IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UPMC, UPMC HEALTH PLAN INC. AND PRODIGO SOLUTIONS LLC,	:	Civil Action No. 12-0692
Plaintiffs,	:	Judge Joy Flowers Conti
v.	:	
HIGHMARK INC., WEST PENN ALLEGHENY HEALTH SYSTEM INC., PROTOCO PPI LLC, PROTOCO SUPPLY CHAIN SERVICES LLC, and HMPG PHARMACY LLC,	:	Related to Civil Action Nos. 09-0480 and 10-1609
Defendants.	:	

WEST PENN ALLEGHENY HEALTH SYSTEM INC.'S
MOTION TO DISMISS COUNTS V, VI AND VII OF THE AMENDED COMPLAINT

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Even a cursory examination of UPMC, UPMC Health Plan Inc. and Prodigo Solutions LLC's (collectively, "UPMC") amended averments against West Penn Allegheny Health System, Inc. ("West Penn Allegheny") confirms that this case is not a legitimate attempt to seek justice, but simply a reflection of the arrogance typical of monopolists, particularly UPMC. The antitrust laws are intended and designed to protect competition and consumers, not monopolists determined to eliminate their only remaining competitor. But, apparently, UPMC does not concern itself with the rules, the facts or the applicable legal precedent. The Amended Complaint suffers from the same fatal flaws as its predecessor and the Counterclaims in the companion case, Civil Action No. 09-0480. Not only is the mere filing of this action procedurally improper as a violation of the prior pending action rule, it is substantively meritless for at least three reasons: (1) UPMC has not alleged injury to competition; (2) UPMC has not alleged antitrust injury proximately caused by West Penn Allegheny's conduct; and (3) UPMC has failed to allege an agreement. For these reasons, West Penn Allegheny respectfully requests that this Court dismiss Counts V, VI, and VII.

I. Procedural History

The history of this action is inseparable from that of related civil action No. 09-0480, and requires a brief recounting of that history to fully understand. West Penn Allegheny filed a First Amended Complaint ("FAC") in case No. 09-0480 on August 28, 2009. The FAC advanced two theories of liability: a conspiracy claim under Sections 1 and 2 of the Sherman Act against UPMC and Highmark and a separate claim for illegal unilateral conduct by UPMC. UPMC moved to dismiss the FAC. *See* C.A. No. 09-0480, Dkt. No. 80. Judge Schwab granted UPMC's motion to dismiss on October 29, 2009. The Third Circuit Court of Appeals reversed and remanded the case on November 29, 2010. *W. Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85 (3d Cir. 2010), *cert. denied,* 132 S. Ct. 98 (2011). In that opinion, the Third Circuit

repeatedly noted West Penn Allegheny's allegations that UPMC had market power and controlled a large percent of the health care services market. *See*, *e.g.*, *id.* at 91-92, 93 & 100. West Penn Allegheny's recently filed Second Amended Complaint ("SAC") contains the same allegations of unilateral misconduct against UPMC but, in the wake of West Penn Allegheny's proposed affiliation with Highmark, dropped the conspiracy claims.

On May 23, 2012, UPMC filed its Answer, Affirmative Defenses and Counterclaims in C.A. No. 09-0480. The Amended Complaint and the Amended Counterclaims assert the same claims against West Penn Allegheny based on the same alleged conduct. Conveniently, no version of the claims spells out the extent of UPMC's market share or market power as compared to West Penn Allegheny, and both are largely a litany of complaints about Highmark. The claims asserted against West Penn Allegheny, which appear to be an afterthought in the great swirl of anti-Highmark vitriol, are that West Penn Allegheny -- which UPMC repeatedly characterizes as a tottering, dismally performing, cash-hemorrhaging, and financially distressed health care provider, lacking any real means to compete (*see* Counterclaims ("CC") at ¶¶ 42-43, 49-51, 68 & 73; Amended Complaint ("Am. Comp.") at ¶¶ 5, 51, 121, 141, 187, 196, 206) -- allegedly somehow is able to stop health insurers from entering into Western Pennsylvania by charging them higher prices than it charges to Highmark, and that West Penn Allegheny supposedly conspired with Highmark to exclude companies like Aetna and CIGNA in exchange for allegedly more favorable pricing from Highmark than was afforded to UPMC. CC at ¶ 41; Am. Comp. at ¶ 61.

UPMC's Amended Complaint and Counterclaims are based on a house of cards comprised of patently obvious falsehoods and preposterous economic theories entirely inconsistent with the antitrust laws. Stymied in its attempts to stop West Penn Allegheny's

antitrust and state law claims, UPMC has determined that its best (perhaps its only) defense is to try to put up an offense. But, the federal courts are not a forum for duplicate, bogus claims brought by overbearing monopolists intent on bullying those who, smaller though they be, challenge, expose or criticize their actions.

