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

ELECTRICAL MEDICAL TRUST and PLUMBERS LOCAL UNION NO. 68 WELFARE FUND, Plaintiffs, v. U.S. ANESTHESIA PARTNERS, INC., WELSH, CARSON, ANDERSON & STOWE XI, L.P., et al., Defendants.	§	Civil Action No. 4:23-cv-04398

MOTION TO DISMISS OF THE WELSH CARSON ENTITIES

This case is an opportunistic and ill-founded attempt to piggyback on an improper Federal Trade Commission ("FTC") action against an investor in a physician services organization that facilitates the delivery of much needed, high-quality anesthesia services to Texas communities, including where Plaintiffs' members no doubt reside. The Complaint states no valid claims.

PRELIMINARY STATEMENT

More than a decade ago, a Welsh Carson investment fund helped finance the creation of U.S. Anesthesia Partners, Inc. ("USAP"). In the following years, USAP expanded access to quality anesthesia services across and beyond Texas. In addition to organic growth, part of USAP's approach was to attract and combine with other quality practices—a growth strategy commonly used by countless other companies in many industries. USAP's commercial success has allowed it to invest in technology, quality, and infrastructure to provide comprehensive 24/7 anesthesia services to hospitals large and small, including in underserved Texas communities. USAP provides these crucial services at prices that, adjusted for inflation, have basically stayed

flat for more than a decade.

Of course, the Complaint is silent about all of this; these facts do not fit the narrative through which Plaintiffs improperly seek to hold USAP liable for alleged price increases for anesthesia services. Worse still, Plaintiffs attempt to drag along seven Welsh Carson entities, none of which was party to, or committed any injurious acts with respect to, *any* of the transactions or agreements alleged to violate the antitrust laws. Instead, the Complaint merely confirms that since 2017—long before the putative class period starts—no Welsh Carson entity, individually or collectively, ever held more than a 23% stake in USAP or had the right to direct USAP's conduct.[1]

Critically, the Complaint fails to clear a fundamental hurdle: Plaintiffs' claims, arising from long-ago acquisitions by USAP, are barred by the four-year statute of limitations. Nearly all the supposedly wrongful USAP acquisitions are alleged to have occurred well outside of the limitations period (as early as 2012). For the few that are not, Plaintiffs fail to allege any nexus to a Welsh Carson entity. Further, Plaintiffs allege no facts to support any continuing violation by the Welsh Carson entities, nor any basis for tolling. These fundamental defects compel dismissal.

Even setting aside this fatal flaw, the Complaint (like the FTC complaint its allegations mimic) attempts to turn established antitrust and corporate law principles on their head by making undifferentiated allegations against USAP and the Welsh Carson entities as a group, without alleging facts to support any independent participation in any supposed violation by any Welsh

[1] Welsh, Carson, Anderson & Stowe XI, L.P. ("Fund XI"), WCAS Associates XI, LLC, Welsh, Carson, Anderson & Stowe XII, L.P. ("Fund XII"), WCAS Associates XII, LLC, WCAS Management Corporation, WCAS Management, L.P., and WCAS Management, LLC (the "Welsh Carson entities"). Though the Complaint refers to "Defendant Welsh, Carson, Anderson & Stowe" and, in passing, to "eight Defendants" affiliated with "Welsh Carson," the caption names only seven entities. *See* Compl. ¶¶ 17–18.

Carson entity.[2] Plaintiffs' allegations about the Welsh Carson entities boil down to the unremarkable assertion that, after a decade-old initial investment, the Welsh Carson entities exercised customary equity-holder supervision by providing advice, financial support, and oversight. This is a legally inadequate basis to impute liability to an investor. Nor can Plaintiffs carry their pleading burden based on conduct alleged to have pre-dated USAP's formation or on alleged conduct by a USAP director appointed by a Welsh Carson investor, who is legally presumed under Supreme Court precedent to act on USAP's behalf. Because the Complaint improperly ignores basic and longstanding principles of corporate law and separateness, every one of Plaintiffs' claims fails on that basis as well.

Finally, Plaintiffs' request for equitable relief in the form of restitution or disgorgement must be dismissed. Such backward-looking relief is unavailable to them as a matter of law.

In short, Plaintiffs' copycat action is untimely, ignores black-letter corporate law and basic pleading requirements, and ultimately offers no plausible basis on which to pursue claims against *any* Welsh Carson entity. The Complaint should therefore be dismissed with prejudice as against all seven Welsh Carson entities.

FACTUAL BACKGROUND

USAP is an anesthesia physician services organization formed with the goal of establishing a physician-centric organization and providing high-quality anesthesia services. Compl. ¶ 2. USAP uses a partnership model, and its many physician partners collectively hold the largest share of USAP's stock. *Id.* ¶ 19. Since its founding, USAP has been a separate legal entity with separate management and employees from the Welsh Carson entities. *Id.* ¶ 51.

One of the Welsh Carson entities, Fund XI, provided startup capital to USAP at its founding

[2] The Welsh Carson entities join in USAP's Motion to Dismiss for Plaintiffs' failure adequately to plead any primary violation of the antitrust laws by USAP.

in 2012. *Id.* ¶¶ 52, 55. Although Plaintiffs allege that six other Welsh Carson entities also "controlled or directed and invested in USAP," *id.* ¶ 17, they fail to allege any details about which entities held USAP equity or ever controlled or directed anything. Plaintiffs repeatedly refer to these seven distinct entities as "Welsh Carson" as if they were one, without regard to their separate legal identities, ownership, practical functions, or relationships to USAP. *See id.* at 1 n.1; *id.* ¶ 18.

