UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

LONG ISLAND ANESTHESIOLOGISTS PLLC,

Plaintiff,

Case No.: 2:22-cv-04040-HG

v.

UNITEDHEATLHCARE INSURANCE COMPANY OF NEW YORK INC., as Program Administrator, THE EMPIRE PLAN MEDICAL/SURGICAL PROGRAM and MULTIPLAN INC.,

Defendants.

MULTIPLAN, INC.'S MOTION TO
DISMISS PLAINTIFF'S COMPLAINT

PLEASE TAKE NOTICE THAT Defendant MultiPlan, Inc. ("MultiPlan"), by and through its undersigned counsel, will move the Honorable Hector Gonzalez of the United States District Court for the Eastern District of New York, located at 225 Cadman Plaza East, Brooklyn, New York, 11201, Courtroom 6A South, on a date and a time to be designated by the court for an Order, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, to dismiss the Complaint filed by Long Island Anesthesiologists PLLC ("Plaintiff"), because all of Plaintiff's causes of action against MultiPlan fail to state claims upon which relief can be granted.

MultiPlan requests that the Court dismiss the Complaint in its entirety with prejudice. This Motion is based on the Memorandum of Law filed concurrently herewith, all pleadings on file with this Court, and on such oral argument as may be presented at the hearing on this matter.

October 10, 2022

Respectfully Submitted,

/s/ Aimee Leigh Creed

Aimee Leigh Creed
d'Arcambal Ousley & Cuyler Burk LLP
40 Fulton Street
New York, NY 10038
Telephone: (212) 971-3175
Fax: (212) 971-3176
E-mail: acreed@darcambal.com

-and-

Errol J. King *(pro hac vice)*
Katherine C. Mannino *(pro hac vice)*
Taylor J. Crousillac *(pro hac vice)*
Phelps Dunbar LLP
II City Plaza
400 Convention Street, Suite 1100
Baton Rouge, LA 70802
Telephone: (225) 346-0285
Fax: (225) 381-9197
Email: errol.king@phelps.com
katie.mannino@phelps.com
taylor.crousillac@phelps.com

-and-

Craig L. Caesar *(pro hac vice)*
Phelps Dunbar LLP
365 Canal Street
Suite 2000
New Orleans, LA 70130
Telephone: (504) 584-9272
Fax: (504) 568-9130
E-mail: craig.caesar@phelps.com

Attorneys for Defendant MultiPlan, Inc.

CERTIFICATE OF SERVICE

I, Aimee L. Creed, certify that on October 10, 2022, I caused the foregoing Motion to Dismiss and Memorandum of Law in Support of the Motion to Dismiss to be filed with Clerk of the Court and served upon all counsel of record via the Court's CM/ECF system.

Dated: October 10, 2022

/s/ Aimee Leigh Creed
Aimee Leigh Creed

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

LONG ISLAND ANESTHESIOLOGISTS PLLC,

Plaintiff,

Case No.: 2:22-cv-04040-HG

v.

UNITEDHEATLHCARE INSURANCE COMPANY OF NEW YORK INC., as Program Administrator, THE EMPIRE PLAN MEDICAL/SURGICAL PROGRAM and MULTIPLAN INC.,

Defendants.

MULTIPLAN, INC.'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFF'S COMPLAINT

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

MEMORANDUM OF LAW 1

INTRODUCTION AND STATEMENT OF ISSUES TO BE DECIDED 1

PROCEDURAL AND FACTUAL BACKGROUND 2

ARGUMENT 5

I. Standard for Dismissal Under Rule 12(b)(6) 5

II. Plaintiff Has Failed to Meet the Plausibility Standard of Twombly/Iqbal 5

III. Plaintiff Has Failed to Make out Its Sherman Act Claims 7

IV. Plaintiff Has Failed to Make Out Its Donnelly Act Claims 10

V. Plaintiff Has No Unjust Enrichment Claim 11

CONCLUSION 12

TABLE OF AUTHORITIES

Page(s)

Cases

Abbott Lab'ys v. Adelphia Supply USA,
No. 15CV5826CBALB, 2017 WL 5992355 (E.D.N.Y. Aug. 10, 2017) 10

