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 PUBLIC COMMENTS

Pursuant to the requirements of the Antitrust Procedures and Penalties Act ("APPA" or "Tunney Act"), 15 U.S.C. § 16(b)-(h), the United States hereby files the four public comments that the United States received concerning the proposed Final Judgment in this case and the United States' response to those comments. The United States will move the Court for entry of the proposed Final Judgment after the comments and this Response have been published in the *Federal Register*, pursuant to 15 U.S.C. § 16(d).

On February 25, 2008, the United States filed the Complaint in this matter alleging that the proposed merger of UnitedHealth Group Incorporated ("United") and Sierra Health Services, Inc. ("Sierra") would violate Section 7 of the Clayton Act, 15 U.S.C. § 18. Simultaneously with the filing of the Complaint, the United States filed a proposed Final Judgment and a Hold Separate and Asset Preservation Stipulation and Order ("Stipulation") signed by the United States and Defendants consenting to the entry of the proposed Final Judgment after compliance with the requirements of the Tunney Act.[1] Pursuant to those requirements, the United States

[1] The merger closed on February 25, 2008. In keeping with the United States' standard practice, neither the Stipulation nor the proposed Final Judgment prohibited closing the merger.

filed a Competitive Impact Statement ("CIS") in this Court on February 25, 2008; published the proposed Final Judgment and CIS in the *Federal Register* on March 10, 2008, *see* 73 Fed. Reg. 12762 (2008); and published summaries of the terms of the proposed Final Judgment and CIS, 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. The 60-day period for public comments ended on May 15, 2008, and the United States received the four comments described below and attached hereto.

I. THE UNITED STATES' INVESTIGATION AND THE PROPOSED FINAL JUDGMENT

On March 11, 2007, United and Sierra entered into an agreement, whereby United agreed to acquire all outstanding shares of Sierra. Over the next eleven months, the United States Department of Justice (the "Department") conducted an extensive, detailed investigation into the competitive effects of the proposed transaction. As part of this investigation, the Department obtained substantial documents and information from the merging parties and issued numerous Civil Investigative Demands to third parties. In response, the Department received and considered more than 2.5 million pages of material. The Department conducted approximately 150 interviews with customers, hospitals and physician groups, insurance companies, and other individuals with knowledge of the industry.

See ABA Section of Antitrust Law, *Antitrust Law Developments* 406 (6th ed. 2007) (noting that "[t]he Federal Trade Commission (as well as the Department of Justice) generally will permit the underlying transaction to close during the notice and comment period"). Such a prohibition could interfere with many time-sensitive deals and prevent or delay the realization of substantial efficiencies.

After conducting a detailed analysis of the acquisition, the Department concluded that the combination of United and Sierra likely would substantially lessen competition in the Las Vegas, Nevada area (consisting of Clark and Nye Counties, Nevada) in a product market no broader than the sale of Medicare Advantage health-insurance plans to senior citizens and other Medicare-eligible individuals. As defined by federal law, Medicare Advantage plans consist of Medicare Advantage health maintenance organization plans ("MA-HMO"), Medicare Advantage preferred provider organization plans ("MA-PPO"), and Medicare Advantage private fee-for-service plans ("MA-PFFS"). *See* 42 U.S.C. § 1395w-21(a)(2). United and Sierra together would have accounted for approximately 94 percent of the total enrollment in Medicare Advantage plans in the Las Vegas area, which accounts for approximately $840 million in annual commerce. United markets and sells its Medicare Advantage products under the Secure Horizons and AARP brands. Sierra markets and sells its Medicare Advantage products under the Senior Dimensions, Sierra Spectrum, Sierra Nevada Spectrum, and Sierra Optima Select brands.

