whether the above criteria have been met.

Under Section VIII(D), Heartland may employ or acquire, with plaintiff's approval, any physician who would cease practicing in Buchanan County but for Heartland's employment or acquisition.

Section IX of the proposed Final Judgment describes the circumstances under which defendants may seek a modification of the proposed Final Judgment. It provides that any defendant may move for a modification of the proposed Final Judgment, and plaintiff will reasonably consider an appropriate modification, in the event that any of the provisions of the proposed Final Judgment proves impracticable or in the event of a significant change in law or fact.

Section X of the proposed Final Judgment requires the defendants to implement a judgment compliance program. Section X(A) requires that within 60 days of entry of the Final Judgment, defendants must provide a copy of the proposed Final Judgment and the Competitive Impact Statement to certain officers and all directors. Sections X (B) and (C) require defendants to provide a copy of the proposed Final Judgment and Competitive Impact Statement to persons who assume those positions in the future and to brief such persons annually on the meaning and requirements of the proposed Final Judgment and the antitrust laws, including penalties for violating them. Section X(D) requires defendants to maintain records of such persons written certifications indicating that they (1) have read, understand, and agree to abide by the terms of the proposed Final Judgment, (2) understand that their noncompliance with the proposed Final Judgment may result in conviction for criminal contempt of court, and imprisonment, and/or fine, and (3) have reported any violation of the proposed Final Judgment of which they are aware to counsel for defendants. Section X(E) requires defendants to maintain for inspection by plaintiff a record of recipients to whom the proposed Final Judgment and Competitive Impact Statement have been distributed and from whom annual written certifications regarding the proposed Final Judgment have been received.

The proposed Final Judgment also contains provisions in Section XI requiring defendants to certify their compliance with specified obligations of Section IV through X of the proposed Final Judgment. Section XII of the proposed Final Judgment sets forth a

series of measures by which the plaintiff may have access to information needed to determine or secure defendants' compliance with the proposed Final Judgment. Section XIII provides that each defendant must notify plaintiff of any proposed change in corporate structure at least 30 days before that change to the extent the change may affect compliance obligations arising out of the proposed Final Judgment.

Finally, Section XV states that the decree expires five years from the date of entry, except that plaintiff during that five year period may, in its sole discretion, after consultation with defendants, extend for an additional five years all provisions of the decree except the provisions of Section VI(D), that portion of the Final Judgment dealing with Heartland's acquisition of physician practices.

C. Effect of the Proposed Final Judgment on Competition

1. The Prohibitions on Setting and Negotiating Fees and Other Contract Terms

The prohibitions on setting and negotiating fees and other contract terms set forth in Sections IV (C) and (D), V (C) and (D), and VI(B) provide defendants with essentially two options for complying with the proposed Final Judgment.⁶ First, Health Choice may change its manner of operation and no longer set or negotiate fees on behalf of competing physicians, for example by using a "messenger model," a term defined in the proposed Final Judgment. Second, Health Choice may restructure its ownership and provider panels to become a QMCP.⁷

Currently, SJPI owns 50% of Health Choice and includes among its shareholders competing physicians who do not share substantial financial risk. In addition, Heartland, which owns the other 50% of Health Choice, employs physicians who compete with the SJPI physicians and other physicians on the Health Choice provider panel. The SJPI and Heartland physicians on the provider panel also do not share financial risk. The proposed Final Judgment prevents Health Choice, under its present structure, from continuing to set or negotiate fees or other terms of

reimbursement collectively on behalf of these competing physicians. (Section V(C).) ⁸ Such conduct would constitute naked price fixing. *Arizone* v. *Maricopa County Medical Soc'y*, 457 U.S. 332, 356–57 (1982).

The proposed Final Judgment does not, however, prohibit Health Choice as presently structured from engaging in activities that are not anticompetitive.9 In particular, while the proposed Judgment enjoins Health Choice from engaging in price fixing or similar anticompetitive conduct, it permits Health Choice to use an agent or third party to facilitate the transfer of information between individual physicians and purchasers of physician services. Appropriately designed and administered, such messenger models rarely present substantial competitive concerns and indeed have the potential to reduce the transition costs of negotiations between health plans and numerous physicians.

The proposed Final Judgment makes clear that the critical feature of a properly devised and operated messenger model is that individual providers make their own separate decisions about whether to accept or reject a purchaser's proposal, independent of other physicians' decisions and without any influence by the messenger. (Section II(F).) The messenger may not, under the proposed Judgment, coordinate individual providers' responses to a particular proposal, disseminate to physicians the messenger's or other physicians' views or intentions concerning the proposal, act as an agent for collective negotiation and agreement, or otherwise serve to facilitate collusive behavior. 10 The

⁶ For convenience, this Statement discusses Health Choice's options. However, the same options are available to SIPI and Heartland, should they choose to utilize them.

⁷ Of course, Health Choice could simply cease operations and dissolve. Defendants have indicated, however, that they will not pursue that approach. In any event, the Judgment's prohibitions on setting and negotiating fees and other contract terms (as well as a number of other prohibitions) apply to any organization in which the defendants own an interest, not just to Health Choice.

⁸ Similarly, Section IV(C) prevents SJPI from setting or negotiating fees and other contract terms for just SJPI physicians, and Sections (V(D) and VI(B) prevent physicians and Heartland from engaging in such conduct through their ownership of Health Choice.

⁹ For example, nothing in the proposed Final Judgment prevents Health Choice from continuing to offer billing, utilization management, and third party administrator services, provided it does not violate the Judgment's prohibitions, in Sections V (A) and (B), on exclusivity and the collection and dissemination of competitively sensitive information.

¹⁰ For example, it would be a violation of the proposed Final Judgment if the messenger selected a fee for a particular procedure from a range of fees previously authorized by the individual physician, or if the messenger were to convey collective price offers from physicians to purchasers or negotiate collective agreements with purchasers on behalf of physicians. This would be so even if individual physicians were given the opportunity to "opt out" of any agreement. In each instance, it would really be the messenger, not the individual physician, who would be making the critical decision, and the purchaser would be faced with the prospect of a collective response.