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

DEFENDANT U.S. ANESTHESIA PARTNERS, INC.'S UNOPPOSED MOTION TO PERMANENTLY SEAL CERTAIN EXHIBITS TO ITS MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rules of Civil Procedure 5.2(d) and (e) and the governing protective order, Defendant U.S. Anesthesia Partners, Inc. ("USAP") respectfully moves the Court to maintain Exhibits 1 (Dkt. No. 302-01), 5 (Dkt. No. 302-05), 6 (Dkt. No. 302-06), and 36 (Dkt. No. 302-36) to USAP's Motion for Summary Judgment, permanently under seal, and to allow USAP to file the substitute redacted excerpts attached as exhibits to this motion. USAP has conferred with counsel for the Federal Trade Commission and counsel indicated that the FTC does not oppose this motion.

BACKGROUND

This motion concerns the sealing of Exhibits 1, 5, 6, and 36 attached to and referenced in USAP's Motion for Summary Judgment. Those exhibits are full and unredacted copies of the parties' expert reports. The reports were designated by the parties as "Highly Confidential" under the Protective Order, and they contain sensitive business material that both USAP and nonparties have designated Confidential or Highly Confidential. In the course of this litigation,

both parties have filed the same or similar confidential information under seal pursuant to the Protective Order.*

The FTC has informed USAP that it believes the exhibits should be limited to the excerpts of the reports directly cited in USAP's Motion for Summary Judgment, and USAP agrees that this approach would be the most practical. By limiting the exhibits this way, the parties can minimize the burdens on nonparties, which otherwise would be required to file excessive motions to seal other portions of the expert reports that were not directly cited in the Motion for Summary Judgment, and on the Court, which would otherwise have to resolve that large set of motions. Accordingly, USAP requests leave to submit redacted excerpts of the expert reports and to place the original filings under permanent seal. The practical effect of this request is to substitute more manageable versions of the exhibits that bear the minimum necessary redactions. The FTC does not oppose this request.

PROCEDURAL HISTORY

On May 28, 2024, the Court entered a protective order to prevent the unauthorized disclosure and use of confidential information during and after the litigation. *See* Order on Motion For Protective Order (May 28, 2024), Dkt. No. 152; FTC Revised Proposed Protective Order (May 17, 2024), Dkt. No. 149-1 ("Protective Order"). The Protective Order prohibits the filing of "Confidential or Highly Confidential Materials . . . in the public record." Protective Order ¶ 9. If a filing contains such materials, "the filing party or nonparty will seek leave from the Court to file the Confidential or Highly Confidential Material under temporary seal." *Id.* The filing party must also "file on the public record a duplicate copy of the paper that does not reveal the Confidential or Highly Confidential Material." *Id.* Any producing party who wishes

* *See* Dkt. Nos. 49, 227, 274, 297, 301, and 304.

to maintain Confidential or Highly Confidential material under seal has "fourteen (14) days to provide a basis for maintaining the record under seal." *Id.*

On March 5, 2025, the Court entered a Supplemental Protective Order. *See* Supplemental Protective Order (March 5, 2025), Dkt. No. 244 ("Supp. Protective Order"). In that Order, the Court reaffirmed that "[f]or any pretrial motions, the parties will follow paragraph 9 of the May 2024 Protective Order for filing Confidential and Highly Confidential Materials under seal." *Id.* ¶ 4.

On February 10, 2026, USAP filed its Motion for Summary Judgment and supporting exhibits under seal, Dkt. No. 302, along with a Motion To Temporarily Seal these materials, Dkt. No. 301, and a redacted copy of the Motion for Summary Judgment, Dkt. No. 303. The Court granted USAP's Motion to Temporarily Seal on March 18, 2026, Dkt. No. 316. Among the materials that were temporarily sealed by the March 18, 2026 order are Exhibits 1, 5, 6, and 36 to USAP's Motion for Summary Judgment.

LEGAL STANDARD

While the public has a common-law right to inspect and copy judicial records, that right is not absolute. *See Bradley ex. Rel. AJW v. Ackal*, 954 F.3d 216, 225 (5th Cir. 2020). The right of access is best left to the discretion of the trial court, which should be "exercised in light of the relevant facts and circumstances of the particular case." *Belo Broad. Corp. v. Clark*, 654 F.2d 423, 430 (5th Cir. 1981) (cleaned up). In exercising its discretion to seal judicial records, "the court must balance the public's common law right of access against the interests favoring nondisclosure." *Ackal*, 954 F.3d at 225 (citation omitted).

ARGUMENT

The Fifth Circuit has held that there are "well-recognized situations in which the seal may and should be used." *Federal Sav. & Loan Ins. Corp. v. Blain*, 808 F.2d 395, 399 (5th Cir. 1987)

(citing *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 599 (1978)). This includes preventing documents from being used "as sources of business information that might harm a litigant's competitive standing." *Nixon*, 435 U.S. at 598; *see also Oldendorff Carriers GmbH & Co., KG v. Grand China Shipping (Hong Kong) Co.*, 2013 WL 1867604, at *4 (S.D. Tex. Apr. 22, 2013) (finding good cause to maintain seal over confidential corporate information based on defendant's "reliance on the confidential nature of these agreements, as well as the possibility that disclosure would potentially harm its competitive standing in the shipping industry"). "A party's interest in sealing information that competitors would use to its disadvantage can overcome the public's right to access judicial records." *Ironshore Specialty Ins. Co. v. Facility IMS, LLC*, 2023 WL 6850006, at *11 (N.D. Tex. Oct. 17, 2023) (Kinkeade, J.) (citing *Nixon*, 435 U.S. at 598).

Here, there is no public interest in the (lengthy) portions of the expert reports that were not directly cited in USAP's Motion for Summary Judgment, but there are significant confidentiality concerns belonging to both USAP and nonparties. As to the portions that were directly cited, the public's interest in access to judicial records will be adequately protected by the filing of substitute versions with minimal redactions. The Court should therefore permanently seal the original exhibits and allow USAP to file its redacted substitute versions.

A. The Original Exhibits Contain Information that Should Remain Under Seal

Courts uphold sealing for "sources of business information that might harm a litigant's competitive standing." *Nixon*, 435 U.S. at 598. Exhibits 1, 5, 6, and 36 are the full, unredacted copies of the parties' expert reports. The reports contain information originally produced by USAP and nonparties that is commercially and/or financially sensitive, reflecting operational business decisions, pricing decisions, claims data, contractual terms and negotiations, and other confidential business information. Courts routinely hold that this type of information is

sufficiently sensitive to warrant sealing. *See*, *e.g.*, *340B Holdings, LLC v. Bobo*, 2020 WL 9720461, at *2 (W.D. Tex. Apr. 15, 2020) (holding that "competitive sensitive business information," such as pricing, financial information, and customer information, warrants filing under seal); *North Cypress Med. Ctr. Operating Co. v. Cigna Healthcare*, 781 F.3d 182, 204 (5th Cir. 2015) (confidential business information can be sealed); *Cellular Commc'ns Equip., LLC v. Apple Inc.*, 2017 WL 10311215, at *3 (E.D. Tex. Jan. 5, 2017) (granting motion to seal information related to payment terms in licensing agreements because disclosure would put the party at a competitive disadvantage in negotiations for future licensing deals); *Apple Inc. v. Samsung Elecs. Co.*, 727 F.3d 1214, 1225-26 (Fed. Cir. 2013) (recognizing "parties' strong interest in keeping their detailed financial information sealed and the public's relatively minimal interest in this particular information"); *In re Violation of Rule 28(D)*, 635 F.3d 1352, 1359 (Fed. Cir. 2011) (noting district court granted motion to seal a license agreement because "the parties have legitimate, competitive and business interests in preventing public disclosure") (cleaned up); *Binh v. King & Spalding LLP*, 2022 WL 130879, at *3 (S.D. Tex. Jan. 10, 2022) (granting motion to seal parties' litigation funding agreement).

The reports were designated by both parties as "Highly Confidential." That designation indicates that disclosure of this information "is likely to cause significant competitive or commercial harm" including but not limited to, "current or future non-public pricing information . . . confidential contractual terms, proposed contractual terms, or negotiating positions" Protective Order ¶ 2(b), and no party or nonparty has challenged those designations. The "Highly Confidential" designations here arise from the fact that the expert reports contain confidential and sensitive business information belonging to both USAP and nonparties. To be sure, those designations themselves are not dispositive; but they confirm the large number of

parties and nonparties who believe that disclosure would threaten sensitive commercial interests and place the producing parties at a competitive disadvantage. The nonparties who produced the information used in the expert reports in particular did so with the expectation that their information would receive robust protection under the Court's protective orders. *See*, *e.g.*, Protective Order ¶¶ 2(d), 9, 10(f); Supp. Protective Order ¶¶ 1-4 (supplemental protective order granting nonparty's request for heightened protections); *see also* Joint Stipulation (Mar. 11, 2025), Dkt. No. 252.

In light of the sensitive information contained in the full versions of the parties' experts reports, USAP requests that the Court maintain those versions under permanent seal.

B. The Public's Interest in Disclosure, if Any, Is Resolved by USAP's Request To Substitute the Exhibits

While there is a presumption in favor of the public's common law right of access to court records, that right is not absolute. *See Ackal*, 954 F.3d at 225. The Court can adequately balance that right of access with litigants' and nonparties' need for confidentiality by permitting the substitution (and public filing) of the redacted and excerpted versions of the expert reports attached as Exhibits 1, 5, 6, and 36 to this motion. *See United States v. Ahsani*, 76 F.4th 441, 453 (5th Cir. 2023) (recognizing redaction "is often practicable and appropriate as the least restrictive means of safeguarding sensitive information").

The proposed substitute versions include the minimum redactions needed to protect the "Confidential" and "Highly Confidential" information of USAP and nonparties. Accordingly, allowing USAP to file those versions as substitutes would (1) adequately protect USAP and nonparty commercially sensitive information, including operational business decisions, financial and pricing information, claims data, contractual terms, and other information the parties have

identified as containing confidential or commercially sensitive business information, while (2) ensuring that the public maintains a right of access to non-sensitive material.

In addition, allowing USAP to file these exhibits as substitutes will significantly reduce the burdens on nonparties and the Court. Under the Protective Order, nonparties are given an opportunity to seek sealing of any of their confidential information that is filed on the docket. Without substituting the excerpted exhibits, this process would require dozens of nonparties to review (differently redacted) versions of the expert reports and file motions to seal them, often in connection with information that will not influence the resolution of the Motion for Summary Judgment in the first place. It would then require the Court to address the many sealing motions that are filed. In contrast, permitting USAP's proposed substitution would mean this is the only sealing motion the Court would need to deal with concerning these exhibits. The process is significantly less burdensome for both nonparties and the Court.

Accordingly, the balance of interests weighs in favor of maintaining the original versions of summary judgment Exhibits 1, 5, 6, and 36 permanently under seal and allowing USAP to file the substitute exhibits proposed here to provide appropriate public access.

CONCLUSION

For the foregoing reasons, USAP respectfully requests the Court's permission to maintain Exhibits 1, 5, 6, and 36 to USAP's Motion for Summary Judgment permanently under seal and allow USAP to file substitute exhibits containing redacted excerpts of the expert reports on the docket.

Dated: March 27, 2026

Respectfully submitted,

/s/ *Geoffrey M. Klineberg*

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

Geoffrey M. Klineberg (D.C. Bar No. 444503)
(*Pro Hac Vice*)
Mark C. Hansen (D.C. Bar No. 425930)
(*Pro Hac Vice)*
Attorney-in-Charge
Bradley E. Oppenheimer (D.C. Bar No. 1025006)
(*Pro Hac Vice*)
Kyle M. Wood (D.C. Bar No. 90012250)
(*Pro Hac Vice*)
Katherine V. Tondrowski (D.C. Bar No. 90017712)
(*Pro Hac Vice*)
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
gklineberg@kellogghansen.com
mhansen@kellogghansen.com
boppenheimer@kellogghansen.com
kwood@kellogghansen.com
ktondrowski@kellogghansen.com

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

CERTIFICATE OF CONFERENCE

I hereby certify that on March 26, 2026, counsel for USAP conferred via email with counsel for the FTC concerning the relief requested in this motion to seal. I am authorized to state that the FTC does not oppose this motion.

Respectfully submitted,

/s/ *Katherine V. Tondrowski*
Katherine V. Tondrowski

CERTIFICATE OF SERVICE

I hereby certify that on March 27, 2026, 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/ *Geoffrey M. Klineberg*
Geoffrey M. Klineberg

Exhibit 1

PUBLIC - REDACTED

HIGHLY CONFIDENTIAL

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

REVISED EXPERT REPORT OF DAVID A. FIX

[redacted]

A. USAP's Providers

34. USAP is composed of more than 5,000 clinicians – anesthesiologists, CRNAs, and CAAs – nationwide. These clinicians provide anesthesiology in all specialties, including cardiovascular, neurosurgery, obstetrics, orthopedics, and pediatrics.[12]

35. [redacted]

36. [redacted]

B. USAP's Partnership Model

37. [redacted]

[11] [redacted]

[12] U.S. Anesthesia Partners, Locations – USAP Texas (South), https://www.usap.com/locations/usap-texas-south (last visited Sep. 18, 2025).

[13] [redacted]

[14] [redacted]

[15] [redacted]

HIGHLY CONFIDENTIAL

Dated: December 2, 2025

David A. Fix

Exhibit 5

PUBLIC - REDACTED

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

Federal Trade Commission, Plaintiff, v. U.S. Anesthesia Partners, Inc., Defendant.	Case No.: 4:23-CV-03560-KH

CORRECTED EXPERT REPORT OF LONA FOWDUR, Ph.D.

January 12, 2026

[redacted]

21. Patients typically do not choose their anesthesiologist.[25] Rather, patients choose which surgeon or hospital they prefer and, by default, the anesthesia group that provides anesthesia coverage to the patient's chosen surgeon or facility provides anesthesia services to the patient.[26] In other words, as anesthesia is a necessary component of almost any surgical procedure, hospitals or other facilities where patients obtain surgical services

---

[redacted]

22 [redacted]

23 [redacted]

24 [redacted]

25 *See,* Complaint, ¶ 46 and Capps Report, ¶ 94.

26 Capps Report, ¶ 94.

generally choose anesthesia providers on behalf of their patients.[27] The implication is that the provision of anesthesia services is subject to *derived* instead of *direct* demand.[28] In contrast, surgical services that patients obtain are subject to direct demand because patients can directly choose a facility and/or surgeon for surgical care.

22. Surgical services and anesthesia services are complements because patients utilize both services as a bundle. Hospitals and other facilities that provide surgical services typically issue requests for proposals ("RFPs") and award contracts to their chosen anesthesia groups to cover the anesthesia-service needs of all of their patients, irrespective of the type of insurance coverage that the patients have.[29] Due to the complementarity between surgical and anesthesia services, facilities have an incentive to pick anesthesia groups that will provide the best care to their patients and that will best complement their own facility's surgical services (e.g. through operational benefits).

23. While hospitals and other facilities contract with anesthesia-service provider groups to provide coverage to all patients, payments for anesthesia services provided to commercially insured patients are determined through bilateral bargaining between each anesthesia group and individual commercial payors. In contrast, payments for services provided to patients

---

[27] Some facilities may use a "follow the surgeon" model in which the surgeon is allowed to choose the anesthesia providers, as long as those practitioners are credentialed at the facility. In such cases as well, it is not the patient who chooses the anesthesiologist, consistent with the derived demand characterization. *See, e.g.,* Deposition of Scott Holliday (USAP), April 15, 2025, *hereinafter* Holliday Deposition, 156:5-25 [redacted]

[28] Capps Report, ¶ 95.

[29] *See, e.g.,* Amended and Restated Anesthesiology Services Agreement between Memorial Hermann Health System and USAP, dated January 30, 2025, USAPTX-00742009-066 at USAPTX-00742013-14 [redacted] *See also,* Professional Medical Services Agreement between Ascension Seton and USAP, dated November 1, 2021, PX-2305 (ASC_000001-039 at ASC_000004) [redacted]

with Medicare and Medicaid (i.e., government payors) coverage are determined through administratively set rates that providers have no choice but to accept as a condition of program participation.

B. FACILITIES AWARD ANESTHESIA CONTRACTS THROUGH A BIDDING PROCESS

24. Hospitals and other facilities where surgeries are performed select their anesthesia service provider groups through a bidding process: Facilities issue RFPs for contracts for anesthesia-service coverage for a defined period, some or all of the anesthesia provider groups invited to participate in the RFP respond, and ultimately each facility makes a choice between one or more qualified groups that submitted a proposal to fulfill the facility's anesthesia-service coverage needs.[30] Some facilities use an exclusive provider to fulfill all of their anesthesia needs while others will use multiple groups, each of which can bid on a portion or slice of the facility's coverage needs.[31]

25. Economists refer to markets where buyers and sellers interact through contract bidding as markets characterized by winner-take-all competition.[32] Such competition can either occur for both the full contract or for a slice of the contract that the buyer can carve out and

---

30 [redacted]

31 *See*, Section IV.A below for examples of facilities that use exclusive or non-exclusive (sliced) providers of anesthesia care.

32 *See,* D. Patterson and C. Shapiro (2001), "Transatlantic Divergence in *GE/Honeywell: Causes and Lessons*," *Antitrust Magazine*, *hereinafter* Patterson and Shapiro (2001), citing to the European Commission and noting that "the Commission described a true bidding market as one where 'tenders take place infrequently, while the value of each individual contract is usually very significant. Contracts are typically awarded to a single successful bidder (so-called 'winner-takes-all' principle). Strong incentives therefore exist for all competitors to bid aggressively for each contract.'" *See also,* OECD Competition Committee, "Competition in Bidding Markets: Series Roundtables on Competition Policy No. 66," 2006, *hereinafter* OECD (2006), p. 7. Available from https://www.oecd.org/content/dam/oecd/en/publications/reports/2007/06/competition-in-bidding-markets_38ce7d98/af4c1b4b-en.pdf.

award to additional sellers. In such markets, the extent of competition cannot be quantified based on shares of current or historical sales, as these sales – which are functions of previously won contracts – would not accurately capture each firm's ability to win a new contract or the number of bidders that are comparably situated to win the contract.[33] Instead, competition over contracts depends on each competitor's ability to undercut rival bidders by offering more attractive terms or demonstrating a better ability to meet the customer's needs, irrespective of each bidder's aggregated share of sales based on previously won business.

26. From the standpoint of a facility choosing among anesthesia-service provider groups that have responded to a RFP, what matters to the facility is a group's ability to meet the conditions of the contract and the group's ability to deliver the best services at the best prices.[34] Under such circumstances, existing volume shares of each anesthesia group would not capture the extent of competition among anesthesia groups vying for facility

---

[33] *See, e.g.,* D. Wirth, "To Bid or Not to Bid, That is the Question: The Assessment of Bidding Markets in Merger Control," Harvard Law School Forum on Corporate Governance, December 12, 2016. Available from https://corpgov.law.harvard.edu/2016/12/12/to-bid-or-not-to-bid-that-is-the-question-the-assessment-of-bidding-markets-in-merger-control/. *See also,* OECD (2006), p. 7 ("**Existing market shares** are not always informative about competition in the future, whether in markets with bidding or markets without bidding. It can be useful to separate the concepts of competition *ex ante* and market share *ex post*, and note that the *ex post* market share does not necessarily reflect the intensity of competition in the market during the bidding process.") The same treatise also notes that "[if] the rivals had a fairly equal probability of winning the auction for the contract […] [then] market shares of 1/N would provide a better summary of the competitive situation when the competition was underway." OECD (2006), p. 44. "N" refers to the number of bidders. *See also,* ABA (2012), Market Power Handbook: Competition Law and Economics Foundations, Second Edition, *hereinafter* ABA Handbook , pp. 118-119 ("Markets in which the buyer of goods or services solicits bids for its business present special challenges for market analysis, especially in markets in which orders are infrequent or 'lumpy.' Assigning equal shares to all firms may be appropriate in markets in which each firm has, on a forward-looking basis, an equal likelihood of securing sales. Models that assign firms equal market shares are often termed 'bidding models' because each firm that submits a bid may be equally well positioned to win a competition.")

[34] *See, e.g.,* [redacted] *See also,* [redacted]

contracts nor the number of available groups able to satisfy these contracts. In particular, volume shares do not capture the fact that firms that may not have won the contract still competed (i.e. providing "competitive discipline" over prices and other contract terms) for the awarded contract.[35] Rather, it is the intensity of rivalry among qualified bidders at the time of contracting – and the availability of substitute anesthesia provider groups to the facility choosing among different groups – that defines the extent of competition.[36]

27. [redacted]

C. THE PROVISION OF ANESTHESIA SERVICES IS DIFFERENTIATED

28. [redacted]

---

35 *See, e.g.*, ABA Handbook, p. 119 ("More specifically, consider a defense contractor that makes no sales of a product in a given year because it did not win the last government contract that was awarded in its market. If the contractor retains the ability to bid competitively on the next contract, it does not make sense to assign the losing contractor a market share of zero percent and the winning contractor a market share of 100 percent, since both contractors will have a competitive influence on the next bid"). *See also,* U.S. Department of Justice and the Federal Trade Commission, "Horizontal Merger Guidelines," 2023, *hereinafter* HMG 2023, § 4.2.C.

36 *See,* Patterson and Shapiro (2001).

37 [redacted]

[redacted]

29. [redacted]

D. NON-COMMERCIAL RATES OFTEN DO NOT COVER THE COST OF PROVIDING SERVICES GENERATING A NEED FOR STIPENDS

30. When an anesthesia group contracts with a hospital or other facility to provide anesthesia coverage, the contract covers all patients and not just commercial patients. Non-

---

[redacted]

40 [redacted]

41 [redacted]

commercial patients include patients covered by Medicare, Medicaid, and uninsured patients.[42] Reimbursement rates to anesthesiologists for Medicare and Medicaid patients are pre-set by the government and are typically insufficient to cover the cost of providing care.[43] For example, Medicare in 2025 reimbursed $21 per unit of anesthesia service supplied in Houston, Texas.[44] Third-party studies (that I describe below) illustrate that the salary costs alone of anesthesiologists (which are only a portion of the total costs of providing these services) were often three times or more of this Medicare reimbursement amount. These same third-party studies also confirm that market-based salary costs of providing anesthesia services exceeded not just Medicare and Medicaid revenues, but also the total expected revenues (across all patients, including commercial patients) from providing services at particular facilities. For example:

- [redacted][45]

---

42 Between 2014 and 2023, commercial payors accounted for 57% of services, government payors accounted for 35% of services, and other sources (including the uninsured) accounted for 8% of services measured based on all Texas hospital charges provided to all patients. *See,* RAND Data Workpaper in my backup.

43 *See*, Capps Report, n. 38 [redacted]

44 Centers for Medicare and Medicaid Services, "Anesthesiologists Center", accessed September 19, 2025. Available from https://www.cms.gov/medicare/payment/fee-schedules/physician/anesthesiologists-center.

