UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

SPECIAL MASTER REPORT AND RECOMMENDATION NO. 5

Pending before the Special Master is Plaintiffs' Motion to Compel Defendants to produce correspondence exchanged by Defendants' attorneys related to alleged breaches of Defendants' Merger Agreement (Dkt. No. 146). For the reasons that follow, the Special Master recommends that the Court grant in part and deny in part this Motion.

I. Background

This case concerns Plaintiffs' challenge to the proposed merger of healthcare insurers Anthem, Inc. and Cigna Corp. based on alleged violations of section 7 of the Clayton Act. [Complaint (Dkt. No. 1) ¶ 9].

On August 16, Cigna counsel informed the Special Master during a teleconference involving all parties to this case that the general counsel to Anthem and general counsel to Cigna had exchanged letters accusing their respective corporations of breaching the merger contract.

The following day, the United States served on each Defendant a Request for Production seeking

> all documents discussing Anthem's or Cigna's compliance or noncompliance with any term of the Merger Agreement, including documents discussing any actual, potential, or alleged breach of

> any term of the Merger Agreement. For avoidance of doubt, such documents include communications between counsel for Anthem and counsel for Cigna (whether in-house or outside counsel) relating to any disputes or disagreements about either company's compliance or noncompliance with any term of the Merger Agreement.

[Pl. Mot. Exh. C (Pl. 2nd RFPs to Anthem) at RFP 48; Pl. Mot. Exh. D (Pl. 2nd RFPs to Cigna) at RFP 42].

Both Defendants objected to Plaintiffs' request, claiming that the documents are protected under the joint defense privilege.[1] Following unsuccessful meet-and-confer sessions, Plaintiffs filed the instant Motion. Defendants each submitted an Opposition, and each Defendant provided to the Special Master for *in camera* review the documents that each believed to be responsive to Plaintiffs request. At oral argument on this Motion, the Special Master directed Defendants to file supplementary opposition papers addressing the privileges underlying the joint defense privilege, and to resubmit the documents for *in camera* review in a form that more readily identified exactly which documents and/or portions of documents each defendant claimed as privileged. Each Defendant subsequently provided the requested re-submissions, and Plaintiffs submitted a Reply brief.

The Special Master has reviewed all of the briefing provided to him, has examined the documents provided for *in camera* review, and has considered the arguments made at oral argument. This matter is now ripe for resolution.

II. Legal Standard

A. Relevance

Rule 26 of the Federal Rules of Civil Procedure permits a party to obtain discovery

[1] The Defendants entered into Common Interest and Confidentiality Agreements in December 2014 and August 2015 which outline the nature and scope of the Agreements. Defendants provided these Agreements to the Special Master for *in camera* review.

> regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

[Fed. R. Civ. P. 26(b)(1)].

In evaluating whether information is relevant, relevance is to be "'construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on' any party's claim or defense.'" [*United States ex rel. Shamesh v. CA, Inc*., 314 F.R.D. 1, 8 (D.D.C. 2016) (quoting *Oppenheimer Fund, Inc. v. Sanders*, 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)(both noting that the December 2015 Amendments to Rule 26 did not impact the standard for relevance)]. Nevertheless, "[a]s with most things in life, Rule 26 is not an all-or-nothing proposition," and the rule does not permit a party to issue expansive requests seeking information unrelated to the actual claims and defenses at issue in a case, or which are unlikely to lead to such information. [*Smith v. Café Asia*, 246 F.R.D. 19, 20 (D.D.C. 2007) (citing *Tequila Centinela, S.A. de C.V. v. Bacardi & Co. Ltd.*, 242 F.R.D. 1, 6 (D.D.C.2007))].

The burden is on the party seeking discovery to show that the information sought is within the scope of discoverable information under Rule 26. [Uni*ted States v. All Assets Held at Bank Julius Baer & Co*., __ F. Supp. 3d. __, 2016 WL 4082617 at *4, (D.D.C. July 29, 2016) (citing *Meijer, Inc. v. Warner Chilcott Holdings Co., III, Ltd*., 245 F.R.D. 26, 30 (D.D.C.2007) and Adv. Comm. notes to R. 26)]. "If that party carries its burden, the party resisting discovery

then must show 'why discovery should not be permitted,'" such as for reasons related to the privileges discussed next. [Id. (citing *Alexander v. F.B.I.*, 194 F.R.D. 316, 326 (D.D.C.2000)].

B. The Joint Defense Privilege

"The joint defense privilege, often referred to as the common interest rule, is an extension of the attorney-client privilege that protects from forced disclosure communications between two or more parties and/or their respective counsel if they are participating in a joint defense agreement." [*Minebea Co. Ltd. v. Pabst*, 228 F.R.D. 13, 15 (D.D.C. 2005) (quoting *United States v. Hsia*, 81 F. Supp. 2d 7, 16 (D.D.C. 2000))]. "The doctrine permits represented parties who share a common legal interest to exchange privileged information in a confidential manner for the purpose of obtaining legal advice without waiving the attorney-client [or work product] privilege." [Katharine Traylor Schaffzin, *An Uncertain Privilege: Why the Common Interest Doctrine Does not Work and How Uniformity Can Fix It*, 15 B.U. Pub. Int. L.J. 49, 50 (2005)(citations omitted)].

Because the joint defense privilege operates as an extension of the attorney-client privilege and work product doctrine, a party who asserts the joint defense privilege must first show that one of these underlying privileges applies to the documents at issue. (*Minnebea*, 228 F.R.D. at 16). Should the party make this showing, it must then demonstrate that "'(1) the communications were made in the course of a joint defense effort; (2) the statements were designed to further the effort; and (3) the privilege has not been waived.'" [*U.S. ex rel Purcell v. MWI Corp.*, 209 F.R.D. 21, 25 (D.D.C. 2002) (quoting *In re Sealed Case* (1994), 29 F.3d 715, 719 n. 5 (D.C. Cir. 1994))].

Communications are made in the course of a joint defense effort when "the parties have clearly and specifically agreed in some manner to pool information for a common goal."

[*Minnebea*, 228 F.R.D. at 16 (quoting 2 Stephen A. Saltzburg, et al., *Federal Rules of Evidence Manual* at 501-35-36 (8th ed. 2002))]. While "a written agreement is the most effective method of establishing the existence of a joint defense agreement … an oral agreement whose existence, terms and scope are proved by the party asserting it, may be enforceable as well." (*Id*.)

Finally, voluntary disclosure waives the privilege, but one party to the common interest cannot waive it unilaterally. (*Minebea*, 228 F.R.D., 15-16). No party to this case has alleged that the joint defense privilege has been waived, and this element is not at issue here.

C. Attorney Client Privilege

Because assertion of the joint defense privilege rests upon an initial showing that the attorney client privilege or work product doctrine apply, an explanation of each of these privileges is necessary to the resolution of this matter.

The attorney-client privilege "applies to a confidential communication between attorney and client if that communication was made for the purpose of obtaining or providing legal advice to the client." [*In re Kellogg Brown & Root, Inc.* (hereinafter "*KBR"*), 756 F.3d 754, 757 (D.C. Cir. 2014) (citation omitted)].

The privilege applies when:

> (1) the asserted holder of the privilege is or sought to become a client;
> (2) the person to whom the communication was made (a) is a member of the bar of a court or his subordinate and (b) in connection with this communication is acting as a lawyer;
> (3) the communication relates to a fact of which the attorney was informed (a) by his client, (b) without the presence of strangers, (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and
> (4) the privilege has been (a) claimed and (b) not waived by the client.

[*In re Sealed Case* (1984), 737 F.2d 94, 98-99 (D.C. Cir. 1984) (citation omitted)].

The privilege protects not only communications from client to attorney but also from attorney to client, provided that the latter communication "is based on confidential information provided by the client." [*Loftin v. Bande*, 258 F.R.D. 31, 34 (D.D.C. 2009)(quoting *Brinton v. Dep't of State*, 636 F.2d 600, 603-04 (D.C. Cir. 1980))]. However, "when an attorney conveys to his client facts acquired from other persons or sources, those facts are not privileged." (*Brinton*, 636 F.2d at 604).

Additionally, because the privilege only applies to communications made for the purpose of obtaining legal advice, "communications made by and to a lawyer with respect to business matters, management decisions, or business advice are not protected." [*United States v. Motorola*, 1999 WL 552553 at *3 (D.D.C. May 28, 1999)]. Nevertheless, obtaining legal advice need not be the sole purpose of the communication. Rather, the D.C. Circuit has concluded that the privilege will apply to the document if obtaining or providing legal advice was "one of the significant purposes" of the communication. (*KBR*, 756 F.3d at 758-59).

Finally, the privilege can be waived by voluntary disclosure, which is "inconsistent with the confidential relationship" between client and attorney [*In re Subpoenas Deuces Tecum*, 738 F.2d 1367, 1369 (D.C. Cir. 1984), or by inadvertent disclosure if the holder the privilege did not take reasonable steps to prevent disclosure or failed to take reasonable steps to rectify the error. (*See* Fed. R. Evid. 502(b); *Convertino v. United States*, 674 F. Supp. 2d 97, 109 (D.D.C. 2009)]. It is not, however, qualified, meaning that, unlike factual work product protection, it cannot be overcome based on a showing of substantial need and inability to obtain similar facts without undue hardship.

D. Work Product Doctrine

The work product doctrine "protects written materials lawyers prepare 'in anticipation of litigation.' … By ensuring that lawyers can prepare for litigation without fear that opponents

may obtain their private notes, memoranda, correspondence, and other written materials, the privilege protects the adversary process." [*In re Sealed Case* (1998), 146 F.3d 881, 884 (D.C. Cir. 1998) (citing Fed. R. Civ. P. 26(b)(3) and *In re Sealed Case* (1997), 107 F.3d 46, 51 (D.C.Cir.1997))].

