IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *et al.*, *Plaintiffs*, v. AETNA INC., and HUMANA INC., *Defendants*.	Civil Action No. 1:16-cv-1494-JDB

NOTICE OF SUBMISSION TO THE SPECIAL MASTER OF PLAINTIFF UNITED STATES' OPPOSITION TO DEFENDANTS' MOTION FOR SANCTIONS AND CROSS-MOTION FOR A PROTECTIVE ORDER

Pursuant to the Order appointing the Hon. Richard A. Levie (Ret.) as Special Master (Dkt. No. 53, August 11, 2016), the United States hereby gives notice that Plaintiff United States' Opposition to Defendants' Motion for Sanctions and Cross-Motion for a Protective Order will be submitted to Special Master Levie for his consideration. A copy of the Response in Opposition to Defendant's Motion and the United States' Cross-Motion is attached as Exhibit A.

Date: October 8, 2016

Respectfully submitted,

/s/ Peter J. Mucchetti

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CERTIFICATE OF SERVICE

I hereby certify that on October 8, 2016, a true and correct copy of the foregoing was served on all counsel of record via the Court's CM/ECF system.

Date: October 8, 2016

/s/ Peter J. Mucchetti

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EXHIBIT A

Plaintiff United States' Opposition to Defendants' Motion for Sanctions and Cross-Motion for a Protective Order

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *et al.*, *Plaintiffs*, v. AETNA INC., and HUMANA INC., *Defendants*.	Civil Action No. 1:16-cv-1494-JDB Submitted to the Special Master, The Hon. Richard A. Levie (Ret.)

PLAINTIFF UNITED STATES' OPPOSITION TO DEFENDANTS' MOTION FOR SANCTIONS AND CROSS-MOTION FOR A PROTECTIVE ORDER

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The United States submits this brief (i) in opposition to Defendants Aetna Inc. and Humana Inc.'s (collectively, "Defendants") motion for sanctions pursuant to Fed. R. Civ. 37(b)(2) or this Court's inherent powers; and (ii) in support of the United States' cross motion for a Protective Order pursuant to Fed. R. Civ. P. 26(c)(1) to deem the United States' response to the subpoena Defendants served on the Department of Health and Human Services ("HHS") on July 29, 2016 (the "Subpoena"), complete under Fed. R. Civ. P. 26.

INTRODUCTION

Defendants' motion for sanctions is a transparent attempt to derail the United States' merger challenge before the District Court ever hears from a single witness or reviews any evidence. Although Defendants characterize the relief they demand as "modest" and "limited," their chosen sanctions—which include having the Court draw an adverse inference that "CMS views Medicare Advantage as part of the same product market as Original Medicare" and precluding the United States from calling any CMS employees as witnesses or even introducing any CMS documents into evidence—are extraordinary. Defendants' efforts must be viewed as nothing more than a ploy to shield themselves from evidence that Original Medicare and Medicare Advantage are not part of the same relevant product market and that the merger is unlawful. Such sanctions, far from being modest, are precisely the kinds of case-altering sanctions that courts in this Circuit have reserved for only the most flagrant cases of misconduct and have been imposed only after a substantial showing of prejudice. There is simply no evidence of any misconduct, much less flagrant misconduct, or indeed of any prejudice, here. Although Defendants spend 39 pages attempting to concoct a narrative that supports their claims of "deliberate" misconduct and the resulting prejudice, Defendants' rhetoric cannot mask the overwhelming evidence of the United States' good faith conduct throughout the extraordinarily

accelerated discovery process or the fact that Defendants' claimed prejudice is illusory. Indeed, Defendant's own motion reveals what really undergirds their strategy to secure these sanctions: they ultimately hope that a finding that Original Medicare is in the same product market as Medicare Advantage would cause the United States' claims to "largely—if not entirely—collapse." Defendants' Motion for Sanctions ("Def. Mot.") at 2. Defendants should not be permitted to exploit the rapidity of the discovery process that they demanded or advance specious claims of misconduct and harm as supposed bases for sanctions so broad, unwarranted, and potentially preclusive of the public interests this suit was brought to vindicate.

First, the United States has not engaged in any deliberate or bad faith attempt to deny Defendants access to the data and documents sought by the Subpoena. It was Defendants who demanded a highly expedited trial schedule—one that originally called for trial beginning this month—purely to serve their commercial self-interests. Notwithstanding the schedule, Defendants then chose to serve a broad and extremely burdensome discovery demand upon HHS. In response, the United States promptly produced, in August, vast quantities of HHS data—which Defendants then indicated was their top priority but now omit mention of from their motion—and initiated a "go get it" collection of responsive documents from relevant custodians that was consistent with HHS's historical discovery practices and could have been completed in the first part of September. But instead of working with the United States to refine this targeted approach that properly reflected the compressed discovery schedule, Defendants brought the "go get it" collection to a halt, and, in the face of the United States' repeated objections and warnings, convinced this Court to order an expansive forensic collection from twenty custodians across different HHS components, most of whom work in sensitive policy-making positions that by definition implicate HHS's deliberative process privilege.

As soon as this Court ordered the requested forensic collection, which resulted in the collection of millions of documents, the ability of the United States to complete a document-by-document review in the few weeks provided for production vanished. However, instead of working with the United States to devise a reasonable plan to address the obvious impossibility of individually reviewing millions of documents for responsiveness and privilege in a matter of days, Defendants consistently took the position that it was the United States' problem to solve. After determining that the use of predictive coding was not feasible given the lack of time necessary to train the software (and which would have still yielded an impossibly large quantity of documents requiring privilege review), the United States was forced to use other electronic means to review and produce documents on the timeline imposed by the Court. Through a Herculean effort, and at great cost, the United States did just that, completing productions of more than 800,000 documents from all 20 custodians by late September, applying reasonable means to initially screen documents for privilege, and producing an additional 600,000 documents after further attorney review. Although the process has been necessarily imperfect, the record overwhelmingly demonstrates the United States' good faith effort to produce documents under the exceedingly difficult circumstances Defendants created.

Second, Defendants' suggestion that the United States' conduct has inflicted "serious prejudice" and left Defendants unprepared for trial is unsupportable. This Court specifically directed the Defendants to file a revised motion to compel that provided "chapter and verse" to justify their request to force the turnover of HHS documents the United States was withholding on privilege grounds. See Hearing Tr. at 24:17-25:6 (Sept. 29, 2016) (Levie). Yet, as throughout this process, Defendants have failed in their restyled sanctions motion to identify any

specific information they are seeking from this production. This is not surprising since, as Defendants' motion consistently neglects to mention, Defendants already have:

- The entire 8.6 GB universe of data that the United States collected during its 13-month investigation (and have had this material since August);
- Over 2.5 GB of additional HHS data and reports the United States produced pursuant to the Subpoena in four separate productions completed by mid-September;
- Hundreds of reports and data sets that HHS makes publicly available; and
- More than 1.4 million documents from all 20 of the agreed-upon HHS custodians.

This is all in addition to the more than 10 million documents from other sources that the United States produced from its investigative file and the extensive knowledge and documents Defendants have accumulated from their years of working closely with the Centers for Medicare & Medicaid Services (CMS) as two of the most sophisticated Medicare Advantage providers in the United States. There is simply no merit to the notion that Defendants' ability to defend themselves at trial rests on what lies in the e-mails and electronic documents of a small subset of HHS employees. Were it true that these documents could hold the lynchpin to their defense, Defendants presumably would have accepted the United States' repeated invitations to work cooperatively to refine the "go get it" collection that the United States identified as the quickest and most effective means to obtain the documents from these custodians.

The United States has now spent thousands of attorney hours and vast sums of taxpayer dollars to conduct the massive forensic collection and review that Defendants demanded and this Court ordered. This review has resulted in the United States: (1) producing more than 800,000 documents from all of the 20 custodians the parties agreed to by September 28; (2) using

electronic tools to review hundreds of thousands of other documents for deliberative process privilege and other privileges; and (3) producing more than 600,000 additional documents after further attorney review of documents that had been initially withheld as potentially privileged—bringing the total number of documents produced to over 1.4 million. The time and resources the United States has expended responding to the Subpoena well exceeds the "reasonableness" required by Rule 26. Accordingly, in addition to denying Defendants' motion, the United States cross moves for a protective order pursuant to Fed. R. Civ. P. 26(c)(1) declaring the United States' response to the Subpoena reasonable and ordering no further production.

BACKGROUND

A. At the Same Time the Defendants Seek a Mid-Fall Trial to Suit their Commercial Interests, They Serve an Expansive Subpoena Upon HHS

On July 29, 2016—two weeks before the District Court's August 12 entry of a Scheduling and Case Management Order and the opening of fact discovery—Defendants served a Fed. R. Civ. P. 45 subpoena (the "Subpoena") upon HHS. At the time they served the Subpoena, Defendants were seeking an October or November trial date from the District Court.[1] Defendants previewed for the District Court at an August 4 hearing their defense that traditional Medicare should be included in the same product market as Medicare Advantage—a defense which, if successful, they claimed would resolve the case in their favor.[2] They also made clear at

[1] See Status Hearing Tr. at 43:4-5 (Aug. 4, 2016) (Aetna counsel: "I think in the October-November period is the ideal time for this."). Defendants sought this schedule because, as they repeatedly advised the District Court, their merger agreement had a December 31 "drop dead" date, and it was uncertain as to whether this date could be renegotiated. See id. at 47:4-5 ("The issue is…we have a drop-dead date of the end of this year."); Status Hearing Tr. at 45:24-46:1 (Aug. 10, 2016) (Aetna counsel: "We certainly would urge the Court…to look at the fact that that date is there, and the date does have consequences."); Defendants' Position Statement Regarding the Timing of These Proceedings and Coordination with United States v. Anthem, Inc. ("Position Statement") ¶ 1 (Dkt. No. 31) (Aug. 2, 2016) ("Aetna and Humana believe that…commencing the trial in mid-fall would allow sufficient time for the Court to reach a decision before the parties' contractual deadline at the end of the year.").

[2] See Status Hearing Tr. at 41:17-23 (Aug. 4, 2016) (Aetna counsel: "[I]n terms of simplifying the trial…we think that when it that is apparent, that original Medicare belongs in that market, it's going to take care of virtually every market that is alleged…by the Department of Justice and move it outside of any ability to claim there is a

that hearing that their market definition defense, as is typically the case, would rely heavily on data and expert testimony.[3]

Despite the highly compressed trial schedule Defendants were seeking and the importance they attributed to data and expert evidence, the Subpoena they prematurely served on July 29 contained over 20 requests for production, many with multiple subparts, and included a litany of open-ended document and data requests reaching back over six years. For example, the document requests sought "all analyses, reports, memoranda, or spreadsheets" on a wide variety of topics, including the impact of CMS regulations on several aspects of Medicare Advantage plans; the effects of Star Ratings on beneficiaries and Medicare Advantage Organizations; the effect of enrollee characteristics on Star Ratings; analyses performed by CMS related to competition, plan selection, carrier participation, entry or exit, or switching among plans by consumers; and the provision of coordinated care to Medicare beneficiaries by Medicare Accountable Care Organizations. See Subpoena Requests No. 7, 8, 10, 11, 15, and 19.

Upon receipt of the Subpoena, the United States immediately contacted HHS to review the requests and then engaged with Defendants two days later. In an August 2 letter, the United States notified Defendants that even though the Subpoena had been improperly noticed under Rule 45 and was premature under the federal rules, the United States would "work cooperatively and expeditiously with [Defendants] to provide the discovery sought." See Declaration of Christopher M. Wilson ("Wilson Decl.") ¶ 4; Wilson Decl., Ex. 2 (Letter from Chris Wilson of DOJ to Christopher Thatch of Jones Day dated August 2, 2016).

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presumption of anticompetitive conduct."); see also Position Statement ¶ 1 ("Once the product market is properly defined to include original Medicare, the Government's case crumbles on its core claim.").

[3] 8/4/16 Status Hearing Tr. at 41:3-5 (Aetna counsel: "[W]e think, when we get into the economic data on that, it will show that original Medicare belongs on all of these product markets that the DOJ has alleged."); id. at 41:9-16 (Aetna counsel: "…I think that the information in particular that the economic experts will be able to add…will show that it's in that market. And we think that the expert testimony on that will be very helpful.").

Subject to its objections to, among other things, the overbroad, unduly burdensome, and disproportional nature of the requests, and the fact that those requests called for the production of clearly privileged information, the United States began a substantive response comprising two primary components: (1) the production of large quantities of HHS data; and (2) the anticipated collection of responsive documents from key custodians using a "go get it" approach.

B. The United States Prioritizes and Completes Substantial Productions of HHS Data in August After Defendants Identify HHS Data Production as Their Top Priority

The United States' first priority in responding to the Subpoena was to work with Defendants to narrow the Subpoena's extremely broad data requests and prepare large volumes of data for production. The Subpoena represented one of the broadest requests for data that HHS had ever received and the specific requests raised a host of technical and practical complications that HHS indicated could take months to resolve. See generally Wilson Decl. ¶¶ 2-3. Defendants' data requests sought literally billions of records from an array of HHS databases maintained in different locations that would take months to produce, if they could be properly extracted and produced at all. See, e.g., Wilson Decl., Ex. 5 (United States' Responses and Objections to Defendants' Notice of Subpoena to the Department of Health and Human Services dated August 8, 2016) (explaining that Request No. 5 sought "over 250 million records" and could take "in excess of 6 months" to respond to). Moreover, many of these databases contained highly sensitive information, including information that raised serious individual privacy concerns (*e.g.*, personally identifiable information (PII)) or competitively sensitive information, creating complications that would take significant time and effort to resolve (if they could be resolved). The United States repeatedly raised these issues with Defendants in the weeks after the Subpoena was served, and even made HHS IT representatives available to Defendants to

explain directly to Defendants the extensive complications and burden that the Subpoena's requests entailed. See Wilson Decl. ¶ 8.

At the same time, the United States recognized the importance of HHS data to the work of both parties' experts and worked diligently to prepare data for production to Defendants. The urgency and paramount importance of expediting this production was underscored by Defendants themselves, who made the production of HHS data the focus of correspondence and meet-and-confers with the United States in the two weeks following service of the Subpoena. See Wilson Decl. ¶ 13. This focus made sense given the importance of data to the issues in this litigation as Defendants had represented to the District Court.

The United States' efforts to quickly provide Defendants with HHS data proceeded on several fronts. First, DOJ worked diligently with HHS to prepare the HHS data in DOJ's investigative file—which represented the complete universe of data that DOJ had obtained from HHS during its investigation—for production. To this end, the United States completed an initial production to Defendants on August 15, a second production on August 18, and a final production on August 23. See Wilson Decl. ¶ 6. Thus, by August 23—ten days before the September 2 deadline set forth in the Scheduling and Case Management Order the District Court entered on August 12—the United States had produced to Defendants all the data it had obtained from HHS during its 13-month merger investigation. These productions included, among other things, Medicare market share data; nationwide Medicare Advantage enrollment data by county and plan year; total plan beneficiary cost data; Medicare beneficiary survey data; Medicare Supplemental plan enrollment data; Medicare Advantage plan Star Rating data; Medicare Advantage risk adjustment scoring; Exchange plan medical loss ratio data; historic Medicare Advantage insurer bidding data; and ASPE reports on ACA exchange plan choice, competition,

premiums, and enrollment. Wilson Decl. ¶ 6. Together, the United States' investigative file productions totaled approximately 8.6 GB of data.

The United States also affirmatively directed Defendants to the voluminous data sources and reports that HHS makes publicly available. For example, on August 18, the United States identified to Defendants over 20 publicly available data and document sources from CMS that contained information responsive to the Subpoena's requests and provided links to these materials. See Wilson Decl., Ex. 4 (E-mail from Chris Wilson of DOJ to Aaron Healey of Jones Day, dated August 18, 2016). These publicly-available databases and reports were important in light of the numerous complexities posed by extracting and producing data from several of HHS's non-public databases targeted by Defendants' requests.

Finally, the United States worked with HHS to produce substantial additional data beyond the material the United States collected during its investigation and what was publicly available online. Specifically, the United States produced 2017 Medicare Advantage insurer bidding data; information on Medicare Accountable Care Organizations; insurer Medical Loss Ratio data; Medicare Shared Savings Program information; reports on Bundled Care Payment Initiatives; CMS brochures and publications on Medicare Advantage plans and benefits; ASPE reports on competition, beneficiary spending, Medicare Advantage Star Rating calculation methodology, and Medicare benefit offerings; and data underlying HHS reports on competition on the ACA exchanges. Wilson Decl. ¶ 9. The United States completed production of this material, totaling over 2.5 GB, in mid-September.

C. The United States Devises and Commences "Go Get It" Collection that Can Be Completed in First Half of September and Warns that a Forensic Collection Is Not Workable Under Defendants' Preferred Case Schedule

At the same time it was moving aggressively to make multiple productions of the data that both parties agreed was the top priority (productions Defendants' narrative entirely ignores), the United States worked closely with HHS to devise a collection and review plan to respond to the Subpoena requests that required the production of documents from the files of individual HHS personnel. As the United States informed Defendants, the United States believed that, consistent with the Scheduling and Case Management Order, it could complete its document production pursuant to this plan within approximately three weeks of identifying a set of relevant custodians and thus have all documents from this set of custodians produced to Defendants in the first half of September. See Wilson Decl. ¶ 15 & Ex. 9.

The United States began developing its plan to collect and review HHS documents as soon as it received the Subpoena even though it was not until August 12 that the Court set a discovery schedule or opened fact discovery. In early August, DOJ and HHS began internal discussions about appropriate custodians for this production. Given the broad nature of Defendants' requests and the fact that CMS alone comprises thousands of employees and over 20 distinct centers, offices, and other components, identifying an appropriate universe of custodians took several days. Wilson Decl. ¶ 11. This process resulted in an initial list of six custodians from ASPE and two from CMS, a universe that the United States believed was entirely appropriate given the compressed discovery and trial schedule the District Court established on August 12.

DOJ and HHS also discussed how documents would be collected and reviewed. From the start, the United States contemplated that HHS would use a "go get it" method to collect potentially responsive documents from the selected custodians. HHS had used this approach for many years and found it to be an efficient and reliable method to respond to discovery demands

on the agency. Pursuant to the "go get it" collection, HHS' Office of the General Counsel (OGC) would provide the selected custodians the list of documents sought, direct them to search their electronic and hard copy files and send all responsive docs to OGC, provide oversight over the collection, and then review the materials received from the custodians for privilege and production. Wilson Decl. ¶ 14.

HHS's use of the "go get it" collection method also reflected several practical considerations. As a small office with limited resources, OGC did not historically have the budget or the IT infrastructure to oversee a sizable or expedited forensic collection of documents. Additionally, many of HHS's documents contain highly sensitive information irrelevant to this litigation. HHS' documents also are often protected from disclosure under the deliberative process and other privileges. These issues made it burdensome and difficult to manage an enormous document production under a very short deadline. Consequently, using the "go get it" collection was an appropriate approach because it would have returned a significant portion of the most responsive and relevant documents in a reasonable timeframe as opposed to forensic collection methods that often harvest large quantities of non-responsive documents. Wilson Decl. ¶¶ 14, 15. The use of a "go get it" collection also was reasonable in light of Aetna's representation that it used a similar collection method for certain of the United States' discovery requests. See, e.g., Hearing Tr. 59:5-60:14 (Sept. 11, 2016) (Aetna's counsel: "[T]hose are go-gets . . . it is not predictive coding, but it is a method that is attorney-supervised….And we confirmed that we fulfilled our responsibilities under Rule 26 to produce the responsive documents. It is not search terms.").

Although Defendants now ascribe "critical[] important[ce]" to the HHS documents (see Def. Mot. at 1), they conspicuously omit that at no point during the first two weeks of August did

they inquire about custodians, the process the United States intended to use for the HHS document collection, or the progress of the custodian-based collection and review more generally. Wilson Decl. ¶ 13. On a meet-and-confer on August 18, the United States affirmatively presented Defendants with a plan to collect documents from the files of eight custodians from the office of the Assistant Secretary for Planning and Evaluation (ASPE) and from CMS. Wilson Decl. ¶ 13. The United States informed Defendants that HHS estimated being able to complete this collection in approximately three weeks, and confirmed both the scope of the collection and the anticipated timing in writing the next day. See Wilson Decl. ¶ 13 & Ex. 9 (E-mail from Chris Wilson of DOJ to Aaron Healey of Jones Day dated August 19, 2016). On the August 18 meet-and-confer, the United States also highlighted the Scheduling and Case Management Order's instruction that productions "following resolution of objections and custodians" were to be completed "on a rolling basis with a good-faith effort to be completed no later than 21 days after resolution," and that the 21-day clock thus started after agreement on custodians. See Scheduling and Case Management Order ¶ 14.D.

Even though Defendants had not yet agreed to a list of custodians, DOJ worked with HHS OGC to initiate the "go get it" collection process from the initial eight custodians with the internal goal of having all documents collected for DOJ review and production by September 2. Wilson Decl. ¶ 16. Over the next several days, the United States, at Defendants' request, provided additional information about its proposed custodians. Wilson Decl. ¶ 16. On August 22, the United States notified Defendants that its document collection from the custodians was underway. Wilson Decl. ¶ 16 & Ex. 10 (E-mail from Chris Wilson of DOJ to Aaron Healey of Jones Day dated August 22, 2016).

On August 23, Defendants articulated concerns about United States' use of a "go get it" collection on a meet-and-confer call and raised the possibility of the United States performing a forensic collection. Wilson Decl. ¶ 17. The United States immediately explained that neither DOJ nor HHS OGC had the resources to conduct and complete a forensic collection on the compressed timetable Defendants had demanded. See Wilson Decl. ¶ 17. At Defendants' request, the United States agreed to provide additional detail about the "go get it" collection in writing so it could work with Defendants to address any concerns. See Wilson Decl. ¶ 17.

Defendants also indicated on August 23 that they wished to add additional custodians to the search, including custodians from several additional offices and departments within CMS, and asked the United States to identify supplemental custodians. Wilson Decl. ¶ 18. Although HHS had concerns that adding custodians in different offices would further complicate efforts to quickly collect, review, and produce documents, the United States worked in good faith to devise a proposal that addressed Aetna's request while balancing practical considerations about timing and burden. Wilson Decl. ¶18. The United States' efforts culminated in a proposal to add new custodians from the Center for Medicare and Medicaid Innovation, the Center for Medicare, the Center for Consumer Information and Insurance Oversight (CCIIO), and the Office of the Actuary, which increased the total number of custodians from 8 to 12. Wilson Decl. ¶ 20.

On August 25, the United States provided Defendants with the detailed written description of the "go get it" collection method it had initiated. In the description, the United States outlined the contours of the search, the extensive oversight that HHS OGC would provide, and HHS's willingness to "certify to the Court that each custodian understood their discovery obligations, conducted a thorough and diligent search for any and all documents responsive to each request, specify the details of how the search was conducted and affirm that no responsive

documents are being withheld on grounds other than applicable privileges." Wilson Decl. ¶ 19 & Ex. 11 (E-mail from Chris Wilson of DOJ to Aaron Healey of Jones Day dated August 25, 2016). The United States warned again that the "go get it" approach represented the only viable option because "[HHS] does not have the IT resources (either internally or through a contractor) or legal staffing in place to conduct hard drive pulls and email folder searches, etc. in the 2-3 week response time set out in each action's case management order or even by the close of fact discovery in either action." Wilson Decl., Ex. 11.

Defendants' response to these clear and repeated warnings was to run to the Court to seek to shut down the United States' "go get it" collection and to drastically expand its scope. On August 26, Defendants informed the United States that, in their view, the parties had reached an "impasse" on the proposed collection method, but nonetheless posed additional questions about how it would work. Wilson Decl., Ex. 12. At the same time, Defendants proposed, again for the first time, adding 19 additional custodians spanning numerous additional HHS components to the collection, bringing the total universe of custodians to 31, "subject," Defendants indicated "to possible, further supplementation." Wilson Decl., Ex. 12.

With Defendants threatening to dramatically expand the parameters of the collection and review, the United States attempted again to work in good faith to address Defendants' concerns. Later on August 26, the United States offered to have Defendants "supply the search terms for each request and the parameters for the search (in terms of places to be searched)" and repeated its prior assurances about HHS OGC's oversight of the process and willingness to provide written certifications. Wilson Decl, Ex. 12 (E-mail from Chris Wilson of DOJ to Aaron Healey of Jones Day dated August 26, 2016). The United States also agreed with Defendants to increase

the universe of custodians from 12 to 19 (a number that later increased to 20 when accounting for one custodian's predecessor).[4] See Wilson Decl. ¶ 24.

Defendants rejected the United States' attempts to address their concerns about the "go get it" collection method and, on August 29, urged this Court to impose a forensic collection in the face of the United States' repeated objections and warnings. The Court agreed and, that day, directed the United States to initiate a forensic collection.

D. After Defendants Insist Upon Forensic Collection, the United States Attempts in Good Faith to Comply Without Cooperation from Defendants

1. After Document Collection Reveals that Predictive Coding Cannot Be Completed in the Time Allotted, the United States Uses Alternative Means to Produce Documents to Defendants as Quickly as Possible

In response to the Special Master's August 29 order, the United States immediately initiated a forensic collection from the 20 custodians. The forensic collection was a complicated and time consuming process that required the United States to work with two IT vendors and custodians located in seven different offices or departments, including in Washington, D.C.; Bethesda, Maryland; Baltimore, Maryland; and Santa Ana, California, to identify and image responsive sources of emails and non-e-mail electronic files. See Wilson Decl. ¶ 25. The United States received the electronic materials collected from the custodians in tranches starting in early September and concluding on September 15. See Wilson Decl. ¶ 25. Once collected, the materials had to be loaded onto DOJ's document review platform, Relativity, a process that took an additional time for each tranche. By the time the United States had completed the forensic collection on September 15, it had collected more than 780 GB of data and almost 3.9 million records. Declaration of Tracy Greer ("Greer Decl.") ¶ 14.

[4] This predecessor custodian was Richard Frank, who was later named on the United States' initial fact witness list.

Although the United States—like Defendants and the Court—would have preferred to use predictive coding to facilitate the forensic collection and review, it determined that predictive coding was not feasible under the compressed schedule for production. As explained in the accompanying declaration from Tracy Greer, the Antitrust Division's Senior Counsel for Electronic Discovery, predictive coding requires a large investment of time before the review process even begins in order to achieve the smaller, more relevant productions that predictive coding promises; substantial quality control and sampling after the process has been completed; and additional time to export and duplicate the productions. See generally Greer Decl. ¶ 9. In addition, certain aspects of the HHS collections in particular posed additional challenges. See Greer Decl. ¶ 11. All of these considerations taken together rendered it impossible to perform predictive coding on the three-week timetable the Court imposed for the first major production. Greer Decl. ¶ 12. Additionally, the use of predictive coding would have in no way eliminated the need to review large volumes of documents for deliberative process and other privileges. Greer Decl. ¶ 13. Thus, even if the United States had somehow been able to use predictive coding to review documents for responsiveness, it would still have had to develop a process to screen large volumes of documents for privilege.

As the United States proceeded with the forensic collection, it kept Defendants apprised of the progress and the United States' mounting concerns about the resulting volumes of documents. For example, on September 6, the United States indicated to Defendants' counsel that it had "an early email/attachment count" for one custodian of "40,400 emails and attachments in the specified date range." Wilson Decl, Ex. 13 (E-mail from Chris Wilson of DOJ to Aaron Healey of Jones Day dated September 6, 2016). The United States warned that applying this count across the full set of custodians "suggest[ed] there are at least 750,000 emails

and attachments" and that "[t]he total number of documents should grow as other sources are pulled in." See Wilson Decl, Ex. 13. Similarly, on September 7, the United States informed Defendants on a meet-and-confer that the initial pull of e-mails for 10 custodians alone had returned in 1.1 million documents. Wilson Decl. ¶ 26.

Once the United States got a handle on the massive size of the document universe, it notified Defendants that predictive coding could not be completed in the limited time available for production. Specifically, on September 6 and 7, the United States informed Defendants that the United States lacked adequate time to utilize predictive coding and was therefore forced to switch to the use of search terms to screen for responsive documents. See Wilson Decl, ¶ 27 & Ex. 13. The United States provided Defendants an initial list of terms it planned to use to narrow the document universe, but invited Defendants to provide any suggestions or offer additional terms. Wilson Decl. ¶ 27, Ex. 13. The Defendants proposed a modified list of terms on September 11. See Wilson Decl. ¶ 28, Ex. 14 (E-mail from Aaron Healey of Jones Day to Peter Mucchetti of DOJ, dated September 11, 2016). Although the United States attempted to utilize these terms, it discovered that, for purely technical reasons, many of Defendants' search strings would not run properly on Relativity, the United States' document review platform. Danks Decl. ¶ 4. Accordingly, the United States modified the search terms in ways that could run in Relativity while capturing a universe of documents no narrower than the ones that Defendants had proposed. Danks Decl. ¶ 4.

The United States also brought its mounting concerns to the attention of the Court. At a hearing on September 11, the Court instructed the United States to start getting documents for production to Defendants, telling the United States to "get it done. And it doesn't matter what you have to do to do it." Hearing Tr. 35:25-26:4 (Sept. 11, 2016) (Levie). Following the

conference, on September 19, the Court entered an order requiring the United States to produce documents from certain ASPE custodians on September 20 and 21; produce documents from 12 CMS custodians on September 23; and produce the remaining documents on September 26. See Special Master Order #3 (Dkt. No. 125) (September 19, 2016).

On September 20, the United States produced documents from all six ASPE custodians other than documents withheld for privilege review. This totaled more than 170,000 documents. Greer Decl. ¶ 15. As the United States explained to Defendants, the productions included the complete forensic collections of non-privileged documents from these custodians because there was not sufficient time to adapt the search terms into a workable form on Relativity before the time required for production. Danks Decl. ¶ 5. On September 23, the United States produced an additional 155,000 records from eleven additional CMS custodians. Greer Decl. ¶ 15. And on September 27 and 28, the United States produced non-privileged documents from the forensic collection of the remaining custodians from CMS. This production totaled nearly 500,000 documents. Greer Decl. ¶ 19.

Thus, by September 28, the United States had produced to Defendants hundreds of thousands of e-mails and other electronic documents from all 20 custodians other than the documents that were undergoing further privilege review.

2. The United States Develops a Privilege Review Process that Balances the Requirements of Rule 26 with the Impossibility of a Document-by-Document Review

At the same time it was preparing documents for production, the United States was developing a method to review for privilege the massive universe of documents that Defendants' forensic collection had returned. This task took on particular importance because many of the ASPE and CMS custodians targeted by Defendants' discovery demands were likely to have large

volumes of highly-sensitive documents protected by the deliberative process privilege, as well as the attorney-client privilege and the work product doctrine. As the United States repeatedly emphasized to Defendants and the Court, it was impossible to have attorneys individually review over a million documents for privilege on the timetable imposed for production. Accordingly, the United States, in consultation with HHS OGC, devised, and repeatedly refined, an electronic search term process to screen out documents most likely to be privileged and then supplemented this with extensive attorney review to ensure, to the extent practicable, that responsive, non-privileged documents were not being withheld. Danks Decl. ¶ 7.

The electronic search term process captured large quantities of documents, many of which were non-responsive due to the limited search terms that were applied to the forensic collections. The United States repeatedly sought Defendants' assistance in refining the search terms or otherwise focusing the search to decrease the universe of documents that required further privilege review. Defendants consistently rebuffed these requests, however, claiming that it was "incumbent on the Division to identify or propose, in the first instance, specific – rather than abstract – means to cull out relevant materials." Danks Decl. ¶ 6, Ex. 2 (E-mail from Aaron Healey of Jones Day to Ryan Danks of DOJ, dated September 26, 2016). Left with the unworkable universe of documents Defendants' forensic search created, the United States supplemented the electronic search terms with substantial additional review by DOJ attorneys. Danks Decl. ¶ 7. This review has resulted in supplemental productions of more than 600,000 documents, bringing the total production to more than 1.4 million documents. Danks Decl. ¶ 9.

The Division also engaged in extensive good faith efforts to comply with the Court's order to produce a final privilege log on October 7. To this end, DOJ attorneys used the "clustering" function of Relativity (which uses analytics search tools to create groups of

conceptually similar documents) to group documents discussing similar topics. Danks Decl. ¶ 8. The United States' logs were also itemized by custodian, file name, and relevant email information for each document that continues to be withheld. Danks Decl. ¶ 8.

