Complainants' motion for temporary relief initially addressed the '781, '694, '138, '030, and '981 patents. During the initial pre-hearing conference, however, the parties entered into a stipulation that limited the Complainants' motion to the '694 patent—specifically, claims 1, 10 and 11. The Initial Determination (''ID'') at issue is the ALJ's denial of the Complainants' motion. In the subject ID, the ALJ analyzed the four factors for determining whether to grant preliminary relief: The likelihood of success on the merits, irreparable harm, the balance of hardships, and the public interest.

The ID found that the Complainants had not demonstrated that they would suffer irreparable harm. Specifically, the ID found that the Complainants failed to demonstrate an irreparable harm from the following: (1) Price erosion; (2) exclusivity erosion; (3) loss of goodwill and reputation; (4) lost sales and market share; or (5) reduced investment. The ALJ found that the lack of irreparable harm precluded temporary relief in this investigation. The ALJ also found the following: a likelihood of success on the merits with respect to claim 10 of the '694 patent; that the balance of hardships did not favor either party; and that the public interest would not preclude preliminary relief.

On September 12, 2011, the TEO Respondents filed opening comments and on September 14, 2011, the Complainants submitted reply comments as authorized by 19 CFR 210.66(c), (e)(1). These comments do not take issue with the ALJ's findings regarding the lack of irreparable harm. Instead, the comments principally deal with Complainants' likelihood of success on the merits, challenging various aspects of the ALJ's analyses of infringement and the balance of hardships.

Having examined the record of this investigation, including the ALJ's ID and the subsequent comments and reply comments, the Commission finds that irreparable harm has not been demonstrated. It was Complainants' burden to demonstrate that such harm was likely absent temporary relief, and it failed to meet that burden. *Winter* v. *Natural Res. Defense Council, Inc.,* 129 S. Ct. 365, 375 (2008). The Commission has therefore determined not to review the ID's finding of lack of irreparable harm and the ID's denial of temporary relief.

Because irreparable harm is dispositive here, the Commission need not evaluate the remaining factors, *i.e.,* the likelihood of success on the merits, the balance of hardships, or the public interest. Therefore, the Commission has determined to review the ID's findings on the likelihood of success, the balance of hardships, and the public interest and to take no position on them. *See Beloit Corp.* v. *Valmet Oy,* 742 F.2d 1421 (Fed. Cir. 1984).

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in section 210.66 of the Commission's Rules of Practice and Procedure (19 CFR 210.66).

By order of the Commission.

Issued: November 10, 2011.

James Holbein,

Secretary to the Commission.

[FR Doc. 2011–29665 Filed 11–16–11; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Antitrust Division

United States et al. v. Blue Cross and Blue Shield of Montana, Inc. et al.; Proposed Final Judgment and Competitive Impact Statement

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h), that a proposed Final Judgment and Competitive Impact Statement have been filed with the United States District Court for the District of Montana, Billings Division, in *United States et al.* v. *Blue Cross and Blue Shield of Montana, Inc. et al.,* Civil Action No. 1:11-cv-00123. On November 8, 2011, the United States and the State of Montana filed a Complaint challenging an agreement between Blue Cross and five of the six hospital owners of New West Health Services, Inc., a competing insurer, to purchase health insurance from Blue Cross exclusively for six years. The hospital defendants are Billings Clinic, Bozeman Deaconess Health Services, Inc., Community Medical Center, Inc., Northern Montana Health Care, Inc., and St. Peter's Hospital. The Complaint alleges that the agreement unreasonably restrains trade in the sale of commercial health insurance in Billings, Bozeman, Helena, and Missoula, Montana, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1, and that the agreement substantially lessens competition in the sale of commercial health insurance in those same areas, and will likely continue to do so, in violation of Section 7 of the Clayton Act, 15 U.S.C. 18 and the Montana Unfair Trade Practices Act, Mont. Code Ann. § 30–14–205.

A Competitive Impact Statement filed by the United States describes the Complaint, the proposed Final Judgment, the industry, and the remedies available to private litigants who may have been injured by the alleged violation.

Copies of the Complaint, proposed Final Judgment, and Competitive Impact Statement are available for inspection at the Department of Justice, Antitrust Division, Antitrust Documents Group, 450 Fifth Street NW., Suite 1010, Washington, DC 20530 (telephone: (202) 514–2481), on the Department of Justice's Web site at *http://www.usdoj.gov/atr,* and at the Office of the Clerk of the United States District Court for the District of Montana, Billings Division. Copies of these materials may be obtained from the Antitrust Division upon request and payment of the copying fee set by Department of Justice regulations.

Public comment is invited within 60 days of the date of this notice. Such comments, and responses thereto, will be published in the **Federal Register** and filed with the Court. Comments should be directed to Joshua H. Soven, Chief, Litigation I Section, Antitrust Division, U.S. Department of Justice, 450 Fifth Street NW., Suite 4100, Washington, DC 20530 (*telephone:* (202) 307–0827).

Patricia A. Brink,

Director of Civil Enforcement.

In the United States District Court for the District of Montana Billings Division

United States of America and State of Montana, Plaintiffs, v. *Blue Cross and Blue Shield of Montana, Inc., Billings Clinic, Bozeman Deaconess Health Services, Inc., Community Medical Center, Inc., New West Health Services, Inc., Northern Montana Health Care, Inc., and St. Peter's Hospital,* Defendants.

Case No. 1:11–cv–00123–RFC

Complaint

The United States of America, acting under the direction of the Attorney General of the United States, and the State of Montana, acting under the direction of the Montana Attorney General, bring this civil antitrust action to enjoin an anticompetitive agreement (the ''Agreement'') between defendant Blue Cross and Blue Shield of Montana, Inc. (''Blue Cross'') and defendants Billings Clinic; Bozeman Deaconess Health Services, Inc.; Community Medical Center, Inc.; Northern Montana Health Care, Inc.; and St. Peter's Hospital (collectively, the ''hospital defendants''), and to remedy the harm to competition that the announcement and

formation of the Agreement have caused and will likely continue to cause.

The hospital defendants are five of the six hospitals that own defendant New West Health Services, Inc. (''New West''), a health-insurance company that has vigorously and effectively competed against Blue Cross to provide commercial health insurance to Montana consumers. In the Agreement, Blue Cross agreed to pay $26.3 million to the hospital defendants in exchange for their agreeing to collectively stop purchasing health insurance for their own employees from New West and instead buy insurance for their employees from Blue Cross exclusively for six years. Blue Cross also agreed to provide the hospital defendants with two seats on Blue Cross's board of directors if the hospitals do not compete with Blue Cross in the sale of commercial health insurance.

The Agreement will likely cause New West to exit the markets for commercial health insurance, eliminating an important competitor to Blue Cross and ultimately leading to higher prices and lower-quality service for consumers. Consequently, the Agreement unreasonably restrains trade in the sale of commercial health insurance in Billings, Bozeman, Helena, and Missoula, Montana, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. The Agreement also substantially lessens competition in the sale of commercial health insurance in those same areas, and will likely continue to do so, in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and the Montana Unfair Trade Practices Act, Mont. Code Ann. § 30–14–205.

Therefore, the United States seeks temporary, preliminary, and permanent injunctive and other equitable relief under Section 4 of the Sherman Act, 15 U.S.C. 4, and Section 15 of the Clayton Act, 15 U.S.C. 25, blocking the transaction; and the State of Montana seeks temporary, preliminary, and permanent injunctive and other equitable relief under Section 16 of the Clayton Act, 15 U.S.C. 26, blocking the transaction.

Plaintiffs allege as follows:

I. Defendants and the Transaction

1. Defendant Blue Cross is a nonprofit corporation based in Helena, Montana. Blue Cross sells a range of commercial health-insurance products, including preferred-provider organization (''PPO'') products, health-maintenance organization (''HMO'') products, indemnity products, and individual products, and its group products are offered on a fully-insured and self-insured basis. In 2010, Blue Cross's annual revenues were approximately $530 million.

2. For many years, Blue Cross has dominated the commercial health-insurance markets in Montana. In the four geographic areas harmed by the Agreement, Blue Cross is by far the largest commercial health insurer, with shares ranging approximately from 43% to 75%. Blue Cross has market power in each of these geographic areas.

3. The hospital defendants are each non-profit corporations organized under Montana law:

a. Billings Clinic is a 370-bed hospital in Billings, Montana;

b. Bozeman Deaconess Health Services, Inc. is an 86-bed hospital in Bozeman, Montana;

c. Community Medical Center, Inc. is a 143-bed hospital in Missoula, Montana;

d. Northern Montana Health Care, Inc. is a 49-bed hospital in Havre, Montana; and

e. St. Peter's Hospital is a 122-bed hospital in Helena, Montana.

4. Defendant New West is a nonprofit corporation based in Helena, Montana. It was formed in 1998 by four hospitals—Billings Clinic, Community Medical Center, Northern Montana Health Care, and St. Peter's Hospital—to compete directly against Blue Cross, and to challenge what the hospitals described as Blue Cross's ''dominating presence.'' In 2006, two additional hospitals acquired an ownership interest in New West: Bozeman Deaconess (in Bozeman) and Benefis Health System (in Great Falls). Like Blue Cross, New West offers PPO products, HMO products, indemnity products, and individual products, and its group products are offered on a fully-insured and self-insured basis.

5. By 2011, New West had become the third-largest commercial health insurer in the four geographic areas harmed by the Agreement, with shares ranging from approximately 7% to 12%. Over the last 13 years, New West has offered Montana residents a high-quality option for their health insurance, routinely pressuring Blue Cross to offer lower prices and better customer service. New West's annual revenues in 2010 were approximately $120 million.

