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 RESEARH 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,

and

COMMONWEALTH OF PENNSYLVANIA,

Intervenor.

CIVIL DIVISION

No. GD-12-018361

HON. CHRISTINE WARD

MEMORANDUM AND ORDER

Copies Sent To:

***Counsel for Plaintiff*:**

Daniel I. Booker, Esq.
Jeremy D. Feinstein, Esq.
Jack B. Cobetto, Esq.
Dianna C. Wyrick, Esq.
William J. Sheridan, Esq.

Kyle R. Bahr, Esq.
Nellie E. Hestin, Esq.

REED SMITH LLP
Reed Smith Centre
225 Fifth Avenue
Pittsburgh, PA 15222

Counsel for Defendants:

Barbara T. Sicalides, Esq.
Laurence Z. Shiekman, Esq.
Daniel J. Boland, Esq.
Benjamin J. Eichel, Esq.

PEPPER HAMILTON LLP
3000 Two Logan Square
Eighteenth and Arch Streets
Philadelphia, PA 19103

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 RESEARH 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,

and

COMMONWEALTH OF PENNSYLVANIA,

Intervenor.

CIVIL DIVISION

No. GD-12-018361

MEMORANDUM

A. SUMMARY

This case involves a proposed health care services and financing partnership between Highmark Inc. (hereinafter "Highmark") and the West Penn Allegheny Health System, which is governed by an Affiliation Agreement (hereinafter "the Affiliation Agreement" or "the

Agreement"). Highmark contends that the West Penn Allegheny Health System has breached the Affiliation Agreement by unilaterally terminating the Agreement and shopping for other partners prior to the End Date of the Agreement. As such, Highmark filed a Motion for Special and Preliminary Injunctions, seeking an Order restricting West Penn Allegheny Health System from violating the Agreement. West Penn Allegheny Health System denies Highmark's position, alleging that Highmark has anticipatorily breached the Agreement by placing additional requirements on West Penn Allegheny Health System and stating its unwillingness to consummate the Agreement as written.

The Commonwealth of Pennsylvania subsequently intervened by filing a Complaint for injunctive relief on October 31, 2012. The Commonwealth has asserted its *parens patriae* standing,[1] and requested an Order granting injunctive relief in the form of a dismissal without prejudice of all claims between the parties, a timetable of ninety (90) days or less for the parties to work together to complete the PID submission and make the submission, and a payment by Highmark of West Penn Allegheny Health System's operational losses from the date of such Order, if the PID fails to approve of the transaction.

The taking of testimony and the introduction of documentary evidence occurred during multiple days of on Highmark's Motion for Preliminary Injunction. At the hearing, Highmark called the following witnesses: (1) Dr. William Winkenwerder, Chief Executive Officer of Highmark, (2) Leo Gerard, International President of the United Steelworker's Union, and (3) Nanette DeTurk, Executive Vice President, Chief Financial Officer and Treasurer or Highmark. At the hearing, West Penn Allegheny Health Services called the following witnesses: (1) Dr. Kenneth Melani, former Chief Executive Officer of Highmark, (2) Dan Brailer, Board Member

[1] Pursuant to PA.R.C.P. No. 235, the Attorney General may intervene as a party on behalf of the Commonwealth in any proceeding involving a charitable trust.

of West Penn Allegheny Health System, (3) Martin Leonard Cohen, Senior Managing Director at FTI Consulting, (4) Dr. Keith Ghezzi, Interim CEO of West Penn Allegheny Health System, and (5) David McClenahan, Board Member of West Penn Allegheny Health System. The Commonwealth of Pennsylvania did not file a motion for preliminary injunction, nor did it present evidence or interrogate the witnesses presented by Highmark and WPAHS.

Upon consideration of the testimony and evidence offered by the parties at the hearing, and the post hearing submission of the parties, this Court grants Highmark's Motion for Preliminary Injunction, as this Court finds that Highmark did not breach the Affiliation Agreement and it has met its burden of proving each of the five prerequisites necessary to the issuance of a preliminary injunction. This Court takes the Commonwealth's request for preliminary injunction under advisement for further consideration.

B. FACTUAL BACKGROUND

In June of 2011, two of the parties to this action, Highmark Inc. (hereinafter "Highmark") and West Penn Allegheny Health System, Inc. jointly announced a proposed partnership to create an integrated health care financing and delivery system in Western Pennsylvania. Pursuant to this proposed partnership, Highmark and West Penn Allegheny Health System, Inc., as well as West Penn Allegheny Health System's subsidiaries, 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 (hereinafter referred to collectively as "WPAHS") entered into the Agreement on October 31, 2011. Highmark Trial

Exhibit No. 1 (hereinafter "Highmark 1"). The Agreement outlines each party's obligations related to the proposed partnership, which would result in a change of control of Highmark and WPAHS, placing both under the common control of a new nonprofit corporation called UPE. *Id.* The End Date contemplated by the Agreement is set for eighteen (18) months after its execution - May 1, 2012. *Id.* at Section 10.1(b).

The purpose of the partnership, as described by David McClenahan (hereinafter "Mr. McClenahan"), former Chairman of WPAHS' Board of Directors, was as follows:

> [T]he purpose of the transaction was to really start a health care system of financing health care, which was the Highmark side, and delivering health care, which is the health system [WPAHS] side, which is dramatically different from anything that has ever been around Pittsburgh before. It was designed to change the way health care is financed and delivered. It would align the objectives, the economic objectives of the insurer with the economic objectives of the health system. That's never been done. Although it is done to some extent by UPMC. But it's an unusual arrangement. It was designed to take advantage of the trend in health care for patients to get their care in more efficient ways in out-patient (*sic*) facilities and clinics, as opposed to the very large and very expensive hospitals that we all know. So, it would permit patients and their families to have access to more convenient places that would be quicker and cheaper than the hospitals they're used to going to. It would permit the formation of the system that was, if you will, lean and mean, and very economical relative to the competition. It was a very important and exciting venture for this community, for our health system [WPAHS] and for Highmark.

