UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 09-4468

WEST PENN ALLEGHENY HEALTH SYSTEM, INC.,

Plaintiff-Appellant,

v.

UPMC and HIGHMARK, INC.

Defendants-Appellees.

On Appeal from an Order of the United States District Court for the Western District of Pennsylvania, No. 09-cv-0480 (Honorable Arthur J. Schwab)

BRIEF OF APPELLANT WEST PENN ALLEGHENY HEALTH SYSTEM, INC. AND JOINT APPENDIX, VOLUME I

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CORPORATE DISCLOSURE STATEMENT AND STATEMENT OF FINANCIAL INTEREST

Pursuant to Fed. R. App. P. 26.1 and L.A.R. 26.1, Appellant West Penn Allegheny Health System, Inc. makes the following disclosure:

1) For non-governmental corporate parties please list all parent corporations:

None.

2) For non-governmental corporate parties please list all publicly held companies that own 10% or more of the party's stock:

None. West Penn Allegheny Health System, Inc. is a non-stock, non-profit corporation.

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests.

None.

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy

proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

Not applicable – not a bankruptcy appeal.

/s/ Barak A. Bassman
Barak A. Bassman

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STATEMENT OF RELATED CASES

This case has not previously been before this Court. West Penn Allegheny in not aware of any other case or proceeding that is in any way related, completed, pending or about to be presented before this Court or any other court or agency.

STATEMENT OF JURISDICTION

The District Court had jurisdiction over the federal claims pursuant to 28 U.S.C. §§ 1331 and 1337(a), and supplemental jurisdiction over the state claims pursuant to 28 U.S.C. § 1367(a). The District Court dismissed the claims of West Penn Allegheny Health System, Inc. ("West Penn Allegheny") on October 29, 2009. West Penn Allegheny filed a Notice of Appeal on November 20, 2009. JA0001-0003. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Did the District Court fail to follow decisions of this Court when it found the Amended Complaint failed to state a claim for conspiracy under Sections 1 and 2 of the Sherman Act, viewing its averments as a whole and drawing all inferences in favor of West Penn Allegheny?

2. Did the District Court fail to follow decisions of this Court when it found the Amended Complaint failed to plead antitrust injury, viewing its averments as a whole and drawing all inferences in favor of West Penn Allegheny?

3. Did the District Court fail to follow decisions of this Court when it found the Amended Complaint failed to plead a claim of attempted monopolization under Section 2 of the Sherman Act, viewing its averments as a whole and drawing all inferences in favor of West Penn Allegheny?

STATEMENT OF THE CASE

Appellant West Penn Allegheny, a Pittsburgh-based hospital system, filed this antitrust action against Appellees UPMC, the dominant hospital system in Pittsburgh, and Highmark, Inc. ("Highmark"), the dominant health insurer in Pittsburgh, on April 21, 2009. Dkt. 1. West Penn Allegheny alleged that UPMC and Highmark violated Sections 1 and 2 of the Sherman Act by entering into a conspiracy in which UPMC agreed to use its market power in hospital services to block Highmark's competitors from entering the Pittsburgh market in exchange for Highmark's agreement to use its position as the dominant health insurer to raise the costs of (and otherwise undermine) rival hospitals, particularly West Penn Allegheny. This conspiracy is also the subject of an ongoing, multi-year investigation by the United States Department of Justice.

Because West Penn Allegheny poses the only competition to UPMC for high-end tertiary and quaternary care services (such as level one trauma services and solid organ transplants) in the Pittsburgh area, UPMC has pursued a relentless campaign to destroy West Penn Allegheny. This included not only the conspiracy with Highmark, but also exclusive dealing arrangements with community hospitals to choke off patient referrals to West Penn Allegheny and systematic physician raiding and predatory bidding up of physician salaries. These

predatory acts are the basis for West Penn Allegheny's claim against UPMC for attempted monopolization in violation of Section 2 of the Sherman Act.

Both defendants moved to dismiss. Dkt. 38 & 44. On July 30, 2009, the District Court conducted a case management conference. The District Court ordered each party's Chief Executive Officer to personally attend. Text Order of April 30, 2009. At the conference, the District Court stated that "there is a lot of dynamics here other than legal dynamics," JA0156, and met privately in chambers with the parties' CEO's and in-house counsel (excluding counsel of record for the parties). JA0194-195. The District Court ordered discovery stayed, directed the parties to engage in mediation, Dkt. 63, while not deciding the pending motions, and offered West Penn Allegheny the opportunity to file an Amended Complaint.

On August 28, 2009, West Penn Allegheny filed an Amended Complaint. Dkt. 66. UPMC and Highmark again moved to dismiss. On October 29, 2009, the very same day the mediator reported no settlement was achievable, the District Court granted the motions to dismiss. JA0004. Not only was the opinion apparently ready to be issued as soon as the court-ordered mediation ended, but it also cited repeatedly to the *original*, and not the Amended, Complaint. JA0006. On November 20, 2009, West Penn Allegheny filed a Notice of Appeal. JA0001-3.

The District Court's opinion is riddled with substantial legal errors. The court below misapplied the standards set out in Rule 12(b)(6) of the Federal Rules of Civil Procedure, created for itself an impermissible role as a "gatekeeper" fact-finder, and inexplicably ignored key factual allegations in the Amended Complaint and grossly mischaracterized others. Consistent with the District Court's earlier comments that there are "dynamics here other than legal dynamics," it staked out the position that it was a "gatekeeper" that must review the Amended Complaint in light of the "practical and economic implications of permitting this case to proceed through the discovery process." JA0036-40. The District Court reasoned that this "gatekeeper" function was established in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2008), which the District Court cited as authority for it to disbelieve and disregard West Penn Allegheny's detailed factual averments in the interest of, in its opinion, greater community interests.

This is a grand distortion of *Twombly*. The Supreme Court there stated that "Rule 12(b)(6) does not countenance dismissals based on a judge's disbelief of a complaint's factual allegations. . . a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.'" *Id.* at 556 (citation omitted). *Twombly* did not create a "probability requirement" at the pleading

stage. *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009). As Justice Souter, author of *Twombly*, wrote:

> *Twombly* does not require a court at the motion-to-dismiss stage to consider whether the factual allegations are probably true. We made it clear, on the contrary, that a court must take the allegations as true, no matter how skeptical the court may be. The sole exception to this rule lies with allegations that are sufficiently fantastic to defy reality as we know it: claims about little green men, or the plaintiff's recent trip to Pluto, or experiences in time travel.

Id. at 1959 (citations omitted) (Souter, J., dissenting). Applying the correct standard, the Amended Complaint more than adequately states claims for relief.

STATEMENT OF FACTS

I. UPMC's Early Attempts to Destroy West Penn Allegheny

West Penn Allegheny was formed in 2000 by a merger of The Western Pennsylvania Healthcare System, comprising The Western Pennsylvania Hospital and Suburban General Hospital, and the Pittsburgh-based hospitals formerly affiliated with the bankrupt Allegheny Health Education and Research Foundation ("AHERF"), including Allegheny General Hospital ("AGH") and three community hospitals. JA0086, ¶20 (Amended Complaint). AGH is a sophisticated tertiary and quaternary care teaching hospital. JA0086, ¶20.

UPMC is the dominant hospital system in Pittsburgh with twenty tertiary, specialty, and community hospitals. JA0125-126, ¶174. For tertiary and quaternary care services, West Penn Allegheny and UPMC are the only competitors in Pittsburgh. JA0126, ¶¶176-177. Because West Penn Allegheny is the only competitor for these high-end services, it is the only constraint upon UPMC's dominance.

From the outset, UPMC tried to destroy West Penn Allegheny. Initially, UPMC unsuccessfully lobbied AGH Board members and local officials to oppose the merger creating West Penn Allegheny. JA0086, ¶22. UPMC then upped the ante by interfering with West Penn Allegheny's initial bond offering in

2000 by disseminating defamatory information to potential investors and pressuring investors not to buy the bonds.[1] JA0087, ¶¶24-25.

UPMC's main strategy, however, was to starve West Penn Allegheny of the patient volume necessary to survive. Hospitals incur large fixed costs to operate, and require a sufficient volume of patients to remain viable. JA0087-88, ¶26. An essential source of patients is referrals from physicians on the hospital's medical staff. *Id*. UPMC systematically raided the key referring physicians on the AGH Medical Staff to choke off AGH's access to patients. JA0089, ¶31. From 1999-2001, UPMC raided key AGH referring physicians through a campaign of bribes and inducements, including inflated salaries and purchases of land owned by physicians at levels far above market value. JA0088, ¶¶27-28. UPMC informed AGH physicians that UPMC intended to "bury" AGH and to turn it into a nursing home.[2] JA0089, ¶30.

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[1] UPMC repeated these tactics in late 2006, when West Penn Allegheny was again poised to launch a new bond offering. JA0122-123, ¶¶160-164. UPMC created and distributed a "book" printed in a format designed to appear as if it were authored by West Penn Allegheny, but containing false and defamatory information about West Penn Allegheny's finances. JA0122, ¶161.

[2] For example, in early 2002, AGH was a party to an exclusive contract for anesthesiology services with Allegheny Anesthesia Associates ("AAA"). JA0090, ¶36. UPMC approached AAA and offered to hire the entire group with a guaranteed three-year contract with salaries in excess of $400,000 for each anesthesiologist, regardless of experience or qualifications, even though UPMC paid its own anesthesiologists between $200,000 and $350,000. *Id.* This was

(continued...)

II. The Alliance Between Highmark and West Penn Allegheny

Despite these attacks, West Penn Allegheny survived and grew in the early 2000's. Part of the reason for this growth was West Penn Allegheny's alliance with Highmark, the dominant health insurer in Western Pennsylvania.