6. On or around August 1, 2011, Blue Cross and the hospital defendants entered into the Agreement, a letter of intent in which Blue Cross agreed to pay $26.3 million to the hospital defendants in exchange for their agreeing to collectively stop purchasing health insurance for their own employees from New West and instead buy insurance for their employees from Blue Cross exclusively for six years, starting January 1, 2012. (The only New West owner that did not sign the Agreement was Benefis Health System, which already used Blue Cross for its employees and had never used New West.) The hospital defendants collectively account for approximately 11,000 enrolled lives, or roughly one-third of New West's commercial health-insurance business at the time of the Agreement. The Agreement further requires that *all* of the hospital defendants participate for the agreement to be effective: if any hospital defendant withdraws, the Agreement is terminated. Additionally, Blue Cross agreed to install two representatives of the hospital defendants on Blue Cross's board of directors if the hospitals do not own or belong to an entity that competes with Blue Cross in the sale of commercial health insurance.

7. The Agreement effectively eliminates New West as a viable competitor in the sale of commercial health insurance. News that none of New West's owners will buy health insurance for their own employees from New West creates a perception that New West is exiting the commercial health-insurance market, and will likely cause many existing and potential customers to stop purchasing (or decline to purchase) insurance from New West. The Agreement also will lead New West and its hospital owners to significantly reduce their support for and efforts to win commercial health-insurance customers, further hindering its ability to compete.

8. Furthermore, because the hospital defendants agreed to act collectively, the Agreement ensures that New West would lose the support of all its owners and likely exit the market.

9. In addition, by agreeing to install two representatives of the hospital defendants on Blue Cross's board of directors only if the hospitals did not own or belong to an entity that competes against Blue Cross, the Agreement further ensures that New West will lose the support of its owners and likely exit the market.

10. As alleged below, by damaging and virtually eliminating New West as an effective competitor, the Agreement will significantly increase concentration in the markets for commercial health insurance in Montana and end the substantial head-to-head competition between Blue Cross and New West, likely resulting in higher insurance premiums and lower-quality service for Montana consumers in the affected markets.

II. Jurisdiction, Venue, and Interstate Commerce

11. Plaintiff United States brings this action under Section 4 of the Sherman Act, 15 U.S.C. 4, and Section 15 of the Clayton Act, 15 U.S.C. 25, and plaintiff State of Montana brings this action under Section 16 of the Clayton Act, 15 U.S.C. 26, seeking injunctive and other equitable relief from the defendants' violations of Section 1 of the Sherman Act and Section 7 of the Clayton Act, 15 U.S.C. 1 and 18; and Mont. Code Ann. § 30–14–205.

12. The defendants are engaged in interstate commerce and in activities substantially affecting interstate commerce. They sell insurance that covers residents when they travel across state lines; purchase health-care services from providers located outside of Montana; and receive payments from customers outside of Montana. The defendants also purchase health-care products and services, such as pharmaceuticals, in interstate commerce. Further, the availability of health insurance at affordable prices can attract businesses and jobs to a state or region, and higher health-insurance prices can affect interstate commerce by causing employers to exit the state. The Agreement, therefore, affects interstate commerce.

13. The State of Montana brings this action on its own behalf and in its sovereign capacity as *parens patriae* on behalf of the citizens, general welfare, and economy of the State. The State of Montana purchases group health insurance for approximately 16,000 employees in Montana, and it purchases from only two insurers: Blue Cross and New West. The State is likely to be injured in its business and property as a result of this agreement.

14. The Court has subject-matter jurisdiction over this action under Section 4 of the Sherman Act, 15 U.S.C. 4, and Section 15 of the Clayton Act, 15 U.S.C. 25 (as to claims by the United States); Section 16 of the Clayton Act, 15 U.S.C. 26, and 28 U.S.C. 1367 (as to claims by the State of Montana); and 28 U.S.C. 1331, 1337(a), and 1345.

15. The Court has personal jurisdiction over the defendants under Section 12 of the Clayton Act, 15 U.S.C. 22.

16. Venue is proper in this District under Section 12 of the Clayton Act, 15 U.S.C. 22, and 28 U.S.C. 1391. Each defendant is a corporation that transacts business and is found in this District. The acquisition was negotiated in substantial part in this District. Therefore, a substantial part of the events giving rise to plaintiffs' claim occurred in this District.

III. The Relevant Markets

A. Background on Commercial Health Insurance

17. In Montana, as throughout the United States, individuals who are not eligible for government programs such as Medicare or Medicaid typically obtain health insurance from commercial health-insurance companies. Most employees obtain commercial health insurance through their employers. Commercial health insurance obtained through an employer or another group is known as ''group health insurance.'' Commercial health insurance that individuals purchase directly from an insurer is known as ''individual health insurance.'' In 2009, approximately 50% of Montana residents obtained group health insurance, and about 15% obtained individual health insurance from commercial health insurers, including Blue Cross and New West.

18. Commercial health insurers compete to be selected by employers, their employees, and individuals on a number of factors, including price; the breadth of their health-care provider networks; out-of-pocket costs, such as deductibles, co-payments, and coinsurance; customer service; and reputation. Insurers also compete by developing programs to improve the health of their members and reduce medical-care costs. For group health insurance, employers and other groups typically select the insurance plan or plans that they offer to their employees or group members, who then choose whether to enroll in the one or more plans offered.

19. Group health insurance can either be ''fully-insured'' or ''self-insured.'' Under fully-insured plans, the insurer bears the risk that health-care claims will exceed anticipated losses. Under self-insured plans, the employer itself pays a large portion of medical costs and bears a large portion of the risk of unanticipated losses. Self-insurance is a viable option primarily for large employers only.

B. Relevant Product Markets

20. The relevant product markets affected by the proposed transaction are (1) The sale of commercial group health insurance and (2) the sale of commercial individual health insurance, collectively referred to in this Complaint as ''commercial health insurance.'' Group health insurance and individual health insurance are each lines of commerce for purposes of analyzing the effects of the Agreement within the meaning of Section 7 of the Clayton Act.

(1) Group Health Insurance

21. The sale of commercial group health insurance, including access to a provider network, is a relevant product market. Group health insurance sold in Montana usually includes access to a provider network, and most employers and their employees consider an insurer's provider network to be an important element of a health-insurance product because the network specifies the physicians and hospitals to which patients can turn for service with substantially lower costs to themselves.

22. There are no reasonable alternatives to group health insurance, including access to a provider network, for employers or for most employees. Individual health insurance is typically much more expensive than group health insurance, in part because employer contributions to group health-insurance premiums are not taxable to the employee and are tax deductible by the employer. Virtually all individual health insurance is purchased by persons who do not have access to employer-sponsored group health insurance.

23. Furthermore, purchasing hospital services directly (*i.e.,* without insurance), rather than through a commercial insurer, is typically prohibitively expensive and is not a viable substitute for group health insurance. Employers without health insurance almost never purchase hospital services directly from hospitals at prices comparable to prices paid by Blue Cross or New West.

24. Thus, a small but significant increase in the price of group health insurance in the geographic markets alleged in paragraph 28 would not cause a sufficient number of groups to switch to other health-insurance products such that the price increase would be unprofitable.

(2) Individual Health Insurance

25. The sale of commercial individual health insurance, including access to a provider network, is also a relevant product market. Individual health insurance is the only product available to individuals without access to group coverage or government programs that allows them to (1) reduce the financial risk of adverse health conditions and (2) access health care at the discounted prices negotiated by commercial health insurers.

26. There are no reasonable alternatives to individual health insurance for individuals who lack access to group health insurance or

government programs such as Medicare and Medicaid. As with group insurance, purchasing hospital services directly, rather than through a commercial insurer, is typically prohibitively expensive and is not a viable substitute for individual health insurance. Thus, a small but significant increase in the price of individual health insurance in the geographic markets alleged in paragraph 28 would not cause a sufficient number of individuals to switch to other health-insurance products such that the price increase would be unprofitable.

C. Relevant Geographic Markets

27. The markets for commercial health insurance, including access to a provider network, are local. Patients typically seek medical care close to their homes or workplaces. As a result, consumers strongly prefer health-insurance plans with networks of hospitals and physicians that are close to their homes and workplaces.

28. The following areas are relevant geographic markets for the sale of group and individual commercial health insurance:

a. The Billings Metropolitan Statistical Area (''MSA'') (Yellowstone and Carbon Counties);

b. The Bozeman Micropolitan Statistical Area (''MiSA'') (Gallatin County);

c. The Helena MiSA (Lewis and Clark County and Jefferson County); and

d. The Missoula MSA (Missoula County).

29. Consumers in these areas cannot practicably turn to commercial health insurers that do not have a network of providers in these areas. Consequently, a small but significant increase in the price of commercial health insurance in these areas would not cause a sufficient number of consumers to switch to insurers outside of these areas to make such a price increase unprofitable. These areas are, therefore, the relevant geographic markets within which to assess the likely effects of the Agreement, and they qualify as a ''section of the country'' within the meaning of Section 7 of the Clayton Act.

IV. Likely Anticompetitive Effects

30. Blue Cross and New West are two of only three significant competitors for the sale of commercial health insurance in Billings, Bozeman, Helena, and Missoula. Besides Blue Cross and New West, the only other significant competitor in these areas is Allegiance, which is owned by CIGNA.

31. Blue Cross has market power in the sale of commercial health insurance in the relevant geographic areas. As the table below shows, Blue Cross's shares of commercial health insurance ranged from approximately 43% to 75% in the four relevant areas at the time the Agreement was signed, as measured by covered lives. New West's shares of commercial health insurance ranged from 7% to 12% in those four areas at the time the Agreement was signed.

COMMERCIAL HEALTH INSURANCE MARKET SHARE

	Blue Cross (percent)	New West (percent)
Billings	43	9
Missoula	49	7
Bozeman	65	12
Helena	75	9

32. The Agreement will cause Blue Cross's market share to increase in two ways. First, the transfer of the hospitals' accounts to Blue Cross will directly increase Blue Cross's market share. Second, because the Agreement effectively eliminates New West as a viable competitor, New West's remaining customers are likely to switch insurers, with most moving to Blue Cross because it is the market leader.

