UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 09-4468

WEST PENN ALLEGHENY HEALTH SYSTEM, INC.,

Plaintiff-Appellant,

v.

UPMC AND HIGHMARK INC.,

Defendants-Appellees.

ON APPEAL FROM A JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA
NO. 09-CV-0480 (HONORABLE ARTHUR J. SCHWAB)

BRIEF OF APPELLEE HIGHMARK INC.

DANIEL I. BOOKER
P. GAVIN EASTGATE
DONNA M. DOBLICK
JEFFREY J. BRESCH
REED SMITH LLP
225 Fifth Avenue
Pittsburgh, PA 15222
Phone: (412) 288-3131
Facsimile: (412) 288-3063

Attorneys for Appellee Highmark Inc.

March 1, 2010

CORPORATE DISCLOSURE STATEMENT AND STATEMENT OF FINANCIAL INTEREST

Pursuant to Fed. R. App. P. 26.1 and L.A.R. 26.1, Highmark Inc. makes the following disclosure:

1) For non-governmental corporate parties please list all parent corporations:

None. Highmark Inc. is the parent corporation.

2) For non-governmental corporate parties please list all publicly held companies that own 10% or more of the party's stock:

None.

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests.

None.

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

Not applicable.

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1. Where a plaintiff in an antitrust suit alleges that it was injured, but its claimed injury does not reflect harm to competition or to consumers generally and where the plaintiff seeks higher prices as a remedy, should the complaint be dismissed for failure to state an antitrust injury?

2. Where a complaint contains contradictory and implausible allegations of fact regarding the existence of a claimed conspiracy in restraint of trade, should the complaint be dismissed?

3. Where a complaint alleges that defendants formed a conspiracy in restraint of trade seven years before the complaint was filed, and does not allege overt acts during the limitations period that imposed new and accumulating injury on plaintiff, should the complaint be dismissed as time-barred?

COUNTERSTATEMENT OF THE CASE

West Penn Allegheny Health System Inc. ("WPAHS") filed its original Complaint on April 21, 2009. JA1234 (docket #1). On June 11, 2009, UPMC filed a motion to dismiss the entire Complaint. JA1237 (docket #38). Highmark simultaneously filed a motion to dismiss the only counts directed against it, namely: Count I (alleging a conspiracy in restraint of trade in violation of 15 U.S.C. § 1) and Count II (alleging conspiracy to monopolize in violation of 15 U.S.C. § 2). *Id.* (docket #44). Both motions were fully briefed, and, on July 30, 2009, the district court heard extensive oral argument. JA0145-0196 (transcript of oral argument; docket #85). At the July 30 conference, the district court gave WPAHS an opportunity to amend its Complaint. JA0162-0165.

WPAHS filed its Amended Complaint on August 28, 2009. JA0081-0144 (docket #66). The Amended Complaint contained some new factual details, but largely elaborated upon or recharacterized the allegations that had appeared in the original Complaint. Accordingly, Highmark and UPMC each filed renewed motions to dismiss. JA1241 (docket #82 and #78, respectively). Those motions were fully briefed. JA1241-42 (docket ## 80, 83, 86, 92, 93, 96).

In a seventy-three page opinion dated October 29, 2009, the district court granted both motions and dismissed the Amended Complaint. JA0005-0080 (docket #97). The district court rejected Highmark's threshold argument: that

Counts I and II of the Amended Complaint were time-barred. JA0075. However, the district court concluded that Counts I and II should be dismissed because WPAHS failed to plead a cognizable antitrust injury. JA0042-51, JA0073-75. Further, after making a lengthy analysis of the factual allegations in the Amended Complaint and controlling law, the district court concluded that the Amended Complaint did not allege a conspiracy or unlawful agreement in restraint of trade. JA0005-0042, JA0052-0066.

This appeal followed.

COUNTERSTATEMENT OF THE FACTS

A. The Parties

West Penn Allegheny Health System, Inc. is a provider of health care services. WPAHS is comprised of two tertiary hospitals – Allegheny General Hospital ("AGH") and The Western Pennsylvania Hospital ("West Penn") – and four community hospitals.[1] JA0086 (Amended Complaint, ¶ 20). In 1998, the Allegheny Health, Education, and Research Foundation ("AHERF"), which was then the parent hospital system of AGH, went bankrupt. *Id.* Intensive efforts were made to preserve AGH as a viable source of healthcare services for the community. *Id.* (*id.*, ¶ 21). With significant financial support from Highmark in

[1] A "tertiary" hospital is generally one that provides specialized consultative care. Specialist cancer care, neurosurgery (brain surgery), and burn care are examples of tertiary care services.

the form of a $125 million loan, West Penn and Suburban General Hospital combined with AGH and other former AHERF hospitals to form WPAHS. JA0091-92 (*id.*, ¶¶ 42-43). Highmark's loan made it possible for WPAHS to rise "from the ashes" of the failed AHERF. Complaint ¶¶ 3, 48-49 (docket #1).

The University of Pittsburgh Medical Center ("UPMC") is a competitor of WPAHS in the provision of health care services. JA0125-26 (Am. Comp., ¶¶ 174-176). Beginning in the 1990s, UPMC executed a growth strategy by acquiring a number of area hospitals. JA0125 *(id.*, ¶ 174). UPMC is now comprised of twenty hospitals, including three tertiary hospitals that compete with the WPAHS tertiary hospitals: UPMC Presbyterian; UPMC Shadyside; and, since 2007, UPMC Mercy. JA0125 (*id.*, ¶ 174). With the exception of burn treatment, UPMC possesses a market share in excess of 50% in every tertiary and quaternary[2] care service line in the six-county Pittsburgh metropolitan region. JA0126 (*id.*, ¶ 175). WPAHS alleges that health insurers, such as Highmark, "cannot create a marketable, adequate network of participating providers for employers in Allegheny County without reasonable access to UPMC's facilities. . . ." JA0127 (*id.*, ¶ 183).

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[2] "Quaternary care" refers to advanced levels of medicine which are highly specialized and not widely used. Experimental medicine, service-oriented surgeries and other less common approaches to treatment and diagnostics comprise the bulk of quaternary care. The term is an extension of tertiary care, which is more common and less specific.

Highmark does not provide healthcare services and does not compete with either WPAHS or UPMC in the provision of healthcare services. JA0091-92 (Am. Comp., ¶ 42). Rather, Highmark is a purchaser of the healthcare services those entities provide. *Id.* Highmark offers a variety of indemnity products, managed care health insurance products, and other health care products and services to employers and individuals. Highmark separately negotiates with each hospital or hospital system the rates at which it will reimburse them for services they provide to Highmark subscribers. In exchange for being a participating provider in Highmark's networks, the hospital agrees to accept Highmark's reimbursement rates and not seek additional monies from the patient or the patient's employer. *See, e.g.*, JA0253 (Managed Care Hospital Agreement, Section C – Hospital Services). WPAHS acknowledges that higher reimbursement rates lead to higher health insurance premiums. JA0091-92 (Am. Comp. ¶ 42), JA0104 (*id.*, ¶ 91). JA0111 (*id.*, ¶¶ 116-17), JA0126 (*id.*, ¶¶ 175-177), JA0127 (id., ¶ 183), JA0128 (*id.*, ¶ 185).

UPMC Health Plan, a subsidiary of UPMC, competes with Highmark in the sale and marketing of health insurance products. JA0093 (Am. Comp., ¶¶ 47-48). None of the WPAHS hospitals have ever participated in the UPMC Health Plan provider network. *Id.*

B. The Allegations Of A Conspiracy In Restraint Of Trade

WPAHS contends that Highmark and UPMC agreed in the Summer of 2002 to "protect one another from competition." JA0081 (Amended Complaint, ¶ 2). Specifically, WPAHS contends that Highmark agreed to help UPMC "shutter" WPAHS, JA0133 (*id.*, ¶ 208), and, in return, UPMC agreed to "protect" Highmark by "refusing to contract on reasonable terms with any competing health insurer" (*e.g.*, United), and to relegate Highmark's competitors to "marginal participation (at best) in the Pittsburgh market." JA0082 (*id.*, ¶ 3).

