IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Commonwealth of Pennsylvania, :
By Josh Shapiro, Attorney General; :
Pennsylvania Department of Insurance, :
By Jessica K. Altman, Insurance :
Commissioner and Pennsylvania :
Department of Health, By Rachel :
Levine, Secretary of Health, :
Petitioners :
:
v. : No. 334 M.D. 2014
: Submitted: March 18, 2019
UPMC, A Nonprofit Corp.; :
UPE, a/k/a Highmark Health, :
A Nonprofit Corp. and Highmark, Inc., :
A Nonprofit Corp., :
Respondents :

BEFORE: HONORABLE ROBERT SIMPSON, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SIMPSON **FILED: April 3, 2019**

Before this Court is the University of Pittsburgh Medical Center's (UPMC) Answer, in the Nature of a Motion to Dismiss or Preliminary Objections, to the Commonwealth's Petition to Modify Consent Decrees[1] (Petition). In its Petition, the Commonwealth, acting as *parens patriae* through its Office of Attorney General (OAG), seeks to modify the terms of a 2014 Consent Decree entered by this Court in a long-standing dispute between a leading healthcare

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[1] Although there are two separate consent decrees, one signed by UPMC, and one signed by UPE, also known as Highmark Health and Highmark Inc., which, as explained below, are identical in all material respects, references below are to the singular "Consent Decree."

insurer and a major health services provider operating primarily in Western Pennsylvania. Upon review, UPMC's Answer, in the Nature of a Motion to Dismiss or Preliminary Objections, to the Commonwealth's Petition to Modify Consent Decrees are denied as to most of the prayers for relief in Count I of the Petition.

I. Background

A. Generally

Since entry of the Consent Decree nearly five years ago, prior litigation concerning the interpretation of various aspects of the Consent Decree, initiated in this Court, twice reached the Supreme Court of Pennsylvania. See Commonwealth by Shapiro v. UPMC, 188 A.3d 1122 (Pa. 2018); Commonwealth ex rel. Kane v. UPMC, 129 A.3d 441 (Pa. 2015).

The background that gave rise to the Consent Decree was set forth extensively in our Supreme Court's decision in Kane. Relevant here, UPMC, which was incorporated in 1982, became a nonprofit corporation under the Nonprofit Corporation Law of 1988 (NCL), 15 Pa. C.S. §§5101-5997, is the dominant provider of healthcare services in Western Pennsylvania. UPMC also maintains a controlling interest in an "insurance holding company" that includes the "UPMC Health Plan," which covers approximately 2 million people in Western Pennsylvania. Kane, 129 A.3d at 445. Under this arrangement, UPMC operates an "integrated health care delivery system" in which one entity provides health insurance, and, also, delivers healthcare services through physicians, hospitals, and other ancillary medical care facilities. Id.

UPE, also known as Highmark Health and Highmark Inc. (collectively, Highmark), possesses a controlling interest in an insurance company holding system in which two of its subsidiaries operate not-for-profit healthcare insurance plans. One subsidiary, Highmark Blue Cross, is a nonprofit hospital insurance plan, and another, Highmark Blue Shield, is a nonprofit healthcare insurance plan. Highmark's healthcare insurance plans are sold, commercially, to businesses and individuals.

In 2002, UPMC entered into a 10-year "provider agreement" with Highmark under which it furnished healthcare services on an in-patient or out-patient basis to subscribers of Highmark's commercial insurance plans and billed Highmark for those services at specified, negotiated rates. Id. Under the terms of other, separate provider agreements covering Highmark's Medicare Advantage products, Highmark and UPMC mutually agreed UPMC would be considered "in-network" for those products. Id. (citation omitted).

In the spring of 2011, however, UPMC announced it would not agree to renew or renegotiate these provider agreements with Highmark, the majority of which were set to expire on June 30, 2012. UPMC cited as its reason Highmark's proposed affiliation with West Penn Allegheny Health System (WPAHS), which would create another integrated healthcare delivery system in competition with the UPMC system. The Commonwealth considered the expiration of these agreements as having deleterious consequences for members of Highmark's health insurance plans. According to the Commonwealth, these members would be subjected to "significantly higher out-of-network charges for their [healthcare] needs unless

they either switched their [healthcare] provider away from UPMC or their health plan away from Highmark to one of the health insurers with which UPMC had contracted, albeit at higher prices." Id. at 445-46.

This prospect led to legislative hearings and appointment of a mediator by then-Governor Tom Corbett in May 2012. UPMC and Highmark entered into a "Mediated Agreement" that month (2012 Mediated Agreement), which provided, among other things, that Highmark's Medicare Advantage members would have "in-network access to all UPMC hospitals and physicians" until December 31, 2014. Id. at 446. Under a separate provision of the 2012 Mediated Agreement, UPMC also agreed to "continue to provide in-network hospital and physician services at preferred rates for certain Highmark plans which serve vulnerable populations ... for such time as these plans ... continue to be offered by Highmark." Id.

In April 2013, the Pennsylvania Insurance Department (Insurance Department) approved Highmark's affiliation with WPAHS, contingent on Highmark fulfilling a number of conditions. One condition required Highmark to file a formal transition plan with the Insurance Department if it and UPMC could not negotiate new provider agreements by July 31, 2014. Thereafter, "the already strained relations between UPMC and Highmark deteriorated precipitously." Id. According to the Commonwealth, in June 2013, because it now viewed Highmark as a competing healthcare provider, UPMC's Board of Directors resolved to forego any extension of existing contracts, or any new commercial contracts providing Highmark with in-network access to any current UPMC hospitals or physicians in

Southwestern Pennsylvania. The only exceptions were for Children's Hospital of Pittsburgh of UPMC, Western Psychiatric Institute and Clinic, UPMC Northwest, UPMC Bedford Memorial, and other services specified in the 2012 Mediated Agreement. The Commonwealth noted that, rather than "attempting to negotiate over these matters, the parties escalated their dispute and engaged in extensive and costly lobbying, advertising campaigns, and litigation which ... contributed to the public's confusion and misunderstanding." Id. at 446-47.

By June 2014, after it became clear UPMC and Highmark would be unable to negotiate a continuation of the provider agreements on their own, the Commonwealth, acting as *parens patriae* though OAG, its Insurance Commissioner, and its Secretary of Health (Commonwealth parties), filed a petition for review in this Court. The Commonwealth parties asserted that both Highmark and UPMC breached the 2012 Mediated Agreement, to which, the Commonwealth parties contended, the public at-large was a third-party beneficiary. The Commonwealth parties requested, among other things, that this Court find the public to be a third-party beneficiary and, also, require the parties to enter into a variety of agreements to settle disputed issues regarding access to medical care at UPMC facilities by Highmark subscribers after the expiration of the provider agreements on December 31, 2014.

Thereafter, this Court supervised the Commonwealth parties' efforts to mediate an agreement that would accomplish this objective, as well as settle other outstanding and disputed issues. "[B]ecause there was such intense acrimony between the parties, they would not negotiate with each other, nor sit together in

the same room during the process." Id. at 448 (citation omitted). Eventually, the Commonwealth parties secured a comprehensive agreement between the parties in the form of the Consent Decree, but, because the parties refused to sign a common document, two final separate consent decrees were prepared, one for Highmark and one for UPMC. Each party's decree has identical provisions except for the fact that Highmark's Consent Decree requires Highmark to comply with its terms, and UPMC's Consent Decree requires UPMC to comply with its terms. The Commonwealth parties are signatories to both decrees.

The Consent Decree states that this Court is to retain jurisdiction, for the duration of its existence, "to enable any party to apply to this Court for such further orders and directions as may be necessary and appropriate for the interpretation, modification, and enforcement of this Consent Decree." Id. at 450 (quoting Consent Decree, §IV(C)(11)).

