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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REPLY 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 MD 2014

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INTRODUCTION

In its opening brief, Highmark—like the OAG—explained why the Commonwealth Court's conclusion that it may not modify the Consent Decrees' end date does not withstand scrutiny under controlling law. First, the linchpin of that conclusion—namely, that this Court decided in *Medicare Advantage II* that no such modification is permitted—is flat wrong. *See* Highmark's Br., § II. Second, an analysis of the Consent Decrees' modification provision through the lens of settled contract law shows that it expressly authorizes the OAG's request for modification—including its request for an extension of the end date—so long as it proves that the proposed modifications are in the public interest. *See* Highmark's Br., § I.

UPMC's response does not call into question either of these points. On the first point, UPMC has nothing at all to say—indeed, it does not even try to provide a reasoned justification for the Commonwealth Court's conclusion that *Medicare Advantage II* forecloses modification of the Consent Decrees' end date and instead simply declares that it does. On the second, UPMC tries to escape the clear, unambiguous language of the Consent Decrees—including the express modification provision to which it agreed—by offering an interpretation of the agreements that rewrites the modification provision in a way that makes it meaningless. UPMC tries to back up this flawed contract interpretation with

arguments that find no support in the law, cherry-picking language from cases without regard to context and ignoring what the cases actually addressed and held, and—in at least one notable instance—relying on cases entirely outside of the realm of contract law. UPMC's contract interpretation also ignores the Consent Decrees' core purpose—that of protecting the public interest—which is reflected in the Consent Decrees' plain language, including the language of the modification provision itself.

Indeed, on close examination, it becomes apparent that UPMC is trying to change the question and misdirect this Court. Instead of focusing on whether the Consent Decrees' text authorizes modification of the end date, UPMC's main themes are that (1) the OAG should lose on its request for modifications; and (2) the modifications will be inconvenient. While UPMC may well be heard on these issues at trial, they have no bearing on the narrow legal question at issue on this appeal. On that issue, UPMC cannot avoid the fundamental truth: it agreed to, and executed, a Consent Decree that contains a broad modification provision limited only by the need for a party seeking modification to demonstrate to the Commonwealth Court that it would be "in the public interest." This Court should reverse so that this matter can proceed to trial to determine whether modification of the Consent Decrees—including extension of their end date—is in the public interest.

ARGUMENT

I. UPMC's Brief Does Not Rehabilitate The Commonwealth Court's Ruling

As the briefs filed by the OAG and Highmark explain, the Commonwealth Court erred in two key respects. First, the court wrongly concluded that this Court's *Medicare Advantage II* decision forecloses modification of the Consent Decrees' end date. Highmark's Br., § II; OAG's Br., § I.B. In reaching that conclusion, the Commonwealth Court failed to recognize the narrow issue before this Court in *Medicare Advantage II* (which had nothing to do with whether the Consent Decrees' end date could be ***modified***) and ran afoul of settled rules governing case law interpretation.

Second, by relying solely on this Court's *Medicare Advantage II* decision, the Commonwealth Court overlooked basic principles of contract interpretation that require courts to construe contracts according to their plain and unambiguous language. Highmark's Br., § I; OAG's Br., § I.A. Here, that plain language expressly provides that the terms of the Consent Decrees may be modified without limitation, save the requirement that the party seeking modification demonstrate to the Commonwealth Court that the modifications are in the public interest.

A. UPMC Does Not Even Try To Defend The Commonwealth Court's Conclusion That *Medicare Advantage II* Controls The Question Here

The linchpin of the Commonwealth Court's ruling is that this Court's 2018 decision in *Medicare Advantage II* determined that the June 30, 2019 end date was an "unambiguous and material term of the Consent Decree" and thus it cannot be modified absent "fraud, accident or mistake." Op. at 34-35. Apparently lacking confidence in the Commonwealth Court's rationale, UPMC offers no defense of it beyond a single sentence that contains no elaboration. *See* UPMC's Br. at 19 ("Judge Simpson correctly applied that holding [in *Medicare Advantage II*] and dismissed OAG's claim to the extent it sought to alter that end-date."). This is not surprising.

