Patent No. 8,508,607 (''the '607 patent''). The complaint further alleges that an industry in the United States exists as required by the applicable Federal Statute. The complainant requests that the Commission institute an investigation and, after the investigation, issue a limited exclusion order and cease and desist orders.

ADDRESSES: The complaint, except for any confidential information contained therein, may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.* For help accessing EDIS, please email *EDIS3Help@usitc.gov.* Hearing impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at (202) 205–2000. General information concerning the Commission may also be obtained by accessing its internet server at *https://www.usitc.gov.*

FOR FURTHER INFORMATION CONTACT: Katherine Hiner, Office of the Secretary, Docket Services Division, U.S. International Trade Commission, telephone (202) 205–1802.

SUPPLEMENTARY INFORMATION: *Authority:* The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, and in section 210.10 of the Commission's Rules of Practice and Procedure, 19 CFR 210.10 (2020).

Scope of Investigation: Having considered the complaint, the U.S. International Trade Commission, on September 8, 2021, *Ordered that*—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain products identified in paragraph (2) by reason of infringement of one or more of claims 1–4, and 6–36 of the '912 patent; claims 1–16 of the '312 patent; and claims 1–4, 6–7, 10–13, 15–16, 19–21, 25–26, and 29 of the '607 patent, and whether an industry in the United States exists as required by subsection (a)(2) of section 337;

(2) Pursuant to section 210.10(b)(1) of the Commission's Rules of Practice and Procedure, 19 CFR 210.10(b)(1), the plain language description of the accused products or category of accused products, which defines the scope of the investigation, is ''IP security cameras and systems, as well as the software and components of those cameras and systems'';

(3) For the purpose of the investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainants are:

Motorola Solutions, Inc., 500 W. Monroe St., Chicago, IL 60661
Avigilon Corporation, 555 Robson St. 3rd Floor, Vancouver, British Columbia, V6B 1A6, Canada
Avigilon Fortress Corporation, 555 Robson St. 3rd Floor, Vancouver, British Columbia, V6B 1A6, Canada
Avigilon Patent Holding 1 Corporation, 555 Robson St. 3rd Floor, Vancouver, British Columbia, V6B 1A6, Canada
Avigilon Technologies Corporation, 555 Robson St. 3rd Floor, Vancouver, British Columbia, V6B 1A6, Canada

(b) The respondents are the following entities alleged to be in violation of section 337, and are the parties upon which the complaint is to be served:

Verkada Inc., 405 E 4th Avenue, San Mateo, California 94401

(c) The Office of Unfair Import Investigations, U.S. International Trade Commission, 500 E Street SW, Suite 401, Washington, DC 20436; and

(4) For the investigation so instituted, the Chief Administrative Law Judge, U.S. International Trade Commission, shall designate the presiding Administrative Law Judge.

Responses to the complaint and the notice of investigation must be submitted by the named respondents in accordance with section 210.13 of the Commission's Rules of Practice and Procedure, 19 CFR 210.13. Pursuant to 19 CFR 201.16(e) and 210.13(a), as amended in 85 FR 15798 (March 19, 2020), such responses will be considered by the Commission if received not later than 20 days after the date of service by the complainant of the complaint and the notice of investigation. Extensions of time for submitting responses to the complaint and the notice of investigation will not be granted unless good cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the administrative law judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter an initial determination and a final determination containing such findings, and may result in the issuance of an exclusion order or a cease and desist order or both directed against the respondent.

By order of the Commission.

Issued: September 8, 2021.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2021–19740 Filed 9–13–21; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Antitrust Division

United States v. Evangelical Community Hospital, et ano; Response to Public Comments

Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h), the United States hereby publishes below the Response to Public Comments on the Proposed Final in *United States* v. *Evangelical Community Hospital and Geisinger Health,* Civil Action No. 4:20–cv–01383–MWB, which was filed in the United States District Court for the Middle District of Pennsylvania on August 31, 2021, together with a copy of the five comments received by the United States.

A copy of the comments and the United States' response to the comments is available at *https://www.justice.gov/atr/case/us-v-geisinger-health-and-evangelical-community-hospital.* Copies of the comments and the United States' response are available for inspection at the Office of the Clerk of the United States District Court for the Middle District of Pennsylvania. Copies of these materials may also be obtained from the Antitrust Division upon request and payment of the copying fee set by Department of Justice regulations.

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. Evangelical Community Hospital and Geisinger Health, Defendants.

Civil Action No.: 4:20–cv–01383–MWB

Response of Plaintiff United States

To Public Comments on the Proposed Final Judgment

Pursuant to the requirements of the Antitrust Procedures and Penalties Act (the ''APPA'' or ''Tunney Act''), 15 U.S.C. 16(b)–(h), the United States submits this response to the five public comments received regarding the proposed Final Judgment, as amended, in this case. After carefully considering the submitted comments, the United States continues to believe that the amended proposed Final Judgment will provide an effective and appropriate remedy for the antitrust violations alleged in the Complaint and is therefore in the public interest. The United States will move the Court for entry of the amended proposed Final Judgment (Dkt. 51–1) after the public comments and this response have been published pursuant to 15 U.S.C. 16(d).

I. Procedural History

On February 1, 2019, Defendant Geisinger Health (''Geisinger'') and Defendant Evangelical Community Hospital (''Evangelical'') entered into a partial-acquisition agreement (the ''Collaboration Agreement'') pursuant to which Geisinger would, among other things, acquire 30% of Evangelical. After a thorough and comprehensive investigation, the United States filed a civil antitrust Complaint (Dkt. 1) on August 5, 2020, seeking to rescind and enjoin the Collaboration Agreement, which Defendants had twice amended before the United States filed its Complaint.

On March 3, 2021, the United States filed a proposed Final Judgment (Dkt. 45–2) and a Stipulation and Order (Dkt. 45–1), signed by the parties, that consents to entry of the proposed Final Judgment after compliance with the requirements of the APPA. At the same time, the United States filed a Competitive Impact Statement, describing the transaction and the proposed Final Judgment (Dkt. 46). The Court entered the Stipulation and Order on March 10, 2021 (Dkt. 47).

On March 10, 2021, the United States published the Complaint, proposed Final Judgment, and Competitive Impact Statement in the **Federal Register**, *see* 15 U.S.C. 16(b)–(c); 86 FR 13,735 (March 10, 2021), and caused notice regarding the same, together with directions for the submission of written comments relating to the proposed Final Judgment, to be published in the *Washington Post* on March 8–14 and in *The Daily Item* on March 9–14 and March 16.

On May 17, 2021, the United States and Defendants filed a Joint Notice of Amended Proposed Final Judgment (the ''Joint Notice''), attaching an amended proposed Final Judgment (Dkts. 51, 51–1). As stated in the Joint Notice, the amended proposed Final Judgment removed provisions from the Collaboration Agreement (including its attachments) that did not conform with the proposed Final Judgment and corrected typographical errors in those documents. The amended proposed Final Judgment is identical in all respects to the original proposed Final Judgment except for a change to the definition of the ''Amended and Restated Collaboration Agreement'' to reflect the date of execution and title of the revised, updated agreement—the Second Amended and Restated Collaboration Agreement (the ''Amended Agreement'').

The 60-day period for public comment ended on May 17, 2021. The United States determined that it would consider any additional comments that were received by June 7, 2021, in order to afford the public time to review the Joint Notice and the amended proposed Final Judgment. The United States received five comments. As required by the APPA, the comments, with the authors' addresses removed, and this response will be published in the **Federal Register**.

II. Standard of Judicial Review

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

> (A) The competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
> (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. 16(e)(1)(A) & (B). In considering these statutory factors, the Court's inquiry is necessarily a limited one as the government is entitled to ''broad discretion to settle with the defendant within the reaches of the public interest.'' *United States* v. *Microsoft Corp.,* 56 F.3d 1448, 1461 (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 APPA 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. *Microsoft,* 56 F.3d 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 APPA). This language explicitly wrote into the statute what Congress intended when it first enacted the APPA 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).

III. The Harm Alleged in the Complaint and the Amended Proposed Final Judgment

The amended proposed Final Judgment is the culmination of a thorough, comprehensive investigation conducted by the Antitrust Division of the United States Department of Justice. Based on the evidence gathered during the investigation, the United States concluded that the likely effect of Geisinger's partial acquisition of Evangelical resulting from the Collaboration Agreement 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. The partial acquisition was not a passive investment by Geisinger. The Collaboration Agreement created certain entanglements between Defendants that provided opportunities for Geisinger to influence Evangelical, which would likely lead to higher prices, lower quality, and reduced access to inpatient general acute-care services in central Pennsylvania. Accordingly, the United States filed a civil antitrust lawsuit that alleged that certain features of the Collaboration Agreement, taken together, were likely to substantially lessen competition between Defendants, and sought to rescind and enjoin the Collaboration Agreement because it violated Section 1 of the Sherman Act, 15 U.S.C. 1, and Section 7 of the Clayton Act, 15 U.S.C. 18.

The amended proposed Final Judgment provides an effective and appropriate remedy for the likely competitive harm the United States alleges would result from the Collaboration Agreement and maintains Evangelical's independence as a competitor in the market for inpatient general acute-care services in central Pennsylvania. The amended proposed Final Judgment restores competition by: (1) Capping Geisinger's ownership interest in Evangelical; (2) preventing Geisinger from exerting control or influence over Evangelical through the mechanisms alleged in the Complaint; and (3) requiring an antitrust compliance program and prohibiting Geisinger and Evangelical from sharing competitively sensitive information—all of which restore Defendants' incentives to compete with each other on quality, access, and price. At the same time, the amended proposed Final Judgment permits Evangelical to use Geisinger's passive investment to fund specific projects that will benefit patients and the community.

A. Reduction of Ownership Interest and Investment

The amended proposed Final Judgment caps Geisinger's ownership interest in Evangelical to a 7.5% passive investment and prohibits Geisinger from increasing its ownership interest in Evangelical.[1] The amended proposed Final Judgment permits Evangelical to spend the money that it has already received from Geisinger only on two specific projects that will benefit patients in central Pennsylvania: (1) Improving Evangelical's patient rooms and (2) sponsoring a local recreation and wellness center.[2] It also prohibits Geisinger from making any loan, providing any line of credit, or providing a guaranty to Evangelical against any financial loss.[3] These provisions of the amended proposed Final Judgment, along with the others described below, eliminate mechanisms for Geisinger to influence Evangelical through its investment and restore the incentives of both hospitals to compete with each other for the benefit of patients and health insurers.

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

The amended proposed Final Judgment maintains Evangelical's independence as a competitor in the relevant market because it prevents Geisinger from exercising influence over

[1] Amended proposed Final Judgment ¶ IV.B.2.

[2] Amended proposed Final Judgment ¶ V.A.

[3] Amended proposed Final Judgment ¶¶ IV.B.3, 6.

