DEPARTMENT OF JUSTICE

Antitrust Division

United States v. Evangelical Community Hospital, et ano. 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, Stipulation, and Competitive Impact Statement have been filed with the United States District Court for the Middle District of Pennsylvania in *United States of America* v. *Evangelical Community Hospital and Geisinger Health,* Civil Action No. 4:20–cv–01383–MWB. On August 5, 2020, the United States filed a Complaint alleging that Geisinger's partial acquisition of Evangelical would violate Section 1 of the Sherman Act, 15 U.S.C. 1 and Section 7 of the Clayton Act, 15 U.S.C. 18. The proposed Final Judgment requires Geisinger and Evangelical to amend the transaction to cap Geisinger's ownership interest in Evangelical at a 7.5% passive interest and to eliminate additional entanglements between the two competing hospitals.

Copies of the Complaint, proposed Final Judgment, and Competitive Impact Statement are available for inspection on the Antitrust Division's website at *http://www.justice.gov/atr* and at the Office of the Clerk of the United States District Court for the Middle District of Pennsylvania. 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, including the name of the submitter, and responses thereto, will be posted on the Antitrust Division's website, filed with the Court, and, under certain circumstances, published in the **Federal Register**. Comments should be submitted in English and directed to Eric D. Welsh, Chief, Healthcare and Consumer Products Section, Antitrust Division, Department of Justice, 450 Fifth Street NW, Suite 4100, Washington, DC 20530.

Suzanne Morris,

Chief, Premerger and Division Statistics, Antitrust Division.

United States District Court for the Middle District of Pennsylvania

United States of America, Plaintiff, V. *Geisinger Health, and Evangelical Community Hospital, Defendants.*

Civil Action No.:

Complaint

The United States of America brings this civil antitrust action to enjoin Geisinger Health's partial acquisition of Evangelical Community Hospital. Defendants' agreement creates substantial financial entanglements between these close competitors and reduces both hospitals' incentives to compete aggressively. As a result, this transaction is likely to substantially lessen competition and unreasonably restrain trade, resulting in harm to patients in the form of higher prices, lower quality, and reduced access to high-quality inpatient hospital services in central Pennsylvania.

I. Introduction

1. Geisinger and Evangelical are, respectively, the largest health system and largest independent community hospital in a six-county region in central Pennsylvania. For many patients in this region, Geisinger and Evangelical are close substitutes for the provision of inpatient general acute-care services. As the CEO of Evangelical explained in an interview describing the transaction with Geisinger, ''if you don't get your care here [at Evangelical], you get it there [at Geisinger].''

2. Geisinger competes for virtually all of the services that Evangelical provides, with Geisinger also offering some high-end, specialized services that Evangelical does not offer. This competition between Geisinger and Evangelical has improved the quality, availability, and price of inpatient general acute-care services in the region.

3. In late 2017, Evangelical announced to Geisinger and other industry participants that it was considering selling itself or entering into a strategic partnership with another hospital system or healthcare entity. This announcement raised concerns for Geisinger, which had long feared that Evangelical could partner with a hospital system or insurer to compete even more intensely with Geisinger. A more effective competitor could put Geisinger's revenues at risk.

4. In an effort to forestall that outcome and eliminate existing competition from Evangelical, Geisinger sought to acquire Evangelical in its entirety, making a bid for its rival that was substantially larger than any comparable offer. During negotiations, however, both Geisinger and Evangelical recognized that a merger between the two hospitals would likely be blocked on antitrust grounds. So instead, Defendants tried a strategy to avoid antitrust scrutiny.

5. On February 1, 2019, Defendants agreed to a partial acquisition—self-styled as a ''Collaboration Agreement.'' As part of this agreement, Geisinger acquired a 30% interest in Evangelical. In exchange, Geisinger pledged to provide $100 million to Evangelical for investment projects and intellectual property licensing.

6. The $100 million pledge, however, was not made altruistically and is certainly not without strings. The partial-acquisition agreement ties Geisinger and Evangelical together in a number of ways, fundamentally altering their relationship as competitors and curtailing their incentives to compete independently for patients. Patients and other purchasers of healthcare in central Pennsylvania likely will be harmed as a result of this diminished competition.

II. Jurisdiction and Venue

7. This Court has subject-matter jurisdiction under Section 4 of the Sherman Act, 15 U.S.C. 4, Section 15 of the Clayton Act, 15 U.S.C. 25, and 28 U.S.C. 1331, 1337, and 1345.

8. Defendants are engaged in activities that substantially affect interstate commerce. Defendants provide healthcare services for which employers, insurers, and individual patients remit payments across state lines. Defendants also purchase supplies and equipment that are shipped across state lines, and they otherwise participate in interstate commerce.

9. Venue is proper under Section 12 of the Clayton Act, 15 U.S.C. 22, and under 28 U.S.C. 1391(b) and (c).

10. This Court has personal jurisdiction over each Defendant. Geisinger and Evangelical are both incorporated in the Commonwealth of Pennsylvania with their principal place of business located in the Middle District of Pennsylvania.

III. Defendants and the Agreement

11. Geisinger Health is an integrated healthcare provider of hospital and physician services. Geisinger operates 12 hospitals in Pennsylvania and New Jersey and owns physician practices throughout Pennsylvania, with a significant presence in the central and northeastern portions of the state. Geisinger also operates urgent-care centers and other outpatient facilities in Pennsylvania and New Jersey. As of April 2020, the Geisinger system employed approximately 32,000 employees, including 1,800 physicians.

12. Geisinger's flagship hospital, Geisinger Medical Center, is located in Danville, Pennsylvania, and is licensed to accommodate 574 overnight patients. Geisinger operates three other hospitals in the area: Geisinger Shamokin (70 beds), Geisinger Jersey Shore (25 beds),

and Geisinger Bloomsburg (76 beds). In addition, Geisinger operates several urgent-care centers and other outpatient facilities within the area.

13. Geisinger also operates Geisinger Health Plan, an insurance company that sells commercial health insurance, Medicare, and Medicaid products. Geisinger Health Plan has approximately 600,000 members.

14. Geisinger has a history of acquiring community hospitals in Pennsylvania. From 2012 to 2017, Geisinger acquired six hospitals in Pennsylvania. Three of the four hospitals that Geisinger owns in the area, Shamokin, Jersey Shore, and Bloomsburg, were formerly independent hospitals, and two of those hospitals were the subject of previous antitrust challenges.

15. Evangelical Community Hospital is an independent community hospital in Lewisburg, Pennsylvania. The hospital is licensed to accommodate 132 overnight patients. As of December 2018, Evangelical employed approximately 1,800 individuals and had 170 physicians on staff. Evangelical also owns a number of physician practices in central Pennsylvania and operates an urgent-care center and several other outpatient facilities.

A. Defendants Are Close Competitors in Central Pennsylvania

16. Geisinger and Evangelical both provide inpatient general acute-care services to patients in central Pennsylvania and together provide care for the vast majority of patients living in Danville and Lewisburg, Pennsylvania, and the surrounding communities.

17. Defendants are particularly close competitors in the six-county area in central Pennsylvania comprised of Union, Snyder, Northumberland, Montour, Lycoming, and Columbia counties.

18. This six-county area has benefitted from competition between Geisinger and Evangelical. Geisinger and Evangelical are each other's closest competitor for many services and compete on dimensions that include quality, scope of services, and price. According to a Geisinger Health Plan executive, Geisinger and Evangelical ''care for the same people and populations.'' Geisinger and Evangelical recognize that they compete closely to provide inpatient general acute-care services, which include orthopedics, women's health, cardiac, and general surgery services. Geisinger and Evangelical also recognize that they compete to win patients at the expense of the other.

19. The competition between Geisinger and Evangelical to attract patients is reflected in their plans for capital investments. When planning for the future, competition between Geisinger and Evangelical affects the capital investments each chooses to make. For example, in 2016, when Evangelical's CEO was explaining to the hospital's board why she recommended constructing a new orthopedic facility, she said that Evangelical was ''vulnerable to GMC [Geisinger Medical Center] in orthopedics.'' Similarly, in considering capital expenditures for certain improvements to its facilities in 2018, Geisinger cited Evangelical's competitive activities.

20. Geisinger and Evangelical also compete against each other in their negotiations with insurers. For example, insurers have used Evangelical's lower prices for inpatient general acute-care services to negotiate lower prices for those services from Geisinger.

21. Geisinger and Evangelical also have engaged in direct price competition for members of several religious communities that include Amish and Mennonite practitioners, who Defendants refer to as the ''Plain Community.'' Members of the Plain Community generally pay their medical bills directly and do not rely on any form of health insurance. In 2018, for example, an Evangelical physician obtained, and circulated to Evangelical executives, Geisinger's then-current Plain Community discount program. After learning about Geisinger's newly lowered prices, Evangelical lowered its prices in response, and Evangelical's CFO sent a letter to members of the Plain Community with the new pricing ''[s]o that they would know that our rates were lower.'' Evangelical's CEO observed that Plain Community business ''has recently become more competitive as Geisinger has significantly reduced its prices,'' prompting Evangelical ''to reduce its prices to the Plain Community in order to remain competitive.''

B. Recognizing That a Full Merger Would Create an Illegal ''Monopoly,'' Geisinger Proposed a Partial Acquisition That Would Increase Coordination

22. As early as 2016, Geisinger had identified that ''[a]llignment'' with Evangelical would provide it with ''[d]efensive positioning against expansion by [UPMC] and/or affiliation with [another] competitor.'' When Geisinger learned that Evangelical had engaged in a process to find a strategic partner or acquirer, Geisinger was concerned that Evangelical would partner with a different hospital system.

23. Geisinger would have strongly preferred to fully acquire Evangelical and initially submitted a bid for a full acquisition, as it has done in the past with other community hospitals. Given the competition described above, however, Defendants quickly recognized that a full acquisition would likely violate the antitrust laws. Evangelical's CEO explained in a video interview that ''the state and federal government looks at these kinds of things for antitrust . . . and you can't create a monopoly. And so you know the reality of it is even if they wanted to, Geisinger would not have been able to acquire us.'' Geisinger's documents similarly note that a full acquisition of Evangelical ''[p]resented serious anti-trust concerns.''