As more fully explained in the CIS, the Stipulation and proposed Final Judgment in this case are designed to preserve competition in the sale of Medicare Advantage health-insurance plans in the Las Vegas area by requiring United to divest its individual Medicare Advantage line of business in the Las Vegas area. The Stipulation and proposed Final Judgment also require United to take several steps to assist the acquirer in providing prompt and effective competition in the Medicare Advantage market, including assisting the acquirer to enter into agreements that will allow members of United's Medicare Advantage plans to have continued access to substantially all of United's provider network of physicians, hospitals, ancillary service providers, and other health care providers on terms no less favorable than United's existing agreements. United must also provide transition support services for medical-claims processing,

appeals and grievances, call-center support, enrollment and eligibility services, access to form templates, pharmacy services, disease management, Medicare risk-adjustment services, quality-assurance services, and such other services as are reasonably necessary for the acquirer to operate the Divestiture Assets.

On February 25, 2008, United and Humana Health Plan Inc. ("Humana") signed an agreement providing for Humana to purchase United's Las Vegas Medicare Advantage line of business for approximately $185 million. After receiving approval from the Centers for Medicare and Medicaid Services ("CMS") and the Nevada Division of Insurance, Humana completed the acquisition of United's Las Vegas Medicare Advantage line of business on May 1, 2008. In the Department's judgment, the divestiture of United's Las Vegas Medicare Advantage line of business to Humana, along with the other requirements contained in the Stipulation and proposed Final Judgment, are sufficient to eliminate the anticompetitive effects identified in the Complaint.

II. STANDARD OF JUDICIAL REVIEW

Upon the publication of the Comment and this Response, the United States will have fully complied with the Tunney Act and will move for entry of the proposed Final Judgment as being "in the public interest." 15 U.S.C. § 16(e)(1), as amended.

The Tunney Act states that, in making that determination, the Court shall consider:

> (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
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> (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from

> the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e)(1)(A)-(B); *see generally United States v. AT&T Inc.*, 541 F. Supp. 2d 2, 6 n.3 (D.D.C. 2008) (listing factors that the Court must consider when making the public-interest determination); *United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1, 11 (D.D.C. 2007) (concluding that the 2004 amendments to the Tunney Act "effected minimal changes" to scope of review under Tunney Act, leaving review "sharply proscribed by precedent and the nature of Tunney Act proceedings").[2]

As the United States Court of Appeals for the District of Columbia Circuit has held, under the APPA, a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See United States v. Microsoft Corp.*, 56 F.3d 1448, 1458-62 (D.C. Cir. 1995). With respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States v. BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988) (citing *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft*, 56 F.3d at 1460-62. Courts have held that:

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "*within the*

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[2] The 2004 amendments substituted "shall" for "may" in directing relevant factors for courts to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. *Compare* 15 U.S.C. § 16(e) (2004), *with* 15 U.S.C. § 16(e)(1) (2006).

> *reaches of the public interest*." More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted). *Cf. BNS*, 858 F.2d at 464 (holding that the court's "ultimate authority under the [APPA] is limited to approving or disapproving the consent decree"); *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to "look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass"). *See generally Microsoft*, 56 F.3d at 1461 (discussing whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'").

The government is entitled to broad discretion to settle with defendants within the reaches of the public interest. *AT&T Inc.*, 541 F. Supp. 2d at 6. In making its public-interest determination, a district court "must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations." *SBC Commc'ns*, 489 F. Supp. 2d at 17; *see also Microsoft*, 56 F.3d at 1461 (noting the need for courts to be "deferential to the government's predictions as to the effect of the proposed remedies"); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States' prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case).

Court approval of a consent decree requires a standard more flexible and less strict than that appropriate to court adoption of a litigated decree following a finding of liability. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public

interest.'" *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); *see also United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). To meet this standard, the United States "need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." *SBC Commc'ns*, 489 F. Supp. 2d at 17.

Moreover, the Court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its complaint, rather than to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459. Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States did not pursue. *Id.* at 1459-60. As this Court recently confirmed in *SBC Communications*, courts "cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power." *SBC Commc'ns*, 489 F. Supp. 2d at 15.

