UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

OPTUM, INC. and
OPTUM SERVICES, INC.,

Plaintiffs,

v.

DAVID WILLIAM SMITH,

Defendant.

Civil Action No.: 19-cv-10101

DEFENDANT DAVID SMITH'S OPPOSITION TO PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER

Respectfully submitted,

DAVID WILLIAM SMITH

By his attorneys,

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Dated: January 22, 2019

CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2019, the undersigned filed a copy of this document via the Court's CM/ECF system, which will send notification of such filing to all registered participants.

/s/ John F. Welsh, III
John F. Welsh, III

I. INTRODUCTION

Plaintiffs Optum, Inc. and Optum Services, Inc. ("Optum") filed a Complaint against Defendant David Smith ("Smith") alleging trade secret misappropriation and breach of contract. Optum now seeks a TRO barring Smith from working for TCORP62018 LLC ("ABC") in any capacity due to Smith's alleged inevitable disclosure of unnamed trade secrets. ABC is an independent health care venture established by Amazon, Berkshire Hathaway, and JPMorgan Chase & Co. (the "Founders").

The problems with Optum's trade secret misappropriation claim are myriad: (i) Optum fails to identify the actual trade secrets that Smith allegedly misappropriated; (ii) Optum submits no evidence that Smith retained any Optum information or documents post-termination; (iii) Optum submits no evidence that Smith actually misappropriated, used, or disclosed any of Optum's trade secrets to damage Optum; (iv) Smith and his supporting witnesses' testimony demonstrates that he does not have any of Optum's information, does not want or need any such information, and has no use for such information in his current job at ABC; and (v) Optum's inevitable disclosure theory has zero supporting authority. Massachusetts courts categorically do not recognize inevitable disclosure of trade secrets as sufficient for injunctive relief.

Optum's breach of non-compete claim is equally defective because there is no competition to enjoin: (i) ABC is a company that Optum's own Memorandum only speculates is a competitor ("ABC will very soon be a direct competitor, if it is not providing competitive services to Optum's clients already"); (ii) Optum has no idea, and presents no evidence, regarding what Smith does for ABC that competes with Optum; and (iii) again, Smith and his supporting witnesses' testimony demonstrates that ABC is not a competitor and Smith is not working in a competitive role. Optum's limited evidence on these issues does not come close to

establishing that it is likely to succeed on the merits of its contract claim. While it is not Smith's burden, his undisputed evidence proves that ABC offers no products or services to the general market, is not profit-seeking, and does not compete for any business with Optum. The crux of a non-compete restriction is actual competition. Here, there is none, and no TRO is warranted.

Finally, and critically, Optum's own arbitration agreement with Smith precludes it from seeking any of the relief that it seeks here. Optum's pleadings make no mention of the arbitration agreement it required Smith to sign as a condition of his employment, but that agreement expressly forbids Optum from even asking a court to order discovery. It also precludes the injunctive and other relief Optum seeks; all that is for arbitration. *See* Smith's Motion to Compel Arbitration.

II. FACTUAL BACKGROUND

A. Why Did Smith Join ABC?

ABC hired Smith due to his broad understanding of the health care economy, his analytic skillset, and his consulting background. Smith's background and recruitment to ABC make all of that clear.

For his entire professional career, Smith has worked in the health care industry, including as a consultant at Bain & Company from 2011-2016. Ex. A, Smith Aff. ¶ 2. Smith worked for Optum for 2.5 years as a junior leader from July 2016 to December 2018, during which time he was a Vice President of Product/Corporate Strategy. *Id.* at ¶ 3. In this job, Smith worked under the supervision of Nick Seddon, Head of Corporate Product, and Steve Wolin, Head of Corporate Strategy. *Id.* These groups reported into Michael Weissel, Executive Vice President of Product and Strategy. *Id.* Weissel reported into Dirk McMahon, President of Optum, who in turn reported into Andrew Witty, CEO of Optum. *Id.* Witty reported into David Wichmann,

CEO of UnitedHealth Group Inc. ("UHG"). *Id.* Smith never met Witty or Wichmann, and he met McMahon fewer than 5 times. *Id.* Smith was not a member of Optum's executive team or senior leadership team, did not have independent authority to make decisions regarding Optum's corporate strategy or products, and was 1 of 7 individuals at a similar level on the Product/Corporate Strategy team. *Id.* at ¶ 4. Smith's role at Optum involved working on Optum's strategies and products in areas including workers' compensation, population health, and pharmacy benefits. *Id.* at ¶ 5. Smith had no involvement in providing any Optum products or services to the Founders, and he had no confidential information about any Optum activity, product, or service related to the Founders. *Id.*

On his own initiative, Smith reached out to ABC's CEO, Atul Gawande, via email on June 24, 2018, expressed interest in working with ABC, and submitted his resume. *Id.* at ¶ 8. He did not receive a reply from Gawande. *Id.* On October 7, 2018, an ABC recruiter contacted Smith through LinkedIn. *Id.* at ¶ 9. She arranged for Smith to interview with Jack Stoddard, ABC's Chief Operating Officer, on October 29, 2018, and arranged interviews with other ABC representatives on November 2, 2018. *Id.* Smith never discussed or disclosed any Optum strategy, business plan, trade secret, or other confidential information to anyone at ABC, its recruiter, or any other third party. *Id.*; Ex. B, Stoddard Aff. ¶ 18.

On December 6, 2018, at approximately 3 p.m. central time, and after the conclusion of Optum's quarterly strategy meeting, Smith received a phone call from an ABC recruiter advising him that he would be getting an offer from ABC. Smith Aff. ¶ 10. Prior to that date, Smith had no confirmation and did not have any certainty as to if, in fact, he would receive an offer of employment from ABC. *Id.* On December 7, 2018, Smith received a written offer from ABC. *Id.* at ¶ 11. Smith did not immediately decide to accept the offer. *Id.* Smith and his wife co-parent

two young children. *Id.* He planned to discuss with his wife what working at ABC would mean for their personal lives and the lives of their children. *Id.* The Smiths considered the offer, discussed these issues over the weekend, and by Tuesday December 11, Smith decided to accept the offer. *Id.*

Smith signed and returned the ABC offer letter on December 11, 2018. *Id.* He advised Nick Seddon (Optum's Head of Corporate Product) that he accepted the ABC offer that same day. *Id.* at ¶ 12. Believing that communications to more senior executives should be done in person, Smith advised Mike Weissel (Executive VP of the Consumer Solutions Group) and Steve Wolin (Head of Corporate Strategy) of his acceptance of ABC's offer on December 13 when they returned to the office from an out of town engagement. *Id.* Smith's communications with Weissel and Wolin were cordial and professional, and Smith advised them that he planned to work for Optum through the end of 2018. *Id.* Contrary to Wolin's affidavit, at no time during Smith's meeting with Wolin did he tell Smith that he "was uncomfortable with [Smith's] plans to join ABC, a competitor of Optum that promises to be a disrupter in the healthcare industry, and that [Smith] would have an issue with his noncompete and equity grants under the Agreements." Nor did Wolin make any similar statements. *Compare id.* at ¶ 13, *with* Wollin Aff. ¶ 24, ECF No. 7. In fact, when they ended their conversation, Smith was left with the clear understanding that he would work for Optum through December. Smith Aff. ¶ 13.

For the remainder of December 13, 2018, Smith focused on transitioning his duties to other Optum employees. *Id.* at ¶ 14. At approximately 3:00 pm that day, however, Smith was advised by Wolin that he was being placed on administrative leave and told to leave the building. *Id.* Smith left all Optum property behind. *Id.* He did not walk out of the building with any of Optum's property, documents, or data in any media. *Id.* Smith has represented to Optum that the

only UHG or Optum documents in his possession are an email chain with a slide deck attachment containing his headshot, some of his own personnel documents, and some publicly filed UHG reports. *Id.* at ¶ 15. Smith, through his counsel, has also told Optum that Smith will execute an affidavit attesting to those facts and return or destroy the documents at Optum's direction. *Id.* He still awaits Optum's direction as Optum never responded to Smith's offer. *Id.*

B. Why Did Optum Sue Smith?

On December 21, Optum sent letters to both Smith and ABC threatening to bring legal claims against both parties if ABC employs Smith and claiming that he had stolen UHG data and was barred from working for ABC by his non-compete agreement. *See* ECF Nos. 1-8, 1-9. In response and after a December 26 phone call between ABC and Optum, ABC sent a letter to Optum explaining that (i) Optum had mistakenly confused Amazon initiatives that are not strategies or initiatives of ABC, which is a completely separate entity, and had feared that those initiatives were competitive with Optum; (ii) ABC has no product or service that competes with Optum; (iii) ABC does not seek, want, nor permit any of its employees to use or disclose prior employers' confidential information; (iv) ABC was aware of no facts supporting Optum's allegations about Smith's theft of Optum's information; and (v) ABC was willing to consider all measures that Optum believed were reasonable and appropriate to protect its interests. *See* ECF No. 1-10. ABC further requested that Optum provide ABC the facts that Optum relied on for its allegation that Smith retained or had stolen Optum's data or information. *Id.*

Also on December 28, Smith (through his counsel) sent a letter to Optum addressing the same allegations that Optum includes in its Complaint. *See* ECF No. 1-11. Smith explained that:

- ABC has no products, does not compete for business with Optum, and to Smith's knowledge, has no plans to do so;
- Michael Weissel, Executive Vice President of Product and Strategy at Optum, had

remarked in front of a number of Optum employees, including Smith, that ABC was more likely to be a customer than a competitor to Optum;

- Smith expected that in his new role at ABC, he would do in-depth research on the delivery and costs of health care for the over one million individuals covered by the health plans of the Founders at ABC;

- Smith affirmed that he would not use or disclose Optum's confidential information and would exclude himself from conversations, meetings, assignments or other circumstances (if any) that would involve the use or disclosure of Optum's information; and

- Smith was willing to sign an affidavit stating that he has no hard or electronic copies of any Optum confidential information; that he has shared no Optum confidential documents with ABC or any third party; that the only Optum documents in his possession were an email chain containing a document with his headshot, some personnel documents, and some publicly filed reports; and that Smith did not print and remove confidential Optum documents to his home.

See id.[1] Instead of proposing to ABC any measures to protect its interests or providing any further explanation as to what documents Optum believed that Smith misappropriated, Optum wrote a conclusory one-page letter to ABC on January 3 claiming that Smith's job title alone meant that "he cannot help but use his knowledge of Optum's strategy and other trade secrets." *See* ECF No. 1-12. Optum never requested that Smith return any Optum documents or information, allegedly confidential or otherwise. Smith Aff. ¶ 15. Optum also never accepted Smith's offer of an affidavit denying its baseless allegations. *Id.*[2]

C. Are Optum and ABC Competitors? No

A simple analysis of the products and services that Optum and ABC offer demonstrates that the two entities are not competitors.

Optum offers a range of services, including things like data analytics (OptumInsight),

[1] Smith's letter also addressed Optum's baseless allegations of misconduct prior to his departure. *See* ECF No. 1-11. Smith's explanations are laid out in detail in Section II.E, *infra*.

[2] Most recently, in a phone conference between counsel on January 18, Optum's counsel was asked if it would identify a single or specific document or piece of data or trade secret that it claims Smith retained in his possession or has given to ABC and should be returned. Optum's counsel would not identify anything. When asked, again, whether Optum would like Smith to return or destroy the headshot document, Optum's counsel did not request that Smith return or destroy the document. Ex. C, Welsh Aff. ¶¶ 3-4.

health care delivery, health care operations, health plan resources, and pharmacy care services (OptumRx). Stoddard Aff. ¶ 6. Optum offers these in the form of health care products and services to entities like private employers, state and federal governments, and health care providers. *Id.* Optum's products and services include, for example, selling Pharmacy Benefit Management Services (PBM), selling direct primary and specialty care, selling access to and claims processing for specialty clinical networks (e.g., behavioral health and transplant), and selling revenue-cycle management services and software to hospitals. *Id.* at ¶ 7. Optum is a subsidiary of UHG, a for-profit public company. *Id.* at ¶ 8.

In January 2018, the Founders announced that they would form an independent entity—*i.e.*, ABC—with the goal of providing better health outcomes, increased patient satisfaction, and lower costs for the Founders' employees and their families. *Id.* at ¶ 9. ABC does not sell or offer any products or services to the general market. *Id.* at ¶ 10. Instead, ABC will be evaluating potential health care solutions for the Founders' over 1.2 million employees that lead to better outcomes, higher satisfaction, and more affordable care. *Id.* Importantly, ABC is actually seeking to evaluate, test, and scale solutions provided by third-party vendors—which could potentially include Optum—who are willing to innovate with ABC. *Id.* at ¶ 11. ABC is currently using data, analytics, and expertise to combine products from vendors—again, potentially Optum—to come up with new ways of unlocking value for the Founders and their employees. *Id.* This is not a service that Optum provides to the Founders. *Id.* ABC is not profit-seeking, and even in serving the employees of the Founders, it is not charging for its work. *Id.* at ¶ 13.

Simply put, there are key differences between Optum and ABC. Unlike Optum, ABC is not profit-seeking. *Id.* Unlike Optum, ABC is not returning profits or dividends to its owners (or a parent company in Optum's case). *Id.* And most importantly, unlike Optum, ABC does not

offer or sell products or services to the general market, let alone any products or services that compete with Optum. *Id.* at ¶ 10, 14.

D. Is Smith's Role at ABC a Competing Role? No

Smith began working at ABC on January 17, 2019, in the position of Director, Strategy and Research. *Id.* at ¶ 19. Smith's original title was "Director, Product Strategy and Research," but the "Product" portion of his title—and similar titles of his colleagues in the Strategy and Research group—was dropped because this group is not responsible for the product management function. *Id.* In this role, Smith will be evaluating third-party vendors and recommending ways that ABC can unlock value for the Founders and their employees. *Id.* at ¶ 20. Smith's role at ABC is also to use his general skillset to evaluate health care problems, analyze potential solutions, and handle ad hoc research requests from senior leaders. *Id.* ABC plans to restrict Smith from evaluating Optum or UHG products in 2019. *Id.*

ABC has recently hired a number of people with similar backgrounds to Smith—*i.e.*, consulting backgrounds with an understanding of the health care industry—irrespective of the companies they might have worked for previously. *Id.* at ¶ 17. Smith is not on the senior leadership team at ABC, and he will not be working on any health care products that he might have been involved with at Optum, nor could he since Smith did zero work at Optum for any of the Founders. *Id.* at ¶¶ 21-22; Smith Aff. ¶ 5. Moreover, and out of an abundance of caution, Smith will not assist in any analysis of any Optum or UHG products or services (either separately or in comparison to any other company's products or services). Stoddard Aff. ¶ 22.

ABC has also established precautions regarding Smith's potential disclosure of any of Optum's information that he may still retain in his head. *Id.* at ¶ 23. As a condition of his employment, ABC required Smith to sign an Employee Confidentiality, Assignment and Non-

Solicitation Agreement that states he will not disclose to ABC nor induce ABC to use any confidential information belonging to any previous employer. *Id.* at ¶ 24. ABC also required Smith to sign an Acknowledgement on his first day of work stating that he has not retained any documents belonging to a prior employer, will not use or disclose any confidential information belonging to a prior employer, and will immediately contact Erica Davila (ABC's Acting General Counsel) if he has any concerns about those issues. *Id.* at ¶ 25.

E. Is There Any Evidence of Smith's Misconduct? No

Optum's Memorandum makes several nefarious allegations about Smith's "wrongful activity." Each are addressed below.

First, Optum claims that on October 29, 2018—nearly 2 months before he received an offer of employment from ABC—Smith printed a document titled "20180912 Project Orange Factbook vFINAL.pdf" (the "Factbook"). The Factbook was created as part of the first phase of a planned four-phase initiative to refresh Optum's corporate strategy and determine how the company can better sell its products and services in the health care market. Smith Aff. ¶ 20. The first phase involved fact-based market research, and the Factbook summarized that research. *Id.* The second phase involved the development of a high-level approach and overall corporate strategy structure. *Id.* Two more phases were planned for completion in February-April 2019 to develop an actual strategy for the business units to sell specific products, which Smith was not privy to since he was terminated before those phases began. *Id.* Though Smith did not draft the Factbook, he assisted with the market research summarized in it and used the document in performing his job (like the entire Corporate Strategy team) in order to help businesses understand how the Corporate Strategy group was looking at overall health care trends. *Id.* at ¶ 21. Smith printed this document as part of his work for Optum and left or discarded the

document at Optum. *Id.* Smith has not retained, used, or disclosed this document or the contents of this document to anyone outside of Optum. *Id.*

Second, Optum claims that on December 4, Smith asked junior members on the Corporate Strategy team for secret information, which Optum does not identify. This allegation lacks basic factual detail, including who Smith allegedly asked, what "secret" information he asked about, and why that "secret" information was unrelated to Smith's job.[3] In any event, Smith routinely had conversations with junior members on the Corporate Strategy team regarding Optum, and he denies asking any Optum employee for secret information that had nothing to do with his job. *Id.* at ¶ 23.

Third, Optum claims that on December 6, 2018—*i.e.*, before Smith had an offer from ABC or any certainty that an offer would be forthcoming—Smith attended a cross-team product and strategy meeting with senior leadership, including Optum's CEO. The December 6 meeting occurred before Smith knew he would receive a job offer, and he did not receive that offer until roughly 3 p.m., which was after the conclusion of Optum's quarterly strategy meeting. *Id.* at ¶ 24. Smith worked diligently for Optum through his last date of employment on December 13, including preparing for and attending the December 6 meeting which was one of Optum's regular quarterly strategy meetings. *Id.*

Fourth, Optum claims that on December 10, 2018, Smith printed the "OES Socialization Deck for OET_v20181126FINAL.pptx") (the "OES Deck"). The OES Deck was created as part of the second phase of the four-phase initiative, and the document set forth Optum's corporate strategy at a high level. *Id.* at ¶ 25. Smith relied heavily on this document when preparing for the December 6, 2018 quarterly strategy meeting and in his ongoing work. *Id.* He again printed it on

[3] Conveniently, Steve Wolin "planned" to raise this "troubling" issue with Smith but failed to do so in the 9 days between when it allegedly occurred and Smith's last date of employment. *See* ECF No. 7, Wolin Aff. ¶¶ 31-35.

