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Shelley Rouillard
Director
Department of Managed Health Care
980 9th Street, Suite 500
Sacramento, California 95814

By email

Dear Ms. Rouillard,

I am writing regarding Delta Dental of California's proposed acquisition of Moda Health Plan to urge you not to approve the transaction without requiring Delta to commit to a plan to begin fulfilling its public benefit duties as a nonprofit plan.

Under Article 11 of the Knox-Keene Act, a nonprofit plan that proposes to restructure its activities must, among other things, report to the Department the public benefit activities it is currently undertaking and that it proposes to undertake in the year following the restructuring.¹ As a coalition of consumer and community groups has detailed in a letter to you, Delta's proposed acquisition of Moda clearly constitutes a restructuring under Article 11.²

Even if you conclude that Article 11 does not apply to the transaction, you could still require, as a condition of the deal's approval, that Delta demonstrate how it will fulfill its public benefit duties. Your authority to enforce the public benefit obligations of nonprofit health plans is not limited to Article 11. Under Corporations Code Section 7240, a nonprofit health care service plan "is subject at all times to examination by the [Director of the Department of Managed Health Care], on behalf of the state, to ascertain to what extent, if at all, it has failed or is failing to comply with trusts it has assumed. In case of any such failure the [Director of the Department of Managed Health Care], in the name of the state, may institute against any person or persons the proceedings necessary to correct the failure."³

In addition, the Department routinely negotiates undertakings that require even for-profit plans to engage in specific public benefit activity as a condition of obtaining approval for acquisitions and mergers. For example, in just the last few months you have negotiated

¹ Health and Safety Code Section 1399.70(b).

² January 16, 2019, letter to you from Consumer Reports, California Pan-Ethnic Health Network, Health Access, and the Western Center on Law and Poverty.

³ Corporations Code Sections 7240 and 10821.

undertakings conditioning approval of Optum's acquisition of DaVita Health Plan on \$40 million in philanthropic activities, Cigna's acquisition of Express Scripts on \$17.5 million in charitable contributions, and CVS's acquisition of Aetna on \$38.3 million in charitable contributions (including funding free dental care).⁴ Given your authority to impose public benefit requirements on for-profit plans seeking deal approvals, you undoubtedly have the authority to require Delta, as a condition of obtaining approval for its proposed acquisition, to fulfill its public benefit duty as a nonprofit.

The enforcement authority California law gives you over the public benefit obligations of nonprofit health plans is exclusive. The attorney general has no authority in this area and members of the public cannot sue in court for redress of a nonprofit plan's failure to serve the public good. If you decline to enforce a nonprofit plan's public benefit duty, there is nothing to stop the plan from disregarding it entirely.

That is what is happening now with Delta. As the letter to you from the coalition of consumer and community groups documents, Delta has a clear charitable trust obligation, or duty to use its assets for the benefit of the public. But by all appearances, Delta uses its assets primarily to benefit its management. Delta pays exorbitant compensation to its executives and directors and reports providing virtually no public benefit, as I described in my November 30, 2018, letter to you.⁵

Even worse, Delta maintains that it has *no duty* as a nonprofit to operate for public benefit and that its assets are not subject to a charitable trust obligation.⁶ Delta insists that its only obligation as a social welfare nonprofit is to provide dental benefits coverage, yet it identifies nothing about its dental benefits business that distinguishes it from the purely commercial activity of a for-profit dental plan.⁷

If the Department allows Delta's interpretation of its duties to stand, the nonprofit plan would be free not only to continue operating as nothing more than a business, providing no benefit to the public, but also to convert into a for-profit company without being subject to the Article 11 requirement that it set aside its assets into a public benefit foundation. The loss to the public, which would be equal to Delta's market value, would likely be in the billions of dollars.

The duty that Delta owes the public to work on their behalf and use the organization's

⁴ See undertakings for each transaction posted on the Department's website at <http://www.dmhc.ca.gov/AbouttheDMHC/Newsroom.aspx>

⁵ In my letter I noted, for example, that Delta paid its CEO \$14.3 million in 2016 and reported that same year providing a total of \$1.8 million in public benefit.

⁶ In its responses filed December 13, 2018, to queries by the Department, Delta asserts it "has never held assets subject to a charitable trust obligation" and claims it was not "organized as a nonprofit corporation benefitting the public-at-large."

⁷ Ibid.

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assets exclusively for their benefit will be honored only if you enforce it. In accordance with Article 11 and your broad charitable trust enforcement authorities and responsibilities, you should not approve the acquisition without requiring Delta to begin fulfilling its nonprofit duties by committing to a specific plan for providing an acceptable level of public benefit, such as that proposed to you by the consumer and community group coalition.

Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael Johnson", with a long horizontal flourish extending to the right.

Michael Johnson