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334 MD 2014

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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

UPMC'S RESPONSE IN OPPOSITION TO THE ATTORNEY GENERAL'S APPLICATION TO QUASH SUBPOENA AND FOR A PROTECTIVE ORDER

General Shapiro's motion to quash assumes that UPMC seeks to depose Jim Donahue in his capacity as lead counsel for the Attorney General in this action — i.e., as to privileged matter concerning litigation strategy, mental impressions and conclusions, and confidential attorney-client privileged communications. That is wrong: It fundamentally mischaracterizes Mr. Donahue's long first-hand personal involvement in the underlying facts and events relevant to this action.

Contrary to General Shapiro's contention, UPMC intends to depose Mr. Donahue as a percipient witness with first-hand personal knowledge of the pre-Petition to Modify facts and events that are central to the claims against UPMC and its defenses. Simply put, Mr. Donahue was the lead investigator into the underlying facts and a principal participant in the meetings, conversations, and negotiations with UPMC, Highmark, and others from 2011 onward (a) that gave rise to the June 27, 2014 reciprocal consent decrees (which are collectively referred to as the "Consent Decree"), (b) concerning the proposed modifications General Shapiro now seeks in this case (the "Proposed Modifications"), and (c) he has also made statements and given sworn

testimony concerning the underlying facts and the limits of the authority of the Attorney General. All of these investigations, communications, statements, and testimony were with or in the presence of third parties; they are not privileged, and there is no better witness to testify as to what took place, what he said and was told, than Mr. Donahue himself. General Shapiro cannot hide his negotiator from discovery after initiating a legal action against UPMC challenging the meaning of the Consent Decree.

Importantly, contrary to General Shapiro's contention, UPMC has not just "steamrolled forward, demanding the deposition under oath of the Commonwealth's longtime lead counsel." (Appl. at 1.) For example, UPMC offered to stipulate the substance of one such communication on which it intends to depose Mr. Donahue — namely, a chambers conference in which Judge Dan Pellegrini told Mr. Donahue that he needed to proceed in that hearing, if ever, on a modification theory to extend the Consent Decree because he would not be allowed to come back later on that ground. (UPMC's proposed stipulation is attached as Exhibit 1.) Mr. Donahue rejected that offer without explanation (attached as Exhibit 2), indicating that General Shapiro intends to dispute what happened in this conference, and presumably, in other meetings and communications where the Office of Attorney General ("OAG") made key admissions that contradict General Shapiro's allegations in the Petition. UPMC thus has to depose Mr. Donahue to develop a record of these facts. Moreover, given General Shapiro's decision to wait until the last minute and then file this case on an emergent basis — even though he has known since 2014 that the Consent Decree expires on June 30, 2019 — means that UPMC must pursue all necessary discovery on an expedited basis. It does not have the luxury of conducting extended paper discovery before taking depositions as might be appropriate with a standard case management schedule.

General Shapiro's application to quash and for a protective order should be denied, and UPMC should be permitted to depose Mr. Donahue (subject of course to the Attorney General's right to object to specific questions if they would reach legitimately privileged subject matter).

ARGUMENT

I. Under Pennsylvania Law, General Shapiro Bears The Burden Of Proof To Show "Good Cause" For The Protective Order He Requests.

The Pennsylvania Rules of Civil Procedure set forth particular circumstances in which leave of court is required to take a deposition, none of which are applicable here. Beyond those exceptions, "a deposition may be taken without leave of court." Pa. R. Civ. P. 4007.2.[1] Here, however, General Shapiro, relying on a disputed line of federal cases that has not been adopted by the Third Circuit or uniformly accepted by the Federal District Courts in Pennsylvania,[2] let alone by this Court, attempts to flip Rule 4007.2 on its head by requiring UPMC to bear the burden of proving the need for a discovery deposition, when, in fact, no leave of court is required to do so. The only way General Shapiro can prevent the deposition is by moving for a protective order under Rule 4012, in which case, the burden of proof properly lies with General Shapiro. Pa. R. Civ. P. 4012. As this Court has recognized, "protective orders are rare, disfavored, and

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[1] Leave of court is not required except as provided in Rules 1042.5 (relating to discovery in professional liability actions), 4003.5(a)(2) (relating to expert discovery), 4007.2(b) (relating to depositions noticed for a date prior to the expiration of 30 days from the service of original process), and 4007.2(d) (relating to depositions of prisoners).