Trial Transcript at 831-32 (hereinafter "T.T. at ____").

Pursuant to the Affiliation Agreement, Highmark is investing $1 billion into the integrated delivery system of which WPAHS is intended to be the core. The Agreement provides for payments to WPAHS in the amount of $475 million with the additional funds reserved for affiliations with other hospital systems, the establishment of physician groups and group practices, the establishment of management services and group practice organizations, and

the creation of medical malls. Since executing the Affiliation Agreement, Highmark has provided WPAHS $200 million in funding in accordance with its funding obligations under the Agreement. In addition, beyond its funding obligations under the Affiliation Agreement, Highmark has allowed WPAHS to treat $30 million as a grant, paid approximately $10 million in advertising and marketing expenses, and advanced approximately $25 million for capital expenditures in improvements to Forbes Hospital and West Penn Hospital.

The proposed partnership requires several regulatory and governmental approvals. Section 6.10 of the Affiliation Agreement provides that the parties will "use their commercially reasonable best efforts" to satisfy the agreed-upon conditions of the Agreement prior to closing, "including the receipt of all required Approvals and Permits." Highmark 1. Since entering the Affiliation Agreement on October 31, 2011, the transaction has been cleared or approved by both the Internal Revenue Service[2] and the Department of Justice Antitrust Division.[3] On November 7, 2011, Highmark filed a Form A with the Pennsylvania Insurance Department (hereinafter "PID"), the final regulatory agency needing to approve the transaction. On July 13, 2012, Highmark filed a revised Form A with PID, which included some new information about financial losses at WPAHS.

On July 17, 2012, Dr. William Winkenwerder (hereinafter "Dr. Winkenwerder") began working at Highmark as its Chief Executive Officer (hereinafter "CEO"). He replaced Highmark's prior CEO, Dr. Kenneth Melani (hereinafter "Dr. Melani"), whose last day at Highmark was March 31, 2012. On July 19, 2012, Dr. Winkenwerder met with the Commissioner of the PID, Michael Consedine (hereinafter "Commissioner Consedine"), and assured Commissioner Consedine that Highmark remained committed to the partnership with

[2] IRS approved the 501(c)(3) status for UPE on March 3, 2012.
[3] U.S. Department of Justice approved the proposed partnership on April 10, 2012.

WPAHS. At this meeting, Commissioner Consedine expressed the PID's general concern about the financial health of WPAHS. The revised Form A filing, and supplemental information provided by WPAHS demonstrated both a deteriorating operational performance and a significant amount of debt. WPAHS has more than $1 billion in long-term debt. WPAHS's secured creditors include (i) its bondholders, to whom WPAHS owes $725.8 million, (ii) its pension fund liability of $280.2 million, and (iii) Highmark, which has extended WPAHS a $100 million loan under the terms of the Affiliation Agreement. Highmark 70, 75.

On July 25, 2012, Highmark held a meeting of its Board, and drafted a Resolution stating that "West Penn Allegheny shall agree with the corporation [Highmark] to address matters related to West Penn Allegheny's outstanding tax-exempt bond debt in a matter satisfactory to the Board of Directors of the corporation." WPAHS 215A. At a meeting on July 31, 2012 among Dr. Winkenwerder, Dr. Baum, Chairman of Highmark's Board of Directors, Mr. Isherwood, Chairman of the WPAHS Board of Directors, and Dr. Keith Ghezzi (hereinafter "Dr. Ghezzi"), WPAHS's Interim CEO, the Board Resolution was given to WPAHS by Highmark. On August 7, 2012, Highmark met with the PID and bankruptcy counsel that the PID had hired for advisory purposes. During that meeting the PID again expressed concern about the financial operating performance at WPAHS and WPAHS's level of indebtedness.

On August 30, 2012, Dr. Winkenwerder attended his first WPAHS Board Meeting. At that meeting, Dr. Winkenwerder expressed his belief that the PID was not likely to approve the transaction absent some efforts by both parties to address the PID's concerns about the financial health of WPAHS. Additionally, Dr. Winkenwerder "asked the West Penn Allegheny Board to enter into negotiations with Highmark to modify the current executed Affiliation Agreement of October, 2012 indicating that the revised terms would need to address, among other things, a

prepackaged restructuring of West Penn Allegheny debt." Highmark 37. Mr. McClenahan asked Dr. Winkenwerder, "[I]f the Insurance Department does approve of the transaction, will Highmark close it?" Dr. Winkenwerder refused to answer the question, stating that it was speculative.

On August 31, 2012, Dr. Ghezzi sent a letter to Highmark, informing Highmark that WPAHS would be willing to discuss debt restructuring if Highmark was willing to void the exclusivity provision of the Agreement and agree to various other conditions. WPAHS 202. On September 3, 2012, Dr. Winkenwerder replied to Dr. Ghezzi with a letter stating that Highmark was unwilling to void the exclusivity provision, as it "would leave only one party (Highmark) committed to the transaction and bearing any risk." WPAHS 14.