45 [redacted]

- [redacted][46]
- [redacted][47]

31. Another reason why expected revenues will often fall short of expected costs is that anesthesiologists are only reimbursed by payors when they perform a procedure, but hospitals need anesthesiologists on call at all times in case of emergency or for obstetrics cases.[48] This expected downtime, and general uncertainty around the timing of anesthesia coverage needs for specific patients, also contributes to the revenue shortfalls that necessitate the subsidies or stipends from hospital facilities.[49]

32. As a result of these revenue shortfalls, hospital facilities frequently pay a subsidy or stipend to the anesthesia group that they contract with to provide anesthesiology services at the

---

46 [redacted]

47 [redacted]

48 *See, e.g.,* [redacted]

49 *See,* [redacted]

facility.[50] These stipends are necessary where the expected cost of providing anesthesiology services covering the hospital (including salaries and overhead for providers necessary to provide round-the-clock coverage) exceeds the expected revenue collected from payors (commercial and government) for providing these services for the entire patient population at that hospital facility.[51] Without these subsidies or stipends, anesthesia groups would face reimbursement challenges that compromise their incentives to contract

---

50 *See*, Capps Report, ¶ 57. While stipends or subsidies have historically been paid to anesthesia groups by hospitals, and not ASCs, in recent years shifting patient populations have put pressure on anesthesia providers to request such reimbursement from ASCs as well. *See, e.g.,* [redacted]

51 Dr. Capps and other witnesses generally recognize that hospitals' payor mix, when skewed in favor of non-commercial patients, are associated with a need for stipends. Capps Report, ¶ 57. *See also,* [redacted]

with hospitals and other facilities. Hospitals and other facilities pay stipends to ensure that they can attract anesthesiology coverage.[52] Importantly, this is not unique to USAP.

33. When determining the necessary subsidy to fully compensate anesthesia groups for their costs, the hospital facility or the anesthesia group will typically engage a third-party firm to evaluate the required subsidy to cover the shortfall between the expected revenue collections and costs incurred from providing anesthesia services at a particular hospital.[53] These Fair Market Value ("FMV") analyses take into consideration the total costs of staffing coverage at the hospital using market-based data on salary estimates for the providers and compare these costs to the expected revenues collected at the facility based on the expected payor mix (i.e. the number and percentage of patients that have commercial insurance by payor, those that have government insurance, and the underinsured and uninsured). The third-party firms undertaking such analyses rely on a variety of industry data sources to estimate salary costs, as well as information collected and reconciled from the hospital and provider group pertaining to staffing and coverage needs and historical volume and revenue (from commercial payors and government payors), to calculate the expected shortfall in revenue that anesthesia provider groups will face.[54] The recommended subsidies are then based on this expected shortfall (either

---

52 *See, e.g.*, [redacted]

53 *See,* [redacted]

54 *See, e.g.*, [redacted]

through a simple subsidy or by implementing a revenue guarantee meant to cover the estimated costs).[55]

34. [redacted]

E. HIGH PRICES IN A COMPETITIVE MARKET OF DIFFERENTIATED PRODUCTS IS NOT EVIDENCE OF ANTICOMPETITIVE MARKET POWER

35. [redacted]

[55] *See,* [redacted]

A. EMPIRICAL EVIDENCE DEMONSTRATES THAT COMPETITION FOR FACILITY CONTRACTS IS ROBUST

42. [redacted]

1. Facilities Have Multiple Anesthesia Provider Group Options to Choose From

43. Data available in this case allows for an evaluation of the number of anesthesia providers that can supply exclusive coverage to different inpatient hospital facilities in the Houston, Dallas, Austin, and San Antonio MSAs.[66] These data provide an indication of the minimum necessary practice size serving these hospitals and also allow for an evaluation of the number of groups with the same or greater practice size within the same MSA that are available as choices to each hospital. In particular, an assessment of the number of groups within different bands of minimum necessary practice size gives an indication of the number of alternative groups that could supply each hospital's anesthesia service coverage needs. I have limited this analysis to hospital facilities that exclusively used one practice in 2023.[67] The bars in Exhibit 2 through Exhibit 5 show the number of hospitals within each band of minimum practice size and the line shows number of anesthesia groups, again by minimum necessary practice size, available to serve those hospitals.[68]

---

65 Capps Report, ¶¶ 22 and 54-56.

66 I conservatively focus this analysis on hospitals that use exclusive groups as other hospitals' choices reveal that they are not constrained by group size when determining how to meet their service needs.

67 I identify hospital facilities (defined as Place of Service equal to 21, 22, or 23) that employ an "exclusive" model as those hospitals with 95% or more of their yearly claims supplied by a single anesthesia provider group. I consider only those provider groups with 20% or more total claims at places of service 21, 22, 23, or 24, in each MSA. To obtain the count of anesthesiology providers within a group or at a hospital, the provider must have 12 yearly claims with anesthesiology CPT codes at the hospital/group level to be included.

68 See Appendix D for additional exhibits summarizing this analysis.

44. As Exhibit 2 below shows, the majority of hospitals in Houston require an anesthesia provider group with no more than 30 providers to service their hospital. These Houston hospitals each have between 12 and 27 anesthesia provider groups of sufficient size that could supply their anesthesia coverage needs on an exclusive basis. Even for hospitals that rely on groups of larger size of up to one hundred anesthesiologist providers, as many as seven groups of sufficient size are available. Only two hospitals, that rely on more than 170 anesthesiologists each, have four or fewer alternatives. This analysis confirms that, in general, there are many groups of sufficient size that can service each Houston hospital.

Exhibit 2: Count of Anesthesia Provider Groups of Sufficient Size to Serve Hospital Facilities in Houston MSA in 2023

45. Exhibit 3 through Exhibit 5 below report this same analysis for hospital facilities in the Dallas, Austin, and San Antonio MSAs. These exhibits confirm that hospital facilities in these three additional MSAs also have many choices of anesthesia practice groups. In the Dallas MSA, 54 out of the 56 hospitals have at least 5 options; in the Austin MSA, 11 out

of the 22 hospitals have at least 5 options; and in the San Antonio MSA all but one hospital facility has at least 5 options.

Exhibit 3: Count of Anesthesia Provider Groups of Sufficient Size to Serve Hospital Facilities in Dallas MSA in 2023

Exhibit 4: Count of Anesthesia Provider Groups of Sufficient Size to Serve Hospital Facilities in Austin MSA in 2023

Exhibit 5: Count of Anesthesia Provider Groups of Sufficient Size to Serve Hospital Facilities in San Antonio MSA in 2023

46. A similar analysis comparing the number of alternatives that were available in 2014 relative to 2023 shows that the number of large groups that can meet the coverage needs of hospitals that require many anesthesiologists to provide coverage has increased and/or the same groups have grown in size over the that time. Exhibit 6 through Exhibit 9 below provide a list of alternatives, by anesthesiology group size that were available to hospitals in each MSA from 2014 through 2023, respectively, in the top panel. The bottom panel of each exhibit shows the number of facilities (hospitals and ASCs) that each group served in each year.

Exhibit 6: Houston Provider Groups

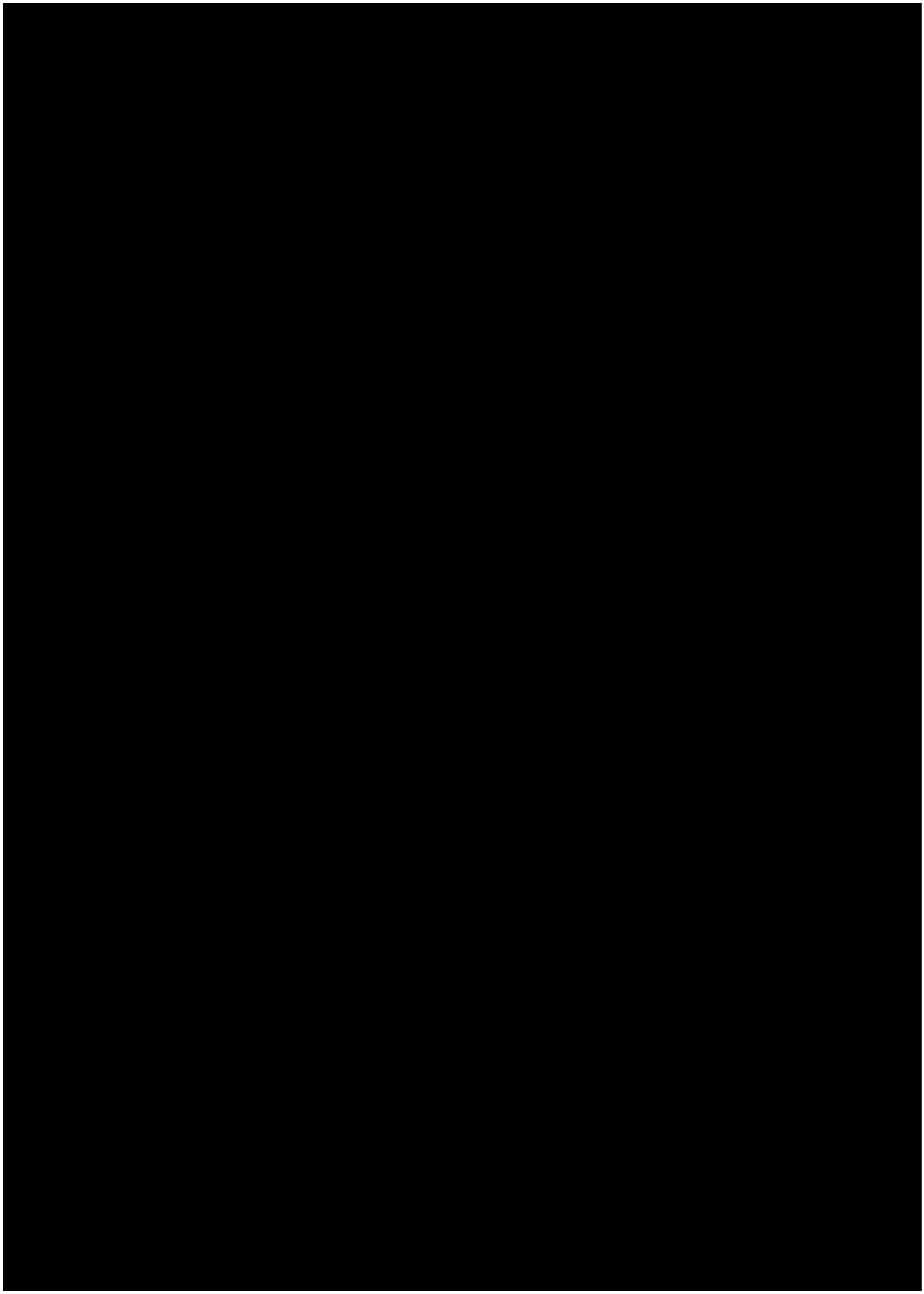


Exhibit 7: Dallas Provider Groups

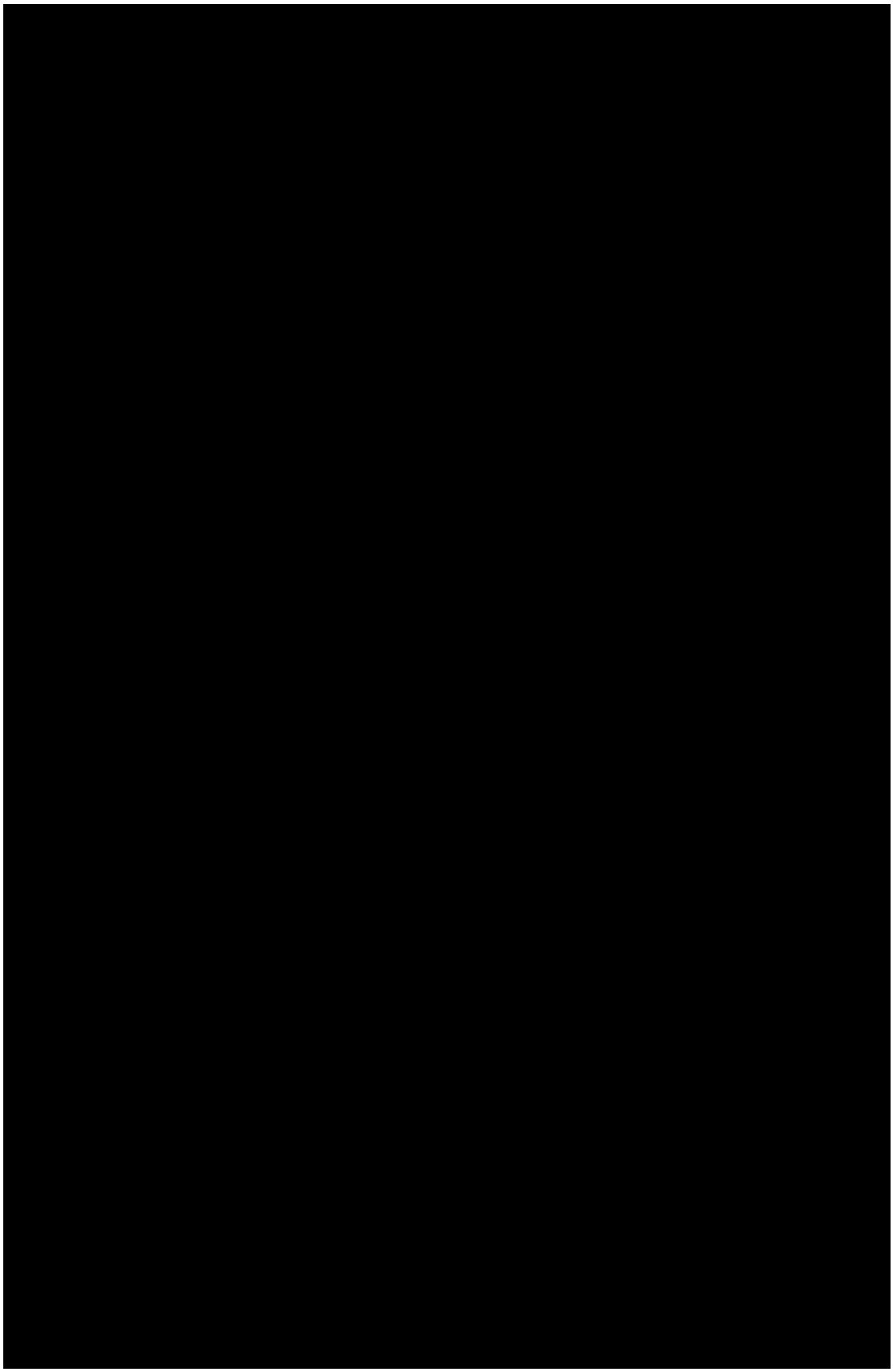


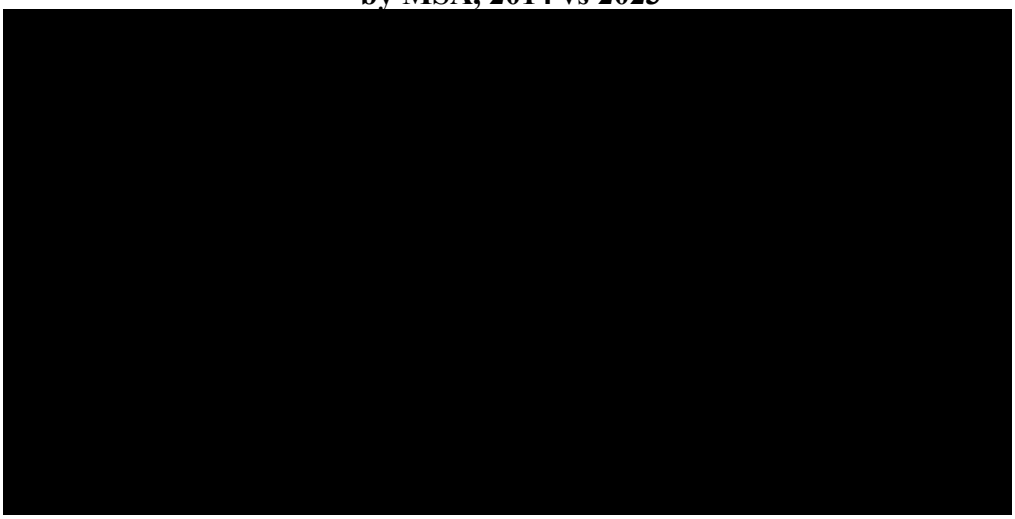
Exhibit 8: Austin Provider Groups

Exhibit 9: San Antonio Provider Groups

47. Exhibit 10 summarizes the information in the four exhibits above to show that the number of independent large groups available has actually grown through entry and/or expansion, thereby providing more choices to hospitals in 2023 than in 2014, notwithstanding USAP's transactions with independent anesthesia practice groups.[69] This analysis confirms the added competition that USAP faces from new entrants or expanded groups in 2023 relative to 2014.

[69] See Appendix D for a list of these facilities.

Exhibit 10: Count of Independent Groups with At Least 30 Providers by MSA, 2014 vs 2023



48. The implication of the above table is that notwithstanding USAP's transactions, hospitals that desired exclusive contracts had more choices among large anesthesia groups of more than 30 providers each in 2023 relative to 2014, when USAP itself was a new entrant in Houston and Dallas. In other words, the groups that were acquired or employed by USAP were replaced by new groups that either entered or expanded.

2. Facilities Do Switch Among Exclusive Anesthesia Provider Groups

49. Even when they tend to use a single exclusive anesthesia provider group to meet their coverage needs, hospital facilities do replace the groups they use to provide these services over time. Furthermore, some of these hospital facilities move away from an exclusive (or nearly exclusive) model by contracting with another anesthesia practice group for some share of their anesthesia procedures at different points in time.

50. To study the extent of switching between anesthesia provider groups at facilities, I utilize claims data produced in this matter to identify the competitive model employed by facilities based on their usage patterns of anesthesia provider groups over time. Specifically, for a given point in time, I identify whether a facility was employing an exclusive or nearly exclusive model (utilizing a single provider group for anesthesia

services) or employing a slicing model (utilizing multiple provider groups for anesthesia services).[70]

51. Using this data, I assess hospital facilities that have tended to use a single anesthesia provider group to supply all or substantially all of their commercial anesthesia coverage needs in the four largest Texas MSAs. Exhibit 11 counts the number of times I observe that a facility switched from an exclusive provider to a different exclusive provider, or when a facility switched from an exclusive provider to multiple providers. As this table demonstrates, many hospitals with exclusive anesthesia provider relationships switched to a different provider (or switched to a model of using multiple providers) in the past five years. For example, in Houston [redacted] of facilities with exclusive providers switched and in the remaining MSAs the rate of switching ranged between [redacted] in Austin and [redacted] in San Antonio. This rate of switching not only demonstrates the competition in these areas but is also in direct contrast to Dr. Capps' claims that switching costs for hospitals is prohibitively high.[71]

---

[70] I define an exclusivity period as a period where one anesthesia provider group has at least three anesthesia claims and at least a 95% share of claim volume for at least six months (of which at least six must be consecutive), and during which no other anesthesia provider group has at least 3 claims and at least a 10% volume share for a period of 3 consecutive months. I define transition periods as periods of three months or less between exclusivity periods. I define a slicing period as a period where no single anesthesia provider group has exclusivity, and the facility is not transitioning between exclusive providers. To ensure the facilities I assess have sufficient anesthesia claim volume, I limit to facilities with at least 30 anesthesia claims for four consecutive quarters. In rare instances, I do not have sufficient claims data to determine the type of model employed at the facility at a certain point in time. Additionally, where indicated below, I also visually review charts of provider group shares at a facility over time to make determinations about switching patterns at facilities. *See,* Switching Workpaper in my backup materials for details.

[71] Capps Report, ¶ 179.

Exhibit 11: Switching of Anesthesia Services Over Time
Hospitals With Exclusive Anesthesia Providers 2019-2023

3. Facilities Can Contract with Multiple Anesthesia Provider Groups at Once

52. Some hospitals, especially in Dallas, and to a lesser extent in other MSAs, do not exclusively contract with only one provider group and instead "slice" their anesthesiology services across multiple provider groups. Some of the slicing is for service lines (e.g., slicing labor and delivery services, or ER services) whereas some hospitals employ the "follow the surgeon" model in which the surgeon gets to choose the anesthesiologist as long as the anesthesiology provider has privileges to practice at the hospital.[72] While

[72] *See, e.g.,*

slicing has been undertaken for a variety of reasons, its prevalence makes clear that it is a viable competitive mechanism generally.[73]

53. [redacted]

[73] *See, e.g.,* [redacted]

[74] [redacted]

Exhibit 14: Slicing of Anesthesia Services Over Time
Austin Hospitals with More than 10,000 Total Anesthesia Claims 2014-2023

Exhibit 15: Slicing of Anesthesia Services Over Time
San Antonio Hospitals with More than 10,000 Total Anesthesia Claims 2014-2023

54. Aside from switching or slicing their providers, a few hospitals also self-supply, meaning that they employ their own anesthesiologists. Examples include University of Texas MD Anderson Cancer Center (Houston MSA), Christus Good Shephard Medical Center (Longview MSA), Cook Children's Hospital (Dallas MSA), University of Texas Southwestern Medical Center (Dallas MSA), and Baylor Scott and White Medical Center,

Capitol Area locations (Austin).[75] The ability of facilities to hire their own anesthesiologists provides another competitive alternative to existing anesthesia providers.

4. Many Large Hospital Facilities in the Relevant MSAs Do Not Rely on USAP for All or Most of their Anesthesia Services

55. [redacted]

[75] Internally Supplied Hospitals Workpaper. *See also,* [redacted]

[76] [redacted]

[redacted]

86. [redacted]

---

119 *See,* DX-185 (UHG_FTC00006545-560 at UHG_FTC00006546-560). [redacted] UHG_FTC00125575-5636 at UHG_FTC00125587.

120 *See,* [redacted]

121 *See,* [redacted]

122 *See,* [redacted]

123 *See,* [redacted]

87. [redacted]

---

124 [redacted]

125 *See*, McCort Deposition, 113:23-114:4 [redacted] *See also,* Deposition of Matthew Maloney (USAP), April 9, 2025, *hereinafter* Maloney Deposition, 190:1-5 [redacted]

126 [redacted]

[redacted]

101. With respect to anesthesia services in particular, because the services that different groups provide are differentiated, prices across provider groups will vary and high prices alone do not support the conclusion that a provider possesses anticompetitive market power. Further, volume shares of anesthesia services are a product of contracts won in a bidding market for a differentiated product and are uninformative as to the extent of competition that prevails among the different groups for facility-level contracts. As a result, from the onset, Dr. Capps does not present any evidence to support a claim that USAP ever had, or acquired, anticompetitive market power.

102. [redacted]

[redacted]

153 Economists distinguish between Ricardian rents, which arise from a firm's superior efficiency, and monopoly rents, which arise from a firm's substantial market power. *See, e.g.*, J. Shaanan (2006), "Ricardian or Monopoly Rents? The Perspective of Potential Entrants," *Eastern Economic Journal*, 32(1):19-30.

107. [redacted]

108. [redacted]

109. Anesthesiologists sell their services as a comprehensive bundle of all ASA procedures, and not just Dr. Capps' arbitrary hospital-only procedures. As Dr. Capps acknowledges, his limited set of hospital only services accounts for only about [redacted] of payors' total commercial payments to Texas anesthesia providers for services provided in a hospital in 2023.[161] That percentage is even lower when calculated as a share of procedures that

159 [redacted]

160 [redacted]

161 Capps Report, ¶ 127.

anesthesiologists perform over all sites of service—Dr. Capps' product market accounts for only [redacted] of anesthesia claims volume in hospital locations and [redacted] of volume in all locations.[162] It does not make economic sense to define a market that excludes services provided by the same individual physicians under the same contract and at the same price when consumers (in this case hospitals and other facilities) choose suppliers that can supply a far broader bundle of services and the competitive determinants of the prices for all anesthesiology services are inextricably linked.

110. [redacted]

111. [redacted]

112. [redacted]

---

162 *See,* Capps Product Market Workpaper.

163 [redacted]

[redacted]

Exhibit 29: Share of Claim Type Among Anesthesia Provider Groups Supplying Services in

[redacted]

113. In addition to his distinction among procedures performed within hospitals, Dr. Capps' distinction between ASCs and outpatient hospitals are inconsistent with commercial realities and adds to the arbitrariness of his product market. Dr. Capps' claim that while [redacted] is undermined by the empirical evidence

that the procedures that Dr. Capps treats as hospital-only occur in both places.[164] Exhibit 30 below reports the share of procedures occurring in an outpatient hospital facility that also occur in ASCs. As seen in this exhibit, more than half of procedures that occur in outpatient hospitals are also performed in ASCs.

