

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

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

U.S. ANESTHESIA PARTNERS, INC.,

Defendant.

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

**PLAINTIFF FEDERAL TRADE COMMISSION’S MOTION
FOR CLARIFICATION OR LEAVE TO DEPOSE FORMER
USAP DIRECTOR BRIAN REGAN FOR FIVE HOURS**

The FTC respectfully requests that the Court clarify the applicability of a provision in the Order and Stipulated Protocol Regarding Depositions, ECF No. 247 (Mar. 11, 2025) (“Deposition Protocol”). Defendant U.S. Anesthesia Partners has cross-noticed the FTC’s deposition of Brian Regan, who was a director of USAP from 2012 until 2022 and remains a partner at former defendant Welsh, Carson, Anderson, and Stowe.¹ Mr. Regan oversaw and directly participated in USAP’s anticompetitive scheme and has a wealth of firsthand knowledge about numerous aspects of the FTC’s case. The Deposition Protocol provides extra time—five hours per side—when both parties depose “a former employee of Defendant [USAP].”

¹ When the FTC filed this case, it initially named Welsh Carson entities as defendants because of Welsh Carson’s close involvement with USAP’s anticompetitive scheme. *See, e.g.*, Compl., ECF No. 69, ¶¶ 2-3, 77-79, 81-129. This Court dismissed the claims against Welsh Carson on procedural grounds because it found that they challenged only past conduct—whereas the FTC statute that authorizes suits in federal district court (Section 13(b)) requires an ongoing or future violation. Mot. to Dismiss Op., ECF No. 146, at 8-16. The Court noted that its “analysis should not be construed to offer any opinion on Welsh Carson’s conduct except as Section 13(b) applies to it.” *Id.* at 16. The FTC and Welsh Carson subsequently settled a potential administrative case challenging the same conduct. *See* Press Release, FTC Secures Settlement with Private Equity Firm in Antitrust Roll-Up Scheme Case (Jan. 17, 2025), available at <https://www.ftc.gov/news-events/news/press-releases/2025/01/ftc-secures-settlement-private-equity-firm-antitrust-roll-scheme-case>.

Deposition Protocol ¶ 17. Welsh Carson contends, however, that Mr. Regan was technically a former “director” of USAP rather than an employee and consequently that the FTC is only entitled to 3.5 hours of deposition time. *See* Deposition Protocol ¶ 18. USAP, which presumably has full access to Mr. Regan outside the deposition, would receive equal time.

Though the relevant provisions of the Deposition Protocol use the words “former employee,” the purpose of these provisions is to draw a dichotomy between nonparties who were formerly USAP personnel—and thus warrant additional deposition time—and those who are true third parties. It would not make sense for the Deposition Protocol to provide the FTC extra time to depose ordinary “employees” but exclude higher-level USAP personnel like Mr. Regan. The FTC thus requests that the Court clarify that Mr. Regan’s deposition will be 10 hours due to his former role as a USAP director. Alternately, if the Court interprets the Deposition Protocol to categorize Mr. Regan as “not a former employee of Defendant,” the FTC respectfully requests that the Court nonetheless allow the FTC to depose him for at least five hours given his importance to this case.

NATURE AND STAGE OF PROCEEDINGS

The FTC filed this case on September 21, 2023 challenging USAP’s scheme to “roll up” Texas hospital anesthesia providers into a single large company and use the resulting leverage to charge high prices for anesthesia services throughout the state. Compl. ECF No. 69 (redacted version). Pursuant to the First Amended Scheduling Order (ECF No. 173), discovery in this case began on May 13, 2024, and fact discovery will close on April 30, 2025. Depositions began on January 16, 2025, and are ongoing.

