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

HIGHMARK INC., *et al.*,	)	
	)	
Plaintiffs,	)	Civil Action No. 11-919
	)	
v.	)	Judge Flowers Conti
	)	Magistrate Judge Bissoon
UPMC, *et al.*,	)	
	)	
Defendants.	)	

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

I. RECOMMENDATION

It is respectfully recommended that Plaintiffs' (collectively, "Highmark's") Motion for Preliminary Injunction (Doc. 2) be denied.[1]

II. REPORT

BACKGROUND

Highmark has brought this action against UPMC, and eight of its affiliated hospitals ("Hospitals"), alleging false advertising under the Lanham Act. *See generally* Compl. (Doc. 1). The lawsuit emanates from the well-publicized disputes between Highmark and UPMC regarding the expiration and attempted renegotiation of contracts between the Hospitals and Highmark ("Hospital Contracts"). Highmark alleges that UPMC has undertaken an

[1] Also pending is Defendants' (collectively, "UPMC's") Motion to Dismiss (Doc. 29). Given the time-sensitive nature of Highmark's request for injunctive relief, as well as the likelihood of an interlocutory appeal, *see* 28 U.S.C. § 1292(a)(1), it is recommended that the Court defer ruling on UPMC's Motion to Dismiss. The undersigned further would note that at least some of the arguments presented in favor of and in opposition to dismissal would require a consideration of materials outside the scope of the pleadings. *See, e.g.*, Defs.' Br. in Supp. of Mot. Dm. (Doc. 30) at 11 (first full paragraph); Pls.' Br. in Opp'n to Mot. Dm. (Doc. 35) at 5 n.2; *id.* at 16 (first full sentence); *and id.* at 19 n.12.

advertising/solicitation campaign erroneously representing that UPMC patients' insurance coverage through Highmark currently is in jeopardy, or will be, upon the expiration of the Hospital Contracts in June 2012. *See generally id.* at ¶¶ 1, 5-6. Highmark claims that, pursuant to the Hospital Contracts' one year "run-out" clauses, any changes in coverage regarding UPMC hospitals and physicians may occur no sooner than July 1, 2013. *Id.* at ¶ 6. Highmark also asserts state law breach of contract claims under the Hospital Contracts' non-solicitation clauses. *See id.*, Counts I-VIII.[2]

UPMC's communications regarding the Hospital Contracts did not arise in a vacuum. In a letter dated May 5, 2011, Highmark's chief legal officer wrote to UPMC's chief legal officer:

> As you know, . . . Highmark and . . . UPMC have been exchanging correspondence for several weeks, but getting nowhere. I am hoping you and I will have greater success. Highmark just wants to know if UPMC is willing to continue negotiations on new contracts to replace those that expire on July 1, 2012 (with an obligation on UPMC's part to continue accepting Highmark reimbursement as payment in full for Highmark members through June 2013). . . .
>
> We were recently advised that on May 2, 2011, employees at Magee Hospital were instructed to begin telling patients that, as of June 2012, Magee would no longer accept [Highmark] insurance. If someone instructed the employees in this way, it is not only a violation of our current contract, but it also suggests UPMC does not intend to continue negotiating.
>
> I would appreciate . . . a definitive answer. . . . If you are willing to continue negotiations, please send us proposed meeting dates as soon as possible.

Doc. 32-5.[3]

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[2] Although Highmark also alleges that UPMC Health System tortiously interfered with the Hospital Contracts, *see* Count IX, this claim does not form a basis for Highmark's preliminary injunction request.

[3] Unless otherwise noted, the parties do not dispute the contents or authenticity of the materials considered in this Report. Regarding media reports, both Highmark and UPMC have cited liberally to these sources, and the Court references them not for the truth of the matter asserted, but merely to show what has been reported. Finally, UPMC has specifically stated that

On May 10th, UPMC's chief legal officer responded:

[Regarding] employees of Magee Hospital being instructed to tell patients that Magee would not be accepting Highmark insurance after June 30, 2012, no such instructions were authorized or, to my knowledge, given. On the contrary, we have been very careful about what our employees are authorized to say about UPMC's transition to non-participating provider status as of July 1, 2012.

One point on which I think we can agree is the importance of communicating clearly and accurately with all interested constituencies about the effects of non-renewal – and doing so as soon as possible. It[is] unfair for the community to mistakenly believe [that] this matter will be settled at the last minute. Clearly communicating what the expiration of the contracts means would seem to be a mission you and I could share.