33. Thus, using the Herfindahl-Hirschman Index (''HHI''), a measure of concentration commonly relied on by the courts and antitrust agencies to measure market concentration (defined and explained in Appendix A), the transaction would significantly increase concentration. Assuming that all of the hospital defendants' business transfers to Blue Cross per the terms of the Agreement and that New West's other commercial business is lost to the remaining competitors in proportion to their current shares, the HHIs would increase by 640 in Billings to 2,290; by 1,277 in Bozeman to 5,870; by 1,100 in Helena to 6,900; and by 512 in Missoula to 3,690. These HHI levels far exceed concentration levels that many courts have found create a presumption that an acquisition likely would substantially lessen competition in violation of the Clayton Act.

34. In addition to harming competition by substantially increasing concentration in the relevant markets, the Agreement is likely to harm consumers by eliminating the vigorous head-to-head competition between Blue Cross and New West. For the past several years, New West has been one of only two significant alternatives to Blue Cross for commercial health insurance in the relevant areas. Many consumers view Blue Cross and New West as the two most significant insurers in the relevant markets and each other's main competitor.

35. Blue Cross and New West have a long history of competing against each other in the relevant areas to attract and retain customers by offering better products and services and lower prices. New West has competed effectively with Blue Cross because New West has low rates with hospitals and physicians throughout Montana, including, notably, its own hospitals and hospital-owned physician practices; a broad network of hospitals and physicians; and a strong reputation for high-quality customer service.

36. Since the Agreement was announced in August 2011, many employers in Montana have chosen not to purchase health insurance from New West, likely because they were unsure whether New West would continue to exist. Some of those employers have already switched their business to Blue Cross, and many more likely will.

37. The Agreement has eliminated and will continue to substantially eliminate competition between Blue Cross and New West. Without New West as an effective competitor, Blue Cross will likely increase prices and reduce the quality and service of commercial health-insurance plans to employers and individuals in the relevant areas.

V. Absence of Countervailing Factors

A. Entry

38. Entry of new health insurers or expansion of existing health insurers is unlikely to prevent the harm to competition that the Agreement has caused and likely will continue to cause. Most health insurers that have attempted to enter or expand into the four alleged geographic markets in recent years have been unsuccessful.

B. Efficiencies

39. The Agreement has not generated and likely will not generate verifiable, agreement-specific efficiencies sufficient to reverse or outweigh the anticompetitive effects that it has already caused and is likely to cause.

VI. Violations Alleged

Count One: Unlawful Agreement in Violation of Sherman Act § 1

40. Plaintiffs repeat and reallege the allegations of paragraphs 1 through 39.

41. The Agreement to enter into the transaction is a contract, combination, and conspiracy that unreasonably restrains interstate trade or commerce, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1.

Count Two: Unlawful Acquisition in Violation of Clayton Act § 7

42. Plaintiffs repeat and reallege the allegations of paragraphs 1 through 39.

43. The acquisition has substantially lessened competition in the sale of commercial health insurance in the relevant areas, and will likely continue to do so, in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, in that (1) Actual and potential competition between Blue Cross and New West in the alleged geographic markets has been and will be eliminated; and (2) competition in the alleged geographic markets for the sale of commercial health insurance has been and likely will continue to be substantially lessened.

Count Three: Unlawful Restraint of Trade in Violation of Montana Unfair Trade Practices Act

44. Plaintiffs repeat and reallege the allegations of paragraphs 1 through 39.

45. The Agreement to enter into the transaction is an unlawful agreement for the purpose of regulating the production of an article of commerce, in violation of Mont. Code Ann. § 30–14–205(1).

VII. Requested Relief

46. Plaintiffs request that this Court:

a. Adjudge and decree that the Agreement violates Section 1 of the Sherman Act, 15 U.S.C. 1; Section 7 of the Clayton Act, 15 U.S.C. 18; and Mont. Code Ann. § 30–14–205(1);

b. Preliminarily and permanently enjoin the defendants from carrying out the Agreement;

c. Provide equitable relief sufficient to restore the competition lost due to the Agreement;

d. Award plaintiffs their costs in this action; and

e. Award plaintiffs such other relief as may be just and proper.

Dated: November 8, 2011.

Respectfully submitted,

FOR PLAINTIFF UNITED STATES OF AMERICA:

Sharis A. Pozen,
Acting Assistant Attorney General.

Leslie C. Overton,
Special Advisor.

Patricia A. Brink,
Director of Civil Enforcement.

Joshua H. Soven,
Chief, Litigation I Section.

Leif M. Johnson,
Civil Chief, Office of the U.S. Attorney, District of Montana.

Peter J. Mucchetti* (DC Bar #463202),
Assistant Chief, Litigation I Section.

Claudia H. Dulmage,
Scott I. Fitzgerald,
Barry J. Joyce,
Attorneys for the United States, U.S. Department of Justice, Antitrust Division, Litigation I Section, 450 Fifth Street NW., Suite 4100, Washington, DC 20530, Tel.: (202) 353–4211, Fax: (202) 307–5802.

*Attorney of Record.

FOR PLAINTIFF STATE OF MONTANA:

Steve Bullock,
Attorney General of Montana.

James P. Molloy,
Chief of Consumer Protection.

Chuck Munson,
Assistant Attorney General, 215 N. Sanders, P.O. Box 201401, Helena, MT 59620, Tel.: (406) 444–2026.

Certificate of Service

I hereby certify that, on November 8, 2011, a copy of the foregoing document was served on the following persons by the following means:

1 CM/ECF
____ Hand Delivery
____ U.S. Mail
____ Overnight Delivery Service
____ Fax
2.3 E-Mail

1. Clerk, U.S. District Court.

2. Counsel for Defendant Blue Cross and Blue Shield of Montana: David C. Lundsgaard, Graham & Dunn PC, Pier 70, 2801 Alaskan Way Suite 300, Seattle, WA 98121–1128. *dlundsgaard@grahamdunn.com.*

3. Counsel for Billings Clinic; Bozeman Deaconess Health Services, Inc.; Community Medical Center, Inc.; New West Health Services, Inc.; Northern Montana Health Care, Inc.; and St. Peter's Hospital: Kevin P. Heaney, Crowley Fleck PLLP, Transwestern Plaza II, 490 N. 31st St., Suite 500, Billings, MT 59101. *kheaney@crowleyfleck.com.*

Peter J. Mucchetti,
Antitrust Division, U.S. Department of Justice, 450 Fifth Street NW., Suite 4100, Washington, DC 20530. Tel.: (202) 353–4211. peter.j.mucchetti@usdoj.gov.

In the United States District Court for the District of Montana Billings Division

United States of America and State of Montana, Plaintiffs, v. *Blue Cross and Blue Shield of Montana, Inc., Billings Clinic, Bozeman Deaconess Health Services, Inc., Community Medical Center, Inc., New West Health Services, Inc., Northern Montana Health Care, Inc., and St. Peter's Hospital,* Defendants.

Case No.1:11–cv–00123–RFC

Competitive Impact Statement

Plaintiff United States of America (''United States''), pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act (''APPA'' or ''Tunney Act''), 15 U.S.C. 16(b)–(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. Nature and Purpose of the Proceeding

On November 8, 2011, the United States and the State of Montana filed a civil antitrust lawsuit challenging an agreement (the ''Agreement'') between defendant Blue Cross and Blue Shield of Montana, Inc. (''Blue Cross'') and defendants Billings Clinic; Bozeman Deaconess Health Services, Inc.; Community Medical Center, Inc.; Northern Montana Health Care, Inc.; and St. Peter's Hospital (collectively, the ''hospital defendants'').

The hospital defendants are five of the six hospitals that own defendant New West Health Services, Inc. (''New West''), a health insurer that competes against Blue Cross to provide commercial health insurance to Montana consumers. In the Agreement, Blue Cross agreed to pay $26.3 million to the hospital defendants in exchange for their agreeing to collectively stop purchasing health insurance for their own employees from New West and instead buy insurance for their employees from Blue Cross exclusively for six years. Blue Cross also agreed to provide the hospital defendants with two seats on Blue Cross's board of directors if the hospitals do not compete with Blue Cross in the sale of commercial health insurance.

The Complaint alleges that the Agreement will likely cause New West to exit the markets for commercial health insurance, eliminating an important competitor to Blue Cross and ultimately leading to higher prices and lower-quality service for consumers. Consequently, the Complaint alleges that the Agreement unreasonably restrains trade in the sale of commercial health insurance within Montana in the Billings Metropolitan Statistical Area (''MSA''), Bozeman Micropolitan Statistical Area (''MiSA''), Helena MiSA, and Missoula MSA, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1; and that the Agreement has substantially lessened competition in the sale of commercial health insurance in those same areas, and will likely continue to do so, in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and the Montana Unfair Trade Practices Act, Mont. Code Ann. § 30–14–205.

With the Complaint, the United States and the State of Montana filed an Asset Preservation Stipulation and Order and proposed Final Judgment which are designed to eliminate the anticompetitive effects of the Agreement. The proposed Final Judgment, which is explained more fully below, would permit Blue Cross and the hospital defendants to proceed

with the Agreement but would require the divestiture of New West's commercial health-insurance business (the ''Divestiture Assets'') and other injunctive relief sufficient to preserve competition in the sale of commercial health insurance in Billings, Bozeman, Helena, and Missoula.

Until the divestiture has been accomplished, the Asset Preservation Stipulation and Order requires New West and the hospital defendants to take all steps necessary to ensure that New West's commercial health-insurance business will be maintained and operated as an ongoing, economically viable, and active line of business; that competition between New West and Blue Cross in the sale of commercial health insurance is maintained during the pendency of the ordered divestiture; and that New West and the hospital defendants preserve and maintain the Divestiture Assets. The Asset Preservation Stipulation and Order thus ensures that that competition is protected pending completion of the required divestiture and that the assets are preserved so that relief will be effective.