Exhibit 30: Percent of Claims at Outpatient Hospitals that Could be Performed at ASCs

114. [redacted]

[164] Capps Report, ¶ 127.

115. Further, provider groups can and do typically draw from the same hiring pool for anesthesiologists at hospitals and ASCs, indicating there is not a distinction from the supply side. Exhibit 31 below calculates the share of providers who provide services in Dr. Capps' relevant product market while also providing services at ASCs either (1) within the same year; (2) within the past three years; or (3) within the past 5 years. More than one-third of providers who provide a substantial number of hospital-only anesthesia services also provide services in ASCs in the same year, around half of providers did so in the prior three years, and around 60% of providers did so in the prior five years.

Exhibit 31: Share of Hospital Providers that Also Perform Anesthesia Services in ASCs

116. [redacted]

[redacted]

121. From the standpoint of delineating appropriate market boundaries, when a facility issues an RFP for anesthesia coverage, MSA boundaries do not preclude competing anesthesia groups from bidding on the contract.[179] To properly delineate a geographic market, the relevant question is as follows: If all anesthesia provider groups within a candidate market were to implement a small price increase, to what extent would groups from outside the candidate market be a sufficient substitute to (or option for) enough facilities such that the price increase would be unprofitable. Dr. Capps does not provide any evidence that groups located just outside his MSA-level candidate markets or beyond are insufficiently close substitutes and could not constrain a price increase of provider groups within the candidate market.

122. [redacted]

---

[179] Record evidence indicates hospitals receive bids from anesthesia groups not operating in a given market area. *See, e.g.,* [redacted]

[redacted]

130. [redacted]

131. While I disagree with Dr. Capps' assertion that volume-based shares are a relevant measure of competitive significance, I demonstrate below that his focus on an arbitrarily defined product market of hospital-only services has the effect of overstating USAP's volume-based shares. Including the claims volume of current participants and rapid entrants by including all services (hospital-based and non-hospital-based services performed at hospitals and ASCs) reduces Dr. Capps' estimate of USAP's volume shares. Exhibit 34 below reports volume-based share estimates for USAP by year for each of the three relevant MSAs as well as the Austin MSA expanded to include the San Antonio counties in which Austin residents traveled for anesthesia services. By 2023, USAP's volume share was below [redacted] in all three areas.

183 [redacted]

184 [redacted]

185 [redacted]

Exhibit 34: USAP Volume-Based Share of Anesthesia Claims at Hospitals and ASCs Over Time

132. [redacted]

[186] *See, e.g.,* evidence in n. 178 that anesthesiology groups bid on hospital RFPs even when they don't already operate in a hospital's market area.

Exhibit 36: Change in Volume-Based Shares and HHIs From USAP Transactions

b. HHI calculations do not inform the extent of competition in bidding markets.

136. As I explained above, shares and HHIs are not informative of the extent of competition in bidding markets.[190] A more informative measure of the extent of competition is the number of qualified bidders that could bid on a potential facility's contract.

137.

i. Houston

138.

[190] *See, e.g.,* evidence in n. 33.

246. [redacted]

247. [redacted]

Lona Fowdur, Ph.D.

January 12, 2026

Exhibit 6

PUBLIC - REDACTED

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

Federal Trade Commission, Plaintiff, v. U.S. Anesthesia Partners, Inc., Defendant.	Case No.: 4:23-CV-03560-KH

CORRECTED EXPERT REPORT OF CORY S. CAPPS, PHD

August 28, 2025

[redacted]

III.A.1. Hospitals' selections of anesthesia providers

(49) According to a publication from 2010, hospitals account for more than 80% of an anesthesiologist's clinical time on average.[14] In this case, payer claims data show that, as of 2023, 75% of commercial payments for anesthesia services rendered in a facility were for services rendered in a hospital setting and 25% for services rendered in an ambulatory surgery center (ASC). For USAP, [redacted] of commercial payments are for services provided in a hospital setting. Although anesthesia providers can be directly employed by a hospital, it is more common for them to be part of a group, such as USAP, that is independent from hospitals.[15] Hospitals that rely on independent anesthesia groups use either an "exclusive" or "closed" model in which the hospital contracts with a single anesthesia group to provide most or all of its anesthesia services or an "open" model in which anesthesia providers from multiple groups render services within a hospital, often the request of the surgeon.[16]

(50) Under the exclusive model, the anesthesia group may commit to providing 24/7 coverage.[17] As compared with an open model, an exclusive contract to provide anesthesia services at a hospital will bring greater and more steady patient volume for the group.[18] In contrast, hospitals that use an open model do not typically contract directly with an anesthesia group and instead rely on surgeons to

---

[13] The U.S. Bureau of Labor Statistics reports that in May 2023, 93% of anesthesiologists in the U.S. were employed by "Offices of Physicians." U.S. Bureau of Labor Statistics, "Occupational Employment and Wage Statistics, May 2023, Anesthesiologists," https://www.bls.gov/oes/2023/may/oes291211.htm. Hospital-based providers are medical professionals "such as a pathologist, anesthesiologist, or emergency physician, who furnishes substantially all of such services in a hospital inpatient or emergency room setting and through the use of the facilities and equipment, including qualified electronic health records, of the hospital." 42 U.S.C. § 1395w-4(o)(1)(C)(ii).

[14] Lindsay Daugherty et al., *An Analysis of the Labor Markets for Anesthesiology* (RAND Corporation, 2010), 28.

[15] USAP-FTC-CID-00099912 at -931 ([redacted])

[16] For example, the following anesthesiology services agreements between hospitals and USAP identify USAP as the exclusive provider: [redacted]

[17] *See* [redacted]

[18] PX0170 at -016 [redacted]); *see also*, Deposition of Robert Coward (USAP), March 21, 2025 [hereinafter "Coward (USAP) Dep."], 53 [redacted] and PX1077 at -001 [redacted]

coordinate with anesthesia providers to cover their cases.[19] In some cases, hospitals use exclusivity only for specific service lines (e.g., trauma and obstetrics) or for specific hospitals within a multi-hospital system.[20]

(51) [redacted]

(52) When selecting an anesthesia group for an exclusive contract, hospitals consider various factors, including [redacted],[23] [redacted],[24] [redacted]

19 *See, e.g.,* [redacted] Deposition of Dale Flowers (USAP), April 17, 2025 [hereinafter "Flowers (USAP) Dep."], 46 [redacted]; [redacted]

20 Examples of service-specific anesthesiology contracts include [redacted] ([redacted]) Examples of anesthesia services contracts with some but not all hospitals within a system include [redacted]); [redacted]

21 [redacted]

22 [redacted]

23 *See, e.g.,* [redacted]

24 *See, e.g.,* [redacted]

[redacted].[26] Contract terms can vary in length; for example, [redacted].[27]

(53) [redacted]

101 [redacted]

25 *See, e.g.,* [redacted]

26 *See* [redacted] DX452 at -841 [redacted] *See also,* [redacted]). I describe stipends in more detail below.

27 *See, e.g.,* [redacted]

28 [redacted]

29 [redacted]

30 [redacted]

[redacted]

(56) [redacted]

(57) Hospitals may pay a "subsidy" or "stipend" to the anesthesia groups they select to provide services (anesthesia groups receive this amount from the hospital in addition to the payments anesthesia groups receive from payers). [redacted][38].

[redacted]

[36] [redacted]

[37] [redacted]

[38] *See, e.g.,* [redacted]

[redacted][39][redacted][40][redacted][41].

(58) [redacted]

(59) [redacted]

[redacted]

39 [redacted]

40 [redacted]);

41 *See, e.g.,* [redacted]

42 [redacted]

[redacted]

III.A.2. Payments for anesthesia services

(60) Healthcare providers that reach a contractual agreement with a health plan are referred to as "participating" or "par" providers. Agreements between participating providers and health plans typically specify the rates the provider will receive for services; such contractual rates are typically below the provider's list charges (list charges are sometimes referred to as "billed" charges). The agreements usually also specify that the provider cannot "balance bill" patients for covered services. That is, a participating provider for a given health plan normally cannot bill patients for the difference between the contracted payment amounts and the provider's list charges. In general, network participation offers providers increased volume, more prompt payment and better cash flow, and a greater proportion of total amounts due being collectable from health plans rather than patients.

(61) [redacted]

(62) [redacted]

[redacted]

43 [redacted]

44 [redacted]

45 [redacted]

[redacted]

(74) Given these distinctions, I define "hospital-only anesthesia services" to be the set of anesthesia-requiring services that are solely or predominantly provided by hospitals: (1) all inpatient anesthesia services and (2) all outpatient anesthesia services that are predominantly (at least 90% of cases in the baseline approach) performed in HOPDs.[77] That is, I use the term hospital-only anesthesia services to mean the kinds of anesthesia services shown in Figure 1 and Figure 2, as opposed to those shown in Figure 3. Based on the claims data in this case, such services represent [redacted] of commercial payments for anesthesia services provided in hospitals in 2023. For USAP, hospital-only anesthesia services accounted for [redacted] of commercial revenue for services it provided in hospitals in 2023.[78]

[76] [redacted]

[77] The set of hospital-only services varies over time due, for example, to changes in the services on the Inpatient Only list and the ASC Exclusion list.

[78] In addition, in 2023, claims data indicate that anesthesia services (whether hospital-only or not) rendered in hospitals

(77) [redacted].

III.B.1. Demand for anesthesia services is a derived demand

(78) Anesthesia providers differ from most other categories of physician: patients do not directly demand anesthesia for its own effects but rather demand anesthesia because of other services they require, such as anesthesia for surgery or an epidural for a delivery. In this respect the demand for anesthesia services is a *derived demand*.[79] Patients undergoing surgery will, of course, place an extremely high value on anesthesia services, but that value is subordinate to and conditioned upon the surgery—absent the surgery, the patient would not value the anesthesia service.

(79) In addition, consumers generally do not select their anesthesia providers. Instead, the choice of anesthesia provider is determined by the patient's choice of facility and, in some cases, choice of surgeon.[80] Often, [redacted].[81] As one example, [redacted]"[82] Because patients do not directly select anesthesia providers, if such a group becomes out-of-network, it would likely see a relatively small decline in volume so long as the hospital(s) served by group remains in-network.[83] Consistent with this, [redacted]

[79] Derived demand is the "[d]emand for a good that is derived from the production and sale of other goods." David Besanko and Ronald R. Braeutigam, *Microeconomics*, 2d ed. (Hoboken: John Wiley & Sons, 2005), 26. In some cases involving derived demand, consumers are able to mix and match (e.g., the demand for gasoline is derived from the demand for automobile transportation, but consumers are able to separately choose their preferred car and gasoline). This is not generally the case for anesthesia services, where choosing a hospital also means selecting, implicitly, an anesthesia provider who practices at that hospital.

[80] One slide from an initial business plan to form the entity that would become USAP included the heading, [redacted] PX2265 at -008.

[81] *See, e.g.,* [redacted]

[82] [redacted]

[83] [redacted] *See, e.g.,* [redacted]

[redacted].[84]

(80) [redacted].

[redacted]

See also, USAP-FTC-CID-00330413 at 420 [redacted].

[84] [redacted].

[redacted]

V.B. Commercially reimbursed hospital-only anesthesia services constitute a relevant service market

(125) [redacted]

(126) [redacted]

- [redacted]
- [redacted]

(127) As discussed in section III.A.3, hospital-only procedures accounted for about [redacted] of payers' total commercial payments to Texas anesthesia providers for services provided in a hospital in 2023. Hence, hospital-only anesthesia services account for a substantial volume of services and payments. Because there are many anesthesia-requiring services that only a hospital can provide—namely, all

[171] *See* PX0170 at -019 ("[redacted] (Emphasis added.)).

such inpatient services and many such outpatient services—a payer cannot offer a commercially viable health plan that features a provider network that includes no hospitals.[172] This is true no matter how many ASCs an insurer includes in its provider network: though ASCs provide some competition to hospitals for a subset of outpatient services and patients, ASCs are not a substitute for hospitals.[173] Moreover, claims data show that hospitals rely on anesthesiologists (as opposed to CRNAs) to a greater degree than ASCs do.[174] For these reasons, anesthesia services provided at ASCs are not a substitute for hospital-only anesthesia services. [redacted]

(128) [redacted]

[172] Such a network would almost certainly violate network adequacy requirements (*see* section III.C).

[173] By way of analogy, consider the difference between a basic calculator and a smartphone. Both can perform arithmetic functions, but a calculator cannot send text messages, browse the web, make voice or video calls, or host multi-user games. Consequently, a smartphone is much more expensive than a calculator, and the two are not substitutes, even though a calculator performs a subset of smartphone functions.

[174] Specifically, [redacted] of all cases in hospitals (not limited to hospital-only) are performed by CRNAs without anesthesiologists compared to [redacted] of cases in ASCs. "CRNA without anesthesiologist" refers to a case in which a CRNA is the sole provider (i.e., there is no physician NPI present). Providers are identified as CRNAs or physicians (MDs/DOs) based on their degree in the NPPES data.

[175] [redacted]

- [redacted]
- [redacted]
- [redacted]
- [redacted]

(188) [redacted]

(189) In section III.A.2, I explained that most anesthesia payments are computed as the product of (1) "total units," which equals the sum of base, time, and modifying units, and (2) the applicable "conversion factor." Given this, the conversion factor, which equals the average allowed amount per unit (rather than per case), is a potential alternative measure of price. I focus on the allowed amount per case for both practical and conceptual reasons.

(190) [redacted]

(191) [redacted]

[redacted]

226 [redacted]

227 [redacted]

VI.A.4. USAP's prices are high relative to other anesthesia groups

(211)

(212) The Houston MSA.

- As shown above in Figure 15, as of 2023, USAP had a hospital-only anesthesia services market share in the Houston MSA of about
-

[redacted]

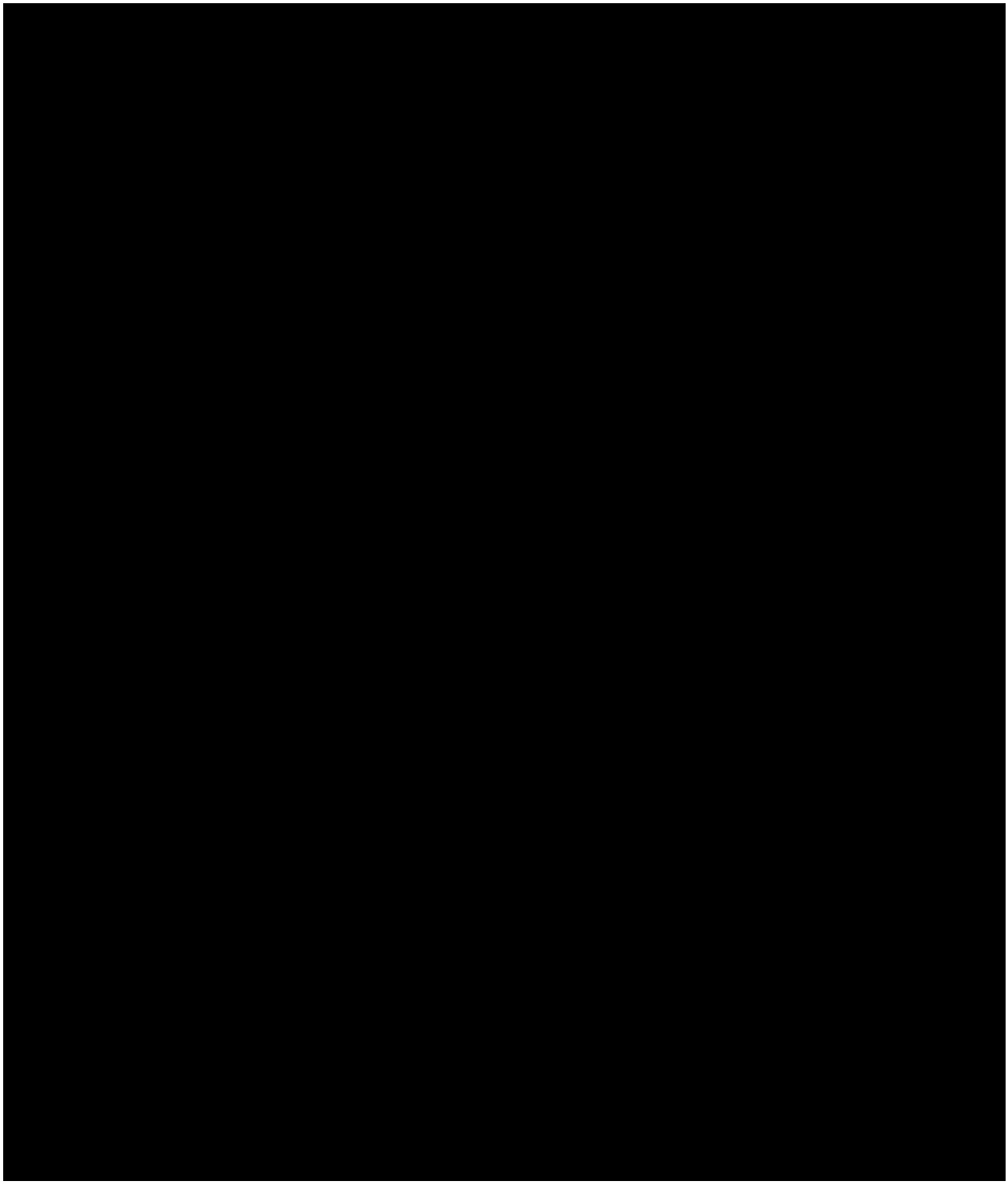
(213) The Dallas MSA.

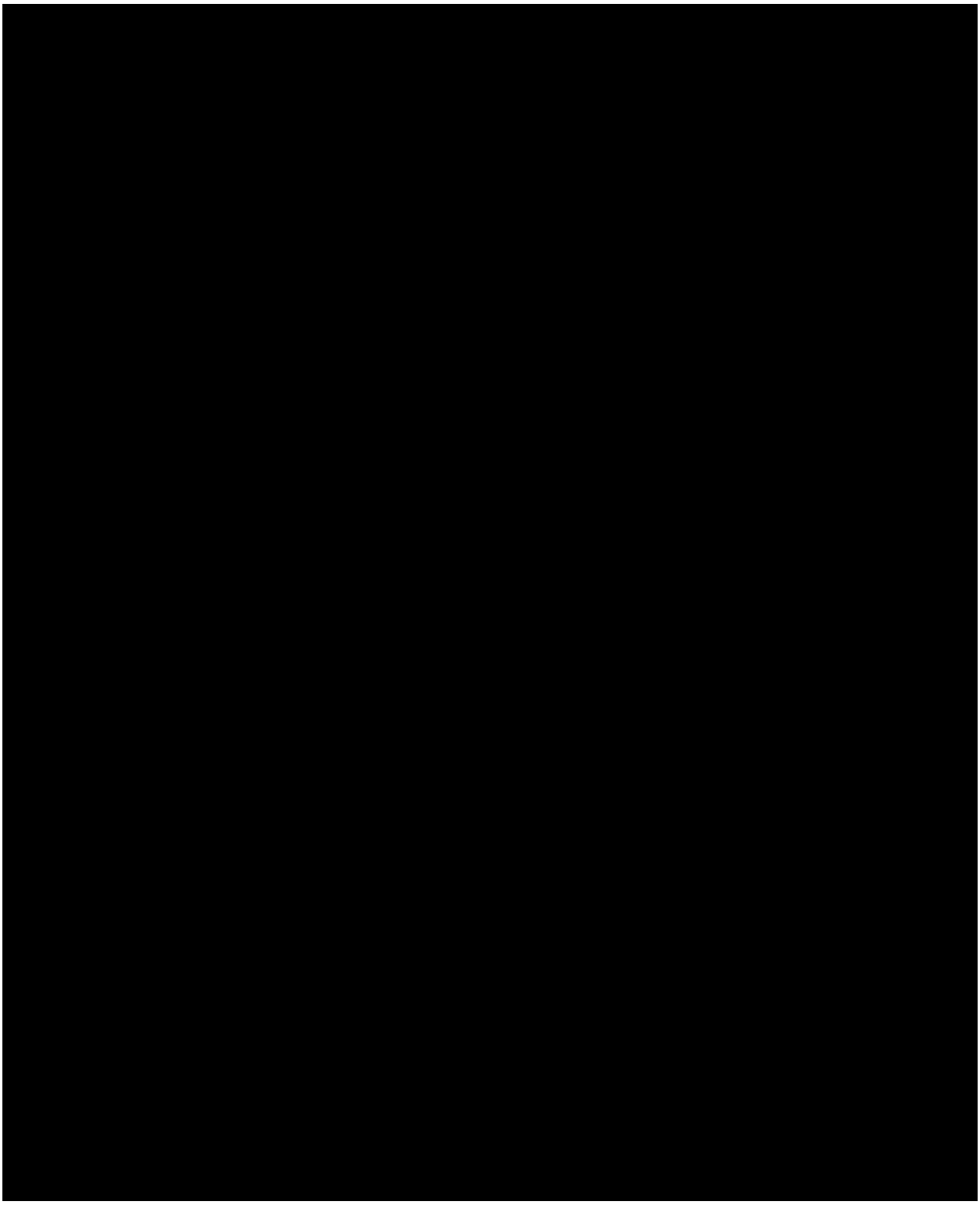
- As shown above in Figure 17, as of 2023, USAP had a market share in the Dallas MSA of about [redacted];
- [redacted]

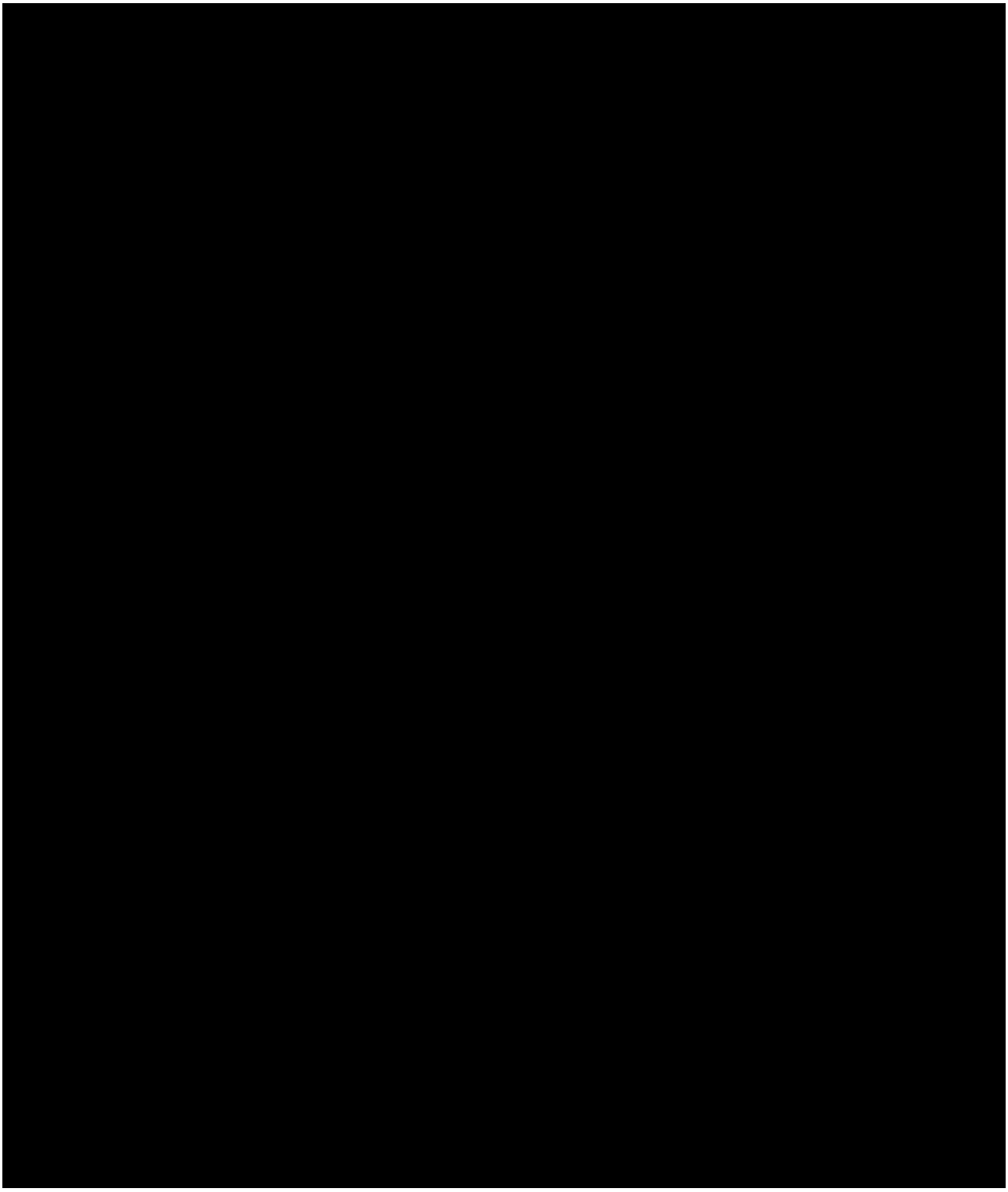
(214) The Austin MSA.