[2] *Compare State Farm Mut. Auto. Ins. Co. v. Stavropolskiy*, No. 15-CV-5929, 2017 WL 3116284, at *2 (E.D. Pa. July 21, 2017) (following the "Shelton rule," which puts the burden on the party seeking to depose opposing counsel), *with In re Subpoena Issued to Dennis Friedman*, 350 F.3d 65, 72 (2d Cir. 2003) (rejecting the "Shelton rule" and instead applying a "flexible approach" that "takes into consideration all of the relevant facts and circumstances" including "the need to depose the lawyer, the lawyer's role in connection with the matter on which discovery is sought and in relation to the pending litigation, the risk of encountering privilege and work-product issues, and the extent of discovery already conducted"); *see also Cambs v. Am. Express Co., Inc.*, No. CV 15-428, 2016 WL 4735022, at *2 (E.D. Pa. Sept. 12, 2016) (acknowledging that the Third Circuit has yet to adopt the "Shelton rule" and that it has not applied the "Shelton rule" in all cases).

require the party seeking a protective order to shoulder a heavy burden, which includes a particularized, fact intensive showing of the necessity of the order." *Office of the Dist. Attorney of Philadelphia v. Bagwell*, 155 A.3d 1119, 1136–37 (Pa. Commw. Ct. 2017) (emphasis added). This is a burden General Shapiro cannot carry.

II. Mr. Donahue Is A Percipient Witness With Relevant First-Hand Personal Knowledge.

We are unaware of any Pennsylvania appellate court decision that has analyzed the circumstances when the deposition of an opposing party's attorney should be precluded under Rule 4012. However, several Federal Courts addressing the question have, just as Rule 4012 does, placed the burden on the objecting party "to show that the deposition would cause undue burden or oppression." *Adeniyi-Jones v. State Farm Mut. Auto. Co.*, No. 14-7101, 2015 WL 6180965, at *1 (E.D. Pa. Oct. 21, 2015) (quoting *Frazier v. Se. Pa. Transp. Auth.*, 161 F.R.D. 309, 313 (E.D. Pa. 1995)).

To that end, there is no undue burden or oppression and "*[a] deposition of counsel is appropriate where 'the attorney's conduct itself is the basis of a claim or defense, [and] there is little doubt that the attorney may be examined as any other witness.*'" *Adeniyi-Jones*, 2015 WL 6180965 at *1 (emphasis added) (quoting *Johnston Dev. Grp., Inc. v. Carpenters Local Union No. 1578*, 130 F.R.D. 348, 352 (D.N.J. 1990). "The fact that the proposed deponent is an attorney for one of the parties in the case is clearly not enough, by itself, to justify granting in full the motion for a protective order." *Frazier v. Se. Pennsylvania Transp. Auth.*, 161 F.R.D. 309, 313 (E.D. Pa. 1995).

For example, in *Adeniyi-Jones* the attorney was personally involved in the central events at issue in the case, which involved an insurance bad faith claim against State Farm that centered on the parties' pre-suit communications concerning the plaintiffs' claims. *Adeniyi-Jones*, 2015

WL 6180965 at *1. The plaintiffs' counsel had been the principal speaker for the plaintiffs in these communications. *Id.* State Farm sought to depose counsel "with respect to discussions that she had with State Farm's claims adjuster concerning the plaintiffs' insurance claim before filing this lawsuit" which were "central factual issues relevant to the plaintiffs' allegation in this lawsuit that State Farm acted in bad faith in negotiating settlement of their insurance claim." *Id.* The plaintiffs' counsel moreover disputed State Farm's characterization of the conversations, setting up a contested factual issue. *Id.* The Court allowed the deposition of counsel because, *inter alia*, "the attorney's conduct itself [was] the basis of a claim or defense." *Id.* It further stated: "Even where a conversation takes place among a handful of individuals, each individual's unique perspective is independently discoverable." *Id.*; *see Johnston Dev. Grp.*, 130 F.R.D. at 353.

Similar to *Adeniyi-Jones*, Mr. Donahue was personally involved and a primary participant in the underlying events at issue. He negotiated the Consent Decree on behalf of the OAG, and General Shapiro is now suing UPMC challenging the meaning of the Consent Decree, including particularly the modification provision that Mr. Donahue negotiated. Mr. Donahue has since then been directly involved as the lead investigator, negotiator, speaker, and public advocate for the OAG in all of the matters that followed the Consent Decree and the Proposed Modifications.

