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., WCAS ASSOCIATES XI, LLC, WELSH, CARSON, ANDERSON & STOWE XII, L.P., WCAS ASSOCIATES XII, LLC, WCAS MANAGEMENT CORPORATION, WCAS MANAGEMENT, L.P., and WCAS MANAGEMENT, LLC,

Defendants.

Civil Case No. 4:23-cv-04398

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS THE COMPLAINT

Hon. Alfred H. Bennett

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INTRODUCTION

This case challenges the exact conduct Congress enacted the anti*trust* laws to prohibit—consolidating competitors, by any means, to form a *trust* or monopoly. Here, two entities, New York-based private equity firm Welsh, Carson, Anderson & Stowe (composed of multiple related companies under common control, together, "**Welsh Carson**") and the entity it formed—U.S. Anesthesia Partners, Inc. ("**USAP**"), successfully conspired to consolidate over half of all hospital-only anesthesia services reimbursed by commercial payors in Texas. Compl. ¶¶ 1-2, 6, 17. Defendants surpassed the halfway mark by acquiring Star Anesthesia in 2019 and Guardian Anesthesia Services in 2020. *Id.* ¶¶ 78-82. Together with John Rizzo (a former executive at a large national anesthesia group and later USAP), Welsh Carson partners D. Scott Mackesy and Brian Regan designed this "aggressive 'buy and build' consolidation strategy" to "cover every major hospital in the market" and "drive profitability," i.e., increase prices. *See id.* ¶¶ 48-49, 57. Defendants accordingly targeted practices with exclusive hospital contracts so that, as one Welsh Carson analyst explained, "if a payor refuses to give us the pricing that we're looking for, then the threat of us going out-of-network would be more painful on the payor than it would be on us." *Id.* ¶ 57. By 2020, they wielded USAP's market share and hospital coverage to charge Texas payors like plaintiffs supracompetitive prices that were nearly 40% more expensive than the average cost of all other anesthesia providers in Texas. *Id.* ¶ 83.

In Section I of the Argument, plaintiffs explain that accepting USAP's antitrust standing argument would require the Court to overturn Supreme Court precedent and re-write the complaint: Plaintiffs have standing as direct purchasers because they—and only they—paid USAP for anesthesia services it provided to their members. Sections II and III describe how USAP disregards well-pled facts laying out the relevant product market and USAP's market

power. Instead, it asks this Court to choose its misapprehensions over plaintiffs' allegations. In Section IV, plaintiffs unravel USAP's bold assertion that acquisitions creating a monopoly do not violate Section 2 of the Sherman Act—a claim refuted by more than a century of antitrust jurisprudence. Section V rebuts USAP's request that this Court bestow immunity from the antitrust laws based on a healthcare statute that only addresses a single billing practice.

Welsh Carson, for its part, seeks exemption based on two contradictory positions that require the Court to draw *opposite* inferences depending on its tactic of the moment. On the one hand, it claims it formed a single enterprise with USAP "at all times" and thus could not conspire as a matter of law. On the other hand, it claims *not* to be part of that single enterprise for statute of limitations purposes; but, rather, a separate entity that has done nothing wrong in the last four years. Sections VI.A and VI.B explain that the Court cannot resolve the factual questions of whether Welsh Carson conspired with USAP or formed a single enterprise on the pleadings. What *can* be resolved is that plaintiffs have sufficiently pled both that Welsh Carson conspired to monopolize Texas hospital-based anesthesiology markets and that, in addition and in the alternative, it formed a single enterprise with USAP to that end. Section VI.C continues that Welsh Carson's statute of limitations defense also cannot be resolved on the pleadings because plaintiffs do not allege (nor does Welsh Carson even suggest) that it ever withdrew from either of these arrangements. Section VI.D addresses how Welsh Carson's arguments against Section 7 liability run squarely into case law interpreting the Clayton Act. Lastly, plaintiffs argue in Section VII that, contrary to defendants' assertions, the complaint states price-fixing claims. Defendants' motions must be denied.

BACKGROUND

Step One: Welsh Carson Formed USAP to Create a Monopoly. In 2012, former anesthesia group executive John Rizzo approached D. Scott Mackesy—a partner at the New

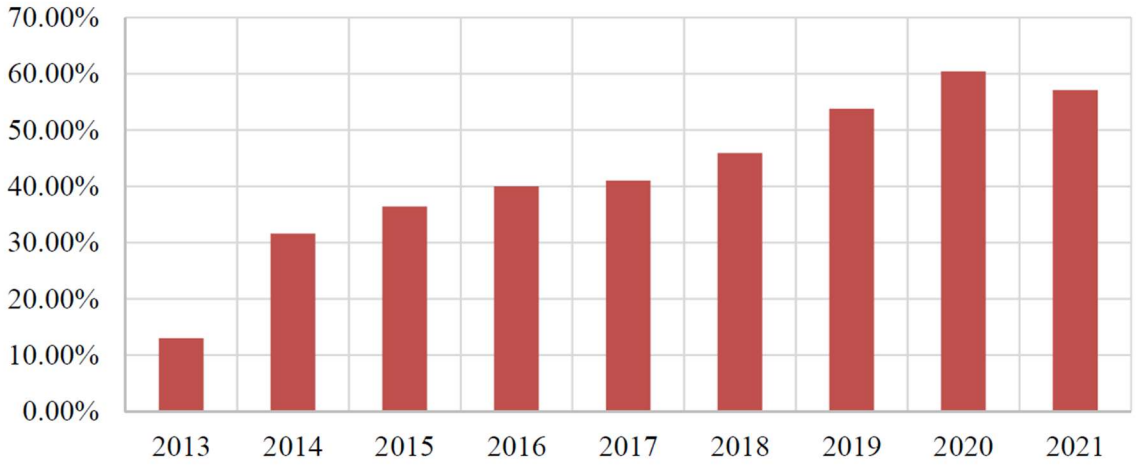
York private equity firm Welsh Carson—with a new investment idea. *Id.* ¶ 48. Rizzo proposed a self-described "aggressive 'buy and build' consolidation strategy" of the Texas hospital-only anesthesia services market. *Id.* Under that scheme, Welsh Carson would invest "$1-$2 million" into Rizzo's "New Day Anesthesia" company, which would "consolidat[e] [anesthesia] practices with high market share in a few key [Texas] markets." *Id.* ¶¶ 48-50. Rizzo and Welsh Carson explicitly set out to amass "negotiating leverage with commercial payers" so the firm could "raise prices" across the state well above competitive levels. *Id.* ¶ 49. Welsh Carson partner Brian Regan served as Rizzo's champion; Regan convinced Welsh Carson to invest in New Day, and ultimately to embark on a program of monopolization in Texas. *Id.* ¶¶ 49-50. Regan subsequently identified targets, conducted due diligence, and helped obtain financing to form USAP and make its first acquisition: Greater Houston Anesthesiology ("GHA"). *Id.* ¶¶ 52-56.

At the outset, Welsh Carson ensured its influence over USAP. *Id.* ¶¶ 19-22. Welsh Carson obtained a majority of USAP's shares, allowing it to make key appointments, including CEO, CFO, COO, and head of HR. *Id.* Welsh Carson's majority status also gave it the right to appoint a majority of USAP's board of directors, which Welsh Carson used to install Brian Regan. *Id.* ¶ 21. Each appointee was affiliated with Welsh Carson. *Id.* ¶¶ 21-22, 51. Through these critical appointments, Welsh Carson controlled USAP's "day-to-day operations." *Id.* ¶ 23.

Step Two: At Welsh Carson's Direction, USAP Consolidated Texas. Over the next seven years, USAP acquired fifteen anesthesia practices across Texas. *Id.* ¶¶ 60-61, 66, 69-70, 72-76, 78, 80-82. USAP and Welsh Carson specifically targeted practices that had exclusive contracts with major hospitals, effectively forcing patients and their insurers to use (and pay) USAP anesthesiologists when receiving medical care at those hospitals. *Id.* ¶¶ 65, 69, 70, 72, 74-76, 78, 80-82. Figure 1 shows USAP's market share growth in Texas, which surpassed 50%

in 2019 and reached an apex in 2020.

Figure 1: USAP Statewide Market Share
(By Revenue)



Defendants also consolidated control of hospital-based anesthesiology in individual major metropolitan areas within Texas. By 2021, USAP had 73% of these services across Dallas, Houston, and Austin (the "three-MSA market"), consisting of nearly 70% of the Dallas and Houston markets, and more than 50% of the Austin market. *Id.* ¶¶ 85, 88, fig.4.

USAP and Welsh Carson exploited the unique nature of healthcare markets, in which patients and their physicians make the decisions about care, but insurers and self-insured funds mostly foot the bill. *Id.* ¶ 33. Naturally, patients see doctors near where they live. Private payors, however, must build a network by negotiating rates with medical groups, hospitals, and large provider systems. *Id.* ¶ 31. In order to be commercially viable, an insurer's network must be geographically broad and cover all possible aspects of patient care. *Id.* ¶ 34. An insurer must have access to large numbers of providers in a particular market if it wants to offer a network that covers that market. Put bluntly, an insurer that cannot access half the hospital-based anesthesiologists in Texas simply does not have a product at all. By consolidating multiple geographies, USAP therefore "benefit[ed] from a multiplier effect in negotiations with insurers."

Id. In the words of a major Texas insurance executive, "[e]very time [USAP] folded in a geographic region or every time that they grew, it just strengthened their ability to raise rates and leverage at the negotiating table." *Id.* ¶ 7. As one Welsh Carson analyst explained, "if a payor refuses to give us the pricing that we're looking for, then the threat of us going out-of-network would be more painful on the payor than it would be on us." *Id.* at ¶ 57.

USAP and Welsh Carson transformed their growing market share and foothold in multiple geographies across Texas into greater and greater profits. After each acquisition, USAP raised reimbursement rates above competitive levels. *Id.* ¶¶ 61, 67, 69, 71-75, 77, 79, 80-82. By 2020, USAP charged rates nearly 40% more than the average cost of all other anesthesia providers in Texas. *Id.* ¶ 41. Overcharges in Houston were even higher—by 2021, USAP imposed rates double those of other anesthesiology groups in that area. *Id.* ¶ 77.

Unfortunately, improved quality does not explain USAP's skyrocketing reimbursement rates. A flurry of malpractice cases against USAP suggest that USAP and Welsh Carson in fact *sacrificed* quality on the altar of profit. *Id.* ¶¶ 102-05. At best, the healthcare industry believes USAP's "quality performance is not meaningfully better than their peers." *Id.* ¶ 83.

Unsatisfied with raising their own rates across the state of Texas, USAP and Welsh Carson had one more trick up their sleeve: USAP entered into and maintained price-fixing agreements with three competitors and attempted to enter into similar agreements with two more. *Id.* ¶¶ 111, 114-15, 117, 120-24. Welsh Carson's own Brian Regan proposed at least one of these contracts. *Id.* ¶¶ 120-22. Under those contracts, USAP sets the rates at which its competitors bill patients, guaranteeing they will not undercut USAP's own rates and cementing market power. *Id.*

Step Three: Reaping. Welsh Carson's consolidation scheme succeeded—the New

York private equity fund has exported nearly $435 million in dividends alone from USAP to its Lexington Avenue headquarters. *Id.* ¶ 24. What is more, in 2017, Welsh Carson partly cashed out, selling some of its equity in USAP to Berkshire Partners and GIC Capital for an undisclosed sum. *Id.* ¶ 107. Welsh Carson, however, chose to continue to profit from the monopoly it created in Texas by retaining a 23% ownership stake in USAP. These profits come straight from the pockets of Texas healthcare payors, including self-funded plans like plaintiffs. *Id.* ¶¶ 99-108, 151, 158, 165, 174, 180, 189.

Welsh Carson and USAP are finally facing the music. In September 2023, the Federal Trade Commission filed a lawsuit challenging USAP and Welsh Carson's monopoly in Texas. *Id.* ¶ 125. That lawsuit, however, only seeks injunctive relief. *Id.* Plaintiffs' lawsuit is the only means by which Texans can hold USAP and Welsh Carson responsible for their actions *and* be compensated for their injuries. Tellingly, after plaintiffs filed, USAP settled with the Colorado Attorney General for engaging in the same consolidation scheme there. Colo. Att'y Gen., *Private equity-run U.S. Anesthesia Partners to end Colorado health care monopoly under agreement with Attorney General Phil Weiser* (Feb. 27, 2024), https://coag.gov/press-releases/usap-health-care-monopoly-attorney-general-phil-weiser-2-27-2024/.