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

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

Finally, both factual and opinion work product protection can be waived by production "to an adversary or a conduit to an adversary" of the party claiming that information is protected. (*Deloitte*, 610 F.3d at 140). "[S]uch disclosure, under the circumstances, is inconsistent with the maintenance of secrecy from the disclosing party's adversary." (Id.)

III. Discussion and Analysis

a. Relevance

The United States argues that the information sought is relevant because "the Breach Letters reveal the current state of hostility between Defendants," thereby providing evidence of barriers to integrating Anthem and Cigna. (Mot. at 3). According to Plaintiffs, such barriers in turn suggest that the efficiencies which Defendants contend will flow from this merger are in fact less likely to come to fruition. (*Id*. at 1).

Defendant Anthem argues that "any disagreements between the in-house lawyers are irrelevant to the efficiencies that can be achieved from the proposed acquisition." (Opp. at 2). Anthem contends that this is the case because "[n]o pre-closing disagreements between the lawyers can have any effect on the undisputed authority of post-closing management to achieve these efficiencies," noting that "synergies by definition are post-closing developments." (*Id*. at 1).

The information sought is plainly relevant to the question of efficiencies. Anthem's Fourth Affirmative Defense claims that:

> The proposed acquisition is procompetitive. The acquisition will result in substantial efficiencies and other procompetitive effects that will directly benefit consumers in greater access to affordable healthcare. These benefits outweigh any alleged anticompetitive effects.

[Anthem Answer (Dkt. 15) at 18].

The efficiencies to be gained in this merger, however, will stem from the existence of the new corporation as an integrated entity. Under the terms of the Merger Agreement, current Anthem Chief Executive Officer Joseph Swedish will be the Chief Executive Officer of the merged company, and current Cigna Chief Executive Officer David Cordani will be the President and Chief Operating Officer. [*See* Anthem Opp. Exh. C (Merger Agreement) at 10]. In addition, the new entity's Board of Directors will consist of nine current members of Anthem's Board of Directors and five current members of Cigna's Board of Directors. (*Id*. at 9). To the extent that the letters alleging breach reflect hostility between these individuals, such hostility may hamper these individuals' ability to work together to implement the contemplated efficiencies. Similarly, to the extent that the letters suggest divergent opinions relating to each party's conduct under the Merger Agreement, such disagreement also arguably indicates that the merged entity may not be able to bring forth the efficiencies that Defendants promise. The letters are therefore directly relevant to the Court's assessment of whether Anthem's proposed efficiencies are in fact likely to counter the alleged anticompetitive outcomes that DOJ anticipates will occur.

Anthem's arguments that this information is not relevant apparently are intended to suggest that the newly-merged company will be able to overcome or, perhaps, overrule, any disagreements in order to obtain post-merger efficiencies. (*See* Anthem Opp. at 1). That may be the case. But to the extent that this is true, Anthem's arguments at best show that the Court should afford less weight to any evidence of pre-merger disagreements between the merging parties.

Indeed, by electing to assert post-merger synergies as an affirmative defense to this action, Anthem itself has placed the synergies into issue in this case. Rule 26(b)(2) permits

discovery regarding "any nonprivileged matter that is relevant to any party's claim *or defense*." Anthem has raised synergies as a defense to this Action. The breach letters provide evidence as to the likelihood that those synergies will actually develop. The letters are relevant here.[2]

b. Attorney Client privilege

Because Plaintiffs have shown that the documents are relevant, the burden now shifts to the party resisting discovery – Defendants - to show why the letters should not be produced. [*Alexander v. FBI,* 192 F.R.D. 50, 53 (D.D.C.2000)]. While Anthem and Cigna contend that the documents at issue are protected by the Joint Defense privilege, as discussed above, this privilege is an extension of the attorney-client privilege and work product doctrine, and can only be invoked upon a showing that one of these underlying privileges applies to the document.

Most of the documents provided for review by both Anthem and Cigna were drafted by either Thomas Zielinski, in-house counsel to Anthem, by Nicole Jones, in-house counsel to Cigna, or by outside counsel to either Anthem or Cigna.[3]

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[2] The Defendants have differing views regarding the scope of documents that are responsive to Plaintiffs' request. More precisely, one Defendant interprets Plaintiffs' request as seeking all documents related to allegations of breach of contract, and one Defendant interprets the request as seeking only those documents which actually allege that one of the parties has breached the agreement. At oral argument, the United States indicated that it did in fact intend to seek all documents related to allegations of breach, and that it is prepared to serve an additional request for production to clarify any ambiguities in the first request. Given the compressed discovery schedule in this case, the Special Master believes it is most efficient to review all documents presented to him, particularly because both sets of documents – those alleging breach of contract, and those which lead to the allegations of breach – are relevant to Anthem's Fourth Affirmative Defense.

[3] Cigna document numbers 3a, 5, 17a, 23a, 28a, 33a, 41, and 46, and Anthem document numbers 2, 5, and 19 were transmitted on behalf of Mr. Zielinski by his agent. This does not impact the application of the privilege. [*Fed. Trade Comm. v. TRW, Inc.*, 479 F. Supp. 160, 163 n.7 (D.D.C. 1979)]. The Special Master treats these materials as having been conveyed by Mr. Zielinski directly.

The exception to this is Cigna document number 10, which is an email from Anthem's Chief Executive Officer Joseph Swedish to Mr. Zielinski. Defendants have not shown that this communication contains confidential information conveyed for the purpose of obtaining legal advice. Defendants have not provided any contextual information for this document, and have not provided any evidence that this communication was made for the purpose furthered by the attorney-client privilege. The attorney-client privilege therefore does not protect this email. Likewise, because the email is not a document prepared by an attorney in anticipation of litigation, it also does not qualify for work product protection. This email (but not the communications quoted beneath the email) must therefore be produced.

With respect to the remaining documents, neither Anthem nor Cigna has provided sufficient argument which "presents the underlying facts demonstrating the existence" of the attorney-client privilege. [*In re Lindsey*, 158 F.3d 1263, 1270 (D.C. Cir. 1998)]. Notably, the law of this Circuit requires a party invoking the protections of the attorney-client privilege to show that "the communication relates to a fact of which the attorney was informed by his client," (*In re Sealed Case* (1984), 737 F.2d at 98-99), but neither Defendant has provided sufficient context for these documents to show precisely what confidential facts the documents contain, or what the source of these facts was. Indeed, while Anthem's Supplemental Opposition claims that the attorney-client privilege protects this material because the documents "reveal client confidences made to counsel for the purpose of obtaining legal advice on the regulatory approval effort," Anthem fails to detail what the confidences are, or who conveyed them to counsel. (*See* Anthem Supp. Opp. at 2-3). Likewise, Exhibit A to Anthem's Supplemental Opposition purportedly provides the "basis of the privilege or work product claim," but provides only broad descriptions of the documents provided for review, and does not describe the confidential information

conveyed. (*See id*. Exh. A). Cigna has likewise failed to offer any context for the documents which support a finding that the documents are protected by the attorney-client privilege. "[W]hen attempting to invoke the attorney-client privilege, a party must prove each required element of the privilege and 'a blanket assertion of the privilege will not suffice.'" [*United States v. Trabelsi*, 2015 WL 5175882 at *4 (D.D.C. Sept. 3, 2015) (quoting *In re Sealed Case* (1984), 737 F.2d at 98-99)]. Defendants have failed to prove each element of the privilege as to these documents.

Accordingly, the Special Master concludes that the attorney-client privilege does not protect these documents.[4]

[4] Defendants' failure to make the required showing regarding client confidences is dispositive of this question. Nevertheless, the Special Master also notes that Defendants' invocation of the attorney-client privilege is lacking in other respects. Importantly, while "a lawyer's status as in-house counsel 'does not dilute the privilege,'" [*KBR I*, 756 F.3d at 758 (quoting *In re Sealed Case* (1984), 737 F.2d at 99)], "[b]ecause an in-house lawyer often has other functions in addition to providing legal advice, the lawyer's role on a particular occasion will not be self-evident as it usually is in the case of outside counsel." [*Boca Investerings Partnership v. United States*, 31 F.Supp.2d 9, 12 (D.D.C. 1998)]. Accordingly, because "[o]nly communications that seek 'legal advice' from a professional legal advisor in his [or her] capacity as such' are protected," [*Minebea*, 228 F.R.D. at 21 (quoting *In re Lindsey*, 158 F.3d at 1270)], "[a] court must examine the circumstances to determine whether the lawyer was acting as a lawyer rather than as business advisor or management decision-maker." (*Boca Investerings*, 31 F. Supp. 2d at 12). Defendants have not provided sufficient contextual information for these documents upon which the Special Master can determine definitively for purposes of the attorney-client privilege that Anthem's and Cigna's in-house counsel were acting in a legal, rather than business, capacity when they issued these communications.

Similarly, Defendants have provided scant evidence that any underlying confidential information was relayed for the purpose of obtaining legal advice, primarily because they have not provided any information as to what actual underlying confidential information these documents contain. Based on the record before him, the Special Master cannot determine the purpose for the conveyance of asserted confidential information in these circumstances, but does note the recent guidance from the Court of Appeals that a communication will qualify for protection "so long as obtaining or providing legal advice was one of the *significant* purposes" of the communication, and does not need to be the sole purpose of the communication. (*KBR*, 756 F.3d at 758-59).

c. Work Product Protection

The documents do qualify as protected opinion work product.

First, the documents were prepared in anticipation of litigation. "To determine whether a particular document was prepared in anticipation of litigation, this Circuit applies "the 'because of' test, asking 'whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.'" [*United States v. ISS Marine Svcs., Inc.*, 905 F. Supp. 2d 121, 133-34 (D.D.C. 2012) (quoting *Deloitte*, 610 F.3d at 137)]. The documents presented for *in camera* review can be placed into two categories in this regard: (1) documents and portions of documents prepared because of the prospect of litigation by the Department of Justice to enjoin the Anthem-Cigna merger; and (2) documents and portions of documents dealing with allegations of breaches of the Merger Agreement. Based on review of all documents in both categories, the Special Master concludes that the attorneys who drafted the documents "had a subjective belief that litigation was a real possibility, and that belief [was] . . . objectively reasonable." [*In re Sealed Case* (1998), 146 F.3d at 884].

