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

UPMC,	:	Civil Action No. 12-0692
Plaintiff,	:	Judge Joy Flowers Conti
v.	:	
HIGHMARK INC. and WEST PENN ALLEGHENY HEALTH SYSTEM, INC.,	:	Related to Civil Action No. 09-0480
Defendants.	:	

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

Even a cursory examination of UPMC's averments against West Penn Allegheny Health System, Inc. ("West Penn Allegheny") reveals that the above-captioned litigation 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. The Counterclaim in the companion case, Civil Action No. 09-0480, and the Complaint here are equally meritless, for two reasons: (1) UPMC has not alleged injury to competition; and (2) UPMC has not alleged antitrust injury proximately caused by West Penn Allegheny's conduct. 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 with court approval. Therefore, Highmark ceased being party to that litigation.

On May 23, 2012, UPMC filed its Answer, Affirmative Defenses and Counterclaims in C.A. No. 09-0480. UPMC's Counterclaims are almost identical to this Complaint. Conveniently, neither 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 the only restraint on UPMC's market dominance -- Highmark. The claims asserted against West Penn Allegheny in the Counterclaims and in this Complaint, 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 and financially distressed health care provider, lacking any real means to compete (*see* Counterclaims ("CC") at ¶¶ 42-43, 49-51 & 73; Complaint ("Comp.") at ¶¶ 70-71, 77-79 & 103) -- 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; Comp. at ¶ 69.

UPMC's Complaint, like its Counterclaims, is not a legitimate attempt to enforce the antitrust laws. Stymied in its attempts to stop West Penn Allegheny's case, 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 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.

III. Argument

A. 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 the alleged deal between Highmark and West Penn Allegheny helps Highmark to monopolize the insurance market or permits Highmark to restrain trade in that market, UPMC must allege that the purported contract forecloses other insurers from a substantial share of the customer base that Highmark's rivals need 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"). 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 contract between Highmark and West Penn Allegheny could possibly foreclose insurance carriers from access to the provider market, in the face of conflicting allegations that several of them entered the insurance market by accessing UPMC's part of the provider market. A fundamental flaw in UPMC's deeply flawed Complaint is the unstated and unalleged premise 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 missing allegation is fatal to UPMC's theories.

UPMC's Counts V and VII[1] each allege that "Highmark has agreed to favor WPAHS over UPMC in terms of compensation and other financial treatment, and in return WPAHS has agreed not to contract with any outside insurer on more favorable terms than Highmark." Comp. at ¶¶ 189, 206. West Penn Allegheny's alleged failure to contract with outside insurers allegedly "significantly hampered" "the ability of Highmark's insurance competitors to penetrate the market." *Id.* at ¶ 80. 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 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 (Count V) or to support Highmark's monopoly (Count VII) by its supposed foreclosure of health insurance competition that matters to this analysis. For West Penn Allegheny to be able to foreclose competition in the insurance market, however, it must

[1] 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 absolutely no allegations of any affirmative act on West Penn Allegheny's part, for the naked conclusion that "Highmark and WPAHS have entered into a continuing conspiracy with the purpose and effect of restraining competition unreasonably in the provision of inpatient care" is not an allegation that even comes close to satisfying *Twombly*. Comp. at ¶ 196. That allegation 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). Stripped of the conclusory statement, Count VI alleges nothing against West Penn Allegheny. *See also* Comp. at ¶¶ 138-144 (no allegations of independent actions by West Penn Allegheny in UPMC's recital of harms to provider market). 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.

have enough power in the marketplace 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 to contract with for services for their members. There is no plausible reason to believe that under this scenario, West Penn Allegheny would be able 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.").

UPMC has made no allegations whatsoever of West Penn Allegheny's power to exclude health insurers from the insurance market, such as that West Penn Allegheny has such a large market share that health insurers cannot provide health care services to their members without contracts with its facilities. This failure dooms its Counts V and VII, which are necessarily premised on the unalleged assumption the West Penn Allegheny has that power. *See Jacobs v. Tempur-Pedic Int'l., Inc.*, 626 F.3d 1327, 1339, 1345 (11th Cir. 2010) (affirming dismissal where plaintiff failed to allege defendant's ability to harm competition). Despite the many baseless and absurd accusations made by UPMC here, the reason it has failed to allege that West Penn Allegheny has sufficient market power to foreclose competition in the health

insurance market, of course, is obvious: UPMC is the only health care provider in Western Pennsylvania with sufficient market power to foreclose competition. *See*, *e.g.*, Answer in C.A. No. 09-0480 at ¶ 74 (UPMC admits it owns 15 hospitals).

