Received 3/18/2019 3:08:36 PM Commonwealth Court of Pennsylvania

Filed 3/18/2019 3:08:00 PM Commonwealth Court of Pennsylvania
334 MD 2014

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, By JOSHUA D. SHAPIRO, Attorney General, et al.; Petitioners, v. UPMC, A Nonprofit Corp., et al.; Respondents.	: : : : : : : : : : :	No. 334 M.D. 2014

REPLY IN SUPPORT OF RESPONDENT UPMC'S MOTION TO DISMISS THE PETITION TO MODIFY CONSENT DECREES, OR PRELIMINARY OBJECTIONS IN THE NATURE OF A DEMURRER

COZEN O'CONNOR
Stephen A. Cozen (Pa. 03492)
James R. Potts (Pa. 73704)
Stephen A. Miller (Pa. 308590)
Jared D. Bayer (Pa. 201211)
Andrew D. Linz (Pa. 324808)
1650 Market Street, Suite 2800
Philadelphia, PA 19103
Tel.: (215) 665-2000

JONES DAY
Leon F. DeJulius, Jr. (Pa. 90383)
Rebekah B. Kcehowski (Pa. 90219)
Anderson T. Bailey (Pa. 206485)
500 Grant Street, Suite 4500
Pittsburgh, PA 15219
Tel.: (412) 391-3939

Attorneys for Respondent UPMC

Dated: March 18, 2019

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes & Regulations

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, By JOSHUA D. SHAPIRO, Attorney General, et al.;	:	
Petitioners,	:	No. 334 M.D. 2014
v.	:	
UPMC, A Nonprofit Corp., et al.;	:	
Respondents.	:	

REPLY IN SUPPORT OF RESPONDENT UPMC'S MOTION TO DISMISS THE PETITION TO MODIFY CONSENT DECREES, OR PRELIMINARY OBJECTIONS IN THE NATURE OF A DEMURRER

In his response to UPMC's motion to dismiss, General Shapiro gives up the game. He reveals that the singular issue underpinning his entire Petition for Modification is UPMC's refusal to give Highmark a full, systemwide in-network contract:

> Accordingly, UPMC's refusal to contract with Highmark is directly contrary to UPMC's stated charitable purposes and supports a finding that UPMC's Board of Directors and Executive Management have breached their fiduciary duties of loyalty/obedience to UPMC's charitable mission and those of its subsidiary hospitals.

Commw.'s Mem. in Opp'n at 24 ("OAG Opp."). This acknowledgement confirms that everything that the Attorney General has done since signing the 2014 Consent Decrees—in which the Attorney General *confirmed* the legality of UPMC's refusal to give Highmark a systemwide contract, *released* UPMC from claims based on that refusal, and expressly *affirmed* that Consent Decree's purpose as preparing patients for the attendant transition—was designed to maneuver UPMC right back into a systemwide contract that both the Attorney General and the Commonwealth have acknowledged they have no power to compel.

General Shapiro's confession lays bare that Count I of the Petition to Modify Consent Decrees is unsustainable as a matter of law and should be dismissed with prejudice. Count I does not seek modification of the Consent Decree. It seeks to impose a new agreement on UPMC when the current agreement expires. And, this new agreement would vitiate the animating purpose of the parties' existing Consent Decree—providing an orderly wind-down of the UPMC-Highmark relationship—by compelling a systemwide contract *forever*. Saddled with the unambiguous text of the Consent Decree, the Supreme Court's July 2018 opinion, and admissions from his lead counsel, all of which demonstrate that his proposed modification is improper, General Shapiro contends that UPMC implicitly consented to be bound forever to a blank-check of new terms simply by agreeing to the inclusion of a modification provision in the Consent Decree. That, of course, is not credible and is contrary to Pennsylvania law.

And perhaps unsurprisingly in light of the eleventh-hour repudiation of the past five years under the Consent Decree, the Petition makes no attempt to allege how the proposed "modification" would promote the public interest. The Court should not proceed on an expedited basis to determine whether modification is in the "public interest" without General Shapiro even alleging the basis for that claim.

I. There Is No Basis For General Shapiro's Unprecedented And Extreme Interpretation Of The Consent Decree.

Count I asks this Court to install—over UPMC's objection—a radically different, permanent "modified consent decree" on the grounds that the end of in-network access to UPMC providers for Highmark subscribers is allegedly against the public interest. OAG Opp. at 24. The only legal ground for Count I is that Section IV.C.10 of the parties' existing 2014 Consent Decree permits a request for modification and, according to General Shapiro, "places no limitations on the types of modification that may be sought." OAG Opp. at 9. As such, General

Shapiro reads "modification" to include giving this Court *carte blanche* to write a new agreement that supplants the purpose and the material terms of the existing decree.

"Modification" is a misnomer, however. While Section IV.C.10 is clearly intended to permit modification during the term of the Consent Decree, General Shapiro is not seeking to modify, alter, amend, or change anything about the existing agreement. He is trying to take the Consent Decree out of existence and implement—by coercion—an entirely new agreement that would take effect when the current one expires. Section IV.C.10 therefore should not apply at all. Nevertheless, even taking Count I at face value, Pennsylvania law and the plain language of the parties' Consent Decree preclude interpreting Section IV.C.10 as permitting the Attorney General's requested modification.

A. The Modification Provision is Constrained By The Parties' Intent And Plain Language Of The 2014 Consent Decree.

General Shapiro does not dispute the key principles that must guide this Court's interpretation of the modification provision. *See* OAG Opp. at 9 (acknowledging that a consent decree is a contract). As with any contract, the fundamental rule in interpreting the 2014 Consent Decree is "to ascertain and give effect to the intention of the parties." *Lower Frederick Twp. v. Clemmer*, 543 A.2d 502, 510 (Pa. 1988). The Court must also interpret the provisions of the Consent Decree as a whole and harmonize the modification provision with the other expressions of the parties' intent. *Hazell v. Servomation Corp.*, 440 A.2d 559, 560 (Pa. 1982) ("In construing the parties' agreement, we are required to read the contract as a whole and interpret each part with reference to the whole, so as to give effect to its true purpose.").

Nor does General Shapiro dispute that courts apply these same principles when addressing whether to *modify* a consent decree. The Attorney General does not even acknowledge—much less try to rebut—the decision in *Salazar v. District of Columbia*, which

held that modifications to a consent decree must "give effect to and enforce the operative terms of the original consent decree," and that courts "*may not, under the guise of modification, impose entirely new injunctive relief*." 896 F.3d 489, 498 (D.C. Cir. 2018) (emphasis added); Mem. in Support of UPMC's Mot. to Dismiss at 21 ("UPMC Br.").[1]

General Shapiro cites no authority holding otherwise. And, *Salazar* is hardly unique. Black-letter law from both Pennsylvania state and federal courts holds that the power to modify a consent decree does *not* include the power to "impose a duty on the defendant that was not contained in" the original agreement. *Fox v. U.S. Dep't Housing & Urban Dev.*, 680 F.2d 315, 322-23 (3d Cir. 1982); *see also Universal Builders Supply, Inc. v. Shaler Highlands Corp.*, 175 A.2d 58, 61-62 (Pa. 1961) (holding that the court lacked authority to modify "clear and unequivocal" provisions of the consent decree); *Watson v. City of Sharon*, 406 A.2d 824, 826-27 (Pa. Commw. Ct. 1979) (holding that a trial court did not have authority to add terms to consent decree where one party never agreed to the terms, did not request them, and objected, and the additional terms went to the heart of the underlying dispute); *Holland v. N.J. Dep't of Corrections*, 246 F.3d 267, 281, 283-84 (3d Cir. 2001) (holding that courts must guard against a modification provision overtaking the original purpose or material terms of the original consent

[1] While General Shapiro ignores *Salazar* altogether, Highmark—which tries to muddy the waters with its own brief on behalf of the Attorney General's claims—attempts to distinguish that case on the grounds that the decree at issue supposedly did not contain a modification provision. Highmark Opp. at 36. That is not true; the decree in *Salazar* did provide for petitions to modify in light of changes in the law. *Salazar*, 896 F.3d at 494-95. Moreover, it is indisputable that the courts in *Salazar* and *Fox* had their own mechanisms for modification. *Id.* at 491 (noting that Fed. R. Civ. P. 60(b) allows a court to modify its orders). The point of those cases is that, while a court is empowered to modify a consent decree, there are still restrictions that prevent imposing on the parties' new duties to which they did not agree.

decree, and must "not impose terms when the parties did not agree to those terms"). "Modification" does not and cannot mean the wholesale rewriting of a consent decree.[2]

As a matter of law, General Shapiro's proposed modification therefore must be rejected. *The fundamental point of the Consent Decree was that the UPMC-Highmark contractual relationship would end.* As Judge Pellegrini already held, the parties' intent was to provide for limited access rights for certain Highmark subscribers "during a period of transition to enable them to decide whether to remain with Highmark or change insurance carriers." Jan. 29, 2018 Mem. Op. at 2, attached hereto as Exhibit S. The Consent Decree thus:

- Explicitly states in its very first provision (called "interpretive principles") that it "is not a contract extension and shall not be characterized as such," Consent Decree § I.A, and repeats later that certain access rights are not "a contract extension," *id.* § IV.A.10;
- Provides for only *limited* access to UPMC, not broad access to all UPMC services for all Highmark members, *see id.* § IV.A;
- For those obligations it does create, sets a specific termination date of June 30, 2019, *id.* § IV.C.9;
- Stipulates that this limited access and express termination date comply with the "insurance laws and health laws," as well as UPMC's obligations under the nonprofit and charitable laws, *id.* § IV.C.6; and
- Provides that this Court's jurisdiction over any request for modification ends when the Consent Decree terminates, *id.* § IV.C.11 ("*Unless this Consent Decree is terminated*, jurisdiction is retained by this Court…." (emphasis added)).

In fact, less than a year ago, the Pennsylvania Supreme Court expressly held the termination date was "an unambiguous and material term of the Consent Decree." *Commonwealth ex rel. Shapiro v. UPMC*, 188 A.3d 1122, 1132 (Pa. 2018).

---

[2] In its own effort to support General Shapiro's claims, Highmark cites cases that are inapposite. The unpublished decision in *Griffith v. Griffith*, 343 WDA 2018, 2019 WL 123429 (Pa. Super. Jan. 7, 2019), was simply about whether a subsequent court order invalidated the modification provision in the parties' original consent decree. In *Melat v. Melat*, 602 A.2d 380 (Pa. Super. 1992), the court simply adjusted the due date for a payment, while emphasizing that the underlying obligations remained unaltered.

The proposed modifications repudiate the entire purpose of the existing Consent Decree and eliminate each of these terms. General Shapiro never attempts to argue that his interpretation of an unlimited modification provision and proposed modifications can be read in harmony with the existing Consent Decree. Nor could he. Basic rules of contract interpretation prohibit reading "modify" to include: (1) deleting the Consent Decree's June 30, 2019 termination date, (2) granting the Court perpetual jurisdiction over UPMC's objection well beyond what the parties agreed to; and (3) forcing the very contract extension that the current Consent Decree expressly and repeatedly disclaims.[3]

Moreover, "public interest" cannot mean the exact opposite of what it meant when the parties negotiated and agreed to the Consent Decree in 2014. The Consent Decree states that it must be interpreted "consistent" with the PID's Approving Order, in which the Insurance Department approved Highmark's acquisition of its own provider system. *See* Consent Decree § I.A; *see also* UPMC Br. at 3-4; UPMC Exhibits D-E. That Order was itself issued "to protect the public interest," and it approved the transaction on the *assumption* there would be *no* extension of the systemwide UPMC-Highmark contractual relationship that the Attorney General seeks to coerce here. UPMC Exhibit D at 3; UPMC Exhibit E at ¶ 146(e). General Shapiro cannot now re-interpret the "public interest" differently than the Approving Order in order to force a never-ending UPMC-Highmark contract.

Merely stating General Shapiro's position demonstrates its absurdity. As the Attorney General and the other Commonwealth agencies have recognized, they have no authority to

[3] This also puts the lie to General Shapiro's claim that UPMC is "estopped" from defending this action because it agreed to the modification provision. OAG Opp. at 8. The point is not whether the provision is "inoperative" but whether Count I can state a claim under that provision. Nothing about the provision allows General Shapiro to back-door a completely new consent decree, as he seeks to do in Count I.

require UPMC and Highmark to contract. UPMC Exhibits G and L at 1. But because UPMC signed a Consent Decree—one that expressly acknowledged that it was not a contract extension, provided a termination date of all existing contracts, and stated that it must be interpreted consistently with the PID's prior public-interest assumption there would be no contract—General Shapiro contends he can now require UPMC and Highmark to contract in perpetuity for the public interest. Such a reading improperly overtakes the original purpose, violates the material terms of the parties' agreement, and must be rejected. *Hazell*, 40 A.2d at 560.

Underlying General Shapiro's modification request is the suggestion that UPMC is not acting in accordance with law. But that is a different question. If the Attorney General believes that UPMC has violated the law by not extending its contracts with Highmark, he can file a complaint and the parties can litigate the claims.[4] He cannot, however, try to short circuit the process and impose such a remedy through "modification" of the Consent Decree.

B. General Shapiro's Interpretation Of The Modification Provision Violates Established Law.

General Shapiro's interpretation of Section IV.C.10 also fails for the additional reason that a contract cannot be construed in a way that is contrary to the law. As the Supreme Court made clear in interpreting this Consent Decree, "we do not countenance the interpretation of a contract which would render it illegal or incapable of performance." *Commonwealth ex rel. Kane v. UPMC*, 129 A.3d 441, 467-68 (Pa. 2015). The Attorney General's opposition concedes that the Consent Decree contemplated an end to the parties' *commercial* contracts but suggests the Court must modify the Consent Decree to impose future systemwide contracts, including

[4] For all the reasons stated in UPMC's motion to dismiss, including the fact that he released the claims, General Shapiro has no such action.

commercial contracts, because it was not known then that UPMC would not continue to contract for Highmark's *Medicare* plans.[5] *See* OAG Opp. at 2, 4. But the Attorney General has no jurisdiction over Medicare. He thus interprets the modification provision to permit this Court to overwrite federal statutes and regulations governing the Medicare Advantage program ("MA")—something that Congress has specifically directed that state officials and judges cannot do.

Medicare Advantage is a federally funded program overseen exclusively by the federal government. Under that program, "a private insurance company … contracts with the federal government ["CMS"] and … manages the administration of Medicare benefits and pays claims." *Kane*, 129 A.3d at 452 (describing evidence). Congress' underlying intent was to harness private competition in order to "create a more efficient and less expensive Medicare system." *In re Avandia Mktg., Sales Practices & Prod. Liab. Litig.*, 685 F.3d 353, 363 (3d Cir. 2012). The program is subject to extensive federal regulation regarding, for instance, the adequacy of each MA plan's provider network. *See, e.g.*, 42 U.S.C. §§ 1395w-21 – 1395w-28; *see also* 42 C.F.R. §§ 422.1 – 422.2615.

These federal laws expressly preempt *any* state regulation of the Medicare Advantage program. *See* 42 U.S.C. § 1395w-26(b)(3) ("The standards established under this part shall supersede any State law or regulation (other than State licensing laws or State laws relating to plan solvency) with respect to MA plans which are offered by MA [insurers] under this part."). Thus, "all State standards, *including those established through case law*, are preempted to the extent that they specifically would regulate [Medicare Advantage] plans, with exceptions of

[5] The Consent Decree terminates in full on June 30, 2019, including as to Medicare Advantage contracts, as the Pennsylvania Supreme Court has already held. *Shapiro*, 188 A.3d at 1132. The same arguments in Part I.A, *supra*, fully apply to any request for relief related to Medicare Advantage. Medicare preemption is an additional reason why General Shapiro's "unlimited" construction of the modification provision is wrong as a matter of law.