The United States, the State of Montana, and the defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA, unless the United States withdraws its consent. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

II. Events Giving Rise to the Alleged Violation

A. The Defendants and the Agreement

Blue Cross is a nonprofit corporation based in Helena, Montana. It sells a range of commercial health-insurance products, including PPOs, HMOs, indemnity products, and individual products, and its group products are offered on a fully-insured and self-insured basis. (Under fully-insured plans, the insurer bears the risk that health-care claims will exceed anticipated losses; under self-insured plans, the employer itself pays a large portion of medical costs and bears a large portion of the risk of unanticipated losses.) In 2010, Blue Cross's annual revenues were approximately $530 million. For many years, Blue Cross has dominated the commercial health-insurance markets in Montana.

New West is a nonprofit corporation, also based in Helena. Four of the hospital defendants—Billings Clinic, Community Medical Center, Northern Montana Health Care, and St. Peter's Hospital—formed New West in 1998 to compete directly against Blue Cross. In 2006, two additional hospitals acquired an ownership interest in New West: defendant Bozeman Deaconess and Benefis Health System (in Great Falls). Like Blue Cross, New West offers PPO products, HMO products, indemnity products, and individual products, and its group products are offered on a fully-insured and self-insured basis. As the Complaint alleges, New West has offered Montana residents a high-quality option for their health insurance, routinely pressuring Blue Cross to offer lower prices and better customer service. New West's annual revenues in 2010 were approximately $120 million.

On or around August 1, 2011, Blue Cross and the hospital defendants entered into the Agreement, a letter of intent in which Blue Cross agreed to pay $26.3 million to the hospital defendants in exchange for their agreeing to collectively stop purchasing health insurance for their own employees from New West and instead buy insurance for their employees from Blue Cross exclusively for six years, starting January 1, 2012. (The only New West owner that did not sign the Agreement was Benefis Health System, which already used Blue Cross for its employees and had never used New West.) The hospital defendants collectively account for approximately 11,000 enrolled lives, or roughly one-third of New West's commercial health-insurance business at the time of the Agreement.

The Agreement further requires that *all* of the hospital defendants participate for the agreement to be effective: if any hospital defendant withdraws, the Agreement is terminated. Additionally, Blue Cross agreed to install two representatives of the hospital defendants on Blue Cross's board of directors if the hospitals do not own or belong to an entity that competes with Blue Cross in the sale of commercial health insurance.

B. The Relevant Markets

1. Product Markets

The Complaint alleges two relevant product markets: (1) The sale of commercial group health insurance, and (2) the sale of commercial individual health insurance. These products are collectively referred to as ''commercial health insurance.''

(a) Group Health Insurance

As the Complaint explains, most employees obtain commercial health insurance through their employers, which is called ''group health insurance.'' There are no reasonable alternatives to group health insurance for employers, or for most employees. The closest alternative—individual health insurance—is typically much more expensive than group health insurance, in part because while group health insurance is purchased using pre-tax dollars, individual health insurance is not. Furthermore, purchasing hospital services directly (*i.e.,* without insurance), rather than through a commercial insurer, is typically prohibitively expensive and is not a viable substitute for group health insurance.

Thus, a small but significant increase in the price of group health insurance in the relevant geographic markets would not cause a sufficient number of groups to switch to other health-insurance products, such that the price increase would be unprofitable.

(b) Individual Health Insurance

Individual health insurance is the only health-insurance product available to individuals without access to group coverage or government programs, such as Medicare or Medicaid. As with group insurance, purchasing hospital services directly, rather than through a commercial insurer, is typically prohibitively expensive and is not a viable substitute for individual health insurance. Thus, as the Complaint alleges, a small but significant increase in the price of individual health insurance in the relevant geographic markets would not cause a sufficient number of individuals to switch to other health-insurance products, such that the price increase would be unprofitable.

2. Geographic Markets

Because patients typically seek medical care close to their homes or workplaces, consumers strongly prefer health-insurance plans with local networks of hospital and physicians. Thus, employers that offer group health insurance to their employees demand insurance products that provide access to health-care provider networks, including primary- and tertiary-care hospitals, in the areas in which substantial numbers of their employees live and work. Likewise, individuals who purchase individual health insurance demand insurance products that provide access to health-care provider networks, including hospitals,

in the areas in which they live and work.

The following local areas are relevant geographic markets for the sale of group and individual commercial health insurance:

- The Billings MSA (Yellowstone and Carbon Counties);
- The Bozeman MiSA (Gallatin County);
- The Helena MiSA (Lewis and Clark County and Jefferson County); and
- The Missoula MSA (Missoula County).

As the Complaint alleges, a small but significant increase in the price of commercial health insurance in these areas would not cause a sufficient number of consumers to switch to insurers outside of these areas to make such a price increase unprofitable.

C. Anticompetitive Effects of the Agreement

According to the Complaint, the Agreement effectively eliminates New West as a viable competitor in the sale of commercial health insurance. First, news that none of New West's owners will buy health insurance for their own employees from New West creates a perception that New West is exiting the commercial health-insurance market, and will likely cause many existing and potential customers to stop purchasing (or decline to purchase) insurance from New West. Second, the Agreement will lead New West and its hospital owners to significantly reduce their support for and efforts to win commercial health-insurance customers, further hindering its ability to compete. Furthermore, because the hospital defendants agreed to act collectively, the Agreement with Blue Cross ensures that New West would lose the support of all its owners and likely exit the market. And the Agreement further deters the hospitals from supporting New West by granting them two positions on Blue Cross's board of directors, but only if the hospitals do not own or belong to a competing insurer.

The Complaint alleges that by eliminating New West as an effective competitor, the Agreement would significantly increase concentration in the markets for commercial health insurance in Montana. In the four relevant areas, Blue Cross's share of commercial health insurance ranged from approximately 43% to 75% at the time the Agreement was signed, and New West's share ranged from 7% to 12%. The Agreement increases Blue Cross's share directly through the transfer of the hospital defendants' accounts from New West, and indirectly because New West's remaining customers are likely to switch insurers, with most moving to Blue Cross because it is the market leader.

Using the Herfindahl-Hirschman Index (''HHI''), a standard measure of market concentration, and assuming that (1) All of the hospital defendants' business transfers to Blue Cross per the terms of the Agreement and (2) that New West's other commercial business is lost to the remaining competitors in proportion to their current shares, the HHIs would increase by 640 in Billings to 2,290; by 1,277 in Bozeman to 5,870; by 1,100 in Helena to 6,900; and by 512 in Missoula to 3,690. These HHI levels far exceed concentration levels that many courts have found create a presumption that an acquisition likely would substantially lessen competition in violation of the Clayton Act.

The Agreement also eliminates vigorous head-to-head competition between Blue Cross and New West. For the past several years, New West has been one of only two significant alternatives to Blue Cross for commercial health insurance in the relevant areas. Many consumers view Blue Cross and New West as the two most significant insurers in the relevant areas and each other's main competitor. Without New West as an effective competitor, Blue Cross will likely increase prices and reduce the quality and service of commercial health-insurance plans to employers and individuals in the relevant areas.

III. Explanation of the Proposed Final Judgment

A. The Divestiture Assets

The proposed Final Judgment will eliminate the anticompetitive effects identified in the Complaint by requiring New West and the hospital defendants to divest New West's commercial health-insurance business, including its administrative-services-only contracts and its fully-insured business, but excluding the contracts that cover the hospital defendants' employees and their dependents. This divestiture will allow the acquirer to compete vigorously in the relevant geographic markets.

New West and the hospital defendants must divest New West's fully-insured commercial health-insurance business to the acquirer through a bulk-reinsurance agreement, as provided by Mont. Code Ann. § 33–2–1212. At the same time, they must also divest the remainder of New West's commercial health-insurance business, including its administrative-services-only contracts. This divestiture structure ensures that all of New West's rights and obligations relating to its commercial health-insurance business immediately transfer to the acquirer. The Final Judgment does not require New West to divest its Medicare Advantage business, and New West plans to continue selling this health-insurance product to the Medicare-eligible population.

New West and the hospital defendants have proposed to sell the Divestiture Assets to PacificSource Health Plans, and the United States, after consulting with the State of Montana, has tentatively approved PacificSource as the acquirer. Consequently, Section IV(F) of the proposed Final Judgment requires New West and the hospital defendants first to attempt to sell the Divestiture Assets to PacificSource.

Under the proposed Final Judgment, the United States and the State of Montana must be satisfied that none of the terms in any agreement between New West and the hospital defendants and the acquirer enable New West or the hospital defendants to interfere with the acquirer's ability to compete effectively.

Although the proposed Final Judgment does not require New West and the hospital defendants to divest the New West health-insurance contracts that covered the hospital defendants' employees and dependents, the proposed Final Judgment does require New West and the hospital defendants to use their best efforts to maintain New West's contracts for coverage of at least 14,600 enrollees in its fully- or self-insured plans until the Divestiture Assets are transferred to the acquirer. To ensure that New West's management will work aggressively to meet this membership target, New West and the hospital defendants will fund an incentive pool of at least $50,000, which will be available to New West's management if they meet the membership target as of the closing date for the sale of the Divestiture Assets. This will allow the acquirer to obtain sufficient enrollees to preserve existing levels of competition.

Section IV(A) of the proposed Final Judgment requires New West and the hospital defendants to divest the Divestiture Assets as a viable, ongoing business within 30 days after the filing of the Complaint. The quick divestiture will help preserve the existing level of competition because it will convey to the market that a new competitor will rapidly replace New West, and it will help to reduce the possibility that the Divestiture Assets will lose their value.

B. Selected Provisions of the Proposed Final Judgment

Other provisions of the proposed Final Judgment will enable the acquirer to promptly and effectively compete in the market for commercial health insurance. Most importantly, Sections IV(G)–(I) ensure that the acquirer has a cost-competitive health-care provider network. To compete effectively in the sale of commercial health insurance, insurers need a network of health-care providers at competitive rates because hospital and physician expenses constitute the large majority of an insurer's costs. By requiring New West and the hospital defendants to help to provide the acquirer with a cost-competitive provider network, Sections IV(G)–(I) help ensure that the acquirer will be able to compete as effectively as New West before the parties entered the Agreement.

