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August 25, 2022

The Honorable Hector Gonzalez, U.S.D.J.
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

RE: *Long Island Anesthesiologists PLLC v. UnitedHealthcare Insurance Company of New York et al.*, Case No. 2:22-cv-04040
Joint Letter

Dear Judge Gonzalez:

We represent the Plaintiff Long Island Anesthesiology PLLC (LIA) in the above-referenced matter and write jointly with counsel for Defendants UnitedHealthcare Insurance Company of New York (United) and MultiPlan, Inc. as required by the Court's July 21, 2022 Scheduling Order.

Plaintiff's Statement

Owned by its physician providers, LIA provides high quality and easily accessible anesthesia services to hospitals, ambulatory surgery centers, and office-based facilities throughout Long Island, New York. LIA enters into arrangements with those facilities to perform anesthesia services to all patients undergoing surgical or other medical procedures. As such, LIA cannot pick and choose what health plans to deal with for reimbursement.

United, a subsidiary of United Health Group Incorporated (UHG), is one of the largest managed care organizations in the nation. United has embarked on a campaign of anti-competitive conduct designed to strangle and, ultimately, force LIA and other local independent perioperative practices out of business. United has significant, anti-competitive motives to enter this scheme including the elimination of competition in favor of physician practice groups owned or managed through its subsidiary, OptumCare. United achieves this goal by fostering a "race to the bottom" on rates that enables United to garner supra-competitive profits it does not pass along to its customers.

United has used various anticompetitive tools to drive down out-of-network reimbursement rates to LIA and other similarly situation physician practices. One such mechanism is through misuse of the federal No Surprises Act. United is the Program Administrator of the Empire Plan, a part of the New York State Health Insurance Program ("NYSHIP") that provides health coverage for public employees of New York. Prior to January 2022, the Empire Plan was treated as subject to the New York Surprise Bill Law by all stakeholders, including the Empire Plan itself, the Department of Financial Services, state independent dispute resolution agencies, and out-of-

network providers. Under New York law, if a dispute existed between the health plan and the out-of-network physician as to what is "reasonable reimbursement" for the covered medical services at issue, either party may submit the dispute to the independent dispute resolution (IDR) process established by the Surprise Bill Law, which uses the FAIR-health database to determine a reasonable fee for the services rendered.

On January 1, 2022, LIA—and other out of network providers to the Empire Plan—started to experience a dramatic 80% decrease in reimbursement rates for services provided to members of the Empire Plan. United's explanation for this dramatic lowering of reimbursement is that it was "determined" that the Empire Plan no longer be subject to New York insurance laws or be subject to regulation by the Department of Financial Services, despite the existence of a specified state law (New York Surprise Bill Law) as that term is defined in the federal No Surprises Act.

Following this announcement, LIA started to receive written communications from MultiPlan, identifying itself as working with United. LIA's attempts to negotiate a reasonable rate with MultiPlan have fallen on deaf ears. In response to each attempt, United, through MultiPlan, states that they are only authorized to offer the dramatically reduced QPA amount, while contemporaneously insisting on a 45-minute window within which to receive any documentary support to resolve the dispute. This is a cynical attempt to foreclose LIA from pursuing any type of IDR on these claims.

The actions of United and MultiPlan regarding the Empire Plan have caused significant harm. The sudden, precipitous decrease in reimbursement – to less than 20% of what it was in December 2021 – is devastating to LIA and other anesthesia providers, particularly given skyrocketing expenses due to inflation and the uncertain economic climate. As a result, many anesthesia practices will be forced to go out of business or dramatically curtail their services, which decreases OptumCare's competition in the field.

Due to the above, LIA filed this action seeking redress under Sherman Act §§ 1 and 2 and pendent state law claims for violations of the Donnelly Act and unjust enrichment.

Defendants' Statement

United is a third-party administrator for the Empire Plan, which is self-funded by the New York Department of Civil Service. United does not fund reimbursements under the Empire Plan and does not make decisions about which law governs the Empire Plan's reimbursements for out-of-network services. But LIA has sued United anyway.

