

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	:	
By JOSH SHAPIRO, Attorney General, <i>et al.</i> ,	:	
	:	
	:	Petitioners,
	:	
	:	
v.	:	NO. 334 M.D. 2014
	:	
	:	
UPMC, A Nonprofit Corp., <i>et al.</i> ,	:	
	:	
	:	
	:	Respondents.

**THE COMMONWEALTH OF PENNSYLVANIA’S
DISCLOSURE OF WITNESSES AND PRE-TRIAL MEMORANDUM**

Pursuant to the Court’s May 31, 2019 Order, the Commonwealth of Pennsylvania, by Josh Shapiro, Attorney General (the “Commonwealth”), submits this Disclosure of Witnesses and Pre-Trial Memorandum (the “Disclosure”). The Commonwealth reserves the right to amend this disclosure at any time.

STATEMENT OF THE CASE

The “narrow” question before the Court is whether the parties’ intent as to the meaning of the Modification Provision is consistent with its plain language, which “sets no limits upon the modifications contemplated, . . . including the termination date” (as OAG and Highmark assert), or is contrary to the express language such that the termination date was implicitly excluded from the Modification Provision (as UPMC asserts). May 28, 2019 Opinion and Order at 20-21. UPMC bears the burden of persuasion on this issue by a preponderance of the evidence.

APPLICABLE LAW

The law is clear that where a preliminary objection requires the Court to hear evidence, the party that raised the preliminary objection – here, UPMC – is the moving party and “ha[s] the burden of proving that [its] objections . . . are valid” by a preponderance of the evidence. *Gale v. Mercy Catholic Med. Center Eastwick, Inc. Fitzgerald Mercy Div.*, 698 A.2d 647, 652 (Pa. Super. Ct. 1997); *see also In re: School Dist. Of Pittsburgh Allegheny Cnty.*, 244 A.2d 42, 46 (Pa. 1968) (dismissing preliminary objections where movant failed to meet its burden of providing evidence “on issues of fact raised by the preliminary objections”); *Liggit v. Liggit*, 384 A.2d 1261, 1264-64 (Pa. Super. Ct. 1978) (“Preliminary objections are pleadings,” and “the defendant is the moving party and bears the burden of supporting his claim. . .”).

UPMC must therefore prove by a preponderance of the evidence that the parties intended the Modification Provision – which was negotiated and agreed to by “sophisticated” parties and “skilled attorneys” yet contains “unbounded language” with no carve-out limiting modification of the termination date – to implicitly exclude the termination date from its otherwise broad and clear reach. May 28, 2019 Opinion and Order at 18.

THE PARTIES' POSITIONS

The Commonwealth contends that the Modification Provision may be applied to any provision of the Consent Decree, including the termination date, so long as modification is in the public interest. UPMC, by contrast, insists that the Modification Provision cannot possibly apply to the termination date, and that any modification of the termination date (currently June 30, 2019) would “transform its Consent Decree into a ‘perpetual contract’ against its will[.]” *Id.* at p. 13 (quoting Brief for UPMC at 25, 33).

DISCLOSURE OF POTENTIAL WITNESSES AND BRIEF SUMMARY OF ANTICIPATED TESTIMONY

1. Michael Consedine
Former Commissioner, Pennsylvania Insurance Department
2. James A. Donahue, III, Esq.
Executive Deputy Attorney General, Public Protection Division
3. Yen Lucas, Esq.
Former Chief Counsel, Pennsylvania Insurance Department
4. W. Thomas McGough, Jr., Esq.
Senior V.P. and Chief Legal Officer, UPMC
5. Honorable Gerald J. Pappert
Former Attorney General, Former First Deputy Attorney General, and Former Counsel to UPMC
6. James D. Schultz, Esq.
Former General Counsel to the Governor
7. Thomas L. VanKirk, Esq.
Executive V.P., Chief Legal Officer and Secretary, Highmark Health

8. Michael Wolf
Former Secretary, Pennsylvania Department of Health
9. *The Commonwealth also reserves the right to call any witness identified by UPMC or Highmark in their Disclosures.*

All witnesses are anticipated to testify regarding their recollections and understandings of the dispute between UPMC and Highmark, and the negotiation of the Consent Decrees between the parties, including the negotiation, intent and potential applicability of the Modification Provision.

EXHIBITS

The Parties are not required to share their anticipated 10 exhibits as part of this Disclosure, but are required to appear at the hearing with exhibits pre-marked and with sufficient copies for opposing counsel and the Court. May 31, 2019 Order. Nonetheless, at this time, the Commonwealth anticipates that its exhibits may include:

- The Consent Decrees and Court Order approving them;
- Written communications among the parties relating to the negotiation of the Consent Decrees;
- Documents relied upon in drafting the Consent Decrees, including but not limited to filed Consent Decrees and related orders issued by courts relating to Capital Health System Services and Polyclinic Health System, Children's Hospital, Mercy Hospital, and UPE; and

- A Chronology of Negotiations Over the Consent Decree to be submitted pursuant to Pennsylvania Rule of Evidence 1006, Summaries to Prove Content.

STIPULATIONS

None at this time.

Respectfully submitted,

JOSH SHAPIRO
Attorney General

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Date: June 6, 2019

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Chief Deputy Attorney General
Civil Litigation Section
Attorney ID 205178

*Counsel for Commonwealth of
Pennsylvania By Josh Shapiro,
Attorney General*

CERTIFICATION REGARDING PUBLIC ACCESS POLICY

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

s/ Keli M. Neary
KELI M. NEARY
Chief Deputy Attorney General

CERTIFICATE OF SERVICE

I, Keli M. Neary, Chief Deputy Attorney General for the Commonwealth of Pennsylvania, Office of Attorney General, hereby certify that on June 6, 2019, I caused to be served foregoing document titled the Commonwealth of Pennsylvania's Disclosure of Witnesses and Pre-Trial Memorandum via PACFile on all counsel of record.

s/ Keli M. Neary

KELI M. NEARY
Chief Deputy Attorney General