No. 17-5024

United States Court of Appeals for the District of Columbia Circuit

UNITED STATES OF AMERICA, *et al.*,
Plaintiffs-Appellees,

v.

ANTHEM, INC.,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
No. 1:16-cv-01493-ABJ (The Honorable Amy Berman Jackson)

BRIEF FOR DEFENDANT-APPELLANT ANTHEM, INC.

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February 13, 2017

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for Defendant-Appellant Anthem, Inc. submits this Certificate of Parties, Rulings, and Related Cases.

A. Parties

Defendants in the District Court were Anthem, Inc. (Anthem) and Cigna Corporation (Cigna). Anthem is the only Appellant in this Court.

Plaintiffs in the District Court and Appellees in this Court are the United States of America, the State of California, the State of Colorado, the State of Connecticut, the District of Columbia, the State of Georgia, the State of Iowa, the State of Maine, the State of Maryland, the State of New Hampshire, the State of New York, the State of Tennessee, and the Commonwealth of Virginia.

B. Rulings Under Review

Appellant seeks review of the District Court's Order dated and entered on February 8, 2017 (ECF 498), enjoining the merger between Anthem and Cigna. The Order was accompanied by a Memorandum Opinion filed under seal the same day (ECF 499), a public version of which has not yet been docketed. The Order is reproduced in the Joint Appendix (JA) at JA198-209, and the Memorandum Opinion is reproduced at SA1-140. No official citation to the Order or Memorandum Opinion exists at this time.

C. Related Cases

The case on review has not been before this Court or any other court previously, and to the best of counsel's knowledge no related cases are pending in this Court or in any other court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Defendant-Appellant Anthem, Inc. states that it has no parent corporation, and that no publicly held corporation owns, directly or indirectly, 10% or more of its stock.

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GLOSSARY

ASO: Administrative Services only

CBSA: Core-based Statistical Area

HMG: Horizontal Merger Guidelines

PNB: *United States v. Phila. Nat'l Bank*, 374 U.S. 321 (1963)

RFP: Request for Proposal

TPA: Third-party Administrator

UPP: Upward Pricing Pressure

PRELIMINARY STATEMENT

In permanently enjoining the proposed merger of Anthem, Inc. and Cigna Corporation under Section 7 of the Clayton Act, 15 U.S.C. § 18, the District Court threatens to deprive employers and employees across the country of billions of dollars each year in medical cost savings. In declining to consider these medical cost savings as cognizable merger efficiencies, the District Court went so far as to dispute that consumer welfare is the paramount consideration in merger analysis. SA102, 127. But modern antitrust analysis emphatically establishes that consumer welfare is indeed paramount, as this Court held in the leading case of *United States v. Baker Hughes, Inc.*, 908 F.2d 981, 990-91, 990 n.12 (D.C. Cir. 1990) (stating that, in merger cases under Section 7 of the Clayton Act, the district court must determine "whether the challenged acquisition is likely to hurt consumers") (quoting *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1386 (7th Cir. 1986)). Under this standard, the merger of Anthem and Cigna should be permitted to proceed because the medical cost savings it promises for employers and employees far outweigh any anticompetitive effect from the loss of the limited rivalry between the two companies.

JURISDICTIONAL STATEMENT

The District Court had subject-matter jurisdiction under the Clayton Act's Section 15 (as to the claims of the United States) and Section 16 (as to the claims

of the Plaintiff States), 15 U.S.C. §§ 25 & 26. The District Court's Order, dated and entered on February 8, 2017 (JA198-209), adjudicated all claims, rights and liabilities as to all parties and therefore constitutes a final judgment. Anthem filed a timely Notice of Appeal on February 9, 2017. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

ISSUE PRESENTED FOR REVIEW

Whether consumer welfare is the paramount consideration in analyzing a merger under Section 7 of the Clayton Act such that the medical cost savings passed on to employers (and employees) resulting from the proposed merger between Anthem and Cigna should be weighed against any anticompetitive effect from the loss of the rivalry between the two companies.

STATUTES AND OTHER AUTHORITIES

Pertinent statutes, regulations and other authorities are set forth in an addendum included with this brief.

STATEMENT OF THE CASE

On July 23, 2015, Anthem and Cigna, two publicly traded health insurance companies, executed a merger agreement under which Anthem would be the surviving company, Anthem's current shareholders would retain a majority interest, and Anthem's current board of directors would constitute a majority of the merged company's board. JA1283; JA1791. Anthem's current Chairman and

CEO, Joseph Swedish, would retain those roles in the merged entity, while Cigna's current CEO would be President and COO of the merged entity, reporting to Mr. Swedish. JA1791. Anthem's and Cigna's shareholders voted overwhelmingly in support of the merger (although Cigna's incumbent senior management has not supported the transaction). JA1800; SA117.

The Antitrust Division of the United States Department of Justice investigated the merger for approximately one year. Then, on July 21, 2016, the Division, joined by 12 Attorneys General, commenced this action in the District Court seeking a permanent injunction under Section 7 of the Clayton Act. JA129 at ¶¶ 79-80. Although Anthem and Cigna have several lines of business, the Division and the State AGs pursued claims relating only to the companies' commercial health insurance, i.e., insurance purchased by employers for their employees. JA109 at ¶ 20; JA115 at ¶ 39.

The Complaint alleged that the merger likely would substantially lessen competition in three alleged product markets: (i) the sale of health insurance to "national accounts" in two alleged geographic markets (the parts of the 14 states in which Anthem sells under a Blue Cross/Blue Shield license and the United States generally) (JA105 at ¶ 8; JA109-114 at ¶¶ 19-37); (ii) the sale of health insurance to "large-group" employers in 35 metropolitan areas (JA105 at ¶ 8, JA115-120 at ¶¶ 38-50); and (iii) the purchase of healthcare services by commercial health

insurers in the same 35 metropolitan areas (JA105 at ¶ 8, JA124-128 at ¶¶ 64-75). (The Complaint included a fourth claim based on the sale of health insurance on the public exchanges established by the Affordable Care Act, but Plaintiffs voluntarily dismissed that claim prior to trial. *See* JA188-191.)

The Complaint acknowledged that the proposed merger is likely to reduce healthcare costs for millions of Americans and affirmatively alleges that the proposed merger will "likely lead to lower reimbursement rates" paid to healthcare providers. *See, e.g.*, JA124 at ¶ 64; JA127 at ¶ 71 (alleging merger would "enhance Anthem's leverage" during negotiations with providers and "likely would reduce the rates" paid to providers); JA128 at ¶ 75 (alleging that "Anthem plans to lower reimbursement rates by applying its generally lower rates to the Cigna membership it acquires"); JA130 at ¶ 85 (alleging merger would "caus[e] reimbursements to drop").

The Complaint alleged that these lower reimbursement rates will be passed on directly to employers because the overwhelming majority of large employers — such as the alleged "national accounts" — contract to bear the healthcare costs of their employees: "Most large employers buy self-insured plans (also known as administrative-services-only or 'ASO' contracts), under which the employer retains most of the risk of its employees' healthcare costs and pays the insurer an administrative fee for access to the insurer's network of doctors and hospitals and

for processing medical claims." JA108 at ¶ 16. The Complaint also acknowledged that employees ultimately bear much of their own healthcare costs as "even large employers are increasingly shifting more of the costs of healthcare to their employees." *Id*. at ¶ 16.

The District Court expedited the proceedings before it. JA144-187. Extensive discovery and other pretrial proceedings were conducted in a compressed timeframe. SA16. A bench trial was held from November 21, 2016 until January 4, 2017. *Id*. The Division led the Plaintiffs' case, while Anthem led the defense.

At trial, Anthem presented a defense centered principally on the grounds that the merger would generate substantial savings in medical costs and that employers (and employees) would be the beneficiaries, given the automatic pass through of healthcare costs under the ubiquitous ASO contracting. The savings would come from applying Anthem's lower reimbursement rates to Cigna customers (and, in those limited geographies where Cigna had negotiated lower reimbursement rates, applying Cigna's lower rates to Anthem customers).