December 10 as part of two pieces of work specifically assigned to him. *Id.* Smith either discarded or left the document at Optum. *Id.* Smith has not retained, used, or disclosed this document or the contents of this document to anyone outside of Optum. *Id.*

Fifth, and finally, Optum claims that it has "reason to believe" that Smith solicited former Optum employee Caitlin Fleming based on the mere fact that ABC hired Fleming after Smith left Optum. This is pure speculation not rooted in any evidence. Fleming's decision to leave Optum and join ABC had nothing to do with Smith. Ex. D, Fleming Aff. ¶ 6. Smith never encouraged or solicited Fleming to leave Optum or join ABC. *Id.* at ¶ 6; Smith Aff. ¶ 28. Fleming was connected to ABC via a mentor who is neither an Optum nor ABC employee. Fleming Aff. ¶ 4.

III. ANALYSIS

To obtain a TRO, Optum has the burden of showing: (1) a substantial likelihood of success on the merits; (2) a significant risk of irreparable harm if the injunction is withheld; (3) a favorable balance of hardships, and (4) a fit (or lack of friction) between the injunction and the public interest. *See Upromise, Inc. v. Angus*, 2014 WL 212598, at *4 (D. Mass. Jan. 21, 2014). Further, injunctive relief is an "extraordinary and drastic remedy." *Id.*

A. Optum Is Not Likely to Succeed on the Merits of Its Claims

1. Optum's Trade Secret Misappropriation Claims Will Fail

To succeed on these claims, Optum must establish (1) the existence of a protectable trade secret; (2) misappropriation of the trade secret by the defendant; and (3) damages. *See, e.g.*, *Phyllis Schlafly Revocable Trust v. Cori*, 2016 WL 6611133, at *2 (E.D. Mo. Nov. 9, 2016). Optum's speculative argument relies on Smith's inevitable use and disclosure of undisclosed trade secrets, and therefore, fails all three misappropriation requirements.

Optum does not identify what specific documents are entitled to trade secret protection,

why they are entitled to trade secret protection, or that such documents are even retained by Smith. Instead, Optum's Memorandum paints in broad strokes, claiming Smith had Optum's product strategy plans and that it "cannot be credibly disputed" that Smith had extensive knowledge of Optum's trade secrets. This is nonsense. Optum's failure to carry its burden to identify the specific trade secrets that Smith allegedly misappropriated is fatal to its claim. *Bay Side Recycling Co., LLC v. SKB Envtl., Inc.*, 2014 WL 6772908, at *10-11 (D. Minn. Dec. 1, 2014) (denying motions for TRO and expedited discovery on trade secret misappropriation claim because "Plaintiffs have simply asserted that several categories of information constitute trade secrets without providing any detail about the information in each of those categories," thus failing to show a likelihood of success on the merits).[4]

To be sure, while it paints the picture of theft by Smith to color him as a bad actor, Optum's only theory of trade secret misappropriation is inevitable disclosure: that "Smith's inevitable use and disclosure of [unidentified] trade secrets is a direct result of the breach of that duty of secrecy, which constitutes wrongful means under the DTSA and MUTSA." ECF No. 4, p. 17. Yet, Massachusetts courts have categorically rejected the argument that inevitable disclosure is legally sufficient to show a likelihood of success on the merits:

- *Manganaro Northeast, LLC v. De La Cruz*, 2018 WL 5077180, at *3 (D. Mass. Aug. 22, 2018) (denying preliminary injunction alleging breach of non-compete agreement where plaintiff sought to ban defendant from working for a competitor due to alleged inevitable disclosure of trade secrets; stating that "**the <u>potential</u> disclosure of confidential information, alone, as a result of De La Cruz's employment with PDC does not indicate a likelihood of establishing an actually-occurring contractual breach**") (emphasis added);

[4] *See also Am. Sci. & Eng'g, Inc. v. Kelly*, 69 F.Supp.2d 227, 238-39 (D. Mass. 1999) (denying preliminary injunction on trade secret misappropriation claim because plaintiff's theory of misappropriation suffered from "vagueness and lack of specificity" and the court was "unclear as to exactly what 'trade secrets' were allegedly misappropriated"; the record "simply does not provide" the information necessary to determine whether there were trade secrets that warranted protection).

- *U.S. Elec. Services, Inc. v. Schmidt*, 2012 WL 2317358, at *9 (D. Mass. June 19, 2012) (denying preliminary injunction alleging trade secret theft and seeking to enforce non-compete agreement because Massachusetts cases "**do not show that a party may rely solely on inevitable future conduct, rather than conduct that has actually occurred, to establish a likelihood of success on the merits**") (emphasis added).

Optum also has not established any likely damages. Establishing a trade secret and actual misappropriation are necessary predicates to damages based on that misappropriation. Where, as here, the misappropriation claim has no evidence of actual use or disclosure, the claim also must fail the damages requirement. *Comark Communications, LLC v. Anywave, LLC*, 2014 WL 2095379, at *2 (D. Mass. May 19, 2014) (denying preliminary injunction alleging trade secret theft and breach of contract because plaintiff "has not shown that Defendants acquired and used any of Comark's trade secrets. Defendants have filed affidavits under oath that they do not possess Comark's property," and "Comark has failed to demonstrate a likelihood that it will be injured if a preliminary injunction does not issue"); *Compass Bank v. Lovell*, 2016 WL 8738244, at *6 (D. Ariz. Apr. 8, 2016) (denying motions for TRO and expedited discovery where plaintiff believed that defendant had not returned documents upon termination and "might have" trade secret documents because plaintiff's "**speculative belief does not justify granting the extraordinary remedy of a TRO**") (emphasis added).

2. Optum's Breach of Contract Claim Will Fail

Optum claims that Smith has breached his non-compete agreement.[5] For its breach of contract claim, Optum must establish (1) the existence of a valid, enforceable contract; (2) the breach of an obligation imposed by the contract; and (3) that Optum suffered damages as a result of the breach. *See, e.g., eCommerce Industries, Inc. v. MWA Intelligence, Inc.*, 2013 WL 5621678, at *13 (Del. Ch. Sept. 30, 2013). Optum fails all three elements.

[5] Smith's four RSU and Stock Option agreements contain his identical non-competes and are all governed by Delaware law. ECF No. 1-1, pp. 6, 11; ECF No. 1-2, pp. 10, 12; ECF No. 1-3, pp. 6, 11; ECF No. 1-4, pp. 10, 12.

a. Smith's Non-Compete Is Unenforceable

Delaware courts will only enforce a non-compete if it "(i) adhere[s] to general principles of contract, (ii) is reasonable in scope and duration, (iii) advances the legitimate economic interests of the party enforcing the covenant, and (iv) survives a balance of the equities." *Tasktop Technologies US Inc. v. McGowan*, 2018 WL 4938570, at *5 (D. Del. Oct. 11, 2018). Optum fails (ii), (iii), and (iv).

Smith's non-compete restricts him from doing any of the following anywhere in the United States:

> (i) Engage in or participate in any activity **that competes, directly or indirectly, with any [Optum] activity, product or service that [Smith] engaged in, participated in, or had Confidential Information about during [Smith's] last 36 months of employment with [Optum]**; or
>
> (ii) Assist anyone in any of the activities listed above.

See ECF No. 1-1, pp. 6 (emphasis added).

Optum's pleadings define the ridiculously broad scope of the non-compete: "Optum services virtually every dimension of the health system across the United States," and Smith "managed product strategy globally." ECF No. 1, ¶ 13; ECF No. 4, p. 4. Put differently, it is Optum's position that Smith is banned from working in "every dimension of the health system" across the United States. This alone makes the non-compete unenforceable. *Tasktop Technologies US Inc.*, 2018 WL 4938570 at *6 (denying motion for preliminary injunction to enforce non-compete and finding that the agreement was unenforceable because defendant was "prohibited from working in any company anywhere that provides [integration or task management] services . . . Given the extensive geographic area and competitive businesses encompassed by the Agreement, the Court finds the Agreement is unreasonably broad."). Make no mistake, this is precisely how broadly Optum seeks to have the non-compete enforced. *See*

ECF No. 1, ¶¶ 13, 92.

Smith's non-compete also does not advance Optum's legitimate interests because Optum and ABC are not competitors, thus making it unenforceable:

- *McCann Surveyors v. Evans*, 611 A.2d 1, 4-5 (Del. Ch. Ct. 1987) (denying TRO based on a finding that "defendant is not engaging in unfair competition" and noting that non-competes "will not be mechanically or automatically specifically enforced" because they "deal with the ability of a person to earn a livelihood");

- *Robert Half Int'l, Inc. v. Stenz*, 2000 WL 1716760, at *4 (E.D. Pa. Nov. 17, 2000) (collecting Delaware cases and denying preliminary injunction for non-compete under Delaware law that sought to prohibit employee from working for an alleged competitor because it is "assumed that without using confidential information, the employee is no more effective than an ordinary competitor"; noting that Delaware courts will not enforce a non-compete where the employee is not using proprietary information and that such a result would be a "draconian remedy").

Optum's claim for relief also does not survive a balance of the equities. Whatever ephemeral interest Optum has in prohibiting Smith from working for a company that offers no competing products or services is greatly outweighed by the fact that it is "unreasonable under these circumstances to expect [Smith] to find employment in a non-competitive industry or in a location which does not violate the Agreement." *Tasktop Technologies US Inc.*, 2018 WL 4938570 at *6 (denying motion for injunction on non-compete and finding that the "balance of equities does not favor enforcement"). Smith has spent the past 15 years honing his knowledge in health care, and the United States health care industry includes over 13 million jobs and constitutes over 9% of the total employment in the country.[6] According to Optum, he is barred from all of them. It is patently absurd to expect Smith to abandon his expertise to find a job in a different industry.

[6] These numbers are from the Kaiser Family Foundation's analysis of the May 2017 Bureau of Labor Statistics. *See* KFF, "Total Health Care Employment," available at https://www.kff.org/other/state-indicator/total-health-care-employment/?currentTimeframe=0&selectedDistributions=total-health-care-employment&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D#; *see also* KFF, "Health Care Employment as a Percent of Total Employment," available at https://www.kff.org/other/state-indicator/health-care-employment-as-total/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location %22,%22sort%22:%22asc%22%7D.

b. Smith Has Not Breached His Non-Compete, And Optum Has No Damages

> Smith has not breached his non-compete because he has not engaged or assisted in:
>
> any activity that **competes**, directly or indirectly, with any [Optum] activity, product or service that [Smith] engaged in, participated in, or had Confidential Information about during [Smith's] last 36 months of employment with [Optum].

See ECF No. 1-1, pp. 6 (emphasis added).

Optum has submitted no evidence that ABC has a single product or service that competes with an Optum product or service, let alone that Smith is specifically engaged in any activity that competes with Optum. Optum's pure speculation on competition is insufficient to show Smith's breach or Optum's damages.

The language of Smith's non-compete is important and shows why Smith has not breached. ABC has zero activities, products, or services that compete with any Optum activities, products, or services. Stoddard Aff. ¶ 14. At a more granular level (and in accordance with the restrictions), Smith does not do anything for ABC that competes with any activity, product, service, or confidential information that he had at Optum. *Id.* at ¶¶ 14, 20-22. Moreover, Smith does not work on any health care products that he might have been involved with at Optum, nor could he since Smith did zero work at Optum for any of the Founders. *Id.* at ¶ 22; Smith Aff. at ¶ 5. It is fundamental that Smith cannot violate the non-compete by working for a company that does not compete with Optum. *See McCann Surveyors, supra*; *Robert Half Int'l, Inc., supra*. Massachusetts courts recognize this exact same principle. *See, e.g., Kauzens v. Diamond Diagnostics, Inc.*, 2005 WL 1683665, at *5 (Mass. Super. Ct. June 2, 2005) (denying preliminary injunction on non-compete because absent competition, "[i]t seems hard to see that [former employee's] work for Beckman Coulter . . . touches in any way on Diamond's secrets or confidential information"); *Upromise, Inc. v. Angus*, 2014 WL 212598, at *6 (D. Mass. Jan. 21,

2014) (denying preliminary injunction to former employer who sought to bar former senior executive from working for alleged competitor because of factual dispute as to whether the companies were actually competitors; "Given the parties' conflicting positions disputing the key issue about whether Upromise and Intuition are competitors, the Court cannot say that Upromise has demonstrated a substantial likelihood of success sufficient to warrant the 'extraordinary' remedy of preliminary injunctive relief.").

To support its position on this point, Optum's Memorandum states, with no foundation, that "Smith will be engaged in activities to develop and provide competitive products and services for ABC for two of Optum's customers: JPMorgan and Berkshire Hathaway." ECF No. 4, pp. 6-7. In support of that sweeping statement that goes to the heart of this dispute, Optum cites only to Paragraph 4 of Steve Wolin's Affidavit stating that to date Optum has served various entities "as well as companies, including [JPMorgan] and certain subsidiaries of Berkshire Hathaway." ECF No. 4, p. 7; ECF No. 7 ¶ 4. The leap from Wolin's statement to the misrepresentation in Optum's Memorandum cannot be understated. Wolin does not identify what products or services Optum provides to JPMorgan or Berkshire Hathaway, what products or services (if any) ABC provides that are competitive, or on what basis Optum claims that Smith will be engaged in activities to develop and provide competitive products and services. Upon close examination, Optum's entire Motion for TRO falls apart in that single sentence.

B. Optum Has Made No Showing of Irreparable Harm

Optum also cannot satisfy its burden of proving that it will suffer immediate, irreparable harm if Smith is permitted to continue to work for ABC. "A finding of irreparable harm must be grounded on something more than conjecture, surmise, or a party's unsubstantiated fears of what the future may have in store." *ITyX Solutions, AG v. Kodak Alaris, Inc.*, 2016 WL 8902596, at *8

(D. Mass. Aug. 16, 2016). Optum cannot show irreparable harm for at least three reasons.

First, as discussed above, ABC and Optum do not compete, and Optum has failed to show that its legitimate business interests are at risk. *See supra,* Sections III.A.1, III.A.2. Predictably, Massachusetts courts and others find an absence of irreparable harm in comparable circumstances. *See Athenahealth, Inc. v. Cady*, 2013 WL 4008198, at *9 (Mass. Super. Ct. May 2, 2013) (denying preliminary injunction on non-compete and finding no irreparable harm absent proof former employee took any trade secrets or new employer had a competitive product at market); *Kauzens*, 2005 WL 1683665, at *4 (no irreparable harm where former employer and new employer were not competitors and work for new employer did not touch "in any way on [former employer's] secrets or confidential information"); *Medtronic, Inc. v. Ernst*, 182 F.Supp.3d 925, 934-35 (D. Minn. 2016) (denying motions for TRO and expedited discovery for non-compete and trade secret misappropriation claims because defendant's work at new company was unrelated to work she did for old company and plaintiff relied on "pure speculation" of alleged harm; noting that "the evidence submitted shows that [defendant] never accessed the documents after leaving Medtronic and all documents have been returned to Medtronic").

Second, the little evidence Optum's Memorandum has offered, such as inferences drawn from third-party internet articles, is speculative and insufficient to show irreparable harm. *ITyX Solultions, AG v. Kodak Alaris, Inc.* is instructive on this point. *Id.*, 2016 WL 8902596 (D. Mass. Aug. 16, 2016). There, plaintiff ITyX sought a preliminary injunction against a former business partner, Kodak Alaris ("KA"), claiming that KA had begun to develop a competitive product in violation of the agreement under which the two companies had previously collaborated. *Id.* at *3. The court denied ITyX's preliminary injunction, finding no irreparable harm because ITyx could

not demonstrate that KA was "interfering with its business in any appreciable way, or causing any other type of irreparable harm. In other words, ITyx has presented no evidence that [KA] is successfully competing against ITyX's own software in the relevant market." *Id.* at *8-9. Here, as there, Optum's claims fail because it has presented no evidence that ABC sells any products or services that compete with or interfere with Optum's business.

Third, and finally, even if Optum's speculative evidence showed some degree of harm, that harm would be economic and reparable in the form of any business that ABC allegedly took from Optum. *See T.T.K., Inc. v. Columbia Speedway Plaza Member, LLC*, 2009 WL 3644707, at *3 (Mass. Super. Ct. Oct. 9, 2009) (denying preliminary injunction and finding no irreparable injury because losses from competition can be calculated by experts and recompensed by money damages and plaintiff submitted no evidence that the loss "threatens the very existence of the movant's business").

C. The Balancing of Hardships Disfavors a TRO

Optum cannot show that the balancing of hardships favors injunctive relief, especially here, where Optum is asking this Court to (1) remove Smith from his current job; (2) restrict his ability to support his family and earn a living in the health care industry nationwide, which covers 13 million jobs; and (3) prohibit him from working in "every dimension of the health system across the United States." Delaware and Massachusetts courts routinely find that injunctive relief is not appropriate in these situations because the hardships favor the employee:

- *Tasktop Technologies US Inc. v. McGowan*, 2018 WL 4938570, at *7 (D. Del. Oct. 11, 2018) (denying motion for preliminary injunction to enforce non-compete and finding that the balance of equities weighed in favor of the employee because enforcing the agreement meant he would have to find employment in a completely different industry, which would "impose serious hardship" on him and threaten his ability to "earn[] a living to support his family");

- *Kauzens*, 2005 WL 1683665, at *4 (denying preliminary injunction on non-compete and

finding that the balance of harms "falls considerably in favor" of the employee given that he would be "unemployed in the kind of work he understands");

- *Chiswick, Inc. v. Constas*, 2004 WL 1895044, at *4 (Mass. Super. Ct. June 17, 2004) (denying preliminary injunction on non-compete and finding that balance of harms favored former employee because employee was the "primary provider for his family" and plaintiff sought to have him "effectively barred from working in his field of expertise").