Consistent with its initial 50.2% interest in USAP, Fund XI received typical shareholder rights, including the *right*—never alleged to have been (nor ever was) exercised—to fill a majority of USAP's board of directors. *See id*. ¶¶ 19–20. Shortly after USAP's founding in 2012, Fund XI's equity interest in USAP began declining below 50%, as equity was issued to new USAP physician partners. *See id.* ¶ 19. By 2017, USAP recapitalized. Fund XI sold its entire stake in USAP to other investors, including in part to Fund XII, which acquired a 23% interest in USAP. *See id.* Plaintiffs allege that the Welsh Carson entity currently holding an interest in USAP—which Plaintiffs fail even to identify—has the right to appoint *two* (out of fourteen) directors to the USAP board, less than its proportional equity interest in USAP. *See id.* ¶ 21. Plaintiffs allege no facts supporting the conclusion that any Welsh Carson entity had the authority to control USAP at any time since 2017.

The Complaint attempts to implicate the Welsh Carson entities in two main categories of allegedly anticompetitive conduct: (i) acquisitions of certain anesthesia practices in certain Texas geographies by USAP and (ii) alleged market allocation and price-setting agreements (in the form of billing arrangements) between USAP and certain competitors. Yet no Welsh Carson entity is alleged to have been a party to the acquisitions of anesthesia practices or signed any of the acquisition agreements at issue. *See id.* ¶¶ 60–82, 111–24, 126. And the few allegations about the Welsh Carson entities that go beyond one entity's mere equity ownership in USAP simply lump

together "USAP and Welsh Carson," without elaboration on the role of any Welsh Carson entity. *See, e.g.*, *id.* ¶¶ 3, 6, 8–9, 58, 64–65, 155.

STANDARD OF REVIEW

Claims may be dismissed under Rule 12(b)(6) "if the complaint does not contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Walker v. Beaumont Indep. Sch. Dist.*, 938 F.3d 724, 734 (5th Cir. 2019).[3] Thus, a motion to dismiss may be granted on a limitations defense "where it is evident from the pleadings that the action is time-barred, and the pleadings fail to raise some basis for tolling." *Taylor v. Bailey Tool Mfg. Co.*, 744 F.3d 944, 946 (5th Cir. 2014). Moreover, a complaint with only "labels and conclusions" or a "formulaic recitation of the elements of a cause of action" cannot survive a motion to dismiss. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Nor can a complaint survive "by stating facts merely consistent with liability." *BRFHH Shreveport, LLC v. Willis-Knighton Med. Ctr.*, 49 F.4th 520, 525 (5th Cir. 2022). "Where the well-pleaded facts of a complaint do not permit a court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not show[n]—that the pleader is entitled to relief." *Walker*, 938 F.3d at 734. Claims for relief that is unavailable as a matter of law will likewise be dismissed under Rule 12(b)(6). *See Brown v. Aetna Life Ins. Co.*, 2013 WL 3442042, at *4 (W.D. Tex. July 8, 2013).

ARGUMENT AND AUTHORITIES

I. PLAINTIFFS' CLAIMS ARE TIME-BARRED AS PLEADED.

Plaintiffs' claims fail as a threshold matter because they fall well outside the four-year statute of limitations applicable to federal antitrust claims.

[3] Unless otherwise noted, alterations, citations, and internal quotation marks in citations in this motion are omitted, and emphases are added.

A. Plaintiffs' Claims Against the Welsh Carson Entities Did Not Accrue Within the Applicable Statute of Limitations.

Antitrust claims by private plaintiffs must be "commenced within four years after the cause of action accrued." 15 U.S.C. § 15b. "Generally, a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business." *Zenith Radio Corp. v. Hazeltine Rsch., Inc.*, 401 U.S. 321, 338 (1971). Claims "must be based on some injurious act *actually occurring during the limitations period*, not merely the abatable but unabated inertial consequences of some pre-limitations action." *Poster Exch., Inc. v. Nat'l Screen Serv. Corp.*, 517 F.2d 117, 128 (5th Cir. 1975). As the Fifth Circuit has held:

> [W]here a defendant commits an act injurious to plaintiff outside the limitations period, and damages continue to result from that act within the limitations period, no new cause of action accrues for the damages occurring within the limitations period because no act committed by the defendant within that period caused them.

Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc., 677 F.2d 1045, 1053 (5th Cir. 1982). In short, current injury from prior actions is not enough.

Plaintiffs admit that they allege "substantially the same misconduct" as the FTC complaint filed against USAP and the Welsh Carson entities on September 21, 2023. Compl. ¶ 125. Plaintiffs therefore must allege that the Welsh Carson entities committed some "injurious act" on or after September 21, 2019. *See* 15 U.S.C. § 16(i). Their Complaint does not.

1. *Plaintiffs Allege No Welsh Carson Conduct Relating to Any Challenged Acquisitions Accruing Within the Limitations Period (Counts One, Two, Three, and Four).*

Despite Plaintiffs' attempt to frame their action as one covering a multi-year course of conduct by USAP and the Welsh Carson entities, Plaintiffs' claims are, at their core, challenges to transactions that occurred many years ago. As a matter of law, claims relating to each acquisition accrued on the respective dates of those acquisitions. "Generally, a Section 7 action challenging the initial acquisition of another company's stocks or assets accrues at the time of the merger or

acquisition." *Midwestern Mach. Co. v. Nw. Airlines, Inc.*, 392 F.3d 265, 269 (8th Cir. 2004); *see also Z Techs. Corp. v. Lubrizol Corp.*, 753 F.3d 594, 604 (6th Cir. 2014) ("As with the Sherman Act, a Section 7 cause of action challenging an acquisition accrues at the time of the merger or acquisition . . . .").