Evangelical through participation in Evangelical's governance, management, or strategic decision-making. For example, the amended proposed Final Judgment prohibits Geisinger from appointing any directors to Evangelical's board of directors and prohibits Geisinger from obtaining any management or leadership position with Evangelical that would provide Geisinger with the ability to influence its strategic or competitive decision-making.[4] In addition, it prohibits Geisinger from controlling Evangelical's expenditure of funds.[5] The amended proposed Final Judgment also prevents Geisinger from having any right of first offer or first refusal regarding any proposal or offer made to Evangelical, such as proposals to enter into future joint ventures with other entities or to enter into competitively significant asset sales.[6] In addition, the amended proposed Final Judgment prohibits Defendants from entering into joint ventures with each other or making changes to the Amended Agreement without obtaining the approval of the United States.[7] The amended proposed Final Judgment also prohibits Geisinger from licensing its information technology systems to Evangelical without the consent of the United States, except as expressly permitted in the amended proposed Final Judgment.[8]

C. Compliance Program and Prohibitions Against Sharing Competitively Sensitive Information

The amended proposed Final Judgment eliminates the provisions of the Collaboration Agreement that would have provided Geisinger with the ability to access Evangelical's competitively sensitive information and prohibits Defendants from providing each other with non-public information, including information about strategic projects being considered by either Defendant.[9] It also prevents Defendants from having access to each other's financial records and requires that Defendants implement and maintain a firewall to prevent them from sharing competitively sensitive information.[10]

In addition, the amended proposed Final Judgment requires Defendants to institute a robust antitrust compliance program.[11] Finally, the amended proposed Final Judgment provides the United States with the ability to investigate Defendants' compliance with the Final Judgment and expressly retains and reserves all rights for the United States to enforce provisions of the Final Judgment.[12]

In sum, the amended proposed Final Judgment prevents Geisinger from increasing its ownership interest in Evangelical, eliminates the anticompetitive portions of the Collaboration Agreement that were challenged in the Complaint, and prevents Defendants from reinstituting those anticompetitive provisions. It restores Defendants' incentives to compete with each other on quality, access, and price, and maintains Evangelical as an independent competitor for inpatient general acute-care services in central Pennsylvania.

IV. Summary of Public Comments and the United States' Response

The United States received five public comments. Four comments are from community members who live in central Pennsylvania. The fifth comment is from a competitor to Geisinger and Evangelical, the University of Pittsburgh Medical Center (''UPMC''). UPMC is an integrated healthcare system that operates two hospitals and UPMC Health Plan, an insurance company that sells commercial health insurance in competition with a Geisinger-operated insurance company, Geisinger Health Plan, in central Pennsylvania.

The United States summarizes the comments and responds below. The comments do not support a finding that the amended proposed Final Judgment is not in the public interest, and the modifications that UPMC proposes to the amended proposed Final Judgment are not necessary or appropriate to address the loss of competition alleged in the Complaint.

A. The Amended Proposed Final Judgment Resolves the Concerns Expressed by Four Community Members

Four community members express concern that, if Geisinger were allowed to control Evangelical, it could negatively affect patient care and reduce choices for consumers. One commenter states that ''Evangelical can give patients the best care by remaining an independent community hospital.''[13] Another commenter states that she has ''all of [her] care given at Evangelical,'' and ''would hate to have that spoiled'' by having Evangelical controlled by Geisinger, and believes that they should not merge.[14] Another commenter notes that prior mergers in the area left the community with ''few options [for] quality and affordable healthcare'' and urges the United States ''to make sure [that] people looking for good affordable health care have that choice.''[15] The United States agrees with these commenters that consumers are best served by preserving Evangelical's independence, which is why the United States initiated this litigation and has required Geisinger to relinquish its ability to influence or control Evangelical through the terms of the amended proposed Final Judgment. Because the amended proposed Final Judgment preserves Evangelical's independence, and prohibits Geisinger from acquiring Evangelical, it fully addresses these commenters' concerns. These comments, therefore, provide no basis to conclude that the amended proposed Final Judgment is not in the public interest.

One of the community members expresses concern about Geisinger's 7.5% interest in Evangelical and raises questions about Evangelical's financial circumstances. The commenter also notes that the settlement addresses harm the United States alleged with respect to inpatient services and asks what would prevent Geisinger from expanding outpatient services to compete with those offered by Evangelical.[16] This commenter does not ask the Court to reject the proposed remedy and does not propose any specific measures to be incorporated into the amended proposed Final Judgment.

This comment likewise provides no basis to conclude that the amended proposed Final Judgment is not in the public interest. First, as discussed above, the amended proposed Final Judgment ensures that Evangelical will remain an independent competitor by capping Geisinger's interest in Evangelical and stripping Geisinger of the ability to influence or control Evangelical. Second, the proposed remedy does not place Evangelical on insecure financial footing as Evangelical was in a strong financial position before it executed the agreement with Geisinger (*see* Complaint ¶ 65), and nothing in the amended proposed Final Judgment changes its financial status.

[4] Amended proposed Final Judgment ¶¶ IV.B.1, 4.

[5] Amended proposed Final Judgment ¶ IV.B.6.

[6] Amended proposed Final Judgment ¶ IV.B.5.

[7] Amended proposed Final Judgment ¶¶ IV.E, F.

[8] Amended proposed Final Judgment ¶ IV.B.7.

[9] Amended proposed Final Judgment ¶ IV.G.

[10] Amended proposed Final Judgment ¶ IV.G, VII.A.

[11] Amended proposed Final Judgment § VI.

[12] Amended proposed Final Judgment §§ VIII, XI.

[13] Comment from Sandy Young, attached as Exhibit E.

[14] Comment from Carol Barsh, attached as Exhibit A.

[15] Comment from Keith Young, attached as Exhibit D.

[16] Comment from Dr. Steve Karp, attached as Exhibit B. Dr. Karp's comment also raised questions about Evangelical's receiving financial support for information technology systems from Geisinger. This concern was also raised by UPMC and is discussed in Section IV.B.2, *infra.*

Third, the commenter's concern about Geisinger expanding in the outpatient market is outside the scope of this Court's review under the APPA as the United States did not allege harm in an outpatient services market. *See Microsoft,* 56 F.3d at 1459; *U.S. Airways,* 38 F. Supp. 3d at 76. It is also misplaced as the proposed remedy maintains Evangelical's independence and preserves Defendants' incentives to compete for both inpatient and outpatient services. Indeed, if Geisinger expands outpatient services to compete with those offered by Evangelical, that would increase competition and benefit patients in central Pennsylvania.

B. UPMC's Comment Provides No Basis To Conclude That the Amended Proposed Final Judgment Is Not in the Public Interest

UPMC's comment raises concerns regarding two aspects of the Amended Agreement.[17] First, UPMC questions provisions that establish the terms under which Evangelical, a small community hospital, provides medical services to patients insured by Geisinger Health Plan (''GHP''), a health insurance company owned by Geisinger. UPMC claims these provisions will reduce competition between Evangelical and Geisinger to provide medical and hospital services and create an incentive for Evangelical to charge higher prices to third-party insurance companies such as UPMC Health plan (UPMC, like Geisinger, is vertically integrated, offering both health insurance and hospital services). Second, UPMC expresses concerns about Geisinger's providing subsidized electronic medical records systems and associated support to Evangelical, as permitted in Paragraph V.B of the amended proposed Final Judgment (the ''IT Subsidy''). As discussed below, these provisions do not undermine the remedy in the amended proposed Final Judgment.

1. The Margin Guarantee

UPMC questions provisions that establish the terms under which Evangelical provides hospital and medical services to patients insured by GHP. Specifically, Evangelical and GHP have agreed that Evangelical will lower its prices to GHP for treating GHP insured patients, and GHP will, in return, place Evangelical in the most favorable tier of its fully insured, tiered commercial insurance plans. This sort of arrangement is common in the healthcare industry. By placing Evangelical in the most favorable tier, the expectation is that more GHP members will seek treatment from Evangelical, allowing Evangelical to maintain or increase its profit on these patients notwithstanding its lower prices. To further guarantee that Evangelical's lower prices will not reduce Evangelical's profits from treating GHP members, GHP has committed that Evangelical's profit (in dollars) on GHP's fully insured commercial business will remain the same or increase during the time that Evangelical provides these lower prices to GHP.[18] This ''Margin Guarantee'' thus protects Evangelical, a small hospital, from losing money as a result of offering GHP lower prices. UPMC, however, claims these provisions will reduce competition between Evangelical and Geisinger and create an incentive for Evangelical to charge higher prices to third-party insurance companies such as UPMC Health Plan.

In its Complaint, the United States did not allege competitive harm resulting from the Margin Guarantee.[19] Therefore, UPMC's concerns regarding the Margin Guarantee are outside the scope of the Court's review under the APPA. *See Microsoft,* 56 F.3d at 1459; *U.S. Airways,* 38 F. Supp. 3d at 76. Moreover, UPMC's concerns regarding the Margin Guarantee are unfounded for the following reasons. First, UPMC argues that the Margin Guarantee reduces competition between Evangelical and Geisinger because, absent the Margin Guarantee, GHP would have tried to steer patients toward Geisinger hospitals and physicians, while the Margin Guarantee gives GHP an incentive to have more patients treated at Evangelical. UPMC's argument, however, would apply to any arrangement that made Evangelical a more attractive or lower cost option for patients who are commercially insured by GHP. Under UPMC's reasoning, arrangements that are standard in the health insurance industry, such as a tiered network arrangement with a health insurance company that places Evangelical in the most favorable tier, would be improper, which is not the case. The Margin Guarantee simply ensures that Evangelical's profitability on GHP patients will not decrease as a result of offering GHP lower prices; at the same time, this arrangement is designed to save GHP money and benefit its members (*e.g.,* through lower copays). Additionally, the amended proposed Final Judgment ensures that Geisinger and Evangelical will remain independent, and will thus have the incentive to compete against one another.

Second, UPMC speculates that the Margin Guarantee gives Evangelical the incentive to raise rates to third-party insurers like UPMC Health Plan. If anything, however, the Margin Guarantee is likely to incentivize Evangelical to maximize the share of its patients that are insured by third-party insurers such as UPMC Health Plan, rather than incentivize it to increase prices to these entities. This is because any profit from third-party insurers would be *in addition to* the profit that Evangelical is already guaranteed to earn from GHP. UPMC argues that Evangelical's increasing the number of patients it sees from third-party insurers would violate the ''spirit'' of the Amended Agreement,[20] but this is incorrect because the amended proposed Final Judgment maintains Evangelical's independence, preventing Geisinger from controlling or influencing Evangelical's negotiations with third-party insurers.

Finally, to the extent UPMC raises concerns about potential information sharing between Evangelical and Geisinger relating to the Margin Guarantee, those concerns are unwarranted. Integrated insurer-hospital systems like Geisinger and UPMC routinely obtain sensitive information from insurer negotiations with third-party hospital systems like Evangelical and must assure those hospital systems that the information will not be shared more broadly throughout the integrated organization. To the extent that UPMC is concerned that Evangelical will share sensitive information about the UPMC-Evangelical contract with GHP, UPMC, a large, sophisticated hospital system, can protect itself through its contract with Evangelical. Moreover, in this instance, the amended proposed Final Judgment requires Defendants to implement a firewall to prevent competitively sensitive information from being disclosed between Geisinger and Evangelical, providing an additional level of protection to prevent such improper disclosure.[21] Should Defendants bypass the firewall and share competitively sensitive

[17] UPMC Comment, attached as Exhibit C.

[18] Second Amended and Restated Collaboration Agreement (Dkt. 51–3) at Exh. D. If the volume of GHP insured patients is not sufficient on its own to maintain Evangelical's current level of profitability, GHP, under the Margin Guarantee, will adjust the rates it pays Evangelical to reach this threshold, which will not impact Evangelical's preferred tier status.

