

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

HIGHMARK INC.,

Plaintiff,

v.

WEST PENN ALLEGHENY HEALTH
SYSTEM, INC., CANONSBURG GENERAL
HOSPITAL, ALLE-KISKI MEDICAL
CENTER, ALLEGHENY MEDICAL
PRACTICE NETWORK, ALLEGHENY-
SINGER RESEARCH INSTITUTE,
ALLEGHENY SPECIALTY PRACTICE
NETWORK, ALLE-KISKI MEDICAL
CENTER TRUST, CANONSBURG GENERAL
HOSPITAL AMBULANCE SERVICE,
FORBES HEALTH FOUNDATION,
SUBURBAN HEALTH FOUNDATION, THE
WESTERN PENNSYLVANIA HOSPITAL
FOUNDATION, WEST ALLEGHENY
FOUNDATION, L.L.C., WEST PENN
ALLEGHENY ONCOLOGY NETWORK, and
WEST PENN PHYSICIAN PRACTICE
NETWORK,

Defendants.

CIVIL DIVISION

No.: 6212-18361

VERIFIED COMPLAINT FOR SPECIAL,
PRELIMINARY AND PERMANENT
INJUNCTIVE RELIEF, FOR SPECIFIC
PERFORMANCE AND FOR DAMAGES

Code: 010-Breach of Contract

Filed on behalf of Plaintiff Highmark Inc.

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NOTICE TO DEFEND

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this complaint and notice are served, by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so, the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the complaint or for any claim or relief requested by the plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER OR CANNOT AFFORD ONE, GO TO OR TELEPHONE THE OFFICE SET FORTH TO FIND OUT WHERE YOU CAN GET LEGAL HELP:

Lawyer Referral Service
The Allegheny County Bar Association
11th Floor Koppers Building
436 Seventh Avenue
Pittsburgh, PA 15219
Telephone: (412) 261-5555

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**VERIFIED COMPLAINT FOR SPECIAL, PRELIMINARY AND PERMANENT
INJUNCTIVE RELIEF, FOR SPECIFIC PERFORMANCE AND FOR DAMAGES**

Plaintiff Highmark Inc. ("Highmark"), by and through its undersigned counsel, files this *Verified Complaint for Special, Preliminary and Permanent Injunctive Relief, for Specific Performance and for Damages* (the "Complaint"), and respectfully states as follows for its Complaint against Defendants West Penn Allegheny Health System, Inc., Canonsburg General Hospital, Alle-Kiski Medical Center, and the other subsidiaries of Defendants identified in the caption above and in the Affiliation Agreement attached hereto as Exhibit A (collectively, "WPAHS"):

SUMMARY OF ACTION

1. On October 31, 2011, Highmark and WPAHS entered into an Affiliation Agreement (the “Agreement”) to facilitate a transaction (the “Transaction”) in which they would operate under common control and under which WPAHS would be the core of a new and vigorous integrated health care financing and delivery system that would serve Western Pennsylvania and benefit the entire community. *See generally* Exh. A.
2. On September 28, 2012 – after an intense and highly publicized effort of nearly a year to secure regulatory approval of the Transaction, after grants and investments of hundreds of millions of dollars by Highmark to and in WPAHS, after Highmark and physicians and at least one hospital made extensive commitments in reliance on completion of the Transaction, and despite WPAHS’ ongoing and substantial further financial deterioration – WPAHS unilaterally and in breach of its obligations under the Agreement announced that it was abandoning the Transaction. Press Release, West Penn Allegheny Health System, West Penn Allegheny Health System Moves On From Affiliation Agreement With Highmark (Sept. 28, 2012).¹ Exh. B.
3. Moreover, in spite of its obligations under the Agreement to use its best efforts and to take all commercially reasonable steps to cause the Transaction to be closed, WPAHS has refused to offer any proposal or take any substantial step to fix its dire financial condition other than to ask and demand that Highmark give it even more money than the hundreds of millions of dollars that Highmark has already paid and is prepared to pay under the Agreement. WPAHS has ignored the clearly stated and repeated “significant concerns”

¹ Available at <http://www.wpahs.org/news/9-28-2012/west-penn-allegheny-health-system-moves-affiliation-agreement-highmark>.

of the Pennsylvania Insurance Department (the "PID") "about the WPAHS's projected deficit and inability to meet its bond obligations – in both the short and longer term."

Press Release, Pennsylvania Insurance Department, Insurance Commissioner Michael Consedine's Statement on Highmark/WPAHS Proposed Affiliation (Sept. 28, 2012).²
Exh. C.