Nearly all the acquisitions challenged in the Complaint are alleged to have occurred well outside the limitations period, starting as early as 2012. Compl. ¶¶ 56, 60–61, 66, 69–70, 72–76, 78, 80. For the remaining acquisitions, the Complaint fails to allege any conduct by any Welsh Carson entity. This makes sense since it is undisputed that no Welsh Carson entity (singularly or collectively) has held a majority interest in USAP or had the ability to elect a majority of the board since well before 2019. Specifically, Plaintiffs challenge one USAP acquisition in early September 2019 (*id.* ¶ 81) and another in 2020 (*id.* ¶ 82), but fail to allege any actionable conduct (or, in fact, any conduct at all) by any Welsh Carson entity relating to these acquisitions. Plaintiffs attempt to connect the Welsh Carson entities to the alleged 2019 acquisition but fail to do so. They assert, for instance, that "USAP and Welsh Carson first earmarked" the acquisition target in 2013, *six years before* the alleged antitrust violation. *Id.* ¶ 81. They go on to cite an alleged statement by a Welsh Carson–affiliated USAP director at some unspecified time *before* the 2019 acquisition. *Id.* In fact, this statement is from an email (expressly incorporated by reference in the pleading) dated March 11, 2016—well outside the limitations period. And, even if it were not, the alleged statement does not rebut the presumption that the USAP director was acting in his role as such. *See infra* Section II.B.2.

These disconnected allegations do not suffice to attribute those two acquisitions to the Welsh Carson entities. The statute of limitations bars Plaintiffs' claims as against the Welsh Carson entities.

2. *Plaintiffs Have Not Plausibly Alleged a Continuing Violation Stemming from the Challenged Acquisitions*.

Plaintiffs make another perfunctory effort, in a single conclusory allegation, to claim that a "continuing impact" extends the statute of limitations as to their claims against the Welsh Carson entities, *id.* ¶ 108, but that argument fails.

"[T]he continuing conspiracy or continuing violation exception . . . permits a cause of action to accrue whenever the defendant commits an overt act in furtherance of an antitrust conspiracy or, in the absence of an antitrust conspiracy, commits an act that by its very nature is a continuing antitrust violation." *Kaiser*, 677 F.2d at 1051. But it is black-letter law that mergers themselves do not constitute a continuing violation. "Once a merger is completed, there is no continuing violation . . . that would justify extending the statute of limitations beyond four years." *Midwestern Mach. Co*., 392 F.3d at 271; *see also Z Techs.*, 753 F.3d at 598–600 (extending the same principle to merger-acquisition claims under Sherman Act); *Complete Ent. Res. LLC v. Live Nation Ent., Inc.*, 2016 WL 3457177, at *1 (C.D. Cal. May 11, 2016) (rejecting use of continuing violations doctrine as a "backdoor around the Clayton Act statute of limitations for challenging a merger"); *Reveal Chat Holdco, LLC v. Facebook, Inc.*, 471 F. Supp. 3d 981, 995 (N.D. Cal. 2020) (agreeing "that the continuing violation doctrine does not apply in the context of Section 7 claims under the Clayton Act").

The only support the Complaint offers for its conclusory assertion that Defendants' collective alleged conduct has had "a continuing impact" is the lone allegation that "each acquisition" provided "USAP additional negotiating leverage with insurers." Compl. ¶ 108. Of course, this conclusory allegation says nothing about any conduct by a Welsh Carson entity. In any event, those effects are precisely the type of "lingering effects" of alleged pre-limitations conduct that the Fifth Circuit has explicitly held are "not events that restart the statute of

limitations." *Acad. of Allergy & Asthma in Primary Care v. Quest Diagnostics, Inc.*, 998 F.3d 190, 197–98 (5th Cir. 2021) (challenged policy's implementation did not restart statute of limitations because it was "merely a delayed result of [defendants'] earlier actions"); *see also Poster Exch., Inc.*, 517 F.2d at 128 ("abatable but unabated inertial consequences" of pre-limitations conduct cannot support a claim). And for good reason: if those allegations were sufficient to establish a continuing violation, the limitations period would *never* run. "It cannot be the case that if a merger leads to monopoly power then anything anticompetitive that the newfound monopolist does is a continuing violation that began with the merger, allowing the merger to be challenged indefinitely . . . ." *Complete Ent. Res. LLC*, 2016 WL 3457177, at *1.

Plaintiffs' claims about allegedly rising rates also fail. Increased prices as a result of a merger that occurred outside the statute of limitations are insufficient to show a continuing violation. The Complaint acknowledges, as it must, that those alleged consequences flow from the challenged acquisitions. *See* Compl. ¶ 108 (alleging that the "impact of the scheme continues to be felt in every anesthesia reimbursement for which USAP receives higher rates than it would have *absent its consolidation*"). They are therefore far from "new and independent" injuries that may, under some circumstances, allow claims to accrue after the dates of the acquisitions. *See Z Techs.*, 753 F.3d at 598–600 (holding antitrust claims time-barred: "the continuing violations doctrine does not apply to price increases following a merger or acquisition").

3. *Plaintiffs Have Failed to Allege Any Agreement-Based Violation Within the Limitations Period (Counts Five and Six).*

Nor can a timely claim be established from the handful of allegations of market allocation and "price-fixing" in connection with billing arrangements Plaintiffs tack on to their claims. *See* Compl. ¶¶ 109–24, 126.

As an initial matter, for the reasons detailed below, these claims are implausible and

insufficient as a matter of law. *See infra* Section II.A.2. But even if they had properly stated a claim (they do not), they would be time-barred. Plaintiffs fail to allege any conduct by a Welsh Carson entity relating to these arrangements within the limitations period. And no continuing violation for alleged price-fixing can be established when a defendant's "involvement with [the claimed] continuing violation cannot be discerned." *TCA Bldg. Co. v. Nw. Res. Co.*, 861 F. Supp. 1366, 1377–78 (S.D. Tex. 1994) (price-fixing and conspiracy allegations time-barred where the plaintiff "points to no injurious act" by defendant, or "any active participation by [defendant] in any alleged conspiracy" within the limitations period).