On January 7, 2025, the FTC sent a letter to USAP noticing the deposition Mr. Regan. Decl. of Kara Monahan ¶ 2. The next week, USAP responded that “Mr. Regan will be represented by Ropes & Gray.” *Id.* ¶ 3. After confirming Mr. Regan’s availability with his

counsel, on February 4, 2025, the FTC issued a subpoena to Mr. Regan for a deposition on May 1. *Id.* ¶ 4. Two months later, on April 2, 2025, USAP cross-noticed the deposition of Mr. Regan. *Id.* ¶ 5.

ISSUES TO BE DECIDED BY THE COURT

Whether Mr. Regan is subject to a 10-hour deposition under Paragraph 17 of the stipulated Deposition Protocol, or, in the alternative, whether the FTC should be allocated five hours to depose Mr. Regan given his importance to the FTC’s case.

BACKGROUND

The FTC’s complaint alleges that USAP—in coordination with and at the direction of Welsh Carson—carried out an anticompetitive campaign to monopolize hospital anesthesia services in Texas markets. The centerpiece of this strategy was a “roll up” in which USAP acquired 16 hospital-based anesthesia practices, focused in major metropolitan areas, and raised their prices substantially. Compl. ¶¶ 4-5, 77-173. USAP augmented this roll-up strategy with several other illegal agreements. It signed a non-compete agreement with a competitor to keep it out of the Dallas hospital anesthesia market. *Id.* ¶¶ 7, 208-15. And it maintained and sought out billing arrangements with other competing providers in which USAP billed for their anesthesia services at its own higher rates—and shared the resulting extra profits. *Id.* ¶¶ 6, 175-207.

The Complaint outlines at length Mr. Regan’s role in the scheme. In 2012, he was asked by a senior Welsh Carson partner to evaluate a Texas-based anesthesia roll-up. *Id.* ¶¶ 78-79. After researching the industry, Mr. Regan pitched the other Welsh Carson partners on “consolidating practices with high market share in a few key markets” to gain “[n]egotiating leverage with commercial payors.” *Id.* ¶ 79. USAP was created to carry out this strategy, and Mr. Regan joined its board of directors at the outset. *See id.* ¶¶ 84, 86. He then oversaw and directly participated in the roll-up scheme: He planned USAP acquisitions (*id.* ¶¶ 96-100); worked with a consultant to

develop a modeling tool that would identify anesthesia practices for USAP to acquire (*id.* ¶ 81); signed deal documents for USAP’s largest acquisitions in Houston and Dallas (*id.* ¶¶ 84-85); personally approved USAP’s contracts with health insurers (*id.* ¶ 154); negotiated USAP’s Dallas market allocation agreement (*id.* ¶¶ 211-14); and initiated negotiations for an unlawful billing arrangement (*id.* ¶¶ 200-03). Mr. Regan remained a USAP board member until 2022. *See* Welsh Carson Mot. to Dismiss, ECF No. 100, at 9. Welsh Carson has characterized him as a “USAP director affiliated with the Welsh Carson entities.” *See, e.g.,* Welsh Carson Mot. to Dismiss Reply, ECF No. 124, at 12; Welsh Carson Mot. to Dismiss at 26.

On January 7, the FTC notified USAP that it would depose Mr. Regan, who is still a partner at Welsh Carson but ceased to be a USAP director in 2022. Monahan Decl. ¶ 2. Three months later, USAP sent a cross-deposition subpoena for Mr. Regan. *Id.* ¶ 5. The Deposition Protocol provides that, if the FTC and USAP both subpoena the deposition of a former USAP employee, “the deposition will be ten (10) hours and will be divided equally between the Parties.” Deposition Protocol ¶ 17. Welsh Carson informed the FTC, however, that it believes Mr. Regan is not governed by this provision because his “past service as a *director* of USAP did not create an employment relationship with USAP.” Monahan Decl. ¶ 7 (emphasis added). Welsh Carson thus stated that it will only provide Mr. Regan for seven hours, “to be split evenly with USAP.” *Id.* USAP appears to agree with Welsh Carson’s interpretation. *See Id.* ¶¶ 8-10. USAP also rejected the FTC’s request for a time allocation for a seven-hour deposition that would give the FTC five hours and USAP the remaining two. *Id.* ¶ 8. As a result, Welsh Carson and USAP will only agree that the FTC can depose Mr. Regan for 3.5 hours.