The original Complaint, which was 184 paragraphs long, was *devoid* of allegations of direct evidence of the claimed conspiracy between Highmark and UPMC. After being faced with extensive briefs from Highmark and UPMC arguing that the Complaint should be dismissed for failure to state a claim, WPAHS filed its Amended Complaint. Although the Amended Complaint hinges on many of the *identical* conversations that were described in the original Complaint, WPAHS enhanced its description of those conversations in an effort to recharacterize them as "admissions" of conspiratorial agreement. Under these circumstances, the allegations are suspect. Further, despite the enhancements, the allegations still fail to constitute direct evidence of an illegal agreement. *See, e.g.,* docket #1, Complaint ¶¶ 102-03 (Highmark rejected WPAHS proposals "because UPMC would respond by either selling the UPMC Health Plan or contracting with

United") with JA0108-09 (Amended Complaint, ¶ 106) (Highmark Chairman "expressed concern that UPMC would retaliate") and (Amended Complaint, ¶ 108) ("Highmark could not assist [WPAHS] because UPMC would respond by either selling the UPMC Health Plan or contracting with United."). As discussed *infra*, Argument – Section B, even accepting WPAHS's allegations as true for purposes of Appellees' Rule 12(b)(6) motions, the conduct and conversations described do not evidence an agreement that unreasonably restrains trade.

C. WPAHS's Allegations Directed Only Against UPMC

In the Amended Complaint, WPAHS also alleges that UPMC injured it by luring, or attempting to lure, away some of its physicians. *E.g.*, JA0087-91 (¶¶ 26-41) (alleging such conduct occurred in the years 1999 – early 2002 and were "unique to UPMC"). Additionally, WPAHS alleges that UPMC attempted to sabotage WPAHS's efforts at obtaining its initial financing and Highmark's loan, JA0086-877 (*id.*, ¶ ¶ 23-25), and also attempted to interfere with WPAHS's 2007 bond offering. JA0122-23 (*id.*, ¶¶ 161-164). WPAHS does *not* contend, however, that Highmark participated in or sanctioned any of that alleged conduct. Accordingly, those allegations have no bearing on whether Counts I or II of the Amended Complaint state a claim against Highmark.

D. WPAHS's Agreements With Highmark

Although WPAHS attempts to link its claimed injury to 1) the level of reimbursement rates from Highmark, 2) the terms on which it was to repay Highmark's $125 million loan, and 3) alleged discriminatory grant-making by Highmark, WPAHS neglected to attach any of the written contracts governing these matters to either its Complaint or its Amended Complaint. Highmark submitted these contracts in an appendix to its motion to dismiss. JA0251-0697 and JA0966-1211. The district court was permitted to take notice of those written agreements without converting the motions to dismiss into motions for summary judgment.[3]

1. Beginning in 1996, The WPAHS Tertiary Hospitals Negotiated Reimbursement Rates With Highmark, And The Parties Embodied Those Rates In Contracts.

In July 1996, prior to the AHERF bankruptcy and the formation of WPAHS, Highmark executed separate hospital and managed care agreements with the two

[3] *See In re Burlington Coat Factory Securities Litigation*, 114 F.3d 1410, 1426 (3d Cir. 1997); *Lum v. Bank of America*, 361 F.3d 217, 222 n.3 (3d Cir. 2004) ("A document forms the basis of a claim if the document is integral to or explicitly relied upon in the complaint. The purpose of this rule is to avoid the situation where a plaintiff with a legally deficient claim that is based on a particular document can avoid dismissal of that claim by failing to attach the relied upon document.") (citations and quotations omitted); *Angstadt v. Midd-West-School District*, 377 F.3d 338, 342 (3d Cir. 2004) (considering school district's letters outlining the requirements for participation in extracurricular activities as integral to the student's civil rights claims).

major hospitals that became the WPAHS Tertiary Hospitals – West Penn and AGH. *See* JA0251-0276 (Exhibit 1) and JA0277-0303 (Exhibit 2) (the "1996 Agreements"). The 1996 Agreements set forth the terms on which Highmark would reimburse WPAHS for services rendered to Highmark subscribers.[4] Procedure-specific reimbursement rates were listed on Payment Rate Exhibits that were attached to, and incorporated by reference into, the 1996 Agreements. JA0966-0971 (Exhibit 1A) and JA0972-0979 (Exhibit 2A).

In August 1999, coincident with Highmark's $125 million loan to support the formation of WPAHS, Highmark and the WPAHS Tertiary Hospitals executed amendments to the 1996 Agreements. The 1999 amendments: (a) converted the existing year-to-year contracts into long-term contracts expiring June 30, 2005 for West Penn, and June 30, 2006 for AGH; and (b) provided for increased rates and an annual indexed adjustment to those rates. JA0304-0330 (Exhibit 3), JA0980-0994 (Exhibit 3A), JA0331-0344 (Exhibit 4), JA0995-1000 (Exhibit 4A).

On June 15, 2002, Highmark and WPAHS agreed to further amendments to the 1996 Agreements. JA0345-0388 (Exhibit 5), JA1001-1024 (Exhibit 5A),

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[4] *See* JA0251-0276 (Exhibit 1) and JA0277-0303 (Exhibit 2) at Part III, Section A – Conditions of Payment ("[Highmark] agrees to pay the Hospital in accordance with the terms and payment rate set forth in **Exhibit I, Payment Rates"**), and Part I, Section C – Hospital Services ("[t]he Hospital agrees to accept the payment made by [Highmark] hereunder as payment in full for the covered services rendered").

JA0389-0431 (Exhibit 6), JA1025-1047 (Exhibit 6A). In those amendments, which were retroactive to July 1, 2001, Highmark agreed to increase its reimbursement rates to WPAHS's Tertiary Hospitals. *Id.* The June 2002 amendments also extended the term of the 1996 Agreements through June 30, 2008. JA0346 (Exhibit 5), JA0390 (Exhibit 6).

Between June 2002 and June 2008, Highmark and WPAHS amended their contracts occasionally for specific purposes. JA0432-0577 (Exhibits 7 through 15) and JA1048-1153 (Exhibits 7A through 15A). None of those amendments decreased WPAHS's aggregate reimbursement rates. To the contrary, twice during this period, on July 1, 2003 and January 1, 2004, Highmark agreed to increase aggregate reimbursement rates to the WPAHS Tertiary Hospitals. JA0468-04889 (Exhibit 9) and JA1073-1089 (Exhibit 9A); JA0489-0512 (Exhibit 10) and JA1090-1108 (Exhibit 10A). Other amendments increased specific reimbursement rates to the WPAHS Tertiary Hospitals. JA0513-0558 (Exhibit 11 through 13) and JA1109-1142 (Exhibit 11A through 13A).

In June 2008, Highmark and WPAHS agreed to new and higher reimbursement rates. WPAHS admitted in a presentation it made to investors in July 2009 (and prior to filing its Amended Complaint) that these rates from Highmark were market competitive. JA0930-0932 ("8. WPAHS' contract with Highmark appears to contain market competitive rates."). These increased and

"market competitive" rates were incorporated into two simultaneous agreements. On June 18, 2008, Highmark and WPAHS first executed final amendments to the 1996 Agreements, which made the market competitive rates retroactive to October 1, 2007. JA0559-0568 (Exhibit 14) and JA1143-1148 (Exhibit 14A). And, simultaneously, but effective July 1, 2008, WPAHS and Highmark entered into a new five-year facility agreement for West Penn and AGH. JA0113 (Am. Comp., ¶ 127); JA0578-0658 (Exhibit 16) and JA1154-1185 (Exhibit 16A). The July 1, 2008 Agreement applied the new market competitive rates to future hospital services rendered at West Penn and AGH. Reflecting its separate admission that the rates negotiated in June 2008 are market competitive, WPAHS states in the Amended Complaint that the 2008 contract "narrow[ed] the reimbursement gap between [it] and UPMC." JA0113 (Am. Comp., ¶ 127).

2. The $125 Million Loan Agreement

A Master Indenture and a Credit Agreement for the $125 million loan Highmark made to allow for WPAHS's formation were executed in July 2000. JA0698-0835 (Exhibits 18 and 19). Although WPAHS contends that Highmark has repeatedly and wrongfully refused to renegotiate the terms of this financing (JA0106-0110 (Am. Comp., ¶¶ 97-112)), WPAHS does *not* allege that Highmark breached the terms of either the Master Indenture or the Credit Agreement.

