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

Redacted Public Version

Plaintiff Federal Trade Commission's
Opposition to Defendant U.S. Anesthesia Partners, Inc.'s
Motion for Leave to Amend its Answer

In another post-discovery motion,[1] USAP seeks the Court's approval to withdraw a substantive admission that it made repeatedly over the course of this case and the preceding investigation. The FTC's Complaint challenges—among other things—USAP's acquisitions of 16 anesthesiology groups in Texas, including two that competed with USAP at Medical City Dallas Hospital: BMW Anesthesiology (also referred to as BMW Physicians) and Medical City Physicians. USAP's Answer and discovery responses to the FTC repeatedly admitted that USAP "acquired" BMW and Medical City. Now, at the 11th hour, USAP wants to withdraw those admissions so that it can argue that these two acquisitions were "per se legal" because they were in fact not "acquisitions" but merely "hiring."

The Court should reject USAP's gambit. First, USAP's proposed amendment is untimely. USAP claims that its admissions that it had "acquired" BMW Anesthesiology and Medical City Physicians were based on a misunderstanding that did not become apparent until the FTC defined the term "acquired" in a March 2025 discovery request. But the March 2025 definition was not new: the FTC had sent a virtually identical definition to USAP on multiple occasions over several years, and USAP repeatedly took the position that it applied to the BMW and Medical City deals. Second, USAP's proposed amendment is futile: regardless of semantics, the reality remains that USAP took over these practices—which fully ceased to exist—and clever wordsmithing cannot render the deals "per se legal." Third, if not futile, USAP's proposed amendment is manifestly unfair to the FTC, which relied on USAP's admissions and did not test these new assertions in fact discovery.

[1] *Cf.* USAP's Motion to Compel Interrogatory Responses (ECF 269).

NATURE AND STAGE OF PROCEEDINGS

The FTC filed this case on September 21, 2023, challenging USAP's scheme to "roll up" Texas hospital anesthesia providers, focusing on USAP's acquisition of competing anesthesia practices in three major Texas markets: Houston, Dallas, and Austin. Complaint for Injunctive and Other Equitable Relief ("Compl."), ECF 1. USAP's Answer to the Complaint was originally due on May 28, 2024. After obtaining an unopposed extension for "additional time to investigate the allegations," USAP filed its Answer on June 17, 2024. ECF 150; ECF 151; ECF 157. Pursuant to the First Amended Scheduling Order (ECF 173), fact discovery in this case ran from May 13, 2024, until April 30, 2025. USAP sought and received an unopposed extension until May 30 for the "limited purpose" of taking certain third-party depositions and resolving third-party document discovery.[2] ECF 263, at 1-2; ECF 266. The case is now in expert discovery and the parties' opening expert reports are due on July 25, 2025. ECF 266.

ISSUES TO BE DECIDED BY THE COURT

Whether USAP can amend its Answer after the close of fact discovery to withdraw its admissions that it acquired BMW Anesthesiology and Medical City Physicians.

BACKGROUND

The FTC's September 2023 Complaint challenges USAP's serial acquisitions of anesthesia practices in three distinct Texas markets: Dallas, Houston, and Austin. *See* Compl. Counts I-III (challenging Houston acquisitions), IV-VI (challenging Dallas acquisitions), VII

[2] USAP notified the FTC in April that it wanted to seek an extension of discovery. The FTC responded that it did not need an extension but was "prepared to not oppose" one on the condition USAP's motion "specifie[d] that the fact discovery deadline is extended to May 30 for the explicitly limited purpose of [taking certain depositions and] the deadline for written fact discovery remain[ed] April 30." Ex. 1 at 1 (Email from M. Haneberg to R. Beynon, Apr. 21, 2025). USAP agreed; its motion specified the requested extension was "for the limited purpose of completing [specific] depositions . . . and already propounded document discovery." ECF 263 at 2.

(challenging Austin acquisitions). This motion concerns two of the practices USAP acquired in Dallas: BMW Anesthesiology and Medical City Physicians,[3] which previously competed with USAP at Medical City Dallas Hospital. The Complaint describes these acquisitions in the following allegations:

- Paragraph 138 alleges in relevant part that "Over five months from December 2015 to April 2016, USAP acquired four additional groups in Dallas: [including] BMW Anesthesiology [and] Medical City Physicians."
- Paragraph 141 alleges that "in January 2016, USAP acquired BMW Anesthesiology and unaffiliated anesthesiologists referred to as Medical City Physicians."
- Paragraph 141 further alleges that USAP "purchased BMW, a group of 9 anesthesiologists for [redacted]" and "acquired the Medical City Physicians, a group of 7 anesthesiologists, for [redacted]."

USAP's June 17, 2024, Answer admitted all these allegations without qualification. *See* USAP Br. at 2; ECF 157.

USAP's admissions are unsurprising: USAP executed letters of intent with both BMW Anesthesiology and Medical City Physicians stating that it [redacted]. Ex. 3 at -855 (BMW Letter of Intent); Ex. 4 at -681 (Medical City Physicians Letter of Intent). After the agreements were finalized, neither BMW Anesthesiology nor Medical City Physicians existed, and all the doctors affiliated with them worked for USAP. Ex. 5 at -169 (BMW Closing Checklist); Ex. 6 at -761 (Medical City Physicians Closing Binder Index).

[3] Medical City Physicians was a group of affiliated physicians that each had their own practice. These practices jointly negotiated a buyout with USAP, where [redacted]

At the very end of fact discovery, however, in response to an FTC request for admission, USAP changed course and "den[ied] that it acquired" either BMW Anesthesiology or Medical City Physicians. *See* USAP Br. at 3. When the FTC noted that this denial contradicted USAP's Answer to the Complaint, USAP claimed that its earlier admissions—e.g., that it had "acquired the Medical City Physicians" or "purchased BMW"—in fact had meant that it had "hired, as new employees, personnel formerly affiliated with BMW Physicians [and] Medical City Physicians." *Id*. USAP asked the FTC to agree that it could amend its Answer accordingly. The FTC declined to consent to this modification, and USAP filed the instant motion. ECF 271-7, Ex. F.

ARGUMENT

Under the Federal Rules of Civil Procedure, after a short initial grace period,[4] "a party may amend its pleading only with the opposing party's written consent or the court's leave." Fed. R. Civ. P. 15(a)(2). "Whether leave to amend should be granted is entrusted to the sound discretion of the district court . . . ." *Wimm v. Jack Eckerd Corp.*, 3 F.3d 137, 139 (5th Cir. 1993). Rule 15 "provides that such leave 'shall be freely given when justice so requires.'" *Id* (quoting Fed. R. Civ. P. 15(a)). But leave "is by no means automatic." *Id* (internal quotation marks omitted). District courts can deny leave for reasons such as "undue delay[,] . . . undue prejudice to the opposing party, and futility of amendment." *Id*; *Pierce v. Fondren Orthopedic Grp., LLP*, No. CV H-18-1686, 2018 WL 6200049, at *12 (S.D. Tex. Nov. 28, 2018) (denying

[4] A party "may amend its pleading once as a matter of course no later than 21 days after serving it." Fed. R. Civ. P. 15(a)(1) (cleaned up).

leave to amend answer on futility grounds). Here, USAP's request to amend its Answer is untimely, futile, and—if not futile—highly prejudicial to the FTC.

I. USAP's request is untimely

USAP should not be allowed to withdraw a Complaint admission—over a year after making it and after fact discovery has closed—where there are no new facts or changed circumstances to justify doing so. "Although Rule 15(a) contains no time limit for permissive amendment, 'at some point, time delay . . . can be procedurally fatal.'" *Whitaker v. City of Houston, Tex.*, 963 F.2d 831, 836 (5th Cir. 1992) (quoting *Gregory v. Mitchell*, 634 F.2d 199, 203 (5th Cir. 1981). "In such a situation, the [movant] must meet the burden of showing that the delay was due to oversight, inadvertence, or excusable neglect, a burden which properly shifts to the party seeking to amend where apparent lack of diligence exists." *Id.* (internal quotation marks omitted). Courts in this circuit have denied leave to amend where the movant was "aware of the underlying facts at the outset of th[e] action." *Wimm*, 3 F.3d at 142; *see also Pope v. MCI Telecomms. Corp.*, 937 F.2d 258, 263 (5th Cir.1991) (denying motion to amend pleadings "based upon the same facts" as the earlier pleading); *Udoewa v. Plus4 Credit Union, No. CV H-08-3054,* 2010 WL 1169963, at *2 (S.D. Tex. Mar. 23, 2010) ("In the context of a motion for leave to amend, the court may deny the motion if the movant 'knows or should have known of the facts upon which the proposed amendment is based but fails to include them . . . .'").

USAP has no good reason for seeking to withdraw its admissions a year after serving its Answer and after the close of fact discovery. USAP does not assert that its proposed amendment is based on new facts unearthed in discovery—indeed, USAP was a party to the relevant agreements and has known the facts all along. Nor is it the case that USAP "could not have known that there was disagreement over the meaning of 'acquired' . . . until the FTC's April 30 [2025] letter." USAP Br. at 9. As a matter of plain meaning, it is implausible that the Complaint

allegations that USAP "acquired BMW Anesthesiology and . . . Medical City Physicians" in fact meant it merely "hired as new employees personnel formerly affiliated with" those groups. *See* USAP Br. at 5. And USAP does not even attempt to explain what was unclear about the allegation that it "purchased BMW." *See* Compl. ¶ 141.

Moreover, even if there were some ambiguity in the wording of the Complaint, the FTC's March 2025 definition of "acquired" was not new. In 2021, the FTC asked USAP to identify "Transactions" using a virtually identical definition, and in 2024—one month before USAP submitted its Answer—the FTC asked USAP for documents from each of its "Acquisitions" again using essentially the same definition. Ex. 7 at 3-4, 13 (Civil Investigative Demand Issued to USAP, Nov. 18, 2021) ("CID"); Ex. 8 at 3, 11 (FTC's First Set of Requests for Production, May 13, 2024). As the chart below demonstrates, the March 2025 definition uses virtually identical language—indeed it includes every single word that appears in the 2021 and 2024 definitions.

FTC request	Relevant definition
2025 RFAs	"[E]xecuted any transaction, including, but not limited to, a merger, acquisition (including asset purchases or acquisitions of voting stock or other equity), affiliation, consolidation, investment, joint venture, license, partnership, sale, or other transaction by or on behalf of the Company and a third party . . . ."[5]
2024 RFPs	"[A]ny transaction, including, but not limited to, a merger, acquisition (including asset purchases or acquisitions of voting stock or other equity), affiliation, consolidation, investment, joint venture, license, partnership, sale, or other transaction by or on behalf of the Company and a Third Party."
2021 CID	"[M]erger, acquisition (including asset purchases or acquisitions), consolidation, investment, joint venture, license, partnership, sale, or other transaction by or on behalf of the Company and a Third Party."

[5] Though omitted from USAP's brief and not relevant here, the 2025 definition also includes a parenthetical reference to a discovery document: "(including, but not limited to, the 'Acquisitions' as used in USAP-FTC00004191)." *Cf.* USAP Br. at 2-3.

USAP agreed that its acquisitions of BMW and Medical City met the FTC's 2021 and 2024 definitions. Indeed, contrary to USAP's current argument, its response to the 2021 request expressly stated that it understood the FTC's definition of "Transaction" to exclude "hiring anesthesia providers . . . in the ordinary course" and still listed both the BMW and Medical City deals as meeting the definition of "Transaction." Ex. 10 at 23, 24 (USAP Narrative Submission to the FTC, June 17, 2022). And in response to the FTC's 2024 document request, USAP did not dispute that BMW and Medical City were "Acquisitions" under this same definition and provided documents from "Acquired Group Custodians" for both deals. Ex. 9 at 2-3 (Letter from N. Perlman, Oct. 23, 2024).

Thus, by the time USAP denied that it acquired BMW and Medical City in 2025, it had already seen the same definition twice over the span of three years; had indicated that it understood that definition to exclude ordinary course hiring; and had consistently found that the BMW and Medical City agreements met the definition. USAP's contention that its proposed amendment is justified because it was surprised by the FTC's use of a virtually identical definition in March 2025 is unfounded.

II. USAP's proposed amendment is futile

USAP's request to amend is futile because it does not support the legal defense USAP seeks to raise. In the context of defenses, "an amended pleading is 'futile' if the asserted defenses fail to provide a basis for relief." *Stock Bldg. Supply of Tex., L.P. v. Richardson*, No. CV SA-06-CA-192-FB, 2007 WL 9702864, at *4 (W.D. Tex. May 23, 2007). USAP contends that "the proposed amendment is important because hiring another firm's talent is per se legal under the antitrust laws." USAP Br. at 1, 7-8. But this argument is based on a misreading of *Taylor Publishing. Co. v. Jostens, Inc.*, 216 F.3d 465 (5th Cir. 2000). *Taylor Publishing* held that ordinary course hiring of *some* of a competitor's employees "cannot generally be held

exclusionary . . . because there is a high social and personal interest in maintaining a freely functioning market for talent." *Id*. at 479 (quoting Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 702b, at 141 (1996)). But even under USAP's revised description of its agreements, it hired *all* of these competing groups' practitioners, paid [redacted], and the groups ceased to exist as a result. This type of "outright takeover" is "not governed by *Taylor Publishing*." *BRFHH Shreveport, LLC v. Willis Knighton Med. Ctr.*, 176 F. Supp. 3d 606, 621 (W.D. La. 2016). Indeed, the motivating concern of protecting competition for talent is inapplicable when one hiring employer removes another hiring employer from the market.

The Supreme Court has long been clear that antitrust law focuses on the substance of challenged agreements—not on semantic word games. *See Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 760 (1984) (antitrust law is "aimed at substance rather than form"). As the leading antitrust treatise explains, "'acquisition' should be construed broadly" under antitrust law, with a focus on the "impact on competition, not [] the technical formalities of the transaction." Herbert Hovenkamp & Phillip Areeda, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* § 1201a (2024). Regardless of how USAP wishes to describe its takeovers of BMW Anesthesiology and Medical City Physicians, the impact on competition here is simple: USAP paid [redacted] to entirely subsume two groups it previously competed with at Medical City Dallas Hospital. USAP's attempt to create a legal defense for these agreements via creative word choice is futile.

III. If not futile, USAP's proposed amendment would substantially prejudice the FTC

On the other hand, if USAP were correct that its proposed amendment would create a fact issue as to whether the BMW and Medical City acquisitions were "per se legal," then the amendment would substantially prejudice the FTC. The FTC conducted all of fact discovery

relying on USAP's repeated admissions that it had "purchased" and "acquired" BMW Anesthesiology and "acquired" Medical City Physicians, and thus did not specifically inquire into those issues. USAP blithely asserts that "there is no prejudice to the FTC, as USAP produced closing documents for the challenged transactions." USAP Br. at 1-2. But had the FTC been aware that USAP was seeking to immunize these deals from challenge by mischaracterizing them as hiring, the FTC could have deposed the heads of these practices or asked targeted questions in the depositions of USAP's executives about the structure of these transactions. Allowing USAP to withdraw these admissions after the FTC relied on them for the entirety of fact discovery would be manifestly unfair. *See, e.g.*, *Pope*, 937 F.2d at 263 (denying leave to amend pleadings "long after extensive discovery had taken place"); *Smith v. EMC Corp.*, 393 F.3d 590, 596 (5th Cir. 2004) (denying leave to amend pleadings where "both parties would have had to reopen discovery"); *Little v. Liquid Air Corp.*, 952 F.2d 841, 846 (5th Cir. 1992) (denying leave to amend pleadings "several months after discovery on the actions had effectively terminated") *aff'd on reh'g en banc*, 37 F.3d 1069 (5th Cir. 1994).

CONCLUSION

For the foregoing reasons, the Court should deny USAP's motion in its entirety.

Dated: July 11, 2025

Respectfully submitted,

/s/ Kara Monahan

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CERTIFICATE OF SERVICE

I hereby certify that on July 11, 2025, I have electronically filed a true and correct copy of the Plaintiff Federal Trade Commission's Opposition to Defendant U.S. Anesthesia Partners, Inc.'s Motion for Leave to Amend its Answer with the Clerk of the Court using the CM/ECF system, which will automatically send e-mail notification of such filing to all counsel of record.

Dated: July 11, 2025

/s/ Kara Monahan

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FEDERAL TRADE COMMISSION,

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U.S. ANESTHESIA PARTNERS, INC.,

Defendant.

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

Appendix of Authorities in Plaintiff Federal Trade Commission's Opposition to Defendant U.S. Anesthesia Partners, Inc.'s Motion for Leave to Amend its Answer

Cases

2018 WL 6200049
United States District Court, S.D. Texas, Houston Division.

Peggy PIERCE, Plaintiff,
v.
FONDREN ORTHOPEDIC GROUP, LLP and Fondren Orthopedic Ltd., Defendants.

Civil Action No. H-18-1686
|
Signed 11/28/2018

Attorneys and Law Firms

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Kelsi Stayart White, Joseph Y. Ahmad, Ahmad, Zavitsanos, Anaipakos, Alavi & Mensing P.C., Houston, TX, for Defendants.