As Highmark explained in its opening brief, the Commonwealth Court's reliance on this Court's *Medicare Advantage II* decision was incorrect. The Commonwealth Court erred because—as that court acknowledged elsewhere in its opinion—the *Medicare Advantage II* decision arose in the context of an enforcement action, where the OAG asked the lower court to interpret the plain meaning of the Consent Decrees' terms, not to modify them. *See* Highmark's Br. at 22-23. The issue on this appeal, by contrast, relates to a specific request for a modification that will benefit the public interest—as expressly allowed by the Consent Decrees' terms. *See* Highmark's Br., § II; see also OAG's Br., § I.

B. UPMC's Contract Interpretation Arguments Do Not Save The Commonwealth Court's Erroneous Ruling

Given that *Medicare Advantage II* does not control the question here, we are back to the Consent Decrees' express language and an application of the settled rules of contract interpretation to that language. In their opening briefs, Highmark and the OAG provided a straightforward contract-interpretation analysis that looked to the Consent Decrees' plain, unambiguous terms—here, the modification provision—which expressly states that any party may seek modification by making a showing to the Commonwealth Court that such modification would be in the public interest. *See* Highmark's Br. at 29-30; *see also* OAG's Br. at 21-23.

Moreover, as Highmark and the OAG explained, nothing in the Consent Decrees' plain language precludes the modification of a "material" term, nor does it preclude, specifically, the modification of the Consent Decrees' end date. *See* Highmark's Br. at 31-33; see also OAG's Br. at 20-21. Finally, as Highmark and the OAG further explained, the Commonwealth Court offered no legal basis—beyond pointing to language in *Medicare Advantage II* that had nothing to do the express modification provision—to support its erroneous conclusion that it could not modify the Consent Decrees' terms absent a showing of fraud, accident, or mistake. *See* Highmark's Br. at 33-38; *see also* OAG's Br. at 25-27. This was demonstrably wrong because the ***only limitation*** on the modification provision

agreed to by the parties was the requirement that modification be in the public interest.

UPMC's interpretation of the modification provision essentially re-writes the Consent Decrees by adding limitations to the agreed-upon modification provision that appear nowhere in the text. This approach not only is contrary to the Consent Decrees' plain language, but it also undermines their public policy purpose. And UPMC's arguments—filled with rhetoric and hyperbole—in support of its flawed contract interpretation fall apart upon examination both as a matter of law and logic. This Court, therefore, should reject UPMC's interpretation of the Consent Decrees, reverse the decision of the Commonwealth Court, and allow the OAG to demonstrate to the Commonwealth Court why modification of the Consent Decrees—including the current June 30, 2019 end date —is in the public interest.

1. UPMC's Efforts To Narrowly Limit Or Constrain The Modification Provision To Which It Agreed Fail

Faced with a modification provision to which it agreed, in a Consent Decree it signed, UPMC now tries to avoid that provision's plain and unambiguous language by obfuscating the true intent of the Consent Decrees and citing dictionary definitions and inapposite case law in an effort to strip the OAG of its ability to seek modification of the Consent Decrees' end date. This ignores the

larger point that the Consent Decrees' agreed-upon language does not limit what types of modifications could be made beyond requiring that they be in the public interest. *See* Consent Decrees, § IV(C)(10).

a. The Modification Provision Is Plain and Unambiguous

As an initial matter, UPMC offers no reason why the parties did not include other limitations on the modification provision. Despite its lengthy discussion of the OAG's negotiations with UPMC and Highmark, UPMC's Br. at 24-25, UPMC does not contend that it sought to limit the modification provision to only non-material terms, or to exclude modification of the end date from the scope of that provision. UPMC seems to suggest that the absence of negotiations on the modification provision somehow guts its effect or makes it an unimportant term, but things actually cut the other way. If limitations on the modification provision were as important to UPMC as it now claims, it is odd that UPMC never sought to negotiate over such terms. UPMC's failure to do so does not mean that the modification provision "does not count." Sophisticated parties are presumed to have understood what they agreed to, and to have memorialized their intent in the writing of a contract.[1] *See John B. Conomos, Inc. v. Sun Co., Inc. (R&M)*,

[1] UPMC tries to salvage its faulty interpretation of the modification provision by arguing that the Consent Decree must be construed against the OAG as the drafter.

