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 an Order of the United States District Court for the Western District of Pennsylvania, No. 09-cv-0480 (Honorable Arthur J. Schwab)

REPLY BRIEF OF APPELLANT WEST PENN ALLEGHENY HEALTH SYSTEM, INC.

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I. INTRODUCTION

As West Penn Allegheny Health System ("West Penn Allegheny") showed in its opening Brief, District Judge Schwab's opinion below was a wholly inappropriate exercise in fact-finding at the pleading stage, under the guise of an overreaching "gatekeeping" function,[1] and failed to credit the allegations of the Amended Complaint. When viewed in light of the proper standard under Rule 12(b)(6), the Amended Complaint easily satisfies the requirements to plead claims under the Sherman Act.

Defendants' Briefs make the same fundamental error as Judge Schwab. Rather than assume the truth of the Amended Complaint (as is required at this stage), defendants argue the weight and credibility of the evidence and ask that this Court disbelieve West Penn Allegheny's claims. This is improper. The mere fact that defendants can think of benign excuses for their conduct does not help them if West Penn Allegheny has alleged that these acts flow from an illegal agreement. And it avails them even less if, as here, the Amended Complaint pleads direct evidence of conspiracy. Defendants ignore these basic principles and urge instead that the acts and admissions described at length in the 258-paragraph Amended Complaint be disregarded in favor of their whitewashed version of their

[1] Although the District Court devoted several pages of its opinion to the "gatekeeper" concept, JA0034-40, neither UPMC nor Highmark expressly defend this overbroad reading of *Twombly*.

conduct. Defendants' belated recasting of their behavior is perfectly appropriate for a jury argument, but it cannot support a motion to dismiss.

II. ARGUMENT

A. The Amended Complaint Stated a Claim Under Section 1 of the Sherman Act

1. There Are Ample Allegations of Conspiracy

a. Appellees Fail to Respond to West Penn Allegheny's Arguments

Defendants provide, at most, token defense of the District Court's holding that West Penn Allegheny failed to plead a conspiracy. In response to West Penn Allegheny's detailed argument showing the direct and circumstantial evidence of conspiracy, West Penn Allegheny Br. at 26-44, Highmark offers only perfunctory and conclusory argument. Highmark Br. at 37-38.

According to UPMC, there *is* an agreement between UPMC and Highmark and "the eighteen pages West Penn spends in its brief cataloging alleged direct and circumstantial evidence of an agreement are beside the point." UPMC Br. at 20. UPMC then suggests that "the only relevant question is what the scope of the UPMC/Highmark agreement actually was." *Id.* Despite this stated desire to join the battle over "scope," UPMC ignores the bulk of the allegations of conspiracy, limiting its argument to two points: that West Penn Allegheny is wrong that there was an agreement to discontinue Highmark's Community Blue

product (UPMC Br. at 25-26) and also wrong that there was an agreement to suppress reimbursement rates to West Penn Allegheny (UPMC Br. at 30).

This treatment of different parts of the conspiracy as isolated, separate claims is improper. *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 357 (3d Cir. 2004) ("a court 'should not tightly compartmentalize the evidence put forward by the nonmovant, but instead should analyze it as a whole to see if it supports an inference of concerted action'") (citation omitted). Regardless, UPMC's two "no conspiracy" arguments fail on their own terms:

First, UPMC's argument that there was no agreement to shutter Community Blue is doomed by Paragraph 66 of the Amended Complaint, which details a speech by UPMC CEO Jeffrey Romoff to UPMC Health Plan employees, delivered shortly after the new June 2002 contract. In that speech, Romoff announced that he had reached an agreement with Highmark that included the closure of Community Blue. JA0097, ¶66. Romoff's admission is direct evidence of an agreement. *Toledo Mack Sales & Services, Inc. v. Mack Trucks, Inc.*, 530 F.3d 204, 223-224 (3d Cir. 2008) (admissions by defendant's executives constituted direct evidence of conspiracy).

Second, defendants' admissions likewise defeat UPMC's argument that there was no agreement to suppress reimbursement to West Penn Allegheny: "When West Penn Allegheny requested improved reimbursement rates in 2005 and

2006, Highmark CEO Dr. Melani said he could not increase West Penn Allegheny's rates because of Highmark's agreement with UPMC to block United's entry into the Pittsburgh market." JA0111, ¶119.

b. The Conspiracy Continued into the Limitations Period

As an alternative to the indefensible "no conspiracy" holding, Highmark argues that this Court affirm on statute of limitations grounds. Highmark Br. 38-46. This argument is meritless.

"Generally, a cause of action under § 1 [of the Sherman Act] accrues and the [four-year] statute of limitations begins to run when a defendant commits an act that injures the plaintiff's business." *Toledo Mack*, 530 F.3d at 217 (citation omitted). "In the context of a continuing conspiracy to violate antitrust laws, each time a plaintiff is injured by an act of the defendant a cause of action accrues to it to recover damages caused by that act and, as to those damages, the statute of limitations runs from the commission of the act." *Id.* (citation omitted). Accordingly, to show that the conspiracy continued into the limitations period, West Penn Allegheny need only allege that defendants "committed during the limitations period overt acts in furtherance of an illegal conspiracy . . . even if that conspiracy began before the limitations period." *Id.* at 218.

