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39 MAP 2019

IN THE SUPREME COURT OF PENNSYLVANIA

Case 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

On appeal from the Order of the Commonwealth Court of Pennsylvania, Honorable Robert Simpson presiding, Filed April 3, 2019, in No. 334 MD 2014

BRIEF FOR APPELLEE UPMC

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If this Court has a sense of *déjà vu* after reading the opening passages of the brief from the Office of Attorney General ("OAG"), that would be understandable. As in its briefing before this Court just one year ago, OAG is once again claiming that the healthcare sky will fall if UPMC's Consent Decree is enforced according to its plain terms and allowed to expire on the agreed-upon termination date of June 30, 2019. Once again, OAG resorts to these same scare-tactics because its legal position cannot be squared with the Consent Decree it negotiated and signed or the legal principles that govern that decree. Once again, the calamity that OAG predicts is pure fiction. Once again, UPMC finds it necessary to reground the issues before this Court in reality and to correct fundamental misrepresentations in OAG's briefing. And once again, the Court should hold that OAG cannot change the unambiguous end-date to which the parties expressly agreed.

The Consent Decree always was intended to be a *transition,* with a beginning, a middle, and an end. The Commonwealth's goal in negotiating the agreement was (in OAG's words) to "develop a transition plan for the expiration of the UPMC-Highmark contracts." (R.532a ¶ 16.) The Commonwealth's idea was (in OAG's words) to create "a five-year period to transition … to a new world where Highmark and UPMC will no longer contract." (R.996a.) Terms of the Consent Decree were proposed to UPMC as (in OAG's words) "Key Transition Issue Agreements." (R.1770a.)

Indeed, in the final agreement, OAG expressly agreed that the Consent Decree was "not a contract extension"; that system-wide commercial in-network access to many UPMC services for most Highmark subscribers could terminate at the end of 2014; and that those UPMC services that remained in network for some Highmark subscribers could and would end on June 30, 2019. Since then, all the parties and the courts have time and again recognized—and the public has been repeatedly told—that the Consent Decree unambiguously ends on June 30, 2019. This was the bargain—and the benefit of the bargain to UPMC was that the conditions of the Consent Decree would end on June 30, 2019, and yield to free-market forces and existing state and federal health care laws.

That date does not now loom as some sort of impending catastrophe. Highmark's Medicare Advantage and commercial members will continue to have in-network access at 24 of UPMC's 35 Pennsylvania hospitals after the Consent Decree ends.[1] That includes in-network access to, among others, UPMC Western Psychiatric Hospital, a national leader in psychiatric care, and UPMC Children's Hospital of Pittsburgh, a unique resource of pediatric excellence renown in the

[1] It is not the well-publicized end of the Consent Decree that causes any public confusion; it is false allegations and the reckless media reporting they engender. For instance, OAG is well aware of UPMC's ongoing contracts with Highmark (*see, e.g.*, R.625a, R.2043a-2046a) but nevertheless falsely states that UPMC has "no intention of contracting with Highmark concerning any of Highmark's Medicare Advantage plans after the Consent Decrees terminate." OAG Br. at 13.

country, both of which will remain in Highmark's network until at least 2024 and 2022, respectively, as well as many of the UPMC Cancer Centers. As in the past, in the future UPMC will offer both of these nationally renowned hospitals to all insurers at compatible market rates. While Highmark agreed during a 2018 mediation led by the Governor and Pennsylvania Insurance Department to extend the UPMC Western Psychiatric contract, it has thus far singularly refused to extend the UPMC Children's Hospital contract as it grows its own pediatric services.

While eleven hospitals are going out of Highmark's network, they are all located around Pittsburgh and Erie, where tens of thousands of Highmark subscribers have been carrying on *for years* without in-network access to UPMC. Since the end of 2014, Highmark has been deliberately excluding UPMC from some of its commercial and Medicare Advantage products. (*See, e.g.*, R.534a ¶¶ 26-28.) Pennsylvania's regulators have approved these no-UPMC products, people have purchased them, and the sky remains in place. Against this entire factual backdrop, it is unsurprising that Highmark itself has called the end of the Consent Decree a "non-event." *See infra* p. 50 & n.27.

Nor is OAG's parade of supposed victims (OAG Br. 14) accurately described. Yes, after June 30 some current UPMC patients who have Highmark insurance will not have in-network access to UPMC services they obviously value. But, the absence of in-network access to those services will be the result of either

(1) a voluntary, well-informed election by that patient to select Highmark insurance despite the ready availability of one or more UPMC-friendly options,[2] or (2) a voluntary, well-informed decision by an employer to restrict its current and/or former employees' in-network options to Highmark and Allegheny Health Network.[3] In this regard, OAG's implication that those who use Allegheny Health Network's services in Pittsburgh and Erie will somehow receive inferior, even life-threatening, care is remarkable.[4]

As for OAG's hyperbolic description of UPMC's requirement of payment in advance for any non-emergent out-of-network care, that requirement has been a standard practice for years, borne of Highmark's stubborn insistence on sending

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[2] *See, e.g.,* K. Mamula*, A face of Highmark/UPMC fight figures out her cancer care plan,* Pittsburgh Post-Gazette (April 28, 2019) (Judy Hays, "the public face of Attorney General Josh Shapiro's challenge to UPMC's refusal to sign a contract with rival Highmark," will receive her oncology care after June 30 at UPMC's joint venture with Heritage Valley Sewickley Hospital, then in January 2020 will switch her health insurance "to a carrier that offers access to both AHN and UPMC doctors."), available at https://www.post-gazette.com/business/healthcare-business/2019/04/28/Highmark-access-UPMC-cancer-consent-decrees-hillman-st-clair-hospital/stories/201904220113.

[3] E. Palatella, *Highmark lands ad deal for Erie Vets Stadium*, Erie Times-News (Apr. 19, 2019) ("Highmark will pay the Erie School District $320,000 a year over 10 years, for a total of $3.2 million in return for both the advertising rights … and the Erie School District's loyalty to Highmark as its insurer."), available at https://www.goerie.com/news/20190419/highmark-lands-ad-deal-for-erie-vets-stadium.

[4] OAG further overlooks that Highmark's Medigap and Signature 65 members will also continue to have in-network access to all UPMC hospitals. (*See, e.g.*, R.2042a.)

any payments for such care to its subscribers rather than to UPMC. UPMC has requested—and OAG and the Pennsylvania Insurance Department ("PID") have advised—that Highmark abandon this practice, which can have truly perverse and tragic consequences,[5] but to no avail. (*See, e.g.*, R.844a.)

OAG's overall strategy is simply to leverage these unsubstantiated, misleading, or false accusations—many of which betray a fundamental ignorance about how healthcare actually works—to pursue its own peculiar vision of how healthcare should work. At bottom, OAG's problem is not with the Consent Decree, but rather with the market-based realities of modern healthcare. But whatever this Court thinks of those realities, an appeal from a lower court's refusal to disregard an express termination date in a five-year Consent Decree is not the legal vehicle to address them. The decision below correctly enforces the parties' intent and the letter of their agreement, and it should be affirmed.

[5] W. Drash, *Insurer Sent $33,000 to a Man Struggling With Addiction. He Used the Cash to Go on a Binge – and Died*, CNN (Apr. 23, 2019), available at https://www.cnn.com/2019/04/23/health/anthem-blue-cross-payments-patient-overdose/index.html (noting that "[c]ritics say it's a tactic insurers use to pressure providers into joining their networks and accepting lower payments").

COUNTERSTATEMENT OF JURISDICTION

The Court granted OAG the right to interlocutory appeal under 42 Pa. C.S. § 702(b). The order below did not dispose of all claims, and the Commonwealth Court did not make the express determination that Pa. R.A.P. 341(c) requires. Because the order below is not a "final order" as defined in Pa. R.A.P. 341, this Court does not have jurisdiction under 42 Pa. C.S. § 723.

COUNTERSTATEMENT OF THE SCOPE AND STANDARD OF REVIEW

The standard of review is *de novo* and the scope of review is plenary. *Commonwealth ex rel. Shapiro v. UPMC*, 188 A.3d 1122, 1132 (Pa. 2018). The Court can affirm the decision below on any alternative grounds. *C.B. ex rel. R.R.M. v. Dep't of Pub. Welfare*, 786 A.2d 176, 178 (Pa. 2001).

COUNTERSTATEMENT OF THE QUESTION INVOLVED

Is the power to modify the Consent Decree set forth in Section IV.C.10 of the agreement limited by the unambiguous and material termination provision in Section IV.C.9 of the agreement? The Commonwealth Court held that it was. That decision should be affirmed.

COUNTERSTATEMENT OF THE CASE

I. The Consent Decree Is—And Was Always Intended To Be—A Transition to June 30, 2019.

A. The 2012 Agreement To Transition Patients

For ten years, UPMC and Highmark were parties to a series of commercial and Medicare Advantage provider agreements that were set to expire on June 30, 2012. *Commonwealth ex rel. Kane v. UPMC*, 129 A.3d 441, 445 (Pa. 2015). UPMC announced in 2011 that it would not renew those agreements due to Highmark's intent to acquire a competing hospital system. *Id*. UPMC understood that Highmark would try to steer its members away from UPMC, leading to significant losses and diminishing UPMC's nonprofit research and charitable activities. (*See* R.811a-817a (2013 Board statement explaining UPMC's reasoning).)

