

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA, et al.,

Plaintiffs,

V.

AETNA INC., et al.,

Defendants.

Civil Action No. 16-1494 (JDB)

SECOND AMENDED PROTECTIVE ORDER

The Court, upon good cause shown and in accordance with Rule 26(c)(1) of the Federal Rules of Civil Procedure, **ORDERS** as follows:

A. Definitions

(1) As used herein:

(a) “Action” means the above captioned action, including any related discovery, pre-trial, trial, post-trial, or appellate proceedings.

(b) “Confidential Information” means (i) any trade secret, confidential research, development, commercial, or competitively sensitive information, as such terms are used in Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure; (ii) any transcript or other material containing such information that has not been published or otherwise made publicly available; and (iii) any “Personally Identifiable Information” or “Protected Health Information,” as such terms are defined in this Order.

(c) “Defendants” means Aetna Inc. and Humana Inc., and their divisions, subsidiaries, affiliates, partnerships and joint ventures, and all directors, officers, employees, agents (including counsel), and representatives of the foregoing.

(d) “Disclosed” means shown, divulged, revealed, produced, described, transmitted, or otherwise communicated, in whole or in part.

(e) “Document” means documents or electronically stored information as defined in Rule 34(a) of the Federal Rules of Civil Procedure.

(f) “Including” means including, but not limited to.

(g) “Investigation” means the pre-Complaint investigation of the Agreement and Plan of Merger among Anthem and Cigna dated July 23, 2015, and the Agreement and Plan of Merger among Aetna Inc. and Humana Inc. dated July 2, 2015.

(h) “Investigation Materials” means non-privileged correspondence, documents, data, written information or statements, transcripts of testimony, declarations (including drafts), affidavits (including drafts), Civil Investigation demands, informal requests for information, and other materials that:

- (i) were exchanged between any Defendant, or affiliated person or entity, and any Plaintiff, either voluntarily or under compulsory process, during, and in connection with the Investigation; or
- (ii) were exchanged between any counsel for a Party who provided legal services to the Party in connection with the Investigation and any non-party not having an attorney-client or common-interest relationship with the Party (*e.g.*, experts, consultants, counsel for co-Defendants, and counsel for states' attorneys general), either voluntarily during and in connection with the Investigation or in response to any request issued during and in connection with the Investigation, where such communications were made for the purposes of the Investigation.

(i) “Litigation Materials” means non-privileged documents, written information, or other materials that (i) any Protected Person provides to any Party, either voluntarily or under compulsory process, in connection with this Action; (ii) constitute any communication between any Party and any non-party or Protected Person in connection with this Action; (iii) any Defendant, or affiliated person or entity, provides to any Plaintiff, either

(q) “Protected Health Information” or “PHI,” as defined in 45 C.F.R. § 160.103, means individually identifiable health information that is transmitted or maintained in electronic media or any other form or medium. The term does not include individually identifiable health information (i) in education records covered by the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g; (ii) in records described at 20 U.S.C. § 1232g(a)(4)(B)(iv); (iii) in employment records held by a covered entity in its role as employer; and (iv) regarding a person who has been deceased for more than 50 years.

(r) “Individually Identifiable Health Information,” as defined in 45 C.F.R. § 160.103, is a subset of health information, including demographic information collected from an individual, and (i) created or received by a healthcare provider, health plan, employer, or healthcare clearinghouse; and (ii) relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and (1) that identifies the individual; or (2) with respect to which there is a reasonable basis to believe the information can be used to identify the individual.

B. Notice

(1) Within three business days after the Court's entry of this Order, the applicable Party must give notice of this Order to each Protected Person (or, if represented by counsel, the Protected Person's counsel) that provided Investigation Materials to that Party and who provided an email address, facsimile number, or physical address. Notice must be given by sending a copy of this Order by email, facsimile, or overnight delivery.

(2) If a Protected Person determines that this Order does not adequately protect its Confidential Information, it may, after meeting and conferring with the Parties within 10

calendar days after receipt of a copy of this Order, seek additional protection from the Court for its Confidential Information. If a Protected Person seeks additional protection from the Court, the information for which additional protection has been sought will not be provided to other Persons until the Protected Party and the Parties have agreed or the Court has ruled on the Protected Party's motion.

(3) **Confidential Health Information.** The Parties acknowledge that information produced in the Investigations and in discovery in this litigation, regardless of its designation under this Order, may contain personal and health information that may be subject to the protections of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), the applicable requirements of the Standards for Privacy of Individually Identifiable Health Information and its implementing regulations issued by the U.S. Department of Health and Human Services (45 C.F.R. Parts 160-64, HIPAA Privacy Regulations), and state regulations protecting the confidentiality of individually identifiable personal and health information. The Parties and all Persons who sign the agreement set forth in Appendix A hereto agree to take all measures necessary to comply with the requirements of these laws and any other applicable laws governing the privacy of personal and health information.

C. Designation of Confidential Information

(1) **Right to Confidential Designation.** A Protected Person may designate as "Confidential Information" any Investigation Materials or Litigation Materials, to the extent such information constitutes Confidential Information as defined in subparagraph A(1)(b) of this Order. Such designations constitute a representation to the Court that the Protected Person (and counsel, if any) in good faith believes that the Investigation Materials or Litigation Materials so designated constitute Confidential Information.

