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

WEST PENN ALLEGHENY HEALTH SYSTEM, INC., Plaintiff v. UPMC, Defendant	:	CIVIL ACTION NO. 09-CV-0480

SECOND AMENDED COMPLAINT

INTRODUCTION

1. Plaintiff, West Penn Allegheny Health System, Inc. ("West Penn Allegheny"), brings this action against Defendant UPMC, in order to vindicate its and the community's rights protected under the Sherman Act, 15 U.S.C. §2 and state law.

2. Since West Penn Allegheny was formed to preserve the bankrupt AHERF's Pittsburgh area assets, Pittsburgh's dominant hospital system, UPMC, has relentlessly sought to monopolize the market for tertiary and quaternary care in the Pittsburgh community by reducing competition and raising prices at the expense of the community's employers, consumers, and patients. West Penn Allegheny is the sole surviving competitor to UPMC in the market for sophisticated tertiary and quaternary care and the last bulwark against a UPMC monopoly.

3. UPMC's most senior executives have openly and repeatedly said that they want to destroy West Penn Allegheny. UPMC CEO Jeffrey Romoff has stated publicly that competition in health care does not work and that West Penn Allegheny has no future. *See*

"Romoff Questions West Penn's Long-Term Viability," *Pittsburgh Business Times* (October 21, 2002).

4. More recently, in 2011, following his testimony before the Pennsylvania Insurance Department on the current state of negotiations between UPMC and Highmark, a Pittsburgh-based health insurer, Mr. Romoff openly conceded that UPMC is a monopolist.

5. Since at least 1999 and continuing to the present, UPMC has used various predatory tactics to advance its scheme to crush its last competitor. These tactics have included: establishing exclusive "joint venture" arrangements with community hospitals designed to eliminate West Penn Allegheny's access to patients; inducing physicians to leave West Penn Allegheny through the offer of inducements and bribes for the purpose of hindering West Penn Allegheny's provision of services and to further cut off its access to patients; interfering with West Penn Allegheny's bond offerings through dissemination of defamatory comments about West Penn Allegheny; and threatening Pittsburgh's largest insurer not to aid West Penn Allegheny.

6. UPMC's conduct has taken a severe toll on West Penn Allegheny. UPMC's exclusionary tactics have artificially blocked and stunted West Penn Allegheny's natural growth as the high-quality and low-cost leader, resulting in lost patient volume, and depressed growth and earnings for West Penn Allegheny. Those earnings are critical to West Penn Allegheny's charitable mission to improve the extent, scope, and quality of health care available to the Pittsburgh community. In stark contrast, UPMC has posted profits that are dramatically disproportionate to its size. For example, for fiscal year 2006, UPMC's net income was $512 million, while West Penn Allegheny's net income was $21 million. Although UPMC

is five times as large as West Penn Allegheny, its profits were 25 times those of West Penn Allegheny's.

PARTIES

7. Plaintiff West Penn Allegheny is a Pennsylvania nonprofit corporation with its principal place of business in Pittsburgh, Pennsylvania.

8. Defendant UPMC is a Pennsylvania nonprofit corporation with its principal place of business in Pittsburgh, Pennsylvania.

JURISIDICTION AND VENUE

9. This action arises under Section 2 of the Sherman Act, 15 U.S.C. § 2. This Court has jurisdiction of this case pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1337(a).

10. Supplemental jurisdiction over West Penn Allegheny's claims under state law is conferred by 28 U.S.C. § 1367.

11. Venue is proper in the Western District of Pennsylvania by virtue of 28 U.S.C. §139l(b) because both parties reside in the Western District of Pennsylvania.

FACTS

UPMC's Failed Attempts to Stop the Emergence of West Penn Allegheny

12. West Penn Allegheny was formed by a combination in August 2000 of The Western Pennsylvania Healthcare System, comprised of The Western Pennsylvania Hospital ("West Penn") and Suburban General Hospital, and the Pittsburgh-based hospitals formerly affiliated with AHERF, including Allegheny General Hospital ("AGH"), Allegheny Valley Hospital (now the Alle-Kiski Medical Center), Forbes Regional Hospital (now The Western

Pennsylvania Hospital – Forbes Regional Campus), and Canonsburg General Hospital. AGH was the flagship hospital of AHERF and is a highly sophisticated tertiary and quaternary care teaching hospital. At the time of the merger, West Penn was a smaller tertiary care facility.

13. The merger arose from AHERF's bankruptcy in 1998. The West Penn Board of Directors, which included some large area employers, sought to preserve AGH as a strong competitor because of concern that, if AGH failed, there would be few healthcare options for consumers.

14. From the outset, UPMC attempted to sabotage the formation and operation of West Penn Allegheny. A vice president for UPMC told physicians that UPMC intended to turn AGH into a "parking lot." UPMC Board members and employees unsuccessfully lobbied AGH Board members and local officials to oppose the West Penn-AGH merger.

15. Stymied in these efforts, UPMC attempted unsuccessfully to intervene in the Orphans' Court proceedings regarding the creation of West Penn Allegheny. Similarly, UPMC filed a frivolous lawsuit against the Pennsylvania Department of Insurance to block Highmark from providing a loan to West Penn Allegheny.