UPMC's announcement led to a 2012 mediated agreement negotiated and signed with the assistance of the Governor's Office. *Kane*, 129 A.3d at 446. The express purpose of that agreement was to "provide for sufficient and definite time for patients to make appropriate arrangements for their care." (R.1782a.) Among other things, UPMC agreed to extend all UPMC-Highmark contracts "until the end of 2014," and to come to terms on in-network access for a subset of "certain UPMC services" beyond 2014. (*Id*.)

B. Negotiation And Execution Of The Termination Date

In 2014, UPMC began negotiations with the Commonwealth over a Consent Decree that would address those "certain UPMC services." Acting through OAG, PID, and the Department of Health ("DOH"), the Commonwealth proposed the negotiation of a consent decree as a "collaborative process to try to resolve outstanding issues and to formulate a pro-consumer *transition plan*." (R.1767a (emphasis added).) As OAG later stipulated, the agencies' intent heading into the negotiation was "to develop a *transition plan* for the expiration of the UPMC-Highmark contracts at the end of 2014." (R.532a ¶ 16 (emphasis added).)

The parties negotiated a Term Sheet that explicitly recognized "[t]he Consent Decree is not a contract extension" and that identified the "Key *Transition* Issue Agreements" to be discussed. (R.1775a-1776a (emphasis added).) At the request of UPMC, these draft term sheets included language that the proposed consent decree would terminate five years after entry. (R.1780a.)

After UPMC signed the Consent Decree, the Commonwealth commenced this action via Petition for Review. Count I of that petition alleged that relief was necessary "to smooth the public's transition in the changing relationship between UPMC and Highmark." (R.454a ¶ 47.) On June 27, 2014, the Commonwealth then submitted the Consent Decree for court approval as "settlement" of the claims

in the Petition for Review. (R.150a-152a.) The Court approved the decree on July 1, 2014.

Among other things, the final Consent Decree:

- Confirmed in the first clause that it was "not a contract extension and shall not be characterized as such," and repeated that disclaimer later in the agreement (R.153a § I.A; *see also* R.161a-162a § IV.A.10);
- Included a termination clause providing that "[t]his Consent Decree shall expire five (5) years from the date of entry," (R.166a § IV.C.9);
- Called for UPMC to pay $2 million "to the Consumer Education Fund to be used by the OAG, PID or DOH for education and outreach purposes during the transition," (R.162a § IV.B); and
- Obligated UPMC to only provide some in-network access to a limited set of Highmark subscribers for certain types of services, (R.157a-162a § IV.A).

The same court that approved the agreement and presided over two different evidentiary hearings about its implementation held—twice—that the purpose of the Consent Decree was to provide "certainty as to what would occur during transitional periods," thus allowing Highmark subscribers to "decide whether to remain with Highmark or change insurance carriers so that they would have continued access to UPMC facilities." *Commonwealth v. UPMC*, 2018 Pa. Commw. Unpub. LEXIS 393, at *3 (Pa. Commw. Ct. Jan. 29, 2018); *see also* June 29, 2015 Mem. Op. at 6 (same).

Consistent with both the 2012 mediated agreement and the 2014 Consent Decree, many of the commercial contracts between UPMC and Highmark expired

on December 31, 2014. On that date, most Highmark subscribers lost in-network access to most UPMC services in Allegheny County, while other Highmark subscribers gradually lost in network access to other specified UPMC services over the life of the Consent Decree.

C. Subsequent Disputes Confirm The Consent Decree's Transitional Nature.

The limited and temporary scope of the Consent Decree has been confirmed in multiple court proceedings since 2014.

First, in 2014, the Commonwealth Court held that the Consent Decree did not obligate Highmark to include UPMC as an in-network provider for all of its Medicare Advantage products. *See Commonwealth v. UPMC*, 2014 Pa. Commw. Unpub. LEXIS 652 (Pa. Commw. Ct. Oct. 30, 2014). There, OAG (along with PID and DOH) sought to hold Highmark in contempt for excluding UPMC in its Community Blue Medicare Advantage Plan.

The court denied OAG's petition. According to the court, the plain terms of the mirror-image Consent Decrees that UPMC and Highmark each signed with the Commonwealth did not require Highmark to include UPMC in all of Highmark's Medicare Advantage plans. *See id.* at *20-21. In other words, the Consent Decree *never contemplated* full in-network access between UPMC providers and all Highmark subscribers. UPMC thus went out-of-network for Community Blue

members starting in 2015. OAG did not thereafter seek to modify the terms of the Consent Decrees to grant those members in-network access to UPMC.

Second, in 2014 Highmark slashed UPMC's hospital reimbursements under commercial provider agreements, leading to hundreds of millions in damages for UPMC. Highmark separately sued UPMC for a declaration that it could unilaterally decrease UPMC's hospital reimbursements, causing UPMC to invoke a provision in the Consent Decree's "vulnerable populations" provision allowing UPMC to withdraw from the agreement "if Highmark should take the position that it" can unilaterally revise reimbursement rates. *See Kane*, 129 A.3d at 450-51, 471. This Court ultimately held that UPMC could not withdraw from the Consent Decree and that the vulnerable populations provision "governs the parties' continuing obligations under the Consent Decree with respect to Medicare Advantage participants for the time period that it covers—*i.e.*, from the time of the entry of the decrees until 2019." *See id.* at 469.[6]

Third, in 2018, OAG filed a Petition to Enforce that sought to compel UPMC to provide in-network coverage to seniors through at least June 30, 2020, a full year beyond the negotiated end-date. *Shapiro*, 188 A.3d at 1131. OAG argued

[6] UPMC eventually recovered all those reimbursements, with interest, in a separate arbitration with Highmark. Notice of the award and a related agreement was filed with the court below. *See* Nov. 19, 2015 Notice of Arbitration Award (Pa. Commw. Ct. No. 334 M.D. 2014).

that extending the end-date would reflect the Consent Decree's "true purpose" of providing "'enduring certitude and security for health care consumers,'" and would avoid the prejudice and confusion that the end of in-network access to UPMC would purportedly occasion. (R.1715a (quoting *Kane*).)

This Court rejected OAG's argument, noting three times in its unanimous decision that the Consent Decree's June 30, 2019 termination date was "unambiguous." *See Shapiro*, 188 A.3d at 1132 (holding that "the June 30, 2019 end date" was an "unambiguous and material term of the Consent Decree"); *id*. at 1133 (noting the "the unambiguous termination date of the Consent Decree"); *id*. at 1134 (holding there was "no basis upon which to alter this unambiguous date"). The Court refused to interpret the Consent Decree in a way that extended UPMC's obligations thereunder because to do so "alters an unambiguous and material term of the Consent Decree—the June 30, 2019 end date." *Id*. at 1132.

D. Advertising The Termination Date.

In the years since the Consent Decree was approved, all concerned parties reaffirmed their understanding that the Consent Decree provided the public with a transition period as UPMC and Highmark wound-down their relationship. In the words of OAG, the Consent Decree provided "certain consumers a five-year period to transition their care to a new world where Highmark and UPMC will no longer contract." (R.996a.)

Highmark and UPMC have both long advised the public that this transition period ends on June 30, 2019. In 2017, with two years still remaining in the Consent Decree, Highmark told the brokers selling its products that "UPMC providers will remain in our networks [for certain Medicare Advantage plans] through June 2019." (R.1246a ¶ 17, R.1322a.) Highmark also posted to its website information about "Access for Seniors" stating that its Medicare Advantage enrollees would only have "access to most UPMC providers on an in-network benefit level through June 2019." (R.1246a ¶ 18, R.1331a.) Similarly, UPMC has repeatedly disseminated the June 30, 2019 end-date to brokers, seniors, and other consumers in this region. (R.1464a ¶ 5, R.1487a, R.1490a, R.1492a.) Even as of this filing, PID advises consumers through its official Commonwealth website that the Consent Decree expires "on **June 30, 2019**." (R.2035a (emphasis in original).)[7]

II. OAG's Latest Attempt To Renege On The Parties' Agreement.

The Consent Decree contains two provisions that address modification. Section IV.C.10 allows a party to "petition the Court for modification," in which case the petitioning party "shall bear the burden of persuasion that the requested modification is in the public interest." (R.166a-167a.) Section IV.C.11 then

[7] *See also* "FAQs for End of Consent Decree Between Highmark and UPMC," https://www.insurance.pa.gov/Companies/Documents/FAQ%20for%20End%20of%20Consent%20Decree%20Final.pdf.

immediately states that "[u]nless this Consent Decree is terminated, jurisdiction is retained by [the Commonwealth] 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." (R.167a.)

On February 7, 2019, OAG filed a Petition to Modify the Consent Decree. Neither PID nor DOH, the other signatories to the Consent Decree, joined the petition. Count I invoked the Consent Decree's modification provision and asked the Commonwealth Court to modify the agreement over UPMC's objection.

Most significantly, OAG sought to eliminate the Consent Decree's June 30, 2019 termination date. Instead of the five-year term that UPMC bargained for and that the parties agreed to, OAG proposed that "[t]his Consent Decree shall remain in full force and effect until further order of the Court." (R.222a § 11.)

In addition, OAG sought to "modify" the Consent Decree by eliminating all of its other terms and replacing them with a slate of broad new obligations, including:

- Provisions requiring UPMC providers to contract with any interested insurer (not just Highmark) and requiring UPMC insurers to contract any interested provider (R.209a §§ 3.2, 3.3);
- Restrictions on what kinds of clauses and reimbursement terms the parties can include in these forced contracts (R.210a § 3.4);
- Compulsory arbitration provisions whereby the parties to these forced contract negotiations must participate in binding "baseball" arbitration to resolve any dispute over material contract terms, (R.211a § 4.1);

- Specific procedures for appointing non-expert, non-lawyer panels to decide those arbitrations (R.212a § 4.3); and
- A requirement that a majority of UPMC's Board of Directors resign (R.211a § 3.11).

