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
MOTION TO COMPEL INTERROGATORY RESPONSES

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

OTHER MATERIALS

INTRODUCTION

The Federal Trade Commission ("FTC") has refused to respond to Defendant U.S. Anesthesia Partners, Inc.'s ("USAP") second set of interrogatories, claiming that USAP's initial set of six somehow counts as 25. The FTC's math does not add up, and it has no other basis to refuse to respond. The Court should thus compel the FTC to answer USAP's interrogatories.

BACKGROUND

The FTC alleges that USAP has illegally acquired monopoly power in what it claims are markets for "commercially insured hospital-only anesthesia services" in Houston, Dallas-Fort Worth, and Austin. Compl. ¶¶ 216, 253, 341, 356, 365, 395, 397. USAP denies these allegations, including because the FTC's gerrymandered markets exclude many important competing anesthesia providers whose presence shows that USAP does not have a monopoly and cannot charge supracompetitive prices. The FTC seeks sweeping injunctive and structural relief against USAP that could displace hundreds of physicians and disrupt healthcare across Texas.

On October 16, 2024, USAP served its First Set of Interrogatories, which consisted of six interrogatories that focused mainly on market definition. *See* Ex. A. The FTC served responses and objections on December 2, 2024, asserting that USAP's six interrogatories should (conveniently) count as 25. *See* Ex. B at 1; Fed. R. Civ. P. 33(a)(1) (default 25-interrogatory limit); *see also* ECF No. 132, at 5 (joint discovery plan providing that parties may serve interrogatories in accordance with Rule 33); ECF No. 266, at 1 (second amended scheduling order endorsing the parties' agreement regarding interrogatories). Although the parties have since deposed 65 witnesses (including 41 non-party witnesses), the FTC has not supplemented its responses.

On March 31, 2025, USAP served its Second Set of Interrogatories, which contained another eighteen (Nos. 7-24). *See* Ex. C. The FTC served its objections on April 30, 2025. *See*

Ex. D. It did not respond to any of the interrogatories from the second set, stating "the FTC has no obligation to answer them" because "USAP had already exhausted its 25 interrogatories in its First Set." *Id.* at 1-2.

The parties met and conferred regarding this dispute and reached impasse.

LEGAL STANDARD

When a party challenges an interrogatory as "multiplicitous" (i.e., exceeding Rule 33's default limit of 25), the Court must decide what constitutes a "discrete separate subject." *Erfindergemeinschaft Uropep GbR v. Eli Lilly & Co.*, 315 F.R.D. 191, 194 (E.D. Tex. 2016). With no guiding precedent "from the United States Supreme Court, Fifth Circuit, or even any of the other Courts of Appeals," courts in this district take a "relaxed approach that allows individual interrogatories to request a range of information touching on a common theme" without counting as multiple interrogatories. *Nance-Bush v. Lone Star Coll. Sys. Dist.*, 337 F.R.D. 135, 137 (S.D. Tex. 2021) (collecting cases). An interrogatory will not count as having "distinct" subparts if the alleged subparts are "logically or factually subsumed within and necessarily related to the primary question," *Krawczyk v. City of Dallas*, 2004 WL 614842, at *2 (N.D. Tex. Feb. 27, 2004) (internal quotation marks omitted), *or* if they relate to a "common theme" or constitute components of a "full and complete answer," *Nance-Bush*, 337 F.R.D. at 137. And to decide whether a subpart addresses a common theme or part of a "full and complete answer," it must be compared only to the primary topic of the interrogatory, not to other alleged subparts. *Dimitrijevic v. TV&C GP Holding Inc.*, 2005 WL 8164073, at *3 (S.D. Tex. Aug. 24, 2005) ("It should be emphasized that the 'full and complete answer' standard involves comparison between the primary question and its subpart, not . . . between one subpart and another.").

ARGUMENT

USAP's First Set of Interrogatories (Interrogatory Nos. 1-6) do not contain "discrete" subparts that qualify as separate questions; they certainly do not count as 25 separate interrogatories. Nor does USAP's Second Set of Interrogatories bring the total above 25. The FTC's mistaken math improperly rewrites USAP's interrogatories and conflicts with decisions from this district and elsewhere. The FTC should therefore be required to respond to USAP's Second Set of Interrogatories.

I. USAP's First Set of Six Interrogatories

USAP's first set of six interrogatories should count as just that—six. The FTC argues that Interrogatory Nos. 2 through 6 should each count as multiple.[1] The FTC is wrong on each interrogatory:

> ***Interrogatory No. 2.*** USAP's second interrogatory states:
>
> Identify each fact supporting Your position (see Compl. ¶¶ 226, 234, 243, 251, 259) that any Person has recognized any of the Relevant Markets (as You have defined and populated those Relevant Markets) as a distinct market, in ordinary course business Documents or otherwise, including by identifying when and how each such Person recognized the Relevant Market as a distinct market.