In its 2004 amendments to the Tunney Act, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction that "[n]othing 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." 15 U.S.C. § 16(e)(2). The amendments codified what Congress intended when it passed the Tunney Act in 1974, as Senator Tunney then explained: "[t]he court is nowhere compelled to go to trial or to engage in

extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of Senator Tunney). Rather, the procedure for the public-interest determination is left to the discretion of the court, with the recognition that the court's "scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings." *SBC Commc'ns*, 489 F. Supp. 2d at 11.[3]

III. SUMMARY OF PUBLIC COMMENTS AND THE UNITED STATES' RESPONSE

During the 60-day comment period, the United States received comments from the Service Employees International Union Local 1107 (the "SEIU comment"), the American Medical Association, Nevada State Medical Association, and the Clark County Medical Society (collectively, the "AMA comment"), the Honorable Nydia M. Velazquez, Chairwoman, United States House of Representatives Committee on Small Business (the "Velazquez comment"), and the Honorable Chris Giunchigliani, Commissioner, Board of Commissioners - Clark County, Nevada (the "Giunchigliani comment"). Those comments are attached to this Response.

After reviewing the comments, the United States has determined that the proposed Final Judgment remains in the public interest. The commenters raise two main concerns: (A) that the United States should have alleged and remedied harm to competition in additional product

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[3] *See United States v. Enova Corp.*, 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the "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"); *United States v. Mid-Am. Dairymen, Inc.*, 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977) ("Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances."); S. Rep. No. 93-298, 93d Cong., 1st Sess., at 6 (1973) ("Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.").

markets other than the Medicare Advantage market alleged in the United States' Complaint and (B) that the proposed Final Judgment does not adequately remedy the harms to competition alleged in the Complaint. The United States addresses these concerns below.

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

1. Summary of Comments

Each of the commenters argue that the United States should have alleged and remedied competitive concerns that are not addressed in the Complaint in this matter. They argue that the United States should have pursued a case of harm to competition in a commercial health-insurance market in Clark County, Nevada. (AMA comment at 12; SEIU comment at 4; Velazquez comment at 3; Giunchigliani comment at 1-2). The commenters also express concern that the United-Sierra merger will harm competition in the sale of various types of commercial health insurance, such as the provision of HMO policies, HMO and PPO policies, and the provision of commercial insurance to employers with 50 or fewer employees. (AMA comment at 12; SEIU comment at 4; Velazquez comment at 4; Giunchigliani comment at 1).

The AMA and Velazquez also argue that the United States should have alleged that the transaction would harm physicians and sought an appropriate remedy. They maintain that the merged company will control a sufficient share of the purchases for physicians services in Clark County such that the merged company will be able to reduce payments to physicians below competitive levels. (AMA comment at 5; Velazquez comment at 4). Similarly, the SEIU argues that the merged company will control a sufficient share of purchases of hospital services such that the merged company will be able unilaterally to reduce reimbursement rates to hospitals. (SEIU comment at 4). The SEIU argues that such lower reimbursement rates to hospitals will

result in higher patient-to-nurse ratios and place patient safety and quality of care in jeopardy. (SEIU comment at 3-4).

2. The United States' Response

The comments 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, which are not addressed in the Complaint, are outside the scope of this APPA proceeding. The Department's decision to allege a harm in a specific market is based on a case-by-case analysis that varies depending on the particular circumstances of each product and geographic market. The Department investigated the transaction's potential competitive effects on each of the types of health insurance identified by the commentators, and on the purchase of physician and hospital services, and concluded that it should not allege harm in these markets. As explained by this Court, in a Tunney Act proceeding, the district court should not second-guess the prosecutorial decisions of the Department regarding the nature of the claims brought in the first instance; "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, Microsoft*, 56 F.3d at 1459 (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"); *BNS*, 858 F.2d at 462-63 ("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"). This court has held that "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.'" *SBC Commc'ns*, 489 F. Supp. 2d at 14

(quoting *Microsoft*, 56 F.3d at 1459) (emphasis in original). Nor does the fact that the State of Nevada obtained terms of settlement different from those obtained by the United States alter the ordinary Tunney Act standard of review.

