

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

U.S. ANESTHESIA PARTNERS, INC. et al.

Defendants.

REDACTED PUBLIC VERSION

Case No.: 4:23-CV-03560-KH

ORAL ARGUMENT REQUESTED

**DEFENDANT U.S. ANESTHESIA PARTNERS, INC.'S
MOTION TO DISMISS THE FTC'S COMPLAINT**

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
INTRODUCTION	1
BACKGROUND	5
A. Anesthesia Providers Work Both In And Out of Hospitals And Negotiate Rates Directly With Insurance Companies	5
B. USAP Inherited Reimbursement Rates That Had Been Negotiated Between Commercial Insurers And GHA	8
C. USAP Expanded Its Provision Of High-Quality Anesthesia Services Within And Outside Of Houston	9
D. USAP Inherited And Executed Ancillary Agreements In Connection With Certain Acquisitions.....	10
LEGAL STANDARD.....	11
ARGUMENT.....	11
I. THE FTC LACKS AUTHORITY TO SEEK INJUNCTIVE RELIEF UNTETHERED FROM AN ADMINISTRATIVE PROCEEDING AND FOR LONG-PAST CONDUCT	11
A. Section 13(b) Bars The FTC From Seeking Injunctive Relief Independent Of Administrative Proceedings.....	12
1. The Statute Does Not Permit An Independent Federal Court Action.....	12
2. Traditional Tools Of Statutory Interpretation Confirm That Section 13(b) Requires Administrative Proceedings For Injunctive Relief.....	14
B. The FTC Lacks Statutory Authority To Challenge USAP’s Past Acquisitions Or Agreements.....	18
1. Congress Authorized The FTC To Sue In Federal Court Only To Halt Imminent Or Ongoing Violations Of Law	18
2. USAP’s Acquisitions And Contractual Arrangements Are Past Conduct Not Cognizable Under Section 13(b)	19
II. THE COMPLAINT FAILS TO ALLEGE PLAUSIBLE ANTITRUST CLAIMS.....	22
A. The FTC Fails To Plausibly Allege A Relevant Market.....	22

B.	The FTC Fails To Plausibly Allege Monopoly Power	26
C.	The FTC Fails To Plausibly Allege Exclusionary Conduct.....	28
D.	The FTC Fails To Plausibly Allege A Violation Of The Clayton Act	31
E.	The FTC Fails To Plausibly Allege A Price-Fixing Agreement.....	32
F.	The FTC Fails To Plead A Valid Conspiracy Claim	35
CONCLUSION.....		35
CERTIFICATE OF SERVICE		

TABLE OF AUTHORITIES

CASES	Page(s)
<i>I-800 Contacts, Inc. v. FTC</i> , 1 F.4th 102 (2d Cir. 2021).....	35
<i>Abbott v. United States</i> , 562 U.S. 8 (2010).....	14
<i>Abraham & Veneklasen Joint Venture v. Am. Quarter Horse Ass’n</i> , 776 F.3d 321 (5th Cir. 2015)	26, 27, 28, 31
<i>AMG Cap. Mgmt., LLC v. FTC</i> , 141 S. Ct. 1341 (2021).....	2, 12, 13, 14, 15, 17, 18
<i>Apani Sw., Inc. v. Coca-Cola Enters., Inc.</i> , 300 F.3d 620 (5th Cir. 2002)	22, 23
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009).....	5
<i>Basic Cap. Mgmt., Inc. v. Dynex Cap., Inc.</i> , 976 F.3d 585 (5th Cir. 2020).....	7
<i>Bell Atl. Corp. v. Twombly</i> , 550 U.S. 544 (2007).....	11, 20, 27, 28 31, 32, 34, 35
<i>BRFHH Shreveport, LLC v. Willis-Knighton Med. Ctr.</i> , 49 F.4th 520 (5th Cir. 2022).....	32, 35
<i>Cargill v. Garland</i> , 57 F.4th 447 (5th Cir. 2023), <i>cert. granted</i> , 2023 WL 7266996 (Nov. 3, 2023).....	15-16
<i>Collins v. Midland Mortg.</i> , 2022 WL 16556810 (S.D. Tex. Oct. 31, 2022).....	11
<i>Complete Entm’t Res. LLC v. Live Nation Entm’t, Inc.</i> , 2016 WL 3457177 (C.D. Cal. May 11, 2016)	20
<i>Concord Boat Corp. v. Brunswick Corp.</i> , 207 F.3d 1039 (8th Cir. 2000).....	20
<i>Copperweld Corp. v. Independence Tube Corp.</i> , 467 U.S. 752 (1984).....	4, 35
<i>David B. Turner Builders LLC v. Weyerhaeuser Co.</i> , 603 F. Supp. 3d 459 (S.D. Miss. 2022).....	31
<i>Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.</i> , 732 F.2d 480 (5th Cir. 1984), <i>aff’d</i> , 2023 WL 2401587 (5th Cir. Mar. 8, 2023).....	31
<i>Dresses for Less, Inc. v. CIT Grp./Com. Servs., Inc.</i> , 2002 WL 31164482 (S.D.N.Y. Sept. 30, 2002).....	29
<i>Eastman Kodak Co. v. Image Tech. Servs.</i> , 504 U.S. 451 (1992)	26, 28

<i>Eastman v. Quest Diagnostics Inc.</i> , 2016 WL 1640465 (N.D. Cal. Apr. 26, 2016), <i>aff'd</i> , 724 F. App'x 556 (9th Cir. 2018)	29
<i>FTC v. AbbVie Inc.</i> , 976 F.3d 327 (3d Cir. 2020).....	19
<i>FTC v. Credit Bureau Ctr., LLC</i> , 937 F.3d 764 (7th Cir. 2019).....	19
<i>FTC v. Evans Prods. Co.</i> , 775 F.2d 1084 (9th Cir. 1985)	19
<i>FTC v. Shire Viropharma, Inc.</i> , 917 F.3d 147 (3d Cir. 2019)	16, 19, 20, 21
<i>FTC v. Southwest Sunsites, Inc.</i> , 665 F.2d 711 (5th Cir. 1982).....	19
<i>Hicks v. PGA Tour, Inc.</i> , 897 F.3d 1109 (9th Cir. 2018).....	24
<i>Ironshore Specialty Ins. Co. v. Facility IMS, LLC</i> , 2023 WL 6850006 (N.D. Tex. Oct. 17, 2023)	21
<i>It's My Party, Inc. v. Live Nation, Inc.</i> , 811 F.3d 676 (4th Cir. 2016)	2-3, 25-26
<i>Jarkesy v. SEC</i> , 34 F.4th 446 (5th Cir. 2022), <i>cert. granted</i> , 143 S. Ct. 2688 (2023)	16
<i>Katrina Canal Breaches Litig., In re</i> , 495 F.3d 191 (5th Cir. 2007)	11
<i>Louisiana Pub. Serv. Comm'n v. FCC</i> , 476 U.S. 355 (1986).....	12
<i>Madison 92nd St. Assocs. v. Courtyard Mgmt. Corp.</i> , 624 F. App'x 23 (2d Cir. 2015)	24
<i>Midwestern Mach. Co. v. Northwest Airlines, Inc.</i> , 392 F.3d 265 (8th Cir. 2004).....	20
<i>MM Steel, L.P. v. JSW Steel (USA) Inc.</i> , 806 F.3d 835 (5th Cir. 2015).....	32
<i>New Orleans Ass'n of Cemetery Tour Guides & Cos. v. New Orleans Archdiocesan Cemeteries</i> , 56 F.4th 1026 (5th Cir. 2023)	25
<i>NSS Labs, Inc. v. Symantec Corp.</i> , 2019 WL 3804679 (N.D. Cal. Aug. 13, 2019).....	23
<i>Oceanic Steam Navigation Co. v. Stranahan</i> , 214 U.S. 320 (1909).....	16
<i>Ohio v. Am. Express Co.</i> , 138 S. Ct. 2274 (2018)	22
<i>Queen City Pizza, Inc. v. Domino's Pizza, Inc.</i> , 124 F.3d 430 (3d Cir. 1997)	23
<i>Rambus, Inc. v. FTC</i> , 522 F.3d 456 (D.C. Cir. 2008).....	3, 26, 30
<i>Reveal Chat Holdco, LLC v. Facebook, Inc.</i> , 471 F. Supp. 3d 981 (N.D. Cal. 2020).....	20
<i>Roy B. Taylor Sales, Inc. v. Hollymatic Corp.</i> , 28 F.3d 1379 (5th Cir. 1994).....	31

<i>Seila Law LLC v. CFPB</i> , 140 S. Ct. 2183 (2020).....	16
<i>Shah v. VHS San Antonio Partners, L.L.C.</i> , 985 F.3d 450 (5th Cir. 2021).....	22, 25
<i>Stearns Airport Equip. Co. v. FMC Corp.</i> , 170 F.3d 518 (5th Cir. 1999).....	26
<i>Surgical Care Ctr. of Hammond, L.C. v. Hosp. Serv. Dist. No. 1 of Tangipahoa Parish</i> , 309 F.3d 836 (5th Cir. 2002)	35
<i>Taylor v. Christus St. Joseph Health Sys.</i> , 216 F. App'x 410 (5th Cir. 2007).....	26
<i>Texas v. Nuclear Regul. Comm'n</i> , 78 F.4th 827 (5th Cir. 2023)	18
<i>United States v. Am. Can Co.</i> , 230 F. 859 (D. Md. 1916)	30
<i>United States v. Am. Tobacco Co.</i> , 221 U.S. 106 (1911).....	30
<i>United States v. Microsoft Corp.</i> , 253 F.3d 34 (D.C. Cir. 2001).....	30
<i>United States v. Moore</i> , 71 F.4th 392 (5th Cir. 2023)	15
<i>United States v. Morrow</i> , 266 U.S. 531 (1925)	14, 15
<i>Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP</i> , 540 U.S. 398 (2004).....	28, 31
<i>West Virginia v. EPA</i> , 142 S. Ct. 2587 (2022).....	15
<i>Whitman v. Am. Trucking Ass'ns</i> , 531 U.S. 457 (2001)	14, 15
<i>Z Techs. Corp. v. Lubrizol Corp.</i> , 753 F.3d 594 (6th Cir. 2014)	20

STATUTES

Federal Trade Commission Act, 15 U.S.C. §§ 45 <i>et seq.</i>	14
15 U.S.C. § 45(b)	13
15 U.S.C. § 45(c)	13
15 U.S.C. § 53(b)	<i>passim</i>
Trans-Alaska Pipeline Act, Pub. L. No. 93-153, 87 Stat. 576 (1973)	16

RULES

Fed. R. Evid.:

201(b).....	7
201(d).....	7

Fed. R. Civ. P. 12(b)(6).....	11
-------------------------------	----

OTHER AUTHORITIES

119 Cong. Rec. 36600 (1973)	16
IV Phillip E. Areeda et al., <i>Antitrust Law</i> (1998)	29
J. Howard Beales III & Timothy J. Muris, <i>Striking the Proper Balance: Redress Under Section 13(b) of the FTC Act</i> , 79 Antitrust L.J. 1 (2013).....	17
Peter C. Ward, <i>Restitution for Consumers Under the Federal Trade Commission Act: Good Intentions or Congressional Intentions?</i> , 41 Am. U. L. Rev. 1139 (1992)	16-17
Phillip E. Areeda & Herbert Hovenkamp, <i>Antitrust Law</i> (2023)	29
S. Rep. No. 93-151 (1973).....	17

INTRODUCTION

The Federal Trade Commission's lawsuit against U.S. Anesthesia Partners, Inc. threatens the ability of a leading physician-owned anesthesiology practice to continue to provide high quality service to Texas hospitals and other healthcare facilities. Individual hospitals and hospital systems decide who can practice at their facilities, and many hospitals in Houston and Dallas have determined that USAP will provide the best care for their patients—particularly those in underserved communities. By partnering with USAP, hospital systems secure 24/7 coverage for all procedures across multiple sites, whether their patients have commercial or government sponsored insurance (such as Medicare or Medicaid), or no ability to pay. And competition for these hospital partnerships is fierce. But despite this competition, the FTC now objects to local hospitals' decisions about how best to provide quality care to their patients. With this lawsuit, the FTC seeks to skew the market for anesthesiology services, placing its thumb on the scale to support the nation's wealthiest and most powerful commercial insurance companies.

The FTC's misguided litigation effort reflects an ever-expanding sense of its own authority. Its lawsuit not only suffers from the constitutional infirmities raised by *Welsh Carson* in its motion to dismiss (which USAP hereby joins and incorporates by reference), but also ignores clear limits that Congress imposed when authorizing the FTC to come into federal court. And besides proceeding *ultra vires*, the FTC brings claims that would improperly remake antitrust law in multiple respects. For the reasons explained further below, the complaint is fatally defective and should be dismissed.

The FTC Lacks Statutory Authority To Maintain This Suit. Section 13(b) of the FTC Act, 15- U.S.C. § 53(b), is the sole source of authority the FTC invokes to bring this case. *See* Compl. ¶¶ 18-19. That statute authorizes the FTC to proceed in federal district court *only* when doing so would aid parallel proceedings in the FTC's own administrative court. Congress

enacted Section 13(b) in 1973 to address a specific problem: Because the FTC’s administrative process could take years, the FTC needed a mechanism to halt ongoing or imminent violations of law in the interim. Section 13(b) provides that mechanism. But it does *not* provide a substitute for the FTC’s administrative process. Indeed, just two years ago, the Supreme Court held that Congress “could not have . . . inten[ded]” the FTC “to use § 13(b) as a substitute for” its own internal administrative procedure. *AMG Cap. Mgmt., LLC v. FTC*, 141 S. Ct. 1341, 1349 (2021). Section 13(b) gives the FTC no power to bring a permanent injunction action in district court where, as here, it has bypassed its own administrative process. *See infra* Part I.A.

Section 13(b) also focuses narrowly on empowering the FTC to stop ongoing or imminent legal violations. It does *not* authorize the FTC to sue in federal court to remedy past conduct. Yet the FTC challenges acquisitions that closed, and contracts that expired, years ago. The FTC contends that USAP’s continued ownership of anesthesiology practices acquired almost a decade ago constitutes an ongoing violation of the antitrust laws, but that is contrary to authority: Completed acquisitions are not ongoing violations. Here too, the FTC’s attempt to challenge past conduct is at war with the plain text of Section 13(b). *See infra* Part I.B.

The FTC Has Not Alleged A Plausible Relevant Market. On the merits, the FTC’s antitrust claims depend on a market defined to exclude readily substitutable services. The FTC alleges that there is a unique market for “commercially insured hospital-only anesthesia services,” but it fails to support this illogical line drawing with any factual allegations justifying those arbitrary boundaries. Moreover, the FTC’s proposed market clearly excludes reasonably interchangeable substitutes—most obviously, anesthesiology performed in ambulatory surgical centers—and therefore represents an attempt to “gerrymander its way to an antitrust victory

without due regard for market realities.” *It’s My Party, Inc. v. Live Nation, Inc.*, 811 F.3d 676, 683 (4th Cir. 2016). That, too, requires dismissal. *See infra* Part II.A.

The FTC Has Not Plausibly Alleged That USAP Has Monopoly Power. Even crediting the FTC’s gerrymandered market definition, its monopolization claims fail because the FTC does not allege that USAP has charged or has the power to charge a supracompetitive price—*i.e.*, monopoly power. The complaint never alleges that USAP raised rates above the competitive level in any alleged market; indeed, the FTC takes no steps to analyze competitive market pricing at all. Instead, the FTC’s own allegations prove that USAP *cannot* charge rates higher than those set by competitive market negotiation *before USAP even entered the market*. Were there any doubt, recent legislation subjecting out-of-network anesthesiologists’ rates to mandatory arbitration now effectively prevents any provider from charging supracompetitive rates. The absence of any plausible factual basis for a claim of monopoly power is likewise fatal to the FTC’s monopolization theory. *See infra* Part II.B.

The FTC Has Not Plausibly Alleged Exclusionary Conduct. The FTC’s Section 2 claims require it to advance plausible allegations of exclusionary conduct. But the acquisitions on which the FTC relies are not alone sufficient; acquisitions often increase competition and therefore support no presumption of anticompetitive harm. Moreover, exclusionary conduct “must harm the competitive process and thereby harm consumers.” *Rambus, Inc. v. FTC*, 522 F.3d 456, 463 (D.C. Cir. 2008). But because USAP’s rates were set by its predecessor without monopoly power, the FTC has failed to allege any price increase above the competitive level, and the FTC makes no other claim of consumer harm. *See infra* Part II.C.

The FTC Has Not Alleged A Plausible Violation of the Clayton Act. The FTC’s claims under Section 7 of the Clayton Act require it to allege a probability of anticompetitive results

flowing from the challenged acquisitions. Not only was there no such probability, but here, the acquisitions are long since past, and the FTC points to no anticompetitive results that have actually materialized. *See infra* Part II.D.

The FTC Has Not Alleged A Plausible Agreement To Fix Prices. The FTC also seeks to attack USAP's practice of handling administrative-billing and payor-relations functions on behalf of three small anesthesiology practices by contorting these separate administrative services agreements into a Section 1 "price-fixing" claim. That claim fails for the simple reason that the complaint does not allege an agreement among competitors to fix prices. Rather, the complaint alleges that USAP's administrative services clients assigned it their right to payment from insurers in exchange for compensation at rates other than USAP's. Even as alleged, that bargain bears no resemblance to price fixing, and those claims should be dismissed. *See infra* Part II.E.

No Other Claim Survives. The FTC's remaining claims fail as well. The FTC's conspiracy claims require dismissal because, for the reasons Welsh Carson explains in its motion, USAP and Welsh Carson are legally incapable of conspiring under *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 770-71 (1984). And because the FTC's "unfair method of competition" claims under Section 5 of the FTC Act merely duplicate its theories under the Sherman and Clayton Acts, those claims cannot survive either. *See infra* Part II.F.

For all these reasons, the complaint should be dismissed in its entirety.

BACKGROUND¹

USAP is a physician-owned organization that provides anesthesia and pain management services to patients throughout Texas. *See* Compl. ¶¶ 21, 302. USAP did not exist until 2012, when it acquired a preexisting, standalone practice called Greater Houston Anesthesiology, or GHA. *See id.* ¶¶ 21, 95. For the last 11 years, USAP providers have cared for patients across Texas in both inpatient and outpatient facilities, no matter the patients' insurance status or ability to pay. *See id.* ¶¶ 3, 57. Besides caring for patients, USAP also provides certain administrative services. *See id.* ¶ 176. The FTC does not question or challenge the quality of the services USAP provides to patients, hospitals, or other anesthesiology practices.

A. Anesthesia Providers Work Both In And Out of Hospitals And Negotiate Rates Directly With Insurance Companies

"Anesthesia is a type of medical treatment that prevents patients from feeling pain during procedures such as surgery or dental work." Compl. ¶ 41. Physician anesthesiologists and certified registered nurse anesthetists, or CRNAs, are qualified to practice anesthesiology. *See id.* ¶¶ 43-44. These providers can render anesthesia services "in several healthcare facility settings" throughout Texas, "including hospitals, outpatient surgery centers, ambulatory surgical centers, and doctors' offices." *Id.* ¶¶ 45, 47. Inpatient anesthesia services "may be performed by the same providers" who work in outpatient settings, and the same services are provided without regard to the payor. *Id.* ¶ 222. Yet the FTC's claims are limited to (a) "hospital-only anesthesia services sold to commercial insurers" that are (b) performed in the Houston, Dallas, and Austin, Texas metropolitan areas. *See id.* ¶¶ 216, 235.

¹ Although USAP disputes many of the facts alleged in the FTC's complaint, the factual allegations described below are from the complaint and are taken as true for this motion. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

To guarantee the availability of “hospital-only anesthesia services,” hospitals often choose to partner exclusively with “independent anesthesiologists or anesthesia groups, such as USAP.” *Id.* ¶¶ 52-53. Hospitals benefit from these contractual agreements as they help secure coverage for the “entire facility . . . on a 24/7 basis,” including “overnight or during other off-peak hours.” *Id.* ¶¶ 53-54. These arrangements also “help guarantee treatment for less lucrative patients by ensuring 24/7 coverage.” *Id.*

While “[a]nesthesia groups often compete for exclusive hospital contracts,” these contracts are “not always lucrative.” *Id.* ¶¶ 55, 57. That is in part because the group must “staff the hospital around the clock,” which requires having providers “cover long shifts and overnight call.” *Id.* ¶¶ 56, 224. And it is also because hospitals may treat many patients who have “government insurance,” such as Medicare or Medicaid, or no insurance at all. *Id.* Anesthesiologists “receive significantly higher reimbursement rates for services sold to commercial plans compared to” government insurance, so staffing a hospital with more government-insured patients is less lucrative to anesthesia groups. *Id.* ¶ 233. Moreover, hospitals serve patients that may be “uninsured or under-insured,” further lowering the chances that the anesthesia group will be paid in full or at all. *Id.* ¶ 57.

Given these challenges, hospitals often provide subsidies to encourage anesthesia practice groups to enter into exclusive partnerships under which the group commits to providing comprehensive coverage “on a 24/7 basis.” *Id.* ¶¶ 53, 57. The FTC alleges that hospitals benefit from anesthesia groups that take “a lower subsidy” and instead rely on alternative revenue streams—namely, the payments they receive from insurance companies for the anesthesia services they provide. *Id.* ¶ 299.

In Texas, “the four largest insurers” are “Aetna, Blue Cross Blue Shield of Texas, Cigna, and United.” *Id.* ¶ 66. For context, while the complaint alleges that USAP generated \$ [REDACTED] in revenue nationwide in 2021, *see id.* ¶ 21, UnitedHealth Group Inc. and The Cigna Group respectively reported generating \$287.5 billion² and \$174.1 billion³ in revenue that same year.

The rates at which anesthesia groups are compensated for their services differ depending on whether the payor is a government or commercial insurer. Government insurers reimburse anesthesia groups at set rates tied to government fee schedules. *See id.* ¶ 233. In contrast, anesthesia groups and commercial insurers can directly negotiate reimbursement rates. *See id.* ¶ 65. As a first step, the anesthesia groups and commercial insurers negotiate whether the group will be included in the insurer’s “network” of providers. *See id.* ¶¶ 61-62. In exchange for being part of the insurer’s “network,” anesthesia groups offer to give insurers “a discount off the total amount [they] charge” for their services. *Id.* The agreed-upon rates and “network status” are reflected in contracts between the providers and the insurers. If the providers and insurers do not form such an agreement, the anesthesia group is considered “out of network.” *Id.* ¶ 61. Out-of-network providers used to be able to bill at higher rates, but the law has recently changed such that this is no longer the case.⁴

² *See* UnitedHealth Group Inc., Annual Report (Form 10-K) at 29 (Feb. 24, 2023), <https://tinyurl.com/3mudvzt8>. The court may take judicial notice of a Form 10-K filing and its contents at the motion to dismiss stage. *See Basic Cap. Mgmt., Inc. v. Dynex Cap., Inc.*, 976 F.3d 585, 589 (5th Cir. 2020); *see* Fed. R. Evid. 201(b), (d).

³ *See* The Cigna Group, Annual Report (Form 10-K) at 53 (Feb. 23, 2023), <https://tinyurl.com/b4u8ajrm>.

⁴ *See* Compl. ¶ 74 n.5. Under recent state and federal legislation (the latter known generally as the No Surprises Act), “out-of-network anesthesiologists must obtain payment through costly and uncertain arbitration.” *Id.* ¶ 72.

B. USAP Inherited Reimbursement Rates That Had Been Negotiated Between Commercial Insurers And GHA

The FTC focuses much of its attention on the rates at which USAP's anesthesiologists are reimbursed. *See, e.g.*, Compl. ¶ 5. Many of these rates were established before USAP itself was formed. They trace back to long-term agreements between commercial insurers and GHA, which USAP acquired upon its formation in 2012. At the time of its acquisition, GHA was "well-positioned" with the four hospital systems in Houston that "performed almost 65% of all inpatient surgeries in Houston." *Id.* ¶ 89. GHA's 220 physicians and 180 CRNAs, *see id.* ¶ 95, handled around 39% of hospital-based anesthesia cases in Houston, *id.* ¶ 266 tbl. 1. The FTC does not allege that GHA had monopoly power before USAP acquired it.

In acquiring GHA, USAP inherited GHA's contracts with commercial insurance companies—contracts that established, for example, GHA's in-network status and reimbursement rates. *See id.* ¶¶ 60-64 (describing the process of setting reimbursement rates for health care providers); *see id.* ¶ 90 (alleging one consultant's analysis of GHA's then-existing reimbursement rates with commercial payors). GHA's pre-acquisition negotiations with commercial insurers "achieved very good levels of reimbursement from commercial payers." *Id.* ¶ 90. The FTC does not allege that these rates were supracompetitive or that GHA had monopoly power when it negotiated these rates.

GHA's legacy contracts generally established that if GHA acquired another practice, the insurer would reimburse the newly acquired physicians for their services at GHA's pre-existing, contractually agreed upon rates. *See, e.g., id.* ¶ 151. USAP negotiated with certain insurers to modify these legacy contracts, clarifying, for example, that the GHA rates would not apply right away but would, instead, start applying [REDACTED] after the acquisitions. *See id.* ¶ 153. The

FTC refers to these provisions as “tuck-in” clauses. *Id.* The FTC does not allege that these clauses deviated from market norms or were otherwise unique to GHA.

C. USAP Expanded Its Provision Of High-Quality Anesthesia Services Within And Outside Of Houston

After acquiring GHA, USAP sought to grow its business and to improve the quality of anesthesia services offered across the State of Texas. The complaint alleges that USAP made the following acquisitions:

Year	Practice	Total Providers	Location	Complaint Citation
2013	Lake Travis Anesthesiology	“small group”	Austin	¶ 161
2014	Pinnacle Anesthesia Consultants	537	Dallas	¶ 127
2014	North Houston Anesthesiology—Kingwood Division	30	Houston	¶ 103
2015	Anesthesia Consultants of Dallas	50	Dallas	¶ 130
2015	Excel Anesthesia Consultants	74	Dallas	¶ 134
2015	Southwest Anesthesia Associates	Not alleged	Dallas	¶ 139
2016	BMW Anesthesiology	9	Dallas	¶ 141
2016	Medical City Physicians	7	Dallas	¶ 141
2016	Sundance Anesthesia	31	Dallas	¶ 144
2016	East Texas Anesthesiology Associates	34	Tyler	¶ 157
2017	MetroWest Anesthesia Care	130	Houston	¶ 108
2018	Capitol Anesthesiology Association	232	Austin	¶ 160
2018	Amarillo Anesthesia Consultants	20	Amarillo	¶ 165
2019	Star Anesthesia	194	San Antonio	¶ 169
2020	Guardian Anesthesia Services	77	Houston	¶ 112

Even though GHA’s contracts with many commercial insurers authorized USAP to bill the newly acquired practitioners at GHA’s negotiated rates, *see id.* ¶ 151, the insurers did not always honor those prior agreements. Instead, the insurers started “push[ing] back” on the very rates they had agreed to before, leading to “protracted negotiations” that “lasted months or years.” *Id.* ¶ 152. For example, when USAP acquired Pinnacle—an anesthesia practice in Dallas—one insurer refused to recognize the agreed-upon GHA rates, and instead “opted to treat the former Pinnacle (now USAP) anesthesia providers as out of network.” *Id.* ¶ 128. It took

nearly two years to resolve that dispute, with USAP ultimately agreeing to a lower reimbursement rate than the legacy rate from GHA. *See id.* ¶¶ 128, 152.

Commercial insurers have continued to force USAP to accept lower rates over time. *See id.* ¶¶ 316-318. For example, in 2020, United sought to “unilaterally amend[] the United-USAP contract to reduce USAP’s rates.” *Id.* ¶ 316. As USAP could not agree to the size of the rate reductions, United’s demand temporarily forced USAP out of network. After eighteen months, United secured a new contract with USAP under which “USAP’s rates decreased.” *Id.* ¶ 318.

D. USAP Inherited And Executed Ancillary Agreements In Connection With Certain Acquisitions

The FTC also challenges certain agreements that USAP either inherited or executed between 2012 and 2014 that are separate from its provision of anesthesia services.

First, the FTC alleges that USAP has been party to three administrative services agreements.⁵ Under these agreements, USAP agreed to perform back-office functions such as payor relations and billing on behalf of a group of physicians. *See id.* ¶¶ 176, 184. USAP “bill[s] payors for the anesthesia services rendered by” client provider groups “using USAP’s own provider or tax information.” *Id.* ¶ 176. USAP then collects the payments from insurers and other payors, remitting to the non-USAP physicians what they are owed while keeping “some portion” of the collected payment as compensation for the administrative services it has performed. *Id.* ¶ 176; *see also* ¶¶ 196, 203 (discussing these mechanisms in similar agreements).

Of the administrative services agreements the FTC challenges, USAP inherited two of them from practices it had acquired—in 2012, USAP became party to its predecessor GHA’s

⁵ The complaint also alleges that USAP attempted to enter into a fourth administrative services agreement with physicians at the University of Texas in 2014 and again in 2020, but an agreement was never reached. *See* Compl. ¶¶ 204-207.

contract with The Methodist Hospital Physicians Organization, *see id.* ¶ 183; and in 2014, USAP inherited Pinnacle’s contract with the Baylor University Medical Center. *See id.* ¶ 192. USAP itself entered into the third challenged agreement with the Baylor College of Medicine in 2014. *See id.* ¶ 201. Notably, that latest agreement “was terminated” in 2020. *Id.* ¶ 203. The FTC nowhere alleges that any of these agreements were materially significant.

Second, the FTC alleges that USAP negotiated a [REDACTED]

[REDACTED] in connection with the sale of an anesthesia practice. *See id.* ¶ 410.

[REDACTED]. *See id.* ¶ 214.

LEGAL STANDARD

“Federal Rule of Civil Procedure 12(b)(6) requires that a plaintiff plead facts sufficient to state a plausible cause of action.” *Collins v. Midland Mortg.*, 2022 WL 16556810, at *1 (S.D. Tex. Oct. 31, 2022) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “In deciding a Rule 12(b)(6) motion to dismiss for failure to state a claim, the court ‘accepts all well-pleaded facts as true, viewing them in the light most favorable to the [nonmovant].’” *Id.* (alteration in original) (quoting *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007)). “Even so, ‘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.’” *Id.* (alteration in original) (quoting *Twombly*, 550 U.S. at 555).

ARGUMENT

I. THE FTC LACKS AUTHORITY TO SEEK INJUNCTIVE RELIEF UNTETHERED FROM AN ADMINISTRATIVE PROCEEDING AND FOR LONG-PAST CONDUCT

The FTC invokes Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), as its sole source of authority to bring this suit in federal district court, *see* Compl. ¶¶ 18-19. For two independent reasons, the FTC’s complaint exceeds its statutory authority: *First*, Section 13(b) authorizes the

FTC to proceed in federal court *only* to support enforcement proceedings in its own administrative forum, but the FTC has instituted no such proceedings and apparently intends to litigate only in this Court. When the FTC seeks to follow the statute by moving only for preliminary relief, it does so expressly and then promptly files an administrative complaint—it has not done so here. *Second*, Section 13(b) authorizes *only* injunctions to halt ongoing or imminent anticompetitive conduct, but the FTC complains about past acquisitions and agreements that are no longer operative. The FTC is a creature of statute, and possesses only those powers Congress has given to it. *See Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). Because Congress did not grant the FTC the authority it claims here, the case should be dismissed.