4. In a flight from reality, WPAHS has chosen to take over \$200 million of Highmark's money and the expectations of an entire community and run from its obligations to negotiate in good faith and exclusively with Highmark. Simultaneously with its repudiation of the Agreement, WPAHS issued a press release stating its intention to seek "other potential partners." Exh. B.
5. Highmark has been and unequivocally remains committed to performing its obligations under the Agreement, to receiving the benefits of the Agreement, and ultimately to closing the Transaction.
6. Accordingly, as set forth below, Highmark seeks: (a) injunctive relief prohibiting WPAHS from engaging in specific conduct that violates the Agreement, and in particular a special injunction ordering WPAHS to cease immediately its violation of the Agreement's exclusivity provision, and also a preliminary injunction requiring WPAHS in addition to comply with the provisions of the Agreement requiring the protection of WPAHS Assets; (b) specific performance of WPAHS' obligation to deal exclusively with Highmark; (c) a declaration that WPAHS' purported termination of the Agreement is improper, unjustified, and of no effect; and (d) additionally or in the alternative, a

² Available at http://www.portal.state.pa.us/portal/server.pt?open=512&objID=17319&PageID=502655&mode=2&contentid=http://pubcontent.state.pa.us/publishedcontent/publish/cop_hhs/insurance/news_and_media/news___media/articles/september_28__2012.html

judgment for the immediate payment of \$200 million pursuant to the terms of the Agreement governing Material Defaults by WPAHS and for other damages flowing from WPAHS' injurious and unwarranted conduct.

PARTIES

7. Plaintiff Highmark Inc. is a Pennsylvania nonprofit corporation with its principal place of business located at Fifth Avenue Place, 120 Fifth Avenue, Pittsburgh, Pennsylvania, 15222.
8. Defendant West Penn Allegheny Health System, Inc. ("WPAHS") is a Pennsylvania nonprofit corporation with its principal place of business located at 30 Isabella Street, Suite 300, Pittsburgh, Pennsylvania, 15212.
9. Defendant Canonsburg General Hospital ("Canonsburg") is a Pennsylvania nonprofit corporation with its principal place of business located at 100 Medical Boulevard, Canonsburg, Pennsylvania 15317. Canonsburg is a subsidiary of WPAHS and a party to the Agreement.
10. Defendant Canonsburg General Hospital Ambulance Service ("Canonsburg Ambulance") is a Pennsylvania nonprofit corporation with its principal place of business located at 209 West Pike Street, Canonsburg, Pennsylvania 15317. Canonsburg Ambulance is a subsidiary of WPAHS and a party to the Agreement.
11. Defendant Alle-Kiski Medical Center ("Alle-Kiski") is a Pennsylvania nonprofit corporation with its principal place of business located at 1301 Carlisle Street, Natrona Heights, Pennsylvania 15065. Alle-Kiski is a subsidiary of WPAHS and a party to the Agreement.

12. Defendant Alle-Kiski Medical Center Trust (“Alle-Kiski Trust”) is a Pennsylvania nonprofit corporation with its principal place of business located at 1301 Carlisle Street, Natrona Heights, Pennsylvania 15065. Alle-Kiski Trust is a subsidiary of WPAHS and a party to the Agreement.
13. Defendant Allegheny Medical Practice Network (“AMPN”) is a Pennsylvania nonprofit corporation with its principal place of business located at 4800 Friendship Avenue, Pittsburgh, Pennsylvania 15224. AMPN is a subsidiary of WPAHS and a party to the Agreement.
14. Defendant Allegheny-Singer Research Institute (“Allegheny-Singer”) is a Pennsylvania nonprofit corporation with its principal place of business located at 320 East North Avenue, Pittsburgh, Pennsylvania 15212. Allegheny-Singer is a subsidiary of WPAHS and a party to the Agreement.
15. Defendant Allegheny Specialty Practice Network (“ASPN”) is a Pennsylvania nonprofit corporation with its principal place of business located at 4800 Friendship Avenue, Pittsburgh, Pennsylvania 15224. ASPN is a subsidiary of WPAHS and a party to the Agreement.
16. Defendant Forbes Health Foundation (“Forbes Health”) is a Pennsylvania nonprofit corporation with its principal place of business located at 2570 Haymaker Road, Monroeville, Pennsylvania 15146. Forbes Health is a subsidiary of WPAHS and a party to the Agreement.
17. Defendant Suburban Health Foundation (“Suburban Health”) is a Pennsylvania nonprofit corporation with its principal place of business located at 100 South Jackson Street,

