UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, et al., *Plaintiffs*, v. AETNA INC. and HUMANA INC., *Defendants*.	Case No. 1:16-cv-01494 (JDB)

REPORT AND RECOMMENDATION NO. 3 OF THE SPECIAL MASTER

Pending before the Special Master is non-party UnitedHealth Group Inc.'s ("United" or "UnitedHealth") Motion to Quash a subpoena that Defendant Aetna Inc. ("Aetna") served on the Centers for Medicare and Medicaid ("CMS").[1] For the reasons that follow, the Special Master recommends that the Court deny United's Motion.

I. Background

On September 14, 2016, the Special Master issued Report and Recommendation No. 2 in this case, concerning United's Motion to Amend the Protective Order to (a) permit a non-party which produced materials to the Department of Justice to designate certain of those materials as irrelevant to the claims at issue in this case, thereby preventing DOJ from producing the materials to Defendants; (b) prohibit disclosure of non-party confidential information to any outside counsel unless that outside counsel certified that he or she was not involved in either

[1] United's Motion states that it is directed toward Aetna's subpoena issued to CMS. (Mot. At 1). For purposes of this litigation, CMS is represented by the United States Department of Justice ("DOJ"). Aetna notes that it also issued a subpoena directly upon United seeking, *inter alia*, the same information at issue here. (Opp. at 1; Opp. Exh. A RFP 12). That subpoena is not directly before the Special Master as part of this Motion.

Defendants' competitive decision making, and would not be for a period of two years after conclusion of this litigation; and (c) require the parties to identify all individuals who access confidential information, and to certify that such information has been destroyed at the conclusion of this case. [*See* Report & Recommendation No. 2 (Dkt. No. 112) at 3-6].

The Special Master recommended that the Court deny United's Motion because United failed to provide specific facts demonstrating that it would suffer harm under the terms of the Protective Order currently in effect. In the Report and Recommendation, the Special Master noted that

> [t]he current Protective Order … limits both *who* may use United's confidential information (outside counsel, experts, and vendors only) and *how* they may use it (exclusively for purposes of this litigation). It is not evident, therefore, how [particular confidential information provided by United] may be provided to any individual who may be in [a] position to use this information to Defendants' advantage or to United's disadvantage, and United has provided no 'specific demonstration of facts' showing how this may be the case.

[*Id*. at 7-8 (emphasis in original) (citations omitted)]. On September 16, 2016, UnitedHealth filed a Notice that it did not intend to appeal Report and Recommendation No. 2. [Dkt. No. 119].

Shortly after Report and Recommendation No. 2 was entered, United filed the instant Motion in an effort to prevent Plaintiff United States from responding to a subpoena issued by Defendants Aetna, Inc., seeking information regarding United's 2017 Medicare Advantage bid

pricing tools ("BPTs"). United originally submitted these materials to the CMS as part of its Medicare Advantage biding for 2017.[2]

United contends that its 2017 BPTs "are particularly sensitive" because they "detail United's competitive plans and expected profit for the upcoming contract year." (Mot. at 1).[3] According to United, disclosure of the BPTs "exposes United to significant competitive harm while providing little, if any, benefit to Aetna." (*Id*. at 2). United notes that Aetna already possesses United's 2012-2016 BPTs, and suggests that the 2017 BPTs would provide no benefit to Aetna beyond the information already provided in connection with the earlier BPT disclosure. (*Id*.) In support of its assertion that disclosure of the 2017 BPTs would be damaging, United argues:

> Defendants are United's competitors, and disclosure of the 2017 BPTs – forward-looking information regarding active competitions – would undermine the policy that a non-party to merger should be able to prohibit access by competitive decision makers to its competitively-sensitive information. . . (citation omitted). Because the 2017 BPTs detail United's current competitive plans, disclosure to United's competitors *could* reduce competition and harm customers.