A. Section 13(b) Bars The FTC From Seeking Injunctive Relief Independent Of Administrative Proceedings

1. The Statute Does Not Permit An Independent Federal Court Action

In Section 13(b), which is titled “Temporary restraining orders; preliminary injunctions,” Congress granted the FTC limited authority to seek injunctive relief in federal district court “while administrative proceedings are foreseen or in progress.” *AMG Cap.*, 141 S. Ct. at 1349. Section 13(b) states:

Temporary restraining orders; preliminary injunctions

Whenever the Commission has reason to believe—

(1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and

(2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public—

the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to

enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond: Provided, however, That if a complaint is not filed within such period (not exceeding 20 days) as may be specified by the court after issuance of the temporary restraining order or preliminary injunction, the order or injunction shall be dissolved by the court and be of no further force and effect: Provided further, That in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction. . . .

Before Congress enacted Section 13(b), the FTC had no authority to seek a court-ordered injunction to halt ongoing or imminent violations. *See AMG Cap.*, 141 S. Ct. at 1346. Congress enacted Section 13(b) to “address[] a specific problem, namely, that of stopping seemingly unfair practices from taking place while the Commission determines their lawfulness” in parallel administrative proceedings. *AMG Cap.*, 141 S. Ct. at 1348.

By its plain terms, Section 13(b) requires the FTC to proceed administratively. It can proceed here only “pending the issuance of a complaint by the Commission.”⁶ Section 13(b)'s first proviso (the clause that begins, “Provided, however”) confirms that any injunction obtained here “shall be dissolved” if the FTC does not bring an administrative proceeding within twenty days of getting the injunction. So while Section 13(b) lets the FTC seek injunctive relief in court to aid its administrative proceedings, those administrative proceedings are a necessary predicate. The FTC cannot simply choose to litigate its antitrust claims in federal court.

⁶ “Complaint” here means an administrative complaint issued by the FTC under Section 5(b), 15 U.S.C. § 45(b). Section 13(b) provides for preliminary injunctive relief “pending the issuance of a complaint” and “until such complaint is dismissed by the [FTC] or set aside by the court on review, or until the order of the [FTC] made thereon has become final,” which is a clear reference to the FTC's administrative adjudication procedures, *see* 15 U.S.C. § 45(b), (c).

The FTC's authority to seek a *permanent* injunction under Section 13(b) is also tied to administrative proceedings and not a warrant for independent federal court litigation. In its second proviso, Section 13(b) states: "Provided further, That in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction." As the Supreme Court has explained, "the appearance of the words 'permanent injunction' (as a proviso) suggests that those words are directly related to a previously issued preliminary injunction." *AMG Cap.*, 141 S. Ct. at 1348. That conclusion flows from longstanding interpretive principles: "The 'grammatical and logical scope' of a proviso . . . 'is confined to the subject-matter of the principal clause' to which it is attached." *Abbott v. United States*, 562 U.S. 8, 25-26 (2010) (quoting *United States v. Morrow*, 266 U.S. 531, 534-35 (1925)). The principal clause here lets the FTC seek "a temporary restraining order or a preliminary injunction" only when tied to administrative proceedings. The permanent-injunction proviso therefore necessarily conditions the availability of a "permanent injunction" on the existence of those administrative proceedings. Nothing in the statutory language or structure authorizes the FTC to institute federal court litigation without any connection to an administrative proceeding.

2. Traditional Tools Of Statutory Interpretation Confirm That Section 13(b) Requires Administrative Proceedings For Injunctive Relief

The FTC's assertion of authority under Section 13(b) to institute litigation in this Court independent of administrative proceedings also clashes with the provision's context, the principle of constitutional avoidance, and Section 13(b)'s own history.

First, "statutory and historical context" show that Section 13(b) was not meant to provide an end run around the FTC's administrative proceedings. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 471 (2001). Since its creation in 1914, the FTC has had the power to enforce the FTC Act through administrative proceedings under Section 5. *See* 15 U.S.C. § 45. Given this long

history, the Supreme Court has rejected the notion “that Congress, without mentioning the matter, would have granted the [FTC] authority so readily to circumvent its traditional § 5 administrative proceedings” by bringing a federal court action under Section 13(b) instead. *AMG Cap.*, 141 S. Ct. at 1349. In *AMG Capital*, the Supreme Court held, “[i]n light of the historical importance of administrative proceedings,” that allowing the FTC to go directly to federal court to seek monetary relief without first engaging in administrative proceedings “would allow a small statutory tail to wag a very large dog.” *Id.* at 1348-49. That logic applies here.

Text and context instead confirm that Congress did *not* intend Section 13(b)’s permanent-injunction proviso to create a “separate, parallel enforcement path[.]” *Id.* at 1350; *see Morrow*, 266 U.S. at 535 (rejecting interpretation of proviso that would “introduce independent legislation”). If Congress actually *had* intended to create such an alternative to the FTC’s administrative proceedings, it would not have buried that massive expansion of enforcement authority 213 words into a provision entitled “Temporary restraining orders; preliminary injunctions.” *See United States v. Moore*, 71 F.4th 392, 397 (5th Cir. 2023) (“Titles . . . can be a helpful tool for statutory interpretation.”). “Congress does not hide elephants in mouseholes.” *AMG Cap.*, 141 S. Ct. at 1349 (cleaned up) (quoting *Whitman*, 531 U.S. at 468). “Nor does Congress typically use oblique or elliptical language to empower an agency to make a ‘radical or fundamental change’ to a statutory scheme.” *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022) (citation omitted) (“major questions doctrine” exists to address the “problem” of “agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted”).

Second, accepting a broader interpretation of Section 13(b) “would raise serious constitutional problems” that a narrower interpretation would avoid. *Cargill v. Garland*, 57

F.4th 447, 471-72 (5th Cir. 2023) (en banc), *cert. granted*, 2023 WL 7266996 (Nov. 3, 2023).

As the Fifth Circuit has held in an analogous case involving the SEC, “the power to assign disputes to agency adjudication is ‘peculiarly within the authority of the legislative department.’” *Jarkesy v. SEC*, 34 F.4th 446, 461 (5th Cir. 2022) (quoting *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909)), *cert. granted*, 143 S. Ct. 2688 (2023).

But under the FTC’s broad view of Section 13(b), Congress “gave the [agency] the unfettered authority to choose whether to bring enforcement actions in Article III courts or within the agency.” *Jarkesy*, 34 F.4th at 459; *cf. FTC v. Shire Viropharma, Inc.*, 917 F.3d 147, 159 n.17 (3d Cir. 2019) (describing FTC argument that it has “unreviewable discretion to file suit” in federal court under Section 13(b)). If that interpretation were correct, then under binding Fifth Circuit precedent, “Congress unconstitutionally delegated legislative power to the [FTC]” because it provided no “intelligible principle by which to exercise that power.” *Jarkesy*, 34 F.4th at 459, 462; *see id.* at 459 n.9 (alternative holdings by the Fifth Circuit are binding precedent). This Court should interpret Section 13(b) to avoid creating such a constitutional problem.⁷

Third, the FTC’s attempt to use Section 13(b) as authority for a standalone permanent-injunction suit flouts Section 13(b)’s history. Congress enacted Section 13(b) in a last-minute amendment to the Trans-Alaska Pipeline Act, which aimed to address a national energy crisis created by a shortage of domestic crude oil. *See Trans-Alaska Pipeline Act*, Pub. L. No. 93-153, 87 Stat. 576 (1973); *see* 119 Cong. Rec. 36600 (1973). “There was no discussion of [the

⁷ Accepting a broad interpretation of Section 13(b) would also create the Article II problem that Welsh Carson details in its motion to dismiss, which USAP joins and incorporates by reference. If Congress granted the agency authority to sue for permanent injunctive relief in federal district court, then it unconstitutionally vested executive law-enforcement power in an agency whose members are not removable at will by the President. *See Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2191 (2020).

permanent-injunction proviso] during the debate on the Trans-Alaska Pipeline Act.” Peter C. Ward, *Restitution for Consumers Under the Federal Trade Commission Act: Good Intentions or Congressional Intentions?*, 41 Am. U. L. Rev. 1139, 1178 (1992). “What little debate there was evinces no indication that *anyone* understood [Section 13(b)] to do anything other than confer on the agency the authority to seek injunctive relief to end practices while administrative proceedings were on-going.” J. Howard Beales III & Timothy J. Muris, *Striking the Proper Balance: Redress Under Section 13(b) of the FTC Act*, 79 Antitrust L.J. 1, 14-15 (2013); *see AMG Cap.*, 141 S. Ct. at 1346 (citing the Beales & Muris article). Given this enactment history, the FTC’s “broad reading” of the permanent-injunction proviso, which “would allow it to use § 13(b) as a substitute for § 5,” “could not have been Congress’[s] intent.” *AMG Cap.*, 141 S. Ct. at 1349.

The legislative history demonstrates that the permanent-injunction proviso was carefully cabined. According to the Senate report accompanying the provision, Congress’s “purpose” in enacting Section 13(b) was to “permit the Commission to bring an immediate halt to unfair or deceptive acts or practices” that would otherwise “continue for several years *until agency action is completed*.” S. Rep. No. 93-151, at 30 (1973) (emphasis added). Within this scheme, the permanent-injunction proviso played a limited role: it aimed to solve the practical problem of “when a court is reluctant to grant a temporary injunction because it cannot be assured of a[n] early hearing on the merits.” *Id.* at 30-31. Rather than issue a preliminary injunction and then wait years to judge the case on the merits—until after the administrative proceedings ran their course—the court could “set a definite hearing date” for a permanent injunction. *Id.*

Other appellate courts have ignored the plain language of Section 13(b). But the Fifth Circuit has not addressed this issue, and this Court should be guided by the text of the statute.

See Texas v. Nuclear Regul. Comm'n, 78 F.4th 827, 840-42 (5th Cir. 2023) (adopting plain-text statutory interpretation and rejecting cases from other circuits that “assume[d] the Commission’s authority without analyzing the statute”). In *AMG Capital*, “eight Circuits” had accepted the FTC’s interpretation of Section 13(b), and none had rejected it. 141 S. Ct. at 1351. All nine Justices rejected that interpretation because it was inconsistent with the plain language of the statute. This Court can and should reach the same conclusion that the Supreme Court did in *AMG Capital*: Section 13(b)’s plain meaning controls.

B. The FTC Lacks Statutory Authority To Challenge USAP’s Past Acquisitions Or Agreements

The FTC acknowledges that it can maintain its suit in federal district court under Section 13(b) only if USAP is “violating or about to violate” the antitrust laws. Compl. ¶ 19. But the complaint challenges conduct that ended years ago. USAP’s last Texas acquisition closed in 2020, *see id.* ¶ 112, its billing arrangement with Baylor College of Medicine “was terminated” in 2020, *id.* ¶ 203, and its contractual relationship with [REDACTED] *see id.* ¶ 214. The FTC’s contention that it may proceed because USAP continues to operate long after those past actions have ceased contorts the statutory language and has been rejected by many courts. The complaint should be dismissed for this reason as well.

1. Congress Authorized The FTC To Sue In Federal Court Only To Halt Imminent Or Ongoing Violations Of Law

Section 13(b) allows the FTC to “bring suit in a district court of the United States” only when “any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the [FTC] . . . to enjoin any such act or practice.” 15 U.S.C. § 53(b). By its plain terms, Section 13(b) “focuses upon relief that is *prospective, not retrospective.*” *AMG Capital*, 141 S. Ct. at 1348 (emphasis added). It allows the FTC to proceed in federal district court only in cases of an ongoing (“is violating”) or imminent (“is about to violate”) violation.

See *FTC v. AbbVie Inc.*, 976 F.3d 327, 376 (3d Cir. 2020) (“imminent or ongoing”); *FTC v. Credit Bureau Ctr., LLC*, 937 F.3d 764, 772, 774 (7th Cir. 2019) (“ongoing and imminent future violations”). The FTC cannot invoke Section 13(b) “to remedy a past violation.” *FTC v. Evans Prods. Co.*, 775 F.2d 1084, 1089 (9th Cir. 1985).

Section 13(b)’s “unambiguous” and “clear text” “does not permit the FTC to bring a claim based on long-past conduct without some evidence that the defendant ‘is’ committing or ‘is about to’ commit another violation.” *Shire*, 917 F.3d at 147, 150, 156. In *Shire*, the FTC alleged only “a violation in the distant past and a vague and generalized likelihood of recurrent conduct,” so it “fail[ed] to state a claim upon which relief can be granted.” *Id.* at 159, 161. The FTC makes the same insufficient allegations here.⁸

2. USAP’s Acquisitions And Contractual Arrangements Are Past Conduct Not Cognizable Under Section 13(b)

USAP’s long-closed acquisitions are past conduct. The FTC alleges that USAP’s acquisitions all closed years ago. The FTC alleges that “[b]etween 2014 and 2020” USAP “made the three Houston Tuck-In Acquisitions,” Compl. ¶ 349; “[b]etween 2015 and 2016” it “made the six Dallas Tuck-in Acquisitions,” *id.* ¶ 374; and in 2013 and 2018 it made the “Austin Acquisitions,” *id.* ¶ 390. USAP’s most recent challenged acquisition—of Guardian Anesthesia Services—closed “[i]n January 2020.” *Id.* ¶ 112. USAP’s alleged acquisition conduct is therefore beyond the scope of a Section 13(b) suit.

⁸ *Shire* should control here because it reflects a plain-text reading of Section 13(b). The Fifth Circuit’s decision in *FTC v. Southwest Sunsites, Inc.*, 665 F.2d 711 (5th Cir. 1982), provides no reason to depart from *Shire*’s straightforward conclusion that Section 13(b) requires either ongoing or imminent violations. There, the defendants’ “continuing” and “large-scale systematic scheme tainted by fraudulent and deceptive practices” was “still in place,” *id.* at 723, so the court did not weigh in on Section 13(b)’s imminence requirement.

Here, as in *Shire*, the FTC attempts to clear the statutory bar with a vague and conclusory allegation that USAP's conduct "remains ongoing." Compl. ¶ 333. But such "a naked assertion . . . without some further factual enhancement . . . stops short of the line between possibility and plausibility." *Twombly*, 550 U.S. at 557. A closed merger cannot "remain[] ongoing," Comp. ¶ 333, because it is not a "continuing violation," *Complete Entm't Res. LLC v. Live Nation Entm't, Inc.*, 2016 WL 3457177, at *1 (C.D. Cal. May 11, 2016). A merger is a "discrete act" that is completed upon closing, "not an ongoing scheme"; "[o]nce the merger is completed, the plan to merge is completed." *Reveal Chat Holdco, LLC v. Facebook, Inc.*, 471 F. Supp. 3d 981, 995 (N.D. Cal. 2020) (alteration in original) (quoting *Midwestern Mach. Co. v. Northwest Airlines, Inc.*, 392 F.3d 265, 271 (8th Cir. 2004)). As a result, federal courts have consistently held that the continued operation of a company formed by an allegedly illegal acquisition is *not* an "ongoing" or "continuing" violation of the antitrust laws. *See, e.g., Z Techs. Corp. v. Lubrizol Corp.*, 753 F.3d 594, 599, 604 (6th Cir. 2014) (collecting cases).

Neither does the FTC plead facts raising a plausible claim that additional acquisitions in Texas are imminent. It simply alleges that USAP might make future acquisitions. *See* Compl. ¶ 335 ("USAP continues to plan for acquisitions in Texas, as well as elsewhere, and is well-positioned to continue its conduct."). The complaint's naked conclusion, with no factual support, amounts only to "a vague and generalized likelihood of recurrent conduct." *Shire*, 917 F.3d at 159. "If this were enough to make out a continuing violation, there would in effect be no statute of limitations since a Section 7 challenge to the holding or use of assets could be brought at any time." *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1052 (8th Cir. 2000).

USAP's past acquisitions are all beyond the reach of Section 13(b). The Court should therefore dismiss the FTC's "roll-up" claims, Counts II, V, and VII. The Court should also dismiss Counts I, III, IV, VI, and VIII to the extent that they depend on acquisition conduct.

USAP's billing services for Baylor College of Medicine is past conduct. The FTC acknowledges that USAP's administrative services arrangement with Baylor College of Medicine "was terminated" in 2020. Compl. ¶ 203. The FTC does not allege that USAP is imminently about to enter into any additional agreement to provide administrative billing services. And the FTC's allegation that USAP has not "offered any assurances against engaging in similar conduct in the future," *id.* ¶ 335, is plainly inadequate. *See Shire*, 917 F.3d at 160 ("vague allegations" of restarting terminated conduct do not plausibly support finding that a defendant is "about to" restart that conduct). The FTC does not allege that USAP has taken any steps or made any plans to reinstate its past arrangement with Baylor College of Medicine or that it is still providing services at the same hospital, so it cannot establish an imminent violation.

The Court should dismiss Counts I, III, and IX to the extent that they depend on the past agreement with Baylor College of Medicine.

USAP's contract with [REDACTED] is past conduct. The FTC alleges that USAP and [REDACTED] had a contractual relationship [REDACTED] Compl. ¶ 214. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] And the FTC does not even attempt to plausibly allege that a similar agreement is likely to recur. The Court should therefore dismiss Count X.

* * *

Section 13(b) limits the FTC's power to proceed in this Court. In two distinct respects, the FTC has attempted to expand that authority beyond what Congress provided. The Court should dismiss the FTC's overreaching complaint.

II. THE COMPLAINT FAILS TO ALLEGE PLAUSIBLE ANTITRUST CLAIMS

A. The FTC Fails To Plausibly Allege A Relevant Market

It is axiomatic that an antitrust case like this one requires enough pleaded facts to establish both a geographic market and a product market in which the defendant competes. Without "an accurate definition of the relevant market" that outlines "the area of effective competition" for the defendant's product and "reflects commercial realities," there is "no way to measure" whether the defendant has any "ability to lessen or destroy competition" and harm the consumers the antitrust laws are designed to protect. *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2285 (2018) (citations omitted); see *Apani Sw., Inc. v. Coca-Cola Enters., Inc.*, 300 F.3d 620, 628 (5th Cir. 2002) (relevant market must be defined for Sherman Act and Clayton Act claims); *Shah v. VHS San Antonio Partners, L.L.C.*, 985 F.3d 450, 453-54 (5th Cir. 2021) (relevant market necessary for both Sherman Act Sections 1 and 2).

Whether a relevant market has been alleged "may be determined as a matter of law." *Apani*, 300 F.3d at 628. As the Fifth Circuit has explained, "[w]here the plaintiff [1] fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or [2] alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff's favor, the relevant market is legally insufficient, and a motion to dismiss may be granted." *Id.*

Courts regularly dismiss antitrust complaints where the plaintiff's proposed market definition is unsupported by factual allegations that justify its asserted boundaries. *See, e.g., Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 436-37 (3d Cir. 1997) (affirming dismissal where "the relevant market [was] legally insufficient" because plaintiff "fail[ed] to define" it "with reference to the rule of reasonable interchangeability and cross-elasticity of demand"). The FTC's complaint provides a laundry list of reasons why "hospital-only anesthesia services" are supposedly distinct. But all of them reduce to the irrelevant tautology that "hospital-only anesthesia services" must be provided in hospitals. *See* Compl. ¶ 176 ("Specifically, all hospital-only anesthesia services require patients to receive care in a hospital setting."); *id.* ¶ 220 ("Patients requiring hospital-only services must receive that service in a hospital setting and cannot obtain it elsewhere"); *id.* ¶ 222. Conspicuously absent from the complaint are any supporting allegations regarding reasonable interchangeability (what can be substituted for the relevant service) or cross-elasticity of demand (where consumers will go if prices rise). That alone compels dismissal. *See NSS Labs, Inc. v. Symantec Corp.*, 2019 WL 3804679, at *9 (N.D. Cal. Aug. 13, 2019) (dismissing antitrust claims for improper market definition where the plaintiff "fail[ed] to identify the economic substitutes for the product markets" and did not "plead any facts regarding the cross-elasticity of demand").

Besides this pleading failure, the FTC's "hospital-only" market definition "clearly does not encompass all interchangeable substitute products." *Apani*, 300 F.3d at 628. While licensed anesthesiologists may work in inpatient or outpatient hospital settings, as well as other outpatient settings (such as ambulatory surgical centers), the FTC fails to allege any distinction between the *nature of the services provided* in these settings. Indeed, the FTC expressly concedes that "the anesthesia services that form the hospital-only services may be performed by the same providers

as other services.” Compl. ¶ 222. In other words, trained anesthesiologists can provide services to patients in hospitals regardless of where those anesthesiologists typically practice—in hospitals, in outpatient surgery centers (whether at hospitals or external to them), or in medical offices. The FTC claims that doctors who practice at *any* hospital, not just the doctors who practice at the hospital where the patient undergoes surgery, are competitors in the alleged relevant market. *See id.* ¶ 217. Yet doctors of equal skill and training who currently locate their practice in other non-hospital facilities are supposedly *not* competitors, even though they are fully capable of providing the same services.

This is both implausible on its face and unsupported by any facts. Anesthesiologists who are located in various settings—not just hospitals—have the actual or potential ability to take cases away from hospital-based physicians. As such the FTC’s alleged market does *not* “encompass[] the group or groups of sellers or producers who have actual or potential ability to deprive each other of significant levels of business,” *Hicks v. PGA Tour, Inc.*, 897 F.3d 1109, 1120-21 (9th Cir. 2018) (citation omitted). The FTC’s market definition is therefore inadequate because the availability of “non-hospital”-based anesthesiologists “restrains [USAP’s] ability to raise prices above the competitive level.” *Madison 92nd St. Assocs. v. Courtyard Mgmt. Corp.*, 624 F. App’x 23, 28 (2d Cir. 2015) (citation omitted).

The FTC has several *arguments*—not facts—for its obviously crabbed market definition. It claims, first, that some patients need to be treated in hospitals. But that says nothing about which anesthesiologists can provide the requisite care in any particular hospital. If doctors from *other* hospitals can also provide that care, there is no basis for excluding from the relevant market doctors with the same expertise who are practicing in non-hospital settings. All may be acceptable substitutes; the complaint contains no facts that suggest otherwise. Moreover, the

FTC does not allege, and cannot allege, that insurers prevent hospitals from employing fully credentialed anesthesiologists at lower cost, merely because they do not currently practice at a hospital. If, contrary to the FTC's theory, insurers are the relevant consumers in this market and have the power to dictate who provides what service to patients, then plainly the power lies with insurers and the FTC's allegations of monopolization by USAP are entirely misdirected.

Courts, and the Fifth Circuit in particular, have routinely rejected artificial market definitions similar to the FTC's litigation-driven definition here. For instance, in *Shah*, the plaintiff attempted to define a market for "pediatric anesthesia services" provided at a handful of facilities within an eight-county radius. *See Shah*, 985 F.3d at 454. The Fifth Circuit found the plaintiff's proposed market "insufficient as a matter of law" because it failed to "encompass all interchangeable substitute products." *Id.* at 455 (emphasis in original). The same is true here. By limiting the market to "hospital-only" anesthesia services, the FTC has artificially excluded the large population of "non-hospital" anesthesiologists capable of providing the same services, without facts establishing a plausible basis for that exclusion. The FTC has thereby scrubbed its proposed market of "reasonably interchangeable substitutes," rendering it "unduly narrow and legally insufficient." *New Orleans Ass'n of Cemetery Tour Guides & Cos. v. New Orleans Archdiocesan Cemeteries*, 56 F.4th 1026, 1038 (5th Cir. 2023) (affirming dismissal of antitrust complaint on that ground).

The FTC's proposed market definition is simply not plausible. Because "the anesthesia services that form the hospital-only services may be performed by the same providers as other [outpatient] services," Compl. ¶ 222, the FTC's proposed market for "commercially insured hospital-only anesthesia services" is "plainly designed to bolster" its claims "by artificially

exaggerating [USAP's] market power.” *It’s My Party*, 811 F.3d at 683. Dismissal of the complaint is therefore required.

B. The FTC Fails To Plausibly Allege Monopoly Power

The FTC’s Sherman Act Section 2 claims (Counts I, III, IV, and VI) require the assertion of *facts* making out a plausible claim that USAP has a monopoly position in a relevant antitrust market. As discussed above, the FTC’s market allegations are insufficient. But equally insufficient are its claims that USAP has monopoly power, a *sine qua non* of any Section 2 monopolization claim. See *Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 481 (1992); *Abraham & Veneklasen Joint Venture v. Am. Quarter Horse Ass’n*, 776 F.3d 321, 334 (5th Cir. 2015) (Section 2 monopolization claim requires showing that defendant “possesses monopoly power in the relevant market”) (citing *Stearns Airport Equip. Co. v. FMC Corp.*, 170 F.3d 518, 522 (5th Cir. 1999)).

Monopoly power is the power to raise price *above a competitive level*, to restrict output (to the same effect), or to reduce quality below a competitive level. See, e.g., *Taylor v. Christus St. Joseph Health Sys.*, 216 F. App’x 410, 412 (5th Cir. 2007); see also *Rambus*, 522 F.3d at 466. The FTC does not allege that USAP either restricted output or reduced quality in any way. The FTC does claim that prices have increased. See Compl. ¶ 319. But the dispositive fact is that the complaint lacks any claim that USAP raised prices “above the competitive level,” *Abraham*, 776 F.3d at 335, after it supposedly attained a monopoly through its “roll-up” of anesthesia practices in Texas.

Indeed the pricing history recounted in the complaint alleges the opposite of what the FTC needs to plead and prove. It establishes that, at all relevant times, USAP has functioned in a highly competitive marketplace that sets prices based on individualized negotiations. The FTC does not allege that USAP has extracted a monopoly price from any purchaser. On the contrary,

it has struggled to maintain the contractually agreed prices that a predecessor, *non-monopolist* provider (GHA) negotiated prior to its acquisition by USAP. The FTC's allegations merely establish that USAP has sought payment at the prices previously agreed by GHA and payors—except for instances in which it has been unable to charge even those prices. *See, e.g.*, Compl. ¶ 318 (acknowledging that “USAP’s rates decreased” pursuant to renegotiation after United took USAP out of network).⁹

The FTC’s only pricing allegations in the complaint pertain to a series of “Tuck-In Acquisitions” by which USAP acquired a number of smaller anesthesiology practices in Houston and Dallas following its anchor purchase of Greater Houston Anesthesiology in December 2012. *See, e.g.*, Compl. ¶¶ 102-115 (describing USAP’s “roll-up” of the Houston market by acquiring North Houston Anesthesiology’s Kingwood Division, MetroWest Anesthesia Care, and Guardian Anesthesia Services). Rather than alleging that USAP followed these acquisitions by raising prices to supracompetitive levels, the FTC claims that USAP “tucked in” these acquired practices to the *preexisting* rates that GHA had negotiated with the commercial insurers.¹⁰ *See id.* ¶ 107 (“Following the acquisition, USAP raised NHA Kingwood’s reimbursement for the same anesthesia providers *to its own contracted rate*” (emphasis added)); *see also id.* ¶ 111 (same for MetroWest Anesthesia Care); *id.* ¶ 115 (same for Guardian Anesthesia Services). And

⁹ The recent passage of the federal No Surprises Act, which the FTC references in its complaint, Compl. ¶ 74, directly undermines its claim that USAP possesses monopoly power. By requiring mandatory arbitration for disputes between providers and insurers over out-of-network rates, the Act denies USAP significant leverage in its negotiations with insurers. It is doubtful whether any provider could exercise monopoly power—“the ability to charge a price above the competitive level,” *Abraham*, 776 F.3d at 335—in the teeth of these statutory protections for patients and insurers. At a minimum, against the backdrop of the No Surprises Act, the FTC’s allegation of USAP’s monopoly power is simply not “plausible.” *See Twombly*, 550 U.S. at 570.

¹⁰ Indeed, the FTC’s own allegations confirm that, from 2013 to 2020, USAP’s rates have only increased by roughly █% per year. *See* Compl. ¶ 118.

at the time of the USAP acquisition of GHA in December 2012, GHA only had a 39% share of the FTC's own gerrymandered market definition of "commercially insured hospital-only anesthesia services" in Houston. *Id.* ¶ 266. In other words, the FTC's only alleged fact regarding monopoly power is that, after acquiring small anesthesiology practices, USAP raised the rates of *some* but not all of those anesthesiologists to the prevailing market rate for their services, as it was contractually permitted to do under agreements that were negotiated at arms-length with sophisticated commercial payors by USAP's concededly non-monopolist predecessor GHA.

An alleged monopolist that cannot charge more than a competitive price, restrict output to the same effect, or reduce quality below competitive levels is no monopolist at all. The complaint contains no such allegations, and the FTC has therefore failed to plead facts "plausibly suggesting" USAP's "possession of monopoly power." *Twombly*, 550 U.S. at 557; *Eastman Kodak*, 504 U.S. at 481. To the contrary, the facts that the FTC *has* alleged soundly refute any "presumption" of monopoly power created by the allegedly high share held by USAP in the gerrymandered "hospital-only" anesthesiology services market. For the reasons set forth above, those facts establish that USAP does *not* have monopoly power, and accordingly cannot be subject to the FTC's monopolization claims under section 2 of the Sherman Act.

C. The FTC Fails To Plausibly Allege Exclusionary Conduct

The FTC's Sherman Act Section 2 claims (Counts I, III, IV, and VI) fail for the additional reason that the complaint contains no cognizable allegations of exclusionary conduct. As the Supreme Court has made clear, "the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct." *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004); *see Abraham*, 776 F.3d at 334 ("Having or acquiring a monopoly is not in and of itself illegal.")

The FTC's principal allegation of exclusionary conduct is that USAP obtained a monopoly by acquiring several anesthesia practices throughout Texas, consolidated these providers under the USAP umbrella, and thereby increased its market share.¹¹ No court has ever held that acquisition-based allegations similar to these amount to a plausible claim of actionable exclusionary conduct under Section 2. Acquisitions, including acquisitions of competitors, support no presumption of anticompetitive effect because such acquisitions often increase competition and benefit consumers. *See Eastman v. Quest Diagnostics Inc.*, 2016 WL 1640465, at *9 (N.D. Cal. Apr. 26, 2016) ("plaintiffs cannot rely on the fact of the acquisitions alone"), *aff'd*, 724 F. App'x 556 (9th Cir. 2018); *Dresses for Less, Inc. v. CIT Grp./Com. Servs., Inc.*, 2002 WL 31164482, at *12 (S.D.N.Y. Sept. 30, 2002) ("[T]he mere fact that a merger eliminates competition between the firms concerned has never been a sufficient basis for illegality.") (quoting IV Phillip E. Areeda et al., *Antitrust Law* ¶ 901a (1998)). This is particularly true when an established firm acquires a fledgling competitor: there are obvious opportunities for benefits not only to the acquiring company, but also to consumers. *See Dresses for Less*, 2002 WL 31164482, at *12 ("horizontal mergers are much more likely to be procompetitive than anticompetitive"); Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 901a (2023) (competitors may merge "to achieve synergies in the production or distribution of complementary goods, to put inefficiently run assets into the hands of superior management").

¹¹ The FTC also points to USAP's supposed "price-setting arrangements" and "market allocation agreement" with [REDACTED] as further instances of exclusionary conduct. But the "price-setting arrangements" are wholly valid for the reasons explained in Part II.E, *infra*, and the [REDACTED], entered into in connection with the sale of an anesthesia practice, is long-past conduct that the FTC may not challenge via this Section 13(b) court proceeding, *see* Part I.B, *supra*.

