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 **ORAL ARGUMENT REQUESTED**

DEFENDANT UNITEDHEALTHCARE INSURANCE COMPANY OF NEW YORK'S NOTICE OF MOTION TO DISMISS THE COMPLAINT

PLEASE TAKE NOTICE that Defendant UnitedHealthcare Insurance Company of New York (United), by and through its undersigned counsel, will move the Honorable Hector Gonzalez of the United States District Court of the Eastern District of New York, located at 225 Cadman Plaza East, Brooklyn, NY 11201, at a time and date to be set by the Court, for an Order dismissing with prejudice the Amended Complaint filed by Plaintiff Long Island Anesthesiologists PLLC (LIA) under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim.

PLEASE TAKE FURTHER NOTICE, that in support of its motion, United relies on its accompanying Memorandum Supporting its Motion to Dismiss the Amended Complaint, dated July 18, 2024.

PLEASE TAKE FURTHER NOTICE, that pursuant to the Court's June 21, 2024 Order, Plaintiff's response, if any, is due on August 19, 2024, and United's reply, if any, is due on September 4, 2024.

United requests oral argument on its motion.

Dated: July 18, 2024

ALSTON & BIRD LLP

/s/Karl Geercken

Karl Geercken
90 Park Avenue
New York, New York 10016
(212) 210-9400
karl.geercken@alston.com

Brian D. Boone (*pro hac vice*)
Emily McGowan (*pro hac vice*)
ALSTON & BIRD LLP
101 S. Tryon Street, Suite 4000
Charlotte, NC 28280
(704) 444-1000
brian.boone@alston.com
emily.mcgowan@alston.com

D. Andrew Hatchett (*pro hac vice*)
Jordan Edwards (*pro hac vice*)
ALSTON & BIRD LLP
1201 W. Peachtree Street
Atlanta, GA 30309
(404) 8811-7000
andrew.hatchett@alston.com
jordan.edwards@alston.com

Attorneys for Defendant UnitedHealthcare Insurance Company of New York

CERTIFICATE OF SERVICE

I certify that on July 18, 2024, I electronically filed the foregoing Notice of Motion and Memorandum of Law in Support of the Motion to Dismiss the Amended Complaint with the Clerk of Court using the CM/ECF system.

/s/ Karl Geercken

Karl Geercken
90 Park Avenue
New York, New York 10016
(212) 210-9400

Attorney for Defendant UnitedHealthcare Insurance Company of New York

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

UNITED'S MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

TABLE OF CONTENTS

INTRODUCTION 1

BACKGROUND AND PROCEDURAL HISTORY 2
- A. New York's Surprise Bill Law does not apply to the Empire Plan. 3
- B. United works with MultiPlan in the Federal IDR Process. 4
- C. LIA loses in the *Joseph* case. 5
- D. The Court dismisses LIA's original complaint. 6

LEGAL STANDARD 6

ARGUMENT 7

I. THE NEW YORK SUPREME COURT'S RULING IN THE PARALLEL STATE ACTION IS DISPOSITIVE AND PRECLUSIVE. 7

II. LIA'S AMENDED COMPLAINT DOES NOT FIX ITS FAILURE TO ALLEGE ANTITRUST INJURY. 9

III. LIA'S CONSPIRARY ALLEGATIONS ARE INSUFFICIENT. 14

IV. LIA'S CONSPIRACY CLAIMS DO NOT SATISFY THE RULE OF REASON. 17

V. LIA FAILS TO ALLEGE PLAUSIBLE SECTION 2 MONOPSONY CLAIMS (COUNTS II AND III) 21

VI. LIA'S UNJUST ENRICHMENT CLAIM CONTINUES TO FAIL. 25

CONCLUSION 25

TABLE OF AUTHORITIES

Page(s)

CASES

Anesthesia Assocs. of Ann Arbor, PLLC v. Blue Cross Blue Shield of Mich.,
2021 U.S. Dist. LEXIS 174021 (E.D. Mich. Sept. 14, 2021)....11, 22

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

Assocs. Cap. Serv. Corp. of N.J. v. Fairway Private Cars, Inc.,
590 F. Supp. 10 (E.D.N.Y. 1982)....9

Atl. Richfield Co. v. USA Petroleum Co.,
495 U.S. 328 (1990)....21

Balaklaw v. Lovell,
14 F.3d 793 (2d Cir. 1994)....9, 11

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007)....6, 7, 14

Bologna v. Allstate Ins. Co.,
138 F. Supp. 2d 310 (E.D.N.Y. 2001)....9

Bookhouse of Stuyvesant Plaza, Inc. v. Amazon.com, Inc.,
985 F. Supp. 2d 612 (S.D.N.Y. 2013)....20

Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.,
509 U.S. 209 (1993)....21

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

Caithness Long Island II, LLC v. SEG Long Island LLC,
2019 U.S. Dist. LEXIS 174866 (E.D.N.Y. Sept. 30, 2019)....15

Campfield v. State Farm Mut. Auto. Ins. Co.,
532 F.3d 1111 (10th Cir. 2008)....17

Chapman v. N.Y. State Div. for Youth,
546 F.3d 230 (2d Cir. 2008)....23

City of N.Y. v. Grp. Health Inc.,
649 F.3d 151 (2d Cir. 2011)....17

Concord Assocs., L.P. v. Ent. Props. Tr.,
2013 U.S. Dist. LEXIS 186964 (S.D.N.Y. Sept. 18, 2013)..18

Discon Inc. v. NYNEX Corp.,
86 F. Supp. 2d 154 (W.D.N.Y. 2000)..23, 24

Discon Inc. v. NYNEX Corp.,
93 F.3d 1055 (2d Cir. 1996)...24

Fido's Fences, Inc. v. Canine Fence Co.,
672 F. Supp. 2d 303 (E.D.N.Y. 2009) 10

Giakoumelos v. Coughlin,
88 F.3d 56 (2d Cir. 1996)...8

Goldstein v. Pataki,
488 F. Supp. 2d 254 (E.D.N.Y. 2007) 12

In re Aluminum Warehousing Antitrust Litig.,
2014 U.S. Dist. LEXIS 121435 (S.D.N.Y. Aug. 29, 2014) 14

In re Crude Oil Commodity Futures Litig.,
913 F. Supp. 2d 41 (S.D.N.Y. 2012)...6

In re Dairy Farmers of Am., Inc. Cheese Antitrust Litig.,
801 F.3d 758 (7th Cir. 2015) 15

In re Jan. 2021 Short Squeeze Trading Litig.,
2021 U.S. Dist. LEXIS 221509 (S.D. Fla. Nov. 17, 2021)...16

In re Novartis & Par Antitrust Litig.,
2019 U.S. Dist. LEXIS 138133 (S.D.N.Y. Aug. 14, 2019) 25

In re SSA Bonds Antitrust Litig.,
2020 U.S. Dist. LEXIS 54000 (S.D.N.Y. Mar. 18, 2020) 14

In re Suboxone Antitrust Litig.,
2017 U.S. Dist. LEXIS 171322 (E.D. Pa. Oct. 16, 2017)..19, 20

