THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. UNITEDHEALTH GROUP INCORPORATED and SIERRA HEALTH SERVICES, INC., Defendants.	Case No. 1:08-cv-322-ESH

RESPONSE OF PLAINTIFF UNITED STATES TO THE AMA'S AND SEIU'S MOTION FOR LEAVE TO APPEAR AS AMICI CURIAE

The United States opposes the American Medical Association's (the "AMA") and Service Employees International Union's (the "SEIU") Joint Motion For Leave To Appear As Amicus Curiae ("Motion") in this Tunney Act (the "Act") proceeding. Under the Act, 15 U.S.C. § 16(b)-(h), the Court must determine whether entry of the proposed Final Judgment is in the public interest. As Congress anticipated, courts typically make this determination on the basis of the information, including public comments, that the Act requires the United States to file with the Court. In this case, the AMA and SEIU submitted extensive public comments, to which the United States has already responded. Both the AMA's and SEIU's comments and the United States' response have been filed with the Court. According to their motion, the AMA and SEIU intend to repeat the same arguments as amicus that they have already stated in their comments. Moreover, those comments relate primarily to arguments outside the well-settled scope of Tunney Act proceedings – namely the AMA's and SEIU's argument that the United States should have asserted claims not alleged in the complaint. For reasons of judicial efficiency and

consistent with the terms of the Tunney Act, the court should deny their motion.

I. INTRODUCTION

A. The Tunney Act. The Court must find that the proposed Final Judgment is in the public interest before entering the Final Judgment. 15 U.S.C. § 16(e). The Act, which governs the Court's public interest determination, sets forth a public comment process requiring that the United States (1) publish notices in newspapers and the *Federal Register*; (2) file and publish a Competitive Impact Statement describing, among other things, the antitrust violation and the proposed decree; and (3) file with the Court and publish in the *Federal Register* any public comments received and the United States's response to those comments. *Id.* § 16(b)-(d). The public comment process gives the Court, as well as the United States, the benefit of views of interested nonparties prior to making its public interest determination.

The Act enumerates factors the Court must consider in making its public interest determination. *Id.* § 16(e)(1). The Court may make its determination based on the information provided by the Complaint, proposed Final Judgment, Competitive Impact Statement, public comments, and the government's response to comments. If the Court concludes that the information is insufficient, the Act provides a wide array of tools for obtaining more. *Id.* § 16(f). However, the Act explicitly allows the court to enter the Final Judgment without conducting an evidentiary hearing; *see id.* § 16(e)(2) ("Nothing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene.").

B. Proceedings to date. On February 25, 2008, the United States filed a Complaint alleging that the merger of UnitedHealth Group Incorporated ("United") and Sierra Health Services, Inc. ("Sierra") violated Section 7 of the Clayton Act, 15 U.S.C. § 18. At the same time,

the United States filed a proposed Final Judgment, to which the defendants had consented, requiring United to divest its individual Medicare Advantage line of business in the Las Vegas area to remedy the harms alleged in the Complaint. *See* 15 U.S.C. § 16(b)-(h). Also on February 25, 2008, the United States filed its Competitive Impact Statement, *see id.* § 16(b), analyzing the violation alleged in the Complaint and the remedies in the proposed Final Judgment for the competitive harms the proposed merger would create if consummated as United and Sierra had planned. The United States published the proposed Final Judgment and Competitive Impact Statement in the *Federal Register* on March 10, 2008, *see* 73 Fed. Reg. 12762 (2008); 15 U.S.C. §16(b), and published summaries of the terms of the proposed Final Judgment and Competitive Impact Statement, together with directions for the submission of written comments relating to the proposed Final Judgment, in The *Washington Post* for seven days beginning on March 16, 2008 and ending on March 22, 2008, and in the *Las Vegas Review-Journal* for seven days beginning on March 8, 2008 and ending on March 14, 2008, *see id.* § 16(c)). The comment period expired on May 15, 2008.

During the comment period, the United States received four comments: from the Service Employees International Union Local 1107; the American Medical Association, Nevada State Medical Association, and the Clark County Medical Society (collectively, the "AMA"); the Honorable Nydia M. Velazquez, Chairwoman, United States House of Representatives Committee on Small Business; and the Honorable Chris Giunchigliani, Commissioner, Board of Commissioners - Clark County, Nevada. The United States filed its response to these four

comments, along with the comments themselves, on July 7, 2008.[1]

C. The AMA-SEIU Motion. On September 17, 2008, the AMA and SEIU filed the instant Motion seeking leave to appear as amicus curiae.