Here, the allegations relating to these agreements are devoid of *any* act taken by a Welsh Carson entity. The only allegation even attempting to establish the involvement of "Welsh Carson" relates to supposed statements from Mr. Regan—a USAP director presumed to act on behalf of USAP. *See United States v. Bestfoods*, 524 U.S. 51, 69–70 (1998). Even if that qualifies as "Welsh Carson" conduct, those alleged statements are from approximately a decade ago, well outside the limitations period. Compl. ¶ 120. Otherwise, Plaintiffs assert only unspecified and undated "overt acts in furtherance of this conspiracy," *id.* ¶ 162, which are conclusory and insufficient as a matter of law. *See BRFHH Shreveport*, 49 F.4th at 525 (courts will not "accept as true conclusory allegations, unwarranted factual inferences, or legal conclusions").

Plaintiffs have not plausibly alleged any claims against the Welsh Carson entities that accrued within the applicable four-year statute of limitations. Dismissal is required.

B. Plaintiffs Plead No Facts to Support Tolling of the Statute of Limitations.

Plaintiffs have also failed to plead any facts to support tolling the statute of limitations. As the Fifth Circuit has recognized, tolling may be available where a plaintiff alleges fraudulent concealment. *See Chandler v. Phoenix Servs., L.L.C.*, 45 F.4th 807, 815 n.7 (5th Cir. 2022).

To properly plead fraudulent concealment, a plaintiff must allege facts establishing that (i)

the defendant took affirmative action to conceal the conduct complained of, and (ii) the plaintiff failed, despite exercising due diligence, to discover the facts forming the basis of its claim. *See id.* at 815. Moreover, in this Circuit, allegations of fraudulent concealment must satisfy Rule 9(b)'s particularity requirement. *See In re Pool Prod. Distrib. Mkt. Antitrust Litig.*, 940 F. Supp. 2d 367, 400 (E.D. La. 2013) (citing *Shushany v. Allwaste, Inc.,* 992 F.2d 517, 521 (5th Cir. 1993)).

Nothing in the Complaint even remotely suggests fraudulent concealment by any Welsh Carson entity, let alone offers sufficient factual detail to satisfy the strict standard of Rule 9(b). The closest the Complaint comes to hinting at fraudulent concealment is a speculative, vague, and insufficient assertion that "Pinnacle and USAP kept patients and payors in the dark" by virtue of their alleged billing agreements. Compl. ¶ 118. But there are no allegations that any Welsh Carson entity resorted to any "contrivance" or sought to conceal any of the challenged actions. Accordingly, tolling as against the Welsh Carson entities is unavailable. *See In re Pool Prod. Distrib. Mkt. Antitrust Litig.*, 940 F. Supp. 2d at 400–02.[4]

II. PLAINTIFFS FAIL TO ALLEGE FACTS SUFFICIENT TO STATE AN ANTITRUST VIOLATION BY A WELSH CARSON ENTITY.

In addition to being untimely, the Complaint suffers from myriad pleading failures.

The Complaint contains no allegations that any of the seven distinct Welsh Carson entities engaged in conduct in violation of the antitrust laws. Rather than make a meaningful effort to plead the elements of each claim as to each Welsh Carson defendant, as is required, Plaintiffs resort to improper group pleading that fails to comply with notice pleading requirements. *See Gurgunas v. Furniss*, 2016 WL 3745684, at *5 (N.D. Tex. July 13, 2016) ("group pleading" failed to meet

[4] Nor is tolling available based on unascertainable damages. The Complaint itself confirms that Plaintiffs' alleged damages were apparent long ago. *See, e.g.*, Compl. ¶¶ 61, 69, 71 (all alleging USAP increased reimbursement rates). Plaintiffs also allege Defendants' conduct caused them to pay higher prices. *Id.* ¶¶ 151, 158, 165.

Rule 8 standard because it was "impossible to ascertain which particular [d]efendant(s) [we]re supposedly responsible" for each alleged act); *Noble Cap. Tex. Real Est. Income Fund LP v. Newman*, 2023 WL 3035411, at *3 (W.D. Tex. Jan. 13, 2023), *report and rec. approved*, 2023 WL 3035399 (W.D. Tex. Feb. 22, 2023) (stating that "[g]roup pleading or shotgun pleading is disfavored . . . in the Fifth Circuit"; "claims must be more clearly—and more fairly—connected to particular defendants"); *ADR Int'l Ltd. v. Inst. for Supply Mgmt. Inc.*, 667 F. Supp. 3d 411, 421 (S.D. Tex. 2023) (dismissing claims where group pleading "fail[ed] to delineate the acts that [one member of the corporate family] specifically committed distinguished from the acts that [another member of the corporate family] committed as Rule 8 requires"). Plaintiffs do not distinguish between and among the seven Welsh Carson entities, nor between and among those entities and USAP, contrary to Rule 8.

Moreover, by basing all of their claims against the Welsh Carson entities on USAP's alleged conduct, Plaintiffs ignore established principles of corporate law that affirm distinctions between investors and the companies in which they invest. USAP is alleged to be a separate and independent corporation, with separate officers and directors, in which Fund XI was once (but is no longer) an investor and in which a different Welsh Carson entity—that the Complaint fails to identify as Fund XII—has owned a minority, non-controlling stake since 2017. Plaintiffs attempt to blur the lines between USAP and Welsh Carson because they cannot plead any facts to show the required independent conduct by any of the Welsh Carson entities. *See, e.g.*, *Lenox MacLaren Surgical Corp. v. Medtronic, Inc.*, 847 F.3d 1221, 1237 (10th Cir. 2017) (plaintiff must "come forward with evidence that each defendant independently participated in the enterprise's scheme, to justify holding that defendant liable as part of the enterprise"); *Chandler v. Phoenix Servs.*, 2020 WL 1848047, at *14 (N.D. Tex. Apr. 13, 2020) (same), *aff'd*, 45 F.4th 807 (5th Cir. 2022). The

Complaint is bereft of any facts that would allow any of USAP's or its directors' conduct to be properly attributed to any particular Welsh Carson entity, much less to *all* of the Welsh Carson entities. The claims against the Welsh Carson entities must therefore be dismissed.