In the spirit of preparing for this eventuality, perhaps we can agree upon a statement along the following lines:

"In the event that the various commercial insurance contracts between UPMC and Highmark expire on June 30, 2012,

- As of that date, most UPMC Hospitals, including UPMC Presbyterian Shadyside, Magee-Womens Hospital of UPMC, UPMC St. Margaret, UPMC Passavant, UPMC McKeesport, UPMC Bedford, UPMC Horizon, and UPMC Northwest will no longer be participating providers in Highmark's commercial networks.
- As of that date, Highmark Commercial Members will be required to obtain Highmark's approval to use non-participating UPMC Hospitals, in addition to obtaining required authorizations of medical necessity from Highmark for certain designated services.
- For UPMC Hospitals' services approved in advance by Highmark, UPMC Hospitals will accept Highmark reimbursement and any applicable copayments as payment in full for such services until June 30, 2013, provided this payment is made directly to the UPMC Hospital.
- The Highmark contracts governing the services of UPMC physicians, as distinguished from UPMC hospitals, are generally terminable on 60-days notice. To date, no notice to terminate those contracts has been issued. If those contracts are terminated effective June 30, 2012, in whole or in part, the availability of UPMC physicians to Highmark's Members at current contract rates would be limited or foreclosed after that date.
- As Highmark Commercial Members approach June 30, 2012, they will need to consider and clarify their personal financial responsibility for care at UPMC facilities and by UPMC caregivers.

Highmark's Motion for Preliminary Injunction should be resolved without a hearing, *see* Defs.' Br. (Doc. 31) at 25 n. 7, and Highmark's briefing fails to assert the contrary. *See* Pls.' Br. (Doc. 3) *and* Reply Br. (Doc. 37) (omitting reference to hearing). In any event, the District Court independently should hold that there is sufficient evidence in the record to resolve the preliminary injunction request without a hearing.

- Highmark and UPMC will use the next thirteen months prior to the expiration or termination of the various contracts to plan an orderly transition of care for everyone who will be a Highmark Commercial Member after June 30,2012.
- Highmark and UPMC recognize the importance to the community of working together to transition our relationship. As more information and details about the transition become available, we will advise all the affected constituencies, and particularly our patients and Members."

. . . . [T]he benefits of communicating promptly, candidly and clearly to all the affected parties over the next thirteen months outweigh, in my opinion, the difficulty of coming together on the message. I would therefore welcome your thoughts.

Doc. 32-6. UPMC's proposed statements are consistent with its interpretations regarding the Hospital Contracts in this case, as well as the contracts between Highmark and UPMC physician groups ("Physician Contracts"). The Physician Contracts do not contain run-out provisions and are terminable on 60-days written notice. *See generally* Defs.' Br. (Doc. 31) at 3-5.

On May 17th, Highmark wrote:

While [Highmark] agree[s] that we want our messages to our members and your patients to be clear and honest, at this time Highmark cannot join with UPMC in delivering those messages. We very much disagree that a contract between the parties is unattainable . . . .

Highmark remains ready and willing to negotiate with UPMC. If your position changes, let [Highmark] know.

Doc. 32-7.

On May 24th, a Tuesday, UPMC responded:

[UPMC is] disappointed that you declined to help craft a consistent message to give to our various constituencies about the expiration of our contracts. It was your letter of May 5, after all, that had expressed concern about statements that you (erroneously) alleged were being disseminated at Magee Hospital. UPMC still believes that prompt and candid communications regarding the impact of the non-renewals are critical and therefore intends to use the following bullet points as a foundation for our communications, both internal and external, beginning [Friday,] May 27[.]

Doc. 32-8. Minor revisions aside, UPMC's bullet points were the same as the ones it previously proposed to Highmark. *See id.* UPMC closed by stating,

> If you believe [that the] bullet points are incorrect in any way, or if you have any other concerns about UPMC using them as a foundation for internal and external communications regarding the non-renewal, please let [UPMC] know in writing by the close of business on [Thursday,] May 26[th].

Id.

Highmark did not respond to UPMC's May 24th letter, but instead, on May 26th at 4:51 p.m., sent an email to local employers, insurance brokers and insurance agents stating Highmark's "[p]osition" regarding the expiration of the Hospital Contracts:

> We understand that there may still be confusion in the market regarding the length of the Highmark contract with select UPMC facilities and whether our members will have access to those facilities beyond the termination date of the contract. The following clarification is provided for the benefit of our customers and our producers.
>
> Our position is simple: Although UPMC has terminated its agreement with Highmark as of June 30, 2012, under terms of the current contract, Highmark members will have full access to UPMC facilities during the 12-month run-out period through June 30, 2013.
>
> The rates for those services have been set by the terms of the contract so there should be no undue financial hardship on group policyholders or individual members. All copayments, deductibles and plan provisions will be applied during the run-out period in exactly the same manner as they are applied today. Contrary to statements we have heard in the market, we do not expect the approval process for admissions to the UPMC facilities will change significantly during the run-out period. Highmark will make every effort possible to assure the convenience of our members.
>
> When the parties negotiated the 10-year agreement in 2002, they anticipated at the end of that long contract period there would very likely be several issues that would take time to work through. They realized the possibility that all issues