The Amended Complaint sets forth numerous overt acts in furtherance of the conspiracy within the limitations period (*i.e.*, April 21, 2005 forward), including:

- Highmark rejected West Penn Allegheny's debt restructuring proposals because of UPMC's threats to aid Highmark's competitor United, in April 2005 (*see* JA0107, ¶¶100-101), and in 2006. JA0110, ¶112. In each instance West Penn Allegheny was forced to incur artificially inflated financing costs. JA0110-111, ¶114.

- In September 2005, UPMC sent Highmark a letter describing all the ways in which West Penn Allegheny may seek assistance from Highmark and instructed Highmark not to support West Penn Allegheny. JA0107-108, ¶103.

- In September 2005, Highmark refused to consent to West Penn Allegheny's request to issue $35 million of subordinate debt because of its agreement with UPMC. JA0107, ¶102.

- In November 2005, Highmark's Chairman Mr. Baum informed West Penn Allegheny that Highmark could not assist West Penn Allegheny because UPMC would respond by either selling the UPMC Health Plan or contracting with United. JA0108-110, ¶¶105-111. Baum characterized Highmark's actions as "probably illegal." JA0109, ¶109.

- In November 2005, UPMC CEO Romoff instructed a UPMC executive to remind Highmark's Melani that the goal of their conspiracy was to keep United out of Western Pennsylvania and that any support from Highmark to West Penn Allegheny would only help United. JA0110, ¶113.

- In November 2005, Highmark instituted a grant program in which dollars were awarded on a per physician basis, with an aggregate limit of $500,000 per health system. This limit only impacted West Penn Allegheny and UPMC. Highmark waived the limit for UPMC, but not for West Penn Allegheny.

Highmark provided UPMC $8 million in grant money. JA0113, ¶125.

- In Spring 2006, Highmark refused to reimburse Alle-Kiski Medical Center at emergency room rates for emergency care services because of "issues" with UPMC. JA0112, ¶¶122-124.
- Highmark continued to pay depressed reimbursement rates to West Penn Allegheny and inflated rates to UPMC at least through Summer 2008.[2] JA0113, ¶127.

Nevertheless, Highmark argues that that "there were no new transactions, actions, or inactions by Highmark in the limitations period," because Highmark had begun its rate discrimination before the limitations period and because Highmark rejected different loan refinancing proposals before the limitations period. Highmark Br. at 38-39. According to Highmark, a continuing conspiracy cannot be shown based upon Highmark and UPMC's continuation of the same conspiratorial conduct into the limitations period, as such harm is not "new" enough to be a "new" overt act causing injury.

Highmark is wrong on the facts. Highmark engaged in *new* injurious acts during the limitations period. For example, in September 2005, West Penn Allegheny asked Highmark's consent, *for the first time*, to issue an additional $35

[2] While Highmark notes that it finally signed an improved contract with West Penn Allegheny in Summer 2008, Highmark conspicuously omits that it acted under pressure of the Department of Justice's ongoing investigation of the Highmark-UPMC conspiracy. JA0113, ¶127.

million in bonds. Highmark refused because of its agreement with UPMC. JA0107-108, ¶¶102-104.

Highmark is also wrong on the law. This Court has repeatedly held what should be obvious: *continued* adherence to a pattern of illegal activity is what shows a *continuing* conspiracy. Proof that the conspirators' acts are "more of the same" shows that the conspiracy continued. *In re Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d 1144, 1172 (3d Cir. 1993) (plaintiff steel companies sued defendant railroads for 25-year conspiracy to block plaintiffs' ability to ship iron ore at lower costs; held that plaintiffs satisfied burden of showing that conspiracy continued into limitations period by showing defendants' *continued* refusal to lease dock property and *continued* refusal to grant commodity line haul rates to plaintiffs during limitations period); *Pennsylvania Dental Ass'n v. Med. Serv. Ass'n of Pennsylvania*, 815 F.2d 270, 278 (3d Cir. 1987) (defendants' *continued* failure within the limitations period to rescind trade association resolutions demonstrated existence of continuing conspiracy); *Harold Friedman, Inc. v. Thorofare Markets, Inc.*, 587 F.2d 127, 139 (3d Cir. 1978) (*continued* adherence to illegal contract showed that illegal conspiracy *continued* into limitations period).[3]

[3] Highmark ignores *Pennsylvania Dental* and *Friedman*. Highmark distinguishes *Lower Lake Erie* on the basis that West Penn Allegheny's reimbursement and refusal to consent to refinance claims arose from agreements negotiated before the conspiracy began, whereas *Lower Lake Erie* "involved injury

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Thus, "a conspiracy's refusal to deal, which began outside the limitations period, may be viewed as a continuing series of acts upon which successive causes of action may accrue." *In re Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d at 1173. Similarly, in a price-fixing conspiracy, "each sale to the plaintiff, 'starts the statutory period running again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times.'" *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 189 (1997) (citation omitted). A continuing conspiracy is also evidenced by statements from the conspirators affirming their continued adherence to the unlawful activity. *Toledo Mack*, 530 F.3d at 224 (statements by defendant's executives showed continuing conspiracy). Thus, Highmark's *continued* rate discrimination, its *continued* pattern of refusing West Penn Allegheny's refinancing requests, and its executives' (such as Baum in November 2005) *continued* statements of adherence to the conspiracy show a *continuing* conspiracy.