II. The Court Should Deny the AMA-SEIU Motion for Leave to Appear as Amici Curiae

The AMA and SEIU provide no sound reason for granting their Motion. This proceeding is not a trial on the merits. It is a statutory proceeding to determine whether it would be in the public interest for the Court to enter the proposed Final Judgment. 15 U.S.C. § 16(e). The Act requires the United States to provide the Court with substantial information relevant to the Court's determination, including the views and analyses of interested third parties. *Id.* § 16(b), (d). This information is ordinarily sufficient to support a court's determination. The AMA-SEIU Motion seeks to provide the Court with information that the AMA and SEIU have already provided to the Court through the public-comment process. Accordingly, no sound reason exists to grant the AMA-SEIU Motion, and the Court should reject their Motion.

A. The Court Should Base Its Public Interest Determination On The Mandatory Tunney Act Materials Unless They Inadequately Inform The Court's Public Interest Determination

The parties to the underlying antitrust dispute have resolved their differences, and the Court therefore does not face the typical judicial task of resolving contested disputes of fact, law, and remedy.[2] Rather, the Act requires that the government provide the Court with substantial

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[1] Defendants United and Sierra have completed their merger. Pursuant to the terms of the proposed Final Judgment, United sold its individual Medicare Advantage line of business in the Las Vegas area to Humana Health Plan, Inc. on May 1, 2008.

[2] Rather, the Court's task is only to determine whether to perform the "judicial act," *United States v. Swift & Co.*, 286 U.S. 106, 115 (1932), of entering the decree proposed by the

information relevant to its public interest determination, including the Complaint, the proposed decree, the Competitive Impact Statement, any comments submitted to the government by interested third parties, and the government's response to those comments. 15 U.S.C. § 16(b), (d). Congress contemplated that these materials would often suffice.[3] Congress reiterated its understanding in the 2004 Amendments to the Act by providing in 15 U.S.C. § 16(e)(2) that "Nothing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene."

The Act provides a wide array of optional tools which the Court may employ to gather additional information, 15 U.S.C. § 16(f), but the Court should employ these tools only when it is necessary to do so. To do otherwise would conflict with the principle that "the trial judge will adduce the necessary information through the least . . . complicated and least time-consuming means possible . . . ." S. Rep. No. 93-298 at 6 (1973) (Senate Report). Ordinarily, courts do not

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parties as the Court's decree. In carrying out that task, the Court must be mindful of the congressional purpose to preserve the role of the consent decree in effective antitrust enforcement, *see* S. Rep. No. 93-298 at 5 (1973) ("Senate Report") ("the consent decree is of crucial importance as an enforcement tool, since it permits the allocation of resources elsewhere"); 119 Cong. Rec. 24,600 (1973) (Statement of Sen. Gurney) (Tunney Act "is designed to enhance the value and effectiveness of the consent decree as a tool of public policy"), a purpose which would be threatened by transforming the Court's public interest determination into a process resembling a trial.

[3] Senate Report at 6 ("[w]here the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized"); *see also United States v. Enova Corp.*, 107 F. Supp. 2d 10, 17 (D.D.C. 2000) ("Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone"); The Antitrust Procedures & Penalties Act: Hearings on S. 782 & S. 1088 Before the Subcomm. on Antitrust & Monopoly of the Senate Committee on the Judiciary, at 152-53, 93d Cong. (1973) (testimony of Hon. J. Skelly Wright) ("an experienced judge, who does have the facility of getting to the point and getting others to get to the point, can arrive at a public interest determination in most cases without using" additional tools).

find it necessary to employ these additional tools in Act proceedings. Thus, for example, Judge Greene, considering the entry of a decree that would massively restructure the entire telecommunications industry, "concluded that none of the issues before [the Court] require[d] an evidentiary hearing. That being so, there [was] obviously no need, nor indeed any occasion, for the presentation by a third party of its own witnesses or for the cross-examination of adverse witnesses." *United States v. AT&T*, 552 F. Supp. 131, 219 (D.D.C. 1982), *aff'd mem. sub. nom. Maryland v. United States*, 460 U.S. 1001 (1983).