Only in rare circumstances not alleged here have acquisitions of competitors been held to be exclusionary under Section 2. For example, in the historic *American Tobacco* case, the Supreme Court condemned the defendant's serial acquisition of rivals' assets solely to shut them down and make them unavailable for competition. *See United States v. Am. Tobacco Co.*, 221 U.S. 106, 183 (1911) (Section 2 violation where defendant spent "millions upon millions of dollars in buying out plants, not for the purpose of utilizing them, but in order to close them up and render them useless for the purposes of trade"); *see also United States v. Am. Can Co.*, 230 F. 859, 875 (D. Md. 1916) (Section 2 violation where monopolist shut down two-thirds of the plants it acquired within two years of their purchase). But the FTC has made no such allegations here—indeed it has alleged precisely the opposite. The complaint describes USAP's plan to consolidate a handful of compatible anesthesiology practices, but "to supply hospitals with generally the same providers as before." Compl. ¶ 99. The FTC therefore has no basis to claim exclusionary conduct by virtue of the alleged acquisitions alone.

Moreover, actionable exclusionary conduct must have an "anticompetitive effect," that is, "it must harm the competitive process and thereby harm consumers." *Rambus*, 522 F.3d at 463; *see also United States v. Microsoft Corp.*, 253 F.3d 34, 58, 79 (D.C. Cir. 2001) (preventing distribution of rival browsers on third-party PCs prevented competition on the merits in the PC operating system market). But the FTC's complaint contains no plausible allegation that USAP's acquisitions caused harm to competition or consumers in any measurable way. As explained above, the FTC nowhere alleges that USAP's rates themselves have increased above a competitive level as a consequence of its acquisitions. And its core allegation—that the newly acquired practices were "tucked in" at USAP's existing rates, *see, e.g.*, Compl. ¶ 107—merely reflects the extension of market rates negotiated at arms-length by a non-monopolist.

The FTC states, in conclusory fashion, that USAP's acquisitions have increased prices for anesthesia services. But given the concrete facts alleged in the complaint regarding USAP's pricing practices (as discussed above), the FTC's claims of market-wide harm are unfounded, contrary to the admitted fact that USAP has never charged more than a competitive price and, even without all that, purely speculative. *See Twombly*, 550 U.S. at 555 (conclusions must be disregarded); *Roy B. Taylor Sales, Inc. v. Hollymatic Corp.*, 28 F.3d 1379, 1385 (5th Cir. 1994) ("Speculation about anticompetitive effects is not enough."). The FTC has failed to allege any facts regarding USAP's "exercise[] [of] its power to control prices or exclude competitors from the relevant market for its products," *Abraham*, 776 F.3d at 334, and thus has not alleged the "element of anticompetitive conduct" that a Section 2 monopolization claim requires, *Trinko*, 540 U.S. at 407. Counts I, III, IV, and VI should therefore be dismissed.

D. The FTC Fails To Plausibly Allege A Violation Of The Clayton Act

The FTC's Clayton Act claims (Counts II, V, and VII) also fail. "To state a claim under Section 7, a complaint must define the relevant market and demonstrate the probability of anticompetitive results flowing from the challenged merger or acquisition." *David B. Turner Builders LLC v. Weyerhaeuser Co.*, 603 F. Supp. 3d 459, 466 (S.D. Miss. 2022) (citing *Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.*, 732 F.2d 480, 491-92 (5th Cir. 1984)), *aff'd*, 2023 WL 2401587 (5th Cir. Mar. 8, 2023). The FTC's market definition is deficient for the reasons stated above, and the Section 7 claims fail for the same reasons as the Section 2 claims fail.

But the FTC's Section 7 claims further require dismissal because the acquisitions described in the complaint are not alone sufficient to state a claim, given the absence of any factual allegations establishing consumer or competitive harm "flowing from" these acquisitions. *Turner Builders*, 603 F. Supp. at 466 (dismissing section 7 claim where complaint did "not provide any facts to plausibly suggest the probability of anticompetitive results" from the

acquisitions in question). Unlike a typical Section 7 case, where courts have to speculate about potential harm to consumers from a challenged acquisition, here there is no need to speculate. These acquisitions have already taken place (some more than a decade ago), yet the FTC does not (because it cannot) allege that consumers have sustained any cognizable harm as a result of USAP's expanded ability to provide critical care in hospitals throughout Texas. That is, as explained *infra*, the acquisitions have *not* led to prices above competitive levels.

E. The FTC Fails To Plausibly Allege A Price-Fixing Agreement

The FTC's price-fixing claim (Count IX) fails because the complaint does not allege the most basic ingredient of such a claim: an agreement among competitors to fix prices. To establish a violation of Section 1 of the Sherman Act, "a plaintiff must show that the defendant (1) engaged in a conspiracy (2) that restrained trade (3) in a particular market." *BRFHH Shreveport, LLC v. Willis-Knighton Med. Ctr.*, 49 F.4th 520, 525 (5th Cir. 2022) (cleaned up) (quoting *MM Steel, L.P. v. JSW Steel (USA) Inc.*, 806 F.3d 835, 843 (5th Cir. 2015)). For purposes of the first element, "[t]he crucial question is whether the challenged anticompetitive conduct stems from independent decision or *from an agreement*, tacit or express." *Id.* at 526 (quoting *Twombly*, 550 at 553 (emphasis in original)). At the pleading stage, it is the plaintiff's burden to make "allegations plausibly suggesting (not merely consistent with) agreement." *Id.* at 528 (quoting *Twombly*, 550 U.S. at 557).

Count IX of the FTC's complaint alleges a violation of Section 1 of the Sherman Act based on USAP's "[h]orizontal [a]greements [with other anesthesiology practices] to [b]ill [for anesthesiology services] at a [f]ixed [p]rice." That claim should be dismissed because the FTC has not plausibly alleged an "agreement" between USAP and competing anesthesiology practices to fix prices for their anesthesia services. The "agreements" that the FTC labels "price-setting arrangements" for purposes of this claim are in fact contracts to provide back-office,

administrative services. USAP performs these functions for its own anesthesiologists, but not all anesthesiology practices do. For that reason, three smaller anesthesiology practices contracted with USAP or its predecessors to obtain reimbursement from payors on their behalf. The provider groups “assign[] to [USAP] any right to bill and receive payment from patients and payors for services rendered.” Compl. ¶ 184. USAP then “bill[s] payors for the anesthesia services rendered by” the client provider groups “using USAP’s own provider or tax information,” obtains reimbursement from payors, and then “[pays] the non-USAP” anesthesiologists, typically retaining “some portion” of the reimbursement amount as compensation for the administrative services it has performed. *Id.* ¶ 176. USAP also provides two hospitals (and used to provide one hospital) with certain other ancillary services related to billing and reimbursement.¹²

The FTC concedes that anesthesiologists at the three relevant hospitals are (or were) compensated at different reimbursement rates than USAP’s. *See, e.g., id.* ¶ 203 (“USAP paid Baylor College of Medicine [REDACTED] for its anesthesia providers’ time.”); *id.* ¶ 196 (alleging that USAP “compensat[ed] Dallas Anesthesiology Associates . . . based on [that] group’s billing rate at Baylor University Medical Center”). Thus, not only does the FTC fail to allege the existence of an agreement between USAP and its competitors setting prices for anesthesia services, its own allegations expressly confirm that USAP and the other anesthesiology practices at issue continued to offer their anesthesia services at different prices. That these other practices assign their right to payment to USAP, *see, e.g., id.* ¶ 184, and that

¹² For instance, the FTC alleges that Pinnacle’s administrative services practice (later acquired by USAP) maintained a customer service phone number that Pinnacle’s back-office staff would answer on behalf of another practice, Dallas Anesthesiology Associates. *See id.* ¶ 195.

USAP uses its own tax and provider information to obtain reimbursement from payors, *see, e.g., id.* ¶ 176, do not constitute an “agreement” to fix prices that is the “crucial” requirement of the FTC’s Section 1 claim, *see Twombly*, 550 U.S. at 553.

The FTC challenges USAP’s administrative services business for several reasons, but none of them cures this fatal deficiency with the FTC’s price-fixing claim. The FTC complains that USAP’s administrative services contracts “made it appear to payors as if USAP was doing the work of the other group’s anesthesia providers,” *id.* ¶ 176; that USAP “could have cooperated with other providers” by “hir[ing] them as subcontractors,” *id.* ¶ 178; that USAP’s reimbursement practices might breach its insurer contracts due to “compliance issues related to pass through billing,” *id.* at ¶ 179; and that USAP was pleased that its administrative service business allowed it to “collect[] a nice margin,” *id.* at ¶ 196. None of these concerns have merit. But the more important point here is that none of these objections to USAP’s business practices so much as reference the horizontal price-fixing agreement that the FTC’s Section 1 claim requires, let alone constitute “allegations plausibly suggesting (not merely consistent with) [that] agreement.” *Twombly*, 550 U.S. at 557.

Ultimately, the FTC’s own account of USAP’s administrative services business concedes the absence of the price-fixing agreement that its Section 1 claim requires. The FTC alleges that USAP’s administrative services contracts “*effectively* raised the reimbursement rates of the non-USAP providers up to USAP’s much higher rates,” Compl. ¶ 176 (emphasis added), and that they “*functioned the same as* an agreement between USAP and the non-USAP providers to charge the higher USAP rates,” *id.* ¶ 177 (emphasis added). But the FTC does not allege that non-USAP providers *actually* charged the same rates for their anesthesia services as USAP providers did, and it does not allege that USAP *actually* entered into an agreement with

competing anesthesiology providers to fix prices for anesthesia services. Nor can it, because no such agreement has ever existed. Because the FTC has not even alleged a price-fixing agreement, it has failed to “nudge[] [its price fixing claim] across the line from conceivable to plausible,” *Twombly*, 550 U.S. at 570, and Count IX must therefore be dismissed. *See, e.g., BRFHH Shreveport*, 49 F.4th at 525 (dismissing Section 1 claim because plaintiff failed to plausibly allege an “agreement” to fix prices for healthcare services).

F. The FTC Fails To Plead A Valid Conspiracy Claim

USAP hereby incorporates by reference Section III.C of Welsh Carson’s motion to dismiss. *See* WC Mot. Section III.C. Independent of the reasons stated above, the FTC’s conspiracy claims in Counts III and VI must be dismissed because Welsh Carson and USAP were not separate economic entities and were thus incapable of conspiring as a matter of law under *Copperweld*, 467 U.S. at 770-71. *See, e.g., Surgical Care Ctr. of Hammond, L.C. v. Hosp. Serv. Dist. No. 1 of Tangipahoa Parish*, 309 F.3d 836, 840-41 (5th Cir. 2002) (“as a matter of law, a corporation and its agent . . . are incapable of conspiring with one another to violate the antitrust laws”). The FTC all but concedes as much, repeatedly alleging that Welsh Carson and USAP were functionally indistinguishable, not distinct actors with disparate economic objectives. *See* Compl. ¶¶ 35, 37, 39, 40, 345, 351, 370, 376, 392, 400, 406, 411. Counts III and VI must therefore be dismissed.¹³

CONCLUSION

The Court should dismiss the FTC’s complaint in its entirety.

¹³ The FTC’s claims under Section 5 of the FTC Act are merely derivative of the FTC’s claims under the Sherman Act and Clayton Act, and therefore require dismissal on any of the grounds enumerated above. *See 1-800 Contacts, Inc. v. FTC*, 1 F.4th 102, 122 (2d Cir. 2021) (where conduct does “not constitute a violation of the Sherman Act . . . an asserted violation of the FTC Act fails of necessity”).

Dated: November 20, 2023

David J. Beck (TX Bar No. 00000070)
(Federal I.D. No. 16605)
Garrett S. Brawley (TX Bar No. 24095812)
(Federal I.D. No. 3311277)
BECK REDDEN LLP
1221 McKinney Street, Suite 4500
Houston, TX 77010
Tel: (713) 951-3700
Fax: (713) 951-3720
dbeck@beckredden.com
gbrawley@beckredden.com

Respectfully submitted,

/s/ Mark C. Hansen
Mark C. Hansen (D.C. Bar No. 425930)
(*Pro Hac Vice*)
Attorney-in-Charge
Geoffrey M. Klineberg (D.C. Bar No. 444503)
(*Pro Hac Vice*)
David L. Schwarz (D.C. Bar No. 471910)
(*Pro Hac Vice*)
Kevin J. Miller (D.C. Bar No. 478154)
(*Pro Hac Vice*)
Dennis D. Howe (D.C. Bar No. 90011114)
(*Pro Hac Vice* Application Pending)
Derek C. Reinbold (D.C. Bar No. 1656156)
(*Pro Hac Vice* Application Pending)
KELLOGG, HANSEN, TODD,
FIGEL & FREDERICK, P.L.L.C.
1615 M Street N.W., Suite 400
Washington, D.C. 20036
Tel: (202) 326-7900
Fax: (202) 326-7999
mhansen@kellogghansen.com
gklineberg@kellogghansen.com
dschwarz@kellogghansen.com
kmiller@kellogghansen.com
dhowe@kellogghansen.com
dreinbold@kellogghansen.com

Counsel for Defendant U.S. Anesthesia Partners, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2023, I filed the foregoing document with the Court and served it on opposing counsel through the Court's CM/ECF system. All counsel of record are registered ECF users.

Respectfully submitted,

/s/ Mark C. Hansen

Mark C. Hansen

Boston, Massachusetts 02199

Telephone: (617) 951-7000

Facsimile: (617) 951-7050

*Counsel for Defendants Welsh, Carson,
Anderson & Stowe XI, L.P., WCAS
Associates XI, LLC, Welsh, Carson,
Anderson & Stowe XII, L.P., WCAS
Associates XII, LLC, WCAS Management
Corporation, WCAS Management, L.P.,
and WCAS Management, LLC*

TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT	1
SUMMARY OF THE ARGUMENT	3
STATEMENT OF THE NATURE AND STAGE OF THE PROCEEDING	6
STATEMENT OF THE ISSUES.....	6
FACTUAL BACKGROUND.....	7
STANDARD OF REVIEW	9
ARGUMENT	10
I. The FTC Is Not Authorized to Bring this Action under Section 13(b) of the FTC Act.	10
II. The FTC Fails to State a Claim for Alleged Violation of the Antitrust Laws by Welsh Carson.	15
A. The Complaint States No Claims Against the Welsh Carson Entities for Monopolization, Unlawful Agreements in Restraint of Trade, or Unfair Methods of Competition.	16
1. The FTC Fails to Plead that Welsh Carson Is a Monopolist Engaged in Exclusionary Conduct under Section 2 of the Sherman Act (Counts I & IV).....	16
2. The FTC Does Not Allege that any Welsh Carson Entity Was Party to an Agreement or Transaction in Violation of the Antitrust Laws (Counts II, V, VII, IX, & X).....	18
3. The FTC Fails to State a Claim under Section 5 of the FTC Act Against the Welsh Carson Defendants (Count VIII).....	20
B. Welsh Carson Cannot Be Liable for Alleged Violations of the Antitrust Laws by USAP.	21
1. Courts Respect the Corporate Form.....	22
2. The Welsh Carson Entities’ Alleged Activities Incidental to their Investments Do Not Constitute Independent Conduct.....	24
3. None of the FTC’s Remaining Allegations Properly Plead Independent Conduct by the Welsh Carson Entities.	26

4.	The FTC Fails to Plead Any Claim Based on Agency Liability.....	28
C.	The FTC Fails to State a Valid Conspiracy Claim Under Section 2 of the Sherman Act (Counts III & VI).	29
III.	The Case Should Also Be Dismissed Because, as an Independent Agency, the FTC Cannot File an Enforcement Action—an Authority Reserved to Agencies Directly Supervised by the President.	30
A.	The FTC Act Amendments, Which Authorized Independent FTC Commissioners to Exercise the President’s Executive Power, Such as By Filing this Enforcement Action in Court, Violate Article II of the Constitution.	31
B.	The Appropriate Remedy for this Constitutional Violation Is to Strike the Executive Powers Granted to the FTC in 1973, which Compels Dismissal of this Action.....	34
CONCLUSION.....		35

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>In re Alper Holdings USA, Inc.</i> , 398 B.R. 736 (S.D.N.Y. 2008).....	27
<i>Am. Needle, Inc. v. Nat’l Football League</i> , 560 U.S. 183 (2010).....	29
<i>AMG Capital Mgmt., LLC v. Fed. Trade Comm’n</i> , 141 S. Ct. 1341 (2021).....	11, 33
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009).....	10
<i>Barr v. Am. Ass’n of Pol. Consultants, Inc.</i> , 140 S. Ct. 2335 (2020).....	35
<i>Bell Atl. Corp. v. Twombly</i> , 550 U.S. 544 (2007).....	10
<i>Bond v. United States</i> , 572 U.S. 844 (2014).....	31
<i>BRFHH Shreveport, LLC v. Willis-Knighton Med. Ctr.</i> , 49 F.4th 520 (5th Cir. 2022)	10, 13, 15, 17
<i>Bridas S.A.P.I.C. v. Gov’t of Turkmenistan</i> , 447 F.3d 411 (5th Cir. 2006)	22
<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976).....	33
<i>Chandler v. Phoenix Servs.</i> , No. 7:19-CV-00014, 2020 WL 1848047 (N.D. Tex. Apr. 13, 2020), <i>aff’d</i> , 45 F.4th 807 (5th Cir. 2022)	16, 23
<i>Clark v. Thompson</i> , 850 Fed App’x 203 (5th Cir. 2018)	21
<i>Cnty. Ct. of Ulster Cnty., N.Y. v. Allen</i> , 442 U.S. 140 (1979).....	31
<i>E.I. du Pont de Nemours & Co. v. Fed. Trade Comm’n</i> , 729 F.2d 128 (2d Cir. 1984).....	20

<i>Fed. Trade Comm’n v. AdvoCare Int’l, L.P.</i> , No. 4:19-CV-715, 2020 WL 6741968 (E.D. Tex. Nov. 16, 2020)	14
<i>Fed. Trade Comm’n v. Credit Bureau Ctr., LLC</i> , 937 F.3d 764 (7th Cir. 2019)	10
<i>Fed. Trade Comm’n v. Facebook, Inc.</i> , 560 F. Supp. 3d 1 (D.D.C. 2021)	11, 12, 13
<i>Fed. Trade Comm’n v. Shire ViroPharma, Inc.</i> , 917 F.3d 147 (3d Cir. 2019).....	10, 11, 13, 14
<i>Gurgunas v. Furniss</i> , No. 3:15-CV-03964, 2016 WL 3745684 (N.D. Tex. July 13, 2016).....	15
<i>California ex rel. Harris v. Safeway, Inc.</i> , 651 F.3d 1118 (9th Cir. 2011)	19
<i>Hobart Bros. Co. v. Malcolm T. Gilliland, Inc.</i> , 471 F.2d 894 (5th Cir. 1973)	19
<i>Humphrey’s Executor v. United States</i> , 295 U.S. 602 (1935).....	5, 32, 34, 35
<i>Lenox MacLaren Surgical Corp. v. Medtronic, Inc.</i> , 847 F.3d 1221 (10th Cir. 2017)	16
<i>In re LIBOR-Based Financial Instruments Antitrust Litig.</i> , No. 11 MDL 2262, 2019 WL 1331830 (S.D.N.Y. Mar. 25, 2019)	23
<i>Masimo Corp. v. Wireless</i> , No. 19-CV-01100, 2020 WL 7260660 (S.D. Cal. Dec. 10, 2020)	24, 29
<i>Off. Airline Guides, Inc. v. Fed. Trade Comm’n</i> , 630 F.2d 920 (2d Cir. 1980).....	20
<i>In re Penn. Title Ins. Antitrust Litig.</i> , 648 F. Supp. 2d 663 (E.D. Pa. 2009)	23, 25
<i>PostX Corp. v. Secure Data in Motion, Inc.</i> , No. C 02-044832005 WL 8177634 (N.D. Cal. Aug. 17, 2005).....	29, 30
<i>In re Pressure Sensitive Labelstock Antitrust Litig.</i> , 566 F. Supp. 2d 363 (M.D. Pa. 2008)	25
<i>Rio Grande Royalty Co. v. Energy Transfer Partners, L.P.</i> , 786 F. Supp. 2d 1202 (S.D. Tex. 2009)	18

<i>Rohlfing v. Manor Care, Inc.</i> , 172 F.R.D. 330 (N.D. Ill. 1997).....	30
<i>Seila Law, LLC v. Consumer Financial Prot. Bureau</i> , 140 S. Ct. 2183 (2020).....	<i>passim</i>
<i>Shujauddin v. Berger Bldg. Prods., Inc.</i> , No. CV 19-876, 2019 WL 9102043 (E.D. Pa. June 18, 2019)	15
<i>SSP Partners v. Gladstrong Invs. (USA) Corp.</i> , 275 S.W.3d 444 (Tex. 2008).....	22
<i>Stankis v. Environmental Protection Agency</i> , 713 F.2d 1181 (5th Cir. 1983)	11
<i>Stearns Airport Equip. Co. v. FMC Corp.</i> , 170 F.3d 518 (5th Cir. 1999)	16
<i>T D X Energy, LLC v. Chesapeake Operating, Inc.</i> , 857 F.3d 253 (5th Cir. 2017)	11
<i>Top Rank, Inc. v. Haymon</i> , No. CV154961, 2015 WL 9948936 (C.D. Cal. Oct. 16, 2015)	30
<i>Transamerica Leasing, Inc. v. La Republica de Venezuela</i> , 200 F.3d 843 (D.C. Cir. 2000).....	29
<i>TransUnion LLC v. Ramirez</i> , 141 S. Ct. 2190 (2021).....	33
<i>Trinity Indus., Inc. v. Greenlease Holding Co.</i> , No. CIV.A. 08-1498, 2014 WL 1766083 (W.D. Pa. May 2, 2014), <i>aff'd</i> , 903 F.3d 333 (3d Cir. 2018).....	27
<i>United States v. Jon-T Chems., Inc.</i> , 768 F.2d 686 (5th Cir. 1985)	23
<i>United States v. Bestfoods</i> , 524 U.S. 51 (1998).....	22, 26, 27
<i>United States v. Grinnell Corp.</i> , 384 U.S. 563 (1966).....	16, 17
<i>Valdez v. Cap. Mgmt. Servs., LP</i> , No. CIV.A. B:09-246, 2010 WL 4643272 (S.D. Tex. Nov. 16, 2010).....	23
<i>Vaughn Med. Equip. Repair Serv., L.L.C. v. Jordan Reses Supply Co.</i> , No. CIV.A. 10-00124, 2010 WL 3488244 (E.D. La. Aug. 26, 2010)	18

<i>Verizon Commc'ns, Inc. v. Law Off. of Curtis V. Trinko</i> , 540 U.S. 398 (2004)	28
<i>Walker v. Beaumont Indep. Sch. Dist.</i> , 938 F.3d 724 (5th Cir. 2019)	9, 10
<i>Weinberger v. UOP, Inc.</i> , 457 A.2d 701 (Del. 1983)	26
Statutes	
15 U.S.C. § 18	18
15 U.S.C. § 41	32
15 U.S.C. § 41 <i>et seq.</i>	33
15 U.S.C. § 45(a)(1)	20
15 U.S.C. § 53(b)	<i>passim</i>
Pub. L. No. 93-153, § 408(f), 87 Stat. 576, 592 (1973)	32
Other Authorities	
Fed. R. Civ. P. Rule 8	15, 21
Fed. R. Civ. P. Rule 12(b)(6)	<i>passim</i>
U.S. Const. Art. II	<i>passim</i>
28 C.F.R. § 0.40	34
Fed. Trade Comm'n – Enforcement, https://www.ftc.gov/enforcement	34
Transcript, A Conversation with FTC Chair Lina Khan and DOJ Assistant Attorney General Jonathan Kanter on Antitrust Enforcement, Brookings Inst. 2, 22 (Oct. 5, 2023) (Chair Khan: FTC has “a whole set of law enforcement tools”), https://www.brookings.edu/wp- content/uploads/2023/08/gs_20231005_antitrust_transcript.pdf	33
Q&A with FTC Chair Lina Khan, Chicago Booth Stigler Ctr. (June 3, 2022) (antitrust statutes “allow the FTC to police unfair methods of competition”), https://www.promarket.org/2022/06/03/qa-with-ftc-chair-lina-khan-the-word- efficiency-doesnt-appear-anywhere-in-the-antitrust-statutes/	33

PRELIMINARY STATEMENT

This case involves an unprecedented attempt by the Federal Trade Commission (“FTC”) to challenge and unravel long-ago investments in a healthcare company that provides vital services in this State. The investments facilitated delivery of needed anesthesia services to Texas cities, including medically underserved areas here in Houston. The FTC’s lawsuit evidently seeks to dismantle this physician-owned company and disrupt its delivery of vital services, all while ignoring well-settled principles of corporate and antitrust law in seeking to somehow hold its minority investor liable.

A decade ago, a Welsh Carson fund helped finance a local group of physicians to create defendant U.S. Anesthesia Partners, Inc. (“USAP”). Over the years, USAP grew into a company that expands access to quality anesthesia services across Texas and other states. Part of USAP’s approach was to attract and combine with other quality practices—a strategy used by countless other companies in many other industries. Its growth has allowed USAP to invest in technology, quality, and infrastructure to provide comprehensive 24/7 anesthesia services to hospitals both large and small, including those with patient populations that previously had access only to lower quality anesthesia services or struggled to access such services at all. And USAP serves these patient needs at prices that, accounting for inflation, have basically stayed flat since inception.

None of this seems to matter to the FTC. This lawsuit focuses on supposed harm to the healthcare *insurance* industry, dominated by four insurers: Aetna, United, Cigna, and Blue Cross. Nothing in the Complaint alleges that USAP’s success has harmed patient care, much less that Welsh Carson investments have done so. Nor does the Complaint assert that any of the respected Texas hospitals (which rely on USAP for access to high-quality care for underserved populations) has been hurt by the supposed anticompetitive acts. Instead, the FTC complains that the big four

insurance companies—which routinely kick out healthcare providers from coverage during pricing negotiations—now are allegedly less able to leverage their bargaining power against USAP.

Beyond that, the Complaint just looks backward and cites no specific current or imminent violation by the Welsh Carson entities.¹ That is fatal to its claims. The FTC’s power to sue under Section 13(b) of the Federal Trade Commission Act (the “FTC Act”) is restricted to a putative defendant that *is* violating, or *is about* to violate, a law enforced by the FTC. The last act alleged by the FTC was more than four years ago; most are more than a decade old. As a matter of this governing statute, hindsight enforcement over long-completed investments by the Welsh Carson Funds is well beyond the authority of the FTC.

Even more, the Complaint targets mere investors, turning decades of settled corporate law on its head. The FTC alleges that Fund XII is the only Welsh Carson investor in USAP since 2017, and it has never held more than a 23% share in USAP and two of fourteen USAP board seats. But rather than admit the illogic of suing non-controlling investors for alleged misconduct by the company in which they invested, the Complaint instead lumps everyone together to try to conceal the illogic. It ignores longstanding principles of corporate law and separateness, apparently hoping to survive a motion to dismiss through hazy and undifferentiated group pleading.

By limiting the FTC to its statutory authority and holding it to the pleading standards, the Court will avoid the need to reach serious constitutional issues raised by the agency’s aggressive new litigation agenda. Recent Supreme Court precedent highlights that the FTC’s exercise of

¹ Welsh, Carson, Anderson & Stowe XI, L.P. (“Fund XI”), WCAS Associates XI, LLC, Welsh, Carson, Anderson & Stowe XII, L.P. (“Fund XII” and, together with Fund XI, “the Funds”), WCAS Associates XII, LLC, WCAS Management Corporation, WCAS Management, L.P., and WCAS Management, LLC (collectively, the “Welsh Carson entities”).

quintessentially executive power under the FTC Act, as amended, violates Article II of the Constitution.

In short, the FTC's Complaint greatly overreaches its standing and statutory power, ignores the harm that it will cause to consumers of USAP's critical services here and elsewhere, and improperly sues Welsh Carson investors which are not controlling, conspiring, or even proper parties.

SUMMARY OF THE ARGUMENT

Section 13(b) of the FTC Act. The FTC's action exceeds the scope of its statutory authority because no Welsh Carson entity "is violating" or "is about to violate" any law protecting competition, as required to invoke Section 13(b) of the FTC Act. Congress specifically limited the FTC's authority in federal court to situations where the FTC seeks to remedy ongoing or impending conduct; past conduct alone will not suffice. But no Welsh Carson entity owns a majority of or controls USAP today, nor has any Welsh Carson entity ever provided anesthesia services. Most of the FTC's allegations about Welsh Carson-related conduct are more than a decade old; the most recent of the scant allegations are from 2019, more than four years ago. And the FTC's conclusory and speculative allegations do not show that any Welsh Carson entity is about to make additional investments or take action of any kind that will violate the antitrust laws. Indeed, the FTC's resort to such non-factual speculation confirms its failure to meet the statutory standard. The FTC therefore lacks authority to bring this action under Section 13(b) of the FTC Act, and dismissal is required.

Failure to State a Claim under Rule 12(b)(6). The FTC's threadbare group-pleading allegations about the Welsh Carson entities' purported involvement in the business activities of USAP present additional grounds for dismissal under Rule 12(b)(6). Even if the FTC could

plausibly allege antitrust violations directly by USAP,² its attempt to sweep seven Welsh Carson entities into the litigation ignores basic and long-settled principles of corporate separateness and agency law, constituting an unprecedented overreach. The FTC's story, as alleged in the Complaint, is simple: Fund XI "founded" USAP by providing startup capital in 2012. USAP (not any Welsh Carson entity) expanded by acquiring additional anesthesia physician practices. In short, the FTC alleges that USAP's multiple acquisitions resulted in violations of the antitrust laws, but it alleges no well-pleaded fact suggesting that any *Welsh Carson* entity committed such a violation. At most, the FTC alleges that "Welsh Carson" was responsible for the *idea* to create, grow, and expand USAP, a platform of supported anesthesiology practices—but that does not state a claim for violation of the antitrust laws. At all times, the Funds acted as a financing source, and no Welsh Carson entity acted as a market participant. The alleged conduct by the Welsh Carson entities is typical of the relationship between an investor and the entity in which it invested: advice, financial support and oversight that has been repeatedly rejected as a basis to impute liability to the investor as a matter of settled corporate law. By attempting to convert investments by the Welsh Carson Funds into liability for *USAP's* alleged subsequent antitrust violations, the FTC casually ignores fundamental principles of corporate law, including corporate separateness. Nor can the FTC carry its burden as to the Welsh Carson entities based on conduct before USAP's formation or conduct by a USAP director (appointed by Welsh Carson) who is legally presumed to act on USAP's behalf.

The FTC's conspiracy claims under Section 2 of the Sherman Act also fail because the FTC does not plausibly allege that any Welsh Carson entity ever had a separate economic interest

² For the reasons stated in USAP's Motion to Dismiss, in which the Welsh Carson entities join, the FTC fails adequately to plead any primary violation of the antitrust laws by USAP.

from USAP in any relevant market. Nor could it: the Welsh Carson investment funds were merely investors in USAP's business of providing Texans access to efficient, high-quality anesthesiology services. And the FTC does not (because it cannot) allege that the Welsh Carson entities and USAP are, or at any time were, actual or potential competitors. The conspiracy claims should be dismissed for these reasons.