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flowing from agreements that were made – and consequent injury that was felt – during the limitations period." Highmark Br. 44-45. The agreements to which Highmark refers appear to be "new transactions to buy transportation services" at the same inflated rates. *Id.* at 45. This is no different from Highmark continuing to pay depressed rates on "new transactions" concerning health care services, and no different than Highmark's refusal to consent to new refinancing proposals in the limitations period.

2. The Conspiracy Unreasonably Restrained Trade

UPMC also incorrectly argues in its brief that the Amended Complaint fails to sufficiently allege that the conspiracy unreasonably restrained trade. West Penn Allegheny must plead that "the combination or conspiracy produced adverse, anti-competitive effects within the relevant product and geographic markets." *Toledo Mack*, 530 F.3d at 225. If the conspiracy falls within the category of conduct that is *per se* illegal, adverse effects are "conclusively presumed satisfied." *Rossi v. Standard Roofing, Inc.*, 156 F.3d 452, 465 (3d Cir. 1998). Otherwise, the plaintiff must show under the "rule of reason" that the conspiracy adversely affected competition. *Id.* at 464-465.

As West Penn Allegheny argued below,[4] the conspiracy is *per se* illegal. Highmark and UPMC are competitors in the health insurance business, and their agreement that UPMC Health Plan would cease to compete for commercial business (in exchange for Highmark's agreement to help cripple West Penn Allegheny) constitutes a "horizontal" agreement between direct competitors to

[4] UPMC's falsely claims that West Penn Allegheny has "never argued" defendants' agreement is a *per se* violation. *See* Doc. 86, 26; JA0137, ¶224; UPMC Br., 21.

allocate markets and customers. JA0136, ¶¶222-224. This is *per se* unlawful. *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 49 (1990).[5]

However, it is unnecessary to reach whether the *per se* rule applies because the Amended Complaint satisfies the rule of reason. Under the rule of reason, "proof of anticompetitive effects can be achieved by demonstrating that the restraint is facially anticompetitive or that its enforcement reduced output, raised prices or reduced quality. Alternatively, because proof that concerted action actually caused anticompetitive effects is often impossible to sustain, proof of the defendants' market power will suffice." *Toledo Mack*, 530 F.3d at 226.

The Amended Complaint alleges defendants' market power. JA0125-0129, ¶¶174-189 (UPMC); JA0129-0131, ¶¶190-200 (Highmark). That alone is sufficient under the rule of reason. *Toledo Mack*, 530 F.3d at 226 (plaintiff presented evidence sufficient to proceed to jury under rule of reason by proffering evidence of market power).

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[5] Citing *AT&T Corp. v. JMC Telecom, LLC*, 470 F.3d 525 (3d Cir. 2006), UPMC argues that its agreement with Highmark is vertical and thus not *per se* illegal. UPMC Br., 21-22. *AT&T* addressed a territorial restraint imposed by AT&T upon its distributor of pre-paid telephone cards. The Third Circuit held that this relationship was primarily vertical, and the fact that AT&T also sold phone cards at the retail level did not change that relationship. *Id*. at 531. The current situation is inapposite. UPMC does not sell health insurance through Highmark. In the commercial health insurance market, UPMC and Highmark are solely horizontal competitors.

West Penn Allegheny also pled anticompetitive effects. Defendants, as a result of the conspiracy, raised prices above competitive levels. *Toledo Mack*, 530 F.3d at 226 (elevated prices are evidence of anticompetitive effects). UPMC agreed to stop competing against Highmark in the commercial health insurance sector and to block any of Highmark's competitors from entering Pittsburgh. JA0097-0101, ¶¶65-78. Consequently, Highmark faced no real competition and raised health insurance premiums far above competitive levels. JA0104-0105, ¶¶89-94. In fact, Highmark's financial statements admitted that its 200% increase in net income between 2003 and 2004 was due to a $265 million increase in premium revenue. JA0104, ¶90. Contrary to Highmark's rhetoric that it is only trying to secure the lowest hospital costs for its customers, Highmark has used this illegal conspiracy to raise health insurance premiums far above national averages. JA0104-105, ¶¶91-93.

The conspiracy also restricted output in the health insurance and hospital sectors. *Toledo Mack*, 530 F.3d at 226 (reduced output is evidence of anticompetitive effects). In the health insurance sector, UPMC agreed, as part of the conspiracy, to restrict its own output of health insurance services.[6] JA0101,

[6] Citing a document from outside the Amended Complaint, UPMC claims that its Health Plan's enrollment has "increased every year since 2002." UPMC Br., 38, n.7. This document cannot be considered at the motion to dismiss stage. *Pension Benefit Guar. Corp. v. White Consol. Indus.*, 998 F.2d 1192, 1196 (3d Cir.
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1993). At most, this data could be considered under judicial notice rules. But UPMC cites it for the truth of the UPMC Health Plan enrollment figures listed therein, which is beyond the scope of judicial notice: "[Public records] may only be considered for the limited purpose of showing that a particular statement was made by a particular person. They may not be considered for the truth of the matters stated within them. If a court adopted the approach of considering such documents for the truth of the matter asserted therein, it would be authorizing a trial by public documents, and thus imprudently expanding the scope of 12(b)(6) motions." *In re Viropharma, Inc., Sec. Litig.*, C.A. No. 02-1627, 2003 U.S. Dist. LEXIS 5623, at *5, 2003 WL 1824914 (E.D. Pa. Apr. 3, 2003) (citations omitted). West Penn Allegheny accordingly objected to the use of this document below. Dkt. No. 86, 11 n.10.