II. The Standard on a Motion to Dismiss

Dismissal of a complaint is proper under Rule 12(b)(6) where the Court determines that the facts alleged, taken as true and viewed in a light most favorable to the counterclaim plaintiff, fail to state a claim as a matter of law. *See*, *e.g.*, *Gould Elecs., Inc. v. United States*, 220 F.3d 169, 178 (3d Cir. 2000). To survive a motion to dismiss, UPMC must allege enough facts to state a claim to relief that is plausible on its face. As the Third Circuit explained in the appeal taken in related C.A. No. 09-0480:

> Under Federal Rule of Civil Procedure 8, a complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), the Supreme Court held that to satisfy Rule 8, a complaint must contain factual allegations that, taken as a whole, render the plaintiff's entitlement to relief plausible. *Id.* at 556, 569 n.14; *Howard Hess Dental Labs., Inc. v. Dentsply Int'l, Inc.*, 602 F.3d 237, 246 (3d Cir. 2010); *Phillips v. County of Allegheny*, 515 F.3d 224, 234 (3d Cir. 2008). This "'does not impose a probability requirement at the pleading stage,' but instead 'simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of' the necessary element." *Phillips*, 515 F.3d at 234 (quoting *Twombly*, 550 U.S. at 556). In determining whether a complaint is sufficient, courts should disregard the complaint's legal conclusions and determine whether the remaining factual allegations suggest that the plaintiff has a plausible—as opposed to merely conceivable—claim for relief. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949–50 (2009); *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210–11 (3d Cir. 2009).

W. Penn Allegheny Health Sys., Inc., 627 F.3d at 98. UPMC's claims fail as a matter of law.

III. Argument

A. The Prior Pending Action Rule Bars UPMC's Claims Against West Penn Allegheny

The prior pending action rule provides that a party does not have a "right to maintain two separate actions involving the same subject matter at the same time in the same court and against the same defendant." *Walton v. Eaton Corp.*, 563 F.2d 66, 70 (3d Cir. 1977) (citing *United States v. Haytian Republic*, 154 U.S. 118, 123-24, 14 S. Ct. 992 (1894)); *see also McKenna v. City of Phila.*, No. 06-1705, 2007 U.S. Dist. LEXIS 86075, at *2 (E.D. Pa. Nov. 21, 2007) ("The pendency of a prior pending action in the same federal court is ground for abatement of the second action"). "There is no reason why a court should be bothered or a litigant harassed with duplicating lawsuits on the same docket." *McKenna*, 2007 U.S. Dist. LEXIS 86075 at *2. (citing *Walton*). The allegations need not be identical to be subject to the prior pending action rule. *Id.* (dismissing second suit that arose out of same activity alleged in first suit even though different acts of retaliation were alleged in each suit). The rule permits a court that becomes aware of duplicative actions on its docket to consolidate the two actions, "dismiss [the] second complaint without prejudice." *Walton,* 563 F.2d at 70-71; *Conklin v. Warrington Twp.*, No. 1:06-cv-2245, 2008 U.S. Dist. LEXIS 53004, at *43-44 (M.D. Pa. 2008).[1]

Here, the activity, conduct, and claims alleged against West Penn Allegheny in both case No. 09-480 and this case are the same. In its motion seeking leave to amend its counterclaims, UPMC admits that its "conspiracy claims in the two cases are materially the same" and, in fact, sought leave to "ensur[e] that the conspiracy claims in the two cases proceed under the same set of factual allegations." *See* Case No. 09-480, dkt. no. 262, ¶¶ 3, 7. To permit

[1] Courts must ensure that a litigant does not circumvent the procedural requirements of Rule 15 governing by filing a second complaint. If consolidation of the two actions would effectively allow amendment without Rule 15 compliance, consolidation should not be permitted. *McKenna*, 2007 U.S. Dist. LEXIS 86075 at *6.

UPMC to pursue identical claims against West Penn Allegheny in two separate actions is inefficient and a waste of resources.[2] Whatever tactical or public relations advantage UPMC seeks to gain is not a basis for the filing of duplicate claims in two separate cases against West Penn Allegheny. Accordingly, the Amended Complaint's claims against West Penn Allegheny or Amended Counterclaims must be dismissed.