831 A.2d 696 (Pa. Super. 2003). The parties did so here, and UPMC cannot second-guess that plain language nearly five years after it was written and agreed to.

UPMC's efforts to change the meaning of the modification provision are unpersuasive. UPMC first points to several dictionary definitions that it suggests would limit the use of the term "modify" to so-called "minor changes" to a contract or would preclude "deleting" terms of a contract. UPMC's Br. at 20-22. Of course, this argument is based upon a faulty presumption—namely, that the OAG's proposed modification somehow seeks to "delete" a term of the Consent Decrees. It does not.[2] Instead, the OAG seeks to extend the length of the Consent

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See UPMC's Br. at 26. This argument fails under Pennsylvania law. Courts generally do not apply the doctrine of *contra proferentem* where the agreement is between sophisticated parties or the agreement is the result of the joint efforts of negotiators. *See, e.g.*, *Kozura v. Tulpehocken Area Sch. Dist.*, 791 A.2d 1169, 1174 n.8 (Pa. 2002) (stating "[t]he principle that a contractual ambiguity is to be construed against the drafter does not apply where, as here, the contract is the result of the joint efforts of negotiators."); *Williston on Contracts* § 32:12 (stating "[a]pplication of the rule [of *contra proferentem*] may be further limited by the degree of sophistication of the contracting parties or the degree to which the contract was negotiated.").

[2] UPMC argues that "eliminating the end-date" is not a modification, but instead "fundamental repudiation of the basic deal." *See* UPMC's Br. at 32. In support, UPMC argues that it could not seek to "modify" the money it paid to educate consumers, and that UPMC could not "modify" the release provision to release all claims, because these were specifically negotiated, binding terms. *See id.* UPMC is wrong. If UPMC felt that modifying the release provision or the provision providing for payment for education to consumers were in the public

Decrees, asserting that doing so would serve the public interest. Such a change is entirely consistent with the plain language of the agreed-upon modification provision.

The Consent Decrees were intended to serve the public interest, *see* § I.B.3, *infra*, and the OAG has sought to modify the end date in order to maintain the Consent Decrees' effectiveness in serving the public interest until evidence demonstrates that they are no longer necessary. This will, in turn, improve the availability and affordability of healthcare for patients in Western Pennsylvania. UPMC's assertion that only "minor" changes are permitted by the modification provision would inhibit the parties' ability to effectuate the Consent Decrees' purpose by making changes that are in the public interest. *See City of Phila. v. Phila. Transp. Co.*, 26 A.2d 909, 912 (Pa. 1942) ("where a public interest is affected, an interpretation that favors the public is preferred").

Moreover, UPMC's assertion is inconsistent with the plain terms of the agreement. UPMC would have this Court write a new term into the modification provision requiring that the parties could only request "minor changes" to the Consent Decrees. Such a request runs afoul of basic principles of contract

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interest, UPMC could seek to modify the Consent Decrees pursuant to the terms of the modification provision.

interpretation. *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.").

Finally, UPMC cites no case law supporting its proposition that modifications to a contract pursuant to an agreed-to modification provision must be "minor." Indeed, its assertion is unsupported by the law related to modifications, which, by definition, are hardly "minor," because they create a new contractual obligation. *Melat v. Melat*, 602 A.2d 380, 385 (Pa. Super. 1992) (modification "acts as a substitute for the original contract, but only to the extent that it alters it").

The cases UPMC cites on this point are even farther afield. In an effort to cabin the definition of "modify" to suit its ends, UPMC offers two court decisions related to statutory construction—not contract law—that arose in the narrow context of a statutory grant of authority to subordinate agencies to "modify" certain statutory provisions by promulgating rules and regulations. *See* UPMC's Br. at 20-21. For example, in *Commonwealth v. DeFusco*, 549 A.2d 140 (Pa. Super. 1988), the Superior Court addressed an appeal related to a speeding ticket. In that case, the court considered whether a statutory grant of authority to the Delaware River Port Authority to "modif[y] by rules or regulations" the provisions of the Pennsylvania Motor Vehicle Code allowed the authority to pass a regulation

allowing its officers to use radar speed guns—even though the Motor Vehicle Code limited the use of such devices to the Pennsylvania State Police. *Id.* at 141-43. Against this statutory and regulatory backdrop, the court concluded that "[w]e do not believe, however, that the legislature intended to grant the power to the [authority] to promulgate rules and regulations that directly contravene matters expressed in the Motor Vehicle Code." *Id.* at 144.