There is no carve-out for Medicare Advantage or other federally regulated healthcare programs from the scope of OAG's proposed new decree.

The Petition to Modify also included three other counts, which alleged claims for violation of charity laws, fiduciary duties, and consumer protection statutes. (R.114a-139a.) On March 12, 2019, the Commonwealth Court bifurcated those claims, which were stayed in favor of proceeding first on Count I. (R.440a-442a.)

UPMC filed a motion to dismiss, which the Commonwealth Court granted in part on April 3, 2019. Noting that the June 30, 2019 termination date was an "unambiguous and material" term, the court held that this explicit provision circumscribed any power to modify the Consent Decree in the absence of fraud, accident, or mistake, none of which is alleged here. The Commonwealth appealed.

SUMMARY OF THE ARGUMENT

UPMC, PID, DOH and OAG all had an agreement that OAG now seeks to repudiate. Relying on an unprecedented and untenable interpretation of the Consent Decree, as well as the same speculative, misleading arguments that this Court rejected last year, OAG seeks—again—to bind UPMC beyond the June 30, 2019 end-date, this time into perpetuity. The Commonwealth Court properly dismissed the request as contrary to the parties' agreement, and this Court should affirm for the following reasons.

First, OAG's argument that the term "modification" in the Consent Decree is broad enough to encompass elimination of the agreed-upon termination date is wrong. That term must be read according to its plain meaning and in harmony with other material terms of the agreement. Such a reading precludes the OAG's requested relief.

A contract must also be interpreted to ascertain and effectuate the parties' intent, which indisputably here was to create a five-year transition ending June 30, 2019. OAG opened negotiations with that goal in mind; UPMC bargained for that specific end-date as consideration for its own obligations under the Consent Decree; and the parties expressed their intent to establish a transition throughout the plain language of the agreement. Courts have consistently interpreted and applied the Consent Decree to effectuate that purpose, and the collective intent to

establish a five-year transition precludes OAG's claim to extend the Consent Decree indefinitely.

The interpretation that OAG and Highmark advance, furthermore, is contrary to Pennsylvania contract law. Exalting the Consent Decree's generic modification provision over all other terms improperly overrides the parties' intent, makes every other term of the agreement illusory, and creates discord among terms that are easily harmonized to effectuate all of the provisions, including the agreed-upon June 30, 2019 termination. No court addressing analogous consent decrees—including decrees with express modification provisions—holds that the power to modify can be used to displace the parties' intent, destroy bargained-for consideration, or impose brand new obligations on an unwilling party.

Second, if adopted, OAG's interpretation would conflict with supreme federal law and violate separation of powers principles. OAG is requesting that the Court create a cause of action under the Consent Decree that would require the Commonwealth Court (and by extension, this Court) to oversee massive healthcare reform in the "public interest." Courts do not set public policy. Moreover, federal law governs Medicare Advantage and other federal healthcare programs and expressly preempts related state statutes, regulations, and court orders. These programs—which already address all of the speculative public interest concerns OAG imagines—preclude OAG's interpretation.

Third, OAG's *ad hominem* attacks on UPMC's fidelity to its nonprofit mission—all of which could have been raised years ago—are misleading, uninformed, and irrelevant. OAG fundamentally misrepresents how healthcare works, the state of UPMC-Highmark contracting, and what healthcare markets will look like after the Consent Decree ends.

Finally, the Court should summarily deny OAG's extraordinary request for interim relief in the form of an open-ended (likely years-long) interim extension of the Consent Decree. The Court already rejected this request, has no record to assess OAG's unsubstantiated and heavily disputed allegations, and should not let OAG divert resources and attention from the significantly expedited proceedings on the distinct legal question certified for appeal. Nor should the Court upset settled expectations by altering the June 30, 2019 end-date. Consumers have decided on their healthcare options. All parties have invested heavily in reliance on the end-date. Even minimal adjustment to the end-date, which has been repeatedly communicated to consumers, would create exactly the kind of confusion OAG purportedly seeks to avoid.

ARGUMENT

I. OAG MISCONSTRUES "MODIFICATION" AND PUTS PARAGRAPH IV.C.10 AT WAR WITH THE REST OF THE CONSENT DECREE AND WITH THE PARTIES' INTENT.

Ten months ago, this Court rejected a proposed interpretation of the Consent Decree because it would alter "an unambiguous and material term of the Consent Decree—the June 30, 2019 end date." *Shapiro*, 188 A3d at 1132. Judge Simpson correctly applied that holding and dismissed OAG's claim to the extent it sought to alter that end-date.

OAG's central argument in this appeal—indeed its only real argument—is quite simple. OAG contends that it can erase the very same "unambiguous and material" term through "modification" because:

> The Modification Provision [in paragraph IV.C.10] expressly provides for modification of the Consent Decree in the public interest. Nothing in that provision limits what the Commonwealth Court may alter.

OAG Br. at 17. That argument is also quite wrong.[8]

[8] OAG is barred from even making this new argument to extend the Consent Decree. It could have raised modification when the parties were litigating the end-date for in-network Medicare Advantage services in 2018. That prohibits OAG from now bringing another serial claim for extension. *Balent v. City of Wilkes-Barre*, 669 A.2d 309, 313 (Pa. 1995) ("*Res judicata* applies not only to claims actually litigated, but also to claims which could have been litigated during the first proceeding if they were part of the same cause of action.").

Any interpretation of a contract must start with that contract's language—all of it. *Shapiro*, 188 A.3d at 1131. Here, OAG would first have this Court imbue the term "modification" with a meaning that term simply cannot accommodate, and then impose that meaning in a way that would render the Consent Decree incoherent and contrary to the parties' intent.

A. "Modification" Does Not Mean Significant or Fundamental Changes, And Cannot Have That Meaning Here.

The term "modify" means "to make minor changes" or to change the agreement "slightly, esp. to improve it or make it more acceptable or less extreme."[9] These are standard definitions of "modify" and they control how courts apply the term and its derivatives. *In re Beyer*, 115 A.3d 835, 839 (Pa. 2015) (holding that the meaning of a word may be ascertained from its dictionary definition). As the Superior Court has observed, the word "modify" means "altering or changing in *incidental* or *subordinate* measures." *Commonwealth v. DeFusco*, 549 A.2d 140, 144 (Pa. Super. Ct. 1988) (emphases added; citing Black's Law Dictionary). Similarly, the U.S. Supreme Court has held that "modify" means to "change moderately or in minor fashion." *MCI Telecomms.*

[9] Miriam Webster Online, https://www.merriam-webster.com/dictionary/modify; Cambridge Dictionary Online, https://dictionary.cambridge.org/us/dictionary/english/modify.

Corp. v. AT&T Co., 512 U.S. 218, 225 (1994), *superseded by statute on other grounds*, 47 U.S.C. § 160(a)(1).

The decision in *MCI* is instructive. In that case, Section 203(a) of the Communications Act required telecommunications carriers to file tariffs with the FCC, and Section 203(b) authorized that agency to "'modify any requirement'" of the statutory scheme. *Id*. at 220, 224-25. But the Court rejected the FCC's argument that the modification provision was unlimited. FCC could not eliminate an express requirement because the word "modify" did not mean "fundamental changes." Nor was there any ambiguity on that question. *Id*. at 228. Surveying multiple different dictionaries, the Court held that "[v]irtually every dictionary we are aware of says that 'to modify' means to change moderately or in minor fashion." *Id*. at 225. "The word "modify"—like a number of other English words employing the root 'mod-' (deriving from the Latin word for 'measure'), such as 'moderate,' 'modulate,' 'modest,' and 'modicum'—has a connotation of increment or limitation." *Id*. (citing, *inter alia*, Webster's, Oxford English, and Black's Law dictionaries). Mere use of the term "modify" unambiguously restricted the agency's authority to making only "moderate change." *Id*. at 228.[10]

[10] OAG is also selective in the dictionary definitions it offers. OAG Br. at 22. Black's Law Dictionary further defines "modification" to mean a "qualification or limitation of something." The American Heritage Online Dictionary likewise includes a second definition of "make less extreme, severe, or strong."

Modification cannot be read as "delete," "eliminate" or "annul." Indeed, even OAG, grasping for the broadest definition of "modify" it can find, ultimately resorts only to "change" or "alter." Yet "delete" is exactly what OAG asked the court below to do—to eliminate a bargained-for term that this Court already held is "unambiguous and material." Instead of the Consent Decree expiring according to its express terms ("This Consent Decree shall expire five (5) years from the date of entry" (R.166a)), the OAG would have it continue in perpetuity absent some undefined "further order of the Court." (R.222a.) That request asks far more of the word "modification" than it can reasonably bear.

OAG's request also places Paragraph IV.C.10 ("Modification") in direct conflict with the very next provision, Paragraph IV.C.11 ("Retention of Jurisdiction"), the only provision in the Consent Decree that refers to both termination and modification:

> Unless this Consent Decree is *terminated*, jurisdiction is retained by [the Commonwealth] 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."