Specifically, Section IV(G) requires the hospital defendants to sign three-year contracts with the acquirer on terms that are substantially similar to their existing contractual terms with New West. This requirement is vital because three of the hospital defendants (Bozeman Deaconess, St. Peter's, and Northern Montana Hospital) are the only hospitals in their respective geographic markets, while Billings Clinic and Community Medical Center each only compete with one other hospital. Because these three-year contracts provide the acquirer with a cost structure comparable to New West's costs, they position the acquirer to be competitive selling commercial health insurance in all four geographic markets.

To address health-care provider contracts that are not under the hospital defendants' control, Sections IV(H) and IV(I) require New West and the hospital defendants—at the acquirer's option—to (1) use their best efforts to assign the contracts that are not under their control to the acquirer, or (2) lease New West's provider network to the acquirer for up to three years, using their best efforts to maintain the network, including maintaining contracts with substantially similar terms.

Sections IV(M) and IV(N) also require New West and the hospital defendants to provide transitional support services as necessary for the acquirer to operate the Divestiture Assets. New West and the hospital defendants may not provide these transitional support services for more than 12 months without approval from the United States.

The proposed Final Judgment contains three provisions that address Blue Cross's relationships with health-insurance brokers and health-care providers. First, under Section V(A), Blue Cross must provide 30 days' written notice to the plaintiffs before entering into exclusive contracts with health-insurance brokers. This provision prevents Blue Cross from blocking the acquirer's access to brokers. Access to brokers is important because many customers purchase health insurance through a broker. Second, under Section V(B), Blue Cross must provide 30 days' written notice to the plaintiffs before entering into any agreement that prohibits a health-care provider from contracting with other insurers. Third, under Section V(C), Blue Cross must provide 30 days' written notice before entering into any most-favored-nation agreement with a health-care provider, which would require the provider to give Blue Cross rates that are equal to or better than other insurers. If the United States issues a Civil Investigative Demand (''CID'') within 30 days after Blue Cross notifies the plaintiffs that it intends to engage in the practices covered by Sections V(A)–(C), then Blue Cross may not adopt the practices until 30 days after certifying compliance with the CID. These provisions help ensure that Blue Cross will not interfere with the acquirer's ability to compete effectively.

Finally, if New West and the hospital defendants do not accomplish the divestiture within the period prescribed in the proposed Final Judgment, the Court will appoint a trustee selected by the United States to carry out the divestitures. If a trustee is appointed, New West and the hospital defendants must pay the trustee's costs and expenses, and the trustee's commission will provide an incentive based on the price, terms, and speed of the divestiture. Once the trustee is appointed, the trustee will file monthly reports with the Court and the United States explaining his or her efforts to accomplish the divestiture. At the end of six months, if the divestitures have not been accomplished, the trustee and the United States will make recommendations to the Court, which will enter such orders as it deems appropriate in order to carry out the purpose of the trust. This may include extending the trust or the term of the trustee's appointment for up to six additional months. However, if at the end of all extensions of the trustee's term, the trustee has not accomplished the divestiture, then New West and the hospital defendants will have no further obligations to preserve the divestiture assets.

IV. Remedies Available to Potential Private Litigants

Section 4 of the Clayton Act, 15 U.S.C. 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. 16(a), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against the defendants.

V. Procedures Available for Modification of the Proposed Final Judgment

The United States, the State of Montana, and the defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least 60 days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within 60 days of the date of publication of this Competitive Impact Statement in the **Federal Register**, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the United States Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time before the Court's entry of judgment. The comments and the response of the United States will be filed with the Court and published in the **Federal Register**.

Written comments should be submitted to: Joshua H. Soven, Chief, Litigation I Section, Antitrust Division, United States Department of Justice, 450 Fifth Street NW., Suite 4100, Washington, DC 20530.

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the

modification, interpretation, or enforcement of the Final Judgment.

VI. Alternatives to the Proposed Final Judgment

As an alternative to the proposed Final Judgment, the United States considered a full trial on the merits against the defendants. The United States is satisfied, however, that the divestiture of the assets described in the proposed Final Judgment will fully address the competitive concerns set forth in the Complaint. Thus, the proposed Final Judgment achieves all or substantially all of the relief the United States would have obtained through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits of the Complaint.

VII. Standard of Review Under the APPA for the Proposed Final Judgment

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a 60-day comment period, after which the court shall determine whether entry of the proposed Final Judgment ''is in the public interest.'' 15 U.S.C. 16(e)(1). In making that determination, the court, in accordance with the statute as amended in 2004, is required to consider:

(A) The competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and

(B) The impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. 16(e)(1)(A) & (B). In considering these statutory factors, the court's inquiry is necessarily a limited one as the government is entitled to ''broad discretion to settle with the defendant within the reaches of the public interest.'' *United States* v. *Microsoft Corp.,* 56 F.3d 1448, 1461 (DC Cir. 1995); *see also United States* v. *SBC Commc'ns, Inc.,* 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing public-interest standard under the Tunney Act); *United States* v. *InBev N.V./S.A.,* No. 08–1965 (JR), 2009 U.S. Dist. LEXIS 84787, at *3 (D.D.C. Aug. 11, 2009) (noting that the court's review of a consent judgment is limited and only inquires ''into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanisms to enforce the final judgment are clear and manageable.'').[1]

Under the APPA, a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the United States' complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See Microsoft,* 56 F.3d at 1458–62. With respect to the adequacy of the relief secured by the decree, a court may not ''engage in an unrestricted evaluation of what relief would best serve the public.'' *United States* v. *BNS Inc.,* 858 F.2d 456, 462 (9th Cir. 1988) (citing *United States* v. *Bechtel Corp.,* 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft,* 56 F.3d at 1460–62; *InBev,* 2009 U.S. Dist. LEXIS 84787, at *3; *United States* v. *Alcoa, Inc.,* 152 F. Supp. 2d 37, 40 (D.D.C. 2001). Courts have held that:

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is ''*within the reaches of the public interest.*'' More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[2] In determining whether a proposed settlement is in the public interest, a district court ''must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations.'' *SBC Commc'ns,* 489 F. Supp. 2d at 17; *see also Microsoft,* 56 F.3d at 1461 (noting the need for courts to be ''deferential to the government's predictions as to the effect of the proposed remedies''); *United States* v. *Archer-Daniels-Midland Co.,* 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States' ''prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case'').

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. ''[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'' *United States* v. *Am. Tel. & Tel. Co.,* 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States* v. *Gillette Co.,* 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff'd sub nom. Maryland* v. *United States,* 460 U.S. 1001 (1983); *see also United States* v. *Alcan Aluminum Ltd.,* 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). To meet this standard, the United States ''need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms.'' *SBC Commc'ns,* 489 F. Supp. 2d at 17.

Moreover, the court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its complaint, and does not authorize the court to ''construct [its] own hypothetical case and then evaluate the decree against that case.'' *Microsoft,* 56 F.3d at 1459; *see also InBev,* 2009 U.S. Dist. LEXIS 84787, at *20 (''the 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged''). Because the ''court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place,'' it follows that ''the court is only authorized to review the decree itself,'' and not to ''effectively redraft the complaint'' to inquire into other matters

[1] The 2004 amendments substituted ''shall'' for ''may'' in directing relevant factors for courts to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. *Compare* 15 U.S.C. 16(e) (2004), *with* 15 U.S.C. 16(e)(1) (2006); *see also SBC Commc'ns,* 489 F. Supp. 2d at 11 (concluding that the 2004 amendments ''effected minimal changes'' to Tunney Act review).

[2] *Cf. BNS,* 858 F.2d at 464 (holding that the court's ''ultimate authority under the [APPA] is limited to approving or disapproving the consent decree''); *United States* v. *Gillette Co.,* 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to ''look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass''); *see generally Microsoft,* 56 F.3d at 1461 (discussing whether ''the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'').

that the United States did not pursue. *Microsoft,* 56 F.3d at 1459–60. A court ''cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power.'' *SBC Commc'ns,* 489 F. Supp. 2d at 15.

In its 2004 amendments, Congress made clear its intent to preserve the practical benefits of using consent decrees in antitrust enforcement, adding the unambiguous instruction that ''[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene.'' 15 U.S.C. 16(e)(2). This language effectuates what Congress intended when it enacted the Tunney Act in 1974. As Senator Tunney explained: ''[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process.'' 119 Cong. Rec. 24,598 (1973) (statement of Senator Tunney). Rather, the procedure for the public-interest determination is left to the discretion of the court, with the recognition that the court's ''scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings.'' *SBC Commc'ns,* 489 F. Supp. 2d at 11.[3]

VIII. Determinative Documents

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Respectfully submitted,

Scott I. Fitzgerald (WA Bar #39716),
Peter J. Mucchetti,
Claudia H. Dulmage,
Barry J. Joyce,

Attorneys for the United States, U.S. Department of Justice, Antitrust Division, Litigation I Section, 450 Fifth Street, NW., Suite 4100, Washington, DC 20530.
Dated: November 8, 2011.

[3] *See United States* v. *Enova Corp.,* 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the ''Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone''); *United States* v. *Mid-Am. Dairymen, Inc.,* 1977–1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977) (''Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should * * * carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.''); S. Rep. No. 93–298 at 6 (1973) (''Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.'').

Certificate of Service

I hereby certify that, on November 8, 2011, a copy of the foregoing document was served on the following persons by the following means:

____1 CM/ECF
____ Hand Delivery
____U.S. Mail
____ Overnight Delivery Service
____ Fax
____ 2,3 E-Mail

1. Clerk, U.S. District Court.

2. Counsel for Defendant Blue Cross and Blue Shield of Montana: David C. Lundsgaard, Graham & Dunn PC, Pier 70, 2801 Alaskan Way Suite 300, Seattle, WA 98121–1128. *dlundsgaard@grahamdunn.com.*

3. Counsel for Billings Clinic; Bozeman Deaconess Health Services, Inc.; Community Medical Center, Inc.; New West Health Services, Inc.; Northern Montana Health Care, Inc.; and St. Peter's Hospital: Kevin P. Heaney, Crowley Fleck PLLP, Transwestern Plaza II, 490 N. 31st St., Suite 500, Billings, MT 59101. *kheaney@crowleyfleck.com.*

Scott I. Fitzgerald,
Antitrust Division, U.S. Department of Justice, 450 Fifth Street, NW., Suite 4100, Washington, DC 20530. (202) 353–3863. scott.fitzgerald@usdoj.gov.