From 1999 through Summer 2002, Highmark and UPMC were at loggerheads over reimbursement rates that Highmark paid UPMC for services rendered to Highmark's members. JA0092, ¶46. Frustrated with UPMC's demands for exorbitant rates, Highmark launched Community Blue in the late 1990's, a deep-discount insurance plan whose limited provider network directed patients to AGH and other non-UPMC hospitals. *Id.* UPMC's key facilities, including its flagship Presbyterian and Shadyside Hospitals, did not participate in Community Blue because UPMC refused to accept the discounted rate. *Id.* In 2001 UPMC represented: "West Penn Allegheny serves as the core of Highmark's narrow network products." *Id.* Community Blue grew to over 200,000 members. *Id.*

(continued...)

despite the fact that UPMC did not have sufficient volume to absorb these new anesthesiologists. *Id.* UPMC's internal analysis showed that this raid would be unprofitable. *Id.* Several physicians told AGH management that a UPMC executive said that UPMC's raid on AAA was designed solely to run AGH out of business. *Id.*

Highmark also made a $125 million loan to West Penn Allegheny to help finance the initial merger. JA0092, ¶43. Similarly, in early 2002, Highmark provided a $42 million grant to West Penn Allegheny.[3] JA0092, ¶45. This support was not charity: West Penn Allegheny was the only viable alternative to UPMC for high-end services and its failure would have left Highmark at the mercy of UPMC. JA0091-0092, ¶42.

In response to Community Blue, UPMC started its own health insurance arm, UPMC Health Plan, which focused on UPMC's facilities. JA0093, ¶¶47-48. With minor exceptions, UPMC Health Plan excluded West Penn Allegheny from its network. JA0093, ¶48. Then-UPMC Executive Vice President said that UPMC entered the health insurance business because of its inability to extract a "fair rate" from Highmark and so that UPMC would not be "at the mercy

[3] Relying on documents outside the Amended Complaint that Highmark appended to its motion to dismiss, the District Court found that the $42 million grant was awarded after the conspiracy began in Summer 2002. JA0060. But the Amended Complaint specifically pled that the grant decision was made "in *early* 2002." JA0092, ¶45 (emphasis added). Moreover, even assuming it could be considered at the motion to dismiss stage, the December 2002 grant agreement proffered by Highmark expressly noted that over $15 million of the grant was disbursed before the agreement's execution in December 2002 (JA0842) – a fact consistent with the allegation that Highmark agreed to the grant long before the final paperwork was signed later in 2002. The District Court clearly went beyond construing the allegations in the light most favorable to West Penn Allegheny and made an affirmative, adverse finding of fact as to when the grant was made. That, however, is the jury's job.

of Highmark." JA0093, ¶47. UPMC asserted that Highmark used "predatory pricing" to promote and market the low-cost Community Blue product. JA0095, ¶55. UPMC resorted to unlawful tactics to promote its Health Plan against Community Blue, leading Highmark to bring a successful court action to put a stop to UPMC's campaign of false advertising. JA0093, ¶49.

III. UPMC and Highmark Enter into a Conspiracy in Summer 2002

Highmark resisted UPMC's demands until the two entered into a conspiracy in Summer 2002 in which UPMC would protect Highmark from competition in the health insurance field if Highmark in turn would tilt hospital competition in UPMC's favor. Leading up to the formation of West Penn Allegheny, UPMC CEO Jeffrey Romoff offered Highmark a deal: "'Let's call a truce,' Romoff recalled UPMC saying to Highmark officials during the board meetings in January. 'You delay putting Community Blue out and we will not sign an agreement with an outside insurer.'" JA0095, ¶56.

In a court pleading filed in September 2001, Highmark characterized Romoff's offer as an invitation to illegal conspiracy:

> Defendant [UPMC] asserts that [UPMC's acquisition of Children's Hospital] is justified because Highmark has allegedly engaged in anticompetitive behavior. Remarkably, as an example of such behavior, Defendant cites Highmark's rejection of Defendant's *overtures to attempt to form a "super" monopoly for the provision of health care in Western Pennsylvania* in which UPMCHS,

> the leading provider of hospital services, and Highmark, the leading health insurer, would combine forces.

JA0095, ¶57 (emphasis added).

As it turned out, in Summer 2002, Highmark agreed to Romoff's proposal for a "super monopoly." JA0095-96, ¶58. This conspiracy was evidenced by the two parties' new multi-year agreement with bloated reimbursement rates for UPMC. JA0096, ¶59. Highmark also agreed to provide over $230 million to UPMC, $70 million of which was a grant while the remainder was a low-interest loan. JA0096, ¶60. Highmark further agreed to "sunset" Community Blue, which did not include UPMC's overpriced facilities, by switching each employer to a more expensive plan when its Community Blue contract expired. JA0101, ¶79. Community Blue was discontinued completely by January 2004. *Id*.

Highmark also agreed that UPMC would be an in-network provider in every health plan that it offered. JA0096, ¶62. This agreement eliminated competition between UPMC and West Penn Allegheny for preferred provider status in Highmark's networks – even though the competition for such status (and the attendant increase in patient volume) is the "carrot" used by health insurers to induce hospitals to grant them significant discounts. *Id*. Highmark thus removed any incentive for UPMC to reduce its prices.

Highmark's actions – eliminating Community Blue, caving into UPMC's rate demands, and giving away over $200 million to make UPMC even more powerful – were contrary to its normal self-interest as a health insurer to hold reimbursement rates down and to keep UPMC from being so dominant that it could dictate terms. Highmark was willing to make these concessions to UPMC, however, in exchange for UPMC's agreement to insulate Highmark from competition in the commercial health insurance sector. JA0097, ¶64-65.

First, UPMC agreed with Highmark to halt its own competition in the commercial health insurance segment. JA0097, ¶65; JA0101, ¶78. UPMC also agreed not to sell UPMC Health Plan to a national health insurer trying to enter or expand in the Pittsburgh market, such as United Healthcare or Aetna, even though UPMC received such offers. JA0098, ¶69.

UPMC CEO Romoff admitted that he struck this deal in a speech to the employees of the UPMC Health Plan. JA0097-98, ¶66. Romoff boasted that UPMC had won the war against Highmark because Highmark agreed to close Community Blue. *Id*. Romoff said that Highmark had paid double for UPMC Health Plan, by paying all the money that UPMC demanded while allowing the Health Plan to continue to exist. *Id*. Romoff then said that the UPMC Health Plan had grown large enough. *Id*.

Romoff implemented UPMC's agreement with Highmark in three ways. First, he increased UPMC Health Plan's prices by 26%. JA0098, ¶67. This ensured that the former Community Blue customers could not turn to UPMC Health Plan for a new low-cost health plan. Second, Romoff slashed the Health Plan's advertising budget from $12 million to $2 million. *Id*. Third, Romoff agreed to a "firewall" so that the loans, grants, and higher reimbursements received from Highmark could not be used to benefit the UPMC Health Plan. JA0096, ¶61.

Commercial enrollment in UPMC Health Plan declined rapidly. According to an economic analysis submitted to the Pennsylvania Insurance Department in October 2008, UPMC Health Plan's commercial enrollment declined from more than 675,000 members in 2002 to less than 280,000 members in 2006. JA0098, ¶68. This occurred despite the fact that all of UPMC's 50,000 employees and their dependents are enrolled in the UPMC Health Plan, and that UPMC's employee population has grown significantly since 2002, for example as a result of UPMC's 2006 acquisition of Mercy Hospital. JA0023, ¶85; JA0098, ¶68.

Not only did UPMC rein in its Health Plan, but it also agreed not to contract on reasonable terms with Highmark's competitors. JA0099-100, ¶¶70-77. Because of UPMC's dominance as a hospital system, a new health insurer entering the market can no longer develop a marketable offering without UPMC. JA0099,

¶71. Absent competitive rates from UPMC, no major national insurer – including United, Aetna, CIGNA, and Coventry – reached even a 10% market share in Pittsburgh. JA0099, ¶70; JA0130, ¶196. When it investigated this market in 2006, the Pennsylvania Attorney General found that UPMC did not make its flagship hospitals available to Highmark's competitors:

> The availability or non-availability of key healthcare facilities, such as hospitals, has a significant effect on the viability of a Health Plan. Access to certain hospitals is an important factor for employers choosing a Health Plan. Within the Relevant Geographic Market, many Health Plans do not have access to UPMC Presbyterian/Shadyside and are only able to cover Tertiary Care services provided at [Mercy] and [West Penn Allegheny]. . . . The largest Health Plan in the Relevant Geographic Market [*i.e.*, Highmark] does offer UPMC Tertiary Care services at UPMC Presbyterian/Shadyside, and enjoys a substantial market share advantage over the nearest competing Health Plan.

JA0124-125, ¶171, quoting Compl., ¶ 32 in *Commw. of Pennsylvania v. Catholic Health East, et al.*, Civ. A. No. 07-708 (W.D. Pa.). *See also* JA0099, ¶72.

IV. The Conspiracy Inflates Health Care Costs to the Pittsburgh Community

Without competitors to worry about, Highmark has simply passed on UPMC's bloated reimbursement rates and continually raised health insurance premiums. The closure of Community Blue forced many businesses to incur premium increases of as much as forty percent. JA0102, ¶81; JA0105, ¶92. Since the conspiracy was hatched in mid-2002, consumers and employers in Pittsburgh

have endured double-digit increases in premiums that were above national averages. JA0104-105, ¶¶89-93.

At the same time, UPMC and Highmark enjoyed record profits. UPMC's net income rose from $23 million in 2002 to over $618 million by 2007. JA0103-104, ¶87. Between 2003 and 2004 (the first full year of the conspiracy), UPMC's net income soared more than 300%. *Id.* Highmark saw a similar growth in profits, as its net income increased from less than $50 million in 2001 to $398 million in 2006. JA0104, ¶88. Highmark's financial statements linked these soaring profits to Highmark's premium increases. JA0104, ¶90.

V. The Conspiracy's Impact Upon West Penn Allegheny

The conspiracy directly targeted West Penn Allegheny. To secure UPMC's agreement to block the entry of rival health insurers, Highmark agreed not only to UPMC's reimbursement rate demands, but also to stop supporting West Penn Allegheny. JA0097, ¶¶63-64.

For example, Highmark repeatedly refused to consent to the restructuring of its loan to West Penn Allegheny, even though these proposals would have had no material effect on Highmark. JA0106-111, ¶¶97-114. Indeed,

Highmark had written off a substantial portion of the loan by early 2004.[4] JA0106, ¶97.

- In April 2005, Highmark executives told West Penn Allegheny that Highmark rejected West Penn Allegheny's then-most recent proposal out of fear of retaliation by UPMC. Highmark said that if it did anything that is perceived to be helpful to West Penn Allegheny, UPMC would either sign a provider agreement with United (a Highmark competitor) or sell its health plan to United. Highmark further told West Penn Allegheny that it was under a "constant barrage" from UPMC, and that UPMC's CEO was "obsessed" with driving West Penn Allegheny out of business. JA0107, ¶¶100-101.