[19] The only allegation in the Complaint that relates to the Margin Guarantee is that ''Evangelical's placement in the most favored tier of Geisinger Health Plan's commercial insurance products does not require the partial-acquisition agreement.'' Complaint ¶ 66.

[20] UPMC Comment at 10.

[21] Amended proposed Final Judgment ¶ VII.A.

information, the United States can seek relief from the Court under the Final Judgment or through antitrust laws that will continue to apply to Defendants.

UPMC's concerns as to the Margin Guarantee, which go beyond the allegations in the Complaint and thus are beyond the scope of the Court's APPA review, do not undermine the amended proposed Final Judgment. Moreover, UPMC's request, in connection with the Margin Guarantee, to modify the amended proposed Final Judgment to have the Court mandate specific contractual practices between Defendants, or to have the United States oversee contractual negotiations between them, is unnecessary and would involve the Court and the United States inappropriately in private contractual negotiations.[22]

2. The IT Subsidy

UPMC also objects to Paragraph V.B of the amended proposed Final Judgment, under which Geisinger may provide Evangelical with electronic medical records systems and support at a subsidized cost—the IT Subsidy.[23]

The IT Subsidy will enable Evangelical to adopt health information technology to improve the delivery of care to patients in central Pennsylvania. Indeed, as UPMC acknowledges, Defendants' sharing of electronic medical records software is likely to improve the experience for patients who receive care at both Geisinger and Evangelical. Even if UPMC is correct that having Geisinger and Evangelical on an integrated platform would increase interoperability by making patient records easier to access, patient scheduling more fluid, and patient referrals easier across the organizations,[24] those features will benefit patients without harming competition. Moreover, it is not uncommon in the health care industry for large health care systems to offer to subsidize a portion of the costs for smaller health care organizations to acquire electronic health records systems.[25]

UPMC appears to object to the IT Subsidy because it may *increase* Evangelical's independence and, by virtue of meeting its business needs, may make Evangelical less likely to partner with others in the market, such as UPMC. This outcome, however, would not harm competition.

Finally, UPMC's attempt to analogize the IT Subsidy to so-called ''reverse payment'' cases is misplaced, as the IT Subsidy lacks an essential component of an agreement to delay competition. In a typical ''reverse payment'' case, a pharmaceutical company that manufactures a brand-name drug settles a claim of patent infringement with a generic competitor by agreeing to pay the generic competitor in exchange for the generic competitor's agreement to delay launching a competing generic drug. Here, by contrast, there is no agreement between Defendants to delay or restrain competition. UPMC's comment thus provides no reason for concluding that the amended proposed Final Judgment is not in the public interest.

V. Conclusion

After carefully reviewing the public comments, the United States continues to believe that the amended proposed Final Judgment provides an effective and appropriate remedy for the antitrust violations alleged in the Complaint and is therefore in the public interest. The United States will move this Court to enter the Final Judgment after the comments and this response are published as required by 15 U.S.C. 16(d).

Dated: August 31, 2021

Respectfully submitted,

FOR PLAINTIFF UNITED STATES OF AMERICA

/s/David M. Stoltzfus

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[REDACTED]

March 8, 2021

U.S. Dept of Justice, 450 Fifth St. NW, Suite 4100, Washington, DC 20530

Dear Mr. Welsh,

I am commenting about the settlement between Geisinger and Evangelical Hospital I agree with your conclusion that they do not merge because of the monopoly the Geisinger will have and all the bad effects that will occur.

I live in Danville, one mile from the Geisinger but have all of my care given at Evangelical. I would hate to have that spoiled.

Sincerely,

Carol A. Barsh

Eric Welsh, Chief
Healthcare and Consumer Products Section
Antitrust Division
U.S. Department of Justice
450 Fifth St. NW
Suite 4100
Washington, DC 20530

Mr. Welsh:

I am writing to express my concerns regarding the DOJ's recent proposed settlement for the partial acquisition of Evangelical Community Hospital by Geisinger Health.

As it stands, the settlement limits Geisinger's ownership interest in Evangelical to 7.5%, described as passive. Additionally, loans/lines of credit to Evangelical are forbidden, as is exerting any control over Evangelical's expenditures. Kendra Aucker, Evangelical's CEO, has stated that Evangelical will use Geisinger's financial support to fund facilities, technology and services while simultaneously describing Evangelical Hospital as ''independent''. From this, arise the following questions and issues:

How is Evangelical independent if it depends upon Geisinger's 7.5% involvement without which we must assume Evangelical could not fund upgrades to what Ms. Aucker describes as facilities, technology and services?

What benefit does Geisinger obtain in the arrangement proposed by the DOJ since it represents only a fraction of what Geisinger sought in both monetary interest and strategic control? It appears that had Geisinger walked away from the proposed settlement it would have made plain their strategy of assuming sufficient control of a competitor without an outright takeover. This strategy was long evident to some of us in the community as ''why take over outright what you can control by other means''. Hospital competition in the area is presently limited due to Geisinger's acquisition of Shamokin Area Hospital, Bloomsburg Hospital and the closure of Sunbury hospital. With only Evangelical Hospital remaining the strategy almost worked. So is it now about Geisinger saving face or is there another agenda afoot?

The proposed settlement is framed in terms of both hospital's competition for 'inpatient general acute-care hospital services'' however there's much revenue to be made from outpatient services. What is to prevent Geisinger from expanding services into Evangelical's outpatient market thereby negating the cap imposed on the inpatient services, thus causing further financial strain on Evangelical?

Evangelical hospital recently completed construction of a $70 million PRIME (Patient Room Improvement, Modernization, and Enhancement) project. With an annual revenue of about $260 million, it is reasonable to enquire about the financing and terms that were obtained, what was used as collateral and if there was a co-signer. The facility was advertised as allowing access to

[22] *See Brunswick Corp.* v. *Pueblo Bowl–O–Mat, Inc.,* 429 U.S. 477, 488 (1977) (''[A]ntitrust laws . . . were enacted for the protection of competition not competitors.'') (internal quotation marks removed).

[23] Amended proposed Final Judgment ¶ V.B.

[24] UPMC Comment at 15.

[25] Office of the Nat'l Coordinator for Health Info. Tech. (part of the U.S. Department of Health and Human Services), *EHR Contracts Untangled: Selecting Wisely, Negotiating Terms, and Understanding the Fine Print* 6 (2016), *https://www.healthit.gov/sites/default/files/EHR_Contracts_Untangled.pdf.*

leading-edge technology not found at other community hospitals. Was this project planned prior to Geisinger's attempted acquisition? Was failure the plan? Without Geisinger's hoped for depth of financial involvement what will this mean for Evangelical's future finances?

If Evangelical does not anticipate an adverse financial impact from the DOJ's agreement, despite Geisinger's significantly reduced financial involvement, why did Evangelical originally accede to Geisinger's partnership with such onerous terms unless it was needed?

If Evangelical seeks a revisiting of the DOJ's settlement due to future financial shortcomings, does the DOJ currently have an opinion on what it may need to propose? In other words, did the DOJ review, and if not, will it review why Evangelical was seeking to expand services beyond what is found in a community hospital, services it apparently could not afford without giving up financial and strategic control of its hospital? Structuring an agreement that on the surface would not appear to be an antitrust violation gives an indication in my mind as to the mindset of the parties.

Regarding Evangelical's acquisition of IT systems and support from Geisinger, will this be at fair market value? Is there a mechanism to ensure that the price for support will not make up for the denied opportunity of partial hospital ownership and the service lines that Geisinger planned to develop?

In summary, what benefit does Geisinger derive from passive involvement in Evangelical, what is the endgame of each organization, and at what cost is there to the community, given the ever shrinking choices available to the public?

Thank You,

Steve Karp, MD

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June 3, 2021

Via Electronic Mail

Eric D. Welsh, Esq.
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450 Fifth Street NW, Suite 4100
Washington, DC 20530

Re: *United States* v. *Evangelical Community Hospital and Geisinger Health,* Civil Action No. 4:20–cv–01383–MWB (M.D. Pa.)

Dear Mr. Welsh:

On behalf of our client UPMC, a Pennsylvania nonprofit non-stock corporation, we submit these comments suggesting modifications to the Proposed Final Judgment (''PFJ'') [1] in the above-referenced case.

UPMC recently entered the general market region involved in this case to invigorate competition on both the provider and the insurer side. Like Geisinger Health (''Geisinger''), UPMC itself is both a provider and payer, or Integrated Delivery and Finance System (''IDFS''). And to attempt to increase competition in the very region at issue, UPMC engaged in talks with Evangelical Community Hospital (''Evangelical'') regarding potential collaboration. The combination of these facts puts UPMC in a unique position from which to comment on the PFJ.

After a lengthy investigation, the Department of Justice (''DOJ'') properly concluded that the initial proposed Collaboration Agreement between Geisinger and Evangelical would ''substantially lessen competition and unreasonably restrain trade . . . .'' Complaint at 1, *United States* v. *Geisinger Health,* No. 4:20–cv–01383–MWB (M.D. Pa. 2020) (hereinafter ''Compl.'').[2] From the outset, the DOJ correctly alleged that ''the substantial financial entanglements between these two close competitors . . . reduces both hospitals' incentives to compete aggressively.'' Id. The Complaint further explains that Geisinger's motivation to acquire and collaborate with Evangelical was to eliminate its central fear—that an Evangelical ''strategic partnership'' with UPMC would create a ''more effective competitor [that] could put Geisinger's revenues at risk.'' Id. ¶ 3.

Rather than litigate to enjoin the acquisition, on March 3, 2021, the DOJ and the defendants stipulated to the PFJ.[3] This remedy was aimed at preserving Evangelical's competitive independence, and prohibiting Geisinger and Evangelical from sharing competitively sensitive information. Indeed, the PFJ was intended to require the parties to ''eliminate other entanglements between them that would allow Geisinger to influence Evangelical.'' Competitive Impact Statement (''CIS''), ECF No. 46 at 2. After the publication of the PFJ on March 3, 2021, however, UPMC alerted the DOJ—and the DOJ acknowledged—that several problematic provisions contained in the original ''Collaboration Agreement'' [4] between Geisinger and Evangelical had not been addressed in the PFJ or Amended and Restated Collaboration Agreement (''Amended Collaboration Agreement''). ECF No. 45–2; 46–2. These legacy issues—if left in place—would harm competition, and they only make sense in the light of the original, improper collaboration.

DOJ has since corrected only some of the legacy issues. On May 17, 2021, it filed a Joint Notice of Amended Proposed Final Judgment, attaching a revised PFJ and Second Amended and Restated Collaboration Agreement (''Second Amended Collaboration Agreement''). See ECF No. 51, 51–1, 51–3. According to the Joint Notice, ''[a]fter filing the proposed Final Judgment, it was discovered that the Amended and Restated Collaboration Agreement and its attachments inadvertently included legacy provisions that did not conform to the proposed Final Judgment.'' ECF No. 51. Still, despite these corrections, additional legacy issues that harm competition remain unaddressed.