D. The Public Interest Disfavors a TRO

The fourth, and final, prong of public interest also does not favor a TRO. "[F]or good reason, courts have refused to permanently enjoin activities that would injure the public health." *Cordis Corp. v. Boston Sci. Corp.*, 99 F. App'x 928, 935 (Fed. Cir. 2004) (affirming denial of motion for preliminary injunction where public had strong interest in work of alleged competitor in patent case). Here, Smith's role at ABC is to evaluate current health care products in order to provide better health outcomes, increased patient satisfaction, and lower costs for the Founders' over 1.2 million employees and their families. The public interest weighs heavily in favor of allowing Smith to work to improve those individuals' health.

E. Injunctive Relief Is Unavailable Because Optum Does Not Have Clean Hands

Finally, it is black letter law that "he who comes into equity must come with clean hands." *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 814 (1945). Here, Optum's hands are filthy. It has breached its own contract with Smith by filing this lawsuit in violation of the arbitration agreement which it did not even disclose to the Court in the over 400 pages it filed, and it improperly seeks discovery, damages, and injunctive relief from this Court that are plainly delegated to arbitration in that same agreement.

IV. CONCLUSION

For the reasons set forth above, Smith requests that this Court deny Optum's Motion for TRO in its entirety.

EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

OPTUM, INC. and OPTUM SERVICES, INC., *Plaintiffs*, v. DAVID WILLIAM SMITH, *Defendant*.	Civil Action No.: 19-cv-10101

AFFIDAVIT OF DAVID SMITH

I, David Smith, hereby state under penalty of perjury as follows:

1. I submit this Affidavit in opposition to Plaintiffs' Motion for a Temporary Restraining Order. The matters set forth herein are based on my personal knowledge.

Employment with Optum

2. I have worked in the health care space for my entire professional career. From 2004 to 2009, I worked as an analyst for a health care venture capital fund in New York, focused on medical technology and biotechnology. From 2009 to 2011, I attended business school and achieved a joint degree in health administration and policy. From 2011 to 2016 (including an internship during business school in 2010), I worked as a consultant at Bain & Company, focused on health care, working with health care insurers, health systems, pharmaceutical companies and other health care services companies.

3. From July 2016 to December 2018, I worked for Optum, Inc. ("Optum"), a subsidiary of UnitedHealth Group ("UHG"), as a Vice President of Corporate Strategy and Product. I was a junior leader for Optum. In this job, I worked under the direct supervision of Nick Seddon, Head of Corporate Product, and Steve Wolin, Head of Corporate Strategy. As of

2018, these groups reported into Michael Weissel, Executive Vice President of Product and Strategy. Michael Weissel reported into Dirk McMahon, President of Optum, who in turn reported into Andrew Witty, CEO of Optum. Andrew Witty reported into David Wichmann, CEO of UHG. In my career at Optum, I never met either Andrew Witty or David Wichmann, and had met Dirk McMahon fewer than five times in my more than two years with the company.

4. I was not a member of Optum's executive team or a part of senior leadership (i.e., I was not on the "Executive Leadership Team" consisting of the top ten to fifteen employees at Optum, nor was I on the "Senior Leadership Team" consisting of the approximately top two-hundred employees at Optum). I did not have independent authority to make decisions regarding Optum's corporate strategy or product portfolios and, as of 2018, I was one of seven individuals at a similar level on the Corporate Strategy/Product teams.

5. Optum is in the business of delivering health care products and services to many customer types, including insurers, state and federal government entities, providers and employers. My role at Optum involved working on Optum's strategies and products in areas including workers' compensation, population health, and pharmacy benefits. In my job at Optum, I had no involvement in providing any Optum products or services to Amazon, Berkshire Hathaway and JPMorgan Chase (the "Founders"), and I had no confidential information about any Optum activity, product, or service related to the Founders.

6. As part of my employment with Optum, I agreed to an Employment Arbitration Policy. A true and correct copy of my Employment Arbitration Policy is attached as Exhibit 1.

Employment Offer From ABC

7. On December 11, 2018, I accepted an offer of employment from TCorp62018 LLC ("ABC"), a company that was created by the Founders with the goal of providing better health

care outcomes and increased patient satisfaction for the Founders' own employees and their families.

8. By way of background, on June 24, 2018, I reached out to ABC's Chief Executive Officer, Atul Gawande, via email, expressed an interest in working with ABC, and submitted my resume. I did not receive a reply from Mr. Gawande. I was interested in working for ABC because I believed it would provide exciting, intellectually challenging, and very different opportunities to work directly toward better health care outcomes for a group of employees and their families. My interest was not financially motivated, and, in fact, my total compensation at ABC is less than I received at Optum.

9. On October 7, 2018, an ABC recruiter, Paige Divoll, contacted me through LinkedIn, though I did not see or respond to this message until October 18, 2018. She arranged for me to interview with Jack Stoddard, ABC's Chief Operating Officer, on October 29, 2018, and arranged interviews with other ABC representatives on November 2, 2018. I never discussed or disclosed any Optum strategy, business plan, trade secret, or other confidential information to anyone at ABC, its recruiter, or any other third party (nor was I asked about these topics at any point), and I have not done so ever.

10. On December 6, 2018, at approximately 3:00 p.m. central time, and after the conclusion of Optum's quarterly strategy meeting that I attended that day, I received a phone call from Ms. Divoll advising me that I would be getting an offer of employment from ABC. Prior to that date, I had no confirmation and did not have any certainty as to if, in fact, I would receive an offer of employment from ABC.

11. On December 7, 2018, I received a written offer from ABC. I did not immediately decide to accept the offer. My wife and I co-parent two young children. I planned to discuss with

my wife what working at ABC would mean for our personal lives and the lives of our children. We considered the offer, discussed these issues over the weekend, and by Tuesday December 11, I decided to accept the offer. I signed and returned the ABC offer letter on December 11, 2018.

12. On that same day, I notified Nick Seddon (Head of Corporate Product at Optum) that I had accepted the ABC offer. Believing that communications to more senior executives should be done in person, I advised Michael Weissel (Executive Vice President of Product and Strategy) and Steve Wolin (Head of Corporate Strategy) of my acceptance of ABC's offer on the morning of December 13, 2018, when they returned to the office from an out-of-town engagement. My communications with Mr. Weissel and Mr. Wolin were cordial and professional, and I advised them that I planned to work for Optum through the end of 2018 in order to enable a smooth transition.

13. Contrary to the assertion made by Mr. Wolin in Paragraph 24 of his affidavit, at no time during my meeting with Mr. Wolin did he ever tell me that he "was uncomfortable with [my] plans to join ABC, a competitor of Optum that promises to be a disrupter in the health care industry, and that [I] would have an issue with [my] noncompete and equity grants under the Agreements." Nor did Mr. Wolin make any similar statements. When I ended my conversation with Mr. Wolin, I left with the clear understanding that I would work for Optum through the end of December.

14. For the remainder of December 13, 2018, I focused on transitioning my duties to other Optum employees. At approximately mid-day, Mr. Weissel reached out to suggest that for the remainder of my transition, I should recuse myself from anything that may be sensitive. At this point, I canceled a number of future meetings and focused solely on transition activities. At approximately 3:00 p.m. that day, however, I was advised by Mr. Wolin that I was being placed on administrative leave at the recommendation of Legal and told to leave the building. I left all

Optum property behind. I did not walk out of the building with any of Optum's property, documents, or data in any media.

15. On December 21, 2018, Optum sent me a letter threatening to bring legal action against me. As I have represented to Optum, through my counsel, the only UHG or Optum documents I have in my possession are an email chain with a slide deck attachment containing my headshot, some of my own personnel and onboarding documents, and some publicly filed UHG reports. I have also told Optum, through my counsel, that I will execute an affidavit attesting to these facts and return or destroy the documents at Optum's direction. Optum never responded to my offer.

16. I understand that my employment with Optum was officially terminated on January 5, 2019. I began my employment with ABC on January 17, 2019. As a condition of my employment, ABC required me to sign an Employee Confidentiality, Assignment and Non-Solicitation Agreement. A true and correct copy of that Employee Confidentiality, Assignment and Non-Solicitation Agreement is attached as Exhibit 2. ABC also required me to sign an Acknowledgement on my first day of work that states, among other things, I will not use or disclose any confidential information belonging to a prior employer, and will immediately contact Erica Davila (ABC's Acting General Counsel) if I have any concerns about those issues. A true and correct copy of that Acknowledgment is attached as Exhibit 3.

17. Optum's own Executive Vice President of Product and Strategy, Michael Weissel, has openly stated that ABC "is more likely a customer than a competitor."

18. My role at ABC will be to conduct in-depth research focused on understanding the one million employees and family members who work for and receive health benefits from the Founders. This role is unrelated to the job I was performing at Optum, and it will not require me

to draw upon any Optum confidential information I was privy to while working for that company for at least three reasons. First, in my job at Optum, I had no involvement in providing any Optum products or services to the Founders, and I had no confidential information about any Optum activity, product, or service related to the Founders. Second, at ABC, I will not assist in any analysis of any Optum products or services (either separately or in comparison to any other company's products or services). Instead, I will be working for the Founders to help their employees better interact with the health care system—essentially acting as a benefits consultant and as an extension of the Founders' benefits teams, which are customers of companies like Optum, not competitors. Third, I will be solving a problem fundamentally different from the issues I worked on for Optum. My old role at Optum was focused on profitably selling Optum products into multiple markets, whereas my new role at ABC has nothing to do with commercializing products or making a profit; it is only focused on helping to improve the health and wellbeing of the employees and families of the Founders and helping make health benefits more affordable for the Founders' companies.

I Did Not Engage In Any Wrongful Conduct

19. Optum makes several allegations about me in its Complaint. These allegations are false. I have not misappropriated any Optum confidential information and have not shared (and will not share) any of Optum's information with anyone associated with ABC. At all times during my employment with Optum up until I was placed on administrative leave, my focus was on performing my job for Optum.

20. Optum alleges that on October 29, 2018, I printed a document titled "20180912 Project Orange Factbook v.FINAL.pdf" (the "Factbook"). Optum alleges that the Factbook contains highly confidential, competitive information that I would have "no reason to print" for

my work responsibilities at Optum. *See* ECF No. 4, p. 7; ECF No. 7, Wolin Aff. ¶ 36. The Factbook was created as part of the first phase of a planned four-phase initiative to refresh Optum's corporate strategy and determine how the company can better sell its products and services in the health care market. The first phase involved fact-based market research, and the Factbook summarized that research. The second phase involved the development of a high-level approach and overall corporate strategy structure. Two more phases were planned for completion in the February-April 2019 time period to develop an actual strategy for the business units to sell specific products, which I was not privy to since I was placed on administrative leave before these phases commenced.

21. Though I did not draft the Factbook itself, I assisted with the market research summarized in the Factbook and used the document in performing my job (as did the entire Corporate Strategy team) in order to help businesses understand how the Corporate Strategy group was looking at overall health care trends. I printed the document as part of my work for Optum and either discarded or left the document at Optum. While working for Optum, I routinely printed and read/worked from hard copy documents while in the office. It was my preference and regular practice to read and work from hard copy documents for in-person meetings rather than electronic documents. I have not retained, used, or disclosed the Factbook or the contents of the Factbook to anyone outside of Optum.

22. Optum alleges that on December 4, 2018, I "asked junior members on the Corporate Strategy team for secret information that had nothing to do with [my] job." *See* ECF No. 4, p. 7. I do not know what Optum is referring to specifically, as it provides no details regarding who I allegedly asked, what "secret" information I allegedly asked about, or why that "secret" information was unrelated to my job.

23. In performing their jobs, the Optum Corporate Strategy team members—particularly those who sit at a single space in Boston, which included me—continually brainstorm and talk among themselves and with other colleagues about a wide range of business ideas and concepts, beyond the specific tasks to which they are assigned at the time. Both I and other team members used each other as sounding boards, to get different perspectives on issues they are talking through, and to collaborate. I attest that I did not, on December 4, 2018, or at any other time, engage with any colleague in an effort to obtain confidential information that had nothing to do with my job. Any work-related conversations I had with junior members of the Corporate Strategy team were solely intended to advance Optum's business goals.

24. Optum alleges that on December 6, 2018, I attended a confidential, cross-team product and strategy meeting with senior leadership, including Optum's Chief Executive Officer. Optum claims that I should not have attended the meeting because I was informed by ABC's recruiter that same day that I would receive a formal written offer the next day. *See* ECF No. 4, p. 7. However, I had not yet received a job offer from ABC at the time I attended this meeting. At that point, I had no confirmation and did not have any certainty as to if, in fact, I would receive an offer of employment from ABC. Therefore, my resignation was not imminent and my attendance and participation at the meeting was appropriate and, indeed, required as part of my job duties for Optum. Optum held off-site strategy meetings approximately every three months. These quarterly meetings were attended by Michael Weissel and either Steve Wolin and the Corporate Strategy team or Nick Seddon and the Product team. As a member of both teams, I was expected to attend and participate in the meetings, and often led discussions and prepared meeting materials. For the December 6, 2018 meeting, I helped to prepare and present a discussion about changing product organization. I gave my presentation around mid-day. At roughly 3:00 p.m. central time, after the

meeting had concluded, I received a call from Ms. Divoll notifying me that I would be receiving an offer from ABC. Prior to receiving that call, I did not know that I would be receiving an offer from ABC. I continued to work diligently for Optum until I was placed on administrative leave on December 13, 2018.

25. Optum alleges that on December 10, 2018, I printed out a document titled "OES Socialization Deck for OET _v20181126FINAL.pptx" (the "OES Deck"). Optum alleges that the OES Deck contains highly confidential information that I would have "no reason to print" for my work responsibilities at Optum. *See* ECF No. 4, p. 7; ECF No. 7, Wolin Aff. ¶ 36. The OES Deck was created as part of the second phase of the four-phase initiative referenced above, and the document memorialized Optum's corporate strategy at a high level. I relied heavily on this document when preparing for the December 6, 2018 quarterly strategy meeting and in ongoing work, both for the Product team and for the Corporate Strategy team as it was intended to be socialized (i.e., shared) within Optum (per the title of the document). I again printed it on December 10 as part of two pieces of work specifically assigned to me. The first project was an effort to help the Pharmacy Benefit Management business (OptumRx) grow business with health care insurers. OptumRx leadership had been solely focused on Optum Rx products, and I was trying to help them think more broadly about how to go to market. The OES Deck focused on this approach at a very high level, and bringing it to update meetings allowed me to convince leadership to take a longer, broader view, understanding that the OES Deck reflected just an outline. The second project was an effort to help the Product team think about how to allocate capital, and understanding which products might align with the strategy outlined in the OES Deck allowed us to make proposals to the businesses about which products they should spend more time on. Given the large number of products at Optum, I needed to print out documents to be able to compare

to work for Optum until the end of 2018, so I intended to continue progressing and transitioning these projects for the rest of December. I either discarded or left the OES Deck at Optum. I have not retained, used, or disclosed the OES Deck or the contents of the OES Deck to anyone outside of Optum.

26. As I stated above, other than the email and attachment containing my headshot, some personnel and onboarding documents, and some public reports, I have no hard or electronic copies of any Optum documents in my possession. I did not print-out and remove any Optum documents to my home. I have not shared any Optum documents with ABC, or any other third party, except as authorized by Optum during the course of my employment. When placed on administrative leave on December 13, 2018, I left my work laptop and all other Optum property with Optum and did not remove any Optum property from the office. Any Optum documents I printed at work were either discarded once I was finished with them or left at Optum when I was placed on administrative leave.

I Did Not Solicit Caitlin Fleming, Or Any Other Optum Employees, To Work For ABC

27. Optum also alleges that I solicited another former Optum employee, Caitlin Fleming, to leave Optum and work for ABC, in violation of my non-solicit with Optum. Again, this is a false allegation.

28. Ms. Fleming previously worked with me in the Corporate Strategy group, but rotated out of that group in the beginning of 2018. After that, I no longer worked with Ms. Fleming directly, though I maintained a good professional relationship with her. I was unaware that Ms. Fleming was interviewing with ABC until Ms. Divoll informed me on December 6, 2018. Upon being informed of this, I canceled a meeting I had scheduled with Ms. Fleming for the following

week, and intentionally kept my distance from her because of my non-solicit. I had no involvement whatsoever in recruiting Ms. Fleming to ABC, and I never encouraged or solicited Ms. Fleming to leave Optum or join ABC. I have made no efforts to recruit any other Optum employees to work for ABC, nor do I intend to do so.

Granting Optum's Request For A Temporary Restraining Order And Injunction Would Cause Great Hardship To Me And My Family

29. In this action, Optum seeks to prohibit me from working for ABC or any other company that, in Optum's view, competes with it "directly or indirectly." Given that Optum describes itself as servicing "every dimension of the health system across the United States and globally," (ECF No. 3, ¶ 13), Optum effectively seeks an order that would bar me from working in the health care industry entirely.

30. If the relief Optum seeks is granted, it would cause extreme hardship to me and my family. I would be prohibited from working in the health care industry, my field of expertise and the space in which I have worked for my whole professional career, for an entire year. I am married with two young children, ages one and three. I am the primary wage earner for my family and my income is needed to, among other things, pay the mortgage and maintenance on our home, pay down graduate school debt, and provide for childcare and other basic necessities for my family. Having an injunction granted against me based on Optum's false allegations also may cause irreparable and indefinite damage to my professional reputation and career trajectory and make it difficult for me to obtain employment in the health care industry ever again.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 21, 2019

David Smith

EXHIBIT 1

UnitedHealth Group Employment Arbitration Policy Acknowledgement Form

DAVID SMITH

Review and Acknowledge at the bottom of this page

UnitedHealth Group Employment Arbitration Policy

Employment Arbitration Policy

A. STATEMENT OF INTENT

UnitedHealth Group Incorporated and its subsidiaries and affiliates (referred to as "UnitedHealth Group") acknowledge that disagreements may arise between an individual employee[1] and UnitedHealth Group or between employees in a context that involves UnitedHealth Group. It is the intent of UnitedHealth Group that legal disputes be resolved as efficiently and amicably as possible, and that issues not resolved voluntarily through informal resolution or through the internal dispute resolution ("IDR") process be resolved through binding arbitration. Unless excluded below, legal disputes that cannot be resolved through voluntary informal resolution or the IDR process are covered under this Employment Arbitration Policy ("Policy").