- Pittsburgh, Pennsylvania 15202. Suburban Health is a subsidiary of WPAHS and a party to the Agreement.
18. Defendant The Western Pennsylvania Hospital Foundation (“TWPHF”) is a Pennsylvania nonprofit corporation with its principal place of business located at 4800 Friendship Avenue, Pittsburgh, Pennsylvania 15224. TWPHF is a subsidiary of WPAHS and a party to the Agreement.
 19. Defendant West Penn Allegheny Foundation, L.L.C. (“West Penn LLC”) is a Pennsylvania limited liability company with its principal place of business located at 320 East North Avenue, 16th Floor, Pittsburgh, Pennsylvania, 15212. West Penn LLC is a subsidiary of WPAHS and a party to the Agreement.
 20. Defendant West Penn Allegheny Oncology Network (“West Penn Oncology”) is a Pennsylvania nonprofit corporation with its principal place of business located at 1200 Brooks Lane, Suite 180, Jefferson Hills, Pennsylvania 15025. West Penn Oncology is a subsidiary of WPAHS and a party to the Agreement.
 21. Defendant West Penn Physician Practice Network (“West Penn Physician”) is a Pennsylvania nonprofit corporation with its principal place of business located at 4800 Friendship Avenue, Pittsburgh, Pennsylvania 15224. West Penn Physician is a subsidiary of WPAHS and a party to the Agreement.
 22. All Defendants are collectively referred to as “WPAHS.”

VENUE

23. Venue is appropriate because the actions described herein took place in Allegheny County and because Highmark’s causes of action arose in Allegheny County.

APPLICABLE LAW

(A) Breach of Contract

24. The necessary material facts that must be alleged for a breach of contract action are simple: there was a contract, the defendant breached it, and the plaintiff suffered damages from the breach.

(B) Special and Preliminary Injunction

25. To obtain a special or a preliminary injunction, a petitioner must establish that:
- (1) relief is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by money damages;
 - (2) greater injury will occur from refusing to grant the injunction than from granting it;
 - (3) the injunction will restore the parties to their status quo as it existed before the alleged wrongful conduct;
 - (4) the petitioner is likely to prevail on the merits;
 - (5) the injunction is reasonably suited to abate the offending activity; and
 - (6) the public interest will not be harmed if the injunction is granted.

(C) Permanent Injunction

26. To justify the award of a permanent injunction, the party seeking relief must establish that its right to relief is clear, that an injunction is necessary to avoid an injury that cannot be compensated by damages, and that greater injury will result from refusing rather than granting the relief requested.

(D) Specific Performance

27. Specific performance is an equitable remedy allowing a court to compel performance of a

contract where the contract contains an agreement between the parties as to the nature of the performance. To obtain specific performance, the plaintiff must show (1) a valid agreement, (2) that the agreement has been violated, and (3) that the plaintiff does not have an adequate remedy at law.

(E) Damages

28. The purpose of a damage award in a breach of contract action is to place the non-breaching party as nearly as possible in the same position it would have occupied had there been no breach.

RELEVANT PROVISIONS OF THE AFFILIATION AGREEMENT

29. The Affiliation Agreement (“Agreement”) is a written agreement between Highmark and WPAHS (collectively, the “Parties”) that was executed on October 31, 2011. Capitalized terms not defined herein have the meanings as set forth in the Agreement.

(A) WPAHS’ Limited Termination Rights

30. Section 10.1(e) of the Agreement sets forth the only situations in which WPAHS may unilaterally terminate the Agreement. WPAHS may terminate only if: (1) Highmark materially breaches or violates any representation or warranty in the Agreement, or (2) Highmark breaches any material covenant or agreement in the Agreement. Exh. A § 10.1(e). Moreover, WPAHS cannot terminate unless Highmark’s breach under either (1) or (2) “would give rise, or could reasonably be expected to give rise, to a failure of a condition [precedent] and cannot be or has not been cured within [the earlier of] (A) 30 days after WPAHS notifies Highmark of such breach or violation or (B) the End Date.”
Id.

31. The Agreement’s stated End Date is May 1, 2013. Exh. A § 10.1(b).

(B) Requirement of Best Efforts to Obtain Approvals and Permits

32. In the Agreement, the Parties agree to “use their commercially reasonable best efforts” to cause all agreed-upon conditions over which they have control to be satisfied by the time of closing, “including the receipt of all required Approvals and Permits.” Exh. A § 6.10.
33. In the Agreement, Highmark’s obligations are conditioned upon Highmark obtaining documentation or other evidence reasonably satisfactory to Highmark that the Parties have received the Approvals and Permits set forth in Schedule 8.4. Exh. A § 8.4.
34. Approval from the PID is an express condition of Highmark’s obligation to complete the transaction. Exh. A § 8.4; Exh. A Sched. 8.4.
35. The Agreement also obligates the Parties to “use their respective best efforts, as promptly as practicable, to obtain all Approvals and Permits . . . necessary for the consummation of the Transaction and the operation of the business following the Closing,” and to “cooperate with each other . . . in order to obtain the Approvals and Permits . . . to consummate the Transaction.” Exh. A § 6.7.