Similarly, in *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218 (1994), the United States Supreme Court addressed the meaning of the statutory phrase "modify any requirement" in the Communications Act of 1934 as it related to a statutory authorization by the Federal Communications Commission to make rules governing long-distance telephone service rates. *Id.* at 224-25. The Court concluded that the rules adopted by the FCC went beyond the type of modifications permitted by the Act because the alleged modification was, in fact, a "fundamental change" that was inconsistent with the entire statutory scheme. *Id.* at 227-29.

Needless to say, neither *DeFusco* nor *MCI* dealt with interpreting contracts, modification of the end date of a contract, or even contract law more generally. To the contrary, both cases dealt with a very specific question of statutory interpretation in the context of a limited legislative grant of authority to a subordinate entity, and what rules or regulations that entity could then promulgate

without running afoul of the statutory authority. Here, by contrast, no limitations (beyond the public interest requirement) are placed upon the modification of the Consent Decrees. *See* Consent Decrees, § (IV)(C)(10). Nor is there any overarching statutory scheme that would impose additional limits on modification that are not explicitly spelled out in the Consent Decrees. Put simply, the parties agreed to what is written, and UPMC's appeal to statutory construction arguments imposes additional constraints that are not in the text. *Murphy v. Duquesne Univ. of the Holy Ghost*, 777 A.2d 418, 429-33 (Pa. 2001); *Steuart v. McChesney*, 444 A.2d 659, 662 (Pa. 1982).

b. The Modification Provision Is Entirely Consistent With The Remainder Of The Consent Decrees

UPMC also tries to support its efforts to minimize or outright negate the modification provision by declaring that it is inconsistent with the remainder of the Consent Decrees because it will "eliminate" the end date entirely. *See* UPMC's Br. at 20-26. As a threshold matter, these arguments presume that the Commonwealth Court order will continue the Consent Decrees in perpetuity (something it is not obligated to do absent proof that it would be in the public interest) and presume that any resulting Consent Decree would not be modifiable in the public interest going forward, including with respect to its term, which surely it would be. UPMC's presumption is unsupported and premature, however,

because no trial has taken place and the Commonwealth Court has not ruled on the OAG's modification request.[3]

And in any event, UPMC's efforts to undercut the modification provision lack support for multiple other reasons.

First, UPMC argues that the modification provision is inconsistent with the "Retention of Jurisdiction" provision, which gives the Commonwealth Court the ability to enter orders enforcing, modifying, or interpreting the Consent Decrees, "[u]nless this Consent Decree is terminated." Consent Decrees § IV(C)(11). Under UPMC's argument, the ongoing ability to modify the end date "even into perpetuity" would render the "[u]nless this Consent Decree is terminated" language "meaningless." UPMC's Br. at 22-23. UPMC is wrong—indeed, its assertion is contradicted by the express language of the Retention of Jurisdiction provision. What that provision did—as its plain language reflects—was provide the Commonwealth Court with jurisdiction after the entry of the Consent Decrees (which resolved the Petition the OAG filed in 2014). Nothing about the OAG's request for modification is inconsistent with the Retention of Jurisdiction provision

[3] And, in any event, the actual duration of any modification is, in part, in UPMC's (and Highmark's) hands. When the modified consent decree is no longer needed to serve the public interest, any party may petition for its modification or termination. (R.222a)

because it was filed before the June 30, 2019 end date—when the Commonwealth Court had jurisdiction to modify.