B. Current Petition

1. Generally

Through the instant Petition, OAG seeks to modify the Consent Decree, which, it asserts, is necessary to protect the public interest. OAG avers all parties to the Consent Decree, OAG, the Insurance Department, the Pennsylvania Department of Health (DOH), Highmark, and UPMC, agreed, if modification of the Consent Decree would be in the public interest, the party seeking modification would notify the other parties and attempt to agree on the modification. Consent Decree, §IV(C)(10). If an agreement could not be reached, the party seeking modification has the right to petition this Court for modification and bears the burden of persuasion that the requested modification is in the public interest. Id.

OAG asserts it attempted to secure the agreement of Highmark and UPMC to modify the Consent Decree for the past two years. It maintains it provided Highmark and UPMC a formal proposal to modify the existing Consent Decree. OAG avers Highmark agreed to the terms, provided UPMC would be subject to the same terms; however, UPMC was unwilling to agree to the modifications. Thus, it contends, court intervention is now required.

2. UPMC's Charitable Purposes

OAG asserts the basis for seeking this modification primarily arises from UPMC's status as a charitable nonprofit healthcare institution governed by Pennsylvania's charitable laws. It maintains UPMC's status requires that it operate consistent with its charitable purpose as set forth in its articles of incorporation.

OAG alleges UPMC operates as the parent and controlling member of a nonprofit academic medical center and integrated healthcare delivery system supporting the healthcare, research, and educational services of its constituent hospitals and providers. It avers UPMC and all of its constituent nonprofit charitable hospitals were recognized as tax exempt entities under Section 501(c)(3) of the Internal Revenue Code (IRC), 26 U.S.C. §501(c)(3), and are all classified as public charities under Section 509(a)(3) of the IRC, 26 U.S.C. §509(a)(3).

OAG further alleges UPMC and all of its constituent nonprofit, charitable hospitals are registered as institutions of purely public charity under the

Institutions of Purely Public Charity Act (Act 55),[2] and are exempt from Pennsylvania income, sales, use, and local property taxes.

OAG further avers that, on its website, UPMC makes an additional representation though which it solicits the public for donations of financial support and volunteers, answering the question "Why Support UPMC?" as follows:

> Life Changing Medicine. Every day at UPMC lives are saved and quality of life is restored. We provide hope during difficult illnesses and compassion for every patient.
>
> We are deeply committed to the people who make up our communities and to making sure that everyone who comes through our doors has access to the very best, most advanced health care available.
>
> * * * *
>
> It is our mission to provide outstanding patient care and to shape tomorrow's health care through clinical innovation, biomedical and health services research, and education.
>
> No matter the size or type, all gifts are meaningful and provide important support for all of the programs at UPMC. Please consider giving today.

Pet. at ¶6.

3. Public Financial Support

OAG further alleges that, as a charitable organization committed to the public benefit, UPMC enjoyed and benefitted from strong public financial

[2] Act of November 26, 1997, P.L. 508, No. 55, 10 P.S. §§371-385.

support throughout its existence. OAG provides several examples of this public financial support. It also avers that, from July 1, 2005 through June 30, 2017, UPMC reported in its IRS Form 990 UPMC Group returns that it received $1,272,514,014 in public and private contributions and grants to support its charitable healthcare, education, and research missions. OAG further alleges, from its inception, UPMC benefitted from: hundreds of millions of dollars in accumulated state and federal income tax exemptions; city and county property tax exemptions; and low-interest, tax-exempt government bonds and debt financing. It also avers UPMC receives approximately $40 million in annual real estate tax exemptions in Allegheny County alone. OAG avers the public's support has not gone unrewarded as UPMC has grown into one of Pennsylvania's largest healthcare providers and healthcare insurers.

4. Additional History Regarding Consent Decree

After setting forth the factual history that led to entry of the Consent Decree, recounted above, OAG adds that, on January 1, 2013, Highmark re-launched its Community Blue Health Plan. OAG asserts this Plan was exempt from the anti-tiering and anti-steering provisions[3] under the provider agreements between Highmark and UPMC, as well as the 2012 Mediated Agreement. OAG alleges UPMC reacted by refusing treatment to Highmark Community Blue subscribers under any circumstance, even when those subscribers attempted to

[3] OAG explains an anti-tiering/anti-steering provision is a contract provision between a health plan, like Highmark, and a health provider, like UPMC, which prohibits the health plan from providing customers with the option of using less costly healthcare providers while "steering" them away from more costly providers. Pet. at 12 n.5. It asserts plans with these types of provisions are usually sold at a discount to plans that offer unfettered access to any provider.

forego their Highmark insurance coverage and pay UPMC's charges directly out-of-pocket. OAG avers UPMC's refusal to treat Highmark Community Blue subscribers caused considerable hardship on Community Blue patients, many of whom were forced to find other providers. OAG also alleges UPMC and Highmark engaged in aggressive and often misleading marketing campaigns that caused widespread public confusion and uncertainty as to the cost and access of Highmark subscribers to their UPMC physicians.

In response, OAG asserts, the Insurance Department, DOH, and OAG formed the "Patients First Initiative" to resolve the disrupted healthcare and in-network access issues presented. Pet. at ¶18. After lengthy negotiations, OAG alleges, UPMC and Highmark agreed on the terms reflected in the Consent Decree. Despite the Consent Decree, OAG avers, UPMC and Highmark continuously engaged in disputes that required informal mediations by OAG and other state agencies and foretell the negative consequences the public will suffer after the Consent Decree expires.

OAG further avers, in December 2017, a second mediated agreement was negotiated between UPMC and Highmark through the auspices of Governor Tom Wolf. Despite the administration's best efforts, OAG alleges, the agreement will only apply to Highmark's commercial insurance products—it does not include Highmark's Medicare Advantage products, which are important to senior citizens, or any other health plan UPMC decides it disfavors. Moreover, OAG avers, this latest agreement will only extend in-network access to certain UPMC specialty and sole provider community hospitals for a period of two to five years after June 30,

2019, and it retreats from the broader protections afforded under the Consent Decree regarding emergency room and out-of-network rates as well as balance billing practices. As a result, OAG alleges, despite past assurances from UPMC that senior citizens would never be impacted by their contractual disputes, UPMC fails to ensure senior citizens and other vulnerable members of the public will continue to have affordable access to their healthcare providers.

In light of these circumstances and public statements by UPMC, OAG asserts, expiration of the Consent Decree is expected to result in UPMC's eventual refusal to contract with other health insurers. It alleges such refusal will result in more patients seeking access to UPMC on a cost-prohibitive, out-of-network basis. OAG avers these circumstances conflict with UPMC's status as a charitable institution.

5. UPMC's Alleged Departure from its Charitable Purposes

OAG further alleges that, as a charitable nonprofit healthcare institution, UPMC must continuously satisfy all of its obligations to the public, not only those that further its commercial goals. Although UPMC may receive reasonable compensation for the value of its services, OAG asserts, it may not profit, and it is prohibited from private, pecuniary gain. Thus, OAG avers, the financial success of its healthcare operations must inure to the public benefit.

Under the Consent Decree, OAG avers, UPMC agreed Highmark subscribers would pay no more than 60% of the charges when they sought care from UPMC on an out-of-network basis. OAG alleges Highmark created out-of-network policy riders offered to some of its self-insured employers under which

Highmark would pay 60% of the out-of-network charges, less the usual co-payments and co-insurance. OAG avers UPMC thwarted the efforts of patients to use these riders, causing confusion.[4]

OAG alleges these issues imposed financial hardships, treatment denials, or treatment delays. It provides specific examples of these issues. Pet. at ¶25(a)-(c). OAG asserts these examples evince the Consent Decree's shortcomings in securing compliance by Highmark and UPMC with their stated charitable purposes and support the merits of the requested modifications here.

