No. 09-4468

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT

WEST PENN ALLEGHENY HEALTH SYSTEM, INC.,

Plaintiff-Appellant,

—v.—

UPMC and HIGHMARK, INC.,

Defendants-Appellees.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA,
NO. 09-CV-0480 (HONORABLE ARTHUR J. SCHWAB)

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March 1, 2010

CORPORATE DISCLOSURE STATEMENT AND STATEMENT OF FINANCIAL INTEREST

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, Defendant-Appellee UPMC 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 hold 10% or more of the party's stock:

None.

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as 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.

Dated: March 1, 2010

/s/ Jonathan M. Jacobson
JONATHAN M. JACOBSON

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STATEMENT OF THE ISSUES

1. Did the District Court properly hold that West Penn failed to allege sufficient facts to support its claims of conspiracy in restraint of trade and conspiracy to monopolize under Sections 1 and 2 of the Sherman Act where West Penn's allegations in the provider market were insufficient to suggest any agreement in restraint of trade, its allegations in the insurance market provided no basis for any claim, and its allegations had no synergistic effect?

2. Did the District Court properly hold that West Penn failed to allege sufficient facts to support its attempted monopolization claim under Section 2 of the Sherman Act, where West Penn failed to allege substantial foreclosure in the relevant market and failed adequately to allege any elements of a predatory hiring claim?

3. Having dismissed West Penn's federal claims, did the District Court properly dismiss its state claims as well?

STATEMENT OF THE CASE

This appeal arises from the District Court's dismissal of West Penn Allegheny Health System, Inc.'s amended complaint alleging violations of the federal antitrust laws by UPMC and Highmark, Inc. West Penn and UPMC are both non-profit health care systems based in Pittsburgh, Pennsylvania. Highmark, a Blue Cross and Blue Shield licensee, is the largest health insurer in the Pittsburgh area. The core of West Penn's complaint is that UPMC and Highmark took steps to injure West Penn in an alleged Allegheny County, Pennsylvania market for acute care hospital services.

West Penn's initial complaint alleged that UPMC and Highmark violated Sections 1 and 2 of the Sherman Act by conspiring to protect each other from competition and to raise West Penn's costs, and that UPMC violated Section 2 by attempting to monopolize the market for acute care inpatient services in Allegheny County. Dist. Ct. Dkt. No. 1. West Penn also brought state law claims against UPMC. *Id.*

UPMC and Highmark each moved to dismiss for failure to state a claim under Rule 12(b)(6). Dist. Ct. Dkt. Nos. 38, 44. After briefing and argument, the District Court permitted West Penn to file an amended complaint. JA162-66. West Penn's amended complaint included the same claims as its initial complaint, but expanded its allegations concerning the challenged conduct. JA81-144; *see, e.g.*, JA115-21. UPMC and Highmark again moved to dismiss. Dist. Ct. Dkt. Nos. 78, 82. The District Court this time granted the motions. JA5-80.[1]

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[1] The District Court also required the parties to participate in an early neutral evaluation as well as a mediation process. These efforts were not successful. West Penn attempts to cast doubt on the Court's decision by pointing to the settlement efforts and to the District Court's citations to the initial complaint, implying that the Court did not properly consider West Penn's amended complaint. West Penn Br. 5. But the Court specifically noted that it "included all references to the Original and Amended Complaint, where applicable, for purposes of completeness," emphasizing that "[o]f course, the allegations of the Amended Complaint are the only allegations that are before the Court as the filing of the Amended Complaint supersedes the Original Complaint." JA6 n.1.

The District Court held that West Penn's Section 1 and 2 claims based on UPMC's and Highmark's alleged conspiracy failed as a matter of law because: (1) West Penn had not alleged any antitrust injury, JA42-51; (2) certain alleged concerted conduct of which West Penn complained was not an unreasonable restraint of trade, JA45-46; and (3) West Penn's amended complaint was "short on any plausible facts to support its bald allegations" of the various aspects of concerted action it claimed, JA55. The Court also held that West Penn had not stated a Section 2 attempted monopolization claim against UPMC because West Penn had not alleged exclusionary conduct by UPMC. JA66-73. The Court further observed that the implementation of West Penn's prayers for relief "would be practically and logistically challenging, if not impossible," and noted that "[t]he Court [knew] of no recent anti-trust case which has resulted in a Court's day-to-day regulating of the contractual negotiations and business relations of the parties." JA74.

The Court thus dismissed West Penn's federal claims with prejudice, holding that amendment would be futile, and dismissed the supplemental state law claims without prejudice. JA76-77. This appeal followed.

STATEMENT OF FACTS

A. THE PARTIES AND MARKETS INVOLVED

Both West Penn and UPMC are healthcare systems in the Pittsburgh area. JA85-86, 126. West Penn was formed in August 2000 when the Western Pennsylvania Health Care System merged with hospitals that had been affiliated with the Allegheny Health, Education, and Research Foundation, which had entered bankruptcy. JA82, 86.

West Penn alleges that the health care services market at issue here is "acute care inpatient services" or, in the alternative, "high-end tertiary and quaternary acute care inpatient services" in Allegheny County. JA126; *see also* West Penn Br. 48. According to West Penn, UPMC enjoys market power in this market, and West Penn is "the sole surviving competitor to UPMC in sophisticated tertiary and quaternary care." JA82, 125-29. West Penn also alleges that Highmark possesses market power in the market for "health care financing and administration for private employers and individuals" in Allegheny County. JA129-31.

West Penn claims that, "[a]t least since 2002, Pittsburgh's dominant hospital system, UPMC, and its dominant health insurer, Highmark, have conspired to reduce competition . . . ." JA81. According to West Penn, "[o]ne of the conspiracy's principal aims was to cripple [West Penn], the sole surviving competitor to UPMC in sophisticated tertiary and quaternary care." JA82.

B. THE ANTAGONISTIC RELATIONSHIP BETWEEN UPMC AND HIGHMARK PRIOR TO 2002

The relationship between Highmark and UPMC has long been bitterly antagonistic. As West Penn acknowledges, "in the late 1990's and early 2000's, Highmark and UPMC were at loggerheads." JA92; *see also* JA93 (noting "mutual antagonism between Highmark and UPMC in the early 2000's").

For example, according to West Penn, UPMC: (1) refused to participate in Highmark's CommunityBlue network, which West Penn describes as a "low-cost insurance option" with a "limited provider network" that "sent business to [Allegheny General Hospital] and other non-UPMC hospitals"; (2) launched its own competing insurance company, the UPMC Health Plan, because of its inability to negotiate a "fair rate" with Highmark; and (3) "disseminat[ed] false information to the media" about CommunityBlue, leading Highmark to sue UPMC for false advertising. JA92-93. Highmark also sued UPMC in 2001 to enjoin UPMC's acquisition of the Children's Hospital of Pittsburgh, claiming that the merger violated the antitrust laws. JA93-94.

Significantly, prior to the June 2002 agreement discussed below, UPMC and Highmark had significant and acrimonious disputes about the levels of reimbursement to which UPMC was entitled. *See* JA92-93, 938, 1226. This led UPMC to allege in litigation that Highmark was exercising monopoly power to dictate prices for health care providers and that "Highmark's promotion of its low-cost Community Blue product constituted 'predatory pricing.'" JA94-95.

C. THE AMICABLE RELATIONSHIP BETWEEN WEST PENN AND HIGHMARK PRIOR TO 2002

West Penn acknowledges that, at the same time Highmark was at "loggerheads" with UPMC in the late 1990s and early 2000s, Highmark supported West Penn. JA92 ("Highmark was helpful to West Penn Allegheny in the late 1990's and early 2000's"); *see also* JA91-92.

For example, in 2000, Highmark provided a $125 million subordinated loan to West Penn to help finance the West Penn/Allegheny General Hospital merger. JA92. Highmark also attended meetings with West Penn executives to promote West Penn's initial bond offering to investors and, in early 2002, provided West Penn with a multi-million dollar grant. JA92.

Perhaps most importantly, as the District Court observed, "Highmark re-negotiated [its] contracts with West Penn Allegheny in June 2002 at higher rates and at an extended term through June 30, 2008." JA60; *see also* JA345-431 (June 14, 2002 West Penn/Highmark Agreement). These increased reimbursement rates included successive rate increases, beginning in 2002 and continuing to the present. JA60, 1048-1153.

D. THE JUNE 25, 2002 UPMC/HIGHMARK AGREEMENT

On June 25, 2002, eleven days after West Penn and Highmark entered into their own agreement (discussed above) that gave West Penn higher reimbursement rates, UPMC and Highmark also entered into a provider agreement. JA1212-29. Under that agreement:

- Highmark gave UPMC a small, one-time rate increase and then froze UPMC's reimbursement rates for seven years, with adjustments only for inflation. JA1226-27, 1229 (setting forth percentage detail).

- UPMC agreed to participate in all of Highmark's plans for the duration of the agreement, except for CommunityBlue, and also agreed that "the sales, promotion, marketing, and benefit and network design of any CommunityBlue Products" would "not constitute a breach of [the] Agreement." JA1224-26.

- Highmark and UPMC agreed to construct a new Children's Hospital on the site of the former St. Francis Medical Center at Lawrenceville, and "to satisfy, guaranty, defease or fund the payment of the debts and other obligations of the St. Francis Health System." JA1212-13. To that end, Highmark provided UPMC a $70 million grant and $163 million loan; UPMC contributed hundreds of millions of dollars of its own. JA96, 1213-17.

