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October 4, 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

Dear Judge Gonzalez:

We represent the Plaintiff, Long Island Anesthesiology PLLC (LIA), and write in response to Defendants' September 26 letter (Dkt 23) requesting a pre-motion conference to discuss their intent to seek a stay of all discovery pending their forthcoming motion to dismiss. This Court should deny the requested stay.

Initially, the "law is clear in this court that there is no automatic stay of discovery pending the determination of a motion to dismiss." *Rivera v. Incorporated Vill. of* Farmingdale, CV 06-2613-DRH-ARL, 2007 U.S. Dist. LEXIS 99970, *2 (E.D.N.Y. Oct. 17, 2007); *see also Doe v. New York City Dep't of Educ.*, 16-CV-1684-NGG-RLM, 2016 U.S. Dist. LEXIS 169321, *5 (E.D.N.Y. Dec. 7, 2016); *Osan Ltd. v. Accenture LLP*, CV 05-5048-SJ-MDG, 2006 U.S. Dist. LEXIS 39138, *1-*2 (E.D.N.Y. Jun. 13, 2006). Rather, a party seeking a stay of discovery under Fed. R. Civ. P. 26(c) bears the burden of showing good cause. *See Osan,* at *1-*2.

In deciding whether to grant a discovery stay, the court "must look to the particular circumstances and posture of each case. *Id.* at *1. When making this decision, courts typically examine three factors: "(1) whether the defendant has made a strong showing that the claim is unmeritorious; (2) the breadth of discovery and the burden of responding to it; and (3) the risk of unfair prejudice to the party opposing the stay." *Rivera*, at *3.

Here, it is important to note that LIA does not seek broad-ranging discovery during the pendency of the motion, but instead has only proposed seeking limited discovery before the motion is decided, such as Rule 26 initial disclosures, the negotiation of a protective order between the parties, and the service and responses to initial requests for production of documents, interrogatories, and requests for admission. (Dkt. 22.) And, regarding the service and responses to initial written discovery requests, LIA is willing to negotiate with Defendants to limit the scope to basic information.

When the limited discovery sought is analyzed in the context of the three stay factors enumerated above, we respectfully submit that this Court should deny the proposed stay. *See Doe* at *5 (denying stay to grant limited discovery); *Rivera* at *2 (same); *Osan*, at *2.

First, Defendants have not met their burden to make a "strong showing" that LIA's claims are "unmeritorious." *Id.* LIA asserts Sherman Act §§ 1 & 2, New York Donnelly Act, and unjust enrichment claims. LIA specifically alleges that UnitedHealthcare, through its position as the administrator of the NY State public employees' health plan (the Empire Plan) is using its substantial market power to drive health care reimbursement rates to sub-competitive levels and thereby force independent, hospital-based anesthesia practices in the NY metropolitan area, such as LIA, out of business. LIA further alleges that UnitedHealthcare has conspired with MultiPlan to accomplish this objective, and that UnitedHealthcare has undertaken this scheme to eliminate competition in favor of physician practice groups controlled by its OptumCare subsidiary. One significant way UnitedHealthcare and MultiPlan have been able to drive health care reimbursement rates to sub-competitive levels is through the manipulation and abuse of various federal and state out-of-network reimbursement laws and regulations, including the recently effective federal No Surprises Act.

Defendants' motions to dismiss primarily seek to dismiss the lawsuit based on *Colorado River* abstention, because there is a lawsuit pending in the New York State Supreme Court, in which LIA is one of 18 plaintiffs, challenging the Empire Plan's recent pronouncement that, with the enactment of the No Surprises Act, it is not subject to the provisions of the NY insurance law as violative of New York Civil Service Law § 162. Under Defendants' view, this lawsuit involves the same conduct as the state court lawsuit and thus *Colorado River* abstention is appropriate. However, this lawsuit contends that the Defendants have engaged in a wide variety of anticompetitive conduct that goes far beyond any violation of Civil Service Law § 162. This anticompetitive conduct, and its substantial effects, will be completely unaffected by any decision in the State Lawsuit. And, even if the State Lawsuit results in a judgment declaring that the Empire Plan's actions did not violate Civil Service Law § 162, this judgment does not alter the fact that Defendants here engaged in a wide variety anticompetitive (even it was legal) conduct. *See, e.g.*, *TeleAtlas N.V. v. NAVTEQ Corp.*, No. C-05-01673 RS, 2008 U.S. Dist. LEXIS 145998, *4 (N.D. Cal. Nov. 13, 2008) ("Two principles defining the boundaries of 'anticompetitive conduct' merit discussion given the allegations of this case. First, that 'anticompetitive' conduct may include otherwise *legal* conduct. Second, courts must consider all of an alleged monopolist's related conduct in the aggregate.") Accordingly, because the allegations in this lawsuit allege far broader conduct, and will be unaffected by, any finding in the State Lawsuit, this lawsuit is not "unmeritorious" based on *Colorado River* abstention. *See Village Green at Sayville, LLC v. Town of Islip*, 2:17-CV-7391-DRH-ARL, 2019 U.S. Dist. LEXIS 167177, *30-*31 (E.D.N.Y. Sept. 27. 2019).

Defendants also seek dismissal contending that LIA failed to satisfy various pleading requirements for antitrust claims. LIA disagrees, believing that the Complaint more than

adequately pleads the existence of actual market power, an anticompetitive scheme, a conspiracy between Defendants to carry out that scheme, and the existence of antitrust injury. (Dkt 1.) LIA believes that these allegations more than satisfy the pleading requirements under *Twombly* and *Iqbal.* Finally, even if the Court were to find that the Complaint was deficient from a pleading standpoint, LIA would be able to request leave to amend and, upon amendment, cure any pleading deficiency. Thus, Defendants' pleading deficiency arguments do not meet its burden of establishing an "unmeritorious" claim.

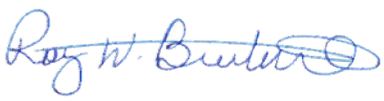
Second, Defendants have not established that the breadth and burden of discovery weigh in favor of a stay. In fact, as discussed above, LIA has sensibly proposed limited discovery that can be conducted during the pendency of the motion that will not impose any significant burden upon Defendants. LIA has even proposed working with Defendants to tailor the scope and eliminate any unnecessary burden. LIA's proposed course will enable the parties to "jump start" the discovery process with preliminary matters while the Court is considering the motions to dismiss. This will promote efficiencies and avoid unnecessary delays after the motions to dismiss are decided. Our proposed course here has been followed by this Court in other cases and represents, we submit, an appropriate balancing of the burdens. *See Doe* at *5 (denying stay to grant limited discovery); *Rivera* at *2 (same); *Osan*, at *2.

Finally, Defendants have not met its burden of establishing that the requested stay will not risk unfair prejudice to LIA. As the Complaint details, Defendants' conduct, particularly the dramatically reduced reimbursement rates, has had significantly profound effects on LIA's business to the point of requiring it to curtail certain services, cease hiring, and take other serious steps to abate the severe financial distress Defendants have caused. Accordingly, any delay in the process of this lawsuit has profound consequences on LIA and its ability to continue providing high quality services to its patients. Granting a stay here will most certainly delay the process of this lawsuit and, accordingly, should be avoided at all costs.

For these reasons, this Court should deny the requested stay.

Respectfully yours,

HARRIS BEACH PLLC



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