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 Office of Chief Counsel
 July 2, 2026
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July 2, 2026

BY ELECTRONIC FILING

Hon. Jenifer J. Soulikias
 Administrative Law Judge
 Surface Transportation Board
 395 E Street S.W.
 Washington, D.C. 20423-0001

Re: Finance Docket No. 36873, *Union Pacific Corp., et al. – Control – Norfolk Southern Corp., et al.*

Dear Judge Soulikias:

CPKC moves to compel NS to respond to targeted discovery concerning UP's compliance with Applicants' merger agreement: requests (1) to produce communications in which NS alleged or suggested that UP has failed to honor its contractual commitments to NS in the merger agreement and (2) to respond to an interrogatory and a request for admission about NS's opinion on whether UP has honored those contractual commitments. The evidence CPKC seeks is relevant to several key issues. For instance, NS's view on whether UP has fulfilled its obligation to propose conditions to prevent harm that would otherwise result from the merger is relevant to the Board's consideration of whether the merger is in the public interest. In addition to assessing the adequacy of UP's proffered remedies, contractual disputes between NS and UP are also relevant to (1) assessing the likelihood that UP and legacy NS would be able to work together cooperatively after a merger to avoid service disruptions and achieve the efficiencies promised in their application, (2) assessing whether any set of remedies could effectively regulate a combined UP-NS, and (3) the timing of any lifting of the abeyance. Because NS and UP are in an adversarial relationship with respect to UP's compliance with the merger agreement, no privilege exists. *See United States v. Anthem, Inc.*, 2016 WL 8461264, at *4-10 (D.D.C. Oct. 6, 2016), *report and recommendation adopted*, 2016 WL 11164028 (D.D.C. Oct. 14, 2016) [hereinafter *Anthem*, attached as Exhibit A]. NS's other objections of alleged and unsubstantiated burden, ambiguity, and alleged misuse of the request for admission and interrogatory process are baseless. NS's blanket refusal to provide any answer on the issue of UP's compliance with its contractual commitments to NS only heightens the potential import of this evidence.

BACKGROUND

In Section 5.8 of their merger agreement, UP promised NS that UP would use its “reasonable best efforts” to effectuate the proposed transaction, including by taking specified “actions” to attempt to remediate the proposed merger’s otherwise harmful effects. Rev. App. 4-74 (Section 5.8 – Efforts); Rev. App. 4-182 to -83 (Company Disclosure Schedules, Section 5.8 – Efforts). Those “actions” include offering certain conditions or other remedies to mitigate the anticompetitive harms of the merger. *See* Rev. App. 4-74; Rev. App. 4-182 to -83. In addition, UP promised to pay NS a \$2.5 billion termination fee if the transaction does not close under certain scenarios, including if the parties fail to obtain regulatory approval. Rev. App. 4-91 (Section 7.3 – Termination Fees). In the case of a willful breach of the agreement, NS may also have damages claims against UP above and beyond that termination fee. Rev. App. 4-90 to -91 (Section 7.2 – Effect of Termination).

There is reason to believe that NS may hold the view that UP has not complied with those contractual commitments. UP promised to file “the application contemplated by 49 C.F.R. § 1180.4(c)” within six months of the signing of the merger agreement. Rev. App. 4-74 to -75 (Section 5.8 – Efforts). An acceptable application under 49 C.F.R. § 1180.4(c) was not filed until April 30, 2026. With respect to the Amended Application, the Board has criticized UP for, among other things, failing to provide “clarity and detail and . . . afford parties a meaningful opportunity to comment on the merits” and generating “significant issues regarding the workshop submission process.” Decision No. 21 at 18, 33 (STB Served May 28, 2026). Moreover, UP failed to offer in its Amended Application all the commitments it promised NS it would undertake. *See* Rev. App. 4-182 to -83.¹

In its Second Set of Discovery to NS, CPKC sought targeted discovery of NS’s view of whether UP has lived up to its contractual commitments in the merger agreement through a request for production, a request for admission, and an interrogatory. *See* CPKC’s Second Set of Discovery Requests to NS (Exhibit B).² Relevant documents would include correspondence from NS to UP (including through counsel) alleging or suggesting failure by UP to abide by its contractual commitments, demands that UP offer additional, more robust commitments, or negotiations about payment—either in full or in part—of the \$2.5 billion termination fee. The

¹ Although both UP and NS filed the Amended Application, UP has the right to control strategy with respect to these proceedings. *See* Rev. App. 4-77.

