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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
SUCV2014-02033-BLS2

COMMONWEALTH

vs.

PARTNERS HEALTHCARE SYSTEM, INC. & others[1]

MEMORANDUM OF DECISION AND ORDER ON JOINT MOTION FOR ENTRY OF AMENDED FINAL JUDGMENT BY CONSENT

This is an action brought by the Massachusetts Attorney General, on behalf of the Commonwealth of Massachusetts, challenging certain practices by defendant Partners Healthcare System, Inc. (Partners) on the grounds that they violate the Massachusetts Consumer Protection Act, G.L. c. 93A. Specifically, the Complaint alleges that Partners has engaged in unfair methods of competition and, among other things, seeks to enjoin Partners' proposed acquisitions of hospitals north and south of Boston that are currently competitors. Simultaneous with the filing of the Complaint, however, the parties submitted a Final Judgment by Consent that would allow the acquisitions to go forward on certain terms negotiated in the months leading up to the filing of this lawsuit. They now ask this Court to approve it as amended (the Proposed Consent Judgment).

By agreement of the parties at the initial hearing on this matter, it was decided that the public would first be permitted to comment on the proposed settlement before the Court took any

[1] South Shore Health and Educational Corp. and Hallmark Health Corp.

action on a joint motion for approval. In so doing, the Court would loosely follow a procedure, set forth in a federal statute, the Antitrust Procedures and Penalties Act (also known as the Tunney Act), that is used by federal courts called upon to approve antitrust settlements. See 15 U.S.C. §16. Although some supported the settlement (or more accurately, the proposed acquisitions), many – among them entities and individuals the most knowledgeable about health care -- were sharply critical of the deal that the parties had reached. At a full day hearing held on November 10, 2014, this Court discussed the public comments with the parties and heard extensive arguments regarding the legal standard that guides this Court's determination. After careful consideration of the parties' submissions together with the public comments, this Court concludes that the Proposed Consent Judgment must be rejected, for two reasons.

First, it is not in the "public interest' as that has been defined by the case law. By permitting the acquisitions, the settlement, if adopted by this Court, would cement Partners' already strong position in the health care market and give it the ability, because of this market muscle, to exact higher prices from insurers for the services its providers render. These Partners-driven increases in costs are estimated by an independent state agency, the Massachusetts Health Policy Commission (HPC), to amount to tens of millions of dollars a year. Those costs will ultimately be borne by consumers and employers in the form of higher insurance premiums and higher deductibles on their insurance plans. The Proposed Consent Judgment, which contains temporary price caps and other so-called "conduct-based" remedies, does not reasonably or adequately address the harm that is almost certain to occur as a consequence of the anticompetitive conduct by Partners that the Complaint describes.

Second, this Court has serious concerns as to the enforceability of the Proposed Consent

Judgment. Where a consent decree contemplates ongoing judicial involvement, as it does here, and there are substantial questions regarding enforcement, this alone is sufficient to reject it. The Proposed Consent Judgment envisions a ten-year period during which this Court could be called upon to resolve disagreements among the parties in at least ten different areas, including on complicated issues relating to health care pricing. Moreover, this lawsuit is brought at a time when the entire health care field is undergoing enormous change. This Court is ill-equipped to keep abreast of those changes as they unfold over the next decade or to predict at this point how such changes might affect the meaning and application of the Proposed Consent Judgment going forward. Certainly, there is reason to doubt that this Court has the technical competence or resources required to resolve the disputes that are certain to arise under this consent decree if it were approved.

This Court makes its decision fully aware that, as a general rule, litigation settlement agreements should be viewed with favor, and, that the Court owes some deference to decisions by the prosecutor—here the Attorney General.[2] In rejecting the Proposed Consent Judgment, this Court does not question her good faith. That said, the Proposed Consent Judgment does little to restore any part of the competition that would be lost by these two proposed acquisitions. And the remedies that are proposed are temporary and limited in scope – like putting a band-aid on a gaping wound that will only continue to bleed (perhaps even more profusely) once the band-aid is taken off. Certainly, the Attorney General can make a decision not to pursue Partners at

[2] The negotiations were conducted and the settlement reached when the Attorney General was Martha Coakley. Since the hearing, a new Attorney General, Maura Healy, has assumed office. In a filing with this Court just days ago, she made it clear that, had she been the Attorney General at the time, she would not have approved the settlement, seeing some of the same problems with the Proposed Consent Judgment that this Court identifies in this memorandum. Although this did not affect this Court's ruling, it is relevant to what is likely to occur in its aftermath, since Healy vowed to vigorously pursue litigation against Partners in the event this Court rejected the Proposed Consent Judgment.

all. But see fn. 2, supra. But when she asks for this Court's assistance in enforcing a consent decree, the Court has some say as to whether it is going to put the power of the judiciary behind it. This Court concludes that it cannot do so in good conscience.

BACKGROUND

Because of the parties' agreement to a public comment period, this Court relies on more than the allegations in the Complaint in its evaluation of the Proposed Consent Judgment. The comments, which came from a variety of sources, contain data and other information (much of it undisputed) that provide an important factual context for this Court's decision. To the extent that those comments express opinions, the Court has assessed those opinions in light of the responses that the parties have given to them, keeping in mind the extent to which those comments may (or may not) be relevant to the issues before the Court. Among the commenters is the Massachusetts Health Policy Commission (HPC), which has independently reviewed the proposed acquisitions as required by the law that created it, Chapter 224 of the Acts of 2012. See G.L. c. 6D, § 13. Pursuant to that law, the HPC's reports can be considered as evidence in a judicial proceeding. G.L. c. 6D, § 13(h).

This Court would add, however, that it is not making factual findings. Rather, it is considering the information before it in line with what the parties agreed to, much like a federal district court would do in deciding whether to approve an antitrust settlement. Significantly, the Attorney General opposed this Court's taking of any testimony (for example, from expert witnesses) or appointing a special master to assist it, not because these options were legally unavailable (they are, under the Tunney Act) but because the Attorney General made it clear that she was willing to rest on the record before this Court. See Transcript of November 10, 2014

Hearing at p. 170. That record, summarized in this section, does not assist the parties in their request that this Court approve the Proposed Consent Judgment.

A. The Parties

Partners is a Massachusetts not-for-profit corporation headquartered in Boston. It operates the largest health care provider system in the state. Partners was founded in 1994 when Brigham and Women's Hospital (the Brigham) and Massachusetts General Hospital (MGH) became affiliated. Those two hospitals are academic medical centers (or AMCs) that serve as the principal teaching hospitals for Harvard Medical School. In addition to those two hospitals, Partners currently owns seven other general acute care hospitals in Massachusetts: Faulkner Hospital (associated with the Brigham); Newton-Wellesley Hospital; Union Hospital and Salem Hospital (collectively, North Shore Medical Center); Martha's Vineyard Hospital; Nantucket Cottage Hospital; and Cooley Dickinson Hospital. It owns a psychiatric hospital (McLean), a home care agency, and a network of rehabilitation facilities including Spaulding Rehabilitation Center. Partners also negotiates contracts with health insurers on behalf of approximately 6,200 primary care physicians.

Not surprisingly, Partners is also quite large financially. In fiscal year 2012, the annual revenue of Partners was approximately $9 billion, an increase of approximately twenty percent in the last four years. HPC Letter dated July 17, 2014, at 10. Its total net assets are more than double the combined assets of the next five largest systems in Massachusetts. Id. It accounts for more than half of the commercial discharges in the state and receives nearly one-third of all commercial payments to acute care hospitals.

South Shore Health and Educational Corporation (South Shore) is a Massachusetts not-

for-profit corporation with a principal place of business in South Weymouth, Massachusetts. It is the parent company of South Shore Hospital (SSH), a large acute-care hospital in South Weymouth, Massachusetts located about seventeen miles south of downtown Boston. SSH is the largest hospital in its region, with net patient services revenue nearly double that of the next largest hospital in the area. Its managed care network includes 400 physicians, making it the seventh largest physician network in the state. It is in strong financial condition, with substantially greater operating revenue and assets than other hospitals in the area. HPC Letter dated July 17, 2014, at 11.

Hallmark Health Corporation (Hallmark) is a Massachusetts not-for-profit corporation with a principal place of business in Medford, Massachusetts. It is the parent company of two community hospitals: Lawrence Memorial Hospital in Medford, Massachusetts and Melrose-Wakefield Hospital in Melrose, Massachusetts. These hospitals are located approximately seven to ten miles to the north of downtown Boston and serve the metro-north area. Hallmark also has a number of outpatient facilities in the same region and has a managed care network of approximately 400 physicians. According to data compiled by the HPC, Hallmark's operating margin is high compared with those of community hospitals in the same area, and its cash reserves are strong. Although Hallmark did present information to this Court showing that it sustained a substantial loss in the early part of 2014, HPC's conclusion based on its own analysis of the data provided by the parties is that Hallmark's "financial position is positive and improving" and "does not indicate that financial distress is motivating its decision to affiliate with Partners." HPC Review of Partners Healthcare System's Proposed Acquisition of Hallmark Health Corporation, Preliminary Report, July 2, 2014, at 18.

