**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., U.S. ANESTHESIA PARTNERS HOLDING, INC., and U.S. ANESTHESIA PARTNERS OF TEXAS, P.A.,

Defendants.

Civil Case No. 4:23-cv-04398

**PLAINTIFFS' OPPOSITION TO DEFENDANTS U.S. ANESTHESIA PARTNERS HOLDINGS, INC. AND U.S. ANESTHESIA PARTNERS OF TEXAS, P.A.'S MOTION TO DISMISS THE AMENDED COMPLAINT**

Hon. Alfred H. Bennett

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## INTRODUCTION

When related corporate entities participate in an anticompetitive scheme, their collective actions "must be viewed as that of a single enterprise," for which all members of the enterprise may be held liable. *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 771 (1984). Plaintiffs allege that USAP Holdings[1] [redacted] USAP Inc.[2] [redacted] and USAP Texas[3] ([redacted] professional association) constitute such an enterprise. *See* Am. Compl. ¶¶ [redacted] 21. Further, Plaintiffs allege that USAP Holdings and USAP Texas (collectively, "USAP Movants") *independently* participated in the enterprise, [redacted] Plaintiffs further allege coordinated activity [redacted] who identified rivals that the USAP enterprise should acquire and negotiated those acquisitions. *Id.* ¶¶ 18, 65-69, 74-76, 78-79, 81, 83, 86-87. Subsequently, [redacted] used the enterprise's growing market share as leverage to "peanut butter spread" supra-competitive prices to acquired providers. *Id.* ¶¶ 47, 66, 72-74, 76-80, 82, 84-88. [redacted]

Rather than address plaintiffs' single-enterprise allegations head on, USAP Holdings and USAP Texas invoke group pleading, alter-ego theory, and the premise, inapposite here, that plaintiffs must allege conduct by *each* defendant establishing *every* element of *each* of plaintiffs' claims. Not until the last two pages of their brief do USAP Movants mention the single-enterprise doctrine, at which point their motion unravels completely. USAP Movants correctly

[1] U.S. Anesthesia Partners Holdings, Inc.
[2] U.S. Anesthesia Partners, Inc.
[3] U.S. Anesthesia Partners of Texas, P.A.

concede that where "affiliates engage in 'coordinated activity' and each has 'independently participated in the enterprise's scheme'" each can be held liable as part of the single enterprise. However, they contend—incredibly—that "sign[ing] a few merger agreements" does not qualify as independent anticompetitive conduct in a *merger*-to-monopoly case. USAP Movants' sole support for this proposition is that most of plaintiffs' allegations have not changed. Their "Conclusion" immediately follows.

Moving the elephant to the brief's final pages does not get it out of the room. Plaintiffs' allegations against the USAP enterprise, including USAP Holdings and USAP Texas, state multiple violations of the antitrust laws—monopolization, attempted monopolization, unlawful acquisitions, and price-fixing. Furthermore, because they both executed several of the anticompetitive agreements in question, USAP Holdings and USAP Texas face standalone liability under the Sherman Act and Section 7 of the Clayton Act. The motion should be denied.

## BACKGROUND

Plaintiffs challenge a "multi-year anticompetitive scheme perpetrated by USAP and Welsh Carson to monopolize hospital anesthesia services in Texas." *Elec. Med. Tr. v. U.S. Anesthesia Partners, Inc.*, No. 4:23-CV-04398, 2024 WL 5274650, at *1 (S.D. Tex. Sept. 27, 2024). In 2012, former anesthesia group executive John Rizzo pitched D. Scott Mackesy—a partner at Welsh Carson Anderson & Stowe ("Welsh Carson")—on an "aggressive 'buy and build' consolidation strategy" of the Texas hospital-only anesthesia services market. Am. Compl. ¶ 53. The scheme aimed to amass "negotiating leverage with commercial payers" by "consolidat[ing] practices with high market share in a few key markets" so the firm could "raise prices" above competitive levels. *Id.* ¶¶ 54-55. Welsh Carson identified initial targets and obtained financing to form the USAP enterprise and make its first acquisition: Greater Houston Anesthesiology. *Id.* ¶¶ 57-61.