Integrated Sys. & Power, Inc. v. Honeywell Int'l, Inc.,
713 F. Supp. 2d 286 (S.D.N.Y. 2010)...17, 18

Jefferson Parish Hosp. Dist. No. 2 v. Hyde,
466 U.S. 2 (1984)...20

JLM Indus., Inc. v. Stolt-Nielsen SA,
387 F.3d 163 (2d Cir. 2004)...15

Joseph et al. v. Corso et al.,
No. 902227-22 (N.Y. Sup. Ct.) .... passim

Joseph et al. v. Corso et al.,
No. CV-23-1477 (App. Div. 3d Dep't), Dkt. 10 6

Kartell v. Blue Cross Blue Shield of Mass., Inc.,
749 F.2d 922 (1st Cir. 1984) 13, 21

Korshin v. Benedictine Hosp.,
34 F. Supp. 2d 133 (N.D.N.Y. 1999) 11, 13

MacDermid Printing Sols. LLC v. Cortron Corp.,
833 F.3d 172 (2d Cir. 2016) 12, 17

Mahmud v. Kaufmann,
607 F. Supp. 2d 541 (S.D.N.Y. 2009), *aff'd*, 358 F. App'x 229 (2d Cir. 2009) 9

Marrese v. Am. Acad. of Orthopaedic Surgeons,
470 U.S. 373 (1985) 7

Mathews v. ADM Milling Co.,
2019 U.S. Dist. LEXIS 97564 (W.D.N.Y. June 11, 2019) 10

Mathias v. Daily News, L.P.,
152 F. Supp. 2d 465 (S.D.N.Y. 2001) 18

Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,
475 U.S. 574 (1986) 21

Mayor & Council of Balt. v. Citigroup, Inc.,
709 F.3d 129 (2d Cir. 2013) 14

Mich. State Podiatry Ass'n v. Blue Cross & Blue Shield of Mich.,
671 F. Supp. 1139 (E.D. Mich. 1987) 13

Mooney v. AXA Advisors, L.L.C.,
19 F. Supp. 3d 486 (S.D.N.Y. 2014) 19

Mosaic Health Inc. v. Sanofi-Aventis U.S., LLC,
2022 U.S. Dist. LEXIS 159137 (W.D.N.Y. Sept. 2, 2022) 25

Nat'l Gear & Piston, Inc. v. Cummins Power Sys., LLC,
861 F. Supp. 2d 344 (S.D.N.Y. 2012) 14

NicSand, Inc. v. 3M Co.,
507 F.3d 442 (6th Cir. 2007) 10

Oliver v. Am. Express Co.,
2020 U.S. Dist. LEXIS 76688 (E.D.N.Y. Apr. 30, 2020) 25

People ex rel. Spitzer v. Applied Card Sys., Inc.,
11 N.Y.3d 105, 894 N.E.2d 1, 863 N.Y.S.2d 615 (2008)..8

Relevent Sports, LLC v. Fédération Internationale De Football Ass'n,
551 F. Supp. 3d 120 (S.D.N.Y. 2021)..16, 17

Ross v. Am. Express Co.,
35 F. Supp. 3d 407 (S.D.N.Y. 2014)..17, 19

Schwartz v. Public Adm'r of Cnty. of Bronx,
24 N.Y.2d 65, 246 N.E.2d 725, 298 N.Y.S.2d 955 (1969)...8

Sitts v. Dairy Farmers of Am., Inc.,
417 F. Supp. 3d 433 (D. Vt. 2019)...22

Solow v. Delit,
1993 U.S. Dist. LEXIS 11362 (S.D.N.Y. Aug. 13, 1993) 8

Todd v. Exxon Corp.,
275 F.3d 191 (2d Cir. 2001)..7

U.S. Elecs. v. Directed Elecs.,
2007 U.S. Dist. LEXIS 118438 (S.D.N.Y. 2007) 19

Uddoh v. United Healthcare,
2017 U.S. Dist. LEXIS 19415 (E.D.N.Y. Feb. 10, 2017)..2

Ulrich v. Moody's Corp.,
2014 U.S. Dist. LEXIS 145898 (S.D.N.Y. Mar. 31, 2014) 12

Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.,
549 U.S. 312 (2007)...21, 22

Wolf Concept S.A.R.L. v. Eber Bros. Wine & Liquor Corp.,
736 F. Supp. 2d 661 (W.D.N.Y. 2010) 6

STATUTES

28 U.S.C. § 1738..7

The Donnelly Act...14

Financial Services Law §§ 601–08 3

The No Surprises Act (Public Law 116-260) .... passim

The Sherman Act 14, 21

The Surprise Bill Law .... passim

OTHER AUTHORITIES

The New York State Society of Anesthesiologists, Inc., *What is the NYSSA?*, https://www.nyssa-pga.org/ (last visited June 12, 20245) 20

U.S. BUREAU OF LABOR STATISTICS, *Occupational Employment and Wages, May 2023, 29 1211, Anesthesiologists*, https://www.bls.gov/oes/current/oes291211.htm (last visited July 16, 2024)..10

INTRODUCTION

Like its original complaint, Plaintiff Long Island Anesthesiology PLLC's (LIA) Amended Complaint makes no sense. The Court previously dismissed LIA's antitrust claims because LIA (i) failed to plead facts establishing an antitrust injury and (ii) failed to plead facts establishing a horizontal conspiracy between the Defendants. *See* Dkt. 50 ("MTD Order"). LIA now adds a few new paragraphs to its complaint, but they don't change anything.

LIA continues to allege that it was injured in January 2022 when the Empire Plan (the state-sponsored health plan for New York state employees) began applying the federal No Surprises Act, instead of New York's Surprise Bill Law, when reimbursing LIA for out-of-network anesthesiology services. LIA alleges that reimbursement rates under the federal law are lower than prevailing rates under New York's statute. But neither United nor MultiPlan made that decision, and LIA still fails to allege an injury to competition or the competitive process, a requirement for antitrust claims. None of the new allegations establishes that United and MultiPlan are horizontal competitors or that their vendor relationship is anything other than a standard business relationship.

Although LIA failed to cure the defects that this Court previously identified, there is now an even more fundamental defect with LIA's claims. The crux of LIA's claim is built on a misperception that New York's Empire Plan did something wrong when it applied the federal No Surprises Act when reimbursing out-of-network emergency anesthesiology services. But it is the New York Department of Civil Service (DCS)—not United (the Empire Plan's third-party administrator) or MultiPlan (United's vendor)—that sponsors and funds reimbursements under the Empire Plan. And DCS (not United or MultiPlan) decided to follow federal law. The New York Supreme Court confirmed as much with a preclusive and dispositive ruling in *Joseph et al. v. Corso et al.*, No. 902227-22 (N.Y. Sup. Ct.). The *Joseph* court held that the Empire Plan applied the law

correctly; it also held that the Empire Plan, not United, made that choice. The *Joseph* plaintiffs (which include LIA) are appealing portions of the New York Supreme Court's ruling but are not challenging the conclusion that United was not responsible for the decision about whether to follow the state or federal surprise-bill law. United and MultiPlan cannot be held liable for ancillary services they provided the Empire Plan in support of *the Plan's* now judicially confirmed correct application of federal law.