In re Aluminum Warehousing Antitrust Litig.,
833 F.3d 151 (2d Cir. 2016)... 9

Anderson News, L.L.C. v. Am. Media, Inc.,
680 F.3d 162 (2d Cir. 2012)...7, 8

Arista Records LLC v. Lime Grp. LLC,
532 F. Supp. 2d 556 (S.D.N.Y. 2007)...9

Armstrong v. McAlpin,
699 F.2d 79 (2d Cir. 1983)...8

Ashcroft v. Iqbal,
566 U.S. 662 (2009)...1, 6

Atlantic Richfield Co. v. USA Petroleum Co.,
495 U.S. 328 (1990)...9

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007)..1, 5, 6

Bilinski v. Keith Haring Found., Inc.,
96 F. Supp. 3d 35 (S.D.N.Y.), *aff'd in part*, 632 F. App'x 637 (2d Cir. 2015) 10

Biocad JSC v. F. Hoffmann-La Roche,
942 F.3d 88 (2d Cir. 2019)...10

Brunswick Corp. v. Pueblo Bowl–O–Mat, Inc.,
429 U.S. 477 (1977)...9

Cenedella v. Metro. Museum of Art,
348 F. Supp. 3d 346 (S.D.N.Y. 2018)...10

Concord Assocs., LP v. Entm't Props. Trust,
2014 WL 1396524 (S.D.N.Y. Apr. 9, 2014), *aff'd*, 817 F.3d 46 (2d Cir. 2016) 8

Concord Assocs., LP v. Entm't Props. Trust,
817 F.3d 46 (2d Cir. 2016)...7

In re Crude Oil Commodity Futures Litig.,
913 F. Supp. 2d 41 (S.D.N.Y. 2012)....................5

Eastway Constr. Corp. v. City of New York,
762 F.2d 243 (2d Cir.1985)....................8

Electronics Communications Corp. v. Toshiba America Consumer Prods.,
129 F.3d 240 (2d Cir.1997)....................9

G.K.A. Beverage Corp. v. Honickman,
55 F.3d 762 (2d Cir. 1995)....................8

Gatt Commc'ns, Inc. v. PMC Assocs., L.L.C.,
711 F.3d 68 (2d Cir. 2013)....................8, 10

Halebian v. Berv,
644 F.3d 122 (2d Cir. 2011)....................5

Hinds Cty., Miss. v. Wachovia Bank, N.A.,
620 F. Supp. 2d 499 (S.D.N.Y. 2009)....................8

Indyk v. Habib Bank Ltd.,
694 F.2d 54 (2d Cir.1982)....................11

Jaffe v. Capital One Bank
2010 WL 691639 (S.D.N.Y. Mar. 1, 2010)....................11

Joseph v. Corso, Acting Comm'r NY State Dep't of Civil Serv., et al.,
Index No. 902227-22....................2

Kaye v. Grossman,
202 F.3d 611 (2d Cir. 2000)....................11

Nat'l Gear & Piston, Inc. v. Cummins Power Sys., LLC,
861 F. Supp. 2d 344 (S.D.N.Y. 2012)....................10

Paramount Film Distrib. Corp. v. State,
30 N.Y.2d 415, 285 N.E.2d 695 (1972)....................11

Stolow v. Greg Manning Auctions Inc.,
258 F. Supp. 2d 236 (S.D.N.Y.), *aff'd*, 80 F. App'x 722 (2d Cir. 2003)....................8

Tarrytown House Condominiums v. Hainjie,
161 A.2d 310 (1st Dept. 1990)....................11

Todd v. Exxon Corp.,
275 F.3d 191 (2d Cir. 2001)....................9

Wolf Concept S.A.R.L. v. Eber Bros. Wine & Liquor Corp.,
736 F. Supp. 2d 661 (W.D.N.Y. 2010)....................5

Yankees Ent. & Sports Network, LLC v. Cablevision Sys. Corp.,
224 F. Supp. 2d 657 (S.D.N.Y. 2002)....................10

Yong Ki Hong v. KBS Am., Inc.,
951 F. Supp. 2d 402 (E.D.N.Y. 2013)....................11

Statutes

N.Y. Gen. Bus. Law § 340 *et seq.* (Donnelly Act)....................1, 2, 10, 11

N.Y. Financial Services Law §§ 601-08 (Surprise Bill Law)....................2, 3, 9

No Surprises Act (Pub. L. 116-210, Div. BB § 109)....................2, 3, 9

Sherman Act, Section 1, 15 U.S.C. § 1....................1, 2,7, 10, 11

Sherman Act, Section 2, 15 U.S.C. § 2....................1, 8

Other Authorities

Fed. R. Civ. P. 8(a)....................1, 5, 6

Fed. R. Civ. P. 10(c)....................2

Fed. R. Civ. P. 12(b)(6)....................1, 5

MEMORANDUM OF LAW

Defendant, MultiPlan, Inc. ("MultiPlan"), respectfully submits this Memorandum of Law in support of its Motion to Dismiss the Complaint ("Compl.") filed by Plaintiff, Long Island Anesthesiologists PLLC ("Plaintiff" or "LIA"), pursuant to Fed. R. Civ. P. 12(b)(6) (the "Motion"), as follows:

