UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

LONG ISLAND ANESTHESIOLOGISTS PLLC, Plaintiff, vs UNITEDHEALTHCARE INSURANCE COMPANY OF NEW YORK INC., as Program Administrator, THE EMPIRE PLAN MEDICAL/SURGICAL PROGRAM and MULTIPLAN INC., Defendants.	Index No. 2:22-cv-04040 Hon. Hector Gonzalez

UNITEDHEALTHCARE INSURANCE COMPANY OF NEW YORK'S
REPLY SUPPORTING ITS MOTION TO DISMISS

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In its opposition brief, LIA muddles the law, misstates its own factual allegations, and ignores the most glaring defects plaguing its antitrust theories. None of that changes the reality that LIA's antitrust theories are flawed on every level. LIA's Complaint should be dismissed.

ARGUMENT

I. THIS COURT SHOULD ABSTAIN UNDER *COLORADO RIVER* BECAUSE LIA IS ACTIVELY LITIGATING THIS CASE'S CENTRAL QUESTION IN A PARALLEL STATE ACTION.

This Court should abstain under *Colorado River* because LIA is actively litigating this case's threshold legal question—whether the Empire Plan is subject to New York's Surprise Bill Law or the federal No Surprises Act—in a parallel state action, *Joseph et al. v. Corso et al.*, No. 902227-22 (N.Y. Sup. Ct.), Dkt. 31-1 (Mot.) at 8–12. LIA responds only by arguing that abstention is inappropriate because its antitrust claims do not turn on which law governs the Empire Plan's reimbursements. The Complaint proves otherwise.

Hoping to put distance between its antitrust claims and the legal issue in the state action, LIA argues that United engaged in anticompetitive conduct "before the No Surprises Act was enacted in December 2020." Dkt. 42 ("Opp.") at 7. But LIA's only support for that assertion is an allegation concerning negotiations between United and Good Samaritan Hospital in 2012—a decade before the No Surprises Act—where United purportedly "pressur[ed]" LIA to become an in-network provider. Compl. ¶ 92. But LIA does not contend that those 2012 negotiations were unlawful, much less an antitrust violation (which in any event would be time-barred). Instead, LIA alleges that it remained an out-of-network provider for the Empire Plan and profited as a result. But two paragraphs later, LIA alleges that "[a]ll [that] changed since January 1, 2022," when the Empire Plan began following the No Surprises Act. Compl. ¶ 94.

Those allegations confirm that the Department of Civil Service's (DCS) decision to follow the No Surprises Act is at the root of LIA's antitrust claim. LIA argues that the question about

which law governs the Empire Plan's reimbursements is "[a]t most . . . only relevant to damages." Opp. 8. That is nothing more than a dodge. DCS chose (correctly) to follow the federal No Surprises Act, and that decision forecloses LIA's claims, which hinge entirely on its contention that it is entitled to reimbursement rates that allegedly would apply under the New York Surprise Bill Law.[1] Although LIA complains about "United's post-No Surprises Act practices" and MultiPlan's communications that put "extreme pressure on anesthesia providers" to accept low reimbursement rates (*id.* at 7), the only damages that LIA alleges turn on DCS's decision to follow the No Surprises Act, which LIA alleges has resulted in reimbursements at the Qualifying Payment Amount instead of the UCR amount permitted under the New York regime. Compl. ¶ 116.

The only reasonable reading of LIA's Complaint—which copies 40-plus paragraphs from the *Joseph* action—is that LIA's antitrust claims are predicated on its view that DCS incorrectly followed the No Surprises Act. LIA fails to explain how antitrust liability or damages can exist if DCS's statutory interpretation is correct. So this Court must decide whether the Empire Plan is subject to New York's Surprise Bill Law or the federal No Surprises Act, which creates a potential "for inconsistent and mutually contradictory determinations" that "would cause friction between state and federal courts." *De Cisneros v. Younger*, 871 F.2d 305, 308 (2d Cir. 1989). This Court should abstain and "wait[] for the state court to speak first" on this issue. *Id.* at 309.

