# EXHIBIT A

## Defendants' Motion for Sanctions

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

**UNITED STATES OF AMERICA**, *et al.*,

*Plaintiffs*,

v.

**AETNA INC.** and **HUMANA INC.**,

*Defendants*.

Civil Action No. 1:16-cv-1494-JDB

Submitted to the Special Master,
The Hon. Richard A. Levie (Ret.)

## DEFENDANTS' MOTION FOR SANCTIONS

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## INTRODUCTION

Defendants Aetna Inc. and Humana Inc. bring this motion for sanctions as a last resort to preserve the integrity of the trial in the wake of serious and prolonged discovery misconduct by the Government in its handling of Defendants' subpoena to the United States Department of Health and Human Services and the Centers for Medicare and Medicaid Services (collectively, "CMS"). Defendants have worked diligently since July to avert the prejudice that they are now suffering, by negotiating, involving the Special Master early and often, and indulging those of the Government's requests for accommodations that were reasonable.

Despite Defendants' efforts, the process has failed, and there is no longer sufficient time to remedy the Government's discovery violations with a compliant production in light of the tightly constrained litigation schedule necessitated by the Government's merger challenge. A set of reasonable and proportionate sanctions, entered pursuant to Rule 37(b) of the Federal Rules of Civil Procedure, the Court's inherent powers, or both, are now necessary to preserve Aetna's and Humana's ability to defend themselves.

## BACKGROUND[1]

As the following narrative of relevant events shows in detail, the Government has impeded Defendants' discovery of CMS documents. The CMS documents at issue are critically important, and highly relevant to key questions in this litigation. Among other things, one of the central issues in this merger challenge is the proper definition of the product market that will be used to assess the Government's claims. *See, e.g.*, *FTC v. Owens-Illinois, Inc.*, 681 F. Supp. 27, 34 (D.D.C.) ("The first and most critical task is to define the 'relevant product market.'"), *vacated and remanded on other grounds,* 850

[1] To fully document the history leading up to this Motion, Defendants are providing, as exhibits to this Motion, a number of emails and letters exchanged between counsel for the Government and for Defendants. These emails and letters all come from the files of defense attorneys Aaron Healey and Christopher Thatch, both of whom have submitted declarations attesting to the authenticity of the materials produced from their respective files. *See* Decl. of A. Healey at ¶ 2 (Oct. 3, 2016) ("Healey Decl.") (Ex. 1); Decl. of C. Thatch at ¶ 2 (Oct. 3, 2016) (Ex. 2).

F.2d 694 (D.C. Cir. 1988). And identifying a valid product market requires analysis of the substitutability between products: "[t]he general question is 'whether two products can be used for the same purpose, and if so, whether and to what extent purchasers are willing to substitute one for the other.'" *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 119 (D.D.C. 2004) (Bates, J.) (citations omitted).

Here, the question is whether the product market that includes Medicare Advantage plans (which are offered by private insurers) also includes traditional Medicare (which is offered by the federal government) in combination with other products. The Government has always recognized the centrality of this dispute. In its complaint, the Government acknowledged that Medicare Advantage was specifically created as "a market-based alternative to traditional Medicare" (Comp. ¶¶ 2, 6, Dkt. No. 1 (July 21, 2016), but then articulated a meritless theory why traditional Medicare should not be included in the product market for Medicare Advantage services (*id.* ¶¶ 23-29). If the Government is incorrect and traditional Medicare *is* a necessary component of the product market, its claims of anticompetitive effects will largely—if not entirely—collapse.

Nor can the Government plausibly deny the importance of discovery from CMS on this issue (among other important issues on which the CMS documents bear, including CMS's "Star Ratings" applicable to Medicare Advantage plans, and others). There is no entity more perfectly positioned to provide key insight on the Government's view of the relationship and substitutability between traditional Medicare and Medicare Advantage. That is because CMS—as the federal entity responsible for administering traditional Medicare and overseeing private insurers' administration of Medicare Advantage plans, and paying for both—operates at the fulcrum between the two alternatives. *See, e.g.*, CMS, *CMS Strategy: The Road Forward, 2013–2017* (2013), https://goo.gl/EUQDZu (noting CMS's "traditional role of administering [] Medicare"). Thus, as the Special Master has recognized, "CMS in particular[] [i]s a rather large repository of documents

that would bear on the subject under review," such that "there really were no surprises of what was going to have to be examined here and where … the crown jewels are." Hearing Tr. 93:9-16, 94:22-95:3 (Sept. 26, 2016) (Levie); *see also, e.g.*, *id.* at 101:23-102:3 ("I doubt there is a person in this room who doesn't understand what the Defendants want from HHS and why.") (Levie). This is why Defendants' very first discovery requests—served just eight days after the complaint was filed—were directed to CMS. It is also undoubtedly why the Government has proposed calling no fewer than three CMS witnesses at trial (and has even indicated its intent to treat those witnesses as experts). *See* Pls.' Initial Fact Witness List at 3 (Sept. 9, 2016) (Ex. 3). Simply put, CMS is at the heart of this case, and the information it possesses will be of the utmost importance in resolving the Government's claims.

The Government has engaged in a course of serious delay and misconduct. When the Government's dilatory conduct rendered timely compliance impossible, the Government compounded the problem by using unlawful and prejudicial search procedures. These procedures resulted in the production of massive volumes of irrelevant documents and prompted the Government to withhold just as many documents on grounds that they might invoke the deliberative process privilege—despite the Government's admission that its attorneys had not reviewed, and would not review, those documents nor follow the other procedures required to assert the privilege. The end result is that Defendants are now mere days away from the deadline for final witness lists with no ability to have taken meaningful, document-informed CMS depositions, with fact discovery and expert reports two weeks away and no path for realistically getting the documents that were improperly designated as potentially subject to the deliberative process privilege.

### A. *July 29: Defendants Serve Discovery Requests On CMS, And The Government Promises To Begin Compiling Responsive Materials.*

On July 29, eight days after the Government filed its complaint, Defendants served on CMS a subpoena pursuant to Rule 45 of the Federal Rules of Civil Procedure. The CMS subpoena

contained 23 requests: 11 requests for documents, and 12 requests for data sets. Notice of Subpoena (July 29, 2016) (Ex. 4). After serving the subpoena, Defendants' counsel corresponded with lawyers at CMS regarding the production. Email from A. Healey to S. Lyons (July 29, 2016) (Ex. 5); Email from S. Lyons to A. Healey (Aug. 1, 2016) (Ex. 5). Defendants and CMS counsel agreed to hold a meet-and-confer on August 3. Email from A. Healey to S. Lyons (Aug. 1, 2016) (Ex. 5).

Negotiations with CMS quickly came to a halt when, on August 2, Department of Justice lawyers injected themselves into the discussions between Defendants and CMS. DOJ attorney Christopher Wilson informed Defendants of DOJ's position that CMS, as a federal agency, is a party to this litigation, and that the subpoena should have been served as a Rule 34 request for party discovery. Letter from C. Wilson to C. Thatch (Aug. 2, 2016) (Ex. 6). Over the next week, while the parties sorted out the form of the requests, Mr. Wilson indicated several times that "we did get started with HHS as soon as we received your subpoena" and that DOJ "will continue working with HHS on the substance of your extensive discovery requests." Letter from C. Wilson to C. Thatch (Aug. 8, 2016) (Ex. 7).

Mr. Wilson provided the Government's Responses and Objections to the requests for documents and materials on August 8. Pl. United States' Responses & Objections to Defs.' Notice of Subpoena to the Dep't of Health & Human Servs. (Aug. 8, 2016) (Ex. 8). The Responses and Objections indicated that the Government would not produce *any* materials in response to the requests. Though the parties continued to debate the form of the requests and the scope of the Government's objections, Mr. Wilson reaffirmed that DOJ attorneys "have already been working [with] HHS/CMS to determine what can be produced and the timeframe for production," and would provide further details "consistent with the obligations of the parties under the soon to be entered case management order." C. Wilson Email to A. Healey (Aug. 10, 2016) (Ex. 9).

### B. *Mid-August: After Initially Committing to Calculate Its 28-Day Production Deadline Beginning On August 11, The Government Reverses Course and Insists on a New Round of Negotiations.*

On August 11—nearly two weeks after Defendants first served the requests on CMS—counsel for the Government and for Defendants finally held a meet-and-confer to discuss them. As Mr. Wilson confirmed later that day, the Government stated that it would treat the subpoena as a Rule 34 discovery request "with an effective service date as of today, August 11." Email from C. Wilson to A. Healey (Aug. 11, 2016) (Ex. 9). Mr. Wilson noted that the Government's time for responding to the requests would be governed by the Case Management Order, and would "run from the effective date of service"—i.e., August 11.[2] *Id.* He also once again stated that DOJ "would begin a rolling production of documents/data as they become ready for production," and assured Defendants that DOJ "ha[s] been moving forward with CMS and continue to do so on this issue." *Id.* In another meet-and-confer four days later, Mr. Healey asked whether the Government intended to rest on the objections made in its August 8 Responses & Objections, or whether there would be any other obstacles to producing those documents. Mr. Wilson responded to these questions in the negative. Healey Decl. ¶ 4.