- The agreement resolved what otherwise would have been an impasse between Highmark and UPMC, allowing Highmark subscribers to obtain medical care at UPMC facilities if they so chose. Without the agreement, UPMC facilities would have been out-of-network for all Highmark subscribers.

E. WEST PENN'S DISINGENUOUS DEPICTION OF THE 2002 UPMC/HIGHMARK AGREEMENT

The gravamen of West Penn's complaint is that the June 25, 2002 UPMC/Highmark agreement was part of "a broad, and illegal, agreement . . . to restrain health care competition in the Pittsburgh community." JA95-96. West Penn asserts that UPMC and Highmark implemented this purported conspiracy through a variety of agreements as follows:

> UPMC agreed to protect Highmark by refusing to contract on reasonable terms with any competing health insurer or to sell its health insurance affiliate to any competing health insurer, thus relegating major national insurers such as United, Coventry, and Aetna to marginal participation (at best) in the Pittsburgh market. In exchange, Highmark agreed to restrict UPMC's hospital primary competitor, West Penn Allegheny, by shuttering its low-cost Community Blue product, attempting to block West Penn Allegheny's efforts to refinance its debt, and paying inflated reimbursement rates to UPMC while maintaining depressed rates for UPMC's competitors, especially West Penn Allegheny.

JA82. As discussed below, the actual terms of the UPMC/Highmark agreement, the terms of Highmark's agreements with West Penn, and other publicly-available information suggest otherwise. [2]

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[2] Although West Penn now quibbles that the District Court took judicial notice of certain documents outside the amended complaint, West Penn Br. 11 n.3, it did not object below to any of UPMC's and Highmark's requests for judicial notice, and makes no substantive argument in this Court that judicial notice was improper. Accordingly, West Penn has waived any objection to the use of these and other documents as to which the District Court took judicial notice. *See* FED. R. EVID. 201(e) ("A party is entitled *upon timely request* to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed.") (emphasis added); *John Wyeth & Brother Ltd. v. Cigna Int'l Corp.*, 119 F.3d 1070, 1076 n.6 (3d Cir. 1997).

Reimbursement Rates and Grants. West Penn alleges that the 2002 UPMC/Highmark agreement inflated reimbursement rates for UPMC and that Highmark agreed "to tilt the playing field unfairly in UPMC's favor through discriminatory reimbursement and grant-making." JA82, 96-97, 111-13. But, as discussed above, the 2002 agreement – reached after years of mutual antagonism and intense negotiations – gave UPMC a single modest rate increase and then (other than adjustments for inflation) froze rates for *seven years*. JA92-93, 938, 1226-27.

Conversely, West Penn's own agreement with Highmark, reached eleven days before the UPMC/Highmark agreement, included reimbursement rate *increases*. And for each year from 2002 and continuing to the present – in contrast to the reimbursement rates that Highmark gave UPMC, which were frozen for seven years – Highmark granted West Penn a series of successive rate increases over and above inflation, including entirely renegotiated rates in 2004 and 2008. JA1048-53. In fact, in 2009, West Penn acknowledged that its "current contract with Highmark appears to contain market competitive rates." JA932. In addition, West Penn continued to receive grants from Highmark after June 2002. JA836-50, 964.

CommunityBlue. West Penn alleges that, by virtue of the UPMC/Highmark agreement, Highmark agreed to "shutter[]" its CommunityBlue plan and that this "ended health insurance price competition in the Pittsburgh community and forced employers and families into buying Highmark's remaining, far more expensive health insurance products." JA82, 97, 101. But the UPMC/Highmark agreement specifically contemplated the continued existence of CommunityBlue; as set forth above, the agreement provides that, although UPMC will not participate in Highmark's CommunityBlue plan going forward, Highmark's continued marketing of CommunityBlue is not a breach of the agreement. JA1224-26.

Furthermore, although West Penn alleges that, as a "*quid pro quo* for Highmark's agreement," "UPMC agreed not to grow or market" its own health plan, JA97, 101, in fact the UPMC Health Plan has grown every year since 2002 – with enrollment increasing from 683,000 in 2002 to 1.327 million in 2008 – an increase of over 94% in six years in a region not known for population growth. JA928-29.

UPMC/Highmark "Truce." West Penn argues that UPMC offered Highmark a "truce," asserting that the allegation provides "direct evidence" of a conspiracy. West Penn. Br. 12-13, 28-29 (citing JA95). But what West Penn ignores is that the allegation in question relates to a comment made in January 1998 – four and a half years before the purported conspiracy, JA95 – and that, by West Penn's own allegations, the offer of a "truce" was *rejected*, as UPMC and Highmark remained "mutual[ly] antagonis[tic]" for years, JA91-95.

Highmark's "Refusal" to Refinance West Penn's Debt. West Penn alleges that, after Highmark entered into the 2002 agreement with UPMC, Highmark refused to consent to refinance the $125 million loan it previously had given West Penn. JA92, 97, 106-11. As the District Court observed, however, "Highmark's refusals to further assist West Penn Allegheny through modifications to the existing loan is fully consistent with Highmark's self-interest in making sure the loan would be repaid at its agreed terms." JA61-62. Moreover, the fact is that, as West Penn acknowledges, it achieved a highly successful refinancing in 2007 at a low interest rate. JA110-11; *see* JA921-23.

F. UPMC'S COMPETITION WITH WEST PENN

West Penn also claims that UPMC violated Section 2 of the Sherman Act by attempting to monopolize the Allegheny County acute care hospital market in two ways. JA87-91, 115-21, 138-40. First, West Penn alleges that UPMC "began a campaign of raiding" key physicians from West Penn in order to "chok[e] off [West Penn's] access to patients from these admitting physicians." JA87, 89, 117-21. As the District Court noted, however, "West Penn Allegheny has also engaged in the same type of hiring of UPMC's 'star' physicians." JA69.

Second, West Penn alleges that UPMC entered into exclusive dealing arrangements with independent community hospitals that resulted in West Penn being "close[d] off" from "tertiary and quaternary care referrals . . . from the community hospitals' oncology departments." JA115-17. West Penn does not, however, provide any information about which community hospitals are involved in these arrangements, what their specialties might be, what the terms of the supposedly exclusive arrangements are, or why these particular hospitals might be a significant source of referrals to West Penn.

G. WEST PENN'S CLAIMED INJURIES

As the District Court observed, West Penn's allegations regarding its injuries are internally inconsistent. JA22-23. On the one hand, West Penn alleges that, "[a]s a result of the conspiracy between UPMC and Highmark, West Penn Allegheny's growth has been artificially stunted and its market share unduly restricted." JA131-32. In the same vein, it alleges that it was "starv[ed]" of the capital it "needed to grow and to expand" and that this caused it "to lose market share and inpatient admissions volume." JA132, 134. And West Penn claims that, "[b]ut for" the UPMC/Highmark agreement, it "would have received millions of dollars in additional reimbursement from Highmark." JA133-34.

On the other hand, however, West Penn avers that it has been able to provide equal or better care to the community than UPMC provides and at a lower cost. JA84. It further alleges that its cash flow, revenue, and EBITDA have continually increased since its formation in 2000. JA132-33. These allegations are borne out by West Penn's public statements about its finances (of which the District Court properly took judicial notice), which show that it was profitable throughout the period of the alleged conspiracy. JA950-65. And, as discussed above, Highmark has successively raised West Penn's reimbursement rates since 2002, a fact also noted in West Penn's public financial comments. JA132-33; *see* JA932, 958-62.

STANDARD OF REVIEW

This Court exercises plenary review over a District Court's order granting a motion to dismiss. *Fowler v. UPMC Shadyside*, 578 F.3d 203, 206 (3d Cir. 2009); *Phillips v. County of Allegheny*, 515 F.3d 224, 233 (3d Cir. 2008). A court may take facts properly subject to judicial notice into account in evaluating a motion to dismiss. *See, e.g.*, *Lum v. Bank of Am.*, 361 F.3d 217, 222 n.3 (3d Cir. 2004). The determination whether particular conduct is anticompetitive or unreasonable is a question of law for the court. *E.g.*, *SmileCare Dental Group v. Delta Dental Plan*, 88 F.3d 780, 783 (9th Cir. 1996); *see Pacific Bell v. linkLine Commc'ns*, 129 S. Ct. 1109 (2009) (granting Rule 12(b)(6) dismissal because conduct was not exclusionary as a matter of law).

In *Fowler*, this Court instructed that the evaluation whether a complaint states a claim under Rule 12(b)(6) involves a two-part analysis:

> First, the factual and legal elements of a claim should be separated. The District Court must accept all of the complaint's well-pleaded facts as true, but may disregard any legal conclusions. Second, a District Court must then determine whether the facts alleged in the complaint are sufficient to show that the plaintiff has a "plausible claim for relief." In other words, a complaint must do more than allege the plaintiff's entitlement to relief. A complaint has to "show" such an entitlement with its facts.

578 F.3d at 210-11 (citing *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949-50 (2009); *Phillips*, 515 F.3d at 234-35).

Determining "whether a complaint states a plausible claim for relief [is] a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 129 S. Ct. at 1950. This is particularly true in antitrust cases where allegations of anticompetitive conduct should be "viewed in light of common economic experience." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 565 (2007). A key reason for this requirement is to expose deficient pleadings that, "however true, could not raise a claim of entitlement to relief" "at the point of minimum expenditure of time and money by the parties and the court." *Id.* at 558 (internal quotation marks and citations omitted). Thus, as the Supreme Court has observed, "it is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be [quite] expensive." *Id.* (citation omitted).