24. Instead of a full merger, Geisinger and Evangelical concocted the complicated partial-acquisition agreement at issue in this case, in part, to avoid antitrust scrutiny. After the letter of intent for the agreement was signed, for example, a senior employee at Geisinger wrote that the agreement was ''[k]inda smart really'' because it ''[d]oes not require AG [Attorney General] approval.'' Nevertheless, the Antitrust Division learned of the agreement and opened an antitrust investigation shortly after the agreement was executed.

25. Initially, Defendants' partial-acquisition agreement was replete with provisions evidencing Geisinger's intent to substantially limit competition by controlling its close competitor and replacing competition with ''cooperation'' (as would occur in a full merger), such as Geisinger's right to appoint six members to the Evangelical board of directors, the potential for Geisinger to fund revenue lost by Evangelical, proposed joint ventures in areas where Defendants historically competed, and Geisinger's right to have a say in who would be Evangelical's Chief Executive Officer. As a senior Geisinger employee testified, ''one of Geisinger's objectives was to integrate . . . to the fullest extent possible.''

26. Defendants twice amended their partial-acquisition agreement in response to some of Plaintiff's concerns. Nevertheless, the provisions of the transaction illuminate Geisinger's motivation for doing this deal, which survives despite these amendments. More importantly, the anticompetitive effects of the agreement also survive. The amendments simply do not rectify the fundamental problems with the agreement: Geisinger has acquired a significant ownership interest in its close competitor and imposed significant entanglements between the

two, likely leading to an impermissible substantial lessening of competition between Geisinger and Evangelical.

27. As with a full merger, this partial-acquisition transaction would lessen competition between Geisinger and Evangelical as they cooperate and look for ''wins'' for both firms. As Evangelical's CEO described in an interview discussing the deal, ''there's an economic principle called co-opetition. And you can cooperate, and you can compete. And as long as both sides find wins, it works.'' Such statements are predictive of how these close competitors are likely to behave if this transaction is allowed to proceed: They will coordinate their activity to ''find wins'' at the expense of robust competition. Consumers will be on the losing end of this bargain as prices increase and access to high-quality services is diminished.

C. The Transaction Is Likely to Substantially Lessen Competition Between Geisinger and Evangelical

28. Defendants' transaction links Geisinger and Evangelical together in a number of ways that fundamentally alter the relationship between them, reducing their incentives to attract all patients away from each other by competing on the quality, scope, and availability of inpatient general acute-care services. The agreement also is likely to lead Geisinger to raise prices to commercial insurers and other purchasers of inpatient general acute-care services, resulting in harm to the consumer.

29. *Financial entanglement.* Under the agreement, Geisinger has acquired a 30% interest in Evangelical, its close rival. In exchange, Geisinger has committed to pay $100 million to Evangelical over the next several years and is poised to remain a critical source of funding to Evangelical for the foreseeable future. The $100 million consists of $90 million in cash—$88 million of which is earmarked for specified projects approved by Geisinger and $2 million of which is for unspecified projects that Geisinger must approve—and $10 million in attributed value for intellectual property that Geisinger would license to Evangelical.

30. These financial arrangements establish an indefinite partnership between Evangelical and Geisinger. As a senior Geisinger employee put it, through this investment, Evangelical is ''tied to us'' so ''they don't go to a competitor.'' As a result, Evangelical is likely to avoid competing to enhance the quality or scope of the services it offers, which would attract patients from Geisinger, its part owner.

31. This financial entanglement also reduces Geisinger's incentives to compete by investing in improvements that would attract patients from Evangelical. If Geisinger expands its services or improves the quality of its services in areas in which it competes with Evangelical, it would attract patients at Evangelical's expense, reducing the value of Geisinger's 30% interest in Evangelical.

32. Thus, as a result of this transaction, both Defendants have the incentive to pull their competitive punches—incentives that would not exist in the absence of the agreement.

33. *Improper influence.* The agreement also gives Geisinger influence over Evangelical, including over its ability to partner with others in the future. The agreement gives Geisinger rights of first offer and first refusal with respect to any future joint venture, competitively significant asset sale, or change-of-control transaction by Evangelical, which ensures that Geisinger will have the opportunity to interfere if Evangelical attempts to enter into any of these transactions with a healthcare entity other than Geisinger. These rights deter collaborations between Evangelical and other entities that compete with Geisinger because Geisinger is given advance notice and is able to delay or prevent the collaboration. Such collaborations are and have been an important dimension of quality competition among hospitals. For example, if Evangelical wanted to enter into a joint venture with a health system to enhance its cardiology services to better compete against Geisinger, Geisinger would receive advance notice and could exercise its rights of first offer or first refusal to attempt to prevent this competition.

34. Geisinger can also improperly influence Evangelical through its right to approve Evangelical's use of funds. The agreement allocates funds to Evangelical for specific projects or service-line initiatives in specified amounts (*e.g.,* $20 million for women's health initiatives), including $2 million for ''other mutually agreeable Strategic Project Investment projects.'' In addition, if Evangelical wants to spend any funds originating from Geisinger for purposes other than those described in the agreement, it needs Geisinger's approval. The transaction affords Geisinger the right to withhold that approval if it believes that the project would enable Evangelical to compete in a way that Geisinger does not like.

35. *Less independent expansion and more anticompetitive cooperation.* For years, Evangelical has independently expanded in a number of service lines that compete for patients against service lines offered by Geisinger. The agreement, however, lessens Evangelical's incentives to expand because it likely will not want to bite the hand that feeds it by disrupting its relationship with Geisinger. Evangelical instead may seek to cooperate with Geisinger, effectively agreeing not to compete. For example, after the transaction with Geisinger, an Evangelical executive deleted recommendations to independently expand Evangelical's orthopedic offerings from a draft of Evangelical's three-year strategic plan and instead focused on Evangelical's partnership with Geisinger in this area. Orthopedics is a service line in which Evangelical historically has competed closely with Geisinger, to the benefit of patients who need orthopedic care. Even though Defendants claim to have abandoned the joint venture involving orthopedic services that was originally described in the partial-acquisition agreement, if this transaction is not rescinded or enjoined, they are more likely to avoid competition with each other as a result of their financial and other entanglements.

36. *Sharing of competitively sensitive information.* Further facilitating coordination, the transaction provides the means for Geisinger and Evangelical to share competitively sensitive information by enabling ongoing interactions between them. For example, the agreement provides the opportunity and means for Defendants to share competitively sensitive information when Evangelical requests that Geisinger disburse funds for strategic projects under the agreement because the agreement requires that these requests be ''supported by appropriate business plans.'' This request necessarily would require sharing competitively sensitive information.

37. The transaction also requires Evangelical to inform Geisinger about any strategic partnerships, joint ventures, or other major transactions with other hospital systems before those transactions are executed. In addition, Geisinger's approval rights over certain Evangelical capital improvements provide additional opportunities for Defendants to inappropriately share competitively sensitive information. These requirements will give Geisinger advance notice of its competitor's strategic moves and will facilitate discussions between Geisinger and Evangelical about Evangelical's strategic plans.

38. Evangelical has publicly stated that it already has cooperative

relationships with Geisinger, which increases the likelihood that Defendants will share such competitively sensitive information. In fact, Defendants have already shared important competitive information as part of the agreement. In discussions regarding joint ventures, Evangelical's CEO sent her counterpart at Geisinger a document that detailed her thinking on Evangelical's strategic growth options. The transaction continues to contemplate joint ventures between the Defendants, and the inappropriate sharing of competitively sensitive information is likely to continue.

39. *Increased prices.* The transaction also creates incentives for Geisinger to raise prices to commercial insurers and other purchasers of inpatient general-acute care services. Because Geisinger now owns 30% of Evangelical, it benefits when patients choose Evangelical instead of Geisinger because the value of its ownership interest in Evangelical increases. This ability to partially recover the value of lost patients through its ownership of Evangelical gives Geisinger greater bargaining leverage in negotiations with insurers and the ability to set higher prices for patients who lack insurance.

D. Defendants Have a History of Picking and Choosing When To Compete With Each Other, Which This Partial Acquisition Will Exacerbate, Deepening Coordination at the Expense of Competition

40. Although Geisinger and Evangelical are competitors for patients in central Pennsylvania, they have previously engaged in coordinated behavior, picking and choosing when to compete and when not to compete. This tendency to coordinate their competitive behavior is reflected by Evangelical's CEO's view of ''co-opetition.''

41. Defendants' prior acts of coordination, which are beneficial only to themselves, reinforce their dominant position for inpatient general acute-care services in central Pennsylvania. Defendants' coordination comes at the expense of greater competition and has taken various forms:

- Leaders from Defendants have had ''regular touch base meetings,'' in which they discussed a variety of topics, including strategic growth options.
- Geisinger has shared with Evangelical the terms of its loan forgiveness agreement, which Geisinger uses as an important tool to recruit physicians.
- Geisinger and Evangelical established a co-branded urgent-care center in Lewisburg that included a non-compete clause. As Evangelical's head of marketing explained to the board, the venture allowed Evangelical ''to build volume to our urgent care with Geisinger as a partner rather than potentially as a competitor.''

42. More concerning, senior executives of Defendants entered into an agreement not to recruit each other's employees—a so-called no-poach agreement. Defendants' no-poach agreement—an agreement between competitors, reached through verbal exchanges and confirmed by email from senior executives—reduces competition between them to hire hospital personnel and therefore directly harms healthcare workers seeking competitive pay and working conditions. Defendants have monitored each other's compliance with this unlawful agreement, and deviations have been called out in an effort to enforce compliance. For example, after learning that nurses at Evangelical were being recruited by Geisinger via Facebook, the CEO of Evangelical wrote to her counterpart at Geisinger, asking: ''Can you please ask that this stop[?] Very counter to what we are trying to accomplish.'' After receiving the message, the Geisinger executive forwarded the email to Geisinger's Vice President of Talent Acquisition, instructing her to ''ask your staff to stop this activity with Evangelical.'' Defendants' no-poach agreement works to insulate Defendants' businesses from competition for healthcare professionals.

43. This history of coordination between Defendants increases the risk that the additional entanglements created by the partial-acquisition agreement will lead Geisinger and Evangelical to coordinate even more closely at the expense of consumers when it is beneficial for them to do so. Moreover, this history makes clear that Defendants' self-serving representations about their intent to continue to compete going forward—despite all of the entanglements created by the partial-acquisition agreement—cannot be trusted.

