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 & RECOMMENDATION No. 6

Pending before the Special Master is Defendant Anthem Inc.'s Motion to Compel the United States to respond to Anthem Interrogatory Nos. 8 and 13, which ask the United States to identify the markets in which the United States contends that the proposed merger is presumptively unlawful. (Dkt. No. 167). For the reasons that follow, the Special Master recommends that the Court deny this Motion.

I. Background

This case concerns Plaintiffs' challenge to the proposed merger of healthcare insurers Anthem, Inc. and Cigna Corp. based on alleged violations of Section 7 of the Clayton Act. [Complaint (Dkt. No. 1) ¶ 9]. Two particular Plaintiff contentions are relevant to the interrogatories at issue.

First, Plaintiffs allege that the merger is likely to "substantially lessen competition for the sale of health insurance to large-group employers" and that, under this theory, "the proposed merger is presumptively unlawful under Supreme Court precedent and the Merger Guidelines in at least 20 of the relevant markets." (*Id*. at 15, ¶ 44). Anthem Interrogatory No. 8 asks the United States to identify these 20 markets, and to provide facts and evidence, such as market share calculations, which support this determination. (*See* Mot. Exh. A at 5). The United States responded to this Interrogatory, in relevant part, by objecting to it to the extent that the interrogatory seeks information protected by the attorney-client or deliberative process privileges or the work product doctrine.[1] The United States did, however, provide the sources of its market share data, albeit not the actual identities of the markets at issue.

Second, Plaintiffs allege that the proposed merger will "substantially lessen competition for the purchase of healthcare services" from healthcare providers and that, under this theory, "[i]n at least 25 [relevant] markets … the merger is presumptively unlawful under Supreme Court precedent and the Merger Guidelines." (Compl. at 24, ¶ 69). Anthem Interrogatory No. 13 asks the United States to identify the 25 markets at issue under this theory, and to provide supporting facts and evidence. (Mot. Exh. A at 5).

[1] In its response to the Interrogatory, the United States also objected to the interrogatory as seeking information that the United States is not required to prove in connection with the allegations at issue in this case; as misstating the United States' contention or calling for a response seeing a legal conclusion; as premature, and as seeking premature disclosure of expert discovery; as overly broad and unduly burdensome; and as seeking facts already in Anthem's possession. (*See* Mot. Exh. B at 2-4). The United States did not raise these objections in its Opposition to the Motion at hand, however, and the Special Master will not address these other objections here.

The United States objected to this Interrogatory on the same grounds as those indicated for Anthem Interrogatory 8, and again identified the sources of its market share data, but not the actual markets at issue.

Anthem subsequently submitted the instant Motion to Compel on September 29, 2016, asking the United States to supplement its answers to Interrogatory Nos. 8 and 13. In its Motion, Anthem argues that it seeks only factual information that support Plaintiffs' allegations, and that the United States' "failure to state which of the 20/25 markets are 'presumptively unlawful' thwarts efforts to narrow this case and to focus discovery." (Mot. at 2).

On the day after Anthem filed the Motion now at issue, the Special Master issued Report and Recommendation No. 4, addressing Anthem's Motion to Compel the United States to Supplement its Answers to Anthem Interrogatory No. 1. That Interrogatory had asked the United States to identify various competitors in the health insurance marketplace, to identify the market share that each competitor held, and to provide all supporting methodology which the United States used to calculate those market shares. (*See* R&R No. 4 at 2-3).[2] The Special Master recommended that the Court deny Anthem's Motion inasmuch as it sought identification of actual market shares, or the methodology and/or economic models used to calculate those shares, concluding that such information was opinion work product and that Anthem had not shown an extraordinary need for this material. (*Id*. at 8-10). The Special Master further recommended that the Court grant Anthem's Motion to the extent that it sought the data underlying the United States' calculations, concluding that this underlying data was factual work product for which

[2] Report and Recommendation No. 4 also addressed Anthem's Motion to Compel regarding Anthem Interrogatory No. 10, which is not directly relevant to the instant Motion.

Anthem had shown a "substantial need" and an inability to acquire through other means. (*Id*. at 11). No party objected to Report and Recommendation No. 4.

The United States submitted its Opposition to Anthem's Motion to Compel regarding Interrogatory Nos. 8 and 13 the day after the Special Master issued Report and Recommendation No. 4. Relying on Report and Recommendation No. 4, the United States' Reply argues that "the details surrounding Plaintiffs' pre-Complaint market-share calculations are privileged" and protected under the work product doctrine.[3] (Opp. at 2). The United States further argues that "Anthem's attempt to indirectly discover the results of those shares through compelling the identity of the markets that qualify for the presumption is similarly improper" because "the identification of markets where the Acquisition is presumptively unlawful is tantamount to releasing the market shares themselves." (Opp. at 2).

