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

FEDERAL TRADE COMMISSION, Plaintiff, v. U.S. ANESTHESIA PARTNERS, INC., et al. Defendants.	Case No.: 4:23-CV-03560-KH

DEFENDANT U.S. ANESTHESIA PARTNERS, INC.'S REPLY IN SUPPORT OF MOTION FOR LEAVE TO AMEND ITS ANSWER

USAP seeks to amend two paragraphs (out of more than 400) in its Answer. The proposed amendment would clarify that USAP hired employees formerly associated with BMW Physicians and Medical City Physicians but did not "acquire" these entities as the FTC defines that term. This clarification would ensure that USAP's Answer reflects the record, and it would resolve a supposed conflict between the Answer and USAP's discovery responses.

The FTC does not dispute that Rule 15's standard governs, under which "leave 'should be granted absent some justification for refusal.'" *Vanzzini v. Action Meat Distribs., Inc.*, 995 F. Supp. 2d 703, 712 (S.D. Tex. 2014); *see* Opp. at 5 (applying Rule 15). The FTC instead asserts that USAP's proposed amendment is untimely, futile, or (if not futile) prejudicial. The FTC is wrong three times over. The requested amendment is timely: USAP had no reason to amend its Answer until April 30, when the FTC complained that USAP's discovery responses conflicted with its Answer. It is important because there is a difference under the antitrust laws between hiring talent and buying another firm. And it will not prejudice the FTC, which investigated USAP's supposed "acquisitions" of BMW Physicians and Medical City Physicians before filing its lawsuit and during fact discovery. The Court should grant USAP leave to amend its Answer.

I. The Court Should Grant Leave To Amend

A. USAP's Proposed Amendment Is Timely

The FTC concedes (at 6) that Rule 15(a) contains no time limit on amendments. It tries (at 6) to derive one from a handful of cases, but those cases do not fit the facts here. The plaintiffs there moved to amend their complaint months after dismissal, *see Whitaker v. City of Houston*, 963 F.2d 831, 837 (5th Cir. 1992), or tried to add new claims either "in an attempt to avoid summary judgment," *Wimm v. Jack Eckerd Corp.*, 3 F.3d 137, 139 (5th Cir. 1993), or "less than a week before trial," *Pope v. MCI Telecommunications Corp.*, 937 F.2d 258, 263 (5th Cir. 1991). USAP promptly moved to clarify its Answer to resolve a supposed conflict with its

discovery responses after the FTC raised the issue and months before summary judgment briefing. The FTC's premise that USAP's amendment fails some timeliness requirement is legally unsound.

Even if some timeliness requirement did apply here, USAP has satisfied it. The FTC concedes (at 6) that courts should grant leave to amend when "changed circumstances" warrant the amendment. That is the case here: it was not until April 30 that the FTC objected to USAP's discovery responses denying that it "acquired" BMW Physicians and Medical City Physicians as inconsistent with its Answer. Before then, there was no dispute over whether USAP "acquired" those practices by hiring their former employees. So USAP had no reason to revise its Answer. *See* Mot. at 6-7 (explaining why USAP has good reason to seek leave to amend now under Rule 16's stricter "good cause" standard).

The FTC erroneously contends (at 6-7) that, under the "plain meaning" of "acquired," the Complaint's allegations that USAP "acquired" BMW Physician and Medical City Physicians could not plausibly be read to encompass hiring former employees. Nowhere in its 416-paragraph Complaint did the FTC define "acquire," which means "to come into possession or control of often by unspecific means" – e.g., "The team *acquired* three new players this year." *Acquire*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/acquire (last accessed July 18, 2025). USAP thus had no reason to know when it filed its Answer in June 2024 that the FTC would object to USAP's explanation in its discovery responses that it hired providers formerly affiliated with BMW Physicians and Medical City Physicians but did not purchase the practices. This ambiguity easily justifies modest tweaks to clarify two paragraphs. *See*, *e.g.*, *Fair Isaac Corp. v. Federal Ins. Co.*, 2019 WL 6715057, at *2 (D. Minn. Dec. 10,

2019) (granting leave to amend answer to include a new affirmative defense because the "complaint was ambiguous").

The FTC fares no better in arguing (at 7-8) that USAP "agreed" with the FTC's definition of "acquired" by responding to the FTC's pre- and post-complaint document requests. The FTC's 2021 Civil Investigative Demand not only preceded the Complaint but also did not use (or define) the term "acquired" in the first place. *See* Opp. at 7 & Ex. 7 at ¶ 29 (quoting as the "Relevant Definition" the definition of "Transaction"). The FTC's Requests For Production did purport to define the term "Acquisition," but USAP objected to that definition and explained that it would interpret the term "consistent with . . . the allegations in the FTC's Complaint." Ex. I, ¶ 8. Neither document request teed up the issue of whether USAP "acquired" BMW Physicians and Medical City Physicians by hiring former employees.

B. USAP's Proposed Amendment Is Important

As USAP explained (at 7-8), the proposed amendment is important because the antitrust laws distinguish between a company buying another firm and hiring employees. USAP thus seeks to revise its Answer to clarify, consistent with the record and its discovery responses, that it hired employees formerly affiliated with BMW Physicians and Medical City Physicians without purchasing the businesses. *See* Opp. Ex. 5 (closing binder for BMW Physicians showing that USAP hired BMW providers); Ex. 6 (same for Medical City Physicians).