IV. The Relevant Market

A. Inpatient General Acute-Care Services are a Relevant Product Market

44. A relevant product market in which to analyze the effects of the partial-acquisition agreement is the sale of inpatient general acute-care services. This product market encompasses a broad cluster of inpatient medical and surgical diagnostic and treatment services offered by both Geisinger and Evangelical that require an overnight hospital stay, including many orthopedic, cardiovascular, women's health, and general surgical services.

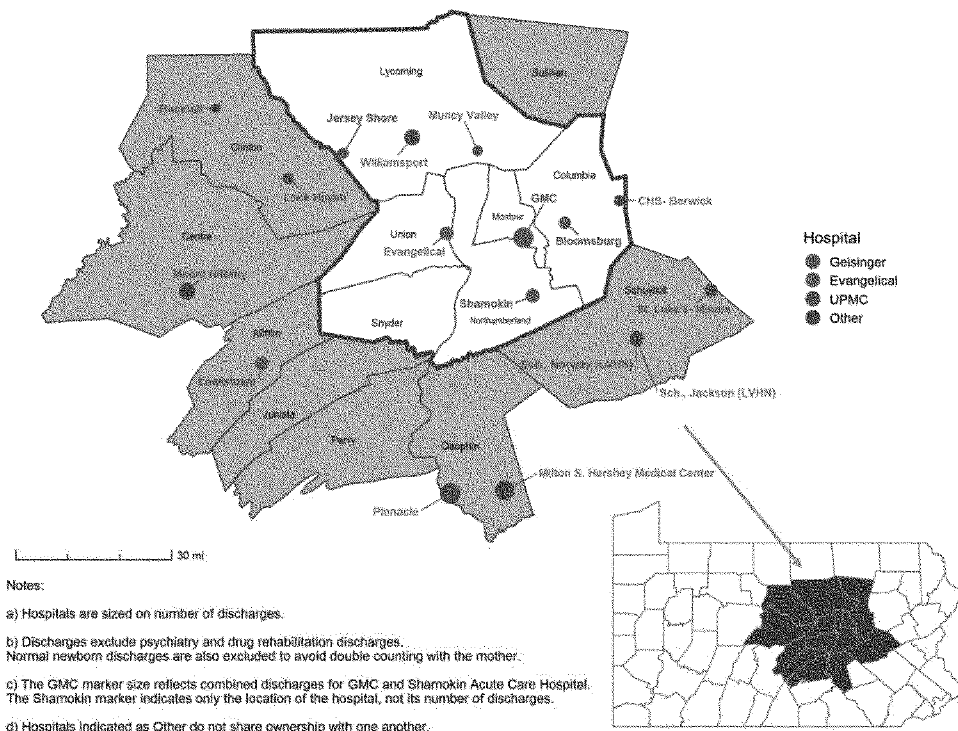
45. It is appropriate to evaluate the agreement's likely effects across the cluster of inpatient general acute-care services. These specific services are not substitutes for each other (*e.g.,* obstetrics care is not a substitute for hip replacement surgery), but it is appropriate to consider them within one relevant product market because the services are offered to patients under similar competitive conditions by similar market participants. There are no practical substitutes for this cluster of inpatient general acute-care services.

46. The relevant market excludes outpatient services and specialized services that are offered by Geisinger but not Evangelical because these services are offered under different competitive conditions than inpatient general acute-care services. Outpatient services are services that generally do not require an overnight hospital stay, and some outpatient services are provided in settings other than hospitals. Health plans and the vast majority of patients who use inpatient general acute-care services would not switch to outpatient services in response to a price increase. Similarly, the relevant market excludes the more specialized services that are offered by Geisinger but not Evangelical, such as certain advanced cancer services and organ transplants. These services treat medical conditions that require more specialized medical training or equipment, so patients have a different set of competitive options for them.

B. The Six-County Area in Central Pennsylvania is a Relevant Geographic Market

47. The relevant geographic market is no larger than the six-county area that comprises the Pennsylvania counties of Union, Snyder, Northumberland, Montour, Lycoming, and Columbia (the ''six-county area''). This area encompasses the cities of Danville and Lewisburg, where Geisinger Medical Center and Evangelical are respectively located. The hospitals are approximately 17 miles apart. The map below illustrates the relevant geographic market and the locations of the hospitals in it.

Hospitals in Central Pennsylvania



48. The Horizontal Merger Guidelines (''Merger Guidelines'') issued by the U.S. Department of Justice and Federal Trade Commission set forth the relevant test for geographic market definition: Whether a hypothetical monopolist of the relevant services within the geographic area could profitably impose a small but significant and non-transitory increase in price (here, reimbursement rates for inpatient general acute-care services). If so, the boundaries of that geographic area are an appropriate geographic market.

49. In this case, a hypothetical monopolist of inpatient general acute-care services within the six-county area could profitably impose a small but significant and non-transitory increase in the price of inpatient general acute-care services for at least one hospital in the six-county area. In general, patients choose to seek care close to their homes or workplaces, and residents of the six-county area also prefer to obtain inpatient general acute-care services locally. Thus, the availability of these services outside of the six-county area is not sufficient to prevent a hypothetical monopolist from profitably imposing a price increase.

50. In addition, health plans that offer healthcare networks in the six-county area do not consider hospitals outside of that area to be reasonable substitutes in their networks for hospitals within that area. Because residents of the six-county area strongly prefer to obtain inpatient general acute-care services from within the six-county area, a health plan that did not have hospitals in the six-county area likely could not successfully market a network to employers and patients in the area. Thus, a health plan would not exclude from its network a hypothetical monopolist of all inpatient general acute-care services in the six-county area in response to a small but significant price increase.

V. Anticompetitive Effects

A. The Market for Inpatient General Acute-Care Services in Central Pennsylvania is Highly Concentrated

51. Market concentration is one useful indicator of the level of competitive vigor in a market and of the likely competitive effects of a transaction involving competitors. The more concentrated a market, and the more a transaction would increase concentration in a market, the more likely it is that a transaction—even a partial acquisition—will result in a meaningful reduction in competition.

52. Geisinger currently accounts for approximately 55% of inpatient general acute-care services provided in the six-county area. Evangelical accounts for approximately 17% of that market. Defendants together thus account for approximately 71% of the relevant market. Defendants' internal documents report shares that are consistent with these shares for inpatient general acute-care services in general and for many service lines. The other competitor of significance in the six-county area is the University of Pittsburgh Medical Center (''UPMC''), which operates two hospitals in Williamsport and Muncy. UPMC also used to operate a hospital in Sunbury, but that hospital permanently closed on March 31, 2020.

53. The shares of total discharges of patients receiving inpatient general acute-care services from hospitals in the six-county area between the fourth quarter of 2018 and third quarter of 2019 are shown in the table below. These shares likely understate the Defendants' current shares because they include discharges from UPMC's Sunbury hospital, which has now closed, and some patients who would have used Sunbury are likely to choose Defendants' hospitals instead.

Hospital system	Share (%)
Geisinger	54.6
Evangelical	16.7
UPMC	26.7
Community Health System	2.0

54. As these shares illustrate, the relevant market is highly concentrated. The Merger Guidelines measure market concentration by using the Herfindahl-Hirschman Index (''HHI''), which is calculated by summing the square of

individual firms' market shares. Under the Merger Guidelines, a market is considered to be highly concentrated if the HHI is above 2,500. Defendants' partial-acquisition agreement would operate in a market that is already highly concentrated, with an HHI of 3,979.

55. Under the Merger Guidelines, a merger that significantly increases concentration in a highly concentrated market is presumed to be unlawful. A full merger between Geisinger and Evangelical would trigger the presumption of illegality under the Merger Guidelines by a wide margin, resulting in a post-merger HHI of 5,799 and an increase of 1,820. A partial acquisition that creates the incentive and ability for two close competitors to coordinate in such a highly concentrated market poses a similar danger to consumers.

B. The Partial Acquisition Will Diminish Evangelical's and Geisinger's Incentives To Compete Against Each Other for Patients

56. Geisinger is by far the largest health system in the six-county region and within central Pennsylvania. It already enjoys a competitive advantage over its smaller competitors. By allowing Geisinger to partially acquire Evangelical and creating substantial entanglements between the two hospitals, the agreement will likely substantially lessen competition as Evangelical will have less incentive to compete for patients against the Geisinger behemoth—its financial partner—than it would have had it remained independent and not partnered with its closest competitor.

57. Similarly, the transaction reduces Geisinger's incentives to compete for patients against Evangelical. Any patient that Geisinger attracts from Evangelical will diminish the value of Geisinger's interest in Evangelical, and Geisinger will also benefit from increasing coordination with its close rival.

58. Competition between hospitals like Geisinger and Evangelical benefits patients in a number of ways, including by providing convenient access to high quality services. Hospitals also compete to be included in health insurers' networks.

59. Hospitals compete to attract patients to their facilities by offering high quality care, a broad scope of services, amenities, convenience, customer service, and attention to patient satisfaction. To provide these services, hospitals expand service lines, hire specialists, family care physicians, and nurses, purchase modern equipment and technology, open specialized facilities, and continuously make other improvements. These investments improve access to healthcare, lower wait times, and improve the quality of care for all patients, including Medicare, Medicaid, and uninsured patients.

60. Anticompetitive effects arising out of this transaction are likely to occur from the combination of Geisinger's influence over Evangelical, Defendants' reduced incentives to expand and improve services, and the facilitation of information sharing and coordination between Geisinger and Evangelical. These anticompetitive effects are likely to lead to a reduction in the quality, scope, and availability of inpatient general acute-care services.

C. The Partial Acquisition Is Also Likely To Lead to Increased Health Insurance Prices

61. Hospitals compete for patients not only through the quality of the services they offer, but also through participation in health insurers' networks. Hospitals and insurers negotiate prices (called reimbursement rates) as part of their negotiations about whether, and under what conditions, a hospital will be included in an insurer's network. The bargaining positions of a hospital and an insurer during these negotiations depend on whether there are other nearby, comparable hospitals that are available to the insurer. Competition among hospitals limits any individual hospital's leverage with insurers and enables insurers to negotiate lower reimbursement rates and other terms that reduce healthcare costs. Less costly care benefits patients and their employers in the form of lower premiums, copays, and deductibles.