Article II of the U.S. Constitution. This Court should dismiss the claims against the Welsh Carson entities entirely for failure to satisfy the Section 13(b) standard, or on the basis of the pleading defects under Rule 12(b)(6) that are obvious from the face of the Complaint. But, if it does not, then this enforcement action must be dismissed because it is premised on an impermissible exercise of executive authority in violation of Article II of the Constitution. Almost a century ago, the Supreme Court upheld the constitutionality of the FTC Act, which restricts the President's appointment and removal authority with respect to FTC Commissioners. But the Court did so because the FTC, as it existed in 1935, did not exercise "executive" power. *Humphrey's Executor v. United States*, 295 U.S. 602, 628–29 (1935). The 1973 amendments to the FTC Act granted the FTC substantial authority to enforce antitrust laws—authority that the Supreme Court has recently characterized as "quintessentially executive power." *Seila Law, LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183, 2200 (2020). The FTC Act, as amended, violates Article II of the Constitution to the extent it purports to grant FTC Commissioners essential executive powers, while limiting both the President's appointment and removal authority. The appropriate remedy for this constitutional violation is to strike the 1973 amendments and to dismiss this suit as an unconstitutional exercise of executive power by the FTC.

* * *

After a two-year investigation involving hundreds of thousands of documents and extensive sworn testimony, the FTC's resort to hazy and undifferentiated pleading, supported only by non-factual, conclusory allegations regarding the Welsh Carson entities, amplifies the failure of its pleading. And the FTC's efforts to ignore black-letter corporate law betray its true policy motives in bringing the action. The Welsh Carson entities respectfully seek dismissal of all claims alleged against them.

STATEMENT OF THE NATURE AND STAGE OF THE PROCEEDING

Plaintiff FTC filed its complaint (the "Complaint") on September 21, 2023. ECF No. 1. All defendants have waived service of process. The Welsh Carson entities now move, pursuant to Federal Rule of Civil Procedure 12(b)(6), to dismiss the Complaint for failure to state a claim.

STATEMENT OF THE ISSUES

1. Whether Section 13(b) of the FTC Act, which allows the FTC to bring an action for injunctive relief in federal court only upon a showing that a defendant "is violating, or is about to violate" the law, authorizes the FTC to bring this action against any Welsh Carson entity, where the FTC alleges only long-past conduct as a basis for its action against the Welsh Carson entities.
2. Whether the FTC adequately pleads a claim that any Welsh Carson entity is liable for USAP's alleged antitrust violations, based on imputing USAP's conduct to its shareholder in violation of bedrock corporate law, while failing to differentiate among the seven Welsh Carson entities named as defendants.
3. Whether the FTC, as an independent agency, has the constitutional authority to bring this enforcement action pursuant to the 1973 amendment to the FTC Act, which granted the FTC the quintessentially executive power to bring enforcement actions, where the FTC Act otherwise restricts the President's appointment and removal authority.

FACTUAL BACKGROUND

Fund XI and Fund XII are separate private equity investment funds that made separate investments at different times in healthcare and technology companies on behalf of different investors. *See* Compl. ¶¶ 26, 28. Each of Fund XI and Fund XII pooled capital from independent investors, such as pension and retirement funds, which was then invested to create ownership stakes in its respective portfolio companies. *Id.* ¶ 26. WCAS Associates XI, LLC is the general partner of Fund XI. *Id.* ¶ 29. WCAS Associates XII, LLC is the general partner of Fund XII. *Id.* ¶ 27. Each general partner entity is empowered to act on behalf and for the benefit of its respective Fund and its investors. *Id.* ¶¶ 27, 29. WCAS Management Corporation provides investment advisory and consulting services to the Funds and their portfolio companies. *Id.* ¶ 25. WCAS Management, L.P. serves as a sub-advisor to WCAS Management Corporation, and WCAS Management, LLC is the general partner of WCAS Management, L.P. *Id.* ¶¶ 30–31.

Fund XI owned stock in USAP from 2012 until 2017, and no longer owns stock in USAP. *Id.* ¶¶ 28, 35. Fund XII has held a minority stake (never more than 23%) in USAP since 2017. *Id.* ¶¶ 26, 35. The FTC does not allege that any of the five other Welsh Carson defendants ever owned any portion of USAP or engaged in any specific conduct relating to USAP. Throughout its Complaint, the FTC lumps together these seven entities as “Welsh Carson” as if they were one, without regard to their distinct legal identities and distinct practical functions. *See id.* at 1–2 (defining “Welsh Carson” to refer to all seven Welsh Carson-affiliated defendants); *see also id.* at 13 nn.2–3 (eliding further distinctions among Welsh Carson-related entities, including non-party entities).

USAP is a healthcare services organization focused on anesthesia and pain management services. *Id.* ¶ 21. Established in Texas in 2012, USAP currently operates in eight states. *Id.* ¶ 22. USAP was formed with the goal of establishing a physician-centric organization providing high-

quality anesthesia services that result in excellent clinical outcomes for patients. Since its founding, USAP has been a separate legal entity with separate management and employees from the Welsh Carson entities named as defendants. *See id.* ¶¶ 20, 38.

USAP's partnership model means that its many physician partners collectively hold the largest share of USAP's stock, retain clinical control of their practices and devote their time to patient care rather than to administrative tasks, which are delegated to management services professionals. USAP provides doctors with access to capital, technology, improved quality management and reporting capabilities, and the business capabilities and sophistication necessary to contend with the increasingly complex healthcare industry. The FTC's Complaint does not allege that any patient received substandard or poor-quality care, or that any patient was denied access to medical care because of financial need. Nor does it allege that any Texas hospital that relies on USAP has been hurt by any alleged anticompetitive conduct. Rather, the Complaint repeatedly points to the alleged grievances of the powerful insurance industry, not patients (who require access to high-quality care) or physicians (who face increasing challenges to serve the complex needs of their patients). *See id.* ¶¶ 2, 5, 68, 74–76, 155, 307, 314–18.

Fund XI invested in USAP at its founding in 2012. *Id.* ¶ 93. Consistent with its initial 50.2% stake in USAP, Fund XI received typical shareholder rights, including the *right*—never alleged to have been exercised—to fill a majority of USAP's board of directors. *See id.* ¶¶ 35–36. Shortly after USAP's founding in 2012, Fund XI's equity interest in USAP began declining, as equity was issued to new USAP physician partners, and Fund XI was soon a minority holder. *Id.* ¶ 35. During 2017, Fund XI sold its entire interest in USAP. *Id.* ¶¶ 28, 35. Fund XII first made a minority investment in USAP in 2017, and today it owns approximately 23% of USAP. *Id.* ¶¶ 26, 35. As a result of its 2017 investment, Fund XII is entitled to appoint just two out of fourteen

directors to the USAP board, less than its proportional equity interest in USAP. *See id.* ¶ 36. Indeed, the FTC conspicuously avoids mentioning that at no time have the Funds appointed more than two of USAP’s fourteen directors. Similarly, the FTC does not (and cannot) allege that USAP’s organizational documents and operative agreements granted either Fund the legal authority to control USAP’s day-to-day operations at any time. Brian Regan, a Welsh Carson executive, served as a USAP director from Fund XI’s initial investment in 2012 until 2022. *Id.* ¶ 37.

The Complaint outlines two main categories of alleged *USAP* conduct that the FTC deems anticompetitive and in which it tries to implicate the Welsh Carson entities: (i) acquisitions of certain anesthesia practices in the Houston, Dallas, and other Texas locations by USAP; and (ii) a so-called “market allocation” agreement by USAP.³ But the FTC alleges that USAP (not any Welsh Carson entity) acquired each anesthesia practice at issue, and that USAP (not any Welsh Carson entity) was the signatory to the alleged January 2014 agreement. *See id.* ¶¶ 102–49, 157–73, 214. To the extent the Complaint contains allegations about the Welsh Carson entities that go beyond the incidents of equity ownership in USAP, the FTC’s undifferentiated pleading simply lumps together “USAP and Welsh Carson,” without elaboration on the role of any Welsh Carson entity in the conduct at issue. *See, e.g., id.* ¶¶ 3–5, 7, 98–100, 106, 124–25, 129, 138, 150–52, 261, 274, 286.

STANDARD OF REVIEW

“[C]laims may be dismissed under Rule 12(b)(6) on the basis of a dispositive issue of law. Dismissal under [Rule] 12(b)(6) also is warranted if the complaint does not contain sufficient

³ Although the FTC also complains of USAP’s alleged price setting arrangements, the Complaint is devoid of any allegation that Welsh Carson played any role at all in those arrangements, save for a reference to a “suggestion” offered by the then-USAP director designated by Welsh Carson. *See* Compl. ¶¶ 175–200.

factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Walker v. Beaumont Indep. Sch. Dist.*, 938 F.3d 724, 734 (5th Cir. 2019).⁴ A complaint with only “labels and conclusions” or a “formulaic recitation of the elements of a cause of action” cannot survive a motion to dismiss. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *see also BRFHH Shreveport, LLC v. Willis-Knighton Med. Ctr.*, 49 F.4th 520, 525 (5th Cir. 2022) (courts will not “accept as true conclusory allegations, unwarranted factual inferences, or legal conclusions”). Nor can a complaint survive a motion to dismiss “by stating facts ‘merely consistent with’ liability.” *BRFHH Shreveport*, 49 F.4th at 525 (quoting *Twombly*, 550 U.S. at 557 (2007)); *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). “Where the well-pleaded facts of a complaint do not permit a court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not ‘show[n]’—that the pleader is entitled to relief.” *Walker*, 938 F.3d at 734.

ARGUMENT

I. THE FTC IS NOT AUTHORIZED TO BRING THIS ACTION UNDER SECTION 13(b) OF THE FTC ACT.

Section 13(b) of the FTC Act authorizes the FTC to sue in federal court to enjoin a defendant that “is violating, or is about to violate” a law enforced by the FTC. *See* 15 U.S.C. § 53(b)(1). As numerous courts have held, Congress expressly limited the FTC’s authority to sue in federal court to circumstances where there is a need for immediate relief due to “existing or impending conduct.” *Fed. Trade Comm’n v. Shire ViroPharma, Inc.*, 917 F.3d 147, 156 (3d Cir. 2019) (“Simply put, Section 13(b) does not permit the FTC to bring a claim based on long-past conduct without some evidence that the defendant ‘is’ committing or ‘is about to’ commit another violation.”); *see also Fed. Trade Comm’n v. Credit Bureau Ctr., LLC*, 937 F.3d 764, 774 (7th Cir.

⁴ Unless otherwise noted, alterations, citations and internal quotation marks are omitted and emphases are added.

2019) (“Section 13(b) serves a . . . forward-facing role: enjoining ongoing and imminent future violations.”); *Fed. Trade Comm’n v. Facebook, Inc.*, 560 F. Supp. 3d 1, 26-27 (D.D.C. 2021) (rejecting the FTC’s claim for injunctive relief under Section 13(b) where “no actionable violation [was] either ongoing or about to occur”). Section 13(b) is not satisfied by allegations of *past* violations, or by allegations suggesting a mere possibility of future recurrence. *See Shire*, 917 F.3d at 156–59; *see also AMG Capital Mgmt., LLC v. Fed. Trade Comm’n*, 141 S. Ct. 1341, 1348 (2021) (“Taken as a whole, the provision focuses upon relief that is *prospective*, not *retrospective*.”).

Indeed, the plain language of Section 13(b)—using the present tense—signifies that Congress intended to provide a remedy for presently occurring or imminent future acts, but *not* for completed, past acts. *See Stankis v. Environmental Protection Agency*, 713 F.2d 1181, 1185 (5th Cir. 1983) (“We start with a strong presumption that Congress meant what it said.”); *see also T D X Energy, LLC v. Chesapeake Operating, Inc.*, 857 F.3d 253, 266 (5th Cir. 2017) (“The use of the present and future tenses [‘drilling or intending to drill’] shows legislative intent that the provision did not apply to completed wells.”). “[T]he words ‘is violating’ and ‘is about to violate’ (not ‘has violated’) . . . reflect that the provision addresses a specific problem, namely, that of stopping seemingly unfair practices from taking place while the Commission determines their lawfulness.” *AMG Capital Mgmt.*, 141 S. Ct. at 1348.

In the limited instances where the Complaint offers non-conclusory allegations about the conduct of any Welsh Carson entity, those allegations relate exclusively to *long-past, plainly stale* conduct. The FTC devotes significant attention to “Welsh Carson’s” alleged role in founding USAP more than a decade ago, when Fund XI made an investment in 2012. *See, e.g.*, Compl. ¶ 34 (alleging “Welsh Carson” “created” USAP); *id.* at 26 & ¶¶ 77–80 (alleging “Welsh Carson”

“hatche[d] a strategy to consolidate anesthesia practices in Texas” in 2012); *id.* ¶¶ 81–95 (alleging the circumstances of USAP’s founding in 2012); *id.* ¶ 336 (around USAP’s founding, “Welsh Carson” “developed the overarching strategy to consolidate anesthesia markets”). However, the Complaint also acknowledges that Fund XI divested its minority stake in 2017, and that, since its investment in 2017, Fund XII has never held more than a minority interest in USAP. *See id.* ¶ 35. Even crediting all reasonable inferences in its favor, the most that the FTC alleges is that “Welsh Carson”—referring to all seven entities without distinction—generally participated in meetings, presentations, and activities in furtherance of USAP’s diligence of potential acquisition targets between 2012 and 2019. *See, e.g., id.* ¶¶ 79, 96, 200, 211, 337.

In other words, at most, the FTC alleges that Fund XI completely divested its investment more than six years ago; that Fund XII is and always has been a minority investor in USAP; and that no Welsh Carson entity has engaged in conduct in furtherance of alleged antitrust violations since 2019, more than four years ago.⁵ The FTC’s allegations of long past-conduct by the Welsh Carson entities are insufficient to satisfy the statutory standard. *See Facebook, Inc.*, 560 F. Supp. 3d at 26 (FTC cannot pursue claim under Section 13(b) where alleged anticompetitive policy was suspended three years earlier).

Nor has the FTC alleged any facts regarding current or future conduct that suggest any Welsh Carson entity is “about to” violate the antitrust laws. The Complaint’s resort to non-factual speculation and hypothesis confirms this failure. The FTC alleges that nothing “prevent[s] Welsh Carson from re-upping its investment in USAP, *retaking* formal control of the company, and directing yet more anticompetitive acquisitions.” Compl. ¶ 337 (emphasis added). In other words,

⁵ The only Welsh Carson-related allegations after 2019 relate to Fund XII’s alleged receipt of dividend payments through 2020, which are irrelevant to the alleged antitrust violations and still occurred nearly three years ago. *See* Compl. ¶ 337.

the FTC expressly concedes that the Welsh Carson entities have no control of USAP. Theoretical speculation about a series of hypothetical future events, absent factual indicia showing they are “about to” happen, fails the statutory test. *See Shire*, 917 F.3d at 156 (“[Section 13(b)] was not designed to address hypothetical conduct or the mere suspicion that such conduct may yet occur.”); *Facebook, Inc.*, 560 F. Supp. 3d at 26–27 (rejecting the FTC’s allegation that the defendant could, hypothetically, reinstate a challenged policy from 2018, calling it “conditional and conclusory,” and “insufficient to establish the requisite imminence”). And, in any event, the assertion is implausible on its face: many facts might “prevent” such a hypothetical massive reinvestment by the Welsh Carson entities in USAP, including the fact that USAP is owned by hundreds of other stockholders who would have to agree to sell their stakes, a speculative scenario not alleged to have been discussed or planned, or even contemplated, at any time in the last six years. *See BRFHH Shreveport*, 49 F.4th at 525 (on motion to dismiss, courts need not “accept as true conclusory allegations, unwarranted factual inferences, or legal conclusions”).⁶

The FTC also offers a vague and insufficient allegation that the Welsh Carson entities are about to violate the antitrust laws because, more than *six years in the past*, “Welsh Carson” made two unrelated investments in unrelated geographic locations and unrelated healthcare specialties. *See* Compl. ¶ 339. Specifically, the FTC points to a 2015, past investment in “the emergency medicine market” and an investment in or around 2017 in “the radiology market” to support its claim that the Welsh Carson entities are “about to violate” the antitrust laws. *Id.* But this pleading gambit has been repeatedly rejected by courts. The FTC alleges nothing more than “a violation in

⁶ Moreover, the FTC does not allege that either of Fund XI or Fund XII has any remaining funds available to make such an acquisition, let alone cash sufficient to acquire a majority of USAP. The FTC’s non-factual, conclusory allegations about “Welsh Carson’s” general financial capacity and “frequent search for new [healthcare] investments,” Compl. ¶ 338, support no inference that any Welsh Carson entity “is about to violate” the antitrust laws.

the distant past and a vague and generalized likelihood of recurrent conduct.” *Shire*, 917 F.3d at 159, 161 (admonishing the FTC for its “improper use of Section 13(b)” where it “waited until five years after [the defendant] had stopped its allegedly illegal conduct before seeking an injunction”).

The statutory standard set forth in Section 13(b) is not satisfied by years-old conduct and speculative musings about hypothetical future conduct. *See Fed. Trade Comm’n v. AdvoCare Int’l, L.P.*, No. 4:19-CV-715, 2020 WL 6741968, at *5–6 (E.D. Tex. Nov. 16, 2020) (granting defendants’ motion to dismiss because “each of the FTC’s factual allegations pertain[ed] only to *past* misconduct” by the defendants, and noting that Section 13(b) “unambiguously requires plausible factual allegations” of current or future violation (emphasis in original)). The Fifth Circuit’s opinion in *Federal Trade Commission v. Southwest Sunsites, Inc.* is consistent with this approach. 665 F.2d 711, 723 (5th Cir. 1982) (finding Section 13(b) action authorized based on a factual showing of “continuing” conduct and a “large-scale systematic scheme”).

Finally, the FTC offers the non-factual and speculative conclusion that “there is a reasonable likelihood that Welsh Carson will engage in similar and related conduct in the future.” Compl. ¶ 338. But as the Third Circuit explained, this is plainly not the statutory standard under Section 13(b), which requires a showing that a Welsh Carson entity “is violating, or is about to violate” a law enforced by the FTC. *See Shire*, 917 F.3d at 158 (rejecting FTC’s reliance on the “likelihood of recurrence” standard because “the FTC cannot overcome Congress’s plain language in Section 13(b)”; *id.* at 160 (“Section 13(b) cannot accommodate the FTC’s interpretation—that ‘about to violate’ means only that a violation could recur at some future point.”)). Even if, despite the statutory text, the standard for an injunction under Section 13(b) were “reasonable likelihood of recurrence” (which it is not), the FTC pleads no facts supporting any inference (let alone a plausible one) that any Welsh Carson defendant is likely to engage in related or similar conduct

that would violate the antitrust laws. *See AdvoCare Int'l*, 2020 WL 6741968, at *6 (finding pleading insufficient to support an inference of present or future violations where the channel of misconduct was permanently defunct or reformed, lawful, and monitored for compliance); *BRFHH Shreveport*, 49 F.4th at 525 (courts need not accept unwarranted factual inferences).

II. THE FTC FAILS TO STATE A CLAIM FOR ALLEGED VIOLATION OF THE ANTITRUST LAWS BY WELSH CARSON.

All ten of the FTC's causes of action against the Welsh Carson entities should also be dismissed under Rule 12(b)(6) because the Complaint contains no allegations that any of the seven distinct Welsh Carson entities named as defendants engaged in any conduct in violation of the antitrust laws. Instead, the FTC hides behind improper group pleading that fails to comply with basic notice pleading requirements. Where, as here, the complaint names multiple entities as defendants, a plaintiff must plead the elements of each claim as to each defendant; generalized pleading directed at all defendants will not suffice. *See Gurgunas v. Furniss*, No. 3:15-CV-03964, 2016 WL 3745684, at *5 (N.D. Tex. July 13, 2016) ("group pleading" failed to meet Rule 8 standard because it was "impossible to ascertain which particular [d]efendant(s) [we]re supposedly responsible" for each alleged act); *Shujauddin v. Berger Bldg. Prods., Inc.*, No. CV 19-876, 2019 WL 9102043, at *1 n.2 (E.D. Pa. June 18, 2019) ("An allegation against multiple defendants that is bereft of specific wrongdoing by those proposed defendants is insufficient to state a claim. Generalized pleadings are not entitled to the assumption of truth.").

This hazy and undifferentiated pleading is exacerbated by the FTC's efforts to evade decades of bedrock corporate law, which makes clear distinctions between investors and the operating company in which they invested. At their core, all of the FTC's claims against the Welsh Carson entities are based on alleged conduct by USAP, a separate and independent corporation with a separate board of directors and separate officers, in which Fund XI was once an investor

and in which Fund XII has owned a minority (*i.e.*, non-controlling) stake since 2017. But the FTC fails to allege facts necessary to show that any of USAP's conduct, or the conduct of its directors, can be properly attributed to any particular Welsh Carson entity, much less to *all* of the Welsh Carson entities named as defendants. *See, e.g., Lenox MacLaren Surgical Corp. v. Medtronic, Inc.*, 847 F.3d 1221, 1237 (10th Cir. 2017) (plaintiff must "come forward with evidence that each defendant independently participated in the enterprise's scheme, to justify holding that defendant liable as part of the enterprise"); *Chandler v. Phoenix Servs.*, No. 7:19-CV-00014, 2020 WL 1848047, at *14 (N.D. Tex. Apr. 13, 2020) ("[A] plaintiff is [] required to come forward with evidence that each defendant independently participated in the enterprise's scheme, to justify holding that defendant liable as part of the enterprise."), *aff'd*, 45 F.4th 807 (5th Cir. 2022). By improperly lumping together all eight defendants, the FTC tries to create the impression that "USAP and Welsh Carson" are somehow a unified entity. But they are not: each defendant is distinct. The FTC has not pled and cannot plead the independent conduct necessary to sustain any claim against any Welsh Carson entity, and all ten of the FTC's claims against the Welsh Carson entities should be dismissed.

A. The Complaint States No Claims Against the Welsh Carson Entities for Monopolization, Unlawful Agreements in Restraint of Trade, or Unfair Methods of Competition.

1. *The FTC Fails to Plead that Welsh Carson Is a Monopolist Engaged in Exclusionary Conduct under Section 2 of the Sherman Act (Counts I & IV).*

A monopolization claim under Section 2 of the Sherman Act requires a showing "that the asserted violator 1) possesses monopoly power in the relevant market and 2) acquired or maintained that power willfully, as distinguished from the power having arisen and continued by growth produced by the development of a superior product, business acumen, or historic accident." *Stearns Airport Equip. Co. v. FMC Corp.*, 170 F.3d 518, 522 (5th Cir. 1999) (citing *United States*

v. *Grinnell Corp.*, 384 U.S. 563, 570–71 (1966)). “Exclusionary conduct under [S]ection 2 is the creation or maintenance of monopoly by means other than the competition on the merits embodied in the *Grinnell* standard.” *Id.*

These claims fail because there is no factual allegation that any Welsh Carson entity was a participant (let alone a monopolist) in any relevant market. To the contrary: the FTC alleges that “Welsh Carson” is a New York-based private equity firm “engaged in the business of private equity investment and management,” Compl. ¶¶ 2, 23, while alleging that “USAP has monopoly power” in the markets for commercially insured hospital-only anesthesia services in Dallas and Houston. *See* Compl. at 71, 75. Put simply, no Welsh Carson entity can be a monopolist in a market in which it does not participate. And, by definition, no market can have more than one monopolist; the FTC alleges USAP is the monopolist, not any Welsh Carson entity. *See Grinnell*, 384 U.S. at 571 (defining monopoly power).

Nor has the FTC, in hundreds of paragraphs of allegations and after years of investigation, pleaded any fact sufficient to establish that any Welsh Carson entity engaged in any actionable exclusionary conduct. *See BRFHH Shreveport*, 49 F.4th at 529 (defining exclusionary conduct as “the use of monopoly power to foreclose competition, to gain a competitive advantage, or to destroy a competitor”). While the FTC recites the elements in the conclusory assertion that “USAP and Welsh Carson have willfully acquired and maintained monopoly power,” Compl. ¶¶ 342, 366, the alleged specifics of the purportedly exclusionary conduct concern only USAP. *See id.* ¶¶ 343–44, 367–69 (alleging that “USAP acquired” certain practices and that “USAP entered into, or maintained” certain agreements alleged to violate Section 1). The FTC pleads no exclusionary conduct by any Welsh Carson entity, and certainly not by any of the four Welsh Carson entities that did not even exist and/or have a role in USAP at the time of the alleged conduct between 2012

and 2017. *See* Compl. ¶¶ 26 (Fund XII), 27 (WCAS XII Associates, LLC); 30 (WCAS Management L.P.); 31 (WCAS Management LLC); *Rio Grande Royalty Co. v. Energy Transfer Partners, L.P.*, 786 F. Supp. 2d 1202, 1212 (S.D. Tex. 2009) (dismissing Section 2 monopolization claim for failure to allege “actionable exclusionary conduct”). The monopolization claims fail, and Counts I and IV should be dismissed.

2. *The FTC Does Not Allege that any Welsh Carson Entity Was Party to an Agreement or Transaction in Violation of the Antitrust Laws (Counts II, V, VII, IX, & X).*

The FTC likewise fails to allege that any Welsh Carson entity was a party to any allegedly unlawful agreement, as required by each of Counts II, V, VII, IX and X.

Section 7 Claims. In Counts II, V, and VII, the FTC alleges violations of Section 7 of the Clayton Act, which prohibits a party from acquiring a target competitor where the effect “may be substantially to lessen competition, or to tend to create a monopoly.” 15 U.S.C. § 18. The FTC alleges that USAP (not the Welsh Carson entities) acquired certain physician practices in Houston (Count II), Dallas (Count V), and Austin (Count VII). The Complaint never alleges that any Welsh Carson entity acquired any of the anesthesia practices identified in the Complaint.

Price Fixing Claim under Section 1 of the Sherman Act. In Count IX, the FTC alleges that USAP and the Welsh Carson entities violated Section 1 of the Sherman Act by engaging in “price-setting” where USAP provided administrative billing services for other anesthesiologists. Compl. ¶¶ 176, 405–06. It is the FTC’s burden to plead facts which establish that USAP and the Welsh Carson entities entered into an agreement or conspiracy “among actual competitors.” *Vaughn Med. Equip. Repair Serv., L.L.C. v. Jordan Reses Supply Co.*, No. CIV.A. 10-00124, 2010 WL 3488244, at *16 (E.D. La. Aug. 26, 2010) (citing *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 216–19 (1940)). The FTC alleges that USAP (not the Welsh Carson entities) entered into or maintained agreements with third parties, pursuant to which USAP (not the Welsh Carson

entities) provided administrative billing services, and that those agreements purportedly resulted in *USAP* (not Welsh Carson entities) billing for others' services at *USAP*'s higher rates. Compl. ¶¶ 175–81. The Complaint never once alleges that any Welsh Carson entity was a competitor in the relevant markets, or entered into any of those agreements.

Market Allocation under Section 1 of the Sherman Act. In Count X, the FTC alleges that *USAP* and the Welsh Carson entities violated Section 1 of the Sherman Act by engaging in horizontal market allocation or division as a result of *USAP*'s alleged noncompete agreement with a potential competitor. Compl. ¶¶ 214, 410–11.⁷ But the FTC must plead facts establishing an agreement among competitors “at the same level of the market structure to allocate territories in order to minimize competition.” *Hobart Bros. Co. v. Malcolm T. Gilliland, Inc.*, 471 F.2d 894, 899 (5th Cir. 1973). The FTC's allegations focus on *USAP*'s (not the Welsh Carson entities') alleged agreement with a potential competitor, in which the potential competitor allegedly agreed not to compete with *USAP* (not the Welsh Carson entities) in the Dallas-Fort Worth market in connection with *USAP*'s (not the Welsh Carson entities') acquisition of Pinnacle Anesthesia Consultants. Compl. ¶¶ 214, 410. No Welsh Carson entity is alleged to have been a market participant or to have entered into any agreement with the named potential competitor. *See id.* ¶¶ 208–15; *see also California ex rel. Harris v. Safeway, Inc.*, 651 F.3d 1118, 1132 (9th Cir. 2011) (Section 1 outlaws “[a]greements of competitors, whether express or implicit, whether by formal agreement or otherwise, in restraint of trade.”).

⁷ To the extent the FTC refers to the “Welsh Carson”-affiliated executive in its discussion of market allocation (Compl. ¶¶ 208–15), he was at all times relevant to this allegation a *director of USAP* (*id.* ¶ 37) and is thus presumed to have been acting in his capacity as a *USAP* director, as detailed below. *See infra* at 26–27.

3. *The FTC Fails to State a Claim under Section 5 of the FTC Act Against the Welsh Carson Defendants (Count VIII).*

In Count VIII, the FTC purports to bring a claim under Section 5 of the FTC Act, alleging generally that “USAP’s and Welsh Carson’s course of conduct, whether considered as a whole or each portion in isolation, is an unfair method of competition.” Compl. ¶ 402. The FTC pleads no additional factual allegations in Count VIII; its Section 5 claim merely restates and combines the FTC’s Sherman Act and Clayton Act claims and fails for the same reasons explained above.

To the extent the FTC is attempting to allege a standalone theory under Section 5—*i.e.*, a claim that the WCAS entities have violated Section 5 of the FTC Act even if they have not violated *any* of the antitrust laws—the FTC’s theory is far too vague to give fair notice to the defendants regarding what conduct is permissible or to provide the court a basis to determine whether Count VIII states a claim. *See E.I. du Pont de Nemours & Co. v. Fed. Trade Comm’n*, 729 F.2d 128, 139 (2d Cir. 1984) (Under Section 5, the Commission “owes a duty to define the conditions under which conduct [would be an unfair method of competition] so that businesses will have an inkling as to what they can lawfully do rather than be left in a state of complete unpredictability.”).

Nevertheless, despite the FTC’s silence about its theory under Section 5, such a claim requires, *at a minimum*, that the defendant be a market participant engaged in unfair methods of competition. *See* 15 U.S.C. § 45(a)(1); *see also Off. Airline Guides, Inc. v. Fed. Trade Comm’n*, 630 F.2d 920, 926 (2d Cir. 1980) (reversing FTC order under Section 5, holding that entity not engaged in business as an air carrier could not be held liable under Section 5 for conduct relating to competition in the air carrier business). Here, the FTC does not allege that any Welsh Carson entity was a market participant in the provision of anesthesia services in any geography. The Section 5 claim fails.

B. Welsh Carson Cannot Be Liable for Alleged Violations of the Antitrust Laws by USAP.

Even though USAP is the only entity even arguably alleged to have engaged in anticompetitive conduct, the FTC tries to impute liability to all seven of the Welsh Carson entities (without distinction) for the alleged conduct of USAP. This approach has no basis in corporate or antitrust law, and instead betrays the FTC's true motivation here, which is to advance its new policy goal of targeting the private equity industry by presuming certain acquisitions are anticompetitive.

Hoping to elide the clear corporate separateness between USAP and each of the Welsh Carson entities, the FTC repeatedly incants the allegation that "Welsh Carson controlled, directed, dictated, or encouraged USAP's conduct with respect to, and directly and actively participated in," the challenged conduct. *See, e.g.*, Compl. ¶¶ 40, 345, 370, 351, 376, 392, 400, 406, 411. But this non-factual, legal conclusion is entitled to no weight on a motion to dismiss. *See Iqbal*, 556 U.S. 662, 678–79 (Rule 8 "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions"); *Clark v. Thompson*, 850 Fed App'x 203, 208 (5th Cir. 2018) (dismissal appropriate where plaintiff offers "speculation and conclusory allegations").⁸ And the FTC fails to plead sufficient facts showing that any of USAP's conduct (including the conduct of USAP's directors designated by one of the Funds) can be properly attributed to any particular Welsh Carson entity, or that any Welsh Carson entity independently engaged in such conduct.