State licensing and solvency laws." 70 Fed. Reg. 4665 (emphasis added). Judge Pellegrini previously applied this preemption statute in rejecting an earlier attempt by the Attorney General to interpret the 2014 Consent Decrees in such a way that would interfere with Medicare Advantage. *See* Oct. 30, 2014 Mem. Opinion at 18 ("Insofar as the Commonwealth claims that the written materials CMS expressly approved are 'misleading,' we find the Commonwealth's claim preempted.").[6] The Court accordingly cannot impose any new Medicare Advantage requirements on UPMC.

Even more troubling, General Shapiro's opposition expressly states an intent to *force* UPMC into a Medicare Advantage contract with Highmark. *See* Opp. at 24. Mandatory contracting, however, specifically violates both the letter and spirit of the federal law governing Medicare Advantage. In what is known as the "noninterference" statute, Congress expressly prohibited CMS from requiring that insurers contract with particular providers or include specific price structures in their provider contracts. 42 U.S.C. § 1395w-24(a)(6)(B)(iii). General Shapiro nevertheless interprets the modification provision to allow this Court—over UPMC's objection—to force Medicare Advantage contracts between UPMC and Highmark (*see* Exhibit G to Petition at ¶¶ 3.2, 3.3), force UPMC not to bill certain fees for services to Medicare enrollees (*id.* ¶ 2.26, 3.6), and force arbitrated rates for those services (*id.* ¶ 4.3.4). General Shapiro's opposition does not offer any basis for interfering with Medicare Advantage. The Court cannot override federal law, and it cannot—as both Judge Pellegrini and the Supreme Court already held

---

[6] *Available at Commonwealth v. UPMC*, 334 M.D. 2014, 2014 Pa. Commw. Unpub. LEXIS 652, at *22 (Pa. Commw. Ct. Oct. 30, 2014). *See also, e.g., Mass. Ass'n of HMOs v. Ruthardt*, 194 F.3d 176, 177 (1st Cir. 1999) (preempting regulatory actions by state officials seeking to expand the benefits available under Medicare Advantage plans); *Pacificare of Nev., Inc. v. Rogers*, 266 P.3d 596, 600 (Nev. 2011) (preempting actions based on state contract and tort law concerning operation of an insurer's network); *Meek-Horton v. Trover Sols., Inc.*, 915 F. Supp. 2d 486, 492 (S.D.N.Y. 2013) (same).

in this case—achieve the same result through an overbroad interpretation of the modification provision. Count I fails as a result. *See, e.g.*, *Dippel v. Brunozzi*, 74 A.2d 112, 114 (Pa. 1950) (the "general rule" is that an agreement "which violates a provision of a statute" is illegal and void).[7]

C. General Shapiro's Interpretation Violates Separation Of Powers.

General Shapiro tries to defend his proposed modification as a simple exercise of his "'ancient powers of guardianship'" over nonprofits and charitable trusts. OAG Opp. at 17 (quoting *Pruner Estate*, 136 A.2d 107, 109 (Pa. 1957)). Repeatedly, General Shapiro retreats for the cover of his *parens patriae* status. That misses the point. Count I is not about nonprofit laws, charitable trusts, or standing to intervene. It is about how to interpret a provision that allows the Court to "modify" the 2014 Consent Decree in the "public interest." That provision is either (1), as UPMC maintains and caselaw indicates, a safety valve that allows the Court to clarify existing obligations where necessary to effectuate the intent of the original Consent Decree, *Fox*, 680 F.2d 315; or (2), as General Shapiro argues, an unlimited license to bring unprecedented causes of action for the sake of imposing any form of injunction on UPMC without regard for the parties' agreement, OAG Opp. at 9.

It cannot be the latter. General Shapiro's interpretation effectively transfers to the Attorney General and this Court authority to determine the public interest, a role that exclusively resides in other branches of government. *See* UPMC Br. at 37-39; *see also* Proposed Brief for *Amicus Curiae* Senate President Pro Tempore Joseph B. Scarnati, III. What General Shapiro

[7] In a separate action that certain UPMC subsidiaries filed in federal court seeking a declaration that the Medicare Act preempts General Shapiro's new requirements for nonprofit MA insurers, General Shapiro did not contest that those insurers had stated a claim, and intimated that he might just not enforce the proposed modified consent decree at issue here to the extent it purports to alter rights and obligations set forth in federal law. *See* OAG Br. at 11 n.1, Dkt. 42, *UPMC Pinnacle v. Shapiro*, No. 19-298 (M.D. Pa. 2019), attached hereto as Exhibit T.

presents as a "modification" is in fact a complete repudiation of the existing Consent Decree that replaces all of the agreement's terms with new, dramatically different, and perpetual obligations that would begin when the original Consent Decree ends. And, these new obligations would govern how healthcare is delivered for millions of Pennsylvanians and impact the economics of healthcare for third-party insurers and providers not party to this proceeding.

That is not "modifying." It is using the proxy of court proceedings and the pretense of modification to legislate General Shapiro's unilateral vision of the "public interest." The result will be an unprecedented proceeding well beyond the judiciary's purview. Deciding how healthcare should be accessed and delivered in Pennsylvania requires studied deliberation by legislators, who can convene hearings, take input from a broad array of stakeholders, and debate a multiplicity of different options before deciding how best to effectuate the public interest. It is uniquely the function of the legislature to address such matters – and notably, the legislature has repeatedly *rejected* policies like what General Shapiro proposed here. *See* UPMC Br. at 35 (detailing legislative rejections of the policy undergirding his proposed "modifications").

In contrast, General Shapiro wants this Court to set healthcare for Pennsylvania, and to do so in the context of an expedited lawsuit he filed against UPMC with limited discovery. General Shapiro has no statutory or other basis for forcing hospitals to contract because he may think it is in the "public interest"—a point that is undisputed. *See* UPMC Br. at 7-8, 10 (discussing testimony from Mr. Donahue and statements of PID).[8] Similarly, there is no legal

[8] Indeed, in separate proceedings, General Shapiro contends that the proposed modifications he wants this Court to order do not reflect the law of the land. *See* Exhibit T at 10. General Shapiro has only such powers and duties as the General Assembly has conferred by statute. *See, e.g.*, 71 P.S. § 732-101, *et seq.*; *Commonwealth v. Carsia*, 517 A.2d 956, 957-58 (Pa. 1986). Those exercises and delegations do not include re-making healthcare delivery. Highmark's own opposition brief only reinforces that limitation. Highmark relies on three cases to argue that General Shapiro's *parens patriae* authority empowers him to unilaterally impose the terms of a new decree on UPMC "into perpetuity." Highmark Br. at 39. Of those

cause of action for "public interest." This Court has no standards, precedent, claim elements or defenses to allow it to decide the nakedly public policy question: how should Pennsylvanians best access and receive their healthcare? Because that is not the function of the judiciary. The modification provision must be interpreted to respect that constitutional limitation on the court's authority. *See Kane*, 129 A.3d at 467-68 (consent decrees must be interpreted consistent with the law); *see also Cotlar v. Warminster Twp.*, 302 A.2d 859, 862 (Pa. Commw. Ct. 1973) ("[W]e are all best served by the continual awareness that we are subject to a government of laws and not of men.").

II. Count I Is Barred As A Matter Of Law.

Count I separately fails for the independent reason that General Shapiro is precluded from seeking mandatory contracts between UPMC and Highmark. With respect to commercial services, the Attorney General expressly released UPMC from any claim based on its refusal to contract with Highmark—a fact that General Shapiro does not even dispute. With respect to non-commercial Medicare Advantage services, the Attorney General fails to demonstrate that any claim can survive the parties' prior litigation and the Supreme Court's 2018 holding that the Consent Decree ends June 30, 2019.

A. Any Claim Based On UPMC's Failure To Contract With Highmark For Commercial Services Was Released.

The Attorney General's opposition all but concedes that any claim against UPMC was released insofar as it is based on the failure to contract with Highmark for commercial services to non-Medicare members. As General Shapiro acknowledges, Section IV.C.5 of the 2014 Consent

---

cases, however, two did not involve a consent decree at all, while the other only ordered perpetual relief *because all of the parties expressly agreed to it*. That case only bolsters UPMC's argument. *See Commonwealth v. Philip Morris, Inc.*, 40 Pa. D. & C. 4th 225, 233 (Pa. Com. Pl. 1999) (noting the parties' agreements were "a major accomplishment because they *exceed the kind of injunctive relief that this court would have been able to extend*[.]") (emphasis added).

Decree "releases … those claims the Commonwealth brought or could have brought relating to facts alleged or encompassed within its decree for the period July 1, 2012 to the date of filing, *i.e.*, June 27, 2014." OAG Opp. at 13.

The scope of that release covers UPMC's decision not to have a commercial contract with Highmark. That decision was made in 2013—squarely within the release period—and was expressly encompassed in the original 2014 Petition for Review that initiated this case, which alleged that on "June 12, 2013, UPMC's Board of Directors allegedly resolved, *inter alia*, to forego 'any extension of the existing commercial contracts, or any new commercial contracts, providing Highmark with in-network access to any current UPMC hospitals or physicians in Southwestern Pennsylvania beyond'" certain exception services and hospitals. UPMC Exhibit A ¶ 33; *see* UPMC June 12, 2013 Board Resolution and Background Statement, attached hereto as Exhibit U.[9] Any refusal to contract with Highmark for commercial services stems from that board resolution. The Attorney General not only expressly released UPMC from any claim based on that refusal, but separately agreed that *not* extending the UPMC-Highmark commercial contracts complied with all health, insurance, nonprofit, and charitable laws. Consent Decree § IV.C.6. Count I must therefore be dismissed to the extent it seeks relief for UPMC's refusal to contract with Highmark for commercial services.

B. General Shapiro Cannot Now Seek Relief Based On The Expiration Of Medicare Advantage Contracts.

To get around the clear release of the commercial contracts, General Shapiro argues that the existing Consent Decree was never intended to help transition seniors in Highmark's *non-*

[9] With the assistance of the Governor's office and PID, UPMC has contracted with Highmark for these UPMC exception hospitals and services beyond 2019. UPMC Western Psychiatric Hospital and UPMC Children's Hospital of Pittsburgh, for instance, remain under contract with Highmark—though General Shapiro omits that point from his Petition to Modify.

commercial plans to being out-of-network for UPMC. OAG Opp. at 1-2 & n.1. But the Supreme Court has already decided two prior disputes concerning Medicare Advantage and expressly affirmed the end-date for in-network access to those services under the Consent Decree. *See, e.g.*, UPMC Br. at 8-9. None of General Shapiro's arguments save Count I from the effect of those prior rulings.

The Supreme Court held in 2015 that UPMC was free to terminate its then-existing Medicare Advantage contracts with Highmark at any time, so long as UPMC had *some* Medicare Advantage contract with Highmark through the end of the Consent Decree. *See Kane*, 129 A.3d at 469. Then, in September 2017, UPMC served notice that in-network access for Highmark's Medicare Advantage members would end June 30, 2019. General Shapiro sued to extend that date, and the Supreme Court held in no uncertain terms that the Consent Decree's termination date—including for Medicare Advantage—was "an *unambiguous* and *material term*." *Shapiro*, 188 A.3d at 1132 (emphasis added). Those rulings are binding and preclude any claim in Count I based on termination of the Medicare Advantage contracts. *See* UPMC Br. at 15-17, 19.[10]

General Shapiro unpersuasively argues that the prior Supreme Court proceeding did not entail a request for modification. OAG Opp. at 11. That is irrelevant. As General Shapiro concedes, what matters is only whether he "'had an *opportunity* to appear and assert'" his rights. *Id.* (quoting *Stevenson v. Silverman*, 208 A.2d 786, 788 (Pa. 1965) (emphasis added)). That opportunity is undisputed. General Shapiro brought the case in 2017 knowing that UPMC asserted in-network Medicare Advantage access would end in June 2019, and with every

[10] And, as noted above, federal law preempts any state law standards that purport to regulate the operation of Medicare Advantage in any event. *See* Part I.B, *supra*.

opportunity to ask the court to modify that date.[11] He chose not to, despite ample notice and opportunity to frame the issues and seek relief. That requires now dismissing any reliance on the end of Medicare Advantage contracting. *See, e.g.*, *Gesiorski v. Branch Banking & Tr. Co.*, No. 13-606, 2013 WL 1952385, at *4 (M.D. Pa. May 10, 2013) (recognizing that, under Pennsylvania law, "the proper inquiry [for claim preclusion] is whether the claims *could have been* litigated"). "A party cannot escape operation of the bar of *res judicata* by varying the form of action or adopting a different method of presenting the case. Nor can one avoid the consequences of the prior judicial adjudication merely by altering the character of the relief sought." *Swift v. Radnor Twp.*, 983 A.2d 227, 232 (Pa. Commw. Ct. 2009) (citation omitted).[12]

General Shapiro asks for lenience based on a case regarding zoning matters. *See* OAG Opp. at 11-12 (citing *Callowhill Ctr. Assocs. v. Zoning Bd. of Adjustment*, 2 A.3d 802, 809 (Pa. Commw. Ct. 2010)). But the court in *Callowhill* dismissed a claim because the petitioners "had the opportunity to appear and assert their rights" in the prior proceeding. *Callowhill*, 2 A.3d at 809. Regardless, this is a far cry from a zoning matter where General Shapiro should have leave to alter a requested variance for the size of a yard sign. His office has repeatedly and publicly misled consumers about the Consent Decree. The Attorney General negotiated and publicized an

---

[11] In fact, in a conference before hearing argument on General Shapiro's request to extend the Consent Decree, on January 17, 2018, Judge Pellegrini informed the Attorney General's Office that it must proceed under all theories, including modification under Section IV.C.10, because this was their "one shot." This is one of the reasons UPMC has sought the deposition of Mr. Donahue, who has refused to stipulate to the Court's directive.

[12] This also disposes of General Shapiro's alternative argument that the issues in the 2018 Supreme Court decision were not "identical." OAG Opp. at 12. They did not need to be identical in order for Count I to be precluded. *See, e.g.*, *Balent v. City of Wilkes-Barre*, 669 A.2d 309, 313 (Pa. 1995) ("*Res judicata* applies not only to claims actually litigated, but also to claims which *could have been litigated* during the first proceeding if they were part of the same cause of action.") (emphasis added). Moreover, the Supreme Court's 2018 decision held that in-network access to UPMC under the Consent Decree would end on June 30, 2019. That General Shapiro now tries to collaterally attack that holding with a "request to modify" is exactly the kind of second bite at the apple that courts preclude. *Id.*

unambiguous five-year term for the Consent Decree. When UPMC sought to terminate its Highmark Medicare Advantage contracts coincident with that end-date, General Shapiro sued to extend the date. Now, seven months after he lost that case, General Shapiro—with another big press conference—filed this request to "modify" a deadline that the Supreme Court has already affirmed. *Res judicata* and collateral estoppel preclude his second bite at the apple.[13]

III. The Attorney General Identifies No Well-Pleaded Facts Demonstrating That The Requested Modification Is In The *Public* Interest.