During a meet-and-confer on August 18, however, the Government's position changed. Mr. Wilson stated that the Government would not begin to calculate its production deadline until the parties agreed on the list of custodians from whom documents would be produced. Healey Decl. at ¶ 5. Mr. Wilson suggested that the list include all personnel within the Office of Health Policy, which sits within HHS's Office of the Assistant Secretary for Planning and Evaluation ("ASPE").

[2] Under the Case Management Order, which was entered the day after Mr. Wilson's email, responsive productions "will be made on a rolling basis with a good-faith effort to be completed no later than 28 days after service of the request for production." C.M.O. at ¶ 14(D), Dkt. No. 55 (Aug. 12, 2016). Where there are objections or questions regarding custodians, the C.M.O. requires "a good-faith effort to [] complete[] [productions] no later than 21 days after resolution" of those issues. *Id.*

*Id.* Mr. Wilson also identified two additional custodians for two of Defendants' requests. *Id.* Mr. Healey asked for additional information about CMS's organizational structure in order to assess whether additional custodians should be added. *Id.* Mr. Wilson then sent Mr. Healey an email containing links to HHS web pages containing organizational charts. Email from C. Wilson to A. Healey (Aug. 18, 2016) (Ex. 10). Mr. Healey agreed that collection and production from the identified custodians could begin. Email from A. Healey to C. Wilson (Aug. 18, 2016) (Ex. 10).

The next day brought another change in the Government's position. On August 19, the Government provided Amended Responses and Objections to the CMS requests. Pl. United States' Am. Responses & Objections to Defs.' Notice of Subpoena to the Dep't of Health & Human Servs. (Aug. 19, 2016) (Ex. 11). Although Mr. Wilson had previously represented that the Government would not stand on its blanket objections to Defendants' requests, the Government reversed course again and indicated that it would not provide any materials responsive to several requests. *Compare id.* at 16-19, 23 (Request Nos. 13, 17) with Healey Decl. ¶ 4. Mr. Healey asked about this discrepancy in an email to Mr. Wilson the next day. Email from A. Healey to C. Wilson (Aug. 20, 2016) (Ex. 12). Mr. Healey also asked for the names and titles of the ASPE officials that the Government proposed to treat as custodians. *Id.*

### C. *Late August: The Government Proposes that Custodians Conduct a "Self-Search" for Responsive Documents.*

On August 22, Mr. Wilson sent an email identifying six ASPE custodians. Email from C. Wilson to A. Healey (Aug. 22, 2016) (Ex. 13). Mr. Wilson also stated, for the first time, that these individuals would be "searching their files for documents responsive to the requests." *Id.* Mr. Healey made this topic an item for the agenda of an August 23 meet-and-confer. Email from A. Healey to C. Wilson (Aug. 23, 2016) (Ex. 14). During that call Mr. Healey expressed (as did other defense counsel present) that Defendants did not believe that the custodians' self-search was proper or adequate for use in this case under the Federal Rules of Civil Procedure. Healey Decl. ¶ 6.

Rather, Defendants believed that a forensic electronic document collection along with predictive coding—which Defendants employed for their own productions—was appropriate and proportional. *Id.* Nevertheless, Mr. Healey asked Mr. Wilson to put in writing the details of the HHS custodial self-search plan for defendants to review, a request to which Mr. Wilson responded on August 25. *Id.*; Email from C. Wilson to A. Healey (Aug. 25, 2016) (Ex. 15).

According to Mr. Wilson, each custodian would be "given the text of each request and instructed as to the substance of what each request is seeking, and directed to pull any and all potentially responsive documents for each request from" their files. *Id.* These individuals would be entrusted with carrying the search out themselves, with HHS's Office of General Counsel "supervis[ing]" the process. *Id.* Purportedly to "allay[] concerns" the Government anticipated Defendants would have with this process, Mr. Wilson stated that HHS would "certify to the Court that each custodian understood their discovery obligations [and] conducted a thorough and diligent search for any and all documents responsive to each request, specify the details of how the search was conducted and affirm that no responsive documents are being withheld on grounds other than applicable privileges." *Id.*

During a telephone conversation that same day (August 25), Defendants lodged their objection to this process, and stated that they would be raising the issue with the Special Master. Healey Decl. ¶ 7. In an email the next day (August 26), Mr. Healey raised a number of questions regarding the proposed self-search process in order to facilitate the Special Master's consideration. Email from A. Healey to C. Wilson (Aug. 26, 2016) (Ex. 16). In response, Mr. Wilson suggested that the Government could "have each custodian's search supervised by an attorney from HHS' Office of General Counsel," but did not alter the Government's proposal to have those custodians ultimately conduct the searches themselves. Email from C. Wilson to A. Healey (Aug. 26, 2016) (Ex. 16). Mr. Wilson's proposal included no indicia of DOJ assistance or involvement in the

process, and did not indicate how lay custodians could accurately and adequately perform the outlined tasks without a forensic document-collection protocol. On August 28, Mr. Healey informed Mr. Wilson that this proposal did not allay Defendants' concerns about the adequacy of the self-search process, and that Defendants still intended to raise the issue with the Special Master. Email from A. Healey to C. Wilson (Aug. 28, 2016) (Ex. 17).

### D. *August 29: The Special Master Orders The Government To Conduct A Forensic Electronic Collection Using Predictive Coding.*

The hearing before the Special Master occurred on August 29—31 days after Defendants served their requests on CMS. At that hearing, Defendants objected to the Government's self-search proposal. Healey Decl. ¶ 8. Defendants argued that the Government should employ a forensic electronic collection utilizing predictive coding, which is generally recognized as more reliable in identifying responsive documents than term searching. *Id.* The Government, by contrast, argued that self-search was appropriate under the circumstances. *Id.* The Government also admitted that it had not yet begun gathering materials responsive to Defendants' requests, despite the fact that its lawyers had provided assurances to the contrary for nearly a month. *Id.*

After hearing the parties' arguments, the Special Master ordered the Government to conduct a forensic electronic collection utilizing predictive coding, and to retain an outside vendor if necessary. *Id.*[3] The Special Master also directed Defendants to consider narrowing their list of

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[3] Although this hearing was off the record, the Special Master subsequently and repeatedly made clear that he had ordered predictive coding. *See* Hearing Tr. 20:24-21:11 (Sept. 11, 2016) ("In terms of timing for predictive coding, it was my impression when we all left on the 29th of August—when I said to the government you need to do predictive coding … it was my working assumption that you were going to do it. And last Friday was the first time when we all chatted that I heard that it wasn't being done by the government."); *id.* at 122:3-20 ("[W]hen we left our status on the 29th of August, I truly expected that there was going to be predictive coding…. And I had, I thought, clearly—you know, I didn't use the words 'I order.' I tend to say 'I request,' thinking people will get the drift and just do it without a formal order. But the idea of agency counsel doing it was not something that struck me as particularly satisfactory, satisfactory to get this done."); Hearing Tr. 93:10-23 (Sept. 12, 2016) ("Nobody came in on the 30th or the 1st or the 2nd or the 3rd

*(continued)*

proposed custodians (which then contained 31 individuals) and the date range applicable to their requests (which then reached back to January 1, 2010). *Id.*

Heeding the Special Master's directive, Defendants immediately offered to reduce the date range for their requests by three years (from January 1, 2010—though several of the document requests facially included narrower date ranges—to January 1, 2013), and the Government accepted this proposal. Email from C. Conrath to A. Healey (Aug. 30, 2016) (Ex. 18). Defendants also reviewed and unilaterally dropped nine prospective custodians from their proposed list (from 31 to 22). Email from A. Healey to C. Conrath (Aug. 30, 2016) (Ex. 19). On August 31, during a meeting prior to a hearing with the Special Master, Defendants agreed to reduce the number of custodians to 19. Healey Decl. ¶ 9. In the email memorializing these compromises, Mr. Healey also indicated Defendants' understanding that the Government had "retained an e-discovery vendor," would work with that vendor to "develop and test a predictive coding model" to be used in carrying out the production of responsive materials, and would "promptly inform defendants of any issues arising in the collection process that may delay production." Email from A. Healey to C. Wilson (Aug. 31, 2016) (Ex. 20). Mr. Wilson confirmed that "[t]his all sounds right," subject to a few "caveats/clarifications" regarding particular details of the production. Email from C. Wilson to A. Healey (Aug. 31, 2016) (Ex. 20). In particular, Mr. Wilson provided details regarding the steps that the Government's retained vendor would take, thereby confirming Mr. Healey's understanding that the Government had, in fact, retained a vendor to implement the predictive-coding process. *Id.*

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*(continued…)*
or the 4th or the 5th or 6th, et cetera, to say that's not going to work…. So the first time I heard about this was … Thursday night—that that wasn't going to be used."); Hearing Tr. 94:10-95:7 (Sept. 26, 2016) ("I left the meeting on, whether it was August 29 or 31st, I think it was the 29th, believing that the Government was going to do predictive coding. And it was on September 7, I think, that Defendants were informed that was not the case and I learned of it whatever the next Monday was.").

