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 **JOINT STATUS REPORT** Hon. Alfred H. Bennett

Plaintiffs and Defendants (together, "the parties") respectfully submit this Joint Status Report in advance of the Status Conference set for July 19, 2024. The parties respectfully reiterate their request for this Court to schedule oral argument on Defendants' motions to dismiss.

I. FTC Timeline of Events

The parties provide this chronological summary of events in the *FTC v. USAP* matter since the prior hearing with Your Honor.

- May 1, 2024: Judge Hoyt issues a Scheduling Order, setting the following deadlines:
    - May 13, 2024: Discovery opens.

- January 31, 2025: Expert designations and reports due.
- February 28, 2025: Rebuttal expert designations and reports due.
- April 30, 2025: Fact and expert discovery closes.
- April 30, 2025: Dispositive motions deadline.
- May 30, 2025: Oppositions to dispositive motions due. Replies due within ten days of the submission of an opposition.
- September 8, 2025: Docket call.

- May 13, 2024: Judge Hoyt issues an order denying USAP's Motion to Dismiss, and granting the Welsh Carson entities' Motion to Dismiss.
- May 13, 2024: Pursuant to the scheduling order, the FTC and USAP exchanged initial disclosures and began serving party and non-party discovery.
- May 28, 2024: Judge Hoyt grants the FTC's Motion for Protective Order, giving USAP's in-house counsel access to Confidential Material but not Highly Confidential Material.
- June 12, 2024: USAP files a Notice of appeal from the Order denying its Motion to Dismiss.
- June 13, 2024: USAP files a Motion to Stay Pending Interlocutory Appeal.
- June 17, 2024: USAP files its Answer to the FTC's Complaint.
- July 5, 2024: The FTC files its Response in Opposition to USAP's Motion to Stay Pending Interlocutory Appeal.
- July 12, 2024: USAP files its Reply in Support of its Motion to Stay Pending Interlocutory Appeal.

II. Motions to Dismiss

The parties agree that the motions to dismiss are fully briefed and ready to be decided, subject to the Court's decision on whether or not to hold oral argument.

III. Discovery Stay Dispute

The parties disagree whether discovery should remain stayed.

A. Plaintiffs' Position

At the last conference, this Court delayed discovery "for [the] purposes of giving [Judge

Hoyt] room to enter his scheduling order and potentially rule on his motion to dismiss before I proceed." Apr. 5, 2024 Initial Conf. Tr. ("Tr.") 30:18-31:13, ECF No. 81. Judge Hoyt has now ruled and opened discovery, denying USAP's motion to dismiss on some of the same grounds it advanced here. The FTC has already produced its investigative file to USAP, which includes materials the FTC obtained from Defendants and non-parties, like insurers.

Rule 26 permits discovery after the 26(f) conference, and this Court's standard procedures presume that discovery commences even before the scheduling conference. Fed. R. Civ. Proc. 26(d)(1); Tr. 21:12-16; Judge Alfred H. Bennett, *Court Procedures & Practices* 4 (Nov. 7, 2023). A motion to dismiss does not automatically stay discovery, and courts in this Circuit have denied requests to stay discovery pending such motions when defendants have not demonstrated good cause, such as undue burden, or an imminent ruling. *Ivy v. Tran*, No. CV 20-1475, 2021 WL 7906843, at *2 (E.D. La. Feb. 4, 2021); *Sedillo v. Team Techs., Inc.*, No. 3:20-CV-1628-D, 2020 WL 5411697, at *3 (N.D. Tex. Sept. 9, 2020); *U.S. ex rel. Gonzalez v. Fresenius Med. Care N. Am.*, 571 F. Supp. 2d 766, 768 (W.D. Tex. 2008).

