IN THE CIRCUIT COURT OF WOOD COUNTY, WEST VIRGINIA

CHARLESTON DIABETES AND ENDOCRINE CONSULTANTS, PLLC, and PRASUNA JAMI, M.D.,

Plaintiffs,

v.

Civil Action No. 16-C-457
Judge Jeffrey B. Reed

HIGHMARK WEST VIRGINIA INC.,

Defendant.

DEFENDANT'S MOTION TO DISMISS

Defendant, Highmark West Virginia Inc.[1] ("Highmark WV"), by counsel, moves pursuant to W. Va. R. Civ. P. 12(b)(1) and 12(b)(6) to dismiss Plaintiffs' Complaint. As set forth more fully in the accompanying memorandum of law, filed contemporaneously herewith and incorporated by reference, the Complaint should be dismissed for two independent reasons.

First, Plaintiffs' Complaint *as pleaded* is premature; Plaintiffs do not and cannot plead that they have been injured at this time. Thus, this Court is without subject-matter jurisdiction over all Plaintiffs' claims. Second and for similar reasons, none of Plaintiffs' claims *as pleaded* states a legal claim upon which relief can be granted.

WHEREFORE, Defendant, Highmark West Virginia Inc., respectfully requests the Court to GRANT its motion and to ORDER that Plaintiffs' Complaint be DISMISSED.

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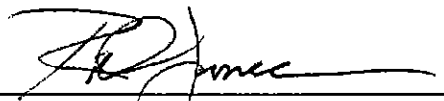
[1] Highmark West Virginia Inc. does business as Highmark Blue Cross Blue Shield West Virginia and was formerly known as Mountain State Blue Cross Blue Shield Inc.

Respectfully submitted this 5th day of December, 2016.

HIGHMARK WEST VIRGINIA INC.
By Counsel,



Russell D. Jessee (W. Va. State Bar No. 10020)
STEPTOE & JOHNSON PLLC
P. O. Box 1588
Charleston WV 25326-1588
Telephone: (304) 353-8000
Fax: (304) 353-8180
Counsel to Highmark West Virginia Inc.

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HIGHMARK WEST VIRGINIA INC.,

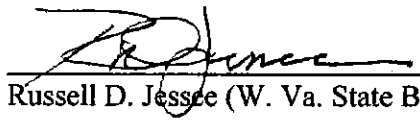
Defendant.

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of December, 2016, I served the foregoing **"Defendant's Motion to Dismiss"** upon the following counsel of record by depositing a true copy thereof in the United States mail, postage prepaid, in an envelope addressed as follows:

Scott S. Segal, Esq.
C. Edward Amos, II, Esq.
The Segal Law Firm
810 Kanawha Blvd, East
Charleston, WV 25301

Karen H. Miller, Esq.
Joseph L. Amos, Jr., Esq.
Miller & Amos, Attorneys at Law
2 Hale Street
Charleston, WV 25301



Russell D. Jessee (W. Va. State Bar No. 10020)

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CHARLESTON DIABETES AND ENDOCRINE CONSULTANTS, PLLC, and PRASUNA JAMI, M.D.,

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HIGHMARK WEST VIRGINIA INC.,

Defendant.

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS

I. INTRODUCTION

Plaintiffs, who voluntarily contracted with Highmark West Virginia Inc.[1] ("Highmark WV") to be participating providers, misguidedly seek to challenge the audit process to which they agreed. Their Complaint *as pleaded* suffers from two independently fatal defects.

First, Plaintiffs' Complaint *as pleaded* is premature. Plaintiffs concede that they have not completed the audit process that they seek to challenge. Since the process is not complete, Plaintiffs have repaid nothing to Highmark WV. Plaintiffs thus have no injury-in-fact. Because Highmark WV has not injured Plaintiffs, they have no standing to bring their claims and this Court is without subject-matter jurisdiction.