- In September 2005, West Penn Allegheny proposed to issue $35 million of new debt on parity with Highmark. Highmark's consent was needed for this offering. JA0107, ¶102. Soon after making this proposal, Highmark's CEO said that he received a letter from UPMC describing all the ways that West Penn Allegheny may seek assistance from Highmark, that UPMC told Highmark not to accommodate West Penn Allegheny, and that UPMC again threatened Highmark with United's entry into the market and a potential relationship between UPMC and United. The next day, Highmark's CEO declined to consent. JA0107-108, ¶¶103-104.

- West Penn Allegheny tried going over the head of Highmark management, and its Board Chairman reached out to Highmark's Board Chairman, Robert Baum, in Summer 2005

[4] The District Court ignored this allegation when it found West Penn Allegheny's claim of conspiracy to lack credibility because "Highmark would have lost $125 million it loaned to West Penn Allegheny" if it entered into a conspiracy with UPMC. JA0059-60. Having written off much of the loan, Highmark had already absorbed the bulk of this hypothetical loss on its books. Moreover, whatever loan asset remained on its books paled in comparison to the hundreds of millions of dollars of profits that Highmark reaped each year from the conspiracy. JA0104, ¶¶88-90.

> and discussed restructuring the loan. JA0108, ¶105. During these calls Baum was sympathetic to West Penn Allegheny's position, but he expressed concern that UPMC would retaliate by facilitating United's entry into the marketplace. *Id*. On November 1, 2005, Mr. Baum toured West Penn Allegheny's facilities. JA0108-109, ¶¶106-107. During lunch, West Penn Allegheny's Board Chairman and CEO again raised the question of restructuring the loan and said that UPMC should not have input into Highmark's decisions about West Penn Allegheny. JA0109, ¶108. In response, Baum praised West Penn Allegheny's operations but said that Highmark could not help because UPMC would respond by contracting with United or selling its Health Plan to United. *Id*. He then added that Highmark's agreement with UPMC was "probably illegal." JA0109, ¶109.

Highmark's repeated refusals to consent to West Penn Allegheny's restructuring proposals, which occurred from 2003 through 2007, artificially inflated West Penn Allegheny's financing costs, as West Penn Allegheny was unable to reduce the interest rate on its debt and to raise additional capital. JA0110-111, ¶114. Highmark also funded UPMC's predatory tactics by overpaying UPMC while at the same time underpaying West Penn Allegheny, *i.e.*, Highmark has consistently paid below fair market value for the services that West Penn Allegheny has provided to Highmark's insureds. JA0111-112, ¶¶115-124. When West Penn Allegheny demanded improved rates in 2005 and 2006, Highmark's CEO responded that he could not help because of Highmark's agreement with UPMC to block Highmark competitor United from entering the

Pittsburgh market. JA0111, ¶119. This underpayment again deprived West Penn Allegheny of needed capital.

VI. The District Court's Improper Attack Upon West Penn Allegheny's Well-Pleaded Factual Allegations

In its opinion, the District Court did not, as required, assume the facts of the Amended Complaint to be true and draw all reasonable inferences in West Penn Allegheny's favor. *See infra* at Standard of Review. Instead, under the heading "Plaintiff's Inconsistent Factual Allegations," JA0022-23, the District Court improperly assumed the role of a fact-finder and arbiter of the credibility of West Penn Allegheny's case. For example:

- The District Court discounted West Penn Allegheny's claim that "it suffered financial hardship and has a need for capital" because it experienced increased earnings from 2000-2005. JA0022. This supposed contradiction is absurd: just because West Penn Allegheny, through committed management, managed to persevere and grow under difficult conditions does not mean that it suffered no injury and would not have performed even better, absent defendants' illegal conduct. This is an argument for the jury to weigh, not for a court in evaluating sufficiency of pleadings.

- The District Court then offered its disbelief of West Penn Allegheny's averment that "it was able to provide a sophisticated, high level of care to its patients," pointing to allegations that, in the District Court's view, show that West Penn Allegheny "could not provide proper care." JA0022-23. Nowhere in the Amended Complaint did West Penn Allegheny ever allege that it provided anything less than the best care to its patients. Rather, West Penn Allegheny alleged that, because the conspirators starved it of capital, it was not able to expand its services so it could provide even more world-class care to

- The District Court also apparently found that West Penn Allegheny's damages were the result of internal inefficiencies as opposed to defendants' conduct. JA0023. This conclusion is directly contradicted by the allegations of the Amended Complaint, which cite statistics from the Council of Teaching Hospitals attesting to West Penn Allegheny's efficient delivery of services. JA0132-133, ¶¶ 206-208.

While defendants may choose to argue to a jury that West Penn Allegheny should have made different management decisions, or did not need Highmark's continued support, this type of factual determination cannot be made in a ruling on a motion to dismiss, particularly where, as here, the Amended Complaint includes detailed factual averments in conflict with each of the District Court's improper, erroneous factual findings.

STANDARD OF REVIEW

This Court exercises plenary review over an order granting a motion to dismiss. *Fowler v. UPMC Shadyside*, 578 F.3d 203, 206 (3d Cir. 2009). In two recent opinions, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2008) and *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009), the Supreme Court clarified the standard of review for a motion to dismiss.

Twombly concerned a putative class action against local telephone companies for alleged violations of Section 1 of the Sherman Act. 550 U.S. at 549. The Court explained that "we do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." Where the plaintiffs do not "nudg[e] their claims across the line from conceivable to plausible, their complaint must be dismissed." *Id.* at 570. A plaintiff need only put forward "a short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Id.* at 555 (quotes and cites omitted). Though mere "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do," the complaint "does not need detailed factual allegations." *Id.*

In *Iqbal*, the Court summarized *Twombly*. *Iqbal* held that a complaint is considered plausible "when the plaintiff pleads factual content that allows the

court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S.Ct. at 1949. *Iqbal* noted that *Twombly* did not create a "probability requirement." *Id.* While "obvious alternative explanations" for the defendants' conduct should be ruled out, *id.* at 1951, a plaintiff need not "plead facts tending to rebut all possible lawful explanations for a defendant's conduct." *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 596 (8th Cir. 2009). Such a requirement would turn *Twombly* and *Iqbal*'s "plausibility" requirement into a "probability" requirement. *Id.* at 597.

Following *Twombly*, courts at the motion to dismiss stage must "accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." *Phillips v. County of Allegheny*, 515 F.3d 224, 233 (3d Cir. 2008) (citations omitted).

SUMMARY OF ARGUMENT

The District Court dismissed the Amended Complaint for three reasons, none of which can withstand scrutiny by this Court. First, the District Court held that West Penn Allegheny's claim under Section 1 of the Sherman Act must be dismissed for failure to allege facts showing a conspiracy between Highmark and UPMC. In so holding, the District Court often ignored, and at other times mischaracterized, the direct evidence of conspiracy set out in the Amended Complaint, including the repeated admissions of Highmark's executives that they were no longer willing to support West Penn Allegheny because UPMC had threatened to retaliate for any assistance extended by contracting with United, a competitor of Highmark. Under *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), such acquiescence to threats is direct evidence of conspiracy. Direct evidence of conspiracy, by its nature, renders the allegations of conspiracy at least plausible. Moreover, the Amended Complaint sets forth detailed circumstantial evidence of conspiracy, in particular the radical change in Highmark and UPMC's behavior before and after the conspiracy.

Second, the District Court held that West Penn Allegheny failed to plead antitrust injury. The District Court ignored, however, that the conspiracy expressly targeted the elimination of West Penn Allegheny's ability to compete. Because West Penn Allegheny is the *only* competitor to UPMC for sophisticated

tertiary and quaternary care services, the crippling of West Penn Allegheny's competitive position limited output in the market and hindered the sole competitive constraint upon UPMC. The District Court disregarded numerous precedential opinions from this Court in analogous circumstances that have held that competitors targeted by a conspiracy are proper plaintiffs and that their losses are cognizable antitrust injuries.

Third, the District Court improperly dismissed West Penn Allegheny's attempted monopolization claim against UPMC for failure to allege that UPMC engaged in predatory, anticompetitive conduct. To begin with, UPMC's conspiracy with Highmark certainly constitutes predatory conduct. Moreover, UPMC coerced community hospitals – a key source of referrals for tertiary and quaternary hospitals – into establishing oncology "joint ventures" with UPMC. These joint ventures function as exclusive dealing arrangements in which UPMC receives all oncology referrals from these hospitals for more sophisticated tertiary and quaternary care services. Even though this Court and others have repeatedly held that exclusive dealing and lock-up of distribution channels constitutes predatory conduct, the District Court never addressed these allegations in its opinion. The Amended Complaint alleges additional predatory conduct, including physician raiding and predatory bidding of physician salaries.

ARGUMENT

I. The Amended Complaint States a Claim Under Section 1 of the Sherman Act

Section 1 of the Sherman Act provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is declared to be illegal." 15 U.S.C. § 1. Under Section 1, a plaintiff must establish: "(1) that the defendants contracted, combined or conspired among each other; (2) that the combination or conspiracy produced adverse, anti-competitive effects within the relevant product and geographic markets; (3) that the objects of and the conduct pursuant to that contract or conspiracy were illegal; and (4) that the plaintiffs were injured as a proximate result of that conspiracy." *Toledo Mack Sales & Services, Inc. v. Mack Trucks, Inc.*, 530 F.3d 204, 225 (3d Cir. 2008). The District Court dismissed West Penn Allegheny's Section 1 claims for failure to plead the first element, conspiracy. This ruling was erroneous and should be reversed.

The Amended Complaint alleges that UPMC and Highmark entered into a conspiracy to restrain trade in two markets by protecting and reinforcing one another's market power. UPMC agreed that its Health Plan will not compete against Highmark for commercial business and that UPMC will use its market power as a hospital provider to block the entry or expansion of Highmark's rivals. JA0097-99, ¶¶65-71. In exchange, Highmark agreed to protect UPMC from

competition by withdrawing support for UPMC's primary competitor, West Penn Allegheny. JA0097, ¶63; JA0106-111, ¶¶96-119.

