UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

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ELECTRICAL MEDICAL TRUST 4:23-cv-04398

VS.

HOUSTON, TEXAS

U.S. ANESTHESIA PARTNERS, INC., ET AL. SEPTEMBER 5, 2024

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TRANSCRIPT OF MOTION HEARING
HEARD BEFORE THE HONORABLE ALFRED H. BENNETT
UNITED STATES DISTRICT JUDGE

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APPEARANCES:

FOR THE PLAINTIFFS:	Mr. Brendan P. Glackin Mr. Benjamin A. Trouvais Ms. Jules A. Ross LIEFF CABRASER HEIMANN & BERNSTEIN, LLP 275 Battery Street, 29th Floor San Francisco, California 94111
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Southern District of Texas
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P R O C E E D I N G S

THE LAW CLERK: All rise.

THE COURT: Good afternoon. Thank you. Please have a seat.

01:30PM MR. GLACKIN: Good afternoon, Your Honor.

MR. YETTER: Good afternoon.

THE COURT: Cause Number 4:23-cv-4398, Electrical Medical Trust, et al. versus U.S. Anesthesia Partners, et al.

Counsel, your appearances for the record?

01:30PM MR. GLACKIN: Brendan Glackin for the plaintiffs.

THE COURT: Just a moment.

MS. ROSS: Jules Ross for plaintiffs.

THE COURT: I'm sorry. I didn't hear you.

MS. ROSS: Jules Ross for plaintiffs.

01:31PM MR. TROUVAIS: Benjamin Trouvais for the plaintiffs.

THE COURT: Very well.

MR. BECK: Good afternoon, Your Honor. David Beck and Jeff Klineberg for USAP, the defendant, and also Mr. Greg Stevens is a representative of the company here for

01:31PM today's hearing.

THE COURT: Very well.

MR. YETTER: Good afternoon, Your Honor. Paul Yetter for the Welsh Carson defendants as well as my partner Matt Zorn and our colleague Kathryn Caldwell.

01:31PM THE COURT: Very well.

The Court has before it two motions to dismiss that have been fully briefed. I understand we're going to argue those motions today. Who would like to start?

MR. KLINEBERG: Good afternoon, Your Honor.

01:32PM Again my name is Geoffrey Klineberg from the Kellogg Hansen firm in Washington, D.C., along with David Beck. I represent the defendant U.S. Anesthesia Partners.

Your Honor, in our motion to dismiss we make four key arguments to support dismissing plaintiff's complaint.

01:32PM One, the plaintiffs are not direct purchasers of USAP's anesthesiology services and are, therefore, not entitled under federal antitrust laws to bring their damages claims.

Two, the plaintiffs have failed to allege the proper market for anesthesia services and have, therefore,

01:32PM misstated USAP's share of that mark.

Three, plaintiffs have failed to allege that USAP has raised prices above a competitive level when their only allegations with respect to pricing are that after acquiring various anesthesia practices USAP started billing those

01:32PM practices out at USAP's existing rates, as it was entitled to do under its contracts with the insurance companies.

And finally plaintiffs have failed to allege that USAP has engaged in exclusionary conduct.

Section II requires something more than the mere

01:33PM allegations that USAP acquired various practices. There has to

be a claim that USAP engaged in anticompetitive conduct that caused actual harm to consumers, and simply acquiring practices and billing the rates they were contractually entitled to charge is not enough.

01:33PM But as you know, Your Honor, Judge Hoyt has already concluded that the FTC's identical allegations relating to market definition, monopoly power and anticompetitive conduct were sufficiently plausible to survive our motion to dismiss in that case; and although we respectfully disagree 01:33PM with that conclusion and urge this Court to take a fresh look at those arguments in the briefing, I thought it would make sense today and be most useful for me to address this afternoon the one argument that Judge Hoyt had no occasion to consider, which was the direct purchaser argument. So that's what I'd 01:34PM like to turn to now.

Plaintiffs here have sued for damages under Section 4 of the Clayton Act, which provides that "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor" and 01:34PM may recover damages.

In *Illinois Brick* the Supreme Court interpreted this language to mean that a plaintiff who purchases a good or service directly from an antitrust violator is the party, quote, injured in his business or property within the meaning 01:34PM of Section 4 of the Clayton Act.

Illinois Brick and its progeny have created a bright-line direct purchaser rule: "Those who purchase a product or service directly from an antitrust violator can sue that violator for damages, but those who are two or more steps removed from the alleged violator cannot. No further inquiry into the specifics of a case is required or even permitted."

So the only question Your Honor needs to decide here is whether plaintiffs have plausibly alleged in their complaint that they are direct purchasers of USAP anesthesia services such that they can sue USAP for damages under the Clayton Act, and we submit that they cannot plausibly make that allegation. The complaint should, therefore, be dismissed to the extent it seeks antitrust damages.

Your Honor, with your permission, I have a one-page handout that I think will help illustrate my argument and show how plaintiffs here are indirect purchasers.

THE COURT: Very well. If you will, hand that up.

I assume that you have provided this to opposing counsel.

MR. KLINEBERG: Yes, indeed, Your Honor.

THE COURT: Very well.

MR. KLINEBERG: What this illustrates is that there are three basic types of employee plans in our health care system, at the top the fully-insured plan where the plan pays premiums to the insurance company and the insurance company bears the

risk of the members' medical costs. The insurance company, of course, negotiates rates with health care providers, receives the bills for those services and then pays the health care provider.

01:36PM The second category, the self-insured plan, or sometimes called administrative-services-only plans, are the plaintiffs here and here the employer itself takes on the risk of the medical costs by funding an account with the insurance company; but just as with the fully-insured plan, it is the 01:37PM insurance company that negotiates the rates with the health care providers, receives the bills for those services and pays the health care provider for the services provided.

And finally there is this third category of employee benefit plans that enter into a direct contracting 01:37PM arrangement with health care providers. This typically makes sense only for the very largest employers in the country; but here the plan bypasses an insurance company altogether, negotiating rates with individual health care providers and receiving their bills and most importantly paying directly for 01:37PM those services. So as reflected here, both the fully-insured plan and the self-insured plan rely on the insurance company to perform exactly the same activities: To negotiate rates; receive and process bills; and, most importantly, to pay the health care providers directly for those services. It is only 01:37PM the third category, this direct contracting arrangement, where

the employee plan directly purchases the health care services from the providers.

So five years ago the Supreme Court decided a case called *Apple versus Pepper* where it reaffirmed the direct purchaser rule and restated the rule in very simple terms.

When there is no intermediary between the purchaser and the antitrust violator, the purchaser may sue; but when there is such an intermediary, as there clearly is in this case, Your Honor, the purchaser may not.

So in the case of both fully-funded and self-funded plans, there is clearly an intermediary between the purchaser and the defendant; and as the Supreme Court recognized, when this is so, the plaintiffs may not sue.

So the district court in the *NorthShore University* case, which we discuss in our brief, analyzed the precise question we have here. Is a self-funded plan a direct purchaser of health care services or is it, instead, an indirect purchaser? And the court there recognized that the direct payment from the insurance company to the health care provider is, quote, the key element to determining the insurer as the direct purchaser and not the self-insured plan.