In the United States District Court for the District of Montana Billings Division

United States of America and State of Montana, Plaintiffs, v. *Blue Cross and Blue Shield of Montana, Inc., Billings Clinic, Bozeman Deaconess Health Services, Inc., Community Medical Center, Inc., New West Health Services, Inc., Northern Montana Health Care, Inc., and St. Peter's Hospital,* Defendants.

Case No.1:11–cv–00123–RFC

[Proposed] Final Judgment

Whereas, Plaintiffs, the United States of America and the State of Montana, filed their Complaint on November 8, 2011, alleging that Defendants Blue Cross, New West, Billings Clinic, Bozeman Deaconess, Community Medical Center, Northern Montana Health Care, and St. Peter's, by their respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law and without this Final Judgment constituting any evidence against or admission by any party regarding any issue of fact or law;

And whereas, Defendants agree to be bound by the provisions of this Final Judgment pending its approval by the Court;

And whereas, the essence of this Final Judgment is the prompt and certain divestiture of certain rights and assets by New West and the Hospital Defendants to ensure that competition is not substantially lessened by the Agreement;

And whereas, the United States and the State of Montana require Defendants to make certain divestitures for the purpose of remedying the loss of competition alleged in the Complaint;

And whereas, New West and the Hospital Defendants have represented to the United States and the State of Montana that the divestiture required by this Final Judgment can and will be made, and that they will not later raise any claim of hardship or difficulty as grounds for asking the Court to modify any of the provisions of this Final Judgment;

Now therefore, before any testimony is taken, without trial or adjudication of any issue of fact or law, and upon consent of the parties, it is *ordered, adjudged, and decreed:*

I. Jurisdiction

This Court has jurisdiction over the subject matter of, and each of the parties to, this action. The Complaint states a claim upon which relief may be granted against Defendants under Section 1 of the Sherman Act, 15 U.S.C. 1; Section 7 of the Clayton Act, as amended, 15 U.S.C. 18; and the Montana Unfair Trade Practices Act, Mont. Code Ann. § 30–14–205.

II. Definitions

As used in this Final Judgment:

A. ''Acquirer'' means the entity to whom the Divestiture Assets are divested.

B. ''Agreement'' means the Letter of Intent dated on or around August 1, 2011, by and among Blue Cross and the Hospital Defendants.

C. ''Billings Clinic'' means Defendant Billings Clinic, a Montana non-profit corporation based in Billings, Montana, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their respective directors, officers, managers, agents, and employees.

D. ''Blue Cross'' means Defendant Blue Cross and Blue Shield of Montana, Inc., a Montana corporation based in Helena, Montana, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their respective directors, officers, managers, agents, and employees.

E. ''Bozeman Deaconess'' means Defendant Bozeman Deaconess Health

Services, Inc., a Montana non-profit corporation based in Bozeman, Montana, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their respective directors, officers, managers, agents, and employees.

F. ''Broker'' means any insurance agent, producer, or broker who facilitates the sale of health-insurance plans to individuals or groups.

G. ''Community Medical Center'' means Community Medical Center, Inc., a Montana non-profit corporation based in Missoula, Montana, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their respective directors, officers, managers, agents, and employees.

H. ''Divestiture Assets'' means:

(1) New West's Commercial Health Insurance Business;

(2) all business, financial, and operational books, records, and data, both current and historical, that relate to New West's Commercial Health Insurance Business.

I. ''Health-Care Provider'' means any person or entity that provides any health-care service, including hospitals, physician groups, laboratories, ambulatory surgical centers, nursing facilities, and other providers of health-care services.

J. ''Health Insurer'' means any entity that is responsible for all or part of any expense for health-care services provided to any person or group. The term includes commercial health-insurance plans, including health-maintenance organizations, preferred-provider organizations, and indemnity plans; health-care provider rental networks, union trust funds, and multiple employer trusts; and self-insured health plans.

K. ''Hospital Defendants'' means Billings Clinic, Bozeman Deaconess, Community Medical Center, Northern Montana Health Care, and St. Peter's.

L. ''Most-Favored-Nation Provision'' means any most-favored-nation, most-favored-discount, or most-favored-pricing provision in any health-care provider agreement. The term includes any Blue Cross policy, practice, or contractual provision that conditions Blue Cross's payment rate or discount to any health-care provider on another health insurer's payment rate or discount to that provider, regardless of how such policy, practice, or contractual provision is denominated.

M. ''New West'' means New West Health Services, Inc., a Montana non-profit corporation based in Helena, Montana, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their respective directors, officers, managers, agents, and employees.

N. ''New West's Commercial Health Insurance Business'' means all of New West's health-insurance contracts and policies for products providing commercial health insurance, including fully-insured and administrative-services-only products, health-maintenance organization products, preferred-provider organization products, point-of-service products, and indemnity-insurance products, for both groups and individuals. The term ''New West's Commercial Health Insurance Business'' does not include (1) New West's Medicare Advantage products and (2) New West's health-insurance contracts and policies covering employees and dependents of the Hospital Defendants.

O. ''Northern Montana Health Care'' means Northern Montana Health Care, Inc., a Montana non-profit corporation based in Havre, Montana, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their respective directors, officers, managers, agents, and employees.

P. ''PacificSource'' means PacificSource Health Plans, an Oregon non-profit corporation based in Springfield, Oregon.

Q. ''Provider Network'' means all of the health-care providers that have contracted with a particular health insurer to provide medical services.

R. ''St. Peter's'' means St. Peter's Hospital, a Montana non-profit corporation based in Helena, Montana, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their respective directors, officers, managers, agents, and employees.

III. Applicability

A. This Final Judgment applies to Blue Cross, New West, and the Hospital Defendants, as defined above, and to all other persons in active concert or participation with any of them who receive actual notice of this Final Judgment by personal service or otherwise.

B. If, before complying with Sections IV and VI of this Final Judgment, Defendants sell or otherwise dispose of all or substantially all of their assets or of lesser business units that include the Divestiture Assets, they must require the purchaser to be bound by the provisions of this Final Judgment. Defendants do not need to obtain such an agreement from the Acquirer of the assets divested pursuant to this Final Judgment.

IV. Divestitures

A. New West and the Hospital Defendants are ordered, within 30 calendar days after the filing of the Complaint in this matter, to divest the Divestiture Assets in a manner consistent with this Final Judgment (1) To an Acquirer acceptable to the United States in its sole discretion, after consultation with the State of Montana; and (2) on terms acceptable to the United States in its sole discretion, after consultation with the State of Montana. The United States in its sole discretion, after consultation with the State of Montana, may grant one extension of this time period not to exceed 30 calendar days in total, and shall notify the Court in such circumstances.

B. New West and the Hospital Defendants must obtain all regulatory approvals necessary for such divestitures as expeditiously as possible. If applications for approval have been filed with the appropriate governmental units within 5 calendar days after the United States has provided written notice, pursuant to Section VII(C), that it does not object to a proposed divestiture, but these required approvals have not been issued before the end of the period permitted for Divestiture in Section IV(A), the United States will extend the period for Divestiture until five business days after all necessary government approvals have been received.

C. New West and the Hospital Defendants must permit prospective Acquirers of the Divestiture Assets to have reasonable access to New West personnel and access to any and all financial, operational, or other documents and information customarily provided as part of a due-diligence process.

D. New West and the Hospital Defendants must divest New West's fully-insured Commercial Health Insurance Business to the Acquirer through a bulk-reinsurance agreement, as provided by Mont. Code Ann. § 33–2–1212. New West and the Hospital Defendants must divest the remainder of New West's Commercial Health Insurance Business, including its administrative-services-only contracts, to the Acquirer at the same time as they divest New West's fully-insured business.

E. The Divestiture must be accomplished in such a way as to satisfy the United States in its sole discretion, after consultation with the State of Montana, that the Divestiture Assets can and will be used by the Acquirer as part

of a viable, ongoing business engaged in the sale of commercial health insurance, and that the Divestiture will remedy the competitive harm alleged in the Complaint. The Divestiture must be:

(1) made to an Acquirer that, in the United States' sole judgment, after consultation with the State of Montana, has the intent and capability (including the necessary managerial, operational, technical, and financial capability) to compete effectively in the sale of commercial health insurance in the Billings Metropolitan Statistical Area (''MSA''), Bozeman Micropolitan Statistical Area (''MiSA''), Helena MiSA, and Missoula MSA; and

(2) accomplished so as to satisfy the United States, in its sole discretion, after consultation with the State of Montana, that none of the terms of any agreement between New West or the Hospital Defendants and the Acquirer gives New West and the Hospital Defendants the ability unreasonably to raise the Acquirer's costs, to lower the Acquirer's efficiency, or otherwise to interfere with the Acquirer's ability to compete effectively.

F. New West and the Hospital Defendants must first attempt to sell the Divestiture Assets to PacificSource.

G. For three years, the Hospital Defendants must contract to participate in the Acquirer's provider network on terms that are substantially similar to the Hospital Defendants' existing contractual terms with New West as determined by the United States in its sole discretion, after consultation with the State of Montana.

H. At the Acquirer's option, New West and the Hospital Defendants must use their best efforts to assign to the Acquirer all contracts for the provision of medical services that New West has with health-care providers that are not controlled by the Hospital Defendants.

I. For three years, at the Acquirer's option, New West must also lease its provider network to the Acquirer. Until the expiration of such a lease, New West and the Hospital Defendants must use their best efforts to maintain New West's provider network, including maintaining contracts, with substantially similar terms, with all health-care providers in New West's provider network as of August 1, 2011.