16. Unsuccessful in its attempts to prevent the creation of West Penn Allegheny, UPMC embarked on a campaign to destroy it. Since at least 1999, and continuing through the present day, UPMC has engaged in a relentless campaign of anticompetitive, predatory conduct, in an attempt to monopolize the Allegheny County markets for acute inpatient hospital services and/or for tertiary and quaternary care services, and oncology services at the tertiary and quaternary care level. UPMC's campaign has had five main prongs: (1) UPMC has restricted West Penn Allegheny's ability to cooperate with, and secure referrals from,

independent community hospitals; (2) UPMC has tried to starve West Penn Allegheny of necessary patient referrals by raiding key admitting physicians, as well as raiding physicians such as anesthesiologists who are necessary for hospital operation; (3) UPMC has bid physician salaries to artificially inflated, supracompetitive levels; (4) UPMC has interfered with West Penn Allegheny's bond offerings; and (5) UPMC has continually threatened Pittsburgh's largest health insurer Highmark, Inc. ("Highmark") not to aid West Penn Allegheny in any manner whatsoever.

UPMC's Predatory and Anticompetitive Conduct

UPMC's Coercion of, and Exclusive Dealing Agreements with, Independent Community Hospitals

17. UPMC has taken *de facto* control of independent community hospital systems. UPMC threatened these local community hospitals with the establishment of rival UPMC satellite facilities adjacent to them unless they consented to enter into "joint ventures" with UPMC or to have a UPMC cancer center established on their campus. This tactic resulted in UPMC forming "joint ventures" with, or placing a UPMC cancer center within, nearly every community hospital system (except those owned by West Penn Allegheny) in the six-county Pittsburgh metropolitan area.

18. These UPMC Cancer Centers have been in place at least since Fall 2006 and have remained in continuous operation to the present day. Upon information and belief, UPMC controls the management of the joint ventures and cancer centers and, in particular, can veto the joint ventures' and cancer centers' participation in any health insurer's network of participating providers.

19. UPMC also used the joint ventures and Cancer Centers to foreclose competition from West Penn Allegheny by preventing West Penn Allegheny and the community

hospitals at issue from launching programs together. For example, before its 2004 merger with Latrobe Hospital, Westmoreland Hospital partnered with West Penn Allegheny to provide oncology services. Because Latrobe is a party to a UPMC oncology joint venture, Westmoreland terminated its relationship with West Penn Allegheny after the merger.

20. The UPMC Cancer Center network has restricted West Penn Allegheny's ability to compete in numerous ways. First, it restricts West Penn Allegheny's ability to compete for oncology services at the tertiary and quaternary care levels. Second, it closes off tertiary and quaternary care referrals for other procedures to West Penn Allegheny from the community hospitals' oncology departments. Sophisticated tertiary and quaternary care facilities such as AGH rely on community hospitals for referrals of complex, difficult cases. By coercing the community hospitals into turning over their oncology programs to UPMC, UPMC has cut off these referral sources.

21. Essentially, the UPMC Cancer Center network functions as a group of exclusive dealing agreements between UPMC and the affected community hospitals. By housing a UPMC Cancer Center, each community hospital has ceded control over tertiary and quaternary care referrals to UPMC, which in turn refers cases almost always to its own tertiary and quaternary care facilities at Presbyterian and Shadyside hospitals. West Penn Allegheny has accordingly been foreclosed from providing care to these patients.

22. In addition to referrals of difficult cases, community hospitals often provide academic medical centers like AGH with access to patients for clinical research protocols. Being able to secure sufficient patients for cutting-edge research programs is important for recruitment of top physicians.

23. Moreover, UPMC has used its Cancer Centers to block West Penn Allegheny from developing clinical relationships with community hospitals in fields outside of oncology. Revenues from cancer treatment and related services are crucial for the economic health of community hospitals. UPMC's ability to cut off independent community hospitals' key oncology business has resulted in these community hospitals refusing to affiliate with West Penn Allegheny in any clinical programs – a further loss of tertiary and quaternary care referrals.

UPMC's Predatory Physician Raiding and Artificial Inflation of Physician Salaries

24. UPMC also engaged in a ruthless and predatory campaign of physician raiding beginning in 1999 to both thwart the formation of West Penn Allegheny and to cripple, if not destroy, West Penn Allegheny as a viable competitor. That campaign has continued unabated to the present day.

25. The West Penn Allegheny hospitals, like all hospitals, rely on physicians and their medical staffs to direct patients to their facilities for their services. Put differently, the primary way that a hospital distributes its services is through a physician's admission of patients. Given the high fixed costs of hospitals and the consequent need to maintain a steady volume of patients to remain financially afloat, the role of a physician in sending patients to a facility is absolutely crucial.

26. UPMC engaged in a campaign to "cherry pick" the key physicians who provided most of West Penn Allegheny's profits through a campaign of bribes and inducements with the avowed purpose of burying West Penn Allegheny.

27. At the outset of the campaign in 1999, UPMC focused its raiding efforts on key members of AGH's medical staff. These efforts included:

- In September 1999, UPMC hired Dr. Joseph Maroon, AGH's Chief of Neurosurgery, and four other neurosurgeons. UPMC lured Maroon by offering a substantially higher salary and by agreeing to purchase two parcels of land from Dr. Maroon for in excess of $6 million, even though their market value was well below this number (Maroon had purchased the properties for less than $300,000 in 1988 and 1991).