MEMORANDUM OPINION AND ORDER

SIM LAKE, UNITED STATES DISTRICT JUDGE

***1** Plaintiff, Peggy Pierce ("Pierce" or "Plaintiff"), sued defendants, Fondren Orthopedic Group, LLP and Fondren Orthopedic Ltd. (collectively, "Defendants"), in this court for federal and state employment claims and state breach of contract claims.

Pending before the court are

Pierce's Motion for Partial Summary Judgment on Two of Her Breach of Contract Claims ("Plaintiff's MPSJ") (Docket Entry No. 9);

Defendants' Objections to Pierce's Evidence in Support of Her Motion for Partial Summary Judgment ("Defendants' Objections to Plaintiff's Evidence") (Docket Entry No. 15);

Fondren Orthopedic Ltd.'s Cross-Motion for Partial Summary Judgment ("FOLTD's Cross-MPSJ") (Docket Entry No. 32);

Fondren Orthopedic, Ltd.'s Objections to Pierce's Evidence in Response to Fondren Orthopedic, Ltd.'s Cross-Motion for Partial Summary Judgment ("FOLTD's Objections to Plaintiff's Evidence") (Docket Entry No. 40);

Snow Goose Corporation's Motion to Intervene (Docket Entry No. 19);

Defendants' Motion for Leave to File a Second Amended Answer and Counterclaim (Docket Entry No. 20); and

Fondren Orthopedic Ltd.'s Motion for Leave to File a Third-Party Complaint ("FOLTD's Motion for Leave to File Third-Party Complaint") (Docket Entry No. 21).

For the reasons stated below, the court will deny Plaintiff's MPSJ, FOLTD's Cross-MPSJ, Snow Goose Corporation's Motion to Intervene, Defendants' Motion for Leave to File a Second Amended Answer and Counterclaim, and FOLTD's Motion for Leave to File Third-Party Complaint. [1]

I. Factual Background

Pierce's First Amended Complaint arises from her termination as CEO and Administrator of Fondren Orthopedic Group, LLP ("FOG"). Pierce's Complaint alleges a federal claim for age discrimination under the Age Discrimination in Employment Act and state law claims for disability discrimination, age discrimination, sex discrimination, and retaliation under the Texas Commission on Human Rights Act. [2] Plaintiff also alleges state law claims for breaches of contract. [3] Plaintiff's MPSJ addresses only two of Plaintiff's pending breach of contract claims. FOLTD's Cross-MPSJ addresses all three of Plaintiff's pending breach of contract claims.

Defendants are two of a series of interrelated business entities with common management and officers. FOG, Pierce's former employer, is a Texas limited liability partnership composed of physicians engaged in providing medical services. FOLTD is a Texas limited partnership formed for the purpose of investing in Texas Orthopedic Hospital, where the physician partners of FOG and FOLTD perform medical services. FOLTD has no employees. [3] As a limited partnership, FOLTD is composed of both general and limited partners. The general partner of FOLTD is Snow Goose Corporation ("Snow Goose"). [4] The limited partners of FOLTD are many of the same physicians who are partners in FOG. [5] Snow Goose Corporation is a holding corporation, which -- at the time of the events at issue -- was operated by persons who were also partners in both FOG and FOLTD. [6]

***2** Pierce was terminated under disputed circumstances after working for FOG and its related entities for nearly 30 years. Pierce alleges that she was terminated because of her age and her disability, [7] and in retaliation for discovering what Pierce alleges were illegal practices on the part of FOG partners. [8] Defendants assert that Pierce was terminated for misconduct and poor performance. [9]

The motions pending before the court relate only to Pierce's breach of contract claims. Pierce alleges that after she was terminated, FOLTD failed to honor an agreement that she entered into with FOLTD in 2014 ("the Agreement"). The Agreement provides, in relevant part, as follows:

> ... [T]his will confirm that as long as you are the Administrator of [FOG], an affiliate of [FOLTD], and continue to handle the day-to-day business affairs of [FOLTD], and then continuing for a period of five (5) years after you are no longer performing those responsibilities, whether due to retirement, death, disability or termination, you will continue to be paid a gross amount equal to what a limited partner in the Partnership receives from operating income distributions based on him then owning 10 Units of limited partner [FOLTD] Interests.
>
> ...
>
> You have done an excellent job for [FOLTD] and after these many years of dedicated service deserve not only to continue sharing in the success of [FOLTD], but to benefit past the point when you are no longer working for [FOG] and [FOLTD]. [10]

The Agreement was signed by Dr. G. William Woods, M.D. ("Dr. Woods") in his capacity as the president of FOLTD's general partner, Snow Goose. Dr. Woods was also a limited partner in FOLTD. [11] The Agreement was on Snow Goose letterhead. The enforce-ability of the Agreement, and Dr. Woods' authority to sign it, are at issue in this action.

II. Pierce's Motion for Partial Summary Judgment and FOLTD's Cross-Motion for Partial Summary Judgment

In her MPSJ Pierce argues that she is entitled to summary judgment on two of her breach of contract claims based on Defendants' breach of the Agreement. Defendants argue in response that the Agreement is unenforceable for three reasons: lack of consideration; because Plaintiff was terminated for cause; and because Dr. Woods did not have actual or apparent authority as President of Snow Goose to enter into the Agreement on FOLTD's behalf. In FOLTD's Cross-MPSJ, FOLTD argues that FOLTD is entitled to summary judgment on Pierce's breach of contract claims because Dr. Woods lacked actual or apparent authority to enter into the Agreement as a matter of law.

A. Standard of Review

Summary judgment is authorized if the movant establishes that there is no genuine dispute about any material fact and the law entitles it to judgment. Fed. R. Civ. P. 56(c). Disputes about any material facts are "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 106 S. Ct. 2505, 2511 (1986). In reviewing the evidence "the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." Reeves v. Sanderson Plumbing Products, Inc., 120 S. Ct. 2097, 2110 (2000). Factual controversies are to be resolved in favor of the nonmovant, "but only when ... both parties have submitted evidence of contradictory facts." Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc).

B. Consideration

***3** A written instrument is prima facie proof of consideration. Taylor v. Fred Clark Felt Co., 567 S.W.2d 863, 867 (Tex. Civ. App. -- Houston [14th Dist.] 1978, writ ref'd n.r.e.). It is the defendant's burden to offer evidence to defeat this prima facie proof. Thigpen v. Thigpen, 563 S.W.2d 868, 870 (Tex. Civ. App. -- San Antonio 1978, writ ref'd n.r.e.). The existence (or lack of) consideration is a question of law. Brownwood Ross Co. v. Maverick County, 936 S.W.2d 42, 45 (Tex. App. -- San Antonio 1996, writ denied) (citing Williams v. Hill, 396 S.W.2d 911, 913 (Tex. Civ. App. -- Dallas 1965, no writ). Because there is a written agreement in this case, Defendants must demonstrate that the Agreement is not supported by consideration.

In Texas employments are terminable at-will unless the employer and employee contract otherwise. See Winters v. Houston Chronicle Publishing Co., 795 S.W.2d 723, 723-24 (Tex. 1990). Under the employment at-will doctrine either the employer or employee can terminate the employment

relationship for any reason or no reason at all, at any time. See East Line & R.R.R. Co. v. Scott, 10 S.W. 99, 102 (Tex. 1888).

Defendants argue that the Agreement is not supported by consideration because Plaintiff could have terminated her employment with FOG at any time. However, if "a promise to grant a raise to a terminable-at-will employee is necessarily illusory ... why is an employer's original promise to pay a certain wage to an at-will employee enforceable when the employee performs?" Vanegas v. American Energy Services, 302 S.W.3d 299, 303-304 (Tex. 2009) (citing 1 John E. Murray, Jr. & Timothy Murray, CORBIN ON CONTRACTS § 1.17 (Supp. Fall 2009)). Defendants' argument would render many compensation agreements between at-will employees and their employers unenforceable.

While past services alone may not serve as consideration for a promise, a contract created both to reward an employee for past services and to compensate the employee for future services is supported by consideration. In Pasant v. Jackson National Life Insurance Co., 52 F.3d 94, 97 (5th Cir. 1995), the court evaluated a contract to compensate an employee for "valuable services" he had rendered to his employer in the past, as well as future services that the employee continued to render until he was terminated. Id. at 97-98. The court held that the employee's continued work for the company until he was terminated provided adequate consideration. Id.

The court is persuaded that the Agreement is supported by consideration. The Agreement does reward Plaintiff for previously performed services to FOG and FOLTD. It states:

> You have done an excellent job for [FOLTD] and after these many years of dedicated service deserve not only to continue sharing in the success of [FOLTD], but to benefit past the point when you are no longer working for [FOG] and [FOLTD]. [12]

But the Agreement also states that it is contingent on Pierce's continuing to serve as the administrator of FOG and "continuing] to handle the day-to-day business" of FOLTD. [13] Plaintiff continued to provide services to FOG and FOLTD in compliance with the Agreement until her termination in 2018 -- over three years after the Agreement was executed. [14] The court therefore concludes that the Agreement is supported by consideration.

C. Good Cause

***4** Plaintiff argues that the Agreement is enforceable as a matter of law regardless of the reason she was terminated because the Agreement contains no exception for a termination "for cause." Defendants argue that because FOG had good cause to terminate Plaintiff, Defendants have no obligation to pay Plaintiff the 5-year post-termination payments guaranteed by the Agreement. The circumstances of Plaintiff's termination are disputed, and fact issues exist as to whether Plaintiff was terminated for cause.

The Agreement does not contain any language excusing FOLTD's performance in the event Plaintiff was terminated for cause. Furthermore, the Agreement expressly contemplates that five years of payments would be made to Plaintiff regardless of whether she left FOG and FOLTD "due to retirement, death, disability, or **termination**." [15]

One Texas court has read a "for cause" exception into performance of an employment contract by an employer. See Gorbet v. Northwood Lincoln-Mercury, No. 14-04-00813-CV, 2005 WL 2875283, at *1-2 (Tex. App. -- Houston [14th Dist.] Nov. 3, 2005, pet. denied) (unpublished). In Gorbet an employee demanded performance from his employer on his 12-month term employment contract, which required that even if Gorbet was terminated, he was to be paid for the full 12-month period. Id. at *1. Gorbet was terminated for cause under undisputed circumstances -- the only dispute between the parties was whether the employment agreement was enforceable in spite of the fact Gorbet was terminated for cause. The court noted that if an employer is warranted in discharging an employee, the employee is not entitled to "collect the **salary** accruing to him" after the date of his termination. Id. (emphasis added). The court held that because the circumstances of Gorbet's termination were uncontested and Gorbet was terminated for cause as a matter of law, Gorbet was not entitled to the rest of his salary under the contract. Id. at *2.

Plaintiff argues that Gorbet does not apply for three reasons. First, Plaintiff argues that Gorbet's holding is limited to

term employment contracts. Second, Plaintiff argues that the employer in Gorbet did not specifically promise to make payments to the employee after termination. Third, Plaintiff contends that the Agreement is distinct from the employment contract in Gorbet because the Agreement was designed in part to reward Plaintiff for her work for FOLTD and FOG, not solely to compensate Plaintiff for future work she would perform for FOLTD and FOG.

Defendants argue that Gorbet applies because the Agreement was between Plaintiff and her employer. Defendants also argue that the promise in Gorbet to pay the plaintiff's salary for the remainder of his employment term if he were terminated is indistinguishable from the promise in the Agreement to pay Pierce for five years post-termination. Defendants also argue that FOLTD's motive for entering into the Agreement is irrelevant to this analysis.

The contract in Gorbet is distinguishable from the Agreement at issue in this case in key respects. First, the contract at issue in Gorbet was for employment for a specified term, rather than an agreement to compensate an at-will employee. Second, and most importantly, the Agreement specifically contemplated paying Plaintiff for five years after her termination in addition to any salary she was receiving through her at-will employment with FOG and FOLTD. There is a difference between continuing to pay an employee a salary for the remainder of an employment term, as in Gorbet, and paying an employee separate severance-like payments promised by the employer in the event the employee was terminated, as in this case.

***5** As a general rule, in evaluating a contract courts should not read in additional terms but should interpret the contract according to its plain meaning. American Manufacturers Mutual Insurance Co. v. Schaefer, 124 S.W.3d 154, 157-59 (Tex. 2003); Coker v. Coker, 650 S.W.2d 391, 393 (Tex. 1983). In the absence of applicable, controlling Texas authority, the court declines to read in a "for cause" exception to the Agreement between Plaintiff and FOLTD. The Agreement plainly requires FOLTD to pay Plaintiff five years of payments after her termination. The Agreement does not excuse FOLTD's performance in the event of a for-cause termination. The Agreement is therefore enforceable, regardless of whether Plaintiff was terminated for cause.

D. Dr. Woods' Authority to Execute the Agreement

Both Plaintiff and FOLTD argue that they are entitled to summary judgment regarding Dr. Woods' authority to execute the Agreement. Plaintiff argues that the Agreement is enforceable because Dr. Woods had actual authority to sign the Agreement on behalf of Snow Goose and FOLTD. In the alternative, Plaintiff argues that Dr. Woods had apparent authority to enter into the Agreement on FOLTD's behalf. Defendants argue that Dr. Woods lacked either actual or apparent authority to execute the Agreement, and that the Agreement is therefore not binding on FOLTD.

1. Actual Authority

It is undisputed that Dr. Woods signed the Agreement while he was President of Snow Goose Corporation. Dr. Woods' actions required two levels of authority to be valid: First, Snow Goose needed authority to execute the contract on behalf of FOLTD. Second, because Dr. Woods signed the Agreement as President of Snow Goose, he needed authority to act on behalf of Snow Goose. Snow Goose had the authority to enter into contracts on behalf of FOLTD under FOLTD's limited partnership agreement, which expressly vests Snow Goose with such authority. [16] The authority contested by the parties, and the issue before the court, is whether Dr. Woods had authority to act on behalf of Snow Goose.

Absent either actual or apparent authority, an agent cannot bind a principal. IRA Resources, Inc. v. Griego, 221 S.W.3d 592, 597 (Tex. 2007). Actual and apparent authority are created through conduct of the principal communicated either to the agent (actual authority) or to a third party (apparent authority). Gaines v. Kelly, 235 S.W.3d 179, 182 (Tex. 2007). Actual authority can be either express or implied. Express actual authority exists when the principal has made clear to the agent that he wants the agent to act on the principal's behalf. Pasant, 52 F.3d at 97. Implied actual authority exists when there is only circumstantial proof of actual authority. Id. Implied actual authority may arise from (1) some indication from the principal to the agent that the agent has such authority; (2) a necessary implication of an expressly authorized act; or (3) from a previous course of dealing between the principal and agent. Id.

Defendants argue that Dr. Woods lacked actual authority to enter into the Agreement because Pierce was an officer of Snow Goose, which required that the Agreement (1) be approved by the Snow Goose Board of Directors under Snow Goose's Bylaws [18] and (2) comply with provisions of

Texas law regarding contracts between corporations and their officers.[19] Defendants also argue that while the Agreement may have created an obligation between Plaintiff and FOLTD, any agreement between Plaintiff and FOLTD is also a contract between Plaintiff and Snow Goose because Snow Goose is FOLTD's general partner.

***6** Plaintiff argues that her status as a Snow Goose officer is irrelevant to the enforceability of the Agreement because the Agreement was executed between Plaintiff and FOLTD, not Plaintiff and Snow Goose. The court agrees. The Agreement is between Plaintiff and FOLTD and has nothing to do with Plaintiff's involvement in the management of Snow Goose. The court is therefore not persuaded by Defendants' arguments that the Agreement required approval of the Snow Goose Board because of Plaintiff's alleged status as an officer of Snow Goose.

The court is also not persuaded by Defendants' argument that because Snow Goose is FOLTD's general partner, all FOLTD contracts are necessarily Snow Goose contracts. In its Cross-MPSJ, FOLTD cites Peterson Group, Inc. v. PLTQ Lotus Group, L.P., 417 S.W.3d 46 (Tex. App. -- Houston [1st Dist.] 2013, pet. denied), and Pinebrook Properties, Ltd. v. Brookhaven Lake Property Owners Ass'n, 77 S.W.3d 487 (Tex. App. -- Texarkana 2002, pet. denied), in support of its argument that Texas law considers limited partnerships to be "one and the same" with their general partners.[19] These cases merely held that the doctrine of alter ego does not apply to the general partners of limited partnerships because there is no need to "veil pierce" in order to hold general partners liable -- general partners are already jointly and severally liable on partnership obligations. Peterson Group, 417 S.W.3d at 57; Pinebrook Properties, 77 S.W.3d at 499-500. The fact that Snow Goose could ultimately be held liable on one of FOLTD's obligations does not mean that Snow Goose was a party to all of FOLTD's contracts. The Agreement was between Plaintiff and FOLTD; it did not purport to create a Snow Goose obligation. The Agreement did not need to conform to the requirements of the Snow Goose Bylaws or Texas law regarding contracts between corporate officers and corporations.

