COZEN O'CONNOR

February 21, 2019

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James A. Donahue, III
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Public Protection Division
14th Fl. Strawberry Square
Harrisburg, PA 17120

Re: Commonwealth of Pennsylvania by Josh Shapiro, Attorney General, et al. v. UPMC, A Nonprofit Corp., et al.

Dear Jim:

Pursuant to Rules 1023.1-1023.4 of the Pennsylvania Rules of Civil Procedure, we are providing you with notice of matters alleged in your Petition to Modify Consent Decrees that have no evidentiary support whatsoever, are not warranted by existing law or by a non-frivolous argument for the extension, modification or reversal of existing law, or appear to be included for an improper purpose. More specifically,

1. The OAG previously admitted that it cannot force UPMC to contract against its will. The basic premise of the OAG's Petition and the principal relief sought on each count is to force UPMC hospitals to enter into contracts with Highmark (and every other willing payor) and to force the UPMC Health Plan to enter into contracts with Allegheny Health Network (or any other willing provider) at rates and on terms determined by outside arbitrators, or to impose this regime by requiring UPMC to provide healthcare services to everyone, regardless of whether there is a provider contract, at in-network rates. But, the OAG has specifically admitted that it has no legal authority to force UPMC to contract with Highmark—that was the basis for the negotiating mutually-agreed reciprocal consent decrees with UPMC and Highmark (collectively the "Consent Decree") in the first instance. You moreover specifically testified to this before the Democratic Policy Committee of the Pennsylvania House of Representatives on October 10, 2014. In that testimony, you defended the Commonwealth's strategy in securing the Consent Decrees with UPMC and Highmark by explaining that the Commonwealth could not force UPMC to contract with Highmark or anyone else. You testified that the OAG evaluated whether it could "force UPMC and Highmark to contract with each other," and "concluded that we could not" because "there is no statutory basis to make UPMC and Highmark contract with each other." We called this testimony to your attention on January 31 and were therefore surprised to see the contrary assertions in your Petition when it was filed a week later. Any assertion that your office has the authority to compel contracts between UPMC and Highmark should therefore be withdrawn.

2. The core allegations in the Petition were released in the Consent Decree. As alleged in the Petition, the "Patients First Initiative" was formed by the Commonwealth "to resolve the disrupted health care and In-Network access issues presented" in 2014 by the impending end of UPMC's provider contracts with Highmark. (¶ 18.) The end result of that initiative was the Consent Decree, which comprehensively addressed the wind-down and eventual termination of the UPMC/Highmark relationship, and "release[d] any and all claims the OAG, PID or DOH brought or could have brought against UPMC for violations of any laws or regulations within their respective jurisdictions, including claims under laws governing non-profit corporations and charitable trusts, consumer protection laws, insurance laws and health laws relating to the facts alleged in the Petition for Review or encompassed within this Consent Decree for the period of July 1, 2012 to the date of filing." (Consent Decree §IV.C.5.) The OAG's Petition nonetheless rests almost entirely on a recitation of clearly released allegations, including:

    a. The dispute regarding Highmark's Community Blue plan, which occurred during 2013 and which was expressly resolved by the Consent Decree, (*see* Petition ¶¶ 16-18, 96, 103, 107, 118);

    b. Allegedly misleading marketing campaigns regarding access to UPMC physicians for Highmark subscribers, which occurred in the course of the Community Blue dispute. (*See id.* ¶ 17.) The Consent Decree expressly resolved and addressed this by requiring UPMC and Highmark to jointly pay into a Consumer Education Fund for the Commonwealth to inform consumers about the end of the UPMC/Highmark relationship, (Consent Decree § IV.B);

    c. The compensation of UPMC's executives and location of its headquarters, both of which were in place long before the Consent Decree went into effect on July 1, 2014, (*see* Petition ¶ 60);

    d. Various, allegedly revenue-increasing practices — including transferring procedures to specialty providers, charging provider-based fees, and charging Out-of-Network patients for the unreimbursed balance of the services they receive — all of which predated, and were specifically addressed by, the Consent Decree, (*see id.* ¶ 31; Consent Decree §§ IV.A.8 (regulating transfer of patients), IV.A.3 & IV.A.4 (regulating balance billing), & IV.C.1 (setting a schedule of billing rates in the absence of a negotiated rate)); and

    e. Most importantly, UPMC's refusal to contract with Highmark to provide In-Network access to Highmark enrollees. (*See* Petition ¶¶ 27-29, 106, 107, 117, 119.c.) As discussed above, the Consent Decree and the Mediated Agreement that predated it were occasioned by UPMC's decision to terminate its relationship with Highmark. (*See id.* ¶¶ 12-18.) The Consent Decree was put in place to implement the separation over time — UPMC's efforts to initiate that separation *necessarily preceded* and were covered in the Consent Decree.

Not only did your Petition not even mention the Release contained in the Consent Decrees it was seeking to "modify," it proposes a modified decree that deletes the

Release entirely. Clearly the failure of your Petition to account for the Release and the deletion of that Release from the proposed "modification" cannot be squared with good faith and should be rectified by withdrawal of those claims in the Petition that have been released.

3. The allegations regarding UPMC Susquehanna (¶¶ 38-41 & 104) have no evidentiary basis. The Petition alleges a sequence of events involving UPMC Susquehanna, PMF Industries (also referred to as "a Williamsport area manufacturing business"), and PMF's unnamed "insurer." (Petition ¶ 38.) It proceeds to allege that PMF "purchase[s] health insurance" for its employees from this "insurer," which in turn tries to contract with providers for "Reference Based Pricing." The refusal of UPMC Susquehanna to enter into these contracts with PMF or its insurer is then cited as a supposed violation of the Nonprofit Corporations Law ("NCL") and Unfair Trade Practices and Consumer Protection Law ("UTPCPL"). In fact, as you must know, PMF's "insurer," INDECS, is not an insurer at all, but rather a self-styled "third-party administrator" that does not engage in reference based pricing. It instead arbitrarily decides on an ad hoc basis how much to pay for a service already rendered to a patient without any reference to the hospital's charge, Medicare/Medicaid rates, or any other published rate schedule. It is moreover operated by a convicted felon and has been sanctioned for misconduct in both New Jersey and New York. The allegations regarding UPMC Susquehanna are false, have no evidentiary basis, and should be withdrawn.

4. The allegations regarding out-of-area BCBS companies (¶¶ 42-43) are false. The Petition alleges that UPMC "deci[ded] to not participate" in the networks of out-of-area Blue Cross Blue Shield ("BCBS") companies. That, as you must know, is false. In fact, UPMC has repeatedly offered to enter into full in-network provider contracts with these out-of-area BCBS companies, but they have refused to contract with UPMC because of the Blue Cross Blue Shield Association's ("BCBSA") illegal and anticompetitive market allocation rules for its affiliated companies, which are enforced in Western Pennsylvania by Highmark, precluding out-of-area BCBS companies from contracting with UPMC. UPMC is currently seeking an injunction in the U.S. District Court for the Northern District of Alabama against enforcement of those rules, which have been declared *per se* violations of the Sherman Act. UPMC demands that the OAG withdraw the false allegations in paragraphs 42-43, and would welcome the OAG to join in the effort to undo the BCBSA illegal market allocation compact.

5. The OAG contends that the expansion of UPMC (¶¶ 64-70) will allegedly harm more patients, but the OAG reviewed and did not object to these transactions. The Petition alleges that "[t]he effects on the public of UPMC's conduct were previously limited to the greater Pittsburgh area[, but] with its expansion across the Commonwealth, even more patients will experience these negative impacts," (Petition at 35), and that "its potential to deny care or increase costs will impact thousands more Pennsylvanians," (¶ 70). As the OAG knows, however, the refusal of certain UPMC hospitals to contract with Highmark is and always has been limited to Allegheny and Erie Counties, where Highmark owns and operates a competing hospital system, and thus does not extend to hospitals outside of those areas. Moreover, the OAG reviewed each of these transactions (up to and including the transaction with Somerset Hospital, which closed on February 1, 2019)

for compliance with both charitable trust law and antitrust law and, with the exception of Jameson Health System, made no objection. In the case of UPMC Jameson, moreover, the OAG litigated its objections and lost. The allegations concerning potential harm caused by UPMC's expansion are therefore unfounded and should be withdrawn.

To bring your filing into compliance with Rules 1023.1-1023.4, please withdraw or correct the above-noted errors within twenty-eight days of the date of this letter.

Sincerely,

COZEN O'CONNOR

By: Stephen A. Cozen

SAC:jdb

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, By JOSHUA D. SHAPIRO, Attorney General, et al.; Petitioners, v. UPMC, A Nonprofit Corp., et al.; Respondents.	: : : : : : : : : : :	No. 334 M.D. 2014

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

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Dated: February 21, 2019

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The Attorney General's Petition to Modify Consent Decrees (the "Petition") is actually an attempt to undo and reverse those decrees. It asks this Court to force Respondent UPMC to remove a majority of its Board of Directors, to return its contractual obligations with Highmark Inc. to what they were before the Consent Decrees were entered, to maintain those obligations *forever*, and, going further, to force UPMC to contract with *any* insurance carrier or third-party administrator without limitation, also forever.

This "modification" would be unprecedented and unwarranted. More than just trampling over several legal protections, as detailed below, Attorney General Shapiro's Petition guts the very Consent Decree that he seeks to "modify." Indeed, less than one year ago, the Pennsylvania Supreme Court held in this case regarding this Consent Decree that a court cannot "alter[] an unambiguous and material term of the Consent Decree — the June 30, 2019 end date" (*Commonwealth ex rel. Shapiro v. UPMC*, 188 A.3d 1122, 1131 (Pa. 2018) ("*Shapiro*")) — yet

General Shapiro asks for that same relief again. The Petition exceeds General Shapiro's authority, and it should be dismissed in its entirety.

BACKGROUND

The Consent Decree[1] was always rooted in the Commonwealth's effort to provide an orderly termination of contractual relationships between UPMC and Highmark. The background to this termination, however, began long before 2014, and the involvement of various Commonwealth agencies provides important context for General Shapiro's Petition.

Mediated Agreement and Highmark-WPAHS Litigation

In 2011, UPMC prepared to terminate its contractual relationship with Highmark after the latter announced its plan to acquire UPMC's top competitor. *See* Petition for Review, *Commonwealth ex rel. Kane v. UPMC*, No. 334 M.D. 2014 (Pa. Commw. Ct. June 27, 2014), attached hereto as Exhibit A, ¶ 21. The acquisition of this competitor, the struggling West Penn Allegheny Health System ("WPAHS"), set the stage for a new era in which Highmark would become an integrated delivery and finance system ("IDFS"), like UPMC. *Id.* ¶ 22. As integrated systems in competition with each other, universal contracts no longer made sense for both parties.

The parties' split grew contentious, however, attracting the involvement of Governor Tom Corbett. Concerned with the impact of an immediate termination on Pennsylvania citizens, Governor Corbett's administration negotiated a so-called "Mediated Agreement" between UPMC and Highmark in May 2012. *Id*. ¶ 24; *see also* Highmark – UPMC Agreement (the "Mediated Agreement"), attached hereto as Exhibit B. Among other things, that Mediated

[1] The Commonwealth — represented by the Office of Attorney General, the Insurance Department, and the Department of Health — entered into separate, nearly identical Consent Decrees with both Highmark and UPMC on or about June 27, 2014 (collectively referred to herein as the "Consent Decree").