### E. *September 7: The Government Reveals That It Will Not Be Complying With The Special Master's Order Requiring It To Use Predictive Coding.*

Over the next several days, Defendants continued to press for updates regarding the Government's planned production schedule. Mr. Wilson continually assured Defendants that this process was underway, without any indication that the Government was deviating from the predictive-coding production that the Special Master had ordered or from the specific details to which the parties had agreed. *See* Email from C. Wilson to A. Healey (Sept. 1, 2016) (Ex. 21) (stating that "[t]he vendor is in the process of pulling custodians' emails" and that the Government "will know more regarding a production schedule" once at least one custodian's emails had been pulled); Email from C. Wilson to A. Healey (Sept. 6, 2016) (Ex. 22) (providing "an early email/attachment count for 1 custodian," specifying the databases the Government would search, and providing a set of search terms to be used).

On September 7, however, Defendants were surprised to hear a very different explanation of the status of the Government's efforts and plans. During a hearing before the Special Master that day, Mr. Wilson stated that the Government had collected 1.1 million materials from 10 out of 19 custodians, and proposed that the parties work to find ways to reduce the universe of responsive documents. During a meet-and-confer later that day, Mr. Wilson mentioned, for the first time, that the Government did not intend to use predictive coding, and would instead be using only search terms. Healey Decl. ¶ 10. The next day, Mr. Healey sent an email to Mr. Wilson reiterating Defendants' "concerns about both the timing and accuracy of the production" and explaining that it "deviate[d] from what the Special Master requested." Email from A. Healey to C. Wilson (Sept. 8, 2016) (Ex. 23). Mr. Wilson responded: "Disagree as to your contention that what we discussed yesterday deviates from what Judge Levie requested. Also disagree that our discussion yesterday deviates from what I conveyed to you last week." Email from C. Wilson to A. Healey (Sept. 8, 2016) (Ex. 23). The parties participated in a brief conference call with the Special Master on

September 9, during which Defendants informed the Special Master of the Government's revelation. Healey Decl. ¶ 11. Although Mr. Wilson took the position that the Government had not committed to utilizing predictive coding, the Special Master stated that he had instructed the Government to use predictive coding at the August 29 hearing. *Id.* The Special Master set a hearing to further address the matter for two days later, on Sunday, September 11. *Id.* **Shortly after the September 9 conference call, the Government produced its initial witness list, which included three witnesses from ASPE (coincidentally one of the few places the Government had agreed to look for responsive documents). Ex. 3 at 3. Defendants, by contrast, were forced to include five placeholders for unnamed CMS witnesses on their initial list, since Defendants had not yet obtained any materials necessary to identify potential witnesses. Defs.' Preliminary Fact Witness List at 3 (Sept. 9, 2016) (Ex. 24).**

At the September 11 hearing, the Special Master reiterated that he had instructed the Government to engage in predictive coding, and that "the idea of agency counsel doing [the production] was not something that struck me as particularly satisfactory." Hearing Tr. 122:3-20 (Sept. 11, 2016). Counsel for the Government, Peter Mucchetti, acknowledged that "defendants have a legitimate request for this discovery," but took the position (never before expressed by any Government attorney to Defendants' counsel) that Defendants were seeking too many documents and needed to "prioritiz[e]" their requests.[4] Hearing Tr. 31:11-34:10 (Sept. 11, 2016) (Mucchetti). The Special Master stated that "[t]he fact that HHS has never done a search on this magnitude … doesn't even come close to carrying the day," and instructed the Government to "get it done." *Id.* at 35:18-36:7 (Levie). The Special Master also found it "very, very troubling" that the Government

[4] Previously, Mr. Mucchetti had acknowledged that Defendants were in fact entitled to the discovery they had requested: "[W]e do recognize that defendants have a legitimate request for this discovery. We want them to get the discovery that we can given what we have available to us, . . . consistent with their need and the ability of the agency." Hearing Tr.31:11-18 (Sept. 11, 2016).

stated it would not be able to quickly produce documents for the three witnesses it had identified. *Id.* at 118:16-119:25. The Special Master encouraged the parties to discuss a plan for moving forward, noting that "the clock is working against everyone." *Id.* at 65:3-7.

Consistent with the Special Master's directive, Mr. Healey sent the Government Defendants' proposed revisions to the search terms the Government had provided. Email from A. Healey to P. Mucchetti (Sept. 11, 2016) (Ex. 25). Mr. Healey requested that these terms be vetted by CMS personnel "to ensure they … capture idiosyncratic, agency terminology." *Id.*

The next day, the Special Master held another hearing. At that hearing—now 45 days after Defendants served their requests on CMS—the Government acknowledged the insufficiency of the search-term method it was proposing. As its e-discovery expert recognized, "search terms are by their definition an imprecise and not very effective means to parse out responsive information." Hearing Tr. 154:9-18 (Sept. 12, 2016) (Greer). Nonetheless, the Government persisted in advocating a search-term approach because it was "having to make the best of a bad situation." *Id.* It also requested additional time before committing to a production schedule, representing that "we need more experience with the system before we can propose additional dates" and stating that the Government needed Defendants to "tell us what they want us to prioritize." Hearing Tr. 113:18-24 (Sept. 12, 2016) (Mucchetti). To that end, Defendants identified an initial set of custodians to prioritize. *Id.* at 120:10-121:19. In a subsequent hearing on September 15, the Special Master put the Government on notice that he was inclined to set September 26 "as a hard stop" for complying with the CMS requests. Hearing Tr. 68:24-69:1 (Sept. 15, 2016) (Levie).

### F. ***Mid-September: The Government Indicates That It Will Be Withholding Large Numbers Of Documents As Potentially Privileged, Without Having Attorneys Review The Documents In Question.***

In several hearings over the following weeks, the Government continued to express skepticism regarding its ability to make a timely production, and began shifting the focus to its claim

that Defendants' requests would likely sweep in a substantial number of documents protected by the deliberative-process privilege.

On September 19, in yet another hearing addressing the requests, Defendants asked the Special Master to enter an order confirming that the Government's deadline for production would be September 26. Hearing Tr. 7:3-12 (Sept. 19, 2016) (Healey). Counsel for the Government asserted that its production would implicate a substantial number of documents potentially shielded by the deliberative process privilege, and asked the Special Master to allow the Government to withhold as privileged any documents that contained certain unidentified search terms. *Id.* at 41:2-44:13 (Mucchetti). The Government would not agree to share these search terms with Defendants (*id.* at 48:19-55:20), and stated that even with this "modification" to its production obligations, it would only be "substantially done, but not completely done, by September 26" (*id.* at 42:13-18)). The Government noted that "electronic review for deliberative process privilege is not used as often as it is for attorney-client privilege," but claimed that DOJ had used this procedure in other cases. *Id.* at 68:7-23 (Mahr). The Government also acknowledged that, under its proposal, attorneys would not actually be reviewing each document over which the Government claimed privilege; according to the Government, "an eyes-on privilege review of the extraordinary amount of documents that we were required to collect in this forensic process … would just be impossible by trial, let alone by the 26th." *Id.* at 69:18-23 (Mahr).

Defendants objected to DOJ's proposal, noting that it contravened settled law on the requirements for asserting the deliberative process privilege. *Id.* at 59:14-60:12 (Healey). The Special Master did not issue an advisory opinion on the propriety of the Government's proposal, but emphasized the need for transparency in any process the Government implemented for identifying privileged documents, and expressed "concerns about the productivity of using an algorithm when you're using deliberative process." *Id.* at 55:5-22, 79:9-19 (Levie). Later that day, the Special Master

entered an order requiring the United States to "produce on a rolling basis all documents and things responsive to Defendants' Requests for Production to the Center for Medicare and Medicaid Services numbers 6, 8, 10, 11, 14, 15, 18, 19, 20, and 22 no later than September 26, 2016." S.M. Order No. 3, Dkt. No. 125 (Sept. 19, 2016).

Defendants continued to attempt to work with the Government to facilitate a complete production complying with the Special Master's timeline. The parties held a meet-and-confer on September 20, during which the Government confirmed that it intended to use search terms to identify supposedly privileged documents, but did not intend to share those search terms with Defendants. Email from A. Healey to R. Danks (Sept 20, 2016) (Ex. 26) (memorializing the meet-and-confer). The Government also now acknowledged—contrary to its representation at the September 19 hearing—that in past cases where it had used search terms to identify materials potentially subject to the deliberative-process privilege, those search terms had only been an initial step that was ultimately followed by attorneys' eyes-on review. I*d.* The Government continued to demur as to the details of its plan, informing the Special Master on a September 22 conference call that the Government did not know the size of the universe of documents it would be withholding as potentially privileged and did not "have a final answer" regarding privilege log issues, and that it would not be until "the end of next week" that the Government would "be able to have a conversation with you about what we think this is going to look like and what processes there will be in place to allow the Court to assess any privilege challenges that the Defendants would like to raise." Hearing Tr. 8:16-9:1, 15:6-17:13 (Sept. 22, 2016) (Danks).

After the hearing on September 22, the Special Master entered an order that, among other things, required the Government to "produce a final privilege log no later than October 7" and clarified that "Defendants shall be permitted to identify for *in camera* review by the Special Master samples of documents withheld on the basis of the deliberative process privilege." S.M. Order No.