Although styled as an antitrust suit, LIA's lawsuit in reality raises the question of which law (the federal No Surprises Act or New York's Surprise Bill Law) governs the reimbursement of out-of-network emergency services provided to Empire Plan members. The New York Department of Civil Service—which sponsors the Empire Plan—has already informed LIA that the federal No Surprises Act applies.

As United and MultiPlan will make clear in their motions to dismiss, LIA's claims are without merit for multiple reasons.

1. **This case should be dismissed under the *Colorado River* and *Burford* abstention doctrines.**

Whether the Empire Plan is subject to the New York Surprise Bill Law or the federal No Surprises Act is the central question in a declaratory judgment action that LIA filed along with other plaintiffs in state court on March 28, 2022. *See Wayne Joseph et al. v. Rebecca Corso et al.*, No. 902227-22 (N.Y. Sup. Ct.). Many of the allegations in the *Joseph* complaint are copied verbatim in LIA's federal suit.

Colorado River abstention applies because the parallel state and federal cases create a potential for "inconsistent and mutually contradictory determinations" that could "cause friction between state and federal courts." *De Cisneros v. Younger*, 871 F.2d 305, 308 (2d Cir. 1989) (quoting *Lumbermens Mut. Cas. Co. v. Conn. Bank & Tr. Co.*, 806 F.2d 411, 414 (2d Cir. 1986)). "[T]he interests of comity are best served by waiting for the state court to speak first," which would also "guarantee[] that [this Court] will not misinterpret New York law." *De Cisneros*, 871 F.2d at 309. In *Joseph*, the state court has already denied the plaintiffs' motion for a preliminary injunction and the parties are briefing motions to dismiss.

Burford abstention also applies because a preliminary decision by this Court would "interfere[] with efforts to establish a coherent state policy on a matter of substantial public concern." *Gabelli v. Sikes Corp.*, 1990 U.S. Dist. LEXIS 17015, at *7 (S.D.N.Y. Dec. 14, 1990) (citing *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943)). Decisions about Empire Plan administration belong to the New York agency (the New York Department of Civil Service) that sponsors the Empire Plan—not United (the third-party administrator) or MultiPlan (United's vendor). The Court should not resolve that question of state policy in a case where the state is not represented.

2. **LIA's antitrust claims (Counts I, II, III, and IV) fail because LIA does not plead antitrust injury.**

"The antitrust laws . . . were enacted for 'the protection of competition, not competitors." *Balaklaw v. Lovell*, 14 F.3d 793, 797 (2d Cir. 1994) (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)). Thus, LIA "must show more than that the defendants' conduct caused them an injury." *Id.* At most, LIA alleges that it received lower reimbursements for a limited category of emergency services reimbursed under a single health plan. Both the Supreme Court and the Second Circuit have found that similar impacts felt by anesthesiologists are not the sort of injury to competition that the antitrust laws were designed to protect against. *See Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 29–30 (1984); *Balaklaw*, 14 F.3d at 798.

3. **LIA's federal and state-law restraint of trade claims (Counts I and IV) fail because LIA does not plead a plausible conspiracy.**

Counts I and IV assert conspiracy claims, which require allegations that "reasonably tend[] to prove that the [defendant] and others had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Relevent Sports, LLC v. Fédération Internationale De Football Ass'n*, 551 F. Supp. 3d 120, 127 (S.D.N.Y. 2021) (citation omitted). LIA offers conclusory allegations of an agreement between United and MultiPlan (Compl. ¶¶ 175–77), but does not "allege enough facts to support the inference that a conspiracy actually existed." *Relevent Sports*, 551 F. Supp. 3d at 129–30. Indeed, it is impossible to tell from the complaint what exactly LIA believes United and MultiPlan (which are not horizontal competitors or parties to a traditional vertical arrangement) even agreed to do. Nor would an agreement make sense as neither United nor MultiPlan had the power or ability to control whether the Empire Plan chose to follow state or federal law when reimbursing out-of-network providers for emergency services.

4. LIA's federal and state-law restraint of trade claims (Counts I and IV) fail because LIA does not plead facts that support a violation of the rule of reason.