LEGAL STANDARD

On a motion to dismiss, defendants may only challenge the "formal sufficiency of the statement of the claim for relief," not disputed facts or a lawsuit's merits. *Sewell v. Monroe City Sch. Bd.*, 974 F.3d 577, 581-82 (5th Cir. 2020). The complaint survives so long as it "contain[s] sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'" *Id.* at 582 (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "The issue 'is not whether a plaintiff will ultimately prevail but whether he is entitled to offer evidence to support his claims.'" *Sewell*, 974 F.3d at 582. (citation omitted). Thus, courts must "assume that the facts the complaint

alleges are true and view those facts in the light most favorable to the plaintiff." *Id*. Dismissal is only proper if defendants "show that, even in the plaintiff's best-case scenario, the complaint does not state a plausible case for relief." *Id.* at 581. The Federal Rules do not impose a heightened pleading standard in antitrust cases. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

ARGUMENT

I. Plaintiffs Have Antitrust Standing.

A. Plaintiffs Are Direct Purchasers.

USAP first attempts to invoke the *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), indirect purchaser rule to deny plaintiffs standing. However, while Supreme Court jurisprudence bars most indirect purchasers from antitrust standing, it explicitly "authorizes" claims by *direct* purchasers, the status that plaintiffs allege here. *Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1520 (2019). The complaint pleads that "[b]ecause of Welsh Carson and USAP's consolidation scheme and agreements with competitors, Plaintiffs [] have paid artificially inflated reimbursement rates." Compl. ¶ 10. Further, it alleges that plaintiffs "self-fund[] their members' health insurance," "directly reimburse[] healthcare providers who treat [their] members," and "pa[y] USAP for hospital anesthesia services provided to [their] plan participants." *Id.* ¶¶ 114-15. USAP's own authority, *United States v. Anthem, Inc.*, explains that self-insured plans like plaintiffs pay providers *directly*:

> In self-insured plans, the employer takes on the risk of the medical costs itself. It pays the insurer an ASO fee in return for both access to the provider network and claims administration and adjudication services. But the employer ***pays the healthcare costs directly***, usually by funding a bank account from which the insurer pays the claims as they are submitted by the providers.

236 F. Supp. 3d 171, 189 (D.D.C. 2017) (emphasis added), *aff'd*, 855 F.3d 345 (D.C. Cir. 2017). USAP cites and quotes this very passage of *Anthem*, USAP Mot. at 9, but omits the explanation

that self-funded plans like plaintiffs "***pay healthcare costs directly***."

Thus, unsurprisingly, courts have found that self-insured entities have antitrust standing at the pleadings stage. The *City of Miami v. Eli Lilly & Co.* court, for example, observed that the allegation that plaintiff paid drug manufacturer defendants "is not necessarily inconsistent with [the] allegation that it also contracts with insurance companies." No. 21-22636-Civ-Scola, 2022 WL 198028, at *4 (S.D. Fla. Jan. 21, 2022). Likewise, the *City of Pontiac v. Blue Cross Blue Shield of Michigan* court found the plaintiff "sufficiently alleged that as a self-insured municipality, it is a direct purchaser." No. 11-10276, 2012 WL 1079885, at *7 (E.D. Mich. Mar. 30, 2012).

B. *Illinois Brick* Does Not Bar Plaintiffs.

The self-funded plans here most certainly are *not* indirect purchasers. The Supreme Court in *Illinois Brick* ruled:

> *[I]ndirect* purchasers who are two or more steps removed from the violator in a distribution chain may not sue. . . . 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 is an antitrust violator. And C may sue B if B is an antitrust violator. That is the straightforward rule of *Illinois Brick*.

Pepper, 139 S. Ct. at 1520-21 (citing *Loeb Indus., Inc. v. Sumitomo Corp.*, 306 F.3d 469, 481-82 (7th Cir. 2002)). Because an indirect purchaser's injury is derivative of the initial injury to the re-selling middleman, such claims raise complex issues of proof of damages and apportionment. *Illinois Brick*, 431 U.S. at 737. Thus, USAP's indirect purchaser cases involve plaintiffs who bought from a middleman who bought from the defendant. *Sharif Pharm., Inc. v. Prime Therapeutics, LLC*, 950 F.3d 911, 915 (7th Cir. 2020) (plaintiffs bought from excluded pharmacy); *Warren Gen. Hosp. v. Amgen Inc.*, 643 F.3d 77, 88 (3d Cir. 2011) (plaintiff bought from wholesaler that purchased from manufacturer defendant); *Hughes v. Tobacco Inst., Inc.*, 278 F.3d 417, 423 (5th Cir. 2001) (plaintiffs bought from retailers, not defendant manufacturers);

In re Xyrem (Sodium Oxybate) Antitrust Litig., 555 F. Supp. 3d 829, 881 (N.D. Cal. 2021) (plaintiffs bought from pharmacy, not defendant). And, the *In re Surescripts Antitrust Litigation* plaintiffs did not allege whom they paid. No. 1:19-CV-06627, 2020 WL 4905692, at *6 (N.D. Ill. Aug. 19, 2020). These cases demonstrate that the indirect purchaser rule does not apply because plaintiffs do not have a "derivative" injury: They did not buy anesthesiology that was bought by another and then marked-up and re-sold to them down the distribution chain.

***Illinois Brick* Did Not Create a Privity Requirement.** USAP's chief case, *In re NorthShore University HealthSystem Antitrust Litigation ("NorthShore")*, No. 07-CV-4446, 2018 WL 2383098 (N.D. Ill. Mar. 31, 2018), is an outlier and was never appealed. In *NorthShore*, the court held that a self-funded plan did not qualify as an adequate class representative because it did not stand in contractual privity with the defendant. USAP quotes *NorthShore* for the proposition that the only "relevant consideration in the *Illinois Brick* analysis [] is which entity negotiated and maintained the contract with the healthcare provider." USAP Mot. 10 (quoting *NorthShore*, 2018 WL 2383098, at *8). Under this thinking, regardless of who suffers the injury and how it is suffered, the absence of a contractual relationship between a plaintiff and defendant dooms any case.

Unfortunately for USAP, *NorthShore* runs squarely into contrary Supreme Court and Circuit court authority. The Supreme Court itself has rejected a "privity" requirement in exactly the context of health insurance markets: In *Blue Shield of Virginia v. McCready*, the Supreme Court held that an employee had antitrust standing to bring claims against her health insurance company, even though not she, but her employer, contracted with the insurer. 457 U.S. 465, 472 (1982). And *Apple Inc. v. Pepper* confirms that who negotiates the price doesn't matter—contrary to *NorthShore*'s "only relevant consideration." *See* Pepper, 139 S. Ct. at 1524-25.

Pepper expressly *rejected* defendant Apple's proposed "who sets the price" rule, which would have barred consumer plaintiffs who paid for apps at prices set by developers. *Id.* at 1522.

Furthermore, to explain the contours of *Illinois Brick*, the Court approvingly cited *Loeb*, the leading Seventh Circuit decision on applying the indirect purchaser rule to particularly complex, multi-sided markets. *Id.* at 1521 (citing 306 F.3d at 482). The *Loeb* plaintiffs, purchasers of copper products, sued defendants for manipulating the price of copper contracts in the futures market, which increased the price they paid for physical copper. 306 F.3d at 482. Although the plaintiffs did not transact with defendants, the Seventh Circuit held that they nevertheless had antitrust standing. *Id.* *Loeb* explicitly held that Supreme Court precedent authorizes "suits between plaintiffs and defendants not in privity with each other." *Id.* The next year, the Seventh Circuit decided *U.S. Gypsum Co. v. Indiana Gas Co.*—a non-cartel case like this one—and reiterated that plaintiffs may have antitrust standing even when they did not have a contract with a defendant. 350 F.3d 623, 627-28 (7th Cir. 2003).

Otherwise, Plaintiffs Fit Within an *Illinois Brick* Exception. And, even if plaintiffs here purchased indirectly, they would have standing because they have the functional equivalent of a "cost plus" contract, under controlling Fifth Circuit precedent: *In re Beef Industries Antitrust Litigation*, 600 F.2d 1148 (5th Cir. 1979). In *Beef*, the Fifth Circuit considered a case brought by beef producers against grocery stores and other retailers that formed a buying cartel to buy beef at lower prices. *Id.* at 1153-57. But the producers did not sell directly to the retailers; they sold to packers. Nevertheless, lower prices paid by the cartel to the packers automatically translated into lower prices to producers, because the packers determined the cattle prices paid to producers by applying a rigid formula to the wholesale prices at which they sold to retailers. *Id.* at 1163-64. The lower court dismissed these claims under *Illinois Brick*.

The Fifth Circuit reversed. It based its reasoning on one of *Illinois Brick*'s explicit exceptions: the fixed quantity cost-plus contract. *Id.* at 1153, 1165, 1171. A buyer using such a contract has a claim because that scenario does not require apportionment, as it is relatively easy to prove that the middleman passed along the entire overcharge and was not injured. *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 494 (1968). Analyzing that exception, the Fifth Circuit held that in cases where a pricing formula automatically passes injuries up and down the chain of distribution, indirect purchasers (or indirect sellers) may sue, with no requirement of a fixed quantity. *Beef*, 600 F.2d at 1165. Because the alleged "habitual use of predetermined formulae would enable measurement of the effect on prices[,] . . . [t]he plaintiffs have alleged the functional equivalent of cost-plus contracts." *Id.* at 1165. *Beef* remains the law of the Fifth Circuit. *Sec. Data Supply, LLC v. Nortek Sec. & Control LLC*, No. 3:18-CV-1399-S, 2019 WL 3305628, at *5 (N.D. Tex. July 22, 2019) (holding that *Beef* remains binding authority after *Kansas v. Utilicorp United, Inc.*, 497 U.S. 199 (1990)); *In re Lease Oil Antitrust Litig.*, No. CIV.A. C-98-048, 1998 WL 469840, at *7 (S.D. Tex. Apr. 28, 1998) ("Here, the type of pricing structure which Plaintiffs allege is tantamount to a cost-plus contract."). Here, even if one incorrectly views the administrator as a middleman who "passes on" an overcharge, the pass-on happens even more automatically than in *Beef* or in a cost-plus contract: The self-insured fund simply pays the price negotiated by the administrator. So USAP's *Illinois Brick* argument fails for this additional reason as well.

Plaintiffs' standing here can also be confirmed by quick reference to the antitrust standing factors set forth by the Supreme Court in *Associated General Contractors v. California State Council of Carpenters*, 459 U.S. 519, 537-38, 540-43, 544 (1983):

> (1) the "causal connection between [the] antitrust violation and [the] harm"; (2) the presence of "improper motive"; (3) "the nature of the plaintiff's alleged injury" and

> whether it was one Congress sought to redress; (4) "the directness or indirectness of the asserted injury"; (5) how speculative or identifiable the damages are; and (6) "the risk of duplicative recoveries . . . or the danger of complex apportionment of damages."

Here, a direct causal link exists between USAP's ability to charge supra-competitive prices and plaintiffs' injury; the complaint alleges an improper motive to monopolize; their injury is direct, and not derivative of an injury suffered in the first instance by another. For the same reason, there is no risk of duplicative recoveries—the third-party administrators suffered no injury from, and therefore have no claim raising out of, plaintiffs' payments to USAP.

II. Plaintiffs Allege a Plausible Relevant Product Market—Hospital-Only Anesthesia Services Reimbursed by Commercial Payors.

USAP next challenges the relevant product market. This question, however, "can be determined only after a factual inquiry into the 'commercial realities' faced by consumers." *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 482 (1992) (citation omitted). In general, it depends on "the degree of 'cross-elasticity of demand between the product itself and substitutes for it.'" *Apani Sw., Inc. v. Coca-Cola Enters., Inc.*, 300 F.3d 620, 626 (5th Cir. 2002) (citations omitted). "The possibilities for substitution must be considered," but plaintiffs may plausibly allege that no substitutes exist. *Marathon Fin. Ins. Co., RRG v. Ford Motor Co.*, No. 5:05-CV-16-DF, 2006 WL 8441917, at *7-8 (E.D. Tex. Mar. 28, 2006) (citation omitted). Allegations about interchangeability, like all other allegations, must be accepted as true and need only be plausible. *See In re Pool Prods. Distrib. Mkt. Antitrust Litig.*, 940 F. Supp. 2d 367, 381 (E.D. La. 2013) ("Because plaintiffs have pled facts indicating a lack of interchangeability[,]. . . they have sufficiently alleged a product market."). Dismissal on the pleadings typically only happens where plaintiffs "limit a product market to a single brand" or "fail[] to even attempt a plausible explanation as to why a market should be limited in a particular way." *Id.* at 378 (quoting *Todd v. Exxon Corp.*, 275 F.3d 191, 199-200 (2d Cir. 2001)).