INTRODUCTION AND STATEMENT OF ISSUES TO BE DECIDED

This case has been brought by Plaintiff primarily as a federal and state antitrust case; however, the Complaint fails utterly to make out any such claims. As MultiPlan will demonstrate, Plaintiff has not satisfied the applicable pleading standards of the Federal Rules of Civil Procedure and further, has failed properly to allege essential elements of their claims. For this reason, their Complaint against MultiPlan should be dismissed.

Issues to be resolved by the Court in considering this Motion:

1. Has the Plaintiff failed to meet the "plausibility" standard of Fed. R. Civ. P. 8(a), as articulated by the United States Supreme Court in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 566 U.S. 662 (2009), thereby requiring the dismissal of all of its claims under Fed. R. Civ. P. 12(b)(6)?

2. Subsumed within the foregoing, has Plaintiff failed to allege a Sherman Act § 1 or § 2 violation against MultiPlan, for various reasons, thereby requiring dismissal of those claims?

3. Similarly, has Plaintiff failed to allege a Donnelly Act violation against MultiPlan, for various reasons, thereby requiring dismissal of that claim?

4. Has Plaintiff failed to make out a claim for unjust enrichment against MultiPlan?

The answer to each of these questions is simple and straightforward "*yes*." There is no cognizable federal or state antitrust claim presented; there is no claim for unjust enrichment under New York law. Dismissal of the Complaint with prejudice is therefore warranted.

PROCEDURAL AND FACTUAL BACKGROUND

This case was brought in this Court by LIA on July 11, 2022. [Dkt. 1]. On August 25, 2022, pursuant to this Court's July 21, 2022 Scheduling Order [Dkt. 8], the parties filed their Joint Letter. [Dkt. 16]. Thereafter, both MultiPlan and its co-defendant, United Healthcare Insurance Company of New York Inc. ("United"), filed Letters seeking a Pre-Motion Conference, confirming their respective intentions to file motions to dismiss. [Dkt. 20, 21]. On September 19, 2022, the Court directed that, in lieu of a Pre-Motion Conference, those defendants proceed to file their motions to dismiss.

As the Court is aware from the prior communications of the parties, Plaintiff is seeking to obtain additional reimbursement for claims submitted to United based on Plaintiff's view that the New York Surprise Bill Law, rather than the federal No Surprises Act, applies to such claims. Plaintiff has sought to advance that argument in a parallel state court proceeding in which MultiPlan is not a party. *See Joseph v. Corso, Acting Comm'r NY State Dep't of Civil Serv., et al.*, Index No. 902227-22. Not only United, but the State of New York itself, have taken the contrary position, as recently as Wednesday, August 31, 2022. *See id.*, Memorandum of Law in Support of Defendants' Motion to Dismiss [NYSCEF Doc. No. 69].

Plaintiff is using the case before this Court as another opportunity to advance its meritless position. Plaintiff has added MultiPlan as a defendant—based on the latter's provision of surprise-billing support services to United, which acts as the administrator of the self-funded Empire Plan—and has concocted baseless claims under the Sherman Act, and its New York State counterpart, the Donnelly Act.[1] The flaws in Plaintiff's antitrust claims are numerous and glaring. For that reason, the Complaint should be dismissed.[2]

---

[1] Plaintiff has also thrown in an unjust enrichment claim, arguing that somehow a benefit *from Plaintiff* has been bestowed upon MultiPlan through its receipt of fees paid by United for services rendered in the form of a percentage of savings. Under the applicable pleading standard, the plausibility of such allegations is utterly lacking.

[2] United is also filing today a Motion to Dismiss the Complaint. To the extent that the arguments raised by United apply to the claims asserted against MultiPlan, MultiPlan refers to, and by such reference, adopts the same herein. *See* Fed. R. Civ. P. 10(c).