Anthem's economist Mark Israel, Ph.D. quantified the medical cost savings that the combined firm would achieve post-merger, using a "best-of-best" methodology based on the economic theory that the combined firm, with its greater volume, would be able to obtain discount rates that are no worse than either of the

firms could obtain separately. By analyzing claims data from Anthem and Cigna, Dr. Israel calculated that the merger would generate $2.4 billion in medical cost savings through improved discount rates, 98% of which would be passed through to self-insured ASO customers. Using merger simulation models, Dr. Israel balanced these substantial customer savings against potential anticompetitive effects from the loss of the rivalry between the two companies, and found that cost savings swamp any potential harm by such a large margin that the merger would still be procompetitive even if only one-third of the medical cost savings were realized. Dr. Israel also analyzed whether the merger would cause anticompetitive (or "monopsonistic") harm to providers. He found that the cost savings would in fact be procompetitive because provider prices would not fall below the competitive level, output would not be reduced, and cost savings would be passed through to customers. *See generally* JA430-506, JA658-696 (excerpts of Dr. Israel's trial testimony).

On February 8, 2017, the District Court issued its Order permanently enjoining the merger. JA198-209. In the Order, the District Court stated that "the proposed merger is likely to lessen competition substantially in the market for the sale of commercial health insurance to national account customers in the fourteen Anthem territories and in the market for the sale of commercial health insurance to large group customers in the Richmond, Virginia market." JA208.

In enjoining the merger, the District Court categorically rejected Anthem's defense that the merger would enable employers (and their employees) to save at least $2.4 billion annually in medical expenses through lower reimbursement rates, i.e., discounts. The District Court held that the medical cost savings were not "merger-specific" or "verifiable" and added that "it is questionable whether they are 'efficiencies' at all." SA5/JA202. In so finding, the District Court embraced a theory that contradicted its own product market findings and that was rejected by both sides at trial: that such savings are not part of the product being sold by health insurers. JA717:22-24 (Division counsel in closing: "the medical network provider rates *are* part of the product that Anthem is selling") (emphasis added).

Based on this theory, the District Court concluded that the claimed savings from discounts were outside of the relevant market. SA6-8/JA203-205. Drawing a distinction between "competition" and "consumer welfare," the court even chastised Anthem for arguing that consumer welfare was a relevant consideration:

[redacted] SA127; *see also* SA102 [redacted]

SUMMARY OF ARGUMENT

The District Court made serious errors of law, fact, and logic in rejecting Anthem's showing that customers' medical cost savings far outweigh any potential adverse competitive effects of the merger. The court's errors threaten to unnecessarily deprive employers and employees of billions of dollars in lower healthcare costs annually. Beyond that, the District Court's profound skepticism of efficiencies generally, and its harsh rejection of a consumer welfare standard, defy modern antitrust law and threaten to turn back the clock five decades to a time when antitrust analysis condemned increased concentration even when the result was benign or pro-consumer. This Court's decisions in *Baker Hughes* and *FTC v. H.J. Heinz Co.*, 246 F.3d 708 (D.C. Cir. 2001) do not permit such a rewinding of antitrust jurisprudence.

In finding that medical cost savings are not "merger-specific" or "verifiable," the District Court ignored the allegations of the Complaint and overwhelming evidence at trial. In the Complaint, the Division affirmatively pleaded that the merger would cause lower reimbursement rates (and that these discounted rates would be passed on to employers). JA127 at ¶71; JA128 at ¶75. At trial all parties presented proof from industry participants and economists alike that the merger would lead to better medical discounts. The extent of the claimed

savings — ranging from $2.4 to $3.3 billion annually — was calculated conservatively and corroborated in multiple independent ways.

In discounting these efficiencies, the District Court went so far as to conclude that [redacted] SA6-7, 124 [redacted] In fact, medical provider discounts (or reimbursement rates) are a crucial component of the insurers' offerings, and often the decisive component in winning business. The District Court itself recognized this fact, repeatedly and as early as page three of its Memorandum Opinion, [redacted] SA3. But because the District Court erroneously concluded that medical-cost discounts were not part of the insurers' product, it proceeded to conclude that better discounts resulting from the merger would be "out of market" benefits, and therefore not cognizable in the efficiencies analysis.

In addition to failing to credit cognizable efficiencies, the District Court also erred on the other side of the scale, by overstating the competitive harm resulting from the loss of competition between Anthem and Cigna as independent companies. When each side of the scale is properly weighed, the proposed merger is decidedly favorable for employers and employees throughout the United States.

ARGUMENT

The District Court [redacted] SA59. This Court reviews the "legal reasons" *de novo*. *See Baker Hughes*, 908 F.2d 981 at 983. And if this Court finds that any of the District Court's "factual . . . reasons" are clearly erroneous, they must be set aside. *Id.* "A finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). And the clearly erroneous standard "does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 501 (1984). Under these standards of review, the District Court's rejection of Anthem's efficiencies defense cannot stand.

I. THE DISTRICT COURT IMPROPERLY DECLINED TO CONSIDER BILLIONS OF DOLLARS IN COGNIZABLE MEDICAL COST EFFICIENCIES

A. The District Court Improperly Rejected a Consumer Welfare Standard — The Benchmark of Modern Antitrust Law

In rejecting Anthem's efficiencies wholesale, the District Court found [redacted]

[redacted]

SA102. This sweeping broadside against consumer welfare as the fundamental tenet of modern antitrust law is reversible error. *See Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 319 (2007) (reversing trial court where legal standard did not account for benefit to the consumer).

The District Court effectively rejected the last 50 years of antitrust law, which unequivocally treats consumer welfare as paramount. The court's invocation of the anachronistic 1963 *Philadelphia National Bank* decision (SA127-128), not only misconstrues that decision, but ignores the subsequent succession of Supreme Court and Circuit Court cases enshrining consumer welfare (i.e., lower prices) as both the object and governing standard of antitrust law.

The District Court's stunning assertion that [redacted] (SA127 (emphasis in original) (citing *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1223 (11th Cir. 1991))), misapprehends the antitrust laws. The District Court misperceived the maintenance of competitive rivalry as an end in itself, and elevated the interest in preserving Anthem and Cigna as separate competitors over the interests of employers (and employees) in obtaining less expensive healthcare.

Controlling precedent recognizes the antitrust laws as "a consumer welfare prescription." *NCAA v. Bd. of Regents*, 468 U.S. 85, 107 (1984). *See also Atl. Richfield Co. v. USA Petr. Co.*, 495 U.S. 328, 340 (1990) ("[L]ow prices benefit consumers regardless of how those prices are set."); *Weyerhaeuser*, 549 U.S. at 319 ("[D]epriving consumers of the benefits of lower prices . . . does not constitute sound antitrust policy.") (quotes omitted); *Baker Hughes*, 908 F.2d at 990 n.12 (holding Section 7 requires "a judgment whether the challenged acquisition is likely to hurt consumers") (quotes and citations omitted); *Ball Mem'l Hosp. Inc. v. Mut. Hosp. Ins. Inc.*, 784 F.2d 1325, 1333 (7th Cir. 1986) (Easterbrook, J.) (warning that "a mistaken grant of an injunction may elevate [the price patients pay for insurance], harming the consumers that antitrust laws are designed to protect"); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 218 (D.C. Cir. 1986) ("[T]he purpose of the antitrust laws [is] the promotion of consumer welfare."); *Hosp. Corp. of Am.*, 807 F.2d at 1386 (Posner, J.) (holding that Section 7 requires courts to assess "the probability of harm to consumers"). The Division's Horizontal Merger Guidelines agree. 2010 HMG § 1 ("The Agencies examine effects on either or both of the direct customers and the final consumers.").