Agreement provided that UPMC would continue to extend full in-network access to Highmark Medicare Advantage and commercial health plan subscribers through December 31, 2014. The parties acknowledged that "[t]he contractual extension until the end of 2014 will provide for sufficient and definite time for patients to make appropriate arrangements for their care and eliminate the need for any possible government intervention under Act 94." Exhibit B at 1; s*ee also* Exhibit A ¶ 25.

Around this time, the Attorney General publicly endorsed the importance of competition between the two integrated systems, UPMC and Highmark. Highmark's decision to extend its full in-network relationship with UPMC through the end of 2014 — and the attendant delay in Highmark shifting admissions away from UPMC and into WPAHS — prompted WPAHS to announce a termination of its Highmark affiliation. In late 2012, Highmark sued WPAHS to enjoin WPAHS's termination, and the Attorney General intervened in support of Highmark's request for relief. *See* Commonwealth's Findings of Fact and Memorandum of Law, *Highmark, Inc. v. W. Penn Allegheny Health Sys., Inc.*, Case No. GD-12-18361 (Ct. Common Pleas, Allegheny County Nov. 7, 2012), attached hereto as Exhibit C. In that litigation, the Attorney General emphasized that, if the affiliation failed, "[t]he competitive benefits to the community of a second integrated health care financing and delivery system [in addition to UPMC] will be lost indefinitely." *Id.* at 11.

Highmark Acquisition of WPAHS

To secure the Pennsylvania Insurance Department's ("PID") approval for the WPAHS acquisition, Highmark made several important representations. Most specifically, Highmark conceded that WPAHS — which was saddled with ruinous financial losses[2] — could only be

[2] *See* Exhibit C at ¶ 5 (noting that WPAHS stated that "its deteriorating financial position" was so dire that, when the Highmark acquisition was stalled, it needed to "move as quickly as possible to secure

salvaged if Highmark did not have global contracts with UPMC. *See* Pennsylvania Insurance Department's UPE Order in the Highmark/West Penn Allegheny Health System Matter, *In re Application of UPE*, No. ID-RC-13-06 (Pa. Ins. Dept. April 29, 2013) ("Approving Order"), attached hereto as Exhibit D, at 15 (recognizing that Highmark's financial projections are "premised on a non-continuation of the UPMC Contract and that continuation of such contract may, based on [Highmark's] projections, delay WPAHS' financial recovery"); *see also* PID Findings of Fact and Conclusion of Law, *In re Application of UPE*, No. ID-RC-13-06 (Pa. Ins. Dept. April 29, 2013), attached hereto as Exhibit E, at ¶ 146(e) (noting that "the assumed termination of Highmark's provider contract with UPMC" is a "critical assumption[] on which Highmark's projections rely"). As explained in the Commonwealth's original Petition for Review:

> Highmark's filing and supporting materials submitted to the PID contemplated a 'base case' scenario where Highmark would not have a continued contractual relationship with UPMC. **The PID's approval was largely premised on acceptance of Highmark's base case scenario.**

Exhibit A ¶ 30 (emphasis added).

This representation about the viability of WPAHS was important. Highmark's financial projections for WPAHS would dramatically change if Highmark remained in contract with UPMC — thereby placing Highmark's reserves at risk. *See* Allegheny Health Network Strategic and Financial Plan 2017-2020, No. ID-RC-13-06, filed on March 17, 2017 by Highmark Health, available at https://www.insurance.pa.gov/Companies/IndustryActivity/CorporateTransactionsofPublicInterest/HighmarkWestPennAlleghenyHealthSystem/Documents/

another strategic partner in order to preserve its charitable health care mission"); ¶ 10 (stating that the deterioration in WPAHS's financial condition "negative[ly] affects the quality and future viability of its health care services in the community").

HH_AHN%20Public%20Strategic%20and%20Financial%20Plan%202017-2020.pdf, attached hereto as Exhibit F.[3] For that reason, the PID's Approving Order required Highmark to provide the Insurance Department "updated information, based on reasonable assumptions and credible projections, on the impact of the terms of *any New UPMC Contract* on the financial performance of [WPAHS] as well as an independent analysis of an expert on the impact of the New Contract on both the insurance and provider markets in the region including but not limited to any effects on competition." Exhibit D ¶ 22A (emphasis added).

Proceedings Leading to the Consent Decree

The Consent Decrees arose roughly one year after the PID conditionally approved Highmark's acquisition of WPAHS. As a predicate for negotiating the Consent Decrees, three Commonwealth agencies — the PID, the Department of Health ("DOH"), and the Attorney General — asserted violations of the Mediated Agreement by both Highmark and UPMC in a June 2014 "Petition for Review." In its Petition for Review, the Commonwealth repeatedly acknowledged that the Mediated Agreement was intended only to be a temporary measure that expired on December 31, 2014. *See, e.g.*, Exhibit A ¶ 25; *see also, e.g.*, *id.* ¶ 47 ("Under the Mediated Agreement, Highmark's members were intended to have access to all of UPMC's providers through at least December 31, 2014 to smooth the public's transition in the changing relationship between UPMC and Highmark[.]").[4] Nonetheless, in exchange for settlement of the

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[3] Under Pa. R.E. 201, courts may take judicial notice of facts that can be "accurately and readily determined from sources whose accuracy cannot reasonably be questioned." *See also, e.g., Drake Mfg. Co., Inc. v. Polyflow, Inc.*, 109 A.3d 250, 264 (Pa. Super. Ct. 2015) ("[T]he court can take judicial notice of public documents.").

[4] *See also* Exhibit A ¶ 52 (alleging that Highmark and UPMC's failure to contract has "caused confusion and uncertainty for patients and ha[s] denied the public the benefit of the *smooth transition the Mediated Agreement intended*.") (emphasis added).

Petition for Review — and a release of all of its claims — the Commonwealth agencies obtained a further delay in the separation of Highmark and UPMC.

The Commonwealth made multiple allegations against UPMC in the Petition for Review, many of which reappear in General Shapiro's Petition. Among other things, the Commonwealth contended that:

- UPMC's alleged failure to timely execute definitive agreements with Highmark for services that would remain in-network after December 31, 2014 had "caused confusion and uncertainty for patients and have denied the public the benefit of the smooth transition the Mediated Agreement intended" and otherwise violated Act 68. *Id.* ¶¶ 52, 77;

- UPMC's alleged decision to "forego [*sic*] all future contractual relationships with Highmark after December 31, 2014 violate[d] . . . its representations set forth in its mission statement [and . . . .] its representations set forth in its 'Patients' Rights and Responsibilities that '[a] patient has the right to medical and nursing services without discrimination based upon . . . [the] source of payment[.]'" *Id.* ¶ 55; and

- UPMC allegedly violated the Consumer Protection Law by engaging in "unfair methods of competition and unfair or deceptive acts or practices," "willfully engag[ing] in unfair and unconscionable acts or practices . . . by pursuing a strategy of subjecting consumers to unfair and substantially higher 'out-of-network' charges under circumstances beyond the consumers' control. *Id.* at 16-17.

Highmark and UPMC agreed to resolve the Petition for Review, but only on terms — like those in the 2012 Mediated Agreement and as acknowledged in the 2014 Petition for Review — that were again subject to a fixed expiration date (June 30, 2019) and a release.

The Consent Decree

On June 27, 2014, UPMC and the three Commonwealth parties (the Attorney General, the PID, and DOH) signed the Consent Decree as a settlement of the Petition for Review, "the allegations of which [were] incorporated" and released in the Consent Decree. Exhibit B to Petition, (the "Consent Decree") at 1. The parties agreed that the Consent Decree should be "interpreted consistently with" the 2013 Approving Order and the Mediated Agreement, and that

"[t]he Consent Decree is not a contract extension and shall not be characterized as such." *Id*. at 2. Indeed, under the Consent Decree, UPMC starting in 2015 largely would be out-of-network for Highmark subscribers in the Greater Pittsburgh Area. There, UPMC agreed to provide only transitional in-network services such as continuity of care, oncology, emergency services, and otherwise unique care to Highmark subscribers for another five years. *Id.* § IV.A.

In exchange for UPMC's agreement to provide these services, the three Commonwealth parties agreed to "release any and all claims [they] brought or could have brought against UPMC for violations of any laws or regulations within their respective jurisdictions including claims under laws governing non-profit corporations and charitable trusts, consumer protection laws, insurance laws and health laws relating to the facts alleged in the Petition for Review or encompassed with this Consent Decree for the period of July 1, 2012 to the date of filing." *Id.* at 14. The parties also agreed that, even though UPMC would not be providing full in-network care to all Highmark subscribers during the ensuing five years, "the terms and agreements encompassed within [the] Consent Decree do not conflict with UPMC's obligations under the laws governing non-profit corporations and charitable trusts, consumer protection laws, antitrust laws, insurance laws and health laws." *Id*.

The Attorney General's Office defended the Consent Decree in public testimony. A few months after the Consent Decree was executed, Executive Deputy Attorney General James A. Donahue, III, who negotiated and signed the Consent Decree, testified before the Democratic Policy Committee of the Pennsylvania House of Representatives. In that testimony, Mr. Donahue defended the Commonwealth's strategy in securing the Consent Decrees with UPMC and Highmark by explaining that the Commonwealth could not force UPMC to contract with Highmark or anyone else: "UPMC's announcement in 2011 that it would no longer contract with

Highmark for a full range of services raised tremendous concern in Western Pennsylvania. The simple question we faced was could we force UPMC and Highmark to contract with each other? We concluded that we could not . . . ." James A. Donahue, III, Video of Testimony before Pa. House Democratic Policy Committee, Oct. 10, 2014, available at https://wdrv.it/39aa0b6df, attached hereto as Exhibit G.

The Attorney General's Efforts to Enforce the Consent Decree

The Attorney General sued to enforce the Consent Decrees on three occasions. First, soon after the Decrees went into effect, the Attorney General sued Highmark over its refusal to include UPMC in its Community Blue Medicare Advantage program. *See Commonwealth ex rel. Kane v. UPMC*, 129 A.3d 441, 451 (Pa. 2015) ("*Kane*"). Then, in 2016, the Pennsylvania Supreme Court held that certain actions by Highmark did not trigger provisions of the Consent Decree allowing UPMC to terminate immediately its Medicare Advantage contracts with Highmark. *See Kane*, 129 A.3d at 463. Finally, on November 20, 2017, the General Shapiro filed an enforcement action against UPMC over the termination of Medicare Advantage contracts in 2019. *See Shapiro*, 188 A.3d at 1125.

In this most recent enforcement action, General Shapiro tried to force UPMC to remain in Medicare Advantage contracts with Highmark after the Consent Decree expired. General Shapiro sought to extend UPMC's obligation to remain in-network for Highmark's Medicare Advantage products for a year beyond the June 30, 2019 end date of the Consent Decree to June 30, 2020.[5]

[5] In support of his petition, General Shapiro alleged, among things, that UPMC's decision to terminate Medicare Advantage contracts contradicted a October 27, 2014 mailer to seniors in which it promised to continue serving seniors with Highmark Medicare Advantage plans. Brief in Support of Petition to Enforce, *Commonwealth ex rel. Shapiro v. UPMC*, No. 334 M.D. 2014 (Pa. Commw. Ct. Nov. 20, 2017), attached hereto as Exhibit H, at 5. This allegation re-appears in the instant Petition at ¶ 120.