- UPMC hired AGH chief oncologist Dr. Stanley Marks and the remaining <u>30</u> medical and radiation oncologists who practiced at AGH. UPMC offered extremely large salaries to the Marks group, and further agreed to pay $2 million for certain land owned by Marks – again well above fair market value. UPMC's offer was contingent upon the oncologists switching hospitals before West Penn Allegheny completed its financing – a clear sign that the purpose of hiring Marks and paying excessive amounts for his real estate holdings was the destruction of AGH. AGH could not afford to match UPMC's offer, and suffered a severe setback in its oncology program.

- UPMC raided AGH's hand surgeons, who generated 2,000 to 3,000 admissions per year.

- UPMC raided invasive cardiologists on the AGH Medical Staff. UPMC paid one of these physicians in excess of $1 million per year, even though the MGMA median salary for invasive cardiologists in the Pittsburgh area at that time was less than $400,000.

28. In addition, UPMC raided multiple gastroenterologists, pulmonologists and primary care physicians from the AGH Medical Staff.

29. UPMC required that each raided AGH physician agree to become a UPMC employee, even though certain of these physician previously operated their own practices. Turning formerly independent physicians into employees tightened UPMC's control over their future conduct, including their ability to refer patients to non-UPMC facilities and, because of non-compete agreements, their ability to return to AGH.

30. UPMC repeatedly admitted to AGH physicians that UPMC intended to "bury" AGH and to turn it into a nursing home. UPMC bluntly told AGH physicians that UPMC wanted to hire them in order to damage AGH.

31. Given these statements, it is clear that UPMC hired AGH's physicians for the express purpose of choking off AGH's access to patients from these admitting physicians, crippling AGH financially and destroying it as a competitor.

32. Upon information and belief, the amount of reimbursement that UPMC received for these physicians was below the cost of the inflated compensation packages used to lure them away from the AGH Medical Staff. In fact, by July 2001, UPMC's physician division was "losing about $1 million a week." *See* "UPMC Health Plan Grows Amid Feuding," *Pittsburgh Tribune-Review* (July 1, 2001). This money-losing strategy could only be in UPMC's self-interest if UPMC hoped to recoup these losses by driving AGH out of business.

33. Upon information and belief, UPMC intended to bid physician compensation levels up to artificially inflated levels solely in order to prevent West Penn Allegheny from being able to recruit and retain qualified physicians.

34. A particularly outrageous instance of physician raiding occurred in early 2002 when UPMC attempted to close AGH by poaching its entire anesthesiology staff. Without qualified anesthesiologists, a hospital cannot perform surgical procedures, maintain an emergency department, or treat inpatients who might require surgery. Thus, if UPMC could steal all of AGH's anesthesiology staff, it would close AGH.

35. At that time, AGH was a party to an exclusive contract for anesthesiology services with Allegheny Anesthesia Associates ("AAA"). AAA employed all of AGH's 37 anesthesiologists and 60 certified registered nurse anesthetists ("CRNA's"). UPMC approached AAA and offered to hire away the entire group for a substantial increase in salary, above not only their reimbursement from AGH but also well above what UPMC paid its own

anesthesiologists. UPMC offered a guaranteed three-year contract with salaries in excess of $400,000 to each of the AAA anesthesiologists, regardless of their experience or qualifications, even though UPMC paid its own anesthesiologists between $200,000 and $350,000.

36. This offer was not made to meet the needs of UPMC, which lacked sufficient operating room volume to absorb these new anesthesiologists. UPMC's own internal analysis showed that this raid on AGH's anesthesiology staff would be unprofitable. UPMC's Tony Detre, Vice President Business Development, told physicians that UPMC's raid on AAA was designed solely to run AGH out of business.

37. UPMC was forced to raise all of its existing anesthesiologist salaries (at a cost of $8 million), without sufficient volume to keep its now excessive anesthesiology staff fully employed. The AAA group subsequently fractured and its various members left UPMC – yet further proof that UPMC had no valid business need to hire them.

38. UPMC had made similar predatory physician raids to drive out other competitors. For example, in 2000, UPMC acquired the Russellton Medical Group and forced those physicians to resign their staff privileges at Citizens General Hospital, for which they were a key source of patients. This raid was a major factor in Citizens General's closure in November 2000.

39. Similarly, UPMC precipitated the 2002 closure of St. Francis Medical Center through predatory raiding of key members of that hospital's medical staff.

40. Additional physician raiding activity that occurred in 2002 includes:

- UPMC raided two cardiothoracic surgeons from AGH.

- UPMC raided multiple primary care and infectious disease physicians, orthopedists, OB/GYN physicians, and gastroenterologists on the AGH Medical Staff.
- To ward off a predatory raid of a cardiology group by UPMC, AGH was forced to drastically increase those physicians' compensation to levels well beyond those of a competitive market. AGH was forced to take similar steps to repel UPMC's attempted raid of a urology group.

41. UPMC's predatory conduct is not limited to AGH. In 2003, UPMC focused its campaign to destroy West Penn Allegheny on Alle-Kiski Medical Center ("AKMC"). Specifically, UPMC raided the entire oncology department of AKMC and the practice of a primary care physician with strong ties to AKMC. Again, UPMC's intent in these raids, in which UPMC paid exorbitant compensation far above market levels, was to try to kill West Penn Allegheny as a competitor.