Over the next seven years, the USAP enterprise acquired fifteen anesthesia practices across Texas. *Id.* ¶¶ 65-87. The [redacted] identified and negotiated those acquisitions, specifically targeting practices that had exclusive contracts with major hospitals. *Id.* ¶¶ 18, 65-69, 71, 74-76, 78-79, 81-83, 86-87. The Amended Complaint alleges that [redacted]

[4] Declaration of Brendan Glackin ("Glackin Decl."), [redacted]

[redacted]

[redacted]

As a result, the USAP enterprise steadily amassed market share, surpassing 50% of the all-Texas market in 2019, the same year [redacted]. Am. Compl. ¶ 90; fig.1.

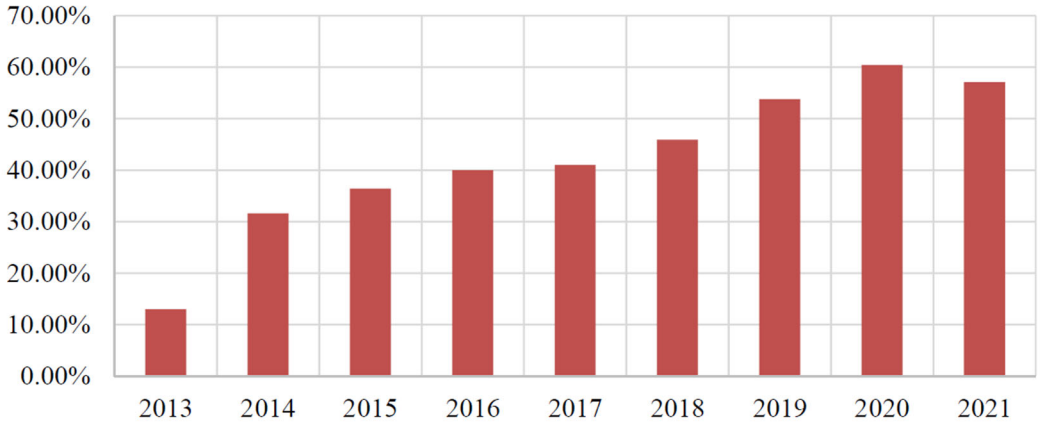
[5] Glackin Decl. [redacted]
Plaintiffs have attached documents that "are referenced in the pleadings and are central to [their] claims." *See Wilson v. Ham*, No. CV 23-2708, 2024 WL 5701882, at *2 (E.D. La. Mar. 6, 2024) (explaining that courts may consider such documents to rule on a motion to dismiss). Because several of USAP Movants' contracts exceed 100 pages, Plaintiffs have excerpted them. Plaintiffs can submit them in their entirety if the Court so requests.

[6] Glackin Decl. [redacted]

[7] *See, e.g.*, Glackin Decl. [redacted]

[8] *See, e.g.*, Glackin Decl. [redacted]

**Figure 1: USAP Statewide Market Share**
(By Revenue)




Taking advantage of its growing market power, the USAP enterprise "peanut butter spread" its higher prices to acquired practices. *Id.* ¶¶ 47, 66, 72-74, 76-80, 82, 84-88. In addition, Alan Glenesk [redacted] used the USAP enterprise's growing market share to impose a "tuck-in clause" on insurers in network participation agreements, ensuring that USAP's higher rates would apply after acquisitions. *See id.* ¶ 73. The USAP enterprise also used its growing market power to negotiate even higher reimbursement prices in network participation agreements with insurers. *Id.* ¶ 7.

[redacted]

Finally, when the USAP enterprise could not buy its rivals, it entered into and maintained price-fixing agreements in which it sets the rates competitors bill insurers, guaranteeing they will not undercut the USAP enterprise's own rates. *Id.* ¶¶ 114-29. The USAP enterprise inherited price-fixing agreements with Methodist Hospital Physician Organization and Dallas Anesthesiology Associates when it acquired Greater Houston Anesthesiology and Pinnacle, respectively. *Id.* ¶¶ 116-24.