Plaintiff alleges that it is a private anesthesiology practice located in West Islip, New York, and that it provides anesthesia services at Good Samaritan Hospital Medical center in that city. [Compl., at ¶¶ 19-20]. It also allegedly provides anesthesia services at physician offices and surgery centers around New York and Long Island. [*Id.* at ¶ 24]. Plaintiff has alleged that, insofar as it relates to this case, it is an "out-of-network" provider. [*Id.* at ¶¶ 38, 91–93]. Thus, there is no agreement between Plaintiff and United, as administrator of the Empire Plan, that sets specific rates of reimbursement for claims submitted to United in connection with services rendered by Plaintiff to Empire Plan beneficiaries. Instead, as alleged by Plaintiff, "[h]istorically, the Empire Plan reimbursed out-of-network physicians for providing covered medical services to Plan employees at amounts approximating the usual, customary, and reasonable (UCR) rate for the medical services in the geographic area where the services are provided." [*Id.* at ¶ 72]. Plaintiff further alleges that "[t]he UCR rate used by the Empire Plan for out-of-network reimbursement was determined using the benchmarking data bases maintained by FAIR Health . . . ." [*Id.* at ¶ 73]. Plaintiff also suggests that the enactment of the New York Surprise Bill Law in March 2015 maintained the *status quo* to Plaintiff's benefit and also provided a remedy for alleged under-reimbursement by United. [*Id.* at ¶¶ 81–90]. It is Plaintiff's dissatisfaction with more recent developments resulting in reimbursements lower than those previously received that have led to its dispute with United and to this litigation that has brought MultiPlan into the mix.

Plaintiff alleges that, following the enactment of the federal No Surprises Act in December 2020, and the statute becoming effective in January 2022, United determined that the Empire Plan was not subject to the New York Surprise Bill Law and would be treated like a non-governmental self-funded employee health plan under the No Surprises Act. [*Id.* at ¶¶ 95–97, 100]. As a result, Plaintiff alleges, the reimbursements it received from United were dramatically reduced. [*Id.* at ¶ 94]. Further, Plaintiff alleges that it "had no choice" but to employ the dispute resolution process of the federal law which it viewed less favorably than that in the New York statute. [*Id.* at ¶ 118]. Plaintiff goes on to allege that when it did so, it was informed by CMS, the responsible federal agent, that the "non-initiating entity," *i.e.*, the Empire Plan, had indicated that the federal dispute

resolution process was not applicable. [*Id.* at ¶ 121]. Thereafter, Plaintiff began to receive "written communications from MultiPlan, identifying itself as working with [United]." [*Id.* at ¶ 123]. Plaintiff then alleges that, on United's behalf, MultiPlan engaged in a series of communications that were designed to pressure Plaintiff to accept a "Qualifying Payment Amount" that was "significantly less than the FAIR Health-determined UCR amount" by requiring a response in a short timeframe and without the opportunity to negotiate a higher reimbursement. [*Id.* at ¶¶ 116, 124–26]. Plaintiff asserts that such conduct was "the height of bad faith" and "particularly disingenuous." [*Id.* at ¶¶ 128–33].

MultiPlan, of course, disputes these allegations. However, for purposes of the instant Motion, these facts are less significant than those which Plaintiff attempts to set forth as the basis for its antitrust claims; for it is the latter that the Court must scrutinize to determine whether this case can proceed. Although the Complaint sets forth numerous paragraphs purportedly describing "anti-competitive harm" and "anti-competitive motives," [*id.* at ¶¶ 134–39, 141-151], and further seeks to document the existence of a relevant product and geographic market in which the Defendants exercise market power, [*id.* at ¶¶ 152–58,[3] 160–62], containing allegations of *United's* market power, [*id.* at ¶¶ 163–72], the Complaint is silent as to any market power possessed or exercised by MultiPlan. Moreover, nowhere is it alleged that MultiPlan is a competitor of Plaintiff, and nowhere is it alleged that United and MultiPlan compete with each other. Finally, the Complaint contains vague and conclusory allegations concerning harm to competition. [*Id.* at ¶¶ 179–81].

The inadequacy of Plaintiff's allegations, as well as the lack of other allegations needed to make out valid claims, is ultimately fatal to Plaintiff's cause.

---

[3] In paragraph 159 of the Complaint, Plaintiff claims "the relevant "product market" here is the New York metropolitan area." MultiPlan is perplexed by such an allegation, since it is difficult to understand how a city and its environs can be a product.