To circumvent the Amended Complaint's detailed allegations of conspiracy, the District Court "sliced and diced" the Amended Complaint's allegations, analyzing the conspiracy as a series of isolated acts as opposed to interrelated evidence of a larger agreement.[5] This contravenes this Court's admonition to all district court judges that "we must not 'tightly compartmentalize the evidence,' but review it as a whole to see if it together supports an inference of concerted action.'" *Toledo Mack,* 530 F.3d at 218 (citation omitted). Taking the Amended Complaint's allegations as true and viewing them as a whole requires reversal.

A. Direct Evidence of Conspiracy

The Amended Complaint sets forth direct evidence of conspiracy. These statements are "explicit" and "require no inferences to establish" concerted action. *Intervest, Inc. v. Bloomberg, L.P.*, 340 F.3d 144, 163 (3d Cir. 2003). Direct evidence, by its nature, satisfies the pleading standard of *Twombly* as it renders the existence of a conspiracy at least plausible. *See Petruzzi's IGA*

[5] For example, the District Court segregated the conspiracy allegations into five artificial silos: reimbursement rates, refinancing requests, insurer entry theory, Community Blue, and admissions by Highmark's Board Chairman. The District Court lifted these five topics directly from Highmark's original motion to dismiss. JA0058-65.

Supermarkets v. Darling-Delaware Co., 998 F.2d 1224, 1233 (3d Cir. 1993) ("no inferences are required from direct evidence to establish a fact and thus a court need not be concerned about the reasonableness of the inferences to be drawn from such evidence."). Below is a summary of the direct evidence, most of which the District Court ignored:

1. Admissions by UPMC

UPMC CEO Romoff said to Highmark: "Let's call a truce . . . You delay putting Community Blue out and we will not sign an agreement with an outside insurer." JA0095, ¶56. The offer was clear – scrap Community Blue and UPMC will protect Highmark in the insurance market. This is direct evidence of UPMC's intent to enter an agreement with Highmark to restrict competition. *Rossi v. Standard Roofing*, 156 F.3d 452, 469-470 (3d Cir. 1998) (statements prior to alleged conspiracy's existence are relevant and probative of motive). During litigation in 2001 over UPMC's acquisition of Children's Hospital of Pittsburgh, Highmark acknowledged UPMC's prior "overtures to attempt to form a 'super' monopoly for the provision of health care in Pennsylvania in which [UPMC], the leading provider of hospital services, and Highmark, the leading health insurer, would combine forces." JA0095, ¶57. After the conspiracy began, the offer came to pass: Highmark "sunset" Community Blue and UPMC (as found by the

Pennsylvania Attorney General) never contracted on competitive terms with "an outside insurer." JA0101, ¶79; JA0124-125, ¶171; JA0138 ¶231.

The District Court glosses over Romoff's offer to conspire, finding that an "alleged offer of 'truce' during litigation [does not] support[] any contention that the Defendants acted in concert or have since formed a conspiracy." JA0056. As a threshold matter, Romoff's 1998 truce offer did *not* occur during litigation between UPMC and Highmark. Rather, Highmark acknowledged Romoff's previous overtures during litigation in 2001.[6] JA0095, ¶ 57. More importantly, the District Court's conclusion runs counter to the law in this Circuit that statements prior to the alleged conspiracy's existence are relevant and probative of defendants' motive. *See Rossi*, 156 F.3d at 469-470 (*citing Big Apple BMW v. BMW of North America, Inc.*, 974 F.2d 1358, 1360-61 (3d Cir. 1992)). The District Court at this stage must assume the truth of the "truce" offer and draw all reasonable inference in West Penn Allegheny's favor therefrom – which it clearly chose not to do in summarily finding that the offer to enter into the conspiracy "[does not] support[] any contention that the Defendants acted in concert or have since formed a conspiracy." JA0056; *Fowler*, 578 F.3d at 210

[6] Notwithstanding the fact that Romoff's truce offering was not made during litigation, it is unclear why the District Court believes that an agreement made during litigation would not be subject to the antitrust laws if it unreasonably restrained trade.

("courts must accept all factual allegations as true, construing the complaint in the light most favorable to the plaintiff") (*quoting Phillips*, 515 F.3d at 233).

There are further admissions from Romoff, which the District Court simply ignored. After entering the conspiracy in Summer 2002, Romoff announced at a meeting of UPMC Health Plan employees that UPMC had won the war, because Highmark agreed to close Community Blue, while UPMC would be allowed to keep its Health Plan, although it would no longer grow. JA0095-96, ¶58; JA0097-98, ¶66. The District Court did not consider Romoff's speech in finding that the Amended Complaint "fail[ed] to include any facts that would rule out an independent decision by Highmark to withdraw Community Blue from the market." JA0063.

Moreover, in November 2005, Romoff instructed a UPMC executive to remind Highmark's CEO that a goal of their conspiracy was to keep United out of Western Pennsylvania and that any support from Highmark to West Penn Allegheny would only help United. JA0110, ¶113. The District Court ignored this allegation.

Also in November 2005, UPMC admitted that it intended to cancel all contracts with third-party "rental networks" because a customer chose United as its health insurer. By terminating its agreement with rental networks, UPMC would ensure that the customer would only have access to UPMC facilities at prices well

above competitive levels. JA0110, ¶113. Again, the District Court ignored these allegations and summarily rejected the allegation that UPMC thwarted insurers' entry into the market as "purely speculative and stat[ing] a conclusion[,] not facts." JA0062.

2. Admissions by Highmark

As pled, Highmark made an even more damning series of admissions in connection with West Penn Allegheny's refinancing proposals, which admissions were not taken as true by the District Court. Before the conspiracy, Highmark loaned $125 million to West Penn Allegheny. JA0092, ¶43. In April 2005, West Penn Allegheny sought Highmark's consent to restructure that debt. JA0107, ¶100. Under the proposal, Highmark would have incurred no additional risk, although its consent was required. JA0107, ¶100. Highmark rejected the proposal. Highmark executives admitted that their decision was based on the stated threat that, if Highmark helped West Penn Allegheny, UPMC would either sign a provider agreement with United or sell its own health plan to United. JA0107, ¶101. Highmark executives further stated that Highmark was under a "constant barrage" from UPMC about West Penn Allegheny and that UPMC's CEO was "obsessed" with driving West Penn Allegheny out of business. JA0107, ¶101.

Similarly, in September 2005, Highmark refused to consent to a proposal by West Penn Allegheny to issue additional bonds. JA0107, ¶102. This plan, again, presented no financial detriment to Highmark. *Id.* But, again, Highmark withheld its consent and cited UPMC's threats as the reason. In a September 27, 2005 telephone conversation with West Penn Allegheny, Highmark CEO Melani admitted that he had received a letter from UPMC detailing the ways in which West Penn Allegheny might seek assistance from Highmark, including potential debt restructuring plans. JA0107-108, ¶103. According to Melani, UPMC instructed Highmark not to accommodate West Penn Allegheny or else UPMC would contract with a rival insurer. JA0107-108, ¶¶103-104.

In November, 2005, Highmark's Board Chairman Robert Baum, while conceding that the refinancing made business sense for both Highmark and West Penn Allegheny (JA0108-109, ¶106), similarly admitted that Highmark would not assist West Penn Allegheny because UPMC would respond by contracting with Highmark's competitors. JA0108-109, ¶¶105-108. Baum admitted that Highmark's agreement with UPMC was "probably illegal." JA0109, ¶109.

Moreover, in 2005 and 2006, Highmark's CEO also admitted to West Penn Allegheny that "he could not increase West Penn Allegheny's reimbursement rates because of Highmark's agreement with UPMC to block United's entry into

the Pittsburgh market."[7] JA0111, ¶119. In Spring 2006, Highmark also refused to increase reimbursement to a West Penn Allegheny facility because of "issues" with UPMC. JA0112, ¶¶122-124.

These admissions – that Highmark hindered West Penn Allegheny in exchange for UPMC's agreement to block United's entry into Pittsburgh – are direct evidence of conspiracy. *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 765 (1984) (threat by co-conspirator to cut off access to product if prices levels were not maintained and subsequent submission to threat constituted "substantial direct evidence of agreements to maintain prices"); *Rossi*, 156 F.3d at

[7] Ignoring these allegations, the District Court wrote that the "Amended Complaint does not set forth any facts supporting . . . that an agreement was reached to limit reimbursements to West Penn Allegheny." JA0059. Rather than crediting the truth of Highmark's statement set out in the Amended Complaint, the District Court instead took judicial notice of documents attached to Defendants' motions to dismiss, which apparently it deemed more credible. Based upon these documents, the District Court surmised that West Penn Allegheny's reimbursement rates were set prior to the summer of 2002 and increased in June 2002. JA0059-60. Relying upon these "facts" from outside the Amended Complaint, the District Court improperly found that allegations of Highmark suppressing West Penn Allegheny's reimbursement rates were false. *Id.* As an initial matter, looking at the movement in solely West Penn Allegheny's reimbursement provides no information regarding discrimination between it and UPMC. Importantly, the District Court, by weighing the extraneous and partial "evidence" proffered by Defendants in support of their motion to dismiss, again exceeded its authority in making factual determinations contrary to the Amended Complaint. It drew inferences that invaded the sole province of the jury. *Fowler*, 578 F.3d at 210 ("courts accept all factual allegations as true, [and] construe the complaint in the light most favorable to the plaintiff") (*quoting Phillips*, 515 F.3d at 233).

468-469 (threats against plaintiff's business by coconspirators constitutes direct evidence of conspiracy); *BabyAge.com, Inc. v. Toys "R" Us*, 558 F. Supp. 2d 575, 582 (E.D. Pa. 2008) (allegation that defendant "threatened to retaliate against each manufacturer if each manufacturer did not implement minimum resale price maintenance . . . agreement with its retailers, and [that] the manufacturers in turn acquiesced" rendered allegations of conspiracy plausible).

Nevertheless, the District Court held that UPMC's warnings to Highmark not to aid West Penn Allegheny "are nothing more than threats and do not give any evidence of agreement." JA0062. This holding is in direct conflict with Supreme Court and Third Circuit precedent that acquiescence to threats is direct evidence of conspiracy. *Monsanto*, 465 U.S. at 765; *Rossi*, 156 F.3d at 468-469. The District Court made no attempt to square its result with the holdings of *Monsanto* and *Rossi*.