Two critical legacy issues create anticompetitive financial entanglements that undermine the objective to preserve and protect competition in the relevant market. These two principal entanglements involve: (1) Geisinger's margin guarantees to Evangelical, found in the Addendum to Geisinger's Hospital Services Agreement with Evangelical and the Addendum to the Physician Services agreement, both included as Exhibit D to the Second Amended Collaboration Agreement (ECF No. 51–3 at 55–56, 60–61) (''Margin Guarantee''); [5] and (2) Geisinger's subsidization of Evangelical's information technology (''IT'') expenses, as well as Geisinger's ongoing entanglement in those IT services, both referenced in the PFJ at V.B.1–3 (ECF No. 51–1 at 7) and 6.5 of the Second Amended Collaboration Agreement (ECF No. 51–3 at 9) (''IT Entanglement''). These entanglements also involve substantial improper information sharing not resolved by the PFJ.

Whether viewed independently or together, these provisions enable Geisinger and Evangelical to achieve precisely those anticompetitive effects of the transaction that the DOJ strongly urged should be eliminated. Permitting these legacy provisions to survive will reduce the incentives of Geisinger and Evangelical to compete. *See* Compl. ¶ 6. In fact, in addition to the reduction in competition from a stand-alone Evangelical, these surviving entanglements will reduce the threat to Geisinger that Evangelical will become a stronger competitor through collaboration with UPMC (or another entity). *See* id. ¶ 3. As the Complaint and Competitive Impact Statement make plain, those two anticompetitive goals motivated the original Collaboration Agreement, and that purpose is still accomplished through the Margin Guarantee and the IT Entanglement.

The key to unraveling the purpose and effect of these provisions is to ''follow the money.'' Here, as in reverse payment cases where a branded pharmaceutical pays a generic to eliminate a competitive threat to its market position, the flow of money from Geisinger to Evangelical under the Margin Guarantee and IT Entanglement is most consistent with anticompetitive intent and effects. For example, under the PFJ, Geisinger is permitted to provide heavy subsidies on IT— discounts of 85%, presumably worth tens of millions of dollars—to its ''closest competitor.'' Compl. ¶ 18. Further, contrary to the expected outcome between a payer and a provider, Geisinger's Margin Guarantee can lead to Geisinger paying more when it sends additional volume to Evangelical. *See* ECF No. 51–3 at 59, 64. Finally, under the terms of PFJ, Evangelical gets to keep approximately $20.3 million from Geisinger, while Geisinger obtains a 7.5% interest in a non-profit that will entitle it to that 7.5% value only upon sale of Evangelical, liquidation, or termination of the agreement. *See* CIS at 10–11; ECF No. 51–3 at 10–11.

[1] ECF No. 51–1.

[2] ECF No. 1.

[3] ECF No. 45–1 (Stipulation and Order to the first proposed Final Judgment filed on March 3, 2021, ECF No. 45–2).

[4] ECF No. 46–1.

[5] The Margin Guarantee was also included in Exhibit D to the Amended Collaboration Agreement. ECF No. 46–2 at 54, 60–61.

Why would Geisinger bestow such largess on its closest competitor? After all, Geisinger—which despite its position in the relevant market refuses to enter provider contracts with any of UPMC's health plans—knows how to compete. The DOJ has already properly rejected any suggestion that Geisinger was offering funds ''altruistically.'' Compl. ¶ 6. Instead, Geisinger is providing and guaranteeing this money, and Evangelical is accepting it, because ''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.'' Compl. ¶ 32. Geisinger achieves a dependent Evangelical, and perhaps more importantly, keeps UPMC at bay. Indeed, if permitted, the entanglement created by the remaining provisions could allow Geisinger to influence Evangelical to cut off its relationship with UPMC as well, further threatening competition for health plans in the market.

This outcome should not be permitted, particularly where the DOJ has already acknowledged there are no procompetitive benefits in the transaction to weigh against these harms,[6] and ''Evangelical's placement in the most favored tier of Geisinger Health Plan's commercial insurance products does not require the partial-acquisition agreement.'' Compl. ¶ 66. These legacy provisions, like those the DOJ has excised, were designed to further the anticompetitive ''spirit and intent of the ECH-Geisinger Collaboration Agreement.'' ECF No. 46–2 at 54, 60. Because there is no pro-competitive collaboration which outweighs the likely anticompetitive effects, the PFJ should be modified to eliminate these last impactful vestiges of the original Collaboration Agreement.

Background

Evangelical and Geisinger are each other's closest competitors in a six-county area of Central Pennsylvania. Compl. ¶¶ 18, 56, 65; CIS at 4–5. Together they account for at least 70% of the inpatient general acute-care services in this area. CIS at 4. As an independent community hospital with annual revenue of approximately $260 million, Evangelical knew it was vulnerable to competition from Geisinger, the largest provider in the relevant market, with annual revenue above $7 billion. *See* Compl. ¶¶ 19, 21; CIS at 2–3. Meanwhile, Geisinger ''had long feared that Evangelical could partner with a hospital system or insurer to compete even more intensely'' against Geisinger. Compl. ¶ 3.

Geisinger's concern was heightened in 2017 when Evangelical announced it was looking for a strategic partner. Compl. ¶ 22. This occurred just after Susquehanna Health System joined UPMC in 2016, having rejected overtures from Geisinger. To avoid a potential repeat whereby a nearby competitor became stronger, Geisinger intended to create ''an indefinite partnership'' to ensure that ''Evangelical is 'tied to us' so 'they don't go to a competitor.' '' Compl. ¶ 30. The stage was set for a merger or collaboration that would solve both Geisinger's and Evangelical's troubles. And since the defendants knew they could not merge outright, they ''concocted the complicated partial-acquisition agreement . . . to avoid antitrust scrutiny.'' Compl. ¶ 24.

Even now after several revisions (both pre- and post-challenge), the Second Amended Collaboration Agreement still maintains certain anticompetitive features that generate the same financial and other entanglements condemned in the DOJ's Complaint. These provisions negatively impact the incentives for Geisinger and Evangelical to compete with one another, incentivize higher prices to payers, and substantially reduce the likelihood that Evangelical would partner with UPMC or any other entity in a way that could better compete against Geisinger. Indeed, Paragraph 6 of the Complaint aptly summarizes the results:

> 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.

The relief already obtained by the DOJ disentangles the parties in some important ways, such as severing Geisinger's ability to appoint directors and control certain Evangelical actions. The DOJ also capped Geisinger's ownership interest in Evangelical to attempt to preserve each company's respective incentives to compete.

Unfortunately, the surviving entanglements between Geisinger and Evangelical—now ostensibly blessed by the PFJ—effectively negate to a substantial degree the potential positive effects of the proposed relief. The Margin Guarantee and IT Entanglement were negotiated in connection with, and are inextricably linked to, the original Collaboration Agreement. So too was the payment of $20 million. There is no reason to pick and choose between the various provisions as to which can survive. Given the existence of a hold-separate agreement in this case, voiding the Second Amended Collaboration Agreement in its entirety is the best option to achieve the relief described in the Complaint and claimed in the Competitive Impact Statement. Short of total elimination, at a minimum, the provisions discussed herein should be voided. In the event that the first two options are rejected, some additional alternatives are presented that might lessen the magnitude of the harm.

We explain in more detail below why the legacy provisions regarding the Margin Guarantee and IT Entanglement maintain the competitive harms identified in the Complaint and why the PFJ should be modified to promote the public interest. The PJF simply does not fall ''within the range of acceptability or 'within the reaches of the public interest.' ''[7]

Legal Standard in Tunney Act Proceedings

The DOJ will file comments and its response with the Court in compliance with the Tunney Act, which states, the Court ''shall determine that the entry of [the PFJ] is in the public interest.''[8] ''[C]ourts compare the complaint filed by the government with the proposed consent decree and determine whether the remedies negotiated between the parties and proposed by the Justice Department clearly and effectively address the anticompetitive harms initially identified.''[9] Proposed remedies should ''effectively open[] the relevant markets to competition . . . .''[10] Although courts owe deference to the DOJ, the exercise is not ''a mere formality''[11] nor ''merely a 'judicial rubber stamp.' ''[12] In this regard, when making its public interest determination, a court must ''make an independent determination.''[13] As the D.C. Circuit has explained, ''If, for example, a proposed consent 'decree is ambiguous, or the district judge can foresee difficulties in implementation,' the decree should not be entered until the problems are fixed.''[14] Further, courts are not obliged to accept a consent ''if third parties contend they would be positively injured by the decree.''[15]

When, after reviewing the DOJ's response that nothing in the public comments alters the DOJ's original conclusions, a court disagrees and concludes that a Proposed Final Judgment does not meet the public interest standard, courts have taken a variety of steps. Those have included requiring the parties to substantially modify the proposed consent decree before approving it,[16] ordering that the parties file annual reports with the court regarding the status of certain requirements in the Final Judgment,[17] and holding annual hearings ''to ensure that the Final Judgment does, and continues to, satisfy the public interest.''[18] As in another

[6] Compl. ¶ 67 (''there are no transaction-specific efficiencies to weigh against the harm'').

[7] *United States* v. *Am. Tel. & Tel. Co.,* 552 F. Supp. 131, 151 (D.D.C. 1982) (citations and subsequent history omitted).

[8] 15 U.S.C. 16(b), (d), (e)(1).

[9] *United States* v. *Thomson Corp.,* 949 F. Supp. 907, 913 (D.D.C. 1996). None of the relief proposed here exceeds the scope of the Complaint allegations. Cf. *United States* v. *Microsoft Corp.*, 56 F.3d 1448, 1462 (D.C. Cir. 1995).

[10] *AT&T,* 552 F. Supp. at 153.

[11] *United States* v. *CVS Health Corp.,* 407 F. Supp. 3d 45, 52 (D.D.C. 2019).

[12] *Thomson Corp.,* 949 F. Supp. at 914.

[13] *Id.* (internal quotations and citations removed). Here, the court declined to approve the Proposed Final Judgment until it included a provision that would require the defendants to provide anyone a free license to a copyright upon request or another suitable remedy to resolve the court's concerns about barriers to entry. Id. at 930–31.

[14] *CVS Health,* 407 F. Supp. 3d at 52 (citing Microsoft, 56 F.3d at 1462).

[15] *Microsoft,* 56 F.3d at 1462.

[16] *AT&T,* 552 F. Supp. at 214; Thomson, 949 F. Supp. at 931.

[17] *United States* v. *Comcast Corp.,* 808 F. Supp. 2d 145, 149–150 (D.D.C. 2011). The court indicated that ''despite the Government's assurances that 'this Court retains jurisdiction to issue orders and directions necessary and appropriate to carry out or construe any provision of the Final Judgment,' and 'to enforce compliance, and to punish violations of its provisions,' I am not completely certain that these safeguards, alone, will sufficiently protect the public interest in the years ahead.'' Id. at 149 (citations omitted).

[18] *Comcast Corp.,* 808 F. Supp. 2d at 150.

recent matter involving the health care industry, ''with so much at stake, the congressionally mandated public interest inquiry must be thorough.'' [19]

Margin Guarantees in the Collaboration Agreement Addenda

Exhibit D to the Second Amended Collaboration Agreement [20] incorporates Margin Guarantee provisions that create incentives for Geisinger and Evangelical not to compete. As detailed more fully below, under the Margin Guarantee, Geisinger ensures that Evangelical obtains equal or larger Geisinger Health Plan revenues throughout the term of the agreement. In addition to reducing head-to-head competition, this Margin Guarantee creates incentives for Evangelical to raise provider rates to UPMC and other health plans, increasing costs to consumers and heavily favoring Geisinger in the relevant market. These Addenda were part of the original Collaboration Agreement,[21] and their practical effects are only understood in that context. With no pro- competitive collaboration or integration to offset the likely anticompetitive effects, these Addenda should be stricken along with the other disincentives to compete still embedded in the Second Amended Collaboration Agreement.