This Policy is a binding contract between UnitedHealth Group and its employee. **Acceptance of employment or continuation of employment with UnitedHealth Group is deemed to be acceptance of this Policy.** However, this Policy is not a promise that employment will continue for any specified period of time or end only under certain conditions. Employment at UnitedHealth Group is a voluntary (at will) relationship existing for no definite period of time and this Policy does not change that relationship.

The Federal Arbitration Act (9 U.S.C. § 1 et seq.) shall govern this Policy. All disputes covered by the Policy shall be decided by an arbitrator through arbitration and not by way of court or jury trial.

B. SCOPE OF POLICY

This Policy creates a contract between UnitedHealth Group and employee requiring both parties to resolve employment-related disputes (except the excluded disputes listed below) that are based on a legal claim through final and binding arbitration. Arbitration is the exclusive forum for the resolution of such disputes, and the parties mutually waive their right to a trial before a judge or jury in federal or state court in favor of arbitration under the Policy.

UnitedHealth Group and employee mutually consent to the resolution by arbitration of all claims and controversies, past, present, or future, that employee may have against UnitedHealth Group or UnitedHealth Group may have against employee, which arise out of or relate to employee's employment, application for employment, and/or termination of employment.

Employees are encouraged to exhaust the IDR process before initiating arbitration. If an employment-related dispute is not resolved through the IDR process and the dispute is based on a legal claim not expressly excluded from this Policy, any party to the dispute may initiate the arbitration process. UnitedHealth Group is not required to follow the steps of either the IDR process or the Policy before initiating or implementing any disciplinary action.

Subject to the specific exclusions below, the claims covered by the Policy include, but are not limited to: claims for unfair competition and violation of trade secrets; claims incidental to the employment relationship but arising after that relationship ends (for example, claims arising out of or related to post-termination defamation or job references and claims arising out of or related to post-employment retaliation); claims for wages or other

compensation due (including but not limited to, minimum wage, overtime, meal and rest breaks, waiting time penalties, vacation pay and pay on separation); claims for breach of any contract or covenant (express or implied); tort claims; common law claims; equitable claims; claims for discrimination and harassment; retaliation claims; and claims for violation of any federal, state or other governmental law, statute, regulation, or ordinance, except claims excluded below.

Covered claims include any disputes regarding the Policy or any portion of the Policy or its interpretation, enforceability, applicability, unconscionability, arbitrability or formation, or whether the Policy or any portion of the Policy is void or voidable, with the exception noted in the Class and Representative Actions Waivers section below**.**

Claims excluded from mandatory arbitration under the Policy are (i) Workers' Compensation benefit claims (but workers' compensation discrimination and/or retaliation claims are covered); (ii) state unemployment or disability insurance compensation claims; (iii) claims for severance benefits under the UnitedHealth Group Severance Pay Plan; (iv) claims for benefits under UnitedHealth Group's other ERISA benefit plans; (v) claims for benefits under UnitedHealth Group's Short-Term Disability Plan; (vi) claims that may not be the subject of a mandatory arbitration agreement as provided by Section 8116 of the Department of Defense ("DoD") Appropriations Act for Fiscal Year 2010 (Pub. L. 111-118), Section 8102 of the Department of Defense ("DoD") Appropriations Act for Fiscal Year 2011 (Pub. L. 112-10, Division A), and their implementing regulations, or any successor DoD appropriations act addressing the arbitrability of claims; and (vii) claims that the Dodd-Frank Wall Street Reform and Consumer Protection Act or other controlling federal law bars from the coverage of mandatory pre-dispute arbitration agreements..

This Policy does not preclude an employee from filing a claim or charge with a governmental administrative agency, such as the National Labor Relations Board, the Department of Labor, or the Equal Employment Opportunity Commission, or from filing a workers' compensation or unemployment compensation claim in a statutorily-specified forum. In addition, this Policy does not preclude either an employee or UnitedHealth Group from seeking emergency or temporary injunctive relief in a court of law in accordance with applicable law. However, after the court has issued a ruling concerning the emergency or temporary injunctive relief, the employee and UnitedHealth Group are required to submit the dispute to arbitration pursuant to this Policy.

An issue is subject to arbitration only if it states a claim under applicable federal, state, or local law. An arbitrator or a court of law with jurisdiction shall dismiss, without a hearing on the merits, any matter which does not state a claim under applicable federal, state, or local law.

C. CLASS AND REPRESENTATIVE ACTION WAIVERS

There will be no right or authority for any dispute to be brought, heard, or arbitrated as a class or collective action, or in a representative capacity on behalf of any other person. Nor shall the Arbitrator have any authority to hear or arbitrate any such dispute. Accordingly,

1. There will be no right or authority for any dispute to be brought, heard or arbitrated as a class or collective action ("Class Action Waiver"). The Class Action Waiver shall not be severable from this Policy in any case in which (1) the dispute is filed as a class or collective action and (2) a civil court of competent jurisdiction finds the Class Action Waiver is invalid, unenforceable, unconscionable, void or voidable. In such instances, the class action must be litigated in a civil court of competent jurisdiction; and

2. There will be no right or authority for any dispute to be brought, heard or arbitrated as a private attorney general act representative action ("Private Attorney General Waiver"). The Private Attorney General Waiver does not apply to any claim employee brings in arbitration as a private attorney general solely on employee's own behalf and not on behalf of or regarding others. The Private Attorney General Waiver shall be severable from this Policy in any case in which a civil court of competent jurisdiction finds the Private Attorney General Waiver is invalid, unenforceable, unconscionable, void or voidable. In such instances and where the claim is brought as a private attorney general, such private attorney general claim must be litigated in a civil court of competent jurisdiction.

Regardless of anything else in this Policy and/or any rules or procedures that might otherwise be applicable by virtue of this Policy or by virtue of any arbitration organization rules or procedures that now apply or any amendments and/or modifications to those rules, the interpretation, enforceability, applicability, unconscionability or formation of the Class Action Waiver and Private Attorney General Waiver may be determined only by a court and not by an arbitrator.

D. ARBITRATION RULES AND PROCEDURES

The arbitration will be administered by the American Arbitration Association ("AAA") and, except as provided in this Policy, shall be in accordance with the then-current Employment Arbitration Rules of the AAA ("AAA Rules"). The AAA Rules are available via the Internet at www.adr.org/employment or by using a search engine such as www.google.com to search for "AAA Employment Arbitration Rules." To the extent any of the terms, conditions, or requirements of this Policy conflict with AAA Rules, the terms, conditions, or requirements of this Policy shall govern, All arbitrations shall be conducted in accordance with the Policy in effect on the date the Corporate Legal Department receives the Demand for Arbitration, except that any amendments to the Policy made after a claim arises will not be applied to proceedings related to that claim.

1. Initiation of Arbitration Proceeding

a. Arbitration Initiated by Employee - UnitedHealth Group shall pay 100 percent in excess of the first twenty-five dollars ($25) of the required AAA administrative fee. An employee may initiate arbitration by submitting, within the applicable statute of limitations period, a written demand for arbitration which states a claim under applicable federal, state, or local law to Corporate Legal Department, UnitedHealth Group, 9900 Bren Road East, MN008-T502, Minnetonka, MN 55343, with a check for $25 payable to "UnitedHealth Group." The demand shall set forth the dispute, including the alleged act or omission at issue, the name, address and telephone number of the employee, and the names of all persons allegedly involved in the act or omission. Within 30 business days of receiving such demand UnitedHealth Group shall file the demand with the appropriate office of the AAA, together with the applicable administrative fee as provided in the AAA's fee schedule.

b. Arbitration Initiated by UnitedHealth Group - UnitedHealth Group may initiate arbitration by submitting, within the applicable statute of limitations period, a written demand for arbitration which states a claim under applicable federal, state, or local law to the employee's last home address of record via certified mail or overnight mail. The demand shall set forth the dispute, including the alleged act or omission at issue, the name, address and telephone number of the employee, and the names of all persons allegedly involved in the act or omission. Within 30 business days of submitting the demand to the employee, UnitedHealth Group shall file the demand with the appropriate office of the AAA, together with the applicable administrative fee as provided in the AAA's fee schedule. When arbitration is initiated by UnitedHealth Group, the company is responsible for 100% of all AAA administrative fees.

2. Appointment of Neutral Arbitrator

The arbitrator shall be selected in the following manner:

a. As soon as practicable, the AAA shall submit to each party an identical list of nine (9) proposed arbitrators.

b. Each party shall have ten (10) business days from the mailing date of the list to cross off names of arbitrators to which the party objects, number the remaining names in order of preference and return the list to the AAA. Each party may strike up to three names without cause.

c. If the party does not return the list within the time specified, all persons on the list shall be deemed acceptable.

d. If only one common name remains on the lists of all parties, that individual shall be designated as the arbitrator. If more than one common name remains on the lists of all parties, the AAA shall appoint an arbitrator remaining on the list in the order of preference, to the extent the order of preference of the parties can be reconciled by the AAA.

In the event the parties fail to agree on any of the persons named, or if an acceptable arbitrator is unwilling to act, the AAA shall issue an additional list of arbitrator names to the parties**.**

3. Qualifications of Neutral Arbitrator

Unless the parties jointly agree otherwise, the arbitrator shall be an attorney experienced in employment law and licensed to practice law in the state in which the arbitration is convened, or a retired judge from any jurisdiction.

4. Vacancies

If a vacancy occurs, if an appointed arbitrator is unable to serve promptly, or if an arbitrator is disqualified under subparagraph 3 above, the vacancy shall be filled in accordance with subparagraph 2.

5. Summary Disposition

The arbitrator shall have the authority to issue an award or partial award without conducting an arbitration hearing on the grounds that there is no claim stated on which relief can be granted or that there is no genuine issue as to any material fact and that a party is entitled to a judgment as a matter of law, consistent with Rule 12 or Rule 56 of the Federal Rules of Civil Procedure. Upon the request of either party, the arbitrator will establish a briefing schedule and, if necessary, schedule an opportunity for oral argument prior to considering such motions for dispositive motions.

6. Date, Time, and Place of Hearing

The arbitrator shall set the date and time of the hearing. Unless the parties jointly agree otherwise, the arbitration shall take place in or near the city in which employee is or was last employed by UnitedHealth Group.

7. Representation

Any party may be represented by an attorney or by him or herself. A party must inform the other party and the AAA of the name, address and telephone number of an authorized representative at least three (3) business days prior to the date set for the hearing.

8. Confidentiality

All proceedings under this Policy are private and confidential, unless applicable law provides to the contrary. The arbitrator shall maintain the privacy and confidentiality of the arbitration hearing unless applicable law provides to the contrary. The arbitrator shall have the authority to make appropriate rulings to safeguard that confidentiality.

9. Stenographic Record

Either party may request a stenographic record of the hearing. The party that requests the record shall bear the cost of such a record. If both parties request a stenographic record, the cost shall be borne equally by the parties.

10. Discovery

a. Interrogatory - Each party shall be entitled to propound and serve upon the other party one interrogatory in a form consistent with Rule 33 of the Federal Rules of Civil Procedure and which shall be limited to the identification of potential witnesses. “Identification” means that a party must identify each witness’s name, current address and telephone number, and a brief description of the subject of testimony.

b. Requests for Production of Documents - Each party shall be entitled to propound and serve upon the other party one set of Requests for the Production of Documents in a form consistent with Rule 34 of the Federal Rules of Civil Procedure and which shall be limited in number to twenty-five (25) requests (including subparts, which shall be counted separately). Parties reserve the right to make objections to any document request on the grounds that the request is irrelevant, overly broad, vague, or burdensome, or any other good faith objection available under the Federal Rules of Civil Procedure.

c. Depositions - Each party shall be entitled to conduct a maximum of two (2) eight-hour days of depositions of witnesses or of the parties in accordance with the procedures set forth in Rule 30 of the Federal Rules of Civil Procedure. In addition, each party shall be entitled to conduct a maximum of one (1) eight-hour day of depositions of expert witnesses designated by the other party.

d. Physical and Mental Examinations - Each party shall be entitled to obtain discovery consistent with Rule 35 of the Federal Rules of Civil Procedure.

e. Arbitrator Authority - The arbitrator shall have the authority to resolve all issues concerning discovery that may arise between the parties. Each party can request that the arbitrator allow additional discovery, and additional discovery may be conducted under the parties’ mutual stipulation or as ordered by the arbitrator. In addition, the arbitrator shall have the authority to issue subpoenas for the appearance of witnesses or the production of documents pursuant to applicable law.

f. Prehearing Submissions - At least thirty (30) days prior to the hearing, the parties are required to exchange lists of witnesses, including any expert witnesses, who the parties anticipate will be called to testify at the hearing. In addition, the parties are required to exchange copies of all exhibits the parties intend to introduce as evidence at the hearing.

12. Evidence

The arbitrator shall apply the Federal Rules of Evidence.

13. Award

a. Form - The award shall be in writing and shall set forth findings of fact and conclusions of law upon which the arbitrator based the award. All awards shall be executed in the manner required by law.

b. Scope of Relief – Except as to disputes involving an employment agreement or equity award containing a Minnesota choice of law provision, the arbitrator shall follow the rules of law of the state which is the employee's principal place of work, any applicable Federal law, and the rules as stated in this Policy. In cases involving an employment agreement and/or equity award with a Minnesota choice of law provision, the arbitrator shall follow Minnesota law, any applicable Federal law, and the rules as stated in this Policy. The arbitrator shall have the authority to grant any remedy or relief (including attorneys' fees where authorized by statute) that the arbitrator deems just and equitable and which is authorized by and consistent with applicable law, including applicable statutory limitations on damages.

c. Final Judgment - The award shall be final and binding upon all parties to the arbitration.

14. Delivery of Award to Parties

The award shall be deemed delivered to a party upon placement of the award, or a true and correct copy thereof, addressed to the party or its representative at the last known address in the U.S. mail, certified, return receipt requested; personal service of the award, or a true and correct copy thereof; or the filing of the award in any manner that is permitted by law.

15. Severability

Except as provided in the clause entitled "Class and Representative Action Waivers," above, if any portion or provision of this Policy is held to be void or unenforceable, the remainder of this Policy will be enforceable and any part may be severed from the remainder, as appropriate.

16. Judicial Proceedings and Enforcement of Awards

Either party may bring an action in a court of competent jurisdiction to compel arbitration under this Policy, to enforce an arbitration award, or to vacate an arbitration award.

17. Expenses

The expenses of witnesses for either side shall be paid by the party requiring the presence of such witnesses. Each side shall pay its own legal fees and expenses, except where such legal fees and expenses may be awarded under applicable law.

18. Time Period for Arbitration

The written Demand for Arbitration must be received within the time period allowed pursuant to the statute, regulation, or other law applicable to the alleged act or omission giving rise to the dispute. Nothing in this Policy relieves any party of the duty to exhaust administrative remedies by filing a charge or complaint with an administrative agency and obtaining a right to sue notice, where required by law.

19. Interpretation and Application of Procedure

The arbitrator shall interpret and apply these procedures insofar as they relate to the arbitrator's powers and duties. All other procedures shall be interpreted and applied by the AAA.

E. CONSIDERATION

The mutual obligations by UnitedHealth Group and by employee to arbitrate differences provide consideration for each other. UnitedHealth Group's payment of the filing fee in excess of $25 for employee also constitutes

consideration for this Policy. Employee's employment by UnitedHealth Group constitutes additional consideration.

Employee and UnitedHealth Group understand and agree that through this agreement, UnitedHealth Group and employee give up their respective rights to a court or jury trial and that, pursuant to the terms of this Policy, UnitedHealth Group and employee are agreeing to arbitrate claims covered by this Policy.

This Policy supersedes any and all prior versions and has been revised effective January 1, 2016.

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[1] Throughout this Policy, the term "employee" includes both current and former employees of UnitedHealth Group.

DAVID SMITH

I have read and agree to the above **Date Received:** 08/02/2016

Thank You. Your acknowledgement has been captured. No further action is needed.

EXHIBIT 2

TCorp62018 LLC

Employee Confidentiality, Assignment and Non-Solicitation Agreement

In consideration and as a condition of the commencement of my employment by **TCorp62018 LLC** (including its subsidiaries and other affiliates and its and their successors and assigns, the "Company"), I agree as follows:

1. **Proprietary Information.** I agree that all proprietary and confidential information, whether or not in writing, concerning the Company's business, technology, business relationships or financial affairs which the Company has not released to the general public (collectively, "Proprietary Information") and all tangible embodiments thereof are and will be the exclusive property of the Company. By way of illustration, Proprietary Information may include information or material which has not been made generally available to the public, such as: (a) *corporate information*, including plans, strategies, methods, policies, resolutions, negotiations or litigation; (b) *marketing information*, including strategies, methods, customer or business partner identities or other information about customers, business partners, prospect identities or other information about prospects, or market analyses or projections; (c) *financial information*, including cost and performance data, debt arrangements, equity structure, investors and holdings, purchasing and sales data and price lists; (d) *operational and scientific information*, including plans, specifications, manuals, forms, templates, software, pre-clinical and clinical testing data and strategies, research and development strategies, designs, methods, procedures, formulas, data, reports, discoveries, inventions, improvements, concepts, ideas, know-how and trade secrets; and (e) *personnel information*, including personnel lists, reporting or organizational structure, resumes, personnel data, compensation structure, performance evaluations and termination arrangements or documents. Proprietary Information also includes information received in confidence by the Company from its customers or suppliers, business partners or other third parties.

2. **Recognition of Company's Rights.** I will not, at any time, without the Company's prior written permission, either during or after my employment, disclose any Proprietary Information to anyone outside of the Company, or use or permit to be used any Proprietary Information for any purpose other than the performance of my duties as an employee of the Company. I will cooperate with the Company and use my best efforts to prevent the unauthorized disclosure of all Proprietary Information. I will deliver to the Company all copies and other tangible embodiments of Proprietary Information in my possession or control upon the earlier of a request by the Company or termination of my employment.