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[2] As part of its Opposition to the instant Motion, Aetna submitted a declaration from James Paprocki, Aetna's Head Actuary for Individual Medicare Advantage, who oversees Aetna's own Medicare Advantage bidding. (*See* Opp. Exh. C at ¶ 2). Mr. Paprocki explains that

> [e]ach year, insurers offering Medicare Advantage plans are required to submit bids for the upcoming calendar year in early June. After receiving bids, CMS will follow up as needed with individual insurers, in order to resolve any questions CMS has and to ensure that each bid complies with applicable requirements. Once this process has completed, CMS will notify the insurer that its bid has been finalized. After the initial June submission, an insurer cannot change its bid except as needed to account for input from CMS or to correct errors.

(*Id*. at ¶ 3). The information that Aetna seeks through its subpoena to CMS stems from United's participation in this bid process.

[3] All of United's arguments and factual assertions rest solely upon statements of counsel. United submitted no declarations from any United employee involved in the BPT/bid process.

(*Id*. at 3)(emphasis supplied).

According to United, even though the current Protective Order does not permit disclosure to Aetna or Humana's in-house counsel, because "the PO does not prohibit outside professionals involved in competitive decision-making from accessing" confidential information, "[i]t is unrealistic to expect [outside professionals] advising defendants regarding their Medicare Advantage businesses not to be influenced (inadvertently or otherwise) by United information received in this litigation." (*Id*.)

Aetna argues that United's Motion should be denied for three reasons: (1) lack of standing; (2) United's prior waiver of objection; and (3) because United has failed to meet its burden to show that the subpoena should be quashed.

First, Aetna argues that United lacks standing to raise the Motion to Quash because Aetna has issued a direct subpoena to United for the same information, which United has not challenged. (Opp. at 1). According to Aetna, "[b]ecause the BPT documents sought in the CMS subpoena are already available through unchallenged, independent sources [the Aetna subpoena to United], [the CMS] subpoena does not 'directly implicate United's privilege or rights,' as United admits is necessary for standing." [*Id*. (citations omitted)].

Aetna presents two arguments for waiver. It contends that United has waived its right to move to quash either Aetna's subpoena to CMS or Aetna's direct subpoena to United "by expressly agreeing to itself produce the 2017 BPTs." (*Id*. at 2). Aetna provides a copy of the Objections to Aetna's Subpoena Requests which United served on Aetna in response to Aetna's direct subpoena. In those Objections, United notes that in response to Aetna's request for United's BPTs for 2010 to the present, it "is willing to produce documents responsive to this request … following a good faith meet and confer with Aetna in an attempt to narrow this

Request and agree on a reasonable scope of responsive information." (Opp. Exh. B at 21). Aetna contends that, through this response, "United expressly elected not to challenge Aetna's receipt of the documents at issue." (Opp. at 2).

Second, Aetna notes that Special Master Order No. 1, entered on August 25 (Dkt. No. 74) directed non-parties who intended to seek modifications to the Protective Order to provide notice of their intent to seek modifications to the Protective Order by August 31, 2016, and that Special Master Order No. 2, entered on September 2 (Dkt. No. 92), directed UnitedHealth, specifically, in addition to three other identified non-parties who "objected to production to the parties of nonparty material previously produced to the Department of Justice during the government investigation of this case based on concerns related to the current Protective Order" to submit formal motions to amend the Protective Order no later than September 6. (Opp. at 2). Aetna argues that, because United submitted briefing in response to both of these Orders, but failed to raise its concerns with the 2017 BPT data, United has waived its right to seek to prevent production of that information at this time. (Opp. at 2).

Finally, Aetna argues that, in addition to the previously listed procedural concerns, United's Motion fails on its merits because United has failed to show that "extraordinary circumstances" warrant quashing the CMS subpoena. (Opp. at 3). According to Aetna, United has not shown that any competitive decision makers can or will access the data at issue. Likewise, Aetna argues that United has not shown that it will suffer any particularized harm if the 2017 BPT data is produced, and that United cannot make such a showing because CMS required all insurers, including Aetna and United, to submit 2017 bid data in June 2016, after which time such bids could not be modified. Aetna reasons that because its own 2017 bid has

already been approved, Aetna cannot derive any advantage at this time from seeing United's bid information.