42. Around this time, David Martin, CEO of UPMC St. Margaret Hospital, stated at a meeting of the St. Margaret medical staff that he was going to force AKMC to close by raiding its key groups of admitting physicians.

43. Similar to the tactic used against AGH in 2002, in late October 2005, Mr. Martin tried to shutter AKMC by stealing all of its anesthesiologists. Without qualified anesthesiologists, a hospital cannot perform surgical procedures, maintain an emergency department, or treat inpatients who might require surgery.

44. At that time, AKMC's anesthesiology services were supplied by a physician group called Pennsylvania Anesthesia Providers ("PAP"). Mr. Martin met secretly in the basement of AKMC with the physicians in PAP and offered to purchase their practice for a substantial premium over fair market value.

45. Upon information and belief, UPMC St. Margaret did not have any need at the time for additional anesthesiologists and could not have fully employed the PAP physicians.

46. AKMC was only able to retain the PAP physicians by substantially increasing their compensation.

47. Mr. Martin also attempted to raid the entirety of AKMC's radiology staff in one transaction. Upon information and belief, UPMC St. Margaret did not have the excess capacity to absorb this many radiologists.

48. UPMC also tried to starve AKMC of patient admissions by placing UPMC physicians as medical directors of nearby nursing homes. UPMC representatives expressly told nursing home administrators that they were going to take over these medical directorships in order to divert patient referrals from AKMC to UPMC St. Margaret.

49. UPMC further aggressively recruited West Penn Allegheny anesthesiologists and CRNAs during a 2005 contract dispute between West Penn Allegheny and its anesthesia group, Western Pennsylvania Anesthesia Associates ("WPAA"). In 2005, WPAA demanded higher reimbursement from Highmark, with whom WPAA had its own contract separate from West Penn Allegheny's contract with Highmark. Highmark refused the request and insisted that WPAA should look solely to West Penn Allegheny for increased compensation under the terms of the WPAA-West Penn Allegheny contract for providing anesthesia services. WPAA then demanded that West Penn Allegheny agree to exorbitant increases in compensation or else all of the anesthesiologists would quit within two weeks. After filing an action for injunctive relief, West Penn Allegheny extended the termination period to ninety days. During

this time, UPMC aggressively recruited WPAA's anesthesiologists and CRNAs to prevent them from remaining with or rejoining West Penn Allegheny.

50. UPMC engaged in other physician raiding activity in 2005:

- UPMC raided a surgery group from West Penn Allegheny's Suburban General Hospital.
- West Penn was forced to pay excessive compensation to an endocrinology group to fend off an attempted UPMC raid and maintain its ability to offer endocrinology services.

51. The raiding activity continued into 2006:

- UPMC raided a radiologist at West Penn.
- UPMC raided an orthopedic surgeon at West Penn.
- UPMC raided a cardiovascular surgeon at West Penn, and West Penn's entire Vascular Lab Department, who went to work for UPMC Shadyside hospital. This is despite the fact that, upon information and belief, Shadyside already had a fully staffed Vascular Department (both surgeons and staff).
- UPMC attempted to raid the premier podiatrist who practiced at West Penn. West Penn Allegheny was only able to retain him at increased cost.
- UPMC informed liver surgeons around the country whom AGH was recruiting that AGH's liver transplant program will never succeed.

52. There were further physician raids in 2008:

- UPMC raided multiple cardiovascular surgeons in Summer 2008.
- UPMC raided multiple cardiologists in Fall 2008.
- UPMC raided eight primary care physicians in 2008.

53. In April 2009, UPMC raided Dr. Joseph Colella, a bariatric surgeon at AGH, by offering artificially inflated compensation to him. The purpose of this raid, as with the others, was to injure West Penn Allegheny as a competitor. In an internal email to UPMC CEO

Mr. Romoff, UPMC senior executive Marshall Webster wrote that "If he [Colella] carries through, AGH will not have a sustainable bariatrics program unless they just merge it with WP." To which Romoff replied: "Excellent. AGH will merge with WP in bariatrics I believe." Moreover, Dr. Webster stated in internal UPMC emails that, even if AGH were able to retain Dr. Colella, UPMC will have forced AGH to incur higher costs.

54. In many of these instances of physician raiding UPMC guaranteed exceedingly high salaries without requiring the physicians to meet specified productivity targets. This is contrary to standard industry practice, which requires high salary levels to be justified by proven, objective measures of physician productivity.

55. For example, in 2009, UPMC offered to employ a primary care physician on staff at AKMC for a significant salary increase while at the same time only requiring him to maintain half or a third of his current productivity level.

56. Similarly, in 2008, UPMC purchased the practice of a primary care physician on staff at West Penn Hospital. While this physician earned approximately $120,000 per year in private practice, UPMC hired him at a salary of roughly $500,000. At this inflated salary, UPMC cannot recover its compensation costs from reimbursements for services that this physician provides to patients. The intent of the transaction was transparent: UPMC bribed a physician to steer referrals to UPMC’s facility and away from West Penn Hospital.

57. UPMC’s efforts to control competition and wield its market power extends to coercion of third parties involved in the dissemination of healthcare services. One such third party is the Veterans Administration Pittsburgh Healthcare System (the “VA”), which is staffed in significant part by UPMC residents.

