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334 MD 2014

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, By JOSHUA D. SHAPIRO, Attorney General; PENNSYLVANIA DEPARTMENT OF INSURANCE, By JESSICA ALTMAN, Insurance Commissioner, and PENNSYLVANIA DEPARTMENT OF HEALTH, By DR. RACHEL LEVINE, Secretary of Health;

Petitioners,

v.

UPMC, A Nonprofit Corp., *et al*.;

Respondents.

No. 334 M.D. 2014

RESPONDENT UPMC'S PROPOSED FINDINGS OF FACT, PROPOSED CONCLUSIONS OF LAW, AND PROPOSED ORDER

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The Office of Attorney General's ("OAG") Petition to Modify seeks to extend UPMC's Consent Decree "indefinitely." Petition at ¶ 75(r). The Supreme Court was unable to resolve UPMC's argument "that indefinite extension of the Consent Decrees is a remedy that exceeds the intended scope of the Modification Provision," because it held that the modification provision was ambiguous. *Shapiro v. UPMC*, 39 MAP 2019, at 13, 20 (Pa. May 28, 2019) (*Shapiro II*). The Court therefore remanded the case for this Court to determine in light of the extrinsic evidence whether the parties intended the modification provision to permit an indefinite extension of the Consent Decree. *Id*. at 21-22. After an evidentiary hearing, the Court enters the following findings of fact and conclusions of law.

I. Findings of Fact

1. After the last evidentiary hearing in this matter, this Court found that the purpose of the Consent Decree was "to ensure access for Highmark subscribers during transition periods to enable them during these periods to decide to remain with Highmark or change insurance carriers so that they have continued access to UPMC facilities." May 27, 2015 Mem. Op. at 4. Evidence presented at the most recent hearing reaffirms that finding.

A. Background to the Consent Decree

2. In April 2013, the Pennsylvania Insurance Department ("PID") approved Highmark's acquisition of the financially struggling West Penn Allegheny Health System ("WPAHS"). UPMC Ex. 134. The Approving Order, signed by Insurance Commissioner Michael Consedine, was "premised on a non-continuation" of the UPMC-Highmark contracts because "continuation of such contract[s] may … delay WPAHS' financial recovery." *Id.* at 15.

3. After PID issued the Approving Order, UPMC's Board of Directors passed a June 12, 2013 resolution directing UPMC management not to extend commercial contracts with

Highmark in Southwestern Pennsylvania. UPMC Ex. 142. The Board also directed UPMC management to "immediately attempt to engage Highmark in discussions regarding the transition that will take place between the date of this resolution and December 31, 2014." *Id*.

4. UPMC attempted to negotiate a transition plan, but Highmark continued to demand "full network access for all Highmark members to all UPMC providers." UPMC Ex. 144; *see also* UPMC Ex. 143.

5. With Highmark and UPMC "literally talking past each other," then-Governor Tom Corbett created the Patients First Leadership Team ("PFLT"). 6/11 Tr. at 235:19-20. The PFLT—composed of Consedine; Michael Wolf, Secretary of the Department of Health ("DOH"); and Attorney General Kathleen Kane—was asked to "develop a transition plan for the expiration of the UPMC-Highmark contracts at the end of 2014." UPMC Ex. 170 ¶ 16.

6. The PFLT met with UPMC on June 5, 2014 to begin discussing a transition plan. Consedine opened the meeting by stating that the PFLT understood there would not be an extension of the UPMC-Highmark contracts, and that the Commonwealth representatives were there to broker terms for a transition. 6/11 Tr. at 254:17-255:23.

7. At that meeting, UPMC and the Commonwealth agreed that a key component of this transition was establishing a fixed end-date, which would eliminate any public uncertainty about when system-wide in-network access to UPMC for Highmark members would end. *Id*.

B. The Parties' Negotiation

8. The intent of UPMC and the Commonwealth to establish a transition plan with a definitive end-date was further established during negotiation of the Consent Decree.

9. Following the June 5 meeting, UPMC and the Commonwealth negotiated a term sheet. UPMC Chief Legal Officer W. Thomas McGough, Jr. was involved in those negotiations

on behalf of UPMC. James Donahue of the Office of Attorney General ("OAG") and Yen Lucas of PID negotiated on behalf of the Commonwealth. UPMC Ex. 101; 6/11 Tr. at 258:6-23.

