EXHIBIT C

AXINN

RICHARD B. DAGEN
1901 L STREET NW
WASHINGTON, DC 20036
202.721 5418
RDAGEN@AXINN.COM

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VIA ELECTRONIC MAIL

Eric D. Welsh, Esq.
Chief, Healthcare and Consumer Products Section
Antitrust Division, Department of Justice
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.

[1] ECF No. 51-1.

[2] ECF No. 1.

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

[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.

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.

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%

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

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

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[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.

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 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.

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[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.

[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.

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,

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[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).

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.

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[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 . . . .").

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 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

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[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).

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

[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: evasion of the spirit of the bargain").

> 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. ¶ 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

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[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.

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

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[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.'").

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 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 both

[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).

the 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

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[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 WELLMONT HEALTH 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

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."

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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 Fed. Reg. 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.

> 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 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.").

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[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.").

[53] C*f. 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.")

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

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[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.

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 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

[59] *Id.*

[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.

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

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[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).

conditions, the DOJ should take additional steps to ensure that the remedy comports with the harms alleged in the Complaint.

Sincerely,

Richard B. Dagen