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 Fed. Reg. 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, Pub. L. 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 Evangelical through participation in Evangelical's governance, management, or strategic decision-making. For example, the amended proposed Final Judgment prohibits Geisinger from

[1] Amended proposed Final Judgment ¶ IV.B.2.
[2] Amended proposed Final Judgment ¶ V.A.
[3] Amended proposed Final Judgment ¶¶ IV.B.3, 6.

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

[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.

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.

[10] Amended proposed Final Judgment ¶ IV.G, VII.A.
[11] Amended proposed Final Judgment § VI.
[12] Amended proposed Final Judgment §§ VIII, XI.

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.

[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.

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. 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

[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*.

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

[17] UPMC Comment, attached as Exhibit C.

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

[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.

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

[20] UPMC Comment at 10.

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 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

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

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

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[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.

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

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CERTIFICATE OF SERVICE

I, David M. Stoltzfus, hereby certify that on August 31, 2021, I electronically filed the foregoing Response of Plaintiff United States to Public Comments on the Proposed Final Judgment through the Court's CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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