So the court explained that even if a purchaser passes the entire overcharge of a purchase to someone else down the line, still that original purchasing entity remains the direct purchaser for antitrust suit purposes. And the court

recognized that here the fact remains that the insurance company, not the self-insured employee plan, is the entity actually sending money to the hospital for payment. In that case it was a hospital. In this case, of course, it's the anesthesia providers.

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In our case the payment goes from the insurance company to USAP. It's the insurance companies that negotiate with USAP to establish the rates they will pay; and when the patient who is a member of the employee benefit plan receives

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service from USAP, it is the insurance company that pays the amount owed to USAP. Indeed USAP typically doesn't even know who the patient's employee benefit plan is. USAP knows that the patient is a member of the Cigna, Aetna or Blue Cross Blue Shield insurance network; but the fact that the plaintiff

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employee benefit plan funds the payment is immaterial. As the court in *NorthShore University* recognized, the key question is: Which entity, quote, is actually sending the money to the health care provider for payment?

And that is undoubtedly the insurance company

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here and not the plaintiff employee benefit plans.

Because the plaintiffs here are not the direct purchasers of the anesthesiology services my client provides, they are not entitled to bring this antitrust case seeking damages under the Clayton Act.

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I did want to take one moment to respond to an

argument that the plaintiffs made in their responses brief. They suggested that we misquoted some language from a case called *United States versus Anthem;* and I did want to just make sure that I was clear about one thing there, that *United States versus Anthem* had actually nothing to do with this distinction between direct and indirect purchasers. It was a government challenge to a merger and Judge Jackson in the *Anthem* case was simply describing the various plans like the one I've described in my handout here, the point being that when she did write that "employer pays health care costs directly" in describing a self-funded plan, she was not using "directly" in any way that mattered for purposes of the direct or indirect purchaser argument. The court was just contrasting a self-funded plan, which pays the cost of the health care for its members, with a traditional fully-insured plan where the employer pays only a premium and the insurance company bears the risk of the health care costs. So the court was not suggesting that self-funded plans pay the health care provider directly. On the contrary, as I mentioned and as we argued in the brief, *Anthem* specifically recognized that it's the insurer who pays the claims; and that, of course, is the key fact.

THE COURT: One of your central cases is this *NorthShore* case, which is out of a district court in Illinois. So for a court here sitting in the Southern District of Texas in the Fifth Circuit, how persuasive should that case be?

MR. KLINEBERG: Well, Your Honor, it's as persuasive as you find its reasoning. You're certainly not bound by it. And there are not that many cases -- we looked out there -- where this issue has been litigated and this was one of the very few; and it does, in fact, strongly support our position on the merits. But you're absolutely right. You're not bound by it, and it's as persuasive as you think it is.

THE COURT: And you believe it to be on four corners with the facts of this case?

01:43PM MR. KLINEBERG: Largely with respect to the kind of contours of the plan and the structure of the industry that it is describing. This, of course, has to do with hospital services and it has to do with different kind of health care providers; but on the issue at hand, yes, I do think it is quite persuasive and on all fours.

THE COURT: Thank you, counselor.

MR. KLINEBERG: Okay. Thank you, Your Honor.

By the way, to the extent that we have any time, I would like to preserve a minute or so to rebut.

01:44PM Thank you, Your Honor.

THE COURT: Counsel, before you respond in regards to the motion to dismiss you just heard, will you prefer to tackle it now; or would you prefer to hear the other motion to dismiss and respond to both?

01:44PM MR. GLACKIN: Thank you, Your Honor. We talked ahead

of time and we agreed that the sensible way to proceed would be to do the USAP motion for 30 minutes and the Welsh Carson motion second for 30 minutes and split the time 15 and 15 within each motion, so that's what we'll be doing.

01:44PM THE COURT: You may proceed, sir.

MR. GLACKIN: Thank you very much, Your Honor.

I, too, brought a folder. I have three copies, one for Your Honor and two for anyone else who would like to have it.

01:45PM THE COURT: Very well. Your name for the court reporter, please?

MR. GLACKIN: My apologies, Your Honor. Brendan Glackin, Lieff Cabraser Heimann & Bernstein, for the plaintiffs.

01:45PM THE COURT: Thank you.

And I again presume opposing counsel has been provided their copies.

MR. GLACKIN: Yes, Your Honor.

THE COURT: Thank you.

01:45PM MR. GLACKIN: So I'm going to start by addressing the suggestion in the papers that we engaged in inartful pleading. I just want to point out to the Court that at Paragraphs 14 and 15 of the complaint we allege that both plaintiffs, Electrical Medical Trust and Plumbers Local 68, directly reimbursed health 01:45PM care providers. And then in the following sentence in each

paragraph we said that they both paid USAP for anesthesiology services during the relevant time period. That is our allegation.

I think the artfulness attack might have been a suggestion that we should have used the word "directly" again in the second sentence. For any avoidance of doubt it is our allegation that we paid USAP directly for anesthesiology services during the relevant period because USAP is a health care provider.

01:46PM In terms of this demonstrative, which contains a description of insurance plans and how they interact with self-insured -- how self-insured plans interact with plan administrators, I want to say I don't agree with this completely and it is not -- these allegations are not in our 01:46PM complaints; so the Court would have to take judicial notice of these facts in order to rely on them to dismiss the complaint.

I'm also going to say the specific ways in which I disagree with it. First of all, the money from the employee plan in both cases with respect to our plaintiffs doesn't go to 01:47PM the insurance company. The fund -- each plan has a segregated fund that is not commingled with the funds of any other self-insured plan at a bank. That money goes to the account where it is held and then the -- in both cases, Aetna and United have the authority to pay the claims to the providers 01:47PM out of that account. If the balance in the account goes below

a certain level relative to the claims, then the self-funded plan has to put more money in. But it's not like they are paying the provider and getting a knee replacement surgery in response. This is actually a graph that I think overly simplifies the relationship between those different entities, and I don't agree with it.

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A second way in which it's not accurate is that frequently and in this case the health care providers actually do send the claims directly to the funds. So in the case of Plumbers Local 68, the claim actually first goes to Plumbers Local 68; and then the claim is then forwarded to United in the case of that fund for repricing and payment. United takes the claim, reprices it according to the rates United has negotiated and then pays it out of this segregated account that United maintains for Plumbers Local 68. It's my understanding of the facts -- none of what I have said is in the complaint. None of this is in the complaint either and I just wanted to be clear that I don't agree with it and I'm not sure it's right in this case.

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Next, with respect to the *Illinois Brick* rule, it is frequently misstated that the rule is that only direct purchasers can bring a case. That is not the *Illinois Brick* rule. The *Illinois Brick* rule is a rule against indirect purchasers bringing a case. And the Supreme Court -- the *Illinois Brick* rule applies in the following scenario: Where

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you have a violator and the violator sells something to an intermediary like a retailer or a distributor or a contractor and then the contractor, retailer or distributor turns around and does another transaction with the plaintiff. In that
01:49PM situation the Supreme Court has held that the plaintiff does not have a claim, that the distributor or retailer or contractor, which has already -- which has made a purchase and been injured under the Clayton Act may claim the full value of the claim of its injury regardless of whether or not it passed
01:49PM on any of the harm to the plaintiffs.