Although the CIS does not mention the Margin Guarantee, the DOJ apparently views the Margin Guarantee as a ''typical'' contract between a payer and a provider with a guarantee that Evangelical will achieve guaranteed revenue in exchange for lower rates. But this view ignores the reality reflected throughout the Complaint that Geisinger is not a typical payer, but is vertically integrated, providing both health care services and health plans.

Given the uncertain nature of healthcare costs, a typical payer-provider contract does not contain 10-plus-year margin guarantees. UPMC is both a provider and an insurer, and is not aware of the existence of any agreement with a similar Margin Guarantee in any other context. The concept is rife with anticompetitive potential and several such effects are likely to unnecessarily eviscerate a substantial portion of the relief sought in the PFJ.

The Addenda consist of two main parts. First, Geisinger commits that Evangelical's hospital and other provider services will be included in the highest tier (Tier 1) of Geisinger's health plans.[22] This provision is not generally problematic; a health plan often attempts to steer increased patient traffic to a provider in exchange for lower reimbursement rates.

Second, however, the Addenda contains an unusual and plainly anticompetitive Margin Guarantee,[23] that (while somewhat difficult to parse and perhaps intentionally vague as to details) appears to provide for the following:

• In each year of the ten-year agreement, Geisinger guarantees that Evangelical will receive the same or a larger amount of total margin dollars (called a ''Margin Threshold'') starting from a certain base.[24]

• If the margin dollars decrease, Geisinger will make it up to Evangelical with (i) a retroactive payment; and (ii) higher reimbursement rates to Evangelical going forward.[25]

• If the margin dollars increase, Evangelical pays Geisinger a retroactive payment and Geisinger's rates go down.[26]

• Geisinger and Evangelical share highly competitively sensitive information to effectuate the agreement on a monthly basis (discussed further below).[27]

Illustrations of how this framework is to operate in practice are attached to the Addenda as Exhibit A, and they produce highly surprising and competitively suspect results.[28]

First, recall that Evangelical feared competition from Geisinger. Absent this Margin Guarantee for the next ten years, Geisinger would have tried to steer patients away from Evangelical providers and toward Geisinger providers. But Geisinger's Margin Guarantee has reduced Evangelical's fear of losing patients by setting up a penalty to discourage Geisinger from engaging in such activity. With the Margin Guarantee, Evangelical is immunized against loss of margin. And if Geisinger is to entice a patient to a Geisinger hospital, Geisinger not only has to offer better terms to the patient, but also has to make up revenue lost by Evangelical. By design, the incentive to compete between Geisinger and Evangelical has decreased, the very same effect that the DOJ decried in the Complaint regarding the Collaboration Agreement.

Why would Geisinger offer to make payments to compensate Evangelical for patients it lures away? [29] Because the penalty benefits Geisinger; Evangelical no longer fears competition from Geisinger, and therefore Geisinger has less reason to fear that Evangelical would partner with UPMC (or another entity) and become ''a more effective competitor.'' Simply put, the Margin Guarantee achieves Geisinger's main objective from the collaboration: ''[d]efensive positioning against expansion by [UPMC] and/or affiliation with [another] competitor.'' Compl. ¶ 22 (brackets in original).

Also by design, this reduction of competition from Geisinger gives Evangelical the freedom and incentive to raise provider rates to other payers (like UPMC), which have much smaller subscriber bases and direct lower patient volume to Evangelical than can Geisinger. As Evangelical raises rates for medical services, Geisinger providers are then also in a position to raise rates. Indeed, economic theory predicts that no actual payments even have to trade hands for market rates to be successfully increased. This is a classic example of game theory involving an enforceable pre-commitment.[30]

The Exhibit A to the Addenda also reveal a second mechanism incenting Evangelical to raise payer rates. If Geisinger Health Plan competes for and captures an existing Evangelical patient from another insurer that pays Evangelical higher reimbursement rates than does Geisinger, then Geisinger must make up the revenue loss to Evangelical. In effect, this could result in Geisinger paying higher rates to Evangelical even when Geisinger's volume to Evangelical increases. Several crucial implications fall out from this odd result.

It is axiomatic that higher payer patient volumes predictably lead to lower reimbursement rates. Geisinger has by far the largest insurance market share in the relevant area. Therefore, one would expect that most payers, if not all, are like the insurer referred to in Exhibit A as ''Payer A,'' paying higher provider rates than Geisinger to Evangelical. In this example, when Geisinger's Health Plan takes a current Evangelical patient from ''Payer A''—which pays Evangelical higher rates than would Geisinger for the same medical services—Geisinger has promised to reimburse Evangelical for lost margin through a retroactive payment and higher rates going forward. And the greater the difference in rates, the more money Geisinger has promised to pay to make Evangelical whole.

Why does it follow that Evangelical has the incentive to raise rates to UPMC or another similarly-situated Payer A? First of all, that's what Geisinger wants—and it is willing to pay Evangelical to get it. Moreover, Evangelical will raise rates because it can profitably do so. As Evangelical increases provider rates to UPMC two possibilities can

[19] *CVS Health,* 407 F. Supp. 3d at 48.

[20] *See* Addendum to the Agreement to Provide Hospital Services by and among Geisinger Health Plan, Geisinger Indemnity Insurance Company, Geisinger Quality Options, Inc., and Evangelical Community Hospital, ECF No. 51–3 at 55; Addendum to the Agreement to Provide Primary and Specialty Medical Services by and among Geisinger Health Plan, Geisinger Indemnity Insurance Company, Geisinger Quality Options, Inc., and Evangelical Medical Service Organization, ECF No. 51–3 at 60.

[21] *See* ECF No. 46–1 at 129–140.

[22] *See* ECF No. 51–3, at 56 (§ B.2), at 61 (§ B.2).

[23] *See* ECF No. 51–3, at 55–56 (§ B.1), at 60–61 (§ B.1).

[24] *See* ECF No. 51–3, at 55–56 (§§ A, B.1), at 60–61 (§§ A, B.1).

[25] *See* ECF No. 51–3, at 55–57 (§§ B.1, B.3, B.6, B.7); id. at 59 (Exhibit A); at 60–63 (§§ B.1, B.3, B.6, B.7); id. at 64 (Exhibit A).

[26] *See* ECF No. 51–3, at 55–57 (§§ B.1, B.3, B.6, B.7); id. at 59 (Exhibit A); at 60–62 (§§ B.1, B.3, B.6, B.7); id. at 64 (Exhibit A).

[27] *See* ECF No. 51–3, at 56–57 (§§ B.6, B.7), at 61–62 (§§ B.6, B.7).

[28] *See* ECF No. 51–3, at 59 (Exhibit A), at 64 (Exhibit A).

[29] The 7.5% interest retained by Geisinger does not entitle it to receive any cash flow. ECF 51–3, at 8 (§ 6.2) (''Evangelical shall not make, nor be required to make, any distributions or other payments with respect to Geisinger's membership interest in Evangelical.'').

[30] *Cf.* Jonathan Baker, *Two Sherman Act Section 1 Dilemmas: Parallel Pricing, the Oligopoly Problem, and Contemporary Economic Theory,* 38 ANTITRUST BULLETIN 143, 158 (''Firms can deter rivals from cheating by guaranteeing that when the time comes to carry through a punishment, they will find the punishment behavior attractive. They do so by tying their own hands . . . .''); Ian Ayres, *How Cartels Punish: A Structural Theory of Self-Enforcing Collusion,* 87 COLUMBIA L. REV. 295, 317 (1987) (''Once a super-competitive cartel price is established, an MFN [most-favored-nation] clause also acts to increase the costs of prices cuts. Unlike an MCC [meeting competition clause], where the rivals are committed to punishing, the MFN clause is a credible commitment to self-punishment '').

occur: In one scenario, UPMC accepts those rate increases and pays more, passing those additional costs on to its insured employers and employees. This in turn increases the cost of UPMC's health plans, making UPMC less competitive against Geisinger's plans. If UPMC is able to retain its employer clients in the face of the price increase, Evangelical's price increase is successful, and it gets more revenue. Alternatively, if UPMC's employer clients refuse the price increase, the most likely insurer alternative is Geisinger. Geisinger, as discussed above, would then have to pay Evangelical to make up for any lost margin, but it gains new subscribers that offset the payment to Evangelical. In short, Evangelical is protected against any loss of profit from raising rates to UPMC or another ''Payer A,'' and will gain revenue under many likely circumstances.[31]

The illustration above raises another particularly unusual question that should give an antitrust enforcer pause: As Geisinger Health Plan wins new patients and its volume increases at Evangelical, why would Geisinger commit to paying a higher rate to Evangelical? In light of the motivation for the Collaboration Agreement as a whole, the best answer is to think of the Margin Guarantee as Geisinger paying Evangelical to raise rates to UPMC. That benefits Geisinger because employers that are not willing to accept the price increase will simply switch to Geisinger. Additionally, on the provider side, if patients leave Evangelical as a result of the higher prices, Geisinger's providers are again the most likely alternative: Geisinger has more than 50% of the relevant market, and we understand that the diversion ratio from Evangelical to Geisinger is around 70%. In short, the Margin Guarantee is a new method to ''raise rivals' costs,'' and gain additional market share, whether it occurs on the provider or payer side.[32]

We understand the DOJ's belief is that instead of increasing provider rates to UPMC and other payers, Evangelical will be incentivized to lower rates to other health plans with the expectation that these smaller payers will win Geisinger-insured patients and still preserve its margin from Geisinger under the Margin Guarantee. But this is unlikely for several reasons. The Addenda is supposed to further the collaboration between the two, to the benefit of both parties. If Evangelical opportunistically reduced rates to other payers to take advantage of the Margin Guarantee, Geisinger would likely have a claim for breach of contract because of the implied covenant of good faith and fair dealing. The Second Amended Collaboration Agreement allows Geisinger to provide approximately $20 million to Evangelical in exchange for a 7.5% ownership interest. If Evangelical substantially lowered rates to other providers, that would not be in the spirit of contract.[33]

Additionally, because of the payment mechanism and the information sharing in the Margin Guarantee, there is no doubt that Geisinger would learn of any discounting to UPMC or others. As a result, Evangelical would be further dissuaded from lowering prices to UPMC in fear that Geisinger might retaliate, for example, through additional capital expenditures in Evangelical's backyard. Compl. ¶ 19 (''in considering capital expenditures for certain improvements to its facilities in 2018, Geisinger cited Evangelical's competitive activities.''). Further, a rate decrease to UPMC (or other payers) would have the almost certain effect of reducing revenue for all current volume, balanced against an uncertain hope that UPMC (or other payers) would send additional volume to Evangelical. Lower rates then would require the unlikely belief by Evangelical that the uncertain incremental revenue would surpass the predictable loss from revenue of current patients. For all the above reasons, incentives point towards Evangelical raising provider reimbursement rates to non-Geisinger payers.

