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.	:	

COMMONWEALTH'S MEMORANDUM IN OPPOSITION TO RESPONDENT UPMC'S MOTION TO DISMISS PETITION TO MODIFY CONSENT DECREES OR PRELIMINARY OBJECTIONS IN THE NATURE OF A DEMURRER

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

STATUTES

COURT RULES

SECONDARY AUTHORITY

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MOTION TO DISMISS PETITION TO MODIFY CONSENT DECREES

Petitioner, the Commonwealth of Pennsylvania acting in its capacity as *parens patriae* through its Attorney General, Josh Shapiro (Commonwealth), respectfully offers the following in opposition to ***UPMC's Answer in the Nature of a Motion to Dismiss or Preliminary Objections to "Commonwealth's Petition to Modify Consent Decrees":***

COUNTER-BACKGROUND
AND SUMMARY OF THE ARGUMENT

The Commonwealth entered into the Consent Decrees based upon UPMC's representations that seniors and other vulnerable populations needing specialized care would never be affected by the respondents' contractual disputes. The Commonwealth intended to provide for an orderly termination of the respondents'

commercial[1] relationships while preserving the access of vulnerable populations to UPMC's specialized care – not on the notion suggested by UPMC that the Consent Decrees were intended to authorize unbridled denials of access and care to the Citizens of the Commonwealth by UPMC after the expiration of the decrees. Due to the unique complexities of healthcare and a variety of material changes in circumstances, namely the announced impacts on out-of-network patients and the expansion of UPMC's contracting disputes both geographically and with other Health Plans, the Commonwealth now seeks to modify the decrees. This modification is sought without closing the door on future modifications should they prove necessary to promote the public interest.

Contrary to the exaggerated characterizations argued by UPMC, the ***Commonwealth's Petition to Modify Consent Decrees*** (Petition) is not an attempt to undo and reverse the Consent Decrees; it does not seek to force UPMC to return to the contractual obligations it had with Highmark before the decrees were entered; it does not require UPMC to maintain those obligations forever; and, it does not seek unprecedented and unwarranted relief.

As set forth more specifically within, the Petition seeks to ensure that, above all else, UPMC and Highmark comply with the charitable commitments they

[1] "Commercial" refers to the respondents' non-Medicare and non-Medicaid related contracts.

respectively owe to the public-at-large. In many instances, the proposed modifications involve terms and conditions that UPMC previously agreed to in this and other matters, including, but not limited to, last, best offer arbitration when good-faith contract negotiations fail.

UPMC's contention that the Commonwealth previously conceded it cannot force the respondents to contract is simply unavailing and irrelevant. The Commonwealth has never contended that it is a judicial body. Pursuant to the terms of the Consent Decrees, the parties agreed that this Court has the authority to impose the requested relief if the modification is shown to be "in the public interest." In accordance therewith, the Commonwealth has petitioned this Court which has the requisite authority. Lastly, UPMC is continuously subject to this Court's inherent equitable powers and oversight regardless of the decree's existence. Accordingly, there is nothing remarkable about imposing the requested modifications indefinitely under the continuing jurisdiction of this Court.

The Commonwealth agrees that the contractual disputes between the respondents began as a consequence of Highmark's affiliation with the West Penn Allegheny Health System, which created an integrated healthcare system in competition with UPMC. By arguing, however, that universal contracts no longer made sense for both parties, then and now, UPMC reveals its misunderstanding of the duties both respondents owe to the public. The question isn't whether preserving

the respondents' contractual relationships makes sense for the respondents – it is whether preserving the respondents' contractual relationships makes sense for the public.

UPMC's argument that the financial viability of the West Penn Allegheny Health System, now a part of the Allegheny Health Network (AHN), depended upon the termination of the contractual relationships between Highmark and UPMC is no longer relevant or persuasive. Experience since 2014 has shown that AHN has gained financial stability despite the respondents' continuing contractual relationships under the decrees. As set forth in the Commonwealth's Petition, maintaining the respondents' contractual relationships through the requested modifications to the Consent Decrees promises to preserve the public's access while promoting continued competition. Notably, Highmark has already agreed to the proposed modification provided UPMC is subject to the same terms and conditions.

Although Governor Wolf announced a Second Mediated Agreement that was reached in January of 2018 that extends In-Network commercial contracts for UPMC specialty and sole provider community hospitals for two to five years, rates for Emergency Department and Medicare Advantage contracts were not extended. Here again, despite the best efforts of Pennsylvania's Insurance Department (PID) and Department of Health (DOH), senior citizens and emergency patients will face UPMC's much higher Out-of-Network charges after the expiration of the Consent

Decrees. It is an untenable circumstance that neither agency can fully address as only the Attorney General, acting as *parens patriae,* can seek to enforce UPMC's charitable obligations of providing the public with a high quality, cost-effective and accessible health care system.

UPMC's contention that the Commonwealth is barred by *res judicata* from seeking the proposed modification in light of the Supreme Court's July 18, 2018 decision at Commonwealth, et al., v. UPMC, et al., 188 A.3d 1122 (2018), looks past the fact that the Supreme Court was not asked to construe the modification provision in paragraph IV.C.10 of UPMC's decree. That case involved a disputed interpretation of paragraph IV.A.2 concerning when and how UPMC could terminate its Medicare Advantage contract with Highmark. Under the terms of the Medicare Advantage contracts at issue, a six-month runout period followed UPMC's December 31, 2018 termination of the contracts. The Supreme Court determined that the runout period which extended through June 30, 2019 satisfied UPMC's contractual obligation under the Consent Decrees. Here, the issue of modification presents an entirely distinct legal issue that has yet to be judicially considered, thus *res judicata* is inapplicable.

ARGUMENT

I. UPMC's Motion to Dismiss and Preliminary Objections in the Nature of a Demurrer Must Admit as True all Well-Pleaded Allegations in the Commonwealth's Petition along with all Inferences Reasonably Deducible Therefrom.

It is well settled that "preliminary objections in the nature of demurrer are deemed to admit all well-pleaded facts and all inferences reasonably deduced therefrom." Commonwealth v. Events International, Inc., 137 Pa. Cmwlth. 271, 278, 585 A.2d 1146, 1149-1150 (1991) (citing Watson & Hughey Co., 128 Pa. Cmwlth. 484, 563 A.2d 1276 (1989)). "On appeal from an order sustaining preliminary objections [which would result in the dismissal of suit], we accept as true all well-pleaded material facts set forth in the appellants' complaint and all reasonable inferences which may be drawn from those facts. [citations omitted] . . . Where, as here, upholding sustained preliminary objections would result in the dismissal of an action, we may do so **only in cases that are clear and free from doubt.**" Ellenbogen v. PNC Bank, N.A., 731 A.2d 175, 177-184 (Pa. Super. 1999) (emphasis added), (citing Filipovich v. J.T. Imports, Inc., 431 Pa. Super. 552, 637 A.2d 314 (Pa. Super. 1994)); See also, Sweatt v. Dept. of Corrections, 769 A.2d 574, 576 (Pa. Cmwlth. 2001) (citing Rodgers v. Pennsylvania Dept. of Corrections, 659 A.2d 63 (Pa. Cmwlth. 1995)) (When ruling upon preliminary objections in the nature of a demurrer, the Court must accept as true all well-pleaded allegations of material fact as well as all reasonable inferences deducible therefrom).