Although the United States believed that its privilege review and logging efforts satisfied Rule 26, at the Court's request, DOJ approached HHS in late September and obtained HHS's consent to make large quantities of the remaining documents that are being withheld on privilege grounds available in a "clean room." Danks Decl. ¶ 10. The United States provided the details of this "clean room" proposal to Defendants and the Court on September 29. See Danks Decl. ¶ 10, Ex. 3 (E-mail from Ryan Danks of DOJ to Geoffrey Irwin of Jones Day, dated September 29, 2016). On October 4, the United States offered to modify the "clean room" proposal to address concerns the Court raised during a telephonic conference. Danks Decl. ¶ 10.

Defendants rejected this extraordinary proposal to provide them access to hundreds of thousands of privileged documents, underscoring the fact that their priority has been this motion for sanctions, not access to the actual documents. See Hearing Tr. at 5:19 (Sept. 30, 2016) (Aetna's counsel: "[T]he proposal is simply unworkable").

ARGUMENT

As explained below, Defendants' motion for sanctions should be denied because Defendants fail to demonstrate either the misconduct or prejudice necessary to support the severe sanctions they seek. Moreover, in light of the United States' extensive efforts to comply in good faith with the Subpoena, the Court should grant the United States' cross motion for a protective order and deem the United States' Subpoena response sufficient under Rule 26.

I. Defendants Have Utterly Failed to Demonstrate that Sanctions Are Warranted Under Rule 37(b)(2) or Pursuant to this Court's Inherent Authority

Defendants have failed to establish that any sanctions, much less the severe sanctions that they request, are warranted under either Rule 37(b)(2)(A) or the Court's inherent authority. Rule 37 provides that if a party "fails to obey an order to provide or permit discovery," the court "may issue further just orders." Fed. R. Civ. P. 37(b)(2) (emphasis added). But the D.C. Circuit has repeatedly emphasized that "[t]he central requirement of Rule 37 is that any sanction must be just" and "guided by the concept of proportionality between offense and sanction." Bonds v. Dist. of Columbia, 93 F.3d 801, 808 (D.C. Cir. 1996) (internal quotation marks omitted). Severe sanctions are not appropriate unless failure to comply with a discovery order is due "to willfulness, bad faith, or any fault." Nat'l Hockey League v. Metro. Hockey Club, Inc., 427 U.S. 639, 640 (1976) (citation omitted). Moreover, the party seeking to impose severe sanctions must also demonstrate that "it has been so prejudiced by the misconduct that it would be unfair to require [the party] to proceed further in the case." Webb v. Dist. of Columbia, 146 F.3d 964, 971 (D.C. Cir. 1998); see also Bradshaw v. Vilsack, 286 F.R.D. 133, 140 (D.D.C. 2012). Defendants have failed to demonstrate that the United States acted in bad faith or prejudiced them in any way when it made reasonable attempts to comply with the Subpoena and the Court's orders in the limited time provided for the HHS production. Any failure by the United States to comply strictly with an order by the Court is the direct result of Defendants' insistence, over the United States' objection, on a full-scale forensic collection and production on an unworkable schedule and refusal to work cooperatively to navigate the impossible situation the forensic collection created.[5] Accordingly, no sanctions are warranted, let alone the severe sanctions Defendants request, which would hamper the United States' ability to litigate key issues in the case and the District Court's ability to fairly and justly adjudicate these issues.

[5] Special Master Order No. 4 states that the United States' efforts to respond to Defendants' document requests do not waive the United States' objections to those requests being overbroad, unduly burdensome, and disproportional to the needs of this case or its accelerated schedule. Special Master Order No. 4 ¶6 (Dkt. No. 127) (Sept. 22, 2016).

a. Defendants' Proposed Adverse Inferences and Preclusion of Witnesses and Evidence Plainly Qualify as Severe Sanctions Under Rule 37

Defendants' requested sanctions would have a substantial effect on major disputed issues in this litigation and easily qualify as "severe" under the law of this Circuit.[6] As the D.C. Circuit has explained, any "discovery sanction that results in a one-sided trial . . . is a severe one." Bonds, 93 F.3d at 809. Each sanction Defendants request would effectively deprive the District Court of information necessary to decide central fact issues, leaving the trial "one-sided" in Defendants' favor.

Defendants first ask the court to make the adverse inference "that CMS views Medicare Advantage as part of the same product market as Original Medicare." Def. Mot. at 33. Defendants claim now that this adverse inference is "modest and limited," id. at 34, but have previously argued that the United States' "case [would] crumble[] on its core claim" if they successfully prove that Original Medicare is in the same product market as Medicare Advantage. See Position Statement ¶ 1. Like the inappropriate preclusion order at issue in Bonds, this inference would "approach[] a default judgment in its severity." Id. at 808. Similarly, whether CMS would approve Defendants' proposed transfer of their Medicare Advantage contracts with CMS to Molina, *see* Def. Mot. at 33, is also a central issue to the case. Defendants have asserted as a defense to their illegal merger that they will transfer to Molina a patchwork of the defendants' contracts with CMS and the associated responsibility for insuring seniors in counties harmed by the merger. But the parties cannot accomplish those transfers unless CMS approves them – which it may not – and therefore Defendants seek to use their sanctions motion as a

[6] One request of Defendants does not fall into the category of extreme sanctions: the request that "CMS-related fact discovery should be extended until at least October 26." Def. Mot. at 38. The United States agreed with Defendants that this deadline could be extended to October 26, and this Court ordered the extension on October 7. See Special Master Order #5 (Dkt. No. 137) (Oct. 7, 2016).

vehicle to avoid the District Court's determination of whether the parties will be able to complete the transfer of contracts to Molina.

Defendants have also asked the Court to preclude the testimony of CMS witnesses and the introduction of CMS documents by the United States, see Def. Mot. at 21, but "preclusion of evidence is an extreme sanction," Richardson v. Korson, 905 F. Supp. 2d 193, 200 (D.D.C. 2012). Such a sanction would deprive the District Court of important testimony and evidence. For example, as previously disclosed to Defendants, the United States anticipates calling as a witness Richard Frank, a Special Advisor to Secretary Sylvia Mathews Burwell of HHS, and who previously served as the Assistant Secretary for Planning and Evaluation at HHS. Dr. Frank is also Margaret T. Morris Professor of Health Economics at Harvard University Medical School and a Research Associate at the National Bureau of Economic Research. Dr. Frank is expected to testify about the Medicare Advantage and Health Insurance Marketplace programs, including the differences between these programs and other health insurance offerings and how competition operates in these programs. As an expert with deep knowledge about the Medicare Advantage and Marketplace programs, Dr. Frank is ideally suited to explain how these programs are structured and the importance of competition to the success of these programs. Excluding Dr. Frank would deprive the District Court of valuable testimony from a former Assistant Secretary and prevent the Court from directing any questions to this government expert. Similarly, Defendants' request that the United States be precluded from introducing any CMS documents into evidence would deprive the Court of valuable information and create the unjust and "one-sided" situation where Defendants could introduce documents as exhibits from the voluminous documents that the United States has produced while the United States would be precluded from introducing documents from the very same sources.

b. **Defendants Fall Far Short of Meeting the Exacting Standards that Rule 37 Requires for the Imposition of Severe Sanctions**

Defendants have failed to prove any of the severe sanctions they request are warranted. Because a sanction must be "just" and "proportional[]" to the offense, Bonds, 93 F.3d at 808, "in cases involving severe sanctions," the court must "consider whether lesser sanctions would be more appropriate for the particular violation," id. And, in addition to having to show bad faith, the party seeking sanctions bears the burden of presenting evidence that it suffered "undue prejudice." Amersham Pharmacia Biotech, Inc. v. Perkin-Elmer Corp., 190 F.R.D. 644, 648-49 (N.D. Cal. 2000) (internal citations omitted), which must be shown through citations of "specific facts demonstrating actual prejudice," *Bradshaw,* 286 F.R.D. at 140-41 (emphasis added). Defendants' rhetoric cannot make up for their failure to meet these exacting standards.

In fact, the very cases Defendants cite demonstrate the much more egregious sort of conduct that courts require before they will impose the kinds of extreme sanctions sought here. For instance, Defendants rely heavily on Parsi v. Daioleslam, see Def. Mot. at 19, 20, where the sanctioned parties "engaged in a disturbing pattern of delay and intransigence" over the course of three years, including "misrepresent[ing] to the District Court that they did not possess key documents," refusing to present hard drives for forensic analysis, "flout[ing] multiple court orders," and altering documents. 778 F.3d 116, 118-25 (D.C. Cir. 2015). Only after the sanctioned parties refused to produce key computer drives for more than a year did the court award sanctions under Rule 37(b)(2)(A). Similarly, in DL v. District of Columbia, also cited by Defendants, see Def. Mot. at 19, 21 & n.6, the district court awarded sanctions only after "repeated, flagrant, and unrepentant failures to comply with Court orders." 274 F.R.D. 320, 326 (D.D.C. 2011). It emphasized that the case presented a "discovery violation of [] exotic

magnitude" that was "literally unheard of in this Court." Id. at 321-22. Defendants have shown nothing of the sort here.

i. **The United States Acted in Good Faith to Comply with the Court's Orders of August 29 and September 19**

In stark contrast to those extreme cases where courts have found severe sanctions were appropriate, the United States here has made extensive good faith efforts over the last several weeks to collect and produce documents to Defendants (in addition to the vast quantities of data the United States produced before the production of documents began). Before the Court ordered a forensic collection, the United States reasonably devised and initiated a "go get it" collection from eight HHS custodians to comply with the Subpoena. When the Court ordered on August 29 that the United States switch gears and complete a forensic collection (despite the United States' objections), the United States did just that. The United States also would have employed predictive coding as the Court had envisioned if that method of review could have been completed in the time minimal available for production. But because using predictive coding would have resulted in productions well after the Court's deadlines, see generally Greer Decl. ¶¶ 11-12, the United States devised a reasonable alternative strategy to produce documents in the timetable established by the Court, heeding the Court's instruction to "get it done. And it doesn't matter what you have to do to do it." Hearing Tr. 35:25-26:4 (Sept. 11, 2016) (Levie).

Moreover, all the events Defendants have pointed to occurred within a very short time frame. Even if Defendants had shown a violation, any such violation must "be evaluated in the context of the demands that the plaintiffs' discovery requests placed on defense counsel within a strict pre-trial schedule set by the district court." Bonds, 93 F.3d at 812. Because there has been no discovery violation of the sort that "reflect[s] either an attack on the integrity of the court or an attempt by the [plaintiff] to gain an unfair tactical advantage," severe sanctions such as an

adverse inference on a central fact or preclusion of key witnesses or other evidence would be

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The United States also made all reasonable efforts to comply with the September 19 order that it produce documents from all of the HHS custodians by September 26 (and documents from a subset of these custodians on September 20, 21, and 23). The United States made substantial productions from these custodians on the dates the Court ordered, with the exception that due to technical difficulties, the September 26 production was delayed until September 27 and 28. By September 28, the United States had produced more than 800,000 documents from all 20 custodians—hardly "an attack on the integrity of the court" or "pattern of delay and intransigence." Parsi, 778 F.3d at 118. Although the United States withheld significant numbers of documents for privilege review, it was entirely appropriate to protect HHS's legitimate interest in protecting privileged information, a right that the Case Management Order acknowledges. See Scheduling and Case Management Order ¶ 14.G ("This Order is not intended to impose on a Party a waiver of its rights to review its documents for privilege or any other reason (including to identify non-responsive documents) and the existence of this Order cannot be used to compel a Party to produce documents without review."). Moreover, the large number of documents that were caught in this review is entirely a byproduct of Defendants' insistence on a forensic collection and refusal to work with the United States to narrow the universe of documents. And the United States has worked in good faith to substantially narrow the universe of withheld material, subjecting substantial quantities of withheld documents to attorney review and making supplemental productions of responsive documents that this review identified as not privileged. In light of the compressed timeframe for review and the volume of documents, the electronic review that the United States has employed has been a reasonable

means of segregating likely privileged documents and certainly does not constitute any "flagrant or egregious" action by the United States. Bonds, 93 F.3d at 809.

ii. **Defendants Suffered No Specific Prejudice as a Result of the Manner in which the United States Has Responded to Defendants' Overbroad Discovery Requests**

Also fatal to Defendants' request for sanctions is the lack of any specific prejudice flowing from the alleged discovery violations. As previously detailed, the United States produced to Defendants more than 10 million records from its investigative file, all the data that the United States received from HHS during the its merger investigation, extensive amounts of additional data that Defendants requested in the Subpoena, and hundreds of thousands of documents from the 20 agreed-upon custodians. In addition, the United States has identified extensive guidance, data, and other public materials to Defendants concerning HHS policies, programs, studies, and analyses. The United States will also disclose, in due course, all materials that its experts rely upon, and defendants will have the opportunity to depose the United States' experts. Finally, Defendants have years of experience with the Medicare Advantage and Marketplace programs and interacting with CMS. Given the extensive materials produced by the United States from HHS and other sources, and the additional materials at the Defendants' disposal, they are not prejudiced in their ability to litigate any issue in this case. Indeed, Defendants fail to explain with any particularity what information they still lack—or offer any "specific facts demonstrating actual prejudice," Bradshaw, 286 F.R.D. at 140-41— a failure that is unsurprising given the enormous quantity of documents and data they already have.

c. For Similar Reasons, Sanctions Are Inappropriate Under the Court's Inherent Authority

Defendants also assert that sanctions should be awarded pursuant to the court's "inherent power," Def. Mot. at 18, but that argument fails for similar reasons. According to the D.C.

Circuit, severe sanctions are not appropriate unless there is: (1) prejudice to the other party, (2) prejudice to the judicial system requiring the district court to modify its own docket and operations to accommodate the delay, and (3) the need to sanction conduct that is disrespectful to the court and to deter similar conduct in the future." Butera v. District of Columbia, 235 F.3d 637, 661 (D.C. Cir. 2001) (quoting Webb v. District of Columbia, 146 F.3d 964, 971 (D.C. Cir. 1998). Moreover, for severe sanctions, "a finding of bad faith is required for sanctions under the court's inherent powers." United States v. Wallace, 964 F.2d 1214, 1219 (D.C. Cir. 1992). Defendants must prove these requirements with clear and convincing evidence. Shepherd v. ABC, 62 F.3d 1469, 1477 (D.C. Cir. 1995). Because the United States acted in good faith to comply with the Court's discovery orders, and Defendants have not demonstrated any prejudice, they cannot satisfy their burden of showing that the Government engaged in misconduct warranting the court to exercise its inherent authority to issue sanctions.

II. The United States Is Entitled to a Protective Order Declaring the Production and Privilege Review Process Sufficient for Purposes of Rule 26

a. The Forensic Collection and Review Defendants Demanded Rendered their Subpoena Overbroad, Unreasonable, and Disproportionate to the Needs of the Case

The expansive forensic collection and review of millions of HHS documents on the expedited discovery schedule imposed in this case has far exceeded the bounds of reasonableness and the requirements for proportionality in this case. As courts have observed, "[i]t is well established that discovery has limits and that these limits grow more formidable as the showing of need decreases." O'Toole v. Sears Roebuck and Co., No. 11-c-4611, 2014 WL 1388660, at *3 (N.D. Ill. Apr. 10, 2014) (quoting United Air Lines, Inc. v. United States, 26 F.R.D. 213, 219 n.9 (D. Del. 1960)). And where "the party requests voluminous discovery where only a small fraction of the produced documents may be relevant," courts "frequently deny discovery."

United States v. Kellogg Brown & Root Servs., 284 F.R.D. 22, 36 (D.D.C. 2012). The need for reasonableness only increases where the available time for discovery is short. See Landwehr v. F.D.I.C., 282 F.R.D. 1, 4 (D.D.C. 2010) (denying plaintiffs' motion for expedited discovery because it was inconsistent with their request for broad discovery that would be "highly burdensome to the defendants").

Here, Defendants' demand that the United States complete a forensic collection and review of documents from 20 custodians in less than a month was neither proportional to the needs of the case nor supported by a substantial showing of need. As discussed above, at the time Defendants demanded the forensic production, the United States had already produced all of the data it had collected from HHS during its investigation of the Aetna-Humana merger, directed Defendants to numerous additional sources of publicly available HHS data and documents, and was preparing substantial additional data productions responsive to the Subpoena. In light of what the United States had already produced, and its plan to conduct a "go get it" document collection focused on most efficiently gathering and producing the most relevant documents from the HHS custodians in the limited time available,[7] Defendants had no justification for arguing for a forensic collection.

At the same time, there was every reason to believe that the forensic collection would pull in large quantities of irrelevant documents and create potentially insurmountable difficulties around privilege review. As the United States has explained repeatedly, the Defendants' demand targeted, among other things, an office within HHS—the Assistant Secretary for Planning and

[7] Defendants suggest that the "go get it" collection was not appropriate under the Federal Rules of Civil Procedure, see Def. Mot. at 6, but offer no legal support for this proposition. Defendants' assertion is particularly surprising in light of Defendants' own use of this very method.

Evaluation—whose primary mission is to advise the Secretary of HHS on policy development[8] and would thus have large volumes of documents protected by the deliberative process privilege. After the Court ordered a forensic collection, Defendants only added to the burdensome nature of their discovery demand, refusing to work cooperatively with the United States to help focus the review or navigate the obvious impossibility of reviewing over a million documents in a few weeks for responsiveness and privilege. On top of that, Defendants have since claimed they are entitled to a full document-by-document log, including supporting declarations, for all documents withheld under the deliberative process privilege—another feat Defendants knew from the outset would be disproportionate and, indeed, impossible under the schedule in this case. For all of these reasons, the production demanded by Defendants in response to the subpoena far exceeded the bounds of Rule 26. Cf. Spears v. City of Indianapolis, 74 F.3d 153, 158 (7th Cir. 1996) (upholding the district court's order that plaintiff pay a portion of defendant's discovery costs, considering "[t]he timing of the [plaintiff's] subpoenas, the wealth of materials sought—with the whiff of a fishing expedition apparent—and the privileged nature of many of the documents").

b. **Notwithstanding Defendants' Overbroad Discovery Demand, Including its Insistence on an Unduly Burdensome Forensic Collection, the United States Responded Reasonably and Satisfied Rule 26's "Proportionality" Standard**

Faced with Defendants' overbroad and unduly burdensome discovery demand, the United States responded reasonably. As detailed above, since the opening of fact discovery on August 12, the United States: (1) produced all of the data from its investigative file (well before the date required under the Scheduling and Case Management Order); (2) produced substantial additional data requested by Defendants; (3) devised and initiated a "go get it" method from relevant

[8] U.S. Dep't of Health and Human Servs., Office of the Assistant Sec'y for Planning and Evaluation, available at https://aspe.hhs.gov/ (last visited Oct. 7, 2016).

custodians which could have been completed by the first half of September; (4) agreed to Defendants' request to increase the number of HHS custodians from eight to 13 and finally to 20; (5) conducted the forensic collection; (6) informed Defendants that predictive coding was not workable on the expedited timetable provided for production and sought to collaborate on a "search term" approach; (7) produced over 800,000 from all 20 HHS custodians on the approximate dates set forth in the Court's September 19 order; (8) devised a process to navigate the impossibility of doing a document-by-document review for privilege that combined electronic search terms and attorney "eyes on" review; (9) produced hundreds of thousands of additional documents after additional scrutiny; and (10) offered, at this Court's urging, the extraordinary option of a "clean room" procedure for Defendants to access potentially privileged documents.

Without acknowledging the expedited schedule, the massive difficulties posed by their demand for the forensic collection and review, or the United States' strenuous efforts to respond, Defendants claim that numerous aspects of the United States' review and production were inadequate. But the "Federal Rules of Civil Procedure do not require perfection," Moore v. Publicis Group, 287 F.R.D. 182, 191 (S.D.N.Y. 2012), and discovery is governed by principles of good faith, reasonableness, and proportionality. See First Sav. Bank, F.S.B. v. First Bank Sys., 902 F. Supp. 1356, 1364 (D. Kan. 1995); see also Datel Holdings Ltd. v. Microsoft Corp., 2011 WL 866993, at *4 (N.D. Cal. Mar. 11, 2011) ("In relatively large productions of electronic information under a relatively short timetable, perfection or anything close based on the clairvoyance of hindsight cannot be the standard; otherwise, the time and expense required to avoid mistakes to safeguard against waiver would be exorbitant, and complex cases could take years to ready for trial."). This is all the more true in an expedited case like this one. As the

Court has underscored, "[i]n this case, the time lines, the technicalities of the Federal Rules of Civil Procedure are not going to work, period." See Hearing Tr. at 36:9-12 (Sept. 26, 2016) (Levie).

For example, Defendants repeatedly complain about the United States' failure to use predictive coding and instead to rely on search terms. See Def. Mot. at 20, 24-26, 31. But as explained above and in the accompanying declaration of Tracy Greer, the Division's Senior Counsel for Electronic Discovery, predictive coding—the use of which is nowhere required by the Federal Rules of Civil Procedure—was not feasible in the limited time available for production. Similarly, the United States' use of a categorical privilege log was reasonable in this case, where document-by-document reviews, descriptions, and declarations are impossible. The Federal Rules "do[] not require the production of a document-by-document privilege log," In re Imperial Corp. of Am., 174 F.R.D. 475, 479 (S.D. Cal. 1997), and a streamlined privilege log may suffice in certain circumstances, see Judicial Watch, Inc. v. FDA, 449 F.3d 141, 147 (D.C. Cir. 2006). Defendants rely on cases rejecting the categorical privilege log, see Def. Mot. at 25; however, these cases involved only several hundred documents, which pale in comparison to the hundreds of thousands of documents at issue here. See Auto. Club of New York v. Port Authority of New York & New Jersey, 297 F.R.D. 55, 60 (S.D.N.Y. 2013) ("[T]he justification for a categorical log of withheld documents is directly proportional to the number of documents withheld."). Preparing a traditional privilege log and accompanying declarations for hundreds of thousands of documents within a few weeks was completely impracticable and not justified under the Federal Rules of Civil Procedure.

The United States' production and proposals to address potentially privileged documents are not only reasonable under the circumstances, but also consistent with the rights specified in

the Scheduling and Case Management Order, which provides that each party may "review its documents for privilege or any other reason" and explicitly states that its provisions "cannot be used to compel a Party to produce documents without review." Scheduling and Case Management Order ¶ 14.G. Notwithstanding these rights, the United States even offered the extraordinary option of a "clean room" procedure that would permit Defendants further opportunity to assess the potentially privileged documents. This proposal, devised at the Court's suggestion but promptly rejected by Defendants, represented yet another good faith effort on the part of the United States to balance the exigencies in this case and the need to protect HHS's legitimate interests in safeguarding its deliberative process and other privileged information.

For all of these reasons, this Court should find that the United States' collection, review, and production fully satisfies its discovery obligations under Rule 26.

c. **Any Further Discovery Would Be Unduly Burdensome and Should be Denied**

Given the extensive efforts the United States has engaged in to date, any additional discovery would necessarily constitute an undue burden on the United States. Specifically, Defendants sought in their withdrawn motion to compel, and now seek as a "sanction," disclosure of all HHS documents that the United States is withholding as potentially privileged subject to a clawback arrangement. See Def. Mot. to Compel at 1 (withdrawn on Oct. 4, 2016); Def. Supp. Mot. at 1 & Proposed Order. But such a proposal is unprecedented and unworkable. The United States would have no practical opportunity to review the voluminous documents before the conclusion of this litigation, and there is no effective remedy for disclosure of HHS's most sensitive internal deliberations to an unknown number of lawyers, outside experts, vendors, and others. See Chase Manhattan Bank, N.A. v. Turner & Newall PLC, 964 F.2d 159, 165 (2d Cir. 1992) ("[A]ttorneys cannot unlearn what has been disclosed to them in discovery."); Int'l

Digital Sys. Corp. v. Digital Equip. Corp., 120 F.R.D. 445, 449 (D. Mass. 1988) ("[R]egardless of how painstaking the precautions, there is no order . . . which erases from defendant's counsel's knowledge what has been disclosed.").

These dangers are particularly acute in the context of the deliberative process privilege, which federal courts have long recognized serves important public interests, see Petroleum Info. Corp. v. U.S. Dep't of Interior, 976 F.2d 1429, 1433-34 (D.C. Cir. 1992), including "enabl[ing] governmental decision-makers to engage in that frank exchange of opinions and recommendations necessary to the formulation of policy without being inhibited by fear of later public disclosure." Am. Fed. of Gov. Employees v. U.S. Dep't of Commerce, 632 F. Supp. 1272, 1275 (D.D.C. 1986) (internal quotation marks omitted); see also Carl Zeiss Stiftung v. V.E.B. Carl Zeiss Jena, 40 F.R.D. 318, 325 (D.D.C. 1966) ("Nowhere is the public interest more vitally involved than in the fidelity of the sovereign's decision- and policy-making resources."). This privilege not only protects against introduction of pre-decisional agency information in court, but more generally, it protects against disclosure of such information to the public. If Defendants' proposal were accepted, the realistic possibility of wholesale release of documents to private individuals, regardless of a clawback agreement, would have a chilling effect on the flow of communications among agency personnel, result in the diminished quality of agency decisions, and deprive the public of a thoughtful and effective government. Cf. FTC v. Texaco, Inc., 555 F.2d 862, 882 (D.C. Cir. 1977) (stating, in the context of an administrative subpoena, that a company may establish undue burden if compliance would "unduly disrupt or seriously hinder normal operations of the business").

Moreover, Defendants' latest proposal would unjustifiably narrow the clawback protections set forth in the Case Management Order, and thus should be rejected for this

additional reason. Compare Def. Supp. at 4 n.6 & Proposed Order ¶ 9 (imposing restrictions on the United States' ability to clawback privileged documents including limiting the United States to 72 hours before a noticed deposition to clawback a privileged document) with Scheduling and Case Management Order ¶ 14.G (imposing continuous duty on both parties to protect privileged documents; permitting procedure for challenging and preserving claims of privilege; and providing that the order "is not intended to impose on a Party a waiver of its rights to review its documents for privilege"). Defendants' proposed changes concerning clawback protections would impose a burden on the United States to review hundreds of thousands of documents to potentially identify within a matter of days a subset of documents that are privileged. Removing the Case Management Orders' clawback protections would unfairly punish the United States for producing documents more quickly to the Defendants. Recognizing the possibility that massive discovery on an expedited basis may result in privileged documents being inadvertently produced, the Case Management Order appropriately protects the United States' ability to clawback privileged documents. The Court should not eviscerate this key protection.

Dated: October 8, 2016

Respectfully submitted,

/s/ Peter J. Mucchetti

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EXHIBIT B

Declaration of Christopher Wilson

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, et al., *Plaintiffs*, v. AETNA INC. and HUMANA INC., *Defendants*.	Case No. 1:16-cv-1494 (JDB) Submitted to the Special Master, The Hon. Richard A. Levie (Ret.)

DECLARATION OF CHRISTOPHER M. WILSON, ESQ.

1. My name is Christopher M. Wilson. I am a Trial Attorney at the U.S. Department of Justice, Antitrust Division ("DOJ").

2. On July 29, 2016, DOJ received notice that Defendants had served a subpoena on the Department of Health and Human Services ("HHS") in the above-captioned action. The Subpoena is attached hereto as Exhibit 1.

3. I immediately reached out to attorneys in HHS's Office of the General Counsel (OGC), and, over the next few days, had multiple discussions with HHS OGC about the nature of the subpoena's requests and HHS's plan for responding. In these initial communications, representatives from HHS OGC expressed serious concerns about the broad scope of the subpoena, which contained 23 requests for documents and data. In fact, HHS representatives indicated that the subpoena was among the broadest discovery requests that the agency had ever received and worried that preparing the agency's response could take months.

4. I also promptly engaged with Defendants' counsel even though the subpoena was improperly styled as a non-party subpoena under Rule 45 instead of party discovery under Rule 34. On August 2, 2016, I contacted counsel for Defendants and indicated that the United States would "work cooperatively and expeditiously with [Defendants] to provide the discovery sought" despite the improper service. See Letter from Chris Wilson of DOJ to Christopher Thatch of Jones Day dated August 2, 2016, attached hereto as Exhibit 2. On August 8, 2016, I again contacted Defendants' counsel and notified counsel that "in the interest of keeping things moving forward," the United States had already started "working with HHS on the substance of [Defendants'] extensive discovery requests" while awaiting a properly styled discovery request under Rule 34. See Letter from Chris Wilson of DOJ to Christopher Thatch of Jones Day dated August 8, 2016, attached hereto as Exhibit 3.

5. I also began the meet-and-confer process to help guide HHS's response. In these initial meet-and-confers, which began on August 9, and continued over the next week, Defendants' counsel was focused on receiving responses to the subpoena's numerous data requests, including obtaining all of the HHS data that DOJ had collected during the course of its investigation. For example, on one of the early meet-and-confer calls held on August 15, Defendants' counsel identified Request Nos. 2, 3, 4, 7 and 12—all data requests—as Defendants' priorities for discussion. In these meet-and-confer calls, and in repeated e-mails to Defendants' counsel, I conveyed the United States' intent to prioritize the production of data and described the many complications triggered by the broad scope of several of Defendants' requests.

6. For example, I worked diligently with HHS to quickly prepare the HHS data and reports in DOJ's investigative file for production. These efforts resulted in an initial production to Defendants on August 15, a second production on August 18, and a final production on

August 23. In other words, by August 23—well before the September 2, 2016 deadline set forth in the Scheduling and Case Management Order that the Court entered on August 12—the Defendants had been provided with all non-privileged data and other material the United States had obtained from HHS during the course of its 13-month investigation of the Aetna-Humana proposed merger. These productions from DOJ's investigative file included Medicare market share data; nationwide Medicare Advantage enrollment data by county and plan year; total plan beneficiary cost data; Medicare beneficiary survey data; Medicare Supplemental plan enrollment; Medicare Advantage plan Star Rating data; Medicare Advantage risk adjustment scoring; Exchange plan medical loss ratio data; historic Medicare Advantage insurer bidding data; and ASPE reports on Affordable Care Act (ACA) exchange plan choice, competition, premiums, and enrollment. Together, these productions totaled approximately 8.6 GB of data.

7. I also highlighted for Defendants' counsel the numerous publicly-available databases where they could immediately obtain data and documents responsive to their requests. For example, in an August 18 e-mail I sent to Aetna's counsel, Aaron Healey, I identified for Mr. Healey over 20 data sources from CMS where Defendants could obtain some of the materials they were seeking. See E-mail from Chris Wilson of DOJ to Aaron Healey of Jones Day, dated August 18, 2016, attached hereto as Exhibit 4. These publicly-available reports and databases were important because many of the non-public HHS databases targeted by Defendants' subpoena contained highly sensitive information, including information that raised serious individual privacy concerns (*e.g.*, personally identifiable information (PII), the disclosure of which is sharply constrained by federal law) or competitively sensitive information (*e.g.*, insurer forward-looking bidding data), and navigating these issues would take significant time and effort

(if they could be sufficiently addressed at all). In deference to these issues, United States' investigation of the transaction mainly relied on publicly available information.

8. Defendants' data requests, which sought literally billions of records from an array of HHS databases maintained in different offices, raised severe concerns about burden and feasibility. DOJ outlined these concerns in written correspondence, during meet-and-confers, and in responses and objections to Defendants' subpoena served on August 8, and amended on August 19. See Plaintiff United States' Responses and Objections to Defendants' Notice of Subpoena to the Department of Health and Human Services, dated August 8, 2016, attached hereto as Exhibit 5; Plaintiff United States' Responses and Objections to Defendants' Notice of Subpoena to the Department of Health and Human Services, dated August 19, 2016, attached hereto as Exhibit 6; E-mail from Chris Wilson of DOJ to Aaron Healey of Jones Day, dated August 21, 2016, attached hereto as Exhibit 7. I also arranged, at Defendants' request, to have HHS IT personnel participate in a meet-and-confer call to explain the difficulties posted by Defendants' data requests directly. Specifically, on August 25, CMS IT personnel participated on an August 25 meet-and-confer during which they affirmed my prior representations that Defendants' subpoena represented the largest data request that HHS had ever received; that several of the data requests, as currently constituted, would take months to respond to (if it were even possible to do so); and that several of the data requests created technical and practical complications that were exceedingly difficult to navigate (if they could be navigated at all).

