COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
CIVIL ACTION No. 14-2033-BLS2

COMMONWEALTH OF MASSACHUSETTS,

Plaintiff,

v.

PARTNERS HEALTHCARE SYSTEM, INC., SOUTH SHORE HEALTH AND EDUCATIONAL CORP., and HALLMARK HEALTH CORP.,

Defendants.

PLAINTIFF COMMONWEALTH OF MASSACHUSETTS'S RESPONSE TO PUBLIC COMMENTS

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Pursuant to the Court's Orders of July 2, 2014 and July 17, 2014, the Commonwealth of Massachusetts (the "Commonwealth"), through its Attorney General, hereby files the public comments received concerning the proposed Final Judgment by Consent in this case and the Commonwealth's response to those comments. After careful consideration of the comments, the Commonwealth continues to believe that the proposed Consent Judgment will provide an effective and appropriate remedy for the unfair methods of competition in violation of Massachusetts General Laws c. 93A, § 2 alleged in the Commonwealth's complaint (the "Complaint"). In light of all the fully investigated facts, the realities of litigation risk, and the broad, immediate and effective remedies contained in the settlement, this Consent Judgment is superior to uncertain and prolonged litigation. It advances the public interest. The Commonwealth therefore asks that the Court grant the Joint Motion for Entry of Amended Final Judgment by Consent and enter the proposed Amended Final Judgment by Consent (the "Consent Judgment").

I. PROCEDURAL HISTORY

On June 24, 2014, the Commonwealth filed the Complaint, alleging that Partners HealthCare System, Inc.'s ("Partners") proposed acquisitions of South Shore Health and Educational Corporation ("SSHEC") and of Hallmark Health Corporation ("Hallmark," together with Partners and SSHEC, the "Defendants") would substantially lessen competition in portions of Eastern Massachusetts and that Partners' practice of negotiating reimbursement rates with health insurers on behalf of certain non-owned affiliate physician groups unreasonably restrains trade, all in violation of Massachusetts General Laws c. 93A, § 2. Concurrently with the filing of the Complaint, the Commonwealth and the Defendants (collectively, the "Parties") filed a Joint Motion for Entry of Final Judgment by Consent. This Joint Motion included a copy of the

proposed Consent Judgment, which contains the remedies that the Commonwealth and the Defendants agreed, after a long and adversarial negotiation, would resolve the claims in the Complaint.

On July 2, 2014, the Court entered an Order stating that any interested members of the public could submit comments regarding the proposed Consent Judgment, including the legal principles governing the Court's decision regarding entry of the Consent Judgment, to be received by the Attorney General's Office by July 21, 2014. On July 17, the Court entered an Order that extended the period for submitting comments to September 15, 2014. That Order also directed the Attorney General to file those comments, along with any responses that the Attorney General wished to make, by September 25, 2014.

On September 3, 2014, the Health Policy Commission's ("HPC") released its Review of Partners HealthCare System's Proposed Acquisition of Hallmark Health Corporation, Final Report ("Hallmark Final Report"). Pursuant to the terms of the proposed Consent Judgment, the Parties met to negotiate amendments to the Consent Judgment based upon the report's contents. On September 25, contemporaneous with the filing of this Response, the Parties filed the Joint Motion for Entry of Amended Final Judgment by Consent with the amended proposed Consent Judgment.

The Attorney General received 136 comments, both in favor of and in opposition to the Court's entry of the proposed Consent Judgment. This response primarily addresses the criticisms of the proposed Consent Judgment. The comments themselves are submitted herewith

as Appendices in six volumes. In order to provide transparency throughout the comment process, the Attorney General's Office also has posted these comments on its website.[1]

II. THE INVESTIGATION AND THE PROPOSED RESOLUTION

A. Investigation

The Attorney General's Office has been investigating the conduct described in the Complaint since 2009, when the Attorney General issued its first Civil Investigative Demands regarding Partners' practice of contracting with health insurance companies, often referred to as "payers," on behalf of its affiliates. Following Partners' announcement of its proposed acquisitions of SSHEC in 2012 and of Hallmark in 2013, the Attorney General issued additional Civil Investigative Demands to evaluate the likely competitive impact of those proposed acquisitions. As part of these investigations, attorneys and staff of the Attorney General's Office and the Antitrust Division of the Department of Justice ("DOJ") and their experts have

- reviewed voluminous documents produced by Partners (more than 4 million pages) and by third parties;
- compiled and reviewed economic projections;
- interviewed relevant market participants (including more than 50 formal interviews); and
- conducted over 30 depositions of various employees of the Defendants.

The Attorney General's Office carefully analyzed this information and weighed the evidence and testimony as it evaluated Partners' conduct. The Attorney General also closely coordinated her investigation with that of DOJ. Staff and experts of each office often worked together to examine the potential competitive effects of the various transactions and practices at issue.

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[1] *See* http://www.mass.gov/ago/partnerscomments.

Following these investigations, the Attorney General prepared and filed the Complaint alleging that: (1) Partners' proposed acquisitions of SSHEC and of Hallmark would substantially lessen competition in portions of Eastern Massachusetts enabling the merged entities to raise prices; and (2) Partners' practice of negotiating reimbursement rates with payers on behalf of non-owned affiliate physician groups that are not also closely affiliated with a Partners hospital unreasonably restrains trade, permitting such physician groups to obtain higher reimbursement rates. Simultaneously with the filing of the Complaint, the Attorney General filed the proposed Consent Judgment that, if entered by the Court, would resolve the litigation by remedying the harms alleged in the Complaint.

The health care market across the country and in Massachusetts continues to undergo a period of rapid change and transformation. As reforms from both the federal government and the Commonwealth are carried out, such as the formation of accountable care organizations and the creation of limited and tiered network health plans,[2] and as private market participants continue to innovate in attempts to cut costs and increase the quality of care, such as provider risk contracts, this market will continue to transform. The proposed Consent Judgment takes account of the applicable laws, the facts gathered through the Attorney General's extensive investigations, and remedies the harms alleged in the Commonwealth's Complaint against this backdrop.

[2] A limited network health plan typically reduces the patient's premium in exchange for covering fewer health care providers with its "in network" benefit package. A tiered network health plan places providers in different "tiers" based on their cost and quality and requires the member to pay different co-payments or out-of-pocket costs depending on which tier the provider is in.

B. The Proposed Consent Judgment

Broadly, the remedies contained in the proposed Consent Judgment are designed to work together to limit Partners' leverage in contract negotiations with payers. The proposed Consent Judgment requires that Partners fundamentally alter its current contracting practices and puts important limits on Partners' future growth in place. These remedies are designed to limit Partners' ability to raise its prices. To the extent Partners is able to negotiate price increases, the proposed Consent Judgment also imposes a comprehensive price cap on Partners, which places a firm limit on such future price increases based upon the rate of inflation.

More specifically, the proposed Consent Judgment more than sufficiently addresses the potential anticompetitive harms that would be likely to occur as a result of the loss of competition alleged in the Complaint. This section briefly explains the potential harms identified by the Attorney General's Office in the Complaint and how the relief provided by the proposed Consent Judgment addresses those harms.[3] This section also outlines the additional relief that the Attorney General negotiated that will fortify the claim-specific remedies.

1. The Consent Judgment Addresses the Potential Anticompetitive Harms of the SSHEC Acquisition.

The Complaint alleges that the proposed acquisition of SSHEC by Partners will result in higher prices due to the loss of competition between South Shore Hospital and Partners hospitals.[4] In addition, the Health Policy Commission ("HPC"), which was created by statute in 2012 to evaluate the impact of acquisitions and other material changes by health care providers,

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[3] An in-depth discussion of the remedies contained in the proposed Consent Judgment is provided in the Memorandum of the Commonwealth of Massachusetts in Support of the Entry of Final Judgment (Dkt. 4) filed on June 24, 2014.

[4] Complaint, ¶24.

found that the acquisition would result in higher prices.[5] The proposed Consent Judgment addresses this harm by capping the price increases that Partners might negotiate for South Shore Hospital and its affiliated physicians post-acquisition at the lower of general inflation or medical inflation for six-and-a-half years. Importantly, the baseline for measuring these price increases is South Shore Hospital's and the affiliated physicians' pre-acquisition rates.

Further, Partners has forced payers to negotiate for inclusion of its provider network in the payer's health plans on an "all-or-nothing" basis, meaning that a payer had to include either all of Partners hospitals and physicians or none of them. Practically, this meant that in order to gain access to pieces of the Partners provider network that the payer wanted to include in a certain health plan, it would also have to include Partners providers that it otherwise would have excluded at the price offered by Partners. The proposed Consent Judgment requires that Partners offer South Shore Hospital and its affiliated physicians on a "component" basis for seven years, meaning that a payer can, among other options, either (1) contract for just South Shore Hospital and its affiliated physicians or (2) exclude South Shore Hospital and its affiliated physicians while contracting for the other desired components of the Partners network.[6] This preserves the pre-merger status quo in that it allows payers to add or exclude South Shore Hospital separately from the Partners network for seven years.

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[5] *Id.*, ¶ 25; Massachusetts Health Policy Commission Review of Partners HealthCare System's Proposed Acquisition of South Shore Hospital and Harbor Medical Associates, Final Report, February 19, 2014 ("South Shore Final Report"), 2.

[6] As explained in greater detail below, the "Component Contracting" remedy creates four separate contracting components. A payer, at its option, may choose to negotiate for any combination of the following: (1) the South Shore Contracting Component; (2) the Hallmark Contracting Component; (3) the Community Contracting Component; and (4) the AMC Contracting Component.

2. The Consent Judgment Addresses the Potential Anticompetitive Harms of the Hallmark Acquisition.

The potential price increase alleged in the Complaint due to Partners' proposed acquisition of Hallmark[7] is addressed in the proposed Consent Judgment by capping the price increases that Partners might negotiate for Hallmark and its affiliated physicians post-acquisition at the lower of general inflation or medical inflation for six-and-a-half years. As explained in greater detail in Section IV.A below, the separate price cap applicable to the Hallmark Contracting Component was developed and agreed to as a response to the HPC Final Report concerning the acquisition of Hallmark by Partners. Like the remedy applicable to the South Shore providers, the baseline for measuring these price increases is Hallmark's and the affiliated physicians' pre-acquisition rates.

Importantly, the Component Contracting remedy also provides payers with an additional tool to reject a price increase that is out of line with the market value of the Hallmark providers. As with South Shore Hospital, the proposed Consent Judgment requires that Partners offer the Hallmark hospitals and Hallmark's affiliated physicians on a "component" basis for seven years, meaning that a payer can, among other options, either (1) contract for just the Hallmark hospitals and Hallmark's affiliated physicians or (2) exclude Hallmark while contracting for the other desired components of the Partners network. This remedy provides payers with more flexibility than they currently have when negotiating with Partners for inclusion of Hallmark in their health plans; because Partners currently negotiates on behalf of Hallmark, it is generally offered to payers only on an "all-or-nothing" basis with the rest of the Partners network. If Partners

[7] Complaint, ¶31.

attempts to increase Hallmark's prices above what a payer believes is reasonable, then the payer has the ability to "drop" the Hallmark component from its health insurance plans while continuing to contract for the other components of the Partners network – South Shore, the other community providers, or the academic medical centers – that it chooses to.

3. The Consent Judgment Addresses the Potential Anticompetitive Effects of Partners Contracting on Behalf of Unowned Affiliates That Are Not Closely Aligned with a Partners Hospital.

The Complaint alleges that the Partners' practice of negotiating payer contracts on behalf of certain unowned physician groups substantially reduces competition in the market for physician services, and that these physicians receive higher reimbursement rates from payers than they would be able to obtain without their contracting relationship with Partners.[8] The Complaint further alleges that Partners' practice of negotiating on behalf of these unowned physician groups does not result in sufficient procompetitive benefits to outweigh these anticompetitive effects.[9] The proposed Consent Judgment addresses this harm by prohibiting Partners, after a brief phase-out period for its current arrangements, from contracting on behalf of any unowned physician groups that are not closely affiliated with a Partners hospital for ten years. Partners is also prevented from contracting on behalf of any other unowned health care providers, such as hospitals, for ten years.

4. The Consent Judgment Contains Additional Relief That Fortifies the Claim-Specific Remedies.

The relief outlined above directly addresses the potential anticompetitive price increases that are likely to result from the conduct alleged in the Complaint. However, the Commonwealth

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[8] Complaint, ¶¶ 33-34.
[9] *Id.*, ¶ 35.

also negotiated additional remedies that work in conjunction with the claim-specific relief to provide further limits on Partners' conduct in the market. These additional remedies are briefly discussed below.

Component Contracting. As mentioned above, the proposed Consent Judgment requires Partners to offer a South Shore Contracting Component (consisting of South Shore Hospital and its associated providers) and a Hallmark Contracting Component (consisting of the Hallmark Hospitals and its associated providers) to payers. The proposed Consent Judgment also allows Payers to contract separately for the Partners academic medical centers as the "AMC Contracting Component"[10] and all of the other Partners providers that do not belong to the South Shore, Hallmark or AMC components as a "Community Contracting Component."[11] This additional market tool prevents Partners from forcing payers to contract with it on an "all-or-nothing" basis and will enhance the ability of payers to craft tiered and limited network health insurance products in support of Massachusetts health care reform initiatives.[12]

Comprehensive Price Caps. Through 2020, the proposed Consent Judgment places restraints on the growth of unit prices for *all* Partners providers, not just those acquired through the proposed transactions. The Unit Price Growth Cap ("UPGC") applies separately to all four groups of Partners providers: (1) the South Shore Contracting Component; (2) the Hallmark

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[10] The AMC Contracting Component includes Brigham & Women's Hospital, Massachusetts General Hospital, Spaulding Rehabilitation Hospital, McLean Hospital, and their associated physicians. Proposed Consent Judgment, ¶3.

[11] After seven years, the South Shore Contracting Component and Hallmark Contracting Component are merged into the Community Contracting Component for the final three years the Component Contracting relief is in place. *Id.*, ¶66. Cooley Dickinson Hospital and its affiliated physicians are treated separately, as described in Paragraphs 109 through 111 of the proposed Consent Judgment.

[12] Payers can choose to use this Component contracting option on a product-by-product basis, meaning a payer can craft different health insurance products that include different components of the Partners network.