On September 5, 2012, Dr. Winkenwerder, Dr. Ghezzi, Dr. Baum and Mr. Isherwood met to discuss some concerns that had arisen since the August 30, 2012 Board Meeting. At that meeting, Mr. Isherwood talked about his reservations about a pre-packaged bankruptcy and suggested that Highmark consider two other options for handling the debt: a staged transaction and a joint venture. Mr. Isherwood asked Dr. Winkenwerder whether he would recommend that the Highmark Board close the transaction if the PID approved it, and Dr. Winkenwerder said, "No."

On September 6, 2012, various members of the WPAHS Board and management[4] met with the PID. At that meeting they learned from the PID that the PID had not conditioned its approval of the transaction on a bankruptcy filing by WPAHS. Highmark 50. Additionally, while addressing the financial viability of the Highmark-WPAHS transaction, the PID expressed its concern that Highmark not send "good money after bad." *Id.* The PID made it clear that it

[4] Mr. McClenahan, Mr. Isherwood, Dr. Ghezzi and Peg McCormick Barron (WPAHS's Vice President of Legislative Affairs) attended the September 6, 2012 meeting with the PID.

understood the "tangible benefits" to the community that could stem from the transaction, and that it wanted Highmark and WPAHS to collaborate to find answers to the economic problems faced by WPAHS - most notably the projected "$100 million hole." *Id.* The PID also expressed to the WPAHS Board that it wanted to "know the economics before approving the transaction." *Id.*

On September 11, 2012, the WPAHS Board held an executive session. At this meeting Messrs. Isherwood and McClenahan reported back to WPAHS about the September 5 and September 6, 2012 meetings. The Board also discussed Highmark's position regarding the need for a pre-packaged bankruptcy and whether it constituted a breach.

Highmark and WPAHS held various meetings throughout the remainder of September 2012. At these meetings, the parties discussed restructuring and other options for modifying the Agreement. These meetings were, by all accounts, an attempt to try to get the parties and the Agreement back together again.

On September 27, 2012, Dr. Winkenwerder appeared at the WPAHS Board Meeting. He made some brief opening remarks, and then introduced Michael Hammond (hereinafter "Mr. Hammond"), an advisor with a firm called H2C which had been retained by Highmark to assist with addressing WPAHS's deteriorating financial situation. Mr. Hammond made a presentation to the WPAHS Board proposing a pre-packaged bankruptcy, and suggesting that it was necessary for WPAHS to approach the bondholders immediately. The proposed plan involved removing about $700 million of debt by requiring the bondholders to take a haircut, and removing WPAHS's pension liability to the Pension Benefit Guarantee Corporation (hereinafter "the PBGC). *Id.* This Court finds credible Mr. McClenahan's testimony that at that meeting he asked Mr. Hammond whether Highmark would close the deal if it did not get the pre-packaged

bankruptcy it wanted, and Mr. Hammond said, "No, you're on your own." This Court also finds credible the numerous affidavits affirming that at the same meeting, Dr. Winkenwerder said words to the effect of, "The original Affiliation is history," and "[t]he Affiliation is dead."[5]

On September 28, 2012, WPAHS sent Highmark a letter indicating that it believed that Highmark had breached the Agreement. WPAHS 7. In the letter, WPAHS claimed:

> Highmark's breach of the Affiliation Agreement is not one that can be cured. Its authorized representatives have unequivocally stated that Highmark will not close on the transaction set forth in the Affiliation Agreement on its present terms, even if the PID approves the transaction. This clear anticipatory breach as well as Highmark's threats, its misleading statements about the PID, its broken promises, and its assertions that it is overpaying for the transaction constitute an incurable breach going to the essence of the Affiliation Agreement.

Id. On the same day, WPAHS issued a statement to the press, stating that WPAHS "is released from its obligations under the Affiliation Agreement..., and as a result WPAHS will be exploring new options for its future direction." Highmark 39. In the same press statement, Mr. Isherwood said, "...[I]t is incumbent upon us now to explore other potential partners who are interested in preserving our health system for the community." *Id.*

At the time of the preliminary injunction hearing, the PID had not yet approved the proposed partnership. Additionally, in a September 28, 2012 press statement, Commissioner Consedine stated as follows:

> We are very concerned about today's announcements and events. Our primary focus is ensuring broad health care access for all citizens of Western Pennsylvania. Both Highmark and WPAHS are important to the Pittsburgh community. The citizens they both serve and the jobs involved must be the highest priority.
>
> As shown in the record of the transaction (Form A) filing, the department has raised significant concerns to both Highmark and

[5] *See* Affidavits marked as Exhibit D of Defendants' Memorandum of Law in Opposition to Plaintiffs' (*sic*) Petition for Special Relief.

> WPAHS about the WPAHS's projected deficit and inability to meet its bond obligations - in both the short and longer term. At the close of the public hearing in Pittsburgh, I made it very clear that no determination could be made without a full and comprehensive record...

Highmark 40.

On October 2, 2012, Highmark filed a Motion for Special and Preliminary Injunctions, requesting a Court Order prohibiting WPAHS from violating Section 11.1 of the Affiliation Agreement (hereinafter "the no-shop clause"), ignoring its obligations under the Agreement or contending that its obligations under the Agreement have been excused, released, discharged or terminated, and/or from violating the pre-closing covenants of the Parties set forth in Article 6 of the Agreement.

C. PROCEDURAL POSTURE

Highmark filed a Verified Complaint for Special, Preliminary and Permanent Injunctive Relief, for Specific Performance and for Damages at GD No. 12-018361 on October 1, 2012. On October 2, 2012, Highmark filed its Motion for Special and Preliminary Injunctions, alleging that it is entitled to injunctive relief pursuant to WPAHS's breach of the Agreement. The Commonwealth of Pennsylvania intervened by filing a Complaint on October 31, 2012. A four day hearing on Highmark's Motion for Special and Preliminary Injunctions occurred on October 25-26, 2012 and November 1-2, 2012 before the undersigned. On November 7, 2012, Proposed Findings of Fact and Conclusions of Law were filed by Highmark, WPAHS and the Commonwealth of Pennsylvania. Highmark also filed a Post-Hearing brief.