## LEGAL STANDARD

Rule 8 requires only that a complaint contain a "short and plain statement of the claim."

Fed. R. Civ. P. 8(a)(2). On a motion to dismiss, defendants may only dispute the "formal sufficiency of the statement of the claim for relief," not the facts or a lawsuit's merits. *Sewell v. Monroe City Sch. Bd.*, 974 F.3d 577, 581-82 (5th Cir. 2020) (citation omitted). The complaint need only "contain sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'" *Id.* at 582 (quoting *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*. The moving party must "show that, even in the plaintiff's best-case scenario, the complaint does not state a plausible case for relief." *Id.* at 581. No heightened pleading standard applies in antitrust cases. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

## ARGUMENT

### I. USAP Defendants Are Liable as a Single Enterprise.

#### A. All Entities in a Single Enterprise Are Liable for Its Antitrust Violations.

The USAP Defendants formed a single enterprise that is collectively liable for its actions. The Supreme Court recognized single-enterprise liability in *Copperweld*, in which it held that a parent and its wholly owned subsidiary could not conspire under Section 1 of the Sherman Act. 467 U.S. at 759. *As a matter of law*, such entities "must be viewed as that of a single enterprise" because they "have a complete unity of interest." *Id.* at 771. The Court analogized a parent and its wholly owned subsidiary to "a multiple team of horses drawing a vehicle under the control of a single driver," recognizing that "in reality [such entities] always have a 'unity of purpose or a common design.'" *Id.* at 771-72 (citation omitted). Although, as *Copperweld* explained, entities within a single enterprise cannot by definition enter into anticompetitive agreements with each other that would violate Section 1, such entities do not get a free pass from the antitrust laws: "A

corporation's initial acquisition of control will always be subject to scrutiny under § 1 of the Sherman Act and § 7 of the Clayton Act [and] [t]hereafter, the *enterprise* is fully subject to § 2 of the Sherman Act[.]" *Id.* at 777 (emphasis added).

Accordingly, "in 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 MacLaren Surgical Corp. v. Medtronic, Inc.*, 847 F.3d 1221, 1236 (10th Cir. 2017) (citing Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1464g, at 227 (3d ed. 2008)). This rule applies generally to antitrust violations, not just Section 2 claims. Under *Copperweld* and USAP Movants' own authority, "[a] wholly owned subsidiary that engages in coordinated activity in furtherance of the anticompetitive scheme of its parent and/or commonly owned affiliates is deemed to engage in such coordinated activity with the purpose of the single 'economic unit' of which it is a part" for Section 1. *Arandell Corp. v. Centerpoint Energy Servs., Inc.*, 900 F.3d 623, 632 (9th Cir. 2018) (endorsing single-enterprise theory in a Section 1 case); *see also Jones v. Varsity Brands, LLC*, 618 F. Supp. 3d 713, 722 (W.D. Tenn. 2022) (permitting plaintiffs to pursue Section 1 claim where they alleged a single enterprise conspired with a defendant outside the enterprise). The single-enterprise rule also applies to Section 7 claims, consistent with the Clayton Act's condemnation of anticompetitive acquisitions whether they occur "directly or indirectly." 15 U.S.C. § 18; *see Hightower v. Celestron Acquisition, LLC*, No. 5:20-CV-03639-EJD, 2021 WL 2224148, at *3, 11 (N.D. Cal. June 2, 2021) (permitting plaintiffs alleging Section 1, Section 2, and Section 7 claims to proceed on single-enterprise theory). Any other result "would all but eviscerate the [antitrust laws] with respect to sophisticated competitors. So long as a corporation spread its anticompetitive scheme

over multiple subsidiaries, such that no one entity met all the requirements for individual antitrust liability, it could unlawfully monopolize with impunity." *Lenox*, 847 F.3d at 1236.