J. New West and the Hospital Defendants must use their best efforts to maintain New West's contracts for coverage of at least 14,600 enrollees in fully- or self-insured commercial health-insurance plans until the Divestiture Assets are transferred to the Acquirer. To encourage New West's management to meet this membership target, the Hospital Defendants and New West will fund an incentive pool of at least $50,000, which will be available to New West's management if they meet the membership target as of the closing date for the sale of the Divestiture Assets.

K. New West must provide the plaintiffs with bi-weekly reports on total commercial health-insurance membership until the divestitures required by this Final Judgment are complete.

L. New West and the Hospital Defendants must provide the Acquirer, the United States, and the State of Montana with information relating to the personnel involved in the operation of the Divestiture Assets to enable the Acquirer to make offers of employment. For a period of two years from the filing of the Complaint in this matter, New West may not hire or solicit to hire any such person who was hired by the Acquirer, unless the Acquirer has notified such person that the Acquirer does not intend to continue to employ the person. Until the divestiture is completed, Blue Cross may not solicit to hire any such person who was hired by the Acquirer.

M. At the Acquirer's option, and subject to approval by the United States, after consultation with the State of Montana, New West and the Hospital Defendants must provide transitional support services that are reasonably necessary for the Acquirer to operate the Divestiture Assets, including but not limited to medical-claims processing, appeals and grievances, call-center support, enrollment and eligibility services, access to form templates, pharmacy services, disease management, and quality-assurance services, and may charge the Acquirer commercially reasonable rates for these services. The Hospital Defendants and New West may not provide such transitional support services for more than 12 months from the date of the completion of the Divestiture unless the United States, after consultation with the State of Montana, shall otherwise approve.

N. To ensure an effective transition of the Divestiture Assets to the Acquirer, New West and the Hospital Defendants must cooperate and work with the Acquirer in transition planning and implementation of the transfer of the Divestiture Assets.

O. Defendants may not take any action that will impede in any way the permitting, operation, or divestiture of the Divestiture Assets.

P. New West and the Hospital Defendants must communicate and cooperate fully with the Acquirer to promptly identify and obtain all consents of government agencies necessary to divest the Divestiture Assets.

V. Injunctive Relief as to Blue Cross

A. Blue Cross may not, without providing 30 days' advance written notification to the Plaintiffs:

(1) Condition the right of any broker to sell Blue Cross health-insurance products based on whether the broker sells non-Blue Cross health-insurance products; or

(2) Require any broker to be, or agree with any broker that it will become, an exclusive broker for Blue Cross.

Provided, however, that this Section does not apply to brokers who are employees of Blue Cross or entities wholly or partially owned by Blue Cross. Provided, further, that nothing in this Final Judgment prohibits Blue Cross from terminating or refusing to appoint any broker, or dealing with brokers on any terms, so long as Blue Cross does not violate the prohibitions in this Section.

B. Blue Cross, without providing 30 days' advance written notification to the Plaintiffs, may not enter into, adopt, maintain, or enforce any term in any agreement that directly or indirectly:

(1) Prohibits or discourages a health-care provider from (a) Participating in another health insurer's provider network or (b) negotiating or contracting with another health insurer; or

(2) Conditions the price that Blue Cross will pay a health-care provider, or other contract term, on whether the provider participates in another health insurer's provider network.

C. Blue Cross, without providing 30 days' advance written notification to the Plaintiffs, may not enter into, adopt, maintain, or enforce any most-favored-nation provision in any agreement with a health-care provider.

D. Within 30 days of receiving the notice required by Sections V(A)–(C) of this Final Judgment, representatives of the Antitrust Division may issue a Civil Investigative Demand (''CID''), pursuant to 15 U.S.C. 1311–14, for additional information or documentary material relevant to the notification. The Antitrust Division may share the information and documentary material produced in response to the CID with the State of Montana. If the Antitrust Division issues a CID, Blue Cross may not enter into, adopt, maintain, or enforce the notified agreement until 30 calendar days after certifying compliance with the CID.

E. Nothing in this Final Judgment prohibits Blue Cross from undertaking the actions described in Sections V(A)–(C), provided that Blue Cross provides the required notice and, if necessary,

waits for the expiration of the periods described in Section V(D).

F. This Section expires six years from the date of entry of the Final Judgment.

VI. Appointment of Trustee

A. If New West and the Hospital Defendants have not divested the Divestiture Assets within the time period specified in Section IV(A) and (B), they must notify the United States of that fact in writing. Upon application of the United States, the Court shall appoint a trustee selected by the United States and approved by the Court to effect the divestiture of the Divestiture Assets.

B. After the appointment of a trustee becomes effective, only the trustee may have the right to sell the Divestiture Assets. The trustee will have the power and authority to accomplish the divestiture to an Acquirer acceptable to the United States, after consultation with the State of Montana, at such price and on such terms as are then obtainable upon reasonable effort by the trustee, subject to the provisions of Sections IV, VI, and VII of this Final Judgment, and will have such other powers as this Court deems appropriate. Subject to Section VI(D) of this Final Judgment, the trustee may hire at the cost and expense of New West and the Hospital Defendants any investment bankers, attorneys, or other agents, who shall be solely accountable to the trustee, reasonably necessary in the trustee's judgment to assist in the divestiture.

C. Defendants may not object to a sale by the trustee on any ground other than the trustee's malfeasance. Any such objections by Defendants must be conveyed in writing to the United States, the State of Montana, and the trustee within 10 calendar days after the trustee has provided the notice required under Section VII.

D. The trustee must serve at the cost and expense of New West and the Hospital Defendants, on such terms and conditions as the United States approves, and must account for all monies derived from the sale of the assets sold by the trustee and all costs and expenses so incurred. After approval by the Court of the trustee's accounting, including fees for its services and those of any professionals and agents retained by the trustee, all remaining money shall be paid to New West and the trust shall then be terminated. The compensation of the trustee and any professionals and agents retained by the trustee shall be reasonable in light of the value of the Divestiture Assets and based on a fee arrangement providing the trustee with an incentive based on the price and terms of the divestiture and the speed with which it is accomplished, but timeliness is paramount.

E. New West and the Hospital Defendants must use their best efforts to assist the trustee in accomplishing the required divestiture. The trustee and any consultants, accountants, attorneys, and other persons retained by the trustee must have full and complete access to the personnel, books, records, and facilities relating to the Divestiture Assets, and New West and the Hospital Defendants must develop financial and other information relevant to such business as the trustee may reasonably request, subject to reasonable protection for trade secret or other confidential research, development, or commercial information. Defendants may not take any action to interfere with or to impede the trustee's accomplishment of the divestiture.

F. After its appointment, the trustee must file monthly reports with the United States, the State of Montana, and the Court setting forth the trustee's efforts to accomplish the divestiture ordered under this Final Judgment. To the extent that such reports contain information that the trustee deems confidential, such reports may not be filed in the public docket of the Court. Such reports must include the name, address, and telephone number of each person who, during the preceding month, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring any interest in the Divestiture Assets, and must describe in detail each contact with any such person. The trustee must maintain full records of all efforts made to divest the Divestiture Assets.

G. If the trustee has not accomplished the divestiture ordered under this Final Judgment within six months after its appointment, the trustee must promptly file with the Court a report setting forth (1) the trustee's efforts to accomplish the required divestiture, (2) the reasons, in the trustee's judgment, why the required divestiture has not been accomplished, and (3) the trustee's recommendations. To the extent that such reports contain information that the trustee deems confidential, such reports may not be filed in the public docket of the Court. The trustee must at the same time furnish such report to the United States, which shall have the right to make additional recommendations consistent with the purpose of the trust. The Court thereafter shall enter such orders as it deems appropriate to carry out the purpose of the Final Judgment. The Court may, if necessary and requested by the United States, extend the trust and the term of the trustee's appointment by a period no longer than six months. If at the end of all extensions of the trustee's term, the trustee has not accomplished the divestiture, then New West and the Hospital Defendants will have no further obligations to preserve the divestiture assets as required by Section V of the Asset Preservation Stipulation and Order in this matter.

VII. Notice of Proposed Divestiture

A. Within two business days following execution of a definitive divestiture agreement, New West and the Hospital Defendants, or the trustee, whichever is then responsible for effecting the divestiture required herein, must notify the United States and the State of Montana of any proposed divestiture required by Section IV or VI of this Final Judgment. If the trustee is responsible, it must similarly notify Defendants. The notice must set forth the details of the proposed divestiture and list the name, address, and telephone number of each person not previously identified who offered or expressed an interest in or desire to acquire any ownership interest in the Divestiture Assets, together with full details of the same.

B. Within five business days of receipt by the United States and the State of Montana of such notice, the United States may request from Defendants, the proposed Acquirer, any other third party, or the trustee, if applicable, additional information concerning the proposed divestiture, the proposed Acquirer, and any other potential Acquirer. Defendants and the trustee must furnish any additional information requested within five business days of the receipt of the request, unless the parties shall otherwise agree.

C. Within 15 calendar days after receipt of the notice or within 10 calendar days after the United States has been provided the additional information requested from Defendants, the proposed Acquirer, any third party, and the trustee, whichever is later, the United States must provide written notice to Defendants and the trustee, if there is one, stating whether or not it objects to the proposed divestiture. If the United States provides written notice that it does not object, the divestiture may be consummated, subject only to Defendants' limited right to object to the sale under Section VI(C) of this Final Judgment. Absent written notice that the United States does not object to the proposed Acquirer or upon objection by the United States, a

divestiture proposed under Section IV or Section VI may not be consummated. Upon objection by Defendants under Section VI(C), a divestiture proposed under Section VI may not be consummated unless approved by the Court.

VIII. Financing

Defendants may not finance all or any part of any Purchase made pursuant to Section IV or VI of this Final Judgment.

IX. Asset Preservation

Until the divestiture required by this Final Judgment has been accomplished, Defendants must take all steps necessary to comply with the Asset Preservation Stipulation and Order entered by this Court. Defendants may not take any action that will jeopardize the divestiture ordered by this Court. Provided, however, that nothing in this Final Judgment precludes Blue Cross from competing for New West's commercial health-insurance customers, before or after the sale of the divestiture assets.