The District Court conflated [redacted] (SA128 (quoting *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 371 (1963) ("*PNB*"))) — with the

consumer welfare "prescription" of the antitrust laws. *NCAA*, 468 U.S. at 107. A merger that benefits consumers through lower prices, as distinct from providing other generalized societal benefits such as those considered in *PNB*, does not substantially lessen competition under the antitrust laws: "'Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels they do not threaten competition . . . . We have adhered to this principle regardless of the type of antitrust claim involved.'" *Brooke Grp. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223 (1993) (quoting *Atl. Richfield*, 495 U.S. at 340).

[redacted] (SA126-30), the District Court goes out of its way to [redacted] SA127 (citing JA716). This criticism is unfair, as *University Health*, in emphasizing the need to balance efficiencies against competitive harm, does in fact focus on "the extent to which these efficiencies would be passed on to consumers" and "efficiencies benefiting consumers." 938 F.2d at 1223. And the quotation of *University Health* in this Court's decision in *Heinz*, referring to efficiencies benefiting "competition, and hence, consumers," also places its ultimate focus on consumers. *Heinz*, 246 F.3d at 720 (quoting *Univ. Health*, 938 F.2d at 1223). While the District Court

apparently equated "competition" solely with rivalry, *University Health* seemed to use the term more generally to refer to lower pricing. 938 F.2d at 1223. In any event, the medical cost savings promised by the Anthem/Cigna merger most assuredly would benefit "competition, and, hence, consumers" — under any sense of the word "competition" — [redacted] *See* SA59 (summarizing testimony of Anthem economist Dr. Israel).

Courts have recognized that "[t]he consumer does not care how many sellers of a particular good or service there are; he cares only that there be enough to assure him a competitive price and quality." *Prods. Liab. Ins. Agency, Inc. v. Crum & Forster Ins. Cos.*, 682 F.2d 660, 663-64 (7th Cir. 1982) (Posner, J.). Maximizing consumer welfare is, thus, "the exclusive goal of antitrust adjudication" and "the sole consideration the judge must bear in mind." Robert H. Bork, *The Antitrust Paradox: A Policy At War With Itself*, at xi (2d ed. 1993); *see also* Douglas H. Ginsburg & Joshua D. Wright, *Philadelphia National Bank: Bad Economics, Bad Law, Good Riddance*, 80 Antitrust L.J. 201, 218-19 (2015) ("[T]he lodestar of the enforcement agencies' mission is consumer welfare, not cheap victories in litigation."); William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust Law*, 60

Tex. L. Rev. 661, 694 (1982) ("[T]he only legitimate objective that can be distilled from the fundamental congressional goals of antitrust law is the enhancement of consumer welfare.").

The District Court's Opinion sets a dangerous anti-consumer precedent, elevating arbitrary presumptions based on market structure over a careful weighing of consumer impact, and effectively undoing decades of economic thinking that brought antitrust analysis into the modern era. *See Baker Hughes*, 908 F.2d at 990 ("Although the Supreme Court has not overruled these section 7 precedent [such as *PNB*], it has cut them back sharply."); *Hosp. Corp. of Am.*, 807 F.2d at 1386 (noting that subsequent Supreme Court cases have "cast doubt on the continued vitality of [1960s era] cases"). Simply put, the District Court's decision furthers the faulty 1960s logic that "big is always bad" even when it concerns a transaction that all parties acknowledge is likely to lower costs for American businesses and make healthcare more affordable for U.S. employers and their employees.

The District Court acknowledged that, as a theoretical matter, [redacted] SA99-102. But in addressing Anthem's claimed efficiencies, the District Court — apparently colored by its expressed skepticism about consumer welfare — made clear that its theoretical acknowledgements were

mere lip service, as the court set standards for merger specificity, verifiability and even the very definition of "efficiencies" that could not realistically be attained. Modern antitrust law, with its elevation of consumer welfare over other interests, requires reasonable standards for the consideration of efficiencies, lest consumers be denied benefits they sorely need.

B. The Merger's Efficiencies Benefit Customers by Directly Reducing the Costs of Customer Medical Claims Through Lower Provider Rates

"National account" customers seek to minimize the total cost of their employees' health care. JA218:6-219:17. To lower that cost, [redacted] SA40 (citing JA229:5-12). [redacted] SA19 (citing JA212-213, 230-31, 751-52). [redacted] *See* SA19 (citing JA383-84); JA231:2-232:19; *cf. Ball Mem'l*, 784 F.2d at 1334 (noting that health insurers "are financial intermediaries, purchasing

agents for the consumers of medical services" and as such "may drive any bargains open to the consumers of services").

Experts, market participants, and the Division agree that, through bargaining, larger insurers — those with the most patients to steer to healthcare providers — obtain lower discount rates for their customers. JA430:6-431:19; JA232:13-19; JA816(113:20-114:16); JA105 at ¶ 8; JA127 at ¶ 71. [redacted] SA1164; JA306:24-307:14; JA450:7-16 (discussing SA1163). The merger will allow the combined firm to offer those lower discount rates to Cigna customers. JA324:16-325:9. Because medical costs make up roughly 95% of a customer's healthcare costs, even small changes in discounts generate significant customer savings on their healthcare expenditure. JA431:20-432:19; JA231:2-9.

[redacted] (SA127) [redacted] *See* SA592-593; SA1424; SA1863-1871; JA380:22-25; JA347:16-348:2. First, the structure of ASO means that employers are directly responsible for the medical costs of their employees. As a customer testified, "If the rates go down, then we pay less. That's a direct correlation."

JA779(75:6-16). [redacted] SA127 (citing JA659); JA465:19-466:25. [redacted] SA1865 ([redacted] JA380:16-25; JA427:2-428:8. [redacted] SA59 (citing JA452-454, 490-494, 497-498); JA451:18-452:17.

Because of this extraordinary set of facts, this merger presents not some [redacted] (SA127) but a quintessential "demonstrat[ion] that [a merger's] claimed efficiencies would benefit customers, and more particularly the customers in the challenged markets." *United States v. Aetna*, Slip. Op., No. 16-1494 at 147 (citing *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 82 (D.D.C. 2015); 2010 HMG § 10).

In abandoning the well-established consumer welfare standard, the District Court observed that, [redacted] *See* SA127 (citing JA659) [redacted]

Massive consumer benefits should not be tossed aside because merging parties — capitalists after all — stand to make a modest profit for their shareholders. Moreover, to do so ignores competition's intended beneficiaries: consumers. 2010 HMG § 1; *see Univ. Health*, 938 F.2d at 1223.

C. The District Court Contradicted Its Own Product Definition to Dismiss Efficiencies

In declining to credit the merger's efficiencies, the District Court stated that [redacted] SA124 [redacted]; *see also* SA123 [redacted]

But this product definition is a complete about-face from how the District Court defined the "product" throughout its prima facie and competitive effects analyses: [redacted] SA18 (emphasis added) (citing JA214-215); *see also* SA3 [redacted]; SA19 (citing JA383-84) [redacted]

[redacted]; SA55 [redacted]; *id.* (citing JA217, 226-227, 1943; SA1712) [redacted]

Excluding medical cost savings from the product definition also contradicts the Antitrust Division's own position. JA717:1-25 (Division attorney: "I agree with Mr. Curran that in a larger sense, the medical network provider rates are part of the product that Anthem is selling"); *see also* JA708:8-709:17 (Division economist, Prof. David Dranove, Ph.D., agreeing with paragraph within his report (JA1279) that states that the "product" includes the ASO fee and medical claims costs).

