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 PLAINTIFF'S AMENDED COMPLAINT

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I. THE NEW YORK SUPREME COURT'S RULING IN THE *JOSEPH* CASE IS DISPOSITIVE AND PRECLUSIVE.

LIA cannot evade the preclusive and dispositive effect of *Joseph v. Corso*, No. 902227-22 (N.Y. Sup. Ct. July 14, 2023), Dkt. 95. LIA argues that the decision is irrelevant because its claims "are not predicated upon the Empire Plan's decision to follow the No Surprises Act instead of New York's Surprise Bill Law." Opp. at 21. As the Amended Complaint confirms, that is false. *See* Am. Compl. ¶ 97 ("While [the] Empire Plan's standard out-of-network reimbursement rates were based on the FAIR Health-determined UCR, covered services provided by out-of-network . . . anesthesiologists—such as LIA . . . were reimbursed in full by the Empire Plan."); *id.* ¶ 120 ("All this has changed since January 1, 2022, when LIA—and other out-of-network physicians—began being reimbursed by United for providing medically necessary anesthesia services to Empire Plan enrollees at amounts dramatically less than provided for in the Plan.").

However LIA tries to spin it, there is no avoiding that its claims remain predicated on its contention that DCS, allegedly at United's behest, 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. *See, e.g.*, Am. Comp. ¶ 125 ("[A]t United's insistence, the Empire Plan has 'decided' that it will be treated like a non-governmental self-funded employee health plan . . . governed by the federal No Surprises Act.").

The *Joseph* court decided those issues[1] when it rejected LIA's view and held that (1) DCS's statutory interpretation is correct and (2) United does not control the Empire Plan. *Joseph*, No. 902227-22, Dkt. 95 at 5–6. LIA misreads *Joseph* to suggest that the court "actually and necessarily" decided only "whether United could, and did, control the Empire Plan's decision to follow the federal No Surprises Act." Opp. at 23. Even if true, LIA would be precluded from pressing the allegation that "United . . . has substantial control over the Empire Plan by setting and determining reimbursement rates . . . ." Am. Compl. ¶ 273. But LIA's description of *Joseph* is wrong. The *Joseph* court determined that "the State defendants[']usage of the federal No Surprises Act to resolve out-of-network reimbursement disputes is wholly rational and reasonable and not contrary to the clear wording of any applicable statutes and/or regulations." *Joseph*, No. 902227-22, Dkt. 95 at 6. The Amended Complaint should be dismissed because LIA is precluded from relitigating the issues decided in *Joseph*. *See Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985).

II. LIA FAILS TO PLEAD FACTS ESTABLISHING ANTITRUST INJURY.

LIA's claims also fail on the merits because its allegations fail to establish an antitrust injury. LIA claims that it has established antitrust injury by alleging (1) a decrease in the quality and output of anesthesia services and (2) "something more" than a mere reduction in reimbursement rates, which LIA acknowledges is insufficient to establish antitrust injury. Opp. 6; *see also Kartell v. 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.").

[1] Since issue preclusion applies, LIA's claim-preclusion discussion is inapposite and does not warrant a response. *Compare* Opp. 21–22, *with* United's Mot. to Dismiss the Am. Compl., ECF No. 61-1 ("Mot.") at 8 (arguing that the *Joseph* case bars LIA "from re-litigating the same *issues*.").

As to the former, LIA argues that "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." Opp. 4. But LIA's cited cases do not say what LIA says they say. *See id.* (citing *Angelico v. Lehigh Valley Hosp., Inc.*, 184 F.3d 268, 276 (3d Cir. 1999); *Reddy v. Puma*, No. 06-cv-1283, 2006 U.S. Dist. LEXIS 67848, at **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)). All three involve plaintiffs that alleged that they were excluded from the market as a *competitor*. But here, neither United nor MultiPlan is LIA's competitor. And in *Reddy*, a plaintiff with 35–45% market share was entirely excluded from the market. 2006 U.S. Dist. LEXIS 67848, at *12. LIA, by contrast, is but one anesthesia provider among hundreds. And LIA has not been excluded from the market at all; on the contrary, LIA is still free to provide out-of-network anesthesia services or to negotiate for network participation. Similarly, in *N.Y. Medscan*, the plaintiff alleged that the defendants suppressed competition. 430 F. Supp. 2d at 147. But even after an opportunity to amend, LIA still fails to plead facts showing an inability to compete. Nor does it plausibly allege that even one anesthesiologist has stopped practicing because of the Empire Plan's choice to follow federal law. Finally, *Angelico* does not even address the alleged exclusionary behavior's effect on the market, so it does not help the analysis. 184 F.3d at 276 ("Although the District Court considered Angelico's proffered evidence of an actual anticompetitive market effect, we will not address that evidence because it is appropriate that the District Court reconsider it within the legal framework we have outlined.").

