IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 334 M.D. 2014

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.

UPMC, A Nonprofit Corp.; UPE, a/k/a Highmark Health, A Nonprofit Corp. and Highmark, Inc., A Nonprofit Corp.,

Respondents.

HIGHMARK'S RESPONSE IN OPPOSITION TO RESPONDENT UPMC'S ANSWER, IN THE NATURE OF A MOTION TO DISMISS OR PRELIMINARY OBJECTIONS TO PETITION TO MODIFY CONSENT DECREES

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INTRODUCTION

The Attorney General of Pennsylvania (the "Attorney General") has broad and continuing supervisory authority over Pennsylvania charitable organizations to ensure that each charity operates in accord with its charitable mission for the benefit of the community. He is authorized to address any transgression by a charitable organization and take affirmative steps to require charitable organizations to adhere to their charitable purposes. This case presents a paradigmatic example of circumstances warranting the exercise of the Attorney General's continuing authority to ensure that charitable healthcare organizations provide healthcare in a manner that benefits the community.

Respondents Highmark Health and Highmark, Inc. (collectively "Highmark") support the Attorney General's position that charitable healthcare organizations must provide reasonable, affordable access to the community. For that reason, Highmark—itself a charitable institution—has agreed to the terms of the Attorney General's proposed modified consent decree provided this Court imposes similar requirements on UPMC. UPMC, on the other hand, does not, and does not intend to, operate for the benefit of the community that has supported it through tax benefits and charitable contributions. And UPMC even goes so far as to ask this Court to summarily dismiss the Attorney General's Petition without even considering its merits. This Court should not.

There can be no doubt that UPMC is subject to the Attorney General's broad oversight authority. UPMC is a charitable healthcare system, as evidenced in the Articles of Incorporation of its parent entity. Most of its affiliated health care providers are charitable organizations exempt from federal and state income, sales, and property taxes. Even UPMC's for-profit enterprises are owned and controlled ultimately by charitable organizations. UPMC touts the far-reaching scope of its healthcare system on its website, stating: "UPMC operates 40 academic, community, and specialty hospitals, 700 doctors' offices and outpatient sites, employs 4,800 physicians, and offers an array of rehabilitation, retirement, and long-term care facilities."

UPMC was formed as a charity, and has used the public's money—including charitable contributions, tax-exempt debt, foregone taxes and the additional revenue and gain generated from the use of those charitable assets—as equity to build its extensive system. If UPMC wanted to operate for the benefit of its own commercial interests rather than the benefit of the community, it should have formed its system as a for-profit, commercial enterprise with private equity and without the benefit of public support.

As this Court has explained, "the polestar of a charitable hospital is providing service to persons in need of medical care, and not protecting its market share." *Pinnacle Health Hosps. v. Dauphin Cnty. Bd. of Assessment Appeals,* 708 A.2d

1284, 1295 (Pa. Commw. 1998), *reversed on other grounds,* 713 A.2d 1142 (Pa. 1998). Along those same lines, the Third Circuit has held that an organization that limits access to healthcare in a manner similar to UPMC "is primarily benefiting itself" as opposed to the community. *Geisinger Health Plan v. Comm'r of Internal Revenue*, 985 F.2d 1210, 1219 (3d Cir. 1993).

Yet, UPMC effectively denies a significant number of individuals in the community access to its facilities simply because they have Highmark insurance. UPMC is dead set on acting in a way that is contrary to its obligations as a charity—and, as the Consent Decree's termination date approaches—has deployed increasingly aggressive tactics and has strayed farther and farther from its charitable mission. Indeed, UPMC has stated—publicly and insistently—that it will not do business with another charity—Highmark and its affiliates—for competitive and commercial reasons. UPMC's charitable status precludes exclusionary practices like this.

The consequences of UPMC's actions cannot be understated. If the last five years have shown anything, it is that healthcare is personal and complicated, and, as such, the community benefits when charitable providers are available to all in the community at reasonable prices regardless of the payor. It now is clear that UPMC's effective denial of access to a large segment of the community—as well as its aggressive actions, such as requiring prepayments of Medicare Advantage recipients

and charging its astronomical self-determined charges for life-saving medical care in emergency rooms for Highmark insureds—are inimical to the community's interests.

When a charitable healthcare organization benefits itself at the expense of the health of the very community that is subsidizing its operations through tax benefits and charitable contributions, only the Attorney General can make things right. Thus, the Attorney General has sought redress in this Court to halt UPMC's transgressions against the very community that has built UPMC.

UPMC's motion to dismiss the Attorney General's Petition to Modify the Consent Decrees fails from the start because it fails to acknowledge the Attorney General's broad *parens patriae* power to oversee charities like UPMC and Highmark. Contrary to what UPMC says, the Attorney General has the authority to petition this Court to ensure that UPMC acts in accordance with its obligations to operate for the benefit of the community. And, contrary to what UPMC says, the Attorney General's Petition does not come too late—its oversight authority is continuing—and the full extent of the harm caused (and the future harm that will be caused) by UPMC's actions was not understood previously. The Attorney General is acting now, he has the authority to do so, and the community will benefit from the relief he seeks.

UPMC's defenses to the Attorney General's Petition also fail for a host of other reasons. As for the defenses such as release, forfeiture, res judicata, and ripeness, UPMC's arguments ignore the plain language of the Consent Decrees and wrongly assume that prior decisions concerning the enforcement of the Consent Decrees bar the modification sought by the Attorney General now. UPMC also ignores the plain language of the Consent Decrees in arguing that the proposed modification is "improper"—indeed, its arguments are an impermissible attempt to write out the modification provision that expressly directs any party seeking modification to petition this Court. That is precisely what the Attorney General has done.

UPMC's Motion to Dismiss should be denied in its entirety and this Court should consider the merits of the Petition and the relief the Attorney General seeks pursuant to his *parens patriae* powers.

STANDARD OF REVIEW

Preliminary objections in the nature of a demurrer must be overruled unless it is clear and free from doubt, from all the facts pleaded, that the claimant will be unable to prove facts legally sufficient to establish a right to relief. *See Bower v. Bower*, 611 A.2d 181, 182 (Pa. 1992); *Cianfrani v. Com. State Employees' Retirement Bd.*, 479 A.2d 468, 469 (Pa. 1984) (demurrer should not be sustained "unless the law says with certainty that no recovery is possible"). In deciding

preliminary objections, "this Court must consider as true all of the well-pleaded material facts set forth in [the] complaint and all reasonable inferences that may be drawn from those facts." *Bower*, 611 A.2d at 182. The Court must also resolve all doubt against the objecting party. *Int'l Ass'n of Firefighters, Local 2493 v. Loftus*, 471 A.2d 605, 607 (Pa. Commw. 1984).

