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December 6, 2007

The Honorable James M. Rosenbaum
Chief District Judge, District of Minnesota
United States District Court
15E U.S. Courthouse
300 South Fourth Street
Minneapolis, MN 55415

Re: In re UnitedHealth Group Shareholder Derivative Litigation, No. 06-1216 JMR/FLN

Dear Judge Rosenbaum:

The injunction entered by consent on the joint motion of Dr. McGuire, the plaintiffs in the derivative case, and the PSLRA plaintiffs, expires today. Derivative plaintiffs and Dr. McGuire now jointly seek a new injunction, in the derivative case only. It would enjoin Dr. McGuire and UnitedHealth Group (“UHG”) from taking any action with respect to \$420 million he is surrendering pursuant to the Derivative and SEC Settlements, as well as certain other options. If the Derivative Settlement garners final approval, a motion to lift the injunction and allow transfer of the assets Dr. McGuire has agreed to surrender to the Company will follow. If the Settlement does not garner final approval, at least \$420 million in assets will remain subject to the injunction. Neither the SLC nor the SEC or the derivative plaintiffs have requested more.

But the PSLRA plaintiffs want more. They once again demand an injunction freezing most of Dr. McGuire’s assets and preventing him from exercising any options that the Company, the SLC, the SEC, and the derivative plaintiffs have all agreed are rightfully his property—and before trial, verdict, or judgment. There is no legal or factual basis for such drastic relief.

To decide this motion, the Court need only answer one question: have Plaintiffs proved irreparable harm—*i.e.*, that without the requested injunction, they will not be able to enforce a judgment?

There is *no* evidence that Dr. McGuire intends to disappear with his assets. And Plaintiffs cannot argue that the Company, which they allege is jointly and severally liable, would be unable to satisfy any judgment they might secure. UHG generates billions in revenues each quarter, and now stands to recover from Dr. McGuire over \$620 million in value (from the \$420 million settlement and the nearly \$200 million Dr. McGuire voluntarily gave back in the 2006 repricing agreement).

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Under controlling Eighth Circuit precedent, the motion must be denied.¹

Background and Procedural History

Dr. McGuire has worked diligently to help bring the alleged backdating problems at UHG to a proper and prompt resolution. Dr. McGuire has demonstrated his commitment to responsibly address the allegations against him:

- A year before the settlements, Dr. McGuire voluntarily agreed to reprice his options to ensure that he received no advantage from the determination of exercise prices under the Company's stock option plans. (Dkt. No. 138, Ex. A at ¶ 2). The repricing is valued at nearly \$200 million. This amount proved to be *almost four times* greater than any price benefit from alleged backdating.²
- Beginning this past July, Dr. McGuire participated in a mediation in the derivative case that ultimately resulted in the Derivative Settlement. He also agreed to a settlement with the SEC to be announced today. Under the terms of the Derivative Settlement, Dr. McGuire voluntarily surrendered (a) 9.2 million UHG stock options (valued at over \$320 million), (b) his right to \$8.1 million of his Executive Savings Plan, (c) his vested right to his Supplemental Executive Retirement Plan (valued at \$92 million), and (d) various other employment benefits. The SEC Settlement provides that Dr. McGuire will disgorge and reimburse over \$460 million in incentive compensation, stock sale proceeds, and stock options (which the SEC agreed would be satisfied by the assets being surrendered to the Company in the Derivative Settlement) and will pay a \$7 million civil penalty.³

Today's dispute over the scope of the injunction has its roots in proceedings last year. In November 2006, Dr. McGuire and the derivative plaintiffs jointly sought an injunction in the derivative case, in order to preserve the status quo while the SLC conducted its investigation and avoid potentially unnecessary employment litigation. The PSLRA Plaintiffs separately moved for a pre-judgment attachment of assets. (Dkt No. 113). At that time, Dr. McGuire demonstrated why Plaintiffs were entitled to *no* injunction. (Dkt. No. 137). Nevertheless, because he was jointly moving for the injunction in the derivative case, Dr. McGuire did not object to the same injunction being entered in this case. That injunction has been extended

¹ And, regardless of how they label their claims, what Plaintiffs ultimately seek is money. Because they have an adequate remedy at law, a pre-judgment asset freeze is barred by controlling Supreme Court precedent. (Dkt. No. 137, 7-8).