LIA's restraint-of-trade claims are governed by the rule of reason, which requires LIA to "identify the relevant market affected by the challenged conduct and allege an actual adverse effect on competition in [that] market." *Relevent Sports*, 551 F. Supp. 3d at 128. LIA alleges "the relevant product market at issue here is the provision of medically necessary anesthesia services to patients." Compl. ¶ 152. But neither United nor MultiPlan competes in that market. LIA alleges that one of United's sister companies (OptumCare) offers anesthesia services (Compl. ¶¶ 47–55), but OptumCare is not a named defendant. LIA also fails to allege that United "had sufficient 'market power' [in the market for the provision of medically necessary anesthesia services] to cause an adverse effect, 'plus some other ground for believing that the challenged behavior' has harmed competition." *MacDermid Printing Sols. LLC v. Cortron Corp.*, 833 F.3d 172, 182 (2d Cir. 2016). As non-participants in the alleged relevant market for anesthesia services, neither United nor MultiPlan has power in that market, even if you include OptumCare's limited anesthesiology practices. And LIA does not allege actual harm to consumers (which is required to show injury to competition). *Id.* LIA alleges that it received lower reimbursements on a limited category of emergency medical services reimbursed under one health plan. At most—if that is an injury at all—it is an injury to a single competitor, not to the competitive process.

5. LIA's Section 2 claims (Counts II and III) fail because LIA does not plausibly allege the Defendants had the requisite degree of market power in a properly defined relevant product and geographic market.

A Section 2 plaintiff must show that the defendant has monopoly (or monopsony) power in a properly defined relevant market. *Todd v. Exxon Corp.*, 275 F.3d 191, 201 (2d Cir. 2001). LIA alleges that "United possesses monopsony power in a market for the reimbursement of anesthesia services in the New York metropolitan area." Compl. ¶ 189. But LIA offers no factual allegations to support that market definition, which is mentioned only in a single paragraph when describing the Section 2 theory. In addition, LIA does not allege United or MultiPlan compete in the "reimbursement" market. LIA alleges that United administers the Empire Plan; but the New York Department of Civil Service funds any reimbursements under the Plan. *Discon, Inc. v. NYNEX*

Corp., 93 F.3d 1055, 1061–62 (2d Cir. 1996) ("it is axiomatic that a firm cannot monopolize a market in which it does not compete").

LIA's geographic market also appears to be arbitrarily limited to the counties in which LIA offers services, without offering any factual basis for the court to conclude that LIA has identified a reasonable, economically rational geographic market. *Concord Assocs., L.P. v. Ent. Props. Tr.*, 817 F.3d 46, 53 (2d Cir. 2016) ("The plaintiffs have provided no basis on which to justify their proposed geographic market definition.").

Even accepting its unsupported market definition, LIA fails to allege that United has monopsony power. LIA alleges that United has a 26% share New York metropolitan insurance market, with a share that increases if only certain products or services are considered (Compl. ¶¶ 62, 170). But despite throwing around various statistics, LIA never identifies United's share of the alleged "reimbursement of anesthesia services" market identified for the Section 2 claims. And it does not allege any market share information for MultiPlan, which makes sense since MultiPlan is not a participant in that market.

Finally, LIA's unjust enrichment claim (Count V) fails because LIA does not allege that it conferred a benefit on the defendants. *See, e.g., Graham v. Take-Two Interactive Software, Inc.*, 2019 U.S. Dist. LEXIS 206236, at *5–6 (S.D.N.Y. Nov. 25, 2019) ("An additional basis to dismiss the unjust enrichment claim is that Plaintiff has not alleged that a specific and direct benefit was conferred upon [the defendant].").

Anticipated Motions

In addition to filing Rule 12(b)(6) motions to dismiss on the grounds stated above, United and MultiPlan are evaluating additional defenses that may be raised in additional preliminary motions, including a possible motion to compel arbitration.

Settlement Conference

At this time, the parties do not unanimously agree to a "referral of this case for a settlement conference before Magistrate Judge Arlene R. Lindsay or to the Eastern District of New York's Court-Annexed Mediation program." ECF No. 8 at ¶ 6.

Respectfully,

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