A straightforward application of these standards compels the conclusion that UPMC's Preliminary Objections should be overruled. The Attorney General's Petition lays out in great detail the facts demonstrating that the proposed modification to the Consent Decrees is in the public interest and the legal basis for this Court addressing the merits of the Petition.

ARGUMENT

I. The Attorney General Has Broad and Continuing *Parens Patriae* Powers to Oversee Charitable Organizations on Behalf of the Public.

The Attorney General has broad, continuing supervisory authority over charitable organizations in Pennsylvania to ensure that they operate in accordance with their charitable missions for the benefit of the community. The Pennsylvania Supreme Court explained the Attorney General's *parens patriae* authority to act on behalf of the Commonwealth to supervise charitable organizations:

> 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 [of charities] traditionally has been delegated to the attorney general to be performed as an exercise of his *parens patriae* powers. These are 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***.

In re Pruner's Estate, 136 A.2d 107, 109 (Pa. 1957) (emphasis added).

This Court has recognized that the Attorney General's *parens patriae* powers remain relevant today, noting that "[t]his common law doctrine ... has never been abolished." *Com., ex rel. Corbett v. Citizens All. for Better Neighborhoods, Inc.*, 983 A.2d 1274, 1278 (Pa. Commw. 2009); *see also Com. by Kane v. New Foundations, Inc.*, 182 A.3d 1059, 1070 (Pa. Commw. 2018). The Attorney General's *parens patriae* powers extend to ***all*** charitable entities, no matter how they are organized. *In re Cain's Estate*, 16 Pa. D & C.3d 50, 58-59 (Pa. Com. Pl. 1980) ("[T]he Attorney General's interest, as *parens patriae* for charities, is in all charitable organizations, not merely in charitable trusts."). All of a charitable organization's assets are subject to the Attorney General's authority. *In re Roxborough Memorial Hosp.*, 1991 Phila. Ct. Com. Pl. LEXIS 2, 17 Fid. Rep. 2d 412 (Phila. Orph. Ct. Sept. 30, 1997) ("[A]ll property held by a nonprofit charitable corporation is held in trust to carry out its charitable purposes.").

UPMC argues that the Attorney General may not interject itself into the operations of Pennsylvania charities, but that is not Pennsylvania law. More specifically, UPMC argues that the Attorney General's *parens patriae* powers are limited to certain undertakings—such as fundamental changes under the Pennsylvania Nonprofit Corporations Law—and are not applicable to a charity's ongoing activities. That is flat wrong.

The Attorney General's *parens patriae* authority is not limited to particular transgressions or activities. To the contrary, the Attorney General is empowered to enforce a charitable organization's compliance with its charitable mission for the benefit of the public no matter the transgression or the manner in which the transgression occurs. *See Pruner's Estate*, 136 A.2d at 109-10 ("For, not only in actions involving the application of *cy pres* but in every proceeding which affects a charitable trust, whether the action concerns invalidation, administration, termination or enforcement, the attorney general must be made a party of record because the public as the real party in interest in the trust is otherwise not properly represented."); *see also Com. v. Barnes Foundation*, 159 A.2d 500, 505 (Pa. 1960) (noting the Attorney General's broad powers and stating: "It cannot be questioned that [the] Attorney General [], by virtue of the powers of her office, is authorized to inquire into the status, activities and functioning of public charities.").

Moreover, and contrary to what UPMC suggests, the Attorney General's authority to oversee charities is not time limited: "A charitable trust is initially and ***continuously*** subject to the *parens patriae* power of the Commonwealth and the supervisory jurisdiction of its courts." *In re Coleman's Estate*, 317 A.2d 631, 634 (Pa. 1974) (emphasis added). Thus, the Attorney General may bring an action to ensure that a charitable organization is acting in the public interest at any time. As information develops and public policy evolves, a charitable organization's obligations to the public also develop and evolve. Because the Attorney General's authority is continuous, he may intercede on behalf of the public ***whenever*** there are indications that the actions of the charitable organization are detrimental to the public.

Charities may not "opt out" of fulfilling their mission to benefit the public—the charitable obligation is perpetual. And, for that reason, there is no temporal limitation on the type of relief the Attorney General can seek to impose to ensure the charity acts consistently with its charitable purpose.[1] In sum, the Attorney General may exercise his *parens patriae* powers whenever he determines that a charitable organization's activities are not in the public's interest and the relief sought may be unlimited as to time.

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[1] If a charitable organization later believes that relief is no longer appropriate, it may seek redress in the courts.

Pennsylvania courts have held time and again that the Attorney General, as the representative of the Commonwealth, may intervene in the activities of a charitable organization that is not acting in the public interest. The landmark case of *Commonwealth v. Barnes* illustrates this point. When the Barnes Foundation limited access to its art galleries, the Attorney General moved for an order to show cause why the Foundation could preclude the public from visiting and viewing the gallery. 159 A.2d at 501. The Barnes Foundation attempted to justify its actions by arguing that, as trustees, it was given express authority to deny public access to the art gallery so that the public would not interfere with students of the Foundation. *See id.* at 504. The Supreme Court disagreed, explaining that the Barnes Foundation's position was "an anomalous observation to make concerning a public institution exempt from public taxation." *See id.* The Court found for the Attorney General and required the Barnes Foundation to grant the public reasonable access to the museum galleries:

> 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. It is because of the temptation which such lack of supervision would offer, that a Congressional committee observed: "Foundations should not only operate in a goldfish bowl, they should operate with glass pockets."

Id. at 467-68.

More recently, the Attorney General intervened on behalf of the community in *In re Milton Hershey School Trust*, and this Court supported that intervention. The Hershey Trust Company and its Board of Directors sought to sell stock of the Hershey Foods Corporation. 807 A.2d 324, 334, 329 (Pa. Commw. 2002). The Attorney General intervened to block the sale of the stock, arguing that the sale would be detrimental to the community, which relied on the company for employment and other important benefits. *Id.* at 330. The trial court found that the Attorney General had carried his burden of showing that the sale could harm the community—particularly the economic interests of Derry Township. *Id.* at 331. In reaching that conclusion, the trial court emphasized that the "Attorney General has the authority to inquire whether an exercise of a trustee's power, even if authorized under the trust instrument, is inimical to the public interest," and that the court itself had "broad visitorial and supervisory powers over charitable trusts" and authority "as extensive as the demands of justice." *Id.* at 330. This Court affirmed the order enjoining the sale. *Id.* at 327.