Contracting Component; (3) the AMC Contracting Component; and (4) the Community Contracting Component. Applying the caps to all of Partners' providers prevents Partners from attempting to circumvent the South Shore-specific and Hallmark-specific price caps by seeking higher prices from payers elsewhere in its network. More broadly, it limits any Partners price increases to the lower of general or medical inflation. Historically, these caps are lower than Partners' negotiated price increases. For example, between 2005 and 2009, Partners' average price increases were more than double the average increases that would have been allowed by the cap.

The proposed Consent Judgment also requires that, for all business for which Partners bears financial risk associated with a patient's total medical expense,[13] any increase in total medical expense be cumulatively less than or equal to HPC's annually determined cost growth benchmark through 2020.[14] Outside the context of the proposed Consent Judgment, the HPC benchmark does not limit the rates of individual providers, and as such exceeding the benchmark does not require the provider to reimburse the excess revenue it has been paid. The proposed Consent Judgment requires that Partners refund payers for any amount by which it exceeds the cost growth benchmark for this commercial risk business, making the benchmark legally enforceable as to Partners. No other health care provider in Massachusetts would be subject to such a restriction.

Limits on Partners' Hospital Growth in Eastern Massachusetts. Partners is barred from acquiring any additional hospitals in Eastern Massachusetts for seven years, absent the

[13] Total medical expense or "TME" is the total cost of providing health care to a patient.
[14] HPC has an annually determined cost growth benchmark. Pursuant to state law it has been set at 3.6% for 2013 and for 2014.

discretionary approval of the Attorney General. This discretionary approval requirement does not apply to Emerson Hospital, which has maintained an affiliate and contracting relationship with Partners for over a decade. Any proposed acquisition of Emerson remains reviewable under all applicable laws by the Attorney General, HPC, or any other governmental agency.

Limits on Partners' Physician Growth in Eastern Massachusetts. For a period of five years, the proposed Consent Judgment restricts the number of community physicians (i.e., those physicians that practice primarily at non-AMC facilities)[15] in Partners' physician network. In addition, the proposed Consent Judgment requires Partners to provide the Attorney General with advance notice of planned acquisitions of physician groups in Eastern Massachusetts. Absent the proposed Consent Judgment, no such growth restriction or notice requirement exists, nor could they have been achieved if the Commonwealth had sought to enjoin either the SSHEC or the Hallmark transactions. The settlement therefore provides an important new limit on Partners' ability to grow its physician network, guarding against potential harms that might result from unchecked growth by Partners.

Additionally, AMC primary care physicians who practice in AMCs or AMC facilities in the Metro Boston core area will be further identified as "AMC PCPs" and will be subject to a growth cap, meaning that Partners may only increase the number of AMC PCPs within its network according to defined growth limitations.

Comprehensive Monitoring. The proposed Consent Judgment establishes an independent monitor, retained by the Attorney General, to aid the Attorney General in ensuring

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[15] The restriction on community physicians also captures the number of AMC physicians (physicians that primarily practice at AMC facilities) who provide services at community facilities. These AMC physicians count toward the cap on a full-time equivalent basis. Proposed Consent Judgment, ¶¶94-95.

that Partners complies with its obligations. The Compliance Monitor has broad powers allowing it to access all Partners' information and documents relevant to Partners' performance under the terms of the proposed Consent Judgment. Partners is required to fund the monitoring activities of the Compliance Monitor, beginning with a payment of $2.0 million into a trust account, and the proposed Consent Judgment contains provisions for additional funding as necessary.

III. CASE LAW GOVERNING THE COURT'S DECISION ON ENTRY OF THE PROPOSED CONSENT JUDGMENT

The case law governing the Court's consideration of the proposed Consent Judgment is set forth in detail in the Commonwealth's Further Memorandum of Law in Support of the Entry of Final Judgment, which has been filed simultaneously with this Response. As explained in that Memorandum, the Court should enter a proposed Consent Judgment if it (1) is lawful; (2) contains clear enforcement mechanisms; and (3) is consistent with the public interest.[16]

IV. SUMMARY OF PUBLIC COMMENTS AND THE COMMONWEALTH'S RESPONSES

The Commonwealth received comments from more than 136 individuals and entities[17]; a complete list of the commenters is provided in Exhibit 1 to the Filing of Public Comments. This section summarizes issues raised by the commenters and provides the Commonwealth's responses to those issues. Because of the referrals made by the Health Policy Commission and the amendment made to the proposed Consent Judgment in response to HPC's Final Report concerning the proposed acquisition of Hallmark, this section addresses HPC's comment first.

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[16] *See* Plaintiff Commonwealth of Massachusetts's Further Memorandum of Law in Support of the Entry of Final Judgment ("Further Memorandum of Law"), Section I.E.

[17] SSHEC submitted a binder containing more than 300 separate comments from individuals and entities. These comments are submitted to the Court and counted as one comment in the above figure. *See* SSHEC, Public Comments Regarding the Massachusetts Attorney General's Proposed Settlement with Partners HealthCare (Sept. 5, 2014).

This section next responds to subjects raised in multiple comments, then concludes with responses to certain individual commenters.

A. Response to the Health Policy Commission's Comment and Reports

1. Summary of Comments[18]

The Health Policy Commission submitted a comment on July 17, 2014 which included four reports, a cover letter and a summary of those reports. The comment includes:

- Massachusetts Health Policy Commission Review of Partners HealthCare System's Proposed Acquisition of South Shore Hospital and Harbor Medical Associates, Final Report, February 19, 2014 ("South Shore Final Report");
- Massachusetts Health Policy Commission Review of Partners HealthCare System's Proposed Acquisition of Hallmark Health Corporation, Preliminary Report, July 2, 2014 ("Hallmark Preliminary Report");
- Massachusetts Health Policy Commission 2013 Cost Trends Report, January 8, 2014; and
- Massachusetts Health Policy Commission 2013 Cost Trends Report July 2014 Supplement, July 2, 2014.

The South Shore Final Report projected estimated cost increases of $23-$26 million per year as the result of the proposed South Shore Hospital acquisition and contracting relationship planned between Partners and South Shore Physician Hospital Organization.[19] HPC also provided a discussion of the proposed acquisition's effect on market concentration based on its statutorily-

[18] The summaries in this document are provided for convenience. They are not intended to include all of the points made in the relevant comments.
[19] South Shore Final Report, 2.

required analysis of SSH's primary service area.[20] HPC concluded its South Shore Final Report by making a referral to the Attorney General.[21]

HPC's Hallmark Preliminary Report was issued after the Parties filed the proposed Consent Judgment in this matter. In that report HPC stated that the fact that the price cap remedy in the Consent Judgment did not apply separately to the Hallmark providers would permit those providers to increase prices beyond the price cap.[22] HPC therefore encouraged the Parties to amend the proposed Consent Judgment to apply the price cap separately to the Hallmark providers. On September 3, 2014, HPC issued its Review of Partners HealthCare System's Proposed Acquisition of Hallmark Health Corporation, Final Report ("Hallmark Final Report") and submitted that report as a supplement to its earlier comment. The Hallmark Final Report projected estimated cost increases of $15.5 - $23 million per year as the result of the proposed Hallmark acquisition.[23] HPC also predicted much lower projected cost estimates if the Consent Judgment's price cap is applied separately to the Hallmark providers. As with the South Shore Hospital Report, HPC provided a discussion of the proposed acquisition's effect on market concentration in the Hallmark Primary Service Area. HPC concluded the report with a referral to the Attorney General.[24]

2. Response:

The Attorney General greatly appreciates and has benefitted from the work done by HPC in reviewing the acquisitions at issue in the Complaint. HPC's goals of "enhanc[ing] the

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[20] *Id.*, 36-42.
[21] *Id.*, 56.
[22] Hallmark Preliminary Report, 2. HPC acknowledged that this would mean that Partners' prices or price increases would have to be commensurately lower elsewhere in the Community Component. *Id.*
[23] Hallmark Final Report, 2.
[24] Hallmark Final Report, 78.

transparency of significant changes to [the Massachusetts] health care system" and "inform[ing] and complement[ing] the many important efforts of other agencies, such as the AGO" has been well-served by the HPC's Cost and Market Impact Reviews included with the HPC's comment.[25]

In particular, the Attorney General responded to HPC's Final Hallmark Report by negotiating a significant change to the proposed Consent Judgment. In order to address HPC's estimated cost increases at the Hallmark providers, the Parties agreed to apply the Unit Price Growth Cap remedy separately to the Hallmark Contracting Component. Previously, the proposed Consent Judgment applied the price cap remedy to the Hallmark providers as part of the larger Partners' Community Component. The proposed Consent Judgment now addresses these projected cost increases directly, just as it does for the South Shore Hospital providers.

a. The Proposed Consent Judgment Contains Relief That Addresses Concerns Raised by HPC About the Acquisitions of SSHEC and Harbor.

The proposed Consent Judgment contains multiple provisions that address the cost and other concerns raised in HPC's report about Partners' proposed acquisition of SSHEC and Harbor. The proposed Consent Judgment directly responds to the finding in the HPC Report that the acquisition of SSHEC and Harbor would increase medical spending by $23 million to $26 million a year by restricting the growth of the prices charged by all South Shore-affiliated providers to the lower of general or medical inflation from a baseline of their pre-acquisition prices. The proposed Consent Judgment also requires that Partners make South Shore Hospital and its affiliated physicians, including the Harbor physicians, available to payers on a component basis, separate from the rest of the Partners provider network. This component treatment is

[25] Hallmark Final Report, Introduction, 2.

designed to prevent the South Shore entities from gaining the negotiating leverage that may come from becoming part of the larger Partners network. Put simply, the South Shore-specific price cap and component contracting remedies of the proposed Consent Judgment will halt the predicted increases in Partners' and the South Shore providers' prices.

HPC raises another concern related to physician facilities in the South Shore area (as well as in the Hallmark area) stemming from the possibility that Partners could significantly increase the cost of care at these facilities by "fee splitting" or otherwise altering the "facility fees" charged at those facilities.[26] The price cap mechanisms plainly cover these issues and capture and control any such potential increases.[27] This means that Partners would either be prevented from charging such increases or would have to lower prices elsewhere among the South Shore providers to meet its price cap obligations.

b. The Proposed Consent Judgment Contains Relief That Addresses Concerns Raised by HPC about the Hallmark Acquisition.

The proposed Consent Judgment addresses the cost and other concerns raised in the reports issued as a result of HPC's Cost and Market Impact Review of the proposed Hallmark transaction. The HPC Final Hallmark Report stated that applying the price cap separately to the providers in the Hallmark Contracting Component would "better constrain" potential price increases after the transaction.[28] Indeed, HPC predicted approximately a $6.8 million increase in

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[26] South Shore Final Report, 44-45 ("Facility fees are payments assessed by hospitals to cover their overhead costs, such as medical records, medical equipment, facility upkeep, and salaries of nurses and other staff. Facility fees are routinely included in hospital outpatient department visits, but can also apply to care delivered at off-campus sites—such as a physician's office or an ambulatory care center (ACC)—if that site is considered an outpatient clinic that bills through the hospital.").
[27] *See* Proposed Consent Judgment, Attachment A, Section III.a.vii.3.
[28] Hallmark Final Report, 53 n.199.

annual medical spending due to higher Hallmark physician prices as a result of the transaction,[29] but indicate this would be limited to approximately $1.1 million[30] under the separate Hallmark price cap now included in the proposed Consent Judgment. Similarly, HPC predicted a $9.3 million increase in annual medical spending due to higher Hallmark hospital prices[31] that would be reduced to $1.2 million[32] with the separate Hallmark price cap. HPC also predicts that changes in referral patterns and patient volumes may result in an increase in total medical spending "if Hallmark's prices increase to those of Partners' owned community hospitals."[33] Although HPC does not quantify the reduction that a Hallmark-specific price cap would have on this estimate, because the cap limits Partners' ability to raise Hallmark's prices, the cap would also significantly limit the increases related to HPC's projection of more patients utilizing Hallmark. Additionally, to the extent that Partners attempted to negotiate prices that the payers found unacceptable for Hallmark, even within the cap, the Component Contracting remedy would allow payers to drop Hallmark from their health plans without having to drop the rest of the Partners network.

The HPC Final Report also notes that the impact of Component Contracting will depend "on whether and to what extent payers vigorously pursue this option and on how the market responds."[34] The market incentives of the payers are to utilize Component Contracting to the maximum extent possible to negotiate lower reimbursement rates and to create new health

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[29] HPC estimated that the cost impact of the price increase from 2016 onward could range from $2.3 to $14.6 million a year, but estimated the "moderate estimate" to be $6.8 million. *Id.*, 52.
[30] Hallmark Final Report, 52 n.196 (assuming a growth cap of 1.5%).
[31] *Id.*, 53.
[32] *Id.*, 53 n.199 (assuming a growth cap of 1.5%).
[33] *Id.*, 56-57.
[34] *Id.*, Exhibit B, 6.

insurance products to take advantage of this new contracting flexibility with Partners. Through Component Contracting, the proposed Consent Judgment puts a powerful new tool in payers' hands. This would prevent Partners from imposing "all-or-nothing" contracting by allowing payers to drop (or threaten to drop) undesired portions of the Partners network.[35] This remedy also supports the goals of Chapter 288 of the Acts of 2010 and Chapter 224 of the Acts of 2012 in encouraging the construction of limited network products.

c. The HPC's Market Concentration Analysis is a Useful Screen But Is Not a Market Analysis Pursuant to the Antitrust Laws.

As the HPC explains, its examinations of market share and concentration within the Hallmark and South Shore Primary Service Areas, respectively, perform the function of serving as a "screening tool to determine whether those transactions warrant further review" and are not intended to "fully replicate[] the work of law enforcement authorities."[36] The type of screening analysis used by HPC in performing this "initial step"[37] necessarily gives way to the full investigation by the Attorney General.[38] That investigation included performing economic analyses based on antitrust law, reviewing documents and other facts from numerous sources,

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[35] As discussed *infra*, the Massachusetts Association of Health Plans ("MAHP") states in its comment that it would prefer even stronger relief enabling its member payers to contract with individual parts of the Partners network. Letter from Massachusetts Association of Health Plans to Hon. J. Sanders of 9/15/14 ("MAHP Comment"), 11. The proposed Consent Judgment is necessarily a compromise, and this new contracting tool will give important new options to payers when contracting with Partners.

[36] HPC Hallmark Final Report, Exhibit B, 11.

[37] *Id.* (quoting FTC & DOJ, Proposed Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program, 5 (2011), available at http://www.justice.gov/atr/public/guidelines/269155.pdf).

