UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA *et al.*,

Plaintiffs,

v.

CVS HEALTH CORPORATION

and

AETNA INC.,

Defendants.

Case No. 1:18-cv-02340-RJL

ORAL ARGUMENT REQUESTED

MOTION OF THE UNITED STATES TO LIMIT THE SCOPE OF THE TUNNEY ACT HEARING AND EXCLUDE IRRELEVANT AND UNDISCLOSED TESTIMONY

Much of the testimony proposed by the American Medical Association, AIDS Healthcare Foundation, and Consumer Action and U.S. PIRG (collectively, "amici") is beyond the statutory scope of Tunney Act review and is otherwise inadmissible in an evidentiary hearing of the kind currently proposed. Specifically, the proposed testimony relating to alleged antitrust violations that amici believe the United States should have included in the Complaint is beyond the scope of the public-interest inquiry before the Court and is therefore irrelevant. Consequently, it should be excluded. Much of the opinion testimony offered by amici is also inadmissible or unsupported. It, too, should be excluded.

The United States respectfully requests that the Court limit the scope of the testimony and evidence received at the hearing to the adequacy of the proposed remedy in light of the violations alleged in the Complaint and exclude the proposed out-of-bounds and inadmissible testimony

before the hearing. For the reasons explained more fully below, the United States requests that the Court strike Professor Greaney, Dr. Singer, Dr. Burns, Dr. Wohlfeiler, and Dr. Moss from the witness lists and limit the scope of the testimony from Dr. Scheffler and Professor Sood as indicated in Attachments A-C.[1] These limitations will ensure that the hearing remains within the appropriate statutory and constitutional bounds, and will protect the Executive Branch's constitutionally mandated control over its resource-allocation decisions in the enforcement of the antitrust laws.

I. The Federal Rules of Evidence apply to an evidentiary hearing under the Tunney Act

Although the Tunney Act expressly contemplates that the Court may make its public-interest determination on the administrative record alone, *see* 15 U.S.C. § 16(b)-(d), when the Court decides to go beyond that record and hold an evidentiary hearing, the Federal Rules of Evidence, applicable to "proceedings in United States courts," apply to testimony and evidence introduced at that hearing. *See* Fed. R. Evid. 101(a); *see also* Fed. R. Evid. 1101(b) (specifically identifying applicability to "civil cases and proceedings"). Applying the Federal Rules of Evidence helps to ensure that the hearing effectively determines the relevant facts while also limiting the burden placed on the parties. Applying the Federal Rules of Evidence to the forthcoming hearing also will help avoid the prudential and constitutional concerns articulated below.

[1] Amici's April 19 filings outlining their proposed witness testimony are attached to this Motion as Attachments A-C. The highlighted portions contain outside-the-scope and inadmissible material. The material highlighted in yellow is an unsupported opinion; the material highlighted in blue is both outside the scope/irrelevant and is unsupported opinion; and the material highlighted in green is an inappropriate legal opinion. The United States seeks to exclude testimony regarding the highlighted materials from the upcoming hearing.

II. The Court should limit the scope of the hearing by excluding all testimony that is not related to the adequacy of the remedy for the violations alleged in the Complaint

A. The scope of the Tunney Act is limited to determining whether the consent judgment reasonably remedies the harm alleged in the Complaint

The Tunney Act entrusts the Court with determining whether a proposed antitrust consent judgment is in the "public interest." 15 U.S.C. § 16(e)(1). As part of this public-interest inquiry, the scope of the Court's review of the unlawful conduct is limited to "the competitive impact of such judgment, including termination of *alleged violations*," and "the impact of entry of such judgment upon . . . individuals alleging specific injury *from the violations set forth in the complaint*." *Id.* § 16(e)(1)(A)-(B) (emphases added). By placing these limitations in the statute, Congress set a boundary beyond which it did not intend courts to cross and limited the authority that it was granting to courts for their review.

As the D.C. Circuit explained in *Microsoft*, a court conducting a Tunney Act review is "barred from reaching beyond the complaint to examine practices the government did not challenge." *See United States v. Microsoft Corp.*, 56 F.3d 1448, 1460 (D.C. Cir. 1995); *see also United States v. Fokker Servs.*, 818 F.3d 733, 738 (D.C. Cir. 2016) (reaffirming *Microsoft* and noting that a court cannot reject a consent decree "because it believes the government 'failed to bring the proper charges'"). Thus, the question before the Court is whether the proposed final judgment is a "reasonably adequate remed[y] for the alleged harm," and is therefore in the public interest. *See United States v. Iron Mountain, Inc.*, 217 F. Supp. 3d 146, 152-53 (D.D.C. 2016); *see also* United States' Response to Order to Show Cause (Doc. No. 32), at 1-7; United States' Response to Public Comments on the Proposed Final Judgment (Doc. No. 56), at 2-8.

B. The Court should exclude amici's proposed testimony that goes beyond the scope of the Tunney Act because it is irrelevant

The United States filed a complaint against CVS and Aetna that alleged a violation of the antitrust laws as a result of a decrease in horizontal competition in 16 markets for the sale of individual Medicare prescription drug plans (PDPs). In addition to limiting the scope of the Court's review under the Tunney Act, the Complaint's allegations establish the outer bounds for relevant evidence at the Tunney Act hearing. Based on amici's April 19 filing, much of the proposed testimony should be excluded under Federal Rule of Evidence 402.

