UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UPMC, Plaintiff, v. HIGHMARK INC. and WEST PENN ALLEGHENY HEALTH SYSTEM INC., Defendants.	Civil Action No. 2:12-cv-00692-JFC **Electronically Filed**

DEFENDANT HIGHMARK INC.'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS ALL CLAIMS IN UPMC'S COMPLAINT

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UPMC—a self-described monopolist—is the dominant healthcare provider in Western Pennsylvania and wields nearly unchecked market power. UPMC has sought for decades to destroy its only potentially viable competitor network, West Penn Allegheny Health System. UPMC's complaint in this matter is merely the latest step in its seemingly never-ending campaign to punish Highmark for having the temerity to try to help preserve West Penn (which employs more than 13,000 people) in an effort to create a viable alternative healthcare provider network to UPMC, to give Western Pennsylvania consumers a choice of providers and to end UPMC's unilateral control over healthcare prices in the region.

In its complaint, UPMC alleges that Highmark, through a supposed conspiracy with West Penn, a separate purported conspiracy with the Blue Cross and Blue Shield Association and other Blue Cross Blue Shield member plans and various other alleged misconduct, has foreclosed competition from other healthcare insurers and has harmed competition between healthcare providers in Western Pennsylvania. UPMC claims to have been injured by this conduct because it supposedly received lower reimbursement rates from Highmark than it would have in a competitive insurance market. UPMC therefore contends that consumer healthcare costs in Western Pennsylvania should be ***higher*** than they already are. UPMC's wild conspiracy theories have no basis in fact.

As the dominant healthcare provider in Western Pennsylvania, UPMC controls the price of healthcare in this region. It is UPMC, not Highmark or West Penn, that controls which other healthcare insurers can do business in Western Pennsylvania, and how successful they will be. For most of the last ten years, UPMC has kept for-profit insurers, such as UnitedHealthcare, Cigna, Aetna and HealthAmerica, from being able to compete meaningfully in Western Pennsylvania by charging them supracompetitive rates and/or denying them full in-network

access to all UPMC doctors and hospitals. UPMC openly admits to its past price gouging of the for-profit insurers. It was not until mid-2011, after deciding to terminate its relationship with Highmark in retaliation for Highmark helping West Penn, that UPMC entered into contracts with the for-profit insurers that finally gave them full in-network access to all UPMC doctors and hospitals. Incredibly, UPMC essentially admits all of this in its complaint. If UPMC is unhappy with the current state of the healthcare insurance and provider markets in Western Pennsylvania today, it has only itself to blame.

UPMC could never prove the allegations in its complaint, but it should never be given a chance to because, even accepting all of the allegations as true, each of UPMC's claims fails on its face. The Court should dismiss UPMC's complaint in its entirety.

ARGUMENT

UPMC is required to plead factual allegations sufficient "to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). UPMC does not come close to meeting this standard.

I. THE COURT SHOULD DISMISS COUNTS V-VII BECAUSE UPMC HAS FAILED TO MEET *TWOMBLY'S* PLEADING REQUIREMENTS

A. UPMC Has Failed To Plausibly Allege A Conspiracy Between Highmark And West Penn

In Counts V-VII, UPMC alleges that Highmark and West Penn conspired to violate the antitrust laws. UPMC's threshold burden for all three counts is the same; it must plausibly allege an unlawful agreement between Highmark and West Penn. *Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc.*, 602 F.3d 237, 254 (3d Cir. 2010). Because it has not, all three claims fail.

For conspiracies under both Section 1 and Section 2 of the Sherman Act, "the crucial question is whether the challenged anticompetitive conduct stems from independent decision or from an agreement . . . ." *Twombly*, 550 U.S. at 553; *TruePosition, Inc. v. LM Ericsson Tel. Co.*, 844 F. Supp. 2d 571, 598 (E.D. Pa. 2012) (dismissing Section 1 and 2 conspiracy claims for failure to plausibly allege agreement). UPMC must plausibly allege that Highmark and West Penn engaged in "concerted action," *i.e.,* that they had "a conscious commitment to a common scheme designed to achieve an unlawful objective." *TruePosition*, 844 F. Supp. 2d at 593 (quotations and citation omitted).

