disclose such information if disclosure is reasonably necessary for the operation of a QMCP in which that defendant has an ownership interest, or if the information is already generally available to the medical community or

Section IV(B)(3) enjoins DHS, DAIPA, and HealthCare Partners from owning an interest in any organization that directly or through an agent or other third party sets fees or other terms of reimbursement, or negotiates for competing physicians, unless that organization is a QMCP and complies with Sections IV (B)(1) and (B)(2). However, defendants may own an interest in an organization that uses a messenger model.

Section IV(C)(1) enjoins DHS from exercising its control over staff privileges with the purpose of reducing competition with DHS in any line of business, including managed care, outpatient services, and physician services. Nothing in the Final Judgment limits DHS' authority to make staff decisions for assuring quality of care.

Section IV(C)(2) prohibits DHS from conditioning the provision of inpatient hospital services to individuals covered by any payer on the purchase or use of DHS' utilization review program, qualified managed care plan, ancillary or outpatient services, or any physician's services, unless the physician services are intrinsically related to the provision of inpatient care. (These prohibitions, however, do not apply to any organization or any contract in which DHS has a substantial financial risk.)

Section IV(C)(3) prohibits DHS from conditioning rates to any payer for inpatient hospital services on the exclusive use of the Hospital's outpatient services. Nothing in this Section limits the terms and conditions on which DHS may contract with any payer pursuant to which DHS bears substantial financial risk for the delivery

of outpatient services.

Section V of the proposed Final Judgment contains additional provisions with respect to DAIPA and HealthCare Partners. Section V(A) requires DAIPA and HealthCare Partners to notify participating physicians annually that they are free to contract separately with any payer on any terms, except with regard to those physicians who have agreed to exclusivity in connection with an ownership interest or membership in a QMCP. Similarly, DAIPA and HealthCare Partners must notify in writing each payer with whom HealthCare Partners has or is negotiating a contract, or which subsequently inquires about contracting, that each of

its participating physicians is free to contract separately with such payer on any terms and without consultation with DAIPA or HealthCare Partners.

Under Section V(B), DHS must file with plaintiffs annually on the anniversary of the filing of the Complaint a written report disclosing the rates for inpatient hospital services to any payer, including any plan affiliated with DHS. In lieu of a report, DHS may file documents disclosing the rates for each payer other than Medicare and Medicaid.

Section VI of the proposed Final Judgment requires defendants to implement a judgment compliance program. Section VI(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 all officers and directors. Sections VI (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 VI(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 VI(E) requires defendants to maintain for inspection by plaintiffs 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 VII requiring defendants to certify their compliance with specified obligations of Section VI(A) of the proposed Final Judgment. Section VIII of the proposed Final Judgment sets forth a series of measures by which plaintiffs may have access to information needed to determine or secure defendants' compliance with the proposed Final Judgment. Section IX provides that each defendant must notify plaintiffs 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 XI states that the Judgment expires ten years from the date of entry.

- 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 or expressing views on prices and other contract terms or negotiating for competing physicians, set forth in Section IV(A), provide defendants with essentially two options for complying with the proposed Final Judgment. First, HealthCare Partners and DAIPA may change their 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, HealthCare Partners and DAIPA may restructure their ownership and provider panels to become a QMCP.3

DAIPA jointly owns HealthCare Partners with DHS and appoints six of HealthCare Partners directors. DAIPA includes competing physicians among its owners on whose behalf HealthCare Partners negotiates fees and other competitively sensitive terms and conditions. These physicians do not share financial risk. The proposed Final Judgment prevents HealthCare Partners and DAIPA, under their present structures, from continuing to set or negotiate fees or other terms of reimbursement collectively on behalf of the competing physicians. (Section IV(A)) Such conduct would constitute naked price fixing. Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 356-57 (1982).

The proposed Final Judgment does not, however, prohibit HealthCare Partners and DAIPA, as presently structured, from engaging in activities that are not anticompetitive. In particular, while the proposed Judgment enjoins HealthCare Partners and DAIPA from engaging in price fixing or similar anticompetitive conduct, it permits HealthCare Partners and DAIPA 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 transaction costs of negotiations

<sup>&</sup>lt;sup>3</sup> Of course, HealthCare Partners and DAIPA could simply cease operations and dissolve.