Ex. A at 8. That interrogatory poses a single question: what is the factual basis for the FTC's claim that anyone, among either the "industry" or the "public," has ever "recogni[zed]" the markets the FTC has alleged exist as "separate economic entit[ies]"? *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962); *see also FTC v. Tempur Sealy Int'l, Inc.*, 2025 WL 617735, at *18 (S.D. Tex. Feb. 26, 2025) (rejecting the FTC's alleged market definition because "there was no clear industry recognition of" the market defined by the FTC). And because it poses just that

[1] There is no dispute that Interrogatory No. 1 only counts as one interrogatory. *See* Ex. B at 6-7.

single question addressing a single theme, it counts as just one interrogatory. *See*, *e.g.*, *United States v. Texas Dep't of Health*, 2005 WL 8179552, at *1 (S.D. Tex. June 10, 2005) (interrogatory addressing a "single" subject counts as one); 8B Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice and Procedure* § 2168.1 (3d ed. 2025) ("[A]n interrogatory containing subparts directed at eliciting details concerning a common theme should be considered a single question.").

The FTC asserts that this interrogatory should count as five. Ex. B at 10. It does not identify any discrete subparts in Interrogatory No. 2 as written. Instead, the FTC rewrites the interrogatory and says it asks for:

> (1) support for the position that hospital-only anesthesia services are distinct from non-hospital-only anesthesia services; (2) support for the position that commercial insurance markets are distinct from government insurance markets; (3) support for the position that the Houston metropolitan statistical area ("MSA") is relevant geographic market for hospital-based anesthesia services; (4) support for the position that the Dallas MSA is a relevant geographic market for hospital-based anesthesia services; and (5) support for the position that the Austin MSA is a relevant geographic market for hospital-based anesthesia services.

Id. at 10-11.[2] But that is not the interrogatory USAP served. The FTC cannot identify any distinct *subpart* in Interrogatory No. 2 as written; it simply fragments its response to come up with *sub-answers*. For that reason alone, the Court should find that Interrogatory No. 2 counts as one interrogatory—not multiple. *See Kizer v. North Am. Transp. Servs., LLC*, 2020 WL 6263733, at *6 n.4 (W.D. Okla. Oct. 23, 2020) (finding a numerosity objection moot because an

[2] The fact that the FTC separated subparts (1) and (2) here, with subpart (1) addressing hospital versus non-hospital markets and subpart (2) addressing government-insured versus commercially-insured markets, further casts doubt on the genuineness of its objections. The FTC alleges there is a market for "commercially insured hospital-only anesthesia services," Compl. ¶ 216—not one market for commercially-insured services and a separate market for hospital-only services. So this is either an artifice to increase the number of alleged subparts, or it is the FTC's genuine view and thereby demonstrates that the market it alleges is not actually a single definable market.

interrogatory did "not consist of subparts"); *Dawson v. HITCO Carbon Coponsites, Inc.*, 2018 WL 3815032, at *2 (C.D. Cal. June 22, 2018) (rejecting a numerosity objection because "the interrogatories do not contain subparts").

Even if the FTC's rewrite of Interrogatory No. 2 were valid, it still would not count as five interrogatories. That is because for purposes of counting subparts, what matters is whether the subparts fit within the umbrella of the main question—not whether each subpart is different from the other subparts. *See Dimitrijevic*, 2005 WL 8164073, at *3; *Krawczyk*, 2004 WL 614842, at *2 (recognizing that courts compare "interrogatory subparts" to "the primary question" when making a numerosity determination) (internal quotation marks omitted); *Texas Dep't of Health*, 2005 WL 8179552, at *1 (same); *RYH Props., LLC v. West*, 2010 WL 11527428, at *5 (E.D. Tex. Oct. 14, 2010) (same). Moreover, an interrogatory subpart is not "discrete" where it is "simply designed to obtain additional details concerning the general theme presented in the primary interrogatory question and are therefore counted as a single request." *RYH*, 2010 WL 11527428, at *4-5 (same).

Here, the primary question is whether there is any support that anyone has ever recognized any of the FTC's alleged markets as real and distinct. The alleged subparts in the FTC's rewrite need to be compared to that question, not to each other. And each of the five subparts that the FTC posits in its rewritten version clearly fits within the main question of what support exists for the FTC's market allegations. That means the interrogatory counts as one.

