Long Island Anesthesiologists PLLC v. United Healthcare Insurance Company of New York Inc. et al, Docket No. 2:22-cv-04040 (E.D.N.Y. Jul 11, 2022), Court Docket

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

LONG ISLAND ANESTHESIOLOGISTS PLLC Plaintiffs, v. UNITEDHEALTHCARE INSURANCE COMPANY OF NEW YORK INC., as Program Administrator, THE EMPIRE PLAN MEDICAL/SURGICAL PROGRAM and MULTIPLAN INC., Defendants.	**Civil Action No. 2:22-CV-04040-HG**

PLAINTIFF'S MEMORANUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

LEGAL STANDARD 2

ARGUMENT 3

I. LIA HAS ALLEGED ANTITRUST INJURY 3

A. Defendants' scheme to suppress reimbursement payments has caused antitrust injury by decreasing the quality and output of anesthesia services. 3

B. Even absent a decrease in quality or output, the reduction of reimbursement payments is independently sufficient to constitute antitrust injury in this case, because there is 'something more.' 5

II. LIA HAS PLAUSIBLY ALLEGED A VIOLATION OF SECTION 1 OF THE SHERMAN ACT 8

A. LIA has alleged facts sufficient to establish a 'combination' or 'concerted action' between United and MPI. 8

B. Defendants' actions constitute an unreasonable restraint on trade under the 'rule of reason.' 13

1. Product Market 14

2. Geographic Market 15

3. Market Power 15

III. LIA HAS PLAUSIBLY ALLEGED SECTION 2 MONOPSONY CLAIMS 17

IV. JOSEPH IS IRRELEVANT TO THE PRESENT LITIGATION 21

V. LIA HAS SUFFICIENTLY ALLEGED AN UNJUST ENRICHMENT CLAIM AGAINST DEFENDANTS 24

CONCLUSION 25

TABLE OF AUTHORITIES

CASES **PAGE(S)**

99 Cents Concepts, Inc. v. Queens Broadway, LLC,
70 A.D.3d 656 (2d Dep't 2010) 23

Aetna Cas. & Sur. Co. v. LFO Constr. Corp.,
207 A.D.2d 274 (1st Dep't 1994) 25

Anderson News, LLC v. Am. Media, Inc.,
680 F.3d 162 (2d Cir. 2012) 8, 9

Anesthesia Assocs. of Ann Arbor, PLLC v. Blue Cross Blue Shield of Mich.,
20-CV-12916-TGB-APP, Docket Entry No. 52 (E.D. Mich. Sept. 28 2022) 6, 7

Angelico v. Lehigh Valley Hosp., Inc.,
184 F.3d 268 (3d Cir. 1999) 4, 5

Ashcroft v. Iqbal,
556 U.S. 662 (2009) 2, 20

Atl. Richfield Co. v. USA Petroleum Co.,
495 U.S. 328 (1990) 18

Balaklaw v. Lovell,
14 F.3d 793 (2d Cir. 1994) 3

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007) 2, 9

Berkovits v Berkovits,
190 A.D.3d 911 (2d Dept 2021) 24

Brown Media Corp. v. K&L Gates, LLP,
854 F.3d 150 (2d Cir. 2017) 22

Caithness Long Island II, LLC v. PSEG Long Island LLC,
2019 U.S. Dist. LEXIS 176866 (E.D.N.Y. Sept.30, 2019) 13

Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs.,
996 F.2d 537 (2d Cir. 1993) 13

Compass, Inc. v. Real Estate Bd. of N.Y.,
2022 U.S. Dist. LEXIS 60871 (S.D.N.Y. Mar. 31, 2022) 9

Concord Assocs., L.P. v. Ent. Props. Tr.,
2013 U.S. Dist. LEXIS 186964 (S.D.N.Y. 2013), *aff'd*, 817 F.3d 46 (2d Cir. 2016) 15

Davitashvili v. Grubhub Inc.,
2022 U.S. Dist. LEXIS 58974 (S.D.N.Y. Mar. 30, 2022) 16

Fineman v. Armstrong World Indus.,
980 F.2d 171 (3d Cir. 1992) 13

FTC v. Indiana Fed. of Dentists,
476 U.S. 447 (1986) 17

Geneva Pharms. Tech. Corp. v. Barr Labs., Inc.,
386 F.3d 485 (2d Cir. 2004) 17

George C. Frey Ready-Mixed Concrete, Inc. v. Pine Hill Concrete Mix Corp.,
554 F.2d 551 (2d Cir. 1997) 3

In re Aluminum Warehousing Antitrust Litig.,
2014 U.S. Dist. LEXIS 121435 (S.D.N.Y. Aug. 29, 2014) 10

In re Dairy Farmers of Amer., Inc. Cheese Antitrust Litig.,
801 F.3d 758 (7th Cir. 2015) 13

In re Delta Dental Antitrust Litig.,
484 F. Supp. 3d 627 (N.D. Ill. 2020) 6

In re Jan. 2021 Short Squeeze Trading Litig.,
2021 U.S. Dist. LEXIS 221509 (S.D. Fla. Nov. 17, 2021) 13

In re Tether & Bitfinex Crypto Asset Litig.,
576 F. Supp. 3d 55 (S.D.N.Y. 2021) 17

In re WellPoint, Inc. Out-of-Network UCR Rates Litig.,
865 F. Supp. 2d 1002 (C.D. Calif. 2011) 13

JLM Indus., Inc. v. Stolt-Nielsen SA,
387 F.3d 163 (2d Cir. 2004) 10

Joseph v. Corso,
No. 902227-22, Dkt. 95 (N.Y. Sup. Ct. 2023) 21, 23

Josephson v. Oxford Health Ins., Inc.,
2012 NY Slip Op. 32112 (N.Y. Sup. Ct. 2012)) 24

Kaufman v. Eli Lilly & Co.,
65 N.Y.2d 449 (1985) 23

Kelco Disposal, Inc. v. Browning-Ferris Indus.,
845 F.2d 404 (2d Cir. 1988) 18

Korshin v. Benedictine Hosp.,
34 F. Supp. 2d 133 (N.D.N.Y. 1999) 5

La. Wholesale Drug Co. v. Shire LLC,
929 F. Supp. 2d 256 (S.D.N.Y. 2013) 2

Long Island Plastic Surgical Group, P.C. v. United HealthCare Insurance Company of New York, Inc.,
No. 605543/2019, Dkt. 45 (N.Y. Sup. Ct. 2020) 24

MacDermid Printing Solutions LLC v. Cortron Corp.,
833 F.3d 172 (2d Cir. 2016) 5

Migra v. Warren City Sch. Dist. Bd. Of Educ.,
465 U.S. 75 (1984) 22

N.Y. Medscan LLC v. N.Y. Univ. Sch. of Med.,
430 F. Supp. 2d 140 (S.D.N.Y. 2006) 4, 5

New Mexico Oncology & Hematology Consultants, Ltd. v. Presbyterian Healthcare Servs.,
54 F. Supp. 3d 1189 (D.N.M. 2014) 6