SUMMARY OF ARGUMENT

1. West Penn's principal argument on appeal is that it adequately alleged concerted action between UPMC and Highmark and that its claim of an overarching conspiracy to restrain trade in, or monopolize, the acute care hospital market in Allegheny County should therefore have been allowed to proceed. The argument fails. UPMC is a hospital system; Highmark is an insurer. The fact that they have entered into an "agreement," thereby engaging in "concerted action," is a matter of obvious necessity and plainly not, without more, unlawful. Without some Highmark/UPMC agreement, UPMC facilities would be outside of Highmark's network, and Highmark subscriber-patients would be unable to use the leading hospital facilities in the Pittsburgh area.

The relevant question, then, is whether the specific activities set forth in West Penn's amended complaint give rise to an antitrust violation. And, on that question, the District Court correctly held that West Penn's allegations fall far short. The District Court properly concluded that West Penn's allegations about CommunityBlue, purportedly discriminatory reimbursement rates, and the West Penn refinancing were insufficient because, in each instance, West Penn failed to allege facts to suggest any agreement on these matters at all or, even if it had, its allegations of an unreasonable restraint of trade were insufficient as a matter of law. As for West Penn's allegations about competition in the insurance market, the

Court was correct in holding that West Penn was neither a customer nor a competitor in the insurance market, failed in any event to allege compensable antitrust injury, and was not a proper party to sue.

On appeal, West Penn tries to evade these many deficiencies by asserting that it adequately alleged *some* concerted action and that it suffered injury in its ability to compete. But, as the District Court correctly recognized, each of the activities on which West Penn based its claims provided no basis to recover, and West Penn alleged no facts to suggest that there was any synergistic effect from the activities alleged. Nothing plus nothing is still nothing, and the "conspiracy" claims were properly dismissed as a result.

2. The District Court was on equally sound footing in dismissing West Penn's attempted monopolization claim. The allegations concerning UPMC's purported exclusive arrangements with community hospitals for oncology referrals stated no claim because West Penn failed to allege *any* foreclosure of competition in the relevant market. Its allegations of "predatory hiring" were equally insufficient. It failed to allege that UPMC did not utilize the services of physicians it hired, or that its salaries resulted in below cost pricing of acute care services, or that there was any prospect of recoupment – all essential elements of the claim.

3. With the federal claims dismissed, the District Court properly dismissed, without prejudice, West Penn's state law claims as well.

ARGUMENT

I. THE DISTRICT COURT PROPERLY DISMISSED WEST PENN'S CONSPIRACY CLAIMS UNDER SECTIONS 1 AND 2 OF THE SHERMAN ACT

The District Court correctly held that West Penn failed to allege sufficient facts to support essential elements of both its Section 1 and Section 2 Sherman Act conspiracy claims. In order to appreciate why the District Court was correct, we briefly set forth, in this section of the brief, the elements of the claims as relevant to this case. We then analyze each of the factual allegations that West Penn contends support a claim for relief in turn, and demonstrate that none supports a viable theory of antitrust violation. We group our discussion of West Penn's allegations (as does West Penn) as follows: (1) Highmark's discontinuation of CommunityBlue; (2) Highmark's allegedly discriminatory reimbursement rates; and (3) Highmark's failure to refinance West Penn's debt. We then discuss why West Penn's allegations that UPMC and Highmark conspired to reduce competition in the Pittsburgh insurance market (as opposed to the health care provider market) also are insufficient to state a Section 1 claim.

For purposes of exposition, it is necessary to discuss each grouping of West Penn's allegations in turn. But, as we will also explain, the same results hold when the averments are examined as a whole. Here, as in *Pacific Bell v. linkLine*

Commc'ns, 129 S. Ct. 1109, 1123 (2009), there can be no "synergistic" effect from summing a number of claims when *none* has any independent validity of its own.

A. SECTION 1 REQUIRES CONCERTED ACTION, AN UNREASONABLE RESTRAINT OF TRADE, AND CAUSAL ANTITRUST INJURY

There are several elements of any claim under Section 1 of the Sherman Act. Three of the elements established by this Court are in issue here. *First*, West Penn must allege the existence of concerted action – a "contract, combination, or conspiracy" – among the defendants. *Second*, it must allege facts sufficient to show that that concerted action resulted in an *unreasonable* restraint of trade. And, *third*, West Penn must allege facts to show that it is an appropriate party to bring suit, incurring compensable antitrust injury from the claims alleged. *See, e.g., In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 267 (3d Cir. 2009); *Barton & Pittinos, Inc. v. SmithKline Beecham Corp.*, 118 F.3d 178, 182-84 (3d Cir. 1997); *see generally* ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 2-3, 46-49, 809-10 (6th ed. 2007). We provide a brief overview of each of these elements as enunciated by this Court and the Supreme Court prior to turning to West Penn's specific allegations here.

1. Concerted Action

Proof of *concerted* action is an essential element of any claim under Section 1. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767 (1984);

Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761 (1984). As the Court explained in *Twombly*, the "crucial question" is whether there was an *agreement* between the defendants on the matters alleged. 550 U.S. at 553; *see also, e.g.*, *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 117 (3d Cir. 1998) (allegations, if proven, must demonstrate that the defendants had a "conscious commitment to a common scheme designed to achieve an unlawful objective").

West Penn relies on a number of decisions from this and other courts finding that particular allegations of concerted action were sufficient to find that there was an agreement. *See* West Penn Br. 43-46. But this case is fundamentally different from the typical case and from the precedents on which West Penn relies. Specifically, here, there is no question that there was an agreement between Highmark and UPMC. Their June 2002 agreement specified, in writing and in detail, their mutual obligations going forward. JA1212-29. In sharp contrast, in the cases on which West Penn relies – *e.g.*, *Rossi v. Standard Roofing*, 156 F.3d 452 (3d Cir. 1998); *Big Apple BMW v. BMW of North America*, 974 F.2d 1358 (3d Cir. 1992) – as well as cases such as *Twombly*, *Monsanto*, and *Matsushita Elec. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), the question was *whether there was any agreement at all*.

That distinction is critical here. Although West Penn strives mightily to demonstrate the existence of *some* agreement between Highmark and UPMC, that is neither disputed nor relevant. Thus, the eighteen pages West Penn spends in its brief cataloging alleged direct and circumstantial evidence of an agreement are beside the point. West Penn Br. 26-44. The only relevant question here is what the scope of the UPMC/Highmark agreement actually was. In other words, did Highmark and UPMC agree that CommunityBlue would be discontinued? Did they agree on the rates that Highmark would pay West Penn? It is on these and other similar issues that West Penn's arguments fall far short – as the District Court correctly ruled.[3]

2. Unreasonable Restraint of Trade

Under Section 1 of the Sherman Act, even if the existence of a contract, combination, or conspiracy is proven, the arrangement is considered unlawful only

[3] West Penn also asserts that the District Court improperly applied the summary judgment standard of the *Matsushita* case, rather than standards applicable to a motion to dismiss under Rule 12(b)(6). West Penn Br. 43-46 (citing JA61-64). But the District Court's opinion, including the portions cited by West Penn, demonstrates otherwise. The Court simply found, under *Twombly* and *Iqbal*, that the allegations of West Penn's amended complaint were either conclusory, or implausible, or both. That West Penn's allegations were of conduct consistent with Highmark's and UPMC's individual self interest, rather than conspiracy, may well be significant under *Matsushita*'s summary judgment standard. But it is also important in evaluating whether an allegation is plausible, as both *Twombly*, 550 U.S. at 565-76, and *Iqbal*, 129 S. Ct. at 1950, specifically recognize.

if it is shown to be an *unreasonable* restraint of trade. As this Court has often held, therefore, proof that the restraint in issue is unreasonable is a second essential element of any claim under Section 1. *See, e.g.*, *Gordon v. Lewistown Hosp.*, 423 F.3d 184, 208 (3d Cir. 2005). Reasonableness is typically determined under a form of analysis known as the "rule of reason," especially in the context of vertical arrangements like those in issue here. *See Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 886-87 (2007). Under the rule of reason, an agreement is considered unlawful only if shown to reduce market output or otherwise restrict competition substantially in a properly defined relevant market. *Id.*; *see generally* ANTITRUST LAW DEVELOPMENTS 46-76.[4]

The rule of reason is the standard for analyzing each of West Penn's Section 1 allegations in this case. West Penn has never argued otherwise. Although UPMC competes with its Health Plan against Highmark in the insurance market, their 2002 agreement was one in which a healthcare provider (UPMC) agreed on the terms on which it would be reimbursed by an insurer (Highmark). That is a quintessentially vertical agreement. *See Business Electronics v. Sharp Electronics*,

[4] In a small minority of cases, involving truly pernicious practices with no plausible justification such as price fixing among competitors, courts instead apply a rule of "per se illegality." *See Leegin*, 551 U.S. at 886-87. If the per se rule applies, the agreement is conclusively determined to be unlawful without regard to the actual impact of the arrangement on competitive conditions. *Id.*

485 U.S. 717, 730 & n.4 (1988). This Court, consistent with all the courts of appeals to address the issue, has made clear that, in cases such as this involving agreements between firms that compete against each other in some respects but have a vertical relationship as well, the rule of reason controls. *See AT&T v. JMC Telecom*, 470 F.3d 525, 531 (3d Cir. 2006); *accord*, *e.g*., *Electronics Commc'ns Corp. v. Toshiba America*, 129 F.3d 240, 243-44 (2d Cir. 1997) (collecting cases).