B. The Proposed Acquisitions

On December 21, 2012, Partners and South Shore entered into an agreement that would give Partners control of SSH. Partners and South Shore currently compete against each other in the provision of general acute-care inpatient services sold to commercial health plans in the South Shore region of the state. The proposed acquisition would eliminate this competition. On July 19, 2013, Partners subsidiary Brigham and Women's Physician Organization (BWPO) executed a Memorandum of Understanding to acquire South Shore's managed care network of approximately 400 physicians which includes Harbor Medical Associates (Harbor). Harbor provides primary and specialty care services to patients in the South Shore region.

On January 31, 2014, Partners and Hallmark executed an agreement whereby Partners would acquire Hallmark and its affiliates, including its two acute care hospitals, Lawrence Memorial Hospital and Melrose-Wakefield Hospital, as well as multiple outpatient facilities. For the previous eighteen years, Hallmark and Partners had a relationship which allowed Hallmark to contract with most of the major payers through Partners; they also had a clinical relationship. The acquisition would expand the existing relationship between Partners and Hallmark, giving Partners full control over Hallmark.

If these acquisitions are approved, Partners will add three acute care hospitals to its system within the Greater Boston area and at least 800 physicians. The acquisitions will also effectively eliminate Hallmark and South Shore as Partners' competitors.

C. The Attorney General's Investigation and the Complaint

Well before the agreements described above were executed, the Attorney General's Office was investigating Partners for anticompetitive practices. Beginning in 2009, the Attorney

General issued a number of Civil Investigative Demands regarding Partners' practice of contracting with unaffiliated doctors in dealing with health insurance companies (referred to as "payers") so as to obtain higher reimbursement rates. When the proposed acquisitions were announced, the Attorney General issued additional Civil Investigative Demands. She coordinated her investigation with a similar one being conducted by the United States Department of Justice (DOJ).

The outcome of that investigation was the instant Complaint alleging that Partners violated G.L. c. 93A, §2.[3] The Complaint noted that competition in the provision of health care is necessary in order to "reduce costs, increase quality, improve service, and spur innovation." Complaint at ¶ 15. More particularly, if lower cost health care plans are to be made available to employers and individuals, payers must be able to negotiate competitive prices with providers, but a payer's ability to negotiate that lower price depends on whether it can credibly threaten to exclude a hospital from its insurance plan. Complaint at ¶ 17. If patients are willing to keep the health plan without that hospital included, then the payer is better able to resist a hospital's demand for price increases. If that threat is not credible, then the payer is more likely to accede to the hospital's demands. Although patients choose health care providers based on a number of factors, the provider's geographic proximity to the patient is one of them. Complaint at ¶ 18. Thus, where a single provider dominates a geographic market, then it can threaten to exclude its hospitals from the network offered by a plan and thus force the payer to capitulate to its

[3] For a lawsuit of this importance, the Complaint is quite short, its allegations written in the most general terms. For purposes of this Court's analysis, however, what is most important is the harm that the Complaint alleges. A settlement cannot be rejected for its failure to address harms not alleged; thus, the Complaint sets some limits on how the Court approaches the issues before it.

demands.

The Complaint alleges three harms. See fn. 3, supra. The first concerns the South Shore acquisition. South Shore and Partners currently compete against each other in the market for general acute care inpatient hospital services sold to commercial health plans. That market consists of the South Shore region. Complaint at ¶¶ 21-23. If permitted to acquire South Shore, Partners would eliminate that "significant" competition, thus enabling it to raise prices. Complaint at ¶ 24.

The second harm concerns the Hallmark acquisition. By expanding the existing relationship between Partners and Hallmark, Partners would have full control over Hallmark and thus eliminate "significant potential competition" in the relevant geographic market, namely the Boston and greater Metro-North area. Complaint at ¶¶ 27-30. As it would with the South Shore acquisition, Partners would then be in a position to raise prices. Complaint at ¶ 25. In sum, both acquisitions would substantially lessen competition in the health care market for acute care inpatient health services in portions of Eastern Massachusetts, resulting in higher health costs for consumers. Complaint at ¶ 3.

The third harm alleged by the Complaint concerns Partners' practice of jointly contracting with certain unowned physician groups. This practice allows these physician groups to receive higher reimbursement rates than they would otherwise obtain from health plans if they did not have this joint contracting arrangement. Complaint at ¶ 33-34. Similar to the proposed acquisitions, this practice reduces competition in the market for physician services. Complaint at ¶ 33. It also constitutes an unreasonable restraint on trade. Complaint at ¶ 4.

D. The Proposed Consent Judgment

Well before the Complaint was filed, the parties began negotiating a resolution. The result of the negotiations was an agreement -- ultimately embodied by the Proposed Consent Judgment -- filed simultaneous with the Complaint on June 24, 2014. At that point, however, the HPC, which was statutorily required to review both the Hallmark and the South Shore acquisitions, had not yet issued its report regarding Hallmark. Once that report issued, the parties negotiated further and amended the Proposed Consent Judgment. It is that amended judgment which is before the Court.

The Proposed Consent Judgment contains four primary components, each of them carefully circumscribed in scope and thus limited in their impact post-acquisition. Each of these four components was also the subject of public comment and criticism. Although the Attorney General questioned the validity of the criticism, she did not take issue with many of the facts underpinning those comments. The four components together with certain factual observations about each of them culled from the public comments are as follows:

1. Price Caps: The Proposed Consent Judgment contains two types of price caps, both of them temporary. The general price cap ("Unit Price Growth Cap" or "UPGC") prohibits all Partners providers from making increases in rates for their commercial business above that dictated by medical or general inflation, whichever is lower. As to SSH and Hallmark, the baseline rate to be used for this UPGC would be the rates they currently charge, before any Partners acquisition. The UPGC cap is limited to Partners' commercial business, which accounts for approximately sixty percent of Partners' total revenues. It does not apply to government funded programs that are managed by private insurance companies (Managed Medicaid and

Managed Medicare), where Partners is reimbursed at government-established rates.

A second more stringent price cap is based on a complicated formula that takes into account Total Medical Expenses or "TME." This TME cap applies only to that portion of the Partners business for which it bears "commercial risk." That makes up only eleven percent of its overall business. It thus would have no application to PPO products, which according to the Massachusetts Association of Health Payers, is a growing segment of the market. Although it does apply to PCP-driven products like HMOs, Partners already has a built-in incentive to minimize TME in those products since the risk arrangements themselves reward Partners financially for doing so. See Public Comment, Massachusetts Center for Health Information and Analysis, Sept. 15, 2014.

Both the UPGC and the TME caps would expire 6.5 years after the date the Proposed Consent Judgment enters, if it is approved.[4] After that time period, Partners could revert to its practice of billing at prices well above inflation. Those rates are undisputedly high. For example, non-Partners hospitals like Beth Israel Deaconess Medical Center (BIDMC) and St. Elizabeth's Hospital currently bill insurers between $8,000 and $10,000 for inpatient admissions relating to a kidney or urinary tract infection; MGH and BWPO charge $31,000. A spinal fusion without major complications costs about $40,000 at BIDMC; it costs $105,000 at MGH.[5] Once the price caps expire, Partners would be in an even stronger bargaining position than it is

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[4] As to why 6.5 years was chosen, the Attorney General offered no particular explanation except that this was the outcome of the negotiations.

[5] This Court took these figures from letters submitted by funds created by certain unions to provide health insurance to their members, described more fully below. Partners did not question the accuracy of these figures.

currently as a consequence of having added hospitals to the north and south of Boston.

2. Component Contracting: The Proposed Consent Judgment permits health care insurers to negotiate with Partners so that they may purchase only certain components of service in the Partners network rather than be required by Partners to take the entire Partners network of services—a more costly option. Like the price caps, this Component Contracting option would have a limited life span, available in its most expanded form for seven years and then in a more restricted form for three years after that. After ten years, Partners could revert to its "all or nothing" approach with health care insurers whereby it requires payers to take all Partners providers – or none of them, an option payers are less likely to choose even though Partners is more expensive. When it is in effect, the Component Contracting provision does not permit payers to choose between MGH and the Brigham or allow them to negotiate the inclusion of only particular products within a component as part of the health care plans that they offer.

In theory, Component Contracting will allow insurers to put together plans for consumers that are lower priced. Whether that actually occurs depends on whether such mixed plans prove attractive both to insurers and consumers and whether this provision can be enforced. Certainly, this remedy has no track record of success: it has been a part of only one antitrust settlement to date, and no payer in that case actually availed itself of the Component Contracting option. The Federal Trade Commission does not favor this as a remedy in cases involving hospital mergers.