New York City Health & Hosps. Corp v WellCare of N.Y., Inc.,
35 Misc. 3d 250 (N.Y. Sup. Ct. 2011) 25

Newcal Indus., Inc. v. Ikon Off. Sol.,
513 F.3d 1038 (9th Cir. 2008) 14, 16

Omnicare, Inc. v. UnitedHealth Grp., Inc.,
524 F. Supp. 2d 1031 (N.D. Ill. 2007) 6

Parker v. Blauvelt Volunteer Fire Co.,
93 N.Y.2d 343 (1999) 22

Presque Isle Colon & Rectal Surgery v. Highmark Health,
391 F. Supp. 3d 485 (W.D. Pa. 2019) 6, 7, 17

Primetime 24 Joint Venture v. NBC,
219 F.3d 92 (2d Cir. 2000) 8

Reddy v. Puma,
2006 U.S. Dist. LEXIS 67848 (S.D.N.Y. Sept. 19, 2006) 4, 5

Relevant Sports, LLC v. Federation Internationale De Football Ass'n,
551 F. Supp. 3d 120 (S.D.N.Y. 2021) 13

Relevant Sports, LLC v. Federation Internationale De Football Ass'n,
61 F.4th 299 (2d Cir. 2023) 13

Russo v. Irwin,
49 A.D.3d 1039 (3d Dep't 2008) 23

Schwartz v. Public Adm'r of Bronx County,
24 N.Y2d 65 (1969) 23

Staatsburg Water Co. v. Staatsburg Fire Dist.,
72 N.Y.2d 147 (1988) 23

Starr v. Sony BMG Music Ent.,
592 F.3d 314 (2d Cir. 2010) 9, 13

Telsat v. Entm't & Sports Programming Network,
753 F. Supp. 109 (S.D.N.Y. 1990) 17

Todd v. Exxon Corp.,
275 F.3d 191 (2d Cir. 2001) 14, 15, 17

Ulrich v. Moody's Corp.,
2014 U.S. Dist. LEXIS 14598 (S.D.N.Y. Mar. 31, 2014), *aff'd*, 721 F. App'x 17 (2d Cir. 2018) 5

United States v. Topco Assocs., Inc.,
405 U.S. 596 (1972) 8

West Penn Allegheny Health Sys. v. UPMC,
627 F.3d 85 (3d Cir. 2010) 6, 7, 8

Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.,
549 U.S. 312 (2007) 18

STATUTES

15 U.S.C. § 15 22

N.Y. Court of Claims Act § 8 22

PRELIMINARY STATEMENT

This lawsuit concerns access to high-quality anesthesia services for NY metropolitan area residents. Defendant UnitedHealthcare Insurance Company of New York ("United") is one of the largest healthcare payers in the NY metropolitan area and is the administrator of the Empire Plan, the health plan for over 1.2 million public-sector employees. United, with the assistance of Defendant MultiPlan Inc. ("MPI"), has used its market power to force out-of-network anesthesia practices in the NY metropolitan area to accept dramatically lowered Empire Plan reimbursement rates for their medically necessary services. These cuts have totaled more than 80% starting January 2022.

Defendants' actions have had, and will continue to have, significantly adverse economic effects on the hospital-based out-of-network anesthesia providers in the NY metropolitan area, including Plaintiff, Long Island Anesthesiologists PLLC ("LIA"). Anesthesiologists cannot choose their patients and cannot turn away patients because of their health coverage or other issues. Given the number of public employees in the NY metropolitan area, anesthesia providers are at the mercy of United. For LIA, and many other area anesthesia practices, approximately 40% of their revenue comes from the Empire Plan.

Thus, during a time of significant economic upheaval and inflation, vitally essential anesthesia providers are suffering an unsustainable and unending 80+% reimbursement cut. This has decreased, and will continue to decrease, the availability of high-quality anesthesia services in the NY metropolitan area; many providers will be forced out of business entirely, and others will be forced to significantly curtail their services and recruitment and retention of well-trained clinicians.

Given the above, LIA commenced this lawsuit in July 2022 asserting claims against United and MPI for violations of Sherman Act § 1 and the New York Donnelly Act. It also

asserts claims against United for monopsony and attempted monopsony in violation of Sherman Act § 2, and unjust enrichment.

Last November, this Court granted Defendants' Fed. R. Civ. P. 12(b)(6) motion to dismiss. This Court thereafter granted LIA leave to serve an amended complaint (the "AC") which it did in May 2024. Defendants now seek to dismiss this amended complaint under Fed. R. Civ. P. 12(b)(6) and have both filed separate motion papers seeking dismissal.

LIA hereby submits its opposition to Defendants' twin motions to dismiss. This Court should deny Defendants' motions in their entireties. As we explain in Point I, the AC plausibly alleges antitrust injury by establishing that Defendants' actions harmed competition as a whole in the relevant market – as opposed to harming only LIA. Points II and III summarize the reasons why LIA has sufficiently alleged the remaining elements to make out claims under Sherman Act §§ 1 and 2. Point IV addresses why Defendants' reliance on *Joseph* is misplaced, and Point V explains why LIA has alleged a legally sufficient unjust enrichment claim.

LEGAL STANDARD

Under the Rule 12(b)(6) standard, the AC need only plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007). Facial plausibility is demonstrated "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the conduct alleged." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009). "The task of a court … is to 'assess the feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof.'" *La. Wholesale Drug Co. v. Shire LLC,* 929 F. Supp. 2d 256, 259-60 (S.D.N.Y. 2013). This dismissal standard is the same for antitrust cases, which carry no heightened pleading standard. *See George C. Frey Ready-Mixed Concrete, Inc. v. Pine Hill Concrete Mix Corp.,* 554 F.2d 551, 555 (2d Cir. 1997).

ARGUMENT

I. LIA HAS ALLEGED ANTITRUST INJURY

"To establish antitrust standing with respect to both its Sherman Act Section 1 and 2 claims as a private plaintiff, LIA must do more than allege an injury causally related to unlawful conduct – it must allege plausible facts that it suffered injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." Docket Entry No. 50, Memorandum and Order ("Order") at 7 (quotation marks omitted). This requires LIA to show that Defendants' conduct has had an actual adverse effect on competition as a whole in the relevant market as opposed to just LIA being harmed as an individual competitor. *See Balaklaw v. Lovell,* 14 F.3d 793, 797 (2d Cir. 1994).

Defendants argue that LIA has not alleged facts sufficient to plead antitrust injury. United argues that (1) decreased reimbursement payments to three anesthesia providers are not reflective of the wider market; (2) LIA has not alleged that patients will see higher healthcare costs; and (3) LIA's allegations that Defendants' actions will adversely affect the quality and output of anesthesia services are merely conclusory, and thus insufficient. *See* Docket Entry No. 61-1, United's Motion to Dismiss Plaintiffs' Amended Complaint ("United MOL") at 10-13. MPI argues that (1) decreased reimbursements to three anesthesia providers are not reflective of competition in the market; and (2) LIA has not alleged that patients will see higher healthcare costs. Docket Entry No. 62-1, MPI's Memorandum of Law in Support of its Motion to Dismiss Plaintiff's Amended Complaint ("MPI MOL") at 12-13.