District courts in the Fifth Circuit have applied the single-enterprise doctrine. Indeed, this Court did so in ruling on Welsh Carson's motion to dismiss, relying on *Arandell* and *Lenox* for the principle that plaintiffs may establish single-enterprise liability as to each defendant that independently participated in the enterprise's scheme. *See Elec. Med. Tr.*, 2024 WL 5274650, at *5. The Northern District of Texas has as well. *See Chandler v. Phx. Servs.*, No. 7:19-CV-00014-O, 2020 WL 1848047, at *12-15 (N.D. Tex. Apr. 13, 2020), *aff'd sub nom. Chandler v. Phx. Servs., L.L.C.*, 45 F.4th 807 (5th Cir. 2022) (granting summary judgment on single-enterprise theory because plaintiffs conceded that the parent had no knowledge, shared intent, or involvement in its subsidiary's alleged inequitable conduct).

**B. <u>USAP Holdings and USAP Texas Form a Single Enterprise with USAP Inc.</u>**

The Amended Complaint alleges that USAP Holdings, USAP Inc., and USAP Texas form a single enterprise, functioning as "a single entity with a shared identity." Am. Compl. ¶ 21. [redacted] As such, USAP defendants have a "unity of purpose" as a matter of law and must be viewed as a single enterprise when they engage in coordinated conduct. *See Arandell*, 900 F.3d at 630 (quoting *Copperweld*, 467 U.S. at 771); *see also Belnap v. Steward Health Care Sys. LLC*, No. 2:19-CV-00330-DAK, 2020 WL 619402, at *6 (D. Utah Feb. 10, 2020) (collecting cases applying *Copperweld* to subsidiaries that are not wholly owned).

**C. <u>USAP Holdings and USAP Texas Independently Participated in the USAP Enterprise's Anesthesia Consolidation Scheme.</u>**

Neither USAP Holdings nor USAP Texas debates their "unity of purpose" with USAP

[9] Glackin Decl. [redacted]

Inc. *See* Mot. at 8-9. Indeed, *Copperweld* protects the USAP entities from an allegation of an illegal agreement among them under Section 1 of the Sherman Act. Presumably, they do not wish to disavow that protection. They also do not seem to dispute that, if they formed part of the enterprise, a claim has been stated. Indeed, this Court has already found that plaintiffs plausibly alleged their Section 1, Section 2, and Section 7 claims. *See Elec. Med. Tr.*, 2024 WL 5274650, at *8-9. Instead, they rest their defense on the requirement of "independent participation." *See* Mot. at 8-9.

Minimal facts, however, can meet that requirement—and the Amended Complaint alleges more than enough. For instance, in *Jones*, the court found that two private equity firms independently participated in a scheme with their portfolio company to monopolize the competitive cheerleading market by acquiring rivals: the private equity firms held seats on the portfolio company's board of directors, worked with leadership to execute the unlawful strategy, and funded acquisitions. 618 F. Supp. 3d at 724. Indeed, *USAP Movants' own counsel*, Kellogg Hansen, in *Lenox* itself, acknowledged the extremely low bar of activity required to establish "independent participation." Representing the plaintiff-appellant in *Lenox*, Kellogg Hanson argued that a related corporate defendant played a sufficient role in the alleged anticompetitive scheme to drive Lenox out of the bone mill market *because its executives signed a recall form* for that bone mill. Glackin Decl. Ex. I, Principal Br. Pl.-Appellant at *49-50, *Lenox MacLaren Surgical Corp. v. Medtronic, Inc.*, Nos. 16-1012, 15-1500, 2016 WL 1399542 (10th Cir. Apr. 7, 2016). In Kellogg Hanson's own words: "Medtronic Inc.'s senior officers . . . approved the sham recall of Lenox's bone mills . . . . That evidence *alone* is sufficient for a reasonable factfinder to infer that Medtronic Inc. also actively participated in the scheme to drive Lenox out

of the market." *Id*. (emphasis added).[10]