> would not be resolved on the contract expiration date. Not wanting to disadvantage Highmark members and UPMC patients, we collectively built in a 12-month run-out so that individuals could continue to receive care while the parties worked through any unresolved issues. Both parties actively participated in the development of this position.
>
> What is important for you to know is that, while June 30, 2012 is still more than a year away, UPMC has mounted a communication campaign aimed at frightening Highmark policyholders and individual members that they will not have coverage beyond that date. They are conveniently ignoring the run-out period that they had helped to define in the current contract.
>
> Highmark has and will continue to seek to negotiate new contract terms with UPMC. Our goal is to finalize an agreement that will preserve access to UPMC for our members while maintaining the choice of high-quality hospitals, physicians and community health care institutions that Western Pennsylvania residents have enjoyed for well over 50 years. This is what the community clearly expects from both parties, but UPMC refuses to negotiate.
>
> We will make every effort to resolve our differences during the 13 months remaining on the contract and will continue those efforts during the 12-month run-out period through July 2013. In the meantime, we expect that UPMC will abide by the terms of the contract.

Doc. 32-9.

By May 28th, the media had begun reporting on Highmark's and UPMC's opposing interpretations of the Hospital Contracts (and Physician Contracts, if only by implication on the part of Highmark). As one newspaper reported:

> Highmark . . . and [UPMC], in the midst of an epic contract showdown, can't seem to agree on much these days – including how long Highmark's millions of commercial customers will continue to have full access to UPMC's vast network of doctors and hospitals.
>
> In separate position statements issued this week, both the insurer and the health care system sought to ease the 'confusion in the market' regarding access to care.

> Highmark makes the case that even though the contract between the two Pittsburgh health giants expires June 30, 2012, 'Highmark members will have full access to UPMC facilities during the 12-month run-out period through June 30, 2013. . . .
>
> But UPMC says that the truth is a bit more complicated. In its own position statement, UPMC says that as of June 30, 2012, 'most UPMC hospitals [will] no longer be participating providers in Highmark's commercial networks,' meaning that Highmark subscribers may be subject to out-of-network charges when they seek care at those hospitals, and 'may be required to obtain Highmark's approval to use non-participating UPMC hospitals, in addition to obtaining required authorizations of medical necessity from Highmark for certain designated services.'
>
> Also, 'the Highmark contracts governing the services of UPMC physicians, as distinguished from UPMC hospitals, are generally terminable on 60 days notice. If those contracts are terminated effective June 30, 2012, in whole or in part, the availability of UPMC physicians to Highmark's members at current contract rates would be limited or precluded after that date.
>
> . . . .

See May 28th article (Doc. 4-13).[4]

On June 2nd and 3rd, respectively, UPMC sent letters to Pittsburgh-area employers and one of the Hospital's staff attaching an information sheet with contents materially similar to the bullet points proposed by UPMC to Highmark. *See* Docs. 38-3 *and* 38-4. The cover letter to the June 2nd letter stated:

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[4] The May 28th article also reported that, according to Highmark, "UPMC [already] ha[d] mounted a communication campaign aimed at frightening Highmark policyholders and individual members that they will not have coverage beyond [June 2012]." *Id.* Although Highmark's Complaint alleges that UPMC engaged in false communications "[s]ince at least mid-April," the only UPMC statements, before the ensuing media debate, were the purported instructions given to Magee Hospital employees on May 2, 2011 (*see* Highmark's May 5th letter, quoted *supra*) and an April 18th email to Pittsburgh-area employers from UPMC's chief human resources officer. *See* Compl. at ¶ 47. The April 18th email, which does not appear in the record, purportedly stated: "access to UPMC physicians and hospitals will only be available through UPMC Health Plan and a number of [other] prestigious national insurers after our current contract with Highmark expires on June 30, 2012. Knowing that this will impact your employee benefit decisions for January 1, 2012[,] I wanted to personally make you aware of this change." *Id.*

> [T]he time for negotiations and new agreements [between UPMC and Highmark] has passed, and the focus must be on sustaining uninterrupted patient access to UPMC doctors and facilities.
>
> UPMC believes it's critical that western Pennsylvania employers and health insurance subscribers begin preparing now to ensure they're able to receive the best-in-class health care available at UPMC hospitals. . . .
>
> When UPMC's . . . contracts with Highmark expire on June 30, 2012, the availability of UPMC Health Plan, Aetna, Cigna, and United Healthcare in western Pennsylvania will ensure that residents of this region will continue to have access to UPMC's doctors and hospitals at affordable rates.