² The Company issued its restatement in March 2007, after determining "measurement dates" for the option grants at issue based upon a methodology approved by the SEC. The difference between the value of the options using the original strike price and the strike price under the restatement measurement date is approximately \$56 million.

³ Dr. McGuire has also consented to the entry of an injunction against future violations of the securities laws, and to a 10-year bar on service as an officer or director of a public company, in connection with the SEC Settlement. He neither admits nor denies the allegations in the SEC's complaint, but retains his right to contest securities claims brought in other litigation to which the SEC is not a party.

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several times while the SLC's work was continuing.⁴ But now that the SLC has issued its report and the joint injunction is expiring, the derivative plaintiffs and Dr. McGuire have jointly moved for an injunction against the disposition of assets to be surrendered under the Derivative Settlement, plus certain additional options relevant to the SEC Settlement, pending this Court's decision on final approval. However, as the "whereas" clause in the Derivative Settlement Agreement (at 2) shows, each of the signatories—the SLC, the Company, the derivative plaintiffs and Dr. McGuire—believe "he should be permitted to exercise the options he retains."

Argument

Plaintiffs seek, again, what the Supreme Court of the United States has characterized as "a 'nuclear weapon' of the law"—the power to freeze a defendant's assets before judgment, something "manifestly susceptible of the grossest abuse." *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 330, 332 (1999) (internal quotation marks omitted). They were not entitled to that remedy a year ago, and the passage of time has further undermined their argument. Under controlling circuit precedent, Plaintiffs must prove *each* of the following four elements in order to demonstrate their entitlement to a preliminary injunction:

- (1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest.

Dataphase Sys., Inc. v. CL Sys., Inc., 640 F.2d 109, 113 (8th Cir. 1981). *See also Watkins, Inc. v. Lewis*, 346 F.3d 841, 844 (8th Cir. 2003); *Calvin Klein Cosmetics Corp. v. Lenox Labs, Inc.*, 815 F.2d 500, 503 (8th Cir. 1987). Yet this Court need look no further than the first element.

1. *Plaintiffs Cannot Prove Irreparable Harm.* Binding Eighth Circuit precedent establishes that the first *Dataphase* factor may only be satisfied by a showing of injury that is "both *certain* and *great ... actual* and not *theoretical*." *Packard Elevator v. Interstate Commerce Comm'n*, 782 F.2d 112, 115 (8th Cir. 1986) (emphasis added) (denying stay for lack of irreparable injury). Plaintiffs fail this test for two reasons.

First, and foremost, there is *no* risk that Dr. McGuire will flee the jurisdiction or dissipate his assets. Over the past 20 months, faced not only with the present class action lawsuit, but also derivative claims, an investigation by the SEC, and a federal criminal investigation, Dr. McGuire did not make any attempt to do so. He and his wife and daughters have remained in Minnesota. And throughout this period Dr. McGuire has taken affirmative steps to deal with the options timing matters in a responsible manner that he hoped would lead to their ultimate resolution: He voluntarily repriced his options well before the Company completed its restatement; he moved for the initial injunction in order to preserve the status quo and avoid unnecessary employment

⁴ Each order linked the timing of expiration to completion of the SLC's work. Dkt. No. 148 (ordering injunction "until 30 days after a final decision, as to Dr. McGuire, by the Special Litigation Committee established by the Board of Directors of UnitedHealth on June 26, 2006, in connection with these matters and related litigation filed in state court"); Dkt. No. 239; Dkt. No. 278; Dkt. No. 285.

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litigation with the Company while the SLC conducted its investigation; and he has now entered into the Derivative and SEC Settlements. There is simply *no* risk of flight. (Dkt No. 137 at 2-3). Plaintiffs can offer nothing more than abstract speculation that Dr. McGuire might flee the country or waste assets. Because “virtually every person who sues another for money damages” can speculate about a defendant wasting assets, such speculation “cannot conceivably be enough to justify the issuance of a prejudgment injunction.” *Charlesbank Equity Fund II v. Blinds To Go, Inc.*, 370 F.3d 151, 162 (1st Cir. 2004).