And those are the twin rulings, the twin rulings of *Illinois Brick* and *Hanover Shoe*. *Hanover Shoe* says that the retailer or distributor gets the full value of its claim without with respect to pass-on; and then *Illinois Brick* says,
01:49PM well, because that's the law about the retailer, plaintiffs downstream can't bring a claim because there would be duplicative recovery and you'd have to calculate the amount of pass-on and it's ultimately -- it's intended to be a pro-enforcement rule. It's intended to -- the whole rationale
01:50PM for it is that it would streamline antitrust enforcement to avoid these questions of pass-on. And the Supreme Court said this as recently as *Apple versus Pepper*, where it said, for example, If Manufacturer A sells to Retailer B and Retailer B sells to Consumer C, then C may not sue A, but B may sue A if A
01:50PM is an antitrust violator and C may sue B if B is an antitrust

violator. That is the straightforward rule of *Illinois Brick*.

So that concept of a transaction of an upstream purchase and sale that the plaintiff is not a party to, I mean it's the crux of the whole rationale for the rule which is the avoidance of calculating pass-on. If there isn't an initial transaction followed by a resale, there is no pass-on and there is no intermediary that's actually done a transaction. I mean this -- this chart, if it were accurate, would actually -- I mean every graph explaining how things work in the health care industry is at minimum a triangle and sometimes it's a questionnaire, because all of these entities have complex relationships with one another; but they are not the relationship that is specified in *Apple versus Pepper* or *Illinois Brick*. It is not the case that UnitedHealthcare buys a knee replacement surgery and then turns around and decides what to sell it to Plumbers Local for. Plumbers Local pays the rate for the knee surgery that UnitedHealthcare negotiated with the providers. It pays United a fee, a per-member per-month fee to get access to that network at those rates; but UnitedHealthcare is not doing a buy and a resale.

To further illustrate the fact that you don't have to be a direct purchaser, particularly in the health insurance context, I would point the court to the Supreme Court's decision in *Blue Shield versus McCready*, which came after *Illinois Brick* and is still the law of the land.

In *Blue Shield versus McCready*, Mrs. McCready found that -- I believe her psychology services were not going to be covered by her insurer because of an agreement between her insurer and psychiatrists. Psychiatrists were basically trying to keep the psychologists out of the market.

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Now, because Ms. McCready didn't buy the insurance, of course; and the Supreme Court noted this in *Blue Shield versus McCready*. The employer bought the insurance. It was the employer that was in contractual privity with Blue Shield. It was the employer that paid money to Blue Shield, not Mrs. McCready. And the Supreme Court nevertheless held that MsCready had antitrust standing because, you know, A, *Illinois Brick* doesn't apply; and, B, they found that the nature of her injury was such that she had a -- she had been wronged under the Clayton Act and she had a right to proceed.

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But I really just -- I'm not saying -- we're not Ms. McCready. We're a different sort of link in this chain, but my point is that anybody who tells you that there is a direct purchaser rule is not speaking correctly. There is an indirect purchaser rule under *Illinois Brick*. If we're not in the indirect purchaser scenario, then standing is governed by a case called *Associated General Contractors,* which has a 5- or 6-factor test which we mentioned in our briefs that looks at the issue of causation and damages from a whole different set of -- basically from five or six different angles. Of course

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that analysis cannot be done at the pleading stage and never is, which is why they don't try to engage with it.

Then I'm also going to mention something that we brought up in our briefs, but that Mr. Klineberg omitted to address, which is in the Fifth Circuit, and everywhere, we have the benefit of the cost-plus exception that was articulated in *Illinois Brick* originally. And the Fifth Circuit is actually one of the few circuits that has really elaborated on that rule, because, as Mr. Klineberg said, these issues don't come up that often and the cost-plus exception comes up even less often. But we are in the Fifth Circuit and we are under *In Re Beef* and *In Re Beef* continues to be good law. It has never been overturned or questioned. It was followed by the district court in the *In Re Lease Oil* decision as recently as six years ago; and what the cost-plus exception and *In Re Beef's* elaboration on it says is that if this whole issue of pass-on, which we don't say happened here. We don't think there was any pass-on here. But if the whole issue of pass-on -- if both of the prices of these transactions, these two transactions, have a formulaic relationship to each other, like cost-plus, like I, the retailer, agree to sell you, the consumer, this laptop at my cost plus 5 percent, right -- that's cost-plus -- if it's a with formulaic relationship between the two transactions, then the *Illinois Brick* rule doesn't apply because there's no problem with pass-on and as a matter of law the first person

hasn't been injured because, you know, as a matter of obvious economics they've recovered whatever their overcharge was.

I don't agree there are two transactions here; but even if we wanted to conceptualize this as a two-transaction situation, this is even more formulaic than *In Re Beef* because we just pay the rates that are negotiated by United for us and for itself. United negotiates rates with USAP. United pays claims by USAP at those rates. Mr. Klineberg even said that USAP has no idea, you know, who's paying what; and that is because the rate is always the same. They're just getting the same payment no matter what. It's a formulaic question.

So even if *Illinois Brick* applied -- and it doesn't -- the elaboration on the cost-plus exception in *In Re Beef* would clearly also require that the motion be denied.

I am ready to sit down and reserve the balance of my time unless Your Honor has any questions.

Oh. I'm sorry. I did want to point out one thing. In the handout I gave you on the first two pages we show this misquotation of *U.S. versus Anthem*, which on the first slide we show how they quoted it; and then on the second slide we show the full quotation and the words they excerpted, which include the words "pay directly." So it was a misquote and it was a misleading quote, I think; but that is the quotation from the case.

And then I wanted to say one more thing about *NorthShore*, which is it was not decided on the pleadings. It was decided on class certification after years of litigation, and the district court's finding was that the proposed class rep was not an adequate class rep because they lacked standing. It was not decided on the pleadings. So in addition to the fact that it's out of circuit and it wasn't subject to *In Re Beef* or any other Fifth Circuit case law, if you want to follow *NorthShore*, I would suggest the motions be denied and we can proceed to discovery and we can have this argument again in class cert.

I'll reserve the balance of my time. Thank you. Unless you have questions.

THE COURT: No, sir. Thank you.

MR. GLACKIN: You're welcome.

THE COURT: Do you have a brief reply?

MR. KLINEBERG: I do, Your Honor. Very brief.

THE COURT: Your name again for the record?

MR. KLINEBERG: I'm sorry. Geoffrey Klineberg.

The point that Mr. Glackin made about my chart and about the underlying facts of his particular clients of course is nowhere in his complaint, and so he's right. The allegations are not in the complaint; and that's the problem, because there is not a plausible allegation as to how these self-funded plans work. If he had included the details to show

that in fact the self-funded plans do pay my clients directly, then we wouldn't be here on this motion; but that's not what we have here. We have a complaint that says nothing about that. So that's the first point.

01:58PM The second point, with respect to the *In Re Beef* case, the Fifth Circuit case, is it's true the Fifth Circuit recognizes a cost-plus exception; but it is very narrow and in fact it requires that there be an allegation of a preexisting formula to the wholesale price that they pay. That's what the 01:58PM Fifth Circuit recognized. Again, there is no allegation in the complaint about any kind of preexisting formula to determine what the rates his clients are paying should be; and so, therefore, again I think this complaint is inadequate as pleaded.

01:59PM THE COURT: Counsel, I've been taking some quick notes and I've been listening to you closely. You've said they had included the details. You just said, "inadequate."