II. LIA FAILS TO RESPOND TO UNITED'S ARGUMENT THAT DCS IS REQUIRED TO FOLLOW THE NO SURPRISES ACT.

United has argued that LIA's claims must be dismissed because DCS properly applied the No Surprises Act. Mot. 12–13. LIA did not respond to that argument, so it has conceded that issue. *See Napoli v. Nat'l Sur. Corp.*, 2022 U.S. Dist. LEXIS 90420, at *16 (S.D.N.Y. May 19, 2022)

[1] Even if DCS/the Empire Plan erred in applying the federal No Surprises Act—they did not—the fact that DCS (and not United) made that choice undermines LIA's claims.

("Plaintiffs did not address that argument in their opposition, and, on that basis alone, may be deemed to have conceded the point."); *Canas v. Whitaker*, 2019 U.S. Dist. LEXIS 89812, at *7 (W.D.N.Y. May 29, 2019) (similar). Because that is a dispositive issue in the case (*see* Section I), LIA's Complaint should be dismissed. *Guzman v. Macy's Retail Holdings, Inc.*, 2010 U.S. Dist. LEXIS 29544, at *26 (S.D.N.Y. Mar. 29, 2010) ("'[F]ailure to adequately brief an argument constitutes waiver of that argument' at [the] motion to dismiss stage.").

III. LIA FAILS TO PLEAD FACTS ESTABLISHING ANTITRUST INJURY.

LIA acknowledges that "a health plan lowering reimbursement rates to a physician practice" is generally insufficient to establish antitrust injury. Opp. 13; *see also Kartell v. Blue Cross Blue Shield of Mass., Inc.*, 749 F.2d 922, 925 (1st Cir. 1984) ("Antitrust law rarely stops the buyer of a service from trying to determine the price or characteristics of the product that will be sold.").[2] Nonetheless, LIA argues that reduced reimbursements can constitute antitrust injury if accompanied by "something more." Opp. 13. LIA argues that the "something more" in this case is that United "exercise[d] its monopsony power to lower reimbursement rates in part through a horizontal conspiracy" with MultiPlan and was "motivate[ed] . . . to competitively hobble [LIA's anesthesia] practice for the benefit of OptumCare, a United affiliate." *Id.* at 15. LIA misstates the law, and in any case, its arguments are not supported by the Complaint's factual allegations.

LIA's own cases make clear that United does not violate the antitrust laws merely by negotiating for reduced reimbursement rates. *See, e.g.*, *West Penn. Allegheny Health Sys. v. UPMC*, 627 F.3d 85, 103 (3d Cir. 2010) ("[H]ad Highmark been acting alone, West Penn would have little basis for challenging the reimbursement rates. A firm that has substantial power on the

[2] *See also Mich. State Podiatry Ass'n v. Blue Cross & Blue Shield of Mich.*, 671 F. Supp. 1139, 1152 (E.D. Mich. 1987) (an argument "that podiatrists make less money from BCBSM than previously . . . is insufficient to state an antitrust violation").

buy side of the market (*i.e.*, monopsony power) is generally free to bargain aggressively when negotiating the prices it will pay for goods and services."). LIA cites cases showing that antitrust injury may exist when two independent actors, each representing "independent centers of decisionmaking," conspire to set low reimbursements. *Id.* (citing *Am. Needle, Inc. v. NFL*, 560 U.S. 183, 190 (2010)); *see also Omnicare, Inc. v. UnitedHealth Grp., Inc.*, 524 F. Supp. 2d 1031, 1040–42 (finding antitrust injury in case alleging a "buyers' cartel" between multiple insurers to drive down reimbursement rates). But those sorts of facts are not alleged here.

Although LIA argues that it has alleged "a horizontal conspiracy," MultiPlan and United are not horizontal competitors. *See In re Aluminum Warehousing Antitrust Litig.*, 2014 U.S. Dist. LEXIS 121435, at *114 (S.D.N.Y. Aug. 29, 2014) ("Plaintiffs claim to have alleged a horizontal conspiracy in restraint of trade, but they do not allege that . . . defendants are horizontal competitors. In the absence of the latter, the former cannot be correct."). And even setting aside disagreements about whether United has any power over pricing, LIA has alleged expressly that MultiPlan, in its capacity as a billing vendor, had no authority to modify the rates offered to LIA. *See* Compl. ¶¶ 126–29.