Lack of Interchangeability. USAP wrongly claims that the complaint contains no "supporting allegations regarding interchangeability." USAP Mot. at 11. To the contrary, the complaint pleads that patients cannot substitute hospital-only anesthesia services with anesthesia services elsewhere "[b]ecause non-negotiable medical considerations drive [facility] decisions," such as the need for hospital admission or the risks associated with surgery. Compl. ¶ 27. The complaint pleads the simple, common-sense fact that, from an insurer's or patient's perspective, anesthesia services at an outpatient clinic are not "interchangeable" with services that have to be provided at a hospital and can only be provided by anesthesiologists practicing at that hospital. *Id.* ¶¶ 27-28, 98. Additionally, the complaint alleges that hospitals select, often exclusively, the anesthesiologist practice that will serve their patients. *Id.* ¶ 39.

USAP wrongly describes this allegation as "tautological." USAP Mot. at 12. This may be USAP's way of conceding it is the truth. Obviously, a patient who needs open-heart surgery cannot roll over to an outpatient clinic for anesthesia, and then roll back to the hospital for the surgery. A gunshot victim in the emergency room cannot be rolled over to the office of an anesthesiologist who will administer general anesthetic, and then be rolled back to the operating room. Patients who need anesthesia in a hospital have no choice in the matter—and where one practice dominates such services state-wide and in the state's major cities, their insurers have no choice but to contract with, and pay the prices of, that firm. Compl. ¶¶ 39, 44-45, 57-58, 65, 69, 70, 72, 74-78, 80-82, 98. Accepting this proposition as true should not be hard at any phase of the case: But in any event, at the pleadings stage, the law requires it.

Distinct Characteristics of Hospital-Only Anesthesia Services. Courts defining markets also must, and do, look beyond the mere functional form of the product, to factors such as "the product's peculiar characteristics and uses" and "unique production facilities." *Brown*

Shoe Co. v. United States, 370 U.S. 294, 325 (1962). Differences in setting matter; the same product or service in another setting is not necessarily a substitute. *See Pool Prods.*, 940 F. Supp. 2d at 380 (citing *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1075 (D.D.C. 1997)). Hence, the *Pool Products* court recognized a relevant market for wholesale distribution of pool products that excluded big retailers like Wal-Mart that sold the same things. *Id.* Likewise, the court held in *Staples* "that although the products were the same whether they were sold through superstores or other types of retailers, products sold by office superstores nonetheless made up the relevant market." *Id.* (describing *Staples*, 970 F. Supp. at 1074-80). The setting-specific product market was appropriate because of "differences between office superstores and other outlets, as well as special characteristics of office superstores' customers." *Id.* (describing *Staples*, 970 F. Supp. at 1074-80).

Here, the higher level of care and resources associated with hospitals, as well as their distinct services and staffing requirements, similarly distinguish the hospital-only market. Indeed, those characteristics fit within the Supreme Court's "practical indicia" of a relevant market. *Brown Shoe*, 370 U.S. at 325. Plaintiffs further allege "industry or public recognition of the []market as a separate economic entity" and "distinct prices." *Id.* at 325. Medicare, Medicaid, and some private insurers have separate billing codes, i.e., different prices, for hospital anesthesia services. Compl. ¶ 26. In addition, defendants themselves judged potential acquisitions based on the target's presence at hospitals—not ambulatory surgical centers—as uniquely supportive of market power and profit. *Id.* ¶ 29. Plaintiffs also allege facts relevant to "specialized vendors," *Brown Shoe*, 370 U.S. at 325, including hospitals' practice of engaging an exclusive anesthesia provider and the resulting capacity hospital providers must maintain to staff procedures on a 24/7 basis. Compl. ¶ 28. Further, the complaint specifies "sensitivity to price

changes." *Brown Shoe*, 370 U.S. at 325. It alleges that plaintiffs' product market satisfies the SSNIP test for market definition: that a hypothetical monopolist could profitably impose a small but significant non-transitory increase in price (an "SSNIP"). Compl. ¶ 27. However, USAP ignores all these allegations, failing to address any of them.

USAP's Authority Is Inapt. USAP provides no authority to dismiss a complaint with the type and number of product market allegations present here. USAP's *Shah* case is off the mark: It concerned an anesthesiologist's ability to find work, not *payors*' ability to contract with anesthesiology practices. *Shah v. VHS San Antonio Partners, L.L.C.*, 985 F.3d 450, 453-54 (5th Cir. 2021). Plaintiffs do not contend that an anesthesiologist working at a hospital cannot go work for an outpatient surgical center. But they *do* allege that a patient who needs services at a hospital does not have the same options, for the reasons stated above. Furthermore, *Shah* was decided on summary judgment after plaintiff "did not attempt to identify . . . 'where people could practicably go' for pediatric anesthesia services." *Id.* at 455.

USAP's other cases are no more relevant. Hospitals' control over staffing—a point USAP concedes, USAP Mot. at 1—and their use of exclusive contracts qualify as the type of structural barriers that demarcate "the group of sellers [] who have actual or potential ability to deprive each other of significant levels of business." *Hicks v. PGA Tour, Inc.*, 897 F.3d 1109, 1120-21 (9th Cir. 2018) (citation omitted). By contrast, the plaintiffs in *Hicks* identified no such barrier to define their two professional golf tournament advertising markets—participant endorsements and "in-play" ads—from other forms of advertising. *Id.* at 1123. Cases where the plaintiff tried to plead a market consisting only of the defendant do not apply; plaintiffs here make no such attempt. *New Orleans Ass'n of Cemetery Tour Guides & Cos. v. New Orleans Archdiocesan Cemeteries*, 56 F.4th 1026, 1039 (5th Cir. 2023); *It's My Party, Inc. v. Live*

Nation, Inc., 811 F.3d 676, 682-83 (4th Cir. 2016). Moreover, cases that considered complaints with no allegations at all about interchangeability, unlike here, similarly provide no guidance. *NSS Lab'ys, Inc. v. Symantec Corp.*, No. 18-CV-05711-BLF, 2019 WL 3804679, at *9 (N.D. Cal. Aug. 13, 2019); *Jacobs v. Tempur-Pedic Int'l, Inc.*, 626 F.3d 1327, 1338 (11th Cir. 2010).

III. Plaintiffs Show Monopoly Power and State a Section 7 Claim.

The complaint pleads two types of proof that each sufficiently demonstrate monopoly power. Monopoly power "may be inferred from [USAP's] predominant share of the market." *See Heatransfer Corp. v. Volkswagenwerk, A.G.*, 553 F.2d 964, 981 (5th Cir. 1977) (citing *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966)). Alternatively, plaintiffs show monopoly power through direct proof of injury to competition: paying supracompetitive prices. *See FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 460-61 (1986) (using direct proof to demonstrate market power for Section 1 claim); *see also Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1431 (9th Cir. 1995) (recognizing direct proof may be used to prove Section 2 claims); *United States v. Microsoft Corp.*, 253 F.3d 34, 57 (D.C. Cir. 2001) ("Microsoft's behavior may well be sufficient to show the existence of monopoly power.").

A. The Complaint Pleads Circumstantial Evidence of Monopoly Power.

USAP concedes that if plaintiffs have sufficiently pled a relevant market, *supra* Section II, then they have also sufficiently pled monopoly power. USAP has 57% of the Texas market, 73% of the three-MSA market, nearly 70% of the Dallas and Houston markets, and more than 50% of the Austin market. Compl. ¶¶ 85, 88, fig.4. These allegations more than suffice to plead monopoly power, especially given the high barriers to entry also pled. *Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.*, 732 F.2d 480, 489 (5th Cir. 1984) (holding 50% is the minimum sufficient share absent special circumstances); *Associated Radio Serv. Co. v. Page Airways, Inc.,* 624 F.2d 1342, 1352 n.18 (5th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981) (about 50%

market share coupled with few competitors and high barriers to entry); *Heatransfer Corp.*, 553 F.2d at 981 (71-76% sufficient).

B. The Complaint Pleads Direct Evidence of Monopoly Power.

USAP claims that plaintiffs do not allege it raised prices for anesthesia services above competitive levels. USAP Mot. at 14. The complaint, however, repeatedly alleges the opposite. Plaintiffs specifically allege: (1) "[b]ecause of Welsh Carson and USAP's consolidation scheme," they "paid artificially inflated [i.e., supracompetitive] reimbursement rates for hospital-only anesthesia services," Compl. ¶ 10; (2) "[a]s an executive at the largest health insurer in Texas explained, '[E]very time [USAP] folded in a geographic region or every time that they grew, it just strengthened their ability to raise rates'"—or more simply, impose monopoly prices, *id.* ¶ 7; (3) how USAP "'leverage[ed] market share' to establish rates over two times higher than other Houston anesthesiologists" after acquiring MetroWest Anesthesia Care, *id*. ¶ 77; (4) USAP imposed rates "nearly 40% more expensive than the average cost of all other anesthesia providers in Texas" by 2020, *id*. ¶ 41; and (5) USAP had a greater ability to impose higher prices than its targets, *id*. ¶ 95. On a motion to dismiss, "the issue 'is not whether a plaintiff will ultimately prevail but whether he is entitled to offer evidence to support his claims.' [USAP] will have its say later." *Sewell*, 974 F.3d at 582 (citation omitted).

USAP, however, would prefer to "have its say" right now, by re-writing the complaint. For instance, it asserts that plaintiffs' allegations "establish that, at all relevant times, USAP has functioned in a highly competitive marketplace." USAP Mot. at 15. USAP has no citation for that claim because the complaint pleads the opposite: that the relevant markets are highly concentrated, Compl. ¶¶ 6, 91-92; have significant entry barriers, *id*. ¶¶ 97-98; and that defendants acquired practices in smaller geographies precisely "to prevent another group from achieving a state-wide scale that could possibly challenge USAP," *id*. ¶¶ 46, 91-92. Nor has

USAP "struggled to maintain" its prices or merely charged GHA's rates. USAP Mot. at 15. The complaint alleges that USAP successfully increased prices for *every single practice it acquired*, including above the rates charged by GHA. *Id.* ¶ 8 ("After each acquisition, USAP has raised the target's prices to [GHA's] higher reimbursement rate *and continued to increase prices* . . . ." (emphasis added)). And, contrary to USAP's assertion, plaintiffs plead that defendants sacrificed quality. *Compare* USAP Mot. at 16 *with* Compl. ¶¶ 99-105.

C. Both Types of Evidence Sufficiently State a Section 7 Claim.

USAP repeats its monopoly power arguments to object to Section 7 liability. USAP Mot. at 22. Those arguments fail for the same reason: Plaintiffs plausibly plead cognizable harm "flowing from" the challenged acquisitions. Their market share allegations "establish[] a prima facie case that the 'transaction in question will significantly increase market concentration'" in violation of Section 7. *Corrente v. Charles Schwab Corp.*, No. 4:22-CV-00470, 2023 WL 2244680, at *5 (E.D. Tex. Feb. 24, 2023) (citations omitted) (completed merger presumptively anticompetitive); *see also United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 363 (1963). Further, USAP's post-acquisition rate increases provide direct evidence of its acquisitions' anticompetitive effects. *Dale v. Deutsche Telekom AG*, No. 1:22-CV-03189, 2023 WL 7220054, at *15 (N.D. Ill. Nov. 2, 2023) (relying on a price jump following the challenged merger).