ARGUMENT

I. Standard For Dismissal Under Rule 12(b)(6)

"The purpose of Federal Rule of Civil Procedure 12(b)(6) 'is to test, in a streamlined fashion, the formal sufficiency of the plaintiff's statement of a claim for relief without resolving a contest regarding its substantive merits'" or "weigh[ing] the evidence that might be offered to support it." *Halebian v. Berv,* 644 F.3d 122, 230 (2d Cir. 2011) (quoting *Global Network Commc'ns, Inc. v. City of New York,* 458 F.3d 150, 155 (2d Cir. 2006)). A court therefore must ordinarily confine itself to the four corners of the complaint and look only to the allegations contained therein. *Id*.

While "[t]here is no heightened pleading requirement in antitrust cases," *In re Crude Oil Commodity Futures Litig*., 913 F. Supp. 2d 41, 54 (S.D.N.Y. 2012), "a plaintiff must do more than cite relevant antitrust language to state a claim for relief." *Wolf Concept S.A.R.L. v. Eber Bros. Wine & Liquor Corp.,* 736 F. Supp. 2d 661, 667 (W.D.N.Y. 2010) (citing *Todd v. Exxon Corp.*, 275 F.3d 191, 198 (2d Cir. 2001)). "A plaintiff must allege sufficient facts to support a cause of action under the antitrust laws. Conclusory allegations that the defendant violated those laws are insufficient." *Id.* at 667–68 (quoting *Kasada, Inc. v. Access Capital, Inc.*, No. 01 Civ. 8893 (GBD), 2004 WL 2903776, at *3 (S.D.N.Y. Dec. 14, 2004)).

Plaintiff has failed to satisfy the requisite pleading standard set forth above; the Complaint should therefore be dismissed with prejudice.

II. Plaintiff Has Failed to Meet the Plausibility Standard of Twombly/Iqbal.

Cutting across all of the allegations in the Complaint is one fundamental flaw: Plaintiff has failed to present a plausible claim as required by *Twombly/Iqbal* alleging that MultiPlan (or United) has done anything improper or illegal by engaging in contractual dealings to control excessive healthcare costs.

Fed. R. Civ. P. 8 provides that a pleading "must contain ... a short and plain statement of the claim showing that the pleader is entitled to relief." Pleadings that are conclusory are not acceptable; there must be factual allegations that are sufficient to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Twombly*, 550 U.S. at 550 (2007)

(internal quotation marks omitted). "Rule 8(a) 'contemplates the statement of circumstances, occurrences, and events in support of the claim presented' and does not authorize a pleader's 'bare averment that he wants relief and is entitled to it.'" *Id.* at 555 n. 3. For a complaint to be sufficient, the claim asserted must be one that, in light of the factual allegations, is at least, "plausible." *Id.* at 570. To present a plausible claim, the "pleading must contain something more ... than ... a statement of facts that merely creates a suspicion [of] a legally cognizable right of action." *Id.* at 555 (internal quotation marks omitted).

In *Iqbal*, the Supreme Court explained that courts considering motions to dismiss should adopt a "two-pronged approach" in applying these principles: (1) eliminate any allegations in the complaint that are merely legal conclusions; and (2) where there are well-pleaded factual allegations, "assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Iqbal*, 566 U.S. at 679.[4]

Applying those working principles to the Complaint in this matter leads to the inevitable conclusion that Plaintiff has not made out a plausible case in any of the Counts against MultiPlan. All that is involved here is MultiPlan providing services to its client United, as the administrator of the Empire Plan, pursuant to an above-board commercial arrangement. MultiPlan has not been alleged to be (1) a competitor of Plaintiff; (2) a competitor of United; or (3) an entity that possesses or exercises market power in any properly defined relevant product or geographic market. Further, outside of conclusory allegations, MultiPlan has not been shown to be a co-conspirator, or an aider or abettor of United, as the essential elements of such claims are missing. Finally, there has been no proper allegation of an *antitrust* injury caused by MultiPlan. Careful perusal of the Complaint discloses that these is no antitrust claim here, despite Plaintiff's attempt to craft one. Whatever Plaintiff's view of recent events, injury to competition attributable to MultiPlan has not been pled, nor is it discernable, let alone plausible.

---

[4] Importantly, the Court held in *Iqbal*, as it had in *Twombly*, that courts may infer from the factual allegations in the complaint, "obvious alternative explanation[s]," which suggest lawful conduct rather than the unlawful conduct the plaintiff would ask the court to infer. *Iqbal,* 566 U.S. at 682 (quoting *Twombly*, 550 U.S. at 567).