Second, UPMC argues that the Consent Decrees' specific terms (here, the end date) should control more than general terms (here, the modification provision). UPMC's Br. at 24-25. UPMC provides no legal basis for making such a distinction. It simply expects this Court to accept its *ipse dixit* that the modification provision is "general," yet it fails (not surprisingly) to explain how the modification provision could be any more specific. Indeed, the modification provision ***is specific*** to—and furthers—the Consent Decrees' purpose because it requires that any modification be in the public interest. Consent Decrees § IV(C)(10). It is hard to fathom how a modification provision (which, by its very nature, applies to the contract as a whole) could possibly be more specific.

And, as a general matter, the whole point of a modification provision is to authorize the parties to modify the contract or seek judicial approval of a modification if that is what the contract requires. Like virtually all contracts, the Consent Decrees are filled with specific terms. Endorsement of UPMC's position that a modification provision is a general term that cannot override specific terms would render modification provisions toothless—indeed, they will have no effect at all. That is not the law—nor should it be.

The only case UPMC cites in support of this argument, *Musko v. Musko*, 697 A.2d 255 (Pa. 1997), was cited by Highmark in its opening brief because it explicitly rejected a "specific vs. general" argument on the ground that "[t]here [was] no apparent conflict between specific and general terms which would justify" the use of the rule put forward by UPMC. Highmark's Br. at 37-38; *see also* OAG's Br. at 21. As discussed above and in Highmark's opening brief, there is no conflict between the provisions of the Consent Decrees and the necessarily general modification provision, and thus no need to give one term any priority over another. UPMC simply cites *Musko* and does not even try to explain why Highmark's discussion of that case is wrong or why it supports UPMC instead. Moreover, UPMC still has not explained why its "specific vs. general" argument does not lead to an absurdity—namely, if modification provisions were deemed to be "general" terms that were superseded by any and all "specific" terms, they would have no effect and would be rendered nullities.

Third, UPMC tries to characterize the modification provision as "boilerplate," and argues that because it "specifically bargained for" the June 30, 2019 end date, that date somehow supersedes the modification provision. *See* UPMC's Br. at 24-25, 29. Not so. The fact that UPMC asked that an end date be included in the Consent Decrees does not nullify the modification provision to which UPMC also agreed. In fact, evidence of the negotiations surrounding the

Consent Decrees is largely irrelevant given that the Consent Decrees signed by the parties and entered by the Commonwealth Court are what governs here. *See In re Kostelnik's Estate*, 369 A.2d 1211, 1213 (Pa. 1977) ("If the writing is unambiguous, its terms, like that of any other contract, may not be contradicted by parol evidence, in the absence of fraud, accident or mistake.").

Put simply, the modification provision is not boilerplate, it is what UPMC agreed to. It signed an agreement containing a broad modification provision with plain and unequivocal language. The fact that it now posits that it did not negotiate over a term it mischaracterizes as a "standard term" does not negate the OAG's right to seek modification in accord with the terms of the Consent Decrees.

2. UPMC's Reliance On Inapposite Case Law And Its Mischaracterization Of How That Law Applies To The Plain Language Of The Consent Decrees Is Unpersuasive

UPMC's position that an end date in a consent decree can never be modified finds no support in the cases it cites. For example, UPMC says *Commonwealth v. U.S. Steel Corp.*, 325 A.2d 324 (Pa. Commw. 1974) stands for the proposition that a consent decree cannot be modified except where there has been a finding of impossibility or mistake. UPMC is wrong. In that case, the Commonwealth Court ruled only that it was inappropriate for the trial court—in the midst of an enforcement action—to enter a modification of the consent decrees, *sua sponte*,

when no party had requested one. *Id.* at 330. In fact, the Commonwealth Court suggested that if one of the parties ***had*** made a proper request, a modification of the consent decree might have been appropriate. *Id.* at 329-330 (observing that the "proper course would be [for one of the parties] to seek a modification" and noting that the court was required to enforce the consent decree "until such time as that order is properly modified.") Thus, *U.S. Steel* does not support UPMC's argument and has no bearing on this case because there is no question that the OAG has petitioned the Court to modify—not to enforce—the terms of the Consent Decrees.