IV. Gaining a Monopoly by Buying Your Rivals Violates the Law.

USAP argues that it cannot be liable just for acquiring a monopoly by buying up its rivals. USAP Mot. at 19. USAP's claim would surprise President Teddy Roosevelt, Senator Sherman, and John D. Rockefeller (of Standard Oil), among others. "Historically and today, merging viable competitors to create a monopoly is a clear §2 offense." Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 701a (2023). The Sherman Act's legislative record bristles with complaints about then-dominant trusts; one senator stated plainly that Section 2 prohibits

"the buying up of all other persons engaged in the same business." 21 Cong. Rec. 3152 (1890); *see also id.* at 2726 ("all human experience and all human philosophy have proved that [trusts] are destructive the of public welfare and come to be tyrannies, grinding tyrannies"). After the Sherman Act's passage, the Supreme Court swiftly recognized that mergers could violate Section 2. The earliest successful Section 2 cases condemned consolidation schemes similar to the one challenged here. *Standard Oil Co. v. United States*, 221 U.S. 1 (1911); *United States v. Am. Tobacco Co*., 221 U.S. 106 (1911). In *Northern Securities Co. v. United States*, for instance, the Supreme Court condemned competing railroad companies' "scheme of organizing a corporation . . . which should *hold* the shares of the stock of the [rival] companies." 193 U.S. 197, 326-27 (1904). The Court held that "the [rival] companies ceased, under such a combination, to be in active competition for trade and commerce along their respective lines, and have become, practically, one powerful consolidated corporation," i.e., a monopoly, and that "[n]o scheme or device could more certainly come within the words of the [Sherman] act." *Id.* at 327-28. "If Congress has not, by the words used in the act, described this and like cases, it would, we apprehend, be impossible to find words that would describe them." *Id.* at 360.

The Sherman Act's prohibition on mergers forming or maintaining monopolies is a through-line of antitrust jurisprudence. *See, e.g.*, *United States v. Grinnell Corp.*, 384 U.S. 563, 576 (1966) (defendant's serial acquisitions "perfected the monopoly power to exclude competitors and fix prices"); *FTC v. Facebook, Inc.*, 581 F. Supp. 3d 34, 53 (D.D.C. 2022) ("It is well established that mergers may constitute" anticompetitive conduct violating Section 2. (citations omitted)); *BRFHH Shreveport, LLC v. Willis Knighton Med. Ctr*., 176 F. Supp. 3d 606, 622 (W.D. La. 2016) ("[A]cquisitions of viable competitors alone may establish the anticompetitive conduct element of a section 2 claim."). The Fifth Circuit is no different.

Heatransfer Corp., 553 F.2d at 982 (affirming Section 2 verdict based on Section 7 violations). Like one-off mergers, serial acquisitions suffice. *Grinnell Corp.*, 384 U.S. at 576 (1966); *Standard Oil*, 221 U.S. at 41 (Defendants "acquired the majority of the stocks of the various corporations engaged in purchasing, transporting, refining, shipping, and selling oil.").

USAP insists that to state a monopolization claim plaintiffs must allege "exclusionary conduct," but the model jury instructions say otherwise: plaintiffs must prove the "defendant willfully acquired or maintained monopoly power in [the] market by engaging in *anticompetitive* conduct." Am. Bar Ass'n, *Model Jury Instructions in Civil Antitrust Cases* 102 (2016) (emphasis added). The notes explain that although "[s]ome cases have used other terminology, such as 'predatory,' 'restrictive,' or 'exclusionary' conduct. . . . the term 'anticompetitive conduct' is the most broadly applicable and least confusing term to describe the conduct that is necessary for a violation of Section 2." *Id.* at 103. And acquiring rivals in order to monopolize a market is the quintessential form of unilateral anticompetitive conduct.

Lastly, USAP's citation to "multiple courts" that have found that acquisitions of competitors do not support a presumption of anticompetitive effects omits important context. For instance, quoting *Abraham & Veneklasen Joint Venture v. American Quarter Horse Association*, 776 F.3d 321, 334 (5th Cir. 2015), to say that "acquiring a monopoly is not in and of itself illegal" omits necessary context. USAP Mot. at 19. USAP ignored the Fifth Circuit's restatement of the common sense, well-known point that illegal monopolization requires something more than "development of a superior product, business acumen, or historic accident." *Abraham*, 776 F.3d at 334. Similarly, plaintiffs in *Eastman v. Quest*, unlike plaintiffs here, failed to allege "the particular ways in which the acquisitions have unreasonably restricted competition." No. 15-CV-00415-WHO, 2016 WL 1640465, at *9 (N.D. Cal. Apr. 26,

2016), *aff'd*, 724 F. App'x 556 (9th Cir. 2018). And the *Dresses for Less* court found that plaintiffs *sufficiently alleged anticompetitive conduct*—the defendant used the control it acquired through its acquisitions to deny plaintiffs financing and discourage their participation in the market. *Dresses for Less, Inc. v. CIT Grp./Com. Servs., Inc.*, No. 01 CIV. 2669, 2002 WL 31164482, at *12-13 (S.D.N.Y. Sept. 30, 2002). Moreover, the court in *Rambus Inc. v. FTC* only analyzed the narrow issue of whether deceptive conduct suffices. 522 F.3d 456, 464-67 (D.C. Cir. 2008). Finally, the *Roy B. Taylor Sales, Inc. v. Hollymatic Corp.* case was decided on *summary judgment*, and plaintiffs at that stage failed to produce evidence that consumers continued to buy the supposedly tied product—a prerequisite to finding anticompetitive effects there. 28 F.3d 1379, 1385 (5th Cir. 1994). By contrast, plaintiffs here allege anticompetitive effects resulting from the merger: higher concentration and supracompetitive prices. *Supra*, Section III. These anticompetitive effects are not speculative—they are quantified and exactly the type of effects that harm consumers.

V. The No Surprises Act Does Not Immunize USAP from the Antitrust Laws.

Requesting judicial notice of the No Surprises Act, USAP asserts that it cannot have monopoly power because that law and similar state legislation prohibit it from balance-billing patients, which reduces its bargaining leverage versus insurers. To begin with, USAP fails to mention that the No Surprises Act went into effect on, and is applicable only to plan years beginning, January 1, 2022. Requirements Related to Surprise Billing; Part 1, 86 Fed. Reg. 36872, 36872 (July 13, 2021) ("The regulations are generally applicable for plan years . . . beginning on or after January 1, 2022."). Whatever its effect on provider-payor negotiations going forward, it did not affect USAP's ability to raise reimbursement rates prior to 2022. This alone provides a basis to deny the motion. More fundamentally, while the fact of the statute can be judicially noticed, any purported effect on provider-payor negotiations may not be.

To be judicially noticeable, a fact must be obvious, well-accepted, and incontrovertible. Facts Judicially Noticeable; Indisputability, 21B Fed. Prac. & Proc. Evid. § 5104 (2d ed.) ("A high degree of indisputability" is required.); *see also Franklin v. Apple Inc.*, 569 F. Supp. 3d 465, 477 (E.D. Tex. 2021) (Judicial notice is limited to "the existence of a document itself."). But "the ultimate results of these legislative efforts [No Surprises Act] remain uncertain." Compl., *FTC v. U.S. Anesthesia Partners, Inc.*, No. 4:23-cv-03560 (S.D. Tex. Sept. 21, 2023), ECF No. 1, ¶ 74 n.5. Even as to post-January 2022 effects, granting the motion would mean accepting that on January 1, 2022, all payors in the class immediately renegotiated their rates to erase any effect of USAP's monopolization of hospital-based anesthesiology services. To state this proposition ought to be enough to refute it, especially at the pleadings stage.

Indeed, taken to its logical extreme, USAP's argument would amount to a grant of implied immunity from the antitrust laws for all healthcare providers subject to the No Surprises Act. Congress, however, does not "hide elephants in mouse holes," *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001), and the No Surprises Act clearly fails the test for implied immunity. *See Credit Suisse Sec. v. Billing*, 551 U.S. 264, 285 (2007). Here "[t]here is nothing built into the [No Surprises Act] regulatory scheme which performs the antitrust function." *Silver v. N.Y. Stock Exch.*, 373 U.S. 341, 358 (1963). And while regulation may in some cases be relevant to antitrust analysis, *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004), ultimately, "[r]epeals of the antitrust laws by implication from a regulatory statute are strongly disfavored." *Philadelphia Nat'l Bank*, 374 U.S. at 350.

VI. USAP and Welsh Carson Are Liable Under Sherman Act Section 2 and Clayton Act Section 7.

Welsh Carson attempts to extricate itself from this suit by making two contradictory factual allegations. First, it relies on distinctions of corporate form—arguing that the Welsh

Carson affiliates were so distinct from USAP, that USAP's actions could *not* be imputed to Welsh Carson as part of a "single enterprise" under *Copperweld.* WC Mot. at 2-3, 11-13 (arguing principles of corporate law and separateness). Second, Welsh Carson—and USAP by incorporation of Welsh Carson's argument, USAP Mot. at 21-22—makes the incongruous argument that USAP and Welsh Carson were incapable of conspiring to monopolize under *Copperweld* because they had "aligned economic interests" and could not be considered "separate economic actors." WC Mot. at 15. The problem with their argument is that whether and how the *Copperweld* doctrine applies is a fact question not resolvable on a motion to dismiss. Furthermore, Welsh Carson ignores allegations in the complaint that contradict its arguments. Setting aside the question of its "single-enterprise" status with USAP, Welsh Carson reached agreements first with unquestionably separate persons and entities, namely Rizzo, New Day Anesthesia, GHA (which became USAP), and GHA's co-owners. Compl. ¶¶ 48-56. And because the complaint does not allege Welsh Carson ever withdrew from that conspiracy or ceased to be a part of the single enterprise, the ongoing acts of the other conspirators and the enterprise tolled the running of the statute of limitations as to Welsh Carson.

A. USAP and Welsh Carson Plausibly Engaged in a Conspiracy to Monopolize.

USAP and Welsh Carson's serial acquisition scheme satisfies all four requirements for a conspiracy to monopolize: "(1) the existence of specific intent to monopolize; (2) the existence of a combination or conspiracy to achieve that end; (3) overt acts in furtherance of the combination or conspiracy; and (4) an effect upon a substantial amount of interstate commerce." *Am. Airlines, Inc. v. Travelport Ltd.*, No. 4:11–CV–244–Y, 2012 WL 3737037, at *3 (N.D. Tex. Aug. 7, 2012) (quoting *Stewart Glass & Mirror, Inc. v. U.S. Auto Glass Disc. Ctrs., Inc.*, 200 F.3d 307, 316 (5th Cir. 2000)). It does not require proof of monopoly power: only an effect on a substantial amount of interstate commerce. Contrary to Welsh Carson's brief, *see* WC Mot. at

15, it also does not require that conspirators both participate in or compete in a relevant market. "[T]here is still a combination within the meaning of the Sherman Act" when a conspirator has "been *enticed* or coerced to share in an anticompetitive scheme," even "in a market in which [the conspirator] do[es] not compete." *Spectators' Comm'n Network Inc. v. Colonial Country Club*, 253 F.3d 215, 221 (5th Cir. 2001) (emphasis added); *see Drs. Hosp. of Laredo v. Cigarroa*, No. SA-21-cv-01068-XR, 2022 WL 3567353, at *16 (W.D. Tex. Aug. 17, 2022) ("[Section 2] reach[es] co-conspirators that may not compete in the relevant market."). And, like other illegal conspiracies, the conspiracy's goal need not be realized: The crime is complete upon formation of the agreement. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 252 (1940). Once the conspiracy exists, each participant is jointly and severally liable for every act by any member in furtherance of it. *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 646 (1981).

Specific Intent. Welsh Carson rightly does not claim that, at the pleadings stage, plaintiffs must produce direct evidence in the form of specific factual allegations about intent. *See Pool Prods.*, 940 F. Supp. 2d at 391-92 (At the pleading stage, "[s]pecific intent may be shown by inference from evidence that a defendant engaged in anticompetitive conduct."). Instead, Welsh Carson contends—incredibly—that the complaint merely alleges that USAP sought to "grow as a business, including through acquisitions." WC Mot. 14. To the contrary, the complaint alleges on its very first page that the conspiracy aimed to "drive up prices," Compl. ¶ 1, a charge repeated throughout the document, *see, e.g.*, *id.* ¶¶ 3-4, 8-9, 49, 54. The complaint specifically alleges that at the very birth of the arrangement among Welsh Carson, John Rizzo, and New Day Anesthesia, the parties, including Welsh Carson, intended to implement a "consolidation strategy" that would result in "negotiating leverage with commercial payors," i.e., control over prices. *Id.* ¶¶ 48-55. Specific intent to monopolize has been alleged.