Count I finally fails because it does not allege that each of the proposed modifications would serve the public interest. The deficiency in General Shapiro's pleading is captured perfectly in the heading in his opposition brief on this point: "The Commonwealth's Proposed Modified Consent Decree Serves the Public Interest by Prohibiting UPMC's Unjust Enrichment Through its Practice of Balance Billing Out-of-Network Patients Based Upon its Published/Chargemaster Rates Rather than the Reasonable Value of its Services." OAG Opp. at 27. Notwithstanding that this heading would apply to virtually every hospital in the Commonwealth, there are no allegations in the Petition that justify forced contracting as the solution to this alleged problem; indeed, there is no attempt *anywhere* to justify forced

[13] The other case on which General Shapiro principally relies is a Kansas federal decision that was not decided under Pennsylvania law and, in any event, is entirely inapposite to the instant dispute. *See Raab Sales, Inc. v. Domino Amjet, Inc.*, 530 F. Supp. 2d 1192 (D. Kan. 2008) (holding that *res judicata* did not bar a claim that could have been asserted as a counterclaim in an Illinois proceeding because, under Illinois procedure, counterclaims were not mandatory). Highmark's arguments are similarly frivolous. Highmark throws up a smokescreen about "claim splitting" (something virtually no *res judicata* cases actually discuss) and contends that Supreme Court's decision in *Shapiro* was not a "final judgment." Highmark Br. at 21, 22, n.4. But the Supreme Court's certified opinion and the docket sheet for the matter both expressly state "Judgment Entered 07/18/2018." Highmark also argues the Attorney General is not susceptible to "ordinary court rules" like preclusion. *Id.* at 15. Not even General Shapiro takes that extreme position, which is also wrong as a matter of law. *See, e.g.*, *Commonwealth v. Brown*, 260 F. Supp. 323, 343 (E.D. Pa. 1966) (applying Pennsylvania preclusion law to the Attorney General), *vacated in part on other grounds*, 373 F.2d 771 (3d Cir. 1967).

contracting. This is a clear failure to state a claim upon which relief can be granted—particularly where the PID's Approving Order (with which the Consent Decree consistently must be interpreted, *see* Consent Decree § I.A) states that a systemwide UPMC/Highmark contract would *not*, absent specified evidence, be in the public interest. UPMC Br. at 4-5; *see also Line Lexington Lumber & Millwork Co., Inc. v. Pennsylvania Publ'g Corp.*, 301 A.2d 684, 688 (Pa. 1973) ("As a minimum, a pleader must set forth concisely the facts upon which his cause of action is based.").[14]

Indeed, in a complex economic market such as healthcare, the public interest cannot be defined by anecdotal examples and without acknowledging that government interference could have significant downsides, something the Attorney General's office has done outside the courtroom. When the lead prosecutor in this case, James A. Donahue, III, testified in October 2014 before a legislative committee—to *defend* the Consent Decree as the best deal that the Commonwealth could have obtained—he noted the dangerous unpredictability of the healthcare industry as a specific reason to disfavor government interference in contracting disputes among healthcare insurers and providers: "That ability to walk away forces each side to be reasonable in most circumstances," and the Attorney General's Office concluded that "putting our finger on

[14] In a case such as this, where the Attorney General seeks to enjoin UPMC to undertake specific action, even more specificity is required. The Court cannot issue an injunction imposing each of the proposed modifications without a demonstration that the modification is carefully tailored to remedy a specific harm. *See, e.g.*, *N.A.A.C.P. v. City of Phila.*, Civil Action No. 11-6533, 2014 WL 7272410, at *1 (E.D. Pa. Dec. 19, 2014) ("'Injunctions, which carry possible contempt penalties for their violation[,] must be tailored to remedy the specific harms shown rather than to enjoin all possible breaches of the law.' Accordingly, the Court may grant injunctive relief only for harms on which Plaintiff has met its burden of proof.") (quoting *Davis v. Romney*, 490 F.2d 1360, 1370 (3d Cir. 1974)); *see also, e.g.*, *Eagleview Corp. Ctr. Ass'n. v. Citadel Fed. Credit Union*, 150 A.3d 1024, 1030 n.6 (Pa. Commw. Ct. 2016) ("[I]njunctions should be drawn narrowly."). The Court has set trial in just over two months. It is fundamentally unfair to require UPMC to go to trial on whether General Shapiro's proposed modifications are in the public interest when he has failed to even meet the most basic pleading requirements. UPMC should not have to wait until trial to hear why General Shapiro filed the Petition.

the scale in favor of one side or the other changes that dynamic in ways that are unpredictable."[15] The unpredictable response to these "modifications" is only heightened when the Commonwealth agencies best equipped to regulate healthcare—PID and DOH—continue to refuse to join in General Shapiro's aggressive demand.

On its face, General Shapiro's proposed modification is not even consistent with his conclusory interest in "public" access to UPMC. OAG Opp. at 29. The Attorney General falsely equates public access to UPMC with in-network access to UPMC *through Highmark*. *Id.* at 24, 26 (lamenting the lack of a UPMC-Highmark contract). But consumers have multiple choices for non-Highmark insurers, all of which offer plans providing in-network access to UPMC. Seniors, in particular, can chose from more than 20 plans that offer in-network access to UPMC. And where consumer choice in insurers is limited, UPMC has contracted with Highmark. *See* OAG Opp. at 4 (describing 2018 agreement mediated by the Governor's office). That people may choose to purchase a plan without UPMC in-network does not mean they lack access.

Nor does General Shapiro's proposed modification on its face actually provide in-network access to UPMC through Highmark. As General Shapiro concedes in footnote 17, *Highmark still can exclude UPMC from its plans*. Even if this Court grants his Petition, there is no indication that increased in-network access will follow. To be sure, requiring every non-profit hospital to provide its services for free sounds good, but that does not mean it would increase access to services because soon the public would have no available services; as is often

[15] *See* UPMC Exhibit G (James A. Donahue, III, Testimony before Pennsylvania House Democratic Policy Committee, October 10, 2014, video available at https://wdrv.it/39aa0b6df).

said in non-profit circles, "no margin means no mission."[16] General Shapiro's bald allegations of public interest are the equivalent of economic malpractice and should not be allowed to stand.

At bottom, this is not a proposal in the public interest but rather a proposal in Highmark's interest. The requested modification would not only permit Highmark to tier providers and steer patients away from UPMC (and into its own health system) by requiring its members to make cost-prohibitive payments in order to access UPMC, but to also exclude UPMC entirely when it suits Highmark's needs. By arming Highmark with these exclusionary tools, the Attorney General would nullify the very interest he is purportedly seeking to promote: affordable, in-network access to UPMC through compelled contracts.

Highmark's imperative to keep its subscribers from affordably accessing UPMC is not news to the Attorney General. Just months after the Consent Decrees were signed, Highmark created new Medicare Advantage plans that excluded in-network access to UPMC—a decision affirmed by this Court as authorized by the Consent Decree. *See generally* Oct. 30, 2014 Mem. Opinion, *Commonwealth v. UPMC*, 2014 Pa. Commw. Unpub. LEXIS 652. And, as the Attorney General also knows, ever since the Consent Decree was executed, non-Highmark Blue Cross/Blue Shield plans have refused to sign direct, in-network contracts with UPMC for their members, repeatedly denying their members affordable access to UPMC. Yet, the Attorney

[16] As General Shapiro is well aware, UPMC's board of directors concluded, similar to the PID, that broad access to UPMC's services would be best preserved by *not* contracting with Highmark. When Highmark acquired its own hospital system, Highmark indicated that it intended to use its share of the insurance market to move more than 41,000 in-patient admissions annually from UPMC hospitals into Highmark's own hospital system—the equivalent of closing, for example, two of UPMC's most used and highly regarded Pittsburgh-based hospitals, UPMC Shadyside and UPMC Mercy. UPMC's board determined that in such an event, UPMC would be unable to offer the services on which many communities rely. Not extending its in-network contracts was the only way to prevent that from happening. *See* Exhibit U.

General has turned a blind eye to this, doubling down on his model of exclusion and making a mockery of the very public interest he purports to support.[17]

General Shapiro seeks to impose radical, sweeping "modifications" that represent a dramatic reversal from prior practice. The Court should demand more than his "say so" before allowing a claim to proceed. The Petition needed to plead specific facts demonstrating why the modifications are necessary and how they are properly tailored to the alleged problems. It did not, and the Court should dismiss the Petition.

CONCLUSION

The Consent Decree arose from the Commonwealth's desire to promote an orderly wind-down of the UPMC-Highmark relationship. Now, on the eve of the expiration of that five-year Consent Decree, General Shapiro wants to change the rules and say that this orderly wind-down, all along, violated Pennsylvania law.

This Court should reject General Shapiro's improper attempt to "modify" the Consent Decree out of existence. If General Shapiro wants to bring a separate complaint against UPMC seeking this relief, he can bring it after the Consent Decree expires (with well-pleaded allegations that—unlike here—demonstrate how his proposed injunctive relief serves the public interest). But he cannot smuggle his proposed, wide-ranging relief through the Consent Decree's modification provision.

[17] That non-Highmark Blue Cross/Blue Shield members could have in-network "access" to UPMC if UPMC signed a system-wide contract with Highmark is of no import. The only access these members would have is through Highmark, which would be able to tier, steer and exclude them from UPMC with the Attorney General's blessing. The only way these members would secure unfettered in-network access is if their non-Highmark Blues contract with UPMC directly.

For the foregoing reasons, this Court should dismiss General Shapiro's Petition for Modification.

Dated: March 18, 2019

Respectfully submitted,

COZEN O'CONNOR

/s/ *Stephen A. Cozen*

Stephen A. Cozen (Pa. 03492)
James R. Potts (Pa. 73704)
Stephen A. Miller (Pa. 308590)
Jared D. Bayer (Pa. 201211)
Andrew D. Linz (Pa. 324808)
1650 Market Street, Suite 2800
Philadelphia, PA 19103
Tel.: (215) 665-2000

JONES DAY
Leon F. DeJulius, Jr. (Pa. 90383)
Rebekah B. Kcehowski (Pa. 90219)
Anderson T. Bailey (Pa. 206485)
500 Grant Street, Suite 4500
Pittsburgh, PA 15219
Tel.: (412) 391-3939

Attorneys for Respondent UPMC

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of March, 2019, I submitted the foregoing Reply in Support of Respondent UPMC's Motion to Dismiss the Petition to Modify Consent Decrees, or Preliminary Objections in the Nature of a Demurrer for electronic service via the Court's electronic filing system on Petitioner, The Office of Attorney General, and Respondent, Highmark, on the following:

James A. Donahue, III
Executive Deputy Attorney General
Public Protection Division
Pennsylvania Office of Attorney General
jdonahue@attorneygeneral.gov

Mark A. Pacella
Pennsylvania Office of Attorney General
mpacella@attorneygeneral.gov

Jennifer A. Thomson
Senior Deputy Attorney General
Pennsylvania Office of the Attorney General
jthomson@attorneygeneral.gov

Tracy Wright Wertz
Pennsylvania Office of the Attorney General
twertz@attorneygeneral.gov

Joseph S. Betsko
Pennsylvania Office of Attorney General
jbetsko@attorneygeneral.gov

Michael T. Foerster
Pennsylvania Office of Attorney General
mfoerster@attorneygeneral.gov

Heather Vance-Rittman
Pennsylvania Office of Attorney General
hvance_rittman@attorneygeneral.gov

Jonathan S. Goldman
Pennsylvania Office of Attorney General
jgoldman@attorneygeneral.gov

Keli M. Neary
Pennsylvania Office of Attorney General
kneary@attorneygeneral.gov

Douglas E. Cameron
Reed Smith
dcameron@reedsmith.com

Daniel I. Booker
Reed Smith
dbooker@reedsmith.com

Kim M. Watterson
Reed Smith
kwatterson@reedsmith.com

Jeffrey M. Weimer
Reed Smith
jweimer@reedsmith.com

/s/ *Stephen A. Cozen*
Stephen A. Cozen

EXHIBIT S

LM

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Commonwealth of Pennsylvania, By Kathleen G. Kane, Attorney General; Pennsylvania Department of Insurance, By Michael Consedine, Insurance Commissioner and Pennsylvania Department of Health, By Michael Wolf, Secretary of Health, Petitioners	:	
v.	:	
UPMC, A Nonprofit Corp.; UPE, a/k/a Highmark Health, A Nonprofit Corp. and Highmark, Inc. A Nonprofit Corp., Respondents	:	No. 334 M.D. 2014 Heard: January 17, 2018

BEFORE: HONORABLE DAN PELLEGRINI, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
SENIOR JUDGE PELLEGRINI

FILED: January 29, 2018

Before us is the motion of the Commonwealth of Pennsylvania, acting through its Attorney General, Josh Shapiro,[1] to enforce consent decrees (Petition to

[1] The Attorney General of the Commonwealth has the responsibility to supervise public charities through its *parens patriae* powers. *See In re Estate of Coleman*, 317 A.2d 631 (Pa. 1974); *In re Milton Hershey School Trust*, 807 A.2d 324 (Pa. Cmwlth. 2002). This *parens patriae* power arises when the Commonwealth asserts quasi-sovereign interests, which are interests that the Commonwealth has in the well-being of its populace. *Commonwealth ex rel.*

(Footnote continued on next page...)

Enforce) seeking to mandate UPMC to continue to contract for Medicare Advantage plans with UPE, also known as Highmark Health and Highmark, Inc. (collectively, Highmark), for all of 2019 by prohibiting UPMC from terminating its contract – that gives Highmark Medical Advantage Plan subscribers access to UPMC hospitals – prior to the expiration of the consent decree.

I.

A.

By order dated July 1, 2014, this Court approved and entered two separate but parallel consent decrees (collectively, Consent Decree) with mirror terms between the Commonwealth and Highmark and between the Commonwealth and UPMC, another nonprofit corporation. There are two consent decrees because UPMC and Highmark refused to contract directly with each other. The purpose of the Consent Decree was to ensure access for Highmark subscribers at in-network rates during a period of transition to enable them to decide whether to remain with Highmark or change insurance carriers so that they would have continued access to UPMC facilities. In negotiating the subject consent decrees, the Commonwealth attempted to lessen the anxiety of Highmark subscribers by providing certainty as to what would occur during transitional periods and providing a basis by which

---

(continued...)

Pappert v. TAP Pharmaceutical Products, Inc., 885 A.2d 1127, 1143 (Pa. Cmwlth. 2005). The Nonprofit Corporation Law of 1988, 15 Pa. C.S. §§ 5101-5997, also granted the Attorney General additional powers to take certain actions regarding non-profits and charities if they veer away from their charitable missions. Highmark and UPMC are both non-profit corporations, and UPMC is also recognized as a purely public charity, thus exempt from taxation.

Highmark subscribers and others who sought to buy Highmark insurance could make informed decisions regarding their healthcare.

By the terms of the Consent Decree, this Court retained jurisdiction "to enable any party to apply to this Court for such further orders and directions as may be necessary and appropriate for the interpretation, modification and enforcement of this Consent Decree." (UPMC Consent Decree § IV(C)(11).) The Consent Decree expires on June 30, 2019.[2]

B.

On September 27, 2017, Highmark filed a Motion for Expedited Adjudication of Special Injunction Pending Hearing and for Contempt. Like the other petitions to enforce that had been previously filed in this matter, the underlying dispute involved Highmark Medicare Advantage (MA) Plans. Highmark's motion asserted that:

> (1) UPMC sent notices dated September 26, 2017 purporting to terminate 10 hospital Medicare Acute Care Provider Agreements with Highmark effective December 31, 2018;
>
> (2) UPMC intended to distribute advertising materials for the 2018 MA open enrollment period stating that UPMC

[2] A more complete recitation of the underlying facts and extensive background of this case can be found in this Court's previous decisions, *Commonwealth of Pennsylvania v. UPMC* (Pa. Cmwlth., No. 334 M.D. 2014, filed October 30, 2014 and June 29, 2015), as well as the Supreme Court of Pennsylvania's decision affirming this Court's opinion, *Commonwealth ex rel. Kane v. UPMC*, 129 A.3d 441 (Pa. 2015).

> would not participate in Highmark MA networks for the full 2019 calendar year; and
>
> (3) UPMC intended to terminate many of its physician contracts with Highmark under which those physicians provide MA services to Highmark vulnerable population subscribers.

(Highmark's "Verified Motion for Expedited Adjudication of Special Injunction Pending Hearing and For Contempt" dated September 27, 2017.) It also alleged that UPMC's intent to terminate violates the parties' obligation to continue to contract for vulnerable population services for the full period of the Consent Decree.