² *Request for Production*: Produce all Communications and Documents between Union Pacific and Norfolk Southern relating to any allegation or suggestion by Norfolk Southern that Union Pacific has failed to comply with Union Pacific’s obligations under the Merger Agreement, including correspondence exchanged through counsel, notices under Section 8.7 of the Merger Agreement, correspondence relating to potential termination of the Merger Agreement, and correspondence relating to the Company Termination Fee as defined in Section 7.3(a) of the Merger Agreement.

Request for Admission: Admit that Union Pacific has complied with its obligations under the Merger Agreement.

Interrogatory: Has Union Pacific complied with its obligations under the Merger Agreement?

request for admission and interrogatory are designed to allow NS to explain its views about UP's compliance beyond what may exist in correspondence.

NS raised five objections to the discovery requests: (1) relevance, (2) privilege, (3) burden, (4) vagueness, and, with respect to the request for admission and interrogatory, (5) an objection that the discovery impermissibly asks NS to provide a legal conclusion. *See* NS Responses and Objections to CPKC's Second Set of Discovery Requests (Exhibit C) (the "Objections"). Based on its objections, NS refused to provide any response to the requests. During the meet and confer process, NS would neither confirm nor deny the existence of documents responsive to the request for production, nor would it describe who might have relevant material at NS or where it might be located.

ANALYSIS

1. **Relevance.** The evidence CPKC seeks is relevant to several issues:

a. Assessing the adequacy of UP's proffered remedies. NS's views about whether UP is obliged to offer remedies beyond what UP has put forward in the Amended Application are relevant to the Board's assessment of whether the proposed transaction is in the public interest. The Board is entitled to consider those views when considering the adequacy of the remedy UP has offered—which is less than what UP promised NS. Indeed, the Board has already determined that those promises "may relate to the competitive issues that the Board would consider." Decision No. 9 at 9 (STB served January 16, 2026). NS's view as to whether UP has complied with its contractual obligation to offer commitments is equally, if not more, relevant than the contractual obligation itself. Indeed, courts often rely on evidence of a target's own views about the competitive effects of a proposed merger in assessing its likely competitive effects. *See, e.g., Anthem* at *4-5 (ordering production of materials relating to the acquiring party's alleged breaches of the merger agreement); *Fed. Trade Comm'n v. Edwards Lifesciences Corp.*, 2026 WL 228723, at *1, 8-10 (D.D.C. Jan. 28, 2026) (citing target company's concerns about the anticompetitive effects of a buyer's acquisition).

b. Assessing the likelihood of service disruption and any efficiencies. The Board in its determination of the public interest is required to weigh the likelihood of transitional service problems. The Board has recognized that "significant service problems can arise during the transitional period when merging firms integrate their operations." 49 C.F.R. § 1180.1(c)(2)(iii). This is so even in the best of worlds where the parties work together cooperatively. If discovery reveals NS has accused UP of breaching its obligations under their merger agreement, the Board is entitled to consider whether hostilities between UP and NS could hamper their ability to work together and cause disruption to customers, especially here, where a multi-year integration process is envisioned. Rev. App. 2-1076 to -84 (*Turner V.S.* ¶¶ 518-520). The Board is also entitled to consider whether the savings and benefits that UP claims would come about from the merger are possible if the relationship between the parties has deteriorated. *See Anthem* at *5 ("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.").

c. Assessing whether any set of remedies could effectively regulate a combined UP-NS. An issue that could be relevant to the Board's consideration is whether there is any set of remedies that the Board can confidently conclude would control UP's behavior going forward. UP has offered commitments to the Board that amount to promises that it will take or refrain from taking certain actions. If discovery reveals that UP has refused to honor its contractual commitments to its merger partner, that behavior would be relevant to the question of whether UP can be trusted to honor the commitments that it has offered to the Board as potential conditions of approval. UP and NS are free to argue that NS's views about whether UP has fulfilled its contractual commitments are irrelevant to that question, but the Board is entitled to give that evidence weight.

d. Timing of any lifting of the abeyance. The requests are relevant to the timing and procedural schedule of this proceeding. If UP and NS are in negotiations that would result in enhanced undertakings or voluntary termination of their transaction, there would be no need for the Board to bring this matter out of abeyance until those discussions are complete. *See, e.g., Commuter Rail Div. of the Reg'l Transp. Auth. – Adverse Abandonment – Omnitrax/Chicago Rail Link*, Abandonment Docket No. 1337 (STB Decision No. 52061 served Feb. 27, 2024) at 1 (“Granting an abeyance not only serves the public purpose by avoiding unnecessary litigation but is also consistent with prior precedent. The Board has held proceedings in abeyance to allow time for the record to be clarified, the issues to be narrowed, and for the parties to progress settlement negotiations.”). Moreover, any material changes to the Merger Agreement would require UP and NS to submit another amended application.

