UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, et al., *Plaintiffs*, v. Anthem, Inc. and Cigna Corp., *Defendants*.	Case No. 1:16-cv-1493 (ABJ)

SPECIAL MASTER REPORT AND RECOMMENDATION NO. 4

Before the Special Master is Defendant Anthem's Motion to Compel Plaintiff the United States to respond to Interrogatory Nos. 1 and 10 (Dkt. No. 152). For the reasons that follow, the Special Master recommends that the Court grant in part and deny in part Anthem's Motion.

I. Background

The Motion before the Special Master concerns two interrogatories propounded by Anthem on the United States concerning market share calculations and alleged monopsonistic impacts on healthcare provider reimbursement rates.

In brief, this case concerns Plaintiffs' challenge to the proposed merger of health insurers Anthem, Inc. and Cigna, Inc., based on alleged violations of Section 7 of the Clayton Act. [*See* Complaint (Dkt. No. 1) at ¶ 5]. In support of these allegations, Plaintiff's Complaint notes the

market shares which it has calculated each Defendant holds in particular areas, and predicts alleged anticompetitive impacts based on those shares. (*See, e.g.*, Complaint at ¶¶31-32; 44-45; 70). Anthem's Interrogatory No. 1 seeks information regarding Plaintiffs' method for calculating these market shares. [*See* Def. Exh. A (First ROGs) at ROG No. 1].

Plaintiffs' complaint further alleges that the proposed merger will establish a monopsony in 35 metropolitan areas, and predicts that the merger will grant Anthem greater leverage in negotiations with healthcare providers. (*See* Complaint at ¶ 68-73). Anthem's Interrogatory No. 10 requests information from the United States regarding the facts gathered during the investigation stage of this case to support these allegations. [*See* Def. Exh. C (Second ROGs) at ROG No. 10].

The United States responded to both interrogatories by objecting in part and providing some substantive information. Anthem contends that the United States' response was insufficient, and following an unsuccessful meet and confer, filed the instant Motion. The United States submitted an Opposition, arguing that the request was premature since discovery is on-going and invoked privilege concerns; Anthem submitted a Reply brief. The Special Master has reviewed all of these papers and the arguments made therein, and heard oral argument on this matter. The matter is now ripe for resolution.

II. Interrogatory No. 1

a. Arguments of the Parties

Anthem's Interrogatory No. 1 asks the United States, for each "relevant geographic market" identified in the Complaint, to

> Identify each competitor for 2015 for the sale of health insurance to 'national accounts' (Compl. ¶¶ 19-37), the sale of health insurance to 'large group employers' (Compl. ¶¶ 38-50), the sale of health insurance on the public exchanges (Compl. ¶¶ 51-63),

> and the 'purchase of healthcare services' (Compl. ¶¶ 64-75), and identify the market share of each competitor in each such market, including the methodology and all data and documents, that support [the identified] market share calculation (including the numerator and denominator), and the Persons most knowledgeable about [the United States'] answer to this interrogatory.

[Mot. Exh. A (First ROGs) at ROG 1].

The United States objected to this interrogatory (1) "to the extent that it seeks information relating to contentions the United States is not required to prove;" (2) "to the extent it misstates [the United States'] contention or calls for a response that requires a legal conclusion;" (3) as premature; (4) as seeking privileged material; (5) as overly burdensome; (6) "to the extent it premature seeks expert materials that will be disclosed during expert discovery;" and (7) to the extent that facts sought are publicly available or already in Anthem's possession. (*Id*. Exh. B at 2-3). Nevertheless, the United States did offer Anthem a list of its sources for market share data. (*Id*. at 4).