Additionally, UPMC's speaking demurrers may not be considered in sustaining their preliminary objections. See Regal Industrial Corp. v. Crum, 890 A.2d 395 (Pa. Super. 2005) (A speaking demurrer requires the aid of facts not appearing on the face of the pleading to which objection is filed and may not be considered in sustaining a preliminary objection). Denials in the form of preliminary objections are similarly misplaced. UPMC's assertions are more properly a part of their answer and evidence that a genuine dispute exists, which supports the sufficiency of the petition. The Commonwealth has well pled its causes of action.

II. The instant petition is the proper vehicle to bring this matter before the court on the basis of Paragraph IV.C.10 of the consent decree.

The instant petition is the proper vehicle to raise modification because the parties agreed that this Court retained 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.11 (emphasis added). The Consent decree has not terminated. It remains under the jurisdiction of this Court on this docket.

Moreover, the parties, including, UPMC agreed that:

> If the OAG, PID, DOH **or** UPMC believes that modification of this Consent Decree would be in the public interest, that party shall give notice to the other 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.

Consent Decree § IV.C.10 (emphasis added). As such, UPMC's contention that the requested modification "should not go forward without the unanimous consent of all concerned, including UPMC, the PID and DOH," is simply incorrect. *See*, *Resp. Brief* at 29, f.n. 11.[2]

In accordance with its obligations under the agreement, the Commonwealth reached out to UPMC but was unable to secure an agreement on modification. Following the procedure to which the parties agreed, the instant petition followed. Having signed the Consent Decree and agreed to its terms, UPMC is estopped from now claiming that the agreed-upon modification provision is inoperative. By signing the Decree, UPMC has already conceded to the Attorney General's ability to seek modification.[3]

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[2] UPMC's contention that the Attorney General has conceded that it cannot force UPMC to contract is also without merit. The Office of Attorney General has never alleged that it is a judicial body. As set forth in the plain language of the Consent Decree, the Attorney General may merely move for relief. As the Consent Decree makes clear, UPMC remains subject to the jurisdiction of this Court which may grant modification.

[3] Respondents' contention that the Attorney General lacks power because the legislature failed to pass "any willing provider" legislation is similarly without merit. It is well-settled that legislative inaction "lacks 'persuasive significance' because

Paragraph IV.C.10 places no limitations on the types of modification that may be sought so long as the party believes that seeking modification would be in the public's interest and notice is given to the other parties. Ergo, a party may seek modification of any of the provisions, including, but not limited to Paragraph 9 (Termination). *See*, Penn Tp. v. Watts, 618 A.2d 1244 (Pa. Cmwlth. 1992) (A consent decree is a contract); *See also*, Cecil Tp. v. Klements, 821 A.2d 670, 674 (Pa. Cmwlth. 2003) (A consent decree is binding until the parties choose to amend it). In this case, the parties agreed to a contractual term which permits modification by this Court and proscribed a procedure for seeking it.[4]

Modification serves the public's interest, a lack of modification results in people being denied care or being forced to pay a much higher price for it. UPMC is a public charity whose harmful actions include closing its doors to out-of-network

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'several equally tenable inferences' may be drawn from such inaction, 'including the inference that the existing legislation already incorporated the offered change." Pension Benefit Guaranty Corporation v. LTV Corp., et al, 496 U.S. 633, 650 (1990) (quoting United States v. Wise, 370 U.S. 405, 411 (1962)). In this case, the Nonprofit Corporations Law and UTPCPL are already applicable to Respondents. Further, the Commonwealth has not requested the Court impose any willing payer or provider relief. Rather, the Commonwealth has requested the Court impose a duty to negotiate in good faith on the parties with an optional last best offer arbitration back stop.

[4] UPMC mistakenly attempts to rest on the plain language of Paragraph IV.C.9 which states that the Consent Decree shall expire five (5) years from date of entry. However, this is not the end of the inquiry. The issue is the application of Paragraph IV.C.10 as it applies to all of the terms of the Consent Decree, including, the modification of Paragraph IV.C.9.

patients through prohibitive pricing and demands for upfront payment, and steering the public toward its insurance plan. UPMC has also represented that it will continue this conduct while continuing to enjoy its tax-exempt status as a nonprofit corporation subsidized by some of the very same people it chooses not to serve. In support thereof, the Commonwealth incorporates its Petition to Modify Consent Decrees and all of the averments set forth therein. *See*, Pa.R.C.P. No. 1019(g).

As such, the Commonwealth is in accord with the procedure to which the parties agreed and the petition is the proper vehicle for seeking modification.

III. UPMC's contentions that the Commonwealth's claims are barred as a matter of law are without merit given UPMC's status as a public charity subject to the continuous oversight of the court, as well as Paragraph IV.C.11 of the consent decree.

The Commonwealth is not precluded from bringing its claims on the basis of *res judicata*. By its very terms, the Consent Decree expressly permits any of the parties to petition 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.11 (emphasis added).

As acknowledged by UPMC, the Attorney General has sued to enforce the Consent Decrees on three occasions in 2015, 2016 and 2017. *See*, UPMC' *Brief* at 8. As evidenced by the multiple actions, all parties agreed and were on notice that their agreement was ongoing and that further relief could be sought.

None of the three aforementioned actions involved a request for modification pursuant to Paragraph IV.C.10. In Commonwealth v. UPMC, 188 A.3d 1122, 1135 (Pa. 2018), the issue in the enforcement proceeding was whether a runout provision satisfied UPMC's obligations under the parties' agreement. At no point was modification pursuant to Paragraph IV.C.10 at issue. The Supreme Court clearly acknowledged however that, "[t]he Commonwealth Court, by the terms of the Consent Decree, retains jurisdiction for any necessary and appropriate interpretation, **modification**, or enforcement. *See* Consent Decree § IV(C)(11)." Id. At 1125, fn. 7 (emphasis added).

The doctrine of *res judicata* does not prevent a court from addressing multiple breaches of the same contract and claims which arise based upon different facts. See, Raab v. Domino Amjet, 530 F. Supp. 2d 1192, 1196-1197 (Dist. Ct. Kansas. 2008) (Although the claims raised in both actions arise from the same contract, the nature of those claims are fundamentally different and not precluded by *res judicata*). "The thing which the court will consider is whether the ultimate and controlling issues have been decided in a prior proceeding in which *the present parties actually had an opportunity to appear and assert their rights*." Stevenson v. Silverman, 208 A.2d 786, 788 (Pa. 1965). In certain instances, such as zoning, Pennsylvania courts have applied *res judicata* narrowly because, "the need for

flexibility outweighs the risk of repetitive litigation." Callowhill Center Associates v. Zoning Bd. of Adjustment, 2 A.3d 802, 809 (Pa. Cmwlth. 2010).

> In addition, the doctrine of *res judicata* subsumes the doctrine of collateral estoppel, which forecloses re-litigation in a later action of an issue of fact or law that was actually litigated and was necessary to the original judgment. Collateral estoppel applies if: (1) **the issue decided in the prior case is identical to one presented in the later case**; . . . .

Callowhill Center Associates v. Zoning Bd. of Adjustment, 2 A.3d 802, 809 (Pa. Cmwlth. 2010) (emphasis added) (citing City of Pittsburgh v. Zoning Board of Adjustment, 559 A.2d 896 (Pa. 1989)).