See Doc. 38-3.

The press quickly reported UPMC's communications, writing on June 3rd:

> This week, UPMC sent letters to employers in its 30-county service area, urging them to 'begin preparing now' for the contract expiration, saying 'there cannot be any prospect of contract renewals between UPMC and Highmark.' . . .
>
> Highmark, meanwhile, says its commercial policyholders will have access to most UPMC facilities through mid-2013, rather than 2012, noting that the current contract contains a one-year run-out period.

See Doc. 4-14.

Nine days later, on June 12th, Highmark published an "An open letter about Highmark and UPMC," stating:

> For generations, Western Pennsylvanians have taken comfort in the fact that they have a variety of high-quality health care options to choose from when selecting a physician, hospital or health care professional. . . . But our efforts to continue to ensure affordable choices are being challenged by UPMC . . . .
>
> Highmark and UPMC have been talking about a new contract for several months. In recent weeks, public statements by UPMC have created confusion and concern among consumers, employers, physicians and other health care professionals. In the interest of clarity and fairness, we are presenting some important facts to clear up some of the confusion.
>
> . . . .

> Fact: Highmark members will continue to be covered for UPMC hospital services through June 30, 2013. If UPMC terminates the contract with Highmark on June 30, 2012, under the terms of the contract, our members will continue to have the same access to UPMC hospital services through mid-year 2013. No special permissions or approvals are required.
>
> Highmark continues to look for common ground and a reasonable contract with UPMC. Our region deserves the security that comes with knowing that Western Pennsylvanians can choose among multiple viable health care systems, independent hospitals, physicians and other health care providers that deliver high-quality medical care at reasonable, affordable costs.

See Doc. 4 at ¶ 65; *see also* Doc. 4-41. The letter was run an unspecified number of times in various local/regional papers. *See* Doc. 4 at ¶ 65.

In mid-June, new reports continued to highlight UPMC's and Highmark's opposing interpretations. *See, e.g.*, Doc. 4-15 (June 16th report) ("UPMC said Highmark members will have to pay out-of-network provider rates to most UPMC physicians when the insurer's contract with UPMC expires June 30, 2012," and "Highmark counters that its commercial policyholders will have access to most UPMC facilities through mid-2013, noting that the current contract contains a one-year run-out period"); Doc. 38-2 (June 20th report) (upon expiration of Hospital Contracts in June 2012, "Highmark members will be able to access [UPMC] health-care facilities for up to another year, but under the terms of the deal will need prior approval and might have to pay more").[5]

Next came UPMC's advertising campaign, "Keep Your Doctor[,] Check Your Plan." UPMC's newspaper ad, which first ran on June 22nd, read:

[5] The June 20th article in the Tribune Review, just referenced, is the only news report in the record that appears not to have given equal coverage to Highmark's interpretations. Placing aside any conclusions regarding the thoroughness of the article's supporting investigation, all other indications are that Highmark's and UPMC's positions were well communicated.

> Good health is not just about the quality of your doctor, but the quality of your relationship with your doctor. That's why it's important you maintain uninterrupted access to your renowned UPMC physicians as well as UPMC hospitals and facilities . . . .
>
> Sometimes, change in inevitable. But there is one thing that no one wants to change – the relationship you have with your doctors. So remember, when it's time to choose your health insurance you can keep your doctor. This group of health insurance companies is proud to provide access to UPMC.

Doc. 1-3. The advertisement listed Aetna, Cigna, HealthAmerica, United Healthcare and UPMC Health Plan, but not Highmark. *See id.*

UPMC's dedicated website, keepyourdoc.com, echoed the newspaper advertisement, stating in relevant part:

> The commercial insurance landscape is changing in western Pennsylvania, and there are important things you need to know to maintain uninterrupted in-network access to your renowned UPMC physicians, as well as to UPMC hospitals and facilities.
>
> . . . .
>
> Check with your employer to ensure it will offer a plan that provides in-network access to UPMC physicians and facilities, such as Aetna, CIGNA, HealthAmerica, United Healthcare, or UPMC Health Plan.