In *Frazier*, the plaintiff asserted an action against a state transportation agency, alleging that the surveillance it conducted of her in her prior, unsuccessful personal injury action against the agency violated certain of her constitutionally protected rights. *Frazier*, 161 F.R.D. at 313. The transportation agency sought to depose the plaintiff's counsel (who represented plaintiff both in the underlying case and the case before the court) concerning his knowledge of the nature

and extent of the surveillance conducted, discussions he undertook with various person regarding the surveillance, and his knowledge of potential witnesses to the surveillance. *Id.* As in *Adeniyi-Jones*, the court compelled the plaintiff's counsel deposition, finding that the lines of inquiry were "directly related" to the plaintiff's case. In doing so, the court explicitly rejected the notion that the transportation agency was under a duty to show that the information sought was only available from the plaintiff's attorney. Rather, the "onus [was] on [the plaintiff] to show that the information [was] so readily available from other sources that an order compelling [her attorney's] deposition would be oppressive," which the plaintiff failed to do. *Id.* at 313-314.

Similarly, in *Premium Payment Plan v. Shannon Cab Co.*, the central issue in the case was whether the taxi company breached a contract to finance payment of insurance premiums owed by the company. 268 F.R.D. 203, 204 (E.D. Pa. 2010). The taxi company's attorney had "close involvement" with the business dealings of the plaintiff, including critical communications with third parties concerning payment on the contract at issue. *Id.* at 205. Because he had such "close involvement" with matters central to the claim at issue, the court found that the deposition was proper. *Id.*

Analogous to *Frazier* and *Shannon Cab*, Mr. Donahue was closely and directly involved in the central underlying events. He was the principal negotiator of the Consent Decree and the lead investigator, negotiator, speaker, and public advocate for the OAG in all of the matters that followed the Consent Decree and the Proposed Modifications.

UPMC here seeks to depose Mr. Donahue concerning exactly the same types of things that the courts found appropriate in *Adeniyi-Jones*, *Frazier*, and *Shannon Cab* — that is, Mr. Donahue's personal investigation of the facts, his personal involvement as lead negotiator of the Consent Decree, and his personal involvement in meetings, communications, statements, and

testimony by or involving him on the subjects of the Consent Decree, Proposed Modifications, and UPMC/Highmark provider contracting. Specifically:

(1) Mr. Donahue played a leading role on behalf of the OAG in negotiating the Consent Decree with UPMC and Highmark, which involved a number of meetings, conversations, and communications back-and-forth with UPMC, Highmark, and other Commonwealth executive departments. This includes, among others, a meeting with UPMC on April 29, 2014, in which OAG representatives, including Mr. Donahue, made numerous statements and admissions that contradict allegations General Shapiro is making and positions he is taking now in the Petition.

(2) Mr. Donahue similarly played a leading role in the meetings and discussions with UPMC, Highmark, and (we believe) a number of other third parties lobbying for or concerning the Proposed Modifications. This includes, among others, meetings or communications with UPMC on October 17, 2014 and November 26, 2018, in which OAG representatives, including Mr. Donahue, made numerous statements and admissions that contradict allegations General Shapiro is now making and positions he is now taking in the Petition.

(3) Mr. Donahue was one of the OAG's chief public advocates of both the Consent Decree and the Proposed Modifications, attending public meetings and forums, and making statements and discussing the Consent Decree and Proposed Modifications, and the reasons therefor.

(4) Mr. Donahue was a first-hand participant in conferences and court proceedings in prior enforcement actions. This includes a conference that took place in chambers on January 17, 2018 before Judge Pellegrini, where the Judge raised the question of whether the Attorney General intended to seek to extend the term of the Consent Decree through the modification provision, and instructed the OAG to present evidence and proceed on that claim in that hearing,

if ever, because the OAG "can't come back later" to seek extension of the Consent Decree by modification. Indeed, the substance of what was said in this conference was the subject of UPMC's proposed stipulation, which Mr. Donahue refused without explanation, (*see* Exhibits 1-2), demonstrating (a) that General Shapiro may dispute many of the statements and communications as to which UPMC seeks to depose Mr. Donahue, and (b) that UPMC must accordingly depose Mr. Donahue to make the record it needs to attack the claims made.

