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

Electrical Medical Trust and Plumbers Local Union No. 68 Welfare Fund, *Plaintiff,* v. U.S. Anesthesia Partners, Inc., *et al.*, *Defendants*	CAUSE NO. 4:23-CV-04398

NON-PARTY BROWN & BROWN INSURANCE SERVICES, INC.'S OPPOSITION TO USAP'S CROSS-MOTION TO COMPEL

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Non-Party Brown & Brown Insurance Services, Inc. ("BBIS") and files its Response in Opposition to Defendants U.S. Anesthesia Partners' ("USAP" or "Defendants") Cross-Motion to Compel. [R. Doc. 191] As set forth BBIS's Motion to Quash Subpoena and Motion for Protective Order [R. Doc. 183], BBIS has "met-and-conferred" multiple times with USAP, produced documents [R.Docs. 183-1 and 183-5], and provided responses and objections to USAP's requests [R.Doc. 183-5]. In addition to these arguments, and in Response to USAP's Motion to Compel, BBIS would show as follows:

I. INTRODUCTION

Defendants move to compel sweeping discovery from non-party BBIS, an insurance brokerage firm that has no relationship to Plaintiffs, no relationship to the putative class, no relationship with Defendants, and no involvement in the alleged anticompetitive conduct at issue. USAP's subpoena demands confidential materials from

approximately 35 of BBIS's clients to be identified by the number of beneficiaries located in Texas, both private and governmental entities, including marketing documents, presentations, administrative services agreements, stop-loss policies, plan documents, broker proposals, and onboarding materials. [R. Doc. 183-2]. USAP claims these materials are necessary to support its argument that class certification fails because self-funded plans operate through individualized broker arrangements. However, Rule 45 and Rule 26 do not permit industry-wide discovery from a non-party based on a legally flawed predominance theory. The subpoena is untethered to the claims, untethered to the class, and untethered to the alleged pricing conduct in the Texas anesthesia market. Indeed, USAP's subpoena seeks expansive confidential business information from unrelated, non-party entities in an effort to manufacture heterogeneity. Because the subpoena is irrelevant to any claim or defense, disproportionate to the needs of the case, and imposes undue burden on a non-party, USAP's Cross-Motion to Compel should be denied.

II. ARGUMENT

A. Rule 45 Requires Heightened Protection for Non-Parties

Rule 45 imposes an independent obligation on courts to protect non-parties from undue burden and expense. Fed. R. Civ. P. 45(d)(1) Unlike party discovery, subpoenas directed to non-parties are subject to "special weight" in evaluating burden and proportionality. The Fifth Circuit has recognized that courts must be particularity sensitive to the burden imposed on non-parties. *See, Wiwa v. Royal Dutch Petroleum Co.,* 392 F.3d 812, 818 (5th Circ. 2004). In assessing undue burden, courts consider: (1) the relevance of the information requested; (2) the need for the documents; (3) the breadth of the request; (4) the time period covered; (5) the particularity of the request; and (6) the burden imposed.

See, Wiwa, 392 F.3d at 817–18 (5th Cir. 2004). Subpoenas that sweepingly pursue material with little apparent relevance, or that demand "all documents" on broad topics without particularity or reasonable time limits, are facially overbroad. *See, e.g., Am. Fed'n of Musicians of the U.S. & Can. v. Skodam Films*, LLC, 313 F.R.D. 39, 40 (N.D. Tex. 2015); *Concord Boat Corp. v. Brunswick Corp.,* 169 F.R.D. 44 (S.D.N.Y. 1996).

Here, BBIS is not a party; BBIS is not alleged to have engaged in anticompetitive conduct; BBIS is not a broker to Plaintiffs or Defendants; and BBIS does not negotiate anesthesia reimbursement rates with USAP or any other provider. Yet, USAP seeks broad categories of confidential client files spanning nearly a decade belonging to dozens of unrelated, non-party entities. Rule 45 does not allow litigants to conscript a non-party brokerage firm into producing industry-wide proprietary information absent a strong showing of relevance and necessity. USAP has not made that showing.

Further, USAP's assertion that BBIS has failed to "meet-and-confer" in good faith and refused to respond to repeated attempts to engage via email, phone, or letter is blatantly false. The documents show that counsel for BBIS was in regular communication with USAP beginning September 24, 2025, and that BBIS and USAP had several "meet-and confers"; specifically, undersigned counsel "met-and-conferred" with multiple USAP attorneys on October 17, 2025, November 25, 2025, December 17, 2025, and January 21, 2026. [R. Doc. 183-3, 183-5, 183-6, 183-7]. USAP's assertion to the contrary is disingenuous and misleading.

B. <u>The Subpoena Fails Rule 26(b)(1)'s Relevance Requirement</u>

Discovery must be relevant to a claim or defense under Federal Rule of Civil Procedure 26(b)(1). While relevance is broad, it is not boundless. USAP contends it needs

BBIS's client documents to demonstrate that self-funded plans operate through individualized broker arrangements, which purportedly defeats predominance under Rule 23(b)(3). However, this is an antitrust overcharge case, and the relevant issues involve questions of USAP's conduct, reimbursement rates, and pricing. Importantly, BBIS has no involvement with negotiating anesthesia rates or pricing; consequently, its internal materials do not bear on the existence of a market-wide overcharge. Moreover, none of the requests are for documents relevant to the issues in the underlying case. Relevance cannot be established by asserting abstract variability in plan administration unrelated to the challenged conduct.