3. Causal Antitrust Injury

Lastly, even if a plaintiff can show the first two elements discussed above, it still must demonstrate that it satisfies the requirements for a private plaintiff under Section 4 of the Clayton Act, i.e., that: (1) it suffered an injury cognizable under the antitrust laws ("antitrust injury"); and (2) it is a proper party to assert the antitrust claim it seeks to bring. *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990); *Associated General Contractors of California v. California State Council of Carpenters*, 459 U.S. 519, 539-42 (1983) ("*AGC*").

Antitrust injury. Contrary to West Penn's arguments (West Penn Br. 47-56), a plaintiff may not recover damages in a private action under the antitrust laws merely by alleging *any* injury causally linked to an asserted antitrust violation. Rather, the "plaintif[f] must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). Thus, a plaintiff does not suffer antitrust injury when the harm incurred is not one the antitrust laws were intended to prevent, such as when the harm results from a *pro*competitive effect in the market. *See, e.g*., *id.* at 488 (plaintiff's lost profits could not be an antitrust injury where the defendant's alleged antitrust violation — acquisition of failing bowling alleys — actually preserved competition in the market). Nor can a plaintiff demonstrate antitrust injury where the conduct it alleges would in fact benefit it, even if other entities or individuals would be harmed. For example, a plaintiff cannot demonstrate antitrust injury based on allegations that its competitors conspired to raise prices in the market. While "[s]uch conduct would indeed violate the Sherman Act, . . . it could not injure [the plaintiff]." *Matsushita*, 475 U.S. at 583; *accord Atlantic Richfield*, 495 U.S. at 337.

Proper plaintiff. In addition to demonstrating cognizable antitrust injury, the plaintiff must also establish that it has "standing" in the broader sense that it "is a proper party to bring a private antitrust action." *AGC*, 459 U.S. at 535 n.31; *see also Barton*, 118 F.3d at 182 ("Antitrust injury is a necessary but insufficient condition of antitrust standing."). A plaintiff that is too remote from the violation is not entitled to sue. As a general matter, therefore, only companies that are customers or competitors in the relevant market may sue. *See, e.g., AGC,* 459 U.S. at 539, 542 (plaintiff union was too remote to challenge defendants' agreement to restrict business of unionized firms where union was "neither a consumer nor a competitor in the market in which trade was restrained"); *Barton*, 118 F.3d at 184 (plaintiff not entitled to sue because it was "not a competitor or a consumer in the market in which trade was allegedly restrained").

* * *

West Penn has advanced numerous allegations in support of its claim of a conspiracy in restraint of trade under Section 1. Some of those allegations relate to competition in the hospital or provider market; others are relevant to competition in the health insurance market only. We discuss the allegations below, first as to the provider market and then as to the insurance market, and show why none of them, taken alone or in tandem, is sufficient to support West Penn's Section 1 claim.

B. WEST PENN'S ALLEGATIONS IN THE PROVIDER MARKET ARE LEGALLY INSUFFICIENT TO GIVE RISE TO ANY AGREEMENT IN RESTRAINT OF TRADE

According to West Penn, three aspects of defendants' conduct injured competition in the relevant hospital market: (1) a purported agreement to close Highmark's narrow-network CommunityBlue plan; (2) a purported agreement that Highmark would provide more favorable reimbursement rates to UPMC than to West Penn; and (3) a purported agreement that Highmark would not refinance the

$125 million loan it had granted West Penn in 2000. None of these allegations provides a basis for West Penn's claims.

1. Discontinuation of CommunityBlue

CommunityBlue is an insurance plan introduced by Highmark in the late 1990s. It was offered as a low cost, narrow-network plan that provided coverage at West Penn facilities, but excluded UPMC. JA92. West Penn contends that Highmark and UPMC conspired to eliminate CommunityBlue in connection with their 2002 agreement. West Penn Br. 13-14, 53-54. The District Court properly found that allegation wanting because: (1) there was no agreement between UPMC and Highmark to discontinue CommunityBlue; and (2) even had there been such an agreement, it would not have resulted in an unreasonable restraint of trade. JA45-46, 62-64.

No agreement. West Penn's assertion that there was an agreement between UPMC and Highmark to discontinue CommunityBlue is inconsistent with incontrovertible documentary evidence and is, at best, implausible. *See Twombly*, 550 U.S. at 570; *Phillips*, 515 F.3d at 234. The June 2002 agreement specifically provided for the *continuation* of CommunityBlue, requiring Highmark to include UPMC in its network going forward in all of its plans – *except* CommunityBlue. JA1224-26. The contrary allegation of an agreement to close CommunityBlue, set forth in paragraph 79 of the amended complaint, JA101, and alluded to in paragraphs 63 and 66, JA97, is entirely conclusory, supported by no allegations of fact, and so, under *Iqbal*, is not entitled to any assumption of truth. *Iqbal*, 129 S. Ct. at 1949-50. As in *Twombly*, there is nothing in the West Penn allegations to suggest that the discontinuation of that narrow-network plan was anything other than a unilateral decision made by Highmark based on its own analysis of CommunityBlue's profitability. *Twombly*, 550 U.S. at 566. The District Court was therefore correct in holding that West Penn's allegations of concerted action as to CommunityBlue were insufficient to support a claim. JA62-64.

No unreasonable restraint of trade. Moreover, even if there had been an agreement to close CommunityBlue, West Penn's allegations would still be insufficient because such an agreement could not have been an unreasonable restraint of trade. The District Court properly recognized this point as well. JA45-46.

West Penn argues that the alleged agreement to close CommunityBlue (together with the actual agreement to include UPMC in Highmark's other plans) was unreasonable because it "eliminated competition for preferred provider status in Highmark's plans," and that closing the plan meant that a low-cost option was no longer being provided. West Penn Br. 53-54 (citing JA102). West Penn's arguments fail as a matter of law for several reasons.

First, nothing in any agreement provided any exclusive rights to UPMC or otherwise foreclosed West Penn in any respect. The June 2002 agreement provided that UPMC would be included in Highmark's network but did *not* provide that West Penn or anyone else would be excluded. JA1224-26. West Penn in fact continued to be in-network in every plan that Highmark offered. What the agreement did, at most, was to prevent Highmark and West Penn from agreeing, during the contractual term, *to exclude UPMC*. Given the extraordinarily cozy relationship between Highmark and West Penn, JA91-92, securing protection for UPMC against exclusion going forward made obvious business sense. And, in any event, West Penn cites no authority suggesting that an agreement to *include* a supplier, while excluding no one, is an unreasonable restraint of trade. The only remotely analogous cases, in fact, suggest just the opposite. *See, e.g.*, *Smith Mach. Co. v. Hesston Corp.*, 878 F.2d 1290, 1295-98 (10th Cir. 1989) (supplier requirement that dealers stock its full line held lawful in absence of any prohibition against carrying competing lines).

Second, accepting all of West Penn's allegations as true, Highmark's agreement to include UPMC in-network in all of its insurance plans unambiguously *increased* competition by enhancing consumer choice. Prior to the agreement, patients insured by Highmark had coverage at only the limited set of providers included in Highmark's network. After the agreement, patients had a fuller range of provider options from which to choose. Increasing consumer choice is a central goal of the antitrust laws. *See, e.g.*, *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 459 (1986). West Penn's legal theory is contrary to that goal.

Third, the suggestion that including UPMC in Highmark's plans "eliminated" competition to become a preferred provider demonstrates a fundamental misunderstanding of the most basic antitrust principles. Nothing in the 2002 agreement eliminated *any* competition. The agreement provided, rather, that UPMC would be in-network in all Highmark plans. JA1224-26. To say that "eliminates" competition is meaningless because, as then-Judge Breyer explained, "virtually *every* contract to buy 'forecloses' or 'excludes' alternative sellers from some portion of the market, namely the portion consisting of what was bought." *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 236 (1st Cir. 1983) (emphasis in original); *see also Barry v. Blue Cross*, 805 F.2d 866, 871 (9th Cir. 1986).

Here, Highmark's agreement with UPMC included UPMC in all of Highmark's plans and prevented West Penn and others from entering separate arrangements that would oust UPMC. JA1224-26. That is not the "elimination" of competition; it is the *outcome* of competition among UPMC, West Penn, and other providers. *See Menasha Corp. v. News America Marketing In-Store*, 354 F.3d 661, 663 (7th Cir. 2004) ("competition for the contract is a vital form of rivalry, and often the most powerful one, which the antitrust laws encourage rather than suppress.”). It is emphatically not an unreasonable restraint of trade.

Fourth, the essence of West Penn’s argument seems to be that CommunityBlue was a low-cost plan, and so eliminating it must have increased prices in some way. JA101-02; West Penn Br. 53-54. That logic fails. West Penn alleges no agreement between UPMC and Highmark concerning the premiums Highmark would charge on *any* of its plans. With or without CommunityBlue, there was nothing to prevent Highmark from charging even lower premiums on any of its plans. (Indeed, had it kept CommunityBlue, nothing would have prevented Highmark from *increasing* the premiums charged for that plan.) Given that Highmark could continue to price its remaining plans in any manner, without restriction, the District Court was clearly right in holding there was no restraint of trade at all, let alone an unreasonable restraint. JA46; *see Business Electronics*, 485 U.S. at 731 (agreement to terminate price-cutting distributor is not an agreement on the prices to be charged); *Santana Prods. v. Bobrick Washroom Equip.*, 401 F.3d 123, 132 (3d Cir. 2005) (“without a ‘restraint,’ there is ‘no restraint of trade’”) (quoting *Schachar v. American Academy of Opthalmology*, 870 F.2d 397, 397 (7th Cir. 1989)).