(5) Mr. Donahue gave public (and perhaps non-publicized) testimony and statements to members of the Pennsylvania legislature (and others) concerning the Consent Decree and the fact that General Shapiro has no legal authority to force UPMC to contract with Highmark, the principal relief it now seeks. Among other statements/testimony, on October 10, 2014, Mr. Donahue testified under oath at a public hearing:

> The simple question we faced was could we force UPMC and Highmark to contract with each other? We concluded that we could not for several reasons. First, there is no statutory basis to make UPMC and Highmark contract with each other. . . . Second, the disputes that we see here that exist between Highmark and UPMC are similar to although less publicly known than disputes between health plans and hospitals around the country. These disputes over how, what the terms of contracts are go on every day and there are very vigorous and acrimonious disputes going on with many hospital systems and many health plans throughout the Commonwealth. If we forced a resolution in this case we really could not avoid trying to force a similar resolution in all those other situations and that is just simply an unworkable method of dealing with these problems. Third, the contracting process involves two parties willingly coming to an agreement. By us trying to force the parties to enter into an agreement we would be putting our finger on the scale so to speak and having effects that we aren't quite sure what those effects would be. And in particular we wouldn't be sure about what the price effects that we would impose would be. In contract negotiations one of the key things is that each party has the ability to walk away from the negotiations. That ability to walk away forces each side to be reasonable in most circumstances, putting our finger on the scale in favor of one side or the other changes that dynamic in ways that are unpredictable.

> And one of the key things here in most contract negotiations is price, and price is at the heart of the dispute between Highmark and UPMC, and there is no mechanism in Pennsylvania for resolving this price dispute.

(6) Mr. Donahue authored and signed on to briefs and other documents filed on behalf of the Attorney General of record in other litigation taking positions concerning the healthcare industry and benefits of competition in the healthcare industry in Pennsylvania contrary to the "modifications" now proposed. For example, in the Pinnacle/Hershey merger litigation (*Federal Trade Comm'n v. Penn State Hershey Medical Ctr., et al.*, No 16-2365 (3d Cir.)), the Attorney General opposed a merger of two hospital systems, taking the position directly contrary to those taken in this case that:

> Competition between hospitals leads to both lower prices (as described immediately below) and to improvements in quality of care and service to patients.... Prices are negotiated between each hospital and health insurance company. Like any business deal, both sides have some amount of bargaining power, or "leverage," and the agreement reached depends on the relative strengths of that leverage.

In sum, Mr. Donahue is a percipient witness who was the lead investigator into the underlying facts and a participant in nearly a decade of meetings, communications, statements, and testimony concerning the Consent Decree and Proposed Modifications. He personally made a number of statements and admissions that directly contradict the allegations being made and positions being taken by General Shapiro in the Petition. UPMC is entitled to depose Mr. Donahue on these matters, of which he has first-hand personal knowledge, and which are central to UPMC's defenses in this case, such as: (a) the modification provision in the Consent Decree, which Mr. Donahue personally negotiated; (b) the Attorney General's lack of legal authority to force UPMC and Highmark to contract, which Mr. Donahue has testified to publicly and stated several times to UPMC; and (c) the factual basis for the allegations in the Petition, for which Mr.

Donahue was the principal investigator. It is absolutely critical for UPMC to be able to make a record of these facts (and/or learn if they are disputed so that UPMC can marshal contrary evidence for trial) in order to present its defenses. General Shapiro's application should be denied and UPMC allowed to proceed with the deposition of Mr. Donahue now, subject to privilege objections if proper.

III. UPMC Is Entitled To Depose Mr. Donahue, The OAG's Longtime Chief Representative For UPMC/Highmark Contracting Issues, Concerning The Factual Basis For The Allegations In The Petition.

General Shapiro is the petitioning party in this matter, and the Attorney General made numerous factual allegations in its Petition that are unfounded and which UPMC demanded in a Rule 1023 letter, attached as Exhibit 3, that General Shapiro withdraw (but which, to date, he has not withdrawn). UPMC is entitled to discover the facts (if any) upon which these allegations are based, including specifically the factual basis for the allegations at the time of filing of the Petition. Pa. R. Civ. P. 4003.1(a). Surely General Shapiro cannot dispute that.

As is clear from the recitation of Mr. Donahue's long and detailed first-hand personal involvement in the years of negotiations concerning UPMC/Highmark contracting, and General Shapiro's admission in his application for relief (at 2), Mr. Donahue was the OAG's lead representative for UPMC/Highmark contracting matters. As such, Mr. Donahue is highly likely to be knowledgeable of the facts upon which General Shapiro's allegations in the Petition are based. UPMC is entitled to discovery on the factual basis for General Shapiro's allegations, and Mr. Donahue is an appropriate and necessary deponent. General Shapiro's application should be denied and UPMC allowed to proceed with the deposition of Mr. Donahue now.