Anthem subsequently filed this Motion alleging that the United States' response is insufficient. Anthem contends that it needs a more detailed answer "to respond to the allegations in the Complaint," noting that with the exception of the Complaint in this case, the United States has "routinely – if not always – included market shares and post-merger HHIs [Herfindahl-Hirschman Index calculations] in its Complaints." (Mot. at 2). At oral argument, Anthem further argued that this information is relevant to the extent that it is probative of numerous allegations made in the Complaint, and represents a legitimate inquiry into Plaintiffs' experts' analyses. (*See* 9/26/16 Tr. at 58-59). In particular, Anthem noted that Plaintiffs' experts relied on particular artificially constructed demographic regions in order to calculate the market share information noted in the Complaint, and argued that Anthem is entitled to test the veracity of those constructs. (*See id*. at 60).

The United States opposes Anthem's request as seeking premature disclosure of information which "requires expert evaluation." [Opp. at 1 (citation omitted)]. The United States notes that it intends to disclose its final expert reports on October 7, as required under the Case Management Order, which is roughly two weeks from the date that the Anthem filed the instant Motion. (*Id*.)

The United States further objects to Anthem's request as seeking material protected by the deliberative process privilege and work product doctrine. (*Id*. at 1-2). According to the United States, the only purpose that Anthem might have for previously-generated expert reports is "to see how [the United States'] (or its expert's) thinking has evolved." (*Id*. at 2). The United States argues that this thinking represents classic work product, contending that "[m]arket shares are not themselves 'facts' in the traditional sense of the word, but instead a legal and economic interpretation of other underlying facts." (*Id*.)

Finally, the United States argues that Anthem will not suffer prejudice if it is required to wait until October 7 because Anthem "already has all of the facts, data and other documents used by Plaintiffs to calculate [market] shares," and therefore can perform its own calculations on this data. (*Id*.)

Anthem responds that the market shares are facts, and that "facts do not become privileged merely because an attorney selected and referenced them in a complaint." (Reply at 1). Anthem further argues that it will suffer prejudice if it is required to wait until October 7 to receive this information, because "approximately 40 depositions are scheduled before then, each of which could bear on the accuracy of Plaintiffs market shares." (*Id*.)

b. Legal Standard

The United States objects to Anthem's motion, arguing that discovery should not be permitted because the interrogatories seek information protected by the deliberative process privilege and work product doctrine.

"Courts… permit agencies to invoke the deliberative process privilege in order to protect information that exposes their decisionmaking processes, and thus ultimately, to 'prevent injury to the quality of agency decisions.'" [*Colorado Wild Horse and Burro Coalition, Inc. v. Kempthorne*, 571 F. Supp. 2d 71, 75 (D.D.C. 2008) (quoting *Petroleum Info. Corp. v. U.S. Dep't of the Interior,* 976 F.2d 1429, 1434 (D.C.Cir.1992))]. The privilege applies only to documents that are (1) predecisional, meaning that they were created prior to the agency decision at issue; and (2) deliberative, such that they "reflect[ ] the give-and-take of the consultational process." [*Id*. (citing *Petroleum Info. Corp.,* 976 F.2d at 1434)]. To properly invoke this privilege, the agency which claims its protections "must 'make a detailed argument, including affidavits from the proper governmental authorities, in support of the 'privilege' because, 'without a specific articulation of the rationale supporting the privilege,' a court cannot rule on whether the privilege

applies." [*Ascom Hasler Mailing Sys., Inc. v. U.S. Postal Svc.*, 267 F.R.D. 1, 4 (D.D.C. 2010) (quoting *Doe v. District of Columbia*, 230 F.R.D. 47, 51-52 (D.D.C. 2005)]. [1]

The work product doctrine "protects written materials lawyers prepare 'in anticipation of litigation.' … By ensuring that lawyers can prepare for litigation without fear that opponents may obtain their private notes, memoranda, correspondence, and other written materials, the privilege protects the adversary process." [*In re Sealed Case*, 146 F.3d 881, 884 (D.C. Cir. 1998) (citing Fed. R. Civ. P. 26(b)(3) and *In re Sealed Case,* 107 F.3d 46, 51 (D.C.Cir.1997))].