Moreover, even when a charity is not involved, the Attorney General also has broad authority to invoke his *parens patriae* powers to protect Pennsylvanians' health and economic wellbeing—both of which are jeopardized by UPMC's conduct. *See, e.g., Com. of Pa. v. Porter*, 659 F.2d 306, 315 (3d Cir. 1981) (discussing the Commonwealth's *parens patriae* authority and noting that the

Commonwealth is "vitally interested in safeguarding the health and safety of individuals in its territory"). In the realm of health and well-being, the Attorney General has brought enforcement actions against private companies for producing or marketing products in a manner that undermines individual health and/or the Commonwealth's healthcare market. *Com. v. Philip Morris Inc.*, 40 Pa. D. & C.4th 225, 251-52 (Pa. Com. Pl. 1999); *Com. ex rel. Pappert v. TAP Pharmaceutical Products, Inc.*, 885 A.2d 1127, 1141 (Pa. Commw. 2005) (deceptive practices related to drug pricing). Similarly, the Attorney General has pursued claims to protect Pennsylvanians' economic well-being. *Com. v. Russell Stover Candies, Inc.*, No. CIV. A. 93-1972, 1993 WL 145264, at *7 (E.D. Pa. May 6, 1993) (seeking to block allegedly anticompetitive merger); *Com. of Pa. v. Mid-Atlantic Toyota Distributors, Inc.*, 704 F.2d 125, 132 (4th Cir. 1983) (seeking to enjoin price-fixing arrangement). In each of these cases, the court confirmed that the Attorney General properly could act on behalf of the Commonwealth and its residents pursuant to his *parens patriae* powers.

UPMC argues that the Petition should be dismissed because the Attorney General's proposed modifications "intrude on a regulatory field that the Pennsylvania General Assembly *exclusively* delegated to DOH and PID." *See* Memorandum of Law in Support of UPMC's Motion to Dismiss ("UPMC's Memorandum") at 37 (emphasis in original). That is wrong. The Attorney General's

parens patriae powers are not diminished because a charity operates in an industry—such as the healthcare industry—that also is regulated by other branches of the Commonwealth's government (or the federal government). All of the regulations and proposed legislation UPMC cites apply to charitable and for-profit insurers and/or healthcare providers alike.[2] Thus, UPMC's position is a remarkable one—that it can fulfill its charitable obligations simply by complying with the regulations imposed alike on charitable and for-profit healthcare providers and insurers. That proposition is plainly at odds with Pennsylvania law, which holds charities like UPMC to a higher standard—and subject to more and different governmental oversight—than for-profit businesses.

When UPMC organized itself as a charitable nonprofit corporation, exercised control over its healthcare affiliates, and continued to expand across the Commonwealth as such, it committed itself to the serve the public and subjected itself to the ongoing oversight of the Attorney General. *See Glenmede Tr. Co. v. Dow Chem. Co.*, 384 F. Supp. 423, 428 (E.D. Pa. 1974) ("[N]o trust is permitted to declare itself charitable without submitting to the supervision and inspection of the

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[2] *See* 40 P.S. § 991.2181 (d), (e) (regulating managed care plans generally); 40 P.S. § 991.2111(1), (4) (same); 40 P.S. § 991.2116 (same); 28 Pa. Code § 9.679 (regulating healthcare providers generally); Pennsylvania General Assembly, House Bill 345, Regular Session 2017-2018, Feb. 3, 2017 (same); Pennsylvania General Assembly, House Bill 1621, Regular Session 2017-2018, June 26, 2017 (same).

Attorney General.") UPMC has repeatedly and flagrantly spurned its charitable obligations to the public since the Consent Decrees were signed—becoming even more aggressive as the Consent Decrees' existing end date has approached.

As a consequence, the Attorney General filed this Petition, appropriately exercising his *parens patriae* powers. *See New Foundations, Inc.*, 182 A.3d at 1070 ("[i]t is the duty of the Attorney General to ensure that the purpose of the charity remains charitable and to take such action necessary to make sure the charity carries out it[s] charitable purpose and take necessary corrective action"). The Attorney General's supervisory power has remained a cornerstone of charity law for centuries and exists to police exactly the sort of behavior at issue in this case. UPMC, which has received an untold amount of public support since its inception, cannot now escape oversight from the Commonwealth officer charged with ensuring that UPMC is faithful to its mission to serve the general public.

II. The Attorney General's Petition to Modify the Consent Decrees Is Not Barred.

UPMC seeks dismissal of the Attorney General's Petition based on a laundry list of defenses, including release, res judicata, ripeness, and forfeiture. *See* UPMC's Memorandum at 13-23. Through these defenses, UPMC attempts to avoid altogether the merits of the Attorney General's request for modification of the Consent Decrees—arguing, variously, that the request is too late, too early, raises issues that already have been decided, or is barred for some reason or another by the

terms of the current Consent Decrees. All of these defenses fail for foundational reasons (§ II.A, *infra*), and, independent of these threshold defects, each of them fails on its own merits (§ II.B-E, *infra*).

A. The Defenses UPMC Invokes Do Not Constrain the Attorney General.

All of UPMC's defenses fail as a matter of law for a threshold reason—they ignore the Attorney General's *parens patriae* powers over Pennsylvania charitable institutions. *See* § I, *supra*. In gist, each of UPMC's defenses is an attempt to cut the Attorney General off at the knees and constrain him from acting to protect the public. But it is well-established that one cannot estop the government, and so, as a matter of law, UPMC's defenses do not prevent this Court from considering the merits of the Attorney General's Petition. *See, e.g., Citizens All. for Better Neighborhoods, Inc.*, 983 A.2d at 1278 ("The Government, which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes. This common law doctrine has its roots in the prerogative of the Crown and has never been abolished. Its purpose is to vindicate public rights and to protect public property, and this purpose outweighs any inconvenience experienced by a defendant.") (citations and quotation marks omitted). And, for these same reasons, UPMC's contention that the Attorney General's authority to ensure that UPMC is acting in the public interest does not extend beyond the four corners of the existing Consent

Degrees is flat wrong. The Consent Decrees do not articulate the full extent of the Attorney General's powers to oversee UPMC—or Highmark—as charities. *In re Pruner's Estate*, 136 A.2d at 531-32 ("The Commonwealth itself must perform this [supervisory] function if charitable trusts are to be properly supervised."); *see also* § I, *supra*.