X. Affidavits and Records

A. Within 10 calendar days of the filing of the Complaint in this matter, and every 10 calendar days thereafter until the divestiture has been completed under Section IV or VI, New West and the Hospital Defendants must deliver to the United States and the State of Montana an affidavit as to the fact and manner of its compliance with Section IV or VI of this Final Judgment. Each such affidavit must include the name, address, and telephone number of each person who, during the preceding 10 calendar days, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the Divestiture Assets, and must describe in detail each contact with any such person during that period. Each such affidavit must also include a description of the efforts Defendants have taken to solicit buyers for the Divestiture Assets, and to provide required information to prospective Acquirers, including the limitations, if any, on such information. Assuming that the information set forth in the affidavit is true and complete, any objection by the United States, after consultation with the State of Montana, to information provided by Defendants, including limitation on information, must be made within 14 calendar days of receipt of such affidavit.

B. Within 10 calendar days of the filing of the Complaint in this matter, Defendants must deliver to the United States and the State of Montana an affidavit that describes in reasonable detail all actions that Defendants have taken and all steps that Defendants have implemented on an ongoing basis to comply with Section IX of this Final Judgment. Defendants must deliver to the United States and the State of Montana an affidavit describing any changes to the efforts and actions outlined in Defendants' earlier affidavits filed pursuant to this section within 10 calendar days after the change is implemented.

C. New West and the Hospital Defendants must keep all records of all efforts made to preserve and divest the Divestiture Assets until one year after such divestiture has been completed.

XI. Compliance Inspection

A. For the purposes of determining or securing compliance with this Final Judgment, or of determining whether the Final Judgment should be modified or vacated, and subject to any legally recognized privilege, from time to time authorized representatives of the United States Department of Justice, including persons retained by the United States, must, upon written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to Defendants, be permitted:

(1) Access during Defendants' office hours to inspect and copy, or at the option of the United States, to require Defendants to provide hard copy and electronic copies of, all books, ledgers, accounts, records, data, and documents in the possession, custody, or control of Defendants, relating to any matters contained in this Final Judgment; and

(2) To interview, either informally or on the record, Defendants' officers, employees, or agents, who may have their individual counsel present, regarding these matters. The interviews must be subject to the reasonable convenience of the interviewee and without restraint or interference by Defendants.

B. Upon the written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, Defendants must submit written reports, or responses to written interrogatories, under oath if requested, relating to any of the matters contained in this Final Judgment.

C. The United States may share information or documents obtained under Section XI with the State of Montana.

D. No information or documents obtained by the means provided in this section may be divulged by the United States or the State of Montana to any person other than an authorized representative of the executive branch of the United States, except in the course of legal proceedings to which the United States or the State of Montana is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

E. If at the time information or documents are furnished by Defendants to the United States, Defendants represent and identify in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure, and Defendants mark each pertinent page of such material, ''Subject to claim of protection under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure,'' then the United States must give Defendants 10 calendar days notice before divulging such material in any legal proceeding (other than grand jury proceedings).

XII. No Reacquisition

Defendants may not acquire or reacquire any part of the Divestiture Assets during the term of this Final Judgment.

XIII. Retention of Jurisdiction

This Court retains jurisdiction to enable any party to this Final Judgment to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

XIV. Expiration of Final Judgment

Unless this Court grants an extension, this Final Judgment shall expire 10 years from the date of its entry.

XV. Public-Interest Determination

Entry of this Final Judgment is in the public interest. The parties have complied with the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16, including making copies available to the public of this Final Judgment, the Competitive Impact Statement, and any comments thereon and the United States' response to comments. Based upon the record before the Court, which includes the Competitive Impact Statement and any comments and response to comments filed with the Court, entry of this Final Judgment is in the public interest.

Date: _____

Court approval subject to procedures set forth in the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16.

United States District Judge

[FR Doc. 2011–29656 Filed 11–16–11; 8:45 am]

BILLING CODE 4410–11–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 10–60]

Robert G. Crummie, M.D.; Decision and Order

On July 9, 2010, Administrative Law Judge (ALJ) Timothy D. Wing, issued the attached recommended decision. The Respondent did not file exceptions to the decision.

Having reviewed the record in its entirety including the ALJ's recommended decision, I have decided to adopt the ALJ's rulings, findings of fact, conclusions of law, and recommended Order.

Order

Pursuant to the authority vested in me by 21 U.S.C. 823(f) and 824(a), as well as 28 CFR 0.100(b) and 0.104, I order that DEA Certificate of Registration, BC2964965, issued to Robert G. Crummie, M.D., be, and it hereby is, revoked. I further order that any pending application of Robert G. Crummie, M.D., to renew or modify his registration, be, and it hereby is, denied. This Order is effective immediately.[1]

Dated: November 8, 2011.

Michele M. Leonhart,

Administrator.

Christine Menendez, Esq., for the Government.

Ryan G. Cason Crummie, Esq., for the Respondent.

Opinion and Recommended Decision of the Administrative Law Judge

Timothy D. Wing, Administrative Law Judge. This proceeding is an adjudication governed by the Administrative Procedure Act, 5 U.S.C. 551 *et seq.,* to determine whether Respondent's Certificate of Registration with the Drug Enforcement Administration (DEA) should be revoked and any pending applications for renewal or modification of that registration denied. Without this registration, Respondent, Robert G. Crummie, M.D., would be unable to lawfully possess, prescribe, dispense, or otherwise handle controlled substances.

On May 27, 2010, the Deputy Assistant Administrator, Office of Diversion Control, DEA, issued an Order to Show Cause why the DEA should not revoke Respondent's DEA Certificate of Registration, BC2964965, on the ground that Respondent lacked authority to handle controlled substances in North Carolina, the state in which he maintained his DEA registration. Respondent, through counsel, timely requested a hearing on the issues raised in the Order to Show Cause.

The Government subsequently filed a Motion for Summary Disposition, asserting that on March 17, 2010, the North Carolina Medical Board indefinitely suspended Respondent's medical license, effective April 2, 2010, and that Respondent consequently did not have authority to possess, dispense or otherwise handle controlled substances in North Carolina, the jurisdiction in which he maintained his DEA registration. The Government contended that such state authority is a necessary condition for DEA registration and therefore asked that I grant the Government's motion for summary disposition and recommend to the Deputy Administrator that Respondent's registration be revoked and any pending application for renewal or modification of such registration be denied. Counsel for the Government attached to the motion two supporting documents: (1) An Affidavit of Stephanie A. Evans, DEA Diversion Investigator, affirming that she had confirmed with the North Carolina Medical Board that Respondent's medical license had not been reinstated as of July 9, 2010 and (2) a copy of the North Carolina Medical Board's Findings of Fact, Conclusions of Law and Order of Discipline regarding Respondent, indicating that Respondent's North Carolina medical license was suspended indefinitely, beginning April 2, 2010.

On July 14, 2010, I issued an order directing Respondent to reply to the Government's motion no later than July 20, 2010. On July 20, 2010, Respondent filed a Motion for Enlargement of Time to respond to the Government's motion, requesting an extension of time until August 20, 2010, on the grounds that counsel for Respondent needed ''additional time to consult with [Respondent] and prepare a response to the Government's motion.'' I afforded Respondent an extension of time until July 29, 2010, to reply to the Government's motion. To date, Respondent has failed to file a response to the Government's motion or to request an additional extension of time.

Discussion

Loss of state authority to engage in the practice of medicine and to handle controlled substances is grounds to revoke a practitioner's registration under 21 U.S.C. 824(a)(3). Accordingly, this agency has consistently held that a person may not hold a DEA registration if he is without appropriate authority under the laws of the state in which he does business. *See Scott Sandarg, D.M.D.,* 74 FR 17528 (DEA 2009); *David W. Wang, M.D.,* 72 FR 54297 (DEA 2007); *Sheran Arden Yeates, M.D.,* 71 FR 39130 (DEA 2006); *Dominick A. Ricci, M.D.,* 58 FR 51104 (DEA 1993); *Bobby Watts M.D.,* 53 FR 11919 (DEA 1988). In the instant case, the Government asserts, and Respondent does not deny, that Respondent's North Carolina medical license is indefinitely suspended.

Summary disposition is warranted if the period of suspension is temporary, or if there is the potential for reinstatement of state authority because ''revocation is also appropriate when a state license had been suspended, but with the possibility of future reinstatement.'' *Stuart A. Bergman, M.D.,* 70 FR 33193 (DEA 2005); *Roger A. Rodriguez, M.D.,* 70 FR 33206 (DEA 2005).

It is well-settled that when no question of fact is involved, or when the material facts are agreed upon, a plenary, adversarial administrative proceeding is not required, under the rationale that Congress does not intend administrative agencies to perform meaningless tasks. *See Layfe Robert Anthony, M.D.,* 67 FR 35582 (DEA 2002); *Michael G. Dolin, M.D.,* 65 FR 5661 (DEA 2000). *See also Philip E. Kirk, M.D.,* 48 FR 32887 (DEA 1983), aff'd *sub nom. Kirk* v. *Mullen,* 749 F.2d 297 (6th Cir. 1984); *Puerto Rico Aqueduct and Sewer Auth.* v. *EPA,* 35 F.3d 600, 605 (1st Cir. 1994).

As noted above, there remain no material disputed facts. The Government asserted with uncontroverted evidence that Respondent is without state authority to handle controlled substances in North Carolina at the present time. In these circumstances, I conclude that further delay in ruling on the Government's motion for summary disposition is not warranted. I therefore find that the motion for summary disposition is properly entertained and granted.

Further, inasmuch as Respondent has failed to respond to the directives issued in this proceeding, and has not shown good cause for such failure, I also find that Respondent has waived his right to a hearing under 21 CFR 1301.43(d).

[1] Based on the findings of the North Carolina Medical Board, which led it to impose an indefinite suspension of Respondent's state medical license, I conclude that the public interest requires that this Order be made effective immediately. *See* 21 CFR 1316.67.