"In ascertaining whether a document was prepared in anticipation of litigation, [courts apply] a 'because of' test, asking whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.'" [*Nat'l Assn. of Crim. Def. Lawyers v. U.S. Dep't of Justice Exec. Office for U.S. Attys. & U.S. Dept. of Justice*, —F.3d —, 2016 WL 3902666 at *1 (D.C. Cir. July 1, 2016) (quoting *United States v. Deloitte LLP*, 610 F.3d 129, 137 (D.C. Cir. 2010))]. "For that standard to be met, the attorney who created the document must have 'had a

[1] The United States contends that the information is protected by the Deliberative Process Privilege, but it has not properly invoked that privilege. Proper invocation of the Deliberative Process Privilege requires the submission of a declaration which:

> (1)[asserts] a formal claim of privilege by the "head of the department" having control over the requested information; (2) assertion of the privilege based on actual personal consideration by that official; and (3) a detailed specification of the information for which the privilege is claimed, with an explanation why it properly falls within the scope of the privilege.

[Landry v. FDIC, 204 F.3d 1125, 1135 (D.D.C. 2000)(citations omitted)]. These requirements are "designed to ensure that the privilege[ ] [is] presented in a deliberate, considered, and reasonably specific manner." (*Id*. at 1135-36).

As the United States has not presented any such declaration here, the Special Master concludes that it has not met its burden to show that the privilege applies.

subjective belief that litigation was a real possibility,' and that subjective belief must have been 'objectively reasonable.'" (*Id*.)

"[A] party's ability to discover work product often turns on whether the withheld materials are fact work product or opinion work product." [*F.T.C. v. Boehringer Ingelheim Pharmaceuticals, Inc.*, 778 F.3d 142, 153 (D.C. Cir. 2015)]. Opinion work product is "virtually undiscoverable," (*Deloitte*, 610 F.3d at 135) requiring an "extraordinary showing of necessity" in order for it to be revealed. (*In re Sealed Case*, 676 F.2d 793, 811 (D.C. Cir. 1982). Fact work product, by contrast, is discoverable if the party seeking the materials shows a "substantial need for the materials to prepare its case" and that it "cannot, without undue hardship, obtain their substantial equivalent by other means." [*Boehringer*, 778 F.3d at 153 (citing Fed. R. Civ. P. 26(b)(3)].

c. Discussion

The interrogatory seeks information relevant to the claims and defenses of this case. The subject matter at the heart of Anthem's request – namely, the appropriate market share calculations – is certainly relevant to this case. Plaintiffs do not seriously contend otherwise. Indeed, the paragraphs of the Complaint which Anthem references identify the United States' calculated market share shares.[2] The assessment of these market shares is therefore pivotal to Plaintiffs' claims in these cases, and to Defendants' efforts to dispute those claims. The interrogatories are designed to produce evidence that Defendants can use to dispute Plaintiffs'

[2] Paragraph 31, for example, states that "[f]or national accounts headquartered in the 14 Anthem states, Anthem and Cigna have a combined market share of at least 40 percent. For national accounts in the United States as a whole, Anthem … and Cigna have a combined market share of at least 30 percent." Likewise, Paragraph 44 states that in part due to the current market shares held by Anthem and Cigna, "the proposed merger is presumptively unlawful under … the Merger Guidelines in at least 20 of the relevant markets."

claims regarding market shares. Given the "broad scope" of discovery permissible at this stage, the Special Master concludes that this interrogatory does seek relevant information. [*See* Fed. R. Civ. P. 26 (b)(1); *United States ex rel. Shamesh v. CA, Inc*., 314 F.R.D. 1, 8 (D.D.C. 2016); Smith v. Café Asia, 246 F.R.D. 19, 20 (D.D.C. 2007)].