There is another foundational problem with UPMC's defenses. Many of them turn on the contention that the terms of the Consent Decrees themselves somehow bar the relief sought in the Petition. This argument fails to take into account the Consent Decrees' express language ***authorizing*** the Attorney General to seek a ***modification*** of the Consent Decrees if he believes the public interest requires a modification. Given this plain language authorizing modification requests—language to which UPMC agreed—UPMC can hardly argue that the Attorney General's modification request is barred by either the Consent Decrees themselves or concepts such as release, forfeiture, lack of ripeness, and res judicata.

B. The Attorney General Did Not "Release" His Authority to Seek a Modification of The Consent Decrees.

UPMC contends that the release provision in the Consent Decrees bars the Attorney General's modification request. That argument is easily defeated by the plain language of the release provision itself:

> This Consent Decree will release any and all claims the OAG, PID or DOH brought or could have brought against UPMC for violation 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 law relating to the facts alleged in the Petition for Review 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 to violations of the crimes code, Medicaid fraud laws or tax laws are not released.

Petition, Ex. B at 14 (emphasis added). This provision, by its terms, releases UPMC from certain claims arising out of alleged wrongful conduct that ***preceded*** the filing of the Consent Decree—nothing more.

Moreover, the release provision appears in the very same document in which UPMC (and Highmark) agreed that the Attorney General could seek a modification of the Consent Decrees. UPMC's release argument, like many of its other arguments, is an effort to write-out the modification provision—something the settled rules of contract interpretation forbid. *See, e.g., Steuart v. McChesney*, 444 A.2d 659, 662 (Pa. 1982) ("[I]t is not the function of this Court to re-write [a contract], or to give it a construction in conflict with ... the accepted and plain meaning of the language used."); *Murphy v. Duquesne Univ. of the Holy Ghost*, 777 A.2d 418, 429-39 (Pa. 2001) (courts should not read the individual words or phrases of a contract in isolation, but rather in the context in which they are used and in the context of the entire contract); *Sw. Energy Prod. Co. v. Forest Res., LLC*, 83 A.3d 177, 187 (Pa. Super. 2013) ("[C]lauses in a contract should not be read as independent agreements thrown together without consideration of their combined effects. Terms in one section of the contract, therefore should never be interpreted

in a manner which nullifies other terms in the same agreement.") (citation omitted).[3] The Consent Decrees' modification provision also puts to rest UPMC's contention that the Attorney General is "reneging" on the release agreement. That accusation is hardly true given the release's express language—which is limited to claims based on conduct prior to the filing of the Consent Decree in 2014—and given that UPMC knew (and agreed) that the Attorney General could request a modification.

In an effort to shoehorn the Attorney General's modification request into the release, UPMC argues that the Attorney General's request is "covered" by the release because UPMC had declared its intent to cease contracting with Highmark before the parties executed the Consent Decrees. In other words, UPMC seems to be suggesting that its earlier declaration that it would not contract with Highmark could have formed the basis of a "claim" and thus was "released." That argument, however, disregards the Attorney General's continuing supervisory authority—indeed, obligations—and also badly mischaracterizes the Petition.

In support of its release argument, UPMC selectively cites a handful of paragraphs in the Petition laying the history of the controversy and then declares these paragraphs show that the modification request is based on pre-Consent Decree

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[3] UPMC has acknowledged that a consent decree is a contract that is controlled by principles of contract law. *See* UPMC's Memorandum at 13; *see also Com. ex rel. Kane v. UPMC*, 129 A.3d 441, 463 (Pa. 2015).

conduct. That is wrong. The Petition contains a multitude of allegations regarding UPMC's ***post-Consent Decree*** conduct. *See, e.g.*, Petition, ¶¶ 24, 25 (UPMC has thwarted Highmark's creation of Out-of-Network policy riders since the Consent Decrees were issued, creating confusion among consumers); *see id.*, ¶33 (UPMC circulated promotional flyer in July 2017 misrepresenting program for UPMC Susquehanna service area); *see id.*, ¶ 37 (as one example of the numerous UPMC patients who will lose access to UPMC doctors after June 30, 2019, a UPMC cancer patient was advised in July 2018 that she can no longer see her UPMC oncologists in-network unless she switches to a non-Highmark In-Network insurance plan); *see id.*, ¶ 52 (UPMC has stated that after expiration of the Consent Decrees in June 2019, all out-of-network patients, regardless of insurer, will be required to pay all of UPMC's expected charges for non-emergency health care services up-front).

None of this alleged conduct has been released and all of it supports the relief the Attorney General seeks here. UPMC's argument that the Attorney General has released its right to seek modification fails.

C. Claim Preclusion (Res Judicata) Does Not Bar the Attorney General's Proposed Modification.

UPMC argues that the Petition is barred by the rule of claim preclusion, also known as res judicata. *See* UPMC's Memorandum at 15-17. Not so. As this Court explained:

> ... [R]es judicata provides that where a final judgment on the merits exists, a future lawsuit on the same cause of action is precluded. ...
>
> [It] requires the 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. Res judicata applies to claims that were actually litigated as well as those matters that should have been litigated. Generally, causes of action are identical when the subject matter and the ultimate issues are the same in both the old and new proceedings.

J.S. v. Bethlehem Area Sch. Dist., 794 A.2d 936, 939 (Pa. Commw. 2002) (citation omitted).

According to UPMC, the Attorney General should have asked for the modification it now requests in 2017 when he filed a motion to enforce the Consent Decrees (seeking to prevent UPMC from terminating certain Medicare Acute Care Provider Agreements with Highmark on December 31, 2018). UPMC further asserts that the modification request is barred by the 2018 Supreme Court decision addressing the 2017 motion to enforce, *Commonwealth by Shapiro v. UPMC*, 188 A.3d 1122 (Pa. 2018) ("*Medicare Advantage II*"). UPMC's argument does not align with the settled law on claim preclusion—neither the doctrine's requirements nor its purpose.

The doctrine of res judicata exists to prevent plaintiffs from engaging in "claim splitting." *See, e.g., Consol. Coal Co. v. District 5, United Mine Workers of Am.*, 485 A.2d 1118 (Pa. Super. 1984). To fulfill that objective, the law requires

plaintiffs to assert all causes of action arising out of a transaction or occurrence in a single action, and after that action gets to final judgment, the plaintiff is barred from asserting both the claims it did assert and those it could have asserted.