In its Reply, United asserts that both case law and Section B(2) of the Protective Order grant it standing to "protect its Confidential Information from disclosure." [Reply at 1 (citation omitted)]. Second, United argues that it did not waive its objections because it did object to Aetna's subpoena to it (United) and "never agreed to produce the entire BPTs." (*Id*.).[4] Likewise, United contends that it did not learn that DOJ intended to produce the 2017 BPTs until the week of September 12, after United had submitted its responses to Special Master Order Nos. 1 and 2, at which time "it *immediately* informed the parties that it intended to seek protection." [*Id.* (emphasis in original)]. Third, United argues that, because Report & Recommendation No. 2 only specifically addressed United's Motion to Modify the Protective Order, that Report & Recommendation "did not address the production requirements for any specific document." (*Id*. at 3). Finally, United argues that Aetna has failed to show that Aetna will suffer harm if it is denied access to the 2017 BPT information, nor has Aetna showed why it needs access to this data. (*Id*.)

The Special Master has considered all of the papers and the arguments made therein. This recommendation follows.[5]

[4] The submissions to the Special Master here show only that United's responses to Aetna's subpoena detail numerous objections to Aetna's requests. Likewise, United has not provided any evidence whether it formally noted objections to CMS when it learned that CMS intended to produce the 2017 BPT data to Aetna.

[5] By email dated September 15, 2016, the United States informed the Special Master that it expresses no position regarding Third Party UnitedHealth Group's Motion to Quash and would not be filing a responsive pleading. [*See* Email from Christopher Wilson, Trial Attorney, U.S. Dep't of Justice, to Special Master and Parties (Sept. 15, 2016, 4:16 EST)].

II. Legal Standard

"A motion to quash, or for a protective order should generally be made by the person from whom the documents or things are requested." [*Washington v. Thurgood Marshall Acad.,* 230 F.R.D. 18, 21 (D.D.C. 2005) (citing 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2459 (2d ed. 1995))]. Nevertheless, Rule 45 of the Federal Rules of Civil Procedure permits a court to quash a subpoena "to protect a person subject to *or affected by* a subpoena" if the subpoena requires "disclosing a trade secret or other confidential research, development, or commercial information." [Fed. R. Civ. P. 45(d)(3)(B)(i) (emphasis added)].

Two factors should be considered when determining whether to quash a subpoena under Rule 45: (1) whether releasing the information would "unfairly harm the disclosing party's ability to compete in the marketplace"; and (2) "who could potentially receive the disclosed information, assuming 'that disclosure to a competitor is more harmful than disclosure to a non-competitor.'" [*Albany Molecular Research, Inc. v. Schloemer*, 274 F.R.D. 22, 25 (D.D.C. 2011) (Bates, J.) (citing *Falicia v. Adv. Tenant Serv. Inc.*, 235 F.R.D. 5, 7 (D.D.C. 2006))].

"The burden is on the movant [here, United] to establish … that a subpoena duces tecum should be quashed." [*Washington*, 230 F.R.D. at 21 (citing U.S. v. Intern. Bus. Mach. Corp., 83 F.R.D 97, 104 (S.D.N.Y. 1979))]. Because "[t]he quashing of a subpoena is an extraordinary measure, and is usually inappropriate absent extraordinary circumstances … the movant's burden is greater for a motion to quash than if [the movant] were seeking more limited protection." [*Flanagan v. Wyndham Intern. Inc.*, 231 F.R.D. 98, 102 (D.D.C. 2005) (citing *Westinghouse Elec. Corp. v. City of Burlington,* 351 F.2d 762, 766 (D.C.Cir.1965); *Salter v. Upjohn Co.,*593 F.2d 649, 651 (5th Cir.1979); and *Rolscreen Co. v. Pella Prod. of St. Louis, Inc.*, 145 F.R.D. 92, 96 (S.D. Iowa 1992)]. Likewise, "while a decision whether to quash or to modify a subpoena is