Anthem subsequently submitted a Reply brief in which it noted that in light of Report and Recommendation No. 4, it "now seeks only the *identities* of the 20 and 25 local markets alleged (anonymously) in the Complaint – and not the underlying market shares." (Reply at 1)(emphasis in original). According to Anthem, the United States has not claimed that the identities of the markets qualifies as protected work product, nor has it explained how Anthem may use those

[3] The United States' Opposition does not make clear whether it opposes Anthem's request solely on grounds of the work product doctrine, or whether it also objects to Anthem's request as seeking information protected by the deliberative process privilege. Regardless, in Report and Recommendation No. 4, the Special Master found the United States' deliberative process privilege claims unavailing because the United States failed to properly invoke the privilege. (*See* R&R No. 4 at 6 n. 1). The United States has likewise not properly invoked the privilege as to the information sought in Interrogatory Nos. 8 and 13. More precisely, it has not offered a declaration of a high-ranking agency official which asserts that these interrogatories seek privileged material and offers "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)]. As such, the United States has not shown that the deliberative process privilege protects this information.

identities to obtain privileged information regarding the market shares themselves. (*Id*.) Anthem also suggests that providing the identities of these markets will "reduce the burden on non-parties in further discovery," presumably by enabling Defendants to tailor any future non-party discovery requests to only non-parties in the 20/25 markets. (*Id*. at 2).

Following receipt of Anthem's Reply brief, the Special Master asked the United States via email whether it objected to providing only the identities of the markets at issue. [*See* Email on behalf of J. Levie to parties (Oct. 4, 2016 12:53 p.m.)]. The United States responded in the affirmative. [*See* Email from R. Struve to J. Levie and parties (Oct. 4, 2016 8:09 p.m.)].

The Special Master has considered all arguments made by the Parties. This Report and Recommendation follows.

II. Legal Standard

The Special Master described the applicable legal standards in detail in Report and Recommendation No. 4. Those standards remain the same and are repeated here:

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 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)].

III. Discussion

The information sought is relevant to Plaintiffs' allegations that the merger is presumptively unlawful under Supreme Court precedent and the DOJ antitrust guidelines; indeed, the interrogatories themselves cite directly to Plaintiffs' allegations on these points in the Complaint. [*See* Compl. ¶¶44, 69; 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) (Relevance is to be "construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on' any party's claim or defense")(citation omitted)].

Because Anthem has made the required showing of relevancy, the burden shifts to the United States to show that the material is protected work product. [*Alexander v. FBI*, 194 F.R.D.

316, 326 (D.D.C.2000)]. The United States has met that burden here because, when it assessed the presumptive lawfulness of the merger in relevant markets, it plainly did so with the "subjective belief that litigation was a real possibility," and this belief was "objectively reasonable." (*Nat'l Assn. of Crim. Def. Lawyers*, ___ F.3d __, 2016 WL 3092666 at *1). Indeed, the United States relies upon the presumptive unlawfulness determinations to support two separate allegations in its Complaint in this matter. As such, the identification of the markets, resting as it does upon the work and processes of identifying those markets by Plaintiffs, qualifies as protected work product.

The question is, however, whether the United States' determination that the merger is presumptively unlawful in 20/25 markets qualifies as opinion or factual work product and, if the latter, whether Anthem has shown both a substantial need for the identification of the markets and an inability to obtain this information or its substantial equivalent by other means without undue hardship.

a. The Identification of the Markets is Opinion Work Product

Plaintiffs argue that this determination qualifies as opinion work product because "the identification of the markets is inextricably intertwined with the market shares themselves, and essentially derivative of those shares." [Email from R. Struve to J. Levie and parties (Oct. 4, 2016 8:09 p.m.)].

The Special Master finds the United States' arguments convincing. The relevant portions of the Complaint allege that in 20 and 25 markets, "the proposed merger is presumptively unlawful under Supreme Court precedent and the Merger Guidelines." (Compl. ¶¶44, 69). In its response to Anthem Interrogatory Nos. 8 and 13, the United States cited *United States v. Philadelphia National Bank*, 347 U.S. 321, 364-65 (1963), presumably to support its allegations

that the merger is unlawful under Supreme Court precedent, and to the United States Department of Justice and Federal Trade Commission 2010 Horizontal Merger Guidelines for the proposition that the merger is unlawful under those guidelines. These sources note that "an increase of more than 33% in concentration must be regarded as significant," (*Phil. Nat'l Bank*, 347 U.S. at 365) and that "[m]ergers resulting in highly concentrated markets that involve an increase in the HHI [Herfindahl–Hirschman Index] of more than 200 points will be presumed to be likely to enhance market power." (DOJ Merger Guidelines at 19).