LIA argues, in passing, that United (in its capacity as an insurer) "regularly seeks and imposes rate increases" and as a result "patients now pay more money for lower quality services." Opp. 5. But arguments in a brief about United's activities as an insurer are irrelevant. LIA did not sue United in its capacity as an insurer; it sued United in its role as a third-party administrator of the Empire Plan. There is no plausibly alleged connection between United's so-called rate increases as an insurer and its alleged activities as an administrator of the Empire Plan. And LIA does not cite to one allegation in its

Amended Complaint for its contention that "patients now pay more money." *See id.* at 5. On the contrary, LIA expressly disclaims adverse effects on price. *See* Opp. 4 n.1. As this Court previously observed, the Amended Complaint "does not credibly allege that patients have had to or necessarily will have to pay more for anesthesia services as a result of the decreased reimbursement rates." MTD Order at 9.

At most, LIA alleges that one anesthesia practice has "lost more than 10% of its physician staff due to financial distress" resulting from "the low Empire Plan rates." Am. Compl. ¶ 212. But as explained in United's motion, LIA does not allege how many physicians the practice employs or that those physicians are no longer practicing anesthesiologists. Mot. 12–13. It is equally plausible that those physicians remain anesthesiologists either individually or under another practice. "Without any allegation as to how market-wide competition will be affected, the complaint fails to allege a claim on which relief may be granted." *Korshin v. Benedictine Hosp.*, 34 F. Supp. 2d 133, 138–39 (N.D.N.Y. 1999).

LIA separately argues that its allegations are sufficient to establish antitrust injury because they reflect "something more" than reduced reimbursement rates. *See* Opp. 6–7 (acknowledging that a health plan lowering reimbursement rates to a physician practice is generally insufficient to establish antitrust injury but that there must be "something more"); *see also* MTD Order at 12. LIA offers three theories in support of its "something more" argument. Each falls short.

First, LIA argues that the rushed response deadlines in MultiPlan's notices to healthcare providers amount to "something more." Opp. 6–7. There is no authority for the proposition that allegations of rushed deadlines qualify as antitrust injury. The two cases LIA cites, *West Penn. Allegheny Health System v. UPMC*, 627 F.3d 85 (3d Cir. 2010) and *Presque Isle Colon & Rectal Surgery v. Highmark Health*, 391 F. Supp. 3d 485 (W.D. Pa. 2019), certainly do not stand for that proposition. *West Penn* involved allegations that a dominant hospital provider and a dominant health

insurer conspired to insulate one another from competition by refusing to enter agreements with rivals, increasing premiums, and discriminating against competitors. 627 F.3d at 93–94. And *Presque* involved allegations that a Health Care Plan (not a third-party administrator, as here) lowered reimbursement rates and controlled the hospitals where out of network physicians practiced. 391 F. Supp. 3d at 492–95. Those cases are very different from the allegations here, where the Empire Plan (not United) sets the reimbursement rates and neither United nor MultiPlan has any control over the Empire Plan, Good Samaritan Hospital, or any other relevant hospital.

Next, LIA argues that it has established "something more" by alleging that United and MultiPlan are in a horizontal conspiracy. But United and MultiPlan are not horizontal competitors in any capacity that is relevant to this case. Recognizing as much, LIA argues that even though United and MultiPlan do not compete in the market for the provision of anesthesia services, they compete in the PPO market which "obviously . . . plays a crucial role in the market for medically necessary anesthesia services." Opp. 9–10. But this case is not about PPO services. LIA alleges (1) that the Empire Plan is a *self-funded* plan (Am. Compl. ¶¶ 71, 79–80); (2) that United acts only as the administrator to the Empire Plan (*id.* ¶¶ 71–76, 79); and (3) that MultiPlan serves as United's vendor (*id.* ¶¶ 151–53). Those allegations do not describe horizontal competition. And the cases LIA cites provide no authority for the proposition that a court can find a horizontal conspiracy simply because two defendants compete in *separate* markets that have nothing to do with the claims in the case. *See, e.g.*, *Anesthesia Assocs. of Ann Arbor, PLLC v. Blue Cross Blue Shield of Mich.,* No. 20-CV-12916 (E.D. Mich. Sept. 28 2022), Dkt. 52 (granting motion to dismiss regarding a horizontal conspiracy between the insurer and the hospital system, but allowing a claim involving allegations of a horizontal conspiracy among insurers to proceed).