Instead, the FTC engages in impermissible group pleading as to all of the named defendants, rendering the Complaint unintelligible as to what any given entity is allegedly

⁸ Indeed, the FTC's own pleading admits that the Welsh Carson entities do not control USAP. Compl. ¶ 336 (hypothesizing about future conduct that might allow "Welsh Carson" to "retak[e] formal control of the company).

supposed to have done. As an especially egregious example, the FTC repeatedly alleges that in 2012, “Welsh Carson” (defined by the FTC to refer to *all seven* Welsh Carson entities, Compl. at 1–2) “created USAP,” *id.* ¶ 3; devised USAP’s “consolidation strategy,” *id.*; hired some of USAP’s original management team, *id.* ¶ 38; and committed capital, *id.* ¶ 80. Of course, these allegations about conduct at the time of USAP’s creation in 2012 cannot be attributable to all seven Welsh Carson entities, let alone the *four* Welsh Carson entities that (as the FTC’s pleading itself makes clear) did not exist at that time.⁹ The FTC bears the burden of pleading the elements of each of its claims against all seven Welsh Carson entities, and it has failed to carry that burden here. Even after a lengthy investigation, the FTC has failed to plead facts demonstrating the type of “independent conduct” required for the claims against any Welsh Carson entity to proceed; all it alleges is conduct wholly typical of investor and investee. Quite frankly, it has made no effort at all to do so; all it alleges is conduct that is wholly typical of the investor and investee relationship. Fundamental principles of corporate law, which the FTC seeks to ignore, dictate that these claims be dismissed.

1. *Courts Respect the Corporate Form.*

As the Supreme Court has held, “[i]t is a general principle of corporate law that a parent corporation (so-called because of control through ownership of another corporation’s stock) is not liable for the acts of its subsidiaries.” *United States v. Bestfoods*, 524 U.S. 51, 52 (1998); *see also Bidas S.A.P.I.C. v. Gov’t of Turkmenistan*, 447 F.3d 411, 416 (5th Cir. 2006) (same); *SSP Partners v. Gladstrong Invs. (USA) Corp.*, 275 S.W.3d 444, 455 (Tex. 2008) (“We have never held corporations liable for each other’s obligations merely because of centralized control, mutual

⁹ *See* Compl. ¶¶ 26 (Fund XII founded in 2014; no role in USAP before 2017), 27 (WCAS XII Associates, LLC founded in 2014; no role in USAP before 2017); 30 (WCAS Management L.P. founded in 2017); 31 (WCAS Management LLC founded in 2017).

purposes, and shared finances.”); *Valdez v. Cap. Mgmt. Servs., LP*, No. CIV.A. B:09-246, 2010 WL 4643272, at *6–7 (S.D. Tex. Nov. 16, 2010) (declining to disregard corporate form where entities were alleged to have acted as agents and assigns for each other).¹⁰ Courts respect the corporate form because “limited liability remains the norm in American corporate law.” *United States v. Jon-T Chems., Inc.*, 768 F.2d 686, 691 (5th Cir. 1985).

Consistent with this settled principle, an entity cannot be liable for violations of the antitrust laws unless it participated in those violations through some “independent conduct.” *See, e.g., Chandler*, 2020 WL 1848047, at *14 (“[A] plaintiff is . . . required to come forward with evidence that each defendant independently participated in the enterprise’s scheme, to justify holding that defendant liable as part of the enterprise.”); *In re Penn. Title Ins. Antitrust Litig.*, 648 F. Supp. 2d 663, 688 (E.D. Pa. 2009) (“[T]o state a claim against parent corporations, plaintiffs must set forth facts establishing the parent corporations’ direct and independent participation in the alleged conspiracy.”); *In re LIBOR-Based Financial Instruments Antitrust Litig.*, No. 11 MDL 2262, 2019 WL 1331830, at *38 (S.D.N.Y. Mar. 25, 2019) (dismissing claims where complaint did not allow an “inference that [defendants’] subsidiaries and affiliates independently participated in [the alleged misconduct]” or “actually played a role in the scheme”).

A credible and factual showing that the parent directed or controlled the subsidiary’s anticompetitive conduct is required. *See In re Penn. Title Ins. Antitrust Litig.*, 648 F. Supp. 2d at 689 (“[P]laintiffs here rely on general statements that barely rise above mere labels and conclusions and thus hardly raise a right to relief above a speculative level.”). Conduct “typical of any parent

¹⁰ This concept of corporate separateness is another reason why the FTC’s attempt to lump together the various Welsh Carson defendants necessarily fails. Allegations that “[t]he Welsh Carson Defendants operate as a common enterprise” because they “share a website,” “use the same office space,” or have overlapping officers and directors cannot overcome this bedrock corporate law principle that the Welsh Carson defendants are, in fact, separate entities, with separate stakeholders, business purposes, and operations. Compl. ¶ 32.

and subsidiary” is insufficient. *Id.*; see also *Masimo Corp. v. Wireless*, No. 19-CV-01100, 2020 WL 7260660, at *16 (S.D. Cal. Dec. 10, 2020) (liability only attaches to a parent where its authority over a subsidiary is “so extensive that the subsidiary becomes only a means through which the parent acts, or nothing more than an incorporated department of the parent”).

2. *The Welsh Carson Entities’ Alleged Activities Incidental to their Investments Do Not Constitute Independent Conduct.*

The FTC fails to allege facts showing that any Welsh Carson entity independently participated in any unlawful conduct. Despite its repeatedly-incanted but conclusory allegations of “Welsh Carson’s” direction and control of USAP’s conduct, the purported factual predicates alleged by the FTC merely reflect nothing more than the “typical” relationship between an investor and its portfolio or subsidiary company. The FTC cannot establish “independent conduct” based on its allegations that Welsh Carson:

- held varying ownership interests in USAP over time and certain associated shareholder rights, including the right to nominate directors to USAP’s board of directors, Compl. ¶¶ 35–36;¹¹
- “assist[ed]” USAP by “identifying attractive acquisitions, helping secure funding, and assisting in negotiations with insurers,” *id.* ¶ 37;
- “hired most of USAP’s original management team” around the time of USAP’s founding in 2012, *id.* ¶ 38;
- “regularly provided USAP with strategic, operational, and financial support . . . [and, p]ursuant to a series of management agreements and otherwise, . . . provided USAP with services related to corporate finance, acquisition due diligence, and strategic planning (among other things),” *id.* ¶ 39;¹² and

¹¹ As explained above, the Funds had certain customary shareholder rights in USAP, including, prior to 2017, the right to fill a majority of directors to USAP’s Board with Welsh Carson-affiliated directors. The FTC does not allege—because it cannot—that the Funds ever exercised that right.

¹² There is no allegation that USAP was under an obligation to use those services (which are typical of those offered by capital sponsors to their portfolio companies), or to take direction from these professionals.

- “continued to play a critical oversight role,” citing only a 2013 USAP-drafted “Playbook” about USAP’s plan for future interactions with “Welsh Carson,” *id.* ¶ 101.¹³

These allegations of basic stockholder rights and advisory assistance are typical of, and incidental to, the Funds’ holdings in USAP and are plainly insufficient to show independent participation, much less management of USAP’s day-to-day operations. See *In re Pressure Sensitive Labelstock Antitrust Litig.*, 566 F. Supp. 2d 363, 376 (M.D. Pa. 2008) (allegation that parent regarded wholly-owned subsidiary as a “valuable asset” because an alleged anticompetitive agreement allowed it to maintain supracompetitive prices did not support an inference that parent was party to such agreement). The FTC never alleges that Fund XII has the legal authority to control USAP under Delaware law, USAP’s organizational documents, or the operative agreements. And the FTC concedes that the Funds have held a minority share for most of USAP’s existence, and they have never appointed more than two of USAP’s directors, despite an alleged right to appoint more. This counsels strongly against any finding of control by the Welsh Carson entities.

The district court’s decision in *In re Pennsylvania Title Insurance Antitrust Litigation* is instructive. There, the court respected the legal distinction between a parent and its wholly-owned subsidiary and rejected plaintiffs’ argument that they had set forth independent participation. The court did not find independent conduct where the parent entities allegedly gave “their assent and approval to their respective [wholly-owned] subsidiaries’ conduct” and “had ownership and control of their respective subsidiaries.” *In re Penn. Title Ins. Antitrust Litig.*, 648 F. Supp. 2d at 688. Those allegations were insufficient to impute liability; that conduct was “typical of any parent and subsidiary.” *Id.* The allegations failed to demonstrate independent conduct because they did not plausibly allege facts showing conduct by the parent that violated the antitrust laws. So, too,

¹³ Notably, the FTC does not allege that Welsh Carson ever enforced its “critical oversight” function.

here. Taken individually or collectively, the FTC's allegations come nowhere close to establishing independent participation in unlawful, anticompetitive conduct by any Welsh Carson entity.

3. *None of the FTC's Remaining Allegations Properly Plead Independent Conduct by the Welsh Carson Entities.*

As detailed above, there are no allegations that any Welsh Carson entity was a monopolist engaged in exclusionary conduct or a party to any USAP acquisitions and agreements alleged to violate the antitrust laws. *See supra* Parts II.A.1 & II.A.2.¹⁴ So all the FTC is left with is that "Welsh Carson" created the idea for USAP and that a USAP director who was affiliated with Welsh Carson acted on behalf of USAP. Neither can impute liability to any Welsh Carson entity.

USAP Director Conduct. The bulk of the FTC's allegations regarding "Welsh Carson's" conduct concern the alleged conduct of a USAP director, Mr. Regan, who is also affiliated with Welsh Carson. These allegations cannot establish the independent conduct of any Welsh Carson entity. As the Supreme Court has held, it is a "well established principle [of corporate law] that directors and officers holding positions with a parent and its subsidiary can and do 'change hats' to represent the two corporations separately." *Bestfoods*, 524 U.S. at 69 (quoting *Lusk v. Foxmeyer Health Corp.*, 129 F.3d 773, 779 (5th Cir. 1997)). Directors are presumed to act on behalf of the company on whose board they sit when involved in company business:

Since courts generally presume that the directors are wearing their subsidiary hats and not their parent hats when acting for the subsidiary, it cannot be enough to establish liability here that dual officers and directors made policy decisions and supervised activities at the facility.

Id., 524 U.S. at 69–70; *see also Weinberger v. UOP, Inc.*, 457 A.2d 701, 710 (Del. 1983) (under Delaware law, designated directors owe the company on whose board they sit "uncompromising"

¹⁴ The FTC alleges that a representative of Welsh Carson signed certain documents or agreements, but does not allege those documents or agreements had anything to do with any violation of the antitrust laws. *See, e.g.,* Compl. ¶¶ 84, 126, 211.

fiduciary duties, and “[t]here is no dilution of this obligation where one holds dual or multiple directorships”). Dual directors must “depart so far from the norms of parental influence exercised through dual officeholding as to serve the parent, even when ostensibly acting on behalf of the subsidiary.” *Bestfoods*, 524 U.S. at 71.

The FTC pleads no facts to rebut the presumption that the USAP director affiliated with Welsh Carson was acting on behalf of USAP. The best the FTC can muster is the non-factual allegation that “[a]t least one Welsh Carson director on USAP’s board . . . acted in his Welsh Carson capacity” in connection with USAP business. Compl. ¶ 37. But this conclusory allegation is insufficient to rebut the Supreme Court’s presumption, as it lacks any supporting factual detail showing that any USAP director acted to benefit a Welsh Carson entity and *not* USAP. *See Bestfoods*, 524 U.S. at 70 & n.13 (plaintiff bears the burden of “show[ing] that dual officers or directors were in fact acting on behalf of the parent”).¹⁵ Indeed, it does not come close to the “so far from the norms” principle established by the Supreme Court. *Id.* at 70 n.13, 71.

Because the Complaint alleges *neither* independent participation in the allegedly unlawful conduct by any Welsh Carson entity, *nor* conduct by the director appointed by the Welsh Carson Funds that is inconsistent with acting for USAP, the Welsh Carson entities cannot be liable for USAP’s conduct.

Pre-USAP Formation Conduct. Nor can Fund XI’s provision of start up capital and outlining a proposed strategy leading up to USAP’s founding in 2012 be a basis for liability. *Id.*

¹⁵ *See also In re Alper Holdings USA, Inc.*, 398 B.R. 736, 752–54 (S.D.N.Y. 2008) (parent company not liable for the conduct of its subsidiary where pleadings did not identify any specific actions undertaken by the dual agent that were for the benefit of the parent but not for the benefit of the subsidiary); *Trinity Indus., Inc. v. Greenlease Holding Co.*, No. CIV.A. 08-1498, 2014 WL 1766083, at *11 (W.D. Pa. May 2, 2014), *aff’d*, 903 F.3d 333 (3d Cir. 2018) (where plaintiff did not point to evidence showing that the parent’s officers or directors acted on the subsidiary’s board “in any way that was ‘plainly contrary to the interests of [the subsidiary] yet nonetheless advantageous to [the parent],’” plaintiff failed to rebut the presumption that the dual officers and directors acted in their capacity as the subsidiary’s board members).

¶¶ 77–94. From this pre-founding conduct, the FTC alleges that *USAP* (not the Welsh Carson entities) made a series of acquisition and management decisions purportedly consistent with that strategy over the course of the next decade. All the allegations of purportedly unlawful conduct focus on USAP, not on any Welsh Carson entity. *See, e.g., id.* ¶ 100 (“Welsh Carson and USAP had set in motion their consolidation strategy . . . USAP soon began executing on it.”); *id.* ¶ 334 (“USAP has engaged in a whole set of anticompetitive tactics to execute the consolidation scheme Welsh Carson set out.”); *id.* at 37 (“USAP expands its roll-up scheme . . .”); *id.* ¶ 174 (“USAP extended and defended its growing power through . . . (1) price-setting arrangements in which USAP charged its own, higher prices for services rendered by anesthesia providers who chose to remain independent; and (2) a market allocation agreement to avoid a head-to-head rivalry . . . with another large anesthesia provider. . .”).

In other words, the FTC impermissibly attempts to hold the Welsh Carson entities liable for allegedly supplying an *idea* to USAP which, in turn, was led by its own management empowered to make its own decisions over the course of the next decade. *See, e.g., Verizon Commc’ns, Inc. v. Law Off. of Curtis V. Trinko*, 540 U.S. 398, 407 (2004) (“The opportunity to charge monopoly prices—at least for a short period—is what attracts ‘business acumen’ in the first place; it induces risk taking that produces innovation and economic growth.”).

4. *The FTC Fails to Plead Any Claim Based on Agency Liability.*

To the extent there is any unpled suggestion that the Welsh Carson entities are liable on the theory that USAP acted as any of the Welsh Carson entities’ agent, that theory of liability also fails. Consistent with its other pleading failures, the FTC’s allegations that the Funds had rights as stockholders and appointed two directors to the USAP board are insufficient to state an agency

claim against the Welsh Carson entities for the alleged conduct of USAP.¹⁶ See *Transamerica Leasing, Inc. v. La Republica de Venezuela*, 200 F.3d 843, 851 (D.C. Cir. 2000) (rejecting agency theory based on allegations that Republic of Venezuela owned majority of corporate entity and could appoint directors and officers of corporate entity, put its chosen manager in charge of entity and let him run “day-to-day” operations, and provided funds to entity); *Masimo Corp.*, 2020 WL 7260660, at *16–18 (dismissing vicarious liability infringement claims, as allegations that parent and subsidiary shared officers and/or directors, parent was involved in subsidiary’s legal disputes, and parent was involved in “minutia of a product line” were insufficient to demonstrate agency relationship). The claims against the Welsh Carson entities should be dismissed because the FTC fails to plead that USAP acted as any Welsh Carson entity’s agent.

C. The FTC Fails to State a Valid Conspiracy Claim Under Section 2 of the Sherman Act (Counts III & VI).

Finally, the FTC cannot plead a viable “conspiracy” claim in violation of Section 2 of the Sherman Act as between USAP and any of the seven Welsh Carson entities. As the Supreme Court has held, a conspiracy requires “concerted activity” between two “separate economic actors pursuing separate economic interests.” *Copperweld Corp.*, 467 U.S. at 768. Corporate separateness does not drive the *Copperweld* analysis; rather, the concerted action inquiry is informed by “competitive reality.” *Am. Needle, Inc. v. Nat’l Football League*, 560 U.S. 183, 196 (2010). “The crucial question is whether the entities alleged to have conspired maintain an economic unity, and whether the entities were either actual or potential competitors.” *PostX Corp. v. Secure Data in Motion, Inc.*, No. C 02-04483, 2005 WL 8177634, at *3 (N.D. Cal. Aug. 17, 2005).

¹⁶ The FTC likewise fails to plead any other basis for vicarious liability for any of the Welsh Carson entities.

The Complaint does not, and cannot, allege that USAP and Welsh Carson were separate economic actors capable of conspiring as competitors (or even market participants) in any relevant market in violation of the antitrust laws. The FTC does not allege that Welsh Carson had interests that diverged from USAP's, or that Welsh Carson and USAP are or were actual or potential competitors. In fact, the opposite is true: at all times, at least one of the Welsh Carson entities was an investor in, or otherwise aligned with, USAP, and no Welsh Carson entity ever provided anesthesia services. As such, they were never "separate economic actors" capable of concerted action and were not actual or potential competitors. *See, e.g., PostX Corp.*, 2005 WL 8177634, at *4 (holding that a 20% investor could not have conspired with the company because they had shared economic interests and were not actual or potential competitors); *Top Rank, Inc. v. Haymon*, No. CV154961, 2015 WL 9948936, at *3, *16 (C.D. Cal. Oct. 16, 2015) (dismissing claims against asset management and investment advisory firms that held equity interests in and "commit[ted] funding, business expertise, and operational supervision" to a portfolio company because they were incapable of conspiring under *Copperweld*: they "share[d] a complete unity of economic interest in the venture's success, and [had] no alleged separate interest, at least as it relate[d] to the relevant . . . markets," and the investor firms were not actual or potential competitors of the portfolio company); *Rohlfing v. Manor Care, Inc.*, 172 F.R.D. 330, 344 (N.D. Ill. 1997) ("Even in cases where the parent's ownership interest is not strong, unity of interest may be established if the economic objectives of the corporations are interdependent.").

III. THE CASE SHOULD ALSO BE DISMISSED BECAUSE, AS AN INDEPENDENT AGENCY, THE FTC CANNOT FILE AN ENFORCEMENT ACTION—AN AUTHORITY RESERVED TO AGENCIES DIRECTLY SUPERVISED BY THE PRESIDENT.

As outlined above, all of the FTC's claims against the Welsh Carson entities fail both as a matter of statute and pleading, and they should be dismissed. Dismissal on those grounds would

fully resolve this motion. However, if the Court does not dismiss the FTC's claims on the merits, the Court would need to address the constitutional problems posed by the FTC's lawsuit, which is an impermissible exercise of executive branch authority—an important constitutional issue that the Court could otherwise avoid resolving. *See, e.g., Bond v. United States*, 572 U.S. 844, 855 (2014) (“[I]t is a well-established principle governing the prudent exercise of this Court’s jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case.”).¹⁷ In the event the Court does not dismiss on statutory or procedural grounds, it should dismiss the FTC’s action as a violation of Article II of the U.S. Constitution. The choice whether to initiate an enforcement action in court is the paradigmatic exercise of executive branch authority; but the FTC is an independent agency whose existence and structure the Supreme Court upheld only because it *did not* exercise executive branch functions. The FTC’s power to bring enforcement lawsuits for injunctions under Section 13(b) in federal court must therefore be stricken and, as a result, this case must be dismissed.¹⁸

A. The FTC Act Amendments, Which Authorized Independent FTC Commissioners to Exercise the President’s Executive Power, Such as By Filing this Enforcement Action in Court, Violate Article II of the Constitution.

This case presents the very same problem that the Supreme Court has already recognized as a constitutional violation: an independent agency (here, the FTC) is exercising fundamentally executive power (filing an enforcement action) that is reserved exclusively to the President under

¹⁷ *See also Cnty. Ct. of Ulster Cnty., N.Y. v. Allen*, 442 U.S. 140, 154 (1979) (although courts “have a duty to decide constitutional questions when necessary to dispose of the litigation before them,” they “have an equally strong duty to avoid constitutional issues that need not be resolved in order to determine the rights of the parties to the case under consideration”).

¹⁸ USAP argues that the FTC’s power to file suit in federal court for a preliminary or permanent injunction (as here) is conditioned upon the FTC promptly pursuing or having pursued to completion an administrative proceeding against the defendants (which it has not done here). The Welsh Carson entities agree with USAP’s position and incorporate USAP’s argument herein.

the U.S. Constitution, while enjoying protection from Presidential oversight. *See Seila Law*, 140 S. Ct. at 2191 (holding that structure of Consumer Financial Protection Bureau (“CFPB”) violated separation of powers). Under Article II of the Constitution, “the ‘executive Power’—all of it—is ‘vested in a President.’” *Id.* This power necessarily includes “appointing, overseeing, and controlling” principal executive officers, *id.* at 2197, such as those who “set enforcement priorities” and “initiate prosecutions,” *id.* at 2203–04.

Since its creation in 1914, the FTC has been, by conscious design, “independent” of the President’s control. Congress limited *both* the President’s power to appoint FTC commissioners of his choice (mandating that “[n]ot more than three of the Commissioners shall be members of the same political party”), *and* the President’s power to remove them (providing that a “Commissioner may be removed by the President” only “for inefficiency, neglect of duty, or malfeasance in office”). 15 U.S.C. § 41. In 1935, the Supreme Court upheld the constitutionality of the FTC, notwithstanding its structure as an independent agency, based on the limited, quasi-judicial and quasi-legislative nature of the authorities the Commissioners could exercise. *See Humphrey’s Executor*, 295 U.S. at 628. The Court’s opinion was built on the crucial understanding that the FTC, at the time, “exercis[ed] ‘no part of the executive power.’” *Seila Law*, 140 S. Ct. at 2198 (quoting *Humphrey’s Executor*, 295 U.S. at 628). The Court found that the FTC instead functioned “as a legislative or as a judicial aid.” *Humphrey’s Executor*, 295 U.S. at 628.

Decades later, however, Congress amended the FTC Act to vest in FTC Commissioners the indisputably executive power of seeking injunctive relief in federal district court (so long as it is tethered to a parallel administrative proceeding). *See* 15 U.S.C. § 53(b) (amended in Pub. L. No. 93-153, § 408(f), 87 Stat. 576, 592 (1973)). As a result of these amendments, the FTC now wields substantial executive power: it operates, in large part, as an enforcement agency, and its

function is quintessentially executive in nature. *See AMG Capital Mgmt.*, 141 S. Ct. at 1346 (detailing Congress’s conferral of enforcement authority on the FTC beginning in the 1970s).¹⁹ Lest there be any doubt that the FTC is an enforcer, the FTC Chair has repeatedly referred to the FTC as an “enforcement” agency.²⁰

Congress’s grant to the FTC—an independent agency—of such core enforcement powers breached the limits of Article II. The powers that were added to the FTC’s authority in 1973 are at the heart of the duty “vested” exclusively in the President to “take Care that the Laws be faithfully executed.” U.S. Const. Art. II, §§ 1, 3. “[T]he choice of how to prioritize and how aggressively to pursue legal actions against defendants who violate the law falls within the discretion of the Executive Branch.” *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2207 (2021); *see also Buckley v. Valeo*, 424 U.S. 1, 138 (1976) (“A lawsuit is the ultimate remedy for a breach of the law, and it is to the President . . . that the Constitution entrusts th[is] responsibility.”). The FTC Commissioners enjoy the same powers to “set enforcement priorities [and] initiate prosecutions” that the Supreme Court recently concluded, when reviewing the structure of the CFPB, were “significant executive power[s].” *Seila Law*, 140 S. Ct. at 2201, 2203–04.

In sum, much of the authority the FTC claims today no longer resembles that of the independent agency that the Supreme Court endorsed in 1935. The FTC’s exercise of executive

¹⁹ The FTC is equipped with the authority to investigate suspected violations of the laws that it is tasked with enforcing, the power to order compulsory process, and the ability to initiate administrative proceedings or to seek injunctive relief in federal court. *See* 15 U.S.C. § 41 *et seq.*

²⁰ *See generally* Transcript, A Conversation with FTC Chair Lina Khan and DOJ Assistant Attorney General Jonathan Kanter on Antitrust Enforcement, Brookings Inst. 2, 22 (Oct. 5, 2023) (Chair Khan: FTC has “a whole set of law enforcement tools”), https://www.brookings.edu/wp-content/uploads/2023/08/gs_20231005_antitrust_transcript.pdf; Q&A with FTC Chair Lina Khan, Chicago Booth Stigler Ctr. (June 3, 2022) (antitrust statutes “allow the FTC to police unfair methods of competition”), <https://www.promarket.org/2022/06/03/qa-with-ftc-chair-lina-khan-the-word-efficiency-doesnt-appear-anywhere-in-the-antitrust-statutes/>.

power under Section 13(b) cannot be reconciled with the independence that the Commission enjoys, both in the form of restrictions on the President's appointment authority and the Commissioners' insulation from Presidential removal. Section 13(b) thus violates the U.S. Constitution.

B. The Appropriate Remedy for this Constitutional Violation Is to Strike the Executive Powers Granted to the FTC in 1973, which Compels Dismissal of this Action.

The inquiry does not end at identifying the constitutional violation; the Court must determine the remedy for the violation. In *Seila Law*, the Supreme Court concluded that it could sever the CFPB Director's removal protection (i) "because the surviving provisions were capable of functioning independently," (ii) because other agencies had been closed and their authorities transferred to CFPB, and (iii) because "nothing in the text or history of the [statute] demonstrates Congress would have preferred *no* CFPB to a CFPB supervised by the President." 140 S. Ct. at 2208–10 (emphasis in original). But the same logic does not apply here, and the FTC's executive power should be revoked.

The FTC existed for half a century before Congress granted it the expansive executive powers outlined in the 1973 amendments that give rise to the constitutional violation in this case. Indeed, the Supreme Court upheld the structure of the FTC as originally constituted and endorsed Congress's conception of an independent FTC with restrictions on the President's authority over FTC Commissioners' appointment and removal. See *Humphrey's Executor*, 295 U.S. at 628. Striking the FTC's executive powers would not, however, limit the government's ability to enforce the antitrust laws. The Antitrust Division of the Department of Justice ("DOJ"), a body directly accountable to the President, is already tasked with "[g]eneral enforcement, by criminal and civil proceedings, of the Federal antitrust laws." See 28 C.F.R. § 0.40. Nor would it leave the FTC without a mandate. The FTC is charged with administering more than seventy laws and related

regulations. *See* Fed. Trade Comm’n – Enforcement, <https://www.ftc.gov/enforcement> (last visited Nov. 11, 2023). The FTC can thus still function as legislative and judicial aid. *See Humphrey’s Executor*, 295 U.S. at 628. Severing the FTC’s later-added executive authorities would thus *both* preserve the independent character of the agency as Congress created it more than a century ago (and has never seen fit to change), *and* preserve to DOJ the authority to execute the laws subject to the President’s full supervision. Here, Section 13(b) in the 1973 amendment is what must be severed so the original law can stand without the unconstitutional amendment.

Severing Section 13(b) in the later-enacted amendments, which created the constitutional problem, is also consistent with the Supreme Court’s precedent on severability. “The Court has long applied severability principles . . . where Congress added an unconstitutional amendment to a prior law. In those cases, the Court has . . . severed the [problem] introduced by amendment, so that the original law stands without the amendatory [violation].” *Barr v. Am. Ass’n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2353 (2020) (plurality opinion).

Striking the FTC’s more recently added executive functions will return the body to what Congress originally, constitutionally created—“a multimember body of experts, balanced along partisan lines, that performed legislative and judicial functions.” *Seila Law*, 140 S. Ct. at 2199. Striking the amendment would also compel dismissal of this action, which proceeds under authority unconstitutionally granted to the FTC by the amendment. Without constitutional authority for the FTC to bring this suit, dismissal is the appropriate result.

CONCLUSION

For the foregoing reasons, the Welsh Carson entities respectfully request that all claims against them be dismissed with prejudice.

Dated: November 20, 2023

/s/ R. Paul Yetter

R. Paul Yetter
(Attorney-in-Charge)
State Bar No. 22154200
Fed I.D. 3639
pyetter@yettercoleman.com
YETTER COLEMAN LLP
811 Main Street, Suite 4100
Houston, Texas 77002
Telephone: (713) 632-8000
Facsimile: (713) 632-8002

David B. Hennes (*pro hac vice*)
david.hennes@ropesgray.com
Jane E. Willis (*pro hac vice*)
jane.willis@ropesgray.com
C. Thomas Brown (*pro hac vice*)
thomas.brown@ropesgray.com
ROPES & GRAY LLP
1211 Avenue of the Americas
New York, New York 10036
Telephone: (212) 596-9000
Facsimile: (212) 596-9090

Douglas Hallward-Driemeier (*pro hac vice*)
douglas.hallward-driemeier@ropesgray.com
ROPES & GRAY LLP
2099 Pennsylvania Avenue, NW
Washington, DC 20006
Telephone: (202) 508-4600
Facsimile: (202) 508-4650

Kathryn Caldwell (*pro hac vice*)
kathryn.caldwell@ropesgray.com
ROPES & GRAY LLP
Prudential Tower
800 Boylston Street
Boston, Massachusetts 02199
Telephone: (617) 951-7000
Facsimile: (617) 951-7050

Kenneth Field (*pro hac vice*)
ken.field@hoganlovells.com
HOGAN LOVELLS US LLP
Columbia Square

555 Thirteenth Street, NW
Washington, DC 20004
Telephone: (202) 637-5600
Facsimile: (202) 637-5910

Perry A. Lange (*pro hac vice* forthcoming)
perry.lange@wilmerhale.com
WILMER CUTLER PICKERING HALE AND
DORR LLP
2100 Pennsylvania Avenue, NW
Washington, DC 20006
Telephone: (202) 633-6493
Facsimile: (202) 663-6363

*Counsel for Defendants Welsh, Carson, Anderson
& Stowe XI, L.P., WCAS Associates XI, LLC,
Welsh, Carson, Anderson & Stowe XII, L.P., WCAS
Associates XII, LLC, WCAS Management
Corporation, WCAS Management, L.P., and WCAS
Management, LLC*

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Welsh Carson Entities' Motion to Dismiss was electronically filed and served on all counsel of record on November 20, 2023.

/s/ R. Paul Yetter
R. Paul Yetter

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

ELECTRICAL MEDICAL TRUST
and PLUMBERS LOCAL UNION
NO. 68 WELFARE FUND,

Plaintiffs,

v.

U.S. ANESTHESIA PARTNERS,
INC., WELSH, CARSON,
ANDERSON & STOWE XI, L.P.,
WCAS ASSOCIATES XI, LLC,
WELSH, CARSON, ANDERSON &
STOWE XII, L.P.,
WCAS ASSOCIATES XII, LLC,
WCAS MANAGEMENT
CORPORATION,
WCAS MANAGEMENT, L.P., and
WCAS MANAGEMENT, LLC,

Defendants.