[38] Indeed, HPC's use of a hospital's Primary Service Area ("PSA") as the designated "market" within which to analyze potentially anticompetitive effects differs from the approach federal antitrust enforcers take in defining a "relevant market" (including a relevant geographic area) in which to assess potential anticompetitive harms of a merger. See DOJ and the FTC Horizontal Merger Guidelines, § 4, available at http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf.

deposing and/or interviewing potential witnesses, and applying the antitrust laws to those facts. As the authority charged with the enforcement of the antitrust laws on behalf of the Commonwealth, the Attorney General is ultimately responsible for determining whether any legal claims under those laws are viable and analyzing the strength of those claims.

As demonstrated by the Complaint, the Office determined that the transactions raise anticompetitive concerns and worked to reach a resolution that best serves the interests of Massachusetts consumers and businesses while accounting for litigation risks. As described in this Response and in the Commonwealth's other filings, the proposed Consent Judgment addresses the significant harms identified by the HPC's reports and advances the public interest in promoting a better-functioning health care market and restraining Partners' prices.

d. The Scope and Finite Duration of the Proposed Consent Judgment Is the Result of a Negotiated Settlement.

HPC expresses some concern that the relief in the proposed Consent Judgment expires after a number of years, and therefore the remedies obtained by the Attorney General would not be in place indefinitely.[39] The proposed Consent Judgment is a negotiated settlement, which, by its nature, required compromise;[40] however, this compromise does not mean that the settlement is not in the public interest. Under analogous federal law, it is well established that "it is

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[39] Other commenters also raise concerns about the proposed Consent Judgment's duration. *See* Letter from Dafny to Hon. J. Sanders of 7/21/14 ("Dafny Comment"), 6; Comments of Atrius Health, Inc., Beth Israel Deaconess Medical Center, Inc., Harvard Medical Faculty Physicians at Beth Israel Deaconess Medical Center, Inc., Lahey Health System, Inc., Mount Auburn Hospital, New England Baptist Hospital, and Tufts Medical Center, Inc., 4-5 (Sept. 11, 2014) "(Competitor Group Comment"); Letter from The American Antitrust Institute to Hon. J. Sanders of 9/11/14 ("AAI Comment"), 3. For purposes of convenience, the issue is addressed here.

[40] *See Sniffin v. Prudential Ins. Co. of America*, 395 Mass. 415, 421 (1985) ("[T]he essence of a settlement is compromise.") (quoting *Armstrong v. Bd. of Sch. Dirs. of Milwaukee*, 616 F.2d 305, 315 (7th Cir. 1980)).

improper for a court to require a proposed settlement to perfectly remedy antitrust violations when those violations have not yet been proven, and when the government needs room to negotiate a settlement."[41] The choice of the Attorney General's Office is not between certain victory and the remedies of the proposed Consent Judgment; it is between the certain relief of the Consent Judgment and the unpredictable chances of proving the case at trial.[42] Entry of the proposed Consent Judgment avoids the risk that these acquisitions and practices by Partners would proceed unabated after an unsuccessful legal challenge and ensures the public receives the significant benefits of the negotiated remedies.[43]

In addition, HPC raises certain other potential harms in its reports, such as HPC's projected increased costs arising from estimated changes in referral patterns of new physicians. For example, the HPC Hallmark Final Report projects such costs as between $1.3-$3.5 million annually. The proposed Consent Judgment mitigates this potential cost increase because the prices at the Hallmark Hospitals are restricted by a separate price cap. Although HPC states other concerns, the proposed Consent Judgment addresses all the quantified cost increase

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[41] *United States v. SBC Communications, Inc.*, 489 F. Supp. 2d 1, 16 (D.C. Cir. 2007).

[42] Multiple commenters assert that once the price cap agreed to by the New York State's Attorney General in the merger of Long Island Jewish Medical Center and North Shore Health System expired, prices increased. *See* AAI Comment, 10-11. However, these commenters fail to mention that DOJ litigated to block that merger and lost. *See United States v. Long Island Jewish Med. Ctr.*, 983 F. Supp. 121, 149 (E.D.N.Y. 1997) ("The Court finds that, in the relevant product and geographic markets, the Government failed to prove that the merger of these hospitals will substantially lessen competition, increase hospital prices above competitive level or in any way reduce services at the merged entity.").

[43] *See SBC Communications*, 489 F. Supp. 2d at 23 ("Success at trial was surely not assured, so pursuit of that alternative may have resulted in no remedy at all. While a trial may have created an even greater evidentiary record, that benefit may not outweigh the possible loss of the settlement remedies."); *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995) (indicating that a court should take into account that "underlying weakness in the government's case" may exist and "that the allegations in the complaint have [not] been formerly made out" when evaluating the remedies of a consent judgment).

projections in the Hallmark Final Report.[44] The proposed Consent Judgment addresses the significant harms identified by the HPC comment and reports and, as such, clearly serves the public interest.

B. Response to Issues Raised by Multiple Commenters

1. Comments That the Attorney General's Success at Trial Would Be Certain

a. Summary of Comments

Some commenters, notably the American Antitrust Institute ("AAI") and a group of Partners' competitors (the "Competitor Group"),[45] suggest that the Attorney General, had she proceeded to litigate the claims in the Complaint at trial, was assured success. For instance, AAI states that "[g]iven the HPC's findings, and the recent success of the Federal Trade Commission in blocking comparably anticompetitive hospital mergers, there is little reason to doubt that the Attorney General could have obtained an injunction to block the mergers here."[46] Similarly, the Competitor Group compares the HPC's reports to "findings that the defendant has actually engaged in illegal practices,"[47] "violations found" or "liability findings."[48]

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[44] To the extent other harms identified by HPC's report are not addressed, it is critical to recall that the remedies of the proposed Consent Judgment must be measured by whether they address the harms plead in the Commonwealth's Complaint.
[45] The Competitor Group consists of Atrius Health, Inc.; Beth Israel Deaconess Medical Center, Inc.; Harvard Medical Faculty Physicians at Beth Israel Deaconess Medical Center, Inc.; Lahey Health System, Inc.; Mount Auburn Hospital; New England Baptist Hospital; and Tufts Medical Center, Inc.
[46] AAI Comment, 2.
[47] Competitor Group Comment, 11.
[48] Competitor Group Comment, 12, 12 n.23.

b. Response:

i. HPC's Reports Do Not Find Any Violations of the Law and Its Predictions of Higher Prices Would Be Heavily Contested by the Defendants at Trial.

These comments reflect a misstatement of the law and a completely unrealistic assessment of litigation seeking to enjoin the proposed transactions. They inaccurately portray, or fundamentally misunderstand, HPC's role in the process of reviewing proposed health care mergers. Simply put, there has been no finding by HPC, let alone by a court, that Parties' proposed transactions are "illegal practices."

Commenters appear to mistakenly believe that HPC's statements on the predicted effects and projected cost increases of the two proposed mergers would automatically result in a successful antitrust suit to block those mergers. These commenters misconstrue the important but limited policy role of HPC and the import of HPC's predictions. As explained above, HPC performs a preliminary analysis as a "screen" to determine whether further investigation is warranted; it does not make any determinations as to the legality of a transaction under the antitrust laws, nor could it under its enabling statute.[49] As noted by AAI, HPC's reports may be used as "evidence" in any action brought by the Attorney General, but that is not the equivalent of an evidentiary finding, let alone a "liability finding," that would be binding upon the court at trial. HPC's predictions concerning price effects and the Parties' proposed efficiencies would be heavily contested at trial by other evidence and expert testimony.[50]

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[49] *See* G.L. c. 6D § 13.

[50] A preview of some of the types of arguments Partners and Hallmark would be likely to raise at trial can be seen in their response to HPC's Preliminary Report reviewing the Hallmark transaction. *See* Hallmark Final Report, Exhibit A.

The Attorney General's Office made full use of the HPC's Final Report and referral on the SSHEC transaction and HPC's Preliminary and, more recently, Final Report on Hallmark and referral in its analysis. But these reports were only a part of the larger, detailed application of the relevant antitrust case law to the facts developed during the Office's years-long investigations.

The suggestion that the Federal Trade Commission's ("FTC") recent success in blocking four health care mergers[51] guarantees success in any other case ignores the vast differences in fact patterns between merger cases. For instance, in *FTC v. ProMedica*[52] and *FTC v. OSF Healthcare System*,[53] the defendants did not contest the geographic market definitions of the FTC, often a key issue in health care merger cases; as noted by the Commonwealth of Pennsylvania Office of the Attorney General in its comment, "Litigating cases over mergers in health care markets involve significant risks most importantly because health care markets are difficult to define."[54] Here, Partners, SSHEC and Hallmark would strongly contest any market definitions that suggest an anticompetitive problem. AAI's suggestion that this case is the

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[51] Although AAI identifies these cases as "hospital mergers," *FTC v. St. Luke's Health System Ltd.*, Case No. 1:13-CV-00116, 2014 WL 407446 (D. Idaho Jan 24., 2014) dealt with a hospital acquiring a physician group, not another hospital. That lawsuit was also initiated by a private plaintiff, then joined by the FTC, so it would typically be cited to as *Saint Alphonsus Medical Center —Nampa, Inc. v. St. Luke's Health System Ltd.*

[52] 749 F.3d 559, 565 (6th Cir. 2014) ("Here, the parties agree that the relevant geographic market is Lucas County.").

[53] 852 F. Supp. 2d 1069, 1075 (N.D. Ill. 2012) ("In this case, however, defendants do not meaningfully dispute the relevant market definitions proposed by the FTC. *See, e.g.*, Doc. 150 at 2 ('The structure of the healthcare market in Rockford is not in dispute.').").

[54] Letter from J. Donahue, Executive Deputy Attorney General, Pennsylvania Office of the Attorney General Comment to Hon. J. Sanders of 8/28/14 ("Pennsylvania Office of the Attorney General Comment"), 1.

equivalent of other health care merger cases without at all considering the individual facts of those four cases and the facts at issue in the Complaint renders this argument without merit.

The Attorney General has not shied away from difficult litigation or confronting issues facing the health care market. AAI states that Massachusetts "has led the way … as an antitrust innovator."[55] The Competitor Group repeatedly cites the efforts of the Attorney General's Office in examining issues in the health care market.[56] But these commenters then sweep aside the Office's enforcement and cost containment record because, in this case, the commenters urge a different enforcement choice. The Attorney General's Office has carefully considered the issues here, and the commenters recognize that the Office has had no issue bringing difficult, complex litigation when warranted.[57] Here, the Attorney General exercised her discretion in weighing litigation risks and the benefits of the consent judgment and making a reasoned determination of what she believes serves the public interest.

If the Competitor Group truly disagrees with the Attorney General's calculus of litigation risks and the benefits of the negotiated remedies, the proposed Consent Judgment does nothing to alter their ability to bring claims challenging the acquisitions (or to bring other antitrust claims) if they believe such claims are appropriate. Indeed, four members of the Competitor Group[58] have alleged such claims in a Complaint for Injunctive Relief[59] and argued that they

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[55] AAI Comment, 18.
[56] *See*, *e.g.*, Competitor Group Comment, 1 n.3, 6, 19, 24, 25 n.58, 41.
[57] *See* AAI Comment, 18.
[58] Atrius Health, Inc., Beth Israel Deaconess Medical Center, Inc., Lahey Health System, Inc. and Tufts Medical Center, Inc.
[59] Complaint for Injunctive Relief of Plaintiffs-Intervenors of Atrius Health, Inc., Beth Israel Deaconess Medical Center, Inc., Lahey Health System, Inc., and Tufts Medical Center (June 27, 2014) (No. 14-2033 BLS-2, Dkt. 6).

have antitrust standing to challenge Partners' conduct in a memorandum before this Court.[60] Their dissatisfaction with the relief obtained in the proposed Consent Judgment should not, however, prevent the Court from entering the Consent Judgment as a settlement of the Attorney General's claims.

ii. It Is Improper for a Court to Assess the Strength of the Government's Claim When Assessing a Consent Judgment.

Even if such commenters were correct—which they are not—that a subsequent antitrust trial would be a mere formality, it would not impact the review of the proposed Consent Judgment. Federal authority is clear that a court's consideration of a consent judgment should not include an independent assessment of the strengths of the government's underlying case.[61]

2. Comments That the Proposed Consent Judgment Should Not Be Reviewed with the Deference Typically Used by Courts When Reviewing Negotiated Settlements

a. Summary of Comments

AAI states that HPC's findings "provide support" for evaluating the proposed Consent Judgment "on the assumption that the government would have won," particularly because the HPC's final reports may be used as evidence in a trial.[62] The Competitor Group goes further, declaring that "it is incumbent upon the Attorney General to provide the Court with an

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[60] Memorandum of Law in Support of Emergency Motion to Intervene of Atrius Health, Inc., Beth Israel Deaconess Medical Center, Inc., Lahey Health System, Inc., and Tufts Medical Center, 13-17 (June 27, 2014)(No. 14-2033 BLS-2, Dkt. 6).

[61] *United States v. Bechtel Corp.* 648 F.2d 660, 666 (9th Cir. 1981) (stating court's refusal to consider "contentions going to the merits of the underlying claims and defenses … was proper"); *United States v. U.S. Airways Group, Inc.*, --- F. Supp. 2d. ----, 2014 WL 1653269, at *11 (D.D.C. April 25, 2014) (stating that commenter's questioning of "the merits of [the] underlying lawsuit … sheds no light on whether the settlement of this litigation is within the reaches of the public interest" and that a "Tunney Act proceeding is not occasion for a de novo determination of facts and issues") (citing *United States v. Western Elec. Co.*, 993 F.2d 1572, 1577 (D.C. Cir.1993)).

[62] AAI Comment, 6 n.7.

explanation of why and how the conduct remedies here are superior to structural relief that could have been achieved through litigation."[63]

b. Response: The Commenters Provide No Basis for the Court to Depart from Well-Established Precedent Concerning the Entry of Consent Judgments.

Because the proposed Consent Judgment plainly meets the well-established requirements for entry articulated in the Commonwealth's Memoranda,[64] the opposing commenters distort the applicable case law and facts in an effort to invent a different standard.