(R.167a (emphases added).) If "modification" could encompass the elimination of the Consent Decree's explicit termination date, then the first six words of this provision would be meaningless and the Commonwealth Court's jurisdiction would last as long as the Court might say it lasts—even into perpetuity. Contracts

must be read as a whole, and courts will not interpret one provision in a manner that would annul another provision. *Kane*, 129 A.3d at 463-64; *Shehadi v. Ne. Nat. Bank of Pa.*, 378 A.2d 304, 306 (Pa. 1977) (stating that words "are not to be read in a vacuum ignoring the explicitly stated intention of the parties").[11]

OAG and Highmark contend that the Commonwealth Court somehow nullified or rewrote the modification provision. But both also must concede that the Commonwealth Court allowed seventeen counts for modification to go forward. OAG Br. at 2; HMK Br. at 19. That is not a nullification. The Commonwealth Court correctly gave meaning to all of the terms of the Consent Decree by allowing claims of modification to proceed so long as they did not threaten to eliminate UPMC's bargained-for consideration by eliminating the explicit termination date. Under appropriate circumstances, the Commonwealth Court could modify the agreement to clarify existing obligations or better effectuate the parties' intent. But the modification provision cannot be read to repudiate fundamental terms of the parties' agreement.[12]

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[11] Words are also "known by the company they keep," and their meaning "may be indicated or controlled by those words with which they are associated." *Northway Vill. No. 3, Inc. v. Northway Properties, Inc.*, 244 A.2d 47, 50 (Pa. 1968). It is telling that Paragraph IV.C.11 lists "modification" in between "interpretation" and "enforcement"—two words that no one would contend allow for radical changes.

[12] It is by no means "paradoxical[]"—as to use Highmark's word—that the trial court enforced the June 30, 2019 end-date even while allowing other claims for modification to go forward. HMK Br. at 21. The decision below harmonizes all

In addition, the absence of a term expressly indicating priority of modification is separately dispositive. Not all provisions of a contract are entitled to equal weight. Under black-letter law, specific terms and those that the parties negotiate take priority. *See Musko v. Musko*, 697 A.2d 255, 256 (Pa. 1997) ("[S]pecific provisions ordinarily will be regarded as qualifying the meaning of broad general terms in relation to a particular subject." (marks and citation omitted)); Restatement (Second) of Contracts § 203(d) (1981) ("[S]eparately negotiated or added terms are given greater weight than standardized terms or other terms not separately negotiated."). The Consent Decree is replete with specific provisions that preclude OAG's overly broad interpretation of the general modification provision. These include the specific termination date (R.166a § IV.C.9), the express limitation of the Court's jurisdiction to the period pre-termination (R.167a § IV.C.11), and the explicit disclaimer that the Consent Decree "is not a contract extension and shall not be characterized as such." (R.153a § I.A and R.161a-162a § IV.A.10).

And, these terms were specifically negotiated. UPMC specifically required that a termination provision be added and OAG did so in a term sheet prepared two

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terms of the Consent Decree by allowing claims for modification except where they contradict express, negotiated terms that this Court already held to be unambiguous and material, and from which the parties' intent can be ascertained and effectuated.

weeks later—a term sheet that OAG described as containing the "core principles" of the agreement and that did not include any reference to modification. (R.1767a-1780a.) The modification provision on which OAG rests its entire case was simply a standard term added at the end with other concluding provisions, such as paragraphs called "counterparts," "averment of truth," and "notices." (R.166a-167a.) It is disingenuous for OAG to argue that a provision that was not considered one of the "core principles" is nevertheless the sole governing principle that now overrides UPMC's negotiated consideration. *See, e.g.*, *Trombetta v. Raymond James Fin. Servs.*, 907 A.2d 550, 554 (Pa. 2006) (declining to adopt an interpretation that "would result in a situation whereby the more general … would control the more specific").

To eliminate the termination date and transform the Consent Decree into a perpetual contract would require even more specificity. "Pennsylvania law disfavors perpetual contracts and, thus, requires a perpetual term to be expressed unequivocally." *Wyeth Pharms., Inc. v. Borough of W. Chester*, 126 A.3d 1055, 1064 (Pa. Commw. Ct. 2015) (citing *Hutchinson v. Sunbeam Coal Co.*, 519 A.2d 385, 390 n.5 (Pa. 1986)). That is true even where a contract is silent as to the length of its term. *Id.* (citing *Moravecz v. Hillman Coal & Coke Co.*, 141 A.2d 570, 572 (Pa. 1958)). The Court thus cannot infer an intent to exalt the boilerplate modification provision over the specifically negotiated and unambiguous

termination date.[13] The parties made their intent clear—and it was to limit the scope of the Consent Decree to a five-year period.

Finally, to the extent it is unclear whether the parties intended for modification to trump the termination date, the Consent Decree must be construed against OAG, which drafted the agreement. *Ins. Adjustment Bureau, Inc. v. Allstate Ins. Co.*, 905 A.2d 462, 468 (Pa. 2006). This is particularly true here, where OAG is arguing that un-negotiated boilerplate terms should be given precedence over and annul UPMC's benefit of the bargain.

B. The Court Cannot Adopt A Definition Of "Modification" That Would Be Contrary To The Intent Of The Consent Decree.

Were this Court to move beyond the express and internally coherent language of the Consent Decree, it must still reject OAG's radical reinterpretation of that document. "The fundamental rule in interpreting the meaning of a contract is to ascertain and give effect to the intent of the contracting parties." *Murphy v. Duquesne Univ. of the Holy Ghost*, 777 A.2d 418, 429 (Pa. 2001). This Court has reaffirmed that principle in this very case. *Shapiro*, 188 A.3d at 1131 ("[O]ur primary objective is ascertaining the intent of the parties."); *Lesko v. Frankford*

[13] The modification provision was lifted verbatim from past consent decrees OAG has used for at least a decade. *See, e.g.*, May 25, 2007 Final Order ¶ 46 (Dkt. 1), *Commonwealth v. Catholic Health East*, 2:07-cv-00708-AJS (W.D. Pa.). Any decision that would allow OAG to gut this Consent Decree likely puts dozens of other existing consent decrees with the same provision at risk.

Hosp.-Bucks Cnty., 15 A.3d 337, 342 (Pa. 2011) (refusing to interpret a contract so as to make it contrary to the intent of the parties).

The intent of the parties and the overriding purpose of the Consent Decree was a five-year wind-down of in-network access to UPMC ending on June 30, 2019. That intent was expressed throughout the plain language of the agreement, was prevalent in the negotiation of the Consent Decree, and has been central to the last five years of implementation and interpretation.

1. Start with the intent plainly expressed in the agreement. Though the UPMC-Highmark commercial contracts were all set to expire at the end of 2014, the July 1, 2014 Consent Decree states in its opening paragraph that it "is not a contract extension and shall not be characterized as such." (R.153 § I.A.) That is more than a statement of intent. It is designated by the parties in the terms of the contract as an "interpretive principle" to guide all construction of the Consent Decree. (*Id*.) *See Wyeth*, 126 A.3d at 1062 (stating that a contractual preamble can be a "reliable indicator of intentions of the parties" that will be "looked to" when construing the contract (citations and internal quotations omitted)).

The Consent Decree also states as another "interpretive principle" that it "shall be interpreted consistently with" both (1) PID's order approving Highmark's acquisition of a hospital system in order to compete directly with UPMC (the "Approving Order"), and (2) the 2012 mediated agreement between UPMC and

Highmark. (*Id*.) Both documents presumed there would be no extension of the UPMC-Highmark contracts. PID issued its Approving Order on the basis of financial projections that were "premised on a *non*-continuation of the UPMC Contract." (R.922a (emphasis added).) Similarly, as set forth above, the 2012 mediated agreement was intended to establish a *finite* period of "sufficient and definite time for patients to make appropriate arrangements for their care." (R.1782a.)

The limited and transitional nature of the agreement is explicitly stated throughout the remainder of the document as well. Most evident is the termination provision: "This Consent Decree shall expire five (5) years from the date of entry," or June 30, 2019. (R.166a § IV.C.9.) Rate dispute resolution procedures set forth in the Consent Decree thus only applied for a limited window of time, ending in relevant part with "expiration of the Consent Decree." (R.163a § IV.C.1.a.iii.) And, to make sure patients were informed sufficiently in advance of that date to either switch their insurer or switch their provider, UPMC paid $2 million to a special fund "to be used by the OAG, PID or DOH for education and outreach purposes *during the transition*." (R.162a § IV.B.) Highmark paid the same amount for the same purpose, totaling $4 million that the Commonwealth has spent educating consumers about "the transition." (R.184a § IV.B.) The in-network access to UPMC that the Consent Decree provides is itself limited in nature; only

certain kinds of Highmark members seeking specified kinds of services can access UPMC on an in-network basis. The Consent Decree explicitly acknowledges that many Highmark members will remain out of network. (R.159a-160a § IV.A.6.)

2. The parties' intent for the Consent Decree to have a five-year transition is not in dispute. *Lesko*, 15 A.3d at 344 (adopting interpretation of the agreement consistent with the parties' intent). OAG has *stipulated* in this case that when it joined with other Commonwealth agencies to negotiate the Consent Decree, its goal was "to develop a *transition* plan for the *expiration* of the UPMC-Highmark contracts." (R.532a ¶ 16 (emphases added).) OAG did not set out to force an *extension* of the UPMC-Highmark contracts, but only to "resolve[] a number of issues stemming from the *wind-down* of the UPMC-Highmark contracts." (R.532a ¶ 18 (emphasis added).) In OAG's words, the Consent Decree was negotiated, executed, and implemented to "transition … to [a] new world where Highmark and UPMC will no longer contract" on a system-wide basis. (R.996a.)