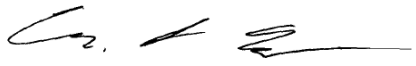
- As shown above in Figure 19, as of 2023, USAP had a market share in the Austin MSA of about [redacted],
- [redacted]

241 [redacted]









[NAME]

August 28, 2025

Date

Exhibit 36

PUBLIC - REDACTED

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

Federal Trade Commission, Plaintiff, v. U.S. Anesthesia Partners, Inc., Defendant.	Case No.: 4:23-CV-03560-KH

REPLY EXPERT REPORT OF CORY S. CAPPS, PHD

December 12, 2025

[redacted]

(29) [redacted]

- [redacted]
- [redacted]
- [redacted]

(30) [redacted]

(31) Finally, USAP's prices are high relative to competitive benchmarks. Firms in a competitive market earn zero economic profit. The fact that many anesthesia groups are viable while charging lower prices than USAP implies that their prices are at or above the competitive level, which in turn implies that USAP's prices are above the competitive, zero-profit level. Even under Dr. Fowdur's standard of "but-for" prices, my analysis of competitive effects shows that USAP's prices (including the prices of the groups it acquired) are higher than their but-for prices.

I.B.2. USAP's acquisitions have increased its market power and harmed consumers

(32) [redacted]

[redacted]

23 [redacted]

24 [redacted]

25 [redacted]

[redacted]

(57) [redacted]

(58) Third, there are additional clear differences between hospital-only anesthesia services and other in-hospital anesthesia services:

- [redacted] Higher units for hospital-only services means that these services are, on average, more complex and take more time.
- Even limiting to HOPD claims, hospital-only anesthesia services [redacted] Again, complexity and duration are greater for hospital-only anesthesia services.
- As another reflection of the difference between the two categories of services, recall that Dr. Fowdur shows that within hospitals, hospital-only services account for [redacted]. However, because they are more complex and more expensive, they account for [redacted] *ayments,* as shown in Figure 4. [redacted]

61 [redacted]

62 [redacted]

63 [redacted]

[redacted].[64]

- Dr. Fowdur's Exhibit 30, titled [redacted]" taken on its face shows that ASCs could be substitutes for hospitals for at most [redacted] of claims. (The vertical axis in this exhibit extends up to [redacted]
- Within the hospital setting, about [redacted] of hospital-only anesthesia cases occur on a weekend as compared with about [redacted] for the remaining in-hospital anesthesia cases and for ASCs. *See* Figure 3. Therefore, non-hospital-only anesthesia services are more similar to the typically elective, non-emergent care provided in ASCs than to care that is predominantly provided in hospitals.

(59) [redacted]

[redacted]

[64] In one of the market share sensitivities in my initial report, I report shares of cases based on including anesthesia services that were performed in HOPDs (relative to ASCs) at least 50% of the time, rather than the [redacted] threshold in my baseline market shares. Capps Report, Figure 29. The [redacted] threshold shares are slightly lower but similar to the baseline shares. *Compare* Capps Report, Figure 20 and Figure 29.

Dr. Fowdur does not address this, but the [redacted] anesthesia services rendered within hospitals.

[redacted]

(69) Consistent with [redacted] I show in Figure 5 that a significant majority of anesthesia providers in the Houston, Dallas, and Austin MSAs worked primarily in either the hospital setting or in the ASC setting.[80] For example, the left-most blue bar labeled [redacted] shows that [redacted] anesthesia providers in the three MSAs have [redacted] or more of their claims at ASCs; likewise, anesthesia providers who have [redacted] or more of their claims at ASCs account for only [redacted] of anesthesia providers serving facilities in the three MSAs. Conversely, more than [redacted] of anesthesia providers have [redacted] or more of their claims occur in a hospital rather than an ASC; likewise, [redacted] of anesthesia providers have [redacted] or more of their cases in hospitals.[81] In addition, the green line shows the composition of medical doctors relative to CRNAs among the providers depicted in each of the blue bars. Compared with anesthesia providers who have the majority of their cases in hospitals, the

[79] Fowdur Report, note 39.

[80] The figure includes cases from 2014–2023. The results and takeaways remain the same when looking at a more recent range, like 2022–2023.

[81] Dr. Fowdur's Exhibit 33 shows that [redacted]

percentage of medical doctors among anesthesia providers who have more of their cases at in ASCs is lower.[82]

(70)

[82] In Exhibit 31, Dr. Fowdur reports percentages of hospital-based anesthesia providers who also provided services at ASCs in the She identifies a provider as having served in an ASC if they had at least 12+ yearly claims in an ASC, but she does not otherwise account for variation in the extent to which providers served in an ASC versus a hospital, nor for variation in the extent of medical doctors relative to CRNAs. Figure 5 accounts for both factors.

In addition, Dr. Fowdur's exhibit addresses the wrong question: because she is attempting to establish that anesthesia providers currently working *in ASCs* could and would rapidly switch to providing services to *hospitals*, she should have looked at the share of ASC-based providers that previously worked at hospitals.

[83]

[redacted]

(194) [redacted]

(195) USAP increased the prices of groups it acquired and sustained those prices over time, implying that the acquired groups were, on their own, not able to negotiate prices comparable to USAP's. In other words, in a but-for world without USAP's acquisitions, these groups' prices would not have risen to USAP's higher level. Therefore, USAP's prices are above a but-for benchmark.

(196) [redacted]

214 [redacted]

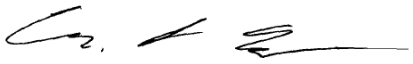
215 [redacted]

216 [redacted]

217 [redacted]

218 [redacted]

219 [redacted]



Cory S. Capps, PhD

December 12, 2025

Date

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

APPENDIX TO DEFENDANT U.S. ANESTHESIA PARTNERS, INC.'S UNOPPOSED MOTION TO PERMANENTLY SEAL CERTAIN EXHIBITS TO ITS MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

Page

CASES

2020 WL 9720461
Only the Westlaw citation is currently available.
United States District Court, W.D. Texas, Austin Division.

340B HOLDINGS, LLC d/b/a SUNRx, Plaintiff,
v.
Matthew BOBO in his individual capacity, and Performance Healthcare Solutions, LLC, Defendants.

1:20-CV-197-RP
|
Signed 04/15/2020

Attorneys and Law Firms

Amy Wintersheimer Findley, Allen Matkins Leck Gamble Mallory & Natis LLP, San Diego, CA, Katherine Patrice Chiarello, Kayna Stavast Levy, Maria Amelia Calaf, Karen S. Vladeck, Wittliff Cutter PLLC, Austin, TX, for Plaintiff.

Amanda L. Cottrell, Jonathan Clark, Stephen Edward Fox, Sheppard Mullin Richter & Hampton, LP, Dallas, TX, for Defendants.

ORDER

ROBERT PITMAN, UNITED STATES DISTRICT JUDGE

***1** Before the Court are two motions for leave to file various exhibits under seal. (Pl.'s Mot. Seal, Dkt. 7; Defs.' Mot. Seal, Dkt. 38). Plaintiff 340B Holdings, LLC *d/b/a* SUNRx ("SUNRx") seeks to file exhibits 4, 8, 9, and 10 to the Declaration of Jill Simoes, ("Simoes Decl."), under seal. (Pl.'s Mot. Seal, Dkt. 7, at 1). Defendants Matthew Bobo ("Bobo") and Performance Healthcare Solutions, LLC ("Performance Healthcare") seek leave to file exhibits 2, 3, 10, 12, and 13 to their response to SUNRx's motion for a preliminary injunction under seal. (Defs.' Mot. Seal, Dkt. 38, at 1). For the reasons discussed below, the Court will grant SUNRx's motion in part and deny Defendants' motion.

Generally, the public has a right to inspect judicial records. *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978). This right "promotes the trustworthiness of the judicial process, curbs judicial abuses, and provides the public with a better understanding of the judicial process, including its fairness[, and] serves as a check on the integrity of the system." *Bradley ex rel. AJW v. Ackal*, No. 18-31052, 2020 WL 1329658, at *4 (5th Cir. Mar. 23, 2020) (citing *United States v. Sealed Search Warrants*, 868 F.3d 385, 395 (5th Cir. 2017)).

This right is not absolute: the "common law merely establishes a presumption of public access to judicial records." *Id.* (citing *SEC v. Van Waeyenberghe*, 990 F.2d 845, 848 (5th Cir. 1993)). The Fifth Circuit has neither assigned a particular weight to this presumption nor interpreted the presumption in favor of access as creating a burden of proof. *Bradley*, 2020 WL 1329658, at *4. But in light of the public's right to access judicial records, courts are required to "use caution in exercising [their] discretion to place records under seal." *United States v. Holy Land Found. for Relief & Dev.*, 624 F.3d 685, 689–90 (5th Cir. 2010) (citing *Fed. Sav. & Loan Ins. Corp. v. Blain*, 808 F.2d 395, 399 (5th Cir. 1987)). "In exercising its discretion to seal judicial records, the court must balance the public's common law right of access against the interests favoring nondisclosure." *Bradley*, 2020 WL 1329658, at *4 (citing *Van Waeyenberghe*, 990 F.2d at 848). "The presumption however gauged in favor of public access to judicial records is one of the interests to be weighed on the public's side of the scales." *Id.* (cleaned up).

"Not every document, however, is a judicial record subject to the common law right of access." *Id.* at *5. "[S]ealing may be appropriate where orders incorporate confidential business information." *N. Cypress Med. Ctr. Operating Co. v. Cigna Healthcare*, 781 F.3d 182, 204 (5th Cir. 2015). But when the party seeking leave to file under seal "does not identify any particular confidential information in the orders that may cause it harm, and much of the information therein is available elsewhere," sealing is generally unwarranted. *N. Cypress*, 781 F.3d at 204; *see also Powers v. Duff & Phelps, LLC*, No. 1:13-CV-768, 2015 WL 1758079, at *7–8 (W.D. Tex. Apr. 17, 2015) ("[T]he parties' decision to designate documents as confidential does not mandate that the Court seal the record. The standard for sealing court documents is more stringent than [the] standard for protecting discovery materials under a protective order."). "[I]n order for a document to be sealed, the movant must not only point to specific confidential information contained in the document, but must also show the specific harm that would be suffered if the public were granted access to this document." *Omega Hosp., LLC v. Cmty. Ins. Co.*, No. CV 14-2264, 2015 WL 13534251, at *4 (E.D. La. Aug. 12, 2015) (citing *N. Cypress*, 781 F.3d at 204).

I. Defendants' Motion to Seal

***2** The Court finds that Defendants have not asserted sufficient grounds for filing their exhibits under seal. Defendants' sole reason for sealing the exhibits to their response is that the exhibits "have been designated by [SUNRx] as either 'Confidential' or 'Attorneys' Eyes Only' " and they wish "to comply with the Agreed Protective Order" entered in this case. (Defs.' Mot. Seal, Dkt. 38, at 1). While the exhibits may reasonably be subject to the parties' protective order, "[t]he standard for sealing court documents is more stringent than [the] standard for protecting discovery materials under a protective order" and Defendants have not presented any compelling reasons for sealing the exhibits other than that the exhibits are covered by the protective order in this case. (Mot. Seal, Dkt. 64, at 1); *Powers*, 2015 WL 1758079, at *7; *see also Amazon.com, Inc. v. Corydoras Techs., LLC*, No. 1:19-CV-1095-RP, 2020 WL 1644005, at *2 (W.D. Tex. Apr. 2, 2020). Defendants have neither pointed to specific confidential information contained in the exhibits nor shown how this information might be harmful if made public. *See N. Cypress*, 781 F.3d at 204 (upholding unsealing when the party seeking to seal did "not identify any particular confidential information in the orders that may cause it harm, and much of the information therein [was] available elsewhere."). Therefore, the Court will deny Defendants' motion.

II. SUNRx's Motion to Seal

By contrast, SUNRx's motion for leave to seal the exhibits to the Simoes Decl. specifically identifies (for the most part) the confidential, proprietary, and trade secret information that may cause it harm. (*See* Pls.' Mot. Seal, Dkt. 7, at 1–2). For instance, SUNRx notes that exhibit 8 is a copy of several of its "Assessment Packets provided for specific SUNRx clients" and that these packets "contain competitive sensitive business information, including SUNRx's administrative fee pricing, financial information related to specific medical providers, and curated customer information." (*Id.* at 2). Exhibit 9 contains "a copy of an excerpt of a spreadsheet reflecting SUNRx's proprietary financial analysis of the potential profit a specific SUNRx client would obtain by using SUNRx's services," and Exhibit 10 is "a copy of a regulatory analyses [sic] performed by SUNRx employees to evaluate the impact of certain legislation on SUNRx's business opportunities." (*Id.*). In balancing the public's common law right of access against the interests favoring nondisclosure, the Court finds SUNRx's request to seal exhibits 8, 9, and 10 is warranted because SUNRx has pointed to "particular confidential information" in the exhibits that may cause it harm. *See N. Cypress*, 781 F.3d at 204.

However, SUNRx has not asserted sufficient grounds for placing exhibit 4 under seal. With respect to exhibit 4, SUNRx only notes that it includes correspondence between Bobo and a current SUNRx client "that *may* be confidential to Performance Health Care." (*Id.* at 1) (emphasis added). The possible disclosure of confidential information is insufficient to overcome the presumption of public access to judicial records, and the Court will deny SUNRx's request to seal exhibit 4.

Accordingly, **IT IS ORDERED** that Defendants' motion to file exhibits under seal, (Dkt. 38), is **DENIED**. The Clerk shall unseal Defendants' motion for leave to file under seal, (Dkt. 38). Its attachments may remain under seal.

IT IS FURTHER ORDERED that SUNRx's motion to file exhibits under seal, (Dkt. 7), is **GRANTED IN PART**. The Clerk shall file only exhibits 8, 9, and 10 to the Simoes Decl., (Dkt. 6-1), under seal. The Clerk shall unseal SUNRx's motion for leave to file under seal. (Dkt. 7).

All Citations

Not Reported in Fed. Supp., 2020 WL 9720461

End of Document

2022 WL 130879
Only the Westlaw citation is currently available.
United States District Court, S.D. Texas, Houston Division.

Trinh Vinh BINH, Plaintiff,
v.
KING & SPALDING LLP, et al., Defendants.

Civil Action No. 4:21-CV-02234
|
Signed 01/10/2022

Attorneys and Law Firms

Brett Wagner, Doherty Wagner, Houston, TX, for Plaintiff.

Anthony N. Kaim, Caitlin Alyssa Halpern, Scott A. Humphries, Barrett H. Reasoner, Gibbs Bruns LLP, Houston, TX, for Defendants.

ORDER

Alfred H. Bennett, United States District Judge

***1** Before the Court are three motions: first, Defendants' Motion to Compel Arbitration and Dismiss (Doc. #4), Plaintiffs Response (Doc. #15), and Defendants' Reply (Doc. #18); second, Plaintiffs Motion to Remand (Doc. #11), Defendants' Response (Doc. #20), Plaintiffs Reply (Doc. #22); and third, Defendants' Motion to Seal (Doc. #5), Plaintiffs Response (Doc. #14), and Defendants' Reply (Doc. #19). Having reviewed the parties' arguments and applicable legal authority, the Court denies the Plaintiffs Motion to Remand, grants Defendants' Motion to Compel Arbitration, and grants Defendants' Motion to Seal.

I. Background

This dispute arises out of an arbitration proceeding in which King & Spalding LLP and two of its lawyers, Reginald Smith and Craig Miles, (collectively "Defendants") represented Plaintiff Trinh Binh against the Republic of Vietnam. Doc. #4 at 2. The parties confirmed the terms of the legal representation in an Engagement Agreement. Doc. #15, Ex. A. As part of their representation, Defendants helped Plaintiff secure litigation funding from a company now known as Burford Capital LLC ("Burford"). Doc. #4 at 2. On March 20, 2015, Plaintiff and Burford executed a Prepaid Forward Purchase Agreement ("PFPA") to establish how Burford would fund Plaintiffs legal proceedings against the Republic of Vietnam. *See* Doc. #4, Ex. 1. The PFPA includes an arbitration provision which states:

> Any controversy or claim arising out of or relating to this Agreement or any other Transaction Document, or the breach thereof, shall be settled by confidential arbitration in Chicago, Illinois administered by the American Arbitration Association under its Commercial Arbitration Rules.... The arbitrator(s) will have the authority to ... determine his/her/their own jurisdiction by interpreting the scope of this arbitration clause and whether a controversy or claim arises out of or relates to this Agreement or any other Transaction Document.

Doc. #4, Ex. 1 at 13. On the same day, Plaintiff and Defendants executed another document (the "Counsel Letter"), instructing Defendants to distribute any arbitration proceeds in compliance with the PFPA. *See* Doc. #4, Ex. 2. The Counsel Letter is explicitly included in the PFPA's definition of "Transaction Documents." Doc. #4, Ex. 1 at 4.

In 2019, Defendants won an award of more than $45 million on Plaintiffs behalf and obtained payment of the entire amount from the Republic of Vietnam. Doc. 4 at 3. On June 11, 2021, Plaintiff filed this suit in state court against Defendants for allegedly colluding with Burford to improperly distribute the arbitration proceeds in violation of the PFPA. *See* Doc. #4, Ex. 4. On July 2, 2021, Plaintiff amended his Petition to add a claim for defective representation. *See* Doc. #4, Ex. 3. On July 9, 2021, Defendants removed to this Court and now move to compel arbitration. Doc. #1 and Doc. #4. Plaintiff denies that the PFPA's arbitration provision applies to disputes with Defendants and moves to remand. Doc. #11.

II. Legal Standard

***2** The United States is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("Convention"), which Congress has codified at 9 U.S.C. § 201, *et seq.* ("Convention Act"). *Acosta v. Master Maint. & Const. Inc.*, 452 F.3d 373, 375 (5th Cir. 2006). "An

arbitration agreement arising out of a legal relationship ... which is considered as commercial, including a transaction, contract, or agreement [to settle by arbitration a controversy thereafter arising out of such contract or transaction], falls under the Convention." 9 U.S.C. §§ 202, 2. The Convention Act grants federal district courts original and removal jurisdiction over cases related to arbitration agreements falling under the Convention. *Acosta*, 452 F.3d at 375. Under the Convention, "the court should compel arbitration if (1) there is an agreement in writing to arbitrate the dispute, (2) the agreement provides for arbitration in the territory of a Convention signatory, (3) the agreement arises out of a commercial legal relationship, and (4) a party to the agreement is not an American citizen." *S & T Oil Equip. & Mach., Ltd. v. Juridica Invs. Ltd.*, 456 F. App'x 481, 483 (5th Cir. 2012). "If these requirements are met, the Convention requires district courts to order arbitration." *Francisco v. Stolt Achievement MT*, 293 F.3d 270, 273 (5th Cir. 2002). This is a "very limited inquiry," and any "doubts as to whether a contract falls under the Convention Act should be resolved in favor of arbitration." *Id.* at 274–75. "[T]he federal policy favoring arbitration applies with special force in the field of international commerce." *Id.* at 275 (quotation omitted). Congress's purpose in enacting the Convention Act was "to encourage the recognition and enforcement of commercial arbitration agreements and international contracts and to unify the standard by which the agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries." *Acosta*, 452 F.3d at 376.

Parties can "agree to arbitrate 'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." *RentA-Center, West, Inc. v. Jackson*, 561 U.S. 63, 68-69 (2010). Parties provide "clear and unmistakable evidence of their intent to delegate these issues" by "expressly incorporating rules empowering the arbitrator to decide substantive arbitrability." *Halliburton Energy Servs., inc. v. Ironshore Specialty Ins. Co.*, 921 F.3d 522, 537 (5th Cir. 2019). If an agreement explicitly binding a signatory "clearly and unmistakably delegates arbitrability," then the delegation applies to the signatory's disputes with nonsignatories as well. *Brittania-U Nigeria, Limited v. Chevron USA, Inc.*, 866 F.3dd 709, 715 (5th Cir. 2017).

III. Analysis

Defendants argue that, although they are not signatories to the PFPA, Plaintiffs claims against them are subject to arbitration for a number of reasons. Doc. #4 at 4. Defendants first argue that the applicable arbitration agreement is governed by the Convention, which requires the Court to compel arbitration based on the same factors that established grounds for removal. *Id.* Alternatively, Defendant argues that should the Court reach the terms of the arbitration agreement, the PFPA delegates all arbitrability questions to the arbitrator. *Id.* at 6. Lastly, Defendant argues that even if the Court considers whether Plaintiffs claims are arbitrable, it must answer that question in the affirmative. *Id.* at 7.

Plaintiff responds that this Court lacks subject-matter jurisdiction and should therefore remand the case back to state court. Doc. #11 at 1. Additionally, Plaintiff disputes one of the Convention factors—whether there was an agreement in writing to arbitrate the dispute. Doc. #15 at 3. Plaintiff initially argues that there is no written agreement to arbitrate the dispute between himself and Defendants because the Defendants did not sign the PFPA and the PFPA's arbitration clause is limited to disputes between signatories. *Id.* at 4. Plaintiff alternatively argues that Defendants, as non-signatories, cannot enforce the PFPA's arbitration clause under New York law, which governs the agreement. Doc. #15 at 4.