A. Defendants' scheme to suppress reimbursement payments has caused antitrust injury by decreasing the quality and output of anesthesia services.

The harm to competition required for antitrust injury may be pled through allegations that a defendant's anticompetitive behavior had adverse effects on the price, *quality, or output* of the

relevant good or service. *See Reddy v. Puma*, 2006 U.S. Dist. LEXIS 67848, *10-12 (S.D.N.Y. Sept. 19, 2006); *N.Y. Medscan LLC v. N.Y. Univ. Sch. of Med.*, 430 F. Supp. 2d 140, 148-49 (S.D.N.Y. 2006). In the medical context, courts have repeatedly found allegations regarding the reduced availability and number of providers and a decline in quality of patient care to be sufficient to state an antitrust injury. *See*, *e.g.*, *Angelico v. Lehigh Valley Hosp., Inc.*, 184 F.3d 268, 276 (3d Cir. 1999) (deterioration of quality or reduction of output is sufficient to show antitrust injury); *Reddy*, 2006 U.S. Dist. LEXIS 67848, at *12-13; *N.Y. Medscan*, 430 F. Supp. 2d at 148 ("[T]he courts have repeatedly held that a decline in quality is among the injuries that the antitrust laws were designed to prevent."). As noted in *N.Y. Medscan*, in the context of critical healthcare, "the quality of care is likely to be at least as important to patients as the price." *Id.*

Defendants' arguments are unavailing because LIA has alleged ample facts to show plausible market-wide adverse effects of the quality or output of the anesthesia services as a result of Defendants' conduct.[1] As discussed in LIA's motion for leave to amend, from the perspective of the consumer-patient, the actions of United and MPI have required the closure of operating and procedure rooms for lack of available anesthesiologists, the lengthening of OR schedules and wait times, the curtailment of anesthesia-related services, the layoff of highly trained and qualified anesthesia staff, the suspension of efforts to recruit, hire, and retain highly trained and high quality anesthesiologists, and the halting of new equipment and technology acquisitions. AC ¶¶ 200-22.

[1] That LIA has chosen to establish antitrust injury through proof of actual adverse effects on quality and output (as opposed to price) distinguishes this case from the Second Circuit's holding in *MacDermid Printing Solutions LLC v. Cortron Corp.*, 833 F.3d 172 (2d Cir. 2016), cited by United. And, in any event, the Second Circuit in *MacDermid* found that plaintiff's theory regarding actual adverse effects on prices was speculative and too attenuated in the context of a post-trial decision, where the standard is much higher than here on a motion to dismiss. All LIA must establish here is that it is *plausible* that Defendants' actions have had actual adverse effects on quality and output, a burden that LIA has met through the AC.

Critically, LIA has alleged that these effects are market-wide because the affected anesthesia providers serve as the exclusive providers to several hospitals. *Id.* ¶¶ 213, 219. The AC alleges that Defendants' actions have caused market-wide effects because "seven large Long Island hospitals, and a significant number of ambulatory surgery centers and other facilities" have been adversely affects as a result of Defendants' scheme. *Id.* ¶ 220. These specific facts plausibly allege – the minimal burden required to survive a pre-answer motion to dismiss – that Defendants' actions have caused an actual decrease in the quality and output of anesthesia services and have thus caused antitrust injury within the healthcare context. *See Angelico*, 184 F.3d at 276; *Reddy*, 2006 U.S. Dist. LEXIS 67848, at *12-13; *N.Y. Medscan*, 430 F. Supp. 2d at 148. Indeed, while Defendants contend that this market wide impact is speculative, the AC provides a specific example of curtailment of services and one market-based anesthesia practice closing its doors.[2] AC ¶ 214.

Notably, despite the decrease in the quality and availability of anesthesia services due to Defendants' scheme to dramatically reduce reimbursements to anesthesia providers, any potential savings are not passed on to patients because United regularly seeks and imposes rate increases even while generating net earnings in the tens of billions. AC ¶ 6. As a result, patients now pay more money for lower quality services – while Defendants see windfall profits.

B. Even absent a decrease in quality or output, the reduction of reimbursement payments is independently sufficient to constitute antitrust injury in this case, because there is 'something more.'

As discussed in LIA's motion for leave to amend, the exercise of monopsony power to lower reimbursement payments can constitute actionable antitrust injury. *See, e.g.*, *West Penn*

[2]These extensive, detailed allegations distinguish the situation here from that present in *Korshin v. Benedictine Hosp.*, 34 F. Supp. 2d 133 (N.D.N.Y. 1999), cited by United, where there were no allegations of harm beyond the plaintiff's business. United's reliance on *Ulrich v. Moody's Corp.*, 2014 U.S. Dist. LEXIS 14598, at *91 (S.D.N.Y. Mar. 31, 2014), *aff'd*, 721 F. App'x 17 (2d Cir. 2018) suffers the same fate.

Allegheny Health Sys. v. UPMC, 627 F.3d 85, 103-04 (3d Cir. 2010); *In re Delta Dental Antitrust Litig.,* 484 F. Supp. 3d 627, 642 (N.D. Ill. 2020); *Presque Isle Colon & Rectal Surgery v. Highmark Health,* 391 F. Supp. 3d 485, 500 (W.D. Pa. 2019); *New Mexico Oncology & Hematology Consultants, Ltd. v. Presbyterian Healthcare Servs.,* 54 F. Supp. 3d 1189, 1205 (D.N.M. 2014); *Omnicare, Inc. v. UnitedHealth Grp., Inc.,* 524 F. Supp. 2d 1031, 1040 (N.D. Ill. 2007); *Anesthesia Assocs. of Ann Arbor, PLLC v. Blue Cross Blue Shield of Mich.*, No. 20-CV-12916, Docket Entry No. 52 at 31 (E.D. Mich. Sept. 28 2022).

Generally, to establish antitrust injury in these circumstances there must be "something more" than the mere lowering of rates. For example, in *Anesthesia Associates of Ann Arbor*, that "something more" was that the ability to lower reimbursement rates was obtained through a horizontal conspiracy to allocate markets. *Id.* In *West Penn Allegheny*, the "something more" was that the defendant health plan lowered the plaintiff physician practice's reimbursement rates "to hobble" plaintiff for the benefit of a competing medical group that had taken efforts to insulate defendant from competition from other health plans. 627 F.3d at 103-04. In *Presque Isle Colon & Rectal Surgery*, the "something more" came in allegations that the defendant health plan lowered the plaintiff physician practice's reimbursement rates, subjected them to unnecessary audits, and engaged in steering activities all designed to disadvantage the plaintiff and benefit competing physician practices owned by the defendant health plan. 391 F. Supp. 3d at 499-500.