Equitable estoppel is similarly, inapplicable. Equitable estoppel may be asserted when a party's actions or representations induce another party to act in reliance upon said actions or representations. It is generally raised in instances in which one party claims that it was induced to believe that a valid contract was in place and/or that a contract was modified. The burden of proof is on the party claiming that it was misled. *See*, Novelty Knitting Mills, Inc. v. Siskind, 457 A.2d 502 (Pa. 1983). Equitable estoppel cannot be raised here because UPMC agreed to Paragraphs IV.C.10 and 11 which remain enforceable. UPMC has not been led to believe otherwise. Moreover, as set forth above, the Commonwealth has initiated multiple actions to enforce the parties' agreement which belie any contention that the Commonwealth was foreclosed from bringing the instant action for modification.

Finally, at least two events at the center of this petition occurred well after the period released in the original decrees. Last Fall, UPMC announced that all out of network patients would be required to pay for the entire expected bill before services were provided and its conduct in Lycoming County occurred in 2017. The Commonwealth is not estopped from seeking to redress UPMC's recent conduct.

UPMC's reliance upon 42 U.S.C. § 1395a (Free choice by patient guaranteed) and 42 U.S.C. § 1396a(a)(23) (deemed unconstitutional and not severable by Texas v. U.S., 340 F.Supp.3d 579 (N.D. Tex. 2018)), is also misplaced. The purpose of the cited provisions is to protect patient's rights and not to support barriers such as prohibitive pricing imposed by institutions, like UPMC.

UPMC's contention that the Commonwealth' Petition is barred as a matter of law is unfounded.

IV. The Commonwealth Has Not Released UPMC From the Claims at Issue

Contrary to UPMC's position that the Commonwealth's claims are barred under the terms of its Consent Decree, paragraph IV.C.5 of the decree releases only those claims the Commonwealth brought or could have brought relating to facts alleged or encompassed within its decree for the period July 1, 2012 to the date of filing, *i.e.,* June 27, 2014. UPMC has not been released from any claims arising prior to or after the dates specified, including UPMC's treatment denials of

Highmark Community Blue patients prior to June 27, 2014. See Commonwealth Exhibit 1.

V. As a Public Charity, UPMC Must Fulfill Its Charitable Mission For The Public As A Whole.

UPMC seeks to make its charitable mission available to some persons and not to others. As a charitable healthcare system, however, UPMC cannot discriminate against patients based upon their source of payment as UPMC contends.[5] As a public charity, UPMC owes a duty to the citizens of Pennsylvania, "[a] corporate charter is a contract with the state which may insure that corporate assets, which originate from public funds, be distributed so as to insure their continued use for charitable purposes." Tauber v. Virginia (Tauber I), 499 S.E.2d 839, 845 (Va. 1998), quoting, Hanshaw v. Day, 120 S.E.2d 460, 464 (Va. 1961). Unionville-Chadds Ford School Dist. V. Chester Cty. Bd. Assessors, 692 A.2d 1136, 1141 (Pa. Cmwlth. 1997); Donohugh's Appeal, 5 W.N.C. 196 (PA. 1878)(An essential feature of public use is that it is not confined to privileged individuals, but is open to the indefinite public).

> **A nonprofit public benefit corporation's reason for existence, however, is not to generate a profit. Thus, a director's duty of loyalty lies in pursuing or ensuring pursuit of the charitable purpose or public benefit which is the mission of the corporation.**

[5] UPMC must comply with the non-discrimination provision based upon a patient's source of payment under the "Patient Bill of Rights" provided for under 28 Pa. Code § 103.22(b)(13) or face disciplinary actions pursuant to 28 Pa. Code § 103.24.

Summers v. Cherokee Children & Family Services, Inc., 112 S.W.3d 486, 504 (Tenn. Ct. App. 2002) (emphasis added) (Attorney General of Tennessee prevailed in action to dissolve two nonprofit public benefit corporations that abandoned their charitable mission).

> Thus, **nonprofit directors and officers must be "principally concerned about the effective performance of the nonprofit's mission."** . . . **[T]hose who control a nonprofit corporation "have a special duty to advance its charitable goals** and protect its assets."

Summers v. Cherokee Children & Family Services, Inc., supra., at 504 (Citing Oberly v. Kirby, 592 A.2d 445, 472-473 (Del. 1991) (emphasis added); Harvey J. Goldschmid, *The Fiduciary Duties of Nonprofit Directors and Officers: Paradoxes, Problems, and Proposed Reforms,* 23 IOWA J. CORP. L. 631, 641 (1998); *Developments in the Law—Nonprofit Corporations,* 105 HARV. L.REV. 1578 (May 1992)).

Access is a key factor in determining whether an entity is discharging its fiduciary duty to the public and continues to qualify as a charity.

> A charity, in the legal sense, may be more fully defined as a gift, . . . for the benefit of an indefinite number of persons. . . . **An institution will be classed as charitable if the dominant purpose of its work is for the public good . . . . But if the dominant purpose of its work is to benefit its members or a limited class of persons it will not be so classed, ...**

Western Mass Lifecare Corp. v. Board of Assessors, 747 N.E.2d 97, 102-103 (Mass. 2001) (emphasis added) (relieving disease and suffering is a charitable function) (Citing Boston Chamber of Commerce v. Assessors of Boston, 54 N.E. 2d 199 (Mass. 1944); New England Legal Foundation v. Boston, 670 N.E. 2d 152 (Mass 1996)); Appeal of Dunwoody Village, 52 A.3d 408 (Pa. Cmwlth. 2012) (Facility was not providing sufficient charitable services test due, in part, to its requirement of financial security as a prerequisite for admission).

> [A] charity is a gift to the general public use which extends to the rich as well as to the poor.

Selfspot v. Butler County Family YMCA, 987 A.2d 206, 214 (Pa. Cmwlth. 2010) (Relevant factors include whether it was run free of profit motive and whether it was available to the community as opposed to dues paying members); See also, City of Pittsburgh v. Bd. of Property Assessment, Appeals and Review, 564 A.2d 1026 (Pa. Cmwlth. 1989); Appeal of Sewickly Valley YMCA, 774 A.2d 1 (Pa. Cmwlth. 2001).

VI. The Attorney General's Authority and Duty to Protect Charitable Assets and Ensure UPMC's Compliance With its Charitable Mission on Behalf of the Commonwealth are Well-Established.

Pennsylvania's case law makes clear the role and authority of the Commonwealth when acting through its attorney general in cases involving public charities and, indeed, all property committed to charitable purposes:

> The beneficiary of charitable trusts is the general public to whom the social and economic advantages of the trusts

> accrue. But because the public is the object of the settlors' benefactions, private parties have insufficient financial interest in charitable trusts to oversee their enforcement. Consequently, *the Commonwealth itself must perform this function if charitable trusts are to be properly supervised. The responsibility for public supervision traditionally has been delegated to the attorney general to be performed as an exercise of his* parens patriae *powers.* . . . These are the ancient powers of guardianship over persons under disability and of protectorship of the public interest which originally were held by the Crown of England as the 'father of the country,' . . . and which as part of the common law devolved upon the states and federal government. . . . *Specifically, these powers permitted the sovereign, wherever necessary, to see to the proper establishment of charities through his officer, the attorney general, and to exercise supervisory jurisdiction over all charitable trusts.*

Pruner Estate, 390 Pa. 529, 531-32, 136 A.2d 107, 109 (1957) (citations and footnotes omitted, emphasis added).