So as opposed to dismissing this, why wouldn't the appropriate remedy be to order the plaintiff to replead to 01:59PM include the details and to become more adequate to address the arguments you just made?

MR. KLINEBERG: Your Honor, that would be an option; but understand that, of course, the plaintiffs need to make a plausible allegation that this is how it works and we're not 01:59PM sure they can do that. But, you know, that is certainly

something that they could try; but I don't have any expectation that they will be able to make a plausible allegation with respect to this, but it may be true.

THE COURT: Very well, sir. Thank you.

02:00PM MR. GLACKIN: I'm sorry, Your Honor. May I briefly respond?

THE COURT: We are moving to the next motion to dismiss.

MR. YETTER: Your Honor, you are perfectly on time. It

02:00PM is 2 o'clock. Paul Yetter on behalf of the Welsh Carson defendants.

Like my esteemed colleagues, we put together a short slide deck. We exchanged it before the hearing, Your Honor.

02:00PM If I may?

THE COURT: You may, sir.

MR. YETTER: Your Honor, this motion for these defendants is, I would respectfully submit, different in certain ways, certainly certain issues than what we've just

02:01PM heard. This motion is based on critical allegations that are missing from the plaintiff's complaint and that cannot be added no matter how much more pleading and critical allegations that are made in plaintiff's complaints that both undermine the plausibility and the viability of claims that they are making

02:01PM against the Welsh Carson defendants.

If we could go, Your Honor, to the slide deck on Slide 2, fundamentally the motion that you have before you, Your Honor, on behalf of the Welsh Carson defendants rests on timeliness. This complaint raises claims against these defendants that are untimely by frankly any measure; and it rests on certain pleading allegations that are made and that are missing that, likewise, confirm that this complaint raises untimely, stale claims that even on a motion to dismiss are warranted to be dismissed.

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And as the Court well knows, this is not a stand-alone case. This is a second-filed -- what is sometimes called in these situations a tag-along complaint. It is unapologetically based on the investigation and the allegations of the government. The FTC filed its claim within just weeks before this case was filed. This case is briefed and pleaded based on certain additional allegations to hopefully, at least in the view of the plaintiffs, make it timely. Those same claims of conspiracy and single enterprise were pleaded by the government in the FTC case. Those claims are all dismissed.

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So this is the ironic situation where the subordinate complaint is asking to survive when the primary claims of the government already have failed. And we know that there's -- again, kind of a preface. We know that this complaint is subordinate and reliant on the FTC claims and investigation because the plaintiffs have told the Court that.

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The plaintiffs more than once have said, "We need to see the FTC investigation file, because we don't have those documents."

And the complaint itself pleads in Paragraph 125 that it is based on, quote, substantially the same claims as the FTC complaint.

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So for purposes of limitations, there's three issues that we believe the Court is going to focus on: One, have they made allegations that directly show, that directly assert acts by the Welsh Carson defendants within the relevant four-year time frame that could amount to antitrust violations; two, have they made allegations that would support a plausible conspiracy claim against the Welsh Carson defendants; and three, have they made allegations that would support a so-called single-enterprise claim.

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The FTC case was dismissed by Judge Hoyt. It was dismissed on a statutory ground, but it was a timeliness issue that the Court was dealing with.

If we go to Slide 3, Your Honor, this is the -- this is a slide -- essentially the same slide that we earlier -- that I earlier discussed with Judge Hoyt about the Welsh Carson defendants. They are separate defendants, distinct from each other, lawful defendants. There's no dispute about that by the plaintiffs; but what the plaintiffs do in their complaint is lump them all together as a single entity called Welsh Carson, which, as the Court well knows, is

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a form of pleading called group pleading, which is not appropriate except in very limited circumstances.

If we go to Slide 4, Your Honor, it is a brief timeline. Again, this is undisputed information. These are facts that are both verified in the FTC complaint and either directly quoted in the class complaint here or alluded to or admitted in briefing by the class plaintiffs here. This all began with an investment in 2012 by a certain fund, Fund 11 of the Welch Carson defendants. It is one of the seven. It ended up owning just over 50 percent. That percentage dropped. Fund 11 never had more than two directors out of 14. Fund 11 disposed of its entire stake in 2017, and fund 12 separately bought a minority stake in USAP.

Now, the plaintiff's complaint alleges and their briefing emphasizes that they haven't really admitted that Fund 11 divested its stake and Fund 12 bought its stake in 2017. I have full confidence, Your Honor, that these fine counsel will be forthcoming with the Court because they know what the facts are -- they're in the FTC complaint -- that it is a separate transaction. Fund 11 divested, and Fund 12 bought a new minority stake. I focus on this because Judge Hoyt in the FTC case focused on this as well, because it's significant because 2017 was six years before plaintiffs brought their class complaint and what Judge Hoyt found was that there was no action by any of the Welsh Carson defendants

that could amount to an antitrust violation within those six years ago since Fund 12 ended up with a 23 percent minority interest. Both complaints were filed in 2023.

We will go to Slide 5, Your Honor, briefly.

02:07PM I know the Court has read Judge Hoyt's opinion. It was a timing issue under Section 13(b) of the FTC Act on whether the Welsh Carson defendants -- and Judge Hoyt was looking at all of them -- together and individually, whether they were violating or are violating or are about to violate

02:07PM the antitrust laws, the laws subject to the FTC Act. Judge Hoyt found, based on a detailed pleading, that this case tracks in the FTC case that the FTC alleged no conduct by any Welsh Carson entity in the past six years that is a plausible antitrust violation.

02:08PM You know, significantly we believe, Your Honor, or we submit Judge Hoyt didn't even try to break them down. He looked at them as a whole. So even given -- even if the plaintiffs in this case were allowed to do group pleading, which we don't believe they are, Judge Hoyt actually looked at

02:08PM it as a group and found that there is no pleaded or plausible antitrust conduct -- anticompetitive conduct by any of the Welsh Carson defendants and he rejected the novel interpretation by the government to expand liability to minority investors. This, we believe, deals with the first

02:08PM piece of the limitations argument: Are there actually specific

allegations against each or any of the Welsh Carson defendants that they took action that could be a plausible antitrust violation within the last four years?

And I have to compliment my colleagues on the other side on their fine PowerPoint; but I want to point out, if Your Honor would look at the class plaintiff's PowerPoint on Slide 6, Slide 6 -- they have Slide 3, Slide 4, Slide 5, all of which they're saying deals with Welsh Carson liability -- but Slide 6 is the only slide that is actually within the statute of limitations and Slide 6 has nothing, no conduct by Welsh Carson except for going down in ownership. As I said, I'm very confident counsel for the putative class will be clear that it is Fund 11, divesting its entire stake in 2017, and Fund 12, getting this minority stake. But there's no other conduct on Slide 6, which is the entire limitations period from 2019 to 2023, which takes us to the first of two theories that plaintiff raises to try to avoid limitations dismissal. And that's on Slide 6 of our presentation, Your Honor. And this is conspiracy. The issue of conspiracy is not new to this case. It was raised by the government in the FTC case in a slightly different context on the merits; but the FTC, to be sure, claimed that Welsh Carson was liable and subject to litigation by the government in that case because it was part of a purported conspiracy. It was pleaded, it was briefed, every one of the class plaintiff's allegations in its briefing and in

its complaint and in its slide deck here on Slides 3, 4 and 5 are in -- were in the FTC complaint and many of them were briefed by the FTC and Judge Hoyt dealt with this as what the FTC called a scheme between Welsh Carson and U.S. Anesthesia Partners. It is -- it got nowhere, and we respectfully believe it should get nowhere in this Court because of a very simple concept. Under *Copperweld* there can't be an antitrust conspiracy between actors that have common economic interests; and the simple theory is an antitrust violation, and a conspiracy in particular, has to be based upon a combination that reduces competition. So a conspiracy between two entities that have the same economic interests -- in other words, they're not conspiring -- doesn't reduce competition in the marketplace.

