DISTRICT COURT, COUNTY OF EL PASO, STATE OF COLORADO 270 S Tejon St Colorado Springs, CO 80903 STATE OF COLORADO, ex rel. PHILIP J. WEISER, ATTORNEY GENERAL Plaintiff, v. UNITEDHEALTH GROUP INCORPORATED and DAVITA INC., Defendants.	**COURT USE ONLY**
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COMPLAINT	

The planned purchase of DaVita Medical Group by Optum threatens to weaken competition among health plans for older adults in Colorado Springs. The largest competitor in that market, UnitedHealthcare, has a substantial market share even though it has lost market share to another insurer, Humana, over the past several years. Instead of continuing to compete with Humana on benefits or price, UnitedHealthcare's affiliate, Optum, seeks to purchase a key physician practice used by Humana's health plans. Absent an appropriate remedy, this merger may have the effect of preventing Humana and other competing health care plans from competing effectively in Colorado Springs.

The anti-competitive effects of this planned purchase are compounded by UnitedHealthcare's exclusive agreement with Centura Health, a large healthcare provider with two hospitals in Colorado Springs. This exclusive relationship prevents Medicare Advantage HMO insurers, other than UnitedHealthcare, from including the two Centura Health hospitals in the Colorado Springs area—Penrose and St. Francis—in their networks.

The Attorney General brings this civil law enforcement action under the Colorado Antitrust Act to protect older adults in Colorado Springs by preventing UnitedHealth Group Incorporated, through its wholly-owned subsidiary Optum Inc., from acquiring DaVita Inc.'s wholly-owned subsidiary, DaVita Medical Holdings, LLC, referred to as DaVita Medical Group (the "Proposed Acquisition") in violation of §6-4-107, C.R.S., unless appropriate safeguards are implemented.

I. INTRODUCTION

1. On December 5, 2017, UnitedHealth Group Incorporated entered into an equity purchase agreement to acquire DaVita Medical Group for approximately $4.9 billion in cash. The purchase price was amended to $4.3 billion on December 11, 2018. The Proposed Acquisition includes DaVita Medical Group's medical groups and affiliated networks across all six states where DaVita Medical Group operates, including Colorado.

2. The Proposed Acquisition violates §6-4-107, C.R.S. because the effect of such acquisition may be to substantially lessen competition in the market for Medicare Advantage plans in El Paso and Teller counties in Colorado ("Colorado Springs Area"). The proposed acquisition will harm Medicare-eligible individuals age 65 and over ("Older Adults") who rely or may rely on Medicare Advantage plans for access to high quality, cost-effective healthcare services. If the Proposed Acquisition is completed, Older Adults in the Colorado Springs Area will likely experience increased costs of care, reduced benefits, and fewer choices. To prevent

this irreparable harm to Older Adults, the Attorney General requests that this Court prevent the Proposed Acquisition from occurring without appropriate safeguards.

II. THE MERGING PARTIES

3. UnitedHealth Group Incorporated ("UnitedHealth Group") is a for-profit corporation headquartered at 9900 Bren Road East, Minnetonka, MN 55343. UnitedHealth Group operates, among others, two wholly-owned subsidiaries: UnitedHealthcare and Optum.

4. UnitedHealthcare offers health insurance plans, including both commercial plans and Medicare Advantage plans, to employer groups and individual consumers in Colorado. UnitedHealthcare offers its Medicare Advantage products to Older Adults in competition with other Medicare Advantage insurers. UnitedHealthcare is the largest Medicare Advantage insurer in the Colorado Springs Area.

5. Optum is a health services business that, among other things, operates medical groups, independent physicians associations or affiliated networks, ambulatory surgery centers, and urgent care centers.

6. DaVita Inc. is a for-profit corporation headquartered at 2000 16th Street, Denver, CO 80202. DaVita Medical Holdings, LLC (a/k/a DaVita Medical Group), presently a subsidiary of DaVita, Inc., operates managed care provider

organizations in six states including Colorado, and is headquartered at 717 17th Street, Denver, Colorado 80202.

