UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA, et al., Plaintiffs-Appellees, v. ANTHEM, INC., Defendant-Appellant.	Appeal No. 17-5024 District Ct. No. 1:16-cv-01493-ABJ District Judge: Hon. Amy Berman Jackson

EMERGENCY MOTION OF APPELLANT
ANTHEM, INC. FOR EXPEDITED CONSIDERATION OF APPEAL
(PUBLIC COPY – SEALED MATERIAL DELETED)

Under Circuit Rule 27(f), Anthem, Inc. ("Anthem") respectfully moves this Court to expedite this appeal, which arises from an Order by the District Court permanently enjoining Anthem from merging with Cigna Corporation ("Cigna"). That Order, a final judgment under 28 U.S.C. § 1291, was issued by the District Court under section 7 of the Clayton Act, 15 U.S.C. § 18, on February 8, 2017.

Anthem requests that the briefing of this appeal be expedited to enable this Court to issue a decision on the merits by April 30, 2017, the "Termination Date" under the Merger Agreement. Anthem and its counsel appreciate that this is an extraordinary request and are willing to make substantial sacrifices to minimize the inconvenience to the Appellees and the Court. Anthem therefore is submitting its merits brief with this Motion (even though the District Court's Order was issued

less than five days ago). Anthem proposes that the opposition merits brief be filed by March 6, 2017, and the reply brief by March 10. If necessary, Anthem will forgo oral argument.

The United States has stated that it intends to oppose expedition (and will consult with the other Appellees). In order to provide sufficient notice for Appellees to prepare their brief if expedition is granted, Anthem respectfully requests expedited consideration of this Motion.

BACKGROUND

This case concerns the largest merger in the history of the healthcare industry. On July 23, 2015, Anthem and Cigna entered into an Agreement and Plan of Merger (the "Merger Agreement") to create a combined company designed to transform healthcare for consumers by enhancing healthcare access, quality, and affordability (the "Merger"). Under the Merger Agreement, Anthem agreed to pay consideration of approximately $54 billion, providing Cigna's shareholders with a premium of 38.4%, or $13.4 billion.

The Merger Agreement had an initial "Termination Date" of January 31, 2017. Anthem has exercised its unilateral right to extend the "Termination Date" through April 30, 2017, the latest date to which it may unilaterally extend. District Court Order at 14 ([redacted]

[redacted]). Anthem has asked Cigna to agree to extend the "Termination Date" further, but Cigna has not agreed to do so.

The Antitrust Division of the United States Department of Justice investigated the Merger for approximately a year. Then, on July 21, 2016, the Antitrust Division, joined by State Attorneys General from 11 states and the District of Columbia, commenced this action in the District Court, seeking a permanent injunction under section 7 of the Clayton Act.

The District Court expedited proceedings to allow the Merger to be consummated by April 30, 2017. *United States v. Anthem* No. 1:16-cv-01493, ECF Nos. 68 (Aug. 12, 2016), 74 (Aug. 15, 2016), 91 (Aug. 31, 2016). *See* 15 U.S.C. § 25 (providing that, in actions seeking injunctions under the Clayton Act, the district court "shall proceed, as soon as may be, to the hearing and determination of the case"). Extensive discovery and other pretrial proceedings were conducted in a compressed timeframe. A bench trial was held from November 21, 2016, until January 4, 2017. On February 8, 2017, the District Court issued its Order (accompanied by a Memorandum Opinion) permanently enjoining the Merger.

In enjoining the Merger, the District Court rejected Anthem's principal defense that the Merger would enable employers (and their employees) to save $2.4 billion annually in medical expenses through the synergistic combination of

Anthem's and Cigna's medical provider networks and discounts. The District Court embraced a theory not advocated by any party: that the discounts were not part of the product being sold by the health insurers and, therefore, the medical cost savings were not cognizable as efficiencies. [redacted] Op. at 127 [redacted] *see also id.* at 102 [redacted]

On Thursday, February 9, 2017, the day after the Order was issued, Anthem filed a notice of appeal. On Friday, February 10, 2017, the appeal was docketed in this Court and Anthem conferred with the Antitrust Division about expediting the appeal. The Antitrust Division stated that it opposes expedition. On Monday, February 13, 2017, Anthem filed this Motion and its opening appeal brief.