It bears repeating that the Margin Guarantee was created to better align incentives in furtherance of a joint profit maximizing collaboration. Moreover, any thoughts that past competition would predict future competition between Evangelical and Geisinger is dispelled by the DOJ's compelling recitation of ''the history of picking and choosing when to compete with each other.'' *See* Compl. ¶¶ 40–42. In fact, the DOJ found:

- 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.
- 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.
- 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. . . .

The DOJ's conclusion to this section is particularly relevant here:

> 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.

Compl. ¶ 43 (emphasis added).

Even without this history, the entanglements raise unjustifiable antitrust risks. With this history, the result is even more certain. These entities are not entitled to the benefit of the doubt at the expense of consumers.

Finally, the Margin Guarantee has nothing to do with, and is severable from, the tiering provision in the Addendum. As Paragraph 66 of the Complaint recognizes:

> 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.

This logic also applies to the Margin Guarantee. This entanglement is not necessary to effectuate tiering. The Margin Guarantee was part and parcel of the original, anticompetitive Collaboration Agreement, designed to foster collaboration, not competition. Recall, the parties' preferred outcome was a complete merger. Compl.

[31] In the ''but for'' world without the Margin Guarantee, assuming that Evangelical raises rates to UPMC and UPMC loses employers to Geisinger, if Geisinger's reimbursement rates are lower, Evangelical would lose revenue. With the Margin Guarantee, Evangelical no longer has to consider that potential revenue loss from the rate increase to UPMC or another similarly situated payer.

[32] *See* PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 651b5 (4th and 5th ed. 2013–20) (''Several anticompetitive actions by dominant firms are best explained as efforts to limit rivals' market access by increasing their costs. Such strategies may succeed where more aggressive ones involving the complete destruction of rivals might not. Once rivals' costs have been increased, the dominant firm can raise its own price or increase its market share at the rivals' expense.''); Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price,* 96 YALE L.J. 209 (1986).

[33] *See Alpha Upsilon Chapter of Fraternity of Beta Theta Pi, Inc.* v. *Pennsylvania State Univ.,* No. 4:19–cv–01061, 2019 WL 5892764, at *10–11 (M.D. Pa. Nov. 12, 2019) (denying motion to dismiss claim for breach of the implied covenant of good faith and fair dealing); *Somers* v. *Somers,* 613 A.2d 1211, 1213 (Pa. Super. 1992) (''certain strains of bad faith which include: ''e''vasion of the spirit of the bargain'').

¶ 23. The Margin Guarantee, like all the other provisions, was drafted (*i.e.,* ''concocted'') to replicate that goal as much as feasible.

Evangelical and Geisinger should not be permitted to maintain ''additional entanglements created by the partial acquisition agreement.''

It Subsidy and Entanglement by Horizontal Competitor

Another key anticompetitive legacy issue from the original Collaboration Agreement remains: Geisinger's extraordinary subsidy of and entanglement in its main competitor's IT systems. The IT Entanglement was part of the original Collaboration Agreement because Geisinger and Evangelical expected to cease (or at least substantially reduce) mutual competition. The CIS summarily concludes that ''the provision of upgraded health records software and other support software is unlikely to prevent Evangelical from collaborating with other healthcare providers.'' CIS at 16. But the DOJ does not have ''a crystal ball to forecast'' how this IT Entanglement will work, and lacks experience with this unique situation.[34] For the reasons below, the DOJ conjecture is likely incorrect. As a result, the IT Entanglement should also be reconsidered and eliminated.

The Complaint recognizes that Evangelical had the financial ability to improve its IT without this collaboration.[35] And, as the DOJ has pointed out, Geisinger's outlays to Evangelical are not for altruistic purposes. *See* Compl. ¶ 6. If not for altruism, then why would Geisinger assist its main competitor to become even marginally more competitive? The answer, once again, is that Geisinger has its eye on the prize—ensuring its dominant competitive position in the market by reducing Evangelical's independence and the likelihood that Evangelical would collaborate with another entity to become a significantly more effective competitor. UPMC is well aware that independent community hospitals cherish their independence, and collaborate only when necessary. By effectively taking Evangelical's IT expenses off the table, Geisinger achieves its objective. Furthermore, Geisinger is not just subsidizing IT; rather, Geisinger is entangling itself within the Evangelical IT system.[36] This entanglement will give Geisinger, the dominant provider and payer in the market, a further advantage over any other competition, of which there already is very little.[37]

As before, the IT Entanglement should be examined, not in a vacuum, but informed by the anticompetitive purpose of the original Collaboration Agreement. And the big picture is clear. Prior to the deal, Evangelical was in a ''strong financial position, had been profitable for the last five years,'' and had the financial ability to fund capital improvement projects. Compl. ¶ 65. Meanwhile, Evangelical was considering a partnership with UPMC or others. The Complaint alleges that Geisinger was aware of that threat, and wanted to prevent it. This motive leads to the following alternative, yet realistic, view of the but for world:

- Geisinger believed that Evangelical was considering partnering with UPMC. Compl. ¶ 22. Geisinger knew that such a partnership would increase competition and be unfavorable for Geisinger's dominant position. Compl. ¶ 3. Geisinger believed that it needed to prevent a UPMC-Evangelical collaboration. Compl. ¶ 30.
- Geisinger would have preferred a full acquisition of Evangelical, but also soon realized that such a transaction would be blocked on antitrust grounds. Compl. ¶ 23.
- As a fallback, Geisinger and Evangelical sought to ''concoct'' a partial acquisition, Compl.¶ 24, but that arrangement too might be blocked.
- As a further attempt to prevent a relationship between UPMC and Evangelical, Geisinger decided to offer an arrangement whereby Evangelical remains technically independent, but will become entangled and collaborate closely with Geisinger.
- Geisinger offers to pay the vast majority of Evangelical's significant IT expenses, requiring Evangelical's dependence on Geisinger for technology licenses and operational support, as well as significant information sharing over the course of a decade.

This is essentially the state of the world. Geisinger should have no incentive to assist its main adversary. So why do it? To reduce the risk of Evangelical partnering with UPMC or another entity that might pose an increased competitive threat to Geisinger. Prior to the negotiations over the original Collaboration Agreement, the parties were negotiating an IT license. The value of the IT license to Geisinger was estimated at $10 million alone;[38] thus, the Second Amended Collaboration Agreement will reduce that revenue to only $1.5 million, a windfall of $8.5 million for Evangelical (in addition to the $20.3 million). It is unlikely that this IT Entanglement represents an arms-length transaction between competitors; Geisinger expects Evangelical to hold up its end of the deal, and these provisions provide assurances that this will occur.

This is another anticompetitive ''win-win'' for Geisinger and Evangelical, which nominally maintains Evangelical's independence while becoming dependent on Geisinger's largesse, thereby reducing its threat to Geisinger's dominance. But it is a significant loss for health care consumers in the region, who might have benefitted from more vigorous competition to Geisinger's stronghold on both medical services and insurance in the relevant market.

With respect to the likely anticompetitive effects, the most appropriate analogy to the substantial IT discounts provided by Geisinger to Evangelical involves the branded-generic pharmaceutical reverse payment cases.[39] As the courts now recognize, the large and unjustified flow of anything of value from a dominant firm to a competitor in the wrong direction is suspect. *See King Drug Co. of Florence, Inc.* v. *SmithKline Beecham Corp.,* 791 F.3d 388, 404 (3d Cir. 2015) (stating ''reverse payments are problematic because of their potential to negatively impact consumer welfare by preventing the risk of competition'' and recognizing that certain non-cash transfers ''are likely to present the same types of problems as reverse payments of cash.''). Here, Geisinger is effectively transferring substantial revenue to a competitor to avoid a threat of increased competition.[40] As in the pay-for-delay cases, finding a valid business reason for such a flow of consideration is not easy, and the DOJ did not suggest any justification in its Competitive Impact Statement.[41] Bestowing millions of dollars of discounts on Evangelical should evoke as much suspicion as above market sales, particularly when the discounts are born from an anticompetitive collaboration.

The example of Susquehanna Health, now UPMC Susquehanna, is instructive here. As mentioned above, Susquehanna joined UPMC in 2016, after rebuffing advances from Geisinger similar to those made to Evangelical. Geisinger had offered to provide for all of Susquehanna's needed IT expenditures, which were valued at tens of

[34] *Cf. Comcast Corp.,* 808 F. Supp. 2d at 149; CVS Health, 407 F. Supp. 3d at 50–51 (rejecting DOJ conclusion that foreclosure ''is unlikely to occur,'' because absent supporting evidence and explanation, the response is ''little more than a bald assertion that it is right and the AMA is wrong'').

[35] Compl. ¶¶ 64–65.

[36] There are two means by which a ''donor'' under the Stark Act might provide IT subsidies. The first involves the donee dealing directly with the EMR. The other puts the donor between the EMR and the donee, which involves more entanglement. The Agreement here seems to contemplate the latter.

[37] The Complaint alleges that UPMC has approximately 27% of the relevant market. But this substantially overstates UPMC's position. The DOJ's estimated share is an artifact of the reality that Evangelical's service area stretches as far north as Williamsport, home of a major UPMC hospital. This artificially boosts the apparent competitive significance of UPMC. In fact, there are very few zip codes where any material overlap between UPMC and Evangelical exists. Geisinger and Evangelical are the only two significant competitors in the vast majority of Evangelical's service area.

[38] Compl. ¶ 29.

[39] *King Drug Co. of Florence, Inc.* v. *SmithKline Beecham Corp.,* 791 F.3d 388, 402 (3d Cir. 2015) (quoting *FTC* v. *Actavis, Inc.,* 570 U.S. 136, 140–41 (2013)) (''In a reverse payment settlement, the patentee ''pays money . . . purely so [the alleged infringer] will give up the patent fight.'' These payments are said to flow in 'reverse' because 'a party with no claim for damages (something that is usually true of a paragraph IV litigation defendant) walks away with money simply so it will stay away from the patentee's market.' '').

[40] While it is true that the consideration in Actavis resulted in express contractual commitments not to compete, that distinction is not material in this context; rather the consideration (part of the partial collaboration) results in the same anticompetitive effects- reduced competition in the relevant market.

[41] *Cf. In re High Fructose Corn Syrup Antitrust Litig.,* 295 F.3d 651, 659 (7th Cir. 2002) (emphasis in original) (when one competitor sources from another competitor at a higher cost than internal production, this could signify that the conduct ''is a way of shoring up a sellers' cartel by protecting the market share of each seller.''); *In re Titanium Dioxide Antitrust Litig.,* 959 F. Supp. 2d 799, 815 (D. Md. 2013) (''Instead of competing for Millenium's customers, DuPont appears to have provided help to Millennium, selling titanium dioxide at a rate lower than that on the market.''); *In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig.,* 681 F. Supp. 2d 141 (D. Conn. 2009) (holding that selling to a competitor at below market prices created an inference of a price-fixing conspiracy).

millions of dollars. Had Susquehanna received that money from Geisinger, or a subsidy like that contemplated here, Susquehanna's incentive to join UPMC would have been reduced. And even if it had remained technically ''independent,'' it would have become dependent on Geisinger's aid, to the detriment of consumers in the region. The same is true here.

