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

WEST PENN ALLEGHENY HEALTH SYSTEM, INC.,	)
Plaintiff,	) Case No. 2:09-cv-00480-JFC
v.	) Judge Joy Flowers Conti
UPMC,	) *Electronically Filed*
Defendant.	) Related to Case No. 2:10-cv-01609-JFC

UPMC's ANSWER, AFFIRMATIVE DEFENSES AND COUNTERCLAIMS

Defendant UPMC ("Defendant" or "UPMC"), for its answer and affirmative defenses to the purported second amended complaint ("Complaint") of Plaintiff, states as follows:

1. To the extent the allegations of Paragraph 1 are conclusions of law, no response is required. To the extent that a response is required, UPMC denies the allegations of Paragraph 1, except admits that Plaintiff purports to bring an action against UPMC under the Sherman Act, 15 U.S.C. § 2 and state law.

2. To the extent the allegations of Paragraph 2 are conclusions of law, no response is required. To the extent that a response is required, UPMC denies the allegations of Paragraph 2, except admits that West Penn Allegheny was formed after the Allegheny Health, Education, and Research Foundation ("AHERF") bankruptcy. By way of further response, UPMC states that it competes vigorously with West Penn Allegheny and other competitors, but denies that it does so in an unlawful manner.

3. Certain of the allegations contained in Paragraph 3 relate to a written document, a newspaper article, the terms of which speak for themselves. UPMC denies those allegations to the extent that they are inconsistent with the terms of the article. By way of further response, UPMC denies the remaining allegations contained in paragraph 3.

4. The allegations contained in Paragraph 4 refer to a written document, the transcript of Jeffrey Romoff's testimony before the Pennsylvania House Insurance Committee on August 25, 2011. The contents of which speak for themselves. UPMC denies any allegations inconsistent with the contents of that transcript.

5. Certain of the allegations of Paragraph 5 are conclusions of law to which no response is required. To the extent that a response is required, UPMC denies those allegations and the remaining allegations of Paragraph 5.

6. Certain of the allegations of Paragraph 6 are conclusions of law to which no response is required. To the extent that a response is required, UPMC admits that it had approximately $514 million excess revenues over expenses for fiscal year 2006, and denies knowledge or information sufficient to form a belief as to the truth of the allegations that (a) West Penn Allegheny has "lost patient volume" and experienced "depressed growth and earnings;" (b) West Penn Allegheny's "earnings are critical to West Penn Allegheny's charitable mission to improve the extent, scope, and quality of health care available to the Pittsburgh community;" and (c) "UPMC is five times as large as West Penn Allegheny" and for fiscal year 2006 "its profits were 25 times those of West Penn Allegheny's." UPMC denies the remaining allegations of Paragraph 6.

7. UPMC admits the allegations of Paragraph 7.

8. UPMC admits the allegations of Paragraph 8.

9. The allegations of Paragraph 9 are conclusions of law, and therefore do not require a response. To the extent that a response is required, UPMC admits that Plaintiff purports to bring an action under Section 2 of the Sherman Act and denies the remaining allegations contained in Paragraph 9.

10. The allegations of Paragraph 10 are conclusions of law, and therefore do not require a response. To the extent that a response is required, UPMC denies the allegations contained in Paragraph 10.

11. The allegations of Paragraph 11 are conclusions of law, and therefore do not require a response. To the extent that a response is required, UPMC admits that its principal place of business is Pittsburgh, Pennsylvania and denies the remaining allegations contained in Paragraph 11.

12. UPMC admits that West Penn Allegheny was created out of the bankrupt AHERF health system in August 2000 through the injection of at least $125 million by Highmark, and otherwise denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 12.

13. UPMC admits that West Penn Allegheny was created out of the bankrupt AHERF health system in August 2000 through the injection of at least $125 million by Highmark, and otherwise denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 13.

14. UPMC denies knowledge or information sufficient to form a belief as to the truth of the allegations concerning an alleged comment made by a UPMC Vice President or alleged lobbying efforts by UPMC Board members or employees. UPMC denies the remaining allegations of Paragraph 14.

15. UPMC admits that it opposed Highmark's role in the then-proposed creation of Plaintiff, and denies the remaining allegations contained in Paragraph 15.

16. UPMC denies the allegations of Paragraph 16.

17. UPMC admits that is has formed joint ventures with certain hospitals in western Pennsylvania and denies the remaining allegations of Paragraph 17.

18. UPMC admits that it has had cancer centers in operation from approximately 2006 until the present day. The remaining allegations refer to written documents, various joint venture agreements, the terms of which speak for themselves. UPMC denies any allegations that are inconsistent with the terms of those agreements.

19. UPMC admits that Latrobe Hospital is a party to an oncology joint venture with UPMC. UPMC denies that it has used joint ventures or cancer centers to foreclose competition from Plaintiff and denies knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 19. To the extent that a further response is required to those remaining allegations, those allegations are denied.

20. UPMC denies knowledge or information sufficient to form a belief as to the truth of the allegation that AGH relies on community hospitals for referrals of complex, difficult cases and UPMC denies the remaining allegations of Paragraph 20.

21. UPMC denies the allegations of Paragraph 21.

22. UPMC denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 22. To the extent that a further response is required to those allegations, the allegations are denied.

23. UPMC denies the allegations of Paragraph 23.

24. UPMC denies the allegations of Paragraph 24.

25. UPMC admits that patient referrals are generally an important source of revenue for hospitals. UPMC denies knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 25. To the extent that a further response is required to those remaining allegations, those allegations are denied.

26. UPMC denies the allegations of Paragraph 26.

27. UPMC denies the allegations of the first sentence of Paragraph 27.

- UPMC admits that in September 1999, it contracted with Dr. Joseph Maroon and four other neurosurgeons. UPMC further admits that it purchased certain property owned by Dr. Maroon around this same time. UPMC denies the remaining allegations of the first bullet of Paragraph 27.
- UPMC admits that it contracted with Dr. Stanley Marks and other medical and radiation oncologists who had practiced at AGH. UPMC further admits that it purchased certain property owned by Dr. Marks around this same time. UPMC denies knowledge or information sufficient to form a belief as to the truth of the allegations of the last sentence of the second bullet of Paragraph 27 and denies the remaining allegations contained in the second bullet of Paragraph 27.
- UPMC denies the allegations of the third bullet of Paragraph 27.
- UPMC denies the allegations of the fourth bullet of Paragraph 27.

28. UPMC denies the allegations of Paragraph 28.

29. UPMC denies the allegations of Paragraph 29. By way of further response, with the exception of certain sub-specialties, UPMC does not require physicians to be UPMC employees in order to obtain privileges to practice at its hospitals.

30. UPMC denies the allegations of Paragraph 30.

31. UPMC denies the allegations of Paragraph 31.

32. Certain of the allegations contained in Paragraph 32 refer to a written document, the terms of which speak for themselves. UPMC denies any allegations that are inconsistent with the terms of that written document. By way of further response, UPMC denies the remaining allegations contained in Paragraph 32.

33. UPMC denies the allegations of Paragraph 33.

34. UPMC admits that in 2002, it extended offers of employment to certain private practice anesthesiologists who, at the time, were on the AGH medical staff and denies the remaining allegations contained in Paragraph 34.

35. UPMC denies knowledge or information sufficient to form a belief as to the truth of the allegations of the first and second sentences of Paragraph 35. As to the remaining allegations contained in Paragraph 35, UPMC admits that in or about January 2004, it contracted with certain AAA anesthesiologists and CRNAs and denies the remaining allegations contained in Paragraph 35.

36. UPMC denies the allegations of Paragraph 36.

37. UPMC admits that it periodically reviews and, when appropriate, adjusts physician compensation to ensure that it remains competitive in the marketplace for physician services and denies the remaining allegations contained in Paragraph 37.

38. UPMC admits that it acquired the Russellton Medical Group in the mid-1990s. UPMC denies knowledge or information sufficient to form a belief as to the truth of the allegations that the Russellton Medical Group was "a key source of patients" for Citizen's General Hospital and that UPMC's acquisition of the Russellton Medical Group "was a major factor in Citizens General's closure in November 2000." UPMC denies the remaining allegations contained in Paragraph 38.

39. UPMC denies the allegations of Paragraph 39.

40. UPMC denies the allegations of Paragraph 40.

41. UPMC admits that it has contracted with certain physicians who had privileges at Alle-Kiski Medical Center and denies the remaining allegations contained in Paragraph 41.

42. UPMC denies the allegations of Paragraph 42.

43. UPMC denies the allegations of Paragraph 43.

44. UPMC admits that David Martin met with certain Pennsylvania Anesthesia Providers in or about 2005 at their invitation and denies the remaining allegations contained in Paragraph 44.

45. UPMC denies the allegations of Paragraph 45.

46. UPMC denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 46. To the extent that a further response is required to the allegations contained in Paragraph 46, those allegations are denied.

47. UPMC denies the allegations of Paragraph 47.

48. UPMC denies the allegations of Paragraph 48.

49. UPMC admits that in or about 2005, UPMC offered contracts to certain CRNAs affiliated with Western Pennsylvania Anesthesia Associates ("WPAA") and certain WPAA physicians and denies knowledge or information sufficient to form a belief as to the truth of the allegations

regarding WPAA's communications with Highmark and/or WPAHS and denies the remaining allegations contained in Paragraph 49.

50. UPMC denies the allegations contained in Paragraph 50.

51. UPMC denies the allegations contained in Paragraph 51.

52. UPMC denies the allegations contained in Paragraph 52.

53. Certain of the allegations contained in Paragraph 53 relate to written documents, e-mail communications, the terms of which speak for themselves. UPMC denies those allegations to the extent that they are inconsistent with the terms of the email communications. By way of further response, UPMC denies the remaining allegations contained in paragraph 53.

54. UPMC denies the allegations of Paragraph 54.

55. UPMC denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 55. To the extent that a further response is required, UPMC denies the allegations of Paragraph 55.

56. UPMC denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 56. To the extent that a further response is required, UPMC denies the allegations of Paragraph 56.

57. UPMC admits that at various times certain UPMC residents have rotated through various Veterans Administration clinical sites in western Pennsylvania and denies the remaining allegations contained in Paragraph 57.

58. UPMC admits that UPMC doctors have performed liver transplants for the VA, denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 58

regarding the purported avoidance by the VA of using UPMC doctors and denies the remaining allegations contained in Paragraph 58.

59. UPMC admits that in or about 2007, a UPMC transplant physician advised UPMC of his intention to resign from UPMC and seek employment with the Department of Veterans Affairs. UPMC further admits that it advised the physician of provisions in his UPMC employment contract that precluded him from competing with UPMC under certain conditions following his employment. UPMC denies knowledge or information sufficient to form a belief as to the truth of the allegations regarding the intentions of the physician or the Veterans Administration and denies the remaining allegations contained in Paragraph 59.