Rather, WPAHS alleges that it proposed various modifications to the Credit Agreement, and that Highmark rejected those proposals. JA0106-0110 (*id.*, ¶¶ 97-112). And, significantly, although WPAHS alleges that its proposed modifications would not increase Highmark's costs, *id.*, WPAHS does *not* allege that any of its proposed modifications would have *benefited* Highmark or would have improved Highmark's chances of having the loan repaid. To the contrary, any proposed amendment to benefit WPAHS would *weaken* the priority of Highmark's loan. It also is undisputed that WPAHS ultimately repaid the Highmark loan early and did not need Highmark's consent to do so. JA0050.

3. Highmark's Grants to WPAHS

In 2002, Highmark made a $42 million grant to WPAHS. JA0092 (Am. Comp., ¶ 45). The purpose of the grant was to support "marketing and advertising activities of WPAHS," to "support program and facility developments/ improvements at WPAHS and its affiliates," and to "support physician recruitment activities of WPAHS." JA0836-0850 – at JA0840 (Exhibit 20, ¶ 2.2). Indeed, Highmark's $42 million grant provided monies to WPAHS to assist with the very activities it now alleges (in the Amended Complaint) it lacked the capital to fund. *E.g.*, JA0132-0135 (Amended Complaint, ¶ 204, 205, 210-214).

Although Highmark and WPAHS announced this grant in April 2002 (prior to Highmark's alleged conspiratorial agreement with UPMC), the Grant

Agreement was not fully negotiated and executed until December 6, 2002 (six months or more *after* the alleged conspiracy began). JA0837 (Ex. 20). WPAHS does not allege that Highmark breached the Grant Agreement.

In May 2003, Highmark also made a $1.5 million grant to WPAHS, payable in three yearly installments of $500,000. The stated purpose of that grant was to help WPAHS recruit and retain anesthesiologists and certified registered nurse anesthetists. JA0461-0467 (Exhibit 8 at p. 2).

E. WPAHS's Inconsistent Allegations

As the district court recognized (JA0022-23), the Amended Complaint is not internally consistent. For example, although WPAHS alleges that Highmark and UPMC "starv[ed] it of the capital needed to grow and expand" (JA0132, Am. Comp., ¶ 203), WPAHS admits that:

- its unrestricted cash *increased* by $54 million between June 2001 and June 2005;
- its revenue *increased* $362 million between 2000 and 2005; and
- its EBITDA (earnings before interest, taxes, depreciation and amortization) *increased* by $80 million between 2000 and 2005.

JA0132-33 (Am. Comp., ¶ 206).

Although Highmark made a $125 million loan in August 2000 which allowed for the creation of WPAHS (JA0092 (Am. Comp., ¶ 43), WPAHS claims

that, less than two years later, Highmark conspired to help UPMC "destroy" WPAHS – and thereby put the repayment of that loan in jeopardy.

Similarly, although the Amended Complaint alleges that Highmark conspired with UPMC in the summer of 2002 to deny WPAHS access to capital WPAHS needed in order to invest in "new facilities, technology and equipment," JA0083 (Am. Comp., ¶ 7), Highmark signed an agreement in December 2002 granting WPAHS $42 million – the specific purpose of which was to *improve* WPAHS's facilities. JA0836-0850 – at JA0840 (Exhibit 20, ¶ 2.2).

In addition, although WPAHS contends it was injured by Highmark's refusal to modify the terms of its $125 million loan, in May 2007, WPAHS successfully raised $750 million by issuing bonds at rates that were *lower than* the rates set forth in the Highmark Credit Agreement. JA0922-23, JA0943-0946. The proceeds of that bond issuance allowed WPAHS to repay the Highmark loan early, repay other creditors, and provided a significant amount of capital WPAHS could invest in its business. JA0922-23.

The Amended Complaint also emphasizes that UPMC has significant bargaining power in its negotiations with insurers and that insurers must have UPMC in their network. JA0125-0127 (Am. Comp., ¶¶ 174-177, 182-183). Despite this, the Amended Complaint alleges that the *only* rational explanation as

to why Highmark allegedly pays UPMC more than what it pays WPAHS is the existence of a conspiracy. JA0111 (*id.*, ¶ 117).

As more fully explained *infra*, the district court acted well within its power under *Twombly* and *Iqbal* when it sifted through WPAHS's conclusory statements and conflicting allegations and ultimately determined that the alleged conspiratorial restraints of trade were not plausible on the facts alleged.

F. WPAHS's Prayer For Relief

WPAHS seeks to force Highmark to contract with it on the same terms and rates as Highmark contracts with UPMC. Specifically, in addition to seeking compensatory, treble, and punitive damages, WPAHS wants the court to order Highmark "to end any discrimination in reimbursement (both direct and indirect) between UPMC and [WPAHS]." JA0142-43 (Amended Complaint, Prayer for Relief ¶¶ 1-8.) More specifically, WPAHS is asking the court to order Highmark to reimburse WPAHS at *higher* rates than it was able to negotiate for itself. WPAHS explains its vision in its Amended Complaint: the court should order reductions in the rates Highmark negotiated with UPMC, and should order commensurate increases in the rates Highmark pays WPAHS, until WPAHS and UPMC have achieved rate parity, and the aggregate payments to hospitals by Highmark go down. JA0133-34 (Am. Comp., ¶ 209).

SUMMARY OF THE ARGUMENT

Although the Amended Complaint is lengthy, it fails to state a claim against Highmark for which relief could be granted under the federal antitrust laws.

The district court properly exercised its gatekeeper function under *Twombly* and *Iqbal* and was correct in concluding that the Amended Complaint fails to allege either a plausible conspiracy in restraint of trade or an antitrust injury. Rather, the crux of the Amended Complaint is that Highmark "discriminates" between UPMC and WPAHS. This, of course, is the *essence of* competition (whereby the seller with the best negotiating power is able to obtain the best prices), not an indicator of an agreement in restraint of trade between UPMC and Highmark. And, even assuming *arguendo* that the Amended Complaint states sufficient facts to support an inference of a conspiracy, it nonetheless should be dismissed because it fails to allege a cognizable antitrust injury. WPAHS is seeking a regime in which the federal courts regulate and micro-manage the prices Highmark pays hospitals. Courts have long recognized, however, that the antitrust laws are designed to protect competition, not competitors, and that the courts should not be in the business of regulating prices. The result WPAHS seeks to achieve in this litigation – higher prices through court-supervised rate parity – is the antithesis of what the antitrust laws were enacted to achieve.

Moreover, the Court need not determine whether WPAHS has pleaded either a conspiracy in restraint of trade or a cognizable antitrust injury, because WPAHS's claims against Highmark plainly are time-barred. Although the district court rejected that argument, this Court can and should affirm the dismissal of the Amended Complaint for that reason alone.

For any and all of these reasons, this Court should affirm the dismissal of the Amended Complaint.

COUNTERSTATEMENT OF THE STANDARD OF REVIEW

This Court reviews an order dismissing a complaint under Fed. R. Civ. P. 12 *de novo*. *Fowler v. UPMC Shadyside*, 578 F.3d 203, 206 (3d Cir. 2009). A court may take notice of documents that are integral to or explicitly relied upon in the complaint without converting a motion to dismiss into a motion for summary judgment. *In re Burlington Coat Factory Securities Litig.,* 114 F.3d 1410, 1426 93d Cir. 1997), and other authorities cited *supra*, p.8 n.3. A court also may consider facts that are subject properly to judicial notice when determining whether to dismiss a complaint. *Lum v. Bank of Am.*, 361 F.3d 217, 222 n.3 (3d Cir. 2004). Although the Court must accept well-pleaded allegations of fact as true, the Court need not accept legal conclusions as true. *Fowler*, 578 F.3d at 210-11. For purposes of determining whether the Amended Complaint states an actionable

claim against Highmark, this Court should disregard all allegations of fact that are not directed toward Highmark. Specifically, because the Amended Complaint does not allege that Highmark participated in or sanctioned the alleged "physician raiding" or the alleged efforts to sabotage WPAHS's efforts to obtain financing from third parties, this Court should disregard those allegations when determining whether to affirm the dismissal of Counts I and II as directed toward Highmark.