As explained above, neither the HPC's final reports nor other circumstances justify an assumption that the Commonwealth would have been successful at trial when evaluating the remedies of the proposed Consent Judgment. Federal precedent is clear that when evaluating the remedies of a consent judgment, it should be taken into account that "that the allegations in the complaint have [not] been formally made out" and that "underlying weakness in the government's case" may exist.[65] The law recognizes that remedies must be viewed in the context of litigation risks, noting that "[s]uccess at trial [is] surely not assured" and that while a trial may create "an even greater evidentiary record, that benefit may not outweigh the possible loss of the settlement remedies."[66]

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[63] Competitor Group Comment, 19.
[64] *See* Memorandum of the Commonwealth of Massachusetts in Support of the Entry of Final Judgment (Dkt. 4); the Further Memorandum of Law has also been filed contemporaneously with this Response.
[65] *United States v. Microsoft Corp.*, 56 F.3d at 1461.
[66] *SBC Communications*, 489 F. Supp. 2d at 23 ("Success at trial was surely not assured, so pursuit of that alternative may have resulted in no remedy at all. While a trial may have created an even greater evidentiary record, that benefit may not outweigh the possible loss of the settlement remedies.").

Additionally, given that "perfect matching between remedies and alleged violations is not required for Tunney Act approval,"[67] it is clear that the Attorney General does not need to show that the remedies of the proposed Consent Judgment are "superior" to those available after successful litigation. The Competitor Group cites to no legal authority to support this impractically heightened standard.[68]

The Court should certainly ensure that the proposed Consent Judgment meets the standards established by the applicable case law: that it is lawful, clear, and consistent with the public interest. However, no credible reason has been given to depart from the established case law.

3. Comments That the Proposed Consent Judgment Does Not Address Potential Claims Not Brought in the Complaint

a. Summary of Comments

Many commenters fault the proposed Consent Judgment, either explicitly or implicitly, for failing to address a number of potential legal claims or issues raised by Partners' size or conduct. Multiple commenters make references to Partners' "market power,"[69] and there are references to Partners' ability to "extract monopoly rents" or "Partners' current monopoly advantage"[70] or "monopolistic hold."[71] Multiple commenters, for instance, object to the

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[67] *U.S. Airways Group, Inc.*, 2014 WL 1653269, at *9.
[68] The Competitor Group suggests that the Attorney General's Office not be provided the deference that governmental bodies are usually granted when entering into consent judgments because the Attorney General "does not have the significant expertise in remedying anticompetitive mergers as does the Antitrust Division of the United States Department of Justice … or the Federal Trade Commission." (Competitor Group Comment, 12.) The Competitor Group's contentions that the Attorney General is due less deference than other government enforcement agencies are unfounded. *See* Further Memorandum of Law, Section III.A.
[69] Competitor Group Comment, 1, 4, 5, 7, 17; AAI Comment, 2.
[70] Competitor Group Comment, 27, 38.

proposed Consent Judgment's price caps because the base prices are "based on Partners' already supra-competitive rates."[72] Other commenters fault the proposed Consent Judgment for failing to address the 1994 merger between Massachusetts General Hospital and Brigham and Women's Hospital that formed Partners.[73]

b. Response: The Proposed Consent Judgment Is Properly Judged Based on How It Addresses the Harms Plead by the Attorney General in the Complaint.

As set forth above, multiple commenters identify harms they believe stem from Partners activities in the health care market, beyond the acquisitions and contracting practices described in the Complaint. The proper frame through which the Court evaluates the proposed Consent Judgment, however, is whether the remedies contained therein reasonably address the potential harms that may or may not result from the three claims stated in the Complaint: (1) that the acquisition of SSHEC by Partners violates G.L. c. 93A; (2) that the acquisition of Hallmark by Partners violates G.L. c. 93A; and (3) that Partners practice of negotiating on behalf of certain unowned affiliates violates G.L. c. 93A. While the commenters identify conduct that may form the basis of potential legal claims if proven, the Office of the Attorney General is not bringing

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[71] Letter from A. Murino to Hon. J. Sanders of 9/15/14, 4.
[72] AAI Comment, 15-16. *See also* Competitor Group Comment, 24-25, 40-41.
[73] Competitor Group Comment, 16-17 ("There is nothing prohibiting the Attorney General, even now, from seeking relief from (or even undoing) the 1994 transaction."); Letter from Alan Sager, Ph.D. to Attorney General Coakley of 7/17/14, 4-5 (arguing best course of action is to sue to split Massachusetts General Hospital and Brigham and Women's Hospital); Letter from Nancy M. Kane, DBA and Nancy C. Turnbull, MBA to Attorney General Coakley of 7/18/14 (the "Kane Comment"), 1 ("The proposed agreement would likely lock-in these disparities, if not make them worse. In particular, the proposed agreement leaves in place the two academic medical centers, Brigham and Women's Hospital ('the Brigham') and Massachusetts General Hospital ('MGH'), as a single bargaining unit…").

such claims at this time. It is well-settled that the Attorney General has broad discretion to determine what claims it brings against a defendant.[74]

Massachusetts case law on this point is mirrored by authority relating to the Tunney Act. Federal courts have determined that "a district court is not permitted to 'reach beyond the complaint to evaluate claims that the government did *not* make and to inquire as to why they were not made.'"[75] As such, comments that speculate as to what claims the Attorney General *could* bring against the Defendants, and as to what the proposed Consent Judgment *could* have done to address these hypothetical claims, have no bearing on whether the proposed Consent Judgment resolves the claims in the Complaint in a way that is a clear, lawful and consistent with the public interest.[76]

AAI recognizes that "it is inappropriate for the court to consider claims that the Attorney General could have brought," but then states that because the proposed Consent Judgment contains "extra complaint benefits," then "it seems fair to ask why a different complaint could not be brought to achieve them."[77] The Attorney General believes that her ability to negotiate for relief that addresses broader policy concerns about Partners' place in the Massachusetts health care market beyond the immediate transactions inures to the public's benefit, but such a

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[74] Further Memorandum of Law, Section I.
[75] *SBC Communications*, 489 F. Supp. 2d at 14 (*quoting* Microsoft, 56 F.3d at 1459); *see also United States v. InBev N.V./S.A.*, No. 08-1965 (JR), 2009-2 Trade Cas. (CCH) ¶ 76,736, 2009 U.S. Dist. LEXIS 84787, at *20, (D.D.C. Aug. 11, 2009) ("[T]he 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believe could have, or should have, been alleged.").
[76] *U.S. Airways Group, Inc.*, 2014 WL 1653269, at *5 ("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 and inquire into matters that the [government] did not pursue.") (internal quotations omitted).
[77] AAI Comment, 16 n.20.

policy concern does not necessarily form the basis of a cognizable legal claim, as AAI seems to suggest. The "extra complaint benefits" of the proposed Consent Judgment serve the public interest and will promote a better-functioning market; that does not mean that the Consent Judgment addresses the myriad issues facing the Massachusetts health care market, many of which stretch beyond the reach of antitrust laws.

To the extent commenters disagree, the proposed Consent Judgment does not alter the rights of private parties with respect to their ability to bring a monopolization claim, or any other claims, against Partners.

4. Comments That Federal Enforcement Agencies Prefer Structural Remedies over Behavioral Remedies When Resolving the Concerns of Potential Harms Raised by Horizontal Mergers

a. Summary of Comments

Commenters have argued that behavioral remedies are, as a category, flawed and inferior to structural remedies.[78] These commenters, citing examples from matters where there had already been a judicial determination of liability, argue that behavioral remedies are almost by definition incapable of remedying anticompetitive harm from horizontal mergers, and therefore argue that the Attorney General should not have negotiated behavioral remedies in the Consent Judgment.[79]

Commenters also cite excerpts from statements by federal authorities, arguing that these authorities refuse to utilize behavioral remedies.[80] The commenters cite these excerpts as a

[78] AAI, 3; Competitor Group Comment, 18-20.
[79] AAI, 9; Competitor Group Comment, 18, 18 n.44.
[80] AAI, 8; Competitor Group Comment, 18, 18 n.45.

reason for this Court to conclude that behavioral remedies, and therefore the proposed Consent Judgment, are improper here.[81]

b. Response: The Remedies of the Proposed Consent Judgment Address the Potential Anticompetitive Harms Alleged in the Complaint.

Comments to the effect that the "behavioral remedies" of the proposed Consent Judgment are not substitutes for the "structural remedies" available after successful litigation by the Attorney General ignore the fact that there has been no finding of liability in this case.[82] Courts have cautioned against improperly presuming liability in a settled case and against requiring a particular remedy in a settled case.[83] These commenters take the ideological stance that the only acceptable outcome when an enforcement agency believes a horizontal merger may potentially cause anticompetitive effects is seeking to stop the transaction through litigation. Many of these commenters take for granted that the Attorney General would prove all the elements of the claims in the Complaint, overcome any defenses raised by Defendants, and prevail at trial.[84] For instance, when discussing the courts' views of conduct remedies in horizontal merger cases, AAI cites *United States v. E.I. du Pont de Nemours & Co.*, in which the court, after trial, had already

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[81] *See* AAI, 9, 13; Competitor Group Comment, 20.
[82] Behavioral or conduct remedies typically involve terms that regulate how the defendant or defendants conduct their business going forward. Structural remedies typically involve either suing to block a merger or orders to divest certain business assets of a party.
[83] *See, e.g., U.S. Airways Group, Inc.*, 2014 WL 1653269, at *9 (stating that "perfect matching between remedies and alleged violations is not required for Tunney Act approval").
[84] *See* Section IV.B.1, *supra*.

found the alleged conduct to be illegal.[85] That authority is off point where, as here, there is no finding of liability on the part of the Defendants.

These commenters also misconstrue the Attorney General's role, which is to weigh the risks of litigation and the benefits of a negotiated settlement and, cognizant of those litigation risks, reach the best outcome for the public that she believes is possible. While the Attorney General *may* have won had she litigated her claims, entry of the proposed Consent Judgment provides benefits that are certain and avoids the risk that Partners' acquisitions and practices would proceed unabated if the Attorney General were unsuccessful at trial.[86] The Massachusetts Attorney General's Office is not unique in this position; the Pennsylvania Office of the Attorney General commented, "Litigating cases over mergers in health care markets involve significant risks most importantly because health care markets are difficult to define. In our experience, we have found a conduct remedy may be the best way to achieve benefits for consumers and employers."[87]

The Attorney General determined that the remedies of the proposed Consent Judgment are more beneficial to consumers and the health care market than litigating the claims in the Complaint when accounting for litigation risk. After an extensive investigation which involved interviewing or deposing numerous market participants, the Attorney General concluded that the price growth caps and component contracting remedies would reasonably mitigate the potential

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[85] *See United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 318 (1961) (summarizing procedural posture of the appeal and noting Supreme Court had previously held "that du Pont had violated [section] 7 of the Clayton Act"). AAI also cites *California v. American Stores Co.*, which examined whether divestiture was a form of injunctive relief available to a private litigant under the Clayton Act after successfully proving an antitrust violation. 495 U.S. 271, 295 (1990) (noting that in "a Government case the proof of the violation of law may itself establish sufficient public injury to warrant relief").
[86] *See SBC Communications*, 489 F. Supp. 2d at 23; *Microsoft*, 56 F.3d at 1461.
[87] Pennsylvania Office of the Attorney General Comment, 1.

anticompetitive effects of the two proposed acquisitions by Partners. When deciding whether to enter a consent judgment, a 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."[88]

Multiple commenters argue that "behavioral remedies" are generally disfavored by the federal authorities and attempt to portray such remedies as unused. However, DOJ has incorporated behavioral remedies in recent consent judgments used to resolve anticompetitive concerns raised by its investigations in cases involving vertical mergers or similar arrangements.[89] For instance, DOJ's resolution of the Comcast-NBC Universal proposed joint venture included a consent judgment with remedies that placed a number of restrictions on the parties' conduct and responded to objections from AAI as follows:

> AAI argues that because the proposed Final Judgment contains conduct remedies, it fails to match the allegations of the Complaint with an appropriate cure and thereby diverges from the Department's Antitrust Division Policy Guide to Merger Remedies and from longstanding policy in vertical merger cases. AAI's statement of Department policy is incorrect. [90]

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[88] *United States v. Archer–Daniels–Midland*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003). *See also Microsoft*, 56 F.3d at 1461 (noting the need for courts to be "deferential to the government's predictions as to the effect of the proposed remedies"); *U.S. Airways Group, Inc.*, 2014 WL 1653269, at *5, 7.

[89] *See, e.g.*, Final Judgment, *United States v. GrafTech International LTD*,, Case No, 1:10-cv-02039 (D.D.C. March 24, 2011), *available at* http://www.justice.gov/atr/cases/f268900/268995.pdf (for ten years, prohibiting the use of certain contract terms, requiring information to be reported to United States for monitoring purposes, segregation of staff within the merged company); Final Judgment, *United States v. Ticketmaster Entertainment, Inc.*, Case No. 1:10-cv-00139, 7 (D.D.C. July 30, 2010), *available at* http://www.justice.gov/atr/cases/f260900/260909.pdf (prohibiting retaliation against customers that used one of the merging companies but not the other and forbidding mandatory bundling of services).

[90] *See* Plaintiff United States's Response to Public Comments, *United States v. Comcast Corp.*, Case No. 1:11-cv-00106, 11 (D.D.C.), *available at* http://www.justice.gov/atr/cases/f272100/272100.pdf.

Commenters cite a speech by Deborah Feinstein, director of the FTC Bureau of Competition for the proposition that conduct remedies are inadequate in horizontal mergers,[91] but they ignore a statement from that same speech that "some state Attorneys General have accepted conduct-based remedies in a handful of cases" and that "states often have robust state regulatory bodies, with particularized knowledge of the community needs, that may put them in a better position to oversee compliance and regulate these types of conduct remedies."[92] Indeed, as stated in court, "recognizing that Massachusetts has a unique regulatory system, the Department of Justice supports the [Attorney General's Office's] efforts here and the conclusions [it] reached with respect to the Consent Judgment."[93] It is disingenuous to use generic statements by the federal authorities, especially DOJ, concerning conduct remedies without recognizing DOJ's support for the Attorney General's actions *in this case* after DOJ performed an in-depth investigation into these transactions and the Massachusetts market. Unlike the generalities put forth in by the Commenters without reference to any specific matter, in this particular case, DOJ "has coordinated closely with the Attorney General throughout [the] investigation, which ha[s] been exhaustive and which has resulted in a comprehensive settlement."[94]

Unlike federal authorities, the Attorney General's Office will be able to call upon the expertise of the various state agencies that have been created by the Commonwealth to help

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[91] *See* AAI Comment, 8.
[92] Deborah L. Feinstein, Director, Fed. Trade Comm'n Bureau of Competition, Antitrust Enforcement in Health Care: Proscription, not Prescription, Remarks at Fifth National Accountable Care Organization Summit, 16 n.44 (June 19, 2014), http://www.ftc.gov/system/files/documents/public_statements/409481/140619_aco_speech.pdf.
[93] Motion Hearing Trans. at 42:21-43:1 (June 30, 2014)
[94] *Id.*, 43:1-43:4.

monitor, analyze and control health care spending, such as HPC and the Center for Health Information and Analysis ("CHIA"), while enforcing the proposed Consent Judgment. Conduct remedies are an important tool for states when addressing anticompetitive issues arising from mergers in local health care markets[95] and the Attorney General's Office believe they will be effective remedies in this case.