B. UPMC's Failure to Allege the Requisite Harm to Competition is Fatal to its Baseless Antitrust Claims

1. West Penn Allegheny Has No Market Power with which to Harm Competition

To state a claim that an agreement between Highmark and West Penn Allegheny facilitates Highmark's monopolization of the insurance market or otherwise unreasonably restrains trade in that market, UPMC must allege that the purported agreement forecloses other insurers from a substantial share of the customer base or providers such that Highmark's rivals are unable to compete effectively against Highmark. *See Dickson v. Microsoft Corp*., 309 F.3d 193, 211 (4th Cir. 2002) ("we agree with the district court that for [plaintiff] to state a viable § 1 claim, it was required to allege facts which, if proven true, would demonstrate that Compaq's or Dell's individual agreements with Microsoft were likely to result in an anticompetitive effect. Without alleging facts demonstrating Compaq's or Dell's power or share in the PC market, Gravity was unable to make such a showing."); *see also Masco Contr. Servs. East, Inc. v. Beals*, 279 F. Supp. 2d 699 (E.D. Va. 2003) (dismissing § 1 counterclaim where plaintiff "fail[ed] to allege that any of these suppliers individually possesses a great enough share of the market that an agreement between Masco East and one of them would have an anticompetitive effect").

[2] Unlike the Amended Counterclaims, the Amended Complaint names Prodigo Solutions, LLC as a plaintiff and defendants Highmark, Protoco PPI LLC, Protoco Supply Chain Services, LLC, and HMPG Pharmacy, LLC as defendants. The Amended Complaint includes asserts claims against the additional defendants and includes Highmark as defendant in the claims asserted against West Penn Allegheny.

UPMC has not alleged that at all. Instead, UPMC merely alleges that West Penn Allegheny is the instrumentality of the scheme but does not explain anywhere how the alleged agreement between Highmark and West Penn Allegheny could possibly foreclose insurers from access to the provider market, particularly in the face of conflicting allegations that several of them entered the insurance market by accessing UPMC. A fundamental flaw in UPMC's deeply flawed Amended Complaint is the conclusory and unsupported allegation that West Penn Allegheny has enough market power to foreclose competition in the health insurance market in violation of the Sherman Act. That necessary but deficient allegation is fatal to UPMC's theories.

UPMC's Counts V and VII[3] each allege that "Highmark has agreed to favor WPAHS over UPMC in terms of compensation and other financial treatment," and in return WPAHS "has not contracted with any outside national insurer on more favorable terms than Highmark." Am. Comp. at ¶¶ 186, 205. West Penn Allegheny's alleged failure to contract with outside national insurers allegedly "significantly hampered" "the ability of many of Highmark's most significant potential insurance competitors to penetrate the market." *Id.* at ¶ 61. For this "hampering" to constitute an antitrust violation, it must have an actual adverse effect on the alleged market. *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 315 (3d Cir. 2010) ("In

[3] UPMC alleges three counts in violation of the Sherman Act against West Penn Allegheny. Insurance market foreclosure is not relevant to Count VI. But Count VI must be dismissed out of hand because it contains no allegations of any affirmative act on West Penn Allegheny's part. Instead, UPMC alleges that West Penn Allegheny was a passive recipient of funds and patients as a result of Highmark's alleged conduct. Am. Comp. ¶195; *see also* Am. Comp. at ¶¶ 136-143 (no allegations of independent actions by West Penn Allegheny in UPMC's recital of harms to provider market, instead acknowledgement of Highmark's alleged "control" over West Penn Allegheny). These allegations fall far short of supporting UPMC's naked conclusion that Highmark and WPAHS "have engaged into a continuing conspiracy with the purpose and effect of restraining competition unreasonably in the provision of provider market." Am. Comp. at ¶ 195. Such an allegation does not even comes close to satisfying *Twombly* and it need not be taken as true as it is nothing more than a legal conclusion reciting the elements of a claim. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009); *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210-11 (3d Cir. 2009). Frankly, West Penn Allegheny is at a loss as to what UPMC intends to allege in Count VI unless it is a complaint about unilateral acts that Highmark took in league with UPMC against West Penn Allegheny. For this reason it should be dismissed. *See also infra* §III.D

addition to demonstrating the existence of a conspiracy, or agreement, the plaintiff must show that the conspiracy to which the defendant was a party imposed an unreasonable restraint on trade.") (quotation marks omitted).

To be clear, UPMC's antitrust claim has to be based on the alleged ability of *West Penn Allegheny* to restrain trade unreasonably (Count V) or to foreclose health insurance competition to maintain Highmark's monopoly (Count VII). For West Penn Allegheny to be able to foreclose competition in the insurance market, however, it must have enough power in the market to do so. *See* 2B Areeda & Hovenkamp, ¶ 501 at 109-11 (3d ed. 2010); *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d at 315-16 ("a judgment about market power is a means by which the effects of the challenged conduct on the market place can be assessed"); 11 Areeda & Hovenkamp, ¶ 1803 at 105 (3d ed. 2010) ("output contracts covering small market shares cannot generally be anticompetitive and must therefore be lawful").

