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39 MAP 2019

IN THE SUPREME COURT OF PENNSYLVANIA

No. 39 MAP 2019

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

v.

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

Appeal of: Commonwealth of Pennsylvania, By Josh Shapiro, Attorney General

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BRIEF OF HIGHMARK HEALTH AND HIGHMARK, INC. PURSUANT TO PENNSYLVANIA RULE OF APPELLATE PROCEDURE 908 IN SUPPORT OF REVERSAL

On Appeal from the Order of the Commonwealth Court of Pennsylvania, Honorable Robert Simpson, Entered April 3, 2019, in No. 334 MDA 2014

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INTRODUCTION

This appeal presents a single legal question: May the Commonwealth Court modify the Consent Decrees' end date if the Office of the Attorney General shows that the modification is in the public interest? This question must be answered through an analysis tethered solely to the settled rules of contract interpretation. A straightforward application of those legal principles to the Consent Decrees' express language demonstrates that the answer unequivocally is "yes." And nothing in this Court's 2018 opinion alters that conclusion.

As this Court well knows based on other appeals arising out of the Consent Decrees, the Commonwealth entered into separate (but virtually identical) Consent Decrees with UPMC and Highmark in July 2014.[1] The Consent Decrees expressly authorize the Commonwealth Court to modify the Decrees if the party seeking modification demonstrates that the modification is in the public interest:

[1] Because UPMC and Highmark entered into nearly-identical Consent Decrees with the Commonwealth, in this appeal, Highmark refers to the "Consent Decrees," plural. Instances where only one Consent Decree is discussed will be clearly denoted.

> If the OAG, PID, DOH or [Highmark/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 Decrees, § IV(C)(10). (The Consent Decree between the Commonwealth and UPMC is attached to this brief at Tab B.)

Concluding that modifications of the Consent Decrees were acutely needed to serve the public interest, the Office of the Attorney General (OAG) provided both UPMC and Highmark with a proposed modified consent decree aimed at ensuring that UPMC did not effectively deny a significant number of individuals in the Western Pennsylvania community access to its facilities simply because of the insurance they carry. Highmark agreed to the proposed modification, but UPMC did not. Then, invoking the Consent Decrees' express modification provision, the OAG filed a petition in the Commonwealth Court asking the court to modify the Consent Decrees. The OAG's requested modifications would extend beyond June 30, 2019, the current end date of the Consent Decrees.

UPMC filed preliminary objections, but the Commonwealth Court rejected most of them—for instance, the court concluded that the OAG had stated sufficient facts supporting its contention that the modifications were in the public interest

and, as such, the public interest question would best be resolved after a trial. The Commonwealth Court also concluded, however, that the Consent Decrees' end date could not be modified—that is, that any modifications endorsed by the court could not extend beyond June 30, 2019. Recognizing the importance of this legal issue—and that there were reasonable grounds for a difference of opinion on it—the Commonwealth Court asked this Court to hear an immediate appeal.

The Commonwealth Court reasoned that the Consent Decrees' end date could not be modified because it was a "material term" and cited this Court's 2018 decision in *Commonwealth v. UPMC*, 188 A.3d 1122, 1125 (Pa. 2018) ("*Medicare Advantage II*") as "binding" on this point. This conclusion and the reasoning used to reach it cannot be reconciled with either controlling contract law or the well-established jurisprudential rules governing the interpretation of case law.

As explained below, the Consent Decrees' express terms authorize the OAG to petition for a modification of the Decrees and authorize the Commonwealth Court to modify them if the OAG carries its burden by demonstrating that a modification is in the public interest. The Consent Decrees contain no other limitation on the parties' ability to seek a modification, or for the court to order one. In other words, the Consent Decrees do not state generally that "material terms" may not be modified, nor do they state specifically that the end date may

not be modified. Because the Consent Decrees' express language must control the analysis, the Commonwealth Court erred as a matter of law.

The Commonwealth Court also was wrong when it reasoned that this Court's 2018 opinion supported its "no-modification-of-end-date" conclusion. In the 2018 appeal, this Court was called upon to ***enforce*** the Consent Decrees—specifically to answer whether, consistent with the terms of the Consent Decrees, UPMC could be required to enter into a Medicare Advantage Provider Agreement with Highmark that extended beyond June 30, 2019. This Court's ruling that the ***existing*** terms of the Consent Decrees did not impose obligations beyond June 30, 2019 said nothing about whether the Consent Decrees could be ***modified***, pursuant to their express terms, upon a proper request filed with the Commonwealth Court and if the OAG met its burden to prove the requested modifications are in the public interest. Indeed, this Court was not asked to answer that question—nor did it.

Thus, we are back to the question posed at the start: Do the Consent Decrees authorize the OAG to request modifications to the Consent Decrees—and for the Commonwealth Court to order modifications—that would extend Highmark and UPMC's obligations beyond June 30, 2019. As the Consent Decrees' express and unequivocal terms make clear, they do, so long as the OAG proves that the requests are in the public interest. This Court, accordingly, should reverse the

Commonwealth Court's April 3, 2019 ruling and allow this matter to return to the Commonwealth Court to address the essential question of whether the OAG's proposed modifications are in the public interest.[2]

STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to 42 Pa. C. S. § 702(b) and Rule 1311 of the Pennsylvania Rules of Appellate Procedure. In its April 3, 2019 Order, the Commonwealth Court *sua sponte* certified its ruling for an immediate appeal, expressly stating that it "involves a controlling question of law as to which there is a substantial grounds for difference of opinion, and an immediate appeal may materially advance the termination of the matter." The OAG then filed a Petition for Permission to Appeal in this Court. This Court granted the petition on April 16, 2019.

[2] In prior filings, UPMC has suggested, if not outright stated, that the OAG is trying to impose these modifications on UPMC. Not true. The OAG is simply doing what is authorized by the Consent Decrees—asking the Commonwealth Court to determine if the OAG has met the burden for modification provided in the Consent Decrees. Along those same lines, UPMC's prior briefing has attacked the propriety of the modifications. Those arguments are premature and must be left to the trial on the ultimate issue.

ORDER IN QUESTION

The ruling in question is contained in the Commonwealth Court's April 3, 2019 Opinion and Order sustaining in part UPMC's preliminary objections to the OAG's Complaint. As is relevant to this appeal, the Commonwealth Court sustained in part UPMC's preliminary objections as to the OAG's "prayer [in Count I] to extend the Consent Decrees indefinitely." The Opinion and Order is attached to this brief at Tab A.

SCOPE AND 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. *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).

On an appeal, this Court "exercise[s] *de novo* review of a lower tribunal's

order sustaining preliminary objections in the nature of a demurrer." *William Penn Sch. Dist. v. Pennsylvania Dep't of Educ.*, 170 A.3d 414, 434 (Pa. 2017); *Doe v. Franklin Cty.*, 174 A.3d 593, 602 (Pa. 2017) (appeal regarding reversal of trial court's order sustaining preliminary objections "presents pure questions of law over which our standard of review is *de novo* and our scope of review is plenary").

"Because contract interpretation is a question of law, [an appellate court] is not bound by the trial court's interpretation. Our standard of review over questions of law is *de novo* and to the extent necessary, the scope of our review is plenary as [the appellate] court may review the entire record in making its decision." *Ragnar Benson, Inc. v. Hempfield Twp. Mun. Auth.*, 916 A.2d 1183, 1188 (Pa. Super. 2007); *McMullen v. Kutz*, 985 A.2d 769, 773 (Pa. 2009) ("We note that the interpretation of the terms of a contract is a question of law for which our standard of review is *de novo,* and our scope of review is plenary.")

QUESTIONS PRESENTED

Whether the Commonwealth Court committed an error of law in concluding that the Consent Decrees' end date could not be modified where the Consent Decrees contain an express modification provision that authorizes the OAG to seek modifications and the Commonwealth Court to order modifications if the OAG proves they are in the public interest and where the Consent Decrees do not exclude the end date from the scope of the modification provision?

Whether the Commonwealth Court committed an error of law in concluding that this Court's 2018 decision in *Medicare Advantage II* is binding on the question at issue in this litigation—namely, whether the Consent Decrees' end date may be modified—where that question was neither raised nor adjudicated by this Court in the 2018 appeal?

STATEMENT OF THE CASE

A. Events Leading Up To The Execution Of The Consent Decrees

This Court is well-aware of the history of the relationship between UPMC and Highmark, including the events leading up to the execution of the Consent Decrees and the subsequent disputes related to the Consent Decrees. Accordingly, only a short overview of that history follows.

This litigation has its genesis in the Commonwealth of Pennsylvania's efforts to protect consumers in the wake of UPMC's declaration that it intended to

terminate its contracts with Highmark—contracts that had, for years, provided in-network health care services to Highmark's insureds. In 2011, UPMC announced that it would not renew certain provider agreements with Highmark after Highmark acquired West Penn Allegheny Health System, which UPMC viewed as competition for its provider-side business. (R.79a-80a) Because UPMC's threat not to renew certain contracts with Highmark (notwithstanding UPMC's own health plan which has competed with Highmark) created the prospect of significant disruption for Western Pennsylvania citizens, the OAG intervened to protect the interests of the general public caught in the middle of the parties' contractual dispute. (R.80a-81a) After legislative hearings and a mediation effort by the Governor, UPMC and Highmark signed an agreement in May 2012 (the "Mediated Agreement"). (R.80a-81a) Under this Mediated Agreement, UPMC and Highmark would provide for in-network access to all UPMC hospitals and physicians for Highmark Commercial and Medicare Advantage members until December 31, 2014. (R.80a-81a)

Uncertainty arose once again when, in Spring 2014, UPMC stated that it intended to terminate its commercial contracts with Highmark. (R.81a-82a) In response, the OAG, asserting its *parens patriae* powers to protect health care consumers in Western Pennsylvania, filed a petition in the Commonwealth Court on June 27, 2014. (R.19a) Together with this petition, the OAG filed two motions

to approve the Consent Decrees it had negotiated with the parties prior to filing the petition—one between the OAG and UPMC and another between the OAG and Highmark—which were entered as orders of the Commonwealth Court on July 1, 2014. (R.19a, 82a-83a)

The Consent Decrees were to remain in effect for a period of five years. Consent Decrees, § IV(C)(9). They provided that the Commonwealth Court retained jurisdiction "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 Decrees, § IV(C)(11).