Second, even if Dr. McGuire were to spend every penny in his possession, or flee to some uncharted Caribbean isle, Plaintiffs would suffer *no* injury whatsoever. They have sought joint and several liability against both Dr. McGuire *and* the Company. *See* Compl. at ¶ 210 (demanding “compensatory ... money damages against all defendants, jointly and severally”). If Plaintiffs ultimately prevail, the class can fully satisfy any judgment it may secure from the Company alone. UHG is a Fortune 50 company that less than two months ago reported third quarter revenues of \$18.68 billion, diluted net earnings per common share up by 19% over the previous year and earnings from operations of \$2.2 billion.⁵ And it will be further enriched by the substantial SEC and Derivative Settlements. Independently, Dr. McGuire is indemnified by the Company and is covered by its Directors’ and Officers’ Liability insurance, a further potential source of funds to ensure satisfaction of any judgment. There is simply no need for any protection against Dr. McGuire.

Even if Plaintiffs could establish any liability on the part of Dr. McGuire, the absolute certainty that the Plaintiffs will be able to fully recover any monetary damages demonstrates that there is an adequate remedy at law, and, therefore, the Plaintiffs will not suffer any irreparable harm from the denial of a preliminary injunction. *See Watkins*, 346 F.3d at 844 (equating the lack of an adequate remedy at law with irreparable harm); *cf.* Restatement (Second) of Torts § 938 & cmt. d (noting that relative adequacy of other remedies must factor into the propriety of granting preliminary injunction); *id.* § 944 cmt. i (relative adequacy of money damages increases in proportion to collectability of damages).

Because Plaintiffs cannot prove a threat of irreparable harm absent an injunction broader than the one to which Dr. McGuire consents, this Court need engage in no further analysis. “Failure to show irreparable harm is an independently sufficient ground upon which to deny a preliminary injunction.” *Watkins*, 346 F.3d at 844; *see also Dataphase*, 640 F.2d at 114.

2. *Plaintiffs Cannot Satisfy The Remaining Dataphase Factors.*

a. The equities weigh in favor of Dr. McGuire: The injunction Dr. McGuire previously consented to has already caused him substantial hardship. That hardship will be significantly increased by an injunction in the form Plaintiffs propose. He has been unable for the past year to access these assets and as a result, has been unable to carry out his plans for philanthropic activities and new business ventures. He has been subject to fluctuations in the market price of UHG stock without any ability to make independent investment decisions, and, if enjoined from exercising the stock options in question, faces the risk of loss due to market

⁵ *See* UnitedHealth Group, Inc., Quarterly Report (Form 10-Q) (Nov. 1, 2007), at 26.

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fluctuations. *See Carton v. Choice Point*, 450 F. Supp. 2d 489, 497 (D.N.J. 2006) (recognizing that “lost opportunity to sell stock at a higher price is an injury”), *vacated in other part on reconsideration*, 482 F. Supp. 2d 533 (D.N.J. 2007). In addition, he stands to lose a substantial amount of money if he is unable to exercise the remaining options in 2007, because of lost interest on excess tax withholding that cannot be recovered until mid-2009, at the earliest. By contrast, Plaintiffs can claim no credible hardship from having to wait until the legal process plays out to conclusion.

b. The injunction is not in the public interest: In their initial motion for a preliminary injunction, Plaintiffs candidly admitted that they sought the injunction in order to prevent the “government and regulatory agencies” from securing prior claims to Dr. McGuire’s “personal assets, including liquid assets.” (Dkt. No. 114 at 25). That concern has no validity, especially now that Dr. McGuire has settled with the SEC, which requires him to disgorge and reimburse over \$400 million to UHG. The SEC represents the public interest in this matter, and it has chosen to settle with Dr. McGuire rather than joining Plaintiffs’ demand for an extreme and overly-expansive injunction.⁶ This factor, like the other three, weighs against Plaintiffs.

c. Although the Court need not even reach the issue to dispose of the motion, Plaintiffs cannot establish a likelihood of success on their *equitable* claims as is required to obtain preliminary relief under *Grupo*. (*See* Dkt. No. 137 at 12-15).

Conclusion

PSLRA Plaintiffs offer this Court no legally sufficient justification for the extraordinary remedy they seek. Dr. McGuire has suffered under this injunction for over a year, acting in good faith and squarely facing up to his responsibilities. The time has come to return to him control over the assets that are—until a judgment says otherwise—lawfully his. Plaintiffs’ request for a further preliminary injunction should be denied.

Respectfully submitted,

Steve Gaskins

—and—

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Enclosures

⁶ The U.S. Attorney’s Office for the Southern District of New York has been informed of these proceedings.

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cc: Andrew Brown, Esq.
Peter Carter, Esq.
David L. Hashmall, Esq.
Richard G. Mark, Esq.