With respect to the first category of materials, the Special Master notes that documents in this category were all drafted after the Department of Justice began its investigation into the merger and within three months of this lawsuit being filed, and all address strategies for obtaining approval of the merger or success at the litigation stage. These documents reflect an objectively reasonable belief that litigation may develop. With respect to the second, documents or portions of documents containing allegations of breach of contract were drafted with a subjectively and objectively reasonable belief that such allegations may result in litigation related

to the alleged breaches. None of the documents from either category can be fairly said to have been prepared in the usual course of business.

Finally, the documents qualify as opinion work product because the information discussed in them reflects the "mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation [or future litigation]." [Fed. R. Civ. P. 26(b)(3)(B)]. Each document other than Cigna Document No. 10 reflects attorney strategies for approaching litigation. Disclosing these documents would "reveal or provide insights into the 'mental processes of the attorney' in the analysis and preparation" of the merger litigation or possible future actions. [*Shapiro v. U.S. Dep't of Justice*, 969 F. Supp. 2d 18, 32 (D.D.C. 2013)(citing *Dep't of the Interior and Bureau of Indian Affairs v. Klamath Water Users Protective Assoc.*, 532 U.S. 1, 8 (2001) and *United States v. Nobles*, 422 U.S. 225, 238 (1975)].

Some of the documents do contain factual information, but those facts are inseparable from the opinion work product because they "reflect the attorney's focus in a meaningful way." (*Boehringer*, 778 F.3d at 151-52 (citing Dir. Office of Thrift Supervision, 124 F.3d 1304, 1308 (D.C. Cir. 1997)]. These documents do not simply memorialize an attorney's interview of a witness. (See *In re Sealed Case* (1997), 124 F.3d at 236, and cases cited therein). Rather, to the extent that the documents contain facts, the facts included support the legal arguments, theories and strategies at the heart of these documents. Moreover, even assuming that parts of the documents might be construed as factual work product, the government has not made any argument regarding the work product privilege, nor has it shown that it has a "substantial need" for the facts contained in these documents or that it "cannot, without undue hardship, obtain their substantial equivalent by other means." [*Boehringer*, 778 F.3d at 153 (citing Fed.R.Civ.P. 26(b)(3)].

Opinion work product is "virtually undiscoverable," (*Deloitte*, 610 F.3d at 135), and can only be disclosed upon an "extraordinary showing of necessity," [*In re Sealed Case* (1982), 676 F.2d at 811], which Plaintiffs do not make here.

Nevertheless, the reason that the documents are at issue for purposes of this Motion is because each Defendant voluntarily disclosed the contents of the documents to the other. Voluntary disclosure waives work-product protection when the voluntary disclosure is "to an adversary or a conduit to an adversary." (*Deloitte*, 610 F.3d at 140). This is the case because "such disclosure, under the circumstances, is inconsistent with the maintenance of secrecy from the disclosing party's adversary." (*Id*.)

Defendants did not waive privilege as to documents within the first category – documents prepared in anticipation of litigation to enjoin the merger – because Anthem and Cigna cannot be considered to have been adversaries in this situation. This is so for essentially the same reason that the joint defense privilege protects these documents: the parties were engaged in a joint defense and effectuation of the merger, exchanged the material at issue in furtherance of that joint defense and the merger, and the documents have not been disclosed to any entity outside of the joint community. Indeed, to the extent that the documents comment on appropriate strategies vis-à-vis the regulatory review process, or regarding the likelihood of litigation that may result from that process, such strategies are on their face designed to further the joint defense interests of achieving this merger. This is so even to the extent that some documents may criticize the other Defendant's approach to this matter. Such documents are understood to be efforts by one Defendant to redirect the conduct of the second Defendant in order increase the likelihood of regulatory approval and/or success in litigation.

To the extent that documents or portions of documents accuse the opposing side of failing to satisfy the terms of contractual obligations or deal with rights and obligations related to accusations between Defendants, however, Defendants have waived work product protection over the strategies in those documents or portions of documents. In such instances, each Defendant operates adversely to the other. To be clear, the question is not "whether [Anthem] could be [Cigna's] adversary in any conceivable future litigation, but whether [Anthem] could be [Cigna's] adversary in the sort of litigation that documents [in this second category] address." (*Deloitte*, 610 F.3d at 329). If the breach of contract allegations relating to the Merger Agreements result in litigation, Anthem and Cigna will be adversaries in that litigation. Disclosure of work product material to an adversary in a breach of contract action is wholly "inconsistent with the maintenance of secrecy from the disclosing party's adversary." (*Id*.)

d. Joint Defense Privilege[5]

The Joint Defense privilege would not protect documents alleging breach of the merger agreement or related violations because their contents do not fall within the four corners of the

[5] There is no need to reach the question of whether the joint defense privilege applies to those documents as to which the Special Master concludes that work product protection has not been waived. In this case, the government seeks production of documents which contain the opinion work product of attorneys for Anthem and Cigna, respectively. For the reasons noted above, this material is opinion and not fact work product. Under normal circumstances, these attorneys' protected opinion work product would be "virtually undiscoverable." [*United States v. Clemens*, 793 F. Supp. 2d 236, 244 (D.D.C. 2011)(citation omitted)].The only possible way for the Department of Justice to overcome that privilege would be upon an exceptional showing of need, which is not made here, or by showing that the document creators waived the privilege by disclosing the documents to third parties. (*Id*.)

The documents at issue were in fact voluntarily disclosed by Anthem to a third party, Cigna, and vice versa. This could effect waiver, but only to the extent that Cigna is "an adversary or a conduit to an adversary" of Anthem, because only in that situation would disclosure be "inconsistent with the maintenance of secrecy from the disclosing party's adversary." [*Deloitte*, 610 F.3d at 140 (citations omitted)]. For the reasons explained above, to the extent that such disclosure was *not* made to an adversary or conduit to an adversary, waiver did not occur. Thus, there would be no means for the Department of Justice to overcome the opinion work product protection to obtain these documents.

To the extent that such documents *were* disclosed to an adversary or conduit to an adversary, then work product protection has been waived. In this case, the joint defense privilege may establish a method for Anthem and Cigna to protect those documents, notwithstanding the waiver of work product privilege, because the joint defense privilege specifically permits a party to disclose information to another party without waiving the attorney client privilege (not applicable here) or work product protection if the first party is engaged in a joint defense with the second. (*Minebea*, 228 F.R.D. 15-16).

The joint defense privilege does not, in other words, provide an additional avenue through which the Department of Justice may obtain these documents. Rather, the privilege provides an additional layer of protection upon which Anthem and/or Cigna may rely in order to protect documents as to which the work product protection may have been waived. If that underlying privilege has not been waived, the joint defense privilege does not come into play. Nevertheless, for purposes of completeness, the Special Master finds that the joint defense privilege does protect these documents and/or portions of documents because their contents fall within the four corners of the Joint Defense Agreements and are intended to further the purpose of those Agreements.

joint defense agreements, and cannot be understood to have been created or shared with the intent of furthering that agreement.

Indeed, an *in camera* review of the applicable joint defense agreements in this case shows that those Agreements are specific and limited in scope to the instant merger. Notwithstanding Defendants' arguments to the contrary, the letters asserting breaches of the merger agreement concern wholly different legal concerns, namely, allegations by each party that the other has failed to satisfy the requirements of the merger contract.

Moreover, to the extent that either party theoretically might pursue a breach of contract action against the other in relation to the Merger Agreements, there is no conceivable manner in which the parties might be engaged in a joint defense with respect to any such action. To the contrary, in that instance, the parties would be direct adversaries rather than parties with a common interest. "Common sense suggests that there can be no joint defense agreement when there is no joint defense to pursue." [*In re Grand Jury Subpoena*, 274 F. 3d 563, 575 (1st Cir. 2001)]. As such, it is not possible to interpret the joint defense agreements in a manner which would extend protection to these documents or portions of documents.

Likewise, neither Anthem nor Cigna has offered any evidence that the breach allegations were designed in any way to further the joint defense effort. Rather, such allegations were at best designed to protect the interest of each individual Defendant, rather than the interests of obtaining merger approval or regulatory success.

In its Opposition, Anthem claims that "*each and every* assertion of breach at issue here was based on an argument that either Anthem or Cigna was not sufficiently carrying out the parties' common goal of obtaining federal and state government approval of the merger. … A disagreement of that nature does not destroy the common interest, it strengthens it." (Anthem

Opp. at 2). Based on a review of the documents the Special Master disagrees, and finds the cases Anthem cites to be inapplicable here. In *United States v. United Technologies Corporation*, for example, various engineering corporations joined together to produce a particular jet engine, and subsequently to pursue a strategy to minimize each member's taxation liability. [979 F. Supp. 108, 110 (D. Conn. 1997)]. The court concluded that, even though the process of developing this strategy "was not without hostility," the common interest privilege protected a document containing confidences conveyed by the members of the consortium to their attorneys because "the [consortium] members acted not as adversaries negotiating at arms length [sic] but as collaborators, legally committed to a cooperative venture and seeking to make that venture maximally profitable." (*Id*. at 112). In so finding, the court noted that "the attorneys for each of the IAE collaborators advised the other members and coordinated their legal efforts." (*Id*.) By contrast, the documents at issue do not cleanly, unambiguously and consistently indicate the kind of joint effort as in *United Technologies*. If the breach of contract allegations do proceed to litigation, it is inconceivable that counsel would coordinate their legal efforts in any way. Such action would be inconsistent with the adversarial process. Indeed, in *Niagara Mohawk Power v. Megan-Racine Assocs.*, another case cited by Anthem, the court actually noted that the joint-defense privilege no longer applies "where the parties become adverse litigants." [189 B.R. 562, 572 (Bankr. N.D.N.Y 1995)].