Leaving aside Geisinger's interference with Evangelical's path toward becoming a stronger competitor to Geisinger, the IT arrangement thoroughly entangles Geisinger with Evangelical. Evangelical will become dependent on Geisinger to provide and manage the key IT systems required for the successful management of Evangelical's health care operations and patient care. And aside from dependency on Geisinger's subsidies, the difficulty and cost of potentially having to uproot and integrate a new IT system in the future will make Evangelical even more hesitant to cross Geisinger for fear that its infrastructure may also be at risk. This will further reduce competition in the market. The Complaint repeatedly references the fact that the entanglements between Evangelical and Geisinger bode ill for consumers. Although DOJ has accomplished a number of disentanglements, the IT Entanglement, like the Margin Guarantee discussed above, still remain and create unnecessary competitive risks.

As any healthcare provider understands, today's healthcare delivery is heavily dependent on the utilization of a modern Electronic Medical Record (''EMR'') system, which impacts boththe physician and patient. The Second Amended Collaboration Agreement at issue outlines the IT Entanglement as follows:

- Geisinger ''will provide its electronic medical system records systems (EPIC and related embedded clinical systems, including a license to the embedded Geisinger intellectual property) at an 85% discount'' to Evangelical;
- Geisinger will provide support for such systems at an 85% discount to Evangelical; and
- The parties will enter an IT sharing agreement, whereby Geisinger will provide additional back office systems to Evangelical at commercially reasonable rates.[42]

Every EMR system is different; in fact, an EMR provided by Epic Systems at two different hospitals will often be different from one another in meaningful ways, which can limit their interoperability. The goal for EMRs is to allow providers to exchange information and seamlessly integrate it into their own systems.[43] Laws, regulations, and standards establish some EMR interoperability requirements, but actual true, complete, and seamless interoperability between different EMR's is dependent on implementation.[44]

Under the Second Amended Collaboration Agreement, like the original version, Evangelical will be brought into Geisinger's version of Epic, meaning that Geisinger and Evangelical will be on an integrated EMR infrastructure. Patient referrals between Evangelical and Geisinger will be easier within the integrated platform. Patient records will be easier to access across Evangelical and Geisinger. Patient scheduling will be fluid between Evangelical and Geisinger provider facilities.

In the abstract, one might conclude these are unambiguously procompetitive efficiencies, but the reality is that Evangelical could achieve any such efficiencies either on its own or with ''affiliation with a partner other than its primary competitor.'' [45] As a result, likely anticompetitive effects outweigh any such efficiencies. The IT Entanglement is inextricably linked to the goals of the original collaboration: Bringing Evangelical into the Geisinger fold and making it more difficult for others to compete with the collaboration. Geisinger and Evangelical intended their IT integration to be seamless; there is no suggestion they intended that others share their outcome. Yet, the IT Entanglement remains essentially unchanged. Other providers and payers will face more friction when trying to work with Evangelical or compete for patients. And in furtherance of the collaboration's goal to insulate Geisinger and Evangelical from outside competition, they will likely ''make it harder than it needs to be (legally or technically) for patients to take their data to other [health care organizations] because this can inhibit patients or customers from moving their business to competing providers.'' [46]

Of particular interest here, the discussion of recent Medicare Program amendments acknowledges that a prohibition on information blocking was intended to ensure the ''policy goal of fully interoperable health information systems and will not be misused to steer business to the donor [hospital].'' [47] While UPMC has no reason to believe that total ''information blocking'' will occur, UPMC is concerned that Geisinger will necessarily gain an unfair competitive advantage through the IT Entanglement and subsequent additional entanglements if those legacy provisions are not eliminated from the Second Amended Collaboration Agreement.[48]

As one example, because the agreement apparently anoints Geisinger as Evangelical's IT gatekeeper, when the inevitable technological glitch arises between UPMC (or United or Aetna) and Evangelical, Geisinger apparently would be responsible for fixing the problem.[49] That alone should raise concerns. Similarly, the Office of the National Coordinator for Health Information Technology (''ONC'') explains that, under the Cures Act Final Rule:

It will not be information blocking if an actor does not fulfill a request to access, exchange, or use EHI due to the infeasibility of the request, provided certain conditions are met.''

It will not be information blocking for an actor to charge fees, including fees that result in a reasonable profit margin, for accessing, exchanging, or using EHI, provided certain conditions are met.[50]

Geisinger and Evangelical also have other means at their disposal to make patient transfers to other providers more difficult. Those include making it difficult to match patients' health records stored across different systems [51] and making it ''challenging to establish the governance and trust'' related to patient information exchange practices.[52] By subsidizing, supporting, and essentially controlling Evangelical's IT, the IT Entanglement further solidifies the relationship between the two

[42] *See* Second Amended Collaboration Agreement, § 6.5, ECF No. 51–3, at 9.

[43] U.S. GOV'T ACCOUNTABILITY OFF., GAO–15–817, ELECTRONIC HEALTH RECORDS NONFEDERAL EFFORTS TO HELP ACHIEVE HEALTH INFORMATION INTEROPERABILITY 4 (2015) [hereinafter GAO INTEROPERABILITY REPORT], *https://www.gao.gov/assets/gao-15-817.pdf.*

[44] *See* Lucia Savage, Martin Gaynor, and Julia Adler-Milstein, *Digital Health Data and Information Sharing: A New Frontier for Health Care Competition?,* 82 ANTITRUST L. J., 593, 604 (2019) [hereinafter *Health Care Competition?*]; GAO INTEROPERABILITY REPORT 1–2; 12 (''Stakeholders and representatives from the selected EHR initiatives described five key challenges to achieving EHR interoperability; (1) insufficiencies in standards for EHR interoperability, (2) variation in state privacy rules, (3) accurately matching patients' health records, (4) costs associated with interoperability, and (5) need for governance and trust among entities.''). *See also id.* at 596 (''Whether these provisions will be sufficiently strong to overcome firms' incentives to engage in information blocking remains an open question.'').

[45] *Cf.* FED. TRADE COMM'N, FED. TRADE COMM'N STAFF SUBMISSION TO THE SOUTHWEST VIRGINIA HEALTH AUTHORITY AND VIRGINIA DEPARTMENT OF HEALTH REGARDING COOPERATIVE AGREEMENT APPLICATION OF MOUNTAIN STATES HEALTH ALLIANCE AND WELLMONTHEALTH SYSTEM 35 (2016), *https://www.ftc.gov/system/files/documents/advocacy_documents/submission-ftc-staff-southwest-virginia-health-authority-virginia-department-health-regarding/160930wellmontswvastaffcomment.pdf.* FTC staff concluded that many of the purported efficiencies were not significant, and to the extent that they could be validated, were achievable by less restrictive means. *Id.* at 34–36.

[46] *Id.* at 604.

[47] Medicare Program; Modernizing and Clarifying the Physician Self-Referral Regulations, 85 FR 77492, 77611 (Dec. 2, 2020) (Final Rule).

[48] *Health Care Competition?* at 596 (short of an outright information block, defendants still can ''engage[ ] in practices that impede efficient access and use of the data by competitors or other individuals or entities.'').

[49] *See* Second Amended Collaboration Agreement, § 6.5, ECF No 51–3, at 9; EPIC SYSTEMS CORP., *ONC Health IT Certification Details,* at 3 (May 18, 2021) (where ''[a]n Epic client extends access to its EHR to a hospital . . . [t]he Epic client's IT staff provide installation and ongoing support services.''), *https://www.epic.com/docs/mucertification.pdf.*

[50] *Information Blocking,* ONC'S CURES ACT FINAL RULE, *https://www.healthit.gov/curesrule/final-rule-policy/information-blocking* (last visited May 30, 2021).

[51] GAO INTEROPERABILITY REPORT at 13.

[52] *Id.* at 14 (''These governance practices can include organizational policies related to privacy, information security, data use, technical standards, and other issues that affect the exchange of information across organizational boundaries. One stakeholder noted that it is important to establish agreements to ensure that entities share information openly with all other participants in a network.'').

largest providers in the market.[53] How the entangled Geisinger-Evangelical exercises potential discretionary acts to permit or impede interoperability is critical to how competition plays out in the region.[54] There is no mechanism in the PFJ to assure that UPMC and others are not disadvantaged. Given ''the history of coordination between Defendants,'' and the fact that the IT Entanglement, like the Margin Guarantee, was an integral part of the original collaboration agreement, no ''self-serving representations about their intent to continue to compete'' can overcome the logic and intuition that this Entanglement is bad for consumers.

Further, once Evangelical is fully integrated into the Geisinger technology ecosystem, this arrangement will give Geisinger additional leverage over Evangelical, which will be dependent on both the use of the EMR system and Geisinger's technical support to operate it. UPMC is unaware of any other instance where a dominant health system has subsidized an EMR system for its closest hospital competitor. It is simply unheard of to fund—to the point of a near giveaway—such a crucial resource in these circumstances. Geisinger and Evangelical together already possess a ''dominant position'' in the relevant inpatient general acute-care market, with a combined share greater than 70%. Compl. ¶ 41, 64. And the existence of significant barriers to entry, id. at ¶ 68, as well as their history of ''co-opetiton''—''coordinat[ing] their activity to 'find wins' at the expense of robust competition,'' id. at ¶ 27—demonstrates this subsidy will lead to further dominance of the relevant market. Finally, as the DOJ recognized, there are less restrictive alternatives available for Evangelical to upgrade its IT system. See Compl. ¶ 65 (''Evangelical also could have obtained funds for capital improvements from sources other than Geisinger, its closest competitor.'').

The Second Amended Collaboration Agreement refers to ''an existing Anti-Kickback and Stark Safe Harbor.'' *See Second Amended Collaboration Agreement* at Section 6.5. Presumably it refers to Stark Act exceptions (42 CFR 1001.952(y) and 42 CFR 411.357(w)), which, under certain circumstances, permit institutions, like hospitals or health plans, to subsidize IT upgrades to physicians and physician practices. Because these relationships are primarily vertical, the potential efficiencies are easily understood. Here, however, the Complaint recognizes that the relationship between Geisinger and Evangelical is also heavily horizontal—they are competitors. Payments between horizontal competitors under these circumstances have the risks identified above. And while 42 CFR 1001.952(y) and 42 CFR 411.357(w) may allow the provision of IT systems in some circumstances, even if applicable here, they would not convey any antitrust immunity on the parties. Cf. *FTC* v. *Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 228 (2013) (''while the Law does allow the Authority to acquire hospitals, it does not clearly articulate and affirmatively express a state policy empowering the Authority to make acquisitions of existing hospitals that will substantially lessen competition''). Similar to Phoebe, a hospital might have authority to merge, but that does not provide the hospital with the right to violate Section 7 of the Clayton Act or Section 1 of the Sherman Act.

UPMC does not contend that an arms-length license between Geisinger and Evangelical would be per se unlawful. As the Complaint recognizes, ''Defendants were in discussion to do so long before this transaction was under consideration.'' Compl. ¶ 64.

However, the terms likely would have been much different absent the Margin Guarantees and the $20 million payment that Evangelical is permitted to retain as part of this settlement. If this transaction is voided, Evangelical loses the Margin Guarantee and potentially has to pay back the $20 million. Without those side payments, Evangelical might not be so quick to lock itself into Geisinger's IT for the foreseeable future. The legality of such a license need not be decided today; rather it is only necessary to understand that the contemplated license, part of the original Collaboration Agreement, was created in anticipation of, and has the effect of, a reduction in competition.