For those and other reasons described below, LIA's complaint should again be dismissed—this time with prejudice.

BACKGROUND AND PROCEDURAL HISTORY

UnitedHealthcare Insurance Company of New York is one of multiple third-party administrators for the Empire Plan—the state-sponsored health plan for New York state employees and their families. Am. Compl. ¶¶ 71, 79–80. United does not fund reimbursements under the Empire Plan; instead, the New York Department of Civil Services sponsors and funds the Plan. *Id.* ¶¶ 71–76, 79; *Uddoh v. United Healthcare*, 2017 U.S. Dist. LEXIS 19415, at *8–9 (E.D.N.Y. Feb. 10, 2017) ("[B]ecause the Empire Plan is self-insured, the Department of Civil Service bears all responsibility for claims and expenses under or against it, for which it receives state funding and makes annual budget requests to the New York State Division of the Budget."). United contracts with MultiPlan to communicate with providers about reimbursement questions. Am. Compl. ¶¶ 151–53.

LIA is a private anesthesiology practice that primarily serves patients at Good Samaritan Hospital, including patients covered by the Empire Plan. Am. Compl. ¶¶ 19–24, 101, 254. Healthcare providers are generally classified as either "in-network" or "out-of-network" with respect to a health plan. *Id.* ¶ 32. "In-network" providers negotiate reimbursement rates in advance.

Id. ¶¶ 33–34, 37. Providers without a participation agreement are "out-of-network." Even though LIA may provide services at in-network facilities, it has "traditionally chosen to remain out of network." *Id.* ¶ 38. LIA admits that it has chosen to stay out-of-network so that it can capture the Empire Plan's traditionally inflated out-of-network reimbursements. *Id.* ¶¶ 118–19.

A. New York's Surprise Bill Law does not apply to the Empire Plan.

The New York Surprise Bill Law (Financial Services Law §§ 601–08) took effect in March 2015. The Surprise Bill Law prohibits out-of-network providers like LIA from directly billing patients in circumstances where the bill qualifies as a "surprise bill." Am. Compl. ¶ 109. The Surprise Bill Law applies to certain "emergency" services where the patient did not have an opportunity to select their provider or received care from an out-of-network physician at an in-network facility (such as when LIA provides out-of-network anesthesiology services at an in-network facility like Good Samaritan Hospital). Health plans subject to the Surprise Bill Law must reimburse out-of-network providers at a "reasonable amount." Am. Compl. ¶ 110. Disputes over what constitutes a reasonable amount may be submitted to a state-established independent dispute resolution (IDR) process. *Id.* ¶ 111. LIA alleges that the state's IDR process generally requires payments at 80% of the usual, customary, and reasonable (UCR) rate in the FAIR Health benchmarking database. *Id.* ¶¶ 113–16.

In December 2020, Congress passed the No Surprises Act (Public Law 116-260), which took effect January 1, 2022. Am. Compl. ¶ 132. Like New York's Surprise Bill Law, the federal No Surprises Act establishes a federal IDR process that governs disputes between health plans and out-of-network providers concerning reimbursement rates for qualifying "surprise" or emergency services. *Id.* ¶ 134. LIA alleges that the federal IDR process sets reimbursement rates based on the Qualifying Payment Amount (QPA), defined as the health plan's median in-network rates for the same service in a similar geographic area. *Id.* ¶ 144. LIA alleges that "[i]n virtually all

circumstances, the QPA is significantly less than the FAIR Health-determined UCR amount." *Id.* ¶ 145. The federal No Surprises Act generally applies to all health plans, unless there is a "specified state law" that governs the plan. *Id.* ¶¶ 135–38.

The Empire Plan has followed the federal No Surprises Act since its effective date of January 1, 2022. Am. Compl. ¶¶ 124–29. LIA alleges that the Empire Plan decided to follow the federal law "at United's insistence" or "at United's behest" (*id.* ¶¶ 4, 125, 130), and that the decision was "wrong." *Id.* ¶¶ 130–31. LIA alleges that two other anesthesia providers experienced lower reimbursement rates when the Empire Plan began applying the No Surprises Act. *Id.* ¶¶ 200–21. LIA also alleges that—if this is allowed to continue—providers will have to curtail their services. *Id.* ¶¶ 208, 215. According to LIA, this possibility, combined with a pre-existing shortage of physicians, is causing hospitals to close operating rooms, delay procedures, and extend wait times. *Id.* ¶¶ 207–08, 213, 215, 218.

LIA does not allege that United had actual authority or control over the decision to apply the federal No Surprises Act, which led to the alleged reduction in reimbursement rates. Instead, it alleges that United is responsible for "most day-to-day decisions regarding the operation of the Plan and the provision of benefits." Am. Compl. ¶ 80. According to LIA, that includes "the determination and payment of reimbursement rates for medically necessary services." *Id.* ¶ 85.

B. United works with MultiPlan in the federal IDR process.

After the Empire Plan explained that it was subject to the federal law, LIA invoked the federal IDR process under a reservation of rights. Am. Compl. ¶ 147. LIA then "started receiving written communications from MultiPlan" which "identif[ied] itself as working with United[]" and offered to pay the QPA to resolve billing disputes. *Id.* ¶ 151–53. Over time, LIA alleges that it "started receiving more notices from MultiPlan as United[]'s representative." *Id.* ¶ 154. LIA complains about the volume of letters from MultiPlan, alleging that it was "impossible to keep up

with the flood of correspondence and still keep up with the ability to routinely bill and collect for other anesthesia services." *Id.* ¶ 159. It also alleges that some of those letters imposed rushed and unreasonable response deadlines. *Id.* ¶¶ 153–55.

LIA contends that those allegations establish a supposed conspiracy between United and MultiPlan. *See* Am. Compl. Although LIA concedes that MultiPlan acts as a "United vendor engaging in isolated communications with out-of-network providers" (*id.* ¶ 162), it simultaneously claims that MultiPlan is actually United's competitor in other contexts unrelated to this litigation. *Id.* ¶¶ 162–63, 168. Specifically, LIA claims that MultiPlan "is a horizontal competitor of United because both [MultiPlan] and United own and operate Preferred Provider Organization (PPO) networks." *Id.* ¶ 163. LIA also notes that MultiPlan is "like United, . . . a health insurance payer." *Id.* ¶ 41.[1] Finally, LIA spends several paragraphs discussing MultiPlan's analytics services provided to health insurers, including to Cigna, Elevance, Centene, and Humana. *Id.* ¶¶ 170–80.

C. The New York Supreme Court rejected LIA's claims in the *Joseph* case.

On March 28, 2022, three months before filing this lawsuit, LIA joined other plaintiffs in a declaratory judgment action in the New York Supreme Court against the Empire Plan, DCS, New York Department of Financial Services, and United, seeking a declaration that "at all times, the Empire Plan, and its provision of benefits and reimbursement, remain subject to New York insurance law, including the Surprise Bill Law." *Joseph et al. v. Corso et al.*, No. 902227-22 (N.Y. Sup. Ct. March 28, 2022), Dkt. 2. Like its original complaint, many of the factual allegations in LIA's Amended Complaint are copied directly from allegations in its state-court complaint.