Similarly, in *Matter of Grand Jury Subpoena Duces Tecum Dated November 16, 1974*, the information shared between two parties to a joint defense was designed to protect both parties against an impending SEC action. [406 F. Supp. 381, 392 (S.D.N.Y. 1975)]. Thus, even though the first party may have anticipated that the second party might have eventually brought an action against the first, in which the information disclosed as part of the joint defense might

be used against him, "he was entitled to risk it for the sake of strengthening his immediate defense" against the SEC charge. (*Id*.) The facts of this case are vastly different. Here, there is no evidence that the breach allegations might help to further the joint defense in the merger case. Such allegations are intended on their face to protect each Defendant as an individual, and not as a joint unit.

Indeed, finding the joint defense privilege to apply here would go against the justification for that privilege's existence. "The purpose of the … common interest privileges is to ensure that attorneys feel free to fully and completely prepare for trial by assuring that their legal preparations will not be accessible to an adversary." [*Pogue*, 2004 WL 2009413 at *4 (citing U*nited States v. Am. Tel. and Tel. Co*. (hereinafter "*AT&T*"), 642 F. 2d 1285, 1300 (D.C. Cir. 1980)]. Finding waiver to have occurred when two parties with common interests share information "would discourage trial preparation and vigorous advocacy" by those two parties. (*AT&T*, 642 F.2d at 1300). As discussed above, however, the breach of contract letters implicate potential advocacy by each Defendant against the other Defendant. There is no reason to believe that disclosure of these letters will inhibit Defendants' joint advocacy in favor of the merger agreement, or would have a chilling effect on other litigation in which two parties might be actually aligned in a joint effort.

Finally, the Special Master notes that it is not inconsistent to find that the Joint Defense Privilege protects some documents or parts of documents, but not others. "The common interest rule is concerned with the relationship between the transferor and the transferee at the time that the confidential information is disclosed." [*In re United Mine Workers of America Employee Benefits Plan*, 159 F.R.D. 307, 314 (D.D.C. 1994)]. In this case, Anthem and Cigna have had two very different relationships: allied in the merger effort, but potentially "adversarial" (*see*

Deloitte, 610 F.3d at 140) as to allegations of breach of contract. This fluctuating status must be understood to afford protection over documents or parts of documents associated with the former, but not the latter.

IV. Conclusion

For all of the foregoing reasons, the Special Master makes the specific recommendations listed on the attached chart and recommends that the Court grant in part and deny in part Plaintiffs' Motion to Compel Production of the Breach of Contract Letters.

October 6, 2016

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

EXHIBIT A

SPECIAL MASTER REPORT AND RECOMMENDATION NO. 5
In Camera Determinations

Doc No.[1]	Work Product / Joint Defense Privilege Applicability	Ruling
Anthem 1 Cigna 1b Cigna 1a (cover email)[2]	This document addresses general positions and strategy regarding the merger.[3] It does not include allegations of breach of contract or any other allegations intimating adversarial[4] legal action between the two Defendants. Opinion work product protection applies to this and all documents submitted to the Special Master, and any facts in the document are inextricably intertwined with the strategies and opinions expressed therein. (*See* R&R No. 5 at 13-15). That protection is not waived as to this document in particular because nothing in this document places the Defendants into an adversarial position against each other. Because there has been no waiver, the joint defense privilege is irrelevant because the document is protected work product. Nevertheless, the	Protect document in its entirety.

[1] Each Defendant submitted *in camera* documents to the Special Master. Many of these documents were identical but numbered differently. For this reason, while the chart may include more than one document number in a particular row, each row addresses only one actual document or one document and an associated cover email.

[2] Numerous documents contain cover emails to which the letter or memoranda authors attached the respective letter or memoranda. These cover emails are not of any independent value, but provide context for the associated letter or memoranda. For this reason, the Special Master has elected to assess each cover email along with the letter or memoranda with which it is associated.

[3] This and many documents presented for review predate the July 21 filing of the Complaint in this case. Nevertheless, it is apparent from the content of the documents that the parties were aware of the potential that the United States and/or individual states may seek to enjoin the merger in court. The contents of this document and all documents as to which the Special Master concludes that protection is warranted likewise make plain that the legal strategies and opinions expressed therein were targeted towards a realistic potential of such litigation developing. These documents therefore were prepared "in anticipation of litigation." *See* R&R No. 5 at 13-14.

[4] In using the term "adversarial," the Special Master specifically refers to the term "adversary" as used in *United States v. Deloitte LLP*, 610 F.3d 129, 140 (D.C. Cir. 2010). *See* R&R No. 5 at 15.

	document is also protected under the joint defense privilege because it falls within the four corners of the joint defense agreement and is intended to further that joint defense.	
Anthem 4 Cigna 2b Cigna 2a (cover email) Anthem 4 Cigna 2b Cigna 2a (cover email) (Continued from previous page)	This document addresses general positions and strategy regarding the merger. The portion of this document addressing other litigation contains legal strategy regarding impact of that litigation on merger litigation. It does not include allegations of breach of contract or any other allegations intimating legal action between the two Defendants. Opinion work product protection applies to this and all documents submitted to the Special Master, and any facts in the document are inextricably intertwined with the strategies and opinions expressed therein. (*See* R&R No. 5 at 13-15). That protection is not waived as to this document in particular because nothing in this document places the Defendants into an adversarial position against each other. Because there has been no waiver, the joint defense privilege is irrelevant because the document is protected work product. Nevertheless, the document is also protected under the joint defense privilege because it falls within the four corners of the joint defense agreement and is intended to further that joint defense.	Protect document in its entirety.
Anthem 3 Cigna 3b Anthem 2 (cover email) Cigna 3a (cover email)	This document addresses general positions and strategy regarding the merger. The portion of this document addressing other litigation contains legal strategy regarding impact of that litigation on merger litigation. It does not include allegations of breach of contract or any other allegations intimating legal action between the two Defendants. Opinion work product protection applies to this and all documents submitted to the Special Master, and any facts in the document are inextricably intertwined with the strategies and opinions expressed therein. (*See* R&R No. 5 at 13-15). That protection is not waived as to this document in particular because nothing in this document places the Defendants into an adversarial position against each other. Because there has been no waiver, the joint defense privilege is irrelevant because the document is protected work product. Nevertheless, the document is also protected under the joint defense privilege because it falls within the four corners of the joint defense agreement and is intended to further that joint defense.	Protect document in its entirety.

Anthem 6 Cigna 4b Anthem 5 (cover email) Cigna 4a (cover email)	This document addresses general positions and strategy regarding the merger litigation. The portion of this document addressing other litigation contains legal strategy regarding impact of that litigation on merger litigation. It does not include allegations of breach of contract or any other allegations intimating legal action between the two Defendants. Opinion work product protection applies to this and all documents submitted to the Special Master, and any facts in the document are inextricably intertwined with the strategies and opinions expressed therein. (*See* R&R No. 5 at 13-15). That protection is not waived as to this document in particular because nothing in this document places the Defendants into an adversarial position against each other. Because there has been no waiver, the joint defense privilege is irrelevant because the document is protected work product. Nevertheless, the document is also protected under the joint defense privilege because it falls within the four corners of the joint defense agreement and is intended to further that joint defense.	Protect document in its entirety.
Anthem 7 Cigna 5	The first paragraph of document alleges violation of Merger Agreement. The remainder of this document provides the author's company's position on the violation alleged in the first paragraph and provides support for those allegations. Neither work product protection nor joint defense privilege apply to these paragraphs. While this document qualifies as opinion work product (*see* R&R No. 5 at 13-15), that protection is waived because the document author voluntarily disclosed this document to opposing counsel and because the content of the document makes clear that the disclosure was done with adversarial intent. (*See* R&R no. 5 at 16-17). The joint defense privilege does not serve to protect the document notwithstanding the work product waiver because the content of the document does not fall within the four corners of the Joint Defense Agreements and because the document cannot be seen as intended to further the purpose of those agreements.	Disclose document in its entirety. [5]

[5] As to this document and all documents as to which disclosure is recommended in whole or in part, the Special Master also recommends that the disclosing party also be required to provide the time and date stamp of the email or the date of the letter, "To" and "From" information, and subject line information, where applicable, to provide context for the disclosed portion of the document or email. This information is not protected by the work product doctrine or joint defense privilege.