UPMC's reliance on *Holland v. New Jersey Dep't of Corr.*, 246 F.3d 267 (3d Cir. 2001), is equally misplaced. There, the consent decree allowed the parties to seek modification only of "the ***procedures enumerated***" in the decree. *Id.* at 279 (emphasis added). Plaintiffs moved to modify the termination date, and in response, the defendant emphasized that the modification provision conferred "no power to modify [the consent decree's] non-procedural aspects." *Id.* at 280. Finding that argument persuasive, the Third Circuit agreed that changing the termination date was not a "mere procedural modification covered by" the plain text of the consent decree's modification provision. *Id.* at 281.

Holland is of no moment here because the Consent Decrees' modification provision is not limited, by its express terms or otherwise, to "procedural" or non-

material changes. Rather, under that provision, any term of the Consent Decrees may be modified, so long as the modification is in the public interest. Highmark simply asks that the Commonwealth Court be afforded the opportunity to decide that issue—*i.e.*, whether the proposed modifications are in the public interest—on the merits.

3. The Purpose And Intent Of The Consent Decrees Was To Benefit The Public

In another effort to convince this Court that the Consent Decrees' end date is not subject to modification, UPMC argues that the intent of the parties and the purpose of the Consent Decrees was "a five-year wind-down of in-network access to UPMC ending on June 30, 2019." *See* UPMC's Br. at 27. While the Consent Decrees contemplated a wind down of the relationship between Highmark and UPMC, the overarching purpose was to protect consumers in Western Pennsylvania who faced—and continue to face—confusion and uncertainty as a result of the UPMC's refusal to continue to enter into in-network contracts with Highmark. The modification provision serves the Consent Decrees' underlying purpose because it authorizes modifications that are in the public interest.

There can be no doubt that the Consent Decrees are agreements that have a public interest purpose and are not simply agreements resolving a commercial dispute. The fact that multiple government actors—including the Governor and

the OAG—were involved in the negotiations and the fact that the Commonwealth and charitable institutions (Highmark and UPMC) are the parties to the Consent Decrees demonstrate this. Put another way, this is something far different from a run-of-the-mill commercial dispute (as UPMC tries to characterize it). Nor are the parties to the dispute just market participants (as UPMC would have it). To the contrary, UPMC and Highmark are charitable organizations that have benefited from the largesse of the communities they serve. And thousands of individuals count on UPMC and Highmark for one of the most consequential aspects of their lives—their health.

The OAG has concluded, as set forth in its Petition, that the termination of the Consent Decrees on June 30, 2019 is not in the public interest, and based on that conclusion has asked the Commonwealth Court to modify the Consent Decrees to ensure that UPMC and Highmark—charitable institutions whose mission is to provide health care for the benefit of the community—continue to act in the public interest and for the benefit of the public in the provision of health care to individuals in Western Pennsylvania. (R.71a-72a)[4]

[4] UPMC's argument that the Commonwealth Court gave adequate effect to the modification provision by "allow[ing] seventeen counts for modification to go forward" is disingenuous at best. *See* UPMC's Br. at 23. Without extension of the end date, these modifications are a dead letter in a month and a half—hardly enough time to implement such modifications, much less effectuate the public interest.

In the face of this, UPMC repeatedly declares that the Consent Decrees had only a "transitional" purpose and were intended to facilitate a complete "transition" (*i.e.*, end) of the UPMC-Highmark relationship. This ignores the broader purposes of the Consent Decrees. While the Consent Decrees included a June 30, 2019 end date, the OAG has concluded that it is not in the public interest for the vast majority of those who have coverage with certain insurers to be deprived of in-network coverage at UPMC or Highmark facilities and their providers because that will leave large swaths of the public without access to affordable health care of their choice.[5]

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[5] UPMC recently announced a requirement that patients, including seniors, will need to pay in full and up front for non-emergency care provided by UPMC on an out-of-network basis. (R.88a) UPMC characterizes the OAG's allegations about this requirement as "hyperbole" and flatly responds that UPMC's prepayment requirement is permissible because "UPMC does not have to serve all non-emergent, out-of-network patients." UPMC's Br. at 47 (arguing that there is no general common law duty for hospitals to accept and treat all individuals in nonemergency situations).