---

[1] There appears to be an error in the numbering on the Amended Complaint. Although numbered paragraph 41, this fact follows after paragraph 168. *See* Am. Compl. ¶ 168.

Last year the New York Supreme Court ruled against LIA and other plaintiffs, holding that "the Surprise Bill Law is not an applicable insurance law to the Empire Plan." *Joseph*, No. 902227-22 (N.Y. Sup. Ct. July 13, 2023), Dkt. 95 at 5–6. The Court also dismissed United from the case for a separate reason: "United cannot and does not, control the Empire Plan's coverage or reimbursement decisions." *Id.* The *Joseph* plaintiffs did not appeal the Court's decision to dismiss United. *See Joseph et al. v. Corso et al.*, No. CV-23-1477 (App. Div. 3d Dep't), Dkt. 10 at 5 n.1.

D. The Court dismisses LIA's original complaint.

LIA filed this case in 2022, pressing five claims in the original complaint: monopsony and attempt to monoposonize; antitrust conspiracy under federal and state law; and unjust enrichment. Dkt. 1. This Court dismissed LIA's federal antitrust claims because LIA failed to allege antitrust injury or a plausible horizontal conspiracy between United and MultiPlan. MTD Order at 5. The Court declined to exercise supplemental jurisdiction over LIA's state law claims but noted that they would fail for the same reasons as the federal antitrust claims. *Id.* at 16 n.11.

In its Amended Complaint, LIA advances the same five causes of action under the same theory, namely that United used its purported monopsony power to drive down reimbursement rates and has conspired with MultiPlan to exclude competition. For similar reasons as those that doomed its original complaint, LIA's claims fail.

LEGAL STANDARD

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Although "[t]here is no heightened pleading requirement in antitrust cases," *In re Crude Oil Commodity Futures Litig.*, 913 F. Supp. 2d 41, 54 (S.D.N.Y. 2012), "a plaintiff must do more than cite relevant antitrust language to state a claim for relief." *Wolf Concept S.A.R.L. v. Eber Bros. Wine & Liquor Corp.*,

736 F. Supp. 2d 661, 667 (W.D.N.Y. 2010) (citing *Todd v. Exxon Corp.*, 275 F.3d 191, 198 (2d Cir. 2001)). "A plaintiff must allege sufficient facts to support a cause of action under the antitrust laws. Conclusory allegations that the defendant violated those laws are insufficient." *Id.* at 667–68; *see also Twombly*, 550 U.S. at 555 ("[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.").

ARGUMENT

I. THE NEW YORK SUPREME COURT'S RULING IN THE PARALLEL STATE ACTION IS DISPOSITIVE AND PRECLUSIVE.

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. In a parallel state court case, the New York Supreme Court rejected that view, holding that "the Surprise Bill Law is not an applicable insurance law to the Empire Plan," and, in any event, "United cannot and does not, control the Empire Plan's coverage or reimbursement decisions." *Joseph et al. v. Corso et al.*, No. 902227-22 (N.Y. Sup. Ct.), Dkt. 95 at 5–6. Those holdings are both preclusive and dispositive of LIA's antitrust claims.

A federal court must give a state court ruling the same preclusive effect as that ruling would have in state court. *See Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985); 28 U.S.C. § 1738 (state judicial proceedings "shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken."). Absent a reversal on appeal, principles of *res judicata* or collateral estoppel would require New York state courts to follow the *Joseph* ruling and prevent

LIA from re-litigating the same issues.[2] "Accordingly, this Court is also bound." *Solow v. Delit*, 1993 U.S. Dist. LEXIS 11362, at *8 n.2 (S.D.N.Y. Aug. 13, 1993).

The *Joseph* decision precludes LIA's antitrust claims in this case. LIA's allegations borrow heavily from the *Joseph* complaint; it claims that it was harmed when the Empire Plan began applying reduced reimbursement rates under the federal No Surprises Act as opposed to New York's Surprise Bill Law. As alleged, LIA has no damages—and thus no legal claim—if the Empire Plan's decision to apply the federal law was correct. That is exactly what the *Joseph* court held. *Joseph*, No. 902227-22, Dkt. 95 at 6 ("[T]he 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."). LIA fails to explain how antitrust liability or damages can exist if DCS's statutory interpretation is correct.

The *Joseph* decision is dispositive for another reason: DCS—not United—made the (correct) choice to follow the federal No Surprises Act. LIA admits that United is only a third-party administrator for the Empire Plan. Am. Compl. ¶¶ 71, 79–80. LIA nevertheless alleges that "United, far from simply recommending action to the Empire Plan, has substantial control over the Empire Plan by setting and determining reimbursement rates, selecting in-network providers, processing and adjudicating claims, paying claims, and negotiating dispute resolutions." *Id.* ¶ 273.

---

[2] *See Giakoumelos v. Coughlin*, 88 F.3d 56, 59 (2d Cir. 1996) ("[T]he doctrine of collateral estoppel, or issue preclusion, applies when a litigant in a prior proceeding asserts an issue of fact or law in a subsequent proceeding and (1) the issue 'has necessarily been decided in the prior action and is decisive of the present action,' and (2) there has been 'a full and fair opportunity to contest the decision now said to be controlling.'" (quoting *Schwartz v. Public Adm'r of Cnty. of Bronx*, 24 N.Y.2d 65, 71, 246 N.E.2d 725, 298 N.Y.S.2d 955 (1969))); *People ex rel. Spitzer v. Applied Card Sys., Inc.*, 11 N.Y.3d 105, 122, 894 N.E.2d 1, 863 N.Y.S.2d 615 (2008) (under New York law, *res judicata* "bars successive litigation based upon the same transaction or series of connected transactions if: (i) there is a judgment on the merits rendered by a court of competent jurisdiction, and (ii) the party against whom the doctrine is invoked was a party to the previous action, or in privity with a party who was." (cleaned up)).

But *Joseph* held that "United cannot and does not, control the Empire Plan's coverage or reimbursement decisions." *Joseph*, No. 902227-22, Dkt. 95 at 5–6. That conclusion is correct, and the plaintiffs in *Joseph* (including LIA) chose not to appeal that ruling. *Joseph* precludes LIA from seeking to hold United responsible for the Empire Plan's (correct) application of federal law.

II. LIA'S AMENDED COMPLAINT DOES NOT FIX ITS FAILURE TO ALLEGE ANTITRUST INJURY.

If the Court reaches the merits of LIA's antitrust claims, it should dismiss them because LIA does not plead "antitrust injury." *Mahmud v. Kaufmann*, 607 F. Supp. 2d 541, 554 (S.D.N.Y. 2009), *aff'd*, 358 F. App'x 229 (2d Cir. 2009). When this Court reviewed LIA's initial complaint, the Court held, consistent with United and MultiPlan's arguments, that LIA failed to allege antitrust injury. MTD Order at 8. The Court emphasized that federal and state antitrust statutes were enacted to protect competition, but "[t]hey are not general prohibitions of all types of activity which may result in economic harm to any individual." *Assocs. Cap. Serv. Corp. of N.J. v. Fairway Private Cars, Inc.*, 590 F. Supp. 10, 13 (E.D.N.Y. 1982). Thus, to state a claim under the antitrust laws, a plaintiff must show that the challenged conduct has resulted in an "antitrust injury"—that is, "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Balaklaw v. Lovell*, 14 F.3d 793, 797 (2d Cir. 1994) (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)). LIA's Amended Complaint falls well short.