Second and for similar reasons, none of Plaintiffs' claims *as pleaded* states a legal claim upon which relief can be granted. Because Plaintiffs have not been injured, they have no basis to claim breach of contract or damages on which to assert a breach of contract claim. Plaintiffs' assertion that the West Virginia Prompt Pay Act governs Highmark WV's audit process states no

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[1] Highmark West Virginia Inc. does business as Highmark Blue Cross Blue Shield West Virginia and was formerly known as Mountain State Blue Cross Blue Shield Inc.

claim, because the audit process is entirely contractual; the Prompt Pay Act says nothing about audits. The Prompt Pay Act's provisions regarding "deny[ing]" provider claims also cannot be enforced at this time, because, again, Plaintiffs have not yet repaid any amount to Highmark WV that could be determined to violate the Prompt Pay Act. And, the Unfair Trade Practices Act that governs claims on insurance policies is inapplicable to contractual payments from Highmark WV to its participating providers; Highmark WV's participating provider network agreements are not insurance policies.

II. STATEMENT OF FACTS[2]

A. Factual Background.

1. Plaintiffs agreed to their contractual relationship with Highmark WV.

As Plaintiffs plead, their relationship with Highmark WV is purely contractual. Plaintiffs entered a Network Agreement with Highmark WV.[3] (*See* Compl. ¶ 5 & Plfs.' Ex. 1.[4]) The purpose of medical providers contracting with Highmark WV to participate in its network is to agree to a process whereby Highmark WV pays providers directly. (*See* Network Agreement, Plfs.' Ex. 1, § I Payments for Covered Services.) Absent a provider contracting with Highmark WV through a Network Agreement, Highmark WV has no obligation to pay anything directly to

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[2] Pursuant to W. Va. R. Civ. P. 12(b), Highmark WV assumes the facts stated in the Complaint to be true solely for purposes of this Motion to Dismiss and only to the extent that purported facts are not actually "legal conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions cast in the form of factual allegations." *Forshey v. Jackson*, 222 W. Va. 743, 756, 671 S.E.2d 748, 761 (2008) (citation omitted).

[3] That the Court may construe the parties' contract and rule as a matter of law on this motion to dismiss is beyond dispute. *See, e.g.*, Syl. Pt. 8, *Berkeley County Public Serv. Dist. v. Vitro Corp. of Am.*, 152 W. Va. 252, 162 S.E.2d 189 (1968) ("It is error to allow witnesses to give their interpretation or construction of a contract as this is a matter of law for the court to decide.").

[4] A court ruling on a motion to dismiss under Rule 12(b)(6) "may consider, in addition to the pleadings, documents annexed to it, and other materials fairly incorporated within it." , 222 W. Va. at 747, 671 S.E.2d at 752 (quoting Franklin D. Cleckley et al., LITIGATION HANDBOOK ON WEST VIRGINIA RULES OF CIVIL PROCEDURE § 12(b)(6)[2], at 348 (footnote omitted)). Thus, the Court may consider the Network Agreement in ruling on this motion to dismiss without converting the motion into one for summary judgment.

a provider. Instead, Highmark WV would pay its insureds (and members of self-funded plans administered by Highmark WV) directly, and a non-participating provider must have a process for collecting payments directly from patients.

The Network Agreement and incorporated Provider Manual state the terms and provisions of the relationship between Plaintiffs and Highmark WV.[5] (*See* Network Agreement Plfs.' Ex. 1, at 1.) While the Network Agreement states that it will be administered in accord with the Prompt Pay Act (Compl. ¶ 12), the Prompt Pay Act does not create additional obligations that are not found in the Network Agreement. Absent their contractual agreement, Plaintiffs could not seek to enforce the Prompt Pay Act against Highmark WV. *See* W. Va. Code 33-45-2 (stating that the Act governs "provider contract[s]").

If Plaintiffs did not want to be bound by the terms and provisions of the Network Agreement and incorporated Provider Manual, they could have terminated their contractual relationship with Highmark WV. Then, they would no longer receive payments directly from Highmark WV when they provide services to patients covered by Highmark WV. Also, Plaintiffs would have no basis to seek to apply the Prompt Pay Act to Highmark WV.