2. Discriminatory Reimbursement Rates

West Penn also maintains that UPMC and Highmark violated the Sherman Act by agreeing that Highmark would discriminate against West Penn in reimbursements. West Penn Br. 54-56. That argument fails because: (1) West Penn's allegations of agreement are insufficient; and (2) even if there had been such an agreement, it would not amount to an unreasonable restraint of trade.

No agreement. The incontrovertible documentary evidence establishes that there was no agreement between UPMC and Highmark on the rates West Penn would be paid.

West Penn reached agreement on rates with Highmark on June 14, 2002, JA389-431, *before* the June 25, 2002 agreement between Highmark and UPMC, JA1212-29. Nothing in the amended complaint suggests that UPMC, struggling to reach its own reimbursement agreement with Highmark, had the slightest input into the rates Highmark elected to pay West Penn.

Moreover, while the UPMC/Highmark agreement froze UPMC's rates (apart from inflation) from June 2002 to the present, JA1227, West Penn repeatedly was granted reimbursement *increases* from Highmark. JA1048-53. Given the absence of any factual allegation of agreement as to the rates West Penn would be paid, and given the incontrovertible fact that West Penn received increases while UPMC received none, the District Court was correct in determining that West Penn's allegations with regard to discriminatory reimbursement rates failed to give rise to any claim. JA59-61.

No unreasonable restraint of trade. Even assuming Highmark had agreed to provide "better" rates to UPMC, that conduct is not illegal. UPMC secured more favorable reimbursement rates from Highmark because it had more to offer in those negotiations; nothing in the amended complaint suggests otherwise.

Indeed, as West Penn's own allegations acknowledge, UPMC provided Highmark a significantly greater volume of patients than West Penn. JA128 ("UPMC's market share in Allegheny County, excluding government payors, exceeds 55% . . . more than double West Penn Allegheny's market share"). Getting better rates for greater volume is not only sound and common – it is an entirely lawful business practice. *See Western Parcel Express v. UPS*, 190 F.3d 974, 976 (9th Cir. 1999) ("volume discount contracts are legal under antitrust law"); *see also In re Elevator Antitrust Litig.*, 502 F.3d 47, 51 (2d Cir. 2007) (where conduct can be explained by "bargaining power and commercial goals" it can "suggest competition at least as plausibly as it can suggest anticompetitive conspiracy").

Cases under the Sherman Act recognize uniformly that the charging of different prices to different customers is often the essence of effective competition. *See, e.g., MetroNet Servs. v. Qwest Corp.*, 383 F.3d 1124, 1133-34 (9th Cir. 2004);

Monahan's Marine, Inc. v. Boston Whaler, Inc., 866 F.2d 525, 528-29 (1st Cir. 1989) (Breyer, J.); *Ferguson v. Greater Pocatello Chamber of Commerce, Inc.*, 848 F.2d 976, 983 (9th Cir. 1988). As then-Judge Breyer explained in *Monahan's*:

> [A] judicial holding that price discrimination is unlawful has the . . . potential to harm competition. If suppliers cannot charge low, nonpredatory prices without the threat of antitrust actions, they will hesitate to cut their prices. If suppliers must cut prices to all competing dealers or to none, if they cannot decide to favor a single dealer, say, to promote their product or to target a particular area, they may well decide not to cut prices at all, perhaps to the benefit of the dealers, but certainly to the detriment of the Sherman Act's ultimate beneficiary, the consumer.

866 F.2d at 527-28.[5]

The Supreme Court recently underscored this same antipathy towards Sherman Act price discrimination claims. *See Pacific Bell v. linkLine Commc'ns*, 129 S. Ct. 1109 (2009). The Court in *linkLine* rejected a "price-squeeze" claim, in which plaintiff contended that the defendant violated the antitrust laws by charging plaintiff wholesale prices that were too high to allow the plaintiff to compete effectively with the defendant's low retail prices. Chief Justice Roberts' opinion confirmed that the defendant had "no obligation to deal under terms and conditions

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[5] Price discrimination, while not considered anticompetitive under the Sherman Act, is subject to the provisions of the Robinson-Patman Act, 15 U.S.C. § 13. That statute is not at issue here. *See generally Advo, Inc. v. Philadelphia Newspapers*, 51 F.3d 1191, 1195 (3d Cir. 1995) (services are outside scope of Robinson-Patman Act).

favorable to its competitors," as imposition of such a duty would necessarily chill procompetitive price competition. *Id.* at 1119. Application of that same principle dooms the similar claim at issue here.[6]

3. The Failure to Refinance West Penn's Debt

The amended complaint also alleges that UPMC and Highmark agreed that Highmark would "attempt[] to block [West Penn's] efforts to refinance its debt." JA82; *see also* JA106-11. These allegations provide no basis to recover because: (a) Highmark was only one of an almost infinite number of sources of financing; (b) it is undisputed that West Penn in fact obtained financing on favorable terms; and (c) Highmark could not impede West Penn's access to financing.

a. There was no foreclosure of financing. Even assuming there was an agreement between Highmark and UPMC not to refinance West Penn's debt, such an agreement would not be an unreasonable restraint of trade. Any contrary holding would require this Court to reach the impossible conclusion that Highmark was the only source (or one of only a few sources) of debt financing for West

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[6] In the District Court, West Penn sought to evade the circuit court precedents cited above by relying on *Callahan v. A.E.V., Inc.*, 182 F.3d 237 (3d Cir. 1999). But *Callahan* provides no support for its arguments. The decision made clear that "antitrust *liability* issues are not presented in this appeal . . . and, consequently, we express no view" as to them. *Id.* at 241 (emphasis in original). Moreover, although a dictum in *Callahan* suggested that a price discrimination claim under the Sherman Act is not necessarily foreclosed, the opinion antedates the Supreme Court's decision in *linkLine*, which, as discussed above, severely undercuts that dictum.

Penn. No purported UPMC/Highmark agreement possibly could have impaired West Penn's ability to seek refinancing from *other* sources. *See Paycom Billing Servs., Inc. v. MasterCard Int'l*, 467 F.3d 283, 294 (2d Cir. 2006) (exclusion of some options "cannot impact competition in the market" if many options remain available). Rather, only a single potential purchaser of West Penn's debt, Highmark, would have been foreclosed, and Highmark represents but the tiniest fraction of the financing market.

As the District Court correctly ruled, JA49-50, "den[ying]" West Penn of one source of financing is not an antitrust violation. If West Penn has positive cash flow, banks will be happy to supply all the financing it needs. If it does not, then no antitrust principle supports the propping up of a business that deserves to fail. *See, e.g., Johnson v. University Health Servs.*, 161 F.3d 1334, 1338 (11th Cir. 1998) (no antitrust injury from defendant's denial of financing where plaintiff continued to have "full access to the capital markets"); *Ball Memorial Hosp. v. Mutual Hosp. Ins.*, 784 F.2d 1325, 1338 (7th Cir. 1986) ("Competition is a ruthless process. A firm that reduces cost[s] and expands sales injures rivals – sometimes fatally. . . . The deeper the injury to rivals, the greater the potential benefit.").

Highmark clearly has no monopoly on money. *See U.S. Steel Corp. v. Fortner Enters.*, 429 U.S. 610, 621-22 (1977). Absent some showing that the purported agreement between UPMC and Highmark foreclosed access to an input which West Penn could not otherwise obtain, there is no unreasonable restraint of trade, and so no violation of the Sherman Act. *See, e.g.*, *Advo*, 51 F.3d at 1204.

b. West Penn obtained favorable financing. Even if there had been such an agreement (which there was not), it clearly had no effect. West Penn in fact obtained the refinancing it sought on highly favorable terms – a 5.37% interest rate notwithstanding the very high risk of its debt, more favorable than anything Highmark would reasonably have offered – in an offering that it bragged received an "overwhelmingly positive response" and was dramatically oversold. JA940-42. Far from harming West Penn, obtaining financing from sources other than Highmark at the peak of the credit glut served only to help West Penn, securing better terms than would otherwise have been available at any earlier time. There is, again, no basis for any claim.

c. Highmark could not impede West Penn's access to financing. West Penn argues that the District Court erred because Highmark "impeded West Penn Allegheny's ability to access to *any* financing." West Penn Br. 52. That argument is simply wrong. The amended complaint asserts that Highmark's consent was required if the refinancing resulted in a "put" back to Highmark from Citigroup, JA107, or if Highmark's collateral were impaired by the issuance of new debt "on parity with Highmark's loan." JA107. It is of course true that Highmark's consent would be required to impair its interest in its loan. But the amended complaint says nothing about the myriad types of financing available that would *not* require Highmark's consent. That West Penn had such a successful refinancing in 2007 without Highmark's consent underscores this point with emphasis.

C. WEST PENN'S ALLEGATIONS IN THE INSURANCE MARKET PROVIDE NO BASIS FOR ANY CLAIM

West Penn also alleges that UPMC and Highmark agreed not to compete in the insurance (or payor) market in the following ways: (1) UPMC agreed that its Health Plan would compete against Highmark less aggressively; and (2) UPMC declined to sell its Health Plan to United or otherwise contract with United (or others) on favorable terms.