A. Plaintiffs Fail to State Direct Claims Against the Welsh Carson Entities.

1. *Plaintiffs Fail to State Any Section 2 Claim Against a Welsh Carson Entity (Counts One, Three, and Four)*

Plaintiffs assert monopolization, attempted monopolization, and conspiracy claims under Section 2 of the Sherman Act against the Welsh Carson entities. None survives scrutiny under Rule 12(b)(6).

Monopolization/Attempted Monopolization. Plaintiffs' monopolization and attempted monopolization claims fail for the same reason: Plaintiffs fail to allege the required exclusionary conduct or anticompetitive action taken by any Welsh Carson entity. *See Stearns Airport Equip. Co. v. FMC Corp.*, 170 F.3d 518, 522 (5th Cir. 1999) (for monopolization claim, plaintiff must allege both monopoly power and "exclusionary conduct," which is "the creation or maintenance of monopoly by means other than the competition on the merits embodied in the *Grinnell* standard") (citing *United States v. Grinnell Corp.*, 384 U.S. 563 (1966)); *Taylor Publ'g Co. v. Jostens Inc.*, 216 F.3d 465, 474 (5th Cir. 2000) (attempted monopolization claim requires alleging that "the defendant engaged in predatory or exclusionary conduct," along with "a specific intent to monopolize" and "a dangerous probability of . . . attain[ing] monopoly power").

Plaintiffs have pled no facts sufficient to show that a Welsh Carson entity engaged in actionable exclusionary or "predatory" conduct. *See BRFHH Shreveport*, 49 F.4th at 529 (defining exclusionary conduct as "the use of monopoly power to foreclose competition, to gain a competitive advantage, or to destroy a competitor"). Plaintiffs' generic and conclusory recitation of those elements does not suffice to state a claim. *See, e.g.*, Compl. ¶ 149 ("Welsh Carson and

USAP willfully acquired [a] monopoly . . . ."). The only purportedly exclusionary or predatory conduct is the alleged conduct *of USAP* relating to certain USAP acquisitions and agreements alleged to violate the antitrust laws; there are no allegations that any Welsh Carson entity was a direct party to any of those acquisitions or agreements at any time. *See id.* ¶¶ 60–82, 111–124, 126 (alleging that "USAP acquired" or "completed the acquisition" of certain practices and that USAP entered into or maintained certain agreements alleged to violate Section 1). The Section 2 claims all suffer from this dispositive flaw. *See Rio Grande Royalty Co. v. Energy Transfer Partners, L.P.*, 786 F. Supp. 2d 1202, 1212 (S.D. Tex. 2009) (dismissing Section 2 monopolization claim for failure to allege "actionable exclusionary conduct").

The monopolization and attempted monopolization claims each also fail for additional reasons. The monopolization claim fails because the Complaint contains no factual allegation that any Welsh Carson entity was even a participant—let alone a monopolist—in any relevant market. *See Stearns Airport*, 170 F.3d at 522 (alleged monopolist must "possess[] monopoly power in the relevant market"). The Complaint alleges that *USAP*, not any Welsh Carson entity, "has monopoly power" in various geographies. *See* Compl. ¶ 148. No market can have more than one monopolist, *see Grinnell*, 384 U.S. at 571 (defining monopoly power), and "Welsh Carson"—a New York-based private equity firm, *see* Compl. ¶¶ 2, 17—cannot be a monopolist in a market in which it does not participate. The attempted monopolization claim also fails because no well-pleaded facts show that any Welsh Carson entity had the required specific intent. The most Plaintiffs can muster is an allegation—untethered to any Welsh Carson entity—that *USAP's* "goal" was to grow as a business, including through acquisitions, *see, e.g.*, *id*. ¶¶ 49, 57, an entirely unremarkable business goal that fails to bridge the gap to specific intent to monopolize. *See United States Steel Corp. v. Fortner Enters.*, 429 U.S. 610, 612 n.1 (1977) ("[I]ncreasing sales and increasing market share are

normal business goals, not forbidden by § 2 without other evidence of an intent to monopolize."); *Great Escape, Inc. v. Union City Body Co.*, 791 F.2d 532, 541 (7th Cir. 1986) ("[M]ere intention to exclude competition and to expand one's own business is not sufficient to show a specific intent to monopolize.").

Conspiracy. Plaintiffs' failure to allege specific intent is similarly fatal to their Section 2 conspiracy claim. *See Stewart Glass & Mirror, Inc. v. U.S. Auto Glass Disc. Centers, Inc.*, 200 F.3d 307, 316 (5th Cir. 2000) (plaintiff asserting Section 2 conspiracy claim must allege, among other things, "the existence of specific intent to monopolize"). Moreover, there are no allegations in the Complaint that the Welsh Carson entities were ever economic actors in any relevant market separate from their ownership of USAP. As the Supreme Court has held, a Section 2 conspiracy requires "concerted activity" between two "separate economic actors pursuing separate economic interests." *Copperweld Corp. v. Independence Tube*, 467 U.S. 752, 768–69 (1984); *see also Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 196 (2010) (concerted action inquiry is informed by "competitive reality"). The Complaint here contains no suggestion, let alone facts, to show that the Welsh Carson entities had interests that diverged from USAP's, or that the Welsh Carson entities and USAP are (or ever were) actual or potential competitors.

To the contrary, the Complaint paints a picture of aligned economic interests between the Welsh Carson entities and USAP at all times, and no competition between them. As such, the Welsh Carson entities and USAP are not "separate economic actors" capable of concerted action. *See, e.g.*, *PostX Corp. v. Secure Data in Motion, Inc.*, 2005 WL 8177634, at *4–5 (N.D. Cal. Aug. 17, 2005) (20% investor could not have conspired with the company because they had shared economic interests and were not actual or potential competitors); *Top Rank, Inc. v. Haymon*, 2015 WL 9948936, at *3, *16 (C.D. Cal. Oct. 16, 2015) (dismissing claims against investor firms that

held equity interests in and "commit[ted] funding, business expertise, and operational supervision" to portfolio company because they were incapable of conspiring under *Copperweld*).