D. DISCUSSION

In *Brayman Construction Corporation v. Pennsylvania Department of Transportation*, the Supreme Court of Pennsylvania held that a preliminary injunction is appropriately granted

where: (1) the movant possesses a clear right to the injunctive relief; (2) the injunctive relief prevents immediate and irreparable harm to the movant; (3) refusing the injunctive relief will result in greater harm than granting it; (4) the injunctive relief will not adversely affect the public interest; and (5) the injunctive relief is narrowly tailored and will restore the status quo as it existed before the defendant's alleged wrongful conduct. *Brayman Const. Corp. v. Penn. Dep't of Transp.*, 13 A.3d 925, 935 (Pa. 2011).

Here, this Court has evaluated each of the preliminary injunction prerequisites set forth in *Brayman*. For the reasons set forth below, we find that Highmark has met its burden, entitling it to injunctive relief.

1. Highmark Will Likely Succeed on the Merits

Under Pennsylvania law, in order to be entitled to injunctive relief, a party is required to demonstrate that it is likely to succeed on the merits of the underlying claim. *The Woods at Wayne Homeowners Ass'n v. Gambone Bros. Constr. Co.*, 893 A.2d 196, 204. The party need not prove "that [it] will, in fact, ultimately win," but must demonstrate that there is a likelihood of success. *Shepherd v. Pittsburgh Glass Works, LLC*, 25 A.3d 1233, 1246-46 (Pa. Super. Ct. 2011). Here, Highmark has met this requirement.

The purpose of Highmark's request for injunctive relief is to obtain a judicial determination that it did not commit a material breach of the Affiliation Agreement and that, therefore, WPAHS may not shop for other acquirers. Highmark is likely to succeed on this claim. Highmark is likely to prove that it did not commit an anticipatory breach, and that even if it did, WPAHS failed to allow Highmark the required opportunity to cure any breach threatened.

In order to prove a breach of contract under Pennsylvania law, a plaintiff must establish "(1) the existence of a contract, including its essential terms, (2) a breach of a duty imposed by

the contract and (3) resultant damages." *Gorski v. Smith*, 812 A.2d 683, 692 (Pa. Super. Ct. 2002). Here, neither party disputes that the Affiliation Agreement was a bargained-for contract with the essential terms clearly laid out on the face of the document, and that the Agreement is the contract at issue in this case. As such, this Court needs merely address the second (2nd) and third (3rd) requirements imposed by the Superior Court in *Gorski*.

A. Highmark is Likely to Succeed on its Claim that WPAHS Breached the Agreement's Termination Provision

Section 10.1 of the Agreement sets forth the rights and responsibilities of the parties with regard to termination of the Affiliation Agreement. Article 10.1(e) provides in relevant part:

> This Agreement may be terminated and the Transaction may be abandoned at any time prior to the Closing...by WPAHS if...Highmark and the UPE parties have breached or violated in any material respect any of their material covenants and agreements contained in this Agreement, which breach or violation...would give rise, or could reasonably be expected to give rise, to a failure of a condition set forth in Article 9 and cannot be or has not been cured within (A) 30 days after WPAHS notifies Highmark of such breach or violation or (B) the End Date, whichever is sooner.

WPAHS contends that Highmark anticipatorily breached the Affiliation Agreement due to statements made by Dr. Winkenwerder and Mr. Hammond that it would not consummate the current Agreement, even if the PID approved it. Further, WPAHS contends that Highmark's anticipatory breach was even more evident when Dr. Winkenwerder said something to the effect that "the original Affiliation is history" and "the Affiliation is dead" at the September 27, 2012 WPAHS Board Meeting. This Court finds that while WPAHS's interpretation of Dr. Winkenwerder's statements is not wholly unreasonable, we find that Dr. Winkenwerder's statements reflect tactical threats made as a form of negotiation. Additionally, Dr. Winkenwerder did not represent that he was authorized by Highmark's Board of Directors to

take a definitive position on the transaction following PID approval. WPAHS acknowledged this lack of authority when Mr. Isherwood asked Dr. Winkenwerder at the September 5, 2012 WPAHS Board Meeting whether he would recommend that the Highmark Board close the transaction if the PID approved it. WPAHS further contends that this breach was incurable because it destroyed the trust between the parties, and that WPAHS was under no obligation to allow Highmark the requisite time to cure. This Court finds no support for this contention in the evidence presented at the hearing or in Pennsylvania law.

An anticipatory breach gives the non-breaching party "the immediate right to sue for breach of contract or, alternatively, to treat the repudiation by the obligor as justification for not performing a condition otherwise precedent to the obligor's duty, without thereby losing the right to sue for breach of contract when the time for obligor's performance arrives. *Id.* at 183. An anticipatory breach is "an absolute and unequivocal refusal to perform [under a contract] or a distinct and positive statement of an inability to do so." *2401 Pa. Ave. Corp. v. Fed'n of Jewish Agencies of Greater Philadelphia,* 507 Pa. 166, 172 (1985). The breaching party's conduct must be more than just a "threat of non-performance." *Boro Constr., Inc. v. Ridley Sch. Dist.*, 992 A.2d 208, 217 (Pa. Commw. Ct. 2010). The making of a tactical threat, as a matter of law, does not create sufficient grounds to support a claim for an anticipatory breach. *Id.*

Dr. Winkenwerder's statements made in negotiation with WPAHS cannot be construed to constitute an anticipatory breach, as the moment of truth has not yet arrived. The PID has not yet approved the proposed affiliation. Highmark's Board has not yet had the opportunity to vote on the consummation of the affiliation following the approval of the PID. As such, this Court finds that the statements made by the two Highmark representatives could not constitute a breach of the Affiliation Agreement.