The Pennsylvania Supreme Court unanimously rejected General Shapiro's attempt to extend the Consent Decree. *See Shapiro*, 188 A.3d at 1135. The Court confirmed that the Consent Decree expired on June 30, 2019, and that the Consent Decree only required UPMC to remain in its Medicare Advantage contracts with Highmark through that date. *See id.* The Court expressly rejected the Commonwealth's effort to compel UPMC's participation in the Consent Decree beyond that date. As the Court recognized, there was "no basis upon which to alter [the Expiration Date], to which the parties agreed[.]" *See id.* at 1134.

The Commonwealth Prepared For the Expiration of the Consent Decrees

In 2017 and 2018, the PID continued to prepare for the end of the Consent Decrees. The PID continued to monitor Highmark's progress in developing WPAHS, now known as Allegheny Health Network ("AHN"), as an IDFS competitor to UPMC. Although the requirement in the PID's Approving Order that Highmark provide updated information on the impact of any new UPMC contract on AHN, as well as the insurance and provider markets, was set to expire on December 31, 2018, the PID opted to extend that protection. In late July 2017, the PID modified its Approving Order to extend that protection through December 31, 2020. *See* Letter from Teresa D. Miller to Jack M. Stover dated July 28, 2017, attached hereto as Exhibit I, at 31 (modifying Approving Order sunset provision to December 31, 2020).[6]

In 2018, while General Shapiro fought his losing battle in court, the PID secured UPMC's support in preparing Pennsylvania citizens for the expiration of the Consent Decree. In particular, the PID, which (along with DOH) expressly declined to join General Shapiro's 2018

[6] Available at https://www.insurance.pa.gov/Companies/IndustryActivity/CorporateTransactionsofPublicInterest/HighmarkWestPennAlleghenyHealthSystem/Documents/Approval%20Letter%20-%20Highmark%20Health%20Request%20for%20Modification%20to%202013%20Order%20-%20FINAL%20-%20July%2028%202017.pdf.

enforcement action,[7] and — with the Governor's Office — brokered an agreement between UPMC and Highmark to extend in-network commercial contracts for UPMC specialty and sole provider community hospitals for two to five years. *See* Petition ¶¶ 20-21; *see also* Press Release, "Governor Wolf Announces Landmark UPMC and Highmark Agreement to Access Critical Care Services," Jan. 4, 2018, available at https://www.governor.pa.gov/ governor-wolf-announces-landmark-upmc-highmark-agreement-access-critical-health-care-services/, attached hereto as Exhibit K, at 2 ("Consumers who live in communities where a choice of providers, facilities, and services is available will have to make a choice when the consent decrees expire at the end of June 2019."). In late 2018, the PID posted Frequently Asked Questions ("FAQs") online to provide guidance to patients about this new agreement and to assist patients with transition issues attendant with the end of the Consent Decrees. *See* Pennsylvania Insurance Department, "FAQs for End of Consent Decree Between Highmark and UPMC," available at https://www.insurance.pa.gov/Companies/Documents/FAQ%20for%20End%20of%20Consent%20Decree%20Final.pdf, attached hereto as Exhibit L. The PID explained that the Commonwealth was "allowing this to happen" because "[t]he Commonwealth cannot force an insurance company and a provider contract at in-network rates with each other," the same conclusion detailed in Mr. Donahue's October 2014 testimony. *Id.*

In the FAQs, the PID explained that the end of the Consent Decree would "primarily impact current Highmark insureds in the Greater Pittsburgh and Erie areas who: (a) are in a continuing course of treatment with a UPMC provider; or (b) who are currently in or will seek oncology treatment from a UPMC provider; and/or (c) have Medicare Advantage plans." *Id.*

[7] *See* Letter from Kenneth L. Joel to Pennsylvania Supreme Court, *Shapiro*, 188 A.3d 1122 (Pa. Mar. 30, 2018), attached hereto as Exhibit J, at 2 (explaining that the PID and DOH "took no position before Commonwealth Court and, accordingly, submit that by taking no position in this appeal, we will be better able to protect consumers and patients moving forward").

Those insureds would "now need to decide" to "keep their Highmark insurance and start seeing a new in-network doctor," "to continue seeing their UPMC doctor and change their insurance plan to one where UPMC providers are in-network," or "continue seeing their UPMPC doctor and consider options for paying out-of-network provider costs." *Id.*

The Petition to Modify

General Shapiro filed the instant Petition against the backdrop of this extensive history. He moved forward in litigation without the participation of the PID or DOH, which had concluded that the Commonwealth had no authority to compel continued UPMC-Highmark contracts and were working to facilitate patient transitions under the Consent Decree. *See id.* He moved forward even though the Pennsylvania Supreme Court had held only months earlier that he could not extend UPMC's obligations beyond June 30, 2019. And he moved forward by recycling allegations from his failed 2017 Petition to Enforce, the 2014 Petition for Review, as well as allegations regarding conduct predating the Consent Decree — conduct that was released by the Attorney General pursuant to the Consent Decree.

Relying on these old allegations, General Shapiro seeks to rewrite the Consent Decree entirely and impose radical new obligations on UPMC beyond June 30, 2019. These unprecedented requirements go well beyond the original purpose of the Consent Decree or the alleged harm the 2012 Mediated Agreement sought to remedy. Among other things, the terms of General Shapiro's demands include the following, all of which he seeks to impose on UPMC in perpetuity:

(a) By January 1, 2020, UPMC must replace a majority of its board members who were on its boards as of April 1, 2013, with new board members who have not had any relationship with UPMC for the past five years, and make certain other unspecified changes to its executive management;

(b) UPMC providers must contract with any insurer that wants a commercial or MA contract with that provider;

(c) the UPMC Health Plan must contract with any healthcare provider that seeks an MA or commercial contract;

(d) the parties to these forced contracts must submit to binding arbitration if they cannot agree on the rates to be paid for healthcare services;

(e) UPMC is prohibited from utilizing Provider-Based Billing, defined to mean "charging a fee for the use of the . . . building or facility at which a patient is seen," (Exhibit G to Petition § 2.25);

(f) UPMC is prohibited from including six other types of non-rate provisions in any of its contracts, including a provision that limits the dissemination of cost information;

(g) UPMC must accept rates for out-of-network emergency services at rates established by General Shapiro;

(h) UPMC is prohibited from engaging in any public advertising that General Shapiro determines is unclear or misleading in fact or by implication; and

(i) UPMC is barred from exercising any right to terminate a contract without cause.

See Petition ¶ 75. In the alternative to the items listed above, General Shapiro seeks to limit UPMC's reimbursements for all Out-of-Network services to the average of its In-Network rates. *See* Petition at 45. In addition, he seeks other relief for alleged violations of the Charities Act, Nonprofit Corporation Law ("NCL"), and Unfair Trade Practices and Consumer Protection Law ("UTPCPL"), including: forcing UPMC to substantiate the reasonableness of its executives' compensation, provide an accounting of charitable contributions it received for over a decade, and pay an undefined amount in penalties, reimbursement and restitution, as well as enjoining UPMC from denying access and treatment to Highmark subscribers. *See* Petition at 50, 57-58, 67-69.

These mandates are not limited to UPMC's relationship with Highmark and have nothing to do with providing Highmark subscribers a transition period to prepare for the end of the UPMC/Highmark provider contracts. And notwithstanding the Supreme Court's recent ruling confirming that the Consent Decree ends June 30, 2019 and is not subject to involuntary extension, General Shapiro seeks to impose each of these new requirements and conditions in perpetuity through a "modification" of the Consent Decree.

ARGUMENT

I. The Petition's Claims Are Barred as a Matter of Law.

The allegations in General Shapiro's Petition are either released, forfeited, or unripe and should be summarily dismissed by this Court. The 2014 Consent Decree irrevocably released claims arising from most of the allegations in the Petition, and they cannot be resurrected. The Attorney General forfeited other claims by failing to bring them in any of the earlier enforcement actions in this case, as the Consent Decree and claim-preclusion principles require. The remainder of the "facts" in the Petition rests on speculative predictions about future harms that are neither ripe (nor accurate) nor adequate to state a claim for relief. Taken together, these procedural flaws bar the relief sought by the Petition.

A. Claims Released by the Consent Decree Cannot Support General Shapiro's Petition.

A consent decree is a contract controlled by ordinary principles of contract interpretation. *See, e.g.*, *Shapiro*, 188 A.3d at 1131 (recognizing that the Consent Decree in this case is "a judicially sanctioned contract that is interpreted in accordance with the principles governing all contracts"). A release or settlement agreement contained in a contract will be enforced "if all its material terms have been agreed upon by the parties." *Pennsbury Vill. Assocs., LLC v. McIntyre*, 11 A.3d 906, 914 (Pa. 2011); *see, e.g.*, *Roth v. Old Guard Ins. Co.*, 850 A.2d 651, 653 (Pa.

Super. Ct. 2004) ("In the absence of fraud or mutual mistake a general release is enforceable according to its terms.").

UPMC's decision to terminate a full contractual relationship with Highmark formed the core of the allegations at issue in the Petition for Review and encompassed in the Consent Decree. Petition ¶¶ 52, 55, 77. The Consent Decree was intended as a five-year transition from UPMC's global relationship with Highmark to a more limited one. *See* Consent Decree § IV.C.9. An essential part of the Consent Decree was the Commonwealth's release of *any and all claims* arising out of a series of UPMC actions. Specifically, the Consent Decree:

> **release[d] any and all claims** the [Attorney General's Office], PID or DOH **brought or could have brought against UPMC for violations of any laws or regulations** within their respective jurisdictions, including claims under laws governing non-profit corporations and charitable trusts, consumer protection laws, insurance laws and health laws relating to the facts alleged in the Petition for Review or encompassed within this Consent Decree for the period of July 1, 2012 to the date of filing.

Consent Decree § IV.C.5 (emphasis added). All claims in the instant Petition that are based on allegations that predate the Decree are accordingly released.

In an attempt to persuade this Court that intervention is needed, however, General Shapiro dredges up these released factual allegations and tries to use them broadly to impose forced contracting with all providers and insurers. Among others, General Shapiro relies on the following fully released claims:

- the dispute over Highmark Community Blue plan, which occurred during 2013, *see* Petition ¶¶ 16-18, 96, 103, 107, 118;
- the compensation of UPMC's executives and location of its headquarters, both of which were in place long before the Consent Decree, *id.* at ¶¶ 61–63;
- various, allegedly revenue-increasing practices — including transferring procedures to specialty providers, charging provider-based fees, and charging Out-of-Network patients for the unreimbursed balance of the services they receive

— all of which predated, and were specifically addressed by, the Consent Decree, *see id.* ¶ 31; Consent Decree §§ IV.A.8 (regulating transfer of patients), IV.A.3 & IV.A.4 (regulating balance billing), & IV.C.1 (setting a schedule of billing rates in the absence of a negotiated rate); and

- most importantly, UPMC's refusal to contract with Highmark to provide In-Network access to Highmark enrollees, *see* Petition ¶¶ 12-19, 27-29, 37, 106, 107, 117, 119.c.

General Shapiro now, after having enjoyed the benefit of UPMC's agreement to abide by the Decree for nearly five years, cannot renege on the release that secured the agreement. All of the allegations in the Petition that predate the Consent Decree are released and cannot be considered, as a matter of law, in General Shapiro's Petition.