4 at ¶¶ 2, 3, Dkt. No. 127 (Sept. 22, 2016). The Order also stated that the Government's compliance would be "without prejudice to Defendants' rights to seek relief or sanctions for prior or ongoing" discovery violations, and that the Order would not "be construed as an agreement or admission" by Defendants that the Government's compliance "will in any way mitigate prejudice resulting from any violations." *Id.* at ¶¶ 4, 5.

### G. *September 26: The Government Fails To Complete Its Production By The Court-Mandated Deadline, And Withholds Approximately One Million Documents From Its Final Production Based On "Potential" Privilege Issues.*

On September 25—58 days after Defendants served their requests on CMS—the Government finally provided insight into the number of documents it was withholding from its production, informing Defendants that "between 860,000 and 1.1 million documents" responsive to the search terms the Government used had "[] triggered a need for further privilege review." Email from R. Danks to A. Healey (Sept. 25, 2016) (Ex. 27). Ultimately, this amounted to roughly half of the documents that responded to the search terms the Government utilized. In a hearing the next day, the Government acknowledged that it could not say that "all of [these] documents are properly protected"; indeed, "[t]hat's not the Department's position at all." Hearing Tr. 62:7-13 (Sept. 26, 2016) (Danks). Nevertheless, the Government claimed that "there are a lot of documents that raise very significant concerns and that warrant further review." *Id.* The Government also confirmed that it did not intend to have anyone review all of the documents to resolve these concerns, and that it intended to submit a privilege log and supporting declaration that addressed documents on a categorical—rather than individualized—basis. *Id.* at 62:16-20, 71:5-23 (Danks). The Special Master noted that, before a governmental entity can invoke the deliberative-process privilege, it must provide a declaration by the appropriate agency head, and asked whether "there [is] some other way you are going to approach this invocation of privilege to these." *Id.* at 70:18-71:4. The Special Master also expressed "serious concerns" with the Government's proposal for providing a privilege

log that addressed the withheld documents categorically rather than individually, explaining that it was unclear how "the Government, HHS, is even going to establish the categories." *Id.* at 97:18-24, 100:24-101:3. As the Special Master put it, the Government's proposal was "almost an all or nothing roll of the dice by the Government." *Id.* at 100:22-101:5.

Later that day, Mr. Healey sent Mr. Danks an email requesting a "specific proposal" for dealing with privilege that "protects defendants' legitimate interest in obtaining responsive materials that are currently being held behind the privilege screen." Email from A. Healey to R. Danks (Sept. 26, 2016) (Ex. 27). Mr. Healey also asked Mr. Danks to share the search terms the Government was using to identify potentially privileged documents, explaining that Defendants "would not argue that such disclosure constituted waiver of any privilege that may apply to those terms or a broader subject matter waiver." *Id.* In reply, Mr. Danks stated only that "Plaintiffs do not agree with all of [the Healey email's] characterizations," but would be providing additional details later that day. Email from R. Danks to A. Healey (Sept. 26, 2016) (Ex. 27).

**Even setting aside the roughly one million withheld documents, the Government did not complete its production by the September 26 deadline.** At a hearing on September 27, the Government indicated its expectation that it would "produce a large number of documents this afternoon from most if not all of the CMS custodians," and would "be able to finish the production of all the forensically-collected materials tomorrow, with one exception" arising from a technical issue. Hearing Tr. 7:20-8:2 (Sept. 27, 2016) (Danks). The Government indicated that it was "reconsidering" the possibility of producing the remaining materials subject to a claw-back agreement, but was not willing to commit to that approach. *Id.* at 8:21-9:4 (Danks). The Special Master again noted the problems associated with the Government's proposal to withhold documents on a categorical basis, and expressed "hop[e] [that] there can be some very serious discussion with HHS in terms of whether in this case, in this limited universe of custodians and

components of HHS and the timelines here," the Government could agree to produce the materials subject to a claw-back agreement. *Id.* at 19:7-20:7 (Levie). At the same time, the Special Master recognized that Defendants could file a motion to compel production of the withheld materials, so that the issue could be squarely presented for resolution. *Id.* at 41:21-42:6. Defendants filed a motion to compel the very next day.

On September 29—now 62 days after Defendants served their requests on CMS—in another hearing before the Special Master, the Government altered its proposal for handling the one million withheld documents. Under its new proposal, the Government would provide Defendants with access to "a subset of" the withheld documents—which would be identified by a set of search terms to which Defendants would not be privy—in a Government-controlled "clean room" with a variety of restrictions. Hearing Tr. 10:21-11:4 (Sept. 29, 2016). Defendants' outside counsel only would be permitted to review the withheld documents in DOJ's offices, in order to "identify the documents that they think are relevant and non-privileged." But in conducting that review, defense counsel would not even be permitted to take notes. Once certain documents would be identified, counsel for the Government would review the documents in question to determine whether there is a legitimate basis for claiming privilege. *Id.* at 11:14-22. The Government would produce any identified documents it decided not to claim as privileged. *Id.* at 11:23-12:2. But for all documents over which the Government invoked privilege, the Government would submit the documents to the Special Master so that the privilege claim could be adjudicated on a document-by-document basis. *Id.* at 12:3-13:2. The Government also stated that this proposal was conditioned upon Defendants' agreement—or an order from the Special Master—that the "clean room" protocol would "satisf[y] [the Government's] discovery obligations." Hearing Tr. 4:13-19. The Government confirmed the terms of this proposal in an email later that day. Email from R. Danks to G. Irwin (Sept. 29, 2016)

(Ex. 28). Among other things, this email explained that Defendants would be "permitted to identify" no more than 100 documents per day as responsive and non-privileged. *Id.*

## ARGUMENT

### I. Legal Standards

Rule 37(b) of the Federal Rules of Civil Procedure provides that "[i]f a party … fails to obey an order to provide … discovery, … the court where the action is pending may issue further just orders." Fed. R. Civ. P. 37(b)(2)(A). Under this rule, "[d]istrict courts … possess broad discretion to impose sanctions for discovery violations." *Parsi v. Daioleslam*, 778 F.3d 116, 125 (D.C. Cir. 2015). There are only two prerequisites to sanctions under Rule 37(b): "(1) there must be a discovery order in place, and (2) that order must be violated. Once those two hurdles are cleared, … Rule [37(b)(2)(A)] allows for" a variety of sanctions. *DL v. Dist. of Columbia*, 274 F.R.D. 320, 325 (D.D.C. 2011).

Even separate from Rule 37, the Court has the inherent power to impose sanctions. *See, e.g.*, *Chambers v. Nasco, Inc.*, 501 U.S. 32, 43-44 (1991). The sanctions provided for in the Federal Rules "reach[] only certain individuals or conduct," whereas "the inherent power extends to a full range of litigation abuses." *Id.* at 46. Courts thus possess the power and obligation "to 'protect their institutional integrity and to guard against abuses of the judicial process with … sanctions as they find necessary.'" *Parsi*, 778 F.3d at 130 (quoting *Shepherd v. Am. Broadcasting Cos.*, 62 F.3d 1469, 1472 (D.C. Cir. 1995)). "[I]ssue-related sanctions that are fundamentally remedial rather than punitive and do not preclude a trial on the merits—such as barring admission of evidence or considering an issue established for the purpose of the action—can be imposed on a showing that the sanctioned party resisted discovery by a preponderance of the evidence." *Id.* at 131 (internal quotation marks omitted).

## II. The Government Has Failed To Abide By Its Discovery Obligations, Violated Discovery Orders, And Created Enormous Prejudice That, If Not Remedied, Will Preclude A Fair Trial.

Sanctions are urgently needed to remedy the Government's violations of the Court's discovery orders. This misconduct was knowing and repeated. The result is that Defendants have been deprived of information of core importance to the defense of the Government's lawsuit. There is no time in these expedited proceedings to remedy the Government's discovery misconduct other than through the imposition of sanctions under Rule 37, the Court's inherent powers, or both.

### A. *The Government Has Violated Discovery Orders And Systematically Failed To Produce The CMS Documents.*

The Government has had the CMS subpoena for over two months in a case that requires production within 28 days. The Government represented on August 8 that it had been "working with HHS on the substance of" the requests (Ex. 8), and it represented on August 11 that it "ha[d] been moving forward" on the CMS production and would "begin a rolling production" in compliance with the case management order (Ex. 10). Yet weeks later, on August 29, the Government revealed that it had not, in fact, been preparing its CMS production, and the Special Master ordered a belated production using predictive coding. *See, e.g.*, Hearing Tr. 94:10-95:7 (Sept. 26, 2016) (Levie) ("I left the meeting on, whether it was August 29 or 31st, I think it was the 29th, believing that the Government was going to do predictive coding.").

The Government's failure to proceed as promised during the month between July 29 (when it received the subpoena) and August 29 (when it was ordered to begin a process of predictive coding) was unexcused and created enormous urgency for the Government to comply. Without any indication that it was not abiding by the Special Master's order to employ a predictive coding process with the assistance of a vendor, the Government announced at a conference with Defendants' counsel on September 7 that it would not use predictive coding at all.