2. *Plaintiffs Fail to State a Claim Under Section 1 of the Sherman Act Against any Welsh Carson Entity (Counts Five and Six)*

Plaintiffs allege that USAP and the Welsh Carson entities violated Section 1 of the Sherman Act, but they allege no facts that support those claims. For instance, Plaintiffs allege that defendants entered into or maintained inherited agreements to fix prices with certain USAP competitors. *See* Compl. ¶¶ 109, 111, 115, 121. But the Complaint itself acknowledges that these agreements were, in fact, billing services agreements between USAP or entities it acquired and other physician practices. *See, e.g.*, *id.* ¶¶ 112–13 (alleging Greater Houston Anesthesiology agreement with non-profit anesthesia group to retain its providers and to bill and collect for services using its provider numbers); *id.* ¶ 116 (alleging Pinnacle Anesthesia Consultants agreement with independent anesthesiology practice to staff a hospital and bill for services under its tax identification number). Nothing in the Complaint suggests that any Welsh Carson entity was party to these agreements. In fact, the Complaint fails to allege that any Welsh Carson entity even knew about most of these agreements. *See, e.g.*, *id.* ¶¶ 115–19 (alleging an agreement with Dallas Anesthesiology Associates but making no mention of any Welsh Carson entity's involvement or knowledge).

Plaintiffs further fail to allege that any Welsh Carson entity was a competitor in any relevant market. Thus, they fail to plead facts establishing that USAP and the Welsh Carson entities entered into an agreement or conspiracy "among actual competitors." *Vaughn Med. Equip. Repair Serv., L.L.C. v. Jordan Reses Supply Co.*, 2010 WL 3488244, at *16 (E.D. La. Aug. 26, 2010) ("To plead a claim of horizontal price-fixing, the plaintiff must allege facts to show the existence of an agreement or conspiracy among actual competitors . . . ."). This is a separate basis

for dismissal.

3. *Plaintiffs Fail to State a Claim Under Section 7 of the Clayton Act Against Any Welsh Carson Entity (Count Two)*

The Complaint likewise fails to allege violations of Section 7 of the Clayton Act, which prohibits a party from acquiring a target competitor where the effect "may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18. As detailed above, Plaintiffs fail to allege any acquisition by a Welsh Carson entity at all. Rather, Plaintiffs allege that *USAP* (not a Welsh Carson entity) acquired certain physician practices in certain geographies. *See, e.g.*, Compl. ¶ 60 ("USAP acquired Lake Travis Anesthesia."); *id.* ¶ 61 ("USAP acquired a division of North Houston Anesthesiology."); *id.* ¶ 74 ("USAP acquired Sundance Anesthesia."). The Section 7 claim fails for this reason alone.

B. The Welsh Carson Entities Cannot Be Liable for Alleged Violations of the Antitrust Laws by USAP.

Throughout their Complaint, Plaintiffs seek, with no basis in corporate or antitrust law, to impute liability to all seven Welsh Carson entities (without distinction) for the alleged conduct of USAP. They repeatedly claim that "Welsh Carson" collectively "controlled" or "directed" USAP. *See* Compl. ¶¶ 17, 23, 187. But such non-factual, legal conclusions are entitled to no weight on a motion to dismiss. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009) (Rule 8 "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions"); *Clark v. Thompson*, 850 Fed App'x 203, 208 (5th Cir. 2018) (dismissal is appropriate where plaintiff offers "speculation and conclusory allegations"). Their allegations are especially implausible because they identify no basis—in fact or under basic principles of corporate law—on which a minority investor could control a separate corporate entity. And Plaintiffs fail to plead facts sufficient to show that any USAP conduct (including of USAP's directors designated by those Welsh Carson entities that held investments in USAP) can be properly attributed to any particular Welsh Carson

entity, or that any Welsh Carson entity engaged in independent conduct in violation of the antitrust laws.

Instead, Plaintiffs resort to impermissible group pleading as to all defendants, both as between and among Welsh Carson entities and as between and among those entities and USAP. This renders the Complaint unintelligible as to what any given entity is alleged to have done. *See, e.g.*, Compl. ¶ 6 ("Welsh Carson and USAP successfully executed that plan"); *id.* ¶ 58 ("USAP and Welsh Carson also knew USAP had 'room to expand its footprint throughout Texas.'"); *id.* ¶ 65 ("USAP and Welsh Carson hired consulting firms . . . .").

Unable to plead independent conduct in violation of the antitrust laws by a Welsh Carson entity, Plaintiffs resort to inviting an implausible inference of unlawful conduct from alleged facts that pre-date USAP's formation in 2012 or relate to the conduct of a USAP director affiliated with the Welsh Carson entities who, under Supreme Court precedent, is presumed to be acting on behalf of USAP (and not on behalf of the Welsh Carson entities). Plaintiffs allege the provision of start-up capital and evaluation of a strategy proposal leading up to USAP's formation in 2012, but no fact in the Complaint establishes why or how such pre-formation funding and strategy formulation was in any way improper, let alone unlawful. And the conduct Plaintiffs allege of the USAP director (who is presumed to be acting on behalf of USAP) is fully consistent with standard corporate governance norms and likewise fails to support any claim. Fundamental principles of corporate law therefore dictate that Plaintiffs' claims must be dismissed.

1. *The Welsh Carson Entities' Alleged Activities Incidental to Their Investments Do Not Constitute Independent Conduct.*

The Supreme Court has long held that "[i]t is a general principle of corporate law that a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries." *Bestfoods*, 524 U.S. at 52; *see also Bridas S.A.P.I.C.*

v. Gov't of Turkmenistan, 447 F.3d 411, 416 (5th Cir. 2006) (same); *SSP Partners v. Gladstrong Invs. Corp.*, 275 S.W.3d 444, 455 (Tex. 2008) ("We have never held corporations liable for each other's obligations merely because of centralized control, mutual purposes, and shared finances."); *Valdez v. Cap. Mgmt. Servs., LP*, 2010 WL 4643272, at *6–9 (S.D. Tex. 2010) (declining to disregard corporate form where entities were alleged to have acted as agents and assigns for each other). Courts respect the corporate form because "limited liability remains the norm in American corporate law." *United States v. Jon-T Chems., Inc.*, 768 F.2d 686, 691 (5th Cir. 1985).