Nevertheless, much of the information sought is protected by the work product doctrine. Anthem's Motion seeks to compel two categories of information: (1) the actual market shares for competitors in each market, and the calculations and methodology that the United States used to calculate the shares; and (2) all of the data underlying these calculations. The first qualifies as protected opinion work product, and the United States should not be compelled to produce it. The second is fact work product as to which Anthem has shown a compelling need and inability to obtain equivalent information without undue hardship, and the United States should be compelled to produce this information.[3]

Both the market share calculations and the methodology that the United States used to determine these shares are likely to "reveal or provide insights into the 'mental processes of the attorney' in the analysis and preparation" of this case. [*Shapiro v. U.S. Dep't of Justice*, 969 F. Supp. 2d 18, 32 (D.D.C. 2013)(citing *Dep't of the Interior and Bureau of Indian Affairs v.*

[3] As a preliminary matter, there is no question that all of this information was "prepared in anticipation of litigation" because the market share calculations were conducted in the course of the Department of Justice investigation into the proposed Anthem-Cigna merger. "[W]here an attorney prepares a document in the course of an active investigation focusing upon specific events and a specific possible violation by a specific party, it has litigation sufficiently 'in mind' for that document to qualify as attorney work product." [S*afecard Svcs., Inc. v. Securities and Exchange Comm'n*, 926 F.2d 1197, 1202 (D.C. Cir. 1991)].

To the extent that market share calculations were performed by non-lawyer economists, such materials were drafted at the behest of DOJ attorney supervisors to inform the attorneys themselves. The privilege therefore applies to these materials regardless of who the actual drafter was. [*See In re Apollo Group, Inc. Securities Litig.*, 251 F.R.D. 12, 29-30 (D.D.C. 2008)].

Klamath Water Users Protective Assoc., 532 U.S. 1, 8 (2001) and *United States v. Nobles*, 422 U.S. 225, 238 (1975)]. The market shares themselves, as well as any HHI calculations, are the product of legal and economic analyses performed by counsel to the United States and/or their agents in preparation for this litigation. Such analyses are precisely the type of "conclusions" which Rule 26(b)(3)(B) prohibits a court from ordering disclosed. [*See* Fed. R. Civ. P. 26(b)(3)(B) ("If the court orders discovery of (factual work product) materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation"))]. The Special Master agrees with the United States' argument here: "Market shares are not themselves 'facts' in the traditional sense of the word, but instead a legal and economic interpretation of other underlying facts." (Pl. Opp. at 2). Simply put, the market share numbers would not exist had government counsel not applied the underlying data to their economic models in order to calculate these shares.

Likewise, the methodology and/or models upon which the United States relied in performing these calculations is also protected opinion work product.[4] Such models are "material which might disclose" the drafting attorneys' or economists' "appraisal of factual evidence" by revealing how the United States reached these legal conclusions. [*Mervin v. F.T.C.*, 591 F.2d 821, 826 (D.C. Cir. 1978)]. Additionally, the United States' decision to use particular models or methodology itself constitutes a legal determination which reflects its' attorney's "opinions" regarding the most appropriate methodology to use in calculating market share information. This is not a situation in which an attorney issued "general and routine" requests for data, nor is the analysis of the market share data representative of "'information and frameworks'" with "no

[4] If the models and/or methodology are disclosed in the experts' reports, the status of the privilege may change.

legal significance." (*Boehringer*, 778 F.3d at 152-53). To the contrary, the market share analyses are central to the United States' case.[5]

The actual data sets underlying the calculations at issue qualify as fact work product which may be producible upon a showing of substantial need and inability to obtain the same information without undue hardship. The United States represents that it has provided Anthem with all of the data underlying the United States' market share calculations. Anthem avers that the United States has not "identif[ied] the data … it used with any specificity." (Mot. at 2).

In response to Interrogatory 1, the United States responded by reserving its objections and stating that:

> The sources of our market share data are Parties' and third parties' enrollment data; Parties' and third parties' member-level data; Interstudy data; data from Mark Farrah Associates; the Quarterly Census of Employoment and Wages; Business Dynamics Statistis data; the Medical Paenl Expenditure Survey; the American Communities Survey; documents ANTM00023646 and BSCA-CIDPROD-0018757; a list of counties in each CBSA [Core Based Statistical Area], a list of counties by their FIPS [Federal Information Processing Standard] codes, and a list of Zip Code Tabulation Areas (ZCTAs) in each county, all from the U.S. Census Burea; and a list that matches zip codes to ZCTAs from http://www.udsmapper.org/zcta-crosswalk.cfm.