9. Despite all of these difficulties, in addition to the data produced from DOJ's investigative file, the United States worked with HHS to produce substantial volumes of additional data and related material, including 2017 Medicare Advantage insurer bidding data, information on Medicare Accountable Care Organizations, insurer Medical Loss Ratio data,

Medicare Shared Savings Program information, reports on Bundled Care Payment Initiatives, CMS brochures and publications on Medicare Advantage plans and benefits, ASPE reports on competition, beneficiary spending, Medicare Advantage Star Rating calculation methodology, and Medicare benefit offerings, and data underlying HHS reports on competition on the ACA exchanges, among other items. These additional materials, which were produced in four productions provided in mid-September, represented approximately 2.5 GB of additional data.

10. At the same time I was working to prepare the large amounts of data that Defendants had prioritized for production, I worked expeditiously with HHS OGC to prepare the agency's response to the document requests that required HHS to search and produce documents from the electronic and hard copy files of HHS personnel. Even though the Court did not enter the Scheduling and Case Management Order setting the schedule for fact discovery (or a trial date) until August 12, and even though fact discovery did not open until August 12, I worked extensively with HHS well before August 12 to ensure the that the United States would be in a position to produce documents in response to the HHS subpoena in a timely manner.

11. The first step was identifying appropriate custodians for such a production. Although the United States had a general awareness of offices within HHS where appropriate custodians might be found, including the Office of the Assistant Secretary for Planning and Evaluation (ASPE), identifying an appropriate set of custodians was no easy task for HHS, an agency with 79,000 employees. For example, the Centers for Medicare and Medicaid Services (CMS) alone consisted of roughly 6,000 employees and 22 distinct departments or offices (and CMS is only one of eleven operating divisions within HHS).

12. On August 15, I participated in a meet and confer with Mr. Healey regarding the HHS subpoena. During that call, Mr. Healey asked if the United States would stand on the

objections articulated in the United States' August 8 responses and objections and refuse to produce documents for any document requests. I indicated that the United States did not intend to rest on its August 8 objections and was not aware of any requests where it planned to produce no documents.

13. At no point in the two weeks following their issuance of the July 29 subpoena did Defendants' counsel inquire about possible custodians or the process that would be used for document collection or review more generally. Nonetheless, on a meet-and-confer on August 18, I affirmatively identified to Defendants' counsel six proposed custodians from ASPE and two from CMS and agreed, at counsel's request, to send HHS and CMS organizational charts so that Defendants could evaluate these custodians and suggest any others. I sent these organization charts to counsel the same day. See E-mail from Chris Wilson of DOJ to Aaron Healey of Jones Day, dated August 18, 2016, attached hereto as Exhibit 8. On the August 18 call, I also quoted paragraph 14.D of the Scheduling and Case Management Order, which provides that "[r]esponsive productions following resolution of objections and custodians will be completed on a rolling basis with a good-faith effort to be completed no later than 21 days after resolution." My interpretation of this paragraph, as expressed to Mr. Healey, was that the parties needed to agree on custodians before the 21-day deadline for production could begin. Nonetheless, DOJ worked with HHS to initiate the document collection process for the eight custodians I referred to on the August 18 call while Defendants considered the additional custodian information I had sent.

14. From the moment I initiated discussions with HHS OGC about the agency's response to the subpoena, it was contemplated that HHS would use a "go get it" method to collect potentially responsive documents from the selected custodians. As HHS OGC explained

to me, they had used this procedure—which entailed OGC providing the selected custodians the list of documents sought and directing them to search their electronic and hard copy files and send all responsive docs to OGC—for many years and found it to be an efficient and reliable method to respond to discovery demands. As HHS OGC explained to me, OGC played an active role in this "go get it" collection, overseeing the collection process, verifying the rigor of the search, offering guidance in response to employee questions, reviewing the documents collected, and screening out any privileged materials that should be withheld from production. As OGC further explained, OGC's regular use of a "go get it" collection also reflected practical realities; as a small office with limited resources, OGC did not have the budget or the IT infrastructure to oversee a sizable or expedited forensic collection of documents and data the way that a large corporation might. Finally, OGC had found that the "go get it" collection method best accommodated the fact that HHS documents often contain highly sensitive information, including information that raises serious individual privacy concerns, is competitively sensitive, or implicates the deliberate process or other privileges. As the volume of affected documents increases, it became harder for HHS to navigate these issues in a timely and efficient manner.

15. HHS OGC estimated that it could conduct and complete the "go get it" collection from the eight ASPE and CMS custodians in approximately three weeks. On the August 18 meet-and-confer with defense counsel, I communicated the fact that HHS would start collecting documents and the anticipated three-week production timetable, and affirmed this plan in writing to Aetna's counsel on August 19. See E-mail from Chris Wilson of DOJ to Aaron Healey of Jones Day dated August 19, 2016, attached hereto as Exhibit 9.

16. Mr. Healey contacted me on August 20, 2016 to request that the Government add an additional custodian from HHS and provide further information about the eight custodians it

had identified (which I provided on August 22). While Defendants were reviewing this custodian-related information, I and HHS OGC directed the eight custodians that we had identified to start collecting responsive documents and preparing them for production. As I indicated to HHS, my initial goal was to have all responsive materials collected for DOJ review and production by September 2. I informed Mr. Healey by e-mail on August 22 that the HHS document collection had begun. See E-mail from Chris Wilson of DOJ to Aaron Healey of Jones Day dated August 22, 2016, attached hereto as Exhibit 10.

17. On August 23, I participated in another meet-and-confer with defense counsel during which we discussed the details of the "go get it" collection HHS was using. On the call, Aetna's counsel expressed concerns regarding HHS's plan to use this collection method and raised the possibility of a forensic collection. I explained that neither DOJ nor HHS OGC had the resources to conduct and complete a forensic collection on the timetable for discovery in this case. Aetna's counsel requested that I describe HHS's proposed collection process in writing, which I agreed to do.

18. Aetna's counsel also indicated that Defendants would seek to add additional custodians from numerous other HHS departments, including CMS's Office of the Administrator, Office of Strategic Operations and Regulatory Affairs, Office of the Actuary, the Center for Medicare, Office of Communications, Consortium for Medicare Health Plan Operations, the CMS Center for Medicare and Medicaid Innovation, the HHS Office for Health Reform, and the Center for Consumer Information & Insurance Oversight (CCIIO). Defendants' proposed addition of several new custodians raised concerns with HHS OGC given the expedited timetable for discovery, but the United States endeavored to provide an amended custodian proposal to address Defendants' concerns.

19. On August 25, I provided the more detailed written description of the proposed collection and review process for the HHS custodians that Mr. Healey had requested. The description explained the necessity of proceeding with the "go get it" approach given the expansive nature of Aetna's discovery requests, HHS's limited resources, and the compressed discovery schedule in the case:

> Due to the number of broad document requests from both Anthem and Aetna, targeted at largely overlapping custodians and topics, and differing IT infrastructures across departments, HHS has elected to employ a "self-search" process where each custodian is given the text of each request and instructed as to the substance of what each request is seeking, and directed to pull any and all potentially responsive documents for each request from email folders, hard drives, hard copy files, communal resources such as network drives, and any pother place they believe responsive documents may be located. HHS's OGC supervises the process by guiding the custodians and confirming that they have searched for all potentially responsive documents available to each custodian, wherever located. HHS's OGC will then screen any privileged documents before production. Given the extremely condensed timeframe for discovery, the broad nature of the document requests, the need to address Anthem and Aetna document requests simultaneously, and the limited staffing resources available to HHS, this approach ensures the highest volume of highly responsive documents in the shortest possible response time. This is because custodians, who are experts in their subject matter, are best situated to quickly locate and identify responsive documents. Under this approach, virtually all documents produced should be relevant, unlike the "search term" process, which, in our experience, tends to return high volumes of documents, 80-90% of which are minimally relevant or irrelevant.
>
> HHS employs this process because it does not have the IT resources (either internally or through a contractor) or legal staffing in place to conduct hard drive pulls and email folder searches, etc. in the 2-3 week response time set out in each action's case management order or even by the close of fact discovery in either action.

The description further explained that the Government was willing to make additional accommodations to give Defendants' confidence in the collection process and its compliance with Rule 26. Specifically, the description indicated that HHS would "certify to the Court that each custodian understood their discovery obligations, conducted a thorough and diligent search for any and all documents responsive to each request, specify the details of how the search was

conducted and affirm that no responsive documents are being withheld on grounds other than applicable privileges." See E-mail from Chris Wilson of DOJ to Aaron Healey of Jones Day dated August 25, 2016, attached hereto as Exhibit 11.

20. My August 25 e-mail to Mr. Healey also provided the additional custodian information he had requested and proposed adding additional custodians from the Center for Medicare and Medicaid Innovation, the Center for Medicare, the CCIIO, and the Office of the Actuary. These four additional custodians (one of which was the individual agreed upon on August 20) increased the total number of custodians to 12.

21. On August 26, Mr. Healey indicated in an e-mail that "an impasse" had been reached regarding the Government's anticipated collection method. Mr. Healey's e-mail also included follow-up questions about the "go get it" collection, including whether search terms would be used and what the search parameters would be. In a further effort to accommodate Defendants' concerns, I responded the same day offering to "let Aetna supply the search terms for each request and the parameters for the search (in terms of places to be searched)" and "have each custodian's search supervised by an attorney from HHS' Office of General Counsel, and certify for each custodian that he/she followed the search terms and searched e-mails, hard drives, shared drives, hard copy files, etc." See E-mail from Chris Wilson of DOJ to Aaron Healey of Jones Day dated August 26, 2016, attached hereto as Exhibit 12. Given the concerns that Defendants had raised about the "go get it" method, I also started exploring with HHS the possibility of conducting a forensic collection.

22. Mr. Healey's August 26 e-mail also vastly expanded the universe of proposed custodians. In addition to the 11 custodians I had identified on August 25, Mr. Healey proposed adding 20 more spanning numerous additional HHS departments. Mr. Healey's proposal would

bring the total universe of custodians to 31, "subject," he indicated "to possible, further supplementation." See Exhibit 12 [same e-mail from prior paragraph].

23. On August 28, Mr. Healey informed me via e-mail that my August 26 proposal did not sufficiently address Defendants' concerns and that Defendants would bring the issue to the Special Master for adjudication. On August 29, and over DOJ's objections, the Special Master ordered a forensic collection of documents from the HHS custodians.

24. Between August 26 and 31, I engaged in further meet-and-confer efforts with Defendants' counsel and we agreed to narrow the list of custodians to 19. This number ultimately increased to 20.

25. Between August 29 and September 15, I oversaw the forensic collection of documents from the agreed-upon custodians. This was a complicated and time consuming process that required the United States to work with an IT vendor and custodians located in seven different offices or departments, including in Washington, D.C.; Bethesda, Maryland; Baltimore, Maryland; and Santa Ana, California to identify and image responsive sources of emails and non-e-mail electronic files. The United States received the material collected from these various offices in tranches and loaded each tranche onto Relativity, DOJ's document review platform, which took additional time.

26. As the collection unfolded, I was in repeated contact with Defendants' counsel to apprise them of the collection's progress. For example, on September 6, I e-mailed Mr. Healey to inform him, among other things, that we had "an early email/attachment count" for one custodian: "40,400 emails and attachments in the specified date range." I warned that applying this across the 19 custodians, "that suggests there are at least 750,000 emails and attachments" and that "[t]he total number of documents should grow as other sources are pulled in." See E-

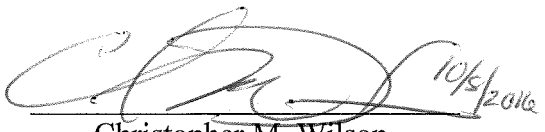
mail from Chris Wilson of DOJ to Aaron Healey of Jones Day dated September 6, 2016, attached hereto as Exhibit 13. On September 7, I informed Mr. Healey on a meet-and-confer that the initial pull of e-mails and attachments for 10 of the 19 custodians had returned in 1.1 million documents.

27. At the same time I apprised Defendants of the massive numbers of documents the forensic collection was returning, I also informed them that the United States would not be able to proceed with predictive coding because it could not be used effectively on the compressed timetable provided for production. Specifically, in the September 6 e-mail and during the September 7 meet-and-confer, I explained that the United States would use search terms to screen for responsive documents and provided a list of proposed terms. I also invited Defendants to provide any suggestions or offer additional terms.

28. The Defendants proposed a modified list of search terms on September 11. See E-mail from Aaron Healey of Jones Day to Peter Mucchetti of DOJ, dated September 11, 2016, attached hereto as Exhibit 14.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 8, 2016.



Christopher M. Wilson

Exhibit 1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANTS' NOTICE OF SUBPOENA OF DEPARTMENT OF HEALTH AND HUMAN SERVICES / CENTER FOR MEDICARE AND MEDICAID SERVICES

PLEASE TAKE NOTICE that, pursuant to and in accordance with Rule 45 of the Federal Rules of Civil Procedure, Defendants Aetna Inc. and Humana Inc. are serving a subpoena for documents and things on the Department of Health and Human Services / Center for Medicare and Medicaid Services as set forth in the Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises in a Civil Action, attached hereto.

Dated: July 29, 2016

Respectfully submitted,

/s/ Christopher N. Thatch

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CERTIFICATE OF SERVICE

I certify that on July 29, 2016, I served one copy of the foregoing by electronic mail on the following:

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Dated: July 29, 2016

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AO 88B (Rev. 02/14) Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Columbia

United States of America, et al.,
Plaintiff
v.
Aetna Inc. and Humana Inc.,
Defendant

Civil Action No. 1:16-cv-1494-JDB

SUBPOENA TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS OR TO PERMIT INSPECTION OF PREMISES IN A CIVIL ACTION

To: Department of Health and Human Services, Office of Legal Resources, Office of the General Counsel
Room 700E, 200 Independence Avenue, SW, Washington, DC 20201
(Name of person to whom this subpoena is directed)

☑ *Production:* **YOU ARE COMMANDED** to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and to permit inspection, copying, testing, or sampling of the material: See Subpoena Attachment. For response time: RFPs 1, 2, 3, 4, 5 by August 8, 2016; all other RFPs by August 17, 2016.

Place: JONES DAY 51 Louisiana Avenue, NW Washington, DC 20001	Date and Time: 08/08/2016 5:30 pm

☐ *Inspection of Premises:* **YOU ARE COMMANDED** to permit entry onto the designated premises, land, or other property possessed or controlled by you at the time, date, and location set forth below, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

Place:	Date and Time:

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 07/29/2016

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk

Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing *(name of party)* Aetna Inc., who issues or requests this subpoena, are:

Christopher Thatch, JONES DAY, 51 Louisiana Avenue, NW, Washington, DC 20001, (202) 879-4658

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

Civil Action No. 1:16-cv-1494-JDB

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for *(name of individual and title, if any)* _____

on *(date)* _____ .

❒ I served the subpoena by delivering a copy to the named person as follows: _____

_____

_____ on *(date)* _____ ; or

❒ I returned the subpoena unexecuted because: _____

_____ .

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of $ _____ .

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc.:

Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)

(c) Place of Compliance.

(1) ***For a Trial, Hearing, or Deposition.*** A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

(A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or

(B) within the state where the person resides, is employed, or regularly transacts business in person, if the person

(i) is a party or a party's officer; or

(ii) is commanded to attend a trial and would not incur substantial expense.

(2) ***For Other Discovery.*** A subpoena may command:

(A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and

(B) inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) ***Avoiding Undue Burden or Expense; Sanctions.*** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) ***Command to Produce Materials or Permit Inspection.***

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) ***Quashing or Modifying a Subpoena.***

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) ***Producing Documents or Electronically Stored Information.*** These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) ***Claiming Privilege or Protection.***

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) Contempt.

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

For access to subpoena materials, see Fed. R. Civ. P. 45(a) Committee Note (2013).

SUBPOENA ATTACHMENT

Pursuant to Federal Rules of Civil Procedure 34 and 45, Defendants Aetna Inc. ("Aetna") and Humana Inc. ("Humana") request production of the documents and materials identified below. Please deliver the requested documents and materials to the attention of Geoffrey Irwin, Esq., Jones Day, 51 Louisiana Avenue, N.W., Washington, DC, 20001. For Request Nos. 1, 2, 3, 4, and 5, please deliver the requested documents and materials no later than Monday, August 8, 2016. For the remainder of the Requests, please deliver the requested documents and materials no later than Wednesday, August 17, 2016.

REQUESTS FOR PRODUCTION

REQUEST NO. 1

All documents concerning MA bid pricing tools (BPTs) or bid workbooks received from any MAO, including the most recent version of all 2017 bid workbooks.

REQUEST NO. 2

All data for the past five years from the Medicare Enrollment Database (EDB) (Personal Identifying Information may be masked using a unique ID that is consistent for each enrollee over time.).

REQUEST NO. 3

All data for the past five years from the Medicare Risk Adjustment Processing System (RAPS) (Personal Identifying Information may be masked using a unique ID that is consistent for each enrollee over time.).

REQUEST NO. 4

All data for the past five years from the Medicare Monthly Membership Detail Report (MMDR) (Personal Identifying Information may be masked using a unique ID that is consistent for each enrollee over time.).

REQUEST NO. 5

To the extent it is are not produced in response to Requests 2 through 4 above, any other data sufficient to identify each beneficiary's enrollment in Original Medicare, an MA plan, a Prescription Drug (Part D) plan, a Medicare Supplemental (Medigap) plan, or other supplemental health insurance, including Medicare or employer coverage.

REQUEST NO. 6

All documents concerning Original Medicare (and its related add-on products: Medicare Supplemental, Prescription Drug (Part D) plans) and Medicare Advantage as alternatives to one another or otherwise as offering competing choices to consumers. This request includes but is not limited to: documents purporting to educate or inform consumers about their Medicare coverage options or consumers' right or ability to switch options; documents concerning the factors that influence consumers' decision to choose between or to select among Medicare Advantage and Original Medicare, either alone or in combination with Medicare Supplemental and/or Prescription Drug (Part D) plans; and documents explaining the historic relationship between Original Medicare and Medicare Advantage.

REQUEST NO. 7

All documents, including but not limited to Daily Transaction Reply Report (DTRR) files, showing enrollment in, disenrollment from, or switching or choosing between Medicare Advantage products, Prescription Drug (Part D) and Original Medicare products (Personal Identifying Information may be masked using a unique ID that is consistent for each enrollee over time.).

REQUEST NO. 8

All analyses, reports, memoranda, or spreadsheets evaluating the impact of CMS regulations on: (1) MA plan bids, (2) MA plan attractiveness or benefits to consumers, (3) MA plan profitability and growth, (4) expansion of MA plans or the MA program, and (5) MA plan design or the richness of benefits.

REQUEST NO. 9

Documents sufficient to show the 2017 Star Ratings for MA products, including any preliminary data, as well as the underlying data on which the ratings are predicated.

REQUEST NO. 10

All analyses, reports, memoranda, or spreadsheets concerning the effects of Star Ratings on beneficiaries and MAOs, including but not limited to: (1) the effects on plan selection by (i) age-ins, and (ii) switching by seniors already in the Medicare programs; (2) the effects on MAOs' retention and turnover of members; and (3) the effects on MAOs' ability to offer products with improved benefits.

REQUEST NO. 11

All analyses, reports, memoranda, or spreadsheets concerning the effect of enrollee characteristics (e.g., income, age, or disability status) on Star Ratings, including but not limited to any research performed by or on behalf of CMS regarding the reliability, accuracy or biases of Star Ratings.

REQUEST NO. 12

All data sufficient to show for each Individual Exchange enrollee (Personal Identifying Information may be masked using a unique ID that is consistent for each enrollee over time) on an annual basis for 2014-2016:

a) the plan selected (identified by HIOS plan ID, metal tier, carrier, and plan name),

b) the county of residence;

c) any applicable tax credit or cost-sharing subsidy qualification;

d) the enrollee's age, gender, and race;

e) whether the enrollee actively or passively selected the plan;

f) whether the enrollee effectuated coverage;

g) the start date of the enrollee's coverage;

h) the end date of the enrollee's coverage; and

i) the "Provider Participation Rate" for the plan and whether the plan breadth is "Basic," "Standard," or "Broad" (these terms have the meaning set forth in CMS, "2017 Letter to Issuers in the Federally-Facilitated Marketplaces," February 29, 2016, at 27).

REQUEST NO. 13

All data concerning the Medical Loss Ratio (MLR), total medical premiums, total medical expenses, and other profit measures for each exchange plan (identified by HIOS plan ID, carrier, and plan name) by state, annually for 2014-2016.

REQUEST NO. 14

All documents relating to the following reports, including all data and intermediate files used by the Assistant Secretary for Planning and Evaluation (ASPE), to produce the reports:

a) "MARKETPLACE PREMIUMS AFTER SHOPPING, SWITCHING, AND PREMIUM TAX CREDITS, 2015-2016," April 12, 2016;

b) "HEALTH INSURANCE MARKETPLACES 2016 OPEN ENROLLMENT PERIOD: FINAL ENROLLMENT REPORT," March 11, 2016;

c) "HEALTH PLAN CHOICE AND PREMIUMS IN THE 2016 HEALTH INSURANCE MARKETPLACE," October 30, 2015;

d) "CONSUMER DECISIONS REGARDING HEALTH PLAN CHOICES, IN THE 2014 AND 2015 MARKETPLACES," October 28, 2015; and

e) "COMPETITION AND CHOICE IN THE HEALTH INSURANCE MARKETPLACES, 2014-2015: IMPACT ON PREMIUMS," July 27, 2015.

REQUEST NO. 15

All analyses, reports, memoranda, or spreadsheets concerning analyses performed by CMS related to competition, plan selection, carrier participation, entry or exit, or switching among plans by consumers, and network breadth on the Individual Exchanges, including underlying data.

REQUEST NO. 16

All data concerning: (1) the identification of the counties and rating areas in which each existing or new carriers will offer Individual Exchange plans in 2017; and (2) the premium and total beneficiary cost for each such plan. This request includes but is not limited to applications for new Qualified Health Plans (QHPs) filed by carriers who plan to enter an exchange or offer a new exchange plan in 2017, and rate review requests filed by carriers who will continue to offer exchange plans in 2017.

REQUEST NO. 17

All data identifying, for 2015-2016, all Medicare Accountable Care Organizations (ACOs) with attributed Medicare beneficiaries in any county, the type of each such ACO (MSSP, Pioneer, Next Generation, etc.), and the number of attributed beneficiaries for each ACO and county.

REQUEST NO. 18

Data sufficient to identify for 2015 and 2016 all Bundled Payment Care Improvement initiative arrangements, including but not limited to the name, address, TIN, type of organization and type of entity of each Awardee, Awardee Convener, Facilitator Convener, Provider Partner and the episodes of care applicable.

REQUEST NO. 19

All analyses, reports, memoranda, or spreadsheets evaluating or analyzing the provision of coordinated care to Medicare beneficiaries by Medicare ACOs.

REQUEST NO. 20

All data evaluating or analyzing the growth of Medicare ACOs; the effects of Medicare ACOs on healthcare spending for the Medicare population; the effects of Medicare ACOs on the enrollment, growth, or profitability of Medicare Advantage plans; the ability or likelihood of providers participating in Medicare ACOs beginning to offer MA plans; or the effects of Medicare ACOs on healthcare quality or patient outcomes.

REQUEST NO. 21

All documents concerning communications with DOJ regarding the Transaction.

REQUEST NO. 22

All documents concerning any internal or external analyses or communications regarding the Transaction.

REQUEST NO. 23

All documents provided to DOJ for the purposes of its review of the Transaction.

DEFINITIONS

Unless the context indicates otherwise, the following definitions shall apply to these Requests:

1. "Aetna" means Aetna Inc. and its predecessors, divisions, subsidiaries, affiliates, partnerships and joint ventures, and all directors, officers, employees, agents and representatives.

2. "All" (or "all") and "Each" (or "each"), as used herein, shall be construed as all and each.

3. "And" ("and") and "Or" ("or"), as used herein, shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery Request all responses that might otherwise be construed outside of its scope.

4. "Any" (or "any"), as used herein, means each and every.

5. "Communication" (or "communication"), as used herein, means all modes of conveying information, including but not limited to telephone calls, e-mails and all other forms of electronic communication and electronic messaging, letters, conversations, interviews, meetings, hearings, and other written, electronic or spoken language or graphics between two or more persons, however transmitted or stored.

6. "Concerning" (or "concerning"), "Relating to" (or "relating to"), and "Regarding" (or "regarding"), as used herein, mean analyzing, alluding to, concerning, considering, commenting on, consulting, comprising, containing, describing, dealing with, evidencing,

identifying, involving, reporting on, relating to, reflecting, referring to, studying, mentioning, or pertaining to, in whole or in part.

7. "Document" (or "documents") is defined as broadly as that term is construed under Rule 34 of the Federal Rules of Civil Procedure, and is meant to include, but is not limited to, all tangible and intangible modes of communicating, conveying or providing any information such as writings, correspondence, communications, notes, letters, memoranda, drawings, graphs, charts, photographs, discs, computer recordings, electronic mail, spreadsheets, data, databases, and any other data compilations from which information can be obtained.

8. "DOJ" means the Department of Justice, its employees, attorneys, accountants, economists, staff, consultants, experts, agents, and representatives, and specifically includes any third party representative or agent, wherever located, acting or purporting to act on behalf of or assisting the DOJ.

9. "Humana" means Humana Inc., and its predecessors, divisions, subsidiaries, affiliates, partnerships and joint ventures, and all directors, officers, employees, agents and representatives.

10. "Individual Exchange" (or "individual exchange") means a federally-administered health insurance marketplace, a federally-supported health insurance marketplace, or a state-partnership health insurance marketplace, but excludes any state-based health insurance marketplaces.

11. "Medicare Advantage" (or "MA") means the program through which private entities offer health insurance plans to Medicare-eligible beneficiaries under Part C of the Medicare program.

12. "Medicare Advantage plan" (or "MA plan") means a CMS-approved health care

coverage plan offered by private insurers under Medicare Part C and sold to individuals with or without a Prescription Drug plan, but excludes employer group MA plans.

13. "Medicare Advantage Organization" (or "MAO") means any entity that offers or is authorized to offer a Medicare Advantage plan under Medicare Part C.

14. Original Medicare" or "Traditional Medicare" or "FFS Medicare" means the fee-for-service health coverage program managed directly by the United States Government through the Centers for Medicare & Medicaid Services ("CMS") and available to people who are 65 or older, certain younger people with disabilities, and people with End-Stage Renal Disease (permanent kidney failure requiring dialysis or a transplant, sometimes called ESRD).

15. "Prescription Drug (Part D) plan" (or "Prescription Drug (Part D)") means Medicare-approved prescription drug coverage offered under Medicare Part D.

16. "Person" (or "person") means any natural person, corporation, association, organization, firm, company, partnership, joint venture, trust, estate, or other legal or governmental entity (*e.g.*, the U.S. Department of Justice, a state Department of Insurance, a state Attorney General, etc.), whether or not possessing a separate juristic existence.

17. "Third party" (or "third party") means any person other than DOJ, Aetna, and Humana, including but not limited to the Federal Trade Commission and Congress.

18. "This Litigation" means *United States of America v. Aetna, Inc. et al.*, No. 16-cv-01494 (D.D.C. July 21, 2016).

19. "Transaction" (or "transaction"), as used herein, means the proposed acquisition of Humana by Aetna.

20. "You" (or "you") or "Yours" (or "yours") or "CMS" (or "cms") means Center for Medicare and Medicaid Services ("CMS"), its managers, employees, attorneys, accountants,

economists, staff, consultants, experts, agents, and representatives, and specifically includes any third party representative or agent, wherever located, acting or purporting to act on behalf of CMS.

INSTRUCTIONS

1. Provide all responsive Documents in your possession, custody, or control or in the possession, custody or control of your representatives and agents.

2. Unless otherwise stated, the relevant time period for the Requests is January 1, 2010 through the present.

3. For each Request, you are to produce entire documents including all attachments, enclosures, cover letters, memoranda and appendices. Copies that differ in any respect from an original (because, by way of example only, handwritten or printed notations have been added) shall be treated as separate documents and produced separately. Each draft of a document is a separate document. A request for a document shall be deemed to include a request for any and all transmittal sheets, cover letters, exhibits, enclosures or attachments to the document, in addition to the document itself. For those documents written in a language other than English, please translate the document into English and produce the foreign language document, with the English translation attached thereto.

4. Provide all electronically stored information ("ESI") in standard, single-page Group IV TIFF format with searchable text and metadata in a Concordance or similar load file. Also, provide any spreadsheet or presentation files, including Microsoft Access, Excel, and PowerPoint files, as well as audio, audiovisual, and video files, in their native formats. Provide all hard copy documents as image files with searchable OCR text and unitize the hard copy documents to the extent possible (i.e., multi-page documents shall be produced as a single

document and not as several single-page documents). Hard copy documents shall be produced as they are kept, reflecting attachment relationships between documents and information about the file folders within which the document is found. Produce the metadata for any responsive ESI with the responsive data, including the following fields: custodian, author(s), recipient(s), copy recipient(s), blind copy recipient(s), subject, file sent date/time, file creation date/time, file modification date/time, file last accessed data/time, beginning bates, ending bates, parent beginning bates, attachment(s) beginning bates, hash value, application type, file type, file name, file size, file path, and folder path. Documents produced in native format shall be accompanied by a native link field.

5. Where a claim of privilege or other protection from discovery is asserted in objecting to any Request or sub-part thereof, and any document is withheld (in whole or in part) on the basis of such assertion, you shall provide a log ("Privilege Log") in Microsoft Excel format that identifies where available:

(a) The nature of the privilege or protection from discovery (including but not limited to attorney-client, work product, and deliberative process) that is being claimed with respect to each document;

(b) The type of each document;

(c) The date of each document;

(d) The author of each document;

(e) The addresses and recipients of each document (including those recipients cc-ed or bcc-ed);

(f) A description of each document containing sufficient information to identify the general subject matter of the document and to enable Defendants to assess the applicability of the privilege or protection claimed; and

(g) The identity of and any production Bates number assigned to any attachment(s), enclosure(s), cover letter(s), or cover email(s) of each document, including the information outlined in subsections (a) through (g)

above for each such attachment, enclosure, cover letter, or cover email. Attachments, enclosures, cover letters, and cover emails shall be entered separately on the Privilege Log. The Privilege Log shall include the full name, title, and employer of each author, addressee, and recipient, denoting each attorney with the letters "ESQ." Submit all non-privileged portions of any responsive document (including non-privileged or redactable attachments, enclosures, cover letters, and cover emails) for which a claim of privilege is asserted, noting where redactions to the document have been made.

6. If you assert that part of the Request is objectionable, respond to the remaining parts of the Request to which you do not object. For those portions of any document Request to which you object, please state the reasons for such objection and describe the documents or categories of documents that are not being produced.

7. These document Requests shall not be deemed to call for identical copies of documents. "Identical" means precisely the same in all respects; for example, a document with handwritten notes or editing marks shall not be deemed identical to one without such notes or marks.

8. The documents responsive to these Requests are to be produced as they were kept in the ordinary course of business and are to be labeled in such a way as to show which files and offices they came from.

9. The specificity of any single Request shall not limit the generality of any other Request.

10. Unless clearly indicated otherwise: (a) the use of a verb in any tense shall be construed as the use of that verb in all other tenses; (b) the use of the feminine, masculine, or neuter genders shall include all genders; and (c) the singular form of a word shall include the plural and vice versa.

11. These Requests are continuing in nature, and you must supplement your responses pursuant to Federal Rule of Civil Procedure 26(e). Defendants specifically reserve

the right to seek supplementary responses and the additional supplementary production of documents before trial.

Exhibit 2

U.S. Department of Justice

Antitrust Division

Liberty Square Building

450 5th Street, N.W.
Washington, DC 20001

August 2, 2016

Christopher N. Thatch
Jones Day
51 Louisiana Ave., N.W.
Washington, DC 20001-2113
cthatch@jonesday.com

Re: *United States et al. v. Aetna, Inc.* - Case No. 1:16-cv-1494

Dear Chris:

We write in regard to the Notice of Subpoena dated July 29, 2016 that you delivered to the Department of Health & Human Services/Center for Medicare and Medicaid Services ("HHS"). We will work cooperatively and expeditiously with you to provide the discovery sought in this litigation, but this Notice is improper.