IV. General Shapiro's Broadly-Asserted Privilege Claims Are Unfounded; Any Legitimate Privilege Claims Can Be Asserted At The Time Of The Deposition.

General Shapiro in his application broadly claims that any questioning of Mr. Donahue is precluded by the work-product doctrine, attorney-client privilege, deliberative process privilege, and investigative privilege. Given Mr. Donahue's long and detailed first-hand personal involvement in the years of negotiations concerning UPMC/Highmark contracting issues and the numerous clearly non-privileged third-party communications on which UPMC intends to depose him, General Shapiro's broad-brush privilege claims are unfounded, and any claim of privilege is premature. General Shapiro will have the opportunity at the time of the deposition to object to specific questions if they would reach legitimately privileged subject matter, and those objections can be dealt with in due course.

A. UPMC Is Not Seeking Discovery Of The Attorney General's Work Product.

To be clear, UPMC is not seeking to depose Mr. Donahue on his mental impressions of the claims. Rather, UPMC intends to question Mr. Donahue concerning his communications with and statements to third parties, as well as the factual basis for the allegations against UPMC in General Shapiro's Petition. Some of Mr. Donahue's analysis and mental impressions and conclusions may be work product, but it is clear under the law that the underlying facts themselves are not. *Bagwell v. Pa. Dep't of Educ.*, 103 A.3d 409, 415 (Pa. Commw. Ct. 2014). "[W]ork-product privilege only applies to records that are the work-product of an attorney… Neither privilege [attorney-client or work-product] protects mere facts." *Id.* (emphasis added) (citing *Upjohn Co. v. United States*, 449 U.S. 383 (1981)). UPMC is entitled to depose Mr. Donahue concerning these underlying facts; it is not asking for his internal memoranda containing his mental impressions and conclusions in anticipation of litigation, so the work-product doctrine does not apply.

B. UPMC Is Not Seeking To Question Mr. Donahue About His Confidential Client Communications Regarding The Provision Of Legal Advice.

The attorney-client privilege only protects confidential attorney-client communications made for purposes of seeking or providing legal advice. *Gillard v. AIG Ins. Co.*, 15 A.3d 44, 59 (Pa. 2011). UPMC does not intend to question Mr. Donahue about his confidential communications with his client for the purpose of rendering legal advice. Rather, UPMC intends to question Mr. Donahue about his discussions with and statements to third parties — like Highmark, UPMC, the General Assembly, and anyone else outside of the OAG, including the Pennsylvania Insurance Department ("PID") and Department of Health ("DOH")[3] — as well as the factual basis for the allegations in General Shapiro's Petition. By definition such third-party communications are not attorney-client privileged because they are not confidential, attorney-client communications seeking or rendering legal advice, *Gillard*, 15 A.3d at 59, and the factual basis for the allegations in the Petition cannot be privileged because the attorney-client privilege does not shield "mere facts," *Bagwell*, 103 A.3d at 415. Accordingly, the attorney-client privilege does not broadly preclude the deposition of Mr. Donahue.

C. The Deliberative Process And Investigative Privileges Have Not Been Sufficiently Invoked And Do Not Apply.

1. The Deliberative Process And Investigative Privileges Can Only Be Invoked By General Shapiro Himself Upon His Personal Review And Attestation As To Privilege.

There are specific procedural requirements to invoke the deliberative process and investigative privileges; they cannot just be breezily claimed in an unverified application for relief. According to the authority relied on by the Attorney General to assert these privileges in

[3] PID and DOH participated in the negotiation of the Consent Decree and post-Consent Decree matters in their own stead, *not* represented by the OAG as counsel. In fact, PID and DOH were each represented by their own counsel. Communications between the OAG and PID or DOH as to the Consent Decree, Proposed Modifications, or UPMC/Highmark contracting are thus not attorney-client communications.

his application for relief, invocation of either privilege requires "a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer." *Chisler v. Johnston*, 796 F. Supp. 2d 632, 638 (W.D. Pa. 2011) (quoting *U.S. v. Reynolds*, 345 U.S. 1 (1953)); *Black v. Sheraton Corp. of America*, 564 F.2d 531, 543 (D.C. Cir. 1977). As the D.C. Circuit explained in *Black*:

> We agree that where the executive seeks to withhold from the court documents relevant to a civil or criminal lawsuit, the claim of privilege must meet strict requirements. In that situation the court is relying on the affidavit of the responsible department head for the information pertinent to its decision concerning the privilege. It is therefore essential that the affidavit be based on actual personal consideration by the affiant official, that it specify the documents for which protection is sought, and that it explain why the specified documents properly fall within the scope of the privilege.