2. Privilege. Disagreements between UP and NS about UP's compliance with its contractual commitments to NS are not privileged. As parties to a contract, UP and NS have different interests in, among other things, UP's promise to pay NS \$2.5 billion if the transaction does not close on account of UP's failure to exert reasonable best efforts or otherwise. *See Anthem* at *6-10 (concluding that no privilege applies to correspondence between merging parties relating to alleged breaches of a merger agreement); *Chabot v. Walgreens Boot All., Inc.* 2020 WL 3410638, at *10 (M.D. Pa. June 11, 2020) (rejecting privilege claims for “adversarial communications” between merging parties); *cf.* Decision No. 9 at 9 (“[I]t is difficult to imagine a privilege claim that would apply in this context to justify Applicants’ withholding of a merger agreement document—negotiated by counterparties to a transaction at arm’s length and required to be submitted to the Board . . .”).

3. Burden. NS has failed to articulate any burden associated with gathering its communications with UP, through correspondence between NS's lawyers and UP's lawyers or otherwise, addressing UP's compliance with UP's obligations under the merger agreement, or any burden associated with responding to the request for admission and interrogatory. These are narrow and targeted requests. NS's objection that CPKC is seeking information that is not in NS's possession makes no sense: the requests seek communications between NS and UP, and NS certainly has views about UP's compliance with their merger agreement. If NS is aware of responsive material that NS no longer possesses, CPKC is willing to address that issue after receiving a summary of what is missing.

4. Vagueness. CPKC is seeking correspondence between NS and UP respecting allegations or suggestions that UP has failed to comply with any part of their merger agreement.

That request is neither vague nor ambiguous, and, to the degree it conceivably is, NS failed to articulate why during the meet and confer process. The merger agreement between NS and UP is the largest contract NS has ever entered into. With the help of a large team of external counsel, and with a \$2.5 billion termination fee on the line, NS is assuredly monitoring UP's compliance with its contractual commitments to NS closely. Indeed, failure to monitor UP's compliance would almost certainly amount to a breach of management's fiduciary obligations to NS's shareholders.

5. Legal conclusions. With respect to CPKC's request for admission and interrogatory, NS objects on the additional ground that they improperly call for "a legal conclusion." Objections at 2-4. That objection is also baseless: CPKC is seeking NS's view about UP's compliance with the merger agreement. That is a topic on which NS certainly has a view, regardless of how a court might ultimately rule.

The Board's discovery rules "follow generally those in the Federal Rules of Civil Procedure." *Potomac Elec. Power Co. v. CSX Transp., Inc.*, 2 S.T.B. 290, 290 n.5 (1997). The Federal Rules of Civil Procedure allow requests to admit the truth of any matters relating to "facts, the application of law to fact, or opinions about either," Fed. R. Civ. P. 36(a)(1)(A), and interrogatories that "ask[] for an opinion or contention that relates to fact or the application of law to fact," Fed. R. Civ. P. 33(a)(2). Both are common in breach of contract actions. See *Sigmund v. Starwood Urb. Retail VI, LLC*, 236 F.R.D. 43, 46 (D.D.C. 2006) ("A request for admission that relates to the interpretation of a contract at issue in a case involves the application of law to the unique facts of that case and, therefore, would be permissible under the amended Rule 36."); *Smash Tech., LLC v. Smash Sols., LLC*, 335 F.R.D. 438, 449 (D. Utah 2020) (noting that an interrogatory asking a party to "state what he believes to be acts of contract compliance, which necessarily requires the application of law to facts[,] is precisely what Rule 33(a)(2) allows). NS should answer the interrogatory and request for admission.

CONCLUSION

For the reasons above, CPKC respectfully requests that Your Honor issue an order compelling NS to respond to CPKC's Second Set of Discovery Requests.

Respectfully submitted,

/s/ Joseph J. Matelis

Joseph J. Matelis

Attorney for CPKC

cc: All Parties of Record

CERTIFICATE OF SERVICE

I hereby certify that, on this 2nd day of July 2026, a true and correct copy of the foregoing was served by first-class mail or email on all parties of record in this proceeding, the Secretary of Transportation, the Attorney General of the United States, and Administrative Law Judge Jenifer J. Soulikias.

/s/ Noah P.M. Stern
Noah P.M. Stern

Exhibit A

2016 WL 8461264

Only the Westlaw citation is currently available.
United States District Court, District of Columbia.