B. Claim Preclusion Bars Re-litigation of General Shapiro's Claims.

General Shapiro forfeited the instant claims under principles of claim preclusion. Claim preclusion, also known as *res judicata*, bars re-litigation by the same parties of the same claim *and* all other claims that should have been litigated in the prior action — or here, multiple enforcement actions. *See, e.g.*, *Balent v. City of Wilkes-Barre*, 669 A.2d 309, 313 (Pa. 1995); *see also Gregory v. Chehi*, 843 F.2d 111, 116 (3d Cir. 1988) ("Claim preclusion prevents a party from prevailing on issues he might have but did not assert in the first action.") (citations omitted). The doctrine of claim preclusion looks beyond "the technical differences between the two actions, take[s] a broad view of the subject, and bear[s] in mind the actual purpose to be attained." *Gregory*, 843 F.2d at 117 (citing *Helmig v. Rockwell Mfg. Co.*, 131 A.2d 622, 626-27 (Pa. 1957)).

In 2017, General Shapiro brought the most recent enforcement action in an attempt to extend UPMC's contract for Highmark's Medicare Advantage plans beyond the June 30, 2019 expiration of the Consent Decree. *See Shapiro*, 188 A.3d at 1132. The case was ultimately resolved by the Pennsylvania Supreme Court, which held that the Consent Decree expires on

June 30, 2019 and could not be extended. *See id.* ("There is also no dispute that the Consent Decree, by its terms, expires on June 30, 2019."). The Supreme Court held that the "June 30, 2019 end date" is "an unambiguous and material term of the Consent Decree" and that it had "no basis upon which to alter this unambiguous date, to which the parties agreed[.]" *Id.* at 1132, 1134.

General Shapiro could and should have asserted the Petition's claims in his 2017 enforcement action. All the factual allegations in the Petition allegedly took place before that enforcement action.[8] General Shapiro was aware of these various acts alleged in the Petition supposedly showing that UPMC failed to comply with its charitable mission or made misleading statements. UPMC's expansion and expenditures were also known to General Shapiro. General Shapiro could have asserted his claims based on those allegations the last time he was before the Court in this case. He chose not to do so, and the final judgment of the Pennsylvania Supreme Court precludes General Shapiro from resurrecting them now. *See Shapiro*, 188 A.3d at 1132.

Moreover, the Petition openly announces that General Shapiro's "actual purpose" has not changed since last year's litigation in this case — namely, to extend UPMC's contracts with Highmark beyond the expiration of the Consent Decree. The 2017 enforcement action likewise sought to force UPMC to extend its relationship with Highmark for a year beyond the end of the Consent Decree. *See id.* at 1125-26. After failing to convince the Supreme Court to grant that extension, General Shapiro is now doubling down and trying to extend that relationship *forever*. If any of the grounds now asserted in the Petition support such an extension, they necessarily should have been asserted to support the extension sought last year. For example, General

[8] As the Attorney General's Petition demonstrates, the allegations that post-date that enforcement action consist of UPMC's efforts to implement the June 30, 2019 termination of the Medicare Advantage contracts — the termination that the Supreme Court held was permitted under the Consent Decrees. *See, e.g.*, Petition ¶ 37, 117.

Shapiro now maintains that the public interest requires the Consent Decree to be modified to continue the contract between UPMC and Highmark indefinitely. But last year, when he was trying to extend that very contract, General Shapiro did not seek a modification on that ground.

C. Claims Rest on Legally Deficient Speculation About Future Conduct.

The Petition is also based on speculative future actions. General Shapiro contends that modification is necessary because *if* UPMC were to refuse to contract with insurers other than Highmark — a hypothetical for which there is no support — "[s]uch refusal will result in more patients seeking access . . . to UPMC on a cost-prohibitive Out-of-Network basis." Petition ¶ 23; *see also, e.g.*, *id.* ¶¶ 23, 30, 52-54, 105-107.b, 117, 119.c, 121. General Shapiro assumes without basis that UPMC will be Out-of-Network for non-Highmark insurers, and that subscribers of non-Highmark insurance companies will therefore be burdened at some future time. *See id.* ¶ 42.

A party, however, may not invoke a court's jurisdiction "to determine rights in anticipation of events which may never occur." *DeNaples v. Pa. Gaming Control Bd.*, 150 A.3d 1034, 1040 (Pa. Commw. Ct. 2016) (quotation omitted). "An issue that may arise in the future is not considered "ripe" for judicial interpretation." *Id.* (internal quotation omitted); *see also, e.g.*, *Phila. Entm't & Dev. Partners, L.P. v. City of Phila.*, 937 A.2d 385, 392-93 (Pa. 2007) (finding that challenge to city ordinance that had yet to be enforced was not ripe for adjudication where the only harm asserted was based on what challenger "anticipate[d]" to occur). These allegations are predicated on predictions about future UPMC conduct for which there is no present indication that they will ever occur. UPMC has never said it will not contract with non-Highmark insurers. Nor has General Shapiro alleged any such facts to assert that is the case. There is, accordingly, none of the antagonism in the parties' respective positions that ripeness requires, because UPMC has not taken any position and is not alleged to have taken any position. As the Pennsylvania Supreme Court recognized in this case, "while there may be a colorable

belief that the loss of UPMC as a provider for Highmark plans may be disruptive, *conjecture of this nature* is insufficient to alter the unambiguous termination date of the Consent Decree." *Shapiro*, 188 A.3d at 1133 (emphasis added). The Petition's claims that rely on these empty predictions are inadequate as a matter of law.

* * *

Taken as a whole, each and every claim in the Petition is barred as a matter of law, and the Petition should be dismissed.

II. The Petition Seeks an Invalid Modification.

General Shapiro's Petition should also be dismissed as an improper "modification" of the Consent Decree. In reality, General Shapiro asks the Court to obliterate material terms of the existing Consent Decree and impose a new, sweeping, inconsistent injunction with no expiration date — all under the guise of "modification." Pennsylvania law does not permit such an action.

A. General Shapiro Cannot Annul The Central Purpose Of The Consent Decree Through "Modification."

General Shapiro's proposed "modification" is a misnomer as it repudiates the central terms of the Consent Decree — including the parties' express termination date and the lack of full in-network contracts between UPMC and Highmark. General Shapiro cannot "modify" an agreement in a way that binds UPMC and Highmark, forever, in a way contrary to the original purpose of the Consent Decree.

As discussed above, the Consent Decree is a contract controlled by ordinary principles of contract interpretation. *See Shapiro*, 188 A.3d at 1131. Accordingly, it should be read holistically to give effect to all of its provisions and to render them consistent with each other. *See, e.g.*, *Guy M. Cooper, Inc. v. East Penn Sch. Dist.*, 903 A.2d 608, 616 (Pa. Commw. Ct. 2006). Fundamentally, the plain language of the Consent Decree controls its scope. *See, e.g.*,

Jacob Siegel Co. v. Philadelphia Record Co., 35 A.2d 408, 409 (Pa. 1944). "Where the language used is plain and unambiguous, the rights of the parties must be determined by the provisions of the instruments wherein they committed their agreement to writing." *Musselman v. Sharswood Bldg. & Loan Ass'n*, 187 A. 419, 421 (Pa. 1936). Similarly, courts have consistently refused to interpret one provision of a contract in a way that annuls another provision. *See, e.g.*, *Shehadi v. Ne. Nat'l Bank*, 378 A.2d 304, 306 (Pa. 1977) (reversing the lower court's decision to isolate and disregard a material provision of an agreement).

There is no dispute that the Consent Decree expires on June 30, 2019. The Consent Decree states it expressly, see Consent Decree, § IV.C.9 ("**Termination** — This Consent Decree shall expire five (5) years from the date of entry"), and the Supreme Court of Pennsylvania expressly held that the Consent Decree terminates on that date, see *Shapiro*, 188 A.3d at 1132. The Supreme Court further held that the expiration date of the Consent Decree was a material provision of the parties' agreement and that the courts cannot "alter[] an unambiguous and material term of the Consent Decree — the June 30, 2019 end date." *Id.*

The Supreme Court's decision in *Shapiro* is more than merely illustrative; it is the law of the case that is binding on this Court and preclusive of General Shapiro's attempt to relitigate the issue. *See, e.g.*, *Zappala v. James Lewis Grp.*, 982 A.2d 512, 519 n.6 (Pa. Super. Ct. 2009) (noting that the law of the case doctrine commands that a lower court "may not alter a legal question decided by an appellate court in the matter") (citing *Commonwealth v. Starr*, 664 A.2d 1326, 1331 (Pa. 1995)); *Robinson v. Fye*, 192 A.3d 1225, 1231-32 (Pa. Commw. Ct. 2018) (collateral estoppel bars relitigation by a party to an earlier action of the same issue that was actually litigated and necessary to a prior judgment). General Shapiro cannot now make another

attempt to "alter the unambiguous termination date of the Consent Decree" because he already litigated that before the Pennsylvania Supreme Court and lost. *Shapiro*, 188 A.3d at 1133.

It is also clear that the Consent Decree did not extend existing provider agreements or prohibit their termination. The Consent Decree emphasizes plainly in its introductory paragraph that it "is not a contract extension and shall not be characterized as such." Consent Decree, ¶ I.A. The *Shapiro* Court — citing its prior decision in *Kane*, 129 A.3d 441 — stated that "the Consent Decree 'forecloses the automatic renewal' of the [UPMC / Highmark provider agreements]." 188 A.3d at 1128.

In spite of, and in response to, that decision, General Shapiro now asks the Court to "modify" the Consent Decree in a manner that vitiates the "consent" that gives animating force and legal authority to the Consent Decree. This Court cannot "modify" the Consent Decree in a manner that directly contradicts its most material term. General Shapiro has alleged no fraud, accident or mistake that might justify a modification of the material terms of the Consent Decree, let alone a wholesale rewriting of the agreement. *See, e.g.*, *Universal Builders Supply v. Shaler Highlands Corp.*, 175 A.2d 58, 61 (Pa. 1961) (citing *Buffington v. Buffington*, 106 A.2d 229 (Pa. 1954)).

Moreover, any "modification" to the Decree could only have effect during the period that the Consent Decree remains operative — namely, until June 30, 2019. The imposition of obligations beyond that date is not a "modification;" it would require, as an essential prerequisite, UPMC's consent for a new decree that extended past that date. Otherwise, there is no "consent" authorizing any modifications to a "Consent" Decree. What General Shapiro seeks to do here is plainly not a "modification," because any genuine modification would expire along with the rest of the Consent Decree. Instead, he seeks to unilaterally impose some brand new

and different agreement under the guise of a modification. General Shapiro's coercive effort to extend the Consent Decree beyond its express, material terms must fail. *See Dravosburg Hous. Ass'n v. Borough of Dravosburg*, 454 A.2d 1158, 1161 (Pa. Commw. Ct. 1983) (citing *Commonwealth ex rel. Creamer v. Rozman*, 309 A.2d 197 (Pa. 1973)) ("[A] consent decree is an agreement binding upon the parties thereto who cannot be allowed to repudiate that to which they agreed for purposes of their own and for their own benefit.").