3. Prohibition on Joint Contracting: Currently, doctors who have no association with Partners may contract with Partners so that it negotiates with insurers on their behalf; this allows the physicians to be paid at higher Partners rates. The Proposed Consent Judgment would

prohibit this practice of joint contracting on a prospective basis. This prohibition would not apply to doctors who do have some Partners association through a Physician Health Organization or PHO, however. Nor does it prevent doctors who are currently unaffiliated from seeking such an affiliation so as to be able to continue to be paid at the higher Partners rates. Although they must meet certain criteria to obtain such an affiliation, how tough these criteria are to satisfy is a matter of dispute. Application of these criteria also creates problems regarding enforceability of this provision.

4. Growth Restrictions: The Proposed Consent Judgment purports to restrict physician and network growth, but like other parts of the consent decree, these restrictions would apply only for a limited period of time. As to the restriction on network growth, it does not prevent growth but simply requires the Attorney General, in her absolute discretion, to approve any attempt by Partners to acquire hospitals in the eastern part of the state for the next seven years. Proposed Consent Judgment at 30. As to the cap on physician growth (in effect for five years, not seven) the baseline used for setting the cap is January 1, 2012, when the number of doctors with Partners was the highest (including among that number the nonaffiliated doctors jointly contracting with Partners – a practice identified in the Complaint as being in violation of antitrust laws). Id. at 31. The result (conceded by the parties) is that Partners would actually be able to increase the number of affiliated physicians, growing by a third its community physician network over the next five years. These physicians are reimbursed at rates substantially higher than those physicians not affiliated with Partners, so that an increase in their number would necessarily increase overall health costs.

The enforcement of the Proposed Consent Judgment is a complicated affair. The

Judgment contains 58 separate definitions (excluding the highly technical definitions governing computation of the price caps). Not all of them are straightforward. For example, an FTE or "full time equivalent," a term used in determining the number of permissible AMC community physicians, is defined as a calculation of "the aggregate for each specialty using a twelve (12) month total of work relative value units (WRVUs) by specialty provided by all AMC physicians at Community Facilities divided by the MGMA Community Specialty median WRVUs for each specialty." Proposed Consent Judgment, p. 8. One of the most important terms, is "Total Medical Expense" or "TME," specifically described in Attachment A to the Proposed Consent Judgment. Although that definition is not particularly complex, the application of the TME Growth Cap to Partners' pricing structures certainly is.

Many of the provisions of the Proposed Consent Judgment may implicate the Court in the ten-year period in which it is in effect, either because the provisions themselves are general in nature (allowing for differences of opinion in interpretation) or because they are not self-executing and contemplate collection and analysis of information as a part of enforcement. As to those terms that are general in nature, many purport to restrict Partners in important ways, so that how a Court applies and interprets them will determine whether the restrictions they impose on Partners are illusory or real. For example, one of the public commenters, the American Antitrust Institute (AAI), noted that Partners may be able to take steps to make Component Contracting unattractive for payers by offering discounts to those who forego it. The Attorney General says that cannot happen because the Proposed Consent Judgment requires Partners to behave in a "fair and nondiscriminatory manner." But whether pricing structures that actually reward rather than punish a payer for selecting a particular option fall afoul of such a prohibition could very well be

an area where reasonable minds could differ.

As to those provisions which are not self-executing, the Proposed Consent Judgment calls for the appointment of a monitor, chosen by the Attorney General, "following consultation with Partners," who will oversee enforcement of the decree and who, together with the Attorney General, will approve or disapprove certain proposed actions by Partners. Proposed Consent Judgment at 36. In the event of a disagreement between Partners and the Attorney General, the parties may petition the Court to resolve the dispute. There are at least ten different areas expressly contemplated by the Proposed Consent Judgment that allow for such judicial recourse. These are not on insignificant matters either. Indeed, several relate directly to the remedies, so that the Court's decision will affect the extent to which those remedies actually limit Partners' conduct. Moreover, the Court's task will not be easy, since it will be called upon to answer questions that are either highly complex or that are governed with reference to vague and sometimes ambiguous criteria and standards. The following are illustrative of the types of disagreements this Court may become embroiled in:

1. Partners may seek to exceed the TME Growth Cap in the event of "unanticipated market conditions that affect utilization." The Proposed Consent Judgment does not attempt to define that phrase except by way of a couple of examples.[6] In the event that the Attorney General does not agree with easing the cap, Partners may petition the Court for relief. The TME Growth Cap is the more stringent of the two types of price caps contemplated by the Proposed

[6] The two examples offered are: (1) a pandemic; and (2) a government mandate expanding benefits. Proposed Consent Judgment at 22. Those two examples hardly narrow the field or bring clarity to the question of whether the conditions are sufficiently unanticipated as to excuse Partners from the TME Growth Cap.

Consent Judgment. Partners' ability to convince a Court that the market conditions were "unanticipated" will thus bear directly on the extent to which this price cap has real teeth. Given that the health care market is undergoing tremendous change even now, it seems well-nigh certain that there will be market conditions arising in the next six and a half years (the period during which this price cap is in effect) which could be said to be unanticipated. To complicate things further, the Proposed Consent Judgment does not reference any criteria that the Court is to resort to in determining whether the market conditions are sufficiently changed so as to justify a loosening of the TME cap.

2. Partners may seek to be relieved of any provision in the Proposed Consent Judgment based on statutory or regulatory changes that either conflict with the judgment's provisions or which, in Partners view, prevent Partners from complying as a result of an impact on cost. If Partners takes the position that it cannot comply as a consequence of a change that impacts costs, then Partners must show that the statutory or regulatory change "has caused or will cause an increase in the consolidated costs of Partners and its Corporate Affiliates that is greater than 0.5% of the consolidated commercial revenue of Partners and its Corporate Affiliates." Proposed Consent Judgment at 46. In the event that the Attorney General does not agree with Partners that the change warrants relief, then Partners may petition the Court. Arguably a court is skilled in interpreting statutes or regulations and presumably could also make the calculations regarding impact on Partners revenue. The difficulty with this provision, however, is that it introduces a level of uncertainty into the Proposed Consent Judgment, since regulatory and even statutory changes in the health care area seem quite likely to occur in the next ten years.

3. Nonaffiliated doctors who wish to become affiliated with Partners through a PHO

(and thus be paid at higher Partners rates) may do so if they can demonstrate to the Attorney General that they will have an "integrated clinical relationship" with the Partners provider hospital. Proposed Consent Judgment, p. 27-28. If the Attorney General objects to the affiliation, the Court will determine whether a sufficient clinical relationship has been demonstrated. The criteria relevant to such a determination include "without limitation" the physician group's "actual or expected" (a) membership on the Partners provider hospital medical staff; (b) admitting relationship with such Hospital; (c) geographic proximity of such group's practice site; (d) participation in the Hospital's quality improvement and care management programs; and (e) participation in Partners' population health management programs. Proposed Consent Judgment, p. 28. If the Attorney General (or the Court) applies these criteria liberally, than that will necessarily weaken the prohibition on joint contracting, since unaffiliated doctors could more easily realign themselves with Partners through PHOs. Moreover, the open ended nature of these criteria makes it hard to predict how much a barrier they will be to those seeking to circumvent the joint contracting prohibition.

4. With regard to the Component Contracting remedy, the Proposed Consent Judgment allows Partners to change the composition of a contracting component (because of a merger or transfer of licensure, for example) provided that the Attorney General determines that the proposed change will not "materially undermine the goals and objectives of the component contracting option . . . ." Proposed Consent Judgment, p. 20. Here too, Partners may petition the Court if the Attorney General does not approve, thus requiring the Court to become intimately familiar with how component contracting works so as to understand the impact of any proposed change on its goals.

5. Partners may seek to increase the temporary cap that the Proposed Consent Judgment places on AMC primary care physicians (or PCPs) if it can convince the Attorney General (and then the Court in the event of disagreement) that four criteria are satisfied. Proposed Consent Judgment, p. 32-33. These criteria are difficult to apply without a complete understanding of how the health care market operates. For example, the Attorney General (and then the Court) will have to assess the extent to which adding these physicians will affect competition or increase costs. The Attorney General (and the Court in the event of disagreement) will have to determine if these physicians are "new to the market" and if they are, whether Partners can show that they are needed to serve a particular at-risk or underserved patient population Proposed Consent Judgment, p. 33. How these complex questions are answered directly affects the viability of the physician growth cap that the Proposed Consent Judgment contemplates. If the criteria are interpreted and applied liberally, the cap, at least as to AMC PCPs, may have no real impact on growth.