First, the Notice is untimely under FRCP 26(d)(1), which states as follows: "A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order." Therefore, the Notice is premature.

Second, HHS is an agency of the Executive Branch of the United States federal government. The United States is a plaintiff in this litigation. In the interest of expedition, we are willing to treat your request as an "Early Rule 34 Request" pursuant to Rule 26(d)(2). Please resubmit it in that format and in compliance with that rule, and we will review and consider the request in the meantime. Please confirm with us by COB Wednesday, August 3, 2016, that you are withdrawing the subpoena and wish to proceed in the manner described so that we will not need to take action otherwise. Of course, we request that you coordinate through counsel for the United States before seeking discovery from a United States federal agency such as HHS.

Third, we note that the time you have allotted for HHS to provide the data and documents requested—in this case, as little as 7 days—is inconsistent with FRCP 34(b)(2)(A), which provides 30 days after service for the target of discovery to respond.

Finally, this is not an exhaustive list of deficiencies with your proposed discovery and we reserve the right to raise further objections in accordance with the Federal Rules of Civil Procedure. We await your resubmitted request.

Best Regards,

/s/

Christopher Wilson

Cc: Susan Lyons (HHS)

Exhibit 3

U.S. Department of Justice

Antitrust Division

Liberty Square Building

450 5th Street, N.W.
Washington, DC 20001

August 8, 2016

VIA E-MAIL

Christopher N. Thatch
Jones Day
51 Louisiana Avenue, N.W.
Washington, DC 20001-2113

Re: *United States et al. v. Aetna et al.*

Dear Chris:

We were disappointed to receive your letter dated August 4, 2016 regarding the Notice of Subpoena you served on HHS.

As pointed out in our letter, the Notice of Subpoena was improper Rule 45 discovery when discovery on the Executive Branch of the United States should be party discovery. We wrote you to point this out along with other problems with your subpoena, but offered to treat your Notice as permissible early party discovery. We also said that in the interest of keeping things moving forward, we would get started with HHS even while we were awaiting your re-filed discovery – and we did get started with HHS as soon as we received your subpoena.

But your response was a letter that issued three demands, none of which relate to or expedite the substance of the discovery sought in your Subpoena. While we are disappointed that you chose this path rather than continuing in the cooperative spirit that we offered, we agree to accept service of discovery on behalf of HHS and that service was proper under Rule 26 and 34.

Accordingly, we will respond to the subpoena that you sent.

And we will continue working with HHS on the substance of your extensive discovery requests, since we assume that you will renew them eventually.

Sincerely,

/s/

Christopher M. Wilson

Exhibit 4

Wilson, Christopher (ATR)

From: Wilson, Christopher (ATR)
Sent: Thursday, August 18, 2016 11:40 AM
To: 'Aaron Healey'
Subject: RE: CMS databases

Aaron,

I also wanted to share with you CMS's Medicare Advantage Ratebooks and supporting data. As with the Medicare enrollment data, this is publicly available information. It contains detailed Medicare risk score information along with other data. I assume you are aware of these as well. It can be found here:

https://www.cms.gov/Medicare/Health-Plans/MedicareAdvtgSpecRateStats/Ratebooks-and-Supporting-Data.html

Chris

Christopher M. Wilson
Office: 202-598-8688
Christopher.Wilson5@usdoj.gov

From: Wilson, Christopher (ATR)
Sent: Thursday, August 18, 2016 11:10 AM
To: 'Aaron Healey'
Subject: CMS databases

Aaron,

I wanted to draw your attention to the below CMS databases regarding Medicare and Medicare Advantage enrollment. This is all publicly available information. I assume you and your team are already well aware of these databases but wanted to share with you in any event.

https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/MCRAdvPartDEnrolData/index.html

Report	Description
Monthly Contract and Enrollment Summary Report	Provides the number of contracts, MA only enrollment, Part D enrollment, and total enrollment by organization type. This report contains all organization types.
Monthly Enrollment by Contract	Provides monthly enrollment for each contract. This report contains all organization types.
Monthly Enrollment by Contract/Plan/State/County	Provides monthly enrollment at the contract/plan/state/county level for all organization types.
Monthly Enrollment by Plan	Provides monthly enrollment at the contract/plan level for all organization types.
Monthly MA Enrollment by State/County/Contract	Provides monthly enrollment at the state/county/contract level for all organization types except for PDP and employer-direct PDP. Note: An abridged version is also provided that excludes rows with 10 or less enrollees.

Monthly PDP Enrollment by State/County/Contract	Provides monthly enrollment at the state/county/contract level for PDP and employer-direct PDP organizations. Note: An abridged version is also provided that excludes rows with 10 or less enrollees.
MA State/County Penetration	Provides MA market penetration rates at the state/county level.
PDP State/County Penetration	Provides PDP market penetration rates at the state/county level.
MA Contract Service Area by State/County	Provides contract service area by state and county for all organization types except for PDP and employer-direct PDP.
PDP Contract Service Area by State/County	Provides contract service area by state and county for PDP and employer-direct PDP organizations.
State Service Area	Provides the list of states covered in whole or in part by each contract. This file contains all organization types.
Enforcement Letters	Provides data on enforcement actions taken by CMS against MA and PDP organizations since January 2006.
Corrective Action Plans	Information on ad hoc Corrective Action Plan (CAP) requests can now be found using this link: http://www.cms.gov/Medicare/Compliance-and-Audits/Part-C-and-Part-D-Compliance-and-Audits/Part-C-and-Part-D-Compliance-Actions.html.
Special Needs Plan (SNP) Data	Provides monthly plan enrollment for each SNP and provides totals by SNP type.
HEDIS Public Use Files	Provides annual Medicare Health Plan Employer Data and Information Set (HEDIS) performance measures.
MA Plan Directory	Provides a plan contact for each MA, cost, PACE, and demo organization. Note: This directory is populated using the Plan Directory Contact for public web site field maintained by organizations in HPMS.
PDP Plan Directory	Provides a plan contact for each PDP organization. Note: This directory is populated using the Plan Directory Contact for public web site field maintained by organizations in HPMS.
MA Claims Processing Contacts	Provides a claims processing contact for each MA, cost, PACE, and demo organization. Note: This directory is populated using the MA Claims Processing Contact field maintained by organizations in HPMS.
LIS Enrollment by Plan	Provides low income subsidy enrollment at the contract/plan level for all organizations offering Part D.
LIS Contract Enrollment by County	Provides low income subsidy enrollment at the contract/plan level for all organizations offering Part D.
Plan Crosswalks	Provides the list of annual plan crosswalks for all organization types.
Benefits Data	Provides approved MA and Part D benefits information for all organizations that submit a bid.

Trial Attorney
U.S. Department of Justice
Antitrust Division - Transportation, Energy & Agriculture Section
450 5th Street NW
Room 8018
Washington, D.C. 20001
Office: 202-598-8688
Mobile: 202-560-0363
Christopher.Wilson5@usdoj.gov

Exhibit 5

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, et al., *Plaintiffs*, v. AETNA INC. and HUMANA INC., *Defendants*.	Case No. 1:16-cv-1494 (JDB)

PLAINTIFF UNITED STATES' RESPONSES AND OBJECTIONS TO DEFENDANTS' NOTICE OF SUBPOENA TO THE DEPARTMENT OF HEALTH & HUMAN SERVICES

Plaintiff United States ("Plaintiff") hereby serves the following Responses & Objections to Defendants Aetna and Humana's ("Defendants") Notice of Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises in a Civil Action to the Department of Health & Human Services ("the Subpoena").

GENERAL OBJECTIONS

1. Plaintiff objects to the Subpoena as improperly served as Rule 45 discovery. The Subpoena seeks discovery from a party, in this case Plaintiff United States, and should be served under Rule 34.

2. Plaintiff objects to Defendants' Instructions and Definitions to the extent that they attempt to impose any obligation on Plaintiff greater than those imposed or authorized by the Federal Rules of Civil Procedure, the Local Civil Rules of the United States District Court for the District of Columbia, or any applicable order of the Court.

3. Plaintiff objects to Defendants' Instructions to the extent that they request premature production of expert materials, or production of expert materials not subject to

discovery under the Joint Scheduling and Case-Management Order ("CMO") entered in this action or Rule 26 of the Federal Rules of Civil Procedure.

4. Plaintiff objects to Defendants' Instructions to the extent that they request production of documents that are protected from disclosure by the attorney-client privilege, the deliberative process privilege, the attorney work-product doctrine, the law enforcement investigatory files privilege, the common interest privilege, the joint prosecution privilege, or any other applicable privilege or any statute governing confidentiality of information.

5. Plaintiff objects to the Instructions to the extent that they request production of documents that are subject to the terms of confidentiality or non-disclosure agreements with non-parties or would violate privacy interests of others.

6. Plaintiff objects to the Instructions to the extent that they request production of Personally Identifiable Information ("PII") or information subject to confidentiality by federal or state law.

7. Plaintiff objects to Instruction 5 to the extent it requires individualized logging in a privilege log of voluminous privileged documents that can be described categorically, such as the Antitrust Division's internal privileged documents that have not been disclosed to persons outside the Antitrust Division. Individual logging of such documents in a privilege log is unduly burdensome and exceeds the obligation imposed by the Federal Rules of Civil Procedure and the CMO.

8. Plaintiff objects to the Subpoena to the extent it attempts to impose a timeframe to respond inconsistent with Rule 34(b)(2)(A) of the Federal Rules of Civil Procedure.

9. Plaintiff objects and responds without in any way implying that it considers the requests or responses to be relevant or material to the subject matter of this action.

10. Plaintiff expressly incorporates these Objections to Instructions into each response below. A response may repeat any of the aforementioned Objections for emphasis or some other reason. The failure to repeat any of the aforementioned Objections in a particular response does not waive any objection applicable to that request.

SPECIFIC OBJECTIONS

Plaintiff's investigation and development of facts and circumstances relating to this action are ongoing. Therefore, Plaintiff reserves the right to supplement, clarify, revise, or correct any or all of its responses and objections, and to assert additional objections or privileges, in one or more supplemental responses.

REQUEST NO. 1

All documents concerning MA bid pricing tools (BPTs) or bid workbooks received from any MAO, including the most recent version of all 2017 bid workbooks.

RESPONSE:

Plaintiff objects to this Request on the ground that the request is overbroad, unduly burdensome, and not reasonably limited in scope in relation to the needs of this case. Plaintiff further objects to this Request as seeking material not relevant to the issues at stake in this litigation. Plaintiff further objects to this Request as seeking commercially sensitive information regarding Aetna's competitors.

REQUEST NO. 2

All data for the past five years from the Medicare Enrollment Database (EDB) (Personal Identifying Information may be masked using a unique ID that is consistent for each enrollee over time.).

RESPONSE:

Plaintiff objects to this Request on the ground that the request is overbroad, unduly burdensome, and not reasonably limited in scope in relation to the needs of this case. In its current form, this Request seeks over 250 million records. Further, given Defendants' request for other linked Medicare databases in Requests 3, 4, 7, and 12, proper de-identification of enrollee data could take in excess of 6 months. Plaintiff further objects to this Request as seeking material not relevant to the issues at stake in this litigation.

REQUEST NO. 3

All data for the past five years from the Medicare Risk Adjustment Processing System (RAPS) (Personal Identifying Information may be masked using a unique ID that is consistent for each enrollee over time.).

RESPONSE:

Plaintiff objects to this Request on the ground that the request is overbroad, unduly burdensome, and not reasonably limited in scope in relation to the needs of this case. Plaintiff further objects to this Request as seeking material not relevant to the issues at stake in this litigation. Plaintiff further objects to this Request as seeking commercially sensitive information regarding Aetna's competitors.

REQUEST NO. 4

All data for the past five years from the Medicare Monthly Membership Detail Report (MMDR) (Personal Identifying Information may be masked using a unique ID that is consistent for each enrollee over time.).

RESPONSE:

Plaintiff objects to this Request on the ground that the request is overbroad, unduly burdensome, and not reasonably limited in scope in relation to the needs of this case. Plaintiff further objects to this Request as seeking material not relevant to the issues at stake in this litigation.

REQUEST NO. 5

To the extent it is are [*sic*] not produced in response to Requests 2 through 4 above, any other data sufficient to identify each beneficiary's enrollment in Original Medicare, an MA plan, a Prescription Drug (Part D) plan, a Medicare Supplemental (Medigap) plan, or other supplemental health insurance, including Medicare or employer coverage.

RESPONSE:

Plaintiff objects to this Request on the ground that the request is overbroad, unduly burdensome, and not reasonably limited in scope in relation to the needs of this case. In its current form, this Request seeks over 250 million records. Further, given Defendants' request for other linked Medicare databases in Requests 2, 3, 4, 7, and 12, proper de-identification of enrollee data could take in excess of 6 months. Plaintiff further objects to this Request as seeking material not relevant to the issues at stake in this litigation. Plaintiff objects to the term "any other data" as vague, ambiguous, overly broad, and unduly burdensome. Plaintiff does not track or maintain Medicare Supplemental (Medigap) information, nor does it track or maintain information on other supplemental non-Medicare health insurance.

REQUEST NO. 6

All documents concerning Original Medicare (and its related add-on products: Medicare Supplemental, Prescription Drug (Part D) plans) and Medicare Advantage as alternatives to one

another or otherwise as offering competing choices to consumers. This request includes but is not limited to: documents purporting to educate or inform consumers about their Medicare coverage options or consumers' right or ability to switch options; documents concerning the factors that influence consumers' decision to choose between or to select among Medicare Advantage and Original Medicare, either alone or in combination with Medicare Supplemental and/or Prescription Drug (Part D) plans; and documents explaining the historic relationship between Original Medicare and Medicare Advantage.

RESPONSE:

Plaintiff objects to this Request on the ground that the request is overbroad, unduly burdensome, and not reasonably limited in scope in relation to the needs of this case. Plaintiff further objects to this Request in that it seeks publicly available information.

REQUEST NO. 7

All documents, including but not limited to Daily Transaction Reply Report (DTRR) files, showing enrollment in, disenrollment from, or switching or choosing between Medicare Advantage products, Prescription Drug (Part D) and Original Medicare products (Personal Identifying Information may be masked using a unique ID that is consistent for each enrollee over time.).

RESPONSE:

Plaintiff objects to this Request on the ground that the request is overbroad, unduly burdensome, and not reasonably limited in scope in relation to the needs of this case. Plaintiff further objects to this Request as seeking material not relevant to the issues at stake in this litigation. Plaintiff maintains enrollment and disenrollment data, but does not track enrollees across records. Further, given Defendants' request for other linked Medicare databases in

Requests 2, 3, 4, and 12, proper de-identification of enrollee data could take in excess of 6 months. Linking and standardizing enrollment/disenrollment information for the purpose of responding to this Request is unduly burdensome and not reasonably limited in scope in relation to the needs of this case.

REQUEST NO. 8

All analyses, reports, memoranda, or spreadsheets evaluating the impact of CMS regulations on: (1) MA plan bids, (2) MA plan attractiveness or benefits to consumers, (3) MA plan profitability and growth, (4) expansion of MA plans or the MA program, and (5) MA plan design or the richness of benefits.

RESPONSE:

Plaintiff objects to this Request on the ground that the request is overbroad, unduly burdensome, and not reasonably limited in scope in relation to the needs of this case. Plaintiff further objects to this Request as seeking commercially sensitive information regarding Aetna's competitors.

REQUEST NO. 9

Documents sufficient to show the 2017 Star Ratings for MA products, including any preliminary data, as well as the underlying data on which the ratings are predicated.

RESPONSE:

Plaintiff objects to this Request on the ground that the request is overbroad, unduly burdensome, and not reasonably limited in scope in relation to the needs of this case. Plaintiff further objects to this Request as seeking material not relevant to the issues at stake in this litigation. Moreover, as 2017 data is not finalized, the Star Rating data sought by this Request could change and require supplementation on a daily basis.

REQUEST NO. 10

All analyses, reports, memoranda, or spreadsheets concerning the effects of Star Ratings on beneficiaries and MAOs, including but not limited to: (1) the effects on plan selection by (i) age-ins, and (ii) switching by seniors already in the Medicare programs; (2) the effects on MAOs' retention and turnover of members; and (3) the effects on MAOs' ability to offer products with improved benefits.

RESPONSE:

Plaintiff objects to this Request on the ground that the request is overbroad, unduly burdensome, and not reasonably limited in scope in relation to the needs of this case. Plaintiff further objects to this Request in that it seeks publicly available information. Plaintiff further objects to this Request as seeking commercially sensitive information regarding Aetna's competitors.

REQUEST NO. 11

All analyses, reports, memoranda, or spreadsheets concerning the effect of enrollee characteristics (e.g., income, age, or disability status) on Star Ratings, including but not limited to any research performed by or on behalf of CMS regarding the reliability, accuracy or biases of Star Ratings.

RESPONSE:

Plaintiff objects to this Request on the ground that the request is overbroad, unduly burdensome, and not reasonably limited in scope in relation to the needs of this case. Plaintiff further objects to this Request in that it seeks publicly available information.

REQUEST NO. 12

All data sufficient to show for each Individual Exchange enrollee (Personal Identifying

Information may be masked using a unique ID that is consistent for each enrollee over time) on an annual basis for 2014-2016:

a) the plan selected (identified by HIOS plan ID, metal tier, carrier, and plan name),

b) the county of residence;

c) any applicable tax credit or cost-sharing subsidy qualification;

d) the enrollee's age, gender, and race;

e) whether the enrollee actively or passively selected the plan;

f) whether the enrollee effectuated coverage;

g) the start date of the enrollee's coverage;

h) the end date of the enrollee's coverage; and

i) the "Provider Participation Rate" for the plan and whether the plan breadth is "Basic," "Standard," or "Broad" (these terms have the meaning set forth in CMS, "2017 Letter to Issuers in the Federally-Facilitated Marketplaces," February 29, 2016, at 27).

RESPONSE:

Plaintiff objects to this Request on the ground that the request is overbroad, unduly burdensome, and not reasonably limited in scope in relation to the needs of this case. Plaintiff further objects to this Request as seeking material not relevant to the issues at stake in this litigation. Plaintiff further objects to this Request as seeking material subject to heightened protection by Section 1411(g) of the Patient Protection and Affordable Care Act, 5 U.S.C. § 552a(b), and 45 CFR 155.260.

REQUEST NO. 13

All data concerning the Medical Loss Ratio (MLR), total medical premiums, total medical expenses, and other profit measures for each exchange plan (identified by HIOS plan ID, carrier, and plan name) by state, annually for 2014-2016.

RESPONSE:

Plaintiff objects to this Request on the ground that the request is overbroad, unduly burdensome, and not reasonably limited in scope in relation to the needs of this case. Plaintiff further objects to this Request as seeking material not relevant to the issues at stake in this litigation.

REQUEST NO. 14

All documents relating to the following reports, including all data and intermediate files used by the Assistant Secretary for Planning and Evaluation (ASPE), to produce the reports:

a) "MARKETPLACE PREMIUMS AFTER SHOPPING, SWITCHING, AND PREMIUM TAX CREDITS, 2015-2016," April 12, 2016;

b) "HEALTH INSURANCE MARKETPLACES 2016 OPEN ENROLLMENT PERIOD: FINAL ENROLLMENT REPORT," March 11, 2016;

c) "HEALTH PLAN CHOICE AND PREMIUMS IN THE 2016 HEALTH INSURANCE MARKETPLACE," October 30, 2015;

d) "CONSUMER DECISIONS REGARDING HEALTH PLAN CHOICES, IN THE 2014 AND 2015 MARKETPLACES," October 28, 2015; and

e) "COMPETITION AND CHOICE IN THE HEALTH INSURANCE MARKETPLACES, 2014-2015: IMPACT ON PREMIUMS," July 27, 2015.

RESPONSE:

Plaintiff objects to this Request on the ground that the request is overbroad, unduly burdensome, and not reasonably limited in scope in relation to the needs of this case. Plaintiff further objects to this Request as seeking material not relevant to the issues at stake in this litigation.

REQUEST NO. 15

All analyses, reports, memoranda, or spreadsheets concerning analyses performed by CMS related to competition, plan selection, carrier participation, entry or exit, or switching among plans by consumers, and network breadth on the Individual Exchanges, including underlying data.

RESPONSE:

Plaintiff objects to this Request on the ground that the request is overbroad, unduly burdensome, and not reasonably limited in scope in relation to the needs of this case. Plaintiff further objects to this Request as seeking material subject to heightened protection by Section 1411(g) of the Patient Protection and Affordable Care Act, 5 U.S.C. § 552a(b), and 45 CFR 155.260.

REQUEST NO. 16

All data concerning: (1) the identification of the counties and rating areas in which each existing or new carriers will offer Individual Exchange plans in 2017; and (2) the premium and total beneficiary cost for each such plan. This request includes but is not limited to applications for new Qualified Health Plans (QHPs) filed by carriers who plan to enter an exchange or offer a new exchange plan in 2017, and rate review requests filed by carriers who will continue to offer exchange plans in 2017.

RESPONSE:

Plaintiff objects to this Request on the ground that the request is overbroad, unduly burdensome, and not reasonably limited in scope in relation to the needs of this case.

REQUEST NO. 17

All data identifying, for 2015-2016, all Medicare Accountable Care Organizations (ACOs) with attributed Medicare beneficiaries in any county, the type of each such ACO (MSSP, Pioneer, Next Generation, etc.), and the number of attributed beneficiaries for each ACO and county.

RESPONSE:

Plaintiff objects to this Request on the ground that the request is overbroad, unduly burdensome, and not reasonably limited in scope in relation to the needs of this case. . Plaintiff further objects to this Request in that it seeks publicly available information.

REQUEST NO. 18

Data sufficient to identify for 2015 and 2016 all Bundled Payment Care Improvement initiative arrangements, including but not limited to the name, address, TIN, type of organization and type of entity of each Awardee, Awardee Convener, Facilitator Convener, Provider Partner and the episodes of care applicable.

RESPONSE:

Plaintiff objects to this Request on the ground that the request is overbroad, unduly burdensome, and not reasonably limited in scope in relation to the needs of this case. Plaintiff further objects to this Request as seeking material not relevant to the issues at stake in this litigation.

REQUEST NO. 19

All analyses, reports, memoranda, or spreadsheets evaluating or analyzing the provision of coordinated care to Medicare beneficiaries by Medicare ACOs.

RESPONSE:

Plaintiff objects to this Request on the ground that the request is overbroad, unduly burdensome, and not reasonably limited in scope in relation to the needs of this case. Plaintiff further objects to this Request in that it seeks publicly available information.

REQUEST NO. 20

All data evaluating or analyzing the growth of Medicare ACOs; the effects of Medicare ACOs on healthcare spending for the Medicare population; the effects of Medicare ACOs on the enrollment, growth, or profitability of Medicare Advantage plans; the ability or likelihood of providers participating in Medicare ACOs beginning to offer MA plans; or the effects of Medicare ACOs on healthcare quality or patient outcomes.

RESPONSE:

Plaintiff objects to this Request on the ground that the request is overbroad, unduly burdensome, and not reasonably limited in scope in relation to the needs of this case. Plaintiff further objects to this Request in that it seeks publicly available information.

REQUEST NO. 21

All documents concerning communications with DOJ regarding the Transaction.

RESPONSE:

Plaintiff objects to this Request to the extent that it seeks the production of documents that are protected from disclosure by the attorney-client privilege, the deliberative process privilege, the attorney work-product doctrine, the law enforcement investigatory files privilege,

the common interest privilege, the joint prosecution privilege, or any other applicable privilege or any statute governing confidentiality of information. Plaintiff objects to this Request to the extent that it requires production of expert materials, or production of expert materials not subject to discovery under the CMO entered in this action or Rule 26 of the Federal Rules of Civil Procedure.

REQUEST NO. 22

All documents concerning any internal or external analyses or communications regarding the Transaction.

RESPONSE:

Plaintiff objects to this Request to the extent that it seeks the production of documents that are protected from disclosure by the attorney-client privilege, the deliberative process privilege, the attorney work-product doctrine, the law enforcement investigatory files privilege, the common interest privilege, the joint prosecution privilege, or any other applicable privilege or any statute governing confidentiality of information. Plaintiff objects to the term "internal or external analyses" as vague and ambiguous. Plaintiff objects to this Request to the extent it seeks documents that are not in Plaintiff's custody, possession or control.

REQUEST NO. 23

All documents provided to DOJ for the purposes of its review of the Transaction.

RESPONSE:

Plaintiff objects to this Request to the extent that it seeks the production of documents that are protected from disclosure by the attorney-client privilege, the deliberative process privilege, the attorney work-product doctrine, the law enforcement investigatory files privilege, the common interest privilege, the joint prosecution privilege, or any other applicable privilege

or any statute governing confidentiality of information. Plaintiff further objects to this Request as seeking material subject to heightened protection by Section 1411(g) of the Patient Protection and Affordable Care Act, 5 U.S.C. § 552a(b), and 45 CFR 155.260.

Dated: August 8, 2016

Respectfully submitted,

/s/ Craig Conrath
CRAIG CONRATH

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Attorneys for the United States of America and on behalf of Plaintiff States

CERTIFICATE OF SERVICE

I hereby certify that on August 8, 2016, I caused a true and correct copy of the foregoing to be served upon the parties of record via the Court's CM/ECF system.

/s/ Craig Conrath
CRAIG CONRATH

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Attorney for the United States of America

Exhibit 6

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, et al., *Plaintiffs*, v. AETNA INC. and HUMANA INC., *Defendants*.	Case No. 1:16-cv-1494 (JDB)

PLAINTIFF UNITED STATES' RESPONSES AND OBJECTIONS TO DEFENDANTS' NOTICE OF SUBPOENA TO THE DEPARTMENT OF HEALTH AND HUMAN SERVICES

Plaintiff United States ("Plaintiff") , on behalf of the Department of Health and Human Services ("HHS"), hereby serves the following Responses and Objections to Defendants Aetna and Humana's ("Defendants") Notice of Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises in a Civil Action to the Department of Health and Human Services ("the Subpoena").

GENERAL OBJECTIONS

1. Plaintiff objects to Defendants' Instructions and Definitions to the extent that they attempt to impose any obligation on Plaintiff greater than those imposed or authorized by the Federal Rules of Civil Procedure, the Local Civil Rules of the United States District Court for the District of Columbia, the Joint Scheduling and Case Management Order entered in this action, or any other applicable order of the Court.

2. Plaintiff objects to Defendants' Instructions to the extent that they request premature production of expert materials, or production of expert materials not subject to

discovery under the Joint Scheduling and Case-Management Order ("CMO") entered in this action or Rule 26 of the Federal Rules of Civil Procedure.

3. Plaintiff objects to Defendants' Instructions to the extent that they request production of documents that are protected from disclosure by the attorney-client privilege, the deliberative process privilege, the attorney work-product doctrine, the law enforcement investigatory files privilege, the common interest privilege, the joint prosecution privilege, or any other applicable privilege or any statute governing confidentiality of information.

4. Plaintiff objects to the Instructions to the extent that they request production of documents that are subject to the terms of confidentiality or non-disclosure agreements with non-parties or would violate privacy interests of others.

5. Plaintiff objects to the Instructions to the extent that they request production of Personally Identifiable Information ("PII") or information subject to confidentiality by federal or state law.

6. Plaintiff objects to Instruction 5 to the extent it requires individualized logging in a privilege log of voluminous privileged documents that can be described categorically, such as the Antitrust Division's internal privileged documents that have not been disclosed to persons outside the Antitrust Division. Individual logging of such documents in a privilege log is unduly burdensome and exceeds the obligation imposed by the Federal Rules of Civil Procedure and the Joint Scheduling and Case Management Order entered in this action.

7. Plaintiff objects to the Subpoena to the extent it attempts to impose a timeframe to respond inconsistent with Rule 34(b)(2)(A) of the Federal Rules of Civil Procedure and the Joint Scheduling and Case Management Order entered in this action.

8. Plaintiff's objections or responses are not intended to imply that the Requests or any responses to them are relevant or material to the subject matter of this action.

9. Plaintiff expressly incorporates these Objections to Instructions into each response below. A response may repeat any of the aforementioned Objections for emphasis or some other reason. The failure to repeat any of the aforementioned Objections in a particular response does not waive any objection applicable to that Request.

SPECIFIC OBJECTIONS

Plaintiff's investigation and development of facts and circumstances relating to this action are ongoing. Therefore, Plaintiff reserves the right to supplement, clarify, revise, or correct any or all of its responses and objections, and to assert additional objections or privileges, in one or more supplemental responses.

REQUEST NO. 1

All documents concerning MA bid pricing tools (BPTs) or bid workbooks received from any MAO, including the most recent version of all 2017 bid workbooks.

RESPONSE:

Plaintiff objects to this Request as overbroad, unduly burdensome, and not reasonably limited in scope in relation to the needs of this case. Plaintiff further objects to this Request as seeking material not relevant to the subject matter of this litigation. Plaintiff further objects to this Request as seeking commercially sensitive information regarding Aetna's competitors. As it relates to 2017 bid workbooks, given that 2017 bid data is preliminary, tentative, dynamic, and subject to amendment or withdrawal by participating MAOs, it is not probative evidence regarding the Medicare Advantage marketplace that may exist in 2017; as such, Plaintiff objects to producing this data on the ground that it lacks relevance to the subject matter of this litigation.

Further, because the finalization process for 2017 MA bid data requires intensive data processing, data standardization, and compilation and analysis of narrative responses exchanged between HHS and participating MAOs, the review and collection of same is unduly burdensome, and not reasonably limited in scope in relation to the needs of this case.

Subject to and without waiving the foregoing objections, Plaintiff will produce provide the bid data responsive to this Request that HHS provided to DOJ in connection with DOJ's investigation.

REQUEST NO. 2

All data for the past five years from the Medicare Enrollment Database (EDB) (Personal Identifying Information may be masked using a unique ID that is consistent for each enrollee over time.).

RESPONSE:

Plaintiff objects to this Request as overbroad, unduly burdensome, and not reasonably limited in scope in relation to the needs of this case. In its current form, this Request seeks over 250 million records. The Request also seeks information that cannot be produced in the manner in which it is kept in the ordinary course of business. The data contained in the Medicare Enrollment Database is maintained in a "flat file"—that is, it cannot be indexed and exported along data fields such as state, plan, or time period. One monthly upload file—Defendants seek 60 such files—for the Medicare Enrollment Database contains 2.5 billion lines of data and is 1 terabyte in size. The process of producing all data for the past five years from the Medicare Enrollment Database would entail downloading all data in the database—which contains information going back to 1965—and applying programming to configure it into a format that is useable in a relational database such as Microsoft Excel, and then attempting to isolate only the

data called for by this Request. It is estimated that this process would take 3-4 months and require the hiring of an external contractor, as this is not an operation routinely performed by HHS in the normal course of business. Further, given Defendants' request for other linked Medicare databases in Requests 3, 4, 7, and 12, proper de-identification of enrollee data could take in excess of 6 months and up to a year.

In light of the undue and excessive burden of de-identifying and developing unique beneficiary IDs linked across the databases sought in this and other Requests, Plaintiff does not intend to produce beneficiary-level Medicare Enrollment data. Plaintiff further objects to this Request as seeking material not relevant to the subject matter of this litigation. Plaintiff further avers that DOJ has not accessed the Medicare Enrollment Database during the course of its investigation and that Plaintiff does not intend to use such data during the course of this litigation.