OAG next alleges UPMC has made clear that it has no intention of contracting with Highmark concerning any of Highmark's Medicare Advantage plans after June 30, 2019. It avers UPMC's latest refusal to contract with Highmark's Medicare Advantage plans after June 30, 2019 constitutes a reversal of prior representations to the public.

Additionally, OAG alleges, UPMC largely refused to commit its newly acquired healthcare systems to contracting with all health insurers going forward, stating only that it will agree to contract if health plans are willing to pay

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[4] Specifically, OAG avers confusion arose as to: (1) how much insurance coverage was actually provided by Highmark's out-of-network riders in addition to a patient's applicable deductible, co-payment and co-insurance; (2) whether patients must pay all 60% of UPMC's out-of-network charges "up front" under Section IV(A)(6) of the Consent Decree before receiving any treatment and before being reimbursed by Highmark; (3) whether Highmark is obliged to pay UPMC directly under the prompt payment provision of Section IV(A)(6) of the Consent Decree; and (4) whether UPMC must accept Highmark's pledge of prompt payment in lieu of demanding "up front" payments from patients for the entire 60% of UPMC's out-of-network charges or only the patients' applicable deductibles, co-payments, or co-insurance. Pet. at ¶24(a)-(d).

UPMC's self-defined, often higher, market rates. OAG avers UPMC also employs practices that increase its revenue without apparent regard for the increase on the costs of the region's healthcare, including: (1) transferring medical procedures to its higher cost specialty providers; (2) utilizing "provider based," "facilities based" or "hospital based" billing practices that "permit increased service charges in facilities where they had not been before;" (3) balance billing out-of-network patients even when the insurance payments UPMC receives generally exceed the actual costs of UPMC's care; and (4) insisting on full "up front" payments from out-of-network insureds before rendering medical services. Pet. at ¶31.

OAG further avers, with large numbers of Pennsylvanians in health plans disfavored by UPMC, UPMC had an incentive to convince people to abandon those disfavored plans. In July 2017, OAG alleges, the UPMC Health Plan circulated a promotional flyer offering employers in UPMC Susquehanna's service area the opportunity to "[p]ut a lock on health care costs." Pet. at ¶33. OAG avers the promotional flyer represented:

> With this special, limited-time offer from UPMC Health Plan, you can lock in to single-digit premium increases through 2020. Given the double-digit increases during the last decade, this offer could translate to massive savings for your organization. Meanwhile, with UPMC Health Plan, your employees will be getting extensive in-network access to hospitals and providers, affordable plan options, and world-class local customer service they can count on.

Pet. at ¶34 (citing Pet., Ex. E). However, OAG alleges, in the lower right-hand corner of the flyer under "Terms and conditions," it stated: "UPMC Health Plan may, at its sole discretion, cancel, amend, modify, revoke, terminate or suspend

this program at any time. Participation in this program and/or election of the offer is not a guarantee of continued plan availability or renewal." Pet. at ¶35.

OAG avers UPMC also markets a limited UPMC Health Plan so that subscribers unwittingly purchase coverage for UPMC's community hospitals that "does not include in-network access to UPMC's premier or exception hospitals,[5] resulting in unexpected and much more costly [o]ut-of-[n]etwork charges should subscribers need heightened levels of care from UPMC's premier or exception hospital providers." Pet. at ¶36 (footnote omitted).

OAG also alleges, despite UPMC's representation that it is "deeply committed to the people who make up [its] communities," UPMC does not ensure "everyone who comes through [its] doors has access to the very best, most advanced health care available." Pet. at ¶37. Rather, OAG avers, only people who carry the right in-network insurance or are able to pay up front and in-full for non-emergency medical services obtain access to UPMC healthcare. OAG provides several examples of individuals afflicted with serious illnesses who are currently

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[5] OAG notes that Section 5 of the Consent Decree identifies "exception hospitals" as:

> Western Psychiatric Institute and Clinic, UPMC Bedford, UPMC Venango (Northwest),UPMC/Hamot and UPMC/Altoona, UPMC Horizon and any facility, any physician, facility or other provider services located outside the Greater Pittsburgh Area currently owned or acquired in the future by UPMC, or with whom UPMC has an agreement to handle provider contracting such as, but not limited to Kane Hospital, or any other physician or facility outside the Greater Pittsburgh Area determined by DOH to be essential to meet local community needs, by July 15, 2014 ....

Pet. at 21 n.9.

receiving medical treatment with UPMC and, who, it alleges, will no longer be able to receive treatment in-network as of June 30, 2019. Pet. at ¶37(a)-(d).

In addition, OAG alleges, UPMC's denial of access or treatment also affects employers. In August 2017, it avers, UPMC Susquehanna notified patients of its Susquehanna Medical Group physician practice, who were employees of PMF Industries (PMF), a Williamsport area business, that it was discontinuing access to the practice despite PMF's insurer's contract with the practice. It avers PMF's insurer calculated hospital reimbursements using reference-based pricing,[6] and it did not have a separate hospital contract.

Like PMF, OAG alleges, many employers purchase health insurance for their employees. OAG also avers that, like PMF, many other employers look at innovative health plan products, like reference based pricing to lower their healthcare costs. OAG avers UPMC rejects efforts by employers to use reference based prices or other cost comparison tools as a means to deny access to patients with disfavored health plans.

OAG also alleges, under Section 1395dd of the Emergency Medical Treatment and Labor Act, 42 U.S.C. §1395dd, hospitals are required to treat all persons who come to an emergency room in an emergency medical condition or in labor. It avers UPMC obtains over 60% of its patient admissions through its emergency rooms, and when a patient is treated for an emergency condition or

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[6] OAG asserts reference based pricing means using prices hospitals actually receive, *i.e.*, the market based prices UPMC says it desires, as opposed to the "chargemaster prices," which hospitals often open with in contract negotiations. Pet. at ¶40.

admitted for an emergency, the patient's health plan is obligated to pay for the patient's care. Because patients with an emergency medical condition often have no control over the emergency room they are taken to when their emergency occurs, OAG alleges, it is common for patients to be taken to emergency rooms in hospitals outside the networks of their health plans.

In those situations, OAG avers, the health plan pays the hospital's bill at rates negotiated on an *ad hoc* basis. In such circumstances, for commercial patients, *i.e.*, non-Medicare patients, it alleges, UPMC tenders bills to the health plans at its full charges, representing UPMC's highest prices, and each bill is individually negotiated. OAG avers that, if the price negotiated is below UPMC's posted chargemaster price, the patient may be billed for the balance. If UPMC can deny contracting with Highmark (or other health insurers), OAG alleges: those insurer's members will still arrive at UPMC's emergency rooms through no choice of their own; those insurers and UPMC will negotiate each bill; and those insurers and their members will pay much higher costs for UPMC's emergency care. OAG alleges imposing these higher costs conflicts with UPMC's stated charitable mission.

OAG also avers UPMC made clear that after the Consent Decree expires on June 30, 2019, all out-of-network patients, regardless of their insurer, will be required to pay all of UPMC's expected charges for their non-emergency healthcare services up-front and in-full before receiving services from UPMC providers. Although UPMC's out-of-network charges for Medicare patients will be limited to the applicable rates established by the Centers for Medicare and

Medicaid (CMS), OAG alleges, UPMC's up-front and in-full payment demand will effectively deny access to those who cannot afford to pay the Medicare rates up-front or in-full. It avers all non-Medicare patients will be in an even more difficult position as they will be required to pay UPMC's charges in advance and in full without the limitation of CMS's applicable rates or the existing 60% limitation under Section IV(A)(6) of the Consent Decree.