Interrogatory No. 3. USAP's third interrogatory states:

> Identify each fact supporting Your allegations regarding the market share of any Market Participant in any Relevant Market (e.g., Compl. Tables 1-6), including for each market-share figure the factual basis for including or excluding any Person as a Market Participant; the factual basis for including or excluding any Service as "hospital-only"; the identity, nature, and (if applicable) Date range of each source of data or other information used in calculating such market-share figure; and the

> manner in which You processed or otherwise manipulated that data or information to arrive at the figures alleged in the Complaint (including but not limited to any manual or automated method, computer programs, or formulas You used to arrive at such market share allegations).

Ex. A at 8. This is also one interrogatory. It asks the FTC to identify the support it has, if any, for its allegations regarding the market shares of USAP and its competitors. To be sure, it spells out details that a complete response must include, such as why the FTC included or excluded particular entities as competitors and included or excluded particular services within the market for that calculation, and it asks the FTC to show its work in terms of the actual math. But subparts that merely attempt to "guide" a party's answers to an "appropriate level of thoroughness and specificity" are "not discrete questions." *Simon v. State Farm Lloyds*, 2015 WL 12777219, at *3 (S.D. Tex. Apr. 9, 2015). That is exactly what Interrogatory No. 3 does: it asks the FTC for its basis for calculating market share figures it alleged in its complaint, and specifies that the appropriate level of detail in response should include explanations of what the FTC treated as in- or out-of-market and how the math applies to it. Subparts count as discrete interrogatories only when they seek information beyond the "common theme" of the primary question. *Nance-Bush*, 337 F.R.D. at 137. The details sought here, regarding how the FTC came up with its market share figures, are firmly within the common theme of the primary question: "Identify each fact supporting Your allegations regarding [] market share."

The FTC asserts that this interrogatory counts as three, consisting of: "(1) the factual basis for including or excluding any Person as a Market Participant; (2) the factual basis for including or excluding any Service as 'hospital-only'; and (3) the source of data or other information used in calculating the market share figures in the Complaint." Ex. B at 17. But all of those components are necessary to provide a full response to the primary question: what is the FTC's factual support for its market share allegations? Even as framed by the FTC, then, the

alleged subparts are "simply designed to obtain additional details concerning the general theme presented in the primary interrogatory question and are therefore counted as a single request." *RYH*, 2010 WL 11527428, at *5.

Interrogatory No. 4. USAP's fourth interrogatory states:

> For each Person who provides (or ever has provided) any Service in any Geographic Market, explain whether that Person is (or ever has been) a Market Participant in any Relevant Market, including by identifying each fact supporting Your position.

Ex. A at 9. This, again, is one interrogatory. It asks the FTC to say whether each anesthesia provider in the cities at issue counts as a market participant. That is a single topic. And the fact that the FTC would need to go through each provider separately does not change the count. The Advisory Committee's note to Rule 33(a) provides an on-point analogy: "a question asking about [all] communications of a particular type should be treated as a single interrogatory even though it requests [details such as] the time, place, persons present, and contents [to] be stated separately for each such communication." Fed. R. Civ. P. 33(a) advisory committee's note to 1993 amendment. This interrogatory similarly asks for details about each anesthesia provider (specifically, whether they were participants in the FTC's alleged markets), but only addresses that single subject.

Again, the FTC argues this interrogatory should count as three. Again it does so by rewriting the interrogatory, saying that USAP asked for it to "identify[]" (1) "the market participants in the hospital-only commercial anesthesia market in Houston;" (2) "the market participants in the hospital-only commercial anesthesia market in Dallas;" and (3) "the market participants in the hospital-only commercial anesthesia market in Austin." Ex. B. at 20-21. But, again, that is not the interrogatory USAP served. *See Kizer*, 2020 WL 6263733, at *6 n.4 (no numerosity problem where interrogatory contained no subparts); *Dawson*, 2018 WL 3815032, at

*2 (same). Indeed, the FTC's rewrite of the interrogatory leaves out some of its most important contents: an explanation of which providers are *not* in the FTC's market, which would provide evidence of how the FTC has gerrymandered its market definition and misapplied it in practice.