This revelation directly contravened the Special Master's August 29 discovery order. The violation was deliberate and knowing; the Government was fully aware of the Special Master's ruling and had represented that it would comply with the ruling, and the Government made no effort to communicate its unilateral change of plans to the Special Master (and merely mentioned it in passing to Defendants).

The Government's violation of the August 29 order greatly aggravated the effects of the Government's previous unwarranted delay, necessitating a new round of negotiations with Defendants, new hearings before the Special Master, and new procedures to deal with the CMS production. As a result of these protracted proceedings, the Special Master imposed a September 26 deadline for the Government to complete its CMS production.[5] The Government expressed optimism about complying with this order. *See* Hearing Tr. 42:13-18 (Sept. 19, 2016) (Mucchetti) ("Now, with that modification [*i.e.*, an agreement on narrowing], we believe that we would be in a position to start making very significant productions and to be substantially done, but not completely done, by September 26").

Nonetheless, on September 25, the Government announced that it would not produce up to a million documents that its own process had deemed responsive, and said that it would engage in "further privilege review." Ex. 27. The Government's claim to additional time to determine whether a privilege applies at all does not extend the time for compliance with its production obligations. *See, e.g.*, *Parsi*, 778 F.3d at 127 ("Reasonable people cannot differ about whether a party is entitled to withhold relevant documents without articulating any claim of privilege."). While Defendants are ordinarily amenable to reasonable extensions of discovery deadlines, this situation is different for several reasons. First, the Government's previous—and extended—delay had made a

[5] The Special Master ordered that compliance with the September 26 deadline would not excuse the Government from the consequences of past violations. S.M. Order No. 4 at ¶ 5, Dkt. No. 127 (Sept. 22, 2016).

full, final production of documents by September 26 absolutely critical. And second, the Government withheld these documents while acknowledging that there was no practicable way of identifying and producing the non-privileged documents amongst them in any timely fashion. Thus, the Government's violation of the Special Master's September 25 order was not merely a technical, interim default. Rather, it represented a fundamental, announced statement that the Government would not comply with the core requirement of the order within any meaningful period of time.

The Government's extended pattern of dilatory conduct, misrepresentations, and violations of court orders plainly satisfies the requirements for imposition of sanctions under Rule 37(b). *See, e.g.*, *DL*, 274 F.R.D. at 325 (noting that Rule 37(b) sanctions require only "(1) [that] there … be a discovery order in place, and (2) that [the] order [has been] violated"). It is equally clear that this wrongful conduct suffices to warrant sanctions under the Court's inherent powers, which does not even require the violation of a court order. *See, e.g.*, *Parsi*, 778 F.3d at 131 ("[I]ssue-related sanctions that are fundamentally remedial rather than punitive and do not preclude a trial on the merits—such as barring admission of evidence or considering an issue established for the purpose of the action—can be imposed on a showing that the sanctioned party resisted discovery by a preponderance of the evidence." (internal quotation marks omitted)).

### B. *The Government's Misconduct Has Gravely Prejudiced Defendants.*

By consistently flouting its discovery obligations, the Government has caused serious prejudice that, if left unaddressed, will jeopardize the basic fairness of this litigation. Although Defendants bear no burden of proving prejudice, the record starkly shows that the Government's conduct has gravely undermined Defendants' ability to defend their merger.[6]

[6] Defendants need not affirmatively prove prejudice at all: the Government may not "attempt to profit from [its] discovery misconduct by shifting the burden to [the other party] to demonstrate how they were prejudiced by that misconduct." DL, 274 F.R.D. at 328. Indeed, the D.C. Circuit has suggested that "prejudice to the other party" becomes relevant only where the

*(continued)*

*First*, as explained above (*supra* at 1-3), the materials at issue here are extremely important. CMS's role in paying for and/or regulating the products at issue explains not only why Defendants' discovery requests could come as no surprise to the Government, but also why the Government's obstructionist conduct is so troubling. This case is fairly anomalous insofar as one of the products at issue directly competes with a product offered by the federal government. Unlike in a case involving a merger of airlines or of office-supply vendors, Defendants are seeking competitive information from the very sovereign that is prosecuting their merger. The Government thus has a clear tactical interest in restricting Defendants' access to materials showing the federal government's perspective on competition between traditional Medicare and Medicare Advantage. And the Government has acted on that interest, with the Department of Justice immediately inserting itself into Defendants' discussions with CMS and grinding the discovery process to a halt. It is hard to imagine any clearer confirmation of the importance of the CMS materials at issue here.

*Second*, the Government's repeated and compounding violations of discovery orders has directly and substantially prejudiced Defendants. This case is necessarily "proceeding on an exceptionally expedited timeline" (S.M. R.&.R. No. 2 at 17, Dkt. No. 112 (Sept. 14, 2016)), a fact that the Government had every reason to anticipate before filing its complaint. The Government's intransigence has ensured that Defendants will not have anywhere near the information they require—and are entitled to—as key deadlines loom:

- Final fact witness lists are due on October 7, just three days from now. C.M.O., Dkt. No. 55 at 1 (Aug. 12, 2016). Because the Government failed to produce any responsive materials before the September 9 deadline for initial lists, Defendants were forced to rely on categorical placeholders for CMS witnesses (in contrast to the Government's ability to

*(continued…)*

sanction is so "severe" as to "approach[] a default judgment"—a situation not presented here. *Bonds v. Dist. of Columbia*, 93 F.3d 801, 808 (D.C. Cir. 1996). This is, in part, because sanctions serve "to deter [a governmental entity] and other parties from behaving the same way in the future"—a basis that is "wholly independent of any prejudice [the other party] may suffer as a result of the [governmental entity's] misbehavior." Id.

specifically name three ASPE officials). *Compare* Ex. 3 at 3 (Pls.' Initial Fact Witness List) with Ex. 24 at 3 (Defs.' Preliminary Fact Witness List). Before Defendants can replace these placeholders, several steps need to occur: Defendants must obtain a full complement of responsive documents from CMS, review those materials to understand the issues and identify the key decisionmakers, depose those key individuals (after providing sufficient pre-deposition notice), and then determine which should be named as trial witnesses. The Government has seen to it that *none* of these necessary steps will occur in the next four days.

- Fact discovery closes on October 19. C.M.O. at 1. The Government has made clear that there is no way Defendants will have meaningful access to all materials by then, especially given the Government's unwillingness to produce the documents it is withholding as potentially privileged. Even if the Government is required to produce all of those documents subject to a claw-back agreement, this would result in Defendants receiving *one million* additional documents that have been subject to minimal screening for responsiveness, without any hope of meaningfully putting those documents to use in depositions or other aspects of fact discovery.

- Expert reports are due on October 21. C.M.O. at 2. Expert analysis is critical in resolving market-definition disputes. *See, e.g.*, *Water Craft Mgmt., L.L.C. v. Mercury Marine*, 361 F. Supp. 2d 518, 542 (M.D. La. 2004) (noting that a number of "[c]ourts consistently require that expert testimony adequately define the relevant … product market[] in antitrust cases"), *aff'd*, 457 F.3d 484 (5th Cir. 2006); *Berlyn, Inc. v. Gazette Newspapers, Inc.*, 223 F. Supp. 2d 718, 727 (D. Md. 2002) ("[T]o prove relevant market, expert testimony is of utmost importance …."), *aff'd*, 73 F. App'x 576 (4th Cir. 2003). The Government's conduct has severely compromised the defense experts' ability to prepare comprehensive analyses by the deadline—a handicap that *does not* afflict the Government's experts. (This includes the three witnesses from ASPE who the Government has indicated will file expert reports—relying, no doubt, on materials to which Defendants have not had access.) And getting additional facts after the close of discovery would not help, as Judge Bates has already asked the parties to agree that "nothing in terms of a factual support [for an expert] could be developed after [the close of fact discovery] for use at trial." Hearing Tr. at 49 (Oct. 9, 2016).

- Pretrial briefs addressing, among other things, "market definition," are due on November 22, and trial commences on December 5. Order, Dkt. No. 81 (Aug. 29, 2016); C.M.O. at 2. All of discovery is leading up to these events, and there is nothing Defendants can do to fill the knowledge gap occasioned by the Government's failure to abide by its discovery obligations.

In short, Defendants will not reach any of these deadlines with the information to which they should have had access. This is especially true given that the Government has made clear that it will not comply with its obligations unless specifically ordered to do so—meaning that Defendants will likely have to wait through two rounds of briefing and adjudication before there is any hope of the Government moving forward. And that prejudice cannot be remedied with a shift in deadlines.

The operative time frame is short, and Judge Bates recognized the necessity of a highly expedited trial in setting the schedule.

All of this was avoidable. Defendants would not be in this position if the Government had promptly begun responding to the July 29 request (like it said it was) or even if it had promptly complied with the August 29 order that it utilize predictive coding (like it said it would).[7] And the Government has no excuse for its failings. As the Special Master has pointed out repeatedly, the Government had every reason to expect that CMS's documents would be at the absolute heart of this litigation: "[T]he concern I have been raising for a while now is the government did the investigation. The government decided when to bring the suit, what the allegations were going to be, what the markets would be, et cetera. And the fact that tens of thousands, hundreds of thousands, millions of documents would potentially be implicated is not something new." Hearing Tr. 79:20-80:4 (Sept. 19, 2016) (Levie). The Government alone is responsible for the prejudice to Defendants' case.