7. In the Colorado Springs Area, DaVita Medical Group operates two practice groups: Colorado Springs Health Partners and Mountain View Medical Group. Those two practice groups collectively constitute one of the largest managed care physician organizations in the Colorado Springs Area.

III. INDUSTRY BACKGROUND

A. Medicare Advantage Insurers

8. The federal government offers health insurance to Medicare-eligible Older Adults through two programs: (1) Original Medicare, and (2) privately-administered Medicare Advantage plans.

9. Under Original Medicare, a beneficiary receives insurance coverage for inpatient care, known as "Part A" benefits, and coverage for physician and outpatient services, known as "Part B" benefits.

10. For those covered by Original Medicare, the government reimburses healthcare providers on a fee-for-service basis, paying the provider for each good or service provided according to a fee schedule established by the Centers for Medicare and Medicaid Services ("CMS").

11. Original Medicare enrollees may obtain care from any healthcare provider that accepts Original Medicare rates, but Original Medicare does not cover

the full cost of medical care, nor does it cap the out-of-pocket costs that a beneficiary may incur.

12. Congress created the Medicare Advantage program in 1997 to offer Older Adults a market-based alternative to Original Medicare. Under the Medicare Advantage program, the government pays Medicare Advantage insurers to provide health insurance to beneficiaries.

13. Medicare Advantage plans must include all benefits provided by Original Medicare. Medicare Advantage plans also include additional benefits that are attractive to Older Adults, but that are not available through Original Medicare.

14. Participating Medicare Advantage insurers enter into contracts with CMS, and CMS licenses these insurers to offer Medicare Advantage plans. Medicare Advantage insurers apply for CMS contracts as part of an annual bidding process overseen by CMS that determines how much a Medicare Advantage insurer will be paid by the government.

15. This calculation begins with the CMS "benchmark," which CMS publishes each year for each county in the United States based on the cost to Original Medicare of providing Part A and Part B benefits to the average enrollee in that county the prior year.

16. The benchmark represents the maximum amount the government will pay a Medicare Advantage insurer to provide benefits to an Older Adult living in

that county. Medicare Advantage insurers are paid on a "capitated" basis, meaning CMS will reimburse Medicare Advantage insurers a predetermined amount of money for each member in the plan, regardless of the expenses actually incurred by the plan over the course of the year. The predetermined amount paid to a Medicare Advantage insurer is based on that insurer's "bid" to CMS.

17. Medicare Advantage insurers submit bids during an annual bidding process. CMS regulations require Medicare Advantage insurers to submit bids that reflect the anticipated total healthcare costs its members will incur, combined with the insurer's administrative costs and desired profit margin.

18. If a Medicare Advantage insurer's total bid is below the benchmark, CMS pays the Medicare Advantage insurer a "rebate" for each Medicare beneficiary the Medicare Advantage insurer enrolls, which is a portion of the difference between the benchmark and the bid. The remaining portion of these savings are retained by CMS.

19. The rebates earned by the Medicare Advantage insurer must be reinvested into the Medicare Advantage plan to lower out-of-pocket costs or enrich member benefits; they cannot be retained by the Medicare Advantage insurer as an additional margin.

20. This structure provides Medicare Advantage insurers with an incentive to minimize healthcare costs: a Medicare Advantage insurer with lower bid due to lower anticipated medical costs will receive a larger rebate and thus

allow the Medicare Advantage insurer to increase enrollment by offering more attractive benefits.

21. If, on the other hand, a Medicare Advantage insurer's bid exceeds the benchmark, CMS will pay the Medicare Advantage insurer only the benchmark rate for each member, and the Medicare Advantage insurer is required to charge to its members an additional premium equal to the difference between the bid and the benchmark. Naturally, Medicare Advantage plans that require additional premiums are less attractive to Older Adults than Medicare Advantage plans that do not charge additional premiums.

22. The amount of a Medicare Advantage insurer's payments from CMS also depends, in part, on the Medicare Advantage insurer's "Star Rating." Star Ratings are CMS's comprehensive measure of plan quality, reflecting factors like clinical outcomes, patient satisfaction, and access to care. A high Star Rating directly affects the Medicare Advantage insurer's payment by increasing the benchmark or allowing the Medicare Advantage insurer to earn higher rebates.