Existence of the Agreement. Welsh Carson disavows neither the fact of the agreement nor its participation in it; rather, Welsh Carson claims that it had *so much to do with it* that it formed a single enterprise with USAP incapable of conspiring (or reaching agreements) within itself. To do so, it invokes the doctrine of *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), in which the Supreme Court held that a parent and a wholly-owned subsidiary could not conspire or agree for purposes of Section 1 of the Sherman Act.

But Welsh Carson sidesteps the complaint itself, which alleges that the conspiracy began *before* the creation of USAP. This is not the prototypical *Copperweld* fact pattern involving two firms doing business under a pre-existing parent/subsidiary relationship. When "John Rizzo, a former executive at a large national anesthesia group, emailed D. Scott Mackesy, a partner at Welsh Carson, seeking investors for a new anesthesia practice: 'New Day Anesthesia,'" Compl. ¶ 48, Rizzo and New Day did not have any relationship with Welsh Carson that would activate *Copperweld*. They were separate economic actors with separate interests who reached an agreement—a conspiracy—to build an entity that would monopolize Texas hospital-based anesthesiology and raise prices across the board. Whatever interconnectedness of relationship subsequently developed between Welsh Carson and that entity (USAP) cannot expunge liability for the pre-existing agreement with Rizzo and New Day that generated USAP.

Welsh Carson also ignores the subsequent acquisition of GHA. Again, GHA and Welsh Carson had no prior "single enterprise" relationship—that was the point. Welsh Carson and New Day instead had to reach an agreement with GHA; and to do that, they had to pitch their strategy of "aggressive consolidation"—monopolization—to GHA's physician owners. *Id.* ¶ 52. After Welsh Carson and New Day obtained financing, they formed USAP; and less than a month later, USAP "agreed to acquire [GHA]." *Id.* ¶ 56.

Welsh Carson's exclusive focus on events *after* the formation of USAP turns conspiracy law on its head. It would be perverse if two obviously separate economic actors could evade liability for a conspiracy by intertwining their subsequent illegal activities into a "single enterprise." But even the question of whether Welsh Carson and USAP formed a "single enterprise" incapable of conspiring cannot be determined on the pleadings. Although Welsh Carson exercised great influence over USAP, it never owned more than approximately 50% of USAP. It always remained a separate entity with presumably other business interests and responsibilities besides monopolizing anesthesia markets. And as the Supreme Court explained in *American Needle*, whether or not two separate-but-related entities constitute a single enterprise or separate entities is a functional, not formalistic inquiry dependent on whether the entities are "independent centers of decisionmaking" or share "a complete unity of interest." *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 196 (2010). There is no "bright line rule," *In re Aluminum Warehousing Antitrust Litig.*, 95 F. Supp. 3d 419, 445 (S.D.N.Y. 2015) (collecting cases), and the question can seldom be resolved on the pleadings: *Copperweld* came to the Court after a trial, and *American Needle* after summary judgment—as did much of Welsh Carson's authority, such as *Lenox MacLaren Surgical Corp. v. Medtronic, Inc.*, 847 F.3d 1221, 1233 (10th Cir. 2017) (summary judgment), and *PostX Corp. v. Secure Data in Motion, Inc.*, No. C 02-04483 SI, 2005 WL 8177634, at *4 (N.D. Cal. Aug. 17, 2005) (same). As the *Reading International v.Oaktree Capital Management LLC* court noted, "[T]he threshold question of whether such control exists is a fact-specific inquiry hinging on the particular structure and dynamics of the two entities. Such a determination 'must await hearing on the merits.'" 317 F. Supp. 2d 301, 325 (S.D.N.Y. 2003) (quoting *Brager & Co., Inc. v. Leumi Sec. Corp.*, 429 F. Supp. 1341, 1345 (S.D.N.Y. 1977)); *Surgical Care Ctr. of Hammond*, 309 F.3d at 838-39

(dismissing the conspiracy claim only once "the district court tried the case"). For this reason, Welsh Carson's *Copperweld* argument—and by extension USAP's argument—cannot be a basis for dismissing plaintiffs' Section 2 conspiracy claim as to either defendant.

Overt Act. Welsh Carson argues the complaint does not allege any overt acts by it in the previous four years, effectively conceding that the complaint alleges *plenty* of overt acts by Welsh Carson prior to that time. Before 2019, Welsh Carson (1) encouraged USAP's acquisitions by providing "$1-$2 million to set-up [sic] shop," Compl. ¶ 50; (2) helped USAP secure debt financing from commercial lenders, *id.* ¶ 54; (3) identified and ran due diligence on USAP's acquisition targets, *id.* ¶ 23; and (4) helped USAP negotiate acquisitions and prices with insurers, *id.* Welsh Carson's executives also helped draft the tuck-in clause that allowed USAP to raise its rates following an acquisition. *Id.* ¶ 68. A more comprehensive list of Welsh Carson's alleged overt acts can be found in Section VI.B.3, *infra*, discussing its participation in the USAP/Welsh Carson "single enterprise." In short, the complaint is replete with "overt acts" by Welsh Carson: and one suffices to hold Welsh Carson liable for conspiracy to monopolize.

Effect on Commerce. Welsh Carson does not dispute that its scheme had a substantial effect on interstate commerce, to the tune of $435 million in dividends delivered to its Manhattan accounts, plus the unknown profits from its partial sale of its interest in 2017.

Group Pleading. Welsh Carson misinterprets the degree of specificity required to plead a conspiracy. *See* WC Mot. at 11-12. Courts must not "compartmentaliz[e]" conspiracy claims "against each . . . defendant[] as if they were separate lawsuits." *In re Fine Paper Antitrust Litig.*, 685 F.2d 810, 822 (3d Cir. 1982) (citing *Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 698-99 (1962)). In other words, plaintiffs' complaint "need not contain detailed 'defendant by defendant allegations.'" *In re Cal. Bail Bonds Antitrust Litig.*, No. 19-cv-

00717-JST, 2022 WL 19975276, at *12 (N.D. Cal. Nov. 7, 2022) (quoting *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 586 F. Supp. 2d 1109, 1117 (N.D. Cal. 2008) ("*TFT-LCD I*")); *see also Moehrl v. Nat'l Ass'n of Realtors*, 492 F. Supp. 3d 768, 777 (N.D. Ill. 2020); *In re OSB Antitrust Litig.*, No. 06-826, 2007 WL 2253419, at *5 (E.D. Pa. 2007). "Questions as to each Defendant's participation in the conspiracy . . . may be raised later in litigation, but do not merit dismissal at [the motion to dismiss] phase." *In re Foreign Exch. Benchmark Antitrust Litig.*, No. 13 Civ. 7789 (LGS), 2016 WL 5108131, at *4 (S.D.N.Y. Sept. 20, 2016).

The complaint's allegations that (1) the highest levels of Welsh Carson leadership helped organize the conspiracy, Compl. ¶¶ 48-59; (2) Welsh Carson's executives and subordinate employees carried out the conspiracy, *id.* ¶¶ 48-59, 65-66, 68; and (3) individuals entered into agreements on Welsh Carson's behalf and kept Welsh Carson apprised of USAP's anticompetitive conduct, *id.* ¶¶ 52, 59, 66, plausibly allege each Welsh Carson entity's participation. *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 599 F. Supp. 2d 1179, 1184-85 (N.D. Cal. 2009) ("*TFT-LCD II*"); *see also In re Cathode Ray Tube (CRT) Antitrust Litig.*, No. 07–5944 SC, 2010 WL 9543295, at *6 (N.D. Cal. Feb. 5, 2010). This is particularly true where, as here, defendants did not "distinguish between the entities within a corporate family." *TFT-LCD II*, 599 F. Supp. 2d at 1185. Welsh Carson collectively refers to all the entities that make up "the Firm" as "Welsh Carson" or "WCAS." *See* WCAS, https://www.wcas.com/ (Welsh Carson's website, describing all its entities, collectively, as "the Firm"). Welsh Carson even lists its highest executives, many of whom are implicated in plaintiffs' alleged conspiracy, as working for "the Firm." *See id.* (D. Scott Mackesy is "Managing Partner of the Firm"; Brian Regan is a "General Partner" of no specified Welsh Carson entity; Jonathan Rather is "responsible for managing the operations of the Firm"); Compl. ¶ 18. Welsh Carson wrongly argues that

plaintiffs' complaint must provide "evidence that each defendant independently participated": That question is for summary judgment, not a motion to dismiss. *See* WC Mot. at 12 (citing *Lenox*, 847 F.3d at 1237 (a summary judgment case)); *Chandler v. Phoenix Servs.*, No. 7:19-CV-00014-O, 2020 WL 1848047, at *14 (N.D. Tex. Apr. 13, 2020), *aff'd sub nom. Chandler v. Phoenix Servs., L.L.C.*, 45 F.4th 807 (5th Cir. 2022) (same)); *see also In re Static Random Access Memory (SRAM) Antitrust Litig.*, 580 F. Supp. 2d 896, 904 (N.D. Cal. 2008) (such evidence not needed at motion to dismiss stage).

Common Enterprise. Furthermore, Welsh Carson disregards the "common enterprise" doctrine that says "each entity within a set of interrelated companies may be held jointly and severally liable for the action of other entities that are part of the group." *FTC v. Tax Club, Inc.*, 994 F. Supp. 2d 461, 469 (S.D.N.Y. 2014); *see also FTC v. Kennedy*, 574 F. Supp. 2d 714, 722 (S.D. Tex. 2008) (recognizing the doctrine). To determine whether a common enterprise exists, "courts consider a set of non-dispositive factors, including 'whether they (1) maintain officers and employees in common, (2) operate under common control, (3) share offices, (4) commingle funds, and (5) share advertising and marketing." *Tax Club*, 994 F. Supp. 2d at 469 (quoting *FTC v. Consumer Health Benefits Ass'n*, No. 10 Civ. 3551(ILG)(RLM), 2012 WL 1890242, at *5 (E.D.N.Y. May 23, 2012). Each Welsh Carson defendant here is named some variation on "Welsh Carson" or "WCAS" and maintains officers and employees in common. Compl. ¶ 18. For example, D. Scott Mackesy is listed as the "Managing Partner of the Firm" and is a managing member of WCAS XI and XII Associates, LLC, President and director of WCAS Management Corp., and a managing member and director of WCAS Management, LLC. *Id.* Similarly, other Welsh Carson executives work broadly for "the Firm," managing all Welsh Carson entities. *See* WCAS, https://www.wcas.com/ (listing Mackesy, Regan, and Rather—

among others—as members of the *Firm*'s "Management Committee") (last visited Mar. 12, 2024). The Welsh Carson defendants all list 599 Lexington Avenue, Suite 1800, New York, New York 10022 as their principal place of business. Compl. ¶ 18. Additionally, all Welsh Carson defendants share marketing by using the same trademarks of "WCAS" and "Welsh, Carson, Anderson & Stowe." *Id.* The Welsh Carson defendants operate under common control as "Welsh Carson partners control the various management entities[,]" and "[t]he management entities, in turn, control the management funds." *Id.* ¶ 17. These allegations suffice to hold the Welsh Carson entities jointly and severally liable as a common enterprise. *See Tax Club*, 994 F. Supp. 2d at 469; *Kennedy*, 574 F. Supp. 2d at 722.

None of Welsh Carson's cases supports a finding of improper group pleading here. Plaintiffs (1) detail how the Welsh Carson entities controlled USAP and how the various Welsh Carson entities interacted with each other, Compl. ¶¶ 17, 21-23; (2) assert claims against a discrete set of seven Welsh Carson entities based on six related antitrust causes of action, *id.* ¶¶ 17, 146-93; (3) attribute specific actions to the Welsh Carson entities, namely that the five Welsh Carson management organizations controlled the two investment funds, which then invested Welsh Carson assets into USAP that were used to make the challenged acquisitions, *id.* ¶¶ 17, 52, 55, 66; (4) do not rely on a theory of alter ego liability; and (5) do not allege fraud with its accompanying heightened pleading standard. By contrast, Welsh Carson's cases lack detailed allegations and involve considerable overreach, alter ego liability, and fraud. *See Gurganus v. Furniss*, No. 3:15-cv-03964-M, 2016 WL 3745684, at *5 (N.D. Tex. Jul. 13, 2016) ("conclusory allegations" that defendants merely "called the shots"; alter ego liability); *Noble Cap. Tex. Real Est. Income Fund L.P. v. Newman*, No. 1-22-CV-652-LY, 2023 WL 3035411, at *3 (W.D. Tex. Jan. 13, 2023) (asserting "fourteen causes of action" "ranging from fraud to RICO to false

advertising" against "nearly seventy" "individuals and entities as defendants" including on the basis of alter ego liability); *ADR Int'l Ltd. v. Inst. for Supply Mgmt. Inc.*, 667 F. Supp. 3d 411, 421 (S.D. Tex. 2023) (failing to "attribute any specific acts" to each entity).