564 F.2d at 543.

The Attorney General failed to submit any affidavit by General Shapiro identifying the materials as to which privilege is claimed, stating that he has personally considered them, and that after his personal consideration, they are protected by the deliberative process and/or investigative privileges. Under General Shapiro's own cited authority, he has not properly invoked either privilege, and the assertion of deliberative process and investigative privilege should be rejected.

2. UPMC Is Not Asking For The OAG's Internal Deliberations Or Investigative Processes.

Even were the deliberative process or investigative privileges properly invoked, which they have not been, neither privilege applies.

"[T]he deliberative process privilege only extends to 'confidential deliberations of law or policymaking, reflecting opinions, recommendations or advice.'" *Chisler*, 796 F. Supp. 2d at 640 (quoting *In re Grand Jury*, 821 F.2d 946, 959 (3d Cir. 1987)). "The privilege does not extend to

factual information, even when that information is contained within an otherwise protectable document." *Id.* (emphasis added) (citing *In re Grand Jury*, 821 F.2d at 959). The investigative privilege is similarly limited to protection against "disclosure of documents that would tend to reveal law enforcement investigative techniques or sources." *Black*, 564 F.2d at 545.

Here, UPMC is not seeking production of documents revealing the OAG's internal deliberations or its law enforcement investigative techniques or sources. Instead, UPMC is seeking a deposition of Mr. Donahue about discussions with and statements to third parties and the factual basis for the allegations in General Shapiro's Petition. This does not implicate internal deliberations or investigative techniques at all; the deliberative process and investigative privileges do not apply.

V. UPMC Needs To Be Able To Depose Mr. Donahue Now.

Given General Shapiro's decision to wait until just a few months before the Consent Decree expires to file its Petition and request emergent relief, everything to prepare the case for trial must be expedited. By refusing to stipulate to what happened during the January 2018 conference with Judge Pellegrini, General Shapiro has telegraphed that he intends to dispute what happened in key conferences, meetings, communications, and testimony that are central to UPMC's defenses. UPMC must accordingly develop a record of the numerous critical admissions and statements by Mr. Donahue in order to defend itself in this case, and given the tight time constraints, must pursue all avenues of discovery – including the deposition of Mr. Donahue – now. The Court should deny General Shapiro's application to quash and allow UPMC to proceed with Mr. Donahue's deposition.

CONCLUSION

For all of the reasons set forth above, General Shapiro's application to quash the deposition subpoena to James A. Donahue, III and for a protective order should be denied and UPMC allowed to proceed with Mr. Donahue's deposition now.

Dated: March 18, 2019

Respectfully submitted,

COZEN O'CONNOR

/s/ Stephen A. Cozen

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of March, 2019, I submitted the foregoing Response in Opposition to the Attorney General's Application to Quash Subpoena and for a Protective Order for electronic service via the Court's electronic filing system on the following:

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EXHIBIT 1

COZEN O'CONNOR

February 25, 2019

VIA E-MAIL (JDONAHUE@ATTORNEYGENERAL.GOV)

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Re: Commonwealth of Pennsylvania, by Josh Shapiro, Attorney General, et al. v. UPMC, A Nonprofit Corp., et al., No. 334 M.D. 2014

Dear Counsel:

Please let me know by Wednesday, February 27, 2019, whether you will stipulate that the following facts occurred in an *in-camera* discussion with the Court on January 17, 2018 in the Medicare Advantage litigation in Commonwealth Court:

1) The January 17, 2018 *in-camera* conference took place in chambers in advance of a hearing on the Commonwealth's Petition to Enforce UPMC's Consent Decree. Among those in attendance were James Donahue and Mark Pacella for the Office of Attorney General ("OAG"), Daniel Booker representing Highmark, Leon DeJulius, Jr. and Anderson Bailey representing UPMC, and Amy Daubert representing the Pennsylvania Department of Insurance.

2) In the course of the *in-camera* conference, the judge raised the prospect of extending the expiration date of the Consent Decree through its modification provision. Counsel for OAG noted it might eventually seek such a modification. The Court instructed the OAG to produce any witnesses it had in support of modification, explaining that the parties "can't come back later" to seek extension of the Consent Decree. OAG did not produce any such witnesses or seek modification at that time.

