



UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Statement of
Commissioner Noah Joshua Phillips and Commissioner Christine S. Wilson
In the Matter of UnitedHealth Group and DaVita
Commission File No. 181-0057
June 19, 2019

UnitedHealth Group, Inc. (“United”) proposes to acquire DaVita Medical Group (“DMG”). United’s insurance business, operated by United’s subsidiary UnitedHealthcare, offers commercial and Medicare Advantage (“MA”) health insurance plans to employer groups and individual consumers across the country. United and DMG both offer managed care provider organization (“MCPO”) services to health insurers. The merger is therefore both horizontal in nature – because it combines two competing MCPO service providers – and vertical, as it combines MCPO and insurance assets.

Staff spent more than a year and a half investigating the competitive effects of this acquisition, which involves assets in several states, including Colorado, Florida, New Mexico, Nevada, and Washington. Based on the findings from that investigation, the Commission has accepted a proposed consent agreement requiring United to divest DMG’s healthcare provider organization (its MCPO) in the Las Vegas, Nevada, area to Intermountain Healthcare, a non-profit healthcare provider system without a presence in the market. We join Commissioners Slaughter and Chopra in supporting this remedy and in thanking staff for their exceptional effort and diligence through this long investigation.

Our colleagues write separately, stating they would have asked a federal judge to block United’s acquisition of DMG based on their belief that the vertical integration of United’s health insurance business and DMG’s MCPOs and physicians in Colorado would harm consumers. In our view, the evidence in support of likely harm in Colorado was not compelling, and therefore a federal judge was unlikely to grant that relief.

As Commissioners Slaughter and Chopra point out, the acquisition in Colorado is purely vertical. In other words, in that state the transaction combines firms that operate at different levels of the supply chain and do not compete with one another. Specifically, DMG’s MCPO services and physicians serve as “inputs” to the MA insurance plans that United and other health insurers sell to employers and individuals. The putative theory of harm in Colorado involved raising rivals’ costs (“RRC”). It posited that, after acquiring DMG, United would find it profitable to raise DMG’s prices to rival MA insurance plans, because doing so would reduce these plans’ benefits and induce some customers to switch to United’s MA products. The more business United recaptures in the market for MA plans, the greater its incentive to raise DMG’s prices to rivals.

We do not rule out the possibility that vertical mergers can harm competition under a RRC theory. We both voted to issue the complaint, which alleges a similar vertical theory of harm in

Nevada. And given both substantially stronger facts and the significant horizontal overlap in that state, that was the right call.

But vertical mergers often generate procompetitive benefits that must also factor into the antitrust analysis.¹ A major source of these benefits is the elimination of double-marginalization, which places downward pressure on prices in the output market. We conclude that the evidence in Colorado, quantitative and qualitative, reflected both dynamics, with mixed results. In our view, taken together, the evidence would not have convinced a judge that the proposed acquisition was likely, on balance, to harm consumers in Colorado.

As our colleagues note, a lawsuit based upon this evidence posed significant litigation risk. Among other things, the law on vertical mergers is relatively underdeveloped, and an adverse decision can impact enforcement in later cases that present clearer harm. Of course, all litigation presents risks, and sometimes the risks are worth taking. But, faced with a body of evidence of harm that was ambiguous in the first place, we cannot agree with our colleagues that this was a case on which to roll the dice.

¹ See, e.g., *United States v. AT&T*, 310 F.Supp.3d 161, 192-94 (D.D.C. 2018).