LIA cites to a later unpublished decision in *Anesthesia Associates* (a case cited by United), noting that the court took a second look at the antitrust injury arguments on a motion for leave to file an amended complaint. *See* Opp. 15. But LIA ignores that the court also denied the motion for leave as to most of the antitrust claims after concluding that there were no plausible allegations of a horizontal conspiracy between the insurer and the hospital system. Dkt. 41-5 at 20–21. The only claim allowed to proceed involved allegations of a horizontal conspiracy among insurers. *Id.* at 26–31. Those sorts of allegations don't exist here.

And there is no case suggesting that a "motivation to hobble" a business can transform permissible aggressive bidding into an antitrust injury. But even if such a case existed, LIA's allegations that United was motivated to drive LIA out of business to benefit a sister company (OptumCare) are implausible. *See* Mot. 21–23. LIA offers no factual allegations suggesting that OptumCare—which employs less than 1% of anesthesiologists in the alleged market (Mot. 22–23)—has the capacity or ability to capture business through Good Samaritan Hospital if LIA goes out of business. LIA's argument is pure implausible speculation.

In the end, LIA has alleged nothing more than a single anesthesia practice's dissatisfaction with reduced reimbursements offered under a single health plan for a limited category of surprise bills. LIA's speculation that anesthesiologists will go out of business or that patient care will decline doesn't pass muster. The Empire Plan has followed the No Surprises Act for almost a year, yet LIA does not allege that a single doctor has quit offering its services as a result. LIA has failed to allege the sort of market-wide injury to competition that is necessary to establish antitrust injury.

IV. A LONGSTANDING BUSINESS RELATIONSHIP DOES NOT CONSTITUTE A SECTION 1 CONSPIRACY.

LIA's Section 1 and Donnelly Act claims fail because LIA does not allege a plausible conspiracy between United and MultiPlan. To plead a Section 1 claim, LIA must offer "direct or circumstantial evidence that reasonably tends to prove that the defendant and others had a conscious commitment to a common scheme designed to achieve an unlawful objective." *See Caithness Long Island II, LLC v. SEG Long Island LLC*, 2019 U.S. Dist. LEXIS 174866, at *9 (E.D.N.Y. Sep. 30, 2019). LIA, however, never explains what United and MultiPlan agreed to do, let alone offers factual allegations establishing the formation of an unlawful agreement.

At most, LIA complains that United and MultiPlan have a "comprehensive and longstanding business relationship" (Opp. 21) and that, while serving as United's vendor,

MultiPlan used pressure tactics to compel providers to accept lower reimbursement rates. *Id.* at 17. But a longstanding business relationship does not by itself constitute an illegal Section 1 agreement, and LIA offers no factual allegations showing a "conscious commitment" to engage in unlawful conduct. *See, e.g.*, *In re Dairy Farmers of Am., Inc. Cheese Antitrust Litig.*, 801 F.3d 758, 763 (7th Cir. 2015) (rejecting conspiracy claim where defendants' communications "could be understood as a part of a legitimate business relationship as readily as they could be understood as a part of a conspiracy" and there was no "single communication that suggests a meeting of the minds to fix prices"); *In re January 2021 Short Squeeze Trading Litig.*, 2021 U.S. Dist. LEXIS 221509, at * 73 (S.D. Fla. Nov. 17, 2021) (allegations that one defendant "is an important business partner of the other Defendants" insufficient to support plausible inference of conspiracy).

Rather than pointing to allegations reflecting a conscious commitment to an unlawful scheme, LIA undermines its position by arguing that MultiPlan provides identical services for "other health plan clients," including Cigna, Anthem, Centene, and Humana—relationships that LIA says are similarly "quite deep and longstanding."[3] Opp. 19. LIA offers no explanation as to how the MultiPlan/United relationship differs from MultiPlan's relationship with its many other clients. Considering that MultiPlan performs the same services for its other clients, the "obvious alternative explanation to the facts underlying the alleged conspiracy" is that United and MultiPlan are engaged in normal business dealings. *Relevent Sports, LLC v. Fédération Internationale De Football Ass'n*, 551 F. Supp. 3d 120, 128 (S.D.N.Y. 2021).