And, as noted *supra*, UPMC specifically bargained for the June 30, 2019 end-date. The first draft of the agreement that OAG proposed did not include a termination date. (R.519a-524a.) Following two weeks of discussion, OAG circulated a revised draft term sheet to "reflect[] some of the changes that [UPMC and Highmark] have requested." (R.1767a.) According to the revised draft sheet,

"[t]he term of the Final Decree shall be for 5 years from the date of entry." (R.1774a ¶ 9). In contrast, there was no negotiation over the modification provision, which was among the boilerplate provisions added at the end of the Consent Decree. *See also supra* n.13.

The final Consent Decree thus avoided litigation by releasing UPMC from OAG's claims and imposing specific obligations on UPMC for a five-year period. As this Court recognized just last year, the termination date was an "unambiguous and material" part of the bargain. *Shapiro*, 188 A.3d at 1132. To be sure, the Consent Decree also references consumer protection, provides for some in-network access to UPMC, and includes a modification provision. But those terms do not establish an intent to grant permanent in-network access or to disregard explicit language that the Consent Decree is "not a contract extension." UPMC *rejected* the OAG's term sheet that lacked an end-date. In a Consent Decree where the parties were clear and express in their intent to terminate after five years, the modification provision alone provides no basis to override that end-date. "Simply put, the parties' contractual intent cannot be gleaned by ignoring all but one sentence in the Contract, and then reading that sentence out of context." *Murphy*, 777 A.2d at 429.[14]

[14] Highmark suggests that the Court can nevertheless override that end-date by interpreting the Consent Decree to effectuate the public interest. HMK Br. at 30. That is not the law. As courts broadly hold, "'general considerations of supposed

3. The Consent Decree was subsequently and repeatedly interpreted in light of the limited and transitional purpose. In 2014, the Commonwealth Court held that Highmark could market Medicare Advantage plans that exclude UPMC providers, thus preventing in-network access to UPMC. *See UPMC*, 2014 Pa. Commw. Unpub. LEXIS 652. UPMC would have treated those seniors as in-network, but the Commonwealth Court found that they had no in-network access under the Consent Decree. Because there was no explicit requirement "that Highmark include UPMC in *all* of its Medicare-Advantage products," Highmark was free to exclude in-network access to UPMC. *Id*. at *21. Following the decision, OAG did not move to modify the Consent Decrees to provide for that access. *See Atlantic Richfield v. Razumic*, 390 A.2d 737, 740-41 n.6 (Pa. 1978) (considering course of performance in interpretation of a contract).

So too in 2018. OAG sought to enforce the existing terms of the agreement in a way that would extend its obligations past June 30, 2019. The Commonwealth Court held that the purpose of the Consent Decree was to provide "certainty as to

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public interest'" will never suffice to displace the plain language or intent of a contract. *Eichelman v. Nationwide Ins. Co.*, 711 A.2d 1006, 1008 (Pa. 1998) (citation omitted); *see also Paylor v. Hartford Ins. Co.*, 640 A.2d 1234, 1235 (Pa. 1994); *Adamitis v. Erie Ins. Exch.*, 54 A.3d 371, 376 (Pa. Super. Ct. 2012). Even in the case on which Highmark relies, this Court simply enforced the parties' intent as expressed in the explicit language establishing the intended term of the agreement, without regard for any public interest considerations. *Pritchard v. Wick*, 178 A.2d 725, 727 (Pa. 1962).

what would occur during transitional periods," thus allowing Highmark subscribers to "decide whether to remain with Highmark or change insurance carriers so that they would have continued access to UPMC facilities." *UPMC*, 2018 Pa. Commw. Unpub. LEXIS 393, at *3. The court granted OAG's request, but still fixed a limited remedy intended simply to provide a "date certain" by which obligations would end and give Highmark subscribers "certainty as to what time period they will have access to UPMC facilities." *Id*. at *15. This Court then reversed even that limited order based on the Court's "primary hesitation" that the injunction "alters an unambiguous and material term of the Consent Decree—the June 30, 2019 end date." *Shapiro*, 188 A.3d at 1132.

Eliminating the end-date to make a perpetual contract is not a modification. As the Court recognized last year, it is a fundamental repudiation of the basic deal that the parties agreed upon. The parties negotiated a five-year deal and exchanged what they deemed appropriate consideration. UPMC cannot seek to "modify" the money it paid to help educate consumers about the transition from $2 million to $1, or to "modify" the release provision to prospectively release all possible claims that could ever accrue. Those were specifically negotiated, binding terms. Likewise, the modification provision cannot retroactively strip UPMC of the consideration it bargained for and excuse OAG's performance. OAG has already secured the benefit of UPMC's full performance, and UPMC has relied on the

terms of the agreement. OAG cannot now, at the very end of the parties' five-year deal, "modify" the agreement out of existence by taking away UPMC's bargain and converting the Consent Decree into a permanent injunction with vastly broader terms.

C. Courts Have Specifically Rejected OAG's Interpretation.

Unsurprisingly, courts uniformly interpret contractual modification provisions to further the parties' intent, not destroy it.

Under Pennsylvania law, the power to modify material terms of a consent decree is limited to fraud, accident, or mistake. *Universal Builders Supply, Inc. v. Shaler Highlands Corp.*, 175 A.2d 58, 61 (Pa. 1961). In *Universal Builders*, the trial court extended the time for performance of obligations in a consent decree pursuant to the court's inherent powers, and this Court reversed. *Id*. at 60. Because a consent decree "is merely an agreement between the parties…. [t]he court, in the absence of fraud, accident or mistake, had neither the power nor the authority to modify or vary the terms set forth." *Id*. at 61. That principle is a bedrock Pennsylvania law. *See, e.g.*, *Penn Township v. Watts*, 618 A.2d 1244, 1248 (Pa. Commw. Ct. 1992) (reversing modification of a consent decree not "necessitated by fraud, accident or mistake"); *Dravosburg Hous. Ass'n v. Borough of Dravosburg*, 454 A.2d 1158, 1161 (Pa. Commw. Ct. 1983) (same).

This law applies even where the parties agree to a modification provision. In *Commonwealth v. U.S. Steel Corp.*, the parties' entered a consent decree to control emissions from a large plant, and explicitly agreed that the decree could "be modified by agreement of the parties or by this Court upon petition by any party." 325 A.2d 324, 328 (Pa. Commw. Ct. 1974). After technical problems with compliance arose, the court modified the decree "to establish a program under which some of these very perplexing technical and scientific problems are to be resolved by experts." *Id*. at 327. On appeal, the Commonwealth Court reversed under *Universal Builders* because there was insufficient proof of mistake or impossibility of performance. *Id*. at 328-29. Absent such proof, the trial court had "very little choice but to" apply the substantive terms of the agreement as written. *Id*. at 329.

OAG misleadingly cites *U.S. Steel* for the proposition that "a modification provision … allowed the court to modify the decree upon application of one of the parties." OAG Br. at 25. That overlooks the actual holding of the case. Even faced with interpreting a consent decree that included a purportedly unlimited modification provision, the court still held modification to be legal error because there was no proof of impossibility or mistake. The court did so despite recognizing that the modifications in question—while legally improper—made

"eminent good sense" in resolving the difficult scientific problems surrounding pollution reduction. *U.S. Steel*, 325 A.2d at 327-28.[15]

Similarly, the Third Circuit has rejected the very same argument that OAG advances here. *See Holland v. New Jersey Dep't of Corr*., 246 F.3d 267, 284 (3d Cir. 2001). In *Holland*, the parties entered a consent decree to alleviate alleged discriminatory practices. The decree contained both an express termination provision stating that it would remain "in effect for a period of four (4) years" from entry, and a provision stating that any party "may seek to modify the procedures enumerated in this Decree, provided that the proposed modifications effectuate the purposes of this Decree." *Id*. at 279. After the trial court extended the decree by ten months, the Third Circuit reversed, specifically rejecting the argument that the consent decree itself had bestowed any authority to change the end-date. The court acknowledged that the modification provision might "imply that the District Court has the power to extend the Decree," but held that "the clear language … explicitly limiting the Decree time period to four years while not providing any express

[15] OAG also cites *Dravosburg*, 454 A.2d 1158, as stating that the fraud, accident, or mistake standard only applies "in the absence of a modification provision." OAG Br. at 24-25. *Dravosburg* says no such thing. If anything, the decision reaffirms that it is the parties' collective intent that must govern modification. *See Dravosburg*, 454 A.2d at 1162 ("We hold, therefore, that the rule in Pennsylvania remains firm that where a decree in equity is entered by the consent of the parties, it is binding upon the parties until *they* choose to amend it.") (emphasis in original).

means for the District Court to extend this time period trumps this possible implication." *Id*. at 281 (internal citation omitted).