Finally, some commenters have noted that both Commonwealth and federal policy encourage greater "coordination of care" between providers in order to deliver more efficient, less costly care. The Defendants have presented plans for care coordination to both the Attorney General and HPC that they claim are only possible if the acquisitions are allowed to occur, arguing that the benefits of these health care programs – including population health management and integration of electronic medical records – justify the acquisitions even if there were some anticompetitive effects. The Attorney General, like HPC, remains skeptical that these projected efficiencies outweigh the potential anticompetitive effects of the proposed acquisitions. However, the Attorney General's Office believes that the remedies in this Consent Judgment mitigate the anticompetitive effects of these acquisitions, while allowing for the possibility that the Defendants are able to achieve the claimed pro-competitive benefits, furthering the care coordination goals of embodied in Massachusetts and federal statutes.[96]

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[95] Pennsylvania Office of the Attorney General Comment, 1 ("Our Office has considered conduct remedies to be an important tool in address market power issues arising from mergers in health care markets.").

[96] G.L. c. 6D, 15(a) ("The commission shall establish a process for certain registered provider organizations to be certified as accountable care organizations, herein referred to as ACOs; provided that no provider organization is required to become an ACO. ... The purpose of the ACO certification process shall be to encourage the adoption of integrated delivery care systems in the commonwealth for the purpose of cost containment, quality improvement and patient protection."). *See* Patient Protection and Affordable Care Act, 42 U.S.C. § 18001 (2010).

5. Comments That Monitoring Compliance Will Be Difficult

a. Summary of Comments

A number of comments object to the proposed Consent Judgment due to the difficulty of monitoring Partners' compliance with the terms of the agreement.[97] Some commenters raise a concern that the proposed Consent Judgment contains terms that are "incomplete and ambiguous" which would necessarily involve the Court in various disputes.[98] The Competitor Group indicates a belief that the Compliance Monitor is not sufficiently empowered by the proposed Consent Judgment to oversee Partners' performance.[99] AAI also states that the Attorney General, even aided by the Compliance Monitor, lacks the expertise to enforce the regulatory aspects of the agreement, such as the price regulation relief.[100] Comments similarly state that Court either lacks the capability to adjudicate the disputes that may arise or that doing so would take substantial judicial resources.[101]

b. Response:

The suggestion that enforcement of the proposed Consent Judgment is beyond the abilities of the Attorney General and the courts is misplaced. Though the commenters attempt to portray the proposed Consent Judgment as uniquely complicated, the Attorney General and the courts regularly deal with complex and technical matters.[102] The Attorney General has entered

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[97] *See* Competitor Group Comment, 32-35, 38; AAI Comment, 3, 6, 11-12, 14; Kane Comment, 3.
[98] *See* Competitor Group Comment, 32; AAI Comment, 3.
[99] Competitor Group Comment, 33.
[100] AAI Comment, 11.
[101] *See* Competitor Group Comment, 33; AAI Comment, 11.
[102] For instance, any litigation brought to block the two acquisitions and challenge Partners' current contracting on behalf of unowned affiliates not closely linked to a Partners' hospital would involve deeply complex and technical issues, including but not limited to contentions involving relevant product and geographic markets, predicting the future competitive impacts of the transactions and the ability of the

into agreements that require monitoring the compliance of parties and has rarely required court intervention in those agreements' implementation. This proposed Consent Judgment is not different in kind from other matters with respect to its demands on the Attorney General or the judiciary.

i. The Proposed Consent Judgment Is Sufficiently Clear to Be Enforceable.

The proposed Consent Judgment, by necessity, contains detailed and comprehensive terms. Contrary to the assertions of the commenters, those terms are clearly stated, capable of enforcement by the Attorney General and interpretation by the Court in the event a dispute concerning Partners' compliance would arise. The commenters' few examples of alleged "ambiguity" in the proposed Consent Judgment reveal that their concerns are misplaced. For example, the Competitor Group states that the Unit Price Growth Cap ("UPGC") is subject to too much ambiguity to be enforceable because the proposed Consent Judgment fails to specifically define "prices."[103] This criticism misses the point. The term "price" is not used separately in implementing the UPGC. The defined term "Realized Price Increase" is more germane to the issue, and Attachment A to the proposed Consent Judgment addresses how the price cap will be measured under the UPGC. This detailed and technical section cannot fairly be described as ambiguous, and the method for enforcement is clearly spelled out.[104] The Attorney General

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merging parties to produce claimed efficiencies. The tasks set forth by the proposed Consent Judgment are no more difficult, and likely less so, than resolving these litigation questions.

[103] Competitor Group Comment, 32-33.

[104] Demonstrating that the UPGC is clear in its application, the Competitor Group was successfully able to plainly and succinctly summarize the operation of the UPGC in three sentences in their comment. *See* Competitor Group Comment, 42.

worked closely with its healthcare antitrust economist in developing the UPGC and in designing it to prevent Partners from evading its obligations.

ii. The Compliance Monitor Has Broad Powers to Fulfill Its Obligations under the Proposed Consent Judgment.

The Competitor Group ignores the role of the Compliance Monitor (the "Monitor") when claiming Partners could manipulate the information it is required to report to its advantage. The Monitor serves as an independent auditor, retained by the Attorney General, of Partners' compliance with the terms of the proposed Consent Judgment.[105] Importantly, the proposed Consent Judgment explicitly empowers the Monitor to seek independent verification on price growth from the payers and grants the Monitor wide-reaching authority to review Partners internal documents.[106] As the counterparties to the payment contracts at issue, the payers are an additional source of information available to the monitor and the Attorney General to enforce the proposed Consent Judgment and, in particular, the Unit Price Growth Cap and TME Growth Cap.

The Competitor Group also suggests concerns regarding the autonomy and the ability of the monitor to function effectively.[107] These concerns are unwarranted. For example, the Competitor Group questions Partners' ability to "consult" regarding the hiring of the monitor and necessary staff.[108] The proposed Consent Judgment states that "[t]he Attorney General shall, following *consultation* with Partners, retain a Compliance Monitor to undertake the

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[105] *See* Proposed Consent Judgment, ¶¶112-122.
[106] *See* Proposed Consent Judgment, ¶¶114-115.
[107] *See* Competitor Group Comment, 32-35.
[108] Competitor Group Comment, 34-35 ("Why is the Attorney General required to consult with Partners before engaging a Compliance Monitor? Why is the Attorney General required to consult with Partners regarding its 'arrangements' with the Compliance Monitor and any firms or persons hired by the Compliance Monitor?").

responsibilities and duties described in this Section V of the Consent Judgment,"[109] The plain meaning of the terms "consultation" is to provide input, nothing more. Partners has no veto authority over the selection of the Monitor.

The Competitor Group further questions whether there is any limit on the funding requirement for the monitor in the event that the Attorney General requires the Court's assistance on determining the monitor's budget.[110] The answer is no. The proposed Consent Judgment does provide Partners with the right to participate in setting the budget for the Monitor and not simply write a "blank check." This term will allow the Parties to reach agreement in advance of money being expended, avoiding Partners potentially returning to the Court after the fact claiming excessive Monitor expenditures.

iii. There Is No Reason to Anticipate Excessive Court Involvement in the Enforcement of the Proposed Consent Judgment.

The terms of the proposed Consent Judgment are largely self-executing and will not require excessive court involvement to enforce. Moreover, mechanisms for addressing disputes are standard in any consent judgment. They exist to allow the orderly and predictable resolution of disagreements, generally without resort to the courts. While the Competitor Group and AAI identify a variety of instances in the proposed Consent Judgment that could result in the Parties returning to the Court,[111] there is nothing to suggest that this particular consent judgment would necessarily lead to a greater than usual level of court involvement. Further, there is nothing in

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[109] Proposed Consent Judgment, ¶112 (emphasis added). Similarly, the section on hiring staff states that "The Compliance Monitor shall, at the direction of the Attorney General after the Attorney General *has consulted* with Partners, have the power and authority to retain individuals or firms to assisting in conducting the Compliance Monitor's responsibilities and duties." *Id.*, ¶117 (emphasis added).
[110] Competitor Group Comment, 35.
[111] Competitor Group Comment, 33-34; AAI Comment, 11.

the proposed Consent Judgment requiring judicial intervention; instead, there is recognition that if the Parties cannot agree whether changed circumstances warrant changes to the application of the proposed Consent Judgment, the Parties may need to seek court assistance.[112]

Moreover, the Attorney General's recent experience with consent decrees containing on-going compliance requirements demonstrates that the Attorney General's Office has rarely needed to return to court for resolution of disputes. For example, *United States & 49 States v. Bank of America et al.*,[113] a case against five of the largest banks in the United States relating to improper mortgage loan servicing and foreclosures, resulted in a consent judgment appointing a monitor and creating ongoing compliance requirements including quarterly reports on progress.[114] In that matter, only one state has had to return to court to resolve issues with the enforcement of the consent judgment. Similarly, in *Commonwealth of Massachusetts v. Countrywide Financial Corp. et al.*,[115] a case alleging unfair loan origination practices against four related entities, the consent judgment contained quarterly reporting requirements relating to performance under the consent judgment and the parties never needed to return to court to resolve any disputes.

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[112] Similarly, the Massachusetts Rules of Civil Procedure recognize that returning to court after judgment has been entered may sometimes be necessary. Massachusetts Rule of Civil Procedure 60(b)(6) specifically allows in relevant part that "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons…(6) any other reason justifying relief from the operation of the judgment."

[113] Civil Action No. 12-00361 (D.D.C. April 4, 2012), documents relating to case available at http://www.justice.gov/opa/documents-mortgage-servicing-settlement.

[114] *See* Exhibit E to Consent Judgment in *United States & 49 States v. Bank of America et al.*, Civil Action No. 12-00361 (D.D.C. April 4, 2012), http://www.justice.gov/sites/default/files/opa/legacy/2012/03/12/bank-of-america-consent-judgement.pdf, for the specific terms of monitoring and reporting.

[115] Final Judgment by Consent, Superior Court Civil Action No. 10-1169 (Mass. Superior Ct. entered March 24, 2010)

The terms of the proposed Consent Judgment are clear and enforceable. The critiques based on ambiguity or lack of expertise of the Attorney General or the Court provide no basis to reject the proposed Consent Judgment.

6. Comments That the Unit Price Growth Cap Does Not Do Enough to Limit Partners' Prices

a. Summary of Comments

Some commenters object to the Unit Price Growth Cap ("UPGC") on the basis that it does nothing to address utilization of Partners' medical services, meaning that Partners' revenues may continue to grow at a rate faster than inflation even though its unit prices are constrained.[116] Relatedly, others noted that the UPGC measures the growth in Partners' unit prices by holding utilization steady between the baseline year and the next year. The commenters objected to the fact that Partners could achieve greater revenues by negotiating with payers to increase the prices for services that Partners believes will grow in the coming year while taking smaller increases on services they expect to be used less.[117] MAHP suggests resolving these concerns through a limit on "the total percentage increase in health care revenues for Partners."[118]

Some commenters argued that the UPGC would not serve any purpose if Partners' prices would not have risen faster than the general inflation rate in the future.[119]

Multiple commenters also faulted the UPGC because it does not address Partners' existing pricing advantage over its competitors.[120] They state that this existing pricing advantage allows Partners an advantage in improving facilities and recruiting physicians.[121]

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[116] MAHP Comment, 4-5.
[117] Competitor Group Comment, 23-24, 42-43.
[118] MAHP Comment, 6.
[119] Dafny Comment, 4; AAI Comment, 4, 14-15.

b. Response:

i. The UPGC Protects Against the Anticompetitive Harms Described in the Complaint Despite Commenters' Concerns about Partners Ability to Avoid Its Restrictions.

The UPGC, which applies to the entire Partners network, serves multiple purposes: (1) to help guard against any circumvention of the South Shore Contracting Component price cap and Hallmark Contracting Component price cap by preventing Partners from raising rates elsewhere in the network; and (2) reducing the increases of Partners' rates below the annual increases that it has been able to negotiate in the past.

As stated previously, the price caps separately applicable to the South Shore and Hallmark Contracting Components specifically address claims in the Complaint, capping the prices that South Shore providers and Hallmark providers can charge based on their pre-acquisition rates. HPC has acknowledged that the UPGC would greatly limit any predicted price increase at the Hallmark hospitals.[122] By capping Partners' prices across its entire network, the proposed Consent Judgment prevents Partners from attempting to exert any increase in market power from the SSHEC and Hallmark acquisitions by negotiating higher prices elsewhere in the network.

Relatedly, a potential price effect from both the proposed acquisitions by Partners is that Partners might be able to leverage its larger provider network to obtain greater price increases than it had been able to previously. The proposed Consent Judgment prevents those potential increases by limiting Partners' potential price increases below their historical rate.

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[120] Competitor Group Comment, 24-25, 40-41; AAI Comment, 15-16.
[121] MAHP Comment, 5-6; Competitor Group Comment, 25.
[122] Hallmark Final Report, 52 n.196, 53 n.199.

Some concerns about Partners' ability to circumvent the UPGC do not rise to a level of materiality, especially considering the broad scope of the cap. For instance, comments state Partners may increase its revenue by negotiating for larger price increases for services that it anticipates will receive higher utilization in the coming year and accepting lower increases on services it expects to receive lower utilization. However, these comments do not attempt to quantify the effects of this potential shifting by Partners, and are built on assumptions that Partners will correctly predict utilization trends. In negotiating and formulating the UPGC, this concern was determined to be marginal in comparison to the overall restriction placed on Partners' pricing.