Moreover, in an antitrust case such as this one, the Court should be especially cognizant of its role as a gatekeeper. The Court should scrutinize every element of the alleged violations (including the allegations of a conspiracy and the allegations of antitrust injury) and determine whether the factual allegations are plausible. "In other words, a complaint must do more than allege the plaintiff's entitlement to relief. A complaint has to 'show' such an entitlement with its facts." *Fowler*, 578 F.3d at 210-11 (citing *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949-50 (2009). Determining "whether a complaint states a plausible claim for relief [is] a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 129 S. Ct. at 1950. Allegations of anticompetitive conduct should be "viewed in light of common economic experience." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 564 (2007). Allegations that are as consistent with self-interested conduct as with collusive conduct should not survive a motion to dismiss. *Id.* at 554-55, 568-69.

ARGUMENT

A. WPAHS Failed To Plead A Cognizable Antitrust Injury.

Congress and the courts have imposed a number of limitations on plaintiffs who seek to recover damages under the antitrust laws. *See, e.g., Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477, 485-86 (1977). Among the most important of these limitations is the requirement that a private antitrust plaintiff must prove the existence of an antitrust injury. *Atlantic Richfield Co. v. USA Petroleum Co.,* 495 U.S. 328, 334 (1990) ("*ARCO*"). A plaintiff may not recover damages merely by pleading that it suffered an "injury" it claims was "causally linked to an illegal presence in the market." *Id.* (quoting *Brunswick*, 429 U.S. at 489). Rather, the plaintiff must plead and prove that it suffered an *antitrust* injury, namely, an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick,* 429 U.S. at 489. The purpose of the antitrust injury requirement is to "ensure the harm claimed by the plaintiff corresponds to the rationale for finding a violation of the antitrust laws in the first place." *ARCO*, 495 U.S. at 342.

The antitrust laws are concerned with protecting consumers from higher prices. *Alberta Gas Chemicals Ltd. v. E.I. du Pont de Nemours & Co.*, 826 F.2d 1235, 1243 (3d Cir. 1987)*; Ehredt Underground, Inc. v. Commonwealth Edison Co.*, 90 F.3d 238, 240 (7th Cir. 1996). The antitrust injury requirement "is the glue

that cements each suit with the purposes of the antitrust laws, and prevents abuses of those laws." *NicSand, Inc. v. 3M Co.*, 507 F.3d 442, 449-50 (6th Cir. 2007). Because the antitrust laws are designed to protect competition, not competitors, this Court has instructed district courts to "analyze the antitrust injury question from the viewpoint of the consumer." *Alberta Gas*, 826 F.2d at 1241; *see also Mathews v. Lancaster General Hosp.*, 87 F.3d 624, 641 (3d Cir. 1996).

The district court followed and properly applied these controlling precedents. As explained *infra*, Argument – Sections A.1. and A.2., when viewed from the viewpoint of the various consumers of WPAHS's services, the Amended Complaint abjectly fails to allege antitrust injury. And, equally importantly, the relief WPAHS seeks for the alleged injury it incurred – higher reimbursement rates until it is on parity with UPMC – is the antithesis of the remedies the antitrust laws empower the courts to impose.

1. Any Differential In Reimbursement Rates Between UPMC And WPAHS Is Not Anti-Competitive And Does Not Harm Consumers Of Healthcare Services.

WPAHS and Highmark are in a vertical seller-buyer relationship: WPAHS provides healthcare services to Highmark's customers, and Highmark reimburses WPAHS for those services at rates set forth in arms-length negotiated, written contracts. It is in the interest of Highmark and its customers (whether employers and their employees or individuals) for Highmark to negotiate the lowest

reasonable price for those services. Indeed, WPAHS recognizes and pleads that there is a direct connection between the reimbursement rates paid to healthcare providers and the premiums paid by customers of healthcare services: as healthcare costs rise, so do insurance premiums. JA0091-92 (Am. Comp. ¶ 42), JA0104 (*id.*, ¶ 91). JA0111 (*id.*, ¶¶ 116-17), JA0126 (*id.*, ¶¶ 175-177), JA0127 (id., ¶ 183), JA0128 (*id.*, ¶ 185).

WPAHS competes with UPMC in the market for healthcare services in Allegheny County. WPAHS alleges that UPMC "possesses a market share in excess of 50% in every tertiary and quaternary care service line in the six-county Pittsburgh metropolitan region," and, as such, is a monopolist. JA0126 (Amended Complaint ¶175). Because of the depth and breadth of UPMC's presence in this geographic area and its "dominance" in "numerous specialties," WPAHS alleges that "health insurers cannot create a marketable, adequate network of participating providers for employers in Allegheny County without reasonable access to UPMC's facilities . . . ." JA0127 (*id.*, ¶ 183).

Despite recognizing the vast difference in size and bargaining power between it and UPMC, WPAHS nonetheless complains about UPMC's ability to negotiate significantly higher reimbursement rates from Highmark. UPMC is alleged to have negotiated those higher rates *after* WPAHS and Highmark had

negotiated WPAHS's reimbursement rates.[5] However, WPAHS claims that because UPMC's later-negotiated rates were significantly higher than WPAHS's Highmark unlawfully discriminated against WPAHS. As the remedy for its alleged "harm," WPAHS asks the court to reduce UPMC's rates, increase its rates, and order Highmark "to end any discrimination in reimbursement (both direct and indirect) between UPMC and West Penn Allegheny." JA0142 (Amended Complaint, Prayer for Relief ¶ 2).

However, to plead a violation of the antitrust laws that will survive a Rule 12(b)(6) motion, a plaintiff must plead that its injury is "of the type that the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *ARCO*, 495 U.S. at 334. Here, WPAHS is complaining that its payments from Highmark are low compared with Highmark's payments to UPMC. Significantly, however: (1) WPAHS does not plead that its reimbursement levels constitute "predatory pricing" by Highmark; and (2)

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[5] WPAHS admits that it negotiated and agreed to its long-term contracts with fixed reimbursement rates *prior to* the alleged conspiracy between Highmark and UPMC. JA0096 (Amended Complaint, ¶ 59) ("As part of this [conspiracy, Highmark and UPMC] entered into a new multi-year participating provider agreement, with reimbursement rates for UPMC that were much higher than those *previously negotiated* for West Penn Allegheny.") (emphasis added). Because its agreements preceded the alleged formation of the conspiracy, WPAHS cannot even claim that the conspiracy was a cause-in-fact of the allegedly "low" rates Highmark paid it.

although WPAHS contends that UPMC is a monopolist that exercises its market power to receive *supra*-competitive rates, WPAHS alleges that it, too, should be paid at UPMC's rates.[6]

"Antitrust injury does not arise for purposes of § 4 of the Clayton Act until a private party is affected by an *anticompetitive* aspect of the defendant's conduct; in the context of pricing practices, only predatory pricing has the requisite anticompetitive effect." *ARCO*, 495 U.S. at 339 (internal citations omitted; emphasis in original). The district court correctly recognized that any alleged price differential between WPAHS and UPMC: (a) evidences competition in the healthcare services market, and (b) reflects the respective bargaining power of the two competitors providing health care services. *See Monahan's Marine, Inc. v. Boston Whaler, Inc.*, 866 F.2d 525, 527-28 (1st Cir. 1989) (Breyer, J.) (disparity in prices and terms offered to competing dealers does not violate the Sherman Act). Significantly, WPAHS does not allege either that it operated at a loss as a result of Highmark's reimbursements or that its negotiated reimbursement rates fell below

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[6] The alleged "discrimination" between it and UPMC is at the heart of the Amended Complaint. However, WPAHS does not, and cannot, contend that Highmark violated the Robinson-Patman Act. The Robinson-Patman Act expressly applies only to goods "sold" to two or more "purchasers," at different prices, by a single seller. *See* 15 U.S.C. § 13(a). Here, however, Highmark is *purchasing*, not selling, medical services. And, in any event, medical services are not "goods." *Ball Mem'l Hosp. v. Mutual Hosp. Ins.*, 784 F.2d 1325, 1340 (7th Cir. 1986).

an appropriate measure of its costs (*e.g.*, that Highmark was engaged in predatory pricing).

As the U.S. Supreme Court has recognized, where (as here), a plaintiff complains about the harm it suffers from *nonpredatory* price competition, it is really claiming that "it is unable to raise prices." *ARCO*, 495 U.S. at 337-38 (internal quotation omitted). Such a claim, however, is inconsistent with the purposes of the antitrust laws and does not represent cognizable antitrust injury. *Id.*; *see also Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1060-63 (8th Cir. 2000).