60. UPMC denies the allegations of Paragraph 60.

61. UPMC denies knowledge or information sufficient to form a belief as to the truth of the allegations regarding the VA's decision making and Plaintiff's compensation of the physician and denies the remaining allegations of Paragraph 61.

62. UPMC denies knowledge or information sufficient to form a belief as to the truth of the allegations concerning "other hospital system[s]" and denies the remaining allegations contained in Paragraph 62.

63. UPMC denies the allegations of Paragraph 63.

64. UPMC admits that in the late 1990s UPMC retained Reynolds & Co. to provide consulting services and that Reynolds prepared a written report regarding the West Penn-AGH merger, the terms of which speak for themselves. UPMC denies any allegations inconsistent with the terms of that written report. UPMC further admits that it made the Reynolds report publicly available. UPMC

otherwise denies knowledge or information sufficient to form a belief as to the truth of the last sentence of Paragraph 64 and denies the remaining allegations contained in Paragraph 64.

65. UPMC denies knowledge or information sufficient to form a belief as to the truth of the allegations of the last sentence of Paragraph 65. UPMC denies the remaining allegations contained in Paragraph 65.

66. UPMC denies that it created or disseminated to the financial community any false, defamatory or misleading information to potential purchasers of WPAHS bonds or to credit rating agencies. By way of further response, UPMC denies knowledge or information sufficient to form a belief as to the truth of the allegations of the last sentence of Paragraph 66 and denies the remaining allegations contained in Paragraph 66.

67. UPMC admits that Plaintiff's Chairman called Nicholas Beckwith in or around January 2007 regarding UPMC communications related to Plaintiff's bond offering and denies the remaining allegations contained in Paragraph 67.

68. UPMC admits that Nicholas Beckwith conferred with UPMC management regarding his January 2007 conversation with Plaintiff's Chairman and Plaintiff's bond offering in particular. UPMC further admits that Mr. Beckwith returned the phone call of Plaintiff's Chairman after conferring with UPMC management and that Mr. Beckwith and Plaintiff's Chairman reached an agreement regarding WPAHS' bond offering. UPMC denies the remaining allegations contained in Paragraph 68.

69. UPMC denies the allegations of Paragraph 69.

70. UPMC denies the allegations of Paragraph 70.

71. UPMC denies knowledge or information sufficient to form a belief as to the truth of the allegations of the first sentence of Paragraph 71 and denies the remaining allegations contained in Paragraph 71.

72. UPMC admits that it has stated publicly that it would not contract with Highmark, which is the longstanding monopolist insurer in the region, based on its decision to step down from its perch as a neutral insurer by converting itself into an integrated delivery and financing system through its planned acquisition of WPAHS. UPMC denies the remaining allegations of Paragraph 72.

73. The allegations contained in Paragraph 73 are conclusions of law, to which no response is required. To the extent that a response is required, those allegations are denied.

74. UPMC admits that it owns approximately fifteen hospitals in western Pennsylvania certain of which it acquired starting in the 1990s and denies the remaining allegations contained in Paragraph 74.

75. UPMC denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 75. To the extent that a further response is required, the allegations of Paragraph 75 are denied.

76. UPMC denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 76. To the extent that a further response is required, the allegations of Paragraph 76 are denied.

77. UPMC admits that there are other health systems in western Pennsylvania other than UPMC and WPAHS including the health systems and hospitals identified in Paragraph 77 and denies the remaining allegations contained in Paragraph 77.

78. UPMC denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 78. To the extent that a further response is required, the allegations of Paragraph 78 are denied.

79. To the extent the allegations of Paragraph 79 are conclusions of law, no response is required. To the extent a response is necessary, UPMC admits that the provision of inpatient hospital services is a relevant product market. UPMC otherwise denies the allegations of Paragraph 79.

80. To the extent the allegations of the first sentence of Paragraph 80 are conclusions of law, no response is required. To the extent a response is necessary, UPMC denies the allegations of the first sentence of Paragraph 80. By way of further response, UPMC denies knowledge or information sufficient to form a belief as to the truth of the allegations of the second sentence of Paragraph 80. To the extent that a further response is required to the allegations of the second sentence of Paragraph 80, the allegations are denied.

81. To the extent the allegations of the first sentence of Paragraph 81 are conclusions of law, no response is required. To the extent a response is necessary, UPMC denies the allegations of the first sentence of Paragraph 81. By way of further response, UPMC denies knowledge or information sufficient to form a belief as to the truth of the allegations of the second and third sentences of Paragraph 81. To the extent that a further response is required to the allegations of the second and third sentences of Paragraph 81, the allegations are denied.

82. To the extent the allegations of Paragraph 82 are conclusions of law, no response is required. To the extent a response is necessary, UPMC denies the allegations of Paragraph 82.

83. To the extent the allegations of Paragraph 83 are conclusions of law, no response is required. To the extent a response is necessary, UPMC denies the allegations of Paragraph 83.

84. Certain of the allegations contained in Paragraph 84 relate to written documents, newspaper articles, the terms of which speak for themselves. UPMC denies those allegations to the extent that they are inconsistent with the terms of the articles. By way of further response, UPMC states that WPAHS is an inefficient and poorly managed provider. UPMC denies the remaining allegations contained in paragraph 84.

85. The allegations contained in Paragraph 85 are conclusions of law to which no response is required. To the extent that a response is required, those allegations are denied.

86. UPMC denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 86, except denies the allegation that "UPMC controls the contracting decisions of almost every nominally independent community hospital in Allegheny County except those owned by West Penn Allegheny." To the extent that a further response is required to the remaining allegations of Paragraph 86, the allegations are denied.

87. Certain of the allegations contained in Paragraph 87 relate to written documents, newspaper articles, the terms of which speak for themselves. UPMC denies those allegations to the extent that they are inconsistent with the terms of the articles. By way of further response, UPMC denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 87. To the extent that a further response is required to the allegations of Paragraph 87, the allegations are denied.

88. UPMC denies the allegations of Paragraph 88.

89. To the extent the allegations of Paragraph 89 are conclusions of law, no response is required. To the extent a response is necessary, UPMC denies knowledge or information sufficient to

form a belief as to the truth of the allegations of Paragraph 89. To the extent that a further response is required to the allegations of Paragraph 89, the allegations are denied.

90. To the extent the allegations of Paragraph 90 are conclusions of law, no response is required. To the extent a response is necessary, UPMC admits that is has acquired St. Francis, Mercy and Citizens General Hospitals. By way of further response, UPMC states that Highmark is but one example of an entrant into the market of inpatient hospital services through its effective acquisition of WPAHS and other providers. UPMC otherwise denies knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 90. To the extent that a further response is required to the remaining allegations of Paragraph 90, the allegations are denied.

91. UPMC denies the allegations of the first sentence of Paragraph 91. UPMC otherwise denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 91, except admits that it purchased Mercy Hospital in 2006. To the extent that a further response is required to the allegations of Paragraph 91, the allegations are denied.

92. UPMC denies the allegations of Paragraph 92.

93. UPMC denies the allegations of Paragraph 93.

94. UPMC denies the allegations of Paragraph 94.

95. UPMC denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 95, except denies the allegations of Paragraph 95 of "UPMC's unfettered ability to control the healthcare market." To the extent that a further response is required to the allegations of Paragraph 95, the allegations are denied.

96. UPMC denies the allegations of Paragraph 96, except denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 96 regarding the sophistication

and level of care provided by West Penn Allegheny. To the extent that a further response is required to the allegations of Paragraph 96, the allegations are denied.

97. UPMC denies the allegations of Paragraph 97.

98. UPMC denies the allegations of Paragraph 98.

99. UPMC denies the allegations of Paragraph 99, except denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 99 that West Penn Allegheny's costs were raised, which resulted in less capital to invest in its business. To the extent that a further response is required to the allegations of Paragraph 99, the allegations are denied.

100. UPMC denies the allegations of Paragraph 100.

101. UPMC denies the allegations of Paragraph 101.

102. In response to the allegations of Paragraph 102, UPMC incorporates its responses to the allegations of Paragraphs 1 through 101 as if fully set forth herein.

103. UPMC denies the allegations of Paragraph 103.

104. UPMC denies the allegations of Paragraph 104, except denies knowledge or information sufficient to form a belief as to the truth of the allegation that "UPMC executives have also stated that they want to turn AGH into a nursing home or a parking lot." To the extent that a further response is required to the allegations of Paragraph 104, the allegations are denied.

105. UPMC denies the allegations of Paragraph 105.

106. UPMC denies the allegations of Paragraph 106.

107. The allegations of Paragraph 107 are conclusions of law, and therefore do not require a response. To the extent a response is necessary, UPMC denies the second sentence of Paragraph 107 and denies knowledge or information sufficient to form a belief as to the truth of the remaining

allegations of Paragraph 107. To the extent that a further response is required to the remaining allegations of Paragraph 107, the allegations are denied.

108. UPMC denies the allegations of Paragraph 108.

109. In response to the allegations of Paragraph 109, UPMC incorporates its responses to the allegations of Paragraphs 1 through 108 as if fully set forth herein.

110. UPMC denies the allegations of Paragraph 110.

111. UPMC denies the allegations of Paragraph 111, except denies knowledge or information sufficient to form a belief as to the truth of the allegation that "UPMC executives have also stated that they want to turn AGH into a nursing home or a parking lot." To the extent that a further response is required to the allegations of Paragraph 111, the allegations are denied.

112. UPMC denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 112.

113. UPMC denies the allegations of Paragraph 113.

114. UPMC denies the allegations of Paragraph 114.

115. The allegations of the first and last sentences of Paragraph 115 are conclusions of law, and therefore do not require a response. To the extent a response is required, UPMC denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 115. To the extent that a further response is required to the allegations of Paragraph115, the allegations are denied.

116. UPMC denies the allegations of Paragraph 116.

117. In response to the allegations of Paragraph 117, UPMC incorporates its responses to the allegations of Paragraphs 1 through 116 as if fully set forth herein.

118. UPMC denies the allegations of Paragraph 118.

119. UPMC denies the allegations of Paragraph 119.

120. UPMC denies the allegations of Paragraph 120.

121. UPMC denies the allegations of Paragraph 121.

122. In response to the allegations of Paragraph 122, UPMC incorporates its responses to the allegations of Paragraphs 1 through 121 as if fully set forth herein.

123. UPMC denies the allegations of Paragraph 123.

124. UPMC denies the allegations of Paragraph 124.

125. UPMC denies the allegations of Paragraph 125.

126. UPMC denies the allegations of Paragraph 126.

127. UPMC denies the allegations of Paragraph 127.

128. UPMC denies the allegations of Paragraph 128.

129. UPMC denies the allegations of Paragraph 129.

130. UPMC denies the allegations of Paragraph 130.

AFFIRMATIVE DEFENSES

Without assuming any burden of proof they would not otherwise bear, UPMC also asserts the following defenses:

First Affirmative Defense

The Second Amended Complaint, and each purported cause of action contained therein, fails to state facts sufficient to constitute a cause of action against UPMC.