III. Plaintiff Has Failed to Make Out Its Sherman Act Claims.

Plaintiff alleges violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1-2. [Compl., ¶¶ 184, 189–91, 194–96]. To survive a motion to dismiss, a Sherman Act claim must "(1) define the relevant geographic market, (2) allege an antitrust injury, and (3) allege conduct in violation of antitrust laws." *Concord Assocs., LP v. Entm't Props. Trust*, 817 F.3d 46, 52 (2d Cir. 2016). "For antitrust purposes, the concept of market has two components: a product market and a geographic market." *Id*. "Taken together, the product and geographic components illuminate the relevant market analysis, which is essential for assessing the potential harm to competition from the defendants' alleged misconduct." *Id.* at 52–53. "And this analysis is equally applicable to claims made under Section Two of the Sherman Act, because 'without a definition of that market there is no way to measure the defendant's ability to lessen or destroy competition.'" *Id.* at 53. Plaintiff fails to meet this standard. Other than conclusory allegations that lack appropriate economic justification, Plaintiff's allegations as to the existence of relevant markets are superficial, at best, and again, fail to lay the foundation for the existence of market power. That is incontestably the case with respect to MultiPlan, where there is not one allegation that shows MultiPlan has or exercises such power in *any* market. And again, the failure to allege that MultiPlan is a competitor of Plaintiff *or* United is fatal to Plaintiff's antitrust claims, especially that based on Section 1 of the Sherman Act, where an agreement *between competitors* that unreasonably restrains trade is the *sine qua non* of a violation of the statute.[5]

Plaintiff also alleges an anticompetitive conspiracy. [Compl., ¶¶ 175, 185–86]. At the pleading stage, a complaint claiming conspiracy, to be plausible, must plead "enough factual matter (taken as true) to suggest that an agreement was made," *i.e.,* it must provide "some factual context suggesting [that the parties reached an] agreement," not facts that would be "merely consistent with an agreement." *Anderson News, L.L.C. v. Am. Media, Inc*., 680 F.3d 162, 184 (2d Cir. 2012) (quoting *Twombly*, 550 U.S. at 556, 549, 557). "Conclusory allegations of

[5] One also searches in vain for allegations in the Complaint that demonstrate such an unreasonable restraint of trade.

'participation' in a 'conspiracy' have long been held insufficient to state a claim." *Id.* at 182 (citations omitted). This precisely describes Plaintiff's allegations.

Moreover, Plaintiff has not established the necessary elements of a conspiracy. "Circumstances must reveal 'a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement.'" *Anderson News*, 680 F.3d at 183 (quoting *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764 (1984)); *Hinds Cty., Miss. v. Wachovia Bank, N.A.*, 620 F. Supp. 2d 499, 515 (S.D.N.Y. 2009) (where antitrust complaint names multiple defendants, plaintiff must "make allegations that plausibly suggest that each defendant participated in the alleged conspiracy."). "[D]efendants are entitled to know how they are alleged to have conspired, with whom, and for what purpose." *Concord Assocs., LP v. Entm't Props. Trust*, 2014 WL 1396524, at *23 (S.D.N.Y. Apr. 9, 2014), *aff'd*, 817 F.3d 46 (2d Cir. 2016). There is no plausible conspiracy alleged here.

Also, Plaintiff has not shown that MultiPlan is an aider and abettor of any alleged misconduct by United, even if the same were to be properly pled as a violation of Section 2 of the Sherman Act. In *Stolow v. Greg Manning Auctions Inc.*, 258 F. Supp. 2d 236, 250 (S.D.N.Y.), *aff'd*, 80 F. App'x 722 (2d Cir. 2003), the court stated that to "allege aiding and abetting, a plaintiff must claim: (1) a violation of law by the primary party; (2) knowledge of the violation by the aider and abettor; and (3) 'substantial assistance' by the aider and abettor in achieving the primary violation." (Citations omitted). *See also Armstrong v. McAlpin*, 699 F.2d 79, 91 (2d Cir. 1983) (same). None of those elements have been alleged in the Complaint. Therefore, there is no basis to proceed further if this is the theory which Plaintiff seeks to advance.

Plaintiff must also demonstrate that it has antitrust standing. "[A]ntitrust standing is a threshold, pleading-stage inquiry and when a complaint by its terms fails to establish this requirement [the Court] must dismiss it as a matter of law." *Gatt Commc'ns, Inc. v. PMC Assocs., L.L.C.*, 711 F.3d 68, 75 (2d Cir. 2013). A plaintiff only has standing if he suffered an antitrust injury. *See G.K.A. Beverage Corp. v. Honickman*, 55 F.3d 762, 766 (2d Cir. 1995); *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 250 (2d Cir.1985). An antitrust injury is "injury

of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Atlantic Richfield Co. v. USA Petroleum Co*., 495 U.S. 328, 344 (1990). "The injury should reflect the anticompetitive effect either of the violation or of the anticompetitive acts made possible by the violation." *Brunswick Corp. v. Pueblo Bowl–O–Mat, Inc.*, 429 U.S. 477, 489 (1977).