UPMC's current position is squarely at odds with the prior and repeated representations UPMC has made to Western Pennsylvania seniors. UPMC has made recurring promises to the public that seniors would not be affected by UPMC's decision not to contract with Highmark for commercial business. *See, e.g.*, Commw. Ct. Dkt. No. 140 (OAG's Memorandum In Opposition to UPMC's Preliminary Objections, Exhibit D (June 26, 2011 Pittsburgh Post-Gazette Op-Ed from UPMC's Chief Legal Officer emphasizing that "[a]ny disruption will also be confined to the 'commercial' market; Medicare and Medicaid plans will not be affected")); *See id.* (October 27, 2014 letter from

UPMC's arguments in support of its position that the Consent Decrees were only "transitional" and the express modification provision cannot be applied to the Consent Decrees' end date are without merit.

First, UPMC says this Court and the Commonwealth Court have interpreted the Consent Decrees "in light of the limited and transitional purpose" in prior litigation concerning enforcement of the Consent Decrees. *See* UPMC's Br. at 31-32. Nothing in the Commonwealth Court's or this Court's decisions supports UPMC's bald contention. UPMC points only to snippets of prior opinions taken out of context.

For example, UPMC argues that the Commonwealth Court's 2014 decision that Highmark did not have to provide in-network access to UPMC for all of its products demonstrates that the Commonwealth Court found that the Consent Decree's sole purpose was to assist with the winding down of the UPMC-

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UPMC's Chief Medical Officer Steven Shapiro making the same promise directly to UPMC's senior patients).

UPMC's willingness to renege on its prior commitments to the public only further underscores why the OAG's proposed modifications are necessary. Given UPMC's recent about-face on its promise to avoid disruption for seniors, UPMC's similar promise that "[t]here's never been any indication, any intent on our part, to ever deny access [to Children's Hospital] to any one, any insurers," also rings hollow. *See* Paul J. Gough, *UPMC Says it Won't Deny Access to Children's Hospital*, Pittsburgh Bus. Times (May 2, 2019) https://www.bizjournals.com/pittsburgh/news/2019/05/02/upmc-says-it-wont-deny-access-to-childrens.html.

Highmark relationship. *See* UPMC's Br. at 10-11. This is inaccurate. Although it is true that the Commonwealth Court acknowledged that the Consent Decrees were executed to assist Highmark subscribers "during transitional periods," the court also acknowledged that "[t]he ***purpose of the consent decrees*** was to alleviate some of the harm UPMC and Highmark's ongoing acrimonious 'dispute' involving the delivery and payment of healthcare caused the citizens of Western Pennsylvania." *See* Commw. Ct. Dkt. No. 70 (Opinion dated June 29, 2015 at 5-6) (emphasis added).

And, contrary to what UPMC says, both this Court and the Commonwealth Court have recognized time and again that the purpose of the Consent Decrees was to serve and protect the public. Indeed, in *Medicare Advantage I*, this Court recognized that the public was a third-party beneficiary to the Consent Decrees. *See Commonwealth v. UPMC*, 129 A.3d 441, 448 (Pa. 2015) ("*Medicare Advantage I*"). In that same decision, this Court recognized that the public interest purpose underlying the Consent Decrees was "abundantly clear," acknowledging the Consent Decrees were intended 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.

Second, UPMC argues that "[t]he parties' intent for the Consent Decree to have a five-year transition is not in dispute." *See* UPMC's Br. at 29. While Highmark does not dispute that the Consent Decrees have a five-year term, that is not the full story. They also contain the modification provision. As noted in Highmark's opening brief, there is nothing in the modification provision which precludes that provision from applying to the end date—so long as such a modification will benefit the public interest. Highmark's Br., § I.

Third, UPMC quotes the OAG's briefing in other facets of this case, contending that these statements show that the Consent Decrees were intended to wind down the relationship between UPMC and Highmark. *See* UPMC's Br. at 29. This exercise in selective quotation cannot carry the day. UPMC ignores other statements ***on the very same page*** it cites that remove all doubt as to the parties' intent. The OAG's brief stated that **"*[t]he explicit purpose of the UPMC-Highmark Consent Decrees was to protect the public.***" (*See* R.996a (citing

Section I.A of the Consent Decree that it "shall be interpreted consistently with '…the 2012 Mediated Agreement and to protect consumers and UPMC's charitable mission.'") (emphasis added)) Elsewhere on that same page, the OAG urged the Commonwealth Court to "adopt the meaning that serves the public interest ***since the Consent Decree was intended to protect the public***." R.996a (emphasis added) (citing *City of Phila.*, 26 A.2d at 912 ("where a public interest is affected, an interpretation that favors the public is preferred")).