By identifying these sources, the United States has provided Anthem with the bases upon which it (the United States) determined that merger would be presumptively unlawful in 20 and 25 markets. What the United States has not provided Anthem with is the method which the United States used to determine that the merger will result in "an increase of more than 33% in concentration," or an "increase in the HHI of more than 200 points." Such calculations undoubtedly rely in part on the United States' independent determination of market shares, which the Special Master has already concluded is opinion work product. (*See* R&R No. 4 at 9). The Special Master has also already concluded that the HHI assessments are opinion work product. (*See id*.) As the Special Master previously noted, the United States' market share and HHI numbers "would not exist had government counsel [or their agents] not applied the underlying data to their economic models … to calculate these shares," and such analyses "are precisely the type of 'conclusions' which Rule 26(b)(3)(B) prohibits a court from ordering disclosed." (*Id*.)

Likewise, the Special Master previously concluded that the actual economic models or algorithms used to determine both HHI and market shares, and the manner in which the United States "tweaked or worked with" market data in order to perform market share and HHI

calculations, are also protected opinion work product. (*Id.* at 9-10). As the Special Master noted, the decision to use such models and data constitute a legal determination that these models and data are the most appropriate methodology to use in determining market share and HHI numbers. (*Id*.)

As such, the Special Master has already determined that all of the "pieces" used by the United States to assess the presumptive lawfulness or unlawfulness of the merger in various markets qualify as opinion work product. Anthem apparently recognized this fact when it elected not to pursue its Motion to Compel with respect to these underlying elements.

Nevertheless, even Anthem's reduced request, seeking only the identities of the markets at issue, seeks opinion work product because the actual "presumptively unlawful" markets themselves can only be determined based on the above-noted calculations. The identities of the 20/25 markets are not simply facts in and of themselves. Rather, they represent the United States' legal conclusion that the merger will cause market share concentrations to increase by more than 33%, and HHI to increase by more than 200. Additionally, the identities of the markets represent the United States' legal opinion that market share itself, as well as HHI, should be calculated in particular way, using particular data. For all of these reasons, the identity of the 20/25 markets is simply not segregable from the data underlying the determination that the merger will be presumptively unlawful in those markets. The market identities qualify as opinion work product.[4]

Even if the identities qualified as factual work product instead, however, Anthem has not made the necessary showing to obtain the identities because it has not shown a substantial need

[4] Anthem has made no showing of extraordinary necessity – the foundation in any effort to overcome opinion work product.

for this information or an inability to obtain its equivalent without undue hardship. (*See Boehringer*, 778 F.3d at 153). Anthem has access to all of the underlying data upon which the United States based its market share and HHI calculations. Anthem also has retained numerous well-qualified experts. Anthem has not provided any evidence that it is unable to provide its experts with the underlying data; that its experts are unable to use this data to calculate the market share and HHI information in the relevant regions; that its experts are not able to use all of this information to assess how this results of these calculations relate to the standards set out in *Philadelphia National Bank* and the Department of Justice Horizontal Merger Guidelines; or that performing these analyses would place an undue burden upon it.[5] In addition, Anthem shortly will learn the identity of the 20/25 markets as discovery proceeds and Plaintiffs' experts share their reports. Accordingly, even if the information sought was merely factual, rather than opinion, work product, Anthem has not met its burden to show a need for this information. [6]

[5] Notably, in the Complaint, Plaintiffs identify 35 relevant geographic markets as to which they allege the proposed merger would harm large-group employers, and state that the proposed merger is presumptively unlawful in "at least 20" of these markets. (Compl. at ¶¶41, 44) Likewise, Plaintiffs state that the "relevant geographic markets for identifying harm to competition for the purchase of healthcare services are the same 35 markets in which large groups would be harmed," and note that the merger would be presumptively unlawful in 25 of these markets. (*Id*. at 26 and ¶69). This is not, in other words, an unlimited universe of markets.

[6] The Special Master does not take issue with Anthem's assertion that disclosure of the identities of the 20/25 markets would focus and narrow discovery as well as potential implicate the involvement of third parties. Notwithstanding these potential benefits, which are not insignificant in the context of time-limited discovery and trial preparation, such potential benefits are not enough legally to override Plaintiffs' invocation of work product protection.

IV. Conclusion

For all of the foregoing reasons, the Special Master recommends that the Court deny Anthem's Motion to Compel regarding Anthem Interrogatory Nos. 8 and 13.

October 10, 2016

/s/ Hon. Richard A. Levie (Ret.)
Hon. Richard A. Levie (Ret.)
Special Master