Relevant to the present dispute, the Consent Decrees included a modification provision (the "Modification Provision") which provided:

> 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.

Consent Decrees, § IV(C)(10).

B. Prior Enforcement Actions Under The Consent Decrees

Less than a year after the parties entered into the Consent Decrees, UPMC announced that it was terminating its Medicare Acute Care Provider Agreements ("Medicare Agreements") with Highmark. In response, the Commonwealth filed its first enforcement action pursuant to Section IV(C)(11), asserting that UPMC's actions violated the Consent Decrees. (R.23a) The Commonwealth Court (per Judge Pellegrini) granted the OAG's Motion on May 29, 2015, held that UPMC could not abandon its commitments under the Consent Decrees, and required UPMC to "be in a contract with Highmark" and to "be an in-network provider for Highmark Medicare Advantage Plans." (R.40a) UPMC appealed the Commonwealth Court's order to this Court. (R.40a) This Court affirmed on November 30, 2015. *Commonwealth v. UPMC*, 129 A.3d 441 (Pa. 2015) ("*Medicare Advantage I*").

Then, in September 2017, UPMC informed Highmark that it intended to terminate its Medicare Agreements with ten Highmark facilities effective December 31, 2018—before the end of the Consent Decrees—and taking the position that 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 Medicare Agreements' end date (the "runout provision"). *Medicare Advantage II*, 188 A.3d at 1125. Highmark and the OAG disagreed, and moved the Commonwealth Court to enforce the Consent Decrees. (R.46a, 49a) The Commonwealth Court held that the Consent Decrees required UPMC to be in a contract with Highmark until at least the end of June 2019. Commw. Ct. Dkt. No. 126 (January 29, 2018 Order and Opinion). The Commonwealth Court further 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. Commw. Ct. Dkt. No. 126 (January 29, 2018 Order and Opinion).

This Court reversed. The issue before this Court was whether the runout provision satisfied UPMC's obligations under the Consent Decrees and whether the Commonwealth Court was correct to conclude that UPMC should be required to enter into a one-year contract that would extend beyond June 30, 2019. *Medicare Advantage II*, 188 A.3d at 1127-28. This 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 and, under

the terms of the Consent Decrees, UPMC could not be ordered to enter into a contract with Highmark that extended beyond that date. *See id.* at 1134-35.[3]

On December 20, 2017, Highmark and UPMC negotiated a Second Mediated Agreement through the auspices of Governor Tom Wolf. (*See* R.83a) That Agreement covers Highmark's commercial insurance products only, extends in-network access to only certain UPMC specialty provider and community hospitals for a period of two to five years after June 30, 2019, and retreats from broader protections afforded under the Consent Decrees concerning emergency room and out-of-network rates as well as balance billing practices. (R.83a-84a)

C. Current Proceedings Before The Commonwealth Court

The current controversy arises out of the OAG's petition to modify the Consent Decrees invoking a provision of the Decrees that permits modifications upon a showing that modifications will serve the public interest. The Petition outlines both the roots of litigation, as well as the profound adverse effect of UPMC's refusal to provide in-network health services to a significant swath of the population which, in turn, the OAG contends justifies its request for modifications of the Consent Decrees. More specifically, the Petition alleges the following:

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[3] This Court expressly 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." *Medicare Advantage II*, 188 A.3d at 1125 n.7 (citing Consent Decrees, § IV(C)(11)) (emphasis added).

For the past two years, the OAG has attempted to negotiate modifications of the Consent Decrees. (R.72a) UPMC had no interest in that. (R.72a) For instance, UPMC has indicated that when the Consent Decrees terminate on June 30, 2019, it will immediately begin to impose fees for emergency and trauma department services that are many times higher for all out-of-network patients. (R.99a) Determined to implement that plan—which would, for example, prevent hundreds of thousands of out-of-network insureds from obtaining emergency care at UPMC facilities at reasonable rates—UPMC refused to modify the Consent Decrees or to engage in meaningful negotiations on reasonable reimbursement rates for emergency care. (*See* R.72a)

Highmark, on the other hand, agreed to the proposed modifications that the OAG formally presented to the parties in December 2018, provided UPMC would agree to be subject to those same terms. Notably, the proposed modification would apply equally to both UPMC and Highmark, requiring, for instance, that Highmark-owned Allegheny Health Network hospitals would have to contract with UPMC health plans, and vice versa. (R.108a-112a, 230a)

On February 7, 2019, the OAG petitioned the Commonwealth Court to modify the Consent Decrees in order to protect the public interest (Count I). (R.55a, 106a-114a) The OAG brought its Petition pursuant to both its broad *parens patriae* power to oversee charities such as UPMC and Highmark and the

Consent Decrees' explicit provision that modification in the public interest could be sought by petitioning the Commonwealth Court.[4] (R.71a) The Petition seeks to modify the Consent Decrees in eighteen ways, including by modifying the termination date. (R.108a-112a)

Consistent with the Consent Decrees, which themselves were entered to benefit the public, the Petition is squarely focused on protecting the public interest. It states "the modification being sought in this petition is in the public interest as UPMC's Actions … are causing widespread confusion among the public and personal hardships for many individual UPMC patients." (R.71a) Detailing the harm that UPMC's conduct had already caused the public—and how it will continue to harm the public in the future—the Petition asserts that "UPMC has failed to ensure that senior citizens and other vulnerable members of the public will continue to have affordable access to their health care providers," and that UPMC's refusal to contract with health care insurers "will result in more patients seeking access to UPMC on a cost-prohibitive Out-of-Network basis." (R.84a)

[4] The OAG's Petition also includes claims for Violation of the Solicitation of Funds for Charitable Purposes Act (Count II), Breach of Fiduciary Duties of Loyalty and Care Owed to its Constituent Health Care Providers and Public-at-Large (Count III), and Violations of the Unfair Trade Practices and Consumer Protection Law (Count IV). (R.114a-139a) The Commonwealth Court severed Count I from the other counts so that Count I could be "litigated separately and expeditiously." (R.440a) As a result, the Commonwealth Court's Order addressed only Count I.

The Petition provides concrete illustrations of how individuals—including cancer patients, a kidney transplant recipient, and a patient with Parkinson's disease—and employers will be directly harmed by UPMC's conduct if the Decrees are not modified. (R.90a-95a) The Petition also notes that UPMC's conduct "imposes special costs and hardships on seniors" who come into contact with the healthcare system more frequently than other segments of the population. (R.96a)

The Petition also explains that 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 undoubtedly will increase the harm flowing from its failure to allow full access to its physicians and facilities. On top of that, UPMC is engaging in new and different conduct that further shuts its doors and deprives the public of access to 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* R.90a-92a, 95a-96a, 99a-100a) This conduct, in turn, renders all out-of-network insureds vulnerable to the uncertainty caused by unforeseen changes in where and how they will be able to access potentially life-saving health care.

The Petition makes clear that UPMC's conduct is particularly harmful to the public because of its status as a charity, alleging that UPMC has "benefitted from hundreds of millions of dollars" in favorable tax treatment and has been the

recipient of more than one billion dollars in public and private contributions. (R.78a-79a) The OAG contends that because UPMC is a charity and enjoys the benefits of that status, it must remain "committed to providing the public with access to high-quality, cost effective health care" and is "prohibited from private pecuniary gain—the financial success of its health care operations must inure to the benefit of the public-at-large." (R.80a, 85a) Yet, as the OAG alleges, UPMC "employs practices that increase its revenue without apparent regard for the increase on the costs of the region's health care." (R.88a) As a result, according to the OAG, "the public has paid for UPMC's dramatic expansion, yet thousands of those taxpayers who built UPMC are now being shut out of the very care they helped pay for." (R.79a) In other words, UPMC's refusal to contract with certain health insurance plans "will result in both UPMC's unjust enrichment as patients will be forced to pay amounts in excess of the reasonable value of UPMC's services and denial of care to patients in contradiction to UPMC's stated charitable mission and representations to the public." (R.100a-101a)

To address these issues and serve the public interest, the Petition proposes eighteen modifications to the Consent Decrees. The OAG states that the proposed modifications are designed to: "(a) Enable patients' continued and affordable access to their preferred health care providers and facilities; (b) Protect against the respondents' unjust enrichment; (c) Promote the efficient use of the respondents'

charitable assets; and, (d) Restore the respondents to their stated charitable missions beyond June 30, 2019." (R.107a-108a) Highmark responded to the Petition, stating that it "supports the Attorney General's position that this Court should modify the Consent Decrees to ensure that charitable healthcare organizations operate in accord with their charitable obligations to provide reasonably priced and accessible healthcare …." (R.230a-231a) UPMC filed an Answer in the Nature of a Motion to Dismiss or Preliminary Objections, raising a whole host of arguments that essentially posited that the OAG was powerless to pursue any of the proposed modifications to the Consent Decrees. (R.57a)

D. The Commonwealth Court's Decision On UPMC's Preliminary Objections

The Commonwealth Court (per Judge Simpson), ruled on UPMC's Answer on April 3, 2018. After detailing this case's long procedural history, the OAG's allegations, and the parties' responses, the court agreed that the OAG has broad powers to seek modification as *parens patriae* under the Consent Decrees' modification provision. Op. at 41-42. The court also found that the doctrines of waiver, claim preclusion, ripeness, and equitable or judicial estoppel did not preclude the OAG from seeking modification. Op. at 29-31. Other than the requirement to prove that the proposed modifications serve the public interest, the court observed that "the Consent Decree sets forth no other constraints on OAG's

ability to seek modification." Op. at 34. Based on these conclusions, the Commonwealth Court denied UPMC's Preliminary Objections with respect to seventeen of the OAG's eighteen requests for modification. Op. at 34-38.