Taking its cue from the District Court's usurpation of the jury's fact-finding role, UPMC now invites this Court to affirm dismissal of the Amended Complaint on the theory that the allegations of the Amended Complaint are false, as this document supposedly proves. Such weighing of the evidence is for trial, not motions to dismiss. In fact, the document that UPMC claims so clearly shows that its Health Plan had growing enrollment is hardly so unambiguous. It includes Medicare and Medicaid, which are outside of the relevant market. JA0129, ¶190 ("The relevant product market is health care financing and administration for *private* employers and individuals") (emphasis added). The column "Commercial – ASO" refers to the "administrative services only" sector for which UPMC Health Plan acts as a third-party health plan administrator. However, the ASO figures include UPMC's own self-funded employee plan, which includes 50,000 UPMC employees and their dependents. The three non-"physical health" columns are better described as health-related services rather than health insurance, yet they constitute the bulk of UPMC Health Plan's enrollment according to UPMC's exhibit, and three-quarters of its growth from 2002 through March 31, 2009. For example, "EAP Solutions" is a workplace wellness program.

Notably, the "Commercial – Fully Insured" column, appears to be the only data that is relevant and contains no UPMC employees. It shows an explosion of growth in the commercial health insurance enrollment for the UPMC Health Plan from 2000 to 2002 and then a substantial decline from 222,210 members in 2002 to 177,660 members in 2006. *Id*. This trend is exactly what West Penn Allegheny alleged: rapid growth in commercial enrollment for the UPMC Health Plan before

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¶78. UPMC also agreed to block Highmark's rivals, such as United, from entering Pittsburgh by refusing to contract with them on reasonable terms. JA0099-0100, ¶¶70-77. Absent the conspiracy, these insurers would have expanded their output of insurance services in Pittsburgh.

The conspiracy further restricted output in the hospital market. JA0134, ¶¶210-213. Highmark effectively raised West Penn Allegheny's financing costs and depressed its reimbursement rates. JA0133, ¶¶208-209. Consequently, West Penn Allegheny was starved of capital to expand its output of services, including oncology, cardiology, orthopedics, and neurology. JA0134, ¶210.

Defendants ignore these core allegations, offering instead a hodge-podge of meritless contentions. For example, they argue that the elimination of Highmark's low-priced Community Blue product resulted in zero harm to competition. UPMC Br., 26-29; Highmark Br., 33-34. UPMC argues that Community Blue's elimination could not have been anticompetitive because it supposedly *increased* choices to patients. UPMC Br., 27-28. UPMC contends that because Community Blue did not include its facilities, ending Community Blue

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the conspiracy in 2002 and reversal of that growth thereafter, as UPMC fulfilled its illegal agreement to stop competing for commercial health insurance business.

was a boon to Community Blue subscribers by giving them access to more hospitals.

Community Blue was launched in the late 1990's as a low-cost insurance product. JA0092, ¶46. Community Blue did not "exclude UPMC;" rather, UPMC refused to provide the discounts necessary to participate in Community Blue. *Id.* In contrast, West Penn Allegheny cut its prices to participate in Community Blue. JA0101, ¶80. This is how competition works: Highmark demanded that hospitals cut their prices to compete for a place in the Community Blue network, and Highmark then used these cost savings to market a health insurance plan with reduced premiums. *Id.* Employers and consumers who wanted to buy insurance from Highmark in the late 1990's and early 2000's thus had two options: the lower-priced Community Blue or a higher-priced Highmark plan that included UPMC (UPMC participated in Highmark's other plans).

When Highmark discontinued Community Blue (JA0101-0102, ¶¶79-82), it forced Community Blue subscribers to switch to the remaining higher-priced Highmark products.[7] Community Blue members were socked with

[7] Highmark argues that its customers were still permitted to go to West Penn Allegheny and also free to choose non-Highmark plans from other insurers. Highmark Br., 33. This is disingenuous. While Highmark's customers could still go to West Penn Allegheny, they could no longer do so at Community Blue's reduced rates. In addition, consumers did not have alternative non-Highmark

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premium increases of 40%. JA0102, ¶81. And, to ensure that disappointed Community Blue subscribers did not switch to the UPMC Health Plan, Highmark and UPMC agreed that UPMC would raise prices to commercial subscribers for its health plan. JA0098, ¶67. Far from celebrating their newfound "choice" (as UPMC would have it), small business groups complained bitterly about losing a low-cost health insurance option. JA0102, ¶81.

Defendants also argue, relying upon predatory pricing cases, that Highmark's suppression of West Penn Allegheny's reimbursement cannot be an unreasonable restraint of trade. UPMC Br., 31-32; Highmark Br., 23 (citing, for example, *Monahan's Marine, Inc. v. Boston Whaler, Inc.*, 866 F.2d 525 (1st Cir. 1989)). These predatory pricing cases are off point. As Judge Becker explained in *Callahan v. A.E.V., Inc.*:

> The plaintiffs' claims are unlike an ordinary price discrimination case, in which a single supplier offers different prices to different purchasers to advance its own interests. They allege that Fuhrer was convinced to offer different prices in order to advance the defendants' – the plaintiffs' competitors – interests. We see no reason why price discrimination, under appropriate circumstances, could not be part of an agreement in restraint of trade or a monopolization attempt.