Second Affirmative Defense

Plaintiff has not sustained any cognizable injury or antitrust injury by reasons of any actions or omissions of UPMC.

Third Affirmative Defense

Plaintiff lacks standing to bring some or all of their claims.

Fourth Affirmative Defense

UPMC's conduct was not intended to have, did not have, and is not likely to have any adverse effect on competition in any relevant market.

Fifth Affirmative Defense

UPMC lacks market power in any relevant market.

Sixth Affirmative Defense

UPMC had independent and legitimate business justifications for its conduct.

Seventh Affirmative Defense

Defendant's conduct was procompetitive.

Eighth Affirmative Defense

Plaintiff's claims are barred, in whole or in part, because the damages it seeks are too speculative and too remote.

Ninth Affirmative Defense

Plaintiff's claims are barred, in whole or in part, by the doctrines of laches, estoppel and unclean hands.

Tenth Affirmative Defense

Plaintiff's claims are barred, in whole or in part, because Plaintiffs have failed to mitigate their alleged damages, if any.

Eleventh Affirmative Defense

Plaintiff's claims are barred to the extent the claims or the relief sought are moot.

Twelfth Affirmative Defense

Plaintiff's claims for injunctive or equitable relief are barred, in whole or in part, because Plaintiff has an adequate remedy at law.

Thirteenth Affirmative Defense

The relief sought by Plaintiff is barred, in whole or in part, because the alleged damages sought are too speculative and uncertain, and because ascertaining and allocating alleged damages would be impossible.

Fourteenth Affirmative Defense

Plaintiff's claims are barred, in whole or in part, by the applicable statutes of limitations.

UPMC reserves the right to assert other defenses as appropriate.

COUNTERCLAIMS AGAINST WPAHS

1. Counterclaim Plaintiff UPMC brings this action against Counterclaim Defendant West Penn Allegheny Health System, Inc. ("WPAHS") under Sections 1 and 2 of the Sherman Act, 15 U.S.C §§ 1, 2.

2. WPAHS has been and continues to be party to a long-term conspiracy with non-party Highmark, Inc. that has impaired competition in the provision of health care services, and has enabled Highmark to monopolize the provision of health insurance in Western Pennsylvania and monopsonize the purchase of health care provider services.

3. Since its inception in 1996, Highmark has waged a crusade to cripple UPMC as a provider of healthcare and of insurance products in order to preserve Highmark's health insurance monopoly. Following the bankruptcy of AHERF (Allegheny Health, Education and Research

Foundation) in 1998, a major part of Highmark's crusade has been its relationship with WPAHS. By its own admission, Highmark created WPAHS with its initial round of financing. Highmark's prime purpose for WPAHS has not been to enhance competition among healthcare providers, but rather for Highmark to have a presence in the provider market that could be used to maintain its insurance monopoly. The result has been a rash of anticompetitive behavior by Highmark, WPAHS, and others they have enlisted to preserve Highmark's dominant position in insurance. This behavior has included, but is far from limited to, a conspiracy between Highmark and WPAHS to favor WPAHS in compensation over UPMC, in exchange for which WPAHS has not contracted with any outside insurers on terms more favorable than Highmark. Highmark has been able artificially to hinder UPMC's viability as a potential insurance competitor through its Health Plan by limiting its reimbursements to UPMC on the provider side, while at the same time preventing other insurance competition from entering or expanding in Western Pennsylvania.

4. Most recently, WPAHS has entered into an "Affiliation Agreement" with Highmark devised to coerce long-term renewal of Highmark's contracts with UPMC and to exclude competition from outside insurers. The objective has been to preserve Highmark's monopsony rates to providers, and to sustain the high barriers to entry which its insurance competitors have not been able to conquer to date.

5. For at least two decades, hospitals in Western Pennsylvania have faced daunting challenges. Stagnant or declining population and the migration of many medical treatments from in-patient settings to out-patient settings have left many institutions starved for both patients and revenues. Overcapacity, that being too many hospital beds for the number of available admissions, has been rampant in the region.

6. This region-wide phenomenon has provided Highmark with great market power as a dominant buyer of health care (or "monopsonist"). Because hospitals have desperately needed the patients Highmark could deliver, Highmark has driven down the reimbursement rates paid to those hospitals far below the rates paid for similar services in similar markets. Highmark's overall scheme of anticompetitive conduct, including its conspiracy with WPAHS, has furthered this trend, ensuring that Highmark has not had to raise its reimbursement rates.

7. This "monopsonist pricing" could have been a boon to the region's consumers of healthcare if Highmark had passed the savings along to its subscribers. But it has not done so. Lacking any effective competition in the insurance market, Highmark has in fact increased premiums while hoarding the excess in reserves, which are now greater than $5 billion. Highmark is thus a "monopsonist" as a buyer of health care from providers, as well as a "monopolist" as a dominant seller of insurance plans to consumers.

8. Highmark has also, by its own admission, been "ineffective" at controlling utilization of healthcare and at collaborating with providers to develop new, more cost-efficient models of care, resulting in additional costs to its subscribers. It could get away with being ineffective only because it had faced little competition in the market for health insurance, particularly competition for "national" accounts.

9. Since at least the mid-1990s, Highmark has recognized that the major threat to its monopoly/monopsony was a strong UPMC and its upstart Health Plan. It therefore began what has become a 15-year, wildly expensive, and only marginally successful campaign to mute competition from UPMC.

10. In the course of this campaign, Highmark enlisted and conspired with a number of separate entities and persons, including WPAHS and a variety of "consultants."

11. This continuing conspiracy and campaign has cost UPMC and the citizens of Western Pennsylvania perhaps billions of dollars over the years, dollars that went into Highmark's bloated reserves or into the pockets of its co-conspirators. Only in the past year has the prospect of real competition in both the market for health insurance and the market for health care services begun to emerge, and only because UPMC has managed to withstand the latest salvos fired at it in this illegal campaign.

12. This Court's intervention is necessary to remedy the harms to competition which have resulted from WPAHS's and Highmark's conduct, described in further detail below, and to compensate UPMC for the great damage already done. The anticompetitive conduct must also be brought to a halt, necessitating an award of appropriate equitable relief.

PARTIES

13. Counterclaim Plaintiff UPMC is a 501(c)(3) not-for-profit corporation organized under the laws of the State of Pennsylvania with a principal place of business in Pittsburgh, Pennsylvania.

14. Counterclaim Defendant WPAHS is a 501(c)(3) not-for-profit corporation organized under the laws of the State of Pennsylvania with its principal place of business in Pittsburgh, Pennsylvania.

JURISDICTION & VENUE

15. This Court has subject-matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 (Federal Question Jurisdiction) and 1337(a) (Antitrust) because the causes of action asserted

herein arise under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, and Section 16 of the Clayton Act, 15 U.S.C. § 26.

16. This Court has personal jurisdiction over Counterclaim Defendant WPAHS as it has ongoing and continuous contacts with this judicial district, including maintaining its corporate headquarters in this district and bringing the instant litigation.

17. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(b) because UPMC, as well as Counterclaim Defendant WPAHS, maintain their headquarters in this district and a substantial part of the events or omissions giving rise to the claims asserted herein occurred within this judicial district.

18. The conduct alleged herein was committed in and affected interstate commerce.

RELEVANT MARKETS

19. The provision of commercial health insurance is a relevant product market. Health insurance is essential to accessing healthcare, as very few individuals can afford the risk of financing health services on their own to any significant degree. Government-financed health insurance programs for the Veteran's Administration health system and Medicare/Medicaid are not included in the product market for purposes of this litigation. Those programs have specific eligibility requirements based on age, income, veteran status, and other factors, and are not accessible to the ordinary consumer of health insurance services. Nor do these programs provide a meaningful competitive constraint on the market for commercial health insurance.

20. There is no adequate substitute for commercial health insurance available to businesses and individual consumers. Commercial health insurance is so important that the Patient

Protection and Affordable Care Act requires all individuals to purchase a minimum level of insurance coverage beginning in 2014.

21. The provision of Medicare Advantage plans is an additional relevant product market. The provision of Medicare Advantage plans constitutes a market separate from the provision of commercial health insurance plans because Medicare Advantage is available only to individuals who are disabled or elderly. Those who qualify for Medicare Advantage would not find it cost-effective to switch to commercial health insurance. Thus, Medicare Advantage insurance is not a substitute for commercial health insurance.

22. Medicare Advantage is also distinguished from other government-financed health insurance programs, such as Medicare and Medicaid. It constitutes a separate relevant product market because the rates for Medicare Advantage are negotiated between each insurer and provider, rather than set by the government. As a result, the terms of Medicare Advantage can be much more beneficial for consumers. (Hereinafter, the term "relevant insurance markets" refers to both the markets for the provision of commercial health insurance and the provision of Medicare Advantage plans.)

23. The provision of inpatient hospital services ("inpatient services/care" or "provider market") is also a relevant product market. Inpatient services consist of inpatient surgical, medical, and supporting services provided in a hospital setting to patients. This market excludes outpatient services. The choice of inpatient, as opposed to outpatient, services is largely determined by physicians, and is based on the medical needs of the patient, not on the relative cost of the services. Thus, inpatient services and outpatient services are not substitutes. The relevant product market, however, is no narrower than all inpatient services.

24. The purchase of health care provider services by insurance companies on behalf of commercial insureds is another relevant product market. Generally speaking, patients do not purchase services directly from healthcare providers. Patients purchase commercial health insurance products from health insurance companies, which purchase services from healthcare providers.

25. Another relevant product market is the purchase of provider services by insurance companies on behalf of Medicare Advantage insureds. Those who are eligible for Medicare Advantage do not purchase services directly from healthcare providers. Eligible patients purchase Medicare Advantage products from insurance companies, which purchase services from healthcare providers. (Hereinafter, the term "relevant purchase markets" refers to both the markets for the purchase of provider services by insurance companies on behalf of commercial insureds and the purchase of provider services by insurance companies on behalf of Medicare Advantage insureds.)

26. The relevant geographic market for each of the relevant product markets is Western Pennsylvania, which includes Allegheny, Armstrong, Beaver, Bedford, Blair, Butler, Cambria, Cameron, Clarion, Clearfield, Crawford, Elk, Erie, Fayette, Forest, Greene, Indiana, Jefferson, Lawrence, McKean, Mercer, Somerset, Venango, Warren, Washington, and Westmoreland counties. Healthcare markets are generally regional as, for most types of treatment, consumers only travel a limited distance to obtain the services they need. Although for many subspecialties, the geographic markets are far broader, Western Pennsylvania is the appropriate geographic market for addressing the instant Counterclaims.