The District Court also dismissed Highmark Chairman Baum's admission that the agreement was "probably illegal" as an "off-handed or stray remark" by a "non-lawyer" evidencing only his "perception about how UPMC might react if Highmark helped West Penn Allegheny by refinancing the loan, rather than showing evidence of an agreement or conspiracy." JA0064. The District Court erroneously inferred that the statement actually evidenced no agreement at all because it showed that Baum felt hamstrung by UPMC. JA0064.

This was prohibited fact-finding. *Fowler*, 578 F.3d at 210 ("courts must accept all factual allegations as true, construing the complaint in the light most favorable to the plaintiff"). Besides, Baum cannot be mistaken for a rambling bumpkin. He chairs the Board of the multi-billion dollar Highmark and has been a faculty member at the University of Maryland's Smith School of Business since 2002. JA0109, ¶110. Merely pleading his credentials shows that the weight of his remarks is within the province of the jury.

Nor was this remark "off-handed or stray," but rather was made in response to a question from West Penn Allegheny's Board Chairman as to why Highmark would not consent to West Penn Allegheny's refinancing proposals. JA0109, ¶¶108-109. The District Court ignored the clear context of Baum's statement, apparently to tailor the facts to what appears to any reader to be a pre-ordained conclusion.

The Third Circuit's decision in *Phillips* is on point. There, this Court overturned the same judge's dismissal of plaintiff's due process claim for failure to plead a causal connection between the defendants' actions and the plaintiff's harm. *Phillips*, 515 F.3d at 236-237. The complaint alleged that the defendants provided confidential information (home address) to a person who used that information to track down and kill the plaintiff's son. *Id.* at 237. District Judge Schwab dismissed, holding that "the complaint fail[ed] to allege where the shooting took

place, and reasoned that if the shootings did not occur at [the victim's] residence, the unauthorized information provided by the [defendants] did not render [victim] vulnerable to danger." *Id.* The Third Circuit reversed, holding that it was reasonable to infer that the killer gained information at the residence regarding the victim's whereabouts, and therefore, dismissing the complaint was improper. *Id.* In the current case, not only has the District Court similarly failed to make reasonable inferences in favor of West Penn Allegheny, but it has ignored direct evidence of agreement and made inferences in favor of defendants. "Such a crabbed reading of the complaint denies [West Penn Allegheny] the inferences to which [its] complaint is entitled," *id.*, and violates the District Judge's duty of neutrality.

B. Circumstantial Evidence of Conspiracy

Direct evidence is "frequently difficult for antitrust plaintiffs to come by." *Rossi*, 156 F.3d at 465. Plaintiffs are therefore "permitted to rely solely on circumstantial evidence (and reasonable inferences that may be drawn therefrom) to prove a conspiracy." *Id.* To show an antitrust conspiracy through circumstantial evidence, West Penn Allegheny must prove facts that tend "to exclude the possibility" that UPMC and Highmark acted unilaterally. *Id.* at 466. While West Penn Allegheny maintains that its allegations of direct evidence are sufficient to

plead a claim of conspiracy, the Amended Complaint also sets forth ample circumstantial evidence.

1. Admissions by UPMC and Highmark

Any analysis of the Amended Complaint's circumstantial evidence must begin with the admissions of UPMC and Highmark discussed above. *Supra* at §§ I.A.1, I.A.2. These statements reveal Defendants' economic motive for conspiring – to protect one another from competition in their respective markets. *Rossi*, 156 F.3d at 466 (plaintiffs must set forth economically plausible theory of collusion). The statements also show that the two parties actively maintained and policed that agreement (including through UPMC's repeated threats) and that the agreement included hindering West Penn Allegheny from competing with UPMC. *Id.* at 477-478 (evidence of monitoring and enforcement activities supports inference of conspiracy). That Highmark cited acquiescence to UPMC's threats as the basis of its decisions more than plausibly suggests that Highmark was not acting alone. *Twombly*, 550 U.S. at 557, n.4 ("conduct that indicates the sort of restricted freedom of action and sense of obligation that one generally associates with agreement" satisfies standard to plead conspiracy).

2. UPMC's and Highmark's Behavior Changed Dramatically

In *Twombly*, the Court explained that "complex and historically unprecedented changes in pricing structure made at the very same time by multiple

competitors, and made for no other discernible reason would support a plausible inference of conspiracy." *Id.*; *see also In re Graphics Processing Units Antitrust Litig.*, 540 F. Supp. 2d 1085, 1096 (N.D. Cal. 2007) ("Taken as true, plaintiffs' allegations show that there was a marked change in defendants' behavior in the market around the time the conspiracy allegedly started. . . . Accordingly, direct-purchaser plaintiffs have pleaded allegations that if true would make an antitrust conspiracy plausible.").

The Amended Complaint alleges a marked shift in UPMC's and Highmark's historical behavior, which was contrary to their individual business interests and can only be explained as the result of illicit collusion. Prior to the conspiracy in mid-2002, Defendants were in conflict. Highmark, as a health insurer, did not want UPMC to dominate the market for hospital services because UPMC would then be in a position to demand exorbitant reimbursement rates. JA0091-92, ¶42. Accordingly, Highmark supported West Penn Allegheny as a competitive check upon UPMC. JA0092, ¶¶43-45. Highmark also launched Community Blue, a low-cost product, whose limited provider network sent business to UPMC's lower-cost competitors, principally West Penn Allegheny. JA0092, ¶46. Consistent with its interest in checking UPMC's market power, in 2001, when UPMC sought to acquire Children's Hospital of Pennsylvania, Highmark sued to enjoin the merger. JA0093-94, ¶50.

Before the conspiracy, UPMC likewise tried to check Highmark's dominance. UPMC launched its own Health Plan, because, in the words of its executives, UPMC was not able to negotiate a "fair rate" with Highmark and had no desire to be "at the mercy of Highmark." JA0092-93, ¶46-47. UPMC logically tried to curb Highmark's bargaining power as the dominant health insurer.

This behavior changed after the conspiracy began in Summer 2002. After years of resistance, Highmark agreed to UPMC's demands for exorbitant rates, as well as gave UPMC over $200 million in grants and low-interest loans. JA0095-96, ¶¶58-60. Highmark discontinued Community Blue. JA0101-102, ¶¶79-80, 82. When UPMC announced its acquisition of Mercy Hospital in 2006, not only did Highmark choose not to oppose it, through litigation or otherwise, in a move completely contrary to its interest in curbing UPMC's market power, Highmark publicly supported the deal. JA0103, ¶85. Highmark also agreed not to offer any health plan that did not include UPMC as an in-network provider, eliminating any price competition between UPMC and other hospitals for preferred provider status in Highmark's health plans. This was contrary to Highmark's self-interest in using offers of increased patient volume to extract lower prices from hospitals. JA0096-97, ¶¶62, 64. Highmark also changed course in dealing with West Penn Allegheny, repeatedly refusing to consent to West Penn Allegheny's proposals for debt restructuring even though the proposals provided no material

risk to Highmark. JA0106-110, ¶¶97-113. These actions not only marked a dramatic shift from earlier behavior, but were contrary to Highmark's unilateral self-interest, as Highmark was now actively helping UPMC to grow its market power and stunting the growth of UPMC's main competitor, West Penn Allegheny.

The explanation for Highmark's otherwise self-destructive conduct lies in UPMC's reciprocal agreement to stifle health insurance competition. UPMC also performed a marked turn about. It allowed its commercial health insurance business, the same one that it created to compete with Highmark, to languish, failing to market UPMC Health Plan's commercial insurance products. JA0097, ¶¶65-66; JA0101, ¶78. After entering into the conspiracy, Romoff announced that UPMC Health Plan had grown large enough, slashed its advertising budget, and increased prices by 26%. JA0097-98, ¶¶66, 67. These actions crippled UPMC Health Plan's ability to compete against Highmark in the commercial health insurance business. JA0098, ¶67. Commercial enrollment in UPMC Health Plan fell substantially. JA0098, ¶68. UPMC has also refused to contract competitively with United and other competing health insurers, sacrificing its own patient volume and easing competitive pressure on Highmark. JA0099-JA0100, ¶¶71-76; JA0124-125, ¶171. Again, these actions would be contrary to UPMC's own interest unless it were receiving something in return from Highmark

– and that something was Highmark's agreement to stop supporting West Penn Allegheny.

These otherwise inexplicable shifts in behavior are powerful circumstantial evidence of conspiracy. *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 365-369 (3d Cir. 2004) (evidence that glass manufacturers acted against unilateral self-interest by raising prices when demand did not support increase tended to show existence of price-fixing conspiracy); *Starr v. Sony BMG Music Entertainment*, ___ F.3d ___, No. 08-5637, 2010 U.S. App. LEXIS 768, *32 (2d Cir. Jan. 13, 2010) (allegations of "behavior that would plausibly contravene each defendant's self-interest in the absence of similar behavior by rivals" supports inference of conspiracy); *BabyAge.com*, 558 F. Supp. 2d at 582 (allegations that baby products manufacturers adopted resale price restrictions against their unilateral self-interest rendered claim of conspiracy plausible under *Twombly*); *In re Linerboard Antitrust Litig.*, 504 F. Supp. 2d 38, 54 (E.D. Pa. 2007) (defendants' parallel decisions to shut down production when against each one's individual self-interest evidenced conspiracy to fix prices).

Indeed, after entering into the conspiracy, UPMC and Highmark experienced dramatic increases in profitability. JA0103-105, ¶¶86-94. From 2000 through 2002, when Community Blue competed against UPMC Health Plan, UPMC and Highmark saw their net income drop precipitously. JA103, ¶86. In

contrast, UPMC's net income rose from $23 million in 2002 to $618 million in 2007, and rose over 300% from 2003 to 2004, the first full year of the conspiracy. JA0103-104, ¶87. Highmark's net income similarly soared from less than $50 million in 2001 to $398 million in 2006. JA0104, ¶88. This sudden spike in earnings is another indication of conspiracy. *City of Moundridge v. Exxon Mobil Corp.*, 250 F.R.D. 1, 4 (D.D.C. 2008) (under *Twombly*, allegation that "defendants had reported high profits" lends plausibility to concerted action); *In re Graphics Processing Units Antitrust Litig.*, 540 F. Supp. 2d at 1095 (considerable profit growth during alleged conspiracy "lend[s] more support to plaintiffs' complaint").