Only several years later our Supreme Court went on to rule that the scope of this oversight authority over charitable trusts encompasses all public charities in general. Commonwealth v. Barnes Foundation, 398 Pa. 458, 159 A.2d 500 (1960). In Barnes, the Attorney General filed a petition for citation against a public charity in control of an art gallery that refused to open to the public. The Attorney General also sought an accounting of the foundation's income and expenditures. Reversing the lower court, the Supreme Court denied the foundation's preliminary objections averring that the petition failed to state a cause of action. The Court held that the

Attorney General, as *parens patriae*, is authorized to inquire into the status, activities and functioning of public charities reasoning that:

> It cannot be questioned that Attorney General Alpern, by virtue of the powers of her office, is authorized to inquire into the status, activities and functioning of public charities. This authority was recognized at common law:
>
> 'It is the duty of the King as *parens patriae* to protect property devoted to charitable uses; and that duty is executed by the officer who represents the Crown for all forensic purposes. On this foundation rests the right of the Attorney General in such cases to obtain by information the interposition of the court of equity.' . . . .
>
> This Court has affirmed the common law in holding that where litigation involves charitable trusts, the Attorney General is obliged to participate as a necessary party. . . . It would be an inadequate form of government which would allow organizations to declare themselves charitable trusts without requiring them to submit to supervision and inspection. Without such supervision and control, trustees of alleged public charities could engage in business for profit. . .

Id., at 467-68, 159 A.2d at 505.

The Court further noted: "But what more formidable cause of action could exist than the assertion that the trustees of a charitable trust are failing to carry out the mandates of the indenture under which they operate? ..." *Id.*

On remand to the Orphan's Court, the president judge granted wide latitude to the Attorney General in authorizing the Commonwealth's request that the foundation be ordered to produce, among other things, an inventory of all the art

along with appraised values, an itemized list of the foundation's total assets, the foundation's annual income since the founder's death, and an itemized account of the foundation's expenditures during the same period. Commonwealth v Barnes Foundation (No. 2), 11 Fiduc. Rep. 29 (O.C. Montg. 1961). In its analysis of the scope of inspection and discovery to be afforded the Commonwealth, the court found "[t]hat such powers, *parens patriae*, are broad and sweeping powers there can be no dispute. For it is of the essence of a public charity that it be subject to the visitorial powers of the sovereign." *Id.* At 31. It added that the "broad investigatory and visitorial powers of the Commonwealth" being asserted "should not be lightly regarded" nor restricted on technical procedural grounds. *Id.*[6] Public charities exist not for particular persons, but for the Commonwealth as a whole. In re Buhl's Estate, 300 Pa. 29, 34, 150 A. 86, 87 (1930). *See also,* Cain's Estate, 16 Pa. D. & C. 3d 50 (O.C. Del. 1980) (attorney general's interest, as *parens patriae,* is in all charitable organizations, not merely charitable trusts).

[6] These common law principles have been codified and carried over into Section 204(c) of the Commonwealth Attorneys Act, 71 P.S. §732-204(c), which states in pertinent part that, "[t]he Attorney General shall represent the Commonwealth ... in any action brought by or against the Commonwealth ... and may intervene in any other action, including those involving [charities]."

VII. UPMC's Failure to Honor Its Stated Charitable Purposes and Violations of the Nonprofit Corporations Law

UPMC is a nonprofit corporation whose Amended and Restated Articles of Incorporation set forth the organization's relevant stated charitable purposes as follows:

> [T]o engage in the development of human and physical resources and organizations appropriate to support the advancement of programs in health care, the training of professions in the health care fields, and medical research, such activities occurring in the regional, national and international communities. **The Corporation is organized and will be operated exclusively for charitable, educational and scientific purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code of 1986**, as amended (the "Code") by operating for the benefit of, to perform the functions of and to carry out the purposes of the University of Pittsburgh of the Commonwealth System of Higher Education ("University of Pittsburgh"), UPMC Presbyterian, and other hospitals, health care organizations and health care systems which are (1) described in Sections 501(c)(3) and 509(a)(1)(2) or (3); (2) are affiliated with the Corporation, University of Pittsburgh and UPMC Presbyterian **in developing a high quality, cost effective and accessible health care system in advancing medical education and research;** and (3) which will have the Corporation serving as their sole member or shareholder. Further, **the Corporation provides governance and supervision to a system which consists of a number of subsidiary corporations,[7] including, among others, both tertiary and community hospitals. The Corporation shall guide, direct, develop and support such activities as may be related to the aforedescribed purposes,** as well to the construction, purchase, ownership, maintenance, operation and leasing of one or more hospitals

[7] UPMC contends that its corporate structure requires that the Attorney General must name and attribute to each UPMC subsidiary their respective actions that warrant being bound by a modified consent decree. UPMC's memorandum in support at 29. As UPMC's Articles of Incorporation make clear, UPMC provides governance and supervision to all its subsidiaries.

> and related facilities. Solely for the above purposes, and without otherwise limiting its power, the Corporation is empowered to exercise all rights and powers conferred by the laws of the Commonwealth of Pennsylvania upon not-for-profit corporations. **The Corporation does not contemplate pecuniary gain for profit, incidental or otherwise** *(emphasis added)*.[8]

As alleged, UPMC serves as the sole controlling member of all of its constituent domestic nonprofit, charitable hospitals. Through its "reserved powers," UPMC controls all essential aspects of its subsidiaries, including, but not limited to, their budgets, finances, contractual terms and treatment policies. As such, UPMC owes fiduciary duties to each of its subsidiaries to facilitate the public's access to their services, not deny or make them cost prohibitive.[9]

The Commonwealth's Petition alleges, however, that UPMC's Board of Directors and Executive Management are violating UPMC's stated charitable

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[8] UPMC and all of its pertinent hospitals are registered as institutions of purely public charity under the Institutions of Purely Public Charity Act, 10 P.S. §§ 371, *et seq.*

[9] Corporate articles are to be interpreted according to general rules governing contracts. In re Estate of Hall, 731 A.2d 617 (Pa. Super. 1999); Appeal of Wagner Free Institute, 25 WNC 437 (Pa. 1890); Tauber v. Commonwealth of Virginia (Tauber I), supra. at 845 ; Hanshaw v. Day, supra. at 464; 'Unigroup v. O'Rourke, 980 F.2d 1217 (8th Cir. 1992); Oberbillig v. West Grand, 807 N.W. 2d 143 (Iowa. 2011); Riccobono v. Pierce, 966 P.2d 327 (Wash. App. 1998).

purposes and the Nonprofit Corporations Law[10] in a variety of respects including, but not limited to:

a. refusing to contract with Highmark and other insurers, subjecting their subscribers to UPMC's higher Out-of-Network charges and increasing the overall costs of health care;

b. closing the Susquehanna Medical Group of physicians to patients whose employer lacked a contract with the UPMC Susquehanna hospital;

c. engaging in provider-based billing that increases reimbursements without any added value to patients while increasing the overall costs of health care;

d. prohibiting health insurers from tiering UPMC's services among the insurers' other In-Network health care providers which increases the overall costs of health care;

e. insisting upon "most favored nation" terms within provider contracts that prohibit insurers from contracting with other health care providers at rates less costly than UPMC's which increases the overall costs of health care;

f. requiring onerous lump-sum payments from Out-of-Network patients for all of their expected treatment costs before any medical services are provided, limiting access, increasing the overall costs of health care, and resulting in UPMC's unjust enrichment by receiving reimbursements in excess of the reasonable value of UPMC's services;

g. balance billing patients even after insurance payments have exceeded UPMC's actual costs and the reasonable value of the services UPMC has provided;

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[10] This memorandum focuses on UPMC's failure to comply with its stated charitable purposes, but its actions also implicate violations of the Solicitation of Funds for Charitable Purposes Act and the Unfair Trade Practices and Consumer Protection Law not discussed here.

h. expending hundreds of millions of dollars building superfluous hospitals to compete against other charitable healthcare providers without regard to the larger social costs of its projects which increases the overall costs of health care;

i. subordinating the charitable missions of the system's constituent hospitals to the expansion of the UPMC system;

j. pursuing "a new economic future for western Pennsylvania" at the expense of its primary obligation to provide a high quality, cost effective and accessible health care system;

Pennsylvania's Nonprofit Corporation Law imposes fiduciary duties on UPMC's directors, requiring that they perform their duties in good faith as they reasonably believe to be in the best interests of the corporation:

> (a) Directors.—A director of a nonprofit corporation shall stand in a fiduciary relation to the corporation and shall perform his duties as a director, including his duties as a member of any committee of the board upon which he may serve, in good faith, in a manner he reasonably believes to be in the best interests of the corporation and with such care, including reasonable inquiry, skill and diligence, as a person of ordinary prudence would use under similar circumstances. . . .