62. Even if Geisinger and Evangelical continue to negotiate separately with commercial health insurers, the partial-acquisition agreement creates incentives for Geisinger to increase its rates and enhances its ability to do so. Geisinger's incentive to raise its rates flows from its 30% interest in Evangelical. Before the partial acquisition, Geisinger did not benefit from patients going to Evangelical. With the agreement, Geisinger's 30% ownership of Evangelical now allows Geisinger to benefit when patients choose Evangelical because the value of Geisinger's ownership interest increases as a result of the profits that Evangelical earns. This dynamic gives Geisinger an incentive to raise its reimbursement rates to commercial insurers because the agreement increases Geisinger's bargaining leverage, allowing it to profitably impose a price increase. The agreement will thus result in higher healthcare costs for consumers.

63. Similarly, Geisinger's 30% interest in Evangelical reduces its incentive to compete aggressively with Evangelical on prices to the Plain Community. In the six-county area, hospitals compete directly on discounted prices offered to the Plain Community. Members of the Plain Community usually do not have commercial insurance and pay for medical services out of pocket. With the partial acquisition, if Geisinger raises prices to Plain Community members and some of those members choose Evangelical instead as a result, Geisinger still captures 30% of the value of the profits generated from the patients who chose Evangelical. In addition, the entanglements between Geisinger and Evangelical are likely to cause Evangelical to avoid directly competing against Geisinger on the prices it offers to the Plain Community, resulting in higher prices for those patients.

VI. Absence of Countervailing Factors

64. Geisinger's acquisition of a 30% stake in its close competitor is not reasonably necessary to achieve any of the benefits that Defendants tout in connection with this transaction. For example, Defendants claim the partial-acquisition agreement will improve Evangelical's electronic medical records system. But Evangelical could have licensed Geisinger's electronic medical records software without this transaction, and Defendants were in discussions to do so long before this transaction was under consideration.

65. Evangelical also could have obtained funds for capital improvements from sources other than Geisinger, its closest competitor. At the time Evangelical executed the agreement with Geisinger, it was in a strong financial position, had been profitable for the last five years, and already had decided that it had the financial wherewithal to move forward on the major capital improvement project that now has been funded in part by its competitor and partial owner.

66. Finally, Evangelical's placement in the most favored tier of Geisinger Health Plan's commercial insurance products does not require the partial-acquisition agreement. To the contrary, agreements between hospitals and insurers that offer favorable placement in commercial insurance products in exchange for favorable rates are common and do not require the entanglements created by the partial-acquisition agreement.

67. For these reasons, there are no transaction-specific efficiencies that outweigh the likely competitive harms

of the proposed transaction; indeed, there are no transaction-specific efficiencies to weigh against the harm.

68. In addition, entry or expansion into the relevant market is unlikely to eliminate the anticompetitive effects of the partial-acquisition agreement because entry and expansion are not likely to be timely, likely, or sufficient to offset the agreement's anticompetitive effects. The construction of a new hospital that offers inpatient general acute-care services would require significant time, expenditures, and risk. Moreover, the six-county area is unlikely to attract greenfield entry by a new hospital due to declining demand for inpatient general acute-care services and low population growth. Indeed, no new hospitals have been built in the six-county area for more than 10 years, and UPMC's Sunbury hospital closed in March 2020.

69. Enjoining the partial-acquisition will not require undue disruption of Defendants' businesses. Geisinger and Evangelical have not implemented many of the provisions of the agreement because, on October 1, 2019, they entered into a hold-separate agreement with the United States to maintain the status quo pending an investigation of the agreement by the Antitrust Division. The hold-separate agreement requires Geisinger and Evangelical to cease certain activities contemplated by the agreement, including making most expenditures, integrating IT systems, and planning joint ventures. The hold-separate agreement remains in force until this Court makes a final decision.

VII. Violations Alleged

Count I

(Section 1 of the Sherman Act)

70. Plaintiff alleges and incorporates paragraphs 1 through 69 of this complaint as if set forth fully herein.

71. Geisinger and Evangelical have market power in the sale of inpatient general acute-care services in the six-county area.

72. The partial-acquisition agreement is an agreement between Defendants to unreasonably restrain trade. The partial-acquisition agreement is a contract, combination, or conspiracy within the meaning of Section 1 of the Sherman Act, 15 U.S.C. 1.

Count II

(Section 7 of the Clayton Act)

73. Plaintiff alleges and incorporates paragraphs 1 through 72 of this complaint as if set forth fully herein.

74. The partial-acquisition agreement likely substantially lessens competition in the relevant geographic market for inpatient general acute-care services in violation of Section 7 of the Clayton Act, 15 U.S.C. 18.

75. Among other things, the partial-acquisition agreement has and is likely to continue to cause Defendants:

(a) To coordinate their competitive behavior with respect to inpatient general acute-care services;

(b) to increase their prices for inpatient general acute-care services to insurers, self-paying patients, and other purchasers of healthcare; and

(c) to reduce quality, service, and investment with respect to inpatient general acute-care services or to diminish future improvements in these areas.

VIII. Request for Relief

76. Plaintiff requests that:

(a) The agreement between Geisinger and Evangelical be adjudged to violate Section 1 of the Sherman Act, 15 U.S.C. 1, and Section 7 of the Clayton Act, 15 U.S.C. 18;

(b) the Court order (i) Defendants to rescind or be enjoined permanently from carrying out the subject agreement; (ii) Geisinger to divest to Evangelical its 30% ownership interest in Evangelical; and (iii) Defendants be permanently enjoined and restrained from carrying out any other transaction that would allow Geisinger to partially acquire Evangelical;

(c) Plaintiff be awarded the costs of this action; and

(d) Plaintiff be awarded any other relief that the Court deems just and proper.

Dated: August 5, 2020

Respectfully submitted,

FOR PLAINTIFF UNITED STATES OF AMERICA:

Makan Delrahim

Assistant Attorney General for Antitrust.

Bernard A. Nigro, Jr.

Principal Deputy Assistant Attorney General.

Kathleen S. O'Neill.

Senior Director of Investigations & Litigation.

Eric D. Welsh

Chief, *Healthcare and Consumer Products Section.*

Lee F. Berger
Cecilia Cheng
Chris S. Hong
David C. Kelly
Garrett Liskey
Natalie Melada
David M. Stoltzfus

Attorneys for the United States, U.S. Department of Justice, Antitrust Division, 450 5th Street NW, Suite 4100, Washington, DC 20530, Tel.: (202) 598–2698, Email: lee.berger@usdoj.gov.

David J. Freed

United States Attorney.

Richard D. Euliss

Assistant Unites States Attorney, DC 999166, United States Attorney's Office, 228 Walnut Street, 2nd Floor, P.O. Box 11754, Harrisburg, PA 17108–1754, Phone: 717–221–4462, Fax: 717–221–4493, Richard.D.Euliss@usdoj.gov.

United States District Court for the Middle District of Pennsylvania

United States of America, Plaintiff, vs. *Evangelical Community Hospital and Geisinger Health,* Defendants.

Civil Action No.: 4:20–cv–01383–MWB

[Proposed] Final Judgment

Whereas, Plaintiff, United States of America, filed its Complaint on August 5, 2020, the United States and Defendants, Geisinger Health and Evangelical Community Hospital, by their respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law, without this Final Judgment constituting any evidence against or admission by any party regarding any issue of fact or law, and without Defendants admitting liability, wrongdoing, or the truth of any allegations in the Complaint;

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

And whereas, the purpose of the proposed Final Judgment is to preserve competition for hospital services in central Pennsylvania and to ensure Evangelical and Geisinger remain independent competitors;

And whereas, Defendants agree to undertake certain actions and refrain from certain conduct for the purpose of remedying the anticompetitive effects of the Collaboration Agreement, as alleged in the Complaint.

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

The 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 7 of the Clayton Act, 15 U.S.C. 18 and Section 1 of the Sherman Act, 15 U.S.C. 1.

II. Definitions

A. ''Amended and Restated Collaboration Agreement'' means the ''Amended and Restated Collaboration Agreement'' entered into by Geisinger and Evangelical on February 18, 2021.

B. ''Back Office Systems'' means the following computer systems and their functional substitutes: Spok/WebXchange (electronic phonebook); Digital Control Systems/Micros (food services registers); Lawson Accounts Payable; Lawson Activities Mgmt (project accounting and activities-based costing); Lawson Asset Mgmt (depreciation and reporting requirements); Lawson General Ledger; Allscripts (data transfer); and Axiom.

C. ''Collaboration Agreement'' means the document titled ''Collaboration Agreement'' entered into by Evangelical and Geisinger on February 1, 2019.

D. ''Covered Person'' means (i) each employee or agent of each Defendant who has duties and responsibilities for overseeing the implementation of information technology systems that Geisinger may provide to Evangelical under Paragraph V.B. of this Final Judgment; (ii) the Chief Executive Officers of Defendants and each of their direct reports; and (iii) each director (including each member of the Boards of Directors) of each Defendant.

E. ''Defendants'' means Geisinger and Evangelical.

F. ''Epic'' means Epic Systems Corporation, a medical software company based in Verona, Wisconsin.

G. ''Evangelical'' means Defendant Evangelical Community Hospital, a non-profit community hospital located in Lewisburg, Pennsylvania, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

H. ''Existing Financial Payment'' means the combined payments of twenty million, three hundred thirty-four thousand twenty-three dollars ($20,334,023.00) paid by Geisinger to Evangelical, directly or indirectly.

I. ''Executive Leadership Personnel'' means any President, Chief Executive Officer, Chief Financial Officer, Chief Information Officer, Chief Operating Officer, Chief Strategy Officer, Chief Nursing Officer, Chief Human Resources Officer, Controller, Director, Executive Vice President, Vice President, and any other person with any direct or indirect input, influence, or control over any strategic or competitive decision.

J. ''Geisinger'' means Defendant Geisinger Health, a regional non-profit corporation with its headquarters in Danville, Pennsylvania, its successors and assigns, and its subsidiaries, including Geisinger Health Plan, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

K. ''Including'' means including but not limited to.

L. ''Miller Center Joint Venture'' means the Miller Center for Recreation and Wellness, a Pennsylvania non-profit corporation operating a recreation and wellness center in Lewisburg, Pennsylvania.

M. ''Ownership Interest'' means the seven-and-one-half percent (7.5%) ownership interest in Evangelical that Evangelical transferred to Geisinger in exchange for the Existing Financial Payment, based on Evangelical's valuation as of January 25, 2021.