"An antitrust plaintiff must allege not only cognizable harm to [himself], but an adverse effect on competition market-wide." *Todd*, 275 F.3d at 213; *Electronics Communications Corp. v. Toshiba America Consumer Prods.*, 129 F.3d 240, 242 (2d Cir. 1997). The plaintiff must allege "that the challenged action has had an *actual* adverse effect on competition as a whole in the relevant market." *Id.* (emphasis in original).

"To satisfy the antitrust standing requirement, a private antitrust plaintiff must plausibly allege that (i) it suffered an antitrust injury and (ii) it is an acceptable plaintiff to pursue the alleged antitrust violations." *In re Aluminum Warehousing Antitrust Litig*., 833 F.3d 151, 156 (2d Cir. 2016). "To demonstrate antitrust injury, 'a plaintiff must show (1) an injury-in-fact; (2) that has been caused by the violation; and (3) that is the type of injury contemplated by the statute.'" *Arista Records LLC v. Lime Grp. LLC,* 532 F. Supp. 2d 556, 568 (S.D.N.Y. 2007) (quoting *Blue Tree Hotels Inv. (Can.), Ltd. v. Starwood Hotels & Resorts Worldwide, Inc.*, 369 F.3d 212, 220 (2d Cir. 2004)).

It is hard to fathom how Plaintiff can have suffered *antitrust* injury in this case, particularly if MultiPlan is alleged to be the source/cause of any damages suffered by Plaintiff that affect competition. While Plaintiff does pay lip service to the concept of injury to competition by suggesting that other providers of anesthesia services that have submitted claims to United as the third party administrator of the Empire self-funded health plan have been impacted, the allegations are so sparse and non-specific as to render them meaningless. Moreover, it is impossible to discern how anything that MultiPlan is alleged to have done with respect to communicating with Plaintiff following United's guidance as to application of the federal No Surprises Act to the exclusion of the New York Surprise Bill Law is the cause of any damages

allegedly suffered by Plaintiff, let alone any injury to competition in general (assuming the existence of a relevant market which, as has been shown, has not been properly alleged).

For all of the foregoing reasons, to the extent that they even implicate MultiPlan, the First, Second and Third Causes of Action in the Complaint should be dismissed with prejudice.

IV. Plaintiff Has Failed to Make Out Its Donnelly Act Claim.

"New York's Donnelly Act . . . is modeled after the Sherman Act and 'should generally be construed in light of Federal precedent.'" *Biocad JSC v. F. Hoffmann-La Roche*, 942 F.3d 88, 101 (2d Cir. 2019) (quoting *Gatt Commc'ns, Inc. v. PMC Assocs., LLC*, 711 F.3d 68, 81 (2d Cir. 2013)); *see also Cenedella v. Metro. Museum of Art*, 348 F. Supp. 3d 346, 362–63 (S.D.N.Y. 2018) ("The Donnelly Act is generally coextensive with the Sherman Act unless state policy, differing language, or legislative history suggests otherwise."); *Bilinski v. Keith Haring Found., Inc*., 96 F. Supp. 3d 35, 43 n.6 (S.D.N.Y.), *aff'd in part*, 632 F. App'x 637 (2d Cir. 2015) (analyzing Sherman Act and Donnelly Act claims collectively because there was no state policy or legislative history that would require a different interpretation of the Donnelly Act under the circumstances).

Insofar as Plaintiff seeks to make out a Donnelly Act claim, it must meet the same pleading requirements as are needed to establish its Sherman Act claims. "The standard for a well-pleaded Donnelly Act claim is the same as a claim under Section 1 of the Sherman Act." *Nat'l Gear & Piston, Inc. v. Cummins Power Sys., LLC*, 861 F. Supp. 2d 344, 370 (S.D.N.Y. 2012). "A party asserting a violation of the Donnelly Act must (1) identify the relevant product market, (2) describe the nature and effects of the purported conspiracy, (3) allege how the economic impact of that conspiracy is to restrain trade in the market in question, and (4) show a conspiracy or reciprocal relationship between two or more entities." *Yankees Ent. & Sports Network, LLC v. Cablevision Sys. Corp.*, 224 F. Supp. 2d 657, 678 (S.D.N.Y. 2002).