Here too, USAP Holdings and USAP Texas independently participated "by playing a role in . . . maintaining and expanding [Defendants'] market share." *Jones*, 618 F. Supp. 3d at 725; *see Fed. Trade Comm'n v. Syngenta Crop Prot. AG*, 711 F. Supp. 3d 545, 585-86 (M.D.N.C. 2024) (denying motion to dismiss where parent entities allegedly managed a subsidiary's contracts and entered into at least one of those contracts). USAP Holdings and USAP Texas's "role was not only helpful" to their larger enterprise's consolidation scheme, "it was crucial." *See Arandell*, 900 F.3d at 635. USAP [redacted] *See* Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 701a (2023) ("[M]erging viable competitors to create a monopoly is a clear §2 offense.").

USAP Movants claim that "sign[ing] a few merger agreements" does not qualify as "the core challenged conduct" or a "critical contribution[]" to the violation, such as those found in *Arandell*. Mot. at 9. Gutsy. If acquiring other anesthesia practices is not "the core challenged conduct" in this case, then what pray tell is? A perusal of the table of contents reveals that the Amended Complaint spends *15 pages* detailing a "SERIAL ACQUISITION SCHEME" that included acquiring "ANOTHER FIFTEEN TEXAS ANESTHESIA PRACTICES," [redacted] Am. Compl. ¶¶ 65-87; [redacted]. Indeed, the Supreme Court has held that no other act "could more certainly come within the words of the [Sherman] act" than a scheme to monopolize via acquisition. *See N. Sec. Co. v. United States*, 193 U.S. 197, 326 (1904) (condemning competing railroad companies' "scheme of organizing a

[10] The Tenth Circuit did not reach the independent participation issue, instead holding that claim preclusion would bar plaintiff-appellant's claims if it established a single enterprise. *Lenox*, 847 F.3d at 1239, 1246.

corporation . . . which should *hold* the shares of the stock of the [rival] companies"); *see also Elec. Med. Tr.*, 2024 WL 5274650, at *9. USAP Movants' argument also completely ignores plaintiffs' claim against the enterprise under Section 7 of the Clayton Act, which as a matter of law *only* arises from its unlawful acquisitions.

What is more, USAP Movants provide no explanation as to why USAP Texas's "enter[ing] [into] contracts with commercial payors," Mot. at 8, which the Amended Complaint alleges raised the price of hospital-only anesthesia services, does not state independent participation. That conduct is analogous to the "critical" conduct in *Arandell*—selling the price-fixed product. *See* 900 F.3d at 635. USAP Movants object that the Amended Complaint did not identify specific contracts, those contracts' terms, or the date of their execution, without citing any authority for the proposition that such allegations are necessary. Mot. at 8. To the contrary, the Federal Rules do not require that degree of factual specificity at the pleadings stage. *Jones*, 618 F. Supp. 3d at 724. And, of course, USAP Movants have the contracts—and do not explain why this information would affect the sufficiency of the Amended Complaint. The Amended Complaint more than states a claim against USAP Movants under a single-enterprise theory.

## II. The Amended Complaint States Standalone Claims Against the USAP Movants.

Although the single-enterprise rule offers the most appropriate legal framework for this case, the Amended Complaint states Clayton Act and Sherman Act claims against USAP Movants even putting the single-enterprise framework aside. USAP Movants did not merely provide tangential support to the scheme; they executed its constituent merger agreements.

The Clayton Act condemns an acquisition where "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18. It applies to acquisitions that occur "directly or indirectly." *Id.* "To state a claim under [Section] 7, a plaintiff must (1) define the relevant market and (2) demonstrate the probability of

anticompetitive results flowing from the challenged transaction." *Corrente v. Charles Schwab Corp.*, No. 4:22-CV-00470, 2023 WL 2244680, at *3 (E.D. Tex. Feb. 24, 2023). The Sherman Act likewise condemns transactions that monopolize or attempt to monopolize a relevant antitrust market. *See, e.g.*, Areeda & Hovenkamp (2023), *supra*, ¶ 701a ("[M]erging viable competitors to create a monopoly is a clear §2 offense.").