10. On June 11, Donahue sent UPMC the initial draft term sheet. UPMC Ex. 101.

11. The June 11, 2014 term sheet contemplated that Highmark members would have in-network access to UPMC for only certain services and providers—such as emergency services, oncology, and so-called "unique/exception hospitals/physicians." *See id*. ¶ 3, 6, 7. Terms for such access would be established by separate agreements that, if UPMC and Highmark could not agree, would be determined through binding arbitration. *Id*.

12. In the June 11 term sheet, PFLT also included a provision titled "Extension" that would allow any party to ask that these "binding arbitration provisions" be extended before the overall agreement contemplated by the term sheet expired. *Id.* UPMC understood this "Extension" provision to permit extension of all the mandatory in-network access provisions that were subject to arbitration. 6/11 Tr. at 260:6-14.

13. On June 18, McGough sent a counter-proposal to Donahue. UPMC Ex. 107. UPMC's counter-proposal also provided for access to only certain services during what UPMC called a "Patients-First Transition" with a termination date of December 31, 2017. *Id.* at 1, 8 ¶ 12. UPMC intentionally did not include any provision that would permit either side to seek an extension or modification of the agreement's terms. 6/11 Tr. at 262:8-17.

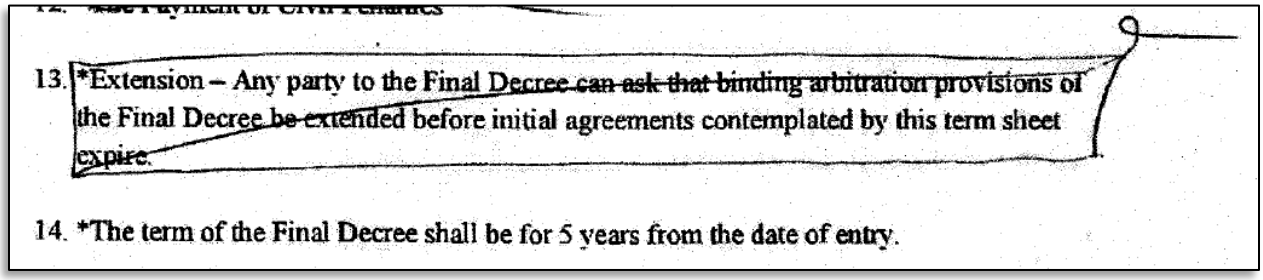
14. UPMC considered the "Extension" provision inconsistent with PFLT's assurances that a transition plan would not include any contract extension. 6/11 Tr. at 261:18-262:7.

15. On June 22, 2014, Lucas sent a revised term sheet from the Commonwealth that "incorporated a number of UPMC's suggestions." UPMC Ex. 110. The June 22 term sheet now proposed terms for "Key Transition Issue Agreements" and included a concrete end-date—

though the Commonwealth proposed a longer, five-year term. *Id.* ¶ 14. It did not contain a modification provision.

16. However, the June 22 term sheet also still included the same "Extension" provision from the June 11 term sheet. UPMC Ex. 110 ¶¶ 4(d), (e), (g), 13.

17. Later on June 22, McGough circulated to the Commonwealth hand-written edits. Among other edits was the following strike-out of the "Extension" provision in its entirety:


13. *Extension – Any party to the Final Decree ~~can ask that binding arbitration provisions of the Final Decree be extended before initial agreements contemplated by this term sheet expire.~~

14. *The term of the Final Decree shall be for 5 years from the date of entry.

18. McGough's June 22 edits went even further. He added language to emphasize that "the Consent Decree is not a contract extension and shall not be characterized as such." UPMC Ex. 111; 6/11 Tr. 266:8-15. McGough left in place the provision from the Commonwealth's June 22 term sheet that "The term of the Final Decree shall be for 5 years from the date of entry." UPMC Ex. 111. UPMC agreed to the longer term as a compromise. 6/11 Tr. at 263:19-264:8.

19. The Commonwealth accepted many of these edits, including UPMC's deletion of the "Extension" provision. On June 24, the Commonwealth circulated its "last, best, and final terms" surrounding the "core principles" of the parties' agreement. UPMC Ex. 102. The June 24 term sheet included the proviso that "the Consent Decree is not a contract extension and shall [not] be characterized as such," as well as the express five-year term. *Id.* at 6.