As an illustration, if West Penn Allegheny held 20% of the provider market in Western Pennsylvania, and agreed to not contract with any insurer for lower reimbursement rates than those paid by Highmark, the outside insurers would still have the remaining 80% of the provider market with which to contract for services for their members. It simply cannot be plausible that West Penn Allegheny is, on the one hand, teetering on the brink of bankruptcy and, on the other hand, powerful enough to exclude insurers from the alleged market. *Cf. Broadway Delivery Corp. v. United Parcel Service,* 651 F.2d 122, 129 (2d Cir. 1981), *cert. denied,* 454 U.S. 968 (1981) ("[A] market share below 50% is rarely evidence of monopoly power, a share between 50% and 70% can occasionally show monopoly power, and a share above 70% is usually strong evidence of monopoly power.").

The Amended Complaint, unlike its earlier iteration, makes a feeble, implausible,

and inadequate attempt to allege that West Penn Allegheny has the power to exclude health insurers from the insurance market. It, however, makes no allegation whatsoever that West Penn Allegheny controls such a large portion of the market for health care services that insurers unable to contract with West Penn Allegheny cannot market their products or access sufficient health care providers for their members.

UPMC attempts to alter reality and save its claims by alleging that West Penn Allegheny "has significant market power through its conspiracy with Highmark," "is the second largest hospital system in Western Pennsylvania," and "controls a significant portion of the provider market." Am. Comp. ¶ 122. Such vague and conclusory assertions of general size and market power are insufficient, particularly given UPMC's contradictory averments. UPMC is the largest hospital system in Western Pennsylvania and the only health care provider in Western Pennsylvania with sufficient market power to foreclose competition. *See*, *e.g. id.* ("Besides UPMC no provider rivals WPAHS's share"); Answer in C.A. No. 09-0480 at ¶ 74 (UPMC admits it owns 15 hospitals); Am. Comp. at ¶ 49 (UPMC made "steady multi-million dollar investments in the Health Plan"); Am. Comp. at ¶¶ 75, 129 (UPMC was able to contract with national insurers without charging competitive rates).

According to UPMC, Highmark's allegedly low reimbursement rates to UPMC forced UPMC to make up missing revenue by charging supracompetitive rates to outside insurers. Am. Comp. at ¶¶ 7, 36. It claims that outside insurers could not expand their plans in Western Pennsylvania while passing on such rates to consumers. *Id.* UPMC's own allegations doom its "antitrust" claims. First, even assuming UPMC was forced to charge outside insurers higher rates as a result of its mythical most favored nation ("MFN") provision in favor of Highmark, the harm caused by that MFN would be UPMC's responsibility, not West Penn

Allegheny's as West Penn Allegheny is not a party to that agreement. Further, even accepting UPMC's entirely false allegation that a West Penn Allegheny/Highmark agreement barred Highmark from paying UPMC higher rates than those it paid to West Penn Allegheny and barred West Penn Allegheny from charging lower rates to other insurers, it is UPMC's actions (supracompetitive prices preventing insurer entry) and UPMC's agreements (UPMC's MFN in favor of Highmark) that resulted in the alleged anticompetitive effects. As explained above, West Penn Allegheny does not control enough of the market to prevent entry by other insurers. Further, given its lack of market power and Highmark's pled dominance, a Highmark MFN in favor of West Penn Allegheny would not prevent Highmark from raising reimbursement rates to UPMC because raising rates across West Penn Allegheny's small market share would not prevent Highmark from raising rates to UPMC.

Second, UPMC's own pleading makes clear that it alone has the power to facilitate market entry by the insurers. In fact, UPMC admits that in 2010 it

> began negotiating with Cigna, HealthAmerica, Aetna and United to reach agreements that would put all UPMC facilities in their respective networks at market rates *i.e.* rates consistent with what insurers paid for similar services in other parts of the country.

Id. at ¶ 75. UPMC finalized these agreements in mid-2011 at market rates. *Id.* at ¶78. In other words, after at least seven straight years of alleged income starvation at the hands of a merciless Highmark, whereby Highmark "*forced*" UPMC to contract at high rates with outside insurers, UPMC all of a sudden was able to bring *four outside insurers* into the market simultaneously. UPMC, however, nowhere explains by what miracle the allegedly ongoing conspiracy suddenly released its spell on UPMC to allow UPMC to contract with outside insurers. There was no miracle. UPMC has had the dominant market power all along and uses it as it sees fit to increase its dominance. In fact, UPMC admits that it, not West Penn Allegheny, is "the linchpin to

[Highmark's] preservation of its monopoly-monopsony position." Am. Comp. ¶112. Nor is there any allegation that West Penn Allegheny in 2011 changed its conduct in any way towards the other insurers or towards UPMC that could account for the abundance of insurers now within the UPMC fold.

The only plausible explanation for the set of facts UPMC alleged is that, in fact, UPMC – the actual dominant hospital system with enormous market power – always had the ability to contract with outside insurers; it just chose not to do business with the outside insurers until "mid-2011." Nothing that West Penn Allegheny did or allegedly did could have plausibly prevented UPMC from entering into reimbursement agreements with the outside insurers before 2011. Had UPMC chosen to negotiate contracts with Cigna, HealthAmerica, Aetna, and United before 2011, it could have done so and UPMC has not alleged any West Penn Allegheny agreement of conduct that could have prevented UPMC from doing so. Thus, by its own admission through reasonable inference, UPMC was the block to health insurance expansion in Western Pennsylvania.