B. The AMA and SEIU Fail To Show How Their Participation Would Be Helpful To The Court

As discussed in the Response of Plaintiff United States to Public Comments (Docket Entry 11), the record in this proceeding includes sufficient information to properly inform the Court's public interest determination. The AMA and SEIU neither explain why the record before the Court is insufficient nor how the AMA's and SEIU's proposed participation would cure any alleged insufficiency. Rather, the motion merely repeats arguments made in the AMA's and SEIU's comments. Indeed, the Motion itself notes that these competitive issues have been discussed at length in the AMA's and SEIU's written comments, stating "[t]he Movants have extensively addressed these issues in their comments." Motion at 10. Consequently, the Court should deny the AMA-SEIU motion.

The Motion does not indicate what the AMA's and SEIU's proposed participation would bring to this proceeding that cannot already be found in the AMA's and SEIU's previous public comments. As Judge Kollar-Kotelly said of a similar proposal by a commentor in another Tunney Act proceeding to offer testimony that was already part of a comment, the "request in this regard

seems somewhat redundant in light of the lengthy comment it submitted to the Department of Justice in response to the proposed consent decree . . . . Because the Court is authorized to consider [the] comments submitted to the Department of Justice, 15 U.S.C. § 16(f)(4), and because the Court has already received and will review copies of [the] comments, . . . the Court considers any additional participation by [the commentor] to be largely superfluous." *United States v. Microsoft Corp.*, 2002 WL 319436, at *3 (D.D.C. Feb. 20, 2002).

III. The Court Should Enter the Proposed Final Judgment Because It is in the Public Interest

None of the issues raised by the AMA and SEIU in their motion are grounds for not entering the proposed Final Judgment. In their pleading, the AMA and SEIU merely repeat the two arguments that they made in their Tunney Act comments. First, they maintain that the United States should have alleged and remedied harm to competition in the sale of products other than those in the Medicare Advantage market alleged in the United States' Complaint and, second, that the proposed Final Judgment does not adequately remedy the harms to competition alleged in the Complaint. The United States thoroughly investigated whether the proposed transaction would harm competition in the sale of these products and services, and reasonably concluded that the merger was unlikely to do so. Its determination is not subject to review under the Tunney Act.

A. Arguments that the United States Should Have Alleged and Remedied Additional Competitive Concerns

Arguments that the United States should have alleged harm to competition for the sale of various types of health insurance or for the purchase of physician or hospital services in its

Complaint are outside the scope of this APPA proceeding.[4] This Court has held that in a Tunney Act proceeding, a district court may not second guess the prosecutorial decisions of the United States to assert or not assert claims in its Complaint; "rather, the court is to compare the complaint filed by the United States with the proposed consent decree and determine whether the proposed decree clearly and effectively addresses the anticompetitive harms initially identified." *United States v. Thomson Corp.*, 949 F. Supp. 907, 913 (D.D.C. 1996); *accord, United States v. Microsoft Corp.*, 56 F.3d 1448, 1459 (D.C. Cir. 1995) (in APPA proceeding, "district court is not empowered to review the actions or behavior of the Department of Justice; the court is only authorized to review the decree itself"); *United States v. BNS Inc.*, 858 F.2d 456, 462-63 (9th Cir. 1988) ("the APPA does not authorize a district court to base its public interest determination on antitrust concerns in markets other than those alleged in the government's complaint"). "[A] district court is not permitted to 'reach beyond the complaint to evaluate claims that the government did *not* make and to inquire as to why they were not made.'" *United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1, 14 (D.D.C. 2007) (quoting *Microsoft*, 56 F.3d at 1459) (emphasis in original).

The AMA's contention that the 2004 Amendments to the Tunney Act overruled precedent in this court and require a more extensive review of the United States' exercise of its prosecutorial judgment conflicts with this Court's holding in *SBC Communications*, *supra*. (AMA comment at

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[4] While it is not necessary for the Court to consider the breadth of the analysis that the United States used to determine not to allege harm in additional markets, the United States notes that it conducted an eleven-month, detailed investigation into the competitive effects of the United-Sierra transaction. This inquiry included reviewing approximately 2.5 million pages of the parties' and third parties' documents, taking depositions of the parties' and third-party witnesses, numerous interviews with physicians, hospitals, and businesses, and economic analysis of data obtained from the parties and third parties.