02:11PM

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02:12PM

That is *Copperweld,* that is *American Needle*, that is the *Top Rank* case that I'd call out for you or your excellent clerk to focus on, Your Honor, because it's a motion to dismiss case and if you've pleaded it -- if you haven't -- if you've pleaded they have a common economic interest, then they cannot conspire. That's the situation here. This complaint is absolutely, unequivocally clear that these plaintiffs are alleging that Welsh Carson and U.S. Anesthesia Partners have completely aligned economic interests. Supposedly it was the Welsh Carson idea that USAP pursued. It was the Welsh Carson funding, it was the Welsh Carson

02:12PM

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assistance, it was the Welsh Carson encouragement. There's complete alignment. That's why, despite what plaintiffs say, under *American Needle* there's no need for discovery because plaintiffs have made critical allegations that discovery is not going to undo and change. That complete alignment of economic interests is pleaded, and discovery will not change that, nor will coming up with the original conspiracy, which plaintiffs raised in their briefing, which they don't plead in their complaint as a conspiracy, because those supposed original conspirators 12 years ago were simply predecessors or ended up becoming part of USAP.

And lastly the one Welsh Carson defendant whose specific role is actually defined by the plaintiffs, that's Fund 11, which owned 50.2 percent originally 12 years ago and then divested its stake entirely in 2017 can't be part of a conspiracy because it withdrew from the conspiracy in 2017 when it sold its interest.

So in summary, conspiracy doesn't work because of *Copperweld*, because of withdrawal; and a dismissal today is appropriate under the *Top Rank* case, which dealt with investors just like here.

Lastly, Your Honor, the plaintiffs raise the single-enterprise argument again, an issue that was raised by the FTC before Judge Hoyt. He didn't specifically rule on it, but the premise of his dismissal certainly -- we believe

certainly is consistent with Welsh Carson being neither in a conspiracy, nor part of a single enterprise. And the simple reason this doesn't work for plaintiffs here is that if you have a single enterprise, you still must allege specific independent, individual wrongful conduct by each of the putative members of that single enterprise and the plaintiffs have not done that here and Judge Hoyt found that there was nothing alleged against any of the Welsh Carson defendants within the last six years.

02:14PM 02:15PM

So in conclusion, Your Honor, based on limitations, we believe dismissal of the seven Welsh Carson defendants is warranted. Repleading will do no good. Discovery will certainly do no good and will do harm, at least to our clients; and we respectfully request that our motion be granted.

02:15PM

Thank you, Your Honor.

THE COURT: Counselor?

MR. GLACKIN: Thank you, Your Honor. Brendan Glackin again for the defendants. I put my binder down somewhere and now it's gone, a total rookie mistake; but I'll be fine.

02:15PM

First of all, Your Honor, I want to address a couple of things. First of all, I don't actually know offhand the precise details of the Fund 11 to Fund 12 thing; but we may not have alleged that with complete clarity in our complaint. But I'll accept for the sake of argument that what Mr. Yetter

02:16PM

is saying is correct about those two funds, because it doesn't matter.

Second, I will also stipulate that our complaint does not allege any overt acts or any anticompetitive acts by Welsh Carson during the limitations period, because we don't have information about any such acts. I don't know whether or not they happened, but I will agree they're not alleged in our complaint. So I just want to save that time.

However, I guess one other thing, though. I'm assuming that Mr. Yetter would also agree, although he alluded to Judge Hoyt and the fact the conspiracy was alleged by the FTC in that case, that Judge Hoyt didn't decide anything about conspiracy between Welsh Carson and USAP in that case because he didn't have to.

What Judge Hoyt decided -- I mean what happened in the -- what Judge Hoyt decided was essentially a mootness argument that was brought against a purely injunctive relief claim by the FTC. Judge Hoyt did not have occasion to consider damages or statute of limitation. He was looking purely at the FTC's jurisdictional ability to bring an injunctive case, and Section 13(b) provides that it can only bring that case in a situation where there is an imminent threat of harm, ongoing harm, etcetera.

THE COURT: I am going to maybe save you some time, because I do intend, at the conclusion of your response to this

motion to dismiss, to ask you about -- both sides -- details about Judge Hoyt's ruling and impact. So to the extent that you want to save that for then and move on to your response, that might save us some time.

02:17PM MR. GLACKIN: Very good, Your Honor.

Moving on, Mr. Yetter said that "Well, we didn't allege -- we were alleging a new conspiracy. We were alleging a conspiracy, you know, in 2012 and another conspiracy maybe starting after that."

02:18PM That's not right. We're alleging one conspiracy that started in 2012; and if you'll look at I believe it's Slide 3 in our presentation, we allege that in 2012 John Rizzo, who had a company called New Day Anesthesia, contacted D. Scott Mackesy, the managing partner of the firm, which is

02:18PM how Welsh Carson refers to itself, and proposed a strategy of using his New Day Anesthesia company to roll up Texas Anesthesiology, to consolidate Texas Anesthesiology. And the specific allegations about that are Paragraphs 48, 49 and 50. And then the rest follows. The rest of it was in service or a

02:19PM continuation of those events. In continuation of those events, Welsh Carson put money into New Day; Welsh Carson got commercial lenders to provide more money to New Day; Welsh Carson and New Day sat down and planned out the consolidation scheme; they turned New Day into USAP; Welsh Carson got an

02:19PM ownership stake and then they caused USAP to acquire Greater

Houston Anesthesiology in late 2012, early 2013; and they were off.

So we don't allege two conspiracies. We allege one conspiracy that started on Paragraph 48. We didn't just include those, you know, as background allegations. We're alleging one course of conduct that began when John Rizzo with New Day Anesthesia contacted D. Scott Mackesy at Welsh Carson.

Now, with respect to the allegation of conspiracy, I believe at this point that no one disputes that we've adequately alleged specific intent, overt acts and in effect done a substantial amount of commerce. My understanding is the only thing we're arguing about now is whether or not Welsh Carson and USAP are legally able to conspire under the *Copperweld* doctrine. And this has significance in this case because notwithstanding that Welsh Carson -- we don't allege any acts by Welsh Carson in the prior four years, it is hornbook law that an overt act in service of an ongoing antitrust violation restarts the running of the statute of limitations and so an overt act within the limitations period entitles the plaintiff to recover damages for any injuries that accrued within the last four years. And that is the Supreme Court's holding in *Klehr versus A.O. Smith Corporation* in 1997 when it answered this question once and for all.

It is equally hornbook law and we have -- we're actually fortunate to have really clear authority on this point

in the Fifth Circuit, which is that in the case of an antitrust conspiracy, the overt acted of one coconspirator restarts the statute as to all of them.