[Opp. Exh. B at 4].

It is not clear from the briefs submitted whether the United States has provided Anthem with the actual documents and information noted above, such as third party enrollment data, Interstudy data, or data from Mark Farrah Associates. At oral argument, the United States represented that it has provided Anthem with "the underlying data sets that fell behind the market shares" that the United States calculated prior to filing the complaint." [9/26/16 Tr. at

[5] Anthem has made no "extraordinary showing of necessity" justifying any consideration of overcoming an invocation of opinion work product.

65:8-9]. The Special Master sought clarification of this point, inquiring as to whether Anthem has "the raw data, they just don't know how you tweaked or worked with, or if you will, manipulated in the economic sense the data to arrive at the conclusions on market share?" (*Id*. at 66:14-18). Counsel to the United States responded in the affirmative. (*Id*. at 66:19).

Counsel for Anthem took issue with the United States' representations, however, stating that

> there's a lot of messiness to this data," such as "threshold issues about whether you look at the place where the employee lives, whether you look at the employer's locations. Some of the data sets don't include ASO [administrative services only insurance], they just include full insurance. A lot of the data sets don't break it out by DOJ's artificially created buckets like large group and national. So that's part of our request, is to understand how they got to the numbers that were specifically referenced in the complaint, we just want the shares that were in their back pocket, that are in their back pockets now, when they filed the complaint.

[*Id*. at 67:1-15].

In the context of an opinion work product analysis in this case, however, Anthem's argument is not persuasive. The United States' decision to "break [data] out by DOJ's artificially created buckets" is itself a legal choice representing DOJ's determination of the most appropriate application of the data at issue to its economic models. Assuming that Anthem has the data sets at issue, it is free to provide that data to its own experts and to break it out or manipulate it into any way it chooses. For example, Anthem noted at the hearing that it "does not maintain market shares by the markets the DOJ has created here; these MSAs, metropolitan or micropolitan statistical areas." (*Id*. at 60:8-11). The United States' decision to assess market share based on particular MSAs is itself a legal conclusion, however, and requiring the United States to produce information regarding its selection of MSAs is likely to "reflect the attorney's focus in a meaningful way." (*Boehringer*, 778 F.3d at 142). Instead, Anthem is free to argue that some

other markets are in fact the relevant markets for this case, and to rely on the data sets at issue to generate its own analyses of those markets.

That being said, to the extent that the United States has not provided Anthem with the data referenced in its response to Interrogatory No. 1, the United States should be compelled to provide the information identified to the extent that the United States has compiled it into documents or data sets not yet already provided it to Anthem. Such data sets are factual work product. Anthem has a "substantial need" for all of this information in order to conduct its own market share calculations.

With respect to the "undue hardship" analysis, certain of the items listed in the United States' response to Anthem seem on their face to be information not publicly available, or that the United States may have commissioned for this case, such as the Interstudy data and data from Mark Farrah Associates. While "each side must undertake its own investigation of the relevant facts and not simply freeload on opposing counsel," a court should compel a party to produce those facts when "unique, relevant information is withheld from a party that never had an opportunity to obtain the information on its own." (*Boehringer*, 778 F.3d at 156). This information should be produced to Anthem. [*See In re HealthSouth Corp. Securities Litig.*, 250 F.R.D. 8, 14 (D.D.C. 2008)].

With respect to other data, namely enrollment data and member-level data from third parties, Anthem could in theory obtain this information from non-party subpoenas. Given the time constraints in this case and, in particular, the extremely compressed deposition schedule over the course of the next two weeks, the Special Master concludes that Anthem cannot obtain the equivalent information without undue hardship. This constitutes special circumstances justifying the production of this factual work product.