But on the eighteenth request—that UPMC's and Highmark's obligations be extended beyond June 30, 2019—the Commonwealth Court held that it was unable to modify the Consent Decrees' termination date because of this Court's ruling in *Medicare Advantage II*. The court reasoned:

> … [O]ur Supreme Court has already decided that the June 30, 2019 termination date is an unambiguous and material term of the Consent Decree. That Court also instructed that in the absence of fraud, accident or mistake, courts have neither the power nor the authority to modify or vary the terms set forth. Whatever preclusion label is applied, our Supreme Court's ruling on this issue is binding here. Stated differently, regardless of the authority of the Attorney General or the remedies set forth in the Consent Decree, inherent limitations on this Court's power prevent relief inconsistent with the Supreme Court's prior ruling in this case. Because the OAG does not plead fraud, accident or mistake, this Court lacks the power or authority to modify the termination date of the Consent Decree without the consent of the parties, even if it were in the public interest to do so.

Op. at 34-35 (internal citations and quotations omitted). Recognizing the significance of its legal ruling—and that there is a reasonable ground for difference of opinion on it—the Commonwealth Court certified its ruling for an immediate appeal under 42 Pa. C. S. § 702(b).

The OAG filed a Petition for Permission to Appeal, or in the Alternative, Application for Extraordinary Relief, asking this Court to certify an appeal on an

expedited basis or, in the alternative "order the maintenance of the Parties' Consent Decrees, pending ultimate resolution of this action in this Court." 46 MM 2019, Dkt. No. 1 (April 4, 2019 Petition for Permission to Appeal, or in the Alternative, Application for Extraordinary Relief). Highmark joined the OAG's petition. 46 MM 2019, Dkt. No. 3 (April 10, 2019 Joinder to Petition for Appeal at 7). This Court entered an Order granting permission to appeal and ordered expedited briefing on April 16, 2019. On April 17, 2019, the Commonwealth Court stayed all proceedings in that Court pending the outcome of this appeal. (R.67a)

SUMMARY OF ARGUMENT

The Commonwealth Court's ruling that the Consent Decrees' June 30, 2019 end date cannot be modified is wrong as a matter of law and also is inconsistent with the court's own analysis in other portions of its opinion.

In rejecting UPMC's assertion that claim preclusion barred the OAG's claims, the Commonwealth Court noted that:

> Section IV(C)(10) of the Consent Decree expressly permits OAG to apply to this Court for modification of the Consent Decree. Through its prior filings in this case, OAG sought *enforcement* of various aspects of the Consent Decree; it did not seek *modification* as expressly permitted by Section IV(C)(10). Thus, there is a lack of identity between OAG's prior and current claims.

Op. at 30 (emphasis in original). This distinction is correct, and the Commonwealth Court's failure to adhere to it undergirds the legal error it committed here.

Similarly, the Commonwealth Court variously stated in its opinion that this Court's "decision in [*Medicare Advantage II*] did not preclude the filing of a petition to modify the Consent Decree prior to its expiration date [and thus it] ***does not definitively bar the Petition*** at this stage." Op. at 34 (emphasis added). Moreover, the Commonwealth Court recognized that "the Consent Decree expressly provides, if OAG believes modification of the Consent Decree would be in the public interest … it 'may petition the Court for modification and [it] shall bear the burden of persuasion that the requested modification is in the public interest.' Consent Decree, §IV(C)(10)." Op. at 33-34. The court went further still and acknowledged that, beyond the public interest requirement, the Consent Decrees "set[] forth ***no other constraints*** on OAG's ability to seek modification" of the Consent Decrees. Op. at 34 (emphasis added). Thus, as even the Commonwealth Court recognized, nothing in the Consent Decrees precludes modification of the end date.

Yet, paradoxically, the Commonwealth Court held that it could not "extend the duration of a modified Consent Decree indefinitely." Op. at 34. Nor did the Commonwealth Court identify any language limiting its ability to do so. Instead,

it supported its holding by citing to language in this Court's 2018 *Medicare Advantage II* opinion stating that the Consent Decrees' end date was an unambiguous and material term that could not be altered absent fraud, accident or mistake. Op. at 34-35 (citing *Medicare Advantage II*, 188 A.3d at 1132).

The Commonwealth Court was wrong to conclude that this Court's 2018 decision concerning a request to ***enforce*** the Consent Decrees bars the modification the OAG seeks. The question implicated by the OAG's current petition is whether the Consent Decrees' end date may be ***modified*** pursuant to the Consent Decrees' modification provision. There is nothing in this Court's 2018 decision in *Medicare Advantage II* that is controlling on ***that*** question because it was neither raised by the parties nor adjudicated by this Court in the 2018 appeal.

In sum: The Commonwealth Court's conclusion and the reasoning used to reach it is untethered to—in fact, is contrary to—the Consent Decrees' terms. Indeed, the Commonwealth Court's ruling rewrites the modification provision—to which UPMC agreed—that expressly authorizes the OAG to petition the Commonwealth Court for a modification of the Consent Decrees and authorizes the Commonwealth Court to order modifications if the OAG demonstrates that such modification is in the public interest. That is precisely what the OAG has done and the Commonwealth Court is expressly authorized to do.

ARGUMENT

I. The Consent Decrees Expressly Authorize The OAG To Petition For Modification And Nothing Constrains It From Requesting Modification Of The End Date

The Commonwealth Court's ruling—which rejected nearly all of UPMC's arguments in support of dismissal—reflects a crucial legal error: by ruling that the Consent Decrees' end date cannot be modified, the court did not adhere to the Consent Decrees' plain language as the controlling rules of contract interpretation require. Based on that plain language, modification of the end date is allowed, and the Commonwealth Court committed three foundational legal errors in ruling otherwise.

First, settled principles of contract law dictate that a court interpreting unambiguous contract language must apply the plain language of the contract. Here, the Consent Decrees are clear—they expressly permit any party to seek a court order modifying the agreements (whether or not the other parties consent) upon a showing that such modification will benefit the public interest. There are no other limitations on the type of modification that may be sought and ordered. The Commonwealth Court's order violates the rules of contract interpretation in ruling otherwise.

Second, the Commonwealth Court erred when it rewrote the Consent Decrees to include a "materiality" exception to the Decrees' modification

provision. There is no such limitation as it relates to modification of any terms. The Consent Decrees do not state that material terms (which are never defined in the Decrees) may not be modified, nor do they state, specifically, that the end date may not be modified. There is no principle of contract interpretation that provides such a limitation. And, as explained further in Section II below, the Commonwealth Court's reliance on certain statements made by this Court in *Medicare Advantage II* was misplaced. Nothing in that decision authorized the Commonwealth Court to rewrite the Consent Decrees' modification provision or required it to conclude that the Consent Decrees' end date could not be modified.

Third, the Commonwealth Court erred by substituting a rule of contract interpretation that forbids courts from altering a contract in the absence of fraud, accident or mistake—applicable when a court is called upon to enforce a contract as written—to preclude a request for modification based on a contract provision that explicitly authorizes such a request. While it may be true in the ***enforcement*** context that a court may not alter the terms of a contract as written unless there has been fraud, accident or mistake, that does not mean that a court may not ***modify*** a contract in accordance with its express modification provision. When a modification is sought pursuant to an express provision to which all parties have agreed, that provision's prerequisites for modification—not the fraud, accident, or mistake interpretative principle—control the analysis.

In sum, the overarching purpose of the Consent Decrees—as reflected in their plain language and as revealed by the circumstances that led to their creation—was to protect the public from the adverse effects of UPMC's refusal to continue its relationship with Highmark. *See* Consent Decrees, § I(A). As this Court has recognized, they were designed to "provide a measure of enduring certitude and security for health care consumers who were members of certain Highmark health care plans, that they would not incur significant costs in seeking treatment at UPMC facilities if UPMC followed through on its promise to terminate provider contracts [and] to alleviate the justifiable concerns [the Commonwealth] had over the deleterious impact these looming terminations would have on certain groups of vulnerable individuals most likely to be in need of access to UPMC facilities or medical treatment …." *Medicare Advantage I*, 129 A.3d at 464.

The Consent Decrees' plain language—as well as their overarching purpose—should have controlled the Commonwealth Court's analysis of the OAG's Petition. The Consent Decrees plainly and explicitly direct that modifications shown to be made in the public interest may be made without limitation.

A. The Consent Decrees Expressly Permit A Party To Seek A Modification Constrained Only By The Need To Prove That The Modification Is In The Public Interest

The Commonwealth Court disregarded the plain language of the Consent Decrees in rendering its decision on Count One of the OAG's Petition, and in doing so violated bedrock principles of contract interpretation. The parties expressly agreed that the Consent Decrees could be modified by agreement or by order of the Commonwealth Court. The Consent Decrees spell out—plainly and in detail—the process for modification when, as here, there was no agreement: "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).