MAHP raises a concern that Partners would be able "to secure countervailing increases in prices and revenues in the western part of the Commonwealth to offset" its losses under the UPGC.[123] However, such increases would be captured by the UPGC, as any provider that was part of a hypothetical "expansion into central and western Massachusetts"[124] would be included in the Community Contracting Component and would be evaluated for purposes of the UPGC at their pre-Partners rates.[125]

Commenters also raised concerns about increases in Partners' revenue resulting from greater utilization of its services, i.e., even though prices are restricted, Partners may order more tests or admit more patients. The suggestion that not just prices, but the availability of and volume of services, should be restricted is a policy issue outside the scope of this antitrust action.

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[123] MAHP Comment, 6-7.
[124] *Id.*
[125] *See* Proposed Consent Judgment, ¶13 (stating that the Community Contracting Component includes all Partners providers not included in the AMC Contracting Component, Hallmark Health Contracting Component, or South Shore Contracting Component).

MAHP suggests capping Partners' total revenue, but does not suggest a method by which to do so. Creating a revenue cap would effectively limit the amount of care Partners hospitals can provide, potentially restricting patient choice and access. Similar concerns are raised about Partners shifting patients from its lower-cost facilities to its higher-cost facilities in an attempt to make up some of the revenue lost as a result of the UPGC. While any given medical decision might be made to simply increase revenue, such decisions may also reflect the genuine judgment by a physician concerning the appropriate site of care. Trying to distinguish between those motivations is well beyond the antitrust laws. How to address the intersection of cost and utilization is a complex policy issue that market participants, the Massachusetts Legislature, CHIA and HPC have begun to address through the reforms of Chapter 224, total medical expense ("TME") measurements, limited and tiered network products, care coordination and risk-based contracts, among other approaches. The proposed Consent Judgment reinforces some of those efforts through the TME Growth Cap and Component Contracting. However, the fact that the proposed Consent Judgment does not solve all of the broader issues facing the Massachusetts health care market does not mean that it fails to address the Complaint's claims in a way that serves the public interest.

ii. Speculation That Health Care Prices May Rise at a Rate Less Than Inflation Does Not Indicate the UPGC Fails to Serve the Public Interest.

Commenters also argue the caps will be ineffective because "healthcare inflation and spending growth are no longer foregone conclusions."[126] The letter authored by academic economists Dafny and Dranove (the "Dafny Comment"), for instance, cite the fact that "[t]otal

[126] Dafny Comment, 5. *See also* AAI Comment, 4, 14-15.

U.S. healthcare spending actually declined between Q42013 and Q12014" and that there are "many ongoing initiatives to 'bend the cost curve.'"[127] Other commenters simply assert that the caps would not be effective *if* health care spending were not to increase absent the proposed transactions, without providing any support for why the longstanding trend of medical spending may decrease.[128]

These concerns do not indicate that the UPGC fails to serve the public interest. As an initial matter, six months of information on nationwide spending does not suggest a reliable trend, especially concerning a market in which, as the Dafny Comment states, demand and cost are not relatively stable.[129] The Dafny Comment itself also spends multiple pages casting doubts about the coordination efforts of the providers through ACOs to actually "bend" the curve of medical costs.[130] Additionally, while the Attorney General respects the expertise of the signatories of the Dafny Comment, they do not claim to have done any study of the Massachusetts health care market or the potential impacts of the specific transactions or remedies at issue.[131] They draw broad conclusions relying nearly entirely on general studies and broad trends. Speculating that health care spending will not increase in the future is not a relevant basis to criticize the price caps applicable here, which protect consumers and the market in the event that health care spending does continue to increase.[132] More to the point, the price caps protect

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[127] Dafny Comment, 5.
[128] *See* AAI Comment, 4, 14-15.
[129] Dafny Comment, 4.
[130] *Id.*, 1-3.
[131] The Dafny Comment's authors state that the only information they had with respect to the Massachusetts market was from "the public documents issued by the Massachusetts Health Policy Commission." (Dafny Comment, 1.)
[132] Others have predicted that 2015 will see the trend of growth in health care spending resume. *See* Ann Carrns, *Consumers Will Spend More on Health Care in 2015, Report Predicts*, N.Y. Times, June 24, 2014

consumers from the potential harm of higher prices that may result from the SSHEC and Hallmark acquisitions.

The Attorney General has worked to aid the Commonwealth's goals of controlling health care costs and is hopeful that the Commonwealth's recent reforms, including the establishment of HPC and CHIA, will be successful. However, the relevant issue here is that the Consent Judgment is designed to address the alleged, potential price increases that may result from the proposed transactions described in the Complaint.

iii. The Existing Price Gap Between Partners and Other Providers Is Unrelated to the Claims in the Complaint.

Several comments suggest that the comprehensive price caps do not do enough to reduce the gap between Partners current reimbursement rates and the prices of other health care providers, that is, to combat the "provider price disparity" that has been well documented in Massachusetts (initially by the Attorney General's Office). This is not an appropriate lens through which to evaluate this remedy. These comments appear to suggest that the UPGC should cut back on the pricing advantage that they attribute to Partners' current market position. But the remedies in the proposed Consent Judgment cannot be evaluated compared to claims that the Attorney General did not bring. Rather, the measure of the UPGC is whether it addresses the harms identified in the Complaint.

In sum, the UPGC prevents circumvention of the South Shore- and Hallmark-specific price caps while securing a substantial benefit for payers and health care consumers – placing a

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(citing a report by PricewaterhouseCoopers's Health Research Institute that forecasts medical cost growth of 6.8% in 2015 as compared to its estimate of 6.5% for 2014).

ceiling on the rate increases Partners can negotiate[133] on behalf of its provider network – that would not have been possible even if the Commonwealth had prevailed at trial. That this remedy does not reduce rates *further* has no bearing on whether the proposed Consent Judgment resolves the claims in the Complaint in a way that is clear, lawful and consistent with the public interest.[134]

7. Comments That the TME Growth Cap Does Not Meaningfully Limit Partners' Revenues

a. Summary of Comments

Commenters criticize the TME Growth Cap on the grounds that it is too narrow because it does not apply to patients in health care products where Partners is not "at risk" and because those risk contracts currently make up 11% of Partners' commercial business. The Competitor Group expresses a belief that the impact of the TME Growth Cap will be blunted because "when the Hallmark Entities join Partners, Partners would, overall, experience a 'decrease' in TME simply by virtue of the Hallmark Entities' lower cost base."[135] They also object to the fact that Partners would be able to keep any surpluses that fall under the TME Growth Cap that are a result of "[s]avings that Partners creates due to their planned efficiencies."[136]

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[133] It is important to note as well that the price cap is a *ceiling* that sets the maximum rate of growth of Partners prices. The proposed Consent Judgment does not mandate that Partners receive that price increase; the actual rates are to be negotiated by the payers and Partners.
[134] Mitigating provider price disparity – e.g., reducing the rates of higher paid providers and increasing the rates of lower paid providers – unquestionably could be addressed by the legislature.
[135] Competitor Group Comment, 47.
[136] *Id.*

b. Response: The TME Growth Cap Provides Support for the Commonwealth's Cost Reduction Initiatives.

The TME Growth Cap applies to a segment of Partners' commercial business – risk contracts – that is expected to grow. The proposed Consent Judgment directs the Compliance Monitor to review Partners' risk business and report on its growth through the life of the TME Growth Cap. The TME Growth Cap supplements the work being done by market participants and regulators to encourage reduced utilization where appropriate. While commenters may wish that the measure were broader, the TME Growth Cap applies to all of Partners' business where it bears risk for its cost performance for a patient population. The TME Growth Cap provides an enforcement mechanism to the state's cost growth benchmark set forth in Section 9(a) of Chapter 224 on a portion of Partners' business; this enforcement mechanism is not in the statute and does not apply to any other provider.

Other criticisms of the TME Growth Cap are misplaced. The Competitor Group is incorrect that Partners will experience a "decrease" by adding Hallmark to its TME in the first measurement period. As part of the Partners Network as defined in the proposed Consent Judgment, Hallmark's pre-acquisition TME will be measured and averaged into Partners' overall TME for the initial TME Baseline Period, which will then be compared to Partners' overall TME in the first measurement period.[137] In other words, Hallmark's "lower cost base" is accounted for in the baseline; it would not be averaged in to decrease Partners' TME in the first measurement period, as the Competitor Group asserts. Additionally, the Competitor Group provides no reason why Partners should not be allowed to retain surpluses that it earns under risk

[137] *See* proposed Consent Judgment, ¶ 48 and Attachment A, Section IV.a.

contracts due to efficient care, as long as those surpluses do not cause Partners' TME to surpass the cap. Risk contracts are designed to incentivize efficient care through allowing providers to earn these surplus payments, and the TME Growth Cap is not intended to remove such incentives or hamper innovative risk deals that might be developed by payers in the future.

8. Comments That Component Contracting Will Be an Ineffective Remedy to the Harms Alleged in the Complaint and Will Not Be Sufficiently Attractive to Payers

a. Summary of Comments

Commenters acknowledge that Component Contracting may prevent "all-or-nothing" contracting by Partners, but suggest it would not preserve head-to-head competition between Partners and the acquired hospitals.[138] In particular, these comments state that Partners will share a bottom line with Hallmark and South Shore Hospital after the proposed acquisitions. As a result, Partners will not, for example, have an incentive to reduce prices at Hallmark to remain in a payer's network because if the payer drops Hallmark, Partners will recapture some portion of Hallmark's patients (and the related revenues) at its other hospitals.[139]

Commenters also state that Component Contracting will only have an impact if payers use it to drop or threaten to drop certain portions of the Partners network, and they predict that payers are unlikely to do so.[140] These comments state that limited network products have not been attractive to consumers and therefore the incentives of payers to form them is low.[141]

The Competitor Group compares Component Contracting to a remedy utilized by the FTC in *In re: Evanston Northwestern Healthcare Corp.*, which involved a merger between

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[138] AAI Comment, 16-17; Competitor Group Comment, 36-37.
[139] *Id.*
[140] Competitor Group Comment, 20; AAI Comment, 18.
[141] Competitor Group Comment, 37; AAI Comment, 18.

hospitals in Illinois that was found to be illegal after it had been consummated.[142] The *Evanston* remedy required the merged hospitals to form two separate negotiating teams that the payers could separately contract with. Commenters state that this remedy was never used by payers, that the FTC has abandoned such remedies, and that negotiating separate contracts with the same provider is inefficient.[143]

Commenters also state that the proposed Consent Judgment does not do enough to distinguish between Partners' offering a bundling discount to a payer that includes multiple components in its network and forbidden discrimination in pricing when a payer refuses to take a Partners' component.[144] One commenter suggests that it would be preferable to forbid any discounting for a payer taking more than one component.[145] Another posits that violations of these anti-discrimination provisions will not be reported by payers due to their repeat contractual negotiations with Partners.[146] Finally, it is suggested that Partners' plans to transfer the license of Lawrence Memorial Hospital ("LMH") from Hallmark to Massachusetts General Hospital would "undermine Component Contracting by removing LMH from the Hallmark Contracting Component" to the AMC Contracting Component.[147]

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[142] Competitor Group Comment, 37; AAI Comment, 16-17; Dafny Comment, 5.
[143] Competitor Group Comment, 21-22, 36; AAI Comment, 16; Dafny Comment, 5.
[144] AAI Comment, 17; MAHP Comment, 13-14.
[145] MAHP Comment, 14.
[146] AAI Comment, 12-13.
[147] Letter from Cambridge Health Alliance to Hon. J. Sanders of 9/15/14 ("CHA Comment"), 7.

b. Response:

i. Component Contracting and the Unit Price Growth Cap Work in Tandem to Prevent Partners from Recouping Lost Revenue If a Payer Drops the South Shore Component or Hallmark Component from Its Network.

Component Contracting, as recognized by AAI, is designed to address the problem identified during the Attorney General's investigation concerning Partners' ability to contract on an "all-or-nothing" basis and "reduce [Partners'] existing leverage."[148] This relief "goes beyond what could be obtained by litigating the complaint."[149] However, commenters fail to acknowledge how Component Contracting and the Unit Price Growth Cap ("UPGC") also work together to further discourage price increases that might result from the proposed acquisitions of Hallmark and South Shore alleged in the Complaint.

For example, some commenters cite HPC's projection that if Hallmark were to become unavailable to patients, Partners would simply recapture that volume at its other hospitals.[150] As a starting point, the HPC's comment begins from the faulty premise that "[a]t present, each hospital system would lose business to the other in the event it does not meet a payer's demands in negotiation."[151] Because Partners currently contracts on behalf of Hallmark, there is no existing opportunity for payers to make separate demands to Partners and Hallmark and play them off one another. The proposed Consent Judgment would create a new ability for the payers

[148] AAI Comment, 16.
[149] *Id.*
[150] *Id.*, 17 (citing Hallmark Final Report, 43).
[151] Hallmark Final Report, Exhibit C, 6.

to threaten to separately drop Hallmark while still contracting for the other components of the Partners network, or vice versa.

In any event, commenters assert that the merger increases the likelihood that Partners would be willing to have payers drop Hallmark from their network because, were Hallmark dropped, some portion of Hallmark's patients would switch to Partners' hospitals.[152] HPC predicts that Partners hospitals, combined, would attract 43 percent of Hallmark's patients if it were dropped from a network.[153] Yet, taking this estimate as true, even with Partners recapturing 43 percent of Hallmark's lost patients, the loss of the remaining 57 percent of Hallmark patients would likely reduce Partners' overall profits. Absent the UPGC, Partners could have attempted to recoup those lost profits through a price increase. The UPGC, however, prevents that price increase. Thus, the UPGC helps to preserve the payer's bargaining power stemming from their ability, as ensured by the Component Contracting provision, to drop the Hallmark or South Shore Components from their network in response to higher prices for those providers.

ii. Component Contracting Provides an Additional Tool for Payers When Contracting with Partners.

As discussed above, Component Contracting addresses the potential anticompetitive harms that arise from the proposed transactions by giving payers the ability to choose whether to include the Hallmark and South Shore providers without having them bundled together with the other Partners providers on an "all-or-nothing" basis. In addition, this remedy provides payers with the ability to contract separately for the Partners AMC providers and community providers, which grants them greater flexibility in developing limited network products. For example,

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[152] AAI Comment, 17.
[153] Hallmark Final Report, Exhibit B, 5 n.18.

during the Attorney General Office's investigation of Partners, multiple market participants stated that the "must have" status of the Partners' AMCs enabled Partners to extract higher rates for its community providers. The ability to contract separately for the Partners AMCs allows payers to create limited network products that provide access to those facilities while excluding other Partners providers that may not be desirable at the offered prices. The payers that make up MAHP comment that they would prefer even more flexibility to contract separately for access to each Partners facility on its own; however, the proposed Consent Judgment resulted from contested negotiations and, as a result, reflects a compromise between the Parties.