Doc. 1-2. Regarding UPMC Hamot, UPMC Mercy and Children's Hospital, the three hospitals whose contracts with Highmark are not set to expire in June 2012, the website stated that those hospitals "[we]re not affected at this time."[6]

Similarly, UPMC ran radio advertisements in early July. Although transcript(s) of the radio spots have not been provided, the Complaint alleges that one such advertisement stated, "[i]n order to keep seeing your current UPMC doctor, ask your employer to include one of the

[6] Although the content of UPMC's website has changed over time, the changes are immaterial to the analyses in this Report. Thus, the Court will focus on the contents of the web page attached to Highmark's Complaint.

five health insurers that provide access to UPMC during open enrollment." Doc. 1 at ¶ 53. UPMC also generated "Q&A" and information sheets for physicians'/staff members' dissemination to patients, with similar messages. *See* Docs. 4-23 & 4-24.

Meanwhile, the news media continued to report on the parties' differing opinions regarding the winding down of the Hospital Contracts. In an article dated July 7th, Highmark for the first time fleshed out its interpretations regarding all of the contract provisions in question:

> UPMC . . . said this week that once the [C]ontract[s] expire next year, Highmark subscribers will have to get prior Highmark approval to go to a UPMC hospital. 'There's an administrative burden [on Highmark] that has to occur . . .'
>
> But Highmark . . . disagree[s], saying no special authorization or permission will be required: 'We don't anticipate that the requirements that already exist will be any different during the run-out period.'
>
> [UPMC] also said Highmark contracts with UPMC physicians expire June 30, 2012, 'and there is no run-out. So you could get in a situation where you had to be hospitalized on Aug[ust] 8, 2012, and your hospital stay could be reimbursed at the in-network rate but your physician will be out of network.'
>
> In a statement, [Highmark] countered that . . . '[it] believes the terms and intent of the commercial hospital contracts require that physician services (including all doctors employed by UPMC hospitals, by University of Pittsburgh Physicians and by UPMC Community Medicine) continue to be available to Highmark members through June 30, 2013.
>
> 'This is because the hospital contracts recognize . . . physician services as an integral part of the full continuum of medical services provided to Highmark members and require UPMC to provide continued access to physician services.'
>
> [Highmark] added: 'If UPMC terminates the physician agreements, Highmark intends to continue to pay UPMC doctors at the in-network rate through June 30, 2013. Our members' financial/cost-sharing responsibility will continue to be based on in-network payment levels.'

See July 7th article (Doc. 4-38).[7]

On July 8th, UPMC's chief legal counsel wrote Highmark's chief counsel regarding the need for a unified message:

> I'm writing once again to propose that the appropriate representatives of our two companies meet to discuss how to manage the necessary transition in the best interest of the patients and the community at large. . . .
>
> [S]uch discussions are even more important now than they were when [UPMC] proposed them back in May. . . . [UPMC] note[s] by way of example [Highmark's recent] statement that 'the commercial contracts require that physician services continue to be available to Highmark members through June 30, 2013.' This statement is misleading and incorrect in that the [H]ospital [C]ontracts explicitly distinguish between hospital services and physician services and require provision of only hospital services during the run-[out] period.

Doc. 32-11.

On July 13th, Highmark responded:

> This is in response to your letter to me of July 8th regarding what you describe as the "necessary transition" of Highmark customers to UPMC in the wake of your unlawful termination of our contracts and accompanying publicity campaign.
>
> Your invitation to cooperate in the unwinding of our contractual relationships is nothing more than a request for us to capitulate to and become complicit in your violations of the law. We decline to do so. We've told you many times, and we repeat again, that we are ready to meet with you at any time to discuss a contract that will provide full coverage for UPMC facilities and doctors past the presentation termination date (including the run-out period) of June 30, 2013.

[7] Prior to the July 7th article, Highmark's public assertions mostly were limited to statements that UPMC's "hospital services," and/or its "facilities," were subject to the one-year run-out clause. *See, e.g.*, Doc. 32-9 ("Highmark members will have full access to UPMC facilities during the 12-month run-out period"); Doc. 4-14 (same); Doc. 4-41 ("Fact: Highmark members will continue to be covered for UPMC hospital services through June 30, 2013") (emphases added). It seems possible, if not likely, that Highmark's assertions were meant to, or did, leave the impression that all of UPMC's hospital and physician services were covered, no caveats or further explanations required.

> Meanwhile, UPMC's misleading and confusing public statements about its unlawful actions and their consequences are causing us damage and irreparably harming our relationships with our members. Therefore, this is to inform you that today we have filed a Complaint and Motion for Preliminary Injunction in the United States District Court for the Western District of Pennsylvania to remedy these wrongs. I enclose a courtesy copy of the papers.
>
> We regret the necessity of seeking court intervention on these issues but UPMC's actions leave us, literally, no choice.

Doc. 31-12.