A key component of the Proposed Consent Judgment is the application of the two price caps. The methodology to be applied in calculating what they are and then applying them to Partners is set forth in Attachment A, a twenty-three-page document with an additional twelve pages of examples. The primary responsibility for this will fall with the monitor selected by the Attorney General. That methodology is quite complicated: although the TME cap is that annual benchmark for spending set by the HPC, the monitor determines whether it has been exceeded in any year by way of a complex formula based on the "TME Trend," the "Weighted TME Trend," and the "Cumulative Weighted TME Trend." Although these computations do not involve the Court directly, Partners can petition the Court if it believes that the monitor is seeking

information not "relevant" to those calculations; to resolve such a dispute, the Court would have to understand how these calculations worked. Having carefully studied Attachment A and heard the Attorney General's explanations regarding the price caps, this Court will admit quite candidly that the methodology remains a mystery to me at this point.

Of greater concern to this Court is whether the monitor will be up to the complex task that is placed upon him or her in administering these price caps. Even with some expertise in the field, the monitor will have to take into account complex contractual arrangements between Partners and the major payers, each of which have their own unique features and tradeoffs. The prices at issue are not for a homogenous good or a single product but for a complex set of services which can be bundled and redefined from one year to the next. Significantly, the monitor must rely on Partners for the critical information to make these calculations – so that the fox is literally guarding the proverbial chicken coop. Although payers could blow the whistle on any attempt by Partners to circumvent the price caps as outlined in the Proposed Consent Judgment, they may be reluctant to do so: after the price caps expire, these same payers will be on their own at the bargaining table and need to maintain a strong relationship with Partners going forward.

E. Post-Filing Proceedings and the Public Comment Period

As already stated, simultaneous with the filing of the Complaint on June 24, 2014, the parties filed the agreement they had reached to resolve the case. The parties first appeared before this Court on June 30, 2014 and (at least initially) expressed the hope that this Court would speedily approve the negotiated resolution. It was almost immediately apparent, however, that a quick disposition of the matter was not to be.

At that first hearing, a group of competitor hospitals (the Competitor Hospital Coalition), appeared to voice their strong objection to the settlement. That group consisted of an alliance of hospitals and physician groups otherwise in competition with each other, among them, Atrius Health, Inc. (Atrius), Beth Israel Deaconess Medical Center, Inc. (BIDMC), Lahey Health System, Inc. (Lahey), New England Baptist Hospital, and Tufts Medical Center, Inc. (Tufts). Initially, they sought to intervene in the lawsuit, which the parties vehemently opposed. It was in the course of discussing that motion to intervene that the parties suggested that this Court generally follow the procedures set forth in the Tunney Act, 15 U.S.C. §16, which governs federal antitrust actions.

This suggestion for a public comment period made particular sense given the fact that the lawsuit itself was fast becoming a political issue of sorts and was receiving a great deal of public attention. Statewide general elections were to take place (and a changing of the guard at the Attorney General's Office was to occur) within the next few months, and various candidates for public office began to speak out about the matter. Maura Healey was the Democratic candidate for Attorney General, who would ultimately take the place of then-Attorney General Martha Coakley. Attorney General Coakley was running for Governor of Massachusetts against her Republican opponent, Charles Baker, who would become the Governor in January, 2015.[7] Other gubernatorial candidates, including Steve Grossman and Don Berwick, were among those who submitted public comments to the Court critical of the deal that Partners had struck with

[7] At the November 10, 2014 hearing, this Court asked what incoming AG Maura Healy's views were on the Proposed Consent Judgment and was informed only that she would enforce it if this Court approved it. This Court delayed its decision so that she could have an opportunity to weigh in, as she has now done. See fn. 2, supra.

Coakley. As to the DOJ, with whom the Attorney General had coordinated in its investigation, the DOJ (for unexplained reasons) did not join as a signatory on the consent decree or submit a written public comment or court filing regarding the Proposed Consent Judgment. At the July 1, 2014 hearing (and at a later hearing before this Court), the Attorney General instead read a statement from the DOJ indicating that it supported the consent judgment, but the Attorney General declined to submit the statement itself to the Court, suggesting that federal authorities wish to keep their options open.

The procedure allowing for a public comment period is set forth in 15 U.S.C. § 16 (c)-(f), which this Court has loosely followed. The goal is to provide the Court with the information it needs to make a determination that the proposed settlement is in the "public interest," taking into account certain considerations set forth in 15 U.S.C. § 16(e). As one court described it, these procedural requirements eliminate "excessive secrecy from the process" and "ensures that the economic power and political influence of antitrust violators do not unduly influence the government into entering into consent decrees that do not effectively remedy antitrust violations." United States v. Airline Tariff Publishing Co., 836 F. Supp. 9, 11 (D.D.C. 1993), citing United States v. AT&T, 552 F. Supp. 131, 148 (D.D.C. 1982).

An initial deadline of July 21, 2014 was set for the filing of the public comments and responses thereto, with a hearing scheduled for August 5, 2014. The Commonwealth moved to continue that hearing to September 29, 2014; with the hearing continued, this Court also enlarged the public comment period. Shortly before the September 29 hearing, the parties submitted an amended version of the Proposed Consent Judgment, and the Commonwealth suggested that there be an additional public comment period; this Court agreed. The parties appeared on

November 10, 2014 to discuss those comments and explain their views on why the Proposed Consent Judgment should be approved.

In addition to a public comment period, the Tunney Act also permits the Court, in its discretion, to take testimony of government officials or expert witnesses, appoint a special master to assist it, and authorize the participation of any "interested persons or agencies" in the proceedings before it. See 15 U.S.C. § 16(f). Although the parties embraced the idea of permitting public comments, they strongly objected to this Court's conducting an evidentiary hearing or bringing in outside consultants. It was the Commonwealth's position that the public comments and the parties' response to them would provide the Court with all that was needed to make the public interest determination. That continued to remain the Attorney General's position at the November 10, 2014 hearing. Since then, there has been no request made by any party to supplement the materials beyond that already before this Court.

F. The Health Policy Commission

Of all the public comments that this Court received, the most important are those from the HPC, so it makes sense to summarize those submissions separately.

The HPC was created by Chapter 224 of the Acts of 2012, entitled "An Act Improving the Quality of Health Care and Reducing Costs through Increased Transparency, Efficiency and Innovation" (Chapter 224). The HPC is an independent state agency governed by a diverse eleven-member board. Its chairperson (currently Dr. Stuart Altman), appointed by the governor, must have demonstrated expertise in health care delivery, health care management, or health care finance and administration. Other members include a primary care physician, a health care economist, and a leader in a labor organization. G.L. c. 6D, § 2. Among other things, the HPC

is charged with measuring provider performances against a health care cost growth benchmark that it develops on a yearly basis. G.L. c. 6D, § 9. It is also required to produce an annual report on health care spending and to review the impact of certain provider transactions on the health care marketplace. See G.L. c. 6D, §§ 5, 8(g).

In keeping with this last responsibility, Chapter 224 requires that providers seeking to make major changes in their operations or corporate structure provide notice of those proposed changes to the HPC. G.L. c. 6D, § 13(a). This is because such changes have been shown to impact health care market functioning and the delivery of cost effective quality care. Upon receiving such notice, the HPC must conduct a "cost and market impact review" (or "CMIR"), taking into account certain statutory factors. G.L. c. 6D, § 13(d). Those factors include the provider's size and market share, the prices it charges for its services relative to other providers in the same market, and the impact of the proposed acquisition or merger on any competing providers in the same area. Depending on its findings, the HPC may refer the matter to the Attorney General to conduct its own investigation and determine if the provider has engaged in or proposes to undertake actions that would constitute anticompetitive behavior or unfair business practices in violation of Chapter 93A. G.L. c. 6D, § 13(e) and (g). The HPC's final CMIR on the proposed transaction may be considered as evidence in any action the Attorney General initiates. G.L. c. 6D, § 13(h).

In the instant case, the Attorney General's investigation of Partners and the proposed acquisitions began before the HPC was created. Once it was established, however, Partners notified the HPC as required by statute, and the HPC conducted its own review of the two proposed acquisitions. Although the HPC does not itself exercise the powers of a prosecutor

(that power lying exclusively with the Attorney General), the HPC is an independent agency dedicated to achieving and preserving a more competitive health care market, with the long term goal of lowering overall health costs. Thus, this Court regards its input as particularly invaluable. As to the acquisitions at issue here, although its conclusions are carefully worded, it is quite apparent that the HPC is of the opinion that they would not be in the public interest. It is also clear that the HPC believes that the Proposed Consent Judgment falls far short of addressing the harms that would occur if these acquisitions were allowed to go forward.

This Court has before it five submissions from the HPC. Two are annual Cost Trends Reports, one for 2013 (the 2013 CT Report) and the other updating that same report with a July 2014 supplement (the July 2014 CT Supplement). The other three are the CMIRs directly relating to the transactions at issue. They are: (1) the Final Report Regarding Partners' Proposed Acquisitions of SSH and Harbor Medical Associates, dated February 19, 2014 (the SSH Final Report); (2) the Preliminary Report Concerning Partners' Proposed Acquisition of Hallmark dated July 2, 2014 (the Hallmark Preliminary Report); and (3) the Final Report Regarding Hallmark dated September 3, 2014 (the Hallmark Final Report). HPC Chair Altman, an economist and professor at the Heller School for Social Policy and Management at Brandeis University, also submitted two letters as part of the public comment process: one is dated July 17, 2014 (the HPC July 17 Letter) and the second is dated October 21, 2014 (the HPC October 21 Letter). These letters summarize the key findings of the CMIRs, with specific citations to them.