Additionally, this Court finds that even if an anticipatory breach had occurred, the Agreement requires WPAHS to notify Highmark of the breach and afford Highmark thirty (30) days to cure the breach. Highmark 1 at 11.1. This Court finds credible Mr. McClenahan's testimony that WPAHS didn't do either:

> Q: After the September 11th meeting when you testified, you had concluded that there had been a breach, did—to your knowledge, did West Penn take any action to say to Highmark, "We think you're in breach of the contract. Are you—and if you don't—if you really mean what you say, what we hear you say that you're not going to close this deal, then we're walking away from this?" Did anybody at West Penn take that step or action?
>
> A: Not that I know of. I mean, we were at that point in sort of an alarm mode. We were trying to figure out what alternatives there were. We were trying to figure out whether this was a breach and what to do about it. We were trying to determine if it was breach, what was the nature of the breach. Was it so fundamental, that is to that you couldn't cure it? At least that was a thought in my mind...
>
> Q: Don't you think we could have avoided all these hearings and all of this litigation and the time that's gone into it if you had said, "Look, we're going to declare a breach if you don't commit to us that you're going to close this transaction if the PID approves it as it's currently structured"?...
>
> A: Based on my conversations with Dr. Winkenwerder...and what I had heard about what Highmark had done in the meantime...and what I heard from the PID, I believed and believe today that Highmark was not going to do this deal without a bankruptcy...
>
> Q: In the meeting on the 11th or in the meeting on the 27th, did any member of the [WPAHS] Board say, "We better not tell them about this because maybe they could correct it and would take away our breach claim"?
>
> A: Not that I know of.[6]

Instead, WPAHS made the unilateral decision that Highmark's anticipatory breach was incurable.

---

[6] This Court also finds credible Dr. Ghezzi's testimony that after the September 11 meeting he did not tell Dr. Winkenwerder that WPAHS believed the Agreement had been breached either.

The only case law cited by WPAHS in support of its unilateral decision to declare what it believed to be Highmark's anticipatory breach incurable, is a Pennsylvania Supreme Court case called *LJL Transportation, Inc. v. Pilot Air Freight Corp.* 599 Pa. 546, 565-66 (2009). In that case, the plaintiff, a franchisee, committed fraud against the defendant, a franchisor, by failing to pay it royalties owed under the franchise agreement. The trial court granted summary judgment to the defendant, even though the defendant did not give the plaintiff the ninety (90) days to cure required under the agreement. *Id.* at 555. The Pennsylvania Superior Court affirmed, holding that "there are circumstances where the nature of the breach permits the aggrieved party to immediately terminate the contract despite a 'cure' provision." *Id.* The Pennsylvania Supreme Court affirmed, holding that "notice before termination under such circumstances would be a useless gesture, as such a breach may not reasonably be cured." *Id.* at 567.

LJL Transportation is easily distinguishable from the facts at issue here. First, *LJL Transportation* involved an actual breach, not an anticipatory breach. Second, *LJL Transportation* involved fraud—a breach that the *LJL* Court found "so exceedingly grave as to irreparably damage the trust" between the parties. *Id.* at 652. In cases not involving such "egregious or fraudulent conduct," the *LJL* Court concluded that the terminating party must comply with "the specified procedures for termination set forth" in the parties' contract. *Id.* at 652 n.8.

Additionally, while WPAHS contends that Highmark's alleged anticipatory breach, "which has destroyed all trust between the parties, cannot be cured, because it frustrates the very purpose of the Agreement,"[7] testimony offered during the hearing demonstrates that even if Highmark did anticipatorily breach the Agreement, the breach was curable. This Court believes that Dr. Ghezzi was truthfully representing the Board at WPAHS when he testified that:

[7] WPAHS Memorandum of Law in Opposition to Plaintiffs' (*sic*) Petition for Special Relief.

> A: The Board has made it clear in order for trust to be restored with Highmark, first of all, there has be some interim assistance that demonstrates Highmark's commitment to getting this transaction done, a transaction done, I should say, in a timely manner. If it goes through PID, there has to be a timeline established such that there's certainly that the PID will rule on it in a reasonable period of time. Finally, there has to be certainly of closure; meaning, there's going to be a penalty for not closing the transaction and not leaving West Penn Allegheny further harmed economically a number of months from now.

This Court also found credible Dr. Ghezzi's determination that more money would have restored at least some of the trust that had been broken:

> Q:...If Highmark had offered unrestricted cash, would that have gone a long way towards restoring the broken trust that you felt that developed between Highmark and West Penn?
>
> A: It would have gone some way.

If additional finances and reassurances would restore the trust between the parties, this Court finds that the trust could not have been irreparably broken. Further evidence of this fact is testimony from each of the WPAHS witnesses that the system is still willing, at this time, to do the transaction.

Here, this Court is convinced that it was improper for WPAHS to determine that Highmark's alleged anticipatory breach was incurable, thereby attempting to relieve WPAHS from its obligation to notify Highmark of the breach and allow it the thirty (30) days to cure. As such, Highmark is likely to prevail on its claim that WPAHS breached the termination clause of the Agreement.