20. The Commonwealth accepted UPMC's deletion of the "Extension" provision. *Id.*

21. UPMC executed the final term sheet on June 24. Shortly thereafter, Lucas

circulated to other Commonwealth officials an internal summary of the term sheet that made no reference to modification or extension, but stated that "the agreement is contemplated to continue **up to** five years." UPMC Ex. 117 (emphasis supplied).

22. The Commonwealth executed the term sheet on June 25. UPMC Ex. 119. Donahue testified that, as of this point, the Commonwealth and UPMC had agreement on all of the core principles. 6/10 Tr. at 123:5-13; *see also id*. at 119, 123.

C. The Modification Provision

23. The modification provision on which the OAG has based the instant petition did not appear in the negotiation until 8:56 pm on the evening of June 25 when the Commonwealth circulated a draft consent decree. 6/11 Tr. 289:1-6; UPMC Ex. 145. This was fewer than seven hours after the Commonwealth had executed the final term sheet.

24. It is undisputed that UPMC and the Commonwealth never discussed the modification provision. 6/11 Tr. at 280:16-18; *see also* 6/10 Tr. at 54, 75-76, 99-100.

25. At the time he circulated the draft consent decree with the modification provision, Donahue was aware that UPMC had stricken the "Extension" provision from the term sheet; the Commonwealth had agreed to delete the provision; and Donahue himself had signed the final term sheet omitting the "Extension" provision. 6/10 Tr. at 140:15-141:5; UPMC 119 at 6.

26. But the Commonwealth never expressed to UPMC any understanding or intent that the modification provision could be used to alter the termination date and "core principles" expressed in the parties' final term sheet. 6/11 Tr. at 281:22-282:10.

27. UPMC could not have reasonably understood that the Commonwealth intended the modification provision to enable extension of the Consent Decree's termination date. 6/11 Tr. at 282:7-284:12 Just hours before circulating the draft Consent Decree, OAG had agreed to

remove the "Extension" provision from the parties' term sheet. 6/11 Tr. at 283:20-284:3.

28. Donahue's correspondence enclosing the initial draft of the consent decree did not reference the modification provision. Rather, it alluded only to certain "concluding paragraphs" that included terms setting forth addresses for notice and the ability to execute the decree in counterparts, as well as the modification provision. 6/10 Tr. at 103:12-18; 6/11 Tr. at 288:20-289:6; UPMC Ex. 145.

29. These were boilerplate terms that the Commonwealth copied verbatim from prior consent decrees OAG has used. 6/10 Tr. at 66:2-12, 67:2-10.

30. In thirty-four years prior to this case, OAG had never applied to extend a Consent Decree pursuant to the boilerplate modification provision. 6/10 Tr. at 114:2-15.

31. The Commonwealth did not tell UPMC that it had used the modification provision from a prior consent decree, and McGough did not review any prior consent decree in his consideration of the modification provision. 6/11 Tr. 367:3-21.

32. McGough reviewed the modification provision and understood "modification" to be a self-limiting term that did not permit alteration of the core principles in the parties' final term sheet, including the five-year term. 6/11 Tr. at 360:6-12.

33. The Consent Decree was intended to implement the term sheet. 6/10 Tr. at 62:3-14, 214:10-23; 6/11 Tr. at 344:7-21.

34. No one from the Commonwealth ever expressed to UPMC that the Consent Decree would alter the "core principles" the parties had agreed to in the final term sheet. 6/11 Tr. at 281:22-284:3.

D. The Parties' Conduct Under The Consent Decree

35. Subsequent to execution of the Consent Decree, all of the parties acted consistent

with the agreement being for a transition of limited duration.

36. Immediately after the two Consent Decrees were executed, the Commonwealth issued a press release describing the decree as a "comprehensive transition agreement" and stating that it was "not a contract extension" between UPMC and Highmark. UPMC Ex. 147.

37. In the ensuing months and years, the Commonwealth has never represented to the public that the Consent Decrees were anything but a transition with a definite end date. 6/10 Tr. at 93:22-94:5; UPMC Ex. 147. That is consistent with its representations to this Court. *See* UPMC Ex. 170 ¶¶ 16, 18; UPMC Ex. 171 at 19.

38. Although both the PID and DOH were parties to the transition agreements, neither agency joined the Attorney General's suit to modify the Consent Decrees. Neither agency raised with UPMC the possibility of modifying the Consent Decree to extend its termination date, 6/11 Tr. at 303:4-10; 6/11 Tr. at 305:7–11, and no representative of PID of DOH appeared to give testimony at the June 10-11 hearing regarding the parties' intent.