As the district court correctly recognized, the fundamental premise of WPAHS's claim is that it would have been even *more* profitable but for the alleged conspiracy, *not* that its payments from Highmark were below cost. JA0048 (Op., p. 44). Specifically, WPAHS alleges that its "market share would be substantially higher and it would have earned *additional profit,*" JA0132 (Amended Complaint, ¶ 202) (emphasis added), through "millions of dollars in additional reimbursement" (JA0133 (*id.*, ¶ 209), from Highmark (and its customers). Such allegations do not, as a matter of law, constitute antitrust injury and are insufficient to survive a motion to dismiss.

WPAHS's allegations are similar to the allegations the plaintiffs made in *Pool Water Products v. Olin Corp.*, 258 F.3d 1024 (9th Cir. 2001). There, re-

packagers and distributors of pool chemical products alleged that the manufacturer and one of its competitors had engaged in a "whole host" of anticompetitive activities that injured them. The Court of Appeals noted that plaintiffs described two types of injury from the alleged anticompetitive practices – lost profits and decreased market share. *Id.* at 1034-35. In dismissing the claims for failure to plead a cognizable antitrust injury, the Ninth Circuit stated:

> Absent proof of predation, it is immaterial whether the price reduction is the result of illegal price setting, illegal mergers and acquisitions, collusion, price discrimination or any other antitrust violation. Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition[.]

Id. at 1035 (internal quotation omitted). There, as here, "reduced profits from lower prices and decreased market share [are] not the type of harm Section 4 [of the Clayton Act] was meant to protect against." *Id.* at 1036; *see also Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.,* 509 U.S 209, 223-24 (1993); *HealthAmerica Pennsylvania, Inc. v. Susquehanna Health System*, 278 F. Supp. 2d 423, 439-440 (M.D. Pa. 2003).

2. WPAHS's Demand For Higher Reimbursement Rates Is Not In Consumers' Interests, Is Inconsistent With The Purposes of The Antitrust Laws, And Is An Impermissible Regulatory Remedy.

WPAHS avers that it has been paid less than the alleged supracompetitive rates UPMC receives, and it wants to be paid more. To remedy this disparity,

WPAHS seeks a court order forcing Highmark (and, either directly or indirectly, Highmark's customers) to pay the same rates to UPMC and WPAHS. This Court has held, however, that an antitrust plaintiff must be an effective and appropriate enforcer of the antitrust laws in order to state a viable antitrust claim. *Alberta Gas*, 826 F.2d at 1240. Indeed, this Court has demanded careful scrutiny of "enforcement efforts by competitors" precisely because the competitor's self-interest is "not necessarily congruent with the consumer's stake in competition." *Id.* at 1239. "When the plaintiff is a poor champion of consumers a court must be especially careful not to grant relief that may undercut the proper functions of antitrust." *Id.* (quoting *Ball Memorial Hosp.*, 784 F.2d at 1334).

The district court was correct when it concluded that WPAHS's demand for higher reimbursement rates (and concomitantly higher profits) is directly adverse to the interests of healthcare consumers. JA0049 (Mem. Op. at 45). *See Alberta Gas*, 826 F.2d at 1243. The decisions of several other Circuits are consistent with this Court's holding in *Alberta Gas*. In *Sanjuan v. American Bd. of Psychiatry and Neurology, Inc.*, 40 F.3d 247 (7th Cir. 1994) (Easterbrook, C.J.), the Court of Appeals for the Seventh Circuit dismissed the claims of two physicians who complained that the Board of Psychiatry and Neurology had reduced their ability to earn additional income because the oral examination for certification was unfair to physicians who were not native English speakers. 40 F.3d at 251-52. In

determining that the plaintiffs had failed to plead *antitrust* injury, Chief Judge Easterbrook stated:

> [t]he claim that a practice reduces (particular) producers' incomes has nothing to do with the antitrust laws, which are designed to drive producers' prices down rather than up… Indeed, it does not even state an antitrust injury… Plaintiffs, who want to obtain a credential that will help them charge higher prices, have pleaded themselves out of court on the antitrust claim.

Id. (citations omitted).

Likewise, the Court of Appeals for the Sixth Circuit recently stated that "[a]ntitrust law is not a negotiating tool for a plaintiff seeking better contract terms." *CBC Companies, Inc. v. Equifax, Inc.*, 561 F.3d 569, 573 (6th Cir. 2009). The Sixth Circuit affirmed the district court's dismissal of plaintiff's complaint for failure to allege antitrust injury. The Court stated, "essentially, CBC disagrees with the price terms of the contract that Equifax proposed and CBC later signed." *Id.* at 573. Here, WPAHS is unhappy with the bargain it struck with Highmark *before the alleged conspiracy even began*, and is using the antitrust laws as a weapon to force a court-overseen renegotiation of those agreements. *See also Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50, 59 (2d Cir. 1997); *Daniel v. American Board of Emergency Medicine*, 269 F. Supp. 2d 159, 174 (W.D.N.Y. 2003) (no antitrust injury where plaintiffs sought increased compensation), *aff'd*, 428 F.3d 408 (2d Cir. 2005).

The district court also correctly recognized that WPAHS is attempting to use the antitrust laws to share in UPMC's alleged monopoly power. JA0074-75 ("West Penn Allegheny seeks the fixing of all prices at the higher rate allegedly received by an entity with alleged monopoly power"). WPAHS wants Highmark and its customers to subsidize competition in the healthcare services market through increased reimbursements to WPAHS. But such a remedy is both contrary to the purposes of the antitrust laws and harmful to the interests of healthcare consumers. As the Court of Appeals for the Tenth Circuit recently noted, plaintiffs like WPAHS:

> very well might be better off with such a shared monopoly, but there's no guarantee consumers would be. Whatever injury [WPAHS] may have suffered, then, it is not one the antitrust laws protect because 'a producer's loss is no concern of the antitrust laws, which protect consumers from suppliers rather than suppliers from each other.'

Four Corners Nephrology Associates, P.C. v. Mercy Medical Center of Durango, 2009 WL 3085882, *9 (10th Cir. Sept. 29, 2009) (quoting *Stamatakis Indus., Inc. v. King*, 965 F.2d 469, 471 (7th Cir. 1992)).

Perhaps recognizing the significant deficiencies in its claims, WPAHS claims that a court could fashion an order whereby its rates would be somewhat higher and UPMC's rates would be lower, with the overall effect being lower charges from both healthcare providers. JA0134 (Amended Complaint, ¶ 209). Although WPAHS believes it would benefit from such judicial regulation of

prices, the district court recognized – properly – that controlling precedent requires it *not* to become the healthcare regulator for Western Pennsylvania. JA0074 (Mem. Op. at 70). To grant WPAHS the relief it seeks, the district court would be required, as Judge Schwab recognized, to:

> become intimately involved with the terms of the contract between Highmark and West Penn Allegheny and would essentially be required to preside over the contractual negotiations between Highmark and West Penn Allegheny, and to police the actions of UPMC, Highmark, and West Penn Allegheny for many years into the future to make sure that the parties do not engage in predatory or anticompetitive conduct.

JA0074 (*id.*).

In addition to being a "practically and logistically challenging, if not impossible" task (JA0074 (*id.*)), this simply is not a role federal courts should play. To the contrary, as the U.S. Supreme Court recently re-emphasized, "[c]ourts are ill suited 'to act as central planners, identifying the proper price, quantity, and other terms of dealing." *Pacific Bell Telephone Co. v. Linkline Communications Inc.*, 129 S. Ct. 1109, 1121 (2009) (citing *Verizon Communications Inc., v. Law Offices of Curtis v. Trinko, LLP*, 540 U.S. 398, 408 (2004)); *see also Four Corners*, 2009 WL 3085882, at *9 ("[t]he federal judiciary is not a price control agency"); *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 25 (1st Cir. 1990) (examining the multitude of reasons why courts avoid regulatory oversight).

3. Even If *WPAHS's* Capacity Has Been Limited By The Alleged Conspiracy, This Is Not An Injury To Consumers or Competition.

WPAHS alleges that, because it was capital-starved as a result of the alleged conspiracy, it was unable to invest in and expand its oncology, cardiology, orthopedic and neurology programs. JA0134 (Amended Complaint, ¶ 210). WPAHS also contends that, because it could not invest in those programs, it lost business to UPMC. JA0134 (*id.*).