A complaint alleging an antitrust conspiracy must do more than recite conclusory labels such as "conspired" or "agreed." *Burtch v. Milberg Factors, Inc.*, 662 F.3d 212, 224-25 (3d Cir. 2011) (allegations that defendants had "reached illegal agreements" about pricing terms were insufficient to state a conspiracy); *Superior Offshore Int'l, Inc. v. Bristow Group Inc.*, 738 F. Supp. 2d 505, 512 (D. Del. 2010) (pleading that defendants "conspired" or "agreed" is not sufficient). The complaint must allege "enough factual matter (taken as true) to suggest that an agreement was made." *Twombly*, 550 U.S. at 556. Where, as here, the plaintiffs do not allege any direct evidence of a conspiracy, and seek to rely on purported circumstantial evidence, the complaint must allege facts that tend to exclude the possibility that the defendants acted independently. *AT&T Corp. v. JMC Telecom, LLC*, 470 F.3d 525, 530 (3d Cir. 2006). A court cannot plausibly infer the existence of an unlawful agreement from allegations that are as consistent with "rational and competitive business strategy" or that have "obvious alternative explanation[s]." *Twombly*, 550 U.S. at 554, 567.

The only purportedly unlawful Highmark/West Penn agreement that UPMC alleges is as follows: "Highmark has agreed to favor [West Penn] over UPMC in terms of compensation and

other financial treatment, and in return [West Penn] has agreed not to contract with any outside insurer on more favorable terms than Highmark."[1] Compl. ¶¶ 189, 206. UPMC does not allege any direct evidence of this supposed agreement, nor does it allege who supposedly made this agreement on behalf of either party, nor when nor where it was purportedly made. UPMC's sole allegation of Highmark's supposed agreement to favor West Penn is the fact that Highmark provided financial support to West Penn. *Id.* ¶ 76. And UPMC's sole allegation of West Penn supporting the claimed agreement to favor Highmark is UPMC's (admittedly false) allegation that West Penn has not "entered into any contract with an outside insurer with more favorable rates than it was receiving from Highmark."[2] *Id.* ¶ 89. UPMC has not even come close to meeting its *Twombly* burden.

There are countless "obvious alternative explanations" why West Penn might unilaterally have decided to give Highmark lower reimbursement rates than other insurers. For example, it is a "rational and competitive business strategy" for a provider to unilaterally structure its rates

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[1] UPMC does not allege how this supposed agreement relates in any way to (much less supports) its claim in Count VI that Highmark and West Penn have conspired to restrain competition in the provision of inpatient care. Compl. ¶ 196. (Nor has UPMC alleged any plausible reason why Highmark would possibly want to restrain competition in the provider market.) UPMC's allegations about Highmark's supposed threats to insurers (*e.g.*, Compl. ¶¶ 116-119) do not implicate West Penn in any way and do not even come close to establishing the necessary agreement. *AT&T*, 470 F.3d at 530-31 (dismissing conspiracy claim because distributor failed to allege that supplier had acted "in concert" with other distributors).

[2] The linchpin of UPMC's conspiracy theory is its allegation that West Penn supposedly did not give any other insurer more favorable rates than Highmark. UPMC's original counterclaim in the related litigation, *West Penn v. UPMC*, No. 2:09-cv-00480-JFC (W.D. Pa.), contained identical allegations. *E.g.*, Cntcl. ¶ 60 (Dckt. No. 219). Shortly after filing that original counterclaim, UPMC amended it, apparently realizing that its original allegation about West Penn's contracting practices was false and that West Penn had in fact granted more favorable rates to other insurers. *E.g.*, Amd. Cntcl. ¶¶ 60, 118 (Dckt. No. 227) (differentiating between national and regional insurers). Despite requests from Highmark's attorneys, UPMC has offered no explanation why it amended this apparently false allegation in the *West Penn* case, but continues to assert it here (much less how it can continue to do so consistent with its obligations under Rule 11).