The FTC responds (at 8-9) that this settled antitrust principle has no application here because USAP hired "all," rather than just "some," of these groups' providers. But *Taylor Publishing Co. v. Jostens, Inc.*, 216 F.3d 465 (5th Cir. 2000), on which the FTC relies (at 8-9), did not draw this some-versus-all distinction. Nor did the FTC's other case (at 8), *BRFHH Shreveport, LLC v. Willis Knighton Medical Center*, 176 F. Supp. 3d 606 (W.D. La. 2016). To the contrary, the *BRFHH* court held that "*Taylor Publishing* governs any acquisition" in which a

healthcare provider merely "hires away [a rival provider's] physicians." *Id.* at 621 (finding "four acquisitions do not give rise to section 2 liability" under *Taylor Publishing*).

USAP's proposed amendment is also important to ensure that USAP can defend itself on the merits at summary judgment or trial. Otherwise, the FTC may argue that the Answer's admissions that USAP "acquired" BMW Physicians and Medical City Physicians – despite the admissions coming before the FTC defined the term – somehow preclude USAP from demonstrating that it simply hired their physicians. Indeed, the FTC's concern (at 9) that the proposed amendment "would create a fact issue" telegraphs their intent to do just that. But litigation "is not a game of 'gotcha,'"; cases "should be decided on actual facts." *Appliance All., LLC v. Sears Home Appliance Showrooms, LLC*, 2015 WL 9319179, at *3 (N.D. Tex. Dec. 23, 2015) (granting leave to amend Answer to correct mistaken citizenship admission); *see Jones v. Louisiana*, 764 F.2d 1183, 1185 (5th Cir. 1985) (the federal rules "permit liberal amendment to facilitate determination of claims on the merits"). USAP's amendment ensures that the Court will decide this case based on actual facts.[*]

C. USAP's Proposed Amendment Will Not Prejudice The FTC

Changing tack, the FTC pivots (at 9-10) from arguing that the proposed amendment does not matter to arguing that it is unfairly prejudicial because the FTC "relied" on USAP's admissions and "thus did not specifically inquire into" BMW Physicians and Medical City Physicians during fact discovery. But the record shows otherwise. The FTC sought custodial documents from former employees of BMW Physicians and Medical City Physicians, *see* Opp. Ex. 9, and served Requests for Admission concerning each practice, *see* Mot. Ex. A. The FTC

[*] The FTC also suggests (e.g., at 4) that USAP did not merely hire the providers of BMW Physicians and Medical City Physicians. USAP has demonstrated why that assertion is wrong, but the Court does not need to resolve the fact dispute now; the whole point is that it should be decided on the merits, based on actual facts.

also questioned numerous USAP witnesses about these alleged "acquisitions." *See*, *e.g.*, Ex. J (Holland Tr.); Ex. K (Flowers Tr.); Ex. L (DeAtkine Tr.).

What's more, the FTC had ample notice of USAP's position that it did not "acquire" BMW Physicians or Medical City Physicians. For example, USAP's former Chief Development Officer Michael Holland testified that Medical City Physicians was a "group of independent individuals" who were "interested in joining" USAP. Ex. J (Tr. 100:15-101:7). He further testified that USAP "came together with" BMW Physicians but that he was "not sure if that was an acquisition" rather than a "partnership." *Id.* at 162:18-22. USAP's Chief Financial Officer Dale Flowers similarly testified that BMW Physicians and Medical City Physicians were "employed into" USAP. Ex. K (Tr. 178:3-23). And weeks before fact discovery closed, on April 16, USAP denied having "acquired" these groups in responses to the FTC's Requests For Admission. Ex. B. USAP's proposed amendment creates no unfair prejudice when the FTC has spent years investigating the alleged acquisitions.

None of the FTC's cases (at 10) suggest otherwise. In *Smith v. EMC Corp.*, 393 F.3d 590 (5th Cir. 2004), the plaintiff moved mid-trial to amend his complaint to add a new cause of action. *See id.* at 594, 596. In *Little v. Liquid Air Corp.*, 952 F.2d 841, *aff'd en banc*, 37 F.3d 1069 (5th Cir. 1994), the plaintiffs proposed amendments that "would have radically altered the nature of a trial" during summary judgment briefing. *Id.* at 846. USAP, by contrast, seeks to revise two (out of more than 400) allegations in its Answer to resolve the FTC's recently contrived discovery dispute and to clarify facts the FTC possessed long before it brought this case.

CONCLUSION

The Court should grant USAP leave to amend its Answer.

Dated: July 18, 2025

Respectfully submitted,

/s/ *Mark C. Hansen*

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

Mark C. Hansen (D.C. Bar No. 425930)
(*Pro Hac Vice*)
Attorney-in-Charge
Geoffrey M. Klineberg (D.C. Bar No. 444503)
(*Pro Hac Vice*)
Rebecca A. Beynon (D.C. Bar No. 451496)
(*Pro Hac Vice*)
Alex P. Treiger (D.C. Bar No. 1670925)
(*Pro Hac Vice*)
KELLOGG, HANSEN, TODD,
FIGEL & FREDERICK, P.L.L.C.
1615 M Street N.W., Suite 400
Washington, D.C. 20036
Tel: (202) 326-7900
Fax: (202) 326-7999
mhansen@kellogghansen.com
gklineberg@kellogghansen.com
rbeynon@kellogghansen.com
atreiger@kellogghansen.com

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

CERTIFICATE OF SERVICE

I hereby certify that on July 18, 2025, I filed the foregoing document with the Court and served it on opposing counsel through the Court's CM/ECF system. All counsel of record are registered ECF users.

Respectfully submitted,

/s/ Geoffrey M. Klineberg
Geoffrey M. Klineberg