Cigna 6b Cigna 6a (cover letter) [Anthem did not submit document]	This document addresses general positions and strategy regarding the merger. It does not include allegations of breach of contract or any other allegations intimating legal action between the two Defendants. Opinion work product protection applies to this and all documents submitted to the Special Master, and any facts in the document are inextricably intertwined with the strategies and opinions expressed therein. (*See* R&R No. 5 at 13-15). That protection is not waived as to this document in particular because nothing in this document places the Defendants into an adversarial position against each other. Because there has been no waiver, the joint defense privilege is irrelevant because the document is protected work product. Nevertheless, the document is also protected under the joint defense privilege because it falls within the four corners of the joint defense agreement and is intended to further that joint defense.	Protect document in its entirety.
Anthem 8 Cigna 7b Cigna 7a (cover email)	This document addresses general positions and strategy regarding the merger. It does not include allegations of breach of contract or any other allegations intimating legal action between the two Defendants. Opinion work product protection applies to this and all documents submitted to the Special Master, and any facts in the document are inextricably intertwined with the strategies and opinions expressed therein. (*See* R&R No. 5 at 13-15). That protection is not waived as to this document in particular because nothing in this document places the Defendants into an adversarial position against each other. Because there has been no waiver, the joint defense privilege is irrelevant because the document is protected work product. Nevertheless, the document is also protected under the joint defense privilege because it falls within the four corners of the joint defense agreement and is intended to further that joint defense.	Protect document in its entirety.
Cigna 8 [Anthem did not submit document]	This document addresses general positions and strategy regarding the merger. It does not include allegations of breach of contract or any other allegations intimating legal action between the two Defendants. Opinion work product protection applies to this and all documents submitted to the Special Master, and any facts in the document are inextricably intertwined with the strategies and opinions expressed therein. (*See* R&R No. 5 at 13-15). That protection is not waived as to this	Protect document in its entirety.

	document in particular because nothing in this document places the Defendants into an adversarial position against each other. Because there has been no waiver, the joint defense privilege is irrelevant because the document is protected work product. Nevertheless, the document is also protected under the joint defense privilege because it falls within the four corners of the joint defense agreement and is intended to further that joint defense.	
Cigna 9 [Anthem did not submit document]	This document addresses general positions and strategy regarding the merger. It does not include allegations of breach of contract or any other allegations intimating legal action between the two Defendants. Opinion work product protection applies to this and all documents submitted to the Special Master, and any facts in the document are inextricably intertwined with the strategies and opinions expressed therein. (*See* R&R No. 5 at 13-15). That protection is not waived as to this document in particular because nothing in this document places the Defendants into an adversarial position against each other. Because there has been no waiver, the joint defense privilege is irrelevant because the document is protected work product. Nevertheless, the document is also protected under the joint defense privilege because it falls within the four corners of the joint defense agreement and is intended to further that joint defense.	Protect document in its entirety.
Cigna 10 [Anthem did not submit document]	The top email on this page (5/21/2016 2:22 pm) is not protected. See page 11 of Report and Recommendation No. 5. The emails quoted below the top email are protected for the reasons described for documents Cigna 8 and Cigna 9.	Disclose top email only.
Cigna 11 [Anthem did not submit document]	This document addresses general positions and strategy regarding the merger. It does not include allegations of breach of contract or any other allegations intimating legal action between the two Defendants. Opinion work product protection applies to this and all documents submitted to the Special Master, and any facts in the document are inextricably intertwined with the strategies and opinions expressed therein. (*See* R&R No. 5 at 13-15). That protection is not waived as to this document in particular because nothing in this document places the Defendants into an adversarial position against each other. Because there has been no waiver, the joint defense	Protect document in its entirety.

	privilege is irrelevant because the document is protected work product. Nevertheless, the document is also protected under the joint defense privilege because it falls within the four corners of the joint defense agreement and is intended to further that joint defense.	
Cigna 12 [Anthem did not submit document	This document addresses general positions and strategy regarding the merger. It does not include allegations of breach of contract or any other allegations intimating legal action between the two Defendants. Opinion work product protection applies to this and all documents submitted to the Special Master, and any facts in the document are inextricably intertwined with the strategies and opinions expressed therein. (*See* R&R No. 5 at 13-15). That protection is not waived as to this document in particular because nothing in this document places the Defendants into an adversarial position against each other. Because there has been no waiver, the joint defense privilege is irrelevant because the document is protected work product. Nevertheless, the document is also protected under the joint defense privilege because it falls within the four corners of the joint defense agreement and is intended to further that joint defense.	Protect document in its entirety.
Cigna 13 [Anthem did not submit document]	This document addresses general positions and strategy regarding the merger. It does not include allegations of breach of contract or any other allegations intimating legal action between the two Defendants. Opinion work product protection applies to this and all documents submitted to the Special Master, and any facts in the document are inextricably intertwined with the strategies and opinions expressed therein. (*See* R&R No. 5 at 13-15). That protection is not waived as to this document in particular because nothing in this document places the Defendants into an adversarial position against each other. Because there has been no waiver, the joint defense privilege is irrelevant because the document is protected work product. Nevertheless, the document is also protected under the joint defense privilege because it falls within the four corners of the joint defense agreement and is intended to further that joint defense.	Protect document in its entirety.

Cigna 14 [Anthem did not submit document]	This document addresses general positions and strategy regarding the merger. It does not include allegations of breach of contract or any other allegations intimating legal action between the two Defendants. Opinion work product protection applies to this and all documents submitted to the Special Master, and any facts in the document are inextricably intertwined with the strategies and opinions expressed therein. (*See* R&R No. 5 at 13-15). That protection is not waived as to this document in particular because nothing in this document places the Defendants into an adversarial position against each other. Because there has been no waiver, the joint defense privilege is irrelevant because the document is protected work product. Nevertheless, the document is also protected under the joint defense privilege because it falls within the four corners of the joint defense agreement and is intended to further that joint defense.	Protect document in its entirety.
Cigna 15 [Anthem did not submit document]	This document addresses general positions and strategy regarding the merger. It does not include allegations of breach of contract or any other allegations intimating legal action between the two Defendants. Opinion work product protection applies to this and all documents submitted to the Special Master, and any facts in the document are inextricably intertwined with the strategies and opinions expressed therein. (*See* R&R No. 5 at 13-15). That protection is not waived as to this document in particular because nothing in this document places the Defendants into an adversarial position against each other. Because there has been no waiver, the joint defense privilege is irrelevant because the document is protected work product. Nevertheless, the document is also protected under the joint defense privilege because it falls within the four corners of the joint defense agreement and is intended to further that joint defense.	Protect document in its entirety.
Cigna 16b Cigna 16a (cover email) [Anthem did not submit document]	This document addresses general positions and strategy regarding the merger. It does not include allegations of breach of contract or any other allegations intimating legal action between the two Defendants. Opinion work product protection applies to this and all documents submitted to the Special Master, and any facts in the document are inextricably intertwined with the strategies and opinions expressed therein. (*See* R&R No. 5 at 13-15). That protection is not waived as to this	Protect document in its entirety.

	document in particular because nothing in this document places the Defendants into an adversarial position against each other. Because there has been no waiver, the joint defense privilege is irrelevant because the document is protected work product. Nevertheless, the document is also protected under the joint defense privilege because it falls within the four corners of the joint defense agreement and is intended to further that joint defense.	
Anthem 8 (mis-numbered as Anthem 9 in Anthem log) Cigna 17b Cigna 17a (cover email)	Fourth full paragraph (beginning with "Cigna cannot…") contains allegations of breach of the Merger Agreement. While this paragraph is opinion work product (*see* R&R No. 5 at 13-15), that protection is waived because the document author voluntarily disclosed this document to opposing counsel and because the content of this paragraph makes clear that the disclosure was done with adversarial intent as to this paragraph only. (*See* R&R No. 5 at 16-17). The joint defense privilege does not serve to protect this paragraph notwithstanding the work product waiver because the content of the paragraph does not fall within the four corners of the Joint Defense Agreements and because the paragraph cannot be seen as intended to further the purpose of those agreements. (*See* R&R No. 5 at 17-21). The remainder of the document is protected opinion work product because the document expresses legal strategy regarding the merger, and because any facts in the document are inextricably intertwined with the strategies and opinions expressed therein. (*See* R&R No. 5 at 13-15). That protection is not waived as to the remainder of this document because nothing in this document other than paragraph 4 places the Defendants into an adversarial position against each other. Because there has been no waiver, the joint defense privilege is irrelevant because the document is protected work product. Nevertheless, the document is also protected under the joint defense privilege because it falls within the four corners of the joint defense agreement and is intended to further that joint defense.	Disclose fourth paragraph. Protect remainder of the document.
Cigna 18 [Anthem did not submit document]	This document contains a long email chain, which will be addressed in chronological order, starting with the earliest email. June 17, 2016 11:30 a.m. email; June 17, 2016 12:07 p.m. email; June 17, 2016 12:17 p.m. email; June 17, 2016 12:37 p.m. email;	Protect in full June 17, 2016 11:30 a.m. email; June 17, 2016 12:07 p.m. email; June 17, 2016 12:17 p.m. email;

Cigna 18 [Anthem did not submit document] (Continued from previous page)	June 18, 2016 12:26 a.m. email These emails are protected opinion work product because they express legal strategy regarding the merger, and because any facts in these emails are inextricably intertwined with the strategies and opinions expressed therein. (*See* R&R No. 5 at 13-15). Work product protection is not waived as to these emails because nothing in them places the Defendants into an adversarial position against each other. Because there has been no waiver, the joint defense privilege is irrelevant - the emails are protected work product, and need not be disclosed to the government. Nevertheless, the emails are also protected under the joint defense privilege because their content falls within the four corners of the joint defense agreement and the emails are intended to further that joint defense. June 18, 2016 12:47 a.m. email The second paragraph of this email, fourth sentence (beginning with "The motivation…") through the end of that paragraph discusses breach of contract allegations. While these sentences are opinion work product (*see* R&R No. 5 at 13-15), that protection is waived because the document author voluntarily disclosed this document to opposing counsel and because the content of this paragraph makes clear that the disclosure was done with adversarial intent as to these sentences only. (*See* R&R No. 5 at 16-17). The joint defense privilege does not serve to protect this paragraph notwithstanding the work product waiver because the content of the paragraph does not fall within the four corners of the Joint Defense Agreements and because the paragraph cannot be seen as intended to further the purpose of those agreements. (*See* R&R No. 5 at 17-21). The remainder of this email concerns joint merger strategy. The email is protected opinion work product because it expresses legal strategy regarding the merger litigation, and because any facts in it are inextricably intertwined with the strategies and opinions expressed therein. (*See* R&R No. 5 at 13-15). Work product protection is not waived as to these emails because nothing in them places the Defendants into an adversarial position against each other. Because there has been no waiver, the joint defense privilege is irrelevant - the emails are protected work product, and need not be disclosed to the government. Nevertheless, the emails are also protected under the joint defense privilege because their content falls within the four corners of the joint defense agreement and the emails are intended to further that joint defense.	June 17, 2016 12:37 p.m. email; and June 18, 2016 12:26 a.m. email. Protect in part June 18, 2016 12:47 a.m. email and June 19, 2016 9:38 a.m. email.