based on the volume of patients that an insurer can provide, granting lower rates to those insurers who can provide more patient volume. UPMC alleges that Highmark is the largest insurer in Western Pennsylvania and therefore, by definition, could provide the largest patient volume to West Penn. Compl. ¶ 29. UPMC itself claims that this is precisely the reason why, in 2002, it agreed to lower reimbursement rates from Highmark than from other insurers. *Id.* ¶ 86-87. Far from plausible, UPMC's conspiracy theory borders on the absurd, given that UPMC admits that West Penn sued Highmark in the midst of their supposed conspiracy. *Id.* ¶ 89. UPMC has never claimed that West Penn's lawsuit was a sham. UPMC does not allege any facts from which the Court could plausibly conclude that West Penn set its reimbursement rates to Highmark as part of an unlawful conspiracy, as opposed to for its own independent business reasons. *See supra* n.2.

Similarly, there are countless "obvious alternative explanations" why Highmark would have unilaterally decided that saving West Penn from failing was in Highmark's own best interest. UPMC has long been the dominant health system in Western Pennsylvania. West Penn is the only other healthcare provider network in the region with even the potential to become a viable competitor to UPMC. However, West Penn has struggled financially for years. *E.g.*, Compl. ¶¶ 70, 71, 103. It has never been in Highmark's (or healthcare consumers') interest to let West Penn fail and therefore to allow UPMC to further cement its domination of Western Pennsylvania and to unilaterally dictate the cost of healthcare in this region.

Because all of UPMC's allegations are at least equally consistent with the explanation that Highmark and West Penn were acting in their own independent self-interests as they are with a conspiracy, UPMC has not met its pleading burden. Courts routinely dismiss conspiracy claims for this type of deficient pleading. For example, in *Bristow Group*, the court concluded

that because all of the supposed bad acts that the plaintiffs had alleged were equally consistent with independent, self-interested action, the complaint failed to state an antitrust conspiracy claim. 738 F. Supp. 2d at 512-17; *see also TruePosition*, 844 F. Supp. 2d at 598 (dismissing Section 1 claims because conduct alleged was equally consistent with "lawful, independent, and unilateral conduct").

B. UPMC Has Failed To Plausibly Allege That The Purported Conspiracy Foreclosed Competition In Any Market

Even if UPMC had plausibly alleged the necessary agreement, Counts V-VII would still fail because UPMC has not plausibly alleged that the purported conspiracy had an actual adverse effect on competition in any market.[3] Because the alleged Highmark/West Penn agreement is "vertical", *i.e.*, between firms at different levels of distribution, merely alleging an agreement is not enough to state a conspiracy claim under either Section 1 or Section 2. Vertical agreements are analyzed under the "rule of reason," which means that UPMC must also plausibly allege that the purported agreement harmed competition as a whole in the relevant markets.

For example, in *Elecs. Commc'ns Corp. v. Toshiba Am. Consumer Prods., Inc.*, 129 F.3d 240, 243 (2d Cir. 1997), the plaintiff challenged an agreement between a cell phone distributor with a significant market share and a manufacturer and alleged that the distributor applied pressure to the manufacturer not to sell the phones outside of the distribution agreement. The Second Circuit dismissed the Section 1 claims, explaining that the plaintiff's allegations that it was excluded from competing in the market as another distributor as a result of the agreement failed to allege harm to competition in the market as a whole. *Id.* at 243-46. Plaintiff's Section 2

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[3] Highmark assumes solely for purposes of this motion that the product and geographic markets that UPMC alleges are the relevant ones in which to assess impact because UPMC's claims fail regardless. Compl. ¶¶ 21-28. Highmark reserves its right to challenge these market definitions at a later appropriate time, if necessary.

conspiracy claim also failed, because the alleged agreement could not "harm competition, and therefore [could not] serve to further an alleged monopolization scheme." *Id.* at 246; *see also Boyd v. Tempay*, No. 07-377, 2008 WL 5156307, at *4 (D. Del. Dec. 4, 2008) (dismissing Section 2 claims because plaintiff had failed to allege defendant's conduct harmed "the market as a whole"); *Crestron Elecs. Inc. v. Cyber Sound & Sec. Inc.*, No. 11-3492, 2012 WL 426282, at *6-7 (D.N.J. Feb. 9, 2012) (dismissing Section 1 claim where plaintiffs failed to allege that purported agreement had substantial anticompetitive effects in the relevant market).