23. Medicare Advantage insurers prefer to contract with providers able and willing to coordinate patient care and control healthcare costs, thereby allowing the Medicare Advantage insurers to bid below the benchmark rate. In some cases, those provider relationships are based on value- or risk-based contracts, in which providers' pay may be based upon various measures of care quality, outcomes, or the ability to control costs, rather than the volume of services provided.

24. When cost-control measures are successful, Medicare Advantage insurers funnel the savings back into their Medicare Advantage plans in the form of reduced out-of-pocket costs or enriched benefits for members, such as vision, dental, hearing, or fitness benefits unavailable through Original Medicare.

25. To be profitable and deliver quality, value-based care, Medicare Advantage insurers often coordinate with their provider networks to manage their patient population's utilization of healthcare services proactively. Medicare Advantage insurers work with providers to coordinate care, minimize hospitalizations, and proactively manage at-risk patient populations (e.g., diabetics) which increase costs if not closely monitored.

26. To align providers' financial incentives with their own, some Medicare Advantage insurers have shifted "risk" to providers by implementing alternative payment arrangements in which providers bear some degree of financial risk.

B. Managed Care Provider Organizations

27. Managed care provider organizations are medical groups that employ or affiliate with a significant number of primary care physicians and specialists to ensure the coordination of patient care and control the costs of delivering proper care to Medicare Advantage members. Managed care provider organizations orchestrate employed and affiliated providers—such as individual physicians, physician groups, hospitals, and outpatient clinics—to manage the care utilization of a particular Medicare Advantage patient population.

28. As gatekeepers, primary care physicians are an integral part of managed care provider organizations because they support the infrastructure underlying population healthcare management, ultimately reducing the overall cost of the Medicare Advantage population's care. Primary care physicians are a critical component of the infrastructure that allow managed care provider organizations to effectively manage care utilization.

29. The most sophisticated managed care provider organizations have extensive networks of physicians, specialists, and other employees or affiliates that facilitate effective and cost-efficient care delivery. A Medicare Advantage insurer that contracts with numerous smaller providers, therefore, may have to perform many of these managed care provider organization functions itself or hire a third party to do so.

30. Providers vary in their ability and willingness to manage a Medicare Advantage population. Provider performance varies according to the provider's operational structure, information technology capabilities, and experience participating in alternative payment methods. The strength of a provider's infrastructure is crucial to its success in controlling costs and managing care for a Medicare Advantage population. This infrastructure includes employing teams of administrators and care professionals (including nurses and social workers) who can run operations efficiently and manage patient care across multiple venues. It also includes information technology and personnel who are capable of managing,

interpreting, and analyzing member data to evaluate efforts to coordinate care and reduce healthcare utilization or costs.

31. Medicare Advantage insurers rely heavily on their provider partners' regular engagement on care management and performance issues, which affect quality scoring. If a Medicare Advantage insurer's provider network is not committed to cost and utilization management, the Medicare Advantage insurer is at significant risk of increased costs and lowered Star Ratings, which in turn decrease the marketability of the insurer's Medicare Advantage plans and the revenue it receives from CMS.

IV. THE RELEVANT SERVICE AND PRODUCT MARKETS

32. The relevant product market in which to analyze the competitive effects of the Proposed Acquisition is the market for Medicare Advantage health plans sold to individual Medicare Advantage members. Without appropriate safeguards, the Proposed Acquisition threatens substantial harm to competition in that product market in the Colorado Springs Area.

33. The appropriate service or product market in which to analyze the Proposed Acquisition is the set of services or products for which a hypothetical monopolist—i.e., a firm that controlled all suppliers of those services or products—could profitably impose a small but significant and non-transitory increase in price (SSNIP). This inquiry is often referred to as the "hypothetical monopolist test."