B. Highmark is Likely to Succeed on its Claim that WPAHS Breached the Agreement's Exclusivity Provision

Based upon our finding that Highmark did not commit an anticipatory breach of the Affiliation Agreement, it follows that WPAHS was not excused from its contractual obligations under the Agreement's exclusivity provision.

Section 11.1 of the Agreement sets forth the rights and responsibilities of the parties with regard to exclusivity under the Agreement. Article 11.1 provides in relevant part:

> During the period from the date of this Agreement to the earlier of (i) the Closing Date or (ii) the date on which discussions with respect to a potential Transaction have been terminated by either party pursuant to Section 10.1, the WPAHS Parties agree that they shall not, directly or indirectly, through any officer, director, employee, agent or otherwise...solicit, initiate or encourage the submission of or entertain any proposal or offer from any Person...related to any business combination, division, conversion, affiliation, member substitution, capital infusion, sale of WPAHS as a whole, merger or consolidation of any WPAHS Assets, any arrangement with any WPAHS Party similar to any arrangement contemplated by this Agreement...without the prior written consent of Highmark, which consent may be withheld or delayed by Highmark in its sole and absolute discretion. The WPAHS Parties further agree to immediately cease and cause to be terminated any and all contacts, discussions and/or negotiations with third parties regarding any Acquisition Proposal...

Highmark 1 at Section 11.1.

Highmark is likely to be successful in proving that WPAHS has violated the Agreement's Exclusivity provision by admittedly shopping for alternative partners. In its September 28, 2012 press statement, WPAHS announced its intent to explore other potential partners. Highmark 40. Further, this Court finds credible Dr. Ghezzi's testimony that Houlihan Lokey, an investment

banking firm hired by WPAHS, has in fact contacted various potential partners for WPAHS since September 28, 2012, and has "received significant expressions of interest."[8]

Accordingly, for the reasons stated above, Highmark has met its burden of proving its likelihood of success on the merits.

2. Highmark is Suffering Immediate and Irreparable Harm

A request for injunctive relief is proper where necessary to avoid "irreparable injury or gross injustice until the legality of the challenged action can be determined." *Fischer v. Dep't of Pub. Welfare*, 439 A.2d 1172, 1174 (Pa. 1982). "A party seeking a preliminary injunction must show that an injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages." *Summit Towne Ctr., Inc.* at 1001.

Pennsylvania courts have consistently held that the loss of a unique business opportunity constitutes "irreparable harm." *See e.g., The York Group, Inc. v. Yorktowne Caskets, Inc.*, 924 A.2d 1234, 1242-43 (Pa. Super. Ct. 2007) (breach of exclusivity provision in distributor agreement loss of business opportunity sufficient to meet irreparable harm standard); *Sovereign Bank v. Harper,* 674 A.2d 1085, 1093 (Pa. Super. Ct. 1996) ("[T]he impending loss of a business opportunity or market advantage may aptly be characterized as an 'irreparable injury'"); *West Penn Specialty MSO, Inc. v. Nolan*, 737 A.2d 295, 299 (Pa. Super. Ct. 1999) (court affirmed preliminary injunction enforcing a non-competition provision of an employment contract because doctor's "departure signaled a significant loss of business opportunity and market advantage."). While there is no Pennsylvania case law directly on point, courts outside of our jurisdiction have held that a defendant's violation of a no-shop provision endangering the plaintiff's unique business opportunity constitutes irreparable harm. *See e.g., Peabody Holding Co. v. Costain Group PLC,* 813 F.Supp. 1402, 1421 (E.D. Mo. 1993) ("Many authorities

[8] The names of the potential partners were provided to the Court Under Seal.

acknowledge the inherent uniqueness of a company sought to be acquired, and the irreparable harm suffered by the party acquiring the company by the loss of the opportunity to own or control that business."); *Qantum Commc'ns Corp. v. Star Broad, Inc.*, 382 F.Supp. 2d 1362, 1366-67 (S.D. Fla. 2005).

Highmark contends that WPAHS's unilateral termination of the contract constitutes the loss of a unique business opportunity, and, therefore, has caused Highmark irreparable harm. This Court agrees. Testimony offered during the hearing demonstrates that the partnership agreement was formed with the unique contributions of each company in mind. Dr. Winkenwerder testified that the WPAHS provided unique services that were considered necessary to the success of the venture:

> A: ... [T]he West Penn Allegheny System, and certainly Allegheny County with [its] tertiary, quaternary services, the high-end services, so to speak, are central and ultimately required services in the concept of development of a large integrated geographically dispersed delivery system. You need those high-end services, and that needs to be part of what we're trying to create. It's the highest of the high end.
>
> Q: That's when somebody is really sick with some unusual thing?
>
> A: That's right.
>
> Q: And that's what West Penn Allegheny provides, that type of service?
>
> A: They do...
>
> Q: Does the integrated delivery network of the kind Highmark has invested—a boatload—has committed a billion dollars to require the inclusion of those types of services?
>
> A: Yes, it does.

Dr. Winkenwerder further testified that "without the appropriate mix and number of specialty and primary care physicians, it is not possible to deliver a comprehensive integrated set of services to a population of people."

While the money contributed towards the partnership by Highmark, some $230 million, could be returned to Highmark via an award of monetary damages, it is clear that the loss of the unique opportunity to partner with WPAHS is irreparable harm that cannot be assigned a dollar amount. Further, it is clear that the loss of necessary personnel, particularly specialty physicians needed to perform tertiary and quaternary services constitutes irreparable harm not compensable by money damages.