Sharing Competitively Sensitive Information With a Horizontal Competitor

Finally, the PFJ fails to resolve concerns raised in the Complaint about the ability of Geisinger and Evangelical to exchange competitively sensitive information under various provisions of the Second Amended Collaboration Agreement. *See* CIS at 14–15.

As the DOJ and FTC's *Antitrust Guidelines for Collaborations Among Competitors* state:

[T]he sharing of information related to a market in which the collaboration operates or in which the participants are actual or potential competitors may increase the likelihood of collusion on matters such as price, output, or other competitively sensitive variables. The competitive concern depends on the nature of the information shared. Other things being equal, the sharing of information relating to price, output, costs, or strategic planning is more likely to raise competitive concern than the sharing of information relating to less competitively sensitive variables.[55]

Here, Paragraph B.6 of the Addenda expressly requires Geisinger and Evangelical to share some competitively sensitive information on a monthly basis throughout the year as part of an annual review and rate reset.[56] The provision also calls for the parties to review ''relevant information . . . such as [Geisinger] Health Plan commercial volume at [Evangelical], total revenue received by [Evangelical] from [Geisinger] Health Plan commercial members, [Evangelical] costs, case mix, etc.'' [57]

Insurers do not receive cost information from providers as there is simply no reason to give it. Even more problematic is the case here, where a vertically integrated provider and health plan, such as Geisinger, receives cost information from another provider—and particularly its closest competitor. In fact, UPMC, which also operates as a vertically integrated provider and health plan, has never received cost information from competitive third-party providers and UPMC does not share its cost structure with any insurer. Information sharing raises red flags and could facilitate collusion between competitive providers operating in the same market.

The Addenda do not require installation of a firewall between Geisinger Health Plan and Geisinger providers—nor would a firewall be sufficient in this circumstance. Firewalls come with some risk of circumvention. Therefore, firewalls are typically only used in antitrust matters as a last resort to enable a procompetitive benefit. But as the Complaint states, there are no procompetitive benefits here. *See* Compl. ¶ 67. As a result, even if the PFJ were to require a more comprehensive firewall regarding Evangelical's cost data, the public would still bear the risks of competitive harm without any corresponding benefit.

The public also bears risks associated with the information Geisinger and Evangelical intend to share because the provisions in this paragraph are vague and not fully defined. What type of information do Geisinger and Evangelical intend to share through the indeterminate term ''etc.''? In the event the Margin Guarantee survives, UPMC encourages the DOJ to require Geisinger and Evangelical to delete the term ''etc.'' and require Geisinger and Evangelical to state exactly what information they have agreed to share. The DOJ should then assess (or reassess) the potential for anticompetitive harm from the information sharing.

The Addenda also raise additional concerns that Evangelical may share rate information of other health plans, such as UPMC, with Geisinger Health Plan. Although the Addenda state, ''[a]ctual payer rates shall not be shared between the parties,'' [58] the Margin Guarantee scheme devised by Evangelical and Geisinger requires comparison between the margins paid by Geisinger and other health plans for Evangelical patients won by Geisinger. Even if rate information is not shared directly, margin information supplied by Evangelical, combined with Geisinger's payer- side knowledge, could allow Geisinger to derive Evangelical's provider rates for other health plans, including those of UPMC.

Exhibit A to the Addenda,[59] illustrates how this happens. In the example with ''decreased margin,'' Geisinger's rates with Evangelical increase if it takes a patient

[53] *Cf. id.* at 595 (''Holding on to data may allow market participants to maintain, and in some cases enhance, their market position.'').

[54] *Id.* at 607 (''strateg[ies] for data holders to impede data transfer and thwart competition . . . may be a version of the strategy of raising rivals' costs to thwart competition.'').

[55] DEP'T OF JUSTICE AND FED. TRADE COMM'N., ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS 15 (2000) (emphasis added), *https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf.*

[56] ECF No. 51–3, at 56 (§ B.6), at 61 (§ B.6).

[57] *Id.*

[58] ECF No. 51–3 at 59, 64.

[59] *Id.*

receiving care at Evangelical who is insured by a health plan that has higher rates at Evangelical than does Geisinger. Likewise, in the example with ''increased margin,'' Geisinger's rates with Evangelical decrease if Geisinger takes a patient receiving care at Evangelical who is insured by a health plan that has lower rates at Evangelical than does Geisinger. And, of course, Geisinger knows its own provider rates at Evangelical. With this information, a simple comparison allows Geisinger to gain great insight into other health plans' rates at Evangelical depending on whether Geisinger's rates go up or down.

We have attempted to identify some of the potential competitive harms that could arise if Geisinger Health Plan learns its competitors' rates at Evangelical. Suffice it to say that this type of information sharing is not in the public interest. We encourage the DOJ to modify the PFJ to resolve this concern.

Requested Modifications

For the reasons detailed above, UPMC urges the total elimination of the Second Amended Collaboration Agreement, including the Margin Guarantee and IT Entanglement.[60]

In the event that the DOJ declines that remedy, there are other options that would improve the relief:

- Include a provision whereby the DOJ monitors Evangelical's actions with respect to UPMC and other payers. This should include maintaining authority to intervene for some period in the event that Evangelical terminates provider contracts with UPMC or others absent exigent circumstances, or imposes rate increases out of line with commercial realities.
- As a condition of permitting the 7.5% ownership, Margin Guarantee, and IT Entanglement provisions, require that Evangelical enter into a 10-year contract with UPMC Health Plan on reasonable terms and conditions.[61]
- Insofar as the Geisinger IT Entanglement will effectively lock-in Evangelical to the whims of Geisinger, develop and include provisions that ensure that Geisinger cannot use this leverage to punish Evangelical for collaborating in any fashion with UPMC or others. More generally, the DOJ should include a mechanism whereby it can assure that other payers are not disadvantaged.[62]
- Impose stronger protections to ensure that payer information obtained by Evangelical is not shared with Geisinger, in the course of rate discussions pertaining to the Margin Guarantee or otherwise, including in any form that could allow Geisinger to derive price, cost, or margin information about other payers.

Conclusion

The risk of doing nothing here far exceeds the risk from taking action. If UPMC is correct about the likely competitive harm of the legacy provisions discussed, and nothing is done, a duopoly with a pre-existing pattern of ''co-opetition'' becomes more intertwined, and an already concentrated market becomes even less competitive. Indeed, with Geisinger constantly in Evangelical's ear, it is conceivable that Evangelical could follow Geisinger's example and not provide UPMC Health Plan with a provider contract.[63] Currently, Evangelical has no reason not to contract with UPMC. However, if Geisinger persuades Evangelical to cancel the UPMC contract, consumers would lose out on competition by UPMC for a variety of health plans, including Medicare and Special Needs Plans (''SNPs''), Medicaid, and Community Health Choices (''CNC'') plans.[64] A remedy for such an action would be difficult, and Evangelical would argue that termination was in its independent interest, given the incentives in the Second Amended Collaboration Agreement provisions at issue.[65]

The best ''prediction of [these provision's] impact upon competitive conditions in the future,'' [66] absent additional relief, is harm to consumers in the relevant market. Under such conditions, the DOJ should take additional steps to ensure that the remedy comports with the harms alleged in the Complaint.

Sincerely,

Richard B. Dagen
Keith Young

[REDACTED]

Eric Welsh

In regards to the decision to limit the scope of the Geisinger-Evangelical Hospital merger. This idea was presented to the public as a partnership, not a merger. While technically they are very similar, to a layman such as I the word merger has a more ominous sound. Thus merger was not used in the press releases.

Geisinger and its regional competitor UPMC have been systematically purchasing small local community hospitals. In the case of UPMC purchasing and then closing the Sunbury Comm. Hosp. While this is a gain to their business structure the local citizenry now has few options in find quality and affordable healthcare

I'm sure that what I see as a local issue you can see it on the national stage and that is the fact that this countries medical system is being taken over by conglomerates.

It is actually very similar to going to a supermarket. You see endless choices until you look closer. You see Heinz Ketchup, Nabisco cookies, Coke & Pepsi. They all have multiple varieties of their own product but in reality, the consumer is locked into a limited diversity of choices.

You have the power to make sure people looking for good affordable health care have that choice.

Respectfully,

Keith A. Young

RE: Geisinger/Evangelical Merger

[REDACTED]

March 8, 2021

Dear Mr. Welsh,

I have been a patient at both Geisinger and Evangelical facilities. Both are fine establishments, however, there is a huge difference in atmosphere and friendliness as well as cost.

Evangelical is a community based, friendly hospital as opposed to the giant Geisinger which has acquired many private practice physician offices as well as Bloomsburg Hospital and Shamokin Hospital. These were both small home-town hospitals prior to Geisinger's acquisition.

We are located in a rural area that is being dominated by large corporations where the profit comes before the patient.

The average income in this area is moderate and even with health insurance, out-of-pocket expenses can be taxing to patients.

Patient care is of the essence. Evangelical can give patients the best care by remaining an independent community hospital.

Competition is essential and Geisinger and UPMC are trying to eliminate it.

Please do *not* let Geisinger acquire Evangelical Hospital.

Sincerely,

Sandy Young

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[60] Although the approximate $20 million payment helps Geisinger achieve its objective of preventing Evangelical from teaming up to become a stronger competitor, UPMC believes that (a) requiring repayment would be unduly disruptive; and (b) the removal of the other provisions will go a long way toward restoring the status quo ante.

[61] UPMC wishes to emphasize that this proposal relates only to the partial acquisition, and is not relief that should be imposed on Evangelical if the transaction is voided.

[62] See UNITED STATES DEP'T OF JUSTICE, ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES 14–16 (2011) (discussion of use of non-discrimination, transparency, and anti-retaliation provisions in conduct remedies), *https://www.justice.gov/sites/default/files/atr/legacy/2011/06/17/272350.pdf.*

[63] Also, if this case presents a false positive—that is, assuming arguendo that the provisions are not actually anticompetitive—the worst case ''harms'' are that Evangelical has to purchase its IT at fair market value and continues with its previous payer contract with Geisinger. These cannot really be characterized as cognizable harms to competition.

[64] The loss of competition would not be easily repaired. See *United States* v. *Aetna Inc.*, 240 F. Supp. 3d 1, 57 (D.D.C. 2017) (regarding Medicare Advantage, ''the expert analysis and the other evidence paint a picture of new entry not being particularly likely, and the barriers to entry being high.'').

[65] *Cf. United States* v. *Phila. Nat. Bank,* 374 U.S. 321, 362 (1963) (Section 7 of the Clayton Act ''was intended to arrest anticompetitive tendencies in their 'incipiency.' ''); H. Hovenkamp, *Prophylactic Merger Policy,* 70 HASTINGS L. REV. 45, 48 (2018) (''Incipiency tests for mergers are most valuable in cases where a merger is likely to lead to conduct or behavior that is both anticompetitive and also is difficult or impossible for antitrust law to reach once the merger has occurred.'').

[66] *FTC* v. *Penn State Hershey Med. Ctr.,* 838 F.3d 327, 344 (2016) (quoting *Phila. Nat. Bank,* 374 U.S. at 362).