OAG alleges UPMC's refusal to entertain any non-contract referenced based pricing, coupled with its intended up-front and in-full billing practices after June 30, 2019, will result in UPMC's unjust enrichment. It avers patients will be forced to pay amounts in excess of the reasonable value of UPMC's services or will be denied care, which is contrary to UPMC's stated charitable mission.

OAG further alleges, as of the end of the 2017 fiscal year, UPMC's consolidated financial statements reported $5,601,837,000 in net assets, including $529,631,000 in cash and cash equivalents, consisting of savings and temporary cash investments, as well as $5,072,206,000 in publicly traded securities and other investments. It also avers that analysis of UPMC's consolidated financial statements reveals that, after satisfying all of its current liabilities, UPMC reports it will still have $1,462,477,000 in cash and cash equivalents as well as publicly traded securities and other investments. As such, OAG avers, UPMC's financial position and large share of the provider and insurance markets belie any contention that contracting with Highmark, or any other competing health provider or insurer, will place its charitable assets and mission at any unreasonable risk.

OAG further avers UPMC's spending and compensation practices mimic material aspects of a purely commercial enterprise in that: UPMC's Chief Executive Officer receives in excess of $6 million in annual compensation; UPMC has 31 executives who receive in excess of $1 million in compensation; and UPMC's corporate offices occupy the top floors of the U.S. Steel Building in Pittsburgh, one of the City's most prestigious and costly locations.

6. UPMC's Expansion

OAG further avers the effects on the public of UPMC's conduct were previously limited to the greater Pittsburgh area. However, it alleges, with UPMC's expansion across Pennsylvania, more patients and payers will experience these negative impacts. Since the implementation of the Consent Decree, OAG alleges, UPMC acquired control of several healthcare providers and has grown well beyond its initial footprint. Pet. at ¶64(a)-(f). It alleges UPMC now controls more than 30 academic, community, and specialty hospitals, more than 600 doctors' offices and outpatient sites, and it employs more than 4,000 physicians.

OAG avers UPMC describes its Insurance Services Division, which includes the UPMC Health Plan, as the largest insurer in Western Pennsylvania, covering approximately 3.2 million members. It further alleges UPMC purports to be Pennsylvania's largest non-governmental employer, with 80,000 employees. OAG avers, as UPMC grows in clinical and geographic scope, its potential to deny care or increase costs will impact thousands more Pennsylvanians.

7. Counts of the Petition

The Petition sets forth four counts, styled as follows: (1) modification of the Consent Decree is necessary to ensure compliance with charities laws; (2) UPMC's violation of the Solicitation of Funds for Charitable Purposes Act[7] (Charities Act); (3) UPMC's breach of its fiduciary duties of loyalty and care owed to its constituent healthcare providers and the public-at-large in violation of Sections 5712, 5547(a), (b) of the NCL, 15 Pa. C.S. §§5712, 5547(a), (b), as well as Section 7781 of the Uniform Trust Act, 20 Pa. C.S. §7781; and (4) UPMC's violations of the Unfair Trade Practices and Consumer Protection Law (CPL).[8] At this juncture, only Count I is at issue. See Cmwlth. Ct., Scheduling Order II, filed 3/13/19.

As to Count I, OAG alleges, it notified all other parties of its belief that modification of the Consent Decree is necessary to protect the public's interests in order to: enable patients' continued and affordable access to their preferred healthcare providers and facilities; protect against UPMC's and Highmark's unjust enrichment; promote the efficient use of UPMC's and Highmark's charitable assets; and restore UPMC and Highmark to their stated charitable missions after June 30, 2019.

OAG avers UPMC's conduct, including, but not limited to the following, will result in it not operating free from a private profit motive: (1) demanding up-front payments in-full from all out-of-network patients based on

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[7] Act of December 19, 1990, P.L. 1200, as amended, 10 P.S. §§ 62.1–162.24.

[8] Act of December 17, 1968, P.L. 1224, as amended, 73 P.S. §§201-1–201-9.3.

UPMC's estimated charges and resulting in payments in excess of the value of the services rendered by UPMC; (2) utilizing facilities-based billing for services "where they had not been before;" and (3) transferring medical procedures to its higher cost specialty providers. Pet. at ¶74. As a result, OAG seeks *18* modifications to the Consent Decree.

In particular, OAG seeks to: (1) impose internal firewalls on UPMC and Highmark that prohibit the sharing of competitively sensitive information between UPMC's and Highmark's insurance and provider subsidiaries; (2) impose on UPMC's and Highmark's healthcare provider subsidiaries a "Duty to Negotiate" with any healthcare insurer seeking a services contract and submit to single, last best offer arbitration after 90 days to determine all unresolved contract issues; (3) impose on UPMC's and Highmark's healthcare insurance subsidiaries a "Duty to Negotiate" with any credentialed healthcare provider seeking a services contract and submit to single, last best offer arbitration after 90 days to determine all unresolved contract issues; (4) prohibit UPMC and Highmark from utilizing in any of their provider or insurance contracts any practice, term, or condition that limits patient choice, such as anti-tiering or anti-steering; (5) prohibit UPMC and Highmark from utilizing in any of their provider or insurance contracts any "gag" clause, practice, term, or condition that restricts the ability of a health plan to furnish cost and quality information to its enrollees or insureds; (6) prohibit UPMC and Highmark from utilizing in any of their provider or insurance contracts any "most favored nation" practice, term, or condition; (7) prohibit UPMC and Highmark from utilizing in any of their provider or insurance contracts any "must have" practice, term or condition; (8) prohibit UPMC and Highmark from utilizing

any "provider-based" billing practice, otherwise known as "facility-based" or "hospital-based" billing; (9) prohibit UPMC and Highmark from utilizing in any of their provider or insurance contracts any "all-or-nothing" practice, term, or condition; (10) prohibit UPMC and Highmark from utilizing in any of their provider or insurance contracts any exclusive contracts or agreements; (11) require UPMC's and Highmark's healthcare provider subsidiaries to limit charges for all emergency services to out-of-network patients to their average in-network rates; (12) prohibit UPMC and Highmark from terminating any existing payer contracts prior to their termination dates for anything other than cause; (13) require UPMC's and Highmark's healthcare insurance subsidiaries to pay all healthcare providers directly for emergency services at the providers' in-network rates; (14) prohibit UPMC and Highmark from discriminating against patients based on the identity or affiliation of the patients' primary care or specialty physicians, the patients' health plan, or utilization of unrelated third-party healthcare providers; (15) require UPMC and Highmark to maintain direct communications concerning any members of their respective health plans being treated by the other's providers; (16) prohibit UPMC and Highmark from engaging in any public advertising that is unclear or misleading; (17) require UPMC and Highmark to replace a majority of their respective board members who were on their respective boards as of April 1, 2013 by January 1, 2020, with individuals lacking any prior relationship to either UPMC or Highmark for the preceding five years; and (18) extend the duration of the modified Consent Decree indefinitely. Pet. at ¶75(a)-(r).

OAG avers nothing in the requested relief will prohibit UPMC and Highmark from continuing to develop both broad and narrow healthcare provider

or healthcare insurance networks or suppress competition among healthcare providers or insurers. Rather, OAG contends, it will create a level playing field and promote competition on the basis of provider-versus-provider and insurer-versus-insurer. OAG avers, as public charities, UPMC and Highmark will only be barred from refusing to contract with any insurer or provider who desires a contractual relationship through the usual course of negotiations with last best offer arbitration compulsory after 90 days of failed negotiations.