Notably, federal courts *always* have the authority to modify a consent decree where failing to do so would be "detrimental to the public interest." *See Salazar by Salazar v. D.C.*, 896 F.3d 489, 492 (D.C. Cir. 2018) (citing *Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 384 (1992)). But they still reject the type of modification proposed by OAG and limit the power of modification to circumstances inapplicable here. In *Salazar*, the plaintiff sought to add to a pre-existing consent decree new ongoing obligations related to recently enacted legislation. *Id*. at 496. The D.C. Circuit reversed the modification, holding that any change to the decree must be "in service of the consent decree's original 'intended result.'" *Id*. at 498. Noting a "critical difference between" the "power to modify an ongoing consent decree and its authority to impose a new injunction," the court held that the "guise of modification" cannot be used to "impose entirely new injunctive relief." *Id*. at 497-98. Doing so denies "the enjoined party the contractual bargain it struck in agreeing to the consent decree at the time of its entry." *Id*. at 298; *see also Reynolds v. Roberts*, 202 F.3d 1303, 1312 (11th Cir. 2000) ("Long standing precedent evinces a strong public policy against judicial rewriting of consent decrees."); *King v. Allied Vision, Ltd*., 65 F.3d 1051, 1058 (2d

Cir. 1995) ("[A] district court may not impose obligations on a party that are not unambiguously mandated by the decree itself.").[16]

Even where the parties to a consent decree are subject to a judicial power to modify, that power cannot be exercised to subvert the purpose of the agreement, contravene the intent of the parties, and rewrite their contract into an entirely different one. To do so would necessarily strip a consent decree of the source of its authority—the parties' consent. *See U.S. Steel*, 325 A.2d at 328 (consent decrees ultimately derive their "efficacy from the agreement of the parties").

II. OAG CANNOT INTERFERE WITH EXISTING LAW.

The decision below also avoids more significant problems that arise from OAG's interpretation, problems that neither OAG nor Highmark even acknowledge. Courts do not "countenance the interpretation of a contract which

[16] The Commonwealth Court opted not to follow *Salazar* in rejecting all proposed modifications because this matter was at the pleading stage and a factual record was necessary to assess most of the specific modifications proposed. *See* Appx. A at 36-37. But, consistent with *Salazar*, the trial court did dismiss OAG's attempt to eliminate a term that this Court had already held to be unambiguous and material, making discovery on that point unnecessary. *Id*. at 35. Moreover, although UPMC repeatedly has raised *Salazar* and similar federal case law, OAG has never even acknowledged that precedent, much less tried to distinguish it. Highmark argues that *Salazar* is distinguishable because it did not involve a proposed modification in the public interest. HMK Br. at 36. That argument, again, fails to address the substance of *Salazar*'s holding about the permissible scope of modification. Highmark's focus on the procedural posture misses the point, because the public interest is always a potential grounds for modification in federal court. *See Salazar*, 896 F.3d at 492.

would render it illegal or incapable of performance." *Kane*, 129 A.3d at 467–68; *see also League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 846 (5th Cir. 1993) ("Courts must be especially cautious when parties seek to achieve by consent decree what they cannot achieve by their own authority."). The unlimited power to modify that OAG proposes would violate basic separation of powers and lead to impermissible conflict with federal law.

A. Taking The Determination of Public Interest Away From The Legislature Infringes Separation of Powers.

OAG's theory of unlimited modification runs afoul of Pennsylvania constitutional law. As OAG recognizes, this case presents "far reaching, *public policy* concerns." OAG Br. at 34 (emphasis added). Indeed, modification of the Consent Decree's end-date is the gateway through which OAG seeks far more expansive healthcare reform. OAG asked the Commonwealth Court to order that *any* insurer and *any* provider operating in Pennsylvania can force a contract with the providers and insurers within UPMC and Highmark's respective systems, (R.209a §§ 3.2, 3.3); that private arbitrators have final say over provider reimbursement rates (R.211a-218a § 4); and that commonly used contractual terms and healthcare reimbursement practices are prohibited (R.210a § 3.4). These modifications have nothing to do with a transition of the UPMC-Highmark relationship and go far beyond the conduct governed by the Consent Decree. OAG nevertheless contends that the Consent Decree requires the Commonwealth Court

to impose and oversee these sudden changes to healthcare markets throughout Pennsylvania because it is in the "public interest."

Declaring policy, however, is a legislative function. *Mamlin v. Geneo*, 17 A.2d 407, 409 (Pa. 1941). Judicial power does not extend to resolving controversial "economic or social problems … capable of solution only as the result of a study of various factors and conditions." *Id*.; *see also Weaver v. Harpster*, 975 A.2d 555, 563 (Pa. 2009). This Court has been called on before to decide what "the public interest in ensuring cost-effective health care" requires. *Insurance Federation of Pa., Inc. v. Com., Ins. Dept.*, 970 A.2d 1108, 1121, 1122 (Pa. 2009). It "decline[d] to do so," holding that it would be improper to "stray into the arena of public policy" and "second-guess the policy choices of the General Assembly" related to "controlling the cost of health care." *Id*. at 1122 & n.15. Likewise, the court in *U.S. Steel* reversed where the trial judge modified a consent decree to convene expert panels to help solve problems related to air pollution. Even if the modification made good practical sense, it was "contrary to the proper judicial function" to call on courts to solve scientific problems or supervise scientific review boards. *U.S. Steel*, 325 A.2d at 327-28.[17]

[17] Nor is public policy for OAG to decide. The authority of the Attorney General is limited by statute. *See* 71 P.S. § 732-101, *et seq*. It does not include promulgating new regulations, enacting new policies, or bringing stand-alone "public interest" claims.

OAG's proposals go even further. The modifications proposed have never been implemented in any state and would materially change how healthcare is delivered. Portions of this dramatic overhaul—including broad requirements to contract with "any willing provider" or "any willing insurer"—have been raised and rejected by the General Assembly and remain highly controversial today.[18] Federal law prohibits forced contracting in Medicare Advantage. *See* 42 U.S.C. § 1395w-24(a)(6)(B)(iii). And as PID explicitly states on its website today: the "Commonwealth cannot force an insurance company and a provider to contract at in-network rates with each other." (R.2034a.) OAG is thus asking the Commonwealth Court to second-guess the legislature and force UPMC into a contract with Highmark not because UPMC violated a law, but because it would be in the "public interest."

In 2014, OAG agreed with these policy limits under state law. In legislative testimony over the Consent Decree, OAG's representative testified that the UPMC and Highmark dispute "[is] similar to . . . disputes between health plans and hospitals around the country…. If we forced a resolution in this case we really

[18] *See* Pennsylvania General Assembly, House Bill 345, Regular Session 2017-2018, February 3, 2017 ("any willing provider" legislation reintroduced to the Pennsylvania Committee on Insurance but not receiving a vote.); Pennsylvania General Assembly, House Bill 1621, Regular Session 2017-2018, June 26, 2017 ("any willing payer" legislation that likewise failed). This legislative history was also explained in a proposed amicus brief filed below. *See* Proposed Brief for Amicus Curiae Senate President Pro Tempore Joseph B. Scarnati, III.

could not avoid trying to force a similar resolution in all those other situations and that is just simply an unworkable method of dealing with these problems." Contrary to the public interest argument asserted now, OAG then admitted:

> By us trying to force the parties to enter into an agreement we would be putting our finger on the scale so to speak and having effects that we aren't quite sure what those effects would be. And in particular we wouldn't be sure about what the price effects that we would impose would be. In contract negotiations one of the key things is that each party has the ability to walk away from the negotiations. That ability to walk away forces each side to be reasonable in most circumstances, putting our finger on the scale in favor of one side or the other changes that dynamic in ways that are unpredictable.

(R.641a.) The only difference now is a different Attorney General.

The judiciary cannot be conscripted into implementing and overseeing OAG's newly discovered public policy preferences under the guise of modification. *See Weaver*, 975 A.2d at 563; *U.S. Steel*, 325 A.2d at 327-28. As OAG recognized, healthcare markets are complex and unpredictable. Legions of disputes will arise (particularly as OAG seeks to include all insurers and providers that deal with UPMC and Highmark, literally thousands of new parties) and further modifications undoubtedly will be requested. If the laws governing healthcare should be changed, the General Assembly can change them and set new policy for the Commonwealth. Healthcare reform, however, cannot be imposed through litigation and held hostage by the changing vagaries of OAG's policy decisions.

B. Federal Law Preempts OAG's Proposed Modifications To Add New Contract Terms Beyond June 30, 2019.

Extending the Consent Decree will also lead to conflict with federal Medicare law. Under federal law, to be an in-network provider for Medicare Advantage plans, there must be a contract between the plan and the provider. *See, e.g.*, 42 C.F.R. §§ 422.112(a)(1)(i), 422.504(i)(2)-(3). This Court specifically held in 2015, *at the insistence of OAG and Highmark*, that the Consent Decree itself does not qualify as a Medicare Advantage contract. *Kane*, 129 A.3d at 469-70. While UPMC is currently in several Medicare Advantage contracts with Highmark, it already terminated nine other Medicare Advantage contracts, and the run-out provisions of those agreements end on June 30, 2019. *See Shapiro*, 188 A.3d at 1124. Accordingly, even if the Consent Decree is extended, there are no separate Medicare Advantage contracts to make those nine hospitals in-network.