So if there's an antitrust conspiracy and one member of the conspiracy, whoever it is, commits any act in furtherance of the conspiracy within the limitations period, the limitations period is restarted as to all of the members of the conspiracy. And this just follows from the principal -- it's a basic principal of conspiracy law, as I know you know; but it's also a basic principle of antitrust conspiracy law, which is set out in *Texas Industries versus Radcliff Materials*, the Supreme Court's decision in which the Supreme Court again answered once and for all this question that had been out there by holding that every member of an antitrust conspiracy is jointly and severally liable for every act of every other member of the conspiracy.

THE COURT: Something I did not appreciate until your argument here now, based upon the deck slide here, specifically your Slide 3, you're taking the position that the conspiracy started in 2012 with the initial contact?

MR. GLACKIN: Well, I would say it started in 2012 when Welsh Carson and John Rizzo and New Day, which at that point were clearly separate independent centers of decisionmaking -- and we'll get to *American Needle* in a moment -- agreed to embark on a strategy of consolidating Texas Anesthesiology.

Whenever they reached that agreement in 2012 to do that thing which we allege, that was when conspiracy started.

THE COURT: So that's what I'm trying to understand. The agreement to consolidate or create this new entity, in your view, was part of the conspiracy.

MR. GLACKIN: Yes. It was the beginning of it. So --

THE COURT: I guess I'm taken aback by that because obviously every day there are, for lack of a better term, business discussions that occur, business transactions that occur; and then all of the sudden in your argument here you're putting this business discussion, this particular transaction, into the realm of a conspiracy; and so I'm just trying to wrap my understanding around how you're phrasing this.

MR. GLACKIN: You know, I really appreciate, Your Honor, what you're saying about the fact that, you know, businesspeople do business deals all the time and not every business deal is a conspiracy.

If I may reference the specific allegations of our complaint, we allege -- we're quoting documents -- quoting internal documents that the FTC obtained and alleged in its complaint. We're taking all this from the FTC, as we often do in antitrust cases. When Rizzo of New Day got in touch with Mackesy at Welsh Carson, he said he wanted to -- from our complaint -- establish a nationwide presence by pursuing, quote, an aggressive buy-and-build consolidation strategy.

And then we say in the next paragraph that Brian Regan, a junior partner at Welsh Carson -- this is Paragraph 49 -- worked with Rizzo to basically sell the rest of the partnership on this deal and the way they sold it was they said that they would pursue an anesthesiology consolidation strategy.

Quote, anesthesiology consolidation strategy.

The, quote, goal for New Day, closed quotes, would be, quote, to build a platform with national scale by consolidating practices with high market share in a few key markets.

That is a plan -- that is a plan to monopolize Texas anesthesiology, and the fact that this was their plan can also be inferred from the fact that that's exactly what they did. They didn't change their minds about what they were doing and embark on a new plan, you know, three years later or something. They said they wanted to do it, and they went out and did it. At least that's what we allege in our complaint.

Yes, I recognize not every businesses deal is a conspiracy; but this one started out with a plan to do exactly what they accomplished which was -- again a quote -- "consolidating practices with high market shares in a few key markets."

That's Paragraph 49.

02:26PM THE COURT: I guess reading, hearing that language and,

of course, what you have on Slide Deck 3, "aggressive buy-and-build consolidation," obviously they didn't use the words "We're going to engage in a conspiracy to engage in antitrust behavior"; but you're reading into what you just read to me from your complaint these intentions that they were planning to engage in a conspiracy for antitrust purposes. And so it takes the Court reading it that way to get back to the underpinning of the argument that this started in 2012?

02:26PM

MR. GLACKIN: Absolutely, Your Honor. And I'll remind everyone that this is the motion to dismiss stage; and so if that is a reasonable inference, the Court is required by the rules to draw it in our favor. I mean there is case law -- I believe we cited it in our brief -- that you can look at what they did later in inferring their specific intent when they reached that agreement. And they aren't as -- I did not hear Mr. Yetter disputing specific intent.

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02:27PM

So if it's true that these two separate actors, undisputedly separate actors, came true to form this conspiracy in 2012, then everything Mr. Yetter said about *Copperweld* is irrelevant. You don't have to find it's true. All you have to find is that we've plausibly alleged it.

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May I say a word about *Copperweld*?

THE COURT: Yes, sir.

MR. GLACKIN: I want to say one thing. Actually we explained in *Copperweld* -- it's in our briefs -- that

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Copperweld is limited to the situation where you have a parent and a wholly-owned subsidiary. It's clear in the holding of the case. The Supreme Court actually says that it's not reaching the question of a partially-owned subsidiary. So I think, you know, *Copperweld* is like *Illinois Brick*. It states the outcome in a particular case, but it doesn't state the general rule. The rule, as Mr. Yetter mentioned, is really in *American Needle*, and the thing I -- the point I want to make is that -- excuse me.

02:28PM So Mr. Yetter said, as they said in their brief, that the two key questions here are, one, were there aligned economic interests between these entities; and, two, was there no -- I believe he said and he definitely said it in their brief -- was there no competition. Did they have aligned 02:28PM economic interests and were they not competing?

And if those two things are true, then under *American Needle* he says, you know, if those things are true, they say, then *American Needle* says that these are a single enterprise and they can't conspire.

02:29PM That is exactly the opposite of what *American Needle* says. *American Needle* says that the key question is: Are these separate centers of independent decisionmaking?

That's the phrase used by the Supreme Court.

Putting aside the fact for the moment that both 02:29PM of Welsh Carson and USAP have lots of other things they do

besides this, besides monopolizing markets, this is not a question that can be decided on the pleadings. I would also point out that the Supreme Court rejected the alignment of economic interests factor. The NFL made the same argument in *American Needle*, and the Supreme Court responded.

"But illegal" -- this is at Page 198.

"But illegal restraints often are in the common interests of the parties to the restraint at the expense of those who are not parties."

So the alignment of interests is actually irrelevant and has been rejected by the Supreme Court as a basis for finding of a single enterprise.

As for the no-competition point, the *Spectators Communication* case from the Fifth Circuit that we cited in our brief stands -- I mean it explains the principle accepted in every circuit that a conspirator in an antitrust case does not need to be a market participant. Conspiracies can happen that include people beyond the constrained market, and we would allege and we do allege that that's what happened here.

On the group pleading point, I just want to say that this case is fundamentally different than the shotgun pleading cases that were mentioned by Welsh Carson in their pleadings; and I'd be happy to elaborate on that if Your Honor is curious.

THE COURT: Mr. Yetter, your brief reply?

MR. YETTER: Well, I really would rather -- I have a couple of responses, but the Court said you wanted to raise the issue of Judge Hoyt's opinion and I'd like to deal with that or if the Court has any specific questions.

02:31PM THE COURT: No. Then let's move to that.

Obviously I don't want to call it "in tandem"; but there is this other case out there that is touching on a lot of the subject matter here and one of the dangers of having cases in tandem, or parallel cases, is having two district 02:31PM judges reaching conclusions that are 180 degrees from each other. It becomes more of a problem if it's coming from the same court, which is a possibility. And so that is the spirit in which I am inquiring as to what Judge Hoyt has done and if you have an indication of what potentially may be coming down 02:32PM the pipe from Judge Hoyt such that I am governing myself accordingly, so with that being said.