within a judge's discretion, when appropriate, the [court] should consider the possibility of modifying the subpoena rather than quashing it." [*Estate of Klieman v. Palestinian Authority*, 293 F.R.D. 235, 240 (D.D.C. 2013) (citing *Linder v. Nat'l Sec. Agency,* 94 F.3d 693, 695 (D.C.Cir.1996) and quoting *Northrop Corp. v. McDonnell Douglas Corp.,* 751 F.2d 395, 403 (D.C.Cir.1984))].

III. Discussion

a. Standing

Aetna's standing argument essentially rests upon the fact that United failed to challenge Aetna's subpoena served directly on United which seeks the same data at issue here. For purposes of this Motion and this subpoena only, the Special Master assumes *arguendo* that United has standing to challenge the subpoena served on CMS.

Ordinarily, the party from whom discovery is sought is responsible for moving to quash a subpoena. (*See Washington*, 230 F.R.D. at 21). Rule 45 expressly permits a court to quash a subpoena to protect "a person … affected by a subpoena," however, if the subpoena requires "disclosing a trade secret or other confidential research, development, or commercial information." [Fed. R. Civ. P. 45 (d)(3)(B)(i)]. The CMS subpoena plainly seeks United's commercial information and for this reason United has "a real and defined interest in the business records requested in [the CMS] subpoena." [*Albany Molecular Research, Inc. v. Schloemer*, 274 F.R.D. 22, 25 (D.D.C. 2011)]. The Court therefore may exercise its discretion to

quash or modify the subpoena if it finds that United has shown that it satisfies the rest of the conditions of Rule 45(d)(3)(B)(i).[6]

Moreover, to the extent that Aetna contends that United lacks standing here because Aetna served a separate subpoena on United seeking the same information that Aetna sought through the CMS subpoena, but United has not moved to quash that direct subpoena, the Special Master does not accept Aetna's argument. (*See* Opp. at 1 and Exh. A). Aetna served the subpoena on United on August 10, 2016, and United responded to Aetna with its Objections to that subpoena on August 18. While neither party provided information regarding the current status of the direct subpoena, it is plain that United has objected to it. Aetna does not represent that United has produced any documents in response to the subpoena, or in particular in response to Request No. 12, which seeks the BPT documents at issue here.

Indeed, United specifically objected to Request No. 12 because it "calls for the production of materials containing confidential commercial information … which would cause enormous economic damage to United and damage to competition in the hands of competitors." [Opp. Exh. A (United Obj. to Aetna Subpoena) at 21]. The Special Master understands this objection to be one raising the risk of competitive harm.

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[6] Although not necessary to resolve in this motion, the Special Master recognizes the conflicting case law regarding who may move to quash a subpoena under Rule 45(d)(3). [*Compare In re Boston Scientific Corp. Pelvic Repair Sys. Product Liability Litig.,* 2014 WL 1329944 at *1 n. 1 (S.D. W.Va. Mar. 31, 2014)(determining that a non-party has standing to challenge a subpoena if "the person objecting to the subpoena has a personal right or privilege in the information sought by the requester") (citations omitted)) and *Putman v. Lima Auto Mall, Inc*., 2008 WL 5159800 at *1 (S.D. Ill. Dec. 8, 2008) (non-party had standing to challenge a subpoena issued to another non-party where the subpoena concerned the movant's intellectual property) *with R. Prasad Indust. v. Flat Irons Environ. Solutions Corp.,* 2014 WL 2804276 at *2 (D. Ariz. June 20, 2014)(non-party lacked standing to challenge subpoena issued to another non-party when the movant based her motion on what is now Rule 45 (d)(3)(A), which obligates a court to quash a subpoena under certain circumstances))].

Accordingly, while the subpoena directly served on United by Aetna may not have been subject to formal motions practice as of yet,[7] therefore, the Special Master is not persuaded by Aetna's argument, based on United's objecctions, that the CMS documents "are already available" through the subpoena served directly on United.