As a threshold matter, West Penn cannot complain about any alleged diminution of competition in the *insurance* market. It is neither a competitor in that market, nor a consumer of insurance coverage, nor a firm whose interests could be served by lower hospital charges to encourage greater payor competition. As discussed below, based on the allegations that West Penn advances, West Penn, in fact, would have been a beneficiary – not a victim – of the challenged conduct. Under the applicable precedents, therefore, it has no basis on which to complain. *See AGC*, 459 U.S. at 537-44; *Barton*, 118 F.3d at 184 ("Because [the plaintiff] was thus not a competitor or a consumer in the market in which trade was allegedly restrained . . . we hold that [the plaintiff's] alleged injury is not 'antitrust injury'").

1. West Penn Cannot Allege Injury From any Claimed Reduction in Competition by the UPMC Health Plan

Taking first the allegation that UPMC competed less aggressively in the insurance market with its Health Plan, there is no conceivable injury to West Penn. The UPMC Health Plan promotes the UPMC hospital system; West Penn is not in the Health Plan's network. Thus, if UPMC had *expanded* the reach of its Health Plan, that might have *injured* West Penn by having more subscribers who would choose to forego West Penn's services. By contrast, if UPMC had curtailed the activities of its Health Plan as West Penn alleges (which it did not), that could not possibly have harmed West Penn. In fact, curtailment would have meant *fewer* subscribers for which West Penn would be out-of-network, to the great *benefit* of West Penn. *See Matsushita*, 475 U.S. at 582-83 (plaintiffs could not challenge alleged conspiracy where they stood "to gain from any conspiracy to raise the market price"); *see also* JA944 (noting that, in 2007, West Penn lost patient volume due to a "shift in HMO enrollment to UPMC's insurance plan"). According to West Penn's own allegations, JA93, it therefore would have benefited from any agreement to limit expansion of UPMC's Health Plan. As a result, it cannot allege the requisite injury. *See Matsushita*, 475 U.S. at 582-83; *Atlantic Richfield*, 495 U.S. at 337.[7]

2. Claimed Conduct Directed at United Health Cannot Support West Penn's Claims

West Penn's other allegation is that UPMC declined to sell its Health Plan to United or otherwise contract favorably with United (or other insurers). JA82, 99-100. But an agreement between UPMC and Highmark that the Health Plan would not be sold to United could not possibly *lessen* existing competition. Such an agreement would do nothing more than leave competition as it was before. It would be no different than an agreement that UPMC would continue to use its Health Plan to compete against Highmark. Had such an agreement been made, and announced on every front page, no one would have batted an eye. Yet that is all this purported agreement could be alleged to have done. West Penn cites no authority, and UPMC is aware of none, where retention of a business has ever been viewed as unlawful.

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[7] As discussed at p. 10 above, it is beyond dispute that the UPMC Health Plan's enrollment has in fact increased every year since 2002. JA928-29. West Penn's argument is that there was a temporary decline in one area – "Commercial-Fully Insured." West Penn Br. 15. West Penn does not, however, explain how the "conspiracy" it alleges would have made conceivable sense if UPMC was expanding (as it was) in all the areas in which its Health Plan competed against Highmark except, temporarily, this single one. The point is ultimately immaterial, however, for the reasons set forth in the text.

In fact, even if UPMC had eliminated United entirely as a potential entrant – for example by acquiring it (which UPMC of course did not do) – that too would be of no consequence. There are numerous other potential entrants into the greater Pittsburgh insurance market, and there is no reason to believe that United's entry would have benefited consumers more than entry or expansion by some other insurer. *See, e.g.*, 5 PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶¶ 1130-31 (3d ed. 2009). Here, the purported agreement in no way eliminated potential entry by United. At most, it eliminated *one* of the various means by which United might enter. Any suggestion of unreasonable restraint, therefore, is insupportable.

Significantly, moreover, if Highmark and UPMC had agreed that UPMC would not sell its Health Plan to United or contract with United (or other insurers) on favorable terms, the injured party would not be West Penn; it would be United (or the others). Courts routinely conclude that a plaintiff cannot sue if its "injury both derives from and is measured by another's more direct injury." *Andrx Pharms., Inc. v. Biovail Corp. Int'l*, 256 F.3d 799, 816 (D.C. Cir. 2001). If indeed there was any injury, the injury would be far too indirect and remote for West Penn to sue. *See, e.g.*, *AGC*, 459 U.S. at 537-44; *Barton*, 118 F.3d at 184; *Allegheny Gen. Hosp. v. Philip Morris*, 228 F.3d 429, 431, 441 (3d Cir. 2000). Here, any injury to West Penn is entirely derivative of the injury to United, which – if the facts alleged were true – would have both the incentive and the resources to pursue a claim of its own. West Penn is not the proper party to complain. *See Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 319-20 (3d Cir. 2007); ANTITRUST LAW DEVELOPMENTS 823 ("where a plaintiff's injury is derivative of a more direct injury to some other person, and that person would have a strong incentive to pursue its own antitrust claim . . ., standing is not likely to be recognized").

D. WEST PENN'S ALLEGATIONS HAVE NO SYNERGISTIC EFFECT

West Penn argues that the District Court improperly "sliced and diced" its allegations, analyzing them separately, rather than as a whole. West Penn Br. 27. The argument is incorrect. The Court below did indeed address each of West Penn's claims, and doing so of course required that they each be discussed in separate sentences. But there is nothing to suggest that the Court did not consider the claims as a whole. The defect the Court recognized was that the amended complaint sets forth no basis from which to conclude that there is any cumulative effect from the allegations that is in any way larger or different from the allegations' component parts. The District Court correctly gave no synergistic effect to the West Penn allegations because, simply, there was none to give. *See linkLine*, 129 S. Ct. at 1123 (rejecting effort "to join [one] claim that cannot succeed with [another] claim that cannot succeed, and alchemize them into a new form of antitrust liability never before recognized by the Court . . . . Two wrong claims do not make one that is right."); *accord*, *e.g.*, *Doe v. Abbott Labs.*, 571 F.3d 930, 934-35 (9th Cir. 2009) (declining to aggregate claims, citing *linkLine*).

It has long been recognized that a plaintiff cannot merely cumulate several invalid claims to make a valid one. *See In re Fine Paper Antitrust Litig.*, 685 F.2d 810, 822 (3d Cir. 1982) (rejecting claim where cumulative effect of evidence did not speak to the alleged conspiracy); *see also, e.g.*, *City of Groton v. Connecticut Light & Power, Co.*, 662 F.2d 921, 928-29 (2d Cir. 1981) ("[W]e reject the notion that if there is a fraction of validity to each of the basic claims and the sum of the fractions is one or more, the plaintiffs have proved a violation of section 1 or section 2 of the Sherman Act. The proper inquiry is whether, qualitatively, there is a 'synergistic effect.'"); *United States v. Microsoft Corp.*, 253 F.3d 34, 78 (D.C. Cir. 2001) (finding that the lower court "did not point to any series of acts, each of which harms competition only slightly but the cumulative effect of which is significant enough to form an independent basis for liability"); *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1366-67 (Fed. Cir. 1999) (following *Groton*). West Penn made no allegations to support any "cumulative effect" theory, and the District Court properly concluded that zero plus zero still equals zero.

E. THE DISTRICT COURT PROPERLY DISMISSED WEST PENN'S SECTION 2 CONSPIRACY CLAIMS

West Penn's allegations of conspiracy to monopolize under Section 2 of the Sherman Act are identical to its allegations of conspiracy in restraint of trade under

Section 1. The allegations are defective for the same reasons, and the District Court therefore properly dismissed the Section 2 conspiracy claims. *See Gordon v. Lewistown Hosp*., 423 F.3d 184, 208-09 (3d Cir. 2005).

II. THE DISTRICT COURT PROPERLY DISMISSED WEST PENN'S ATTEMPTED MONOPOLIZATION CLAIM UNDER SECTION 2 OF THE SHERMAN ACT

To state a claim for attempted monopolization, a plaintiff must plead facts establishing that the defendant (1) has engaged in predatory or anticompetitive conduct, (2) with a specific intent to monopolize, and (3) a dangerous probability of achieving monopoly power. *See Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993); *see also Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 407 (2004); *Advo, Inc. v. Philadelphia Newspapers, Inc.*, 51 F.3d 1191, 1197 (3d Cir. 1995). The District Court properly concluded that West Penn's Section 2 allegations were deficient.

West Penn has abandoned several of the Section 2 contentions it raised below, most notably its allegations that UPMC engaged in anticompetitive defamation and that the acquisition of Mercy Hospital violated Section 2. *See* West Penn Br. § IV. All matters not raised in an opening brief, of course, are waived for purposes of this appeal. *See Laborers' Int'l Union v. Foster Wheeler*

Energy Corp., 26 F.3d 375, 398 (3d Cir. 1994) ("An issue is waived unless a party raises it in its opening brief.").[8]

West Penn's Section 2 appeal is therefore limited to two sets of allegations: (1) that UPMC violated the antitrust laws by entering into joint ventures with several local community hospitals; and (2) that UPMC engaged in predatory behavior by hiring several of West Penn's physicians. Neither of these theories gives rise to an attempted monopolization claim.