2. Plaintiffs agreed to maintain records, provide records, and submit to an audit process.

In their Network Agreement, Plaintiffs agree that they "shall keep accurate and current medical records . . . and shall furnish such records to [Highmark WV] upon request, without

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[5] The Network Agreement states in its introductory paragraph that Plaintiffs "agree to be bound by the terms and conditions [of the Network Agreement], as well as the terms and provision so [Highmark WV's] Provider Manual ('Provider Manual'), including the definitions therein, any revisions thereto, and any other exhibit or documents referenced herein or in the Provider Manual. (Network Agreement, Plfs.' Ex. 1, at 1.) Accordingly, Plaintiffs' assertion that they did not agree to the audit provisions in the Provider Manual (Compl. ¶ 43) must be disregarded as inconsistent with their written agreement attached to their Complaint. West Virginia law has long held that when there is a dispute between the allegations in a complaint and an exhibit attached to the complaint, the exhibit controls. Syl. Pt. 1, *Atlantic Terra Cotta Co. v. Moore Const. Co., et al.*, 73 W. Va. 449, 80 S.E. 924 (1914); *Black v. Maxwell*, 131 W. Va. 247, 254, 46 S.E.2d 804, 808 (1948).

change, alteration or omission." (Network Agreement, Plfs.' Ex. 1, § IV(A).) Plaintiffs further agree to permit Highmark WV to "conduct on-site or off-site audits without charge, examine such original records of Provider as may be necessary to verify performance under this Agreement, or any contract between [Highmark WV] and its Accounts . . . ." (*Id.*, § IV(B).) The Record Review provisions of Plaintiffs' Network Agreement nowhere refer to the Prompt Pay Act, and the Prompt Pay Act nowhere refers to audits.[6]

3. Plaintiffs plead that the audit process is incomplete and they have not repaid anything to Highmark WV.

Plaintiffs plead that they "notified Defendant Highmark of their disagreement with the audit results and requested that a peer to peer (i.e., endocrinologist to endocrinologist) review be conducted." (Compl. ¶ 11.) Plaintiffs then plead that "Defendant Highmark has not conducted a peer to peer review" (*id.*), so Plaintiffs plead that their dispute with Highmark WV continues. Plaintiffs further plead that the overpayment amounts that Highmark WV are only "alleged," not actually recovered by Highmark WV. (*E.g.*, *id.* ¶ 17.) Plaintiffs refer to claims that Highmark WV "*attempts* to 'Retroactively Deny.'" (*E.g.*, *id.* ¶ 32 (emphasis added).) Plaintiffs further seek a prospective ruling that claims payments[7] "covered by Defendant Highmark's statutorily defined 'Health Plans,' which it 'Retroactively Denies' claims outside the one (1) year statute of limitations, *should be withdrawn* from the alleged 'overpayment' amount." (*Id.* ¶ 26 (emphasis added).) Thus, Plaintiffs improperly seek to have this Court intervene in an audit process that has not concluded. Plaintiffs nowhere plead that they have repaid to Highmark WV any portion of the claims payments that Highmark WV made to Plaintiffs. Plaintiffs cannot plead that they

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[6] Accordingly, Plaintiffs' allegation that Highmark WV "unlawfully conducts" audits "in violation of the Prompt Pay Act" (Compl. ¶ 22), must be disregarded.

[7] Payments from Highmark WV to Plaintiffs are not "insurance claims," as Plaintiffs repeatedly mischaracterize them. *See supra* § II(A)(1).

have repaid anything to Highmark WV, because they have not.[8] Plaintiffs retain the full amount of claims payments from Highmark WV.[9] In sum, Plaintiffs cannot plead that they currently have been injured.

B. Procedural Background.

Although Plaintiffs continued to negotiate with Highmark WV for a year through Plaintiffs' attorneys, Plaintiffs' attorneys suddenly ceased communications after September 2016. Plaintiffs then filed their Complaint on October 31, 2016.

While Plaintiffs seek to state their claims as a variety of common law and statutory violations, their claims are that Highmark WV audit process is unlawful and that Highmark WV's assertion, as a result of its audit, that Plaintiffs mis-coded medical procedures to obtain inflated payments somehow is an unlawful "retroactive denial" of claims payments.

Highmark WV now moves to dismiss Plaintiffs' premature and misconceived claims.

III. ANALYSIS

A. Plaintiffs' Claims are Unripe, so this Court Lacks Subject-Matter Jurisdiction.

1. When a plaintiff has not yet been injured, her claims are unripe, and the trial court lacks subject-matter jurisdiction.