The FTC also repeats its earlier errors by stating that "each [subpart] can be fully answered without reference to the others." Ex. B at 20. But, again, the relevant comparison is not the subparts to one another, but the subparts to the primary question. *See Dimitrijevic*, 2005 WL 8164073, at *3; *Krawczyk*, 2004 WL 614842, at *2; *Texas Dep't of Health*, 2005 WL 8179552, at *1; *RYH*, 2010 WL 11527428, at *5. The primary question—state whether each practitioner is in or out of your alleged market—cannot be answered fully without answering every one of the allegedly distinct subparts the FTC identifies. Or put differently, even if the interrogatory is "split into numerous subparts" (and to be clear, this interrogatory is not), "each subpart is factually subsumed within the primary question." *Shijiazhuang Hongray Grp. v. World Trading 23 Inc.*, 2022 WL 17334065, at *3 n.2 (C.D. Cal. Sept. 6, 2022). That means they are not distinct. *See also Krawczyk*, 2004 WL 614842, at *2 (subparts not distinct when they are "factually subsumed" within a full and complete answer to the primary question (internal quotation marks omitted)).

Interrogatory No. 5. USAP fifth interrogatory states:

> For each acquisition or agreement that You contend constitutes any part of the alleged "multi-year anticompetitive scheme to consolidate anesthesia practices in Texas, drive up the price of anesthesia services provided to Texas patients, and increase [USAP's] own profits" (Compl. ¶ 1), identify USAP's purported share of any Relevant Market both before and after that acquisition or agreement, and each fact supporting any such contention (including the identity, nature, and (if applicable) Date range of each source of data or other information used in calculating such market-share figure, and the manner in which You processed or otherwise manipulated that data or information to arrive at the figures alleged in the Complaint (including but not limited to any manual or automated method, computer programs, or formulas You used to arrive at such market share allegations)).

Ex. A at 9. This interrogatory boils down to a single and straightforward request: for each acquisition that the FTC alleges was part of an unlawful scheme in this case, what was USAP's market share before and after the transaction, and what facts support those figures? It goes on to word that request in detail and precision to prevent the FTC from artfully avoiding the substance of the question. To that end, all of the material in the parenthetical merely serves to "guide" the FTC to the right level of detail, *Simon*, 2015 WL 12777219, at *3, asking the FTC to specify its "source of data or other information used in calculating such market-share figure" and the math the FTC used to "process[]" that data into final figures, Ex. A at 9. Accordingly, this is also a single interrogatory.

The FTC counts Interrogatory No. 5 as four separate interrogatories by engaging in the very gamesmanship USAP phrased it to prevent: it again incorrectly rewrites the interrogatory, pretending it asks for different information than what USAP requested. Its revision is:

> [Identify] (1) USAP's market share of hospital-only anesthesia service both before and after each challenged acquisition in the Houston MSA; (2) USAP's market share of hospital-only anesthesia service both before and after each challenged acquisition in the Dallas MSA; (3) USAP's market share of hospital-only anesthesia service both before and after each challenged acquisition in the Austin MSA; and (4) the source of data or other information used in calculating the market share figures in the Complaint, including the manner in which such data was processed.

Ex. B at 26. USAP's interrogatory asked the FTC to state the before-and-after market shares relating to each transaction. The FTC's rewrite instead asks which transactions happened in each geographic area and what their market-share impacts were there—and then, separately, what data source that all comes from. The difference matters: USAP is entitled to know which specific transactions (focusing on the transactions) are most germane to the FTC's case, and dividing them by metropolitan area would give incomplete or misleading answers because some of the

acquisitions spanned multiple geographies.[3] And treating a request for the source data as a completely distinct question from the rest further confirms that the FTC's revision is not genuine. In no sense is the source information that underlies the FTC's response distinct from its response. *See Erfindergemeinschaft*, 315 F.R.D. at 199 ("[T]he request for information about how" a party arrives at its interrogatory answer "is clearly subsumed within the primary question, as that information may well be necessary to an understanding [of] the responses to the primary question.").

Second, putting aside its erroneous rewrite, the FTC's four-interrogatory count is inconsistent with the case law. The primary question asks the FTC to explain how each part of the FTC's alleged "multi-year anticompetitive scheme" of acquisitions affected USAP's market share. Ex. A at 9. That question logically and factually subsumes each regional sub-answer of "where" USAP's market share changed over the course of the alleged scheme. *See Estate of Manship v. United States*, 232 F.R.D. 552, 557 (M.D. La. 2005) (holding that an interrogatory seeking "who, what, when, where and how" information in subparts counts as a single question because it "relates to the common theme presented"); *Krawczyk*, 2004 WL 614842, at *2.