Although this Court must take UPMC's facts alleged as true here, it need not accept conclusory, self-contradictory or implausible theories as plausible. Rather, the Court must "draw on its judicial experience and common sense" to determine if a complaint states a plausible claim. *Iqbal*, 556 U.S. at 679. Being internally inconsistent, UPMC's insurer exclusion theory is not only implausible, it is irrational and impossible, and this Court should reject it as such.

2. UPMC's Excess Capacity Theory is Without Precedent

Knowing that it cannot show that West Penn Allegheny has the ability to exclude health insurance companies, UPMC alleges as a fallback that West Penn Allegheny's very existence is a harm to competition. According to UPMC, Highmark has used West Penn

Allegheny to ensure excess capacity and that the existence of excess beds has allowed Highmark to keep prices low. Am. Comp. at ¶¶ 5, 52, 141. Unbelievably, UPMC, a self-proclaimed monopolist, asserts that its lone surviving competitor's existence is an antitrust violation.

Not only do Counts V, VI and VII of UPMC's Amended Complaint fail to allege the required harm to competition, but UPMC seeks to use its antitrust claims to undermine the fundamental precepts of choice and competition in the health care provider sector. UPMC wants this Court to believe that West Penn Allegheny's very existence (allegedly supported by Highmark pursuant to a conspiracy) maintains excess capacity in the market, which in turn harms health care consumers. *See* Am. Comp. at ¶ 104. This argument turns established antitrust law on its head. It is a bedrock principle that more capacity and output is *good* for consumers because it drives down prices. 7 Areeda & Hovenkamp, ¶ 1503b (2011) ("[O]utput is a sound general measure of anticompetitive effect, and several recent Supreme Court decisions have emphasized it. An increase in output is pro-competitive."); *see*, *e.g.*, *Nelson v. Pilkington PLC*, 385 F.3d 350, 361 (3d Cir. 2004) ("Normally, reduced demand and excess supply are economic conditions that favor price cuts, rather than price increases."); *Kerth v. Hamot Health Found.*, 989 F. Supp. 691 (W.D. Pa. 1997) (discussing HMO's conclusion that excess capacity in health care provider market increased competition).

UPMC's excess capacity claim is nothing more than a complaint about more competition, not less. Excess capacity serves as a hedge against monopoly by allowing a rival to increase output when the dominant player attempts to raise prices by reducing output. *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1441 (9th Cir. 1995).

Even a cursory examination of UPMC's own allegations demonstrates that its excess capacity theory is not cognizable under the antitrust laws. UPMC claims that its alleged

inability to further expand output in the alleged provider market was harmful to competition,[4] Am. Comp. at ¶¶ 145-146, and that Highmark uses excess beds to threaten other providers, Am. Comp. ¶ 5. Importantly, UPMC cannot on the one hand claim that competition has been harmed by its alleged inability to further expand its output and on the other hand claim that the mere existence of West Penn Allegheny hospital beds is somehow anticompetitive.

UPMC's complaint of West Penn Allegheny generating or maintaining "excess capacity" is but a gripe that West Penn Allegheny serves as the bulwark against UPMC's total monopoly. One hospital bed at West Penn Allegheny would be too many to UPMC's CEO Jeffrey Romoff, who UPMC admits (*see* Answer in C.A. No. 09-0480 at ¶ 3) has said publicly that "the problem with competition is that it doesn't work," *see* "Romoff Questions West Penn's Long-Term Viability," *Pittsburgh Business Times* (October 21, 2002) (Exh. A), and has testified in a state hearing that UPMC is a monopolist, *see* J. Romoff's 8/25/11 Testimony Before the Pennsylvania House of Representatives Insurance Committee at 72:14-73:9 (Exh. B).

UPMC could hardly have expressed its monopolistic fervor more clearly than in its allegation that the existence of its sole significant competitor, West Penn Allegheny, is *itself* anticompetitive and somehow part of a conspiracy. West Penn Allegheny does not deny that UPMC sees it as a thorn in its side. However, the federal courts are not in the business of shuttering or reducing output of competitors in the name of competition so that the town bully can control every available bed. In the related case C.A. No. 09-0480, in discussing the decision

[4] As UPMC alludes to in the Amended Complaint and as this Court is surely aware, UPMC in fact expanded its own capacity by building two new hospitals in the Pittsburgh area during the alleged conspiracy period: UPMC East (*see* "About UPMC East," http://www.upmc.com/locations/hospitals/east/Pages/about.aspx) and the new Children's Hospital (*see* "About Our Campus," http://www.chp.edu/CHP/new_campus). *See also* Am. Comp. ¶87. The Court may take judicial notice of these new buildings that have appeared in the Pittsburgh area recently because the fact of their building is both "generally known within the trial court's territorial jurisdiction" *and* "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b).