B. Welsh Carson Also Faces Liability as a Single Enterprise with USAP.

As noted above, Welsh Carson contends it could not have conspired with USAP because it exercised such a degree of ownership and control that the two firms qualify as a "single enterprise." But that does not serve up a get-out-of-jail-free card. Rather, *Copperweld* explicitly held that in such a case the enterprise and all its parts could still face liability for monopolization under Section 2: "[T]he *enterprise* is fully subject to § 2 of the Sherman Act[.]" *Copperweld*, 467 U.S. at 777 (emphasis added); *see also Lenox*, 847 F.3d at 1231-32 (collecting cases). The same "unity of interest" that makes the constituent parts incapable of conspiring makes them *all* potentially liable for monopolization. *Copperweld*, 467 U.S. at 771. "[I]n a single-enterprise situation, it is the affiliated corporations' collective conduct—i.e., the conduct of the *enterprise* they jointly compose—that matters; it is the *enterprise* which must be shown to satisfy the elements of a monopolization or attempted monopolization claim." *Lenox*, 847 F.3d at 1236 (adopted by *Chandler*, 2020 WL 1848047, at *14); *see also Arandell Corp. v. Centerpoint Energy Servs., Inc.*, 900 F.3d 623, 631-32 (9th Cir. 2018).

The complaint states a single-enterprise claim against Welsh Carson because (1) Welsh Carson formed a single enterprise with USAP by acting with a "unity of interest," *Lenox*, 847 F.2d at 1232, 1235, (2) the Welsh Carson/USAP single enterprise's conduct violated the antitrust laws, *id.* at 1236, and (3) each Welsh Carson entity "independently participated" in the enterprise's scheme, *id.* at 1237. *See Jones v. Varsity Brands, LLC*, 618 F. Supp. 3d 713, 725 (W.D. Tenn. 2022) (denying motion to dismiss on single enterprise grounds because complaint alleged parent company's participation in subsidiary's monopolization).

1. Welsh Carson and USAP Formed a Single Enterprise.

First, plaintiffs have alleged sufficient facts to plausibly allege that Welsh Carson and USAP formed a single enterprise. Although USAP is not a wholly owned subsidiary of Welsh Carson, the *Copperweld* doctrine may nevertheless apply "if a unity of interest exists between related corporations, such as parents and majority-owned subsidiaries or 'sister' subsidiaries of a common parent[.]" *Rohlfing v. Manor Care, Inc.*, 172 F.R.D. 330, 344 (N.D. Ill. 1997); *see also Lenox*, 847 F.2d at 1233 (collecting cases that expanded *Copperweld* "to a broader variety of economic relationships"). Here, Welsh Carson itself *claims* to be a single enterprise with USAP when it invokes *Copperweld* to—inadequately—protect itself from the charge of conspiracy to monopolize: "[T]he Complaint paints a picture of aligned economic interests between the Welsh Carson entities *at all times* . . . . As such, the Welsh Carson entities and USAP are not 'separate economic actors' capable of concerted action." WC Mot. at 15 (emphasis added).

2. The Welsh Carson/USAP Enterprise Violated the Antitrust Laws.

Second, plaintiffs plausibly state claims for monopolization and attempted monopolization against the single enterprise. The complaint alleges monopolization: USAP's willful acquisition of monopoly power through anticompetitive mergers. *See supra* Sections III & IV; *OGD Equip. Co. v. Overhead Door Corp.*, No.: 4:17-cv-00898-ALM-KPJ, 2019 WL 5390590, at *2 (E.D. Tex. Aug. 7, 2019) (citing *Stearns Airport Equip. Co. v. FMC Corp.*, 170 F.3d 518, 522 (5th Cir. 1999)) (elements of monopolization). The same allegations support a claim for attempted monopolization. *See Taylor Pub. Co. v. Jostens, Inc.*, 216 F.3d 465, 474 (5th Cir. 2000). Plaintiffs plausibly allege a dangerous probability of attaining monopoly power by illustrating USAP's consistently rising market share and ability to implement price increases after each acquisition. Compl. figs.1, 3, 5-7. Further, the complaint plausibly alleges the Welsh Carson/USAP enterprise's specific intent to monopolize. The enterprise "consolidat[ed]

practices with high market share in a few key markets" and targeted practices with exclusive contracts with hospitals, knowing that increased market share would give the enterprise the ability "to raise prices." *Id.* ¶¶ 49, 57, 65, 69, 70, 72, 74, 76, 78, 80-81; *see Dairy LLC v. Milk Moovement, Inc.*, No. 2:21-cv-02233 WBS AC, 2023 WL 3437426, at *13 (E.D. Cal. May 12, 2023) (finding specific intent when a firm acquired competitors that had exclusivity contracts). The fact that the Welsh Carson/USAP single enterprise *achieved* monopoly power and *raised prices* further supports a finding of specific intent to monopolize. Compl. ¶¶ 83-95, 108; *see Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459 (1993) (holding that a defendant's "unfair" or "predatory" conduct "may be sufficient to prove the necessary intent to monopolize").

Welsh Carson wrongly contends that *it* independently did not possess specific intent. *See* WC Mot. at 14. "Specific intent may be shown by inference from evidence that a defendant engaged in anticompetitive conduct." *See Pool Prods.*, 940 F. Supp. 2d at 391-92. Here, plaintiffs allege facts showing that *Welsh Carson* "had a specific intent to destroy competition or *build a monopoly*" by "engag[ing] in anticompetitive conduct." *Id.* at 391 (emphasis added). Welsh Carson *created* USAP, was the "primary architect" of USAP's scheme to monopolize the Texas hospital-only anesthesia market through a series of anticompetitive mergers, hired USAP's CEO, CFO, COO, and head of HR, populated USAP's senior leadership with its own employees, owned substantial (sometimes majority) shares in USAP, and *designed and implemented* USAP's consolidation strategy. Compl. ¶¶ 2, 4-5, 17, 19-24, 48-57, 59, 64-66, 68. USAP now possesses over 50% of the Texas market, including 73% of the market in the combined Austin, Dallas, and Houston area—eight times larger than the next largest provider, *id.* ¶¶ 85-86, and the Welsh Carson/USAP enterprise inflated prices for hospital-only anesthesia services in Texas without

providing commensurate increases in quality or efficiency, *id.* ¶¶ 83, 99-108. That is a far cry from Welsh Carson's *U.S. Steel* and *Great Escape* cases that involved non-dominant market participants engaged in traditional competition for customers. *U.S. Steel*, 429 U.S. at 612 n.1 ("a firm with a *small market share*" and defendants that competed for customers (emphasis added)); *Great Escape*, 791 F.2d at 541-42 ("mere intention to exclude competition and to expand one's own business"). Finally, the question of specific intent itself is a highly fact intensive inquiry unsuited to adjudication on the pleadings. *See Universal Hosp. Servs., Inc. v. Hill-Rom Holdings, Inc.*, No. CIV.A. SA-15-CA-32, 2015 WL 6994438, at *7 (W.D. Tex. Oct. 15, 2015) (quoting *Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90, 101-02 (2d Cir. 1998)) (pleadings state a claim if jury could find specific intent).

Welsh Carson's argument that the claims against it should be dismissed because it was not a participant in the relevant market is likewise incorrect. *See* WC Mot. at 14. Because Welsh Carson and USAP form a single enterprise, Welsh Carson need not "independently satisfy every element [of a violation] in order to be held liable." *Lenox*, 847 F.3d at 1236. Instead, "it is the affiliated [entities'] collective conduct—i.e., the conduct of the *enterprise* they jointly compose . . . which must be scrutinized under § 2." *Id.* As a result, courts have held private equity firms liable even when they did not directly participate in the monopolized market. *See, e.g.*, *Varsity Brands*, 618 F. Supp. 3d at 723.

3. <u>Welsh Carson Independently Participated in Antitrust Violations.</u>

Welsh Carson independently participated in the single enterprise's violations and is therefore liable for them. *Lenox*, 847 F.3d at 1237. An entity independently participates if it controls, directs, or encourages the violation, or if it commits its "own acts in furtherance" of the violation. *In re Packaged Seafood Prods. Antitrust Litig.*, No. 15-MD-2670 DMS (MDD), 2022 WL 836951, at *10 (S.D. Cal. Mar. 21, 2022); *see Nobody In Particular Presents, Inc. v. Clear*

Channel Commc'ns, Inc., 311 F. Supp. 2d 1048, 1070 (D. Colo. 2004) ("*NIPP*"). The affiliate (Welsh Carson) need *not* participate "in each act or transaction"; it need only participate in the exclusionary scheme *generally*. *Varsity Brands*, 618 F. Supp. 3d at 724. The element can be met by minimal facts: In *Varsity Brands*, it sufficed that the two private equity firms in question allegedly held seats on a portfolio company's board of directors, worked with its leadership to execute an unlawful strategy, and provided the necessary funding for the execution of a monopolization scheme. *Id.* at 724. The allegations supported a plausible inference that the private equity firms independently participated in the anticompetitive scheme "by playing a role in steering the organization, funding acquisitions, and maintaining and expanding [the organization's] market share throughout the years of their ownership." *Id.* at 725. Similarly, the *Syngenta Crop Protection* court found sufficient independent participation by two parent entities, one of which signed a contract on the subsidiary's behalf, that had allegedly "directed, overseen, and approved" a subsidiary's anticompetitive strategy, approved budgets incorporating that strategy, and been involved in negotiating and managing a contract with a competitor that implemented the strategy. *FTC v. Syngenta Crop Protection AG*, No. 1:22-cv-8282, 2024 WL 149552, at *24-25 (M.D.N.C. Jan. 12, 2024). And, contrary to Welsh Carson's argument, WC Mot. at 14, private equity firms are liable for acquisitions of their subsidiaries, even if they are not party to the acquisitions. *Varsity Brands*, 618 F. Supp. 3d at 724-25.

Welsh Carson controlled, directed, and encouraged the enterprise's violations. No mere passive investor, Welsh Carson formed USAP in 2012 specifically to pursue an anticompetitive "roll-up strategy." Compl. ¶ 55. From 2012 until 2017, Welsh Carson controlled a majority of USAP's board of directors and controlled USAP "in all practical respects." *Id.* ¶ 21. After Welsh Carson sold its majority share in 2017, USAP continued to

view Welsh Carson as its "most influential" board member. *Id.* Welsh Carson hired USAP's original management team, *id.* ¶ 22, and "determin[ed] USAP's overall strategy," *id.* ¶ 23. Welsh Carson encouraged USAP's acquisitions by providing "$1-$2 million to set-up [sic] shop," *id.* ¶ 50, and helping USAP secure debt financing from commercial lenders, *id.* ¶ 54. Welsh Carson even retained approval authority over USAP's acquisitions. *Id.* ¶ 59. *See NIPP*, 311 F. Supp. 2d at 1071 (a requirement for "written reports . . . to be submitted to [a subsidiary's] parent company" and a parent company's participation "in the budgeting process" for the subsidiary are indicia of independent conduct); *see also Varsity Brands*, 618 F. Supp. 3d at 724-25 (independent participation where parent company "steer[ed] the [subsidiary], fund[ed] acquisitions, and maintain[ed] and expand[ed] [the subsidiary's] market share").

Welsh Carson committed acts in its own furtherance of the violations. Welsh Carson identified and ran due diligence on USAP's acquisition targets, and helped USAP negotiate acquisitions and prices with insurers. Compl. ¶ 23. Additionally, Welsh Carson's executives helped draft the tuck-in clause that allowed USAP to raise its rates following an acquisition. *Id.* ¶ 68. These acts qualify as Welsh Carson's "own acts in furtherance" of the single enterprise's anticompetitive scheme. *See Packaged Seafood*, 2022 WL 836951, at *10; *see also Syngenta Crop Prot.*, 2024 WL 149552, at *24-25 (independent participation where parent was "directly involved in the negotiation" of subsidiary's anticompetitive agreements).