3. Highmark Offered Pretextual Excuses

In 2003 and 2004, Highmark refused to consent to multiple debt restructuring proposals by West Penn Allegheny. In 2003, Highmark cited unspecified concerns of their legal counsel, while in 2004, Highmark stated that West Penn Allegheny's loan terms were the same as those given to UPMC. JA0106, ¶¶98, 99. As discussed in detail above, Highmark later disclosed the true reason for its repeated refusals – Highmark's agreement with UPMC and its fear that UPMC would contract with United. JA0107-110, ¶¶101-113. Highmark also later admitted that UPMC's loan terms were far more favorable than those given to West Penn Allegheny. JA0110, ¶112.

This history of pretextual excuses lends further support to the claim of conspiracy: "The Third Circuit has long recognized that evidence of pretextual explanations . . ., 'if believed by a jury, would disprove the likelihood of independent action' by an alleged conspirator." *In re Linerboard Antitrust Litig.*, 504 F. Supp. 2d at 53 (*quoting Fragale & Sons Beverage Co. v. Dill*, 760 F.2d 469, 474 (3d Cir. 1985)); *see also Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1012-1013 (3d Cir. 1994) (false, pretextual explanations for conduct permitted inference of conspiracy); *Big Apple BMW v. BMW North America, Inc.*, 974 F.2d 1358, 1376-1381 (3d Cir. 1992) (same).

C. The District Court Applied an Incorrect Legal Standard

Besides ignoring, mischaracterizing, and compartmentalizing the Amended Complaint's allegations, the District Court also misapplied the *Matsushita* summary judgment standard to West Penn Allegheny's conspiracy allegations at the motion to dismiss stage. Under *Matsushita*, when a plaintiff seeks to show agreement through *solely* circumstantial evidence, "[c]onduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Rossi*, 156 F.3d at 466 (*quoting Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). Here, purporting to apply *Matsushita*, the District Court's conspiracy analysis focused primarily upon hypothetical business explanations for

defendants' actions, each of which it held to be more persuasive than the allegations of conspiracy. JA0061-64. The District Court thus used the *Matsushita* standard as another justification for assuming the role of a fact-finding, credibility-assessing "gatekeeper."

This was error piled upon error. To begin with, summary judgment standards do not apply at the motion to dismiss stage. *Fowler*, 578 F.3d at 213; *Starr*, 2010 U.S. App. LEXIS 768 at *24-25 (standard inapplicable at motion to dismiss stage). Moreover, *Matsushita* does not apply when the plaintiff has adduced direct evidence of conspiracy. *Alvord-Polk, Inc.*, 37 F.3d at 1001, n.2 ("analyses set forth in *Matsushita* do not apply when a plaintiff has offered direct evidence of concerted action"); *see also Toledo Mack*, 530 F.3d at 220, n.10 ("the strictures on circumstantial evidence in antitrust cases only apply when the plaintiff has failed to put forth direct evidence of a conspiracy. Thus, in direct evidence cases, the plaintiff need not adduce circumstantial evidence that tends to exclude the possibility that the alleged conspirators acted independently, *and there need not be an inquiry into the plausibility of the defendants' claim or the rationality of defendants' economic motives*.") (emphasis added). Given the direct evidence summarized above, it was improper for the district court to apply *Matsushita*, regardless of procedural posture.

Compounding this error, the District Court misconstrued *Matsushita* in holding that Defendants can avoid a jury trial merely by proffering some *post hoc* rationale for their conduct. Or, put differently, that *Matsushita*, by providing certain limits on inferences to be drawn from circumstantial evidence, empowered the District Judge to substitute his own credibility determinations for those of the jury.

This Court has roundly rejected this expansive view of *Matsushita*. In the words of late Judge Becker: "*Matsushita* does not mean that antitrust defendants are entitled to summary judgment merely by showing that there is a plausible explanation for their conduct; rather, 'the focus must remain on the evidence proffered by the plaintiff and whether that evidence 'tends to exclude the possibility that [the defendants] were acting independently.'" *Rossi*, 156 F.3d at 467 (quoting *Petruzzi's*, 998 F.2d at 1232); *see also In re Linerboard Antitrust Litig.*, 504 F. Supp. 2d at 51 ("The Supreme Court did not hold that if the moving party enunciates any economic theory supporting its behavior, regardless of its accuracy in reflecting the actual market, it is entitled to summary judgment" (citation omitted; emphasis in original)).

The District Court also held that *Twombly* requires dismissal because the Amended Complaint "fails to provide any notice as to the time, place or person involved in the concerted action." JA0056. Notwithstanding the fact that

Twombly explicitly did not require heightened fact pleading, *see* 550 U.S. at 570, this interpretation of the pleading standard is contrary to years of Supreme Court and Third Circuit case law holding that a Section 1 conspiracy can be proven through circumstantial evidence alone.[8] ABA Section of Antitrust Law, Antitrust Law Developments, 5-6 (6th Ed. 2007). To require a specific time, person and place of agreement is to require direct evidence of agreement. *Starr*, 2010 U.S. App. LEXIS 768 at *25 (rejecting argument that "*Twombly* requires that a plaintiff identify the specific time, place, or person related to each conspiracy allegation").

[8] *Twombly* is not to the contrary. The District Court appears to have a taken a footnote in *Twombly* out of context. The entire footnote states:

> If the complaint had not explained that the claim of the agreement rested on the parallel conduct described, we doubt the complaint's references to an agreement among the [defendant ILECs] would have given the notice required by Rule 8. Apart from the 7-year span in which the § 1 violations were suppose to have occurred . . . the pleadings mention no specific time, place or person involved in the alleged conspiracies . . . the complaint here furnishes no clue as to which of the four ILECs (much less which of their employees) supposedly agreed, or when and where the illicit agreement took place.

Twombly, 550 U.S. at 565 n.10 (emphasis added). In context, the Supreme Court's comment does not set out a new rule that the Amended Complaint must allege the specific time, place, and person involved.

Nevertheless, although unnecessary, the Amended Complaint does alleges that the conspiracy began in the Summer of 2002 when there were frequent meetings between Highmark and UPMC executives, including at least, Highmark CEO Ken Melani and UPMC Executive Vice President John Paul. JA0095-96, ¶58.

II. The Amended Complaint States a Claim for Conspiracy under Section 2 of the Sherman Act

West Penn Allegheny also brought a claim for conspiracy to monopolize under Section 2 of the Sherman Act. 15 U.S.C. § 2; JA0137-138, ¶¶227-233. The District Court dismissed the Section 2 conspiracy claim for "the exact same reasons [as the Section 1 claim]…" JA0066. As explained above, West Penn Allegheny's allegations of conspiracy state a claim under Section 1. *Supra*, § I.B. Therefore the Section 2 conspiracy claim should be reinstated.

III. The Amended Complaint Alleged Antitrust Injury

A. West Penn Allegheny Suffered Antitrust Injury as the Target of the Conspiracy

The District Court also dismissed West Penn Allegheny's claims for failure to allege antitrust injury. In doing so, it ignored Third Circuit precedent, mischaracterized and ignored the Amended Complaint's allegations, and found facts in favor of the Defendants.

To show antitrust injury, West Penn Allegheny must allege "that it suffered an injury that (1) is of the type the antitrust laws were intended to prevent and (2) flows from that which makes defendants' acts unlawful." *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 349 (1990) (internal quotations and citation omitted). West Penn Allegheny's injury satisfies this standard.

UPMC agreed to exclude Highmark's competitors in exchange for Highmark's agreement to aid in UPMC's campaign to cripple West Penn

Allegheny. JA0081-82, ¶¶2-4; JA0095-96, ¶¶56-58; JA0097, ¶63; JA0106, ¶96. That the conspiracy targeted West Penn Allegheny was no accident: in the relevant market of high-end tertiary and quaternary care services in Pittsburgh, West Penn Allegheny is UPMC's *only* competitor. JA0082, ¶4; JA0126 ¶¶176-177. Absent West Penn Allegheny's presence, UPMC can harm consumers at will through increased prices or reduced output of services.[9] A competitor "clearly has standing to challenge the conduct of rival(s) that is illegal precisely because it tends to exclude rivals from the market, thus leading to reduced output and higher prices." IIA Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* § 348 at 202 (3d ed. 2007). This Court has repeatedly recognized that a competitor's elimination from the market is a proper antitrust injury.[10]

[9] Although Mercy was, at the time that UPMC and Highmark hatched the conspiracy, still providing certain tertiary care services, Mercy was not a quaternary care hospital and, in any event, was acquired by UPMC in 2006.

[10] *See Toledo Mack Sales & Servs. v. Mack Trucks, Inc.*, 530 F.3d 204 (3d Cir. 2008); *LePage's, Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003); *Pace Electronics, Inc. v. Canon Computer Sys., Inc.*, 213 F.3d 118 (3d Cir. 2000); *Callahan v. A.E.V., Inc.*, 182 F.3d 237 (3d Cir. 1999); *Angelico v. Lehigh Valley Hosp.*, 184 F.3d 268 (3d Cir. 1999); *Rossi v. Standard Roofing, Inc.*, 156 F.3d 452 (3d Cir. 1998); *Brader v. Allegheny General Hospital*, 64 F.3d 869 (3d Cir. 1995); *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., Inc*, 998 F.2d 1224 (3d Cir. 1993); *Big Apple BWM, Inc. v. BMW of North America, Inc.*, 974 F.2d 1358 (3d Cir. 1992); *Arnold Pontiac-GMC, Inc. v. Budd Baer, Inc.*, 826 F.2d 1335 (3d Cir. 1987).