58. UPMC doctors had previously performed liver transplants for the VA, but the VA began to avoid using UPMC doctors due to concerns over both (1) UPMC's diversion of livers intended for VA patients to UPMC, and (2) UPMC's pressure on the VA to have VA liver transplants take place at UPMC Presbyterian rather than at the VA's own (far less costly) facilities.

59. In 2007, a UPMC transplant physician dissatisfied with UPMC decided to leave UPMC with the intention of joining the West Penn Allegheny liver transplant unit after the expiration of his UPMC non-compete obligations. The VA was prepared to hire him for liver transplant surgery while he waited for his non-compete agreement to expire and had, in the past, hired other physicians with local non-competes on the basis that the VA and other local hospitals were not in competition for the VA patients. UPMC complained to the VA that the doctor would be violating his non-compete agreement. The VA's chairperson responded to UPMC that the non-compete agreement would not cover the VA.

60. In response, UPMC threatened to remove all of its residents from the VA's facilities if it decided to hire the transplant doctor. In other words, solely to hurt West Penn Allegheny, UPMC was willing to sacrifice the health care needed by veterans.

61. The VA decided that it could not hire the doctor in light of this threat from UPMC and West Penn Allegheny was forced to compensate the doctor for the term of his non-compete, even though he was not permitted to perform any medical procedures, or lose his services.

62. These predatory hiring and recruitment practices have been unique to UPMC in the Pittsburgh area. No other hospital system has attempted systematically to deprive

West Penn Allegheny of vital physicians, much less to do so by offering over-market salary increases or by hiring in practice specialties where the extra staffing was unnecessary and unprofitable (as in the AAA transaction).

Interference with West Penn Allegheny's Bond Offerings

63. In addition to brokering exclusive dealing arrangements and physician raiding, UPMC has engaged in numerous predatory acts to try to derail West Penn Allegheny's initial bond offering in 1999-2000 and subsequent financing endeavors.

64. UPMC, which had no legitimate role in the initial bond offering, retained its own consulting firm, Reynolds & Co., to develop a competing analysis of the West Penn-AGH merger that predicted the new West Penn Allegheny system would fail on the basis of numerous false and misleading statements about West Penn Allegheny's finances. UPMC disseminated this report to potential purchasers of West Penn Allegheny bonds and to credit rating agencies, as well as to the news media. *See* "UPMC Study Sees Big Risks in Merger," *Pittsburgh Post-Gazette* (June 16, 1999). UPMC officials also took the extraordinary step of meeting personally with potential investors to try to dissuade them from investing in West Penn Allegheny bonds. West Penn Allegheny's investment bankers advised West Penn Allegheny that they had never before seen a competitor engage in a "reverse road show" of this kind.

65. UPMC coerced Vanguard, a money management firm, to avoid purchasing any West Penn Allegheny bonds by threatening to cut off all of its business ties with Vanguard. UPMC similarly coerced Scudder, another money management firm, to refrain from buying $30 million of West Penn Allegheny bonds. Nevertheless, West Penn Allegheny was

eventually able to place its bond offering, though at a less favorable rate than it otherwise would have achieved without UPMC's predatory interference.

66. UPMC's predatory conduct did not cease with the initial bond offering. In late 2006, UPMC again disseminated false and defamatory information to potential purchasers of West Penn Allegheny bonds and to credit-rating agencies. Incredibly, UPMC went beyond its historic tactics of merely using a straightforward smear campaign and actually distributed a book of false and defamatory information about West Penn Allegheny's finances that was printed in a format designed to appear as if it were authored by West Penn Allegheny. West Penn Allegheny's investment bankers were shocked at this conduct, which they told West Penn Allegheny was a level of deceit and underhandedness beyond anything they had ever encountered.

67. Upon discovery in January 2007 that UPMC had disseminated its "book" of defamatory information to credit-rating agencies, West Penn Allegheny's Board Chairman called Nick Beckwith, Chairman of the Board of Directors of UPMC, to demand that UPMC cease its inappropriate conduct.

68. After confirming with UPMC management that UPMC had in fact disseminated its "book" to the credit-rating agencies, Mr. Beckwith called back West Penn Allegheny's Board Chairman and said that "this book is history." Mr. Beckwith conceded that the "book" was inappropriate. He further conceded that the format of the book – which mimicked West Penn Allegheny's standard background coloration and style of type – was "unseemly."

69. UPMC also took the extraordinary and outrageous step of affirmatively meeting with potential West Penn Allegheny investors in a "reverse road show." Upon information and belief, UPMC attempted to dissuade investors from buying West Penn Allegheny debt by making false and defamatory representations about West Penn Allegheny's financial health.

UPMC's Threats to Third Party Payors

70. In addition to the above predatory conduct, UPMC has continually threatened Pittsburgh's largest insurer Highmark that, if it aided West Penn Allegheny in any manner whatsoever, UPMC would retaliate against it.

71. For example, between 2002 and 2006, West Penn Allegheny developed several plans to refinance the $125 million subordinated loan it received from Highmark in connection with the West Penn-AGH merger in 2000. Aware of West Penn Allegheny's refinancing efforts, UPMC repeatedly threatened Highmark not to agree to any loan refinancing or restructuring.