3. **Rights of Others.** I understand that the Company is now and may hereafter be subject to non-disclosure or confidentiality agreements with third persons ("Third Party Agreements") which require the Company to protect or refrain from use or disclosure of proprietary information. I agree to be bound by the terms of such Third Party Agreements in the event I have access to such proprietary information and have actual knowledge or reasonable grounds to believe that the proprietary information is subject to a Third Party Agreement. I understand that the Company strictly prohibits me from using or disclosing confidential or proprietary information belonging to any other person or entity (including any employer or former employer), in connection with my employment. In addition, I understand that the Company prohibits me from bringing any confidential information belonging to any other person or entity onto Company premises or into Company workspaces. I expressly acknowledge and agree that I will indemnify and hold the Company harmless against loss, damage, liability or expense arising from any claim based upon circumstances alleged to be inconsistent with the representations in this paragraph 3.

4. **Commitment to Company; Avoidance of Conflict of Interest.** While an employee of the Company, I will devote my full-time efforts to the Company's business and I will not engage in any other business activity, except as expressly authorized in writing and in advance by the Company. I will advise an authorized officer of the Company or his or her nominee at such time as any activity of either the Company or another business presents me with a conflict of interest or the appearance of a conflict of interest as an employee of the Company. I will take whatever action is reasonably requested of me by the Company to resolve any conflict or appearance of conflict which it finds to exist.

5. **Developments.** I acknowledge that all work performed by me is on a "work for hire" basis, and I hereby do assign and transfer and, to the extent any such assignment cannot be made at present, will assign and transfer, to the Company and its successors and assigns all my right, title and interest in and to all inventions, discoveries, designs, developments, methods, modifications, improvements, processes, algorithms, data, databases, computer programs, research, formulae, techniques, trade secrets, graphics or images, and audio or visual works and other works of authorship, including works in progress (collectively, "Developments"), whether or not patentable or copyrightable, that are created, made, conceived or reduced to practice by me (alone or jointly with others) or under my direction during the period of my employment, that (a) relate to the business of the Company or any customer of, supplier to or business partner of the Company or any of the products or services being researched, developed, manufactured or sold by the Company or which may be used with such products or services; or (b) result from tasks assigned to me by the Company; or (c) result from the use of premises or personal property (whether tangible or intangible) owned, leased or contracted for by the Company ("Company-Related Developments"), and all related patents, patent applications, trademarks and trademark applications, copyrights and copyright applications, and other intellectual property rights in all countries and territories worldwide and under any international conventions ("Intellectual Property Rights"). To the extent necessary to identify, create or protect

the Company's interest or ownership in its rights to any Company-Related Developments as reasonably determined by the Company at any time, I agree to make full disclosure and reporting to the Company regarding such Company-Related Developments or Intellectual Property Rights.

To preclude any possible uncertainty, if there are any Developments that I have, alone or jointly with others, conceived, developed or reduced to practice prior to the commencement of my employment with the Company that I consider to be my property or the property of third parties and that I wish to have excluded from the scope of this Agreement ("Prior Inventions"), I have set forth on Exhibit A attached hereto a complete list of those Prior Inventions. If disclosure of any such Prior Invention would cause me to violate any prior confidentiality agreement, I understand that I am not to list such Prior Inventions in Exhibit A but am only to disclose a cursory name for each such invention, a listing of the party(ies) to whom it belongs and the fact that full disclosure as to such inventions has not been made for that reason. If there are any patents or patent applications in which I am named as an inventor, other than those which have been assigned to the Company ("Other Patent Rights"), I have also listed those Other Patent Rights on Exhibit A. If no such disclosure is attached, I represent that there are no Prior Inventions or Other Patent Rights. If, in the course of my employment with the Company, I incorporate a Prior Invention into a Company product, process or machine, research or development program, or other work done for the Company, I hereby grant to the Company a nonexclusive, royalty-free, fully paid-up, irrevocable, worldwide license (with the full right to sublicense through multiple tiers) to make, have made, modify, use, sell, offer for sale and import such Prior Invention. Notwithstanding the foregoing, I will not incorporate, or permit to be incorporated, Prior Inventions in any Company-Related Development without the Company's prior written consent.

This Agreement does not obligate me to assign to the Company any Development which, in the sole judgment of the Company, reasonably exercised, is developed entirely on my own time and does not substantially relate to the business efforts of the Company, or to the research and development efforts in which, during the period of my employment, the Company actually is engaged or reasonably would be engaged, and does not result from the use of premises or equipment owned or leased by the Company ("Individual Developments"). However, I will also promptly disclose to the Company any such Individual Developments for the purpose of determining whether they qualify for such exclusion. I understand that to the extent this Agreement is required to be construed in accordance with the laws of any state which precludes a requirement in an employee agreement to assign certain classes of inventions made by an employee, this paragraph 5 will be interpreted not to apply to any invention which a court rules and/or the Company agrees falls within such classes. I also hereby waive all claims to any moral rights or other special rights which I may have or accrue in any Company-Related Developments.

6. **Documents and Other Materials.** I will keep and maintain records of all Proprietary Information and Company-Related Developments developed by me during my employment, as reasonably requested by the Company, and such documents will be available to and remain the sole property of the Company at all times.

All files, letters, notes, memoranda, reports, records, data, sketches, drawings, notebooks, layouts, charts, quotations and proposals, specification sheets, or other written, photographic or other tangible material containing Proprietary Information, whether created by me or others, which come into my custody or possession, are the exclusive property of the Company to be used by me only in the performance of my duties for the Company. Any property situated on the Company's premises and owned by the Company, including without limitation computers, disks and other storage media, filing cabinets or other work areas, is subject to inspection by the Company at any time with or without notice. In the event of the termination of my employment for any reason, I will deliver to the Company all Company property and equipment in my possession, custody or control, including all files, letters, notes, memoranda, reports, records, data, sketches, drawings, notebooks, layouts, charts, quotations and proposals, specification sheets, and other written, photographic or other tangible material containing Proprietary Information, and other materials of any nature pertaining to the Proprietary Information of the Company and to my work, and will not take or keep in my possession any of the foregoing or any copies.

7. **Enforcement of Intellectual Property Rights.** I will cooperate fully with the Company, both during and after my employment with the Company, with respect to the procurement, maintenance and enforcement of Intellectual Property Rights in Company-Related Developments. I will sign, both during and after the term of this Agreement, all papers, including without limitation copyright applications, patent applications, declarations, oaths, assignments of priority rights, and powers of attorney, which the Company reasonably may deem necessary or desirable in order to protect its rights and interests in any Company-Related Development or Intellectual Property Rights therein. If the Company is unable, after reasonable effort, to secure my signature on any such papers, I hereby irrevocably designate and appoint each officer of the Company as my agent and attorney-in-fact to execute any such papers on my behalf, and to take any and all actions as the Company may deem necessary or desirable in order to protect its rights and interests in any Company-Related Development, including any Intellectual Property Rights therein.

8. **Non-Solicitation.** In order to protect the Company's Proprietary Information and good will, during my employment and for a period of one (1) year following the date of the cessation of my employment with the Company, I will not, directly or indirectly, in any manner, solicit, entice or attempt to persuade any employee or consultant of the Company to leave the Company for any reason or otherwise participate in or facilitate the hire, directly or through another entity, of any person who is then employed or engaged by the Company.

9. **Government Contracts.** I acknowledge that the Company may have from time to time agreements with other persons or with the United States Government or its agencies which impose obligations or restrictions on the Company regarding inventions made during the course of work under such agreements or regarding the confidential nature of such

work. I agree to comply with any such obligations or restrictions upon the direction of the Company. In addition to the rights assigned under paragraph 5, I also hereby assign to the Company (or any of its nominees) all rights which I have or acquired in any Developments, full title to which is required to be in the United States under any contract between the Company and the United States or any of its agencies.

10. Prior Agreements. I hereby represent that, except as I have fully disclosed previously in writing to the Company, I am not bound by the terms of any agreement with any previous or current employer or other party to refrain from using or disclosing any trade secret or confidential or proprietary information in the course of my employment with the Company or to refrain from competing, directly or indirectly, with the business of such employer or any other party. I further represent that my performance of all the terms of this Agreement as an employee of the Company does not and will not breach any agreement to keep in confidence proprietary information, knowledge or data acquired by me in confidence or in trust prior to my employment with the Company. I will not disclose to the Company or induce the Company to use any confidential or proprietary information or material belonging to any previous employer or others.

11. Remedies Upon Breach. I understand that the restrictions contained in this Agreement are necessary for the protection of the business and goodwill of the Company and I consider them to be reasonable for such purpose. Any breach of this Agreement is likely to cause the Company substantial and irrevocable damage and therefore, in the event of such breach, the Company, in addition to such other remedies which may be available, will be entitled to specific performance and other injunctive relief without the posting of a bond. If a court of law makes a final determination that I have violated this Agreement, in addition to all other remedies available to the Company at law, in equity, and under contract, I agree that I am obligated to pay all the Company's reasonable costs of enforcement of this Agreement, including attorneys' fees and expenses.

12. Use of Voice, Image and Likeness. I hereby give the Company permission to use any and all of my voice, image and likeness, with or without using my name, in connection with the products and/or services of the Company, for the purposes of advertising and promoting such products and/or services and/or the Company, and/or for other purposes deemed appropriate by the Company in its reasonable discretion, except to the extent expressly prohibited by law.

13. Publications and Public Statements. I will obtain the Company's written approval before publishing or submitting for publication any material that relates to my work at the Company and/or incorporates any Proprietary Information. To ensure that the Company delivers a consistent message about its products, services and operations to the public, and further in recognition that even positive statements may have a detrimental effect on the Company in certain securities transactions and other contexts, any statement about the Company which I create, publish or post during my period of employment and for six (6) months thereafter, on any media accessible by the public, including but not limited to social media and networking services and sites, electronic bulletin boards and Internet-based chat rooms, must first be reviewed and approved by an officer of the Company before it is released in the public domain.

14. No Employment Obligation. I understand that this Agreement does not create an obligation on the Company or any other person to continue my employment. I acknowledge that, unless otherwise agreed in a formal written employment agreement signed on behalf of the Company by an authorized officer, my employment with the Company is at will and therefore may be terminated by the Company or me at any time and for any reason, with or without cause.

15. Survival and Assignment by the Company. I understand that my obligations under this Agreement will continue in accordance with its express terms regardless of any changes in my title, position, duties, salary, compensation or benefits or other terms and conditions of employment. I further understand that my obligations under this Agreement will continue following the termination of my employment regardless of the manner of such termination and will be binding upon my heirs, executors and administrators. The Company will have the right to assign this Agreement to its affiliates, successors and assigns. I expressly consent to be bound by the provisions of this Agreement for the benefit of the Company or any parent, subsidiary or affiliate to whose employ I may be transferred without the necessity that this Agreement be resigned at the time of such transfer.

16. Notice of Resignation. If I elect to resign from my employment with the Company, I agree to provide the Company with written notification of my resignation at least two (2) weeks prior to my intended resignation date. Such notice shall include the name and address of any subsequent employer and/or person or entity which whom or which I intend to engage in business activities, and my job title/position. The Company may elect to waive all or part of the two (2) week notice period in its sole discretion.

17. Severability. In case any provisions (or portions thereof) contained in this Agreement shall, for any reason, be held invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect the other provisions of this Agreement, and this Agreement shall be construed as if such invalid, illegal or unenforceable provision had never been contained herein. If, moreover, any one or more of the provisions contained in this Agreement shall for any reason be held to be excessively broad as to duration, geographical scope, activity or subject, it shall be construed by limiting and reducing it, so as to be enforceable to the extent compatible with the applicable law as it shall then appear.

18. Defend Trade Secrets Act of 2016; Other Notices. I understand that pursuant to the federal Defend Trade Secrets Act of 2016, I shall not be held criminally or civilly liable under any federal or state trade secret law for the disclosure of a trade secret that (a) is made (i) in confidence to a federal, state, or local government official, either directly or indirectly, or to an attorney; and (ii) solely for the purpose of reporting or investigating a suspected violation of law; or (b) is made in a complaint or other document filed in a lawsuit or other

proceeding, if such filing is made under seal. I further understand that nothing contained in this Agreement limits my ability to (A) communicate with any federal, state or local governmental agency or commission, including to provide documents or other information, without notice to the Company, or (B) share compensation information concerning myself or others, except that this does not permit me to disclose compensation information concerning others that I obtain because my job responsibilities require or allow access to such information.

19. Choice of Law and Jurisdiction. This Agreement will be deemed to be made and entered into in the Commonwealth of Massachusetts, and will in all respects be interpreted, enforced and governed under the laws of the Commonwealth of Massachusetts. I hereby agree to consent to personal jurisdiction of the state and federal courts situated within Massachusetts for purposes of enforcing this Agreement, and waive any objection that I might have to personal jurisdiction or venue in those courts.

20. Other Agreements and Obligations. This Agreement constitutes the entire agreement between me and the Company regarding the subject matter hereof, and supersedes any previous agreements or understandings that I had or may have had between me and the Company regarding the subject matter, except any obligations specifically preserved in this Agreement.

21. Independence of Obligations. My obligations under this Agreement are independent of any obligation, contractual or otherwise, the Company has to me. The Company's breach of any such obligation shall not be a defense against the enforcement of this Agreement or otherwise limit my obligations under this Agreement.

I UNDERSTAND THAT THIS AGREEMENT AFFECTS IMPORTANT RIGHTS. BY SIGNING BELOW, I CERTIFY THAT I HAVE BEEN ADVISED BY THE COMPANY THAT I HAVE THE RIGHT TO CONSULT WITH COUNSEL PRIOR TO SIGNING THIS AGREEMENT.

IN WITNESS WHEREOF, the undersigned has executed this agreement as a sealed instrument.

EMPLOYEE

DocuSigned by:

Signed: David Smith
68D2D73F229B415...
(Employee's full name)

Type or print name: David Smith

Date: 12/11/2018

EXHIBIT A

To: **TCorp62018 LLC**

From: David Smith

Date: 12/11/2018

SUBJECT: **Prior Inventions**

The following is a complete list of all inventions or improvements relevant to the subject matter of my employment by the Company that have been made or conceived or first reduced to practice by me alone or jointly with others prior to my engagement by the Company:

☒ No inventions or improvements

☐ See below:

_____

_____

_____

☐ Additional sheets have been emailed to TCorp62018 contact

The following is a list of all patents and patent applications in which I have been named as an inventor:

☒ None

☐ See below:

_____

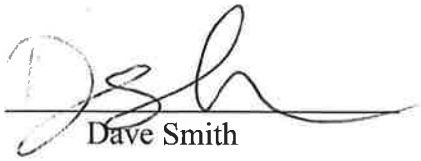
_____

_____

EXHIBIT 3

Acknowledgment

By signing below, I represent and warrant that (a) I am not bound by any agreement (such as a non-competition or non-solicitation agreement) that restricts me from becoming an employee of Tcorp62018 LLC (the "Company") or limits the performance of my job duties and responsibilities; and (b) I have not retained, and will not retain, in my possession, custody or control, any: (i) documents (hard copy, electronic, or otherwise) or other tangible embodiments of any confidential or non-public information of any former employer (for the avoidance of doubt, this includes emails and electronic documents stored in the "cloud"); or (ii) any other property, of any type belonging, to any prior employer. I also agree that: (a) I will not disclose to the Company, or any of its employees, contractors or agents, any confidential information belonging to any current or former employer (or any other person or entity to whom I owe a duty to keep such information confidential); and (b) in the course of performing my duties on behalf of the Company, I will not make any use of any such information. If I have concerns at any time about the matters in this Acknowledgment, I will immediately notify Erica Davila.

Signature:  Date: 1/17/19

Dave Smith

EXHIBIT B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

OPTUM, INC. and
OPTUM SERVICES, INC.,

Plaintiffs,

v.

DAVID WILLIAM SMITH,

Defendant.

Civil Action No.: 19-cv-10101

AFFIDAVIT OF JOHN C. STODDARD

I, John C. ("Jack") Stoddard, hereby state under penalty of perjury as follows:

1. My name is John C. ("Jack") Stoddard, and the matters set forth herein are based on my personal knowledge.

2. I have over 20 years of health care technology and services experience, having worked at companies such as The Advisory Board (acquired by Optum after my tenure), Health Dialog, and Accolade.

3. From 2005 to 2009, I worked for UnitedHealth Group, Inc. ("UHG") in different positions, including as a Senior Vice President, Optum International, and as Senior Vice President, Employer Solutions at Optum.

4. I currently serve as the Chief Operating Officer of TCORP62018 LLC ("ABC"), which is a health care venture established by Amazon, Berkshire Hathaway, and JPMorgan Chase & Co. (the "Founders").

Products and Services of ABC and Optum

5. Based on my general knowledge of the health care industry, publicly available

information, the Founders, and my positions at UHG and ABC, I am familiar with the products and services offered by ABC as well as Optum, Inc. and Optum Services, Inc. ("Optum").

6. Optum offers a range of services, including things like advisory services, data analytics (OptumInsight), health care delivery, health care operations, health plan resources, pharmacy care services (OptumRx), and population health management. Optum offers these in the form of health care products and services to entities like private employers, state and federal governments, and health care providers.

7. Optum's products and services include, for example, selling Pharmacy Benefit Management Services (PBM), selling direct primary and specialty care, selling access to and claims processing for specialty clinical networks (e.g., behavioral health, transplant, etc.), and selling revenue-cycle management services and software to hospitals.

8. Optum is a subsidiary of UHG, which is a for-profit public company.

9. In January 2018, the Founders announced that they would form an independent entity—*i.e.*, ABC—with the goal of providing better health outcomes, increased patient satisfaction, and lower costs for the Founders' own employees and their families.

10. ABC does not sell or offer any products or services to the general market. Instead, ABC is evaluating potential health care solutions for the Founders' over 1.2 million employees that lead to better outcomes, higher satisfaction, and more affordable care.

11. ABC is seeking to evaluate, test, and scale solutions provided by third-party vendors—which could potentially include Optum—who are willing to innovate and experiment with ABC. ABC is currently using data, analytics, and expertise to combine products from third-party vendors—which could potentially include Optum—to come up with new ways of unlocking value for the Founders and their employees. This is not a service that Optum provides to the

Founders.

12. If viable offerings or solutions do not exist in the market, ABC may consider building new solutions to meet the needs of the Founders' employees or consider having third-party vendors develop them.