Courts routinely exclude evidence that does not address the question that needs to be resolved. For example, in *In Defense of Animals*, the plaintiff sued for access to documents that were withheld on the basis that they were "confidential" within the meaning of the Freedom of Information Act. Concluding that the expert testimony that defendants intended to present was unrelated to the appropriate statutory definition of "confidential," the court excluded the testimony. *In Defense of Animals v. U.S. Dept. of Agric.*, 587 F. Supp. 2d 178, 181-82 (D.D.C. 2008); *see also Flythe v. District of Columbia*, 4 F. Supp. 3d 222, 227 (D.D.C. 2014) (excluding as irrelevant evidence regarding defendant's "subjective mental state" as it was "not relevant to [defendant's] defense of qualified privilege"); *United States v. MWI Corp.*, No. 98-2088, 2013 WL 12341690, at *1 (D.D.C. Aug. 27, 2013) (excluding as irrelevant evidence relating to a legal standard rejected by the court). Here, the Tunney Act circumscribes the public-interest standard by directing an inquiry solely into whether the proposed consent judgment reasonably remedies the violations alleged in the complaint. Testimony on other subjects is irrelevant and should be excluded.

In this case, amici's proposed testimony contains three types of irrelevant evidence. The first type of irrelevant evidence concerns purported harm outside of the individual PDP market,

including proposed testimony regarding unalleged vertical theories or general issues of vertical foreclosure. For example, Dr. Singer intends to testify on "the effect of increased vertical integration in the relevant markets," Attachment C at 2; Dr. Wohlfeiler intends to testify on "increasing consolidation in the health care industry"—which appears to include "medical, clinical and pharmaceutical" products but not individual PDPs (the subject of the Complaint in this case), *id.* at 4; and Dr. Moss intends to testify about "the merger's potential to enhance the incentive of CVS-Aetna to exclude rivals," Attachment B at 3. Because this testimony does not relate to the alleged relevant market—the sale of individual PDPs—it cannot possibly relate to the adequacy of the remedy for the alleged harm, and should be excluded.[2]

The second type of irrelevant evidence relates to a different theory of harm that the United States did not allege: coordinated effects. A coordinated effects theory looks not just at what the merged entity can do as a unilateral market participant, but at whether a merger will "affect[] the competitive incentives of multiple firms in the market, not just the merged firm" by making it easier to coordinate within an industry. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 7 (2010). As with vertical theories of harm, these coordinated effects theories of harm are not included in the Complaint and testimony regarding such unalleged theories is therefore irrelevant. Accordingly, the Court should exclude all such testimony, including Professor Greaney's proposal to testify regarding "mergers to oligopoly" and "a history of collusion and coordination," Attachment A at 6-7, as well as Dr. Moss's testimony regarding the merger's potential to "facilitate anticompetitive coordination among health insurers served by PBM CVS-Caremark," Attachment B at 3.

[2] At least some of these witnesses also intend to offer testimony on how vertical issues impact WellCare's likely success as a divestiture buyer. The United States reserves its right to object to this testimony at the hearing to the extent that it moves beyond the ability of WellCare to compete in the sale of individual PDPs and into broader claims about harm from unalleged vertical theories or general claims of vertical foreclosure.

Finally, amici's proposed testimony regarding efficiencies is related neither to any violation alleged in the Complaint nor to the adequacy of the divestiture. For example, Dr. Burns intends to testify regarding "the claimed consumer welfare benefits for the Acquisition." Attachment C at 3. Yet, the United States is not asking the Court to rely on any consumer welfare benefits as part of the alleged violation or the proposed consent judgment. In fact, the United States alleged that "[t]he proposed merger is also *unlikely* to generate verifiable, merger-specific efficiencies sufficient to outweigh the anticompetitive effects that are likely to occur in the sale of individual PDPs in the relevant Part D regions." Compl. ¶ 38 (emphasis added). Because testimony regarding efficiencies is unrelated to the adequacy of the remedy, the entirety of Dr. Burns' proposed testimony and any other testimony related to efficiencies is irrelevant.

Failing to exclude irrelevant evidence before the hearing would cause substantial prejudice to the United States. Congress confined the Court's review to the allegations and the remedy, likely recognizing that it would be unduly burdensome to require the Division to address issues beyond the scope of the Complaint. This is not a trivial concern. The Division has already spent thousands of hours in moving through the Tunney Act process for this matter. Moreover, if a court relied on such evidence in making a public-interest determination, it would unconstitutionally direct the Division's resource-allocation decisions, even where the United States has reached a different conclusion about the merits or its likelihood of success. Overbroad Tunney Act hearings may also limit the Division's ability to settle future cases, as defendants could become concerned that settlement could involve significant expense and uncertainty. *Cf. Microsoft*, 56 F.3d at 1456 ("A district judge's refusal to accept the decree . . . cannot but have enormous practical consequences for the government's ability to negotiate future settlements.").

C. The Constitution requires the Court to limit the scope of the hearing

Separation-of-powers principles make clear that there is no practical purpose to litigating legal theories not included in the Complaint. The necessary implication of amici's attempt to seek relief for unalleged claims is to ask the Court to direct the Antitrust Division to bring a different case, as courts are unable to issue remedies without the predicate of an underlying violation. *See, e.g.*, *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 132 (1969) (requiring antitrust remedies to be of the "same type or class" as the violations); *Microsoft*, 56 F.3d at 1460 ("And since the claim is not made, a remedy directed to that claim is hardly appropriate."). The problem with amici's request is that it would be unconstitutional to direct the Executive to bring specific charges. "It is the Executive who is charged by the Constitution to 'take Care that the Laws be faithfully executed,'" and the Executive's decision "not to indict" is a "decision which has long been regarded as the special province of the Executive Branch." *See Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (quoting U.S. Const. art. II, § 3)).