In order to make a legal claim or seek judicial enforcement of a duty or right, the party, "attempting to establish standing 'must have suffered an injury-in-fact.'" *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W. Va. 80, 94, 576 S.E.2d 807, 821 (2002) (quoting *Coleman v. Sopher,*

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[8] Plaintiffs plead that they "are entitled to compensatory damages" (*e.g.*, Compl. ¶ 33), but they nowhere plead their damages. Plaintiffs are not entitled to be compensated when they have not been damaged.

[9] Plaintiffs omit to plead that since Highmark's notification to Plaintiffs of its audit results in September 2015, Plaintiffs have continually negotiated with Highmark WV through a series of attorneys, most recently some of Plaintiffs' current counsel, Miller & Amos, Attorneys at Law. Plaintiffs and their attorneys indicated that they wanted to review and dispute Highmark WV's substantive audit results, but they did not assert that they thought the audit process or results, which, again, have not resulted in any repayment from Plaintiffs, violated the Prompt Pay Act.

194 W. Va. 90, 95 n. 6, 459 S.E.2d 367, 372 n.6 (1995)). The Supreme Court of Appeals has repeatedly held that

> [c]ourts are not constituted for the purpose of making advisory decrees or resolving academic disputes. The pleadings and evidence must present a claim of legal right asserted by one party and denied by the other before jurisdiction of a suit may be taken.

Syl. Pt. 2, *Harshbarger v. Gainer*, 184 W. Va. 656, 403 S.E.2d 399 (1991) (quoting *Mainella v. Bd. of Trustees of Policemen's Pension or Relief Fund of City of Fairmont*, 126 W. Va. 183, 185-86, 27 S.E.2d 486, 487-88 (1943)). Furthermore,

> "courts will not . . . adjudicate rights which are merely contingent or dependent upon contingent events, as distinguished from actual controversies." Likewise, "courts [will not] resolve mere academic disputes or moot questions or render mere advisory opinions which are unrelated to actual controversies." Indeed, a matter must be ripe for consideration before the court may review it. Courts must be cautious not to issue advisory opinions.

Id. (quoting *Zaleski v. West Virginia Mut. Ins. Co.*, 224 W. Va. 544, 552, 687 S.E.2d 123, 131 (2009) (citations omitted)).

Ripeness is a component of the "justiciable controversy" requirement under West Virginia law. *Harshbarger*, 184 W. Va. at 659, 403 S.E.2d at 402. Although usually "found in cases arising under the declaratory judgment act," the rule "applies to all West Virginia judicial proceedings." *Id.* Ripeness is a significant threshold consideration, inasmuch as it is a limitation upon a circuit court's subject-matter jurisdiction. *See State ex rel. Erie Fire Ins. Co. v. Madden*, 204 W. Va. 606, 610 n.6, 515 S.E.2d 351, 355 n.6 (1998).

"A ripeness review consists of inquiries into 'the fitness of the issues for judicial decision' and 'the hardship to the parties of withholding court consideration.'" *Retail Indus. Leaders Ass'n v. Fielder*, 475 F.3d 180, 188 (4th Cir. 2007) (quoting *Pacific Gas & Elec. Co. v. State Energy Conservation & Dev. Comm'n*, 461 U.S. 190, 201) (1983)). "An issue is not fit for

review if 'it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Id.* (quoting *Tex. v. United States*, 523 U.S. 296 (1998)).

2. Plaintiffs plead that their claims are unripe when they plead that they have not completed the process that they challenge.

Plaintiffs seek to have this Court "[r]eform" the audit process to which they contractually agreed, but they also plead that they have not completed the audit process that they seek to have reformed. Plaintiffs plead that their dispute with Highmark WV continues. (*See supra* § II(A)(3).) And Plaintiffs nowhere plead how Highmark WV currently has injured them. (*See supra id.*) Plaintiffs have not repaid anything to Highmark WV, so they have not currently been injured. Instead, Plaintiffs' claims relating to Highmark WV's allegedly unlawful audit process and allegedly unlawful "retroactive denials" are contingent on Plaintiffs actually having repaid some amount to Highmark WV.[10]