15 Pa.C.S. § 5712.

In The Health Alliance of Greater Cincinnati (Alliance) v. The Christ Hospital (Hospital), et al., 2008 WL 4394738 (Ohio App. 1 Dist. 2008), the court found that the Alliance, a multi-hospital management system, owed fiduciary duties to the Hospital under the parties' joint operating agreement (JOA). And among those duties was an obligation to keep operating The Christ Hospital ("TCH"). "The record is replete with evidence," the court said, "that the Alliance

breached its fiduciary to TCH" by constraining its access to operating capital and potentially preventing it from serving patients. Health All. of Greater Cincinnati v. Christ Hosp., Ohio-4981, ¶ 23. *See also,* Lifespan Corp. v. New England Medical Center, Inc., et al., 731 F.Supp.2d 232 (Dist. R. I. 2010) v*ac, in part, on other grounds by*, Lifespan v. New England Medical Center, 2010 WL 3718952 (Dist. R.I. 2010) (health care network owed fiduciary duties to hospital during affiliation which had reposed faith, confidence, and trust in network's judgment and advice).

Accordingly, UPMC's refusal to contract with Highmark is directly contrary to UPMC's stated charitable purposes and supports a finding that UPMC's Board of Directors and Executive Management have breached their fiduciary duties of loyalty/obedience[11] to UPMC's charitable mission and those of its subsidiary hospitals:

> It is axiomatic that the Board of Directors is charged with the duty to ensure that the mission of the charitable corporation is carried out. . . . "[U]nlike business corporations, whose ultimate objective is to make money, nonprofit corporations are defined by their specific objectives: perpetuation of particular activities are central to the raison d'etre of the organization.

In re Manhattan Eye, Ear & Throat Hosp. (MEETH), 186 Misc.2d 126, 152, 715 N.Y.S.2d 575, 593 (1999) (board could not take advantage of market

[11] The Duty of Obedience is often reasoned to be a subset of the Duty of Loyalty and used interchangeably in many case opinions.

opportunity to maximize assets at the expense of the organization's chartered purpose without breaching its fiduciary duties). *See also*, Commonwealth v. Barnes Foundation, 398 Pa. 458, 159 A.2d 500 (1960) (gallery could not be considered public as the donor's indenture provided **if** the public were admitted only upon the whim of the trustees); Unionville-Chadds Ford School Dist. v. Chester County Bd. of Assessment Appeals, 552 Pa. 212; 714 A.2d 397 (1998) ("it is fully consistent with the fundamental character of a purely public charity to benefit the general public").

> "In significant respects, the beneficiaries of the [hospital], namely its patients and community, stand in a position similar to the minority shareholders in a non-wholly owned, for-profit subsidiary," in that they are vulnerable to the power of the controlling entity." . . . "it is appropriate to apply a fiduciary standard" to a healthcare system acting as the sole member of a non-profit hospital in order "to constrain the [system's] powers and protect the interests of subsidiaries' beneficiaries," just as courts . . . have done with respect to controlling shareholders in for-profit corporations.

Lifespan Corp. v. New England Medical Center, Inc., et al., *supra.*, 731 F.Supp.2d at 240 (citations omitted). The consent decrees focus on the vulnerability of consumers when they need health care, especially the high level, lifesaving health care that UPMC and AHN provide.

Any action taken "against" the corporate purposes of UPMC may be deemed an *ultra vires* act, *i.e.,* an act taken outside the permissible scope of the board's

authority and should render that action void. Arbour v. Pittsburg Produce Trade Assoc., 44 Pa. Super. 240, 249 (Pa. Super., 1910) (Corporations cannot go beyond the powers granted to them and must exercise those powers in a reasonable manner).

Here, UPMC operates a substantial number of the region's emergency rooms which: a) serve patients in need of emergency care; and b) are a significant source of hospital admissions. UPMC can count upon a steady flow of Highmark and other out-of-network patients who will all be subject to paying UPMC's higher out-of-network rates.[12] In short, UPMC's refusal to contract with Highmark can be expected to increase UPMC's revenue stream as well as the region's overall health care costs regardless of how the market reacts to the expiration of its Highmark contract—UPMC simply cannot lose. To avoid those high costs, UPMC advises consumers to choose its health plan or another health plan that has a contract with UPMC. See ¶37, Petition to Modify. Nothing in UPMC's Articles of Incorporation authorizes UPMC's interference with a consumer's choice or a consumer's employer's choice of a health plan.

Accordingly, there is little doubt that UPMC has embarked on a business plan of pursuing profits over the faithful pursuit of its charitable mission and has clearly

[12] Health Plan's generally are obligated to pay for emergency care even if it is rendered at out-of-network hospitals. How much a consumer pays will depend on the consumer's plan design. A consumer who has a high deductible plan with a $5,000 deductible will pay all of a $4,000 bill, for example.

deviated from its charitable mission. While it dresses up this deviation with claims of having to compete, UPMC's reasons are simply a means to extract higher reimbursements from Pennsylvania consumers and employers, placing its pursuit of profits over its charitable mission.

VIII. The Commonwealth's Proposed Modified Consent Decree Serves the Public Interest by Prohibiting UPMC's Unjust Enrichment Through its Practice of Billing Out-of-Network Patients Based Upon its Published/Chargemaster[13] Rates Rather than the Reasonable Value of its Services.

UPMC is incorporated exclusively for charitable purposes without contemplation of pecuniary gain for profit, incidental or otherwise. *See* Commonwealth's Petition, Exhibit 2. As also alleged in the Commonwealth's Petition, UPMC has announced that all Out-of-Network patients must pay **all** of UPMC's estimated charges **Up-Front and In-Full** before it will provide them with any medical care. UPMC engages in this practice despite the fact that its Out-of-Network charges significantly exceed both its actual costs as well as the discounted reimbursements it willingly accepts as payment In-Full from commercial insurance companies with which it has negotiated rates.

[13] The Published/Chargemaster rate is the "list price" that a hospital unilaterally sets for the specific services it provides. For Out-of-Network Medicare Advantage patients, UPMC is limited to charging them the Medicare rate for their services, which for many medical procedures still amounts to thousands of dollars.