13. ABC is not profit-seeking or returning profits or dividends to the Founders, and even in serving the employees of the Founders, it is not charging for its work.

14. ABC has no activities, products, or services that compete with any Optum activities, products, or services.

David Smith

15. I interviewed David Smith ("Smith") for a position at ABC on October 29, 2018.

16. After interviewing Smith, I was inclined to advance him in our hiring process at ABC due to his broad understanding of the health care economy, his analytic skillset, and his consulting background.

17. ABC has recently hired a number of people with similar backgrounds to Smith—*i.e.*, consulting backgrounds with a general understanding of the health care industry—irrespective of the companies they might have worked for previously.

18. Smith has never discussed or disclosed to me in any form of communication any Optum strategy, business plan, trade secret, or any other confidential information, nor have I ever sought such information from Smith.

19. Smith began working at ABC on January 17, 2019, in the position of Director, Strategy and Research. Smith's original title was "Director, Product Strategy and Research," but the "Product" portion of his title—and similar titles of his colleagues in the Strategy and Research group—was dropped because this group is not responsible for the product management function.

20. In this role, Smith will be evaluating third-party vendors and recommending ways for how ABC can unlock value for the Founders and their employees. Smith's role at ABC is also to use his general skillset to evaluate complex health care problems, analyze and test potential health care solutions, and handle ad hoc research requests from senior leaders all for the benefit of the Founders' employees. ABC plans to restrict Smith from evaluating Optum or UHG products in 2019.

21. Smith is not on the senior leadership team at ABC.

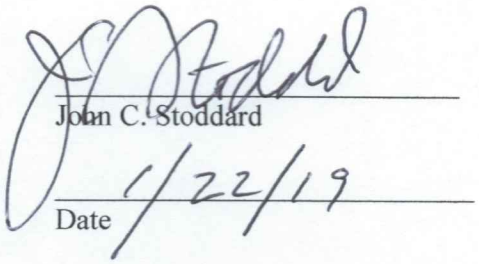
22. At ABC, Smith will not be working on any health care products that he might have been involved with at Optum. Out of an abundance of caution, Smith will not assist in any analysis of any Optum or UHG products or services (either separately or in comparison to any other company's products or services).

23. ABC has established precautions regarding Smith's potential disclosure of any of Optum's information he may still retain in his head.

24. As a condition of his employment, ABC required Smith to sign an Employee Confidentiality, Assignment and Non-Solicitation Agreement that states, among other things, that he will not disclose to ABC nor induce ABC to use any confidential information belonging to any previous employer. *See* Exhibit 1.

25. ABC also required Smith to sign an Acknowledgement on his first day of work stating that he has not retained any documents belonging to a prior employer, will not use or disclose any confidential information belonging to a prior employer, and will immediately contact Erica Davila (ABC's Acting General Counsel) if he has any concerns about those issues. *See* Exhibit 2.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.



John C. Stoddard

1/22/19

Date

EXHIBIT 1

TCorp62018 LLC

Employee Confidentiality, Assignment and Non-Solicitation Agreement

In consideration and as a condition of the commencement of my employment by **TCorp62018 LLC** (including its subsidiaries and other affiliates and its and their successors and assigns, the "Company"), I agree as follows:

1. **Proprietary Information.** I agree that all proprietary and confidential information, whether or not in writing, concerning the Company's business, technology, business relationships or financial affairs which the Company has not released to the general public (collectively, "Proprietary Information") and all tangible embodiments thereof are and will be the exclusive property of the Company. By way of illustration, Proprietary Information may include information or material which has not been made generally available to the public, such as: (a) *corporate information*, including plans, strategies, methods, policies, resolutions, negotiations or litigation; (b) *marketing information*, including strategies, methods, customer or business partner identities or other information about customers, business partners, prospect identities or other information about prospects, or market analyses or projections; (c) *financial information*, including cost and performance data, debt arrangements, equity structure, investors and holdings, purchasing and sales data and price lists; (d) *operational and scientific information*, including plans, specifications, manuals, forms, templates, software, pre-clinical and clinical testing data and strategies, research and development strategies, designs, methods, procedures, formulas, data, reports, discoveries, inventions, improvements, concepts, ideas, know-how and trade secrets; and (e) *personnel information*, including personnel lists, reporting or organizational structure, resumes, personnel data, compensation structure, performance evaluations and termination arrangements or documents. Proprietary Information also includes information received in confidence by the Company from its customers or suppliers, business partners or other third parties.

2. **Recognition of Company's Rights.** I will not, at any time, without the Company's prior written permission, either during or after my employment, disclose any Proprietary Information to anyone outside of the Company, or use or permit to be used any Proprietary Information for any purpose other than the performance of my duties as an employee of the Company. I will cooperate with the Company and use my best efforts to prevent the unauthorized disclosure of all Proprietary Information. I will deliver to the Company all copies and other tangible embodiments of Proprietary Information in my possession or control upon the earlier of a request by the Company or termination of my employment.

3. **Rights of Others.** I understand that the Company is now and may hereafter be subject to non-disclosure or confidentiality agreements with third persons ("Third Party Agreements") which require the Company to protect or refrain from use or disclosure of proprietary information. I agree to be bound by the terms of such Third Party Agreements in the event I have access to such proprietary information and have actual knowledge or reasonable grounds to believe that the proprietary information is subject to a Third Party Agreement. I understand that the Company strictly prohibits me from using or disclosing confidential or proprietary information belonging to any other person or entity (including any employer or former employer), in connection with my employment. In addition, I understand that the Company prohibits me from bringing any confidential information belonging to any other person or entity onto Company premises or into Company workspaces. I expressly acknowledge and agree that I will indemnify and hold the Company harmless against loss, damage, liability or expense arising from any claim based upon circumstances alleged to be inconsistent with the representations in this paragraph 3.

4. **Commitment to Company; Avoidance of Conflict of Interest.** While an employee of the Company, I will devote my full-time efforts to the Company's business and I will not engage in any other business activity, except as expressly authorized in writing and in advance by the Company. I will advise an authorized officer of the Company or his or her nominee at such time as any activity of either the Company or another business presents me with a conflict of interest or the appearance of a conflict of interest as an employee of the Company. I will take whatever action is reasonably requested of me by the Company to resolve any conflict or appearance of conflict which it finds to exist.

5. **Developments.** I acknowledge that all work performed by me is on a "work for hire" basis, and I hereby do assign and transfer and, to the extent any such assignment cannot be made at present, will assign and transfer, to the Company and its successors and assigns all my right, title and interest in and to all inventions, discoveries, designs, developments, methods, modifications, improvements, processes, algorithms, data, databases, computer programs, research, formulae, techniques, trade secrets, graphics or images, and audio or visual works and other works of authorship, including works in progress (collectively, "Developments"), whether or not patentable or copyrightable, that are created, made, conceived or reduced to practice by me (alone or jointly with others) or under my direction during the period of my employment, that (a) relate to the business of the Company or any customer of, supplier to or business partner of the Company or any of the products or services being researched, developed, manufactured or sold by the Company or which may be used with such products or services; or (b) result from tasks assigned to me by the Company; or (c) result from the use of premises or personal property (whether tangible or intangible) owned, leased or contracted for by the Company ("Company-Related Developments"), and all related patents, patent applications, trademarks and trademark applications, copyrights and copyright applications, and other intellectual property rights in all countries and territories worldwide and under any international conventions ("Intellectual Property Rights"). To the extent necessary to identify, create or protect

the Company's interest or ownership in its rights to any Company-Related Developments as reasonably determined by the Company at any time, I agree to make full disclosure and reporting to the Company regarding such Company-Related Developments or Intellectual Property Rights.

To preclude any possible uncertainty, if there are any Developments that I have, alone or jointly with others, conceived, developed or reduced to practice prior to the commencement of my employment with the Company that I consider to be my property or the property of third parties and that I wish to have excluded from the scope of this Agreement ("Prior Inventions"), I have set forth on Exhibit A attached hereto a complete list of those Prior Inventions. If disclosure of any such Prior Invention would cause me to violate any prior confidentiality agreement, I understand that I am not to list such Prior Inventions in Exhibit A but am only to disclose a cursory name for each such invention, a listing of the party(ies) to whom it belongs and the fact that full disclosure as to such inventions has not been made for that reason. If there are any patents or patent applications in which I am named as an inventor, other than those which have been assigned to the Company ("Other Patent Rights"), I have also listed those Other Patent Rights on Exhibit A. If no such disclosure is attached, I represent that there are no Prior Inventions or Other Patent Rights. If, in the course of my employment with the Company, I incorporate a Prior Invention into a Company product, process or machine, research or development program, or other work done for the Company, I hereby grant to the Company a nonexclusive, royalty-free, fully paid-up, irrevocable, worldwide license (with the full right to sublicense through multiple tiers) to make, have made, modify, use, sell, offer for sale and import such Prior Invention. Notwithstanding the foregoing, I will not incorporate, or permit to be incorporated, Prior Inventions in any Company-Related Development without the Company's prior written consent.

This Agreement does not obligate me to assign to the Company any Development which, in the sole judgment of the Company, reasonably exercised, is developed entirely on my own time and does not substantially relate to the business efforts of the Company, or to the research and development efforts in which, during the period of my employment, the Company actually is engaged or reasonably would be engaged, and does not result from the use of premises or equipment owned or leased by the Company ("Individual Developments"). However, I will also promptly disclose to the Company any such Individual Developments for the purpose of determining whether they qualify for such exclusion. I understand that to the extent this Agreement is required to be construed in accordance with the laws of any state which precludes a requirement in an employee agreement to assign certain classes of inventions made by an employee, this paragraph 5 will be interpreted not to apply to any invention which a court rules and/or the Company agrees falls within such classes. I also hereby waive all claims to any moral rights or other special rights which I may have or accrue in any Company-Related Developments.

6. **Documents and Other Materials.** I will keep and maintain records of all Proprietary Information and Company-Related Developments developed by me during my employment, as reasonably requested by the Company, and such documents will be available to and remain the sole property of the Company at all times.

All files, letters, notes, memoranda, reports, records, data, sketches, drawings, notebooks, layouts, charts, quotations and proposals, specification sheets, or other written, photographic or other tangible material containing Proprietary Information, whether created by me or others, which come into my custody or possession, are the exclusive property of the Company to be used by me only in the performance of my duties for the Company. Any property situated on the Company's premises and owned by the Company, including without limitation computers, disks and other storage media, filing cabinets or other work areas, is subject to inspection by the Company at any time with or without notice. In the event of the termination of my employment for any reason, I will deliver to the Company all Company property and equipment in my possession, custody or control, including all files, letters, notes, memoranda, reports, records, data, sketches, drawings, notebooks, layouts, charts, quotations and proposals, specification sheets, and other written, photographic or other tangible material containing Proprietary Information, and other materials of any nature pertaining to the Proprietary Information of the Company and to my work, and will not take or keep in my possession any of the foregoing or any copies.

7. **Enforcement of Intellectual Property Rights.** I will cooperate fully with the Company, both during and after my employment with the Company, with respect to the procurement, maintenance and enforcement of Intellectual Property Rights in Company-Related Developments. I will sign, both during and after the term of this Agreement, all papers, including without limitation copyright applications, patent applications, declarations, oaths, assignments of priority rights, and powers of attorney, which the Company reasonably may deem necessary or desirable in order to protect its rights and interests in any Company-Related Development or Intellectual Property Rights therein. If the Company is unable, after reasonable effort, to secure my signature on any such papers, I hereby irrevocably designate and appoint each officer of the Company as my agent and attorney-in-fact to execute any such papers on my behalf, and to take any and all actions as the Company may deem necessary or desirable in order to protect its rights and interests in any Company-Related Development, including any Intellectual Property Rights therein.

8. **Non-Solicitation.** In order to protect the Company's Proprietary Information and good will, during my employment and for a period of one (1) year following the date of the cessation of my employment with the Company, I will not, directly or indirectly, in any manner, solicit, entice or attempt to persuade any employee or consultant of the Company to leave the Company for any reason or otherwise participate in or facilitate the hire, directly or through another entity, of any person who is then employed or engaged by the Company.

9. **Government Contracts.** I acknowledge that the Company may have from time to time agreements with other persons or with the United States Government or its agencies which impose obligations or restrictions on the Company regarding inventions made during the course of work under such agreements or regarding the confidential nature of such

work. I agree to comply with any such obligations or restrictions upon the direction of the Company. In addition to the rights assigned under paragraph 5, I also hereby assign to the Company (or any of its nominees) all rights which I have or acquired in any Developments, full title to which is required to be in the United States under any contract between the Company and the United States or any of its agencies.

10. Prior Agreements. I hereby represent that, except as I have fully disclosed previously in writing to the Company, I am not bound by the terms of any agreement with any previous or current employer or other party to refrain from using or disclosing any trade secret or confidential or proprietary information in the course of my employment with the Company or to refrain from competing, directly or indirectly, with the business of such employer or any other party. I further represent that my performance of all the terms of this Agreement as an employee of the Company does not and will not breach any agreement to keep in confidence proprietary information, knowledge or data acquired by me in confidence or in trust prior to my employment with the Company. I will not disclose to the Company or induce the Company to use any confidential or proprietary information or material belonging to any previous employer or others.

11. Remedies Upon Breach. I understand that the restrictions contained in this Agreement are necessary for the protection of the business and goodwill of the Company and I consider them to be reasonable for such purpose. Any breach of this Agreement is likely to cause the Company substantial and irrevocable damage and therefore, in the event of such breach, the Company, in addition to such other remedies which may be available, will be entitled to specific performance and other injunctive relief without the posting of a bond. If a court of law makes a final determination that I have violated this Agreement, in addition to all other remedies available to the Company at law, in equity, and under contract, I agree that I am obligated to pay all the Company's reasonable costs of enforcement of this Agreement, including attorneys' fees and expenses.

12. Use of Voice, Image and Likeness. I hereby give the Company permission to use any and all of my voice, image and likeness, with or without using my name, in connection with the products and/or services of the Company, for the purposes of advertising and promoting such products and/or services and/or the Company, and/or for other purposes deemed appropriate by the Company in its reasonable discretion, except to the extent expressly prohibited by law.

13. Publications and Public Statements. I will obtain the Company's written approval before publishing or submitting for publication any material that relates to my work at the Company and/or incorporates any Proprietary Information. To ensure that the Company delivers a consistent message about its products, services and operations to the public, and further in recognition that even positive statements may have a detrimental effect on the Company in certain securities transactions and other contexts, any statement about the Company which I create, publish or post during my period of employment and for six (6) months thereafter, on any media accessible by the public, including but not limited to social media and networking services and sites, electronic bulletin boards and Internet-based chat rooms, must first be reviewed and approved by an officer of the Company before it is released in the public domain.

14. No Employment Obligation. I understand that this Agreement does not create an obligation on the Company or any other person to continue my employment. I acknowledge that, unless otherwise agreed in a formal written employment agreement signed on behalf of the Company by an authorized officer, my employment with the Company is at will and therefore may be terminated by the Company or me at any time and for any reason, with or without cause.

15. Survival and Assignment by the Company. I understand that my obligations under this Agreement will continue in accordance with its express terms regardless of any changes in my title, position, duties, salary, compensation or benefits or other terms and conditions of employment. I further understand that my obligations under this Agreement will continue following the termination of my employment regardless of the manner of such termination and will be binding upon my heirs, executors and administrators. The Company will have the right to assign this Agreement to its affiliates, successors and assigns. I expressly consent to be bound by the provisions of this Agreement for the benefit of the Company or any parent, subsidiary or affiliate to whose employ I may be transferred without the necessity that this Agreement be resigned at the time of such transfer.

16. Notice of Resignation. If I elect to resign from my employment with the Company, I agree to provide the Company with written notification of my resignation at least two (2) weeks prior to my intended resignation date. Such notice shall include the name and address of any subsequent employer and/or person or entity which whom or which I intend to engage in business activities, and my job title/position. The Company may elect to waive all or part of the two (2) week notice period in its sole discretion.

17. Severability. In case any provisions (or portions thereof) contained in this Agreement shall, for any reason, be held invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect the other provisions of this Agreement, and this Agreement shall be construed as if such invalid, illegal or unenforceable provision had never been contained herein. If, moreover, any one or more of the provisions contained in this Agreement shall for any reason be held to be excessively broad as to duration, geographical scope, activity or subject, it shall be construed by limiting and reducing it, so as to be enforceable to the extent compatible with the applicable law as it shall then appear.

18. Defend Trade Secrets Act of 2016; Other Notices. I understand that pursuant to the federal Defend Trade Secrets Act of 2016, I shall not be held criminally or civilly liable under any federal or state trade secret law for the disclosure of a trade secret that (a) is made (i) in confidence to a federal, state, or local government official, either directly or indirectly, or to an attorney; and (ii) solely for the purpose of reporting or investigating a suspected violation of law; or (b) is made in a complaint or other document filed in a lawsuit or other

proceeding, if such filing is made under seal. I further understand that nothing contained in this Agreement limits my ability to (A) communicate with any federal, state or local governmental agency or commission, including to provide documents or other information, without notice to the Company, or (B) share compensation information concerning myself or others, except that this does not permit me to disclose compensation information concerning others that I obtain because my job responsibilities require or allow access to such information.

19. Choice of Law and Jurisdiction. This Agreement will be deemed to be made and entered into in the Commonwealth of Massachusetts, and will in all respects be interpreted, enforced and governed under the laws of the Commonwealth of Massachusetts. I hereby agree to consent to personal jurisdiction of the state and federal courts situated within Massachusetts for purposes of enforcing this Agreement, and waive any objection that I might have to personal jurisdiction or venue in those courts.

20. Other Agreements and Obligations. This Agreement constitutes the entire agreement between me and the Company regarding the subject matter hereof, and supersedes any previous agreements or understandings that I had or may have had between me and the Company regarding the subject matter, except any obligations specifically preserved in this Agreement.

21. Independence of Obligations. My obligations under this Agreement are independent of any obligation, contractual or otherwise, the Company has to me. The Company's breach of any such obligation shall not be a defense against the enforcement of this Agreement or otherwise limit my obligations under this Agreement.