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 4). 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). Because the United States did not allege that the 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. Comment that the Proposed Final Judgment does not Adequately Address the Harms to Competition Alleged in the Complaint

1. Summary of Comment

The AMA states that the remedies in the proposed Final Judgment are inadequate to maintain competition in the sale of Medicare Advantage health-insurance plans in the Las Vegas area. (AMA comment at 13). The AMA argues in its comment that the proposed Final Judgment should include five additional remedies: (1) a permanent injunction on United's use of

"most-favored-nations" clauses in healthcare-provider contracts; (2) a permanent injunction on United's use of "all-products" clauses in healthcare-provider contracts; (3) a divestiture of United's commercial health-insurance business in Clark County; (4) a requirement that United convey the use of certain trademarks to the acquirer of the Medicare Advantage line of business for at least five years; and (5) the immediate use of a monitoring trustee to ensure compliance with the proposed Final Judgment. (AMA comment at 13-15).

2. The United States' Response

The additional remedies proposed by the AMA are not necessary to ensure that competition will remain in the market alleged in the Complaint. Rather, the proposed Final Judgment is in the public interest because it is properly designed to eliminate the anticompetitive effects alleged in the Complaint. First, the proposed Final Judgment requires United to divest its entire individual Medicare Advantage line of business in the Las Vegas area to an acquirer approved by the United States and on terms acceptable to the United States. This line of business covers approximately 25,800 individual Medicare Advantage beneficiaries. As described in Section IV of the proposed Final Judgment, United is required to divest all tangible and intangible assets dedicated to the administration, operation, selling, and marketing of its Medicare Advantage plans to individuals in the Las Vegas area ("the Divestiture Assets"), including all of United's rights and obligations under the relevant United contracts with CMS. Thus, the acquirer will have the benefit of entering the Medicare Advantage market with United's entire individual Medicare Advantage line of business.

Second, the Stipulation and Sections IV(A) and (B) of the proposed Final Judgment required United to divest the Divestiture Assets within the shortest time period reasonable under the circumstances. A quick divestiture has the benefits of maintaining competition that would

otherwise be lost in the acquisition and reducing the possibility of dissipation of the value of the assets while the sale is pending. Per these requirements, United divested the Divestiture Assets to Humana on May 1, 2008.

Third, the divestiture eliminates the anticompetitive effects of the merger by requiring United to divest the Divestiture Assets to an acquirer that can compete vigorously with the merged United-Sierra. The United States approved Humana as the acquirer of the Divestiture Assets because Humana is well positioned to be a strong competitor in the Medicare Advantage market in the Las Vegas area. Humana is an established health-insurance competitor with total annual revenue of $26 billion and a market capitalization of $8.3 billion. Humana is the second-largest provider of Medicare Advantage plans in the nation after United. The company has 1.27 million Medicare Advantage enrollees nationwide. In the United States' judgment, Humana has the intent and capability (including the necessary managerial, operational, technical, and financial capability) to compete effectively in the sale of Medicare Advantage products, and the asset-purchase agreements between United and Humana do not give United the ability to interfere with Humana's ability to compete effectively.

Fourth, the proposed Final Judgment requires Defendants to assist the acquirer in providing prompt and effective competition in the Medicare Advantage market and uninterrupted care to subscribers of United's Medicare Advantage plans by mandating that the Defendants adhere to the following requirements:

- Section IV(F) requires the Defendants to assist the acquirer to enter into an agreement with HealthCare Partners, LLC ("HealthCare Partners") that will allow members of United's Medicare Advantage plans to have continued access to substantially all of United's provider network of physicians, hospitals, ancillary service providers, and other

health care providers on terms no less favorable than United's pre-existing agreement with HealthCare Partners.