Accordingly, United has standing to bring this particular Motion to Quash.

b. Waiver

Aetna argues that United has waived its right to move to quash either the CMS subpoena or the direct subpoena because United responded to Aetna subpoena request No. 12 by stating that it is "'willing to produce documents responsive to the BPT request' following agreement 'on a reasonable scope of responsive information.'" [Opp. at 2 (citing United Obj. to Aetna Subpoena at 21)].

United's statement does not operate as a waiver in these circumstances. "Waiver is the 'intentional relinquishment or abandonment of a known right.'" [*U.S. v. Philip Morris Inc.*, 300 F. Supp. 2d 61, 68 (D.D.C. 2004) (quoting *United States v. Weathers,* 186 F.3d 948, 955 (D.C.Cir.1999))]. United's offer to produce some material responsive to Request No. 12 was plainly contingent on the resolution of its concerns through a meet and confer with Aetna. In that same response, United strongly objected to Aetna's request on the basis of risk of competitive harm. In light of those objections, United's good faith offer to meet and confer with Aetna and to produce some BPT-related documents cannot be read as a waiver which would require United to produce *all* BPT-related documents. Put differently, there is nothing in United's response which can be read an "intentional relinquishment or abandonment" of its right to object to Aetna's

[7] Given the fact that the same information is sought by each subpoena and the similarity of objections, the Special Master does not anticipate any motions practice arising from the request for 2017 BPTs in the subpoena served directly on United.

subpoena, or as an "express[ ] agree[ment]" to produce the 2017 BPT data in particular. (*See* Opp. at 2).

The Special Master is troubled, however, by United's failure to raise the BPT issue in response to Special Master Order No. 1 or No. 2. Order No. 1 offered United an opportunity to express "concerns with the current text of the relevant Protective Order." (Dkt. No. 74 at ¶ I). Order No. 2 directed United to submit a formal Motion regarding its Objections to the Production of its documents by DOJ to Aetna. (Dkt. No. 92 at ¶ 1). Although United responded to both Orders, it failed to mention the 2017 BPTs document issue in either response.[8] While the instant Motion is styled as a Motion to Quash, it directly implicates many of the same issues addressed in United's Motion to Amend the Protective Order, in particular United's concerns that disclosure of its business information to Aetna's outside counsel may inflict competitive harm on United.

Moreover, United represents that it learned during the week of September 12 that DOJ intended to produce United's 2017 BPTs, and filed its motion within days of so learning. The Special Master accepts United's representation. Nevertheless, because Aetna had earlier issued the subpoena directly to United seeking the 2017 BPT documents, United was aware that Aetna was interested in this material. To the extent that the 2017 BPT documents raise issues of particular concern to United, United should have raised this matter sooner, or should have, at a

[8] The Special Master notes United's representation that it was not aware that DOJ intended to provide Defendants with the 2017 BPT data until recently. (*See* Reply at 1). In United's objections to Aetna's subpoena served on it directly, however, United notes that the BPT data is "already in the possession, custody, or control of plaintiffs or defendants, including but not limited to information in the DOJ's Investigation Materials." (Opp. Exh. B at 21). United therefore was aware that the BPT information may be included as part of DOJ's production of United's investigation materials, and should have raised this issue sooner.

minimum, noted in its Motion to Amend the Protective Order that it was particularly concerned about the production of the 2017 BPT data under the terms of the current Protective Order.[9]

Nevertheless, because the instant Motion does not re-raise the precise issues addressed in United's Motion for a Protective Order or in Report and Recommendation No. 2, addressing that Motion, the Special Master will not find that waiver prevents a consideration of the merits of this Motion to Quash. Looking prospectively and hoping to avoid serial motions focusing on the same information and concerns, the Special Master notes here that the information sought with respect to the 2017 BPTs is also sought in the Aetna subpoena served directly on United.

c. Merits

As noted above, when determining whether to quash a subpoena under Rule 45, a court should first consider whether releasing the information would "unfairly harm the disclosing party's ability to compete in the marketplace," and, assuming that that question is answered in the affirmative, consider "who could potentially receive the disclosed information, assuming 'that disclosure to a competitor is more harmful than disclosure to a non-competitor.'" [*Albany Molecular*, 274 F.R.D. at 25).