N. ''Person'' means any natural person, trade association, corporation, company, partnership, joint venture, firm, association, proprietorship, agency, board, authority, commission, office, or other business or legal entity, whether private or governmental.

O. ''Pre-Existing Joint Ventures'' means the Keystone Accountable Care Organization, LLC, an organization of doctors, hospitals, and other healthcare providers that provides coordinated care to Medicare patients and Evangelical-Geisinger, LLC, the joint venture between Evangelical and Geisinger to provide student health services to Bucknell University.

III. Applicability

This Final Judgment applies to Defendants, as defined above, and 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.

IV. Prohibited Conduct

A. The Collaboration Agreement and all amendments, modifications, addenda or supplements, are null and void, with the exception of the Amended and Restated Collaboration Agreement.

B. Geisinger must not, directly or indirectly:

1. Appoint any directors to the Board of Directors of Evangelical;

2. make any financial contribution, payment, or commitment to Evangelical that would result in Geisinger obtaining any equity interest in Evangelical in excess of the Ownership Interest;

3. make any loan or extend any line of credit to Evangelical;

4. maintain or obtain any management, leadership, committee, board or other position at or with Evangelical that provides Geisinger with any direct or indirect input, influence, or control over any strategic or competitive decision to be made by Evangelical, except for any such positions within Pre-Existing Joint Ventures or the Miller Center Joint Venture;

5. maintain or obtain any right of first offer or right of first refusal with respect to any proposal or offer involving Evangelical, including offers or proposals to acquire, affiliate or enter into a joint venture with Evangelical, or otherwise influence or seek to influence any decision to be made by Evangelical with respect to any proposal or offer involving Evangelical and any other party;

6. approve, reject or otherwise influence Evangelical's use of any funds or provide a guaranty to Evangelical against any financial losses that Evangelical may incur; or

7. license to Evangelical any information technology system owned, used, or licensed by Geisinger, without the prior written consent of the United States, in its sole discretion.

C. Evangelical must not, directly or indirectly, appoint any directors to the Board of Directors of Geisinger, including to the Board of Directors of Geisinger Health Plan.

D. Except for the verification of dates of employment and the checking of references for new hires, Defendants must not consult with, provide advice to, or seek to influence, directly or indirectly, each other regarding the decision to appoint or employ any Executive Leadership Personnel, except for such positions within Pre-Existing Joint Ventures or the Miller Center Joint Venture.

E. Defendants must not enter into a joint venture unless the United States, in its sole discretion, has consented in writing. Defendants must not renew, extend, or amend the term of the Miller Center Joint Venture unless the United States, in its sole discretion, has consented in writing. Defendants may renew or extend the term of a Pre-Existing Joint Venture, but may not amend a Pre-Existing Joint Venture unless the United States, in its sole discretion, has consented in writing.

F. Defendants must not amend, supplement, terminate, or modify the Amended and Restated Collaboration Agreement, or any portion of it, without the prior written consent of the United States, in its sole discretion. Defendants must provide at least sixty (60) days written notice to the United States of any intent to enter into or execute any amendment, supplement, or

modification to the Amended and Restated Collaboration Agreement.

G. Defendants must not provide each other with non-public information, including any non-public financial information of either Defendant or information about any strategic projects under consideration by either Defendant; provided however that nothing herein will be construed to prevent Geisinger and Evangelical from disclosing to each other non-public information necessary for the care and treatment of patients or as required for the payment for the care and treatment of patients.

V. Permitted Conduct

A. Evangelical must not use the Existing Financial Payment for any purpose other than the following permitted uses:

1. Assisting Evangelical's PRIME patient room improvement project (approximately $17 million); and

2. sponsoring the Miller Center Joint Venture (approximately $3.3 million).

B. Notwithstanding Paragraph IV.B.7. above, Geisinger may provide Evangelical with information technology systems and support under the following terms and conditions:

1. Geisinger may provide to Evangelical Geisinger's electronic medical record systems (Epic and related embedded clinical systems), including a license to the embedded Geisinger intellectual property, at a cost of no less than 15% of the incremental increase in cost to Geisinger resulting from Evangelical's use of these same systems;

2. Geisinger may provide Evangelical with electronic medical record systems support for the systems identified in Paragraph V.B.1. at a cost of no less than 15% of the incremental increase in cost to Geisinger for the support for these same systems; and

3. Geisinger may provide additional Back Office Systems to Evangelical at commercially reasonable rates.

VI. Required Conduct

A. Within ten (10) days of entry of this Final Judgment, each Defendant must appoint an Antitrust Compliance Officer and identify to the United States the Antitrust Compliance Officer's name, business address, telephone number, and email address. Within forty-five (45) days of a vacancy in a Defendant's Antitrust Compliance Officer position, that Defendant must appoint a replacement, and must identify to the United States the replacement Antitrust Compliance Officer's name, business address, telephone number, and email address. A Defendant's initial or replacement appointment of an Antitrust Compliance Officer is subject to the approval of the United States in its sole discretion.

B. Each Antitrust Compliance Officer must:

1. Within thirty (30) days of entry of this Final Judgment, furnish a copy of this Final Judgment and the Competitive Impact Statement to all Covered Persons;

2. within thirty (30) days after entry of this Final Judgment, in a form and manner to be approved by the United States in its sole discretion, provide all Covered Persons with reasonable notice of the meaning and requirements of this Final Judgment and the antitrust laws;

3. annually train all Covered Persons on the meaning and requirements of this Final Judgment and the antitrust laws;

4. brief and distribute a copy of this Final Judgment and the Competitive Impact Statement to any person who succeeds to a position of a Covered Person within thirty (30) days of such succession;

5. obtain from each Covered Person, within thirty (30) days of that person's receipt of this Final Judgment, a certification that he or she (i) has read and, to the best of his or her ability, understands and agrees to abide by the terms of this Final Judgment; (ii) is not aware of any violation of this Final Judgment that has not been reported to the relevant Defendant's Antitrust Compliance Officer; and (iii) understands that any person's failure to comply with this Final Judgment may result in an enforcement action for civil or criminal contempt of court against any Defendant and/or any person who violates this Final Judgment;

6. maintain a record of certifications received pursuant to this Section;

7. annually communicate to all Covered Persons and all other employees that they must disclose to the Antitrust Compliance Officer, without reprisal, information concerning any potential violation of this Final Judgment or the antitrust laws; and

8. by not later than ninety (90) calendar days after entry of this Final Judgment and annually thereafter, file written reports with the United States affirming that Defendant is in compliance with its obligations under Section VI of this Final Judgment, including the training requirements under Paragraph VI.B.3.

C. Immediately upon the Antitrust Compliance Officer's learning of any violation or potential violation of any of the terms of this Final Judgment, a Defendant must take appropriate action to investigate and, in the event of a violation, must cease or modify the activity so as to comply with this Final Judgment. Each Defendant must maintain all documents related to any potential violation of this Final Judgment for the term of this Final Judgment.

D. Within thirty (30) calendar days of the Antitrust Compliance Officer's learning of any potential violation of any of the terms of this Final Judgment, a Defendant must file with the United States a statement describing the potential violation, including a description of (1) any communications constituting the potential violation, the date and place of the communication, the persons involved in the communication, and the subject matter of the communication; and (2) all steps taken by the Defendant to remedy the potential violation.

E. Each Defendant must have its CEO or Chief Financial Officer and its General Counsel certify in writing to the United States, no later than ninety (90) calendar days after this Final Judgment is entered and then annually on the anniversary of the date of the entry of this Final Judgment, that the Defendant has complied with the provisions of this Final Judgment. The United States, in its sole discretion, may approve different signatories for the certification.

VII. Firewall

A. Defendants must implement and maintain reasonable procedures to prevent competitively sensitive information from being disclosed, by or through implementation and execution of the obligations in this Final Judgment or the Amended and Restated Collaboration Agreement or through Geisinger's provision of information technology systems and support to Evangelical as permitted in Paragraph V.B., between or among employees of Geisinger and Evangelical.

B. Defendants must, within forty-five (45) business days of the entry of the Stipulation and Order, submit to the United States a document setting forth in detail the procedures implemented to effect compliance with this Section VII. Upon receipt of the document, the United States will inform Defendants within thirty (30) business days whether, in its sole discretion, it approves of or rejects Defendants' compliance plan. Within ten (10) business days of receiving a notice of rejection, Defendants must submit a revised compliance plan. The United States may request that this Court determine whether Defendants' proposed compliance plan fulfills the requirements of this Section VII.

VIII. Compliance Inspection

A. For the purposes of determining or securing compliance with this Final Judgment, or of any related orders such as any Stipulation and Order, or of determining whether this Final Judgment should be modified or vacated, and subject to any legally recognized privilege, from time to time, authorized representatives of the United States, including agents and consultants retained by the United States, shall, 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 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 such matters. The interviews will 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 shall submit written reports or responses to written interrogatories, under oath if requested, relating to any of the matters contained in this Final Judgment as may be requested.

C. No information or documents obtained by the means provided in Section VIII will be divulged by the United States 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 is a party (including grand jury proceedings), for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If at the time that Defendants furnish information or documents 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 shall give Defendants ten (10) calendar days' notice prior to divulging such material in any legal proceeding (other than a grand jury proceeding).

IX. Notifications

For purposes of this Final Judgment, any notice or other communication required to be provided to the United States shall be sent to the person at the address set forth below (or such other addresses as the United States may specify in writing to Defendants): Chief, Office of Decree Enforcement and Compliance, U.S. Department of Justice, Antitrust Division, 950 Pennsylvania Avenue NW, Room 3207, Washington, DC 20530, Email: *ODEC@usdoj.gov.*

X. 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.

XI. Enforcement of Final Judgment

A. The United States retains and reserves all rights to enforce the provisions of this Final Judgment, including the right to seek an order of contempt from the Court. Defendants agree that in any civil contempt action, any motion to show cause, or any similar action brought by the United States regarding an alleged violation of this Final Judgment, the United States may establish a violation of the decree and the appropriateness of any remedy therefore by a preponderance of the evidence, and Defendants waive any argument that a different standard of proof should apply.

B. The Final Judgment should be interpreted to give full effect to the procompetitive purposes of the antitrust laws and to restore all competition harmed by the challenged conduct. Defendants agree that they may be held in contempt of, and that the Court may enforce, any provision of this Final Judgment that, as interpreted by the Court in light of these procompetitive principles and applying ordinary tools of interpretation, is stated specifically and in reasonable detail, whether or not it is clear and unambiguous on its face. In any such interpretation, the terms of this Final Judgment should not be construed against either party as the drafter.