In connection with the alleged insurance markets, UPMC has two theories on harm to competition. First, UPMC (admittedly falsely) claims that West Penn's refusal to contract with other insurers on rates more favorable than Highmark enjoys kept those insurers from being able to compete in the insurance markets in Western Pennsylvania. Compl. ¶¶ 4, 31, 71, 72, 80; *see supra* n.2. Second, UPMC claims that because Highmark provided more favorable reimbursement rates to West Penn than UPMC, UPMC lacked the financial resources to make its own captive health plan, the UPMC Health Plan, viable. Compl. ¶¶ 32, 71, 72. But UPMC has not alleged a single fact that would make either theory plausible, and UPMC's own allegations directly contradict both theories.

UPMC alleges that West Penn is an "inefficient," "mismanaged" and "barely financially afloat" institution, and that it has never been of any competitive significance in Western Pennsylvania. Compl. ¶ 70 ("[s]ince [West Penn's] formation it has never been a competitively viable provider"); ¶ 71 (West Penn "has never served as a meaningful competitor on the provider side due to mismanagement and inefficiency"); ¶ 103 (West Penn has "never provided effective competition in the provider space"). It is therefore not plausible that *any* difference in the rates that Highmark and other insurers receive from West Penn foreclosed those insurers from

competing in Western Pennsylvania. On the other hand, UPMC calls itself "a world-class medical institution," (*id.*¶ 151) and openly acknowledges that it price gouged insurers other than Highmark for years in order to increase its own profits. *Id.* ¶ 87. In order to conclude that UPMC's foreclosure theory is plausible, the Court would have to conclude that insurers could not penetrate the Western Pennsylvania market because of the rates they were getting from the competitively *insignificant* West Penn, as opposed to the supra-competitive rates that "world-class medical institution" UPMC was charging them. UPMC has alleged no facts on which the Court could plausibly base that conclusion. *Iqbal*, 556 U.S. at 679 (in assessing plausibility, court must "draw on its judicial experience and common sense"). And UPMC cannot plausibly blame the lower reimbursement rates that it supposedly received from Highmark (vis a vis West Penn) for stunting the growth of the UPMC Health Plan, when UPMC readily admits that it obtained ample revenue from other insurers, and the UPMC entity as a whole has always been highly profitable. Compl. ¶¶ 87. Further, UPMC sets the rates that it charges the UPMC Health Plan and therefore controls how profitable the health plan will be. In any event, merely alleging harm to the UPMC Health Plan is not sufficient to state an antitrust claim. *Boyd*, 2008 WL 5156307, at *4 (allegations that "Defendant's conduct may have harmed Plaintiffs, but not the market as a whole" insufficient to survive motion to dismiss).

With respect to the alleged provider market (Compl. ¶ 196), UPMC does not even proffer a foreclosure theory. UPMC does not allege that it (or any other provider) was in any way precluded from competing with West Penn based on the supposed higher reimbursement rates that West Penn received from Highmark or any of the other purported misconduct. *E.g.*, Compl. ¶ 198. To the contrary, UPMC alleges that West Penn has never posed a competitive threat as a

provider. Compl. ¶¶ 70, 71, 103; *Creston*, 2012 WL 426282, at *6 (plaintiff failed to plead that defendant's actions foreclosed competitors).

II. THE COURT SHOULD DISMISS COUNTS I-IV BECAUSE UPMC FAILED TO PLAUSIBLY ALLEGE THAT HIGHMARK HAS MARKET POWER

In order to state its claims in Counts I-IV for monopolization and attempted monopolization, UPMC must plausibly allege, among other things, that Highmark has market power in the health insurance markets that UPMC claims (and Highmark accepts solely for purposes of this motion) are the relevant markets.[4] Compl. ¶¶ 21-24, 26-27. Market power is "the power to control prices or exclude competition." *United States v. E. I. Du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956).