Snow Goose's Bylaws are only relevant to determining whether Dr. Woods had actual authority to act on behalf of Snow Goose as its President.[20] The president of a corporation has no inherent authority by virtue of his office. See Franco-Texan Land Co. v. McCormick, 23 S.W. 123, 124 (Tex. 1893); Fitzhugh v. Franco-Texan Land Co., 16 S.W. 1078, 1079 (1891). In the absence of specific authority from the board of directors, the president of a corporation has no authority to contract for the corporation. American Bank & Trust Co. v. Freeman, 560 S.W.2d 444, 446 (Tex. Civ. App. -- Beaumont 1977, writ ref'd n.r.e.). "[A]ctual authority of the president to contract on behalf of the corporation must be found either in specific statutes, in the organic law of the corporation, or in a delegation of authority from the board of directors formally expressed, or must be implied from the nature of his position or from custom or habit of doing business." Templeton v. Nocona Hills Owners Ass'n, Inc., 555 S.W.2d 534, 537 (Tex. Civ. App. -- Texarkana 1977, no writ). The burden is on the party claiming authority to demonstrate that the president had actual authority to act on the corporation's behalf. See In re Westec Corp., 434 F.2d 195, 200 (5th Cir. 1970).

***7** Plaintiff presents no evidence that the Snow Goose Board of Directors expressly approved the Agreement signed by Dr. Woods. Because Dr. Woods has no inherent authority as President of Snow Goose under Texas Law and the Snow Goose Board did not approve the Agreement, the court must look to Snow Goose's Bylaws to determine whether Dr. Woods had express actual authority to act as a signatory for Snow Goose. Snow Goose's Bylaws provide that "[t]he President [of Snow Goose] shall have general and active management and control of the business and affairs of the Company ...."[22]

Texas courts faced with identical language in corporate bylaws have reached different conclusions as to what authority it gives to the corporation's president. In Fortenberry v. Cavanaugh, No. 03-07-00310-CV, 2008 WL 4997568, at *13-16 (Tex. App. -- Austin Nov. 26, 2008, pet. denied), the court evaluated identical language and concluded that the bylaws as a whole did not authorize a corporate president to act on behalf of the company without specific board authorization, despite the language's seemingly broad grant of authority, because of other delegations to the board of directors in the bylaws. Another court concluded that the same language authorized the president to act as a general manager, and that under Texas law the general manager has authority to act as an agent for the corporation and bind the corporation by contract. Holman v. Dow, 467 S.W.2d 547, 552 (Tex. Civ. App. -- Beaumont 1971, writ ref'd n.r.e.).

The Snow Goose Bylaws have seemingly conflicting grants of authority to the President and Board of Directors, with broad and somewhat overlapping grants of power to each. [23] The court concludes that the description of Dr. Woods' responsibilities in the Snow Goose Bylaws is not sufficient, standing alone, to support a grant of actual authority to enter into contracts of all types for FOLTD. In the absence of an express grant of actual authority, the court must look to the conduct of Snow Goose and Dr. Woods to determine if Dr. Woods had implied actual authority to sign FOLTD contracts on behalf of Snow Goose.

Dr. Woods acted as a signatory for Snow Goose on documents presented as exhibits by both Plaintiff and Defendants. [24] In her affidavit Pierce states that "[o]n behalf of FOLTD, Dr. Woods unilaterally negotiated, entered into, and signed contracts without a vote of the partners or any prior specific partnership approval." [25] Dr. Woods also acted as a signatory for Snow Goose on a 2005 compensation agreement between Pierce and FOLTD, [26] and there is no evidence that the Snow Goose Board contested the 2005 agreement during the nine-year period between 2005 and 2014, when the Agreement challenged in this action was executed.

Neither Plaintiff nor Defendants have presented definitive evidence demonstrating the scope of authority Dr. Woods was given by Snow Goose to manage the affairs of FOLTD. For summary judgment for Plaintiff to be appropriate, Plaintiff must prove that, based on the evidence presented, reasonable minds could not differ as to whether Dr. Woods had authority. For summary judgment for FOLTD to be appropriate, FOLTD must show that Dr. Woods lacked authority to execute the Agreement as a matter of law. While no evidence has been presented that Snow Goose objected to Dr. Woods signing documents for Snow Goose in Snow Goose's capacity as FOLTD's general partner, Plaintiff has failed to prove as a matter of law that Dr. Woods had direct authorization from Snow Goose, that Dr. Woods' authority to enter into the Agreement was implied from an act expressly authorized by Snow Goose's Board of Directors, that Snow Goose indicated to Dr. Woods that he had authority, or that a previous course of dealing between Snow Goose and Dr. Woods led Dr. Woods to believe he had authority. Therefore, in spite of considerable evidence tending to show that Dr. Woods had actual authority, either express or implied, to execute the Agreement, the court cannot conclude as a matter of law that Dr. Woods either had or lacked actual authority.

2. Apparent Authority

***8** Plaintiff argues in the alternative that FOLTD should be bound by the Agreement because Dr. Woods had apparent authority to execute such an agreement. Defendants argue that there are fact issues as to whether a reasonably prudent person in Plaintiff's position would believe Dr. Woods had authority to bind Snow Goose. In FOLTD's Cross-MPSJ, FOLTD argues that Dr. Woods lacks apparent authority as a matter of law.

Apparent authority arises " 'either from a principal knowingly permitting an agent to hold [himself] out as having authority or by a principal's actions which lack such ordinary care as to clothe an agent with the indicia of authority, thus leading a reasonably prudent person to believe that the agent has the authority [he] purports to exercise.' " Gaines, 235 S.W.3d at 182. The essential elements required to establish apparent authority are: (1) a reasonable belief in the mind of the third party of the agent's authority, (2) generated by some holding out or neglect of the principal, and (3) a justifiable reliance on the authority. 2616 South Loop L.L.C. v. Health Source Home Care, Inc., 201 S.W.3d 349, 356 (Tex. App. -- Houston [14th Dist.] 2006, no pet.). To be bound on an apparent authority theory the principal must have had full knowledge of all material facts. Gaines, 235 S.W.3d at 182.

To prove Dr. Woods had apparent authority Plaintiff must establish that Snow Goose created a reasonable belief in her mind that Dr. Woods had authority to act for Snow Goose. While Pierce points to instances in which Dr. Woods acted as a signatory for Snow Goose in negotiations for FOLTD, she has presented no evidence that Snow Goose's Board held Dr. Woods out as authorized to execute agreements on behalf of FOLTD. Pierce also argues that the actions of Dr. Woods' successor, Dr. Elkousy, are consistent with Dr. Woods having apparent authority because Dr. Elkousy, upon being made aware of the Agreement, did not object to its validity. [27] Defendants have presented evidence that James Bennett, one of the three members of Snow Goose's then Board of Directors, had no knowledge of the Agreement between FOLTD and Pierce. [28]

In its Cross-MPSJ, FOLTD argues that Dr. Woods lacked apparent authority as a matter of law because Plaintiff was an insider, and therefore could not have formed a reasonable belief of Dr. Woods' apparent authority. FOLTD cites In re Westec Corp., 434 F.2d at 195, in which the Fifth Circuit

held that an officer of a corporation could not rely on apparent authority of another officer of the same corporation to create a binding agreement on the corporation's behalf. Id. at 196-200. The court is not persuaded by FOLTD's argument. The Agreement is distinguishable from the one at issue in Westec because the Agreement did not impose an obligation on Snow Goose.

The court concludes that Plaintiff has presented evidence sufficient to create a fact issue on apparent authority based on her knowledge of prior, similar contracts executed by Dr. Woods and Snow Goose's acquiescence to such contracts. [28] As discussed above, while there is a substantial amount of evidence that Dr. Woods had some form of authority, be that authority actual (express or implied) or apparent, to act for Snow Goose to bind FOLTD, the court cannot conclude as a matter of law that Dr. Woods either had or lacked apparent authority to act as a signatory for Snow Goose to bind FOLTD to the Agreement.

III. Snow Goose Corporation's Motion to Intervene

***9** Snow Goose, the general partner of FOLTD, filed a motion to intervene pursuant to Federal Rule of Civil Procedure 24(b). Snow Goose argues that it has claims against both Plaintiff and Dr. Woods, the former President of Snow Goose and the person who signed the disputed Agreement, that share common questions of law and fact with the existing claims in this action. Plaintiff argues that Snow Goose's motion should be denied because Snow Goose's claims are meritless and unlikely to contribute significantly to the development of the facts in this action.

Under Federal Rule of Civil Procedure 24(b) the court may permit anyone to intervene who "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). A motion for permissive intervention must not only meet the requirements of Rule 24(b), but it must also be timely filed. Stallworth v. Monsanto Co., 558 F.2d 257, 263 (5th Cir. 1977). Plaintiff does not contest that Defendants' motion is timely, only whether Snow Goose's claims share common issues of law and fact such that permissive intervention is warranted.

"Permissive intervention 'is wholly discretionary with the [district] court ... even though there is a common question of law or fact, or the requirements of Rule 24(b) are otherwise satisfied.' " New Orleans Public Service, Inc. v. United Gas Pipe Line Co., 732 F.2d 452, 470-71 (5th Cir. 1984). Appellate review of denials of permissive intervention are reviewed under an abuse of discretion standard. Id. at 471.

When evaluating a request for permissive intervention, "a district court should consider, among other factors, whether the interveners are adequately represented by other parties and whether they are likely to contribute significantly to the development of the underlying factual issues.... When a proposed intervenor possesses the same ultimate objectives as an existing litigant, the intervener's interests are presumed to be adequately represented absent a showing of adversity of interest, collusion, or nonfeasance." League of United Latin American Citizens, Council #4434 v. Clements, 884 F.2d 185, 189 (5th Cir. 1989).

Snow Goose's proposed breach of fiduciary duty claims against Plaintiff stem from the challenged Agreement and Dr. Woods' authority to sign it. Snow Goose alleges that Plaintiff breached her fiduciary duty to Snow Goose because Plaintiff was an officer of Snow Goose who knowingly received unauthorized payments from Snow Goose through the Agreement and allowed unauthorized payments to be made to Dr. Woods. [29] Snow Goose also argues that Plaintiff "aided and abetted" a breach of fiduciary duty by Dr. Woods, who signed the challenged Agreement. Plaintiff responds that she was not an officer of Snow Goose and that even if she were an officer of Snow Goose, the Agreement was between Plaintiff and FOLTD and had nothing to do with her activities for Snow Goose.

As discussed above, the court is not persuaded that the Agreement provided for compensation to Plaintiff as an officer of Snow Goose. The Agreement was executed by FOLTD to compensate Plaintiff for her work for FOLTD and FOG. Merely because Snow Goose was FOLTD's general partner and Snow Goose acted as FOLTD's signatory does not make Snow Goose a party to the Agreement. Most of Snow Goose's proposed breach of fiduciary duty claims against Plaintiff are predicated on the false premise that the Agreement was improper officer compensation for Plaintiff's work as an officer of Snow Goose. [31] Snow Goose has no right to assert such a claim because the Agreement did not provide for Snow Goose officer compensation to Plaintiff.

***10** Because the Agreement did not provide for compensation to Plaintiff as an officer of Snow Goose,

Snow Goose's only remaining breach of fiduciary duty claim against Plaintiff alleges that Plaintiff caused unauthorized payments to be made to Dr. Woods, breaching her fiduciary duties to Snow Goose. Snow Goose alleges that Dr. Woods authorized improper payments to himself from Snow Goose funds. Snow Goose refers to these payments as "similar" to the payments received by Plaintiff, which the court has concluded were not Snow Goose officer compensation, but were payments for work Plaintiff did for FOLTD and FOG. Merely because an individual is an officer of a corporation does not make all income received by that individual "officer compensation" that would require Board approval. The court is not persuaded that the challenged compensation to Dr. Woods is distinguishable from the compensation to Plaintiff in any significant respect.

In determining whether to allow Snow Goose to intervene, the court must evaluate not only whether Snow Goose's proposed claims share common issues of law and fact with the claims already pending in this action, but also whether Snow Goose's interests are adequately represented by FOLTD and FOG. The partners of FOG and FOLTD were often partners in both entities. Some of the partners of FOG and FOLTD were also involved in Snow Goose's management. All three members of Snow Goose's Board of Directors at the time of the challenged Agreement were also partners in FOG and FOLTD. [31]

Plaintiff's claims fall into two categories: breach of contract claims and employment claims -- both stemming from her termination from FOG. Snow Goose has failed to show that its interests differ from FOLTD or FOG's interests in this case. Any breach of fiduciary duty claims against Plaintiff stemming from the Agreement may be asserted by FOLTD. The breach of fiduciary duty claims Defendants assert in their proposed amendments to their counterclaims against Pierce are nearly identical to those asserted by Snow Goose. [32] The court concludes that the interests of Snow Goose are adequately represented by FOLTD because the Agreement was between Plaintiff and FOLTD. Intervention by Snow Goose would not contribute significantly to the development of the underlying factual issues in this action. Snow Goose Corporation's Motion to Intervene will therefore be denied.

IV. FOLTD's Motion for Leave to File a Third-Party Complaint

FOLTD argues that it should be granted leave to file a third-party complaint against Dr. Woods pursuant to Federal Rule of Civil Procedure 14(a) on the ground that if FOLTD is found liable to Plaintiff, Dr. Woods would be liable to FOLTD because Dr. Woods breached his fiduciary duty to FOLTD in executing the Agreement. Plaintiff argues that leave should not be granted because FOLTD's proposed claims against Dr. Woods have no merit.

***11** Federal Rule of Civil Procedure 14(a) provides that, "[a] defending party may, as a third-party plaintiff, serve a summons and complaint on a nonparty who is or may be liable to it for all or part of the claim against it. But the third-party plaintiff must, by motion, obtain the court's leave if it files the third-party complaint more than 14 days after serving its original answer." Fed. R. Civ. P. 14(a)(1). A third-party claim need not be based on the same theory as the main claims in the lawsuit. Southern Railway Co. v. Fox, 339 F.2d 560, 563 (5th Cir. 1964). The district court is given "wide discretion in determining whether to permit such third-party procedure to be resorted to." Id. For a third-party complaint to be proper under Rule 14(a), the third-party plaintiff (or original defendant) must allege that the third-party defendant is secondarily (or derivatively) liable to the third-party plaintiff for an obligation it incurs in the litigation. Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, & Richard L. Marcus, Federal Practice & Procedure § 1446 (3d ed. 2011).

Rule 14(a) does not compel a defendant to bring third parties into an action; it simply permits the addition of anyone who meets the standard set forth by Rule 14(a). City of Gretna v. Defense Plant Corp., 159 F.2d 412, 413 (5th Cir. 1947). "In many instances tactical considerations will lead a party to pursue an independent action against a possible third-party defendant rather than resorting to impleader." Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, & Richard L. Marcus, FEDERAL PRACTICE & PROCEDURE § 1446 (3d ed. 2011).

A corporate general partner owes fiduciary duties to the limited partnership. Grierson v. Parker Energy Partners 1984-I, 737 S.W.2d 375, 377 (Tex. App. -- Houston [14th Dist.] 1987, no writ). Not only is the corporation itself liable, but an officer of a corporate general partner who is entrusted with the management of a limited partnership and who exercises control over the limited partnership owes a fiduciary duty to the limited partnership as well. See In re Harwood, 637 F.3d 615, 622 (5th Cir. 2011). Snow Goose owes fiduciary duties to FOLTD. If Dr. Woods was vested with (and exercised) control over FOLTD by virtue of his position as

President of Snow Goose, Dr. Woods owed fiduciary duties to FOLTD. Therefore, FOLTD may seek to hold Dr. Woods liable for breaching fiduciary duties he owed directly to FOLTD.

But that does not mean that FOLTD's proposed claims against Dr. Woods are appropriate for impleader under Rule 14(a). For impleader to be proper under Rule 14(a), the third-party plaintiff (or original defendant) must allege that the third-party defendant is secondarily liable to the third-party plaintiff for an obligation it incurs in the litigation. Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, & Richard L. Marcus, FEDERAL PRACTICE & PROCEDURE § 1446 (3d ed. 2011). The notion of derivative liability is central to Rule 14 (a) and thus "impleader has been successfully utilized when the basis of the third-party claim is indemnity, subrogation, contribution, express or implied warranty," or the like. Id. A claim that is not derivative of or dependent on the main claim cannot be brought into the controversy under Rule 14 (a), no matter how factually analogous it is to the main claim. Id. § 1442. The court is not persuaded by FOLTD's argument that its claims against Dr. Woods are derivative in nature. Merely because FOLTD's proposed breach of fiduciary duty claims against Dr. Woods arise from the same factual transaction as this action does not make FOLTD's claims against Dr. Woods "derivative" in the sense contemplated by Rule 14(a).

FOLTD argues that in executing the Agreement, Dr. Woods breached his fiduciary duty to FOLTD. "The elements of a breach-of-fiduciary-duty claim [under Texas law] are: (1) a fiduciary relationship existed between the plaintiff and defendant; (2) the defendant breached its fiduciary duty to the plaintiff; and (3) the defendant's breach resulted in injury to the plaintiff or benefit to the defendant.' " Neese v. Lyon, 479 S.W.3d 368, 386 (Tex. App. -- Dallas 2015, no pet.). Dr. Woods' liability to FOLTD for breach of fiduciary duty is not contingent on the outcome of this case. Even if Dr. Woods had general authority to act for Snow Goose in executing contracts on behalf of FOLTD (which would make the Agreement valid) he could still be found liable to FOLTD if the Agreement was not in FOLTD's best interests. If FOLTD is correct that Dr. Woods breached his fiduciary duties to FOLTD in entering into the Agreement with Plaintiff, FOLTD may have a claim against Dr. Woods regardless of how the court resolves Plaintiff's claims. Any breach of fiduciary duty claim that FOLTD has against Dr. Woods may be pursued in a separate action between FOLTD and Dr. Woods. Because FOLTD's proposed claim is not appropriate for Rule 14(a) impleader, FOLTD's Motion for Leave to File a Third-Party Complaint will be denied.