Neither one of these factors merit quashing the subpoena in this case, for exactly the same reason - United has not shown that release of the 2017 BPT data under the strictures of the current Protective Order is likely to harm its competitive standing. The moving papers are devoid of factual support in the form of declarations and are presented merely as the arguments of counsel. This is not sufficient.

[9] At least one other non-party, Aon plc, sought relief limited to a very specific set of information in response to the Special Master's request for issues regarding the Protective Order.

United argues that Aetna and Humana are "United's competitors, and disclosure of the 2017 BPTs … would undermine the policy that a non-party to [a] merger should be able to prohibit access by competitive decision makers to its competitively-sensitive information." [Mot. at 3 (citing *AB Electrolux*, 139 F. Supp. 3d at 392)]. *AB Electrolux* is inapplicable here. That case is premised on the concept that "[i]n merger cases, Courts may prohibit access to confidential information from those who can be described as 'competitive decision makers.'" (139 F. Supp. 3d at 392). United has neither shown nor even raised any basis beyond speculation that any "competitive decision makers" will have access to its 2017 BPT data if that data is released to Defendants.

Instead, for all of the reasons previously stated in Report and Recommendation No. 2, United has failed to provide "any specific facts suggesting, let alone demonstrating, that its information may in fact be given to any of its direct competitors," particularly where, as here, the operative Protective Order "limits both *who* may use United's confidential information (outside counsel, experts, and vendors only) and *how* they may use it (exclusively for purposes of this litigation)." (*See* Report & Recommendation No. 2 at 7-9).

Notably, United merely speculates and has not provided any evidence that any Aetna or Humana outside counsel "has had or is likely to have any involvement in Defendants' competitive decision making." (*Id*. at 10) Likewise, every individual eligible to view United's confidential information under Section E of the Protective Order must sign an "Agreement Concerning Confidentiality" confirming that he or she "understands that … failure to abide by the terms of the Stipulated Protective Order," including regarding maintaining the confidentiality of documents, "will subject me, without limitation to civil and criminal penalties for contempt of Court." [Amended Protective Order (Dkt. 108) Appendix A at ¶ 3].

United did not provide any specific facts in connection with its earlier Motion to Amend the Protective Order which would show that these provisions were not sufficient to prevent disclosure of material directly to its competitors, and it has not done so in connection with this Motion. As such, in this case, as in *Albany Molecular,* "[t]he existence of a protective order weighs against quashing the subpoena on commercial information grounds because the protective order is designed to protect and prevent public disclosure of confidential and sensitive business information, like that potentially at issue here." [274 F.R.D. at 26 (citing *Hillerich & Bradsby Co. v. MacKay*, 26 F. Supp. 2d 124, 127-28)(D.D.C. 2008))].[10]

Finally, to the extent that United argues that the BPTs documents are not relevant here, Rule 26 of the Federal Rules of Civil Procedure permits production of materials concerning "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." As the Special Master noted in Report and Recommendation No. 2,

> Even following the December 2015 revisions to this rule, numerous Courts in this District and in others have concluded that "relevance is still to be 'construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on" any party's claim or defense.'" [*United States ex rel. Shamesh v. CA, Inc*., 314 F.R.D. 1, 8 (D.D.C. 2016)

[10]Even if United had shown that its 2017 BPT data might be released to its competitors directly – which it has not – United still has not demonstrated that "extraordinary circumstances" exist to warrant quashing the subpoena here. [*Flanagan v. Wyndham Intern. Inc.*, 231 F.R.D. 98, 102 (D.D.C. 2005)(citations omitted)]. As Aetna points out, the 2017 bidding process is closed at this time, and CMS has already approved Aetna's bid and executed a contract with Aetna for 2017. (*See* Opp. at 4 and Exh. C ¶ 4). Aetna therefore could not derive any benefit with respect to the 2017 bid process.