[redacted] SA76-77 (citing JA297, 308-311) [redacted] (emphasis

added); SA77 (citing JA312) [redacted]; SA81 (citing JA313) [redacted]; SA83 (citing JA302-303; JA770/SA199-200; JA812/SA229; SA234; JA807-809/SA224-226, and JA801 to find that [redacted]; SA86 [redacted] *See* SA124 n.53. But the court confused "access to a network" with an insurer's ability to obtain and negotiate lower medical costs. The latter is reflected only in the lower medical costs themselves, not in the ASO fees. *See* JA230:2-232:8 (testifying that "administrative fee" generally excludes "the claim component of [a customer's] plan cost"); JA731(67:8-16) (clarifying that Anthem's ability to get the best reimbursement rate "doesn't really impact our ASO fees, but it does impact for an ASO client what they will be charged for the claims that they incur").

Looking just to ASO fees obfuscates the true "product" being purchased and sold — the service of negotiating with providers as an agent of employers. JA454:20-456:11 ("[T]he service they're buying from these carriers in large part is acting as an agent on their behalf to negotiate for medical prices, right? . . . And if these insurers get better at providing them lower cost medical care, they're getting a better product, and that's part of the consumer welfare calculation.").

[redacted] SA90-91 (citing JA262-264, 324, 326, 515, 399-402, 753-754 as to the [redacted]); *see also* SA765 [redacted]; JA1943, SA1461 [redacted]; SA1719 [redacted]; JA731(67:17-68:6) (Anthem employee affirming that a "better reimbursement rate" creates "a more attractive offering ultimately to the customer"); JA228:14-229:4 (consultant agreeing that discounts are a strong element in a customer's evaluation of competing health plans); JA779(75:6-10, 75:12-20) (customer testifying that lower discount rates "directly impact" what "Caterpillar pays for health insurance"); JA802(31:8-19, 31:21-32:8) (customer defining "prices" of what a customer pays for health insurance to include medical claims costs).

[redacted] (SA19), there is no direct relationship between the providers and the employers. The insurer pays claims to the provider. The insurer is either reimbursed by the employer after the fact or provided with funds in advance. *See*, *e.g.*, JA1285 (Anthem's 2015 Form 10-K states: "Under self-funded and partially-insured products, we [Anthem] charge a fee for services, and the employer or plan sponsor reimburses us for all or most of the health care costs.").

The District Court's inexplicable and artificial parsing of the ASO fee from negotiated provider rates was clearly erroneous. The relevant product market here, as defined by the District Court, is [redacted] SA39. The court cannot define a market, but then refuse to consider efficiencies in that same market. *Univ. Health*, 938 F.2d at 1221 ("a defendant may rebut the government's prima facie case with evidence showing that the merger would create significant efficiencies in the relevant market"); *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 150 (D.D.C. 2004) (same); *see* 2010 HMG § 4 (defining "relevant market" as encompassing the "group of products together" within a geographic region that satisfies the hypothetical monopolist test); 2010 HMG § 10 ("the Agencies consider whether cognizable efficiencies likely would be sufficient to reverse the

merger's potential to harm customers in the relevant market, e.g., by preventing price increases in that market").

D. The District Court Committed Legal Error in Holding That Medical Cost Savings Are Not Merger-Specific Efficiencies

1. Medical Cost Efficiencies Are Merger-Specific Because They Will Be Caused by the Merger and Are Unlikely to Occur Absent the Merger

The test for merger-specificity is whether efficiencies are [redacted] SA99 (citing 2010 HMG § 10) (emphasis added); *see also FTC v. Cardinal Health*, 12 F. Supp. 2d 34, 62 (D.D.C. 1998) (citing same language in 1997 HMG § 4); *Arch Coal*, 329 F. Supp. 2d at 150 (citing 1997 HMG § 4 with approval); *Heinz*, 246 F.3d at 721-22 n.20 (same); *FTC v. Staples, Inc.* ("*Staples I*"), 970 F. Supp. 1066, 1088 (D.D.C. 1997) (same). [redacted] *See* SA103 [redacted] SA111-112 [redacted]

[redacted]

In determining whether efficiencies are "likely" absent the merger, "[o]nly alternatives that are practical in the business situation faced by the merging firms are considered, . . . not . . . alternative[s] that [are] merely theoretical." 2010 HMG § 10. But the District Court improperly bypassed any consideration of whether achieving the efficiencies absent the merger is practical, [redacted] SA111-112; *cf.* *Heinz*, 246 F.3d at 722 (holding district court erred in its determination of whether the efficiencies were merger-specific because it did not ask how much the company would need to spend in order to achieve the efficiency absent the merger). [redacted] (SA112) [redacted] (SA108-109 (citing JA734/SA166(235:10-19))) is purely theoretical. *See also* JA707:17-24 (Prof. Dranove conceding that today "Anthem can't offer a Cigna product" and vice versa).

The Division acknowledges that the theoretical ability of a firm to achieve efficiencies does not negate merger-specificity where the merger will significantly

accelerate the achievement of those efficiencies. FTC & DOJ, *Commentary on the Horizontal Merger Guidelines*, at 51 (2006) (noting that in such cases "the Agencies credit the merger with merger-specific acceleration of the cost reduction").

2. Medical Cost Efficiencies Are Merger-Specific Because They Create a New, Lower Cost Product That Combines the Best of Both Companies into an Offering That Is Unavailable Today and Unlikely Absent the Merger

[redacted] SA267 [redacted]; SA334 [redacted]; SA646 [redacted]; JA291:10-292:21 (Cordani stating merger benefits include offering Anthem customers Cigna's "high-performing" specialty products); JA418:14-419:1 (indicating merged firm can offer a new product incorporating the best offerings from both companies); JA665:10-666:2 (Dr. Israel explaining new product combines "Cigna's customer-facing programs that some people find attractive with [a] new and improved cost position"); JA643:14-20 (customer

describing merger as a "win-win" because it would allow Anthem customers access to some Cigna products). Consequently, the District Court's statement that [redacted] (SA119) is belied by the overwhelming testimony to the contrary, as well as by the court's own acknowledgement that [redacted] SA119 n.49. This melding of the best product offerings and best provider rates each company separately offers creates a product that neither company has been able to achieve on its own.

[redacted] *See* SA883 [redacted]; JA450:7-16 (Dr. Israel discussing SA1163, [redacted]). The merger will allow Cigna access to lower Anthem rates that it has been unable to achieve alone. Post-merger, customers who were interested in Cigna offerings but did not choose Cigna due to its poor discount position will, for the first time, have the option to switch to a Cigna product with better discounts. *See* JA418:14-419:1; JA433:2-434:16; *see also* JA710:19-22 (Prof. Dranove admitting that a lower-priced Cigna product would be a new, merger-specific product).

As to Anthem, the merger will allow it to incorporate Cigna's customer-facing products that some customers value. JA462:10-463:20 (Dr. Israel explaining that merger creates value by combining Cigna's customer facing products with Anthem's discounts). [redacted] SA111-112; *see also* JA427:20-428:8 (explaining that Cigna's specialty products, including dental, vision, life, and disability products complement Anthem's existing offerings and present an "opportunity" for Anthem to grow its commercial large group business). But Cigna has been developing and honing these programs since at least 2009. JA252:20-257:10 (Mr. Cordani explaining Cigna's focus on its customer-centric programs since 2009); JA291:10-292:21 (Mr. Cordani describing Cigna's customer-facing programs as "high performing" and industry-leading). [redacted] SA78; *see also* SA77 [redacted].

Additionally, the merger allows Anthem to compete in a broader geographic market than it otherwise could, and to secure better discounts than Cigna in those instances where Cigna has the discount advantage. *See* JA415:3-23 (gaining "an immediate footprint to be much more competitive in all of the states outside our 14

Blue states" is a merger benefit for Anthem); JA437:7-438:19 (explaining that in some instances, Cigna has been able to achieve a better discount than Anthem); JA1220/SA1197 ($874 million in savings attributable to where Anthem secures Cigna's better rates). Therefore, the District Court's conclusion that the [redacted] (SA104 (citing JA357-358)), is completely untethered to the record.