39. To the contrary, PID brokered a mediated agreement between UPMC and Highmark based on the Consent Decree's expiration on June 30, 2019. UPMC Ex. 168; *see also* 6/11 Tr. at 298:14-303:23. PID's website also presently advises consumers that the Consent Decree ends on June 30, 2019. 6/11 Tr. at 304:12–305:6; UPMC Ex. 137.

II. Conclusions of Law

1. The Supreme Court held that the modification provision is ambiguous. *See Shapiro II* at 20. This Court thus cannot resolve the question *sub judice* solely on the plain language of the Consent Decree. Courts "resort to extrinsic evidence to ascertain" the intent of ambiguous contracts, and that is what the Supreme Court's mandate in remanding this case requires. *Commonwealth v. UPMC*, 129 A.3d 441, 463 (2015); *see also Shapiro II* at 21-22.

Based on the extrinsic evidence and other principles of contract interpretation, this Court must adopt the most natural and probable interpretation bearing in mind the objects that the parties manifestly set out to accomplish. *Unit Vending Corp. v. Lacas*, 190 A.2d 298, 300 (Pa. 1963).

2. The Court concludes that the parties did not intend the modification provision to allow for indefinite extension of the Consent Decree's specifically negotiated five-year term.

3. ***First***, the surrounding circumstances indicate that the parties intended the Consent Decree to be a limited transition plan. *Burns Mfg. Co. v. Boehm*, 356 A.2d 763, 766 n.3 (Pa. 1976). The UPMC board had resolved that UPMC would not extend its system-wide contracts with Highmark and directed management to negotiate a transition plan. As OAG stipulated, the PFLT was then assembled specifically "to develop a transition plan for the" anticipated expiration, UPMC Ex. 170, and the five-year term of the resulting Consent Decree was meant "to provide certain consumers a … period to transition their care to a new world where Highmark and UPMC will no longer contract." Ex. 170 ¶ 16; Ex. 171 at 19.

4. These representations constitute judicial admissions that cannot be contested. *See Falcione v. Cornell School Dist.*, 557 A.2d 425, 428 (Pa. Super. Ct. 1989) ("trial court erred when its findings were contrary to the stipulated facts."); *see also* 8 Standard Pa. Practice 2D § 50:15 (stipulations and statements in briefs constitute judicial admissions). An agreement to extend the contract indefinitely is inconsistent with a transition plan.

5. ***Second***, the negotiation history of the Consent Decree independently establishes that the parties intended a transition agreement with a date-certain termination and no extension. *See Hutchison v. Sunbeam Coal Corp*., 519 A.2d 385, 390-91 (Pa. 1986).

6. Here the Court may consider only the parties' "outward and objective manifestations of assent," and these support only UPMC's interpretation. *Espenshade v.*

Espenshade, 729 A.2d 1239, 1243 (Pa. Super. Ct. 1999). A party's unexpressed, subjective understanding of a contract term is not relevant to ascertaining the parties' intent. *Spatz v. Nascone*, 424 A.2d 929, 942 (Pa. Super. Ct. 1981); *Celley v. Mut. Benefit Health & Acc. Ass'n*, 324 A.2d 430, 435 (Pa. Super. Ct. 1974).

7. This is particularly true in the case where a contract is ambiguous, as the Supreme Court held the modification provision to be. Under Pennsylvania law, "[i]f a clause in a contract is ambiguous or of doubtful intent it must be construed as meaning what the one party knew, or had reason to know, was in accordance with the other party's understanding of the language employed." *In re Kocher's Estate*, 46 A.2d 488, 490 (Pa. 1946).

8. OAG knew or should have known that UPMC intended for the Consent Decree to be a transition agreement with a date-certain end and no extension. OAG agreed to a term sheet reflecting such an agreement. OAG's failure to express to UPMC any contrary understanding of the effect of the ambiguous modification provision precludes now binding UPMC to OAG's subjective, unexpressed, and entirely one-sided understanding that the modification provision can override the negotiated termination date and effectuate an indefinite extension. OAG's position effectively is that it tricked UPMC by reinstating a provision that the parties had negotiated out. That does not demonstrate intent.