In a similar, uncommon instance where the plaintiff, rather than a defendant, sought to modify the consent decree, the D.C. Circuit held any "fortification of [an] injunction's terms must be in service of the consent decree's original 'intended result." *Salazar v. District of Columbia,* 896 F.3d 489, 498 (D.C. Cir. 2018) (citation omitted). "There is a critical difference between a [trial] court's power to modify an ongoing consent decree and its authority to impose a new injunction." *Id*. at 497. The court continued:

> When a plaintiff seeks to enhance a consent decree's terms, courts must be careful to ensure that the new injunctive terms give effect to and enforce the operative terms of the original consent decree. **Courts may not, under the guise of modification, impose entirely new injunctive relief.** That practice would end run the demanding standards for obtaining injunctive relief in the first instance, would deny the enjoined party the contractual bargain it struck in agreeing to the consent decree at the time of its entry, and would destroy the predictability and stability that final judgments are meant to provide.

Id. at 498 (emphasis added).

The same equitable principles that drove the *Salazar* court to reject the plaintiff's use of a modification provision should also compel this Court's rejection of the Petition. The Consent Decree, consistent with the relief sought in the Petition for Review, provided a definite transition period to avoid disruption to Highmark subscribers. The instant Petition seeks injunctive relief in perpetuity, is not limited to UPMC's contractual relationship with Highmark, imposes new contractual terms on all UPMC provider and health plan contracts, requires changes to UPMC's

Board of Directors and imposes a firewall requirement. These requests for injunctive relief are indisputably entirely "new" injunctive relief, would deny UPMC the benefit of the bargain it struck with the Commonwealth in the form of the Consent Decree, and would destroy the predictability and sustainability that the Consent Decree, entered as a final judgment, was meant to provide. This Court should apply the principles enunciated in *Salazar* and reject General Shapiro's proposed modifications.

B. The Attorney General Agreed that UPMC's Performance Under the Consent Decree, Including No Global In-Network Contract With Highmark, Complied with the Law.

Modification is also improper because the Consent Decree itself established that the central elements of General Shapiro's current Petition are lawful. The Petition repeatedly asks the Court to compel UPMC into a judicially imposed contract with Highmark and, going even further, with any insurer or provider that wishes to contract with UPMC. General Shapiro urges that, by not contracting with Highmark, "UPMC is operating in violation of . . . the Solicitation of Funds for Charitable Purposes Act, the Nonprofit Corporation Law of 1988, and the Unfair Trade Practices and Consumer Protection Law." Petition ¶ 4 (internal citations omitted). The Attorney General, however, explicitly "agree[d] that the terms and agreements encompassed within this Consent Decree" — including no contract extension with Highmark and only temporary transition protections for Highmark subscribers — "*do not conflict with UPMC's obligations under the laws governing non-profit corporations and charitable trusts, consumer protection laws*, antitrust laws and health laws." *See* Consent Decree, IV.C.6 (emphasis added).

The Court cannot modify the Consent Decree based on alleged violations of law where the Attorney General already has *conceded no such violations exist*. That would violate the unambiguous and enforceable terms of the Consent Decree. *See Shapiro*, 188 A.3d at 1131. Equitable estoppel and judicial estoppel further foreclose such an about-face by General Shapiro.

See Commc'ns Network Int'l, Ltd. v. Mullineaux, 187 A.3d 951, 963 (Pa. Super. Ct. 2018) (describing the equitable estoppel doctrine, including "acts, representations, or admissions, or by [one's] silence when [one] ought to speak out") (citation omitted); *see also Westinghouse Elec. Corp./CBS v. Workers Comp. Appeal Bd. (Korach)*, 883 A.2d 579, 586 (Pa. 2005) (laying out the same list); *Trowbridge v. Scranton Artificial Limb Co.*, 747 A.2d 862, 864 (Pa. 2000) (parties may not "assum[e] a position inconsistent with his or her assertion in a previous action, if his or her contention was successfully maintained"); *Gross v. City of Pittsburgh*, 686 A.2d 864, 867 (Pa. Commw. Ct. 1996) ("[T]he doctrine of judicial estoppel . . . prevent[s] parties from abusing the judicial process by changing positions as the moment requires.").

C. The Petition Fails to Allege How the Proposed "Modification" Promotes the Public Interest.

Modification is also improper because General Shapiro failed to plead facts essential to demonstrate how the requested "modification" would promote the public interest. Petitioners must plead sufficient facts to support a claim. Only well-pled facts are entitled to the presumption of truth, and the Court should disregard "conclusions of law, unwarranted inferences from facts, argumentative allegations or expressions of opinion." *Scrip v. Seneca*, 191 A.3d 917, 923 (Pa. Commw. Ct. 2018).

Here, the Petition's statements concerning the public interest are merely conclusory. *Id.* The Petition asserts that the Commonwealth "belie[ves] that modification of the Consent Decrees is needed to protect the public's interests," but alleges nothing to substantiate this "belief." Petition ¶ 73. The Petition takes pains to recite the history of this case and catalog UPMC's alleged bad acts, but it never explains how the proposed modifications would address those wrongs, why they are necessary, or what effect the terms would have on the public if they were

implemented. The list of proposed modifications has almost no connection to either the facts alleged or the Petition's unsupported rhetoric about the public interest.[9]

If the Petition's empty statements about the public interest were enough to support this request for modification, they would be sufficient to request any modification under the sun. It simply cannot be enough for General Shapiro to allege that some, unspecified modification would serve the public interest, and then attach a laundry list of unconnected demands. And yet that is all General Shapiro has done here. The Petition fails to offer any factual allegations supporting its conclusory assertions that modification would actually serve the public interest. Its request for modification, therefore, must be dismissed as legally deficient.

This is not an academic exercise. During the pendency of the Consent Decree, the Attorney General, in fact, has expressly contended that the ability for an insurer or provider *not* to contract is necessary for low prices and high quality care. As recently as 2016, the Attorney General sought to enjoin the proposed merger between UPMC Pinnacle (then called PinnacleHealth System, or "PinnacleHealth") and Penn State Hershey Medical Center ("Hershey"), another hospital system operating in the same geographic area. *See* Complaint, *FTC v. Penn State Hershey Med. Ctr.*, No. 1:15-cv-2362 (M.D. Pa. Apr. 8, 2016), attached hereto as Exhibit M. In opposing the merger, the Attorney General argued that the rivalry between Hershey and Pinnacle benefited patients with "lower healthcare costs and increased quality of care." *See id*. at 3. Critical to the Attorney General's argument was that the merger

[9] With the exception of the mandatory contract term, which would, presumably, serve to force UPMC to remain in contract with Highmark forever, it is unclear how General Shapiro arrived at the list of terms he now demands. For instance, one proposed modification would prohibit sharing of competitively sensitive information. Petition ¶ 75.a. The word "information," however, appears nowhere in the Petition before General Shapiro requests this prohibition in Count I. It is therefore impossible to tell why General Shapiro believes this term is even necessary, much less whether and how it would serve the public interest.

would have eliminated leverage for health insurers seeking to contract with the merged health system. That is, insurers would be forced to accept higher prices from the merged health system because they would have no ability to walk away from negotiations. Indeed, on appeal to the Third Circuit, the Attorney General argued:

> **Competition between hospitals leads to both lower prices (as described immediately below) and to improvements in quality of care and service to patients**. . . . Prices are negotiated between each hospital and health insurance company. Like any business deal, both sides have some amount of bargaining power, or "leverage," and the agreement reached depends on the relative strengths of that leverage. ***Leverage ultimately is a function of a party's ability to walk away from the negotiation and refuse to do business with its negotiating partner***. Thus, in bargaining over hospital prices, if the hospital demands too high a price and the insurer abandons the negotiation, the hospital will lose access to most of that insurer's members. . . . Conversely, if the insurer insists on an unacceptably low price and the hospital walks away, the insurer will be unable to include the hospital in its network and must offer a policy that does not cover the hospital. A hospital's leverage thus depends on how important it is to the insurer's network, which reflects both patient preferences for the hospital and the availability of desirable alternative substitute hospitals.

Brief of the Federal Trade Commission and the Commonwealth of Pennsylvania, *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327 (3d Cir. 2016) (No. 16-2365), attached hereto as Exhibit N, at 6-7 (emphases added). The Attorney General was ultimately successful in that litigation, and the merger failed. In what can only be described as a complete reversal of position, General Shapiro now alleges that it is both unlawful and against the public interest for nonprofit insurers or providers to walk away from negotiations.

Senior representatives from the Attorney General's Office have also made similar statements before the Pennsylvania House of Representatives, even in the context of contract disputes between UPMC and Highmark and, more specifically, about the Consent Decree. In October 2014, James A. Donahue, III, the Executive Deputy Attorney General of the Public

Protection Division — and one of the principal authors of the current Petition before this Court — publicly testified as follows:

> *The simple question we faced was could we force UPMC and Highmark to contract with each other? We concluded that we could not for several reasons*. First, there is no statutory basis to make UPMC and Highmark contract with each other. . . . Second, the disputes that we see here that exist between Highmark and UPMC are similar to although less publicly known than disputes between health plans and hospitals around the country. These disputes over how, what the terms of contracts are go on every day and there are very vigorous and acrimonious disputes going on with many hospital systems and many health plans throughout the Commonwealth. If we forced a resolution in this case we really 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. Third, *the contracting process involves two parties willingly coming to an agreement. 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.* And one of the key things here in most contract negotiations is price, and price is at the heart of the dispute between Highmark and UPMC, and *there is no mechanism in Pennsylvania for resolving this price dispute.*

Exhibit G (emphasis added). The Attorney General has taken irreconcilably inconsistent positions when it comes to the public interest. He should not be allowed to rest on mere conclusions here.

III. The Petition Lacks Required Party-Specific Allegations.

The Court additionally should deny the Petition because General Shapiro failed to plead critical prerequisites to the extreme asserted enforcement authority. His request to bind all facets of the UPMC system to a sweeping new healthcare regime encroaches on the jurisdiction of the Commonwealth agencies actually charged with overseeing that regime, and disregards the limits on his oversight of nonprofit corporations.

First, General Shapiro is proceeding (for the second time in two years) without even alleging any assent, authorization, or input from either of the two other Petitioners in this matter, the PID and the DOH. The PID is "charged with the execution of the laws of this Commonwealth in relation to insurance." 40 P.S. § 41; *see also Foster v. Mut. Fire, Marine & Inland Ins. Co*., 614 A.2d 1086, 1091 (Pa. 1992) ("The General Assembly, in recognition of the specialized complexities involved in insurance generally, and in the regulation of this industry in particular, assigned the task of overseeing the management of that industry, in this Commonwealth, to the Insurance Department, the agency having expertise in that field. The Insurance Commissioner . . . is, therefore, afforded broad supervisory powers to regulate the insurance business in this Commonwealth, including the power to protect 'the interests of insureds, creditors, and the public generally.'") (quoting 40 P.S. § 221.1(c)). Similarly, DOH has authority over licensed healthcare facilities in the Commonwealth, including responsibility for, inter alia, investigating complaints that a facility is seeking direct payment from a patient. *See, e.g*., 35 P.S. §§ 448.803, 449.95; *SEIU Healthcare Pa. v. Commonwealth*, 104 A.3d 495, 498 (Pa. 2014) ("To carry out its statutory duty to protect the health of Pennsylvania citizens and determine and employ the most efficient and practical means for the prevention and suppression of disease, [DOH] oversees the administration of public health services to residents of Pennsylvania's sixty-seven counties.") (citing 71 P.S. §§ 532(a) and 1403(a)).