FACTS

I. HIGHMARK'S DOMINANCE

27. Highmark currently holds in excess of 65% of the market for the provision of commercial health insurance in Western Pennsylvania. It holds in excess of 50% of the market for the provision of health insurance through Medicare Advantage plans.

28. Confirming Highmark's dominance of the relevant insurance and purchase markets, news reports have indicated recently that major national insurers were "cautious" about entering the Western Pennsylvania health insurance market due to Highmark's market dominance.

29. This monopoly position has enabled Highmark to exercise monopsony power over healthcare providers. UPMC has been forced to contract with Highmark at such low reimbursement rates that it had no choice for many years but to charge higher rates to all other insurance networks in order to remain in business. Highmark's monopsony power, artificially maintained by an overall course of anticompetitive conduct including its conspiracy with WPAHS, has discouraged entry into the relevant insurance markets by potential Highmark competitors.

30. Highmark's creation and artificial propping up of WPAHS as a provider pursuant to their conspiracy, detailed below, has contributed to Highmark's ability to maintain its insurance monopolies. The creation and support of WPAHS has enabled Highmark to limit reimbursements to UPMC, while at the same time preventing entry and expansion from other insurance competitors. Those constrained reimbursements to UPMC have hindered its ability to emerge as a competitor in the insurance markets through its Health Plan.

31. Barriers to entry into the relevant insurance and purchase markets are high. National insurers have not been able to secure a significant foothold in the relevant insurance or purchase

markets to date. In addition, the population of Western Pennsylvania is declining, so there is an increasingly smaller population of potential insureds. Thus, the significant investment required to establish a foothold in the market is becoming less attractive over time.

32. Highmark has the power to control prices on insurance premiums in the relevant insurance markets. Due to its monopoly position, employers and individuals have paid steadily increasing insurance premiums to participate in Highmark plans.

33. This power to exclude competition and raise prices demonstrates that Highmark has monopoly power in the relevant Western Pennsylvania insurance markets. Highmark also has monopsony power in the relevant Western Pennsylvania purchasing markets, where reimbursement rates have remained at subcompetitive levels since Highmark's formation.

34. By both extracting monopoly prices from consumers and their employers and extracting monopsony rates from healthcare providers as a result of its anticompetitive agreements, Highmark has accumulated in excess of $5 billion in reserves.

II. UPMC'S IDFS REPRESENTS A POTENTIAL THREAT

35. In 1998, in response to strong arm tactics from Highmark and significantly depressed reimbursement rates, UPMC announced its intention to become an Integrated Delivery and Finance System (IDFS) offering both provider and insurance products. The insurance products were to be offered through the UPMC Health Plan. The UPMC Health Plan has been and remains a "narrow network" plan. That is, to achieve the necessary cost savings, the plan covers only those services provided by select in-network providers.

36. The principle purpose of an IDFS, an innovative and bold concept in 1998, is to integrate provider and insurance offerings so that consumers are offered the highest quality care at

the lowest cost possible. Since UPMC's creation as an IDFS, the IDFS concept has gained national recognition as a leading approach to healthcare solutions.

37. The creation of the UPMC Health Plan was also an attempt to increase insurance competition to the benefit of consumers and UPMC providers. The UPMC Health Plan currently offers commercial insurance and Medicare Advantage insurance products.

38. The UPMC Health Plan represented and continues to represent potential competition to Highmark's monopolies in the relevant insurance markets. Should consumers and businesses find that the (already inflated) premiums they were paying to Highmark exceeded their willingness to pay for such services, the narrow network UPMC Health Plan would provide an alternative.

39. Rather than welcome the prospect of this increased competition from UPMC and offer consumers better products to counter it, Highmark instead embarked on a strategy aimed at avoiding competition and crippling UPMC. One component of this strategy has been its long-term conspiracy with WPAHS and, more recently, a consultant retained by Highmark.

III. HIGHMARK'S INITIAL AFFILIATION WITH WPAHS

40. Highmark created WPAHS out of the bankrupt AHERF health system. Highmark provided a subordinated loan of $125 million to support the WPAHS-AGH merger, with promises of additional aid going forward. As Highmark itself put it: "[G]reat efforts were made to preserve AGH . . . . With significant financial support from Highmark in the form of a $125 million loan, WPAHS and Suburban General Hospital combined with AGH and other former AHERF hospitals to form [WPAHS]. This loan made it possible for WPAHS to '[rise] from the ashes' of the failed AHERF."

41. Highmark's initial loan and further promises of aid were furthered by an agreement between Highmark and WPAHS to discriminate in the compensation Highmark would pay to UPMC by giving WPAHS more favorable financial treatment. In exchange, on information and belief, WPAHS agreed not to contract on more advantageous terms with other insurers in order to prevent their successful entry into Western Pennsylvania.

42. Highmark's primary purpose in creating WPAHS was to establish a vehicle to protect and maintain its insurance monopolies. The favoring of WPAHS over UPMC gave Highmark leverage over UPMC to marginalize its Health Plan and to reinforce Highmark's insurance monopolies. Since WPAHS's formation, it has never been a competitively viable provider, but rather a tool through which Highmark has sought to preserve its dominance.

43. WPAHS has served as a front line vehicle for anticompetitive behavior by Highmark. Highmark's claims that its support of WPAHS is for the primary purpose of enhancing competition among providers are false. WPAHS has never served as a meaningful competitor on the provider side due to mismanagement and inefficiency, but rather has served as Highmark's vehicle through which to protect itself from insurance competition. Through the conspiracy, Highmark and WPAHS have been able to foreclose competition from both UPMC's Health Plan, as well as outside insurers who might seek to enter and/or expand.

44. Highmark has preserved its market position, as a result of the conspiracy, by hindering UPMC's Health Plan as an insurance competitor, and by raising barriers to entry to other Highmark insurance rivals who would otherwise seek to enter or expand. So long as Highmark could starve UPMC of resources on the provider side by favoring WPAHS, UPMC's ability to emerge as a significant insurance competitor would be stunted. Highmark knew and continues to

know that if it deprives UPMC of resources on the provider side, it will preclude competition from UPMC's Health Plan. UPMC's expansion as an insurance competitor through its IDFS is dependent upon market-driven reimbursements on the provider side, to which UPMC has been denied pursuant to the conspiracy.

45. A key part of this conspiracy initially was the establishment and aggressive marketing of an insurance product, "Community Blue," that excluded coverage at UPMC facilities. The purpose of Community Blue was to steer patients away from UPMC and towards WPAHS's providers. If UPMC did not comply with Highmark's demands on the insurance side, then Highmark could market Community Blue more aggressively, depriving UPMC of volume and enriching WPAHS. On information and belief, Community Blue was unprofitable. Its simple purpose was to siphon patients away from UPMC and towards WPAHS. Highmark and WPAHS understood that the creation of this plan was pursuant to Highmark's agreement to favor WPAHS over UPMC on the provider side, so that Highmark would not face meaningful competition on the insurance side.

46. Highmark's internal strategy also reflected its agreement with WPAHS. Specifically, its plan was to "aggressively market and sell CommunityBlue" to steer patients to its then "unofficial" affiliate, WPAHS. It was clear that Highmark viewed UPMC as a competitor and enemy. One Highmark memorandum stated that: "UPMC is not our ally and is not neutral . . . . Therefore, they are a competitor." Thus, both WPAHS *and* Highmark saw UPMC as an enemy, and their agreement aimed to target UPMC for their mutual gain.

47. Former Highmark CEO Melani even acknowledged that the purpose of its combination with WPAHS was to siphon patients away from UPMC. Q&A with Dr. Kenneth

Melani, Pittsburgh Post-Gazette (Jan. 2, 2008) ("WPAHS Allegheny, for as much aggravation as they may pretend we've caused them, they wouldn't be around if it weren't for us"). The more successful that initiative was, the more invulnerable Highmark's insurance monopoly would be.

48. Both parties upheld their end of the conspiracy. On Highmark's side, as it told this Court, it provided "continuing support for WPAHS throughout the past decade." This "continuing support" included:

- "[A]mendments to the 1996 Agreements [in 1999] . . . provid[ing] for increased rates and an annual index adjustment" coincident with its $125 million loan to support WPAHS's formation;
- "[F]urther amendments to the 1996 Agreements [in 2002] including new increased rates . . . retroactive to . . . 2001";
- "[A] $42 million grant to WPAHS in 2002 . . . [a purpose of which was] to support physician recruitment activities of WPAHS;" and
- Further contract amendments between 2002 and 2008, in which "specific reimbursement rates were increased . . . [including] a $1.5 million grant for the recruitment and retention of anesthesiologists and nurse anesthetists at AGH."

Over the same time span, UPMC received nothing in the way of similar reimbursement rate increases or contract reopeners. As discussed below, Highmark's agreement with UPMC in 2002 provided for frozen reimbursement rates for up to 10 years, with adjustments only for inflation. While UPMC's rates remained stagnant, WPAHS was given regular reimbursement rate increases so as to favor them in the provider market.

49. Highmark's discrimination in favor of WPAHS has resulted in the artificial propping up of an inefficient and incompetently managed provider, WPAHS. WPAHS has essentially been a reprise of its failed predecessor, AHERF, and its prime mission has been to exert whatever pressure it could on UPMC for Highmark's benefit. In the end, this has resulted in inefficient excess capacity in the provider market. Consumers have had to pay for that inefficiency through increased

healthcare costs. The harm has been exacerbated by gross mismanagement of WPAHS since its creation, leading to massive financial losses fueled by Highmark's largesse. Had Highmark not intervened and allowed market forces to play their normal role, the level of inefficient excess capacity in Western Pennsylvania health care would be far less serious.

50. Compounding the inefficiency, in 2007, WPAHS re-financed its $125 million loan, repaying Highmark in full with the proceeds even though Highmark had written down the value of the loan four years earlier. That refinancing, however, was based on misleading financials. Subsequently, later WPAHS financial statements have been the subject of an investigation by the Securities and Exchange Commission. The effect of the conspiracy, then, has been to add inefficient excess capacity and, apparently, to mislead investors into supporting that activity.

51. Moreover, under the terms of the refinancing, the bondholders could not rely on Highmark to bail WPAHS out should WPAHS not meet its debt covenants. Also, WPAHS only had to meet those covenants once a year, as opposed to twice a year as was the case for its previous debt. Thus, not only were investors exposed in this deal, but Highmark also managed to rid itself of financial obligation to WPAHS. Highmark could thus continue to utilize its co-conspirator as it saw fit, without even having to take on significant financial risk.

52. On WPAHS's end of the conspiracy, upon information and belief, it aided the effort to hinder the UPMC Health Plan and also gave no outside insurer more favorable rates than Highmark. As a result, the ability of Highmark's insurance competitors to penetrate the market was significantly hampered.

