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The Healthcare Industry Wants to Know What Amazon, Berkshire, and JPMorgan Are Up To: Could Optum Inc. v. Smith Provide Answers?

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In January 2018, Amazon, Berkshire Hathaway, and JPMorgan announced that they were partnering to start an independent healthcare venture focused on providing “simplified, high-quality and transparent healthcare at a reasonable cost” to their U.S. employees.<sup>[2]</sup> The new venture does not currently have an official name but is often referred to by the nickname ABJ or ABC.<sup>[3]</sup> In a joint statement, Amazon, Berkshire Hathaway, and JPMorgan indicated that their new joint healthcare company would initially serve only their U.S. employees, but left open the possibility that ABC’s services could become available to all Americans.<sup>[4]</sup> The founding trio insists that ABC will not be a “profit-seeking” venture and was formed to service the healthcare needs of their employees, but other well established healthcare corporations are concerned about whether or not that is true.<sup>[5]</sup> One company that is particularly concerned with Amazon, Berkshire Hathaway, and JPMorgan teaming up to form ABC is Optum, a subsidiary of UnitedHealth Group.<sup>[6]</sup>

On January 19, 2019, Optum filed a complaint against one of its former senior executives, David Smith, in federal court in the District of Massachusetts alleging that Mr. Smith breached his contract with Optum and misappropriated trade secrets under state and federal law.<sup>[7]</sup> Recently, Mr. Smith testified in court and denied misappropriating any trade secrets when he decided to leave Optum to work for ABC.<sup>[8]</sup> Mr. Smith’s testimony provided a rare insight into ABC’s plans going forward.<sup>[9]</sup> Other than the January 2018 joint statement, Amazon, Berkshire Hathaway, and JPMorgan have not provided much public information regarding their ultimate goals for ABC.<sup>[10]</sup>

There is a belief that Optum is potentially using its suit against Mr. Smith to gain information regarding ABC’s current and future plans.<sup>[11]</sup> In its original complaint against Mr. Smith, Optum expressed its belief that ABC will very soon be a direct competitor in the health care business, if it is not already.<sup>[12]</sup> In Optum’s complaint against Mr. Smith, Optum expressed its belief that ABC’s ultimate goal is “to disrupt the healthcare industry as it exists today.”<sup>[13]</sup> Additionally, at last week’s hearing, Optum’s counsel asked ABC’s chief operating officer, Jack Stoddard, whether ABC planned to become a competitor to Optum in 2019.<sup>[14]</sup> Mr. Stoddard answered, “I don’t want to box in the company, but that is not in our plans.”<sup>[15]</sup> The presiding judge, Judge Mark L. Wolf, advised Optum that “this is not the opportunity or to be a vehicle for getting information about someone you characterized as a competitor.”<sup>[16]</sup>

This begs the question, is Optum’s suit against Mr. Smith really about Mr. Smith’s potential breach of contract and misappropriation of trade secrets or is Optum hoping that through litigation it will uncover information about ABC’s future business plans? After Optum filed suit against Mr. Smith, Mr. Smith submitted to the court a motion to compel arbitration per the arbitration clause included in his Optum employment contract.<sup>[17]</sup> The court denied Mr. Smith’s motion, but Mr. Smith filed a notice of appeal to the United States Court of Appeals for the First Circuit on January 30.<sup>[18]</sup> On Tuesday, February 5, Judge Wolf paused the current case between Optum and Mr. Smith until the First Circuit makes a decision regarding the denied motion to compel arbitration.



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[19] The First Circuit will determine whether the litigation between Optum and ABC's David Smith continues or if the current dispute will be resolved outside of court in arbitration.

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[1] Staff Editor, *Kentucky Law Journal*, Volume 107; J.D. Candidate, The University of Kentucky College of Law (2020).

[2] Complaint at 18, *Optum Inc. v. Smith*, No. 19-cv-10101 (Jan 16, 2019); see also *Amazon, Berkshire Hathaway and JPMorgan Chase & Co. to partner on U.S. employee healthcare*, *BUS. WIRE* (Jan. 30, 2018, 7:00 AM EST), <https://www.businesswire.com/news/home/20180130005676/en/Amazon-Berkshire-Hathaway-JPMorgan-Chase-partner-U.S.>

[3] *Id.* at 19; see Reed Abelson, *Clash of Giants: UnitedHealth Takes On Amazon, Berkshire Hathaway and JPMorgan Chase*, *N.Y. TIMES* (Feb 1, 2019), <https://www.nytimes.com/2019/02/01/health/unitedhealth-amazon-chase.html>.

[4] See *id.* at 20; John Kennedy, *Amazon, JPMorgan, Berkshire Hathaway To Start Health Co.*, *LAW 360* (Jan. 30, 2018, 5:32 PM), <https://www.law360.com/articles/1007049>; see also Zachary Tracer, *Amazon-Berkshire-JPMorgan Health Venture Takes Aim at Middlemen*, *BLOOMBERG* (June 24, 2018, 10:51 AM), <https://www.bloomberg.com/news/articles/2018-06-24/amazon-berkshire-jpmorgan-health-venture-takes-aim-at-middlemen> (stating that if successful, ABC will be made freely available to other companies).

[5] Abelson, *supra* note 3.

[6] See *Compliant*, *supra* note 2.

[7] *Id.*

[8] Nate Raymond, *Fight over new hire at Amazon, Berkshire, JPMorgan Health venture put on hold*, *REUTERS LEGAL* (Feb. 6, 2019), <https://1.next.westlaw.com/Document/120956460268811e9b3d3a4172d3c042e/View/FullText.html?listSource=Search&rank=0&originationContext=MyResearchHistoryAll&transitionType=MyResearchHistoryItem&contextData=%28oc.Category%29&VR=3.0&RS=cblt1.0&sessionScopeld=db0963b038550a70bbff2ffc4b03e7268c02ab522bcd0e7377b320fd>

[9] *Id.*

[10] See Abelson, *supra* note 3.

[11] *Id.*

[12] Complaint, *supra* note 2, at 88.

[13] *Id.* at 21.

[14] Raymond, *supra* note 8.

[15] *Id.*

[16] Abelson, *supra* note 3.

[17] Lauren Berg, *Optum Suit Over Amazon Startup Paused Pending 1st Cir.*, *LAW 360* (Feb. 5, 2019, 10:14 PM), <https://www.law360.com/employment/articles/1126096/optum-suit-over-amazon-startup-paused-pending-1st-circ->

[18] *Id.*

[19] *Id.*

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