WPAHS contends that there is no immediate irreparable harm in that it is merely "shopping" for possible future partners, and has not yet identified such a partner. This argument lacks merit. First, WPAHS cannot successfully argue that there is no immediate harm, since it has clearly stated that it is relieved of the Agreement's restrictions as it has terminated the Agreement. Highmark 39. Second, the evidence demonstrates that WPAHS has completely backed away from any and all negotiations with Highmark, costing Highmark all benefit of negotiation under the contract. As such, it is clear that there is immediate irreparable harm to Highmark via the immediate loss of a unique business opportunity.

Further, the Affiliation Agreement itself expressly provides that "shopping" in violation of the "no-shop" provision would cause irreparable damage. Section 11.3 of the Agreement states:

> The Parties agree 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. Accordingly, each Party agrees that, in the event of any breach or threatened breach by any other Party of any covenant or obligation contained in this Agreement, the non-breaching party shall be

> entitle (in addition to any other equitable remedy that may be available) to seek and obtain, without proof of actual damages, (i) a decree or other Order of specific performance to enforce the observance and performance of such covenant or obligation, and (ii) an injunction restraining such breach or threatened breach.

Highmark 1.

Highmark has presented evidence demonstrating proof of immediate and irreparable harm, as is required for a preliminary injunction to be granted. This Court concludes that the second prerequisite to the issuance of a preliminary injunction has been satisfied.

3. Refusing Highmark's Injunctive Relief Will Result in More Harm Than Granting it

As demonstrated at the hearing, denying Highmark the injunctive relief it has requested would visit serious hardship upon the parties to the Affiliation Agreement and the public, particularly since it would signal the termination of the Agreement. As already discussed, the termination of the Agreement would be the end of a unique business opportunity for Highmark, and would lead to the loss of specialty physicians and services necessary to delivery an integrated set of health services, as was the vision of the partnership. Further, this Court determines, based on the evidence, that the end of the deal would likely cause significant harm to WPAHS and the people of Western Pennsylvania generally.

WPAHS contends that Highmark's insistence on a structured bankruptcy in order to address WPAHS debt puts WPAHS in a bad position with its bondholders and with respect to its pension obligations. As such, WPAHS contends that it has a fiduciary duty to perform a market test (in violation of section 11.1 of the Agreement) and seek out additional partners. The hardship created for WPAHS bondholders, however, was not created by the Affiliation Agreement, or by Highmark, but rather was created by the financial downturn that WPAHS has

taken.[9] All parties agree that WPAHS's financial situation is dire and deteriorating and that time is of the essence.[10] All parties also agree that Highmark is the best-suited partner for the ailing WPAHS.

The granting of Highmark's requested relief merely obligates WPAHS to abide by the terms of the Affiliation Agreement and not shop for other partners until the Agreement expires. Therefore, we find that the harms of denying the requested relief outweigh the harms of granting preliminary injunctive relief.[11]

4. The Public Interest is in the Upholding of the Affiliation Agreement Between Highmark and West Penn

The evidence of record supports a finding that the public interest is best served by the granting of the requested injunctive relief. The public has a strong interest in a stable, high-quality and high-value health care system, and Western Pennsylvania specifically has a strong interest in a healthcare network that provides choices to the consumers and competition. This Court finds credible Dr. Winkenwerder's description of the specific public interest at issue here, when he said:

> ...West Penn Allegheny is central and core to what we're trying to build. In the absence of being able to do that, it will be very difficult to carry out the vision and the objective that we, both parties have actually set, set our minds toward. I think it would bring harm ultimately to consumers and individuals and small businesses will end up paying a higher price for their medical care because of the lack of choice and competition. Fundamentally, that's really important. The high cost of medical care is a huge

[9] Mr. McClenahan testified that the bondholders risk investment was tied to the financial performance of WPAHS, which is currently deteriorating.

[10] WPAHS offered a good deal of testimony concerning the negative effect that Highmark's new agreement with UPMC has had on WPAHS's current and projected financials. While this Court doesn't doubt for a minute that the testimony is accurate, the Affiliation Agreement does not preclude Highmark from reaching agreement with UPMC.

[11] Even if WPAHS were free to shop for another strategic partner due to a material breach by Highmark, all parties agree that Highmark is the best partner and there was concern expressed that the process of seeking another partner or performing a market check may take too much time and cause WPAHS to face a non-structured or "free fall" bankruptcy.

> concern all across the United States. It's a big concern here, and it's important that we have, again, choice [and] competitions *(sic)* in order to help moderate, if not hold down those costs.

Further, this Court agrees with Leo Gerard, the International President of the United Steelworker's Union, who offered testimony as follows:

> Q: So, United Steelworkers represents or speaks for a broad cross-section of the community with respect to the acquisition of health care coverage and health care services?
>
> A: Absolutely...
>
> Q: Does the future, does the welfare of West Penn Allegheny Health System matter to the United Steelworkers?
>
> A: It matters immensely. Like I said, we have tens of thousands of our retirees are active members, our own employees get their health care, a large percentage of them get them from that health care system. Part of the reason I want to participate in this [hearing] is to make sure I can do whatever I can to make sure that the health care system survives for our people, but also for the employees of the health care system.
>
> Q: When you refer to the employees of the health care system, how are their interests affected by the Affiliation Agreement or the termination of the Affiliation Agreement?
>
> A: My view about this is from what I do know is the Allegheny Health Care System is on its ways to more and more financial difficulty. Highmark Blue Cross stepped in and has put hundreds of millions of dollars into there to prop it up. Those dollars come from our members' premiums. A: I don't want those dollars wasted. B: I want to make sure that our members and retirees and our employees can keep getting health care from the system that they're participating in. Again, to make it very personal, if this system was not to survive, if Highmark hadn't propped it up, where the hell would I get my coronary care? If I pop a heart attack, go to the Yellow Pages? No thanks.