Moreover, the District Court's view of merger-specificity [redacted] SA3-4 [redacted], SA90 (citing JA262-264, JA324, JA326, JA399-402 and stating that [redacted] SA76-77 (citing JA308-311 and stating that [redacted]); SA109 (citing JA265-267 to note that [redacted]

Nor can Cigna or Anthem today achieve the full savings afforded by the merger because some of the savings arise from Cigna moving to Anthem's lower discount rates, but others arise from Anthem moving to Cigna's lower rates. JA437:7-441:14.

[redacted] (SA109), neither the HMG nor case law requires "new" volume for bulk discounts to be efficiencies. Here, the combined company will have the increased volume necessary to achieve these efficiencies simply by combining Anthem and Cigna members. JA439:18-440:13. This combination is akin to a joint purchasing arrangement, as the new company can now negotiate with providers for the purchase of healthcare services based on a larger combined volume of members. *Id.*

The DOJ's own guidelines recognize as procompetitive joint purchasing arrangements that bring under the same roof formerly separate purchases, like those enabled by the merger. *See* DOJ and FTC Statements of Antitrust Enforcement Policy in Health Care, at Statement 7 (1996) (joint purchasing arrangements "allow the participants to achieve efficiencies that will benefit consumers" and are procompetitive if they allow the firm to "obtain volume discounts [or] reduce transaction costs . . . that may not be available to each [firm]

on its own"). And while the District Court also held that [redacted] (SA111), [redacted] SA71 [redacted] (citing SA1311-1313, SA1322-1323, SA1324-1329, SA1330-1390, SA1401-1415).

[redacted] (SA97 (citing JA127 at ¶ 71, 661-662) (emphasis added)), the District Court never grappled with the clear import of that admission. The District Court also ignored the Division's admissions that the merger will *cause* lower reimbursement rates. JA545:9-19 ("[T]he one thing we [the Division] agree on here is that provider rates will go down."); JA127 at ¶ 71 (Division's Complaint stated that "[*a*]*s a result of the merger*, Anthem likely would reduce the rates that both types of providers earn by providing medical care to their patients.") (emphasis added); JA541:14-19 (Prof. Dranove testimony, "Q. [The evidence] also indicates that *the merger will result* in lower provider rates . . . correct? A. Yes.") (emphasis added).

The Division's admissions that the medical cost savings are merger-specific were [redacted] SA785 [redacted]; JA599:24-602:5 (same); JA594:22-595:7 (provider calculating that moving Cigna's customers to Anthem's rates post-merger reduces its net revenue by 0.6% or 0.7%); JA590:6-591:3 (provider discussing SA1187, [redacted]; JA592:1-12 (provider discussing SA1991, [redacted]; SA149:4-8, SA149:18-20 [redacted]; *see also, e.g.*, SA186-187(98:10-99:12, 99:23-101:19, 101:23-102:22, 102:25-103:1) [redacted]; SA211-212(184:17-20, 185:3-16, 185:19-21, 186:1-2) [redacted]

3. The District Court Fundamentally Failed to Appreciate the Critical Distinction Between Customer-Facing and Provider-Facing Contracts

[redacted] (SA106-108) is based on a fundamental misunderstanding of the distinction between an insurer's agreements with its employer customers, and an insurer's separate agreements with healthcare providers (e.g., hospital systems). This misunderstanding pervades the District Court's analysis of merger-specificity, as well as the effect of "rebranding" and Anthem's affiliate clauses in contracts with providers. Insurers separately contract with customers and providers: a change in a provider's contracted rates does not result in changes to the customer-facing programs the insurer offers pursuant to customer contracts, and vice versa.

In rebranding, a *customer* may choose to change its Cigna-branded contract to a Blue-branded contract, each of which would be offered by Anthem post-merger; doing so would not necessitate changes in any provider contract. *See* JA374:11-19. Likewise, when Anthem invokes the affiliate clause in the Anthem *provider contracts*, this allows Anthem to offer its provider rates to Cigna as an affiliate without changing the Cigna customer contract or product features. JA357:6-14; *see also* JA362:15-363:4 (colloquy with court explaining that the affiliate clause is a contractual provision that allows Cigna to access the Anthem rates post-merger, that rebranding is a customer decision to move to a Blue

product, and that re-contracting is a renegotiation of rates between the combined company and providers).

[redacted] SA106 (citing JA374). But this statement mischaracterizes the record and ignores extensive evidence, including in response to the court's own questioning, that rebranding means retaining the Cigna product but branding it under the Anthem name with Anthem's negotiated provider rates. *See* JA377:13-378:21. None of Dr. Israel's efficiencies are attributable to or dependent on rebranding (JA506:14-17): what drives his cost savings calculation is not rebranding, but the increased volume that the combined company will bring to the negotiating table *with providers*, or the invocation of the affiliate clause in *contracts with providers*. JA438:20-441:14 (explaining that the combined company will be able to achieve lower rates for Cigna customers through re-contracting because of the combined firm's larger volume); JA356:15-357:14 (explaining that affiliate clause in provider contracts allows Cigna customers access to Anthem rates).

It was also undisputed at trial that customers will not be forced to switch brands should they want a Cigna-branded product. JA343:24-344:1, JA344:11-17

(explaining that customer choice will be preserved); JA392:9-16 (same); JA339:5-22 (same); JA417:14-418:13 (discussing prior Anthem acquisition, where customers retained choice and 99% chose the improved Blue product). The [redacted] SA119 (citing JA346). But what customer would not want its preferred product at a lower price? *See Prods. Liab. Ins. Agency*, 682 F.2d at 663-64 (stating consumers only care about "price and quality").

[redacted] SA119 (citing JA288-289). [redacted] SA119 (citing JA376, JA399; SA1416-1426). But a provider's reaction has no bearing on a customer's decision to switch carriers. The customer-facing attributes of the new product are not dependent on whether they are branded Anthem or Cigna post-merger. JA369:17-370:15 ("[T]he goal is a single unified product that's brand agnostic."). Post-merger integration will allow Anthem "to bring together the best of both worlds in the product offering that we have." JA587:25-589:12.

E. The Medical Cost Savings Were Verified by Multiple Sources

An efficiency is "verifiable" when the predicted savings can be "reasonably verified by an independent party." *See* 2010 HMG § 10. This merger's $2.4 billion in annual medical cost savings flowing directly to consumers were verified by two independent sources and is consistent with the findings of consultants and other industry participants in the ordinary course of business. The District Court's finding to the contrary — [redacted] (SA101) — was made against the immense weight of the evidence and was clearly erroneous. *See U.S. Gypsum*, 333 U.S. at 395; *Staples I*, 970 F. Supp. at 1089 (finding that efficiencies may be "impossible to quantify precisely" but that does not render them unverifiable).

1. The Integration Planning Team Calculated $2.6 to $3.3 Billion in Medical Cost Savings

An integration planning team, working in consultation with independent McKinsey consultants, calculated $2.6 to $3.3 billion in projected annual savings. SA93 (citing JA352-356, JA384-387, JA359, JA389). The team held more than 100 meetings and analyzed 6.2 billion line items, 2.4 billion claims, 250 million enrollment records, and 2 million provider records, all focused on the actual spend on medical claims by Anthem and Cigna. JA384:16-385:3; JA347:16-350:11, JA352:20-356:14.

[redacted] JA405:3-24; *see also* SA94-95 (citing JA356-357, JA392, JA393-394, JA411).

2. Dr. Israel Independently Calculated at Least $2.4 Billion in Annual Medical Cost Savings

Working independently of the integration team, Dr. Israel's team evaluated billions of claims and determined that $2.4 billion in annual medical cost savings would flow to customers. [redacted] SA95 (citing JA437, JA445, JA435-438, JA447); JA435:17-436:3. Contrary to the District Court's decision, Dr. Israel testified that the discount gap would be closed, either through the affiliate clause or through contract renegotiations. JA504:3-505:3. He further found that, on average, Anthem's discounts [redacted] Cigna's discounts. JA435:1-7 (discussing JA1217/SA1194).