West Penn Allegheny agrees that outside insurers *were* in fact notably absent from the Western Pennsylvania health insurance market for many years. The reason is that UPMC excluded them. UPMC in fact *admits* that it has the market power to single-handedly bring outside insurers to Western Pennsylvania—but simply failed to do so until investigated by the Justice Department. Comp. at ¶ 94; *see also* "UPMC Fast Facts: Commitment to the Community," retrieved from http://www.upmc.com/about/facts/Pages/default.aspx (Exh. A).

According to UPMC, Highmark's allegedly low reimbursement rates to UPMC forced UPMC to make up missing revenue through charging high rates to outside insurers. Comp. at ¶ 87. It claims that outside insurers could not expand their plans in Western Pennsylvania while passing on such rates to consumers. *Id.* But, in fact, UPMC admits that after the Department of Justice investigated its conspiracy with Highmark,

> UPMC began negotiating with Cigna, HealthAmerica, Aetna and United on a basis that would put all UPMC facilities in their respective networks at vastly lower "market" rates – *i.e.*, rates consistent with what insurers paid in other parts of the country. These negotiations proved successful and, by mid-2011, agreements with all four outside insurers were reached.

Id. at ¶ 94. 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 enlarge it. Nor is there any allegation that West Penn Allegheny changed its conduct in any way towards the other insurers or towards UPMC.

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 how it is that West Penn Allegheny 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 on this motion to dismiss, it need not accept 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. Most Favored Nations Agreements Alone Do Not Harm Competition

UPMC's claims against West Penn Allegheny rest upon some sort of fictional most favored nation ("MFN") agreements with Highmark. *See* Comp. at ¶4. Assuming, *arguendo*, the existence of MFN agreements, MFNs alone are not enough to sustain UPMC's purported antitrust claim, absent allegations of market power. Not a single court has found to the contrary. The case law neither makes MFNs automatically illegal nor permits UPMC to attribute Highmark's purported market power in the insurance market to West Penn Allegheny as a health

care provider. A provider with little market power, even with an MFN, cannot block the entry of other insurers.

In MFN case *United States v. Delta Dental of R.I.*, 943 F. Supp. 172 (D.R.I. 1996), for example, defendant Delta Dental, which allegedly possessed market power, *see id.* at 180, imposed an MFN clause on ***90%*** of the dentists actively practicing in Rhode Island. Likewise, in *Reazin v. Blue Cross & Blue Shield of Kansas, Inc.*, 899 F.2d 951 (10th Cir. 1990), *all 104 Kansas hospitals* in the Blue Cross defendant's service area were contracting providers under the program that included the MFN. *See Reazin v. Blue Cross & Blue Shield of Kansas, Inc.*, 663 F. Supp. 1360, 1376 (D. Kan. 1987). *See also United States v. Blue Cross Blue Shield of Michigan*, 809 F. Supp. 2d 665 (E.D. Mich. 2011) and *Blue Cross Blue Shield of Michigan* Complaint, retrieved from http://www.justice.gov/atr/cases/f263200/263235.htm, ¶¶ 61, 70, 74, 78 (provider or providers bound by MFN alleged to have market power in each geographic region at issue).

UPMC's theory of the case is novel because it is not based in economic reality. Only UPMC would have the audacity to bring such a baseless claim.

3. UPMC's Excess Capacity Theory is Without Legal Support

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. Comp. at ¶¶ 6-7. 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 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) creates excess capacity, which in turn harms health care consumers. *See* Comp. at ¶ 77. 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 the health care provider market increased competition). 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.[2] Comp. at ¶¶ 148-149. 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

[2] 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). 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).

the mere existence of West Penn Allegheny hospital beds is somehow anticompetitive.

UPMC's complaint of West Penn Allegheny generating "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. B), 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. C).

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 competitors in the name of competition. In the related case C.A. No. 09-0480, in discussing the decision *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.

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

Counts V, VI and VII of UPMC's 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. Comp. at ¶¶ 132-146; 147-153. UPMC's 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, including the Blues." Comp. at ¶ 148. 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* Comp. at ¶¶ 60, 132-153. 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, not even mentioning it in the section on antitrust injury. *See* Comp. at ¶¶ 4, 32, 64, 70-72, 80, 85; *compare* ¶¶ 147-153. The clearest statement comes at Paragraph 4: "Highmark has been able artificially to hinder UPMC's viability as a potential insurance competitor through its Health Plan by limiting its reimbursements to UPMC on the provider side, while at the same time

preventing other insurance competition from entering or expanding in Western Pennsylvania."

UPMC, however, nowhere alleges the facts and inferences that would need to be plausibly alleged to show that 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.[3] 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.

IV. Conclusion

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

Dated: August 24, 2012

Respectfully submitted,

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

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CERTIFICATE OF SERVICE

I hereby certify that on August 24, 2012, the foregoing West Penn Allegheny's Motion to Dismiss Counts V, VI and VII of UPMC's Complaint was served upon Counsel of record via the Court's ECF system.

/s/ Barbara T. Sicalides
Barbara T. Sicalides