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insurance options which would have existed but for UPMC's reciprocal agreement with Highmark to block competition in the health insurance market.

182 F.3d 237, 248-249 (3d Cir. 1999). This Court has recognized that "[s]o long as the price discrimination involves a conspiracy to restrain trade or create a monopoly in some market – along with a substantial effect on competition in the market . . . it would violate the Sherman Act." *Id.* (internal citations omitted).[8]

3. West Penn Allegheny Suffered Antitrust Injury

The final element of a Section 1 claim is "that the plaintiffs were injured as a proximate result of that conspiracy." *Toledo Mack*, 530 F.3d at 225. To show an antitrust injury, West Penn Allegheny must allege "that it suffered an injury that (1) is of the type the antitrust laws were intended to prevent and (2) flows from that which makes defendants' acts unlawful." *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 349 (1990) (internal quotations and citation omitted). An injury "will not qualify as 'antitrust injury' unless it is attributable to an anticompetitive aspect of the practice under scrutiny." *Id.* at 334 (citations omitted). The Amended Complaint meets this standard.

[8] UPMC also argues that the lack of agreement on Highmark's specific prices to its customers equates to no restraint on trade at all, citing *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 731 (1988). UPMC Br., 29. This is a red herring. In *Business Electronics*, the Court did not hold that agreements about matters other than specific prices were automatically legal under the Sherman Act. Rather, the Court held that, under the facts before it there, there was not a per se violation. *Business Electronics*, 485 U.S. at 726-727, 731. *Business Electronics* did not address what must be shown under the rule of reason.

UPMC and Highmark agreed to eliminate competition in the relevant health insurance and the health care services markets by protecting one another from competition.[9] To protect UPMC from competition in the health care services market, defendants targeted West Penn Allegheny, UPMC's *sole* remaining competitor for tertiary and quaternary care services. As there are substantial barriers to entry for a new tertiary care facility,[10] JA0128, ¶187, the elimination of West Penn Allegheny would shield UPMC from any competition for the foreseeable future. To accomplish their scheme, Highmark blocked West Penn Allegheny's refinancing efforts and depressed its reimbursement rates. JA0133, ¶208. By starving West Penn Allegheny of capital to compete with UPMC, defendants crippled West Penn Allegheny's ability to provide a competitive check on UPMC or an incentive to UPMC to continually improve and innovate. As a result, West Penn Allegheny was unable to expand its services and facilities, which harmed the Pittsburgh community as a whole by decreasing output for tertiary and

[9] UPMC argues that West Penn Allegheny cannot recover for harm to the health insurance market. UPMC Br., 36-38. West Penn Allegheny, however, only seeks damages caused as a result of decreased competition in the health care services market. Nevertheless, decreased competition in the health insurance market is relevant as it is part of the overall conspiracy and the *quid quo pro* Highmark received for stunting West Penn Allegheny.

[10] During the relevant time period, there has been no entry of a new competitor in the health care services market. To the contrary, numerous competitors have either folded or been acquired by UPMC. JA0128-0129, ¶¶188-189.

quaternary care. JA0134, ¶¶210-213. Under this Court's precedent, the harm that West Penn Allegheny incurred from these acts is a proper antitrust injury.[11]

a. Restraint On West Penn Allegheny's Output

Highmark argues that West Penn Allegheny's restricted output is not an antitrust injury because there is no overall reduction in the quantity of hospital services in Pittsburgh. Highmark Br., 30-32. According to Highmark, nothing more is alleged than a "shift in market share between two competitors." *Id*. The Third Circuit has already rejected Highmark's argument. In *Angelico v. Lehigh Valley Hosp.*, plaintiff doctor alleged that three hospitals conspired to deny him staff privileges, thus "blackballing" him from the cardiothoracic surgery market. 184 F.3d 268, 274 (3d Cir. 1999). The district court held that there was no antitrust injury because plaintiff failed to establish any effect on price, quantity or

[11] *See Toledo Mack*, 530 F.3d 204; *LePage's, Inc. v. 3M*, 324 F.3d 141, 165-166 (3d Cir. 2003) (recognizing competitor's lost profits from lost market share as proper antitrust injury); *Angelico v. Lehigh Valley Hosp.*, 184 F.3d 268, 274 (3d Cir. 1999) (injuries suffered "when shut out of competition for anticompetitive reasons, is indeed among those the antitrust laws were designed to prevent"); *Pace Electronics, Inc. v. Canon Computer Sys., Inc.*, 213 F.3d 118 (3d Cir. 2000); *Callahan*, 182 F.3d 237; *Rossi*, 156 F.3d 452; *Brader v. Allegheny Gen. Hosp.*, 64 F.3d 869 (3d Cir. 1995); *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., Inc.*, 998 F.2d 1224 (3d Cir. 1993); *Big Apple BWM, Inc. v. BMW of North America, Inc.*, 974 F.2d 1358 (3d Cir. 1992); *Arnold Pontiac-GMC, Inc. v. Budd Baer, Inc.*, 826 F.2d 1335 (3d Cir. 1987); *see also* IIA Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶348 at 202 (3d ed. 2007) (A competitor "clearly has standing to challenge the conduct of rival(s) that is illegal precisely because it tends to exclude rivals from the market, thus leading to reduced output and higher prices.").

quality of services in the cardiothoracic surgery market. *Id*. at 273. The Third Circuit reversed, holding that Angelico "was harmed by a conspiracy with an anticompetitive intent," to exclude him from the market. *Id.* at 275. Angelico's loss of income from being excluded as a competitor in the market was therefore a proper antitrust injury. *Id.* at 275, n.1 ("Indeed, protecting a competitor's ability to compete from a conspiracy, the sole purpose of which is to decrease competition by eliminating that competitor, is clearly in the interest of competition.").