USAP's *pro se* litigant authorities do not involve antitrust cases where the plaintiffs sought a pre-existing production to government regulators. *See Smith v. Potter*, 400 F. App'x 806, 811-13 (5th Cir. 2010); *Petrus v. Bowen*, 833 F.2d 581, 582 (5th Cir. 1987); *Von Drake v. Nat'l Broad. Co.*, 2004 WL 1144142, at *2 (N.D. Tex. May 20, 2004). And *Landry v. Air Line Pilots Association International AFL-CIO*, at most stands for the proposition that courts have discretion to stay discovery. 901 F.2d 404 (5th Cir. 1990), *op'n modified on denial of reh'g* (Apr. 27, 1990). A stay may not be maintained simply based on Defendants' firm belief that they will prevail. *Velazquez v. El Pollo Rebio LP, LLC*, No. 3:15-cv-3170-M, 2017 WL 2289185, at *6 (N.D. Tex. May 25, 2017). Indeed, in addition to denying USAP's motion, Judge

Hoyt dismissed Welsh Carson from the FTC Action on a unique issue—Section 13(b) of the FTC Act, which requires that the defendant be violating or about to violate the law. Order at 9-16 (ECF No. 83-1). That issue has nothing to do with the statute of limitations defense raised in this case, which includes claims for damages for past misconduct. Welsh Carson also ignores that Judge Hoyt thus had no occasion to consider questions such as whether Welsh Carson formed a single enterprise with USAP and independently participated in that enterprise's antitrust violations or conspired with USAP, such that USAP's own continuing violations can be attributed to Welsh Carson for limitations purposes. Pls.' Opp'n at 43-45.

Defendants must demonstrate undue burden to justify a stay of discovery. *U.S. ex rel. Gonzalez*, 571 F. Supp. 2d at 767 (quoting Fed. R. Civ. Pro. 26(c)). They do not. The parties could meaningfully advance discovery without undue burden by, for example, (1) reproducing the FTC's production to Defendants; (2) producing what the Defendants have already collected, reviewed and produced to the FTC; (3) producing organizational charts; (4) producing claims data for services provided by USAP; and (5) negotiating search terms and custodians.

Defendants contend that re-producing their FTC productions would require them to review millions of pages for relevance and privilege. Not so. No claim of privilege exists for documents intentionally handed over to the government, and Plaintiffs have already agreed to the basic terms of a generous clawback order. Relevance, on the other hand, is a broad standard and courts regularly find that evidence of similar anti-competitive conduct outside of the affected market goes to issues such as the temporal scope of the scheme, key participants, their motive, their method, and its effects. *See, e.g.*, *Vasquez v. Indiana Univ. Health, Inc.*, No. 1:21-CV-01693-JMS-MG, 2023 WL 3450809, at *2 (S.D. Ind. May 15, 2023) (collecting cases); *Frame-Wilson v. Amazon.com, Inc.*, No. C20-424RSM, 2023 WL 4201679, at *4 (W.D. Wash. June 27,

2023) (production of European transactional data); *In re Vitamins Antitrust Litig.*, No. 99-197TFH, 2001 WL 1049433, at *11-14 (D.D.C. June 20, 2001) (rejecting U.S. geographic limit). Defendants' authorities did not consider these types of issues. *See Radio Music License Committee, Inc. v. Global Music Rights, LLC*, No. CV 193957, 2020 WL 76376281, at *5 (C.D. Cal. Jan. 2, 2020) (plaintiffs sought discovery about a different product but nothing suggested a similar scheme for it); *Heartland Surgical Specialty Hosp., LLC v. Midwest Div., Inc.*, No. 05-2164, 2007 WL 2668742, at *11 (D. Kan. Sept. 6, 2007) (plaintiff sought data concerning broader geographic area solely because Defendants previously produced records created from that data). The fact that USAP settled with the Colorado Attorney General for allegedly engaging in the *same* consolidation scheme underscores that broad geographic discovery is "within 'reasonable bounds'" here. *See* Colo. Atty' 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/; *Jones v. Metzger Dairies, Inc.*, 334 F.2d 919, 922 (5th Cir. 1964) (also not addressing the relevance of a common scheme).