MR. YETTER: Thank you, Your Honor. I would call these two cases sibling cases, but actually I think they are Siamese twins. The class plaintiffs in this case through excellent 02:32PM counsel are explicit that their case is based on the FTC complaint. Paragraph 125 says it's based on, quote, substantially the same factual allegations and they have reaffirmed that to this Court when they say, "We don't even have the FTC investigation file. All we have is the 02:33PM complaint."

And frankly that is what they -- that's what this case is based on. So this Court's concern about potentially having different outcomes based on the very same factual allegations is very legitimate.

02:33PM A couple of points. Judge Hoyt made a statutory determination under the FTC act of whether the Welsh Carson defendants are violating or are about to violate the antitrust laws. What plaintiff here is arguing, and mainly through their conspiracy count, is that the Welsh Carson defendants -- and 02:33PM they want to kind of lump everybody together -- are violating today the antitrust laws because today they are part of a conspiracy that they now allege started 12 years ago. Those allegations of conspiracy and single enterprise are in the FTC case, Your Honor. They were briefed. They were not argued as 02:34PM much on the motion to dismiss and Judge Hoyt doesn't specifically refer to them; but what Judge Hoyt does do is he -- and I know the Court has looked it over; but he basically has said -- he held "The FTC does not allege" -- this was a decision on the complaint, which includes conspiracy and the 02:34PM single-enterprise claims.

"The FTC does not allege any conduct by Welsh Carson in the past six years that is a plausible antitrust violation."

Here the putative class plaintiffs are saying 02:34PM that virtually an identical complaint does allege willing

conduct by Welsh Carson, namely participation in a conspiracy within the past six years, the past four years, in fact even today.

THE COURT: But even if FTC did not allege that, that does not mean it's is not true. They were able to pick how they pursue and prosecute in their case; and if that is something that they left out, not that they found, that they're not taking a position that it didn't happen, it's just something they were not pursuing, that would not preclude these plaintiffs from making that argument here. Those are kind of two separate things.

MR. YETTER: Certainly not, Your Honor. But they did plead them. The government did plead conspiracy and single enterprise, and they made the same allegations as the plaintiff makes here. The problem here is those allegations -- and the FTC is very clear -- and I would add parenthetically, Your Honor, the FTC has not appealed Judge Hoyt's dismissal of the Welsh Carson defendants, so that is -- presumably for the moment that's done. Here the plaintiffs have alleged, at least in their complaint, a conspiracy between the Welsh Carson defendants and U.S. Anesthesia Partners. When we raised the *Copperweld* issue -- in other words, the same economic actors having the same economic interests -- the plaintiffs pivoted and this Slide 3 that you pointed out, Your Honor, if it was somewhat of a surprise to the Court, it's because that's not

what they plead the conspiracy to be in their complaint. I'm not suggesting they should get a chance to replead and then put this in there, because even if they had pleaded this as a conspiracy -- the allegations are in there, just like they are in the FTC claim; but they're just background allegations in this complaint as well as the FTC. But the reason why they pivoted, Your Honor, is that they were -- we would respectfully submit they were looking for pre-USAP entities that they then could argue, as they have very eloquently today, fall outside of *Copperweld*.

But the problem is all of these entities eventually became USAP. So three folks. New Day Anesthesia was the old name for USAP. It eventually became USAP. So if there was a conspiracy with New Day Anesthesia on Day 1, on Day 6 when it became USAP, that *Copperweld* economic interest kicked in; and it would prevent a conspiracy.

Second, Mr. -- GHA, Greater Houston Anesthesia was the first purchase of U.S. Anesthesia Partners; so it became U.S. Anesthesia Partners. So if on Day 7 GHA was folded and merged into U.S. Anesthesia Partners, yet again *Copperweld* kicks in, same economic interests, no conspiracy.

And lastly Mr. Rizzo was simply acting, was a representative or an executive acting on behalf, according to the allegations in the complaint, of New Day Anesthesia, which became USAP.

So, Your Honor, even this original conspiracy in 2012 -- as soon as the actual acts, the mergers, took place, everybody ended up with the same economic interests, *Copperweld* prevents conspiracy and their claims don't work.

02:38PM THE COURT: In short, you can't conspire with yourself.

MR. YETTER: You cannot, Your Honor. And frankly the case law is very clear and I applaud counsel on very creative arguments; but you just can't and they're not ambiguous in their complaint about how aligned these parties are.

02:38PM Thank you, Your Honor.

THE COURT: Thank you.

Do you want to give me the opportunity to hear from counsel? This is the update re Judge Hoyt. Then that way you can address any of the comments that you heard. So, again, 02:39PM if you'd like to weigh in on behalf of USAP regarding any impact Judge Hoyt's rulings have had or should have on this Court or where you anticipate Judge Hoyt going with his case may have had an impact here.

MR. KLINEBERG: Thank you, Your Honor. 02:39PM Geoffrey Klineberg again on behalf of USAP.

So the short answer is that, as I mentioned in my remarks earlier, we respectfully disagree with the way Judge Hoyt analyzed the various portions of the antitrust cases and we would certainly urge you to take a fresh look at those; 02:39PM but we are not urging at this point that that be the focus of

our argument.

So with respect to Judge Hoyt, that case is -- I think I'm the only one here actually who is -- USAP is certainly the only one here who is in that case at the moment. It is proceeding. Discovery is underway. We are negotiating still with the FTC about the schedule. There's no occasion, I think, for Judge Hoyt to rule or to reevaluate anything in his decision on the motion to dismiss.

I will say just one thing, and that is we did seek an interlocutory appeal of Judge Hoyt's ruling.

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THE COURT: That was my next question.

MR. KLINEBERG: We were quite optimistic about that, but by the end of the day the Fifth Circuit dismissed the appeal as premature and said we can bring the arguments challenging that decision at a later point.

THE COURT: Tell me what you mean when you say -- and you've said it in such a fine way -- that you disagree with Judge Hoyt and you encourage me to look at it afresh. Does that not in invite a possibility if I disagree with the finding that Judge Hoyt made that we're now going to have that conflict that is best to avoid if possible? It doesn't mean that if I reach a different finding, I reach a different finding and it is what it is; but obviously we'd like to avoid that as a much as possible when possible.

MR. KLINEBERG: No, I understand, Your Honor; and

that's why often in cases like this the cases do get consolidated before a single judge and there are, you know, good reasons for that. Of course you're not bound by any decision by a colleague on this Court and I think we would -- we would figure out how to reconcile those two decisions as best we can.

THE COURT: And you being, again, or USAP being involved in that case, discovery is ongoing, there's nothing on the calendar right now in the next several months as you see it that would inform this Court one way or the other?

MR. KLINEBERG: That is correct, Your Honor, with one possible exception. The parties in the FTC case are talking about possibly proposing a possible revision to the schedule in front of Judge Hoyt, so to extend some of the deadlines that are currently in the Court's order; but it would not -- that's all about, you know, procedural extensions, nothing to do with the merits.

THE COURT: Thank you, sir.

MR. KLINEBERG: Thank you.

THE COURT: Counselor, your opportunity to have a last word.

MR. GLACKIN: Thank you.

So I'll start with kind of a case management question. For better or for worse, this is pretty much all I do; and this is not the first, second, third, fourth or fifth

case that I've bright where there has been a parallel government action. Sometimes those parallel government actions are brought together in an MDL; sometimes they're not. We all know the FTC's preference is not to be in the came case as
02:43PM private plaintiffs. That's why they have this rule in the -- I believe it applies to the FTC as well as the DOJ that they can't be MDL'd into the same court as the plaintiffs. I'm not sure about that actually.