Interrogatory No. 6. USAP's sixth interrogatory states:

> For each acquisition or agreement that You contend constitutes any part of the alleged "multi-year anticompetitive scheme to consolidate anesthesia practices in Texas, drive up the price of anesthesia services provided to Texas patients, and increase [USAP's] own profits" (Compl. ¶ 1), state whether You contend that, if USAP had not entered into that acquisition or agreement, prices would be lower, quality would be better, or output would be greater in any Relevant Market, and identify each fact supporting any such contention. For the avoidance of doubt, this Interrogatory seeks the definition of "price" (e.g., id. at ¶ 1), "quality" (id. at ¶¶ 268, 280, 293, 309, & 329), and output in any Relevant Market that underlies any such contention, each fact the FTC contends supports that definition, and each fact the

[3] For example, the FTC alleges that when USAP acquired Greater Houston Anesthesiology ("GHA") in 2012, GHA had a presence in both Houston and Austin. Compl. ¶¶ 89, 95, 161.

> FTC contends supports any purported adverse effect of each challenged acquisition or agreement.

Ex. A at 9-10. The FTC's claims require it to prove that USAP's acquisitions caused anticompetitive harms, which the case law defines principally as "increased prices, decreased output, or lower quality goods." *E.g.*, *Impax Lab'ys, Inc. v. FTC*, 994 F.3d 484, 493 (5th Cir. 2021). Accordingly, this interrogatory asks whether the FTC alleges that any anticompetitive harms flowed from any of USAP's acquisitions. That is a single general topic and therefore a single interrogatory.

The FTC characterizes this single interrogatory as *nine*, reasoning that it is asking about three separate and independent forms of anticompetitive harm multiplied across three separate and independent geographic markets, and states that "each of [those nine alleged subparts] can be fully answered without reference to the others." Ex. B at 36. Yet again, the FTC improperly compares the subparts to one another rather than to the primary question. *See Dimitrijevic*, 2005 WL 8164073, at *3; *Krawczyk*, 2004 WL 614842, at *2; *Texas Dep't of Health*, 2005 WL 8179552, at *1; *RYH*, 2010 WL 11527428, at *5. The test here looks only at a comparison of the primary question and a subpart question, asking whether "the subsequent question stand[s] alone" of the primary question. *Kendall v. GES Exposition Servs., Inc.*, 174 F.R.D. 684, 685 (D. Nev. 1997). The FTC instead focuses on the differences between subparts. That flaw alone disposes of the FTC's argument. Each of the nine supposed subparts the FTC identifies is a part of a full and complete answer to the primary question, which asks what competitive harms the FTC alleges resulted from USAP's acquisitions. *See*, *e.g.*, *Nance-Bush*, 337 F.R.D. at 137 (noting that courts in this district count an interrogatory requesting "a range of information touching on a common theme" as a single question).

Even if the supposed subparts were independent, the FTC's multiply-by-region approach is unwarranted. The primary question asks the FTC to identify whether it contends that any of the three types of anticompetitive effects (higher prices, lower quality, or reduced output) resulted from USAP's conduct. That question logically and factually subsumes each regional sub-answer identifying where market share changed during the alleged scheme; the FTC could not fully answer the question without explaining where (if anywhere) its alleged anticompetitive effect occurred. *See Krawczyk*, 2004 WL 614842, at *2 ("Multiple interrelated questions may constitute a single interrogatory even though it requests" the responding party to include details like "time, place, persons present, and contents [to] be stated separately[.]" (internal quotation marks omitted)). Accordingly, even if the FTC were right that each type of competitive harm is a separate subpart (and it is not), this interrogatory would count as three, not nine.

* * *

For these reasons, USAP's First Set of Interrogatories, containing six interrogatories, counts as just that: six. USAP was therefore entitled to serve, and the FTC was required to answer, up to 19 more. Its refusal to answer *any* interrogatories from USAP's Second Set is therefore substantially unjustified.

II. USAP's Second Set of 18 Interrogatories

The FTC also raised objections to the number of interrogatories in the Second Set, asserting that the 18 interrogatories there should actually count as 25. Ex. D at 2. The Court should overrule those objections as well and require the FTC to respond to *all* of the interrogatories in USAP's Second Set.[4]

[4] When the parties met and conferred, USAP asked the FTC if it would refuse to answer any of the interrogatories from the Second Set on the basis of any other objection if the numerosity question were resolved in USAP's favor. The FTC declined to say. Because USAP

The FTC's objections on this set of interrogatories are limited to four: Interrogatory Nos. 10, 12, 17, and 18.[5] The FTC asserts that together, those four interrogatories count as eleven. It is wrong.

Interrogatory No. 10. USAP's tenth interrogatory states:

> State whether You contend that USAP retains market power against Commercial Payers following the effective Dates of the Federal No Surprises Act and the Texas Surprise Billing Law, and state all relevant facts supporting such contention.