(C) Exclusivity

36. In the Agreement, WPAHS agrees that, during the pendency of the Transaction, “they shall not, directly or indirectly . . . solicit, initiate or encourage the submission of or entertain any proposal or offer from any Person”³ to, *inter alia*, acquire or inject capital into WPAHS, “or participate in any discussions or negotiations regarding, or furnishing to any other Person any information with respect to, or otherwise cooperating in any way with, or assisting or participating in, facilitating, furthering or encouraging any effort or attempt by any other Person to do or seek to do,” *inter alia*, an investment in or

³ The Agreement’s definition of “Person” broadly includes “an individual” or “any . . . entity or organization.” Exh. A § 1.1.

acquisition of WPAHS, without the prior written consent of Highmark. Exh. A § 11.1. WPAHS also is obligated to “promptly notify Highmark if any such Acquisition Proposal, or any inquiry or contact with any Person with respect thereto, is made or received by” WPAHS. *Id.*

(D) Specific Performance

37. The Agreement contains the Parties’ mutual agreement “that irreparable damage will occur in the event that any of the provisions of this Agreement are not performed in accordance with their specific terms or are otherwise breached,” and accordingly that a Party is entitled “to seek and obtain, without proof of actual damages” either (i) an order of specific performance or (ii) an injunction, “in the event of any breach or threatened breach by any other Party of any covenant or obligation contained in” the Agreement. Exh. A § 11.3.

(E) WPAHS Material Adverse Effect

38. The Agreement provides that a condition precedent to Highmark’s obligations under the Agreement is that “[t]here shall have been no WPAHS Material Adverse Effect as of the Closing Date.” Exh. A § 8.3.
39. The Agreement defines “WPAHS Material Adverse Effect” to include “any change, fact, occurrence or event that, individually or in the aggregate . . . has or is reasonably likely to have a material adverse effect on the condition (financial or otherwise) of the operations, results of operations, properties, or assets of [WPAHS].” Exh. A § 1.1.
40. Among WPAHS’ representations and warranties in the Agreement is that, “[s]ince June 28, 2011, . . . there has not been: . . . any WPAHS Material Adverse Effect,” with certain exceptions. Exh. A § 4.28(a).

41. [Intentionally Blank]

(F) WPAHS Material Default

42. The Agreement provides that WPAHS would commit a “Material Default” if WPAHS either (1) “attempted to unilaterally terminate this Agreement” in a manner violative of Section 10.1, or (2) “materially breached its obligations” of exclusivity under Section 11.1. Exh. A § 2.5(k).

43. In the event of a WPAHS Material Default, the Agreement permits Highmark to demand that WPAHS “immediately pay to Highmark both:” (i) \$100 million “if Highmark has not yet exercised the Joint Venture Option and notifies WPAHS in writing that it is exercising its right to terminate the Joint Venture Option Agreement,” and (ii) “all amounts outstanding under the Loan Agreements evidencing the obligations associated with fifty percent (50%) of the Second Funding Commitment and the entire Third Funding Commitment which shall be accelerated and be immediately due and payable to Highmark.” Exh. A § 2.5(k).

(G) Legal Fees and Costs of Disputes

44. The Parties have agreed that if any Party “elects to incur legal expenses to enforce or interpret any provision of this Agreement, the prevailing Party will be entitled to recover such legal expenses, including attorney’s fees, costs and necessary disbursements, in addition to any other relief to which such Party shall be entitled.” Exh. A § 12.2.

STATEMENT OF FACTS APPLICABLE TO ALL COUNTS

45. As set forth in the Agreement, Highmark has provided hundreds of millions of dollars in loans and grants to WPAHS to be used for necessary capital improvements at WPAHS facilities as well as for WPAHS’ operating needs.