V. Defendants' Motion for Leave to Amend

***12** Defendants seek leave to file an amended answer and counterclaim that adds "additional bases to support [Defendants'] breach of fiduciary duty claim, an additional claim for aiding and abetting breach of fiduciary duty, and the remedy of constructive trust."[33] Defendants recently filed Defendants Fondren Orthopedic Group LLP and Fondren Orthopedic Ltd.'s Third Amended Answer and Counterclaim ("Defendants' Third Amended Answer & Counterclaim") (Docket Entry No. 38), which acknowledged that their Motion for Leave to Amend their counterclaims was still pending before the court.[34] It appears to the court that Defendants' Third Amended Answer & Counterclaim contains the same proposed amendments as Defendants' proposed Second Amended Answer & Counterclaim (Docket Entry No. 20-1), to which Plaintiff objects on the basis of futility.[35]

Under Rule 15 of the Federal Rules of Civil Procedure a party may amend its pleading once as a matter of course within 21 days of service. Fed. R. Civ. P. 15(a)(1)(A). After the window for amendment as a matter of course closes, "a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). The decision to grant or deny leave to amend " 'is entrusted to the sound discretion of the district court.' " Pervasive Software, Inc. v. Lexware GmbH & Co. KG, 688 F.3d 214, 232 (5th Cir. 2012).

"Courts within the Fifth Circuit examine five factors to determine whether leave to amend should be granted: 1) undue delay, 2) bad faith or dilatory motive, 3) repeated failure to cure deficiencies by previous amendments, 4) undue prejudice to the opposing party, and 5) futility of the amendment." Petrobras America, Inc. v. Vicinay Cadenas, S.A., 921 F. Supp. 2d 685, 689 (S.D. Tex. 2013) (citing and quoting Smith v. EMC Corp., 393 F.3d 590, 595 (5th Cir. 2004)) (internal quotation marks omitted). Factors one through three (undue delay, bad faith, and repeated failure to cure deficiencies) do not apply. Nor does Plaintiff allege that Defendants' proposed amendment would cause her undue

prejudice. Plaintiff contests only the futility of Defendants' proposed amendment. Plaintiff argues that Defendants should not be granted leave to amend because Dr. Woods did not commit a breach of fiduciary duty. Plaintiff could therefore not have "aided and abetted" such a breach.

The amendments proposed by Defendants rely on the premise that the Agreement (and any additional challenged payments made to Dr. Woods from FOLTD funds) was improper because Dr. Woods lacked authority to unilaterally compensate another Snow Goose officer.[36] While Defendants may have other grounds to support a counterclaim against Plaintiff, Defendants' current proposed amendments are predicated on the incorrect premise that Dr. Woods lacked authority to execute the Agreement because the Agreement provided Snow Goose officer compensation to Plaintiff. Defendants' Motion for Leave to File a Second Amended Answer and Counterclaim will therefore be denied.

VI. Conclusion and Order

***13** For the reasons stated above, Pierce's Motion for Partial Summary Judgment on Two of Her Breach of Contract Claims (Docket Entry No. 9) is **DENIED**; Fondren Orthopedic Ltd.'s Cross-Motion for Partial Summary Judgment (Docket Entry No. 32) is **DENIED**; Snow Goose Corporation's Motion to Intervene (Docket Entry No. 19) is **DENIE**; Fondren Orthopedic Ltd.'s Motion for Leave to File a Third-Party Complaint (Docket Entry No. 21) is **DENIED**; and Defendants' Motion for Leave to File a Second Amended Answer and Counterclaim (Docket Entry No. 20) is **DENIED**.

All Citations

Not Reported in Fed. Supp., 2018 WL 6200049, 2018 IER Cases 437,006

Footnotes

1 The court need not rule on Defendants' Objections to Plaintiff's Evidence, Docket Entry No. 15, or FOLTD's Objections to Plaintiff's Evidence, Docket Entry No. 40, because the court did not rely on the disputed paragraphs in ruling on Plaintiff's MPSJ or FOLTD's Cross-MPSJ.

2 See Plaintiff's First Amended Complaint ("Complaint"), Docket Entry No. 36, pp. 14-27.

3 See id.

3 See Declaration of James B. Bennett, M.D. ("Bennett Declaration"), Attachment 1 to Defendants' Response to Pierce's Motion for Partial Summary Judgment ("Defendants' Response to Plaintiff's MPSJ"), Docket Entry No. 14-1.

4 See id.

5 Compare Amendment No. 2 to the Amended and Restated Limited Partnership Agreement of Fondren Orthopedic Ltd. ("Amendment No. 2"), Exhibit O to Affidavit of Peggy Pierce ("Pierce Affidavit"), Docket Entry No. 9-1, pp. 160-61 (listing the limited partners of FOLTD with their accompanying signatures), with Letter to Peggy Pierce from Mufaddal Gombera, MD, Exhibit B to Plaintiff's Original Complaint, Docket Entry No. 1-2 (listing in its letterhead the then partners of FOG).

6 Compare Exhibit C to Amended and Restated Limited Partnership Agreement of FOLTD, Exhibit O to Pierce Affidavit, Docket Entry No. 9-1, pp. 148-49 (listing James B. Bennett, C. Craig Crouch, and G. William Woods as partners in FOLTD), with Snow Goose Corporation Bylaws, Exhibit 1 to Bennett Declaration, Docket Entry No. 14-1, p. 7 (listing Dr. G. William Woods, Dr. C. Craig Crouch, and Dr. James B. Bennett as the initial directors of Snow Goose).

7 Pierce claims that her termination was based on her medical diagnosis of Multiple Sclerosis, her age (57 years-old), and her sex. See Complaint, Docket Entry No. 36, p. 1.

8 See Complaint, Docket Entry No. 36, pp. 7-11.

9 See Defendants Fondren Orthopedic Group LLP and Fondren Orthopedic Ltd.'s Original Answer and Counterclaim ("Defendants' Original Answer and Counterclaim"), Docket Entry No. 8, pp. 17-21.

10 See Letter to Peggy J. Pierce from Fondren Orthopedic, Ltd. Re: Fondren Orthopedic, Ltd. Unit Compensation Distributions ("Pierce Letter from FOLTD re Unit Compensation Distributions"), Exhibit E to Pierce Affidavit, Docket Entry No. 9-1, pp. 24-25.

11 See Amendment No. 2, Exhibit O to Pierce Affidavit, Docket Entry No. 9-1, pp. 160-61.

12 See Pierce Letter from FOLTD re Unit Compensation Distributions, Exhibit E to Pierce Affidavit, Docket Entry No. 9-1, p. 25.

13 Id.

14 See Plaintiff's MPSJ, Docket Entry No. 9, p. 10.

15 See Pierce Letter from FOLTD re Unit Compensation Distributions, Exhibit E to Pierce Affidavit, Docket Entry No. 9-1, p. 24 (emphasis added).

16 Amended and Restated Limited Partnership Agreement of Fondren Orthopedic Ltd., Exhibit O to Pierce Affidavit, Docket Entry No. 9-1, p. 103 ("12.2 The General Partner may take the following actions if, as, and when it deems any such action to be necessary, appropriate or advisable, at the sole cost and expense of the Partnership: (a) execute any and all documents, contracts,... [etc.] ....").

18 See Snow Goose Corporation Bylaws, Exhibit 1 to Bennett Declaration, Docket Entry No. 14-1, pp. 10-11 ¶ 5.02.

19 See FOLTD's Cross-MPSJ, Docket Entry No. 32, pp. 8-13.

19 See FOLTD's Cross-MPSJ, Docket Entry No. 32, p. 8.

20 In Pierce's Response to Fondren Orthopedic Ltd.'s Cross-Motion for Partial Summary Judgment, she argues that even if the restrictions in Snow Goose's Bylaws are applicable, fact questions concerning waiver, quasi-estoppel, ratification, and apparent authority preclude summary judgment for FOLTD. Pierce's Response to Fondren Orthopedic Ltd.'s Cross-Motion for Partial Summary Judgment ("Plaintiff's Response to FOLTD's Cross-MPSJ"), Docket Entry No. 37, pp. 6-13. Because the Agreement was not for Snow Goose officer compensation and Snow Goose is not a party to the Agreement, the restrictions in Snow Goose's Bylaws on contracts between Snow Goose and its officers do not apply. FOLTD's Cross-MPSJ ultimately fails on other grounds because FOLTD cannot prove as a matter of law that Dr. Woods lacked authority (be that authority actual or apparent). The court therefore need not address issues of waiver, quasi-estoppel, and ratification.

22 See Snow Goose Corporation Bylaws, Exhibit 1 to Bennett Declaration, Docket Entry No. 14-1, p. 11 ¶ 5.07.

23 Compare id. at 11-12 ¶ 5.07, with id. at 7 ¶ 3.01.

24 See, e.g., Amendment No. 2, Exhibit O to Pierce Affidavit, Docket Entry No. 9-1, p. 15 9; Snow Goose Corporation Bylaws, Exhibit 1 to Bennett Declaration, Docket Entry No. 14-1, p. 17.

25 See Pierce Affidavit, Exhibit 1 to Plaintiff's MPSJ, Docket Entry No. 9-1, p. 12.

26 See Pierce Letter from FOLTD Re Compensation Distributions, Exhibit D to Pierce Affidavit, Docket Entry No. 9-1, p. 22.

27 See Plaintiff's Response to FOLTD's Cross-MPSJ, Docket Entry No. 37, p. 12.

28 See Bennett Declaration, Attachment 1 to Defendants' Response to Plaintiff's MPSJ, Docket Entry No. 14-1.

28 See Pierce Affidavit, Exhibit 1 to Plaintiff's MPSJ, Docket Entry No. 9-1, pp. 12-13 ¶¶ 37, 38 (citing other agreements executed by Dr. Woods, including an instance where Dr. Woods authorized a bonus to an FOLTD employee without a prior vote or approval).

29 See Snow Goose Corporation's Complaint in Intervention, Exhibit 1 to Snow Goose Corporation's Motion to Intervene, Docket Entry No. 19-1, pp. 9-10 ¶¶ 38-44.

31 Id.

31 Compare Amended and Restated Limited Partnership Agreement of Fondren Orthopedic Ltd., Exhibit O to Pierce Affidavit, Docket Entry No. 9-1, pp. 148-49 (listing C. Craig Crouch, James B. Bennett, and G. William Woods as partners in FOLTD), with Snow Goose Corporation Bylaws, Exhibit 1 to Bennett Declaration, Docket Entry No. 14-1, p. 7 (listing Dr. G. William Woods, Dr. C. Craig Crouch, and Dr. James B. Bennett as the initial directors of Snow Goose).

32 FOLTD and FOG contend that Pierce breached fiduciary duties to them by both "causing unauthorized payments to be made from FOLTD funds" and "receiving unauthorized payments from FOLTD funds." FOLTD and FOG further argue that Pierce aided a breach of fiduciary duty by Dr. Woods by causing payments to be made both to herself and Dr. Woods. See Defendants Fondren Orthopedic Group LLP and Fondren Orthopedic Ltd.'s Second Amended Answer and Counterclaim ("Defendants' Second Amended Answer & Counterclaim"), Exhibit 1 to Defendants' Motion for Leave to File a Second Amended Answer and Counterclaim, Docket Entry No. 20-1, pp. 23-26 (contending that Pierce breached her fiduciary duties to FOLTD and FOG by "causing unauthorized payments to be made to her from FOLTD funds" and "concealing the ... unauthorized payments" from FOG and FOLTD).

33 Defendants' Motion for Leave to File a Second Amended Answer and Counterclaim, Docket Entry No. 20, p. 1.

34 See Defendants' Third Amended Answer & Counterclaim, Docket Entry No. 38, p. 1.

35 Compare Defendants' Second Amended Answer & Counterclaim, Exhibit 1 to Defendants' Motion for Leave to File a Second Amended Answer and Counterclaim, Docket Entry No. 20-1, ¶¶ 28-37, 40, 43, 47-55, with Defendants' Third Amended Answer & Counterclaim, Docket Entry No. 38, ¶¶ 28-37, 40, 43, 47-55.

36 See Defendants' Second Amended Answer & Counterclaim, Exhibit 1 to Defendants' Motion for Leave to File a Second Amended Answer and Counterclaim, Docket Entry No. 20-1, pp. 21-23 (arguing that Dr. Woods did not have the authority as President of Snow Goose to promise payments to Plaintiff, who was also an officer of Snow Goose, without prior approval from the Snow Goose Board of Directors).

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2007 WL 9702864
Only the Westlaw citation is currently available.
United States District Court, W.D.
Texas, San Antonio Division.

STOCK BUILDING SUPPLY
OF TEXAS, L.P., Plaintiff,
v.
Shannon RICHARDSON, Leonard Salerno, and Ray Mart, Inc. d/b/a Tri Supply Company, Defendants.

Civil No. SA–06–CA–192–FB
|
Signed 05/23/2007

Attorneys and Law Firms

Michael W. Massiatte, W. Stephen Cockerham, Hunton & Williams, LLP, Dallas, Tx, for Plaintiff.

Bruce M. Partain, Wells Peyton Greenberg & Hunt, LLP, Beaumont, TX, for Defendants.

ORDER

PAMELA A. MATHY UNITED STATES MAGISTRATE JUDGE

***1** Came on this day to be considered, the motion of defendants, Shannon Richardson ("Richardson"); Leonard Salerno ("Salerno"); and Ray Mart, Inc. d/b/a Tri Supply Company ("Tri Supply") (collectively "defendants"), for leave to file their second amended answer; [1] the response of plaintiff Stock Building Supply of Texas, L.P. ("Stock"); [2] and defendants' reply. [3]

Procedural History

Stock commenced this action on March 3, 2006, when it filed its original complaint against Richardson and Salerno, [4] who filed their joint original answer on March 22, 2006. [5] On May 22, 2006, the District Court entered its initial scheduling Order which, in part, set a status conference for June 21, 2006 and July 20, 2006 as the deadline for filing motions to amend pleadings. [6] The status conference was held as scheduled on June 21. [7]

On July 20, 2006, Stock filed an unopposed motion for leave to file a first amended complaint; [8] the motion was granted on July 27, 2007; [9] and the first amended complaint, plaintiff's "live" pleading, was filed. [10] The first amended complaint added Tri Supply as a defendant [11] and alleges: (1) Richardson and Salerno breached the fiduciary duties and duties of loyalty owed to Stock; [12] (2) Tri Supply is liable as a joint tortfeasor for participating in Richardson and Salerno's breaches; tortiously interfered with Richardson and Salerno's fiduciary duties and duties of loyalty; tortiously interfered with Stock's business relationships; and aided and abetted Richardson and Salerno in their breaches; [13] and (3) all three defendants engaged in unfair competition and conspired to breach the fiduciary duties and duties of loyalty owed to Stock. [14] Stock seeks an award of compensatory damages, punitive damages, pre and post judgment interest, costs, as well as injunctive relief restricting Tri Supply's use of Stock's confidential information within a 100 mile radius of Stock's San Antonio facility. [15]

Defendants filed their joint first amended answer on September 27, 2006. [16] On October 19, 2006, defendants filed a motion for summary judgment. [17] Stock filed a response on November 6, 2006, [18] and defendants filed a reply on November 11, 2006. [19] The District Court signed an Order on December 4, 2006, referring the case to the undersigned for disposition of all pretrial matters. [20]

On February 21, 2007, the undersigned entered a report recommending defendants' motion for summary judgment be denied and returned the case to the District Court. [21] On March 28, 2007, the District Court adopted the report and defendants' motion for summary judgment was denied. [22] On April 2, 2007, the District Court signed an Order requiring the parties to file advisories on or before April 16, 2007, to indicate the status of the case, as "[t]he Scheduling Order deadlines have run[.]" [23]

***2** The parties filed advisories, as ordered, representing they could be ready for trial in sixty days. [24] Defendants' advisory references the June 21, 2006 status conference and states "this Court was informed of a companion lawsuit pending in the United States' District Court, Western District of Texas, Waco Division." [25] The advisory further states that "based on the Findings of Fact and Conclusions of Law" in the Waco case,

defendants "request leave of Court to amend their Answer to include the affirmative defenses of res judicata and collateral estoppel." [26] On April 18, 2007, defendants filed the motion for leave to file a second amended answer. [27] A response and reply have been filed. [28] On May 4, 2007, the District Court signed an order re-referring the case to the undersigned "for further pretrial proceedings, including the consideration" of defendants' motion for leave to amend. [29]