OAG further alleges these terms were discussed with Highmark and UPMC in November 2018. After receiving and responding to UPMC's and Highmark's feedback, it avers, the terms were formally presented to them contemporaneously in December 2018. OAG alleges Highmark agreed to the requested modifications set forth in the proposed modified decree as long as they also apply to UPMC. It avers UPMC rejected the requested modifications thus requiring OAG to petition this Court for the relief pursuant to Section IV(C)(10) of the Consent Decree. OAG alleges Section IV(C)(11) of the Consent Decree states: "Unless this Consent Decree is terminated, jurisdiction is retained by this Court to enable any party to apply to this Court for such further orders and directions as may be necessary and appropriate for the interpretation, <u>modification</u> and enforcement of this Consent Decree." Pet. at ¶82 (emphasis added). It avers there are no limitations on the scope of permissible modifications, only that they must be shown to promote the public interest. OAG also alleges the requested modifications were never considered by this Court or the Supreme Court.

As a result, it asks this Court to modify the Consent Decree to ensure that the benefits of in-network access to UPMC's and Highmark's healthcare programs and services are available to the public at-large and not just to those patients acceptable to them based on their competitive strategic and financial considerations. Alternatively, OAG requests that reimbursements to both UPMC's and Highmark's provider subsidiaries and physicians for all out-of-network services be limited to the reasonable value of their services, which is no more than the average of their in-network rates.

C. Highmark's Response

Highmark filed a response to the Petition through which it asserts it agreed to the terms of OAG's proposed modified consent decree provided that the terms apply equally to UPMC and Highmark. Highmark supports OAG's position that this Court should modify the Consent Decree to ensure charitable healthcare organizations operate in accord with their charitable obligations to provide reasonably priced and accessible healthcare to the community. However, it denies engaging in misleading marketing campaigns as alleged in the Petition.

D. UPMC's Motion to Dismiss/Preliminary Objections

In response to the Petition, UPMC filed an answer, in the nature of a motion to dismiss or preliminary objections. Generally, UPMC asserts: (1) OAG's claims are barred as a matter of law because they are released, forfeited, or unripe; (2) the Petition wrongfully seeks to modify the Consent Decree to regulate UPMC beyond the Consent Decree's expiration date; (3) the Petition must be dismissed

because OAG is proceeding without the proper parties; and (4) the requested modifications exceed OAG's powers to regulate nonprofit entities.[9]

II. Discussion

A. Release, Preclusion & Ripeness

1. Contentions

UPMC first contends that its decision to terminate a full contractual relationship with Highmark formed the core of the allegations at issue in the 2014 petition for review that led to entry of the Consent Decree. It maintains the Consent Decree was intended as a five-year transition from UPMC's global relationship with Highmark to a more limited one. See Consent Decree, §IV(C)(9). UPMC argues that an essential part of the Consent Decree was OAG's release of any and all claims arising out of a series of UPMC's actions. Consent Decree §IV(C)(5). Thus, UPMC asserts, all claims in the Petition that are based on allegations that predate the Consent Decree are released.[10]

[9] In ruling on preliminary objections, this Court accepts as true all well-pled allegations of material fact and all inferences reasonably deducible from those facts. Phantom Fireworks Showrooms, LLC v. Wolf, 198 A.3d 1205 (Pa. Cmwlth. 2018) (en banc). However, we need not accept unwarranted inferences, conclusions of law, argumentative allegations, or expressions of opinion. Id. For this Court to sustain preliminary objections, it must appear with certainty that the law will permit no recovery. Id. We resolve any doubt in favor of the non-moving party. Id. Thus, the question presented by the demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible. Tucker v. Phila. Daily News, 848 A.2d 113 (Pa. 2004). Where doubt exists as to whether a demurrer should be sustained, this doubt should be resolved in favor of overruling it. Id.

[10] Among others, UPMC maintains, OAG relies on the following fully released claims: the dispute over Highmark's Community Blue plan, which occurred in 2013, see Pet. at ¶¶16-18, 96, 103, 107, 118; the compensation of UPMC executives and the location of its headquarters, which were in place before the Consent Decree, id. at ¶¶61-63; various allegedly revenue-increasing practices, including transferring procedures to specialty providers, charging provider-based fees, and charging out-of-network patients for the unreimbursed balance of the services they receive, all of which predated, and were specifically addressed by, the Consent Decree, id.

(Footnote continued on next page...)

UPMC further contends that OAG forfeited its current claims based on the doctrine of claim preclusion. It maintains that, in 2017, OAG brought its most recent enforcement action in an attempt to extend UPMC's contract for Highmark's Medicare Advantage plans beyond the Consent Decree's June 30, 2019 expiration date. UPMC argues the Supreme Court held the Consent Decree expires June 30, 2019 and could not be extended; it concluded that date was "an unambiguous and material term of the Consent Decree" and it had "no basis upon which to alter this unambiguous date, to which the parties agreed[.]" Shapiro, 188 A.3d at 1132.

UPMC asserts OAG could and should have asserted the Petition's claims in its 2017 enforcement action. It contends all of the Petition's factual allegations occurred before that enforcement action. UPMC maintains OAG was aware of the acts alleged in the Petition supposedly showing UPMC did not comply with its charitable mission or made misleading statements. UPMC argues its expansion and expenditures were also known to OAG. It contends OAG chose not to assert those claims the last time it was before this Court, and the Supreme Court's decision in Shapiro bars OAG from resurrecting them now.

In addition, UPMC asserts the Petition is based on speculative future actions. It contends OAG avers that modification is necessary because if UPMC were to refuse to contract with insurers other than Highmark "[s]uch refusal will

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(continued...)

at ¶31; and UPMC's refusal to contract with Highmark to provide in-network access to Highmark enrollees, see Pet. at ¶¶12-19, 27-29, 37, 106-07, 117, 119(c).

result in more patients seeking access ... to UPMC on a cost-prohibitive [o]ut-of-[n]etwork basis." Pet. at ¶23; see also Pet. at ¶¶30, 52-54, 105-07(b), 117, 119(c), 121. UPMC argues OAG assumes, without basis, that UPMC will be out-of-network for non-Highmark insurers, and subscribers of non-Highmark insurance companies will therefore be burdened at some future time. UPMC contends these allegations are based on predictions of future conduct for which there is no indication will ever occur.

2. Analysis

In Shapiro, our Supreme Court set forth the following relevant principles. A consent decree is a judicially sanctioned contract that is interpreted in accordance with the principles governing all contracts; thus, our primary objective is ascertaining the parties' intent. Id. Where the terms of the contract are unambiguous, they are deemed to reflect the parties' intent. Id. Additionally, in determining intent, we are mindful to examine "the entire contract ... taking into consideration the surrounding circumstances, the situation of the parties when the contract was made and the objects they apparently had in view and the nature of the subject matter." Id. at 1131.

However, "in the absence of fraud, accident or mistake, [courts have] neither the power nor the authority to modify or vary the terms set forth." Id. at 1132 (citations omitted). Extrinsic evidence may be employed to ascertain the meaning of contractual terms only when they are ambiguous, *i.e.*, subject to more than one reasonable interpretation. Id. Interpreting the terms of a contract is a question of law, thus implicating a de novo standard of review and a plenary scope of review. Id.

Further, "[i]n Pennsylvania, it is well settled that the effect of a release is to be determined by the ordinary meaning of its language." Pennsbury Vill. Assocs., LLC v. McIntyre, 11 A.3d 906, 914 (Pa. 2011). The release is to be read as a whole. Ford Motor Co. v. Buseman, 954 A.2d 580 (Pa. Super. 2008). Also,

> when construing the effect and scope of a release, the court, as it does with all other contracts, must try to give effect to the intentions of the parties. Yet, the primary source of the court's understanding of the parties' intent must be the document itself. Thus, what a party now claims to have intended is not as important as the intent that we glean from a reading of the document itself. The parties' intent at the time of signing as embodied in the ordinary meaning of the words of the document is our primary concern.