9. ***Third***, UPMC's interpretation is consistent with the plain language of the Consent Decree itself and principles of contract interpretation, which still apply even in the interpretation of ambiguous contracts. *Kane*, 129 A.3d at 463. UPMC understood "modification" to permit modest changes consistent with the parties' intent. 6/11 Tr. at 280:20-281:8. The U.S. Supreme Court has held that "modify" means only to "change moderately or in minor fashion," *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 225 (1994), and Pennsylvania law is in accord.

See Commonwealth v. DeFusco, 549 A.2d 140, 144 (Pa. Super. Ct. 1988) (relying on Black's definition of "modify" as "altering or changing in incidental or subordinate measures").

10. In contrast, the parties expressly agreed that the Consent Decree "shall expire" on June 30, 2019—mandatory language—and that the Consent Decree "is not a contract extension and shall not be characterized as such."

11. This "specific," expressly negotiated, and unambiguous June 30, 2019 termination date "control[s] the general" boilerplate modification provision. *Clairton Slag, Inc. v. Dep't of Gen. Servs*., 2 A.3d 765, 773-74 (Pa. Commw. Ct. 2010).

12. Reading the modification provision as permitting indefinite extension would also impermissibly nullify the termination date. *Kane*, 129 A.3d at 463-64. The Court must instead interpret the Consent Decree to give effect to *all* provisions, including the mandatory termination date. *Id*. Dismissing a claim for indefinite extension does not nullify the modification clause; it simply aligns that provision with the parties' final term sheet and mutual understanding without doing violence to the unambiguous five-year termination date that reflects the parties' agreement. Nor does enforcing that compromise impair OAG's ability to enforce UPMC's charitable obligations—indeed, OAG has existing claims against UPMC that are already pending before this Court as Counts II, III, and IV of the Petition.

13. Moreover, for the modification provision to create a perpetual contract, such a term would need to be "expressed in clear and unequivocal terms." *Hutchison*, 519 A.2d at 390 n.5. There is no such clear and unequivocal term. Rather, the Consent Decree explicitly provides that "this is not a contract extension." Com. Ex. 6 at § 1.A.

14. OAG argues that UPMC should have known the modification provision could be used to extend the Consent Decree because the termination date was not subject to any

modification provision carve-out. But the Supreme Court unanimously has rejected that argument. Three justices concluded that the Consent Decree on its face precludes an indefinite extension. *Shapiro II*, Dissenting Op. at 3-6. The remaining justices rejected OAG's plain-language argument and held the modification provision to be ambiguous. *Shapiro II* at 20.

15. ***Fourth***, the parties' post-agreement conduct and statements uniformly support UPMC's interpretation. *Pa. Engineering Corp. v. McGraw-Edison Co.*, 459 A.2d 329, 332 (Pa. 1983); *Z & L Lumber Co. of Atlasburg v. Nordquist*, 502 A.2d 697, 701 (Pa. Super. Ct. 1985).

16. Immediately after the Consent Decree was signed, OAG announced it as a "comprehensive transition agreement." UPMC Ex. 147. PID continues to tell consumers that the Consent Decrees end on June 30, 2019. UPMC Ex. 137. In court filings, the OAG has characterized the purpose of the Consent Decree as a transition. *See* UPMC Ex. 171. It has never—before this proceeding—taken a contrary position, and Highmark has for years informed the market that the Consent Decrees will end on June 30, 2019. 6/10 Tr. at 114:2-15, 199:10-23.

17. ***Fifth***, although PID and DOH are members of the PFLT, representatives of the Commonwealth in negotiation for the Consent Decree, and signatories to the agreement, neither agency joined OAG's interpretation of the modification provision, and all extrinsic evidence indicates that they agree the Consent Decree is intended to expire on June 30, 2019. *See* UPMC Ex. 137; *see also* 6/11 Tr. at 303:4-10; 6/11 Tr. at 305:7–11. The Court declines to adopt an interpretation where OAG has not demonstrated the collective understanding of the Commonwealth. *See E.M. v. Dep't of Human Servs.*, 191 A.3d 44, 59 (Pa. Commw. Ct. 2018) ("Where a witness is available, possesses special knowledge relevant to the case, and whose testimony would not be cumulative and would be ordinarily expected to favor that party, a fact-finder may draw an adverse inference from that witness's failure to testify.").