Plaintiff further objects to this Request to the extent that the documents and information sought can be obtained from publicly available sources that are equally accessible to Defendants, impose less burden and expense on Plaintiff, and therefore are more proportional to the needs of this case. Information responsive to this Request has been made publicly available online at https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/MCRAdvPartDEnrolData/index.html. That website includes, among other things:

Report	Description
Monthly Contract and Enrollment Summary Report	Provides the number of contracts, MA only enrollment, Part D enrollment, and total enrollment by organization type. This report contains all organization types.
Monthly Enrollment by Contract	Provides monthly enrollment for each contract. This report contains all organization types.
Monthly Enrollment by	Provides monthly enrollment at the contract/plan/state/county level for all

Contract/Plan/State/County	organization types.
Monthly Enrollment by Plan	Provides monthly enrollment at the contract/plan level for all organization types.
Monthly MA Enrollment by State/County/Contract	Provides monthly enrollment at the state/county/contract level for all organization types except for PDP and employer-direct PDP. Note: An abridged version is also provided that excludes rows with 10 or less enrollees.
Monthly PDP Enrollment by State/County/Contract	Provides monthly enrollment at the state/county/contract level for PDP and employer-direct PDP organizations. Note: An abridged version is also provided that excludes rows with 10 or less enrollees.
MA State/County Penetration	Provides MA market penetration rates at the state/county level.
PDP State/County Penetration	Provides PDP market penetration rates at the state/county level.
MA Contract Service Area by State/County	Provides contract service area by state and county for all organization types except for PDP and employer-direct PDP.
PDP Contract Service Area by State/County	Provides contract service area by state and county for PDP and employer-direct PDP organizations.
State Service Area	Provides the list of states covered in whole or in part by each contract. This file contains all organization types.
Enforcement Letters	Provides data on enforcement actions taken by CMS against MA and PDP organizations since January 2006.
Corrective Action Plans	Information on ad hoc Corrective Action Plan (CAP) requests can now be found using this link: http://www.cms.gov/Medicare/Compliance-and-Audits/Part-C-and-Part-D-Compliance-and-Audits/Part-C-and-Part-D-Compliance-Actions.html.
Special Needs Plan (SNP) Data	Provides monthly plan enrollment for each SNP and provides totals by SNP type.
HEDIS Public Use Files	Provides annual Medicare Health Plan Employer Data and Information Set (HEDIS) performance measures.
MA Plan Directory	Provides a plan contact for each MA, cost, PACE, and demo organization. Note: This directory is populated using the Plan Directory Contact for public web site field maintained by organizations in HPMS.
PDP Plan Directory	Provides a plan contact for each PDP organization. Note: This directory is populated using the Plan Directory Contact for public web site field maintained by organizations in HPMS.

MA Claims Processing Contacts	Provides a claims processing contact for each MA, cost, PACE, and demo organization. Note: This directory is populated using the MA Claims Processing Contact field maintained by organizations in HPMS.
LIS Enrollment by Plan	Provides low income subsidy enrollment at the contract/plan level for all organizations offering Part D.
LIS Contract Enrollment by County	Provides low income subsidy enrollment at the contract/plan level for all organizations offering Part D.
Plan Crosswalks	Provides the list of annual plan crosswalks for all organization types.
Benefits Data	Provides approved MA and Part D benefits information for all organizations that submit a bid.

REQUEST NO. 3

All data for the past five years from the Medicare Risk Adjustment Processing System (RAPS) (Personal Identifying Information may be masked using a unique ID that is consistent for each enrollee over time.).

RESPONSE:

Plaintiff objects to this Request as overbroad, unduly burdensome, and not reasonably limited in scope in relation to the needs of this case. The Medicare Risk Adjustment Processing System generates a risk score for each Medicare beneficiary calculated over time, and as such, this Request seeks roughly over 3 billion records. This Request also seeks information that cannot be produced in the manner in which it is kept in the ordinary course of business. The data contained in the Medicare Risk Adjustment Processing System is maintained in a "flat file"—that is, it cannot be indexed and exported along data fields such as state, plan, or time period. The process of producing all data for the past five years from the Medicare Risk Adjustment Processing System would entail downloading all data in the database and applying programming to configure it into a format that is useable in a relational database such as Microsoft Excel, and then attempting to isolate only the data called for by this Request. It is estimated that this

process would take 3-4 months and require the hiring of an external contractor, as this is not an operation routinely performed by HHS in the normal course of business. Further, given Defendants' request for other linked Medicare databases in Requests 2, 4, 7, and 12, proper de-identification of enrollee data could take in excess of 6 months and up to a year.

In light of the undue and excessive burden of de-identifying and developing unique beneficiary IDs linked across the databases sought in this and other Requests, Plaintiff does not intend to produce beneficiary-level Medicare risk scoring data. Plaintiff further objects to this Request as seeking material not relevant to the subject matter of this litigation. Plaintiff further objects to this Request as seeking commercially sensitive information regarding Aetna's competitors. Plaintiff further avers that DOJ has not accessed the Medicare Risk Adjustment Processing System during the course of its investigation and that Plaintiff does not intend to use such data during the course of this litigation.

Subject to and without waiving the foregoing objections, Plaintiff states that information responsive to this Request has been made publicly available online at https://www.cms.gov/Medicare/Health-Plans/MedicareAdvtgSpecRateStats/Risk-Adjustors.html and at: https://www.cms.gov/Medicare/Medicare-Advantage/Plan-Payment/Plan-Payment-Data.html.

REQUEST NO. 4

All data for the past five years from the Medicare Monthly Membership Detail Report (MMDR) (Personal Identifying Information may be masked using a unique ID that is consistent for each enrollee over time.).

RESPONSE:

Plaintiff objects to this Request as overbroad, unduly burdensome, and not reasonably limited in scope in relation to the needs of this case. As stated, this Request seeks roughly 2.7 billion records. This Request also seeks information that cannot be produced in the manner in which it is kept in the ordinary course of business. The data contained in the Medicare Monthly Membership Detail Report is maintained in a "flat file"—that is, it cannot be indexed and exported along data fields such as state, plan, or time period. The process of producing all data for the past five years from the Medicare Monthly Membership Detail Report would entail downloading all data in the database and applying programming to configure it into a format that is useable in a relational database such as Microsoft Excel, and then attempting to isolate only the data called for by this Request. It is estimated that this process would take 3-4 months and require the hiring of an external contractor, as this is not an operation routinely performed by HHS in the normal course of business. Given Defendants' request for other linked Medicare databases in Requests 2, 3, 7, and 12, proper de-identification of enrollee data could take in excess of 6 months and up to a year. Plaintiff further objects to this Request as seeking material not relevant to the subject matter of this litigation. Plaintiff further avers that DOJ has not accessed the Medicare Monthly Membership Detail Report during the course of its investigation and that Plaintiff does not intend to use such data during the course of this litigation.

In light of the undue and excessive burden of de-identifying and developing unique beneficiary IDs linked across the databases sought in this and other Requests, Plaintiff does not intend to produce beneficiary-level Medicare Enrollment data. Subject to and without waiving the foregoing objections, Plaintiff states that information responsive to this Request has been

made publicly available online at https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/MCRAdvPartDEnrolData/index.html

REQUEST NO. 5

To the extent it is not produced in response to Requests 2 through 4 above, any other data sufficient to identify each beneficiary's enrollment in Original Medicare, an MA plan, a Prescription Drug (Part D) plan, a Medicare Supplemental (Medigap) plan, or other supplemental health insurance, including Medicare or employer coverage.

RESPONSE:

Plaintiff objects to this Request as is overbroad, unduly burdensome, and not reasonably limited in scope in relation to the needs of this case. In its current form, this Request seeks over 250 million records. Further, given Defendants' request for other linked Medicare databases in Requests 2, 3, 4, 7, and 12, proper de-identification of enrollee data could take in excess of 6 months and up to a year. Plaintiff further objects to this Request as seeking material not relevant to the subject matter of this litigation. Plaintiff objects to the term "any other data" as vague, ambiguous, overly broad, and unduly burdensome. Plaintiff does not track or maintain Medicare Supplemental (Medigap) information, nor does it track or maintain information on other supplemental non-Medicare health insurance.

Subject to and without waiving the foregoing objections, Plaintiff is not aware of any data responsive to Request 5 that is not encompassed by Requests 2-4.

REQUEST NO. 6

All documents concerning Original Medicare (and its related add-on products: Medicare Supplemental, Prescription Drug (Part D) plans) and Medicare Advantage as alternatives to one

another or otherwise as offering competing choices to consumers. This Request includes but is not limited to: documents purporting to educate or inform consumers about their Medicare coverage options or consumers' right or ability to switch options; documents concerning the factors that influence consumers' decision to choose between or to select among Medicare Advantage and Original Medicare, either alone or in combination with Medicare Supplemental and/or Prescription Drug (Part D) plans; and documents explaining the historic relationship between Original Medicare and Medicare Advantage.

RESPONSE:

Plaintiff objects to this Request as overbroad, unduly burdensome, and not reasonably limited in scope in relation to the needs of this case. Plaintiff further objects to this Request in that it seeks publicly available information. Information responsive to this Request has been made publicly available online at: https://www.medicare.gov/.

Subject to and without waiving the foregoing objections, Plaintiff will produce documents responsive to this Request from the files of the Assistant Secretary for Planning and Evaluation's Office of Health Policy.

REQUEST NO. 7

All documents, including but not limited to Daily Transaction Reply Report (DTRR) files, showing enrollment in, disenrollment from, or switching or choosing between Medicare Advantage products, Prescription Drug (Part D) and Original Medicare products (Personal Identifying Information may be masked using a unique ID that is consistent for each enrollee over time.).

RESPONSE:

Plaintiff objects to this Request as overbroad, unduly burdensome, not reasonably limited in scope in relation to the needs of this case, and duplicative to the extent it seeks the production of material already sought in Request 2. Plaintiff further objects to this Request as seeking material not relevant to the subject matter of this litigation. The Daily Transaction Reply Report is a system in which CMS captures and confirms receipt of any and all changes to beneficiary records sent to it by Medicare Advantage plans. For example, an inadvertent miscoding and subsequent change to a beneficiary's address, gender, or name would be captured by this system. A single daily report can contain over one thousand entries. The data maintained in this system cannot be isolated by enrollment/disenrollment. Further, given Defendants' request for other linked Medicare databases in Requests 2, 3, 4, and 12, proper de-identification of enrollee data could take in excess of 6 months and up to a year. Linking and standardizing enrollment/disenrollment information for the purpose of responding to this Request is unduly burdensome and not reasonably limited in scope in relation to the needs of this case. Plaintiff further avers that DOJ has not accessed the Daily Transaction Reply Report during the course of its investigation and that Plaintiff does not intend to use such data during the course of this litigation.

In light of the undue and excessive burden of de-identifying and developing unique beneficiary IDs linked across the databases sought in this and other Requests, Plaintiff does not intend to produce beneficiary-level Medicare Enrollment data.

REQUEST NO. 8

All analyses, reports, memoranda, or spreadsheets evaluating the impact of CMS regulations on: (1) MA plan bids, (2) MA plan attractiveness or benefits to consumers, (3) MA

plan profitability and growth, (4) expansion of MA plans or the MA program, and (5) MA plan design or the richness of benefits.

RESPONSE:

Plaintiff objects to this Request as overbroad, unduly burdensome, and not reasonably limited in scope in relation to the needs of this case. Plaintiff further objects to this Request as seeking commercially sensitive information regarding Aetna's competitors.

Subject to and without waiving the foregoing objections, Plaintiff will produce documents responsive to this Request from the files of the Assistant Secretary for Planning and Evaluation's Office of Health Policy.

REQUEST NO. 9

Documents sufficient to show the 2017 Star Ratings for MA products, including any preliminary data, as well as the underlying data on which the ratings are predicated.

RESPONSE:

Plaintiff objects to this Request as overbroad, unduly burdensome, and not reasonably limited in scope in relation to the needs of this case. Plaintiff further objects to this Request as seeking material not relevant to the subject matter of this litigation. Moreover, as 2017 data is not finalized, the Star Rating data sought by this Request could change and therefore require supplementation on a daily basis.

REQUEST NO. 10

All analyses, reports, memoranda, or spreadsheets concerning the effects of Star Ratings on beneficiaries and MAOs, including but not limited to: (1) the effects on plan selection by (i) age-ins, and (ii) switching by seniors already in the Medicare programs; (2) the effects on

MAOs' retention and turnover of members; and (3) the effects on MAOs' ability to offer products with improved benefits.

RESPONSE:

Plaintiff objects to this Request as overbroad, unduly burdensome, and not reasonably limited in scope in relation to the needs of this case. Plaintiff further objects to this Request in that it seeks publicly available information. Plaintiff further objects to this Request as seeking commercially sensitive information regarding Aetna's competitors.

Subject to and without waiving the foregoing objections, Plaintiff will produce documents responsive to this Request from the files of the Assistant Secretary for Planning and Evaluation's Office of Health Policy, and Amy Larrick and Jennifer Shapiro of Medicare's Drug Benefit Group.

REQUEST NO. 11

All analyses, reports, memoranda, or spreadsheets concerning the effect of enrollee characteristics (e.g., income, age, or disability status) on Star Ratings, including but not limited to any research performed by or on behalf of CMS regarding the reliability, accuracy or biases of Star Ratings.

RESPONSE:

Plaintiff objects to this Request as overbroad, unduly burdensome, and not reasonably limited in scope in relation to the needs of this case. Plaintiff further objects to this Request in that it seeks publicly available information.

Subject to and without waiving the foregoing objections, Plaintiff will produce documents responsive to this Request from the files of the Assistant Secretary for Planning and

Evaluation's Office of Health Policy, and Amy Larrick and Jennifer Shapiro of Medicare's Drug Benefit Group.

REQUEST NO. 12

All data sufficient to show for each Individual Exchange enrollee (Personal Identifying Information may be masked using a unique ID that is consistent for each enrollee over time) on an annual basis for 2014-2016:

a) the plan selected (identified by HIOS plan ID, metal tier, carrier, and plan name),

b) the county of residence;

c) any applicable tax credit or cost-sharing subsidy qualification;

d) the enrollee's age, gender, and race;

e) whether the enrollee actively or passively selected the plan;

f) whether the enrollee effectuated coverage;

g) the start date of the enrollee's coverage;

h) the end date of the enrollee's coverage; and

i) the "Provider Participation Rate" for the plan and whether the plan breadth is "Basic," "Standard," or "Broad" (these terms have the meaning set forth in CMS, "2017 Letter to Issuers in the Federally-Facilitated Marketplaces," February 29, 2016, at 27).

RESPONSE:

Plaintiff objects to this Request as overbroad, unduly burdensome, and not reasonably limited in scope in relation to the needs of this case, in that it seeks information, including about individual enrollees, that is not relevant to the subject matter of this action. This Request, therefore, is not proportional to the case or to the needs of the Defendants in this litigation. Plaintiff also objects to this Request as seeking material subject to heightened protection by

Section 1411(g) of the Patient Protection and Affordable Care Act, 5 U.S.C. § 552a(b), and 45 CFR 155.260.

Plaintiff further objects to this Request to the extent that the documents and information can be obtained from other sources that are more convenient, less burdensome, and less expensive. Information responsive to this Request has been made publicly available and can be found online in CCIIO's Public Use Files at: https://www.cms.gov/cciio/resources/data-resources/marketplace-puf.html and https://data.cms.gov/browse?category=Marketplace&utf8=%E2%9C%93. Subject to and without waiving the foregoing objections, Plaintiff will produce aggregated Individual Exchange data responsive to this Request that HHS provided to DOJ in connection with DOJ's investigation.

REQUEST NO. 13

All data concerning the Medical Loss Ratio (MLR), total medical premiums, total medical expenses, and other profit measures for each exchange plan (identified by HIOS plan ID, carrier, and plan name) by state, annually for 2014-2016.

RESPONSE:

Plaintiff objects to this Request as overbroad, unduly burdensome, and not reasonably limited in scope in relation to the needs of this case. Plaintiff further objects to this Request as seeking material not relevant to the subject matter of this litigation.

Plaintiff further objects to this Request to the extent that the documents and information can be obtained from other sources that are more convenient, less burdensome, and less expensive. The information sought is publicly available or can be calculated from information

available in the public domain or through data files made available to the public for purchase from HHS.

By way of further response, a number of analyses, evaluations, reports, and summaries of MLR and its effect on competition have been made publicly available by the HHS Office of the Assistant Secretary for Planning and Evaluation ("ASPE"), and are available online at https://aspe.hhs.gov/ through a searchable database. While there may be additional studies located on the ASPE website, Defendants are specifically referred to the following documents:

- Market Competition Works: Proposed Silver Premiums in the 2014 Individual Market Are Substantially Lower than Expected (08/09/2013) https://aspe.hhs.gov/basic-report/market-competition-works-proposed-silver-premiums-2014-individual-market-are-substantially-lower-expected
- Market Competition Works: Proposed Silver Premiums in the 2014 Individual and Small Group Markets Are Nearly 20% Lower than Expected Premiums (07/18/2013) https://aspe.hhs.gov/basic-report/market-competition-works-proposed-silver-premiums-2014-individual-and-small-group-markets-are-nearly-20-lower-expected-premiums
- Affordable Care Act Expands Mental Health and Substance Use Disorder Benefits and Federal Parity Protections for Over 62 Million Americans (02/20/2013) https://aspe.hhs.gov/pdf-report/affordable-care-act-expands-mental-health-and-substance-use-disorder-benefits-and-federal-parity-protections-over-62-million-americans
- Rate Review Annual Report for Calendar Year 2013 (09/01/2014) https://aspe.hhs.gov/pdf-report/rate-review-annual-report-calendar-year-2013

- Rate Review Annual Report for Calendar Year 2012 (September 2013) https://aspe.hhs.gov/pdf-report/us-department-health-and-human-services-rate-review-annual-report-september-2013
- Innovative Medicaid Managed Care Coordination Programs for Co-morbid Behavioral Health and Chronic Physical Health Conditions: Final Report (05/01/2015) https://aspe.hhs.gov/basic-report/innovative-medicaid-managed-care-coordination-programs-co-morbid-behavioral-health-and-chronic-physical-health-conditions-final-report
- Long-Term Care Insurance Research Brief (06/01/2012) https://aspe.hhs.gov/basic-report/long-term-care-insurance-research-brief-0
- How Many Individuals Might Have Marketplace Coverage After the 2015 Open Enrollment Period? (11/10/2014) https://aspe.hhs.gov/pdf-report/how-many-individuals-might-have-marketplace-coverage-after-2015-open-enrollment-period
- Variation and Trends in Medigap Premiums (12/16/2011) https://aspe.hhs.gov/pdf-report/variation-and-trends-medigap-premiums
- New Census Estimates Show 3 Million more Americans had Health Insurance Coverage in 2012 (11/05/2013) https://aspe.hhs.gov/pdf-report/new-census-estimates-show-3-million-more-americans-had-health-insurance-coverage-2012
- Trends in Premiums in the Small Group and Individual Insurance Markets, 2008-2011 (11/6/2012) https://aspe.hhs.gov/pdf-report/trends-premiums-small-group-and-individual-insurance-markets-2008-2011

- A Framework for Assessing Insurer Responses to Health Care Market Changes (7/1/97) https://aspe.hhs.gov/basic-report/framework-assessing-insurer-responses-health-care-market-changes
- Effects of Implementing State Insurance Market Reform, 2011 – 2012 (06/07/2013) https://aspe.hhs.gov/pdf-report/effects-implementing-state-insurance-market-reform-2011-2012

To the extent that this Request seeks information related to MLR and the Affordable Care Act, responsive documents are publicly available online on the "Affordable Care Act Research" section of the ASPE website at https://aspe.hhs.gov/affordable-care-act-research. This website also provides a searchable database.

Additionally, the Center for Consumer Information and Insurance Oversight ("CCIO") within CMS maintains an online searchable database on the health insurance marketplace website at https://www.cms.gov/CCIIO/Resources/Data-Resources. That website includes a section entitled "Medical Loss Ratio Data and System Resources," which provides links to MLR data including a search tool to find an insurer's Medical Loss Ratio Report for 2011-2014 as well as public use files for 2011-2014 containing raw data submitted by insurance companies subject to MLR reporting requirements. This information can be found at: https://www.cms.gov/CCIIO/Resources/Data-Resources/mlr.html. 2015-16 data is not currently available.

REQUEST NO. 14

All documents relating to the following reports, including all data and intermediate files used by the Assistant Secretary for Planning and Evaluation (ASPE), to produce the reports:

a) "MARKETPLACE PREMIUMS AFTER SHOPPING, SWITCHING, AND PREMIUM TAX CREDITS, 2015-2016," April 12, 2016;

b) "HEALTH INSURANCE MARKETPLACES 2016 OPEN ENROLLMENT PERIOD: FINAL ENROLLMENT REPORT," March 11, 2016;

c) "HEALTH PLAN CHOICE AND PREMIUMS IN THE 2016 HEALTH INSURANCE MARKETPLACE," October 30, 2015;

d) "CONSUMER DECISIONS REGARDING HEALTH PLAN CHOICES, IN THE 2014 AND 2015 MARKETPLACES," October 28, 2015; and

e) "COMPETITION AND CHOICE IN THE HEALTH INSURANCE MARKETPLACES, 2014-2015: IMPACT ON PREMIUMS," July 27, 2015.

RESPONSE:

Plaintiff objects to this Request as overbroad and unduly burdensome, in that it does not specify a particular investigation or matter, and does not specify a time period. Plaintiff further objects to this Request to the extent that the documents and information sought can be obtained from publicly available sources that are equally accessible to Defendants, impose less burden and expense on Plaintiff, and therefore are more proportional to the needs of this case. In addition, Plaintiff objects to this Request as seeking material not relevant to the subject matter of this litigation.

Subject to and without waiving the foregoing objections, Plaintiff will produce non-privileged documents responsive to this Request from the files of the Assistant Secretary for Planning and Evaluation's Office of Health Policy.

REQUEST NO. 15

All analyses, reports, memoranda, or spreadsheets concerning analyses performed by CMS related to competition, plan selection, carrier participation, entry or exit, or switching among plans by consumers, and network breadth on the Individual Exchanges, including underlying data.

RESPONSE:

Plaintiff objects to this Request as overbroad, unduly burdensome, and not reasonably limited in scope in relation to the needs of this case. Plaintiff further objects to this Request as seeking material subject to heightened protection by Section 1411(g) of the Patient Protection and Affordable Care Act, 5 U.S.C. § 552a(b), and 45 CFR 155.260.

Plaintiff further objects to this Request to the extent that the documents and information sought can be obtained from publicly available sources that are equally accessible to Defendants, impose less burden and expense on Plaintiff, and therefore are more proportional to the needs of this case. Subject to and without waiving the foregoing objections, Plaintiff states that responsive documents are available on the "Affordable Care Act Research" section of the ASPE website at https://aspe.hhs.gov/affordable-care-act-research, in CCIIO's Public Use Files at: https://www.cms.gov/cciio/resources/data-resources/marketplace-puf.html and https://www.cms.gov/CCIIO/Resources/Data-Resources/index.html.

Subject to and without waiving the foregoing objections, Plaintiff will produce documents responsive to this Request from the files of the Assistant Secretary for Planning and Evaluation's Office of Health Policy.

REQUEST NO. 16

All data concerning: (1) the identification of the counties and rating areas in which each existing or new carriers will offer Individual Exchange plans in 2017; and (2) the premium and

total beneficiary cost for each such plan. This Request includes but is not limited to applications for new Qualified Health Plans (QHPs) filed by carriers who plan to enter an exchange or offer a new exchange plan in 2017, and rate review requests filed by carriers who will continue to offer exchange plans in 2017.

RESPONSE:

Plaintiff objects to this Request as overbroad, unduly burdensome, and not reasonably limited in scope in relation to the needs of this case. Plaintiff further objects to this Request to the extent it seeks documents from HHS that reflect the agency's internal deliberations, discussions, or studies that are protected by the deliberative process privilege or the attorney/client privilege. Plaintiff further objects to this Request to the extent it seeks documents outside Plaintiff's possession, custody, and control. Plaintiff further objects to this Request to the extent that the documents and information sought can be obtained from publicly available sources, including state Department of Insurance websites, that are equally accessible to Defendants, impose less burden and expense on Plaintiff, and therefore are more proportional to the needs of this case.

Subject to and without waiving the foregoing objections, Plaintiff will produce the Preliminary List of 2017 On-Exchange Carriers that HHS provided to DOJ in connection with DOJ's investigation.

REQUEST NO. 17

All data identifying, for 2015-2016, all Medicare Accountable Care Organizations (ACOs) with attributed Medicare beneficiaries in any county, the type of each such ACO (MSSP, Pioneer, Next Generation, etc.), and the number of attributed beneficiaries for each ACO and county.

RESPONSE:

Plaintiff objects to this Request as overbroad, unduly burdensome, and not reasonably limited in scope in relation to the needs of this case. Plaintiff further objects to this Request in that it seeks publicly available information.

Subject to and without waiving the foregoing objections, Plaintiff states that the Medicare ACO public use file, which contains information on Medicare ACO financial and quality performance, is publicly available at: https://www.cms.gov/Research-Statistics-Data-and-Systems/Downloadable-Public-Use-Files/SSPACO/index.html.

REQUEST NO. 18

Data sufficient to identify for 2015 and 2016 all Bundled Payment Care Improvement initiative arrangements, including but not limited to the name, address, TIN, type of organization and type of entity of each Awardee, Awardee Convener, Facilitator Convener, Provider Partner and the episodes of care applicable.

RESPONSE:

Plaintiff objects to this Request as overbroad, unduly burdensome, and not reasonably limited in scope in relation to the needs of this case. Plaintiff further objects to this Request as seeking material not relevant to the subject matter of this litigation.

Subject to and without waiving the foregoing objections, Plaintiff will produce documents related to HHS's Bundled Payments for Care Improvement (BPCI) Initiative.

REQUEST NO. 19

All analyses, reports, memoranda, or spreadsheets evaluating or analyzing the provision of coordinated care to Medicare beneficiaries by Medicare ACOs.

RESPONSE:

Plaintiff objects to this Request as overbroad, unduly burdensome, and not reasonably limited in scope in relation to the needs of this case. Plaintiff further objects to this Request in that it seeks publicly available information.

Subject to and without waiving the foregoing objections, Plaintiff states that the Medicare ACO public use file, which contains information on Medicare ACO financial and quality performance, is publicly available at: https://www.cms.gov/Research-Statistics-Data-and-Systems/Downloadable-Public-Use-Files/SSPACO/index.htm

Subject to and without waiving the foregoing objections, Plaintiff will produce documents responsive to this Request from the files of the Assistant Secretary for Planning and Evaluation's Office of Health Policy.

REQUEST NO. 20

All data evaluating or analyzing the growth of Medicare ACOs; the effects of Medicare ACOs on healthcare spending for the Medicare population; the effects of Medicare ACOs on the enrollment, growth, or profitability of Medicare Advantage plans; the ability or likelihood of providers participating in Medicare ACOs beginning to offer MA plans; or the effects of Medicare ACOs on healthcare quality or patient outcomes.

RESPONSE:

Plaintiff objects to this Request as overbroad, unduly burdensome, and not reasonably limited in scope in relation to the needs of this case. Plaintiff further objects to this Request on the ground that it seeks publicly available information. Plaintiff states that the Medicare ACO public use file, which contains information on Medicare ACO financial and quality performance, is publicly available at: https://www.cms.gov/Research-Statistics-Data-and-Systems/Downloadable-Public-Use-Files/SSPACO/index.htm.

Subject to and without waiving the foregoing objections, Plaintiff will also produce documents responsive to this Request from the files of the Assistant Secretary for Planning and Evaluation's Office of Health Policy.

REQUEST NO. 21

All documents concerning communications with DOJ regarding the Transaction.

RESPONSE:

Plaintiff objects to this Request to the extent that it seeks the production of documents that are protected from disclosure by the attorney-client privilege, the deliberative process privilege, the attorney work-product doctrine, the law enforcement investigatory files privilege, the common interest privilege, the joint prosecution privilege, or any other applicable privilege or any statute governing confidentiality of information. Plaintiff objects to this Request to the extent that it requires production of expert materials, or production of expert materials not subject to discovery under the CMO entered in this action or Rule 26 of the Federal Rules of Civil Procedure.

Subject to and without waiving the foregoing objections, all non-privileged documents responsive to this Request are encompassed by Plaintiff's production of DOJ's Investigative Materials, as that term is defined in the Joint Scheduling and Case Management Order entered in this action. Plaintiff is not aware of any non-privileged documents responsive to this Request other than what is contained in Plaintiff's production of DOJ's Investigative Materials.

REQUEST NO. 22

All documents concerning any internal or external analyses or communications regarding the Transaction.

RESPONSE:

Plaintiff objects to this Request to the extent that it seeks the production of documents that are protected from disclosure by the attorney-client privilege, the deliberative process privilege, the attorney work-product doctrine, the law enforcement investigatory files privilege, the common interest privilege, the joint prosecution privilege, or any other applicable privilege or any statute governing confidentiality of information. Plaintiff objects to the term "internal or external analyses" as vague and ambiguous. Plaintiff objects to this Request to the extent it seeks documents that are not in Plaintiff's custody, possession or control.

Subject to and without waiving the foregoing objections, Plaintiff will produce documents responsive to this Request from the files of the Assistant Secretary for Planning and Evaluation's Office of Health Policy.

REQUEST NO. 23

All documents provided to DOJ for the purposes of its review of the Transaction.

RESPONSE:

Plaintiff objects to this Request to the extent that it seeks the production of documents that are protected from disclosure by the attorney-client privilege, the deliberative process privilege, the attorney work-product doctrine, the law enforcement investigatory files privilege, the common interest privilege, the joint prosecution privilege, or any other applicable privilege or any statute governing confidentiality of information. Plaintiff further objects to this Request as seeking material subject to heightened protection by Section 1411(g) of the Patient Protection and Affordable Care Act, 5 U.S.C. § 552a(b), and 45 CFR 155.260.

Subject to and without waiving the foregoing objections, all non-privileged documents responsive to this Request are encompassed by Plaintiff's production of DOJ's Investigative Materials, as that term is defined in the Joint Scheduling and Case Management Order entered in

this action. Plaintiff is not aware of any non-privileged documents responsive to this Request other than those contained in Plaintiff's production of DOJ's Investigative Materials.

Dated: August 19, 2016

Respectfully submitted,

/s/ Craig Conrath
CRAIG CONRATH

RYAN M. KANTOR
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Attorneys for the United States of America and on behalf of Plaintiff States

CERTIFICATE OF SERVICE

I hereby certify that on August 19, 2016, I caused a true and correct copy of the foregoing to be served upon the parties of record.

/s/ Craig Conrath
CRAIG CONRATH

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Attorney for the United States of America

Exhibit 7

Wilson, Christopher (ATR)

From: Wilson, Christopher (ATR)
Sent: Sunday, August 21, 2016 1:53 PM
To: 'Aaron Healey'
Cc: Geoffrey S Irwin; Paula Render; Heaven, Astor
Subject: RE: United States v. Aetna - Amended Responses & Objections to HHS Subpoena

Aaron,

As a general matter, we are reluctant to discuss items not included on the proposed agenda especially when the issue you are raising was present well before the agenda was to be submitted. We believed we were working constructively toward resolving your concerns and so are disappointed you have decided to raise the issue now.

As we made clear to you on our initial meet & confer, your requests implicate databases administered by different departments within HHS. I worked with HHS and people in the departments implicated to provide answers to the questions you raised in our initial meet and confer, and on our second meet & confer, you expressed dissatisfaction with my answers and reiterated your request to speak directly with CMS data personnel. As we discussed on Thursday and Friday, we are identifying data personnel knowledgeable about the Medicare Enrollment Database, Medicare Risk Adjustment Processing System, Daily Transaction Reply Report, and Individual Exchange databases which are the subject of some of your document requests. You were well aware of this while we were discussing the proposed agenda for Monday, so are surprised you have elected to raise this issue now. We cannot confirm over the weekend whether CMS data personnel can be present for a meet & confer call by your noon Tuesday deadline. Without having confirmed this with HHS, we believe we can make data personnel present for a call this week however, subject to confirmation with HHS on Monday. If we have not resolved the issue to your satisfaction, then we would propose raising the issue for the Special Master meeting on 8/29. If this proposal is not acceptable to you, then please go ahead and raise the issue for discussion this Monday, 8/22. Though we believe the issue is not ripe for escalation to the Special Master, a discussion around the burden implicated by requests 2-4, 7 and 12 could be worthwhile, along with a decision by Judge Levie whether further meet and confer calls with HHS data personnel are necessary to convince you of the undue burden in responding to these requests.

I can provide answers to the other questions raised in your email on Monday after the meeting.