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977), the Third Circuit wrote:

> So, for example, in *Brunswick*, a group of bowling alleys sued a manufacturer of bowling equipment, claiming that the latter's acquisition of several financially distressed alleys violated the antitrust laws. 429 U.S. at 479-80. The plaintiffs said that if the struggling alleys had been allowed to fail, their profits would have increased, as displaced bowlers would have patronized their alleys. *Id.* at 481. The Supreme Court held, however, that the plaintiffs had not sustained an antitrust injury. The acquisitions in question were unlawful, if at all, because they tended to give the defendant monopoly power in the bowling alley market. And the plaintiffs were complaining about profits lost as a result of continued competition (the defendant's rescuing the distressed alleys), not about injuries linked to reduced competition. The plaintiffs thus failed to establish antitrust injury. *Id.* at 487-89.

W. Penn Allegheny Health Sys., Inc., 627 F.3d at 101-02. The claim in *Brunswick* finds no more success repackaged by UPMC here.

C. UPMC Suffered No Antitrust Injury or Injury Proximately Caused by West Penn Allegheny's Actions

Counts V, VI and VII of UPMC's Amended Complaint must be dismissed because UPMC fails to allege plausible claims of antitrust injury arising from West Penn Allegheny's conduct. Antitrust claims require "injury of the type the antitrust laws were intended to prevent and that flows from that which makes [the] defendants' acts unlawful." *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. at 489. "The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." *Id.*; *see also Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334, 344 (1990) ("[An] injury, although causally related to an antitrust violation, nevertheless will not qualify as an 'antitrust injury' unless it is attributable to . . . a competition-reducing aspect or effect of the defendant's behavior.").

The plaintiff only suffers antitrust injury in a market in which it participates as a consumer or competitor "whose injuries are the means by which the defendants seek to achieve

their anticompetitive ends." *W. Penn Allegheny Health Sys., Inc.*, 627 F.3d at 102. Indeed, at the urging of UPMC, the Third Circuit has ruled in C.A. No. 09-0480 that a health care provider does not suffer antitrust injury when competition is reduced in the health insurance market. *Id.* (citing *Schuylkill Energy Res., Inc. v. Pa. Power & Light Co.*, 113 F.3d 405, 410, 415 (3d Cir. 1997); *SAS of P.R., Inc. v. P.R . Tele. Co.*, 48 F.3d 39, 44–45 (1st Cir. 1995); *Serfecz v. Jewel Food Stores*, 67 F.3d 591, 597–98 (7th Cir. 1995); *Int'l Raw Materials, Ltd. v. Stauffer Chem. Co.*, 978 F.2d 1318, 1327–28 (3d Cir. 1992); *Alberta Gas Chems. Ltd. v. E.I. Du Pont De Nemours & Co.*, 826 F.2d 1235, 1241–42 (3d Cir. 1987)).

UPMC attempts to allege harm to the alleged insurance markets, the provider markets, and the purchasing markets, and antitrust injury from the alleged anticompetitive conduct in each. Am. Comp. at ¶¶ 129-143. UPMC's Amended Complaint, however, fails to state cognizable antitrust injury deriving from West Penn Allegheny's conduct as a matter of law.

1. Exclusion of Insurers Helps UPMC in the Insurance and Purchasing Markets, and is Irrelevant to an Antitrust Injury Analysis in the Provider Market

UPMC's primary antitrust injury argument is that "[i]n the relevant insurance and purchasing markets, UPMC has sustained harm as a result of the hindered entry and expansion of outside insurers." Am. Comp. at ¶ 145. A simple antitrust injury analysis wholly discredits this argument.

UPMC alleges that it participates in three markets, broadly speaking: (1) in the provider market it sells health care services to health insurers; (2) in the insurance market it sells insurance to consumers and employers through its Health Plan; and (3) in the purchasing market its Health Plan buys health care services from providers. *See* Am. Comp. at ¶¶ 129, 136, 145, 147. To begin with, the Third Circuit sustained UPMC's argument in C.A. No. 09-0480 that a

health care provider does not suffer antitrust injury when competition is reduced in the health insurance market. *W. Penn Allegheny Health Sys., Inc.*, 627 F.3d at 102. UPMC is no exception to the rule for which it successfully argued, and cannot plausibly claim harm to UPMC's provider arm.