UPMC's claim preclusion argument tries to fit a square peg in a round hole. The Attorney General's 2017 motion to enforce is not analogous to a pleading asserting causes of action and *Medicare Advantage II* is not analogous to "final judgment." *See, e.g., Coleman v. Coleman*, 522 A.2d 1115, 1121 (Pa. Super. 1987) ("whether a plaintiff may be permitted to bring a second suit on the undecided claims in the first action, and thereby split a cause of action, turns on the question of the parties' and the court's intent; *i.e.* where the parties and the court did not fully address the claims in the first suit did they intend the judgment not to be a final adjudication of all the issues"). Not surprisingly, UPMC does not even try to explain how the doctrine of res judicata—intended to bar claim splitting in civil litigation—can be invoked to constrain or limit the Attorney General's *parens patriae* power. *See* § I, *supra.*

Moreover, even if the circumstances UPMC says gives rise to claim preclusion could be shoehorned into the doctrine, it still would not bar the Attorney General's request to modify the Consent Decrees because res judicata does not bar

claims based on conduct that occurred after the final judgment.[4] *See, e.g., Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2297 (2016) ("Changed circumstances ... may give rise to a new claim."); *Bell v. Township of Spring Brook,* 30 A.3d 554, 559 n.9 (Pa. Commw. 2011) (affirming finding that "res judicata did not apply due to substantial changes in conditions or circumstances") (emphasis omitted); *Callery v. Mun. Auth. of Blythe Twp.*, 243 A.2d 385, 388 (Pa. 1968) (plaintiff not barred from litigating claim related to water quality based on 1964 decision concerning water quality; plaintiff could not have raised claim in prior action decided in 1964 for conduct that occurred in 1965); *Packard v. Citizens & N. Bank*, No. 219 MDA 2012, 2013 WL 11267443, at *4 (Pa. Super. Apr. 9, 2013) (res judicata can serve as a bar only when new "proposed claims and defenses arise from the same transaction or occurrence, or series of transactions or occurrence").

Here, the Attorney General's request for modification is based on events that have occurred (including UPMC's conduct) and circumstances that have arisen (including the impact UPMC's conduct has had and will have on the public) ***after*** the 2017 enforcement action and ***after*** the 2018 Supreme Court decision—all of

[4] Again, the 2018 Supreme Court opinion is not a "final judgment" as it was not a final adjudication of all issues between the parties. Indeed, during the life of the Consent Decrees, the Attorney General has asked this Court to enforce the Consent Decrees three times, and the Supreme Court has issued two decisions related to those enforcement actions.

which warrants the Attorney General's intervention to protect the public interest. *See, e.g.,* Petition, ¶¶ 52-55 (discussing UPMC's statements in November 2018 indicating that it would require up-front and in-full payment for out-of-network patients after June 30, 2019); *see id.*, ¶ 61 (discussing UPMC's recent expansion into areas in close proximity to existing health care providers).

While UPMC does not specifically invoke the companion doctrine of issue preclusion (or collateral estoppel), its brief appears to make a stab in that direction.[5] That doctrine does not support UPMC's request for dismissal either.

> Collateral estoppel acts to foreclose litigation in a subsequent action where issues of law or fact were ***actually litigated and necessary to a previous final judgment.***
>
> [It] bars a subsequent lawsuit where (1) an ***issue*** decided in a prior action is ***identical*** to one presented in a later action, (2) the prior action resulted in a final judgment on the merits, (3) the party against whom collateral estoppel is asserted was a party to the prior action, or is in privity with a party to the prior action, and (4), the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior action.

J.S., 794 A.2d at 939 (emphasis added).

Contrary to what UPMC declares, the Pennsylvania Supreme Court did ***not*** address—much less decide—whether the Consent Decrees' June 30, 2019 end date (or any other provision of the Consent Decrees) could be modified. And it surely

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[5] "Res judicata encompasses two related, yet distinct principles: technical res judicata and collateral estoppel." *J.S.*, 794 A.2d at 939 (emphasis added).

did ***not*** rule that such a modification was not permitted. Thus, the Supreme Court simply did not decide an "issue" that is "identical" to any issue presented in the Attorney General's Petition.

The controversy that led to the Pennsylvania Supreme Court's 2018 decision arose when UPMC informed Highmark that it planned to terminate certain Medicare Acute Care Provider Agreements on December 31, 2018—before the end of the Consent Decrees—believing it could comply with its obligation to provide Highmark Medicare Advantage subscribers with "in-network" access to UPMC physicians, hospitals and other services until June 30, 2019 through a provision in the UPMC-Highmark Provider Agreements requiring UPMC to continue to abide by the Agreements' terms and conditions for six months after the Agreements' end date (the "runout provision.") *See Medicare Advantage II*, 188 A.3d at 1125. The Attorney General (and Highmark) argued that UPMC's termination of the Medicare Provider Agreements violated UPMC's obligation to continue to contract for vulnerable population services for the full period of the Consent Decrees. *See id.* This Court (Judge Pellegrini) concluded that the runout provision did not equate to an in-network "contract" (as required by the Consent Decrees) and ordered UPMC

to remain in the existing one-year Medicare Advantage Agreements with Highmark for calendar year 2019. *See* Order dated January 29, 2018 at 11-13.[6]

The appeal in *Medicare Advantage II*, therefore, presented a discrete and specific issue—whether the runout provision satisfied UPMC's obligations under the Consent Decrees and whether Judge Pellegrini was correct to conclude that UPMC should be required to enter into a one-year contract that would extend beyond June 30, 2019. The Supreme Court concluded that the runout provision did satisfy UPMC's obligation to contract for in-network access for Highmark's Medicare Advantage subscribers through June 30, 2019. *See Medicare Advantage II*, 188 A.3d at 1134-35. And it was in connection with addressing the specific issue before it that the Court said it could not "alter [the] unambiguous [June 30, 2019] date." *See id.* at 1134. To be sure, the Supreme Court held that there was no basis in ***existing*** terms of the Consent Decrees to require UPMC to enter into Medicare Provider Agreements for the entire 2019 calendar year. But the Court did ***not*** hold—because it was not asked to hold—that the Consent Decrees' end date never could be modified. Indeed, the Supreme Court expressly acknowledged that "[t]he Commonwealth Court, by the terms of the Consent Decree, retains jurisdiction for any necessary and appropriate interpretation, modification, or enforcement."

[6] As Judge Pellegrini noted, the parties had performed under these one-year contracts since 1999 and had done so during the life of the Consent Decrees.