At the October 19, 2017 hearing on Highmark's motion, Highmark withdrew its request for an expedited hearing due to certain understandings it reached with UPMC. While it had not yet filed a petition to enforce, at the same hearing, the Commonwealth stated that it supported Highmark's position and would file a separate petition to enforce. On the same day, an order was issued directing the Commonwealth to file the petition by a certain date and scheduling a hearing.

At that scheduled hearing, no evidence was taken on the Commonwealth's Petition to Enforce because the parties agreed that the issue involved is a strictly legal determination based on a textual analysis of the Consent Decree and the Medicare Acute Care Provider Agreement (Provider Agreement).

II.

A.

The provision of the Consent Decree for which an interpretation is sought is Section IV(A)(2) of the UPMC Consent Decree, which gives Highmark MA Plan subscribers access to UPMC facilities. That section provides:

> **2. Vulnerable Populations** – UPMC and Highmark mutually agree that vulnerable populations include: (i) consumers age 65 or older who are eligible or covered by Medicare, Medicare Advantage, (ii) Medigap health plans, (iii) Medicaid and/or (iv) CHIP. With respect to Highmark's covered vulnerable populations, **UPMC shall continue to contract with Highmark at in-network rates** for all of its hospital, physician and appropriate continuity of care services for CHIP, Highmark Signature 65, Medigap and commercial retiree carve out as long as Highmark does not make unilateral material changes to these programs. UPMC shall treat all Medicare participating consumers as In-Network regardless of whether they have Medicare as their primary or secondary insurance. UPMC reserves the right to withdraw from these arrangements if Highmark should take the position that it has the authority to revise the rates and fees payable under those arrangements unilaterally and materially.

(UPMC Consent Decree § IV(A)(2)) (emphasis added).

The dispute centers on what is meant by UPMC's obligation to "continue to contract" with Highmark until June 30, 2019, to provide in-network access to Highmark MA Plan subscribers.

The contract with which UPMC must "continue to contract" under the Consent Decree is the Provider Agreement between UPMC and Highmark that commenced on January 1, 1999. The Provider Agreement established the terms and conditions for the provision and payment of certain healthcare services for individuals enrolled in Highmark's MA Plans while being treated at a UPMC facility. The Agreement had an initial term of 4 years and would automatically renew from contract year to contract year thereafter, unless terminated by either party. The Agreement was subsequently renewed and amended several times, including on January 1, 2002 and July 1, 2012.

B.

UPMC plans to terminate the Provider Agreement on December 31, 2018, but does not dispute that under the Consent Decree it must "continue to contract" with Highmark until June 30, 2019, to provide Highmark subscribers with access to UPMC facilities.

UPMC contends that it will still remain in contract and allow access to UPMC facilities under Section 16.3 of the Provider Agreement, which provides for a 6-month "runout" period in the event of termination of the Provider Agreement, as follows:

> In the event of termination of this Agreement for any reason other than default by Provider, the Provider shall be obligated to continue to comply with the terms and conditions of this Agreement and continue to provide services to Health Plan's Members for six (6) months after the date on which the termination becomes effective. For services rendered during this six (6) month

> period, Provider shall accept Health Plan's payment rates in effect on the termination date.
>
> In addition to the rights stated herein, the non-defaulting party shall have any and all remedies otherwise available at law or in equity, including, without limitation, specific performance.

(Amendment to Provider Agreement § 16.3, effective January 1, 2002.)

UPMC argues that it will continue to contract with Highmark because the runout clause is a contract with written terms and conditions, including rates to which the parties mutually agreed to be bound. It contends that it does not matter whether UPMC provides in-network access to Highmark subscribers for the first six months of 2019 under the standard Provider Agreement or the runout provision because, in either case, it will "continue to contract" with Highmark under the Consent Decree until it expires on June 30, 2019.

The Commonwealth disagrees with UPMC's interpretation. It contends that, pursuant to the plain language of the parties' Consent Decree, UPMC must be in a contract with Highmark for the provision of MA Plans through June 30, 2019, and by "contract" that means the entire Provider Agreement must remain in effect. The Commonwealth contends that Section 16.3's 6-month runout clause expressly applies only "after the date on which the termination becomes effective," meaning that this provision does not continue the contractual relationship between the parties and is not, in and of itself, a contract.

Because the entire Provider Agreement must be in effect until June 30, 2019, the Commonwealth then contends that under Paragraph 5 of the 2012

Amendment the Provider Agreement must remain in effect for the entire calendar year. That provision provides that the Provider Agreement will "automatically renew from year to year thereafter (Contract Year) unless either party provides written notice of termination, not later than April 1 of the Contract Year." (2012 Amendment to the Provider Agreement.) The Commonwealth argues that while UPMC can give notice of termination before April 1 of any year under the Provider Agreement, under Paragraph 5 of the 2012 Amendment the Provider Agreement remains in effect for the entire contract year – *i.e.*, until December 31, 2019 – once notice of termination is given. If UPMC gives notice of termination, then Section 16.3's 6-month runout provision applies, extending Highmark MA subscribers' in-network access to UPMC hospitals until June 30, 2020. Highmark agrees with the Commonwealth's position.

III.

A.

As our Supreme Court has stated:

> [A] consent decree is a contract which has been given judicial sanction, and, as such, it must be interpreted in accordance with the general principles governing the interpretation of all contracts. *International Organization Master, Mates & Pilots of America, Local No. 2 v. International Organization Masters, Mates & Pilots of America, Inc.*, 439 A.2d 621, 624-25 ([Pa.] 1981). In interpreting the terms of a contract, the cardinal rule followed by courts is to ascertain the intent of the contracting parties. *Lesko v. Frankford Hospital-Bucks County*, 15 A.3d 337, 342 ([Pa.] 2011). If the contractual terms are clear and unambiguous on their face, then such terms are deemed to be the best reflection of the intent of the parties. *Kripp v. Kripp*, [ ] 849 A.2d

> 1159, 1162 ([Pa.] 2004). If, however, the contractual terms are ambiguous, then resort to extrinsic evidence to ascertain their meaning is proper. *Murphy v. Duquesne University Of The Holy Ghost*, [ ] 777 A.2d 418, 429 ([Pa.] 2001). A contract's terms are considered ambiguous "if they are subject to more than one reasonable interpretation when applied to a particular set of facts." *Id.* at 430.

Commonwealth ex rel. Kane v. UPMC, 129 A.3d 441, 463 (Pa. 2015).

B.

Before attempting to address the provisions of the Consent Decree and Provider Agreement at issue, some background of MA Plans is needed.

MA Plans are one of three ways Medicare-eligible consumers can receive their Medicare benefits. *See* 42 U.S.C. §§ 1395W-21-28. Those three ways are: (1) original Medicare with the beneficiary paying the resulting co-pays and deductibles; (2) original Medicare with a Medicare Supplement Plan, which will pay for some of Medicare's co-pays and deductibles; or (3) an MA Plan, which typically has lower co-pays and deductibles than original Medicare and often includes benefits that are not part of original Medicare like Vision, Dental and Hearing coverage.

MA Plans are offered by private companies that are approved by the Center for Medicaid and Medicare Services (CMS). Under an MA Plan, a person still has Medicare but the Medicare Part A (Hospital Insurance) and Medicare Part B (Medical Insurance) coverage is paid from the MA Plan and not regular Medicare – *i.e.*, where benefits are paid directly by the government. All MA Plan

companies must have a contract with CMS. 42 U.S.C. § 1395W-27. Under that contract, CMS agrees to pay a set sum for an eligible person's care for the entire year. Correspondingly, the MA Plan provides coverage for a full calendar year, and agreements that provide access to providers are also for the entire year. *Id.* at (c).

Medicare-eligible consumers choose an MA Plan during the period of October 15 through December 7. The plans cover the payment of medical expenses for the period of January 1 to December 31 of the following calendar year.

To fulfill its obligations under its contract with CMS, the private party offering MA Plans enters into provider agreements with hospitals for treatment of MA Plan subscribers. As previously recounted, Highmark has entered into the Provider Agreement with UPMC to provide in-network access for Highmark MA Plan subscribers on a calendar-year basis. That Provider Agreement provides that it will automatically renew for the following calendar year unless notice is given by April 1 of the current calendar year to terminate the agreement. It does not contain a provision for a six-month renewal period.

The difficulty in ascertaining the intent of the parties is that they seem not to have taken into consideration when entering into the Consent Decree that it expires mid-year while MA Plans run for a full calendar year. If UPMC's position that Section 16.3's runout provision fulfills its obligation under the Consent Decree to "continue to contract," that would mean that Highmark would only have access

at in-network rates to UPMC hospitals until June 30, 2019. The net effect is that because MA Plans must be offered on a calendar-year basis, Highmark could not offer an MA Plan for 2019 that includes access to UPMC hospitals. Even if it could, then MA Plan subscribers would no longer have access to UPMC hospitals after June 30, 2019, and whether they could obtain another MA Plan is problematic. Conversely, if the Commonwealth's and Highmark's position is adopted, that would mean that Highmark could offer MA Plans with access for all of 2019, which is beyond June 30, 2019 – the agreed-to date contained in the Consent Decree.

C.

The determinative issue is what is meant by Section IV(A)(2) of the UPMC Consent Decree when it states "UPMC shall continue to contract with Highmark at in-network rates" until June 30, 2019. UPMC contends that Section 16.3 is part of that Provider Agreement, and separately provides for Highmark MA Plan subscribers to have access to UPMC facilities until June 30, 2019; therefore, it remains in "contract" with Highmark. However, the contract referred to in "continue to contract" is the entire Provider Agreement, which has governed the relationship between UPMC and Highmark since 1999, not just a single provision of that document. As the Commonwealth points out, Section 16.3's runout provision only applies "after the date on which the termination [of the Provider Agreement] becomes effective," which evidences an intent by the parties that this provision only becomes effective when the Provider Agreement has ended. UPMC's argument is also belied by its express intention to terminate the Provider Agreement as of December 31, 2018. I find that under the terms of the Consent

Decree, the term "continue the contract" means the entire Provider Agreement and that the Provider Agreement cannot be terminated until June 30, 2019.

The question then becomes what is the effect of the June 30, 2019 termination date under the terms of the Provider Agreement. Once the termination occurs, there seems to be no dispute that Section 16.3's runout provision would apply, which means that Highmark MA Plan subscribers would have in-network access to UPMC hospitals until December 30, 2019. The Commonwealth, though, contends that under Paragraph 5 of the 2012 Amendment pertaining to how the Provider Agreement is to be terminated, the Provider Agreement remains in effect for the entire contract year – *i.e.*, until December 31, 2019. The Commonwealth contends that Section 16.3's runout period would *then* come into effect, giving Highmark MA Plan subscribers in-network rates until June 30, 2020.

However, in its brief in support of its Petition to Enforce, the Commonwealth requests that, given the contentious history between UPMC and Highmark, an order be entered fixing the rights of the party so that those Highmark MA Plan subscribers would have certainty as to what time period they will have access to UPMC facilities. To accomplish that purpose, the Commonwealth suggests that an order be entered prohibiting UPMC from terminating the Provider Agreement for the calendar year 2019, but also that Highmark be ordered not to represent that UPMC is in-network for any part of 2020 based on Section 16.3's run-out clause.

I agree with the Commonwealth's suggested resolution. It provides certainty to Highmark MA Plan subscribers as well as to UPMC and Highmark regarding their obligations for calendar year 2019 by ending all obligations under the Provider Agreement, except for continuity of care, at a date certain. This resolution is the same as fixing a June 30, 2019 date for termination of the Provider Agreement, then activating Section 16.3's runout provision with the obligations expiring December 30, 2019.

Accordingly, for the reasons set forth in this opinion, an order will be entered that the Provider Agreement must remain in effect until December 30, 2019 and that Highmark is ordered not to represent that UPMC is in-network for any part of 2020.

Dan Pellegrini

DAN PELLEGRINI, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Commonwealth of Pennsylvania, By Kathleen G. Kane, Attorney General; Pennsylvania Department of Insurance, By Michael Consedine, Insurance Commissioner and Pennsylvania Department of Health, By Michael Wolf, Secretary of Health, Petitioners	:	
v.	:	
UPMC, A Nonprofit Corp.; UPE, a/k/a Highmark Health, A Nonprofit Corp. and Highmark, Inc. A Nonprofit Corp., Respondents:	:	No. 334 M.D. 2014

ORDER

AND NOW, this 29th day of January, 2018, following a hearing, the Commonwealth's Petition to Enforce is granted. It is ordered that the Medicare Acute Care Provider Agreement and its amendments shall remain in effect until December 30, 2019. Highmark Health and Highmark, Inc. are ordered not to represent in any manner that UPMC is in-network for any part of 2020.

Dan Pellegrini

DAN PELLEGRINI, Senior Judge

EXHIBIT T

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UPMC PINNACLE, *et al.*,	:	
Plaintiffs,	:	
	:	No. 1:19-CV-0298
v.	:	
	:	Hon. John E. Jones III
JOSHUA D. SHAPIRO, Attorney General of the Commonwealth of Pennsylvania,	:	Electronically Filed Document
	:	*Complaint Filed 02/21/19*
Defendant.	:	

DEFENDANT JOSHUA D. SHAPIRO'S
BRIEF IN SUPPORT OF HIS MOTION TO DISMISS THE COMPLAINT

Respectfully submitted,

JOSH SHAPIRO
Attorney General

By: *s/ Jonathan Scott Goldman*

JONATHAN SCOTT GOLDMAN
Executive Deputy Attorney General
Civil Law Division
Attorney ID 93909

KELI M. NEARY
Chief Deputy Attorney General
Civil Litigation Section

JAMES A. DONAHUE, III
Executive Deputy Attorney General
Public Protection Division

Counsel for Attorney General Josh Shapiro

Office of Attorney General
15th Floor, Strawberry Square
Harrisburg, PA 17120
Phone: (717) 787-8058
jgoldman@attorneygeneral.gov

Date: March 15, 2019

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Defendant Joshua D. Shapiro, in his official capacity as Attorney General of the Commonwealth ("General Shapiro"), by and through his undersigned counsel, hereby submits this Brief in Support of his Motion to Dismiss the Complaint filed by Plaintiffs UPMC Pinnacle and other UPMC affiliates (collectively, "UPMC").

I. INTRODUCTION

This is a case of buyer's remorse. UPMC is a non-profit charitable health care institution that is obliged to benefit the public under Pennsylvania law. In order to resolve a contract dispute with Highmark Health (a fellow non-profit competitor), UPMC voluntarily entered into a contractual agreement with the Commonwealth and Highmark (the "Consent Decree"). That Consent Decree is governed by the Commonwealth Court of Pennsylvania under state law and is the subject of an overlapping matter in that court. Mot. To Approve Consent Decree, Sec. IV.C.11, *Commonwealth v. UPMC*, 334 M.D. 2014 (Cmwlth. Ct. June 27, 2014).

Pursuant to the express terms of the Consent Decree, any party – including the Pennsylvania Office of Attorney General (the "OAG") – can seek to modify the agreement by petitioning the Commonwealth Court. The standard for modification is what promotes the public interest. The OAG did precisely this when it filed a Petition to Modify the Consent Decree in the Commonwealth Court on February 7, 2019 (the "Petition to Modify"). If granted, the Petition to Modify will remedy

UPMC's non-charitable conduct through adoption of a Proposed Modified Consent Decree by the Commonwealth Court. The Petition to Modify is currently pending before the Commonwealth Court, and that Court has indicated that it expects "a portion of th[e] litigation" to be resolved before June 30, 2019. Order, *Commonwealth v. UPMC*, 334 M.D. 2014 (Cmwlth. Ct. Mar. 12, 2019).