Id. at 583 (citation omitted).

Here, with regard to modification, the Consent Decree states (with emphasis added):

> 10. **Modification** — If the OAG, [the Insurance Department], DOH or UPMC believes that modification of this Consent Decree would be in the public interest, that party shall give notice to the other[s] and the parties shall attempt to agree on a modification. If the parties agree on a modification, they shall jointly petition the Court to modify the Consent Decree. If the parties cannot agree on a modification, the party seeking modification may petition the Court for modification and shall bear the burden of persuasion that the requested modification is in the public interest.
>
> 11. **Retention of Jurisdiction** — Unless this Consent Decree is terminated, jurisdiction is retained by this Court to enable any party to apply to this Court for such further orders and directions as may be necessary and

> appropriate for the interpretation, modification and enforcement of this Consent Decree.

Consent Decree, §IV(C)(10), (11).

Further, the Consent Decree contains the following release (with emphasis added):

> 5. **Release** —This Consent Decree will release any and all claims [OAG], [the Insurance Department] or DOH brought or could have brought against UPMC for violations of any laws or regulations within their respective jurisdictions, including claims under laws governing non-profit corporations and charitable trusts, consumer protection laws, insurance laws and health laws relating to the facts alleged in the [p]etition for [r]eview or encompassed within this Consent Decree for the period of July 1, 2012 to the date of filing. Any other claims, including but not limited [sic] violations of the crimes code, Medicaid fraud laws or tax laws are not released.

Consent Decree, §IV(C)(5).

Thus, based on its plain language, the Consent Decree released any and all claims OAG "brought or could have brought against UPMC for violations of any laws or regulations within [its] respective [jurisdiction], including claims under laws governing non-profit corporations and charitable trusts, consumer protection laws, insurance laws and health laws relating to the facts alleged in the [June 2014] [p]etition for [r]eview or encompassed within th[e] Consent Decree for the period of July 1, 2012 to the date of filing [June 27, 2014]." Id. (emphasis added). As set forth above, however, only Count I of the Petition, which encompasses OAG's request to modify the Consent Decree, is before the Court at

this time. See Cmwlth. Ct., Scheduling Order II, filed 3/13/19. Thus, this Court does not resolve the effect of the Consent Decree's release language as it relates to OAG's claims in Counts II, III, and IV of the Petition, alleging violations of the Charities Act, the NCL, the Uniform Trust Act, and the CPL, at this time.

As to Count I of the Petition, based on the Consent Decree's express "Modification" provision, where agreement of the parties cannot be obtained, OAG retains the right to petition this Court for modification "and shall bear the burden of persuasion that the requested modification is in the public interest." Consent Decree, §IV(C)(5). Further, unless the Consent Decree is terminated, this Court retains jurisdiction to enable any party to apply for such further orders and directions as may be necessary and appropriate for, among other things, modification of the Consent Decree. Consent Decree, §IV(C)(11). Therefore, the Consent's Decree's release provision, which released statutory or regulatory claims within OAG's jurisdiction relating to facts prior to the applicable timeframe, does not bar OAG's right to pursue modification of the Consent Decree as set forth in Count I of the Petition. Id.

Next, as to UPMC's assertions that the claims raised by OAG are barred by claim preclusion, or *res judicata*, that doctrine applies only when there exists a "coalescence of four factors: (1) identity of the thing sued upon or for; (2) identity of the causes of action; (3) identity of the persons or parties to the action; and (4) identity of the quality or capacity of the parties suing or being sued." Robinson v. Fye, 192 A.3d 1225, 1231 (Pa. Cmwlth. 2018) (emphasis added) (citation omitted). *Res judicata* bars a future suit between the parties for the same

cause of action. Id. *Res judicata* encompasses claims actually litigated and those that could have been litigated. Id.

Here, UPMC argues claim preclusion bars OAG's current claims. In particular, it asserts, in 2017, OAG brought an enforcement action in an attempt to extend UPMC's contract for Highmark's Medicare Advantage plans beyond the Consent Decree's June 30, 2019 expiration date. UPMC asserts the Supreme Court held the Consent Decree expires on June 30, 2019 and could not be extended. UPMC contends OAG could and should have asserted the Petition's claims in its 2017 action as all of the Petition's factual allegations occurred before that action.

We reject UPMC's assertions that claim preclusion bars all OAG's current claims. To that end, as set forth above, Section IV(C)(10) of the Consent Decree expressly permits OAG to apply to this Court for modification of the Consent Decree. Through its prior filings in this case, OAG sought *enforcement* of various aspects of the Consent Decree; it did not seek *modification* as expressly permitted by Section IV(C)(10). Thus, there is a lack of identity between OAG's prior and current claims. As a result, *res judicata* does not bar OAG's current petition to modify the Consent Decree.

Finally, as to UPMC's assertions that the Petition is based on speculative future actions, "the doctrine of ripeness concerns the timing of a court's intervention in litigation." Phantom Fireworks Showrooms, LLC v. Wolf,

198 A.3d 1205, 1217 (Pa. Cmwlth. 2018) (en banc) (citation omitted). "The basic rationale underlying the ripeness doctrine is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." Id. (citation omitted). When determining whether a matter is ripe for judicial review, courts "generally consider whether the issues are adequately developed and the hardships that the parties will suffer if review is delayed." Bayada Nurses, Inc. v. Dep't of Labor & Industry, 8 A.3d 866, 874 (Pa. 2010) (citation omitted).

Based on a review of the Petition's averments, OAG's request for modification is ripe for review. E.g., Pet. at ¶¶27-30, ¶52. Additionally, through the Petition, OAG avers, in accordance with the terms of the Consent Decree, it presented the proposed modifications to UPMC, and UPMC rejected those modifications. Pet. at ¶81. Under these circumstances, OAG is expressly authorized to petition this Court for modification. Consent Decree, §IV(C)(10). Thus, the issues are adequately developed for review. Further, based on the impending expiration of the Consent Decree, the Petition's averments sufficiently indicate that delaying review may result in hardship. Pet. at ¶19, 23, 52. As such, the Petition is ripe for review.

B. Propriety of Modification

1. Contentions

UPMC next maintains that OAG's proposed *modification* is a misnomer because it repudiates the central terms of the Consent Decree, including the parties' express termination date and the lack of full in-network contracts

between UPMC and Highmark. UPMC contends there is no dispute that the Consent Decree expires on June 30, 2019. Shapiro.

UPMC also asserts the Consent Decree did not extend existing provider agreements. It contends the Consent Decree emphasizes in its introductory paragraph that it "is not a contract extension and shall not be characterized as such." Consent Decree, §I(A). UPMC maintains that in Shapiro, the Court, citing Kane, stated, "the Consent Decree 'forecloses the automatic renewal' of the [UPMC/Highmark provider agreements]." Id. at 1128. In spite of, and in response to that decision, UPMC argues, OAG now asks this Court to "modify" the Consent Decree in a manner that vitiates the "consent" that gives it legal authority. UPMC Memo at 20. It asserts this Court cannot *modify* the Consent Decree in a manner that contradicts its most material term. UPMC contends that OAG alleges no fraud, accident, or mistake that would justify modification of the Consent Decree's material terms.

Moreover, it maintains, any "modification" could only have effect during the period the Consent Decree remains operative, until June 30, 2019. Id. UPMC argues the imposition of obligations beyond that date is not a modification; rather, it would require UPMC's consent for a new decree extending beyond that date. It contends what OAG seeks here is not a modification as any true modification would expire along with the rest of the Consent Decree. See Salazar v. District of Columbia, 896 F.3d 489 (D.C. Cir. 2018).