Case No. 4:23-cv-04398

CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

TABLE OF CONTENTS

	Page
INTRODUCTION	1
JURISDICTION AND VENUE	5
THE PARTIES.....	5
A. Plaintiff Electrical Medical Trust	5
B. Plaintiff Plumbers Local Union No. 68 Welfare Fund.....	6
C. Defendant USAP	6
D. Defendant Welsh Carson	7
FACTUAL ALLEGATIONS	10
I. THE RELEVANT MARKETS.....	10
A. Product Market: Hospital-Only Anesthesia Services Reimbursed by Commercial Payors	10
B. The Relevant Geographic Markets	13
1. Austin, Dallas, and Houston MSAs.....	14
2. Combined Texas Major Metropolitan Areas.....	15
3. Texas.....	17
II. USAP AND WELSH CARSON’S ANTICOMPETITIVE SERIAL ACQUISITION SCHEME.....	19
A. Welsh Carson Decides to Invest in an “Aggressive ‘Buy and Build’ Consolidation Strategy.”.....	19
B. Welsh Carson and New Day Launch Their Consolidation Strategy by Acquiring Greater Houston Anesthesiology.	20
III. USAP ACQUIRES ANOTHER FIFTEEN TEXAS ANESTHESIA PRACTICES.....	25
A. Lake Travis Anesthesiology	25
B. North Houston Anesthesiology-Kingwood Division.....	25
C. Pinnacle Anesthesia Consultants	26
D. Anesthesia Consultants of Dallas	28
E. Excel Anesthesia Consultants	29

TABLE OF CONTENTS
(continued)

	Page
F. Southwest Anesthesia Associates	29
G. BMW Anesthesiology and Medical City Physicians.....	30
H. Sundance Anesthesia	30
I. East Texas Anesthesiology Associates	31
J. MetroWest Anesthesia Care	31
K. Capitol Anesthesiology Association.....	32
L. Amarillo Anesthesia Consultants.....	33
M. Star Anesthesia.....	33
N. Guardian Anesthesia Services.....	34
IV. MONOPOLY POWER	34
A. USAP Uses Its Monopoly Power to Charge Monopoly Prices.....	34
B. Market Share and Concentration Data Also Evince USAP's Monopoly Power.....	36
C. USAP's Monopoly Power Is Durable and Resistant to Competition.....	43
D. USAP's Monopolization Sacrificed Quality.....	45
E. Welsh Carson and USAP's Scheme Did Not Create Efficiencies That Benefited Patients or Payors.....	49
F. Welsh Carson and USAP's Violation of the Antitrust Laws Has Had a Continuing Impact.	50
V. USAP ALSO AGREED TO FIX PRICES WITH AT LEAST THREE GROUPS.	51
A. USAP's Agreement with Methodist Hospital Physician Organization.....	52
B. USAP's Agreement with Dallas Anesthesiology Associates.....	53
C. USAP's Agreement with Baylor College of Medicine.....	55

TABLE OF CONTENTS
(continued)

	Page
D. USAP’s Attempted Agreement with a University of Texas Group	56
VI. THE FEDERAL TRADE COMMISSION FILES SUIT.	57
VII. USAP ALSO AGREED TO ALLOCATE A MARKET.....	57
CLASS ACTION ALLEGATIONS	58
A. Numerosity (Rule 23(a)(1))	58
B. Commonality (Rule 23(a)(2))	58
C. Typicality (Rule 23(a)(3)).....	59
D. Adequacy (Rule 23(a)(4) and 23(g))	60
E. Rule 23(b)(2).....	60
F. Rule 23(b)(3).....	60
VIOLATIONS	61
COUNT ONE Monopolization Section Two of the Sherman Act.....	61
COUNT TWO Unlawful Acquisition Section Seven of the Clayton Act	62
COUNT THREE Conspiracy to Monopolize Section Two of the Sherman Act	63
COUNT FOUR Attempted Monopolization Section Two of the Sherman Act	65
COUNT FIVE Horizontal Agreements to Fix Prices Section One of the Sherman Act	66
COUNT SIX Horizontal Agreement to Divide Market Section One of the Sherman Act	68
PRAYER FOR RELIEF	69
DEMAND FOR JURY TRIAL	71

Plaintiffs Electrical Medical Trust and Plumbers Local Union No. 68 Welfare Fund, through their counsel, on behalf of themselves and all others similarly situated, bring this class action complaint under Section Seven of the Clayton Act, 15 U.S.C. § 18, Section One of the Sherman Act, 15 U.S.C. § 1, and Section Two of the Sherman Act, 15 U.S.C. § 2, and allege as follows:

INTRODUCTION

1. This lawsuit challenges a multi-year anticompetitive scheme by Defendant U.S. Anesthesia Partners, Inc. (“USAP”) and Defendant Welsh, Carson, Anderson & Stowe (“Welsh Carson”)¹ to monopolize hospital anesthesia services in Texas, drive up prices, and increase their profits.

2. Welsh Carson is a multibillion-dollar New York-based private equity firm. In 2012, it formed USAP, a physician services organization that “partners” with—a euphemism for acquires—anesthesia providers. Defendants pitch USAP to doctor groups as a more efficient anesthesiology firm with money to invest in quality. Welsh Carson and USAP’s actual strategy, however, has nothing to do with improving efficiency or quality.

¹ Welsh Carson refers collectively to Defendants Welsh, Carson, Anderson & Stowe XI, L.P.; WCAS Associates XI, LLC; Welsh, Carson, Anderson & Stowe XII, L.P.; WCAS Associates XII, LLC; WCAS Management Corporation; WCAS Management, L.P.; and WCAS Management, LLC.

3. Instead, from USAP's conception, Defendants planned and pursued an "aggressive 'buy and build' consolidation strategy" targeting "practices with high market share in a few key markets." Welsh Carson and USAP knew that if they could buy their way to a dominant market share, then USAP would have enhanced "[n]egotiating leverage with commercial payors" enabling it to raise prices for anesthesia services.

4. First Target: Greater Houston Anesthesiology. Defendants laid the foundation for the scheme by acquiring Greater Houston Anesthesiology. They targeted this group for two main reasons. First, it was "the largest anesthesia physician group in the greater Houston region," with 220 physicians and 180 certified registered nurse anesthetists ("CRNAs"). Second, Greater Houston Anesthesiology had the highest reimbursement rates in Houston. These attributes aligned perfectly with Defendants' strategy to buy market share and raise prices. Defendants completed that acquisition in December 2012, effectively firing the starting pistol for their "anesthesiology consolidation strategy."

5. In an internal January 2013 presentation, Welsh Carson and USAP laid out the next step in their plan: USAP would "Roll Up Houston" through a series of "tuck-in acquisitions" while simultaneously expanding in other Texas cities. The recently acquired Greater Houston Anesthesiology would serve as the "platform" into which USAP would fold future acquisitions. For those

acquisitions, Defendants planned to target anesthesia practices with exclusive hospital contracts—particularly with hospitals considered important to insurers—to “bolster [USAP’s] market share and drive profitability” without competing.

6. Expanding Across Texas. Welsh Carson and USAP successfully executed that plan. USAP acquired sixteen anesthesia groups, including the dominant providers in Austin, Dallas, and Houston, creating an anesthesia behemoth with more than 1,000 providers. By revenue, USAP has approximately 73% of the hospital-only anesthesia market across those areas. At best, USAP faces fringe competition. Its two ‘largest’ rivals each only have an approximate 10% share of anesthesiology cases—six times less than USAP. This disparity is even larger for revenue. The next largest group is eight times smaller than USAP by revenue. Today, USAP’s dominance extends across Texas: It has 57% of the hospital-only anesthesia market for the state by revenue.

7. USAP’s dominance within and among Austin, Dallas, and Houston gives USAP enormous bargaining leverage; any insurer who might defy its pricing demands would face the specter of having the majority of anesthesiologists in Austin, Dallas, and Houston simultaneously fall out-of-network. As an executive at the largest health insurer in Texas explained, “[E]very time [USAP] folded in a geographic region or every time that they grew, it just strengthened their ability to raise rates and . . . leverage at the negotiating table.”

8. Raising Prices. Welsh Carson and USAP have ruthlessly exploited their leverage to raise prices. After each acquisition, USAP has raised the target's prices to Greater Houston Anesthesiology's higher reimbursement rate and continued to increase prices—without corresponding quality improvements. One United executive astutely described the result of USAP's serial acquisitions: “[Y]ou’ve basically taken the highest rate of all in one distinct market and then peanut butter spread that across the entire state of Texas.” USAP's current reimbursement rates are now “nearly 40% more expensive than the average cost of all other anesthesia providers in Texas” and far exceed the median rate.

9. Fixing Prices. That is not all. When Welsh Carson and USAP could not buy the competition, they entered agreements with their would-be rivals. Defendants formed price-fixing agreements with at least three anesthesia groups, including their two largest rivals. USAP's executives recognized these agreements were “odd from a compliance standpoint.” USAP also agreed with another physician group that provides anesthesiology services to allocate the market. Through these agreements, Welsh Carson and USAP further increased prices.

10. Injured Health Plans. Because of Welsh Carson and USAP's consolidation scheme and agreements with competitors, Plaintiffs Electrical Medical Trust and Plumbers Local Union No. 68 Welfare Fund and the Proposed Class have paid artificially inflated reimbursement rates for hospital-only

anesthesia services in the Texas and Austin, Dallas, and Houston markets. The Federal Trade Commission recently brought a case to enjoin this conduct. By bringing this action, Plaintiffs seek to vindicate—on behalf of themselves and those similarly situated—their rights under the antitrust laws, restore competition for anesthesiology services, and recover damages for overcharges.

JURISDICTION AND VENUE

11. This Court has subject matter jurisdiction over this action pursuant to Sections Four and Sixteen of the Clayton Act, 15 U.S.C. §§ 15, 26, and 28 U.S.C. §§ 1331, 1337.

12. Venue is proper in this District under Section Twelve of the Clayton Act, 15 U.S.C. § 22, and 28 U.S.C. § 1391(b).

13. The Court has personal jurisdiction over each Defendant under Section Twelve of the Clayton Act, 15 U.S.C. § 22, and Federal Rule of Civil Procedure Four, and one or more Defendants may be found in this District.

THE PARTIES

A. Plaintiff Electrical Medical Trust

14. Plaintiff Electrical Medical Trust is an employee benefit plan headquartered in Houston, Texas. Electrical Medical Trust has nearly 5,400 members across the Houston Gulf Coast Area. Electrical Medical Trust self-funds its members' health insurance and uses a third-party administrator. Members can choose between three plans: Kelsey Care HMO, Memorial Hermann ACO, and

Aetna POS Choice II. Electrical Medical Trust directly reimburses healthcare providers who treat its members. During the Class Period, Electrical Medical Trust paid USAP for hospital anesthesia services provided to its plan participants.

B. Plaintiff Plumbers Local Union No. 68 Welfare Fund

15. Plaintiff Plumbers Local Union No. 68 Welfare Fund is an employee benefit plan headquartered in Houston, Texas and has about 5,300 members across Houston, Galveston, Beaumont, Bryan, College Station, Victoria, Corpus Christi, the Rio Grande Valley, and 62 surrounding counties. Plumbers Local Union No. 68 Welfare Fund is a self-funded plan that provides members and their families a comprehensive benefits package, including medical, vision, dental, prescription, life insurance, and short-term disability insurance. Plumbers Local Union No. 68 Welfare Fund provides this plan in partnership with United Healthcare, which provides access to its network and negotiates rates with providers. Plumbers Local Union No. 68 Welfare Fund directly reimburses healthcare providers who treat its members. During the Class Period, Plumbers Local Union No. 68 Welfare Fund paid USAP for hospital anesthesia services that USAP provided to its plan participants.

C. Defendant USAP

16. Defendant U.S. Anesthesia Partners, Inc. is a for-profit Delaware corporation, with its principal place of business at 12222 Merit Drive, Suite 700,

Dallas, Texas 75251. USAP has over 4,500 anesthesia providers across Colorado, Florida, Indiana, Kansas, Kentucky, Maryland, Nevada, Oklahoma, Ohio, Tennessee, Texas, Washington, and Washington D.C.

D. Defendant Welsh Carson

17. Defendant Welsh, Carson, Anderson & Stowe is a private equity firm headquartered at 599 Lexington Avenue, Suite 1800, New York, New York 10022. Welsh Carson co-founded USAP in 2012. Since its founding, Welsh Carson has controlled or directed and invested in USAP through five management organizations—Defendant WCAS Management Corporation; Defendant WCAS XI Associates, LLC; Defendant WCAS Associates XII, LLC; Defendant WCAS Management, L.P.; and Defendant WCAS Management, LLC—and two investment funds, Defendant Welsh, Carson, Anderson & Stowe XI, L.P. and Defendant Welsh, Carson, Anderson & Stowe XII, L.P. Welsh Carson partners control the various management entities by serving as officers or “managing members.” The management entities, in turn, control the management funds.

18. Because these eight Defendants function as a single entity with a shared identity, this Complaint collectively refers to them as “Welsh Carson.” They all share the trademarks “WCAS” and “Welsh, Carson, Anderson & Stowe,” which are registered to Defendant WCAS Management Corp.; use the same principal place of business, 599 Lexington Avenue, Suite 1800, New York, New

York 10022; and share corporate officers. For instance, D. Scott Mackesy, Welsh Carson's "Managing Partner of the Firm," is also a managing member of Defendants WCAS XI and XII Associates, LLC, President and a director of Defendant Welsh Carson Management Corp., and a managing member and director of Welsh Carson Management, LLC.

19. In 2012, Welsh Carson owned 50.2% of USAP. By 2017, Welsh Carson owned 44.8% after granting equity to physicians it acquired. That year, Welsh Carson sold part of its equity to Berkshire Partners and GIC Capital, retaining an ownership stake of 23%.

20. Welsh Carson formally controls a company when one of its funds owns or has rights to more than 50% of its shares. Additionally, Welsh Carson exercises control—even when it owns less than 50%—through representation on the company's board of directors, hiring executives to manage the company, and daily supervision by Welsh Carson personnel. Welsh Carson has used each of these tools to control USAP since its founding through the present. Indeed, Welsh Carson has dubbed itself USAP's "primary architect."

21. Until 2017, Welsh Carson controlled a majority of the company's board of directors; it either had authority to appoint a majority or held voting rights of the other shareholders. Welsh Carson itself said that it "in all practical respects" continued to control USAP. Even after selling part of its ownership in 2017,

USAP's CEO and Chairman continued to view Welsh Carson as its "most influential" board member. It currently has the authority to appoint two members. Welsh Carson has used its authority to appoint individuals affiliated with itself. Those appointments include Brian Regan, a Welsh Carson partner who directed and implemented USAP's consolidation strategy.

22. At the time of USAP's founding, Welsh Carson hired its CEO, CFO, COO, and head of Human Resources. Like this initial team, many subsequent senior hires previously worked for other Welsh Carson companies, including USAP's Vice President of Payor Contracting and its current CEO.

23. Welsh Carson has also controlled USAP by supervising its day-to-day operations, including corporate finances, securing financing from lenders or Welsh Carson funds, identifying targets, conducting due diligence on potential acquisitions, negotiating acquisitions, negotiating prices with insurers, and determining USAP's overall strategy.

24. Welsh Carson has feasted on USAP's monopoly profits—receiving total dividend payments of nearly \$435 million.

FACTUAL ALLEGATIONS

I. THE RELEVANT MARKETS

A. Product Market: Hospital-Only Anesthesia Services Reimbursed by Commercial Payors

25. Hospital-Only Anesthesia Services. A relevant product market is hospital-only anesthesia services reimbursed by commercial payors.

Anesthesiologists administer medications to prevent patients from feeling pain during medical procedures or surgery. This case concerns hospital-only anesthesia services. Hospital-only anesthesia services include inpatient anesthesia services and outpatient anesthesia services that must be provided in a hospital because the patient may require emergency medical services only available at a hospital.

26. The industry recognizes the distinct characteristics of hospital-only anesthesia services. The Centers for Medicare and Medicaid Services (“CMS”) maintains a list of billing codes that distinguishes between hospital and other anesthesia services used by government insurers. Some private insurers formally require similar billing practices, and many hospitals adopt the CMS list to remain certified for government insurance programs.

27. Anesthesia services at outpatient surgery centers, ambulatory surgical centers, or doctors’ offices cannot substitute for hospital-only services. Patients requiring hospital admission to receive treatment necessarily must receive anesthesia services in a hospital. Similarly, patients whose outpatient procedures

or surgeries must occur in a hospital due to their medical needs or the risks associated with the surgery must receive anesthesia services in a hospital. Because non-negotiable medical considerations drive these decisions, patients and insurers cannot switch to different anesthesia services in response to a small but significant non-transitory increase in price. Similarly, when required by the nature of the procedure, no substitute exists for the services of an anesthesiologist.

28. The contracting and scheduling practices of hospitals also differentiate hospital-only anesthesiology services. Some hospitals engage only one anesthesiology practice. This gives the hospital a central hub for scheduling dozens of procedures per day. It also allows the hospital to implement accountability-of-care quality measures with the practice. In order to be the sole practice for a hospital, however, an anesthesiology provider must employ a certain number of physicians and be able to staff procedures on a 24/7 basis, which not all practices do.

29. Defendants recognize hospital-only anesthesia services as a distinct market. When analyzing possible acquisitions, Welsh Carson and USAP repeatedly focused on the target's presence within hospital systems or at individual facilities without regard to ambulatory surgical centers. Greater Houston Anesthesiology, for example, was an attractive initial acquisition because it had a high "wallet share" at Houston's four largest hospital systems.

30. Commercial Insurers. The relevant market also only includes services paid for by commercial insurance plans, including self-funded insurance plans like Plaintiffs.

31. Commercial insurers typically pay substantially higher reimbursement rates than the government. On average, private rates are nearly double those paid by Medicare for inpatient services.² Commercial insurers negotiate with providers to set reimbursement rates. Medicare reimbursement rates, by contrast, are set at the federal level by the government based on recommendations from a committee of medical specialists.³ USAP recognizes this distinction. It tracks commercial insurers' pricing without reference to government insurance.

32. Anesthesia services provided to government insurance beneficiaries cannot be substituted for those same services provided to commercial insurance beneficiaries. Commercial subscribers cannot switch from commercial to government insurance in response to a small but significant non-transitory price increase for hospital-only anesthesia services because government insurance plans

² Eric Lopez et al., *How Much More Than Medicare Do Private Insurers Pay? A Review of the Literature*, KFF (Apr. 15, 2015), <https://www.kff.org/medicare/issue-brief/how-much-more-than-medicare-do-private-insurers-pay-a-review-of-the-literature/>.

³ John O'Shea et al., *The Medicare Physician Fee Schedule: Overview, Influence on Healthcare Spending, and Policy Options to Fix the Current Payment System*, Mercatus Center (May 24, 2023), <https://www.mercatus.org/research/policy-briefs/medicare-physician-fee-schedule-overview-influence-healthcare-spending-and>.

have specific eligibility requirements. For example, Medicare has an age requirement, and Medicaid eligibility depends on income.

B. The Relevant Geographic Markets

33. In a typical and competitive market, prices depend on a straightforward relationship between output and consumer demand. Healthcare markets, however, are unique. In the private insurance market, individual patients choose among different doctors and facilities. Generally, people strongly prefer to obtain healthcare services in the area where they live. Price, however, does not strongly factor into consumer choice at the point of service. One reason for this is that the need for healthcare is often non-deferable. Another is that insured individuals do not (subject to co-pays) pay out-of-pocket for most treatments. Instead, individuals pay for healthcare insurance, often through their employer or labor union, which in turn pays healthcare providers. To meet this need, commercial insurers such as Blue Cross and United Healthcare build provider networks, and self-funded insurers sometimes contract with insurers for access to those networks. Prices depend on the terms of the contracts between payors and providers.

34. Health insurers view geographic markets differently than consumers. At any given time, an individual consumer only seeks healthcare in a single local area. By contrast, insurers must simultaneously contract with providers for

different locations because they must offer plans and accordingly maintain networks in multiple geographies. Providers operating in multiple geographies, especially high-demand geographies, benefit from a multiplier effect in negotiations with insurers—the more areas in which a provider operates, the more disruptive it is for an insurer to exclude a provider from its network. For example, a hypothetical provider that dominates three geographies would have more power than three individual monopolists, because during negotiations it has an even greater ability to make non-agreement “painful” for the insurer. And because state-wide demand for healthcare is typically consolidated in a few major metropolitan areas, a provider can monopolize an entire state by capturing key geographies.

35. In this case, USAP’s monopoly power can be detected at each of three levels of relevant markets: 1) Austin, Dallas, and Houston, 2) those three geographies combined, and 3) Texas.

1. Austin, Dallas, and Houston MSAs

36. Three initial relevant geographic markets are the Austin Metropolitan Statistical Area (“MSA”), the Dallas-Fort Worth MSA, and the Houston MSA.

37. The Austin metropolitan statistical area includes the following counties: Bastrop, Caldwell, Hays, Travis, and Williamson. The Dallas MSA includes the following counties: Collin, Dallas, Denton, Ellis, Hood, Hunt,

Johnson, Kaufman, Parker, Rockwall, Somervell, Tarrant, and Wise. The Houston MSA includes the following counties: Austin, Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller.

38. The Austin, Dallas, and Houston MSAs are each relevant markets because people strongly prefer to obtain healthcare services in the area where they live. From the individual's perspective, hospital-only anesthesia services offered outside of their given MSA are not a substitute. As a result, insurers contract with anesthesia providers in the same geographies as their enrollees.

39. Furthermore, patients do not choose their anesthesia provider. Instead, patients pick their hospital, and the hospital staffs procedures with anesthesia providers. Like patients, hospitals prefer local providers to avoid travel and lodging costs. They also often need to staff procedures on 24 hours' notice or less. They, therefore, need a ready supply of local anesthesiologists, whether on an exclusive contract or an open staffing model; out-of-area providers do not offer a reasonable substitute. Thus, a hypothetical monopolist of hospital-only anesthesiology services in any of these MSAs could impose a small but significant and non-transitory increase in prices above competitive levels.

2. Combined Texas Major Metropolitan Areas

40. A relevant geographic market also consists of the Austin MSA, Dallas-Fort Worth MSA, and Houston MSA together.

41. As described above, providers operating in this market will enjoy a multiplier effect in negotiations with insurers, which ties together the Austin, Dallas, and Houston MSAs into a relevant geographic market for assessing market power. These three markets include the principal economic centers of the State of Texas. The population of this relevant market is 17.7 million—over half of Texas’s population of 30 million, and including some of its biggest employers.⁴ No insurer seeking to offer a product to residents of this State could afford to do without all three of these localities. Hence, a hypothetical monopolist of hospital-only anesthesiology services in all three MSAs could profitably impose a small but significant non-transitory price increase on commercial payors. Indeed, USAP *did* profitably impose such price increases. According to United Healthcare, USAP’s rates in 2020 were “nearly 40% more expensive than the average cost of all other anesthesia providers in Texas” and as much as 110% above the statewide median.

42. USAP’s own acquisition strategy—to spread Houston rates like “peanut butter” over Austin and Dallas—confirms the connection of these MSAs. USAP targeted these MSAs precisely because of the power inherent in combining them in one contracting package.

⁴ U.S. Census Bureau, *Metropolitan and Micropolitan Statistical Areas Population Totals: 2022-2022*, <https://www.census.gov/data/tables/time-series/demo/popest/2020s-total-metro-and-micro-statistical-areas.html> (last updated June 13, 2023); U.S. Census Bureau, *QuickFacts Texas*, <https://www.census.gov/quickfacts/fact/table/TX/PST045222> (last accessed Nov. 15, 2023).

3. Texas

43. A relevant geographic market is Texas.

44. As described above, businesses often make the initial selection of which insurance to offer employees. Accordingly, insurers must build networks that are attractive to employers. A threshold requirement is that networks include sufficient providers where companies' employees live and work. Large employers typically have workers in multiple geographies, and that is true for major Texas employers. For example, AT&T, H-E-B, and Walmart employ individuals across the state.⁵ This also includes, of course, the State of Texas, which employs over half a million people and offers health insurance to these employees and their families through programs such as the Texas Employees Group Benefits Program and the Teacher Retirement System of Texas. Many large healthcare insurers service the entire state.

45. Hospital-only anesthesia services by providers located outside of Texas cannot be substituted for in-state providers. Individuals typically prefer to

⁵ See Dallas Reg'l Chamber, *Top Employers*, <https://www.dallaschamber.org/wp-content/uploads/2018/04/Business-TopEmployers.pdf> (last accessed Nov. 15, 2023) (AT&T and Walmart); Greater: SATX Reg'l Econ. P'ship, *SATX Major Employers*, <https://greateratx.com/business-in-satx/major-employers/> (last accessed Nov. 15, 2023) (H-E-B); Harris Cnty. Tex. Econ. Dev., *Largest 100 Houston Area Employers*, https://hcoed.harriscountytexas.gov/docs/Largest_100_Employers.pdf (last accessed Nov. 15, 2023) (H-E-B, Walmart, and AT&T); Tyler Econ. Dev. Council, *Major Employers*, <https://tedc.org/site-selectors/major-employers> (last accessed Nov. 15, 2023) (Walmart).

receive healthcare near where they work and live and, again, employers consider that preference when contracting for healthcare insurance. Moreover, to issue healthcare insurance through Texas’ federally-facilitated exchange, the Affordable Care Act requires insurers to “maintain[] a network that is sufficient in number and types of providers, . . . to ensure that all services will be accessible without unreasonable delay.”⁶ Texas also requires insurers to maintain networks such that “travel distances from any point in its service area to a point of service are no greater than” thirty miles for general hospital care and seventy-five miles for specialty care.⁷ Further, Texas requires providers to obtain state certification before they may practice in Texas. These regulatory barriers, not to mention travel and lodging costs, prevent anesthesia providers in other states from serving as substitutes that can constrain prices.

46. USAP and Welsh Carson’s actions confirm that Texas is a relevant market. To strengthen its pricing power in the state, USAP acquired practices in smaller geographies—Amarillo, San Antonio, and Tyler—to prevent another group from achieving a state-wide scale that could possibly challenge USAP. For instance, San Antonio-based Star Anesthesia expanded into Houston and announced intentions to expand across Texas before USAP acquired it. USAP

⁶ 45 C.F.R. § 156.230(a)(1)(ii) (2023).

⁷ 28 Tex. Admin. Code §§ 11.1607(h), 3.3704(f)(8) (2023) (additionally specifying 30 miles from hospitals in nonrural areas and 60 miles for rural areas).

similarly acquired a group in Amarillo to prevent a Dallas-based group from doing the same and building a state-level presence.

47. The Texas market also satisfies the SSNIP test. A hypothetical monopolist of hospital-only anesthesiology services in Texas could profitably impose a small but significant non-transitory price increase on commercial payors. As described above, USAP did just that.

II. USAP AND WELSH CARSON'S ANTICOMPETITIVE SERIAL ACQUISITION SCHEME

A. Welsh Carson Decides to Invest in an "Aggressive 'Buy and Build' Consolidation Strategy."

48. In early 2012, John Rizzo, a former executive at a large national anesthesia group, emailed D. Scott Mackesy, a partner at Welsh Carson, seeking investors for a new anesthesia practice: "New Day Anesthesia." He planned to establish a nationwide presence by pursuing an "aggressive 'buy and build' consolidation strategy."

49. As part of that plan, Brian Regan, a junior partner, evaluated the proposed investment and worked with Rizzo on presenting New Day to Welsh Carson's partnership. That presentation explained New Day Anesthesia would pursue an "anesthesiology consolidation strategy." The "[g]oal for New Day" would be "to build a platform with national scale by consolidating practices with high market share in a few key markets." The proposed plan focused on

consolidation because Welsh Carson understood that market share would give New Day “[n]egotiating leverage with commercial payors” to raise prices.

50. That aggressive consolidation plan convinced Welsh Carson to invest in New Day. The private equity firm agreed to “[c]ommit \$1-\$2 million to set-up [sic] shop, develop a market roadmap, and diligence acquisition candidates” and “devote real time and resources to New Day and the anesthesiology consolidation strategy.”

B. Welsh Carson and New Day Launch Their Consolidation Strategy by Acquiring Greater Houston Anesthesiology.

51. First, Welsh Carson hired Kristen Bratberg to be the CEO of New Day. Bratberg had already successfully implemented a similar consolidation strategy as the CEO of Pediatrix—Welsh Carson’s physician group for neonatologists—overseeing more than 100 acquisitions.

52. Greater Houston Anesthesiology. Regan and Bratberg worked together to identify New Day’s first acquisition. In June 2012, New Day and Welsh Carson, represented by Regan, signed a letter of interest with Greater Houston Anesthesiology, which described itself as “20 times the size of the second largest local competitor.” Welsh Carson and New Day shortly thereafter pitched the potential deal to Greater Houston Anesthesiology’s physicians, highlighting their plan for aggressive consolidation. On August 29, 2012, Welsh Carson and New Day submitted a formal Letter of Intent signed by Bratberg and Rizzo for

New Day and Regan for WCAS Associates XI. That letter explained Welsh Carson would help fund the acquisition by contributing from one of its investment funds, WCAS XI. For the rest of the required funds, New Day would borrow from third-party lenders.

53. Welsh Carson carefully analyzed whether New Day should acquire Greater Houston Anesthesiology. As part of this analysis, the firm hired three consulting groups, and each recommended the deal. Avalere Health noted that anesthesiologists “have more power than most specialists,” and that Greater Houston Anesthesiology’s “commanding market share” only “magnified” its power. Stax, Inc. noted that Greater Houston Anesthesiology was “the largest anesthesia physician group in the greater Houston region,” as “the closest groups to GHA in size are academic in nature, with most independent groups being much smaller.” Additionally, Stax, Inc. found that Greater Houston Anesthesiology was “well-positioned within the [Houston region], and specifically within the four major hospital systems”—Houston Methodist, Memorial Hermann, St. Luke’s, and HCA, which performed almost 65% of all inpatient surgeries in Houston. Savvy Sherpa’s report focused on prices. It observed that Greater Houston Anesthesiology “achieved very good levels of reimbursement from commercial payers.” This analysis confirmed what Regan heard from an ambulatory surgical center executive—that Greater Houston Anesthesiology had the “best rates.”

Further, Savvy Sherpa advised that USAP would be able to spread its higher reimbursement rates to other practices it acquired.

54. Having vetted Greater Houston Anesthesiology, Welsh Carson and New Day pitched the deal to lenders in October 2012. They stressed that Greater Houston Anesthesiology had the “best rates” and “commanding market share.” Regan explained that these attributes made Greater Houston Anesthesiology the perfect cornerstone from which Welsh Carson and New Day planned to “build a platform with national scale by consolidating practices with high market share in a few key markets.” By capturing a dominant market share and creating national scale, it would have “[n]egotiating leverage with commercial payors” to raise anesthesia service prices. That pitch worked. Welsh Carson and USAP secured debt financing from a consortium that included General Electric Capital, KeyBank, Bank of America, Wells Fargo, and Ares Capital.

55. Welsh Carson XI Fund. Meanwhile, Welsh Carson and New Day sought and ultimately received financing from the Welsh Carson XI fund. A November 2012 memo to Welsh Carson’s “Investment Professionals” from Mackesy, Regan, and four others made a similar pitch, explaining that Greater Houston Anesthesiology would be the first acquisition in a “roll-up strategy.”

56. With funding from Welsh Carson and private lenders secured, Defendants announced the formation of USAP on November 19, 2012. Less than a

month later, on December 12, 2012, USAP agreed to acquire Greater Houston Anesthesiology.