There are three theories that the AC puts forward to allege "something more." *First*, LIA alleges that Defendants engaged in anticompetitive conduct by subjecting anesthesia providers to unreasonable timeframes to respond to communications regarding reimbursement, refusing to negotiate in good faith on reimbursement pricing, and flooding anesthesia providers with large volumes of correspondence so as to burden anesthesia providers' ability to routinely bill for

anesthesia services absent a complete acquiescence to Defendants' demand that anesthesia providers accept the lowball, QPA offer. AC ¶¶ 152-61. This conduct, when taken in concert with Defendants' predatory reimbursement reductions, constitutes antitrust injury. *See West Penn Allegheny*, 627 F.3d at 103-04; *Presque Isle Colon & Rectal Surgery*, 391 F. Supp. 3d at 499-500.

Second, LIA alleges that Defendants engaged in a horizontal conspiracy to suppress reimbursement payments. Specifically, the AC alleges that Defendants enacted an anticompetitive price coordination scheme in which United, through MPI, could tacitly coordinate with competitors across the industry (including MPI itself) to offer predatorily low reimbursement rates. AC ¶¶ 170-99. Because the price coordination scheme caused virtually all insurers to offer similarly low reimbursement rates, it eliminated competition and forced market anesthesia providers to accept the lower rates with no recourse. The exact nature and mechanism of this conspiracy are discussed in greater detail in Point II; however, for the purposes of antitrust injury, the AC successfully alleges "something more" by alleging this horizontal conspiracy. *Anesthesia Assocs. of Ann Arbor*, No. 20-CV-12916-TGB-APP, Docket Entry No. 52 at 31.

Third, the AC further alleges that these actions are, of course, part of Defendants' scheme to drive Plaintiff and other anesthesia providers out of business, cause them to sell their practices to hospitals, or force them in-network. AC ¶¶ 223-34. The AC also alleges that United operates a subsidiary, OptumCare, which offers anesthesia services in the NY metropolitan area and competes with LIA. AC ¶¶ 48-61. One of United's motives in engaging in anticompetitive conduct is to eliminate or diminish out-of-network anesthesia providers such as LIA and drive business to OptumCare. AC ¶¶ 224-25.[3] Under such circumstances, "it is certainly plausible that

[3] In its motion papers, United argues that OptumCare is not a subsidiary, but a corporately distinct sister company. Accordingly, United argues that LIA cannot impute OptumCare's market power onto United. This argument misses the point and confuses the issues. LIA alleges that United's unlawful conduct is driving business away from LIA to

paying [LIA] depressed reimbursement rates unreasonably restrain[s] trade" and constitutes antitrust injury. *West Penn Allegheny,* 627 F.3d at 104.

II. LIA HAS PLAUSIBLY ALLEGED A VIOLATION OF SECTION 1 OF THE SHERMAN ACT

To make out a Section 1 violation of the Sherman Act, in addition to establishing antitrust injury, LIA must allege (1) "a combination or some form of concerted action between at least two legally distinct economic entities" that (2) "constituted an unreasonable restraint of trade either *per se* or under the rule of reason." *Primetime 24 Joint Venture v. NBC*, 219 F.3d 92, 103 (2d Cir. 2000).

A. LIA has alleged facts sufficient to establish a 'combination' or 'concerted action' between United and MPI.

A horizontal conspiracy is a conspiracy between competitors at the same level of the market structure. *United States v. Topco Assocs., Inc.,* 405 U.S. 596, 608 (1972); *see also Anderson News, LLC v. Am. Media, Inc.*, 680 F.3d 162, 183 (2d Cir. 2012). The facts alleged "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. This requires allegations of "direct or circumstantial evidence that reasonably tends to prove that [United] and [MPI] had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Id.* at 184; *see also Compass, Inc. v. Real Estate Bd. of N.Y.*, 2022 U.S. Dist. LEXIS 60871, *8 (S.D.N.Y. Mar. 31, 2022).

This is not a high burden at the motion-to-dismiss stage; LIA must "only allege 'enough factual matter (taken as true) to suggest that an agreement was made.'" *Starr v. Sony BMG Music Ent.,* 592 F.3d 314, 321 (2d Cir. 2010); *Compass*, 2022 U.S. Dist. LEXIS 60871 at *8. The

its competitor, OptumCare. The purpose of this allegation is not to establish market power, but to establish a motive for United's unlawful action. United certainly has a pecuniary interest in driving business to a related corporate entity, be it a subsidiary or a sister company.

plaintiff need not pass a probability standard, only a plausibility one. *Anderson News,* 680 F.3d at 190. "[O]n a Rule 12(b)(6) motion[,] it is not the province of the court to dismiss the complaint on the basis of the court's choice among plausible alternatives." *Id.* "[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts [establishing a conspiracy] is improbable, and that a recovery is very remote and unlikely." *Bell Atlantic*, 550 U.S. at 556. This Court held that LIA's previous Complaint was deficient because it failed to allege that MPI and United had a "conscious commitment to a common scheme." Order at 14.

Defendants argue that LIA's conspiracy allegations are still insufficient. United argues that (1) United and MPI are not horizontal competitors; (2) the United-MPI relationship is a 'legitimate business relationship' such that there is no 'conscious commitment' to engage in unlawful conduct; and (3) allegations regarding MPI's repricing algorithm are "totally detached" from the Empire Plan. United MOL at 14-16. MPI argues that (1) United and MPI are not horizontal competitors; and (2) United and MPI's relationship is a 'legitimate business relationship' such that there is no 'conscious commitment' to engage in unlawful conduct. MPI MOL at 10-11. These conclusions are inconsistent with the facts as pled in the AC.

First, United and MPI are horizontal competitors and directly compete in the Preferred Provider Organization ("PPO") network business. AC ¶¶ 163-69. PPOs are the most common type of employer provided healthcare plan in the United States. AC ¶ 164. They contract with health care providers to establish agreed-upon payment rates for the providers' services. *Id.* Subscribers to PPO plans can access any in-network healthcare provider at a reduced rate, but almost always must pay more if they choose an out-of-network provider. *Id.*

Defendants do not dispute that the AC alleges that United and MPI directly compete in the PPO business. Indeed, the AC goes out of its way to identify testimony from both United and

MPI which admits that the two entities compete to secure contracts with medical providers. AC ¶¶ 167-69. Instead, both Defendants absurdly argue that PPOs have no connection to the market for medically necessary anesthesiology services. *See* United MOL at 14-15; MPI MOL at 10-11. However, there is no dispute that PPOs contract with health providers to establish agreed-upon rates and compete with commercial health insurance payers to secure contracts with medical providers. AC ¶¶ 164, 167. Obviously, competition among and between PPOs and commercial health insurance payers plays a crucial role in the market for medically necessary anesthesia services. AC ¶¶ 165-69. Suppressing the reimbursement rates for out-of-network anesthesiologists helps both United and MPI dictate lower contractual rates for providers.[4]