As in *Angelico*, West Penn Allegheny was the target of the conspiracy to reduce competition.[12] The only difference is the harm to competition in the current case far exceeds that present in *Angelico* because West Penn Allegheny is

[12] Highmark attempts to avoid *Angelico* on the grounds that the plaintiff there was completely excluded from the market, whereas here West Penn Allegheny was severely hamstrung but not totally foreclosed from the relevant market. Highmark's argument is unavailing. Applied, it would permit recovery only by plaintiffs whose injury represented a total and complete loss of business. Unsurprisingly, Highmark cites no case finding no antitrust injury on the theory of "crippled but not dead."

Similarly, defendants argue that West Penn Allegheny's ability to eke out a profit during certain years is inconsistent with any claimed injury. Highmark Br., 13; UPMC Br., 12-13. The notion that only plaintiffs with net operating losses can demonstrate antitrust injury is absurd and neither defendants nor the district court cites a case so holding. In addition, defendants fail to give West Penn Allegheny's profit figures their proper context. In 2005, West Penn Allegheny's revenues over expenses totaled $21 million, representing a more-than-modest 1.48% of West Penn Allegheny's $1.43 billion in total revenues and only a fraction of the almost $600 million *increase* in UPMC's profits during the conspiracy. JA0955; JA0103-0104, ¶87.

the *only* other competitor in the tertiary care market. *LePage's, Inc. v. 3M*, 324 F.3d 141, 160-163 (3d Cir. 2003) (holding that exclusion of plaintiff harmed competition as whole because plaintiff was only other competitor in market).

Moreover, this is not a case merely about shifting shares of a static market between UPMC and West Penn Allegheny. As the Amended Complaint sets out in detail, the conspiracy prevented West Penn Allegheny from adding new services and expanding its capacity to provide existing service lines. JA0134, ¶¶210-213. But for the conspiracy, there would have been more services available in the relevant market.

Highmark downplays the harm to competition by arguing that physicians' decisions to refer patients to different hospitals determined how many services West Penn Allegheny provided. Highmark Br., 31-32. This is also a red herring: physicians cannot admit patients to programs that do not exist because West Penn Allegheny was starved of the capital to launch such programs, nor could patients be admitted to beds that do not exist because West Penn Allegheny was starved of the capital needed to build them. Physicians' willingness to refer patients to any hospital is largely a function of the breadth and quality of services offered by the hospital, including its equipment and support services. Moreover, West Penn Allegheny is itself a competitor in the market for patients, some of

whom come to West Penn Allegheny's hospitals primarily because of their reputation for quality of care.

b. Highmark's Refusal to Consent to West Penn Allegheny's Refinancing Proposals

Defendants also argue with the Amended Complaint's allegations regarding Highmark's rejections of West Penn Allegheny's debt restructuring proposals. Defendants try to spin this as Highmark merely declining to loan money to West Penn Allegheny, arguing that Highmark's consent was not required for West Penn Allegheny to access financing from any other source. Highmark Br., 35-36; UPMC Br., 34 ("Highmark clearly has no monopoly on money."). These arguments do not hold up to scrutiny.

In 2000, Highmark provided a $125 million loan to help finance the merger that formed West Penn Allegheny. JA0092, ¶43. In late April 2005, West Penn Allegheny asked Highmark to consent to having the loan bought out by Citigroup. JA0107, ¶100. The purpose of the transaction was to refinance at a lower interest rate. *Id.* West Penn Allegheny was not asking Highmark for a loan, but to consent to West Penn Allegheny securing a loan from someone else.[13]

[13] Because defendants mischaracterize the allegations, the cases that they cite are off point. *U.S. Steel Corp. v. Fortner*, 429 U.S. 610 (1977), which Highmark cites, does even not address antitrust injury. Highmark also cites *Johnson v. Univ. Health Servs., Inc.*, 161 F.3d 1334 (11th Cir. 1998). There, the Eleventh Circuit noted that neither defendant "did anything to impede [plaintiff's] .
(continued...)

Highmark refused its consent to this, and subsequent, requests to refinance the loan. JA0107-110, ¶¶100-112. Without Highmark's consent, the transaction could not proceed.

Further, in September 2005 West Penn Allegheny sought Highmark's consent, required under the loan covenants, to issue $35 million of additional debt. JA0107, ¶102. Again, West Penn Allegheny did not ask Highmark for money, but only that Highmark not impede West Penn Allegheny's ability to seek funds from other investors. Highmark once more refused. *Id.*

Highmark's refusals were the direct result of the conspiracy, as unequivocally admitted by its highest corporate officers. Highmark CEO Dr. Melani and Highmark Board Chairman Mr. Baum both said that the only reason that Highmark refused its consent was as part of a reciprocal agreement whereby UPMC would exclude Highmark's rivals, especially United, from Pittsburgh. JA0107-110, ¶¶102-113.