The OAG complied fully with the modification provision in the Consent Decrees. It 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. (R.107a-108a) Highmark agreed to be bound by the requirements imposed by the modification (subject to UPMC doing the same), but UPMC did not. (R.108a-113a) Then, in accordance with the procedures outlined in the Consent Decrees, the OAG petitioned the Commonwealth Court for modification. (R.113a)

The Commonwealth Court recognized that the Consent Decrees contain an express modification provision, and found that the relief the OAG seeks in its current petition (modification of the existing Consent Decrees) is different from what it sought in the prior actions (enforcement of the existing Consent Decrees). Op. at 30. The court even recognized that proof that the modification will serve the public interest is the ***only*** constraint on modification. Op. at 34. Yet, when faced with a request for modification that adhered to the Consent Decrees' terms, the Commonwealth Court overlooked basic principles of contract law and ruled that the Consent Decrees' end date could not be modified.

The Commonwealth Court's ruling in that regard essentially rewrote the Consent Decrees' modification provision by inserting a limitation—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, 429-33 (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).[5] The Commonwealth Court's reading—which simultaneously acknowledged the existence of the modification provision yet refused to fully enforce it—was contrary to law and should be reversed.

Moreover, the Commonwealth Court's reading of the Consent Decrees failed to give effect to the parties' intent—namely, that the Decrees serve the public interest and may be modified when and as needed to further that interest. Pennsylvania law instructs that contracts must be interpreted to give "effect to the intent of the contracting parties." *Murphy*, 777 A.2d at 429. Indeed, this Court has long recognized that "[i]t is the intention of the parties which is the ultimate guide, and, in order to ascertain that intention, the court may take into consideration the surrounding circumstances, the situation of the parties, the objects they apparently have in view, and the nature of the subject-matter of the agreement." *Hindman v. Farren*, 44 A.2d 241, 242 (Pa. 1945) (citing *Slonaker v. P.G. Publishing Co.*, 13 A.2d 48, 50, 51 (Pa. 1940)). When "arriving at contractual intent," "[t]he whole instrument must be taken together." *Murphy*,

[5] UPMC has acknowledged that a consent decree is a contract that is controlled by principles of contract law. Commw. Ct. Dkt. No. 132; *see also Medicare Advantage I*, 129 A.3d at 463.

777 A.2d at 429. And courts must not interpret contracts in a way that would thwart the parties' manifest intent or the contract's purpose. *Pocono Manor Ass'n v. Allen*, 12 A.2d 32, 35 (Pa. 1940) ("Before a court will interpret a provision in … a contract in such a way as to lead to an absurdity or make the … contract ineffective to accomplish its purpose, it will endeavor to find an interpretation which will effectuate the reasonable result intended.").

Here, it is clear from the Consent Decrees' plain language that the parties' intent was to serve the public interest—and, indeed, they reiterated that purpose expressly in the modification provision.[6]

This Court, too, has recognized the public interest purpose underlying the Consent Decrees by acknowledging they were intended to:

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[6] Adhering to the directive, the OAG's Petition is replete with examples of how modification of the Consent Decrees would serve the public interest by, for example, (1) allowing patients continued and affordable access to their preferred health care providers and facilities; (2) protecting against UPMC's unjust enrichment; (3) promoting the efficient use of UPMC's charitable assets; and (4) restoring UPMC to its stated charitable mission beyond the current end date of the Consent Decrees. (*See e.g.* R.107a-108a)

> provide a measure of ***enduring certitude and security for health care consumers*** who were members of certain Highmark health care plans that they would not incur significant costs in seeking treatment at UPMC facilities if UPMC followed through on its promise to terminate provider contracts [and] to alleviate the justifiable concerns [the Commonwealth] had over the ***deleterious impact these looming terminations would have*** on certain groups of vulnerable individuals most likely to be in need of access to UPMC facilities or medical treatment ….

Medicare Advantage I, 129 A.3d at 464.

Moreover, an interpretation that recognizes the importance of adhering to the Consent Decrees' public interest purpose is consistent with—in fact, is required by—Pennsylvania law. *See Pritchard v. Wick*, 178 A.2d 725, 727 (Pa. 1962) (outlining principles of contractual interpretation and noting that "where a public interest is affected, an interpretation is preferred which favors the public"). And, as noted, UPMC's ongoing conduct and growing footprint as the June 30, 2019 deadline approaches has brought the "deleterious impact" into stark relief. Confusion continues to grow as Highmark insureds are left uncertain of how they will be able to obtain—and afford—health care from their doctors and hospitals. (R.71a, 85a)

In sum: The plain language of the Consent Decrees controls, and the Commonwealth Court erred as a matter of law by rewriting the Consent Decrees to allow UPMC to avoid the modification provision to which it agreed. Consistent with the Consent Decrees' language and purpose, the OAG should be afforded the

opportunity to prove that its proposed modifications—including those that would impose obligations on UPMC and Highmark alike beyond June 30, 2019—are in the public interest.

B. The Consent Decrees Do Not Preclude, Generally, Modification Of A Material Term Or Preclude, Specifically, Modification Of The End Date

The Commonwealth Court reasoned that the end date was a "material term of the Consent Decree" and thus could not be modified. Op. at 34. Yet, nowhere in the Consent Decrees is there limiting language saying that there can be no modification of a material term. The only limitation included in the modification provision is that the modification must be "in the public interest." Consent Decrees, § IV(C)(10); (*see also* R.113a) ("There are no limitations or parameters imposed on the scope of permissible modifications, only that they must be shown to promote the public interest."). Neither the Consent Decrees nor the Commonwealth Court's ruling attempt to differentiate "material" terms from other terms of the Consent Decrees. Nor did the Commonwealth Court identify any principle of contract law supporting its broad assertion that, absent limiting

language in the contract itself, where a contract contemplates modification, such modification may not be made to a "material" term or to the contract's end date.[7]

In essence, the Commonwealth Court read an additional term into the Consent Decrees—one that limited modifications to only "non-material terms." Because no such limitation exists in the Consent Decrees' language, the Commonwealth Court's ruling violated the controlling rules of contract interpretation. It is black-letter law that a court may not add words to a contract. *Litwack v. Litwack*, 433 A.2d 514, 516 (Pa. Super. 1981) ("This court cannot read into the agreement a provision which the parties chose not to insert."). That prohibition follows from the well-settled rule that courts must interpret contracts as written and in accordance with their express terms. *See Steuart*, 444 A.2d at 662 ("This Court long ago emphasized that the parties have the right to make their own contract, and it is not the function of this Court to re-write it, or to give it a construction in conflict with the accepted and plain meaning of the language

[7] Accordingly, this Court need not wrestle with the issue of whether the Consent Decrees' end date is a material term. As explained, the Consent Decrees do not preclude modification of "material" terms. And neither UPMC nor the Commonwealth Court have cited to any case law holding that a material term is not subject to a modification provision absent express language establishing such a limitation. The Commonwealth Court, following UPMC's lead, cites only this Court's decision in *Medicare Advantage II*. But, as shown, the Commonwealth Court misread and misapplied that decision.

used.") (quoting *Robert E. Felte, Inc. v. White*, 302 A.2d 347, 351 (Pa. 1973)) (internal quotation marks and alterations omitted).

This Court has recognized that "[i]n a written contract the intent of the parties is the writing itself and when the words are clear and unambiguous the intent is to be determined ***only*** from the ***express language*** in the agreement." *Felte*, 302 A.2d at 351 (emphasis added) (citing *East Crossroads Ctr., Inc. v. Mellon-Stuart Co.*, 205 A.2d 865 (Pa. 1965)). If the parties intended to exclude material terms from the scope of the modification provision, they were free to do so. They did not. Consent Decrees, § IV(C)(10).

Because the Consent Decrees contain no language limiting the modification provision to only non-material terms—and surely none prohibiting modification of the end date—the Commonwealth Court erred as a matter of law in reading that limitation into the Consent Decrees.

C. Where The Terms Of An Agreement Allow Modification, The Fraud, Accident, Or Mistake Exception Is Inapplicable

The Commonwealth Court's other conclusion—that the Consent Decrees' end date could not be modified because the "OAG [did] not plead fraud, accident or mistake," Op. at 35, is equally untenable because that legal principle has no relevance here. Specifically, the Commonwealth Court relied on language in *Medicare Advantage II* to justify its conclusion that a court cannot modify the terms

of a contract absent fraud, accident, or mistake. Op. at 35. That reliance was misplaced because this Court never adjudicated that issue, as discussed in more detail in Section II, below.

But as it relates to principles of contract law, the Commonwealth Court's analysis conflated two distinct principles—only one of which applies in this case. In other words, the Commonwealth Court put the question in the wrong contract law "bucket" and because it posed the wrong question, it arrived at the wrong answer. The first "bucket" (used in *Medicare Advantage II*) applies when a court is called upon to enforce existing contract language. In those situations, the court is not permitted to interpret the contract in a way that modifies or varies the plain terms of the contract absent fraud, accident, or mistake. *See Medicare Advantage II*, 188 A.3d at 1132. In deciding *Medicare Advantage II*, it was appropriate for this Court to invoke and apply the fraud, accident, or mistake exception to the plain language rule because the OAG simply was asking this Court to interpret and enforce the existing terms of the Consent Decrees. Under those circumstances—where the question was whether, under the terms of the existing Consent Decrees, UPMC could be required to enter into a contract with Highmark that extended beyond June 30, 2019, the Court could not change the Consent Decrees' terms absent a showing of fraud, accident, or mistake. *See Universal Builders Supply,*

Inc. v. Shaler Highlands Corp., 175 A.2d 58, 61 (Pa. 1961) (finding that the trial court erred when it *sua sponte* entered an order modifying a consent decree).