UPMC further maintains the proposed modification is improper as OAG does not plead facts essential to show *how* the modification will promote the public interest; rather, the Petition's averments concerning the public interest are conclusory, which is insufficient. UPMC asserts the Petition lists UPMC's alleged bad acts in detail, but never explains how the proposed modifications would address those wrongs, why they are necessary, or what effect the terms would have on the public if they were implemented.

To that end, UPMC maintains, in litigation involving a proposed merger between UPMC Pinnacle and Penn State Hershey Medical Center, OAG took a contrary position to that advanced here. Specifically, in opposing the merger, OAG asserted the rivalry between the two entities benefitted the public interest by providing patients with lower healthcare costs and increased quality of care. UPMC maintains OAG was successful and the merger failed. In a reversal of that position, UPMC contends, OAG now alleges it is against the public interest for nonprofit insurers or providers to walk away from negotiations.

In addition, UPMC argues OAG's senior representatives made statements during legislative hearings, even in the context of contract disputes between UPMC and Highmark (including the Consent Decree), which reflected OAG's belief that it could not force UPMC and Highmark to contract with one another. It contends estoppel principles bar the relief OAG now seeks.

2. Analysis

As indicated above, the Consent Decree expressly provides, if OAG believes modification of the Consent Decree would be in the public interest, and it

cannot obtain agreement on modification it "may petition the Court for modification and [it] shall bear the burden of persuasion that the requested modification is in the public interest." Consent Decree, §IV(C)(10). Thus, this Court retained jurisdiction to enable any party to apply for such further orders and directions as may be necessary and appropriate for, among other things, "modification of th[e] Consent Decree." Consent Decree, §IV(C)(11).

Because the Consent Decree sets forth no other constraints on OAG's ability to seek modification, this Court declines to state with certainty that, at this stage of the proceeding, all the requested modifications are impermissible. Further, contrary to UPMC's assertions, the Petition sufficiently avers that the requested modifications are in the public interest so as to advance most of the matter beyond the pleading stage. See Pet. at 73(a)-(d).

In addition, while UPMC correctly asserts that, in Shapiro, the Supreme Court stated that the "June 30, 2019 end date" was "an unambiguous and material term of the Consent Decree," id. at 1132, the Court's decision in Shapiro, did not preclude the filing of a petition to modify the Consent Decree prior to its expiration date. Thus, Shapiro does not definitively bar the Petition at this stage.

Nevertheless, there is one prayer for modification in Count I that cannot be granted by this Court: the prayer that the Court extend the duration of a modified Consent Decree indefinitely. Pet. at ¶75(r). As noted above, our Supreme Court has already decided that the June 30, 2019 termination date is an unambiguous and material term of the Consent Decree. Id. That Court also

instructed that in the absence of fraud, accident or mistake, courts have neither the power nor the authority to modify or vary the terms set forth. Id. (citations omitted). Whatever preclusion label is applied, our Supreme Court's ruling on this issue is binding here. Stated differently, regardless of the authority of the Attorney General or the remedies set forth in the Consent Decree, inherent limitations on this Court's power prevent relief inconsistent with the Supreme Court's prior ruling in this case. Because the OAG does not plead fraud, accident or mistake, this Court lacks the power or authority to modify the termination date of the Consent Decree without the consent of the parties, even if it were in the public interest to do so.

UPMC also argues this Court cannot modify the Consent Decree based on alleged violations of law where OAG already conceded no such violations exist. To that end, UPMC asserts OAG "agree[d] that the terms and agreements encompassed within th[e] Consent Decree"—including no contract extension with Highmark and only temporary transition protections for Highmark subscribers—"do not conflict with UPMC's obligations under the laws governing non-profit corporations and charitable trusts, consumer protection laws, antitrust laws and health laws." Consent Decree §IV(C)(6). Thus, UPMC contends, modifying the Consent Decree here would violate its unambiguous and enforceable terms. UPMC maintains equitable estoppel and judicial estoppel "foreclose such an about-face by [OAG]." UPMC Memo at 22. Again, this argument fails.

"In order to apply the doctrine of equitable estoppel to a Commonwealth agency, the party to be estopped (1) must have intentionally or

negligently misrepresented some material facts; (2) knowing or having reason to know that the other party would justifiably rely on the misrepresentation; and (3) induced the party to act to [its] detriment because of a justifiable reliance upon the misrepresented facts." Foster v. Westmoreland Cas. Co., 604 A.2d 1131, 1134 (Pa. Cmwlth. 1992) (citation omitted).

In addition, judicial estoppel is properly applied only if the court concludes: (1) the party assumed an inconsistent position in an earlier action; and (2) the party's contention was successfully maintained in that action. Marazas v. Workers' Comp. Appeal Bd. (Vitas Healthcare Corp.), 97 A.3d 854 (Pa. Cmwlth. 2014). "Settlement of a claim, despite binding the parties and ending an action, does not equal 'successfully maintain.'" Id. at 860.

Contrary to UPMC's assertions, Section IV(C)(6) of the Consent Decree does not estop OAG's current request for modification. That provision states:

> 6. **Compliance with Other Laws** - The Parties agree that the terms and agreements encompassed within this Consent Decree do not conflict with UPMC's obligations under the laws governing non-profit corporations and charitable trusts, consumer protection laws, antitrust laws, insurance laws and health laws.

Id.

The terms of this provision do not preclude OAG's request for modification based on principles of equitable or judicial estoppel. It is unclear how the terms of Section IV(C)(6) of the Consent Decree establish that OAG

intentionally or negligently misrepresented material facts and induced UPMC to act to its detriment because of a justifiable reliance upon any misrepresented facts. Foster. Further, as set forth above, through the Consent Decree, the parties agreed on a modification provision, which allows OAG, or any other party to the Consent Decree, to petition this Court for modification. Consent Decree §IV(C)(10). Thus, equitable estoppel does not bar Count I of the Petition, seeking modification of the Consent Decree. Additionally, because the Consent Decree constituted a settlement of the parties' claims, and a settlement is not tantamount to successfully maintaining a contention in a prior action, judicial estoppel does not apply. Marazas.

UPMC also contends that statements by OAG's senior representatives that OAG could not force UPMC and Highmark to contract with each other are relevant for equitable estoppel. Contrary to UMPC's assertions, we decline to dismiss the Petition on equitable estoppel grounds based on such statements in light of the Consent Decree's plain language, which expressly authorizes OAG to seek modification. See Consent Decree, §IV(C)(10).

Finally, this Court declines to dismiss the Petition at this stage based on the federal appeals court's decision in Salazaar. In that case, the Court reversed a federal trial court order, which, under the guise of modifying a consent decree, effectively issued a new injunction "provid[ing] brand new relief based on brand new facts alleging violations of a new law without the requisite findings for an injunction[.]" Id. at 491. Under those circumstances, the federal appeals court held

that the federal trial court "crossed the line from permissibly modifying into impermissibly enjoining." Id.

Here, the parties dispute whether the requested modifications are permissible under the terms of the Consent Decree. Based on the broad language of the Consent Decree's modification provision, this Court declines to dismiss the Petition at what is essentially the pleading stage based on Salazaar. Rather, development of a factual record is necessary to fully evaluate the scope and propriety of the requested modifications.

C. Party Specific Allegations

1. Contentions

In addition, UPMC argues this Court should deny the Petition because OAG did not plead critical prerequisites to its broad asserted enforcement authority. It argues OAG's request to bind all facets of the UPMC system to a sweeping new healthcare regime encroaches on the jurisdiction of the Commonwealth agencies charged with overseeing that regime. More particularly, UPMC contends, OAG is proceeding without alleging any assent or input from either of the other two petitioners here, the Insurance Department and DOH. UPMC asserts these agencies have subject-matter expertise and statutory authority unique to the regulation of healthcare and insurance. UPMC further maintains that, rather than pursuing any of the relief OAG now seeks, the Insurance Department worked to prepare Western Pennsylvanians for the end of the Consent Decree and to aid in the transition.