And elsewhere in that same brief, the OAG explicitly stated that "the ***Commonwealth's goal of protecting consumers***[] led to the Consent Decrees…", and that the Consent Decrees were negotiated "to eliminate the harm that [Highmark and UPMC] could ***cause the public*** through their acrimonious disputes, namely in higher health care costs and in limiting access to health care…" (R.980a, 991a-992a) (emphasis added).

Fourth, UPMC repeatedly—no less than six times—points to the provision in the Consent Decrees that state that they are "not a contract extension and shall not be characterized as such." *See* UPMC's Br. at 2, 8, 9, 24, 27, 30. UPMC's reliance on this provision is curious. It simply made clear that the Consent Decrees did not require UPMC and Highmark to extend the terms of the provider agreements that existed in 2014. Thus, that provision is both unremarkable and irrelevant to the issue before this Court. Neither the OAG nor Highmark has ever

proposed that the Consent Decrees required an extension of those existing contracts. Instead, the only point Highmark has ever made in prior appeals was that another provision of the Consent Decrees that required UPMC to provide in-network access required some sort of contract, because that was how "in-network" is defined. *Medicare Advantage I,* 129 A.3d at 469-70.

None of this has anything at all to do with the question of whether the Consent Decrees' end date can be modified based on a request made pursuant to the modification provision. Nor does it support UPMC's contention that the Consent Decrees are transitional only and as such the modification provision that expressly serves the Consent Decrees' overarching public interest purpose can be ignored.

II. UPMC's Alternative Arguments Fail

Apparently lacking confidence in its "end-date-may-not-be-modified" argument, UPMC offers two additional arguments. *See* UPMC's Br. § II. UPMC presumably believes it can expand the scope of the issues before this Court on this interlocutory appeal by permission to include alternative grounds for affirmance. This Court need not wrestle with the scope of issues that are part of this appeal because these arguments provide no ground for affirmance.

The separation of powers argument fails on the merits, as the OAG's reply brief will explain. The preemption argument fails too. UPMC argues that the

modifications proposed by OAG are preempted by the Medicare Act. *See* UPMC's Brief at 42-43. Specifically, UPMC argues that an extension of the Consent Decrees would result in forced Medicare contracts. *See id.* Not true. The proposed modifications do not "force" UPMC to enter into involuntary contracts. Instead, they will require UPMC to negotiate with health plans and health care providers in good faith. (R.108a-112a)[6] If those negotiations prove unsuccessful, then the Pennsylvania-registered health plans and providers may invoke binding arbitration in accordance with the provisions of the modified Consent Decree. (*See* R.109a; 211a-218a)

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

[6] In a footnote, UPMC also makes conclusory reference to a *res judicata* argument it raised in the Commonwealth Court, which the court rejected (Op. at 30). *Commonwealth v. Perez*, 93 A.3d 829, 838 (Pa. 2014) ("[T]o the extent appellant's claims fail to contain developed argument or citation to supporting authorities and the record, they are waived ...."). As Highmark argued, the OAG's petition is not barred because the Consent Decree is not a final judgment, its petition to modify is not a new action, and even if it was, the Attorney General has identified conduct on the part of UPMC since this Court last considered issues concerning the Consent Decrees that warrants modification now. (R.85a-86a; 89a-90a; 100a)

Highmark's and UPMC's obligations beyond June 30, 2019—are in the public interest.

Dated: May 6, 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: May 6, 2019

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

This Reply Brief complies with the length-of-brief limitation of Rule 2135 of the Pennsylvania Rules of Appellate Procedure because it contains 6,154 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 14 point font.

Dated: May 6, 2019

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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: May 7, 2019

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CERTIFICATE OF SERVICE

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