ARGUMENT

This Court may expedite review of an appeal when delay will cause irreparable injury and the decision under review is subject to substantial challenge. D.C. Cir. Handbook, § VIII.B. This Court also may expedite cases in which members of the public generally, or other persons not before the Court, have an

unusual interest in prompt disposition. D.C. Cir. Handbook, § VIII.B. Each of these bases applies here.

I. Anthem Will Suffer Irreparable Harm Without Expedited Review

Expedited appeals are warranted when a delay would cause irreparable injury and the prompt disposition of the case is compelling. *See* Handbook of Prac. & Internal Proc.: U.S. Ct. App. D.C. Circ. 33-34 (2017); 28 U.S.C.A. § 1657; D.C. Cir. Rule 2. Thus, expedition is appropriate in cases where deadlines would otherwise render the challenged action moot or otherwise prejudice the parties. *See Mahoney v. Babbitt*, 113 F.3d 219, 220 (D.C. Cir. 1997).

A delay here will cause irreparable injury for three reasons. *First*, absent the expedition, the Merger could terminate before any resolution of this appeal, due to circumstances beyond Anthem's control. Termination would destroy the enormous value of the transformative Merger to Anthem and consumers, and eliminate billions of dollars in deal premium to Cigna's shareholders. The loss of a unique and transformative $54 billion transaction constitutes irreparable harm. *See True N. Commc'ns v. Publicis S.A.*, 711 A.2d 34, 44-45 (Del. Ch. 1997) (describing the loss of a "unique acquisition opportunity" as "a loss that cannot be quantified" and "the essence of irreparable harm"); *see also Oracle Corp. v. Peoplesoft, Inc.*, 2003 Del. Ch. LEXIS 223, at *14 (Del. Ch. Nov. 10, 2003) ("Oracle's loss of the unique opportunity to make an acceptable bid to

PeopleSoft's stockholders constitutes irreparable injury."); *Hollinger Int'l v. Black*, 844 A.2d 1022, 1090 (Del. Ch. 2004) ("Losses of strategic opportunities are often found to pose a threat of irreparable injury."). Recognizing that merger cases face unusual exigencies, this Court has previously granted expedited appeals in such cases. *See, e.g.*, *F.T.C. v. H.J. Heinz*, 246 F.3d 708, 712-13 (D.C. Cir. 2001); *United States v. Baker Hughes, Inc.*, 908 F.2d 981, 982 (D.C. Cir. 1990).

Second, delay would otherwise prejudice Anthem. The "Termination Date" under the Merger Agreement has been extended to April 30, 2017. (The "Termination Date" is the date after which a merger party may terminate the Merger Agreement subject to certain conditions.) Anthem disputes that Cigna has a right to terminate at all, but Cigna disagrees. Having the appeal decided in time to close by April 30, 2017, will avoid risk and litigation on that subject. Moreover, expedition is necessary in any case because the length of a normal appeal will also place a closing at risk. The Merger Agreement was signed on July 23, 2015, and the companies have spent more than eighteen months awaiting its fate. Alternative strategies and initiatives have been sidelined or mothballed. Hundreds of millions of dollars of financing fees have been incurred just to extend to April 30, 2017. Indeed, Anthem's financing commitments expire on that date, and, while any delay past such date will impose additional financing costs on Anthem, it has no guarantee that it can obtain replacement financing after April 30, 2017. An

expedited decision on appeal, within the period contemplated by the April 30, 2017 "Termination Date," would permit the merger to proceed and makes it much more likely that Anthem will be able to obtain new financing.

Of course, even with expedition and a ruling that allowed the Merger to proceed, there is no guarantee that the Merger would be consummated. Anthem still requires certain state insurance regulatory clearances. Nonetheless, Anthem believes that a favorable ruling by this Court prior to the "Termination Date" of April 30, 2017, will allow the clearances to be obtained and the Merger to close.

Third, absent expedition, Anthem could be denied its appeal rights. The loss of an ability to appeal an adverse ruling is irreparable harm. *See Ctr. for Int'l Envtl. Law v. Office of the U.S. Trade Rep.*, 240 F. Supp. 2d 21, 23 (D.D.C. 2003) ("This strong showing of irreparable harm — *de facto* deprivation of the basic right to appeal — further strengthens defendant's argument for a stay pending appeal."); *In re Adelphia Commc'ns Corp.*, 361 B.R. 337, 347-48 (S.D.N.Y. 2007) (finding irreparable harm requirement to issue stay pending appeal satisfied because the "loss of appellate rights is a quintessential form of prejudice" and denial of stay "risks mooting any appeal of significant claims of error").