Second, the AC alleges facts that reasonably tend to prove that United and MPI had a conscious commitment to a common scheme designed to achieve an unlawful objective. Specifically, the AC alleges that United engaged MPI to enact a price coordination scheme to anticompetitively suppress reimbursement rates. AC ¶¶ 170-99. Starting around 2006, MPI embarked on a strategy to sell analytic tools designed to reprice out-of-network claims for health plan payers. AC ¶ 170. This repricing process almost invariably leads to a reimbursement amount below the customary and reasonable amount. *Id.* MPI then, either directly or through the plan, reprices a claim on a take-it-or-leave-it basis. *Id.* ¶ 171. MPI charges its health care payer customers a fee based on the difference between the original and repriced claim amounts. *Id.* ¶ 172. This fee can approach 10%. *Id.* As a result, MPI is motivated to recommend the lowest reimbursement price possible, since it increases the fee that MPI charges to payers. *Id.* MPI

[4] The primary case that United relies upon to support its argument – *JLM Indus., Inc. v. Stolt-Nielsen SA*, 387 F.3d 163 (2d Cir. 2004) – does not support Defendants' position at all. That case concerns the arbitrability of Sherman Act claims, and simply provides, *in dicta*, a basic definition of horizontal conspiracy claims. United's reliance on *In re Aluminum Warehousing Antitrust Litig.*, 2014 U.S. Dist. LEXIS 121435 (S.D.N.Y. Aug. 29, 2014) is equally misplaced because, unlike here in the AC, there were no allegations there of horizontal competition between the alleged conspirators.

leaves little room for doubt as to its motives, stating its repricing products were "built to help [insurers and other] payers reduce the cost of . . . out-of-network" reimbursements to physician practices, in some cases more than 80%. *Id.* ¶¶ 178-79.

MPI's repricing customers include, as of 2023, all the top 15 health insurers, including not only United, but also Cigna, Elevance, Centene, and Humana. AC ¶ 180. All totaled, over 700 managed care companies and 100,000 health plan/sponsors use MPI's repricing services; these cover over 60 million beneficiaries. *Id.* ¶ 182.

In most cases, MPI's repriced amount is not just a recommendation, it is a determination accepted by the payer more than 90% of the time. AC ¶ 173. This is not because MPI's repriced amounts are fair or reasonable, but rather because almost all major health payers use MPI to reprice their out-of-network claim using the exact same analytic tools, thereby yielding virtually identical repricing amount, leaving the providers little alternative but to accept them. *Id.* ¶ 174.

Without the uniformity that the MPI repricing scheme provides, payers would determine reimbursement rates independently based on their own individual analyses. *Id.* ¶ 175. In such an environment, an individual payer would be constrained in its ability to impose dramatically decreased reimbursement rates upon out-of-network providers, for fear that providers and enrollees, when confronted by these reduced rates and the damage they do to the delivery of high quality care, would seek to avoid dealing with the low-reimbursement payer. *Id.* ¶ 176. This, however, does not occur with the MPI repricing scheme. Because payers know that their competitors are using the same repricing tools that generate virtually identical amounts, they are free to dramatically reduce reimbursement knowing that their competitors will be doing the same. *Id.* ¶ 177.

Regarding United, MPI approached it in 2017 and opined that United's out-of-network reimbursements were too high and needed to be brought "back into alignment." AC ¶ 269. MPI affirmed to United that it had already agreed with other competing health payers to manage out-of-network costs and offered to enter into a similar agreement with United. *Id.* When considering whether to enter into the MPI agreement, a key factor for United was that its competitors also used MPI's pricing methodology to suppress out-of-network rates. *Id.* United and MPI thereafter discussed and agreed upon how little United would pay for out-of-network claims using the MPI repricing tools. *Id.*

United entered the arrangement not just because MPI would assist it in repricing claims and thereby potentially lower out-of-network reimbursement. It entered the arrangement because *it knew* that MPI was entering into similar arrangements with its major competitors. AC ¶ 271. Therefore, its ability to dramatically reduce out-of-network reimbursement rates would be assured because providers would have no choice but to accept these lower rates. And, since its competitors were using the same repricing methodology, it would be insulated from losing business to them when it dramatically lowered reimbursement rates. This is nothing more than a price coordination scheme among competitors.[5] *See, e.g.*, *In re WellPoint, Inc. Out-of-Network UCR Rates Litig.*, 865 F. Supp. 2d 1002 (C.D. Cal. 2011).

[5] We respectfully submit that these factual allegations establish United's participation in a market-wide price coordination scheme facilitated by MPI, and render it at least plausible that the United-MPI relationship was a legitimate business relationship, thereby distinguishing this case from the Seventh Circuit's holding in *In re Dairy Farmers of Amer., Inc. Cheese Antitrust Litig.*, 801 F.3d 758 (7th Cir. 2015), cited by United. These allegations also go far beyond simply establishing that United and MPI are important business partners of each other. *Cf. In re Jan. 2021 Short Squeeze Trading Litig.*, 2021 U.S. Dist. LEXIS 221509 (S.D. Fla. Nov. 17, 2021) (cited by United). United's reliance on *Relevant Sports, LLC v. Federation Internationale De Football Ass'n*, 551 F. Supp. 3d 120 (S.D.N.Y. 2021), is similarly misplaced, and in any event, the decision relied on by United was *vacated and remanded* by the Second Circuit, *see Relevant Sports, LLC v. Federation Internationale De Football Ass'n*, 61 F.4th 299 (2d Cir. 2023).

Likewise, MPI, when entering the arrangement with United, knew that it was facilitating a price coordination scheme among competitors. Indeed, MPI's entire marketing program was how its repricing methodology was used by all the major health payers.[6] AC ¶ 272. MPI also knew that its uniform repricing methodology was accepted more than 93% of the time by providers. *Id.* Because of the extensive reimbursement data from all major market competitors through MPI, United was able to dramatically reduce reimbursement levels to out-of-network anesthesia providers below competitive levels and thereby reduce output and quality. *See, e.g.*, *Starr*, 592 F.3d at 325; *Fineman v. Armstrong World Indus.,* 980 F.2d 171, 214 (3d Cir. 1992).

B. Defendants' actions constitute an unreasonable restraint on trade under the 'rule of reason.'

LIA is pursuing this case based on a rule of reason theory, so it "bears the initial burden of showing that the challenged action has had an actual adverse effect on competition as a whole in the relevant market . . . ." *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs.*, 996 F.2d 537, 543 (2d Cir. 1993). "[S]ince the validity of the "relevant market" is typically a factual element rather than a legal element, alleged markets may survive scrutiny under Rule 12(b)(6) subject to factual testing by summary judgment or trial." *Newcal Indus., Inc. v. Ikon Off. Sol.*, 513 F.3d 1038, 1045 (9th Cir. 2008); *see also Todd v. Exxon Corp.,* 275 F.3d 191, 200 (2d Cir. 2001).

Here, the AC alleges actual adverse effects on competition in the relevant market regarding the delivery of medically necessary anesthesia services to patients in the NY metropolitan area. AC ¶ 234, 244, 276. Defendants argue that the AC's allegations do not satisfy the rule of reason. United argues that (1) Defendants are not part of the relevant product market;

[6] The allegations that both United and MPI knew that they were entering into a price coordination scheme with each other distinguishes that case from the decision in *Caithness Long Island II, LLC v. PSEG Long Island LLC*, 2019 U.S. Dist. LEXIS 176866 (E.D.N.Y. Sept. 30, 2019).