Whether the Court has jurisdiction and whether the Court should compel arbitration comes down to the same question: whether or not there is an agreement to arbitrate the dispute. Federal district courts have original and removal jurisdiction over cases related to arbitration agreements falling under the Convention. *Acosta*, 452 F.3d at 375. When the requirements are met, "[t]he Convention imposes a mandatory obligation upon federal courts to enforce an arbitration agreement falling within its scope." *Freudensprung*, 379 F.3d at 341. "An explicit delegation clause states that the arbitrator has the power to determine her own jurisdiction or to determine whether specific claims are arbitrable." *Gemini Ins. Co. v. Certain Underwriters at Lloyd's London*, No. CV H-17-1044, 2017 WL 1354149, at *4 (S.D. Tex. Apr. 13, 2017). "Incorporating the [American Arbitration Association] rules into an arbitration agreement makes threshold questions of arbitrability questions for the arbitrator to decide, rather than the court." *Id.*

***3** Here, the PFPA contains a broad arbitration provision, which states that "[a]ny controversy or claim arising out of or relating to this Agreement or any other Transaction Document, or the breach thereof, shall be settled by confidential arbitration in Chicago, Illinois administered by the American Arbitration Association under its Commercial

Arbitration Rules." Doc. #4, Ex. 1 at 13. The PFPA defines the term "Transaction Documents" to mean "this Agreement, the Security Agreement, the Consulting Agreement, and the Counsel Letter." *Id.* at 4. Plaintiff does not dispute that the "Counsel Letter" referred to in the PFPA is the letter Plaintiff and Defendants executed on March 20, 2015, instructing Defendants to distribute any arbitration proceeds in compliance with the PFPA. *See* Doc. #15 and Doc. #4 Ex. 2. Nor does Plaintiff dispute that the American Arbitration Association rules are explicitly incorporated into the PFPA. *See id.* Plaintiff and Defendants executed the Counsel Letter on the same day the PFPA was executed to fulfill one of Plaintiff's contractual obligations to Burford. Doc. #11 at 4. Therefore, Plaintiff's claim that Defendant did not distribute funds in accordance with the PFPA is a "controversy ... arising out of or relating to" the PFPA or Counsel Letter "or the breach thereof." In light of the broad arbitration agreement and the Court's policy of deferring to the arbitrator, the Court finds that the question of arbitrability should be decided by the arbitrator.

Plaintiff next argues that Defendants cannot enforce the PFPA's arbitration clause as non-signatories under New York law, which governs the agreement. Doc. #15 at 4. However, the PFPA's arbitration agreement itself is governed by federal law because the dispute arises from an arbitration involving interstate commerce, notwithstanding the parties' selection of New York law. *PaineWebber Inc. v. Bybyk*, 81 F.3d 1193, 1197 (2d Cir. 1996) ("Since the contract evidences a transaction involving interstate commerce, the Federal Arbitration Act applies, notwithstanding the parties' selection of New York law."). Regardless, applying New York law would lead to the same result. Generally, New York law "directs courts to honor a strong presumption in favor of arbitration." *Degi Deutsche Gesellschaft Fuer Immobilienfonds MBH v. Haffey*, 1995 WL 669087, at *4 (S.D.N.Y. Nov. 3, 1995). Courts applying Second Circuit and New York state laws have found that compelling arbitration on arbitrability issues is appropriate where "the non-signatory was explicitly tasked with performing certain duties in the contract containing the arbitration clause," or "the issues the non-signatory is seeking to resolve in arbitration are intertwined with the agreement." *Republic of Iraq v. ABB AG, 769* F. Supp. 2d 605, 612 (S.D.N.Y. 2011); *Contec Corp. v. Remote Sol., Co.*, 398 F.3d 205, 209 (2d Cir. 2005). Both descriptions apply to this case. The Court therefore finds that compelling arbitration is proper in this case.

Defendants also move to file the PFPA and Counsel Letter under seal, which Plaintiff opposes. Doc. #5 and Doc. #14. Sealing is appropriate when documents contain "confidential business information" and public disclosure "might place the signatory parties at a competitive disadvantage in future negotiations." *N. Cypress Med. Ctr. Operating Co. v. Cigna Healthcare*, 781 F.3d 182, 204 (5th Cir. 2015); *Cellular Commc'ns 'Equip., LLC. v. Apple Inc.*, 2017 WL 10311215, at *3 (E.D. Tex. Jan. 5, 2017). Finding both factors applicable to the documents at issue, the Court grants the Motion to Seal.

IV. Conclusion

Because the PFPA has a broad delegation clause, this dispute is a controversy arising out of the PFPA, and all doubts are to be resolved in favor of arbitration, the Court finds that the issue of arbitrability must be resolved by an arbitrator. Additionally, it is well established that courts in this Circuit should dismiss, rather than stay, litigation when arbitration will resolve all of the issues in dispute. *Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161, 1164 (5th Cir. 1991). Accordingly, because Plaintiff has not identified any issues that will not be resolved by arbitration, Defendants' Motion to Compel Arbitration is GRANTED, Plaintiff's Motion to Remand is DENIED, and this case is DISMISSED. Additionally, because the relevant documents contain confidential business information and public disclose might create a competitive disadvantage in future negotiations, Defendants' Motion to Seal is GRANTED.

***4** It is so ORDERED.

All Citations

Not Reported in Fed. Supp., 2022 WL 130879

End of Document

2017 WL 10311215
Only the Westlaw citation is currently available.
United States District Court, E.D. Texas, Tyler Division.

CELLULAR COMMUNICATIONS EQUIPMENT, LLC., Plaintiff,
v.
APPLE INC. et al., Defendants.

CIVIL ACTION NO. 6:14-cv-251-KNM
|
Signed 01/05/2017

Attorneys and Law Firms

Jeffrey Ray Bragalone, Jonathan Hart Rastegar, Stephanie R. Wood, Terry Afif Saad, Bragalone Conroy PC, Bradley Wayne Caldwell, Christopher S. Stewart, Hamad M. Hamad, Jason Dodd Cassady, John Austin Curry, Warren Joseph McCarty, III, Caldwell Cassady & Curry, PC, Jason Scott McManis, Gruber Hail Johansen Shank LLP, Dallas, TX, Claire Abernathy Henry, Jack Wesley Hill, Thomas John Ward, Jr., Ward, Smith & Hill, PLLC, Longview, TX, Edward R. Nelson, III, Thomas Christopher Cecil, Gordie Donald Puckett, Ryan P. Griffin, Nelson Bumgardner PC, Ft. Worth, TX, for Plaintiff.

Douglas E. Lumish, Brett M. Sandford, Jeffrey G. Homrig, Latham & Watkins LLP, Menlo Park, CA, Mark C. Scarsi, Ashlee Lin, Michael K. Sheen, Miguel Ruiz, Milbank Tweed Hadley & McCloy, Los Angeles, CA, Brian Kwok, Christopher R. Lubeck, Thomas Christos Mavrakakis, Haynes and Boone, LLP, Christopher Wood Kennerly, Jonas P. Herrell, Philip Ou, Yar R. Chaikovsky, Paul Hastings LLP, Palo Alto, CA, Cassius Kirkpatrick Sims, Latham & Watkins LLP, E. Joshua Rosenkranz, Orrick, Herrington & Sutcliffe LLP, Anup K. Misra, Winston & Strawn LLP, New York, NY, Christine K. Corbett, Erik R. Fuehrer, Krista Grewal, DLA Piper US LLP, East Palo Alto, CA, Edward H. Sikorski, John Allcock, Kevin Hamilton, Richard T. Mulloy, Sean C. Cunningham, Tiffany C. Miller, DLA Piper US LLP, Jeffrey David Comeau, Paul Hastings LLP, San Diego, CA, Eric Hugh Findlay, Roger Brian Craft, Findlay Craft PC, Dallas William Tharpe, Herbert A. Yarbrough, III, Yarbrough Wilcox, PLLC, Michael E. Jones, Potter Minton, a Professional Corporation, Tyler, TX, Gabriel K. Bell, Gabrielle Ashleigh LaHatte, Michael Joseph Gerardi, Latham & Watkins LLP, Mark S. Davies, Orrick, Herrington & Sutcliffe LLP, Allan M. Soobert, Blair M. Jacobs, Paul Hastings LLP, Thomas M. Dunham, Winston & Strawn LLP, Washington, DC, Howard E. Levin, Haynes and Boone, LLP, Sarah Joyce Kalemeris, Winston & Strawn LLP, Chicago, IL, James M. Heintz, DLA Piper LLP, Reston, VA, Joseph H. Lee, Latham & Watkins LLP, Costa Mesa, CA, Harry Lee Gillam, Jr., Melissa Richards Smith, Gillam & Smith, LLP, Marshall, TX, Sean D. Unger, Paul Hastings LLP, San Francisco, CA, Charles Bennett Molster, III, The Law Offices of Charles B. Molster, III, PLLC, Great Falls, VA, Mark W. McGrory, Megan JoAnna Redmond, Erise IP, PA, Overland Park, KS, Robert William Weber, Smith Weber LLP, Texarkana, TX, Douglas James Dixon, Hueston Henningan, LLP, Newport Beach, CA, for Defendants.

ORDER

K. NICOLE MITCHELL, UNITED STATES MAGISTRATE JUDGE

***1** Before the Court are Apple, CCE, AT&T, Verizon, Sprint, and T-Mobile's [1] Unopposed Motions to Seal Confidential Trial Exhibits and Portions of the Trial Transcript. For the reasons stated herein, Apple and CCE's Motions (Doc. No. 333 and 336) are **GRANTED-IN-PART** and **DENIED-IN-PART**. AT&T, Verizon, Sprint, and T-Mobile's Motions (Doc. No. 332, 334, 335, and 337) are **GRANTED**.

1 Initially, there were several defendants in this lawsuit: AT&T Mobility LLC ("AT&T"); Cellco Partnership d/b/a/ Verizon Wireless ("Verizon"); Sprint Spectrum, L.P., Sprint Solutions, Inc., and Boost Mobile, LLC ("Sprint"); T-Mobile USA, Inc., and T-Mobile US, Inc. ("T-Mobile") ("the Carrier Defendants"). On August 28, 2016, the Court severed and stayed the case against all Carrier Defendants until completion of the trial against Apple. Doc. No. 245.

BACKGROUND

On September 30, 2016, the Court denied Apple and CCE's Joint Motion to Seal Confidential Trial Exhibits because several of the exhibits the parties sought to seal were introduced in open court at trial, and because the parties had not offered a particularized showing for any document. Doc. No. 326 at 1. The Court invited the parties to resubmit a

curtailed list of trial exhibits that truly warranted sealing. *Id.* at 3.

On October 14, 2016, Apple and CCE each filed renewed motions to seal certain trial exhibits and portions of the trial transcript, collectively limiting their requests to a small subset of the documents they originally sought to seal. Doc. Nos. 333 and 336. On the same day, the Carrier Defendants filed their own motions to seal certain trial exhibits. Doc. Nos. 332, 334, 335, and 337.

APPLICABLE LAW

There is a "strong presumption that all trial proceedings should be subject to scrutiny by the public." *United States v. Holy Land Found. For Relief & Dev.*, 624 F.3d 685, 690 (5th Cir. 2010). In order to properly scrutinize judicial proceedings, the public must have enough information to "assist [them] in understanding the proceedings." *Smartflash v. Apple*, Case No. 6:13-cv-447-JRG at Doc. No. 534 (citing *Apple Inc. v. Samsung Electronics Co., Ltd.*, 727 F.3d 1214, 1228–29 (Fed. Cir. 2013) (applying Ninth Circuit law)). Thus, the district court must use caution when exercising its discretion to seal judicial records. *N. Cypress Med. Ctr. Operating Co. v. Cigna Healthcare*, 2015 WL 1069411, at *13 (5th Cir. Mar. 10, 2015) (internal quotations omitted); *Federal Sav. & Loan Ins. Corp. v. Blain*, 808 F.2d 395, 399 (5th Cir. 1987) ("The district court's discretion to seal the record of judicial proceedings is to be exercised charily.").

I. Apple's Motion:

Apple's Motion asks the Court to seal four categories of trial exhibits: (1) source code; (2) market research and customer surveys; (3) product testing data; and (4) certain terms of Apple's patent license agreement with Cellular Network Services, LLC.

Regarding the first two types of exhibits, source code and market research and survey reports, Courts have repeatedly recognized the need to preserve the confidentiality of such information. *See Smartflash*, at Doc. No. 534 (granting Apple's request to seal source code because of its "confidential nature"); *Apple v. Samsung*, 727 F.3d at 1228 (noting that because "market research reports contain information that Apple's competitors could not obtain anywhere else ... [,] Apple ha[d] a strong interest in keeping its market research reports confidential"). Accordingly, Apple's request to seal the Qualcomm source code, as well as its market research and survey information is **GRANTED**. The Court **ORDERS** that PDX 1–3, DDX 10, PX 56, PX 57, PX 65, and DTX-626 be **SEALED**. The Court further **GRANTS** Apple's request to keep **SEALED** portions of the trial transcript which discuss the Qualcomm source code. It is therefore **ORDERED** that 9/14/16 a.m. (Lumish) Trial Tr. at 29:1–7; 31:3–5; 32:3–12 remain **SEALED**.

***2** Third, Apple seeks to seal two sections of its patent license agreement (PX 705) with Cellular Network Services ("CNS"): the pricing terms and the list of licensor patents. The Court recognizes that disclosure of these portions of the license agreement will put Apple at a competitive disadvantage in negotiations for future licensing deals. *See In re Elec. Arts, Inc.*, 298 F. App'x 568, 569 (9th Cir. 2008) ("[P]ricing terms, royalty rates, and guaranteed minimum payment terms of ... licensing agreement(s) ... is ... information that plainly falls within the definition of 'trade secrets.' "); *Apple Inc. v. Samsung Elec. Co., Ltd.*, 2012 WL 3283478, at *4 (N.D. Cal. Aug. 9, 2012), *overruled on other grounds* by *Apple Inc. v. Samsung Elec. Co., Ltd.*, 727 F.3d 1214 (Fed. Cir. 2012) (sealing "all information related to the payment terms of Apple's licensing agreements" because "disclosing the terms of these licensing agreements [would] put [Apple] at a competitive disadvantage in negotiations for future licensing deals").

Thus, the Court **GRANTS** Apple's request to keep **SEALED** the pricing terms and list of licensor patents portions of PX 705. It is **ORDERED** that for purposes of the public record, PX 705 be **SEALED**. However, the Court further **ORDERS** Apple to submit PX 705 with redactions to the pricing terms (§ 3.0 at 5) and the list of licensor patents (pp. 11–22). This redacted version shall remain a part of the public record. [2]

2 Apple requests that the Court seal only the pricing terms and list of licensor patents of its license agreement with CNS. Because physical exhibits must be preserved for the record on appeal, it is not possible to seal only certain portions of physical documents. Thus, to the extent the Court grants a Motion to seal certain portions of trial exhibits, the Court will order those exhibits to be sealed in their entirety, in order to preserve the record for appeal. The Court will further order that the party seeking to seal the exhibit submit a redacted version, which will remain a part of the public record.

Finally, Apple seeks to seal PX 71 and PX 262, which contain "highly confidential information regarding the operation of Apple's products." Doc. No. 333 at 6. PX 71 is a table summarizing the results of testing commissioned by CCE to intimate that the iPhone 4, iPhone 4s, iPhone 5, iPhone 5c, iPhone 5s, iPad 2, iPad 3, iPad 4, iPad mini, iPad air ("the accused devices") infringe the '820 Patent. The table presents the following eight columns of data pertaining to each accused device: item number; vendor; model; additional unit ID; operator; uplink MAC PDU count; long BSR count; and short BSR count. PX 262 contains Apple's responses to Plaintiff's First Set of Requests for Admission ("RFA") #6, in which Apple denies that each accused device sends buffer status reports when operating on an LTE network. PX 262 at 8–9. In responding to the other RFAs in PX 262, Apple revealed confidential and proprietary information regarding its device testing specifications and regarding Qualcomm software, in general.

Counsel for CCE presented PX 71 multiple times to the jury to prove that because the accused devices transmit both long and short BSRs, they infringe the '820 Patent. *See* 9/9/16 p.m. (Hill) Trial Tr. at 29:13–30:02; 9/8/16 a.m. (Hill) Trial Tr. at 22:5–14; 7:8–20. Further, Counsel for CCE displayed both PX 71 and PX 262 to the jury while asking Ms. Mewes why she thought Apple would deny that the accused devices send buffer status reports in light of such "obvious findings," those being that the accused devices, as per columns 7 and 8 of PX 71, transmit both long and short buffer status reports. *See* 9/9/16 (Hill) Trial Tr. at 26:21–29:11; 9/12/16 p.m. (Curry) Trial Tr. at 50:9–51:18.

At trial, CCE's theory of infringement was that the accused devices infringe the '820 Patent by sending both long and short buffer status reports over an LTE network. *See generally* 9/14/16 a.m. (Hill) Trial Tr. Thus, access to PX 71 and PX 262 is not only helpful to understanding the jury's verdict, it is essential to understanding the jury's verdict.

***3** Nonetheless, the Court appreciates that both PX 71 and PX 262 contain proprietary information that is superfluous to the jury's analysis, disclosure of which would allow Apple's competitors to glean the details of its technology without making the same investment that Apple did. In particular, only columns 7 and 8 of PX 71 are important to the jury's infringement analysis, as they specify exactly how many long and short buffer status reports each accused device sends to its base station provider on a live cellular network. And regarding PX 262, the portion relevant to the jury's verdict is the fact that Apple denied that its accused devices transmit buffer status reports.

Accordingly, the Court **GRANTS-IN-PART** Apple's request to Seal PX 71 and PX 262. The Court **ORDERS** that for purposes of the official record, PX 71 and PX 262 be **SEALED**. Apple is **ORDERED** to submit PX 71 with redactions to all columns except column 1 (the model), column 7 (the long BSR count), and column 8 (the short BSR count). It is further **ORDERED** that Apple shall submit PX 262, redacting everything except RFA No. 6 and Apple's Response to RFA No. 6 (pp. 8–9), in which Apple denies that its accused devices transmit buffer status reports. PX 262 at 8–9. Both of these redacted versions shall remain a part of the public record.

II. CCE's Motion

CCE also seeks to seal the following categories of exhibits because they contain confidential information: (1) patent purchase agreements; (2) license agreements and negotiations; (3) Qualcomm confidential information; (4) portions of the trial transcript detailing Nokia Siemens Network's ("NSN") negotiations with Apple; (5) compensation information for NSN employees; and (6) a special interrogatory revealing third-party financial information.

Concerning the first two categories, both patent purchase and license agreements contain certain confidential terms which, if disclosed to the public, might place the signatory parties at a competitive disadvantage in future negotiations. *Elec. Arts, Inc.*, 298 F. App'x at 569; *Apple, Inc. v. Samsung Elec. Co.*, 2012 WL 3283478, at *4. The Court therefore **GRANTS** CCE's request to seal PX 7, PX 8, PX 9, PX 10, PX 11 (the patent purchase agreements), as well as PX 77, PX 81, PX 89, PX 91, PX 94, PX 107, PX 109, PX 291, DTX-508, DTX-661, and PX 705 (the patent license agreements). It is **ORDERED** that the aforementioned exhibits be **SEALED.**

Third, CCE requests that the Court seal a category of exhibits (PX 95; PX 118–123; and PX 126–128) which contain device specifications and technical information for Qualcomm devices. PX 95 contains various declarations by Bao Nguyen, a senior staff engineer employed by Qualcomm. During the trial, Counsel for CCE displayed PX 95 to the jury to highlight one of Nguyen's declarations that there are no material differences between the different Qualcomm chips, across all of the Carrier Defendants'

devices.[3] PX 118–123 and PX 126–128 contain information related to the electrical and mechanical specifications for various Qualcomm devices. Because PX 95, PX 118–123 and PX 126–128 are replete with fragmented source code, Qualcomm's interest in preserving their confidentiality outweighs any public interest in accessing them. *Smartflash*, at Doc. No. 534; *Apple v. Samsung*, 727 F.3d at 1228. CCE's request to seal these exhibits is **GRANTED**. The Court therefore **ORDERS** that PX 95; PX 118–123; and PX 126–128 be **SEALED**.

[3] Buffer status reporting is a technology that Apple purchases from Qualcomm, an American semiconductor and telecommunications equipment company. Specifically, Qualcomm sells Apple the functionality in the form of baseband chips, which implement buffer status reporting through the embedded source code. These chips are then integrated into each of the accused devices, which are then sold to the Carrier Defendants as well as to end users. *See* 8/24/16 p.m. Trial Tr. at 7:22-25.

***4** Fourth, CCE seeks to seal PX 64, PX 255, and PX 270, because they contain "NSN confidential information" that "specifically relates to NSN's confidential negotiations with Apple." Doc. No. 336 at 5. At trial, these exhibits were admitted into evidence and presented to the jury in redacted form. The exhibits (as redacted) are comprised of email exchanges between Apple and NSN that generally debate the '820 Patent's purported indispensability to the LTE standard. These portions do not mention licensing, purchasing, or any type of "confidential negotiations" with Apple. CCE's Motion to seal PX 255, PX 270, and PX 64 is therefore **DENIED**. Accordingly, the Court **ORDERS** that PX 64, PX 255, and PX 270 remain **UNSEALED**.

Fifth, CCE seeks to seal DTX-597 because it describes "confidential employment terms used by NSN, and includes specific details of compensation paid to one NSN engineer." Doc. No. 336 at 5. DTX-597 is the compensation agreement between Benoist Sebire, the inventor of the '820 Patent, and NSN (Sebire's employer at the time) for Sebire's invention of "Buffer Status Report Triggers in E-UTRAN." DTX-597 at 1. Public disclosure of this information will disadvantage NSN by allowing its competitors to offer better terms to prospective employees. Considering NSN's strong interest in keeping the details of its employee compensation information confidential, and the public's minimal interest in Mr. Sebire's exact compensation amount, the Court **GRANTS** CCE's request to seal DTX-597. The Court therefore **ORDERS** that DTX-597 be **SEALED**.

CCE next seeks to keep sealed two portions of the trial transcript (9/14/16 a.m. Trial Tr. at 39:4–20 (Lumish) and 59:7–11 (Caldwell)) because they "discuss NSN's negotiations with Apple." Doc. No. 336 at 5. At 39:4–20, Counsel for Apple highlights that in response to Apple's declaration that its products do not infringe the '820 Patent, NSN simply "sold the patent off." *See* 9/14/16 a.m. (Lumish) Trial Tr. at 39:4–20. Moreover, 59:7–1 discusses how Apple responded to NSN's assertion of noninfringement. Neither portions of the trial transcript "discuss NSN's negotiations with Apple" to the extent of pricing, payment, or other sensitive and proprietary information, disclosure of which would place Apple or NSN at a competitive disadvantage. Doc. No. 336 at 5. The Court therefore **DENIES** CCE's request to keep sealed the following portions of the trial transcript: 9/14/16 a.m. Trial Tr. at 39:4–20 (Lumish) and 59:7–11.

CCE finally seeks to seal PX 294 as "Other Third Party Confidential Information," in which Amazon discusses its worldwide smartphone and tablet sales. PX 294 at 1. CCE's damages expert, Philip Green, referred to PX 294 during his (sealed) testimony to explain to the jury exactly how he calculated the per unit rate for the '820 Patent from the CCE-Amazon license. 9/8/16 p.m. Trial Tr. (Green) at 22:5–14. Because Amazon's interest in maintaining the confidentiality of its sales data outweighs the public interest in accessing this document, the Court **GRANTS** CCE's request to seal PX 294. It is hereby **ORDERED** that PX 294 be **SEALED**.

III. The Carrier Defendants' Motions

In addition to CCE and Apple, a number of the Carrier Defendants in this case have filed motions to seal certain trial exhibits. Doc. Nos. 332, 334, 335, and 337. First, AT&T, Verizon, Sprint, and T-Mobile each seek to seal exhibits that contain confidential business information relating to their respective internal mobile device testing procedures (AT&T: PX 70; Verizon: PX 146; Sprint: PX 133; T-Mobile: PX 140) (Docs. No. 337, 334, 335, and 332). CCE briefly presented one page of PX 70 and referenced PX 146, PX 133, and PX 140 only by exhibit number during trial, to highlight that the Carrier Defendants expect the cell phones on their networks to "comply with the 3GPP Standard 36.321 ... which pertains to BSRs." *See* 9/8/16 a.m. Trial Tr. (Dr. Caloyannides) at 5:7 (referencing PX 70); *id.* at 5:3–16 (referencing PX 146); *id.* at 5:22–6:2 (referencing PX 133); *id.* at 5:3–9,

7:1–5 (referencing PX 140). Disclosure of this information would certainly allow the Carrier Defendants' competitors to ascertain proprietary and confidential information about how the Carrier Defendants' cellular networks operate. The Court **GRANTS** AT&T, Verizon, Sprint, and T-Mobile's requests to seal PX 70, PX 146, PX 133, and PX 140, respectively. It is **ORDERED** that PX 70, PX 146, PX 133, and PX 140 be **SEALED**. [4]

[4] CCE also requests the Court to seal PX 20. Doc. No. 336 at 7. The Court **GRANTS** CCE's request to seal PX 20 for the same reason it grants AT&T's request to seal PX 20.