Summary of Arguments

Defendants seek leave to file a second amended complaint to add the affirmative defenses of res judicata and collateral estoppel. [30] Defendants reiterate the assertion that "[d]uring the June 21, 2006 status conference in this case, this Court was informed of a companion lawsuit pending in" the Waco Court in Civil Action No. W–06–CA–63 between Tri Supply and Stock, and between Stock, as counter plaintiff, and Tri Supply employees who used to work for Stock, as counter defendants: Weldon Vybiral, Glenn Covington, Eric Vybiral, and Sheryl Lingo. [31] Chief Judge Walter S. Smith filed findings of fact and conclusions of law in the Waco case on April 3, 2007, which, in part, discharged Tri Supply and its named employees from all liability to Stock, awarded Tri Supply a declaratory judgment that Tri Supply and its named employees did not breach fiduciary duties, duties of loyalty, engage in unfair competition or covert Stock assets, and awarded Tri Supply and Vybrial attorneys' fees of $20,000. [32] Defendants contend that Stock "asserted virtually the same claims" in both the Waco case and this action, and "the issues in the Waco, Texas litigation involve similar factual and legal issues as this case." [33] Citing Federal Rule of Civil Procedure 15(a), defendants argue they will be prejudiced if not allowed to file their second amended answer to include the affirmative defenses of collateral estoppel and res judicata; they are not acting in bad faith or to delay the proceedings; and leave to amend should be freely granted. [34] The proposed second amended answer has been tendered with the motion. [35]

In response, Stock argues the motion for leave should be denied because defendants are "attempt[ing] to add a new claim in this case 9 months after the deadline for amending pleadings, after the close of discovery, and after the Court's disposition of Defendants' Motion for Summary Judgment." [36] Citing Rule 16(b), which Stock asserts governs defendants' motion, Stock argues defendants have failed to show good cause for an out-of-time amendment or "provide any explanation whatsoever for their failure to include [the] affirmative defenses in their earlier amendment or to move to consolidate the two pending cases if they believed" the cases involved the "same nucleus of facts." [37] In that regard, Stock asserts "Defendants were aware of the similarities and differences between these two cases–and were aware that the trial of the Waco case was scheduled far in advance of the trial date in this case (which indeed has not yet been set to date) – as far back as June of 2006," when the deadlines for discovery and dispositive motions had not expired. [38] Stock contends defendants waited to amend their answer until discovery was completed and their motion for summary judgment had been denied. [39] Stock contends it will be prejudiced by the amendment "because the[ ] new defenses would require additional summary judgment briefing." [40] To the extent defendants purport to have filed the second amended answer simultaneously with the motion for leave, Stock argues the second amended answer should be stricken. [41]

***3** In the event the Court grants defendants leave to file the second amended answer, Stock seeks leave to file a motion for summary judgment on the affirmative defenses. [42] Citing relevant case law, Stock argues, in sum, that the doctrines of res judicata and collateral estoppel do not apply to this case. [43] Stock argues the cases "address[ ] separate factual issues that arose out of similar illegal actions" and involve separate Stock facilities and different former Stock employees. [44] Stock argues the facts in the present case were not litigated in the Waco case. [45]

Defendants reply that there is good cause for granting the motion for leave to amend because it results from the recent outcome of the Waco litigation. [46] Specifically, defendants argue the affirmative defenses of res judicata and collateral estoppel could not have been raised before the decision was rendered in the Waco case on April 3, 2007. [47] would have been speculative and futile to assert the defenses earlier. [48] Defendants contend it In addition, defendants contend the amendment is important because it adds two affirmative defenses that may support entry of judgment in their favor. [49] Because no trial date has been set in this case, defendants argue there are no time constraints barring Stock from filing a second motion for summary judgment and a continuance of a trial setting would not be necessary. [50] Defendants assert there is no evidence of "undue delay, bad faith, dilatory motive, or repeated failure to cure." [51] Moreover, defendants

argue, in sum, the amendment is not futile because Tri Supply and Stock were adverse parties in the Waco litigation; "the facts of the two cases are strikingly similar" and occurred during the same time period; and the causes of action in the present case were also asserted in the Waco case. [52]

Analysis

Defendants, Tri Supply and its employees, seek leave to amend their answer approximately nine months after the expiration of the July 20, 2006 deadline for amending pleadings set by the Scheduling Order in this case. When a request to amend pleadings is made after the scheduling order deadline has expired, Rule 16(b) of the Federal Rules of Civil Procedure, which governs pretrial conferences, scheduling, and management, applies. [53] The Fifth Circuit has explained that "[o]nly upon movant's demonstration of good cause to modify the scheduling order will the more liberal standard of Rule 15(a) apply to the district court's decision to grant or deny leave." [54]

Rule 16(b) provides, in part, that a scheduling order "shall not be modified except upon a showing of good cause and by leave of the district judge[.]" [55] The "good cause" standard requires the "party seeking relief to show that the deadlines cannot reasonably be met despite the diligence of the party needing the extension." [56] The absence of prejudice to the nonmovant or the ability to address prejudice through a further continuance in the dispositive motion deadline or trial are generally insufficient to demonstrate "good cause." [57] Assuming without deciding that defendants have established "good cause" for modifying the Scheduling Order [58] based on the May 3, 2007 judgment in the Waco case, [59] the Court must examine whether defendants have satisfied the standards for amendment under Rule 15(a).

***4** Although Rule 15(a) provides that "leave shall be freely given when justice so requires," [60] leave is not automatic. [61] Whether to grant leave "lies within the sound discretion of the district court." [62] "In exercising its discretion, the Court may consider such factors as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, and futility of the amendment." [63] In the context of affirmative defenses, an amended pleading is "futile" if the asserted defenses fail to provide a basis for relief. [64]

Whether the doctrines of res judicata or collateral estoppel bars subsequent litigation is a question of law. [65] Pursuant to the doctrine of res judicata, " 'a final judgment on the merits bars further claims by parties, or their privies based on the same cause of action.' " [66] Res judicata "prevents relitigation of all 'issues that were or could have been raised in [the previous] action.' " [67] Res judicata is applicable if a four-part test is satisfied: (1) the parties must be either "identical or in privity; (2) the judgment in the prior action [must have been] rendered by a court of competent jurisdiction; (3) the prior action must have been concluded in a final judgment on the merits; and (4) the same claim or cause of action [must have been] involved in both actions." [68] In the Fifth Circuit, whether two lawsuits involve the same claim or cause of action is determined by applying the transactional test, which focuses on whether the two cases are based on "the same nucleus of operative facts." [69]

***5** Even assuming the first three prongs of the test for res judicata have been satisfied, defendants have not established that the causes of action advanced in the Waco case arise out of the "same nucleus of operative facts" as the causes of action in the present case. [70] By defendants' admission, the "facts of the two cases are strikingly similar" [71] and involve "similar factual and legal issues." [72] But, similarity in the facts does not control the bar of res judicata; rather, the res judicata bar requires the same operative facts. [73] The operative facts in the Waco litigation concerned whether: any of the named former Temple, Texas employees of Stock breached fiduciary duties and duties of loyalty owed to Stock, engaged in unfair competition, or misappropriated Stock's trade secrets; Tri Supply facilitated or participated in the Temple employees' acts or interfered with Stock's business relationships in Temple; and the Temple employees and Tri Supply engaged in a conspiracy against Stock. [74] In the present case, the operative facts concern whether any conduct of Tri Supply and the named former San Antonio, Texas employees of Stock, before and after the employees left Stock to work for Tri Supply in San Antonio, would impose liability on defendants premised on the same legal causes of action alleged in the Waco case. That the conduct adjudicated in the Waco litigation was insufficient to impose liability on Tri Supply and the Temple employees does not preclude Stock from obtaining a favorable judgment against Tri Supply and the San Antonio employees' based on their distinct conduct. Because Tri Supply and the San Antonio employees have not

argued, proffered or demonstrated that the operative facts in the Waco litigation are the same as those at issue in the present case, res judicata will afford Tri Supply and the San Antonio employees no relief and amending their answer to include that affirmative defense would be futile.

Although Stock may not be barred by res judicata from bringing its claims against defendants, the doctrine of collateral estoppel may preclude Stock from relitigating certain issues. Collateral estoppel

> precludes a party from litigating an issue already raised in an earlier action between the same parties only if: (1) the issue at stake is identical to the one involved in the earlier action; (2) the issue was actually litigated in the prior action; and (3) the determination of the issue in the prior action was a necessary part of the judgment in that action.[75]

Collateral estoppel is not applicable unless the facts and legal standards used to evaluate the applicable facts are the same in both proceedings.[76] Based on this standard, collateral estoppels affords defendants no relief. Although Stock and Tri Supply were parties to the Waco litigation and the same legal causes of action were asserted, the facts to be assessed under those standards are not "identical" nor have defendants argued, proffered, or demonstrated that the facts about the conduct of the parties in named in the San Antonio case were "actually litigated" in the Waco case. Thus, allowing an amendment to assert the affirmative defense of collateral estoppel will offer defendants no relief and would be futile.

Conclusion

Based on the foregoing analysis,

***6 IT IS ORDERED** that defendants' motion for leave to file a second amended answer[77] is **DENIED**; and

IT IS ALSO ORDERED that, subject to re-referral by the District Judge, this case is **RETURNED** to the District Judge at this time, as the case is awaiting disposition at trial before the District Judge.

Notice of Right To Object

Pursuant to FED. R. CIV. P. 72, Rule 4 in Appendix C of the Local Rules of this Court[78] and 28 U.S.C. § 636(b)(1), unless otherwise ordered by the District Judge, any party objecting to any portion of this Order must file and serve a written objection within ten (10) days of the date of this Order.

ORDERED, SIGNED and **ENTERED** this 23rd day of May, 2007.

All Citations

Not Reported in Fed. Supp., 2007 WL 9702864

Footnotes

1 Docket no. 48.

2 Docket no. 49.

3 Docket no. 52.

4 Docket no. 1.

5 Docket no. 2.

6 Docket no. 5. Although several modifications of aspects of the Order were approved upon request of the parties, no party asked the deadline for filing motions to amend pleadings to be extended and that deadline otherwise was not modified. The District Judge has not yet scheduled this case for bench trial.

7 Docket no. 11.

8 Docket no. 17.

9 Docket no. 21.

10 Docket no. 22.

11 Id. at 2.

12 Id. at 7.

13 Id. at 8–10.

14 Id. at 10–11.

15 Id. at 11–12.

16 Docket no. 29.

17 Docket no. 31.

18 Docket nos. 38 and 39.

19 Docket no. 40.

20 Docket no. 41.

21 Docket nos. 42 and 43.

22 Docket no. 44.

23 Docket no. 45.

24 Docket nos. 46 and 47.

25 Docket no. 46 at 1.

26 Id. at 2.

27 Docket no. 48.

28 Docket nos. 49 and 52.

29 Docket no. 51.

30 Docket no. 48.

31 Id. at 2.

32 Id.

33 Id.

34 Id. at 3.

35 Id., exhibit 1.

36 Docket no. 49.

37 Id. at 3.

38 Id. at 5.

39 Id.

40 Id.

41 Id. at 6.

42 Id.

43 Id. at 6–7.

44 Id. at 4.

45 Id.

46 Docket no. 52 at 2.

47 Id. at 3.

48 Id.

49 Id.

50 Id. at 3–4.

51 Id. at 4.

52 Id. 4–9.

53 Hawthorne Land Co. v. Occidental Chem. Corp., 431 F.3d 221, 227 (5th Cir. 2005), cert. denied, —— U.S. ——, 127 S.Ct. 48 (2006); S&W Enter., L.L.C. v. Southtrust Bank of Al., NA, 315 F.3d 533, 536 (5th Cir. 2003).

54 Id.

55 FED. R. CIV. P. 16(b).

56 S&W Enter., 315 F.3d at 536 (citation omitted).

57 Bakner v. Xerox Corp. Employee Stock Ownership Plan, No. SA–98–CA–0230–OG, 2000 WL 33348191, at * 14 (W.D. Tex. Aug. 28, 2000).

58 Stock does not dispute defendants informed the District Court of the pending "companion lawsuit" in Waco during the June 21, 2006 status conference – approximately one month before the expiration of the deadline

for amending pleadings. Arguably, this information gave notice of the possibility that the doctrines of res judicata and collateral estoppel might be applicable in the present case if the Waco case proceeded to judgment first. But, no formal notice was filed, no motion to extend the deadline to file an amended answer was filed, no request to consolidate the two cases was advanced.

59 The entry of judgment can be considered to be an element of both res judicata and collateral estoppel as applied to this case.

60 FED. R. CIV. P. 15(a).

61 In re Southmark Corp., 88 F.3d 311, 314 (5th Cir. 1996), cert. denied, 519 U.S. 1057, 117 S.Ct. 686 (1997); see also Bakner, 2000 WL 33348191 at * 14 (citing Geiserman v. McDonald, 893 F.32d 787, 790 (5th Cir. 1990)).

62 Bakner, 2000 WL 33348191 at * 14 (citing Louisiana v. Litton Mortgage Co., 50 F.3d 1298, 1302–03 (5th Cir. 1995)).

63 Id. (citing Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 230 (1962); Southmark Corp., 88 F.3d 314–15).

64 See Stripling v. Jordan Prod. Co., 234 F.3d 863, 873 (5th Cir. 2000) (applying Rule 12(b)(6) standard in determining whether amended complaint was futile); Avatar Exploration, Inc. v. Chevron, U.S.A., Inc., 933 F.2d 314, 321 (5th Cir. 1991) (explaining amendment would not benefit movants); see also Westport Ins. Corp. v. Albert, 208 Fed. Appx. 222, 2006 WL 3522500, at * 3–4 (4th Cir. Dec. 6, 2006) (amending answer to retract admission of knowledge of forth coming claim would be futile given finding defendants could have reasonably foreseen claim); Miller v. Rykoff–Sexton, Inc., 845 F.2d 209, 214 (9th Cir. 1988) (applying Rule 12(b)(6) standard to determine that amending answer to include affirmative defense of settlement would not be futile as question of fact existed about whether settlement occurred); Crouch v. J.C. Penny Corp., Inc., No. 4:06–CV–113, 2007 WL 1100461, at * 2 (E.D. Tex. Apr. 11, 2007) (amending answer to add potentially viable affirmative defense of qualified privilege was not futile); Equal Employment Opportunity Comm'n v. Geoscience Eng'g & Testing, Inc., No. H–05–3365, 2007 WL 951632, at * 3 (S.D. Tex. Mar. 28, 2007) (amending answer to include Faragher/Ellerth affirmative defense would be futile as only acts alleged were directly attributable to defendant's owner); Medpointe Healthcare, Inc. v. Hi–Tech Pharmacal Co., 380 F.Supp.2d 457, 462–68 (D. N.J. 2005) (applying Rule 12(b)(6) standard and denying amended answer because plaintiff's failure to disclose prior court decisions could not be transformed into cause of action for or defense of patent misuse or unclean hands); Siemens Med. Solutions USA, Inc. v. Sunrise Med. Tech., Inc., No. 3:04–CV–2711–H, 2005 WL 615747, at * 2 (N. D. Tex. Mar. 16, 2005) (denying proposed amended answer because it would not withstand motion to dismiss).

65 United States v. Davenport, ——F.3d ——, 2007 WL 1041033, at * 4 (5th Cir. Apr. 9, 2007) (res judicata); Stripling, 234 F.3d at 868 (collateral estoppel).

66 Davenport, 2007 WL 1041033 at * 3 (quoting Montana v. United States, 440 U.S. 147, 153, 99 S.Ct. 970 (1979)).

67 Id. (quoting Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 398, 101 S.Ct. 2424 (1981)).

68 Id. at 4 (quoting In re Southmark Corp., 163 F.3d 925, 934 (5th Cir.), cert. denied, 527 U.S. 1004, 119 S.Ct. 2339 (1999)).

69 Id.; Southmark Corp., 163 F.3d at 934; In re Baudoin, 981 F.2d 736, 743 (5th Cir. 1993).

70 With respect to the first prong requiring the parties to be "identical" or in privity, none of the four individuals involved in the Waco case are the same as the two individuals sued in this case. Citing a Texas case, defendants argue the involvement of both Stock and Tri Supply as adverse parties in both cases is sufficient to satisfy this case. But, defendants have not established that Stock would have the opportunity to fully develop the record regarding the conduct of the San Antonio employees in the Waco case or that Tri Supply and the Waco employees had the opportunity and motive to develop the record as to the conduct of the San Antonio employees, underlining the potential lack of fairness in allowing the San Antonio employees, who were not parties in the Waco case, to assert the Waco judgment against Stock, as more fully and, perhaps, appropriately discussed in reference to the fourth prong of the test.

71 Docket no. 52 at 6.

72 Docket no. 48, proposed second amended answer at 14.

73 Petro–Hunt, L.L.C. v. United States, 365 F.3d 385, 396 (5th Cir. 2004), cert. denied, 543 U.S. 1034, 125 S.Ct. 808 (2004).

74 See docket no. 52, exhibit 1 (findings of fact and conclusions of law in Waco case).

75 Test Masters Educ. Serv., Inc. v. Singh, 428 F.3d 559, 572 (5th Cir. 2005), cert. denied, ––U.S. ––, 126 S.Ct. 1662 (2006); Petro–Hunt, 365 F.3d at 397.

76 Financial Acquisition Partners, L.P. v. Blackwell, 440 F.3d 278, 284 (5th Cir. 2006); Copeland v. Merrill Lynch & Co., 47 F.3d 1415, 1422 (5th Cir. 1995); RecoverEdge L.P. v. Pentecost, 44 F.3d 1284, 1291 (5th Cir. 1995).