57. Expanding Acquisition Targets. Welsh Carson and USAP immediately began looking for more practices to acquire. The next day, USAP, represented by Bratberg and Rizzo, met with Regan and other Welsh Carson employees in New York to strategize. A January 2013 presentation—bearing USAP and Welsh Carson’s logos—laid out that plan. USAP would “Roll Up Houston” through a series of “tuck-in acquisitions” that could be folded into Greater Houston Anesthesiology, while simultaneously expanding to other markets. After each acquisition, USAP would raise the new practitioners’ reimbursement rates to those of Greater Houston Anesthesiology. To efficiently “bolster [USAP’s] market share and drive profitability”—by quickly amassing negotiating leverage to raise prices—Defendants decided to target anesthesia practices with exclusive hospital contracts, preferably hospitals that insurers had to include in their networks. A Welsh Carson analyst explained the importance of contracts with major hospitals to a potential lender: “[I]f a payor refuses to give us the pricing that we’re looking for, then the threat of us going out-of-network would be more painful on the payor than it would be on us. . . . [W]hen we cover every major hospital in the market, it doesn’t really have much of an impact on us. All the while, the payor would be responsible for reimbursing at out-of-network rates

which are substantially higher than what we see on an in-network basis”

Going out of network could also disrupt patients’ access to surgeries. This plan also took advantage of the fact that anesthesia hospital contracts are “sticky,” meaning hospitals infrequently switch anesthesia providers.

58. USAP and Welsh Carson also knew USAP had “room to expand its footprint throughout Texas.” Early on, Defendants identified Dallas and Austin as attractive targets. Like Houston, four major hospital systems in Dallas conducted a large share of surgical cases: Texas Health Resources, Baylor Scott & White, HCA North Texas (operating as Medical City), and Methodist Health System. Defendants knew that each acquisition would increase USAP’s leverage with commercial payors.

59. Defendants intended for Welsh Carson to be a key decision-maker in USAP’s consolidation strategy. USAP’s 2013 “Business Development Playbook” states that it is “important that [Welsh Carson] remains fully informed” and that analyzing potential acquisitions “will typically involve multiple memos/presentation decks and discussions with [Welsh Carson].” The playbook further provided that “the deal must be reviewed and approved by Welsh Carson” before USAP may issue a letter of intent.

III. USAP ACQUIRES ANOTHER FIFTEEN TEXAS ANESTHESIA PRACTICES.

A. Lake Travis Anesthesiology

60. In July 2013, USAP acquired Lake Travis Anesthesia, a small group that provided coverage for Lakeway Hospital. USAP, at that time, already had a presence in Austin; Greater Houston Anesthesiology had been the fourteenth largest group in the area when USAP acquired it. Despite its small size, USAP executives described this acquisition as a chance to get “points on the board[:] growth in Austin” and a platform to “[c]ontinue GHA’s expansion into [the] Austin MSA.”

B. North Houston Anesthesiology-Kingwood Division

61. In June 2014, USAP acquired a division of North Houston Anesthesiology located in Kingwood, which numbered twenty-one physicians and nine CRNAs. This acquisition fit Welsh Carson and USAP’s plan to target practices with important hospital contracts. The Kingwood Division had “[s]trategic hospital affiliation[s]” with HCA Kingwood and Memorial Heimann Northeast. After this acquisition, Defendants pronounced USAP the “clear leader” in Houston hospital-based anesthesiology services with the next largest anesthesia group “less than 5% the size of USAP.” USAP then raised Kingwood’s reimbursement rates.

C. Pinnacle Anesthesia Consultants

62. In early 2013, Pinnacle Anesthesia Consultants contacted USAP about “explor[ing] potential business opportunities concerning future strategic partnerships.” Pinnacle was an ideal target for USAP. Defendants estimated that it had 26% of the anesthesia providers and performed about 40% of the anesthesia services in Dallas. Moreover, it had a powerful presence in the four hospital systems: approximately 54% of the case volume in the HCA system, 52% in the Baylor system, 42% in the Texas Health Resources system, and 22% in the Methodist Dallas system.

63. Rizzo and Bratberg met Pinnacle’s President and Chairman Mike Hicks and CEO Michael Saunders, and during that conversation, Hicks explained that “he has wanted to do what [USAP is] doing for years.” Indeed, Pinnacle had a “wish list” of acquisition targets—Anesthesia Consultants of Dallas, Excel Anesthesia Consultants, and North Texas Anesthesia Consultants—which USAP would soon tick off.

64. The possibility for more dominance intrigued USAP and Welsh Carson. Regan found Pinnacle “an interesting opportunity” and “definitely a worthwhile discussion given the size of their group and market.” Similarly, Bratberg thought acquiring Pinnacle “[c]ould be strategically a huge step forward from a Texas and national standpoint.” Others at Welsh Carson observed the

acquisition had a “[s]ignificant potential revenue upside applying [USAP’s Houston] rates” to Pinnacle.

65. Again, USAP and Welsh Carson hired consulting firms to assess whether USAP should acquire Pinnacle. They reported that Pinnacle had exclusive hospital contracts—uncommon for Dallas—and that other anesthesia practices “pose[d] no strategic or competitive threat to Pinnacle.” Additionally, the consulting firms recommended that USAP subsequently acquire other practices providing anesthesia services to “key [hospital] system facilities not served by Pinnacle” to obtain more “exclusive contracts over time.”

66. On September 13, 2013, USAP, Welsh Carson, and Pinnacle signed a letter of intent. That letter stated that Defendants intended to “expand throughout Texas by acquiring other local anesthesia groups.” Brian Regan signed the letter for WCAS Associates XI, the general partner entity for the WCAS XI fund. In January 2014, USAP completed the acquisition, and Pinnacle’s 320 anesthesiologists and 217 CRNAs joined Defendants’ growing anesthesia empire. Welsh Carson funded the deal by purchasing additional USAP shares.

67. USAP, post-acquisition, spread its inflated reimbursement rates to the former Pinnacle providers. Although insurers initially tried to resist, USAP prevailed, including over an insurer that treated the new USAP providers as out of network and arbitrated its reimbursement rates for over two years.

68. Afterward, Welsh Carson and USAP strategized how to prevent similar resistance after future acquisitions. Defendants developed a new contract clause, which they referred to as the “tuck-in clause,” to clarify that USAP’s rates would apply after an acquisition. USAP’s Vice President of Payor Contracting, Alan Glenesk, sought Regan’s approval on the drafting of this clause. USAP used its bargaining power to impose this clause on insurers moving forward.

D. Anesthesia Consultants of Dallas

69. In January 2015, USAP acquired Anesthesia Consultants of Dallas, which had twenty-one physicians and twenty-nine CRNAs. Tom Swygert, a USAP anesthesiologist in Dallas, described Anesthesia Consultants of Dallas to Bratberg and Regan as one of the practices with “the largest number of anesthesiologists with specialized skill sets in the DFW market.” If it acquired Anesthesia Consultants of Dallas, Swygert projected that USAP could “create a barrier to entry and promote our ability to garner system contracts.” Anesthesia Consultants of Dallas also had strong ties with major Dallas hospitals. These included exclusive contracts with the Methodist Dallas flagship facility and a Texas Regional Medical Center facility. Additionally, Anesthesia Consultants of Dallas served other Methodist Dallas hospitals and another nine open-staffed hospitals. USAP increased the reimbursement rates of Anesthesia Consultants of Dallas providers after it acquired the group.

E. Excel Anesthesia Consultants

70. In March 2015, USAP acquired Excel Anesthesia Consultants, which had fifty-five physicians and nineteen CRNAs after its recent merger with North Texas Anesthesia Consultants. Excel had an exclusive contract with Health Presbyterian Hospital Dallas, the second largest hospital in the Texas Health Resources system, and served more than twenty hospitals across the four major systems. USAP acquired Excel because its “broad reach and relationships across the Dallas market” would “[p]osition[] [USAP] to obtain exclusive facility contracts.” Regan called this acquisition “our most strategic move in the market next to [Anesthesia Consultants of Dallas].”

71. Furthermore, this acquisition enabled USAP to eliminate a competitor. Excel already “compete[d] directly with some of the [Pinnacle] divisions . . . within the open-staff hospitals,” and Regan feared that another group might acquire Excel to create “a 100 doc [sic] competitive practice with a strong sub specialty orientation in our backyard.” Acquiring Excel “create[d] a barrier to entry” by eliminating a possible foothold. Unsurprisingly, USAP increased the reimbursement rates of Excel providers after this acquisition.

F. Southwest Anesthesia Associates

72. USAP acquired Southwest Anesthesia Associates in December 2015. Despite being a smaller group, it had an exclusive contract with Charlton

Methodist. USAP, consistent with past practice, raised its reimbursement rates after acquiring Southwest.

G. BMW Anesthesiology and Medical City Physicians

73. In January 2016, USAP acquired two practices: BMW Anesthesiology, with nine anesthesiologists, and seven unaffiliated anesthesiologists referred to as Medical City Physicians. USAP pursued both acquisitions to increase its case coverage at Medical City Dallas from 30% to 80%. BMW had additional “strategic value due to their strong participation in leadership roles in the Dallas HCA flagship hospital[.]” Because Medical City Physicians included the newly elected chief of anesthesia, it also held “a key strategic position within Medical City and HCA.” USAP increased BMW and Medical City reimbursement rates following these acquisitions.

H. Sundance Anesthesia

74. In April 2016, USAP acquired Sundance Anesthesia, which had seven physicians and twenty-four CRNAs. It also had an exclusive contract with Texas Health Resources’ Southwest Fort Worth hospital. USAP’s Chief Operating Officer called this acquisition “a huge win, that’s a key THR site we didn’t have. Great work[!]” Once again, USAP increased Sundance’s reimbursement rates after the acquisition.

I. East Texas Anesthesiology Associates

75. In June 2016, USAP acquired East Texas Anesthesiology Associates in Tyler, Texas. The group had twenty-three physicians and eleven CRNAs.

USAP acquired the East Texas Anesthesiology Associates because it covered more than half of the cases and revenue at the East Texas Medical Center in Tyler and had a near-exclusive contract with the University of Texas Health Science Center at Tyler. After the acquisition, USAP increased East Texas Anesthesiology Associates' reimbursement rates.

J. MetroWest Anesthesia Care

76. In March 2017, USAP acquired MetroWest Anesthesia Care, which numbered fifty-one physicians and seventy-nine CRNAs. USAP singled out MetroWest as a "high-priority" target for two reasons. First, USAP's Director of Business Development worried that another large group would enter Houston and "spoil the entire market" by acquiring MetroWest—indeed, the group considered selling to Sheridan Healthcare, now Envision Physician Services, in 2014. USAP, given this concern, viewed acquiring MetroWest as a "defensive" deal to "preserve the protected market." Second, MetroWest had exclusive contracts with hospitals in the Memorial Hermann system. By 2016, that system suggested it would be "moving to a single source anesthesia provider," and USAP was concerned it would be unable to win the single provider contract over MetroWest. USAP thus

acquired MetroWest to “further expand its relationship with Memorial Hermann” without competing.

77. After the acquisition, Blue Cross reported that USAP “[a]ccounted for . . . 69% of cases and 83% of cost in Houston” and that USAP “leverag[ed] market share” to establish rates over two times higher than other Houston anesthesiologists.

K. Capitol Anesthesiology Association

78. In February 2018, USAP acquired the Capitol Anesthesiology Association. Capitol was the largest group in Austin, numbering 80 physicians and 152 CRNAs. Capitol was on USAP’s and Welsh Carson’s radar since 2013 because it had a “substantial market position in Austin”: exclusive contracts with five of the eleven hospitals in the Seton system—the largest in Austin, a presence in five more, and exclusive contracts at multiple other Austin-area hospitals. Shortly before the acquisition, USAP described Capitol as having a “[l]arge share of [a] great market in top hospital systems” in Austin with “significant organic growth for the last 3 years, although they have seen a market share decline from 75% to around 50% today.”

79. After the acquisition, USAP increased Capitol’s reimbursement rates. Regarding those increases, Capitol’s Vice President of Operations and soon-to-be USAP executive celebrated, “Awesome! Cha-ching!”

L. Amarillo Anesthesia Consultants

80. In July 2018, USAP acquired Amarillo Anesthesia, which had ten physicians and ten CRNAs. This group dominated the Amarillo market: Cigna estimated that it covered up to 85% of cases. Further, Amarillo Anesthesia Consultants' relevance extended beyond the local market. It had an exclusive contract at Baptist St. Anthony's Hospital, the largest of Amarillo's two hospitals, and an important facility in the Ardent Health System, with which USAP wanted exclusive agreements elsewhere. By acquiring Amarillo Anesthesia, USAP prevented another large anesthesia group, Metro/IPN, from acquiring Amarillo Anesthesia and gaining a foothold in Amarillo and the Ardent Health System. USAP increased Amarillo Anesthesia's reimbursement rates after the acquisition.

M. Star Anesthesia

81. In September 2019, USAP acquired San Antonio-based Star Anesthesia. With one hundred eighty-two physicians and twelve CRNAs, Star was the largest remaining independent anesthesia practice in Texas. USAP and Welsh Carson first earmarked Star as a potential acquisition in 2013 because it had exclusive contracts with the HCA co-owned Methodist San Antonio hospital system. Over time, Star became an increasingly competitive threat to USAP. Star entered the Houston market in March 2016 by acquiring the division of North Houston Anesthesiology that rejected USAP's offer in 2014. Worried about Star's

relationship with HCA, Regan decided USAP “need[ed] to do a system deal with HCA and kick these guys [i.e., Star] out of town.” USAP also attempted to acquire Star. For a while, Star resisted. It told at least one insurer that it planned to expand, and insurers such as United sought to make Star “a statewide messenger model to be a competitor against USAP.” USAP’s overtures ultimately succeeded, and it acquired Star in 2019. Afterward, USAP raised Star’s reimbursement rates.

N. Guardian Anesthesia Services

82. In January 2020, USAP acquired Guardian Anesthesia Services, which had twenty-one physicians and fifty-six CRNAs. USAP first singled out Guardian in 2013 because the group had exclusive contracts with three HCA hospitals in Houston. However, Guardian declined multiple bids from USAP. During that time, Guardian beat out USAP for an exclusive contract at HCA’s new Pearland Hospital. USAP eventually eliminated competition from Guardian by acquiring it. USAP increased Guardian’s reimbursement rates after the acquisition.

IV. MONOPOLY POWER

A. USAP Uses Its Monopoly Power to Charge Monopoly Prices.

83. USAP’s ability to control price regardless of local market dynamics offers direct evidence of its monopoly power. As one United Healthcare executive explained, “[Y]ou’ve basically taken the highest rate of all in one distinct market and then peanut butter spread that across the entire state of Texas.” USAP also

successfully imposed rate increases on insurers. According to United, USAP's rates in 2020 were "nearly 40% more expensive than the average cost of all other anesthesia providers in Texas" and as much as 110% above the statewide median. Similar increases occurred within the individual Austin, Dallas, and Houston markets and the three-MSA market. Another insured estimated that it spent approximately \$119 million on USAP anesthesia services in Texas by 2016. Changes in quality or other factors do not explain these increases—in the view of one United Healthcare executive, USAP's "quality performance is not meaningfully better than their peers."

84. USAP's price increases are consistent with academic literature studying the impact of private equity ownership on healthcare costs. One study found that contracting with a private equity-backed physician management company increases costs for anesthesia services at outpatient facilities by approximately 26% compared to facilities that contract with independent providers.⁸ The study attributed 10 percentage points of that increase directly to private equity ownership alone.⁹ This causal relationship holds true across practice

⁸ Ambar La Forgia et al., *Association of Physician Management Companies and Private Equity Investment With Commercial Health Care Prices Paid to Anesthesia Practitioners*, 182 JAMA Internal Med. 396, 410 (2022).

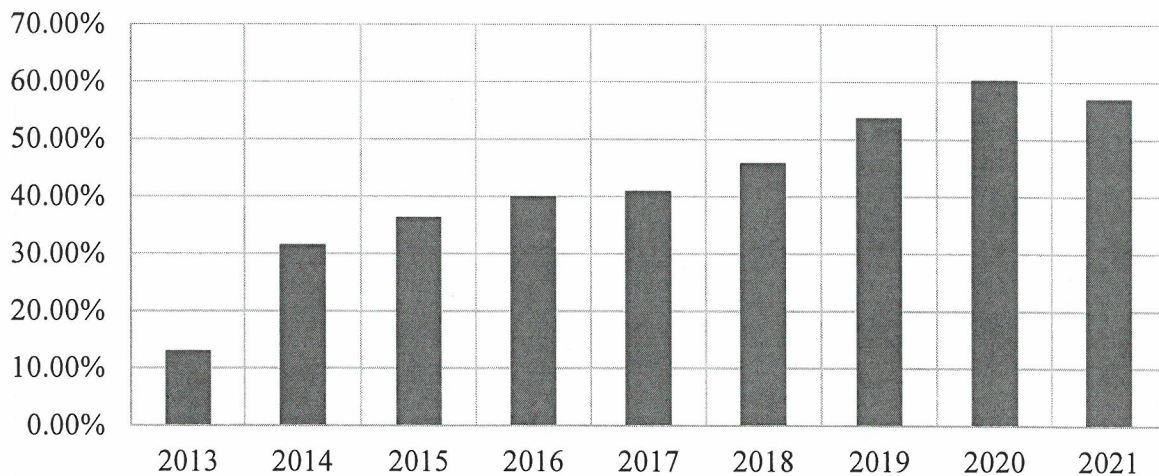
⁹ *Id.*

areas—economists have also found private equity acquisitions to be associated with price increases in dermatology, gastroenterology, and ophthalmology.¹⁰

B. Market Share and Concentration Data Also Evince USAP's Monopoly Power.

85. USAP's dominant market share also demonstrates its monopoly power in the relevant markets. To start, USAP's acquisitions amassed at least 813 anesthesiologists in the three-MSA market and 1,028 anesthesiologists across Texas. Similarly, those acquisitions covered at least 765 CRNAs in Austin, Dallas, and Houston and 798 total across Texas. As a result, in 2019, USAP finally achieved Texas market share in excess of 50%, reaching 60% in 2020. As of 2021, USAP had 57% market share statewide by revenue.

**Figure 1: USAP Statewide Market Share
(By Revenue)**

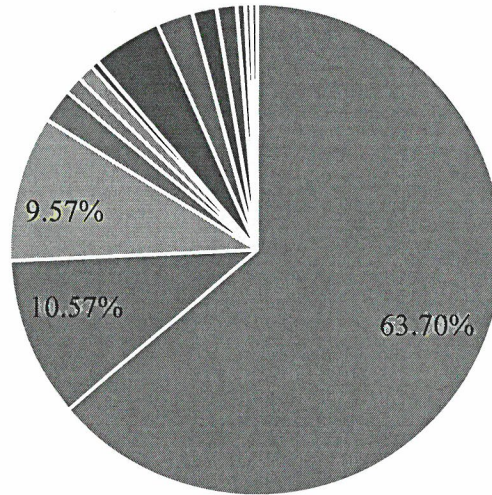


¹⁰ Yashaswini Singh et al., *Association of private equity acquisition of physician practices with changes in health care spending*, JAMA Health F., Sept. 2, 2022, at 9.

86. USAP also has a dominant share within the three-MSA market. By case volume, USAP has approximately 64% of that market and is six times larger than the next provider. Figure 2 shows USAP's case volume share relative to other groups.

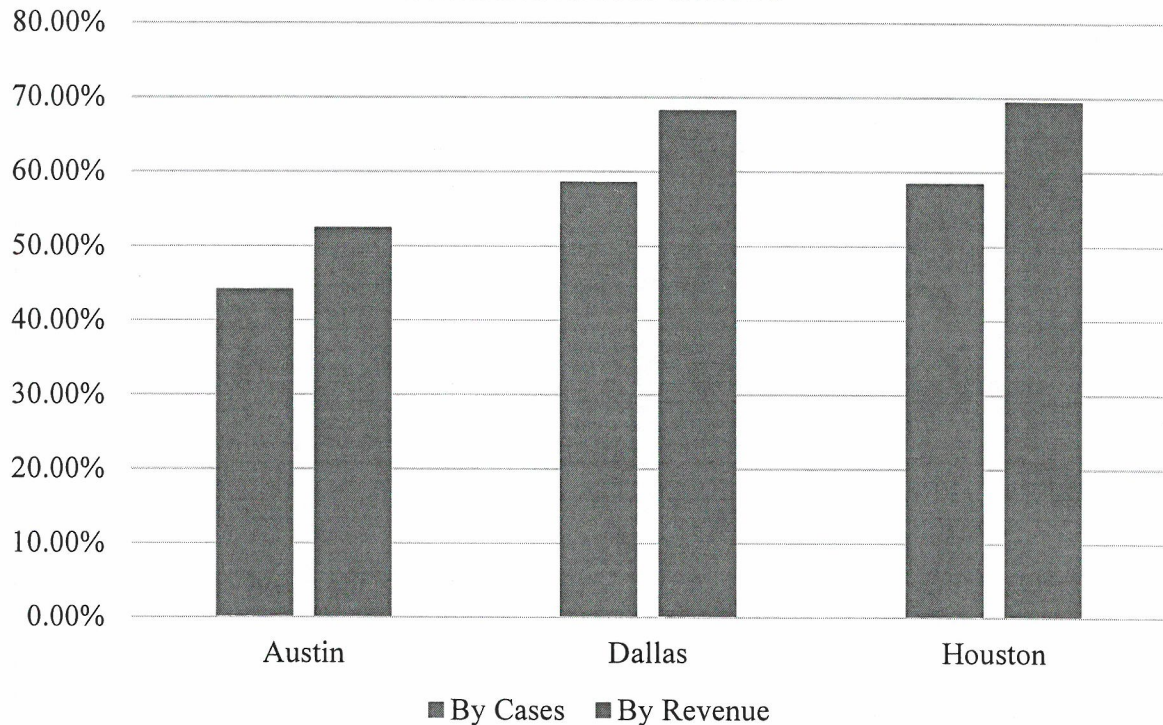
87. This measure may *understate* USAP's market share because it includes commercially insured hospital-only anesthesia services provided at academic medical centers by professors, residents, and fellows. Academic anesthesiologists may not be perfect substitutes for nearby non-academic providers due to institutional constraints on service. Payors therefore do not necessarily consider them when evaluating provider dominance. For example, one insurer estimated that in 2020, USAP controlled "over 80% of anesthesia in Houston. In DFW, similar dominance" excluding academic groups.

**Figure 2: Austin-Dallas-Houston Combined Market Shares
(2021, By Cases)**



- | | |
|---|---------------------------------------|
| ■ U.S. Anesthesia Partners | ■ UT Physicians |
| ■ North American Partners in Anesthesia | ■ Texans Anesthesia Associates |
| ■ Compass Anesthesia Providers | ■ Baylor College of Medicine |
| ■ Best Choice Anesthesia & Pain | ■ Metropolitan Anesthesia Consultants |
| ■ NorthStar Anesthesia | ■ Anesthesia Partners of Dallas |
| ■ Allen Anesthesia Associates | ■ Noble Anesthesia Partners |
| ■ Scott & White Physicians | ■ Westlake Anesthesia |

Figure 4: USAP Share in Individual Metropolitan Statistical Areas in 2021



90. The Herfindahl-Hirschman Index (“HHI”) also demonstrates that the relevant markets are highly concentrated. Courts and regulators rely on HHI for evaluation of market concentration and of the predicted effects of changes in market concentration. To calculate HHI, the percent-denominated market shares of each participant are squared and summed. A perfectly monopolized market, in which a single participant holds a 100% market share, has an HHI of 10,000 (as $100^2 = 10,000$), while a perfectly competitive market in which every participant holds negligible market share (effectively 0%) has an HHI of 0. A merger resulting in an increase of more than 100 and a total HHI of more than 1,800 will

be regarded as creating a “highly concentrated market” and as presumptively anticompetitive.

91. Although information to calculate HHI for Texas is not publically available, USAP’s market share alone means that the total is greater than 1,849 by case volume and 3,249 by revenue. Total HHI for the Austin-Dallas-Houston market is 4,299 by case volume and 5,452 by revenue. Respectively, the three-MSA market HHI figures more than double and triple the threshold for highly concentrated markets.

92. Increasing HHI in the individual MSAs also demonstrates USAP’s monopoly. USAP’s acquisitions increased concentration above a total HHI of 1800 in each MSA with two or more acquisitions. Additionally, eight acquisitions individually resulted in an HHI of over 100 in an MSA: North Houston—Kingwood Division, Anesthesia Consultants of Dallas, Excel, Southwest Associates, Sundance, MetroWest, Capitol, and Guardian.

93. The figures below show HHIs after USAP’s acquisitions in each geography.

Figure 5: Post-Acquisition Anesthesiology Concentration in the Austin Metropolitan Statistical Area

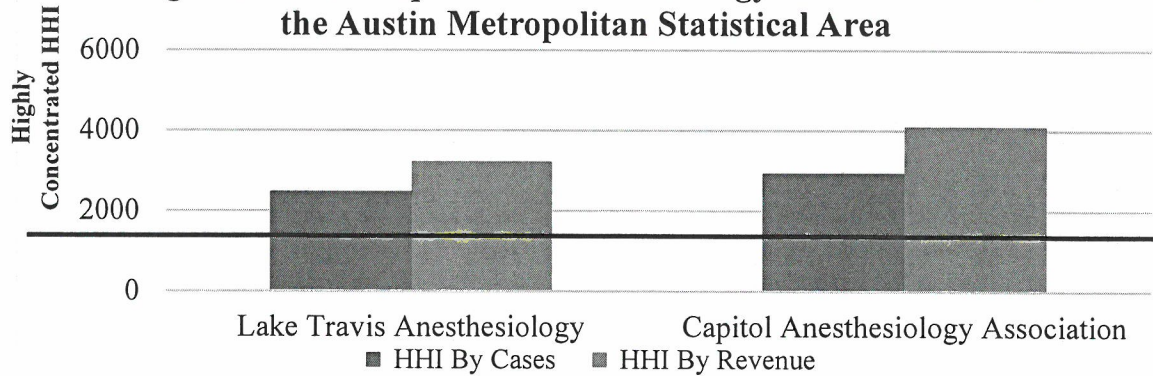


Figure 6: Post-Acquisition Anesthesiology Concentration in the Dallas Metropolitan Statistical Area

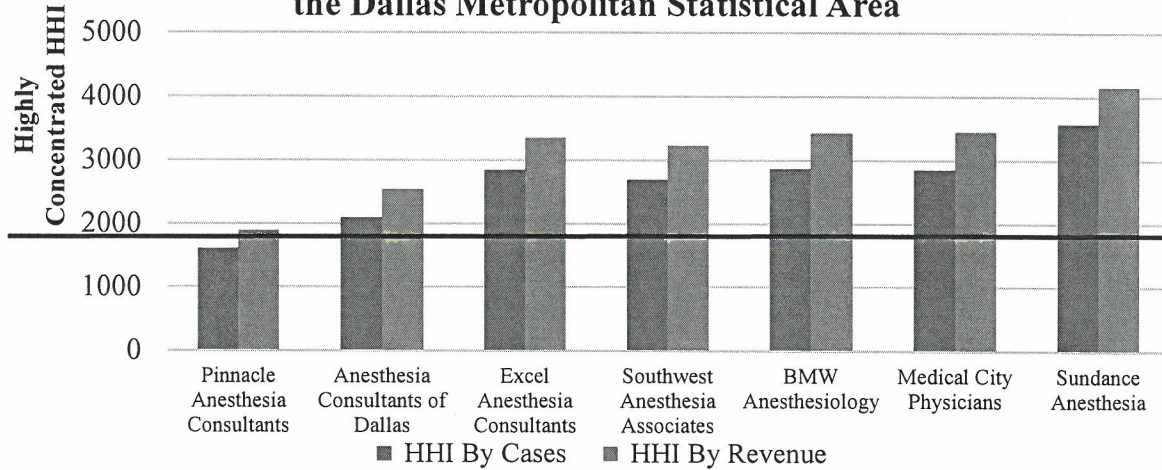
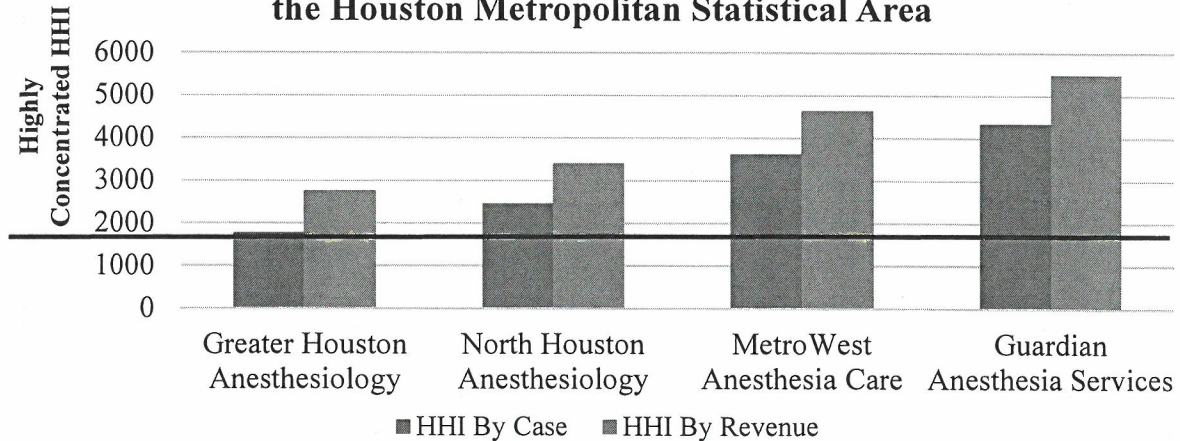


Figure 7: Post-Acquisition Anesthesiology Concentration in the Houston Metropolitan Statistical Area



94. Although share and concentration in any one MSA provide additional evidence, they systematically *understate* USAP's current monopoly power, because these measures fail to account for the fact that healthcare providers negotiate reimbursement rates with insurers that must offer plans and maintain networks that cover members multiple cities. In other words, insurers have less bargaining power when negotiating with healthcare providers that cover multiple geographies. USAP amassed additional monopoly power in Austin, Dallas, and Houston each time it acquired a Texas anesthesia practice, *regardless of where the acquisition occurred*.

95. USAP's acquisitions of Pinnacle and Amarillo Anesthesia demonstrate this phenomenon. As USAP's first acquisitions in Dallas and Amarillo, neither meaningfully increased concentration in those MSAs. However, USAP still successfully negotiated rate increases with Blue Cross in those MSAs after those acquisitions because of its presence throughout Texas. Greater Houston Anesthesiology and Amarillo Anesthesia had previously failed to negotiate increases when they each only had a strong presence in one market.

C. USAP's Monopoly Power Is Durable and Resistant to Competition.

96. New competition does not threaten USAP. Instead, USAP's market share has only increased over time despite its regular price increases. In 2015, a

Welsh Carson associate bragged to lenders that USAP's contract retention rate had "effectively been 100%."

97. Potential providers cannot quickly enter the market. Individuals must undergo years of education and training to become an anesthesiologist or CRNA. Additionally, providers must obtain a license from a state regulatory board. Nor can anesthesia providers easily increase their volume of cases. Providing adequate medical care to patients necessarily caps the output of an anesthesiologist or CRNA. Furthermore, demand for anesthesiology is highly price-inelastic, like most non-elective healthcare. In other words, a new entrant with lower prices could not hope to generate and capture new demand for anesthesiology; demand for anesthesiology services depends on doctors' collective medical decisions about which procedures to recommend to patients, not the price of anesthesia.