2. Analysis

UPMC's assertions on this issue fail. First, although UPMC takes issues with the Petition's failure to more specifically delineate between UPMC's various non-profit and for-profit subsidiary entities, the Consent Decree specifically defines "UPMC" as

> the non-profit, tax-exempt corporation organized under the laws of the Commonwealth of Pennsylvania having its principal address at: 200 Lothrop Street, Pittsburgh, PA 15213. Unless otherwise specified, all references to UPMC include all of its controlled nonprofit and for-profit subsidiaries, partnerships, trusts, foundations, associations or other entities however styled.

Consent Decree, §II(P) (emphasis added). Thus, all of UPMC's controlled nonprofit and for-profit subsidiaries, partnerships, trusts, foundations, associations or other entities are subject to the terms of the Consent Decree's modification provision. Consent Decree, §§II(P), IV(C)(10).

Further, pursuant to the modification provision, "OAG, [the Insurance Department], DOH or UPMC" possesses the right to seek modification before this Court. Consent Decree, §IV(C)(10) (emphasis added). Thus, the terms of the Consent Decree did not require OAG to obtain the assent of the Insurance Department or DOH in order to seek modification through the filing of the Petition. Id. As such, UPMC's claims on this point fail.

D. OAG's Authority

1. Contentions

UPMC also maintains that *parens patriae* authority over charities is limited. It argues *parens patriae* authority does not permit OAG to control the

actions and decisions of a nonprofit corporation made in the ordinary course of business, such as dictating the terms of the nonprofit corporation's commercial contracts. Instead, UPMC asserts, OAG's *parens patriae* authority is properly exercised only when a charity engages in an extraordinary transaction, such as the disposition of assets committed to charity.

UPMC also argues it is beyond dispute that OAG has no legal basis to compel the principal relief it seeks here, forced contracts between UPMC entities and Highmark. It asserts the General Assembly specifically rejected the same "any willing provider" (AWP) and "any willing insurer" regime OAG now seeks to establish. UPMC Memo at 35. UPMC maintains whether a healthcare provider or healthcare payer must contract is not a decision for OAG, but for the General Assembly.

UPMC further argues, after the Supreme Court's 2018 ruling in Shapiro, the Insurance Department expressly admitted it could not force UPMC to enter into contracts against its will. And, UPMC contends, OAG's senior representatives took the same position at legislative hearings when the Consent Decree went into effect. Thus, UPMC maintains this Court should rule that UPMC entities cannot be forced to contract with Highmark. Similarly, it argues this Court should rule it lacks authority to afford OAG's alternative requested relief, limiting UPMC providers' reimbursements for out-of-network services to UPMC's average in-network rates.

2. Analysis

"*Parens patriae* powers" refers to the "ancient powers of guardianship over persons under disability and of protectorship of the public interest which were originally held by the Crown of England as 'father of the country,' and which as part of the common law devolved upon the states and federal government." In re Milton Hershey Sch. Trust, 807 A.2d 324, 326 n.1 (Pa. Cmwlth. 2002) (en banc) (quoting In re Pruner's Estate, 136 A.2d 107, 109 (Pa. 1957)). These powers permitted the sovereign, through his officer, OAG, to exercise supervisory jurisdiction over all charitable trusts. Id.

The responsibility for public supervision of charitable trusts traditionally has been delegated to OAG to be performed as an exercise of its *parens patriae* powers. Id. "Our Supreme Court in [Pruner's Estate, 136 A.2d at 110,] explained this interest: '[I]n every proceeding which affects a charitable trust, whether the action concerns invalidation, administration, termination or enforcement, [OAG] must be made a party of record because the public as the real party in interest in the trust is otherwise not properly represented.'" Id. at 330. Property given to a charity is in a measure public property, and the beneficiary of charitable trusts is the general public to whom the social and economic benefits of the trusts accrue. Id.

Regardless of the parties' dispute over the scope of OAG's *parens patriae* powers, as explained above, the Consent Decree expressly states, if OAG believes modification of the Consent Decree would be in the public interest, it may petition this Court for modification and shall bear the burden of persuasion that the

requested modification is, in fact, in the public interest. Consent Decree, §IV(C)(10). Thus, OAG retained the right to seek modification of the Consent Decree pursuant to its express terms. Further, while UPMC contests the propriety and scope of the requested modifications, in light of the broad language of the Consent Decree's modification provision, we decline to dismiss the Petition at this early stage of the proceeding. Rather, development of a factual record is necessary to fully evaluate the scope and propriety of the requested modifications.

III. Conclusion

Based on the foregoing, UPMC's Answer, in the Nature of a Motion to Dismiss or Preliminary Objections, to the Commonwealth's Petition to Modify Consent Decrees are granted in part and denied in part as to Count I of the Petition. More particularly, the Motion/Preliminary Objections are granted/sustained only as to the prayer to extend a modified Consent Decree indefinitely; all other aspects of the Motion/Preliminary Objections to Count I are denied/overruled. As to the prayer to modify the termination date of the Consent Decree without the consent of the parties, the Court's action is intended to be dispositive of that claim; accordingly, consistent with Scheduling Order II, the Court's action shall include permission to appeal pursuant to Pa. R.A.P. 1311, and shall contain the statement prescribed by 42 Pa. C.S. §702(b).

Further, consistent with this Court's Order of March 13, 2019, severing Count I of the Petition from the remaining Counts of the Petition for separate litigation, this Court defers ruling on UPMC's Answer, in the Nature of a

Motion to Dismiss or Preliminary Objections, as it relates to Counts II, III, and IV of the Petition.

ROBERT SIMPSON, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Commonwealth of Pennsylvania, By Josh Shapiro, Attorney General; Pennsylvania Department of Insurance, By Jessica K. Altman, Insurance Commissioner and Pennsylvania Department of Health, By Rachel Levine, Secretary of Health, Petitioners	:	
v.	:	No. 334 M.D. 2014
UPMC, A Nonprofit Corp.; UPE, a/k/a Highmark Health, A Nonprofit Corp. and Highmark, Inc., A Nonprofit Corp., Respondents	:	

ORDER

AND NOW, this 3rd day of April, 2019, UPMC's Answer in the Nature of a Motion to Dismiss or Preliminary Objections, to Commonwealth's Petition to Modify Consent Decrees are **GRANTED/SUSTAINED in part and DENIED/OVERRULED in part** as to Count I. More particularly, the Motion/Preliminary Objections are granted/sustained only as to the prayer to extend modified Consent Decrees indefinitely; all other aspects of the Motion/Preliminary Objections to Count I are denied/overruled.

As to the prayer to modify the termination date of the Consent Decrees without consent of the parties, this Interlocutory Order is intended to be dispositive of that claim. Accordingly, consistent with Scheduling Order II (filed March 13, 2019), this Order includes permission to appeal from this Court ("lower

court") pursuant to Pa. R.A.P. 1311. Further, pursuant to 42 Pa. C.S. 702(b), this Court is of the opinion that this Interlocutory Order involves a controlling question of law as to which there is substantial ground for difference of opinion, and an immediate appeal may materially advance the ultimate termination of the matter.

Any ruling on UPMC's Answer in the Nature of a Motion to Dismiss or Preliminary Objections, to Commonwealth's Petition to Modify Consent Decrees as it relates to Counts II, III, and IV of the Commonwealth's Petition to Modify Consent Decrees is **DEFERRED**.

ROBERT SIMPSON, Judge

Certified from the Record

APR - 3 2019

And Order Exit