3. Industry Participants Confirmed the Reliability of the Integration Planning Team's and Dr. Israel's Respective Calculations

The methodologies used by the integration planning team and Dr. Israel are consistent with calculations done by industry consultants in the ordinary course of

business. For example, such consultants commonly compare discounts on claims for the same services to determine which carrier has better discounts. JA385:4-386:12; SA1163 [redacted]; JA574:25-575:10 (broker noting that competitors who offer networks with weaker discounts may be unable to "bring programs . . . that are going to be priced in the neighborhood that [employers] would buy them").

4. The District Court's Verifiability Findings Are Not Supported by the Record and Impose Unwarranted Burdens on Merging Parties

[redacted]

SA112-114. In doing so, the District Court asymmetrically imposed a far higher standard on Anthem to establish efficiencies than it required of the Division to prove its case, imposing a virtually insurmountable burden on merging parties. *But see Baker Hughes*, 908 F.2d at 984 ("Section 7 involves *probabilities*, not certainties or possibilities.") (emphasis added).

a. The District Court Improperly Credited Anecdotal Evidence about Possible Pushback from Providers

[redacted] SA112 (emphasis added) (citing SA1416 and

SA1314); *see also* SA113. In relying on speculation rather than crediting hard, unrebutted evidence of industry dynamics, the District Court erred.

Colin Drozdowski, an Anthem executive, testified that once the merger was announced providers understood "immediately" that Anthem would be able to use the provider contract's affiliate clause to give Cigna customers better reimbursement rates. JA409:13-410:23. Nonetheless, over the 18 months that this merger has slowly made its way through the approval process, "very few" of Anthem's approximately 100,000 provider contracts have been modified to address provider concerns. JA413:19-414:25 (discussing SA1314 and SA1784).

As noted above, the Division's own provider witnesses uniformly testified that they expect reimbursement rates to go down due to the merger. *See supra* Section I.D.2. Even Prof. Dranove opined that the new firm is *more likely to achieve better discounts* post-merger. JA630:6-23 (the "bargaining outcome is now likely to be more favorable to a combined Anthem/Cigna"). Rather than undermining Dr. Israel's findings, [redacted] (SA113), Dr. Israel's methodology *explicitly accounts for* provider pushback. JA667:10-669:9.

[redacted] (SA96, n.32 (citing JA446)), it implicitly accepted Prof. Dranove's reliance on nothing but his own "economic reasoning" in its geographic

market analysis. JA616:11-617:5, JA635:1-15; JA654:12-655:6. The District Court never explained its basis for imposing this double-standard.

b. The District Court Also Ignored Evidence That the Savings Are Rapidly Achievable

[redacted]

SA113. [redacted]

[redacted] SA95 (citing JA393-394, JA411); *see also* JA386:13-387:12 (discussing JA1208/SA1996) (noting that savings in this bucket range from [redacted] billion). [redacted] *See, e.g.*, JA566:4-8/SA149:4-8; JA567:15-568:9/SA150:15-151:9 ([redacted]); *see also* JA395:4-23 (discussing SA326) (concluding that 90% of medical cost savings can be achieved within two years).

c. The Medical Cost Savings Are Not Speculative

[redacted]

[redacted] SA114 (citing JA279). The District Court's finding was erroneous because no evidence has been presented to suggest that accounting for

utilization would materially reduce the claimed savings. JA457:7-458:15 (Dr. Israel explaining why a move to value-based care models to control utilization does not materially affect the analysis because the vast majority of claims are still fee-for-service). In any event, both Dr. Israel and the integration team accounted for utilization when conducting their analyses. JA448:9-449:14; JA389:7-390:1.

[redacted] SA114 (citing JA544). But, the comparison of claims data, precisely what the integration team and Dr. Israel did (*e.g.*, JA448:9-449:14), is consistent with industry practice. *See* JA576:11-578:4; JA221:21-222:24, JA223:22-224:8, JA224:21-225:3 (explaining that consultant collects claims data and uses that data to calculate insurers' discount rates); JA766(37:4-6, 37:8-10, 37:12-20)/SA195(37:4-6, 37:8-10, 37:12-20) (explaining that consultant performs a "discount analysis to evaluate the level of discounts available").

d. The District Court Mistakenly Concluded That There Was No Evidence of How the Merged Firm Would Achieve Savings Where Cigna's Rates Are Lower

[redacted] SA114-115. That finding was clearly erroneous. Mr. Drozdowski, Anthem's Vice President of National Provider Solutions, testified that Anthem plans to achieve the lower rates

post-merger through exercising Anthem's affiliate clause, re-branding, and re-contracting with providers. JA405:3-24; *see also* JA357:6-358:9, JA360:13-361:4 (explaining that calculated savings are "very achievable" through renegotiation post-merger). Provider contracts come up for renegotiation frequently and, at that time, the combined company will bring more lives to the providers than Cigna alone and thus negotiate lower provider rates. JA396:23-398:5; JA504:3-505:3.

[redacted] SA114-115 (citing JA564-565/SA147-148). [redacted] (SA115) [redacted] (SA119), [redacted] SA122.

e. Friction Among the Merging Entities Does Not Render the Medical Cost Savings Unverifiable

[redacted]

[redacted] SA115-17. The work of Cigna insiders to avoid the merger does not eliminate the billions of dollars of savings that will be generated post-merger. Indeed, the only work that remains requires access to competitively sensitive information in a "clean room" for review once the transaction is approved. JA396:23-398:5; JA404:2-405:24. Post-merger, the combined company's executives will have a fiduciary duty to negotiate the best deals with providers, so the pre-merger contentiousness of Cigna's CEO will not undermine those savings. One party's interest in not merging does not eliminate the efficiencies. Indeed, if it did, the District Court's opinion would make the efficiencies defense unavailable in hostile takeovers.

[redacted]

SA114-115, SA118. This finding ignores the fact that too much pre-merger coordination may run afoul of antitrust prohibitions on "gun jumping." *See Omnicare, Inc. v. UnitedHealthGroup, Inc.*, 594 F. Supp. 2d 945, 968 (N.D. Ill. 2009) ("Some federal agencies have . . . expressed concern about the potential anticompetitive effects of premerger communications and coordination."). The

District Court's ruling makes it impossible for companies to show that they have verifiable efficiencies without risking antitrust gun-jumping, at least where the efficiencies relate to proprietary information.

[redacted] (SA117, SA122), [redacted] SA119-22 (citing JA288-289) [redacted] SA93-95; SA1007; JA347:16-348:2; JA384:16-386:12. And despite his opinion, Mr. Cordani admitted that, in reference to Dr. Israel's medical cost savings analysis, he "do[es] not know the analysis nor the gentlemen." JA290:7-11.

In any event, the combined patient volume that the merged firm can bring to providers will facilitate, not inhibit, the development of deeper collaborative relationships and true value-based care arrangements. JA407:24-408:11; JA428:11-23; JA479:6-480:16. In fact, Mr. Cordani himself testified that patient "density" fuels value-based arrangements. JA293:12-294:15, JA295:22-296:14. Rachel Rowe of Granite Health, a partnership of six hospital systems in New Hampshire, testified that Cigna does not have "enough patient volume today to do

value-based care effectively," and that having "more lives" in her program would be better. JA558:2-18.

f. The District Court Imposed a Far Greater Burden on Anthem to Establish Its Efficiencies Than It Imposed on the Division to Prove Its Case

[redacted] SA118. [redacted] SA59-60. This asymmetrical treatment is unsupported in economics. *See* Daniel A. Crane, *Rethinking Merger Efficiencies*, 110 Mich. L. Rev. 347, 348-349 (2011) (arguing that "differential treatment" of "merger-generated efficiencies" and "merger-generated societal costs" is "unjustified and counterproductive"). Furthermore, any asymmetry or differential treatment is inconsistent with this Court's decision in *Baker Hughes*. 908 F.2d at 991-92 (noting unfairness of differential treatment favoring plaintiffs).