"The antitrust injury requirement obligates a plaintiff to demonstrate . . . that the challenged action has had an *actual* adverse effect on competition as a whole in the relevant market." *Bologna v. Allstate Ins. Co.*, 138 F. Supp. 2d 310, 319 (E.D.N.Y. 2001) (citation omitted) (emphasis in original). It "will not suffice" to sustain an antitrust injury if a plaintiff only "prove[s] it has been harmed as an individual competitor." *Id.* Upholding that pleading requirement helps to

ensure that antitrust laws do not "become a treble-damages sword rather than the shield against competition-destroying conduct that Congress meant them to be." *NicSand, Inc. v. 3M Co.*, 507 F.3d 442, 450 (6th Cir. 2007).

LIA alleges that that the Empire Plan, "at United's insistence," decided that it is no longer governed by the New York Surprise Bill Law and was instead "governed by the federal No Surprises Act." Am. Compl. ¶ 125. According to LIA, following the federal law allowed the Empire Plan to reimburse for anesthesiology services using the federal QPA, rather than the UCR rate, which in turn negatively affected LIA's revenue. *Id.* ¶¶ 120–24, 200–01. But harm to LIA alone does not show harm to competition. *Fido's Fences, Inc. v. Canine Fence Co.*, 672 F. Supp. 2d 303, 309 (E.D.N.Y. 2009) ("Individual harm to the plaintiff as [an alleged] competitor is insufficient to allege anticompetitive injury."). Now recognizing that defect, LIA adds allegations that Defendants' supposed role in the Empire Plan's decision to be governed by the federal No Suprises Act caused (1) harm to other anesthesia providers, (2) an increase in the price of anesthesia services, and (3) a reduction to the quality and output of anesthesia services. *See* Am. Compl. ¶¶ 39–61, 200–21. But the allegations are still insufficient.

First, LIA alleges that two other anesthesia providers also experienced lower reimbursement rates when the Empire Plan began applying the No Surprises Act. Am. Compl. ¶¶ 200–21. But that still says nothing about *competition in a relevant market*—which might include thousands of anesthesiologist practitioners. *See* U.S. BUREAU OF LABOR STATISTICS, *Occupational Employment and Wages, May 2023, 29 1211, Anesthesiologists*, https://www.bls.gov/oes/current/oes291211.htm (last visited July 16, 2024).[3] Although LIA

[3] The Court can judicially notice U.S. Bureau of Labor statistics. *See, e.g.*, *Mathews v. ADM Milling Co.*, 2019 U.S. Dist. LEXIS 97564, at *10 (W.D.N.Y. June 11, 2019) ("As the statistical

alleges that it and two other practices' individual reimbursement rates have fallen, that fails to adequately allege how a relevant market has been altered. *See Balaklaw*, 14 F.3d at 799. LIA and other anesthesiologists are free to negotiate a participation agreement with the Empire Plan or compete for admitting privileges at Good Samaritan Hospital and other hospitals. There is no "foreclosure of competition" in the alleged market for the provision of anesthesiology services, "and consequently, [there is] no antitrust injury." *Korshin v. Benedictine Hosp.*, 34 F. Supp. 2d 133, 138–39 (N.D.N.Y. 1999) (holding that anesthesiologist did not allege antitrust injury where there were "no indications that [the plaintiff] and other anesthesiologists [we]re excluded, or substantially limited, in the broader market for employment").

Second, LIA fails to show that the Empire Plan's (correct) decision to apply the federal No Surprises Act will result in higher healthcare costs. "Antitrust law in the healthcare setting focuses on protecting patients from prices that are too high." *Anesthesia Assocs. of Ann Arbor, PLLC v. Blue Cross Blue Shield of Mich.*, 2021 U.S. Dist. LEXIS 174021, at *21 (E.D. Mich. Sept. 14, 2021). In *Anesthesia Associates of Ann Arbor*, an anesthesiology practice alleged that the state's largest insurance provider (Blue Cross Blue Shield of Michigan) conspired with a hospital system to reduce the reimbursement rates for anesthesiology services. 2021 U.S. Dist. LEXIS 174021, at *1–2. The court dismissed the plaintiff's antitrust claims, observing that "[i]t is not altogether clear . . . how insisting on low reimbursement rates results in a cognizable antitrust injury . . . ." *Id.* at *25. The same is true here. 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. LIA fails to identify a single patient who has had to pay

---

evidence from the Bureau of Labor offered by Plaintiff comes from the official website of the U.S. Department of Labor, the Court could take judicial notice of it.").

more for anesthesia services. On the contrary, it is far more plausible that consumer costs will increase if health plans are required to remit inflated reimbursements to out-of-network physicians.

LIA tries to sidestep that problem by alleging that the decision to follow the lower reimbursement methodology is part of a multi-step long-term play 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, which owns another subsidiary called OptumCare that also employs anesthesiologists; and (iv) *may* have a negative economic effect on *some* patients. Am. Compl. ¶¶ 39–61, 222–33. Those allegations are implausible and speculative in the extreme. "To prove an *actual* adverse effect on price, a plaintiff must show just that—that prices actually increased" (*MacDermid Printing Sols. LLC v. Cortron Corp.*, 833 F.3d 172, 184 (2d Cir. 2016)) (emphasis in original), not that there is some hypothetical long string of attenuated circumstances where prices might go up many years down the line. *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"), *aff'd*, 721 F. App'x 17 (2d Cir. 2018).

Third, LIA alleges, in conclusory fashion, that the reduction in reimbursement rates adversely affected the quality and output of anesthesia services. *See* Am. Compl. ¶ 276. Those conclusory allegations cannot withstand a motion to dismiss. *Goldstein v. Pataki*, 488 F. Supp. 2d 254, 289 (E.D.N.Y. 2007), *aff'd*, 516 F.3d 50 (2d Cir. 2008). LIA does not allege that even one anesthesiologist has closed its doors or stopped practicing because of the Empire Plan's choice to follow federal law. At most, LIA alleges that one anesthesia practice has "lost more than 10% of its physician staff due to financial distress" due to "the low Empire Plan rates." Am. Compl. ¶ 212.

LIA does not allege how many physicians the practice employs (thus, the Court does not know if "more than 10%" represents two or twenty physicians). It does not even allege that those physicians are no longer practicing anesthesiologists.[4]

The Court has already recognized that a "health plan lowering reimbursement rates paid to a physician practice is generally insufficient to establish antitrust injury." MTD Order at 12. Instead, there must be "something more." *Id.*; *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."); *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"). LIA's Amended Complaint suggests that the "something more" is an alleged conspiracy between United and MultiPlan. But as explained in Section III below, LIA allegations still fail to establish any sort of conspiracy.