A. THE DISTRICT COURT PROPERLY DISMISSED WEST PENN'S EXCLUSIVE DEALING CLAIM BECAUSE WEST PENN FAILED TO ALLEGE SUBSTANTIAL FORECLOSURE IN THE RELEVANT MARKET THAT IT DEFINED

West Penn alleged that UPMC entered into various joint ventures with community hospitals that provided that the hospitals would refer their cancer center patients exclusively to UPMC. JA115-17. The relevant market that West Penn itself defines, however, is not that of cancer patients from community hospitals; it is "the Allegheny County market for acute inpatient hospital services

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[8] Presumably, West Penn abandoned these arguments because their lack of merit was so apparent. As to the problems with West Penn's "defamation" allegations, see JA70-72; *Santana Prods.*, 401 F.3d at 132; *Sanderson v. Culligan Int'l Co.*, 415 F.3d 620, 623 (7th Cir. 2005); *see also* JA206 (West Penn acknowledgement of misstated financials), JA241 (SEC investigation of West Penn). As to the problems with West Penn's allegations regarding the Mercy acquisition, see JA72-73; *Cargill Inc. v Monfort of Colorado, Inc.*, 479 U.S. 104, 116 (1986); *Alberta Gas Chemicals Ltd. v. E.I. duPont de Nemours & Co.*, 826 F.2d 1235, 1240-41 (3d Cir. 1987).

and/or for tertiary and quaternary care services." JA114, 137, 139. West Penn does not even *mention* foreclosure in the very market that it defines.

1. West Penn's Claim Requires Allegations of Substantial Foreclosure in the Relevant Market

Exclusive arrangements do not support a claim under Section 2 unless they foreclose competition in a substantial share of the relevant market. *See, e.g.*, *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 191 (3d Cir. 2005); *LePage's Inc. v. 3M*, 324 F.3d 141, 160 (3d Cir. 2003) (en banc); *see also Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 328-29 (1961). The plaintiff must show, in a properly defined market, "a foreclosure coverage sufficient to warrant an inference of injury to competition." 11 PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶¶ 1821, 1821c (2d ed. 2005). While there is no magic percentage required before a court will consider foreclosure sufficient, it is uncontroverted that the foreclosure must be "substantial."

In the past decade, this Court has twice considered exclusive dealing in the context of Section 2 and, in both cases, has required plaintiff to demonstrate that the foreclosure had a significant impact on competition in the relevant market. *See Dentsply*, 399 F.3d at 191; *LePage's*, 324 F.3d at 160. In *Dentsply*, the Court found that defendant's policy, which prohibited authorized dealers from carrying any other denture product line, violated Section 2. 399 F.3d at 185. While the

Court did not require "total foreclosure," it held that a plaintiff must allege and prove that "the challenged practices bar a substantial number of rivals or severely restrict the market's ambit." *Id.* at 191. In that case, the defendant's exclusive arrangements foreclosed dealers representing 85 percent of the relevant market and, therefore, were significant.

In *LePage's*, this Court affirmed a jury finding that 3M's substantial bundled rebates and discounts were designed to – and did in fact – lock up high volume distribution channels to the exclusion of LePage's. The foreclosed customers included the largest retailers of transparent tape in the country – such as Sam's Club (Wal-Mart), Kmart, and Staples. 324 F.3d at 158. As a result, LePage's was foreclosed from "key retail pipelines *necessary* to permit it to compete profitably" in the relevant product market (transparent tape) that it defined in its complaint. *Id.* at 160 (emphasis added). Similar to *Dentsply*, the Court found that the foreclosure had a significant impact on competition in the relevant market as a whole – LePage's could not compete against 3M without access to these critical distribution channels. *Id.*

The other cases cited by West Penn confirm that there must be allegations of meaningful foreclosure in the relevant market. For example, the court in *Microsoft* explicitly noted that exclusive dealing in a Section 2 case requires "a significant degree of foreclosure," and upheld the determination of liability in light of the foreclosure of "a substantial percentage of the available opportunities for browser distribution." *See Microsoft*, 253 F.3d at 69-71; *accord Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 458 (1992) (exclusive dealing contracts totally foreclosed access to replacement parts from reliable sources); *Geneva Pharms. Tech. Corp. v. Barr Labs., Inc.*, 386 F.3d 485, 504-06 (2d Cir. 2004) (exclusive supply contract, which defendants kept secret from plaintiff, effectively controlled entire supply of product necessary to manufacture drug); *United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 243 (2d Cir. 2003) (defendants' exclusionary rules covered every U.S. bank and, thus, "absolutely prevented [American Express] and Discover from selling their products at all"). There is no magic percentage required before a court will consider foreclosure sufficient, but it is uncontroverted that it must be substantial.

2. West Penn Failed to Allege any Substantial Foreclosure in the Relevant Market

Rather than even mentioning foreclosure in the market it defines ("the Allegheny County market for acute inpatient hospital services and/or for tertiary and quaternary care services," JA114), West Penn complains that it was effectively "cut off" from oncology referrals by those community hospitals that it does not control. JA115-17. But the amended complaint provides no explanation about why the single specialty of oncology is important to overall inpatient hospital services (the relevant market West Penn defines). It says nothing about the amount of oncology referrals West Penn received from community hospitals in the past. It says nothing about whether, or to what extent, community hospital referrals are significant relative to other sources of referrals or alternative means of attracting patients. The amended complaint thus provides nothing that would allow the Court to determine whether the purported arrangements in issue are anything other than trivial. *See* JA115-17.

Without explaining the significance of these referrals to the market for tertiary and quaternary care, West Penn's amended complaint does not adequately plead foreclosure. Simply put, West Penn fails to allege that exclusive dealing in community hospital oncology referrals has any competitive consequence. Absent facts to suggest a significant impact on competition, the bare allegation of exclusive dealing states no claim for relief. *See CDC Techs. v. IDEXX Labs.*, 186 F.3d 74, 80-81 (2d Cir. 1999) (dismissing claims under Sections 1 and 2 on this basis); *Interface Group v. Massachusetts Port Auth.*, 816 F.2d 9, 11 (1st Cir. 1987).

West Penn not only fails to allege substantial foreclosure in the relevant market; it alleges no foreclosure at all. There is nothing to suggest that UPMC's community hospital arrangements themselves are not the outcome of fair competition. West Penn does not (and cannot) contend that community hospitals are required, forced, or economically-coerced into arrangements pursuant to which they refer patients to UPMC only. JA115-17. Nor does West Penn allege any facts to suggest that it even *tried* to compete for comparable joint venture arrangements of its own.

The fact that some community hospitals have *chosen* to refer more oncology patients to UPMC hospitals by entering into the arrangements in issue – because, for example, they believe UPMC offers better facilities, a wider range of insurance coverage, or has demonstrated significant expertise in oncology through its cancer centers – is not anticompetitive. *See Paddock Publ'ns, Inc. v. Chicago Tribune Co.*, 103 F.3d 42, 44 (7th Cir. 1996) (finding significant that plaintiff never tried to outbid defendants for contracts with allegedly foreclosed supplemental news providers); *see also NicSand, Inc. v. 3M Co.*, 507 F.3d 442, 454 (6th Cir. 2007) (rejecting claim of antitrust injury in part because plaintiff "offers no explanation why it could not compete for these multi-year [exclusive] agreements."). This sort of "[c]ompetition-for-the-contract is a form of competition that antitrust laws protect rather than proscribe" and is "to the ultimate benefit of consumers." *Paddock*, 103 F.3d at 45. It is most assuredly not the basis for a claim under Section 2.

B. THE DISTRICT COURT PROPERLY DISMISSED WEST PENN'S PREDATORY HIRING CLAIMS BECAUSE THE COMPLAINT FAILED ADEQUATELY TO ALLEGE ESSENTIAL ELEMENTS

The District Court also properly held that West Penn's predatory hiring allegations provide no support for any claim under Section 2. The Court, relying on sound and uncontroverted precedent, concluded that "hiring talent from a rival is not exclusionary even if it does weaken actual or potential rivals and strengthen a monopolist . . . because there is a high social and personal interest in maintaining a freely functioning market for talent." JA68-69 (internal marks and citations omitted); *see also Taylor Publ'g Co. v. Jostens, Inc*., 216 F.3d 465, 479 (5th Cir. 2000) (quoting 3 PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 702b (2d ed. 1999)). Indeed, courts have found that "special concern must be given to finding antitrust violations for hiring personnel away from competitors" so as "not to impede the ability of the employee to market his or her skills." *Abcor Corp. v. Am Int'l, Inc.*, 916 F.2d 924, 930 (4th Cir. 1990).

Although there are no Third Circuit cases that address specifically the viability of predatory hiring claims or the standard by which such claims should be reviewed, courts around the country have established a basic analytical framework for reviewing these claims:

First, a plaintiff must allege with sufficient facts that the *only* reason the defendant hired the plaintiff's employees was to deny plaintiff the opportunity to compete. Specifically, the plaintiff must allege that the new employees did not help defendant, or that defendant "did not use" the hire. *See Am. Prof'l Testing Serv., Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publ'ns*, 108 F.3d 1147, 1153 (9th Cir. 1997).

Second, a plaintiff must allege that defendant actually *lost* money – not just that it failed to make an appropriate margin by plaintiff's standards – by hiring the new employees. *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 325 (2007) (plaintiff must allege that "the cost of the relevant output" exceeds "the revenues generated in the sale of those outputs."); *Wichita Clinic v. Columbia/HCA Healthcare Corp.*, 45 F. Supp. 2d 1164, 1196 (D. Kan. 1999) (plaintiffs failed to show that physicians' salaries were so "excessive" that defendants' new hires would "produce any losses" or prevent defendant from "recover[ing] its marginal costs in employing the physicians").