Beyond the District Court's failure to consider all the relevant evidence, to the extent the District Court required Anthem to "prove" the efficiencies would be realized, it committed legal error. *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962) (finding that Section 7 deals with "probabilities, not certainties"). And it makes little sense to hold defendants in merger trials to a higher standard than

the government, which bears the ultimate burden of persuasion yet [redacted] SA22 (citing and quoting *Heinz*, 246 F.3d at 719).

The District Court made the same error in [redacted] SA58 n.17 (citing JA507; JA340-341). Of course, if two data sets are inaccurate, the fact that they add up to somewhat similar numbers is probative of nothing. To the extent that it is, the District Court had no basis to reject as unverifiable the similar medical cost savings calculated by the integration team ($2.6 billion to $3.3 billion) and Dr. Israel ($2.4 billion), particularly where those calculations were based on a far more detailed, rigorous analysis than the market share calculations it held sufficient to meet the Division's burden.

F. The District Court Abdicated Its Responsibility to Balance the Likely Benefits of the Merger Against Any Potential Harm

In evaluating a merger, courts should weigh any potential upward pricing pressure against any downward pricing pressure to determine whether, on balance, the merger will benefit consumers. *Heinz*, 246 F.3d at 721; *Baker Hughes*, 908 F.2d at 985; *see also Univ. Health*, 938 F.2d at 1223; 2010 HMG § 10 ("Agencies consider whether cognizable efficiencies likely would be sufficient to reverse the

merger's potential to harm customers in the relevant market, e.g., by preventing price increases in that market."). Modern antitrust analysis performs this balancing by using merger simulations. *See Sysco*, 113 F. Supp. 3d at 66-67; *FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26, 68-70 (D.D.C. 2009); *see also* FTC & DOJ, *Commentary on the Horizontal Merger Guidelines*, at 25-26. Without efficiencies, these mathematical models, by definition, find that any merger of competitors, by virtue of the increase in concentration, will generate some upward pricing pressure. JA678:12-680:22. When efficiencies are properly considered, the model balances them against the possible upward pricing pressure to determine, on balance, whether the merger will benefit consumers. JA484:21-486:25.

Despite alleging and acknowledging that the merger will result in lower medical costs, Prof. Dranove steadfastly refused to incorporate *any* medical cost savings into his models. JA638:3-12 (conceding that on medical cost savings: "I never compute a final number, and I certainly never plug one into my merger sim."); JA705:16-706:4; JA542:14-18 (conceding that he did not "plug in the $2.4 billion in medical cost savings in the UPP" analysis). Only Dr. Israel performed the required balancing. JA492:18-494:2, JA495:9-496:12, JA671:14-674:15. Dr. Israel's merger simulation model incorporated the potential upward pricing pressure, balanced it against the efficiencies generated by the merger ($2.4 billion), and still found that the merger will provide $1.5 billion in net annual medical cost

savings to ASO consumers in the Anthem 14-state footprint. JA492:18-494:2 (discussing SA1236). Thus, Dr. Israel's testimony as to the net effect of the merger is unrebutted.

And, with regard to the Division's calculations of harm, Prof. Dranove's merger simulation and UPP analyses are fundamentally flawed because they are premised upon his market share calculations, which were calculated "as if Anthem bought, all at once, 30 of the Blues." JA333:6-15; *see also* JA638:21-639:18 (discussing SA1959), JA641:8-11; JA675:6-677:2 (discussing JA1273); *see also* SA1904 n.2. Where there is no evidence of common ownership or control, combining non-merging parties' shares — [redacted] (SA55-56) — is unprecedented. *See, e.g.*, *United States v. Rockford Mem'l Corp.*, 717 F. Supp. 1251, 1283-84 (N.D. Ill. 1989); *Hosp. Corp. of Am.*, 807 F.2d at 1387.

Moreover, according to the Division's economist, anticompetitive effects will be felt only when Anthem and Cigna are the final two competitors for a "national account." JA637:3-10 ("what's critical to understanding the effect of the merger on pricing is the frequency with which Anthem and Cigna are 1 and 2 and 2 and 1"); JA315:19-25 ("[i]n an auction framework what matters is are Cigna and Anthem 1 and 2 or 2 and 1"); JA537:24-538:17. But, according to the Division's own expert, *only nine "national accounts" per year would suffer any alleged harm*

under that standard. JA315:19-319:3 (discussing SA1188-1189 and SA1242-1243, which identify a total of 62 RFPs across seven years); JA536:3-25. That over $900 million of harm could result from just nine competitions per year strains credulity. [redacted] SA61 [redacted] (citing JA211; JA546-547; JA335; JA774/SA203, JA741; JA743-744/SA175-176, SA240-266; JA738/SA170; JA482-483; JA1213-1264/SA1190-1241); *see also* JA640:24-641:7 (discussing SA1246) (summarizing Prof. Dranove's diversion tables).

And, even crediting Prof. Dranove's calculations, the Division's alleged harm in the 14-state market ranged from [redacted] (SA58-59), the high end of which is dwarfed by the $2.4 billion of medical cost savings calculated by Dr. Israel. Thus, in this case, the benefits far outweigh the possible harms. The merger is still procompetitive if only one-third of these medical savings are included. JA451:18-452:17, JA490:17-491:11.

Had Prof. Dranove plugged in medical-cost savings into any of his models — his merger simulation or either of his UPP analyses — the model would find the merger to be procompetitive. JA451:18-452:17.

The District Court's finding that [redacted]

[redacted] (SA60 (citing JA512-513; JA514; JA492-494) is patently incorrect. When asked at trial about the merger's competitive effects absent efficiencies, Dr. Israel testified that the merger would *not* lead to higher prices. JA678:12-680:22. As he explained, running the simulation without efficiencies, as Prof. Dranove did, does not provide a meaningful prediction about the impact of the merger. JA678:12-680:2. Moreover, because merger simulations overstate harm since they do not account for entry and repositioning, the better way to assess the extent to which the merger will cause higher prices, regardless of efficiencies, is through econometric analysis. JA678:21-679:14. Dr. Israel's econometrics showed that [redacted] *See* SA69 (citing JA488). Therefore, even without any efficiencies, the merger will not harm consumers.

G. The Merger's Efficiencies Will Not Harm Providers

[redacted] SA130. Dr. Israel testified that the medical cost savings do not come from providers that lack market power. *United States v. Anthem*, No. 1:16-cv-01493, ECF No. 475 (Jan. 13, 2017). A discount gap between Anthem and Cigna is present where a provider has market

power that allows it to charge one firm higher rates than another; providers with no market power will charge the competitive price to all insurers. *Id.* Here, the lower prices that will result from the transaction cannot be monopsonistic because prices are being moved towards, not away from, the competitive level, and hence the lower prices are a procompetitive, not anticompetitive, effect that will directly benefit consumers. JA472:5-473:10; JA473:18-474:6; JA682:15-683:2; JA685:13-686:10, JA686:13-687:12. In other words, the merger will allow the merged firm, with its combined volume, to offset the providers' market power and move the price towards the competitive price increasing consumer welfare. *United States v. Anthem*, No. 1:16-cv-01493, ECF No. 457 (Jan. 13, 2017); JA683:23-685:12. Thus, there is no basis to disallow medical cost savings efficiencies as an exercise of undue market power — or to credit the Complaint's monopsony claims premised on the same assumptions.