In addition, in the event that a Party produces information of the other Party and does not designate it as Confidential or a non-Party produces information of a Party and does not designate it as Confidential, then such Party has the right to object and designate the information as Confidential so long as such Party has a good faith belief that the information constitutes Confidential Information. In such an event, the designated information must be treated in accordance with its Confidential Information designation in the same manner as if the producing Party or producing non-Party had designated the information as Confidential.

(2) **Waiver.** Any production of documents, information, transcripts of testimony, or other materials not designated as Confidential Information will not be deemed a waiver of any future claim of confidentiality concerning such information if it is later designated as Confidential Information. However, the disclosure of any information for which disclosure was proper at the time disclosed will not be deemed improper regardless of any such subsequent confidentiality designation.

(3) **Inadvertent Non-Designation.** If at any time before the trial of this Action, a Protected Person realizes that it should have designated as Confidential Information any documents, testimony, or other materials that the Person previously produced during discovery in this Action, it may so designate such documents, testimony, or other materials by notifying the Parties in writing. After receiving such notice, the Parties must thereafter treat the newly designated information as Confidential Information in accordance with the Protected Person's new designation under the terms of this Order.

(4) **Inadvertent Disclosure.** In the event of a disclosure of any Confidential Information to any Persons not authorized to receive such disclosure under this Order, the Party responsible for having made the disclosure must promptly notify the Protected Person whose

When a Party is entitled under this Order to question a deponent about a document or information that has been designated by a different Protected Person as Confidential Information, the Party that asked such questions must designate as Confidential the portion of the transcript relating to such Confidential Information.

(c) *Documents.* A Protected Person who designates as Confidential Information any document that they produced in this Action must stamp or otherwise mark each page containing Confidential Information with the designation “CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER” in a manner that will not interfere with legibility or audibility. If the entire document is not Confidential Information, the Protected Person making the designation must stamp or label only those pages that contain Confidential Information.

8

electronic files and documents in native electronic format, the electronic files and documents must be designated by the Protected Person for protection under this Order by appending to the file names or designators information indicating whether the file contains Confidential Information, or by any other reasonable method for appropriately designating such information produced in electronic format, including by making such designations in reasonably accessible metadata associated with the files.

When Confidential Information is produced in electronic format on a disk or other medium that contains exclusively Confidential Information, the “CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER” designation may be placed on the disk or other medium. When electronic files or documents in native form are printed for use at deposition, in a court proceeding, or for provision in printed form to any person described in subparagraph E(1)(c), the Party printing the electronic files or documents must affix a legend to the printed document saying “CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER” and include the production number and designation associated with the native file, or use another reasonable method for appropriately designating such information.

D. Challenges to Confidential Designation

(1) Any Party who objects to any designation of confidentiality may at any time before the trial of this Action provide a written notice to the Protected Person who made the designation and all Parties stating with particularity the grounds for the objection. All materials objected to will continue to be treated as Confidential Information pending resolution of the dispute. If the objecting Party and the Protected Person cannot reach agreement on the objection within ten business days of the Party's written notice, either the objecting Party or the Protected Person may raise the dispute with the Court. The producing Party or non-Party bears the burden

of persuading the Court that the material is in fact Confidential Information.

(2) While any dispute concerning the designation of confidentiality is pending before the Court, the designated information must be treated in accordance with its Confidential Information designation under this Order until the Court rules on the motion. If the Protected Person fails to move the Court in accordance with this paragraph within two days of the conclusion of a meet-and-confer session, or if the Court finds the designation of Confidential Information to have been inappropriate, the challenged designation will be considered rescinded. The Parties thereafter are not required to treat the information as Confidential Information under this Order.

(3) The Parties' entry into this Order does not preclude or prejudice either the Protected Person or the objecting Party from arguing for or against any designation, establish any presumption that a particular designation is valid, or alter the burden of proof that would otherwise apply in a dispute over discovery or disclosure of information.

E. Permitted Disclosure of Confidential Information

(1) Confidential Information may be disclosed only to the following Persons:

(a) the Court and all Persons assisting the Court in this Action, including law clerks, court reporters, and stenographic or clerical personnel;

(b) Plaintiffs' attorneys, paralegals and other professional personnel (including support and IT staff), agents, or independent contractors retained by Plaintiffs to assist in this Action, whose functions require access to the information;

(c) Outside Counsel of Record for Defendants including such Outside Counsel's attorneys, paralegals, and other professional personnel (including support and IT staff), agents, or independent contractors retained by the Defendants to assist in this Action,

whose functions require access to the information. Defendants may file motions with the Special Master seeking modification of this provision to share Confidential Information with a very small number of specified in-house attorneys, so long as those attorneys are not involved in Defendants' competitive decision-making. Should a Defendant file such a motion, then Defendant shall contemporaneously notify the Protected Person whose Confidential Information is the subject of such motion, and that Protected Person shall be afforded all rights as set forth in Paragraphs 2-5 of the Order Appointing the Special Master [Dkt. 53], including but not limited to the right to respond to such a motion and be heard at oral argument before the Special Master (if any);