The public also has an interest in the enforcement of valid contracts. The public has no interest in weakening the longstanding tradition of requiring performance on valid, bargained-for

contracts, in the absence of justifiable reasons for terminating the contract. As such, we find that the public interest will not be harmed by the granting of Highmark's requested injunctive relief.

5. The Preliminary Injunction is Narrowly Tailored and Will Restore the Status Quo

The fifth prerequisite is that the moving party must show that the injunction it seeks is narrowly tailored and will restore the status quo. Here, the injunctive relief requested by Highmark is very narrowly tailored. Highmark seeks merely to restrict WPAHS from breaching the Affiliation Agreement by improperly terminating the Agreement, abandoning the Agreement or soliciting and entertaining third-party proposals or offers in violation of the Agreement. The offending activity in this case was WPAHS's unilateral decision to terminate the Agreement and explore other potential offers from third-parties.

Additionally, the movant must prove that a preliminary injunction will properly restore the parties to their status, as it existed immediately prior to the alleged wrongful conduct. "The status quo to be maintained by a preliminary injunction is the last actual, peaceable and lawful non-contested status which preceded the pending controversy." *Lewis v. City of Harrisburg*, 631 A.2d 807, 812 (Pa. Commw. Ct. 1993). Here, Highmark seeks to restrict WPAHS from breaching the Agreement by shopping for alternative partners. This was the last peaceable status of the parties. This Court agrees that an injunction is necessary to restore the status quo.

E. CONCLUSION

The Court concludes that denying the preliminary injunction would cause Highmark to continue to suffer immediate and irreparable harm incapable of being compensated by monetary damages. On the other hand, granting the proposed preliminary injunction would have a lesser detrimental impact on WPAHS, which would still retain its ability to continue to negotiate under

its bargained-for transaction. The requested injunctive relief would restore the status quo. The public has a strong interest in receiving the benefits of a competitive health care system. Additionally, the public has an interest in seeing valid contracts enforced and parties who have knowingly and willingly agreed to courses of action held to those agreements. Highmark has proven all of the necessary prerequisites for the granting of the requested preliminary injunction, and, as such, the Court grants Highmark's request.

BY THE COURT:

DATED: November 9th, 2012 Christine Ward, **J.**

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 RESEARH 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,

and

COMMONWEALTH OF PENNSYLVANIA,

Intervenor.

CIVIL DIVISION

No. GD-12-018361

HON. CHRISTINE WARD

ORDER

AND NOW, this 9th day of November, 2012, upon consideration of Plaintiff's Motion for Preliminary Injunction, and upon consideration of the evidence submitted by the parties at the evidentiary hearing held on the 25th and 26th days of October and the 1st and 2nd days of November, 2012, and upon consideration of the legal arguments presented at the hearing and in

the parties' pre and post hearing written submissions, it is hereby ORDERED, ADJUDGED, AND DECREED as follows:

1. The Court makes the following findings:

a. Plaintiff possesses a clear right to injunctive relief on its claims for breach of the parties' Affiliation Agreement;

b. Injunctive relief will prevent immediate and irreparable harm to Plaintiff;

c. Refusing injunctive relief will result in greater harm than granting it;

d. Injunctive relief will not adversely affect the public interest; and

e. The injunctive relief is narrowly tailored, and restores the status quo as it existed before Defendants' wrongful conduct.

2. Plaintiff's Motion for Preliminary Injunction is GRANTED and a Preliminary Injunction is hereby entered, as follows. The above-captioned Defendants, as further identified in the Complaint (and hereinafter collectively referred to as "WPAHS"), and all of their officers, directors, and agents, and any persons in active concert or participation with any of the foregoing, are hereby ORDERED to:

a. Cease and desist from violating Section 11.1 of the parties' Affiliation Agreement by directly or indirectly soliciting, initiating, encouraging the submission of, or entertaining any proposal or offer from any Person related to any business combination, division, conversion, affiliation, member substitution, capital infusion, sale of WPAHS as a whole, merger or consolidation of any WPAHS Party with or into any other entity, sale of all or any substantial portion of the WPAHS Assets, or any arrangement with any WPAHS Party similar to any arrangement contemplated by the Affiliation Agreement (all capitalized terms herein defined as in the Affiliation Agreement);

b. Cease and desist from violating Section 11.1 of the Affiliation Agreement by directly or indirectly participating 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 contacts, discussions and/or negotiations with third parties regarding any Acquisition Proposal;

c. Specifically perform and comply with any and all other prohibitions or requirements set forth in Section 11.1 of the Affiliation Agreement as if set forth at length herein;

d. Cease and desist from (i) ignoring its obligations under the Affiliation Agreement, (ii) asserting or contending that WPAHS's obligations under the Affiliation Agreement have been excused, released, discharged, or terminated, or (iii) otherwise acting in reliance on the September 28, 2012 WPAHS letter to the Chairman of the Board and the CEO of Highmark; and

e. Abstain from violating the pre-closing covenants of the Parties set forth in Article 6 of the Affiliation Agreement as if set forth at length herein.

3. This ORDER shall become effective as soon as Plaintiff files a bond with the Court in the amount of $50,000 naming the Commonwealth of Pennsylvania as obligee in accordance with Pa.R.C.P. 1531(b), which Plaintiff shall do forthwith.

BY THE COURT:

Christine Ward