C. In any enforcement proceeding in which the Court finds that Defendants have violated this Final Judgment, the United States may apply to the Court for a one-time extension of this Final Judgment, together with such other relief as may be appropriate. In connection with any successful effort by the United States to enforce this Final Judgment against a Defendant, whether litigated or resolved prior to litigation, that Defendant agrees to reimburse the United States for the fees and expenses of its attorneys, as well as any other costs including experts' fees, incurred in connection with that enforcement effort, including in the investigation of the potential violation.

XII. Expiration of Final Judgment

Unless this Court grants an extension, this Final Judgment shall expire ten (10) years from the date of its entry, except that after five (5) years from the date of its entry, this Final Judgment may be terminated upon notice by the United States to the Court and Defendants that the continuation of this Final Judgment is no longer necessary or in the public interest.

XIII. 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, any comments thereon, and the United States' responses to comments. Based upon the record before the Court, which includes the Competitive Impact Statement and any comments and responses to comments filed with the Court, entry of this Final Judgment is in the public interest.

Date: ________

[Court approval subject to procedures of Antitrust Procedures and Penalties Act, 15 U.S.C. 16]

____

United States District Judge

United States District Court for the Middle District of Pennsylvania

United States Of America, Plaintiff, vs. *Evangelical Community Hospital, and Geisinger Health,* Defendants.

Civil Action No.: 4:20–cv–01383–MWB

Competitive Impact Statement

The United States of America, under Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h) (the ''APPA'' or ''Tunney Act''), 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

Defendant Geisinger Health (''Geisinger'') and Defendant Evangelical Community Hospital (''Evangelical'') entered into a partial-acquisition agreement (the ''Collaboration Agreement'') dated February 1, 2019, pursuant to which Geisinger would, among other things, acquire 30% of Evangelical. The United States filed a civil antitrust Complaint on August 5, 2020, seeking to rescind and enjoin the Collaboration Agreement. The Complaint alleged that the likely effect of Geisinger's partial acquisition of Evangelical would be to substantially lessen competition and unreasonably restrain trade in the market for the provision of inpatient general acute-care services in a six-county region in central Pennsylvania, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1, and Section 7 of the Clayton Act, 15 U.S.C. 18.

Before Defendants responded to the Complaint, the United States filed a Stipulation and Order and proposed Final Judgment, which are designed to remedy the loss of competition alleged in the Complaint. Under the proposed Final Judgment, which is explained more fully below, Geisinger is required to cap its ownership interest in Evangelical at 7.5%, and Defendants are required to eliminate other entanglements between them that would allow Geisinger to influence Evangelical. Defendants are also each required to establish robust antitrust compliance programs.

The United States and Defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment will terminate this action, except that the Court will retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

II. Description of Events Giving Rise to the Alleged Violation

A. Defendants

Geisinger is a non-profit corporation organized and existing under the laws of the Commonwealth of Pennsylvania with its headquarters in Danville, Pennsylvania. Geisinger is a regional healthcare provider of hospital and physician services that operates twelve hospitals and owns physician practices throughout central Pennsylvania. It also operates a health insurance company, Geisinger Health Plan, which offers commercial health insurance, Medicare, and Medicaid products. Geisinger's annual revenue in 2019 was approximately $7.1 billion.

Evangelical is a non-profit corporation organized and existing under the laws of the Commonwealth of Pennsylvania with its headquarters in Lewisburg, Pennsylvania. Evangelical operates a 132-bed independent community hospital, owns a number of physician practices, and operates an urgent-care center and several other outpatient facilities in central Pennsylvania. Evangelical's annual revenue in 2019 was approximately $259 million.

B. The Collaboration Agreement

On February 1, 2019, Geisinger and Evangelical entered into the Collaboration Agreement, pursuant to which Evangelical agreed to give Geisinger a 30% ownership interest. In exchange, Geisinger agreed to pay $100 million to Evangelical over the next several years for, among other things, Geisinger-approved investment projects, future investment projects that Geisinger had the right to approve, and intellectual property licensing.

Furthermore, Geisinger's contemplated investment in Evangelical would not have been passive: The Collaboration Agreement created additional entanglements between these two competitors and provided Geisinger with opportunities to influence Evangelical. For example, the Collaboration Agreement gave Geisinger rights of first offer and first refusal with respect to any future joint venture, competitively significant asset sale, or change-of-control transaction by Evangelical. It also gave Geisinger the right to approve Evangelical's use of certain funds provided by Geisinger. Additionally, the Collaboration Agreement provided mechanisms for Geisinger and Evangelical to share competitively sensitive information, such as requiring Evangelical to disclose business plans when requesting disbursement of certain funds and requiring Evangelical to inform Geisinger about planned transactions with other hospital systems before any such transactions were executed.

The Collaboration Agreement originally included other provisions granting Geisinger additional influence over Evangelical, which Defendants eliminated through several amendments during the course of the United States' investigation but before the United States filed its Complaint. For example, the Collaboration Agreement originally included provisions that gave Geisinger the right to appoint six individuals to Evangelical's board of directors as well as certain consultation rights on the appointment of Evangelical's chief executive officer. It also contained provisions that required Defendants to discuss and work toward joint ventures in service lines where they have historically competed, such as women's health and musculoskeletal care, and also required Geisinger to compensate Evangelical for certain financial losses.

C. Anticompetitive Effects of the Partial Acquisition

Defendants are two of the largest hospitals in a six-county region in central Pennsylvania. The vast majority of consumers of inpatient general acute-care services in and around Danville and Lewisburg, Pennsylvania, rely on Geisinger and Evangelical for their care. Together, the two hospitals account for approximately 71% of this six-county market and are each other's closest competitors for many services. Geisinger and Evangelical compete head-to-head for patients—including through investment in high-quality facilities and services, in negotiations with insurers, and through discounts to uninsured patients—and consumers have benefited from this competition through increased quality of care, broader availability, and lower costs.

As alleged in the Complaint, the partial acquisition of Evangelical by Geisinger resulting from the Collaboration Agreement would have created significant entanglements between Defendants, likely leading to increased coordination between them, higher prices, lower quality, and reduced access to inpatient general acute-care services in central Pennsylvania.

1. The Relevant Market

As alleged in the Complaint, the provision of inpatient general acute-care services is a relevant product market. Inpatient general acute-care services encompass a broad cluster of inpatient medical and surgical diagnostic and treatment services that require an overnight hospital stay, including many orthopedic, cardiovascular, women's health, and general surgical services. The relevant market excludes outpatient services, which generally do not require an overnight hospital stay and are provided in settings other than hospitals. The vast majority of patients who use inpatient general acute-care services would not switch to outpatient services in response to a price increase. The relevant market also excludes more specialized services, such as advanced cancer services and organ transplants, which Evangelical does not offer.

As alleged in the Complaint, the relevant geographic market for the sale of inpatient general acute-care services

is no larger than the six-county area that comprises the Pennsylvania counties of Union, Snyder, Northumberland, Montour, Lycoming, and Columbia. This area includes the cities of Danville and Lewisburg, where Geisinger Medical Center and Evangelical are respectively located. In general, patients choose to seek medical care close to their homes or workplaces, and residents of the six-county area alleged in the Complaint also generally prefer to obtain inpatient general acute-care services locally. As a result, health insurers that offer healthcare networks in the six-county area generally do not consider hospitals outside of that area to be reasonable substitutes in their networks for hospitals within that area. Because residents in the six-county area strongly prefer to obtain inpatient general acute-care services from within the six-county area, a health plan that did not have hospitals within the six-county area likely could not successfully attract employers and patients in the area.

2. The Effects of the Collaboration Agreement on Competition

Geisinger and Evangelical are, respectively, the largest health system and largest independent community hospital in a six-county region in central Pennsylvania. For many patients in this region, Geisinger and Evangelical are close substitutes for the provision of inpatient general acute-care services

Robust competition between hospitals is important to American consumers. Hospitals such as Geisinger and Evangelical compete to be included in health insurers' networks and to attract patients by offering high-quality care, lower prices, and increased access to services. Geisinger and Evangelical, like other hospitals, also compete to provide superior amenities, convenience, customer service, and attention to patient satisfaction and wellness. The Collaboration Agreement would negatively impact all of those facets of competition to the detriment of consumers in central Pennsylvania.

a. The Collaboration Agreement Would Create Financial Entanglements Between Defendants

Under the Collaboration Agreement, Geisinger would have acquired a 30% interest in Evangelical, its close rival. In exchange, Geisinger committed to pay $100 million to Evangelical over the next several years and would have remained a critical source of funding to Evangelical for the foreseeable future. This arrangement would establish an indefinite partnership between Evangelical and Geisinger, fundamentally altering their relationship as competitors and curtailing their incentives to compete independently for patients. As a result, Evangelical would be likely to avoid competing to enhance the quality or scope of the services it offers because they would attract patients from Geisinger, its part owner. It would also reduce Geisinger's incentives to compete by investing in improvements that would attract patients from Evangelical. For example, if Geisinger were to expand its offerings or improve the quality of its services in areas in which it competes with Evangelical, it would attract patients at Evangelical's expense, reducing the value of Geisinger's 30% interest in Evangelical. As a result of the partial acquisition, both Defendants would have an incentive to pull their competitive punches.