Some commenters state that limited network plans have traditionally been unpopular with employers and patients, so payers are unlikely to use Component Contracting to form them. At the same time, however, MAHP requests that Partners be prevented from "imposing any restriction on [p]ayers' use of tiered or limited networks that can stimulate competition among providers."[154] This suggests that the payers do see value in such plans, and the proposed Consent Judgment limits Partners' ability to exercise its statutory rights to opt out of or decline participation in any "tiered, select or limited network" product if doing so undermines Component Contracting.[155] The Massachusetts Legislature has also encouraged the formation of such plans through Chapter 288, which mandates the creation of limited and tiered networks and which restricts certain contracting terms that could impede their creation and operation.[156]

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[154] MAHP Comment, 17.
[155] Proposed Consent Judgment, ¶68. MAHP suggests that this provision could include more detail, but, as explained in Section IV.B.8.b.iii, attempting to articulate all specific instances of a violation risks excluding conduct that violates the general principles that the broader prohibition embodies.
[156] Chapter 288 of the Acts of 2010, §§ 32, 39.

Component Contracting provides payers with greater ability to fulfill this mandate to create innovative limited network products that can help decrease medical spending.

The comparison between the remedy in *Evanston* and Component Contracting is inapposite. Contrary to the assertions by the Competitor Group, Component Contracting does not require separate contracting teams to be formed for each component, so the concerns raised about payers not engaging in Component Contracting due to administrative inconvenience or negotiating inefficiency are inapplicable. The situation and market that the FTC was addressing in *Evanston* – which dealt solely with the head-to-head competition between hospitals, and did not include any price caps or other supporting relief – is also different than circumstances in this case. Here, Component Contracting addresses the "all-or-nothing" practices of a health care system with many more providers spread across a larger geographic area, and the price caps bolster the effectiveness of Component Contracting. Component Contracting serves the public interest by providing the payers with a new tool for negotiations with Partners and for the creation of new limited network products.

iii. The Proposed Consent Judgment Provides the Attorney General Broad Oversight in Evaluating Partners' Practices with Regard to Component Contracting.

The Attorney General purposefully negotiated for broad language concerning the prohibitions against Partners discouraging payers from utilizing Component Contracting. The Consent Judgment forbids Partners from making the inclusion of one component in the payer's network contingent on another component, and also forbids Partners from taking or threatening to take any action to "discriminate against, retaliate or punish" any payer for choosing to contract

with less than the full Partners network.[157] Rather than attempt to anticipate and articulate all the activities that might discourage a payer's use of Component Contracting, the Attorney General instead incorporated broad but clear principles that will allow it to police Partners' actions. Despite commenters' attempts to draw sharp distinctions between the proposed Consent Judgment and the types of remedies imposed by federal antitrust authorities, this approach is not unusual and has been used by DOJ in antitrust consent decrees that incorporate conduct remedies.[158]

The Attorney General also does not want to bar Partners from potentially offering discounts to payers for using the entire Partners network. While the UPGC is in place, this discount by definition would have to be, at worst, at a price lower than the maximum allowed by the UPGC, which will allow a payer to make a decision of what offer from Partners provides its members the best value. Criticisms that Component Contracting "works at cross purposes with the purported efficiency justification of the mergers, namely the deep integration of South Shore and Hallmark into the Partners network" are similarly answerable: Component Contracting allows the payer to determine whether the value of the providers' touted integration into Partners

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[157] Proposed Consent Judgment, ¶68.

[158] *See* Final Judgment, *United States v. Ticketmaster Entertainment, Inc.*, Case No. 1:10-cv-00139, 7 (D.D.C. July 30, 2010), *available at* http://www.justice.gov/atr/cases/f260900/260909.pdf ("'Retaliate' means refusing to Provide Live Entertainment Events to a Venue Owner, or Providing Live Entertainment Events to a Venue Owner on less favorable terms, for the purpose of punishing or disciplining a Venue Owner because the Venue Owner has contracted or is contemplating contracting with a company other than Defendants for Primary Ticketing Services. The term 'Retaliate' does not mean pursuing a more advantageous deal with a competing Venue Owner."); Final Judgment, *United States v. Comcast Corp.*, Case No. 1:11-cv-00106, 22 (D.D.C. August 21, 2013), *available at* http://www.justice.gov/atr/cases/f300100/300146.pdf ("Comcast … shall not unreasonably discriminate in transmitting lawful network traffic over a consumer's Internet Access Service. Reasonable network management shall not constitute unreasonable discrimination. …").

outweighs the value of being able to exclude these providers from their networks for certain products.

The proposed Consent Judgment also directly addresses concerns that Partners could materially alter the composition of a contracting component through a license transfer. Partners must obtain the Attorney General's consent before "transfer[ing] DPH licensure of a facility from a healthcare provider or organization that is part of one Contracting component to a health care provider entity or organization that is part of another Contracting Component."[159]

Finally, the Attorney General's Office believes that payers will assist the Compliance Monitor and the Attorney General's Office if Partners violates the terms governing Component Contracting. Relying on counterparties to report violations of the behavioral remedies used in a consent decree is not unusual. For example, then-Assistant Attorney General of the DOJ Antitrust Division Christine Varney described the industry's role in monitoring the parties' compliance with the consent judgment resolving concerns about the Ticketmaster-Live Nation merger as follows:

> I hope that the music industry and the public at large will help us in that monitoring effort. ... My hope is that you and your industry colleagues will zealously report any worrisome behavior to that group. This is a direct line into the Division, and we very much hope that consumers and independent industry players will use it early and often. We understand that you are not antitrust lawyers, but we want to hear what you and your colleagues have to say about how things are going in the industry, and we will do the hard work of sorting the actionable allegations from the issues beyond our jurisdiction.[160]

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[159] Proposed Consent Judgment, ¶70.

[160] Christine A. Varney, Assistant Attorney General, Antitrust Division, The Ticketmaster/Live Nation Merger Review and Consent Decree in Perspective, 14 (March 18, 2010), *available at* http://www.justice.gov/atr/public/speeches/263320.pdf.

In the present matter, the payers were willing to speak out about Partners' activities in this public proceeding through the comment filed by MAHP, despite AAI's fears that their continued contracting relationship with Partners would cause them to remain silent. As the health care market continues to change, and compliance with the provisions of Chapter 224 becomes routine, payers will continue to have regular contact with the government entities overseeing the activities of market participants, which should further aid the efficient flow of pertinent information to the relevant government agencies. The Attorney General's Office will vigilantly enforce compliance with this proposed Consent Judgment if it is entered. We expect payers likewise will see the value in enforcement in order to obtain the full benefits of the proposed Consent Judgment in their interaction with Partners.

9. Comments That the Prohibition on Affiliate Contracting Is Insufficient to Constrain Partners

a. Summary of Comments

Some commenters criticized the affiliate contracting prohibition, arguing that it is subject to abuse.[161] Because the contracting prohibition permits some contracting with non-owned physicians through PHOs, they argue that Partners could either stretch the definition of PHOs,[162] or contract through legitimate PHOs in ways that could cause anticompetitive harm to the market.[163]

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[161] Competitor Group Comment, 28, 49-50; MAHP Comment, 14-16.
[162] Competitor Group Comment, 28.
[163] Competitor Group Comment, 28, 50; MAHP Comment, 14-16.

b. Response: The Prohibition on Affiliate Contracting Addresses the Claim Plead in the Complaint.

The prohibition on affiliate contracting provides a new and important limitation on Partners' provider network and directly addresses the Attorney General's claim that Partners' non-hospital based affiliate contracting violates G.L. c. 93A. It is limited to affiliates outside of physician-hospital organizations ("PHOs") because those affiliates are, as a group, less integrated with hospitals. Because such affiliates are less integrated, improvements in clinical care and gains in efficiency and cost are likely to be smaller, and accordingly such affiliations are in the aggregate more likely to be anticompetitive.

Contrary to the commenter's fears, the geographic proximity and clinical integration requirements for inclusion in a PHO will help ensure that any affiliate contracting advances a legitimate attempt to improve care and lower costs, as opposed to furthering an anticompetitive attempt to raise prices.[164] Prohibiting contracting with non-owned physician groups outside of PHOs accordingly provides a straightforward, self-executing way to significantly reduce the harms that affiliate contracting can otherwise impose on the market.

In addition, it is vital to be aware that the affiliate contracting limitation operates *in addition to*, not in place of, existing restrictions imposed under antitrust law. Comments regarding theoretical abuses of the proposed Consent Judgment's limitation on affiliate contracting appear to assume a lack of future antitrust enforcement. Simply applying the label of "PHO" to an affiliate contracting arrangement is not enough to circumvent the antitrust laws;

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[164] *See, e.g.*, Statements of Antitrust Enforcement Policy in Health Care (1996), 61, *available at* http://www.ftc.gov/sites/default/files/attachments/competition-policy-guidance/statements_of_antitrust_enforcement_policy_in_health_care_august_1996.pdf (stating generally that provider affiliations that feature genuine clinical integration efforts are more likely to offer procompetitive benefits).

such arrangements must actually further clinical integration goals. While the Competitor Group expresses concerns about possible abuse of PHO geographical proximity and clinical integration requirements,[165] the more Partners attempts to stretch those requirements the stronger the antitrust claim would be to prevent the particular contractual affiliation at issue. The MAHP Comment expresses concern that PHO affiliate contracting might violate antitrust standards, but such standards will remain in effect, and therefore anticompetitive PHOs will be subject to enforcement.[166]

In other words, simply because a theoretical Partners affiliation arguably might not violate the terms of the affiliate contracting restrictions does not mean that it is therefore lawful or would be permitted. This restriction provides additional limits on Partners that operate on top of existing antitrust limitations. Concerns that Partners will attempt to cause anticompetitive harm by abusing the terms of the affiliate contracting prohibition are unfounded because the Attorney General retains the authority to act against any such abuses.[167]

Additionally, the Competitor Group's general concern about the effectiveness of antitrust enforcement is misplaced.[168] Antitrust review of Partners has constrained and will continue to

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[165] Competitor Group Comment, 28.

[166] MAHP Comment, 14-15. MAHP seeks the addition of a provision stating that PHO affiliate contracting is to be judged under a standard such as that imposed by existing Federal Trade Commission and Department of Justice guidance. *Id.* Because the proposed Consent Judgment contains no terms exempting PHO affiliate contracting from that guidance or from existing antitrust law generally, Partners PHO affiliate contracting would remain subject to that guidance.

[167] Partners would also be subject to potential private antitrust lawsuits in addition to public antitrust enforcement.

[168] Competitor Group Comment, 51 (stating "After year five, there would be no limit on Partners' physician growth other than through general enforcement of the antitrust laws, which has historically been ineffective in controlling Partners' growth).

constrain Partners' growth.[169] The Attorney General's Office will continue to act to prevent anticompetitive harm in the provider market. In addition, to the extent that the Competitor Group believes that antitrust enforcement cannot reasonably prevent Partners' physician growth, that skepticism is inconsistent with its dismissive view of the litigation risks in this matter.[170] Finally, particular contracting arrangements which do not violate antitrust law (and so may not be the subject of antitrust enforcement) but are nonetheless of public concern may be a topic for the legislature.

10. Comments That the Physician Growth Caps Insufficiently Limit the Size of Partners' Physician Network

a. Summary of Comments

Some commenters criticized the physician growth caps, arguing that Partners could add physicians to its network without violating the caps in ways that would allow it to extract unwarranted price increases in the future.[171] The Competitor Group faults the duration of the physician growth caps, believing that Partners' network size and distribution would be inadequately constrained after five years.[172] Lastly, some commenters criticized the physician growth caps on the grounds that the caps should be set lower, or restrict more categories of physician growth.[173]

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[169] For example, in 2007 Partners cancelled a proposed affiliation with Family Medicine Associates amidst an antitrust review by the Attorney General. This highlights how local physician group acquisitions have been and will continue to be subject to antitrust review.
[170] *See* Competitor Group Comment, 19-20.
[171] Competitor Group Comment, 50-53; MAHP Comment, 9-10.
[172] Competitor Group Comment, 51.
[173] Competitor Group Comment, 26-27, 50-51; MAHP Comment, 10.

b. Response: The Physician Growth Caps Impose an Automatic Restriction on Partners' Growth in Addition to the Enforcement of Antitrust Laws.

The physician growth caps provide a benefit to the market separate from and in addition to complaint-specific remedies in the proposed Consent Judgment. Partners will be subject to unique and automatic limitations to its physician growth. While commenters would prefer that these caps be lower or last longer, it must be remembered that they are the product of contested negotiations, and therefore – as with all consent judgments – necessarily reflect some measure of compromise.

While commenters raise theoretical abuses that could occur without violating the terms of the growth caps (or after the caps expire), such possible abuses are constrained by antitrust law. For example, the Competitor Group raises the concern that, because AMC specialist physicians in Metro Boston are not subject to a cap, Partners could "corner the market on high-cost specialty services in Metro Boston AMC settings."[174] This ignores the fact that antitrust law remains in effect. If Partners "cornered the market" for – in other words, effectively monopolized – key sub-specialties, this could be an enforcement matter for the Attorney General and presumably lead to potential antitrust claims by others as well.

[174] Competitor Group Comment, 54.

11. Comments That the Consent Judgment Should Be Reviewed by HPC Prior to Entry by the Court

a. Summary of Comments

Commenters suggested that the Court should involve HPC directly in the review of the Consent Judgment. One commenter suggested that HPC be appointed as a "special master"[175]; another suggested that HPC review the proposed Consent Judgment as a "material change."[176]

b. Response: The Statutory Framework That Created HPC Places Resolution of Referrals by the HPC within the Discretion of the Office of the Attorney General.

The statutory framework creating HPC specifically preserved the Attorney General's prosecutorial discretion in evaluating a "material change" in a provider's "operations or governance structure." Under that framework, HPC's role is to investigate and, if warranted, make a referral to the Attorney General.[177] The statute unambiguously states that any action the Attorney General decides to take in response to that referral falls within her discretion and does not require further approval or action by HPC:

> When the commission, under subsection (f), refers a report on a provider or provider organization to the attorney general, the attorney general *may*: (i) conduct an investigation to determine whether the provider or provider organization engaged in unfair methods of competition or anti-competitive behavior in violation of chapter 93A or any other law; (ii) report to the commission in writing the findings of the investigation and a conclusion as to whether the provider or provider organization engaged in unfair methods of competition or anti-competitive behavior in violation of chapter 93A or any other law; and (iii) if appropriate, take action under chapter 93A or any other law to protect consumers in the health care market. The commission's final report may be evidence in any such action.[178]

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[175] MAHP Comment, 21.
[176] CHA Comment, 8-9.
[177] G.L. c. 6D, § 13. Where certain conditions are met, the law governing the review of material changes by HPC requires that HPC make a referral to the Attorney General. M.G.L. c. 6D, § 13(e), (f).
[178] G.L. c. 6D, § 13(h) (emphasis added).