Despite ample opportunity, Defendants have not provided basic information to substantiate their relevance or burden arguments, including (1) enumerating or identifying the "other geographies," besides Colorado; (2) the volume of materials concerning other geographies previously produced to the FTC relative to the total production; (3) the type of documents involved, such as whether they consist of emails, PowerPoints, or something else; (4) which, if any, custodians exclusively worked on "other geographies"; and (5) if, in fact, all custodians worked on all geographies, why it would be appropriate to categorically exclude documents about a scheme to corner the market on anesthesiology in Colorado, in a case where the same

person has been accused of doing the same thing in Texas. But the Court need not (indeed should not) decide the discoverability of this information now: the question is whether the process of discovery, including determining that question, should commence. It clearly should.

Defendants' reliance on *Rio Grande Royalty Co. v. Energy Transfer Partners, L.P.* is misplaced. No. H-08-CV-0857, 2008 WL 8465061 (S.D. Tex. Aug. 11, 2008). There, the plaintiffs sought productions to two different agencies of documents handed over in multiple "investigations" into the entities' trading practices. Here, the scope of the FTC's *litigation* is virtually identical to the Plaintiffs', as Defendants themselves have pointed out. Production of discovery from a parallel action involving the same defendant and factual allegations is relevant and proportional. *See, e.g.*, *Whitman v. State Farm Life Ins. Co.*, No. 3:19-CV-06025-BJR, 2020 WL 5526684, at *3 (W.D. Wash. Sept. 15, 2020) (ordering production of discovery from a parallel action where "the instant lawsuit and *Vogt* have significant factual and legal overlap, with both suits against the same defendant asserting almost identical claims based on the same alleged misconduct").

Furthermore, any claim of burden must be measured against the prejudice of delay to Plaintiffs, who allege an ongoing violation that continues to cost them significant anticompetitive overcharges. Defendants not only have the documents they produced to the FTC but also the investigative documents the FTC produced to them as part of discovery in the FTC Action. It is prejudicial to permit Defendants a one-sided head start on review of relevant third-party documents. Defendants have also both expressed a desire for coordinated discovery. Tr. 7:22-24 (USAP); 12:10-12 (Welsh Carson). The growing procedural distance between this case and the FTC Action puts coordination at risk. Depositions in the FTC Action may begin as early as the fall. Without coordinated document discovery, depositions cannot be coordinated either.

This Court stayed discovery for two explicit purposes: to await a rule on the motions to dismiss by Judge Hoyt and the entry of a scheduling order in the FTC Action. Those conditions have now been fulfilled. Discovery should commence.

B. **USAP's Position**

Good cause exists for the Court to extend the discovery stay because lifting it would impose "undue burden or expense" on USAP. Fed. R. Civ. P. 26(c); *see id.* R. 26(d)(1). The Fifth Circuit has found an undue burden justifying a stay when a defendant files a potentially case-dispositive motion to dismiss "that might preclude the need for discovery altogether thus saving time and expense." *Landry v. Air Line Pilots Ass'n Int'l AFL-CIO*, 901 F.2d 404, 436 (5th Cir. 1990); *see Petrus v. Bowen*, 833 F.2d 581, 583 (5th Cir. 1987) (similar); *Smith v. Potter*, 400 F. App'x 806, 813 (5th Cir. 2010) (similar). Indeed, the cost of discovery in antitrust cases is often "unusually high" for defendants, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558-59 (2007), making pre-motion to dismiss stays "particularly appropriate," *Rio Grande Royalty Co. v. Energy Transfer Partners, L.P.*, 2008 WL 8465061, at *1 (S.D. Tex. Aug. 11, 2008).

Here, the burdens discovery would impose on USAP far outweigh the benefits. USAP's Motion to Dismiss raises strong arguments that could either dispose of or narrow the case, and the Court can adjudicate those on the briefs. Plaintiffs continue to ignore the "enormous expense" associated with even producing the FTC file, which could require USAP to re-review "roughly 1.7 million pages" of material touching on its operations across eight states for "responsiveness," "relevancy" to *this* case, and "[p]rivilege." Tr. 25:20-26:14, 27:22-28:20. Judge Ellison found that a nearly identical balance warranted a pre-motion to dismiss stay in a case where the prior investigational productions "relate[d] to time periods and locations that [were] not within the scope of Plaintiff's complaint. *Rio Grande*, 2008 WL 8465061, at *1-2.