Apparently dissatisfied with the terms of the Consent Decree that it freely entered into, and the process agreed to therein for addressing modification, UPMC has now commenced this duplicative federal action, asserting a variety of claims based on broad and fanciful notions of federal preemption and constitutional law and seeking to litigate the Commonwealth Court matter here. UPMC's Complaint is not only a transparent effort to do an end-run around the plain terms of the Consent Decree and circumvent the pending Commonwealth Court litigation, but it is separately deficient as a matter of law.

UPMC's Complaint should be dismissed for the following four reasons.

First, the dispute is not ripe for review. UPMC's claims are predicated entirely on the allegation that it will be harmed if it is subject to the "principles" or "requirements" set forth in the Proposed Modified Consent Decree. (Doc. 1, ¶¶ 27-29; 41). But it cannot and will not be subject to those terms or requirements unless and until the Commonwealth Court grants the OAG's Petition. Because the Commonwealth Court has not yet ruled on that Petition, and neither party has

exhausted its appellate remedies in state court, UPMC's claims are "not ripe for adjudication" – they "res[t] upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (internal quotation omitted).

Second, even if the dispute was ripe for review (it is not), this Court should abstain from hearing it under the *Younger* doctrine since (1) there is a "pending state judicial proceeding," the Commonwealth Court litigation; (2) the proceeding "implicates important state interests" in non-profit, contract, and health and welfare law; and (3) the "state proceeding affords an adequate opportunity to raise constitutional challenges." *Mir v. Behnke,* 2016 WL 3269093, at *3 (M.D. Pa. June 15, 2016) (J. Jones). UPMC can raise the exact same constitutional arguments in the Commonwealth Court proceeding that it is raising here.

Third, by voluntarily agreeing to the terms of the Consent Decree, including the ability of any party to seek a modification from the Commonwealth Court and that the terms of the Consent Decree were lawful in all respects and would be binding upon all affiliates, UPMC has waived any right of its affiliates to assert contradictory claims here.

Fourth, each of UPMC's claims fails substantively as a matter of law:

- the preemption claims (counts 1-3) fail because they are based on all-encompassing and unsupportable theories of federal preemption law;

- the Sherman Act claim (count 4) fails because it is based on the faulty allegation that the Proposed Modified Consent Decree would undermine competition when, in fact, it would promote competition through mechanisms that have been repeatedly approved by the courts; and

- the constitutional claims (counts 5-9) fail because they are based on an antiquated principle of economic constitutional rights set forth in *Lochner v. New York*, 198 U.S. 45 (1905) but expressly overruled by subsequent generations of Supreme Court precedent.

For all of these reasons, and those described further below, UPMC's Complaint should be dismissed.

II. PROCEDURAL AND FACTUAL BACKGROUND

A. The Commonwealth Court Litigation

UPMC is registered as a purely public charity under Pennsylvania's Institutions of Purely Public Charity Act, 10 P.S. §§ 371 et seq., and is obligated to benefit the public by following its stated charitable purposes. *See* Commonwealth's Pet. To Modify Consent Decree, at 1; 4-8, *Commonwealth v. UPMC*, 334 M.D. 2014 (Cmwlth. Ct. Feb. 7, 2019) (hereinafter "Cmwlth. Pet."). As a direct result of its charitable status, UPMC has received enormous financial and public support. *See id.* at 8-10. Notwithstanding that support and its corresponding legal obligation to benefit the public, UPMC has engaged in a longstanding course of conduct aimed at benefitting its bottom line to the detriment of the citizens of the Commonwealth.

In or around 2012, UPMC engaged Highmark in a contract dispute that posed extensive risks to the public. That dispute was resolved when UPMC and others voluntarily agreed to the terms of the Consent Decree, which was to be administered by the Commonwealth Court. *See id.* at 10-14. UPMC and the other parties to the Consent Decree agreed that they could modify the Consent Decree by agreement, or that the Commonwealth Court could modify the Consent Decree if any one of the parties petitioned that court and persuaded it that the party's "requested modification is in the public interest":

> **Modification** - If the OAG, PID, DOH or UPMC believes that modification of this Consent Decree would be in the public interest, that party shall give notice to the other and the parties shall attempt to agree on a modification. If the parties agree on a modification, they shall jointly petition the Court to modify the Consent Decree. If the parties cannot agree on a modification, *the party seeking modification may petition the Court for modification and shall bear the burden of persuasion that the requested modification is in the public interest.*

Consent Decree Sec. IV.C.10 (emphasis added).

UPMC also expressly agreed that "the terms and agreements encompassed within [the] Consent Decree do not conflict with UPMC's obligations under the laws governing non-profit corporations and charitable trusts, consumer protection laws, antitrust laws, insurance laws and health laws," *id.* Sec. IV.C.6., and that the terms of the Consent Decree would be binding upon their affiliates. *Id.* Sec. II.P ("Unless otherwise specified, all references to UPMC include all of its controlled

nonprofit and for-profit subsidiaries, partnerships, trusts, foundations, associations or other entities however styled.").

Despite its charitable obligations under Pennsylvania law and its specific obligations under the Consent Decree, however, since 2012, UPMC has continued to engage in self-serving conduct aimed at increasing its market share and eliminating competition to the detriment of the public interest it is legally obligated to serve. *See* Cmwlth. Pet. at 15-35. For this reason, on February 7, 2019, the OAG invoked the modification provision set forth in the Consent Decree by filing its Petition to Modify in the Commonwealth Court and asking that court to require UPMC to act in accordance with its charitable obligations. The Petition to Modify is currently pending in the Commonwealth Court.

B. The Federal Litigation

Although the Complaint in this case is 50 pages in length and contains over 240 paragraphs, its factual allegations are remarkably sparse. UPMC alleges that Attorney General Josh Shapiro stated at a meeting in November 2018 "that he has 'vast authority' over all Pennsylvania nonprofit entities." (Doc. 1 ¶ 27). UPMC further alleges that General Shapiro delivered a "list of new requirements" for nonprofit entities by providing UPMC with a draft of the Proposed Modified Consent Decree (Doc 1, ¶¶ 28-29; Ex. A), and said that these "requirements" apply to all nonprofit healthcare providers and insurers in Pennsylvania, and he will

enforce them "starting with matters that the Office of the Attorney General currently has under investigation." (Doc. 1 ¶ 32). The sole basis for UPMC's allegation is its own, self-serving letter *that UPMC's counsel sent to the OAG*; not any statement or action by the OAG itself. (Doc. 1, Ex. B). Last, UPMC alleges that it is "unable to accurately project [its] costs" and that "lack of clarity will interfere with [its] operation of [its] business . . . ." (Doc. 1, at ¶ 41).

III. STATEMENT OF QUESTIONS INVOLVED

1. Is UPMC's Complaint ripe for judicial review when its claims are based entirely on specific, proposed "requirements" requested in the OAG's Proposed Modified Consent Decree which remains pending before the Commonwealth Court, even though the Commonwealth Court has not yet ruled on, much less adopted, the proposed modifications and may not do so at all?

Suggested answer: No.

2. Does the *Younger* abstention doctrine apply here, where (1) there is a pending state judicial proceeding in Commonwealth Court; (2) that proceeding implicates important state non-profit, contractual and healthcare interests; and (3) UPMC can raise its same constitutional arguments it raised here in that state proceeding before Commonwealth Court?

Suggested answer: Yes.

3. As a matter of law, did UPMC waive any right to assert its claims by agreeing to the terms of the Consent Decree which expressly (1) allow any party to seek modification before the Commonwealth Court; (2) admit that the terms of the Consent Decree are legal in all respects; and (3) acknowledge that the terms of the Consent Decree are binding on all of UPMC's affiliates?

Suggested answer: Yes.

4. Do UPMC's declaratory judgment claims (counts 1-3) fail to state a cause of action as a matter of law when they are based on all-encompassing and legally unsupportable theories of federal preemption?

Suggested answer: Yes.

5. Does UPMC's Sherman Act claim (count 4) fail to state a cause of action as a matter of law when it is based on the unsupportable allegation that the Proposed Modified Consent Decree would undermine competition when, in fact, it would promote competition through mechanisms that have been repeatedly approved by the courts?

Suggested answer: Yes.

6. Do UPMC's constitutional claims (counts 5-9) fail to state a cause of action when they are based on an antiquated theory of economic constitutional rights set forth in *Lochner v. New York*, 198 U.S. 45 (1905) but expressly overruled by subsequent generations of Supreme Court precedent?

Suggested Answer: Yes.

IV. ARGUMENT

UPMC's Complaint should be dismissed in its entirety for four independent reasons: (1) its claims are not ripe for review; (2) the *Younger* abstention doctrine applies; (3) UPMC waived any right to assert its claims; and (4) each of UPMC's claims fails to state a cause of action as a matter of law.

A. UPMC's Complaint Should Be Dismissed Because Its Claims Are Not Ripe For Judicial Review.

The Court should dismiss UPMC's Complaint because its claims are not ripe. "Ripeness reflects constitutional considerations that implicate Article III limitations on judicial power, as well as prudential reasons for refusing to exercise jurisdiction." *Stoit-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 670 n.2 (2010). "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Thomas*, 523 U.S. at 300. Here, UPMC's claims are not ripe for review and should be dismissed for the following reasons.

First, UPMC's claims are predicated entirely on the allegation that General Shapiro "announced new 'principles'" or "requirements" that purportedly "change how nonprofit health insurers and providers operate. . . ." (Doc. 1, ¶¶ 1; 27-29). This allegation is fundamentally, unquestionably false: every so-called "principle"

or "requirement" cited by UPMC is contained as a request within the four corners of the *Proposed* Modified Consent Decree that is currently being litigated before the Commonwealth Court in connection with the OAG's Petition to Modify. (*See* Doc. 1 ¶ 28; Ex. A). The Attorney General has not created new principles or requirements. He has simply asked the Commonwealth Court to grant a petition, something that the court may, or may not, do. UPMC is asserting that it will be harmed only if the Commonwealth Court grants the Petition to Modify and adopts the terms of the Proposed Modified Consent Decree. The corollary of that assertion, of course, is that UPMC will ***not*** be harmed if the Commonwealth Court *denies* the OAG's Petition to Modify and/or *refuses* to adopt the terms of the Proposed Modified Consent Decree. At this point, no one can know what that court will do. Because the Commonwealth Court has not yet ruled on the Petition to Modify and neither party has exhausted its remedies in state court, UPMC's claims simply are "not ripe for adjudication." They "res[t] upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas*, 523 U.S. at 300.

Second, even if the Commonwealth Court were to grant the OAG's Petition to Modify, UPMC's claims would still be premature. While UPMC contends that the mere existence of the Proposed Modified Consent Decree creates a ripe controversy, no controversy could actually exist unless and until the OAG would

seek to enforce the terms of any Modified Consent Decree against UPMC. UPMC candidly acknowledges that it is too early to know how any such hypothetical enforcement will play out, even if the Commonwealth Court modifies the Consent Decree. (*See* Doc. 1, ¶ 39) ("General Shapiro has not yet identified to Plaintiffs what specific actions he intends to take to ensure that his new rules apply to all nonprofits."); (*see* Doc. 1, ¶ 40) ("General Shapiro has not yet identified to Plaintiffs what specific actions he intends to take to force Plaintiffs to open their doors to insurers and providers who do not agree to be bound by his arbitration procedures.").

Assuming, for the sake of argument, that the Commonwealth Court modifies the Consent Decree at all, the OAG may not take any action to enforce it. One would hope that UPMC would simply abide by the order of the Commonwealth Court, should that Court see fit to issue one. And even if the OAG had to enforce an order in Commonwealth Court, it could do so in a manner that avoids UMPC's objections entirely.[1] Regardless, at this time, neither the parties nor this Court can

[1] For example, UPMC's Medicare Act preemption claim (Count 1) is based solely on the alleged effect that the Proposed Modified Consent Decree might have on the practices of specific Medicare Advantage ("MA") organizations ("MAOs"). (*See* Doc. 1, ¶¶ 49-69). But only two of the UPMC Plaintiffs are alleged to be MAOs, (*see* Doc. 1, ¶¶ 14, 16), and UPMC does not raise any preemption arguments regarding entities other than MAOs. So, if the OAG was to enforce the Proposed Consent Decree against only the vast majority of the UPMC Plaintiffs that are not MAOs (and decline to enforce it against the two UPMC Plaintiff MAOs), UPMC;s arguments would be moot.

know how the OAG might in the future seek to enforce the Proposed Modified Consent Decree – or whether it even will get the opportunity to do so.

For these reasons, UPMC fails to present a ripe controversy for adjudication and the Complaint should be dismissed.

B. UPMC's Claims Should Be Dismissed Because The *Younger* Abstention Doctrine Applies.

Even if UPMC's claims were ripe, and they are not, this Court should abstain from presiding over this matter under the *Younger* Doctrine.[2] "Abstention is appropriate when: (1) there is a pending state judicial proceeding; (2) the proceeding implicates important state interests; and (3) the state proceeding affords an adequate opportunity to raise constitutional challenges." *Mir*, 2016 WL 3269093, at *3. Here, all elements of *Younger* are satisfied. This case is more appropriately decided in the matter pending before the Commonwealth Court, which has jurisdiction to hear disputes involving the important state non-profit, contractual, and health and welfare legal issues arising under the Consent Decree and where UPMC can raise the exact arguments it raises here.

---

[2] "The abstention doctrine first announced by the Supreme Court in *Younger v. Harris* . . . in the context of a pending state criminal prosecution, has since been extended to non-criminal state civil proceedings and state administrative proceedings . . . ." *O'Neill v. City of Philadelphia,* 32 F.3d 785, 789 (3d Cir. 1994) (internal citations omitted).

1. There Is A Pending State Judicial Proceeding Concerning The Same Issues As In This Case.

The first *Younger* element is satisfied because the pending Commonwealth Court litigation concerns the same issues UPMC raises in this case.

It is well-settled that, "[f]or *Younger* purposes, the State's trial-and-appeals process is treated as a unitary system, and for a federal court to disrupt its integrity by intervening in midprocess would demonstrate a lack of respect for the State as sovereign." *O'Neill v. City of Philadelphia*, 32 F.3d 785, 790 (3d Cir. 1994). Thus, "a necessary concomitant of *Younger* is that a party [wishing to contest in federal court the judgment of a state judicial tribunal first] must exhaust his state appellate remedies before seeking relief in the District Court." *Id.* (*quoting Huffman v. Pursue, Ltd.,* 420 U.S. 592, 608 (1975)) (brackets in original).

As described above, UPMC's claims are based entirely on its contingent allegation that – if the Commonwealth Court subjects it to the "principles" or "requirements" set forth in the OAG's Proposed Modified Consent Decree – it will be harmed. (Doc. 1, ¶¶ 1; 27-29).[3] This exact issue is pending before the Commonwealth Court which is considering the OAG's Petition to Modify. Therefore, the first element of *Younger* is satisfied.

[3] The Commonwealth Court will weigh UPMC's argument against the OAG's position that the Proposed Modified Consent Decree should be applied to UPMC, as a Commonwealth non-profit charity, to promote the public interest in accordance with the express standard for modification to which UPMC agreed when it entered into the Consent Decree.

2. The Commonwealth Court Litigation Implicates Important State Interests in Non-Profit, Contract, and Health and Welfare Law.