On the same day, Highmark published a "[m]edia statement" on its website summarizing this lawsuit. *See* Doc. 32-10. On a date unspecified in the record, Highmark also introduced a dedicated website to get out its messages and interpretations. *See* http://highmarkchoicematters .com; *see also id.* at "Members" page ("[w]hile we continue to seek a new contract with UPMC, we want to assure our members that, under the current Highmark contract, they will continue to be covered for UPMC services through June 30, 2013").

ANALYSIS

A preliminary injunction is an extraordinary remedy, which should be granted only in limited circumstances. Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharm. Co., 290 F.3d 578, 586 (3d Cir. 2002). To demonstrate entitlement to a preliminary injunction, Highmark must show: (1) likelihood of success on the merits; (2) irreparable harm if the injunction is denied; (3) that granting relief will not result in greater harm to UPMC; and (4) that the public interest favors such relief. Bimbo Bakeries USA, Inc. v. Botticella, 613 F.3d 102, 109 (3d Cir. 2010) (citation to quoted source omitted).

As to the merits, although Highmark's preliminary injunction papers present numerous theories and arguments, the gist of its case (and basis for invoking federal jurisdiction) is summarized in the bold-texted and underlined assertion on page one of its opening brief: "**even if UPMC ultimately implements the threatened changes to the Highmark/UPMC relationship, there [will] be no impact to Highmark members until at least July 1, 2013**." *See* Pls.' Br. (Doc. 3) at 1 (emphasis in original). The Court's response to this assertion is, that depends.

As UPMC asserts, the Hospital Contracts contemplate a one-year run-out for "Hospital Services," whereas the provisions regarding separately defined "Physician Services" do not. *See generally* Defs.' Br. (Doc. 31) at 3-5 (citing record evidence). In addition, the Physician Contracts, which are terminable with 60-days' written notice, contain no run-out provisions. *See id.* at 5.

In support of its Motion, Highmark has presented pages of dense, footnote-laden legal analysis attempting to demonstrate why, under the terms of the Contracts, UPMC must provide services to Highmark members at currently agreed-upon rates. *See* Pls.' Reply (Doc. 37) at 3 n.2 (incorporating by reference Highmark's arguments in opposition to UMPC's Motion to Dismiss); Pls.' Opp'n to Mot. Dm. (Doc. 35) at 12-16 & footnotes 6-9. But how Highmark expects the Court to determine the veracity of UPMC's statements (or Highmark's, for that matter)[8] regarding the unwinding of the Hospital Contracts remains unclear.

Absent legal interpretations regarding the terms of the Hospital and Physician Contracts, the parties' statements regarding the potential effects of the winding down are incapable of being proven true or false. *See* Global Discount Travel Servs., LLC v. Trans World Airlines, Inc.,

[8] UPMC has stated that, if its Motion to Dismiss is denied, it will file counterclaims under the Lanham Act for Highmark's own public statements and advertisements.

960 F. Supp. 701, 706-707 (S.D.N.Y. 1997) (holding same). Under the circumstances presented, Highmark cannot properly utilize the Lanham Act to resolve in its favor the parties' existing and/or future disputes regarding the Hospital and Physician Agreements. *See id.* (citation omitted).[9]

Highmark also posits the theory that UPMC's communications were literally false because they "necessarily impl[ied]" that Highmark's coverage was or would be immediately affected. *See* Pls.' Br. (Doc. 3) at 10-11; Pls.' Reply (Doc. 37) at 1-2. The Court agrees with defense counsel, however, that Highmark's briefing injects immediacy where it otherwise is lacking. *See* Defs.' Br. (Doc. 41) at 2-3; *see also, e.g.*, Doc. 38-3 ("here are some clarifying points as to what will happen . . . on June 30, 2012"); Doc. 1-2 (discussing what will happen "[w]hen these insurance changes go into effect"); Doc. 1-3 (discussing what insureds should do "when it's time to choose [their] health insurance"); Compl. at ¶ 53 ("ask your employer to include one of the five health insurers that provide access to UPMC during open enrollment") (emphases added). In context, UPMC's statements did not reasonably infer, let alone necessarily imply, that changes in Highmark's coverage were immediately forthcoming. *Cf.* Pls.' Br. (Doc. 3) at 10-11 ("a literally false message may be either explicit or conveyed by necessary implication when, considering the advertisement in its entirety, the audience would recognize the claim as readily as if it had been explicitly stated") (citation omitted, emphasis added) *with* exhibits cited immediately *supra*.[10]

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[9] Although Highmark has attempted to distinguish the court decisions cited by UPMC, and urges against their application here, the undersigned finds Highmark's arguments unpersuasive. Similarly, the cases cited by Highmark are distinguishable, and it is readily apparent that Highmark invites this Court to interpret the Contracts in its favor.