46. In reliance on the Agreement, Highmark has also entered into contracts with third-party hospitals and other health care providers, and incurred other substantial costs and expenses, to begin creating the contemplated integrated health care financing and delivery system. These actions were known to WPAHS and have been highly publicized.
47. For example, on January 4, 2012, Highmark announced an affiliation with Premier Medical Associates, which is “another important element in building a stronger physician-led health care system to serve the people of Western Pennsylvania.” Press Release, Highmark, Highmark announces affiliation with Premier Medical Associates (Jan. 4, 2012).⁴ Exh. D. The announcement was made at WPAHS’ Forbes Regional Hospital, “where officials from Highmark and the West Penn Allegheny Health System also shared details of their \$20 million plans to enhance health care services, renovate the Forbes Regional facility and support plans to become the region’s first Level 2 trauma intensive care program.” *Id.* This affiliation with Premier was in large part to benefit and support volumes at WPAHS and, in particular, Forbes Regional Hospital.
48. For another example, on June 12, 2012, a strategic partnership was announced between Highmark and Jefferson Regional Medical Center, which is “an important part of Highmark’s integrated delivery system in its southern service region.” Press Release, Highmark, Jefferson Regional announces plans for strategic partnership with Highmark (June 12, 2012).⁵ Exh. D.
49. As set forth above, completion of the Transaction is expressly contingent on obtaining all

⁴ Available at <https://www.highmark.com/hmk2/newsroom/pressreleases/2012/pr010412b.shtml>.

⁵ Available at <https://www.highmark.com/hmk2/newsroom/pressreleases/2012/pr061212.shtml>.

required regulatory approvals, including but not limited to the approval of the PID.

50. Based on developments since October 31, 2011, Highmark is concerned that by the date of any closing, changes in WPAHS' financial condition will constitute a "WPAHS Material Adverse Effect" on the operations, operating results, properties, and assets of WPAHS. *See* Exh. A §§ 1.1, 8.3.
51. Highmark has already provided additional financial support, above and beyond what is contemplated in the Agreement, to ameliorate some of the immediate effects that would otherwise result from the adverse changes in WPAHS' finances.
52. The only reason WPAHS has been able to avoid default of its debt and other obligations is by virtue of the financial infusions it has received from Highmark.
53. Despite Highmark's efforts to date, the PID continues to express serious concern that the financial condition and performance of WPAHS is inadequate to permit the approval of the Transaction. For example, in Highmark's estimation, notwithstanding the funds Highmark has provided and has committed to provide, the shortfall between WPAHS' anticipated revenues and its anticipated expenses over a five year period is expected to deteriorate by approximately \$350 million.
54. In December 2011, WPAHS' own auditors issued an opinion expressing reservations about whether WPAHS will be able to continue as a going concern.
55. In light of these concerns, Highmark asked WPAHS to consider potential steps that could be taken, including but not limited to a structured bankruptcy filing, that would allow WPAHS to address its debt and improve its financial condition so that the Transaction could be approved by the PID.
56. In the absence of a WPAHS Material Adverse Effect, as defined at Section 1.1 of the

Agreement, if the PID would approve the Transaction without any restructuring of WPAHS' debt and other obligations and without imposing other material conditions, then Highmark would complete the Transaction. Highmark, however, has been given strong reason to believe, and expects, that the PID will reject the Transaction in its present form given the ongoing deterioration of WPAHS' financial condition.

57. In a press release issued immediately after WPAHS' attempt to terminate the Agreement, PID Commissioner Michael Consedine indicated that he was "very concerned" about this turn of events, and emphasized that the PID had "raised significant concerns to both Highmark and WPAHS about the WPAHS's projected deficit and inability to meet its bond obligations -- in both the short and longer term." Exh. C.
58. The PID further confirmed in that same press release that while it had not sought to "require bankruptcy or restructuring of its debt," it had "urged the parties to work together to address these issues." Exh. C.
59. Consistent with the PID's description of its position, Highmark has never insisted that WPAHS file for bankruptcy as a condition precedent for proceeding with the Transaction.
60. Highmark has always been willing to consider other proposals from WPAHS as to how it could improve its financial condition sufficiently to permit regulatory approval of the Transaction. To date, however, WPAHS has not addressed the concerns about its financial position and debt other than to suggest that in various ways and amounts Highmark give it more money.
61. The parties have a mutual obligation under the Agreement to use their commercially reasonable best efforts to obtain all required regulatory approvals. To fulfill that

obligation, a structured bankruptcy for WPAHS is an option that must be considered.

62. Highmark believes that it is possible for the parties to design a structured bankruptcy for WPAHS that would be fully compatible with the Agreement, that would protect the pensions of WPAHS employees and that would allow the Transaction to proceed.
63. Rather than fulfill its obligation to work cooperatively to satisfy regulatory concerns (whether through a bankruptcy filing or otherwise), on September 28, 2012, WPAHS unilaterally and without prior notice declared itself “released” from performing its obligations under the Affiliation Agreement. Exh. B.
64. WPAHS’ refers to no authority permitting it to terminate in this manner, and for good reason: The Agreement expressly states that it may only be terminated in five specific circumstances, and none of those circumstances are present. *See* Exh. A § 10.1.
65. Even if WPAHS could identify a breach by Highmark that justified termination, which it cannot, the Agreement requires that Highmark be given 30 days notice and an opportunity to cure such a breach. Exh. A § 10.1(e)(ii).
66. In addition to breaching the Agreement through its improper and unjustified termination, WPAHS further violated – and stated its intention to violate – a separate provision of the Agreement forbidding WPAHS from soliciting, initiating or encouraging “any proposal or offer from any Person . . . related to any business combination . . . capital infusion, sale of WPAHS as a whole, [or] merger . . . similar to any arrangement contemplated by this Agreement” Exh. A § 11.1.
67. Specifically, on September 28, 2012, WPAHS issued a press release stating its intention to “explore other potential partners who are interested in preserving our health system for the community.” Exh. B.