The process by which the HPC reached its conclusions was quite thorough. It not only relied on documents and data produced by Partners in response to HPC requests, but it also

gathered information from a number of other sources. As described in the CMIRs, those other sources included state and federal agencies, payers such as Blue Cross Blue Shield and Tufts Health Plan, private organizations that collect health care data, and competing health care providers. To assist it in its review and analysis of this information, HPC engaged consultants with experience in evaluating provider systems and their impact on the health care market. Accordingly, the CMIRs provide an important factual context for the Proposed Consent Judgment, particularly since much of the underlying data contained in them is not contested by the parties. Of particular significance is the following:

* Massachusetts spends more than any other state on health care: In 2012, on a per capita basis, Massachusetts devoted 16.6 percent of its economy to personal health care expenditures, compared with 15.1 percent in the nation, and that number is increasing. Notably, these high costs do not directly translate into higher quality care: the information that the HPC has collected and analyzed from several sources supports a conclusion that between 21 percent and 39 percent of total spending in Massachusetts would be considered wasteful, representing $14.7 million to $26.9 million in 2012 alone. 2013 CT Report at 36-41.

* Rising costs are largely attributable to higher commercial prices charged by health care providers: If better health care is not the reason costs are rising, then the explanation for the increase must be found elsewhere. Part of that increase is due to the fact that more patients in this state receive care in more expensive settings than do patients elsewhere in the nation. In recent years, however, the biggest contributor to commercial health care spending has been increases in the price paid for that care.

As the HPC describes it, growth in total medical spending is driven by four principal

factors: unit price, the provider mix, utilization, and service mix. Spending goes up not only when the provider charges more for its services (an increase in the unit price) but also when changes in the site of care and referral patterns encourage or result in a shift away from lower cost providers to higher costs ones (a change in the provider mix). Provider consolidations and alignments affect all four of the factors that drive health care spending. Hence, the HPC is particularly concerned with such consolidations, given its mission to contain health costs over the long term.

* The majority of care is currently delivered by a few large systems, with Partners as the largest: In 2009, five health systems accounted for 43 percent of all inpatient discharges; as of 2014, that concentration had increased to an estimated 50 percent. July 2014 CT Supplement at 27. Partners is by far the largest of these health systems. In 2009, for example, its share of commercial inpatient discharges was twice that of discharges from the other four systems combined. Id. at 27. In 2011, Partners received nearly one-third of statewide commercial payments to acute hospitals and approximately one-quarter of statewide payments to physician groups. See Hallmark Preliminary Report at 22-23.

* Prices are the result of contract negotiations and are thus influenced by the leverage that each party brings to the bargaining table: Commercial prices for health care services are established through contract negotiations between payers (health care insurers) and providers. The bargaining leverage that each party has determines the result of the negotiations. Thus, a large or important provider can prevail on a payer to accept its higher price if a plan that does not include that provider would be less attractive to purchasers/consumers. Faced with a provider's threat of not participating in the plan's network, the payer must bow to the provider's demand.

See SSH Final Report at 36-37 & n.111.[8] The bigger the provider, the more leverage it has. As noted above, Partners already largely dominates the health care market and thus brings a great amount of leverage to the bargaining table.

* Partners hospitals and physician groups already command the highest prices for services: The HPC examined prices charged by providers to the three major commercial payers from 2010 to 2012 and found that in almost every region in which Partners operates, its hospitals are consistently the highest priced. Public Comment, HPC July 17 Letter, at 10; Hallmark Preliminary Report at 22-23. As compared to Hallmark and South Shore Hospitals in particular, Partners' prices are considerably higher. Similar data relating to prices charged by physician groups showed the same thing: from 2009 to 2011, Partners physician groups received higher prices than nearly all other physical groups in northeastern Massachusetts. Hallmark Preliminary Report at 23.

As to how the transactions at issue in this case would affect the health care market if permitted to proceed, the HPC concluded that they would be quite costly on a number of levels, in spite of the remedies set forth in the Proposed Consent Judgment:

First, total medical spending would increase by more than $38.5 million to $49 million per year. This would be because of an increase in unit price (since Partners generally commands the highest unit price of all providers) and because of a shift in care to higher priced Partners facilities (the provider mix). Although the price caps may, in the short term, prevent an increase

[8] This is consistent with conclusions drawn by the Attorney General herself before the HPC was created. For example, in a 2010 report on cost trends, the Attorney General concluded that price differences between health care providers could primarily be explained by differences in market leverage rather than in quality of care, complexity of services, or other value-based factors.

in unit price for certain segments of Partners' business, the caps have no impact on the other factors that cause spending to go up. Moreover, the caps are time limited and therefore do nothing to contain costs in the long term. Indeed, the HPC notes that in other circumstances where merging entities have been subject to a price cap, prices have immediately risen once the caps expire.

Second, the resulting consolidated system will almost certainly give Partners greater leverage to obtain higher prices and more favorable contract terms in negotiations with payers in the future. Costs attributable to this additional bargaining leverage are not included in the projections above.

Third, the information provided by the parties does not provide a factual basis for concluding that the consolidation would actually promote efficiency in the delivery of health care or improve patient access. Indeed, it was not at all clear to the HPC that a permanent form of affiliation among hospitals is necessary to achieve those ends, since there are alternative ways in which these efficiencies could be realized.

In response to the HPC's submissions, the Attorney General makes several legal arguments (addressed below) as to why, in deference to prosecutorial discretion, this Court should nevertheless accept the Proposed Consent Judgment. Importantly, the Attorney General does not take issue with the factual data that the HPC relies on in its criticism, although she does attempt to minimize its significance. As to proposed price caps in particular, the Attorney General points out (as the HPC itself acknowledged) that applying those caps to Hallmark provides some constraint on price growth and that the price caps will presumably operate in the same manner with regard to the South Shore acquisition. This did not change the HPC's

conclusion, however, that the price caps are largely ineffective in addressing the anticompetitive harm resulting from Partners' proposed acquisitions. As the HPC explains, the price caps are temporary and once they expire, there is no reason to believe that the market will be any more competitive; indeed, Partners, because of having acquired additional hospitals, would be in an even more powerful position. More important, even with the price caps, more patients would be treated within the Partners network and more doctors who previously charged at lower non-Partners rates would be able to command higher reimbursement rates post-acquisition, thus resulting overall in increased health care spending.

The Attorney General replies that that these consequences are not harms alleged in the Complaint and are thus not properly considered. As the HPC submissions explain, however, total medical spending is affected by several factors, unit price being just one of them. In order to assess the effectiveness of the price caps contained in the Proposed Consent Judgment, this Court cannot (nor should it) ignore how these acquisitions will affect other factors, including provider mix and utilization. To say (as the Attorney General argues) that these consequences could be challenged in a separate antitrust action provides little solace to this Court: if the inevitable effect of the acquisitions is to cause problems beyond a simple rise in unit price (addressed at least in the short term by price caps), then to ignore those other consequences seems decidedly wrong.

More generally, the Attorney General maintains that the HPC's opinions are influenced by Partners' pre-acquisition market position and that this is not relevant to the Court's inquiry, constrained as it is by the specific harms alleged in the Complaint. This Court disagrees. Partners' overall size and its current ability to bill at rates higher than any of its competitors do

provide an important context to the proposed acquisitions. The harm that is likely to occur as a result is magnified in a way that would not be true if a smaller competitor were seeking to add these hospitals to its network.

Partners' response to the HPC's findings differs from that of the Attorney General. First, it emphasizes the benefits of the acquisitions, which it says will advance a "new vision for care delivery" and result in substantial savings which it estimates to be $21 million annually. However, Partners concedes that that there is little hard evidence to support these estimates. Moreover, as the Attorney General acknowledged at the November 10, 2014 hearing, those benefits would only be relevant if this case went to trial and the Court, having concluded that the mergers would be anticompetitive, nevertheless decided to allow the consolidation because the advantages of it outweighed the anticompetitive harm that would necessarily result from the acquisitions. They are not relevant to the issue before me now, which is whether the Proposed Consent Judgment reasonably and adequately addresses the anticompetitive harm independent of any benefits.

Second, Partners submitted the Expert Declaration of two economists, Dr. Robert Willig and Margaret E. Guerin-Calvert, which challenges the methodology that HPC used in assessing the anticompetitive effects of the acquisitions at issue. In his October 21, 2014 Letter, HPC Chair Altman, states that this declaration reflects a "fundamental misunderstanding" regarding HPC's methodology, which has been endorsed by both the FTC and the DOJ as a "useful screen" for assessing competitive impact. HPC October 21 Letter, at 2-3 & nn.11-12. This Court sees no reason to question this assessment, nor were the parties willing to have it tested by an evidentiary hearing. Certainly, the Attorney General did not ask this Court to ascribe any weight

to the Declaration nor did it criticize the HPC's analysis other than to say that it did not replicate the work of the Attorney General's Office.