The Second Circuit has found that there is "no reason . . . to interpret the Donnelly Act differently than the Sherman Act with regard to antitrust standing." *Gatt Commc'ns, Inc.,* 711 F.3d at 81 (2d Cir. 2013); *see also Abbott Lab'ys v. Adelphia Supply USA*, No. 15CV5826CBALB, 2017 WL 5992355, at *9 (E.D.N.Y. Aug. 10, 2017) (citing *Gatt* and finding lack of standing for

Donnelly Act claim for "the same reasons" that the plaintiff lacked antitrust standing to pursue its Sherman Act claims); *Yong Ki Hong v. KBS Am., Inc*., 951 F. Supp. 2d 402, 419 (E.D.N.Y. 2013) (citing *Gatt* and dismissing Donnelly Act and Sherman Act claims for lack of antitrust standing).

Because the Complaint lacks the necessary allegations to make out viable Sherman Act claims against MultiPlan, it follows that it fails to make out comparable claims under the Donnelly Act. Accordingly, Plaintiffs' Fourth Cause of Action should be dismissed with prejudice.

V. <u>Plaintiff Has No Unjust Enrichment Claim.</u>

Finally, in its Fifth Cause of Action, Plaintiff asserts in general terms an unjust enrichment claim against both Defendants. "To state a cause of action for unjust enrichment, a plaintiff must allege that it conferred a benefit upon the defendant, and that the defendant will obtain such benefit without adequately compensating plaintiff therefor." *Tarrytown House Condominiums v. Hainjie*, 161 A.2d 310, 313 (1st Dept. 1990); *Kaye v. Grossman*, 202 F.3d 611, 616 (2d Cir. 2000). "[O]n a theory of unjust enrichment, there must first be enrichment." *Indyk v. Habib Bank Ltd.,* 694 F.2d 54, 57 (2d Cir.1982); *see also Jaffe v. Capital One Bank* 2010 WL 691639 (S.D.N.Y. Mar. 1, 2010) (noting "[t]he absence of an allegation that Defendants *tangibly* benefitted at Jaffe's expense") (emphasis added). Here, there is no detailed allegation that Plaintiff bestowed a benefit on MultiPlan. Plaintiff attempts to show that enrichment occurred "by . . . [Defendants] . . . receiving fees and retaining reimbursement . . . ." [Compl., at ¶ 205]. However, that is insufficient, as there is no specificity whatsoever as to the fees or reimbursements involved. moreover, there is no showing that Plaintiff was entitled to the amounts of reimbursement it sought, so that it cannot establish that something was improperly taken from it.[6]

Based on the foregoing, Plaintiff's Fifth Cause of Action should also be dismissed with prejudice.

---

[6] When considering an unjust enrichment claim, a court's "essential inquiry" is one of "equity and good conscience." *Paramount Film Distrib. Corp. v. State,* 30 N.Y.2d 415, 421, 285 N.E.2d 695 (1972). Although Plaintiff alludes to those terms in its Complaint, there is nothing to suggest that either equity or good conscience have been offended here.

CONCLUSION

For the forgoing reasons, as well as those set forth in United's motion papers, Defendant MultiPlan, Inc., respectfully asks the Court to dismiss with prejudice the Complaint of Plaintiff Long Island Anesthesiologists PLLC.

October 10, 2022

Respectfully Submitted,

/s/ Aimee Leigh Creed
Aimee Leigh Creed
D'Arcambal Ousley & Cuyler Burk LLP
40 Fulton Street
New York, NY 10038
Telephone: (212) 971-3175
Fax: (212) 971-3176
E-mail: acreed@darcambal.com

-and-

Errol J. King *(pro hac vice)*
Katherine C. Mannino *(pro hac vice)*
Taylor J. Crousillac *(pro hac vice)*
Phelps Dunbar LLP
II City Plaza
400 Convention Street, Suite 1100
Baton Rouge, LA 70802
Telephone: (225) 346-0285
Fax: (225) 381-9197
Email: errol.king@phelps.com
katie.mannino@phelps.com
taylor.crousillac@phelps.com

-and-

Craig L. Caesar *(pro hac vice)*
Phelps Dunbar LLP
365 Canal Street
Suite 2000
New Orleans, LA 70130
Telephone: (504) 584-9272
Fax: (504) 568-9130
E-mail: craig.caesar@phelps.com

Attorneys for Defendant MultiPlan, Inc.