(2) the geographic market is defective as alleged; and (3) Defendants lack the requisite market power to have an adverse effect on competition in the relevant market. United MOL at 17-20. MPI argues that the AC alleges market power for United, but not MPI. MPI MOL at 5, 9. LIA addresses each of these issues in turn.

1. Product Market

The relevant product market defined in the AC is "the provision of medically necessary anesthesia services to patients." AC ¶ 244. There are three categories of participants in this market. First, there are Hospital-based anesthesia practices, such as LIA, that provide the medically necessary anesthesia services to patients. *Id.* ¶ 203. Second, there are the patients who need the anesthesia services and are therefore the market's consumers. *Id.* ¶ 102. And third, there are the payers, such as United, who reimburse the practices for the medically necessary anesthesia services provided to their enrollees. *Id.* ¶ 62.

United argues that this "alleged market is inconsistent with [LIA's] antitrust theory, which focuses on services provided by United and MPI. This requires dismissal." United MOL at 18. But, of course, United participates in this market as a payer who reimburses anesthesia practices for the medically necessary anesthesia services provided to their enrollees. AC ¶ 62.

Moreover, the delivery of anesthesia services is clearly a relevant product market. Only anesthesiologists have the necessary skills and training to provide these services; other physicians do not have the expertise to competently provide these services and therefore cannot be considered reasonable substitutes. *Id.* ¶¶ 249-50. Patients and health plan payers cannot look to other physicians to provide them anesthesia services, and other physicians cannot enter the market to provide these services without significant time and expense. *Id.* These factors indicate – at least at the pleading stage – that anesthesia services are a properly defined relevant market. *See, e.g.*, *Todd*, 275 F.3d at 200.

2. Geographic Market

The AC defines the relevant geographic market as "no larger than the New York metropolitan area, including New York City, Nassau, Suffolk, and Westchester Counties." United contends that "LIA fails to allege why the market should be limited to an obscurely drawn 'New York metropolitan area' when LIA provides services throughout the state." United MOL at 18. However, United itself provides that justification just one line prior when it concedes that "LIA alleges that 'most patients are willing to travel, under the best of circumstances, only about 30 minutes for health care services.'" *Id.* (quoting AC ¶ 243).

Indeed, this explanation comports with the case law that United itself quotes: "Courts generally measure a market's geographic scope, the 'area of effective competition,' by determining the area in which the seller operates and where consumers can turn, as a practical matter, for supply of the relevant product." United MOL at 18 (quoting *Concord Assocs., L.P. v. Ent. Props. Tr.*, 2013 U.S. Dist. LEXIS 186964, at *45 (S.D.N.Y. 2013) (quotation omitted), *aff'd,* 817 F.3d 46 (2d Cir. 2016)). The 'area of effective competition' is circumscribed by the distance that a Long Island resident can reasonably travel for health care service – about 30 minutes. Accordingly, the geographic area is appropriate because Long Island residents will not travel beyond the NY metropolitan area and will not participate in any broader state market. *See, e.g.*, *Davitashvili v. Grubhub Inc.*, 2022 U.S. Dist. LEXIS 58974, at *15 (S.D.N.Y. Mar. 30, 2022). Moreover, the exact contours of the geographic market are factual questions best left for summary judgment or trial. *Newcal*, 513 F.3d at 1045.

3. Market Power

Defendants sidestep the extensive factual allegations in the AC regarding their market power and argue that "LIA does not adequately allege United or MPI even participates in the market for the provision of medically necessary anesthesiology services, so neither could

possibly have market power to restrain competition in that market." United MOL at 19. However, as discussed above, United is indeed a key player in the market for medically necessary anesthesia services because it is the payer which reimburses the practices for the medically necessary anesthesia services provided to their enrollees. AC ¶ 62. MPI argues that the AC contains no allegations about its market power but ignores the factual allegations in the AC which state MPI's repricing services are used by all the top 15 health insurers, over 700 managed care companies, and over 100,000 health plan/sponsors covering over 60 million beneficiaries. *Id.* ¶¶ 180, 182.

Defendants' market power is well documented in the AC. United has a significant share of the market in the New York area. AC ¶ 252. Depending on the health plan product involved, United's market share is as high as 66%. *Id.* Its share of commercial insurers in the New York City market (defined as Suffolk, Nassau, Queens, Kings, Richmond, New York, Bronx, Westchester, Putnam, and Rockland Counties) as of the third quarter of 2019 was 50%. *Id.* In addition to its personal market share, United is the administrator of the Empire Plan which provides coverage for over 1.2 million public employees in New York and represents a significant, if not dominant, payer of reimbursement for anesthesia services in the NY metropolitan area. *Id.* ¶ 253-54. Furthermore, the AC alleges that LIA and other similarly situated anesthesia practices receive approximately 40% of their revenue from the Empire Plan. *Id.* ¶ 255.

Moreover, while sometimes the court must conduct an inquiry into the defendant's market power to determine whether the challenged conduct could have a substantial adverse impact on competition, "proof of actual detrimental effects, such as a reduction of output," can obviate the need for an inquiry into market power, which is "a surrogate for detrimental effect." *FTC v. Indiana Fed. of Dentists*, 476 U.S. 447, 460 (1986); *see also Geneva Pharms. Tech. Corp.*

v. Barr Labs., Inc., 386 F.3d 485, 509 (2d Cir. 2004). Thus, to survive this motion to dismiss, LIA is not required to demonstrate that Defendants possess market power in the relevant antitrust market, so long as LIA alleges facts plausibly indicating the existence of an actual adverse effect on competition in that market, such as through decreased quality or output. As explained above in Point I, the AC sets forth detailed facts plausibly indicating that Defendants' actions are causing adverse economic effects, such as decreased quality or output, in the market for the delivery of anesthesia services in the New York metropolitan area. AC ¶ 276. These allegations are sufficient to meet LIA's obligation at this motion-to-dismiss stage to allege facts plausibly indicating the existence of an actual adverse effect on competition in that market. *See Presque Isle*, 391 F. Supp. 3d at 500; *see also Todd*, 275 F.3d at 213-14.

III. LIA HAS PLAUSIBLY ALLEGED SECTION 2 MONOPSONY CLAIMS

LIA also alleges claims under Sherman Act § 2. To state a claim for actual monopsony, LIA must allege: (1) the possession of monopsony power in the relevant market; and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. *See In re Tether & Bitfinex Crypto Asset Litig.*, 576 F. Supp. 3d 55, 94 (S.D.N.Y. 2021); *Telsat v. Entm't & Sports Programming Network*, 753 F. Supp. 109, 112 (S.D.N.Y. 1990). For attempted monopsony, LIA must allege (1) anticompetitive or exclusionary conduct; (2) specific intent to monopolize; and (3) a 'dangerous probability' that the attempt will succeed. *See Kelco Disposal, Inc. v. Browning-Ferris Indus.*, 845 F.2d 404, 407 (2d Cir. 1988).