ARGUMENT

“District courts possess the inherent procedural authority to clarify a prior order for causes seen by it to be sufficient.” *Banks v. C.R. Bard*, No. 17-cv-193-SDD-RLB, 2022 WL

17718420, at *1 (M.D. La., Dec. 15, 2022) (cleaned up); *see also PSSI Holdings, LLC v. Calhoun*, No. 5:21-CV-00080-RWS, 2021 WL 6333019, at *1 (E.D. Tex., Nov. 19, 2021). Similarly, the Court “possesses the inherent procedural power to . . . modify an interlocutory order for cause seen by it to be sufficient.” *Melancon v. Texaco, Inc.*, 659 F.2d 551, 553 (5th Cir. 1981). The Court should clarify that Paragraph 17 of the Deposition Protocol applies to Mr. Regan and that his deposition will be ten hours divided equally between the parties. Alternatively, if the Court does not find that Mr. Regan falls under Paragraph 17, the Court should nonetheless make a specific allowance in this instance to give the FTC at least five hours of deposition time with him.

I. Mr. Regan’s deposition should be 10 hours pursuant to the Deposition Protocol

The stipulated Deposition Protocol, entered by the Court on March 11, distinguishes between two types of nonparty witnesses. Paragraph 17 of the protocol addresses “Defendant’s former employees.” Deposition Protocol ¶ 17. It specifies that, “if the deposition of a former employee of Defendant is noticed by both Parties, then the deposition will be ten (10) hours and will be divided equally between the Parties.” *Id.* In contrast, for joint depositions of “[n]onparty witnesses who are not a former employee of Defendant,” Paragraph 18 of the Deposition Protocol specifies that “the deposition will be seven (7) hours and will be divided equally between the Parties.” *Id.* ¶ 18. This distinction recognizes that former employees of USAP are likely to require more deposition time because they will have more personal knowledge on relevant topics than true third parties. The Deposition Protocol does not identify any other categories of nonparty witnesses.

Brian Regan, who was a USAP director for 10 years and closely involved with much of the challenged conduct, is plainly the type of witness who requires the additional time allotted by

Paragraph 17. Welsh Carson argues that Mr. Regan is not covered by that provision because he was technically a “director” of USAP rather than an “employee.” To be sure, in many contexts there is a meaningful distinction between “directors” and “employees.” *See, e.g., Moody v. Am. Nat’l Ins. Co.*, 466 F. Supp. 3d 727, 731-32 (S.D. Tex. 2020) (member of advisory board is not “employee” for purposes of Sarbanes-Oxley whistleblower statute); *Grantham v. Beatrice Co.*, 776 F. Supp. 391, 403 (N.D. Ill. 1991) (director is not an “employee” within meaning of ERISA). The Deposition Protocol, however, does not invoke any of these frameworks. It uses the term “former employee” without defining it and never mentions “directors.” Though perhaps not artfully drafted, the plain intent of the Protocol is to create two categories of nonparty deponents: former USAP personnel, who require more deposition time, and true third parties who were never affiliated with USAP and require less time. Categorizing Mr. Regan as a “[n]onparty witness[] who [is] not a former employee of [USAP]” would lead to the bizarre result that the FTC would get less time to depose one of the most high-level and significant former USAP witnesses than it would for an ordinary former employee.