G. Other Public Comments

In all, this Court received comments from approximately 174 entities and groups of individuals. Certainly, a good number of those comments supported the proposed acquisitions. They did so, however, for reasons that are irrelevant to the primary question before the Court, which is whether the harms identified by the Complaint are reasonably and adequately addressed by the Proposed Consent Judgment. Thus, for example, many wrote in praise of the high quality of care that Partners provides; this Court has no reason to disagree with that, but that is not the question before me. Others from the North and South Shore regions spoke to the economic benefit that a merger would bring to their respective areas. Again, that may be true, but that does not otherwise assist the Court in determining whether the anticompetitive effects of consolidation are addressed by the remedies set forth in Proposed Consent Judgment. Still other comments addressed the claim (also asserted by Partners and the hospitals it seeks to acquire) that consolidation will result in a more efficient delivery of health care by streamlining services and coordinating care in a more clinically and financially integrated system. As noted above, however, those benefits would only be relevant as part of an affirmative defense and are not relevant to the issue before this Court.

Of those comments that did address the issues before me, this Court found submissions by the following entities or individuals to be among the most valuable:

1. American Antitrust Institute (AAI): AAI is an independent nonprofit research and advocacy organization devoted to advancing competition in the economy. Although Partners

and the Attorney General argue that AAI has a bias in favor of stricter enforcement of antitrust laws, this does not diminish the value of AAI's input. AAI submitted two letters to this Court, one dated September 11, 2014 and another dated October 10, 2014, after the Proposed Consent Judgment was amended. Its opinion in a nutshell is that the Proposed Consent Judgment is not in the public interest because it does not restore the competition that will be lost as a result of Partners' proposed acquisitions. AAI also contends that the consent decree "will embroil the Attorney General's Office and the court in extensive regulatory oversight for which they are ill suited." AAI Sept. 11, 2014 Letter at 1.

In support of this opinion, AAI offered the Declaration of John E. Kwoka, Jr., a Professor of Economics at Northeastern University (Kwoka Aff.). That declaration addresses the "conduct based" remedies contemplated by the Proposed Consent Judgment and states why, in Dr. Kwoka's opinion, these remedies will not restore competition. As stated in his affidavit, conduct remedies are "difficult to write, difficult to enforce, and seem on their face unlikely to restrain a firm's natural incentive and ability to exercise the market power secured by merger." Kwoka Aff. ¶ 9. Particularly where the product or transaction is complex and enforcement of the remedies is over a long period of time, there are many opportunities for the entity, in pursuit of its own self-interest, to "crowd" the border of stated rules and create ways to evade them. Kwoka Aff. ¶ 11.

As to the price caps, AAI notes the following:

First, the price caps are limited in scope. The more stringent one (the TME cap) applies to only eleven percent of Partners' commercial business. The UPGC cap is a modest one, limiting Partners only to that which it could charge based on inflation. Neither price cap

prevents price increases projected to occur as a result of shifts in patient flow from lower priced non-Partners providers to higher priced Partners providers.

Second, price regulation is "an inherently difficult and complicated task," requiring "careful design, ongoing monitoring, midcourse adjustments [and] attention to adverse side effects" among other things. Kwoka Aff. ¶¶ 17, 19. Accordingly, it has not been endorsed by federal authorities as an effective antitrust remedy.

Third, the caps are limited in time and do nothing to address the diminution in the quality of competition that will occur as a consequence of the acquisitions. Indeed, they may actually make matters worse since, once they expire, Partners' enhanced market power will be "unshackled" and Partners prices could very well jump significantly if it decides to recoup some of what it lost when the caps were in effect. AAI Oct. 21, 2014 Letter at 3 n.5.

According to AAI, the Component Contracting remedy will prove no more effective based on the following limitations and deficiencies:

First, like the price caps, this remedy is time limited.

Second, there are ways in which Partners could make component contracting unattractive to payers. Id. For example, it could offer "discounts" to payers who do not take advantage of it – conduct that will be difficult to monitor.

Third, there is reason to doubt that payers and consumers will actually take advantage of it. Partners physicians who are part of a payer's network are more likely to steer their patients to other Partners providers; if those providers are out of network, then the patient may rebel at being forced to go "out of system," thus making plans with component contracting less attractive.

Finally, and perhaps most important, the component contacting provision does not purport to address the direct loss of competition that will result if the acquisitions are permitted. Indeed, it is a remedy disfavored by the Federal Trade Commission and has no proven track record of success.

2. Massachusetts Association of Health Plans (MAHP): MAHP represents 17 health plans that provide health care coverage to approximately 2.6 million Massachusetts residents. It submitted a letter dated September 15, 2014 (MAHP Letter) which outlines its criticism of the Proposed Consent Judgment and attached to that letter a legal brief in support of its position. In particular, the MAHP Letter describes the dilemma that payers find themselves in when, in an effort to keep health costs down, they have to negotiate with providers who have the power to drive up prices "based on an institution's or system's brand, geographic isolation or size," rather than on the quality of care or the acuity of the patient population served. As to the remedies offered by the Proposed Consent Judgment, they are (in the MAHP's view) not only inadequate but "could have the unintended effect of exacerbating the market dysfunction issues" that they are intended to address. MAHP Letter at 2. That is because, even with the price caps imposed on Partners, there will still be increases in costs that occur as a result of changes in utilization (i.e. by more patients post-acquisition receiving services from higher-priced Partners providers). To deal with this increase, health plans may have to reduce the rates that they pay to non-Partners providers in order to meet cost benchmarks established by the HPC. "As a result, physicians associated with lower cost physician networks will be faced with an immediate choice – accept lower rates, refuse to contract with payers working to meet the cost benchmark, or seek opportunities to join networks with higher rates, including the Partners network." Id.

3. Massachusetts Center for Health Information and Analysis (CHIA): CHIA is an entity charged under G.L. c. 12C with collecting, analyzing, and disseminating health care data so as to monitor health care trends. CHIA's executive director, Aron Boros submitted a public comment which attacks the metrics that the Proposed Consent Judgment uses with regard to the price caps on two grounds.

First, the metrics chosen by the parties are different from those developed by CHIA. Not only do the CHIA measures rest on a solid analytical foundation but, if used by everyone, they allow policy makers, regulators and state prosecutors to "speak a common language and have a shared understanding of payer and provider actions and how they affect the marketplace." CHIA Comment at p. 9. By using "novel" and untested metrics, the Proposed Consent Judgment makes that comparison impossible.

Second, the Proposed Consent Judgment relies on data provided by Partners that remains confidential. This lack of transparency is "inconsistent with state health care policy as embodied in Chapter 224 . . . . " CHIA Comment at p. 10.

In response to these criticisms, the Attorney General states that the CHIA standards do not measure what is required in order to enforce the Proposed Consent Judgment. They will, however, be used as a "robustness check" on data provided by Partners. That does not change the fact that the Proposed Consent Judgment does not expressly or impliedly reference the CHIA standards. As to the confidentiality of the information, the Attorney General states that this is necessary because the information is propriety in nature. But if transparency is a worthy goal, then keeping this information confidential, no matter what the reason, does not further it.

4. Letter from Nancy Kane and Nancy Turnbull: Nancy Kane and Nancy Turnbull,

lecturers at the Harvard School of Public Health, submitted a letter dated July 18, 2014 (the Turnbull Letter). Of particular significance to this Court are their views regarding the enforceability of the Proposed Consent Judgment. As stated in the letter, the decree requires the Attorney General, through its monitor, to apply "highly complex and untested price control methodologies that would be difficult to consistently implement, both technically and politically." Turnbull Letter at 3. Kane and Turnbull contend that this will prove particularly challenging over time, when the political commitment of elected officials to pressure the state's largest and most powerful health system is likely to wax and wane.

5. Letter from Academic Economists: In a July 21, 2014 letter to the Court, more than twenty professors from some of the leading universities across the country outlined their reasons for their opposition to the Proposed Consent Judgment (Economists' Letter). Of particular interest to the Court is that part of the letter that addresses perceived deficiencies in the price cap and component contracting remedies. Neither remedy is a structural one (that is, one which blocks or dissolves a merger or requires divestiture), and the letter points out that a structural remedy is generally favored in antitrust actions. With regard to component contracting in particular, the letter describes how that remedy fared in Evanston, Illinois where, because of the difficulties posed by unwinding the merger, the Federal Trade Commission approved component contracting in an effort to keep costs down. Ultimately, the remedy did little or nothing to mitigate post-merger price increases. Indeed, since that case, the FTC has rejected that sort of conduct remedy. Deborah L. Feinstein, Antitrust Enforcement in Health Care: Proscription, Not Prescription (June 19, 2014), at 15 n.43, at http://www.ftc.gov/system/files/documents/public_statements/409481/140619_aco_speech.pdf

(last viewed Jan. 26, 2015).