United argues that LIA's monopsony claims fail because (1) LIA did not make a 'predatory-pricing' claim; (2) the defined product market is deficient; (3) the geographic market is deficient; (4) United is merely the administrator of the Empire Plan; and (5) LIA's statistics about United's market power are not directly tied to anesthesia services. United MOL at 21-25.

First, LIA need not state a predatory-pricing theory to plausibly allege a Section 2 monopsony claim. United argues that "[b]ecause LIA has alleged that prices were *too low*, instead of too high, LIA must establish a claim for predatory pricing." *Id.* at 21 (citing *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 340 (1990)) (emphasis in original). United has confused monopolists and monopsonists, and indeed the cited case law discusses monopolies and not monopsonies. *See Atl. Richfield*, 495 U.S. at 331 ("alleging … an attempt to *monopolize* the local retail gasoline sales market in violation of § 2 of the Sherman Act" (emphasis added)). United is correct that whenever an antitrust plaintiff alleges that a defendant monopolist sets prices too low, instead of too high, the plaintiff must state a claim for predatory pricing – but that logic does not apply in the monopsonist context.

Predatory pricing occurs whenever a monopolist seller (not a monopsonist buyer) sets prices so low as to drive competitors out of business. *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312 (2007). The monopsonist mirror of predatory-pricing is predatory-bidding. "To engage in predatory bidding, a purchaser bids up the market price of an input so high that rival buyers cannot survive, thus acquiring monopsony power, which is market power on the buy side of the market." *Id*. Accordingly, if LIA had alleged that Defendants had set reimbursements too high, as opposed to too low, then LIA would have been limited to a predatory-bidding theory. That is not the case here. Instead, LIA is arguing that United is operating as a monopsonist by setting reimbursement rates anticompetitively low to adversely affect the quality and output of medically necessary anesthesia services in the NY metropolitan area.

Second, United argues LIA's product market is deficient because Paragraph 304 of the AC states that "United possesses monopsony power in market for the reimbursement of

anesthesia services in the New York metropolitan area." AC ¶ 304. United contends that "LIA fails to allege facts to support a 'reimbursement' product market." United MOL at 23. This argument ignores the broader context of the AC which clearly explains that the relevant product market is medically necessary anesthesia services and that United's role in the market is as a insurance provider which reimburses patients who receive these services. AC ¶¶ 62, 258. The Court should not credit United's willful misreading of the allegations of the Complaint.

Third, LIA addressed United's concerns regarding the geographic market in Point II(B). By way of recapitulation, United's own motion explains why the geographic market is defined as it is – the 'area of effective competition' is circumscribed by the distance that Long Island resident can travel for health care service, about 30 minutes. *See* United MOL at 18.

Fourth, United's contention that it is merely the administrator of the Empire Plan and thus is not a competitor in the market is plainly contradicted by the allegations of the Complaint. United is the *de facto* authority which controls the Empire Plan, making coverage and benefits determinations for the Plan's written terms and using plan assets to pay benefits for covered healthcare expenses. AC ¶ 81. United is responsible for establishing a network of participating providers, establishing reimbursement rates, processing and paying claims from both participating and non-participating providers, and ensuring compliance with the requirements of the Empire Plan. AC ¶ 82. United is the entity that financially benefits by keeping out-of-network reimbursement rates as low as possible. *Id.* ¶¶ 83-84, 89.

Furthermore, United is not *merely* an administrator of the Empire Plan but also operates its own health benefits and insurance plans. AC ¶ 62. United's control over the Empire Plan's rates thus allows it even greater control over reimbursement rates in the market for medically necessary anesthesia services than it would have on its own.

Fifth, the statistics which the AC cites to establish United's market power are not unlinked to the market for medically necessary anesthesia services. For example, the AC states that UnitedHealthcare Employer and Individual provides medical services for 26.7 million people. AC ¶ 64. United's large group employer commercial health insurance plans had about 23 million members and generated $31 billion in revenue. *Id.* ¶ 65. The AC alleges that United has significant market control in New York including 26% of the combined (all products) market in the NY-NJ-PA Metropolitan Statistical Area. *Id.* ¶ 81. Another study found that United's market share of non-governmental plans in the NYC market was 33.8% in 2022. *Id.* ¶ 70.

The market for medically necessary anesthesia services is subsumed into these statistics. It is impossible for LIA to determine United's exact market share without discovery of United's enrollment data. However, these facts are sufficient to survive a motion to dismiss because allege "factual content that allows the court to draw the reasonable inference that the defendant is liable for the conduct alleged." *Ashcroft,* 556 U.S. at 678; *see also Daniel,* 988 F. Supp. at 122 ("Th[e 12(b)(6)] standard is even more stringent when evaluating antitrust claims, where the proof often is in the hands of the alleged conspirators, and dismissals prior to giving the plaintiff ample opportunity for merit-based discovery should be granted sparingly.").

IV. *JOSEPH* IS IRRELEVANT TO THE PRESENT LITIGATION

Both Defendants advance the argument that a decision in *Joseph v. Corso,* No. 902227-22, Dkt. 95 (N.Y. Sup. Ct. 2023), is both preclusive and dispositive of LIA's antitrust claims. *See* United MOL at 7-9; MPI MOL at 8-9. This argument is premised Defendants' faulty assumption that "LIA's antitrust claims remain predicated on its view that DCS incorrectly followed the federal No Surprises Act instead of New York's Surprise Bill Law—resulting in lower reimbursements for LIA and other anesthesiology practices that serve the Empire Plan as out-of-network providers." United MOL at 7; *see also* MPI MOL at 8.

However, LIA's claims are not predicated upon the Empire Plan's decision to follow the No Suprises Act instead of New York's Surprise Bill Law. Instead, LIA includes that information in the AC to provide factual context. The AC presents facts which suggest that the enactment of the No Surprises Act presented an opportunity for United to push for dramatically lower reimbursement rates. Indeed, this was the 'explanation' which United provided for cutting reimbursements by over 80%. AC ¶¶ 121, 124-26. Accordingly, the AC takes the position that it is irrelevant which specific entity determined that the No Surprises Act was applicable, because the No Surprises Act merely created the opportunity upon which Defendants' unlawful scheme was able to be applied to the Empire Plan.

Moreover, Defendants contend that the state court found that "United cannot and does not, control the Empire Plan's coverage or reimbursement decisions" and that this Court is bound by that factual finding. United MOL at 7 (quoting *Joseph*, No. 902227-22, Dkt. 95 at 5–6); MPI MOL at 8 (same). Defendants make clear that they are invoking the doctrine of *res judicata.*

The doctrine of *res judicata*, or claim preclusion, however, applies to bar a subsequent action where (1) there was a final judgment on the merits in the prior action; (2) the litigants were the same parties; (3) the prior court was of competent jurisdiction; and (4) the causes of

action were the same. *See, e.g.*, *Brown Media Corp. v. K&L Gates, LLP*, 854 F.3d 150, 157 (2d Cir. 2017).