34. The Proposed Acquisition is likely to lead to anticompetitive effects. In the Colorado Springs Area, due to the combined entity's incentive and likely ability to raise the cost of managed care provider organization services for Medicare Advantage insurers other than UnitedHealthcare, in addition to UnitedHealthcare's exclusive arrangement with Centura Health, the merger could substantially lessen competition by reducing the ability of rivals to compete effectively with UnitedHealthcare.

35. Individual Medicare Advantage members in the Colorado Springs Area would accept a SSNIP on Medicare Advantage plans rather than purchase other types of health insurance products, such as Original Medicare plans. Medicare Advantage plans are distinguished from Original Medicare by several key factors—including provider network, caps on out-of-pocket spending, coordination of care, and supplemental benefits like prescription drug coverage or dental, vision, and hearing care—and thus constitute a distinct product market from Original Medicare. *See United States v. Aetna*, 240 F.Supp.3d 1, 41 (D.D.C. 2017) (finding Medicare Advantage product market distinct from market for Original Medicare).

V. THE RELEVANT GEOGRAPHIC MARKET

36. The appropriate geographic market in which to analyze the Proposed Acquisition is the geographic region in which a hypothetical monopolist—i.e., a firm that controlled all suppliers of the relevant services—could profitably impose a SSNIP.

37. The relevant geographic market for a Medicare Advantage plan is the county in which that plan is offered. CMS approves Medicare Advantage plans on a county-by-county basis. A Older Adult can only subscribe to a Medicare Advantage plan approved for sale in his or her county of residence. Therefore, an Older Adult cannot substitute a Medicare Advantage plan offered in his or her county of residence with a Medicare Advantage plan approved for another county.

38. El Paso County and Teller County each satisfy the hypothetical monopolist test individually; however, the competitive conditions and market structure for Medicare Advantage plans sold to individual Medicare Advantage members are sufficiently similar in both counties that it is appropriate to cluster El Paso and Teller counties together as the Colorado Springs Area for analytical convenience.

VI. ANTICOMPETITIVE EFFECTS IN THE COLORADO SPRINGS AREA

39. The Proposed Acquisition would combine Optum, a sister company to the largest Medicare Advantage insurer in the Colorado Springs Area, UnitedHealthcare, with a leading managed care provider organization, DaVita Medical Group.

40. As a leading managed care provider organization in the Colorado Springs Area, DaVita Medical Group has particular importance to Medicare Advantage insurers.

41. Optum's acquisition of DaVita Medical Group, in combination with UnitedHealthcare's exclusive arrangement with Centura Health, could give it the incentive and ability to increase costs for managed care provider organization services sold to UnitedHealthcare's rival Medicare Advantage insurers, or even to withhold such services altogether, reducing the ability of rival Medicare Advantage insurers to compete effectively with UnitedHealthcare.

42. As costs increase for Medicare Advantage insurers in the Colorado Springs Area, prices of Medicare Advantage plans to Older Adults and the federal government will likely increase, while benefits available to Older Adults will likely decrease. UnitedHealthcare will then face less competitive pressure to offer high-quality, low-cost Medicare Advantage plans to Older Adults in the Colorado Springs Area.

A. DaVita Medical Group is a competitively significant input for Medicare Advantage insurers in the Colorado Springs Area

43. DaVita Medical Group is a significant managed care provider organization in the Colorado Springs Area. Medicare Advantage insurers in the Colorado Springs Area rely on DaVita Medical Group for managed care provider organization services.

44. DaVita Medical Group has a record of managing care and controlling costs when serving Medicare Advantage insurers in the Colorado Springs Area.

45. Those improved benefits increase the attractiveness and competitiveness of the Medicare Advantage plans in which DaVita Medical Group participates.

46. While DaVita Medical Group's strength and importance most directly result from its ability to manage care and control costs, DaVita Medical Group also employs a significant number of primary care physicians in the Colorado Springs Area and likewise has a large network of specialists.