***5** Next, AT&T, Verizon, and T-Mobile each seek to seal exhibits that explain how cellphones using the LTE standard communicate with their respective base station providers, as the final step in the buffer status reporting process (AT&T: PX 20; Verizon: PX 151; T-Mobile: PX 141) (Docs. No. 337, 334, and 332). Again, disclosure of this information would allow competitors to ascertain the Carrier Defendants' confidential business information, including the exact mechanism by which their cellphones communicate with base station providers. Thus, the Court **GRANTS** AT&T, Verizon, and T-Mobile's requests to seal PX 20, PX 151, and PX 141, respectively. The Court **ORDERS** that PX 20, 151, and PX 141 be **SEALED**.

Finally, AT&T seeks to seal a trio of exhibits which, although were pre-admitted into evidence, were never displayed or even referenced in front of the jury. Doc. No. 337. Given that the jury could not have considered exhibits, which it never knew existed, the public interest in such exhibits is virtually nonexistent. The Court **GRANTS** AT&T's request to seal PX 68, 720, and 734. It is **ORDERED** that the aforementioned exhibits be **SEALED**.

CONCLUSION

For the foregoing reasons, The Court **GRANTS-IN-PART** and **DENIES-IN-PART** Apple and CCE's Motions to Seal Trial Exhibits. Doc. Nos. 333 and 336. T-Mobile, Verizon, Sprint, and AT&T's Motions to Seal Trial Exhibits are **GRANTED**. Doc. Nos. 332, 334, 335, and 337. The Court hereby **ORDERS** that

The following exhibits shall be **SEALED**: PDX 1–3; DDX 10; DTX-508; DTX-597; DTX-661; DTX 626; DTX-705; PX 7–11; PX 20; PX 56; PX 57; PX 65; PX 68; PX 70; PX 77; PX 81; PX 89; PX 91; PX 94; PX 95; PX 107; PX 109; PX 118–123; PX 126–128; PX 133; PX 140; PX 141; PX 146; PX 151; PX 291; PX 294; PX 720; PX 734.

PX 705; PX 262; PX 71; and PX 95; shall be **SEALED** for purposes of the official record. Apple shall submit: PX 705 with redactions to § 3.0 at 5 and pages 11–22; PX 262 with redactions to all sections except for RFA No. 6 and Apple's Response to RFA No. 6; and PX 71 with redactions to all portions except for columns 1, 7, and 8. CCE shall submit PX 95 with redactions to all sections except 4:9–16. All of these redacted versions shall remain on the public record.

PX 64, PX 255, and PX 270 shall remain **UNSEALED.**

Finally, 9/14/16 a.m. Trial Tr. (with the exception of 29:1–7; 31:3–5; 32:3–12), shall be **UNSEALED.**

So ORDERED and SIGNED this 5th day of January, 2017.

All Citations

Not Reported in Fed. Supp., 2017 WL 10311215

End of Document

2023 WL 6850006
Only the Westlaw citation is currently available.
United States District Court, N.D. Texas, Dallas Division.

IRONSHORE SPECIALTY INSURANCE COMPANY, Plaintiff,

v.

FACILITY IMS, LLC, Thomas D. Scott, Robert J. Riek, Gary D. Anderson, Gene Lunceford, Melinda S. Provence, and Evelyn Breaux Tennyson, as administrator of the Estate of Michael D. Tennyson, Defendants.

Civil Action No. 3:23-CV-00296-K
|
Signed October 17, 2023

Attorneys and Law Firms

D. Randall Montgomery, Alyssa Marie Barreneche, D. Randall Montgomery & Associates, Dallas, TX, Kyle M. Heisner, Pro Hac Vice, Matthew Nathan Klebanoff, Pro Hac Vice, Ronald P. Schiller, Pro Hac Vice, Sharon F. McKee, Pro Hac Vice, Hangley Aronchick Segal Pudlin & Schiller, Philadelphia, PA, for Plaintiff.

Micah Ethan Skidmore, Storm Patrick Lineberger, Haynes and Boone LLP, Dallas, TX, for Defendants Thomas D. Scott, Robert J. Riek.

Linda M. Dedman, Paul Robert Flick, Dedman Law PLLC, Dallas, TX, for Defendants Gary D. Anderson, Gene Lunceford, Melinda Provence, Evelyn Breaux Tennyson, Facility IMS LLC.

MEMORANDUM OPINION AND ORDER

ED KINKEADE, UNITED STATES DISTRICT JUDGE

***1** Before the Court are Plaintiff Ironshore Specialty Insurance Company's ("Iron-shore") Motion for Leave to File First Amended Complaint and First Amended Answer to Defendants' Counterclaim (the "Motion for Leave to Amend"), Doc. No. 66, Defendants Facility IMS, LLC, Thomas D. Scott, and Robert J. Riek's (collectively, "Facility IMS," and, together with Ironshore, the "Parties") Response and Supporting Brief in Opposition to Ironshore's Motion for Leave to File First Amended Complaint and First Amended Answer, Doc. No. 69, Ironshore's Reply in Support of Its First Amended Complaint and First Amended Answer to Defendants' Counterclaim, Doc. No. 71, Facility IMS's Motion for Summary Judgment Denying Plaintiff's Claims (the "Motion for Summary Judgment") and Brief and Appendix in support thereof, Doc. Nos. 39– 41, Ironshore's Response in Opposition to the Facility IMS Defendants' Motion for Summary Judgment and Brief and Appendix in support thereof, Doc. Nos. 50–52, Facility IMS's Reply in Support of Motion for Summary Judgment Denying Plaintiff's Claims, Doc. No. 59, Facility IMS's Response and Brief in Opposition to Ironshore's Alternative Motion for Leave to Amend Complaint, Doc. No. 58, Facility IMS's Motion and Supporting Brief to Strike Ironshore's Opposition Summary Judgment Evidence (the "Motion to Strike"), Doc. No. 56, Ironshore's Brief in Opposition to the Facility IMS Defendants' Motion to Strike Ironshore's Summary Judgment Opposition Evidence, Doc. No. 65, Facility IMS's Reply in Support of Motion to Strike Ironshore's Opposition Summary Judgment Evidence, Doc. No. 68, Ironshore's Motion for Leave to File Supplemental Declaration (the "Motion for Leave to File"), Doc. No. 57, Facility IMS's Response and Supporting Brief in Opposition to Ironshore's Motion for Leave to File Supplemental Declaration, Doc. No. 62, Ironshore's Amended Motion for Leave to File Documents Under Seal (the "First Amended Motion to Seal"), Doc. No. 54, and Ironshore's superseding Amended Motion for Leave to File Documents Under Seal (the "Second Amended Motion to Seal") and Provisionally Sealed Brief in support thereof, Doc. Nos. 60–61.

Upon consideration of the Parties' submissions, the Court **GRANTS** Ironshore's Motion for Leave to Amend its pleadings in part and **DENIES** it in part without prejudice. Ironshore, an insurer, primarily seeks permission to pursue recovery of overpayments it may have made to Facility IMS, its insured. Facility IMS offers no persuasive reason to prevent Ironshore from trying to recover the allegedly excessive payments, and the Court will permit Ironshore to do so. Facility IMS argues more persuasively that Ironshore's remaining allegations are futile. Ironshore alleges that Facility IMS breached contractual obligations to cooperate with Ironshore and settle claims with its consent, but Ironshore fails to allege that the breaches caused Ironshore harm. The Court will permit Ironshore to file another motion for leave to amend its pleading to address this failure.

***2** Because the Court grants Ironshore's Motion for Leave to Amend in part, the Court **DENIES** Facility IMS's Motion for Summary Judgment without prejudice. In the interest of

judicial economy, each Party may file or renew a summary judgment motion addressing all amended or unamended claims on which it seeks judgment in a single brief. Since the Court denies Facility IMS's Motion for Summary Judgment, it also **DENIES** Facility IMS's Motion to Strike Ironshore's summary judgment evidence and Ironshore's Motion for Leave to File supplemental summary judgment evidence as moot.

The Court **DENIES** without prejudice Ironshore's Motion to Seal several portions of its summary judgment filings. Some of the information Ironshore seeks to seal appears to be stale. Other information concerns amounts Ironshore actually paid or considered paying to settle claims against Facility IMS. Ironshore predicts that disclosure of these amounts will make settlement of other claims against Facility IMS more challenging, but the Fifth Circuit has expressly rejected this rationale for sealing documents. Nor can the Court accept Ironshore's alternative contention that the amounts are privileged. Ironshore appears to have filed the allegedly privileged material voluntarily, and Ironshore has not supported its contention with citations to applicable Texas privilege law. The Court will allow Ironshore one more opportunity to strengthen its Motion to Seal before it unseals the documents Ironshore submitted.

I. BACKGROUND

A. Facts

The Court draws the following facts from Ironshore's proposed First Amended Complaint and its attachments and assumes they are true. Doc. No. 66-1 ("FAC"); Doc. Nos. 1-2, 1-3, 1-4, 1-5 (collectively, "Pol'y"); Doc. No. 1-1.

Facility IMS is the subject of numerous lawsuits across the country alleging that it operated nursing homes where residents suffered injuries or died (the "Underlying Lawsuits"). FAC ¶ 15. Between 2014 and 2018, Ironshore insured Facility IMS and some of its personnel against errors and omissions in providing their customers professional services. Pol'y § I(A). Because of the Underlying Lawsuits against Facility IMS, Ironshore has now spent more than a million dollars paying defense costs and judgments or settlements for Facility IMS. FAC ¶¶ 43–50.

Under the insurance policies issued by Ironshore (the "Policies"), one million dollars is Ironshore's maximum liability for a single claim against Facility IMS. *Id.* ¶¶ 44–45. The Policies provide that related claims "shall be deemed to be" and "will be treated as a single Claim" regardless of the number or timing of related claims, the number or identity of the claimants or insureds, and whether the claims arise in individual or class actions. *Id.* ¶ 30. Related claims are claims

> arising out of, directly or indirectly resulting from, in consequence of, or in any way involving the same or related facts, circumstances, situations, transactions, or events or the same or related series of facts, circumstances, situations, transactions, or events, whether related logically, causally, or in any other way, in any combination, whether or not involving more than one policy, practice, procedure or product, including any course of treatment, and whether or not deemed a continuous tort.

Id. ¶ 29.

The Policies contemplate that Ironshore and Facility IMS will work together to settle claims. A "Cooperation Provision" states that, in the "event of a Claim, [Facility IMS] shall provide [Ironshore] with all information, assistance and cooperation that [Ironshore] reasonably requests." *Id.* ¶ 54. A "Consent Provision" states that no "Insured shall, except at its own cost, incur any expense, make any payment, admit liability for, assume any obligation, or settle any Claim without [Ironshore's] written consent." *Id.* ¶ 52.

***3** Ironshore need not cover a claim until Facility IMS pays a $350,000 "self-insured retention" toward the claim. *Id.* ¶ 26; Pol'y Item 4. A "Reimbursement Provision" of the Policies gives Ironshore the "right and option" to "pay all or any portion of the applicable ... self-insured retention on behalf of" Facility IMS, "in which event [Facility IMS] will repay [Ironshore] any amounts so paid." FAC ¶ 26.

Facility IMS stopped paying self-insured retentions attributable to the Underlying Lawsuits in February 2019, telling Ironshore that it was "not in a position" to pay them. *Id.* ¶ 43.

B. Procedural History

On February 9, 2023, Ironshore filed this action to recover the self-insured retentions Facility IMS refused to pay. Doc. No. 1 ¶ 1. Facility IMS counterclaimed, alleging that Ironshore failed to cover its share of a settlement Facility IMS arranged with Wilkes & Associates, the firm representing many of the plaintiffs in the Underlying Lawsuits (the "Wilkes Plaintiffs"). Doc. No. 24 ¶¶ 95–102. Ironshore filed an Answer to the counterclaim a little less than a month later. Doc. No. 33.

Facility IMS then filed an early Motion for Summary Judgment on Ironshore's claims. Doc. No. 39. In its Motion, Facility IMS asserts that it has no outstanding obligation to pay self-insured retentions because the claims in the Underlying Lawsuits are related claims. Doc. No. 40. Facility IMS reasons that the Policies treat related claims as a single claim subject to a single self-insured retention, and Facility IMS has already paid the self-insured retention for a single claim. *Id.* at 31–36.

After Ironshore responded to the Motion for Summary Judgment, Facility IMS filed a motion to strike Ironshore's opposition evidence, and Ironshore sought leave to supplement its evidence. Doc. Nos. 56–57. Ironshore also requested leave to file portions of its summary judgment briefing and evidence under seal, which the Court twice denied for failure to comply with the Court's procedures. Doc. Nos. 49, 53–55. Ironshore's Second Amended Motion to Seal portions of its briefing and evidence remains pending. Doc. Nos. 60–61.

With all of the foregoing motions on file, Ironshore moved for leave to amend its complaint. Doc. No. 66. In its proposed amended complaint, Ironshore first contends that Facility IMS settled with the Wilkes Plaintiffs without cooperating with Ironshore during the settlement process or obtaining Ironshore's consent to the settlement. FAC ¶ 72. According to Ironshore, this breached the Cooperation and Consent Provisions of the Policies. *Id.* Ironshore also seeks attorneys' fees under a Texas statute permitting fees awards in breach of contract cases. *Id.* at 20.

In another portion of its proposed amended complaint, Ironshore claims that it overpaid Facility IMS and should be able to recover the overpayments in unjust enrichment. *Id.* ¶¶ 76–79. Ironshore explains that the Underlying Lawsuits are subject to the coverage limit for a single claim if they involve related claims, and Ironshore has already paid more than the single claim coverage limit on behalf of Facility IMS. *Id.* ¶¶ 64–79. Ironshore seeks related declaratory relief resolving whether the Underlying Lawsuits involve related claims, whether they are subject to the coverage limit for a single claim, and whether Ironshore is entitled to amounts paid in excess of the single claim coverage limit. *Id.* ¶¶ 64–66.

***4** Ironshore proposes a handful of amendments to its Answer on similar theories. Among other things, Ironshore seeks to offset its alleged excess payments against any recovery Facility IMS may obtain on its counterclaim for coverage of the settlement with the Wilkes Plaintiffs. Doc. No. 66-2 ¶ 30. Ironshore also asserts that Facility IMS is "quasi-estopped" from pursuing its counterclaim, evidently on the basis that Facility IMS is acting inconsistently when it seeks coverage of the Wilkes Plaintiffs' settlement exceeding the coverage limit for a single claim and simultaneously asserts that the Underlying Lawsuits involve related claims subject to the self-insured retention for a single claim. Doc. No. 66-2 ¶¶ 27, 31.

II. MOTION FOR LEAVE TO AMEND

The Court begins by granting in part and denying in part Ironshore's Motion for Leave to Amend its pleadings. Facility IMS objects to Ironshore's Motion solely on the basis that Ironshore's proposed amendments are futile, and the Court limits its analysis accordingly. Doc. No. 69 at 6.

A. Legal Standard

The Court permits amendment of pleadings freely when justice so requires. Fed. R. Civ. P. 15(a). The Court will deny amendment of claim as futile if the amended claim would fail to meet the "same standard of legal sufficiency as applies under [Federal Rule of Civil Procedure] 12(b)(6)." *Marucci Sports, L.L.C. v. NCAA*, 751 F.3d 368, 379 (5th Cir. 2014) (citation omitted). A claim fails to satisfy Rule 12(b)(6) if the plaintiff does not plead facts sufficient to make the claim plausible. *City of Clinton v. Pilgrim's Pride Corp.*, 632 F.3d 148, 155 (5th Cir. 2010) (citing *Iqbal*, 556 U.S. at 679, 129 S.Ct. 1937). In assessing the plausibility of Ironshore's proposed amended claims, the Court assumes that Ironshore's factual allegations are true but does not assume that its legal conclusions are true. *Arroyo v. Oprona, Inc.*, 736 F. App'x 427, 430 (5th Cir. 2018).

The Court similarly permits amendment of affirmative defenses unless the amendment would be futile. *Xtria LLC v. Tracking Sys., Inc.*, 2010 WL 1541505, at *3 (N.D. Tex. Apr.

16, 2010) (Fitzwater, C.J.). An amendment to an affirmative defense is futile if the amended defense is insufficient as a matter of law. *Sprint Sols., Inc. v. Precise Wireless Int'l Inc.*, 2015 WL 2359519, at *2 (S.D. Tex. May 15, 2015); *see also United States v. Renda*, 709 F.3d 472, 479 (5th Cir. 2013).

The Parties assume that the substantive law of Texas applies to Ironshore's proposed pleadings, and the Court joins in their assumption. *Reynolds v. American-Amicable Life Ins. Co.*, 591 F.2d 343, 344 (5th Cir. 1979) (per curiam); *Tifford v. Tandem Energy Corp.*, 562 F.3d 699, 705 n.2 (5th Cir. 2009).

B. Discussion

The Court concludes that Ironshore's proposed breach of contract claims and request for attorneys' fees are futile, but Ironshore's proposed unjust enrichment claim, request for declaratory relief, and amendments to its Answer are not. The Court takes each set of proposed amendments in turn.

1. *Breach of Contract*

Facility IMS brings two challenges to Ironshore's proposed claims that Facility IMS breached the Cooperation and Consent Provisions of the Ironshore Policies by unilaterally settling with the Wilkes Plaintiffs. The Court finds only the second challenge persuasive.

Facility IMS's first challenge relies on the overlapping concepts of contractual "conditions" and contractual "covenants" under Texas law. A condition is an event whose non-occurrence excuses a party from performing under a contract. *Solar Applications Eng'g, Inc. v. T.A. Operating Corp.*, 327 S.W.3d 104, 108 (Tex. 2010). A covenant is a contractual promise of action or inaction whose breach may give rise to a claim for damages. *Id.* at 108. A party's substantial compliance with a covenant is a condition of its counterparty's performance under a contract, but lesser breaches of a covenant will not excuse the counterparty's performance. *Id.*; Restatement (Second) of Contracts § 237. The Court distinguishes covenants from conditions by determining which type of provision the Parties intended to adopt, keeping in mind that the law favors covenants over conditions. *Criswell v. Eur. Crossroads Shopping Ctr., Ltd.*, 792 S.W.2d 945, 948 (Tex. 1990).

***5** According to Facility IMS, its obligations to cooperate with Ironshore and obtain Ironshore's consent to the Wilkes Plaintiffs' settlement are conditions, but not covenants, they must fulfill before Ironshore must contribute to the settlement. Doc. No. 69 at 14–15. On that interpretation, if Facility IMS breached the Cooperation and Consent Provisions of the Policies, Ironshore can refuse to cover its share of the settlement cost, but it cannot pursue a breach of contract claim for damages. *Id.*

Facility IMS's interpretation does not fit the Policies' Cooperation Provision. The Cooperation Provision requires Facility IMS, in the event of a claim, to provide Ironshore with all "information, assistance and cooperation" it reasonably requests. Pol'y § IV(J). The provision does not make Ironshore's payment of the claim contingent on Facility IMS's cooperation; it tells Facility IMS what it must do if it receives a claim for damages covered by the Policies. *See PAJ, Inc. v. Hanover Ins. Co.*, 243 S.W.3d 630, 636 (Tex. 2008).

The Policies' Consent Provision also memorializes a covenant rather than a mere condition. The Consent Provision is an agreement to pay for unapproved settlements. It states that Facility IMS may not settle a claim without Ironshore's written consent "except at its own cost." Pol'y § IV(D)(1). If Facility IMS improperly shifts the costs of an unauthorized settlement to Ironshore, it breaches the Consent Provision, and Ironshore can recover the costs. *Md. Cas. Co. v. Am. Home Assur. Co.*, 277 S.W.3d 107, 113 n.12 (Tex. App.—Houston [1st Dist.] 2009, pet. dism'd) (construing nearly identical policy language as setting forth a covenant); *see also KIT Projects, LLC v. PLT P'ship*, 479 S.W.3d 519, 526 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (construing agreement to pay as covenant). There is no indication that Ironshore agreed to limit its remedies to withholding additional payments in that circumstance. Had it done so, the Parties presumably would have inserted language in the Consent Provision that is closer to the language they inserted in neighboring provisions. For example, in one neighboring provision, Ironshore explains that it will "have no obligation to pay" for losses if payments reach a liability cap. Pol'y § IV(D)(2).

The Court acknowledges that several federal courts have found that an insured's compliance with the cooperation provision in an insurance policy is a condition of the insurer's performance rather than covenant to cooperate whose breach can give rise to a claim for damages. *Beaufort Dedicated No. 5, Ltd. v. USA Daily Exp., Inc.*, 2012 WL 6608869, at *8 (S.D. Tex. Dec. 18, 2012); *Evanston Ins. Co. v. Tonmar, L.P.*, 669 F. Supp. 2d 725, 732 (N.D. Tex. 2009) (Fitzwater,

J.); *Phila. Indem. Ins. Co. v. Stebbins Five Cos., Ltd.*, 2002 WL 31875596, at *6 (N.D. Tex. Dec. 20, 2002) (Lynn, J.). Because the federal decisions do not reproduce the full text of the cooperation provisions the courts considered, the Court does not find them especially helpful in interpreting the Cooperation or Consent Provisions of the Ironshore Policies. The only relevant Texas precedent cited in the federal decisions turns on an analysis of policy text. *Progressive Cnty. Mut. Ins. Co. v. Trevino*, 202 S.W.3d 811, 815–16 (Tex. App.—San Antonio 2006, pet. denied). In that case, the Court of Appeals concluded that a requirement that a person "seeking any coverage" must cooperate with an insurer conditioned coverage on cooperation. *Id.* The Policies Ironshore issued to the Facility IMS Defendants do not contain similar language. To the extent that the federal decisions characterize cooperation clauses as mere conditions because insurers typically invoke the clauses to avoid paying claims, the Court finds the decisions unpersuasive. *E.g.*, *Phila. Indem.*, 2002 WL 31875596, at *6. The defensive use of cooperation provisions is consistent with them operating as covenants. A material breach of a covenant excuses the nonbreaching party's performance just as the failure of a condition does. *Solar Applications*, 327 S.W.3d at 108.

***6** Where no policy language dictates the result, the more persuasive rationale for denying an insurer damages when an insured settles a claim without cooperating with the insurer or obtaining the insurer's consent is that the insurer has not suffered harm. If the settlement is prejudicial to the insurer, the insurer can simply refuse to pay the claim. *See Prodigy Commc'ns Corp. v. Agric. Excess & Surplus Ins. Co.*, 288 S.W.3d 374, 382 (Tex. 2009); *Hernandez v. Gulf Grp. Lloyds*, 875 S.W.2d 691, 693 (Tex. 1994).

This is the basis for Facility IMS's second challenge to Ironshore's proposed contract claims, and the Court agrees that Ironshore has not pled damages caused by Facility IMS's alleged failure to cooperate with Ironshore and obtain its consent to the settlement with the Wilkes Plaintiffs. Doc. No. 69 at 14. Ironshore's proposed pleading generically recites that "Ironshore has sustained damages" without tying the damages to Facility IMS's alleged breaches of the Cooperation and Consent Provisions. FAC ¶ 74. Without more specific damages allegations, Ironshore's proposed amendments are futile. *See Langen v. Sanchez Oil & Gas Corp.*, 2019 WL 1674348, at *4 (S.D. Tex. Apr. 17, 2019) (dismissing claim for breach of consent-to-settlement provision for failure to plead damages with sufficient specificity).