Part of the Executive Branch's unique duty is to decide how to allocate prosecutorial resources, and it would intrude on that decision if a court or amici could force the Division to participate in overly broad evidentiary hearings under the Tunney Act. *Caldwell v. Kagan*, 865 F. Supp. 2d 35, 44 (D.D.C. 2012) ("[A]ny agency with limited resources and an investigative mission has the power, absent an express statute to the contrary, to assess a complaint to determine whether its resources are best spent on the violation, whether the agency is likely to succeed, whether the enforcement requested fits the organization's overall policies, and whether the agency has enough resources to undertake the action."). Additionally, any inquiry into why the Division did not bring a specific claim would necessarily involve a consideration of the facts developed in the investigation, judgment of the prosecuting attorneys, and the allocation of the Division's limited resources. All of these considerations are intertwined with the deliberative

process privilege, which promotes the Executive Branch's ability to reach its decisions and direct its resources.

The Antitrust Division has consistently defended against inappropriate expansion of Tunney Act proceedings that would aggravate the separation-of-powers difficulties that inhere in the statute. As former Assistant Attorney General Bingaman explained in a Tunney Act proceeding over two decades ago, "I'm the prosecutor. . . . I decide what makes out a winning case, and if I don't want to file it, nobody can make me file it." Transcript of Jan. 20, 1995 Motion Hearing, *United States v. Microsoft Corp.*, No. 94-cv-1564 (D.D.C.), *available at* the Lexis Counsel Connect Library. The D.C. Circuit agreed, concluding that the Tunney Act does not authorize the court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459; *see also United States v. InBev N.V./S.A.*, No. 08-1965, 2009 U.S. Dist. LEXIS 84787, at *20 (D.D.C. Aug. 11, 2009) ("[T]he 'public interest is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged."). Thus, the United States requests that the Court limit the scope of the hearing to the adequacy of the proposed remedy in light of the violations alleged in the Complaint.

III. The Court should exclude inadmissible opinion testimony

In addition to requiring that testimony be relevant, the Federal Rules of Evidence set precise rules for opinion testimony. Amici's proposed opinion testimony does not satisfy these requirements. Some of the proposed opinion testimony focuses on legal issues rather than material that "will help the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702(a). Other proposed testimony lacks foundation, either as lay opinion

testimony or as expert opinion testimony. The United States thus requests that the Court also exclude all of this inadmissible opinion testimony from any forthcoming hearing.

A. The Court should exclude legal opinions

"Expert testimony that consists of legal conclusions cannot properly assist the trier of fact . . . ." *Burkhart v. Wash. Metro. Area Transit Auth.*, 112 F.3d 1207, (D.C. Cir. 1997); *see also U.S. ex rel. Mossey v. Pal-Tech, Inc.*, 231 F. Supp. 2d 94, 98 (D.D.C. 2002) (striking expert report "because it contains nothing more than legal opinions"). The American Medical Association intends to offer testimony from Professor Greaney—a lawyer and a professor of law, not economics—regarding the "purpose of the antitrust merger law" and the "situations in which the incipiency standard should be applied." Attachment A at 6. These are inappropriate matters for opinion testimony (in the absence of some unique and technical area of law) and should be excluded.

Professor Greaney's proposed legal testimony is similar to that excluded in *Iacangelo v. Georgetown University*. In that case, an expert wanted to offer testimony on the duties imposed by a federal statute on a treating physician. No. 05-2086, 2010 WL 4807082, at *2 (D.D.C. Nov. 19, 2010). The court refused to allow the testimony, as permitting introduction of the "numerous impermissible legal conclusions . . . would usurp the roles of both the Court and the jury." *Id.* at *4. Similarly, permitting Professor Greaney's legal conclusions as to the scope and purpose of the Clayton Act would usurp the role of the Court in this proceeding. If Professor Greaney wants to offer legal analysis to the Court, the proper mode is for him to assist one of the amici in writing its briefs.

B. The Court should exclude testimony that is not based on sufficient facts or data or that is based on facts or data that have not been disclosed to the United States

Under the Federal Rules, both lay and expert testimony require certain foundation. Here, amici's proposed testimony lacks that foundation and thus should be excluded.

1. A lay witness offering fact testimony must have "personal knowledge of the matter." Fed. R. Evid. 602. A lay witness offering opinion testimony also must do so "rationally based on [his or her] perception" and cannot offer an opinion "based on scientific, technical, or other specialized knowledge." Fed. R. Evid. 701(a), (c). These rules are in place to ensure that litigants do not "evad[e]" the evidentiary requirements for an expert witness "through the simple expedient of proffering an expert in lay witness clothing." *United States v. Wilson*, 605 F. 3d 985, 1025 (D.C. Cir. 2010).

To the extent that amici intend to proffer lay witnesses, none of their proposed testimony appears admissible. The matters identified for testimony are highly unlikely to be based on personal knowledge, as none of the witnesses has any direct access to particularized information about the operations of CVS, Aetna, WellCare, or even the relevant market of individual PDPs. "Speculative testimony," in particular, raises problems for lay witness testimony under both Federal Rules of Evidence 602 and 701. *See Athridge v. Aetna Cas. & Sur. Co.*, 474 F. Supp. 2d 102, 105 (D.D.C. 2007) (excluding "hypothetical" opinion testimony about what would have happened under a different factual scenario). Even if not speculative, the proposed testimony requires a level of scientific, technical, or specialized knowledge that make lay opinion testimony inappropriate. Amici are proposing Ph.D. economists to testify regarding market concentration, market definition, and other competitive conditions. They are proposing a business school professor with a Ph.D. and an MBA to testify about efficiencies related to the transaction. They are proposing a lawyer to address his view of antitrust enforcement in

healthcare markets. These witnesses plainly intend to offer expert testimony informed by their scientific, technical, or specialized knowledge, and must be prevented from doing so unless they satisfy the requirements of Federal Rule of Evidence 702.