- Section IV(J) requires that, at the acquirer's option, and subject to approval by the United States, Defendants provide transition support services for medical claims processing, appeals and grievances, call-center support, enrollment and eligibility services, access to form templates, pharmacy services, disease management, Medicare risk-adjustment services, quality-assurance services, and such other transition services that are reasonably necessary for the acquirer to operate the Divestiture Assets.
- Section IV(G) of the proposed Final Judgment prohibits United, until March 31, 2010, from entering into agreements with healthcare providers who, prior to the transaction, participated in United's Medicare Advantage network, but did not participate in Sierra's. Sections IV(F) and (G) collectively ensure that Humana, but not the Defendants, will have access to these healthcare providers, which places Humana in the same competitive position with respect to the merged company as United was in with respect to Sierra prior to the merger of United and Sierra.
- Section IV(H) prohibits United from using the AARP brand for any of its individual Medicare Advantage plans in the Las Vegas area until March 31, 2009, and from using the SecureHorizons brands for any individual Medicare Advantage plans in the Las Vegas area until March 31, 2010. The Department has determined that Section IV(H) will give Humana sufficient time to establish its own brand in the Las Vegas area so that it can effectively compete for the provision of Medicare Advantage plans and reduce beneficiary confusion as to which company operates the Medicare Advantage plan in which the beneficiary is enrolled.

In short, the United States has determined that the remedies in the proposed Final Judgment are sufficient to allow Humana to be an effective competitor and maintain competition in the Las Vegas Medicare Advantage market. As the United States now explains, the additional remedies that the AMA suggests are not needed to preserve the public interest.

a. Most-favored-nations clauses

The AMA states that the proposed Final Judgment should permanently enjoin United from using "most-favored-nations" ("MFN") clauses in its contracts with healthcare-providers. (AMA comment at 13). As explained in the affidavit of Professor David Dranove, submitted by the AMA, an MFN clause would require a healthcare provider to offer United rates no less favorable that those offered to other insurers. (AMA comment, Attachment A at 8). MFNs may be anticompetitive or procompetitive, depending on the circumstances. Federal Trade Comm'n & U.S. Dept of Justice, *Improving Health Care: A Dose of Competition* (Jul. 2004), ch. 6, p. 20, *available at* http://www.usdoj.gov/atr/public/health_care/204694.htm. MFN clauses may harm competition by, for example, discouraging healthcare providers from aggressively discounting to competing insurers who might be seeking to enter or expand in a market. *Id.*

It is not necessary to prohibit United from using MFN clauses to ensure that Humana can compete and maintain the premerger level of competition in Medicare Advantage plans. 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. Accordingly, United could not use MFN clauses to attempt to prevent Humana from competing in the Medicare Advantage market. Of course, the United States remains free to challenge any anticompetitive conduct of

United, including MFN clauses, that the United States determines harm competition.

b. All-products clauses

The AMA states that the proposed Final Judgment should permanently enjoin United's use of "all-products" clauses in healthcare-provider contracts. (AMA comment at 13). An all-products clause is a contractual provision that requires a physician or other healthcare provider to agree to participate in the networks for every one of a health-insurance company's products (*e.g.*, commercial health insurance and Medicare Advantage) as a condition for participating in the network of any one of that health-insurance company's products.

The AMA does not make clear how a prohibition on United's use of all-products clauses would help maintain competition in a Medicare Advantage market. (AMA comment at 13). The AMA comment refers to the affidavit of Professor David Dranove, submitted by the AMA, for an explanation of how all-products clauses can be anticompetitive. (AMA comment, Attachment A at 8). Although Professor Dranove states in his affidavit that the proposed Final Judgment should prohibit all-products clauses to remedy harm in a market for the purchase of physician services, the Complaint did not allege or identify competitive harm in such a market. (Attachment A at 8). To the extent that the AMA advocates a prohibition on all-products clauses to remedy harm in a market for the purchase of physician services, such remedies are outside the scope of this APPA proceeding as discussed in Section III. A. of this Response.

c. United's commercial health-insurance business in Clark County

The AMA argues that the proposed Final Judgment should require United to divest its commercial health-insurance business in the Las Vegas area in addition to United's Medicare Advantage line of business because a Medicare Advantage business operating without a commercial component "faces a significant risk of failure." (AMA comment at 13). The AMA

asserts that "[t]here are significant economies of scope and scale that exist when both commercial and Medicare Advantage businesses are combined." *Id.* The AMA, however, does not identify what these economies of scope and scale are nor why their absence creates a risk of failure.