With respect to the bid process beyond 2017, in its Reply brief, United argues that disclosure of this material could impact "bidding behavior, negotiations of contracted provider rates and sales growth strategies for 2018," but does not explain how disclosure of the 2017 material might have such an effect. (Reply at 3). United's vague references to potential harms are simply not sufficient to support the "extraordinary measure" of quashing Aetna's subpoena in this case. (*Flanagan*, 231 F.R.D. at 102).

> (quoting *Oppenheimer Fund, Inc. v. Sander*s, 437 U.S. 340, 351 (1978)); see *Green v. Cosby*, 314 F.R.D. 164, 171 (E.D. Pa. 2016); *Henry v. Morgan's Hotel Group, Inc*., 2016 WL 303114 at *3 (S.D.N.Y Jan. 25, 2016)]. Likewise, the rule provides that "[i]nformation within this scope of discovery need not be admissible in evidence to be discoverable." [Fed. R. Civ. P. 26 (b)(1)].

(Report and Recommendation No. 2 at 9 n.3). The BPT data is likely to bear on questions of market share and competition.[11] Given the broad definition afforded to relevancy at the discovery stage, the Special Master finds that this data is relevant to this case.[12]

IV. Conclusion

For all of these reasons, the Special Master recommends that the Court deny UnitedHealth's Motion to Quash the subpoena issued by Aetna to CMS in this case.[13]

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[11] Notably, United effectively concedes that the 2010 to 2016 bid data is relevant to this matter. (*See* Mot. at 2). Plaintiffs' Complaint centers around the impact that the proposed merger will have on the future of competition in the relevant markets. [*See generally* Complaint (Dkt. 1) at ¶¶ 11-12, 14, 31-33, 42-43, 47-52]. The 2017 BPT data offers forward-looking insight into such future competition, and is therefore likely to be relevance in terms of Rule 26.

[12] United also contends that Aetna's subpoena to CMS somehow places an undue burden upon United, even though the subpoena does not require United itself to produce any materials. (See Mot. at 2). In all of the cases that United cites in favor of its position, the non-party was the direct recipient of the subpoena at issue. [See *Cusamano v. Microsoft Corp*., 162 F.3d 708, 717 (1st Cir. 1998)(concluding that a Microsoft subpoena seeking to obtain various documents from non-party scholars placed a burden on those scholars which outweighed Microsoft's need for the documents because Microsoft had alternate sources of the same information); *Gonzales v. Google,* Inc., 234 F.R.D. 674, 683 (N.D. Cal. 2006)(noting that "a court determining the propriety of a subpoena balances the relevance of the discovery sought, the requesting party's need, and the potential hardship to the party subject to the subpoena.")(emphasis added)]. Moreover, in this District, "[t]he court entertains the burdensome objection only when the responding party demonstrates how the document is 'overly broad, burdensome, or oppressive, by submitting affidavits or offering evidence which reveals the nature of the burden.'" [U*.S. ex rel Fisher v. Network Software Assoc*., 217 F.R.D. 240, 246 (D.D.C. 2003)]. United has not made any such showing here.

[13] Given the specific, albeit limited, information sought by Aetna, there is no reasonable basis to try to modify the subpoena as an alternative to recommending a denial of the Motion to Quash.

V. Certification

Because this recommendation involves the interests of a non-party to this case, the Special Master, pursuant to paragraph 5 of the appointment order (Dkt. 53) certifies this Report and Recommendation for appeal to the Court. Pursuant to paragraph 5, UnitedHealth has 48 hours from the entry of this Report and Recommendation to file a brief noting an appeal. If UnitedHealth elects not to appeal to the Court, it is requested to notify the Court and the parties as soon as possible.

September 18, 2016

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