The OAG's petition here implicates a second and different "bucket" of contract law by invoking the modification provision and asking the Commonwealth Court to do what that contract provision expressly allows. Given that, the Commonwealth Court was tasked with following the explicit directions contained in the Consent Decrees' modification provision that authorized modifications, provided only that the OAG demonstrated that the modifications were in the public interest. In sum, the OAG is not asking the Commonwealth Court to "remake a contract, under the guise of construction," *Steuart*, 444 A.2d at 662, but instead asked for a modification as authorized expressly in the Consent Decrees' plain language. Putting it another way, the fraud, accident, and mistake prerequisite to contract modification does not apply here because the OAG is not asking the Commonwealth Court to interpret and enforce the terms of the existing Consent Decrees (and modify that existing language in doing so), but instead to modify them in accordance with their express modification provision.

Given that, the Commonwealth Court was bound to look only to the terms of the Consent Decrees. Had the focus been kept where it belongs, it would have been plain that the Consent Decrees do not limit modifications to circumstances where there is fraud, accident, or mistake. And, under settled contract law, the

Commonwealth Court was not free to read such a limitation into the Consent Decrees' unambiguous terms. *See Steuart*, 444 A.2d at 662 ("court may not rewrite the contract" for the purpose of accomplishing that which, in its opinion, may appear proper, or, on general principles of abstract justice") (citing 17A C.J.S. Contracts § 296(3)).

Moreover, the Commonwealth Court offered no case law to support the conclusion that a modification provision agreed upon by all parties to a valid contract is ineffective absent evidence of fraud, accident or mistake. Op. at 35. To the extent that the Commonwealth Court arrived at that conclusion by relying on cases cited in UPMC's preliminary objections, those cases do not support the Commonwealth Court's conclusion because they involved consent decrees that did ***not*** contain modification provisions. *See Universal Builders Supply*, 175 A.2d at 61 (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). And *Salazar v. District of Columbia*, 896 F.3d 489, 498 (D.C. Cir. 2018), which did involve a consent decree with a modification provision, is distinguishable because that case turned on a modification entered pursuant to Federal Rule of Civil Procedure 60 based upon a significant change in legal or factual circumstances—not a showing that the modification would benefit the public interest, as is the case here.

UPMC's position appears to be that ***any*** modification provision included in ***any*** consent decree (or any contract, for that matter) is a dead letter. It argued below that, regardless of whether the consent decree at issue contains a modification provision, a court may not "impose a duty on the defendant that was not contained in the original agreement." Commw. Ct. Dkt. No. 142 (UPMC Reply Brief in Support of Preliminary Objections at 4) (citations omitted). But that position ignores what the Consent Decrees here provide—namely, a carefully-crafted modification provision that details when a party may seek judicial modification if all parties do not agree to the modification.

And, along those same lines, UPMC argued that "specific" contract terms always trump "general" contract terms, and thus the Consent Decrees' end date trumps the modification provision (which UPMC declares is a "general" and "boilerplate" term). 46 MM 2019, Dkt. No. 6 (Respondent UPMC's Answer to Petition for Permission to Appeal, Or in the Alternative, Application for Alternative Relief at 2, 13). This argument, if adopted, would nullify virtually every modification provision in any contract. While it might be true that specific terms control general terms, that principle applies only when a court is faced with a conflict between two different terms of a contract. *Musko v. Musko*, 697 A.2d 255, 256 (Pa. 1997) ("[T]he rule that when specific or exact provisions seem to conflict with broader or more general terms, the specific provisions are more likely

to reflect the intent of the parties than the general provisions.… has no application here. There is no apparent conflict between specific and general terms which would justify its use.") (internal citations and quotations omitted). There is no such conflict here. The Consent Decrees' modification provision is a separate term that does not cover the same subject matter as any other. As a matter of course, contracts always contain a whole host of specific terms. If modification provisions are deemed to be a "general" term overridden by any and all "specific" terms, modification provisions would be nullities. UPMC agreed to the broad modification provision contained in the Consent Decrees, and that provision should be enforced in accordance with its plain language.

II. This Court's 2018 Decision In *Medicare Advantage II* Does Not Preclude The AG's Request For Modification

The only legal authority the Commonwealth Court offered in support of its ruling that the Consent Decrees' end date could not be modified was this Court's 2018 opinion in *Medicare Advantage II*. That was error. The Commonwealth Court took a single sentence from the opinion out of context and without regard for the differences in the question presented in *Medicare Advantage II* and this case. As a result, the Commonwealth Court's reasoning does not align with either the text of *Medicare Advantage II* or settled principles of case law interpretation. Put simply, *Medicare Advantage II* does not control here because interpreting and

enforcing a contract—what this Court did in *Medicare Advantage II*—is not the same as determining whether a contract may be modified in accordance with an express modification provision—what the Commonwealth Court was called upon to do in this case. The Commonwealth Court erred by conflating these two very different judicial exercises.

Contrary to the Commonwealth Court's rationale, this 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 based on a request made pursuant to the Consent Decrees' modification provision. And this Court surely did ***not*** rule that such a modification was prohibited. Indeed, this 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." *See Medicare Advantage II*, 188 A.3d at 1125 n.7 (citing Consent Decrees, § IV(C)(11)) (emphasis added). Thus, nothing about the ruling in *Medicare Advantage II* is "binding here." Op. at 35.

The controversy that led to *Medicare Advantage II* 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 the runout provision in the UPMC-Highmark Medicare Provider Agreements requiring UPMC to continue to abide by the Agreements' terms and conditions for six months after the Agreements' end date. *See Medicare Advantage II*, 188 A.3d at 1125.

The parties' arguments in *Medicare Advantage II* centered on two questions of contract interpretation. First, the OAG and Highmark contended that UPMC's termination of the Medicare Provider Agreements violated UPMC's obligation under the Consent Decrees to continue to contract for vulnerable population services for the full period of the Consent Decrees. *See id.* Second, both the OAG and Highmark argued that the runout provision was not a contract, and consequently did not satisfy UPMC's obligation—imposed by this Court—to remain in an in-network "contract" with Highmark for the duration of the Consent Decrees. *See id.*

The answers to these interpretive questions turned on the interplay between the "continue to contract" language in Section IV(A)(2) of the Consent Decrees and the runout provision in the Medicare Provider Agreements. The Commonwealth Court 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 the entirety of calendar year 2019. Commw. Ct. Dkt. No. 126 (January 29, 2018 Opinion and Order). In support of its decision, the Commonwealth Court noted that the parties had performed under these one-year contracts since 1999 and had done so during the life of the Consent Decrees.

The appeal in *Medicare Advantage II*, therefore, presented a discrete and specific issue of contract interpretation—whether the runout provision satisfied UPMC's obligations under the Consent Decrees and whether the Commonwealth Court was correct to conclude that UPMC should be required to enter into a one-year contract that would extend beyond June 30, 2019. This 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.

It was in connection with addressing the specific question of contract interpretation before it that this Court said it could not "alter[] [the] unambiguous and material term of the Consent Decree—the June 30, 2019 end date," *see Medicare Advantage II*, 188 A.3d at 1132, because there was no basis in the ***existing*** terms of the Consent Decrees to require UPMC to enter into Medicare Provider Agreements for the entire 2019 calendar year—and thus by default extend the Consent Decrees for the remainder of 2019.

Importantly, though, this Court's conclusion arose in the context of interpreting the terms of the existing Consent Decrees—not a request for modification in accordance with their modification provision. While the Commonwealth Court here properly recognized that distinction, it paradoxically failed to properly apply the distinction when considering the OAG's request for modification. *Compare* Op. at 30 ("Through its prior filings in this case, OAG sought *enforcement* of various aspects of the Consent Decree; it did not seek *modification* as expressly permitted by Section IV(C)(10)."") *with* Op. at 34-35 ("As noted above, our Supreme Court has already decided that the June 30, 2019 termination date is an unambiguous and material term of the Consent Decree."). The latter reading is inconsistent with the former, and improperly takes this Court's language out of context.

In short, this Court in *Medicare Advantage II* did ***not*** hold—because it was not asked to hold—that the Consent Decrees' end date never could be modified. *Medicare Advantage II* arose in a completely different context—one of interpreting the existing language of the Consent Decrees, not applying an explicit provision within those agreements. The Commonwealth Court recognized this distinction, Op. at 30, yet failed to consistently apply it.

Indeed, the Commonwealth Court committed an error of law when it failed to properly interpret the effect of certain language used in this Court's prior

decisions. As this Court has explained, *stare decisis* "only applies to issues actually raised, argued and adjudicated, and only where the decision was necessary to the determination of the case. The doctrine is limited to actual determinations in respect to litigated and necessarily decided questions …" *In re L.J.*, 79 A.3d 1073, 1081 (Pa. 2013) (quoting *Commonwealth v. Perry*, 798 A.2d 697, 706 (Pa. 2002) (Castille, J., concurring)) (internal quotation marks omitted); *see also Appeal of Girard*, 4 Pennyp. 347, 360 (1884) ("The doctrines of *res adjudicata* and *stare decisis* do not apply to this case. Different questions were involved in the previous cases …").

Consistent with that approach, this Court employs the "axiom that the holding of a judicial decision is to be read against its facts." *Oliver v. City of Pittsburgh*, 11 A.3d 960, 966 (Pa. 2011); *Commonwealth v. McCann*, 469 A.2d 126, 128–29 (Pa. 1983) (same); *see also Commonwealth v. Resto*, 179 A.3d 18, 22–23 (Pa. 2018) (same). And because judicial decisions are necessarily fact-dependent, courts look disfavorably upon efforts to take isolated language from opinions out of their proper context. *See Maloney v. Valley Med. Facilities, Inc.*, 984 A.2d 478, 490 (Pa. 2009) ("Judicial opinions are frequently drafted … with imperfect foresight, and without due regard for the possibility that words or phrases or sentences may be taken out of context and treated as doctrines. We shouldn't like this done to our opinions …") (quoting *Northwestern Nat'l Ins. Co.*

v. Maggio, 976 F.2d 320, 323 (7th Cir. 1992) (Posner, J.)); *Commonwealth v. Moses*, 287 A.2d 131, 134 (Pa. 1971) ("While there is language in both opinions which lends comfort to appellant's position, it should not be read out of context or without consideration of the facts these cases presented.").