These agencies have the subject-matter expertise — and statutory authority — unique to the regulation of health and insurance. And yet, General Shapiro now seeks to impose on millions of Pennsylvanians sweeping healthcare reform without alleging even that the PID or DOH has reviewed his proposal, much less has agreed with its underlying policy. Indeed, there is reason to believe that they do not. As detailed above, rather than pursue any of the relief

General Shapiro now seeks, the PID has worked diligently to prepare western Pennsylvanians for the end of the Consent Decree and to help them with the transition. *See supra* at 9-11. As a general matter, the Court should not consider General Shapiro's request for relief without making sure that the regulators responsible for administering that relief agree with each of the principles on which the request is based.

That is particularly important under the terms of the specific modification provision at issue here. Any ability to modify the parties current Consent Decree "shall be interpreted consistently with the Insurance Department's UPE Order in the Highmark/West Penn Allegheny Health System matter, In Re Application of UPE, No. ID-RC-13-06 (Pa. Insur. Dept. 2013) [the 'Approving Order']." Consent Decree § I.A. The PID's 2013 Approving Order authorized Highmark's acquisition of the former WPAHS hospital system but imposed certain conditions on the deal. As the Attorney General has admitted, the PID's approval order "was largely premised" on the assumption that Highmark "would not have a continued contractual relationship with UPMC." Exhibit A ¶ 30 (emphasis added). As a means of protecting the public interest and Highmark's financial stability from the undue stress of WPAHS's (and now AHN's) flagging finances, the PID thus required that Highmark submit additional financial data for that agency's review prior to any new contract with UPMC.[10] Exhibit D at ¶ 22. General Shapiro's new requirements for forced contracting and mandatory in-network access for all thus are directly contrary to the PID's own efforts to assure healthy, competitive healthcare markets.

[10] The Petition did not allege that Highmark complied with this requirement. Indeed, the Attorney General's Office conspicuously refused to answer UPMC's direct question whether Highmark had complied with this requirement prior to filing the Petition to Modify. *See* Letter from W. Thomas McGough, Jr. to James A. Donahue, III, Jan. 16, 2019, attached hereto as Exhibit O, at 2. Because of this omission, General Shapiro failed to satisfy a condition precedent to filing the instant Petition.

The Attorney General's Office should not be allowed to supplant its sister agencies' expertise and judgment in health and insurance while the PID and DOH sit on the sidelines.[11]

Second, the Petition ignores fundamental matters of corporate form. As an alternative to the Consent Decree's modification provision, for instance, General Shapiro relies on "the Commonwealth's responsibility to ensure that UPMC . . . fulfills its charitable responsibilities," and enforce "the respondents' charitable missions." Petition ¶ 2. On that basis, he alleges violations of the Pennsylvania charities law (Count II) and asks the Court to re-set all of UPMC's reimbursement to rates of General Shapiro's liking (Count II). He likewise alleges violations of "UPMC's" alleged fiduciary duties (Count III) and "UPMC's" duties under the UTPCPL (Count IV). Based on these allegations, General Shapiro seeks to bind all of UPMC's subsidiaries to the terms of his new proposed consent decree.

Pennsylvania law does not permit blurring corporate distinctions that easily. Courts must instead "start from the general rule that the corporate entity should be recognized and upheld[.]" *Wedner v. Unemployment Compensation Bd. of Review*, 296 A.2d 792, 795 (Pa. 1972). UPMC is the nonprofit parent corporation of over a hundred corporate entities — some for-profit, some nonprofit. In his attempt to force "UPMC" to enter into a "contract" with "Highmark" because it is a "charity," General Shapiro conflates not only all those subsidiaries but also the different factual circumstances and legal regimes that are unique to each of these entities. Significantly, the vast majority of UPMC's hospitals have commercial and Medicare Advantage contracts with Highmark *and will continue to have those contracts after June 30*.[12] *See* Petition ¶ 20. No relief

[11] It makes no difference that the Consent Decree's modification provision permits any party to seek modification. Here, the requested modification is contrary to bedrock principles set forth in the two documents with which the Consent Decree must be harmonized. That kind of "modification" should not go forward without the unanimous consent of all concerned, including UPMC, the PID, and DOH.

[12] UPMC Altoona, UPMC Bedford, UPMC Horizon, UPMC Jameson, UPMC Kane, UPMC Northwest, UPMC Western Psychiatric Institute and Clinic, UPMC Children's Hospital of Pittsburgh, all

can be entered as to them. Nor are all UPMC subsidiaries nonprofits. Notwithstanding the extraordinarily broad authority asserted by General Shapiro, there is no conceivable basis to impose relief against for-profit companies.

And though all Pennsylvania nonprofit corporations are governed by the Nonprofit Corporation Law (NCL), 15 Pa. C.S.A. § 5101 *et seq.*, not all nonprofit corporations share the same status. For example, not every nonprofit corporation qualifies as a section 501(c)(3) organization, a status which is governed by federal law, administered by the IRS and qualifies the organization for exemption from federal income tax. And not every nonprofit corporation is an Institution of Purely Public Charity ("IPPC") under Pennsylvania law nor subject to General Shapiro's authority over charitable trusts and bequests. *See Hosp. Utilization Project v. Commonwealth*, 487 A.2d 1306, 1317 (Pa. 1985) ("*HUP*") (interpreting "Institution of Purely Public Charity" under Article VIII, § 2(a)(v) of the Pennsylvania Constitution); 71 P.S. § 732-204(c) (providing the "Attorney General . . . may intervene in any other action, including those involving charitable bequests and trusts . . . ."). IPPC status entitles qualifying nonprofit corporations to be exempt from certain taxes and is governed by Act 55 and the *HUP* test. *See* 10 P.S. § 375; *HUP*, 487 A.2d at 1317. To the extent General Shapiro purports to challenge "UPMC" exemptions from real estate taxes — the Petition is hopelessly unclear in this regard — it is the titled owner of a real estate parcel that must satisfy Act 55 and *HUP*, which is generally the UPMC hospital that sits on the land. *See* Pa. Const., Art. VIII, § 2(a)(v) (establishing special rule for real property tax exemptions). Some UPMC entities are section 501(c)(3) organizations, but not IPPCs under state law, and vice versa. In fact, some are neither and others are not even

UPMC Pinnacle hospitals, and all UPMC Susquehanna hospitals currently contract with Highmark and will continue to do so beyond June 30, 2019. *See* Exhibit L.

nonprofit corporations. Although all of these different corporations exist within the UPMC system, General Shapiro's Petition accounts for none of these distinctions.

General Shapiro cannot obtain relief against one entity based on the alleged violation by a different entity. The Petition contains none of the allegations necessary to disregard corporate form or specify which UPMC subsidiaries are susceptible to what enforcement authority. Absent particularized allegations specific to the corporate form and contracting status of each UPMC subsidiary, General Shapiro cannot state a claim as to any. For precisely this reason, the Allegheny Court of Common Pleas dismissed a similar lawsuit brought by the City of Pittsburgh. *See City of Pittsburgh v. UPMC*, No. GD-13-05115 (Ct. Common Pleas, Allegheny County June 25, 2014), attached hereto as Exhibit P. The same result is required here.

IV. General Shapiro Has No Legal Authority To Require That UPMC Entities Enter Into Contracts With Any Willing Insurer or Provider, Including Highmark.

While the Petition alleges all manner of purported misconduct, the principal relief it seeks to compel is universal, evergreen contracts between UPMC entities and Highmark (and every other willing insurer or provider) at rates and on terms determined by outside arbitrators. Alternatively, the Petition seeks to limit reimbursements to UPMC providers for Out-of-Network services to UPMC's "average In-Network rates" — as if contracts existed between UPMC providers and insurers. *See* Petition at ¶¶ 75(b)-(c), 97(f), 110(f). General Shapiro cited no legal authority to support this requested relief, and both the Attorney General's Office and the PID have previously admitted — unambiguously — that the Commonwealth lacks any such authority.

A. *Parens Patriae* Authority Does Not Permit General Shapiro to Second-Guess UPMC's Charitable Mission, Including Its Contracting Decisions.

Parens patriae authority over charities is limited. It does not permit General Shapiro to control the actions and decisions of a nonprofit made in the ordinary course of business, such as

dictating the terms of the nonprofit's commercial contracts. Instead, General Shapiro's *parens patriae* authority is appropriately exercised only when a charity engages in an extraordinary transaction, such as the disposition of assets committed to charity, a change of charitable purposes, or some other fundamental corporate transaction, or when the charity's officers or directors have engaged in a gross breach of fiduciary duty or criminal conduct.[13] The Attorney General's Office has acknowledged that its *parens patriae* power typically involves the review of specific, major transactions "effecting a fundamental corporate change." *See* Office of the Attorney General, "Review Protocol for Fundamental Change Transactions Affecting Health Care Nonprofits," Mar. 14, 2011, attached hereto as Exhibit R, at 1. But as commentators have explained, "[n]othing in the Attorney General's *parens patriae* status or powers gives the Attorney General the authority to substitute his judgment for that of the board or trustees of a nonprofit corporation acting in good faith." Marc S. Cornblatt & Bruce P. Merenstein, *Charities & the Orphans' Court*, 46 Duq. L. Rev. 583, 588 (2008).

None of the Pennsylvania cases sanctioning the Attorney General's use of *parens patriae* authority involved intervention into a non-profit entity's ordinary course business affairs. As Judge Pellegrini correctly stated in *In re Milton Hershey School Trust*, "[t]here is no basis in the law, either statutory or case, giving the Attorney General a right to become 'fully involved' in the decision-making of the Trust; he is neither a co-manager nor co-Trustee of the Trust."

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[13] *See, e.g.*, *In re Milton Hershey Sch. Tr.*, 807 A.2d 324, 338-39 (Pa. Commw. Ct. 2002) (proposed sale of a controlling interest in Hershey Corporation, the principal asset of the trust); *In re Coleman's Estate*, 317 A.2d 631, 632 (Pa. 1974) (qualifications of trustees); *Commonwealth v. Citizens Alliance for Better Neighborhoods, Inc.*, 983 A.2d 1274 (Pa. Commw. Ct. 2009) (breach of fiduciary duties and diversion of charitable assets to personal use); 15 Pa. C.S.A. § 5547 (prohibiting disposition of property committed to charitable purposes without court approval); Marc S. Cornblatt & Bruce P. Merenstein, *Charities & the Orphans' Court*, 46 Duq. L. Rev. 583, 588 (2008), attached hereto as Exhibit Q.

Milton Hershey Sch., 807 A.2d at 338-39 (Pellegrini, J., dissenting).[14] Rather, a Pennsylvania nonprofit's normal operations and procedures are left to its fiduciaries, governed by the Pennsylvania Nonprofit Corporation Law ("NCL"), 15 Pa. C.S.A. §§ 5101-6162, and the nonprofit's Articles of Incorporation. *See Zampogna v. Law Enf't Health Benefits, Inc.*, 151 A.3d 1003, 1004 (Pa. 2016).