I UNDERSTAND THAT THIS AGREEMENT AFFECTS IMPORTANT RIGHTS. BY SIGNING BELOW, I CERTIFY THAT I HAVE BEEN ADVISED BY THE COMPANY THAT I HAVE THE RIGHT TO CONSULT WITH COUNSEL PRIOR TO SIGNING THIS AGREEMENT.

IN WITNESS WHEREOF, the undersigned has executed this agreement as a sealed instrument.

EMPLOYEE

DocuSigned by:
Signed: David Smith
68D2D73F229B415...
(Employee's full name)

Type or print name: David Smith

Date: 12/11/2018

EXHIBIT A

To: **TCorp62018 LLC**

From: David Smith

Date: 12/11/2018

SUBJECT: **Prior Inventions**

The following is a complete list of all inventions or improvements relevant to the subject matter of my employment by the Company that have been made or conceived or first reduced to practice by me alone or jointly with others prior to my engagement by the Company:

☒ No inventions or improvements

☐ See below:

_____

_____

_____

☐ Additional sheets have been emailed to TCorp62018 contact

The following is a list of all patents and patent applications in which I have been named as an inventor:

☒ None

☐ See below:

_____

_____

_____

EXHIBIT 2

Acknowledgment

By signing below, I represent and warrant that (a) I am not bound by any agreement (such as a non-competition or non-solicitation agreement) that restricts me from becoming an employee of Tcorp62018 LLC (the "Company") or limits the performance of my job duties and responsibilities; and (b) I have not retained, and will not retain, in my possession, custody or control, any: (i) documents (hard copy, electronic, or otherwise) or other tangible embodiments of any confidential or non-public information of any former employer (for the avoidance of doubt, this includes emails and electronic documents stored in the "cloud"); or (ii) any other property, of any type belonging, to any prior employer. I also agree that: (a) I will not disclose to the Company, or any of its employees, contractors or agents, any confidential information belonging to any current or former employer (or any other person or entity to whom I owe a duty to keep such information confidential); and (b) in the course of performing my duties on behalf of the Company, I will not make any use of any such information. If I have concerns at any time about the matters in this Acknowledgment, I will immediately notify Erica Davila.

Signature: _____ Date: 1/17/19

Dave Smith

EXHIBIT C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

OPTUM, INC. and
OPTUM SERVICES, INC.,

Plaintiffs,

v.

DAVID WILLIAM SMITH,

Defendant.

Civil Action No.: 19-cv-10101

AFFIDAVIT OF JOHN F. WELSH

I, John F. Welsh, hereby state under penalty of perjury as follows:

1. I am counsel for David William Smith, the Defendant in this action. I submit this Affidavit in opposition to Plaintiffs' Motion for a Temporary Restraining Order (the "Motion"). The matters set forth herein are based on my personal knowledge.

2. Plaintiffs Optum, Inc. and Optum Services, Inc. (collectively "Optum") filed this action on January 16, 2019. On January 17, 2019, the Court ordered the parties to meet and confer with respect to the Motion.

3. I conducted a meet and confer phone conference with Optum's counsel on January 17 and again on January 18. During these conferences, I asked Optum's counsel if Optum would identify a single or specific document or piece of data or trade secret that it claims Mr. Smith retained in his possession or has given to ABC and should be destroyed or returned. Optum's counsel would not identify anything in particular.

4. In previous correspondence with Optum's counsel, including a December 28, 2018 letter I sent on behalf of Mr. Smith responding to Optum's December 21 letter threatening legal action against him, I informed Optum that Mr. Smith had forwarded from his Optum email account

to his personal email account an email chain with a document containing his headshot. I further advised that this document, which remains in Mr. Smith's email account and has not been shared with any third party, will be deleted once Optum so instructs. Optum never provided a response. A true and correct copy of my December 28 letter to Optum is attached as Exhibit 1. During the January 17 and 18 phone conferences, I asked Optum's counsel, again, whether Optum would like Mr. Smith to return or delete the headshot document. Optum's counsel responded that the document should be "preserved."

5. In my December 28 letter, I requested a copy of Mr. Smith's personnel record pursuant to Mass. Gen. Laws Chapter 149, Section 52C. Optum produced Mr. Smith's personnel record in response to this request on January 7, 2019. The personnel record includes an Employment Arbitration Policy in which Mr. Smith and Optum agreed to arbitration of all employment-related claims, including "claims for unfair competition and violation of trade secrets" and "claims for breach of any contract or covenant[.]" A true and correct copy of the Employment Arbitration Policy is attached as Exhibit 2.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on 1/21, 2019

John F. Welsh

EXHIBIT 1

BELLO WELSH LLP

125 Summer Street
Suite 1200
Boston, MA 02110

Main: 617.247.4100
Fax: 617.247.4125
bellowelsh.com

John F. Welsh, Esq.

Direct: 617.247.8476
jwelsh@bellowelsh.com

December 28, 2018

Marianne D. Short
Executive Vice President and
Chief Legal Officer
UnitedHealth Group
9900 Bren Road East
Minnetonka, MN 55343

Re: Mr. David Smith / Optum

Dear Ms. Short:

This firm represents Mr. David Smith concerning the matters referenced in your letter dated December 1, 2018. All further communications regarding Mr. Smith should be directed to me or my colleague Justin Engel.

Mr. Smith has fully complied with all lawful obligations owed to Optum. Below I will explain why I believe this to be the case, and then suggest potential resolution which I am hopeful should resolve the matter.

1. Optum and ABJ Are Not Competitors.

Optum basically consists of three businesses: pharmacy benefit management (Optum Rx), health care delivery and management, and data analytics (OptumInsight). Mr. Smith's new employer, TCorp62018 LLC ("ABJ"), is an independent organization that is focused on creating better health outcomes, increased patient satisfaction, and lower costs for Amazon, Berkshire Hathaway, and JPMorgan Chase employees and their dependents. The goal is to create better models of care that can be scaled widely and make getting the right care simpler. The Company is an independent LLC that is separate from its three founding companies - Amazon, Berkshire Hathaway, JPMorgan Chase ("the Company Founders") – and the Company Founders dedicate resources the Company needs for the Company to be a success. At this point, the Company is focused exclusively on Amazon, Berkshire Hathaway and JPMorgan Chase employees and their families.

ABJ has no products. ABJ does not compete for business with Optum and, to Mr. Smith's knowledge, has no plans to do so. Rather, ABJ will partner with companies like Optum to help Amazon, Berkshire Hathaway and JPMorgan Chase employees better connect with the medical services they need. Optum is well-aware of these facts. Optum's own Head of Strategy

has openly stated that ABJ "is more likely a customer than a competitor." This observation is accurate, and dispositive of Optum's non-competition claim.

Your letter states that "publicly available media releases" indicate that ABJ intends to "manage prescription benefits, ship prescriptions, open primary care clinics and develop/sell software that mines data from digitized patient records." Please double-check your sources: these media references are to Amazon, and are not references to ABJ. Again, these are separate entities and Mr. Smith will be employed by ABJ, not Amazon. Thus, your entire non-competition argument rests on a mistaken premise.

2. Mr. Smith Has Not Misappropriated Optum Confidential Information.

Your letter makes several allegations of misappropriation of confidential information against Mr. Smith. Again, you are mistaken and these claims are without merit.

a. Off-Site Meeting Attendance. Your letter posits that an "acute" example of Mr. Smith's alleged improper conduct was his attendance at an all-day strategy session, when his resignation was "imminent". Since Mr. Smith had not received his job offer from ABJ yet, the offer was not imminent at that time, but rather speculative. It was completely appropriate for Mr. Smith to continue working diligently for Optum until the offer was received and accepted, which is precisely what he did. This would include active participation in an off-site meeting which Mr. Smith helped prepare and present. Moreover, although your letter implies the offsite strategy session was a highly significant event, the plain fact is that similar strategy sessions occurred every three months or so, and Mr. Smith was already privy to much of what was discussed at the December 2018 off-site in the regular course of his duties.

b. Alleged Electronic Misappropriation. The allegation concerning alleged misappropriation of documents is similarly unfounded.

Your letter states that misappropriation occurred on three specific dates: November 19, December 4 and December 10, 2018. Mr. Smith possesses only one email sent from his Optum account to his personal Gmail account: it is dated November 19, 2018. It is an email chain with a slide deck attachment sent to Mr. Smith and other strategy team members. Mr. Smith forwarded it to his personal email account to save a copy of his photograph (his "headshot" portrait) that appeared on the back slide. If you reviewed the email that transmitted the slide deck to the strategy team, you will recall it made specific reference to the headshots as being the reason for the distribution. This email, which remains in Mr. Smith's email account and has not been shared with any third party, will be deleted once Optum so instructs.

As to the two other dates referenced in your letter, Mr. Smith possesses no emails from Optum on those dates.

As you know, Mr. Smith left his Optum laptop with the Company when he was placed on administrative leave. As that laptop will show, from time to time he would forward emails from Optum to his personal account. Those emails which pertained to Optum business were

read/worked on at home and then deleted. Often that occurred in the context of a vacation or when he would be away on a weekend. The others were personal emails unrelated to Optum (often transmittals of personal documents scanned at work).

b. Alleged Misappropriation of Paper Documents. Your letter suggests that your misappropriation allegation may rest on the fact that Mr. Smith printed out various documents which you speculate may have been removed from Optum and disclosed without authorization to third parties. Once again, what you surmise and allege is mistaken.

Mr. Smith routinely printed documents and worked using hard copy documents. This was the case up to the point he was placed on administrative leave. Any Optum documents printed out by Mr. Smith were part of his work for Optum and were left at Optum.

To be clear, Mr. Smith has no hard or electronic copies of any Optum confidential documents. He did not print-out and remove confidential Optum documents to his home. He has shared no Optum confidential documents with ABJ or any third party except as authorized by Optum during the course of his employment. He is willing to sign an affidavit attesting to these facts.

3. Talking with Other Employees.

Optum asserts that Mr. Smith talked with colleagues about matters outside his areas of responsibility, and that this connotes an intent not to comply with post-employment restrictive covenants. Your assertion reflects a lack of appreciation of what the Optum strategy team members routinely do in the course of their jobs as well, again, a misunderstanding that ABJ is a competitor of Optum. The strategy team continually talks among themselves and with other Optum colleagues about a wide range of business issues and concepts. They use each other as sounding boards, to get different perspectives on issues they are thinking through, and to collaborate. These discussions in no way demonstrate that Mr. Smith was or is planning to breach his non-compete obligations.

If you provide specific information concerning these alleged communications with Optum employees (names, date and topics discussed – the more specific, the better), Mr. Smith will endeavor to provide additional information concerning the communications. He can state now, categorially, that he did not engage in any such communication at Optum for any purpose other than advancing Optum's business interests.

4. Non-Solicitation. Mr. Smith will not solicit any Optum employees to leave Optum or to join ABJ for the restricted period.

5. Information Requested.

You have asked for various facts concerning Mr. Smith's hire by ABJ.

Mr. Smith submitted an on-line application to ABJ on September 28, 2018 on his own initiative. He received an acknowledgement of receipt but no contemporaneous expression of interest. On October 18, 2018, an ABJ representative contacted Mr. Smith through LinkedIn. This reach-out by ABJ was unrelated to the electronic application submitted in September. Mr. Smith spoke with or interviewed with ABJ officials on October 22, 23, and 29 and on November 2, 2018.

On December 6, 2018, at about 3 or 4 p.m., Mr. Smith received a brief cell phone call advising him that he would be receiving an offer from ABJ. On December 7, 2018, Mr. Smith received an offer letter from ABJ. He signed and returned the ABJ offer letter on December 11, 2018.

Mr. Smith advised Nick Seddon that he had accepted the ABJ offer on December 11, 2018. Believing that this communication should be done in person, he advised Mike Weissel and Steve Wollen of his acceptance of ABJ's offer on December 13 when they returned to the office from an out of town engagement. The communications with these managers were cordial and professional. Regret was expressed that Mr. Smith was leaving, and the hope to collaborate in the future was briefly discussed. Mr. Smith focused on transitioning his duties the remainder of the day, until he was later advised at about 3:30 p.m. that he was being placed on administrative leave and told to leave the building.

Mr. Smith has not been given an ABJ job description. He expects that his initial tasks will be in-depth research focused on the delivery and costs of health care for the over one million individuals covered by the health plans of Amazon, Berkshire Hathaway and JPMorgan Chase. His start date was set for January 2, 2019 but has been postponed so that the corporate parties may speak directly on January 2 and address your concerns. He is uncertain, at this point, of his exact start date.

Your request for assurance in paragraph 8 of your letter is problematic due to the ambiguous use of the term "related." Interpreted broadly, your letter's description of proscribed activities encompasses the entirety of health care.

To be sure, Mr. Smith will not use or disclose Optum confidential information, proprietary information or trade secrets. He will exclude himself from any conversation, meeting, assignment or other circumstance that would involve the use or disclosure of such Optum information.

ABJ has also instructed Mr. Smith, and all of its employees, to safeguard and not use confidential information of former employers in the performance of their ABJ duties. ABJ has specifically instructed Mr. Smith to follow the guidelines set forth in the above paragraph.

You have asked for a clear identification of "United Health" documents in Mr. Smith's possession. He has the email chain containing his headshot portrait, he has a few of his own personnel documents, and some publicly filed United Health reports. He has no other Optum (or United Health) documents in his possession. He will execute an affidavit attesting to these facts.

Lastly, as to solicitation of Optum employees, Mr. Smith has and will continue to abide by all his post-employment restrictive covenants, including his non-solicitation obligation pertaining to Optum employees. For the avoidance of ambiguity on this issue, Mr. Smith will not participate in any respect during the restricted period in any ABJ interview or hire of Optum employees.

6. Mr. Smith's Requests.

It is our hope that upon review of the above information, Optum will accept the explanations and representations made above and withdraw its protest of Mr. Smith's employment by ABJ on the terms outlined. However, given the ongoing possibility of litigation I am constrained to make two requests on Mr. Smith's behalf.

First, on behalf of Mr. Smith, I request a full and complete copy of his entire "personnel record" pursuant to Mass. Gen. Laws Chap. 149, Section 52C ("Section 52C"), the Massachusetts' personnel record statute. Section 52C requires that all requested documents be produced within five business days of your receipt of this request.

Section 52C specifies that a record kept by an employer that identifies an employee, to the extent that the record is used or has been used, or may affect or be used relative to that employee's qualifications for employment or disciplinary action. Thus, we specifically request all documents that were used and relied on in determining to place Mr. Smith on administrative leave and terminate him and all those documents related to the allegations of fiduciary breach referenced in your letter. I request that this production be supplemented if Optum discovers any other documents that they believe Mr. Smith has wrongfully taken.

Third, your letter raises the unfortunate possibility of litigation between the parties if Mr. Smith's status is not addressed and resolved expeditiously. In these circumstances, United Health/Optum is legally required to take immediate, affirmative steps to preserve and maintain all hard copy or electronic documents that may in any respect be relevant to Mr. Smith's employment, his placement on administrative leave and termination, and the allegations raised in your letter. Pursuant to this legal preservation of records requirement, Optum must save the forensic analysis upon which its misappropriation allegations are based as well as all relevant metadata. Optum must also preserve and maintain all internal documents pertaining to ABJ and its competitive posture vis-a-vis Optum. Lastly, Optum must preserve records showing the former employers of recently hired United Health and Optum employees over the past year, as well as the subsequent employers of departing Optum employees during that same period. Optum is required to suspend any routine document retention/destruction policies and place a "litigation hold" to ensure the preservation of all relevant documents, including electronically stored information that refers or relates to the above referenced subject.

Please do not hesitate to contact me if you have any questions concerning the foregoing. It is my hope that we have provided the necessary information to allow an amicable resolution of Optum's concerns.

Very truly yours,

John F. Welsh

Enclosure
cc: Erica M. Davila, Esq.
Michael Sheehan., Esq.

December 7, 2018

Via email: dave.smith49@gmail.com

PERSONAL AND CONFIDENTIAL

Mr. David W. Smith
3 Rangeley Road
Newton, MA 02465

Dear Dave:

Tcorp62018 LLC ("the Company") is pleased to offer you the full-time position of Director, Product Strategy and Research, reporting to Jack Stoddard, Chief Operating Officer, with a proposed start date of January 2, 2019. This offer is conditioned on the successful completion of a background screen and references. We are excited about the prospect of you joining our team and look forward to the addition of your professionalism and experience to help the Company achieve its goals.

Your salary will be paid at an initial rate of $12,500.00 semi-monthly ($300,000.00 annualized). You will be paid in accordance with the Company's normal payroll practices as established or modified from time to time. Currently, salaries are paid on a semi-monthly basis. You will be eligible to participate in benefits programs to the same extent as, and subject to the same terms, conditions and limitations applicable to, other employees of the Company of similar rank and tenure. A Benefits Overview is attached.

The Company requires you to verify that the performance of your position at Tcorp62018 LLC does not and will not breach any agreement entered into by you prior to employment with the Company (i.e., you have not entered into any agreements with previous employers that are in conflict with your obligations to Tcorp62108 LLC). Please provide us with a copy of any such agreements. You will also be required to sign an Employee Confidentiality and Assignment Agreement as a condition of your employment with the Company. A copy of this agreement is attached.

Moreover, please provide us in electronic onboarding, for purposes of completing the I-9 form, sufficient documentation to demonstrate your eligibility to work in the United States.

The above terms are not contractual. They are a summary of our initial employment relationship and are subject to later modification by the Company. Your employment with Tcorp62018 LLC will be "at-will," meaning that either you or the Company may terminate your employment relationship at any time, for any reason, with or without prior notice. The Company has found that an "at-will" relationship is in the best interests of both the Company and its employees.

We are very interested in having you join the Company. We look forward to receiving a response from you within five days acknowledging that you have accepted this offer of employment.