4 and AMA-SEIU Motion at 7-8). In *SBC Communications*, this Court held that "a close reading of the law demonstrates that the 2004 amendments effected minimal changes, and that this Court's scope of review remains sharply proscribed by precedent and the nature of [APPA] proceedings." *SBC Commc'ns*, 489 F. Supp. 2d at 11. This Court continued that because "review [under the 2004 amendments] is focused on the 'judgment,' it again appears that the Court cannot go beyond the scope of the complaint." *Id.*

The 2004 amendments to the APPA, as interpreted and applied by this Court in *SBC Communications*, require the Court to evaluate the effect of the "judgment upon competition" in a Medicare Advantage market in the Las Vegas area. 15 U.S.C. § 16(e)(1)(b). The reviewing court may look beyond the scope of the complaint only when the complaint has been "drafted so narrowly as to make a mockery of judicial power." *SBC Commc'ns*, 489 F. Supp. 2d at 14. Because the United States did not allege that United's acquisition of Sierra would cause harm in additional markets, it is not appropriate for the Court to seek to determine whether the acquisition will cause anticompetitive harm in such markets.

B. Arguments that the proposed Final Judgment does not provide an adequate remedy

The AMA and SEIU also argue that the United States should have obtained prohibitions on MFN clauses, all-product clauses, and exclusive contracts, and arranged for a Physicians Council, as are present in the proposed Final Judgment in the State of Nevada action.

1. MFN, All-Products Clauses, and Exclusive Contracts

It is not clear whether the AMA and SEIU believe that prohibitions on MFN clauses, all-products clauses, and exclusive contracts are necessary to remedy the harm addressed in the

Complaint or to remedy harm to other markets. If the AMA and SEIU favor these remedies to address harms that are not alleged in the Complaint, then the issue is outside the scope of the Tunney Act proceeding.

If the AMA's and SEIU's purpose is to ensure that United cannot reduce competition in the Medicare Advantage market by limiting Humana's access to healthcare providers, then the proposed remedies are not needed to preserve the public interest. The United States carefully crafted the Final Judgement and reviewed the proposed terms of the divestiture with Humana to ensure that the buyer of United's Medicare Advantage assets would have sufficient access to healthcare providers to preserve competition in the market. As the United States has previously reported in its Response to Public Comments (Docket Entry 11, pp. 15-16), pursuant to Section IV(F) of the proposed Final Judgment, on February 29, 2008, Humana entered into an agreement that gives Humana access to United's existing provider network of physicians, hospitals, ancillary service providers, and other healthcare providers on comparable terms to those enjoyed by United at the time of the acquisition. For these reasons, the prohibitions that the AMA and SEIU seek are not necessary. Further, the United States remains free to challenge any anticompetitive conduct of United, including the use of MFN clauses, all-products clauses, and exclusive contracts, if the United States determines that such conduct harms competition.

2. Physicians Council

The AMA-SEIU Motion also argues that the proposed Final Judgment should create a physicians council for the purpose of addressing the relations between United and physicians. Such a council, however, would not contribute to Humana's ability to maintain the premerger competitive level in a Medicare Advantage market and, consequently, is not needed for the Court

to find that the proposed Final Judgment is in the public interest.

IV. Conclusion

For the reasons set forth in this Response, the Competitive Impact Statement, the Response to Public Comments, and the United States' Motion for Entry of the Proposed Final Judgment, the Court should deny the AMA-SEIU Motion for Leave to Appear as Amici Curiae, find that the proposed Final Judgment is in the public interest, and enter the proposed Final Judgment.

Respectfully Submitted,

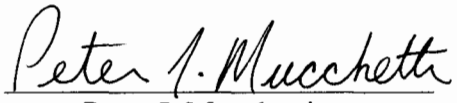
Dated: September 23, 2008

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CERTIFICATE OF SERVICE

I hereby certify that on September 23, 2008, I sent by electronic mail a copy of the foregoing Response of Plaintiff United States to the AMA and SEIU's Motion for Leave To Appear as Amicus Curiae in this matter to:

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