2. Expert testimony likewise requires certain foundation. First, Federal Rule of Evidence 702 requires that any expert opinion be based on "sufficient facts or data." Second, the Federal Rules of Civil Procedure require that expert witnesses whose testimony will be offered at trial must produce a written report with "a complete statement of all opinions the witness will express and the basis and reasons for them" as well as "the facts or data considered by the witness in forming them." Fed. R. Civ. P. 26(a)(2)(B)(i)-(ii). Because one goal of this requirement is to offer advanced notice to the other parties, courts routinely require expert reports before accepting expert testimony at various types of evidentiary hearings. *See, e.g.*, *Kingman Park Civic Ass'n v. Gray*, 956 F. Supp. 2d 230, 257 (D.D.C. 2013) (referencing expert report submitted in support of motion for preliminary injunction); *Shapiro, Lifschitz & Schram, P.C. v. Hazard*, 90 F. Supp. 2d 15, 24 (D.D.C. 2000) (referencing an expert report from an accountant who testified at a hearing on a motion to dismiss for lack of personal jurisdiction). This practice is designed to prevent "unfair surprise to the opposing party," *Muldrow ex rel. Estate of Muldrow v. Re-Direct, Inc.*, 493 F.3d 160, 167 (D.C. Cir. 2007), and also "permit[s] the opposing party to prepare rebuttal reports . . . and cross-examinations." *Mineba Co. v. Papst*, 231 F.R.D. 3, 5-6 (D.D.C. 2005).

Amici's April 19 filings plainly do not satisfy the requirements of Federal Rule of Civil Procedure 26, nor do they provide enough detail to meet the requirements of Federal Rule of Evidence 702. As a result, the United States cannot adequately prepare to cross-examine or rebut these experts. To even attempt to do so would require an expensive and time-consuming

process of anticipating multiple potential approaches that amici's witnesses could use for their testimony and developing rebuttal analyses for each of these possible approaches.

For example, Professor Sood is expected to testify that the proposed divestiture will not restore competition to premerger levels based on "data on the structure, conduct and performance of firms in the relevant industries," Attachment A at 3, but does not identify what data that is or what econometric analysis, if any, has been done with such data. Without knowing on what specific data Professor Sood intends to rely, the United States cannot determine whether any disagreement is a result of his data or his analysis. Similarly, Professor Scheffler intends to testify that "the CVS-Aetna merger and divestiture are likely to lead to consumer harm, including higher premiums." *Id.* at 2. The United States has no way of knowing whether this will be based on some sort of econometric analysis, historical trends, or something else entirely. Likewise, Dr. Singer intends to testify on a range of topics from "market definition" to "likely competitive effects." Attachment C at 2. He does not indicate, however, whether he intends to argue that the United States did not allege the appropriate markets in its Complaint (a subject that would be outside the scope of the Tunney Act hearing and irrelevant to the public-interest standard) or whether he intends to argue that there are anticompetitive effects in the alleged markets that are not adequately remedied by the proposed consent judgment. If the latter, he does not indicate whether he intends to present a quantification of harm, or simply to testify about economic incentives post-merger. If his intent is to testify about incentives, he does not disclose any basis for such arguments. In sum, these submissions are so vague that they do not amount to notice at all, and certainly do not permit the United States to prepare effective cross-examination or rebuttal testimony.

Without notice, any hearing would not be a meaningful one. The American legal system is designed to leverage adversarial proceedings to arrive at the truth. *See Polk Cty. v. Dodson*, 454 U.S. 312, 318 (1981) ("The system assumes that adversarial testing will ultimately advance the public interest in truth and fairness."); *California v. Green*, 399 U.S. 149, 158 (referring to cross-examination as "the greatest legal engine ever invented for the discovery of truth" (internal quotations omitted)). A fundamental tenet of that adversarial system is that parties must have sufficient notice of the opposing party's arguments and evidence to permit a thorough examination. *See Yee v. City of Escondido*, 503 U.S. 519, 535-36 (1992) (describing the benefit of notice as "enabl[ing] the respondent to sharpen the arguments" in opposition); *American Lithotripsy Soc'y v. Sullivan*, 785 F. Supp. 1034, 1036-37 (D.D.C. 1992) (describing inadequate notice as preventing the adversarial comment that the court required to reach a decision). Permitting that thorough examination and testing to occur before the parties come into court not only ensures a fair and effective process, but it conserves judicial resources by allowing litigants to develop efficient presentations that will assist the court in reaching the appropriate outcome.

The United States requests that the Court exclude any purported expert opinions, including any supporting facts and analysis, because they have not been disclosed to the United States sufficiently in advance of any hearing to permit it to prepare cross-examinations and develop rebuttal evidence. Accordingly, on the current record, the United States requests that the Court exclude all of the opinion testimony offered in support of the topics highlighted in Attachments A-C.

Conclusion

For the foregoing reasons, the United States respectfully requests that the Court limit the scope of the Tunney Act hearing and exclude any testimony that addresses theories of harm not

alleged in the Complaint as well as any inadmissible opinion testimony as identified by the highlighting in the attached submissions from amici.

Dated: April 29, 2019

Respectfully submitted,

/s/

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7(m)

Pursuant to D.D.C. Local Civil Rule 7(m), I hereby certify that I discussed the foregoing Motion with counsel for CVS. CVS does not oppose this motion and has filed a separate motion urging similar relief.