Sincerely,

COZEN O'CONNOR

By: Stephen A. Cozen

SAC:adl

EXHIBIT 2

COMMONWEALTH OF PENNSYLVANIA
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February 27, 2019

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Re: Commonwealth of Pennsylvania v. UPMC, No. 334 M.D. 2014

Dear Steve:

The Commonwealth will not stipulate to the assertions made in your February 25, 2019 letter to me regarding the January 17, 2018 off the record conference in chambers.

Very truly yours

James A. Donahue. III
Executive Deputy Attorney General
Public Protection Division

EXHIBIT 3

COZEN O'CONNOR

February 21, 2019

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Re: Commonwealth of Pennsylvania by Josh Shapiro, Attorney General, et al. v. UPMC, A Nonprofit Corp., et al.

Dear Jim:

Pursuant to Rules 1023.1-1023.4 of the Pennsylvania Rules of Civil Procedure, we are providing you with notice of matters alleged in your Petition to Modify Consent Decrees that have no evidentiary support whatsoever, are not warranted by existing law or by a non-frivolous argument for the extension, modification or reversal of existing law, or appear to be included for an improper purpose. More specifically,

1. The OAG previously admitted that it cannot force UPMC to contract against its will. The basic premise of the OAG's Petition and the principal relief sought on each count is to force UPMC hospitals to enter into contracts with Highmark (and every other willing payor) and to force the UPMC Health Plan to enter into contracts with Allegheny Health Network (or any other willing provider) at rates and on terms determined by outside arbitrators, or to impose this regime by requiring UPMC to provide healthcare services to everyone, regardless of whether there is a provider contract, at in-network rates. But, the OAG has specifically admitted that it has no legal authority to force UPMC to contract with Highmark—that was the basis for the negotiating mutually-agreed reciprocal consent decrees with UPMC and Highmark (collectively the "Consent Decree") in the first instance. You moreover specifically testified to this before the Democratic Policy Committee of the Pennsylvania House of Representatives on October 10, 2014. In that testimony, you defended the Commonwealth's strategy in securing the Consent Decrees with UPMC and Highmark by explaining that the Commonwealth could not force UPMC to contract with Highmark or anyone else. You testified that the OAG evaluated whether it could "force UPMC and Highmark to contract with each other," and "concluded that we could not" because "there is no statutory basis to make UPMC and Highmark contract with each other." We called this testimony to your attention on January 31 and were therefore surprised to see the contrary assertions in your Petition when it was filed a week later. Any assertion that your office has the authority to compel contracts between UPMC and Highmark should therefore be withdrawn.

2. The core allegations in the Petition were released in the Consent Decree. As alleged in the Petition, the "Patients First Initiative" was formed by the Commonwealth "to resolve the disrupted health care and In-Network access issues presented" in 2014 by the impending end of UPMC's provider contracts with Highmark. (¶ 18.) The end result of that initiative was the Consent Decree, which comprehensively addressed the wind-down and eventual termination of the UPMC/Highmark relationship, and "release[d] any and all claims the OAG, PID or DOH brought or could have brought against UPMC for violations of any laws or regulations within their respective jurisdictions, including claims under laws governing non-profit corporations and charitable trusts, consumer protection laws, insurance laws and health laws relating to the facts alleged in the Petition for Review or encompassed within this Consent Decree for the period of July 1, 2012 to the date of filing." (Consent Decree §IV.C.5.) The OAG's Petition nonetheless rests almost entirely on a recitation of clearly released allegations, including:

    a. The dispute regarding Highmark's Community Blue plan, which occurred during 2013 and which was expressly resolved by the Consent Decree, (*see* Petition ¶¶ 16-18, 96, 103, 107, 118);

    b. Allegedly misleading marketing campaigns regarding access to UPMC physicians for Highmark subscribers, which occurred in the course of the Community Blue dispute. (*See id.* ¶ 17.) The Consent Decree expressly resolved and addressed this by requiring UPMC and Highmark to jointly pay into a Consumer Education Fund for the Commonwealth to inform consumers about the end of the UPMC/Highmark relationship, (Consent Decree § IV.B);

    c. The compensation of UPMC's executives and location of its headquarters, both of which were in place long before the Consent Decree went into effect on July 1, 2014, (*see* Petition ¶ 60);

    d. Various, allegedly revenue-increasing practices — including transferring procedures to specialty providers, charging provider-based fees, and charging Out-of-Network patients for the unreimbursed balance of the services they receive — all of which predated, and were specifically addressed by, the Consent Decree, (*see id.* ¶ 31; Consent Decree §§ IV.A.8 (regulating transfer of patients), IV.A.3 & IV.A.4 (regulating balance billing), & IV.C.1 (setting a schedule of billing rates in the absence of a negotiated rate)); and

    e. Most importantly, UPMC's refusal to contract with Highmark to provide In-Network access to Highmark enrollees. (*See* Petition ¶¶ 27-29, 106, 107, 117, 119.c.) As discussed above, the Consent Decree and the Mediated Agreement that predated it were occasioned by UPMC's decision to terminate its relationship with Highmark. (*See id.* ¶¶ 12-18.) The Consent Decree was put in place to implement the separation over time — UPMC's efforts to initiate that separation *necessarily preceded* and were covered in the Consent Decree.