Under the circumstances described above, UPMC's practice results in its pecuniary gain and violates its stated charitable purposes; it violates Section 5545 of the Nonprofit Corporation Law, 15 Pa. C.S. § 5545, which limits UPMC to an "incidental profit" for its services; and it violates the governing legal principle of **unjust enrichment**. Unjust enrichment is an equitable doctrine that limits UPMC to receiving the reasonable value for its services, with reasonable value being determined by what people ordinarily pay for them. Temple Univ. Hosp., Inc., v. Healthcare Mgt. Alt., Inc., 832 A.2d 501 (Pa. Super. 2003) (where there is no express agreement to pay, the law implies a promise to pay a reasonable fee for a health provider's services, determined by what the healthcare provider actually receives for those services). *See also*, Eagle v. Snyder, 604 A.2d 253 (Pa. Super. 1992).

The modifications proposed by the Commonwealth will adequately address the above circumstances by promoting negotiated contracts with any Health Plan seeking a services contract and limiting Out-of-Network charges to UPMC's Average In-Network Rates. Moreover, far from being radical and unprecedented as UPMC suggests, the Modified Consent Decree's provisions coincide with the holding of the Temple case, *supra.* As such, the proposed modifications will further the public's interest by promoting affordable access to UPMC's healthcare services.

IX. The Commonwealth's Arguments in FTC v. Penn State Hershey Med. Ctr., 838 F.3d 327 (3d Cir. 2016)(No. 16-2365), Do Not Conflict with the Terms of the Proposed Modified Consent Decree.

UPMC's attempt to draw a conflict between the Commonwealth's opposition to the proposed merger between the Penn State Hershey Medical Center and the Pinnacle Healthcare System ignores the material distinctions between these two cases. The proposed Penn State/Pinnacle merger was challenged on antitrust grounds to prevent the reduction in competition between two health systems for hospital services and preserve a competitive marketplace where the public would continue to have access to high quality affordable health care services. FTC v. Penn State Hershey Med. Ctr., 838 F.3d 327, 334 (3d Cir. 2016). It prevented the creation of a merged entity with a 76% share of the healthcare provider market that could have used its acquired market power to refuse to contract with health plans denying the public access to its health care services or to contract only on terms advantageous to the merged entity resulting in higher prices for the public's access to its services. *Id.*, at 345-346.

This case, however, while based on charitable trust grounds, also seeks to protect the public's access to high quality affordable health care services. In this case, UPMC already possesses a dominant share of the provider market. Despite its status as a charitable institution committed to benefitting the public, UPMC is using its market power to deny the public access to the very health care services the public

funded. As a charitable institution, UPMC is required to provide public benefit, not a public detriment. The remedies the Commonwealth seeks here are behavioral remedies intended to address UPMC's misconduct as a charitable institution. They are similar to the after-the-fact behavioral remedies sought in post-merger challenges to address market power concerns. *See,* In re Evanston Northwestern Healthcare Corp., Dkt. No. 9315 Final Order (FTC April 29, 2008), attached as Exhibit 3.

Indeed, had the Penn State/Pinnacle merger been approved and the merged entity engaged in conduct similar to UPMC, the Commonwealth could have soon been forced to seek to impose substantially the same remedies pursued here.

X. UPMC's For-Profit Entities Must Be Operated to Further UPMC's Charitable Mission.

Notwithstanding its admission that UPMC is, "the nonprofit parent corporation of over a hundred entities – some for-profit, some nonprofit," UPMC asserts that "there is no conceivable basis to impose relief against for-profit companies." *See, Dfs Brief at 29-30* (emphasis added). Said argument ignores that all of the entities fall within the umbrella of the charitable mission of the nonprofit parent.

Section 5545 of the Nonprofit Corporations Law requires a nonprofit corporation apply to all of its incidental profits to its lawful mission as set forth in its Articles of Incorporation. *See,* 15 Pa.C.S. § 5545; Roxborough, *supra.*; UPMC, *supra.*

A charity can create a for-profit entity to enhance its charitable mission. "But, the diversion of surplus monies by an organization into **other entities** that are not operated free of the profit motive, **is** evidence of a profit motive." Community Gen Osteopathic Hosp v. Dauphin Cty., 706 A.2d 383, 390-391 (Cmwlth. 1998) (emphasis in original) (Investment in related for-profit family medical practices that were part of the hospital and "operated under its strict open admission policies" "which requires treatment of individuals without regard to their ability to pay" did not disqualify hospital because they furthered the charity's mission).

A charity may invest in for-profit subsidiaries but the purpose must be to further the charity's mission. See, Saint Margaret Seneca Place v. Bd. of Property Assessment, Appeals and Review, County of Allegheny, 640 A.2d 380 (Pa. 1994) (A charity may have surplus revenue so long as it is used to further the charitable mission and is not "private profit"). The determining factor is whether investment in for-profits is in furtherance of "the institution's charitable purpose." Wilson Area School Dist. v. Easton Hosp., 747 A.2d 877, 881 (Pa. 2000).

In Pinnacle Health Hosp. v. Dauphin Cty., 708 A.2d 1284, 1295 (Pa. Cmwlth. 1998), *rev'd on other grounds by* Wilson, *supra.*, the Court determined that non-compete covenants in physician contracts could have the effect of preventing otherwise qualified physicians from providing care to those in need which combined with other factors was evidence of a profit motive. See, Pinnacle, supra., at 1295-

1296; *See also*, Union-Chadds Ford School Dist. v. Chester Cty. Bd. Assessment, 692 A.2d 1136 (Pa. Cmwlth. 1997) (Competition with commercial businesses is evidence of a profit motive).

In this case, UPMC is closing its doors to certain patients through prohibitive pricing and demands for upfront payment. All in order to steer the public toward its insurance plan. All assets of UPMC's nonprofit and for-profit subsidiaries, are held in trust for the benefit of the public at large and not to be used otherwise. In Re Roxborough Memorial Hosp., 17 Fid. Rep.2d 412, 422-423 (O.C. Phila. 1997). *See also,* In re Stroudsburg Real Prop., 23 Fiduc. Rep. 2d 258, 261 (O.C. Monroe 2003) ("Because Christian Memorial Mission was charitable, the assets involved are charitable.").

Failure to apply funds to the corporation's lawful purpose constitutes "corporate action" within the meaning of the statute. *See* Ciamaichelo v. Independence Blue Cross, 928 A.2d 407, 410-411 (Pa. Cmwlth. 2007) (The court may hear and determine the validity of the corporate action.) 15 Pa. C.S. § 5508, 5793(a), *See also* 10 P.S. §162.12. In re Coleman's Estate, 317 A.2d 631, 634 (Pa. 1974) (Trustees of a charitable trust are fiduciaries and, as such, are officers of the Orphans' Court, subject to its exclusive supervision and control); 20 Pa. C.S.§ 7701, *et seq.*

By refusing to contract, closing its doors to out-of-network patients through prohibitive pricing and demanding upfront payment, UPMC has breached its fiduciary duties to the public. Even if this conduct is accomplished through UPMC's many non-profit and for-profit subsidiaries, which UPMC is unabashedly clear, it controls, the whole of UPMC's assets are within the jurisdiction of the court and subject to its orders. Respondents' reliance upon Zampogna v. Law Enf' Health Benefits, Inc., 151 A.3d 1003 (Pa. 2016), is misplaced. In that case, the Court held that a nonprofit corporation's action is authorized when:

> 1) the action is not prohibited by the NCL [Nonprofit Corporations Law] or the corporation's articles; and
>
> 2) the action is not clearly unrelated to the corporation's stated purpose.