Chris

From: Aaron Healey [mailto:ahealey@jonesday.com]
Sent: Saturday, August 20, 2016 12:03 PM
To: Wilson, Christopher (ATR)
Cc: Geoffrey S Irwin; Paula Render; Heaven, Astor
Subject: Re: United States v. Aetna - Amended Responses & Objections to HHS Subpoena

Chris:

We are still reviewing the responses and objections to the CMS requests you served this evening, and will follow-up with you once our review is complete. However, a few issues that struck us immediately.

First, with respect to requests 2, 3, 4, 7 and 12, it is past time to confer directly with persons at CMS knowledgeable about the data sets we requested. The CMO requires this. (CMO, Sec. 14.E ("the Parties will . . . make *employees knowledgeable about the content, storage, and production of data* available for informal consultations during a meet-and-confer process.") On behalf of HHS, DOJ is withholding information responsive to multiple discovery requests on the basis of burden, but we have been denied basic information about the nature of the purported burden. Since these requests issued, on July 29, we have repeatedly asked to communicate directly with CMS. In fact, we requested the participation of a CMS representative for both our Monday and Thursday meet and confers. Three weeks have passed, and, no one from CMS who is knowledgeable about the content, storage, and production of the data requested has been made

available to us. We cannot assess the validity of DOJ's objections to these requests without additional information that only employees at CMS have. We had hoped to confer with CMS personnel promptly after our call Thursday, but that did not happen. Therefore, we ask that you inform us prior to the meeting with the Special Master on Monday, whether CMS employees will be made available to participate in a meet and confer on these 5 requests by noon on Tuesday. If not, we intend to raise the issue with the Special Master, and ask him to compel CMS's immediate participation in the meet and confer process as required under the CMO.

Second, regarding requests 13 and 17, when we directly asked during Monday's meet and confer whether, aside from the data requests, DOJ would be standing on any of its prior objections and withholding responsive materials, you responded, no. Thus, we are surprised to see that HHS will not be producing any responsive materials to these requests, and instead is resting on your objection that the only information defendants are entitled to is what is cited in those responses as publicly available. We disagree that the mere fact some responsive information is also publicly available (particularly where it may be behind pay-walls) relieves HHS and DOJ's obligation to produce that information, or other similar information in their custody and control. Nor is it appropriate to place the burden on defendants to reassemble disaggregated data from numerous public sources if HHS possess or maintains it differently for its own purposes. However, to understand the scope of any dispute arising from your responses to requests 17 and 13, please confirm that, aside from the publicly available data cited in your responses to these requests, HHS/CMS have no other materials responsive to requests 13 and 17.

Third, we would like a complete list, including name and title, of the individuals within ASPE whose documents are being collected. As we discussed on Thursday, we may have additional requests for custodians, but we would ask now that documents be collected from Kevin Counihan, Director & Marketplace CEO, within the Center for Consumer Information and Insurance Oversight, with respect to request 15.

Last, please confirm our understanding that, in spite of the responses to requests 1 and 9, you intend to get information from CMS regarding the date when the 2017 bids and Star Ratings will be final, and determine whether if we provide a date certain (e.g. September 15) CMS could produce available bid books, and the data on 2017 Star Ratings as they exist on that date.

Regards,
Aaron

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ahealey@jonesday.com

From: "Wilson, Christopher (ATR)" <Christopher.Wilson5@usdoj.gov>
To: "Conrath, Craig" <Craig.Conrath@usdoj.gov>, "Mucchetti, Peter" <Peter.J.Mucchetti@usdoj.gov>, "Kantor, Ryan" <Ryan.Kantor@usdoj.gov>, "Wilson, Christopher (ATR)" <Christopher.Wilson5@usdoj.gov>, "Welsh, Eric (ATR)" <Eric.Welsh@usdoj.gov>, "'michael.undorf@state.de.us'" <michael.undorf@state.de.us>, "'catherine.jackson@dc.gov'" <catherine.jackson@dc.gov>, "'sally.gere@dc.gov'" <sally.gere@dc.gov>, "'liz.brady@myfloridalegal.com'" <liz.brady@myfloridalegal.com>, "'Rachel.Steinman@myfloridalegal.com'" <Rachel.Steinman@myfloridalegal.com>, "'dwalsh@law.ga.gov'" <dwalsh@law.ga.gov>, "'rpratt@atg.state.il.us'" <rpratt@atg.state.il.us>, "'Layne.Lindebak@iowa.gov'" <Layne.Lindebak@iowa.gov>, "'beth.finnerty@ohioattorneygeneral.gov'" <beth.finnerty@ohioattorneygeneral.gov>, "'aschwartz@attorneygeneral.gov'" <aschwartz@attorneygeneral.gov>, "'jthomson@attorneygeneral.gov'" <jthomson@attorneygeneral.gov>, "'soallen@oag.state.va.us'" <soallen@oag.state.va.us>, "'thenry@oag.state.va.us'" <thenry@oag.state.va.us>, "'jdonahue@attorneygeneral.gov'" <jdonahue@attorneygeneral.gov>, "'brian.jordan@ohioattorneygeneral.gov'" <brian.jordan@ohioattorneygeneral.gov>, "'christopher.hunt@myfloridalegal.com'" <christopher.hunt@myfloridalegal.com>, "'cmatelis@oag.state.va.us'" <cmatelis@oag.state.va.us>, "'EMaxeiner@atg.state.il.us'" <EMaxeiner@atg.state.il.us>, "'kelly.drzymalski@state.de.us'" <kelly.drzymalski@state.de.us>, "'laura.daugherty@myfloridalegal.com'" <laura.daugherty@myfloridalegal.com>, "'thomas.anger@ohioattorneygeneral.gov'" <thomas.anger@ohioattorneygeneral.gov>, "'timothy.fraser@myfloridalegal.com'" <timothy.fraser@myfloridalegal.com>, "'patrice.fatig@ohioattorneygeneral.gov'" <patrice.fatig@ohioattorneygeneral.gov>, "'twertz@attorneygeneral.gov'" <twertz@attorneygeneral.gov>, "'william.ullrich@ohioattorneygeneral.gov'"

<william.ullrich@ohioattorneygeneral.gov>, "'Karen.marsh@myfloridalegal.com'" <Karen.marsh@myfloridalegal.com>, "'Paula Render'" <prender@JonesDay.com>, "Heaven, Astor" <AHeaven@crowell.com>, Aaron Healey <ahealey@jonesday.com>, Nathaniel G Ward <nward@jonesday.com>, "'cstah ke@crowell.com'" <cstahlke@crowell.com>, "'dschnorrenberg@crowell.com'" <dschnorrenberg@crowell.com>, "'slahlou@crowell.com'" <slahlou@crowell.com>
Date: 08/19/2016 05:43 PM
Subject: United States v. Aetna - Amended Responses & Objections to HHS Subpoena

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Attached please find Plaintiff United States' amended responses and objections to Defendants' Subpoena to HHS.

Christopher M. Wilson
Trial Attorney
United States Department of Justice - Antitrust Division
450 5th St., N.W.
Suite 8000
Washington, DC 20530
Email: christopher.wilson5@usdoj.gov
Phone: 202-598-8688

[attachment "2016-08-19 - Amended Responses and Objections to HHS Subpoena [].pdf" deleted by Aaron Healey/JonesDay]

Exhibit 8

Wilson, Christopher (ATR)

From: Wilson, Christopher (ATR)
Sent: Thursday, August 18, 2016 4:57 PM
To: 'Aaron Healey'
Subject: HHS/CMS org charts

Aaron,

As discussed today, here is the CMS organizational chart: https://www.cms.gov/About-CMS/Agency-Information/CMSLeadership/index.html

And here is the HHS organizational chart: http://www.hhs.gov/about/leadership/index.html

Chris

Christopher M. Wilson
Trial Attorney
U.S. Department of Justice
Antitrust Division - Transportation, Energy & Agriculture Section
450 5th Street NW
Room 8018
Washington, D.C. 20001
Office: 202-598-8688
Mobile: 202-560-0363
Christopher.Wilson5@usdoj.gov

Exhibit 9

Wilson, Christopher (ATR)

From: Wilson, Christopher (ATR)
Sent: Friday, August 19, 2016 8:48 AM
To: 'Aaron Healey'
Subject: RE: HHS/CMS org charts

Aaron,

We spoke with CMS yesterday following our call and will follow up when we confirm availability of knowledgeable individuals to explain the burden implicated by requests 2, 3, 4, 7 and 12.

Confirmed as to request 1 and 9. I will circle back with you when I have more information from CMS.

Confirmed as to requests 6, 8, 10-11, 14-15, 19-20 and 22. For 10-11, the two additional custodians are Amy Larrick (Acting Director, Medicare Drug Benefit Group) and Jennifer Shapiro (Assistant Director, Medicare Drug Benefit Group).

Should I coordinate with you for the meet & confer regarding the RFPs you served this week on DOJ? I am thinking Monday afternoon.

Chris

From: Aaron Healey [mailto:ahealey@jonesday.com]
Sent: Thursday, August 18, 2016 5:57 PM
To: Wilson, Christopher (ATR)
Subject: Re: HHS/CMS org charts

Thanks, Chris.

To follow-up on our call:

We are available tomorrow to speak with persons at CMS knowledgeable about the databases referenced in requests 2, 3, 4, 7 and 12. Let us know who is available and when.

Regarding requests 1 (with respect to 2017 bid data) and 9 (2017 Star Ratings), you will be asking CMS for the date when those will be final, and, if it is not before the close of discovery, whether a date certain production of that information as it exists is possible.

As noted, we have the org chart and are reviewing it. We understand that you will be immediately pulling responsive documents to requests 6, 8, 10, 11, 14, 15, 19, 20 and 22, and preparing productions from all persons within the Assistant Secretary for Planning and Evaluation's Office of Health Policy, as well as two additional custodians for requests 10 and 11 (please send me their names and titles). The production of documents for these custodians will be completed within 21 days. If we seek productions from additional custodians, those productions will be timed from our request to include the custodian, or the resolution of any objection you have to adding them.

Best regards,
Aaron

Aaron M. Healey
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ahealey@jonesday.com

From: "Wilson, Christopher (ATR)" <Christopher.Wilson5@usdoj.gov>
To: Aaron Healey <ahealey@jonesday.com>
Date: 08/18/2016 04:57 PM
Subject: HHS/CMS org charts

Aaron,

As discussed today, here is the CMS organizational chart: https://www.cms.gov/About-CMS/Agency-Information/CMSLeadership/index.html

And here is the HHS organizational chart: http://www.hhs.gov/about/leadership/index html

Chris

Christopher M. Wilson
Trial Attorney
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450 5th Street NW
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Washington, D.C. 20001
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Christopher.Wilson5@usdoj.gov

Exhibit 10

Wilson, Christopher (ATR)

From: Aaron Healey [ahealey@jonesday.com]
Sent: Monday, August 22, 2016 5:18 PM
To: Wilson, Christopher (ATR)
Cc: Heaven, Astor; gsirwin@jonesday.com; prender@jonesday.com
Subject: RE: United States v. Aetna - Amended Responses & Objections to HHS Subpoena

Chris:

Wednesday works. However, we would like a meet and confer tomorrow on the other responses and objections to discuss issues that do not require CMS participation. Please let us know your team's availability.

Best regards,
Aaron

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ahealey@jonesday.com

From: "Wilson, Christopher (ATR)" <Christopher.Wilson5@usdoj.gov>
To: Aaron Healey <ahealey@jonesday.com>
Cc: "prender@jonesday.com" <prender@jonesday.com>, "Heaven, Astor" <AHeaven@crowell.com>, "gsirwin@jonesday.com" <gsirwin@jonesday.com>
Date: 08/22/2016 04:15 PM
Subject: RE: United States v. Aetna - Amended Responses & Objections to HHS Subpoena

Aaron,

The nature of the burden regarding requests 2-4, 7, and 12 has been made abundantly clear to you, repeatedly, in our meet and confer calls, our correspondence and in our original and amended objections and responses. You received detailed answers to your questions regarding data storage, the content of data residing in these databases, and the cost and time involved in attempting to respond to your proposed discovery. We also made you aware of publicly available databases containing substantially the same data you are seeking and which are immediately and freely accessible to you, an obligation we were not required to undertake under the FRCP or the CMO. Our position is, and remains that it is unduly burdensome to respond to these requests and vastly disproportionate to the needs of the case.

Nevertheless, and notwithstanding our objections, we will make CMS IT personnel available for meet & confer calls this Wednesday and Thursday. I would block off this Wednesday from 2-3pm or this Thursday from 3-4pm for a call. CMS IT personnel will be available to speak to the Medicare Enrollment Database, the Medicare Monthly Membership Detail Report, the Daily Transaction Reply Report, and the Medicare Risk Adjustment Processing System. We will circle back tomorrow regarding your request for Individual Exchange enrollment data, which is Request 12. We have individuals that can speak to that database but need to confirm their availability. As discussed in our Thursday call, we are awaiting your answer as to whether aggregated plan and legal-entity level

enrollment data (which is immediately available) is acceptable in lieu of the individually identifiable data you seek, and if not, an explanation of why this is not sufficient in light of the needs of the case.

For ASPE, the individuals within ASPE's Office of Health Policy are as follows:

- Nancy De Lew, Acting Deputy Assistant Secretary
- Christie Peters, Acting Associate Deputy Assistant Secretary
- Thomas Musco, Acting Director, Division of Health Care Access and Coverage
- Steve Sheingold, Director, Health Care Financing Policy
- Scott Smith, Direct, Health Care Quality and Outcome Division
- Andre Chappel, Director, Division of Public Health Services

To expedite the process, these custodians are searching their files for documents responsive to the requests we discussed in our meet and confer calls last week. We will then produce these documents to you.

I am confirming with CMS that Kevin Counihan is an acceptable custodian for request 15.

Regarding requests 1 and 9, I confirm that I will obtain information from CMS as to whether there is a date certain on which they could produce available 2017 MA bid books and 2017 tentative Star Rating data.

I would propose we meet and confer regarding requests 13 and 17 immediately following the calls regarding the Medicare databases.

Chris

Christopher M. Wilson
Office: 202-598-8688
Christopher.Wilson5@usdoj.gov

From: Aaron Healey [mailto:ahealey@jonesday.com]
Sent: Sunday, August 21, 2016 10:58 PM
To: Wilson, Christopher (ATR)
Cc: Heaven, Astor; Geoffrey S Irwin; Paula Render
Subject: RE: United States v. Aetna - Amended Responses & Objections to HHS Subpoena

Chris:

The meet and confer process as contemplated by the CMO is not working at least with respect to requests 2-4, 7 and 12. We are getting neither productions of responsive material nor access to the CMS personnel knowledgeable about the relevant data bases. Additionally, the lack of CMS participation on our meet and confers delays forward movement on other issues as well, such as how and when to collect the 2017 data responsive to requests 1 and 9. Our intent during the meeting with the Special Master tomorrow is to alert him to our concerns about our lack of prompt access to CMS personnel and ask him to set a hearing on that issue for Tuesday.

With respect to the questions I posed yesterday and the remainder of the responses and objections served Friday, we would like to meet and confer about those at your earliest convenience. Please let us know times when you are available.

Best regards,
Aaron

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ahealey@jonesday.com

From: "Wilson, Christopher (ATR)" <Christopher.Wilson5@usdoj.gov>
To: "'Aaron Healey'" <ahealey@jonesday.com>
Cc: Geoffrey S Irwin <gsirwin@JonesDay.com>, Paula Render <prender@JonesDay.com>, "Heaven, Astor" <AHeaven@crowell.com>
Date: 08/21/2016 01:53 PM
Subject: RE: United States v. Aetna - Amended Responses & Objections to HHS Subpoena

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Aaron,

As a general matter, we are reluctant to discuss items not included on the proposed agenda especially when the issue you are raising was present well before the agenda was to be submitted. We believed we were working constructively toward resolving your concerns and so are disappointed you have decided to raise the issue now.

As we made clear to you on our initial meet & confer, your requests implicate databases administered by different departments within HHS. I worked with HHS and people in the departments implicated to provide answers to the questions you raised in our initial meet and confer, and on our second meet & confer, you expressed dissatisfaction with my answers and reiterated your request to speak directly with CMS data personnel. As we discussed on Thursday and Friday, we are identifying data personnel knowledgeable about the Medicare Enrollment Database, Medicare Risk Adjustment Processing System, Daily Transaction Reply Report, and Individual Exchange databases which are the subject of some of your document requests. You were well aware of this while we were discussing the proposed agenda for Monday, so are surprised you have elected to raise this issue now. We cannot confirm over the weekend whether CMS data personnel can be present for a meet & confer call by your noon Tuesday deadline. Without having confirmed this with HHS, we believe we can make data personnel present for a call this week however, subject to confirmation with HHS on Monday. If we have not resolved the issue to your satisfaction, then we would propose raising the issue for the Special Master meeting on 8/29. If this proposal is not acceptable to you, then please go ahead and raise the issue for discussion this Monday, 8/22. Though we believe the issue is not ripe for escalation to the Special Master, a discussion around the burden implicated by requests 2-4, 7 and 12 could be worthwhile, along with a decision by Judge Levie whether further meet and confer calls with HHS data personnel are necessary to convince you of the undue burden in responding to these requests.

I can provide answers to the other questions raised in your email on Monday after the meeting.

Chris

From: Aaron Healey [mailto:ahealey@jonesday.com]
Sent: Saturday, August 20, 2016 12:03 PM
To: Wilson, Christopher (ATR)
Cc: Geoffrey S Irwin; Paula Render; Heaven, Astor
Subject: Re: United States v. Aetna - Amended Responses & Objections to HHS Subpoena

Chris:

We are still reviewing the responses and objections to the CMS requests you served this evening, and will follow-up with you once our review is complete. However, a few issues that struck us immediately.

First, with respect to requests 2, 3, 4, 7 and 12, it is past time to confer directly with persons at CMS knowledgeable about the data sets we requested. The CMO requires this. (CMO, Sec. 14.E ("the Parties will . . . make *employees knowledgeable about the content, storage, and production of data* available for informal consultations during a meet-and-confer process.") On behalf of HHS, DOJ is withholding information responsive to multiple discovery requests on the basis of burden, but we have been denied basic information about the nature of the purported burden. Since these requests issued, on July 29, we have repeatedly asked to communicate directly with CMS. In fact, we requested the participation of a CMS representative for both our Monday and Thursday meet and confers. Three weeks have passed, and, no one from CMS who is knowledgeable about the content, storage, and production of the data requested has been made

available to us. We cannot assess the validity of DOJ's objections to these requests without additional information that only employees at CMS have. We had hoped to confer with CMS personnel promptly after our call Thursday, but that did not happen. Therefore, we ask that you inform us prior to the meeting with the Special Master on Monday, whether CMS employees will be made available to participate in a meet and confer on these 5 requests by noon on Tuesday. If not, we intend to raise the issue with the Special Master, and ask him to compel CMS's immediate participation in the meet and confer process as required under the CMO.

Second, regarding requests 13 and 17, when we directly asked during Monday's meet and confer whether, aside from the data requests, DOJ would be standing on any of its prior objections and withholding responsive materials, you responded, no. Thus, we are surprised to see that HHS will not be producing any responsive materials to these requests, and instead is resting on your objection that the only information defendants are entitled to is what is cited in those responses as publicly available. We disagree that the mere fact some responsive information is also publicly available (particularly where it may be behind pay-walls) relieves HHS and DOJ's obligation to produce that information, or other similar information in their custody and control. Nor is it appropriate to place the burden on defendants to reassemble disaggregated data from numerous public sources if HHS possess or maintains it differently for its own purposes. However, to understand the scope of any dispute arising from your responses to requests 17 and 13, please confirm that, aside from the publicly available data cited in your responses to these requests, HHS/CMS have no other materials responsive to requests 13 and 17.

Third, we would like a complete list, including name and title, of the individuals within ASPE whose documents are being collected. As we discussed on Thursday, we may have additional requests for custodians, but we would ask now that documents be collected from Kevin Counihan, Director & Marketplace CEO, within the Center for Consumer Information and Insurance Oversight, with respect to request 15.

Last, please confirm our understanding that, in spite of the responses to requests 1 and 9, you intend to get information from CMS regarding the date when the 2017 bids and Star Ratings will be final, and determine whether if we provide a date certain (e.g. September 15) CMS could produce available bid books, and the data on 2017 Star Ratings as they exist on that date.

Regards,
Aaron

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From: "Wilson, Christopher (ATR)" <Christopher.Wilson5@usdoj.gov>
To: "Conrath, Craig" <Craig.Conrath@usdoj.gov>, "Mucchetti, Peter" <Peter.J.Mucchetti@usdoj.gov>, "Kantor, Ryan" <Ryan.Kantor@usdoj.gov>, "Wilson, Christopher (ATR)" <Christopher.Wilson5@usdoj.gov>, "Welsh, Eric (ATR)" <Eric.Welsh@usdoj.gov>, "'michael.undorf@state.de.us'" <michael.undorf@state.de.us>, "'catherine.jackson@dc.gov'" <catherine.jackson@dc.gov>, "'sally.gere@dc.gov'" <sally.gere@dc.gov>, "'liz.brady@myfloridalegal.com'" <liz.brady@myfloridalegal.com>, "'Rachel.Steinman@myfloridalegal.com'" <Rachel.Steinman@myfloridalegal.com>, "'dwalsh@law.ga.gov'" <dwalsh@law.ga.gov>, "'rpratt@atg.state.il.us'" <rpratt@atg.state.il.us>, "'Layne.Lindebak@iowa.gov'" <Layne.Lindebak@iowa.gov>, "'beth.finnerty@ohioattorneygeneral.gov'" <beth.finnerty@ohioattorneygeneral.gov>, "'aschwartz@attorneygeneral.gov'" <aschwartz@attorneygeneral.gov>, "'jthomson@attorneygeneral.gov'" <jthomson@attorneygeneral.gov>, "'soallen@oag.state.va.us'" <soallen@oag.state.va.us>, "'thenry@oag.state.va.us'" <thenry@oag.state.va.us>, "'jdonahue@attorneygeneral.gov'" <jdonahue@attorneygeneral.gov>, "'brian.jordan@ohioattorneygeneral.gov'" <brian.jordan@ohioattorneygeneral.gov>, "'christopher.hunt@myfloridalegal.com'" <christopher.hunt@myfloridalegal.com>, "'cmatelis@oag.state.va.us'" <cmatelis@oag.state.va.us>, "'EMaxeiner@atg.state.il.us'" <EMaxeiner@atg.state.il.us>, "'kelly.drzymalski@state.de.us'" <kelly.drzymalski@state.de.us>, "'laura.daugherty@myfloridalegal.com'" <laura.daugherty@myfloridalegal.com>, "'thomas.anger@ohioattorneygeneral.gov'" <thomas.anger@ohioattorneygeneral.gov>, "'timothy.fraser@myfloridalegal.com'" <timothy.fraser@myfloridalegal.com>, "'patrice.fatig@ohioattorneygeneral.gov'" <patrice.fatig@ohioattorneygeneral.gov>, "'twertz@attorneygeneral.gov'" <twertz@attorneygeneral.gov>, "'william.ullrich@ohioattorneygeneral.gov'" <william.ullrich@ohioattorneygeneral.gov>, "'Karen.marsh@myfloridalegal.com'" <Karen.marsh@myfloridalegal.com>, "'Paula Render'" <prender@JonesDay.com>, "Heaven, Astor" <AHeaven@crowell.com>, Aaron Healey <ahealey@jonesday.com>, Nathaniel G Ward <nward@jonesday.com>, "'cstah ke@crowell.com'"

<cstahlke@crowell.com>, "'dschnorrenberg@crowell.com'" <dschnorrenberg@crowell.com>, "'slahlou@crowell.com'" <slahlou@crowell.com>
Date: 08/19/2016 05:43 PM
Subject: United States v. Aetna - Amended Responses & Objections to HHS Subpoena

Attached please find Plaintiff United States' amended responses and objections to Defendants' Subpoena to HHS.

Christopher M. Wilson
Trial Attorney
United States Department of Justice - Antitrust Division
450 5th St., N.W.
Suite 8000
Washington, DC 20530
Email: christopher.wilson5@usdoj.gov
Phone: 202-598-8688

[attachment "2016-08-19 - Amended Responses and Objections to HHS Subpoena [].pdf" deleted by Aaron Healey/JonesDay]

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This e-mail (including any attachments) may contain information that is private, confidential, or protected by attorney-client or other privilege. If you received this e-mail in error, please delete it from your system without copying it and notify sender by reply e-mail, so that our records can be corrected.
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Exhibit 11

Wilson, Christopher (ATR)

From: Wilson, Christopher (ATR)
Sent: Thursday, August 25, 2016 10:52 AM
To: 'Aaron Healey'
Cc: Geoffrey S Irwin; Heaven, Astor
Subject: RE: U.S. et al. v. Aetna -- Meet & Confer Follow-up

Aaron,

Some additional follow-up on the below. We've reviewed the list of departments you sent and here are the proposed additional custodians:

Center for Medicare/Medicaid Innovation (Requests 18-20)
Megan Cox, Director Seamless Care Models Group

Center for Medicare (Requests 6, 8, 10, 11, 22)
Katherine Coleman, Director of Medicare Drug and Health Plan Contract Administration Group

Center for Consumer Information and Insurance Oversight (CCIIO) (Requests 15, 22)
Kevin Counihan, Deputy Administrator and Director

Office of the Actuary (Requests 6, 8, 10, 11, 19-20, 22)
Jennifer Lazio, Director of Parts C & D Actuarial Group

Here is a more detailed description of the self-collection process.

Due to the number of broad document requests from both Anthem and Aetna, targeted at largely overlapping custodians and topics, and differing IT infrastructures across departments, HHS has elected to employ a "self-search" process where each custodian is given the text of each request and instructed as to the substance of what each request is seeking, and directed to pull any and all potentially responsive documents for each request from email folders, hard drives, hard copy files, communal resources such as network drives, and any pother place they believe responsive documents may be located. HHS's OGC supervises the process by guiding the custodians and confirming that they have searched for all potentially responsive documents available to each custodian, wherever located. HHS's OGC will then screen any privileged documents before production. Given the extremely condensed timeframe for discovery, the broad nature of the document requests, the need to address Anthem and Aetna document requests simultaneously, and the limited staffing resources available to HHS, this approach ensures the highest volume of highly responsive documents in the shortest possible response time. This is because custodians, who are experts in their subject matter, are best situated to quickly locate and identify responsive documents. Under this approach, virtually all documents produced should be relevant, unlike the "search term" process, which, in our experience, tends to return high volumes of documents, 80-90% of which are minimally relevant or irrelevant.

HHS employs this process because it does not have the IT resources (either internally or through a contractor) or legal staffing in place to conduct hard drive pulls and email folder searches, etc. in the 2-3 week response time set out in each action's case management order or even by the close of fact discovery in either action. However, to allay Aetna's concerns, HHS is willing to certify to the Court that each custodian understood their discovery obligations, conducted a thorough and diligent search for any and all documents responsive to each request, specify the details of how the search was conducted

and affirm that no responsive documents are being withheld on grounds other than applicable privileges.

I'm still working on the update for the 2017 MA bid data and star rating information. I hope to have an update by the end of the day today.

Chris

Christopher M. Wilson
Office: 202-598-8688
Christopher.Wilson5@usdoj.gov

From: Aaron Healey [mailto:ahealey@jonesday.com]
Sent: Wednesday, August 24, 2016 11:26 AM
To: Wilson, Christopher (ATR)
Cc: Geoffrey S Irwin; Heaven, Astor
Subject: U.S. et al. v. Aetna -- Meet & Confer Follow-up

Chris:

To confirm the items for follow-up in advance of our call tomorrow afternoon with CMS personnel:

- DOJ will confirm that the bid data produced from the investigative files for 2011-2016 is complete (i.e. contains all bids from all MAOs or prospective MAOs for those years), and that CMS/HHS would have no additional bid data responsive to the request for those years.
- DOJ will review the proposed custodian list and offer a proposal to narrow the number of custodians from those offices/divisions.
- DOJ will provide a written explanation of the document/ESI collection process being employed by HHS to respond to these requests.
- DOJ will provide an update on the 2017 bid and star rating data.
- We will circulate a dial-in for tomorrow's call.
-

Regards,
Aaron

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ahealey@jonesday.com

Exhibit 12

Wilson, Christopher (ATR)

From: Wilson, Christopher (ATR)
Sent: Friday, August 26, 2016 8:49 PM
To: 'Aaron Healey'
Cc: Geoffrey S Irwin; Paula Render; astor Heaven (Humana)
Subject: RE: U.S. et al. v. Aetna Inc., Follow-up from 8.25 Meet and Confer re: CMS

Aaron

If we let Aetna supply the search terms for each request and the parameters for the search (in terms of places to be searched), have each custodian's search supervised by an attorney from HHS' Office of General Counsel, and certify for each custodian that he/she followed the search terms and searched emails, hard drives, shared drives, hard copy files, etc., would you agree to take the search issue off the Special Master meeting agenda?

As for the litigation hold, it went to HHS on July 19. DOJ drafted it but it was edited and sent out by HHS's general counsel. HHS identified the Center for Medicare and Medicaid Services (CMS) and ASPE as division of HHS having potentially relevant information. I need to see about privilege issues before sharing the actual hold notice with you.

The person to speak to you regarding the Individual Exchange database (request 12) is Michael Cohen of CCIIO. I think I can make him available the first half of next week. I should know after the special master meeting on Monday.

I will circle back with you on custodians and request 7 on Monday.

Chris

From: Aaron Healey [mailto:ahealey@jonesday.com]
Sent: Friday, August 26, 2016 4:45 PM
To: Wilson, Christopher (ATR)
Cc: Geoffrey S Irwin; Paula Render; astor Heaven (Humana)
Subject: U.S. et al. v. Aetna Inc., Follow-up from 8.25 Meet and Confer re: CMS

Chris:

Following up on yesterday's (not today's) meet and confer regarding the HHS/CMS requests. First, we are discussing options to move forward on requests 2, 3, 4 and 7. However, we would like information from you on the source of the material responsive to Request 7 produced through the investigative file, and whether it can be supplemented with either all counties or at least all the counties identified in the Appendix to the Complaint. Also, please provide availability of someone at HHS to speak to request 12.

Regarding the HHS document collection efforts, as you saw in the draft agenda for the Special Master and as we discussed yesterday, we believe an impasse has been reached on this issue. However, to frame up our initial discussion with Judge Levie for Monday, please let us know before then:

(1) Whether, other than the language of the requests themselves, HHS counsel supplied custodians with any specific search terms, or search parameters to custodians? If so, what were those terms/parameters? We request a copy of all instructions, including litigation hold memos, given to prospective custodians on how to conduct the searches for responsive documents including any lists of search terms or parameters.

(3) Has a litigation hold notice gone out to HHS/CMS personnel beyond the initial proposed list of custodians (i.e. broader than ASPE Office of Health Policy)? When did the hold notice go out, and who is subject to it?

(4) Did DOJ prepare the litigation hold notice, the custodial instructions, or, if applicable, search terms/search parameters? If not, who prepared them?

(5) Can you provide further detail on the oversight function performed by HHS OGC (or DOJ) in the search process? Does OGC or DOJ interview custodians to determine what files might be relevant? Does it only respond to questions if the custodian asks? How is OGC confirming that all relevant sources have been thoroughly searched by the custodian?

Lastly, as we discussed yesterday, I am attaching a counter proposal for HHS custodians. This list is subject to possible, further supplementation. However, to keep advancing the discussion on the final custodian list, we wanted to get you something today. The list identifies the custodian, and the party who proposed the custodian.