But anyway, they don't want to be here because
02:43PM they think we're going to slow them down. So, you know, in the mass tort context, you know, judges across the country and in the same the courthouse frequently are called upon to decide cases that have exactly the same, you know, factual predicates. For example in the tobacco mass court litigation we had four
02:44PM judges in Florida that had -- I mean there were 2,000 cases. They had to divide the cases up among themselves; and once they had the cases, they had total control over them. It's a fact of life, I think, and so -- but that doesn't mean it's not up to -- I'm just saying I'm comfortable with it, and it's not
02:44PM anybody. I mean the best way to manage the docket is obviously up to the Court.

In terms of the way -- if in terms of whether there's conflicts on the horizon, I guess I'd say a couple of things. You know, one is the FTC's case is fundamentally
02:44PM different than ours in terms of the statutes at issue and

that's why a lot of what Judge Hoyt has done, some of it has bearing on what we do; but some of it does not. So, for example, like the question of the jurisdiction under 13(b) is totally irrelevant to us, because we're not under FTC, the FTC Act Section 13(b).

02:44PM

The other point I want to mention is that in terms of the schedule, we are way behind the FTC at this point. The discovery has been stayed and so, as has been mentioned, we don't even have the basic documents that the FTC used to allege their case and additionally we are going to have to do things that the FTC doesn't have to do, which is get a class certified and that, as you know, is its own project.

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And so I mean the way -- once we're past the pleading stage, you know, the way I would seem this unfolding is that, you know, the next major question you will be class cert, which will turn on the expert analysis and the ability to prove damages and so forth, which is totally irrelevant or, I think, not relevant to an injunction case brought by the FTC. The next thing Judge Hoyt is going to do, other than manage discovery, is going to be summary judgment motions. He'll do that a long time before -- I predict he'll get there before you do.

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And then I guess I just -- then of course they will have a bench trial and we will have a jury trial and those will be fundamentally different things.

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I also wanted to mention that so far our ability to coordinate -- although we've been stayed in discovery, our ability to coordinate has been fine in terms of keeping these actions sort of together. Obviously the FTC is moving forward when we're not. We talked to the FTC regularly. You know, we've been working out protective orders and protocols and so forth that can be married together and work well across the two cases. So to me this just feels like any other case where there's a parallel government action, and doesn't feel particularly challenging in that respect.

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THE COURT: Very well. Thank you, counsel.

MR. GLACKIN: May I address some of Mr. Yetter's argument about *Copperweld*? Do I have a minute?

THE COURT: 90 seconds.

02:47PM

MR. GLACKIN: 90 seconds.

Two things. One, if antitrust conspirators could evade liability by just further integrating their operations, that would be an crazy outcome under the antitrust laws. I can't imagine a bigger problem for antitrust enforcement if members of a cartel could solve their problems by consolidation.

02:47PM

Second -- anyway, there's no law -- this is the first time I've ever heard the argument that *Copperweld* kicks in and somehow changes the playing field. You know, once a conspiracy exists, it exists until the parties to it don't

02:47PM

exist anymore. I mean he said New Day become USAP. If there was a conspiracy between New Day and Welsh Carson and New Day became USAP, did New Day and Welsh Carson really just stop conspiring because Welsh Carson gave New Day 1 to 2 million
02:47PM dollars to fund its operation and New Day gave Welsh Carson an ownership stake? I mean that depends on this acceptance of the idea of aligned economic interests as determinative, which the Supreme Court flatly disagrees with in *American Needle*; and I didn't hear Mr. Yetter question that.

02:48PM But then I'll just point out that, you know, the Supreme Court isn't stupid. The Supreme Court thought of this problem; and in *Copperweld* the Supreme Court said this isn't a problem, right, because even if two firms do integrate in such a way that they can't agree, they remain liable as a single
02:48PM enterprise under Section 2 of the Sherman Act and we allege plenty of overt acts by both entities that satisfy the independent conduct requirement in *Lenox versus MacLaren* [sic]. The Supreme Court -- and, you know, this would be an interesting argument or maybe a determinative argument if we
02:48PM didn't have a Section 2 case, because then the whole case would rest on whether or not these two entities can agree. But if they're different entities, they can conspire and we've alleged that and I don't hear them disputing it. If they're a single enterprise, then they're liable under Section 2 for the acts of
02:49PM that enterprise and they claim in their brief to be a single

enterprise even to today and we don't allege that that ever changed.

So I don't know what the answer is as we sit here, but I know it can't be determined on the pleadings.

02:49PM THE COURT: Thank you, sir.

The Court will endeavor to try to get a ruling on these motions to dismiss and I'm saying this out loud and I realize I have a court reporter sitting over here to my left. I will endeavor to try to do that by the end of the month for 02:51PM some other reasons. I don't know if we're going to be successful now that I've said it. So at a minimum I know we're going to get it done within the next of 60 days, but I will endeavor to get to done by the end of the month for some other reasons.

02:51PM Having said that, if the motions to dismiss are denied or one is denied and one is granted, whatever the case may be, then we're going to have to reconvene to discuss the scheduling and discovery because pending these motions to dismiss, the Court stayed discovery and so with USAP being 02:51PM engaged in discovery under Judge Hoyt, obviously I would not like to see them reinvent the wheel with some of the discovery; so where some of that discovery would be applicable to this case, if we go forward, that may shorten some of the time frames that we're talking about. So perhaps I'm going to have 02:52PM Ms. Edwards reach out to you perhaps by the end of November.

We'll have a status conference; so if, in fact, the Court has denied the motions to dismiss, that would be the appropriate time to visit re scheduling discovery and that way you'll have before the end of the year some idea of moving forward.

02:52PM So those are kind of the next steps that I see. I don't think -- there's nothing else that needs to be done before addressing these motions to dismiss.

So with that being said and having taken your time, counsel, is there anything else you need to bring to my

02:53PM attention?

MR. GLACKIN: As usual, I can think of a couple of things I'd like to have said; but other than that, no, Your Honor.

THE COURT: Very well.

02:53PM Counsel, anything else you need to bring to my attention?

MR. KLINEBERG: No, Your Honor. Thank you.

THE COURT: Counsel?

MR. YETTER: No. Thank you very much, Your Honor, for

02:53PM your time.

THE COURT: Thank you, counsel, for your time. For those who have traveled here, safe travels home.

Ms. Edwards will once again, reach out with a November time frame. Again, having spoken now on the record, I

02:53PM will endeavor to be timely with a ruling on the motions to

dismiss.

Thank you. You are excused.

MR. YETTER: Thank you, Your Honor.

MR. KLINEBERG: Thank you, Your Honor.

02:53PM MR. GLACKIN: Thank you, Your Honor.

(The proceedings were adjourned.)

* * * * *

COURT REPORTER'S CERTIFICATE

I, David S. Smith, CSR, RPR, CRR, Official Court Reporter, United States District Court, Southern District of Texas, do hereby certify that the foregoing is a true and correct transcript, to the best of my ability and understanding, from the record of the proceedings in the above-entitled and numbered matter.

/s/ David S. Smith
Official Court Reporter
870/135x3/12.75x75/478.13

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