LIA has alleged nothing more than three anesthesia practices' dissatisfaction with reduced reimbursements offered under a single health plan for a limited category of surprise bills. LIA has failed to allege the sort of market-wide injury to competition that is necessary to establish antitrust injury. "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*, 34 F. Supp. 2d at 138–39 (quotation omitted).

[4] LIA's Amended Complaint also states that the "Great Resignation" and other economic and societal factors are causing a significant shortage of clinicians. Am. Compl. ¶¶ 207–08. But those factors existed before and independent of the Empire Plan's decision to follow federal law.

III. LIA'S CONSPIRARY ALLEGATIONS ARE INSUFFICIENT.

Defendants charged with violating Sherman Act Section 1 or the Donnelly Act[5] "are entitled to know how they are alleged to have conspired, with whom, and for what purpose." *In re SSA Bonds Antitrust Litig.*, 2020 U.S. Dist. LEXIS 54000, at *22 (S.D.N.Y. Mar. 18, 2020). To satisfy that requirement, a plaintiff must, as a threshold matter, "allege enough facts to support the inference that a conspiracy actually existed." *Mayor & Council of Balt. v. Citigroup, Inc.*, 709 F.3d 129, 136 (2d Cir. 2013); *see also Twombly*, 550 U.S. at 555–56 (antitrust allegations must contain "enough factual matter (taken as true) to suggest that an agreement was made"). That requires factual allegations showing "a unity of purpose, common design and understanding, or a meeting of the minds in an unlawful agreement." *In re Aluminum Warehousing Antitrust Litig.*, 2014 U.S. Dist. LEXIS 121435, at *99 (S.D.N.Y. Aug. 29, 2014), *aff'd*, 833 F.3d 151 (2d Cir. 2016). LIA's conspiracy claims fail to satisfy that threshold pleading requirement.

This case concerns only MultiPlan's function as United's contracted billing vendor for the Empire Plan. Despite that arrangement, LIA alleges that United and MultiPlan are in a horizontal conspiracy. *See* Am. Compl. ¶ 163. But absent allegations that MultiPlan and United are horizontal competitors with respect to the services at issue in this case, they cannot be in a horizontal conspiracy. *See In re Aluminum*, 2014 U.S. Dist. LEXIS 121435, at *114 ("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.").

LIA resists that conclusion and alleges that MultiPlan "is a horizontal competitor of United because both MPI and United own and operate Preferred Provider Organization (PPO) networks."

---

[5] LIA's Donnelly Act claims rise and fall with its Sherman Act claims because "[t]he standard for a well-pleaded Donnelly Act claim is the same as a claim under Section 1 of the Sherman Act." *Nat'l Gear & Piston, Inc. v. Cummins Power Sys., LLC*, 861 F. Supp. 2d 344, 370 (S.D.N.Y. 2012).

Am. Compl. ¶ 163. But LIA's conspiracy allegations in this case do not concern PPO networks or its relationships with PPO clients. LIA's alleged market in this case is the provision of medically necessary anesthesiology services. *See* Am. Compl. ¶ 276. There are no allegations that United and MultiPlan compete in that market. *See, e.g.*, *JLM Indus., Inc. v. Stolt-Nielsen SA*, 387 F.3d 163, 179 (2d Cir. 2004) (explaining that horizontal conspiracies involve "competitors at the same level of competition" agreeing to restrain trade "for a given product market").

LIA's conspiracy allegations also fail for other reasons. To sustain a claim for a conspiracy, LIA must 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." *See Caithness Long Island II, LLC v. SEG Long Island LLC*, 2019 U.S. Dist. LEXIS 174866, at *9–10 (E.D.N.Y. Sept. 30, 2019). LIA alleges that United is engaging MultiPlan to employ various bad-faith negotiating pressure tactics to suppress out-of-network rates and that United and MultiPlan kicked off this process with an "agreement" 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. But those allegations are insufficient to allege a conspiracy. LIA has, at most, alleged that "MultiPlan contracted with United to handle direct communication with providers as part of the federal IDR process with respect to claims for reimbursement related to treatment provided to patients insured by the Empire Plan." MTD Order at 15. But a 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"). LIA has alleged no facts to substantiate that there was some sort of meeting of the minds to engage in some sort of illicit reimbursement negotiation strategies.

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." Am. Compl. ¶ 272. But that allegation is totally detached from the Empire Plan, the federal No Suprises Act, the New York Surprise Bill Law, and every other factual allegation. Thus, even accepting that allegation as true, it does not come close to plausibly alleging a conspiracy that has any connection to LIA's theory of liability.

Just like before, LIA still 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. Far from alleging those sorts of facts, LIA's allegations only demonstrate an established business relationship between United and MultiPlan.[6] That is not enough. *See In re Jan. 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).

---

[6] It is also no different than MultiPlan's relationship with its many other clients. *See* Am. Compl. ¶ 180 ("[MultiPlan's] clients for these services include not only United, but also Cigna, Elevance, Centene, and Humana."). Because LIA alleges 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's conspiracy claims also do not satisfy the rule of reason. "Under Section 1, some restraints on trade, such as horizontal agreements to fix prices, are unlawful per se, while others must be evaluated under the so called 'rule of reason.'" *MacDermid Printing*, 833 F.3d at 181–82. As noted above, LIA's allegations do not describe a horizontal agreement among competitors or any other sort of agreement that could be deemed "'so plainly anticompetitive' that a court can presume them to be unreasonable without further analysis." *Ross v. Am. Express Co.*, 35 F. Supp. 3d 407, 454 (S.D.N.Y. 2014) (citation omitted), *aff'd*, 630 F. App'x 79 (2d Cir. 2015). Instead, LIA's Section 1 claim must be evaluated under the rule of reason. *Relevent Sports*, 551 F. Supp. 3d at 128. At the motion to dismiss stage, the rule of reason inquiry requires the plaintiff to "identify the relevant market affected by the challenged conduct and allege an actual adverse effect on competition in the identified market." *Id.* LIA fails to plead facts that satisfy that test.

To identify the relevant market, a plaintiff must allege "both a product market and a geographic market." *Integrated Sys. & Power, Inc. v. Honeywell Int'l, Inc.*, 713 F. Supp. 2d 286, 298 (S.D.N.Y. 2010). The product market must correspond with the area of effective competition, *Campfield v. State Farm Mut. Auto. Ins. Co.*, 532 F.3d 1111, 1118 (10th Cir. 2008) (The "market is comprised of buyers who are seen by sellers as being reasonably good substitutes"), and reference to economic factors, including interchangeability and cross-elasticity of demand. *Integrated Sys. & Power*, 713 F. Supp. 2d at 298 ("Dismissal is appropriate where the alleged product market is defined without 'reference to the rule of reasonable interchangeability and cross-elasticity of demand.'").[7] LIA alleges that the "provision of medically necessary anesthesia

[7] In other words, "[t]he relevant market must be defined as all products reasonably interchangeable by consumers for the same purposes . . . ." *City of N.Y. v. Grp. Health Inc.*, 649 F.3d 151, 155 (2d Cir. 2011).

services" is the product market. Am. Compl. ¶ 234. But that alleged market is inconsistent with its antitrust theory, which focuses on services provided by United and MultiPlan. That requires dismissal. *Integrated Sys. & Power*, 713 F. Supp. 2d at 298.