(d) any person retained by a Party to serve as a testifying or consulting expert in this Action, including employees of the firm with which the expert or consultant is associated or independent contractors who assist the expert's work in this Action;

(e) outside vendors or service providers (such as copy-service providers and document-management consultants) retained by a Party to assist that Party in this Action;

(f) outside trial consultants (including graphics consultants) retained by a Party to assist in prosecuting or defending this Action;

(g) any mediator or arbitrator that the Parties engage in this Action or that this Court appoints;

(h) authors, addressees, and recipients of particular information designated as Confidential Information solely to the extent they have previously had lawful access to the particular Confidential Information that was disclosed or is to be disclosed; and

(i) persons who counsel for Plaintiffs or Defendants believe in good faith previously received or had access to the document, unless the person indicates that he or she did

current employee of the Protected Person that designated the Confidential Information;

(c) prevents disclosure of Confidential Information by any Party with the express written consent of the Protected Person that designated the material as Confidential Information

(d) prevents disclosure by a Party of Confidential Information that is (i) publicly known through no fault of that Party; (ii) lawfully acquired by or known to that Party independent of receipt in discovery in this Action; (iii) previously produced, disclosed, or provided to that Party without an obligation of confidentiality and not by inadvertence or mistake; or (iv) produced in accordance with an order of this Court

(e) prevents the United States, subject to taking appropriate steps to preserve the further confidentiality of such information, from retaining or disclosing Confidential Information (i) in the course of any other legal proceedings in which the United States is a party; to secure compliance with a Final Judgment that is entered in this Action; or (iii) for law-enforcement purposes, or as may be required by law; or

(f) prevents the United States’ retention or use or disclosure of Confidential Information outside the context of this Action to the extent permitted by applicable law or regulation governing such pre-complaint discovery, including the Hart–Scott–Rodino Act, 15 U.S.C. § 18a, and the Antitrust Civil Process Act, 15 U.S.C. §§ 1311–14, or as required by law, court order, or regulation.

F. Use of Information Designated Confidential

If any documents, testimony, or other materials designated under this Order as Confidential Information are included in any pleading, motion, exhibit, or other paper to be filed with the Court, the Party seeking to file such material must comply with this Court's Local Civil

Rule 5.1(h). Nothing in this Order restricts the Parties or any interested member of the public from challenging the filing of any Confidential Information under seal. Upon receipt of an objection or challenge to the filing of a Protected Person's Confidential Information under seal, or upon the denial of a motion to file such Information under seal or a motion to unseal such Information, the Party that filed or attempted to file the Confidential Information under seal shall notify the Protected Person of such denial, motion, objection or challenge within three business days of the receipt of such objection or challenge, so that the Protected Person has a reasonable opportunity to be heard prior to any ruling.

G. Disclosure of Documents Containing PII and PHI

Any PII or PHI produced to any Party, whether during the course of the Investigation or this Action, is considered Confidential Information under this Order without the need for any Protected Person or Party to designate it as such.

H. Treatment of Confidential Information at Trial

The disclosure of Confidential Information at trial will be governed by a separate Court order. Upon the filing of a proposed order governing the disclosure of Confidential Information at trial, the Parties shall provide notice of such order to any Protected Person whose Confidential Information is expected to be used at trial.

I. Procedures upon Termination of This Action

(1) The obligations imposed by this Order survive the termination of this Action unless the Court, which retains jurisdiction to resolve any disputes arising out of this Order, orders otherwise. Within 90 days after receiving notice of the entry of an order, judgment, or decree terminating this Action, all Persons having received information designated as Confidential Information must either (i) return the material and all copies thereof to the Protected

Person (or the Protected Person's counsel if represented by counsel) that produced it; or (ii) destroy or delete the Confidential Information such that it cannot be reassembled, reconstructed, or used in any way.

(2) Notwithstanding the above Paragraph (I)(1), Plaintiffs' attorneys and Outside Counsel of Record who were permitted access to Confidential Information pursuant to Section E(1)(c) are entitled to retain Confidential Information contained in court papers, deposition and trial transcripts and exhibits, and work product, provided that Plaintiffs' attorneys and Outside Counsel of Record do not disclose the portions of court papers, deposition transcripts, exhibits, or work product containing information designated as Confidential Information to any Person except under Court order or agreement with the Protected Person that produced the Confidential Information or as otherwise permitted in this Order.

(3) All Confidential Information returned to the Parties or their counsel by the Court likewise must be disposed of in accordance with this Paragraph. Nothing in this Paragraph, however, expands or restricts the rights of the Parties under Paragraphs (E)(4) or (E)(5) of this Order.

J. Right to Seek Modification

Nothing in this Order limits any Person, including members of the public, Party, or Protected Person from seeking further or additional protections of any of its materials or modification of this Order upon motion duly made under the rules of this Court, including that certain material not be produced at all or is not admissible evidence in this Action or any other proceeding.

K. The Privacy Act

Any order of this Court requiring the production of any document, information, or