This Court has already found that plaintiffs plead relevant antitrust markets and that the USAP acquisitions lessened competition in those markets. *See Elec. Med. Tr.*, 2024 WL 5274650, at *9. USAP Movants do not seem to dispute that overall premise. They also concede that the Amended Complaint alleges that the USAP Movants entered into merger contracts with—i.e., acquired—Texas anesthesiology practices, as well as reimbursement contracts with payors. Mot. at 8. Instead, they complain that the allegations lack "transaction details" or "specifics as to any of those alleged contracts (which payor or acquired entity, when, in what market, and the like)." *Id.*

This is flat wrong. The Amended Complaint [redacted]

[redacted] The Amended Complaint states standalone claims against each of USAP Movants, independent of single-enterprise liability.

## III. Plaintiffs Did Not Improperly "Group Plead."

USAP Holdings and USAP Texas claim that plaintiffs engage in "group pleading." Mot. at 4-5. But as stated above, the Amended Complaint identifies independent participation specific to USAP Holdings and USAP Texas—[redacted]—establishing their membership in the USAP enterprise. Those specific acquisitions also give rise to independent liability under the Sherman and Clayton Acts. Defendants' authorities are inapposite. The Fifth Circuit did not address group pleading in *Sims v. City of Madisonville*, 894 F.3d 632 (5th Cir. 2018). Instead, the court only found that plaintiff could not raise a new liability theory in response to a motion for summary judgment. *Id.* at 643. USAP Movants also contort this Court's prior order, claiming that it "confirms that antitrust liability must be evaluated defendant-by-defendant." Mot. at 4 (citing *Elec. Med. Tr.*, 2024 WL 5274650, at *5). But that opinion only held that plaintiffs must allege that each defendant *independently* participated in order to state a claim against it as part of a single enterprise. *Elec. Med. Tr.*, 2024 WL 5274650, at *5 (quoting *Lenox*, 847 at 1237) ("[A] plaintiff alleging a single enterprise is 'required to come forward with evidence that each defendant *independently participated* in the enterprise's scheme, to justify holding that defendant liable as part of the enterprise.'"). Attempting to prop up that mischaracterization, USAP Holdings and USAP Texas cite the non-public transcript of this Court's hearing on Welsh Carson's motion to dismiss a complaint in an action to which plaintiffs are not parties. Mot. at 4 (quoting Tr. of Mot. Hrg. Proceedings at 20:1-5, *Musharbash v. U.S. Anesthesia Partners, Inc.*, No. 4:25-cv-116 (S.D. Tex. May 28, 2025)). Here, however, plaintiffs allege independent participation *specific* to

USAP Holdings and USAP Texas.

USAP Holdings and USAP Texas cite several non-antitrust cases for the proposition that plaintiffs must allege conduct by each defendant establishing every element of plaintiffs' claims. Mot. at 5 (citing *Dole Food Co. v. Patrickson*, 538 U.S. 468, 471 (2003) (tort action); *Robbins v. Oklahoma*, 519 F.3d 1242, 1246 (10th Cir. 2008) (Section 1983); *Taylor v. IBM*, 54 F. App'x 794, 794 (5th Cir. 2002) (copyright infringement); *Atuahene v. City of Hartford*, 10 F. App'x 33, 34 (2d Cir. 2001) (constitutional and state common law claims); *Del Castillo v. PMI Holdings N. Am. Inc.*, No. 4:14-CV-03435, 2016 WL 3745953, at *1 (S.D. Tex. July 13, 2016) (tort action); *Dell, Inc. v. This Old Store, Inc.*, No. CIV.A. H-07-0561, 2007 WL 1958609, at *1 (S.D. Tex. July 2, 2007) (trademark and copyright infringement, unfair competition under the Lanham Act, injury to business reputation, tortious inducement of breach of contract, and tortious interference)). Because they did not involve single-enterprise liability under the antitrust laws, these cases are simply beside the point.