18. ***Finally***, to the extent there is any remaining ambiguity about the disputed provision, this ambiguity is construed against OAG, which drafted the modification provision. *Commonwealth v. Mosites Constr. Co.*, 494 A.2d 41, 44 (Pa. Commw. Ct. 1984) (applying the canon to sophisticated parties); *see also* Restatement (Second) of Contracts § 206 ("[The] meaning is generally preferred which operates against the party who supplies the words….").

19. For all of these reasons, the Court concludes that the parties did not intend the modification provision to allow for indefinite extension of the Consent Decree. To the contrary, the parties intended the Consent Decree to be a five-year transition agreement with a June 30, 2019 termination date.

20. The Court further holds that OAG bears the burden to prove that the termination date is subject to indefinite extension. OAG is the petitioning party, and this is a factual question directly linked to its overall claims. *See Bohler-Uddeholm Am., Inc. v. Ellwood Grp., Inc.*, 247 F.3d 79, 102 (3d Cir. 2001) (claimant has the burden to prove the meaning of ambiguous term).[1] Regardless, it would not change the outcome at this stage if UPMC had the burden. All the extrinsic evidence of the negotiations and relevant conduct demonstrates an intent to establish a transition plan with a definitive end-date. The undisputed fact that the Commonwealth never expressed a contrary understanding to UPMC is dispositive no matter who has the burden.

21. The Court also notes that it has given no weight to evidence about Highmark's understanding. Highmark is not a party to UPMC's Consent Decree. Thomas VanKirk, Highmark's Chief Legal Officer, admits that he did not speak to McGough or anyone else at

[1] Even if the Court were to credit OAG's argument that this case remains at the demurrer stage, OAG would still bear the burden, analogous to how courts decide fact questions that arise to preliminary objections based on, for instance, personal jurisdiction. *See, e.g., Hall-Woolford Tank Co., Inc. v. R.F. Kilns, Inc.*, 698 A.2d 80, 84 (Pa. Super. 1997).

UPMC during the negotiations. 6/10 Tr. at 167:6-10, 188:11-21. Nor did VanKirk communicate to anyone his understanding that the termination date of any consent decree was subject to modification. *Id*. at 191:14—192:4. Even were the Court to consider VanKirk's testimony, it would only corroborate that the fundamental purpose of these agreements was to transition to the end of the UPMC-Highmark contracts. *Id*. at 162:3-17, 163:9-21.

22. For each of the foregoing reasons, the Court holds that the parties' intent was that the Consent Decree would terminate five years after entry, and that the unambiguous termination provision cannot be overridden by the ambiguous modification provision to extend the Consent Decree indefinitely. Accordingly, the Court dismisses with prejudice any request for relief inconsistent with that conclusion.

June 12, 2019

Respectfully submitted,

/s/ *Leon F. DeJulius, Jr.*

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, By JOSHUA D. SHAPIRO, Attorney General; PENNSYLVANIA DEPARTMENT OF INSURANCE, By JESSICA ALTMAN, Insurance Commissioner, and PENNSYLVANIA DEPARTMENT OF HEALTH, By DR. RACHEL LEVINE, Secretary of Health; Petitioners, v. UPMC, A Nonprofit Corp., *et al*.; Respondents.	No. 334 M.D. 2014

[PROPOSED] ORDER

The Supreme Court having remanded the question: what is the meaning and scope of the Modification Provision (of the Commonwealth/UPMC Consent Decree entered July 1, 2014) as it relates to the Termination Provision of the Consent Decree and the Commonwealth's request for an indefinite extension of such decree;

And the Court having held a hearing to receive extrinsic evidence of the intent of the parties on the issue in question;

This Court now finds the Commonwealth presented no objective evidence that the parties intended the Modification Provision to extend indefinitely the termination date of the Consent Decrees while UPMC's intent all along was completely to the contrary;

This Court further finds no evidence of any intent between the parties that the expiration date in the Decree can be extended "indefinitely."

Therefore, the ambiguous Modification Provision (Opinion at p.20) cannot extend indefinitely the Termination Provision and the Consent Decree shall expire on June 30, 2019.

June _____, 2019

IT IS SO ORDERED,

_____

Hon. Robert Simpson

CERTIFICATE OF COMPLIANCE

I hereby certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of June, 2019, I served a copy of Respondent UPMC's Proposed Findings Of Fact And Conclusions Of Law on counsel of record via the Court's electronic filing system.

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