The United States has considered this issue and concluded that Humana has the resources needed to effectively compete for the provision of Medicare Advantage plans in the Las Vegas area. Further, even assuming that there are benefits to providing both commercial and Medicare Advantage products, Section IV(F) of the proposed Final Judgment addresses this concern by ensuring that Humana has access to United's existing healthcare provider network on terms no less favorable than United's premerger terms. That provision and the other provisions of the proposed Final Judgment ensure that Humana will have a cost structure similar to United's premerger cost structure and be an effective competitor that maintains competition in the Las Vegas Medicare Advantage market.

d. Use of certain trademarks

The AMA argues that the acquirer of the Divestiture Assets should have use of certain United trademarks. (AMA comment at 13-14). Section IV(H) of the proposed Final Judgment prohibits United from using the AARP brand for any of its individual Medicare Advantage plans in the Las Vegas area until March 31, 2009, and from using the SecureHorizons brands for any individual Medicare Advantage plans in the Las Vegas area until March 31, 2010. The AMA argues that the United States should extend these provisions to last at least five years because "trademarks are of particular importance to continue to secure customer loyalty." (AMA comment at 13-14).

The AMA, however, does not provide any facts to support its assertion that a longer prohibition period on United's use of the AARP and SecureHorizons brands is necessary to allow Humana to be an effective competitor and maintain competition in the Las Vegas Medicare Advantage market. In the United States' judgment based on a review of the terms for the sale of the Divestiture Assets, its assessment of Humana's capabilities, and its investigation of the Las Vegas Medicare Advantage market, the brand prohibitions in the proposed Final Judgment are reasonable in light of their intended purpose – to give Humana time to establish its own brand in the Las Vegas area and reduce beneficiary confusion as to which company operates the plan in which the beneficiary is enrolled. *See SBC Commc'ns*, 489 F. Supp. 2d at 17 (a district court "must accord deference to the government's predictions about the efficacy of its remedies").

e. Use of a monitoring trustee

The AMA argues that the proposed Final Judgment should require the immediate use of a monitoring trustee to ensure United's compliance with the proposed Final Judgment. (AMA comment at 15). Section V of the proposed Final Judgment allows the United States, in its sole discretion and subject to approval by the Court, to appoint a monitoring trustee that would have the power to monitor Defendants' compliance with the terms of the proposed Final Judgment. Section V(H) of the proposed Final Judgment provides that, if a monitoring trustee is appointed, it shall serve until United has divested the Divestiture Assets and any agreements for transition support services have expired.

In the United States' judgment, the immediate use of a monitoring trustee is not necessary to ensure United's compliance with the proposed Final Judgment for at least three reasons. First, United has already complied with many of the provisions of the proposed Final Judgment. United has completed the divestiture of the Divestiture Assets and assisted Humana in entering

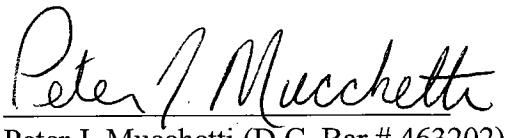
into an agreement with HealthCare Partners that gives Humana access to healthcare providers on terms no less favorable than United's pre-existing agreement with HealthCare Partners. In addition, Humana and United have entered into a transition services agreement as contemplated by Section IV(J) of the Final Judgment. Second, the United States has reviewed the Humana-United transition services agreement and concluded that the agreement provides Humana with contractual rights such that a monitoring trustee is not currently necessary to ensure United's compliance with the terms of that agreement. Third, should United fail to comply with the terms of the transition support agreement, the United States remains free to appoint a monitoring trustee, subject to the Court's approval.

IV. CONCLUSION

The issues raised in the four public comments were among the many considered during the United States' extensive and thorough investigation. The United States has determined that the proposed Final Judgment as drafted provides an effective and appropriate remedy for the antitrust violations alleged in the Complaint, and is therefore in the public interest. The United States will move this Court to enter the proposed Final Judgment after the comments and this response are published in the *Federal Register*.

Dated: July 7, 2008

Respectfully Submitted,



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