/s/

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CERTIFICATE OF SERVICE

I, Jay D. Owen, hereby certify that on April 29, 2019, I caused a copy of the foregoing document to be served upon Plaintiffs State of California, State of Florida, State of Hawaii, State of Washington, and Defendants CVS Health Corporation and Aetna Inc., via the Court's CM/ECF system, and to be served upon Plaintiff State of Mississippi by mailing the document electronically to its duly authorized legal representative:

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[PROPOSED] ORDER

Having reviewed the Motion of the United States to Limit the Scope of the Tunney Act Hearing and Exclude Irrelevant and Undisclosed Testimony, the Court GRANTS the Motion. It is HEREBY ORDERED that

1. The scope of the Tunney Act hearing will be limited to the adequacy of the remedy for the violations alleged in the Complaint;
2. Professor Greaney, Dr. Singer, Dr. Burns, Dr. Wohlfeiler, and Dr. Moss will be stricken from the witness lists and will be excluded from offering testimony;
3. All testimony or evidence regarding potential violations not alleged in the Complaint is excluded, including all proposed testimony highlighted in blue in the United States' attachments;
4. All legal opinions are excluded, including all proposed testimony highlighted in green in the United States' attachments;

5. All unsupported opinion testimony is excluded, including all proposed testimony highlighted in yellow or blue in the United States' attachments.

IT IS SO ORDERED by the Court, this _____ day of _____, 2019.

_____
United States District Judge

Attachment A

The material highlighted in yellow is an unsupported opinion; the material highlighted in blue is both outside the scope/irrelevant and is unsupported opinion; and the material highlighted in green is an inappropriate legal opinion.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *et al.*	)	
Plaintiffs,	)	
v.	)	Case No. 1:18-cv-02340-RJL
CVS HEALTH CORPORATION	)	
and	)	
AETNA INC.	)	
Defendants.	)	

AMICUS CURIAE AMERICAN MEDICAL ASSOCIATION'S
NOTICE OF WITNESS LIST

Pursuant to the Court's order of April 8, 2019 [Dkt. # 70], the American Medical Association respectfully submits the following list of three witnesses that it proposes to offer at a hearing on the Government's Motion for Entry of Final Judgment.

Richard M. Scheffler, Ph.D.

Knowledge and Expertise

Professor Scheffler is a Distinguished Professor of Health Economics and Public Policy at the School of Public Health and the Goldman School of Public Policy at the University of California, Berkeley. He is also the director of UC Berkeley's Nicholas Petris Center on Healthcare Markets and Consumer Welfare, and UC Berkeley's Global Center for Health and Economic Policy Research. Professor Scheffler has testified before the California Department of Insurance on the likely competitive impacts of the recently proposed mergers of Anthem and

Cigna, Aetna and Humana, and CVS and Aetna. This year he is the principal investigator for the California Healthcare Foundation's and the Commonwealth Fund's sponsored research on the impact of consolidation on healthcare prices and quality. Professor Scheffler's resume is attached as Exhibit A.

Proposed Testimony

Based on publicly available information, including the Centers for Medicare & Medicaid Services' (CMS) enrollment data for Medicare Part D Standalone Prescription Drug Plans (PDPs), Professor Scheffler is expected to testify that he has measured market concentrations, market concentration trends and post-merger HHIs for the 34 PDP geographic regions created by CMS.

According to the Department of Justice's own Horizontal Merger Guidelines, mergers that would increase HHIs by more than 100 points and result in post-merger HHIs between 1500 and 2500 "potentially raise significant competitive concerns and often warrant scrutiny." Professor Scheffler has identified seven PDP geographic regions (encompassing nine states) for which the proposed merger and divestiture would satisfy these conditions.

Professor Scheffler is expected to testify further that the CVS–Aetna merger and divestiture are likely to lead to consumer harm, including higher premiums. Accordingly, the government's proposed final judgment is not in the public interest.

Approximate Length of Testimony

One hour of direct examination.

Neeraj Sood, Ph.D.

Knowledge and Expertise

Professor Sood is the Professor of Health Policy and Vice Dean for Research at the Sol Price School of Public Policy, University of Southern California (USC). He is also a faculty member and past director of research of USC's Leonard D. Schaeffer Center for Health Policy and Economics, and is a research associate at the National Bureau of Economic Research—the nation's premier economics research organization.

Professor Sood has published more than 100 papers and reports on health policy and economics. His research has focused on health insurance markets, pharmaceutical markets, and global health. This research has been published in leading journals in economics, health policy, and medicine, including the Journal of Economics, Journal of Economic Perspectives, Journal of Health Economics, Journal of the American Medical Association, and Health Affairs. His work on healthcare costs in the pharmaceutical supply chain has been cited by the Council of Economic Advisers of President Obama and President Trump. Professor Sood has been invited to participate in expert consensus committees of the National Academies of Sciences, Engineering and Medicine. His work has been featured in media outlets, including the New York Times, Washington Post, U.S. News & World Report, and Scientific American. He is an associate editor for leading journals in his field, including the Journal of Health Economics and Health Services Research. He is also a board member of the American Society of Health Economists. Professor Sood's resume is attached as Exhibit B.

Proposed Testimony

Based on his assessment of economic theory, past research, and data on the structure, conduct and performance of firms in the relevant industries, Professor Sood is expected to testify

that the proposed divestiture will not even come close to restoring competition to premerger levels.

The divestiture of Aetna's PDP business will not increase the number of firms competing in the PDP market, and therefore will not address the anticompetitive effects of the CVS–Aetna merger. Aetna, CVS and WellCare all participate in all 34 geographic markets for PDP services. If the CVS–Aetna merger were approved then there would be one less firm or plan sponsor in the market. The loss of competition resulting from this merger will likely not be rectified by entry of new insurers due to substantial barriers to entry in the PDP market. The reduction in the number of firms competing in the market or the exit of Aetna from the market would likely change plan bids, consequently increasing premiums for the elderly and costs of subsidizing these premiums for the government.

The merger and divestiture would eliminate the unique and important role of competition between Aetna and CVS in the PDP market.