Thus, any alleged antitrust injury must consist of harm to UPMC Health Plan. Yet, there are several glaring holes in UPMC's allegations of harm to its Health Plan. The first is that UPMC makes no more than the most vague and conclusory allegations of harm to its Health Plan, and only a passing reference in the section on antitrust injury stating "one of the overriding purposes of Highmark's conspiracy with WPAHS and the consultant is to starve UPMC of resources on the provider side in order to destroy its Health Plan." *See* Am. Comp. at ¶ 146. Any alleged harm, therefore, is derived from UPMC's own internal decisions about whether to fund the plan, not West Penn Allegheny's conduct. *Id.* at ¶ 129. And, as yet another example of the contradiction inherent in UPMC's claims, UPMC admits it "annually invested millions of dollars into the [UPMC] Health Plan," the Plan became profitable in 2004, and in the past three years the Plan has gained a "significant subscriber base." *Id.* at ¶¶ 43-44.

UPMC, however, nowhere alleges the facts and inferences that would need to be plausibly alleged to show that West Penn Allegheny's purported action, let alone Highmark's purported action harmed UPMC Health Plan. For example, does UPMC Health Plan rely on reimbursements to UPMC's hospitals to subsidize its operations? What reimbursement levels did UPMC receive? Did UPMC Health Plan grow or shrink during the conspiracy period? What resources were needed by UPMC Health Plan, and how were they lacking? UPMC has not alleged even the most basic facts needed to plausibly claim injury to its Health Plan, as Rule 8 requires. *Iqbal*, 556 U.S. at 678 ("Threadbare recitals of the elements of a cause of action,

supported by mere conclusory statements, do not suffice.").

Even if these gaps were filled in, UPMC's theory would be hopelessly speculative. UPMC is forced to argue that its Health Plan's growth was hindered because, as part of the alleged conspiracy, Highmark reduced reimbursements to UPMC for hospital services, which meant in some general manner that UPMC had less money than it would like, that this state of having less money overall as an organization reduced funds needed by UPMC Health Plan in some unexplained way, and as a result UPMC Health Plan suffered. Antitrust law does not permit recovery for such a speculative and attenuated theory of indirect injury.

The Supreme Court made this clear in rejecting the plaintiffs' claims in *Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519 (1983). The complaint there alleged "defendants applied coercion against certain landowners and other contracting parties in order to cause them to divert business from certain union contractors to nonunion contractors. As a result, the Union's complaint alleges, the Union suffered unspecified injuries in its 'business activities.'" *Id.* at 540-541. The Court found the complaint both indirect and "highly speculative." *Id.* at 542. The Court therefore concluded that "the Union is not a person injured by reason of a violation of the antitrust laws within the meaning of § 4 of the Clayton Act." *Id.* at 546. *See also Allegheny Gen. Hosp. v. Philip Morris, Inc.*, 228 F.3d 429, 433 (3d Cir. 2000) (finding no proximate cause because "the hospitals' damages are too speculative and their injuries are too remote from the tobacco companies' alleged wrongdoing").

Finally, but most critically, UPMC Health Plan stood to benefit from the alleged conspiracy to exclude Highmark's competitors because it also resulted in the exclusion of UPMC Health Plan's own competitors. UPMC nowhere alleges that its Health Plan's growth was impeded by being unable to secure an attractive-enough contract with West Penn Allegheny, or

that it even attempted or desired to contract with West Penn Allegheny.[5] Thus, West Penn Allegheny's alleged refusal to contract could only affect health insurers other than Highmark and UPMC Health Plan, like Aetna, United, and CIGNA. Even assuming West Penn Allegheny somehow was able to exclude such powerful national insurers, that exclusion would reduce the competition faced by UPMC Health Plan. UPMC Health Plan cannot sue when it benefits from the alleged anticompetitive conduct. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582-583 (1986); *Atl. Richfield Co.*, 495 U.S. at 336-337.

D. **The Amended Complaint Fails to Plead an Agreement**

The Amended Complaint's claims against West Penn Allegheny are premised upon the existence of a conspiracy between West Penn Allegheny and Highmark to disadvantage the monopolist UPMC. *Howard Hess Dental Lab., Inc. v. Dentsply Int'l, Inc.*, 602 F.3d 237, 254 (3d Cir. 2010) (conspiracy claims under both Sections 1 and 2 of the Sherman Act require an agreement). Notwithstanding the incredulous nature of the claim itself, the Amended Complaint fails to allege facts sufficient to plead the requisite agreement.

To plead concerted action, UPMC must plausibly allege facts suggesting "a unity of purpose or a common design and understanding, or a meeting of the minds in an unlawful arrangement." *Id.* (quoting *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984)). Conclusory allegations, including the use of words like "agreed," "conspired," and "conspiracy" (*see e.g.* Am. Comp. ¶¶ 4, 5, 52, 186, 195, 205), are not sufficient. *Howard Hess,* 602 F.3d at 255; *see also Twombly*, 550 U.S. at 555 ("a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." (internal quotes and cites omitted)).

[5] UPMC Health Plan, in fact, has steadfastly refused to include West Penn Allegheny in its network. *See* FAC at ¶ 48.