As a result, West Penn Allegheny was delayed for years in its financial restructuring efforts and forced to incur higher financing costs. JA0110-

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(continued...)

. . access to the capital markets," which distinguished *Johnson* from other cases finding antitrust injury. *Id.* at 1338. That is the point here – that Highmark intentionally used its veto power to impede West Penn Allegheny from receiving loans or investments from other entities in the capital markets. JA0107-111, ¶¶100-112, 114.

111, ¶114. More money that was forced to go to debt service meant less available capital to expand West Penn Allegheny's output of services by investing in expanded and new clinical programs. JA0131-134, ¶¶202-213. The result was reduced competition and output in the health care services market. JA0133-135, ¶¶209-214; *Toledo Mack*, 530 F.3d at 226 (reduced output is injury to competition).

Defendants also argue that, because West Penn Allegheny refinanced its debt in May 2007, there was no antitrust injury during the previous years in which Highmark prevented West Penn Allegheny's refinancing efforts. UPMC Br., 35; Highmark Br., 36. West Penn Allegheny's ability to mitigate damages, after years of incurring inflated financing costs because of the conspiracy, goes to the amount damages rather than to the existence of an injury.

c. Depression of Reimbursement Rates

Highmark's suppression of West Penn Allegheny's reimbursement is another mechanism by which the defendants stifled competition. It prevented West Penn Allegheny from having the resources to expand output of services and to threaten UPMC's dominance. JA0133-0134, ¶209. Highmark CEO Melani admitted that he could not increase West Penn Allegheny's reimbursement because of Highmark's agreement with UPMC. JA0111, ¶119. West Penn Allegheny's claim for lost reimbursement is thus directly "attributable to an anticompetitive

aspect of the practice under scrutiny" in the Amended Complaint. *Atlantic Richfield*, 495 U.S. at 334.

Highmark argues that West Penn Allegheny improperly seeks to use this lawsuit to have its rates increased to the artificially inflated rates that UPMC now receives. Highmark Br., 25-26. West Penn Allegheny does not seek reimbursement at UPMC's inflated level. Rather, absent the conspiracy, UPMC's reimbursement would have been lower and West Penn Allegheny's somewhat higher, with an overall mix yielding far lower hospital service costs. JA0133-0134, ¶209. Indeed, Highmark has not spent the past decade using depressed rates from West Penn Allegheny to spare Pittsburgh employers from harsh premium increases, as it would lead this Court to believe; on the contrary, Highmark has increased health insurance premiums far faster than national averages and reaped record profits. JA0097, ¶65; JA0103-0105, ¶¶84-94.

Defendants also argue that, because West Penn Allegheny's rates were set by contracts prior to the conspiracy and occasionally increased, there can be no injury. Highmark Br., 22 n.5; UPMC Br., 30. This argument sidesteps that, as a result of the illegal conspiracy, West Penn Allegheny's reimbursement was depressed compared to the excessive rates granted to UPMC when the conspiracy commenced in Summer 2002. In the late 1990's, the Allegheny Health, Education, and Research Foundation went bankrupt, imperiling the future of the Allegheny

General Hospital ("AGH"), a sophisticated teaching hospital that provided the main competition to UPMC for an array of high-end services. Fearing a UPMC monopoly, Highmark financed the merger that created West Penn Allegheny, whose flagship is AGH. Highmark knew that saving AGH and preserving competition required support. Highmark thus strongly backed the new health system in the early 2000's, despite UPMC's relentless efforts to kill it.

Everything changed in 2002. Highmark decided that it no longer wanted to promote competition between hospitals. Lured by UPMC's promise to protect Highmark itself from competition, Highmark withdrew its support of West Penn Allegheny, discriminated in UPMC's favor, and blocked West Penn Allegheny's efforts at debt refinancing. The result was devastating: while Highmark paid far more to UPMC, it in turn used the absence of health insurance competition to raise premiums substantially. The conspirators reaped record profits, and consumers suffered. This is the stuff of antitrust violations, not vanilla contract terms. JA0097, ¶¶63-64; JA0111-0112, ¶¶115-120; JA0132, ¶203. Thus, West Penn Allegheny's reimbursement in isolation is immaterial.[14]

[14] Highmark also argues that the district court properly dismissed the Amended Complaint because the Prayer for Relief made requests that would be "a practically and logistically challenging, if not impossible task." Highmark Br., 28-29. However, it is premature to dismiss a complaint based upon the type of relief sought. Highmark, like the District Court, improperly wants to conduct a full trial on merits, including fashioning specific forms of relief, at the pleading stage.

(continued...)