Ex. C at 10.

The federal No Surprises Act, 42 U.S.C. §§ 300gg-111, 300gg-131, 300gg-132, and the Texas Surprise Billing Law, S.B. No. 1264, are complementary pieces of legislation that have drastically increased insurers' leverage over anesthesiologists. They took effect for healthcare services on January 1, 2022 and January 1, 2020, respectively. In simplified terms, the laws limit insured patients' liability to out-of-network providers to what their payments would have been if the provider was in-network, and then create an arbitration system to resolve disputes between the insurer and the provider regarding any further payment. The Texas law covers "fully-insured" patients, meaning those who pay premiums to an insurer who takes on the risk of their medical costs; the federal law covers "self-funded" (or "administrative services only") plans, meaning employers who elect to cover the cost of their employees' medical claims. *See also* Compl. ¶ 65 (describing these two mutually exclusive categories of clients).

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attempted to confer in good faith on this issue, it is ripe for a decision by the Court compelling the FTC to respond.

[5] The FTC agrees that Interrogatory Nos. 7, 8, 9, 11, 13, 14, 15, 16, 19, 20, 21, 22, 23, and 24 each count as one. *See* Ex. D.

Because they keep both patients' and insurers' liability to out-of-network providers low when the provider first submits its bills, those laws fundamentally undermine the FTC's theory of USAP's supposed market power in this case. *Cf.* Compl. ¶ 74 (alleging that insurers "prefer to have anesthesia groups in network"—and that anesthesia groups therefore have leverage over insurers—because out-of-network groups "charge much more" and because "'surprise bills' can upset patients"; the new laws undermine both allegations). The FTC's complaint expressly acknowledged these laws but alleged that it was too soon to describe their effects. *See id.* n.5 ("[T]he ultimate results of these legislative efforts remain uncertain."). Accordingly, Interrogatory No. 10 asks the FTC to explain, with the benefit of two years' more experience, whether the FTC still contends that USAP has market power over insurers in light of this important legislation. That is a single topic, and an important one.

The FTC argues that this interrogatory counts as two because it is asking about two laws with two effective dates. Ex. D at 10-11. As with the above interrogatories, this is a comparison between alleged subparts rather than a comparison to the primary question, which is erroneous. *See Dimitrijevic*, 2005 WL 8164073, at *3; *Krawczyk*, 2004 WL 614842, at *2; *Texas Dep't of Health*, 2005 WL 8179552, at *1; *RYH*, 2010 WL 11527428, at *5. The primary question—whether (and why) the FTC maintains its allegations in light of landscape-altering legislation—encompasses both of the two complementary laws. *See Krawczyk*, 2004 WL 614842, at *2. The interrogatory's reference to these two laws thus "identif[ies] different aspects of the common theme"—precisely what the Rule 33 advisory committee's note permits parties to do while counting as just one interrogatory. *Mayfair House Ass'n, Inc. v. QBE Ins. Corp.*, 2010 WL 11505162, at *2 (S.D. Fla. Apr. 23, 2010); *see* Fed. R. Civ. P. 33(a) advisory committee's note to 1993 amendment.

Interrogatory No. 12. This interrogatory states:

> State whether You contend that Anesthesia Services paid by Commercial Payers are in a product market distinct from Anesthesia Services paid by Government Insurers, paid by self-pay individuals, or not paid at all, and the reasons for such contention.

Ex. C at 11. This interrogatory is straightforward: it asks the FTC to explain whether and why it contends that its alleged market of "commercially-insured" anesthesia services is distinct from the purportedly distinct "markets" adjacent to it. It is one topic and one interrogatory.

The FTC incorrectly asserts that this interrogatory counts as three, treating the differences between the alleged commercially-insured "market" and each of the three adjacent "markets" referenced in the interrogatory each as a separate question. Ex. D at 12. That is not the proper counting. Interrogatory No. 12's primary question asks whether and why the FTC contends that anesthesia services paid by Commercial Payers form a distinct market; that question necessarily requires the FTC to explain why its alleged market is different from all of these others. "The inclusion of detail in an interrogatory to make it clear what the interrogatory is intended to include is not the same thing as propounding a compound interrogatory that contains 'discrete subparts' that should be counted separately pursuant to Rule 33(a)(1)." *Brand Advantage Grp., Inc. v. Henshaw*, 2020 WL 5097107, at *8 (D. Minn. Aug. 28, 2020). The subparts identified here are not distinct questions to answer. *See RYH*, 2010 WL 11527428, at *5.