Cigna 18 [Anthem did not submit document] (Continued from previous page)	Email dated June 19, 2016 9:38 a.m.: First paragraph in its entirety (beginning "I don't know…") and first sentence of second paragraph ("Related, Cigna…) directly address breach allegations. While this paragraph and sentence are opinion work product (*see* R&R No. 5 at 13-15), that protection is waived because the document author voluntarily disclosed this document to opposing counsel and because the content of this paragraph and sentence makes clear that the disclosure was done with adversarial intent as to these sentences only. (*See* R&R No. 5 at 16-17). The joint defense privilege does not serve to protect these sentences notwithstanding the work product waiver because their content does not fall within the four corners of the Joint Defense Agreements and because they cannot be seen as intended to further the purpose of those agreements. (*See* R&R No. 5 at 17-21). The remainder of this email concerns joint merger strategy. The email is protected opinion work product because it expresses legal strategy regarding the merger, and because any facts in it are inextricably intertwined with the strategies and opinions expressed therein. (*See* R&R No. 5 at 13-15). Work product protection is not waived as to these emails because nothing in them places the Defendants into an adversarial position against each other. Because there has been no waiver, the joint defense privilege is irrelevant - the emails are protected work product, and need not be disclosed to the government. Nevertheless, the emails are also protected under the joint defense privilege because their content falls within the four corners of the joint defense agreement and the emails are intended to further that joint defense.	
Anthem 11 Cigna 19	This document addresses general positions and strategy regarding the merger. It does not include allegations of breach of contract or any other allegations intimating adversarial legal action between the two Defendants. Opinion work product protection applies to this and all documents submitted to the Special Master, and any facts in the document are inextricably intertwined with the strategies and opinions expressed therein. (*See* R&R No. 5 at 13-15). That protection is not waived as to this document in particular because nothing in this document places the Defendants into an adversarial position against each other. Because there has been no waiver, the joint defense privilege is irrelevant because the document is protected work product. Nevertheless, the	Protect document in its entirety.

	document is also protected under the joint defense privilege because it falls within the four corners of the joint defense agreement and is intended to further that joint defense.	
Anthem 10 Cigna 20	This document addresses general positions and strategy regarding the merger. It does not include allegations of breach of contract or any other allegations intimating adversarial legal action between the two Defendants. Opinion work product protection applies to this and all documents submitted to the Special Master, and any facts in the document are inextricably intertwined with the strategies and opinions expressed therein. (*See* R&R No. 5 at 13-15). That protection is not waived as to this document in particular because nothing in this document places the Defendants into an adversarial position against each other. Because there has been no waiver, the joint defense privilege is irrelevant because the document is protected work product. Nevertheless, the document is also protected under the joint defense privilege because it falls within the four corners of the joint defense agreement and is intended to further that joint defense.	Protect document in its entirety.
Anthem 12 Cigna 21	The first paragraph of this email discusses allegations of breach. While this paragraph is opinion work product (*see* R&R No. 5 at 13-15), that protection is waived because the document author voluntarily disclosed this document to opposing counsel and because the content of this paragraph and sentence makes clear that the disclosure was done with adversarial intent as to this paragraph only. (*See* R&R No. 5 at 16-17). The joint defense privilege does not serve to protect this paragraph notwithstanding the work product waiver because its content does not fall within the four corners of the Joint Defense Agreements and because it cannot be seen as intended to further the purpose of those agreements. (*See* R&R No. 5 at 17-21). The remainder of the email addresses general positions and strategy regarding the merger. It does not include allegations of breach of contract or any other allegations intimating adversarial legal action between the two Defendants. Opinion work product protection applies to the remainder of the email, and any facts it contains are inextricably intertwined with the strategies and opinions expressed therein. (*See* R&R No. 5 at 13-15). That protection is not waived as to this email, other than the first paragraph, because	Protect document in part. Disclose first paragraph; protect remainder of the document.

	nothing in the remainder of the email places the Defendants into an adversarial position against each other. Because there has been no waiver, the joint defense privilege is irrelevant because the document is protected work product. Nevertheless, the document is also protected under the joint defense privilege because it falls within the four corners of the joint defense agreement and is intended to further that joint defense.	
Anthem 13 Cigna 22	Second paragraph ("Despite your…") and third paragraph ("It has become…") of document directly discuss breach allegations. While these paragraphs are opinion work product (*see* R&R No. 5 at 13-15), that protection is waived because the document author voluntarily disclosed this document to opposing counsel and because the content of these paragraphs makes clear that the disclosure was done with adversarial intent as to these paragraphs only. (*See* R&R No. 5 at 16-17). The joint defense privilege does not serve to protect these paragraphs notwithstanding the work product waiver because their content does not fall within the four corners of the Joint Defense Agreements and because they cannot be seen as intended to further the purpose of those agreements. (*See* R&R No. 5 at 17-21). The remainder of the document addresses general positions and strategy regarding the merger. It does not include allegations of breach of contract or any other allegations intimating adversarial legal action between the two Defendants. Opinion work product protection applies to the remainder of the document, and any facts it contains are inextricably intertwined with the strategies and opinions expressed therein. (*See* R&R No. 5 at 13-15). That protection is not waived as to this document, other than the noted paragraph, because nothing in the remainder of the document places the Defendants into an adversarial position against each other. Because there has been no waiver, the joint defense privilege is irrelevant because the document is protected work product. Nevertheless, the document is also protected under the joint defense privilege because it falls within the four corners of the joint defense agreement and is intended to further that joint defense.	Protect entire document except second and third paragraphs.
Anthem 14 Cigna 23b Cigna 23a (cover letter)	Paragraph 7 ("Moreover, your position…"), paragraph 8 [(b)("Without limiting…")], and paragraph 9 [(i)("comply with…")] allege breach of the Merger Agreement. While these paragraphs are opinion work product (*see* R&R No. 5 at 13-15), that protection is waived because the document author voluntarily disclosed this document to opposing counsel and	Disclose paragraphs 7, 8 and 9. Protect

	because the content of these paragraphs makes clear that the disclosure was done with adversarial intent as to these paragraphs only. (*See* R&R No. 5 at 16-17). The joint defense privilege does not serve to protect these paragraphs notwithstanding the work product waiver because their content does not fall within the four corners of the Joint Defense Agreements and because they cannot be seen as intended to further the purpose of those agreements. (*See* R&R No. 5 at 17-21). The remainder of this document addresses general positions and strategy regarding the merger. It does not include allegations of breach of contract or any other allegations intimating adversarial legal action between the two Defendants. Opinion work product protection applies to the remainder of the document, and any facts it contains are inextricably intertwined with the strategies and opinions expressed therein. (*See* R&R No. 5 at 13-15). That protection is not waived as to this document, other than the noted paragraphs, because nothing in the remainder of the document places the Defendants into an adversarial position against each other. Because there has been no waiver, the joint defense privilege is irrelevant because the document is protected work product. Nevertheless, the document is also protected under the joint defense privilege because it falls within the four corners of the joint defense agreement and is intended to further that joint defense.	remainder of the document.
Anthem 15 Cigna 24	First sentence of fourth paragraph ("As I have…") alleges breach of Merger Agreement. While this sentence qualifies as opinion work product (*see* R&R No. 5 at 13-15), that protection is waived because the document author voluntarily disclosed this document to opposing counsel and because this sentence was asserted with adversarial intent (*See* R&R No. 5 at 16-17). The joint defense privilege does not serve to protect this sentence notwithstanding the work product waiver because its content does not fall within the four corners of the Joint Defense Agreements and because it cannot be seen as intended to further the purpose of those agreements. (*See* R&R No. 5 at 17-21). The remainder of this document addresses general positions and strategy regarding the merger. It does not include allegations of breach of contract or any other allegations intimating adversarial legal action between the two Defendants.	Disclose first sentence of fourth paragraph. Protect remainder of the document.

	Opinion work product protection applies to the remainder of the document, and any facts it contains are inextricably intertwined with the strategies and opinions expressed therein. (*See* R&R No. 5 at 13-15). That protection is not waived as to this document, other than the noted sentence, because nothing in the remainder of the document places the Defendants into an adversarial position against each other. Because there has been no waiver, the joint defense privilege is irrelevant because the document is protected work product. Nevertheless, the document is also protected under the joint defense privilege because it falls within the four corners of the joint defense agreement and is intended to further that joint defense.	
Anthem 17 Cigna 25b Anthem 16 (cover email) Cigna 25a (cover email)	Sixth paragraph ("We are increasingly…") and seventh paragraph ("This brings me…") discusses author's company's position on potential litigation against other Defendant and regarding breach of contract allegations. While these paragraphs are opinion work product (*see* R&R No. 5 at 13-15), that protection is waived because the document author voluntarily disclosed this document to opposing counsel and because the content of these paragraphs make clear that the disclosure was done with adversarial intent as to these paragraphs only. (*See* R&R No. 5 at 16-17). The joint defense privilege does not serve to protect these paragraphs notwithstanding the work product waiver because their content does not fall within the four corners of the Joint Defense Agreements and because they cannot be seen as intended to further the purpose of those agreements. (*See* R&R No. 5 at 17-21). The remainder of this document addresses general positions and strategy regarding the merger. It does not include allegations of breach of contract or any other allegations intimating adversarial legal action between the two Defendants. Opinion work product protection applies to the remainder of the document, and any facts it contains are inextricably intertwined with the strategies and opinions expressed therein. (*See* R&R No. 5 at 13-15). That protection is not waived as to this document, other than the noted paragraphs, because nothing in the remainder of the document places the Defendants into an adversarial position against each other. Because there has been no waiver, the joint defense privilege is irrelevant because the document is protected work product. Nevertheless, the	Disclose sixth and seventh paragraphs. Protect remainder of the document.