Here, the Commonwealth Court committed interpretive error when it took the language from *Medicare Advantage II* out of the context in which that case was decided. This Court did not say that the Consent Decrees could ***never be modified***—quite the opposite. *See Medicare Advantage II*, 188 A.3d at 1125 n.7 ("The Commonwealth Court, by the terms of the Consent Decree, retains jurisdiction for any necessary and appropriate interpretation, ***modification***, or enforcement.") (emphasis added). Indeed, nothing in the Consent Decrees prevents the OAG from seeking relief—including relief that will extend beyond June 30, 2019—based on its allegations relating to 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.* subscribers of plans that do not have provider contracts with UPMC) to have access to UPMC healthcare providers, services, and facilities.

CONCLUSION

The Commonwealth Court erred as a matter of law in concluding that the Consent Decrees' end date could not be modified. This Court should reverse. This matter should return to the Commonwealth Court for a trial to determine whether the OAG's requested modification—including those that would extend Highmark's and UPMC's obligations beyond June 30, 2019—are in the public interest.

Dated: April 24, 2019

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.

Dated: April 24, 2019

/s/ Kim M. Watterson
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CERTIFICATE OF COMPLIANCE WITH RULE 2135(D)

This Brief complies with the length-of-brief limitation of Rule 2135 of the Pennsylvania Rules of Appellate Procedure because it contains 10,098 words, not including the supplementary material listed in Rule 2135(b), based on the word count of Microsoft Word 2016, the word processing system used to prepare this brief. It has been prepared in in 14 point font.

Dated: April 24, 2019

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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on this 24th day of April, 2019, a true and correct copy of the foregoing document was served upon the following counsel by electronic PACFile:

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TAB A

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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

BEFORE: HONORABLE ROBERT SIMPSON, Judge

OPINION NOT REPORTED

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

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

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

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

I. Background

A. Generally

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Current Petition

1. Generally

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

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

2. UPMC's Charitable Purposes

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

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

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

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

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

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

Pet. at ¶6.

3. Public Financial Support

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

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

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

4. Additional History Regarding Consent Decree

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

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

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

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

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

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

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

5. UPMC's Alleged Departure from its Charitable Purposes

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Pet. at 21 n.9.

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

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

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

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

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

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

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

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

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

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

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

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

6. UPMC's Expansion

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

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

7. Counts of the Petition

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

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

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

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

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

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

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

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

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

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

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

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

C. Highmark's Response

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

D. UPMC's Motion to Dismiss/Preliminary Objections

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

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

II. Discussion

A. Release, Preclusion & Ripeness

1. Contentions

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

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

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

(Footnote continued on next page...)

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

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

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

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(continued...)

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

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

2. Analysis

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

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

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

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

Id. at 583 (citation omitted).

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

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

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

Consent Decree, §IV(C)(10), (11).

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

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

Consent Decree, §IV(C)(5).

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

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

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

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

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

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

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

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

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

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

B. Propriety of Modification

1. Contentions

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

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

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

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

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

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

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

2. Analysis

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

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

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

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

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

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

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

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

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

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

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

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

Id.

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

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

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

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

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

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

C. Party Specific Allegations

1. Contentions

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

2. Analysis

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

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

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

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

D. OAG's Authority

1. Contentions

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

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

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

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

2. Analysis

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

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

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

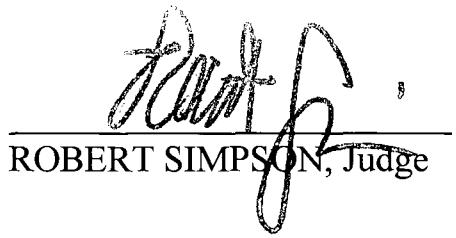
requested modification is, in fact, in the public interest. Consent Decree, §IV(C)(10). Thus, OAG retained the right to seek modification of the Consent Decree pursuant to its express terms. Further, while UPMC contests the propriety and scope of the requested modifications, in light of the broad language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

III. Conclusion

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

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

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



ROBERT SIMPSON, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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

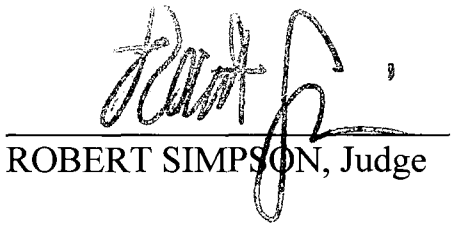
ORDER

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

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

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

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



ROBERT SIMPSON, Judge

Certified from the Record

APR - 3 2019

And Order Exit

TAB B

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, By KATHLEEN G. KANE, Attorney General; PENNSYLVANIA DEPARTMENT OF INSURANCE, By MICHAEL CONSEDINE, Insurance Commissioner and PENNSYLVANIA DEPARTMENT OF HEALTH, By MICHAEL WOLF, 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.	:	No. 334 M.D. 2014

MOTION TO APPROVE CONSENT DECREE WITH RESPONDENT UPMC

1. The Commonwealth of Pennsylvania acting through its Attorney General, Kathleen G. Kane, its Insurance Commissioner, Michael F. Consedine, and its Secretary of Health, Michael Wolf (Petitioners), initiated an action by filing a Petition for Review on June 27, 2014, against the Respondent UPMC, the allegations of which are incorporated herein by reference.

2. The Petitioners and Respondent, UPMC, have resolved the allegations in the Petition for Review subject to this Court's approval of the terms and conditions contained in the proposed Consent Decree attached.

WHEREFORE, Petitioners respectfully request that this Honorable Court approve the proposed Consent Decree.

Respectfully submitted

COMMONWEALTH OF PENNSYLVANIA

KATHLEEN G. KANE
Attorney General

Date: 6/27/2014 By: _____

James A. Donahue, III
Executive Deputy Attorney General
Public Protection Division
Attorney I.D. No.: 42624
14th Floor Strawberry Square,
Harrisburg, PA 17120
(717) 787-4530

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, By KATHLEEN G. KANE, Attorney General; PENNSYLVANIA DEPARTMENT OF INSURANCE, By MICHAEL CONSEDINE, Insurance Commissioner and PENNSYLVANIA DEPARTMENT OF HEALTH, By MICHAEL WOLF, 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.	:	No. _____M.D. 2014

CONSENT DECREE

AND NOW, this _____ day of _____, 2014, upon the Motion to Approve Consent Decree with Respondent UPMC filed by the Commonwealth of Pennsylvania, acting through its Attorney General, Kathleen G. Kane, its Insurance Commissioner, Michael F. Consedine, and its Secretary of Health, Michael Wolf (Commonwealth or Petitioner), which initiated an action by filing a Petition for Review (Petition) on June 26, 2014, the allegations of which are incorporated herein by reference.

SETTLEMENT TERMS

NOW THEREFORE, for good and valuable consideration, Respondent, UPMC agrees for itself, its successors, assigns, agents, employees, representatives, executors, administrators, personal representatives, heirs and all other persons acting on their behalf, directly or through any corporate or other device, as follows:

I. INTERPRETATIVE PRINCIPLES

A. The Court's Consent Decree shall be interpreted consistently with the Insurance Department's UPE Order in the Highmark/West Penn Allegheny Health System matter, *In Re Application of UPE*, No. ID-RC-13-06 (Pa. Insur. Dept. 2013), and the 2012 Mediated Agreement and to protect consumers and UPMC'S charitable mission. The outcome of the actions embodied in the Consent Decree shall be incorporated in the Transition Plan to be filed by Highmark by July 31, 2014, as provided under Condition 22 of the UPE order. The Consent Decree is not a contract extension and shall not be characterized as such.

II. DEFINITIONS

A. "Balance Billing" means when a Health Care Provider bills or otherwise attempts to recover the difference between the provider's charge and the amount paid by a patient's insurer and through member cost-shares.

B. "Children's Final Order" means the Final Order in the matter of *In Re: Children's Hospital of Pittsburgh and Children's Hospital of Pittsburgh Foundation*, No. 6425 of 2001 (All. Co. 2001).

C. "Emergency Services/ER Services" means medical services provided in a hospital emergency department in response to the sudden onset of a medical condition requiring intervention to sustain the life of a person or to prevent damage to a person's health and which the recipient secures immediately after the onset or as soon thereafter as the care can be made available, but in no case later than 72 hours after the onset.

D. "Greater Pittsburgh Area" means the counties of Allegheny, Beaver, Butler, Washington and Westmoreland.

E. "Health Plan" means all types of organized health-service purchasing programs, including, but not limited to, health insurance or managed-care plans, offered by government, for-profit or non-profit third-party payors, health care providers or any other entity.

F. "Health Care Provider" means hospitals, skilled nursing facilities, ambulatory surgery centers, laboratories, physicians, physician networks and other health care professionals and health care facilities.

G. "Highmark" means Highmark, Inc., the domestic nonprofit corporation incorporated on December 6, 1996, with a registered office at Fifth Avenue Place, 120 Fifth Avenue, Pittsburgh, Pennsylvania 15222. Unless otherwise specified, all references to Highmark include UPE and all of its controlled nonprofit and for-profit subsidiaries, partnerships, trusts, foundations, associations or other entities however styled.