[10] Likewise, to the extent that UPMC may be understood to suggest that its advertisements did not single out Highmark, this position is disingenuous. *Compare* Defs.' Br. (Doc. 30) at 6-7 ("UPMC's website never purports to identify all insurers" who may provide coverage,

Next, the District Court should sustain UPMC's objections to Highmark's last-ditch evidence, raised for the first time in Reply, regarding the alleged removal of references to Highmark from physicians' web pages and UPMC staff's purported statements to Highmark members that their coverage currently is in jeopardy. *See* Pls.' Reply (Doc. 37) at 2. Defense counsel has put forth evidence that the lists of accepted insurers on physician web pages are established by the doctors/practices groups, not UPMC. *See* Defs.' Surreply Br. (Doc. 44) at 3-4 (citing record evidence). Highmark's affidavit regarding UPMC staff's alleged misstatements, moreover, is self-serving, contains multiple layers of hearsay and otherwise is lacking in indicia of reliability. *See id.* at 3 & n.2. This evidence, therefore, should be afforded little if any weigh. More importantly, Highmark's recent forays are far afield of the factual allegations in the Complaint and Highmark's initial moving papers. Granting injunctive relief on such evidence would be unduly prejudicial to UPMC, and, in any event, it is insufficient to carry Highmark's heavy burden under the preliminary injunction standards.[11]

For all of these reasons, Highmark has failed to demonstrate a likelihood of success on the merits regarding its Lanham Act claims.[12] And while the parties have made various

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and if "Highmark wants to advertise its [own] products, it can do so") *with* Doc. 1-2 (UPMC's advertisement, specifically noting that changes to coverage will not affect three UPMC hospitals whose contracts with Highmark do not expire in June 2012). This conclusion, however, does not alter Highmark's inability to demonstrate entitlement to a preliminary injunction.

[11] At no point through the course of this litigation has UPMC suggested that changes in Highmark members' coverage will occur before June 2012. Moving forward, UPMC could diffuse Highmark's stated concerns by agreeing that Defendants, and persons reasonably within their control, will not make statements inconsistent with UPMC's understanding that Highmark members' coverage will remain unaffected until at least June 2012.

[12] Most of Highmark's remaining arguments under the Lanham Act are rejected, expressly or by implication, through the analyses above. As a matter of quick comment, however, Highmark's "Medicare patients" theory is a red herring. *See* Pls.' Br. (Doc. 3) at 8, 12. Both sides repeatedly have assured Medicare patients that the expiration of the Hospital Contracts will not affect their coverage. In context, UPMC's other communications are not inconsistent with its assurances to Medicare patients, and no false or misleading statements have been demonstrated. Similarly

arguments regarding the potential harms that may result from granting or denying injunctive relief, the undersigned believes that these concerns are subsumed, or made moot, by the conclusions that the entry of a preliminary injunction is neither favored by the equities nor in the public interest. *See* Sandoz Pharm. Corp. v. Richardson-Vicks, Inc., 902 F.2d 222, 232 n.13 (3d Cir. 1990) (declining, based on similar conclusions, to reach issue of irreparable harm) (citation omitted).

As seen above, Highmark's false advertisement claims invite the Court to weigh in on a very vocal, public debate between two sophisticated and well-funded health care entities. Both before and after the vast majority of UPMC's communications regarding the matter, UPMC repeatedly invited Highmark to formulate joint statements regarding the Hospital Contracts' expirations. Highmark's refusal to embrace UPMC's invitation is understandable, given its firm and oft-stated desire for continued negotiations regarding contract extensions. It would be naïve for the Court to ignore the possibility that UMPC's discussions of the winding down, and Highmark's refusal to consider the issuance of joint statements, are or were extensions of their bargaining positions. *Compare, e.g.,* Doc. 32-6 (UPMC's initial offer to issue joint statements, opining "[i]t is unfair for the community to mistakenly believe [that] this matter will be settled at the last minute") *with* Doc. 32-7 ("at this time[,] Highmark cannot join with UPMC in delivering [joint] messages," because Highmark "very much disagree[s] that . . . contract [extensions are] unattainable").

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inactionable are UPMC's statements, and Highmark's extra-contractual (and, at times, seemingly equivocal) assurances, regarding the presence or absence of additional approvals required during the run-out period. *Cf., e.g.*, Doc. 32-9 ("[Highmark] do[es] not expect the approval process" to "change significantly during the run-out period") (emphasis added) *and* Doc. 4-28 (same). To be clear, though, Highmark's more recent statements have been unequivocal. *See* http://highmarkchoicematters .com/members (Highmark members "will continue to be covered for UPMC services through June 30, 2013," "with no requirement for any special authorizations").