UNITED STATES of
America, et al., Plaintiffs,

v.

ANTHEM, INC. and Cigna Corp., Defendants.

Case No. 1:16-cv-1493 (ABJ)

|
Signed 10/06/2016

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SPECIAL MASTER REPORT AND RECOMMENDATION NO. 5

Hon. Richard A. Levie (Ret.), Special Master

*1 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

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.

*2 [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. [United 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))].

*3 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.” [*Lofitin 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

*4 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:

*5 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

*6 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

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.

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

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].

*8 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 to increase the likelihood of regulatory approval and/or success in litigation.

***9** 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 Privilege⁵

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

***10** 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)].

*11 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 *United 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.

All Citations

Not Reported in Fed. Supp., 2016 WL 8461264

Footnotes

- 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.
- 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.

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 Investorings 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 Investorings*, 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).

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.

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Exhibit B

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 36873

**UNION PACIFIC CORPORATION AND UNION PACIFIC RAILROAD COMPANY
– CONTROL –
NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN RAILWAY COMPANY**

CPKC’S SECOND SET OF DISCOVERY REQUESTS TO NORFOLK SOUTHERN

Pursuant to 49 C.F.R. §§ 1114.26 and 1114.30, Canadian Pacific Railway Company d/b/a Canadian Pacific Kansas City and CPKC, on behalf of itself and its U.S. rail carrier subsidiaries (collectively “CPKC”),¹ requests that Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively “Norfolk Southern”), respond to no later than June 23, 2026, and produce documents responsive to the following discovery requests no later than June 23, 2026. CPKC incorporates by reference its Definitions and Instructions contained in CPKC’s First Set of Discovery Requests to Norfolk Southern, dated December 18, 2025.

REQUEST FOR ADMISSION

1. Admit that Union Pacific has complied with its obligations under the Merger Agreement.

INTERROGATORY

1. Has Union Pacific complied with its obligations under the Merger Agreement?

¹ CPKC’s U.S. rail carrier subsidiaries include Soo Line Railroad Company; Central Maine & Quebec Railway US Inc.; Dakota, Minnesota & Eastern Railroad Corporation; Delaware & Hudson Railway Company, Inc.; The Kansas City Southern Railway Company; Gateway Eastern Railway Company; and The Texas Mexican Railway Company.

REQUEST FOR PRODUCTION

1. Produce all Communications and Documents between Union Pacific and Norfolk

Southern relating to any allegation or suggestion by Norfolk Southern that Union Pacific has failed to comply with Union Pacific's obligations under the Merger Agreement, including correspondence exchanged through counsel, notices under Section 8.7 of the Merger Agreement, correspondence relating to potential termination of the Merger Agreement, and correspondence relating to the Company Termination Fee as defined in Section 7.3(a) of the Merger Agreement.

Respectfully submitted,



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Attorneys for CPKC

Dated: June 8, 2026

CERTIFICATE OF SERVICE

I hereby certify that on June 8, 2026, a true and correct copy of the foregoing CPKC's Second Set of Discovery Requests to Norfolk Southern was served by first-class mail or email on all parties of record in this proceeding, the Secretary of Transportation, the Attorney General of the United States, and Administrative Law Judge Jenifer Soulikias.

Kiera S. Judge

Kiera S. Judge

Exhibit C

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 36873

**UNION PACIFIC CORPORATION, ET AL.
—CONTROL—
NORFOLK SOUTHERN CORPORATION, ET AL.**

**NS'S RESPONSES AND OBJECTIONS TO CPKC'S SECOND SET OF
DISCOVERY REQUESTS TO NORFOLK SOUTHERN**

Pursuant to 49 C.F.R. Part 1114 and other applicable rules and authority, Norfolk Southern Corporation and Norfolk Southern Railway Company (together, “Norfolk Southern” or “NS”), through undersigned counsel, respond as follows to Canadian Pacific Railway Company’s (“CPKC’s”) Second Set of Discovery Requests (“Requests”). NS’s responses and objections to these Requests are based on NS’s present knowledge, information, and belief. NS reserves the right to supplement or amend these Responses and Objections at any time as circumstances may require.

GENERAL RESPONSES AND OBJECTIONS

NS incorporates by reference the General Responses and Objections contained in NS’s Responses and Objections to CPKC’s First Set of Discovery Requests to Applicants. Those General Responses and Objections are to be considered objections to each of the specific discovery requests that follow herein. NS’s Responses and Objections to these Requests are based on NS’s present knowledge, information, and belief. NS’s Objections shall not waive or prejudice any objections that it may later assert.