Nor can the Commonwealth force UPMC into such a contract. Congress has prohibited forced contracting for Medicare Advantage purposes. "In order to promote competition," regulators "may not require any [Medicare Advantage insurer] to contract with a particular hospital, physician, or other entity or individual." 42 U.S.C. § 1395w-24(a)(6)(B)(iii). This prohibition restricts state officials and judges as well because Congress preempted the field. 42 U.S.C. § 1395w-26(b)(3) (standards for Medicare Advantage "shall supersede any State law or regulation … with respect to MA plans," subject only to solvency and licensing

exceptions not relevant here). "[A]s long as a federal standard exists regarding the conduct at issue all [s]tate standards*, including those established through case law*, are preempted to the extent they specifically would regulate MA plans." *Morrison v. Health Plan of Nev., Inc.*, 328 P.3d 1165, 1169 (Nev. 2014) (emphasis added).[19]

It is no answer that there is a Consent Decree purportedly operating in the background. The express purpose of OAG's request to eliminate the termination date is to enable further modifications of the Consent Decree that would force UPMC and its provider and insurer affiliates into Medicare Advantage contracts. But as OAG recognizes, UPMC did not consent to the proposed modifications. OAG Br. at 16. Forced Medicare Advantage contracts is expressly preempted under federal law and thus a legal impossibility. It makes no sense to interpret the Consent Decree in a way that will only create further legal conflict. *See Kane*, 129 A.3d at 467–68.

[19] Medicare Advantage is not the only program that would preempt elements of OAG's requested relief. The Sherman Act, ERISA, and the Affordable Care Act would also displace OAG's attempted healthcare regulation. (R.884a-893a.) Pursuant to the Sherman Act and Medicare Act preemption statutes, the Hospital and Healthsystem Association of Pennsylvania—representing more than 240 hospitals across Pennsylvania—sued OAG for a declaration that the proposals OAG seeks to impose on UPMC in this action could not be applied to other hospitals as a matter of law. *See* Mot. to Intervene (Dkt. 49), *UPMC Pinnacle v. Shapiro*, No. 1:19-cv-00298 (M.D. Pa.). While the case was dismissed on ripeness grounds, the hospitals may pursue relief if OAG continues to pursue its proposed reforms.

III. OAG'S *AD HOMINEM* ARGUMENTS ABOUT NON-PROFIT DUTIES ARE FALSE AND IRRELEVANT.

OAG argues that the parties negotiated the modification provision in the "context" of promoting the public interest. OAG Br. at 27. According to OAG, the Court needs to "reign [*sic*] in" UPMC because bad things will happen if the Consent Decrees expire. *Id*. at 28. This is the same extra-judicial argument the Court rejected last year. And just like last year, there is no authority that supports enforcing the "context" of a contract over the parties' intent and the actual language of the agreement. In the event that OAG believes UPMC is not fulfilling its obligations under the nonprofit laws, it can enforce the law; the Consent Decree and this appeal are of no import.[20] By making these misleading arguments here, OAG resorts to little more than unsubstantiated name-calling.

To begin with, the claim that UPMC is going to "deny more affordable In-Network access to all subscribers of Highmark's Medicare Advantage health plans" is false. *After* the Consent Decree expires, every single member of every single Highmark Medicare Advantage plan will have access to in-network healthcare from a network of providers that CMS has determined to be adequate.

[20] In Counts II, III, and IV of its Petition to Modify, OAG separately sued UPMC for violation of various laws. Those counts were stayed for this appeal, but OAG remains free to pursue those actions and seek whatever relief is allowed by law. But it cannot try to circumvent the demands of proof by repackaging the same allegations as a "public interest" claim under the Consent Decree.

See, e.g., 42 §§ C.F.R. 417.414, 417.416, 422.112(a)(1)(i), and 422.114(a)(3)(ii). Moreover, for those seniors outside of Pittsburgh and Erie, UPMC has already agreed to extend its contracts with Highmark for continued in-network access for commercial members and has maintained its existing contracts for Medicare Advantage subscribers. (R.2038a-2046a.)

For many seniors in Pittsburgh and Erie, they lost in-network access to UPMC four years ago, when the Consent Decrees were interpreted to allow *Highmark* to exclude UPMC from its Community Blue Medicare Advantage plans. *See UPMC*, 2014 Pa. Commw. Unpub. LEXIS 652. Following that decision, OAG did not seek to modify the Consent Decrees to force Highmark to add UPMC back into the Community Blue network. OAG was content to let those seniors go out of network for UPMC, and under OAG's proposed modifications, Highmark can continue to exclude in-network access to UPMC in all of its products.[21]

Highmark has spent billions of dollars to create a competing provider system with affiliations with world-class institutions such as Johns Hopkins and Carnegie

[21] Highmark also incentivizes employers not to give their employees the option of in-network access to UPMC. Just a few days ago, Highmark, for example, agreed to pay Erie School District $3.2 million to make Allegheny Health Network rather than UPMC their employees in-network provider for health care—for the next ten years. E. Palatella, *Highmark lands ad deal for Erie Vets Stadium*, Erie Times-News (April 19, 2019), available at https://www.goerie.com/news/20190419/highmark-lands-ad-deal-for-erie-vets-stadium.

Mellon University. (R.1974a.) Federal law requires providers to accept all emergency patients. *See* 42 U.S.C. § 1395dd. State law, in turn, protects many commercial insureds who receive out-of-network emergency care. 31 Pa. Code §§ 152.11(a)(3), 152.15. Balance billing is subject to existing state regulation, *see, e.g.*, 35 P.S. § 449.34, and the Medicare Act caps reimbursement for services to out-of-network Medicare Advantage members, *see, e.g.*, 42 U.S.C. § 1395w-22(k)(1); 42 C.F.R. § 422.214. These laws form the default that OAG agreed would control after June 30, 2019, and they have for decades regulated providers and insurers without incident. Indeed, for more than 20 years, Highmark's provider network, Allegheny Health Network, has applied these laws in charging UPMC Health Plan subscribers for out-of-network emergency care.

For seniors in Pittsburgh and Erie who have and want continued in-network access to UPMC, they have multiple insurance options and are able to choose at least annually which insurers provide the best benefits for them.[22] And in the event that seniors are not aware of the end of the Consent Decrees (or are confused by

[22] CMS data show that seniors have been switching insurers regularly in Western Pennsylvania with national insurers that offer in-network access to both UPMC and Highmark's provider, Allegheny Health Network, reporting the largest increases in market share. *See* S. Twedt, *Highmark Medicare Advantage numbers drop during extended open enrollment*, Pitts. Post-Gazette (Apr. 25, 2019), available at https://www.post-gazette.com/business/healthcare-business/2019/04/25/Medicare-Advantage-UPMC-Highmark-Aetna-consent-decrees-network/stories/201904240130.

OAG's press conferences and press releases promising an extension), CMS can provide a special enrollment period so that seniors can select a product that better suits their needs. (R.1262a-1263a.) Seniors also have the option during designated periods to drop Medicare Advantage and return to traditional Medicare, which both UPMC and Allegheny Health Network accept in full. *See* 42 C.F.R § 422.62. Seniors who do this can then choose a new Medicare Advantage plan during the next open enrollment period. (*See, e.g.*, R.1276a § 5.)

OAG's emphasis on UPMC's request for upfront payment for *non*-emergent out-of-network services is another example of OAG's hyperbole. UPMC does not have to serve all non-emergent, out-of-network patients. *See Torretti v. Main Line Hospitals, Inc.*, 580 F.3d 168, 173 (3d Cir. 2009) ("There is no general common-law duty for hospitals to accept and treat all individuals in a nonemergency situation."); *Fabian v. Metzko*, 344 A.2d 569, 572 (Pa. Super. Ct. 1975) (same). Medicare Advantage regulations recognize this as well. *See* 42 U.S.C. § 1395a.

When UPMC does serve out-of-network Highmark insureds on a non-emergency basis, Highmark pays its share of the cost *not* to UPMC, but directly to the patient, many of whom never forward payment to UPMC. This practice—intended to "pressure providers into joining [an insurer's] networks and accepting

lower payments"[23]—is one that OAG, PID, and DOH disfavor and that UPMC has asked Highmark to stop, and Highmark has refused. (*See, e.g.*, R.844a.) Asking for payment in advance of providing out-of-network services is a way to accommodate patients without incurring unnecessary financial loss. According to some reports, approximately three-fourths of providers require up-front payment from the patient in such situations.[24]

UPMC has had to resort to these measures because Highmark continuously has breached its contracts and withheld hundreds of millions of dollars to starve UPMC of reimbursement and gain a competitive advantage. As this Court knows, Highmark unilaterally slashed oncology reimbursements—causing UPMC hundreds of millions of dollars in damages and requiring UPMC to file arbitration to recover the lost funds. *Kane*, 129 A.3d at 447. Separately, Highmark unilaterally slashed Medicare Advantage reimbursements by 2%—causing UPMC

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[23] W. Drash, *Insurer Sent $33,000 to a Man Struggling With Addiction. He Used the Cash to Go on a Binge – and Died*, CNN (Apr. 23, 2019), available at https://www.cnn.com/2019/04/23/health/anthem-blue-cross-payments-patient-overdose/index.html.

[24] *Doctors And Hospitals Tell Patients: Show Us The Money Before Treatment*, NPR.org (Dec. 7, 2016) (calling the practice "a routine part of doing business these days"), available at https://www.npr.org/sections/health-shots/2016/12/07/504589131/doctors-and-hospitals-tell-patients-show-us-the-money-before-treatment. It is wrong to assume that upfront payments put patients unnecessarily out of pocket. To the extent a patient has out-of-network coverage under their health plan, he or she can seek reimbursement for the payment from Highmark.

tens of millions of dollars in damages and requiring a lawsuit to recover the lost funds. *See UPMC Altoona v. Highmark Inc.*, No. 2016-00488 (C.P. Cumberland). UPMC's 2013 resolution not to contract with Highmark itself resulted from Highmark's announced plan to steer approximately 41,000 in-patient admissions away from UPMC each year.