77 Docket no. 48.

78 With respect to non-dispositive rulings, Rule 4 provides, in pertinent part, "Any party may appeal from a magistrate judge's order determining a motion or matter under subsection 1(c) of these rules, supra, [a non-dispositive ruling] within 10 days after issuance of the magistrate judge's order ...." The District Judge will "set aside any portion of the magistrate judge's order found to be clearly erroneous or contrary to law. The judge may also reconsider sua sponte any matter determined by a magistrate judge under this rule."

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2010 WL 1169963
Only the Westlaw citation is currently available.

This decision was reviewed by West editorial staff and not assigned editorial enhancements.

United States District Court,
S.D. Texas,
Houston Division.

Henry UDOEWA, Plaintiff,
v.
PLUS4 CREDIT UNION, et al., Defendants.

Civil Action No. H-08-3054.
|
March 23, 2010.

Attorneys and Law Firms

Okon J. Usoro, Okon J. Usoro, P.C., Houston, TX, for Plaintiff.

Dorian Leigh Bass, Terrence B. Robinson, Gordon and Rees LLP, Houston, TX, for Defendants.

Gregg M. Rosenberg, Rosenberg Sprovach, Houston, TX, pro se.

ORDER

LEE H. ROSENTHAL, District Judge.

***1** The defendants have moved for leave to amend their answer to respond to factual allegations raised in Udoewa's Second Amended Complaint and to plead affirmative defenses to Udoewa's defamation claims. (Docket Entry No. 76). Udoewa has responded, arguing that leave to amend should not be granted because the defendants delayed in seeking leave and have not shown good cause for doing so. (Docket Entry No. 79). The defendants have replied. (Docket Entry No. 80). For the reasons stated below, the motion is granted.

I. The Legal Standard

Rule 15(a) provides that a party may amend the party's pleading once without seeking leave of court or the consent of the adverse party at any time before a responsive pleading is served. After a responsive pleading is served, a party may amend only "with the opposing party's written consent or the court's leave." *Id.* Although a court "should freely give leave when justice so requires," FED. R. CIV. P. 15(a), leave to amend "is not automatic." *Matagorda Ventures, Inc. v. Travelers Lloyds Ins. Co. .,* 203 F.Supp.2d 704, 718 (S.D.Tex.2000) (citing *Dussouy v. Gulf Coast Inv. Corp.,* 660 F.2d 594, 598 (5th Cir.1981)). A district court reviewing a motion to amend pleadings under Rule 15(a) may consider factors such as "undue delay, bad faith or dilatory motive ... undue prejudice to the opposing party, and futility of amendment." *In re Southmark Corp.,* 88 F.3d 311, 314-15 (5th Cir.1996).

Rule 16(b) states that scheduling orders "may be modified only for good cause and with the judge's consent." The Rule 16(b) "good cause" standard, rather than the "freely given" standard of Rule 15(a), governs a motion to amend filed after the deadline set in the scheduling order. *See Sw. Bell Tel. Co. v. City of El Paso,* 346 F.3d 541, 546-47 (5th Cir.2003); *S & W Enters., L.L.C v. SouthTrust Bank of Ala., NA,* 315 F.3d 533, 535-36 (5th Cir.2003); *see also Parker v. Columbia Pictures Indus.,* 204 F.3d 326, 340 (2d Cir.2000); *E. Minerals & Chems. Co. v. Mahan,* 225 F.3d 330, 340 (3d Cir.2000); *In re Milk Prods. Antitrust Litig.,* 195 F.3d 430, 437 (8th Cir.1999); *Sosa v. Airprint Sys., Inc.,* 133 F.3d 1417, 1419 (11th Cir.1998) (per curiam); *Riofrio Anda v. Ralston Purina, Co.,* 959 F.2d 1149, 1154-55 (1st Cir.1992); *Johnson v. Mammoth Recreations, Inc.,* 975 F.2d 604, 607-08 (9th Cir.1992); *SIL-FLO, Inc. v. SFHC, Inc.,* 917 F.2d 1507, 1518 (10th Cir.1990). Trial courts need "broad discretion to preserve the integrity and purpose of the pretrial order." *Geiserman v. MacDonald,* 893 F.2d 787, 790 (5th Cir.1990) (quotations omitted). "If we considered only Rule 15(a) without regard to Rule 16(b), we would render scheduling orders meaningless and effectively would read Rule 16(b) and its good cause requirement out of the Federal Rules of Civil Procedure." *Sosa,* 133 F.3d at 1419; *see also Johnson,* 975 F.2d at 610 ("Disregard of the [scheduling] order would undermine the court's ability to control its docket, [and] disrupt the agreed-upon course of the litigation."); *Riofrio Anda,* 959 F.2d at 1155 (finding

that permitting amendment under Rule 15(a) after scheduling order cutoff "would have nullified the purpose of Rule 16(b)(1)"). If amending the pleadings would, in effect, require amendment of the scheduling order, both Rule 15 and Rule 16 apply.

***2** The "good cause" standard focuses on the diligence of the party asking the court to modify the scheduling order. *Parker,* 204 F.3d at 340; *In re Milk Prods.,* 195 F.3d at 437; *Johnson,* 975 F.2d at 609. The absence of prejudice to the nonmovant is relevant to Rule 15(a) but does not satisfy the "good cause" requirement of Rule 16(b). *Tschantz v. McCann,* 160 F.R.D. 568, 571 (N.D.Ind.1995). "The good cause standard requires the 'party seeking relief to show that the deadlines cannot reasonably be met despite the diligence of the party needing the extension.' " *S & W Enters.,* 315 F.3d at 535 (quoting 6A CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 1522.1 (2d ed.1990)). In the context of a motion for leave to amend, the court may deny the motion if the movant "knows or should have known of the facts upon which the proposed amendment is based but fails to include them in the original complaint." *Pallottino v. City of Rio Rancho,* 31 F.3d 1023, 1027 (10th Cir.1994) (quotations omitted); *see also Pope v. MCI Telecomms. Corp.,* 937 F.2d 258, 263 (5th Cir.1991) (denying, under Rule 15(a)'s more lenient standard, a late-filed motion to amend a complaint to include claims based on same facts); *Sosa,* 133 F.3d at 1419 (denying leave to amend under rule 16(b) when facts were known to plaintiff at time of first complaint); *Parker,* 204 F.3d at 340-41 (same).

If a movant establishes good cause to extend the pretrial scheduling order, or if there is no need to extend the scheduling order, the court decides whether to grant leave to file the amended pleading under Rule 15(a). *See Johnson,* 975 F.2d at 608; *see also S & W Enters.,* 315 F.3d at 536 ("Only upon the movant's demonstration of good cause to modify the scheduling order will the more liberal standard of Rule 15(a) apply to the district court's decision to grant or deny leave."). In deciding whether to grant leave to file an amended pleading under Rule 15(a), a district court may consider factors such as undue delay; bad faith or dilatory motive on the part of the movant; repeated failure to cure deficiencies by amendments previously allowed; undue prejudice to the opposing party; and futility of amendment. *See Wimm v. Jack Eckerd Corp.,* 3 F.3d 137, 139 (5th Cir.1993).

II. Analysis

The deadline to amend pleadings has passed. The defendants have shown good cause for their proposed amendments to the answer. Udoewa's deposition testimony, which stretched over three different days during a period of two months, clarified the factual basis for Udoewa's defamation claims. The defendants state that this testimony provided them with an understanding of the specific statements that Udoewa claims the defendants "published" to third parties. The proposed amendments plead affirmative defenses based on this new information. Udoewa's argument that it is inappropriate to conform pleadings to discovery-to "shift with the tide"-is unpersuasive. The Rule 16(b) "good cause" standard is satisfied.

***3** The defendants also argue that leave to amend is appropriate because Udoewa made additional factual allegations in his Second Amended Complaint. As Udoewa argues, the claims that were added to that complaint have been dismissed under Rule 12(b)(6). (*See* Docket Entry No. 56). But Udoewa also added factual detail to the remaining claims, particularly his race discrimination claim and the claim for negligent retention of Stark by Plus 4. (Docket Entry No. 29). These new factual allegations support the conclusion that the defendants have shown good cause for amending their answer. Rule 16(b) is satisfied.

The Rule 15(a) factors also favor granting leave to amend. The record shows that the defendants did not unduly delay in seeking to amend. Udoewa's Second Amended Complaint was filed on August 3, 2009, just before the first day of his deposition. Udoewa's deposition ended on September 21, 2009. The defendants received the transcript sometime in October 2009. Before moving for leave to amend their answer based on the information learned in the deposition and the new allegations in the complaint, the defendants moved to dismiss certain claims in the Second Amended Complaint. This court granted that motion on December 21, 2009. (*See* Docket Entry No. 29). Based on the timeline and the continuing discovery disputes between the parties, the defendants were not dilatory in moving for leave to amend. The defendants have not previously amended their pleadings.

Finally, there is no reason to believe that the amendment will prejudice Udoewa. Although he conclusorily states that

amendments will require further discovery, there is no factual support provided for this statement. There is no indication as to what, if any, additional discovery would be necessary to respond to the affirmative defenses to the defamation claims. The defenses present straightforward issues, such as the truth of the statements and whether (and by whom) the statements were published to third parties, which were the subjects of the discovery already completed. Rule 15(a)'s liberal standard is satisfied.

III. Conclusion

The defendants' motion for leave to amend the answer is granted.

All Citations

Not Reported in F.Supp.2d, 2010 WL 1169963

End of Document

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**

Declaration of Michael Goldenberg in Support of Plaintiff Federal Trade Commission's Opposition to Defendant U.S. Anesthesia Partners, Inc.'s Motion for Leave to Amend its Answer

1. My name is Michael Goldenberg. I am an attorney licensed to practice in the District of Columbia and admitted *pro hac vice* representing the Federal Trade Commission ("FTC") in the above-captioned matter. I submit this declaration in support of the FTC's Opposition to Defendant U.S. Anesthesia Partners, Inc.'s Motion for Leave to Amend its Answer ("Opposition to Motion to Amend Answer").
2. Attached hereto as Exhibit 1 is a true and correct excerpt of an email exchange among counsel that ends with an email from FTC attorney Maren Haneberg to USAP attorney Rebecca Beynon dated April 21, 2025.
3. Attached hereto as Exhibit 2 is a true and correct excerpt of an executed personal goodwill purchase agreement produced by USAP with the bates range USAP-FTC-CID-00264762 to –00264866.
4. Attached hereto as Exhibit 3 is a true and correct copy of an executed letter of intent for USAP's acquisition of BMW Anesthesiology produced by USAP with the bates range USAP-FTC-CID-

00117854 to –00117863.

5. Attached hereto as Exhibit 4 is a true and correct copy of an executed letter of intent for USAP's acquisition of Medical City Physicians produced by USAP with the bates range USAP-FTC-CID-00379680 to –00379685.
6. Attached hereto as Exhibit 5 is a true and correct copy of the BMW Anesthesiology closing checklist produced by USAP with the bates range USAP-FTC-CID-00264166 to –00264170.
7. Attached hereto as Exhibit 6 is a true and correct copy of the Medical City Physicians closing binder index produced by USAP with the bates range USAP-FTC-CID-00264758 to –00264761.
8. Attached hereto as Exhibit 7 is a true and correct excerpt of the Civil Investigative Demand that the FTC issued to USAP on November 18, 2021, in the investigation that preceded this litigation.
9. Attached hereto as Exhibit 8 is a true and correct excerpt of the FTC's First Set of Requests for Production dated May 13, 2024.
10. Attached hereto as Exhibit 9 is a true and correct copy of a letter from FTC attorney Neal Perlman to USAP attorney Kenneth Fetterman dated October 23, 2024.
11. Attached hereto as Exhibit 10 is a true and correct excerpt of a June 17, 2022 submission that USAP made to the FTC in response to the Civil Investigative Demand.
12. I declare under penalty of perjury that the foregoing is true and correct.

Date: July 11, 2025

/s/ Michael Goldenberg
Michael Goldenberg (DC Bar No. 1725079)
(*Pro Hac Vice*)
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
Tel: (202)-506-0798
mgoldenberg@ftc.gov

Counsel for Plaintiff
Federal Trade Commission

Exhibit 1

From: Haneberg, Maren
To: Beynon, Rebecca A.
Cc: Monahan, Kara; Perlman, Neal; Slattery, Timothy; Syed, Afraa; Fetterman, Kenneth M.; Wood, Kyle M.; DBECK@beckredden.com; Adler, Hannah G.; gklineberg-contact; Thompson, Ellie L.; Onafowokan, Tofunmi; Yoon, John; Goldenberg, Michael; Stebinger, Nicolas
Subject: RE: [EXTERNAL] RE: FTC v. USAP: 4:23-cv-03560
Date: Monday, April 21, 2025 1:03:56 PM

Hi Rebecca:

I write to clarify several points:

First, under the First Amended Scheduling Order, court intervention is not necessary for the four depositions the FTC is scheduled to take in May to proceed because USAP has already agreed to those dates. Indeed, three of those four witnesses are represented by you and USAP requested dates in May to accommodate two of its witnesses' schedules and offered May dates for the third.

Second, given that the FTC has completed its scheduling of depositions and is not seeking any relief from the court, we do not believe a joint motion is warranted.

Third, we are prepared to not oppose your motion provided that:

- The motion specifies that the fact discovery deadline is extended to May 30 for the explicitly limited purpose of the depositions of Memorial Herman, HMS, Common Spirit. Surgical Care Affiliates, Aetna, and NorthStar. No additional depositions may be scheduled, and the deadline for written fact discovery remains April 30.
- The motion specifies that none of the identified depositions may be noticed for later than May 23 so that all depositions may be scheduled by May 30 under paragraph 12 of the Deposition Protocol.
- We have the opportunity to review the proposed motion the day before USAP files it.

Please let us know how you plan to proceed.

Thanks,
Maren

From: Beynon, Rebecca A. <rbeynon@kellogghansen.com>
Sent: Monday, April 21, 2025 11:58 AM
To: Haneberg, Maren <mhaneberg@ftc.gov>
Cc: Monahan, Kara <kmonahan@ftc.gov>; Perlman, Neal <nperlman@ftc.gov>; Slattery, Timothy <tslattery@ftc.gov>; Syed, Afraa <asyed@ftc.gov>; Fetterman, Kenneth M. <kfetterman@kellogghansen.com>; Wood, Kyle M. <kwood@kellogghansen.com>; DBECK@beckredden.com; Adler, Hannah G. <hadler@kellogghansen.com>; gklineberg-contact <gklineberg@kellogghansen.com>; Thompson, Ellie L. <ethompson@kellogghansen.com>; Onafowokan, Tofunmi <jonafowokan@ftc.gov>; Yoon, John <jyoon2@ftc.gov>; Goldenberg, Michael <mgoldenberg@ftc.gov>; Stebinger, Nicolas <nstebinger@ftc.gov>
Subject: Re: [EXTERNAL] RE: FTC v. USAP: 4:23-cv-03560

Dear Maren,

We hope you had a nice weekend. To follow up on my email of April 18, is the FTC is agreeable to making the motion for an extension of case deadlines a joint motion?

Also, USAP is prepared to make to Frank Burns available to testify to Topics 5 and 6 of the FTC's March 27 Rule 30(b)(6) notice, consistent with our discussion last week. Specifically, for Topic No. 6, Mr. Burns will be able to testify generally regarding the data that USAP maintains relating to arbitrations. For Topic No. 5, he should be able to determine, in advance of the deposition, the number of out-of-network claims that were not submitted to arbitration. Please let us know if you have any questions, or would like to discuss this further.

Best regards,
Rebecca

> On Apr 18, 2025, at 3:41 PM, Beynon, Rebecca A. <rbeynon@kellogghansen.com> wrote:
>
> Dear Maren,
>
> Please also see attached subpoena to Northstar. For both Northstar and HMS, we are continuing to discuss the dates for the depositions, and we will keep you informed.
>
> Best regards,
> Rebecca
>
> Rebecca A. Beynon
> Kellogg, Hansen, Todd,
> Figel & Frederick, P.L.L.C.
> 1615 M Street, NW, Suite 400
> Washington, D.C. 20036
> (202) 326-7934 (direct)
>
> NOTICE: This transmission is intended only for the use of the addressee and may contain information that is privileged, confidential and exempt from disclosure under applicable law. If you are not the intended recipient, or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify the sender immediately via reply e-mail, and then destroy all instances of this communication. Thank you.
>
> > On Apr 18, 2025, at 3:24 PM, Beynon, Rebecca A. <rbeynon@kellogghansen.com> wrote:
> >
> > Dear Maren:
> >
> > Thank you for your email. Given the scheduling issues for these third parties and the constraints on which these witnesses are available, and in view of your email below, we intend to ask the Court to adjust all of the dates in the the case schedule by a month, so that these depositions would be taken by May 30, 2025, and all other case deadlines would be extended by the same time. We will include in the motion the depositions that the FTC has also noticed for after April 30, 2025 (Messrs. McCort, Saunders, Dennis, and Regan). If there are any other depositions we should include for the FTC, please let us know. We suggest that the parties submit a joint motion, but if the FTC would prefer that we state the motion is unopposed, we will prepare it accordingly. Please let us know if you would like to discuss. We can be available over the weekend and on Monday.
> >
> > Also, please see attached the Rule 30(b)(6) notice the FTC has served on HMS.
> >
> > Best regards,
> > Rebecca
> >
> > Rebecca A. Beynon
> > Kellogg, Hansen, Todd,
> > Figel & Frederick, P.L.L.C.