Welsh Carson independently participated through its Partner Brian Regan. Welsh Carson cannot shield itself by claiming that Regan acted on behalf of USAP, not Welsh Carson. WC Mot. at 21-23. Regan participated extensively in the formation of USAP. Compl. ¶¶ 49, 52, 54, 55. Welsh Carson then installed him as a USAP director, *id.* ¶ 21, where Regan also worked with *Welsh Carson* employees to implement the anticompetitive scheme, including

meeting with them in New York to discuss further acquisitions after the GHA merger, *id.* ¶ 57. Regan even proposed one of the USAP price-fixing contracts, *id.* ¶¶ 120-22. Throughout, Regan continued to hold himself out as a *Welsh Carson partner*, even signing a letter of intent on behalf of WCAS Associates XI in connection with the Pinnacle acquisition. *Id.* ¶ 66.

Welsh Carson claims *United States v. Bestfoods*, 524 U.S. 51 (1998), means "dual-hatted" officers and directors like Regan—who was a Welsh Carson partner and USAP director—presumptively act for the subsidiary unless they act for the sole benefit of the parent. WC Mot. at 21-22. But *Bestfoods expressly declined* to hold that acting solely for the benefit of the parent is the *only* way to show actions on behalf of the parent. *Bestfoods*, 524 U.S. at 70 n.13. Subsequent cases have held that the *Bestfoods* presumption can be rebutted where an employee, as Regan did, holds himself out as acting for the parent and also works with the parent's own employees to assist in the misconduct. *See Packaged Seafood*, 2022 WL 836951, at *10; *Financialapps, LLC v. Envestnet, Inc.*, No. 19-1337-GBW-CJB, 2023 WL 4975373, at *11 (D. Del. July 31, 2023). And, *Bestfoods* itself stated that a corporate parent is directly liable in cases "in which [as here] the alleged wrong can seemingly be traced to the parent through the conduit of its own personnel and management and the parent is directly a participant in the wrong complained of." 524 U.S. at 64 (quotation marks and citation omitted).

Welsh Carson also independently participated through other employees. Its employees: (1) supervised USAP's "day-to-day operations, including corporate finances, securing financing from lenders or Welsh Carson funds, identifying targets, conducting due diligence on potential acquisitions, negotiating acquisitions, negotiating prices with insurers, and determining USAP's overall strategy," Compl. ¶ 23; (2) hired three consulting groups to analyze the GHA merger, and pitched the merger to commercial lenders, *id.* ¶¶ 53-54; (3) financed the

GHA merger using Welsh, Carson, Anderson & Stowe XI, L.P. funds, *id.* ¶ 55; (4) created the January 2013 "Roll Up Houston" presentation, and a Welsh Carson analyst explained why USAP should target practices with exclusivity contracts, *id.* ¶ 57; (5) reviewed and approved USAP's proposed mergers as required by USAP's 2013 "Business Development Playbook," *id.* ¶ 59; and (6) hired consulting firms to assess the Pinnacle acquisition, *id.* ¶ 65. These actions, all taken by non-dual-hatted Welsh Carson employees, were "of necessity taken only on behalf of" Welsh Carson. *Union Pac. R.R. Co. v. Oglebay Norton Mins., Inc.*, No. EP-17-CV-47-PRM, 2018 WL 1722175, at *8 (W.D. Tex. Apr. 9, 2018) (citing *Bestfoods*, 524 U.S. at 72).

In sum, Welsh Carson employees participated intimately and independently in the violation. The cases on which Welsh Carson relies by contrast alleged mere acquiescence or inheritance of anticompetitive contracts. *In re Penn. Title Ins. Antitrust Litig.*, 648 F. Supp. 2d 663, 689 (E.D. Pa. 2009); *In re Pressure Sensitive Labelstock Antitrust Litig.*, 566 F. Supp. 2d 363, 376 (M.D. Pa. 2008). Or they failed to allege *any* independent conduct by the parent company. *Arnold Chevrolet LLC v. Trib. Co.*, 418 F. Supp. 2d 172, 178 (E.D.N.Y. 2006); *Invamed, Inc. v. Barr Lab'ys, Inc.*, 22 F. Supp. 2d 210, 218-19 (S.D.N.Y. 1998); *Gemco Latinoamerica, Inc. v. Seiko Time Corp.*, 685 F. Supp. 400, 403 (S.D.N.Y. 1988). And *Masimo Corp. v. Wireless*, No. 19-cv-01100-BAS-NLS, 2020 WL 7260660, at *16 (S.D. Cal. Dec. 10, 2020), says *nothing* about independent participation under an antitrust single enterprise theory.

The complaint does not improperly group plead. For the reasons stated above in the "Common Enterprise" section, Section VI.A., *supra*, the complaint does not improperly group plead as to Welsh Carson's liability as a single enterprise with USAP.

C. Statute of Limitations

Welsh Carson argues that because the complaint does not allege separate independent acts by Welsh Carson in the limitations period, it may not be held liable for claims that accrued

therein. To succeed on this attack it must show that "the complaint makes plain that the claim is time-barred" and that "the pleadings fail to raise some basis for tolling or the like" as is required on a Rule 12(b)(6) motion. *Petrobras Am. Inc. v. Samsung Heavy Indus. Co.*, 9 F.4th 247, 253 (5th Cir. 2021); *Jones v. Alcoa*, 339 F.3d 359, 366 (5th Cir. 2003). Welsh Carson's limitations argument fails because it either conspired with USAP or formed a "single enterprise" with USAP. And because USAP continued with acquisitions well into the limitations period, culminating with the acquisition of Guardian Anesthesia Services in 2020, claims can continue to accrue against Welsh Carson as a member of the conspiracy or enterprise.

1. The Complaint Alleges a Continuing Violation.

Under the "continuing violation" doctrine, an antitrust cause of action accrues any time a defendant commits "an overt act in furtherance of the antitrust conspiracy." *Powers v. Nassau Develop. Corp.*, 753 F.2d 457, 460 (5th Cir. 1985). The statute of limitations restarts whenever a defendant, an enterprise, or a co-conspirator commits "an act" contributing to the violation. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971); *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 189 (1997) ("[E]ach overt act that is part of the violation and that injures the plaintiff" "starts the statutory period running again . . . ."); *Powers*, 753 F.2d at 461; *see also* Areeda & Hovenkamp, *supra*, ¶ 320c4 ("When the monopolist creates its monopoly by a series of repeated or reasserted acts designed to maintain its monopoly, the statute of limitation is restarted provided that the subsequent acts fall within the definition of 'independent' predicate acts . . . ."). Thus, when defendants "embark on a continuing, multifaceted coercive scheme . . . to enhance [their] monopoly power in the relevant market, and ultimately to charge supracompetitive prices," plaintiffs have a timely claim if "the last anticompetitive act . . . was committed within the limitations period." *In re Mission Health Antitrust Litig.*, No. 1:22-cv-00114-MR, 2024 WL 759308, at *8 (W.D.N.C. Feb. 21, 2024) (cleaned up). Here, to survive a

statute of limitations defense at the pleadings stage, all plaintiffs' complaint must do is allege some "overt act" in furtherance of USAP and Welsh Carson's scheme that occurred within the limitations period. *Powers*, 753 F.2d at 460; *Mission Health*, 2024 WL 759308, at *8.

The last merger occurred within the limitations period. The limitations period here begins September 19, 2019: four years before the FTC brought its case. 15 U.S.C. § 16(i); *see* Compl., *FTC v. U.S. Anesthesia Partners, Inc.*, No. 4:23-cv-03560 (S.D. Tex. Sept. 21, 2023), ECF No. 1. Welsh Carson and USAP sought to monopolize the Texas market for hospital-only anesthesia services through a two-pronged scheme, which involved (1) USAP merging with Texas anesthesia practices that had high market share and exclusivity contracts with hospitals, Compl. ¶¶ 54, 57; and (2) entering into illegal price-fixing and market allocation agreements with competitors it did not acquire, *id.* ¶¶ 109, 126. This scheme started in 2012 with the GHA merger, *id.* ¶ 56, and continued into 2020 with the Guardian Anesthesia Services merger, *id.* ¶ 82. The Guardian merger solidified USAP and Welsh Carson's monopoly power by affording them 60% of the Texas hospital-only anesthesia services market. *Id.* ¶¶ 85, 108. It was "the last anticompetitive act" taken to further USAP and Welsh Carson's scheme. *See Mission Health*, 2024 WL 759308, at *8. Because the Guardian merger occurred "within the limitations period," plaintiffs therefore state timely claims arising from both the mergers *and* the price-fixing agreements that were a part of the USAP/Welsh Carson anticompetitive scheme. *See id.*, at *8. Any other holding would "improperly transform the limitations statute from one of repose to one of continued immunity," allowing defendants to escape liability merely by devising a scheme that stretches longer than four years. *Poster Exch., Inc. v. Nat'l Screen Serv. Corp.*, 517 F.2d 117, 127 (5th Cir. 1975). But such a result "extends the statute beyond its purpose" and "conflicts with the policies of vigorous enforcement of private rights through private actions."

Id. at 127-28 (citing *Zenith Radio Corp.*, 401 U.S. 321).

Mergers can be "overt acts" in cases alleging a broader Section 2 conspiracy to monopolize. Welsh Carson's strange contention that an acquisition cannot be an overt act rests on inapposite case law. WC Mot. at 8. Unlike the situation here, Welsh Carson's cases all involve a merger or acquisition that occurred *before* the limitations period, followed by mere price increases or other consequences of monopoly power during the limitations period. *See Midwestern Mach. Co. v. Nw. Airlines, Inc.*, 392 F.3d 265, 269 (8th Cir. 2004); *Z Techs. Corp. v. Lubrizol Corp.*, 753 F.3d 594, 598 (6th Cir. 2014); *Complete Ent. Res. LLC v. Live Nation Ent., Inc.*, No. CV 15-9814 DSF (AGRx), 2016 WL 3457177, at *1 (C.D. Cal. May 11, 2016); *Reveal Chat Holdco, LLC v. Facebook, Inc.*, 471 F. Supp. 3d 981, 989 (N.D. Cal. 2020). Its cases did not involve what is alleged here—a series of illegal acquisitions tending to create a monopoly, where the most recent illegal acquisition occurred within the limitations period. *See* Compl. ¶¶ 85, 108; *see also Midwestern Mach.*, 392 F.3d at 271 (continuing violation occurs "where the monopolist actively reinitiates the anti-competitive policy" through "overt acts . . . that are designed to promote a monopoly in violation of § 2").

The Section 7 claim cannot be dismissed because the complaint does not "make[] plain that the claim is time-barred." *Petrobras Am.*, 9 F.4th at 253. Regardless of when the other mergers occurred, the Star Anesthesia and Guardian Anesthesia Services mergers both occurred *within* the limitations period. Compl. ¶¶ 81-82.

2. Welsh Carson Is Liable for the Continuing Violation.

Welsh Carson argues that *it* cannot be liable because the complaint does not allege independent overt acts by Welsh Carson during the limitations period. *See* WC Mot. at 7. But Welsh Carson is liable both (1) under the single enterprise doctrine and (2) due to its own acts of conspiracy both before USAP was formed and throughout the conspiracy (to the extent Welsh

Carson acted as a separate entity from USAP). Here, Welsh Carson finds itself in a trap of its own making. Welsh Carson cannot say it qualifies as a "single enterprise" with USAP "*at all times*" and then evade the actions of the enterprise, including the Guardian Anesthesia acquisition in 2020. *Id*. at 15 ("[T]he Complaint paints a picture of aligned economic interests between the Welsh Carson entities and USAP at *all times* . . . ." (emphasis added)). It does not matter that it had reduced its stake, or did not actively participate in the Guardian transaction. Welsh Carson need only participate in the anticompetitive scheme generally, *not* "each act or transaction." *Varsity Brands*, 618 F. Supp. 3d at 724; *see also Esco Corp. v. United States*, 340 F.2d 1000, 1008 (9th Cir. 1965).