72. Further, in 2011, following reports of a proposed affiliation agreement between Highmark and West Penn Allegheny, UPMC made good on its retaliatory threats and refused to renew its contract with Highmark on any terms. UPMC's CEO Jeffrey Romoff has admitted publicly that UPMC's refusal to contract with Highmark is predicated upon Highmark's proposed affiliation with West Penn Allegheny.

73. UPMC's threats to Highmark are evidence of UPMC's specific intent to shutter West Penn Allegheny and to acquire monopoly power.

UPMC's Market Power

74. Hospital services in the Pittsburgh metropolitan area are dominated by UPMC. In the 1990's, UPMC began to acquire smaller, independent hospitals. UPMC currently owns 20 tertiary, specialty, and community hospitals. UPMC's key facilities include:

- UPMC-Presbyterian, UPMC-Shadyside, and UPMC-Mercy, the only other tertiary and quaternary care facilities in Pittsburgh besides West Penn Allegheny's Allegheny General Hospital and Western Pennsylvania Hospital.
- Children's Hospital of Pittsburgh, the only specialized pediatric inpatient facility in the Pittsburgh area.
- Magee Women's Hospital of UPMC, the largest obstetrical care facility in Western Pennsylvania.

75. With the exception of burn treatment, UPMC possesses a market share in excess of 50% in every tertiary and quaternary care service line in the six-county Pittsburgh metropolitan region.

76. UPMC's share of the oncology services market, including its joint ventures and satellite cancer centers, is approximately 80%.

77. Besides UPMC and West Penn Allegheny, there are several small community hospital systems in Allegheny County and the adjoining counties: Excela Health, a four-hospital system; Heritage Valley Health System, a two-hospital system; Butler Health System, which owns Butler Memorial Hospital; St. Clair Hospital; Ohio Valley General Hospital; Armstrong County Memorial Hospital; Jefferson Regional Medical Center; and The Washington Hospital.

78. None of these systems offers sophisticated tertiary and quaternary care and none poses any threat to UPMC's dominance. None of the community hospital systems registers above single digit market shares in any service line in the six-county metropolitan area.

79. The relevant product market for health care services is acute care inpatient services. In the alternative, the relevant product market is high-end tertiary and quaternary acute care inpatient services.

80. In addition, oncology services at the tertiary and quaternary care level constitute a relevant product market. Such high-end oncology services are unique and specialized procedures and treatments that cannot be interchanged or substituted with other types of tertiary and quaternary care or other, less sophisticated oncology care.

81. The relevant geographic market is Allegheny County. Approximately 95% of county residents stay within the county for acute inpatient care. There is accordingly a clear and unequivocal demand by county residents to access care locally.

82. The relevant geographic market is defined to be the area in which a dominant player can exercise market power by forcing consumers in that area to accept price increases against their will. If there is evidence that a dominant company was able to force a price increase upon a group of captive and unwilling customers, then the area in which those customers were exploited is the relevant geographic market.

83. Upon information and belief, UPMC has imposed such a price increase upon commercial health care payors in Allegheny County.

84. In comparison to West Penn, UPMC's charges are exorbitant. A study released by the Pennsylvania Health Care Cost Containment Council in June 2007 found that, for admissions in 2005, UPMC Presbyterian and UPMC Shadyside received an average of $34,803 for coronary artery bypass graft surgery, while AGH received only $23,715 on average. The same study found, though, that AGH performed better than UPMC's hospitals, with a lower readmission rate. *See* "Hospital Chief 'Shocked' at Disparity in Payments," *Pittsburgh Post-Gazette* (June 17, 2007); *see also* "UPMC Was Paid Thousands More for Cardiac Surgery," *Pittsburgh Post-Gazette* (June 14, 2007); "Health Care Costs Report Illustrates Disparities, Could Lead to Change," *The Butler Eagle* (June 20, 2007).

85. In addition, Pennsylvania health insurance regulations provide that a health plan "shall provide for at least 90% of its enrollees in each county in its service area, access to covered services that are within 20 miles or 30 minutes travel from an enrollee's residence or work in a county designated as a metropolitan statistical area (MSA) by the Federal Census Bureau . . . ." 28 Pa. Admin. Code § 9.679(d). There is no feasible way to comply with this regulation for Allegheny County residents without including UPMC in the plan's network of participating providers, especially given UPMC's dominance in certain service lines such as oncology, psychiatry, and behavioral health.

86. In fact, health insurers cannot create a marketable, adequate network of participating providers for employers in Allegheny County without reasonable access to UPMC's facilities because of UPMC's dominance in numerous specialties, including mental health and oncology, and because, as described above, UPMC controls the contracting decisions of almost every nominally independent community hospital in Allegheny County except those owned by West Penn Allegheny.

87. UPMC's market share in Allegheny County for acute inpatient services, excluding government payors, exceeds 55% whether measured by bed capacity or admission volume. This is more than double West Penn Allegheny's market share, and no other hospital system in Allegheny County exceeds single digits. *See also* "UPMC, Highmark Head and Shoulders Above Other Local Health Care Institutions," *Pittsburgh Post-Gazette* (March 20, 2007); "UPMC Earnings Nearing New High," *Pittsburgh Post-Gazette* (May 9, 2007); "UPMC Posts Record $618 Million Profit," *Pittsburgh Post-Gazette* (August 24, 2007).

88. This market share understates UPMC's true market power, as UPMC, through its joint ventures with nominally independent community hospitals, controls the contracting decisions of almost every hospital in Allegheny County except those owned by West Penn Allegheny.