General Shapiro bears a heavy burden in exercising his *parens patriae* authority to allege that a non-profit's actions or decisions violate the Charities Law, the NCL, or its own articles of incorporation. In *Zampogna*, the Pennsylvania Supreme Court reviewed the standards used in evaluating whether a nonprofit corporation's actions could be enjoined under the NCL as inconsistent with its corporate purpose. In rejecting a challenge to a charity's use of funds to send political postcards to its members, the court held that "the interplay between a nonprofit corporation's corporate purpose and that corporation's authority to take corporate action must be construed in the least restrictive way possible, limiting the amount of court interference and second-guessing[.]" *Id.* at 1013. Thus, the Court held, "a nonprofit corporation's action is authorized when: 1) the action is not prohibited by the NCL or the corporation's articles; and 2) the action is not clearly unrelated to the corporation's stated purpose." *Id*.

This is an intentionally difficult standard, because "courts should not act as super-boards second guessing decisions of corporate directors, as courts are 'ill-equipped' to become

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[14] This part of Judge Pellegrini's dissent is consistent with the majority opinion. Judge Pellegrini took exception to the Attorney General's intervention in the proposed sale of a charity's principal asset (Hershey Corporation) before the charity's governing board made a firm decision to sell the asset. *See id*. The majority disagreed, finding that the Attorney General had standing to intervene at an earlier time given its "responsibility for public supervision of charitable trusts" and the fact that the Hershey business was "essentially the sole asset of the corpus of the School Trust" at the time of Mr. Hershey's death. *Id.* at 330-31. Notwithstanding the disagreement on when the Attorney General's *parens patriae* authority was triggered, there is nothing in the majority's opinion that would sanction General Shapiro's intervention in the day-to-day business affairs of a charity.

'enmeshed in complex corporate decision-making.'" *Id.* at 1014 (internal citation omitted); *see also Commonwealth ex rel. Kane v. New Founds., Inc*., 182 A.3d 1059, 1067-68 (Pa. Commw. Ct. 2018) (noting, in case where Attorney General alleged mismanagement of charitable nonprofit corporation, that "the adoption of the business judgment rule 'reflects a policy of judicial noninterference with business decisions of corporate managers, presuming that they pursue the best interest of their corporations, insulating such managers form second-guessing or liability for their business decisions in the absence of fraud or self-dealing or other misconduct or malfeasance'") (quoting *Cuker v. Mikalauskas*, 692 A.2d 1042, 1046 (Pa. 1997))).

General Shapiro alleged no facts that UPMC's refusal to enter into universal contracts with Highmark is prohibited by the NCL or UPMC's articles of incorporation, or that this decision is "clearly unrelated" to UPMC's stated purpose. General Shapiro points to nothing in UPMC's articles of incorporation or the NCL that prohibits UPMC from deciding not to contract with a particular payor. That is because neither contains any such prohibition. Nor does Pennsylvania law require UPMC to provide access to its healthcare system to everyone at a particular price. Accordingly, UPMC's decision not to do so violates no law or any charitable purpose.

In sum, *parens patriae* is a limited power that permits General Shapiro to intervene in court proceedings concerning the affairs of a non-profit entity regarding divestiture of assets or fundamental change of charitable purposes and in extreme cases of fraud or abuse. It does not transform General Shapiro into the "CEO" of any non-profit entity of his choosing, and it does not enable General Shapiro to insert himself into the ordinary course of business decision-making of UPMC and other non-profits in matters such as its commercial contracting.

B. The Commonwealth Has Admitted That It Cannot Force UPMC Entities To Enter Into Contracts With Highmark And All Other Willing Insurers and Providers.

Not only does General Shapiro lack general power under his *parens patriae* authority to intervene in UPMC's operations and business affairs, it is beyond dispute that he has no legal basis under Pennsylvania law to compel the principal relief seeks here: forced contracts between UPMC entities and Highmark (or any other willing insurer or provider). *See* Petition at ¶¶ 75(b)-(c), 97(f), 110(f).

The Pennsylvania General Assembly has specifically rejected the same "any willing provider" ("AWP") and "any willing insurer" regime General Shapiro seeks to establish through the Petition. Despite considering the issue many times, the Pennsylvania General Assembly has refused to enact AWP legislation. Most recently, in February 2017, AWP legislation was re-introduced to the Pennsylvania Committee on Insurance and did not receive a vote.[15] Pennsylvania has also considered a counterpart to AWP legislation, a so-called Any Willing Insurer law, and likewise rejected it.[16] General Shapiro's attempt to mandate and impose terms of contracts between healthcare insurers and providers outside of the legislative process subverts both the free market and democratic systems that define the American healthcare system. Whether a healthcare provider or healthcare payer must contract is not a decision for General Shapiro, but for the Pennsylvania General Assembly.

The Executive Branch of the Commonwealth has explicitly admitted that it cannot force UPMC — or any other nonprofit healthcare provider or insurer for that matter — to enter into contracts against its will. In a statement following the Supreme Court's 2018 ruling that the

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15 Pennsylvania General Assembly, House Bill 345, Regular Session 2017-2018, February 3, 2017.

16 Pennsylvania General Assembly, House Bill 1621, Regular Session 2017-2018, June 26, 2017.

Consent Decree unambiguously expires on June 30, 2019, the PID provided the following question-and-answer guidance on its website:

> **3. Why is the Commonwealth allowing this to happen?**
>
> The Commonwealth cannot force an insurance company and a provider to contract at in-network rates with each other.
>
> Governor Wolf has dedicated significant efforts and will continue to diligently work to protect consumers by overseeing the implementation of the Consent Decree and through the consummation of the January 2018 agreement, to ensure access for Highmark's commercial insureds who require critical, unique services.

See Exhibit L, at 1. *The same guidance remains on the PID's website today.*

Moreover, the Executive Deputy Attorney General *who signed the Consent Decree and this Petition* made exactly the same point when the Consent Decree went into effect. In testimony before the Democratic Policy Committee of the Pennsylvania House of Representatives on October 10, 2014, Executive Deputy Attorney General James A. Donahue, III defended the Commonwealth's strategy in securing the Consent Decrees with UPMC and Highmark by explaining that the Commonwealth could not force UPMC to contract with Highmark or anyone else. Specifically, Mr. Donahue testified that the Attorney General's Office evaluated whether it could "force UPMC and Highmark to contract with each other," and "concluded that we could not" because "there is no statutory basis to make UPMC and Highmark contract with each other."[17] Exhibit G.

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[17] These statements by Mr. Donahue are also relevant for equitable estoppel. The Attorney General's Office induced UPMC's justifiable reliance by taking this position in public testimony that was specifically describing the scope of the Attorney General's authority over UPMC's contractual relations. *See Natiello v. Dept. of Envtl. Prot.*, 990 A.2d 1196, 1203 (Pa. Commw. Ct. 2010) ("The doctrine of equitable estoppel applies when a Commonwealth agency has (1) intentionally or negligently misrepresented a material fact; (2) knowing or having reason to know that another person would justifiably rely on that misrepresentation; (3) or where the other person has been induced to act to his detriment because he justifiably relied on the misrepresentation."). UPMC signed the Consent Decree and spent the last five years ordering its business arrangements and investments in reliance on the terms of the Consent Decree, including, most importantly, its termination.

Accordingly, the Court should, at a minimum, rule that UPMC entities cannot be forced to enter into universal, evergreen contracts between UPMC entities and Highmark (or any other willing insurer or provider). The Court should likewise rule that it has no authority to afford General Shapiro's alternative relief: limiting UPMC providers' reimbursements for Out-of-Network services to UPMC's "average In-Network rates," which effectively seeks the same relief as forcing UPMC into universal contracts against its will.

C. The Pennsylvania General Assembly Delegated Exclusive Regulatory Authority to Other Commonwealth Agencies, Not General Shapiro.

General Shapiro's proposed modifications also fail as a matter of law because they intrude on a regulatory field that the Pennsylvania General Assembly *exclusively* delegated to DOH and the PID. The requirements he asks this Court to impose fly in the face of the considered judgments of the Pennsylvania General Assembly.

The proposed modifications conflict with the carefully crafted regulatory scheme governing managed care plans in the Commonwealth. As defined in 40 P.S. § 991.2102, managed care plans include HMOs, hospital plan corporations (*i.e.*, Blue Cross plans) and professional health services plan corporations (*i.e.*, Blue Shield plans). The General Assembly delegated the power to regulate these health plans exclusively to the DOH and the PID. *See* 40 P.S. § 991.2181(d),(e) (empowering these agencies to ensure compliance of managed care plans to statutes and regulations and to make regulations). This statutory authority includes ensuring that managed care plans "assure availability of adequate health care providers in a timely manner, which enables enrollees to have access to quality care and continuity of health care services." 40 P.S. § 991.2111(1).

Under this authority, in order to ensure adequate provider networks, the DOH has adopted network access requirements in 28 Pa. Code § 9.679 that plans must meet. The DOH

has also established regulations that, among other things, require its approval of provider networks that are limited to select participating providers — so-called narrow networks — to likewise ensure that enrollees continue to have adequate access even with a more limited network. *See* 28 Pa. Code § 9.653 (listing requirements). Thus, the DOH requires that every managed care plan meet provider network access requirements and to obtain express department approval to offer health plans with so-called narrow networks. *Id.* In short, UPMC Health Plan only offers provider networks for its health plans that the Commonwealth, acting through the DOH, deems adequate.

General Shapiro, however, seeks to run roughshod over the DOH and impose his own assessment of an adequate provider network for a health plan. In effect, General Shapiro's proposal would deem all UPMC Health Plan networks inadequate, regardless of DOH approval; instead the only adequate provider network for its health plans would be one that includes every provider interested in joining. This sweeping arrogation of power would gut the DOH's rules and oversight process and commandeer the authority the General Assembly chose to give it.

Network adequacy is not the only area where General Shapiro would supplant applicable regulatory authority. For example, DOH regulations mandate the required provisions that must be included in managed care plan contracts with network providers. *See* 28 Pa. Code § 9.722 (requiring plans to submit and obtain approval of healthcare provider contracts from DOH, and enumerating certain "consumer protection provisions" that must be included). One such required provision expressly allows a plan and provider to include in their contract the ability to terminate without cause, so long as the notice of termination period is no less than 60 days. *See id.* § 9.722(e). Yet General Shapiro's proposed modifications would preclude UPMC from terminating any provider agreements without cause. Petition ¶ 75.l.

General Shapiro would even interfere in areas the General Assembly reserved for itself rather than defer to administrative regulation. The General Assembly, for instance, enacted legislation concerning the provision of emergency services, and did not delegate additional regulatory power to establish rates for such services. The General Assembly mandated that managed care plans "[e]nsure that emergency services are provided twenty-four (24) hours a day, seven (7) days a week and provide reasonable payment or reimbursement for emergency services." 40 P.S. § 991.2111(4). More specifically, in a provision entitled "Emergency Services," the General Assembly directed that managed care plans "shall pay all reasonably necessary costs associated with the emergency services provided during a period of emergency." 40 P.S. § 991.2116. These statutes apply to emergency services, whether provided by in-network or out-of-network providers. *See id*. Thus, the General Assembly has spoken with respect to the reimbursement of emergency services and has not delegated authority to regulate further. In spite of these legislative choices, General Shapiro seeks to exercise power he does not have to establish a cap limiting UPMC's charges for out-of-network emergency services to its average in-network rates. Petition ¶ 75.k.

Because General Shapiro's proposed modifications contradict the settled regulatory delegations of the General Assembly, he lacks authority to impose those modifications.