Sincerely,

DocuSigned by:
1D6FDB0A53294CC...
Atul A. Gawande
Chief Executive Officer

AAG/nbb
Enclosures

ACCEPTED:

DocuSigned by:
David Smith
68D2D73F229B415...
Employee Signature

12/11/2018
Date

EXHIBIT 2

UnitedHealth Group Employment Arbitration Policy Acknowledgement Form

DAVID SMITH

Review and Acknowledge at the bottom of this page

UnitedHealth Group Employment Arbitration Policy

Employment Arbitration Policy

A. STATEMENT OF INTENT

UnitedHealth Group Incorporated and its subsidiaries and affiliates (referred to as "UnitedHealth Group") acknowledge that disagreements may arise between an individual employee[1] and UnitedHealth Group or between employees in a context that involves UnitedHealth Group. It is the intent of UnitedHealth Group that legal disputes be resolved as efficiently and amicably as possible, and that issues not resolved voluntarily through informal resolution or through the internal dispute resolution ("IDR") process be resolved through binding arbitration. Unless excluded below, legal disputes that cannot be resolved through voluntary informal resolution or the IDR process are covered under this Employment Arbitration Policy ("Policy").

This Policy is a binding contract between UnitedHealth Group and its employee. **Acceptance of employment or continuation of employment with UnitedHealth Group is deemed to be acceptance of this Policy.** However, this Policy is not a promise that employment will continue for any specified period of time or end only under certain conditions. Employment at UnitedHealth Group is a voluntary (at will) relationship existing for no definite period of time and this Policy does not change that relationship.

The Federal Arbitration Act (9 U.S.C. § 1 et seq.) shall govern this Policy. All disputes covered by the Policy shall be decided by an arbitrator through arbitration and not by way of court or jury trial.

B. SCOPE OF POLICY

This Policy creates a contract between UnitedHealth Group and employee requiring both parties to resolve employment-related disputes (except the excluded disputes listed below) that are based on a legal claim through final and binding arbitration. Arbitration is the exclusive forum for the resolution of such disputes, and the parties mutually waive their right to a trial before a judge or jury in federal or state court in favor of arbitration under the Policy.

UnitedHealth Group and employee mutually consent to the resolution by arbitration of all claims and controversies, past, present, or future, that employee may have against UnitedHealth Group or UnitedHealth Group may have against employee, which arise out of or relate to employee's employment, application for employment, and/or termination of employment.

Employees are encouraged to exhaust the IDR process before initiating arbitration. If an employment-related dispute is not resolved through the IDR process and the dispute is based on a legal claim not expressly excluded from this Policy, any party to the dispute may initiate the arbitration process. UnitedHealth Group is not required to follow the steps of either the IDR process or the Policy before initiating or implementing any disciplinary action.

Subject to the specific exclusions below, the claims covered by the Policy include, but are not limited to: claims for unfair competition and violation of trade secrets; claims incidental to the employment relationship but arising after that relationship ends (for example, claims arising out of or related to post-termination defamation or job references and claims arising out of or related to post-employment retaliation); claims for wages or other

compensation due (including but not limited to, minimum wage, overtime, meal and rest breaks, waiting time penalties, vacation pay and pay on separation); claims for breach of any contract or covenant (express or implied); tort claims; common law claims; equitable claims; claims for discrimination and harassment; retaliation claims; and claims for violation of any federal, state or other governmental law, statute, regulation, or ordinance, except claims excluded below.

Covered claims include any disputes regarding the Policy or any portion of the Policy or its interpretation, enforceability, applicability, unconscionability, arbitrability or formation, or whether the Policy or any portion of the Policy is void or voidable, with the exception noted in the Class and Representative Actions Waivers section below**.**

Claims excluded from mandatory arbitration under the Policy are (i) Workers' Compensation benefit claims (but workers' compensation discrimination and/or retaliation claims are covered); (ii) state unemployment or disability insurance compensation claims; (iii) claims for severance benefits under the UnitedHealth Group Severance Pay Plan; (iv) claims for benefits under UnitedHealth Group's other ERISA benefit plans; (v) claims for benefits under UnitedHealth Group's Short-Term Disability Plan; (vi) claims that may not be the subject of a mandatory arbitration agreement as provided by Section 8116 of the Department of Defense ("DoD") Appropriations Act for Fiscal Year 2010 (Pub. L. 111-118), Section 8102 of the Department of Defense ("DoD") Appropriations Act for Fiscal Year 2011 (Pub. L. 112-10, Division A), and their implementing regulations, or any successor DoD appropriations act addressing the arbitrability of claims; and (vii) claims that the Dodd-Frank Wall Street Reform and Consumer Protection Act or other controlling federal law bars from the coverage of mandatory pre-dispute arbitration agreements..

This Policy does not preclude an employee from filing a claim or charge with a governmental administrative agency, such as the National Labor Relations Board, the Department of Labor, or the Equal Employment Opportunity Commission, or from filing a workers' compensation or unemployment compensation claim in a statutorily-specified forum. In addition, this Policy does not preclude either an employee or UnitedHealth Group from seeking emergency or temporary injunctive relief in a court of law in accordance with applicable law. However, after the court has issued a ruling concerning the emergency or temporary injunctive relief, the employee and UnitedHealth Group are required to submit the dispute to arbitration pursuant to this Policy.

An issue is subject to arbitration only if it states a claim under applicable federal, state, or local law. An arbitrator or a court of law with jurisdiction shall dismiss, without a hearing on the merits, any matter which does not state a claim under applicable federal, state, or local law.

C. CLASS AND REPRESENTATIVE ACTION WAIVERS

There will be no right or authority for any dispute to be brought, heard, or arbitrated as a class or collective action, or in a representative capacity on behalf of any other person. Nor shall the Arbitrator have any authority to hear or arbitrate any such dispute. Accordingly,

1. There will be no right or authority for any dispute to be brought, heard or arbitrated as a class or collective action ("Class Action Waiver"). The Class Action Waiver shall not be severable from this Policy in any case in which (1) the dispute is filed as a class or collective action and (2) a civil court of competent jurisdiction finds the Class Action Waiver is invalid, unenforceable, unconscionable, void or voidable. In such instances, the class action must be litigated in a civil court of competent jurisdiction; and

2. There will be no right or authority for any dispute to be brought, heard or arbitrated as a private attorney general act representative action ("Private Attorney General Waiver"). The Private Attorney General Waiver does not apply to any claim employee brings in arbitration as a private attorney general solely on employee's own behalf and not on behalf of or regarding others. The Private Attorney General Waiver shall be severable from this Policy in any case in which a civil court of competent jurisdiction finds the Private Attorney General Waiver is invalid, unenforceable, unconscionable, void or voidable. In such instances and where the claim is brought as a private attorney general, such private attorney general claim must be litigated in a civil court of competent jurisdiction.

Regardless of anything else in this Policy and/or any rules or procedures that might otherwise be applicable by virtue of this Policy or by virtue of any arbitration organization rules or procedures that now apply or any amendments and/or modifications to those rules, the interpretation, enforceability, applicability, unconscionability or formation of the Class Action Waiver and Private Attorney General Waiver may be determined only by a court and not by an arbitrator.

D. ARBITRATION RULES AND PROCEDURES

The arbitration will be administered by the American Arbitration Association ("AAA") and, except as provided in this Policy, shall be in accordance with the then-current Employment Arbitration Rules of the AAA ("AAA Rules"). The AAA Rules are available via the Internet at www.adr.org/employment or by using a search engine such as www.google.com to search for "AAA Employment Arbitration Rules." To the extent any of the terms, conditions, or requirements of this Policy conflict with AAA Rules, the terms, conditions, or requirements of this Policy shall govern, All arbitrations shall be conducted in accordance with the Policy in effect on the date the Corporate Legal Department receives the Demand for Arbitration, except that any amendments to the Policy made after a claim arises will not be applied to proceedings related to that claim.

1. Initiation of Arbitration Proceeding

a. Arbitration Initiated by Employee - UnitedHealth Group shall pay 100 percent in excess of the first twenty-five dollars ($25) of the required AAA administrative fee. An employee may initiate arbitration by submitting, within the applicable statute of limitations period, a written demand for arbitration which states a claim under applicable federal, state, or local law to Corporate Legal Department, UnitedHealth Group, 9900 Bren Road East, MN008-T502, Minnetonka, MN 55343, with a check for $25 payable to "UnitedHealth Group." The demand shall set forth the dispute, including the alleged act or omission at issue, the name, address and telephone number of the employee, and the names of all persons allegedly involved in the act or omission. Within 30 business days of receiving such demand UnitedHealth Group shall file the demand with the appropriate office of the AAA, together with the applicable administrative fee as provided in the AAA's fee schedule.

b. Arbitration Initiated by UnitedHealth Group - UnitedHealth Group may initiate arbitration by submitting, within the applicable statute of limitations period, a written demand for arbitration which states a claim under applicable federal, state, or local law to the employee's last home address of record via certified mail or overnight mail. The demand shall set forth the dispute, including the alleged act or omission at issue, the name, address and telephone number of the employee, and the names of all persons allegedly involved in the act or omission. Within 30 business days of submitting the demand to the employee, UnitedHealth Group shall file the demand with the appropriate office of the AAA, together with the applicable administrative fee as provided in the AAA's fee schedule. When arbitration is initiated by UnitedHealth Group, the company is responsible for 100% of all AAA administrative fees.

2. Appointment of Neutral Arbitrator

The arbitrator shall be selected in the following manner:

a. As soon as practicable, the AAA shall submit to each party an identical list of nine (9) proposed arbitrators.

b. Each party shall have ten (10) business days from the mailing date of the list to cross off names of arbitrators to which the party objects, number the remaining names in order of preference and return the list to the AAA. Each party may strike up to three names without cause.

c. If the party does not return the list within the time specified, all persons on the list shall be deemed acceptable.

d. If only one common name remains on the lists of all parties, that individual shall be designated as the arbitrator. If more than one common name remains on the lists of all parties, the AAA shall appoint an arbitrator remaining on the list in the order of preference, to the extent the order of preference of the parties can be reconciled by the AAA.

In the event the parties fail to agree on any of the persons named, or if an acceptable arbitrator is unwilling to act, the AAA shall issue an additional list of arbitrator names to the parties**.**

3. Qualifications of Neutral Arbitrator

Unless the parties jointly agree otherwise, the arbitrator shall be an attorney experienced in employment law and licensed to practice law in the state in which the arbitration is convened, or a retired judge from any jurisdiction.

4. Vacancies

If a vacancy occurs, if an appointed arbitrator is unable to serve promptly, or if an arbitrator is disqualified under subparagraph 3 above, the vacancy shall be filled in accordance with subparagraph 2.

5. Summary Disposition

The arbitrator shall have the authority to issue an award or partial award without conducting an arbitration hearing on the grounds that there is no claim stated on which relief can be granted or that there is no genuine issue as to any material fact and that a party is entitled to a judgment as a matter of law, consistent with Rule 12 or Rule 56 of the Federal Rules of Civil Procedure. Upon the request of either party, the arbitrator will establish a briefing schedule and, if necessary, schedule an opportunity for oral argument prior to considering such motions for dispositive motions.

6. Date, Time, and Place of Hearing

The arbitrator shall set the date and time of the hearing. Unless the parties jointly agree otherwise, the arbitration shall take place in or near the city in which employee is or was last employed by UnitedHealth Group.

7. Representation

Any party may be represented by an attorney or by him or herself. A party must inform the other party and the AAA of the name, address and telephone number of an authorized representative at least three (3) business days prior to the date set for the hearing.

8. Confidentiality

All proceedings under this Policy are private and confidential, unless applicable law provides to the contrary. The arbitrator shall maintain the privacy and confidentiality of the arbitration hearing unless applicable law provides to the contrary. The arbitrator shall have the authority to make appropriate rulings to safeguard that confidentiality.

9. Stenographic Record

Either party may request a stenographic record of the hearing. The party that requests the record shall bear the cost of such a record. If both parties request a stenographic record, the cost shall be borne equally by the parties.

10. Discovery

a. Interrogatory - Each party shall be entitled to propound and serve upon the other party one interrogatory in a form consistent with Rule 33 of the Federal Rules of Civil Procedure and which shall be limited to the identification of potential witnesses. “Identification” means that a party must identify each witness’s name, current address and telephone number, and a brief description of the subject of testimony.

b. Requests for Production of Documents - Each party shall be entitled to propound and serve upon the other party one set of Requests for the Production of Documents in a form consistent with Rule 34 of the Federal Rules of Civil Procedure and which shall be limited in number to twenty-five (25) requests (including subparts, which shall be counted separately). Parties reserve the right to make objections to any document request on the grounds that the request is irrelevant, overly broad, vague, or burdensome, or any other good faith objection available under the Federal Rules of Civil Procedure.

c. Depositions - Each party shall be entitled to conduct a maximum of two (2) eight-hour days of depositions of witnesses or of the parties in accordance with the procedures set forth in Rule 30 of the Federal Rules of Civil Procedure. In addition, each party shall be entitled to conduct a maximum of one (1) eight-hour day of depositions of expert witnesses designated by the other party.

d. Physical and Mental Examinations - Each party shall be entitled to obtain discovery consistent with Rule 35 of the Federal Rules of Civil Procedure.

e. Arbitrator Authority - The arbitrator shall have the authority to resolve all issues concerning discovery that may arise between the parties. Each party can request that the arbitrator allow additional discovery, and additional discovery may be conducted under the parties’ mutual stipulation or as ordered by the arbitrator. In addition, the arbitrator shall have the authority to issue subpoenas for the appearance of witnesses or the production of documents pursuant to applicable law.

f. Prehearing Submissions - At least thirty (30) days prior to the hearing, the parties are required to exchange lists of witnesses, including any expert witnesses, who the parties anticipate will be called to testify at the hearing. In addition, the parties are required to exchange copies of all exhibits the parties intend to introduce as evidence at the hearing.

12. Evidence

The arbitrator shall apply the Federal Rules of Evidence.

13. Award

a. Form - The award shall be in writing and shall set forth findings of fact and conclusions of law upon which the arbitrator based the award. All awards shall be executed in the manner required by law.

b. Scope of Relief – Except as to disputes involving an employment agreement or equity award containing a Minnesota choice of law provision, the arbitrator shall follow the rules of law of the state which is the employee's principal place of work, any applicable Federal law, and the rules as stated in this Policy. In cases involving an employment agreement and/or equity award with a Minnesota choice of law provision, the arbitrator shall follow Minnesota law, any applicable Federal law, and the rules as stated in this Policy. The arbitrator shall have the authority to grant any remedy or relief (including attorneys' fees where authorized by statute) that the arbitrator deems just and equitable and which is authorized by and consistent with applicable law, including applicable statutory limitations on damages.

c. Final Judgment - The award shall be final and binding upon all parties to the arbitration.

14. Delivery of Award to Parties

The award shall be deemed delivered to a party upon placement of the award, or a true and correct copy thereof, addressed to the party or its representative at the last known address in the U.S. mail, certified, return receipt requested; personal service of the award, or a true and correct copy thereof; or the filing of the award in any manner that is permitted by law.

15. Severability

Except as provided in the clause entitled "Class and Representative Action Waivers," above, if any portion or provision of this Policy is held to be void or unenforceable, the remainder of this Policy will be enforceable and any part may be severed from the remainder, as appropriate.

16. Judicial Proceedings and Enforcement of Awards

Either party may bring an action in a court of competent jurisdiction to compel arbitration under this Policy, to enforce an arbitration award, or to vacate an arbitration award.

17. Expenses

The expenses of witnesses for either side shall be paid by the party requiring the presence of such witnesses. Each side shall pay its own legal fees and expenses, except where such legal fees and expenses may be awarded under applicable law.

18. Time Period for Arbitration

The written Demand for Arbitration must be received within the time period allowed pursuant to the statute, regulation, or other law applicable to the alleged act or omission giving rise to the dispute. Nothing in this Policy relieves any party of the duty to exhaust administrative remedies by filing a charge or complaint with an administrative agency and obtaining a right to sue notice, where required by law.

19. Interpretation and Application of Procedure

The arbitrator shall interpret and apply these procedures insofar as they relate to the arbitrator's powers and duties. All other procedures shall be interpreted and applied by the AAA.

E. CONSIDERATION

The mutual obligations by UnitedHealth Group and by employee to arbitrate differences provide consideration for each other. UnitedHealth Group's payment of the filing fee in excess of $25 for employee also constitutes

consideration for this Policy. Employee's employment by UnitedHealth Group constitutes additional consideration.

Employee and UnitedHealth Group understand and agree that through this agreement, UnitedHealth Group and employee give up their respective rights to a court or jury trial and that, pursuant to the terms of this Policy, UnitedHealth Group and employee are agreeing to arbitrate claims covered by this Policy.

This Policy supersedes any and all prior versions and has been revised effective January 1, 2016.

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[1] Throughout this Policy, the term "employee" includes both current and former employees of UnitedHealth Group.

DAVID SMITH

I have read and agree to the above **Date Received:** 08/02/2016

Thank You. Your acknowledgement has been captured. No further action is needed.

EXHIBIT D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

OPTUM, INC. and
OPTUM SERVICES, INC.,

Plaintiffs,

v.

DAVID WILLIAM SMITH,

Defendant.

Civil Action No.: 19-cv-10101

AFFIDAVIT OF CAITLIN FLEMING

I, Caitlin Fleming, hereby state under penalty of perjury as follows:

1. My name is Caitlin Fleming, and the matters set forth herein are based on my personal knowledge.

2. Between 2016 and January 2019, I worked for Optum, Inc. ("Optum") as part of their Optum Leadership Experience Program.

3. On January 7, 2019, I began employment with TCORP62018 ("ABC") as a Manager, Strategy and Research.

4. In November 2018, I was connected to ABC via a mentor of mine from graduate school, Jason Yeung. Yeung reached out to discuss my future career plans. Yeung is a Managing Director and Portfolio Manager at Morgan Stanley, and is neither an Optum nor ABC employee. After talking with Yeung and providing my resume to him, he shared my resume with ABC's CEO Atul Gawande.

5. I interviewed with ABC on November 15, 2018, and December 14, 2018, and those interviews were not with David Smith ("Smith").

6. Smith had no influence on my decision to leave Optum and join ABC. Smith never encouraged me to leave Optum to join ABC, never solicited me to leave Optum to join ABC, and never engaged in any activity to attempt to get me to leave Optum to join ABC.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Caitlin Fleming
Caitlin Fleming

1/21/2019
Date