Finally, with respect to the remaining information, including the Quarterly Census of Employment and Wages, Business Dynamics Statistics data, Medical Panel Expenditure Survey; the American Communities Survey; and various lists of counties and zip codes from the U.S. Census Bureau, and a particular website, it appears that all of these are public sources of information. Anthem has not shown that any of these sources are unavailable to it, or that it is unable to access these sources to generate data which it may use to perform its own market share calculations.

The United States' argues that the information at issue is information used by experts which will be produced by October 7; Anthem notes that approximately 40 depositions will occur prior to October 7 and the information withheld would or could be necessary to explore in those depositions.

The expert evidence in this case likely will be the key to the outcome of the case. Notwithstanding the calculations in the Complaint on market share, ultimately it will be the expert evidence that controls. If Anthem can point to some specific prejudice in the upcoming

depositions based on the recommended denial of opinion work product, that is a matter that can be considered based upon a concrete factual record on an expedited basis. [6] [7]

The Special Master accordingly recommends that the court deny Anthem's Motion to Compel to the extent that it seeks market share calculations and the methodology used to reach those calculations, but grant the motion with respect to the particular underlying data outlined above.

III. Interrogatory 10

a. Arguments of the Parties

Anthem's Interrogatory No. 10 asks the United States to, in relevant part,

> Identify all facts gathered in your investigation that support your allegations in Paragraphs 68-73 of the Complaint[8] that [the United

[6] At oral argument, Anthem contended that "[t]o the extent these things are privileged, which we would contest, they waived that. They've opened the door by alleging specific market share levels and specific numbers and markets where we supposedly violate the merger guidelines or Philadelphia National Bank." (9/26/16 Tr. at 59:18-23). In addition, in Anthem's Reply, it alleges that "any privilege was waived when Plaintiffs based their allegations on [market] shares." (Reply at 1). "[D]isclosing work product to a third party can waive protection if 'such disclosure, under the circumstances, is inconsistent with the maintenance of secrecy from the disclosing party's adversary.'" [*Deloitte*, 610 F.3d at 140 (quoting *Rockwell Int'l Corp. v. U.S. Dep't of Justice,* 235 F.3d 598, 605 (D.C.Cir.2001))]. There is no evidence that the United States' decision to disclose particular market share levels and markets in the complaint was somehow inconsistent with maintaining secrecy regarding other aspects of the market share levels, such as competitors' market shares, or with maintaining secrecy regarding how the United States reached the numbers that it did.

[7] Likewise, the United States' decision to provide greater detail regarding market share numbers and HHI information in other cases does not suggest that such information is not privileged in this case. Rather, the United States made a litigation decision in those cases that releasing that information at the complaint stage was appropriate under the facts of those cases. Anthem has presented no persuasive reason to hold decisions made in those other cases require certain actions by the United States on the facts and circumstances of this case. In the absence of some systemic decision by the United States as to how it pleads alleged antitrust violations – and there is no such showing here, there is no basis as a policy matter to suggest that the United States cannot make case-specific decisions on what to include in any complaint.

[8] These paragraphs detail the United States' allegations that the proposed merger "satisfies the hypothetical monopsonist test." (Complaint at ¶ 68). According to the United States, it would

> States expects] reimbursement rates to be reduced in each of the 35 geographic markets alleged, including all analyses, reports, evaluations, or similar studies of such reimbursement rates . . . .

(Mot. Exh. C at 2-3).

In response, the United States directed Anthem to various paragraphs of Anthem's and Cigna's Answers to the Complaint, and to two documents that Anthem provided to the United States. (*See* Mot. Exh. D at 4).

Anthem argues that "[u]nless the Division intends to be bound by their representation that only those four sources 'support' their allegations that reimbursement rates will be reduced, the [United States'] response completely avoids their obligation to answer the interrogatory." (Mot. at 3).

The United States argues that Anthem's Motion to Compel "ignores the basic fact that discovery is ongoing and Plaintiffs are still collecting facts relevant to the Complaint's allegations." (Opp. at 3; Dkt. No. 157). In addition, the United States argues that Anthem has already admitted in its Answer to the Complaint that reimbursement rates will be reduced. (*See* Opp. at 3 and Exhibit 2 [redacted].