V. Counts II-IV Were Improperly Commenced and, In Any Event, the Attorney General Fails to State a Claim for Violation of the Charities Law, the Nonprofit Corporation Law, or the Unfair Trade Practices and Consumer Protection Law.

Finally, General Shapiro has not stated a claim in Counts II, III, or IV for violation of the Charities Law, NCL, or UTPCPL.

A. Counts II-IV Are Procedurally Improper.

As an initial matter, General Shapiro's Petition is the wrong mechanism to bring a new action alleging statutory claims against UPMC under Counts II-IV.[18] General Shapiro is not immune from the procedural requirements necessary to institute legal claims for relief. Under the Pennsylvania Rules of Civil Procedure, "[a]n action may be commenced by filing with the prothonotary (1) a praecipe for a writ of summons, or (2) a complaint." Pa. R.C.P. 1007. *See Commonwealth ex rel. Creamer v. Rozman*, 309 A.2d 197, 199 (Pa. Commw. Ct. 1973) ("Rozmans correctly contend that an action under the [UTPCPL] Act may not be commenced by a consent petition providing for a permanent injunction."); *In re Correction of Official Records with Civil Action*, 404 A.2d 741, 742 (Pa. Commw. Ct. 1979) ("Our practice generally does not provide for the commencement of an action by petition and rule.").

Here, General Shapiro has filed neither a praecipe nor a complaint. Instead, he attempts to bring entirely new legal claims through a "Petition to Modify Consent Decrees." He cannot, under the guise of such a "modification" petition, effectively amend the initial petition that led to the Consent Decree, bypass discovery, motions practice, and all other pretrial procedures, and fast-forward straight to a judicial determination that UPMC violated the Charities Act, NCL, and UTPCPL. If General Shapiro believed that UPMC violated the Consent Decree, then he should have availed himself of the enforcement mechanism prescribed in Section IV.C.4 of the

[18] Through these claims, General Shapiro asks the Court to, among other things, force UPMC to substantiate the reasonableness of its executives' compensation, enjoin UPMC from conducting any further charitable solicitations, provide an accounting of charitable contributions it received for over a decade, and pay an undefined amount in penalties, reimbursement and restitution, as well as enjoining UPMC from denying access and treatment to Highmark subscribers. Petition at 50, 57-59, 67-69.

Decree.[19] But he cannot smuggle entirely new claims through a petition to "modify" a consent decree.

B. As A Matter Of Law, UPMC Did Not Violate Either the Charities Law or the Nonprofit Corporation Law.

General Shapiro's misuse of the Charities Law and the NCL fails as a matter of law. Put simply, both claims rest on a single false premise — namely, that UPMC commits to providing high-quality accessible healthcare, but UPMC has decided "to deny access" to some people by not providing care to *everyone* at in-network rates. *See* Petition ¶¶ 94, 96, 103-107.

This simplistic contention fundamentally misstates UPMC's charitable mission statement and the meaning of "access" to healthcare. Importantly, UPMC's charitable mission nowhere says that it is to provide high-quality accessible healthcare *to everyone at in-network rates*. *See* Exhibit A to Petition. That is a straw-man invented by General Shapiro.[20] Rather, the mission is, *inter alia*, to develop human and physical resources and organizations appropriate to support the advancement of patient care through clinical and technological innovation, research, and education and to develop a high-quality, cost-effective and accessible healthcare system. Specifically:

> The Corporation is incorporated under the Nonprofit Corporation Law of the Commonwealth of the Pennsylvania for the following purpose or purposes: **to engage in the development of human and physical resources and organizations appropriate to support the**

[19] The Consent Decree designated the procedure to pursue claims that arose before June 30, 2019. Specifically, it empowered the Commonwealth to "seek enforcement of the Consent Decree in the Commonwealth Court" for violations of the terms of the Decree, after notice and an opportunity to cure. Consent Decree § IV.C.4. Enforcement actions were also the designated method to resolve claims that arise from complaints by "[a]ny person who believes they have been aggrieved by violation of [the] Consent Decree." *Id*.

[20] Indeed, General Shapiro inaccurately quotes UPMC's operative articles and statement of charitable mission, which is, *inter alia*, to develop human and physical resources and organizations appropriate to support the advancement of patient care through clinical and technological innovation, research, and education, and to develop a high-quality, cost-effective and accessible healthcare system, not to provide healthcare to everyone at in-network rates. *See* Exhibit A to Petition.

> **advancement of patient care through clinical and technological innovation, research and education, such activities occurring in the regional, national and international medical communities**. The Corporation is organized and will be operated exclusively for charitable, educational and scientific purposes within the meaning of Section 501(c) (3) of the Internal Revenue Code of 1986, as amended (the "Code") by operating for the benefit of, to perform the functions of and to carry out the purposes of the University of Pittsburgh of the Commonwealth System of Higher Education ("University of Pittsburgh"), UPMC Presbyterian Shadyside, and other hospitals, health care organizations and health care systems which are 1) described in Sections 501(c) (3) and 509(a)(1), (2) or (3), 2) are affiliated with the Corporation, University of Pittsburgh and UPMC Presbyterian Shadyside in **developing a high quality, cost effective and accessible health care system in advancing medical education and research**, and 3) which will have the Corporation serving as their sole member or shareholder. Further, the Corporation provides governance and supervision to a system which consists of a number of subsidiary corporations, including, among others, both tertiary and community hospitals. The Corporation shall guide, direct, develop and support such activities as may be related to the aforedescribed purposes, as well as to the construction, purchase, ownership, maintenance, operation and leasing of one or more hospitals and related service facilities. Solely for the above purposes, and without otherwise limiting its power, the Corporation is empowered to exercise all rights and powers conferred by the laws of the Commonwealth of Pennsylvania upon not-for-profit corporations. The Corporation does not contemplate pecuniary gain for profit, incidental or otherwise.

Exhibit A to Petition (emphasis added).

There is no dispute that UPMC is doing just that. Indeed, General Shapiro affirmatively alleges that "[t]he public's support [of UPMC] has not gone unrewarded in that UPMC has grown into one of Pennsylvania's largest health care providers and health care insurers." Petition ¶ 10.[21]

[21] It is unpersuasive, on its face, to claim that UPMC's operations are out of line with its charitable mission or in the public interest. UPMC is the largest non-governmental employer in the Commonwealth, employing over 84,000 people in Pennsylvania. It provides more than $900 million dollars a year in benefits through its communities, including free and reduced-price medical care. It operates a world-renowned medical research center that is considered one of the best research hospitals in the country.

Nor does "accessible" healthcare or "access" to healthcare mean "access to UPMC *at in-network rates*." In *Highmark, Inc. v. UPMC Health Plan, Inc.*, for example, a federal court found that "access" to a healthcare provider means exactly that — the ability to access care at the provider, without regard to whether the access was at in-network or out-of-network rates, *i.e.*, the cost to the subscriber. *See* 276 F.3d 160, 172 (3d. Cir. 2001) (discussing the district court's ruling as to the meaning of "access" and declining to decide that issue on appeal). UPMC does provide high-quality accessible healthcare; there is no dispute that it does, and General Shapiro in fact acknowledges that UPMC provides access to out-of-network patients. It just requires that they pay in advance for the services, which it is permitted to do. *See* 42 U.S.C. § 1395(a) (Medicare); 42 U.S.C. § 1396a(a)(23) (Medicaid) (entitling, through federal legislation that occupies the field, recipients of Medicare and Medicaid to obtain health services from a provider only "if such institution, agency or person undertakes to provide him such services").[22]

That UPMC does not provide healthcare to everyone at in-network rates is not, as a matter of law, contrary to its charitable purpose or in violation of the Charities Act or the NCL.

C. The Petition Fails to State a Claim Under the UTPCPL.

Likewise, General Shapiro cannot impose his new healthcare model through the UTPCPL. He alleges that UPMC has engaged in unfair and deceptive acts or practices in violation of the UTPCPL based upon unsupported allegations relating to UPMC's unwillingness to provide services to certain patients and its unwillingness to contract with Highmark.[23]

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[22] The Attorney General has known for years that UPMC has required prepayment from patients seeking out-of-network care under the Consent Decree. The Attorney General has never contended that UPMC's request for prepayment violated the Consent Decree. Nor is it clear that General Shapiro even contends that today. Regardless, and as detailed above, General Shapiro is now precluded from asserting any claim for modifying the Consent Decree based on that assertion. *See supra* at 15-16.

[23] Those claims are legally barred, in any event, as discussed *supra* at 13-18.

The UTPCPL, however, only regulates the conduct of sellers in consumer transactions (*i.e.*, transactions in which a seller is selling goods or services to a consumer buyer). It proscribes "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce as defined by [the UTPCPL]." 73 P.S. § 201-3. To be unlawful, an act or practice must be done "in the conduct of any trade or commerce," which the law enumerates as four types of commercial activities: "***the advertising, offering for sale, sale or distribution*** of any services and any property, tangible or intangible, real, personal or mixed and any other article, commodity, or thing of value wherever situate, and includes any trade or commerce directly or indirectly affecting the people of this Commonwealth." *Id.* § 201-2(3) (emphasis added).

None of the conduct alleged in support of General Shapiro's UTPCPL claim falls within these four commercial activities. UPMC's negotiating (or refusing to negotiate) with a prospective third-party payor does not involve the "advertising, offering for sale, sale or distribution" of any covered product or service. *See* Petition ¶ 118-19, 121; *see, e.g.*, *Anderson v. Nationwide Ins. Enter.*, 187 F. Supp. 2d 447, 461 (W.D. Pa. 2002) (holding that insurers' alleged refusal to honor contractual obligations did not qualify as "advertising, offering for sale, sale or distribution of any services and any property" under the UTPCPL). Similarly, UPMC's notifications concerning the termination of its Highmark commercial and Medicare Advantage contracts are not covered by the statute. *See* Petition ¶ 117-18, 120.

Moreover, the UTPCPL only regulates the conduct of sellers vis-à-vis consumers; it does not apply to private contracts between commercial entities under which healthcare providers agree to provide services to members/beneficiaries of healthcare plans in exchange for the health plans' reimbursement for those services. Commercial contracting between healthcare providers

and payors is not within the scope of "trade and commerce" under the UTPCPL.[24] Therefore, because General Shapiro does not have authority under the UTPCPL to regulate more than the conduct of sellers in consumer transactions, Count IV provides no basis whatsoever for the relief it seeks.

CONCLUSION

For the foregoing reasons, Respondent UPMC respectfully requests that this Court reject General Shapiro's Petition to Modify Consent Decrees; deny the relief sought in the Petition; and dismiss the claims therein as a matter of law.

Dated: February 21, 2019

Respectfully submitted,

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[24] Even if the UTPCPL did cover the conduct alleged in the Petition — and it does not — General Shapiro has not adequately pled any violation of the statute. As set forth *supra* 13-16, each of the allegedly "unfair" and "deceptive" acts alleged in Count IV either preceded the Consent Decree (and, accordingly, were settled and released), *see, e.g.*, Petition ¶ 118, or should have been addressed in an enforcement actions, *see, e.g.*, Petition ¶ 117, 119-20.

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of February, 2019, I submitted the foregoing Memorandum in Support of Respondent UPMC's Motion to Dismiss the Petition to Modify Consent Decrees, or Preliminary Objections in the Nature of a Demurrer for electronic service via the Court's electronic filing system on Petitioner, The Office of Attorney General, on the following:

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