IV. THE 2002 UPMC-HIGHMARK AGREEMENT

53. As 2002 approached, UPMC's hospitals remained in-network under Highmark insurance plans pursuant to contracts executed in 1996. The 1996 contracts provided for extremely low reimbursement rates, and to the extent there were rate increases for a given year – and for certain years there were none – they did not keep pace with inflation. This was despite massive increases in costs, creating a situation that threatened UPMC's viability.

54. In 2002, the two parties negotiated towards new agreements but reached an impasse. Bowing to intense community pressure, however, UPMC eventually agreed to a new set of contracts in June 2002 covering its then-existing facilities and related services. Subject to various differing terms as to termination dates and terminability, the agreements generally had durations of ten years, with a one year run out period.

55. These agreements include, *inter alia*, the provision and payment of hospital services provided to subscribers of Highmark's commercial products at UPMC Presbyterian Shadyside, UPMC Northwest, UPMC St. Margaret, UPMC Passavant, UPMC Horizon, UPMC Bedford, and UPMC McKeesport. In the same general time period, a series of contracts were executed between UPMC employed physicians and UPMC physician groups and Highmark governing the provision of physician and professional services to Highmark's subscribers. For simplicity, these agreements are referred to hereafter collectively as the "2002 Agreement." (These agreements do not include certain physician contracts as well as the contracts for UPMC Children's, UPMC Mercy, and UPMC Hamot, which were negotiated on a separate timeline and will expire on dates after June 30, 2013.)

56. The 2002 Agreement was highly favorable to Highmark. Although the 2002 Agreement granted UPMC a modest single-digit reimbursement rate increase over the then existing

subcompetitive reimbursement rate levels, it also froze those rates – apart from general inflation – for the duration of the Agreement.

57. Notably, the 2002 Agreement did not put an end to the Highmark-WPAHS conspiracy. Rather, it created a 10-year backstop which Highmark could use to ensure that WPAHS was receiving better compensation. Indeed, as explained above, over the length of the 2002 Agreement Highmark regularly increased WPAHS's reimbursement rates, while UPMC's rates remained stagnant so as to inhibit the emergence of its Health Plan. Highmark's offers to UPMC regarding compensation were not merely the product of market forces, but were artificially influenced because of Highmark's agreement with WPAHS. Indeed, the conspiracy did not end with the 2002 Agreement, but rather made the Agreement possible and enabled the conspiracy's anticompetitive effects to continue.

58. From UPMC's perspective, an unintended and unwelcome effect of the 2002 Agreement was to inhibit entry by other insurers. Because the rates paid by Highmark to UPMC were so low, UPMC could not afford to charge the same rates to outside insurers. In other words, UPMC was forced to use its rates with the outside insurers as a way to make up for the subcompetitive rates it was being paid by Highmark. Because the reimbursement rates the outside insurers had to pay were much higher than those Highmark had to pay, their plans were much more expensive than Highmark's. This prevented the outside insurers from successfully expanding in the market for health care insurance in Western Pennsylvania. This lack of expansion came to the attention of the Department of Justice, which opened a formal investigation in 2007 of Highmark and UPMC. That investigation was closed in 2011.

V. THE HIGHMARK-WPAHS CONSPIRACY CONTINUES

59. Both before and after the 2002 Agreement, Highmark gave routine reimbursement rate increases to WPAHS pursuant to their conspiracy. Those reimbursement rate increases were in no way reciprocated to UPMC, as its rates remained stagnant from 2002 to this very day, apart from adjustments for inflation. By design, this hindered the growth UPMC's Health Plan and precluded the ability of outside insurers to expand.

60. Highmark's generosity was not quite enough for WPAHS, however. To pressure further even greater favoritism, WPAHS filed a complaint against Highmark (as well as UPMC). In 2009, WPAHS's First Amended Complaint was filed and the two found themselves in the unusual posture of litigation adversaries. The lawsuit effected no withdrawal of either WPAHS or Highmark from their continuing conspiracy. Indeed, even in the midst of arguing to the Supreme Court that it was being disadvantaged by Highmark, WPAHS, *at the same exact time*, was receiving financing of at least $50 million from its alleged enemy, as well as a $25 million advance which would "be used to offset future reimbursements" from an unnamed "commercial payor." In addition, in the then most recent WPAHS disclosure to bondholders for FY2008, WPAHS cited "contracted higher rates for commercial [i.e., Highmark] and governmental payors." Accordingly, Highmark's agreement to favor WPAHS over UPMC in terms of financial support has not waivered over the course of the litigation. Nor, upon information and belief, has WPAHS entered into any contract with an outside insurer with more favorable rates than it was receiving from Highmark over the course of the litigation. Indeed, these events affirm that, notwithstanding a federal lawsuit being brought between the co-conspirators, the larger goal of preserving Highmark's insurance dominance reigned paramount.

61. In October 2011, Highmark officially announced its intention effectively to acquire WPAHS through an "Affiliation Agreement" and, by adding provider services to its business, to become an Integrated Delivery and Finance System (IDFS) like UPMC.

62. The announcement of this "Affiliation Agreement," complete with hundreds of millions of dollars of financing, affirmed the parties' status – collaborators in an effort to protect each other from competition, especially competition from UPMC. Still, despite Highmark's public statements that the "Affiliation Agreement" served to enhance provider competition, the true purpose of the arrangement was to utilize WPAHS as a weapon to preserve its insurance monopoly.

63. Highmark filed the "Affiliation Agreement" with the Pennsylvania Department of Insurance ("PID") along with a "Strategic Vision" document, which in essence told Western Pennsylvania consumers that they had been making the wrong health care choices by going to UPMC for care instead of WPAHS. While Highmark would never publicly admit that it would force its insureds to use WPAHS going forward, the "Strategic Vision" not so subtlety hinted that it would "assist" its insureds to make the "right" health care choices. This was an element of Highmark's agreement to favor WPAHS over UPMC. In exchange, Highmark's long-time collaborator, WPAHS, would continue to refuse contracts with outside insurers that would put Highmark at a disadvantage. This aimed to preserve the high barriers to entry which have existed for Highmark's national competitors. Highmark and WPAHS sought to portray the "Affiliation Agreement" as the entirety of the agreement between the two, but the reality is that the parties' long-standing agreement to protect each other from competition remained, with re-vamped elements. As explained further below, Highmark would threaten to steer its insureds to WPAHS's provider assets, to the potential benefit of WPAHS, if UPMC did not comply with Highmark's demands on the insurance side.

VI. THE CONSPIRACY CONTINUES WHILE HIGHMARK SOUGHT TO RENEW THE 2002 AGREEMENT

64. As the 2002 Agreement began to approach its end of term, UPMC determined that a dramatic change of course was necessary. Consistent with the views expressed by the staff lawyers at the Department of Justice, UPMC began negotiating with Cigna, HealthAmerica, Aetna, and United on a basis that would put all UPMC facilities in their respective networks at vastly lower "market" rates – *i.e.*, rates consistent with what insurers paid in other parts of the country. These negotiations proved successful and, by mid-2011, agreements with all four outside insurers were reached. The move was a risky one. UPMC was agreeing to reduced reimbursement rates from the very insurers whose payments were keeping it afloat over the subcompetitive levels it has always received from Highmark. Yet unless those outside insurers are able to capture market share away from Highmark, the outcome for UPMC will be reduced payments without the potentially offsetting gains it might achieve if Highmark's dominance were eroded.

65. Faced for the first time with a viable threat of insurance competition, Highmark struck back. In negotiating renewals of the 2002 agreements with UPMC, Highmark demanded a continuation of a rate structure that would preserve its cost advantage disparity as against other insurers. Armed with its new agreements with the outside insurers, however, UPMC resisted, taking the position that all insurers should pay equivalent market rates and that no insurer should be favored over another.

66. Highmark then officially announced its "Affiliation Agreement" with WPAHS. Highmark's contracting game plan vis-à-vis UPMC was pursuant to its long-standing and continuing conspiracy with WPAHS. Namely, Highmark would threaten to steer all of its insurance subscribers away from UPMC to WPAHS if UPMC did not accede to its long-term contract

demands. WPAHS continued to serve its role as a tool through which Highmark would seek to preserve its insurance monopoly.

67. From UPMC's perspective, it was clear that regardless of the outcome of the contract negotiations, Highmark would, and was obligated to, favor WPAHS and any other provider assets Highmark was to obtain. Accordingly, in contract negotiations from 2011 through the beginning of 2012, UPMC reiterated its position that a final and certain separation from Highmark is necessary, and offers the best solution to the community.

68. Nevertheless, Highmark has pushed on pursuant to its conspiracy, threatening to steer its patients to WPAHS if UPMC did not comply with its contracting demands.

69. In this regard, Highmark threatened to forego potentially-profitable contracting arrangements simply to punish UPMC, and for the potential enrichment of its co-conspirator. For example, UPMC had offered to contract with Highmark for access to the UPMC East facility in Monroeville, Pennsylvania in order to maintain access for Highmark subscribers through June 30, 2013, the date that the one year run out period of the 2002 Agreement was scheduled to end. Highmark, by letter dated January 12, 2012, rejected such a contract, insisting instead on a long-term, system-wide contract. The implication from Highmark was clear: give us the long-term, system-wide contract we seek, or else we will steer all of our insureds away from UPMC East, and toward the directly competitive WPAHS facility, Forbes Hospital. On February 21, 2012, Highmark even stepped up its threat, holding a press conference to announce that UPMC East would not be in-network for either Highmark's commercial *or* its Medicare Advantage subscribers. In essence, Highmark was holding its Medicare Advantage insureds hostage in order to coerce an exclusionary contract with UPMC.

70. The negotiation relating to the urgent care center ("UCC") at Washington Hospital, an independent hospital, tells the same story. In November 2011 the UCC entered into a joint venture with UPMC. For the four years prior, the UCC and Highmark had a profitable relationship. As the newly formed joint venture triggered a change in the UCC's tax status, the UCC requested that its payers assent to the change going forward. Although every other insurer consented, Highmark refused, contending that the parties' relationship "has been placed on hold as part of the larger Highmark/UPMC discussions." The same tactic was being used: unless Highmark received the long-term contract it sought, it would steer all of its insureds away from the Washington UCC and toward WPAHS's directly competitive facility, Canonsburg Hospital.

71. In March 2012, Highmark announced that neither its commercial subscribers nor its Medicare Advantage subscribers would have in-network access to the Washington UCC – the same tactic as had been used for UPMC East. When UPMC pointed out that these decisions, as to both UPMC East and the Washington UCC, could not be squared with its December 2011 assurance that Medicare Advantage patients would not be affected by the commercial dispute, Highmark left no ambiguity: It would address access for Medicare Advantage patients to UPMC East and the Washington UCC only "as part of the broader discussions of in-network access to UPMC community assets and services for all Highmark members." Highmark's implicit threats to steer its commercial *and* Medicare Advantage insureds to WPAHS if its contract demands were not met were made pursuant to its conspiracy with WPAHS.