The divestiture of Aetna's PDP business to WellCare is unlikely to make WellCare as formidable a competitor as Aetna and therefore unlikely to fully remedy the anticompetitive effects of the merger. WellCare is not as well known a brand as Aetna, and the divestiture allows WellCare to use the Aetna brand till only December 2019. Also, the divestiture will not give WellCare the same negotiating or bargaining power with pharmacies and manufacturers that Aetna enjoys because of its size in the PDP market and other markets.

As WellCare's pharmacy benefit management (PBM) supplier and a major pharmacy chain, CVS provides critical services to WellCare, such as negotiating with manufacturers and pharmacies. CVS therefore can increase costs and reduce efficiency for WellCare. In contrast,

Aetna performs its own core PBM functions. Thus, WellCare, more so than Aetna, is vulnerable to input foreclosure and a weak competitor of CVS/Aetna.

As a company that purchases its PBM services, WellCare, faces a PBM market that is highly concentrated. CVS/Caremark, Express Scripts (owned by WellCare's competitor Cigna), and OptumRx (owned by WellCare's competitor UnitedHealth Group) (the Big Three), account for at least 70% of the market. They are all vertically integrated into health insurance markets, including the PDP markets in which they compete with WellCare. Consequently, there is an appreciable danger that CVS and the other Big Three PBMs, with the scale to drive deep discounts with pharmaceutical companies, would engage in market-wide express or tacit collusion or oligopoly behavior by not competing aggressively for PBM customers who compete with them, such as WellCare.

Further dampening WellCare's prospects is a significant danger that CVS/Aetna would raise the costs of retail pharmacy inputs available to its competitors, including WellCare.

The poor prospects for WellCare to become as formidable a competitor as Aetna in the PDP market, are reflected in the low purchase price of the divested PDP assets, which amounts to a small fraction of Aetna's annual profits from its PDP business.

Therefore, the divestiture of Aetna's PBM business to WellCare would not restore competition to premerger levels and is therefore not in the public interest.

Approximate Length of Testimony

Two hours of direct examination.

Thomas L. Greaney, J.D.

Knowledge and Expertise

Professor Greaney is the Visiting Professor of Law at the University of California, Hastings College of Law, and Distinguished Senior Fellow with the UCSF/UC Hastings Consortium on Law, Science and Health Policy. He is also the Chester A. Myers Professor Emeritus at Saint Louis University School of Law, where he was on the faculty for 29 years and directed the Center for Health Law Studies. He has devoted most of his 30-year academic career to studying issues related to competition and regulation in the healthcare sector, writing numerous articles on the subject and co-authoring the leading casebook on health law. He has recently co-authored, with Professor Barak Richman of Duke University, a two-part white paper for the American antitrust Institute analyzing consolidation in the delivery and payment of healthcare services. Professor Greaney has testified before Congressional committees and federal regulatory agencies concerned with competition and antitrust enforcement in healthcare. Before becoming an academic, he served as Assistant Chief in the Antitrust Division of the Department of Justice, litigating and supervising cases involving health care. Professor Greaney's resume is attached as Exhibit C.

Proposed Testimony

Professor Greaney is expected to testify that an important purpose of the antitrust merger law is to arrest certain practices in their incipiency, by preventing business firm acquisitions that are likely to facilitate them. There is a sound economic rationale for the incipiency standard, and especially the need to address markets *trending* toward increasing concentration. That is because, once concentration reaches a high level, antitrust law has few tools to deal with it. Among the high risk situations in which the incipiency standard should be applied include mergers to

oligopoly and vertical mergers. Healthcare markets are rife with the preconditions that raise these two concerns: High levels of concentration, a history of collusion and coordination, high barriers to entry, and inelastic demand. Economic studies show that the persistently high costs of healthcare are in large part attributable to market concentration.

In the PDP market, the central objective of divestitures—to restore competition to ex ante levels—is plainly not achieved. Moreover, it would seem to ignore the importance of the incipiency standard to allow an *increase* in a concentrated market, even if the concentration levels were at the low end of the Merger Guidelines thresholds.

Plainly, the DOJ has not meaningfully responded to the competitive concerns raised by the horizontal merger and divestiture in PDP markets. The country needs aggressive antitrust enforcement in health insurance and pharmaceutical markets. Yet the government is proposing the approval, as in the public interest, of a merger and divestiture that in seven PDP regions covering nine states would fall into the category of potentially raising significant competitive concerns under the Horizontal Merger Guidelines. This is a consequence the government itself concedes and is reason enough for rejecting the proposed final judgement as not in the public interest.[1]

In addition, the PDP marketplace is currently dominated by five plan sponsors.[2] Upon divestiture, WellCare will assume Aetna's PDP business. However, in contrast with Aetna, WellCare has competitive handicaps and vulnerability to rivals' anticompetitive strategies. Therefore, the market would effectively go from having five principal competitors to four. When

[1] Response to Public Comments, at 22; Competitive Impact Statement at 6.

[2] These five plan sponsors are CVS Health, UnitedHealth Group, Humana, Express Scripts, and Aetna. According to Professor Scheffler, they account for 83% of PDP enrollment.

the number of effective players, measured in terms of individual firms' realistic ability to upset collusion or oligopoly by cutting price, is reduced from eight or 10 in the case of express collusion or from five or seven in the case of oligopoly, collusive behavior is more likely. The horizontal anticompetitive effects are made even more dangerous because this merger is also vertical, which increases the risk of input foreclosure or refusal to deal, or raises the probability of coordination among oligopolists, which is hard to detect. CVS provides PBM services to WellCare, making it, compared to Aetna (which self- supplies its core PBM services), vulnerable to input foreclosure and a weak competitor of CVS/Aetna. If Aetna and CVS merge, WellCare would need to shop for PBM services in a marketplace where the three principal suppliers—CVS/Caremark, Express Scripts and UnitedHealth group's Optum RX-comprising 70% of the PBM market and capable of driving deep drug discounts- would all be vertically integrated with a WellCare competitor in the PDP market. The result would be enhanced incentives to engage in horizontal coordination and an appreciable danger that the three firms would engage in market-wide express or tacit collusion or oligopoly behavior of not competing aggressively for PBM customers competing with the big three's PDP business.