ASPE				
Name	Title	Sub-Division/Office	Requests	Proposing Party
Nancy De Lew,	Acting Deputy Assistant Secretary	Office of Health Policy	6, 8, 10, 11, 14, 15, 19 20, 22	DOJ
Christie Peters	Acting Associate Deputy Assistant Secretary	Office of Health Policy	6, 8, 10, 11, 14, 15, 19 20, 22	DOJ
Thomas Musco	Acting Director, Division of Health Care Access and Coverage	Office of Health Policy	6, 8, 10, 11, 14, 15, 19 20, 22	DOJ
Steve Sheingold	Director, Health Care Financing Policy	Office of Health Policy	6, 8, 10, 11, 14, 15, 19 20, 22	DOJ
Scott Smith	Direct, Health Care Quality and Outcome Division	Office of Health Policy	6, 8, 10, 11, 14, 15, 19 20, 22	DOJ
Andre Chappel	Director, Division of Public Health Services	Office of Health Policy	6, 8, 10, 11, 14, 15, 19 20, 22	DOJ
CENTER FOR MEDICARE				
Name	Title	Sub-Division/Office	Requests	Proposing Party
Sean Cavanaugh	Deputy Administrator and Director	N/A	6, 8, 10, 11, 22	Aetna
Cynthia Tudor	Deputy Center Director	N/A	6, 8, 10, 11, 22	Aetna
Liz Richter	Deputy Center Director	N/A	6, 8, 10, 11, 22	Aetna
Amy Larrick	Director	Medicare Drug Benefit and C and D Group	10, 11 6, 8, 22	DOJ (10, 11) Aetna (6, 8, 22)
Jennifer Shapiro	Deputy Director	Medicare Drug Benefit and C and D Group	10, 11 6, 8, 22	DOJ (10, 11) Aetna (6, 8, 22)
Kathryn Coleman	Director	Medicare Drug and Health Plan Contract Administration Group	6, 8, 10, 11, 22	Aetna
Scott Sturiale	Deputy Director	Medicare Drug and Health Plan Contract Administration Group	6, 8, 10, 11, 22	Aetna
Arrah Tabe-Bedward	Director/ Acting Deputy Director	Medicare Enrollment and Appeals Group/CMMI	6, 8, 10, 11, 18, 19, 20, 22	Aetna
Michael Crochunis	Deputy Director	Medicare Enrollment and Appeals Group	6, 8, 10, 11, 22	Aetna

Cheri Rice	Director	Medicare Plan Payment Group	6, 8, 10, 11, 22	Aetna
Jennifer Harlow	Deputy Director	Medicare Plan Payment Group	6, 8, 10, 11, 22	Aetna
CENTER FOR CONSUMER INFORMATION AND INSURANCE OVERSIGHT (CIIO)				
Name	**Title**	**Sub-Division/Office**	**Requests**	**Proposing Party**
Kevin Counihan	Director & Marketplace Chief Executive Officer (CEO)		15, 22	Aetna
Christen Linke Young	Principle Deputy Director		15, 22	Aetna
HHS OFFICE OF HEALTH REFORM				
Name	**Title**	**Sub-Division/Office**	**Requests**	**Proposing Party**
Meena Seshamani	Director		15, 22	Aetna
HHS OFFICE OF ASSISTANT SECRETARY FOR PUBLIC AFFAIRS				
Name	**Title**	**Sub-Division/Office**	**Requests**	**Proposing Party**
Benjamin Wakana	Deputy Assistant Secretary for Public Affairs for Health Care		22	Aetna
CMS OFFICE OF COMMUNICATIONS				
Name	**Title**	**Sub-Division/Office**	**Requests**	**Proposing Party**
Juliet Johnson	Director		6, 8, 10, 11, 22	Aetna
Mary Wallace	Deputy Director		6, 8, 10, 11, 22	Aetna
CMS OFFICE OF THE ACTUARY				
Name	**Title**	**Sub-Division/Office**	**Requests**	**Proposing Party**
Paul Spitalnic	Chief Actuary		6, 8, 10, 11, 19, 20, 22	Aetna
Jennifer Lazio	Director	Parts C&D Actuarial Group	6, 8, 10, 11, 19, 20, 22	DOJ
John Shatto	Director	Medicare and Medicaid Cost Estimates Group	6, 8, 10, 11, 19, 20, 22	Aetna
Stephen Heffler	Director	National Health Statistics Group	6, 8, 10, 11, 19, 20, 22	Aetna
Center for Medicare and Medicaid Innovation				
Name	**Title**	**Sub-Division/Office**	**Requests**	**Proposing Party**
Patrick Conway	Deputy Administrator for Innovation and Quality and CMS Chief Medical Officer		18, 19, 20	Aetna
Amy Bassano	Deputy Director		18, 19, 20	Aetna
Megan Cox	Deputy Director	Seamless Care Models Group	18, 19, 20	DOJ
Pauline Lapin	Director	Seamless Care Models Group	18, 19, 20	Aetna

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Facsimile +1.614.461.4198
ahealey@jonesday.com

Exhibit 13

Wilson, Christopher (ATR)

From: Wilson, Christopher (ATR)
Sent: Tuesday, September 06, 2016 7:18 PM
To: 'Aaron Healey'
Cc: astor Heaven (Humana); Geoffrey S Irwin; Paula Render
Subject: RE: U.S. et al. v. Aetna et al., 1:16-cv-1494 (D.D.C.)--Special Master Hearing Follow-up re: HHS/CMS Productions

Yes, see below.

1. We have an early email/attachment count for 1 custodian. She has 40,400 emails and attachments in the specified date range. Applying that across other custodians, that suggests there are at least 750,000 emails and attachments across the 19 custodians. The total number of documents should grow as other sources are pulled in. Just to confirm, we will search shared directories, network drives, and MS Outlook email servers for all custodians (and hard drives depending on custodial interview), so this number will grow as the collection progresses to sources other than email. We will apply the attached search terms to the custodians' documents, pursuant to the chart in your email of August 31, 2016. If you have edits to the search terms, please let us know.
2. We've conducted interviews of the CCIIO and CMMI custodians. The CCIIO custodians may have some data on request 16. We would propose adding search terms to cover data responsive to requests 13, 16, and 17. 18 is already included as a search term. Please let us know your thoughts.
3. We are informed it would take 2-3 days after 9/15 to produce preliminary 2017 MA bid data. That said, we are locating this data and will aim to produce it no later than 9/15. We will let you know if anything changes.

Request	Search Terms
6	(Medicare w/5 "Medicare Advantage") w/5 (compar! OR choice OR switch OR compet! OR alternat! OR option)
8	(Regulation! w/2 CMS) w/5 ("Medicare Advantage bid" OR "MA bid") w/5 (expan!" OR benefit!" OR growth OR profit!)
10	"Star Rating" w/5 "Medicare Advantage" + "age-ins" OR "switch!" OR "turnover" OR "retention" OR "retain"
11	"Star Rating" w/ 5 "demograph!" OR "income" OR "age" OR "disability" OR "accura!" OR "bias" OR "reliab!"
14	"MARKETPLACE PREMIUMS AFTER SHOPPING, SWITCHING, AND PREMIUM TAX CREDITS" OR "HEALTH INSURANCE MARKETPLACES 2016" OR "HEALTH PLAN CHOICE AND PREMIUMS" OR "CONSUMER DECISIONS REGARDING HEALTH PLAN CHOICES" OR

	"COMPETITION AND CHOICE IN THE HEALTH INSURANCE MARKETPLACES"
15	(Insur! w /5 "public exchange") w/5 (viabl! OR compet! OR switch! OR entry OR exit) (Insur! w/5 "health insurance marketplace") w/5 (viabl! OR compet! OR switch! OR entry OR exit) (Insur! w/5 "HIX") w/5 (viabl! OR compet! OR switch! OR entry OR exit)
18	"bundled care payment initiative" OR "BCPI"
19	"coordinated care" w/5 "accountable care organization!" OR "ACO" OR "Pioneer" OR "MSSP" OR "Shared Saving" OR "Next Generation"
20	("ACO" OR "affordable care organization!") w/5 Medicare Advantage" OR "health outcome" OR "quality" OR "spend!"
22	Aetna OR Humana w/5 merger

We can also discuss at tomorrow's meeting if that is preferable.

Christopher M. Wilson
Office: 202-598-8688
Christopher.Wilson5@usdoj.gov

From: Aaron Healey [mailto:ahealey@jonesday.com]
Sent: Tuesday, September 06, 2016 1:08 PM
To: Wilson, Christopher (ATR)
Cc: astor Heaven (Humana); Geoffrey S Irwin; Paula Render
Subject: RE: U.S. et al. v. Aetna et al., 1:16-cv-1494 (D.D.C.)--Special Master Hearing Follow-up re: HHS/CMS Productions

Chris:

Any updates on the items below?

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ahealey@jonesday.com

From: "Wilson, Christopher (ATR)" <Christopher.Wilson5@usdoj.gov>
To: Aaron Healey <ahealey@jonesday.com>
Cc: "astor Heaven (Humana)" <aheaven@crowell.com>, Geoffrey S Irwin <gsirwin@JonesDay.com>, Paula Render <prender@JonesDay.com>

Date: 09/01/2016 04:31 PM
Subject: RE: U.S. et al. v. Aetna et al., 1:16-cv-1494 (D.D.C.)--Special Master Hearing Follow-up re: HHS/CMS Productions

1) The vendor is in the process of pulling custodians' emails. We are interviewing custodians to determine locations of documents on shared resources like network drives, etc. We will know more regarding a production schedule when at least the email pull has been completed for at least 1 custodian. We can then extrapolate across the other 18 custodians.
2) Interviews with the listed custodians are being scheduled today. Questions regarding data responsive to 13, 16-18 will be asked.
3) No word yet on how long it would take to produce the snapshot of 2017 MA bid data. It depends on what format and shape the 2017 bid data is in right now, which I am trying to determine. I will circle back as soon as I know more. Chr

Christopher M. Wilson
Office: 202-598-8688
Christopher.Wilson5@usdoj.gov

From: Aaron Healey [mailto:ahealey@jonesday.com]
Sent: Thursday, September 01, 2016 3:54 PM
To: Wilson, Christopher (ATR)
Cc: astor Heaven (Humana); Geoffrey S Irwin; Paula Render
Subject: RE: U.S. et al. v. Aetna et al., 1:16-cv-1494 (D.D.C.)--Special Master Hearing Follow-up re: HHS/CMS Productions

Chris:

Since yesterday, are there any updates regarding:
(1) A production schedule from your vendor;
(2) The location of data (or updated data) responsive 13, 16, 17 and 18, and if not, are the interviews with the relevant custodians (Counihan, Cox, Lapin), scheduled?
(3) Any word on how long it would take to produce the 9/15 "snap shot" of 2017 MA plan bid data?

I know there's a lot of moving pieces, but we'd appreciate any updates you have.

Regards,
Aaron

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Office +1.614.469.3939
Facsimile +1.614.461.4198
ahealey@jonesday.com

From: "Wilson, Christopher (ATR)" <Christopher.Wilson5@usdoj.gov>
To: Aaron Healey <ahealey@jonesday.com>
Cc: Geoffrey S Irwin <gsirwin@JonesDay.com>, "astor Heaven (Humana)" <aheaven@crowell.com>, Paula Render <prender@JonesDay.com>
Date: 08/31/2016 02:23 PM
Subject: RE: U.S. et al. v. Aetna et al., 1:16-cv-1494 (D.D.C.)--Special Master Hearing Follow-up re: HHS/CMS Productions

Aaron,

This all sounds right with the following caveats/clarifications:

- I don't recall discussing reservation of rights regarding relief from the CMO with you and Geoff today. Is this something that has been raised under separate cover?
- The vendor would image and collect shared directories, network drives, and MS Outlook email servers for all custodians. If the custodial interview indicates there may be responsive documents on hard drives, then we would image/collect on hard drives.
- We can monitor the resolution of the refresh obligation as it pertains to Defendants' custodians, but we don't see HHS/CMS as similarly situated with Aetna such that reciprocation of refresh obligations is appropriate.
- We will need to know estimated volumes of documents before we can provide a production schedule. We are working with our vendors to get that information and when we have it, we can share a potential production schedule with you. We will do rolling production of documents.

Thanks
Chris

Christopher M. Wilson
Office: 202-598-8688
Christopher.Wilson5@usdoj.gov

From: Aaron Healey [mailto:ahealey@jonesday.com]
Sent: Wednesday, August 31, 2016 12:09 PM
To: Wilson, Christopher (ATR)
Cc: Geoffrey S Irwin; astor Heaven (Humana); Paula Render
Subject: U.S. et al. v. Aetna et al., 1:16-cv-1494 (D.D.C.)--Special Master Hearing Follow-up re: HHS/CMS Productions

Chris:

Thank you for working with Geoff and I today to close out the HHS/CMS custodian list. I've pasted an updated chart below, and count 19 custodians. Please let us know if there are any discrepancies with your notes.

Our understanding of the production process for HHS/CMS going forward is:

- DOJ retained an e-discovery vendor;
- DOJ attorneys accompanied by the e-discovery vendor, beginning today, will conduct interviews of the below custodians to capture all locations where responsive documents may be located. DOJ expects to complete all interviews and collections this week;
- The vendor will collect and image hard drives, and will pull email from servers;
- DOJ has developed a list of search terms for each of the subject requests, and will apply those to the initial data pull to reduce the total universe of documents;
- DOJ, with the vendor, will develop and test a predicative coding model to be applied to remaining document pool (post- application of search terms);
- DOJ will produce documents on a rolling basis;
- DOJ will provide us an update on the schedule for productions following consultation with its vendor today;
- DOJ intends to collect, in the first instance, all documents from the agreed upon custodians from January 1, 2013 until the date of collection (i.e. the date the individual custodian's hard drive is collected and imaged (etc.)).
- The parties will monitor the resolution of the document collection refresh obligation being negotiated for defendants' custodians. Defendants expect that the refresh obligation, if any, imposed on them will be reciprocated by the government for its custodians.
- The parties will report on the proposed schedule, and on the process to the Special Master at least weekly through completion of production.
- DOJ will promptly inform defendants of any issues arising in the collection process that may delay production.

- Defendants reserve their rights to seek appropriate relief from CMO deadlines in the event productions are delayed or the timing of productions creates hardship in scheduling depositions during the fact discovery period or causes any other adverse effect on defendants' trial preparation.
-

We also understand, with respect to our outstanding data requests that:

- DOJ will get additional information on the location of current or updated data responsive to requests 13 (Counihan), 16 (Counihan), 17 (Cox, Lapin), and 18 (Cox, Lapin) during the process of conducting custodial interviews, and provide defendants with an update on the availability or location of such data upon completing interviews of those custodians, which will be this week.
- 2017 Bid data can be captured in a "snap-shot" as of September 15, 2016. With respect to this data, we would ask whether it can be ***produced*** that same day or week, or would the production take longer. If it is longer, what would be the expected date of production.
- 2017 Star rating data will not be available until October 12, and CMS does not believe that it has any substitute for the final data that is available earlier then that.
- 2017 on-exchange carriers--preliminary data was produced in ATR002 or ATR003 (defendants will confirm what we have), DOJ will ask Kevin Counihan if more recent data is available.
-

Chris, again, thank you for working with us to resolve these issues, and please update us on the production schedule following discussions with your vender.

ASPE					
Name	Title	Sub-Division/Office	Requests	Proposing Party	Agreement
Nancy De Lew,	Acting Deputy Assistant Secretary	Office of Health Policy	6, 8, 10, 11, 14, 15, 19 20, 22	DOJ	**Yes**
Christie Peters	Acting Associate Deputy Assistant Secretary	Office of Health Policy	6, 8, 10, 11, 14, 15, 19 20, 22	DOJ	**Yes**
Thomas Musco	Acting Director, Division of Health Care Access and Coverage	Office of Health Policy	6, 8, 10, 11, 14, 15, 19 20, 22	DOJ	**Yes**
Steve Sheingold	Director, Health Care Financing Policy	Office of Health Policy	6, 8, 10, 11, 14, 15, 19 20, 22	DOJ	**Yes**
Scott Smith	Direct, Health Care Quality and Outcome Division	Office of Health Policy	6, 8, 10, 11, 14, 15, 19 20, 22	DOJ	**Yes**
Andre Chappel	Director, Division of Public Health Services	Office of Health Policy	6, 8, 10, 11, 14, 15, 19 20, 22	DOJ	**Yes**
CENTER FOR MEDICARE					
Name	Title	Sub-Division/Office	Requests	Proposing Party	Agreement
Sean Cavanaugh	Deputy Administrator and Director	N/A	6, 8, 10, 11, 22	Aetna	**Yes**
Cynthia Tudor	Deputy Center Director	N/A	6, 8, 10, 11, 22	Aetna	**Yes**
~~Liz Richter~~	~~Deputy Center Director~~	~~N/A~~	~~6, 8, 10, 11, 22~~	~~Aetna~~	~~N/A~~
Amy Larrick	Director	Medicare Drug Benefit and C and D Group	10, 11 6, 8, 22	DOJ (10, 11) Aetna (6, 8, 22)	**Yes**
Jennifer Shapiro	Deputy Director	Medicare Drug Benefit and C and D Group	10, 11 6, 8, 22	DOJ (10, 11) Aetna (6, 8, 22)	**Yes**
Kathryn Coleman	Director	Medicare Drug and Health Plan Contract	6, 8, 10, 11, 22	Aetna	**Yes**

		Administration Group			
~~Scott Sturiale~~	~~Deputy Director~~	~~Medicare Drug and Health Plan Contract Administration Group~~	~~6, 8, 10, 11, 22~~	~~Aetna~~	~~N/A~~
~~Arrah Tabe-Bedward~~	~~Director/ Acting Deputy Director~~	~~Medicare Enrollment and Appeals Group/CMMI~~	~~6, 8, 10, 11, 18, 19, 20, 22~~	~~Aetna~~	~~For Negotiation~~
~~Michael Crochunis~~	~~Deputy Director~~	~~Medicare Enrollment and Appeals Group~~	~~6, 8, 10, 11, 22~~	~~Aetna~~	~~N/A~~
Cheri Rice	Director	Medicare Plan Payment Group	6, 8, 10, 11, 22	Aetna	**Yes**
~~Jennifer Harlow~~	~~Deputy Director~~	~~Medicare Plan Payment Group~~	~~6, 8, 10, 11, 22~~	~~Aetna~~	~~N/A~~
CENTER FOR CONSUMER INFORMATION AND INSURANCE OVERSIGHT (CIIO)					
Name	**Title**	**Sub-Division/Office**	**Requests**	**Proposing Party**	
Kevin Counihan	Director & Marketplace Chief Executive Officer (CEO)		15, 22, **13 (where to find update), 16 (where to find update)**	Aetna	**Yes**
~~Christen Linke Young~~	~~Principle Deputy Director~~		~~15, 22~~	~~Aetna~~	~~N/A~~
HHS OFFICE OF HEALTH REFORM					
Name	**Title**	**Sub-Division/Office**	**Requests**	**Proposing Party**	
Meena Seshamani	Director		15, 22	Aetna	**Yes**
HHS OFFICE OF ASSISTANT SECRETARY FOR PUBLIC AFFAIRS					
Name	**Title**	**Sub-Division/Office**	**Requests**	**Proposing Party**	
~~Benjamin Wakana~~	~~Deputy Assistant Secretary for Public Affairs for Health Care~~		~~22~~	~~Aetna~~	~~For Negotiation~~
CMS OFFICE OF COMMUNICATIONS					
Name	**Title**	**Sub-Division/Office**	**Requests**	**Proposing Party**	
Juliet Johnson	Director		6, 8, 10, 11, **15**, 22	Aetna	**Yes**
~~Mary Wallace~~	~~Deputy Director~~		~~6, 8, 10, 11, 22~~	~~Aetna~~	~~N/A~~
CMS OFFICE OF THE ACTUARY					
Name	**Title**	**Sub-Division/Office**	**Requests**	**Proposing Party**	
Paul Spitalnic	Chief Actuary		6, 8, 10, 11, 19, 20, 22	Aetna	**Yes**
Jennifer Lazio	Director	Parts C&D Actuarial Group	6, 8, 10, 11, ~~19, 20,~~ 22	DOJ	**Yes**
~~John Shatto~~	~~Director~~	~~Medicare and Medicaid Cost Estimates Group~~	~~6, 8, 10, 11, 19, 20, 22~~	~~Aetna~~	
~~Stephen Heffler~~	~~Director~~	~~National Health Statistics Group~~	~~6, 8, 10, 11, 19, 20, 22~~	~~Aetna~~	
Center for Medicare and Medicaid Innovation					
Name	**Title**	**Sub-Division/Office**	**Requests**	**Proposing Party**	
~~Patrick Conway~~	~~Deputy Administrator for Innovation and Quality and CMS Chief Medical Officer~~		~~18, 19, 20~~	~~Aetna~~	~~For Negotiation~~
~~Amy~~	~~Deputy Director~~		~~18, 19, 20~~	~~Aetna~~	~~N/A~~

~~Bassano~~

Megan Cox	Deputy Director	Seamless Care Models Group	18, 19, 20, **17 (where to find)**	DOJ	**Yes**
Pauline Lapin	Director	Seamless Care Models Group	18, 19, 20, **17 (where to find)**	Aetna	**Yes**

Best regards,
Aaron
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This e-mail (including any attachments) may contain information that is private, confidential, or protected by attorney-client or other privilege. If you received this e-mail in error, please delete it from your system without copying it and notify sender by reply e-mail, so that our records can be corrected.
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This e-mail (including any attachments) may contain information that is private, confidential, or protected by attorney-client or other privilege. If you received this e-mail in error, please delete it from your system without copying it and notify sender by reply e-mail, so that our records can be corrected.
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Exhibit 14

From: Aaron Healey
To: Mucchetti, Peter; Wilson, Christopher (ATR); Welsh, Eric (ATR)
Cc: Richard Levie; Richard Levie; Christina Calce; Geoffrey S Irwin; Paula Render; Nathaniel G Ward; Christopher Thatch; astor Heaven (Humana); Mackowski, Martin
Subject: U.S. et al v. Aetna Inc., et al, 1:16-cv-1494 (D.D.C)--Search Term Proposal
Date: Sunday, September 11, 2016 8:15:37 PM

Counsel:

Below are the defendants' proposed revisions to the list of search terms provided to us by DOJ. As Special Master Levie instructed, defendants have spent the time since our hearing today making a best effort to prepare these revisions. Given that we wanted to provide you with this information as soon as possible in order for you to review and consider it by tomorrow, we worked in an expedited manner to complete it, and we may have a few additional comments in the coming hours. We will endeavor to limit those as best we can, and pass on only items that we believe are significant enough to warrant addition. However, we believe that this is substantially complete for the constraints we are under.

We again request that the list of terms be vetted by HHS/CMS personnel to ensure they are linguistically accurate and capture idiosyncratic, agency terminology. For example, on request 22, did HHS/CMS give the transaction a unique nickname? If so, we would ask that it be included on the list of terms. Also, for requests 14 and 18, we think these may be appropriate candidates for an alternative collection approach (i.e. "go get") rather than search terms because these are really data based requests. In light of that, we have not revised the terms for these requests, but if HHS/CMS has other thoughts on the best method for collection we are open to discuss it.

We also propose that whatever the final document/collection process is, DOJ accept a recall rate of 75% with a 95% confidence interval--these are the rates applied to defendants' productions. Defendants would be permitted to verify, through the same process DOJ uses for defendants' productions, whether the recall rate has been met.

As you know, we are providing this list without prejudice to the objections we have raised about the proposed document collection/production process or our rights to seek relief for harm that has been caused or will be caused by both the proposed document collection/production process and the ongoing delays in receiving HHS/CMS productions. We are mindful of Judge Levie's admonition to work cooperatively to determine what can be done in the time remaining for discovery, and our effort here is calibrated to achieve that goal.

We can be available to confer tomorrow between the 9:00 am conference and our appearance before Judge Levie at 3:00 pm.

Request	DOJ Terms	Revised Terms
6	(Medicare w/5 "Medicare Advantage") w/5 (compar! OR choice OR switch OR compet! OR alternat! OR option)	(Medicare OR FFS OR "fee for service" OR "fee-for-service" OR OM OR "Part A" OR "part B" OR "part d" OR PDP) **AND** (MAO* or carrier* or "private option" or payor* or "private insur*" or "primary coverage" or "managed care" or "Medicare Advantage" OR MA OR "Med Advantage" OR "Part C" OR MAPD* OR supp*) **AND** (compet* or choice or choos* or switch* or select* or chang* or alternat* or substitut* or constrain* or stimulat* OR option* OR disenroll* OR join OR drop OR enroll* OR "age-in*" OR "age in* OR turnover OR retention OR retain* OR compare* OR differen* OR similar* OR same*) OR Medicare **AND** ("Prescription Drug Plan" or PDP or "drug coverage" or "Part D" or MedSupp or "Medicare Supplement" or "Medicare Supplemental" or

		Medigap or “Med Supp”)
8	(Regulation! w/2 CMS) w/5 (“Medicare Advantage bid” OR “MA bid”) w/5 (expan!” OR benefit!” OR growth OR profit!)	((MAO* or carrier* or "private option" or payor* or "private insur*" or "primary coverage" or "managed care" or "Medicare Advantage" OR MA OR “Med Advantage” OR “Part C” OR MAPD* OR supp*) w/2 “bid*) **AND** ("zero premium" or "actuarial value" or OOP OR OOPC or TBC or "total beneficiary cost" or "out of pocket" or premium or benefit or profit or margin or rich* OR MLR or “loss ratio” OR “medical loss ratio” OR funding or reimbursement or benchmark OR PBP OR plan)
10	“Star Rating” w/5 “Medicare Advantage” + “age-ins” OR “switch!” OR “turnover” OR “retention” OR “retain”	(“Star” OR “star-rating” OR Stars) **AND** (MAO* or carrier* or "private option" or payor* or "private insur*" or "primary coverage" or "managed care" or "Medicare Advantage" OR MA OR “Med Advantage” OR “Part C” OR MAPD* OR supp*) **AND** (compet* or choice or choos* or switch* or select* or chang* or alternat* or substitut* or constrain* or stimulat* OR option OR disenroll* OR join OR drop OR enroll* OR “age-in*” OR “age in* OR turnover OR retention OR retain OR “plan design” or “benefit design” OR AEP OR elect* OR supplemental*) Molina* AND divest* **AND** (Aetna* OR Humana*)
11	“Star Rating” w/ 5 “demograph!” OR “income” OR “age” OR “disability” OR “accura!” OR “bias” OR “reliab!”	(“Star” OR “star-rating” OR Stars) AND (“demograph!” OR “income” OR “age” OR race or wealth OR “disab*” OR “accura!” OR “bias” OR “reliab!” OR skew or inaccura! OR risk OR ethni! OR sex or gender or health! OR dual OR SNP) Molina* AND divest* **AND** (Aetna* OR Humana*)
15	(Insur! w /5 “public exchange”) w/5 (viabl! OR compet! OR switch! OR entry OR exit) (Insur! w/5 “health insurance marketplace”) w/5 (viabl! OR compet! OR switch! OR entry OR exit) (Insur! w/5 “HIX”) w/5 (viabl! OR compet! OR switch! OR	(exchange* OR HIX OR Obamacare OR marketplace) **w/50** (viabl* OR compet* OR switch* OR entry OR exit OR expan* OR new OR enter OR Change or enroll* OR disenroll* OR choos* OR choice OR network or narrow or “open access” OR breadth or provider* Or carrier or insur* OR Molina*)

	entry OR exit)	
19	“coordinated care” w/5 “accountable care organization!” OR “ACO” OR “Pioneer” OR “MSSP” OR “Shared Saving” OR “Next Generation”	"accountable care" or "value based" or "care management" or "Bundled Payment Care" or BCPI or convener or MSSP or Pioneer or "Next Generation" or "Shared Saving" OR ACO OR (coordinat* w/3 care) OR “next gen” OR “nextgen” OR “SSP”
20	(“ACO” OR “affordable care organization!”) w/5 Medicare Advantage” OR “health outcome” OR “quality” OR “spend!”	(“ACO” OR “affordable care organization*” OR “Pioneer” OR “MSSP” OR “Shared Saving” OR “Next Generation” OR “Next Gen” OR NextGen OR SSP OR “accountable care organization”) **w/50** (MAO* or carrier* or "private option" or payor* or "private insur*" or "primary coverage" or "managed care" or "Medicare Advantage" OR MA OR “Med Advantage” OR “Part C” OR MAPD* OR supp* OR outcome OR “quality” OR “spend*” OR cost or reimburse* OR enroll* OR disenroll* Or profit OR margin OR Grow*)
22	Aetna OR Humana w/5 merger	(Aetna* OR Humana* OR Bertolini* OR Cocozza* OR Mayhew* OR Soistman* OR Olson* OR Broussard*) **w/50** (DOJ OR antitrust OR competit* or “Department of Justice” or “Freedom of Information” OR FOIA or release OR usdoj.gov OR Mucchetti or Kantor OR Baer OR Pfaffenroth OR Hesse OR merger or transact* Or deal or combin* Or acqui* OR “White house” or politic* OR press* OR support OR benefit or efficien* Or “cost saving” or “cost savings” or “cost reductions” OR Compl* Or analy* Or improv* OR Syner* Or drug OR case OR litigat* OR investigat* OR “anti-trust” OR “anti trust” OR ATR OR Secretary OR WH OR “who.eop.gov” OR MAO* or carrier* or "private option" or payor* or "private insur*" or "primary coverage" or "managed care" or "Medicare Advantage" OR MA OR “Med Advantage” OR “Part C” OR MAPD* OR supp*)

Best regards,
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Facsimile +1.614.461.4198
ahealey@jonesday.com

EXHIBIT C

Declaration of Ryan Danks

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, et al., *Plaintiffs*, v. AETNA INC. and HUMANA INC., *Defendants*.	Case No. 1:16-cv-1494 (JDB) Submitted to the Special Master, The Hon. Richard A. Levie (Ret.)

DECLARATION OF RYAN DANKS

1. My name is Ryan Danks. I am an attorney with the United States Department of Justice's Antitrust Division. As one of the attorneys representing the United States in this enforcement action, I have communicated regularly in person, by phone, and over email with counsel for Defendants. Copies of some of the emails I have exchanged with Defendants (in addition to transcripts of hearings before this Court) are attached as exhibits to this Declaration. I have reviewed each of these emails and attest that they are true and correct copies.

2. Since September 14, 2016, I have been assisting my colleagues in preparing the Department of Health and Human Services' (HHS) response to Defendants' discovery requests in this action. On September 20, I spoke with counsel for Defendants and outlined the Division's planned approach with respect to producing materials gathered in the forensic collection on the expedited discovery schedule. As I explained to defense counsel during that call, the quantity of documents and the short timeframe afforded by the Special Master's order made it impossible to complete a document-by-document privilege review.

3. Therefore, the Division, with the advice and input from lawyers from HHS's Office of General Counsel, used a series of search terms to withhold potentially privileged documents from the productions made by the Division on September 20, 23, 27, and 28. I understand that this technique has been used in other large-scale productions, albeit with significantly longer schedules for review of documents and production of privilege logs.

4. The Division provided Defendants with suggested search terms to limit the scope of relevant documents in an email from my colleague, Christopher Wilson, to counsel for Defendants on September 6. *See* Declaration of Christopher M. Wilson ("Wilson Decl."), Ex. 13. On September 11, Defendants responded, proposing search terms that were significantly broader and more complex. *See* Wilson Decl., Ex. 14. As I explained in emails and conversations with defense counsel, after the Division discovered that the complexity of these search terms prevented them from running properly on Relativity, the Division's document review platform, the Division modified them in ways that ensured that they captured a universe of documents no narrower than the one the Defendants proposed on September 11.

5. The Division could not apply the Defendants' search terms to the original production—made on September 20—and still meet the production deadlines imposed by the Special Master's September 19 order. After applying the search terms to subsequent productions, it became apparent that they captured an overlarge universe of documents. (For example, in the initial production of Center for Medicare and Medicaid Services (CMS) materials made on September 23, the Defendants' search terms captured nearly 84% of the documents, or more than 155,000 of the 185,000 potentially responsive, non-privileged records.) I explained this problem to Defendants in an email on September 25. "[T]he extraordinary breadth of Aetna's search terms as they needed to be adapted for Relativity is substantially increasing the burden associated

with our privilege review…. This in turn dramatically increases the number of documents, including irrelevant ones, that we have to review for potential privilege…. We believe that the breadth of the search terms, which resulted from the complexity of the search strings Aetna proposed and our efforts to apply them as quickly and expansively as possible, needs to be addressed." *See* Email from Ryan Danks of DOJ to Aaron Healey of Jones Day, dated September 25, 2016, attached hereto as Exhibit 1.

