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,

/s/ John F. Welsh, III
John F. Welsh, III, BBO #522640
Justin L. Engel, BBO #683894
Bello Welsh LLP
125 Summer Street, Suite 1200
Boston, MA 02110
617-247-4100
Fax: 617 247 4125
Email: jwelsh@bellowelsh.com
Email: jengel@bellowelsh.com

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.