UPMC first alleges that Highmark has market power because Highmark has 50-65% share in the purportedly relevant markets. Compl. ¶ 29. But Highmark's market share, standing alone, is not enough to plausibly allege market power. *Crossroads Cogeneration Corp. v. Orange & Rockland Utils.*, 159 F.3d 129, 141-42 (3d Cir. 1998) (dismissing Section 2 claims because "[a]lleging market share alone is not sufficient to state a claim under the Sherman Act"). UPMC must also plausibly plead other relevant market characteristics, including barriers to entry or expansion. *Id.*; *see also MRO Commc'ns., Inc. v. AT&T Co.*, 205 F.3d 1351, 1999 WL 1178964, at *2 (9th Cir. Dec. 13, 1999) ("Neither monopoly power nor a dangerous probability of achieving monopoly power can exist absent barriers to new entry or expansion."). Where, as

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[4] To state a clam for monopolization, UPMC must allege "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident." *Crossroads*, 159 F.3d at 141 (quotation and citation omitted). To state a claim for attempted monopolization, UPMC must allege "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Id.* (quotation and citation omitted).

here, the complaint does not plausibly allege that the defendant has the power to exclude competitors, it fails to allege market power and fails to state a Section 2 claim.

For example, in *St. Clair v. Citizens Financial Group*, 340 Fed. Appx. 62, 65-66 (3d Cir. 2009), the Third Circuit affirmed dismissal of Section 2 claims for failure to plead market power where the plaintiff had alleged that the defendant "effectively barricaded entry into the market," but had not alleged facts sufficient to make this allegation plausible. Similarly, in *Dicar, Inc. v. Stafford Corrugated Products*, No. 05-5426, 2010 WL 988548, at *11-13 (D.N.J. Mar. 12, 2010), the court dismissed Section 2 claims, even though the plaintiffs alleged that the defendant controlled 70% of the relevant market because the plaintiffs had not sufficiently alleged that the defendant had prevented competitors from entering. The same is result is warranted here.

UPMC conclusorily asserts that "[b]arriers to entry into the relevant insurance and purchase markets are high." Compl. ¶ 33. This assertion is supported only by the allegation that "[n]ational insurers have not been able to secure a significant foothold . . . to date" and that, as the population of Western Pennsylvania has declined "the significant investment required to establish a foothold in the market is becoming less attractive over time." *Id.* But the complaint allegations themselves contradict the idea that the national insurers' allegedly small presence in the market is evidence of a barrier to entry that Highmark has not faced. UPMC admits that, for almost a decade, it would not allow the national insurers to have access to any of UPMC's "world-class medical institution[s]," unless those insurers paid rates far in excess of Highmark's rates, and even then UPMC would grant them only limited access. Compl. ¶¶ 87, 151. Thus, if those insurers did not expand significantly before now, it is because UPMC prevented them from having sufficient access to the dominant health provider in the region at reasonable rates. UPMC

cannot claim to be injured by a problem of its own making and solely within its own control. *See* Part IV, *infra.*

Moreover, UPMC's complaint allegations show that whatever supposed expansion barriers for the national insurers may have existed as a result of UPMC's price gouging have now been overcome. UPMC alleges that it recently signed contracts with all four national insurers at "vastly lower" rates. Compl. ¶ 94. As a matter of law, evidence of actual entry negates any inference of an effective barrier to rivals. *Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90, 99 (2d Cir. 1998) (successful entry refutes any inference of market power that may be drawn from 70% market share); *cf. Ball Mem'l Hosp., Inc. v. Mutual Hosp., Inc.*, 784 F.2d 1325, 1335 (7th Cir. 1986) (describing the lack of entry barriers in the health insurance market; "insurers need only a license and capital").

III. THE COURT SHOULD DISMISS COUNT VIII BECAUSE UPMC HAS NOT PLAUSIBLY ALLEGED A SO-CALLED "BLUES CONSPIRACY"

In Count VIII, UPMC alleges that Highmark is a member of a horizontal conspiracy among competitors (other Blue Cross Blue Shield plans (the "Blue plans")) to eliminate competition among themselves and lower reimbursement rates to UPMC and other providers in Western Pennsylvania. Compl. ¶¶ 37-58. The alleged vehicle for this supposed conspiracy is a trade association, the Blue Cross and Blue Shield Association ("BCBSA"), a not-for-profit corporation that owns and licenses the Blue Cross and Blue Shield trademarks and whose members are Highmark and the other Blue plans. *Id.* ¶¶ 42, 46.