68. The Defendants' intentional and knowing breach of the exclusivity provision creates a risk that Highmark will lose a unique business opportunity, a type of loss that is sufficient to meet the irreparable harm requirement for injunctive relief.
69. The business opportunity put at risk by Defendants' conduct here is unique – namely, the opportunity to have WPAHS' facilities included in the creation of, and indeed serve as the hub of, a new and vigorous integrated health care financing and delivery system that will preserve patient choice and provide high quality, cost-effective health services. If Defendants' existing and threatened breaches of the exclusivity provision cause Defendants not to complete the Transaction, Highmark will lose access to health care assets that will be effectively impossible to replace.
70. WPAHS' solicitations of or discussions with third parties also jeopardizes the confidentiality of Highmark's sensitive competitive information and business strategies, which have been shared with Defendants since entering into the Affiliation Agreement and working closely to plan the new integrated delivery system. The disclosure of Highmark's sensitive competitive information and business strategies would cause Highmark irreparable harm.
71. Highmark has invested an enormous amount of time, money and effort in negotiating the Agreement, in obtaining the necessary approvals to close the Transaction, and in transactions with other providers, which efforts will be irreparably impaired if Defendants continue to breach the exclusivity provision.
72. In sum, Defendants' compliance with the exclusivity clause is essential to preserve the benefit of the bargain that Highmark negotiated. While some of those benefits are pecuniary and measurable, some are non-pecuniary and therefore are difficult to quantify.

73. Anticipating that many potential breaches of the Agreement might similarly cause harm that would be non-pecuniary and difficult to quantify, the Agreement expressly provides that breaches of the Agreement will cause irreparable damage and it allows the parties to seek injunctions and specific performance to enforce the obligations in the Agreement. Exh. A, § 11.3.
74. In addition to the quantifiable pecuniary harms to Highmark, some of which are already noted above, WPAHS' precipitous and unjustified effort to terminate the Agreement threatens to cause additional irreparable harm to Highmark (and, ironically, to WPAHS itself) by damaging WPAHS' financial condition, reputation, and goodwill, and thereby impairing the assets of WPAHS.
75. Indeed, immediately after WPAHS' unjustified and improper termination, a major bond rating organization changed its outlook for WPAHS from stable to negative, with the expectation of further action in the near future.
76. Highmark will also be irreparably harmed in ways that are difficult to estimate (or quantify at all in pecuniary terms) as a result of other transactions it has entered into in reliance on the Agreement.
77. Accordingly, Highmark seeks several forms of relief – injunctive, declaratory, and, additionally or in the alternative, for money damages (where such damages can be quantified) – as appropriate to each violation of the Agreement and as detailed with respect to each Count below.
78. Most pressing, Highmark seeks a special injunction immediately barring WPAHS from violating the exclusivity provisions of Section 11.1 of the Agreement.

COUNT I (BREACH OF CONTRACT)—(EXCLUSIVITY BREACH)

79. Highmark incorporates the allegations of Paragraphs 1 through 78 as if fully set forth here.
80. Highmark and the Defendants entered into a valid, enforceable contract, the Affiliation Agreement, for valuable consideration, on October 31, 2011.
81. Section 11.1 of the Affiliation Agreement states that Defendants shall engage in no activity such as a capital infusion, acquisition, sale, or merger of WPAHS except with Highmark, to the complete exclusion of all others. Exh. A § 11.1.
82. On September 28, 2012, Defendants breached Section 11.1 in publicly announcing that they are seeking “other potential partners” to acquire WPAHS. Exh. B.
83. Highmark, after providing hundreds of millions of dollars to WPAHS, as well as devoting time and resources toward closing the Transaction, has suffered damages from WPAHS’ breach of the Affiliation Agreement.
84. Highmark is entitled to special, preliminary and permanent injunctive relief to restrain WPAHS’ existing and threatened breaches of Section 11.1 of the Affiliation Agreement, and to an order of specific performance restraining further violations of Section 11.1.
85. Highmark has a clear right to relief on the merits, including a clear right to special, preliminary and permanent injunctive relief restraining WPAHS from further violations of the Affiliation Agreement’s exclusivity commitments.
86. By their unlawful conduct, Defendants have caused Highmark to have suffered immediate, irreparable, and substantial harm as set forth herein and including the following:
- (a) To-date, Highmark has provided Defendants with hundreds of millions of dollars in loans and grants pursuant to the Affiliation Agreement, which investment is

now jeopardized as a result of Defendants' breach;