HPC has fulfilled its statutory role by conducting its Cost and Market Impact Reviews, issuing reports evaluating the impact of Partners' acquisition of SSHEC and Hallmark and referring those matters to the Attorney General. The Attorney General received the benefits of HPC's findings concerning the SSHEC transaction when determining the course of this matter. Those conclusions were used by the Attorney General when negotiating the terms of the proposed Consent Judgment. The proposed Consent Judgment also required the Attorney General and Partners to meet concerning the findings of HPC's Final Report reviewing the Hallmark transaction and determine what provisions, if any, they could agree to in order to mitigate any price effects the Report found. The Parties have done so and, as a result, have agreed to a separate price cap applicable to the providers in the Hallmark Contracting Component, as suggested by HPC.[179]

Chapter 224 does not contemplate or require HPC's review or approval of the proposed Consent Judgment, and to require HPC to do so here would improperly infringe upon the Attorney General's prosecutorial discretion. Unlike the Attorney General, HPC is without the authority to enforce antitrust law. Also unlike the Attorney General, HPC is neither empowered nor designed to weigh litigation risks against the benefits of potential settlement.[180] As recently

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[179] Some commenters suggested it was inappropriate for the Attorney General to negotiate the proposed Consent Judgment prior to HPC's release of its Final Report on the Hallmark transaction. The Attorney General executed the provision in the proposed Consent Judgment requiring the Parties to meet and confer concerning the conclusions of the HPC Final Report on Hallmark and successfully negotiated a change that responded to a major concern contained in that report. Ultimately, because the Attorney General's Office asked to delay the Court's consideration of the proposed Consent Judgment until after the HPC's Hallmark Final Report, the Office indeed had the benefit of that Final Report before ultimately negotiating the Consent Judgment.

[180] *Cf. Sec. of Admin and Fin. v. Attorney General*, 367 Mass. 154, 163 (1975) (holding Attorney General had discretion not to appeal lower court finding even when the state official the Attorney General

explained by the HPC in its Review of Partners HealthCare System's Proposed Acquisition of Hallmark Health Corporation Preliminary Report, the HPC's primary role in the process of evaluating a "material change" is to inform other agencies and the public of its findings for those entities to act upon:

> Chapter 224 directs the HPC to enhance the transparency of significant changes to our health care market, given that provider alignments and consolidations impact health care system performance and levels of medical spending. … the purpose of this report is to fulfill this important transparency function, by advancing an evidentiary record that can inform and complement other work being done in the Commonwealth to monitor and oversee our health care market.[181]

The Attorney General views HPC as an important partner in protecting the interests of consumers in the Massachusetts health care market. The Attorney General received the benefits of HPC's work when negotiating the proposed Consent Judgment and incorporated the HPC's findings into her analysis of potential claims against the Defendants.

12. Numerous Commenters Wrote Concerning the Impact That the Proposed Acquisitions Would Have on Their Communities

a. Summary of Comments

A number of citizens, elected officials from Massachusetts communities and business entities expressed views both supporting and opposing Partners acquisitions of SSHEC and Hallmark. A number of citizens wrote the Attorney General's Office describing their personal experiences, both positive and negative, with the care provided by Partners, SSHEC or Hallmark. Some of these commenters advocated for the proposed acquisitions, stating that the transactions would bring higher-quality health care into their communities, expand services offered there, and

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represented wanted to pursue appeal, stating that in "consolidating all the legal business of the Commonwealth in one office, the Legislature empowered, and perhaps required, the Attorney General to set a unified and consistent legal policy for the Commonwealth").

[181] Hallmark Preliminary Report, 40.

ensure the continued survival of their communities' local hospitals; others specifically supported entry of the proposed Consent Judgment, believing that it would allow the benefits of the transactions to occur while addressing the potential concerns. Other commenters opposed the proposed acquisitions based upon concerns that the transactions would provide Partners with greater market clout and lead to higher prices in their communities. A few commenters opposed Partners' plan to transition Union Hospital from a full-service acute care hospital into a behavioral health facility, with primary care, multispecialty and urgent care services provided on an outpatient basis at the adjacent North Shore Physicians Group practice.

b. Response: Comments Concerning the Impact of the Proposed Acquisitions on the Commenters' Communities Demonstrate the Importance of Health Care Issues to the Commonwealth.

The Attorney General appreciates the thought and time taken by the Commonwealth's citizens, business leaders, and elected officials to share their various views on the proposed transactions, the Massachusetts health care market, and the proposed Consent Judgment. The volume of comments and the wide variety of views reflect how important the issues of improving health care while controlling costs are in the Commonwealth. The proposed Consent Judgment addresses some of the broader issues identified with respect to the Massachusetts health care market to the extent that is proper in the context of resolving the claims brought by the Attorney General in the Complaint.

With respect to the concerns about Partners ability to raise prices to supra-competitive levels after these acquisitions, as explained in detail elsewhere in this Response,[182] the proposed

[182] *See* Sections IV.B.6.b and IV.B.8.b.

Consent Judgment's price caps and Component Contracting remedies address such potential anticompetitive harm.

C. Response to Comments Made by Individual Commenters

1. Comments from the Center for Health Information and Analysis ("CHIA")

a. Summary of Comments

CHIA suggests supplementing the price and total medical expense ("TME") measurements used in the proposed Consent Judgment with two health care measurement tools it has developed, stating that adding publicly reported performance measures will increase transparency if used in addition to confidential information from Partners.[183] It suggests that these supplemental tools be added to the proposed Consent Judgment explicitly.[184] CHIA acknowledges, however, that its Relative Price data cannot measure year over year percentage price increases as the proposed Consent Judgment requires, but suggests that Relative Price be used as a supplement to the Unit Price Growth Cap measurement specified in the proposed Consent Judgment. [185] Similarly, CHIA suggests that its TME measurement be used to supplement the proposed Consent Judgment's TME measurement on Partners' risk contracts, although CHIA does not maintain TME data separately on risk contracts.[186] CHIA also describes a number of health care measurement tools it is developing and offers to work with the Attorney General's Office to assist in monitoring Partners' performance using its existing and future measurement tools.

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[183] Center for Health Information and Analysis Comments on Proposed Final Judgment by Consent, 1, 9-10 (Sept. 15, 2014) ("CHIA Comment").
[184] *Id.*, 1, 6, 9.
[185] *Id.*, 6.
[186] *Id.*, 8-9.

b. Response: The Attorney General Looks Forward to Working with CHIA to Assist in Monitoring and Enforcing the Proposed Consent Judgment if Entered.

If the proposed Consent Judgment is entered by the Court, the Attorney General and the Compliance Monitor will use CHIA's data, measurement tools and expertise to assist in monitoring Partners and enforcing the Consent Judgment's obligations. CHIA's data and measurement tools would serve as a robustness check on data obtained from Partners and the payers, and the Attorney General would welcome using this supplemental information in monitoring compliance. In addition, when CHIA has additional data and measurement tools available in the future, the Attorney General looks forward to working with CHIA in using those tools as well.

As CHIA acknowledges, however, its current tools do not match what is required to enforce the proposed Consent Judgment, so those tools are not explicitly included in the document. In addition, in order to enforce Partners' compliance the Monitor and the Attorney General would require access to confidential business information not only from Partners but from the payers as well. It would not be appropriate to make such confidential business information public. However, the results of the analysis of such information would be publically reported, as required by the proposed Consent Judgment.

2. Comments from the Competitor Group

a. Summary of Comments

The Competitor Group Comment contained observations shared by other commenters that are addressed in Section IV.B. However, the Competitor Group raised unique objections to the restriction on Partners' ability to acquire additional hospitals in Eastern Massachusetts. First,

they state that because acquisition is not defined, "Partners could lease or manage a hospital, obtain substantial control over a hospital's governing body, or undertake other transaction designed to give effective control of a hospital."[187] Second, the Competitor Group suggests that the proposed Consent Judgment allows Partners to "absorb" Emerson Hospital in addition to the provider acquisitions described in the Complaint.[188]

b. Response: The Prohibition on Partners' Acquisition of Hospitals in Eastern Massachusetts Is Clear.

To the first point, the proposed Consent Judgment plainly forbids Partners from managing or leasing a hospital in Eastern Massachusetts through the prohibition on affiliate contracting, which prohibits "any new contractual or other relationship with any physician or with any health care provider organization or entity, including without limitation any Hospital … that would result in such physician or such organization or entity becoming a Partners Contracting Affiliate";[189] the definition of Partners Contracting Affiliate includes both leased and managed relationships with providers.[190] The other hypothetical transactions enumerated by the Competitor Group that would provide Partners with "control" over a hospital would result in it becoming a "Corporate Affiliate" as defined by the Proposed Consent Judgment,[191] and it strains credibility to believe that such a transaction does not fall under the common understanding of "acquisition."

As to Emerson Hospital, the proposed Consent Judgment provides that "[a]ny proposed acquisition of Emerson Hospital by Partners remains subject to review by the Attorney General,

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[187] Competitor Group Comment, 55.
[188] *Id.*, 2.
[189] Proposed Consent Judgment, ¶80.
[190] *Id.*, ¶47.
[191] *Id.*, ¶19.

HPC or any other entity under any applicable laws, including without limitation state and federal antitrust laws and the HPC Cost and Market Impact Review process."[192] The proposed Consent Judgment does nothing to alter the review that such a proposed acquisition would receive absent entry of the Consent Judgment.

3. The Dafny Comment

a. Summary of Comments

Academic economists Leemore Dafny and David Dranove co-authored a letter (the "Dafny Comment"), signed by 19 additional academic economists, expressing concerns that the proposed Consent Judgment would not "fully address the substantial alleged anticompetitive effects of the acquisitions proposed by [Partners]."[193] Many of these concerns are addressed in Section IV.B concerning the issues raised by multiple commenters.

The Dafny Comment also raises a unique concern: that there is "scant" evidence that horizontal or vertical integration among health care providers the size of Partners, SSHEC and Hallmark leads to efficiencies, and that a belief in these efficiencies is what must have caused the Attorney General to negotiate the proposed Consent Judgment. The Dafny Comment cites studies that suggest that mergers between hospitals "have consistently failed to generate the benefits promised by their proponents," instead generally leading to higher prices and lower quality of care.[194] While stating that they are "hopeful" that affiliations between physicians and hospitals "can generate savings and quality improvements," the authors note that "there is no convincing evidence" that such affiliations do so, and cite a study that states such integration

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[192] *Id.*, ¶92.
[193] Dafny Comment, 1.
[194] *Id.* at 2.

"has produced mixed results."[195] The Comment then states that Partners is unlikely to achieve the "extraordinary efficiencies" that would be required to "permit an otherwise illegal merger to proceed" because Partners has higher prices than other systems despite "two decades of expansion and integrations" and because any efficiencies will not exceed the cost of Partners' proposed investment into SSH.

b. Response: The Comment's Discussion of the Defendants' Efficiency Claims Does Not Alter the Conclusion That the Consent Judgment is in the Public Interest.

The Dafny Comment asserts that the Defendants would be unable to establish an efficiencies defense in the underlying litigation. However, when determining whether a consent judgment is in the public interest, courts have refused to consider "contentions going to the merits of the underlying claims and defenses,"[196] and therefore evaluating the Defendants' potential defenses is not relevant to the Court's review.

Second, the defense that a proposed merger's efficiencies outweigh its anticompetitive effects is only relevant once the fact that the merger is anticompetitive has been established; as noted in the Comment, "[n]o court has yet to permit an otherwise illegal merger to proceed on the grounds that efficiencies offset alleged harm."[197] The Comment's discussion of efficiencies presumes that the proposed acquisitions by Partners would be found to be anticompetitive, and it is well-established that it is improper to assume that the allegations in a complaint have been formerly proven before a court when evaluating a consent judgment.[198]

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[195] *Id.* (emphasis omitted).
[196] *See Bechtel*, 648 F.2d at 666 (9th Cir. 1981).
[197] Dafny Comment, 3.
[198] *See SBC Communications*, 489 F. Supp. 2d at 23; *Microsoft*, 56 F.3d 1448, 1460-61.

Finally, the Comment misses the mark in its assumption that the Attorney General reached the "implicit conclusion … that [the] transactions are likely to generate merger-specific, verifiable benefits to consumers."[199] If the Attorney General' Office believed that the acquisitions at issue would result in efficiencies that outweighed their potential anticompetitive effects, then it is unlikely that the Office would have filed any complaint alleging the acquisitions violated G.L. c. 93A. The Commonwealth would have sought to establish that the proposed mergers were anticompetitive at trial and would have sought to prove that that the claimed efficiencies are not merger-specific, sufficiently verifiable or of a sufficient quantity to justify these acquisitions. However, these issues would have been heavily disputed by the Defendants at trial. Entry of the proposed Consent Judgment avoids the inherent risk of litigation that these acquisitions and practices by Partners would proceed without a remedy in place and provides the substantial benefits of the negotiated relief.

[199] Dafny Comment, 1.

V. CONCLUSION

After reviewing the public comments, the Attorney General continues to believe that the proposed Consent Judgment provides an effective and appropriate remedy for the harms alleged in the Complaint. Accounting for all the fully investigated facts, the realities of litigation risk, and the broad, immediate and effective remedies contained in the settlement, this Consent Judgment is superior to uncertain and prolonged litigation. It advances the public interest and should be entered.

Respectfully submitted,

COMMONWEALTH OF
MASSACHUSETTS

By its attorneys,

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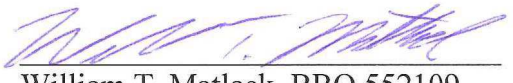

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Dated: September 25, 2014

CERTIFICATE OF SERVICE

I, Matthew M. Lyons, hereby certify that on September 25, 2014 I served true copies of the foregoing *Plaintiff Commonwealth of Massachusetts's Response to Public Comments*, by sending a copy thereof by electronic and U.S. mail, to:

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