*Third*, the Government's half-hearted proposals for moving forward are totally invalid. As the consequences of its misconduct began to play out, the Government began demanding new and increasingly abridged and unlawful procedures to accommodate its previous delay. These proposals are not only improper, but have produced a flagrantly defective and prejudicial production that is at once radically overbroad and radically under-inclusive.

First, the Government's proposal to utilize a categorical privilege log and a categorical supporting declaration to address the roughly *one million* documents it has withheld as potentially shielded by the deliberative-process privilege—without any lawyer actually reading each document—is totally invalid. As Defendants have explained, this proposal is both unnecessary (given

[7] Moreover, the Government waived any claim that it could not complete the process ordered on August 29 by stating that it would, in fact, implement that process.

Defendants' willingness to enter into a claw-back agreement) and fundamentally irreconcilable with the strict requirements the Government must comply with to assert the deliberative-process privilege. To validly assert the deliberative-process privilege, the Government must, *inter alia*, provide "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," along with an agency-head declaration "based on actual personal consideration." *Landry v. F.D.I.C.*, 204 F.3d 1125, 1135 (D.C. Cir. 2000). The whole point of these requirements is "to 'ensure that the privilege[] [is] presented in a deliberate, considered, and reasonably specific manner.'" *Id.* (citation omitted); *see also, e.g.*, *Defs. of Wildlife v. U.S. Dep't of Agric.*, 311 F.Supp.2d 44, 59 (D.D.C. 2004) (noting "the D.C. Circuit's emphasis on the individualized nature of the deliberative-process inquiry"). "[B]ecause the deliberative process privilege is so dependent upon the individual document and the role it plays in the administrative process," "the need to describe each withheld document … is particularly acute." *Elec. Frontier Found. v. U.S. Dep't of Justice*, 826 F.Supp.2d 157, 167-68 (D.D.C. 2011) (citation omitted); *see also* R.&R. #94 at 7-15, *U.S. v. Philip Morris, Inc.*, No. 99-cv-2496 (D.D.C. Jan. 8, 2003) (Levie, S.M.) (finding deficient a government declaration that "d[id] not address each document individually") (Ex. 29), *adopted*, Order #300 (D.D.C. Jan. 15, 2003) (Ex. 30). Individualized review is also required because even documents subject to the privilege must undergo "a 'segregability analysis' … separat[ing] the exempt from the non-exempt portions." *Edmonds Inst. v. U.S. Dep't of Interior*, 383 F.Supp.2d 105, 108 (D.D.C. 2005) (Bates, J.).

Claiming the privilege over unreviewed documents, based on word searches filtering them into broad categories, flatly violates the requirement of reviewing "each withheld document." *Elec. Frontier Found.*, 826 F.Supp.2d at 167. Indeed, there is no way that documents shielded by the deliberative-process privilege could ever be identified using an electronic term search, because no such search could ever capture the context needed to determine whether a document is deliberative

and predecisional. *See, e.g.*, *Chesapeake Bay Found., Inc. v. U.S. Army Corps of Engineers*, 722 F. Supp. 2d 66, 75 (D.D.C. 2010) (Bates, J.) (noting that the deliberative-process privilege only protects "documents that are both predecisional and deliberative" (citation omitted)). And although courts have occasionally permitted agency heads to submit categorical affidavits, this has occurred only after *some* attorney reviewed each document, making the required individualized determination. *See, e.g.*, *Gen. Elec. Co. v. Johnson*, No. 00-cv-2855, 2006 WL 2616187, *8 (D.D.C. Sept. 12, 2006) (Bates, J.) ("From the declarations, the Court has ascertained that lower-level officials reviewed *all of the documents* for which their regions or offices claimed the privilege, while higher-level officials typically reviewed a smaller representative sampling generated by the lower-level officials.") (emphasis added)).

The Government cannot point to any authority that relieves it of its obligation to comply with these requirements. The Government used a process that was guaranteed to sweep up hundreds of thousands of documents as potentially privileged, and now seeks to use that vastness as an excuse for failing to satisfy its obligations. This is impermissible.

Second, the Government's proposal to have defense counsel review the documents in a "clean room" is equally defective. Under this proposal, Defendants would be tasked with "identify[ing] the documents that they think are relevant and non-privileged … [and] request[ing] their production," at which point the Government would review the documents in question and determine whether to assert privilege at all. *Id.* at 11:14-12:18. Each privilege claim would then be litigated before the Special Master, requiring the parties to engage in continuous privilege litigation until Defendants have made it through the million-document holdback. *Id.* at 12:3-13:10. On top of all this, the Government proposes "set[ting] aside" the well-established requirement of an agency head's declaration, based on personal knowledge, that all claims of deliberative-process privilege are proper. *Id.* at 13:11-21.

This proposal simply makes no sense. Far from rectifying the Government's failure to satisfy the deliberative-process requirements, this proposal would only compound the harm to Defendants. It would have the effect of shifting to Defendants the burden of identifying responsive, non-privileged documents—the very process that the Government claims it cannot complete under the schedule set forth in this case. It would also enable the Government to ensure that the process moves at a glacially slow pace—as shown by the Government's insistence that it will review no more than 100 documents per day. And it would give the Government an open window into Defendants' case development, as the Government sees which documents Defendants' counsel seek to utilize. On top of everything else, the proposal is conditioned on Defendants' waiver of their right to seek redress for prejudice they have suffered during discovery. There is no legitimate basis to force Defendants to forego their rights in order to obtain discovery they are properly owed.

Simply put, the Government's proposals would make a mockery of the deliberative-process privilege. They would not cure an ounce of prejudice, but instead would only create new forms of prejudice as Defendants are forced to divert precious resources to compensating for the Government's failures. These last-ditch efforts are no cure at all.

### C. *The Government's Excuses Have No Merit.*

The facts of the Government's misconduct and its consequences are clear on the face of the record. At hearings before the Special Master, the Government offered several excuses for its actions. These rationalizations demonstrably misrepresent what happened and rest upon additional serious legal errors.

#### 1. Any Burden Involved In Complying With The Discovery Orders Resulted From The Government's Own Misconduct, And Consequently Does Not Excuse That Misconduct.

The Government has recently begun complaining that Defendants are demanding impossible procedures. This contention merely reconfirms the deep prejudice stemming from the

Government's misconduct. It does not in any way excuse the Government of the consequences of that misconduct.

In the first place, of course, Defendants' views about the process do not impose constraints on the permissible scope of the Government's discovery conduct. These constraints are imposed by orders of the Court and binding legal precedent. Defendants have, since first serving the requests, worked assiduously to facilitate the Government's production of responsive documents, to compromise as to the scope and extent of the production requests, and to develop fallback approaches. Defendants have worked with the Government, for example, to narrow the applicable date ranges and to reduce the number of custodians. When the effects of the Government's unexcused delays finally made it impossible to comply with the Court's orders and the law, Defendants cannot be faulted for the ultimate impossibility of compliance.

Second, the requests are, on their face, not unduly burdensome. Each of Defendants' 11 document requests to CMS is specifically focused on a discreet issue, and the requests are entirely proportional to the breadth of information implicated in this case.[8] The Government has never suggested that the requests are in any way unclear, and Defendants have repeatedly worked with the Government to minimize any burden involved in responding to these requests, including by repeatedly narrowing the requests (in terms of both number of custodians and temporal scope) and by helping to refine the operative search terms. The requests themselves cannot be narrowed any further. For instance, Defendants' Request 6, which the Government has repeatedly taken issue with, seeks "[a]ll documents concerning Original Medicare … and Medicare Advantage as alternatives to one another or otherwise as offering competing choices to consumers." Ex. 4 at 2.

[8] Further confirming the reasonableness of Defendants' requests, the defendants in the related *Anthem/Cigna* litigation submitted a far greater number of document requests to HHS. *See* Anthem's Mot. to Compel Production Pursuant to Anthem's Third Set of Doc. Requests, *United States v. Anthem Inc.*, No. 1:16-cv-1493, Dkt. No. 93-1 at 17, 45-46 (Sept. 1, 2016).

As explained above, this request goes directly to the product-market issue at the heart of this case, and there is no practicable way that Defendants could narrow the request without forfeiting information to which they are entitled.

Moreover, the Government's current complaints about burden are belied by its own responses to the requests *before* its noncompliance made adequate productions impossible. The Government consistently made clear that it was not asserting any objection to the requests that would preclude compliance with them. In a meet-and-confer on August 15—after the Government had agreed to treat the requests as proper under Rule 34 and committed to beginning a rolling production—counsel for the Government stated that the Government would not be objecting outright to any of Defendants' requests. This explains why the Government did not dispute defense counsel's observation to the Special Master at the September 11 hearing that the Government had "never asserted objections" to producing responsive documents. Hearing Tr. 42:15-43:1 (Sept. 11, 2016) (Irwin).