II. The Court should otherwise allow the FTC five hours of deposition time with Mr. Regan

In the alternative, if the Court finds that Mr. Regan does not fall under Paragraph 17 of the Deposition Protocol, it should nonetheless allow the FTC five hours to depose him. Paragraph 52 of the Deposition Protocol states that “[i]n the event that the Parties do not reach agreement to modify this Deposition Protocol in a particular instance, each Party reserves its respective rights to move the Court for relief from or modification of any part of this Deposition Protocol.” Deposition Protocol ¶ 52. Mr. Regan is a critical witness in this case and has firsthand

knowledge about much of the challenged conduct.² Given Mr. Regan’s central role, the FTC requests five hours to adequately depose him and prepare for trial, as well as any of USAP’s time that it does not use (up to a total of seven hours). USAP presumably has access to Mr. Regan outside of the deposition because Welsh Carson remains a major investor in USAP and would therefore not be prejudiced by receiving two hours of deposition time.

CONCLUSION

For the foregoing reasons, the Court should clarify that Paragraph 17 of the Deposition Protocol applies to Mr. Regan and that his deposition shall be ten hours divided equally between the parties. In the alternative, the Court should order that the FTC is allowed to depose Mr. Regan for at least five hours (as well as any time not used by USAP, up to a total of seven hours) due to his central role in the challenged conduct.

April 10, 2025

Respectfully submitted,

/s/ Kara Monahan

Kara Monahan

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² During its investigation several years ago, the FTC took testimony from Mr. Regan in an investigational hearing. The purpose of this hearing, though, was limited to determining whether a violation of the law occurred—not to prepare and prove a court case. *See Genuine Parts Co. v. FTC*, 445 F.2d 1382, 1387 (5th Cir. 1971) (“[I]nvestigative proceedings and adjudicative proceedings . . . have long been recognized as separate and distinct proceedings serving different functions.”); *see also SEC v. Jasper*, 678 F.3d 1116, 1128-29 (9th Cir. 2012) (noting “the difference in the nature of the [government’s] motivation during an early investigation, at which open-ended questions are typically asked without expectation the witness will be needed at trial, and its motivation at an adverse witness deposition, when battle lines have already been drawn and necessary witnesses identified”).

CERTIFICATE OF CONFERENCE

I hereby certify that counsel for the FTC met and conferred and exchanged correspondence on the following dates with counsel for U.S. Anesthesia Partners, Inc. and counsel for Welsh, Carson, Anderson and Stowe regarding the allocation of deposition time for Mr. Brian Regan's deposition and the application of paragraph 17 of the Deposition Protocol and were unable to reach a resolution:

- April 3, 2025 videoconference with Kathryn Caldwell and Sandra Masselink, counsel for Welsh Carson; FTC attendees included Kara Monahan, Timothy Slattery, Laura Hall, Dylan Herts, and Sophie Pollack;
- April 4, 2025 letter from David Hennes, counsel for Welsh Carson, to FTC attorney Timothy Slattery;
- April 7, 2025 teleconference between FTC attorney Kara Monahan and counsel for U.S. Anesthesia Partners, Inc., Kenneth Fetterman;
- April 7, 2025 email from counsel for U.S. Anesthesia Partners, Inc., Kenneth Fetterman, to FTC attorney Kara Monahan;
- April 8, 2025 email from FTC attorney Kara Monahan to counsel for U.S. Anesthesia Partners, Inc., Kenneth Fetterman and David Beck, and counsel for Welsh Carson, David Hennes and Kathryn Caldwell; and
- April 9, 2025 email from David Hennes, counsel for Welsh Carson, to FTC attorney Kara Monahan.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 10, 2025, in Washington, D.C.

/s/ Kara Monahan
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 10, 2025, I electronically filed a true and correct copy of Plaintiff Federal Trade Commission's Motion for Clarification or Leave to Depose Former USAP Director Brian Regan for Five Hours, Proposed Order, Declaration of Kara Monahan, and Appendix of Authorities using the United States District Court for the Southern District of Texas's CM/ECF System.

I FURTHER CERTIFY that I served a true and correct copy of Plaintiff Federal Trade Commission's Motion for Clarification or Leave to Depose Former USAP Director Brian Regan for Five Hours, Proposed Order, Declaration of Kara Monahan, and Appendix of Authorities on the following counsel via electronic mail:

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