1615 M Street, NW, Suite 400
Washington, D.C. 20036
(202) 326-7934 (direct)

On Apr 18, 2025, at 2:46 PM, Haneberg, Maren <mhaneberg@ftc.gov> wrote:

Hi Rebecca:

Attached is the cross-notice 30b6 subpoena we recently served on BCBS.

Thanks,
Maren

From: Haneberg, Maren
Sent: Thursday, April 17, 2025 10:55 AM
To: Beynon, Rebecca A. <rbeynon@kellogghansen.com>
Cc: Monahan, Kara <kmonahan@ftc.gov>; Perlman, Neal <nperlman@ftc.gov>; Slattery, Timothy <tslattery@ftc.gov>; Syed, Afraa <asyed@ftc.gov>; Fetterman, Kenneth M. <kfetterman@kellogghansen.com>; Wood, Kyle M. <kwood@kellogghansen.com>; DBECK@beckredden.com; Adler, Hannah G. <hadler@kellogghansen.com>; gklineberg-contact <gklineberg@kellogghansen.com>; Thompson, Ellie L. <ethompson@kellogghansen.com>; Onafowokan, Tofunmi <jonafowokan@ftc.gov>; Yoon, John <jyoon2@ftc.gov>; Goldenberg, Michael <mgoldenberg@ftc.gov>
Subject: RE: [EXTERNAL] RE: FTC v. USAP: 4:23-cv-03560

Hi Rebecca:

The FTC has scheduled all our depositions. We have already been engaging with USAP and Aetna about dates for the outstanding 30b6 topics, and said we would be available on 4/30 or 5/1.

We do not, however, consent to any other additional depositions in May. Fact discovery ends on April 30, and we need to move on to expert discovery. If you wish to schedule additional depositions in May, pursuant to First Amended Scheduling Order, you will need to seek leave from the Court. We would not oppose a motion to extend fact discovery into May for the limited purpose of depositions of the additional third parties you've identified here so long as the other remaining dates in the Scheduling Order are pushed back by the same amount of time (e.g., if you seek leave to take these depositions by May 21, all remaining dates in the scheduling order would also be pushed back by three weeks).

Please include us in your efforts to schedule these depositions, as we will cross-notice any SATs you serve.

If you would like to discuss this further, we are available for a call today either between noon and 1:00 or at 3:30.

Thanks,
Maren

From: Beynon, Rebecca A. <rbeynon@kellogghansen.com>
Sent: Thursday, April 17, 2025 9:53 AM
To: Haneberg, Maren <mhaneberg@ftc.gov>
Cc: Monahan, Kara <kmonahan@ftc.gov>; Perlman, Neal <nperlman@ftc.gov>; Slattery, Timothy <tslattery@ftc.gov>; Syed, Afraa <asyed@ftc.gov>; Fetterman, Kenneth M. <kfetterman@kellogghansen.com>; Wood, Kyle M. <kwood@kellogghansen.com>; DBECK@beckredden.com; Adler, Hannah G. <hadler@kellogghansen.com>; gklineberg-contact <gklineberg@kellogghansen.com>; Thompson, Ellie L. <ethompson@kellogghansen.com>; Onafowokan, Tofunmi <jonafowokan@ftc.gov>; Yoon, John <jyoon2@ftc.gov>; Goldenberg, Michael <mgoldenberg@ftc.gov>
Subject: Re: [EXTERNAL] RE: FTC v. USAP: 4:23-cv-03560

Dear Maren,

With apologies for adding to the email traffic, but if the FTC could provide a similar list of depositions it is still scheduling, we would appreciate it.

Best regards,
Rebecca

On Apr 17, 2025, at 9:29 AM, Beynon, Rebecca A. <rbeynon@kellogghansen.com> wrote:

Dear Maren:

We wanted to let you know that USAP is still in the process of scheduling depositions of witnesses for the following third parties, either in a personal or corporate capacity. While we are making every effort to get these scheduled prior to April 30, 2025, it is possible that some of these third-party witnesses will not be available until after that date. We will, of course, keep you informed as to our progress. Please let us know if you would like to discuss.

Memorial Herman witnesses (Urban, Linton)
HMS
Common Spirit
Surgical Care Affiliates
Aetna
NorthStar

Best regards,
Rebecca

From: Haneberg, Maren <mhaneberg@ftc.gov>
Sent: Wednesday, April 16, 2025 8:41 PM
To: Beynon, Rebecca A. <rbeynon@kellogghansen.com>
Cc: Monahan, Kara <kmonahan@ftc.gov>; Perlman, Neal <nperlman@ftc.gov>; Slattery, Timothy <tslattery@ftc.gov>; Syed, Afraa <asyed@ftc.gov>; Fetterman, Kenneth M. <kfetterman@kellogghansen.com>; Wood, Kyle M. <kwood@kellogghansen.com>; DBECK@beckredden.com; Adler, Hannah G. <hadler@kellogghansen.com>; Klineberg, Geoffrey M. <gklineberg@kellogghansen.com>; Thompson, Ellie L. <ethompson@kellogghansen.com>; Onafowokan, Tofunmi <jonafowokan@ftc.gov>; Yoon, John <jyoon2@ftc.gov>; Goldenberg, Michael <mgoldenberg@ftc.gov>
Subject: RE: [EXTERNAL] RE: FTC v. USAP: 4:23-cv-03560

Details attached. Please let me know if you had not previously received this info so that we can alert Veritext.

Exhibit 2

Filed Under Seal

Exhibit 3

Filed Under Seal

Exhibit 4

Filed Under Seal

Exhibit 5

Filed Under Seal

Exhibit 6

Filed Under Seal

Exhibit 7

United States of America
Federal Trade Commission

CIVIL INVESTIGATIVE DEMAND

1. TO	1a. MATTER NUMBER
U.S. Anesthesia Partners, Inc. Attention: General Counsel 12222 Merit Drive, Suite 700 Dallas, Texas 75251	FTC File No. 2010031

This demand is issued pursuant to Section 20 of the Federal Trade Commission Act, 15 U.S.C. § 57b-1, in the course of an investigation to determine whether there is, has been, or may be a violation of any laws administered by the Federal Trade Commission by conduct, activities or proposed action as described in Item 3.

2. ACTION REQUIRED

☐ You are required to appear and testify.

LOCATION OF HEARING	YOUR APPEARANCE WILL BE BEFORE
	DATE AND TIME OF HEARING OR DEPOSITION

☒ You are required to produce all documents described in the attached schedule that are in your possession, custody, or control, and to make them available at your address indicated above for inspection and copying or reproduction at the date and time specified below.

☒ You are required to answer the interrogatories or provide the written report described on the attached schedule. Answer each interrogatory or report separately and fully in writing. Submit your answers or report to the Records Custodian named in Item 4 on or before the date specified below.

☐ You are required to produce the tangible things described on the attached schedule. Produce such things to the Records Custodian named in Item 4 on or before the date specified below.

DATE AND TIME THE DOCUMENTS, ANSWERS TO INTERROGATORIES, REPORTS, AND/OR TANGIBLE THINGS MUST BE AVAILABLE

December 20, 2021, by 5:00 pm

3. SUBJECT OF INVESTIGATION

Whether acquisitions and other conduct by U.S. Anesthesia Partners, Inc. violates Sections 3 or 7 of the Clayton Act, 15 U. S. C. §§ 14, 18, as amended; and/or Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, as amended; and whether Commission action to obtain injunctive relief would be in the public interest. See also attached resolution.

4. RECORDS CUSTODIAN/DEPUTY RECORDS CUSTODIAN	5. COMMISSION COUNSEL
Kara Monahan, Records Custodian Tim Kamal-Grayson, Deputy Records Custodian	Tim Kamal-Grayson, Robert Canterman, Gary Schorr

DATE ISSUED	COMMISSIONER'S SIGNATURE
11/18/2021	Rebecca Kelly Slaughter

INSTRUCTIONS AND NOTICES

The delivery of this demand to you by any method prescribed by the Commission's Rules of Practice is legal service and may subject you to a penalty imposed by law for failure to comply. The production of documents or the submission of answers and report in response to this demand must be made under a sworn certificate, in the form printed on the second page of this demand, by the person to whom this demand is directed or, if not a natural person, by a person or persons having knowledge of the facts and circumstances of such production or responsible for answering each interrogatory or report question. This demand does not require approval by OMB under the Paperwork Reduction Act of 1980.

PETITION TO LIMIT OR QUASH

The Commission's Rules of Practice require that any petition to limit or quash this demand be filed within 20 days after service, or, if the return date is less than 20 days after service, prior to the return date. The original and twelve copies of the petition must be filed with the Secretary of the Federal Trade Commission, and one copy should be sent to the Commission Counsel named in Item 5.

YOUR RIGHTS TO REGULATORY ENFORCEMENT FAIRNESS

The FTC has a longstanding commitment to a fair regulatory enforcement environment. If you are a small business (under Small Business Administration standards), you have a right to contact the Small Business Administration's National Ombudsman at 1-888-REGFAIR (1-888-734-3247) or www.sba.gov/ombudsman regarding the fairness of the compliance and enforcement activities of the agency. You should understand, however, that the National Ombudsman cannot change, stop, or delay a federal agency enforcement action.

The FTC strictly forbids retaliatory acts by its employees, and you will not be penalized for expressing a concern about these activities.

TRAVEL EXPENSES

Use the enclosed travel voucher to claim compensation to which you are entitled as a witness for the Commission. The completed travel voucher and this demand should be presented to Commission Counsel for payment. If you are permanently or temporarily living somewhere other than the address on this demand and it would require excessive travel for you to appear, you must get prior approval from Commission Counsel.

A copy of the Commission's Rules of Practice is available online at http://bit.ly/FTCSRulesofPractice. Paper copies are available upon request.

8. Submit all documents relating to the acquisition of any interest identified in response to Specification 7.

9. Submit all documents relating to any communication with any Person identified in response to Specification 7 relating to any USAP Entity's:

    a. Actual or possible Transaction;

    b. Anesthesia Services in Texas;

    c. Actual or possible Tuck-In Clause; or

    d. Actual or possible Exclusivity Clause.

10. Describe how You identify, analyze, negotiate, and approve possible Transactions, including but not limited to:

    a. Persons involved, including any Third Parties, and their roles;

    b. Factors You analyze, assess, or consider; and

    c. Standard practices You use (e.g., practices relating to diligence, analysis, or financing).

11. Submit all documents relating to any business, development, financial, marketing, advertising, strategic plans, or post-closing integration planning and implementation, relating to Transactions.

12. Identify any Transaction engaged in or entered into by or on behalf of any USAP Entity with any Provider of Anesthesia Services, and for each such Transaction describe:

    a. The date on which the Transaction closed;

    b. The role of any Third Party retained by the Company in any capacity relating to the Transaction (excluding those retained solely in connection with environmental, tax, human resources, pensions, benefits, ERISA, or OSHA issues);

    c. The number of Providers of Anesthesia Services, broken down by type of Provider (e.g., anesthesiologist, certified registered nurse anesthetist), that became employed by or affiliated with any USAP Entity following the closing of the Transaction;

    d. The specific geographic area(s) to which any Provider identified in response to subpart (c) offered or offers Anesthesia Services;

    e. The dollar value and form of consideration paid or otherwise provided by USAP for the Transaction;

    f. A detailed description of the reasons for the Proposed Transaction and the benefits, costs, and risks anticipated as a result of the Proposed Transaction; and

g. All the steps You have taken to integrate into USAP the business or operations of any Provider(s) following the closing of the Transaction, including a detailed description of (including the rationale for) any changes in operations, structure, policies, strategies, corporate goals, financing, business, officers, employees, or any other area of activity as a result of the Transaction.

Submit documents sufficient to support Your response.

13. Submit a complete copy of all Agreements, including all amendments, exhibits, schedules, and other related documents, relating to each Transaction identified in response to Specification 12.

14. Submit all documents relating to any Transaction identified in response to Specification 12 relating to Anesthesia Services in Texas, including but not limited to documents relating to strategy, diligence, valuation, negotiation, or analysis.

15. Identify any Transaction being contemplated, evaluated, discussed, planned, or considered by any USAP Entity and submit all documents relating to any such Transaction.

16. Submit all documents relating to actual or possible competition for Anesthesiology Services in Texas.

17. Submit all documents relating to any forecasts or projections relating to Anesthesia Services in Texas, including documents relating to sales, revenues, volumes, costs, prices, or investments (including research and development), profits, feasibility, risks, or returns. Identify by Bates number any such forecasts or projections that were:

    a. Shared with any USAP Entity's board of directors or other senior executives;

    b. Incorporated or reflected in any USAP Entity's budget or earnings projections or any annual or quarterly business or strategic plan; or

    c. Shared with any Third Party, including but not limited to investors or potential investors, lenders or potential lenders, or counterparties to any actual or contemplated Transaction.

18. Submit all documents discussing the pricing of, quality of, or innovation in Anesthesia Services in Texas.

19. Submit all documents relating to any communication relating to Anesthesia Services in Texas involving any USAP Entity and any

    a. Payor; or

    b. Facility.

20. Identify any Third Party that played any role relating to any USAP Entity's pricing of or actual or potential Agreement with a Payor, Provider, or Facility relating to the provision of

29. "Transaction" means merger, acquisition (including asset purchases or acquisitions), consolidation, investment, joint venture, license, partnership, sale, or other transaction by or on behalf of the Company and a Third Party.

30. "Treatment" means any individual occurrence when a patient receives medical attention (such as a diagnosis, clinical procedure, surgery, imaging service, rehabilitation session, visit, or any other medical assessment, care, procedure, or action) from a Provider at one specific location.

31. "Tuck-In Clause" means any Agreement or any part of any Agreement providing that, following or in connection with a Transaction involving USAP and a Provider, an Agreement between USAP and a Payor establishes the reimbursement or other contractual terms relating to the Anesthesia Services of that Provider. The following are illustrative but not exhaustive examples of Tuck-In Clauses:

    a. "In the event Physician acquires an anesthesia or office-based chronic pain management practice entity which is comprised of ten (10) or more physicians (excluding mid-levels) and such practice entity had been contracted with Humana at the time of such acquisition, the compensation terms contained in the acquired practice's contract shall remain in place with respect to acquired practice entity's practitioners for a period not to exceed six (6) months following the acquisition. Upon the expiration of that six (6) months, the acquired practice entity practitioners' reimbursement shall convert to the then current Physician rates in accordance with the compensation terms of this Agreement. In the event Physician acquires an anesthesia or office-based chronic pain management practice entity which is comprised of ten (10) or more physicians (excluding mid-levels) and such practice entity had not been contracted with Humana at the time of such acquisition, the newly acquired practice entity practitioners' reimbursement shall convert to the then current Physician rates as soon as reasonably practical ("Migration Timeframe"), but not greater than forty-five (45) days following Physician's written notice of the transaction to Humana. During the Migration Timeframe, practitioners associated with the acquired entity shall continue to be treated as non-participating. unless the parties otherwise agree in writing. In the event Physician acquires an anesthesia or office-based chronic pain management practice entity which is comprised of nine (9) or fewer physicians (excluding mid-levels) the payment terms for the newly acquired practice entity's practitioners' shall convert to the then current Physician rates as soon as reasonably practical, but not greater than "-five (45) days following Physician's written notice of the transaction to Humana. During the Migration Timeframe, practitioners associated with the acquired entity shall continue to be treated as non-participating, unless the parties otherwise agree in writing." USAP-FTC00004435 at 439.

    b. "In the event Medical Group acquires another provider group representing 10 or more physicians, already under contract with United or one of United's Affiliates to participate in a network of health care providers at the time of the transaction the payment terms contained within such legacy participation agreement of the newly acquired provider will remain in place for 6 months after the effective date of the

Exhibit 8

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**

Plaintiff's First Set of Requests for Production to U.S. Anesthesia Partners, Inc.

Pursuant to Rule 34 of the Federal Rules of Civil Procedure, Plaintiff Federal Trade Commission ("FTC") requests that Defendant U.S. Anesthesia Partners, Inc. ("USAP") produce the documents specified in this First Set of Requests for Production ("Requests") for inspection, examination, and reproduction. The documents requested herein should be sent to the attention of undersigned counsel in a manner agreed upon by the parties. The production of documents shall be in accordance with the Instructions and Definitions set forth below and Rule 34 of the Federal Rules of Civil Procedure. These Requests are continuing in nature and should be supplemented in accordance with Rule 26(e) of the Federal Rules of Civil Procedure.

INSTRUCTIONS

1. Unless otherwise indicated, these Requests cover any and all documents generated, prepared, created, sent, or received during the period from January 1, 2012 to the present.

2. Documents requested are those in actual or constructive possession, custody, or control of USAP or their representatives, attorneys, or other agents, including without limitation consultants, accountants, lawyers, or any other persons retained, consulted by, or working on behalf or under the direction of USAP, wherever they may be located.