The second *Younger* element is satisfied because the pending Commonwealth Court litigation implicates important state interests in non-profit, contract, and health and welfare law. The second prong of the test is whether the proceedings at issue in the federal court "implicate an important state interest. This factor goes to the very core of the raison d'etre of *Younger* abstention inasmuch as the Supreme Court's holding in *Younger* rested primarily on considerations of 'comity,' a concept which encompasses 'a proper respect for state functions.'" *O'Neill*, 32 F.3d at 791-92. This element is interpreted broadly in favor of abstention: "When [courts] inquire into the substantiality of the State's interest in its proceedings [courts] do not look narrowly to its interest in the *outcome* of the particular case—which could arguably be offset by a substantial federal interest in the opposite outcome. Rather, what we look to is the importance of the generic proceedings to the State." *Id.*

It is beyond dispute that the Commonwealth Court litigation implicates important state interests in at least three areas. First, the state has an important interest in institutions registered as charities under state law. *See Fontain v. Ravenal,* 58 U.S. 369 (1854) (recognizing broad powers of attorney general to protect public interest and insure charitable funds are properly applied). This interest is particularly acute in Pennsylvania, where the power and duty to ensure

the proper functioning of charities in the public interest is expressly vested in the Attorney General. *Commonwealth v. Barnes Foundation,* 398 Pa. 458, 467 (Pa. 1960) ("Attorney General . . . by virtue of the powers of [the] office, is authorized to inquire into the status, activities and functioning of public charities."); *see also, Estate of Pruner*, 136 A.2d 107, 109-10 (1957) ("The beneficiary of charitable trusts is the general public to whom the social and economic advantages of the trust accrue. But because the public is the object of the settlor's benefactions, private parties have insufficient financial interest in charitable trusts to oversee their enforcement. Consequently, the Commonwealth itself must perform this function if charitable trusts are to be properly supervised.").

Second, the Commonwealth has an important interest in enforcing contracts generally, and a particular interest in enforcing and asserting its contractual rights under the Consent Decree to which it is a party. *See Travelers Health Ass'n v. Virginia,* 339 U.S. 643, 647–48 (1950) (discussing state's interest that contractual obligations be observed). Third, insofar as this matter directly affects the healthcare of millions of Pennsylvania residents, "the health and safety of [a state's] citizens" falls squarely within the "police powers [of the state] . . . as to the protection of the lives, limbs, health, comfort, and quiet of all persons." *Medtronic, Inc. v. Lohr,* 518 U.S. 470, 475 (1996) (internal quotation omitted).

In sum, because the Commonwealth Court litigation involves (1) oversight of Pennsylvania charitable institutions by the Attorney General; (2) enforcement of a contract to which the state is a party; and (3) protection of the health and safety of millions of Commonwealth citizens, UPMC's complaint implicates important state interests. The second of the *Younger* abstention doctrine elements is satisfied.

3. UPMC Can Raise Its Exact Same Arguments In The Commonwealth Court.

The third element of *Younger* is satisfied because UPMC can make its same arguments in Commonwealth Court. This "element is satisfied in the context of a state administrative proceeding when the federal claimant can assert his constitutional claims during state-court judicial review of the administrative determination." *O'Neill*, 32 F.3d at 792. Here, UPMC can raise every constitutional argument in Commonwealth Court that it seeks to raise in this case. Therefore, the third element of *Younger* is satisfied.

The Court should abstain from presiding over this case pursuant to the *Younger* abstention doctrine and dismiss UPMC's Complaint.

C. UPMC's Complaint Should Be Dismissed As A Matter of Law Because, By Entering Into The Consent Decree, UPMC Waived Any Right To Assert Its Claims.

By agreeing to the terms of the Consent Decree, UPMC and its affiliates waived any right to assert claims that conflict with the Consent Decree. Because

the causes of action in UPMC's Complaint before this Court conflict with the Consent Decree, they must fail as a matter of law and should be dismissed.

"Consent Decrees are interpreted under ordinary contract law principles." *Harris v. City of Philadelphia*, 47 F.3d 1311, 1323 (3d Cir. 1995). This makes sense because "a consent decree is a contract which has been given judicial sanction" and, as such, it must be interpreted in accordance with the general principles governing the interpretation of all contracts. *Commonwealth ex rel. Kane v. UPMC*, 129 A.3d 441, 463 (Pa. 2015). As described above, UPMC agreed expressly in the Consent Decree that any party – including the OAG – could "petition the Court for modification" and that party "shall bear the burden of persuasion that the requested modification is in the public interest." Consent Decree Sec. IV.C.10.

UPMC placed no limitation on the grounds under which the OAG could seek to modify the Consent Decree. Indeed, UPMC also agreed that the terms of the Consent Decree did "not conflict with UPMC's obligations" under relevant law, *id.* at Sec. IV.C.6., and that the Consent Decree binds its affiliates. *See id.* at Sec.II.P. UPMC cannot agree that the OAG may lawfully "petition the Court for modification" without limitation and then oppose the very modification process it agreed to by asserting its claims here.

Because UPMC waived any right to assert its claims by entering into the Consent Decree, its Complaint should be dismissed.

D. UPMC's Complaint Should Be Dismissed Because Each Claim Fails To State A Cause Of Action As A Matter Of Law.

"To survive a motion to dismiss, a complaint must contain sufficient factual allegations, taken as true, to 'state a claim to relief that is plausible on its face.'" *Fleisher v. Standard Ins.*, 679 F.3d 116, 120 (3d Cir. 2012) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "In other words, a complaint must do more than allege the plaintiff's entitlement to relief. A complaint has to 'show' such an entitlement with its facts." *Fowler v. UPMC Shadyside*, 578 F.3d 203, 211 (3d Cir. 2009). "The District Court must accept all of the complaint's well-pleaded facts as true, but may disregard any legal conclusions." *Id.* at 210-11. Under this basic standard, each of UPMC's substantive claims must fail as a matter of law.

1. UPMC's Preemption/Declaratory Judgement Act Claims (Counts 1-3) Fail As A Matter Of Law.

UPMC asserts that the Proposed Modified Consent Decree is preempted by three federal laws: (1) the Medicare Act, 42 U.S.C. §§ 1395 – 1395lll; (2) the Affordable Care Act (the "ACA") 42 U.S.C. § 18001 et seq.; and (3) the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001–1461 (*see* Doc. 1, ¶¶ 162-166, 167-174, and 175-179, respectively). They ignore, however, "two cornerstones of [the Supreme Court's] pre-emption jurisprudence." *Wyeth v.*

Levine, 555 U.S. 555, 565 (2009). First, is "the basic assumption that Congress did not intend to displace state law." *Maryland v. Louisiana,* 451 U.S. 725, 746 (1981); *see also Medtronic, Inc. v. Lohr,* 518 U.S. 470, 485 (1996) ("because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action"). Second, "[i]n all pre-emption cases, and particularly in those in which Congress has legislated . . . in a field which the States have traditionally occupied, . . . we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act *unless that was the clear and manifest purpose of Congress*.' " *Lohr,* 518 U.S. at 485 (internal quotation omitted) (emphasis added). Thus, the "presumption against preemption" (*Wyeth*, 555 U.S. at 565 n.3) applies with particular force in situations like this fall squarely within the police power of the state. *See Lohr*, 518 U.S. at 475.

a. The Medicare Act Does Not Preempt The Proposed Modified Consent Decree.

UPMC contends that four provisions of the Proposed Modified Consent Decree conflict with the Medicare Act: (1) the "Duty to Negotiate," paragraphs 3.2 and 3.3 (Doc. 1, ¶¶ 54-58); (2) the prohibition on "Provider-Based Billing practice(s)," paragraph 3.4.5 (Doc. 1, ¶¶ 59-61); (3) the "Limitations on Charges for Emergency Services," paragraph 3.5 (*see* Doc 1, ¶¶ 63-65); and (4) the "Advertising" provision, paragraph 3.10 (*see* Doc 1, ¶¶ 66-69). UPMC's

assertions are without merit in all respects and its Count 1 declaratory judgment (Count 1) claim should be dismissed as a matter of law.

(i) The Duty To Negotiate Provisions Of The Proposed Modified Consent Decree Do Not Conflict With The Medicare Act.

UPMC's assertion concerning the Duty to Negotiate Provisions in paragraphs 3.2 and 3.3 of the Proposed Modified Consent Decree can be summed up as follows: (1) two of the UPMC Plaintiffs offer MA health plans (*see* Doc 1, ¶¶ 14; 16); (2) the terms of the Proposed Modified Consent Decree "force" these two UPMC entities "to enter into involuntary MA Contracts" (Doc 1, ¶ 57); and (3) the Duty to Negotiate provisions therefore conflict with the "Noninterference" provision of the Medicare Act. (Doc 1, ¶¶ 55-58). That assertion is based on two fundamental mischaracterizations.

First, UMPC misinterprets the noninterference provision of the Medicare Act. That provision only applies to Medicare-specific benefits and services:

> Noninterference. In order to promote competition under this part and part D of this subchapter and in carrying out such parts, the Secretary may not require any MA organization to contract with a particular hospital, physician, or other entity or individual *to furnish items and services* ***under this subchapter*** or require a particular price structure for payment under such a contract to the extent consistent with the Secretary's authority under this part.

42 U.S.C. § 1395w-24(a)(6)(B)(iii) (emphasis added). By its terms, this noninterference provision applies *only* to state efforts to force an MAO to contract to provide *Medicare-specific* benefits and services. Indeed, the cases cited by UPMC support that interpretation. *See Massachusetts Ass'n of HMOs v. Ruthardt*, 194 F.3d 176, 185 (9th Cir. 1999) (Congress's intent "*to preempt all state benefit requirements* is clear and manifest") (emphasis added).[4] The noninterference provision does not apply to state efforts to regulate contracting by MAOs in areas wholly unrelated to Medicare benefits. Put otherwise, the noninterference provision of the Medicare Act does not apply to the Proposed Modified Consent Decree because the Proposed Modified Consent Decree does not impose any "state benefit" requirements on UPMC.

Second, the Duty to Negotiate Provisions of the Proposed Modify Consent Decree do not "force" UPMC to enter into involuntary contracts with anybody. Rather, those provisions require UPMC to negotiate with health plans and health care providers in good faith – nothing more. If those negotiations are unsuccessful, then Pennsylvania registered health plans and providers may invoke the binding

[4] The other cases cited by UPMC are inapposite. *See Do Sung Uhm v. Humana, Inc.*, 620 F.3d 1134 (9th Cir. 2010) (finding only that state law claim for misleading marketing materials under consumer protection statute was preempted); *Morrison v. Health Plan of Nevada*, 328 P.3d 1165 (Nev. 2014) (finding only that state common law negligence claim was preempted); and *Meek-Horton v. Trover Sols, Inc.*, 915 F. Supp. 2d 486 (S.D.N.Y. 2013) (finding only that state law consumer protection cause of action was preempted).

arbitration procedure agreed to by UPMC and the other parties to the Consent Decree. *See* Consent Decree ¶ IV.C.2. Pursuant to the parties' agreement, that procedure is overseen by an independent body which must impose "last best offer," baseball-style arbitration. *See id.*[5] UPMC's vehement and over-the-top objections to the process it expressly agreed to are even more perplexing in that "last best offer" arbitration has been endorsed by numerous courts as an effective incentive to induce parties to negotiate in good faith and make reasonable proposals.

(ii) The Prohibition On Provider-Based Billing Practices Does Not Conflict With The Medicare Act.

UPMC asserts that the prohibition on "Provider-Based Billing practice(s)" in paragraph 3.4.5 of the Proposed Modified Consent Decree is preempted by the Medicare Act. (*See* Doc. 1, ¶¶59-62). Again, UPMC's argument is incorrect. In

---

[5] The Justice Department has described the moderating benefits of these procedures as follows:

> Under baseball-style arbitration, each party submits its preferred price and other terms to the arbitrator, and the arbitrator selects the proposal that is most reasonable in light of relevant evidence. Because the arbitrator can only choose between the parties' proposals, the process creates an incentive for both parties to make reasonable proposals. The FCC has adopted this method of arbitration as a condition of approving several previous transactions involving the video programming distribution industry.

Supplemental Statement Of The United States In Support Of Entry Of The Final Judgment, at 3 n.4, *United States v. Comcast Corp.*, 11-cv-106 (D.D.C. Aug. 5, 2011); *see also United States v. AT&T*, ---F.3d----, 2019 WL 921544, at *8-9 (D.C. Cir. Feb. 26, 2019) (approving district court's findings regarding the efficacy of "baseball style arbitration" to resolve contract disputes post-merger).

support of its assertion, UPMC cites 42 C.F.R. § 413.65. But that only relates to the "requirements for a determination that a facility or an organization has provider-based status" under the Medicare Act. It does not pertain in any way, shape or form to provider-based billing practices or impose any limitation whatsoever on a state seeking to curtail or eliminate such practices. Therefore, the prohibition on provider-based billing practices set forth in the Proposed Modified Consent Decree does not conflict with the Medicare Act.

(iii) The Limitations On Charges For Emergency Services In The Proposed Modified Consent Decree Do Not Conflict With The Medicare Act.

UPMC asserts that the "Limitations on Charges for Emergency Services" provision in paragraph 3.5 of the Proposed Modified Consent Decree is preempted by the Medicare Act. Again, here, UPMC is wrong. Paragraph 3.5 states that UPMC "shall limit [its] charges for all emergency services to [its] Average In-Network Rates for any patient Receiving Emergency services on an Out-of-Network basis." In support of its preemption argument, UPMC cites to 42 U.S.C. § 1395s-22(k)(1). But that statutory provision only requires that a physician or other entity providing out-of-network services to an MA patient "accept as payment in full . . . the amounts that the . . . entity could collect if the individual" were enrolled in traditional Medicare. The statute puts a *ceiling* on the amount a provider can accept from out-of-network MA patients – i.e., the amount it could

collect from traditional Medicare – but not a *floor*. It does not preclude a state from requiring a provider to accept less than the ceiling amount.

Moreover, UPMC does not allege that its average in-network rates for MA patients are lower than rates it would receive from "traditional" Medicare patients. Thus, even if the statute were improperly interpreted to require a floor for out-of-network reimbursement rather than just a ceiling, UPMC fails to allege that the Proposed Modified Consent decree would impose a reimbursement structure that would violate such a floor.

(iv) The Advertising Provision Does Not Conflict With The Medicare Act.

UPMC also asserts that the Advertising Provision in paragraph 3.10 of the Proposed Modified Consent Decree is preempted by the Medicare Act. (*See* Doc. 1, ¶¶66-69). Again, it is wrong. Paragraph 3.10 states that UPMC "shall not engage in any public advertising that is unclear or misleading in fact or by implication." UPMC contends that the Centers for Medicare & Medicaid Services ("CMS") have "exclusive purview to regulate advertising for MA plans," and that paragraph 3.10 conflicts with CMS' authority. UPMC's newfound contention is curious because it agreed to be bound by the *exact same provision* in the Consent Decree that it now claims is unconstitutional. *See* Consent Decree Sec.IV.A.11 ("UPMC shall not engage in any public advertising that is unclear or misleading in fact or by implication.").

Moreover, assuming solely for the sake of argument that CMS is in fact the only agency that can regulate advertising *for MA plans*, UPMC says nothing about advertising for *non-MA* plans. Even if CMS has "exclusive purview" over the regulation of advertising for MA plans, the Commonwealth would not be prohibited from regulating advertising for *non-MA* plans with that same language.

The cases cited by UPMC support this interpretation. In those cases the courts struck down causes of action asserted under state laws o*nly insofar as they related to MA plans*.[6] But the courts did *not* hold that the underlying state laws/regulations upon which the causes of action were based were preempted insofar as they also related to non-MA plans. That is the argument UPMC tries to make here.

b. The Affordable Care Act Does Not Preempt The Proposed Modified Consent Decree.

UPMC asserts that the ACA preempts the Proposed Modified Consent Decree. (*See* Doc 1., ¶¶ 70-76). That assertion, however, is based on a misreading of the ACA, and it should be rejected.