LIA's geographic market is also defective. "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." *Concord Assocs., L.P. v. Ent. Props. Tr.*, 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). LIA defines the relevant geographic market as "no larger than the New York metropolitan area, including New York City, Nassau, Suffolk, and Westchester Counties." Am. Compl. ¶ 244. In support, LIA alleges that "most patients are willing to travel, under the best of circumstances, only about 30 minutes for health care services." *Id.* ¶ 243. But 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. *See id*. ¶ 24 ("In addition to its diverse practice at Good Samaritan [hospital in West Islip, New York] LI Anesthesia additionally provides anesthesia services at physician offices and surgery centers around New York and Long Island."). More importantly, LIA fails to explain why Empire Plan members, who are likewise located throughout the state, would turn only to the New York metropolitan area for medically necessary anesthesiology services. *See id.* ¶ 75 ("Many New York state residents are covered by the Empire Plan."). LIA's attempt to constrict the market to the New York metropolitan area is unsupported and inconsistent with economic realities. *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 plaintiff's 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).

As for LIA's attempt to allege an actual adverse effect on competition in the identified market, its allegations fail for the reasons set forth in Section II above. Moreover, LIA's allegations are insufficient to establish a harm to competition indirectly because LIA has failed to plead facts showing that Defendants have "sufficient market power to cause an adverse effect on competition" in the proposed market.[8] *Mooney v. AXA Advisors, L.L.C.*, 19 F. Supp. 3d 486, 502 (S.D.N.Y. 2014). As noted above, LIA does not adequately allege United or MultiPlan 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. *See Ross*, 35 F. Supp. 3d at 455. ("To prevail under the rule of reason analysis, plaintiffs must show that the defendant conspirators have market power in a particular market for goods or services.") (internal quotations omitted).

Instead, LIA alleges that United has market power because a sister company (OptumCare) owns and operates medical practices that employ anesthesiologists. Am. Compl. ¶¶ 39–61, 222–25. But LIA pleads no facts that would justify disregarding the corporate distinction between United and OptumCare. In *In re Suboxone (Buprenorphine Hydrochloride & Naloxone) Antitrust Litig.*, the Eastern District of Pennsylvania considered and rejected a similar attempt by a plaintiff to impute a sister company's market power to a defendant. 2017 U.S. Dist. LEXIS 171322, at *31 (E.D. Pa. Oct. 16, 2017). The court reasoned that the complaint did "not contain a single allegation

---

[8] "Market power is defined as the ability to raise price significantly above the competitive level without losing all of one's business and may be shown by evidence of specific conduct indicating the defendant's power to control prices or exclude competition or by evidence of market share." *U.S. Elecs. v. Directed Elecs.*, 2007 U.S. Dist. LEXIS 118438, at *17–18 (S.D.N.Y. 2007) (citations and internal quotations omitted).

from which [it could] reasonably infer that [one company] exercised any control or pervasive domination over [its sister company].” *Id.* The court held that “[a]bsent such control, or at least some showing that the companies were alter egos, [one sister company’s] market power cannot be attributed to [the other].” *Id.* at *31–32. The same is true here. OptumCare is neither a parent nor subsidiary of United, and LIA does not allege that United exercised any control over OptumCare or vice versa. The two entities are related only because both share the same ultimate parent. *See* Am. Compl. ¶ 47. That is not enough. *See In re Suboxone*, 2017 U.S. Dist. LEXIS 171322, at *31.

Even if OptumCare’s employment of anesthesiologists were considered, LIA’s allegations do not show that OptumCare has sufficient market power to satisfy the rule of reason. LIA alleges that OptumCare employs roughly 50 anesthesiologists in the New York metropolitan area (Am. Compl. ¶ 60), but never specifies what that equates to from a market share perspective. There is a good reason LIA is silent on that score. The New York State Society of Anesthesiologists states that it represents “approximately 4,200+ New York anesthesiologists.” The New York State Society of Anesthesiologists, Inc., *What is the NYSSA?*, https://www.nyssa-pga.org/ (last visited June 12, 2024). If that estimate is accurate, OptumCare’s market share would be less than 1%.

The Supreme Court has concluded that a defendant with a 30% share of the market lacks sufficient market power for an antitrust violation. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 26–27 (1984). But this Court doesn’t need to resolve OptumCare’s exact market share on this motion to dismiss. It is enough that LIA has failed to allege facts showing that OptumCare has market power. Merely alleging that OptumCare employs 50 anesthesiologists is not enough. *See Bookhouse of Stuyvesant Plaza, Inc. v. Amazon.com, Inc.*, 985 F. Supp. 2d 612, 622 (S.D.N.Y. 2013) (dismissing Sherman Act Section 1 claim because defendant’s market share was only 36%).

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

In Counts II and III, LIA presses claims under Sherman Act Section 2 for monopsonization (Count II) and attempted monoposonization (Count III). The Supreme Court has described a monopsony as the "mirror image" of a monopoly—but from the "buy side of the market" instead of the "sell side." *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 320–21 (2007). "The kinship between monopoly and monopsony suggests that similar legal standards should apply to claims of monopolization and to claims of monopsonization." *Id.* at 322.

Because LIA has alleged that prices were *too low*, instead of too high, LIA must establish a claim for predatory pricing. *See Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 340 (1990) ("Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition."); *see also Kartell v. Blue Shield*, 749 F.2d 922, 931 (1st Cir. 1984) ("[T]he Congress that enacted the Sherman Act saw it as a way of protecting consumers against prices that were too *high*, not too low.") (emphasis in original). Predatory pricing schemes "are rarely tried, and even more rarely successful." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986). That is because, to succeed, a predatory seller must sell its product below marginal costs for long enough "to drive competitors out of business" only to raise prices to supracompetitive levels once competition is vanquished. *Weyerhaeuser*, 549 U.S. at 318; *see also Matsushita*, 475 U.S. at 589 ("The success of any predatory scheme depends on *maintaining* monopoly power for long enough both to recoup the predator's losses and to harvest some additional gain.") (emphasis in original).

LIA has alleged none of the elements of a predatory-pricing claim—including that United incurred a short-term loss with a "dangerous probability of recouping its investment" by raising prices after driving away competition. *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*,

509 U.S. 209, 222–24 (1993); *see also Anesthesia Assocs. of Ann Arbor*, 2021 U.S. Dist. LEXIS 174021, at *27–28 (rejecting predatory-bidding theory because plaintiff "does not plausibly plead that low reimbursement rates incur short-term losses for Defendant"); *Weyerhaeuser*, 549 U.S. at 323 ("A predatory-bidding scheme requires a buyer of inputs to suffer losses today on the chance that it will reap supracompetitive profits in the future.").