3. USAP shall respond to these Requests in accordance with any agreement or order regarding electronic discovery or electronically stored information. If no such agreement or order is finalized, USAP shall respond to these Requests in accordance with the draft ESI Order sent from FTC counsel to USAP counsel on March 26, 2024.

4. Mark each page of each document with consecutive Bates numbers. None of the Bates numbers should be identical to Bates numbers on documents previously submitted to the FTC in

foreign parents, affiliates, partnerships, and joint ventures; and all the directors, officers, employees, attorneys, consultants, agents, and representatives of the foregoing.

B. "Acquired Anesthesia Group" two or more affiliated providers of anesthesia services subject to an Acquisition.

C. "Acquisition" means any transaction, including, but not limited to, a merger, acquisition (including asset purchases or acquisitions of voting stock or other equity), affiliation, consolidation, investment, joint venture, license, partnership, sale, or other transaction by or on behalf of the Company and a Third Party.

D. "Agreement" means any oral or written contract, arrangement, or understanding, whether formal or informal, between two or more Persons, together with all modifications or amendments thereto.

E. "And" and "or" have both conjunctive and disjunctive meanings as necessary to bring within the scope of these Requests anything that might otherwise be outside their scope.

F. "Anesthesia Services" means all perioperative anesthesia services for patients and other medical procedures related to pain management.

G. "Coinsurance" means the set percentage of covered charges (i.e., the charges recognized by the Health Plan) that a Health Plan enrollee must pay out-of-pocket for each episode of healthcare covered by the enrollee's Health Plan. The term also has any other meaning that the Company ascribes to it in the ordinary course of business.

H. "Collaborative Work Environment" means a platform used to create, edit, review, approve, store, organize, share, and access documents and information by and among authorized users, potentially in diverse locations and with different devices. Even when based on a common technology platform, Collaborative Work Environments are often configured as separate and closed environments, each of which is open to a select group of users with layered access control rules (reader vs. author vs. editor). Collaborative Work Environments include Microsoft SharePoint sites, eRooms, document management systems (*e.g.*, iManage), intranets, web content management systems ("CMS") (*e.g.*, Drupal), wikis (*e.g.*, Confluence), work tracking software (*e.g.*, Jira), and blogs.

I. "Communication" is used in the broadest possible sense and means any exchange, transfer, or dissemination of information, regardless of the means by which it is accomplished.

J. "Copay" means the set fee that a Health Plan enrollee must pay out-of-pocket for each episode of healthcare covered by the enrollee's Health Plan. The term also has any other meaning that the Company ascribes to it in the ordinary course of business.

K. "Deductible" means the set amount that a Health Plan enrollee must pay out-of-pocket each year for healthcare services before the enrollee's Health Plan benefits go into effect. The term also has any other meaning that the Company ascribes to it in the ordinary course of business.

Request No. 18: All documents discussing any Exclusivity Clause.

Request No. 19: For any Acquired Anesthesia Group, a complete set of all Agreements with Payors in effect at any point during the two years before the closing of the Acquisition.

Request No. 20: For any Acquired Anesthesia Group, all documents relating to plans relating to Anesthesia Services, including but not limited to business, development, marketing, advertising, or strategic plans; short-term or long-range strategies and objectives; presentations to management committees or executive committees; and budgets.

Request No. 21: For any Acquired Anesthesia Group, all documents prepared for, presented to, or discussed at a meeting of its board of directors or other meeting of its senior executives or other leaders, and all documents relating to any such meetings (including but not limited to board of directors meeting minutes).

Request No. 22: All documents relating to the No Surprises Act or the Texas Surprise Billing Legislation, including but not limited to drafting and passage, scope and implementation, and anticipated or actual effects.

Request No. 23: All documents relating to any communication with any government agency or other government entity relating to Network Adequacy in Texas.

Request No. 24: All documents relating to any actual or contemplated legislation or regulation in Texas relating to Network Adequacy.

Request No. 25: All documents relating to any MIPS submissions made by either USAP or an Acquired Anesthesia Group.

Request No. 26: All documents relating to any efforts, investments, or initiatives by USAP to improve the Anesthesia Services offered by, or the ability to measure improvements to the Anesthesia Services offered by, USAP or any Acquired Anesthesia Group.

Dated: May 13, 2024

/s/ Michael J. Arin

Michael J. Arin
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580
Ph: 202-326-3531
Email: marin@ftc.gov

Counsel for Plaintiff Federal Trade Commission

Exhibit 9

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Bureau of Competition
Health Care Division

October 23, 2024

By email

Kenneth M. Fetterman
Kyle M. Wood
Kellogg, Hansen, Todd, Figel,
& Frederick, P.L.L.C.
1615 M Street N.W., Suite 400
Washington, D.C. 20036
kfetterman@kellogghansen.com
kwood@kellogghansen.com

Re: Document productions, FTC v. U.S. Anesthesia Partners, Inc., No. 4:23-cv-03560 (S.D. Tex.)

Dear Counsel,

We write to memorialize our conversations and email correspondence about the custodian and search term proposal that USAP intends to use to respond to the FTC's May 13, 2024 RFPs. We write with the understanding that we are still meeting and conferring on the date range and search methodology that USAP intends to apply for its production in response to these RFPs. *See* Letter from N. Perlman to K. Fetterman (Oct. 18, 2024).

The parties agreed that USAP will produce custodial documents to comply with RFPs 4-6, 8-10, 12-13, 18-20, 22-24, and 26. The parties further agreed that RFPs 1-3, 7, 11, 14-17, and 21 are go-get requests. Email from K. Fetterman to T. Kamal-Grayson (Sept. 4, 2024). Specifically, the parties agreed that USAP would treat RFP 25 as a go-get that requests USAP's MIPS submissions and all back-up reporting data. Email from K. Fetterman to T. Kamal-Grayson (Sept. 12, 2024).

The parties agree that USAP will search the files of the following USAP executives and their successors for its custodial productions:

Current/Former USAP Employees[1]

Blaylock, David	Physician leader
Bratberg, Kristen*	CEO
Bryant, David	Legislative Affairs Chairman
Burns, Frank	Chief Administrative Officer
Coward, Robert	CEO
Dennis, Kori	SVP, M&A and Portfolio Management
Dutton, Rick*	Chief Quality Officer
Flowers, Dale	Chief Operating Officer
Giacomin, Jon	CEO
Glenesk, Alan*	EVP, Payor Contracting
Good, Anthony	VP, Communications
Grimes, James	CFO
Hendrix, Harry	VP, Operations
Holland, Michael*	Chief Development Officer
Holliday, Scott	Chairman, BOD; Physician Leader
LeBlanc, Kelly	Physician leader
Maloney, Matthew	President, Clinical Operations
McBee, Tyler	CFO
McCort, Brian	EVP, Payor Relations
Moore, Shannon	Market President, CorePlus Operations + US Practice Integration/Transformation
Saunders, Michael	COO
Schoppa, Derek	Physician leader
Shukla, Aesha	Director of Quality & Patient Safety Analytics
Swygert, Thomas	Physician leader, USAP & Pinnacle
Terry, Jeff	EVP, Health System Strategy & Innovation
Wright, Len*	CEO
Zaafran, Sherif	Physician leader

Acquired Group Custodians[2]

[1] On August 27, USAP agreed to search most of these custodians' files. E-mail from K. Fetterman to T. Kamal-Grayson. On September 20, USAP further agreed to search the files of Harry Hendrix and Michael Saunders. E-mail from K. Fetterman to T. Kamal-Grayson. The FTC and USAP are still discussing whether USAP will search the files of Brian Regan and John Rizzo.

[2] On August 27, USAP agreed to search all but one of these custodians' files. E-mail from K. Fetterman to T. Kamal-Grayson. On September 12, USAP additionally agreed to include Mark Goldstein as a custodian. E-mail from K. Fetterman to T. Kamal-Grayson. The parties agreed USAP would search for documents created up to one year before the relevant acquisition. Email from T. Kamal-Grayson to K. Fetterman (Sept. 6, 2024).

Flores, Gary	GHA
Hicks, Michael	Pinnacle
Scott, Larry	ACD
Gathe-Ghermay, Joy	Excel
Ekstam, Christopher	Southwest
Cotton, Katrina ("Voe")	BMW
Bannon, Michael	Medical City
Leitch, Robert ("Bruce")	Sundance
Thomas, Shawn	ETAA
Goldstein, Mark	MetroWest
Schlotter, Will	Capitol
McCown, Scott	Amarillo
Robert, Steven	Star
Koons, Patrick	Guardian

The parties agree that USAP will search the current/former USAP employees using all the following search terms (whether it uses TAR or manual review), while it intends only to search the acquired group custodians using CID Search Term Combination 1. The FTC's position remains that the sufficiency of any search terms should ultimately be validated by elusion testing.

CID Search Term Combination 1:
(advertis* OR budget* OR (long w/1 term) OR (short w/1 term) OR long-term OR short-term OR development OR marketing OR management OR executive OR cgb) w/5 (strate* OR plan* OR objective* OR report)

CID Search Term Combination 7:
(Exclusiv* OR sole OR solo) w/10 (contract* OR agree* OR clause* OR arrang* OR provid*)

CID Search Term Combination 8:
((develop* OR financ* OR marketing OR advert* OR strateg* OR synerg* OR integrat* OR implement*) w/5 plan*) w/10 (transact* OR merg* OR m&a OR acqui* OR asset OR consolida* OR invest* OR invest OR venture OR jv OR partner OR tuck OR inorganic OR target)

CID Search Term Combination 12:
(compet* OR Challeng* OR strength* OR strength OR strong OR strong* OR advantag* OR weak* OR weak OR deficien* OR vulnerabl* OR gap* OR gap OR SWOT OR threat* OR risk* OR win OR lost OR loss OR losing OR rival OR threat OR champion OR valiant OR consolid* OR envision OR CRH OR premier) w/10 (Texas OR TX OR Dallas OR Houston OR San Antonio OR Austin OR Gulf OR STX OR NTX OR ETX OR WTX OR (Greater Houston Anesthes*))

CID Search Term Combination 16:
(forecast* OR projection*) w/10 (Texas OR TX OR Dallas OR Houston OR San Antonio OR Austin OR Gulf OR STX OR NTX OR ETX OR WTX) OR (Greater Houston Anesthes*) OR

GHA OR North Houston Anesthes* OR NHA OR Metrowest OR metro west OR MAC OR Sugarland Anesthesia OR guardian OR GAS OR Pinnacle)

CID Search Term Combination 18:

(rate* OR fee* OR discount* OR cost* OR incentiv* OR pric* OR profit* OR promo* OR bid* OR pitch* OR proposal* OR rebate* OR margin* OR quote* OR innovat* OR (value w/4 care) OR value added OR qualit*) w/10 (Texas OR TX OR Dallas OR Houston OR San Antonio OR Austin OR Gulf OR Gulf Coast OR STX OR NTX OR ETX OR WTX OR (Greater Houston Anesthes*))

CID Search Term Combination 22:

(contract OR negotia* OR provision OR Exclusiv* OR sole OR solo OR carve OR Convert OR conversion OR tuck OR transact* OR merg* OR m&a OR acqui* OR complai* OR issue OR problem) w/10 (health harris OR "heart and vascular" OR hurst OR orthopedic OR medical center OR trophy club OR victory OR freireich OR seton OR Seybold)

CID Search Term Combination 23:

(contract OR negotia* OR provision OR Exclusiv* OR sole OR solo OR carve OR Convert OR conversion OR transact* OR merg* OR m&a OR acqui* OR complai* OR issue OR problem) w/10 (oprex OR vietnas OR surgical center OR ODS OR michael bannon OR seton OR medical city OR baylor OR irving Coppell OR child* house or luke)

CID Search Term Combination 24:

(contract OR negotia* OR provision OR Exclusiv* OR sole OR solo OR carve OR Convert OR conversion OR transact* OR merg* OR m&a OR acqui* OR complai* OR issue OR problem) w/10 (hospital* OR ASC OR facilit* OR centene OR center OR clinic OR institut* OR university OR memorial OR methodis* OR presbyte*) w/10 (Texas OR TX OR Dallas OR Houston OR San Antonio OR Austin OR Gulf OR STX OR NTX OR ETX OR WTX)

CID Search Term Combination 25:

(contract OR negotia* OR provision OR Exclusiv* OR sole OR solo OR carve OR Convert OR conversion OR transact* OR merg* OR m&a OR acqui* OR complai* OR issue OR problem) w/10 (hospital* OR ASC OR facilit* OR centene OR center OR clinic OR institut* OR university OR memorial) w/10 (Texas OR TX OR Dallas OR Houston OR San Antonio OR Austin OR Gulf)

CID Search Term Combination 26:

(contract OR negotia* OR provision OR Exclusiv* OR sole OR solo OR carve OR Convert OR conversion OR tuck OR transact* OR merg* OR m&a OR acqui* OR complai* OR issue OR problem) w/10 (Hermann OR village surgery OR herman OR katy OR First Texas OR First TX OR medical ambulatory)

CID Search Term Combination 27:

(contract OR negotia* OR provision OR Exclusiv* OR sole OR solo OR carve OR Convert OR conversion OR transact* OR merg* OR m&a OR acqui* OR complai* OR issue OR problem) w/10 (Hermann OR village surgery OR herman OR katy surgery OR First Texas OR First TX OR medical ambulatory)

CID Search Term Combination 28:

(UHC OR blues OR payer OR United OR Aetna OR Humana OR Cigna OR Premera OR Regence OR Blue Cross OR BCBS OR Anthem OR Kaiser OR payor or kaiperm OR UHC*) w/10 (contract OR negotia* OR provision OR Convert OR conversion OR tuck OR transact* OR merg* OR m&a OR acqui* OR complai* OR issue OR problem OR rate*) w/10 (Texas OR TX OR Dallas OR Houston OR San Antonio OR Austin OR Gulf OR STX OR NTX OR ETX OR WTX)

CID Search Term Combination 29:

(Convert OR conversion OR migrat*) w/5 rate*

New Search Term Combination 1:

((obstacle* OR barrier* OR block* OR constrain*) w/5 (enter* OR entr* OR expan* OR access)) AND anesthesi*

New Search Term Combination 2:[3]

"No Surprise* Act" OR "Texas Surprise* Billing" OR "TX Surprise* Billing" or “SB 1264” OR NSA OR ((NSA OR law* OR legislat* OR bill) w/5 surpris*)

New Search Term Combination 3:

(network* w/5 (adequa* OR inadequa* OR complian*)) w/25 ("Texas.gov" OR (Texas w/3 insuranc*) OR CMS OR HHS OR TDI)

New Search Term Combination 4:[4]

(network* w/5 (adequa* OR inadequa* OR complian*)) w/10 ("Texas.gov" OR legislation OR bill OR law OR rul* OR regulat*)

New Search Term Combination 5:

[3] This search string will be run for documents created since January 1, 2018. Email from T. Kamal-Grayson to K. Fetterman (Sept. 6, 2024).
[4] This search string will be run for documents created since January 1, 2020. Email from T. Kamal-Grayson to K. Fetterman (Sept. 6, 2024).

(improv* OR upgrad* OR enhanc* OR rais* OR superior OR higher OR better) w/10 (qualit* OR servic* OR QM OR PQRS OR PACU OR complain* OR "patient satisfaction" OR APSQ2 OR Qualtrics OR SurveyVitals OR MIPS OR NACOR OR AQI OR P4P OR MPOG)

Finally, we agreed that USAP will search all reasonably accessible data sources, including text messaging applications, shared document platforms, and instant messaging services, provided that USAP personnel use such programs. Any data sources not searched during the investigation, such as text messages and instant messages, will be searched for the entire relevant time period.[5] Email from T. Kamal-Grayson to K. Fetterman (Aug. 29, 2024). Except where otherwise noted, the parties agree the relevant time period begins on January 1, 2012.

Please let me know as soon as practicable if this does not reflect your understanding.

Sincerely,

/s/ Neal J. Perlman
Neal J. Perlman

Counsel for the
Federal Trade Commission

[5] On September 4, USAP further agreed to re-search the pre-2022 files of custodians marked with an asterisk (*) for documents relating to Southwest Anesthesia Associates, Texas and federal surprise billing legislation, MIPS submissions, quality capture and improvement, network adequacy, and facility subsidies/stipends, which relate to RFPs 4-6, 7, 9, 12, and 22-26. Email from K. Fetterman to T. Kamal-Grayson.

Exhibit 10

Filed Under Seal

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**

[PROPOSED] Order Denying Defendant U.S. Anesthesia Partners, Inc.'s Motion for Leave to Amend its Answer

The Court has considered Defendant U.S. Anesthesia Partners, Inc.'s Motion for Leave to Amend its Answer (ECF 271), the Plaintiff Federal Trade Commission's Opposition to Defendant U.S. Anesthesia Partners, Inc.'s Motion for Leave to Amend its Answer (ECF __), U.S. Anesthesia Partner, Inc.'s Reply (ECF __), and all related exhibits and briefs, and **DENIES** the Motion for Leave to Amend Answer.

It is so ORDERED.

SIGNED on July__, 2025 at Houston, Texas.

_____
Kenneth M. Hoyt
United States District Judge