LIA's other scattershot arguments don't make its conspiracy claim any more plausible. The fact that MultiPlan has a shared profit motive (Opp. 18) is insufficient to transform a business

[3] LIA alludes to a California state court complaint against MultiPlan that alleges a hub-and-spoke conspiracy. Opp. 20–21. But LIA is not alleging a hub-and-spoke conspiracy in this case, and the allegations in the California case have nothing to do with this lawsuit.

relationship into a conspiracy claim. *See In re Zinc Antitrust Litig.*, 155 F. Supp. 3d 337, 372 (S.D.N.Y. 2016) ("motive to conspire" insufficient to "push[] plaintiffs' conspiracy claim across the line from conceivable to plausible"). Nor is it relevant that United is MultiPlan's largest customer. Opp. 20. Instead, LIA must offer facts showing the existence of a conscious commitment to unlawful scheme. Those allegations do not exist.

V. LIA'S CONSPIRACY CLAIMS DO NOT SATISFY THE RULE OF REASON.

LIA cannot satisfy the rule of reason because its Complaint does not "identify the relevant market affected by the challenged conduct and allege an actual adverse effect on competition in the identified market." *Relevent Sports*, 551 F. Supp. 3d at 128. In its opening brief, United explained that LIA's rule-of-reason claims fail because neither United nor MultiPlan participate in the purported relevant market for the "provision of medically necessary anesthesia services to patients" and thus could not have abused any non-existent power in that market. Mot. 21. In response, LIA argues that, while United does not provide anesthesia services, it nonetheless "participates in that market as a payer of anesthesia services," focusing on United's general commercial business. Opp. 29–30. But LIA's own allegations foreclose that argument.[4]

This case does not concern United's general commercial business, so United's share "of the commercial health insurance market" (Opp. 30) is irrelevant. Instead, LIA's allegations focus exclusively on reimbursements under the Empire Plan. But United does not fund benefits for the Empire Plan; it is merely a third-party administrator. "United, as the administrator, processes and handles claims made by beneficiaries of the Empire Plan." *Uddoh v. United Healthcare*, 2017 U.S. Dist. LEXIS 19415, at *8 (E.D.N.Y. Feb. 10, 2017). DCS is responsible for payments. *Id.* at *8–9 ("[B]ecause the Empire Plan is self-insured, the Department of Civil Service bears all

[4] United disputes that LIA has adequately pleaded a relevant product and geographic market, but stands on its initial briefing for those arguments. Mot. 19–20.

responsibility for claims and expenses under or against it . . . ."). So even with LIA's attempted pivot, it still has not shown that United "participates in that market as a payer of anesthesia services" for the only health plan that matters in this case. Opp. 29–30.

Avoiding United's limited role as a third-party administrator, LIA argues that the Court need not assess market power (or lack thereof) because it has alleged direct evidence of adverse effects in the market. LIA argues that it has alleged concrete allegations that anesthesia practices are failing, laying off staff, reducing their footprint, ceasing recruitment of new doctors, and declining to purchase new supplies. Opp. 28. But none of that is in the Complaint. Instead, the Complaint offers nothing more than a speculative set of allegations about what will happen in the future. *See* Compl. ¶¶ 135–37 (claiming that anesthesia practices "*will* be forced to go out of business" or "*will* be severely hampered in their ability to recruit and retain" physicians). On a motion to dismiss, the court must assess the allegations in the complaint; LIA "is not permitted to interpose new factual allegations or a new legal theory in opposing a motion to dismiss." *Uddoh v. United Healthcare*, 254 F. Supp. 3d 424, 429 (E.D.N.Y. 2017); *see also Ulrich v. Moody's Corp.*, 2014 U.S. Dist. LEXIS 145898, at *91 (S.D.N.Y. Mar. 31, 2014) (dismissing plaintiff's Section 1 claim where plaintiff asserted that the "alleged agreement has harmed competition . . . generally, but fail[ed] to back up [the] assertion with any facts").

VI. LIA FAILS TO ALLEGE PLAUSIBLE SECTION 2 MONOPSONY CLAIMS (COUNTS II AND III).

LIA's monopsonization claims fail because there are no allegations showing that United possessed monopsony power in the alleged relevant market or that it acquired or maintained monopsony power through anticompetitive or exclusionary conduct.