Interrogatory Nos. 17 and 18. These two companion interrogatories state:

> If You contend that Commercial Payers are customers of USAP, state what products or services USAP provides Commercial Payers and which of those products or services Commercial Payers cannot obtain outside of a hospital setting.
>
> If You contend that Government Insurers are customers of USAP, state what products or services USAP provides Government Insurers and how, if at all, such products or services differ from those provided to Commercial Payers.

Ex. C at 11-12. Each of these represents another (single) interrogatory probing the FTC's market definition theory. The FTC's complaint suggests that USAP sells "hospital-only" anesthesia services "to commercial insurers." Compl. ¶ 216. Interrogatory No. 17 asks the FTC to identify the particular products or services that USAP supposedly sells to those payers and to note which of them are "hospital-only" services. *Cf.* Fed. R. Civ. P. 33(a) advisory committee's note to 1993 amendment (noting that interrogatory seeking a list of items with details about each item in the list should count as one interrogatory). Interrogatory No. 18 then asks the FTC to explain how, if at all, those services are different from the ones USAP "sells" to government insurers.

The FTC improperly asserts that each of these interrogatories comprises three questions. For Interrogatory No. 17:

> (1) whether the FTC contends that Commercial Payers are customers of USAP, and if so; (2) what products or services USAP provides Commercial Payers; and (3) what products or services USAP provides Commercial Payers that the Commercial Payers cannot obtain outside of a hospital setting.

Ex. D at 16. And similarly for Interrogatory No. 18:

> (1) whether the FTC contends that Government Insurers are customers of USAP, and if so; (2) what products or services USAP provides Government Insurers; and (3) what products or services USAP provides Government Insurers that the Commercial Payers cannot obtain.

Id. at 17. Once again, the FTC's counting makes no sense on its own terms: these interrogatories plainly do not separately ask whether commercial payers or government insurers are USAP's customers, because another just above them (No. 14) already did that.[6] It makes no sense to say that in the space of five interrogatories, USAP spent three of them asking the same question (who are USAP's customers) three times.

[6] Interrogatory No. 14 asks, "State all Persons or categories of Persons (such as individual patients, Commercial Payers, Government Insurers, Hospitals, Ambulatory Surgical Centers, etc.) who You contend are USAP's customers." Ex. C at 11. Interrogatory Nos. 15 and 16

Nor does it make sense to divide the FTC's list of alleged services into two parts (those that must be performed in hospitals and those that need not be, or those that both government and commercial payers obtain and those that only commercial payers obtain) and claim each list calls for two separate interrogatories. Each interrogatory calls for a single list of services, in which the FTC must note which ones can be provided in a hospital and which cannot (No. 17) or which ones are common to government and commercial payers and which are not (No. 18). In both cases, the purportedly separate lists the FTC points to "are all secondary and related in meaning to the primary question[s] posed." *Infinite Energy, Inc. v. Catalyst Energy, LLC*, 2008 WL 11408499, at *3 (N.D. Ga. Apr. 21, 2008). That means they each count as one interrogatory.

* * *

For the reasons above, the Second Set of Interrogatories does not count as 25 interrogatories, as the FTC asserts. It contains 18 interrogatories, which is below the maximum number allowed, and the Court should require the FTC to answer them all.

III. In the Alternative, the Court Should Grant USAP Leave to Exceed the 25-Interrogatory Cap

If the Court concludes that USAP's interrogatories somehow do exceed the 25-interrogatory cap (and it should not), it should grant USAP leave to exceed the 25-interrogatory cap such that the FTC must answer all of the interrogatories USAP served. *See* Fed. R. Civ. P. 33(a)(1); LR 33.1. The Court has discretion to set aside the 25-interrogatory cap, *see*, *e.g.*,

follow up with questions about USAP's hospital customers ("If You contend that Hospitals are not customers of USAP…"), and then Interrogatory Nos. 17 and 18 follows up with questions about commercial and government insurers, which the FTC cannot credibly argue are USAP's "customers." *Id.* at 11-12. It makes no sense for the FTC to say that Interrogatory Nos. 17 and 18 each contain a distinct subpart counting as separate interrogatories to ask for the information already sought by Interrogatory No. 14.

Nance-Bush, 337 F.R.D. at 139, and there is good reason for the Court to do so here if it concludes that the 25-interrogatory limit has been exceeded.