See Medicare Advantage II, 188 A.3d at 1125 n.7 (citing Consent Decree, § IV.C.11).[7]

Thus, neither claim preclusion nor issue preclusion stand as obstacles to the Attorney General's request for modification of the Consent Decrees.

D. The Attorney General's Petition Is Ripe.

While in one breath UPMC says the issues raised in the Attorney General's Petition have been released, already have been decided, and are raised too late, in the next breath it says the Petition is not ripe because it is based on speculation about future actions. *See* UPMC's Memorandum at 17. UPMC's lack-of-ripeness argument turns on the proposition that the Attorney General cannot act unless and until the public has actually been harmed. This argument is wrong on both the law and the facts.

As for the law, the Attorney General, based on his *parens patriae* powers, may take action to ensure that UPMC is acting in accordance with its charitable purpose and to ***prevent*** harm. Indeed, there is no support for the proposition that the Attorney

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[7] UPMC also argues that *Medicare Advantage II* is the "law of the case" as to the termination date for the Consent Decrees. *See* UPMC's Memorandum at 19. This argument fails for the same reasons. As discussed above, the issues decided in *Medicare Advantage II* are different from the Attorney General's request for modification here. *See Ashbaugh v. Ashbaugh*, 627 A.2d 1210, 1216 (Pa. Super. 1993) (The law of the case doctrine means that whatever is once irrevocably established as the controlling legal rule of decision between the same parties in the same case continues to be the law of the case.) (citations omitted).

General must wait until actual harm occurs—or the full extent of that harm occurs—before exercising his powers. *See In re Milton Hershey Sch. Tr.,* 807 A.2d at 331 ("That the Attorney General cannot identify with certainty that the apprehended harms will occur does not put him out of court."); *Com., Office of Atty. Gen. ex rel. Corbett v. Locust Tp.*, 968 A.2d 1263, 1268 (Pa. 2009) (rejecting township's argument that "there was no justiciable case or controversy" because the "harm alleged by the petition [was] purely speculative" and allowing Attorney General to bring suit asserting statutory powers to oversee township).

As for the facts, UPMC's lack-of-ripeness argument is based on a false premise. The Attorney General's Petition is ***not*** based on "speculative future actions." The Petition contains plain allegations about what UPMC has said it ***will*** (or ***will not***) do and specific harm that ***will*** follow from UPMC's already disclosed intentions. For example, the Attorney General alleges that "UPMC has largely refused to commit its newly acquired health care systems to contracting with all health insurers going forward …." *See* Petition, ¶ 30; *see also id.,* ¶ 52 (noting that "UPMC has made clear that after the expiration of its Consent Decree 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 health care services up-front and in-full …."); *id.,* ¶ 105 ("UPMC has further decided against extending or entering into any new contracts that would provide Highmark members

with In-Network access to many of UPMC's hospitals or physicians beyond June 30, 2019 ..."); *id.*, ¶ 106 ("UPMC is also refusing to contract with Highmark for any of its non-commercial Medicare Advantage plans which will deny In-Network access to seniors who cannot change their insurance plan ..."); *id.*, ¶ 119.c ("UPMC is refusing to contract with Highmark").

Thus, the Attorney General is not speculating about what UPMC might do—instead, its Petition is based on what UPMC itself has said that it will do if left unrestrained and the specific harm that will result to the public from UPMC's refusal to contract with Highmark.

E. The Attorney General Is Not Estopped From Modifying the Consent Decrees.

UPMC argues that Section IV.C.6 of the Consent Decrees estops the Attorney General from asserting that UPMC has not acted in accordance with its charitable purpose. This argument, like UPMC's other defenses, is contradicted by the Consent Decrees' language and controlling law. Section IV.C.6 provides: "The Parties agree that the terms and agreements encompassed within this Consent Decree do not conflict with UPMC's obligations under the laws governing nonprofit corporations and charitable trusts, ..." *See* Consent Decrees, § IV.C.6. It is difficult to see how that provision—reciting that the Consent Decree obligations do not conflict with the law—helps UPMC. UPMC presumably believes that because the parties agreed that acting in accordance with the Consent Decrees—*e.g.*, allowing UPMC to provide

in-network access for certain Highmark subscribers—was not in violation of the law, the parties agreed (by negative implication) that providing such access is all UPMC is required to do to comply with Pennsylvania law governing charities. This argument based on negative implications fails. *See, e.g., McKinney v. Univ. of Pittsburgh*, 915 F.3d 956 (3d Cir. 2019) (rejecting interpretation of policy based on negative implications).

Indeed, nothing in the Consent Decrees estops the Attorney General from seeking relief ***now*** given the harm to the public that has resulted from UPMC's actions over the past five years notwithstanding the Consent Decrees and given the need to prevent the harm to the public that is sure to follow from UPMC's refusal to allow certain members of the public (*e.g.*, most Highmark subscribers) to have access to UPMC healthcare providers, services, and facilities. *See* Petition, ¶¶ 24, 29, 31, 37-38. The full extent of the harm to the public caused by UPMC's exclusionary conduct has only become apparent as time has gone on. And UPMC's expansion of its footprint has increased the harm flowing from its failure to allow full access to its physicians and facilities.[8] On top of that, UPMC is engaging in new and different conduct that further shuts its doors and deprives the public access to

[8] UPMC's expansion across the Commonwealth, and the increased harm that results, are striking given that many of the hospitals UPMC has acquired along the way are themselves ***charities***.

needed healthcare services—for instance, its insistence that patients, including vulnerable seniors, prepay for non-emergency care, and out-of-network charges for emergency and trauma care. *See* Petition, ¶¶ 37, 42, 50, 52-54.[9]

In support of its estoppel argument, UPMC contends that the Attorney General has made misrepresentations to UPMC. As a threshold matter and as explained, the Attorney General cannot be estopped from asserting his *parens patriae* power here. And, in any event, a viable estoppel claim requires allegations of an intentional or negligent misrepresentation of some material fact, with knowledge or reason to know that it would cause justifiable reliance, and an allegation that it actually did so. *See Hauptmann v. Com., Dep't of Transp.*, 429 A.2d 1207, 1210 (Pa. Commw. 1981). The only specific purported misrepresentation upon which UPMC relies for its estoppel claim—Section IV.C.6 of the Consent Decrees—does not say what UPMC suggests and assumes the parties would act in accordance with their charitable mission. Nor does UPMC contend that

[9] In a variation on this same theme, UPMC also argues that it has ordered its operations in accordance with the requirements of the Consent Decrees, seemingly in an effort to suggest that the Attorney General has relinquished his ability to now require UPMC to do anything more or different in accord with its charitable obligations. This is wrong. UPMC established its operations as a charity long before the Consent Decrees were executed, and it has continued to acquire charitable, nonprofit hospitals across the Commonwealth post Consent Decrees. Indeed, when the hospitals that UPMC was acquiring were for-profit hospitals, it converted them to charitable, nonprofit hospitals. It has itself ordered its operations to be subject to the requirements of charitable organizations.

it acted in reliance on any purported misrepresentation contained in Section IV.C.6. Section IV.C.6 therefore cannot be the basis for dismissal on estoppel grounds.