89. There are substantial barriers to entering the relevant market, including the large capital costs required to construct and continually maintain and upgrade a hospital, the need to recruit and pay a large medical staff, the need to negotiate contracts with third-party payors, and the need to mount a marketing campaign to draw patients already familiar with UPMC's facilities. These barriers are particularly daunting in light of Allegheny County's declining population.

90. Since the formation of West Penn Allegheny there has been no entry of a new competitor in the relevant market. By contrast, numerous competitors in that time have either folded or been acquired by UPMC, including St. Francis, Mercy, and Citizens General Hospitals.

91. UPMC has grown its market power through a series of anticompetitive acquisitions. Most recently, UPMC purchased Mercy Hospital in 2006. Mercy was the only tertiary care facility in Pittsburgh not owned by UPMC or West Penn Allegheny. With the acquisition of Mercy, West Penn Allegheny is now the last remaining competitor for many of the most sophisticated and expensive hospital services.

Damages to West Penn Allegheny from UPMC's Predatory Conduct

92. UPMC's illegal and predatory conduct has inflicted severe damage upon West Penn Allegheny.

93. As a result of UPMC's predatory conduct, West Penn Allegheny's growth has been artificially stunted and its market share unduly restricted. Absent UPMC's predatory conduct, West Penn Allegheny's market share would be substantially higher and it would have earned additional profit – profits which it could have reinvested back into its operations to improve the quality of health care in the community and to further its charitable mission.

94. As described above, UPMC attacked West Penn Allegheny by raising its physician costs and financing costs and cutting off access to sources of patient referrals. This resulted in a loss of direct profits for lost patient volume, inflated financing costs, and in West Penn Allegheny being starved of the capital needed to grow and to expand.

95. The lack of capital for investment caused West Penn Allegheny to lose market share and inpatient admissions volume. The capital starvation artificially constrained West Penn Allegheny's capacity, as it could not expand its service lines, programs, and physical plants. Without expanded services and facilities, West Penn Allegheny was limited in the

number of patients to whom it could provide care and in its ability to act as a constraint on UPMC's unfettered ability to control the healthcare market.

96. Despite UPMC's illegal conduct, West Penn Allegheny has always provided sophisticated, high-level care to the Pittsburgh community and continues to do so. But UPMC's conduct has artificially stunted West Penn Allegheny's otherwise natural growth as the more efficient and lower-cost tertiary and quaternary service provider.

97. By cutting West Penn Allegheny off from referrals from independent community hospitals, UPMC has caused West Penn Allegheny to lose inpatient admissions volume and market share.

98. By improperly raiding key admitting physicians from West Penn Allegheny, UPMC has diverted those physicians' patients away from West Penn Allegheny's facilities and to UPMC's facilities. This has caused West Penn Allegheny to lose inpatient admissions volume and market share.

99. The improper raids on West Penn Allegheny's anesthesiology and radiology physicians have forced West Penn Allegheny to incur artificially elevated costs to maintain these services as West Penn Allegheny was forced to raise compensation to these physicians. As explained in detail above, the raising of West Penn Allegheny's costs resulted in West Penn Allegheny having less capital to invest in its business, which in turn led to loss of market share.

100. Similarly, by bidding physician salaries to supracompetitive levels, UPMC has artificially increased West Penn Allegheny's costs.

101. By improperly interfering in West Penn Allegheny's attempts to sell its bonds to the investing public, UPMC artificially reduced demand for West Penn Allegheny's securities, which in turn caused West Penn Allegheny to pay higher financing costs, which in turn led to loss of market share.

CAUSES OF ACTION

Count I – Attempted Monopolization in Violation of Section 2 of the Sherman Act

102. The allegations set forth in paragraph 1 through 101 above are incorporated herein by reference.

103. UPMC has attempted to monopolize the market for acute inpatient services and/or high-end tertiary and quaternary acute care inpatient services and in Allegheny County.

104. UPMC has a specific intent to monopolize – an intent that it acted on repeatedly. Indeed, UPMC CEO Mr. Romoff has publicly stated his belief that competition in health care does not work. UPMC executives have also stated that they want to turn AGH into a nursing home or a parking lot.

105. As detailed above, UPMC has engaged in predatory conduct in support of this goal, including, without limitation, creating a network of joint ventures with community hospitals in order to control referrals, coercing community hospitals into refusing to refer patients to West Penn Allegheny, engaging in a nearly decade-long pattern of predatory physician raiding, interfering with West Penn Allegheny's attempts to secure financing for its operations and threatening Pittsburgh's largest insurer not to aid West Penn Allegheny.

106. UPMC's illegal and anticompetitive predatory conduct continues to the present day. As detailed above, it has engaged in numerous acts of predatory conduct during the limitations period.

107. There is a dangerous probability that UPMC will achieve monopoly power. Not only does UPMC possess substantial market share and market power, but West Penn Allegheny is its only viable competitor, especially in more sophisticated tertiary and quaternary care services. Should West Penn Allegheny falter or weaken significantly, UPMC will achieve monopoly power.

108. As detailed above, West Penn Allegheny has been damaged by UPMC's predatory conduct.

Count II – Attempted Monopolization in Violation of Section 2 of the Sherman Act

109. The allegations set forth in paragraph 1 through 108 above are incorporated herein by reference.

110. UPMC has attempted to monopolize the market for oncology services at the tertiary and quaternary care level in Allegheny County.