72. Highmark's refusal to renew its existing and profitable contract with the UCC at Washington Hospital could only be explained as an attempt to punish a UPMC business partner, to the benefit of WPAHS, as a means of coercing UPMC into an exclusionary contract. Highmark's

refusal occurred only after learning that the urgent care center had become a joint venture between that facility and UPMC. Highmark executives confirmed with Washington Hospital that the reason Highmark refused to continue their relationship is that it would compromise its strategy vis–à–vis UPMC. Highmark also confirmed that it would agree to a contract with Washington Hospital if it was no longer associated with UPMC, and guaranteed referrals to Highmark's provider facilities.

73. These threats confirm WPAHS's role in the marketplace pursuant to its relationship with Highmark: its real purpose is not to compete with UPMC to provide the best healthcare to Western Pennsylvanians, but rather to serve as a bargaining chip for Highmark to utilize to preserve its insurance monopoly. This explains at least part of the reason WPAHS has never provided effective competition in the provider space: Highmark, by design, has kept WPAHS barely financially afloat to serve its anticompetitive purposes.

74. Highmark's public statements as to WPAHS's debt obligations further confirm its intent to use WPAHS for whatever purposes it sees fit. When asked about KPMG's auditing report that WPAHS may not be able to meet its debt covenants later this year, former Highmark CEO Ken Melani stated: "With us involved, I guarantee they won't trip the covenants." However, the Affiliation Agreement provides that Highmark is not assuming WPAHS's debt and pension obligations. Thus, the circumstances are clear: as long as it serves Highmark's monopolistic purposes to keep WPAHS out of default, it will, but otherwise it has no legal obligation to do so.

75. Upon information and belief, one of the Highmark executives who was behind the threats to Washington Hospital has been serving as a Highmark consultant for the last few years ("the consultant").

76. Although the consultant carries the titles of Division President, Integrated Delivery System and Executive Vice President of Highmark, upon information and belief, he remains an independent consultant to Highmark and he and his companies are entities independent of Highmark. Upon information and belief, the consultant has chosen not to be an employee of Highmark so that his various side companies, ventures, and partnerships do not run afoul of traditional conflict-of-interest rules. Accordingly, in this capacity, the consultant has served as an independent co-conspirator with Highmark and WPAHS in the threats to community hospitals such as Washington and Highmark's complementary provider strategy (discussed below) more generally.

77. Highmark's efforts at UPMC East and Washington, on information and belief, were made pursuant to its conspiracy with WPAHS and the consultant to disadvantage UPMC and coerce UPMC into a long-term contract. Highmark's further conspiracy with the consultant served to accomplish the threats to at least Washington for this purpose. The pressure tactics at these locations could not succeed but for the alternative of steering the patients in question to WPAHS's facilities. WPAHS's role has been essential in allowing Highmark's conduct to succeed.

Highmark's Complementary Provider Strategy

78. To step up its threats to UPMC, Highmark announced plans to invest at least $500 million in a new network of doctors, community hospitals, ambulatory care, medical malls and other out-patient locations – all in a market area with an excess of hospital facilities and a stable or declining population. The purpose was to further pressure UPMC into the long-term contract it desires by threatening to steer its insureds to these provider assets. This strategy has been spearheaded by the consultant and is a key component of the Highmark-WPAHS-consultant conspiracy.

79. One acquisition Highmark made for this purpose was its deal with Premier Medical Associates ("Premier"), a 68-physician independent multi-specialty practice. Premier is the "largest multi-specialty physician practice in the Greater Pittsburgh area offering specialties that include asthma/allergy/immunology, cardiology, family practice, gastroenterology, general and breast surgery, hospitalists, internal medicine, neurology, pediatrics, podiatry, radiology, and sleep medicine." Upon information and belief, Highmark paid in excess of $70 million for this practice.

80. In addition, Highmark has also recently acquired an interest in MedExpress, which operates urgent care centers that compete with those operated by UPMC (either individually or in joint ventures with community hospitals).

81. Upon information and belief, in furtherance of this initiative Highmark hired the Astorino architecture firm to do over $1.5 billion worth of design work on its medical malls and facilities.

82. All of these acquisitions served to bolster Highmark's threat to steer patients if it did not get the long-term, network-wide contract it sought. These threats were by the design of Highmark's and WPAHS's conspiracy.

83. Pursuant to the conspiracy, the consultant, in his role as Division President of Highmark's "Integrated Delivery System" (despite remaining an independent contractor), has asked a former UPMC physician to act as Highmark's "property bundler," to buy up, anonymously, property in specific suburban locations where Highmark will create new WPAHS surgical centers or medical malls, typically not far from an existing UPMC facility. Also, the consultant has been involved with Highmark's management of "ProtoCo PPI," a supply chain management company that was created to compete with UPMC's supply chain management company, "ProdiGo Solutions

LLP." Upon information and belief, Highmark and the co-conspirator consultant have used these types of relationships as tools through which to demand obedience from independent hospitals and providers so as to not do business with UPMC, in similar fashion as with Washington Hospital discussed above.

VII. THREATS TO PHYSICIANS, COMMUNITY HOSPITALS, AND OTHER NON-UPMC PROVIDERS

84. In furtherance of the conspiracy to favor WPAHS in the provider market, Highmark former-CEO Ken Melani held a meeting in 2012 with WPAHS employed physicians as well as independent physicians with WPAHS privileges. At that meeting, Dr. Melani made clear that, if the doctors took any action supportive of UPMC or adverse to Highmark (such as seeking UPMC employment or referring cases to UPMC), Highmark would jeopardize their economic well-being. Again, WPAHS's participation was essential to the success of this strategy, as WPAHS is Highmark's provider alternative. By Highmark's design, the true "benefit" from WPAHS's existence is not for patients to choose its providers on the merits, but for it to provide a viable threat to other providers who would otherwise be free to use UPMC.

85. Upon information and belief, this is not the only example of such threats. For example, Highmark's threats to the Washington Hospital pursuant to its conspiracy with WPAHS and the consultant also served to reduce competition on the provider side. Highmark has also been acquiring real estate in close proximity to community hospitals, with the explicit or implicit intention of opening "medical malls" in their backyards. Even the modest diversion of admissions that these malls would assuredly draw would leave these hospitals, which are already grappling with operating losses, declining inpatient use and reduced Medicare and Medicaid payments, in grave condition.

When confronted with such threats, the community hospitals have no option but to submit to Highmark's de facto control over them.

86. As Highmark has remained the dominant insurer, Highmark has had ample power to make good on its threats both on the insurance side through reduced reimbursements in its take-it-or-leave contract renewals, denials of coverage, slow pay tactics and future steering and now on the provider side as well via threats of parking Highmark/WPAHS doctors, medical malls or other Highmark/WPAHS facilities on the doorstep of noncompliant hospitals. Those threats on the provider side, fueled by a $1 billion commitment, would apply to providers' efforts to contract with the national insurers on favorable terms before those insurers have any real foothold in the market. Until that real presence is established, Highmark, along with its co-conspirator hold all the cards.

87. The effect of such conduct taken pursuant to the conspiracy has not only been to impair competition in the provider market, but also to prevent UPMC's potential competition in the insurance markets through its Health Plan.

VIII. THE RECENT HIGHMARK-UPMC AGREEMENT IN PRINCIPLE

88. On May 2, 2012, UPMC and Highmark announced that they had reached an agreement in principle to provide for in-network access to all UPMC hospitals and physicians for Highmark commercial and Medicare Advantage members until December 31, 2014.

89. This agreement sets December 31, 2014 as the date certain by which the UPMC-Highmark commercial relationship will end save certain facilities, and for Highmark members in a continuing course of treatment at UPMC.

90. Highmark's and WPAHS's scheme is likely to continue notwithstanding the May 2012 agreement in principle. Highmark has made public its plans to re-introduce Community Blue, the narrow-network plan that excludes UPMC to WPAHS's benefit.

91. Also, upon information and belief, WPAHS chairman Jack Isherwood recently reported to WPAHS employees that, despite a 100 patient decline in admissions for the third quarter of FY2012, there was nonetheless a $24 million increase in net patient revenue for the same time period. The only plausible explanation for this event is an undisclosed rate increase to WPAHS from Highmark, confirming that Highmark's and WPAHS's agreement as to discriminatory compensation still runs through the present.

IX. THE EFFECT OF A COERCED LONG-TERM CONTRACT

92. A primary purpose of the Highmark-WPAHS-consultant conspiracy, as well as Highmark's complementary provider strategy executed pursuant to it, has been to pressure UPMC into a long-term, system-wide contract which would both preserve Highmark's monopsony rates and maintain the high barriers to entry to outside insurers. This campaign of retaliatory and coercive tactics, including putting patients at risk by refusing to cooperate on an orderly wind down of the UPMC-Highmark relationship, has been designed to force UPMC to capitulate and to enter into an exclusionary long-term contract. The long-term contract desired by Highmark would continue to hinder UPMC's competitiveness as an IDFS by continuing to starve it of resources on the provider side, and deny Highmark's other insurance rivals of the scale they need to successfully enter and expand.

93. That strategy has failed, at least for now. As discussed above, in May 2012, Highmark and UPMC came to an agreement that sets December 31, 2014 as the date certain for the

end of the parties' commercial relationship (with specific pre-existing exceptions). The time between now and the end of 2014 provides the appropriate transition period to ensure that the needs of Western Pennsylvania healthcare consumers are met. And when the Highmark-UPMC commercial relationship ends on December 31, 2014, Western Pennsylvania healthcare consumers will benefit.

94. By taking the bold step of announcing that it would allow its agreements with Highmark to expire at the end of 2014, UPMC's actions have presented the first opportunity for real competition in Western Pennsylvania health care insurance in a generation. Rather than the inertia of the same-old same-old combination of Highmark insurance and UPMC facilities, area employers will enjoy real choices and opportunities. Once UPMC is no longer captive to Highmark, employers will be able to choose between (i) the integrated Highmark/WPAHS payer-provider system offering Highmark insurance and WPAHS/Premier facilities and services; (ii) the integrated system of UPMC facilities and insurance, or (iii) insurance from major national and regional insurers with both UPMC and WPAHS in-network. Faced with this wide menu of alternatives, the inertia that fuels Highmark's monopoly will finally subside and there will be a genuine opportunity for real competition.

95. With this separation, in due time, Highmark will no longer be able to preserve its monopsonist rates to providers (including WPAHS), or its monopolist premiums to consumers.