There is no genuine dispute that the interrogatories address important issues in the case, such as the FTC's alleged market definition, important changes in laws that the FTC artfully pleaded around, and the FTC's alleged theory of antitrust harm, among other things. USAP needs this information now to guide its expert discovery so that it can obtain evidence to refute the FTC's theories and prepare its defenses. It would be fundamentally unfair for the FTC to refuse to answer USAP's valid interrogatories only to later ambush USAP with new theories on these topics at summary judgment or trial. "In the interest of facilitating a smooth discovery process and encouraging a resolution to this case," it is more efficient for the Court and the parties to have the FTC's theories disclosed now. *Nance-Bush*, 337 F.R.D. at 139 (granting a motion to serve additional interrogatories in alternative to a motion to compel).

It would also be inequitable to excuse the FTC from responding to USAP's interrogatories. Many of the "subparts" the FTC identifies are artifacts of the fact that it chose to bring a case alleging three geographic markets at once. *See*, *e.g.*, Ex. B at 36-37 (arguing that USAP's questions should be multiplied by three when USAP asked about the full scope of the FTC's market allegations). The FTC should not be allowed to use the number of markets it alleged to keep USAP from obtaining meaningful discovery about its case. Indeed, the FTC promulgated many multi-part interrogatories of its own, and USAP responded to them in good faith; if the FTC counted its own interrogatories the way it counts USAP's, it would have served

over 60.[7] *See* Ex. E at 4-8; Ex. F at 3. It cannot credibly say that interrogatories with subparts are too burdensome to answer.

IV. The Court Should Award USAP's Fees in Connection with This Motion

The FTC has answered six of USAP's interrogatories and claimed that counts as USAP's full allotment of 25. It has done so on the legally defective basis of rewriting USAP's interrogatories and comparing subparts to one another rather than to the primary topic of the interrogatory—a theory that, if the FTC genuinely believed it, would mean the FTC itself served more than double the allowed 25 interrogatories on USAP. And it has refused reasonable compromises that would have avoided the need for this Court's intervention.[8] Because the FTC's opposition to this motion was substantially unjustified, the Court should require the FTC

[7] For example, the FTC's Interrogatory No. 1 stated: "Identify each Hospital in Texas at which You have provided Anesthesia Services, including: a. The name and address of the Hospital; b. The number of beds, operating rooms, and procedure rooms at the Hospital; c. The total number of USAP Anesthesiologists who practiced at the Hospital during each of the last three calendar years; d. The average number of USAP Anesthesiologists who practiced at the Hospital each day during each of the last three calendar years; e. The maximum number of USAP Anesthesiologists who practiced at the Hospital during a single shift in each of the last three calendar years; f. Any period of time during which You have been the Exclusive Provider of Anesthesia Services at the Hospital or any department or unit of the Hospital; and g. The date(s) on which You began and (if applicable) ceased or will cease providing Anesthesia Services at the Hospital." Ex. E at 4. Its Interrogatory No. 4 stated: "Identify each formal or informal bid or proposal You have submitted to provide Anesthesia Services at a Hospital in Texas, including: a. The name and address of the Hospital; b. The individual Person(s) at the Hospital to whom you directed your bid or proposal; c. The date on which you submitted your bid or proposal; d. The result of the bid or proposal (i.e., won vs. lost); e. Who the proposal or bid was lost to (if applicable); and f. Why the proposal or bid was lost (if applicable)." *Id.* at 5. Indeed, only two of the FTC's interrogatories to USAP did *not* have multiple expressly labeled subparts. *See id.* at 8.

[8] In an effort to avoid burdening the Court and without endorsing the FTC's counting, USAP proposed as a compromise that the FTC could answer just eight of the interrogatories from the Second Set (i.e., cutting that set in half). The FTC refused and said it would not answer more than three further interrogatories—meaning no more than nine total in the case. *See* Ex. G.

to pay USAP's reasonable expenses incurred in filing this motion, including attorney's fees. *See Simon*, 2015 WL 12777219, at *5.

CONCLUSION

The Court should (1) order the FTC to provide complete responses to USAP's second set of interrogatories, and (2) grant USAP all additional relief the Court finds just and proper.

Dated: May 30, 2025

Respectfully submitted,

/s/ *Bradley E. Oppenheimer*

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CERTIFICATE OF CONFERENCE

I hereby certify that on May 8, 9, 13, and 27, 2025, the undersigned counsel for USAP in good faith conferred via videoconference and email with Maren Haneberg, counsel for the FTC, concerning the relief requested in this Motion To Compel. The FTC opposes this Motion To Compel and the relief sought herein.

Dated: May 30, 2025

/s/ *Bradley E. Oppenheimer*
Bradley E. Oppenheimer

CERTIFICATE OF SERVICE

I hereby certify that on May 30, 2025, 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.

/s/ *Bradley E. Oppenheimer*
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