This case is similar to *Zaleski v. W. Va. Mut'l Ins. Co.*, 224 W. Va. 544, 687 S.E.2d 123 (2009), in which the West Virginia Supreme Court held that a dispute was unripe before resolution of threshold issues that were not before the trial court. In *Zaleski*, Dr. Robert J. Zaleski appealed to his insurer its decision to deny renewal of his malpractice coverage. Dr. Zaleski also filed a civil action in which, *inter alia*, the circuit court attempted to approve procedures for the insurer's hearing. With respect to this attempt to dictate the insurer's procedures ***before*** the hearing occurred, the West Virginia Supreme Court reversed the circuit court. The Court found that there was no ripe controversy regarding hearing procedures. The Court explained, "[i]n this case, the circuit court's abstract review of and decision to alter the

[10] Although Plaintiffs' Complaint omits to plead Highmark WV's basis for seeking repayment of overpayments, Plaintiffs cannot dispute that Highmark WV contends that Plaintiffs submitted claims for high-level examinations that Plaintiffs' medical records do not support. In other words, Plaintiffs improperly up-coded office visits, and Highmark WV paid Plaintiffs based on the up-coded claims submissions. To date, Plaintiffs retain the full amounts paid to them as a result of their improper up-coding. Plaintiffs have repaid nothing to Highmark WV.

Mutual's hearing procedures prior to the non-renewal hearing taking place violates this Court's long-standing principles of ripeness and the requirement that an actual case in controversy exist before a matter can be reviewed. In other words, the circuit court put the cart before the horse." *Id.*, 224 W. Va. at 552, 687 S.E.2d at 131. "[T]he outcome of the non-renewal hearing is unknown at this time. After the hearing is conducted, Dr. Zaleski's professional liability policy could in fact be renewed, in which case no abstract objection to the procedures could ever become ripe for consideration by the circuit court." *Id.*

The same is true here. Until Plaintiffs have actually repaid some amount to Highmark WV as a result of Highmark WV's audit process, there is no basis for this Court to determine whether the repaid amounts were properly recouped. The result of the on-going dispute resolution process between Highmark WV and Plaintiffs' counsel may be that Highmark WV recoups only amounts that Plaintiffs will not contend violate the Prompt Pay Act. Plaintiffs also may wish to challenge the lawfulness of amounts recouped. Regardless of Plaintiffs' potential challenges to amounts, if any, that Highmark WV actually recoups from Plaintiffs, ***at this time*** Plaintiffs have not pleaded that Highmark WV ***currently*** has injured them. Plaintiffs do nothing more than seek an advisory opinion.

Accordingly, Plaintiffs' claims are unripe, they have no standing, and this Court lacks subject-matter jurisdiction.

B. For Similar Reasons, Plaintiffs' Claims Fail to State Claims upon which Relief Can Be Granted.

1. The motion to dismiss standard.

The Rules of Civil Procedure provide that a trial court must dismiss a plaintiff's complaint if it "fail[s] to state a claim upon which relief can be granted." W. Va. R. Civ. P. 12(b)(6). A motion to dismiss for failure to state a claim tests the sufficiency of the

complaint. *Collia v. McJunkin*, 178 W. Va. 158, 358 S.E.2d 242 (1987). A trial court presented with a motion to dismiss should grant the motion if it appears beyond doubt that the plaintiff can prove no set of facts in support of the claims contained in the complaint that would entitle it to relief. *Owen v. Board of Educ.*, 190 W. Va. 677, 678, 441 S.E.2d 398, 399 (1994); *Holbrook v. Holbrook*, 196 W. Va. 720, 723, 474 S.E.2d 900, 903 (1996).

A circuit court ruling on a Rule 12(b)(6) motion to dismiss may consider exhibits attached to a complaint or documents incorporated into the complaint by reference without converting the motion to a Rule 56 motion for summary judgment. *Forshey v. Jackson*, 222 W. Va. 743, 748, 671 S.E.2d 748, 753 (2008). A court, however, may "ignore legal conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions cast in the form of factual allegations." *Id.* at 756, 671 S.E.2d at 761 (*quoting* Franklin D. Cleckley, et al., LITIGATION HANDBOOK ON WEST VIRGINIA RULES OF CIVIL PROCEDURE § 12(b)(6)[2], at 347); *see Kopelman and Assocs., L.C. v. Collins*, 196 W. Va. 489, 493, 473 S.E.2d 910, 914 (1996) (while plaintiff "enjoys the benefit of all inferences that plausibly can be drawn from the pleadings, a party's legal conclusions, opinions, or unwarranted averments of fact will not be deemed admitted").[11]

Accordingly, "[a]lthough a plaintiff's burden in resisting a motion to dismiss is a relatively light one, the plaintiff is still required at a minimum to set forth sufficient information to outline the elements of his/her claim. If a plaintiff fails to do so, dismissal is proper."