LIA's market power arguments fail because LIA misstates its own market. In its brief, LIA says the market for its Section 2 claims is "the market for the *delivery* of anesthesia services." Opp.

32 (emphasis added). But in its Complaint, LIA alleges that "United possesses monopsony power in the market for the *reimbursement* of anesthesia services." Compl. ¶ 189 (emphasis added). And yet, whichever market applies, LIA fails to offer factual allegations that United participates in that market as a buyer. LIA does not allege that United purchases the delivery of anesthesia services provided to the Empire Plan's members. Nor is it responsible for funding the Empire Plan's reimbursements. As already explained, United is merely a third-party administrator. *See* Section V. That defect requires dismissal. *Discon Inc. v. NYNEX Corp.*, 93 F.3d 1055, 1062 (2d Cir. 1996) ("[I]t is axiomatic that a firm cannot monopolize a market in which it does not compete."). Moreover, even if United did participate in the market, LIA fails to allege that United has power or control over prices. LIA's Complaint alleges that reimbursement rates are dictated by DCS's determination as to which law (New York's Surprise Bill Law or the federal No Surprises Act) governs its out-of-network surprise bill reimbursements. Compl. ¶¶ 81–90, 103–117. United did not make that decision.

LIA also fails to allege that United engaged in exclusionary conduct that can give rise to a Section 2 claim. In its opening brief, United explained that due to the unique nature of monopsonization claims—which concern allegations that prices were *too low*—successful exclusionary-conduct theories almost always require allegations of predatory bidding. Mot. 23–25 (citing cases). LIA cites fives cases that purportedly show that monopsonization theories can exist absent predatory pricing or predatory bidding. Opp. 31. But neither *Omnicare* nor *Delta Dental* even involved Section 2 claims. *See Omnicare*, 524 F. Supp. 2d at 1034; *In re Delta Dental Antitrust Litig.*, 484 F. Supp. 3d 627, 631 (N.D. Ill. 2020). And contrary to LIA's argument, *West Penn* and *New Mexico Oncology* both involved allegations of predatory bidding. *See, e.g.*, *West Penn*, 627 F.3d at 109 (sustaining monopsonization claim where plaintiff had alleged a conspiracy

that included "predatory hiring"—that is, paying "bloated salaries" to steal employees from a competitor); *New Mexico Oncology & Hematology Consultants v. Presbyterian Healthcare Services*, 54 F. Supp. 3d 1189, 1213, 1216–17 (D.N.M. 2014) (recognizing that "simply possessing . . . monoposony power and . . . bidding at . . . monopsony prices does not violate Section 2" but concluding that plaintiff had alleged more, including allegations of "predatory bidding" designed "to promote backward vertical integration"). The only exception is *Presque Isle Colon & Rectal Surgery v. Highmark Health*, 391 F. Supp. 3d 485, 502 (W.D. Pa. 2019), where the court concluded in a sentence that conduct establishing Section 1 liability automatically established Section 2 liability. That is plainly incorrect. *See, e.g.*, *Am. Needle*, 560 U.S. at 190.

But even if monopsonization can be based on conduct beyond predatory bidding, LIA fails to identify what theory it is advancing (Opp. 31), and its allegations do not resemble any recognizable antitrust theory. This case does not involve typical monopolization theories like tying, exclusive dealing, or refusals to deal. At most, LIA alleges that United offered low reimbursements and that its vendor imposed expedited response deadlines on settlement offers. LIA cites no authority that those allegations amount to an actionable Section 2 claim.

VII. LIA IGNORES THE DEFECT WITH ITS UNJUST ENRICHMENT CLAIM.

LIA argues that United has been unjustly enriched because "the Empire Plan has an obligation to pay for medically necessary services [and] [r]ather than pay the reasonable rate . . . United retained these funds." Opp. 34. But that argument illuminates the problem. As a self-funded plan, *the Empire Plan*—not United—has the obligation to pay for anesthesia services. Funds allegedly unpaid by *the Empire Plan* are retained by *the Empire Plan*. United has not been enriched at LIA's expense.

CONCLUSION

For the foregoing reasons, the Court should dismiss LIA's Complaint with prejudice.

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