Finally, LIA claims it has shown "something more" by alleging that United and MultiPlan are in a scheme to drive LIA out of business to benefit United's sister company, OptumCare. Opp. 7–8. In

other words, LIA expects the Court to accept that the Empire Plan's reimbursement methodology is part of a multi-step, long-term scheme to (i) reduce reimbursement rates for New York anesthesiologists in the short-term; (ii) which will drive anesthesia providers out of business; (iii) which will, in turn, benefit United's parent company, (iv) which will, in turn, benefit OptumCare. Am. Compl. ¶¶ 39–61, 222–33. Yet there is not even an allegation that OptumCare 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 and insufficient to survive a motion to dismiss.

III. LIA FAILS TO ALLEGE A PLAUSIBLE SECTION 1 CONSPIRACY.

LIA clings to its Section 1 and Donnelly Act conspiracy claims, arguing that they survive dismissal because United and MultiPlan compete in the PPO network business and allegedly have engaged in a scheme to lower reimbursement rates. Opp. 8–10. As explained above, whether United and MultiPlan compete in the PPO network market is irrelevant because LIA's liability theory has nothing to do with that market. LIA's conspiracy claims also fail for a different reason: LIA fails to allege "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." *Caithness Long Island II, LLC v. SEG Long Island LLC*, No. 18-CV-4555, 2019 U.S. Dist. LEXIS 174866, at *9 (E.D.N.Y. Sept. 30, 2019).

LIA alleges that United is engaging MultiPlan to employ pressure tactics to suppress out-of-network rates and that this started when United and MultiPlan agreed in 2017 that United's out-of-network reimbursements were "too high" and needed to be "brought back into alignment." Am. Compl. ¶¶ 256–65, 267. LIA also alleges that "[MultiPlan], when entering the arrangement with United, knew that it was facilitating a price coordination scheme among competitors. Indeed, [MultiPlan's] entire marketing program was how its repricing methodology was used by all the major health payers." *Id.* ¶ 272. But those allegations are totally detached from the Empire Plan,

the federal No Suprises Act, the New York Surprise Bill Law, and every other factual allegation. Even accepting that allegation as true, it does not come close to plausibly alleging a conspiracy that has any connection to LIA's liability theory.[2]

The most plausible description of United and MultiPlan's relationship is simply a longstanding business relationship. *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 Jan. 2021 Short Squeeze Trading Litig.*, No. 21-2989-MDL, 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). LIA does not allege that MultiPlan knew the "reimbursement rates it sought were lower than the rates that United had previously offered, that MultiPlan believed the rates were below competitive levels, that MultiPlan had any role in helping United or the Empire Plan determine appropriate reimbursement rates, or that MultiPlan intended to help United drive out competition." MTD Order at 14. LIA's conspiracy claims fail.[3]

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[2] LIA's cited cases do not support its argument. Opp. 12–13 (citing *In re WellPoint Out-Of-Network "UCR" Rates Litig.*, 865 F. Supp. 2d 1002 (C.D. Cal. 2011), *Starr v. Sony BMG Music Ent.*, 592 F.3d 314 (2d Cir. 2010), and *Fineman v. Armstrong World Indus.*, 980 F.2d 171 (3d Cir. 1992)). Both *Wellpoint* and *Starr* are price fixing cases, and LIA does not and cannot bring a claim for price fixing here. And unlike in *Fineman*, United and MultiPlan are not competitors or would-be competitors of LIA in the market for medically necessary anesthesia services.

[3] LIA also alleges that MultiPlan provides identical services for "other health plan clients," including Cigna, Anthem, Centene, and Humana. 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).

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

LIA cannot satisfy the rule of reason because its Amended 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, LLC v. Fédération Internationale De Football Ass'n*, 551 F. Supp. 3d 120, 128 (S.D.N.Y. 2021). 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. at 17–18. 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. 14–15. But LIA's allegations foreclose that argument.