96. Highmark, however, appears reluctant to acknowledge publicly the finality of its recent agreement with UPMC. Highmark executive Deborah Rice has already told Highmark's subscribers that Highmark will try to continue the UPMC relationship beyond 2014, stating: "I want to stress that a multi-year contract agreement between Highmark and UPMC beyond 2014 is still a

priority for Highmark." If Highmark can continue to make area customers believe that UPMC will be in its network indefinitely, the ability of outside insurers to attract customers will be thwarted.

INJURY TO COMPETITION FROM WPAHS' CONSPIRACY WITH HIGHMARK

97. Highmark's improper maintenance of its insurance and purchasing monopolies through its conspiracy with WPAHS has resulted in palpable harm to consumers. Highmark's "Strategic Vision" document confirms that it has had the power to impose whatever premium increases it wants on subscribers so long as it maintains its position as the monopolist insurer. As Highmark admits in the document, "[i]n the last decade alone, health insurance premiums in [W]estern Pennsylvania have increased at a rate greater than 6% per year while wages and salaries have only increased 2-3% per year." Were Highmark able to continue its relationship with UPMC beyond 2014, its ability to continue this trend would go unchecked.

98. WPAHS and Highmark have engaged in a course of conduct pursuant to their conspiracy that has enabled Highmark improperly to acquire and maintain its monopoly power in the relevant insurance markets. Highmark has also entered into agreements with WPAHS and the consultant, which serve to maintain its monopolies and unreasonably restrain trade in those markets, as well as impair competition in the relevant provider market. While the following discussion identifies some of the harmful effects Highmark's and WPAHS's conduct has had in particular relevant markets, the law requires that this broad ranging scheme be viewed as a whole, such that its competitive effects be assessed in their totality. Highmark's conspiracy with WPAHS and others in coordinated fashion, has harmed and continues to harm competition, consumers, and UPMC.

HARM TO THE RELEVANT INSURANCE MARKETS

99. Highmark's conspiracy with WPAHS and the consultant has had the effect of foreclosing the entry and expansion of outside insurance competition. If UPMC's reimbursement rates had not been artificially depressed at monopsonist levels, it could have invested more in its Heath Plan, providing an efficient alternative to consumers. Also, had WPAHS been free to pursue contracts with outside insurers that were more advantageous than those it had with Highmark, that also would have facilitated the entry and expansion of those outside competitors. A prime objective of the conspiracy has been for Highmark to utilize WPAHS for the purpose of blocking outside insurance entry. Also, despite Highmark's public claims, WPAHS's role as an anticompetitive vehicle rather than a truly viable provider also has had negative effects on provider side competition, as addressed below.

100. In the absence of the Highmark-WPAHS conspiracy to foreclose outside insurance competition, Highmark's insurance competitors would have been able to enter and expand. The resulting competition would have had a myriad of benefits to consumers and providers. Just a few examples of resulting pro-competitive effects would have been increased insurance plan options to consumers, lower premiums for those options, increased reimbursements to providers which would be invested in better treatments, and greater customer service to both providers and consumers.

101. The consolidation of Highmark's monopoly position, through its agreements with the consultant and WPAHS, has allowed it to reap monopoly rents on both ends of its business. Namely, Highmark has been able to raise prices on its insurance products, causing employers and their employees to pay higher premiums and imposing more onerous terms like higher co-pays. It has likewise forced persons not purchasing insurance through an employer to pay even higher rates

for even high-deductible plans. On the provider side, Highmark has been able to exercise monopsony power to drive reimbursements to physicians, hospitals, and other care providers to barely-sustainable levels. This rate manipulation has discouraged new providers from establishing themselves in Western Pennsylvania, driven existing providers out of the market, and reduced the quality of care available to consumers.

102. Highmark's conspiracy with WPAHS has resulted in anticompetitive effects which represent the classic evils of monopsony and monopoly. By depressing purchases from providers, Highmark has been able to decrease provider output. That decreased output hinders other insurers from entering and/or expanding, helping maintain Highmark's insurance monopolies. Even if other insurers were to decide to enter, the viability of that effort would be hindered as Highmark has already locked in such low and effectively discriminatory reimbursement rates. As a result, Highmark has driven up wait times and exacerbated existing challenges for prompt access to medical care. There is no benefit to consumers to have their access to their providers delayed or impeded as a result of this scheme.

103. No plausible pro-competitive efficiencies have counter-balanced this harm to competition as a result of Highmark's, WPAHS's, and the consultant's conduct.

104. The end of the UPMC-Highmark commercial relationship, coupled with UPMC's agreements with outside insurers and Highmark's Affiliation Agreement with WPAHS, have combined to create a unique opportunity for competition in health care in Western Pennsylvania. If permitted, the market would benefit from the competition provided by: (i) Highmark/WPAHS, offering both medical care and insurance as an IDFS, independently and without UPMC; (ii) UPMC, offering both medical and insurance (from its own Health Plan) as an IDFS, independently and

without WPAHS; and (iii) the four outside insurers, all offering plans including *both* UPMC and WPAHS services and facilities in-network. When all this comes to pass, there will be at least six effective competitors, all vying for the business of area customers with a wide variety of competitive offerings. The long-run effect on area customers will be tremendously positive. If on the other hand this is artificially stunted as a result of Highmark's and WPAHS's conduct, and if Highmark is allowed to try again in 2014 to coerce a contract renewal from UPMC, this opportunity to competition will be lost for the indefinite future.

HARM TO THE PROVIDER MARKET

105. Highmark's threats to physicians, community hospitals and other providers, made with WPAHS's and the consultant's coordinated support, have served to foreclose competition in the provider market. With no real challenger to threaten Highmark's present monopoly in the relevant insurance markets, it has been able to threaten harm to providers who do not comply with its demands to cease any and all relations with UPMC. WPAHS's true purpose, by the design of the conspiracy, has been to serve as the viable threat to independent providers that Highmark manufactured, rather than a well-run and efficient competitor in the provider market.

106. The result of such threats is that Highmark, pursuant to its conspiracy with WPAHS and the consultant, has been able to restrain trade unreasonably in the market for inpatient services. Consumers' access to provider services has decreased, or at the least, the cost consumers sustained to secure those services has increased. As one example, if a patient's primary physician is an independent doctor, and that doctor normally refers the patient to UPMC for in-patient care at the patient's request, in the face of Highmark's threats the independent doctor is no longer free to do so. So, the consumer either would have to endure the cost of switching to a primary physician who is

not subject to such threats, or alternatively switch to a non-preferred provider. There are a multitude of such examples, as they relate to how physicians and/or patients have preferred to use UPMC facilities (whether via referral, specialized use, payment options) in the absence of any such improper threats. It is well recognized that this type of consumer harm is an actionable antitrust injury.

107. Put another way, as a result of Highmark's threats made with WPAHS's support and the consultant's assistance, providers have no longer been free to distinguish themselves based on their relationships with one or more hospital systems because it must now favor Highmark's provider assets or else suffer the consequences. Consequently, consumers of healthcare have not reaped the benefits that free competition between providers would bring. Such benefits can come in a multitude of ways, including but not limited to quality based referrals between physicians, payment options for treatments not fully covered by insurance, and access to the most effective treatments available for a given condition.

108. Accordingly, with no presently viable competition to challenge Highmark's insurance monopoly, Highmark has been able to continue effectively threatening providers with financial harm if they do not comply with Highmark's demands. As a result, Highmark, the consultant, and WPAHS have been able to effectively dictate where a significant portion of consumers can efficiently go for healthcare. Although many consumers may still desire to choose UPMC providers on the merits, Highmark has had the ability to credibly threaten harm to those providers if they do not disfavor UPMC as Highmark insists.

109. Moreover, because of the conspiracy, an inefficient and incompetently run provider in WPAHS has been propped up artificially. Since WPAHS's inception, its primary function has not

been the provision of meaningful provider side competition but, rather, serving as a lever for Highmark to maintain its insurance monopolies. One effect has been the maintenance of inefficient excess capacity in the provider market. Health care consumers have had to pay for these unnecessary costs.

110. In addition, reimbursement rates have also been depressed for all Western Pennsylvania providers as a direct consequence of Highmark's monopsonistic conduct which co-conspirator WPAHS has aided through its actions, notwithstanding the negative effects on its own reimbursement rates. As explained above, Highmark's artificial maintenance of its insurance monopoly has also resulted in reduced output in the provider market.

111. With Highmark in the position of controlling one Western Pennsylvania hospital system (WPAHS) and controlling another through long-term reimbursement rates (UPMC), it has achieved the power to coordinate pricing at both the provider level and in the sale of insurance. This has enabled Highmark artificially to drive down reimbursement rates to healthcare providers while maintaining premiums to consumers at monopoly price levels. Area providers and consumers have suffered accordingly. The Center for Medicare & Medicaid Services (CMS) has already recognized the harm to competition which has resulted from Highmark being permitted to consolidate its monopoly power. Upon learning that Highmark intended to acquire WPAHS, CMS mandated that Highmark divest its Medicare processing intermediary, recognizing, as even Highmark's CEO had to concede, the "conflict of interest" inherent in being both a competing provider and a claims manager for the wider market.

HARM TO THE RELEVANT PURCHASING MARKETS

112. The aim of the Highmark-WPAHS conspiracy to prevent any and all insurance competition (including from UPMC and outside insurers) has had a direct impact on both the premiums consumers pay for insurance products, as well as the reimbursement rates paid by Highmark to Western Pennsylvania providers. Insulated from competition, Highmark has been able to successfully maintain supracompetitive monopoly rates for the former, and subcompetitive monopsony rates for the latter. In the absence of such a blatant restraint on competition, neither phenomena would have been sustainable. The law recognizes that such damage to customers of and suppliers to the illegally conspiring parties have suffered a cognizable antitrust injury.

113. The expanded presence of Aetna, Cigna, and other nationals would have had immeasurable pro-competitive benefits to the relevant purchasing markets. Just a few of the benefits that would have resulted in the absence of foreclosed competition would be more innovative payment structures, better customer service, and increased transparency as to payor processes affecting providers (apart from the competitive reimbursement rates). The converse of these phenomena has been the status quo however, and these effects of Highmark's monopsonization of the relevant purchasing markets through its conspiracy with WPAHS are significant. With competition having been artificially cut off, there is little motivation for Highmark, the dominant payor, to improve. The ultimate result of these types of constraints is that providers are hindered from offering the best and most efficient healthcare solutions to consumers.

INJURY TO UPMC FROM HIGHMARK'S AND WPAHS'S CONDUCT

114. This injury to competition has harmed and threatens further direct harm to UPMC, coincident with the harms to competition described above.

115. In the relevant insurance and purchasing markets, UPMC has sustained harm as a result of the hindered entry and expansion of outside insurers. In the absence of Highmark's conspiracy with WPAHS, outside insurance entry and expansion would have occurred and UPMC would have received higher reimbursement rates. UPMC has and continues to be victim to the classic evils of improperly retained monopsony power, including hindered entry and expansion of outside insurers, because provider output has been artificially restrained.