C. <u>The Subpoena Fails Rule 26(b)(1)'s Proportionality Requirement</u>

Even if marginally relevant, which it is not, the subpoena is not proportional to the needs of the case. Federal Rule of Civil Procedure 26 requires courts to consider the importance of this issues; the importance of the discovery in resolving those issues; the parties' relative access to information; and whether the burden outweighs the likely benefit. Notably, USAP already possess or should already possess its own contracts and pricing data; market share and market structure evidence; discovery from Plaintiffs; discovery in the parallel litigation (4:24-cv-0116 and 4:23-cv-3560); access to putative class member discovery.

Instead of targeting evidence about USAP's pricing conduct, the subpoena seeks: marketing documents and presentations relating to partially and self-funded health plans; stop-loss insurance plans; cost-sharing structures; broker proposals; plan booklets; onboarding questionnaires. These materials concern risk allocation and benefit design- not anesthesia prices charged by USAP or other similar providers. And, the burden on BBIS

to produce such documents is substantial. Production would require review of sensitive third-party employer documents containing proprietary financial, contractual, and strategic information. These employers are not parties to this case and have no opportunity to object independently. Moreover, BBIS estimates more than 140 personnel hours and over $8,000 in internal labor merely to identify and review potentially responsive files, excluding attorney review, confidentiality screening, logging, and any vendor costs, with significant disruption to operations. [R. Doc. 183-1]. Courts routinely protect non-parties from such burdens. *See, In re Subpoenas Issued to Labatt Food Serv., LLC*, 2022 U.S. Dist. LEXIS 62122 (W.D. Tex. Apr. 1, 2022)*(*court quashed non-party subpoena based on proportionality requirement); *MetroPCS v. Thomas*, 327 F.R.D. 600, 609 (N.D. Tex. 2018). The likely benefit is negligible; the burden is significant. Rule 26 does not permit such discovery.

D. <u>Confidentiality and Third-Party Interests Weigh Against Production</u>

USAP argues that protective orders cure confidentiality concerns. However, they do not. The existence of a protective order does not transform irrelevant discovery into relevant discovery, nor does it eliminate the competitive and business risks associated with compelled disclosure of proprietary client materials. Specifically, the subpoena targets confidential: broker-client strategies; stop-loss negotiations and policies; network design decisions; financial risk structures. These materials belong to unrelated third-parties and may contain financial information and sensitive medical information of employees. Courts recognize such material as protected. *See, In re Remington Arms Co., Inc.,* 952 F.2d 1029, 1032 (8th Cir. 1991). Rule 45 requires courts to protect non-parties from precisely this type of intrusive discovery.

E. USAP'S Predominance Theory Does Not Justify Non-Party Discovery

Even if the Court Considers USAP's Rule 23 argument, it does not justify this non-party subpoena. The Fifth Circuit has held that predominance exists where common issues of liability predominate, even if damages vary. *See*, *In re Deepwater Horizon*, 739 F.3d 790, 815 (5th Cir. 2014). Differences in downstream financial arrangement, such as stop-loss coverage or cost-sharing, do not defeat certification if the alleged injury arises from a common pricing mechanism. USAP's theory attempts to elevate differences in administrative structure into dispositive predominance issues. That is not the law. But even if USAP wishes to advance that argument, it must do so through party discovery or class-member discovery; not by sweeping in confidential files from an unrelated brokerage firm with no connection to the class. Rule 45 does not authorize fishing expeditions designed to support speculative heterogeneity theories.

III. CONCLUSION AND PRAYER

For the foregoing reasons, BBIS respectfully requests that the Court deny USAP's Cross-Motion to Compel in its entirety; sustain BBIS's objections; and grant such other and further relief, as the Court deems just and proper.

Respectfully submitted,

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AI CERTIFICATE

The undesigned preparer of this filing certifies that no portion of the filing was drafted by Artificial Intelligence ("AI") nor was AI utilized in drafting the foregoing document.

/s/ Tessa Vorhaben
Tessa Vorhaben

RULE 7 CERTIFICATE OF CONFERENCE

I hereby certify that I spoke with counsel for U.S. Anesthesia multiple times regarding the merits of this motion and the scope of the subpoena. Specifically, I "met and conferred" with counsel on October 17, 2025, November 25, 2025, December 17, 2025, and January 21, 2026. Once it became apparent that USAP was unwilling to narrow its requests, BBIS proceeded with filing its Motion to Quash and for Protective Order

/s/ Tessa Vorhaben
Tessa Vorhaben

CERTIFICATE OF SERVICE

I hereby certify a true and correct copy of the foregoing document has been this the 3rd day of March, 2026, served on each party who has appeared herein, by and through its attorney of record, via e-service.

/s/ Tessa Vorhaben
Tessa Vorhaben