Consistent with this principle, an entity cannot be liable for violations of the antitrust laws unless it participated in those violations through some "independent conduct." *See, e.g.*, *Chandler*, 2020 WL 1848047, at *14 ("[A] plaintiff is . . . required to come forward with evidence that each defendant independently participated in the enterprise's scheme, to justify holding that defendant liable as part of the enterprise."); *In re Penn. Title Ins. Antitrust Litig.*, 648 F. Supp. 2d 663, 688 (E.D. Pa. 2009) ("[T]o state a claim against parent corporations, plaintiffs must set forth facts establishing the parent corporations' direct and independent participation in the alleged conspiracy."); *In re LIBOR-Based Financial Instruments Antitrust Litig.*, 2019 WL 1331830, at *38 (S.D.N.Y. Mar. 25, 2019) (dismissing claims where complaint did not allow an "inference that [defendants'] subsidiaries and affiliates independently participated in [the alleged misconduct]" or "actually played a role in the scheme"). Conduct "typical of any parent and subsidiary" is insufficient to make that showing. *In re Penn. Title Ins. Antitrust Litig.*, 648 F. Supp. 2d at 689; *see also Masimo Corp. v. Wireless*, 2020 WL 7260660, at *16 (S.D. Cal. Dec. 10, 2020) (liability only attaches to a parent where its authority over a subsidiary is "so extensive that the subsidiary becomes only a means through which the parent acts, or nothing more than an incorporated department of the parent").

Plaintiffs fail to allege facts showing that any Welsh Carson entity independently participated in any unlawful conduct. The Complaint alleges nothing more than the "typical" relationship between an investor and its portfolio or subsidiary company. *See, e.g.*, Compl. ¶ 23 (Welsh Carson "supervis[ed] [USAP's] day-to-day operations, including corporate finances, securing financing from lenders or Welsh Carson funds, identifying targets, conducting due diligence . . . , and determining USAP's overall strategy"); *id.* ¶ 51 (Welsh Carson helped recruit certain of USAP's executives); *id.* ¶¶ 54–55 (Fund XI provided financing and secured third-party financing for USAP). These allegations of basic equity-holder rights and assistance are typical of, and incidental to, the holdings by certain Welsh Carson entities in USAP. Such allegations are insufficient to show independent participation in unlawful conduct. *See, e.g.*, *In re Pressure Sensitive Labelstock Antitrust Litig.*, 566 F. Supp. 2d 363, 376 (M.D. Pa. 2008) (allegation that parent regarded wholly-owned subsidiary as a "valuable asset" because an alleged anticompetitive agreement allowed it to maintain supracompetitive prices did not support an inference that parent was party to such agreement); *Arnold Chevrolet LLC v. Trib. Co.*, 418 F. Supp. 2d 172, 178 (E.D.N.Y. 2006) (dismissing claims against parent where plaintiff failed to "delineate [parent's] role in any alleged anticompetitive conduct").

Nor can independent conduct be established based on control of USAP by any Welsh Carson entity. The Complaint contains no assertion that any Welsh Carson entity has the legal authority to control USAP under Delaware law, USAP's organizational documents, or any operative agreement. And it affirmatively admits that the Welsh Carson entities have held a minority share for most of USAP's existence and for the last six years. Compl. ¶ 19. This confirms that the Welsh Carson entities had no control. *See In re Penn. Title Ins. Antitrust Litig.*, 648 F. Supp. 2d at 688 (respecting the legal distinction between a parent and its wholly-owned subsidiary;

rejecting plaintiffs' argument that they had pleaded independent participation where parent entities gave "assent and approval to their respective [wholly-owned] subsidiaries' conduct" and "had ownership and control of their respective subsidiaries"); *Invamed, Inc. v. Barr Lab'ys, Inc.*, 22 F. Supp. 2d 210, 218–19 (S.D.N.Y. 1998) (allegation that affiliate entities had "ownership and control" of subsidiary did not suffice where no independent conduct was alleged); *Gemco Latinoamerica, Inc. v. Seiko Time Corp.*, 685 F. Supp. 400, 403 (S.D.N.Y. 1988) (dismissing claims against parent entities; "in the absence of a basis for piercing the corporate veil, the parent or grandparent may be held liable only if shown to have acted independently").

2. *None of Plaintiffs' Remaining Allegations Properly Pleads Independent Conduct by the Welsh Carson Entities.*

Pre-USAP Formation Conduct. Plaintiffs' allegations that a Welsh Carson entity provided start-up capital and strategy proposals leading up to USAP's formation in 2012, Compl. ¶ 55, do not come close to forming a basis for liability. There is no allegation that there was anything improper, let alone unlawful, about such pre-formation funding and strategizing. Rather, Plaintiffs suggest that this pre-formation conduct resulted in *USAP* (not the Welsh Carson entities) eventually making a series of acquisition and management decisions purportedly consistent with that strategy over the course of the next decade. Such allegations of purportedly unlawful conduct focus exclusively on USAP, not on a Welsh Carson entity. *See, e.g.*, *id.* ¶ 6 ("USAP acquired sixteen anesthesia groups."); *id.* ¶ 8 ("After each acquisition, USAP has raised the target's prices to [] higher reimbursement rate and continued to increase prices."); *id.* at 51 ("USAP also agreed to fix prices with at least three groups."); *id.* at 57 ("USAP also agreed to allocate a market."). Plaintiffs' theory thus appears to be that the Welsh Carson entities can be held liable for an *idea* that USAP allegedly put into practice at some later time. That is no basis for a claim.