II. The Order Is Subject To Substantial Challenge

The substantial grounds for challenging the District Court's injunction are set forth in Anthem's appeal brief, which is also being filed today. In short, the

District Court made serious errors of law, fact, and logic by enjoining the Merger based on a standard that ignored the relevant consideration of consumer welfare in assessing the efficiencies promised by the Merger. The District Court's rejection of the consumer-welfare standard was contrary to this Court's decision in the leading case of *United States v. Baker Hughes* 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." 908 F.2d 981, 990-91 & n.12 (D.C. Cir. 1990) (quotation marks and citation omitted). The District Court's errors threaten to unnecessarily deprive employers and employees of billions of dollars in medical cost savings annually.

While Anthem believes that the District Court made various other errors in its ruling, Anthem has chosen to focus its merits brief on the medical cost savings to facilitate expedited consideration of this appeal.

III. An Expedited Appeal Is In The Public Interest

Consideration of this matter on an expedited briefing schedule is in the public interest because the Merger holds the prospect of substantial benefits for members of the public.

First, Anthem believes the Merger would benefit the public by creating $2.4 billion in medical cost savings annually, the vast majority of which would be passed through to consumers. And the Merger would provide healthcare access to

a significant number of uninsured individuals by expanding the merged company into new Affordable Care Act exchanges in nine states, where neither Anthem nor Cigna currently offers individual coverages on-exchange.

Second, the Merger would provide Cigna's shareholders with a premium of 38.4%, or $13.4 billion.

Third, the public has a strong interest in the proper application of the antitrust laws to promote lower prices and consumer welfare. Mergers are frequently litigated in district courts, but "meaningful appellate review on the merits" is rare. *F.T.C v. Staples, Inc.*, Civ. Action No. 15-2115 (EGS), 2016 WL 2899222, at *2 n.3 (D.D.C. May 17, 2016) (lamenting that "the lack of meaningful appellate review on the merits is an unfortunate reality of antitrust statutes"); *accord F.T.C. v. Sysco Corp.*, 113 F. Supp. 3d 1, 15 (D.D.C. 2015) ("Sysco and USF have announced that they will not proceed with the merger if the [trial] court grants the requested injunction"); *F.T.C. v. CCC Holdings Inc.*, 605 F. Supp. 2d 26, 31 (D.D.C. 2009) (observing that the merging parties will abandon the merger and not seek appellate review). This case presents the opportunity for appellate review of the important issue of the consumer-welfare standard in merger law, particularly here where the largest merger in the history of the healthcare industry — impacting millions of Americans — is at stake.

Fourth, the Appellees will not be seriously harmed by an expedited appeal as they will have sufficient time to prepare their opposition brief and have no protectable interests in avoiding appellate review of such an important decision.

CONCLUSION

Anthem respectfully requests that this Court rules on this Motion on an expedited basis and enter an expedited briefing schedule for this matter as described herein.

Dated: February 13, 2017

Respectfully submitted,

/s/ *Christopher M. Curran*

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ADDENDUM

Certificate of Parties and Disclosure Statement

In accordance with Rule 27(a)(4) of the Circuit Rules of the United States Court of Appeal for the District of Columbia Circuit, Anthem certifies as follows:

A. Parties

Appellant Anthem, Inc. is a health-benefits company based in Indianapolis, Indiana. It has no parent companies, and there are no publicly-held companies that presently hold a 10% or greater interest in Anthem, Inc.

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.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27(d)(2) of the Federal Rules of Appellate Procedure, the undersigned hereby certifies that:

1. This document complies with the word limit of Fed. R. App. P. 27(d)(2) because this document contains 2,053 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman font, size 14.

/s/ *Christopher M. Curran*
Christopher M. Curran

CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2017, I caused to be served an electronic copy of the foregoing Emergency Motion of Appellant Anthem, Inc. for Expedited Consideration of Appeal via the CM/ECF system, under Circuit Rule 25(f), upon all counsel of record.

/s/ *Christopher M. Curran*
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