Anthem responds to the United States by noting that it agrees that the reduction in provider reimbursement rates will "generate significant healthcare savings," and states that, if "Plaintiffs stipulate that they will not seek to prove these facts based on anything other than what [they] identified in response to interrogatory No. 10, then the parties have no dispute." (Reply at 2).

"substantially increase concentration for the purchase of healthcare services" in particular markets, thereby granting the merged company greater leverage when negotiating provider reimbursement rates and likely resulting in "a reduction in consumer's access to medical care." (*See* Complaint at ¶¶ 70-73).

At oral argument, Plaintiffs declined to so stipulate. (*See* 9/26/16 Tr. at 69-70). This opinion follows.

b. Discussion

Interrogatory No. 10 is a contention interrogatory, even though neither party elected to use that term. "'Contention interrogatories' that ask a party what it contends or to state all the facts upon which it bases a contention are perfectly legitimate." [*In re Rail Freight Fuel Surcharge Antitrust Litig.*, 281 F.R.D. 1, 3 (D.D.C. 2011) (citing *Barnes v. District of Columbia,* 270 F.R.D. 21, 24 (D.D.C.2010))]. The Federal Rules even contemplate such interrogatories, noting that "[a]n interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact." [Fed. R. Civ. P. 33 (a)(2)].

Nevertheless, that same rule also provides that "the court may order that the [contention] interrogatory need not be answered until designated discovery is complete, or until a pretrial conference or some other time." (*Id*.) "There is considerable support for deferring contention interrogatories until the end of the discovery period," unless the party serving the interrogatories early can convincingly demonstrate that early answers "will contribute meaningfully to clarifying the issues in the case, narrowing the scope of the dispute, or setting up early settlement discussion, or that such answers are likely to expose a substantial basis for a motion under Rule 11 or Rule 56." [*B. Braun Medical Inc. v. Abbott Laboratories*, 155 F.R.D. 525, 526 (E.D. Pa. 1994) (citing *Fischer and Porter Co. v. Tolson*, 143 F.R.D. 93, 96 (E.D. Pa. 1992)); see *F.T.C. v. Capital City Mortg. Corp.*, 186 F.R.D. 245, 248 (D.D.C. 1999); *Everett v. U.S. Air Group, Inc*., 165 F.R.D. 1, 3 (D.D.C. 1995); *In re Convergent Technologies*,108 F.R.D. 328, 332 (N.D.Cal.1985)].

The United States has provided answers purportedly to the best of its ability at this time, including providing specific facts supporting its contention. Conversely, Anthem has "not explained why responses are necessary" at this stage of litigation, prior to the conclusion of fact discovery. (*Everett,* 165 F.R.D. at 3). Rather, the United States asserts that it is still gathering facts at this time, including possibly facts that may tend to support the monopsonist allegations. On the showing made by Anthem, it is not warranted that the United States be ordered to either stipulate that it will not use any facts other than those already identified in the response to Interrogatory 10 or to produce all facts supporting their legal conclusion on this issue, including those facts which are still being processed.

For this reason, the Special Master recommends that the Court deny Anthem's request at this time.[9]

IV. Conclusion

For the foregoing reasons, the Special Master recommends that the Court grant in part and deny in part Anthem's Motion with respect to Interrogatory No. 1, and that the Court deny Anthem's Motion with respect to Interrogatory No. 10.

September 30, 2016
/s/ Hon. Richard A. Levie (Ret.)
Hon. Richard A. Levie (Ret.)
Special Master

[9] The Special Master makes this recommendation based upon the assumption that the United States' response represents all of the facts in its possession as of the time that the Complaint was filed. To the extent that the United States' response does not include all of those facts, the Special Master recommends that the Court direct the United States to supplement its response at this time with those facts. In addition, the Special Master reminds the United States that it has an ongoing duty to supplement its interrogatory response as the discovery process produces additional facts in support of its contention.