OAG does not acknowledge any of this in its pleadings. OAG instead trumpets the "millions" or "hundreds of thousands" of Highmark subscribers whose healthcare purportedly hangs in the balance. OAG Br. at 1, 2, 7, 13. Even this is fabricated. Outside the Pittsburgh and Erie regions, UPMC continued in-network for Highmark Medicare Advantage subscribers and extended in-network access for its commercial members as well. (R.2038a-2046a.) And inside Pittsburgh, Highmark members still have ongoing access to UPMC Children's Hospital of Pittsburgh,[25] UPMC Western Psychiatric Hospital, and many UPMC-affiliated doctors and locations around Pittsburgh, including UPMC Cancer Centers. (*Id.*) UPMC, in fact, has agreed to provide each of the individual service lines that Highmark and PID have requested on an in-network basis.

[25] OAG's allegations have undue media reporting that Children's Hospital may soon be out of network to Highmark. There is no basis for that. Highmark members have contracted in-network access through 2022 and UPMC has offered to extend that contract further. Highmark has not responded.

Far from "millions," evidence suggests that the market has already adjusted to the reality of June 30, 2019. Halfway through the Consent Decree, Highmark's expert market analysis, which was submitted to the PID, found "decreasing reliance over time on Highmark members accessing UPMC facilities," as well as "a shift to in-network options at AHN and in-network community partners." (R.2003a.)[26] There is no reason, two years later, to assume that anyone will be caught by surprise. Highmark's own executives concede that the end of the Consent Decree is "a non-event"; consumers "are ready for this next stage"; and it is "really kind of in the rearview mirror."[27] The market has made its decisions. But were OAG ultimately to impose his proffered solution for this supposed problem on UPMC, it would indeed impact millions of Pennsylvanians—in perpetuity—by upending their reasonable and settled expectations about how and from whom they will receive their healthcare.

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[26] *See also* Compass Lexecon, *Report For Pennsylvania Insurance Department, Assessment Of Healthcare Competition Following Highmark Inc.'s Affiliation With West Penn Allegheny Health System, Inc. And Other Healthcare Providers* at 36 (July 2017), available at https://www.insurance.pa.gov/Companies/IndustryActivity/CorporateTransactionsofPublicInterest/HighmarkWestPennAlleghenyHealthSystem/Documents/Compass%20Lexecon%20Public%20Assessment%20of%20Healthcare%20Competition%20in%20WPA%20July%202017.pdf.

[27] *See* UPMC's Apr. 19, 2019 Answer To Pet. For Permission To Appeal at 17 n.5 & Appendices 6-7 (49 MM 2019).

IV. THE COURT SHOULD DECLINE OAG'S REPEAT REQUEST FOR EXTRAORDINARY JURISDICTION.

Finally, OAG repeats its request that this Court assert its King's Bench or extraordinary jurisdiction and issue a special injunction extending the existing Consent Decree until the request for modification is resolved "through final appeal"—a process that, given the federal preemption issues, could take years. OAG Br. at 31. The request is wholly without merit.

This is an improper request and should be summarily denied so as not to require any more resources from the parties. The Court already declined to exercise extraordinary jurisdiction. Both OAG and Highmark asked the Court to hear this case pursuant to 42 Pa. C.S. § 726 and issue interim relief. *See* Apr. 8, 2019 Pet. for Permission to Appeal at 17 (46 MM 2019); Apr. 10, 2019 Joinder at 4-8 (46 MM 2019). The Court's subsequent Order limited its jurisdiction only to the interlocutory appeal of a single legal question pursuant to 42 Pa. C.S. § 702(b), and ordered significantly expedited proceedings. For OAG to resubmit a request for injunctive relief that it never bothered to submit to the trial court and that this Court denied only a few days ago is improper. For OAG to do so mid-expedited proceedings on the one legal question that the Court did certify is prejudicial gamesmanship—particularly when it admits that it "does not need relief immediately." OAG Br. at 31.

Moreover, as with its initial request, OAG comes nowhere close to meeting the heavy burden to show a clear right to relief that is required before this Court will exercise its "sparingly" used jurisdiction under Section 726 or King's Bench jurisprudence. *Washington Cty. Comm'rs v. Pa. Labor Relations Bd.*, 417 A.2d 164, 167 (Pa. 1980); *see also Commonwealth v. Williams*, 129 A.3d 1199, 1206 (Pa. 2015) (King's Bench authority "is exercised with extreme caution"). And, OAG is not seeking to preserve the *status quo*, which is that the Consent Decree ends June 30, 2019, but is asking the Court to change the *status quo* through a mandatory injunction that would force UPMC to take affirmative actions. *See Roberts v. Bd. of Directors of School Dist.*, 341 A.2d 475, 478 (Pa. 1975) ("[A] mandatory injunction which is imposed to preserve the status quo should be issued only in rare cases and certainly more sparingly than one which is merely prohibitory.").

OAG has no record to establish a clear right to relief; hotly contested allegations do not suffice. And these allegations largely just repeat arguments that the Court rejected ten months ago. The Court then held that UPMC could terminate its Medicare Advantage contracts and end in-network access to UPMC on June 30, 2019; that consumers have had advance notice of that date; and that ordinary CMS procedures remain available. *Shapiro*, 188 A.3d at 1133. Nothing about that date, that notice, or those procedures has changed since last July. The

public importance alone is insufficient to invoke extraordinary jurisdiction when OAG cannot clearly demonstrate its rights. *See Phila. Newspapers, Inc. v. Jerome*, 387 A.2d 425, 430 n.11 (Pa. 1978).

Nor can OAG show that it is entitled to a special injunction. OAG waived its request by failing to raise the issue below. *See* Pa. R.A.P. 302(a); Pa. R.A.P. 1732(a). The Court, furthermore, cannot issue an injunction without OAG meeting its burden or establishing any facts. At a minimum, the rules entitle UPMC to a hearing on the allegations against it before a special injunction can issue—not something this Court is equipped to undertake even pursuant to its Section 7226 powers. *See* Pa. R.C.P. 1531(a) (special injunction may issue "only after written notice and hearing"); *see also Jackson v. Hendrick*, 503 A.2d 400, 408 (Pa. 1986) (excepting from the exercise of extraordinary jurisdiction "resolutions of fact which are best determined by the Court of Common Pleas").

The premise of OAG's request is also a fallacy. UPMC is not running out the clock. OAG delayed more than four years in seeking to modify an end-date it negotiated and has known about since June 2014. At a minimum, OAG should have brought this claim last year when it sought to extend the Consent Decree. Instead, as OAG acknowledges, it never proposed any modification until November 2018. OAG Br. at 15. And although UPMC promptly rejected the

modification, OAG waited until February 2019 to seek judicial relief. The purported exigency here is a result solely of OAG's tactics.

Finally, OAG overlooks the prejudice it threatens to impose on UPMC and the consumers. The Consent Decree was designed to provide a five-year transition from one state of affairs (UPMC in-network) to another specific state of affairs (UPMC out-of-network) by the specific, negotiated date of June 30, 2019. Since the Consent Decree was signed and in anticipation of full-fledged competition, Highmark has poured billions into expanding and improving the Allegheny Health Network. (*See, e.g.*, R.1909a ¶ 190, R.1962a.) UPMC has launched new projects and acquired new hospitals. UPMC and Highmark reached a second mediated agreement to address post-Consent Decree matters in specific areas. (R.2031a.) Government contracts have been approved. Hundreds of provider contracts have been terminated. Provider networks have been re-arranged to support new insurance products that have been designed, rated, and marketed. UPMC and Highmark have spent millions of dollars publicizing the end of the Consent Decree on June 30, 2019. The whole point of clear notice about a concrete date was so that everyone could make important choices based on that end-point, and tens of thousands of individuals have since changed their insurer and medical provider.

In July, this Court rejected even a six month extension of UPMC's obligations under the Consent Decree because of the "unambiguous and material"

end-date to which the parties agreed. That only further solidified expectations. Now OAG is trying to unsettle expectations and replace the definitive June 30, 2019 end-date with the amorphous "through final appeal." OAG Br. at 31. Consumers cannot possibly make healthcare decisions based on some unknown future date that could be weeks, months, or years away. It is a disservice for OAG to make serial collateral attacks on an agreement that it negotiated and that the entire market has been relying on for five years. Rather than an orderly wind down that all parties had desired, OAG has attempted to incite panic and disruption through repeated lawsuits and politicized tweets and press releases. Any adjustment to the termination date—much less the open-ended one OAG alternatively requests under King's Bench jurisdiction—will deprive UPMC of its bargain and unduly confuse consumers. The request for King's Bench or extraordinary jurisdiction should be denied.

CONCLUSION

The public has had the transition period it was assured, and all parties should now have the benefit of the bargain they negotiated. UPMC respectfully requests that this Court affirm the decision of the Commonwealth Court that OAG cannot modify the unambiguous and material termination date.

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Respectfully submitted,

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CERTIFICATION OF COMPLIANCE WITH WORD COUNT LIMIT

I hereby certify as prescribed by Pa. R.A.P. 2135 that the foregoing Brief for Appellee UPMC contains 12,950 words. In preparing this certificate, the undersigned has relied upon the word count of the word-processing system used to prepare this brief.

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CERTIFICATE OF COMPLIANCE

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

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CERTIFICATE OF SERVICE

I hereby certify that on May 1, 2019, a true and accurate copy of the foregoing Brief for Appellee UPMC was served via PACFile on counsel of record.

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