Indeed, "[i]n an antitrust case, courts generally limit discovery to the ambit of the applicable market," *Radio Music License Committee, Inc. v. Global Music Rights, LLC*, 2020 WL 76376281, at *5 (C.D. Cal. Jan. 2, 2020), especially here, where there is no allegation in Plaintiffs' Complaint that USAP has (or even abused) market or monopoly power elsewhere in the United States, *see Heartland Surgical Specialty Hosp., LLC v. Midwest Div., Inc.*, 2007 WL 2668742, at *11 (D. Kan. Sept. 6, 2007) (discovery seeking inpatient and outpatient origin and discharge data for all inpatient and outpatient facilities across Missouri was "not relevant on its face" because the plaintiff's complaint limited the relevant geographic market to the "Kansas City metropolitan area").[1]

What's more, contrary to Plaintiffs' claim, discovery would also create prejudicial inefficiencies. As the parties explained above, USAP has filed a Notice of Appeal in the FTC case, and it is USAP's position that the case is stayed automatically until the matter is resolved by the Fifth Circuit. *See Coinbase Inc. v. Bielski*, 599 U.S. 736 (2023). Although the FTC

[1] Plaintiffs' cases are factually inapposite. *See Vasquez v. Indiana Univ. Health, Inc.*, 2023 WL 3450809, at *2 (S.D. Ind. May 15, 2023) (broad discovery granted because geographic market was not yet "conclusively decided"); *Frame-Wilson v. Amazon.com, Inc.*, 2023 WL 4201679, at *4 (W.D. Wash. June 27, 2023) (targeted request for global transaction data specifically to support the plaintiffs' damages theory within the alleged market); *In re Vitamins Antitrust Litig.*, 2001 WL 1049433, at *11-14 (D.D.C. June 20, 2001) (global discovery allowed because the defendants allegedly engaged in a global conspiracy); *Whitman v. State Farm Life Ins. Co.*, 2020 WL 5526684, at *3 (W.D. Wash. Sept. 15, 2020) (ordering re-production of discovery materials the defendant produced in separate but identical litigation against a different private plaintiff—not a governmental investigation into conduct outside the geographic market alleged in the complaint).

Plaintiffs also improperly rely on U.S. Anesthesia Partners of Colorado, Inc.'s recent settlement with the State of Colorado as warranting broad discovery in this case. That settlement agreement clearly states that it shall not "constitut[e] evidence of or an admission" of "any issue of law or fact alleged in the Complaint" or "any liability." Stipulated Consent Agreement and Judgment at 2, *State v. U.S. Anesthesia Partners of Colo., Inc.*, No. 2024CV30595 (Colo. D. Ct. Denver Cnty. Feb. 26, 2024).

disagrees, Judge Hoyt has yet to rule on the question. Beginning discovery in this case when the entire FTC case may remain stayed would prevent Defendants from coordinating discovery in these two, closely related cases and would risk imposing substantial burdens on third parties subject to different deposition and document discovery deadlines.

Plaintiffs finally argue they do not wish to fall behind the FTC case and wish to coordinate the two cases. Defendants have worked with Plaintiffs since April 5 to ensure Plaintiffs do not fall behind. But Plaintiffs are now seeking to move substantially ahead of the FTC case, with no justification for doing so. This Court should therefore maintain the stay on discovery here, at least until the status of the stay in the FTC case is resolved by Judge Hoyt and the Fifth Circuit.