B. The Amended Complaint Stated a Claim Under Section 2 of the Sherman Act

Contrary to UPMC's arguments, the Amended Complaint amply alleges predatory conduct. UPMC discusses predatory conduct as if each instance of conspiracy and coercion were isolated incidents, artificially dividing West Penn Allegheny's Section 2 allegations into the "exclusive dealing claim" and the "predatory hiring claim." This quarantine approach is contrary to this Court's instruction that "courts must look to the monopolist's conduct taken as a whole rather than considering each aspect in isolation." *LePage's Inc. v. 3M*, 324 F.3d 141, 162 (3d Cir. 2003); *City of Anaheim v. S. Cal. Edison Co.*, 955 F.2d 1373, 1376 (9th Cir. 1992) ("it would not be proper to focus on specific individual acts of an accused monopolist while refusing to consider their overall combined effect."). There are no such claims as Section 2 exclusive dealing claims or Section 2 predatory hiring claims. There is only a claim for violation of Section 2, and the predatory conduct that gives rise to a Section 2 claim "can come in too many

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(continued...)

Allright Missouri, Inc. v. Billeter, 829 F.2d 631, 640 (8th Cir. 1987) ("a dismissal of the claims on the basis of the inappropriateness of the requested relief would be premature at this point," because "[a]ny decision on the type of relief available is ordinarily properly made at the end of trial after all of the facts and circumstances have been fully developed"). Moreover, West Penn Allegheny's demand for relief seeks recovery of compensatory damages, which is unquestionably proper. JA0142.

different forms, and is too dependent upon context for any court or commentator to have enumerated all the varieties." *LePage's*, 324 F.3d at 152 (internal quotes and cites omitted).

West Penn Allegheny maintains that *all* of the predatory conduct alleged in the Amended Complaint contributes to its Section 2 claim. *See* JA0086-91, ¶¶22-41; JA0093, ¶49; JA0095-123, ¶¶56-164; JA0139, ¶237. UPMC's acts, as a whole, are clearly predatory. Most notably, UPMC ignores that its conspiracy with Highmark is predatory conduct. In its opening brief, West Penn Allegheny explained why the conspiracy meets the legal standard for predatory conduct. *See* West Penn Allegheny Br. at 58-59. UPMC does not respond to this argument.

Moreover, UPMC mischaracterizes its coercion of independent community hospitals as supposedly benign, freely-chosen affiliations between itself and these institutions. *See* UPMC Br. at 47-48 This is fiction. UPMC threatened to establish rival UPMC cancer centers next to existing community hospitals unless the community hospitals "consented" to replace their independent oncology programs with UPMC Cancer Centers. JA0115-117, ¶¶135-141. Oncology is a critical source of revenue for community hospitals and an adjacent cancer center would be devastating to a community hospital's finances. JA0117, ¶141. The community hospitals, therefore, were compelled to surrender to UPMC's bullying.

Control of the cancer centers enabled UPMC to direct tertiary and quaternary care referrals from "nearly every" independent community hospital to UPMC.[15] JA0115-116, ¶¶135, 138. Tertiary and quaternary facilities, such as West Penn Allegheny and UPMC, depend on referrals from community hospitals to generate admissions. JA0116-117, ¶¶138-139. UPMC's use of coercion to foreclose West Penn Allegheny's access to referrals from these facilities is classic exclusive dealing and predatory. *United States v. Dentsply Int'l Inc.*, 399 F.3d 181, 196 (3d Cir. 2005) ("Dentsply's grip on its 23 authorized dealers effectively choked off the market for artificial teeth); *LePage's Inc.*, 324 F.3d at 160 (defendants' conduct "cut off LePage's from key retail pipelines").

UPMC contends, however, that the Amended Complaint does not explain "why the single specialty of oncology is important to overall inpatient hospital services" or "suggest that it even tried to compete for comparable joint venture arrangements of its own." UPMC Br. at 46-48. Once more, UPMC ignores the allegations of the Amended Complaint.

The "single specialty" of oncology is crucial to the overall revenue stream of a community hospital. JA0117, ¶141. Thus, the Amended Complaint alleges that "UPMC's ability to cut off independent community hospitals' key

[15] Specialist cancer care, along with other types of specialized consultative care, are tertiary care. Highmark Br. at 3 n.1.

oncology business has resulted in these community hospitals refusing to affiliate with West Penn Allegheny in *any* clinical programs" – a loss of tertiary and quaternary referrals in all specialties.[16] JA0117, ¶141. Equally unfounded is the notion that West Penn Allegheny never tried to affiliate with community hospitals. To the contrary, UPMC's predatory conduct forced community hospitals to *end* previous affiliations with West Penn Allegheny. JA0116, ¶137.[17]

III. CONCLUSION

For the reasons set forth herein and in West Penn Allegheny's principal Brief, the judgment of the District Court should be reversed.

[16] The Amended Complaint alleges a relevant market of high-end tertiary and quaternary care services. JA0126, ¶178; JA0139, ¶235.

[17] Owing to space constraints, this discussion is necessarily truncated. UPMC's predatory conduct also included, among other items, defamatory statements about West Penn Allegheny's financial condition and its acquisition of Mercy Hospital, JA0103, ¶85, JA0122-123, ¶¶160-164, JA0125, ¶174, JA0128-129, ¶189, as well as UPMC's campaigns of physician raiding and predatory bidding up of physicians' salaries. *See* West Penn Allegheny Br. at 61-63.

Respectfully submitted,

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CERTIFICATION OF BAR MEMBERSHIP

The undersigned certifies, pursuant to L.A.R. 46.1(e), that all of the attorneys whose names appear on the within brief are members of the bar of this Court.

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