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[11] Applying the identical federal rule, federal courts have been clear that a plaintiff cannot insulate a claim from dismissal by alleging incorrect conclusory "facts." Courts, thus, need not accept conclusory factual allegations devoid of any reference to actual events, *United Black Firefighters v. Hirst*, 604 F.2d 844, 847 (4th Cir. 1979), nor are they "required to ignore facts alleged in the complaint that undermine Plaintiff's claim," *Lekas v. Briley*, 405 F.3d 602, 613-14 (7th Cir. 2005) (citations omitted). Likewise, the Court "need not accept as true unwarranted inferences, unreasonable conclusions, or arguments." *E. Shore Mkt. Inc. v. J.D. Assocs., LLP*, 213 F.3d 175, 180 (4th Cir. 2000).

Forshey, 222 W. Va. at 756, 671 S.E.2d at 761 (*quoting* Cleckley, *et al.*) (internal quotation marks omitted).

2. Plaintiffs plead no breach of contract claim.

For the same reasons that their claims are unripe, Plaintiffs do not plead a valid breach of contract claim in Count I. (*See* Compl. ¶¶ 24-29.) In order to establish a breach of contract claim, Plaintiffs must plead and ultimately prove (1) the existence of a valid, enforceable contract, (2) that they performed under the contract, (3) that Highmark WV breached its duties under the contract, and (4) that they have been injured as a result. *See, e.g., Executive Risk Indem., Inc. v. Charleston Area Med. Ctr., Inc.*, 681 F.Supp.2d 694, 730 (S.D. W. Va. 2009).

Plaintiffs, however, have not pleaded that Highmark WV breached the parties' contract or that they have been damaged. Again, Plaintiffs have not pleaded and cannot plead that they have repaid any amount to Highmark WV. (*See supra* § II(A)(3).) Thus, Plaintiffs have not pleaded and cannot plead that Highmark WV has recouped any amount from them wrongfully in breach of the parties' contract (*i.e.*, in potential violation of the Prompt Pay Act) or that they have been damaged in any way. Accordingly, Plaintiffs fail to plead a breach of contract claim.

3. Plaintiffs plead no violation of the Prompt Pay Act.

Plaintiffs seek to challenge Highmark WV's contractual audit process and the results of their audit as violative of the West Virginia Prompt Pay Act, even though they have not repaid any amount to Highmark WV. (*See* Compl. ¶¶ 30-46.) Plaintiffs, however, plead no actual violation of the Prompt Pay Act.

Plaintiffs first fail to plead any claim that Highmark WV's process for auditing providers violates the Act, which nowhere refers to audits. Highmark WV's audit process is a contractually agreed to process whereby providers maintain records and provide those records on request, and Highmark WV then reviews those records to determine *whether* it believes that a

provider has submitted claims that are not supported by her records. (*See supra* § II(A)(2).) Audits are purely investigative (*i.e.*, they are not begun with any result in mind), and so they cannot be "unlawfully conducted" (Compl. ¶ 22). Plaintiffs contractually agreed to submit to an audit process in order to obtain claims payments directly from Highmark WV. They cannot now claim that they are entitled to those direct payments but do not have to support their entitlement to them when Highmark WV seeks to audit them.

Second and as Plaintiffs concede, Highmark WV may "retroactively deny" a previously paid provider claim past one year when the basis for the denial is "fraud" or a "material misrepresentation."[12] (*Id.* ¶ 18.) At this time, because Plaintiffs have made no repayment to Highmark WV, the basis for any future repayment has not yet been determined. Moreover, up-coding an examination to a higher level while using a template description of the office visit in order to obtain a higher claims payment, which is Highmark WV's claim against Plaintiffs, would be a "material misrepresentation" under the Prompt Pay Act.[13] In any event, the basis for any actual repayment to Highmark WV has yet to be established. Accordingly, Plaintiffs have failed to plead that Highmark WV has currently violated the Prompt Pay Act.