But there is an even more fundamental problem with LIA's claim. Because LIA is asserting a "monopsony" claim instead of a "monopoly" claim, the predatory theory must be reversed. The Supreme Court has held that predatory behavior by a monopsonist requires allegations that the defendant *overpaid* for the good or service—not that it paid too little. *Weyerhaeuser*, 549 U.S. at 323–24. Relying on *Weyerhaeuser*, courts have rejected predatory monopsony theories on allegations resembling those here, including in cases by anesthesiologists complaining about reduced reimbursements. In *Anesthesia Associates of Ann Arbor*, 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. 2021 U.S. Dist. LEXIS 174021, at *27. For the same reasons, LIA's monopsony claim makes no sense and does not resemble any liability theory ever recognized by the Supreme Court.

LIA's monopsony claim also fails because LIA fails to allege facts establishing "the possession of [monopsony] power in the relevant market." *Sitts v. Dairy Farmers of Am., Inc.*, 417 F. Supp. 3d 433, 476 (D. Vt. 2019) (quotation omitted). For its Section 1 claims, LIA defined the relevant market as the market for "the provision of medically necessary anesthesia services to patients" (Am. Compl. ¶ 234) in "the New York metropolitan area" (*id.* ¶ 244). But for its Section 2 claims, LIA abandons its service-provider market definition and asserts that "United possesses

monopsony power in the market for the *reimbursement* of anesthesia services in the New York metropolitan area." *Id.* ¶ 293 (emphasis added). United disputes that "reimbursement" is a plausible product. But whatever market applies, LIA's monopsony claims fail because there are no allegations showing that United participates in that market.

First, other than a conclusory allegation parroting the elements of its claims, LIA fails to allege facts to support a "reimbursement" product market. The reimbursement market is not set forth in LIA's "summary of antitrust allegations" or the "relevant product market" sections of its complaint (Am. Compl. ¶¶ 234–41), nor does LIA define a reimbursement market with reference to economic considerations anywhere else in the complaint. *Chapman v. N.Y. State Div. for Youth*, 546 F.3d 230, 238 (2d Cir. 2008) ("Where the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand . . . , the relevant market is legally insufficient and a motion to dismiss may be granted.").

Second, as with its "provision of medically necessary anesthesiology services" market, LIA fails to justify its decision to restrict the geographic scope of its reimbursement market to the New York metropolitan area. When describing the healthcare-provider for its Section 1 claims, LIA at least tried to link the geographic boundaries to the distance patients are willing to travel for medical care. But that limitation does not work for an alleged reimbursement market. The Empire Plan provides reimbursements statewide, and payors from outside New York routinely reimburse for anesthesia services provided in the state. LIA offers no reason the market should be limited to the area where LIA practices. *Discon Inc. v. NYNEX Corp.*, 86 F. Supp. 2d 154, 162 (W.D.N.Y. 2000) ("The Supreme Court has expressly held that political boundaries, such as state and municipal boundaries, cannot be used artificially to circumscribe a relevant market, because relevant markets

are defined in terms of economic realities.”). LIA’s geographic market definition should be rejected because it is “arbitrary, irrational and not supported by competent [allegations].” *Id.*

Third, 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* Am. Compl. ¶¶ 71, 79-80. 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.”). And even if United did participate in the market, LIA fails to allege that United has power or control over prices. LIA’s Amended 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. Am. Compl. ¶¶ 107–15, 132–46. United did not make that decision.

Fourth, LIA’s allegations are insufficient to show that United has monopsony power even if we accept LIA’s arbitrary market definition. LIA clutters its complaint with statistics without linking those statistics to its defined market. For example, LIA alleges that United has a 26% share among “health care insurers (all products)” in the “New York-Newark-Jersey City, NY-NJ-PA Metropolitan Statistical Area” (Am. Compl. ¶¶ 68–69); a 66% share in that same area “[f]or point-of-service products” (*id.* ¶¶ 68, 252); a 33.8% share “of private (non-governmental) enrollment plans in the New York City market (defined as Suffolk, Nassau, Queens, Kings, Richmond, New York, Bronx, Westchester, Putnam, and Rockland Counties” (*id.* ¶ 70); and a 50% 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)” (*id.* ¶ 252). But LIA never tethers those allegations to the market for the “reimbursement of anesthesia services” (as

opposed to some other commercial insurance market), or the precise geographic boundaries selected by LIA. Its monopsony claims should be dismissed.

VI. LIA'S UNJUST ENRICHMENT CLAIM CONTINUES TO FAIL.

LIA's re-pled unjust-enrichment claim (Am. Compl. ¶¶ 308–13) fails for three independent reasons. *First*, courts hold that unjust enrichment claims do "not comply with the relevant pleading standards" where, as here, the plaintiff "plead[s] federal antitrust claims and the [alleged] factual foundation for them, and then merely allege[s] that those claims are also actionable as unjust enrichment." *Mosaic Health Inc. v. Sanofi-Aventis U.S., LLC*, 2022 U.S. Dist. LEXIS 159137, at *23 (W.D.N.Y. Sept. 2, 2022).

Second, the unjust-enrichment claim is "unnecessary and duplicative" because it will "rise and fall with [LIA's antitrust] claims." *See, e.g., In re Novartis & Par Antitrust Litig.*, 2019 U.S. Dist. LEXIS 138133, at *25 (S.D.N.Y. Aug. 14, 2019).

Third, LIA's unjust-enrichment claim fails because any alleged benefit United retained is too attenuated. While a plaintiff "need not be in privity with the defendant to state a claim for unjust enrichment, the connection between the defendant and the plaintiff must not be 'too attenuated.'" *Oliver v. Am. Express Co.*, 2020 U.S. Dist. LEXIS 76688, at *55 (E.D.N.Y. Apr. 30, 2020). Setting aside that United did not make the decision to follow the federal No Surprises Act, which reduced LIA's reimbursement rates, any alleged benefit from that external decision must flow through several layers. That is, United's fees *may* increase if it negotiates lower reimbursements under its contract with Empire Plan. *See* Am. Compl. ¶¶ 325–26. That connection is too attenuated for unjust-enrichment liability. *Oliver*, 2020 U.S. Dist. LEXIS 76688, at *55.

CONCLUSION

For the foregoing reasons, the Court should dismiss LIA's amended complaint.

Dated: July 18, 2024

ALSTON & BIRD LLP

/s/ Karl Geercken

Karl Geercken
90 Park Avenue
New York, New York 10016
(212) 210-9400
karl.geercken@alston.com

Brian D. Boone (admitted *pro hac vice*)
Emily McGowan (admitted *pro hac vice*)
ALSTON & BIRD LLP
101 S. Tryon Street, Suite 4000
Charlotte, NC 28280
(704) 444-1000
brian.boone@alston.com
emily.mcgowan@alston.com

D. Andrew Hatchett (admitted *pro hac vice*)
Jordan Edwards (admitted *pro hac vice*)
ALSTON & BIRD LLP
1201 W. Peachtree Street
Atlanta, GA 30309
(404) 8811-7000
andrew.hatchett@alston.com
jordan.edwards@alston.com

Attorneys for Defendant UnitedHealthcare Insurance Company of New York