UPMC contends that the Proposed Modified Consent Decree imposes "different regulatory requirements" on non-profit health insurers than for-profit

---

[6] *See Do Sung Uhm v. Humana, Inc.*, 620 F.3d 1134 (9th Cir. 2010) (state law claim for misleading marketing materials under consumer protection statute preempted); *Morrison v. Health Plan of Nevada*, 328 P.3d 1165 (Nev. 2014) (state common law negligence claim was preempted).

health insurers. According to UPMC, this alleged differential treatment violates Section 18012 of the ACA. 42 U.S.C. § 18012, which states:

> Any standard or requirement adopted by a State ***pursuant to this title***, or any amendment made by this title, shall be applied uniformly to all health plans in each insurance market to which the standard and requirements apply. The preceding sentence shall also apply to a State standard or requirement relating to the standard or requirement required by this title (or any such amendment) that is not the same as the standard or requirement but that is not preempted under section 18041(d) of this title.

(emphasis added).

The plain language of the statute is clear that the ACA only prohibits a state from imposing standards and requirements "pursuant to [the ACA]" to some plans but not to others. Put otherwise, the statute requires only that states impose the same *ACA requirements* for all health plans.

In the Commonwealth Court litigation, the OAG is requesting that that court adopt the Proposed Modified Consent Decree to ensure that UMPC acts consistent with its Pennsylvania state law charitable obligations to serve the public interest. This request is wholly unrelated to any requirement under the ACA. The statute cited by UPMC is, therefore, inapposite.

c. ERISA Does Not Preempt The Proposed Modified Consent Decree.

UPMC claims that the Proposed Modified Consent Decree "relates" to an employee benefit plan within the meaning of 29 U.S.C. § 1144(a) and is, therefore, preempted under ERISA.[7] This is incorrect as a matter of law. While UPMC makes a number of different arguments in support of its assertion, each fails for the same reason: UPMC does not have standing to make such an argument because none of the UPMC Plaintiffs offers an employee benefit plan covered by ERISA. Instead, a single UPMC Plaintiff allegedly acts as "a licensed third-party administrator, and that administrator then contracts with self-insured entities to provide administrative services." (Doc. 1, ¶ 18). But a third party administrator that contracts with an ERISA benefit plan does not have standing to assert such claims. Therefore, UPMC has no standing to assert any claims regarding the supposed impact the Proposed Modified Consent Decree would have on the ERISA benefit plan as opposed to the administrator itself. UPMC's ERISA arguments should be rejected, and its ERISA claim should be dismissed.

Moreover, the Modified Consent Decree gives health plans (including ERISA qualified plans) the option of availing its provisions; it does not mandate that such plans avail themselves of provisions. In short, the Modified Consent

---

[7] "A rule of law relates to an ERISA plan if it is specifically designed to affect employee benefit plans, if it singles out such plans for special treatment, or if the rights or restrictions it creates are predicated on the existence of such a plan." *United Wire, Metal & Mach. Health & Welfare Fund v. Morristown Mem'l Hosp.*, 995 F.2d 1179, 1192 (3d Cir. 1993).

Decree would enable a health plan to require UPMC to negotiate with it in good faith if it wanted UPMC's provider assets as part of its health plan design. If it did not want UPMC as part of its plan, the plan is under no obligation to add UPMC.

1. UPMC's Sherman Act (Count 4) Claim Must Fail As A Matter Of Law.

UPMC claims that the Proposed Modified Consent Decree violates the Sherman Act by "restrain[ing] competition by forcing Plaintiffs to contract with all willing insurers or providers; by enabling arbitrators to effectively level-set the prices the insurers pay; and by abdicating this unsupervised regulatory power to nonpolitical, nonresponsive private actors." (Doc. 1, ¶ 96). This claim is without merit and should be dismissed as a matter of law.

As a legal matter, UPMC's Sherman Act claim fails because the arbitration procedures that it claims are anticompetitive are the same as those repeatedly approved by numerous courts as *promoting* commercially reasonable behavior.[8] *See supra* Sec. IV.D.i.a.i. The economic and legal rationale for the arbitration

[8] As set forth above, the Proposed Modified Consent Decree does not restrain trade, because it does not "force" any UPMC entity to enter into any involuntary contract with anybody. Rather, paragraphs 3.2 and 3.3 of the Duty to Negotiate provisions require UPMC to negotiate with health plans and health care providers in good faith. If those negotiations are unsuccessful, then Pennsylvania registered health plans and providers may invoke binding arbitration procedures, overseen by an independent body, which will apply "last best offer" arbitration. These provisions facilitate access to healthcare and *promote trade and competition* by precluding UPMC from stonewalling competitors. The factual allegations in the Complaint provide no basis to infer otherwise.

procedures in those cases applies with equal weight in this case. As such, as a matter of law, "last best offer" arbitration cannot provide the basis for a viable claim under the Sherman Act.

For these reasons, UPMC's Sherman Act claim must fail and should be dismissed.

2. UPMC's Constitutional Claims (Counts 5-9) Must Fail As A Matter Of Law.

UPMC asserts five constitutional claims based on the following dubious theories: (1) regulatory taking (count 5); (2) unconstitutional condition (count 6); (3) equal protection (count 7); (4) due process (count 8); and (5) substantive due process (count 9). These claims fail for the following reasons.

As a general matter, each claim is based on an alleged "fundamental" constitutional right that the Supreme Court has explicitly held is ***not*** *fundamental.* In particular, UPMC contends that it has an "undisputed right to determine what contract [it] enter[s] and to end [its] current contracts. . . ." (Doc. 1, ¶ 43). In other words, UPMC asserts a constitutional right to "freedom of contractual relations." This is a page taken directly from the *Lochner* playbook. *See Lochner*, 198 U.S. at 53 ("The general right to make a contract in relation to his business is part of the liberty of the individual protected by the 14th Amendment of the Federal Constitution. Under that provision no state can deprive any person of life, liberty, or property without due process of law.") (internal citation omitted). Unfortunately

for UPMC, those principles originally set forth in *Lochner* have since been rebuked by generations of Supreme Court precedent. *See, e.g., West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391-92 (1937) ("Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process. *This essential limitation of liberty in general governs freedom of contract in particular*.") (emphasis added).

There is no "undisputed [constitutional] right" to the freedom of contractual relations. (Doc. 1, ¶43). Therefore, UPMC's constitutional claims should be dismissed in their entirety.

In addition to this general ground to dismiss all of UPMC's constitutional claims as a matter of law, UPMC's specific constitutional claims fail for the following specific reasons, each of which provides a separate legal basis to dismiss the indicated constitutional claims.

a. UPMC's Regulatory Taking Claim Must Fail.

UPMC asserts that it has property rights in its alleged freedom to contract and not to contract and the "requirements" presented to the Commonwealth Court in the Proposed Modified Consent Decree "take" away those property "rights" and, therefore, "effect a taking." (Doc. 1, ¶ 198). As a matter of law, UPMC is wrong.

The takings clause of the Fifth Amendment to the Constitution provides that "private property [shall not] be taken for public use, without just compensation." Such a regulatory taking occurs when "a regulatory or administrative action places such burdens on the ownership of property that essential elements of such ownership must be viewed as having been taken." *Hendler v. United States,* 36 Fed. Cl. 574, 585 (1996). In cases like UPMC's claim, where all economically beneficial use is not taken from the property, courts conduct an "essentially ad hoc, factual inquir[y]" focused on three factors: (1) the economic impact of the regulation on the claimant; (2) the degree of interference with the reasonable, investment-backed expectations of the property owner; and (3) the character of the government action. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124-128 (1978).

Even if UPMC was found to have a fundamental constitutional property right in the freedom of contractual relations in violation of Supreme Court precedent, any such right would have to be "public" and not "private" – UPMC is obligated under Pennsylvania state law to benefit *the public* and not its own bottom line. *See, e.g.*, *Pruner*, 136 A.2d at 109 ("because the public is the object of the settlor's benefactions, private parties have insufficient financial interest in charitable trusts to oversee their enforcement"). And a right that is already *public* cannot be taken in violation of the Constitution.

Because UPMC, as a Pennsylvania public charity, does not have a "private" right to freedom of contractual relations, its regulatory taking claim should be dismissed.[9]

b. UPMC's Unconstitutional Condition Claim Must Fail.

UPMC's unconstitutional condition claim is a mirror image of its regulatory taking claim, and it, too, fails as a matter of law. UPMC contends that "[b]y forcing [it] to contract with other insurers and providers, General Shapiro interferes with Plaintiff['s] reasonable expectation that [it] will enjoy the right *not* to contract." (Doc. 1, ¶ 108) (emphasis in original). This is the same regulatory taking allegation reasserted under the guise of a different theory, and it should be rejected for the same reasons.

c. UPMC's Equal Protection Claim Must Fail.

UPMC's Equal Protection claim is based on its allegation that the Proposed Modified Consent Decree "target[s] Plaintiffs (and other UPMC entities) for special regulatory burdens that have not been imposed on other similarly-situated entities." (Doc. 1, ¶ 120). In reviewing an Equal Protection claim, the first inquiry

---

[9] In addition, UPMC has also failed to allege any facts demonstrating that the adoption of the Proposed Modify Consent Decree would "take" its property at all. To the contrary, and as described above, the Duty to Negotiate and Arbitration provisions, if adopted by the Commonwealth Court, would merely require that UPMC negotiate in good faith and, in limited circumstances, submit to "last best offer arbitration" which would induce the parties to act in a commercially reasonable manner.

is "whether the alleged state action burdens a fundamental constitutional right or targets a suspect class." *State Troopers Non-Commissioned Officers Ass'n of New Jersey v. New Jersey*, 399 F. App'x 752, 754 (3d Cir. 2010). "If a classification neither burdens a fundamental right nor targets a suspect class, [the court] will uphold it so long as it bears a rational relation to some legitimate end." *Connelly v. Steel Valley Sch. Dist.*, 706 F.3d 209, 213 (3d Cir. 2013) (quotation omitted). This "rational basis test" is a low bar.

As set forth above, UPMC's claim to a fundamental constitutional right to the freedom of contractual relations is bogus – no such fundamental constitutional right exists. *See West Coast Hotel Co.*, 300 U.S. 379, *supra*. Nor can UPMC allege that it is a "protected class." UPMC is not a "discrete and insular" minority that has been "subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Massachusetts Board of Ret. v. Murgia*, 427 U.S. 307, 313 (1976). Rather, UPMC is an extraordinarily powerful healthcare non-profit that owes a duty to the public under Pennsylvania state law governing charities.

As a result, UPMC's Equal Protection claim must fail as a matter of law "so long as" the Proposed Modified Consent Decree "bears a rational relation to some legitimate end.'" *Connelly*, 706 F.3d at 213. It does. Based on UPMC's long

pattern of behavior, for the reasons described above, and those further described in the Petition to Modify pending before the Commonwealth Court, the Proposed Modified Consent Decree is necessary to ensure that UMPC acts in accordance with its charitable obligations to benefit the public in the Commonwealth of Pennsylvania. It is necessary to protect the basic healthcare of millions of Pennsylvania residents. This reasoning easily satisfies a rational basis test. UPMC's Equal Protection claim should therefore be dismissed.

d. UPMC's Procedural Due Process Claim Must Fail.

UPMC's procedural due process claim is based on the notion that the OAG has deprived it of a protected property interest in contractual relations without proper procedural protections. (*See* Doc. 1, ¶¶ 225-231). To state such a claim, a plaintiff must establish that: (1) it had a protected liberty or property interest; (2) the state deprived it of that interest; and (3) the Plaintiff was deprived of basic procedural protections such as notice and an opportunity to be heard. *See Shoats v. Horn,* 213 F.3d 140, 143 (3d Cir. 2000). Again, here, UPMC's claim must fail as a matter of law.

Assuming UPMC has a protected property interest in contractual relations that is fundamental, UPMC cannot satisfy the second or third elements of a procedural due process claim. As described above, UPMC is not being "deprived" of anything – the Duty to Negotiate and Arbitration provisions in the Proposed

Modified Consent Decree do not "force" UPMC to contract with anyone and any such interest is for the benefit of the public under Pennsylvania charities law, not UPMC privately. UPMC has received ample notice and is taking complete advantage of the opportunity to be heard *in two venues* – the Commonwealth Court and duplicatively, here in the Middle District. UPMC's procedural due process claim should be dismissed.

e. UPMC's Substantive Due Process Claim Must Fail.

UPMC's substantive due process claim is based on identical allegations and it, too, must fail as a matter of law. (*See* Doc. 1, ¶¶ 232-239). To establish a substantive due process claim, a plaintiff must prove that (1) it has a constitutional interest that is protected by the substantive due process clause; and (2) that the government's deprivation of the plaintiff's interest shocks the conscience. *See United Artists Theatre Circuit, Inc. v. Township of Warrington, PA* 316 F.3d 392, 400–02 (3rd Cir. 2003). For such a constitutional deprivation to shock the conscience, "only the most egregious official conduct" qualifies. *Id.* at 400 (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 845-46 (1998).

As set forth above, the "freedom of contractual relations" claimed by UPMC is not a constitutional interest that is protected by the substantive due process clause. And, the Proposed Modified Consent Decree – which the OAG is seeking pursuant to the negotiated contractual framework expressly agreed to by UPMC –

in no way rises to "the most egregious official conduct." Indeed, the Attorney General has done nothing more than file a petition seeking relief from the Commonwealth Court, where this matter properly belongs.

For these reasons, UPMC's substantive due process claim, like the others, should be dismissed as a matter of law.

V. CONCLUSION

For the forgoing reasons, General Shapiro's Motion to Dismiss should be granted and UPMC's Complaint should be dismissed with prejudice.

Respectfully submitted,

JOSH SHAPIRO
Attorney General

By: *s/ Jonathan Scott Goldman*
JONATHAN SCOTT GOLDMAN
Executive Deputy Attorney General
Civil Law Division
Attorney ID 93909

KELI M. NEARY
Chief Deputy Attorney General
Civil Litigation Section
Attorney ID 205178

CALEB C. ENERSON
Deputy Attorney General
Civil Litigation Section
Attorney ID 313832

Office of Attorney General
15th Floor, Strawberry Square
Harrisburg, PA 17120
Phone: (717) 787-8058
jgoldman@attorneygeneral.gov

Date: March 15, 2019

ALEXANDER T. KORN
Deputy Attorney General
Civil Litigation Section
Attorney ID 323957

JAMES A. DONAHUE, III
Executive Deputy Attorney General
Public Protection Division
Attorney ID 42624

MARK A. PACELLA
Chief Deputy Attorney General
Charitable Trusts and Organizations Section
Attorney ID 42214

TRACY W. WERTZ
Chief Deputy Attorney General
Antitrust Section
Attorney ID 69164

CERTIFICATE OF WORD COUNT

I, Jonathan Scott Goldman, Executive Deputy Attorney General, hereby certify that this brief contains 7,736 words within the meaning of Local Rule 7.8(b)(2). In making this certificate, I have relied on the word count of the word processing system used to prepare the brief.