USAP Movants' citation to alter ego cases fail for the same reason. As the Tenth Circuit observed in *Lenox*, theories of veil-piercing, alter ego, and respondeat superior "operate independently of the single-enterprise theory." *Lenox*, 847 F.3d at 1237. USAP Movants' alter ego authorities did not address single-enterprise liability because they did not involve antitrust claims. *See Gardemal v. Westin Hotel Co.*, 186 F.3d 588, 591 (5th Cir. 1999) (negligence); *United States v. Bestfoods*, 524 U.S. 51, 55 (1998) (CERCLA); *Gundle Lining Constr. Corp. v. Adams Cnty. Asphalt, Inc.*, 85 F.3d 201, 203 (5th Cir. 1996) (bond enforcement and indemnification action).

## IV. Alternatively, Plaintiffs Request Leave to Amend.

If the Court believes the Amended Complaint requires additional factual matter to state a claim, plaintiffs respectfully request leave to amend. "When a trial court imposes a scheduling

order, Federal Rules of Civil Procedure 15 and 16 operate together to govern the amendment of pleadings." *Tex. Indigenous Council v. Simpkins*, 544 F. App'x 418, 420 (5th Cir. 2013). Rule 15(a) instructs that courts should "freely give leave when justice so requires." *Cinemark Holdings, Inc. v. Factory Mut. Ins. Co.*, No. 4:21-CV-00011, 2021 WL 3190508, at *2 (E.D. Tex. July 28, 2021) (citation omitted). Under Rule 15, district courts consider five factors to determine whether to grant leave to amend: "(1) undue delay; (2) bad faith or dilatory motive; (3) repeated failure to cure deficiencies by previous amendments; (4) undue prejudice to the opposing party; and (5) futility of amendment." *Id.* (citing *Smith v. EMC*, 393 F.3d 590, 595 (5th Cir. 2004)). If a scheduling order has been entered, the Fifth Circuit has instructed lower courts to consider four additional factors: "(1) the explanation for the failure to timely move for leave to amend; (2) the importance of the amendment; (3) potential prejudice in allowing the amendment; and (4) the availability of a continuance to cure such prejudice." *S&W Enters., L.L.C. v. SouthTrust Bank of Ala., NA*, 315 F.3d 533, 536 (5th Cir. 2003)) (citation modified and citations omitted).

The additional factual matter would be, if required, the execution dates of the merger and payor contracts identified above (which USAP Movants claim to be necessary and sufficient to state a claim). It would also include [redacted] Plaintiffs did not discover the evidence about [redacted] in the document production until after they filed the Amended Complaint.

[redacted]

[11] Glackin Decl. [redacted].

[redacted]

They would also add allegations that [redacted]

Here, upon receiving the documents identifying USAP Movants as appropriate defendants, plaintiffs promptly filed an Amended Complaint within the deadline to do so. Should the Court believe additional factual matter should be added to substantiate the claims (such as the dates or other specifics of the various contracts, or the additional information mentioned above), USAP Movants suffer no undue prejudice because they have been provided the notice of their status as defendants and the nature of the claims that is the governing principle of Rule 8, and the litigation remains at relatively early stage. And, indeed: USAP Movants of course already have this information, because it comes from their own documents. There can be no suggestion that plaintiffs have acted in bad faith, or with insufficient explanation, or from a dilatory motive. The amendment matters, because having these entities within the jurisdiction of

[12] Glackin Decl. [redacted]; *see also id.* ¶¶ 125-27.

the Court may be necessary to remedy the violation.

To be clear, amendment should not be necessary. The Amended Complaint more than states a claim against USAP Movants. But to the extent necessary, plaintiffs request leave to amend.

## CONCLUSION

For the foregoing reason, plaintiffs respectfully request that the Court deny USAP Movants' motion to dismiss.

Dated: June 27, 2025 Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that the foregoing was duly served upon all Counsel of record via the Court's CM/ECF system on June 27, 2025.

By: */s/ Brendan P. Glackin*