111. UPMC has a specific intent to monopolize – an intent that it acted on repeatedly. Indeed, UPMC CEO Mr. Romoff has publicly stated his belief that competition in health care does not work. UPMC executives have also stated that they want to turn AGH into a nursing home or a parking lot.

112. Tertiary and quaternary care facilities rely on referrals from community hospital oncology programs in order to maintain oncology services at the tertiary and quaternary care level.

113. As detailed above, UPMC has coerced every independent community hospitals to establish a UPMC Cancer Centers or joint venture on their campus and thereby eliminate oncology referrals from those community hospitals to the West Penn Allegheny's tertiary and quaternary care facilities. As a result, West Penn Allegheny has been foreclosed from key sources of patient referrals.

114. UPMC's illegal and anticompetitive predatory conduct continues to the present day. As detailed above, it has engaged in numerous acts of predatory conduct during the limitations period.

115. There is a dangerous probability that UPMC will achieve monopoly power. Not only does UPMC possess substantial market share and market power, but West Penn Allegheny is its only viable competitor in the relevant market. Should West Penn Allegheny falter or weaken significantly, UPMC will achieve monopoly power.

116. As detailed above, West Penn Allegheny has been damaged by UPMC's predatory conduct.

Count III – Employee Raiding and Unfair Competition

117. The allegations set forth in paragraph 1 through 116 above are incorporated herein by reference.

118. For the past decade, UPMC has engaged in a systematic campaign to induce physician employees of West Penn Allegheny to switch their employment to UPMC.

119. The principal intent of this campaign has been to cripple and to destroy West Penn Allegheny as a competitor.

120. This illegal campaign of employee raiding has resulted in substantial damages to West Penn Allegheny, including, without limitation, lost patient admissions from raided physicians and increased operational costs.

121. UPMC's conduct is outrageous, malicious, wanton, willful, and oppressive. West Penn Allegheny is therefore entitled to an appropriate award of punitive damages.

Count IV– Tortious Interference with Existing and Prospective Business Relations

122. The allegations set forth in paragraph 1 through 121 above are incorporated herein by reference.

123. UPMC has tortiously interfered with West Penn Allegheny's existing and prospective contractual relations with physicians and investors.

124. UPMC has interfered with West Penn Allegheny's employment contracts with numerous physician employees by inducing them to leave West Penn Allegheny for exorbitant, artificially inflated compensation. The sole purpose of this raiding activity was to weaken West Penn Allegheny as a competitor.

125. UPMC's physician raiding activities are without justification or privilege.

126. West Penn Allegheny has been damaged by UPMC's physician raiding. It has been forced to incur artificially inflated compensation costs, and lost market share and patient volume, including, without limitation, lost patient admissions from physicians raided by UPMC.

127. UPMC also tortiously interfered with West Penn Allegheny's prospective business relationships with bond investors in Spring 2007. UPMC made numerous false statements to potential investors about West Penn Allegheny's finances and circulated a defamatory fake financial report designed to appear as if written by West Penn Allegheny.

128. This smear campaign was without privilege or justification.

129. West Penn Allegheny was damaged by UPMC's conduct.

130. UPMC's conduct is outrageous, malicious, wanton, willful, and oppressive. West Penn Allegheny is therefore entitled to an appropriate award of punitive damages.

Prayer for Relief

WHEREFORE, West Penn Allegheny prays:

1. That UPMC be enjoined from further predatory and anticompetitive conduct, as alleged herein;

2. That UPMC be ordered to cease interfering with community hospitals' ability to refer patients to West Penn Allegheny facilities and to make independent contracting decisions with third-party payors;

4. That West Penn Allegheny recover compensatory and treble damages;

5. That West Penn Allegheny recover punitive damages;

6. That West Penn Allegheny recover its costs for this suit, including reasonable attorneys' fees, as provided by law; and

7. That the Court grant West Penn Allegheny such additional, further and different relief as may be deemed just and proper.

Demand for Jury Trial

West Penn Allegheny demands a trial by jury on all issues triable by jury.

Respectfully submitted,

/s/ Barbara T. Sicalides
Andrew K. Fletcher
PEPPER HAMILTON LLP
One Mellon Center
500 Grant Street, 50th Floor
Pittsburgh, PA 15219
Telephone: (412) 454-5000
Facsimile: (412) 281-0717

Barbara W. Mather
Barbara Sicalides
Barak A. Bassman
PEPPER HAMILTON LLP
3000 Two Logan Square
Eighteenth and Arch Streets
Philadelphia, PA 19103-2799
Phone: (215) 981-4000
Facsimile: (215) 981-4750

Attorneys for West Penn Allegheny Health System, Inc.

Dated: April 24, 2012

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

WEST PENN ALLEGHENY HEALTH SYSTEM, INC., Plaintiff,	:	
v.	:	CIVIL ACTION NO. 09-CV-0480
UPMC, Defendant.	:	

CERTIFICATE OF SERVICE

I herby certify that on the 24th day of April 24, 2012 the foregoing Second Amended Complaint of West Penn Allegheny Health System, Inc. was served upon Counsel of record via the Court's ECF system.

/s/ Barbara T. Sicalides
Barbara T. Sicalides