C. Welsh Carson Entities' Position

The Welsh Carson entities respectfully request that this Court continue to stay discovery pending resolution of Defendants' motions to dismiss by the Court. The potential scope of discovery in this case is enormous: The Complaint concerns a broad swath of allegations spanning more than a decade. What's more, Plaintiffs have issued wide-ranging discovery requests wholly untethered to these allegations. Discovery will therefore demand tremendous resources from the parties and the Court. It makes little sense to expend such resources now, before the Court decides whether some or all of Plaintiffs' claims should be dismissed.[2]

[2] Plaintiffs wrongly assert that the Welsh Carson entities' productions in the FTC's investigation could be re-produced to Plaintiffs without incurring burden. The FTC's specifications were not limited to the Texas market; the resulting productions included substantial materials not relevant to this litigation, which would require manual review to isolate from production. Plaintiffs cannot claim expediency to broaden the scope of this action. Moreover, the Fifth Circuit has emphasized that "discovery procedures must be limited if antitrust cases are to be kept within 'reasonable bounds,'" *Jones v. Metzger Dairies, Inc.*, 334 F.2d 919, 922 (5th Cir. 1964); *see also Radio Music*

A stay of discovery is proper where "defendants have substantial arguments for dismissal of many, if not all, of plaintiff's claims." *Von Drake v. Nat'l Broad. Co.*, 2004 WL 1144142, at *2 (N.D. Tex. May 20, 2004). The Welsh Carson entities respectfully submit that the statute of limitations is one such "substantial argument[] for dismissal." Indeed, this argument is even stronger in light of Judge Hoyt's recent dismissal of all of the Welsh Carson entities from the FTC action, which involves materially identical factual allegations as this action. Judge Hoyt's holding that the Welsh Carson entities are not "violating, or . . . about to violate" antitrust law, as required under Section 13(b) of the FTC Act, bears directly on whether Plaintiffs have plausibly alleged any antitrust violation by the Welsh Carson entities within the four-year limitations period. *See* No. 23-cv-03560 (S.D. Tex.), Doc. 146, at 14. Like the FTC, Plaintiffs do "not allege any conduct by Welsh Carson in the past six years that is a plausible antitrust violation," so their claims are time-barred. *See id.* And without any alleged independent conduct by the Welsh Carson entities, Plaintiffs' "single-enterprise" theory likewise fails. Moreover, while Plaintiffs argue that this action is nonetheless timely because the Complaint alleges a "continuing violation," Judge Hoyt specifically held that "Welsh Carson's activity is not continuing." *Id.*

Plaintiffs will not suffer any prejudice by continuing the discovery stay pending the Court's resolution of the pending dispositive motions. But the Welsh Carson entities would be materially prejudiced if forced to bear the expense of broad, party discovery on claims that may soon be dismissed. Courts in this circuit "recognize[] that staying discovery may be particularly appropriate in antitrust cases, where discovery tends to be broad, time-consuming and expensive."

License Comm., Inc. v. Global Music Rights, LLC, 2020 WL 7636281 (C.D. Cal. Jan. 2, 2020) ("In an antitrust case, courts generally limit discovery to the ambit of the applicable market." (citing *Jones*)).

Endure Indus., Inc. v. Vizient, Inc., 2021 WL 3771770, at *1 (N.D. Tex. Apr. 9, 2021) (internal quotation marks omitted) (staying discovery pending motion to dismiss where plaintiff's request "would require [defendants] to conduct a massively broad search, so voluminous that [d]efendants would have to hire a third-party vendor capable of processing and hosting data in a document review platform," which would have "tak[en] months and easily cost[] hundreds of thousands of dollars").[3]

Finally, the Welsh Carson entities have engaged in good-faith discussions with Plaintiffs regarding discovery consistent with the Court's instructions at the April 5 conference. Should any of Plaintiffs' claims survive the pending motions, the parties will not be "starting at square one" on discovery. *See* Tr. 31:7-10. For these reasons, good cause exists to continue the stay of discovery in this matter.

[3] Plaintiffs assert that "reproducing the FTC's production to Defendants" would "meaningfully advance discovery" without any undue burden on Defendants, but the FTC's production was not made "to Defendants." Rather, the Welsh Carson entities understand that production was made to USAP only, after the Welsh Carson entities were dismissed from the FTC action.

Dated: July 16, 2024 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 July 16, 2024.

By: */s/ Brendan Glackin*