- (b) Highmark has been denied the benefit of its bargain with Defendants, a core component of which was the right to have WPAHS focus exclusively on consummating the Transaction;
- (c) Highmark relied to its detriment on Defendants' representations that they would act in good faith under the terms of the Affiliation Agreement;
- (d) Highmark entered into contracts with third parties, expended enormous efforts and goodwill in furtherance of the Affiliation Agreement and in reliance on WPAHS' good faith performance of the terms of the Affiliation Agreement, including the exclusivity requirement;
- (e) Defendants' breach harms and threatens Highmark's reputation and goodwill; and
- (f) Defendants' refusal to honor the prohibition on pursuit of other transactions similar to the Transaction threatens irreparable harm to Highmark subscribers who may be subject to higher rates and costs (including out-of-pocket costs, coinsurance, and deductibles) and/or need to seek alternative treatment options if Defendants' actions result in a failure of the Transaction.

- 87. Due to the aforesaid immediate, irreparable and substantial harm, Highmark is without an adequate remedy at law.
- 88. Issuance of an injunction against Defendants' conduct will serve the public interest and will not adversely affect such interest.
- 89. An injunction will restore the Parties to the status quo.
- 90. The harm alleged by Highmark is manifest and the injunctive relief requested is narrowly suited to abate this harm.

91. WPAHS has stipulated in the Affiliation Agreement that an appropriate remedy for a breach of the exclusivity provision (among others) is an order of specific performance restraining further violations of the exclusivity provision. Exh. A § 11.3.
92. Greater harm will be inflicted upon Highmark and the general public by the denial of the injunction than the harm, if any, which will result to Defendants if the injunction is granted.

WHEREFORE, Highmark respectfully requests that this Court enter judgment against Defendants and

- (a) enter an order specially enjoining Defendants from any current violations of and all future violations of Section 11.1 of the Affiliation Agreement;
- (b) enter an order preliminarily enjoining Defendants from any current violations of and all future violations of Section 11.1 of the Affiliation Agreement;
- (c) permanently enjoin WPAHS from violating Section 11.1 of the Affiliation Agreement;
- (d) award Highmark \$200 million, plus all other repayment obligations, for the WPAHS Material Default occurring from WPAHS' violation of Sections 2.5(k) and 11.1 of the Affiliation Agreement;
- (e) award Highmark monetary damages in an amount to be proved at trial;
- (f) award Highmark its fees, costs, and expenses in bringing this action as provided in Section 12.2 of the Affiliation Agreement; and
- (g) grant Highmark such other relief as this Court deems just and proper.

COUNT II (BREACH OF CONTRACT)—(IMPROPER TERMINATION)

93. Highmark incorporates the allegations of Paragraphs 1 through [same ¶ No.] as if fully set forth here.
94. Through its actions and statements on September 28, 2012, WPAHS has purported to terminate its obligations under the Affiliation Agreement.
95. The Affiliation Agreement permits WPAHS unilaterally to terminate the Affiliation Agreement only if (1) Highmark materially breaches or violates any representation or

warranty in the Affiliation Agreement, or (2) Highmark breaches any material covenant or agreement in the Affiliation Agreement. Exh. A § 10.1(e).

96. Neither of the conditions for termination set forth in Section 10.1(e) exist. Even if such breaches had occurred, they would have been curable breaches.
97. Moreover, WPAHS has not satisfied the notice and cure requirements of Section 10.1(e).
98. Accordingly, WPAHS' purported termination is improper, invalid, and is itself a breach of Section 10.1 of the Affiliation Agreement.
99. Highmark, its subscribers, and the public have suffered and will suffer severe harm as a direct result of WPAHS' breach of the Affiliation Agreement.
100. The harms suffered by Highmark include pecuniary and quantifiable harms based, among other things, on Highmark's monetary investments in, loans to and grants to WPAHS in the amount of hundreds of millions of dollars.
101. The harms caused by WPAHS' actions also include harms to Highmark, its subscribers, and the public that are non-pecuniary and/or difficult to quantify, such as lost opportunity costs and impairment of Highmark's goodwill and reputation among providers and others. The assets involved in the Transaction are unique and and irreplaceable due to high capital and start-up costs in the hospital market.
102. In particular, Highmark subscribers and the public will be irreparably harmed by WPAHS' unjustified and improper abandonment of the Transaction will create an integrated health care financing and delivery system that would enhance quality of care, lower costs, and expand patients' choices of service providers throughout Western Pennsylvania.
103. WPAHS' actions create a risk of impairment of WPAHS' Assets.