[redacted]

SA8; SA129. But, the District Court, with the Division's support, issued an order during trial specifically precluding introduction of such evidence. *See* JA631:23-

632:18, JA570:7-24 (barring evidence regarding providers' marginal costs, financial information, or effect of lower rates on quality of care). In any event, "any gap in the evidence is a flaw in plaintiff's case — not defendants'." *United States v. SunGard Data Sys.*, 172 F. Supp. 2d 172, 185 (D.D.C. 2001) (applying *Baker Hughes* analytical framework). Plaintiffs "have the burden on every element of their Section 7 challenge, and a failure of proof *in any respect* will mean the transaction should not be enjoined." *Arch Coal*, 329 F. Supp. 2d at 116 (emphasis added); *Baker Hughes*, 908 F.2d at 983 (holding "the ultimate burden of persuasion . . . remains with the government at all times").

And as for output, Dr. Israel did the only quantitative work in the case, showing that where insurance carriers have higher shares of purchases, patients utilize medical services more often, not less often (JA474:21-476:1, JA687:13-688:6); Prof. Dranove did no quantitative analysis of an effect on output (JA334:3-18). *See Ball Mem'l*, 784 F.2d at 1331 (describing market power as "the ability to raise price significantly higher than the competitive level *by restricting output*") (emphasis added).

H. The District Court Ignored the Tremendous Savings the Merger Would Bring to Consumers in Richmond, Virginia

The District Court held for the Division in only a single "local market" — Richmond, Virginia — [redacted] (SA135-138). [redacted]

[redacted] (SA140 (citing JA702-704 (discussing JA1266))), while ignoring the merger's enormous savings for Richmond employers (and employees). Unrebutted evidence from the Division's own witness Mr. Wheeler of Bon Secours, a hospital system in Richmond, [redacted] JA606:8-607:20 (discussing SA1245); SA799. According to Dr. Israel's methodology, this means that there would be substantial savings to customers from moving to the Anthem rates in Richmond. Indeed, Dr. Israel found that there would be net benefits to customers in Virginia based on his merger simulation model that balanced the merger's enormous cost savings and possible anti-competitive harms. JA1268-1269, JA1271-1272/SA1248-1249, SA1251-1252.

The merger's lower prices could not be monopsony harm, as evidence showed that [redacted] SA1244; JA603:10-605:12; SA799. [redacted] (SA109), [redacted] SA695, SA1245.

It was nothing short of an abuse of discretion for the District Court to rely on a chart (JA1266) prepared by Prof. Dranove as [redacted]

[redacted] SA139-140 (citing JA702-704; (discussing JA1266). The chart is facially incredible. JA1266. His model's results for Richmond are so extreme that "no amount of cost savings could offset employer harm." *Id*. This result is incredible because ASO fees are only about 6% of healthcare costs and medical costs are the remaining 94%. JA332:7-14.

Thus, when Prof. Dranove was cross-examined on JA1266 — which he had provided only the day before — and asked whether the "no amount of savings" statement meant that even savings of $10 billion or more would not offset competitive harm, he admitted: "I don't recall the foundation for that statement right now." JA712:10-15; *see also* JA712:22-713:11; *but see Diviero v. Uniroyal Goodrich Tire Co.*, 114 F.3d 851, 853 (9th Cir. 1997) (rejecting expert testimony based on expert's "inability satisfactorily to explain the reasoning behind his opinions"); *Riegel v. Medtronic, Inc.*, 451 F.3d 104, 127 (2d Cir. 2006) ("An expert opinion requires some explanation as to how the expert came to his conclusion and what methodologies or evidence substantiate that conclusion."). Pressed by the District Court on this result from his model, again Prof. Dranove testified that he did not "recall exactly what I did mean." JA712:17-21. When, in closing, the District Court pressed the Division's counsel for an explanation about Prof. Dranove's "odd colloquy" on JA1266, counsel in closing admitted that the explanation for Prof. Dranove's results was "not in the record." JA714:21-715:5.

Because the Division's expert, the proponent of the document, admitted that he was unable to provide any "foundation for that statement," (JA712:10-15), the District Court's reliance on the statement and document was clearly erroneous.

The District Court's characterization that defense evidence [redacted] (SA138) is belied by the record. The Division's witness Claire Harlin of Wells Fargo testified that in Richmond "there are five insurers that have large and comparable networks" including Optima, and that Wells Fargo recommends any one of the five for its clients. JA596:16-19, JA597:1-5. In fact, the evidence showed that the merger leaves five or more competitive choices for employers in Richmond. JA798(91:22-93:4); JA596:16-597:5, JA598:6-21. With the Division's expert Prof. Dranove testifying to a 6% critical loss (JA633:25-634:4), a 5% price increase would readily draw a price increase-defeating response from other firms.

The District Court acknowledged that the merger [redacted] SA92 n.28. The evidence showed that Cigna's closest competitors in Richmond are [redacted] (SA167(281:1-10)).

In addition, any attempted price increase in Richmond would only add impetus to the efforts of the multiple insurers already active in Virginia, who are poised to enter and expand into Richmond. *Baker Hughes*, 908 F.2d at 989

("Secoma's growth suggests that competitors not only can, but probably will, enter or expand if this acquisition leads to higher prices."); *Ball Mem'l*, 784 F.2d at 1335 (holding that a firm's ability to "enter, expand . . . may counteract a reduction in output by existing firms"). [redacted] SA218-219(207:23-209:3, 211:15-24, 212:1-6). The Bon Secours hospital system began offering a new ASO product in Richmond in 2016. JA584:18-585:2. [redacted] JA584:9-585:2; SA759. [redacted] *See* JA586:4-16; JA761-763(29:9-12, 54:13-55:4)/SA190-192(29:9-12, 54:13-55:4). VCU Health, a major hospital system in Richmond, already offers Medicaid and Medicare coverage and can leverage its way into the commercial space as well. JA656:14-657:17.

I. Reversal of the District Court's Ruling on Efficiencies Alone Warrants Reversal of the Opinion in Its Entirety

This Court and courts in this Circuit have acknowledged that efficiencies resulting from a merger can be a full defense to a prima facie Section 7 case. *See Heinz*, 246 F.3d at 720 (acknowledging "trend" to recognize the efficiencies defense and listing cases); *Arch Coal*, 329 F. Supp. 2d at 150 (same). Courts

outside this Circuit have also recognized efficiencies as a complete defense. *See United States v. Long Island Jewish Med. Ctr.*, 983 F. Supp. 121, 146-47 (E.D.N.Y. 1997) ("The courts have recognized that 'in certain circumstances, a defendant may rebut the government's prima facie case with evidence that the intended merger would create significant efficiencies in the relevant market.'") (citing *Univ. Health*, 938 F.2d at 1222). [redacted] SA59. It stands, therefore, that the proper remedy upon reversal of the District Court's rejection of Anthem's efficiencies is to reverse the District Court's opinion in its entirety and render a judgment in favor of Anthem.

CONCLUSION

For all of the foregoing reasons, this Court should reverse the District Court's February 8, 2017 Order in its entirety, vacate the injunction, and rule for Anthem, permitting the proposed merger of Anthem and Cigna to proceed.

Dated: February 13, 2017
Washington, D.C.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. This brief contains 12,584 words (as calculated by the automatic word count function of Microsoft Word), excluding the parts of the brief exempted by Rule 32(f) of the Federal Rules of Appellate Procedure.

This brief complies with the typeface requirements of Rule 32(a)(5)(A) of the Federal Rules of Appellate Procedure and the type-style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point, Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2017, a true and correct copy of the foregoing Brief of Defendant-Appellant Anthem, Inc. ("Brief") was electronically filed with the Clerk's Office of the U.S. Court of Appeals for the District of Columbia Circuit, and further certify that the parties' counsel will be notified of, and receive, this filing through the "Notice of Docket Activity" generated by this electronic filing.

Pursuant to Local Rule 47.1, the original and six copies of the sealed Brief, and the original and eight copies of the public Brief were also delivered to the Clerk's Office of the U.S. Court of Appeals for the District of Columbia by courier.

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