6. Letters from Health Insurance Plans Funded by Various Unions: These letters were submitted by Unite Here (on behalf of Local 26 and the 9,000 members and their families who receive coverage), Boston Building Services Employees Trust Fund (the Health and Welfare Fund of SEIU 32BJ New England District 615, providing insurance for 18,000 individuals), Teamsters Care (on behalf of the Teamsters and 16,000 covered individuals); and Local 103 International Brotherhood of Electrical Workers (with a health plan covering 15,000 people). All provide health insurance plans that are self-funded by the unions and offered to union members and their families. Each letter points to the high prices Partners already charges and expresses a fear that the proposed acquisitions will increase prices even more, thus taking a greater chunk out of the paychecks of working families. As more than one letter stated, Partners already exercises "near monopoly power" that allows it to charge prices far in excess of its competitors for the same services. Although the price caps would appear to be a "step in the right direction," the caps begin with current prices that are already extreme and then "institutionalize" these high prices as an acceptable base level.

DISCUSSION

Generally speaking, cases alleging anticompetitive conduct are brought in federal court under federal antitrust laws. Although this same conduct may also give rise to a Chapter 93A claim, state court actions attacking anticompetitive behavior are rare. Consequently, Massachusetts case law as to what standard this Court should apply in deciding whether to approve a settlement like the one at issue here offers relatively little guidance.

Certainly, "[s]ettlement is a favored resolution of litigation." Trustees v. Boston Five

Cents Savings Bank FSB, 422 Mass. 431, 435 n.7 (1996); Bowers v. Board of Appeals of Marshfield, 16 Mass. App. Ct. 29, 33 (1983) (consent judgment is "useful device to resolve disputes"). See also Scully v. Tillery, 456 Mass. 758, 771 (2010). Where one party to that settlement is the agency charged with enforcing the law, this Court must be careful not to intrude upon that agency's authority. See DiCicco v. Department of Envtl. Protection, 64 Mass. App. Ct. 423, 427-428 (2005). As to the Attorney General in particular, she is the chief law enforcement officer of the Commonwealth, with the duty to protect the public. See G.L. c. 12, §§ 3, 10. See also Commonwealth v. Mass. CRINC, 392 Mass. 79, 88 (1984). This responsibility also means that she has broad authority to decide which claims to prosecute. Apart from these general principles regarding settlements and judicial deference to prosecutorial discretion, Massachusetts cases that pertain to judicial review of consent judgments proposed by the Attorney General are nonexistent.

This Court therefore looks to federal cases. That makes sense, since the parties agreed from the outset to generally follow the public comment procedure set forth in the Tunney Act. That statute states that the court may not approve a settlement in an antitrust action unless it first determines that the entry of the consent decree would be in the "public interest." 15 U.S.C. § 16(e)(1). The factors to be considered in making such a determination are:

> **(A)** the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and

> **(B)** the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e). The parties' submissions include an exhaustive discussion of the reported federal court decisions that apply these factors, among others. As the cases describe it, the Court is faced with two primary questions. First, does the proposed remedy contained in the settlement reasonably and adequately address the harm alleged in the Complaint? Second, is the settlement enforceable? See United States v. SBC Commc'ns, Inc., 489 F. Supp. 2d 1, 17 (D.D.C. 2007).

With regard to the first question, the Court may not reject the government's proposed remedies merely because it believes other remedies are preferable. United States v. Microsoft Corp., 56 F.3d 1448, 1460 (D.C. Cir. 1995). The remedies need not perfectly match the violations alleged in the government's complaint. United States v. SBC Commc'ns, Inc., 489 F. Supp. 2d at 17. Nor may they be determined to be inadequate because they do not address harms that are beyond the scope of the complaint itself. United States v. Apple, Inc., 889 F. Supp. 2d 623, 631 (S.D.N.Y. 2012). This is because the Court's authority to review the decree depends entirely on the government's exercise of its prosecutorial discretion to bring the case in the first place; if the complaint does not raise the issue, then it would be a judicial intrusion on the executive branch of the government if the Court were to insist that the settlement address other harms nonetheless. United States v. Microsoft Corp., 56 F.3d at 1459-1460. That same prosecutorial discretion permits the government some leeway in deciding the terms of a proposed settlement, since remedies "which appear less than vigorous may well reflect an underlying weakness in the government's case . . . ." Id. at 1461. On the other hand, the Court is not to

concern itself with the underlying merits: "whether the government ultimately could prove liability at trial is irrelevant to the public interest determination." United States v. Airline Tariff Publishing Co., 836 F. Supp. 9, 12 n.4 (D.D.C. 1993).

Although a prosecutorial decision to settle a case is entitled to substantial deference, a Court should not simply "rubber-stamp" the government's proposal: rather, it must make an independent determination of whether it is in the public interest. See, e.g, United States v. Microsoft Corp., 56 F.3d 1448, 1458 (D.C. Cir. 1995); United States v. U.S. Airways Group, Inc., 2014 WL 1653269 at *4 (D.D.C. Apr. 25, 2014) (Kollar-Kotelly, J.); United States v. Verizon Commc'ns, Inc., 959 F. Supp. 2d 55, 58-59 (D.D.C. 2013); United States v. Apple, Inc., 889 F. Supp. 2d 623, 631 (S.D.N.Y. 2012); United States v. AT&T Inc., 541 F. Supp. 2d 2, 6 (D.D.C. 2008); United States v. SBC Commc'ns, Inc., 489 F. Supp. 2d at 15. "[T]he relevant inquiry is whether there is a factual foundation for the government's decisions such that its conclusions regarding the proposed settlements are reasonable." United States v. SBC Commc'ns, Inc., 489 F. Supp. 2d at 15-16. See also United States v. Abitibi-Consolidated, Inc., 584 F. Supp. 2d 162, 165 (D.D.C. 2008) (settlement should be rejected if there is no such factual basis). Extrapolating from the factors set forth in the Tunney Act, federal courts called upon to approve antitrust settlements ask themselves whether the decree "effectively opens the relevant markets to competition and prevents the recurrence of anticompetitive activity, all without imposing undue and unnecessary burdens upon other aspects of the public interest . . . ." United States v. AT&T, 552 F. Supp. 131, 151-153 (D.D.C. 1982). If it does, it should be approved. Although the settlement need not represent the best possible solution, it must be "within the reaches of the public interest," as that has been defined by the statute. United States v. Gillette

Co., 406 F. Supp. 713, 716 (D. Mass. 1975). See United States v. Microsoft Corp., 56 F.3d at 1461.

The second question the Court must answer relates to the enforceability of the proposed settlement. The Court should pay special attention to the clarity of the consent judgment, the compliance mechanisms in the consent judgment, and the impact of that judgment on third parties. See United States v. Microsoft Corp., 56 F.3d at 1461-1462. See also United States v. SBC Commc'ns, Inc., 489 F. Supp. 2d at 17. Although the government is entitled to rather broad discretion in settling with the defendant within the reaches of the public interest, it is the Court that must preside over the implementation of the consent judgment. United States v. Microsoft Corp., 56 F.3d at 1461-1462. Thus, this Court is "certainly entitled to insist on that degree of precision concerning the resolution of known issues as to make [the Court's] task, in resolving subsequent disputes, reasonably manageable." Id. If a consent judgment is ambiguous or if this Court "can foresee difficulties in implementation," this Court must insist that these matters be attended to. Id. at 1462. With regard to settlements that include conduct remedies that regulate a party's behavior going forward, this Court should proceed with particular caution. If oversight of the settlement effectively puts the issuing court in the position of being an ad hoc regulatory agency with responsibility for supervising the activities of the parties, the settlement should be rejected. See Original Great Am. Chocolate Chip Cookie Co., Inc. v. River Valley Cookies, Ltd., 970 F.2d 273, 277 (7th Cir. 1992).

With these principles in mind, this Court turns to the two questions before it.

1. *Does the Proposed Consent Judgment reasonably and adequately address the harms alleged in the Complaint?*

The harm that the Complaint alleges in this case is a loss of competition. In the case of the acquisitions, that loss of competition will occur in the market of general acute care inpatient hospital services. In the case of the joint contracting practice, that reduces competition in the market of physician services. That loss of competition will enable Partners to raise prices, thus increasing health care costs for consumers. This Court concludes that the Proposed Consent Judgment does not reasonably and adequately address those harms.