Third, a plaintiff must allege that the predation scheme has long-term effects in a relevant market by allowing the defendant to raise prices in order to recoup any losses incurred from the improper hiring. *Advo*, 51 F.3d at 1200; *see Brooke Group, Inc. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993) (plaintiff must demonstrate "dangerous probability" that defendant will "recoup[] its investment in below-cost prices").

The District Court properly dismissed West Penn's predatory hiring claims because West Penn failed to plead sufficient facts to satisfy *any* of these required elements, much less all of them.

1. West Penn Did Not Allege that UPMC Hired West Penn Physicians *Solely* for an Improper Reason

The District Court correctly rejected West Penn's predatory hiring allegations because West Penn failed to state any facts demonstrating that UPMC hired any of West Penn's physicians *solely* for an improper reason. Indeed, the amended complaint nowhere suggests, as it must, that UPMC failed to make productive use of any of the employees it hired from West Penn. As a number of courts have explained, hiring from rivals is not exclusionary absent a showing that it was done solely to "harm the competition without helping the monopolist, or by showing a clear nonuse in fact." *Universal Analytics, Inc. v. MacNeal-Schwendler Corp.*, 914 F.2d 1256, 1258 (9th Cir. 1990). "As an example of when the hiring away of a competitor's employees would become predatory, Areeda and Hovenkamp describe a dominant computer software firm who hires away all of its rivals' best programmers and, because it has enough of its own programmers, employs them as custodians paid the salaries of computer programmers rather than custodians." *Taylor Publ'g Co.*, 216 F.3d at 480 n.11 (citing 3 PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 702c (2d ed. 1999)).

Nowhere in its amended complaint does West Penn allege "nonuse" – i.e., that UPMC did not gainfully employ West Penn's physicians at its facilities, or that these hires "did not help" UPMC compete in the market. *Universal Analytics*, 914 F.2d at 1258. West Penn argues that its allegation that UPMC did not "fully employ" some of the physicians was sufficient. West Penn Br. 63; *see also* JA90-91, 118-20. But that bare, unexplained conclusion does not suffice to support its claim because it falls far short of the basic nonuse the cases require. The District Court applied the correct legal standard and, having done so, properly rejected the claim. *See* JA69 (West Penn "fails to allege any facts which could support a conclusion that UPMC hired plaintiff's physicians *solely* for the purposes of denying [West Penn] of its services, either individually or in the aggregate.") (emphasis added).

2. West Penn Is Wrong That its Claim That UPMC Overpaid for Some Physicians Saves its Predatory Hiring Claim

The second fatal flaw in West Penn's predatory hiring claim is that it fails to allege that UPMC hired any physicians at rates that would cause UPMC to suffer a loss in the relevant output market, i.e., in "the Allegheny County market for acute inpatient hospital services and/or for tertiary and quaternary care services," as defined in West Penn's amended complaint. JA114; *see Brooke Group*, 509 U.S. at 226. The mere allegation that UPMC "overpaid" for any particular physician or physicians is not sufficient to make out a claim. Without supporting factual averments that the doctors were hired at salaries that would have produced actual losses at UPMC, the allegation is insufficient. *See, e.g.*, *id.* at 222-23; *Wichita Clinic*, 45 F. Supp. 2d at 1196 (dismissing plaintiff's reliance on "high" or "excessive" salary offers to physicians to show predatory hiring absent evidence that defendant hospital incurred "losses" or would "not recover its marginal costs in employing the physicians.").

As West Penn acknowledges, *Weyerhaeuser v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312 (2007), is the governing authority for evaluation of West Penn's predatory hiring claim. In *Weyerhaeuser*, the Supreme Court held that a plaintiff must allege that the defendant would suffer a loss in the output market as a result of its decision to overpay for an input. *See id.* at 325. Simply alleging that a defendant "paid a higher price" or "paid too much" for an input is insufficient as a matter of law to support a predatory bidding claim. *Id.* The Court added that, "[g]iven the multitude of procompetitive ends served by higher bidding for inputs, the risk of chilling procompetitive behavior with too lax a liability standard is as serious here as it was in *Brooke Group*. *Consequently, only higher bidding that leads to below-cost pricing in the relevant output market will suffice as a basis for liability for predatory bidding*." *Id.* (emphasis added).

West Penn does not allege anywhere that UPMC's decision to pay more for physicians resulted in any below-cost pricing in the output (hospital services) market. Indeed, West Penn alleges only that UPMC "paid too much" for the physicians it hired. That, by itself, according to the Supreme Court, is not predatory conduct. *See id.* at 323-24 ("There are myriad legitimate reasons—ranging from benign to affirmatively procompetitive—why a buyer might bid up input prices. . . . A more efficient firm might bid up input prices to acquire more inputs as a part of a procompetitive strategy to gain market share in the output market. . . . [T]his sort of high bidding is essential to competition and innovation on the buy side of the market.").

The District Court made precisely the same point in dismissing West Penn's predatory hiring claim. The Court explained that all West Penn's amended complaint alleged was aggressive competition for talent. As the Court pointed out, "West Penn Allegheny has also engaged in the same type of hiring of UPMC's 'star' physicians." JA69. Thus, "UPMC has 'lost dozens of its star physicians to [West Penn Allegheny] . . . .'" *Id.* (quoting JA202). "Further, as recently as July 8, 2009, . . . West Penn Allegheny boasted its continued recruitment of many key physicians from UPMC." *Id.* As the Court correctly recognized, "[t]he fact that both [West Penn] and UPMC continue to engage in a bitterly fought battle for talent . . . is evidence of a well-functioning market . . . ." JA69-70.

3. West Penn Misconstrues the Recoupment Requirement for Predatory Hiring Claims

West Penn's brief fails to address another fundamental defect in the predatory hiring claim set forth in its amended complaint: namely, that it failed to allege facts supporting the assertion that UPMC's conduct will cause West Penn to exit the relevant market and permit UPMC to raise prices in order to recoup any losses incurred in hiring the physicians.

The *sine qua non* of a successful predation strategy is the defendant's ability to recoup the losses incurred through its predation by driving out competitors and later raising prices. *See Brooke Group*, 509 U.S. at 224. But West Penn did not allege any facts to suggest that the physicians that UPMC hired were critical to, or even part of, West Penn's participation in "the Allegheny County market for acute inpatient hospital services and/or for tertiary and quaternary care services." JA114. Nor did West Penn allege that the physicians were in such short supply that West Penn could not hire other qualified individuals from another source. Without demonstrating that physician services were unavailable and that the physicians that UPMC hired were critical to its continued viability in the relevant market it defined, West Penn cannot succeed on an allegation that UPMC's conduct would have caused West Penn to exit that market.

Thus, even accepting West Penn's allegations as true – for example, that UPMC hired some of West Penn's primary care physicians and one of its bariatric surgeons at inflated salaries with the intent to damage West Penn – the amended complaint does not allege that the hiring of a few, select physicians would matter for "acute inpatient hospital services and/or for tertiary and quaternary care services" as a whole. *See, e.g., Bayou Bottling, Inc. v. Dr Pepper Co.*, 725 F.2d 300, 304 (5th Cir. 1984) (below cost pricing of 32-ounce bottles not predatory because plaintiff sold other sizes as well). Particularly in light of West Penn's admissions that it regularly hired away UPMC's physicians, the amended complaint describes nothing more than competition for talent. It does not allege any facts that suggest it will exit the market because of this alleged physician tug-of-war.

4. West Penn's Predatory Hiring Allegations Are Largely Time Barred

Because the District Court found so many fatal flaws in West Penn's predatory hiring claims, it did not reach UPMC's argument that some or most of West Penn's predatory hiring claims were time barred. Still, Section 4B of the Clayton Act provides that any action to enforce any cause of action under the antitrust laws "shall be forever barred unless commenced within four years after the cause of action accrued." 15 U.S.C. § 15b. West Penn did not sue until April 2009. Accordingly, all of the unilateral conduct challenged by West Penn as unlawful before April 2005 is beyond legal challenge, leaving West Penn with claims based only on a small number of physician hires in 2008 and 2009. JA121.

As explained above, West Penn's attempted monopolization count fails to state a valid claim even if all the conduct asserted is considered. Giving effect to the applicable statutes of limitations renders that outcome even more obvious. Doing so means that the *only* conduct that can be considered is a few post-April 2005 physician hires. But that conduct is not only not unlawful; it is perfectly legitimate, procompetitive conduct – providing no basis whatsoever for any claim.

III. THE DISTRICT COURT PROPERLY DISMISSED WEST PENN'S PENNSYLVANIA STATE LAW CLAIMS

When all the claims providing a basis for federal jurisdiction have been dismissed, dismissal of state claims is presumptively the correct result under 28 U.S.C. § 1367(c). As this Court has explained, a "district court must decline to decide the pendent state claims unless considerations of judicial economy, convenience, and fairness to the parties provide an affirmative justification for doing so." *Hedges v. Musco*, 204 F.3d 109, 123 (3d Cir. 2000). Dismissal of the pendent state claims here, therefore, was appropriate.

CONCLUSION

For all the above reasons, UPMC requests that this Court affirm the District Court's judgment.

Dated March 1, 2010

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I, Jonathan M. Jacobson, hereby certify that:

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2. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,365 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii);

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I, Jonathan M. Jacobson, hereby certify that on March 1, 2010, ten (10) copies of the foregoing BRIEF OF DEFENDANT-APPELLEE UPMC were filed pursuant to Fed. R. App. P. 25.1(a), via hand delivery to:

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