At the very most, WPAHS is alleging that the conspiracy reduced *its* capacity to provide those services. WPAHS does not allege that the conspiracy reduced the level (or quantity) of *hospital services overall* in the Pittsburgh area. In other words, WPAHS contends that, but for the alleged conspiracy, it would have had a bigger slice of the pie, not that the pie would have been bigger. This allegation is insufficient as a matter of law to state a cognizable antitrust injury. As Chief Judge Easterbrook observed over a decade ago: "[o]ver and over, we stress that antitrust is designed to protect consumers from producers, not to protect producers from each other or to ensure that one firm gets more of the business." *Ehredt Underground, Inc. v. Commonwealth Edison Co.*, 90 F.3d 238, 240 (7th Cir. 1996) ; *accord Alberta Gas*, 826 F.2d at 1240-47; *Mathews*, 87 F.3d at 641. An alleged shift in market share between two competitors is not injury to competition because it does not result in reduced output overall. *See Pool Water*

Products, 258 F.3d at 1036 (citing *Cargill Inc. v. Monfort of Colorado, Inc.,* 479 U.S. 104, 116 (1986)).

The Amended Complaint does not allege that consumers lacked access to sufficient healthcare providers or hospital services in Allegheny County or the six-county Pittsburgh metropolitan area. Nor does it allege that patients were unable to access and receive high-level, sophisticated quality care at WPAHS, UPMC, or elsewhere. JA0135 (Amended Complaint, ¶ 214).[7]

Moreover, WPAHS's own allegations make it clear that physicians, not reimbursement levels, determine a particular hospital's output of services. Specifically, WPAHS contends that:

> the primary way that a hospital distributes its services to consumers is through a physician's admission of a patient. Given the high fixed costs of hospitals and the consequent need to maintain a steady volume of patients to remain financially afloat, *the role of a physician in sending patients to a facility is absolutely crucial.*"

JA0088 (Amended Complaint, ¶ 26) (emphasis added). The U.S. Supreme Court similarly recognized in *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984), that physicians commonly direct patients, *id.* at 30 n.50, and that "[i]f no

[7] Indeed, WPAHS claims that it provides "equal or better care than UPMC at a lower cost to the community." JA0084 (Amended Complaint, ¶ 10).

forcing is present, patients are free to enter a competing hospital." *Id.* at 25.[8]

There are no allegations of forcing here. WPAHS does not allege that Highmark engaged in any action that foreclosed patients from seeking treatment at WPAHS hospitals. Because there is no forcing or foreclosure here, WPAHS's reliance on this Court's ruling in *Angelico v. Lehigh Valley Hospital*, 184 F.3d 268 (3d Cir. 1999), is misplaced. In *Angelico*, the plaintiff physician had been denied surgical privileges at *all* hospitals in the Lehigh Valley region and was precluded from participation in the market. He sued the hospitals, alleging a horizontal group boycott. Here, in stark contrast: (a) WPAHS and its physicians were, for the entire period in question, participating providers in every Highmark product; (b) WPAHS has not alleged that Highmark excluded it from any product; and (c) Highmark's customers were always, and continue to be, free to seek services at WPAHS. The Amended Complaint simply does not allege any restriction in the amount of patient services delivered in Pittsburgh and does not allege any fact indicating that Highmark prevented WPAHS from competing in the healthcare services market.

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[8] Significantly, WPAHS contends that unilateral conduct by UPMC – "physician raiding" (JA0139-41 ¶¶ 237, 244, 250) – and not a conspiracy involving Highmark, has reduced WPAHS's patient admissions. WPAHS made no such claim against Highmark, which would in any event be very difficult to square with the fact that Highmark gave WPAHS a $42 million grant to *help with physician recruitment and retention* after the alleged conspiracy began. *See supra,* pp. 12-13.

4. Highmark's Decision To Phase Out Its CommunityBlue Product In 2002 Did Not Harm Competition.

Even accepting the factual allegations in the Amended Complaint as true, the closure of Highmark's CommunityBlue product did not foreclose patients from seeking services at WPAHS hospitals. WPAHS claims *it* was harmed when Highmark discontinued that product, because the partial exclusivity it received through CommunityBlue disappeared. However, Highmark's elimination of that product as an option for its customers did not prevent any customer from seeking services at WPAHS.[9]

CommunityBlue was a narrow network product that Highmark marketed from mid-1998 through 2003. JA0092, JA0095, JA0101 (Amended Complaint, ¶ 46, ¶ 56, ¶ 79). WPAHS, but not UPMC, participated in the CommunityBlue network of hospitals. JA0092 (Amended Complaint, ¶ 46). Customers enrolled in CommunityBlue were restricted from using hospitals outside the CommunityBlue hospital network: if they did go "out of network," the customer would be required to pay some or all of the expenses for doing so. When the CommunityBlue product was eliminated, customers in that plan were invited to participate in other Highmark products (*e.g.*, SelectBlue) but they also had the option to leave Highmark and purchase insurance products offered by other insurers. Customers

[9] Moreover, as discussed *infra*, Argument – Section C, the allegations regarding the discontinuance of CommunityBlue are time-barred.

who elected to stay with Highmark were still entitled to receive in-network services at WPAHS.

WPAHS also claims that consumers paid higher premiums as a result of Highmark's decision to phase out CommunityBlue. However, as the district court correctly noted, there are no allegations in the Amended Complaint concerning any "agreement" between Highmark and UPMC as to the premiums Highmark would charge its subscribers after CommunityBlue was phased out. JA0046 (Mem. Op. at 42). Furthermore, this "harm" (if it exists) was not even arguably inflicted on WPAHS, and WPAHS cannot stand in the shoes of consumers as a "private attorney general."[10] As the district court recognized:

> [WPAHS] . . . does not allege that it is a competitor or consumer in the health insurance market that would be forced to pay these higher premiums. Any injury Plaintiff suffered as a result of this agreement is too indirect and remote given the existence of a class of price-conscious consumers and employers who are more properly situated to vindicate the public interest because they are the ones who allegedly cannot turn to lower-cost alternatives for health insurance.

[10] Furthermore, there has already been consumer-initiated litigation concerning the alleged excessive reserves and premium overcharges of which WPAHS complains in the Amended Complaint, JA0103-0105 (Am. Comp., ¶¶ 87-93). *See Old Forge School Dist. v. Highmark Inc.*, 924 A.2d 1205 (Pa. 2007); *City of Philadelphia v. Insurance Dept.*, 889 A.2d 664 (Pa. Cmwlth. Ct. 2005); *Petty v. Insurance Dept.*, 878 A.2d 942 (Pa. Cmwlth. Ct. 2005). The Pennsylvania Department of Insurance, through then-Commissioner Diane Koken, reviewed Highmark's reserve levels for 2003 and the filed premium rates for 2004, and determined that they were within acceptable levels. *See Old Forge School Dist.*, 889 A.2d at 1207-08.

> Plaintiff cannot act as "private attorney general" for these consumers of health insurance products. *See Assoc. Gen.*, 459 U.S. at 542; *see also Illinois Brick Co. v. Illinois,* 431 U.S. 720, 760-62 (1977) (holding that an indirect purchaser cannot maintain an antitrust suit because of the existence of more direct victims and the danger of duplicative recovery against defendants).

JA0045 (Op., p.41).

In short, WPAHS's allegations concerning CommunityBlue do not constitute antitrust injury.

5. Highmark's Denials of WPAHS's Refinancing Requests Cannot Constitute Antitrust Injury.

WPAHS claims that, beginning in the Summer of 2002, Highmark agreed with UPMC to restrict its financial support to WPAHS by, *inter alia*, refusing to cooperate with WPAHS's refinancing proposals. JA0083 (Amended Complaint, ¶ 7). However, WPAHS undisputedly was free to seek the capital it allegedly needed from a multitude of public and private lenders, and WPAHS successfully sought and obtained that capital in May 2007. JA0922-23. The fact that Highmark previously loaned $125 million to WPAHS in August 2000, and demonstrated a willingness to take on significant risk in the process, simply did not impose on Highmark a continuing legal obligation to subsidize WPAHS in the future.