	document is also protected under the joint defense privilege because it falls within the four corners of the joint defense agreement and is intended to further that joint defense.	
Cigna 26 [Anthem did not submit document]	This document addresses general positions and strategy regarding the merger. It does not include allegations of breach of contract or any other allegations intimating adversarial legal action between the two Defendants. Opinion work product protection applies to this document, and any facts it contains are inextricably intertwined with the strategies and opinions expressed therein. (*See* R&R No. 5 at 13-15). That protection is not waived as to this document because nothing in it places the Defendants into an adversarial position against each other. Because there has been no waiver, the joint defense privilege is irrelevant because the document is protected work product. Nevertheless, the document is also protected under the joint defense privilege because it falls within the four corners of the joint defense agreement and is intended to further that joint defense.	Protect document in its entirety.
Cigna 27 [Anthem did not submit document]	This document addresses general positions and strategy regarding the merger. It does not include allegations of breach of contract or any other allegations intimating adversarial legal action between the two Defendants. Opinion work product protection applies to this document, and any facts it contains are inextricably intertwined with the strategies and opinions expressed therein. (*See* R&R No. 5 at 13-15). That protection is not waived as to this document because nothing in it places the Defendants into an adversarial position against each other. Because there has been no waiver, the joint defense privilege is irrelevant because the document is protected work product. Nevertheless, the document is also protected under the joint defense privilege because it falls within the four corners of the joint defense agreement and is intended to further that joint defense.	Protect document in its entirety.
Anthem 18 Cigna 28b Cigna 28a [Anthem did	This document addresses general positions and strategy regarding the merger litigation. It does not include allegations of breach of contract or any other allegations intimating adversarial legal action between the two Defendants.	Protect document in its entirety.

not submit document]	Opinion work product protection applies to this document, and any facts it contains are inextricably intertwined with the strategies and opinions expressed therein. (*See* R&R No. 5 at 13-15). That protection is not waived as to this document because nothing in it places the Defendants into an adversarial position against each other. Because there has been no waiver, the joint defense privilege is irrelevant because the document is protected work product. Nevertheless, the document is also protected under the joint defense privilege because it falls within the four corners of the joint defense agreement and is intended to further that joint defense.	
Anthem 19 Cigna 29a Cigna 29b (not submitted by Anthem) Cigna 29c (not submitted by Anthem) Cigna 29d (not submitted by Anthem)	These documents address general positions and strategy regarding the merger litigation. They does not include allegations of breach of contract or any other allegations intimating adversarial legal action between the two Defendants. Opinion work product protection applies to these documents, and any facts it contains are inextricably intertwined with the strategies and opinions expressed therein. (*See* R&R No. 5 at 13-15). That protection is not waived as to these documents because nothing in them places the Defendants into an adversarial position against each other. Because there has been no waiver, the joint defense privilege is irrelevant because the documents are protected work product. Nevertheless, the documents are also protected under the joint defense privilege because it falls within the four corners of the joint defense agreement and is intended to further that joint defense.	Protect documents in their entirety.
Anthem 21 Cigna 30b Anthem 20 (cover email) Cigna 30a (cover email)	The first paragraph ("I write in…") addresses breach of Merger Agreement allegations. The second to last paragraph ("Cigna also…") and final paragraph ("Cigna intends…") address one Defendant's position regarding the breach of merger allegations, and reserves the rights of one Defendant against the other. While these paragraphs are opinion work product (*see* R&R No. 5 at 13-15), that protection is waived because the document author voluntarily disclosed this document to opposing counsel and because the content of these paragraphs make clear that the disclosure was done with adversarial intent as to these paragraphs only. (*See* R&R No. 5 at 16-17). The joint defense privilege does not serve to protect these paragraphs notwithstanding the work product waiver because their content does not fall within the four corners of the Joint	Disclose first paragraph, second to last paragraph, and final paragraph. Protect remainder of the document in its entirety.

	Defense Agreements and because they cannot be seen as intended to further the purpose of those agreements. (*See* R&R No. 5 at 17-21). The remainder of the document addresses general positions and strategy regarding the merger. It does not include allegations of breach of contract or any other allegations intimating adversarial legal action between the two Defendants. Opinion work product protection applies to this document, and any facts it contains are inextricably intertwined with the strategies and opinions expressed therein. (*See* R&R No. 5 at 13-15). That protection is not waived as to this document, other than as to the noted paragraphs, because nothing in it places the Defendants into an adversarial position against each other. Because there has been no waiver, the joint defense privilege is irrelevant because the document is protected work product. Nevertheless, the document is also protected under the joint defense privilege because it falls within the four corners of the joint defense agreement and is intended to further that joint defense.	
Anthem 22 Cigna 31	The second to last paragraph ("Let me be…") discusses allegations of breach of contract. While this paragraph is opinion work product (*see* R&R No. 5 at 13-15), that protection is waived because the document author voluntarily disclosed this document to opposing counsel and because the content of this paragraph makes clear that the disclosure was done with adversarial intent as to this paragraphs only. (*See* R&R No. 5 at 16-17). The joint defense privilege does not serve to protect this paragraph notwithstanding the work product waiver because its content does not fall within the four corners of the Joint Defense Agreements and because they cannot be seen as intended to further the purpose of those agreements. (*See* R&R No. 5 at 17-21). The remainder of the document addresses general positions and strategy regarding the merger. It does not include allegations of breach of contract or any other allegations intimating adversarial legal action between the two Defendants. Opinion work product protection applies to this document, and any facts it contains are inextricably intertwined with the strategies and opinions expressed therein. (*See* R&R No. 5 at 13-15). That protection is not waived as to this document, other than as to the noted paragraph, because nothing in it places the Defendants into an adversarial position against each other.	Disclose second to last paragraph. Protect remainder of the document.

	Because there has been no waiver, the joint defense privilege is irrelevant because the document is protected work product. Nevertheless, the document is also protected under the joint defense privilege because it falls within the four corners of the joint defense agreement and is intended to further that joint defense.	
Anthem 23 Cigna 32	Email contains allegations of breach of the Merger Agreement. While the document qualifies as opinion work product (*see* R&R No. 5 at 13-15), that protection is waived because the document author voluntarily disclosed this document to opposing counsel and because the content of the document makes clear that the disclosure was done with adversarial intent. (*See* R&R No. 5 at 16-17). The joint defense privilege does not serve to protect this document notwithstanding the work product waiver because its content does not fall within the four corners of the Joint Defense Agreements and because it cannot be read as intended to further the purpose of those agreements. (*See* R&R No. 5 at 17-21.	Disclose entire email.
Cigna 33 [Anthem did not provide document]	This email responds to allegations of breach of contract. While the email qualifies as opinion work product (*see* R&R No. 5 at 13-15), that protection is waived because the email author voluntarily disclosed the information in this email to opposing counsel and because the content of the email makes clear that the disclosure was done with adversarial intent. (*See* R&R No. 5 at 16-17). The joint defense privilege does not serve to protect this document notwithstanding the work product waiver because its content does not fall within the four corners of the Joint Defense Agreements and because it cannot be read as intended to further the purpose of those agreements. (*See* R&R No. 5 at 17-21).	Disclose entire email.
Cigna 34 [Anthem did not provide document]	First paragraph ("In response…" and fourth paragraph ("Finally, Cigna…") respond to breach of contract allegations. While the paragraphs qualify as opinion work product (*see* R&R No. 5 at 13-15), that protection is waived because the email author voluntarily disclosed this information to opposing counsel and because the content of these paragraphs make clear that the disclosure was done with adversarial intent as to these paragraphs only. (*See* R&R No. 5 at 16-17). The joint defense privilege does not serve to protect these paragraphs notwithstanding the work product waiver because their content does not fall within the four corners of the Joint Defense Agreements and because they cannot be read as intended to further the purpose of those agreements. (*See* R&R No. 5 at 17-21).	Disclose first and fourth paragraph. Protect second and third paragraphs. Email (7/26/2016; 10:59) included in the email chain should be disclosed – *see*

	The second and third paragraphs of the email address general positions and strategy regarding the merger. They do not include allegations of breach of contract or any other allegations intimating adversarial legal action between the two Defendants. Opinion work product protection applies to these paragraphs, and any facts they contain are inextricably intertwined with the strategies and opinions expressed therein. (*See* R&R No. 5 at 13-15). That protection is not waived as to these paragraphs document because nothing in them place the Defendants into an adversarial position against each other. Because there has been no waiver, the joint defense privilege is irrelevant because the paragraphs are protected work product. Nevertheless, the paragraphs are also protected under the joint defense privilege because they falls within the four corners of the joint defense agreement and are intended to further that joint defense.	Cigna Doc. No. 33.
Anthem 24 Cigna 35	This email alleges breach of contract allegations. Neither work product protection nor joint defense privilege apply to this email. While the email is opinion work product and any facts it contains are inextricably intertwined with the legal opinions and strategies it contains, (*see* R&R No. 5 at 13-15), that protection is waived because the email author voluntarily disclosed this email to opposing counsel and because the content of the email makes clear that the disclosure was done with adversarial intent. (*See* R&R no. 5 at 16-17). The joint defense privilege does not serve to protect the email notwithstanding the work product waiver because the content of the email does not fall within the four corners of the Joint Defense Agreements and because the document cannot be seen as intended to further the purpose of those agreements.	Disclose entire document.
Anthem 25 Cigna 36	This email contains allegations of breach of Merger Agreement and confidentiality agreement and reserves rights of one Defendant against the other. While email is opinion work product and any facts it contains are inextricably intertwined with the legal opinions and strategies it contains, (*see* R&R No. 5 at 13-15), that protection is waived because the email author voluntarily disclosed this email to opposing counsel and because the content of the email makes clear that the disclosure was done with adversarial intent. (*See* R&R	Disclose entire email.