4. The Unfair Trade Practices Act is inapplicable to provider claims payments.

In Count IV, Plaintiffs mistakenly attempt to apply the Unfair Trade Practices Act governing payment of insurance claims to the contractual provider claims at issue here. (*See* Compl. ¶¶ 47-50.) Highmark WV's claims payments to Plaintiffs are not "insurance claims"

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[12] By making this argument in its motion to dismiss, Highmark WV ***does not*** concede that Plaintiffs have properly characterized Highmark WV's audit process and the resultant payment adjustments as "retroactively denying" any provider claims. Highmark WV simply asserts that even if the adjustments are mischaracterized as retroactive denials under the Prompt Pay Act—although they are not—Plaintiffs nonetheless fail to state a claim.

[13] Plaintiffs' references to "intentional misrepresentations" (*e.g.* Compl. ¶ 40) is a misstatement of the Prompt Pay Act's term "material misrepresentation," and therefore must be disregarded.

payments. Plaintiffs receive the direct payments solely because they have entered a Network Agreement with Highmark WV. Plaintiffs' Network Agreement is not an "insurance policy" (Compl. ¶ 48). (*See supra* § II(A)(1).)

Furthermore, the insured patients already have received the services (here, office examinations) from Plaintiffs. And Highmark WV already has paid Plaintiffs directly based on procedure codes submitted by Plaintiffs to Highmark WV in provider claims submissions. Highmark WV is contractually entitled to audit the accuracy of the procedure codes submitted by Plaintiffs. (*See supra* § II(A)(2).) Nothing about this process has anything to do with determining in the first instance whether an insured is entitled to an insurance claims payment under an insurance policy. This is in no way analogous to an insurer who refuses to adjust and pay an auto accident claim. Accordingly, Plaintiffs fail to state any claim under the Unfair Trade Practices Act, which governs insurance claims payments, not contractual provider claims payments.

IV. CONCLUSION

Plaintiffs have not pleaded and cannot plead that Highmark WV currently has injured them. Accordingly, they lack standing to bring any of their claims, and this Court has no subject-matter jurisdiction. For similar reasons, as established above, Plaintiffs fail to plead any claim upon which this Court could currently grant relief. Accordingly, all Plaintiffs' claims should be dismissed for both of these independently sufficient reasons.[14]

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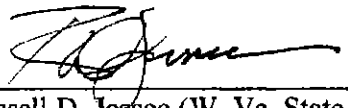
[14] Because the named Plaintiffs of a purported, uncertified class have no claims against Highmark WV, they cannot possibly represent a class, and their class claims are moot. "[A] plaintiff who has no cause of action against the defendant cannot 'fairly and adequately protect the interests' of those who do have such causes of action." *Erie Fire Ins. Co. v. Madden*, 204 W. Va. 606, 609, 515 S.E.2d 351, 354 (1998) (*per curiam*) (citation omitted).

Respectfully submitted this 5th day of December, 2016.

HIGHMARK WEST VIRGINIA INC.
By Counsel,



Russell D. Jessee (W. Va. State Bar No. 10020)
STEPTOE & JOHNSON PLLC
P. O. Box 1588
Charleston WV 25326-1588
Telephone: (304) 353-8000
Fax: (304) 353-8180
Counsel to Highmark West Virginia Inc.

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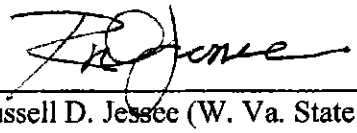
CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of December, 2016, I served the foregoing **"Defendant's Memorandum of Law in Support of Its Motion to Dismiss"** upon the following counsel of record by depositing a true copy thereof in the United States mail, postage prepaid, in an envelope addressed as follows:

Scott S. Segal, Esq.
C. Edward Amos, II, Esq.
The Segal Law Firm
810 Kanawha Blvd, East
Charleston, WV 25301

Karen H. Miller, Esq.
Joseph L. Amos, Jr., Esq.
Miller & Amos, Attorneys at Law
2 Hale Street
Charleston, WV 25301



Russell D. Jessee (W. Va. State Bar No. 10020)