As the U.S. Supreme Court has recognized, a company does not violate the antitrust laws by withholding financing if the potential borrower can obtain financing elsewhere. *See United States Steel Corp., et al., v. Fortner Enterprises,*

Inc., 429 U.S. 610, 621-22 (1977) ("*Fortner II*"); *see also Johnson v. University Health Services, Inc.*, 161 F.3d 1334 (11th Cir. 1998). The district court was correct in finding that WPAHS has not alleged facts to demonstrate that Highmark engaged in any conduct to impede its access to other sources of capital. JA0050. Highmark is not a free-standing relevant market for the provision of financing. JA0050; *Atlantic Exposition Services Inc. v. SMG*, 262 Fed. App'x 449 (3d Cir. 2008).

WPAHS asserts in its Brief, as it did below, that Highmark could "veto" any financing WPAHS sought from other lenders. *See* WPAHS Brief at 51-52. However, the district court correctly found that nothing in the Amended Complaint or any of the Highmark loan documents supports that argument. WPAHS can point to no such provision in the written loan document. Indeed, WPAHS does not even allege in the Amended Complaint that Highmark had "veto" rights over other financing. Moreover, WPAHS in fact refinanced its debt in May 2007, and it did not need Highmark's participation or approval to do so. JA0922-23.

Lastly, assuming *arguendo* Highmark injured WPAHS when it refused to accede to WPAHS's refinancing proposals to change the terms of the Highmark loan (e.g., thereby allegedly causing WPAHS to incur higher financing costs), this is not an antitrust injury. *See NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 134 (1998). Because WPAHS has not alleged any fact demonstrating that Highmark's

refusal to modify the loan reduced the output of hospital services or otherwise harmed consumers seeking healthcare services, the district court's dismissal of Counts I and II of the Complaint should be affirmed.

B. WPAHS Failed To State A Conspiracy In Restraint Of Trade.

As the district court correctly concluded, the Amended Complaint fails to plead that Highmark participated in a conspiracy in restraint of trade. The U.S. Supreme Court has made it clear in *Twombly* and *Iqbal* that courts must scrutinize complaints - complaints alleging violations of the antitrust laws in particular - for plausibility. If the factual allegations are as consistent with independent conduct as with collusion, the complaint should be dismissed. *Twombly*, 550 U.S. at 566-70.

Here, the crux of WPAHS's complaint is that Highmark was its ally until the Summer of 2002 (which led to antitrust charges by UPMC against Highmark, JA0094-95), at which point Highmark allegedly became UPMC's ally (which led to antitrust charges by WPAHS against Highmark – most particularly, this litigation). However, over the entire period at issue, Highmark's dealings with both of these suppliers of hospital services have an obvious non-conspiratorial explanation: Highmark, at all times, acted in its and its customers' best interest by leveraging its position with one supplier and using it against the other, so that Highmark – on its behalf (for its insured business) and on behalf of self-insured employers (who use Highmark's provider network and pay it to perform

administrative services) – could obtain the most favorable price from *both* suppliers.

Accordingly, Highmark adopts and incorporates by reference the arguments in the Brief of Defendant-Appellee UPMC at pp. 17-40, which discuss the absence of a conspiracy or an agreement that unreasonably restrains trade.

C. Counts I and II Are Time-Barred.

As discussed *supra*, the district court was correct when it concluded that the Amended Complaint failed to adequately plead either a conspiracy in restraint of trade or an antitrust injury. This Court can and should affirm the dismissal of the Amended Complaint on either of those grounds. In the alternative, this Court can affirm the dismissal of Counts I and II for the threshold reason that those claims are time-barred. *See Storey v. Burns Int'l Sec. Servs.*, 390 F.3d 760, 761 n.1 (3d Cir. 2004) (this Court may affirm on any grounds that were presented to the district court); *Nicini v. Morra*, 212 F.3d 798, 805 (3d Cir. 2000) (same).

The central point concerning the application of the statute of limitations to this case, and the fact that distinguishes this case from the authority relied upon by WPAHS, is that *all* of the injuries allegedly suffered by WPAHS at the hands of Highmark arose from the application of contracts that WPAHS entered into *before* the limitations period. There were no new transactions, actions or inactions by

Highmark in the limitations period that added to WPAHS's alleged harm flowing from the pre-limitations period contracts.

In rejecting Highmark's argument that the claims against it are time-barred, the district court merely observed that WPAHS had "sufficiently plead[ed] 'continuation' of the alleged wrongdoing within the limitations period." JA0075 (Op., p.71). The law, however, requires more than an allegation that the wrongdoing "continued" during the limitations period. Rather, in order to revive an otherwise time-barred claim, a plaintiff must allege that its damages were caused by an active, injurious conspiracy within the limitations period. *In re Lower Lake Erie Iron Ore Antitrust Litigation*, 998 F.2d 1144, 1173 (3d Cir. 1993).

The statute of limitations for federal antitrust claims is four years. 15 U.S.C. § 15b. The limitations period begins when a defendant "commits an act that injures a plaintiff's business." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971) (citations omitted).[11] Where (as here), the plaintiff alleges a continuing antitrust violation, he also must allege that the defendant committed an "overt act" within the four-year limitations period in order to restart the clock.

[11] For the same reasons the statute of limitations bars WPAHS's claims for damages, the doctrine of laches bars its request for injunctive relief. *Madison Square Garden, L.P. v. National Hockey League*, No. 07-8455, 2008 WL 4547518, *10 (S.D.N.Y. Oct. 10, 2008).

Toledo Mack Sales & Service, Inc. v. Mack Trucks, Inc., 530 F.3d 204, 218 (3d Cir. 2008); *Varner v. Peterson Farms*, 371 F.3d 1011, 1019 (8th Cir. 2004) (quoting *Peck v. General Motors Corp.,* 894 F.2d 844, 849 (6th Cir.1990)).

An "overt act" for these purposes has two elements: "(1) it must be a *new and independent act* that is not merely a reaffirmation of a previous act; and (2) it must inflict *new and accumulating injury* on the plaintiff." *Grand Rapids Plastics, Inc. v. Lakian*, 188 F.3d 401, 406 (6th Cir. 1999) (emphasis added) (internal quotations omitted); *see also Xechem, Inc. v. Bristol-Myers Squibb Co.*, 274 F. Supp. 2d 937, 945 (N.D. Ill. 2003); *Martinez v. Western Ohio Health Care Corp.*, 872 F. Supp. 469, 472 (S.D. Ohio 1994). Although this Court has neither explicitly adopted nor rejected this standard, it is consistent with this Court's controlling precedent regarding "accumulating injury." *See Lower Lake Erie*, 998 F.2d at 1172; *see also Varner*, 371 F.3d at 1019; *Lakian*, 188 F.3d at 406.

WPAHS claims that UPMC and Highmark entered into a conspiracy in restraint of trade in the "summer of 2002." JA0095 (Amended Complaint, ¶ 58). This alleged pact started the running of the four-year limitations period. WPAHS, however, waited nearly seven years – to April 21, 2009 – to file its Complaint. JA1234 (Doc. 1). In furtherance of this alleged 2002 agreement, Highmark purportedly agreed to: (1) withhold financial support from WPAHS by refusing to refinance its $125 million loan; (2) discriminate in the payment of reimbursement

rates; and (3) eliminate the CommunityBlue product. JA (*Id.* ¶ 66). Even the Amended Complaint itself reflects, however, that: (a) all of this conduct occurred *before* April 21, 2005; and (b) any *antitrust injury* caused by that conduct was felt (if at all) before April 21, 2005 as well.

First, WPAHS contends that Highmark decided in *2002* to discontinue the CommunityBlue product, and alleges that this product was entirely gone from the market by January 2004. JA0097, JA0101 (Amended Complaint, ¶¶ 63, 79). Nothing about that conduct tolls the running of the limitations period.

Second, Highmark's refusals to accede to WPAHS's requests to modify the terms of the July 2000 loan did not cause WPAHS to suffer an antitrust injury within the four-year limitations period. (Indeed, as discussed in Argument – Section A, *supra*, Highmark's conduct in this regard did not inflict an antitrust injury *at any time*). WPAHS agreed to the terms of this loan in July 2000, and the loan agreement did not give WPAHS any contractual *right* to refinance. JA0698-718, JA0719-835 (Exhibits 18 & 19). Even WPAHS's requests that Highmark modify the terms of the loan occurred well before the four-year limitations period. JA0106 (Amended Complaint, ¶98-99) (alleging Highmark refused requests to restructure the loan in 2003 and 2004). And, although WPAHS alleges that Highmark persisted in its refusal to modify the terms of the loan when WPAHS approached it in April 2005 and September 2005, even the most liberal reading of

the Amended Complaint reveals that at each instance Highmark was simply reaffirming its earlier decisions. Accordingly, the April and September 2005 conduct were not "new" acts and did not inflict "new" injury. *See Martinez*, 872 F. Supp. at 472; *see also Lakian*, 188 F.3d at 406 (continuing payments arising out of an allegedly illegal agreement did not restart the statute of limitations because they were "only a manifestation of the previous agreement").