H. "Hospital" means a health care facility, licensed as a hospital, having a duly organized governing body with overall administrative and professional responsibility and an organized professional staff that provides 24-hour inpatient care, that may also provide outpatient services, and that has, as a primary function, the provision of inpatient services for medical diagnosis, treatment and care of physically injured or sick persons with short-term or episodic health problems or infirmities.

I. "In-Network" means where a health care provider has contracted with a Health Plan to provide specified services for reimbursement at a negotiated rate to treat the Health

Plan's members. The member shall be charged no more than the co-pay, co-insurance or deductible charged by his or her Health Plan, the member shall not be refused treatment for the specified services in the contract based on his or her Health Plan and the negotiated rate paid under the contract by the Health Plan and the member shall be payment in full for the specified services.

J. "Mediated Agreement" means the Mediated Agreement entered into by UPMC and Highmark on May 1, 2012, with assistance of a mediator appointed by the Governor and all agreements implementing the Mediated Agreement.

K. "Out-of-Network" means where a Health Care Provider has not contracted with a Health Plan for reimbursement for treatment of the Health Plan's members.

L. "Payor Contract" means a contract between a Health Care Provider and a Health Plan for reimbursement for the Health Care Provider's treatment of the Health Plan's members.

M. "Trauma" means medical services that are provided to an individual with a severe, life threatening injury which is likely to produce mortality or permanent disability and which are provided at the designated Trauma Center in a facility that provides specialized medical services and resources to patients suffering from traumatic, serious or critical bodily injuries and which is accredited by the Pennsylvania Trauma Systems Foundation and services needed for appropriate continuity of care.

N. "UPE", also known as Highmark Health, means the entity incorporated on October 20, 2011, on a non-stock, non-membership basis, with its registered office located at Fifth Avenue Place, 120 Fifth Avenue, Pittsburgh, Pennsylvania 15222. UPE serves as the controlling member of Highmark.

O. "UPE Order" means the Pennsylvania Insurance Department's April 29, 2013 Approving Determination and Order of the Highmark/West Penn Allegheny Health System Affiliation, *In Re Application of UPE*, No. ID-RC-13-06 (Pa. Insur. Dept. 2013).

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

Q. "UPMC Health Plan" means the Health Plan owned by UPMC which is licensed by the Pennsylvania Department of Insurance.

R. "UPMC Hospitals" means the Hospitals operated by the following UPMC subsidiaries: UPMC Presbyterian-Shadyside, Children's Hospital of Pittsburgh of UPMC, Magee Women's Hospital of UPMC, UPMC McKeesport, UPMC Passavant, UPMC St. Margaret, UPMC Bedford Memorial, UPMC Horizon, UPMC Northwest, UPMC Mercy, UPMC East, UPMC Hamot, UPMC Hamot, affiliate - Kane Community Hospital, UPMC Altoona, Western Psychiatric Institute and Clinic of UPMC and any other Hospital acquired by UPMC following the entry of the Court's Consent Decree.

S. "Western Pennsylvania" means the 29-county area designated by the Blue Cross Blue Shield Association in which Highmark does business as Highmark Blue Cross Blue Shield.

IV. TERMS

UPMC shall comply with the following terms:

A. **Access**

1. **ER/Trauma Services** - UPMC shall negotiate in good faith to reach an agreement with Highmark on In-Network rates and patient transfer protocols for emergency and trauma services for hospital, physician and appropriate continuity of care services at all UPMC and Allegheny Health Network hospitals by July 15, 2014 or be subject to the Dispute Resolution Process set forth in paragraph C (1) below. This does not mean that Hospitals or physicians rendering emergency or trauma services to a patient are In-Network for purposes or services other than treating the emergency condition for which a patient is admitted or the treating physicians are otherwise In-Network under other terms of this Consent Decree including, but not limited to, the Continuity of Care, Unique/Exception Hospitals or Oncology. The agreement shall be for a commercially reasonable period of time as provided in Condition 3 of the UPE Order. UPMC shall not Balance Bill consumers until the ER services agreement is resolved.

2. **Vulnerable Populations** – UPMC and Highmark mutually agree that vulnerable populations include: (i) consumers age 65 or older who are eligible or covered by Medicare, Medicare Advantage, (ii) Medigap health plans, (iii) Medicaid and/or (iv) CHIP. With respect to Highmark's covered vulnerable populations, UPMC shall continue to contract with Highmark at in-network rates for all of its hospital, physician and appropriate continuity of care services for CHIP, Highmark Signature 65, Medigap and commercial retiree carve out as long as Highmark

does not make unilateral material changes to these programs. UPMC shall treat all Medicare participating consumers as In- Network regardless of whether they have Medicare as their primary or secondary insurance. UPMC reserves the right to withdraw from these arrangements if Highmark should take the position that it has the authority to revise the rates and fees payable under those arrangements unilaterally and materially.

3. **Local Community Needs** – Where UPMC is the provider of services provided locally that the patient's treating physician believes the patient needs and DOH has determined such services are not available from another source, and member is Out-of-Network, UPMC will not Balance Bill the member, and UPMC and Highmark shall negotiate a payment that shall not be greater than the Out-of-Network rates established by this Consent Decree.

4. **Oncology/Cancer Services**– Highmark subscribers may access, as if In-Network, UPMC services, providers, facilities, and physicians involved in the treatment of cancer, if a patient's treating physician determines that a patient who is diagnosed with cancer should be treated by a UPMC oncologist and the patient agrees to be so treated. In addition, UPMC and Highmark shall negotiate an agreement for treatment of illnesses which result from cancer treatment. These resulting illnesses may include, but not be limited to, mental health, endocrinology, orthopedics and cardiology. The need for a treatment of a resulting illness shall be determined, in the first instance, by the patient's treating physician acting in consultation with and in accordance with the wishes of the patient or the patient's representative. Moreover, all UPMC joint ventures and physician services

provided at or on behalf of independent hospitals, whether related to oncology or not, shall be In-Network. If UPMC and Highmark do not reach an agreement on rates for cancer treatment and resulting illnesses by July 15, 2014, the parties will be subject to the Dispute Resolution Process set forth in paragraph C(1) below. UPMC shall not Balance Bill consumers until this agreement is resolved. The agreement shall be for a commercially reasonable period of time as provided in Condition 3 of the UPE Order.

5. **Unique/Exception Hospitals and Physicians** – UPMC shall negotiate in good faith to reach an agreement with Highmark for hospital, physician services and follow-up care services at Western Psychiatric Institute and Clinic, UPMC Bedford Memorial, UPMC Venango (Northwest), UPMC/Hamot, UPMC/Altoona, UPMC Horizon and any facility, any physician services, or any other provider services located or delivered outside the Greater Pittsburgh Area currently owned or acquired in the future by UPMC, or with whom UPMC has an agreement to handle provider contracting, such as, but not limited to, the Kane Community Hospital, or any other physician services or facility outside the Greater Pittsburgh Area determined by DOH to be essential to meet local community needs, by July 15, 2014 or be subject to the Dispute Resolution Process set forth in paragraph C (1) below. The agreement shall be for a commercially reasonable period of time as provided in Condition 3 of the UPE order. The Children's Final Order will continue in effect.

6. **Out-of-Network Services** – For all other Highmark subscribers whose care is not otherwise governed by other provisions in this Consent Decree, beginning

January 1, 2015, UPMC will provide services to all such subscribers on an Out-of-Network basis. UPMC's reimbursement rates for Out-of-Network services for Highmark subscribers shall be no more than 60% of charges if paid promptly and provided that UPMC informs consumers of such charges before rendering services.

7. **Continuity of Care** – UPMC and Highmark mutually agree that the continuation of care of a Highmark member in the midst of a course of treatment at UPMC shall be on an In-Network basis at In-Network rates. The need for a continuing course of treatment shall be determined, in the first instance, by the patient's treating physician acting in consultation with and in accordance with the wishes of the patient or the patient's representative. While undergoing a continuing course of treatment with UPMC, the services covered In-Network will include all services reasonably related to that treatment, including, but not limited to, testing and follow-up care. In the event that Highmark disputes the opinion of the treating physician that a continuation of care is medically appropriate, or disputes the scope of that care, the DOH or its designated representative will review the matter and make a final, non-appealable determination.

8. **Transfer of Services** – If any services covered by this Consent Decree are transferred or consolidated at one or more UPMC Hospitals, the terms of this Consent Decree shall apply to those transferred services where such services are transferred or consolidated.

9. **Referrals and UPMC Transfer of Patients** - (a) UPMC shall not require its physicians to refer patients to a UPMC Hospital in situations where the patient is

covered by a Health Plan that does not participate with such UPMC Hospital or otherwise expresses a preference to be referred to a non-UPMC Hospital; (b) UPMC shall not refuse to transfer a patient, whether for diagnosis or treatment, to a non-UPMC Hospital or health care provider if such transfer is requested by the patient, the patient's representative when such representative is authorized to make care decisions for the patient, or the patient's physician; provided the patient is stable and that the transfer is medically appropriate and legally permissible; (c) When a patient is in need of transfer and is covered by a Health Plan with which the UPMC Hospital does not contract, UPMC shall transfer the patient to the Health Plan's participating non-UPMC facility (provided the patient is stable and that the transfer is medically appropriate and legally permissible) unless, (i) the patient or the patient's representative expresses a contrary preference after having been informed of the financial consequences of such a decision, or (ii) is otherwise approved by the patient's Health Plan.