104. The damages caused to Highmark, its subscribers, and the public were foreseeable and were within the contemplation of the parties at the time that the contract was formed.

The pecuniary harms suffered by Highmark can be proved with reasonable certainty.

WHEREFORE, Highmark respectfully requests that this Court enter judgment against Defendants and

- (a) declare that the Affiliation Agreement has not been properly terminated by WPAHS and remains in full force and effect;
- (b) preliminarily enjoin WPAHS from attempting to terminate the Affiliation Agreement except as provided in Section 10.1 of the Affiliation Agreement, and preliminarily enjoin WPAHS from allowing any impairment or deterioration of WPAHS Assets as provided in Section 6.2(c) of the Affiliation Agreement;
- (c) permanently enjoin WPAHS from attempting to terminate the Affiliation Agreement except as provided in Section 10.1 of the Affiliation Agreement, and permanently enjoin WPAHS from allowing any impairment or deterioration of WPAHS Assets as provided in Section 6.2(c) of the Affiliation Agreement;
- (d) award Highmark \$200 million, plus all other repayment obligations, for the WPAHS Material Default occurring from WPAHS' improper unilateral termination in violation of Sections 2.5(k) and 10.1 of the Affiliation Agreement;
- (e) award Highmark monetary damages in an amount to be proved at trial;
- (f) award Highmark its fees, costs, and expenses in bringing this action as provided in Section 12.2 of the Affiliation Agreement; and
- (g) grant Highmark such other relief as this Court deems just and proper.

COUNT III (BREACH OF CONTRACT)—(FAILURE TO USE BEST EFFORTS)

105. Highmark incorporates the allegations of Paragraphs 1 through [same ¶ No.] as if fully set forth here.

106. Highmark and the Defendants entered into a valid, enforceable contract, the Affiliation Agreement, for valuable consideration, on October 31, 2011.

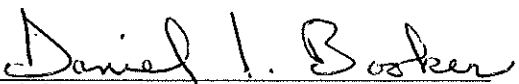
107. Sections 6.7, 6.10, and 8.4 of the Affiliation Agreement contain the Parties' mutual obligation to "use their commercially reasonable best efforts" and to "cooperate with each other" to obtain all Approvals and Permits needed to consummate the Transaction, including the approval of the Pennsylvania Insurance Department.

108. The Pennsylvania Insurance Department, whose approval is necessary for consummation of the Transaction, likely will not approve the Transaction without a restructuring of WPAHS' debt and other obligations, or without other steps that address the continuing deterioration of WPAHS' financial condition.
109. Defendants have refused either to explore restructuring, or to present a viable alternative to restructuring that may be sufficient to secure approval by the Pennsylvania Insurance Department and other regulators. Defendants' refusal in this regard amounts to a failure to use their commercially reasonable best efforts and to cooperate with Highmark to obtain the Pennsylvania Insurance Department's approval and to consummate the Transaction.
110. Defendants' actions are a breach of the Affiliation Agreement.
111. Highmark, after making grants and investments of hundreds of millions of dollars into WPAHS and devoting enormous time and resources toward closing the Transaction, has suffered damages from WPAHS' breach of the Affiliation Agreement.

WHEREFORE, Highmark respectfully requests that this Court enter judgment against Defendants and

- (a) declare that Defendants have failed to use their commercially reasonable best efforts in cooperating with Highmark in obtaining the Pennsylvania Insurance Department's approval of the Transaction;
- (b) award Highmark monetary damages in an amount to be proved at trial;
- (c) permanently enjoin WPAHS from failing to comply with its duties under Sections 6.7, 6.10, and 8.4 of the Affiliation Agreement;
- (d) award Highmark its fees, costs, and expenses in bringing this action as provided in Section 12.2 of the Affiliation Agreement; and
- (e) grant Highmark such other relief as this Court deems just and proper.

Dated: October 1, 2011



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VERIFICATION

I, Nanette P. DeTurk, as Executive Vice President, Chief Financial Officer and Treasurer of Highmark Inc., verify, on behalf of the Plaintiff, that to the best of my knowledge or on information and belief, the statements made in the foregoing Complaint are true and correct.

I understand that false statements herein are subject to the penalties 18 Pa. Cons. Stat. § 4904 relating to unsworn falsification to authorities.

Executed on this 1st day of October, 2012.

Nanette P DeTurk