/s/ Jonathan Scott Goldman
JONATHAN SCOTT GOLDMAN
Executive Deputy Attorney General

CERTIFICATE OF SERVICE

I, Jonathan Scott Goldman, Executive Deputy Attorney General for the Commonwealth of Pennsylvania, Office of Attorney General, hereby certify that on March 15, 2019, I caused to be served foregoing document titled Defendant's Brief in Support of Motion to Dismiss via ECF to the following:

Leon F. DeJulius, Esquire
JONES DAY
500 Grant Street, Suite 4500
Pittsburgh, PA 15219
lfdejulius@jonesday.com

Jared D. Bayer, Esquire
Stephen A. Miller, Esquire
COZEN O'CONNOR
One Liberty Place
1650 Market Street, Suite 2800
Philadelphia, PA 19103
jbayer@cozen.com
smiller@cozen.com

s/ Jonathan Scott Goldman
JONATHAN SCOTT GOLDMAN
Executive Deputy Attorney General

EXHIBIT U

UPMC LIFE CHANGING MEDICINE

RESOLUTION

UPMC Board of Directors
June 12, 2013

It is therefore resolved as follows:

- UPMC cannot, in keeping with its central clinical and academic mission, its duty to protect and preserve its charitable assets, and its obligations to the communities it serves, enter into any extension of the existing commercial contracts, or any new commercial contracts, providing Highmark with in-network access to any current UPMC hospitals or physicians in Southwestern Pennsylvania beyond Children's Hospital of Pittsburgh of UPMC, Western Psychiatric Institute and Clinic, UPMC Northwest, UPMC Bedford Memorial and certain other services (including certain unique oncology services) as specified in the Mediated Agreement of July 1, 2012, and therefore will not do so;
- Management shall continue to enter into, or extend, commercially reasonable contracts with health insurers that do not own or control provider services that compete with UPMC's hospitals or physicians; and
- Management shall immediately attempt to engage Highmark in discussions regarding the transition that will take place between the date of this resolution and December 31, 2014, with the purposes of (1) providing all subscribers, patients, physicians, and employers with adequate, timely and accurate information on which to base the choices they will have; (2) ensure for the smooth and safe transfer of insurance coverage and patient care; and (3) provide for enhanced competition in the market for health insurance and the market for health services.

UPMC LIFE CHANGING MEDICINE

BACKGROUND STATEMENT

June 12, 2013

UPMC's Mission is **to serve our communities by providing outstanding patient care and to shape tomorrow's health system through clinical and technological innovation, research, and education**. Within the comparatively short life of UPMC, this critical Mission has been advanced with levels of effectiveness and impact that probably are unsurpassed in the history of modern American medicine. Today, UPMC is widely recognized as one of the top academic medical centers in the world. The beneficiaries of UPMC's success include the patients we serve, the communities in which we work and the health of human kind. Consider the following:

- The hospitals, physicians and other health care professionals of UPMC now meet the needs of millions of patients annually. By any measure, UPMC has become the clear provider-of-choice for those living in the communities it serves. UPMC also has made Western Pennsylvania a destination-of-choice for patients from other locations around the world who seek medical care for complex conditions.
- In partnership with the University of Pittsburgh, UPMC has pioneered new approaches to transplantation, heart disease, cancer, neurological diseases and injuries, orthopedic conditions, psychiatric disorders and other life-threatening conditions. This unique and critical partnership also has provided education and training for most of the region's physicians, nurses and other healthcare professionals.
- Nearly 60,000 people earn their livelihoods at UPMC, making it Pennsylvania's largest non-governmental employer, and the spending by UPMC and its employees has been a critical factor in restoring and preserving the region's economic health. The system's total economic impact on the region is estimated to be nearly $22 billion annually, making it the principal driver of Western Pennsylvania's new "meds and eds" economy. After the decline of the smokestack industries and the more recent Great Recession, UPMC buoyed the local economy and helped the region to avoid the devastating consequences suffered by other cities.
- In the past fiscal year alone, UPMC also provided more than $622 million in community benefits, including charity care, uncompensated care from government programs for the poor, community health improvement programs and donations, funding for medical research, and education for tomorrow's health care professionals. The vast majority of the care for the region's underserved and economically disadvantaged population is provided by UPMC, while its $100 million commitment to The Pittsburgh Promise stands as an unprecedented example of philanthropic re-investment in the people of the City that has long been its principal home.

The fiduciary responsibility to pursue and protect that Mission is ultimately entrusted to UPMC's Board of Directors, twenty-four unpaid volunteers representing a broad cross-section of the communities and constituencies it serves. Its Board

Continued

has ensured that UPMC provides innovative, high-quality, and cost-effective healthcare to the residents of Western Pennsylvania. It is a Board that also has been consistently attentive to risk – being mindful, in particular, of lessons from the recent history of healthcare in Western Pennsylvania, lessons that are telling but that, at least for some, seem to have been quickly, and perhaps conveniently, forgotten:

- As the original Allegheny General Hospital, a highly respected Pittsburgh institution with a long and proud history, became the Allegheny Health Education and Research Foundation, its operations were jeopardized by a flawed business strategy, poor management decisions, and questionable oversight. The result was the largest bankruptcy in American healthcare history, a series of criminal prosecutions, the loss of tens of millions of Western Pennsylvania dollars and thousands of Western Pennsylvania jobs, and permanent damage to what had been the Allegheny General Hospital.
- When the Board and management of the Western Pennsylvania Hospital assumed the role of "white knight" in saving what was left of the Allegheny General Hospital, their intentions almost certainly were noble. However, an objective look at the financial circumstances of these two institutions strongly suggested that West Penn lacked the strength to assume that responsibility and that the weight of Allegheny General inevitably would quickly pull West Penn, another institution with a long and proud history, into financial jeopardy, which it did.
- Meanwhile Highmark repeatedly tried to support and subsidize the new West Penn Allegheny Health System, over time infusing hundreds of millions of dollars into it. As now is absolutely clear, these subsidies did not rescue West Penn Allegheny from the financial difficulties that were the product of its own management decisions. However, by distorting the competitive environment, those subsidies caused lasting damage to other regional hospitals. St. Francis Hospital, which had been in operation since 1861 and which had particularly distinguished itself as a provider of compassionate psychiatric care and mental health services, did not survive. Mercy Hospital, the city's only remaining Catholic hospital, no longer could sustain itself and asked to become a part of UPMC under an arrangement that helped preserve its distinctive Catholic mission.

Throughout these tumultuous times, though regularly targeted by both Highmark and West Penn Allegheny, UPMC held fast to its mission, which the Board pursued with focus and foresight. A prime example of the Board's stewardship was the creation, fifteen years ago, of the UPMC Health Plan, which over the years has transformed UPMC into an integrated health system. By design, integrated health systems create provider networks that compete on quality, cost and member satisfaction when compared to traditional insurers that instead offer broad networks less attuned to clinical innovation, service, and cost. At its founding, moreover, the UPMC Health Plan emerged as the first real insurance competitor in a market historically dominated by Highmark.

When the UPMC Health Plan was formed, numerous critics, including Highmark, publicly contended that this integrated model could not and would not work—that UPMC was destined to be "another AHERF." But the Board's integrated strategy has been repeatedly confirmed as UPMC has thrived while other respected medical

Continued

institutions in this region have struggled and sometimes failed. Indeed, nationally recognized experts today encourage providers to create financing arms, take on financial risk, and align internal incentives up and down their organizations — actions already taken by UPMC. These experts, supported by the new health reform legislation, now further promote vertical integration and vigorous competition as ways to limit the cost of healthcare and enhance value.

Given these trends, it was perhaps not surprising that two years ago Highmark reversed its longstanding condemnation of UPMC's integrated model and announced its own plan to become an integrated health system by acquiring the financially troubled West Penn Allegheny Health System. Highmark's expressed intention was, and has remained, to resurrect West Penn Allegheny as a competitor to UPMC and to put the full weight of its insurance monopoly behind this new competitor.

UPMC, consistent with its responsibilities to its patients and to the broader community, immediately advised the public of the impending expiration of the contracts allowing Highmark to include UPMC facilities and physicians in its network and specified that a renewal of those contracts would not be possible were Highmark to acquire West Penn Allegheny and reposition itself as a competing provider, both because it would put UPMC at risk and because it would undermine the very competition that should benefit the region, as a driver of even higher levels of quality and of lower cost. Then, as now, UPMC recognized the potential to move Western Pennsylvania from among the least competitive healthcare markets, with a dominant insurer and a dominant provider, to one of the most competitive, with two integrated health systems competing on the basis of quality, service, and cost, and at least three national insurers offering in-network access to both systems.

By mid-2012, with the end of the Highmark/UPMC contracts looming, Highmark and West Penn Allegheny had still not completed their proposed combination. At the Governor's behest, UPMC and Highmark therefore entered into a Mediated Agreement that extended the contracts between them until December 31, 2014, specifically to "provide for sufficient and definite time for patients to make appropriate arrangements for their care and eliminate the need for governmental intervention" when the contracts expired. As one part of that agreement and consistent with its commitments to patients and community, UPMC agreed that after 2014 Highmark subscribers would continue to have in-network access to various unique facilities and services at UPMC, including Children's Hospital, Western Psychiatric Institute and Clinic, certain oncology services not available at West Penn Allegheny, and two facilities that are essentially the sole providers of hospital services in their communities, UPMC Northwest Hospital and UPMC Bedford Memorial Hospital.

The Pennsylvania Insurance Department ultimately approved Highmark's proposal to acquire West Penn Allegheny on April 29, 2013, **an approval built on a Highmark plan that assumed no further contract extension with UPMC**. Highmark and West Penn Allegheny closed their transaction that same day.

As Highmark, UPMC, and the community in general approach this newly competitive market for what is perhaps the most personal, sensitive, and important service of all—health care—no one can afford to ignore demographic or medical reality. Southwestern Pennsylvania, where all of West Penn Allegheny's

Continued

facilities are located, has a significant surplus of hospital beds, the product of a stable or declining population combined with advances in medical care that have reduced the need for acute admissions. As a result, any effort to increase patient admissions at one hospital will succeed only at the expense of other hospitals—a reality the consultants retained by the Pennsylvania Insurance Department described as a "zero sum game."

In the face of that reality, Highmark has put forward a business plan that requires it to increase admissions at West Penn Allegheny's hospitals by 41,000 patients per year. As the St. Francis and Mercy experiences suggest, some of those patients could come from community hospitals. In dealing with that large number, however, Highmark has made no secret of where it intends to get the vast majority of those admissions: UPMC.

As to how it would shift tens of thousands of patients per year from the UPMC doctors and hospitals that have been historically—and overwhelmingly—preferred to West Penn Allegheny's offerings, Highmark has presented two alternative plans. Highmark's "Base Case," as proposed to the Pennsylvania Insurance Department, assumes that it will have no contracts—commercial or Medicare—with UPMC after 2014 and that its subscribers will therefore not have the option of going to UPMC hospitals or physicians in network. According to Highmark, the vast majority of the "contestable volume" of patients in that Base Case will switch to West Penn Allegheny providers rather than change their insurer to keep UPMC in network. Whether or not Highmark's Base Case assumptions are sound can only be determined in the competitive marketplace. However, it is important to note that this Base Case with no UPMC contract was accepted by the Insurance Department—with extensive conditions and monitoring to assure that Highmark meets the expectations it has created. Among those conditions is one requiring Highmark to seek Insurance Department approval before signing any contract that it might offer UPMC, to ensure that, should UPMC ever agree to such a contract, it would not impair the recovery of West Penn Allegheny or otherwise lessen competition among either insurers or providers.

In fact, Highmark's alternative business plan assumes that any new contract with UPMC would, unlike the current contracts, permit Highmark to use economic incentives to "tier and steer" Highmark's subscribers away from UPMC and into the West Penn Allegheny Health System. Highmark has given these contractual provisions the appealing, but misleading, name "consumer choice initiatives," because as Highmark has already demonstrated any "choice" it might provide to its subscribers would be illusory.

In what would amount to a classic bait and switch, Highmark would lure employers and subscribers into new contracts or contract renewals with the illusion of in-network access to UPMC only to use tiers, co-pays, co-insurance, deductibles and the like to steer those subscribers over to West Penn Allegheny. While Highmark has said that it would tier and steer based on differences in "cost and quality," even those pressures would undermine patient choice. Nor could UPMC ever rely on Highmark to gauge "cost and quality" fairly and objectively, particularly where Highmark's announced intention is to drive an additional 41,000 patients every year away from UPMC and into West Penn Allegheny.

Highmark simply has no option but to force its subscribers toward West Penn Allegheny; over the

Continued

last decade, those subscribers have overwhelmingly chosen UPMC when given an unfettered choice. That is why Highmark has outlined only two business plans supporting a rescue of West Penn Allegheny: its base plan in which its subscribers would have no in-network access to UPMC and therefore would have to use West Penn Allegheny, and its alternative plan, where its subscribers would be offered the illusion of access to UPMC only to be steered to West Penn Allegheny.

Clearly UPMC could not responsibly sign contracts giving Highmark the free use of anti-competitive weapons to harm UPMC. The diversion of 41,000 patients per year from UPMC's system would be the equivalent, for example, of closing both UPMC Mercy and UPMC Shadyside, with the attendant loss of approximately 11,000 jobs. Nor could UPMC, as a committed healthcare provider, willingly allow Highmark to discourage patients from using the hospitals and physicians they overwhelmingly prefer. Indeed, Compass-Lexecon, the consultants retained by the Insurance Department, recognized that it would be "unreasonable" to assume that UPMC would enter into the contracts proposed by Highmark.

Were Highmark to divert tens of thousands of patients away from UPMC and into West Penn Allegheny, UPMC would be greatly diminished. It could no longer invest more than $250 million in annual support of cutting edge research, education and training at the University of Pittsburgh. Nor could it make commitments to initiatives like the Pittsburgh Promise, which is investing $100 million of UPMC funds in an unprecedented opportunity for economically challenged families to send their children to college and as an incentive for families to remain in Pittsburgh. It could no longer invest more than $500 million per year in capital projects creating facilities and jobs in Pittsburgh. It could no longer provide care to the vast majority of the underprivileged and underserved. If Highmark wants to inflict that kind of damage on one of the world's best health systems and on the constituents and communities that it serves, it should have to do that by competing, integrated health system to integrated health system, without seeking to create yet another uncompetitive market by handicapping its chief competitor.

UPMC's Board owes a fiduciary obligation to preserve and protect the charitable assets that have been entrusted to it and to ensure that those charitable assets are managed and deployed in pursuit of UPMC's Mission. Highmark's announced plan to steer tens of thousands of admissions away from UPMC's hospitals in Southwestern Pennsylvania poses a direct, substantial threat to UPMC's charitable assets, to its clinical and academic mission, to its role as the economic driver of the region, and to its ability to provide future benefits to the community. Highmark's opportunity to deliver on that devastating plan would be greatly enhanced were it to secure contracts capturing UPMC's hospitals and its physicians within its network after December 31, 2014, particularly if any such contracts allowed Highmark to impede its subscriber's access to UPMC's hospitals and steer them instead into its newly formed health network.

Any concerns, moreover, about continued access to the unique community assets managed by UPMC have already been addressed in the Mediated Agreement, which provides for Highmark subscribers to have in-network access to certain UPMC specialty hospitals, certain unique oncology services, certain "sole-provider" hospitals, certain services at non-UPMC facilities under joint ventures, and certain services provided by UPMC physicians

Continued

at non-UPMC locations or facilities, even after the existing commercial contracts expire on December 31, 2014.

Meanwhile, enhanced competition in both the insurance market and the provider market positions Western Pennsylvania to maintain high quality and affordable healthcare. There will be at least five choices of insurance sponsors available to consumers and businesses, including the UPMC Health Plan, rated as having the highest quality and consumer satisfaction of commercial plans in western Pennsylvania and having at its core UPMC's world class providers. Highmark, meanwhile, will offer plans centered on West Penn Allegheny and designed to entice patients away from UPMC. National insurers, including Aetna, Cigna, and United Healthcare, and others, already are offering and will continue to offer access to both UPMC providers and Highmark providers. Although the Pittsburgh market had long been a competitive outlier without either vibrant national carriers or consumers accustomed to shopping for less costly insurance alternatives, the region's employers and consumers have more recently been the beneficiaries of a price war that will save them tens of millions of dollars on health insurance premiums.

Finally, eighteen months is a reasonable amount of time for Highmark and UPMC to negotiate and implement a transition plan that would allow everyone affected by this development to adapt to and make informed decisions about that transition. Numerous employers are already offering their employees insurance options that will include full, in-network access to UPMC after 2014; others will follow suit once it becomes clear that the current contracts will, in fact, expire. No further time should be wasted, however, in making that expiration clear and in moving forward with the appropriate transition.

SYS409129 JAB/LY 06-13-13