Finally, the Government greatly exacerbated the difficulty of complying while there was still time by altering the agreed search terms in a manner that radically expanded their scope. *See* Hearing Tr. 19:10-23:9 (Sept. 29, 2016) (Irwin) (explaining that the Government—unilaterally and without notice to Defendants—had replaced all "and" connectors in the agreed-upon search terms with "or" connectors, meaning that the Government "appear[s] to be searching for every single document that contains even one reference to any of the search terms that we provided, when, in fact, they were designed to have been linked and limited"). Having unilaterally expanded the scope of the search terms in this way, the Government then turned around and complained to the Special Master that it was *Defendants'* intransigence that led to the production of, for example, every document containing the word "Medicare." *See* Hearing Tr. 62:14-63:6 (Sept. 26, 2016); Hearing Tr. 9:5-19 (Sept. 27, 2016); Hearing Tr. 9:8-19 (Sept. 29, 2016). Thus, the Government not only violated the parties'

agreement and created a massive new burden on both itself and Defendants, but it then attempted to use these results to wrongfully impugn Defendants.

#### 2. The Government's Voluminous Production Of Unreviewed And Largely Irrelevant Materials Does Not Excuse Its Non-Production Of Vast Numbers Of Responsive Documents Without Any Grounds For Asserting A Privilege Over Them.

The Government has also observed that it has now made a large production of documents from CMS. *E.g.*, Hearing Tr. 2:5-11 (Sept. 29, 2016). The Government attempts to suggest by this that it has in large part complied with its discovery obligations. It has not.

As shown above, the manner in which the Government collected its production was flagrantly unlawful. Moreover, it was highly prejudicial in two respects. First, because the Government's misconduct made it impossible to review any of the produced documents or even hone the search process in an iterative manner in order to increase the precision of the searches, it has produced massive volumes of documents that by the Government's own admission are completely irrelevant and would have been pruned through a properly conducted production process. *See, e.g.*, Hearing Tr. 87:23-89:5 (Sept. 26, 2016) (Mucchetti) (stating that the responsive materials include "many [documents] that are absolutely irrelevant to this case" and "have absolutely nothing to do with this case"). The production of this mass of irrelevant documents merely increased the prejudice to Defendants by effectively forcing them to perform the document review that the Government claimed it was unable to perform.

Second, and more fundamentally, the Government is withholding nearly a million documents that its own search process has identified as responsive. The Government has done so without any lawful basis, as shown above. The Government cannot permissibly withhold most of a production, assert no privilege over the documents, and fail to identify any lawful procedure by which it might timely do so in the future. Defendants volunteered to obviate the need for any deliberative-process privilege review by forfeiting any waiver argument based on the production of

the document and permitting unrestricted claw-back of documents the Government deemed privileged, but the Government has refused this offer. Having done so, the Government cannot rely on self-created timing difficulties to avoid the ordinary legal requirements for the assertion of the privilege.

### 3. Defendants Never Insisted On A Production Using Word Searches.

The Government has repeatedly represented that Defendants bear the responsibility for any difficulties associated with the word-search methodology it ultimately used because, it claims, Defendants have "insisted" that the Government use that method. *E.g.*, Hearing Tr. 9:11-16 (Sept. 15, 2016); Hearing Tr. 64:8-16 (Sept. 12, 2016). This allegation is patently false.

Defendants have, throughout this process, expressed flexibility about the manner by which the Government engages in its production of CMS documents, so long as that process satisfied the obligations imposed by the Federal Rules of Civil Procedure and cases interpreting them. The Special Master ordered the Government to use predictive coding, and the Government agreed to do so, representing to Defendants that it had retained a vendor and begun the process.

It was the Government, not Defendants, who then proposed a production using search terms because it was simply too late, according to the Government, to perform an appropriate, attorney-guided production process. In addition, it was the Government that radically expanded the volume of documents returned by the search process by changing all "and" connectors to "or" connectors.

### 4. The Government's Vague References To Defendants' Conduct In Other Aspects Of Discovery Are Irrelevant.

The Government has occasionally made references to the manner in which Defendants have handled their document productions. The Government has not claimed that Defendants' conduct has been inappropriate in these respects, but it has attempted to insinuate that analogies to their

discovery conduct somehow justifies the Government's own misconduct with respect to the CMS production. The Government is wrong for two reasons.

First, Defendants' behavior in discovery is "totally irrelevant" to the analysis as a matter of law. *DL*, 274 F.R.D. at 329. "Each party is responsible for its own obligations under Court orders and the Rules," so references to the other side's discovery conduct does not factor into the sanctions analysis. *Id.*; *see also, e.g.*, *Martinez v. Asian 328, LLC*, No. 15-cv-1071 (GMH), slip op. at 10 (D.D.C. April 27, 2016) (finding the other party's discovery conduct "irrelevant" because "defendants' obligations under this Court's orders are independent of any obligations Plaintiffs may have").

Second, the contrast between Defendants' discovery conduct and that of the Government's conduct with regard to the CMS subpoena strongly reinforces the inadequacy of the Government's response. Defendants engaged in a predictive coding production process, both in the investigation and in the litigation, and worked with the Government to reach agreement on the technical details of that process. The Government also reviewed random sample sets of non-responsive documents to verify Defendants' recall rate. Defendants have produced hundreds of thousands of documents from dozens of custodians in the litigation. Defendants have not withheld any documents for privilege that have not undergone individualized human review. Defendants have agreed to submit a document-specific privilege log on October 7. All of this just demonstrates how far short the Government has fallen in this process.

## III. To Facilitate A Fair Trial, The Court Should Remedy The Government's Misconduct By Imposing Reasonable And Proportionate Sanctions.

Because the propriety of sanctions has been triggered by a showing that the Government has violated discovery orders (for Rule 37 sanctions, *see DL*, 274 F.R.D. at 325) and has otherwise "resisted discovery" (for sanctions under the Court's inherent powers, *Parsi*, 778 F.3d at 131), the Special Master should next consider what sanctions are appropriate under the circumstances. "The imposition of the number and type of sanctions employed under [Rule 37(b)(2)(A)] is left to the

discretion of the trial judge. *Mojarad v. Aguirre*, No. Civ. A. 05-0038, 2006 WL 785415, at *10 (D.D.C. March 27, 2006). Accordingly, "the court may impose" more than one sanction "at the same time." *Id.*

In assessing the propriety of sanctions, the overriding consideration is that "any sanction must be just." *Bonds v. Dist. of Columbia*, 93 F.3d 801, 808 (D.C. Cir. 1996). For a sanction whose severity is akin to resolving the case in favor of the opposing party, or punitive like the imposition of monetary payments, "the district court may consider the resulting prejudice to the other party, any prejudice to the judicial system, and the need to deter similar misconduct in the future." *Id.* (citations omitted). For lesser sanctions, less justification is required, although the Court should consider whether lesser sanctions could be more appropriate before imposing a sanction at any level of severity.

### A. ***The Court Should Draw Inferences Adverse To The Government On Issues That Its Misconduct Prevented Defendants From Adequately Discovering.***

Because of the unusually constrained litigation schedule required by the Government's lawsuit, there is no longer sufficient time to remedy the Government's misconduct through adjustments to the schedule. In order to remedy the Government's failure to make a sufficient production of responsive CMS documents notwithstanding the Special Master's multiple orders, the only appropriate remedy is for the fact-finder to draw inferences adverse to the Government on the issues that a complete production of documents on a timely basis would have addressed. Therefore, the Court should sanction the Government by drawing inferences adverse to the Government on issues directly implicated by the CMS documents: (1) the finder of fact should infer that CMS views Medicare Advantage as part of the same product market as Original Medicare; (2) it should infer that CMS would approve the novation and transfer of the Medicare Advantage contracts that Defendants propose to divest to Molina Healthcare; and (3) it should also adopt such further inferences about CMS's views and conduct as the Court deems appropriate, or that become evident

during the further course of fact or expert discovery. Defendants know, for example, that several analyses that their economic expert plans to perform have been hampered by CMS's inadequate document production, but Defendants need to wait to see the Government's expert reports before they can ascertain the extent to which CMS's discovery failures have prejudiced Defendants and their economic expert.

These inferences are modest and limited. They will not have the effect, either in law or in practical effect, of resolving the entire case against the Government. And they are amply justified by the governing law on these facts. *See, e.g.*, *Stanphill v. Health Care Serv. Corp.*, No. CIV-06-985-BA, 2008 WL 2359730, at *6 (W.D. Okla. June 3, 2008) (imposing adverse inference sanction based on party's "failure to timely supplement its document production").

Where "the nature of the alleged breach of a discovery obligation is the non-production of evidence, a District Court has broad discretion in fashioning an appropriate sanction," and "an adverse inference instruction[] may be imposed where a party has breached a discovery obligation not only through bad faith or gross negligence, but also through ordinary negligence." *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 101 (2d Cir. 2002). Courts typically consider three factors in assessing whether to impose an adverse inference sanction, all of which are satisfied here:

> [W]here, as here, an adverse inference instruction is sought on the basis that the evidence was not produced in time for use at trial, the party seeking the instruction must show (1) that the party having control over the evidence had an obligation to timely produce it; (2) that the party that failed to timely produce the evidence had a "culpable state of mind"; and (3) that the missing evidence is "relevant" to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.