First and foremost, the Proposed Consent Judgment employs conduct remedies rather than structural ones. The Department of Justice and the Federal Trade Commission strongly favor structural relief -- that is, relief that requires divestiture. See U.S. Department of Justice, Antitrust Division, Antitrust Division Policy Guide to Merger Remedies (June 2011), at http://www.justice.gov/atr/public/guidelines/272350.pdf (last viewed Jan. 26, 2015). See also Deborah L. Feinstein, Conduct Merger Remedies: Tried But Not Tested, 26 Antitrust 5 (Fall 2011) ("Divestitures continue to be the remedy of choice--and with extremely rare exceptions, the only remedy for horizontal mergers at both the FTC and DOJ"). A conduct remedy, which typically involves regulation of specific conduct over a limited period of time, is more difficult to craft and easier to circumvent. It also does not directly address the problem, which is a loss of competition: indeed, it permits consolidation and then attempts to limit the consequences that flow from that by imposing certain restrictions on the defendant's behavior. As explained by Professor Kwoka in the submission by the AAI, conduct remedies "seek to thwart the natural incentives of the merged entity to behave as a single firm" and thus require constant and costly monitoring. Kwoka E. Kwoka Aff. p. 3.

The Attorney General offered no real explanation to the Court as to why she chose a conduct remedy over a structural one, other than to argue that this was the choice made by the Attorney General and that the Court should defer to that decision. Certainly, there appears to be no impediment to a remedy that required Partners to divest itself of certain assets or that would partially block the proposed acquisitions – a cleaner remedy that would not raise enforcement issues or require ongoing judicial involvement. Although a proposed settlement should not be rejected simply because the Attorney General opted for a conduct remedy, it does place some onus on the Attorney General to show that the remedies she did elect to include in the settlement reasonably and adequately address the harms flowing from the loss of competition. See United States v. Microsoft Corp., 56 F.3d at 1460. See also United States v. SBC Commc'ns, Inc., 489 F. Supp. 2d at 17. This Court concludes that the government has failed to provide a factual basis for this Court to reach that conclusion, even after according substantial deference to the Attorney General's choice of remedies.

As to the price caps, one price cap limits Partners only to that price that it could charge based on the lower of medical or general inflation. The only way to regard this as any limitation at all is to acknowledge the current reality, which is that Partners, even before these acquisitions, is able to charge supra competitive prices based on its market muscle. The second price cap, based on the HPC benchmark for Total Medical Expenses, applies to only eleven percent of Partners' commercial business. CHIA pointed out in its comment that Partners already has an incentive to keep costs down in this part of its business and that the TME price cap does not apply to areas of its commercial business most likely to grow.

More importantly, these price caps are limited in time. Once they expire, there is no

reason to believe that the market will be any more competitive; indeed, because Partners would be able to acquire major hospitals both to the north and south of Boston, it would be in a much stronger position. As the HPC explained in its own criticism of these price caps, they do nothing to "permanently alter those features of the Partners system, such as its size and market share, which contribute to its current market power to command higher prices and other favorable contract terms." Hallmark Final Report at 44. Accordingly, once those caps expire, "Partners would likely enjoy even greater leverage to command supra-competitive rates . . . ." Id. This is in fact what has occurred in those cases where price caps were part of the remedy. See Economists' Letter at pp. 6-7. Partners does not challenge those assertions except to say that at least for the period when the price caps are in effect, Partners will operate under some constraints and that this is good for consumers generally.

This position -- that the price caps will effectively rein in health costs -- does not rest on any firm factual basis, however. The caps address unit price only; as the HPC explained, increased health costs are due to a number of factors, including provider mix and utilization. Having considered the price caps, the HPC was still of the view that health costs would increase by tens of millions of dollars a year as consequence of these acquisitions. That is because the acquisitions will result in more patients being treated in Partners' facilities with higher costs, and by doctors who will become part of the Partners network billing at higher Partners rates.

In response, the Attorney General says that the Complaint should be read to address only the increase in prices and that this Court must close its eyes to the other consequences of the proposed mergers, like changes in utilization. The Court does not read the Complaint in the crabbed fashion that the Attorney General does. Nor does is it seem appropriate for this Court to

ignore how the acquisitions will contribute to these other factors. Indeed, federal courts have expressly stated that the Court should consider how the settlement impinges on other public policies and the impact that the settlement may have on even unrelated spheres of economic activity. United States v. BNS Inc., 858 F.2d 456, 463 (9th Cir. 1988). See also United States v. Airline Tariff Publishing Co., 836 F. Supp. at 11-12.

As to component contracting, here the Attorney General cannot provide any factual basis for concluding that it will be effective in keeping costs down. That is because the remedy has no track record of any success. In the single case in which it was part of the antitrust remedy, no payer availed itself of that option. Also, like the price caps, it is time limited. Finally, even if the payers were able to negotiate mixed plans that included both Partners and non-Partners components, Partners will still have the incentive and the ability to encourage its physicians and hospitals to direct patients to its own hospitals, even if they are out-of-network. A patient required to go out-of-network may become less likely to purchase those mixed plans.

Partners contends that these remedies must be viewed in the context of other constraints that the Proposed Consent Judgment imposes on it. Specifically, it restricts Partners in physician growth, and it prohibits the current practice of joint contracting. Yet, as the Competitor Hospital Coalition points out, the provision restricting physician growth will actually permit Partners to increase the number of its community physicians over the next five years by one-third. Moreover, the prohibition on joint contracting may be easy to circumvent if unaffiliated doctors are able to become affiliated with Partners through PHOs.

2. *Is the Proposed Consent Judgment enforceable?*

The Proposed Consent Judgment is a lengthy document with many highly technical

provisions. This is largely because it seeks to place regulatory constraints on Partners in connection with activities in a market that is quite complex. Certainly, the Proposed Consent Judgment had to have been a difficult document to draft: if its terms were too strictly defined, they would not cover enough and could allow Partners to circumvent or evade restraints too narrowly drawn. But then terms left vague and ambiguous may not operate as any restraint at all. To complicate matters, the document purports to regulate behavior within a market that is itself undergoing tremendous change. And it does so over a ten year period. Certainly, some built in flexibility is necessary, but in attempting to build in flexibility, the Proposed Consent Judgment also contains provisions that may ultimately be interpreted so as to relax restraints on Partners' behavior or relieve Partners of the restriction entirely.

For example, one provision excuses Partners from all of its obligations in the event that it can convince the Attorney General (or the Court in the event of a disagreement) that there is a statutory or regulatory change that impacts its costs in a certain way. Another provision allows Partners to escape the strictures of the TMC Growth Cap due to "unanticipated" market conditions. Since this consent decree would regulate behavior in a market where things are almost certain to change, these two escape hatches raise a serious question as to whether the Proposed Consent Judgment will even survive in its current form throughout the ten year period that it is supposed to be in effect. Still other provisions rely on criteria or standards which are capable of different interpretations, thus creating some uncertainty as to whether the restrictions on Partners' conduct are meaningful. The provisions and the problems in enforcement that they cause are more specifically described on pages 14-15 of the Memorandum of Decision.

Many of the provisions of the Proposed Consent Judgment are not self-executing, and to

be enforced, require constant and vigilant monitoring of Partners' activities. Consequently, the Proposed Consent Judgment places the Attorney General (and the monitor) in the difficult position of playing the role or regulator in a highly complex field where the party with superior knowledge (Partners) is the very entity being regulated. Moreover (as the Economists' Letter pointed out) Attorneys General are elected, and their political will to zealously enforce such terms may very well wax and wane over time.

Most significant, the Proposed Consent Judgment contemplates ongoing involvement of the Court. As set forth at pages 15 through 17 of this Memorandum, it expressly provides for the parties to petition the Court in ten different areas. Several of these areas directly relate to some constraint that is placed on Partners and therefore could be contentious. Resolution of these disputes will require the Court to familiarize itself with the inner workings of the health care market so that it can understand the consequences of any decision it renders. The Court lacks both the institutional competence and the judicial resources to fulfill that role.

Perhaps the most complex part of this Proposed Consent Judgment concerns the application of the price caps. The formula by which the TME Growth Caps are applied is very complicated; indeed, this Court has no current understanding as to how they would work. Although a monitor would presumably bring greater expertise to the topic, he or she would have to rely on data provided by Partners, the very entity that would have every reason to "crowd" the rules so as to promote its own self-interest. The metrics are not those developed by CHIA and will be confidential, which shrouds the entire process in some secrecy. And some judicial involvement may occur even in this highly technical area, since one provision specifically states that it will be up to the Court to determine if certain information sought by the monitor is (or is

not) relevant.

Although the Attorney General is entitled to some deference in how she decides to settle a dispute, she also is asking the Court to enforce the agreement. She must therefore convince the Court that the terms of the settlement are sufficiently clear so that the task of demanding compliance will be a reasonably manageable one. This Court remains unconvinced that the Proposed Consent Judgment meets that standard. This alone justifies its rejection.

CONCLUSION AND ORDER

For all the foregoing reasons, the Joint Motion to Approve the Amended Final Judgment by Consent is hereby **DENIED**.

Janet L. Sanders
Justice of the superior Court

Dated: January 29, 2015