10. **Safety Net** – UPMC and Highmark mutually agree to establish a one-year safety net beginning January 1, 2015, for any existing UPMC patient and Highmark subscriber (i) who used UPMC physicians and services In-Network during the 2014 calendar year, (ii) who is not in a continuing course of treatment, and (iii) who is unable to find alternative physicians and services in their locality during the one year period. UPMC and Highmark shall hold such consumers harmless if they continue to use such physicians and services prior to January 1, 2016. Rates for the safety net period shall be as set forth under the Dispute Resolution Process

set forth in paragraph C(1) below. The safety net is not a contract extension, and neither Highmark nor UPMC nor their agents shall characterize it as such.

11. **Advertising** – UPMC shall not engage in any public advertising that is unclear or misleading in fact or by implication.

B. **Monetary Terms**

Consumer Education Fund and Costs – UPMC shall contribute $2 million dollars to the Consumer Education Fund to be used by the OAG, PID or DOH for education and outreach purposes during the transition; and to cover costs, including attorneys' or consultant fees of the OAG, PID and DOH within 60 days of the entry of this Consent Decree.

C. Miscellaneous Terms

1. **Dispute Resolution Process -** Where required in this Consent Decree, UPMC and Highmark shall negotiate in good faith. If the parties are unable to reach agreement on any of the issues raised in this Consent Decree by July 15, 2014, or such other date as may be set by OAG, PID and DOH, then the terms or rates shall be subject to the following:

   a. Rates

      i. For the period, January 1, 2015 to December 31, 2015, rates for all In-Network services covered in this Consent Decree, except for those rates currently being arbitrated by UPMC and Highmark, shall revert to the last mutually agreed upon rates or fees by UPMC and Highmark with the applicable medical market basket index (MBI) increase applied January 1, 2015.

ii. For rates currently being arbitrated, in the event that the current arbitration between UPMC and Highmark finds in favor of UPMC, then the rates and fees under the Consent Decree will revert to the rates in effect before April 1, 2014 as of the date of the arbitral award and shall remain in place through December 31, 2015. If as a consequence of the arbitral award, Highmark owes UPMC for underpayments, Highmark shall pay UPMC appropriate interest. If as a consequence of the arbitral award, UPMC owes Highmark for overpayments, UPMC shall pay Highmark appropriate interest. If an arbitral award is not decided before January 1, 2015, Highmark shall increase its payments by one-half the difference between Highmark's April 1, 2014schedule and its rate schedule in effect before April 1, 2014 for the period January 1, 2015 to December 31, 2015.

iii. For the period beginning January 1, 2016 to the expiration of the Consent Decree or the expiration of any agreements between UPMC and Highmark for all In-Network services, whichever is later, the rates shall be the rates mutually agreed to by Highmark and UPMC, or UPMC and Highmark shall engage in a single last best offer binding arbitration to resolve any dispute as to rates after December 31, 2015 as set forth in paragraph C (2) below.

iv. Any agreement or award as to rates and fees will be binding on both UPMC and Highmark, meaning that each will bill and make payments consistent with the agreement or award.

b. Non-Rate Term – Disputed terms set forth in this Consent Decree and unrelated to rate and reimbursement shall be subject to mediation before the OAG, PID and DOH. If mediation does not result in resolution within 30 days or such other time set by the OAG, PID and DOH, UPMC and Highmark shall engage in binding arbitration to resolve the dispute as to terms as set forth in Paragraph C (2) below.

2. **Binding Arbitration**

   a. The Parties will file a joint plan with this court for a single last best offer binding arbitration before independent and neutral parties by August 14, 2014 or seek court intervention to resolve any disputes over such process.

3. **Binding on Successors and Assigns** – The terms of this Consent Decree are binding on UPMC, its directors, officers, managers, employees (in their respective capacities as such) and to its successors and assigns, including, but not limited to, any person or entity to whom UPMC may be sold, leased or otherwise transferred, during the term of the Consent Decree. UPMC shall not permit any substantial part of UPMC to be acquired by any other entity unless that entity agrees in writing to be bound by the provisions of this Consent Decree.

4. **Enforcement** - The OAG, PID and DOH shall have exclusive jurisdiction to enforce the Consent Decree. If the OAG, PID or DOH believe that a violation of the Final Decree has taken place, they shall so advise UPMC and give UPMC 20 days to cure the violation. If after that time the violation is not cured, the OAG, PID or DOH may seek enforcement of the Consent Decree in the Commonwealth Court. Any person who believes they have been aggrieved by a violation of this

Consent Decree may file a complaint with the OAG, PID or DOH for review. If after that review, the OAG, PID or DOH believes either a violation of the Final Decree has occurred or they need additional information to evaluate the complaint, the complaint shall be forwarded to UPMC for a response within 30 days. If after receiving the response, the OAG, PID or DOH, believe a violation of the Consent Decree has occurred, they shall so advise UPMC and give UPMC twenty (20) days to cure the violation. If after that time the violation is not cured, the OAG, PID or DOH may seek enforcement of the Final Decree in this Court. If the complaint involves a patient in an ongoing course of treatment who must have the complaint resolved in a shorter period, the OAG, PID or DOH may require responses within periods consistent with appropriate patient care.

5. **Release** –This Consent Decree will release any and all claims the OAG, PID or DOH brought or could have brought against UPMC for violations of any laws or regulations within their respective jurisdictions, including claims under laws governing non-profit corporations and charitable trusts, consumer protection laws, insurance laws and health laws relating to the facts alleged in the 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 violations of the crimes code, Medicaid fraud laws or tax laws are not released.

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

7. **Notices** – All notices required by this Consent Decree shall be sent by certified or registered mail, return receipt requested, postage prepaid or by hand deliver to:

If to the Attorney General:

Executive Deputy Attorney General
Public Protection Division
Office of Attorney General
14th Floor, Strawberry Square
Harrisburg, PA 17120

If to UPMC:

Chief Executive Officer
University of Pittsburgh Medical Center
U.S. Steel Tower
62nd Floor
600 Grant Street
Pittsburgh, PA 15219

Copies to:

General Counsel
University of Pittsburgh Medical Center
U.S. Steel Tower
62nd Floor
600 Grant Street
Pittsburgh, PA 15219

8. **Averment of Truth** – UPMC avers that, to the best of its knowledge, the information it has provided to the OAG, PID and DOH in connection with this Consent Decree is true.

9. **Termination** – This Consent Decree shall expire five (5) years from the date of entry.

10. **Modification** – 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.

11. **Retention of Jurisdiction** – Unless this Consent Decree is terminated, jurisdiction is retained by this Court to enable any party to apply to this Court for such further orders and directions as may be necessary and appropriate for the interpretation, modification and enforcement of this Consent Decree.

12. **No Admission of Liability** – UPMC, desiring to resolve the OAG's, PID's and DOH's concerns without trial or adjudication of any issue of fact or law, has consented to entry of this Consent Decree, which is not an admission of liability by UPMC as to any issue of fact or law and may not be offered or received into evidence in any action as an admission of liability, whether arising before or after the matter referenced herein.

13. **Counterparts** – This Consent Decree may be executed in counterparts.

NOW THEREFORE, without trial or adjudication of the facts or law herein between the parties to this Consent Decree, Respondent agrees to the signing of this Consent Decree and this Court hereby orders that Respondent shall be enjoined from breaching any and all of the aforementioned provisions.

WE HEREBY consent to this Consent Decree and submit the same to this Honorable Court for the making and entry of a Consent Decree, Order or Judgment of the Court on the dates indicated below.

WHEREFORE, and intending to be legally bound, the parties have hereto set their hands and seals.

BY THE PETITIONERS

COMMONWEALTH OF PENNSYLVANIA
KATHLEEN G. KANE
Attorney General

Date: June 27, 2014 By: _____

Date: 6/27/2014 By: _____
James A. Donahue, III
Executive Deputy Attorney General
Public Protection Division
Attorney I.D. No.: 82620
14th Floor Strawberry Square,
Harrisburg, PA 17120
(717) 787-4530

Date: _____ By: _____
MICHAEL F. CONSEDINE, COMMISSIONER
PENNSYLVANIA INSURANCE DEPARTMENT

Date: _____ By: _____
MICHAEL WOLF, SECRETARY
PENNSYLVANIA DEPARTMENT OF HEALTH

Date: _____ By: _____
JAMES D. SCHULTZ, GENERAL COUNSEL

Date: 6/27/14 By: _____
Yen Lucas
Chief Counsel
Insurance Department
13th Floor, Strawberry Square
Harrisburg, PA 17120

WHEREFORE, and intending to be legally bound, the parties have hereto set their hands and seals.

BY THE PETITIONERS

COMMONWEALTH OF PENNSYLVANIA
KATHLEEN G. KANE
Attorney General

Date: _____ By: _____

James A. Donahue, III
Executive Deputy Attorney General
Public Protection Division
Attorney I.D. No.: 82620
14th Floor Strawberry Square,
Harrisburg, PA 17120
(717) 787-4530

Date: 6/27/14 By: _____

MICHAEL F. CONSEDINE,
COMMISSIONER
PENNSYLVANIA INSURANCE DEPARTMENT

Date: 6/27/14 By: _____

MICHAEL WOLF
SECRETARY
PENNSYLVANIA DEPARTMENT OF HEALTH

Date: 6/27/14 By: _____

JAMES D. SCHULTZ, GENERAL COUNSEL

Date: _____ By: _____

Yen Lucas
Chief Counsel
Insurance Department
13th Floor, Strawberry Square
Harrisburg, PA 17120

Counsel for the Commonwealth of Pennsylvania

BY THE RESPONDENT
UPMC

Date: June 27, 2014 By: _____

W. Thomas McGough, Jr.
Executive Vice President & Chief Legal Officer
UPMC
U.S. Steel Tower, Suite 6241
600 Grant Street
Pittsburgh, PA 15219