IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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

THE COMMONWEALTH'S BRIEF IN OPPOSITION TO UPMC'S MOTION IN LIMINE TO PRECLUDE HIGHMARK FROM TESTIFYING OR PRESENTING EVIDENCE AT THE EVIDENTIARY HEARING

UPMC's Motion should be denied because this Court and the Supreme Court have decided this matter already: Highmark's participation is relevant to the narrow issues before this Court, and UPMC's concerns go to weight, not admissibility.

In its opinion, the Supreme Court observed that it was "presented with two constructions of the Modification Provision" – both "OAG's ***and Highmark's*** account," on one hand, and "UPMC's account," on the other. May 28, 2019 Opinion and Order at 20 (emphasis added). Indeed, the Supreme Court permitted Highmark to file initial and reply briefs, and to present oral argument. On remand, the Supreme Court requested further evidentiary development to shed light on "the

parties' intent with regard to the scope of the Modification Provision." *Id.* at 21. The "parties" plainly includes Highmark.[1]

I. Highmark's Participation Is Relevant And In No Way Prejudicial.[2]

Generally, all relevant evidence is admissible. Pa.R.E. 402. Although relevant evidence may be excluded if "its probative value is outweighed by a danger of ... unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence," Pa.R.E. 403, no such prejudice exists here.

Evidence offered by Highmark is relevant – and will substantially aid the Court – because of the way the Consent Decrees were drafted. The decrees are one, unified agreement that was broken into two parts because of the enmity between UPMC and Highmark. But the two parts, at the insistence of UPMC, are identical – UPMC was unwilling to agree to any provision that would not, likewise, apply to Highmark. In this way, UPMC, Highmark and the Commonwealth negotiated the

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[1] The Commonwealth Court, too, has decided this issue multiple times. It did so by allowing Highmark to participate in litigation over the OAG's Petition presently before it. But it also has decided this issue in other related matters. For example, it permitted Highmark to participate in proceedings over UPMC's objection in *Kane* and UPMC to participate over Highmark's objection in *Kane*. The Court can take judicial notice of the record reflecting both parties' participation throughout the entirety of the prior enforcement actions.

[2] Presumably Highmark will also argue that, because it will be bound by the Court's interpretation of the Consent Decrees, it would be prejudiced by exclusion.

Consent Decrees together, with the OAG acting as the go-between, receiving orally and in writing language preferred by UPMC or Highmark and communicating it to the other. The negotiations started with a term sheet which, over the course of several months, grew into the final agreement among the parties: Everyone was on the same page. On July 1, 2014, this Court approved the Consent Decrees together, as one global agreement in one single order.

The Supreme Court acknowledged this Court's findings on the negotiation dynamic in *Com. ex rel. Kane v. UPMC*:

> As the Commonwealth Court noted, because there was such intense acrimony between the parties... attorneys representing the Commonwealth parties were forced to engage in what the OAG termed "shuttle" diplomacy, . . . whereby they would ferry offers and counteroffers back and forth between the parties. Eventually, the Commonwealth secured ***a comprehensive agreement*** ... but, because the parties refused to sign a common document, two final separate consent decrees were prepared—one for Highmark and one for UPMC (collectively, the "Consent Decrees"). ***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[; t]he Commonwealth parties are signatories to both decrees.

Com. ex rel. Kane v. UPMC, 129 A.3d 441, 448 (Pa. 2015)(emphasis added).

UPMC has not articulated any prejudice warranting the exclusion of Highmark.[3] The Modification and Termination Provisions in the Consent Decrees cannot operate differently because they are identical – by design – and were negotiated together among the three parties. Highmark's participation is relevant.

II. UPMC's Concerns Go To Weight, Not Admissibility.

This is not the case, as UPMC claims, of a non-party trying to intercede with evidence that is "neither relevant nor probative" – quite the contrary.[4] UPMC's Motion, ¶ 12. Nor, as UPMC implies, is this Court likely to suffer from "confusion of the issues." UPMC's Motion, ¶ 13. If anything, UPMC's professed concerns go to weight, not admissibility. This Court is more than capable of weighing evidence proffered by Highmark here – just as it has with evidence submitted by Highmark and UPMC in past proceedings – and making its own determinations

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[3] UPMC's reliance on *Commonwealth v. Cook*, 952 A.2d 594, 612 (Pa. 2008), is misplaced. *Cook* involved an attempt to impart statements made by a prosecutor during a training video into the prosecutor's state of mind at the time of jury selection. Here, Highmark and UPMC were negotiating identical agreements with the Commonwealth simultaneously. Accordingly, there is no persuasive conclusion to be drawn from the holding in *Cook*.

[4] See *Stack v. Tizer*, 203 A. 2d 403 (Pa. Super. 1964) ("When a third person is instrumental in bringing the parties together, is actively involved and adequately familiar in determining and deciding the contractual terms to be agreed upon in the agreement, and is knowledgeable as to both the circumstances existing at the time of the agreement and to the intent of the parties, then the introduction of this evidence by a third party is within the discretion of the trial judge and will not be disturbed absent an abuse of discretion.").

from the evidence presented by the "parties". May 28, 2019 Opinion and Order at 21.

III. Conclusion

For the foregoing reasons, UPMC's Motion should be denied.

Respectfully submitted,
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