Therefore, the proposed final judgment is not in the public interest.

Approximate Length of Testimony

One hour of direct examination.

Dated: April 19, 2019

Respectfully submitted,

/s/ Henry C. Quillen

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Attachment B

The material highlighted in yellow is an unsupported opinion; the material highlighted in blue is both outside the scope/irrelevant and is unsupported opinion; and the material highlighted in green is an inappropriate legal opinion.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA *et al.*, **Plaintiffs,** **v.** **CVS HEALTH CORPORATION *et al.*,** **Defendants.**	**Case No. 1:18-cv-02340-RJL**

AMICI CURAIE CONSUMER ACTION and U.S. PIRG'S WITNESS LIST

Amici Curiae Consumer Action and U.S. PIRG respectfully submit their witness list pursuant to this Court's April 8, 2019 Order (Dkt. 70). Amici Curiae propose to offer one witness at a future hearing. Her name is Diana L. Moss. The following describes the bases of her knowledge and expertise, describes the subject matter that will be covered by her testimony, and provides an estimate of the duration of her direct testimony.

Dr. Diana L. Moss, Ph.D.

Knowledge and Expertise

Diana Moss is the President of the American Antitrust Institute ("AAI").[1] She has been the president of AAI since January 2015. AAI is an independent, nonprofit organization devoted to promoting competition that protects consumers, businesses, and society. The AAI serves the public through research, education, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of national and international competition policy.

[1] Dr. Moss's curriculum vitae is attached as Exhibit 1.

As an economist, Dr. Moss has developed and expanded AAI's advocacy channels and strategies, and strengthened communications with enforcers, Congress, other advocacy groups, and the media. Her work spans both antitrust and regulation, with industry expertise in electricity, petroleum, agriculture, airlines, telecommunications, and healthcare. Before joining AAI in 2001, Dr. Moss was at the Federal Energy Regulatory Commission, where she coordinated the agency's competition analysis for electricity mergers. From 1989 to 1994, she consulted in private practice in the areas of regulation and antitrust. Dr. Moss has spoken widely on various topics involving competition policy and enforcement, testified before Congress, appeared before state and federal regulatory commissions, and made numerous radio and television appearances. She has published articles in a number of economic and legal academic journals, including: *American Economic Review*, *Journal of Industrial Organization*, the *Energy Law Journal*, and the *Antitrust Bulletin*. She is editor of *Network Access, Regulation and Antitrust* (2005). Dr. Moss has written about merger remedies and wrote a letter to the Department of Justice's Antitrust Division regarding the vertical competitive concerns raised by the CVS/Aetna merger.[2]

Dr. Moss is Adjunct Faculty in the Department of Economics at the University of Colorado at Boulder. She holds a M.A. degree from the University of Denver and a Ph.D. from the Colorado School of Mines.

Proposed Testimony

Based on publicly available information as well as her knowledge and experience, Dr. Moss will testify how the proposed final judgement ("PFJ") raises concerns about whether the

[2] Letter from Diana Moss, President of American Antitrust Institute to the Department of Justice, Regarding *Competitive and Consumer Concerns Raised by the CVS-Aetna Merger* dated March 26, 2018. Attached as Exhibit 2.

proposed divestiture package to WellCare Health Plans, Inc. ("WellCare") would be an effective remedy in fully restoring competition lost by the elimination of head-to-head competition between CVS Health Corporation ("CVS Health") and Aetna Inc. ("Aetna") in the sale of Medicare Part D prescription drug plans ("PDPs"). Dr. Moss will also testify how the merger of CVS and Aetna restructures healthcare markets to the detriment of competition and consumers. The CVS-Aetna merger combines the largest retail pharmacy chain and one of the two largest PBMs with the third largest health insurer in the United States. The merger raises a number of questions for competition and consumers.

Dr. Moss will testify to the merger's potential to enhance the incentive of CVS-Aetna to exclude rivals and facilitate anticompetitive coordination among health insurers served by PBM CVS-Caremark. CVS and Aetna already wield significant market power in the retail pharmacy, PBM, and health insurance markets. High concentration in these markets exacerbates competitive concerns. Market idiosyncrasies heighten the merger's potentially anticompetitive effects. These include the role of health insurers in paying for most prescriptions filled and of PBMs in managing the flow of prescription drugs to millions of Americans, and PBM markets that lack important transparency. The three large integrated PBM-insurer systems (i.e., CVS-Aetna, Express Scripts-Cigna, and Optum Rx-United Healthcare) dominate the markets and have weak, if any, incentives to compete. This stands in stark contrast to the competition that is fostered by standalone rivals. Dr. Moss will testify that there is little evidence that past vertical acquisitions by CVS, including its acquisition of Caremark, have resulted in significant benefits and have even harmed consumers and independent pharmacies.

Moreover, because the merger solidifies that the three largest PBMs are all vertically integrated, entry barriers increase dramatically, scalable only by those players who could enter

and compete effectively at two levels – PBM and health insurance. This effectively locks out competition by standalone PBMs, insurers, and other market participants – competition that is needed to foster innovation, to protect the stability of the healthcare supply chain, and promote the welfare of the U.S. consumer.

The anticompetitive effects presented by the merger would be detrimental to consumers through potentially higher prices, lower quality, less choice, and less innovation in markets for prescription drugs and health insurance. In healthcare, these effects can make the difference between wellness or disease, and life or death.