UPMC's estoppel argument is no better on the law. The cases it cites are inapposite, and none of them address a situation where an attorney general invoked his *parens patriae* power to monitor and enforce a charity's fulfillment of its charitable obligations. For example, in two of the cases, estoppel was not asserted against a Commonwealth agency acting under its *parens patriae* power, and in both cases, the court ultimately concluded that equitable estoppel did not bar the claim. *Communs. Network Int'l, Ltd. v. Mullineaux*, 187 A.3d 951, 963 (Pa. Super. 2018); *Westinghouse Electric Corp./CBS v. Workers' Compensation Appeal Board (Korach)*, 883 A.2d 579, 586 (Pa. 2005). In the third case relied upon by UPMC, the court held that the plaintiff was not estopped from asserting a claim and permitted her to demonstrate on summary judgment how her position in the two proceedings was consistent. *See Trowbridge v. Scranton Artificial Limb Co.*, 747 A.2d 862, 864 (Pa. 2000).

UPMC's conduct over the past five years and the repeated instances of resulting public harm and confusion demonstrate that despite the Consent Decrees, the public has been—and is being—harmed. The Attorney General is authorized to assert its *parens patriae* power to require that UPMC act as a charity, and that is

precisely what the Attorney General has done here.[10] UPMC cannot escape its obligations to the public by arguing the Attorney General is estopped from acting when the nature and extent of harm flowing from UPMC's increasing disregard of its charitable obligations is only now becoming apparent. Many individuals in the community will have to choose between emergency care to save their lives or bankruptcy. It also is a fallacy to claim that these individuals could choose different insurance because many in the community do not have that choice, and no charity has the right to make any citizen make that choice even if they could.

III. The Attorney General's Requested Relief is Consistent with Both His *Parens Patriae* Powers and the Consent Decrees' Modification Provision.

Despite the Consent Decrees' plain language expressly providing for modification, UPMC contends that the Attorney General's proposed modification is "improper." UPMC does not simply argue that the proposed modification is unwarranted, but instead that no modification was contemplated or is allowed under the Consent Decrees. This argument is an effort to write out the modification provision in Section IV.C.10 of the Consent Decrees, which expressly authorizes the

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[10] While UPMC may contend that it has ordered its operations in reliance on a June 2019 termination date for the Consent Decrees, it has also voluntarily ordered its operations as a charitable organization. As a result, it must ***perpetually*** order its operations to align with what is required of a charitable organization that has benefitted extensively from the public's largesse and capital. *See* Petition, ¶¶ 8- 11. That is exactly what the Attorney General is asking this Court to require of UPMC.

Attorney General to seek a modification if it believes a modification is in the public interest.

Because UPMC cannot credibly deny that the Consent Decrees specifically speak to and authorize modifications, its argument is baseless unless it explains what the term "modification" means and why it does not apply to the Attorney General's request here. UPMC does not even try to do that—providing no example of what would constitute a "proper" request for modification under Section IV.C.10 of the Consent Decrees. Thus, in the end, UPMC really is saying that the Attorney General may never request a modification of the Consent Decrees. This contention cannot be squared with the Consent Decrees' express terms.

Moreover, contrary to what UPMC suggests, the Attorney General is not acting unilaterally, but instead is seeking relief from this Court. To be sure, it ultimately will be up to this Court to decide whether the Attorney General's proposed modification is in the public interest. But on the threshold question of whether the Attorney General may ask for a modification of the Consent Decrees and, in turn, whether this Court may order a modification, UPMC's argument fails. Whether viewed as a modification to the existing Consent Decrees, or separate relief requested by the Attorney General pursuant to its *parens patriae* powers,[11] there can

[11] Because the Attorney General certainly could have filed a second action, UPMC's argument exalts "form over substance."

be no dispute that the Attorney General has the authority to petition this Court for modification of the Consent Decrees.

A. The Plain Language of the Consent Decrees Expressly Provides for Modification of the Consent Decrees If It Is In the Public Interest.

In its effort to disregard (essentially nullify) the Consent Decrees' provision expressly authorizing modifications, UPMC makes a number of arguments that contradict the Consent Decrees' plain language. First, UPMC argues that the Attorney General's proposed modification is improper because it "annuls" the central purpose of the Consent Decrees. *See* UPMC's Memorandum at 18-20. That argument ignores the law on modification. Under Pennsylvania law, a modification—by definition—creates a new contractual obligation. *Melat v. Melat*, 602 A.2d 380, 385 (Pa. Super. 1992) (modification "acts as a substitute for the original contract, but only to the extent that it alters it"). The original contract may be abrogated in part, but the provisions not impacted by the modification remain in effect. *See id.*

Here, the parties expressly agreed that the Consent Decrees could be modified by agreement or by order of this Court. The Consent Decrees spell out—expressly and in detail—the process for modification by agreement and the process when there was no agreement:

> If the OAG, PID, DOH or [Highmark/UPMC] believe 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.***

See Consent Decrees, IV(C)(10) (emphasis added).

That is exactly what the Attorney General did and is doing here. The Attorney General notified UPMC and Highmark that it believed modification of the Consent Decrees was in the public interest, and sought the parties' agreement to the proposed modification. *See* Petition, ¶ 73. Highmark agreed (subject to UPMC doing the same), and UPMC did not. *See id.*, ¶¶ 75, 80-81. Then, in accordance with the procedures outlined in the Consent Decrees, the Attorney General petitioned this Court for modification. *See id.*, ¶ 81. It now is up to the Court to consider whether the proposed modification is in the public interest.