	no. 5 at 16-17). The joint defense privilege does not serve to protect the email notwithstanding the work product waiver because the content of the email does not fall within the four corners of the Joint Defense Agreements and because the document cannot be seen as intended to further the purpose of those agreements.	
Anthem 26 Cigna 37	First paragraph ("Please be…") contains allegations of breach of Merger Agreement. While this paragraph is opinion work product and any facts it contains are inextricably intertwined with the legal opinions and strategies it contains, (*see* R&R No. 5 at 13-15), that protection is waived because the email author voluntarily disclosed this email to opposing counsel and because the content of the paragraph makes clear that the disclosure was done with adversarial intent as to this paragraph only. (*See* R&R no. 5 at 16-17). The joint defense privilege does not serve to protect this paragraph notwithstanding the work product waiver because the content of the paragraph does not fall within the four corners of the Joint Defense Agreements and because the document cannot be seen as intended to further the purpose of those agreements. The remainder of the email addresses general positions and strategy regarding the merger. It does not include allegations of breach of contract or any other allegations intimating adversarial legal action between the two Defendants. Opinion work product protection applies to this email, and any facts it contains are inextricably intertwined with the strategies and opinions expressed therein. (*See* R&R No. 5 at 13-15). That protection is not waived as to the remainder of the email, other than the noted paragraph, because nothing in it places the Defendants into an adversarial position against each other. Because there has been no waiver, the joint defense privilege is irrelevant because the email is protected work product. Nevertheless, the email is also protected under the joint defense privilege because its content falls within the four corners of the joint defense agreement and is intended to further that joint defense.	Disclose first paragraph. Protect remainder of the email.
Anthem 27 Cigna 38	Email alleges misconduct by one Defendant and breach of the Merger Agreement. Neither work product protection nor joint defense privilege apply to this email. While the email is opinion work product and any facts it contains are inextricably intertwined with the legal opinions and strategies expressed therein, (*see* R&R No. 5 at 13-15), that	Disclose entire email.

	protection is waived because the email author voluntarily disclosed this email to opposing counsel and because the content of the email makes clear that the disclosure was done with adversarial intent. (*See* R&R no. 5 at 16-17). The joint defense privilege does not serve to protect the email notwithstanding the work product waiver because the content of the email does not fall within the four corners of the Joint Defense Agreements and because the document cannot be seen as intended to further the purpose of those agreements.	
Anthem 28 Cigna 39	Email responds to misconduct allegations. A reasonable reading of this document is that it concerns one Defendant's preparations to defend itself against claims by the other defendant. While the email is opinion work product and any facts it contains are inextricably intertwined with the legal opinions and strategies expressed therein, (*see* R&R No. 5 at 13-15), that protection is waived because the email author voluntarily disclosed this email to opposing counsel and because the content of the email makes clear that the disclosure was done with adversarial intent. (*See* R&R no. 5 at 16-17). The joint defense privilege does not serve to protect the email notwithstanding the work product waiver because the content of the email does not fall within the four corners of the Joint Defense Agreements and because the document cannot be seen as intended to further the purpose of those agreements.	Disclose entire email.
Anthem 29 Cigna 40	Email responds to misconduct allegations. A reasonable reading of this document is that it concerns one Defendant's preparations to defend itself against claims by the other defendant. While the email is opinion work product and any facts it contains are inextricably intertwined with the legal opinions and strategies expressed therein, (*see* R&R No. 5 at 13-15), that protection is waived because the email author voluntarily disclosed this email to opposing counsel and because the content of the email makes clear that the disclosure was done with adversarial intent. (*See* R&R no. 5 at 16-17). The joint defense privilege does not serve to protect the email notwithstanding the work product waiver because the content of the email does not fall within the four corners of the Joint Defense Agreements and because the document cannot be seen as intended to further the purpose of those agreements.	Disclose entire email.

Anthem 30 Cigna 41	Second to last paragraph ("As you know…") contains allegations of breach of Merger Agreement. While email is opinion work product and any facts it contains are inextricably intertwined with the legal opinions and strategies it contains, (*see* R&R No. 5 at 13-15), that protection is waived as to this paragraph only because the email author voluntarily disclosed this email to opposing counsel and because the content of this paragraph makes clear that the disclosure was done with adversarial intent as to this paragraph only. (*See* R&R no. 5 at 16-17). The joint defense privilege does not serve to protect this paragraph notwithstanding the work product waiver because the content of this paragraph does not fall within the four corners of the Joint Defense Agreements and because the paragraph cannot be seen as intended to further the purpose of those agreements. The remainder of the email addresses general positions and strategy regarding the merger litigation. It does not include allegations of breach of contract or any other allegations intimating adversarial legal action between the two Defendants. Opinion work product protection applies to this email, and any facts it contains are inextricably intertwined with the strategies and opinions expressed therein. (*See* R&R No. 5 at 13-15). That protection is not waived as to the remainder of the email, other than the noted paragraph, because nothing in it places the Defendants into an adversarial position against each other. Because there has been no waiver, the joint defense privilege is irrelevant because the email is protected work product. Nevertheless, the email is also protected under the joint defense privilege because its content falls within the four corners of the joint defense agreement and is intended to further that joint defense.	Disclose second to last paragraph. Protect remainder of the document.
Anthem 31 Cigna 42	Email expresses general positions and strategy regarding the merger litigation. It does not include allegations of breach of contract or any other allegations intimating adversarial legal action between the two Defendants. Opinion work product protection applies to this email and any facts it contains are inextricably intertwined with the strategies and opinions expressed therein. (*See* R&R No. 5 at 13-15). That protection is not waived as to the remainder of the document because nothing in it places the	Protect entire email.

	Defendants into an adversarial position against each other. Because there has been no waiver, the joint defense privilege is irrelevant because the paragraphs are protected work product. Nevertheless, the paragraphs are also protected under the joint defense privilege because they falls within the four corners of the joint defense agreement and are intended to further that joint defense.	
Anthem 32 Cigna 43	Email alleges breach of Merger Agreement and Confidentiality Agreement as well as misconduct by one Defendant. While the email is opinion work product and any facts it contains are inextricably intertwined with the legal opinions and strategies it contains, (*see* R&R No. 5 at 13-15), that protection is waived because the email author voluntarily disclosed this email to opposing counsel and because the content of the email makes clear that the disclosure was done with adversarial intent. (*See* R&R no. 5 at 16-17). The joint defense privilege does not serve to protect the email notwithstanding the work product waiver because the content of the email does not fall within the four corners of the Joint Defense Agreements and because the email cannot be seen as intended to further the purpose of those agreements.	Disclose entire email.
Anthem 33 Cigna 44	Email responds to misconduct allegations. A reasonable reading of this document is that it concerns one Defendant's preparations to defend itself against claims by the other defendant. While the email is opinion work product and any facts it contains are inextricably intertwined with the legal opinions and strategies it contains, (*see* R&R No. 5 at 13-15), that protection is waived because the email author voluntarily disclosed this email to opposing counsel and because the content of the email makes clear that the disclosure was done with adversarial intent. (*See* R&R no. 5 at 16-17). The joint defense privilege does not serve to protect the email notwithstanding the work product waiver because the content of the email does not fall within the four corners of the Joint Defense Agreements and because the email cannot be seen as intended to further the purpose of those agreements.	Disclose entire email.
Anthem 34 Cigna 45	Document expresses general positions and strategy regarding the merger litigation. It does not include allegations of breach of contract or any other allegations intimating adversarial legal action between the two Defendants. Opinion work product protection applies to this document and any facts it contains are inextricably intertwined with the strategies and opinions expressed therein. (*See* R&R No. 5 at	Protect entire document.

	13-15). That protection is not waived as to the remainder of the document because nothing in it places the Defendants into an adversarial position against each other. Because there has been no waiver, the joint defense privilege is irrelevant because the document is protected work product. Nevertheless, the document is also protected under the joint defense privilege because it falls within the four corners of the joint defense agreement and was intended to further that joint defense.	
Anthem 35 Cigna 46	The email responds to allegations of breach of Merger Agreement. While the email is opinion work product and any facts it contains are inextricably intertwined with the legal opinions and strategies it contains, (*see* R&R No. 5 at 13-15), that protection is waived because the email author voluntarily disclosed this email to opposing counsel and because the content of the email makes clear that the disclosure was done with adversarial intent. (*See* R&R no. 5 at 16-17). The joint defense privilege does not serve to protect the email notwithstanding the work product waiver because the content of the email does not fall within the four corners of the Joint Defense Agreements and because the email cannot be seen as intended to further the purpose of those agreements.	Disclose entire email.
Anthem 36 Cigna 47	Paragraphs two, three and four (the entire section beginning with "Anthem's Contact") responds to breach allegations. While these paragraphs qualify as opinion work product and any facts are inextricably intertwined with the legal opinions and strategies expressed therein, (*see* R&R No. 5 at 13-15), that protection is waived because the letter author voluntarily disclosed this letter to opposing counsel and because the content of these paragraphs makes clear that the disclosure was done with adversarial intent as to these paragraphs only. (*See* R&R no. 5 at 16-17). The joint defense privilege does not serve to protect these paragraphs notwithstanding the work product waiver because the content of the paragraphs does not fall within the four corners of the Joint Defense Agreements and because the paragraphs cannot be seen as intended to further the purpose of those agreements. The remainder of the document expresses general positions and strategy regarding the merger litigation. It does not include allegations of breach of contract or any other allegations intimating adversarial legal action between the two Defendants.	Disclose paragraphs two, three, and four, and the title of the section which addresses these paragraphs. Protect remainder of document.

Anthem 36 Cigna 47 (continued from previous page)	Opinion work product protection applies to this document and any facts it contains are inextricably intertwined with the strategies and opinions expressed therein. (*See* R&R No. 5 at 13-15). That protection is not waived as to the remainder of the document because nothing in it places the Defendants into an adversarial position against each other. Because there has been no waiver, the joint defense privilege is irrelevant because the remainder of the document is protected work product. Nevertheless, the remainder of the document is also protected under the joint defense privilege because it falls within the four corners of the joint defense agreement and is intended to further that joint defense.	