To the contrary, the complaint must allege "enough factual matter to suggest that an agreement was made." *Twombly*, 550 U.S. at 556.

Here, the Amended Complaint does not allege *any* direct evidence of an agreement and, instead, relies solely on circumstantial evidence. UPMC, therefore, must allege facts that tend to exclude the possibility that West Penn Allegheny and Highmark acted independently. *AT&T Corp. v. JMC Telecom, LLC*, 470 F.3d 525, 530 (3d Cir. 2006). Alleged conduct that is merely consistent with an agreement does not satisfy this standard. *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 322 (3d Cir. 2010). "Obvious alternative explanations" for the facts alleged render conspiracy allegations deficient. *Id.* at 322-23 (internal cite omitted).

The Amended Complaint alleges only four acts by West Penn Allegheny in furtherance of the conspiracy: 1) that throughout its history, West Penn Allegheny received cash infusions, grants, loans and excessive reimbursement rates from Highmark which permitted West Penn Allegheny to survive; (*see* Am. Comp. ¶¶ 4, 50-52); 2) that West Penn Allegheny refused to contract on more favorable terms with other insurers (*see* Am. Comp. ¶ 52); 3) that West Penn Allegheny maintained excess capacity to "invigorate Highmark's threats to providers of significant declines in patient volume" (*see* Am. Comp. ¶ 52); and 4) that West Penn Allegheny pretended to be an independently run organization to protect Highmark from West Penn Allegheny's debt obligations (*see* Am. Comp. ¶ 52). Each of the above alleged actions is equally, if not more so, consistent with West Penn Allegheny's own business interests and independent conduct than with the fairytale conspiracy crafted by the Amended Complaint.

First, West Penn Allegheny's receipt of financial support from Highmark can hardly be considered as against West Penn Allegheny's self-interest, particularly in light of the Amended Complaint's allegations depicting the hospital system as a cash-strapped organization,

"barely financially afloat." Am. Comp. ¶¶51, 65, 96. No reasonable business, particularly one in such dire need of capital, would refuse such support. Ensuring West Penn Allegheny's continued existence is similarly in Highmark's interest. The Amended Complaint alleges that West Penn Allegheny is the second largest medical provider in Western Pennsylvania – and it is no secret who the largest provider is. *See* Am. Comp. ¶ 53. Allowing West Penn Allegheny to fail, which would only cement both UPMC's dominance in the region and its negotiating power, is clearly against Highmark's self-interest.

Second, the Amended Complaint alleges that Highmark has 65% of the commercial health insurance market and that no other insurer can "bring new patients into the relevant insurance markets." Am. Comp. ¶¶ 115, 118. Accordingly, it makes perfect sense why Highmark, who according to UPMC's own allegations is the only insurer capable of providing patient volume, would have the most favorable rates. This is in no way inconsistent with West Penn Allegheny's independent business incentives or with what would be expected in a competitive environment. Indeed, UPMC admits that it did not contract with other insurers on more favorable rates either. *See* Am. Comp. ¶ 36.

Third, UPMC's claim that West Penn Allegheny's maintenance of excess capacity, which by the Amended Complaint's own allegations was needed to take volume away from competing hospitals, is also completely consistent with West Penn Allegheny's self-interest. *See* Am. Comp. ¶ 52 (alleging that West Penn Allegheny's capacity made Highmark's threats to shift volume credible). If West Penn Allegheny was to compete in the provider market, it would need to attract or win patients in the battle against UPMC and it could not do so without open beds. It is in West Penn Allegheny's interest to increase its patient volume to fund capital and other expenditures. When excess capacity becomes full, West Penn Allegheny will

again become financially vibrant. Played out, UPMC's argument amounts to the ridiculous – that West Penn Allegheny reducing its hospital beds and shutting its doors is somehow more consistent with its self-interest than trying to compete for additional volume.

Finally, UPMC's allegation that West Penn Allegheny pretended to be independent cannot conceivably support UPMC's conspiracy theory. The allegation itself establishes conduct that on its face is independent and not harmful to competition. Because the Amended Complaint alleges conduct completely consistent with West Penn Allegheny's self-interest, the Amended Complaint simply fails to sufficiently plead an agreement. This failure further necessitates dismissal of the Amended Complaint's claims against West Penn Allegheny. *See In re Ins. Brokerage Antitrust Litig.*, 618 F.3d at 322-23.

IV. Conclusion

West Penn Allegheny respectfully requests that the Court dismiss Counts V, VI and VII of UPMC's Amended Complaint with prejudice.

Dated: October 12, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 12, 2012, the foregoing West Penn Allegheny's Motion to Dismiss Counts V, VI and VII of UPMC's Amended Complaint was served upon Counsel of record via the Court's ECF system.

/s/ Barbara T. Sicalides
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