparation of securities filings,

ix. purchase, sale, or lease of real property, and

x. patent or trademark applications.

The Parties also agree to the following guidelines concerning the preparation of privilege logs: (a) a general description of the litigation underlying attorney work-product claims is permitted, and (b) identification of the name and the company affiliation for each non-defendant person is sufficient identification.

Explanation: Both Parties have agreed to produce privilege logs in this case as required under Rule 26. In the Plaintiffs' experience, privilege logs are a crucial part of the discovery

process because they force each Party—both Plaintiffs and Defendants—to carefully examine their productions and make reasoned evaluations about whether documents should be withheld on the basis of privilege. Privilege logs also give the Parties an opportunity to understand the nature of a claimed privilege and the ability to challenge the claim if necessary.

The Plaintiffs have agreed to a number of broad exclusions to reduce the burden on both sides and focus instead on the kinds of documents most likely to be relevant to the claims and defenses in this action. However, the Plaintiffs disagree with two of the Defendants' proposed exclusions:

- The Defendants have proposed excluding documents or communications sent between any counsel for the Parties, including inside counsel, and any of that party's employees. The vast majority of documents included on any privilege log relate to communications between a party's employees and their inside counsel. These communications are frequently not privileged and often contain relevant information about business decisions and strategy. By putting these documents completely out of bounds, the Defendant's proposal would drastically reduce the usefulness of the privilege log. The Plaintiffs have proposed instead that the privilege log exclude documents or communications sent between a party's employees and *outside* counsel, as those kinds of documents are more likely to be privileged.
- The Defendants have also proposed excluding from their privilege log privileged communications with third parties related to the development of a divestiture to remedy the anticompetitive effects alleged in the Plaintiffs' complaint. Because the Defendants intend to assert that their divestiture agreement does, in fact, address those anticompetitive effects, their communications with third parties about the

divestiture are unquestionably relevant to the Plaintiffs' and the Court's evaluation of the proposed remedy. And, because they are communications with third parties, these kinds of materials are especially unlikely to be privileged.

The Plaintiffs have already proposed a number of exclusions to reduce the burden on the Defendants, recognizing that some categories of documents, such as communications between inside counsel for a party and that party's outside counsel, are very likely to be privileged. The Plaintiffs have no interest in creating work for themselves or the Defendants, with a tight schedule and much to be done, and have worked to accommodate the Defendants' concerns with respect to the privilege log. A full exploration of the facts simply does not permit the broad exclusion of the important categories of documents that the Defendants seek, nor does it allow the Defendants to ignore the requirements of Rule 26(b)(5).

5. DEPOSITIONS

Plaintiffs' Proposed Language:

> *Depositions of Fact Witnesses*. . . . All depositions of fact witnesses are limited to a maximum seven hours of examination. Rule 30(b)(6) depositions shall be limited to seven hours regardless of the number of witnesses produced for testimony. Each Rule 30(b)(6) deposition notice must seek testimony on reasonably related topics. Each such deposition will count as one deposition against the noticing side's maximum, regardless of the number of witnesses produced for testimony. For any deposition, the Parties and any affected non-party may stipulate to additional time beyond the seven hours on the record provided by the Federal Rules of Civil Procedure. Absent agreement of the Parties, the length of depositions provided for in this Order may only be modified by an order of the Special Master for good cause. Defendants will make available in this District its officers or other employees whose depositions are noticed by this action, unless Plaintiffs otherwise agree to a deposition outside this District. Party witnesses will be made available for deposition upon ten days' notice.

Explanation: The Plaintiffs have proposed that each side be permitted to take 25 depositions of fact witnesses in addition to depositions of any person identified on the preliminary or final trial witness lists. This number is sufficient to prepare for trial; any more would waste time and resources that could be put to better use during the accelerated pretrial discovery period.

The Plaintiffs have also proposed that the Defendants bring their employees whose depositions have been noticed to this District within ten days of the notice being issued. The Defendants have offered to try in good faith to make their employees available, but have said that they cannot commit because of scheduling conflicts that are difficult to predict and manage. But the Defendants cannot have it both ways; they are seeking an extremely expedited schedule and have already begun issuing extensive pretrial discovery requests. They are likely to put forward defenses, including a proposed divestiture remedy and arguments about efficiencies, that the Plaintiffs have had very little opportunity to investigate. In order to develop a robust record for the Court to make an informed decision, the Plaintiffs need to be able to schedule Party depositions in a predictable way, which requires certainty as to when and where noticed depositions will be held.

6. THIRD PARTIES

The Defendants have proposed language that would alter the obligations of recipients of subpoenas under Rule 45 and impose substantial burdens on third parties. For example, the Defendants have proposed that the Court order third parties to provide written objections within 8 days after a subpoena is served, when Rule 45(d)(2)(B) allows for 14 days. The Defendants have been unable to identify any authority empowering the Court to impose burdens on third parties above and beyond what is required by Rule 45. At the very least, all third parties would

need to be sent copies of the Scheduling and Case Management Order along with their subpoenas; if they are not alerted to their amended obligations, they may unwittingly waive the right to respond.

7. EXPERT WITNESS DISCLOSURES

Plaintiffs' Proposed Language:

> A. Expert disclosures, including each Party's expert reports, shall be conducted in accordance with Federal Rule of Civil Procedure 26(a)(2) and 26(b)(4), except that neither the Plaintiffs nor the Defendants must preserve or disclose, including in expert deposition testimony, the following documents or information:
>
> (a) any form of oral or written communications, correspondence, or work product not relied upon by the expert in forming any opinions in his or her final report shared between any Party's counsel and its experts or between any agent or employee of Party's counsel and the Party's experts, between testifying and non-testifying experts, between non-testifying experts, or between testifying experts;
>
> (b) any form of oral or written communications, correspondence, or work product not relied upon by the expert in forming any opinions in his or her final report shared between experts and any persons working at the direction of and assisting the expert;
>
> (c) the expert's notes, except for the expert's fact-witness interview notes relied upon by the expert in forming any opinions in the expert's report;
>
> (d) drafts of expert reports, affidavits, or declarations; and
>
> (e) data formulations, data runs, data analyses, or any database-related operations not relied upon by the expert in forming any opinions in his or her final report.

Explanation: The Parties have agreed to exclude from discovery certain categories of information used by their experts. The Defendants have proposed adding language to paragraphs (a) and (b) above, creating broad exclusions that would undermine each side's need for effective

expert discovery. The Defendants seek to withhold "unrelated portions" of even those documents that their experts have relied upon. Their added language would remove from the scope of expert discovery not only stray pieces of paper in a file folder, but would also justify redacting parts of emails or other documents or withholding pieces of data work that are necessary to understand the context of the experts' work.

CONCLUSION

The Plaintiffs respectfully request that the Court enter the attached Scheduling and Case Management Order.

Dated: August 11, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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