Not only did your Petition not even mention the Release contained in the Consent Decrees it was seeking to "modify," it proposes a modified decree that deletes the

Release entirely. Clearly the failure of your Petition to account for the Release and the deletion of that Release from the proposed "modification" cannot be squared with good faith and should be rectified by withdrawal of those claims in the Petition that have been released.

3. The allegations regarding UPMC Susquehanna (¶¶ 38-41 & 104) have no evidentiary basis. The Petition alleges a sequence of events involving UPMC Susquehanna, PMF Industries (also referred to as "a Williamsport area manufacturing business"), and PMF's unnamed "insurer." (Petition ¶ 38.) It proceeds to allege that PMF "purchase[s] health insurance" for its employees from this "insurer," which in turn tries to contract with providers for "Reference Based Pricing." The refusal of UPMC Susquehanna to enter into these contracts with PMF or its insurer is then cited as a supposed violation of the Nonprofit Corporations Law ("NCL") and Unfair Trade Practices and Consumer Protection Law ("UTPCPL"). In fact, as you must know, PMF's "insurer," INDECS, is not an insurer at all, but rather a self-styled "third-party administrator" that does not engage in reference based pricing. It instead arbitrarily decides on an ad hoc basis how much to pay for a service already rendered to a patient without any reference to the hospital's charge, Medicare/Medicaid rates, or any other published rate schedule. It is moreover operated by a convicted felon and has been sanctioned for misconduct in both New Jersey and New York. The allegations regarding UPMC Susquehanna are false, have no evidentiary basis, and should be withdrawn.

4. The allegations regarding out-of-area BCBS companies (¶¶ 42-43) are false. The Petition alleges that UPMC "deci[ded] to not participate" in the networks of out-of-area Blue Cross Blue Shield ("BCBS") companies. That, as you must know, is false. In fact, UPMC has repeatedly offered to enter into full in-network provider contracts with these out-of-area BCBS companies, but they have refused to contract with UPMC because of the Blue Cross Blue Shield Association's ("BCBSA") illegal and anticompetitive market allocation rules for its affiliated companies, which are enforced in Western Pennsylvania by Highmark, precluding out-of-area BCBS companies from contracting with UPMC. UPMC is currently seeking an injunction in the U.S. District Court for the Northern District of Alabama against enforcement of those rules, which have been declared *per se* violations of the Sherman Act. UPMC demands that the OAG withdraw the false allegations in paragraphs 42-43, and would welcome the OAG to join in the effort to undo the BCBSA illegal market allocation compact.

5. The OAG contends that the expansion of UPMC (¶¶ 64-70) will allegedly harm more patients, but the OAG reviewed and did not object to these transactions. The Petition alleges that "[t]he effects on the public of UPMC's conduct were previously limited to the greater Pittsburgh area[, but] with its expansion across the Commonwealth, even more patients will experience these negative impacts," (Petition at 35), and that "its potential to deny care or increase costs will impact thousands more Pennsylvanians," (¶ 70). As the OAG knows, however, the refusal of certain UPMC hospitals to contract with Highmark is and always has been limited to Allegheny and Erie Counties, where Highmark owns and operates a competing hospital system, and thus does not extend to hospitals outside of those areas. Moreover, the OAG reviewed each of these transactions (up to and including the transaction with Somerset Hospital, which closed on February 1, 2019)

for compliance with both charitable trust law and antitrust law and, with the exception of Jameson Health System, made no objection. In the case of UPMC Jameson, moreover, the OAG litigated its objections and lost. The allegations concerning potential harm caused by UPMC's expansion are therefore unfounded and should be withdrawn.

To bring your filing into compliance with Rules 1023.1-1023.4, please withdraw or correct the above-noted errors within twenty-eight days of the date of this letter.

Sincerely,

COZEN O'CONNOR

By: Stephen A. Cozen

SAC:jdb