Id., at 1013 (citing 15 Pa. C.S. 5502(a)(18)). In this case, UPMC's actions in acting contrary to its charitable purpose are prohibited by the Nonprofit Corporations Law and the corporation's articles. Moreover, its actions in trying to grow its revenue at the expense of its charitable obligations to the public are unrelated to, and in contravention of, its stated charitable purposes. The Attorney General, as *parens patriae*, is the only party with the authority and the duty to protect the public's interest in the charitable assets at stake.

XI. UPMC is Subject to the Unfair Trade Practices and Consumer Protection Law

The Attorney General has alleged that UPMC has engaged in trade and commerce in Pennsylvania and that it has done so using unfair and deceptive acts and practices within the meaning of the Unfair Trade Practice and Consumer Protection Law ("UTPCPL"), 73 P.S. § 201-1 *et seq*. The UTPCPL authorizes the Attorney General to seek temporary and permanent injunctions to block unlawful acts. The Attorney General has taken such action here.

UPMC is not exempt from the UTPCPL. UPMC contends that the law only applies to sellers and does not apply to commercial (*i.e.*, business to business) transactions, such as the contractual relationship between a hospital and health plan and, in any event, cannot be applied to conduct involving insurance. UPMC is wrong on all counts.

UPMC engages in trade and commerce as defined by the UTPCPL. "Trade" and "commerce" means "the **advertising**, ... **sale** or distribution of any **services** and any **property**, ... **intangible**, personal or mixed, and ... or **thing of value wherever situate**, and includes **any trade or commerce directly or indirectly affecting the people of this Commonwealth**. 73 P.S. § 201-2 (3) (emphasis added). Respondent UPMC believes trade and commerce consists of just "four types of commercial activities." Respondent UPMC's Answer, p. 44. UPMC would stop the definition

of trade and commerce at "things of value wherever situate" and ignore the last independent clause of the definition.

The Pennsylvania Supreme Court has held the second part of the definition of "trade" and "commerce" is not limited by the four listed types in the first part of the definition. "Instead, it is appended to the end of the definition and prefaced by "and includes," thus indicating an inclusive and broader view of "trade" and "commerce" than expressed by the antecedent language. *See*, Danganan v. Guardian Prot. Servs., 179 A.3d 9, 16 (Pa. 2018).

The Commonwealth has sufficiently pled "trade" and "commerce" under both parts of that definition. Petition to Modify, ¶ 112. "Trade" or "commerce" "includes **any trade or commerce directly or indirectly affecting the people of this Commonwealth**." 73 P.S. § 201-2 (3) (emphasis added). Broadly, "trade" includes the business of buying and selling for money. *See*, May v. Sloan, 101 U.S. 231, 237 (1879); Pavlovich v. Nat'l City Bank, 342 F.Supp.2d 718, 725 (N.D. Ohio 2004), *aff'd,* 435 F.3d 560 (6th Cir. 2006). Broadly, "commerce" includes the business of buying and selling of commodities for money. *See*, United States v. Besser Mfg. Co., 96 F.Supp. 304, 307 (E.D. Mich. 1951), *aff'd,* 343 U.S. 444 (1952). "The words 'trade' and 'commerce,' when used in juxtaposition impart to each other enlarged signification, so as to include practically every business occupation carried

on for subsistence or profit and into which the elements of bargain and sale, barter, exchange or traffic, enter." Black's Law Dictionary, Sixth Edition.

Respondent conveniently ignores the Pennsylvania Supreme Court's statutory construction of the second independent clause. This Court should reject Respondent's interpretation.

Looking to other jurisdictions as did the Pennsylvania Supreme Court in Danganan, Washington's "Consumer Protection Act applies to 'any' trade or commerce affecting the people of the state of Washington, directly or indirectly. RCW 19.86.010(2). It shows 'a carefully drafted attempt to bring within its reaches *every* person who conducts unfair or deceptive acts or practices in *any* trade or commerce.' Short v. Demopolis, 103 Wash.2d at 61, 691 P.2d 163." Stephens v. Omni Ins. Co., 138 Wash.App. 151, 173, 159 P.3d 10, 22 (2007), *aff'd sub nom;* Panag v. Farmers Ins. Co. of Washington, 166 Wash.2d 27, 204 P.3d 885 (2009) (emphasis retained). Under the New Hampshire unfair trade practices law, "while the legislature exempted certain types of transactions from the provisions of the chapter, it did not exempt private causes of action brought by sellers against deceptive buyers. *See* RSA 358–A:3 (1995 & Supp. 2000)." Milford Lumber Co., Inc. v. RCB Realty, Inc., 780 A.2d 1259, 1262 (N.H. 2001). "Moreover, had the legislature intended to limit the protections of the CPA to the definition of

'consumer' as espoused by the defendant, it could have expressly done so as it did" in another law. George v. Al Hoyt & Sons, Inc., 27 A.3d 697, 704 (N.H. 2011).

Under Connecticut jurisprudence, "[i]f the legislature had intended to restrict private actions under CUTPA only to consumers or to those parties engaged in a consumer relationship, it could have done so by limiting the scope of CUTPA causes of action or the definition of 'person,' such as by limiting the latter term to 'any party to a consumer relationship.' 'The General Assembly has not seen fit to limit expressly the statute's coverage to instances involving consumer injury, and we decline to insert that limitation.' *See*, Larsen Chelsey Realty Co. v. Larsen, 656 A.2d 1009, 1020 (Conn. 1995) (citing McLaughlin Ford, Inc. v. Ford Motor Co., *supra.*, 473 A.2d 1185)." Likewise, under the general purpose public enforcement provisions set forth in Sections 3, 4, 4.1 and 8 of the UTPCPL, there is no express exemption for unfair or deceptive buyers in the definition of "person" or express requirement of ultimate consumer transaction nexus in the definition of "trade" and "commerce."

In this case, the Commonwealth's Petition to Modify is replete with allegations that the Respondent engaged in "trade" or "commerce" under both clauses comprising the definition of "trade" or "commerce." *See, e.g., Petition to Modify,* ¶¶ 31, 34, 37, 38, 52-55. The Commonwealth has alleged that UPMC:

> has presented conflicting messages to the public ... that it will treat all patients regardless of their source of payment, but it has

> refused treatment to its patients with Highmark insurance and will no longer contract with Highmark for any of its commercial or Medicare Advantage insurance products after June 30, 2019 which will significantly increase the costs of care for all of Highmark's subscribers.

See, *Petition to Modify*, ¶ 117. Representations made by a health care provider, unrelated to the results of the delivery of medical services, is actionable under the UTPCPL. Com. by Shapiro v. Golden Gate Nat'l Senior Care LLC, 194 A.3d 1010, 1023-1028 (Pa. 2018)

Under the plain language of the UTPCPL, a transaction involving the sale of health care services comes within the laundry list of transactions in the first clause and no "trade" or "commerce" directly or indirectly affects the people of the Commonwealth more than the purchase of health care services. This Court should reject the Respondent's invitation to narrow the scope and protections of the UTPCPL.

UPMC argues that the UTPCPL only applies to sellers, which is an unusual argument since UPMC provides health care services in exchange for money. In short, it sells health care services. Even if UPMC is not a seller, the Pennsylvania Supreme Court directs that the UTPCPL is to be liberally construed to effectuate its purpose. *See*, Com., by Creamer v. Monumental Properties, Inc., 329 A.2d 812, 817

(Pa. 1974). The UTPCPL[14] "protects both the unsuspecting and innocent consumer and the legitimate businessman, both of whom are subject to fraudulent schemes by the unscrupulous profiteer." 40 Pa. Legis. J. – House 1231 (July 8, 1968) (statement of Rep. Beren) (prior to final vote by the House before concurrence with the Senate) (Rep. Beren was one of three members from the House on the Committee of Conference with the Senate on the UTPCPL).[15] Unlike a private plaintiff whose action is limited to violations connected to the purchase of only goods or services for limited purposes, the Office of Attorney General is empowered by statute to ensure a fair marketplace.