Third, WPAHS's allegation of injury stemming from Highmark's reimbursement rates also is confined to the pre-limitations period. As discussed *supra*, pp. 9-10, Highmark and the WPAHS Tertiary Hospitals locked in contractual reimbursement rates on June 15, 2002. Those rates extended through June 30, 2008, thereby blanketing the entire period of the claimed conspiracy.[12] Where (as here) "a complaining party was fully aware of the terms of the agreement when it entered into the agreement, an injury occurs *only* when the agreement is initially imposed." *Varner*, 371 F.3d at 1020 (emphasis added). Here, WPAHS's injury occurred (if at all) no later than June 2002, seven years before WPAHS filed its complaint.

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[12] The only change to these rates that occurred within the statute of limitations period occurred in June 2008, when Highmark and WPAHS amended the agreements to *increase* WPAHS's reimbursement rates, retroactive to October 1, 2007. WPAHS does not contend that those rates were artificially suppressed by the alleged conspiracy.

Although the Amended Complaint contains sporadic references to conduct that allegedly occurred after April 21, 2005, none of those allegations constitute overt acts that imposed new injury related to the conspiracy during the limitations period. Rather, those allegations are unconnected to the core conspiracy WPAHS alleges, and therefore cannot be attributed to "an active, injurious conspiracy," as this Court requires. *Lower Lake Erie*, 998 F.2d at 1173.

For example, WPAHS claims it was harmed by Highmark's decision to reimburse emergency care provided by Alle-Kiski Medical Center ("AKMC") (a WPAHS facility) at outpatient care rates, not at in-patient rates. JA0112 (Amended Complaint, ¶¶ 122-24). Elsewhere, however, WPAHS acknowledges that this is "an issue separate from the rate discrimination between West Penn Allegheny and UPMC[.]" Plaintiff WPAHS's Sur-Reply in Further Opposition to Defendants' Motion to Dismiss the Amended Complaint, p. 6 (Doc. 96). Similarly, the allegation that Highmark reimbursed AKMC at non-emergency rates because of undefined "issues" with UPMC (JA0112) (Amended Complaint, ¶ 123), is far too vague and conclusory to connect this discrete pricing decision regarding AKMC to an active conspiracy regarding the WPAHS tertiary hospitals and restart the running of the clock. *See Lower Lake Erie*, 998 F.2d at 1173 (recognizing that injuries must be caused by "an active, injurious conspiracy.").

WPAHS's allegation that Highmark "leaked" financial information about it to UPMC in the Fall of 2006 also is unconnected to the alleged conspiracy and also is too vague and conclusory to restart the running of the limitations period. JA0113 (Amended Complaint, ¶ 128). Despite being given the opportunity to amend its Complaint, WPAHS does not allege that Highmark "leaked" this information pursuant to any agreement with UPMC. In addition, the alleged "leak" did not injure WPAHS (much less cause it to suffer an antitrust injury), because WPAHS was in fact able to obtain financing shortly thereafter, and did so at rates better than the rates on the Highmark loan. JA0922-23, JA0940-42.

WPAHS's assertion that comments Highmark's Chairman of the Board allegedly made in November 2005 (JA0108-09 (Amended Complaint, ¶ 106) show enforcement of an agreement, and thus constitute an overt act, suffers from the same fatal flaw: even if the court credits these comments, they are not alleged to have caused an injury different or distinct from the alleged injuries that occurred as long ago as 2002.

In support of the contention that its claims are not stale, WPAHS relied below on *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968) (3d. Cir. 1967), and *Lower Lake Erie*. Both cases, however, are fundamentally different from this case, as those cases involved injury flowing from agreements

that were made – and consequent injury that was felt – *during* the limitations period.

Hanover Shoe was a monopolization case. Plaintiff claimed that the defendant's policy of leasing, but refusing to sell, critical shoe machinery to it resulted in an "illegal overcharge during the damage period[.]" 392 U.S. at 483 and 488. Indeed, as the Third Circuit observed, the defendant "went beyond a mere continuation of the refusal to sell; it collected rentals on leases and entered into new leases" during the limitations period. *Hanover Shoe, Inc. v. United Shoe Mach. Corp*., 377 F.2d 776, 794 (3d Cir. 1967) (requiring "separate invasion" of rights within the limitations period), *aff'd in part and rev'd in part*, 392 U.S. 481 (1968). The Supreme Court later emphasized that the "continuing violation . . . inflicted continuing and accumulating harm on [the plaintiff.]" *Id.* at 502 n. 15.

In *Lower Lake Erie*, the plaintiffs alleged that certain railroad companies had conspired to monopolize the market for dock handling, storage, and transport of iron ore by refusing to lease dock property to competitors and refusing to grant commodity line haul rates from non-railroad docks. *Id.* at 1172. Harm within the limitations period was evident because, as plaintiffs engaged in new transactions to buy transportation services, "dock handling rates…remained artificially inflated." *Id*. This Court observed that "[t]o the extent that the steel companies' continued

shipment of ore on Lower Lake Erie resembles continued rents paid to the defendants in *Hanover Shoe*, the cases are indistinguishable." *Id*.

Here, in stark contrast, WPAHS is complaining that Highmark held it to the reimbursement rates and loan terms it negotiated *before the alleged conspiracy even began.* There were no "new transactions" with Highmark during the limitations period. Nor can WPAHS point to any act that occurred within the limitations period that caused it new and accumulating injury. This distinction between the cases is fatal. For all of these reasons, this Court should affirm the dismissal of Counts I and II as time-barred.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: March 1, 2010

Respectfully submitted,

By: s/ Daniel I. Booker

DANIEL I. BOOKER (PA 10319)
dbooker@reedsmith.com
P. GAVIN EASTGATE (PA 86061)
geastgate@reedsmith.com
DONNA M. DOBLICK (PA 75394)
ddoblick@reedsmith.com
JEFFREY J. BRESCH (PA 66777)
jbresch@reedsmith.com

Reed Smith LLP
225 Fifth Avenue
Pittsburgh, PA 15222
Phone: (412) 288-3131
Facsimile: (412) 288-3063

Attorneys for Defendant Highmark Inc.

CERTIFICATE OF COUNSEL

I, Daniel I. Booker, hereby certify that:

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2. This brief complies with Fed. R. App. P. 32(a)(7)(B) because this brief contains **10,413** words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii);

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Dated: March 1, 2010

s/ Daniel I. Booker
Daniel I. Booker

Attorney for Appellee Highmark Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, this 1st day of March, 2010, a true and correct copy of the foregoing **Brief of Appellee Highmark Inc.** was filed and served as follows:

Via Overnight Courier:

Office of the Clerk
United States Court of Appeals for the Third Circuit
U.S. Courthouse, 601 Market Street, Room 21400
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Via the Court's CM/ECF system:

Counsel for Plaintiff-Appellant West Penn Allegheny Health System, Inc. BARAK A. BASSMAN JAMES T. GILES BARBARA W. MATHER BARBARA T. SICALIDES Pepper Hamilton LLP 3000 Two Logan Square Eighteenth & Arch Streets Philadelphia, PA 19103	*Counsel for Defendant-Appellee UPMC* PAUL H. TITUS Schnader Harrison Segal & Lewis LLP 120 Fifth Avenue, Suite 2700 Pittsburgh, PA 15222-3001 NANCY WINKELMAN NILAM A. SANGHVI Schnader Harrison Segal & Lewis LLP 1600 Market Street, Suite 3600 Philadelphia, PA 19103-7286
Counsel for Defendant-Appellee UPMC JONATHAN M. JACOBSON DAVID H. REICHENBERG Wilson Sonsini Goodrich & Rosati, P.C. 1301 Avenue of the Americas, 40th Floor New York, NY 10019	SCOTT A. SHER JONATHAN R. LUTINSKI Wilson Sonsini Goodrich & Rosati, P.C. 1700 K. Street, N.W. Washington, DC 20006

s/ Daniel I. Booker
Daniel I. Booker