Here, the doctrine of *res judicata* does not apply because the causes of action in the two actions are different: this action asserts federal antitrust claims, for example, against United and MPI seeking compensatory damages; and the prior state action asserts no antitrust claim, but merely seeks a declaratory judgment and permanent injunction action against United and the State. *See Joseph*, No. 902227-22, Dkt. 1. New York state courts lack competent jurisdiction to decide federal antitrust claims, *see* 15 U.S.C. § 15, and because New York State was a defendant in the prior state action, the Supreme Court lacked jurisdiction to award damages against the defendants there, *see* N.Y. Court of Claims Act § 8. Accordingly, the decision in the prior state action has no *res judicata* effect here under federal or New York law. *See Brown Media Corp.*, 854 F.3d at 157; *Parker v. Blauvelt Volunteer Fire Co.*, 93 N.Y.2d 343, 348-50 (1999).

Essentially, what Defendants contend here is that the New York court's decision in *Joseph v. Corso* has collateral estoppel or issue preclusive effect in this case. This presents a question of New York law, because, as a result of full faith and credit, federal courts must give the same preclusive effect to a state court judgment as "would be given that judgment under the law of the State in which the judgment was rendered." *Migra v. Warren City Sch. Dist. Bd. Of Educ.*, 465 U.S. 75, 71 (1984).

New York's issue preclusion doctrine prevents a party from relitigating in a subsequent proceeding, even on a different cause of action, an issue that has previously been decided against it in a prior proceeding, as long as the party against whom it is sought to be applied had a full and fair opportunity to litigate the issue in the prior proceeding. *See, e.g.*, *Staatsburg Water Co. v. Staatsburg Fire Dist.*, 72 N.Y.2d 147, 152-53 (1988). Issue preclusion is a flexible, not a rigid

doctrine, which depends upon general notions of fairness. *See, e.g.*, *Russo v. Irwin*, 49 A.D.3d 1039, 1041 (3d Dep't 2008). The burden is on the party seeking the benefit of issue preclusion – here Defendants – to demonstrate the identity of issues in the present litigation and prior determination. *See, e.g.*, *Kaufman v. Eli Lilly & Co.*, 65 N.Y.2d 449, 455 (1985).

New York law further provides that issue preclusion only applies to those issues actually or necessarily determined in the prior action. *See Schwartz v. Public Adm'r of Bronx County*, 24 N.Y.2d 65 (1969); *99 Cents Concepts, Inc. v. Queens Broadway, LLC*, 70 A.D.3d 656 (2d Dep't 2010). The alleged preclusive finding here is the state court's statement that "United cannot and does not, control the Empire Plan's coverage or reimbursement decisions." *Joseph*, No. 902227-22, Dkt. 95 at 4-5. A review of the state court's decision reveals that the state court made that finding to dispose of the plaintiffs' argument that United was "a proper party based on United's level of control over the Empire Plan" based on specific allegations that "United directed the Empire Plan to implement the significant change of following the federal No Surprises Act." *Id.*

That the allegedly preclusive finding related only to United's inability to control the Empire Plan's decision to follow the No Surprises Act is further demonstrated by the language immediately before and after the allegedly preclusive finding, which states: "*United has clearly established that the declaratory relief sought by plaintiffs would be of no moment as* United cannot, and does not, control the Empire Plan's coverage or reimbursement decisions. *Accordingly, declaratory and/or injunctive relief against United would be pointless in the absence of United's power/authority to control the type of coverage and reimbursement decisions being sought by plaintiffs.*" *Id.* at 6 (emphasis reflects language omitted from United's MOL).

Thus, the issue actually and necessarily decided in the state court action was whether United could, and did, control the Empire Plan's decision to follow the federal No Surprises Act.

The state court concluded it did not. This finding, however, by no means extends to the claims in this lawsuit, which are that the No Surprises Act gave United, aided by MPI, the opportunity to use its status as third-party administrator of the Empire Plan to pressure out-of-network anesthesia providers in the New York metropolitan area to accept significantly lower reimbursement rates for anesthesia services as party of an overall price coordination scheme. AC ¶¶ 79-94, 147-61. There has been no factual determination as to these allegations and the principles of *res judicata* and collateral estoppel are inapplicable.

V. LIA HAS SUFFICIENTLY ALLEGED AN UNJUST ENRICHMENT CLAIM AGAINST DEFENDANTS

United finally seeks dismissal of LIA's unjust enrichment claim. To survive dismissal, LIA must allege sufficient facts rendering it plausible: (1) that United was enriched; (2) at LIA's expense; and (3) it would be inequitable to allow United to retain the benefits. *See Berkovits v Berkovits*, 190 A.D.3d 911, 917 (2d Dept 2021). As the Nassau County Supreme Court correctly ruled in *Long Island Plastic Surgical Group, P.C. v. United HealthCare Insurance Company of New York, Inc.*, "[t]o prevent injustice, an out-of-network provider who has not been paid at reasonable and customary rates may maintain an action for unjust enrichment" No. 605543/2019, Dkt. 45 at 2 (N.Y. Sup. Ct. 2020) (citing *Josephson v. Oxford Health Ins., Inc.*, 2012 NY Slip Op. 32112 (N.Y. Sup. Ct. 2012)).

United incorrectly argues that it has not been enriched by the services provided by LIA. There can be no dispute, however, that the Empire Plan has an obligation to pay for medically necessary services, such as those provided to the NYSHIP members. Rather than pay a reasonable rate or in some cases pay anything at all, United retained these funds, generating administrative fees and shared savings for itself. There is no doubt that United has benefitted by withholding funds which rightfully belong to LIA.

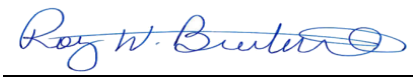
United also asserts that the claim for unjust enrichment cannot stand because the services were not provided at its behest. This position is premised on a flawed understanding of the law. Unlike claims for *quantum meruit*, "[a] claim for unjust enrichment does not require that the party enriched take an active role in obtaining the benefit." *New York City Health & Hosps. Corp v WellCare of N.Y., Inc.*, 35 Misc. 3d 250, 258 (Sup. Ct. N.Y. Cnty. 2011); *Aetna Cas. & Sur. Co. v. LFO Constr. Corp.*, 207 A.D.2d 274, 277 (1st Dep't 1994).

CONCLUSION

For the foregoing reasons, LIA respectfully requests that this Court deny Defendants' motions to dismiss the amended complaint. Alternatively, to the extent that the Court believes that the amended complaint fails to meet the pleading sufficiency standard under Fed. R. Civ. P. 12(b)(6), LIA respectfully requests leave to replead under Fed. R. Civ. P. 15.

Dated: Uniondale, New York
September 9, 2024

HARRIS BEACH, PLLC.
Attorneys for Plaintiff

By 

Roy W. Breitenbach
Steven P. Nonkes
Arvind Jayakumar

The Omni
333 Earle Ovington Boulevard
Uniondale, New York 11553
(516) 880-8378