UPMC again tries to rewrite the Consent Decrees when it argues that the Attorney General's proposed modification is improper because it alters a material term. *See* UPMC's Memorandum at 19-20. Nowhere in the Consent Decree is there limiting language saying there can be no modification of a material term. The only requirement is that the modification be in the public interest. *See* Consent Decrees, IV(C)(10); Petition, ¶ 83 ("There are no limitations or parameters imposed on the scope of permissible modifications, only that they must be shown to promote the public interest."). Nor has UPMC identified any legal authority supporting its broad

assertion that, absent limiting language in the contract itself, where a contract contemplates modification, modification may not be made to a "material" term or the contract's end date.

In a similar vein, UPMC contends there can be no modification without its "consent." Once again, UPMC's argument contradicts the Consent Decrees, which clearly spell out how to accomplish a modification if the parties do not agree—specifically, through a petition filed in this Court, exactly what Attorney General has filed here. *See* Consent Decrees, IV(C)(10) ("***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.") (emphasis added).

The federal decision relied upon by UPMC is inapposite. *See* UPMC's Memorandum at 21 (citing *Salazar v. District of Columbia*, 896 F.3d 489, 498 (D.C. Cir. 2018)). The consent decree at issue in *Salazar* did not include a modification provision and so the parties sought modification under Federal Rule of Civil Procedure 60. Here, by contrast, the parties expressly bargained for and agreed to allow modification. Under Pennsylvania law, where a consent decree contains a modification provision, it may be modified because consent decrees are governed by the law of contracts. *See Griffith v. Griffith*, No. 343 WDA 2018, 2019 WL 123429, at *4 (Pa. Super. Jan. 7, 2019) (reversing the trial court's denial

of request to modify a consent decree because the consent decree contained a modification provision). UPMC's argument, which elides Pennsylvania law and wrongly looks to the federal rules on modification of consent decrees, is nothing but an effort to avoid the merits of the Attorney General's Petition.

UPMC next argues that the Attorney General must, but has not, demonstrated fraud, accident, or mistake. *See* UPMC's Memorandum at 20. Here again, UPMC makes an argument that conflicts with the Consent Decrees' express terms. The Consent Decrees simply do not say that a party seeking modification must show fraud, mistake or accident. UPMC's case law in support of this point is no better than *Salazar*. These cases, too, involved a consent decree that did not contain a modification provision. *See Universal Builders Supply, Inc. v. Shaler Highlands Corp.*, 175 A.2d 58, 61 (Pa. 1961) (court did not have power to modify consent decree where parties did not include modification provision in the decrees); *Penn Twp. v. Watts*, 618 A.2d 1244, 1247 (Pa. Commw. 1992) (same). Here, the Consent Decrees expressly include a modification provision, and authorize modification when it would "be in the public interest." *See* Consent Decrees, IV(C)(10). *See Griffith*, 2019 WL 123429, at *4.

UPMC also suggests that the Attorney General is without a basis to seek affirmative relief from its subsidiaries. UPMC's Memorandum at 29-31. But UPMC ignores the fact that the modification provision, like the rest of the Consent Decrees,

applies to its entire network of affiliates. The Consent Decrees expressly provide: "Unless otherwise specified, all references to UPMC include all of its controlled nonprofit and for-profit subsidiaries, partnerships, trusts, foundations, associations and other entities however styled." Consent Decrees II(P). UPMC executed the Consent Decrees on behalf of "UPMC"— *i.e.,* UPMC and all of its affiliated entities, per the terms of the Decrees. *See* Consent Decrees "Settlement Terms" ("... UPMC agrees for itself, its success, assigns ... and all other persons acting on their behalf, directly or through any corporate or other device, as follows ..."); *see also* Consent Decrees, Signature Page (signature on behalf of "The Respondent UPMC"). Having bound "UPMC"— defined as UPMC and "all of its controlled nonprofit or for-profit subsidiaries"—to the terms of the Consent Decrees, UPMC cannot argue that the Attorney General's power to seek modification does not apply to certain of its subsidiaries or affiliates.

In short, the plain language of the Consent Decrees controls, and UPMC should not be permitted to rewrite the Consent Decrees to avoid the modification provision to which it agreed.

B. The Attorney General Can Seek Modification of the Consent Decrees Even Without the Provision in the Consent Decrees Expressly Permitting Modification.

Apart from the Consent Decrees' express provision authorizing modification, the Attorney General has broad, continuing supervisory authority over Pennsylvania

charitable organizations to ensure these organizations operate in accordance with their charitable missions for the benefit of the community. *See* Section I, *supra*. This Court is the appropriate forum to adjudicate a lawsuit brought by the Attorney General relating to a charitable organization's failure to fulfill its obligations under Pennsylvania law.

UPMC, however, incorrectly narrowly construes the Attorney General's powers and its ability to seek relief in this Court. With regard to UPMC's argument that the Attorney General is seeking to impose a consent decree with a perpetual term, UPMC can point to nothing in the common law or in the Consent Decrees that would prevent the Attorney General from doing so.

Indeed, in other cases where the Attorney General has exercised its *parens patriae* authority over charitable organizations, the Attorney General has exercised oversight authority into perpetuity. For instance, in *Commonwealth v. Barnes Foundation*, the Attorney General successfully argued that the Barnes Foundation must remain open to the public, without any apparent durational limitation. *Barnes Foundation*, 159 A.2d at 506. In *Commonwealth v. Philip Morris*, the court approved a consent decree in which Philip Morris agreed to refrain from certain marketing practices, apparently in perpetuity. *Philip Morris Inc.*, 40 Pa. D. & C.4th at 251-52. And, in *Commonwealth v. Brown*, the Attorney General survived a motion to dismiss in a case seeking to desegregate a private,

charitable school, presumably in perpetuity. *Com. v. Brown*, 260 F. Supp. 323 (E.D. Pa. 1966). The Consent Decrees may be extended perpetually because a charitable organization may have a perpetual existence and must act in accord with its charitable mission throughout its existence. Accordingly, in addition to the fact that UPMC can identify nothing in the Consent Decrees that prevents the Attorney General from petitioning this Court for approval of its proposed modification, the Attorney General has inherent authority to do so as a result of its *parens patriae* power.

CONCLUSION

For the reasons stated herein, this Court should deny UPMC's Preliminary Objections and consider whether the modifications requested by the Attorney General in the Petition to Modify are in the public interest.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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.

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CERTIFICATE OF COMPLIANCE WITH RULE 2135(D)

This Brief complies with the length-of-brief limitation of Pa.R.A.P. 2135, because this Brief contains 9,645 words. This Certificate is based upon the word count of the word processing system used to prepare this Brief.

Dated: March 11, 2019

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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on this 11th day of March, 2019, a true and correct copy of the foregoing document was served upon the following counsel by electronic PACFile:

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