SPECIFIC RESPONSES AND OBJECTIONS

In addition to its General Objections (which apply in full to each and every Request without further enumeration), NS sets forth Specific Objections and Responses to each Request below. NS preserves all of its General Objections as incorporated above, and none of the following Specific Objections shall waive its General Objections. Nor shall any of NS's Specific Objections limit the scope, breadth, generality, or applicability of those General Objections.

REQUEST FOR ADMISSION

Admit that Union Pacific has complied with its obligations under the Merger Agreement.

Response:

NS objects to this Request as irrelevant and not reasonably calculated to lead to the discovery of relevant, admissible evidence that could aid CPKC in preparing its filings in this proceeding. The question in this proceeding is whether the proposed transaction is in the public interest, and the signing parties' compliance with the terms of the merger agreement has no relevance to that question. NS further objects to the Request as overly broad and unduly burdensome to the extent it asks NS to respond to a request on behalf of Union Pacific and requests information that is not in NS's possession, custody or control. NS further objects to this Request to the extent it seeks an admission of information protected from disclosure by the attorney-client privilege, attorney work product doctrine, common interest privilege, or other applicable privilege. NS further objects to this Request to the extent it seeks a legal conclusion regarding the interpretation, meaning, scope

or satisfaction of obligations arising under the Merger Agreement. NS further objects to this Request because it is vague and ambiguous to the extent it refers generally to “obligations under the Merger Agreement” without identifying any particular provision or obligation at issue. NS further objects to this Request to the extent it seeks an admission regarding a legal conclusion or, the application of law to disputed facts.

INTERROGATORY

Has Union Pacific complied with its obligations under the Merger Agreement?

Response:

NS objects to this Interrogatory as irrelevant and not reasonably calculated to lead to the discovery of relevant, admissible evidence that could aid CPKC in preparing its filings in this proceeding. The question in this proceeding is whether the proposed transaction is in the public interest, and the signing parties’ compliance with the terms of the merger agreement has no relevance to that question. NS further objects to this Interrogatory as overly broad and unduly burdensome to the extent it asks NS to respond to a request on behalf of Union Pacific and requests information that is not in NS’s possession, custody or control. NS further objects to this Request to the extent it seeks information protected from disclosure by the attorney-client privilege, attorney work product doctrine, common interest privilege, or other applicable privilege. NS further objects to this Interrogatory to the extent it seeks a legal conclusion regarding the interpretation, meaning, scope or satisfaction of obligations arising under the Merger Agreement.

NS further objects to this Interrogatory because it is vague and ambiguous to the extent it refers generally to “obligations under the Merger Agreement” without identifying any particular provision or obligation at issue. NS further objects to this Interrogatory to the extent it seeks information regarding a legal conclusion or, the application of law to disputed facts.

REQUEST FOR PRODUCTION

Produce all Communications and Documents between Union Pacific and Norfolk Southern relating to any allegation or suggestion by Norfolk Southern that Union Pacific has failed to comply with Union Pacific’s obligations under the Merger Agreement, including correspondence exchanged through counsel, notices under Section 8.7 of the Merger Agreement, correspondence relating to potential termination of the Merger Agreement, and correspondence relating to the Company Termination Fee as defined in Section 7.3(a) of the Merger Agreement.

Response:

NS objects to this Request as irrelevant and not reasonably calculated to lead to the discovery of relevant, admissible evidence that could aid CPKC in preparing its filings in this proceeding. The question in this proceeding is whether the proposed transaction is in the public interest, and the signing parties’ compliance with the terms of the merger agreement has no relevance to that question. NS further objects to this Request to the extent it seeks materials protected from disclosure by the attorney-client privilege, attorney work product doctrine, common interest privilege, or other applicable privilege. NS further objects to this Request as overly broad and unduly burdensome to the extent it asks NS to respond to a request on behalf of Union Pacific and requests information that is not in NS’s possession, custody or control. NS further objects to this Request because it is vague

and ambiguous to the extent it refers generally to “obligations under the Merger Agreement” without identifying any particular provision or obligation at issue.

/s/ Matthew J. Warren

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Date: June 23, 2026

CERTIFICATE OF SERVICE

I hereby certify that on this 23 day of June, 2026, a copy of the foregoing “NS’s Responses and Objections to CPKC’s Second Set of Discovery Requests to Norfolk Southern” was served by email or first class mail on the service list for Finance Docket No. 36873.

/s/ Matthew J. Warren
Matthew J. Warren