98. Widespread use—and USAP's high number—of exclusive contracts poses another barrier to entry. To start, those contracts are "sticky." Hospitals rarely change providers in part because payors, not hospitals, pay for anesthesia. To compete for those contracts, an anesthesiology group must be large enough to staff a hospital. Establishing such a group would require recruiting providers or acquiring multiple independent practices. USAP has made these already difficult tasks near impossible. Its contracts with providers include a carrot and stick to prevent attrition: Equity vesting rules incentivize providers to stay with USAP or

lose out financially, and non-compete clauses prevent providers from leaving to join nearby anesthesia groups.

D. USAP's Monopolization Sacrificed Quality.

99. Private equity consolidation is inherently at odds with high quality healthcare. Firms like Welsh Carson typically aim to exit investments within three to seven years and earn an annual return of at least 20%.¹¹ Academics have observed that the private equity model sacrifices quality of care to generate short-term returns for investors: The “rollup strategy, where a large platform practice is acquired and additional practices are ‘added on,’ gives the firm increased market power in a specialty or geographic region. . . . Ultimately, in such settings, consolidation leads to higher costs and lower quality care.”¹²

100. Quality Studies. Quantitative studies have found that private equity ownership lowered quality of care in nursing homes, dialysis provision, and hospitals.¹³ In each setting, staffing levels suffered. Those outcomes are the

¹¹ Sajith Matthews & Renato Roxas, *Private equity and its effect on patients: a window into the future*, 23 Int'l J. Health Econ. Mgmt. 673, 674 (2023).

¹² *Id.* at 675.

¹³ Charlene Harrington et al., *Nurse Staffing and Deficiencies in the Largest For-Profit Nursing Home Chains and Chains Owned By Private Equity Companies*, 47 Health Serv. Res. 106, 118 (2011); Thomas G. Wollmann, *How to Get Away with Merger: Stealth Consolidation and Its Real Effects on US Healthcare* 34 (Nat'l Bureau of Econ. Rsch., Working Paper No. 27274, 2021); Joseph Bruch et al., *Characteristics of Private Equity-Owned Hospitals in 2018*, 174 Ann. Internal Med. 277, 278 (2021).

natural consequence of the private equity model—the “focus on generating cash flow and exiting the investment in a five-year window puts pressure on doctors to increase volumes of patients seen per day”¹⁴

101. Welsh Carson and USAP are no different. Defendants’ singular focus on amassing market share degraded the quality of hospital-only anesthesia services. According to a former USAP anesthesiologist in Colorado, “the firm’s relentless drive to grow burned out physicians which, he said, detracted from quality.”¹⁵

102. Real Life Consequences. USAP’s patients have born the consequences. For instance, in October 2022, a Dallas jury found that a USAP anesthesiologist and CRNA’s negligence caused a twenty-seven-year old patient, Carlos David Castro Rojas, to suffer a catastrophic brain injury.¹⁶ According to the allegations of his complaint, Rojas broke his shin when he fell off a ladder at his job hanging Christmas lights.¹⁷ To fix the break, he underwent a surgery at Baylor

¹⁴ Eileen Appelbaum, *Private Equity Buyouts in Healthcare: Who Wins, Who Loses?* 3 (Inst. for New Econ. Thinking, Working Paper No. 118, 2020).

¹⁵ Peter Whoriskey, *Financiers bought up anesthesia practices, then raised prices*, Wash. Post (June 29, 2023), <https://www.washingtonpost.com/business/2023/06/29/private-equity-medical-practices-raise-prices/>.

¹⁶ Mark Smith, *Dallas jury awards \$21M to patient who was put under anesthesia and suffered brain injury*, WFAA (Oct. 31, 2022), <https://www.wfaa.com/article/news/local/investigates/dallas-jury-awards-21m-to-patient-who-suffered-brain-injury/287-9f1c5fab-fb69-40c4-bc64-17b5f59a789a>.

¹⁷ Pl.’s First Am. Pet. ¶¶ 24-25, *Graterol v Martin*, No. CC-19-05599-E (Dallas

University Medical Center requiring general anesthesia.¹⁸ A USAP anesthesiologist and CRNA treated Rojas.¹⁹ His brain suffered a severe lack of oxygen while under anesthesia, and Rojas was unresponsive for more than a week following the procedure.²⁰ Unfortunately, he never recovered. Rojas is still in a vegetative state, unable to communicate, walk, or feed himself, and requires twenty-four-hour care.²¹ Rojas's mother, Wilda Jenniffer Rojas Graterol, had to move to Dallas and dedicate her life to caring for her incapacitated son.²² Rojas's USAP anesthesiologist was never in the operating room during his surgery, possibly because they had to supervise three other CRNAs in different operating rooms at the same time.²³ What is more, no one told Rojas he had the right to choose to have an anesthesiologist treat him instead of a CRNA or explained the difference between those providers.²⁴ His lawsuit revealed that to "make more money, USAP and [Baylor] keep patients in the dark and place patients at greater risk by pushing the CRNA model on patients."²⁵

Cnty. Ct. July 9, 2021).

¹⁸ *Id.* at ¶¶ 25-27.

¹⁹ *Id.* at ¶ 33.

²⁰ *Id.* at ¶¶ 55, 61.

²¹ *Id.* at ¶ 62.

²² *Id.*

²³ *Id.*; Smith, *supra* note 16.

²⁴ Graterol, *supra* note 17, at ¶ 32.

²⁵ *Id.*

103. Rojas is not the only patient injured by USAP. Since 2012, another fifty patients or family members have filed malpractice cases against USAP in Texas.²⁶

104. Those individuals include Wayneka Wallace and her child J.W.²⁷ According to the complaint, a USAP doctor administered an epidural to Wallace at Texas Health Arlington Memorial Hospital after she went into labor.²⁸ That anesthesiologist then immediately left her room.²⁹ Afterwards, her other providers laid Wallace flat on her back.³⁰ That position decreased blood flow to Wallace's baby and caused fetal distress.³¹ Wallace's doctors conducted an emergency cesarean section, but it was too late. J.W. had already suffered brain damage.³²

105. USAP's providers insufficiently dosed another patient, Van Wooten, with muscle relaxant during a kidney transplant procedure according to his complaint.³³ As a result, Wooten moved during the procedure, ripping the graft

²⁶ See Ex. 1.

²⁷ Pl.'s Original Pet., *Wallace v. Miller*, No. 236-331336-22 (Tarrant Cnty. Ct. July 10, 2021).

²⁸ *Id.* at ¶¶ 6.01-6.09.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ Pl.'s Original Pet. ¶¶ 12-13, 19, *Wooten v. Hyatt*, No. 342-423058-21 (Tarrant Cnty. Ct. Mar. 15, 2021).

connecting the transplant kidney.³⁴ Although Wooten’s surgeon stopped the bleeding, it was too risky to place the transplant kidney a second time because it had been warm and without blood flow for too long.³⁵ Based on the pleadings, it appears that USAP’s anesthesiologist was once again absent; the complaint alleges that the *surgeon* had to instruct the USAP CRNA to increase the muscle relaxer dose after Wooten started to move.³⁶

E. Welsh Carson and USAP’s Scheme Did Not Create Efficiencies That Benefited Patients or Payors.

106. Welsh Carson and USAP’s internal documents make clear their strategy hinged on capturing dominant market share to create “[n]egotiating leverage with commercial payors” and not efficiencies that would be passed on to payors and patients in the form of costs or higher quality. Indeed, private equity consolidation offers virtually no unique efficiencies. Firms like Welsh Carson have little to no medical expertise. Providers can also obtain potential efficiencies associated with economics of scale without selling to a physician management organization—for example, by joining a group purchasing organization to lower input costs or contracting with a back-office administrator. Furthermore, anesthesiology has relatively low overhead costs compared to other practices, making the opportunities for “efficiencies” even sparser. Anesthesiologists, for

³⁴ *Id.*

³⁵ *Id.* at ¶ 14.

³⁶ *Id.* at ¶ 13.

instance, rarely rent or own office space since they treat patients at hospitals or other facilities.

107. Instead, the upside for private equity firms consists of creating market power, as discussed above, and accounting arbitrage. “Smaller acquisitions are purchased at 2-4x EBITDA [earnings before interest, taxes, depreciation and amortization], while platform practices are purchased at 8-12x EBITDA. Once the practices are merged, the smaller practice’s valuation increases and becomes that of the larger practice (8-12x EBITDA).”³⁷ Private equity firms are thus able to profit from consolidation without creating meaningful or pro-competitive efficiencies. Welsh Carson profited this way in 2017, when it sold approximately 50% of its stake in USAP to Berkshire Partners and GIC Capital. And to the extent any of these acquisitions did reduce any overhead, the resulting concentration in the market guaranteed that the benefit would be reaped by USAP, as opposed to patients or payors.

F. Welsh Carson and USAP’s Violation of the Antitrust Laws Has Had a Continuing Impact.

108. Defendants’ anticompetitive anesthesia consolidation scheme began in 2012 when they formed USAP by acquiring Greater Houston Anesthesiology. Defendants furthered their scheme by acquiring at least another fifteen anesthesia physician groups in Texas. Most recently, USAP acquired Guardian Anesthesia

³⁷ Matthews, *supra* note 11, at 674.

Services in January of 2020. As explained above, each acquisition built USAP's pricing power by giving USAP additional negotiating leverage with insurers. In 2019, USAP finally achieved 50% share in Texas, rising to 60% in 2020. The impact of the scheme continues to be felt in every anesthesia reimbursement for which USAP receives higher rates than it would have absent its consolidation.

V. USAP ALSO AGREED TO FIX PRICES WITH AT LEAST THREE GROUPS.

109. When Welsh Carson and USAP could not buy their competitors, they instead sought to “work something out that would be mutually beneficial and acceptable to everyone.” Defendants implemented price-fixing agreements with at least three independent anesthesia groups in Houston and Dallas and tried to reach similar agreements with others. In each agreement, another group assigned USAP authority to bill and receive reimbursements for hospital-only anesthesia services provided by their physicians. USAP used that authority to charge payors its higher rates.

110. USAP's executives were aware of these agreements' illicit nature. One executive remarked that it “seems odd from a compliance standpoint” for USAP to bill for services provided by another group and “keep[] the revenue.” USAP's Vice President of Payor Relations was concerned they “might possibly compromise” USAP's obligation to insurers “due to compliance issues related to pass through billing.”

A. USAP's Agreement with Methodist Hospital Physician Organization

111. When USAP acquired Greater Houston Anesthesiology, it inherited a pre-existing price-fixing agreement between Greater Houston Anesthesiology and Methodist Hospital Physician Organization, a non-profit anesthesia group associated with the Houston Methodist Hospital and Weill Cornell School of Medicine. As an academic group, it did not offer an acquisition target for USAP. For example, one academic group explained that it “d[id] not view USAP employment as a viable option.”

112. In July 2005, Greater Houston Anesthesiology had agreed to retain Methodist's anesthesia providers to serve Houston Methodist Hospital. Under that contract, “GHA will bill and collect, in the name of GHA and using GHA provider numbers, for Services furnished by” Methodist's providers. In exchange, Methodist assigned to Greater Houston Anesthesiology authority to bill and receive payments for those services. Greater Houston Anesthesiology used its billing authority to charge payors higher reimbursement rates for Methodist's services.

113. Greater Houston Anesthesiology used that contract to secure an exclusive contract with the Houston Methodist Hospital. That exclusive contract required it to “provide seamless Anesthesia Services with TMH[PO] physicians”

and retain “anesthesiologists employed by TMHPO, including, but not limited to cardiovascular anesthesiologists” to serve the hospital.

114. Since acquiring Greater Houston Anesthesiology, USAP has continued to set Methodist Hospital Physician’s reimbursement rates and bill payors at that higher rate. The pricing authority USAP received from this agreement was unnecessary; USAP could have provided administrative services without the authority to determine a competitor’s prices and has done so at least once. Because of this price-fixing agreement, Plaintiffs and the Class paid more than they otherwise would have for hospital-only anesthesia services.

B. USAP’s Agreement with Dallas Anesthesiology Associates

115. When USAP acquired Pinnacle, it inherited a pre-existing price-fixing agreement that Pinnacle had entered into with Dallas Anesthesiology Associates, an independent group with twenty providers.

116. In October 2008, Pinnacle won an exclusive contract to provide anesthesia services to Baylor University Medical Center. A condition of that contract, however, was that Pinnacle would staff the hospital “together with Dallas Anesthesia [sic] Associates,” which had a strong relationship with the hospital. To fulfill that condition, Pinnacle made an agreement with Dallas Anesthesiology Associates. In exchange for providing anesthesia services at Baylor University Medical Center, Dallas Anesthesiology Associates agreed that “Pinnacle shall bill

and collect, or cause to be billed and collected” reimbursements for those services using its name and tax identification number. Dallas Anesthesiology Associates also assigned “all of [their] rights and interest in receiving payment” to Pinnacle. Under that agreement, Pinnacle set the rates it charged payors for anesthesia services provided by Dallas Anesthesiology Associates.

117. Since acquiring Pinnacle, USAP has continued to set Dallas Anesthesiology Associates’ reimbursement rates and bill payors at that higher rate for services that the other group provided at Baylor University Medical Center. The pricing authority USAP received from this agreement was unnecessary; USAP could have provided administrative services without the authority to determine a competitor’s prices and has done so at least once. USAP “collects a nice margin on the business” because it compensates Dallas Anesthesiology Associates based on that group’s lower rate.

118. Pinnacle and USAP kept patients and payors in the dark. Pinnacle, and later USAP, agreed to bill “patients in the service provider Physician’s name” and “provide a telephone number that will be provided on the billing documents. Calls received at the telephone number will be answered as ‘Dallas Anesthesiology Associates’ by Pinnacle.” Because of this price-fixing agreement, Plaintiffs and the Class paid more than they otherwise would for hospital-only anesthesia services.

119. This agreement also enabled USAP to develop a more substantial presence at an important Houston hospital system, thus growing its negotiating leverage with insurers and cementing USAP's monopoly power.

C. USAP's Agreement with Baylor College of Medicine

120. In October 2013, USAP competed for St. Luke's Health with an academic group of fifty anesthesiologists affiliated with Baylor College of Medicine in Houston. USAP hired Stax to assess that group. Ultimately, it was not an attractive acquisition target—the group would lose its valuable affiliation with Baylor College of Medicine if USAP acquired it. Welsh Carson's Regan proposed a different solution: “[I]f Baylor is really pushing for a piece of the anesthesia, get us in a room with them. Maybe we could work something out that would be mutually beneficial and acceptable to everyone.”

121. That solution came to fruition. On October 23, 2014, USAP and Baylor College of Medicine entered into an “Anesthesia Services Collaboration Agreement.” Baylor College of Medicine would provide Baylor St. Luke's anesthesia services, and USAP would bill for those services—at higher rates—as if it were the provider and receive all resulting payments. Because of this price-fixing agreement, Plaintiffs and the Class paid more than they otherwise would have for hospital-only anesthesia services. USAP faithfully executed this agreement until its termination in 2020. The pricing authority USAP received

from this agreement was unnecessary; USAP could have provided administrative services without the authority to determine a competitor's prices and has done so at least once.

122. This agreement also enabled USAP to develop a more substantial presence at an important Houston hospital system, thus growing its negotiating leverage with insurers and cementing USAP's monopoly power.

D. USAP's Attempted Agreement with a University of Texas Group

123. USAP also attempted to negotiate a price-fixing agreement with a group of eighty-four anesthesiologists affiliated with the University of Texas. In 2013, USAP first identified an "alliance with UT" as a "significant rate opportunity." The two parties negotiated in June 2014. Term sheets exchanged by the parties suggested that the University of Texas group would assign USAP its exclusive contract with Texas Medical Center. In exchange, USAP would hire the group's physicians as contractors to serve the hospital and then bill payors at USAP's reimbursement rates. USAP and the University of Texas group resumed negotiations in 2020 without success.

124. USAP also attempted to reach a similar agreement with Guardian Anesthesia Service before it acquired that company.

VI. THE FEDERAL TRADE COMMISSION FILES SUIT.

125. On September 21, 2023, the Federal Trade Commission (“FTC”) filed suit against Welsh Carson and USAP in the United States District Court for the Southern District of Texas. The FTC complaint alleges substantially the same misconduct as alleged by Plaintiffs here. It supports those allegations with non-public information about the USAP’s acquisitions, reimbursement rates, and anticompetitive agreements. The FTC seeks a permanent injunction and other equitable relief.

VII. USAP ALSO AGREED TO ALLOCATE A MARKET.

126. The FTC complaint also alleges that, in addition to its anesthesiology consolidation strategy and price-fixing agreements, USAP agreed to allocate a market with a potential rival and that the agreement “had the purpose and effect of keeping [redacted]—a significant potential competitor—out of the [redacted] market for anesthesia services.”³⁸ Because of this market allocation agreement, Plaintiffs and the Class paid more than they otherwise would have for hospital-only anesthesia services.

³⁸ Compl. at ¶ 215, *Fed. Trade Comm’n v. U.S. Anesthesia Partners, Inc.*, No. 4:23-cv-03560 (S.D. Tex. Sept. 21, 2023), ECF No. 1.

CLASS ACTION ALLEGATIONS

127. Plaintiffs bring this action as representatives of a class under Rule 23, Federal Rules of Civil Procedure § 23(b)(2). Plaintiffs also bring this action as representatives of a class seeking damages under Rule 23(b)(3).

128. The Class is defined as follows:

All entities, not including natural persons, who, on or after four years prior to the filing of this complaint (“the Class Period”), paid for hospital-only anesthesia services provided in Texas by USAP or its co-conspirators.

129. The following persons and claims are excluded from the Class:

- a. Defendants, including their officers, directors, employees, subsidiaries, and affiliates; and
- b. Federal and state government entities.

A. Numerosity (Rule 23(a)(1))

130. The Class is so numerous that joinder of all persons in the class is impracticable. At minimum, thousands of entities self-fund health insurance for their employees or members in Texas, in addition to private insurance companies.

B. Commonality (Rule 23(a)(2))

131. There are common questions of law and fact affecting the rights of the members of the Class, including, without limitation:

132. Whether USAP's acquisitions substantially lessened competition or tended to create a monopoly in the commercially insured hospital-only anesthesia service in the Austin, Dallas, and Houston; the three-MSA; and Texas markets;

133. The definition of the relevant markets and whether Defendants wielded pricing power in those markets;

134. Whether the acquisitions or agreements had anticompetitive effects in the relevant markets;

135. Whether prices charged by USAP and its co-conspirators for hospital-only anesthesia services were artificially inflated as a result of the acquisitions or agreement;

136. Whether, and to what extent, Defendants' conduct caused injury to Plaintiffs and the Class;

137. Whether the alleged conduct violated the Clayton Act;

138. Whether the alleged conduct violated the Sherman Act;

139. What injunctive and other equitable relief is appropriate; and

140. What class-wide measure of damages is appropriate.

C. Typicality (Rule 23(a)(3))

141. The claims of the named class representatives are typical of the claims of the proposed Class. Plaintiffs and all members of the proposed Class sustained the same or similar injuries arising out of and caused by Defendants' common

course of conduct in violation of applicable Federal law, in that each Plaintiff and Class member paid artificially inflated prices as a result of the acquisitions and agreements.

D. Adequacy (Rule 23(a)(4) and 23(g))

142. The named representatives will fairly and adequately protect the interests of the proposed Class. There are no conflicts between the named Class representatives and the other members of the proposed Class.

E. Rule 23(b)(2)

143. This action is maintainable as a class action under Rule 23(b)(2) because Defendants have acted or refused to act on grounds generally applicable to the Class, thereby making appropriate, injunctive, and other equitable relief in favor of the Class.

F. Rule 23(b)(3)

144. Questions of law and fact common to the Class members, including legal and factual issues relating to violation and damages, predominate over any questions that may affect only individual Class members because Defendants have acted on grounds generally applicable to the entire Class.

145. Class treatment offers a superior method for the fair and efficient adjudication of the controversy because, among other things, class treatment will permit a large number of similarly situated persons to prosecute their common claims in a similar forum simultaneously, efficiently, and without the unnecessary

duplication of evidence, effort, and expense that numerous individual actions would engender. The benefits of proceeding through the class mechanism, including providing injured persons and entities with a means of obtaining redress on claims that might not be practicable to pursue individually, substantially outweigh any difficulties that may arise in managing this class action.

VIOLATIONS

COUNT ONE

Monopolization

Section Two of the Sherman Act

146. Plaintiffs incorporate the above paragraphs as though fully set forth herein.

147. Defendants' anticompetitive conduct set forth in this Complaint has violated Section Two of the Sherman Act. *See* 15 U.S.C. § 2.

148. USAP has monopoly power in the Austin, Dallas, and Houston; three-MSA; and Texas markets for commercially insured hospital-only anesthesia services.

149. Welsh Carson and USAP willfully acquired that monopoly by engaging in anticompetitive acquisitions of at least sixteen anesthesiology groups across Texas. With each acquisition, USAP's negotiating leverage with insurers grew and enabled it to charge supra-competitive prices for services in the Austin, Dallas, and Houston; three-MSA; and Texas markets, just as Defendants intended.

150. Defendants' monopolization of the Austin, Dallas, and Houston; three-MSA; and Texas markets for commercially insured hospital-only anesthesia services occurred in or affected interstate commerce.

151. As a result of Defendants' monopolization, Plaintiffs and the Proposed Class have suffered, and will continue to suffer, an antitrust injury because they paid, and will continue to pay, higher prices for hospital-only anesthesia service than they otherwise would have.

152. Pursuant to Section Four of the Clayton Act, 15 U.S.C. § 15, Plaintiffs seek to recover treble damages and other relief prayed for below.

COUNT TWO

Unlawful Acquisition **Section Seven of the Clayton Act**

153. Plaintiffs incorporate the above paragraphs as though fully set forth herein.

154. Defendants' anticompetitive conduct set forth in this Complaint has violated Section Seven of the Clayton Act. *See* 15 U.S.C. § 18.

155. USAP and Welsh Carson devised a strategy to substantially lessen competition for hospital-only anesthesia in the Austin, Dallas, and Houston; three-MSA; and Texas markets. Defendants executed that strategy by acquiring at least sixteen anesthesiology groups across Texas. Those acquisitions were horizontal—USAP competed with the acquired practices in the Austin, Dallas, and Houston;

three-MSA; and Texas markets for hospital-only anesthesia. With each acquisition, USAP's negotiating leverage with insurers grew and enabled it to charge supra-competitive prices for services in the Austin, Dallas, and Houston; three-MSA; and Texas markets, just as Defendants intended. This substantially lessened competition for anesthesia services in those markets.

156. The threat of new entry has not prevented Defendants from substantially lessening competition because significant barriers to entry exist.

157. Defendants' strategy to substantially lessen competition in the Austin, Dallas, and Houston; three-MSA; and Texas markets for commercially insured hospital-only anesthesia services occurred in or affected interstate commerce.

158. As a result of Defendants' several anticompetitive acquisitions, Plaintiffs and the Proposed Class have suffered, and will continue to suffer, an antitrust injury because they paid, and will continue to pay, higher prices for hospital-only anesthesia service than they otherwise would have.

159. Pursuant to Section Four of the Clayton Act, 15 U.S.C. § 15, Plaintiffs seek to recover treble damages and other relief prayed for below.

COUNT THREE

Conspiracy to Monopolize **Section Two of the Sherman Act**

160. Plaintiffs incorporate the above paragraphs as though fully set forth herein.

161. Defendants' conspiracy to monopolize commercially insured hospital-only anesthesia services in the Austin, Dallas, and Houston; three-MSA; and Texas markets set forth in this Complaint has violated Section Two of the Sherman Act. *See* 15 U.S.C. § 2.

162. USAP and Welsh Carson knowingly entered into an agreement, understanding, or conspiracy to monopolize commercially insured hospital-only anesthesia services in the Austin, Dallas, and Houston; three-MSA; and Texas markets. Defendants committed numerous overt acts in furtherance of this conspiracy and had the specific intent to obtain monopoly power for USAP.

163. USAP and Welsh Carson's conspiracy to monopolize commercially insured hospital-only anesthesia services in the Austin, Dallas, and Houston; three-MSA; and Texas markets occurred in or has had an effect on interstate commerce.

164. Neither USAP nor Welsh Carson has withdrawn from their conspiracy to monopolize the commercially insured hospital-only anesthesia services in the Austin, Dallas, and Houston; three-MSA; and Texas markets.

165. As a result of Defendants' conspiracy to monopolize, Plaintiffs and the Proposed Class have suffered, and will continue to suffer, an antitrust injury because they paid, and will continue to pay, higher prices for hospital-only anesthesia service than they otherwise would have.

166. Pursuant to Section Four of the Clayton Act, 15 U.S.C. § 15, Plaintiffs seek to recover treble damages and other relief prayed for below.

COUNT FOUR

Attempted Monopolization
Section Two of the Sherman Act

167. Plaintiffs incorporate the above paragraphs as though fully set forth herein.

168. Defendants' anticompetitive conduct set forth in this Complaint has violated Section Two of the Sherman Act. *See* 15 U.S.C. § 2.

169. Defendants attempted to monopolize the Austin, Dallas, and Houston; three-MSA; and Texas markets for commercially insured hospital-only anesthesia services.

170. Defendants attempted to monopolize these markets by engaging in anticompetitive acquisitions of at least sixteen anesthesiology groups across Texas. With each acquisition, Defendants intended to increase USAP's negotiating leverage with insurers so it could charge supra-competitive prices.

171. Defendants had the specific intent to achieve monopoly power for USAP in the Austin, Dallas, and Houston; three-MSA; and Texas markets for commercially insured hospital-only anesthesia services.

172. There was a dangerous probability that the Defendants would achieve their goal of obtaining monopoly power for USAP in those markets for commercially insured hospital-only anesthesia services.

173. Defendants' attempt to monopolize the commercially insured hospital-only anesthesia services in the Austin, Dallas, and Houston; three-MSA; and Texas markets occurred in or had an effect on interstate commerce.

174. As a result of Defendants' attempted monopolization, Plaintiffs and the Proposed Class have suffered, and will continue to suffer, an antitrust injury because they paid, and will continue to pay, higher prices for hospital-only anesthesia service than they otherwise would have.

175. Pursuant to Section Four of the Clayton Act, 15 U.S.C. § 15, Plaintiffs seek to recover treble damages and other relief prayed for below.

COUNT FIVE

Horizontal Agreements to Fix Prices **Section One of the Sherman Act**

176. Plaintiffs incorporate the above paragraphs as though fully set forth herein.

177. Defendants' anticompetitive conduct set forth in this Complaint has violated Section One of the Sherman Act. *See* 15 U.S.C. § 1.

178. Defendants' agreements to fix prices with Methodist Hospital Physician Organization, Dallas Anesthesiology Associates, and the Baylor College

of Medicine had the purpose and effect of restraining competition in the Austin, Dallas, and Houston; three-MSA; and Texas markets for commercially insured hospital-only anesthesia services. By entering or maintaining these agreements, Defendants were able to profitably maintain prices in the relevant market substantially above what they would have been able to charge absent the agreements.

179. During the agreements, USAP had, and will continue to have, substantial market power in the Austin, Dallas, and Houston; three-MSA; and Texas markets for commercially insured hospital-only anesthesia services.

180. As a result of Defendants' agreements to fix prices, Plaintiffs and the Proposed Class have suffered, and will continue to suffer, an antitrust injury because they paid, and will continue to pay, higher prices for hospital-only anesthesia services than they otherwise would have.

181. Defendants' agreement occurred in or had an effect on interstate commerce.

182. Defendants did not engage in these agreements for any pro-competitive purpose. Nor do Defendants' agreements have any pro-competitive effects. The agreements' actual and likely anticompetitive effects outweigh any arguable benefits.

183. Defendants' agreements to fix prices for commercially insured hospital-only anesthesia services in the Austin, Dallas, and Houston; three-MSA; and Texas markets set forth in this Complaint have violated Section One of the Sherman Act. *See* 15 U.S.C. § 1.

184. Pursuant to Section Four of the Clayton Act, 15 U.S.C. § 15, Plaintiffs seek to recover treble damages and other relief prayed for below.

COUNT SIX

Horizontal Agreement to Divide Market **Section One of the Sherman Act**

185. Plaintiffs incorporate the above paragraphs as though fully set forth herein.

186. Defendants' anticompetitive conduct set forth in this Complaint has violated Section One of the Sherman Act. *See* 15 U.S.C. § 1.

187. Defendants' agreement with a potential competitor not to enter a market for commercially insured hospital-only anesthesia services in exchange for consideration had the purpose and effect of restraining competition in that market. Welsh Carson controlled, directed, or dictated USAP to form and execute that agreement. Through this agreement, Defendants profitably maintained prices in the relevant market substantially above what they would have been able to charge absent the agreement.

188. During the agreement, USAP had, and will continue to have, substantial market power.

189. As a result of Defendants' agreements to allocate the market, Plaintiffs and the Proposed Class have suffered, and will continue to suffer, an antitrust injury because they paid, and will continue to pay, higher prices for hospital-only anesthesia service than they otherwise would have.

190. Defendants' agreement occurred in or had an effect on interstate commerce.

191. Defendants did not engage in this agreement for any pro-competitive purpose. Nor does Defendants' agreement have any pro-competitive effects. The agreement's actual and likely anticompetitive effects outweigh any arguable benefits.

192. Defendants' market allocation agreement set forth in this Complaint has violated Section One of the Sherman Act. *See* 15 U.S.C. § 1.

193. Pursuant to Section Four of the Clayton Act, 15 U.S.C. § 15, Plaintiffs seek to recover treble damages and other relief prayed for below.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, on behalf of themselves and the Class, respectfully pray for the following relief:

- A. An order certifying the action as a class action pursuant to Federal Rule of Civil Procedure 23, and appointing Plaintiffs as the representatives of the Class, and appointing their counsel as Class Counsel;
 - B. An order declaring that Defendants' acquisitions were an unlawful merger of assets in violation of the federal statutes cited herein;
 - C. An order declaring that Defendants' price-setting and market allocation agreements are unlawful restraints of trade, in violation of the federal statutes cited herein;
 - D. An injunction enjoining Defendants' transactions and requiring them to divest assets sufficient to restore competition for commercially insured hospital-only anesthesia service in the relevant market to the extent it existed before Defendants' scheme;
 - E. Treble damages to members of the Class, for their payments of inflated hospital-only anesthesia services provided by USAP or its co-conspirators;
 - F. Equitable relief in the form of restitution or disgorgement of all unlawful or illegal profits received by Defendants as a result of the anticompetitive conduct alleged herein;
 - G. The costs of bringing this suit, including reasonable attorneys' fees;
 - H. An award of pre-and post-judgment interest, to the extent allowable;
- and

I. Such other further relief that the Court deems reasonable and just.

DEMAND FOR JURY TRIAL

Pursuant to Federal Rule of Civil Procedure 38, Plaintiffs Electrical Medical Trust and Plumbers Local Union No. 68 Welfare Fund hereby demand a trial by jury.

Dated: November 20, 2023

Respectfully submitted,

/s/ Nimish Desai

Nimish Desai (TX Bar No. 24105238)
Brendan P. Glackin (CA Bar No. 199643)
Attorney-In-Charge
Lin Y. Chan (CA Bar No. 255027)
Jules Ross (CA Bar No. 348368)
LIEFF CABRASER HEIMANN &
BERNSTEIN, LLP
275 Battery Street, 29th Floor
San Francisco, CA 94111-3339
Phone: (415) 956-1000
Fax: (415) 956-1008
ndesai@lchb.com
bglackin@lchb.com
lchan@lchb.com
jross@lchb.com

Counsel for Plaintiffs and the Proposed Class