The UTPCPL, as enforced by the Attorney General, applies to business and commercial transactions:

> [T]o limit the application of [UDAP] solely to a consumer, the one who ultimately uses the product, would be to say that this is the only party you cannot defraud.... This cannot be so. [UDAP], by its very title, signifies that it is not solely a Consumer Law. Sec. 201–1 states "This act shall be known and may be cited as the 'Unfair Trade PRACTICES and Consumer Protection Law' " (emphasis added).
>
> That [UDAP] is not limited solely to the protection of the consumer is inherent in Section 201–3. "Unfair methods of conduct of any trade or commerce are hereby declared unlawful."

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[14] Act of December 17, 1968, P.L. 1224, *as amended,* 73 P.S. §§ 201–1 —201–9.3 ("Unfair Trade Practices and Consumer Protection Law" ("UTPCPL" or the "Law").

[15] *See* Exhibit 4.

In re Fricker, 115 B.R. 809, 818 (Bankr. E.D. Pa. 1990) (citing Com. v. Koscot Interplanetary, Inc., 54 Erie 79, 93 (Erie Co.C.P.1971)). "The Unfair Trade Practices and Consumer Protection Law prohibits unfair methods of competition and unfair or deceptive acts or practices and is not limited to the protection of the ultimate consumer only." Com. v. Koscot Interplanetary, Inc., 54 Erie 79, 99 (Erie Co.C.P.1971).[16] In a related action, this Court held a pyramid scheme involving the sale of business franchises constituted a violation of the UTPCPL. See, Com. v. Tolleson, 321 A.2d 664, 692–93 (Pa. Cmwlth. 1974). The broad scope of Section 3 of the UTPCPL is "flexible and all-inclusive[.]" Com., by Creamer v. Monumental Properties, Inc., 459 Pa. 450, 466, 329 A.2d 812, 820 (1974). The Attorney General is not required to allege an offender under the UTPCPL to be a seller.

The Law permits the Attorney General to bring a public enforcement action against any "person" for violations of the statute. 73 P.S. § 201-4. "Any person" means every person as the term is defined in 73 P.S. § 201-2 (2). To accept Respondent's argument that a person must be a seller to be liable under the UTPCPL, this Court would have to engraft a restriction that the Legislature did not see fit to include, which is not permitted. *See*, Danganan v. Guardian Prot. Servs., 179 A.3d

[16] Com. v. Koscot Interplanetary, Inc., 54 Erie 79 (Erie Co.C.P.1971) is attached as Exhibit 5.

9, 17 (Pa. 2018); Com. v. Tarbert, 535 A.2d 1035, 1044 (Pa. 1987); and Com. v. Rieck Inv. Corp., 213 A.2d 277, 282 (Pa. 1965).

Moreover, UPMC is a "person" within the meaning of the UTPCPL. The Law defines "person" as "natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations, and any other legal entities." 73 P.S. § 201-2 (2). UPMC in the underlying action is a corporation which unambiguously establishes UPMC as a "person" within the meaning of 73 P.S. § 201-2(2).

Actions brought by individuals under the UTPCPL are limited to a "person" who has "purchase[d] or lease[d] goods or services primarily for personal, family or household purposes." 73 P.S. § 201-9.2. UPMC mistakenly seeks to conflate the broad scope of the public enforcement sections of the UTPCPL with the limited scope of the private action. This distinction, between sections 201-4 and 201-9.2 cannot be ignored or interpreted in a way to eliminate the distinction. *See,* Golden Gate, 194 A.3d at 1028. The Commonwealth brought this underlying action under 73 P.S. § 201-4, not 73 P.S. § 201-9.2.

This Court has previously recognized the distinction between actions brought by the Attorney General under Section 4 and private persons under Section 9.2. A private person must be a buyer to have standing to bring an action. *See,* Bowers v. T-Netix, 837 A.2d 608, 613 (Pa. Cmwlth. 2003). This Court has further rejected the argument that the Attorney General must allege a buyer-seller

relationship. Instead, the Attorney General may proceed when it has reason to believe any person is violating or has violated the Law. See, Com. v. Percudani, 844 A.2d 35, 48 (Pa. Cmwlth. 2004), *as amended* (Apr. 7, 2004), *opinion amended on reconsideration,* 851 A.2d 987 (Pa. Cmwlth. 2004).

UPMC lastly argues that its conduct in engaging in health care insurance transactions as a buyer or a seller does not come within the ambit of the UTPCPL. Under the second enumerated definition of "trade" and "commerce" under the UTPCPL, the Legislature did not intend to exclude any class or classes of transactions except as otherwise provided in Section 3 of the UTPCPL. *See*, Com. by Creamer v. Monumental Properties, Inc., 329 A.2d 812, 815 n.5 (Pa. 1974). This intent was recently re-affirmed in Danganan. "Moreover, there is nothing in any of the language of the Consumer Protection Law that insurance companies are not covered by its provisions, and the General Assembly could have included such language if it desired[.]" Com. ex rel. Fisher v. Allstate Ins. Co., 729 A.2d 135, 140 (Pa. Cmwlth. 1999).

This Court has held that the Attorney General's enforcement of the UTPCPL regarding unfair and deceptive practices of insurance companies is not preempted by the powers vested in the Insurance Commissioner. Com. ex rel. Fisher v. Allstate Ins. Co., 729 A.2d 135, 139 (Pa. Cmwlth. 1999). Indeed, Anderson v. Nationwide, 187 F. Supp.2d 447, 461 (W.D. Pa. 2002), does not stand for the proposition that

insurance contracts[17] are exempt from the UTPCPL. Rather, in that case, the court determined that the conduct was a contract dispute. Here, UPMC widely advertises it services to consumers and promotes itself as a charitable institution. UPMC deals directly with consumers when it engages in its admitted practices such as demanding upfront payment from consumers in exchange for goods and services.

Finally, as the above arguments make clear, the Commonwealth's position remains that its citizens have the right to affordable health care. Its position has not changed.

CONCLUSION

For all the reasons previously set forth, ***UPMC's Motion to Dismiss the Petition to Modify Consent Decrees or Preliminarily Objections in the Nature of a Demurrer*** should be **DENIED.**

[17] A favorite misstatement of UPMC is that the Attorney General seeks to limit or regulate insurance contracts. To the contrary, insurers are free to establish any network of providers they want. The modified consent decree seeks to prevent UPMC from refusing to contract with those insurers that want to contract and pay UPMC for providing services to those insurers' patients.

Respectfully submitted,
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March 11, 2019

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provision 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 from non-confidential information.

/s/ James A. Donahue, III
James A. Donahue, III
Executive Deputy Attorney General
Public Protection Division

March 11, 2019

CERTIFICATE OF SERVICE

I hereby certify that I am this 11th day of March, 2019, serving a true and correct copy of the foregoing ***Commonwealth's Memorandum in Opposition to Respondent UPMC's Motion to Dismiss Petition to Modify Consent Decrees*** on all parties via electronic mail as indicated below:

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