On the other hand, if Welsh Carson was separate from USAP (which it denies), then the complaint pleads that it *conspired* with USAP and others, meaning that it may be held liable for USAP's acquisitions. *See Powers*, 753 F.2d at 461 (noting that "all . . . [antitrust] conspirators are bound by the acts of any one of them"). The act that tolls the statute need not be performed by the defendant because of the conspirators' joint liability. *Id.* at 460. For example, in *Powers*, involving an antitrust scheme between a utility and a developer, an overt act by the utility's assignee within the limitations period sufficed to toll the statute as to all of them. *Id.* Welsh Carson never withdrew from the conspiracy, which requires taking "[a]ffirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach co-conspirators." *United States v. MMR Corp. (LA)*, 907 F.2d 489, 500 (5th Cir. 1990) (citation omitted). Because Welsh Carson never withdrew from the conspiracy—in fact it still profits from it—it can still be liable for the conspiracy to monopolize that continued into the limitation period, regardless of whether it took any overt acts itself in the limitations period. *See Powers*, 753 F.2d at 461. This same reasoning applies to Welsh Carson's liability as

a member of the original conspiracy to monopolize, among Rizzo, Welsh Carson, New Day, and then GHA. Because Welsh Carson never withdrew, it remains liable for every act in furtherance of the scheme, including the Guardian acquisition and claims that accrued during the limitations period.

D. Clayton Act Section 7

Welsh Carson's argument that it cannot be liable under Section 7 as a matter of law contradicts the plain language of the Clayton Act, its legislative history, and applicable case law. As detailed above, Welsh Carson owned and controlled USAP and actively supported USAP's plan to acquire companies where "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly" as proscribed by Section 7. 15 U.S.C. § 18; Compl. ¶¶ 19-23, 49, 52-55, 57, 59, 65-66. Although Welsh Carson did not directly acquire these companies, it did so *indirectly*, and Section 7 plainly prohibits anticompetitive acquisitions either "directly or *indirectly*." 15 U.S.C. § 18 (emphasis added). The Clayton Act therefore bars *all entities* from such acquisitions, not just the purchasing entity. For instance, the court in *Community Publishers* reviewed the legislative history and found that Section 7 "forbids not only direct acquisitions but also indirect acquisitions, whether through a subsidiary or an affiliate *or otherwise*." *Cmty. Publishers, Inc. v. Donrey Corp.*, 882 F. Supp. 138, 140 (W.D. Ark. 1995) (quoting H.R. Rep. No. 81-1191, at 9 (1949)). As such, plaintiffs state a claim against Welsh Carson by alleging that it (1) made an unlawful acquisition indirectly through "parent/subsidiary relationships, or any other corporate structure" and (2) "had an active role in [the] acquisition." *See Geneva Pharms. Tech. Corp. v. Barr Lab'ys. Inc.*, 386 F.3d 485, 510 (2d Cir. 2004); *see also Cmty. Publishers*, 882 F. Supp. at 140-41 (plaintiff stated Section 7 claim against defendant that made unlawful acquisitions through an "affiliated corporation[]"); *In re Jim Walter Corp.*, 90 F.T.C. 671, 737-38 (1977), *vacated on other grounds*, 625 F.2d 676 (5th Cir. 1980) (parent entity

liable under Section 7 for "actively participat[ing] in direction of" unlawful acquisitions by affiliate). During each unlawful acquisition, Welsh Carson owned USAP's stock and played an active role: It identified the acquisition target, provided funding, performed due diligence, helped negotiate the merger agreement, required that it be "fully informed" of any proposed acquisition, and ultimately retained approval authority. Compl. ¶¶ 21, 23, 55, 59, 66.

Welsh Carson (in the FTC action) cited to *Brown Shoe* and *Celanese Corp.* in support of its claim that Section 7's "indirect" language prohibited only the accumulation of market power through the undisclosed ownership of entities that ostensibly remain competitors. Reply Mem. Supp. Mot. to Dismiss of Welsh Carson Entities, *FTC v. U.S. Anesthesia Partners, Inc.*, No. 4:23-cv-03560 (S.D. Tex. Feb. 26, 2024), ECF No. 124 at 17-18. However, Welsh Carson's reading of Section 7 is unduly narrow, and both cases predate the Supreme Court's decision in *Philadelphia National Bank*. The Court discussed the 1950 amendments to Section 7 at length, finding that Section 7 is to be construed expansively to "bring the entire range of corporate amalgamations . . . within the scope of s 7" and cautioning that "[i]t is settled law that '(i)mmunity from the antitrust laws is not lightly implied.'" 374 U.S. at 342, 348 (citing cases). As the *Community Publishers* court found in its review of the legislative history and cases post-dating *Philadelphia National Bank*, "the term 'directly or indirectly' should be interpreted as broadly as necessary to accomplish the purposes of the antitrust laws." 882 F. Supp. at 140-41. And, "[i]n varying contexts, the courts have refused to take a formalistic approach to corporate structures in order to effectively implement the antitrust laws." *Id*.

Finally, Welsh Carson implicitly mischaracterizes Section 7 as barring only the acquisition of "a target competitor." WC Mot. at ¶ 17. Section 7 contains no such limitation; it prohibits *any* acquisition that "may [] substantially [] lessen competition, or [] tend to create a

monopoly," including acquisitions of *potential* competitors and *non-competitors* (e.g., vertical mergers). *See, e.g.*, *FTC v. Meta Platforms Inc.*, 654 F. Supp. 3d 892, 926-27 (N.D. Cal. 2023); *Illumina, Inc. v. FTC*, 88 F. 4th 1036, 1051-55 (5th Cir. 2023).

VII. Plaintiffs State Price-Fixing Claims Against USAP and Welsh Carson.

A. Price Delegation Contracts Are Price-Fixing Agreements.

USAP asserts that plaintiffs' price-fixing claim fails because its agreements with competitors "were agnostic about the rates that USAP (or its predecessors) ultimately charged." USAP Mot. at 24. However, the complaint alleges that competitors delegated pricing authority to USAP. Compl. ¶¶ 109, 112, 116. Agreements delegating pricing authority to a competitor also violate the *per se* rule against price-fixing. *See Spitzer v. Saint Francis Hosp.*, 94 F. Supp. 2d 399, 406, 414 (S.D.N.Y. 2000) (pricing authority delegated to a joint agent); *Citizen Pub Co. v. United States*, 394 U.S. 131, 134-36 (1969) (same); *Va. Excelsior Mills, Inc. v. FTC*, 256 F.2d 538, 540 (4th Cir. 1958) (same). That is because competitors are not actually "agnostic" about their prices; they naturally want and expect prices to be raised and coordinated, exactly as the complaint alleges happened here. Compl. ¶ 109. Although USAP asserts that these agreements are not "materially significant," USAP Mot. at 7, that is a matter of perspective. USAP might find the price increases that resulted from those agreements insignificant, but they *are* materially significant to Texas payors like plaintiffs. Further, USAP's attempt to form a fourth price-fixing agreement is relevant because it speaks to USAP's intent and its ongoing scheme to monopolize hospital-only anesthesia in Texas. *Shreveport, LLC v. Willis-Knighton Medical Center*, 49 F.4th 520, 528 (5th Cir. 2022), is inapplicable—that case was limited to whether an agreement existed, a point USAP concedes, USAP Mot. at 23.

B. Welsh Carson Is a Proper Defendant for the Price Fixing Claims.

In arguing for its dismissal from plaintiffs' price fixing claims, Welsh Carson

misconstrues the allegations in the complaint as to itself as well as the nature of the price-fixing conspiracy alleged. Welsh Carson claims that it had nothing to do with the alleged price-fixing agreements, and that it should therefore be dismissed from those claims. WC Mot. at 16. But this argument fails for the reasons set forth above. First, the complaint alleges that Welsh Carson conspired with Rizzo, New Day, GHA, and USAP; and USAP's price-fixing agreements grew from that conspiracy. *See supra* Section VI.A. Second, Welsh Carson itself claims to be part of a "single enterprise" with USAP, and can therefore be held liable for the acts of the enterprise. *See supra* Section VI.B. For instance, in *Reading International*, the court denied a motion to dismiss an investor that allegedly used its 17% stake in the Regal movie theater chain to "coordinate" Regal's interactions with a competing chain. 317 F. Supp. 2d at 322-23. The court in *RealPage* similarly held that a parent company, such as Welsh Carson, is liable for the *illegal contracts* of its subsidiary when it "is aware of and exercises some degree of control over" the conspiratorial conduct. *In re RealPage, Inc., Rental Software Antitrust Litig. (No. II)*, No. 3:23-md-03071, 2023 WL 9004808, at *5 (M.D. Tenn. Dec. 28, 2023). At the pleadings stage, the Court does not, indeed cannot, adjudicate the merits of these allegations.

Welsh Carson, moreover, independently participated in USAP's agreements to fix prices with each of the three entities. ***First***, as to Methodist Hospital Physician Organization, Welsh Carson was actively involved in the GHA acquisition, extensively reviewing GHA's business. *Id.* ¶ 53. Welsh Carson must have been "aware" of the price fixing agreement that GHA had with Methodist Hospital Physician Organization given its extensive pre-acquisition review. *Id.* ¶ 110. ***Second***, with respect to Dallas Anesthesiology Associates, which had a pre-existing price-fixing agreement with Pinnacle, Welsh Carson hired consulting firms to determine whether merging with Pinnacle was a good idea. *Id.* ¶ 65. Welsh Carson, therefore, must have been

aware of the pre-existing price-fixing agreement, under which USAP, while under Welsh Carson's control, has continued to perform according to its original pricing authority terms. *Id.* ¶¶ 114, 117. ***Third***, as to Baylor College of Medicine, Welsh Carson's own partner Brian Regan *proposed* a "mutually beneficial" arrangement that became the "Anesthesia Services Collaboration Agreement" with its attendant price-fixing terms that USAP and Baylor eventually signed. *Id.* ¶¶ 120-22. Welsh Carson claims that Welsh Carson partner Regan's actions were attributable USAP, not Welsh Carson, due to Regan's dual roles. WC Mot. at 21-22. At minimum, this is a question of fact unsuitable for adjudication on the pleadings and Welsh Carson partner *Regan's knowledge* of the price-fixing can be imputed to Welsh Carson itself regardless of what "hat" Regan was wearing at the time. *Financialapps*, 2023 WL 4975373, at *9, *11 (holding that whether a parent company executive was acting on behalf of the subsidiary is a "significant question[] of fact for the jury"); *see RealPage*, 2023 WL 9004808, at *5 (finding a parent company "aware of" its subsidiary's illegal contract where it selected the subsidiary's corporate suite and installed one of its partners on the subsidiary's board). Under these circumstances, it is eminently plausible that Welsh Carson "implemented price-fixing agreements with at least three independent anesthesia groups in Houston and Dallas and tried to reach similar agreements with others." Compl. ¶ 109.

Welsh Carson's additional argument that plaintiffs did not allege that Welsh Carson was a competitor in a relevant market misconstrues the price-fixing alleged. WC Mot. at 16. Plaintiffs allege that Welsh Carson facilitated price fixing between *USAP and market competitors*. Compl. ¶¶ 111-22. Persons and entities that facilitate price-fixing between competitors are liable under the Sherman Act whether or not they are themselves competitors in the relevant market. *RealPage*, 2023 WL 9004808, at *5 (citing *Varsity Brands*, 618 F. Supp. 3d

at 722); *In re Outpatient Med. Ctr. Emp. Antitrust Litig.*, 630 F. Supp. 3d 968, 991 (N.D. Ill. 2022); *In re Capacitors Antitrust Litig.*, 106 F. Supp. 3d 1051, 1069 (N.D. Cal. 2015)).

CONCLUSION

For the foregoing reasons, plaintiffs respectfully request the Court deny defendants' motions to dismiss. Alternatively, if the Court believes the complaint requires amendment, plaintiffs respectfully request leave to amend.

Dated: March 12, 2024 Respectfully submitted,

By: */s/ Brendan P. Glackin*
Brendan P. Glackin (CA Bar No. 199643) (*pro hac vice*)
Attorney-In-Charge

Lin Y. Chan (CA Bar No. 255027) (*pro hac vice*)
Nimish Desai (TX Bar No. 24105238, S.D. Tex. Bar No. 3370303)
Jules A. Ross (CA Bar No. 348368) (*pro hac vice*)
Benjamin A. Trouvais (CA Bar No. 353034) (*pro hac vice*)
LIEFF CABRASER HEIMANN &
BERNSTEIN, LLP
275 Battery Street, 29th Floor
San Francisco, CA 94111-3339
Phone: (415) 956-1000; Fax: (415) 956-1008
Counsel for Plaintiffs and the Proposed Class

CERTIFICATE OF SERVICE

I certify that the foregoing was duly served upon all Counsel of record via the Court's CM/ECF system on March 12, 2024.

By: */s/ Brendan P. Glackin*
Brendan P. Glackin (CA Bar No. 199643)