Defendants attacked West Penn Allegheny's ability to compete by starving it of capital. JA0132, ¶203. Highmark blocked West Penn Allegheny's refinancing efforts and maintained West Penn Allegheny's reimbursement rates at artificially depressed levels. *Id.* As a result, West Penn Allegheny lacked the money to expand the depth and breadth of its program offerings and the size of its facilities, resulting in an artificial reduction in the amount of services that West Penn Allegheny was able to offer. JA0134, ¶¶210-213. This is an injury to both West Penn Allegheny and to competition as a whole: as its service output was artificially restricted, West Penn Allegheny was not able to grow its patient volumes; at the same time, consumers of health care did not have the broad choices for tertiary and quaternary care services that they would have if UPMC's only competitor were given a fair chance to compete. *See Toledo Mack Sales & Services, Inc.*, 530 F.3d at 226 (reduced output is injury to competition); *Angelico v. Lehigh Valley Hosp.*, 184 F.3d 268, 274 (3d Cir. 1999) (injuries suffered "when shut out of competition for anticompetitive reasons, is indeed among those the antitrust laws were designed to prevent").[11]

[11] *See also Gulf States Reorganization Group, Inc. v. Nucor Corp.*, 466 F.3d 961, 967 (11th Cir. 2006) (plaintiff's "exclusion from the relevant market – is inseparable from the alleged harm to competition."); *Heatransfer Corp. v. Volkswagenwerk, A.G.*, 553 F.2d 964 (5th Cir. 1977) (same); *Litton Sys., Inc. v. Am. Tel. & Tel. Co.*, 700 F.2d 785, 822-826 (2d Cir. 1983) (same).

Angelico v. Lehigh Valley Hosp., Inc., 184 F.3d 268 (3d Cir. 1999), which the District Court ignored, is directly on point. In *Angelico*, plaintiff doctor alleged that three hospitals conspired to deny him staff privileges, thereby "blackballing" him from the cardiothoracic surgery market. The lower court held there was no antitrust injury because there was no evidence of decreased competition or a reduction of quality in the market and "insufficient evidence of a negative impact on price." *Id*. at 273 (internal citations and quotations omitted). The Third Circuit reversed, holding that Angelico's loss of income from being excluded as a competitor in the market was a proper antitrust injury. Angelico "was harmed by a conspiracy with an anticompetitive intent," to exclude him from the market. *Id.* at 275. This Court explained:

> [T]he fact that the antitrust laws are intended to protect competition rather than competitors does not mean that a competitor is never a proper antitrust plaintiff. *Indeed, protecting a competitor's ability to compete from a conspiracy, the sole purpose of which is to decrease competition by eliminating that competitor, is clearly in the interest of competition*.

Angelico, 184 F.3d at 275, n.1 (emphasis added).

The District Court's holding also conflicts with the *en banc* decision in *LePage's, Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003):

> When a monopolist's actions are designed to prevent one or more new or potential competitors from gaining a foothold in the market by exclusionary, *i.e.* predatory, conduct, its success in that goal is not only injurious to

> the potential competitor but also to competition in general. It has been recognized, albeit in a somewhat different context, that even the foreclosure of "one significant competitor" from the market may lead to higher prices and reduced output.

Id. at 159. In *LePage's*, the Third Circuit held that plaintiff, a transparent tape manufacturer, had proven injury to competition by showing that defendant used anticompetitive practices to exclude plaintiff from the market. *Id.* at 160-163. Exclusion of the plaintiff in *LePage's* harmed competition as a whole because the plaintiff was the only other competitor in the market – the exact situation in this case. JA0081-82, ¶¶2-4; JA0095-96, ¶¶56-58; JA0097, ¶63; JA0106, ¶96.[12]

B. Highmark's Blocking of West Penn Allegheny's Refinancing Efforts Constitutes Antitrust Injury

The District Court found that Highmark's "refusal to refinance Plaintiff's debt does not amount to an antitrust injury because Plaintiff could seek other means of refinancing." JA0049. According to the District Court, the Amended Complaint "reveals no facts that allow the Court to infer that Highmark held any sort of veto power to prevent Plaintiff from obtaining financing."

[12] The District Court also ignored the Amended Complaint's detailed allegations of Defendants' market power. JA0125-129, ¶¶174-189 (UPMC); JA0129-131, ¶¶190-200 (Highmark). Under *Toledo Mack* and *Angelico*, Defendants' market power *alone* is sufficient to demonstrate anticompetitive effects in the market. *See Toledo Mack*, 530 F.3d at 226 ("Alternatively, because proof that the concerted action actually caused anticompetitive effects is often impossible to sustain, proof of the defendant's market power will suffice."); *Angelico*, 184 F.3d at 276.

JA0050. The Amended Complaint, however, alleges that, with respect to refinancing, "Highmark would have incurred no additional financial exposure, *although its consent was required*." JA0107, ¶100 (emphasis added); *see also* JA0107, ¶102 ("this proposal required Highmark's consent"). Highmark accordingly impeded West Penn Allegheny's ability to access *any* financing. JA0107-111, ¶¶100-112, 114. The District Court inexplicably ignored the plain language of Paragraphs 100 and 102 of the Amended Complaint.

Highmark's refusals to consent to West Penn Allegheny's refinancing were the direct result of the conspiracy. Both Highmark's CEO and Board Chairman said that the only reason that Highmark refused its consent was as part of a reciprocal agreement whereby UPMC would exclude Highmark's rivals, especially United, from the Pittsburgh market. JA0107-110, ¶¶102-113. As a result, West Penn Allegheny was delayed for years in its financial restructuring efforts and forced to incur higher financing costs. JA0111, ¶114. More money that was forced to go to debt service meant less available capital to grow and expand West Penn Allegheny's output of services by investing in expanded and new clinical programs. JA0131-134, ¶¶202-213. The result was reduced competition and output and an artificially depressed market share for West Penn Allegheny. JA0133-135, ¶¶209-214.

C. The Agreement to Sunset Community Blue Injured West Penn Allegheny

The District Court held that West Penn Allegheny failed to allege that it was injured by Defendants' agreement to eliminate Community Blue or that the agreement unreasonably restrained trade. Once more, the District Court ignored the Amended Complaint's allegations and found facts against West Penn Allegheny.

Community Blue provided a low-cost insurance option by extracting deep discounts from hospitals in exchange for increased patient volume. JA0092, ¶46. UPMC refused to participate because it would not agree to discount its prices. JA0092, ¶46; JA0095, ¶55. Community Blue, therefore, directed patients to West Penn Allegheny as a low-cost alternative. JA0092, ¶46. Upon Community Blue's closure, West Penn Allegheny lost this volume. JA0092, ¶46; JA0096, ¶62. The agreement to eliminate Community Blue thus had a direct and negative impact upon West Penn Allegheny.

The District Court also criticized the Amended Complaint for failing to allege that there was an agreement on what Highmark could charge for its other plans. The District Court thus found that Highmark remained free to lower premiums for other plans, so that the elimination of Community Blue would have no broader effect on prices to consumers. JA0046. However, the District Court ignored that, in addition to eliminating Community Blue, Highmark also agreed to

include UPMC as an in-network provider in every plan Highmark offered and prices increased as a result. JA0096, ¶62. This eliminated competition for preferred provider status in Highmark's plans, which is how Highmark previously induced hospitals to provide discounts in exchange for greater volume, and which in turn allowed Highmark to offer a lower price to consumers. JA0096, ¶62. This concurrent agreement thus curtailed Highmark's ability to provide Community Blue-type pricing in other plans because Highmark no longer had the leverage to secure deep discounts or to exclude UPMC's costly facilities. As a result, Community Blue's closure translated into significant increases in insurance costs, as much as 40%. JA0102, ¶81.

D. The District Court Mischaracterizes West Penn Allegheny's Claim for Reimbursement Rates

The District Court further held that Defendants' suppression of West Penn Allegheny's reimbursement rates "does not amount to an injury that the antitrust laws were designed to protect" and that the relief sought would harm consumers. JA0048-49. Once again, the District Court mischaracterizes West Penn Allegheny's claim.

While not the only (or even primary) form of damages claimed, the difference between the rate West Penn Allegheny received and the fair, competitive rate (which would be *less* than what Highmark paid UPMC) is proper antitrust injury. Highmark's CEO admitted that "he could not increase West Penn

Allegheny's reimbursement rates because of Highmark's agreement with UPMC to block United's entry into the Pittsburgh market." JA0111, ¶119. The resulting damages are therefore "attributable to an anticompetitive aspect of the practice under scrutiny." *Atlantic Richfield Co.*, 495 U.S. at 334.

The District Court's finding that increased reimbursement to West Penn Allegheny must translate into increased health insurance costs is contrary to the Amended Complaint's allegations. The Amended Complaint alleges that Highmark depressed West Penn Allegheny's reimbursement for two reasons: (1) to further UPMC's goal of restraining its key competitor; and (2) to help Highmark offset the inflated rates paid to UPMC. JA0133-134, ¶209. The result was a decrease in output in the health care services market and an artificially diminished market share for West Penn Allegheny. JA0133-135, ¶¶209-214. In return, UPMC protected Highmark from competition in the healthcare insurance market. Highmark, facing no competition in the commercial health insurance business (thanks to UPMC's end of the conspiracy), increased health insurance premiums far faster than national averages. JA0097, ¶65; JA0103-105, ¶¶84-94. Highmark did not pass on savings to its customers from West Penn Allegheny's depressed rates, but used them instead to fatten its own margins. JA0104-105, ¶¶88-90, 92, 94.

In sum, absent the conspiracy, West Penn Allegheny would have received fair (and somewhat higher) reimbursement rates and UPMC would have received far less, with the mix of the two resulting in *lower* health care costs.[13] JA0133-134, ¶209.

IV. The Amended Complaint States a Claim for Attempted Monopolization

The District Court erred in dismissing West Penn Allegheny's claim against UPMC for attempted monopolization under Section 2 of the Sherman Act. There are three elements of this claim: "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize, and (3) a dangerous probability of achieving monopoly power." *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993). The District Court did not address the second and third elements.[14] Instead, it held that West Penn Allegheny failed to

[13] *Alberta Gas Chemicals, Ltd. v. E.I. Du Pont de Nemours and Co.*, 826 F.2d 1235 (1987), upon which the district court relies, is off point. There, plaintiff alleged that product demand would have increased if not for the defendant's allegedly anticompetitive acquisition of a competitor. Plaintiff claimed that, absent the acquisition, demand and price would have increased. The plaintiff thus actually sought damages from an alleged increase in price that did not occur. *Id.* at 1243. To the contrary, West Penn Allegheny alleges that overall prices would have decreased both in the hospital and the health insurance markets absent the conspiracy.

[14] The Amended Complaint alleges both elements in detail. *See* JA0082, ¶4; JA0086, ¶22; JA0089, ¶30; JA0107, ¶101; JA0118, ¶144; JA0139, ¶236 (allegations of specific intent to monopolize); JA0125-0129, ¶¶ 174-189; JA0139, ¶239 (allegations of dangerous probability of achieving monopoly power).

plead predatory conduct. Contrary to the District Court's opinion, the Amended Complaint more than sufficiently alleges predatory conduct by UPMC.