If implemented, the Collaboration Agreement would also likely lead to Geisinger raising prices to commercial insurers and other purchasers of inpatient general acute-care services, resulting in harm to consumers. Before the partial acquisition, in the event of a contracting disagreement with an insurer, Geisinger risked losing patients to Evangelical, and this risk of loss disciplined the pricing that Geisinger negotiated with insurers. The same disciplining effect would occur when Geisinger raised prices to uninsured patients: In response to a price increase, Geisinger risked the uninsured patient moving to Evangelical for care, a result which would keep Geisinger from raising price. After it secured a 30% ownership interest in Evangelical, Geisinger would benefit to some degree when patients choose Evangelical over Geisinger for inpatient general acute-care services, since greater profits for Evangelical would increase the value of Geisinger's ownership interest in Evangelical. This ability to recapture a significant portion of the value of lost patients through its ownership of Evangelical would give Geisinger increased market power to charge higher prices to uninsured patients and greater bargaining leverage in negotiations over reimbursement rates with insurers. Insurers who pay higher reimbursement rates to Geisinger would pass along higher healthcare costs to consumers.

b. The Collaboration Agreement Would Give Geisinger Undue Influence Over Evangelical

The Collaboration Agreement would give Geisinger the ability to influence and exert control over Evangelical and how Evangelical competes in central Pennsylvania. In addition to the influence gained by virtue of Geisinger's $100 million investment and 30% ownership interest in Evangelical, the Collaboration Agreement would give Geisinger influence over Evangelical's ability to partner with others in the future. Geisinger would have rights of first offer and first refusal with respect to several types of transactions that Evangelical may wish to pursue, including any future joint venture between Evangelical and another entity, any competitively significant asset sale by Evangelical, and any transaction involving a change-of-control of Evangelical. These provisions would provide Geisinger with advance notice of Evangelical's competitive plans and the opportunity to interfere with Evangelical's ability to engage in such transactions, and thus deter potentially procompetitive collaborations between Evangelical and other healthcare entities that compete with Geisinger—arrangements that could otherwise benefit patients and the community.

The Collaboration Agreement would also enable Geisinger to influence Evangelical through Geisinger's right to approve or deny Evangelical's use of certain funds provided by Geisinger, as Geisinger could withhold that approval if the expenditure threatened Geisinger's business. The Collaboration Agreement also included other entanglements, such as providing Evangelical with perpetual licenses to Geisinger's IT systems at no cost to Evangelical and proposing joint ventures in service lines such as women's health and musculoskeletal care, where Geisinger and Evangelical have historically competed. Maintaining these entanglements would reduce the incentives for Geisinger and Evangelical to compete aggressively on the quality, scope, and availability of inpatient general acute-care services.

c. The Collaboration Agreement Would Enable the Sharing of Competitively Sensitive Information

The Collaboration Agreement also provided the means and opportunity for Defendants to share competitively sensitive information. Under its terms, Evangelical was required to inform Geisinger about partnerships, joint ventures, and transactions with other healthcare entities before those transactions were executed so that Geisinger would have the opportunity to invoke its rights of first refusal or first offer. The Collaboration Agreement further required that, when Evangelical requested that Geisinger disburse funds from its $100 million commitment for strategic projects, Evangelical would be required to provide Geisinger with

supporting business plans, and Geisinger could grant or withhold approval for certain capital projects. These requirements would enable Geisinger to secure important forward-looking information about Evangelical's plans to compete with Geisinger. Requiring Evangelical to give Geisinger a preview of its future competitive endeavors would likely soften competition between Geisinger and Evangelical, diminish Evangelical's incentives to innovate and expand, and impede Evangelical's ability to enter into strategic alliances with others to compete with Geisinger in the future.

d. Entry or Expansion Is Difficult

Entry of new competitors or expansion of existing competitors is unlikely to prevent or remedy the anticompetitive effects of the Transaction. The construction of a new hospital that offers inpatient general acute-care services in the relevant geographic market would require significant time, expenditures, and risk. In the six-county region where Defendants compete, no new hospitals have been built for more than ten years, and one closed in March 2020. Entry by a new hospital in the relevant market is unlikely due to declining demand for inpatient general acute-care services and low population growth.

III. Explanation of the Proposed Final Judgment

The purpose of the proposed Final Judgment is to remedy the loss of competition alleged in the Complaint and to ensure Evangelical and Geisinger remain independent competitors. The relief required by the proposed Final Judgment will remedy the loss of competition alleged in the Complaint by ensuring that Evangelical remains an independent competitor in the market for inpatient general acute-care services in central Pennsylvania. The proposed Final Judgment will restore competition by: (1) Capping Geisinger's ownership interest in Evangelical; (2) preventing Geisinger from exerting control or influence over Evangelical; and (3) prohibiting Geisinger and Evangelical from sharing competitively sensitive information—all of which will restore Defendants' incentives to compete with each other on quality, access, and price. At the same time, the proposed Final Judgment permits Evangelical to use Geisinger's passive investment for specific projects that will benefit patients and the community. Finally, Defendants are required to institute antitrust compliance programs.

A. Reduction of Ownership Interest and Investment

First and foremost, the proposed Final Judgment caps Geisinger's ownership interest in Evangelical to a 7.5% passive investment. Paragraph IV.A. renders the Collaboration Agreement, including its provision for Geisinger to obtain a 30% ownership interest in Evangelical, null and void. In its place, Defendants have entered into an Amended and Restated Collaboration Agreement that is consistent with the terms of the proposed Final Judgment. Paragraph IV.B.2. prohibits Geisinger from increasing its ownership interest in Evangelical above the 7.5% cap that was obtained in exchange for the approximately $20.3 million already paid by Geisinger to Evangelical, and Paragraph IV.B.3. prohibits Geisinger from making any loan or providing any line of credit to Evangelical. Paragraph V.A. of the proposed Final Judgment permits Evangelical to use the $20.3 million it has already received from Geisinger only for two specified projects, improving Evangelical's patient rooms and sponsoring a local center for recreation and wellness. Under Paragraph IV.F., Defendants may not amend the Amended and Restated Collaboration Agreement without the consent of the United States.

In addition, by limiting Geisinger's ownership interest in Evangelical and prohibiting Geisinger from making any loans to Evangelical, Paragraphs IV.B.2. and IV.B.3. of the proposed Final Judgment restore Geisinger's incentives to compete on price in negotiations with commercial insurers. Limiting the ownership interest and prohibiting loans substantially reduces any bargaining leverage Geisinger would gain from recapturing the profits from any patients lost to Evangelical. Similarly, these provisions preserve Defendants' incentives to compete aggressively with each other as they have in the past for the business of uninsured consumers.

As applied to the facts alleged in the Complaint, the limitations imposed on Geisinger's ownership interest and investment in Evangelical—along with the removal of significant entanglements between the Defendants discussed below—render Geisinger's interest passive, eliminate mechanisms for Geisinger to influence its smaller competitor, and restore the incentives of both hospitals to continue to compete with one another to provide inpatient general acute-care services for the benefit of patients and health insurers. Following entry of the proposed Final Judgment, Geisinger will not be in a position to prevent other healthcare entities from acquiring or partnering with Evangelical, and Geisinger's limited investment will benefit patients and the community by partially financing Evangelical's modernization of its patient rooms and providing funding for wellness and recreation at the Miller Center.

B. Prohibitions Against Geisinger's Influence and Control Over Evangelical

The Collaboration Agreement contained numerous provisions that gave Geisinger the ability to influence and control its close competitor, Evangelical, through management positions and other means. For example, as originally crafted, the Collaboration Agreement gave Geisinger the right to appoint six members to Evangelical's board of directors. The proposed Final Judgment prohibits attempts to reinstate such provisions during the ten-year term of the proposed Final Judgment in order to prevent Geisinger from exerting influence or control over Evangelical in the future.

Paragraphs IV.B.1. and IV.C. of the proposed Final Judgment, respectively, prevent Geisinger from appointing any directors to Evangelical's board of directors and prevent Evangelical from appointing any directors to the board of directors of Geisinger or Geisinger Health Plan. Paragraph IV.B.4. prevents Geisinger from obtaining any management or leadership position with Evangelical that would provide Geisinger with the ability to influence the strategic or competitive decision-making at Evangelical. Paragraph IV.D. prevents Defendants from consulting with each other regarding decisions to employ individuals in executive-level positions. These provisions in the proposed Final Judgment prevent Geisinger from exercising influence over Evangelical through participation in its governance, management, or strategic decision-making, which would render Evangelical a less independent competitor.

The proposed Final Judgment also prohibits Geisinger from otherwise influencing Evangelical, preserving its competitive independence. Paragraph IV.B.5. of the proposed Final Judgment prevents Geisinger from maintaining or obtaining any right of first offer or first refusal regarding any proposal or offer to Evangelical, including proposals to enter into future joint ventures with other entities, competitively significant asset sales, or change-of-control transactions by Evangelical. As alleged in the Complaint, having rights of first offer and first refusal would enable Geisinger to interfere if Evangelical

attempted to enter into such transactions and would deter collaborations between Evangelical and other entities. Prohibiting the use of such rights eliminates an entanglement between Geisinger and Evangelical that would reduce Evangelical's incentive and ability to compete vigorously.

Paragraph IV.B.6. prohibits Geisinger from controlling Evangelical's expenditure of funds, including Evangelical's choice of strategic project investments. Paragraph IV.B.6. also prohibits Geisinger from providing a guaranty to Evangelical against any financial losses. In addition, Paragraph IV.B.3. prohibits Geisinger from making a loan or extending a line of credit to Evangelical. These provisions ensure Evangelical's financial independence. Paragraph IV.B.7. prohibits Geisinger from licensing its information technology systems to Evangelical without the consent of the United States, except for information technology systems and support permitted under Paragraph V.B., subject to a firewall to prevent the sharing of competitively sensitive information. These provisions enable Evangelical to improve its hospital operations and patient care in order to be a more effective competitor while limiting Geisinger's ability to influence Evangelical.

Finally, to maintain their competitive independence, Paragraph IV.E. prevents Defendants from entering into any joint ventures with each other, including those contemplated in the Collaboration Agreement in certain service lines where Defendants historically competed, and from renewing, extending, or amending their joint venture to operate a recreation and wellness center called the Miller Center in Lewisburg, Pennsylvania, without the prior written consent of the United States. Exempted from this prohibition, however, are the renewal or extension of two joint ventures already in place—Evangelical-Geisinger, LLC, a joint venture between Geisinger and Evangelical to provide student health services to Bucknell University and the Keystone Accountable Care Organization, LLC, an organization of doctors, hospitals, and other providers, that provides coordinated care to Medicare Patients. Defendants, however, may not otherwise amend these two pre-existing joint ventures without the prior written consent of the United States.

Collectively, these provisions in the proposed Final Judgment remove Geisinger's ability to exercise influence or control over Evangelical. Defendants' incentives to compete with each other are preserved by eliminating all of Geisinger's rights to influence or control decision-making at Evangelical, removing other entanglements from the Collaboration Agreement, and capping Geisinger's equity stake in Evangelical to a 7.5% passive investment. The terms of the proposed Final Judgment maintain Evangelical's independence as a competitor, substantially reduce the likelihood that Defendants' competitive incentives will be affected by Geisinger's partial ownership, and preserve Defendants' incentives to compete with each other on the price, quality, and availability of services.