6. In a hearing before the Special Master on the following day, September 26, I once again explained that the breadth of the responsive documents needed to be addressed. An example I gave at the time was that the search strings, as adapted for Relativity, "called for all documents with the term Medicare in it," and that it shouldn't "come as any surprise that there are a lot of documents from the Centers for Medicare and Medicaid Services and the Department of Health and Human Services that have the word Medicare in them." 9/26/16 Hearing Tr. 62:21-25, 63:1-6 (Danks). Defendants declined to provide any substantive response or suggest any alternative search terms, claiming that it was "incumbent on the Division to identify or propose, in the first instance, specific – rather than abstract – means to cull out irrelevant materials . . .." E-mail from Aaron Healey of Jones Day to Ryan Danks of DOJ, dated September 26, 2016, attached hereto as Exhibit 2.

7. Attorneys from the Department of Justice have attempted to review as many documents as possible across the entire range of the withheld documents to assess whether they are privileged or responsive to any of Defendants' requests. As a result of that review, the Department produced to the defendants a supplemental production on October 8, 2016, of more than 600,000 documents and is preparing an additional, smaller supplemental production.

8. To make our best efforts to comply with the Special Master's order to produce a final privilege log on October 7, attorneys from the Department of Justice have used the "clustering" function of Relativity (which uses analytics search tools to create groups of conceptually similar documents but does not code or analyze the document itself) to group documents discussing similar topics. We have then provided examples of the topics listed and described some of the deliberative process privilege concerns that they raise. The logs we provided are itemized by custodian, file name, and relevant email information for each document that continues to be withheld.

9. Since the Special Master's order to conduct a forensic review on August 29, and including the supplemental production made on October 8, the Division has produced more than 1.4 million documents to Defendants.

10. At the Special Master's request, the Antitrust Division obtained HHS's consent to utilize a "clean room" approach based on the inspection procedure utilized in the *United States v. Philip Morris* litigation, which would allow defense counsel to access large portions of the documents still being withheld by the United States as privileged, with the ability to identify up to 100 documents every day for privilege reconsideration. The United States would have to provide a response regarding these documents within 48 hours and any disputes would be adjudicated by the Special Master. I sent the details of this proposal to Defendants and the Court. *See* E-mail from Ryan Danks of DOJ to Geoffrey Irwin of Jones Day, dated September 29, 2016, attached hereto as Exhibit 3. In addition, at the Special Master hearing on October 4, I offered that the Division would be willing to modify the proposal to address concerns that the Special Master had addressed in an earlier telephonic conference.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 8, 2016.

/s Ryan Danks
Ryan Danks

Exhibit 1

From:	Danks, Ryan
To:	Aaron Healey; Mahr, Eric (ATR)
Cc:	Ausra O Deluard; astor Heaven (Humana); Wilson, Christopher (ATR); Welsh, Eric (ATR); Geoffrey S Irwin; Van Arsdall, Michael; Nathaniel G Ward; Mucchetti, Peter; Paula Render; Richard Levie; Richard Levie; Christina Calce
Subject:	RE: U.S. et al. v. Aetna Inc., et al, 1:16-cv-1494 (D.D.C)--Meet & Confer re: Information on Privilege Review Process Follow-up
Date:	Sunday, September 25, 2016 8:46:08 AM

All:

As the Special Master requested, I write to provide an update on our processing and post-processing privilege review efforts. In response to the Special Master's order on August 29, the Division began a forensic collection of electronic information from 20 custodians at HHS and CMS. It appears that collection from those 20 custodians has generated more than 1.6 terabytes of information, which thus far has created 8 million files we have had to process. (This number includes files from productions that are processing now and will likely increase as we complete that work.)

So far, we have made two productions that include files from 6 ASPE and 11 CMS custodians. The files associated with those productions originally totaled approximately 3.1 million files. After de-duplication and screening for obviously non-responsive file extensions and other materials, we have produced 326,784 documents and withheld between 860,000 and 1.1 million documents responsive to Aetna's search terms that triggered a need for further privilege review. (The number of documents withheld for further screening fluctuates as we process additional documents, apply deduplication that we did not have time to before, and continue our efforts to get "eyes on" as many documents as possible to determine if they are responsive, obviously non-responsive, or properly withheld.)

Two observations about what we have found thus far. Aetna requested – and the Special Master ordered – us to provide a "null set" to test the sufficiency of Aetna's search terms. As you know, we produced the ASPE custodians on Tuesday without applying those search terms; therefore, that entire production essentially counts as a "null set" in and of itself. For the CMS materials produced today, we can report that Aetna's search terms hit on approximately 84% of the post-screened documents -- of the approximately 185,000 documents available to be produced, more than 155,000 were responsive to Aetna's search terms. Given this extraordinarily high rate, we believe further testing of the search terms as they are currently constituted is unnecessary.

Second, the extraordinary breadth of Aetna's search terms as they needed to be adapted for Relativity is substantially increasing the burden associated with our privilege review. For example, search string 6 now returns any document that contains the term "Medicare," which naturally turns up quite frequently in documents from the Centers for Medicare and Medicaid Services and from HHS more generally. This in turn dramatically increases the number of documents, including irrelevant ones, that we have to review for potential privilege. Many of these documents raise legitimate deliberative process privilege concerns.

We believe that the breadth of the search terms, which resulted from the complexity of the search strings Aetna proposed and our efforts to apply them as quickly and expansively as possible, needs to be addressed. We remain committed--and are working actively through this weekend--to do everything that we can to meet the deadline the Special Master ordered for production of our privilege log. However, to give us any reasonable chance to do so, we must narrow the number of documents at issue.

I hope to be able to provide an additional update on our production progress on Monday morning.

Sincerely,

Ryan Danks

From: Danks, Ryan
Sent: Tuesday, September 20, 2016 2:28 PM
To: Aaron Healey; Mahr, Eric (ATR)
Cc: Ausra O Deluard; astor Heaven (Humana); Wilson, Christopher (ATR); Welsh, Eric (ATR); Geoffrey S Irwin; Van Arsdall, Michael; Nathaniel G Ward; Mucchetti, Peter; Paula Render; Richard Levie; Richard Levie; Christina Calce

Subject: RE: U.S. et al. v. Aetna Inc., et al, 1:16-cv-1494 (D.D.C)--Meet & Confer re: Information on Privilege Review Process Follow-up

Aaron-

Thank you for your note. To follow up on one point you make below – I can confirm that the production we are making today and tomorrow includes the complete forensic collection from all six ASPE custodians, absent documents withheld for privilege.

I also want to clarify the Division's intent with respect to documents withheld for privilege. We believe that it is premature to commit to a specific process for a second-level review of documents withheld for privilege because we do not yet know the volume of HHS/CMS documents that we will need to address. Once we have a better sense of the volume, we can determine which approach will most efficiently and effectively deal with the privileged documents, including affording the Special Master an opportunity to hear any challenges to documents we withheld.

Please let me know if you have any questions.

Ryan

From: Aaron Healey [mailto:ahealey@jonesday.com]
Sent: Tuesday, September 20, 2016 1:20 PM
To: Danks, Ryan; Mahr, Eric (ATR)
Cc: Ausra O Deluard; astor Heaven (Humana); Wilson, Christopher (ATR); Welsh, Eric (ATR); Geoffrey S Irwin; Van Arsdall, Michael; Nathaniel G Ward; Mucchetti, Peter; Paula Render; Richard Levie; Richard Levie; Christina Calce
Subject: RE: U.S. et al. v. Aetna Inc., et al, 1:16-cv-1494 (D.D.C)--Meet & Confer re: Information on Privilege Review Process Follow-up

Ryan:

Thank you for the time this morning. Below is defendants' summary of the representations made in responses to our questions from this morning's call. If we have misstated or misunderstood anything, please let me know. We are providing this summary for purposes of ensuring our understanding of the responsiveness and privilege review process, but it does not represent an agreement or a waiver of any objections defendants have or may have to these processes.

- DOJ does not yet know what the total number of documents collected from HHS/CMS will be before and after processing, and after de-duplication, but will share that information with Defendants when it is available.
-
- DOJ does not yet know what the total number of hits on responsiveness or privilege terms will be. DOJ is adapting the responsiveness search terms for use on Relativity and is still processing collections. DOJ expects to have information on what hits on responsiveness terms and privilege terms late this week or early next week. Ryan will follow-up with defendants later this week when DOJ has a better sense of when all processing will be complete and this information can be made available.
-
- DOJ's plan for identifying responsive documents is to apply the search terms, once they are adapted to Relativity, and produce all documents that hit on those terms, and which do not hit on

its privilege screen terms.
    - DOJ is taking under consideration defendants' proposal that it provide defendants a statistically significant sample of "null set" documents that don't hit on any responsiveness terms to review for purposes of establishing the recall rate for the proposed search terms.
-
- DOJ will be producing documents for ASPE custodians today and tomorrow. The documents produced on 9/20 and 9/21 for custodians De Lew, Sheingold, and Frank will include forensically collected files. However, because the list of responsiveness search terms were not adapted in time for use on Relativity to meet this production deadline, they were not applied to these documents. DOJ did remove from these productions obviously non-responsive documents (i.e. domains, transit proposals). DOJ did apply its privilege screen terms to these custodial collections, and documents hitting on those terms will be withheld (see below).
-
- DOJ's process for identifying privileged documents (attorney-client, work product, and deliberative process privilege) is not an algorithm but is instead the use of a privilege screen, which are search terms that function like the responsiveness terms. The privilege screen search terms were developed based on DOJ's experiencein prior cases (e.g. Deepwater Horizon) and through discussions with HHS. Documents that hit on these terms will be witheld from production.
-
- Documents that hit on privilege screen search terms are not presently being reviewed by attorneys, and there is no firm plan in place to conduct attorneys eyes-on review of these documents going forward. DOJ is awaiting more information on the number of documents that hit on privilege terms to determine what, if any, additional review will be based on the volume and time remaining in the case schedule.
    -
    - In DOJ's prior experience (e.g. Deepwater Horizon), the use of privilege screen search terms in other case was an initial step in a privilege review process that included attorneys' eyes-on review.
    -
- DOJ does not presently have statistics on the precision of its privilege screen/terms process.
-
- DOJ does not intend to provide defendants their privilege screen terminology even though defendants agree that such disclosure will not be used by defendants to argue waiver of work product doctrine protection. DOJ does not consent to *in camera* review of the privilege screen terminology by the Special Master.
-
- DOJ will provide defendants metrics on number of documents for each custodian in the collection, the number of responsive documents by custodian, and the number of responsive documents withheld for privilege.
-
- DOJ will provide defendants a list of final responsiveness search terms, and will confirm what input HHS had in making the list. Defendants asked for input from HHS that validates the linguistics of the search terms. DOJ will provide a comparison of the terms as finalized following HHS review, re-formatting to be compatible with Relativity, and confirm whether HHS's input was provided validate the linguistic accuracy of the search terms. The changes to the search terms to make them compatible with Relativity are likely to broaden, not narrow, the terms.
-

Again, please let me know if we misunderstood anything.

Best regards,

Aaron

Aaron M. Healey
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Facsimile +1.614.461.4198
ahealey@jonesday.com

Exhibit 2

From:	Aaron Healey
To:	Danks, Ryan
Cc:	Ausra O Deluard; astor Heaven (Humana); Christina Calce; Wilson, Christopher (ATR); Mahr, Eric (ATR); Welsh, Eric (ATR); Geoffrey S Irwin; Van Arsdall, Michael; Nathaniel G Ward; Mucchetti, Peter; Paula Render; Richard Levie; Richard Levie; John M. Majoras
Subject:	RE: U.S. et al. v. Aetna Inc., et al, 1:16-cv-1494 (D.D.C)--Meet & Confer re: Information on Privilege Review Process Follow-up
Date:	Monday, September 26, 2016 9:39:54 PM

Ryan:

We wanted to respond to your note from yesterday after today's update before Judge Levie, which was helpful but also confirmed our fears about this production process. We are shocked by the volume of documents being withheld from the CMS/HHS productions based on the privilege screen terms, which are capturing anywhere from 2/3ds to 3/4ths of all documents hitting on responsiveness terms. We understand the Division faces challenges to produce a fulsome, accurate privilege log by October 7 in light of the fact that it is withholding around 1 million documents. However, defendants cannot agree to a process that winnows the universe of documents the Division is required to review and log by discarding potentially relevant and responsive materials that will then never be reviewed, logged, or produced.

That said, we will review any specific proposal the Division has to offer as long as it protects defendants' legitimate interest in obtaining responsive materials that are currently being held behind the privilege screen. For example, if the Division can offer a prospective revision to the responsiveness terms that can isolate non-relevant documents, we are happy to hear it. We do think it is incumbent on the Division to identify or propose, in the first instance, specific--rather than abstract--means to cull out irrelevant materials to both facilitate the Division's privilege review and to protect defendants' right to the production of non-privileged, responsive documents that are being withheld.

Despite assertions to the contrary, defendants have worked continuously with the Division to facilitate a prompt production of the forensically collected material from HHS/CMS. This included working with the Division to winnow custodians, the number of requests that applied to each custodian, and the date range for the document collection. Further, despite our vigorous objection to the use of search terms in place of predicative coding, we supplemented the search terms originally provided by the Division, though we never received any substantive feedback or a request to winnow those terms until the issue of logging privileged documents was raised in your email yesterday. Consistent with our practice to date, we continue to be available and willing to discuss reasonable solutions that adequately protect our legitimate right to obtain this discovery.

Further, defendants reiterate our prior offer to the Division regarding disclosure of the privilege screen terms. If the division discloses the privilege screen terms, defendants would not argue that such disclosure constituted waiver of any privilege that may apply to those terms or a broader subject matter waiver. Given the high number of documents that are being captured within the screen terms, we believe the Division should be looking critically at its privilege screen in an effort to reduce the volume of documents being withheld.

Again, if you have specific proposals that address our concerns, please feel free to reach out.

Best regards,
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ahealey@jonesday.com

From: "Danks, Ryan" <Ryan.Danks@usdoj.gov>

To: Aaron Healey <ahealey@jonesday.com>, "Mahr, Eric (ATR)" <Eric.Mahr@usdoj.gov>
Cc: Ausra O Deluard <adeluard@jonesday.com>, "astor Heaven (Humana)" <aheaven@crowell.com>, "Wilson, Christopher (ATR)" <Christopher.Wilson5@usdoj.gov>, "Welsh, Eric (ATR)" <Eric.Welsh@usdoj.gov>, Geoffrey S Irwin <gsirwin@JonesDay.com>, "Van Arsdall, Michael" <MVanArsdall@crowell.com>, Nathaniel G Ward <nward@jonesday.com>, "Mucchetti, Peter" <Peter.J.Mucchetti@usdoj.gov>, Paula Render <prender@JonesDay.com>, Richard Levie <ralevie@gmail.com>, Richard Levie <RLevie@JAMSADR.com>, Christina Calce <ccalce@jamsadr.com>

Date: 09/25/2016 08:48 AM
Subject: RE: U.S. et al. v. Aetna Inc., et al, 1:16-cv-1494 (D.D.C)--Meet & Confer re: Information on Privilege Review Process Follow-up

---

All:

As the Special Master requested, I write to provide an update on our processing and post-processing privilege review efforts. In response to the Special Master's order on August 29, the Division began a forensic collection of electronic information from 20 custodians at HHS and CMS. It appears that collection from those 20 custodians has generated more than 1.6 terabytes of information, which thus far has created 8 million files we have had to process. (This number includes files from productions that are processing now and will likely increase as we complete that work.)

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Two observations about what we have found thus far. Aetna requested – and the Special Master ordered – us to provide a "null set" to test the sufficiency of Aetna's search terms. As you know, we produced the ASPE custodians on Tuesday without applying those search terms; therefore, that entire production essentially counts as a "null set" in and of itself. For the CMS materials produced today, we can report that Aetna's search terms hit on approximately 84% of the post-screened documents -- of the approximately 185,000 documents available to be produced, more than 155,000 were responsive to Aetna's search terms. Given this extraordinarily high rate, we believe further testing of the search terms as they are currently constituted is unnecessary.

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We believe that the breadth of the search terms, which resulted from the complexity of the search strings Aetna proposed and our efforts to apply them as quickly and expansively as possible, needs to be addressed. We remain committed--and are working actively through this weekend--to do everything that we can to meet the deadline the Special Master ordered for production of our privilege log. However, to give us any reasonable chance to do so, we must narrow the number of documents at issue.

I hope to be able to provide an additional update on our production progress on Monday morning.

Sincerely,

Ryan Danks

From: Danks, Ryan
Sent: Tuesday, September 20, 2016 2:28 PM
To: Aaron Healey; Mahr, Eric (ATR)
Cc: Ausra O Deluard; astor Heaven (Humana); Wilson, Christopher (ATR); Welsh, Eric (ATR); Geoffrey S Irwin; Van Arsdall, Michael; Nathaniel G Ward; Mucchetti, Peter; Paula Render; Richard Levie; Richard Levie; Christina Calce
Subject: RE: U.S. et al. v. Aetna Inc , et al, 1:16-cv-1494 (D.D.C)--Meet & Confer re: Information on Privilege Review Process Follow-up

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Please let me know if you have any questions.

Ryan

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Sent: Tuesday, September 20, 2016 1:20 PM
To: Danks, Ryan; Mahr, Eric (ATR)
Cc: Ausra O Deluard; astor Heaven (Humana); Wilson, Christopher (ATR); Welsh, Eric (ATR); Geoffrey S Irwin; Van Arsdall, Michael; Nathaniel G Ward; Mucchetti, Peter; Paula Render; Richard Levie; Richard Levie; Christina Calce
Subject: RE: U.S. et al. v. Aetna Inc , et al, 1:16-cv-1494 (D.D.C)--Meet & Confer re: Information on Privilege Review Process Follow-up

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* DOJ does not yet know what the total number of hits on responsiveness or privilege terms will be. DOJ is adapting the responsiveness search terms for use on Relativity and is still processing collections. DOJ expects to have information on what hits on responsiveness terms and privilege terms late this week or early next week. Ryan will follow-up with defendants later this week when DOJ has a better sense of when all processing will be complete and this information can be made available.
*
* DOJ's plan for identifying responsive documents is to apply the search terms, once they are adapted to Relativity, and produce all documents that hit on those terms, and which do not hit on its privilege screen terms.
* DOJ is taking under consideration defendants' proposal that it provide defendants a statistically significant sample of "null set" documents that don't hit on any responsiveness terms to review for purposes of establishing the recall rate for the proposed search terms.
*
* DOJ will be producing documents for ASPE custodians today and tomorrow. The documents produced on 9/20 and 9/21 for custodians De Lew, Sheingold, and Frank will include forensically collected files. However, because the list of responsiveness search terms were not adapted in time for use on Relativity to meet this production deadline, they were not applied to these documents. DOJ did remove from these productions obviously non-responsive documents (i.e. domains, transit proposals). DOJ did apply its privilege screen terms to these custodial collections, and documents hitting on those terms will be withheld (see below).
*
* DOJ's process for identifying privileged documents (attorney-client, work product, and deliberative process privilege) is not an algorithm but is instead the use of a privilege screen, which are search terms that function like the responsiveness terms. The privilege screen search terms were developed based on DOJ's experiencein prior cases (e.g. Deepwater Horizon) and through discussions with HHS. Documents that hit on these terms will be witheld from production.
*
* Documents that hit on privilege screen search terms are not presently being reviewed by attorneys, and there is no firm plan in place to conduct attorneys eyes-on review of these documents going forward. DOJ is awaiting more information on the number of documents that hit on privilege terms to determine what, if any, additional review will be based on the volume and time remaining in the case schedule.
•

* In DOJ's prior experience (e.g. Deepwater Horizon), the use of privilege screen search terms in other case was an initial step in a privilege review process that included attorneys' eyes-on review.
*
* DOJ does not presently have statistics on the precision of its privilege screen/terms process.
*
* DOJ does not intend to provide defendants their privilege screen terminology even though defendants agree that such disclosure will not be used by defendants to argue waiver of work product doctrine protection. DOJ does not consent to in camera review of the privilege screen terminology by the Special Master.
*
* DOJ will provide defendants metrics on number of documents for each custodian in the collection, the number of responsive documents by custodian, and the number of responsive documents withheld for privilege.
*
* DOJ will provide defendants a list of final responsiveness search terms, and will confirm what input HHS had in making the list. Defendants asked for input from HHS that validates the linguistics of the search terms. DOJ will provide a comparison of the terms as finalized following HHS review, re-formatting to be compatible with Relativity, and confirm whether HHS's input was provided validate the linguistic accuracy of the search terms. The changes to the search terms to make them compatible with Relativity are likely to broaden, not narrow, the terms.
*
Again, please let me know if we misunderstood anything.

Best regards,
Aaron

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Exhibit 3

From: Danks, Ryan
To: Geoffrey S Irwin; Mucchetti, Peter
Cc: Ausra O Deluard; Aaron Healey; astor Heaven (Humana); Christina Calce; Wilson, Christopher (ATR); Mahr, Eric (ATR); Welsh, Eric (ATR); Van Arsdall, Michael; Nathaniel G Ward; Paula Render; Richard Levie; Richard Levie; Fowler, Jeffrey
Subject: RE: U.S. et al. v. Aetna Inc., et al., 1:16-cv-1494 (D.D.C)
Date: Thursday, September 29, 2016 6:47:00 PM

Judge Levie and all-

Please find below a more detailed description of the United States's proposal with respect to an inspection and review procedure for HHS/CMS documents.

thank you,
Ryan

- Working with attorneys from HHS, the Department of Justice would establish a "Review Set" consisting of a subset of the documents withheld from the HHS and CMS forensic productions. The Review Set would include only those documents that respond to revised substantive search terms that the DOJ would provide to the Defendants and the Special Master. The Review Set would exclude:
  - Documents that fall before January 1, 2013, and
  - Documents that respond to a list of search terms designed to remove narrow sets of documents that are either highly sensitive and non-responsive to the issues in the case, or are subject to attorney-client privilege, work product protection or deliberative process privilege. The DOJ would share this list of search terms in camera with the Special Master.

- Attorneys from the Defendants would then have an opportunity to inspect the Review Set, subject to the following conditions:
  - The Review Set would be placed on a server maintained by the United States' vendor.
  - Review of documents within the Review Set would take place in a location in a DOJ building or one operated by its vendor.
  - No copying, printing, emailing, exporting, photographing or transmittal of documents or information from the Review Set would be permitted. No note taking would be permitted. Persons with access to the Review Set would agree to refrain from using "Print Screen" or the Snipping Tool, or any other technologies, to capture images of documents that are being reviewed.

- Access to the Review Set would be restricted to only designated outside counsel for the Defendants. Each attorney who is given access to the Review Set would sign a Confidentiality Agreement providing that:

  - They would be bound by the protective order;
  - They would not use any information acquired from the Review Set for any purpose outside the litigation; and
  - They would not discuss, transmit, or share in any way any information acquired from the Review Set unless authorized to do so by HHS or the Special Master, pursuant to the structure organized below.

- Attorneys for the Defendants would be permitted to identify up to 100 documents per day from the Review Set that they believe are relevant and not subject to any privilege or work product protection. Within [48] hours (not including weekends, or federal or religious holidays), the DOJ/HHS would then review the identified documents for privilege.

- Any document that the DOJ/HHS agrees would not subject to a privilege claim would be produced to the Defendants subject to the Protective Order.

- If the DOJ/HHS determined that the document was privileged, then the matter would be presented to the Special Master for review. Before any document would be presented to the Special Master for review, a final determination of privilege would be made by [an HHS Reviewing Official TBD] with respect to that specific document.

- After receiving authorization from [an HHS Reviewing Official TBD], DOJ/HHS would submit documents to the Special Master for in camera review, along with any related materials necessary for context. The Special Master would then determine whether the asserted privilege applied to the document at issue. The Special Master may hold argument concerning the issue at any party's request if he concludes that the argument would assist his determination.

- If the Special Master found that the document was not protected by the asserted privilege or work product protection, then the document would be produced pursuant to the Protective Order. If the Special Master found that the document was protected by the asserted privilege or work product protection, then DOJ/HHS would log the document on a formal privilege log.

From: Geoffrey S Irwin [mailto:gsirwin@JonesDay.com]
Sent: Wednesday, September 28, 2016 2:08 PM
To: Mucchetti, Peter
Cc: Ausra O Deluard; Aaron Healey; astor Heaven (Humana); Christina Calce; Wilson, Christopher (ATR); Mahr, Eric (ATR); Welsh, Eric (ATR); Van Arsdall, Michael; Nathaniel G Ward; Paula Render; Richard Levie; Richard Levie; Danks, Ryan
Subject: Re: U.S. et al. v. Aetna Inc., et al., 1:16-cv-1494 (D.D.C)

Thank you, Peter, we appreciate the continuing dialogue with HHS and hope you can reach agreement to release the documents. In your conversations with HHS, I would ask that you please be mindful of our fundamental concerns as to the specific "inspection" procedures at play in Tobacco, and the volumes and very different time constraints involved here. If HHS is willing to allow inspection, we think the documents should just be produced subject to clawback so we can start working with them immediately. The principles are the same.

Judge Levie, I enclose a courtesy copy of the motion to compel that we just filed (in its entirety as a standalone .pdf, as well as a Word version of the motion and .pdfs of the exhibits), again because we may very well need an adjudicated resolution here and time is so short. I am prepared to discuss as much or as little of this as needed on tomorrow's call.

Regards. Geoff Irwin

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From: "Mucchetti, Peter" <Peter.J.Mucchetti@usdoj.gov>
To: Ausra O Deluard <adeluard@jonesday.com>, "astor Heaven (Humana)" <aheaven@crowell.com>, "Wilson, Christopher (ATR)" <Christopher.Wilson5@usdoj.gov>, "Welsh, Eric (ATR)" <Eric.Welsh@usdoj.gov>, Geoffrey S Irwin <gsirwin@JonesDay.com>, "Van Arsdall, Michael" <MVanArsdall@crowell.com>, Nathaniel G Ward <nward@jonesday.com>, Paula Render <prender@JonesDay.com>, Richard Levie <ralevie@gmail.com>, Richard Levie <RLevie@JAMSADR.com>, Christina Calce <ccalce@jamsadr.com>, "Danks, Ryan" <Ryan.Danks@usdoj.gov>, Aaron Healey <ahealey@jonesday.com>, "Mahr, Eric (ATR)" <Eric.Mahr@usdoj.gov>
Date: 09/28/2016 11:35 AM
Subject: U.S. et al. v. Aetna Inc., et al., 1:16-cv-1494 (D.D.C)

Dear Judge Levie:

After our 5:00 call yesterday, we spoke with HHS to again pursue the question of whether HHS would agree to produce documents for inspection in a manner similar to the Tobacco litigation. HHS needs until noon tomorrow, Thursday, to gather its senior clients to discuss this issue and report back to DOJ. Consequently, we suggest that we move our 10 am Thursday meeting to sometime after noon on Thursday so that we can report on HHS's position. Thank you.

- Peter Mucchetti

EXHIBIT D

Declaration of Tracy Greer

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, et al., *Plaintiffs*, v. AETNA INC. and HUMANA INC., *Defendants*.	Case No. 1:16-cv-1494 (JDB) Submitted to the Special Master, The Hon. Richard A. Levie (Ret.)

DECLARATION OF TRACY GREER

1. My name is Tracy Greer. I am the Senior Counsel for Electronic Discovery at the U.S. Department of Justice, Antitrust Division. I have served in this or a related role since 2008.

2. I am responsible for the Antitrust Division's Predictive Coding initiative. Through this program, the Division permits and works with private parties responding to compulsory process to use predictive coding for the production of documents. I have been personally involved in some of these negotiations and provided detailed guidance to Antitrust Division staff for their use. The Division has agreed to a predictive coding protocol in over twenty investigations.

3. In my position, I routinely attend conferences and presentations by lawyers and vendors addressing predictive coding. I also consult with colleagues in other components who have used predictive coding internally. And I stay abreast of current developments in this topic through trade publications and other sources.

4. Predictive coding, or technology-assisted review, is a time-intensive process that, at its simplest, leverages the categorization of a small sample of documents by subject matter

experts (SMEs) over a larger collection of documents. Based on the categorization by the SME, the platform can classify other documents as responsive or non-responsive. The process is repeated until only a small set of "uncategorized" documents remain.

5. After this initial coding process is completed, the collection is subjected to a series of quality control rounds to ensure that the categorization, both by the SMEs and the software, is accurate.

6. In my experience, predictive coding is only effective when used on a carefully collected set of documents in which time and care have been taken to ensure that the documents have been properly loaded into the review platform and that the metadata has been properly collected and appears in the proper fields in the review platform. In addition, the workflow must be carefully thought out and tested to ensure that it works as expected. Finally, the process must be carefully monitored to ensure that the categorization by the SMEs and software is performing as expected.

7. It is my understanding that as part of the Special Master's August 29 order to conduct a forensic collection from custodians from the Department of Health and Human Services' Office of the Assistant Secretary for Planning and Evaluation and the Center for Medicare and Medicaid Services, the Special Master directed the United States to begin producing documents as soon as possible. It is my further understanding that the Special Master subsequently entered an order requiring the initial production of documents from certain custodians by September 20, 2016, three weeks after the August 29 order, with the productions from the remaining custodians completed no later than September 26.

8. In my opinion, it was not realistic to use predictive coding to accomplish the forensic collections ordered in this case given the expedited timetable established for the start of production for several reasons.

9. Designing and organizing a well-thought-out predictive coding process requires a large investment of time before the process begins in order to achieve the smaller, more relevant, productions that predictive coding promises. While my experience suggests that predictive coding speeds the production of responsive documents from a collection, that outcome can only be achieved by taking sufficient time at the outset to ensure that the information has been collected, loaded, and indexed properly. In particular, predictive coding relies upon "advanced analytic" indices which require extra time to build when collections are loaded. The successful use of predictive coding also requires careful quality control and sampling after the process has been concluded to validate the results. Finally, even after review, additional time is required to prepare the export for production, to copy the production to the appropriate media, and to create duplicate copies of the production for both parties and the Division and, finally, for delivery. Export and duplication alone can take multiple days, especially if quality control checks are done.

10. In my experience, proceeding through all of these steps takes longer than three weeks for collections of the size that we were required to collect in this case.

11. In addition, further unique challenges were posed in this case by the nature of the documents collected from HHS. Predictive coding relies on careful collection of identified information and uses a standard process that ensures consistent formatting of extracted metadata across the data set as well as the testing of the metadata. The collections in this matter were

gathered from more than one network. The production deadlines simply did not provide time for the testing and vetting of the data to use predictive coding.

12. All told, using a predictive coding process in this case–including the time necessary to collect, process, search, and build an appropriate review process–would have delayed production significantly beyond the deadlines in Special Master Order #3 to produce documents for HHS custodians. The process employed by the United States resulted in documents being produced to Defendants significantly sooner than if a predictive coding method had been used.

13. Although predictive coding has proven to be a good tool for screening documents for responsiveness, it is unable to automate the review of documents to determine whether they contain information protected by the attorney-client privilege and work product doctrine. I am not aware of any vendor or software platform that has represented that their technology can consistently and reliably identify privileged information. These same limitations would apply to documents and information protected by the deliberative process privilege. I am unaware of any testing that has been done using predictive coding to identify information protected by deliberative process. In my judgment, the limitations of predictive coding technology as applied to the attorney-client privilege and the work product doctrine would apply equally if not more so to information protected by the deliberative process privilege. Therefore, even if predictive coding could have been used to screen the forensic collections for responsiveness, it could not have been used for privilege review.

14. During September and October, I assisted in the preparation of productions derived from the forensic collection of electronic information from HHS. The forensic collection of electronic information from the 20 custodians at ASPE and CMS generated more than 780 GB

of information, or approximately 3.88 million files when published to Relativity, the document review platform used by the Division.

15. Between September 20 and 28, the United States made the following productions:

a. on September 20, the United States produced 171,496 records from 6 ASPE custodians;

b. on September 20, the United States also produced 103 MB of 2017 Medicare Advantage bid data containing product, pricing, and cost information for every Medicare Advantage product available for sale;

c. on September 23, the United States produced a total of 155,288 records from 11 CMS custodians;

d. on September 27, the United States produced a total of 372,138 records from 12 CMS custodians, including two custodians cross-produced from the Anthem-Cigna litigation; and

e. on September 28, the United States produced 129,542 records from 2 ASPE and 2 CMS custodians, including one custodian cross-produced from the Anthem-Cigna litigation.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 8, 2016.

/s Tracy Greer
Tracy Greer