47. The importance of DaVita Medical Group to Medicare Advantage insurers is heightened because of the exclusive Medicare Advantage relationship that the dominant insurer, UnitedHealthcare, has with Centura Health, a large healthcare provider with two hospitals in Colorado Springs. This exclusive relationship prevents Medicare Advantage HMO insurers other than UnitedHealthcare from including the two Centura Health hospitals in the Colorado Springs area—Penrose and St. Francis—in their networks. This limitation, in turn, makes competing Medicare Advantage plans far less competitive for Older Adults with doctors in the Centura Health network.

B. Optum will have the ability and incentive to raise DaVita Medical Group's price

48. Today, UnitedHealthcare competes primarily with Humana for Medicare Advantage plans sold to individual Medicare Advantage members. While

Kaiser Permanente also offers Medicare Advantage plans in the Colorado Springs area, Kaiser has a different model for providing physician services.

49. UnitedHealthcare has long been the leading Medicare Advantage insurer in the Colorado Springs Area, but Humana has recently become a significant competitive threat to UnitedHealthcare. Humana has recently increased its share of the Medicare Advantage market in the Colorado Springs Area.

50. Over the last eight years, UnitedHealthcare's share of the Medicare Advantage market has dropped from approximately 75% to around 50%. A large portion of that lost share went to Humana.

51. For decades, UnitedHealthcare has also enjoyed an exclusive relationship Centura Health, which operates two hospitals in the Colorado Springs Area. That relationship limits other Medicare Advantage HMO plans from relying on that hospital.

VII. **ENTRY BARRIERS**

52. Substantial and effective entry or expansion into the relevant service or product and geographic markets is difficult, and, without appropriate safeguards, would not occur in a timely, likely, or sufficient manner to deter or counteract the likely anticompetitive effects of the Proposed Acquisition in the Colorado Springs Area.

VIII. ABSENCE OF EFFICIENCIES OR PROPOSED REMEDY

53. Defendants' claimed efficiencies are speculative, not merger-specific, not verifiable, and would not be sufficient to overcome the anticompetitive effects and harm to competition that the Proposed Acquisition will cause in the Colorado Springs Area.

54. Defendants have projected cost savings will result from the Proposed Acquisition, but many of these projected cost savings are unsubstantiated and reflect speculative assumptions and do not address the particular situation of the Colorado Springs Area. Even if the claimed efficiencies were substantiated and achievable, many are not merger-specific. In any event, Defendants' projected cost savings are not of the magnitude necessary to justify the Proposed Acquisition in light of its potential to harm competition, unless appropriate safeguards are put in place.

IX. VIOLATION ALLEGED

55. The Attorney General brings this civil law enforcement action pursuant to §6-4-111 C.R.S. to prevent and restrain Defendants from violating §6-4-107, C.R.S.

56. This Court's jurisdiction arises under §6-4-109(1), C.R.S., and venue is proper under §6-4-109(2), C.R.S., because the violations alleged in this Complaint harm Older Adults in the Colorado Springs Area.

57. The Attorney General has standing to bring this action because the Proposed Acquisition would cause antitrust injury in the markets for Medicare Advantage insurance products sold to Older Adults in the Colorado Springs Area.

58. This Court has personal jurisdiction over each Defendant; Defendants transact substantial business in El Paso and Teller Counties.

59. The effect of the Proposed Acquisition, if consummated, will likely substantially lessen competition in the relevant market in violation of §6-4-107 C.R.S.

60. Among other things, without appropriate safeguards, the transaction would likely have the following effects:

a. substantially lessen competition and have anticompetitive effects in the Medicare Advantage plan market in the Colorado Springs Area

b. reduce competition generally in the relevant market;

c. increase prices for customers in the relevant market;

d. cause a reduction in quality in the relevant market;

e. reduce competition over innovation and new product development in the relevant market.

X. REQUEST FOR RELIEF

61. The Attorney General respectfully requests that this Court:

a. adjudicate that the Proposed Acquisition violates the Colorado Antitrust Act of 1992;

b. permanently enjoin and restrain Defendants from carrying out the Proposed Acquisition or any other transaction that would combine DaVita Medical Group with Optum;

c. award the Attorney General fees and costs incurred during the investigation and litigation of this action; and

d. award such other relief as the Court may determine is just and proper.

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