The Court also rejects Ironshore's offer, made for the first time in its reply brief, to supplement its damages allegations. Doc. No. 71 at 9. Ironshore asserts that Facility IMS settled only some of the claims in some of the Underlying Lawsuits for which Ironshore may have to provide coverage, preventing Ironshore from settling the Underlying Lawsuits in full and putting money in the pockets of the attorneys prosecuting surviving claims. *Id.* at 8–9. Whether these allegations sufficiently describe recoverable damages is a question the Court will not answer without first giving Facility IMS an opportunity to state its position. The allegations also raise a question neither Party has briefed: whether the purported losses Ironshore describes are "costs" that Facility IMS must bear under the Consent Provision permitting it to enter unauthorized settlements only "at its own cost." Pol'y § IV(D)(1). If they are not, then Facility IMS did not breach the Consent Provision, and the Parties' remaining arguments with respect to the provision are moot. *Greene v. Farmers Ins. Exch.*, 446 S.W.3d 761, 768 (Tex. 2014). The Court will permit Ironshore to file another motion to amend its pleading so that both Parties can address the sufficiency of Ironshore's newly proposed allegations.

2. *Attorneys' Fees*

The Court denies Ironshore leave to seek attorneys' fees because Ironshore does not identify any claim it has pled for which they are appropriate relief. In its briefing, Ironshore claims attorneys' fees solely as potential relief for Facility IMS's purported breach of the Reimbursement Provision of the Ironshore Policies. Doc. No. 71 at 10. The Reimbursement Provision requires Facility IMS to repay Ironshore to the extent Ironshore advances money toward self-insured retentions on Facility IMS's behalf. Pol'y § IV(A)(8). If Facility IMS did not repay advances, that breach of contract would entitle Ironshore to attorneys' fees under Tex. Civ. Prac. & Rem. Code § 38.001(b), which authorizes fees awards to parties prevailing on contract claims. *Price v. Allstate Ins. Co.*, 190 F. App'x 360, 362 (5th Cir. 2006). While Ironshore's reasoning is sound, it did not plead that Facility IMS breached the Reimbursement Provision in its proposed amended complaint. The Court will not let Ironshore seek remedies for unpled claims.

3. *Unjust Enrichment*

***7** The Court grants Ironshore leave to amend its unjust enrichment claim. According to Ironshore, if the claims in the Underlying Lawsuits against Facility IMS are related claims, then they are subject to a collective coverage limit of one million dollars, and Ironshore's payments in excess of one million dollars to settle some of the claims was a mistake that unfairly benefited Facility IMS. FAC ¶ 77. Although the claim may be untenable, none of the Parties' arguments establish that it is.

Sorting out the Parties' positions begins with clarifying what they have not argued. Facility IMS does not rely on the Fifth Circuit's decision in *Aldous v. Darwin Nat'l Assur. Co.*, which held that, "under Texas law, an insurer has no right of equitable reimbursement against its insured." 851 F.3d 473, 485 (5th Cir. 2017), *adhered to in relevant part on reh'g*, 889 F.3d 798 (5th Cir. 2018). Facility IMS has forfeited the argument that *Aldous* forecloses Ironshore's proposed claims for purposes of resolving the motions pending before the Court.

Facility IMS instead argues that it has not been unjustly enriched by Ironshore's alleged overpayments, or at least that Ironshore cannot rely on equitable principles of unjust enrichment to recover the overpayments because the Policies govern Ironshore's payments. Doc. No. 69 at 11–12. That argument echoes the familiar principle that a party who has agreed to a distribution of benefits and costs in an express contract cannot use an unjust enrichment claim to extract additional benefits inconsistent with the distribution. *Fortune Prod. Co. v. Conoco, Inc.*, 52 S.W.3d 671, 684 (Tex. 2000).

That argument is also a nonstarter. Ironshore is not attacking the agreed distribution of benefits and costs under the Policies. It alleges that it spent even more money for Facility IMS's benefit than the Policies required. FAC ¶ 77. Courts have uniformly held that parties may recover excess payments of this sort in unjust enrichment. *Sw. Elec. Power Co. v. Burlington N. R.R.*, 966 S.W.2d 467, 469 (Tex. 1998); *Unum Life Ins. Co. of Am. v. Munoz*, 2007 WL 628084, at *4 (N.D. Tex. Feb. 27, 2007) (Fish, J.) (granting plaintiff summary judgment on overpayment-of-benefits claim).

Facility IMS contends that Ironshore's proposed unjust enrichment claim is time-barred regardless of its merits, but the Court sees no basis for Facility IMS's contention. Doc. No. 69 at 12–13. The Court generally will not reject a pleading on statute of limitations grounds unless it is clear from the face of the pleading that the statute of limitations is dispositive of the claims pled. *Evanston Ins. Co. v. Nat'l Union Fire Ins. Co.*, 2010 WL 11527373, at *9 (E.D. Tex. Apr. 5, 2010).

Facility IMS points to Ironshore's allegation that Facility IMS stopped paying self-insured retentions in February 2019, about four years before filing this action. Doc. No. 69 at 12–13 (citing FAC ¶¶ 35, 43). If Ironshore's unjust enrichment claim accrued at that time, as Facility IMS contends, the applicable two-year statute of limitations would bar the claim. *Elledge v. Friberg-Cooper Water Supply Corp.*, 240 S.W.3d 869, 871 (Tex. 2007). Facility IMS's reasoning breaks down because the allegation on which it relies establishes when Facility IMS purportedly stopped making payments to Ironshore, not when Ironshore stopped making payments on behalf of Facility IMS. Doc. No. 69 at 12–13. Ironshore's proposed claim seeks recovery of a portion of the latter, which may permissible if the payments were sufficiently recent. *See Allen v. Wilson*, 2016 WL 832780, at *6 (Tex. App.—Mar. 4, 2016, pet. denied) (finding that unjust enrichment claims accrued on the dates of each of several alleged payments benefiting the defendant).

***8** While the Court rejects Facility IMS's statute of limitations argument at this stage of the proceedings, it also rejects Ironshore's assertion that the unjust enrichment claim accrued on May 17, 2023, when Facility IMS filed its Motion for Summary Judgment asserting that the Underlying Lawsuits against Facility IMS involve related claims. Doc. No. 71 at 5–6. An unjust enrichment claim accrues when a defendant wrongfully obtains a benefit it would be unconscionable to retain because that is when the party conferring the benefit can seek relief. *Clark v. Dillard's, Inc.*, 460 S.W.3d 714, 720 (Tex. App.—Dallas 2015, no pet.). Facility IMS's allegedly wrongful act was not filing a summary judgment motion, although Ironshore may not have realized that Facility IMS retained the alleged overpayments from Ironshore prior to the filing. The allegedly wrongful act was the receipt and retention of the overpayments. FAC ¶ 77; *see Mayo v. Hartford Life Ins. Co.*, 354 F.3d 400, 411 & n.16 (5th Cir. 2004) (claim accrued upon wrongful receipt of funds); *Gaffar v. Kamal*, 2011 Tex. App. LEXIS 5714, at *7, 2011 WL 3209218 (Tex. App.—Dallas July 27, 2011, no pet.) (claim accrued upon wrongful receipt of funds despite later discovery of fraud).

Ironshore's purported failure to appreciate that Facility IMS received and retained alleged overpayments until Facility IMS moved for summary judgment does not, as Ironshore contends, defer accrual of Ironshore's unjust enrichment claim

under the "discovery rule." Doc. No. 71 at 6. In limited circumstances, the discovery rule defers accrual of a claim until a plaintiff knows, or in the exercise of reasonable diligence should know, of the facts giving rise to the claim. *Ross v. NavyArmy Cmty. Credit Union*, 2022 WL 100110, at *5–6 (S.D. Tex. Jan. 11, 2022). Ironshore does not suggest that it was unaware of its payments on behalf of Facility IMS or any other fact supporting its proposed unjust enrichment claim. Ironshore's proffered basis for deferral amounts to the possibility that Ironshore did not realize that its payments were overpayments because it misunderstood the payment provisions in its Policies until Facility IMS offered an interpretation of them. Ironshore's alleged confusion about the legal effect of the Policies does not trigger the discovery rule. The "discovery rule applies to the knowledge of facts on the part of the [plaintiff] as opposed to a knowledge of the law." *White v. Cole*, 880 S.W.2d 292, 295 (Tex. App.—Beaumont 1994, writ denied). To the extent that Ironshore faults Facility IMS for not sharing its legal reasoning earlier, Ironshore fails to allege any facts suggesting that Ironshore needed Facility IMS's advice before it could discover the purported overpayments underlying its claim. *See Wagner & Brown v. Horwood*, 58 S.W.3d 732, 735–37 (Tex. 2001) (rejecting application of discovery rule where lessee failed to notify royalty owners that it retained excessive sums).

Because Facility IMS's attack on the merits of Ironshore's proposed unjust enrichment claim fails and because neither Party establishes when the claim accrued for purposes of the applicable two-year statute of limitations, the Court will permit Ironshore to assert the claim.

4. *Declaratory Relief*

The Court also permits Ironshore to seek the declaratory relief outlined in its proposed amended pleading. In its proposed amendments, Ironshore seeks three declarations: (1) a declaration that the Underlying Lawsuits against Facility IMS do or do not rest on related claims, (2) a declaration that coverage for the Underlying Lawsuits is capped at one million dollars if they rest on related claims, and (3) a declaration that Ironshore has no further coverage obligations and is entitled to reimbursement from Facility IMS if the Underlying Lawsuits rest on related claims because Ironshore has paid sums in excess of the one million dollar limit on behalf of Facility IMS. FAC ¶¶ 64–66.

Facility IMS objects to the first two proposed requests for declaratory relief as superfluous. According to Facility IMS, Ironshore has no reason to ask for declarations about the relatedness of the claims against Facility IMS or the coverage limit for those claims because Facility IMS's pleadings already ask the Court to opine on the same topics. Doc. No. 69 at 10–11. Courts have discretion to refuse to entertain requests for declaratory relief when their rulings on other claims and defenses will resolve the same issues raised by the requests. *Encompass Off. Sols., Inc. v. BlueCross BlueShield of Texas*, 2012 WL 13237487, at *6 (N.D. Tex. Nov. 26, 2012) (Solis, J.); *Kougl v. Xspedius Mgmt. Co. of Dallas/Fort Worth*, 2005 WL 1421446, at *4 (N.D. Tex. June 1, 2005) (Fitzwater, J.).

***9** The Court finds no occasion to exercise such discretion because it disagrees with the premise that Ironshore's requests for declaratory relief are duplicative of Facility IMS's pleadings. In its pleadings, Facility IMS alleges that Ironshore must make payments toward Facility IMS's settlement with the Wilkes Plaintiffs, but Facility IMS nowhere alleges that the Wilkes Plaintiffs' claims are or are not related claims. Doc. No. 24. The relatedness of the claims and the consequences of relatedness under the Policies are issues raised by Ironshore's first two requests for declaratory relief. FAC ¶¶ 64–65.

The Court acknowledges that Facility IMS's current strategy for proving its affirmative defenses and counterclaims, expressed in its Motion for Summary Judgment, relies on the proposition that the Underlying Lawsuits against Facility IMS involve related claims. Doc. No. 39. Because the Court denies Facility IMS's Motion for Summary Judgment without prejudice, and because Facility IMS's pleadings do not commit Facility IMS to litigating the relatedness of the claims against it, the Court believes the "safer course" is to permit Ironshore to pursue declaratory relief while there is some "doubt that it will be rendered moot by the adjudication of the main action." 6 Wright & Miller, Fed. Prac. & Proc. § 1406 (Apr. 2023 update); *Amerisure Ins. Co. v. Thermacor Process, Inc.*, 2021 WL 1056435, at *7 (N.D. Tex. Mar. 19, 2021) (Pittman, J.) (declining to dismiss request for declaratory relief where request raised theory of duty to defend that affirmative claims might not raise).

Facility IMS objects to Ironshore's third request for declaratory relief on different grounds, but the Court finds them similarly baseless. According to Facility IMS, Ironshore cannot obtain a declaration that it is entitled to reimbursement of alleged overpayments made on Facility IMS's behalf because Ironshore has no underlying right to reimbursement.

Doc. No. 69 at 9–10. Facility IMS relies on the principle that a declaratory judgment is a remedy for an underlying claim rather than an independent cause of action. *Braidwood Mgmt. v. EEOC*, 70 F.4th 914, 932 (5th Cir. 2023). Since the Court grants Ironshore leave to assert its unjust enrichment claim for reimbursement, the Court cannot accept Facility IMS's position at this stage of the proceedings. *Bent v. U.S. Bank Nat. Ass'n*, 2015 WL 3454226, at *6 (N.D. Tex. May 29, 2015) (Godbey, J.) (permitting request for declaratory relief predicated on sufficient allegations of unjust enrichment to proceed).

5. *Ironshore's Answer*

The Court grants Ironshore leave to amend its Answer. Facility IMS offers only conclusory objections to Ironshore's proposed amendments. To the extent that the Court can discern the bases for the objections, the Court finds them unpersuasive.

Facility IMS's first objection reprises a theory the Court has already rejected. Facility IMS asserts that Ironshore cannot offset any overpayments it allegedly made on behalf of Facility IMS against amounts it may owe Facility IMS in coverage of the Wilkes Plaintiffs' settlement. Doc. No. 69 at 10. Facility IMS apparently reasons that Ironshore has no right to reimbursement of the alleged overpayments. *Id.* The Court's ruling permitting Ironshore to seek recovery of alleged payments in excess of the Policies' coverage limits undermines this reasoning. *Supra* Section II.B.3; *cf. also Shoop v. Devon Energy Prod. Co., L.P.*, 2013 WL 12251353, at *21 (N.D. Tex. Mar. 28, 2013) (Solis, J.) (permitting offset theory to proceed past summary judgment even in the absence of unjust enrichment where defendant purportedly voluntarily overpaid royalties).

***10** Facility IMS's second objection is nearly indecipherable. Facility IMS evidently disputes the validity of Ironshore's quasi-estoppel defense. Quasi-estoppel "precludes a party from accepting the benefits of a transaction and then taking a subsequent inconsistent position to avoid corresponding obligations or effects." *Cambridge Prod. v. Geodyne Nominee Corp.*, 292 S.W.3d 725, 732 (Tex. App.—Amarillo 2009, pet. denied). Ironshore apparently perceives an inconsistency between Facility IMS's assertion that the Underlying Lawsuits against Facility IMS involve related claims collectively subject to the self-insured retention for a single claim and its demand for coverage of the claims that exceeds the liability limit for a single claim. Doc. No. 66-2 ¶¶ 27, 31. In opposition to this theory, Facility IMS offers a single sentence of argument, reproduced here in full with two preceding sentences of context:

> Under Texas law, there can be no recovery for unjust enrichment under a quasi-contract or contract implied-in-law theory when a valid, express contract covers the subject matter of the parties' dispute. Accordingly, the proposed amendment to paragraph 79 of Ironshore's First Amended Complaint should also be denied as futile. Ironshore's amendment in paragraph 31 of its proposed First Amended Answer—asserting a quasi estoppel defense to [Facility IMS's] Counterclaim—should also be denied for the same reason.

Doc. No. 69 at 12 (citations and internal quotation marks omitted). Facility IMS does not explain why its reasoning about unjust enrichment is applicable to the defense of quasi-estoppel, nor does Facility IMS cite any authority holding that the defense rises or falls on the existence of a valid claim for unjust enrichment or a valid contract. Perhaps Facility IMS intends to invoke the principle that a party acting in accordance with a contract is not quasi-estopped from enforcing the contract even if its counterparty mistakenly believes that the party's actions are inconsistent with the contract. *Comiskey v. FH Partners, LLC*, 373 S.W.3d 620, 638 (Tex. App.—Houston [14th Dist.] 2012, pet. denied); *Neiman-Marcus Grp., Inc. v. Dworkin*, 919 F.2d 368, 370–71 (5th Cir. 1990). If so, Facility IMS fails to connect that principle to its own actions under the Policies, and the Court will not invent arguments Facility IMS has not advanced. The Court rejects Facility IMS's opposition to Ironshore's quasi-estoppel defense as inadequately briefed. *United States v. Shah*, 84 F.4th 190, 2023 WL 6385685, at *29 (5th Cir. Oct. 2, 2023).

III. MOTION FOR SUMMARY JUDGMENT

Having granted Ironshore's Motion for Leave to Amend its pleadings in part, the Court denies Facility IMS's Motion for Summary Judgment without prejudice. The Parties may

seek summary judgment on one or more of Ironshore's amended claims or defenses. Permitting each Party to urge a single summary judgment motion addressing all amended and unamended claims and defenses, rather than urging separate motions addressing amended and unamended claims, will best serve judicial economy. The Parties may file or renew motions for summary judgment in accordance with the Scheduling Order in this action. Doc. No. 38; *Haynes v. Ryan Drilling, LLC*, 2016 WL 11585280, at *2 (W.D. Tex. Mar. 21, 2016) (denying summary judgment to permit renewed filing in light of amended pleading). The Court's denial of Facility IMS's Motion for Summary Judgment moots Facility IMS's Motion to Strike Ironshore's summary judgment evidence and Ironshore's Motion for Leave to File supplemental summary judgment evidence. Doc. Nos. 56–57.

The Court reminds the Parties that they should point to specific evidence in their briefing if they wish the Court to consider the evidence in ruling on any summary judgment motion. *Jesus Church of Victoria Tex., Inc. v. Church Mut. Ins. Co.*, 2022 WL 4238089, at *6 n.5 (S.D. Tex. Sept. 13, 2022) (citing *Hernandez v. Yellow Transp., Inc.*, 670 F.3d 644, 651 (5th Cir. 2012)); Fed. R. Civ. P. 56(c)(1), (3); N.D. Tex. L. Civ. R. 56.5(c). In the Motion for Summary Judgment denied by the Court, Facility IMS cites almost exclusively to portions of pleadings in the Underlying Lawsuits that recite generic legal conclusions, like the conclusion that Facility IMS failed to provide a clientplaintiff "reasonable and appropriate healthcare services." *See* Doc. No. 40 at 17–26. If Facility IMS intends to argue that the claims against it in the Underlying Lawsuits are related claims under the Ironshore Policies and does not intend to rely on the sweeping theory that all claims for negligent provision of healthcare are related claims, Facility IMS must cite more specifically to the circumstances showing that the claims are related.

IV. MOTION TO SEAL

***11** Because the Court considered Ironshore's summary judgment brief and exhibits in denying Facility IMS's Motion for Summary Judgment without prejudice, the Court turns to Ironshore's request for leave to file portions of the brief and exhibits under seal. After the Court ordered Ironshore to amend its First Amended Motion to Seal to comply with the Court's order governing sealing, Ironshore filed a superseding Second Amended Motion to Seal. The Court denies the First Amended Motion to Seal as moot and considers the Second Amended Motion to Seal. Doc. Nos. 60–61.

Under the common law, the public enjoys presumptive access to documents filed on the Court's docket. *Binh Hoa Le v. Exeter Fin. Corp.*, 990 F.3d 410, 419 (5th Cir. 2021). The Court will seal documents or portions of documents only if "line-by-line" review of the documents reveals strong and specific reasons for denying public access to the material to be sealed. *IFG Port Holdings, L.L.C. v. Lake Charles Harbor & Terminal Dist.*, 82 F.4th 402, 2023 WL 6151640, at *7 (5th Cir. Sept. 21, 2023). The Court has conducted its review and denies the Second Amended Motion to Seal without prejudice.

A. Confidential Business Information

Many of Ironshore's requests to seal portions of documents turn on an assessment of whether those portions contain confidential business information. A party's interest in sealing information that competitors would use to its disadvantage can overcome the public's right to access judicial records. *Nixon v. Warner Commc'ns*, 435 U.S. 589, 598, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978). Only a specific threat of competitive harm may justify sealing. *Vantage Health Plan v. Willis-Knighton Med. Ctr.*, 913 F.3d 443, 451 (5th Cir. 2019).

Ironshore seeks to seal snippets of its summary judgment brief, a supporting declaration, and three other written communications between Ironshore and Facility IMS because they reveal amounts Ironshore or Facility IMS spent or considered spending to settle a subset of the claims against Facility IMS. Doc. Nos. 61-1, 61-3, 61-4, 61-5, 61-6. Ironshore observes that the public has limited interest in learning these amounts. Although Ironshore's satisfaction of the Policies' coverage limits may be an issue in this case, the specific amounts of Ironshore's coverage payments are not at this stage. *Cf. Geltzer v. Andersen Worldwide, S.C.*, 2007 WL 273526, at *2 (S.D.N.Y. Jan. 30, 2007) (Lynch, J.) (refusing to seal amount of settlement for which bankruptcy trustee sought approval because the amount was essential to the Court's approval or disapproval of the settlement). Ironshore reasons that its own competitive interest in concealing the actual and potential settlement amounts outweighs the public's interest because disclosure of the amounts would advantage plaintiffs whose claims have not settled when they negotiate with Ironshore. Doc. No. 61 at 5–6.

While Ironshore's reasoning is superficially appealing, the Fifth Circuit has squarely rejected it. If disclosure of the settlement amounts might harm Ironshore "by exposing [it] to additional liability and litigation," that is "of no consequence" because " 'a litigant is not entitled to the court's protection

from this type of harm' where it arises solely because of the common law right of access" to judicial records. *Bradley v. Ackal*, 954 F.3d 216, 230 (5th Cir. 2020) (quoting *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1137 (9th Cir. 2003)). The Fifth Circuit has left open the possibility that, in some circumstances, settlement amounts should be sealed if keeping them confidential was material to the decision to settle. *Id.* at 228. The Court also recognizes that the settlement of claims is a significant aspect of an insurer's business, and an insurer's settlement strategies may have competitive value that extends beyond negotiating settlements of claims under a single policy. Because Ironshore has not suggested that either consideration supports sealing here, the Court finds that the competitive interests served by sealing portions of the five documents discussing settlement amounts are not entitled to protection. The Court will give Ironshore one more opportunity to amend its sealing motion to identify interests supporting sealing.

***12** Turning to the remaining document Ironshore seeks to seal, a 2013 email exchange, the Court finds that Ironshore has not sufficiently explained its interest in sealing the proposed redacted portions of the exchange, which discuss Ironshore's historical reserves and premium negotiations with Facility IMS. Doc. No. 61-2. Ironshore has completed its negotiations with Facility IMS and shared the exchange with Facility IMS. Perhaps Ironshore's past reserves and negotiations remain relevant to Ironshore's business with third parties despite being fully a decade old, but Ironshore has presented no declaration or other evidence indicating that they do. The Court is unwilling to find that the seemingly stale information Ironshore provided about its finances and negotiations should be sealed as a matter of law. *See Select Interior Concepts, Inc. v. Pental*, 2020 WL 2132575, at *4 (N.D. Tex. May 5, 2020) (Lindsay, J.) (refusing to seal documents from a three-year-old transaction merely because disclosure "could potentially" harm the transacting party). Ironshore is in a better position than the Court to know the sensitivity of such information in its industry. If Ironshore renews its sealing request, it should present facts supporting its position, including any concrete prejudice it will face or is likely to face from disclosure of the information.

B. Privilege

Ironshore's relies on the federal common interest privilege as a second basis for sealing portions of its briefing and exhibits, including many of the same portions that purportedly contain confidential business information. Doc. No. 61. According to Ironshore, the documents it seeks to seal contain confidential communications among Ironshore, Facility IMS, and outside counsel that enjoy protection from disclosure because they address claims against Facility IMS. *E.g.*, *id.* at 6–7.