Conduct is predatory under Section 2 when "a firm has been 'attempting to exclude rivals on some basis other than efficiency.'" *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985) (citation omitted). This is because the actions of a party with significant market power are subject to heightened scrutiny: "[b]ehavior that otherwise might comply with antitrust law may be impermissibly exclusionary when practiced by a monopolist." *United States v. Dentsply Int'l Inc.*, 399 F.3d 181, 187 (3d Cir. 2005). "[A] monopolist is not free to take certain actions that a company in a competitive (or even oligopolistic) market may take, because there is no market constraint on a monopolist's behavior." *LePage's Inc.*, 324 F.3d at 151-52; *see also Conwood Co., L.P. v. United States Tobacco Co.*, 290 F.3d 768, 784 (6th Cir. 2001) (conduct which included removing competitor's displays and product from stores and providing misleading information to retailers about competitor's product was part of an unlawful "systematic effort to exclude competition").

The universe of predatory conduct is not narrowly circumscribed: "Anticompetitive conduct can come in too many different forms, and is too dependent upon context, for any court or commentator ever to have enumerated all the varieties." *LePage's Inc.*, 324 F.3d at 152 (internal quotes and cites omitted);

see also United States v. Microsoft, 253 F.3d 34, 58 (D.C. Cir. 2001) ("the means of illicit exclusion, like the means of legitimate competition, are myriad"). Thus, "courts must look to the monopolist's conduct taken as a whole rather than considering each aspect in isolation." *LePage's Inc.*, 324 F.3d at 162; *see also City of Anaheim v. S. Cal. Edison Co.*, 955 F.2d 1373, 1376 (9th Cir. 1992) ("it would not be proper to focus on specific individual acts of an accused monopolist while refusing to consider their overall combined effect.").[15]

The Amended Complaint alleges numerous acts of predatory conduct by UPMC. To begin with, as explained above, West Penn Allegheny alleges that UPMC conspired with Highmark to have Highmark provide UPMC with artificially favored reimbursement and to raise West Penn Allegheny's financing costs. The upshot of this conduct was to drain West Penn Allegheny of the resources necessary to grow and thrive. This conduct is anticompetitive. *See JTC Petroleum Co. v. Piasa Motor Fuels, Inc.*, 190 F.3d 775, 778-779 (7th Cir. 1999) (agreement of competitors and suppliers to raise costs to plaintiff, which refused to

[15] Contrary to the District Court's implication, whether conduct is predatory is independent of any legitimate business justification offered by a defendant. JA0068. A plaintiff does not bear the burden to show there was no legitimate business justification. Rather, once plaintiff presents a *prima facie* case of exclusionary conduct, a defendant must prove, as an affirmative defense, that a legitimate business justification excuses the conduct. *Eastman Kodak Company v. Image Technical Servs. Inc.*, 504 U.S. 451, 483 (1992); *Microsoft*, 253 F.3d at 47.

join price-fixing cartel, injured competition); *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1478 (9th Cir. 1997) (hospital's policy of diverting indigent patients to competitors constituted predatory conduct, because it raised rivals' costs); *Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal & Professional Publications, Inc.*, 63 F.3d 1540, 1553 n.12 (10th Cir. 1995) (raising rivals' costs without legitimate business justification constitutes predatory conduct); *Premier Electrical Constr. Co. v. Nat'l Electrical Contractors Ass'n, Inc.*, 814 F.2d 358, 368-371 (7th Cir. 1987) (same).

Moreover, UPMC has coerced nominally independent community hospitals into replacing their independent oncology programs with UPMC Cancer Centers controlled by UPMC. JA0115-117, ¶¶135-141. While the District Court acknowledges this conduct at the outset of its opinion, it ignores the exclusive dealing arrangements in its substantive discussion.

UPMC threatened these local community hospitals with the establishment of rival UPMC facilities adjacent to them unless they consented to enter into "joint ventures" with UPMC or to have a UPMC Cancer Center established on their campus. JA0115-116, ¶135. These cancer centers control the flow of oncology case referrals from community hospitals to tertiary and quaternary care hospitals. Sophisticated tertiary and quaternary care institutions rely on referrals from community hospitals to maintain the inpatient admission

volumes they need to grow and thrive. JA0116, ¶138. While there are several independent community hospitals in the Pittsburgh area, there are only two providers of tertiary and quaternary care – UPMC and West Penn Allegheny. JA0125-126, ¶¶174, 176, 177. UPMC has used these cancer centers as exclusive referral arrangements so that the host community hospitals are only permitted to refer their patients to UPMC's tertiary and quaternary care facilities, and not to West Penn Allegheny's. JA0116-117, ¶¶138, 139, 141.

UPMC's conduct has therefore foreclosed referrals to West Penn Allegheny from "nearly every" independent community hospital and restricted its ability to compete.[16] JA0115-116, ¶135. It is well-established that foreclosure of distribution channels through exclusive dealing arrangements is predatory conduct. *See Dentsply Int'l Inc.*, 399 F.3d at 196 ("Dentsply's grip on its 23 authorized dealers effectively choked off the market for artificial teeth"); *LePage's Inc.*, 324 F.3d at 160 (holding that reasonable jury could find that defendants' conduct "cut LePage's off from key retail pipelines"); *see also Kodak*, 504 U.S. at 483-485

[16] The law does not mandate that a certain percentage of the market be foreclosed in order for conduct to be anticompetitive. *See LePage's*, 324 F.3d at 158-159 (describing nature of and effects from defendant's conduct without considering percentage of market foreclosed by activity); *Microsoft*, 253 F.3d at 70-71 (affirming district court's holding that Microsoft violated Section 2 and noting that exclusive contracts that foreclosed less than 40% or 50% of market may give rise to Section 2 violation).

(monopolist's exclusive dealing contracts with manufacturers of replacement parts for copiers, among other items, constituted improper exclusionary conduct); *Geneva Pharm. Tech. Corp. v. Barr Labs., Inc.*, 386 F.3d 485, 504-506 (2d Cir. 2004) (exclusive supply contract for product necessary to manufacture drug constituted willful maintenance of monopoly power); *United States v. Visa U.S.A., Inc.*, 344 F.3d 229 (2d Cir. 2003) (defendants' rule that prohibited members of defendants' networks from issuing Discover or American Express cards constituted unlawful, exclusionary conduct); *Microsoft Corp.*, 253 F.3d 34 (contracts that restricted internet browser competitors' access to distribution channels were unlawful).

UPMC's predatory conduct also includes bidding up physician salaries to artificially inflated levels, in order to saddle West Penn Allegheny with an unsustainable cost structure. *See* JA0118, ¶146; JA0119-120, ¶¶152-153; JA0121, ¶156-159. Predatory bidding is actionable conduct under Section 2. *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312 (2007). In *Weyerhaeuser*, plaintiff-sawmill claimed that defendant-sawmill used its market power to bid up the price of sawlogs, the key input in the industry, in order to put plaintiff out of business. The Supreme Court determined that such conduct violates Section 2 when the bidding results in below-cost pricing of the defendant's

outputs and the defendant has a dangerous probability of recouping its losses. *Id* at 325.

Here, physicians are analogous to the sawlogs in *Weyerhaeuser*. They are the "input" that generates patient referrals and income for a hospital. UPMC bid up the cost of physicians (in the form of salary) to drive West Penn Allegheny out of business. The Amended Complaint alleges that UPMC hired physicians for such inflated compensation that UPMC incurred financial losses. *See* JA0089, ¶¶32; JA0090-91, ¶37; JA0121, ¶¶156-159. Contrary to industry practice, UPMC has guaranteed high salaries to physicians without any requirement to meet specified productivity targets. JA0121, ¶156. For example, in 2008, UPMC hired a (non-employee) member of the medical staff at West Penn Allegheny who had been earning $120,000 per year in his independent private practice. JA0121, ¶159. UPMC hired this physician at a salary of $500,000 – far beyond any reimbursements that he could generate for UPMC. *Id.*

Likewise, the Amended Complaint pleads dangerous probability of recoupment. UPMC's senior executives have repeatedly stated that they intend to use physician raiding tactics and bidding up of salaries to drive West Penn Allegheny out of business. JA0089, ¶¶30-31; JA0090-91, ¶37; JA0118, ¶144; JA0120-121, ¶155. UPMC has successfully used its predatory physician-raiding tactics to force the closure of two other hospitals, St. Francis and Citizens General.

JA0091, ¶¶39-40. Given the high fixed costs of hospital operation, UPMC only needs to raid enough referring physicians to drive West Penn Allegheny's patient volumes below the tipping point. JA0089, ¶¶30, 31. And without West Penn Allegheny in the market, there will be no competitor to check UPMC's prices for tertiary and quaternary care.

Moreover, UPMC has repeatedly hired physicians from West Penn Allegheny when it had no ability to employ them fully and profitably. *See, e.g.*, JA0090-91, ¶¶ 35-38 (UPMC hired every anesthesiologist at Allegheny General Hospital even though it could not fully employ them); JA0118-119, ¶145-149 (UPMC attempted to raid anesthesiologists and radiologists from Alle-Kiski Medical Center even though it could not fully employ them); JA0120, ¶153 (UPMC Shadyside hired entire Vascular Lab Department from West Penn Hospital even though it had a fully staffed vascular lab). This conduct is likewise illegal. *See* P. Areeda & H. Hovenkamp, III *Antitrust Law*, § 702c (3d ed. 2007) ("Acquiring talent not to use it but to deny it to possible rivals is exclusionary").

Thus, when viewed as a whole, UPMC's conduct has clearly been predatory and the Amended Complaint therefore stated a claim for attempted monopolization.

V. The State Law Claims Should Be Reinstated

Counts IV and V of the Amended Complaint allege state law claims. The District Court did not address the merits of these claims, but declined to exercise supplemental jurisdiction over them after dismissing the federal claims. JA0076. As the Sherman Act claims were improperly dismissed, the state law claims should be reinstated.

CONCLUSION

For the reasons set forth herein, the judgment of the District Court should be reversed.

Respectfully submitted,

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CERTIFICATION OF BAR MEMBERSHIP

The undersigned certifies, pursuant to L.A.R. 46.1(e), that all of the attorneys whose names appear on the within brief are members of the bar of this Court.

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