USAP Director Conduct. The bulk of Plaintiffs' allegations regarding "Welsh Carson"

conduct concern the alleged conduct of a USAP director, Mr. Regan, who is affiliated with Welsh Carson. These allegations cannot establish the independent conduct of any Welsh Carson entity. The Supreme Court has stated that it is a "well established principle of corporate law that directors and officers holding positions with a parent and its subsidiary can and do 'change hats' to represent the two corporations separately . . . ." *Bestfoods*, 524 U.S. at 69. Directors are presumed to act on behalf of the company on whose board they sit when involved in company business:

> Since courts generally presume that the directors are wearing their subsidiary hats and not their parent hats when acting for the subsidiary, it cannot be enough to establish liability here that dual officers and directors made policy decisions and supervised activities at the facility.

Id. at 69–70; *see also Weinberger v. UOP, Inc.*, 457 A.2d 701, 710 (Del. 1983) (under Delaware law, designated directors owe the company on whose board they sit "uncompromising" fiduciary duties, and "[t]here is no dilution of this obligation where one holds dual or multiple directorships"). Dual-hatted directors must "depart so far from the norms of parental influence exercised through dual officeholding as to serve the parent, even when ostensibly acting on behalf of the subsidiary." *Bestfoods*, 524 U.S. at 71.

A USAP director is therefore presumed to act on behalf of USAP despite any Welsh Carson affiliation. Plaintiffs plead no facts to rebut this presumption, which is their burden to meet. *See Bestfoods*, 524 U.S. at 70 & n.13 (plaintiff bears the burden of "show[ing] that dual officers or directors were in fact acting on behalf of the parent"); *see also In re Alper Holdings USA, Inc.*, 398 B.R. 736, 752–54 (S.D.N.Y. 2008) (parent not liable for subsidiary's conduct absent specific actions by subsidiary for the benefit of parent but *not* subsidiary); *Trinity Indus., Inc. v. Greenlease Holding Co.*, 2014 WL 1766083, at *11 (W.D. Pa. May 2, 2014) (plaintiff failed to rebut presumption that dual officers/directors acted on behalf of subsidiary where it identified no evidence that dual officers/directors acted "in any way that was plainly contrary to the interests of

[the subsidiary] yet nonetheless advantageous to [the parent]"), *aff'd*, 903 F.3d 333 (3d Cir. 2018).

The best Plaintiffs can muster is the conclusory allegation that a USAP director signed certain letters of intent in connection with two USAP transactions financed by a Welsh Carson entity. *See* Compl. ¶¶ 52, 66. But the Complaint itself alleges that the Welsh Carson entity signed those letters of intent as a financing source, and not a party to the acquisition, no different from a bank financing a transaction. *See id.* And those limited allegations in no way establish that any other action taken by a USAP director was on behalf of any Welsh Carson entity, because "directors . . . holding positions with a parent and its subsidiary can and do 'change hats' to represent the two corporations separately." *Bestfoods*, 524 U.S. at 69. There are no allegations that Mr. Regan or any USAP director acted against USAP's best interests to the benefit of any Welsh Carson entity. Thus, the Complaint does not come close to showing that any USAP director departed "so far from the norms" as to rebut the *Bestfoods* presumption. *See id.* at 71.

III. PLAINTIFFS ARE NOT ENTITLED TO RESTITUTION OR DISGORGEMENT AS A MATTER OF LAW.

Finally, the Court should dismiss Plaintiffs' claims for restitution and the disgorgement of profits. *See* Compl. at 70. These backward-looking, equitable remedies are unavailable here as a matter of law. *See F.T.C. v. Mylan Labs., Inc.*, 62 F. Supp. 2d 25, 42 (D.D.C. 1999) (granting motion to dismiss "insofar as the States seek disgorgement and/or restitution under § 16").

Private plaintiffs (like Plaintiffs here) may pursue treble damages under Section 4 of the Clayton Act and *prospective* "injunctive relief" under Section 16 of the Clayton Act. *See In re Generic Pharms. Pricing Antitrust Litig.*, 605 F. Supp. 3d. 672, 677 (E.D. Pa. 2022) ("disgorgement, a backward-looking form of relief, does not fall under the term 'injunctive relief' as it is used in § 16 of the Clayton Act"); *Coalition for ICANN Transparency Inc. v. VeriSign, Inc.*, 771 F. Supp. 2d 1195, 1202 (C.D. Cal. 2011) (rejecting Section 16 claim because "[d]isgorgement

is a form of *retrospective* equitable relief").

But it is well established that restitution and disgorgement are backward-looking remedies that do not redress ongoing or future harms. *See, e.g.*, *In re Generic Pharms. Pricing Antitrust Litig.*, 605 F. Supp. at 677 (observing a "distinction between forward-looking equitable remedies (such as divestiture), which are permitted under § 16, and backward-looking remedies (such as restitution or disgorgement), which are not"); *cf. AMG Cap. Mgmt., LLC v. Fed. Trade Comm'n*, 593 U.S. 67, 76 (2021) (Section 13(b) of FTC Act does not allow FTC to seek restitution or disgorgement; the language and structure of Section 13(b) "focuses upon relief that is prospective, not retrospective"). Plaintiffs' claim for restitution and disgorgement therefore must be dismissed.

CONCLUSION

For these reasons, the Welsh Carson entities respectfully request that all claims against them be dismissed with prejudice.

Dated: February 20, 2024

Respectfully submitted,

By: */s/ R. Paul Yetter*

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CERTIFICATE OF CONFERENCE

I, the undersigned, hereby certify that counsel for the Welsh Carson entities conferred with counsel for Plaintiffs regarding the substance of the relief requested. Counsel for Plaintiffs indicated that Plaintiffs oppose this motion.

/s/ R. Paul Yetter
R. Paul Yetter

CERTIFICATE OF SERVICE

I certify that on February 20, 2024, the foregoing was electronically served on all counsel of record via the Court's CM/ECF system.

/s/ R. Paul Yetter
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