Both sides have expended substantial time and resources voicing their positions regarding matters that, by nature, present complicated legal issues. Based on the record before the Court, it is fair to say that their messages have been heard. Unless and until the parties' legal obligations regarding the winding down are established, or the parties agree upon joint statements for issuance to their constituents, some degree of uncertainty and consumer confusion is inevitable.[13]

For the reasons explained above, resolving the parties' disputes through the Lanham Act is neither legally appropriate nor beneficial to the public interest. Although the Court remains duty-bound to give careful attention to all claims of alleged violations of federal and, as appropriate, state law, the federal judicial system does not stand as a platform to influence public perceptions regarding the parties' proposed contractual interpretations or their bargaining positions with respect to potential renegotiations.

Finally, the District Court should deny Highmark's request for injunctive relief based on Defendants' alleged breach of the Hospital Contracts' non-solicitation clauses.[14] Although these claims are fairly encompassed in Highmark's preliminary injunction papers, they cannot shed the appearance of makeweight. As to likelihood of success on the merits, Highmark has failed to

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[13] Of the various messages communicated to the public, the undersigned believes that UPMC's "bullet point" explanations do the best job of capturing the nature of the relevant contractual provisions (albeit, in a light most favorable to UPMC). Had UPMC stuck with those bullet points, their messages would have been far less susceptible to charges of false or misleading advertising. Highmark arguably was no more forthcoming, however, given its references to run-out coverage for UPMC "hospitals" or "facilities," when the far more difficult questions were, and remain, how "Physician Services" and/or the Physician Contracts will be handled. It is hard to find either side's approaches more virtuous.

[14] The non-solicitation clauses state that the Defendant-Hospitals cannot "directly or indirectly solicit, influence, or attempt to influence any [Highmark m]ember . . . to disenroll from coverage . . or participate in or subscribe to another health plan." *See, e.g.*, Doc. 4-5 at pg. 8 of 50 ("Section D"). According to the Contracts, "[t]argeted advertising or solicitation based on identification of [Highmark m]embers . . . violate[s] this provision." *Id.*

demonstrate that the parties bound by the Contracts, the Hospitals, have violated the non-solicitation provisions. *See* Defs.' Br. (Doc. 31) at 16-18 & n.5. While Highmark's allegations and arguments regarding the Hospital-Defendants' "indirect" solicitation through UPMC Health System may be enough for the purposes of Federal Rule 12(b)(6), they are insufficient to carry Highmark's burdens regarding its request for preliminary injunction. *Cf.* Pls.' Br. in Opp'n to Dm. (Doc. 35) at 21 (stating that Complaint alleges Defendant-Hospitals "used UPMC . . . as an indirect means to breach the [n]on-[s]olicitation [c]lauses").[15]

Even were the Court to conclude otherwise, the observations above regarding the balance of the equities and the public interest do not support the entry of a preliminary injunction. Under the circumstances presented, it would be even less appropriate for this Court to resolve the parties' ongoing disputes through an exercise of supplemental jurisdiction over state law contract claims.

For all of the reasons stated above, Plaintiffs' Motion for Preliminary Injunction (Doc. 2) should be denied.

In accordance with the Magistrates Act, 20 U.S.C. § 636(b)(1) (B) and (C), and Rule 72.D.2 of the Local Rules for Magistrates, objections to this Report and Recommendation must be filed by October 31, 2011. Failure to file objections will waive the

[15] Although the non-solicitation provisions purport to establish entitlement to injunctive relief for breach, UPMC correctly observes that a contractual provision cannot usurp the Court's role in balancing the equities. *See* Simpler Consulting, Inc. v. Wall, 2008 WL 763746, *4 (W.D. Pa. Mar. 21, 2008); *see also id.* ("the parties to a contract cannot, by including certain language in [their] contract, create a right to injunctive relief where it would otherwise be inappropriate") (citations and internal quotations omitted). The undersigned also notes that, once allegations of false or misleading advertising are removed from the equation, Highmark's claimed need for injunctive, as opposed to monetary, relief appears significantly undermined. *See generally* Defs.' Br. (Doc. 31) at 18-21 (citing cases regarding availability of money damages for similar claims).

right to appeal. Brightwell v. Lehman, 637 F.3d 187, 193 n.7 (3d Cir. 2011). Responses to objections are due by November 17, 2011.

October 12, 2011

s\Cathy Bissoon
Cathy Bissoon
United States Magistrate Judge

cc (via ECF email notification):

All Counsel of Record