Dr. Moss will testify that vertical considerations bear directly on the likely effectiveness of the divestiture remedy in the relevant markets for the sale of PDPs that are alleged in the complaint. The merger raises the threat of input foreclosure directed at Aetna's health insurance rivals, who are or may become Part D plan sponsors. But the divestiture does not adequately address concerns about potential foreclosure of WellCare and other Part D sponsors post-merger, which would have the effect of insulating the merged company from hard competition in individual PDP markets, to the detriment of competition and consumers.

In light of all of this, Dr. Moss will testify that the PFJ is not in the public interest.

Approximate Length of Testimony

One hour of direct examination.

Conclusion

Amici Curiae appreciate that this Court has taken seriously its responsibility to conduct a thorough review of the PFJ to determine whether it is in the public interest and fully restores competition for millions of patients. Dr. Moss's testimony at a hearing would help fully develop the record regarding the potential areas of failure in the PFJ before the Court makes its decision on whether the PFJ adequately resolves the competitive harm raised by the merger.

Dated: April 19, 2019

Respectfully submitted,

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Attachment C

The material highlighted in yellow is an unsupported opinion; the material highlighted in blue is both outside the scope/irrelevant and is unsupported opinion; and the material highlighted in green is an inappropriate legal opinion.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States of America et al., Plaintiffs, v. CVS Health Corporation et al., Defendants.	Civil Case Number 1:18-cv-02340-RJL

***AMICUS CURIAE* AIDS HEALTHCARE FOUNDATION'S WITNESS LIST**

Pursuant to the Court's Order of April 8, 2019 (Dkt. 70), *Amicus Curiae* AIDS Healthcare Foundation ("AHF") hereby provides the Court with the following list of witnesses that AHF proposes to offer at any evidentiary hearing the Court may schedule:

EXPERT WITNESSES

Dr. Hal Singer

Knowledge and Expertise

Dr. Hal Singer is a Managing Director at Econ One Research Inc., a Senior Fellow at the George Washington Institute of Public Policy, and an Adjunct Professor at Georgetown University, McDonough School of Business, where he teaches advanced pricing to Master in Business Administration candidates. Dr. Singer earned a B.S. in Economics from Tulane University, and an M.A. and Ph.D. in Economics from The John Hopkins University. Dr. Singer's curriculum vitae is attached as Exhibit A.

Subject Matter of Proposed Testimony

Based on his experience as an economist and his analysis of the relevant, available evidence, Dr. Singer will testify regarding a number of different issues in this case, including product market and geographic market definition; market structure and market concentration; likely competitive effects of CVS Health Corporation's acquisition of Aetna Inc. (the "Acquisition"), including the effect of increased vertical integration in the relevant markets; and barriers to entry or expansion in the markets impacted by the Acquisition.

Expected Duration of Proposed Direct Testimony

The expected duration of Dr. Singer's direct examination testimony is approximately two hours.

Dr. Lawton R. Burns

Knowledge and Expertise

Dr. Lawton R. "Rob" Burns is the James Joo-Jin Kim Professor at the Wharton School of the University of Pennsylvania, where he is a Professor in the Department of Management and the Department of Health Care Management. Dr. Burns is also the Director of the Wharton Center for Health Management & Economics, and Co-Director of the Roy and Diana Vagelos Program in Life Sciences and Management at the University of Pennsylvania. In these roles, Dr. Burns teaches courses on the U.S. healthcare system and the industrial organization of healthcare. Dr. Burns earned a Ph.D. in Sociology and a Masters in Business Administration in Health Administration from the University of Chicago. Dr. Burns' curriculum vitae is attached as Exhibit B.

Subject Matter of Proposed Testimony

Dr. Burns will testify on the claimed consumer welfare benefits for the Acquisition offered by CVS and Aetna, and specifically whether the Acquisition will improve access, cost, or quality in health care. His testimony will include discussion of the lack of reliable evidence for any consumer benefits from the merging parties' strategies of vertical integration and diversification, and the lack of consumer benefits from the Acquisition to compensate for welfare losses stemming from antitrust concerns.

Expected Duration of Proposed Direct Testimony

The expected duration of Dr. Burns' direct examination testimony is approximately one hour.

FACT WITNESS

Michael B. Wohlfeiler, J.D., M.D., AAHIVS

Knowledge and Expertise

Dr. Michael Wohlfeiler is the Chief Medical Officer of the AIDS Healthcare Foundation. He earned a Bachelor of Arts in Political Science from the University of Arizona, a Juris Doctorate from The University of Arizona College of Law, and a Doctor of Medicine from Rush Medical College. After two decades as a private practice physician focused on HIV medicine, in 2011 Dr. Wohlfeiler joined AHF as Medical Director for Research and Patient Protocols, and in 2013 became Chief Medical Officer. Dr Wohlfeiler is a Certified HIV Specialist by the American Academy of HIV Medicine. Dr. Wohlfeiler's curriculum vitae is attached as Exhibit C.

Subject Matter of Proposed Testimony

As Chief Medical Officer, Dr. Wohlfeiler directs the AHF Department of Medicine, which oversees and sets the standards for provision of specialized HIV/AIDS treatment and care in AHF's over sixty healthcare centers across the United States. Based on his expertise in the medical, clinical and pharmaceutical aspects of care for HIV/AIDS populations, Dr. Wohlfeiler will testify as to how increasing consolidation in the health care industry has negatively impacted health care providers like AHF that offer specialty services to vulnerable populations, and his concerns that the "Acquisition" will further harm such providers and their patients.

Expected Duration of Proposed Direct Testimony

The expected duration of Dr. Wohlfeiler's direct examination testimony is approximately one hour.

Respectfully Submitted,

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Dated: April 19, 2019