C. Prohibitions Against Sharing Competitively Sensitive Information

The Collaboration Agreement would have provided the potential for increased coordination between Geisinger and Evangelical arising from the sharing of sensitive, forward-looking confidential information about Evangelical's plans to compete with Geisinger. The proposed Final Judgment requires that the provisions in the Collaboration Agreement that would have provided Geisinger with the ability to access Evangelical's competitively sensitive information be eliminated in order to prevent Defendants from coordinating with one another using that information. Paragraph IV.G. of the proposed Final Judgment prohibits the Defendants from providing each other with non-public information, including any information about strategic projects being considered by either Defendant. It also prevents Defendants from having access to each other's financial records. By preventing Defendants from sharing this information, this provision decreases the possibility of anticompetitive coordination between Defendants and helps maintain their incentives to compete with one another. This provision, however, allows Defendants to exchange non-public information that is necessary for the care and treatment of patients. In addition, Paragraph IV.B.5. prohibits Defendants from exercising or maintaining any rights of first offer and first refusal that would allow Geisinger to receive advance notice about Evangelical's competitive plans through exercising such a right.

E. Permitted Conduct

Paragraph V.A. of the proposed Final Judgment permits Evangelical to retain the $20.3 million Geisinger already provided to Evangelical, defined in the proposed Final Judgment as the Existing Financial Payment, but only for the purpose of expending it on Evangelical's PRIME patient room improvement project ($17 million) and to sponsor the Lewisburg YMCA at the Miller Center in Lewisburg, Pennsylvania (approximately $3.3 million). These projects will not impede competition between the parties and will benefit the community.

Paragraph V.B. of the proposed Final Judgment permits Geisinger to provide certain information technology systems and support to Evangelical at a discounted rate to enable Evangelical to upgrade its electronic health records systems. The proposed Final Judgment also permits Geisinger to provide Evangelical access to various back office software systems at commercially reasonable rates. Evangelical has been unable to accomplish such upgrades on its own because of its status as a small independent community hospital. Permitting Evangelical to obtain this electronic medical records upgrade and related support from Geisinger at a discount will benefit patients in central Pennsylvania and promote the adoption of health information technology to improve the delivery of care to patients. Geisinger's provision of upgraded health records software and other support software to Evangelical is unlikely to prevent Evangelical from collaborating with other healthcare providers. The requirement in Paragraph VII.A. that Defendants implement and maintain a firewall will prevent them from sharing competitively sensitive information.

F. Antitrust Compliance Program and Firewall

Defendants are required to institute an antitrust compliance program to ensure their compliance with the Final Judgment and the antitrust laws. Under Section VI of the proposed Final Judgment, each Defendant must create an antitrust compliance program that is satisfactory to the United States to ensure that Defendants comply with the Final Judgment.

Defendants must designate an Antitrust Compliance Officer who is responsible for implementing training and antitrust compliance programs and ensuring compliance with the Final Judgment. Among other duties, each Antitrust Compliance Officer will be required to distribute copies of the Final Judgment to each of Defendants' respective management, among others, and to ensure that relevant training is provided to each Defendants' management as well as individuals with responsibility over Defendants' information technology systems. Defendants are each required to certify compliance with the Final Judgment and the requirements of the antitrust compliance programs annually on the

anniversary of the entry of the Final Judgment.

Under Section VII, Defendants are required to implement and maintain a firewall to prevent competitively sensitive information from being disclosed in the course of Geisinger's provision of electronic medical records and other IT systems and services to Evangelical. Defendants must provide their compliance plan for the firewall to the United States for approval, and the United States maintains the right to seek the Court's determination as to sufficiency of the Defendants' proposed compliance plan for the firewall.

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 neither impairs nor assists 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 Defendants.

V. Procedures Available for Modification of the Proposed Final Judgment

The United States and 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 sixty 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 sixty 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 U.S. Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time before the Court's entry of the Final Judgment. The comments and the response of the United States will be filed with the Court. In addition, comments and the United States' responses will be published in the **Federal Register** unless the Court agrees that the United States instead may publish them on the U.S. Department of Justice, Antitrust Division's internet website.

Written comments should be submitted to: Eric D. Welsh, Chief, Healthcare and Consumer Products Section, Antitrust Division, U.S. 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 challenging the partial acquisition. The United States could have continued this litigation and sought preliminary and permanent injunctions against Geisinger's acquisition of partial ownership of Evangelical and the accompanying entanglements in the Transaction. The United States is satisfied, however, that the relief described in the proposed Final Judgment will remedy the anticompetitive effects alleged in the Complaint, preserving competition in the market for inpatient general acute-care services in the six-county area in Pennsylvania identified 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 sixty-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 (D.C. Cir. 1995); *United States* v. *U.S. Airways Grp., Inc.,* 38 F. Supp. 3d 69, 75 (D.D.C. 2014) (explaining that the ''court's inquiry is limited'' in Tunney Act settlements); *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 a 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 mechanism to enforce the final judgment are clear and manageable'').

As the U.S. Court of Appeals for the District of Columbia Circuit has held, under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations in the government's complaint, whether the proposed Final Judgment is sufficiently clear, whether its enforcement mechanisms are sufficient, and whether it may positively harm third parties. *See Microsoft,* 56 F.3d at 1458–62. With respect to the adequacy of the relief secured by the proposed Final Judgment, a court may not ''make de novo determination of facts and issues.'' *United States* v. *W. Elec. Co.,* 993 F.2d 1572, 1577 (D.C. Cir. 1993) (quotation marks omitted); *see also Microsoft,* 56 F.3d at 1460–62; *United States* v. *Alcoa, Inc.,* 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *United States* v. *Enova Corp.,* 107 F. Supp. 2d 10, 16 (D.D.C. 2000); *InBev,* 2009 U.S. Dist. LEXIS 84787, at *3. Instead, ''[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.'' *W. Elec. Co.,* 993 F.2d at 1577 (quotation marks omitted). ''The court should bear in mind the *flexibility* of the public interest inquiry: The court's function is not to determine whether the resulting array of rights and liabilities is one that will *best* serve society, but only to confirm that the resulting settlement is within the *reaches* of the public interest.'' *Microsoft,* 56 F.3d at 1460 (quotation marks omitted); *see also United States* v. *Deutsche Telekom AG,* No. 19–2232 (TJK), 2020 WL 1873555, at *7 (D.D.C. Apr. 14, 2020). More demanding requirements would ''have enormous practical consequences for the government's ability to negotiate future settlements,'' contrary to congressional intent. *Id.* at 1456. ''The Tunney Act was not intended to create a disincentive to the use of the consent decree.'' *Id.*

The United States' predictions about the efficacy of the remedy are to be afforded deference by the Court. *See, e.g., Microsoft,* 56 F.3d at 1461 (recognizing courts should give ''due respect to the Justice Department's . . . view of the nature of its case''); *United States* v. *Iron Mountain, Inc.,* 217 F. Supp. 3d 146, 152–53 (D.D.C. 2016) (''In evaluating objections to settlement agreements under the Tunney Act, a court must be mindful that [t]he government need not prove that the settlements will perfectly remedy the alleged antitrust harms[;] it need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms.'' (internal citations omitted)); *United States* v. *Republic Servs., Inc.,* 723 F. Supp. 2d 157, 160 (D.D.C. 2010) (noting ''the deferential review to which the government's proposed remedy is accorded''); *United States* v. *Archer-Daniels-Midland Co.,* 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (''A district court must accord due respect to the government's prediction as to the effect of proposed remedies, its perception of the market structure, and its view of the nature of the case.''). The ultimate question is whether ''the remedies [obtained by the Final Judgment are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest.' '' *Microsoft,* 56 F.3d at 1461 (*quoting W. Elec. Co.,* 900 F.2d at 309).

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 U.S. Airways,* 38 F. Supp. 3d at 75 (noting that the court must simply determine whether there is a factual foundation for the government's decisions such that its conclusions regarding the proposed settlements are reasonable); *InBev,* 2009 U.S. Dist. LEXIS 84787, at *20 (''[T]he '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 that the United States did not pursue. *Microsoft,* 56 F.3d at 1459–60.

In its 2004 amendments to the APPA, Congress made clear its intent to preserve the practical benefits of using consent judgments proposed by the United States in antitrust enforcement, Public Law 108–237, 221, and added 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). *See also U.S. Airways,* 38 F. Supp. 3d at 76 (indicating that a court is not required to hold an evidentiary hearing or to permit intervenors as part of its review under the Tunney Act). This language explicitly wrote into the statute what Congress intended when it first 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 Sen. Tunney). ''A court can make its public interest determination based on the competitive impact statement and response to public comments alone.'' *U.S. Airways,* 38 F. Supp. 3d at 76 (citing *Enova Corp.,* 107 F. Supp. 2d at 17).

VIII. Determinative Documents

The only determinative documents or materials within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment are the Collaboration Agreement, dated February 1, 2019, and the Amended and Restated Collaboration Agreement, dated February 18, 2021.

Dated: March 3, 2021

Respectfully submitted,

PLAINTIFF UNITED STATES OF AMERICA

Natalie Melada
David M. Stoltzfus
Chris S. Hong
David C. Kelly
Garrett Liskey

Attorneys for the United States, U.S. Department of Justice, Antitrust Division, 450 5th Street NW, Suite 4100, Washington, DC 20530, Tel.: (202) 353–1833, Email: *natalie.melada@usdoj.gov.*

[FR Doc. 2021–04953 Filed 3–9–21; 8:45 am]

BILLING CODE 4410–11–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Electrified Vehicle and Energy Storage Evaluation

Notice is hereby given that, on February 10, 2021, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Electrified Vehicle and Energy Storage Evaluation (''EVESE'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Gamma Technologies LLC, Westmont, IL, has been added as a party to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and EVESE intends to file additional written notifications disclosing all changes in membership.

On September 24, 2020, EVESE filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on October 15, 2020 (85 FR 65423).

The last notification was filed with the Department on December 1, 2020. A notice was published in the **Federal Register** pursuant to section 6(b) of the Act on December 9, 2020 (85 FR 79218).

Suzanne Morris,

Chief, Premerger and Division Statistics, Antitrust Division.

[FR Doc. 2021–04973 Filed 3–9–21; 8:45 am]

BILLING CODE 4410–11–P