UPMC fails to plausibly allege that Highmark was a party to a conspiracy with the other Blue plans. UPMC never alleges that Highmark entered into an agreement with any other Blue plan directly. Rather, UPMC's complaint acknowledges that Highmark and the other Blue plans are related to each other only through BCBSA, their common licensor. Compl. ¶¶ 37, 42, 47.

UPMC attempts to assert that the BCBSA is a sham, alleging that it is "a creature of the member plans themselves" because it was "created by and for its constituent members." Compl. ¶ 37. But these allegations are meaningless. Just because a trade association involves collective action by competitors does not make it a "walking conspiracy." *Consol. Metal Prods., Inc. v. Am. Petroleum Inst.*, 846 F.2d 284, 293-94 (5th Cir. 1988). UPMC has made no allegations justifying the disregard of the separate corporate form of the BCBSA, such as that BCBSA is not operated as a distinct business entity, commingles its assets or funds with its members, or is used as a mere shell for the operations of its members. *Cf. Kaplan v. First Options of Chi., Inc.*, 19 F.3d 1503, 1521 (3d Cir. 1994). Thus, UPMC must allege collective action by the Blue plans beyond the creation of the trade association itself.

As the purported evidence of concerted action among the Blue plans, UPMC alleges only three things: (1) the Blue plans entered into similar licensing agreements with BCBSA, Compl. ¶ 46; (2) "upon information and belief . . . each member plan has agreed not to compete under the Blue Cross or Blue Shield trademarks except in its designated territory," *id.* ¶ 47; and (3) "on information and belief, there has been an express or implied understanding among the BCBSA plans to avoid or at least reduce competition against one another even on non-Blue products," *id.* ¶ 55. These allegations are not even remotely sufficient to satisfy *Twombly*. *See* Part I.A *supra.*

The Third Circuit has repeatedly made clear that the fact that the Blue plans enter into similar licensing agreements with BCBSA is not sufficient to plausibly state a conspiracy among the plans. The Third Circuit recently reaffirmed the fundamental principle that allegations of similar agreements among competitors with a single entity "manifestly do not describe . . . a horizontal agreement in restraint of trade." *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 331 (3d Cir. 2010) (affirming dismissal of complaint). In that case, plaintiffs alleged that

insurance brokers colluded with insurers to steer clients to particular insurers in exchange for commission payments. *Id.* at 311. In an attempt to establish a conspiracy, plaintiffs alleged that the broker entered into similar contingent commission agreements with each of its insurer-partners. *Id.* at 327. The Third Circuit rejected this theory, holding that "one cannot plausibly infer a horizontal agreement among a broker's insurer-partners from the mere fact that each insurer entered into a similar contingent commission agreement with the broker." *Id.*

Similarly, in *Dentsply*, 602 F.3d at 254-55, the Third Circuit affirmed dismissal of a complaint that alleged not only that dealers of artificial teeth entered into the same agreement with the manufacturer, but also that the manufacturer told each dealer that every other dealer had or would conform to the same agreement. The court found that these allegations were insufficient to plausibly allege a conspiracy among the dealers because "they do no more than intimate 'merely parallel conduct that could just as well be independent action.'" *Id.* at 256 (citation omitted). UPMC's complaint suffers from the same flaws as those in *Insurance Brokerage* and *Dentsply*.

UPMC's two remaining allegations, stated only "upon information and belief," do not satisfy *Twombly* because UPMC has not pled any facts to make these conclusory allegations plausible. *Harman v. Unisys Corp.*, 356 Fed. Appx. 638, 640-41 (4th Cir. 2009) (information and belief allegations insufficient without supporting factual allegations rendering belief plausible); *Walters v. McMahen*, 795 F. Supp. 2d 350, 356 (D. Md. 2011) (same).