116. Highmark's conspiracy with the consultant and WPAHS to foreclose insurance competition has resulted in a direct injury to UPMC. In the absence of this conduct, UPMC would have received greater reimbursements from insurers, would have been able to enhance output on the provider side, and would not have been artificially stunted in its progress as an IDFS. While UPMC has made the best of its circumstances, its competitive potential has been hindered as a result of this overall course of unlawful conduct.

117. Highmark's threats to physicians, community hospitals, and other providers, in tandem with WPAHS's and the consultant's participation, have resulted and continue to result in direct injury to UPMC in the provider market. Threatened providers have been hindered from being able to refer or otherwise treat patients at UPMC. UPMC has suffered and continues to suffer both financial losses and a loss of good will in the community as a result of these tactics.

118. In addition, if Highmark, in tandem with WPAHS, is successful in improperly maintaining its insurance monopolies, national insurers Aetna, Cigna, United, and HealthAmerica will be precluded from expanding in the market, which will mean direct losses to UPMC as a result of its newly negotiated provider agreements. If the national insurers are unable to get a significant foothold in the relevant insurance and purchase markets, UPMC will suffer losses that will

undermine its ability to remain a world-class medical institution. Consumers undoubtedly will suffer as a result of UPMC's inability to maintain its standards.

119. The injuries to UPMC as a result of Highmark's and WPAHS's overall course of conduct are antitrust injuries because they directly stem from that which makes the activities unlawful. The Highmark-WPAHS conspiracy has had the explicit focus of extinguishing UPMC's IDFS as a potential insurance competitor for the purpose of improperly maintaining Highmark's insurance monopolies. The conspiracy has also hindered UPMC's ability to promote expansion from outside insurers which would offer competitive reimbursements, thus artificially maintaining Highmark's purchasing monopsonies. The threats to providers made pursuant to the conspiracy have impaired competition in the provider market at UPMC's expense.

120. The future harm that UPMC has ample reason to expect from Highmark's and WPAHS's anticipated conduct requires injunctive relief from this Court. The Counterclaim Defendant should be enjoined from continuing to take acts and otherwise accede to acts taken pursuant to its long-standing and continuing conspiracy with Highmark that are designed to retain Highmark's monopolies in the relevant insurance and purchasing markets, or harm competition in the relevant provider market. It is essential that Western Pennsylvania providers (including those now controlled by Highmark) be able to compete properly on the merits for the administration of care, rather than be influenced by improper forces. Both providers and healthcare consumers must be given this relief in the best interest of the community. Self-help is unlikely to be sufficient for UPMC to evade WPAHS's anticompetitive tactics. To that end, any efforts by WPAHS to support a coerced renewal of Highmark's agreement with UPMC beyond 2014 should also be enjoined.

NO IMMUNITY

121. None of the conduct alleged herein is subject to any express or implied immunity from the antitrust laws.

122. The reimbursement rates paid by Highmark to UPMC for the purchase of health care provider services on behalf of commercial and Medicare Advantage plan insureds are not subject to approval by any state or federal authority.

123. Nor is any of the other conduct alleged herein subject to any immunity. None of the conduct qualifies as the "business of insurance" under applicable law. In addition, the PID has not regulated, much less directed, Highmark's and WPAHS's anticompetitive conduct and has no authority to do so.

CLAIMS

Count I: Conspiracy in Unreasonable Restraint of Trade in Violation of Sherman Act § 1, 15 U.S.C. § 1

124. Counterclaim Plaintiff UPMC incorporates and realleges counterclaim paragraphs 1 through 123 by reference.

125. Counterclaim Defendant WPAHS has engaged in a continuing conspiracy with Highmark with the purpose and effect of maintaining Highmark's monopolies in the Western Pennsylvania health insurance markets. Highmark has agreed to favor WPAHS over UPMC in compensation and other financial treatment, and in return WPAHS has agreed not to contract with any outside insurer on more favorable terms than Highmark.

126. The purpose and probable effect of the continuing conspiracy is to raise the cost of insurance to Western Pennsylvania consumers, eliminate or marginalize all competitors, and raise barriers to entry in the relevant insurance markets.

127. This conduct has injured and continues to threaten injury to UPMC in its business or property.

128. Accordingly, UPMC seeks damages, to be trebled pursuant to federal antitrust law, and costs of suit, including reasonable attorney's fees for the injuries already sustained. These damages would include, but not be limited to, the increased reimbursement rates UPMC would have received in the absence of the anticompetitive conduct, and the profits which would have resulted had it not been artificially hindered as an IDFS.

129. The expected injury from WPAHS's future conduct would not be redressible by money damages and would therefore be irreparable.

130. An injunction is appropriate to remedy the continuing violation, prevent irreparable harm to UPMC, and further the public interest in competitive health insurance markets.

Count II: Conspiracy in Unreasonable Restraint of Trade in Violation of Sherman Act § 1, 15 U.S.C. § 1

131. Counterclaim Plaintiff UPMC incorporates and realleges counterclaim paragraphs 1 through 130 by reference.

132. Counterclaim Defendant WPAHS has entered into a continuing conspiracy with Highmark with the purpose and effect of restraining competition unreasonably in the provision of inpatient care.

133. As part of this continuing conspiracy, Highmark has assumed effective control over WPAHS's provider assets.

134. Armed with those assets, Highmark has already begun to engage in intimidation and harassment tactics to threaten providers that if they do not comply with its demands, particularly with regard to their treatment of UPMC, they will suffer financial harm. One aspect of the

Highmark-WPAHS conspiracy has been for Highmark to make such threats for WPAHS's potential benefit. The co-conspirator consultant has also been retained by Highmark to execute these threats.

135. As one example, Highmark, through the consultant, threatened the urgent care center at the Washington Hospital that if it does not terminate its joint venture with UPMC, it will steer its insureds to other WPAHS providers, such as Canonsburg Hospital.

136. The purpose and probable effect of the continuing conspiracy is to raise the cost of inpatient care to Western Pennsylvania consumers, eliminate or marginalize all competitors, and raise barriers to entry.

137. This conduct has injured and continues to threaten injury to UPMC in its business or property.

138. Accordingly, UPMC seeks damages, to be trebled pursuant to federal antitrust law, and costs of suit, including reasonable attorney's fees for the injuries already sustained. These damages would include, but not be limited to, the increased revenue it would have received from admissions and referrals it would have received in the absence of such conduct.

139. The expected injury from WPAHS's future conduct would not be redressible by money damages and would therefore be irreparable.

140. An injunction is appropriate to remedy the continuing violation, prevent irreparable harm to UPMC, and further the public interest in competitive health insurance markets.

Count III: Conspiracy to Monopolize in Violation of Sherman Act § 2, 15 U.S.C. § 2

141. Counterclaim Plaintiff UPMC incorporates and realleges counterclaim paragraphs 1 through 140 by reference.

142. Counterclaim Defendant WPAHS has entered into a continuing agreement with Highmark with the purpose and effect of maintaining Highmark's monopolies in the Western Pennsylvania health insurance markets. Highmark has agreed to favor WPAHS over UPMC in compensation and other financial treatment, and in return WPAHS has agreed not to contract with any outside insurer on more favorable terms than Highmark.

143. In furtherance of the continuing conspiracy, Counterclaim Defendant and Highmark have engaged in a broad range of conduct, including but not limited to the creation of Community Blue, and threatening UPMC that if it does not comply with Highmark's demands, its insureds will be steered to WPAHS's facilities. This and other conduct has been undertaken with the specific intent of monopolizing the relevant insurance markets.

144. Due to this relentless campaign of coercion, retribution, and public pressure, this scheme has a dangerous probability of success. This is especially so in light of Highmark's already dominant position in the relevant insurance markets, controlling over 65% of the Western Pennsylvania commercial health insurance market, and over 50% of the Western Pennsylvania Medicare Advantage health insurance market.

145. The purpose and probable effect of the conspiracy is to raise the cost of insurance to Western Pennsylvania consumers, eliminate or marginalize all competitors, and raise barriers to entry in the relevant insurance markets.

146. This conduct has injured and continues to threaten injury to UPMC in its business or property.

147. Accordingly, UPMC seeks damages, to be trebled pursuant to federal antitrust law, and costs of suit, including reasonable attorney's fees for the injuries already sustained. These

damages would include, but not be limited to, the increased reimbursement rates UPMC would have received in the absence of the anticompetitive conduct, and the profits which would have resulted had it not been artificially hindered as an IDFS.

148. The expected injury from WPAHS's future conduct would not be redressible by money damages and would therefore be irreparable.

149. An injunction is appropriate to remedy the continuing violation, prevent irreparable harm to UPMC, and further the public interest in competitive health insurance markets.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff UPMC respectfully requests that this Court:

a. Adjudge and decree that the above-described conduct encompassed by Counts I-II above violates and continues to threaten a violation of Section 1 of the Sherman Act, 15 U.S.C. § 1;

b. Award UPMC damages in the form of three times the amount by which it was injured pursuant to Counts I-II;

c. Issue an injunction pursuant to Section 16 of the Clayton Act, 15 U.S.C. § 26, prohibiting and restraining Counterclaim Defendant WPAHS from:

i. Participating in agreements with Highmark by which it is agreed that WPAHS is favored over UPMC in its compensation or other financial treatment;

ii. Acquiescing in threats made to UPMC, implicitly or explicitly, that if it does not comply with Highmark's demands, patients will be steered to Highmark's provider assets; and

iii. Engaging in any conduct pursuant to its conspiracy with Highmark, the purpose or effect of which is to impair competition in the markets for health insurance or provider services

d. Order Counterclaim Defendant WPAHS to pay UPMC's reasonable costs and attorneys' fees in bringing and maintaining Counts I-II of this action pursuant to 15 U.S.C. § 26;

e. Adjudge and decree that the above-described conduct encompassed by Count III above violates and continues to threaten a violation of Section 2 of the Sherman Act, 15 U.S.C. § 2;

f. Award UPMC damages in the form of three times the amount by which it was injured pursuant to Count III;

g. Issue an injunction pursuant to Section 16 of the Clayton Act, 15 U.S.C. § 26, prohibiting and restraining Counterclaim Defendant WPAHS from engaging in any future initiative to cripple UPMC while attempting to avoid competition on the merits;

h. Order Counterclaim Defendant WPAHS to pay UPMC's reasonable costs and attorneys' fees in bringing and maintaining Count III of this action pursuant to 15 U.S.C. § 26;

i. Award any further relief it may deem just and proper.

DEMAND FOR JURY TRIAL

UPMC demands a trial by jury on all issues triable by jury.

Dated: May 23, 2012

Respectfully submitted,

/s/ Paul H. Titus

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CERTIFICATE OF SERVICE

I hereby certify that on May 23, 2012, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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