This case is not about United's general commercial business, so United's share "of the commercial insurers" (Opp. 16) is irrelevant. LIA's allegations focus exclusively on reimbursements under the Empire Plan and it bears repeating: United does not fund benefits for the Empire Plan; it is a third-party administrator. *Uddoh v. United Healthcare*, No. 16-cv-1002, 2017 U.S. Dist. LEXIS 19415, at *8 (E.D.N.Y. Feb. 10, 2017). The Department of Civil Service is responsible for payments. *Id.* at *8–9 ("[B]ecause the Empire Plan is self-insured, [DCS] bears all responsibility for claims and expenses under or against it . . . .").[4]

LIA's arguments about its proposed geographic market fare no better and continue to be contrary to the law. LIA agrees that "[c]ourts generally measure a market's geographic scope, the

[4] LIA includes statistics about United's alleged market power in the commercial insurance market while simultaneously arguing that the Court need not assess United's market power (or lack thereof) because LIA has alleged direct evidence of adverse effects. Opp. 16–17. But the commercial insurance market is not at issue in this case and for the reasons in Section II, above, LIA does not properly allege direct evidence of adverse effects.

'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." *Concord Assocs., L.P. v. Ent. Props. Tr.*, No. 12 Civ. 1667, 2013 U.S. Dist. LEXIS 186964, at *45 (S.D.N.Y. Sept. 18, 2013) (quotation omitted), *aff'd*, 817 F.3d 46 (2d Cir. 2016). Yet, despite the Amended Complaint's focus on the Empire Plan, which has members throughout the state of New York (Am. Compl. ¶ 75), and LIA's admission that it provides services throughout the state (*id.* ¶ 24), LIA focuses solely on Long Island. Opp. 15 ("[T]he geographic area is appropriate because Long Island residents will not travel beyond the NY metropolitan area[.]"). LIA's mis-matched geographic market requires dismissal of its antitrust claims. *See, e.g.*, *Mathias v. Daily News, L.P.*, 152 F. Supp. 2d 465, 483 (S.D.N.Y. 2001) (dismissing Sherman Act Section 1 claim where allegations concerning the geographic market were contradictory, specifically where it advanced a narrow "tri-state area" market while simultaneously alleging facts suggesting a broader, U.S. market).

V. 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 possesses monopsony power in the alleged relevant market. LIA does not allege that United purchases the delivery of anesthesia services provided to the Empire Plan's members. Nor is it responsible, as a third-party administrator, for funding the Plan's reimbursements. Those facts alone require 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."), *vacated and remanded on other grounds*, 525 U.S. 128 (1998).

LIA also does not allege that United acquired or maintained monopsony power through anticompetitive or exclusionary conduct. LIA is not alleging predatory pricing or predatory bidding and appears to concede that its monopsony claims are not based on any recognized

antitrust theory. Opp. 18. In *Anesthesia Associates of Ann Arbor, PLLC v. Blue Cross Blue Shield of Michigan,* the court dismissed an anesthesiology practice's monopsony claim, observing that the plaintiff had mixed up the standards and inappropriately alleged that the defendant "[was] using its buying power to keep the price of inputs—anesthesia services—*down*" instead of overpaying to disrupt competition. No. 20-CV-12916, 2021 U.S. Dist. LEXIS 174021, at *2727 (E.D. Mich. Sept. 14, 2021). For the same reasons, LIA's monopsony claim makes no sense and does not resemble any liability theory ever recognized by the Supreme Court.

Finally, LIA puts forth United's alleged market shares in a variety of product and geographic markets different from those in this case, none of which is more than 33.8%. Opp. 16. Those allegations are irrelevant and, in any event, "[a] market share of 40% in the United States, without more, does not support a reasonable inference of market power." *Dichello Distribs., Inc. v. Anheuser-Busch, LLC*, No. 20-cv-01003, 2021 U.S. Dist. LEXIS 174001, at *25 (D. Conn. Sep. 14, 2021) (citing *PepsiCo, Inc. v. Coca-Cola Co.*, 315 F.3d 101, 109 (2d Cir. 2002)).

VI. LIA IGNORES UNITED'S ARGUMENTS WITH RESPECT TO ITS UNJUST ENRICHMENT CLAIM.

LIA does not dispute that its unjust enrichment claim is duplicative of, and rises and falls with, its antitrust claims. For that and the other reasons set out in United's motion, the unjust enrichment claim should be dismissed. *See* Mot. at 25.

CONCLUSION

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

[*Signature on following page.*]

Dated: October 14, 2024

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