*Id.* at 107.[9]

[9] This Court has adopted the Second Circuit's approach to adverse inferences in *Residential Funding Corp. See, e.g.*, *Mazloum v. Dist. of Columbia*, 530 F. Supp. 2d 282, 293 (D.D.C. 2008) (Bates, J.).

The Government cannot dispute the first factor, which looks to its control over the evidence and its obligation to timely produce it. As shown above, the CMS documents at issue are in the exclusive possession of the Government, and the Government has never questioned its obligation to produce responsive documents under ordinary discovery procedures.

The second factor considers whether the Government had a "culpable state of mind." *Id.* It is well settled that this factor is satisfied "where [the non-producing] party has breached a discovery obligation not only through bad faith or gross negligence, but also through ordinary negligence." *Id.* at 101; *see also, e.g.*, *Mazloum*, 530 F. Supp. 2d at 293 (holding that negligence can satisfy the state of mind requirement). Here, however, the Government's conduct was not simply negligent. Defendants have maintained ongoing discussions with the Government's counsel about the CMS discovery throughout this lawsuit, and the Government was well aware both of its duty to comply with the CMS discovery and of its decision not to begin and maintain the process in a timely way.

Moreover, the Government has made several clear and demonstrable misstatements, such as its representations throughout August that it was actively working on preparing the CMS production, its confirmation that it would timely commence a predictive coding-based production, and its representation that it would provide Defendants with certain technical information necessary to test the efficacy of its search terms. While some negligent acts by the Government may have exacerbated the prejudice resulting from its misconduct—such as its replacement of all "and's" with "or's" in its search algorithm—there is no question that the core misconduct was not simply the product of negligent inadvertence.

The *Residential Funding Corp.* panel observed that "acts evincing 'purposeful sluggishness'" in the production of evidence can demonstrate a level of culpability beyond mere negligence for purposes of the adverse inference analysis. 306 F.3d at 110. The Government's conduct in this case evinces at least purposeful sluggishness.

The third factor looks to the relevance of the non-produced material. This analysis looks not merely to whether the material would have been "sufficiently probative to satisfy Rule 401 of the Federal Rules of Evidence," but rather to whether "a reasonable trier of fact could infer that the … evidence would have been of the nature alleged by the party affected" by the misconduct. *Id.* at 108-09. Again, this standard is easily satisfied here. In the first, place, "bad faith alone is sufficient circumstantial evidence from which a reasonable fact finder could conclude" relevance for purposes of this factor. *Id.* at 109. As shown above, the Government's conduct rises to the level of bad faith. Second, where the evidence at issue is of central importance to both parties to the lawsuit, the relevance prong "is easily satisfied." *Mazloum*, 530 F. Supp. 2d at 293; *see also Chen v. Dist. of Columbia*, 839 F. Supp. 2d 7, 15 (D.D.C. 2011) (noting that "the importance of the evidence involved" supports the propriety of adverse inferences). Thus, for example, this Court has observed that certain "video evidence [wa]s quite plainly relevant *both* to plaintiff's claims and to defendants' defenses in th[e] case" because it could have revealed important information about the conduct on which the lawsuit was based. *Mazloum*, 530 F. Supp. 2d at 293. Similarly, in *Chen*, this Court found the fact that the evidence at issue "was of critical importance to this case" as supporting the imposition of an inference sanction. 839 F. Supp. 2d at 15. As shown above, the CMS documents at issue here are also very important to central issues in the case. Therefore this last requirement is also "easily satisfied." *Mazloum*, 530 F. Supp. 2d at 293.

### B. *The Court Should Preclude The Government From Calling CMS Witnesses or Introducing CMS Documents Into Evidence.*

In addition to the fact-finder's adoption of adverse inferences on issues related to the CMS documents, the Court should preclude the Government from calling the three CMS employees it has identified as fact or expert witnesses on its witness list—or any other CMS employees—as witnesses at the trial. Rule 37 expressly authorizes the Court to "prohibit[] the disobedient party … from

introducing designated matters in evidence" as a sanction for discovery misconduct. Fed. R. Civ. P. 37(b)(2)(A)(ii).

Accordingly, district courts have the discretion to exclude witnesses from testifying where the discovery misconduct would have impaired the other party from adequately examining the witness. For instance, in *Sheppard v. River Valley Fitness One, L.P.*, 203 F.R.D. 56 (D.N.H. 2001), the United States Magistrate Judge granted a motion to preclude a witness from testifying. Despite finding that the late production of documents at issue "reflect[ed] a lack of diligence rather than an intentional effort to abuse the discovery process," the Magistrate Judge found that the late production "ha[d] unfairly prejudiced" the other parties, and thus deemed preclusion of the affected witness testimony an appropriate sanction. *Id.* at 60. *See also, e.g.*, *Perkinson v. Houlihan's D.C., Inc.*, 108 F.R.D. 667, 673 (D.D.C. 1985) (noting that witnesses had been precluded from testifying as a discovery sanction).

In short, the requirements for a witness-preclusion sanction are met here. And this sanction is not only permissible; it is necessary to provide meaningful relief to Defendants and preserve the integrity of the trial. Unlike a case with flexibility as to the schedule and trial date, where a lesser sanction involving timing latitude could suffice, *see, e.g.*, *Am. Property Constr. Co. v. Sprenger Lang Foundation*, 274 F.R.D. 1, 8 (D.D.C. 2011) ("declin[ing] to exercise [the Court's] discretion to impose the sanction of exclusion based upon [a party's] admitted, but relatively brief, delays in producing responsive documents and information"), the trial schedule here has been litigated and resolved based upon important extrinsic constraints and the Government cannot be rewarded for its misconduct by gaining delays in the trial schedule that it sought and failed to obtain in the litigation over the trial schedule.

For the same reason, the Government should be precluded from introducing CMS documents into evidence. The Government's discovery misconduct has prevented Defendants

from having access to the materials necessary to respond to such evidence, and the Government should not be permitted to benefit from its own misconduct.

### C. *The Court Should Permit Defendants To Reopen Their Witness List, And Extend Fact Discovery With Regard To CMS.*

Finally, as noted above, the Government's discovery misconduct has impeded Defendants' ability to make appropriate witness designations. By adopting a wrongful search process—one that was erroneously performed even using the inappropriate search-term methodology necessitated by the Government's violations— the Government has swamped the production of even the subset of relevant documents it has produced with hundreds of thousands of wholly immaterial documents. This was particularly prejudicial to Defendants because deposition designations can only come from named witnesses on the final list. CMO at ¶ 15. The Government's misconduct has made it impossible for Defendants to depose CMS personnel in time to include deposition designations on the witness list, which is due on October 7.

The Court has the power to alleviate this prejudice by permitting Defendants to reopen their witnesses list for the limited purpose of permitting them to change their selection of CMS witnesses. *See, e.g., Am. Property Constr. Co.*, 274 F.R.D. at 8 (affording prejudiced party "opportunity to explain to the Court what additional evidence, if any, it considers necessary in responding further" in order "to ensure that [it] suffer[ed] no material prejudice"). The Court should do so here.

Relatedly, the Government's misconduct has made it impossible for Defendants to meaningfully depose the Government's CMS witnesses if those witnesses are not precluded from testifying. CMS-related fact discovery should be extended until at least October 26, or such date as necessary to permit Defendants more time to conduct those depositions.[10] *See, e.g.*, *Unique Indus., Inc.*

[10] To preserve their rights and prevent additional prejudice in the event that these witnesses are permitted to testify, on October 3, 2016, Defendants served deposition notices on the Government with respect to the identified CMS witnesses.

*v. 965207 Alberta Ltd.*, 764 F. Supp. 2d 191, 204-06 (D.D.C. 2011) (reopening discovery based upon discovery violations).

**CONCLUSION**

Defendants respectfully move the Special Master to find that sanctions are warranted. Defendants respectfully move the Special Master, further, to recommend the imposition of the following sanctions: (1) the finder of fact should infer that CMS views Medicare Advantage as part of the same product market as Original Medicare; (2) it should infer that CMS would approve the novation and transfer of the Medicare Advantage contracts that Defendants propose to divest to Molina Healthcare; (3) it should also adopt such further inferences about CMS's views and conduct as the Court deems appropriate, or that become evident during the further course of discovery; (4) the Court should preclude the Government from calling CMS employees, including the three CMS employees named on the Government's witness list, from testifying at trial, and from introducing CMS documents into evidence; (5) the Court should permit Defendants to reopen their witnesses list for the limited purpose of permitting them to change their selection of CMS witnesses; and (6) the Court should extend fact discovery until October 26, 2016 for the limited purpose of allowing Defendants to depose the Government's CMS witnesses, if not excluded, until that time.

Respectfully submitted,

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Date: October 4, 2016

**CERTIFICATE OF SERVICE**

I hereby certify that on October 4, 2016, a true and correct copy of the foregoing was served on all counsel of record via the Court's CM/ECF system.

Date: October 4, 2016

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