Moreover, UPMC has not pled anything that tends to exclude the possibility that, wholly apart from the license agreements, each Blue plan has an independent, rational business reason for operating only in certain geographic areas. As the Supreme Court recognized in *Twombly*, "'[f]irms do not expand without limit and none of them enters every market that an outside

observer might regard as profitable, or even a small portion of such markets.'" *Twombly*, 550 U.S. at 569 (citation omitted). The Court noted that incumbent local telephone service providers could "see their best interests in keeping to their old turf" and that plaintiffs did not "allege that competition [in other areas] was potentially any more lucrative than other opportunities being pursued by the [defendants] during the same period." *Id.* at 568. The lack of expansion was not enough to make a conspiracy plausible in *Twombly*, *id.* at 569, and it is not here either.

IV. UPMC FAILED TO ALLEGE THAT IT HAS SUFFERED ANTITRUST INJURY

All of UPMC's claims separately fail because UPMC has not plausibly alleged that it has suffered "antitrust injury." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). Antitrust injury is "injury of the type the antitrust laws were intended to prevent and that flows from that which makes [the] defendants' acts unlawful." *Id.* The antitrust injury that UPMC alleges for each of its claims is the same: UPMC claims that it received lower reimbursement rates than it would have absent the purported antitrust misconduct. *See, e.g.*, Compl. ¶¶ 162, 169, 177, 185, 192. In the circumstances of this case, lower reimbursement rates do not constitute antitrust injury for at least two independent reasons.

First, in a case involving these same parties, the Third Circuit held that depressed reimbursement rates do not constitute antitrust injury unless they are the result of an unlawful conspiracy. *West Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, 103 (3d Cir. 2010) ("A firm that has substantial power on the buy side of the market . . . is generally free to bargain aggressively when negotiating the prices it will pay for goods and services."). Thus, where Highmark is "acting alone," UPMC has "little basis for challenging the reimbursement rates." *Id.* Because UPMC has not plausibly alleged a conspiracy between Highmark and West Penn or between Highmark and BCBSA or the other Blue Plans, it has failed to state cognizable antitrust injury for *any* of its claims.

Second, UPMC has not plausibly alleged that the reimbursement rates that it received resulted from the anticompetitive conduct that it alleges, as opposed to from UPMC's own independent and voluntary choices. *Dentsply*, 602 F.3d at 255 (plaintiff must show that its injury was caused by the alleged anticompetitive conduct). UPMC claims that, in 2002, it had no choice but to agree to Highmark's contract demands, and it is the reimbursement rates in these contracts that UPMC claims are artificially low. Compl. ¶¶ 87, 148. The fundamental problem with UPMC's antitrust injury theory is that UPMC readily admits that Highmark did not coerce UPMC to enter into the 2002 contracts. UPMC expressly alleges that it voluntarily entered into the 2002 contracts with Highmark, not because of anything that Highmark did, but because of "community pressure." Compl. ¶ 82. Highmark is not liable for choices that UPMC voluntarily made for its own reasons. Moreover, UPMC acknowledges that it had other viable options available to it in 2002 that it simply chose not to pursue. UPMC alleges that in 2011, when it came time to renegotiate its contracts with Highmark, UPMC refused Highmark's contract terms, terminated its relationship with Highmark and signed profitable agreements with the four national for-profit insurers. Compl. ¶¶ 94-95. UPMC alleges no reason (much less a plausible one) why it could not have made the exact same choice in 2002 that it made in 2011, *i.e.,* UPMC has not explained why it could not have rejected Highmark's purported demands in 2002 and signed more reasonably priced contracts with the other national insurers. Because UPMC has not plausibly alleged that any purportedly lower reimbursement rates that it received from Highmark were the result of the anticompetitive conduct that it alleges, as opposed to its own voluntary choices, UPMC has failed to allege antitrust injury.

CONCLUSION

For the reasons above, the Court should dismiss UPMC's complaint in its entirety.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that, on August 24, 2012, a true and correct copy of the forgoing Defendant Highmark Inc.'s Memorandum of Law in Support of Motion to Dismiss All Claims in UPMC's Complaint was served on all counsel of record by the Court's electronic filing system (CM/ECF).

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