The Fifth Circuit has not detailed the circumstances in which the application of a privilege outweighs the public's right of access to judicial records, but two guiding principles are discernible in the decisions of other courts. First, a party that puts its own privileged communications at issue in filings on the Court's docket generally waives the privilege and cannot seek to seal the communications on that basis. *See Joy v. North*, 692 F.2d 880, 893–94 (2d Cir. 1982); *cf. also In re Avantel, S.A.*, 343 F.3d 311, 324 (5th Cir. 2003) (placing documents under seal pending a ruling on whether they were privileged); Tex. Evid. R. 511(a) ("A person ... waives [a] privilege if the person ... voluntarily discloses or consents to disclosure of any significant part of the privileged matter unless such disclosure itself is privileged."). Second, a party that does not put its own privileged communications at issue may seek to seal the communications by showing that the privilege survived the filing of the communications and the interests served by the privilege outweigh the public interest in access to the communications. *See Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 125 (2d Cir. 2006); *Crystal Grower's Corp. v. Dobbins*, 616 F.2d 458, 462 (10th Cir. 1980). If the party consistently opposed disclosure of the communications, the Court will often seal them. *See Siedle v. Putnam Invs.*, 147 F.3d 7, 12 (1st Cir. 1998); *In re City of Houston*, 772 F. App'x 143, 144 (5th Cir. 2019) (per curiam).

Ironshore's threshold problem under these standards is that it appears to have put the documents it seeks to seal in issue. Ironshore filed the documents unprompted, and it is not obvious that Facility IMS's Motion for Summary Judgment compelled Ironshore to disclose the privileged contents of the documents rather than the nonprivileged facts discussed in the documents. While Facility IMS is a party to the purportedly privileged documents, Ironshore does not contend that Facility IMS is asserting a privilege in opposition to disclosing them. Ironshore states only that Facility IMS is generally unopposed to Ironshore's Second Amended Motion to Seal. Doc. No. 60 at 15.

Assuming Ironshore could surmount these difficulties, the Court would still decline to seal Ironshore's filings on the briefing before it. Ironshore expressly relies on the federal common interest privilege, which protects communications between actual and potential co-defendants and their counsel made in furtherance of a common interest. Doc. No. 61

at 6; *In re Santa Fe Int'l Corp.*, 272 F.3d 705, 710–13 (5th Cir. 2001). The Court cannot apply the federal law of privilege because it is presiding in diversity over a dispute arising exclusively under state law. Instead, it must apply the privilege law of the forum state: Texas. *Int'l Ins. Co. v. RSR Corp.*, 426 F.3d 281, 299 n.26 (5th Cir. 2005). Texas has no common interest privilege; it has an allied litigant privilege that protects communications from a client, its attorney, or the representative of either of them to an attorney or an attorney's representative representing another party in a pending action. *In re XL Specialty Ins. Co.*, 373 S.W.3d 46, 54 (Tex. 2012). Ironshore may hold an allied-litigant privilege in some of the communications it wishes to seal, but Ironshore has presented no facts or legal authority tailored to the application of the privilege.

***13** Since the Court permits Ironshore one more opportunity to show that the material it seeks to seal constitutes confidential business information, the Court will also permit Ironshore one more opportunity to show that the material should be sealed on the basis of privilege. If Ironshore takes that opportunity, it should not assume that the Court is familiar with the facts relevant to a finding of privilege, including which individuals are attorneys or representatives of others and the status of the various lawsuits against Facility IMS.

V. CONCLUSION

The Court **GRANTS** in part and **DENIES** in part Ironshore's Motion for Leave to Amend. Ironshore may make only its proposed amendments to its unjust enrichment claim, its request for declaratory relief, and its Answer. Within seven days of the entry of this Order, Ironshore **SHALL FILE** (1) its First Amended Complaint, revised to reflect only those amendments permitted by the Order, and (2) redlines showing the differences between the filed pleading and Ironshore's Complaint, Doc. No. 1, and between the filed pleading and Ironshore's proposed First Amended Complaint. Ironshore **MAY FILE** a motion for leave to further amend its pleading no later than fourteen days after the entry of this Order. If Ironshore files such a motion, it must (1) attach its proposed amended pleading to the motion and (2) attach a redline to the motion showing the differences between the proposed amended pleading and the pleading the Court has ordered Ironshore to file.

The Court **DENIES** Facility IMS's Motion for Summary Judgment without prejudice. The Court **DENIES** Facility IMS's Motion to Strike Ironshore's summary judgment evidence and Ironshore's Motion for Leave to File supplemental summary judgment evidence as moot. The Parties **SHALL FILE** any subsequent motions for summary judgment in accordance with the Court's Scheduling Order. Doc. No. 38.

The Court **DENIES** Ironshore's Motion to Seal without prejudice. Within twenty-one days of the entry of this Order, Ironshore **SHALL FILE** (1) a renewed motion or (2) a notice abandoning its motion and stating whether any Defendant intends to file a motion requesting that any of the documents lodged provisionally under seal be filed under seal. If a Defendant so intends, it **SHALL FILE** its motion no later than seven days after the filing of the notice. If no Party requests that one or more of the documents be sealed, the Court **WILL UNSEAL** them upon receipt of the notice. All documents lodged provisionally under seal **SHALL REMAIN UNDER SEAL** pending further order of the Court.

SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2023 WL 6850006

End of Document

2013 WL 1867604
Only the Westlaw citation is currently available.
United States District Court,
S.D. Texas.

OLDENDORFF CARRIERS GMBH & CO., KG
v.
GRAND CHINA SHIPPING
(HONG KONG) CO., LTD., et al.

C.A. No. C–12–074.
|
April 22, 2013.

Attorneys and Law Firms

Briton P. Sparkman, George A. Gaitas, Chalos and Co. PC, Houston, TX, Dabney Welsh Pettus, Welder Leshin LLP, Corpus Christi, TX, George M. Chalos, Chalos and Co., Oyster Bay, NY, for Plaintiff.

John "Jack" C. Partridge, Royston Rayzor et al., Corpus Christi, TX, Richard Anthony Branca, Royston Rayzor Vickery & Williams LLP, Houston, TX, for Defendants.

MEMORANDUM AND RECOMMENDATION TO UNSEAL DOCUMENTS

BRIAN L. OWSLEY, United States Magistrate Judge.

***1** This is an admiralty action filed pursuant to Supplemental Rule B of the Federal Rules of Civil Procedure and the Federal Arbitration Act, 9 U.S.C. §§ 4, 8 in aid of maritime arbitration by plaintiff Oldendorff Carriers GMBH & Co., KG ("Oldendorff"). (D.E.1). Pending is an advisory to the Court regarding documents that should remain under seal submitted by defendants Offshore Heavy Transport AS ("OHT") and OHT Eagle AS ("OHT Eagle"). (D.E.64). For the following reasons, it is respectfully recommended that the documents identified by defendants remain under seal but that all other sealed documents be unsealed, and that a modified confidentiality order be entered.

I. BACKGROUND

On August 5, 2008, defendant Grand China Shipping (Hong Kong) Co., LTD ("GCS") entered into an agreement with Korea Line Corporation ("KLC") to time charter the vessel M/V K Daphne ("Daphne"). (D.E. 1, at 3). GCS later sub-chartered the Daphne to plaintiff Oldendorff on December 20, 2010. *Id.* Pursuant to the sub-charter, Oldendorff then instructed the vessel to proceed to Narvik, Norway on February 9, 2011 in order to fulfill a freighting contract with a Saudi corporation. *Id.*

Before the Daphne was able to execute Oldendorff's orders, however, KLC determined that GCS breached their charter contract by failing to make hire payments. *Id.* On February 23, 2011, KLC withdrew the Daphne from GCS's service and Oldendorff was no longer able to use the vessel. *Id.* As a consequence, Oldendorff was forced to arrange for a replacement vessel to complete the cargo shipping order at a cost of $1,044,503.00. *Id.* at 4. At that time, GCS owed Oldendorff an additional $1,665,916.04 for other non-reimbursed expenses and charges. *Id.*

On July 6, 2011, Oldendorff commenced an arbitration proceeding against GCS in London pursuant to the terms of their sub-charter contract. *Id.* at 5. In order to obtain security for that proceeding, Oldendorff instituted this action against GCS on March 7, 2012, pursuant to Supplemental Rule B of the Federal Rules of Civil Procedure as well as the Federal Arbitration Act, 9 U.S.C. §§ 4, 8, in aid of maritime arbitration. *Id.* Oldendorff claims that GCS breached their sub-charter contract by failing to meet its contractual obligations to KLC. *Id.* at 4, 17. After including interest and attorney fees, the complaint asserted a recoverable amount totaling $3,470,551.95. *Id.* at 5, 14. Oldendorff also sought to hold Grand China Logistics Holding (Group) Company Limited ("GCL"), OHT, and OHT Eagle liable for GCS's breach on the basis that an alter ego relationship existed between each of these corporations. *Id.* at 10–12.

Simultaneously, Oldendorff submitted a motion to seize the OHT Eagle, which was then within the territorial jurisdiction of this Court. (D.E.3). This motion was granted on March 8, 2012 and the OHT Eagle was seized. (D.E.7). OHT posted bond on March 15, 2012, (D.E.16), and plaintiff consented to the release of the vessel. (D.E.17).

***2** On April 19, 2012, OHT and OHT Eagle filed an unopposed motion for a confidentiality order regarding certain proprietary information, (D.E.25), which was granted on April 20, 2012. (D.E.26). At a hearing held on March 19, 2013, this Court ordered defendants to file an advisory regarding which documents should remain under seal. OHT

and OHT Eagle filed their advisory on March 29, 2013. (D.E.64).

II. DISCUSSION

Defendants concede that they are "not opposed to unsealing most of the documents" that have been filed as sealed throughout this litigation. (D.E. 64, at 2). However, they have identified several documents that they contend should be kept sealed, including the following:

(1) the Shareholders' Agreement, (D.E. 27–1, at 8–82; D.E. 51, at 6–79; D.E. 56–1, at 8–82; D.E. 56–2, at 7–34);

(2) the Declaration of Adherence, (D.E. 27–1, at 83; D.E. 56–1, at 83; D.E. 56–2, at 111);

(3) the Declaration of Erik Ostbye, (D.E.40–1);

(4) the Arbitration Demand Letter, (D.E. 40–2; D.E. 56–2, at 130–32);

(5) an email from Tom E. Jebsen, (D.E. 51–3, at 31–34);

(6) OHT Board Minutes, (D.E. 51–4, at 85–86; D.E. 51–5, at 8–12);

(7) the Security Agreement, (D.E. 51–5, at 1–6; D.E. 56–2, at 127–29);

(8) the Pledge Agreement, (D.E. 51–5, at 13–24; D.E. 56–2, at 115–125);

(9) the Share Purchase Agreement, (D.E. 51–5, at 25–35; D.E. 56–2, at 7–34);

(10) the Deposition Testimony of Arne Blystad, (D.E. 56–3; D.E. 58–1, at 5–129);

(11) a letter from Jon Christian Syvertsen, (D.E. 58–1, at 138–41); and

(12) a letter on behalf of Credit Agricole Corporate and Investment Bank, (D.E.62–1).

Pursuant to Rule 26(c)(1) of the Federal Rules of Civil Procedure, upon motion of a party "[t]he court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense" by specifying and limiting the terms of disclosure. " '[T]he burden is upon [the party seeking the protective order] to show the necessity of its issuance, which contemplates a particular and specific demonstration of fact as distinguished from stereotyped and conclusory statements.' " *M–I LLC v. Stelly,* 733 F.Supp.2d 759, 801 (S.D.Tex.2010) (quoting *Sanchez v. Property & Cas.,* No. H–09–1736, 2010 WL 107606, at *1 (S.D.Tex. Jan.7, 2010) (unpublished)); *accord In re Terra Int'l,* 134 F.3d 302, 306 (5th Cir.1998) (per curiam).

Here, the parties were granted a confidentiality order limiting disclosure of information they deem confidential. They have taken full advantage of this order, filing all pleadings related to dispositive motions under seal. A review of these pleadings as well as the attached documents suggests that they have designated information as confidential where it is inappropriate or unnecessary. At this juncture, it is unclear why such a broad order continues to be necessary.

A court retains discretion to modify a protective order once it has been entered. *United Nuclear Corp. v. Cranford Ins. Co.,* 905 F.2d 1424, 1427 (10th Cir.1990) (citation omitted); *In re United States' Motion to Modify Sealing Orders,* No. 5:03–MC–2, 2004 WL 5584146, at *2 (E.D.Tex. June 8, 2004) (unpublished) (quoting *Nixon v. Warner Commc'ns, Inc.,* 435 U.S. 589, 599, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978)). Four factors should guide its consideration of whether a modification is appropriate, including: "(1) the nature of the protective order, (2) the foreseeability, at the time of issuance of the order, of the modification requested, (3) the parties' reliance on the order; and most significantly (4) whether good cause exists for the modification." *Murata Mfg. Co. v. Bel Fuse, Inc.,* 234 F.R.D. 175, 179 (N.D.Ill.2006) (citation omitted); *accord In re Enron Corp. Secs., Derivative & ERISA Litig.,* No. MDL–1446, 2009 WL 3247432, at *3 (S.D.Tex. Sep.29, 2009) (unpublished); *Bayer AG and Miles, Inc. v. Barr Labs., Inc.,* 162 F.R.D. 456, 458 (S.D.N.Y.1995). A careful application of these factors reveals that while most of the specific documents identified by defendants warrant confidentiality, the remaining sealed documents do not.

A. The Nature Of The Confidentiality Order.

***3** First, relevant to the nature of a confidentiality order is " 'its scope and whether it was court imposed or stipulated to by the parties.' " *Murata,* 234 F.R.D. at 179 (quoting *Bayer,* 162 F.R.D. at 465) (citation omitted). Generally, courts should be more hesitant to modify narrowly defined orders that pertain to "a specific type of identified information," as opposed to blanket confidentiality orders. *Id.*

Here, the scope of the protective order is quite broad based on the parties' request. Specifically, pursuant to the unopposed motion, the order limits disclosure of "Confidential Information," which it defines as:

> [A]ll information, whether or not embodied in a document or other physical medium, which the Producing Party believes in good faith is confidential, private or personal information relating to, among other things, any one of the Parties, their business or activities, or employees or former employees of one of the Parties, which the Producing Party would not normally reveal to third parties except in confidence, or has undertaken to maintain in confidence.

(D.E. 26, at 2). Based on this broad definition, the parties have found it appropriate to seal all dispositive motions and corresponding pleadings. In essence, the confidentiality order has permitted the parties to litigate in secret. Accordingly, its sweeping scope weighs toward modification.

B. Foreseeability Of Modification.

Second, regarding the foreseeability factor, the relevant inquiry is " 'whether the need for modification of the order was foreseeable at the time the parties negotiated the original stipulated protective order.' " *Murata,* 234 F.R.D. at 180 (quoting *Bayer,* 162 F.R.D. at 466). " '[A] party's oversight in not negotiating a provision in a protective order considering a matter which should have been reasonably foreseeable at the time of the agreement has been held not to constitute good cause for relief from the protective order.' " *Id.* (quoting *Jochims v. Isuzu Motors Ltd.,* 145 F.R.D. 499, 502 (S.D.Iowa 1992)). Here, this factor has little bearing on the modification analysis because no party seeks modification. However, as a practical matter, it should be foreseeable that an overly-liberal interpretation of a confidentiality order that results in excessive and unnecessary sealing may result in modification of that order.

C. The Parties' Reliance On The Confidentiality Order.

Third, in evaluating the reliance factor, the court should consider " 'the extent to which a party resisting modification relied on the protective order in affording access to discovered materials.' " *Id.* (quoting *Bayer,* 162 F.R.D. at 467). It is " 'presumptively unfair ... to modify protective orders which assure confidentiality and upon which the parties have reasonably relied.' " *AT & T Corp. v. Sprint Corp.,* 407 F.3d 560, 562 (2d Cir.2005) (quoting *S.E.C. v. TheStreet.com,* 273 F.3d 222, 230 (2d Cir.2001)). Specifically pertaining to reliance, defendants argue that Mr. Blystad's deposition testimony, in particular, should remain sealed because "the parties relied upon the confidentiality of the deposition when participating and answering questions posited by opposing counsel." (D.E. 64, at 7). In addition, they indicate that the parties relied on the confidentiality order in proceeding with litigation. (D.E. 64, at 2 n. 2). Accordingly, this reliance weighs against unsealing the documents identified by defendants in their advisory, including, in particular, Mr. Blystad's deposition testimony.

D. Good Cause For Modification.

***4** Fourth, in evaluating whether good cause for modification exists, "the court must weigh [the] need for modification against [the] need for protection, and ought to factor in the availability of alternatives to better achieve both ... goals." *Murata,* 234 F.R.D. at 180 (citations omitted). In the case of a blanket confidentiality order, " 'the burden of showing good cause is on the party seeking continued confidentiality protection.' " *In re Enron Corp.,* 2009 WL 3247432, at *3 (quoting *Holland v. Summit Autonomous, Inc.,* No. Civ. A. 00–2313, 2001 WL 930879, at *2–3 (E.D.La. Aug.14, 2001) (unpublished)).

Here, the need for modification is apparent in light of the parties' tendency to seal documents that do not appear to contain confidential information. This practice flies in the face of the common law right to access and inspect judicial records. *See Macias v. Aaron Rents, Inc.,* 288 F. App'x 913, 915 (5th Cir.2008) (unpublished); *S.E.C. v. Van Waeyenberghe,* 990 F.2d 845, 849–50 (5th Cir.1993) (" 'Public access [to judicial records] serves to promote trustworthiness of the judicial process, to curb judicial abuses, and to provide the public with a more complete understanding of the judicial system, including a better perception of its fairness.' ") (citations omitted). Defendants concede that many of the materials they have filed could be unsealed. However, they contend that there is good cause to maintain the confidentiality of certain documents that fall into four different categories: (1) confidential and proprietary

financial agreements; (2) confidential board minutes and board communications; (3) documents related to exercise of financial options; and (4) deposition testimony regarding OHT's operations.

First, defendants argue that materials consisting of confidential and proprietary financial agreements should remain sealed because several of the documents are agreements that contain specific confidentiality clauses upon which OHT, as well as third parties, relied when entering into them. In addition, release of the exhibits, which contain information relating to "company ownership, exercise of financial options, business plans, corporate decision guides, and corporate governance policies," would place OHT at a disadvantage to its competitors in the highly competitive international shipping industry. (D.E. 64, at 5–6). Although defendants reference various "documents" that fall within this category, it only specifically identifies the Shareholders Agreement. *Id.* Presumably, it meant to include in this category the Share Purchase Agreement, which also contains a confidentiality clause, as well as the Declaration of Adherence to the Shareholders Agreement; the Security Agreement, the Pledge Agreement, and the Share Purchase Agreement. (D.E. 56–2, at 26). Given OHT's reliance on the confidential nature of these agreements, as well as the possibility that disclosure would potentially harm its competitive standing in the shipping industry, defendants have established good cause to maintain seal over the documents. *See Nixon,* 435 U.S. at 598 (noting that courts have denied access to court records when they might be used "as sources of business information that might harm a litigant's competitive standing") (citations omitted).

***5** Second, defendants submit that documents related to its confidential board minutes and board communications should remain under seal because they contain "confidential, attorney-client and trade secret information," including discussions regarding "various financial plans, corporate strategies, potential implications stemming from those decisions, strategies on handling ongoing legal matters, and further information related to internal, corporate operations." (D.E. 64, at 6). Presumably included in this category are the Arbitration Demand Letter; the OHT Board Minutes; the letter from Mr. Syvertsen; and the letter on behalf of Credit Agricole Bank. In addition to these documents, defendants specifically urge that confidentiality be maintained for three related exhibits: (1) Mr. Blystad's deposition testimony; (2) a subpoena to testify at a deposition or to produce documents served upon defendant GCL in January 2013; and (3) Mr. Jebsen's email regarding OHT's financial circumstances between its board of directors from May 2012. (D.E.58–1). Of these three exhibits, it is unclear why the subpoena is included.[1] Although it seeks disclosure of documents related to transactions described in various declarations and deposition, (D.E. 58–1, at 135–37), it contains little specific information revealing financial arrangements or strategies. To the extent it does refer to specific information, these details are publicly available through the memorandum and recommendations that have been issued by this Court. Accordingly, defendants have failed to show good cause for continued sealing of the subpoena. However, the minutes from board meetings, Mr. Blystad's deposition testimony, and the communications between OHT board members do contain sensitive information that, if revealed to competitors, could be disadvantageous to OHT's business. Therefore, there is good cause to keep these exhibits sealed.

1 Indeed, defendants did not identify the subpoena as an exhibit they seek to maintain as sealed elsewhere in their brief. (D.E. 64, at 3).

Third, defendants contend that documents related to the exercise of financial options outlined in the Shareholder Agreement and other agreements should remain sealed because they reveal sensitive information contained in the Shareholders Agreement and "represent significant and confidential financial dealings involving [OHT]." (D.E. 64, at 7). In addition, they explain that "at least one of these exhibits"-although it does not reveal which one-"implicate [s] confidential information regarding loan agreements" to which it was a party. *Id.* Presumably, defendants include in this category the Pledge Agreement, the Arbitration Demand Letter, the Share Purchase Agreement, the letter from Mr. Syvertsen, and the letter from Credit Agricole Bank. (D.E. 51; D.E. 56). Because these documents relate to confidential information contained in the Shareholders' Agreement, the disclosure of which could potentially place OHT at a disadvantage to its competitors, defendants have shown good cause to maintain these documents under seal.

Lastly, defendants seek to maintain seal of the deposition testimony by Mr. Blystad because it contains information regarding confidential documents as well as OHT's internal operations and financial status. They argue that this information is the type sought by competitors seeking to gain an advantage in the international shipping industry, and that the parties conducted the deposition under the impression

that it would remain confidential. Given the possibility that Mr. Blystad's deposition could place OHT at a disadvantage to its competitors, as well as the fact that the parties relied on its confidentiality, defendants have shown good cause to maintain these records under seal.

III. RECOMMENDATION

***6** In light of the foregoing, it is respectfully recommended that the documents identified in defendants' advisory, with the exception of the subpoena duces tecum, remain sealed going forward in this litigation. However, in the interest of promoting access to judicial records and absent any other overriding interest, it is respectfully recommended that the remaining documents that have been filed under seal be unsealed.

It is respectfully recommended that defendants have established good cause to maintain seal over the following documents:

(1) the Shareholders' Agreement, (D.E. 27–1, at 8–82; D.E. 51, at 6–79; D.E. 56–1, at 8–82; D.E. 56–2, at 7–34);

(2) the Declaration of Adherence, (D.E. 27–1, at 83; D.E. 56–1, at 83; D.E. 56–2, at 111);

(3) the Declaration of Erik Ostbye, (D.E.40–1);

(4) the Arbitration Demand Letter, (D.E. 40–2; D.E. 56–2, at 130–32);

(5) an email from Tom E. Jebsen, (D.E. 51–3, at 31–34);

(6) OHT Board Minutes, (D.E. 51–4, at 85–86; D.E. 51–5, at 8–12);

(7) the Security Agreement, (D.E. 51–5, at 1–6; D.E. 56–2, at 127–29);

(8) the Pledge Agreement, (D.E. 51–5, at 13–24; D.E. 56–2, at 115–125);

(9) the Share Purchase Agreement, (D.E. 51–5, at 25–35; D.E. 56–2, at 7–34);

(10) the Deposition Testimony of Arne Blystad, (D.E. 56–3; D.E. 58–1, at 5–129);

(11) a letter from Jon Christian Syvertsen, (D.E. 58–1, at 138–41); and

(12) a letter on behalf of Credit Agricole Corporate and Investment Bank, (D.E.62–1).

In addition, it is respectfully recommended that all other documents that have been filed under seal be unsealed going forward in this litigation.

All Citations

Not Reported in F.Supp.2d, 2013 WL 1867604

End of Document